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JUSTICE SCALIA'S BANKRUPTCY JURISPRUDENCE: THE RIGHT JUDICIAL PHILOSOPHY FOR THE MODERN BANKRUPTCY CODE?

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Abstract

This Article surveys an area of Justice Scalia's legacy that is often overlooked by scholars who write broadly about the Supreme Court: his many contributions to the field of bankruptcy law. The Bankruptcy Code is rife with statutory interpretation questions that demand clear and predictable answers, due to the efficiency interests at stake and the absence of any intermediate interpretive forces, such as administrative agencies. Justice Scalia arrived on the high court at the outset of the modern bankruptcy era and this Article argues that his brand of rule-based textualism is a particularly good fit for bankruptcy law.

Specifically, four themes emerge from Justice Scalia's bankruptcy writings: a holistic approach to the Bankruptcy Code, a commitment to textual justice, a vocal crusade against legislative history, and an insistence on clear rules to delineate bankruptcy judges' powers. A review of Justice Scalia's decisions exemplifying these themes leads to some surprising and perhaps counterintuitive conclusions about the ways in which his approach to the Bankruptcy Code often benefited individual debtors over larger creditors, particularly consumer lenders. This Article argues that each aspect of this philosophy promotes predictability and clarity, thereby furthering the ultimate purposes of the Bankruptcy Code.

Despite these advantages, Justice Scalia's philosophy has not been widely embraced. To help explain this paradox, this Article identifies several bankruptcy decisions in which Justice Scalia did not faithfully follow his own rules, thereby muddying his overall message to lower courts and litigants. Nonetheless, this Article concludes by urging bankruptcy judges and practitioners to look past these exceptions and continue to press a rule-based textualist approach.

 Lecturer and Honorary Fellow in the Institute for Legal Studies, University of Wisconsin School of Law. An early draft of this article was presented at the 2017 American Association of Law Schools Annual Meeting as part of a panel entitled "Justice Scalia and Statutory Interpretation: A Retrospective Assessment," and the author wishes to thank moderator Richard Briffault, fellow panelists, and attendees for helpful comments and insights. Thanks as well for helpful advice and suggestions from the Honorable Robert Martin, John Pottow, Drew Dawson, Anuj Desai, Brad Snyder, Alexandra Huneeus, Bill Whitford, Randy Beck, Logan Sawyer, Usha Rodrigues, Nate Chapman, and many others who attended presentations at the University of Wisconsin and at the University of Georgia School of Law. Riad El-Azem provided terrific research assistance, which would not have been possible without the support of Dean Margaret Raymond and Associate Dean Susannah Tahk.*

I. INTRODUCTION

A jurisprudential giant in life, and seemingly larger than life in death, Justice Antonin Scalia will undoubtedly inspire much discussion in the years, decades, and perhaps even centuries to come. This Article seeks to further the conversation in one discrete area of his jurisprudence: bankruptcy law. Bankruptcy has been described as a "proving ground" for theories of statutory construction.[1] Justice Scalia has issued a number of powerful opinions, concurrences, and dissents in the bankruptcy field, including many seminal bankruptcy cases.[2] Yet surprisingly little academic attention is paid to his contributions to the field. For example, a recently published posthumous collection of Scalia's "landmark"[3] opinions and dissents does not contain a single bankruptcy case.[4] Similarly, scholars who write broadly about competing theories of statutory interpretation rarely engage deeply with decisions interpreting the Bankruptcy Code.[5]

This gap is an oversight that prevents full consideration of Justice Scalia's philosophy and its impact on the law, courts, and the public. Although bankruptcy is often regarded in academic circles as a somewhat esoteric area of practice,[6] its scope and impact on the public is huge: close to a million people file bankruptcy each year.[7] To quantify the impact of bankruptcy law, one set of commentators noted that more people file for bankruptcy each year than get divorced, graduate from college, and are diagnosed with cancer combined.[8] Each filer has dozens or perhaps even hundreds of creditors, at least some of whom still hope to recover a portion of what they are owed when all is said and done. The interests of these various stakeholders are overseen by approximately 350 bankruptcy judges who serve

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[1] Hon. Marjorie O. Rendell, *2003—A Year of Discovery:* Cybergenics *and Plain Meaning in Bankruptcy Cases*, 49 VILL. L. REV. 887, 887 (2004).

[2] *Id.*

[3] KEVIN A. RING, SCALIA'S COURT: A LEGACY OF LANDMARK OPINIONS AND DISSENTS (2016).

[4] *Id*. at 557–60.

[5] Mark Tushnet is a notable exception. He used Justice Scalia's dissent in *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 80–85 (2011), to demonstrate the shared ground between textualism and purposivism. *See* Mark Tushnet, *Theory and Practice in Statutory Interpretation*, 43 TEX. TECH L. REV. 1185, 1187–90 (2011). This Article uses *Ransom* along with several other bankruptcy decisions to develop and refine this argument. *See infra* Sections V.A, V.B.

[6] *See, e.g.*, Douglas G. Baird, *Bankruptcy's Uncontested Axioms*, 108 YALE L.J. 573, 595–96 (1998) (describing the "traditionalist" view that bankruptcy is fundamentally different from other areas of the law and therefore can be "meaningfully separated from every other part of our legal universe.").

[7] *See* U.S. COURTS, MARCH 2017 BANKRUPTCY FILINGS DOWN 4.7 PERCENT (April 19, 2017), http://www.uscourts.gov/news/2017/04/19/march-2017-bankruptcy-filings-down-47-percent [https://perma.cc/EQ8D-JFZP].

[8] *See* LISA A. KEISTER & DARBY E. SOUTHGATE, INEQUALITY: A CONTEMPORARY APPROACH TO RACE, CLASS, AND GENDER 166 (2012).

within each of the ninety-four federal districts.[9] Thus, to overlook Justice Scalia's contributions to the bankruptcy field is to ignore a major aspect of his impact on the courts and on the public.

This Article seeks to bridge this gap by explaining Justice Scalia's key contributions to the bankruptcy field in a way that a nonspecialist audience can understand and appreciate. Specifically, this Article explores his contributions to interpreting the modern bankruptcy code: the Bankruptcy Reform Act enacted by Congress in 1978,[10] together with amendments including the substantive changes introduced by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").[11] By studying Justice Scalia's philosophy within the narrow confines of the Supreme Court's bankruptcy jurisprudence, this Article demonstrates that many of his core principles were a boon to the field. However, for reasons also explored in this Article, his judicial philosophy did not make as clear a mark on the field as one might expect.[12] In addition, this Article highlights several instances in which Justice Scalia interpreted the Code in a way that favored ordinary consumers or small creditors over large business interests, thereby challenging the conventional wisdom that the Justice only embraces "liberal"[13] views in discrete areas of criminal procedure.[14]

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[9] *See History of the Federal Judiciary: Bankruptcy Judgeships*, FED. JUD. CTR., http://www.fjc.gov/history/home.nsf/page/judges_bank.html [https://perma.cc/6X7L-AZNU]. By way of contrast, there are 663 district court judges. *See Table of Authorized Judgeships from 1789 to the Present*, U.S. CTS., http://www.uscourts.gov/judges-judgeships/authorized-judgeships [https://perma.cc/PPR8-HXQ4].

[10] Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978).

[11] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005). Other intervening changes include 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. 3088 (1986); and Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994). *See* Karen Gebbia, *Certiorari and the Bankruptcy Code: The Statutory Interpretation Cases*, 90 AM. BANKR. L.J. 503, 517 n.37 (2016) (listing the most significant changes to the Bankruptcy Code since 1978).

[12] *See, e.g.*, Hon. Thomas F. Waldron & Neil M. Berman, *Principled Principles of Statutory Interpretation: A Judicial Perspective After Two Years of BAPCPA*, 81 AM. BANKR. L.J. 195, 202 (2007) (commenting that a "candid assessment" of the Supreme Court's bankruptcy jurisprudence "finds confusion, if not contradiction"); *see also* Lee Dembart & Bruce A. Markell, *Alive at 25? A Short Review of the Supreme Court's Bankruptcy Jurisprudence, 1979–2004*, 78 AM. BANKR. L.J. 373, 386–87 (2004) (arguing that in twenty-five years of interpreting the Code, the Court had failed to provide any meaningful clarity for lower court judges, notwithstanding Justice Scalia's textual revolution). *But see* Rendell, *supra* note 1, at 887 (arguing that the Court's holistic approach to interpretation has provided helpful guidance to lower courts).

[13] *See, e.g.*, George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1300–02 (1990) (explaining that Justice Scalia's "conservative" approach to criminal procedure highlights the ways in which his jurisprudence leads to "liberal" outcomes).

[14] *See infra* Section V.A. A recent book broadly explores Justice Scalia's deviations

This Article proceeds as follows. Section II lays out the conventional wisdom regarding Justice Scalia and outlines some of the controversial aspects of his jurisprudence. Section III assesses Justice Scalia's overall contributions to bankruptcy law and shows that he played a leading role in the development of modern bankruptcy law. Section IV identifies the ways in which bankruptcy differs from most other areas of the law, with a particular focus on why Justice Scalia's rule-based textualism is an excellent fit for modern bankruptcy practice. Section V highlights those bankruptcy cases in which Justice Scalia best articulated a vision of rule-based textualism that brings clarity and predictability to bankruptcy practice. Section VI highlights those bankruptcy decisions in which Justice Scalia appears to have undermined the rules that he articulated so well in other cases, thereby clouding his overall message. Section VII concludes.

II. JUSTICE SCALIA'S OVERALL JURISPRUDENCE

Few justices in recent memory have inspired so much regular and ongoing controversy as Justice Scalia. The commentary immediately following his death represents just a microcosm of the opinions expressed throughout his years on the high court, but it captures the range of perspectives voiced by the academic and legal communities over the past thirty years.[15] As far as his jurisprudential legacy, scholars predicted both positive and negative developments, including an increased use of originalist arguments[16] and widespread public acceptance of the notion that textualists are more faithful to democratic principles than other jurists.[17]

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from conservative positions. DAVID M. DORSEN, THE UNEXPECTED SCALIA: A CONSERVATIVE JUSTICE'S LIBERAL OPINIONS xiv (2017). However, Dorsen does not consider Justice Scalia's bankruptcy writings in any real depth. *Id.* at 226; *see also infra* note 245 (discussing Dorsen's brief reference to two Scalia dissents that he contends were pro-consumer).

[15] *See, e.g.*, Symposium, *How Antonin Scalia Changed America: 19 Top Legal Thinkers on the Justices Legacy for the Court, the Law, and the Public*, POLITICO MAGAZINE, (Feb. 14, 2016), http://www.politico.com/magazine/story/2016/02/antonin-scalia-how-he-changed-america-213631 [https://perma.cc/Y6QD-H87F] ("Scalia shaped many, many minds and hearts—perhaps more so than he shaped the doctrine itself.").

[16] According to George Mason Law Professor, Ilya Somin, (whose institution was for a short time to be renamed the Antonin Scalia School of Law before it was quickly re-renamed the Antonin Scalia Law School, in order to avoid an unsavory acronym):

> In landmark recent cases addressing federalism, the right to bear arms and other important issues, both sides made extensive use of originalist arguments that would have been unusual a generation ago. When it comes to statutory interpretation, judges of all political stripes take text more seriously than they might have in the 1980s. Some of that progress is undoubtedly due to Scalia's forceful and effective advocacy.

Ilya Somin, Symposium, *supra* note 15, at 2.

[17] University of Pennsylvania Law School's Professor Kermit Roosevelt wrote

At the center of many debates over Justice Scalia's legacy is his particular brand of textualism. According to the Justice himself, his philosophy on how to interpret text was a simple one: the text should be "construed reasonably, to contain all that it fairly means."[18] As then-Tenth Circuit Judge Neil Gorsuch explained in a 2016 speech, Scalia sought "to apply the law as it is, focusing backward, not forward, and looking to text, structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be."[19]

Importantly for Justice Scalia, appropriate consideration of "history" included the views of the Founding Fathers about the meaning of constitutional text,[20] but emphatically did not include the views of legislators about the meaning of statutory text.[21] Moreover, in Justice Scalia's view, judges should not act as quasi-legislators concerned with the outcomes resulting from the application of statutory text.[22] Instead, judges should focus on being faithful readers of text in search of the most reasonable interpretation of the language that Congress chose to effectuate its policy choices.[23] Justice Scalia was aware that his philosophy was guaranteed to lead to outcomes that may be troubling in particular cases; indeed, he celebrated disfavored outcomes as a sign that the judge was faithfully serving his role.[24]

> Both originalism and textualism allow judges to claim to be neutral interpreters simply following the direction of lawgivers, either the drafters of statutes or the Framers of our Constitution. And both theories tend to—and in Scalia's hands certainly did—cast their opponents as unprincipled and partisan activists. It was another of Scalia's successes to create in the public mind an image of a court on which originalists tried to maintain fidelity to our founding document and everyone else sought to advance their own political agendas.

Kermit Roosevelt, Symposium, *supra* note 15, at 3.

[18] ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23 (1997).

[19] Hon. Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905, 906 (2016).

[20] SCALIA, *supra* note 18, at 38 ("[Hamilton and Madison's] writings, like those of other intelligent and informed people at the time, display how the text of the Constitution was originally understood.").

[21] *See, e.g.*, SCALIA, *supra* note 18, at 17 (focusing on the intent of legislators is "one step worse than the trick the emperor Nero was said to engage in: posting edicts high up on the pillars, so that they could not easily be read.").

[22] *See, e.g.*, Michael D. Ramsey, Book Review, 55 J. LEGAL EDUC. 305, 310–11 (2005) (reviewing JUDGES IN CONTEMPORARY DEMOCRACY: AN INTERNATIONAL CONVERSATION (Robert Badinter & Stephen Breyer eds., 2004)) (contrasting Justice Scalia's view with one in which judges "openly embrace the title of minimally constrained quasi-legislator.").

[23] SCALIA, *supra* note 18, at 16–18.

[24] *See* Gorsuch, *supra* note 19, at 906 ("As Justice Scalia put it, '[i]f you're going to be a good and faithful judge, you have to resign yourself to the fact that you're not always going to like the conclusions you reach. If you like them all the time, you're probably doing something wrong.'" (quoting Justice Antonin Scalia, Madison Lecture at the Chapman University School of Law (Aug. 29, 2005)).

Justice Scalia explained in his extrajudicial writings that his textualist philosophy contrasts sharply with purposivism, which involves looking beyond the text to determine legislative intent.[25] As such, Justice Scalia was at the center of a debate[26] largely of his own making, with many scholars pointing out the flaws in his philosophy and arguing that textualists are not, in fact, faithful agents of the legislature.[27] Most recently, Professor Victoria Nourse has made a strong case that minimizing textual ambiguity and ignoring legislative evidence about the meaning of statutory text is downright antidemocratic.[28] But other scholars have downplayed the differences between textualists and purposivists.[29]

From this fray has emerged a more nuanced vision of Justice Scalia's philosophy than that presented by Scalia himself, a philosophy which Professor Caleb Nelson describes as a "rule-based approach."[30] Professor Nelson also downplays the traditional binary that purposivists seek the subjective intent of the legislature as evidenced by legislative history, while textualists seek the objective

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[25] *See, e.g.*, SCALIA, *supra* note 18, at 16–18 (explaining that the belief that judges may look past statutory text to determine the intent of the legislature is both a theoretical and practical threat to democratic government).

[26] *See, e.g.*, Jane S. Schacter, *Text or Consequences?*, 76 BROOK. L. REV. 1007, 1007 (2011) (describing Justices Scalia and Breyer as engaged in a "contest over interpretive first principles"); William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 532–33 (2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012)) (explaining the familiar lines of the "big debate" between new textualists like Justice Scalia and pragmatists or purposivists).

[27] *See generally* David L. Shapiro*, Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 921 & n.1 (1992) (noting the overlap in timing between a "sea-change" in the Supreme Court's approach to statutory interpretation and a "vast" exploration of competing theories in the academic literature). The debate has continued into the current decade, with a particularly strong focus on the proper role of legislative history. The debate has continued into the current decade, with a particularly strong focus on the proper role of legislative history. *See, e.g.*, VICTORIA F. NOURSE, MISREADING LAW, MISREADING DEMOCRACY 161–71 (2016) (making a historical and constitutional case for considering legislative history); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 988–90 (2013) (concluding based on empirical research that textualist critiques of legislative history do not stand up to scrutiny).

[28] *See* NOURSE, *supra* note 27, at 34–45 (explaining her view that new textualists exhibit a "not-so-disguised contempt for Congress").

[29] *See, e.g.*, ROBERT A. KATZMANN, JUDGING STATUTES 55 (2014) (arguing that most judges are "neither wholly textualists nor wholly purposivists"); Tushnet, *supra* note 5, at 1185 (arguing that the purported debate between Justices Scalia and Breyer was "largely theoretical"). *But see* John F. Manning, *What Divides Textualists and Purposivists?*, 106 COLUM. L. REV. 70, 75–76 (2006) (noting that although the two doctrines share more "conceptual common ground" than their proponents usually admit, the differences are nonetheless salient).

[30] Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 372–74 (2005).

intent of the legislature as evidenced by the statutory language.[31] Instead, Nelson argues that the textualist approach is guided by a strong commitment to "ruleness."[32] This "ruleness" has two dimensions: textualists are guided by rules of interpretation in applying statutory text,[33] and in turn, statutory language is read as an attempt to prescribe rules for judges to apply to situations not contemplated by the legislature.[34] Nelson contends that the process is quite similar to purposivism in that both approaches involve a degree of "imaginative reconstruction" to determine how a legislature might have voted in the particular case pending before the court.[35]

This Article adopts the descriptive framework offered by Professor Nelson and uses bankruptcy as a lens through which to identify the key features of Justice Scalia's rule-based textualism. This Article further argues that bankruptcy is a particularly fruitful forum in which to explore both the implementation and the impact of Justice Scalia's rule-based textualism. Specifically, for the reasons explained in Section III below, the modern bankruptcy code gave Justice Scalia an uncharted opportunity to implement interpretative methods without constraint from intermediate forces. Moreover, for the reasons explained in Section IV below, the need for predictability and clarity that rule-based textualism helps fulfill is heightened in the bankruptcy field.

III. THE FRUITFUL FORUM OF BANKRUPTCY LAW

The Bankruptcy Code presents a prime opportunity to evaluate Justice Scalia's approach to statutory interpretation throughout his three decades on the Court for two reasons: first, as discussed in Part A, Justice Scalia's tenure on the Court overlapped almost perfectly with the modern bankruptcy era; second, as explained in Part B, bankruptcy is an area of the law in which judges have few constraints on their approach to statutory interpretation.

A. 1986–2015: A Critical Period for Modern Bankruptcy Law

Appointed to the Supreme Court in 1986, Justice Scalia arrived at almost exactly the right time to have maximum impact on bankruptcy law. The modern bankruptcy code had recently been entirely revamped through the Bankruptcy Reform Act of 1978,[36] which took effect on October 1, 1979.[37] In addition to

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[31] *Id*. at 359–60. Nelson suggests that Scalia's stance against legislative history has more to do with constraining judicial decisionmaking than with skepticism of subjective intent. *Id.* at 362–63.

[32] *Id*. at 373–74.

[33] *Id*. at 376–77.

[34] *Id*. at 399–403.

[35] *Id*. at 403–04.

[36] Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C. §§ 101-1330 (1988)).

[37] U.S.C. § 402(a). Only bankruptcy petitions filed after September 1979 were governed by the new version of Title 11 of the United States Code. *Id.* § 1480(a).

changing the substantive law, the Bankruptcy Reform Act changed the judicial structure for bankruptcy proceedings and appeals.[38] After the Supreme Court rejected the 1978 changes as inconsistent with Article III of the Constitution,[39] Congress again revised the structure in the Bankruptcy Amendments and Federal Judgeship Act of 1984.[40] As a result, it took several years for the first cases applying the substantive provisions of the 1978 Code to reach the Supreme Court.[41]

Thus, by the time Justice Scalia arrived on the Court in fall of 1986, the Court had decided only a half dozen cases applying the new bankruptcy law.[42] Scalia's

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[38] Among other things, the 1978 Act replaced the longstanding system of bankruptcy referees with non-Article III judges who would be appointed by the president to hear bankruptcy matters. Pub. L. No. 95-598, § 201, 92 Stat. 2549, 2681–82 (1978). This new institutional scheme was slated to be phased in as the six-year terms of existing referees expired, and was scheduled to become fully effective in April 1984. *Id.* § 409(a).

[39] *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 88 (1982). The Supreme Court stayed its decision twice in order to give Congress time to fix its flawed scheme; however, the stay expired at the end of 1982, and bankruptcy judges operated under the "Emergency Rule" of the Judicial Conference of the United States until Congress finally passed amended statutes in July 1984. *See* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 38 (1995).

[40] Pub. L. No. 98-353, 98 Stat. 333 (1984).

[41] The Supreme Court did not hear any bankruptcy appeals during the 1980–1981 term. The first Supreme Court decision directly addressing the 1978 Code was *Central Trust Co., Rochester, N.Y. v. Official Creditors' Committee of Geiger Enterprises, Inc.*, 454 U.S. 354, 357–58 (1982) (per curiam). This decision did not apply any substantive provisions of the new Code, however, because the Court rejected a Chapter 11 debtor's efforts to dismiss its petition under the prior version of the Code and refile under the new version of Chapter 11. *Id.* A seven-Justice majority held that Congress had made clear that cases filed before the effective date of the 1978 Act would be governed by the old law. *Id*. Next came the Supreme Court's bombshell decision in *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

[42] After *Northern Pipeline*, the Supreme Court issued one other procedural decision relating to the new Code, concluding that the lien-avoiding provisions of 11 U.S.C. § 522(f) did not operate retroactively. United States v. Sec. Indus. Bank, 459 U.S. 70, 81–82 (1982). The first substantive decision applying the new Code appears to be *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 211–12 (1983), in which the Court held that as Debtor-in-Possession, a corporation had authority under 11 U.S.C. § 542 to require the Internal Revenue Service to return equipment that it had seized to satisfy a tax lien. After that, the Supreme Court issued four more decisions between 1983 and 1986 interpreting or applying various provisions of the new code: *Midlantic Nat'l Bank v. New Jersey Dept. of Env. Prot.*, 474 U.S. 494, 505–07 (1986) (examining whether a trustee properly exercised its abandonment powers under 11 U.S.C. § 554); *Ohio v. Kovacs*, 469 U.S. 274, 282–84 (1985) (determining that a receiver's expenses in performing an environmental clean-up on behalf of a debtor were dischargeable in bankruptcy); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 521–23 (1984) (holding that a collective bargaining agreement was an executory contract that a debtor could reject under 11 U.S.C. § 365). This last case provoked public outrage and immediate response from Congress. *See* Dembart & Markell, *supra* note 12, at 374 ("Congress quickly stomped on the Court's ruling and added a new section to the Code to address it."). The Court's final bankruptcy decision before Justice Scalia's arrival was

first bankruptcy case as a sitting justice was decided in November 1986.[43] His first opportunity to author a bankruptcy decision came early in his second term, in *United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd*.[44] *Timbers* involved a routine but critical question that had divided circuit courts and created uncertainty in capital markets.[45] Justice Scalia's seemingly straightforward resolution of a difficult problem for which the Code lacked clear answers is viewed as one of the all-time heavy hitters of bankruptcy jurisprudence,[46] weaving together several provisions of the Code to reach a defensible conclusion.[47]

Following this prodigious debut, Justice Scalia continued to play an outsized role in the development of the Court's modern bankruptcy jurisprudence. In the five years following Justice Scalia's arrival on the Court, the Court heard twice as many bankruptcy cases (sixteen) compared to the five previous terms (eight), with an additional nine bankruptcy cases decided in Justice Scalia's sixth term.[48] This uptick in bankruptcy cases stands in stark contrast to the overall reduction in the number of cases the Supreme Court heard each year, a trend that has also been attributed to Justice Scalia.[49] According to Professor Steven Calabresi, Justice Scalia "believed that the Supreme Court ought to hear fewer cases and do a better job with them than it had been doing prior to 1986."[50] It appears that bankruptcy law was one of the areas in which Justice Scalia thought the Supreme Court could accomplish this

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Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 358 (1985) (addressing whether a bankruptcy trustee has the authority to waive attorney-client privilege for pre-petition communications with an entity).

[43] Kelly v. Robinson, 479 U.S. 36, 37 (1986). In *Kelly*, Justice Scalia was part of a seven-Justice majority holding that state criminal restitution orders were not dischargeable under 11 U.S.C. § 523(a)(7). *Id.* at 36.

[44] 484 U.S. 365, 367, 382 (1988) (holding that undersecured creditors were not entitled to post-petition interest).

[45] *See, e.g.*, Thomas J. Salerno et al., *Timber's Impact on Creditors*, ADVANCED CHAPTER 11 BANKR. PRAC. § 8.92 (2015).

[46] Admittedly unorthodox support for this assertion comes from the fact that *Timbers* was voted into the Weil Bankruptcy Blog's "Final Four" all-time greatest Supreme Court bankruptcy decisions. *See March Madness: The Weil Bankruptcy Blog's Final Four*, WEIL BANKR. BLOG (Mar. 30, 2011), http://business-finance-restructuring.weil.com/survey/march-madness-the-weil-bankruptcy-blog%e2%80%99s-final-four/ [https://perma.cc/XV9V-D9KZ]. More orthodox support comes from a former bankruptcy judge, who describes *Timbers* as the watershed case for adequate protection law. Dembart & Markell, *supra* note 12, at 382.

[47] For a more thorough discussion of *Timbers*, see *infra* Section V.

[48] Charles Jordan Tabb & Robert M. Lawless, *Of Commas, Gerunds, and Conjunctions: The Bankruptcy Jurisprudence of the Rehnquist Court*, 42 SYRACUSE L. REV. 823, 823–25 (1991).

[49] *See* Steven G. Calabresi, *The Unknown Achievements of Justice Scalia*, 39 HARV. J.L. & PUB. POL'Y 575, 575 (2016) (noting that Justice Scalia played "a key role in persuading the Justices to stop hearing and deciding 150 decisions a year and to aim at only 80 decisions a year instead.").

[50] *Id*.

mission. Through the 2014–15 term, the Supreme Court decided a total of eighty-six cases arising under the modern version of Title 11 of the United States Code.[51] Justice Scalia wrote in twenty-five of these cases, including seven unanimous opinions, four majority opinions, nine concurrences, and five dissents.[52]

These numbers suggest that Justice Scalia played an outsized role in the development of modern bankruptcy law. Indeed, up until his death in February 2015, Justice Scalia wrote in more cases interpreting the modern bankruptcy code than any other justice.[53] In terms of sheer volume, he was closely followed by Justice Stevens writing in twenty-four cases and Justice Thomas writing in twenty-two.[54] The drop-off after that is stark, with Ginsburg writing in a total of ten bankruptcy cases through 2015, and Souter, Rehnquist, and Blackmun each writing in nine cases.[55]

Looking solely at lead opinions, only Justice Thomas wrote more lead opinions than Justice Scalia, with a total of thirteen (eight unanimous decisions and five

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[51] *See infra* Appendix A. This list comes from a combination of two sources. This list started with a Westlaw search for all Supreme Court decisions that reference "bankruptcy" or Title 11 of the United States Code. However, this generates some false positives because some decisions only cite the Bankruptcy Code as an illustration. *See, e.g.*, Rose v. Rose, 481 U.S. 619, 637 (1987) (O'Connor, J., concurring) (pointing to the non-dischargeability of child support obligations as an example of the special status that these obligations are traditionally accorded). Nonetheless, this search was used to identify Justice Scalia's bankruptcy-related writings. This list was then compared to the very helpful Appendix in Karen Gebbia's recent article analyzing the Supreme Court's patterns of granting certiorari in bankruptcy cases. Gebbia, *supra* note 11, at 580–83. There was not complete overlap between the two sources, which suggests that the total number of "bankruptcy cases" varies depending on the extent to which a reader subjectively believes that a particular decision implicates bankruptcy law or practice. The count errs on the side of inclusion. *See, e.g.*, Hubbard v. United States, 514 U.S. 695, 715 (1995) (holding that the general criminal statute penalizing false statements to the government did not apply to bankruptcy filings); U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 24–29 (1994) (case in which the Court granted certiorari on a bankruptcy question but ended up issuing a procedural decision declining to grant the creditor the remedy of vacatur when the parties settled after certiorari was granted); Dep't of Revenue of Mont. v. Kurth Ranch, 511 U.S. 767, 773 (1994) (reviewing a bankruptcy judge's ruling on an objection to a state's claim for a civil forfeiture claim that based on the Double Jeopardy clause). Each of these decisions involved choices that impacted bankruptcy practice.

[52] *See infra* Appendix B.

[53] *See infra* Appendix B.

[54] *See infra* Appendix B. In the year since Justice Scalia's death, Justice Thomas has written in three more bankruptcy cases, bringing his total to twenty-five. Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 987 (2017) (Thomas, J., dissenting); Puerto Rico v. Franklin Calif. Tax Free Trust, 136 S. Ct. 1938, 1942 (2016) (majority opinion); Husky Int'l Elecs., Inc. v. Ritz, 136 S. Ct. 1581, 1590 (2016) (Thomas, J., dissenting).

[55] *See infra* Appendix B. Justice Sotomayor appears poised to join the leader board, having written in five cases during her first five years on the Court. In the short period since Scalia's death, she has written in two more bankruptcy cases: a dissent in *Puerto Rico*, 136 S. Ct. at 1049, and a majority decision in *Husky*, 136 S. Ct. at 1585.

majority opinions).[56] These two justices alone wrote more lead opinions than the next three justices combined: Justices Ginsburg, Souter, and Stevens, who each wrote seven lead opinions in bankruptcy cases.[57] Altogether, these five justices wrote fourty-five lead opinions, just over half of the total number of Supreme Court decisions in the modern bankruptcy era. Fourteen different justices wrote the remaining forty-one bankruptcy decisions. Several current justices are at the very low end of this range, including Justices Kennedy and Kagan, who each wrote one majority opinion during the relevant time period, followed by Justices Roberts, Alito, and Breyer, who each wrote two.[58]

Having shown that Justice Scalia was one of the most active and impactful justices for modern bankruptcy law, Part B now turns to why this field presented Justice Scalia with so many opportunities to refine and implement his brand of rule-based textualism.

B. Modern Bankruptcy Law Creates Unique Statutory Interpretation Questions

A critical aspect of bankruptcy law that is different from ordinary practice is its laser-like focus on questions of statutory interpretation.[59] Statutory interpretation questions are common in the Supreme Court, as they arise with any type of legislation.[60] However, particularly since the Bankruptcy Reform Act of 1978, bankruptcy is an area in which the Supreme Court has had frequent opportunity to address the meaning of statutory language *de novo*, with the full range of interpretive tools available to it.[61]

Indeed, the Code stands out as one of the few areas of modern federal law where the parties to litigation have virtually free rein to argue about the meaning of particular statutory provisions, at least until the Supreme Court has spoken authoritatively.[62] Unlike bankruptcy legislation, much of federal legislation is

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[56] *See infra* Appendix B. In addition to these thirteen opinions, Justice Thomas also wrote the majority opinion in *Puerto Rico*, 136 S. Ct. at 1942.

[57] *See infra* Appendix B.

[58] *See infra* Appendix B. In the 2016–2017 Term, Justice Breyer wrote two more majority opinions: *Jevic Holding Corp.*, 137 S. Ct. at 978, and *Midland Funding LLC v. Johnson*, 137 S. Ct. 1407, 1411 (2017). His analysis in *Jevic* draws on several of Justice Scalia's blockbuster bankruptcy decisions. *See Jevic Holding Corp*., 137 S. Ct. at 985 (citing United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988)); *id*. at 987 (citing RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 649 (2012)); *id*. (citing Law v. Siegel, 134 S. Ct. 1188, 1198 (2014)).

[59] *See* Rendell, *supra* note 1, at 887 ("[T]he Code is intricate, complicated and, in certain portions, hopelessly ambiguous" with recent amendments that "created new puzzles for lawyers and judges.").

[60] KATZMANN, *supra* note 29, at 3 (noting that the Supreme Court's docket contains a substantial number of statutory cases, including almost two-thirds of its cases in a recent term).

[61] *See* Dembart & Markell, *supra* note 12, at 373.

[62] Five years into Scalia's tenure, a 1991 article noted the huge uptick in bankruptcy cases taken by the Supreme Court to address seemingly mundane statutory interpretation

subject either to agency interpretation[63] or, in the case of criminal statutes, to rules of construction that limit ambiguity.[64] These intermediate forces in turn have a filtering effect and limit the tools that ordinary litigants or parties can use to argue for their preferred outcome.

In the agency context, courts apply interpretive doctrines such as the *Chevron* doctrine, which states that courts should first look to whether the intent of Congress is clear.[65] If it is not, then the court should determine whether the agency's interpretation is a "permissible construction of the statute."[66] This means that in most cases where Congress has not directly spoken to the precise issue, courts are merely evaluating the construction that the agency has chosen and determining whether it is permissible.[67] Such analysis looks very different from the analysis a court might undertake in the first instance to determine the meaning of a statute. In the former situation, agency deference means that a court will uphold the agency's interpretation of a statute if it accords with generally recognized tools of construction. In essence, defending the agency's reading depends on identifying tools of construction that support that reading, and then arguing over their reasonableness. Moreover, the notion that the agency may be making policy choices does not undermine its preferred readings, because an agency is seen as part of the executive branch.[68]

In contrast, bankruptcy law does not involve any intermediate agency tasked with interpreting the Code.[69] Instead, it is up to the parties in individual cases to

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questions. Tabb & Lawless, *supra* note 48, at 824.

[63] Daniel A. Austin, *Bankruptcy and the Myth of "Uniform Laws*,*"* 42 SETON HALL L. REV. 1081, 1085 (2012); *see also* KATZMANN, *supra* note 29, at 23 (arguing that in enacting statutory commands, Congress is usually communicating with agencies and not courts).

[64] *See, e.g.*, Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) ("[T]he terms of a penal statute . . . must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties . . . .").

[65] Chevron, U.S.A., Inc., v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). More recent decisions have muddied the issue of the appropriate agency deference. *See generally* Catherine M. Sharkey, *In the Wake of* Chevron*'s Retreat*, (U. Wis. Law School's Ideas and Innovations Series, Working Paper, Sept. 28, 2016) (discussing the potential future application of the *Chevron* doctrine). This Article takes no position on the continued viability of *Chevron* deference except to suggest that agency interpretations will always play at least some threshold role in shaping how courts view questions of statutory interpretation, even if the agency interpretation is rejected.

[66] *Chevron*, 467 U.S. at 843.

[67] *Id*. According to one scholar, Scalia was the high court's "most consistent proponent" of the *Chevron* approach. Richard J. Pierce, Jr., *Justice Scalia's Unparalleled Contributions to Administrative Law*, 101 MINN. L. REV. 66, 69–71 (2016).

[68] *Chevron*, 467 U.S. at 865–66.

[69] As Judge Bruce Markell and his law clerk Lee Dembart have observed, in many other areas of federal law "there are entire executive agencies whose job it is to implement the will of Congress and turn congressional enactments into a consistent and coherent code." Dembart & Markell, *supra* note 12, at 373. Interestingly, the early planning stages for bankruptcy reform involved a proposal to create a bankruptcy agency within the executive

make whatever arguments they believe best support their preferred reading of the statute. If the full range of interpretive tools is available, then one would expect parties to pick and choose the tools that best suit their preferred outcomes, and ignore other tools that might be a better fit for objective interpretation.[70] In turn, the task of interpreting the Code becomes far more open ended, and issues may be revisited repeatedly under different methods of interpretation, depending on the particular arguments that have been made in past cases.[71] At least according to Justice Scalia, the lack of any clear structure enables judicial power grabs[72] and risks unprincipled distortions in the development of the law.[73] Accordingly, to the extent that one believes that judicial power should be constrained in some objective manner, rule-based textualism serves as one method of constraint.[74] Moreover, as discussed in

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branch that would be tasked with counseling and giving guidance to consumers. Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47, 68–69 (1997). Plans for an executive agency were fiercely opposed by bankruptcy judges, who objected to the likely diminution of their powers. *Id*. at 69. Lawyers also universally opposed the creation of such an agency, on the theory that it would take away business and reduce their stature. *Id*. at 83–84. The eventual law reflected a compromise by creating a pilot program that would eventually become the U.S. Trustee Program, which operates as a unit within the Department of Justice. *Id*. at 90. However, Posner argues that beyond overseeing the appointment and conduct of private trustees, the U.S. Trustee system plays little discernable role in shaping bankruptcy law. *Id*. at 124.

[70] Scalia and Garner describe this as a process of "eisegesis," in which ideas about what the text should mean become more important than the text itself, instead of a more principled process of "exegesis," in which the court endeavors to fairly determine what the text says, without regard for outcome. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 10 (2012).

[71] *Id.* For one recent example, compare *Field v. Mans*, 516 U.S. 59, 66–75 (1995) with *Husky International Electronics, Inc., v. Ritz*, 136 S. Ct. 1581, 1586–88 (2016). In both cases, the Court was attempting to determine the meaning of the words "actual fraud" as set forth in 11 U.S.C. § 523(a)(2)(A). But in each decision, the majority used very different tools to interpret this phrase. In *Field*, the Court relied on sources contemporaneous with the 1978 Code, including modern treatises and twentieth century case law from state courts. In *Husky*, the Court approached the same language using a Supreme Court decision from 1877, along with nineteenth century treatises, plus English statutes and case law dating back to the sixteenth century. The *Husky* decision was argued and decided in the months following Scalia's death, but it is fascinating to ponder how Scalia might have handled that seemingly radical departure in interpretive strategy.

[72] SCALIA, *supra* note 18, at 29.

[73] SCALIA & GARNER, *supra* note 70, at 5–6.

[74] *See, e.g.*, FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 148 (1991) (arguing that decisionmaking is more efficient when decision-makers' discretion is limited); *see also id.* at 158 (discussing how rules may represent "withdrawals of decisional jurisdiction . . . ."). However, this view has been criticized as overly simplistic. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 588–89 (1992); Baird, *supra* note 6, at 594–95 (contrasting the proceduralist view of bankruptcy, which endorses constraints, with the traditionalist view, which sees unfettered discretion as a better way to promote the

Section IV below, the benefits of "ruleness" are particularly clear in the bankruptcy context, due to the special nature of this practice.

IV. THE HEIGHTENED IMPORTANCE OF CLARITY AND PREDICTABILITY IN BANKRUPTCY PRACTICE

This Section argues that Justice Scalia's rule-based textualism was a particularly good fit for bankruptcy law. Justice Scalia believed that his textualist philosophy promoted certainty and predictability.[75] Indeed, his treatise on statutory interpretation begins with a foreword authored by Judge Frank Easterbrook explaining why a rule-based approach to statutory interpretation is cost-effective.[76]

As Judge Easterbrook notes, litigation is expensive, and "no one but a zealot or madman throws good money after bad by taking a pointless appeal or filing a doomed petition for certiorari."[77] Thus, when it comes to statutory interpretation, consistency is efficient: if the losing party in civil litigation is confident that the judges on appeal will evaluate the issue the same way that the lower court did, there is less incentive to pursue appeals.[78] In contrast, if there is no standardized way in which courts are likely to evaluate an issue, a litigant may be more willing to roll the dice on the theory that a higher court will see the issue differently.[79] Throughout his career, Justice Scalia advocated for rules that would "narrow the range of acceptable judicial decision-making" and, in turn, narrow the range of issues that are worth arguing about and litigating.[80] Above all else, he sought to minimize the culture of "give-it-a-try litigation,"[81] which he saw as wasteful.[82]

Justice Scalia's normative claim about the benefits of rule-based textualism is the subject of many great debates in academic literature.[83] This is a question that may lack definite answers because, as Professor Nelson points out, there will always be costs and benefits to rule-based textualism.[84] Accordingly, the proper

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purposes of Title 11).

75 *See, e.g.*, SCALIA, *supra* note 18, at 28 (explaining that artificial rules of interpretation diminish uniformity and objectivity and promote unpredictability and even arbitrariness); *id.* at 36 (arguing that the use of legislative history only increases these problems).

76 Hon. Frank Easterbrook, *Foreword* to ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, at xxi–xxvi (2012).

77 *Id.* at xxiv.

78 *Id.* at xxiv–xxv.

79 *Id.* at xxv.

80 SCALIA & GARNER, *supra* note 70, at xxviii.

81 *Id.* at 6.

82 *Id.* at 6–7.

83 *See, e.g.*, Kaplow, *supra* note 74, at 559 & n.1 (surveying the literature on the economic analysis of rules versus standards); WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 34–47 (1994) (contrasting Scalia's brand of textualism with other approaches to statutory interpretation); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 684–88 (1997) (tracing the legal realist roots of Justice Scalia's textualism and contrasting it with positivism).

84 Nelson, *supra* note 30, at 398–99.

philosophical approach to statutory text may depend on the area in which Congress is legislating.[85] This Article does not seek to resolve this debate. Instead, this Article shows how the idiosyncracies of bankruptcy practice amplify the arguments in favor of a rule-based approach.

Drawing on the work of Professor Frederick Schauer, this section argues that bankruptcy is an area of law in which rules may be particularly beneficial. According to Professor Schauer, "reliance" is a key value in shaping effective rules.[86] Specifically, reliance allows actors to plan effectively based on predictions about how rules will be enforced in the future.[87] Professor Schauer posits that "ruleness" promotes reliance in three ways that are significant to evaluating the impact of Justice Scalia's rule-based textualism on bankruptcy practice. First, by "the simplifying properties of rule-based decisionmaking,"[88] ruleness enhances predictability.[89] Second, ruleness decreases the possibility of variation in decisionmaking, thereby reducing the range of possible outcomes.[90] Third, ruleness has an efficiency component in that clear rules do not require judges to invest as much time resolving disputes, thereby promoting judicial economy.[91]

Accepting as true Professor Schauer's claim that ruleness promotes reliance, this Section explains why rule-based textualism is particularly advantageous for the bankruptcy field.[92] Bankruptcy differs from most ordinary litigation in two important ways. First, as explained above in Section III.B, bankruptcy is a code-based practice area, with no intermediate agency to interpret Congressional statutes and no other overarching doctrines that channel courts' interpretation of statutes. Thus, bankruptcy is an area in which lower courts frequently address statutory interpretation questions free from any external constraints, other than the constraints imposed by rule-based textualism. Second, as explained below, clear and predictable rules are particularly important in the bankruptcy context. Part A explains the importance of predictability *ex post*, given the inefficient nature of bankruptcy litigation, while Part B explains the importance of predictability *ex ante*, given the central role bankruptcy law plays in commercial markets.

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[85] *Id*. at 399–400.
[86] SCHAUER, *supra* note 74, at 137–40.
[87] *Id.* at 139–40.
[88] *Id.* at 139.
[89] *Id.*
[90] *Id.* at 144–45.
[91] *Id.* at 146–48.
[92] This is a controversial assumption, particularly in the bankruptcy field, where some have argued that specialist judges are better equipped to ensure the correct outcome on a case by case basis. *See, e.g.*, Baird, *supra* note 6, at 594–95 (explaining that the traditionalist view of bankruptcy sees the process as an ad hoc balancing of interests best performed by the specialist judges of the bankruptcy courts with few constraints on their discretion). However, the ideals of the traditionalist view cannot be fully realized so long as bankruptcy courts' statutory interpretation decisions are subject to de novo review by appellate courts. Thus, even if one subscribes to the traditionalist ideal, there is still room to appreciate the role of clarity and predictability on appeal.

A. Litigation Incentives Are Different

Like all civil litigation, bankruptcy law depends on the adversarial process to identify disputes and advocate for particular interpretations of statutory language.[93] But unlike civil litigation, which typically features a plaintiff and a defendant who are directly and unequivocally adverse, bankruptcy proceedings do not always have clearly defined adversaries. Rather, bankruptcies are better understood as collective actions that involve overlapping and sometimes parallel interests.[94]

Understanding the role of various players is important to understanding the unique dynamics of the collective action of a bankruptcy case. There is always a debtor, who is typically the party that has initiated the bankruptcy process.[95] And there are always creditors, typically in large numbers, who understand that the debtor's bankruptcy filing means that the debtor lacks sufficient assets or income to be able to pay those creditors in full.[96] Although most creditors would likely be considered adverse to a debtor outside of bankruptcy, this conception of adversity may change once a debtor has filed a petition. At that point, creditors no longer have any ability to take steps toward collection without the express approval of the bankruptcy court,[97] and their future actions may be permanently curtailed by the discharge that the debtor receives.[98]

Whether creditors can fairly be considered adverse to the debtor during a bankruptcy proceeding depends on a wide range of factors.[99] For example, secured creditors will typically maintain a security interest in an underlying asset notwithstanding the bankruptcy filing. For them, bankruptcy resolves how much the asset is worth, which in turn influences how much the secured creditor will

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[93] *See, e.g.*, Gorsuch, *supra* note 19, at 910 ("[Judicial] power [is] constrained by its dependence on the adversarial system to identify the issues and arguments for decision . . . .").

[94] *See* Posner, *supra* note 69, at 50; *see also* Lawrence Ponoroff, *Constitutional Limitations on State-Enacted Bankruptcy Exemption Legislation and the Long Overdue Case for Uniformity*, 88 AM. BANKR. L.J. 353, 356 (2014) (unlike state debtor-creditor law, which is concerned with outcomes as between two parties, federal bankruptcy law is "a collectivized debt collection process").

[95] The exception is an involuntary bankruptcy under 11 U.S.C. § 303 (2016). Notably, many involuntary bankruptcies end up looking similar to voluntary bankruptcies once the debtor realizes that bankruptcy is unavoidable and may represent the optimal outcome.

[96] Specifically, debtors file Schedules D, E, and F listing their creditors. *See* U.S. COURTS, BANKRUPTCY FORMS B 106D–106F, http://www.uscourts.gov/forms/bankruptcy-forms [https://perma.cc/UVP5-CE39]. Based on these lists, creditors receive notices from the court notifying them of the bankruptcy and critical deadlines. *See* U.S. COURTS, BANKRUPTCY FORMS B 309A–309I, http://www.uscourts.gov/forms/bankruptcy-forms [https://perma.cc/UVP5-CE39].

[97] *See* 11 U.S.C. § 362 (2016) (describing the automatic stay).

[98] *See id.* § 524 (describing the injunctive feature of the discharge).

[99] *See* Posner, *supra* note 69, at 55–56 (explaining that although creditors as a group have many similar interests, they tend to have divergent interests regarding the costs and procedural protections in bankruptcy law).

ultimately be paid and when the secured creditor can expect payments. Creditors with nondischargeable debt may be able to sit on the sidelines for the entire bankruptcy proceeding, with the assurance that they will be able to continue to make collection efforts after the bankruptcy (though usually without any assurance that those efforts will be any more successful after bankruptcy than they were before bankruptcy). And priority creditors can expect to move to the front of the line and be paid ahead of most other creditors (though that boost is meaningless if a debtor lacks sufficient assets to pay any creditors).[100] These creditors may want the debtor to get through bankruptcy as quickly as possible, while expending as few resources as possible.

In contrast to these categories of creditors who often have some hope of eventual recovery, the vast majority of creditors fall into the category of unsecured, nonpriority creditors who are facing discharge of their debt. For these creditors, bankruptcy is truly a zero-sum game. They likely have limited prospects for recovery in the first instance, and any money or resources that they spend litigating issues will reduce their bottom line recovery. These creditors are typically not adverse to the debtor, at least in the way that we normally conceive of parties to litigation.

Due in part to this collective action problem, bankruptcy has a special actor—the trustee—whose role often aligns with both debtor and creditor interests. Although the trustee's function varies depending on the particular chapter of the bankruptcy code, the trustee's role can be seen as ensuring that the debtor is in the best position to maximize the payout to all of the creditors. In Chapter 7 (and to a lesser extent in Chapter 11),[101] this often means recovering assets that can be used to pay off creditors. Thus, for example, the trustee can proceed against third parties in order to recover assets and administer them in a way that benefits all the parties to the proceeding (at least in theory). Although the trustee sometimes operates in ways that appear adverse to the debtor, the relationship is not always truly adverse: sometimes the trustee's actions benefit the debtor,[102] while other times the debtor is neutral as to the outcome.[103]

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[100] Having priority does not help a creditor in most Chapter 7 cases, as almost 90% of Chapter 7 bankruptcy filings are considered "no asset," meaning that the debtor has no non-exempt assets that are available to be liquidated for the benefit of any creditors. *See Frequently Asked Questions*, NAT'L ASS'N OF BANKR. TR., https://www.nabt.com/faq.cfm [https://perma.cc/3M7X-C9M8].

[101] In Chapter 11, the filing entity can exercise most of the rights and powers of a Trustee as a "debtor in possession." 11 U.S.C. § 1107 (2016). However, a Trustee may be appointed in extreme cases, such as businesses that are accused of fraud or gross mismanagement. *See id.* § 1104 (2016).

[102] For example, a Trustee may seek to invalidate a lien that enables the debtor to claim exempt equity, pay non-dischargeable priority debt, or (in the case of a Chapter 11 Debtor) retain productive business assets. *See In re* Wind Power Systems, Inc., 841 F.2d 288, 290–91 (9th Cir. 1988).

[103] One such example is a proceeding under 11 U.S.C. § 547 (2016), when the Trustee recovers a preferential transfer that favors one creditor at the expense of others. *See, e.g.*, *In re* Sterry Indus., Inc., 553 B.R. 96, 99–102 (Bankr. W.D. Tex. 2016) (analyzing whether a pool company's payments to a subcontractor were preferential transfers that the Trustee

Moreover, to the extent that creditors have any hope of getting paid, they prefer that the debtor conserve its resources. As a result, they are less likely to view adversarial actions against the debtor as a positive development, since any litigation will drain the debtor's already taxed resources.[104] In simple terms, any money that the debtor spends litigating an issue is money that the creditors will not be able to collect from in order to pay their debts.[105] This is particularly true in Chapter 11 and Chapter 13 cases, where a debtor's ability to repay creditors depends on the success of the debtor's plan. Creditors who expect to be paid through the plan are aligned with the debtor to the extent that they want to see the plan succeed—or, if the plan is going to fail, they prefer that it fail quickly, with as little litigation as possible.

Along these lines, any attempt by one creditor to obtain an advantage typically harms other creditors, with the consequence that creditors may often end up adverse not only to the debtor as a matter of form, but also to each other as a practical matter. For example, a creditor may file an adversary proceeding against the debtor in an effort to have that particular creditor's debt declared nondischargeable.[106] The caption for such a proceeding would be "Creditor v. Debtor," but the creditor is also seeking to elevate itself relative to other creditors. In addition, whether the creditor wins or loses the adversary proceeding, the creditor is forcing the debtor to expend resources litigating the matter, which will directly harm the expected recovery of all other creditors.

Given the unique dynamics of the bankruptcy system, having clear rules that govern the outcome of litigation is beneficial to all stakeholders.[107] When the parties can predict ahead of time what the result will be, the parties are less likely to spend time and resources litigating over particular issues.[108] In turn, decreased litigation improves overall outcomes because it preserves debtor resources and ensures the maximum overall payout to all creditors.[109]

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could avoid). If all Creditors have dischargeable debt, or if the debtor is dissolving a business in Chapter 7, the debtor may be neutral as to who loses and who benefits from the avoidance action.

[104] In fact, some commentators have described bankruptcy proceedings as a rent-seeking process in which powerful and well-organized creditors are constantly trying to shape court doctrine in order to extract value from passive creditors. *See generally* Mark J. Roe & Frederick Tung, *Breaking Bankruptcy Priority: How Rent-Seeking Upends the Creditors' Bargain*, 99 VA. L. REV. 1235, 1242 (2013) (explaining that powerful creditors "can react quickly and shift losses to less nimble creditors").

[105] *See* Waldron & Berman, *supra* note 12, at 213 (stating that, in bankruptcy proceedings, "every dollar applied to costs and fees . . . is a dollar not available for distribution to creditors").

[106] *See, e.g.*, Husky Int'l Elecs., Inc. v. Ritz, 136 S. Ct. 1581, 1585–86 (2016) (illustrating that vendor-creditor petitioned to have its debt declared non-dischargeable under 11 U.S.C. § 523(a)(2)(A) due to alleged fraud by the debtor).

[107] *See* Kaplow, *supra* note 74, at 609–10 (noting that courts' reliance on the adversary process may result in poor decisionmaking, which in turn may favor rules over standards).

[108] Easterbrook, *supra* note 76, at xxiv.

[109] *See* Waldron & Berman, *supra* note 12, at 213 (explaining that consistent approaches to statutory interpretation improve predictability and maximize creditor

The same efficiency arguments apply to bankruptcy appeals. As noted above, when there are no clear rules governing courts' approach to statutory questions, a party that was on the losing side before a lower court is more likely to roll the dice on appeal to a higher court.[110] This risk of inefficient appeals is amplified in bankruptcy, where the district court (or, in some circuits, a bankruptcy appellate panel[111]) provides an added layer of appeal between the bankruptcy court and the circuit court of appeals.[112] This extra layer imposes additional costs for the stakeholders in bankruptcy.[113] Moreover, this extra layer of appeal comes without the normal benefit of providing clarity in the law, as only a court of appeals decision would have any precedential effect.[114] But the resources expended in taking an appeal to the district court in turn make it less likely that a party will pursue an appeal to the circuit court, further weakening the efficiency of the system as a whole.[115]

B. Bankruptcy Law Impacts Commercial Markets

In addition to the *ex post* benefits of predictability for stakeholders in the bankruptcy process, there is also a strong argument that predictability in bankruptcy law has *ex ante* benefits. Several commentators have taken arguments about the need for clarity in bankruptcy a step further, by arguing that clarity promotes a wide range of *ex ante* efficiency interests.[116] For example, Professor Daniel Austin argued that

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recoveries).

[110] Easterbrook, *supra* note 76, at xxiv–xxv.

[111] Some circuits have established Bankruptcy Appellate Panels ("BAPs") under 28 U.S.C. § 158(b). These panels are composed of three bankruptcy judges and, with party consent, may hear appeals instead of the district court. 28 U.S.C. § 158(c). As of 2016, a total of five circuits used BAPs: the 1st, 6th, 8th, 9th, and 10th Circuits. *See* U.S. COURTS, TABLE BAP-1—U.S. BANKRUPTCY APPELLATE PANELS JUDICIAL BUSINESS (Sept. 30, 2016), http://www.uscourts.gov/statistics/table/bap-1/judicial-business/2016/09/30 [https://perma.cc/Q9H3-SXGM].

[112] *See* Hon. Leif M. Clark, *On Promoting "Uniform Laws Respecting Bankruptcy*,*"* AM. BANKR. INST. J., Aug. 2002, at 32, 32. Although a bankruptcy court can use 28 U.S.C. § 158(d) to certify questions of first impression for direct appeal to a circuit court, the circuits do not often agree to take these appeals. DAVID G. EPSTEIN ET AL., BANKRUPTCY: DEALING WITH FINANCIAL FAILURE FOR INDIVIDUALS AND BUSINESSES 591 (4th ed. 2015).

[113] Clark, *supra* note 112, at 32.

[114] *Id*.

[115] *Id*. Judge Clark argues that bypassing the district court and allowing direct appeals to circuit courts would promote greater uniformity and reduce transaction costs in commercial markets. *Id*. Similarly, Eric Posner has noted that the extra layer of appeal is unnecessary and likely an inefficient byproduct of Article III judges' efforts to ensure that their power and prestige was not diluted by the 1978 Bankruptcy Reform Act. Posner, *supra* note 69, at 123–24.

[116] *See, e.g.*, Austin, *supra* note 63, at 1135–37 (arguing that uniformity in bankruptcy laws promotes both "efficiency in contractual relations" and "judicial efficiency"); *see also* Clark, *supra* note 112, at 32 (explaining that differences in local approaches to bankruptcy impose transactional costs on national lenders that are "both frustrating and expensive.").

just as contract law drives parties' expectations in commercial relationships, bankruptcy law also creates a backdrop for modern transactions.[117] Professors David Skeel and Thomas Jackson argued that transaction consistency in bankruptcy outcomes is essential to financial markets.[118] Relatedly, Professors Lynn Lopucki and Joseph Doherty have identified a variety of efficiency interests in being able to accurately predict the outcome of a Chapter 11 bankruptcy.[119] To the extent that efficiency is linked to predictability, the benefit of rule-based textualism is heightened.[120]

Clear outcomes under the Code are essential because they "facilitate transparency and predictability in financial relations."[121] This argument finds further support in constitutional text, with many commentators arguing that the framers' use of the word "uniform" in Article I's bankruptcy clause may call for more consistent outcomes.[122] Even critics of general calls for uniformity in law as detrimental to state interests have endorsed the need for uniformity in bankruptcy based on the plain language of the Constitution.[123] In sum, a wide array of voices support the need for clarity and predictability in bankruptcy law.

For these reasons, rule-based textualism appears to be a particularly good fit for bankruptcy law. When judges apply clear and uncomplicated rules, the outcomes are more predictable.[124] And when all judges can be expected to follow these same

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[117] Austin, *supra* note 63, at 1135–36.

[118] *See generally* David A. Skeel, Jr. & Thomas H. Jackson, *Transaction Consistency and the New Finance in Bankruptcy*, 112 COLUM. L. REV. 152, 162–68 (2012) (using evidence from the financial crisis of 2008 to argue that the application of predictable bankruptcy principles to complex financial transactions would have limited the economic damage); *see also* Thomas H. Jackson & David A. Skeel, Jr., *Dynamic Resolution of Large Financial Institutions*, 2 HARV. BUS. L. REV. 435, 447–48 (2012) (arguing that the transparency and clear rules offered by bankruptcy "enhance credit market efficiency").

[119] *See* Lynn M. LoPucki & Joseph W. Doherty, *Bankruptcy Survival*, 62 UCLA L. REV. 970, 974 (2015) (finding that the experience of the bankruptcy judge is a key factor in whether a business will be able to emerge from Chapter 11 successfully).

[120] *See* SCHAUER, *supra* note 74, at 139, 146–48.

[121] Austin, *supra* note 63, at 1137.

[122] *See id.* at 1083–86; Judith Schenck Koffler, *The Bankruptcy Clause and Exemption Laws: A Reexamination of the Doctrine of Geographic Uniformity*, 58 N.Y.U. L. REV. 22, 58–59 (1983); Ponoroff, *supra* note 94, at 384 (arguing that the Framers' choice of the word "uniform" in Article I's bankruptcy clause calls for clear outcomes that discourage forum-shopping). For competing views on the impact of forum shopping, compare LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS 137–40 (2005) (identifying seven negative outcomes caused by the competition for bankruptcy filings) with Todd J. Zywicki, *Is Forum Shopping Corrupting America's Bankruptcy Courts?*, 94 GEO. L.J. 1141, 1184–85 (2006) (reviewing *Courting Failure* and contrasting it with the theory that competition for bankruptcy business is a "race to the top").

[123] *See* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1620 (2008).

[124] SCHAUER, *supra* note 74, at 139–40.

clear and uncomplicated rules, the amount of litigation and appeals is reduced.[125] This vision of ruleness makes bankruptcy proceedings less expensive and more efficient for all stakeholders, while the reliance promoted by predictability in outcomes may benefit commercial transactions. Section V explores Justice Scalia's commitment to rule-based textualism and identifies the key aspects of his rule-based textualism that furthered the efficiency interests identified in this Section.

V. JUSTICE SCALIA'S PHILOSOPHY IN BANKRUPTCY CASES

As the preceding Sections explain, Justice Scalia's approach to statutory interpretation has been described as "rule-based textualism" which may promote efficiency. This Section demonstrates the ways in which Justice Scalia's bankruptcy writings fulfilled this ideal, identifying four specific features of his rule-based textualism that helped promote clarity and predictability.

At the outset, it is apparent from Justice Scalia's bankruptcy writings that he understood the Supreme Court's critical role in encouraging clarity and predictability in bankruptcy law. For example, Justice Scalia clearly articulated this vision in his majority decision in *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*:[126] "The Bankruptcy Code standardizes an expansive (and sometimes unruly) area of law, and it is our obligation to interpret the Code clearly and predictably using well established principles of statutory construction."[127]

Perhaps equally often, however, Justice Scalia was making his pitch for clarity and predictability in dissent or concurrence, criticizing the majority opinion for unnecessarily complicating the text of the Code with extraneous factors. For example, when a five-justice majority balked at the possibility that a particular provision of the revised 1978 Code would irreparably alter the home mortgage market,[128] Justice Scalia argued that the majority's distortion of the statutory text posed far greater consequences:

> By disregarding well-established and oft-repeated principles of statutory construction, [the Court] 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. In the bankruptcy field alone, for example, unfortunate future litigants will have to pay the price . . . .[129]

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[125] SCALIA & GARNER, *supra* note 70, at xxiv–xxv.

[126] 566 U.S. 639 (2012).

[127] *Id.* at 649.

[128] *See* Dewsnup v. Timm, 502 U.S. 410, 416–18 (1992) (refusing to reduce a lien on property to the present value of the real estate despite the clear statutory command of 11 U.S.C. § 522, on the theory that Congress could not possibly have intended such a dramatic change to the home mortgage market).

[129] *Id.* at 435–36. For a thorough discussion of *Dewnsup*, see *infra* Section V.B.

A review of Justice Scalia's bankruptcy writing reveals four features of his rule-based effort to bring clarity and predictability to bankruptcy law. First, Justice Scalia employed a holistic approach to the Code, drawing on seemingly disparate provisions in an attempt to discern an objective legislative intent. Second, Justice Scalia's bankruptcy writings reveal an almost Kantian approach to statutory interpretation: choosing what he believed to be the fairest reading of statutory text, regardless of the consequences. Third, Scalia frequently criticized the use of legislative history and often refused to join any portion of a decision that considered such materials in an attempt to discern subjective legislative intent. Fourth, Scalia sought to simplify jurisdictional and decisional rules that would make it easier to determine the scope of a bankruptcy court's judicial authority. Each of these features of Scalia's rule-based textualism is discussed below, with examples.

A. A Holistic Approach to the Bankruptcy Code

The first marker of Justice Scalia's rule-based textualism is his holistic approach to the text of the Bankruptcy Code. One of the most prominent examples is his unanimous decision in *United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*[130] In *Timbers*, the Court sought to answer a recurring question that appeared to lack any clear answer in the Code: is an undersecured creditor (i.e. a creditor whose collateral is worth less than the creditor is owed) entitled to monthly interest payments in lieu of being able to immediately foreclose on the collateral? Despite the billions of dollars at stake for the commercial lending industry, the Court answered "no."[131] Writing for a unanimous court, Scalia's opinion carefully weaved together no fewer than five seemingly unconnected provisions of the Code to reach a holistic conclusion that Congress did not intend for undersecured creditors to receive post-petition interest.[132]

Not only did *Timbers* resolve a critical question in bankruptcy, it also offered a roadmap to judges for how to use the Code holistically to reach clear and supportable conclusions for the many routine questions that lack a direct answer in the Code.[133] Importantly, *Timbers* is not a purely textualist decision, at least insofar

[130] 484 U.S. 365 (1988).

[131] *See* Dembart & Markell, *supra* note 12, at 374.

[132] *Timbers*, 484 U.S. at 382. The *Timbers* opinion focuses on the interrelation between the automatic stay in 11 U.S.C. § 362 (1982 ed. and Supp. IV) (which prevents a secured lender from foreclosing on the property during the bankruptcy) and the adequate protection provisions of 11 U.S.C. § 361 (which ensure that a secured creditor's property interests are protected during the pendency of the stay). *Id.* at 369–71. However, the opinion also pays careful attention to Section 506, which addressed the difference between secured claims and unsecured claims, *id.* at 371–74, and enhances the analysis with references to Sections 552, *id.* at 374, and 1129 of the Code. *Id.* at 377–78.

[133] *See, e.g.*, Waldron & Berman, *supra* note 12, at 210 (arguing that the Code calls for "a holistic and nuanced process" of interpretation). However, not all commentators agree with the reasoning in *Timbers*. *See, e.g.*, Tabb & Lawless, *supra* note 48, at 836 (describing *Timbers*' holistic approach to the Code as "workmanlike, if not always compelling").

as textualism is perceived to involve a narrow focus on specific statutory provisions.[134] Instead, there is also an element of purposivism to the decision, in that Scalia was trying to discern Congress' purpose by broadly examining the text of the Code as a whole.[135]

Timbers is a particularly helpful case for analyzing various theories about the distinction between textualism and purposivism. For example, in his book *Judging Statutes*, Judge Robert Katzmann argued that most judges are "neither wholly textualists nor wholly purposivists."[136] Undoubtedly a fierce textualist like Scalia, who has vocally critiqued the purposivist movement,[137] would likely consider himself one of the exceptions; however, his decision in *Timbers* helps prove Katzmann's point. Katzmann has argued that even a textualist's toolbox can help to unlock "the institutional context that may serve as a guide to understanding a statute's meaning."[138] Viewed from this perspective, *Timbers* perhaps represents an apex in judicial decisionmaking, where textualism and purposivism meet to achieve a clear and justifiable result for bankruptcy law.[139]

Judge Marjorie Rendell of the Third Circuit has made a similar point about Justice Scalia's later decision in *Hartford Underwriters Insurance Co. v. Union Planters Bank., N.A.*[140] That case resolved an important question about the extent to which nontrustees can recover administrative expenses for costs incurred in preserving assets for the benefit of all creditors.[141] Administrative expenses are the gold standard[142] for bankruptcy claimants, because they are paid before most other claims,[143] so courts frequently deal with litigants who are trying to fit a square peg of nonadministrative expenses into the round hole of 11 U.S.C. 503(b).[144] The stakes

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[134] Some have aptly termed this "petty textualism." *See, e.g.*, NOURSE, *supra* note 27, at 107.

[135] Katzmann has defined purposivism as the process by which judges "glean[] the purpose and policy underlying the legislation" in order to "deduce[] the outcome most consistent with those purposes." KATZMANN, *supra* note 29, at 31–32.

[136] *Id.* at 55.

[137] SCALIA, *supra* note 18, at 22.

[138] KATZMANN, *supra* note 29, at 55.

[139] Waldron & Berman, *supra* note 12, at 204–05. *Timbers* is also a significant decision for other reasons, namely Justice Scalia's uncharacteristic use of legislative history. *See infra* Section VI.C.

[140] 530 U.S. 1 (2000).

[141] *Id.* at 3.

[142] *See generally* Elizabeth Lea Black, *What Are "Administrative Expenses" Under § 503(b) of Bankruptcy Code (11 U.S.C.A. § 503(b)) Granted First Priority for Payment Pursuant to § 507 (a)(1) of Code (11 U.S.C.A. § 507(a)(1))*, 140 A.L.R. Fed. 1, 1 (1997) (explaining that because administrative expenses receive top priority in bankruptcy, "[i]t is not surprising therefore that so many cases have arisen in which the courts have been required to determine what constitutes" such an expense).

[143] *See* 11 U.S.C. § 507(a)(2) (2012) (placing non-trustee administrative expenses in third priority position for payment, after trustee expenses (§ 507(a)(1)(C)) and certain domestic support obligations (§ 507(a)(1)(A) and (B))).

[144] *See generally* Judy Simmons Henry, *Recovery of Creditors' Costs from the*

are even higher under the particular Code provision at issue in *Hartford Underwriters*—11 U.S.C. 506(c), which allows some administrative expenses to be paid by taxing the collateral of secured creditors.

Thus, commercial lenders nationwide were paying close attention to *Hartford Underwriters*, as an insurance company that had floated workers compensation premiums for a Chapter 11 debtor ("Hen House") tried to recover those premiums from the bankruptcy estate. To get paid, the insurer had to overcome a common road block in Chapter 11 cases: all of Hen House's assets were encumbered by liens, meaning that there were no assets available for any unsecured creditors, including administrative claim holders.[145] Nonetheless, the insurer had on its side a wealth of case law indicating that creditors who have preserved assets in a way that benefits secured lenders are entitled to recover from those assets. But to seal its recovery, the insurer had to convince the Supreme Court that the words "[t]he trustee may recover from property securing an allowed secured claim"[146] in 11 U.S.C. § 506(c) did not exclude nontrustees from pursuing the same recovery.[147]

In another unanimous decision authored by Justice Scalia, the Court concluded that the insurer could not recover.[148] Applying a variety of canons of construction, the court reasoned that the natural reading of 506(c) excluded nontrustees, and then explained why the insurer could not meet the "exceptionally heavy"[149] burden of convincing the court to look beyond this plain text.[150] As Judge Rendell pointed out, Justice Scalia's decision went well beyond the narrow words of the statutory provision at issue, exemplifying a "holistic approach" to statutory interpretation.[151] She further argued that this decision and others like it provide much needed guidance to lower courts to engage in a "broad, contextual approach" to interpreting the Bankruptcy Code.[152]

B. A Commitment to Texualism Regardless of Outcome

The second hallmark of Justice Scalia's rule-based textualism in bankruptcy law is his commitment to interpreting the text reasonably regardless of the outcome. The moral philosopher Immanuel Kant was perhaps best known for the phrase, "let justice reign, should all the rascals of the universe perish."[153] Justice Scalia's

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Bankruptcy Estate: Reasonable, Necessary, and . . . Uncertain?, 18 U.A.L.R. L.J. 199, 209–11 (1996) (discussing the available avenues of recovery for creditors).

[145] *Hartford Underwriters*, 530 U.S. at 4.

[146] 11 U.S.C. § 506(c) (2012).

[147] *Hartford Underwriters*, 530 U.S. at 5–6.

[148] *Id.* at 14.

[149] *Id.* at 9 (internal quotation marks omitted) (quoting Patterson v. Shumate, 504 U.S. 753, 760 (1992)).

[150] *Id.*

[151] Rendell, *supra* note 1, at 892–94.

[152] *Id.* at 888.

[153] IMMANUEL KANT, PROJECT FOR PERPETUAL PEACE: A PHILOSOPHICAL ESSAY 61 (1796) ("[F]iat justitia, pereat mundus . . . .").

approach in several of the Supreme Court's bankruptcy cases turned this Kantian ideal on its head, with Scalia explaining that it is a judge's role to do what Congress has instructed, not what the judge believes is the just outcome. In his own words: "[i]f you're going to be a good and faithful judge, you have to resign yourself to the fact that you're not always going to like the conclusions you reach. If you like them all the time, you're probably doing something wrong."[154]

Justice Scalia frequently found himself criticizing the majority for straining the text of the Bankruptcy Code to get to a preferred result from a policy perspective rather than the correct result from a textual perspective. The most prominent example is Justice Scalia's dissent in *Dewsnup v. Timm*,[155] a decision which is roundly derided as one of the worst bankruptcy decisions in recent history.[156]

In *Dewsnup*, the Supreme Court faced a statutory question whose answer would have far ranging consequences for the consumer mortgage market: does 11 U.S.C. § 506(d) authorize a court to reduce a lien on real property to the value of the collateral?[157] Traditionally, a mortgage or other consensual lien on real property was afforded special status in bankruptcy law, with the lien typically passing through consumer bankruptcy untouched.[158] Assuming that a debtor intended to keep a particular property, the lien on the property would continue unaltered through the bankruptcy and any eventual discharge would not affect the debtor's basic obligation to continue making payments on the underlying note.[159]

In 1978, however, Congress made changes to the way bankruptcy had traditionally treated secured interests.[160] Among other things, the 1978 Code created a new framework for dealing with "undersecured"[161] creditors, i.e. secured creditors

[154] Gorsuch, *supra* note 19, at 906 (citing Justice Antonin Scalia, Madison Lecture at the Chapman University School of Law (Aug. 29, 2005)) (alterations in original).

[155] 502 U.S. 410 (1992).

[156] *See, e.g.*, Benjamin A. Ellison, *Is It Possible That* Dewsnup v. Timm *Might Finally Be Overturned?*, AM. BANKR. INST. J., Jun. 2013, at 60, 60 (summarizing the criticism from academics and lower courts). Although the Supreme Court had an opportunity to overturn *Dewsnup* in 2015, the Court unanimously declined to do so. *See* Bank of America v. Caulkett, 135 S. Ct. 1995, 2000–01 (2015). However, in a footnote joined by only six Justices, the Court noted the many critiques of *Dewsnup* and suggested that it had survived only because the debtors had "repeatedly insisted" that the Court did not need to overrule it. *Id.* at 1999–2000 n.†.

[157] *Dewsnup*, 502 U.S. at 411–12.

[158] *Id.* at 418.

[159] *Id.* (citing Farrey v. Sanderfoot, 500 U.S. 291, 297 (1991) ("Ordinarily, liens and other security interests survive bankruptcy.")).

[160] *See, e.g.*, *In re* Tanner, 14 B.R. 933, 939 (Bankr. W.D. Pa. 1981) (explaining that with the newly enacted § 506(d), "Congress announced . . . to the financing industry that henceforth a lien would not be protected to the extent it exceeds the value of the collateral.").

[161] An example is a bank that loans an individual $100,000 to buy a house and takes a mortgage on the home to secure the debt. If the home is not worth $100,000, then the bank is considered "undersecured." Bankruptcy decisions routinely use the term "undersecured" to refer to creditors with liens on property that is worth less than they are owed. *See, e.g.*, United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assoc., 484 U.S. 365, 372 (1988)

whose debt exceeded the value of the asset securing the debt.[162] These creditors were required to file a claim with the bankruptcy court, and unless there was a timely objection, such a claim would be considered an "allowed claim"[163] under Section 502.[164] Then, the newly promulgated Section 506(a) instructed courts to bifurcate the allowed claims of secured creditors into two categories: secured claims and unsecured claims.[165] Pursuant to Section 506(a), such a creditor would be considered to hold a "secured claim"[166] up to the value of the underlying collateral, and an unsecured claim for the remainder.[167] Finally, Congress created Section 506(d), which states, "[t]o the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void."[168]

In *Dewsnup*, debtors sought to use Section 506(d) to partly invalidate a lien interest on land.[169] Respondents had loaned petitioners $119,000 in exchange for a note and a deed of trust on two parcels of farmland.[170] Petitioners filed for Chapter 11 bankruptcy at a time when they owed the respondents $120,000 secured by land that was worth only $39,000.[171] Once in bankruptcy court, petitioners sought to use Section 506 to partially invalidate the lien, capping it at the current value of the land.[172] They argued that under Section 506(a), the court was required to bifurcate the respondents' claim, creating an allowed secured claim of $39,000, with the balance becoming an unsecured claim.[173] Then, under Section 506(d), petitioners argued that the court was required to avoid the lien to the extent it was not an allowed secured claim.[174] In other words, following the sequential application of the

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(contrasting the Code's treatment of "undersecured" creditors with its treatment of "over secured creditors"); *Dewsnup*, 502 U.S. at 428 (noting the superfluity argument "if § 506(d) automatically stripped liens securing undersecured claims to the value of the collateral, *i.e.*, to the value of the allowed secured claims.").

[162] *See* United States v. Ron Pair Enter., 489 U.S. 235, 240 (1989) (explaining that with the 1978 Code, "[c]ongress intended 'significant changes from current law in . . . the treatment of secured creditors and secured claims.'") (citing H.R. Rep. No. 95-595 at 180 (1977)) (alteration in original).

[163] 11 U.S.C. § 502(a) (2012).

[164] *Id.*

[165] *Id.* § 506(a)(1).

[166] *Id.*; *see also Dewsnup*, 502 U.S. at 420–21 (Scalia, J., dissenting) (explaining how Section 506(a) operates).

[167] To continue the explanation from notes 166 and 167, assume that the homeowner files for bankruptcy at a time when the bank is owed $100,000 but the home is only valued at $80,000. Applying the straightforward language of 506(a), this means that the bank has a secured claim for $80,000 and an unsecured claim for $20,000.

[168] 11 U.S.C. § 506(d) (2012). This provision goes on to describe two exceptions, neither of which are relevant here.

[169] *Dewnsup*, 502 U.S. at 412–13.

[170] *Id.* at 412.

[171] *Id*. at 413.

[172] *Id.*

[173] *Id.* at 414–15.

[174] *Id.* at 413.

subprovisions of Section 506, the respondents would only have a $39,000 lien on the property after the petitioners received their discharge.

Justice Scalia agreed that petitioners' reading of the statute was the most natural and obvious interpretation of Section 506(d).[175] But the majority disagreed, and sided with an alternative argument developed by the respondents. Under this argument, the phrase "allowed secured claim" in 506(d) did not have the meaning defined just above in 506(a), but rather looked back to 502: if a secured creditor filed a claim that was "allowed" under Section 502, then the entire claim was an "allowed secured claim" within the meaning of 506(d).[176] In other words, Section 506(d) did not permit any invalidation of liens where creditors were undersecured, so long as their claims had been "allowed."[177]

The majority admitted that this strained interpretation was "not without its difficulty."[178] However, the Court reasoned that pre-Code practice always allowed liens on real property to pass through bankruptcy, and the legislative history did not indicate that Congress intended such major change to pre-Code practice.[179] Moreover, the consequences of petitioners' straightforward reading was just too unpalatable:

> The practical effect of petitioner's argument is to freeze the creditor's secured interest at the judicially determined valuation. By this approach, the creditor would lose the benefit of any increase in the value of the property by the time of the foreclosure sale. The increase would accrue to the benefit of the debtor, a result some of the parties describe as a "windfall."[180]

Given the possibility that the real property would appreciate in value following the bankruptcy, there was a risk that a debtor could use bankruptcy to unfairly benefit at the expense of creditors. The majority did not believe that the foundational policy that bankruptcy gives a debtor a "fresh start" could reasonably encompass this sort of windfall.[181]

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[175] *Id.* at 420–21 (Scalia, J., dissenting).

[176] *Id.* at 417 (refusing to strip down the lien as requested by petitioners because "respondents' claim is secured by a lien and has been fully allowed pursuant to § 502.").

[177] *Id.*

[178] *Id.*

[179] *Id.* at 416.

[180] *Id.* at 417.

[181] *Id.* at 416. The respondents argued that the lien is a property right, suggesting that there is a Fifth Amendment takings issue implicated by the alternative reading. *Id.* However, the majority framed the respondents' interest as a contractual one, arguing that the respondents should receive the benefit of their bargain:

> We think, however, that the creditor's lien stays with the real property until the foreclosure. That is what was bargained for by the mortgagor and the mortgagee. The voidness language sensibly applies only to the security aspect of the lien and

Justice Scalia's dissent was a masterwork of careful statutory construction. He opened with a scathing critique: in ignoring the straightforward interpretation of 506(d), "the Court replaces what Congress said with what it thinks Congress ought to have said—and in the process disregards, and hence impairs for future use, well-established principles of statutory construction."[182] After explaining why petitioners' reading of these statutory provisions was clear,[183] he elaborated in great detail why the respondents' reading was strained and how it was inconsistent with almost every established canon of construction.[184] He then picked apart the majority's effort to justify its preferred reading under established canons.[185]

Justice Scalia's dissent concluded by condemning the majority's deference to pre-Code practice and the absence of any contrary legislative history as "plainly . . . at odds with our jurisprudence."[186] Most powerful, though, were his closing predictions about what the majority's decision portended for the field of bankruptcy law:

> 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. In the bankruptcy field alone, for example, unfortunate future litigants will have to pay the price for our expressed neutrality "as to whether the words 'allowed secured claim' have different meaning in other provisions of the Bankruptcy Code." . . . Having taken this case to resolve uncertainty regarding one provision, we end by spawning confusion regarding scores of others.[187]

> then only to the real deficiency in the security. Any increase over the judicially determined valuation during bankruptcy rightly accrues to the benefit of the creditor, not to the benefit of the debtor and not to the benefit of other unsecured creditors whose claims have been allowed and who had nothing to do with the mortgagor-mortgagee bargain.

Id. at 417. While bankruptcy cannot interfere with property rights, it routinely alters contractual expectations. Blake Rohrbacher, *More Equal Than Others: Defending Property-Contract Parity in Bankruptcy*, 114 YALE L.J. 1099, 1110 (2005).

[182] *Dewsnup*, 502 U.S. at 420.

[183] *Id.* at 421–23.

[184] *Id.* at 423–27.

[185] *Id.* at 427–30.

[186] *Id.* at 433–35.

[187] *Id.* at 435–36.

This dissent in *Dewsnup* was a prime example of Justice Scalia's willingness to look past the practical implications of a decision and instead merely give effect to the statutory words that Congress had chosen. Justice Scalia agreed that the majority's decision to read Section 506 in a way that avoided the prospect of debtor windfall was likely "fairer from the standpoint of natural justice."[188] Nonetheless, implementing the fairer result was "irrelevant"[189] to Scalia, who only cared about the result commanded by the text.[190] While the majority expressed concern for the consumer lending community, Justice Scalia was content to let the chips fall where they may, placing the blame for any fallout squarely on Congress.[191] As he later observed, "Congress can enact foolish statutes as well as wise ones, and it is not for the courts to decide which is which and rewrite the former."[192]

Justice Scalia's willingness to put Congress's possibly "foolish"[193] statutes[194] into effect often benefited ordinary consumers, at least hypothetically. Had Scalia's view prevailed in *Dewsnup*, homeowners across the country would be able to use bankruptcy to take advantage of temporary dips in real estate prices, reaping an eventual windfall when prices inevitably rebounded.[195] Like his decision in *Timbers*, which resulted in billions of dollars in lost interest for financial institutions,[196] Scalia's position in *Dewsnup* is at odds with the conventional leftist critique that the Justice was a consequentialist who tended toward probusiness positions.[197] Instead, it demonstrates that Scalia was more than willing to elevate the interests of ordinary

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188 *Id.* at 435. *See also* SCHAUER, *supra* note 74, at 137 (arguing that rules themselves are not "just" in any real sense of the word).

189 *Dewsnup*, 502 U.S. at 435 ("I say irrelevant[], because a bankruptcy law has little to do with natural justice.").

190 *Id.*; This particular exercise of rule-based textualism dovetails well with Frederick Schauer's notion that a rule's effectiveness has nothing to do with whether it is inherently just. SCHAUER, *supra* note 74, at 137.

191 *Dewsnup*, 520 U.S. at 433–34 (Scalia, J., dissenting) ("The fact . . . that Congress may not have foreseen all of the consequences of a statutory enactment is not sufficient reason for refusing to give effect to its plain meaning." (internal quotations marks omitted) (quoting Union Bank v. Wolas, 502 U.S. 151, 157–58 (1991))). The *Union Bank v. Wolas* decision had been issued just a year earlier, and Justice Scalia had concurred in that case to criticize the majority's reliance on legislative history. *See infra* Section V.

192 SCALIA, *supra* note 18, at 20.

193 *Id.*

194 This is not to say that implementing Congress's statutory language would have been foolish. In fact, *Dewsnup* has been roundly criticized for introducing unnecessary confusion and uncertainty into bankruptcy law. *See, e.g.*, Mary Josephine Newborn, *Undersecured Creditors in Bankruptcy:* Dewsnup, Nobelman, *and the Decline of Priority*, 25 ARIZ. ST. L.J. 547, 581–85 (1993) (explaining that the ambiguous majority opinion in *Dewsnup* "contribute[s] to the lack of a consistent and coherent conceptual approach to the claims of unsecured creditors.").

195 *See* Brief of Respondent at 34, Dewsnup v. Timm, 502 U.S. 410 (1992) (No. 90-741).

196 Dembart & Markell, *supra* note 12, at 374.

197 *See* Eskridge, *supra* note 26, at 549.

consumers above those of large lenders—if that was the result that the statute enacted by Congress dictated.[198]

Another example from the bankruptcy realm where Justice Scalia was willing to extend a statutory benefit to ordinary consumers comes from his dissent in *Ransom v. FIA Card Services N.A.*[199] In *Ransom*, the court was faced with how to interpret 2005 changes to Chapter 13 bankruptcy. In Chapter 13, a debtor creates a long-term payment plan (usually five years[200]) in which a portion of the debtor's income is dedicated to paying off creditors. After successfully completing the payment plan, the debtor receives a discharge of at least some remaining debt.[201]

A critical issue in any Chapter 13 case is the amount of income that a debtor must dedicate to the payment plan. This amount is known as the debtor's "projected disposable income,"[202] and Congress created an elaborate formula for how to calculate it.[203] Among other things, the formula draws on the amount that a debtor is actually paying to certain secured creditors, as well as IRS tables that calculate reasonable living expenses based on household size and state of residence.[204]

Ransom involved a direct conflict between these actual out of pocket expenses and the hypothetical living expense allocations set by the IRS. The debtor in *Ransom* owned a car outright, yet still wanted to deduct the monthly payments that one-car households were entitled to under the IRS tables.[205] The precise statutory provision at issue was 11 U.S.C. 707(b), which states in part:

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[198] A broader argument against this critique comes from the possibility that inconsistency in the interpretation of bankruptcy law favors large corporations that can engage in forum shopping, as well as high-priced lawyers and the clients that can afford them. Austin, *supra* note 63, at 1139. Scalia was arguably favoring ordinary consumer debtors simply by staunchly advocating for clear and consistent approaches to interpreting the Code.

[199] 562 U.S. 61 (2011).

[200] The payment period can be three years for below-median-income debtors. 11 U.S.C. § 1325(b)(4) (2016).

[201] As with Chapter 7 debt, which is subject to the discharge limitations in 11 U.S.C. § 523 (2016), Chapter 13 debt is subject to the discharge limitations in 11 U.S.C. § 1328(a).

[202] 11 U.S.C. § 1325(b)(1)(B) (2016).

[203] *See id.* § 707(b)(2)(A)(ii)–(iv) (describing method of calculating disposable income under all chapters) and *id.* § 1325(b)(2), (3) (modifying the calculations for the purposes of section 1325).

[204] Essentially, Chapter 13 seeks to put a debtor on an austerity budget. The debtor is able to keep a reasonable portion of his or her income for daily living expenses while dedicating the balance to paying off creditors over the payment period. Rather than leaving open the question of whether a debtor's level of continued spending is reasonable, Congress had the bright idea of simply directing courts to the numbers that the Internal Revenue Service already uses when evaluating payment plans for people who owe back taxes.

[205] Ransom v. FIA Card Servs., N.A., 562 U.S. 61, 64 (2011).

> The debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides, as in effect on the date of the order for relief, for the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case, if the spouse is not otherwise a dependent.[206]

Petitioner argued that this subsection of 707 divides a debtor's expenses into two categories.[207] For expenses that the IRS has included as "Other Necessary Expenses,"[208] courts are directed to use actual expenses when calculating disposable income.[209] In contrast, for expenses that the IRS has included within the National Standards and Local Standards, courts should look to the standards when calculating disposable income, not what the debtor is actually spending.[210] Applying this statutory formula, petitioner argued that, as a one-car household, he was entitled to deduct the applicable IRS-prescribed car ownership cost of $471 per month from the disposable income that he would have to allocate to creditors, even though he was not making any car payment.[211] Although petitioner lost this argument in the Ninth Circuit, three circuits agreed with petitioner's position.[212]

But an eight-justice majority rejected this pro-debtor view.[213] Writing for the majority, Justice Kagan first explained that the word "applicable" in the phrase "applicable monthly expense amounts specified under the National Standards and Local Standards"[214] required a threshold inquiry about whether a debtor was eligible for any deduction at all.[215] Because Ransom owned his car outright, he was not eligible for a car ownership deduction that was based on the notion that Ransom was actually making car payments.[216]

The majority did not look favorably on the debtor's policy arguments for why Congress might have intended to allow all car owners to take advantage of this particular deduction. First, the majority explained that allowing the debtor to shield

[206] 11 U.S.C. § 707(b)(2)(a)(ii)(I) (2016).

[207] *Ransom*, 562 U.S. at 74–75.

[208] 11 U.S.C. § 707(b)(2)(a)(ii)(I) (2016).

[209] *Ransom*, 562 U.S. at 75.

[210] *Id.* at 74–75

[211] *Id.* at 67.

[212] *In re* Washburn, 579 F.3d 934, 935 (8th Cir. 2009), *abrogated by* Ransom v. FIA Card Services, 562 U.S. 61 (2011); *In re* Tate, 571 F.3d 423, 424 (5th Cir. 2009), *abrogated by* Ransom v. FIA Card Services, 562 U.S. 61 (2011); *In re* Ross-Tousey, 549 F.3d 1148, 1150 (7th Cir. 2008), *abrogated by* Ransom v. FIA Card Services, 562 U.S. 61 (2011).

[213] *Ransom*, 562 U.S. at 69.

[214] 11 U.S.C. § 707(b)(2)(a)(ii)(I) (2016).

[215] *Ransom*, 562 U.S. at 69–70.

[216] The debtor was eligible for a second category of car operating costs of $338 per month. *Id.* at 72.

$28,000 of "wholly fictional"[217] expenses over the life of the plan was contrary to the purpose of Chapter 13, which was to "ensur[e] that debtors repay creditors to the extent they can."[218] Second, the majority reasoned that allowing the deduction in this case would open the door to even worse game playing, with some future debtor conspiring to buy a pile of "scrap metal"[219] in order to claim the car ownership deduction for a piece of junk "sit[ting] on cinder blocks in his backyard."[220] Third, the majority rejected the debtor's argument that the decision would penalize thrifty individuals who avoided troublesome auto loans; instead, the majority explained that "[m]oney is fungible: The $14,000 that [the debtor] spent to purchase his Camry outright was money he did not devote to paying down his credit card debt."[221] Finally, the majority rejected the argument that Congress intended to create an "emergency cushion"[222] that would ensure that all debtors had adequate money for car payments for the life of the plan, instead pointing Ransom to provisions of the Code that allow for plan modification in the event of changed circumstances.[223]

Alone in dissent, Justice Scalia criticized the majority for straining the meaning of the word "applicable" far beyond what the context would reasonably support. In a decision that Professor Mark Tushnet believes might have just as easily have come from Justice Breyer,[224] Justice Scalia argued that the fairest reading of the word "applicable" simply directed the court to the appropriate line on the specified table.[225] In contrast, the majority's reading of that phrase presumed an overly complicated directive, where the lone word "applicable" actually meant if "a taxpayer has no car payment, the Ownership Cost provisions of the Local Standards will not apply."[226] Scalia argued that if Congress had intended such a directive, there were much clearer ways to phrase it, and that Congress had in fact made such explicit distinctions in other sections of the Code.[227]

To the contrary, Scalia believed that allowing all one-car households the full deduction that the IRS table allotted to one-car households made sense in light of a statutory formula that was intended to create easy and clear rules for calculating

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[217] *Id.* at 74.

[218] *Id.*

[219] *Id.* at 79 (internal quotation marks omitted) (quoting *In re* Brown, 376 B.R. 601, 607 (Bankr. S.D. Tex. 2007)).

[220] *Id*. (internal quotation marks omitted) (quoting *In re* Brown, 376 B.R. at 607). As Scalia's dissent points out, this "imagined horrible" is not especially powerful in light of the fact that a debtor who buys a heap of junk on credit gets the full $471 deduction even if he is paying only a fraction of that each month. *Id.* at 84 (Scalia, J., dissenting).

[221] *Id*. at 79 (majority opinion).

[222] *Id*. at 79–80.

[223] *Id*. at 80.

[224] Tushnet, *supra* note 5, at 1189–90 ("[I]f someone handed over the [*Ransom* dissent's] text without the line identifying its author and asked, 'Who wrote this?,' one could almost as easily answer Justice Breyer as Justice Scalia.").

[225] *Ransom*, 562 U.S. at 81–82 (Scalia, J., dissenting).

[226] *Id*. at 81 (citation omitted) (internal quotation marks omitted).

[227] *Id*. at 82–83.

disposable income. Sometimes the formula would create advantages or disadvantages for individual debtors, but such is the nature of a bright-line test:

> The reality is, to describe it in the Court's own terms, that occasional overallowance (or, for that matter, underallowance) "is the inevitable result of a standardized formula like the means test . . . . Congress chose to tolerate the occasional peculiarity that a brighter-line test produces." Our job, it seems to me, is not to eliminate or reduce those "oddit[ies]," but to give the formula Congress adopted its fairest meaning.[228]

Once again, Scalia was willing to tolerate a possible windfall for an ordinary consumer in order to serve the greater good of clear and straightforward applications of the bankruptcy code.[229]

These initial examples of Scalia's commitment to textualism regardless of outcome have been dissents. It's easy to do textual justice when there is no real risk of the world perishing, so it's fair to ask whether Scalia was only this dogmatic in dissent. But Scalia's majority decision in *Federal Communications Commission v. NextWave Personal Communications, Inc.,*[230] may be the exception that proves the rule, as Justice Breyer's dissent implies that Scalia's straightforward reading of the statute may in fact cause the world to perish—or at least the government's world.[231]

The *NextWave* case pitted the federal government against a struggling company in the high stakes world of federal telecommunications license auctions. NextWave was the winning bidder in an FCC auction of broadband spectrum licenses. Shortly

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[228] *Id.* at 84–85 (citations omitted) (alterations in original).

[229] This is not to say that Scalia always voted in favor of consumer debtors. For example, he was also the lone dissenter in *Hamilton v. Lanning*, 560 U.S. 505, 525 (2010) (Scalia, J., dissenting), which asked whether courts could take a forward looking approach when calculating the amount of a Chapter 13 debtor's "projected disposable income" that must be allocated to plan payments. *Id.* at 508 (majority opinion). In that case, the Debtor had experienced a one-time windfall that artificially inflated her income during the six months leading up to bankruptcy. *Id.* at 511. The Debtor sought to exclude these payments from the calculation of disposable income even though 11 U.S.C. § 101(10A)(A)(i) suggested a rigid backward-looking formula. *Id.* at 510. In a decision authored by Justice Alito, the majority held that it was not necessary to follow a mechanical calculation of projected disposable income when there are known changes in the debtor's income or expenses. *Id.* at 524. But Scalia again dissented, arguing that the result was contrary to the text, and that there were good reasons Congress would have wanted courts to calculate disposable income mechanically. *Id*. at 532–35 (Scalia, J., dissenting). Importantly, Scalia's position was a neutral one: while it could harm debtors in petitioner's position by forcing them to delay bankruptcy if they experienced positive one-time fluctuations in income, it could help debtors in the opposite position who experienced one-time decreases in income shortly before bankruptcy. *Id.* Given that most people file for bankruptcy when they are in weak financial condition, Scalia's position ultimately might have benefited more ordinary consumers than it would have hurt. *Id.*

[230] 537 U.S. 293 (2003).

[231] *Id.* at 310 (Breyer, J., dissenting).

after making a down payment on its $5 billion bid and signing a promissory note with payment terms for the balance, NextWave filed for Chapter 11 bankruptcy.[232]

Initially, NextWave attempted to use Chapter 11 to reduce the value of the licenses and by extension, the amount NextWave had to pay the government under its promissory note. When the Court of Appeals rejected that effort, NextWave proposed to pay the FCC the entire amount owed in a single lump sum payment.[233] The FCC informed NextWave that the licenses had been cancelled because NextWave had failed to make payments when they were due under the terms of the promissory note.[234]

NextWave then challenged the license cancellation as a violation of 11 U.S.C. § 525, an antidiscrimination provision that prevents public and private actors from taking a variety of employment and government actions based on the fact that a debtor has filed for bankruptcy.[235] The terms of 11 U.S.C. § 525(a) expressly prohibit the government from cancelling a license solely because a licensee has filed for bankruptcy.[236]

In what has been described by a prominent bankruptcy judge as "one of the most unheralded decisions of the last 25 years," the Supreme Court agreed with NextWave.[237] Writing for a seven-justice majority, Justice Scalia concluded that the FCC had violated the straightforward terms of the antidiscrimination statute when it canceled the licenses.[238] He rejected as irrelevant the FCC's argument that it had a "valid regulatory motive" for its actions, explaining:

> When the statute refers to failure to pay a debt as the sole cause of cancellation ("solely because"), it cannot reasonably be understood to include, among the other causes whose presence can preclude application of the prohibition, the governmental unit's *motive* in effecting the cancellation. Such a reading would deprive § 525 of all force. It is hard to

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[232] *Id.* at 297–98 (majority opinion).

[233] *Id*. at 298.

[234] *Id*.

[235] *Id*. at 299. NextWave first obtained emergency relief from the bankruptcy court, but the Second Circuit Court of Appeals vacated the decision as beyond the scope of a bankruptcy court's powers. *Id*. at 298–99. Nextwave then filed an Administrative Procedure Act challenge in the D.C. Circuit Court of Appeals, and that court agreed that the cancellation violated 11 U.S.C. § 525, and therefore violated the APA. *Id*. at 299.

[236] 11 U.S.C. § 525(a) (with limited and specified exceptions, "a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to . . . a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.").

[237] Dembart & Markell, *supra* note 12, at 380.

[238] *NextWave*, 537 U.S. at 301–02.

> imagine a situation in which a governmental unit would not have some further motive behind the cancellation—assuring the financial solvency of the licensed entity . . . or punishing lawlessness, . . . or even (quite simply) making itself financially whole. Section 525 means nothing more or less than that the failure to pay a dischargeable debt must alone be the proximate cause of the cancellation—the act or event that triggers the agency's decision to cancel, whatever the agency's ultimate motive in pulling the trigger may be.[239]

Given the context—the integrity of the multibillion dollar auctions that the federal government was routinely conducting among telecommunications firms—the FCC argued it would be catastrophic to its operations to apply Congress' antidiscrimination provision to licenses bought at auction.[240] Justice Breyer found this argument highly convincing, arguing that the majority's decision portended disaster, not just for the FCC, but for any situation in which the government attempted to use the tools of a private lienholder:

> It is dangerous, however, in any actual case of interpretive difficulty to rely exclusively upon the literal meaning of a statute's words divorced from consideration of the statute's purpose. . . . The Court's literal interpretation of the statute threatens to create a serious anomaly. It seems to say that a government cannot *ever* enforce a lien on property that it has sold on the installment plan as long as (1) the property is a license, (2) the buyer has gone bankrupt, and (3) the government wants the license back solely because the buyer did not pay for it. . . . Yet every private commercial seller, every car salesman, every residential home developer, every appliance company can threaten repossession of its product if a buyer does not pay—at least if the seller has taken a security interest in the product. . . . Why should the government (state or federal), and the government alone, find it impossible to repossess a product, namely, a license, when the buyer fails to make installment payments?[241]

But Scalia was unswayed by the FCC's protests, instead directing any blame toward the branch of government responsible for enacting this broad provision:

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[239] *Id.* at 301–02 (citations omitted).

[240] *See* Brief for the Federal Communications Commission at 49, F.C.C. v. Nextwave Pers. Commc'ns, 537 U.S. 293 (2003) (Nos. 01-653, 01-657).

[241] *NextWave*, 537 U.S. at 311–12 (Breyer, J., dissenting).

> Some may think (and the opponents of § 525 undoubtedly thought) that there *ought* to be an exception for cancellations that have a valid regulatory purpose. Besides the fact that such an exception would consume the rule, it flies in the face of the fact that, where Congress has intended to provide regulatory exceptions to provisions of the Bankruptcy Code, it has done so clearly and expressly, rather than by a device so subtle as denominating a motive a cause.[242]

Although *NextWave* involved a well-funded telecommunications company that could obviously afford the best lawyers and finance multiple appeals, it should not be mistaken for a decision that only benefits big business. Rather, its holding impacts small businesses and consumers well beyond this particular high stakes industry, because many states have statutes that impact ordinary debtors' efforts to obtain or maintain a license or some other state privilege.[243] Indeed, as former bankruptcy judge Bruce Markell pointed out, the *NextWave* decision "has broad implications for individual debtors and their everyday lives."[244] Thus, like Scalia's dissents in *Dewsnup* and *Ransom*, *NextWave* is a decision that operates heavily in favor of ordinary debtors.[245]

As the examples in this Section illustrate, Justice Scalia often made a valiant effort to divine and advocate for a text-based answer to important questions under the Code. The fact that the text often elevated ordinary consumers against some very powerful Goliaths is evidence that Justice Scalia was earnest in his cause and not simply using a judicial philosophy selectively to justify an outcome-driven result.

C. Ignore Legislative History

A third aspect of Justice Scalia's rule-based textualism that is highlighted in the bankruptcy arena is his extreme distaste for using legislative history to determine statutory meaning. Justice Scalia has long railed against the use of legislative history, concluding that at best it is an unreliable indication of Congressional intent, and at worst it is antidemocratic mischief.[246]

Indeed, Justice Scalia believed that the only time it was appropriate for a court to use legislative history was when there was a credible claim of scrivener's error:

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[242] *Id.* at 302 (majority opinion).

[243] Dembart & Markell, *supra* note 12, at 380.

[244] *Id*.

[245] A recent book discussing Justice Scalia's "liberal" decisions refers in passing to two of Scalia's bankruptcy decisions. *See* DORSEN, *supra* note 14, at 226 (pointing to two bankruptcy dissents—*Hamilton* and *Ransom*—in a discussion of decisions in which Justice Scalia sided with consumers). But as explained in *supra* note 229, Justice Scalia's dissent in *Hamilton* was actually pro-creditor in that case, as he argued that the debtor should either pay significantly more toward her plan or else delay filing. However, for the reasons also explained in *supra* note 229, his advocacy of a mechanical approach to projected disposable income would likely lead to pro-debtor outcomes in other cases.

[246] SCALIA, *supra* note 18, at 17.

an actual drafting mistake that changed or omitted words that Congress intended to use, thereby altering the effect of the statute.[247] One clear example would be if some hapless Congressional aide, tasked with transmitting the final draft of a statute to the printer, accidentally deleted the word "not" from a provision, thereby causing the opposite result of what Congress intended to be enacted into law.[248]

Justice Scalia's fight against the use of legislative history can be observed frequently throughout his judicial oeuvre,[249] but it is perhaps most pronounced in the bankruptcy arena. As explained in Section III.B, bankruptcy cases tend to call for a more laser-like focus on statutory interpretation than other cases, so it makes sense that Scalia's opposition to legislative history would also be more pronounced in this arena.

But in addition to the fact that there are more opportunities to use (or misuse) legislative history in bankruptcy, there is also greater reason for courts to avoid considering it. First, legislative history introduces many inefficiencies into litigation. Investigating and developing arguments around legislative history is expensive for litigants.[250] The legislative history for bankruptcy laws is extraordinarily lengthy and complex, with the history behind the 1978 Act alone spanning thousands of pages and over a decade of study.[251] Moreover, the use of legislative history also introduces significant uncertainty into how a judge is likely to respond to these arguments. In turn, this increases the costs of litigation and the incentives to appeal unfavorable decisions. For the reasons explained in Section IV.A, increased costs and decreased clarity are a particularly bad prospect for bankruptcy law, which depends on efficiency and predictability.

Second, the legislative history of bankruptcy laws may be particularly problematic, as it tends to reflect highly specialized interests rather than those of the main stakeholders in bankruptcy. For example, Eric Posner argued that the interests of individual debtors as a class are not reflected at all in the legislative history, as most debtors have little incentive to organize.[252] Likewise, many types of creditors are completely unrepresented in the legislative history, while other larger creditors who are represented may have perverse incentives not to make the system efficient

[247] *Id*. at 20.

[248] One of the few examples of an appellate court correcting scrivener's error comes from the bankruptcy context, when the Second Circuit determined that Congress failed to renumber internal cross-references in the Code following an amendment. *In re* Chateaugay Corp., 89 F.3d 942, 954 (2d Cir. 1996).

[249] *See, e.g.*, KATZMANN, *supra* note 29, at 39–40 (highlighting Scalia's leadership in the textualist fight against the use of legislative history).

[250] *See* SCALIA, *supra* note 18, at 36–37 (noting his experience with the Department of Justice Office of Legal Counsel, where he observed that approximately 60% of lawyers' time was devoted to "finding, and poring over, the incunabula of legislative history. What a waste.").

[251] *See* Posner, *supra* note 69, at 67. The legislative history behind 2005's BAPCPA amendments is also described as confusing and of questionable value. Waldron & Berman, *supra* note 12, at 216–17.

[252] *See* Posner, *supra* note 69, at 54–55.

but rather to shift costs to other creditor groups not represented in the legislative process.[253] The legislative history for the 2005 amendments in the BAPCPA may be even more problematic, as some have alleged that most of this legislation was drafted by the credit industry, behind the scenes.[254]

For these reasons, Scalia's longstanding battle against the use of legislative history takes on particular valiance in the bankruptcy context. Moreover, as with his commitment to textualism, Scalia's refusal to indulge legislative history also tends to benefit "the little guy"—i.e., the ordinary debtor or small creditor who has little ability or incentive to organize in order to influence Congressional decisionmaking.[255] Although Scalia sometimes engaged the battle against legislative history in dissent, he most often found himself engaging in these skirmishes in concurrences, where he criticized the majority for its unnecessarily reliance on legislative history.

A prime, early example of Scalia's approach appears in *Begier v. IRS*,[256] in which the Supreme Court answered the question of whether a Chapter 7 bankruptcy trustee had power to avoid the debtor's prepetition payments of withholding and excise taxes to the IRS.[257] The Court agreed unanimously that the answer was no, on the theory that a business' payments of withheld and collected taxes to the IRS never belonged to the debtor in the first place; rather, these monies were merely held by the debtor in trust for the IRS.[258] However, eight justices signed on to a lead opinion that relied heavily on legislative history to support that answer.[259] In particular, the majority opinion pointed to a House Report that contains remarks from the Floor Manager, Representative Don Edwards that supported the Court's reading of the relevant statutes.[260]

Scalia's concurrence made no bones about his distrust of legislative history:

> Representative Edwards, the House floor manager for the bill that enacted the Bankruptcy Code, said on the floor that "[t]he courts should permit the use of reasonable assumptions" regarding the tracing of tax trust funds. 124 Cong. Rec. 32417 (1978). We do not know that anyone except the presiding officer was present to hear Representative Edwards. Indeed, we do not know for sure that Representative Edwards' words were even

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[253] *Id.* at 55–56.

[254] *See, e.g.*, Jean Braucher, *The Challenge to the Bench and Bar Presented by the 2005 Bankruptcy Act: Resistance Need Not Be Futile*, 2007 U. ILL. L. REV. 93, 100 (2007) (noting that the legislative history of BAPCPA is "thin" and stating that "credit industry representatives . . . reputedly did much of the behind-the-scenes drafting").

[255] *See* Posner, *supra* note 69, at 54–55.

[256] 496 U.S. 53 (1990).

[257] *Id*. at 55. Under 11 § U.S.C. 547(b), certain payments made to creditors within the months leading up to bankruptcy are considered preferential transfers that the trustee may have the power to undo (or "avoid") for the benefit of all creditors. *Id*. at 58.

[258] *Id.* at 59.

[259] *Id*. at 65–67.

[260] *Id*.

> uttered on the floor rather than inserted into the Congressional Record afterwards. If Representative Edwards did speak these words, and if there were others present, they must have been surprised to hear him talking about the tracing of 26 U.S.C. § 7501 tax trust funds, inasmuch as the bill under consideration did not relate to the Internal Revenue Code but the Bankruptcy Code, and contained no provision even mentioning trust-fund taxes.[261]

He concluded with a sharp rebuke to his colleagues for looking to the Congressional Record to evaluate legislative intent, rather than the words of the statute that Congress enacted:

> Nonetheless, on the basis of Representative Edwards' statement, today's opinion concludes that "[t]he courts are *directed*" (presumably it means directed by the entire Congress, and not just Representative Edwards) "to apply 'reasonable assumptions' to govern the tracing of funds." *Ante*, at 67 (emphasis added). I do not agree. Congress conveys its directions in the Statutes at Large, not in excerpts from the Congressional Record, much less in excerpts from the Congressional Record that do not clarify the text of any pending legislative proposal.[262]

A year later, Scalia tried a somewhat different tack, using a concurrence to openly lament the mischief that legislative history wreaked on the system:

> I join the opinion of the Court, including Parts II and III, which respond persuasively to legislative-history and policy arguments made by respondent. It is regrettable that we have a legal culture in which such arguments have to be addressed (and are indeed credited by a Court of Appeals), with respect to a statute utterly devoid of language that could remotely be thought to distinguish between long-term and short-term debt. Since 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.[263]

A third method of warfare that Scalia attempted was the silent treatment: saying nothing but simply refusing to join the portion of an opinion that referenced legislative history. One such example comes in *Associates Commercial Corp. v. Rash*,[264] where the Court was faced with the question of how to value a secured

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[261] *Id.* at 67–68 (Scalia, J., concurring) (alteration in original).

[262] *Id.* at 68 (alterations in original). *But see* Dembart & Markell, *supra* note 12, at 379–80 (suggesting that the Court did not pay *enough* attention to Congress's disagreement with past Supreme Court decisions thereby introducing unnecessary confusion into bankruptcy doctrine).

[263] Union Bank v. Wolas, 502 U.S. 151, 163 (1991) (Scalia, J., concurring).

[264] 520 U.S. 953 (1997).

creditor's "allowed secured claim" for the purposes of 11 U.S.C. § 506(a).[265] In particular, the Court had to consider whether to place a lower foreclosure value on a secured creditor's interest (i.e., the amount that the creditor could recover through a forced sale of the property) versus a higher replacement value (i.e., the amount the debtor would have to pay to obtain similar property).[266]

In a nearly unanimous decision, the Court held that replacement value should govern.[267] But the decision contained a footnote explaining why the majority was not giving any weight to legislative history in interpreting 11 U.S.C. § 506.[268] Yet Scalia refused even to join that footnote.[269] Although he offered no explanation by way of a separate writing for his break with the otherwise unanimous opinion, it seems likely that Scalia felt that even including an explanation for why the majority was discounting the House and Senate Reports gave too much credit to the notion that legislative history could have value, at least in some cases.

Despite his ongoing war with legislative history, in which he employed a variety of approaches and argument styles to try to convince his colleagues of his views, Justice Scalia was still fighting the same battles during his last few years on the Court. For example, in *Milavetz, Gallop & Milavetz, P.A. v. U.S.*,[270] the Court was asked to determine whether certain prohibitions on the conduct of "debt relief agencies" applied to bankruptcy lawyers.[271] As an aside, the majority noted that it was unnecessary to refer to legislative history in light of the unambiguous statute but observed that it did support the Court's conclusion.[272]

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[265] *Id.* at 955–56.
[266] *Id.* at 957–58.
[267] *Id.* at 959.
[268] *Id.* at 963 n.4:

> We give no weight to the legislative history of § 506(a), noting that it is unedifying, offering snippets that might support either standard of valuation. The Senate Report simply repeated the phrase contained in the second sentence of § 506(a). See S. Rep. No. 95-989, p. 68 (1978). The House Report, in the Fifth Circuit's view, rejected a "replacement cost" valuation. See *In re Rash*, 90 F.3d 1036, 1056 (C.A.5 1996) (quoting H. Rep. No. 95-595, p. 124 (1977)). That Report, however, appears to use the term "replacement cost" to mean the cost of buying new property to replace property in which a creditor had a security interest. See *ibid.* In any event, House Report excerpts are not enlightening, for the provision pivotal here—the second sentence of § 506(a)—did not appear in the bill addressed by the House Report. The key sentence originated in the Senate version of the bill, compare H. R. 8200, 95th Cong., 1st Sess., § 506(a) (1977), with S. 2266, 95th Cong., 1st Sess., § 506(a) (1977), and was included in the final text of the statute after the House-Senate conference, see 124 Cong. Rec. 33997 (1978).

[269] *Id.* at 955 ("[A]nd in all but n.4 of which Scalia, J., joined.").
[270] 559 U.S. 229 (2010).
[271] *Id.* at 232–24.
[272] *Id.* at 236 n.3.

However, unlike the prominent discussion spanning three pages of text in *Begier*, this time the legislative history was presented only in a brief footnote.[273] Yet Scalia's rebuke was no less sharp than it had been twenty years earlier in *Begier*. First, he took issue with the majority's assertion that the House Report "indicate[d] concern with abusive practices undertaken by attorneys":[274]

> Perhaps, but only the concern of the author of the Report. Such statements tell us nothing about what the statute means, since (1) we do not know that the members of the Committee read the Report, (2) it is almost certain that they did not vote on the Report (that is not the practice), and (3) even if they did read and vote on it, they were not, after all, those who made this law.[275]

Next, he reminded his colleagues of the critical role of the Senate and president in making a bill into a law, which further minimized the evidentiary value of this particular House Report:

> Even indulging the extravagant assumption that Members of the House other than members of its Committee on the Judiciary read the Report (and the further extravagant assumption that they agreed with it), the Members of the Senate could not possibly have read it, since it did not exist when the Senate passed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. And the President surely had more important things to do.[276]

Then, he turned to the other source of legislative history mentioned in the majority's footnote, which he found "truly mystifying":[277]

> For the proposition that "the legislative record elsewhere documents misconduct by attorneys" which was presumably the concern of *Congress*, the Court cites a reproduction of a tasteless advertisement that was (1) an attachment to the written statement of a *witness*, (2) in a hearing held seven years prior to this statute's passage, (3) before a subcommittee of the House considering a *different* consumer bankruptcy reform bill that never passed. "Elsewhere" indeed.[278]

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[273] *Id.*
[274] *Id.*
[275] *Id.* at 253 (Scalia, J., concurring in part and concurring in judgment).
[276] *Id*.
[277] *Id*. at 254.
[278] *Id.*

He concluded by once again expressing frustration with the fact that the Court had even mentioned the existence of legislative history, explaining that the mere fact that the Supreme Court was acknowledging these arguments would encourage their continued use in the future:

> Our cases have said that legislative history is irrelevant when the statutory text is clear. . . . The footnote advises conscientious attorneys that this is not true, and that they must spend time and their clients' treasure combing the annals of legislative history in *all* cases: To buttress their case where the statutory text is unambiguously in their favor; and to attack an unambiguous text that is against them. . . . Even for those who believe in the legal fiction that committee reports reflect congressional intent, footnote 3 is a bridge too far.[279]

As these examples spanning a quarter century suggest, Justice Scalia was a strong crusader against legislative history. Indeed, even this small sampling of bankruptcy decisions shows that he attempted many different strategies to try to engage his colleagues to join the fight. Yet the 2010 decision in the *Milavetz* case suggests that his twenty-five years of advocacy may have fallen on deaf ears.[280]

But *Milavetz* may not have been the final battleground for Scalia. In *Husky Int'l Elec. Inc., v. Ritz*,[281] an appeal that was briefed before Scalia's death, but argued and decided after his death, the parties relied heavily on legislative history to evaluate an exception to discharge. At issue was whether a corporate-director-turned-debtor's expropriation of corporate assets that should have been paid to a vendor could constitute "actual fraud" under 11 U.S.C. § 523(a)(2)(A), even where the debtor had not made any representations to the vendor.[282] A Supreme Court opinion ten years earlier had interpreted this provision in a different context to require the creditor's reasonable reliance on a false statement by the debtor.[283]

In *Husky*, both the petitioner and the Solicitor General as amicus curiae pointed to legislative history stating that the exception to discharge was intended to codify an 1877 decision, *Neal v. Clark*.[284] Legislative history was also a prominent theme at oral argument.[285] In a 7-1 decision, the majority appeared to accept this line of argument, relying in part on the 1878 decision identified in the House and Senate

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[279] *Id.*

[280] *But see* KATZMANN, *supra* note 29, at 45 (providing examples of how Scalia's crusade against legislative history has impacted lawmakers and the courts).

[281] 136 S. Ct. 1581 (2016).

[282] *Id.* at 1587.

[283] Field v. Mans, 516 U.S. 59, 61 (1995).

[284] Brief for Petitioner at 5, Husky Int'l Elecs., Inc. v. Ritz, 136 S. Ct. 1581 (2016) (No. 15-145); Brief for the United States as Amicus Curiae Supporting Petitioner at 12–13, Husky Int'l Elecs., Inc. v. Ritz, 136 S. Ct. 1581 (2016) (No. 15-145).

[285] *See* Transcript of Oral Argument at 10, Husky Int'l Elecs., Inc. v. Ritz, 136 S. Ct. 1581 (2016) (No. 15-145); *id*. at 12–14 (questions of Roberts, C.J., and answers of Petitioner); *id*. at 36 (argument of Respondent).

Reports. Yet legislative history is not mentioned once in the decision.[286] It is almost as if the majority was paying tribute to their deceased colleague's view that the words "legislative history" should never again grace the pages of the Supreme Court Reporter.[287]

D. Make the Scope of Bankruptcy Courts' Authority Clear

A fourth way in which Justice Scalia sought to bring clarity and predictability to bankruptcy law was his advocacy for simple and straightforward rules to govern the scope of a bankruptcy court's authority. The scope of a bankruptcy judge's authority is a recurring question enshrouded in a cloud of uncertainty. The legislative history behind the Bankruptcy Reform Act of 1978 shows a full decade of jurisdictional skirmishes, with Article III judges pushing for bankruptcy judges to have less power; bankruptcy judges pushing for Article III status; and legislative and executive forces pushing for a centralized agency that would take power away from the courts altogether.[288] By ultimately choosing a compromise that entrusted bankruptcy matters to non-Article III judges who would exercise increased powers, Congress created a hornet's nest for the federal courts.

The differences between Article III judges and bankruptcy judges are stark. Article III judges are appointed by the President, confirmed by the Senate, and have life tenure during which time their salary cannot be diminished. In contrast, bankruptcy judges are appointed by the federal appellate judges in their Circuit to fourteen-year terms, and their salary can be changed by Congress. Article III judges must be formally impeached, whereas there are less rigid mechanisms in which bankruptcy judges can lose their appointment or fail to be reappointed.[289]

For good reasons, Article III judges are protective of their special constitutional status and are wary of actions by the other branches of government that might undermine their independence.[290] Thus, questions as to whether and how bankruptcy judges can make factual and legal determinations has been the subject of recurring challenge, particularly since the Supreme Court's 1982 decision in *Northern Pipeline*.[291]

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[286] *Husky* is perhaps an example of an ominous trend toward pretending that statutory language is not ambiguous, and hiding the true basis for a decision. *See, e.g.*, Braucher, *supra* note 254, at 98–99 (noting the trend and arguing that "the law cannot be predictable when judges do not give their real reasons for decision.").

[287] Interestingly, the author of the *Husky* decision was Justice Sotomayor, who also authored the *Milavetz* decision that drew such a powerful tirade from her colleague.

[288] Posner, *supra* note 69, at 74–82.

[289] *See generally* FED. JUDICIAL CTR., COURTS: A BRIEF OVERVIEW, https://www.fjc.gov/history/courts/courts-brief-overview [https://perma.cc/3Z42-7TK3] (describing the differences between Article I and Article III judges).

[290] *See, e.g.*, N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 60 (1982) (courts must "jealously guard[ ]" their Article III powers).

[291] *See supra* Section III.A. Notably, the federal judiciary was highly opposed to any increase in the stature or power of bankruptcy judges relative to Article III judges. *See*

But questions about the proper method for courts to hear and resolve disputes also produce inefficiencies. For example, infirmities in subject matter jurisdiction—meaning a federal court's constitutional authority to hear and decide a case—can be raised at any stage in a proceeding.[292] This means that parties can litigate in a trial court, and then pursue the full range of appeals, only to have a higher court decide that none of this time and effort should have been expended in the first place because the federal courts never had subject matter jurisdiction. The inefficiency risk is significant in any case, but it is particularly counterproductive in bankruptcy matters, for the reasons set forth in Section IV.A above.

Accordingly, Scalia's belief that rules regarding the scope of bankruptcy judges' powers should be clear and predictable is a particularly welcome stance for the bankruptcy field. If courts and litigants have more certainty about the extent and nature of a bankruptcy court's authority to make factual and legal determinations, they are more likely to identify potential problems in a timely manner. In turn, they are less likely to continue to devote resources to matters in which there is a risk that all the bankruptcy court's work will be for naught if some higher level court sees a constitutional problem that the parties and bankruptcy judge did not consider.

Scalia's advocacy for clear and predictable constitutional rules is quite apparent in his bankruptcy decisions. Although he was not on the Court for its seminal decision in *Northern Pipeline*, one of his earliest opportunities to advocate for clear constitutional rules came in the 1989 case of *Granfinanciera, S.A. v. Nordberg*,[293] which involved the question of whether the Seventh Amendment creates a right to a jury trial for a nonclaimant who is defending against a fraudulent transfer action brought by a bankruptcy trustee.[294] By a 6-3 vote, the majority concluded that the nonclaimant did have a right to a jury trial.[295] Scalia ultimately agreed with this conclusion.[296]

Concurring, Scalia wrote, "[t]his central feature of the Constitution must be anchored in rules, not set adrift in some multifactored 'balancing test.'"[297] His main criticism of the majority was its unwillingness to embrace bright line rules in its formulations.[298] In particular, he argued that the Court had butchered the public rights doctrine, a longstanding theory of when certain constitutional protections would apply.[299] In Scalia's view, a better approach would center on clear rules; for example, Scalia believed that at a minimum, the United States must be a party to the

Posner, *supra* note 69, at 74–75. As Posner describes it, last minute lobbying by Chief Justice Warren E. Burger resulted in "remarkably petty reductions in the independence and status of bankruptcy judges" by the Senate. *Id.* at 90–91.

[292] FED. R. CIV. P. 12(b)(1) (2017).

[293] 492 U.S. 33 (1989).

[294] *Id.* at 36.

[295] *Id.* at 35–36.

[296] *Id.* at 65 (Scalia, J., concurring).

[297] *Id.* at 70.

[298] *Id.* ("I do not think one can preserve a system of separation of powers on the basis of such intuitive judgments . . . .").

[299] *Id.* at 65–69.

adjudication for the doctrine to apply.[300] That way, if the United States was not a party to litigation, the court and the parties could be confident that public rights doctrine would not be implicated.

But, as with his unsuccessful war on legislative history, Scalia's efforts to promote certainty regarding bankruptcy judges' authority were of limited impact. Indeed, more than two decades after *Granfinanciera*, Chief Justice Roberts wrote a thirty-six-page lead opinion in *Stern v. Marshall*,[301] in which he attempted to explain the proper scope of a bankruptcy judge's authority.[302] Justice Scalia added to the page tally with a short concurrence criticizing the majority's efforts as unwieldy:

> The sheer surfeit of factors that the Court was required to consider in this case should arouse the suspicion that something is seriously amiss with our jurisprudence in this area. . . . Apart from their sheer numerosity, the more fundamental flaw in the many tests suggested by our jurisprudence is that they have nothing to do with the text or tradition of Article III. . . . The multifactors relied upon today seem to have entered our jurisprudence almost randomly.[303]

Justice Scalia had more success with a second aspect of his battle for clear rules to circumscribe the scope of a bankruptcy judge's power: constraining the judge's equitable authority under 11 U.S.C. § 105. Section 105 is a seemingly broad provision of the Code that authorizes a bankruptcy judge to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," including orders "to prevent an abuse of process."[304] Bankruptcy courts had relied on this provision to support a wide array of outcomes not directly provided for by the Code, leading some critics to argue that bankruptcy judges were assuming equitable powers that were reducing clarity and predictability.[305]

But it seemed that these criticisms had fallen on deaf ears in 2007 when a closely divided Supreme Court held that Section 105 powers could be exercised in a manner that conflicted with the text of the Code.[306] In *Marrama v. Citizens Bank*

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300 *Id.* at 70.

301 564 U.S. 462 (2011).

302 *Id.* at 485–99.

303 *Id*. at 503–04 (Scalia, J., concurring).

304 11 U.S.C. § 105(a) (2017).

305 *See, e.g.*, Alan M. Ahart, *The Limited Scope of Implied Powers of a Bankruptcy Judge: A Statutory Court of Bankruptcy, Not a Court of Equity*, 79 AM. BANKR. L.J. 1, 32–33 (2005) (arguing that bankruptcy courts should not employ traditional equitable doctrines); Daniel B. Bogart, *Resisting the Expansion of Bankruptcy Court Power under Section 105 of the Bankruptcy Code: The All Writs Act and an Admonition from Chief Justice Marshall*, 35 ARIZ. ST. L.J. 793, 824–25 (2003) (arguing that bankruptcy courts too often use equitable powers to diminish the role of procedure and rules).

306 Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367–68 (2007); *see* Jeffrey W. Warren, *Revisiting the Inherent Equitable Powers of the Bankruptcy Court: Does* Marrama v. Citizens Bank of Massachusetts *Signal a Return to Equity?*, AM. BANKR. INST. J., Apr.

of Massachusetts,[307] the Supreme Court was asked to determine whether a bankruptcy judge could deny a debtor's motion to convert a Chapter 7 bankruptcy into Chapter 13, notwithstanding language in the Code that purported to give a debtor an absolute right to conversion.[308]

But in *Marrama*, the debtor was deemed to be abusing the provisions of the Code: first, the debtor attempted to shield assets from Chapter 7 liquidation; then, when the trustee chased down these assets, the debtor sought to convert his petition to Chapter 13, thereby allowing the debtor to retain these assets through bankruptcy.[309] The bankruptcy court denied the debtor's motion to convert under 11 U.S.C. § 105, which authorizes a court to take any action necessary to prevent an "abuse of process," and a five-justice majority held that this was a proper exercise of the bankruptcy court's powers.[310]

Justice Scalia joined the dissent in *Marrama*, which argued that 11 U.S.C. § 105 did not give bankruptcy judges the power to stray from clear statutory commands.[311] And just seven years later, the dissent's core view on the limits of a bankruptcy court's powers carried the day in *Law v. Siegel*,[312] with Justice Scalia's opinion for a unanimous court concluding that the bankruptcy court lacked power under 11 U.S.C. § 105 to issue orders that were inconsistent with the commands of the Code.[313]

In perhaps the most factually bizarre modern bankruptcy case to make it to the Supreme Court, *Law* involved a debtor who had fraudulently documented a nonexistent lien on his house in order to try to keep it out of the hands of real creditors.[314] As the suspicious trustee got closer to chasing down the true facts, the debtor redoubled his efforts, even going so far as to file a foreclosure action purportedly on behalf of this phantom lienholder.[315] The trustee eventually succeeded in proving to the bankruptcy court that no such lien existed, but along the way the trustee incurred almost half a million dollars in fees and costs.[316] Yet when the house was ultimately sold for the benefit of creditors, the trustee expected to recover only a small portion of his costs, while the debtor expected to receive $75,000 of the sale proceeds under his state homestead exemption.[317]

In light of the debtor's outrageous conduct, the trustee asked the bankruptcy court to use its equitable powers to deny the debtor his homestead exemption and

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2007, at 22, 22 (concluding that *Marrama* was "cause for celebration by those concerned about the trend that was limiting the exercise of judicial discretion by bankruptcy courts.").

[307] 549 U.S. 365 (2007).

[308] *Id.* at 368.

[309] *Id*. at 368–69.

[310] *Id.* at 374–76.

[311] *Id*. at 382 (Alito, J., dissenting).

[312] 134 S. Ct. 1188 (2014).

[313] *Id*. at 1198.

[314] *Id*. at 1193.

[315] *In re* Law, 401 B.R. 447, 451 (Bankr. C.D. Cal. 2009).

[316] *Law*, 134 S. Ct. at 1193.

[317] *Id*.

instead award that $75,000 to the trustee as partial reimbursement. Following Ninth Circuit precedent, the bankruptcy court agreed.[318] On appeal to the Supreme Court, the Court unanimously reversed. Writing for the Court, Justice Scalia explained, "[i]t is hornbook law that § 105(a) does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code."[319] Although Section 105(a) "confers authority to 'carry out' the provisions of the Code, [] it is quite impossible to do that by taking action that the Code prohibits."[320] Because 11 U.S.C. § 522 gave the debtor the right to the homestead exemption prescribed by his state, the bankruptcy court's order violated an "express term" of the court, and was therefore reversed.[321]

The impact of *Law* was both broad and immediate,[322] as it arguably gave bankruptcy courts authority to "eviscerate"[323] longstanding precedent regarding the scope of their equitable powers under Section 105.[324] Such a result is consistent with Justice Scalia's general commitment to reducing arbitrary decisionmaking and increasing predictability.[325] From this perspective, the decision in *Law* can be read as a dramatic rollback of bankruptcy judge's authority to engage in ad hoc decisionmaking.[326]

Similarly, Justice Scalia's decision in *RadLAX*[327] has also been described as a decision that is, at its core, about "the proper domain of the bankruptcy judge."[328] On its face, *RadLAX* involves the proper construction of 11 U.S.C. § 1129(b)(2), which applies when a Chapter 11 plan must be crammed down, i.e., confirmed over

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[318] *Id*. at 1193–94.

[319] *Id*. at 1194 (citation omitted) (internal quotation marks omitted).

[320] *Id.*

[321] *Id.* at 1195. Justice Scalia's discussion of the 2007 *Marrama* decision raises some questions about his fidelity to precedent. *See infra* Section VI.D.

[322] *See* Hon. Christopher D. Jaime, *Objections to Exemptions Under State Law After* Law v. Siegel, AM. BANKR. INST. J., Mar. 2017, at 14, 14 ("By now, nearly every federal judge, trustee and bankruptcy practitioner has in one way or another heard about, read or felt the impact of the U.S. Supreme Court's opinion.").

[323] *See, e.g.*, Ashley M. McDow & Michael T. Delaney, Law v. Siegel—*The End of Equitable Authority of the Bankruptcy Court?*, 33 CAL. BANKR. J. 249, 277 (2015) (explaining that the "broad reasoning employed throughout [the decision] provides courts with ample bases to eviscerate existing precedent authorizing the Bankruptcy Court to utilize its equitable authority to prevent abuse.").

[324] *Id.* at 276.

[325] *See* SCALIA, *supra* note 18, at 28.

[326] *See Law*, 134 S. Ct. at 1194–95 ("[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code.") (citations omitted) (internal quotation marks omitted). Such language suggests a trend toward the proceduralist view, which constrains judges' authority, as opposed to the traditionalist view, which advocates for broad discretion. *See* Baird, *supra* note 6, at 595.

[327] RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639 (2012).

[328] *See* Douglas G. Baird and Anthony J. Casey, *Bankruptcy Step Zero*, 2012 SUP. CT. REV. 203, 218 (2012) (describing *RadLAX* as part of "a family of cases in which the Court has limited the domain over which the bankruptcy judge may exercise her discretion.").

the objections of classes of creditors who will be impaired by the plan.[329] In cases involving cramdown, a prerequisite to confirmation is that the plan be "fair and equitable,"[330] and the three subprovisions of Section 1129(b)(2)(A) state the conditions under which a court may satisfy itself that a plan is fair and equitable as to a secured creditor who has objected to confirmation.

In *RadLAX*, Amalgamated Bank served as trustee for a secured creditor who was owed $120 million secured by a mortgage on a hotel that was under construction.[331] The debtor ran out of money and, unable to complete the project, filed for Chapter 11. Under the debtor's Chapter 11 plan, the hotel would be sold at auction "free and clear"[332] of the Bank's mortgage, and the Bank would be repaid based on the proceeds of the sale.[333] However, a key point of contention was that the Bank would not be allowed to "credit bid,"[334] and would instead have to bid with cash if it wanted to take the property at auction.[335] The Bank argued that this violated the specific provision in Section 1129(b)(2)(A)(ii) that applied to "free and clear" sales.[336] But the plan proponents argued that the court could rely on an alternate basis for finding that the plan is fair and equitable: Section 1129(b)(2)(A)(iii), which authorizes confirmation so long as the secured creditor realizes the "indubitable equivalent"[337] of its lien interest.[338] According to this argument, the amount bid at auction would by definition be the "indubitable equivalent" of the Bank's interest in the property.[339]

Notwithstanding the market-based appeal of this logic, the Supreme Court disagreed. In a unanimous opinion authored by Justice Scalia, the Court disregarded the disjunctive "or" in the three-part subprovision of Section 1129(a)(2)(A).[340] Instead, applying the "general/specific canon,"[341] the Court held that the specific

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[329] *RadLAX*, 566 U.S. at 642.

[330] 11 U.S.C. § 1129(b)(1) (2017).

[331] *RadLAX*, 566 U.S. at 641.

[332] 11 U.S.C. § 363(f) (2012).

[333] *RadLAX*, 566 U.S. at 644.

[334] "Credit bid" means that the bank could attempt to buy back the collateral from the estate at auction without putting up any cash, simply by bidding the amount it was already owed. Baird & Casey, *supra* note 328, at 207.

[335] For a discussion of the problems with sales that do not allow credit bidding, see Michael J. Hoffman, RadLAX Gateway Hotel, LLC v. Amalgamated Bank: *Examining the Importance of Credit Bids at Chapter 11 Asset Sales*, 50 HOUS. L. REV. 1223, 1248–53 (2013).

[336] *RadLAX*, 566 U.S. at 643–44.

[337] 11 U.S.C. § 1129(b)(2)(A)(iii) (2017).

[338] *Id.*

[339] *RadLAX*, 566 U.S. at 643–44.

[340] 11 U.S.C. § 1129(b)(2)(A)(ii)–(iii) (2017).

[341] *RadLAX*, 566 U.S. at 645 ("It is a commonplace of statutory construction that the specific governs the general. . . . [P]articularly . . . where . . . Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.") (citations omitted) (internal quotation marks omitted).

subprovision dealing directly with "free and clear" sales controlled in all free and clear sales and required that secured creditors be allowed to credit bid.[342]

As Professors Douglas Baird and Anthony Casey argued that a significant impact of the *RadLAX* decision is to constrain a bankruptcy judge's ability to evaluate bankruptcy sales on a case by case basis.[343] Accordingly, they place *RadLAX* in line with decisions like *Stern* and *Granfinanciera*, in terms of the limits they impose on the judicial powers of bankruptcy judges. Read from this perspective, Justice Scalia's unanimous opinions in *RadLAX* and *Law* both strongly vindicate the views that he had previously expressed in concurrences that there should be clear rules that define and limit the scope of bankruptcy judges' power.

Litigation over the scope of a bankruptcy judge's power to hear and resolve issues introduces a layer of cost and uncertainty into bankruptcy proceedings. Likewise, the possibility that a bankruptcy judge can use equitable powers to contravene the plain language of the text reduces predictability and encourages the parties to spend resources pressing a wider range of arguments in the hopes of triggering the judge's sense of equity.[344] Justice Scalia's consistent advocacy for simpler and easier tests would have the laudable effect of minimizing that added burden for all parties, as well as for the bankruptcy courts themselves. But as with the other aspects of his judicial philosophy, the benefits for lower courts have not been fully realized.[345] Instead, lower courts still find these issues cloudy and uncertain, perhaps for the reasons explored in the next Section.

VI. THE WEAK SPOTS IN JUSTICE SCALIA'S BANKRUPTCY OEUVRE

As Sections IV and V suggest, several aspects of Justice Scalia's rule-based textualism seem to be an excellent fit for bankruptcy practice. However, as Section V also shows, Justice Scalia was often advocating these positions in concurrence, or even dissent. If Scalia's rules were such a great fit for bankruptcy law, why didn't more of his colleagues sign on to them?[346]

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342 *RadLAX*, 566 U.S. at 643–48.

343 Baird & Casey, *supra* note 328, at 216–20.

344 *See, e.g.*, SCHAUER, *supra* note 74, at 144–47 (explaining the efficiency benefits in reducing the acceptable range of decisionmaking).

345 *See* Dembart & Markell, *supra* note 12, at 394–95 (noting that the constitutional status of the bankruptcy courts as well as the statutes defining the limits of their authority are not entirely clear).

346 *See* Braucher, *supra* note 254, at 99 (arguing that despite Justice Scalia's staunch advocacy, most Justices "have lost patience with rigid textualism"); *see also* Dembart & Markell, *supra* note 12, at 386–87 (arguing that despite Justice Scalia's textual revolution, the Supreme Court had not provided any meaningful clarity for lower court judges); Waldron & Berman, *supra* note 12, at 202–03 (lamenting the "confusion" and "contradiction" in the Supreme Court's bankruptcy decisions).

This Section will attempt to pinpoint an answer to a question that was undoubtedly quite vexing for Justice Scalia himself. In particular, this Section will highlight four ways in which Justice Scalia muddied the rule-based textualism that he demonstrated so well in majority opinions like *Timbers* and dissents like *Dewsnup*.

First, Part A illustrates that despite his bluster about allowing the text to be the ultimate arbiter of statutory meaning, he sometimes appeared to embrace the sort of extratextual interpretive tools that he shunned elsewhere. Second, Part B highlights that Scalia's failure to articulate or apply clear rules regarding the role of pre-Code practice made him susceptible to the very accusations of judicial policymaking that he leveled against his colleagues. Third, Part C shows that Justice Scalia was not consistent in his dismissive attitude toward legislative history and sometimes even discussed it in his own decisions. Fourth, Part D suggests that Scalia made frequent and perhaps hypocritical use of the label "dicta" in order to reject the clearest and most predictable path to discerning answers that would not be overturned on appeal: namely, past precedent.[347]

Even Scalia himself was not consistent in championing the most clear and predictable path for bankruptcy law. This is not especially surprising, as it seems unrealistic to expect any judge to demonstrate an unequivocal commitment to fixed principles in every single case.[348] But when the strongest proponent of rule-based textualism appears to be straying from the rules in particular cases, the entire philosophy is undermined.[349]

A. Lack of Clarity About Whether and When to Turn to Extratextual Canons

Section V.A offered several examples of Justice Scalia's commitment to deriving answers from statutory text. In contrast, this Section highlights a few examples of Scalia's bankruptcy decisions where he deemed the text to be insufficient to yield a clear answer. In each case, the court undoubtedly reached what it believed to be the right answer, but the court was forced to embrace more than the plain text to get to that result.

Perhaps the most innocuous example is *Young v. United States*.[350] In *Young*, the Court faced the question of whether Chapter 13 debtors could discharge older tax debt.[351] Under 11 U.S.C. § 523(a)(1)(A), certain tax debts are nondischargeable.[352] Among other such nondischargeable tax debts are those taxes that are also deemed to be priority debts: they are paid ahead of other nonpriority

[347] *See generally* Kaplow, *supra* note 74, at 578–59 (explaining the role of precedent in analyzing the relative efficiencies of rules versus standards).

[348] *See, e.g.*, Nelson, *supra* note 30, at 397–98 (noting that "rigorously principled decisionmaking may be too much to expect from any judges.").

[349] *See, e.g.*, Waldron & Berman, *supra* note 12, at 231 (deriding the implication that there is an "easy button" for statutory interpretation).

[350] 535 U.S. 43 (2002).

[351] *Id.* at 44–45.

[352] *Id*. at 46.

creditors.[353] The statutory provision regarding priority taxes creates a three-year lookback period under Section 507(a)(8)(A)(i).[354] This apparently straightforward lookback period begins on the date that the petition is filed.[355] But this creates a possible "loophole"[356] in light of the fact that debtors can file multiple petitions, and Chapter 13 petitions typically remain pending for several years, during which time creditors (including the IRS) are prohibited from taking any collection action.[357] Thus, some enterprising debtors were filing Chapter 13 petitions, using the protections of the automatic stay until the statutory lookback period for taxes had passed, and then filing for Chapter 7.[358] In that subsequent Chapter 7 bankruptcy, these debtors would then argue that by the time of their second petition, the back taxes were no longer within the three-year window, and therefore could be discharged.[359]

A unanimous court rejected this debtor-friendly interpretation.[360] In a decision authored by Justice Scalia, the Court held that the lookback provision in Section 507(a)(8)(A)(i) was akin to a statute of limitations.[361] In turn, equitable tolling is typically available for a statute of limitations.[362] Bankruptcy courts are "courts of equity and 'appl[y] the principles and rules of equity jurisprudence'"[363] and here, equitable tolling was not clearly inconsistent with the Code.[364] Therefore, the court concluded that lower courts should reject such efforts to use back-to-back petitions to make an end run around the three-year period.[365]

Justice Scalia's decision in *Young* makes several unsupported assumptions about congressional intent: namely, that Congress designed Section 507(a)(8)(A)(i) to be a statute of limitations,[366] that Congress was aware of the "hornbook law"[367] that statutes of limitations are subject to equitable tolling,[368] and that by including equitable tolling in other provisions of the Code, Congress did not intend to create a "negative inference"[369] about the possibility of equitably tolling this particular lookback period.[370]

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[353] 11 U.S.C. § 523(a)(1)(A) (2012).
[354] *Young*, 535 U.S. at 46.
[355] *Id*.
[356] *Id*.
[357] *Id*. The prohibition arises due to the automatic stay under 11 U.S.C. § 362. *Id.* at 46.
[358] *Id.*
[359] *Id*. at 46–47.
[360] *See id.* at 47.
[361] *Id.* at 47–48.
[362] *See id.* at 49–50.
[363] *Id.* at 50 (citing Pepper v. Litton, 308 U.S. 295, 304 (1939)).
[364] *See id.*
[365] *See id.* at 50–51.
[366] *See id.* at 47–48.
[367] *Id.* at 49.
[368] *Id.* at 49–50.
[369] *Id.* at 52.
[370] *See id.* at 52–53.

Although this result is undoubtedly a fair one that prevents debtors from simultaneously taxing and exploiting the bankruptcy system, recall Justice Scalia's admonition that "bankruptcy law has little to do with natural justice."[371] It's not especially difficult to imagine Scalia in dissent in this case. Congress was undoubtedly aware that its statutory scheme created the possibility of serial filings, and in fact had included tolling provisions elsewhere in the Bankruptcy Code. Why wouldn't it be equally fair to assume that Congress intended to create clear, bright line rules about dischargeability of debt? Isn't it possible to view the three-year lookback period as one that provides clarity to governments as well, helping them make more accurate projections about accounts receivable and encouraging them to devote resources more efficiently to current collection actions? And doesn't it strain standard principles of interpretation to construe 11 U.S.C. § 523(a)(1) as a statute of limitations, when some of the other nondischargeability provisions of 11 U.S.C. § 523 have explicit time-bars?[372] These are just a few of the questions that a dissenter might have raised in objection to the result in *Young*, and they all sound very Scalia-like.

Another example where Scalia was willing to look beyond the straightforward textual command came in *Citizens Bank of Maryland v. Strumpf*.[373] This decision involved the scope of the automatic stay under 11 U.S.C. § 362: does Congress' broad prohibition against any act or action to collect a debt from the debtor or lay claim to property of the estate encompass a bank's decision to place a temporary hold on debtor funds in which it may have an interest?[374] A unanimous court concluded that this sort of administrative hold did not violate 11 U.S.C. § 362 because it did not take property from the debtor nor did it amount to an exercise of dominion over property owned by the debtor.[375]

Authoring the unanimous decision, Scalia went to great lengths to explain why the bank's actions in this case were different from ordinary violations of the automatic stay:

> [W]e are unpersuaded by respondent's additional contentions that the administrative hold violated §§ 362(a)(3) and 362(a)(6). . . . Respondent's reliance on these provisions rests on the false premise that petitioner's administrative hold took something from respondent, or exercised dominion over property that belonged to respondent. That view of things

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[371] Dewsnup v. Timm, 502 U.S. 410, 435 (1992) (Scalia, J., dissenting).

[372] *See, e.g.*, 11 U.S.C. § 523(a)(2)(C)(i)(I) (2012) ("[C]onsumer debts owed to a single creditor and aggregating more than $500 for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title are presumed to be nondischargeable . . . ."). Importantly, the Court's conclusion that this was a statute of limitation was based in part on petitioners' concession. *Young*, 535 U.S. at 47–48. Perhaps the decision would have been more difficult if petitioners had mounted a serious challenge to this foundational aspect of the decision.

[373] 516 U.S. 16 (1995).

[374] *Id*. at 17–18.

[375] *See id*. at 19–21.

> might be arguable if a bank account consisted of money belonging to the depositor and held by the bank. In fact, however, it consists of nothing more or less than a promise to pay, from the bank to the depositor, . . . and petitioner's temporary refusal to pay was neither a taking of possession of respondent's property nor an exercising of control over it, but merely a refusal to perform its promise.[376]

As with *Young*, this result is undoubtedly logical. If banks were forced to immediately allow a debtor to withdraw monies on demand, then banks' traditional rights of set-off would be rendered meaningless as a practical matter. But it is also easy to imagine Scalia in dissent, criticizing the majority for tap dancing around the straightforward protections of 11 U.S.C. § 362. It is even easier to imagine Scalia arguing that if Congress intended to create an exception to preserve banks' rights to set-off, it could have done so alongside the twenty-eight other very detailed exceptions to 11 U.S.C. § 362.[377] In fact, Justice Scalia made this precise argument in *Law v. Siegel*: "[t]he Code's meticulous—not to say mind-numbingly detailed—enumeration of exemptions and exceptions to those exemptions confirms that courts are not authorized to create additional exceptions."[378]

Both *Young* and *Citizens Bank* demonstrate that Scalia was willing to embrace nontextual alternatives to a straightforward reading of the words that Congress used in the Bankruptcy Code. This willingness in turn undermines the commitment to textual justice that Scalia demonstrated in cases like *Dewsnup* and *Ransom*. Even as Justice Scalia expressed, "the greatest sympathy for the Court of Appeals who must predict which manner of statutory construction we shall use for the next Bankruptcy Code case,"[379] he was adding to the predictability problems by readily endorsing new exceptions. It is particularly challenging to take a principled stand as a rule-based textualist while simultaneously writing decisions that speak of broader considerations that clearly go beyond the plain text of the Code.

Undoubtedly, there are important and defensible reasons for Scalia's departure from the straightforward text in these two cases. Nonetheless, his paeans to textualism might have had more impact with his colleagues and with lower courts if he had not authored decisions that opted to overlook the very concepts that he advocated for elsewhere. Perhaps his philosophy would have had broader impact if another justice had authored the lead opinion in these cases, allowing Justice Scalia to concur to explain specifically why he was departing from a more absolutist approach.[380] But as the record stands, such decisions sent mixed messages to

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[376] *Id.* at 21 (citations omitted).

[377] To the contrary, 11 U.S.C. § 362(a)(7) (2012) expressly extends the automatic stay to set-offs; a textualist could easily argue that the reference to "set-offs" in subsection (a) coupled with the failure to mention set-offs among the exceptions in subsection (b) demonstrates that Congress did not intend to create such an exception.

[378] Law v. Siegel, 134 S. Ct. 1188, 1196 (2014) (citations omitted).

[379] Dewsnup v. Timm, 502 U.S. 410, 435 (1992) (Scalia, J., dissenting).

[380] An example of such a concurrence is Justice Stevens' concurrence in *FCC v. NextWave Personal Communications Inc.*, 537 U.S. 293 (2003) in which he noted that the

bankruptcy judges and litigants who might otherwise have viewed Scalia as an unequivocal champion of clear and easy rules that derive solely from statutory text.[381]

Finally, any critique of Justice Scalia's commitment to textualism must address his dissent in *Till v. SCS Credit Corp*.[382] The Supreme Court took up *Till* to resolve a circuit split about how to calculate the proper rate of interest when a debtor uses a Chapter 13 plan to pay a secured creditor over that creditor's objections.[383] Prior to the 2005 amendments in BAPCPA, Chapter 13 allowed car owners to restructure their car loans by reducing the repayment obligation to the present value of the car.[384] In *Till*, the Chapter 13 debtors wanted to pay off their car debt with added interest of 9.5% over the life of the plan, while the secured creditor argued for 21%—its typical rate for subprime lending that adequately reflected the risk that the debtors would not complete plan payments.[385]

In the absence of any real guidance in the Code, lower courts devised a startling array of formulas for calculating the appropriate rate, ranging from the debtor-friendly cost of funds rate to a creditor-friendly forced loan rate.[386] In *Till*, a plurality opinion authored by Justice Stevens endorsed the relatively debtor-friendly formula rate, instructing bankruptcy courts to charge the prime rate plus some additional percentage to account for the specific risk that the debtor would not follow through with the Chapter 13 plan.[387] The plurality noted that the typical risk adjustment for courts following the formula rate was in the range of 1–3%.[388] Accordingly, it held that the debtors' proposal to pay 9.5%—the prime rate of 8% plus a risk adjustment of 1.5%—was appropriate.[389]

Strenuously disagreeing, Justice Scalia penned a four-justice dissent that argued for the presumptive contract rate. In his view, the bankruptcy courts' inquiry should always begin with the contract rate to which the parties had agreed, leaving open the possibility that either party could argue for a higher or lower rate depending

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application of 11 U.S.C. § 525 to the FCC's license cancellation presented a "close case[ ]" and explained why he was siding with the majority. *NextWave*, 537 U.S. at 308–10 (Stevens, J., concurring).

[381] *See* Waldron & Berman, *supra* note 12, at 202 (noting the absence of "a consistent methodology that can be assuredly applied by the lower courts" in the Supreme Court's recent bankruptcy jurisprudence); *see also id.* at 231 (explaining that while a "magic tool" or "easy button" for statutory interpretation might be desirable, no such device exists).

[382] 541 U.S. 465, 491 (2004).

[383] The rate of interest is known as the "cram-down" rate, a colorful phrase that draws on the notion that the plan has been "crammed down" the creditor's throat.

[384] The ability to strip down car loans to present value was limited in 2005 with the so-called "hanging paragraph" that follows 11 U.S.C. § 1325(a)(9) (2012). The BAPCPA amendment prevents Chapter 13 debtors from stripping down liens on cars that they have owned for less than 910 days (approximately two-and-a-half years).

[385] *See Till*, 541 U.S. at 471.

[386] *Id*. at 473–74.

[387] *See id.* at 478–79.

[388] *Id.* at 480.

[389] *See id.*

on the circumstances.[390] He contended that this was the best way to maximize efficiency while ensuring that secured creditors were not systematically undercompensated for risk, given the high rate of failure of Chapter 13 plans.[391] For the Chapter 13 debtors in *Till*, this meant that the default would be to continue to pay the 21% interest to which they had originally agreed.[392] In turn, this creditor-friendly default meant that the Tills and many other subprime borrowers would likely be unable to confirm a Chapter 13 plan that involved keeping their car.

But Justice Scalia was only able to convince three other justices to support his proposal.[393] Indeed, it was Justice Thomas who broke ranks with his conservative colleagues and gave the necessary fifth vote to the debtors.[394] In a concurrence that focuses on the plain text of 11 U. S. C. § 1325(a)(5)(B), Justice Thomas argued that all of approaches spawned by the lower courts were wrong. According to Justice Thomas, the mistake was that each approach incorrectly focuses on how to value the debtor's *promise* to pay a certain amount over the life of the plan; in contrast, this provision of Chapter 13 only requires the debtor to pay the value of the property.[395] In other words, the Code requires no risk adjustment at all. Because the debtors' offer to pay 9.5% interest was overly generous and therefore unobjectionable, Justice Thomas gave the necessary fifth vote for plan confirmation to the debtors in *Till*.[396]

For bankruptcy practitioners, *Till* did not provide much clarity or certainty.[397] The plurality decision in *Till* only spawned more confusion in the bankruptcy world, with most courts refusing to apply its logic in Chapter 11 cases, and some even refusing to apply it in Chapter 13 cases.[398] The decision's main significance is as an example of Justice Scalia's willingness to engage in the very act of policy-making that he typically argued should be left to Congress. Moreover, in perhaps the ultimate irony, it is a case in which Justice Thomas stood alone in his advocacy of a textual solution that would have provided the maximum clarity to lower courts and the maximum predictability to litigants. As such, *Till* raised questions about Justice Scalia's overall commitment to textualism, and to predictable outcomes for that matter.[399]

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[390] *See id.* at 498–99 (Scalia, J., dissenting).

[391] *See id.* at 500.

[392] *See id.* at 472 (plurality opinion).

[393] *Id*. at 491 (Scalia, J., dissenting). Chief Justice Rehnquist and Justices O'Connor and Kennedy joined the dissent. *Id.*

[394] *Id.* at 485 (Thomas, J., concurring).

[395] *Id.*

[396] *See id.* at 485.

[397] *See* Dembart & Markell, *supra* note 12, at 384–85 ("[W]hile the Court may have ably decided [*Till v. SCS Credit Corp.*], it hasn't left those in the courtroom or the boardroom much certainty about how to apply the case in the future.").

[398] *See* Austin, *supra* note 63, at 1119–22; *see also* Waldron & Berman, *supra* note 12, at 197 n.13 (expressing agreement with Justice Scalia's candid comment that the decision in *Till* "[was] unlikely to burnish the Court's reputation for reasoned decisionmaking").

[399] *See, e.g.*, Miranda McGowan, *Do as I Do, Not as I Say: An Empirical Investigation*

B. The Lack of Clarity About the Impact of Pre-Bankruptcy Practice

Another area in which Justice Scalia sent mixed messages is with the role of pre-Code practice. Arguments about pre-Code practice started to emerge shortly after Congress enacted the sweeping Bankruptcy Reform Act of 1978. Where Congress had not spoken directly and unequivocally to an issue, litigants would point to decisional law predating the Code and argue that Congress did not intend to disrupt existing practices.[400] By the time Justice Scalia arrived on the Court in fall 1986, the Court had already embraced the notion that pre-Code practice should influence its interpretation of the Code.[401] As the Court explained in *Midlantic National Bank v. New Jersey Dept. of Environmental Protection*,[402] "[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."[403] However, no coherent doctrine had yet emerged for whether and when the Court ought to consider pre-Code practice alongside textual evidence.[404] Thus, Justice Scalia was in a prime position to help shape the Court's jurisprudence regarding the proper role of pre-Code practice. But his writings in this area provide mixed guidance at best.

Justice Scalia had plenty of opportunities to address the role of pre-Code practices. In fact, in one of his earliest decisions, *United Savings Ass'n v. Timbers of Inwood Forest Associates*,[405] his conclusion derived in part from the pre-Code practice of denying postpetition interest to undersecured creditors.[406] In rejecting the petitioner's arguments in favor of a more generous reading of the relevant statutory provisions, he pointed to the absence of any evidence that Congress intended to

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of Justice Scalia's Ordinary Meaning Method of Statutory Interpretation, 78 MISS. L.J. 129, 184 (2008) (arguing that Justice Scalia's dissent in *Till* deployed a common tactic of attributing a purpose to statutory language without any evidence); *see also* Dembart & Markell, *supra* note 12, at 385 (arguing that with unhelpful decisions like *Till*, the Court evidenced "disdain or even mild hostility to or an unfamiliarity with the day-to-day operations of the bankruptcy courts.").

[400] *See, e.g.*, Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot., 474 U.S. 494, 500–01 (1986) (pointing to three lower court decisions as evidence that "the trustee's abandonment power had been limited by a judicially developed doctrine intended to protect legitimate state or federal interests" and reasoning that Congress could not have intended to disrupt this doctrine in enacting 11 U.S.C. § 554).

[401] *See id.* at 501.

[402] 474 U.S. 494 (1986).

[403] *Id*. at 501 (citing Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 266–67 (1979)).

[404] *Compare id.* at 500–01 (relying on three lower court decisions to establish pre-Code practice), *with* United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 249–53 (1989) (O'Connor, J., dissenting) (arguing that the majority had given short shrift to a pre-Code practice that had been followed by the Supreme Court as well as every Court of Appeals to consider the issue, based solely on where Congress had opted to place a comma).

[405] 484 U.S. 365 (1988). For more on *Timbers*, see *supra* Section V.A.

[406] *Timbers*, 484 U.S. at 373.

change pre-Code practices.[407] In a rare reference to legislative history, he wrote: "a major change in the existing rules would not likely have been made without specific provision in the text of the statute . . . ; it is most improbable that it would have been made without even any mention in the legislative history."[408]

In other bankruptcy cases, Justice Scalia took a hard line about the role of pre-Code practice.[409] For example, in *Dewsnup* and *RadLAX*, both discussed above in Section V, Justice Scalia appeared to be endorsing a bright-line rule for lower courts: arguments about pre-Code practice must yield to the straightforward commands of the text that Congress enacted.[410] Such a bright-line rule would reduce litigation and promote certainty. But as it turns out, Justice Scalia was not the best advocate for a bright-line rule either.

The clearest example of Scalia's equivocation about the role of pre-Code practice comes in the 5-4 decision in *BFP v. Resolution Trust Corp*.[411] There, the Court faced a tricky question regarding the scope of a trustee's powers to invalidate (or, in bankruptcy parlance, "avoid") certain recent transactions involving the debtor's property.[412] 11 U.S.C. § 548(a)(2) authorizes a trustee to undo so-called "fraudulent transfers,"[413] in which transactions involving debtor property during the two years leading up to the bankruptcy filing are deemed fraudulent as a matter of law if the debtor received less than a reasonably equivalent value.[414] This very broad avoidance power appears to come into direct conflict with the foreclosure laws of states that allow forced sales of property, as the price paid in a forced sale is often much lower than what a buyer would pay on the open market.[415] The question that divided the Court in *BFP* was whether and when a trustee could undo the results of a state foreclosure sale conducted within the two years leading up to bankruptcy.[416]

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[407] *Id.* at 373–74.

[408] *Id.* at 380. This line of reasoning is also significant for its reference to legislative history: for all of Scalia's bluster about refusing to consider what was in the legislative history to interpret statutory text, he was nonetheless willing to draw conclusions based on what was absent from the legislative history. In a striking bit of irony, the Solicitor General's brief in *Dewnsup* relied on this passage from *Timbers* to support the proposition that Congress could not have intended to radically change the pre-Code expectation that secured claims ordinarily pass through bankruptcy unaltered. *See* Brief for the Respondents at 23, Dewsnup v. Timm, 502 U.S. 410 (1992) (No. 90-741).

[409] *See, e.g.*, Dewsnup v. Timm, 502 U.S. 410, 435 (1992) (Scalia, J., dissenting) (pointing to an earlier decision in which the Court had "deemed the pre-Code practice to be irrelevant."); RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 649 (2012) ("As for pre-Code practices, they can be relevant to the interpretation of an ambiguous text, but we find no textual ambiguity here.").

[410] *See supra* Sections V.B, V.D.

[411] 511 U.S. 531 (1994).

[412] *See id.* at 533–34. *BFP* involved a Chapter 11 debtor in possession seeking to use the avoiding powers of a trustee as authorized by 11 U.S.C. § 1107(a). *Id*. at 534.

[413] *See id.* at 535.

[414] *See id* (citation omittted).

[415] *Id*. at 537–38.

[416] *Id.* at 552 (Souter, J., dissenting).

The courts of appeals devised a variety of ways to approach this issue. For example, the Fifth Circuit adopted what became known as the *Durrett* rule, holding that a foreclosure sale would be invalidated if it were less than 70% of fair market value.[417] The Seventh Circuit endorsed a case-by-case approach, in which a foreclosure sale created a presumption of reasonably equivalent value that the trustee could rebut with specific evidence.[418] Other circuits rejected this inquiry altogether, holding that the price paid in a noncollusive state law foreclosure constituted "reasonably equivalent value" for the purposes of fraudulent transfer analysis under 11 U.S.C. § 548(a)(2).[419]

Justice Scalia wrote for the slender five-justice majority, siding with the latter group of courts.[420] He rejected the notion that bankruptcy law distinguishes between forced sale value and fair market value.[421] In his view, the laws of fraudulent transfer and foreclosure had enjoyed "peaceful co-existence" for 400 years; there was no indication in the Code that Congress had intended to "disrupt th[is] ancient harmony."[422]

In stark contrast to his *Dewsnup* dissent two years earlier, where Scalia criticized the majority for elevating pre-Code practice above the plain meaning of the text, *BFP* featured a four-justice dissent that accused Scalia of the very same flawed logic.[423] Interestingly, the author of the *BFP* dissent was Justice Souter, who alone joined Justice Scalia's scathing dissent in *Dewnsup*; and, in the ultimate irony, Justice Souter drew on many of the same themes that Justice Scalia had used to criticize his colleagues just two years earlier.[424]

Souter's dissent began by arguing that the text of Section 548(a)(2) was clear, with the apparent subtext being that Scalia was breaking his own rule regarding pre-Code practice.[425] Souter next explained that there were good reasons why Congress would have wanted trustees to use Section 548 to up-end the results of state foreclosure sales: "it surely is plausible that Congress, in drafting the Bankruptcy Code, would find it intolerable that a debtor's assets be wasted and the bankruptcy estate diminished, solely to speed a mortgagee's recovery."[426] Souter then criticized the majority for its faithlessness to the text: "[c]onfronted with the eminent sense of the natural reading, the Court seeks finally to place this case in a line of

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[417] *See* Durrett v. Wash. Nat. Ins. Co., 621 F.2d 201, 203–04 (5th Cir. 1980).

[418] *See In re* Bundles, 856 F.2d 815, 824–25 (7th Cir. 1988).

[419] *See, e.g.*, *In re* Winshall Settlor's Trust, 758 F.2d 1136, 1139 (6th Cir. 1985) (holding that the price paid in a non-collusive state law foreclosure constituted "reasonably equivalent value"). This was also the position taken by the Ninth Circuit in its decision below. *In re* BFP, 974 F.2d 1144, 1148 (9th Cir. 1992).

[420] *BFP*, 511 U.S. at 548–49.

[421] *Id*. at 537–38.

[422] *Id*. at 542–43.

[423] *Id*. at 565–66 (Souter, J., dissenting).

[424] *Compare* Dewsnup v. Timm, 502 U.S. 410, 420–36 (1992) (Scalia, J., dissenting), *with BFP*, 511 U.S. at 549–70 (Souter, J., dissenting).

[425] *BFP*, 511 U.S. at 566 (Souter, J., dissenting).

[426] *Id*. at 564–65.

decisions . . . in which we have held that something more than mere plain language is required."[427] Finally, in perhaps the ultimate rebuke to his *Dewsnup* co-dissenter, Souter concluded:

> Like the Court, I understand this case to involve a choice between two possible statutory provisions . . . . But that choice is not ours to make, for Congress made it in 1984, by enacting the former alternative into law and not the latter. Without some indication that doing so would frustrate Congress's clear intention or yield patent absurdity, our obligation is to apply the statute as Congress wrote it.[428]

Thanks to Justice Souter's pointed dissent, the contrast between Scalia's approach in *Dewsnup* and *BFP* could not be starker. Undoubtedly, Scalia's about-face was motivated in part by federalism concerns.[429] Indeed, one factor not present in *Dewsnup* is Scalia's argument that federal law should not be lightly read to interfere with important state interests like the validity of real estate title.[430] There are also obvious efficiency benefits of a bright line rule that treats judicial foreclosures as final.[431]

Nonetheless, setting aside the merits of these counterarguments, the *BFP* descision created the perception that Justice Scalia was willing to rewrite the rules of his rule-based textualism.[432] This perception may have undermined the rule-based approach he had so recently advocated in cases like *Timbers* and *Dewsnup*, especially among lower court judges tasked with applying the rules.[433] It is not easy being a rule-based textualist, but it is even harder to cultivate adherents to a particular philosophy when colleagues accuse you of abandoning the very principles that underlie that philosophy.

Justice Scalia was a bit more circumspect about the role of pre-Code practice in *Hartford Underwriters Ins. Co. v. Union Planters Bank*,[434] which addressed

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[427] *Id*. at 565.

[428] *Id*. at 570.

[429] *Id.* at 543–44 (majority opinion); *see also* Nickolai G. Levin, *Constitutional Statutory Synthesis*, 54 ALA. L. REV. 1281, 1366–68 (2003) (describing the role federalism played in *BFP*).

[430] *BFP*, 511 U.S. at 544.

[431] Despite the efficiency benefits, the merits of the textual argument are questionable. Congress does defer to state law in other provisions of the Code. *See, e.g.*, 11 U.S.C. § 544 (2017) (incorporating state substantive law regarding recording statutes and fraudulent transfers). As another example, in determining how foreclosures of federal interests should be handled, Congress created a statutory scheme that largely defers to state processes. *See generally* 28 U.S.C. § 2410 (2017) (describing actions affecting property on which the United States has a lien).

[432] *See* Dembart & Markell, *supra* note 12, at 390–91 (citing Justice Scalia's decision in *BFP* as evidence that plain meaning is not a coherent standalone doctrine and instead will always "share the stage with extra-textual sources").

[433] *See id*.

[434] 530 U.S. 1 (2000).

whether a nontrustee could use 11 U.S.C. § 506(c) to recover administrative expenses.[435] Although the petitioner pointed to pre-Code practices authorizing such recovery, Scalia's unanimous opinion questioned whether this practice was "sufficiently widespread and well recognized to justify the conclusion of implicit adoption by the Code"[436] and expressed doubt that this was "the type of rule that . . . Congress was aware of when enacting the Code."[437] He concluded, "[i]n any event, while pre-Code practice 'informs our understanding of the language of the Code,' it cannot overcome that language. It is a tool of construction, not an extratextual supplement."[438]

Although Scalia's opinion in *Hartford Underwriters* did not draw a dissent, one can imagine that a colleague inspired enough to challenge the result would find an easy target in the seeming inconsistency regarding whether and when pre-Code practice will be significant. The sporadic indulgence of pre-Code practice appears to be at odds with two beneficial aspects of Justice Scalia's jurisprudence. First, it requires litigants to fill the record with evidence of pre-Code practice in the hopes that the court will find the text ambiguous enough to consider it, thereby increasing litigation costs. Second, it depends on judicial assessment of whether the practice might have been "widespread"[439] enough to be relevant. This loose test is particularly problematic in light of the argument that a sufficiently widespread pre-Code practice is more likely to have been directly addressed by Congress in the statute.[440] Thus, these sorts of judicial assessments about the importance of pre-Code practice can easily start to resemble the "sheer judicial power-grab[s]"[441] that Justice Scalia complained of elsewhere.[442]

The issue of pre-Code practices highlights a tension in Scalia's judicial philosophy: on the one hand, his originalist approach to constitutional interpretation compels him to consider Constitution-era practices in order to inform his understanding of the constitutional text. So on many levels, it makes perfect sense to consider creditor-debtor practices in 1978 to inform his understanding of the Bankruptcy Code. Yet at the same time, considering these practices requires some indication that Congress was aware of them, which blends into the sort of questions about legislative intent that Scalia was so adamant that the Court should avoid. This creates a paradox as demonstrated early on with Justice Scalia's unusual reference to legislative history in his *Timbers* opinion.[443] Scalia's checkered indulgence of pre-Code practice arguments further reflects the difficulty in resolving this tension, and

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[435] *Id*. at 4–5.
[436] *Id*. at 10.
[437] *Id*. (citations omitted) (internal quotation marks omitted) (alteration in original).
[438] *Id*. (citation omitted).
[439] *Id*.
[440] *See, e.g.*, BFP v. Resolution Trust Corp., 511 U.S. 531, 553–54 (1994) (Souter, J., dissenting) (noting that Congress did address certain aspects of state foreclosure law in its 1984 amendments to the Bankruptcy Code).
[441] SCALIA, *supra* note 18, at 29.
[442] *Id*.
[443] For a full discussion of *Timbers*, see *supra* Section V.A.

appears to have created doubt among his colleagues—as well as among lower courts—about his commitment to clear and straightforward interpretive methods.[444]

C. Occasional Acquiescence in the Use of Legislative History

Section V.C above catalogues the variety of methods that Justice Scalia employed to try to dissuade his colleagues from relying on, or even citing legislative history. Given his ardent stance against its use, one might expect that Justice Scalia would consistently chide his colleagues for using it. However, this was not the case. Over the years, Scalia signed onto several unanimous bankruptcy decisions that relied on legislative history.

For example, in the 1988 case of *Norwest Bank Worthington v. Ahlers*,[445] the Court had to decide whether the debtors, as family farmers, would be able to keep their farm even though unsecured creditors would not be paid in full.[446] Creditors argued that this outcome was barred by the absolute priority rule, a rule that was first articulated in nineteenth century case law and was eventually codified in the 1978 Code.[447] But a divided Eighth Circuit Court of Appeals disagreed,[448] relying on the Supreme Court's 1939 decision in *Case v. Los Angeles Lumber Products*,[449] which appeared to leave the door open for exceptions to the absolute priority rule where the debtor had invested "money or money's worth" to the new enterprise.[450] Applying this principle, the Eighth Circuit concluded that the debtors' ongoing contributions of "labor, expertise, and experience over the life of the plan"[451] represented "money's worth"[452] that allowed them to retain the farm despite not paying creditors in full.[453]

The Supreme Court unanimously reversed.[454] Writing for the Court, Justice White explained that the language in *Los Angeles Lumber* was dicta, and that the decision itself foreclosed the result that the Eighth Circuit had reached.[455] As part of his decision, Justice White turned to the legislative history of the 1978 Act, noting that its drafters had rejected a proposal that would create an exception to the absolute priority rule for certain equity holders.[456] He then quoted the House Report's statement that Section 1129(b) "codifies the absolute priority rule for the dissenting

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[444] *See* Waldron & Berman, *supra* note 12, at 211.
[445] 485 U.S. 197 (1988).
[446] *Id*. at 199–202.
[447] *Id*. at 201.
[448] *Id*. at 201–02.
[449] 308 U.S. 106 (1939).
[450] *In re* Ahlers, 794 F.2d 388, 401–02 (8th Cir. 1986) (quoting *Case*, 308 U.S. at 122).
[451] *Id.* at 403.
[452] *Id*. at 402.
[453] *Id*. at 403.
[454] Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 199 (1988).
[455] *Id*. at 203.
[456] *Id*. at 205–06.

class on down."[457] This discussion of legislative history drew nary a peep from Justice Scalia, who was then a relative newcomer to the Court.[458]

A few terms later, the Supreme Court decided the case of *Johnson v. Home State Bank*,[459] which presented the question of whether a debtor who had already received a discharge under Chapter 7 could then list his mortgage as a "claim" to be paid through a Chapter 13 plan.[460] The Court of Appeals agreed with the lender's argument that the only "claim" for the purposes of bankruptcy was the bank's ability to proceed in personam against the debtor.[461] However, a unanimous Supreme Court disagreed, holding that the definition of "claim" in 11 U.S.C. § 101(5) also included the bank's in rem action against the property.[462] The unanimous decision authored by Justice Marshall went into great detail about the legislative history surrounding not only the definition of claim in the 1978 Code, but also the definition in the predecessor statute, as well as the legislative history of the rules of construction for the Code contained in 11 U.S.C. § 102(2).[463] As with *Ahlers*, Justice Scalia made no objection to this legislative history discussion.[464]

These two examples bookending Justice Scalia's concurrence in *Begier*[465] demonstrate that Justice Scalia was not consistent in making his objections to legislative history.[466] His occasional silence on the use of legislative history may have tacitly encouraged its continued use by litigants and lower courts. On the other hand, Justice Scalia's express reliance on legislative history in *Timbers* is more confounding.

As discussed above in Section V.A, *Timbers* presented the question of whether the pre-Code practice of denying postpetition interest to undersecured creditors should continue under the 1978 Code. As explained above, *Timbers* is a striking example of Justice Scalia's efforts to ascertain objective intent through holistic interpretation of statutory text.[467] But, in rejecting the petitioner's argument that pre-Code practice of denying interest to undersecured creditors was changed by the 1978 Code, Justice Scalia broke his own rules by looking at legislative history—or in this case what was *not* in the legislative history.[468] Specifically, he explained that he would expect that such a major change to pre-Code practice would have been addressed in the legislative history.[469] This particular use of legislative history has

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[457] *Id.* at 206 (internal quotation marks omitted) (citing H.R. Rep. No. 95-595, at 413 (1977)).

[458] *Id*. at 198.

[459] 501 U.S. 78 (1991).

[460] *Id*. at 80–81.

[461] *Id*. at 84.

[462] *Id*. at 85.

[463] *Id*. at 85–87.

[464] *Id*. at 79.

[465] Begier v. IRS, 496 U.S. 53 (1990).

[466] *See supra* Section V.C.

[467] *See supra* Section V.A.

[468] *See supra* Section VI.B.

[469] United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365,

been described as "the Sherlock Holmes canon,"[470] and Justice Scalia has been criticized for relying on it in cases like *Timbers* while deriding its use in other decisions.[471]

In sum, Justice Scalia's occasional ambivalence about the use of legislative history is curious given the passion that he often shows in combatting it. Perhaps Justice Scalia's position on legislative history has evolved over time.[472] Nevertheless, the fact that he ran hot and cold on this subject is a weak spot in his overall commitment to a rule-based textualism that would promote clarity and predictability in bankruptcy law.

D. Unpredictable Dictum

A final limitation on Justice Scalia's advocacy for clear and predictable rules was his occasional willingness to depart from precedent. Lower courts are bound to follow Supreme Court precedent, so one way in which the Supreme Court can promote clarity and certainty is to implement its own past decisions clearly and unequivocally.[473] But as with his inconsistency on statutory interpretation questions, Justice Scalia sent mixed messages about the importance of stare decisis to bankruptcy law.

At times he took a very strong stand in favor of stare decisis. For example, in *Hubbard v. United States*,[474] the court faced a question that tied bankruptcy law to criminal law: does 18 U.S.C. § 1001 criminalize false statements made in a bankruptcy proceeding?[475] Section 1001 is an expansive statute that criminalizes a range of false statements to government officials, and courts have frequently grappled with questions about its scope.[476] The question in *Hubbard* was whether a

380 (1988) ("[I]t is most improbable that [such a major change in the existing rules] would have been made without even any mention in the legislative history.").

[470] *See* Anita Krishnakumar, *The Sherlock Holmes Canon*, 84 GEO. WASH. L. REV. 1, 2 (2016) ("Colorfully referred to as the 'dog that did not bark' canon after a Sherlock Holmes story in which a watchdog failed to bark while a racehorse was stolen, the interpretive presumption . . . [is that] a lack of congressional comment regarding a significant change can be taken as evidence that Congress did not intend that interpretation.").

[471] *Id.* at 16.

[472] *See* SCALIA, *supra* note 18, at 36 (noting in 1997 that he had not used legislative history to decide a case in the past nine terms).

[473] *See* Clark, *supra* note 112, at 32 (explaining that creating more binding precedent is an efficient way to promote uniformity in bankruptcy outcomes).

[474] 514 U.S. 695 (1995).

[475] *Id*. at 697.

[476] *Id*. at 699.

bankruptcy court was considered a federal "department" or "agency" within the meaning of Section 1001.[477] The lower courts had concluded that the answer was yes, relying on *United States* v. *Bramblett*,[478] a forty-year-old decision interpreting Section 1001 very broadly to encompass all three branches of the government.[479]

By a 6-3 vote, a majority of the Supreme Court overruled *Bramblett* and concluded that a bankruptcy court is not a "department" or "agency" within the meaning of Section 1001.[480] At the heart of the majority opinion was the view that conflicting lines of case law had carved out too many confusing exceptions to *Bramblett*, such that the more principled approach was simply to overrule it.[481] The voting lines in *Hubbard* exposed an unusual alliance between liberal and conservative justices, with Justice Scalia joining Justice Stevens' opinion along with Justices Kennedy, Thomas, Ginsburg, and Breyer; meanwhile, Chief Justice Rehnquist's dissent was joined by Justices O'Connor and Souter.

Perhaps in light of this unusual division, Justice Scalia also penned a concurrence to explain the importance of stare decisis and his particular reasons for departing from it in this instance.[482] He began with a stirring defense of the doctrine of stare decisis:

> The doctrine of *stare decisis* protects the legitimate expectations of those who live under the law, and, as Alexander Hamilton observed, is one of the means by which exercise of "an arbitrary discretion in the courts" is restrained, The Federalist No. 78, p. 471 (C. Rossiter ed. 1961). Who ignores it must give reasons, and reasons that go beyond mere demonstration that the overruled opinion was wrong (otherwise the doctrine would be no doctrine at all).[483]

Scalia believed that there were significant reasons to depart from the broad interpretation given to Section 1001 in *Bramblett*: namely the "demonstration, over time, that *Bramblett* has unacceptable consequences."[484] These consequences included a great "potential for mischief federal judges have discovered"[485] in *Bramblett'*s overly broad reading of Section 1001.[486] In Scalia's view, the Court's holding in *Bramblett* that "department" applied to all three branches of government was dicta, as the sole question before the Court was whether the statute applied to an executive agency.[487]

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[477] *Id*.
[478] 348 U.S. 503 (1955).
[479] *Hubbard*, 514 U.S. at 702.
[480] *Id*. at 715.
[481] *Id.* at 708–11.
[482] *Id.* at 716 (Scalia, J., concurring). Justice Kennedy joined this concurrence. *Id.*
[483] *Id.*
[484] *Id.*
[485] *Id*.
[486] *Id*.
[487] *Id.* at 717.

This concurrence likely only invigorated the dissent, which sharply criticized the majority for disposing of forty-year-old precedent. In Chief Justice Rehnquist's view, this Court's departure was nothing short of radical.[488] His dissent went on to highlight the practical problems that the Court's decision to jettison *Bramblett* would entail:

> The principle of *stare decisis* is designed to promote stability and certainty in the law. While most often invoked to justify a court's refusal to reconsider its own decisions, it applies *a fortiori* to enjoin lower courts to follow the decision of a higher court. This principle is so firmly established in our jurisprudence that no lower court would deliberately refuse to follow the decision of a higher court.
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> . . . .
>
> One of the consequences of [the Supreme Court's] highly selective standard for granting review is that this Court is deprived of a very important means of assuring that the courts of appeals adhere to its precedents. It is all the more important, therefore, that no actual inducements to ignore these precedents be offered to the courts of appeals. But today's decision is just such an inducement; it tells courts of appeals that if they build up a body of case law contrary to ours, their case law will serve as a basis for overruling our precedent. It is difficult to imagine a more topsy-turvy doctrine than this, or one more likely to unsettle established legal rules that the doctrine of *stare decisis* is designed to protect.[489]

Hubbard may be an extreme example in that it involved forty years of precedent that sprung up like weeds thanks to fertile decisional language that was undoubtedly dicta. But a more nuanced example of how Justice Scalia drew the line between stare decisis and dicta came in *U.S. Bank Mortgage Co. v. Bonner Mall Partnership*.[490] The Supreme Court had originally taken the case to address an important (and still unresolved) question in Chapter 11 bankruptcies: is there a "new value exception"[491] to the absolute priority rule? However, the much hoped-for clarity in Chapter 11 did not materialize.[492] After briefing on the merits, the parties

[488] *Id.* at 720 (Rehnquist, C.J., dissenting).

[489] *Id.* at 719–21.

[490] 513 U.S. 18 (1994).

[491] *See* Dembart & Markel, *supra* note 12, at 381 (criticizing the Court for repeatedly dodging the issue and noting that "[v]eterans of the 'new value' wars can often be heard muttering at conferences that they'd settle for any rule").

[492] *See, e.g.*, Harvey R. Miller, John J. Rapisardi & Reginald A. Greene, *Leaving Old Questions Unanswered and Raising New Ones: The Supreme Court Furthers the New Value Controversy in* Bank of America National Trust & Savings Ass'n v. 203 North LaSalle Street Partnership, 30 U. MEM. L. REV. 553, 573–74 (2000) (explaining that the Supreme Court

settled the matter and requested that the Ninth Circuit decision adopting the exception be vacated.[493] At that point, the question before the Supreme Court changed from a substantive issue of bankruptcy law to a broader issue of judicial procedure: should the Supreme Court vacate the lower court's decision after the parties mooted the appeal by settling?[494]

The procedural question appeared easy in light of the Supreme Court's 1950 decision in *United States v. Munsingwear, Inc.*,[495] which described vacatur for mootness as an "established practice"[496] when one party requests it. A unanimous Supreme Court disagreed and held that voluntary mootness through settlement will not ordinarily be a basis for granting vacatur.[497] In distinguishing the "leading case on vacatur,"[498] Justice Scalia described its key language as dicta that did not justify its application here:

> But *Munsingwear*, and the post-*Munsingwear* practice, cannot bear the weight of the present case. To begin with, the portion of Justice Douglas' opinion in *Munsingwear* describing the "established practice" for vacatur was dictum; all that was needful for the decision was (at most) the proposition that vacatur should have been sought, not that it necessarily would have been granted.[499]

The decision goes on to discuss various policy issues that should inform courts' exercise of its equitable powers.[500] As with *Hubbard*, this discussion indicates that Justice Scalia had no problem relegating precedential language to the dustbin of dictum when there were good policy reasons to do so.

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deepended the confusion over the new value exception by "intimat[ing] its continued vitality" in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*).

[493] U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 20 (1994).

[494] *Id*. at 20–21.

[495] 340 U.S. 36 (1950).

[496] *Id.* at 39.

[497] *Bonner Mall*, 513 U.S. at 29.

[498] *Id*. at 22.

[499] *Id.* at 23.

[500] *Id.* at 26–28. Even though the basis for the decision has nothing to do with bankruptcy law, the Court's refusal to vacate the Ninth Circuit's decision endorsing a new value exception nonetheless had an impact on bankruptcy practice, as that decision was heavily relied on during briefing for a subsequent Supreme Court case, *Bank of America National Trust & Savings Association v. 203 North LaSalle Street Partnership*. *See, e.g.*, Brief for the Petitioner at 11, 18, 19, 22, 45, Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434 (1999) (No. 97-1418).

Another nuanced and perhaps more troubling example comes via Justice Scalia's decision in *Law v. Siegel*.[501] In that closely watched case, the Supreme Court was asked to review the proper scope of a bankruptcy court's equitable powers under 11 U.S.C. § 105,[502] a question that it had ruled on directly only seven years earlier in *Marrama v. Citizens Bank of Massachusetts*.[503]

In *Marrama*, a five-justice majority held that a bankruptcy court had authority to deny a debtor the right to convert a bankruptcy petition from Chapter 7 to Chapter 13 in order to prevent an abuse of process.[504] In reaching this conclusion, the majority rejected the debtor's assertion that Section 706(a) created an unequivocal statutory right to conversion.[505]

Justice Scalia joined the dissent in *Marrama*, which argued that Section 706 expressly gave Chapter 7 debtors an absolute right to convert a case to Chapter 13.[506] In the dissent's view, the majority should not allow bankruptcy judges to use their equitable powers under Section 105 to stray from clear statutory commands.[507]

But just seven years later, in *Law v. Siegel*, Justice Scalia found himself writing a unanimous opinion that vindicated the dissent's view that bankruptcy judges do not have authority to issue orders that are inconsistent with the commands of the Code.[508] In *Law*, the trustee was seeking to be paid from assets that would ordinarily be paid to the debtor.[509] In arguing that the debtor's extreme misconduct justified such a result, the trustee relied heavily on the Court's recent decision in *Marrama*, arguing that the majority had given bankruptcy court's *carte blanche* to issue orders in order to prevent an abuse of process.[510] But Justice Scalia's opinion declined to read the seven-year-old case as binding precedent, distinguishing its key language as dicta: "[t]rue, the Court in *Marrama* also opined that the Bankruptcy Court's refusal to convert the case was authorized under § 105(a) and might have been authorized under the court's inherent powers. But even that dictum does not support [the trustee's] position."[511]

The view that this language was no more than dicta rested on the *Marrama* majority's notion that the text of the particular statutory provision—Section 706—

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[501] *See supra* Section V.D.

[502] Law v. Siegel, 134 S. Ct. 1188, 1194 (2014).

[503] 549 U.S. 365, 375–76 (2007).

[504] *Id.* at 375.

[505] *Id*. at 372–73. In reaching this conclusion, the majority rejected the petitioner's legislative history argument, which was based on House and Senate reports stating that 706(a) "gives the debtor the one-time absolute right of conversion." *Id*. at 371–73 (quoting S. Rep. 95-989, at 94 (1978) and citing H.R. Rep. No. 95-595, at 380 (1977)).

[506] *Id.* at 377 (Alito, J., dissenting).

[507] *Id*. at 382–83.

[508] *See supra* Section V.D.

[509] *Law*, 134 S. Ct. at 1195.

[510] *See* Brief for Respondent at 3, 12, 14, 16, 25, 35–37, 44, 54, Law v. Siegel, 134 S. Ct. 1188 (2014) (No. 12-5196). The Solicitor General's brief also relied heavily on *Marrama*. *See* Brief for the United States as Amicus Curiae at 12, 19, 24–25, Law v. Siegel, 134 S. Ct. 1188 (2014) (No. 12-5196).

[511] *Law*, 134 S. Ct. at 1197 (citation omitted).

was ambiguous, a proposition with which Scalia and the other dissenters strongly disagreed.[512] Yet now, in a curious twist of logic, he dodged the holding of *Marrama* by taking the opposite position: because the language of Section 706 was ambiguous, it was acceptable in that case to allow the bankruptcy court to stray from the statutory text.[513]

There were certainly good reasons for Justice Scalia to take the *Marrama* majority's decision at its word. Indeed, because three justices who joined the *Marrama* majority were still on the Court,[514] Justice Scalia's uncritical acceptance of *Marrama*'s statutory analysis likely allowed for a unanimous decision. However, Justice Scalia's overt about-face regarding the ambiguity of Section 706 risked feeding the impression that the Justice was more opportunistic than principled.

The sense that there is some opportunism in Scalia's dismissive use of the "dicta" label is perhaps heightened by Scalia's occasional use of dicta to possibly shape or impact the future of bankruptcy law.[515] One might expect that a justice who was so quick to distinguish overbroad language in a decision from what was necessary to actually decide an issue might have been very cautious in his own writing.[516] But this does not appear to have been the case. In fact, Scalia occasionally took his own opportunities to place Easter Eggs in his own bankruptcy writings.

One such example appears in his concurrence in *Stern v. Marshall*, the Supreme Court's 2010 decision that attempted to outline the proper scope of a bankruptcy court's authority to issue final decisions.[517] After criticizing the majority for overly complicating the analysis and creating a test that creates uncertainty for lower courts and litigants, he ended with this head-turning suggestion:

> Perhaps historical practice permits non-Article III judges to process claims against the bankruptcy estate, see, *e.g.*, Plank, Why Bankruptcy Judges Need Not and Should Not Be Article III Judges, 72 AM. BANKR.L.J. 567, 607–609 (1998); the subject has not been briefed, and so I state no position on the matter. But Vickie points to no historical practice that authorizes a non-Article III judge to adjudicate a counterclaim of the sort at issue here.[518]

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[512] Marrama v. Citizens Bank of Mass., 549 U.S. 365, 377 (Alito, J., dissenting).

[513] *Law*, 134 S. Ct. at 1197.

[514] *Marrama* was authored by Justice Stevens and joined by Justices Souter, Kennedy, Ginsburg, and Breyer. *Marrama*, 549 U.S. at 366. The latter three were still on the Court when *Law* was decided in 2014.

[515] *See* Owen v. Owen, 500 U.S. 305, 309 (1991).

[516] *See, e.g.*, Calabresi, *supra* note 49, at 576 (relaying Justice Scalia's comment that "the most important thing he did as a Justice was to keep out of his colleague's opinions language that could cause trouble in the future.").

[517] *See supra* Section V.D.

[518] Stern v. Marshall, 564 U.S. 462, 504–05 (2011) (Scalia, J., concurring).

It is hard to imagine any better way to introduce complexity and uncertainty into constitutional doctrine than encouraging future litigants to brief and argue the possible role of historical practices in the understanding of Article III.[519] This seems to undermine his admonition to the majority to keep things simple for the lower courts by sticking to the text of Article III.

Justice Scalia's indulgence in such musings was not limited to concurrences and dissents. One noteworthy example is his decision in *Owen v. Owen*,[520] a case regarding the proper scope of the Florida homestead exemption.[521] *Owen* involved a complicated factual and legal tug of war between a debtor who wanted to claim a condominium as exempt property and an ex-spouse who held a judicial lien by virtue of a marital property division.[522] The precise question was whether 11 U.S.C. § 522(f) allows a debtor to void a judicial lien on homestead property that became exempt after the judicial lien attached to it, when state law provides that the exemption does not impact pre-existing liens.[523] In an eight-justice majority authored by Justice Scalia, the Court agreed that the judicial lien could be invalidated under federal law notwithstanding the state provision.[524] Over a dissent from Justice Stevens, the Court reasoned that the relevant framework for analyzing Section 522(f) is federal bankruptcy law and not state exemption law.[525]

Writing for the majority, Justice Scalia began his analysis with a helpful framework for understanding exemptions and the interplay between federal and state law:

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[519] Thanks to Justice Gorsuch, this load has been lightened: indeed, while on the Tenth Circuit, Justice Gorsuch took up Justice Scalia's suggestion and, largely sua sponte, developed a historical argument for a clearer rule based on the structure of the English bankruptcy system at the time Article III was adopted. *In re* Renewable Energy Dev. Corp., 792 F.3d 1274, 1281–82 (10th Cir. 2015).

[520] *Owen*, 500 U.S. at 309.

[521] *Id.* at 306–08.

[522] *Id.* at 306–07.

[523] *Id*. at 307–08.

[524] *Id*. at 313–14.

[525] *Id.* at 312–13.

> An estate in bankruptcy consists of all the interests in property, legal and equitable, possessed by the debtor at the time of filing, as well as those interests recovered or recoverable through transfer and lien avoidance provisions. An exemption is an interest withdrawn from the estate (and hence from the creditors) for the benefit of the debtor. Section 522 determines what property a debtor may exempt. Under § 522(b), he must select between a list of federal exemptions (set forth in § 522(d)) and the exemptions provided by his State, "unless the State law that is applicable to the debtor . . . specifically does not so authorize," § 522(b)(1)—that is, unless the State "opts out" of the federal list. If a State opts out, then its debtors are limited to the exemptions provided by state law. Nothing in subsection (b) (or elsewhere in the Code) limits a State's power to restrict the scope of its exemptions; *indeed, it could theoretically accord no exemptions at all*.[526]

That last clause is striking. More than three-quarters of states have opted out of federal exemption law and require their citizens to use only the slate of exemptions provided by their individual state.[527] Is it beyond the realm of possibility that a state might decide to eliminate all exemptions?[528] And if that day came, wouldn't a debtor have a conceivable argument that the state was thwarting the purpose of the Bankruptcy Code by deterring its residents from availing themselves of bankruptcy protections? If so, Justice Scalia's musing about this "theoretical" possibility might have some persuasive force, especially with seven justices signing on to it. The inclusion seems mischievous, particularly coming from a Justice who so carefully policed others' "mischief."[529]

VII. CONCLUSION

As with Justice Scalia's overall jurisprudence, his bankruptcy jurisprudence has two striking features: first, a strong and vocal commitment to clear and predictable rules; and second, occasional departures from those very same rules.

These occasional departures are not surprising. As Professor Nelson noted, "rigorously principled decisionmaking may be too much to expect from any judges," even those who are the staunchest proponents of rule-based textualism.[530] Like any

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[526] *Id.* at 308 (alterations in original) (emphasis added).

[527] *See* EPSTEIN ET AL., *supra* note 112, at 166–67.

[528] *See* Posner, *supra* note 69, at 52–53 (suggesting that states might enact "suboptimally stingy exemption laws in order to drive impoverished debtors to other states").

[529] *See, e.g.*, Hubbard v. United States, 514 U.S. 695, 716 (Scalia, J., concurring) (noting the "great potential for mischief federal judges have discovered" in a soon-to-be-overruled Supreme Court decision); *see also* SCALIA & GARNER, *supra* note 70, at 377 ("Legislative history creates mischief both coming and going—not only when it is made but also when it is used. With major legislation, the legislative history has something for everyone.").

[530] Nelson, *supra* note 30, at 397–98.

approach to judicial decisionmaking, rule-based textualism should not be considered a failed philosophy merely because one of its proponents did not follow the rules in every instance. Particularly given the unique context of bankruptcy law, it is worthwhile to evaluate the impact of Justice Scalia's endorsement of rules that promoted clarity and predictability, even if he did not always apply those rules consistently. As Professor William Eskridge of Yale Law School aptly wrote:

> Scalia was the Supreme Court's Rule of Law Conscience. Often in noisy dissent or grumpy concurrence, but increasingly as the author of majority opinions, Scalia reminded, admonished and scolded his colleagues and the entire legal community that modern law is all about public text—the text of statutes, of agency regulations and the text of the Constitution itself. . . .
>
> He demanded that legal interpretation be neutral, objective and predictable—though not entirely free of norms, for statutory purpose and constitutional principles are pervasively relevant. His was and remains an important voice, because judges facing hard cases are constantly tempted to read their own preferred results into legal texts whose ordinary meaning and the overall course of law often run in the other direction. That Scalia himself fell prey to this temptation from time to time reveals the justice to have been human, even as his advice remains classic.[531]

Professor Eskridge's description is even more potent when applied to Scalia's contributions to bankruptcy law. In many ways, Justice Scalia's focus on holistic interpretation, textual justice, and clear rules were—and may continue to be—a boon to the field, notwithstanding the occasional mixed messages that he sent to judges and litigants. Perhaps with some willingness to forgive Justice Scalia for being human, we could agree that he offered the right philosophy at the right time for the modern bankruptcy code.

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[531] Symposium, *supra* note 15, at 4–5.

APPENDIX A – SUPREME COURT DECISIONS IN THE MODERN BANKRUPTCY ERA (ALPHABETICAL THROUGH 2015)

1. Archer v. Warner, 538 U.S. 314 (2003)
2. Assocs. Commercial Corp. v. Rash, 520 U.S. 953 (1997)
3. Baker Botts L.L.P. v. ASARCO LLC, 135 S. Ct. 2158 (2015)
4. Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434 (1999)
5. Bank of Am., N.A. v. Caulkett, 135 S. Ct. 1995 (2015)
6. Barnhill v. Johnson, 503 U.S. 393 (1992)
7. Begier v. IRS, 496 U.S. 53 (1990)
8. BFP v. Resolution Trust Corp., 511 U.S. 531 (1994)
9. Bd. of Governors of the Fed. Reserve Sys. v. MCorp Fin., 502 U.S. 32 (1991)
10. Bullard v. Blue Hills Bank, 135 S. Ct. 1686 (2015)
11. Bullock v. BankChampaign, N.A., 569 U.S. 267 (2013)
12. Cal. State Bd. of Equalization v. Sierra Summit, 490 U.S. 844 (1989)
13. Celotex Corp. v. Edwards, 514 U.S. 300 (1995)
14. Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356 (2006)
15. Cent. Tr. Co. v. Official Creditors' Comm. of Geiger Enters., Inc., 454 U.S. 354 (1982)
16. Citizens Bank v. Strumpf, 516 U.S. 16 (1995)
17. Clark v. Rameker, 134 S. Ct. 2242 (2014)
18. Cohen v. De La Cruz, 523 U.S. 213 (1998)
19. Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343 (1985)
20. Conn. Nat'l Bank v. Germain, 503 U.S. 249 (1992)
21. Dep't of Revenue of Mont. v. Kurth Ranch, 511 U.S. 767 (1994)
22. Dewsnup v. Timm, 502 U.S. 410 (1992)
23. Exec. Benefits Ins. Agency v. Arkison, 134 S. Ct. 2165 (2014)
24. Farrey v. Sanderfoot, 500 U.S. 291 (1991)
25. FCC v. NextWave Pers. Commc'ns. Inc., 537 U.S. 293 (2003)
26. Fid. Fin. Servs., Inc. v. Fink, 522 U.S. 211 (1998)
27. Field v. Mans, 516 U.S. 59 (1995)
28. Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33 (2008)
29. Granfinanciera v. Nordberg, 492 U.S. 33 (1989)
30. Grogan v. Garner, 498 U.S. 279 (1991)
31. Hall v. United States, 566 U.S. 506 (2012)
32. Hamilton v. Lanning, 560 U.S. 505 (2010)
33. Harris v. Viegelahn, 135 S. Ct. 1829 (2015)

34. Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1 (2000)
35. Hoffman v. Conn. Dep't of Income Maint., 492 U.S. 96 (1989)
36. Holywell Corp. v. Smith, 503 U.S. 47 (1992)
37. Howard Delivery Serv. v. Zurich Am. Ins. Co., 547 U.S. 651 (2006)
38. Hubbard v. United States, 514 U.S. 695 (1995)
39. Johnson v. Home State Bank, 501 U.S. 78 (1991)
40. Kawaauhau v. Geiger, 523 U.S. 57 (1998)
41. Kelly v. Robinson, 479 U.S. 36 (1986)
42. Kontrick v. Ryan, 540 U.S. 443 (2004)
43. Lamie v. United States Tr., 540 U.S. 526 (2004)
44. Langenkamp v. Culp, 498 U.S. 42 (1990)
45. Law v. Siegel, 134 S. Ct. 1188 (2014)
46. Marrama v. Citizens Bank, 549 U.S. 365 (2007)
47. Marshall v. Marshall, 547 U.S. 293 (2006)
48. Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot., 474 U.S. 494 (1986)
49. Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229 (2010)
50. NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984)
51. Nobelman v. Am. Sav. Bank, 508 U.S. 324 (1993)
52. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982)
53. Norwest Bank Worthington v. Ahlers, 485 U.S. 197 (1988)
54. Ohio v. Kovacs, 469 U.S. 274 (1985)
55. Owen v. Owen, 500 U.S. 305 (1991)
56. Pa. Dep't of Pub. Welfare v. Davenport, 495 U.S. 552 (1990)
57. Patterson v. Shumate, 504 U.S. 753 (1992)
58. Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380 (1993)
59. RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639 (2012)
60. Rake v. Wade, 508 U.S. 464 (1993)
61. Raleigh v. Ill. Dep't of Revenue, 530 U.S. 15 (2000)
62. Ransom v. FIA Card Servs., N.A., 562 U.S. 61 (2011)
63. Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon, 541 U.S. 1 (2004)
64. Rousey v. Jacoway, 544 U.S. 320 (2005)
65. Schwab v. Reilly, 560 U.S. 770 (2010)
66. Stern v. Marshall, 564 U.S. 462 (2011)
67. Taylor v. Freeland & Kronz, 503 U.S. 638 (1992)
68. Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440 (2004)
69. Things Remembered v. Petrarca, 516 U.S. 124 (1995)

70. Till v. SCS Credit Corp., 541 U.S. 465 (2004)
71. Toibb v. Radloff, 501 U.S. 157 (1991)
72. Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co., 549 U.S. 443 (2007)
73. Travelers Indem. Co. v. Bailey, 557 U.S. 137 (2009)
74. U.S. Bank Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18 (1994)
75. Union Bank v. Wolas, 502 U.S. 151 (1991)
76. United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365 (1988)
77. United States v. Energy Res. Co., 495 U.S. 545 (1990)
78. United States v. Noland, 517 U.S. 535 (1996)
79. United States v. Nordic Vill., Inc., 503 U.S. 30 (1992)
80. United States v. Reorganized CF & I Fabricators of Utah, Inc., 518 U.S. 213 (1996)
81. United States v. Ron Pair Enters., 489 U.S. 235 (1989)
82. United States v. Sec. Indus. Bank, 459 U.S. 70 (1982)
83. United States v. Whiting Pools, Inc., 462 U.S. 198 (1983)
84. United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260 (2010)
85. Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015)
86. Young v. United States, 535 U.S. 43 (2002)

APPENDIX B – JUSTICES RANKED BY TOTAL BANKRUPTCY WRITINGS

* unanimous decision drew a concurrence
^ concur in part and dissent in part

1. Justice Scalia (25 total, 11 lead)

Unanimous (7): United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365 (1988); U.S. Bank Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18 (1994); Citizens Bank v. Strumpf, 516 U.S. 16 (1995); Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1 (2000); Young v. United States, 535 U.S. 43 (2002); RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639 (2012); Law v. Siegel, 134 S. Ct. 1188 (2014).

Majority (4): Owen v. Owen, 500 U.S. 305 (1991); United States v. Nordic Vill. Inc., 503 U.S. 30 (1992); BFP v. Resolution Trust Corp., 511 U.S. 531 (1994); FCC v. NextWave Pers. Commc'ns. Inc., 537 U.S. 293 (2003).

Concurrence (9): Granfinanciera v. Nordberg, 492 U.S. 33 (1989); Hoffman v. Conn. Dep't of Income Maint., 492 U.S. 96 (1989); Begier v. IRS, 496 U.S. 53 (1990); Union Bank v. Wolas, 502 U.S. 151 (1991); Patterson v. Shumate, 504 U.S. 753 (1992); Hubbard v. United States, 514 U.S. 695 (1995); Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon, 541 U.S. 1 (2004); Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229 (2010); Stern v. Marshall, 564 U.S. 462 (2011).

Dissent (5): Till v. SCS Credit Corp., 541 U.S. 465 (2004); Dewsnup v. Timm, 502 U.S. 410 (1992); Dep't of Revenue of Mont. v. Kurth Ranch, 511 U.S. 767 (1994); Hamilton v. Lanning, 560 U.S. 505 (2010); Ransom v. FIA Card Servs., N.A., 562 U.S. 61 (2011).

2. Justice Stevens (24 total, 7 lead)

Unanimous (3): Grogan v. Garner, 498 U.S. 279 (1991); Bd. of Governors of the Fed. Reserve Sys. v. MCorp Fin., 502 U.S. 32 (1991); Union Bank v. Wolas, 502 U.S. 151 (1991).*

Majority (4): Cal. State Bd. of Equalization v. Sierra Summit, 490 U.S. 844 (1989); Hubbard v. United States, 514 U.S. 695 (1995); Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356 (2006); Marrama v. Citizens Bank, 549 U.S. 365 (2007).

Plurality (1): Till v. SCS Credit Corp., 541 U.S. 465 (2004).

Concurrence (5): Conn. Nat'l Bank v. Germain, 503 U.S. 249 (1992); Nobelman v. Am. Sav. Bank, 508 U.S. 324 (1993); Lamie v. United States Tr., 540 U.S. 526

(2004); Marshall v. Marshall, 547 U.S. 293 (2006); FCC v. NextWave Pers. Commc'ns. Inc., 537 U.S. 293 (2003).

Dissent (11): Cent. Tr. Co. v. Official Creditors' Comm. of Geiger Enters., Inc., 454 U.S. 354 (1982); Hoffman v. Conn. Dep't of Income Maint., 492 U.S. 96 (1989); Owen v. Owen, 500 U.S. 305 (1991); Toibb v. Radloff, 501 U.S. 157 (1991); United States v. Nordic Vill. Inc., 503 U.S. 30 (1992); Barnhill v. Johnson, 503 U.S. 393 (1992); Taylor v. Freeland & Kronz, 503 U.S. 638 (1992); Celotex Corp. v. Edwards, 514 U.S. 300 (1995); Assocs. Comm'l Corp. v. Rash, 520 U.S. 953 (1997); Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434 (1999); Travelers Indem. Co. v. Bailey, 557 U.S. 137 (2009).

3. Justice Thomas (22 total, 13 lead)

Unanimous (8): Holywell Corp. v. Smith, 503 U.S. 47 (1992); Nobelman v. Am. Sav. Bank, 508 U.S. 324 (1993); Rake v. Wade, 508 U.S. 464 (1993); Things Remembered v. Petrarca, 516 U.S. 124 (1995)*; Rousey v. Jacoway, 544 U.S. 320 (2005); United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260 (2010); Exec. Bens. Ins. Agency v. Arkison, 134 S. Ct. 2165 (2014); Bank of Am., N.A. v. Caulkett, 135 S. Ct. 1995 (2015).

Majority (5): Conn. Nat'l Bank v. Germain, 503 U.S. 249 (1992); Taylor v. Freeland & Kronz, 503 U.S. 638 (1992); Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33 (2008); Schwab v. Reilly, 560 U.S. 770 (2010); Baker Botts L.L.P. v. ASARCO LLC, 135 S. Ct. 2158 (2015).

Concurrence (4): Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434 (1999); Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon, 541 U.S. 1 (2004); Till v. SCS Credit Corp., 541 U.S. 465 (2004); Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229 (2010).

Dissent (5): United States v. Reorganized CF & I Fabricators of Utah, Inc., 518 U.S. 213 (1996)^; Archer v. Warner, 538 U.S. 314 (2003); Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440 (2004); Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356 (2006); Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015).

4. Justice Ginsburg (10 total, 7 lead)

Unanimous (3): Kawaauhau v. Geiger, 523 U.S. 57 (1998); Kontrick v. Ryan, 540 U.S. 443 (2004); Harris v. Viegelahn, 135 S. Ct. 1829 (2015).

Majority (4): Assocs. Commercial Corp. v. Rash, 520 U.S. 953 (1997); Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon, 541 U.S. 1 (2004); Marshall v. Marshall, 547 U.S. 293 (2006); Howard Delivery Serv. v. Zurich Am. Ins. Co., 547 U.S. 651 (2006).

Concurrence (2): Field v. Mans, 516 U.S. 59 (1995); Things Remembered v. Petrarca, 516 U.S. 124 (1995).

Dissent (1): Schwab v. Reilly, 560 U.S. 770 (2010).

5. Justice Souter (9 total, 7 lead)

Unanimous (3): United States v. Noland, 517 U.S. 535 (1996); Fid. Fin. Servs., Inc. v. Fink, 522 U.S. 211 (1998); Raleigh v. Ill. Dep't of Revenue, 530 U.S. 15 (2000).

Majority (4): Field v. Mans, 516 U.S. 59 (1995); United States v. Reorganized CF & I Fabricators of Utah Inc., 518 U.S. 213 (1996); Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434 (1999); Travelers Indem. Co. v. Bailey, 557 U.S. 137 (2009).

Concurrence (1): Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440 (2004).

Dissent (1): BFP v. Resolution Trust Corp., 511 U.S. 531 (1994).

6. Justice Rehnquist (9 total, 5 lead)

Majority (5): United States v. Sec. Indus. Bank, 459 U.S. 70 (1982); NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984); Barnhill v. Johnson, 503 U.S. 393 (1992); Celotex Corp. v. Edwards, 514 U.S. 300 (1995); Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440 (2004).

Concurrence (1): N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

Dissent (3): Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot., 474 U.S. 494 (1986); Dep't of Revenue of Mont. v. Kurth Ranch, 511 U.S. 767 (1994); Hubbard v. United States, 514 U.S. 695 (1995).

7. Justice Blackmun (9 total, 5 lead)

Unanimous (2): United States v. Whiting Pools, 462 U.S. 198 (1983); Patterson v. Shumate, 504 U.S. 753 (1992).*

Majority (3): United States v. Ron Pair Enters., 489 U.S. 235 (1989); Toibb v. Radloff, 501 U.S. 157 (1991); Dewsnup v. Timm, 502 U.S. 410 (1992).

Concurrence (1): United States v. Sec. Indus. Bank, 459 U.S. 70 (1982).

Dissent (4): Cal. State Bd. of Equalization v. Sierra Summit, 490 U.S. 844 (1989);

Granfinanciera v. Nordberg, 492 U.S. 33 (1989); Pa. Dep't of Pub. Welfare v. Davenport, 495 U.S. 552 (1990); United States v. Energy Res. Co., 495 U.S. 545 (1990).

8. Justice White (8 total, 5 lead)

Unanimous (2): Ohio v. Kovacs, 469 U.S. 274 (1985)*; Norwest Bank Worthington v. Ahlers, 485 U.S. 197 (1988).

Majority (3): United States v. Energy Res. Co., 495 U.S. 545 (1990); Farrey v. Sanderfoot, 500 U.S. 291 (1991); Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380 (1993).

Plurality (1): Hoffman v. Conn. Dep't of Income Maint., 492 U.S. 96 (1989).

Dissent (2): N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); Granfinanciera v. Nordberg, 492 U.S. 33 (1989).

9. Justice Breyer (8 total, 2 lead)

Unanimous (1): Bullock v. BankChampaign, N.A., 569 U.S. 267 (2013).

Majority (1): Archer v. Warner, 538 U.S. 314 (2003).

Dissent (6): Field v. Mans, 516 U.S. 59 (1995); Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33 (2008); FCC v. NextWave Pers. Commc'ns Inc., 537 U.S. 293 (2003); Stern v. Marshall, 564 U.S. 462 (2011); Hall v. United States, 566 U.S. 506 (2012); Baker Botts L.L.P. v. ASARCO LLC, 135 S. Ct. 2158 (2015).

10. Justice O'Connor (7 total, 1 lead)

Unanimous (1): Cohen v. De La Cruz, 523 U.S. 213 (1998).

Concurrence (3): Ohio v. Kovacs, 469 U.S. 274 (1985); Hoffman v. Conn. Dep't of Income Maint., 492 U.S. 96 (1989); Conn. Nat'l Bank v. Germain, 503 U.S. 249 (1992).

Dissent (3): United States v. Ron Pair Enters., 489 U.S. 235 (1989); Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380 (1993); Dep't of Revenue of Mont. v. Kurth Ranch, 511 U.S. 767 (1994).

11. Justice Sotomayor (5 total, 4 lead)

Unanimous (1): Clark v. Rameker, 134 S. Ct. 2242 (2014).

Majority (3): Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229 (2010); Hall v. United States, 566 U.S. 506 (2012); Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015).

Concurrence (1): Baker Botts L.L.P. v. ASARCO LLC, 135 S. Ct. 2158 (2015).

12. Justice Marshall (5 total, 4 lead)

Unanimous (2): Commodity Futures Trading Com v. Weintraub, 471 U.S. 343 (1985); Johnson v. Home State Bank, 501 U.S. 78 (1991).

Majority (2): Begier v. IRS, 496 U.S. 53 (1990); Pa. Dep't of Pub. Welfare v. Davenport, 495 U.S. 552 (1990).

Dissent (1): Hoffman v. Conn. Dep't of Income Maint., 492 U.S. 96 (1989).

13. Justice Alito (4 total, 2 lead)

Unanimous (1): Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co., 549 U.S. 443 (2007).

Majority (1): Hamilton v. Lanning, 560 U.S. 505 (2010).

Concurrence (1): Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015).

Dissent (1): Marrama v. Citizens Bank, 549 U.S. 365 (2007).

14. Justice Kennedy (4 total, 1 lead)

Majority (1): Lamie v. United States Tr., 540 U.S. 526 (2004).

Concurrence (2): Farrey v. Sanderfoot, 500 U.S. 291 (1991); Things Remembered v. Petrarca, 516 U.S. 124 (1995).

Dissent (1): Howard Delivery Serv. v. Zurich Am. Ins. Co., 547 U.S. 651 (2006).

15. Chief Justice Roberts (3 total, 2 lead)

Unanimous (1): Bullard v. Blue Hills Bank, 135 S. Ct. 1686 (2015).

Majority (1): Stern v. Marshall, 564 U.S. 462 (2011).

Dissent (1): Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015).

16. Justice Brennan (2 total, 0 lead)

Plurality (1): N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

Dissent (1): NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984).^

17. Justice Kagan (1 total, 1 lead)

Majority (1): Ransom v. FIA Card Servs., N.A., 562 U.S. 61 (2011).

18. Justice Powell (1 total, 1 lead)

Majority (1): Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot., 474 U.S. 494 (1986).

19. Chief Justice Burger (1 total, 0 lead)

Dissent (1): N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).