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# A STUDY OF THE COSTS AND BENEFITS OF TEXTUALISM: THE SUPREME COURT'S BANKRUPTCY CASES

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The Supreme Court has taken a turn toward text. Its recent opinions in statutory cases by and large focus on the text of the statute in question. Infrequent has become the opinion in which the Court relies on the "intent" of the legislature as expressed in legislative history or on consideration of the consequences of its decision. This change in interpretative focus has been well noted;<sup>1</sup> what remains in question is the propriety of the Court's textualist approach.<sup>2</sup> Most commentators reject textualism, and instead argue that the Court should expressly resolve interpretive issues through what is called "dynamic interpretation."<sup>3</sup> The advocates

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1. See, e.g., William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231 [hereinafter Schauer, *Statutory Construction*]; Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597 (1991) [hereinafter Zeppos, *Scalia's Textualism*]. For an empirical analysis of the sources that the Court cites in its opinions, see Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073 (1992) [hereinafter Zeppos, *Use of Authority*].

2. Support for a textualist approach can be found in Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983) [hereinafter Easterbrook, *Domains*]; Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J. L. & PUB. POL'Y 59 (1988); Schauer, *Statutory Construction*, *supra* note 1; Frederick Schauer, *The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw*, 45 VAND. L. REV. 715 (1992) [hereinafter Schauer, *Response*]; Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). For objections to textualism, see RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 22-69 (1990); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988); William N. Eskridge, Jr. and Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 340-45 (1990); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1310-35 (1990).

3. Professor Eskridge coined the phrase "dynamic interpretation." See William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 Pa. L. Rev. 1479 (1987) [hereinafter *Dynamic Interpretation*]. For a comprehensive explication of Eskridge's theory of dynamic interpretation, see WILLIAM

of dynamic interpretation counsel that where the text of a statute is susceptible to more than one interpretation, the Court should adopt the interpretation that generates the better consequences.<sup>4</sup> It is consequences, not the text of the statute, that should be scrutinized to resolve hard cases.

Despite the exhortation for judges to be attuned to the consequences of their decisions, the proponents of dynamic interpretation have failed to apply the same criteria to their own work. Those who reject textualism tend to base their rejection on an analysis of a few cases in unrelated areas of law.<sup>5</sup> While these cases may give the writers the vehicle they seek to make their points, they tell us little about the effects of the Court's interpretative approach on any given substantive area of law. Whatever the costs and benefits of textualism in a single case, they may differ across a range of related cases. When evaluating a theory's merits, it is dangerous to rely only on an examination of the outliers in the data set.

This failure to examine a set of cases selected without regard to the interpretative method used is the most conspicuous flaw in the literature arguing for judges to use dynamic interpretation. This shortcoming is more than a bit ironic; the literature which posits that judges should examine the consequences of their decision fails to examine in any systematic way the consequences of openly embracing dynamic interpretation. Statutory interpretation theorists seem much more concerned with assessing the interpretation process than with a systematic inquiry into the results generated by the competing methods of interpretation.<sup>6</sup>

To fill this void in the literature, this Article examines the Supreme Court's statutory interpretation of the Bankruptcy Code over the past seven terms. This Article focuses on the past seven terms because that period coincides with Justice Scalia's tenure on the Court. Justice Scalia is the justice most credited with the Court's increasing reliance on statutory text. Thus, this time period should generate a number of textualist decisions.

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N. ESKRIDGE, JR., JURISPRUDENCE, POLITICS, AND DYNAMIC STATUTORY INTERPRETATION (forthcoming 1994).

4. See Posner, *supra* note 2, at 300; Eskridge & Frickey, *supra* note 2, at 345-62; Eskridge, *Dynamic Statutory Interpretation*, *supra* note 3.

5. See *infra* text accompanying notes 42-81.

6. See, e.g., Eskridge and Frickey, *supra* note 2, at 362-83; Eskridge, *Dynamic Statutory Interpretation*, *supra* note 3, at 1538. This focus on process has been noted by Zeppos. See Zeppos, *Use of Authority*, *supra* note 1, at 1082.

This Article concentrates on bankruptcy law because bankruptcy is a particularly apt area for assessing the systemic effects of textualist analysis. Because current bankruptcy law dates only to 1978, the statute has not been encrusted with a substantial number of earlier Supreme Court decisions. This allows the Court to grapple with the Bankruptcy Code (the "Code") rather than Supreme Court precedents. The newness of the Code also pretermits the issue of how the Court should respond to statutory obsolescence, an issue which differs from that of which interpretive method the Court should use.<sup>7</sup> Also favoring the selection of bankruptcy is the fact that the Code was the product of a systematic effort by a congressionally appointed commission to update this country's bankruptcy laws.<sup>8</sup> Furthermore, the Code has not been subjected to many amendments.<sup>9</sup> Thus, the Court is more likely to find coherent purposes in the Bankruptcy Code than in other bodies of law which have been the subject of ad hoc legislation. Finally, there exists in the academy vigorous inquiry into the normative foundations of bankruptcy law.<sup>10</sup> Academic interest in the substantive area of bankruptcy law is at an all-time high. To the extent that statutory interpretation should be assessed by comparing its output against the normative goals of the substantive area of law,

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7. Compare GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982) (allowing the Court to react to the problem of obsolescence by overruling the obsolete statute) with Eskridge, *supra* note 4, at 1481 n.7 (arguing for dynamic interpretation but expressly declining to go as far as Calabresi) and Posner, *supra* note 2, at 300-01 (similar).

8. See COMM'N ON THE BANKRUPTCY LAWS OF THE UNITED STATES, REPORT OF THE COMM'N ON THE BANKRUPTCY LAW OF THE UNITED STATES, H.R. DOC. NO. 137, 93d Cong., 1st Sess. 177 (1973).

9. Significant amendments were made in 1984 and 1986. See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 352 (codified as amended in scattered sections of 11 U.S.C.); Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088 (codified as amended in scattered sections of 11 & 28 U.S.C.). The 1984 amendment was largely in response to the Supreme Court's decision in *Northern Pipeline Constr. Corp. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), which held that the Bankruptcy Code's jurisdictional provisions unconstitutionally gave too much power to bankruptcy courts. The 1986 Amendments were mainly concerned with adding a new provision, Chapter 12, to deal with the problem of farm bankruptcies.

10. For differing views, see THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* (1986); Robert K. Rasmussen, *Debtor's Choice: A Menu Approach to Corporate Bankruptcy*, 71 TEX. L. REV. 51 (1992) [hereinafter Rasmussen, *Debtor's Choice*]; Robert K. Rasmussen, *An Essay on Optimal Bankruptcy Rules and Social Justice*, 1994 U. ILL. L. REV. (forthcoming [hereinafter Rasmussen, *Optimal Bankruptcy Rules*]); Randal C. Picker, *Security Interests, Misbehavior, and Common Pools*, 59 U. CHI. L. REV. 645, 646-49 (1992); Donald R. Korobkin, *Rehabilitating Values: A Jurisprudence of Bankruptcy*, 91 COLUM. L. REV. 717 (1991); Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775 (1987); Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815 (1987).

it is much easier to find a theory of bankruptcy law than it is to find, say, a theory of Medicare reimbursement.

Measuring the effects of the Supreme Court's interpretative practice across bankruptcy law yields several important results. The first is that it exposes the limits of the Court's textualism. Although textualism is the dominant mode of statutory analysis, it is not the exclusive mode. The Court will depart from textualism when it views such a departure as necessary to protect governmental interests. This departure is ironic given that one of the proffered reasons for textualism is to respect the allocation of decisionmaking authority specified by the Constitution.

The second and more significant point that the cases reveal is that textualism may be the appropriate strategy for deciding bankruptcy cases from a consequentialist point of view. This conclusion results in part from the Court's role in the administration of the Bankruptcy Code. Too often, theories of interpretation focus exclusively on the Supreme Court.<sup>11</sup> Yet the Court occupies only the top of the judicial hierarchy. In the context of the Code, the cases reveal that the Supreme Court is content to leave the bulk of the interpretative work to the lower courts. The Court, absent a governmental interest, will only intervene to resolve a conflict among the circuits. While it resolves these conflicts through a textualist analysis, the lower courts often engage in dynamic interpretation.

This divergence in interpretative strategies between the Supreme Court and the lower courts may be the optimal result. A heated debate rages over what constitutes appropriate bankruptcy policy in both the academy and the lower courts. The decisions by the lower courts, which are more fluent with bankruptcy policy, ensure that when cases reach the Court policy justifications often exist for each of the competing results. The Court then selects the result that best comports with the statutory text. This strategy ensures that the textualist result is supported by some bankruptcy policy, while at the same time allowing the Court to decide such cases without engaging in the policy debate. Textualism is thus the best pragmatic strategy for the Court to employ when interpreting the Bankruptcy Code.

Part I of this Article sets forth the two dominant theories of statutory interpretation currently advocated—textualism and dynamic interpreta-

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11. See, e.g., Eskridge and Frickey, *supra* note 2; Eskridge, *supra* note 1; Sunstein, *supra* note 2. Eskridge has recently noted this narrowness of focus. See Eskridge, *Jurisprudence* ch.2.

tion. Textualism, associated closely with the opinions of Justice Scalia, rests on the notion that the text of a statute is the exclusive authority on which the Court should rely when reaching its decision. When a statute is ambiguous, the Court should ascribe to the statute that meaning which most persons would ascribe to the language at issue. Legislative history is not consulted, nor is a judge's sense of which interpretation implements the better social policy. In contrast, dynamic interpretation, which is allied with the use of practical reasoning, uses the text of the statute only as a starting point; the judge is free to consider other sources such as legislative history and policy concerns in reaching a result. As Judge Posner stated, "Maybe the best thing to do when a statute is invoked is to examine the consequences of giving the invoker what he wants and then estimate whether those consequences will on the whole be good ones."<sup>12</sup>

To assess the consequences of adopting one theory of statutory interpretation or another, it is necessary to have an understanding of the substantive area of law involved. To this end, Part II of this Article examines the various policies of bankruptcy law. Bankruptcy scholars can be divided into two groups. In the first group are those who attempt to explain extant law from an economic point of view. For these scholars, bankruptcy law represents the hypothetical contract which the creditors of the debtor would reach amongst themselves. The second group consists of "traditional" scholars. The traditional scholars, in contrast, view bankruptcy law as attempting to reconcile a number of competing social policies. These scholars balance efficiency against concerns with promoting reorganizations and protecting those on whom the burden of financial distress falls most heavily.

After setting forth the competing theories of statutory interpretation and the competing theories of bankruptcy law, Part III of this Article examines the Supreme Court's bankruptcy cases over the last seven terms. This examination confirms that the Court's methodology has been predominantly textualist (hardly a surprising result). The Article then offers both a positive theory of the role that the Court plays in bankruptcy law and an argument as to why this role may be desirable from a normative point of view. Unlike most theories of statutory interpretation, this argument focuses on the relationship between the Supreme Court and the lower courts. When the lower courts are taken into ac-

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12. Posner, *supra* note 2, at 300.

count, it becomes far from evident that dynamic interpretation in the Supreme Court would produce a better bankruptcy system than the one that we now have. Dynamic interpretation thus fails the test that it sets for itself; namely, it fails to produce better consequences.

## I. THE COMPETING THEORIES OF STATUTORY INTERPRETATION

The process of statutory interpretation has become a topic of debate both on the bench and in the academy. The old notion that a court's task in interpreting a statute is to implement the intent of the legislature has no serious defenders left in academia.<sup>13</sup> The two most prominent theories of statutory interpretation today are textualism and dynamic interpretation. Each of these theories can be understood in differing ways, depending on which aspect of the theory is emphasized and which scholar describes the method. Accordingly, for the purposes of this Article, it is necessary to define the competing theories.

An opinion is textualist for the purposes of this Article if the Court's analysis rests on a reading of the statute. Other sources may be cited in the opinion, but they can only be used to buttress the result gleaned from a close examination of the text. To be sure, other definitions of what constitutes a textualist opinion exist. Extreme versions of textualism, such as that practiced by Justice Scalia, allow the judge to rely only on statutory language; she cannot confirm her reading of the text by an examination of legislative history or other nonstatutory materials. If textualism is defined in such a way, it is difficult to find many textualist opinions.<sup>14</sup> The Justices, like all good lawyers, attempt to marshal all possible arguments for their side. Moreover, even when the Court relies on the text of the statute, it often feels the need to refute arguments based on legislative history. Thus, if one simply looks at the Court's citation practice, it becomes apparent that the Court does not cite only textualist sources.<sup>15</sup> Rather than defining textualism in such a way as to ensure that it has never been and will never be adopted, this Article will consider an opinion as textualist if the Court relies primarily on the text of

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13. See Zeppos, *Use of Authority*, *supra* note 1, at 1087. This is not to deny that the Supreme Court even today occasionally decides cases on the basis of legislative intent. See, e.g., *Begier v. IRS*, 496 U.S. 53 (1990).

14. See Zeppos, *Use of Authority*, *supra* note 1, at 1103 (concluding that "the Court has not adopted textualism as its methodology for deciding statutory cases" because the Court has cited numerous other types of authority as well as statutory text).

15. *Id.*

the statute to support its conclusion.<sup>16</sup> Thus, this Article treats an opinion as textualist even if the Court mentions legislative history so long as this history is used only to confirm the Court's reading of the text. The key is that legislative history is not consulted to clarify any ambiguity, let alone used to overturn the statute's plain meaning.

Dynamic interpretation challenges the claims put forward by textualism in at least two respects. The first is that, as a purely positive matter, the Supreme Court does not engage in pure textualism. Rather, the Court inevitably draws on matters other than statutory text in deciding statutory cases.<sup>17</sup> The hermeneutical nature of interpretation ensures that considerations other than the unadorned statutory language will guide the decision which the interpreter reaches.<sup>18</sup> The preferences and experiences of the interpreter shape her reading of the language at issue. Thus, dynamic interpretation is inevitable.

Dynamic interpretation challenges textualism in a second respect as well. There is a difference between an opinion which is—or at least purports to be—textualist and one which expressly embraces dynamic interpretation. The former purports to be following the statutory language exclusively, while the latter expressly draws on other sources in reaching a decision. As a normative matter, the proponents of dynamic interpretation argue that courts should drop the façade that they are not making policy decisions and instead simply following the statutory language.<sup>19</sup> Failing to address explicitly the competing policy concerns involved, textualism leads to decisions which lack a compelling theory for their result. By expressly engaging in dynamic interpretation, courts would be forced to confront the policy choice before them, and supply an explanation for why one result should be favored over another. It is this methodological difference which is the focus of this Article.

Proponents of dynamic interpretation propose a variety of ways in which the court could proceed in implementing their call for reform. For

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16. For a similar treatment of defining the Court's methodology, see William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 347 n.38 (1991). See also ESKRIDGE, JURISPRUDENCE ch. 8 (noting that Burger court's invocation of plain meaning rule was usually accompanied with detailed examination of nonstatutory sources which confirmed the text's "plain meaning").

17. See Eskridge & Frickey, *supra* note 2 at 345-62.

18. See William N. Eskridge, *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609 (1990); ESKRIDGE, JURISPRUDENCE Ch. 2.

19. See Eskridge & Frickey, *supra* note 2, at 383 ("[T]he Court could substantially improve its performance if it more candidly reflected [the dynamic interpretative] process in its opinions.").



example, Professor Sunstein argues that courts should expressly adopt a series of substantive canons of construction to guide their decisions.<sup>20</sup> These canons devolve from what Sunstein views as appropriate policy concerns. Judge Posner proposes a more case-by-case approach under which courts should weigh the consequences of the competing interpretations.<sup>21</sup> Professors Eskridge and Frickey endorse what they view as the Court's current use of various sources on a case-by-case basis but ask the Court to be more candid in its opinions.<sup>22</sup> Despite their differences, these proponents of dynamic interpretation all share the core notion that the Court should expressly consider sources other than the statutory text. Dynamic interpretation proponents also believe that these sources should reflect the current needs of society. All of these versions of dynamic interpretation expressly incorporate policy concerns to help resolve difficult cases.

For the purpose of this Article, dynamic interpretation is defined as follows.<sup>23</sup> The Court begins with the text of the statute. If the statute has a plain meaning, this meaning is given presumptive, but not conclusive, effect. The Court next considers legislative history. The inquiry at this level looks for both a specific congressional intent regarding the issue at hand, and where such an intent does not exist, a more general congressional intent regarding the purpose which the statute is designed to serve. Up to this point, dynamic interpretation resembles the traditional attempt to discern the intent of the legislature. As stated most notably by Hart and Sacks, "A court should try to put itself in imagination in the position of the legislature which enacted the measure. . . . It should assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably."<sup>24</sup>

Dynamic interpretation, however, moves beyond the goal of recapturing—or imaginatively recreating—the legislature's intent. After considering materials contemporaneous with the drafting of the statute, the Court then moves to considerations which have no connection to the statutory text. The Court first looks at any relevant social or legal

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20. CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* 111-59 (1990); Sunstein, *supra* note 2.

21. *See supra* note 4 and accompanying text.

22. *See* Eskridge and Frickey, *supra* note 2.

23. This is taken from Eskridge and Frickey, *supra* note 2.

24. HENRY M. HART, JR. AND ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1414-15 (1958).

changes that have taken place since the statute was enacted. The Court concludes by considering current values. In the case of bankruptcy law, these values would include the policies that bankruptcy law should try to effectuate. These last two inquires are consequentialist in the sense that they evaluate the consequences of the competing interpretations.

To illustrate the difference between these two methods of interpretation, consider the Supreme Court's opinion in *Farrey v. Sanderfoot*.<sup>25</sup> The Bankruptcy Code affords an individual debtor a fresh start in life by allowing the debtor both to jettison certain debts and retain certain assets. The Code itself delineates those debts that are discharged.<sup>26</sup> The assets that the debtor can keep—the debtor's exempt property—are determined by a combination of state and federal law. The Code contains a set of federal exemptions,<sup>27</sup> but it also allows states to opt out of these provisions and force their citizens to select state-created exemptions instead.<sup>28</sup> Most states have taken this option. Even where states have chosen this option, federal law still determines the extent to which a debtor or creditor may impair the applicable exemptions.<sup>29</sup>

In *Farrey*, the Court interpreted the reach of bankruptcy law's protection of exempt assets. The Bankruptcy Code, in section 522(f), allows "the debtor [to] avoid the fixing of a [judicial] lien on an interest . . . in property."<sup>30</sup> Thus, to the extent that a creditor obtains a judicial lien which impairs an exemption, federal law voids the lien. The debtor in *Farrey* divorced his wife prior to his filing for bankruptcy. The property settlement awarded him the marital home, but ordered him to pay his wife approximately half of the equity interest in the house. The court order approving the settlement attached a lien to the house in favor of the wife to secure this obligation. Rather than paying his obligation, the husband filed for bankruptcy in an attempt to avoid the lien. State law gave the husband a \$40,000 exemption for the equity in the house. Because the total equity in the house was only \$60,000, Sanderfoot asserted that his erstwhile wife's lien impaired his exemption (he would only receive \$30,000 if the lien were enforced and \$40,000 if it were not). This impairment, Sanderfoot argued, required that the lien be avoided.

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25. 111 S. Ct. 1825 (1991).

26. 11 U.S.C. § 727 (1988).

27. 11 U.S.C. § 522(d) (1988).

28. 11 U.S.C. § 522(b) (1988).

29. 11 U.S.C. § 522(f) (1988).

30. *Id.*

The Court's analysis focused on the text of the statute. The Court noted that "[n]o one asserts that the two verbs underlying the provision possess anything other than their standard legal meaning: 'avoid' meaning 'annul' or 'undo' and 'fix' meaning to 'fasten a liability upon.'"<sup>31</sup> The Court then argued that "[t]he gerund 'fixing' refers to a temporal event. . . . Therefore, unless the debtor had the property interest to which the lien attached at some point *before* the lien attached to that interest, he or she cannot avoid the fixing of the lien under the terms of [section] 522(f)(1)."<sup>32</sup> The Court thus read the text of the statute and discovered in its language a clear meaning.

The Court's analysis, however, did not stop with the text. It canvassed the legislative history and concluded that "[t]his reading fully comports with the provision's purpose and history."<sup>33</sup> Thus, while the Court's analysis is textualist in that it relies mainly on the language of the statute, it is not Justice Scalia's extreme form of textualism which shuns legislative history as if it were the face of Medusa. Rather, it is a textualism which bases its result on the statutory language, but also invokes other arguments if they are available. The Court, however, does not turn to legislative history to provide the interpretative answer. Legislative history merely confirms the result generated by a careful scrutiny of the statute. Moreover, the Court does not examine the consequences of reading the statute in the manner advocated by the husband.<sup>34</sup>

Having decided that the text of section 522(f) required it to determine when the wife's lien attached, the Court turned to state law.<sup>35</sup> The husband conceded that under Wisconsin law the interest that he held prior to the divorce decree was terminated, and his new interest created, by the decree.<sup>36</sup> This being the case, the interest to which the lien attached did not exist prior to the lien, and thus section 522(f) could not be used to avoid the lien. The Court opined that the result would remain the same even if the divorce decree merely increased the husband's interest from an undivided half ownership to a full ownership because, in the Court's

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31. 111 S. Ct. at 1829 (citations omitted).

32. *Id.*

33. *Id.*

34. See also C. Robert Morris, *Bankruptcy Fantasy: The Site of Missing Words and the Order of Illusory Events*, 45 ARK. L. REV. 265, 286 (1992) ("Justice White . . . relied neither on function or policy.").

35. 111 S. Ct. at 1830.

36. *Id.*

view, the lien would only attach to the wife's half interest.<sup>37</sup>

The textualist nature of the Supreme Court's opinion is highlighted by comparing it to Judge Posner's dissent in the court of appeals.<sup>38</sup> The majority in the Seventh Circuit held that the husband could in fact avoid the wife's lien.<sup>39</sup> Although Judge Posner in dissent reached the same result as the Supreme Court, he did so by a very different route. He began with an explanation of how Sanderfoot was attempting to defraud his wife. Sanderfoot was clearly in bankruptcy court to deprive his wife of the property she was given in the divorce decree. Unlike the Supreme Court, Judge Posner focused immediately on the consequences of what he was being asked to do rather than the precise statutory language. He then noted that this attempt to defeat the divorce decree was not encompassed within the purpose of section 522(f), which is "to thwart unsecured creditors who, sensing impending bankruptcy, rush into court to obtain liens on exempt property, thus frustrating the purpose of the exemptions."<sup>40</sup> Only after making these points, did Judge Posner argue that the statutory language does not require what would clearly be an unjust result. For Judge Posner, the interpretation of the text was closely tied to the consequences of deciding one way or the other. This is dynamic interpretation at its finest.<sup>41</sup>

*Farrey* thus illustrates the contrast between a textualist and a dynamic approach to statutory interpretation. It is interesting to note, however, that despite the different methods used by the Supreme Court and Judge Posner, both reach the same result. It thus does not follow that the choice between textualism and dynamic interpretation necessarily implies a choice between different results. To be sure, most scholars treat the two methods as fundamentally distinct. Those studying statutory interpretation usually place textualism and dynamic interpretation at opposite ends of the spectrum, and from a legal process perspective they certainly are. What scholars have failed to examine is the extent to which the competing methods of interpretation generate different results

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37. *Id.* at 1831. Justice Kennedy, joined by Justice Souter, concurred. They agreed with the Court's interpretation of section 522(f) and that Sanderfoot's concession settled the case. They disagreed, however, with the proposition that section 522(f) would not avoid a lien if the decree had merely augmented Sanderfoot's rights.

38. *In re Sanderfoot*, 899 F.2d 598, 606 (7th Cir. 1990), *rev'd* 111 S. Ct. 1825 (1991).

39. 899 F.2d at 598.

40. *Id.* at 606.

41. The most complete treatment of the issue in *Farrey* is Morris, *supra* note 34, who concludes in regards to the Court's opinion that "[e]verything is wrong except the conclusion." *Id.* at 288.

across a randomly chosen set of cases. Most law review articles that discuss the two theories deal with selected cases in which the theories generate different results. Yet the cases discussed are rarely, if ever, from the same doctrinal area.<sup>42</sup> For example, in their seminal article on the use of practical reasoning in statutory interpretation, Professors Eskridge and Frickey discuss only the following seven cases: the landmark affirmative action case of *United Steelworkers v. Weber*;<sup>43</sup> *Griffin v. Oceanic Contractors, Inc.*,<sup>44</sup> which dealt with wages owed to a maritime worker; *Bob Jones University v. United States*,<sup>45</sup> which held that a private school practicing race discrimination could not receive tax-exempt status; *Church of the Holy Trinity v. United States*,<sup>46</sup> the classic case involving the employment of foreign clergy members; *McNally v. United States*,<sup>47</sup> which interpreted the federal mail fraud statute; *Bryan v. Itasca County*,<sup>48</sup> which concerned the state of Minnesota's power to tax the property of an Indian on a reservation; and *United States v. Kozminski*,<sup>49</sup> which interpreted a statute that criminalized involuntary servitude. Similarly, Judge Posner's analysis of statutory interpretation in *The Problems of Jurisprudence*, discusses three cases: *United States v. Locke*,<sup>50</sup> which considered the proper interpretation of a time limit to file mining claims on federal lands; *Leo Sheep Co. v. United States*,<sup>51</sup> which addressed whether Congress had implicitly reserved an easement when it made a land grant to the Union Pacific Railroad; and *Weber*.

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42. A recent exception to this is Eskridge's discussion of the Supreme Court's labor injunction cases from 1877-1932. See ESKRIDGE, JURISPRUDENCE, Ch 3. To be sure, there are articles which look at the Supreme Court's cases from a specific area. They do not, however, evaluate the textualist/dynamic interpretation choice in these areas. Rather, they criticize the Court for not following the policy which the author advocates. In other words, they assume, rather than justify, the propriety of dynamic interpretation. See, e.g., Michael Livingston, *Congress, the Courts, and the Code: Legislative History and the Interpretation of Tax Statutes*, 69 TEX. L. REV. 819, 844 (1991) ("The tax system will function only if the law achieves a reasonable degree of logic and consistency."); Charles Jordan Tabb & Robert M. Lawless, *Of Commas, Gerunds, and Conjunctions: The Bankruptcy Jurisprudence of the Rehnquist Court*, 42 SYRACUSE L. REV. 823, 827 (1991) ("One unfortunate result of the Court's textualism has been a marked lack of any broader conceptual focus in bankruptcy jurisprudence.").

43. 443 U.S. 193 (1979).

44. 458 U.S. 564 (1982).

45. 461 U.S. 574 (1983).

46. 143 U.S. 457 (1892).

47. 483 U.S. 350 (1987).

48. 426 U.S. 373 (1986).

49. 487 U.S. 931 (1988).

50. 471 U.S. 84 (1985).

51. 440 U.S. 668 (1979).

What is striking about the cases is that they have little, if any, substantive relation to one another. Certainly giving a list of the issues in these cases to lawyers and asking them to discern a pattern would elicit no response except amazement. Of course, the cases are related to the point that the author is attempting to make. They are selected because they are cases where interpretation matters. This selection bias gives the reader a false impression of the stakes in choosing the appropriate interpretive method. The skewed sample of cases makes it appear as if the wide difference in the procedural aspects of textualism and dynamic interpretation leads to a wide difference in results.

This intentional selection bias raises the obvious question: What is the overall effect of choosing one interpretive method over another? Only by examining a random sample of cases can one get a true idea of the systemic costs and benefits of both textualism and dynamic interpretation. To produce such an assessment, this Article considers the bankruptcy cases which the Supreme Court has decided over the past seven terms. Part II of this Article delineates the policies of bankruptcy law. These policies are then used in analyzing the impact of the Court's methodological choice between textualism and dynamic interpretation.

## II. THE POLICIES OF BANKRUPTCY LAW

Academic writing on corporate bankruptcy law consists of two different strands: the economic account and the traditional account. The economic account of bankruptcy law contains both normative and positive elements. The normative strand of economic analysis attempts to specify the optimal set of insolvency rules. Much of the recent work in this area argues for fundamental change in extant law. Reform proposals include: the total abolition of bankruptcy law;<sup>52</sup> the institution of an auction regime for firms that file for bankruptcy;<sup>53</sup> and, the adoption by Congress of a menu of different insolvency regimes from which firms select when they are formed.<sup>54</sup> To the extent that this normative analysis casts doubt

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52. See Barry E. Adler, *Financial and Political Theories of American Corporate Bankruptcy*, 45 STAN. L. REV. 311 (1993); James W. Bowers, *Whither What Hits the Fan?: Murphy's Law, Bankruptcy Theory, and the Elementary Economics of Loss Distribution*, 26 GA. L. REV. 27 (1991); Michael Bradley and Michael Rosenzweig, *The Untenable Case for Chapter 11*, 101 YALE L.J. 1043 (1992).

53. See Douglas G. Baird, *The Uneasy Case for Corporate Reorganization*, 15 J. LEGAL STUD. 127 (1986); Douglas G. Baird, *Revisiting Auctions in Chapter 11*, 36 J. L. & ECON. (forthcoming April 1993).

54. Rasmussen, *Debtor's Choice*, *supra* note 10.

upon congressional decisions embodied in the Code, it offers little aid in assessing the outcome of the Court's interpretative efforts. Even the most ardent supporters of allowing judges to consider social policy in interpreting statutes do not counsel courts to simply ignore congressional judgments and replace them with their own (or even those offered by economists!). Normative criticism of congressional decisions embodied in existing law thus provides little input to the appropriate interpretation of such law.

The positive economic analysis of bankruptcy law, which attempts to explain the fundamental aspects of existing law from an efficiency standpoint, provides a better basis for assessing the Supreme Court's decisions in bankruptcy cases. This analysis purports to describe extant law from the standpoint of efficiency. It also provides a tool for judges who use dynamic interpretation. In cases in which the Bankruptcy Code and its accompanying legislative history provide no definitive answer, a court which embraces dynamic interpretation coupled with the positive economic account of bankruptcy law would select the interpretation which it viewed as best promoting efficiency.

The most complete explication of the efficiency-related description of bankruptcy law is the Creditors' Bargain theory developed by Professors Douglas Baird and Thomas Jackson.<sup>55</sup> Like the Bankruptcy Code, the Creditors' Bargain takes existing state debt collection law as a given.<sup>56</sup> Bankruptcy law thus responds to the deficiencies contained in these laws. Baird and Jackson argue that the deficiency to which federal bankruptcy law responds is a common pool problem.<sup>57</sup> Such a problem exists where individual members of a group have rights to the same assets, but there are insufficient assets to satisfy the desires of the group as a whole. In such a situation, each individual member has an incentive to take actions that harm the group's overall welfare.

In the case of an insolvent firm, the common pool problem identified by Baird and Jackson is that individual creditors using state law remedies to collect their debts could well initiate the piecemeal liquidation of the debtor, even though such liquidation does not fetch top dollar for the

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55. Most of the conclusions of these two authors can be found in DOUGLAS G. BAIRD, *THE ELEMENTS OF BANKRUPTCY* (1992) and Jackson, *supra* note 10. I do not mean to suggest that Baird and Jackson's view of bankruptcy law is solely positive. Rather, they offer a normative theory which is designed to explain the major attributes of extant law.

56. See Baird, *supra* note 10, at 818-19.

57. For an argument that there is no common pool problem in this context, see Picker, *supra* note 10, at 646-49.

firm's assets.<sup>58</sup> Moreover, creditors will spend significant resources to ensure that they are not left at the end of the line.<sup>59</sup> Thus, efficiency is increased by a collective proceeding such as bankruptcy which maximizes the expected return to the creditors.<sup>60</sup> Inside of the collective proceeding the debtor's assets are allocated to the existing creditors in the priority specified by state law. This allocation is necessary to ensure that a bankruptcy proceeding is initiated only when it solves a collective action problem rather than as an attempt by a party to garner the benefits of a bankruptcy-only priority.<sup>61</sup> Baird and Jackson have explained a number of the provisions of the current Code using this conception of the policy animating bankruptcy law.<sup>62</sup>

The competing view of corporate bankruptcy law, which this Article labels the "traditional" view, treats bankruptcy law as a vehicle for dealing with the problems that arise when a firm becomes financially distressed.<sup>63</sup> This view holds that various parties are injured when a firm does not have sufficient resources to pay all of its claimants, and that it is the task of bankruptcy law to decide how the losses will be allocated. The traditional view does not dispute the economic argument that bankruptcy should solve a common pool problem by preventing a destructive race to the debtor's assets; what this view disputes is that this is the only goal of bankruptcy law. In deciding how the hardship caused by financial distress should be distributed, proponents of the traditional view assert that various factors should be considered and weighed against each other. These factors include: the relative hardships that loss will cause to the competing parties; the concern for employee's retaining jobs; equality among creditors; and the needs of the surrounding community.<sup>64</sup> As a general matter, perhaps the two biggest concerns of the traditional mode

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58. See Jackson, *supra* note 10, at 12-15.

59. *Id.* at 16.

60. The legislative history accompanying the Bankruptcy Code embraces this justification for bankruptcy. See H.R. REP. NO. 95-595, 95th Cong., 1st Sess. 340 (1977) ("Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally. A race of diligence by creditors for the debtor's assets prevents that.").

61. See Baird, *supra* note 10.

62. See, e.g., Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857 (1982) (explaining Code's treatment of certain contract provisions and state created priorities); Jackson, *supra* note 10, at 122-50 (explaining preference law); Douglas G. Baird & Thomas H. Jackson, *Kovacs and Toxic Wastes in Bankruptcy*, 36 STAN. L. REV. 1199 (1984) (explaining Code's treatment of environmental cleanup obligations).

63. See, e.g., Warren, *supra* note 10; Korobkin, *supra* note 10.

64. See Warren, *supra* note 10, at 789-93.



of analysis are creditor equality and the promotion of reorganization over liquidation. This view of bankruptcy is often indeterminate. By seeking to promote different policies, the traditional view of bankruptcy often generates competing arguments. The traditional view, however, cannot provide criteria for choosing between these arguments. As described by Professor Elizabeth Warren, one of its leading proponents, the traditional view of bankruptcy is "a dirty, complex, elastic, interconnected view of bankruptcy from which [one] can neither predict outcomes nor even necessarily fully articulate all the factors relevant to a policy decision."<sup>65</sup>

The literature on individual bankruptcy law also consists of an economic account and a traditional account. Central to both accounts is the fundamental difference between corporate and individual bankruptcy law; namely, that the latter contains a fresh start policy for debtors not found in the former. The individual is entitled to discharge debts to obtain a clean slate and hence a "fresh start" in life. Such a policy has little meaning in the case of corporations, and is not part of corporate bankruptcy law. In the case of individuals, however, there exists a wide consensus that such a fresh start policy is desirable. The basis for the fresh start policy is, however, open to question. The economic account has difficulty in justifying the current contours of this policy, especially the fact that individuals cannot waive its protections.<sup>66</sup>

As a positive matter, the economic account of bankruptcy views bankruptcy's fresh start policy as a form of mandatory insurance against the incurring of substantial debt; all persons are promised that if they become insolvent, they can discharge their debts and start life anew. Like all insurance schemes, "bankruptcy insurance" creates a moral hazard problem.<sup>67</sup> In the case of bankruptcy law, the problem is that a generous fresh start provision creates an incentive for persons to engage in risky ventures.<sup>68</sup> In other words, the economic account of individual bank-

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65. *Id.* at 811. I have argued elsewhere that, contrary to the implication of traditional bankruptcy theorists, social justice requires that bankruptcy law be focused solely on efficiency. See Rasmussen, *supra* note 10.

66. See generally Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393 (1985).

67. On moral hazard problems, see generally DAVID M. KREPS, A COURSE IN MICROECONOMIC THEORY 57-79 (1990); Richard S. Higgins, *Products Liability Insurance, Moral Hazard, and Contributory Negligence*, 10 J. LEGAL STUD. 111 (1981); Daniel Keating, *Pension Insurance, Bankruptcy and Moral Hazard*, 1991 WIS. L. REV. 65, 67-68.

68. See Michelle J. White, *Economic versus Sociological Approaches to Legal Research: The Case of Bankruptcy*, 25 LAW & SOC'Y REV. 685, 686-95 (1991) [hereinafter White, *Approaches to*

ruptcy law focuses on the incentive effects of such law without providing a normative basis for such law in the first instance.

In contrast, the traditional account of individual bankruptcy focuses on the plight of the "honest but unfortunate debtor."<sup>69</sup> The core notion here is that individuals often become insolvent through no fault of their own, and therefore deserve relief from their past obligations. The key question is how much relief do these persons deserve, with little attention paid to incentive effects created.<sup>70</sup> Thus, the crucial difference between the economic and traditional accounts of individual bankruptcy law is that the former focuses on the ex ante incentives created by such law, and the latter focuses on the ex post relief granted by the very same law.<sup>71</sup>

With the competing visions of bankruptcy policy now in place, this Article now turns to the Court's recent forays into the bankruptcy arena.

### III. THE SUPREME COURT'S BANKRUPTCY CASES

The Supreme Court's increased reliance on statutory text is generally associated with Justice Scalia's joining the Court in the 1986 Term.<sup>72</sup> Since the advent of Scalia's tenure, which now spans seven terms, the Court has decided twenty-eight bankruptcy cases. Eighteen of those decisions have come in the last three terms. For the purposes of this Article, I have omitted two cases from this sample because they center on the constitutional issue of when a right to a jury trial exists in bankruptcy,<sup>73</sup> and thus have no relevance to the Court's method of statutory interpretation.<sup>74</sup> I have also omitted from the sample a third case which deals with the tax treatment of a firm in bankruptcy and turns solely on the inter-

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*Legal Research*]; Michelle J. White, *Personal Bankruptcy Under the 1978 Bankruptcy Code: An Economic Analysis*, 63 IND. L.J. 1 (1987).

69. This stock phrase comes from *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

70. See White, *Approaches to Legal Research*, *supra* note 68, at 686 (for traditional scholars "bankruptcy filings are never the result of strategic calculations by individuals"). For an analysis using the disparate factors which traditionalists view as driving discharge, see Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047 (1987).

71. The appropriate temporal perspective often dictates the results in corporate bankruptcy law as well. I have argued elsewhere that once the appropriate temporal baseline is established it becomes evident that the policies proffered by the champions of the traditional view of bankruptcy are best served by an efficient bankruptcy rules. See Rasmussen, *Optimal Bankruptcy Rules*, *supra* note 10.

72. See Eskridge, *supra* note 1; Zeppos, *Scalia's Textualism*, *supra* note 1.

73. See *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989); *Langenkamp v. Culp*, 498 U.S. 42 (1990).

74. For those interested in this issue, see Douglas G. Baird, *The Seventh Amendment and Jury Trials in Bankruptcy*, 1989 SUP. CT. REV. 261.

pretation of the tax code.<sup>75</sup> Finally, a fourth case, which deals with the interpretation of a prior Supreme Court case rather than with the Code itself, has been omitted.<sup>76</sup> Of the remaining twenty-four cases in the sample, nine involve issues that arise either exclusively or predominantly in cases involving corporate bankruptcy,<sup>77</sup> twelve involve issues that arise most often in personal bankruptcy,<sup>78</sup> two involve the question whether the Code waives the government's sovereign immunity,<sup>79</sup> and one involves the relationship between the Code's appellate jurisdiction provisions and the general appellate jurisdiction provisions of the United States Code.<sup>80</sup>

Two points readily emerge from reading the entire set of the Supreme Court's bankruptcy cases. The first point, which is qualified by the second, is that the Court often employs textualism when resolving such cases. Most of the Court's decisions rest on its reading of the statutory language. The second point is that the triumph of textualism is not complete; at times the Court diverges from a textualist approach. Subpart III(A) of this Article explores when the Court uses textualism and when it does not. As a matter of positive political theory, the Court's departure from textualism occurs when the Court seeks to protect governmental interests. Subpart III(B) contains the major thesis of the Article. It argues that when the Supreme Court's position in the judicial hierarchy is considered, the Court's textualist approach produces better consequences than would the overt use of dynamic interpretation. The gist of the argument is that the results generated by textualism do not diverge greatly from those that would have been generated by dynamic interpre-

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75. *California State Bd. of Equalization v. Sierra Summit*, 490 U.S. 844 (1989).

76. *Norwest Bank v. Ahlers*, 485 U.S. 197 (1988).

77. See *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 113 S. Ct. 1489 (1993); *Barnhill v. Johnson*, 112 S. Ct. 1386 (1992); *Holywell Corp. v. Smith*, 112 S. Ct. 1021 (1992); *MCorp v. Board of Governors of the Fed. Reserve Sys.*, 112 S. Ct. 459 (1991); *Union Bank v. Wolas*, 112 S. Ct. 527 (1991); *Begier v. IRS*, 496 U.S. 53 (1990); *United States v. Energy Resources, Co.*, 495 U.S. 545 (1990); *United States v. Ron Pair Enters.*, 489 U.S. 235 (1989); *United Sav. Ass'n v. Timbers of Inwood Forest Assoc.*, 484 U.S. 365 (1988).

78. See *Nobelman v. American Savings Bank*, 61 U.S.L.W. 4531 (1993); *Rake v. Wade*, No. 92-621 (1993); *Dewsnup v. Timm*, 112 S. Ct. 773 (1992); *Patterson v. Shumate*, 112 S. Ct. 2242 (1992); *Taylor v. Freeland & Kronz*, 112 S. Ct. 1644 (1992); *Farrey v. Sanderfoot*, 111 S. Ct. 1825 (1991); *Grogan v. Garner*, 498 U.S. 279 (1991); *Johnson v. Home State Bank*, 111 S. Ct. 2150 (1991); *Owen v. Owen*, 111 S. Ct. 1833 (1991); *Toibb v. Radloff*, 111 S. Ct. 2197 (1991); *Pennsylvania Dept. of Pub. Welfare v. Davenport*, 495 U.S. 552 (1990); *Kelly v. Robinson*, 479 U.S. 36 (1986).

79. See *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011 (1992); *Hoffman v. Connecticut Dept. of Income Maintenance*, 492 U.S. 96 (1989).

80. See *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146 (1992).

tation, and that given the Court's limited role in administering the Bankruptcy Code, it is preferable to leave the policy-making role to the lower courts.

*A. The Supreme Court's Textualism: Its Pervasiveness and Its Limits*

The Supreme Court's bankruptcy cases evince a definite trend toward textualist interpretation. Of the twenty-four bankruptcy cases decided in the past seven terms involving statutory interpretation, the Court adopted a textualist approach in nineteen of them.<sup>81</sup> Added to these cases is a twentieth case which one could read as a textualist opinion.<sup>82</sup> Thus, the Court's interpretative method diverges from textualism in only four of twenty-four bankruptcy cases, or seventeen percent. This textualist shift has been noted in the Court's statutory opinions as a general matter.<sup>83</sup> What is interesting is the cases in which the Court abandoned textualism. These cases are not a random sample of cases in the study. Rather, they provide insight into the limits of the Court's textualist approach.

The limits of the Court's textualist approach do not emanate from bankruptcy policy. In none of the four cases in which the Court abandoned textualism did the Court rely on bankruptcy policy in interpreting the Bankruptcy Code. In one case, the Court, faced with an ambiguous statute, searched for the intent of the legislature as evinced in the legislative history.<sup>84</sup> In the other three cases, the Court actually ignored relatively clear statutes to further governmental interests.<sup>85</sup>

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81. See *Rake v. Wade*, No. 92-621 (1993); *Nobelman v. American Savings Bank*, 61 U.S.L.W. 4531 (1993); *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 113 S. Ct. 1489 (1993); *Barnhill v. Johnson*, 112 S. Ct. 1386 (1992); *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146 (1992); *Dewsnup v. Timm*, 112 S. Ct. 773 (1992); *Holywell Corp. v. Smith*, 112 S. Ct. 1021 (1992); *Patterson v. Shumate*, 112 S. Ct. 2242 (1992); *Taylor v. Freeland & Kronz*, 112 S. Ct. 1644 (1992); *Farrey v. Sanderfoot*, 111 S. Ct. 1825 (1991); *Johnson v. Home State Bank*, 111 S. Ct. 2150 (1991); *MCorp v. Board of Governors of the Fed. Reserve Sys.*, 112 S. Ct. 459 (1991); *Owen v. Owen*, 111 S. Ct. 1833 (1991); *Toibb v. Radloff*, 111 S. Ct. 2197 (1991); *Union Bank v. Wolas*, 112 S. Ct. 527 (1991); *Pennsylvania Dept. of Pub. Welfare v. Davenport*, 495 U.S. 552 (1990); *United States v. Energy Resources, Co.*, (1990); *United States v. Ron Pair Enters.*, 489 U.S. 235 (1989); *United Sav. Ass'n v. Timbers of Inwood Forest Assoc.*, 484 U.S. 365 (1988).

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

83. See *Eskridge*, *supra* note 1; *Zeppos*, *Scalia's Textualism*, *supra* note 1.

84. *Begier v. IRS*, 496 U.S. 53 (1990). Not surprisingly, Justice Scalia refused to join the Court's opinion. He concurred in the Court's judgment based on his reading of the statutory text at issue. *Id.* at 67-71.

85. Twice the Court overrode a relatively clear text to further the judicially created policy of immunizing the government from suit. *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011 (1992);

The one case in which the Supreme Court relied on the intent of the legislature demonstrates that the Court has refused to embrace Justice Scalia's extreme form of textualism. *Begier v. IRS*<sup>86</sup> deals with a debtor's liabilities regarding the payment of so-called "trust-fund" taxes. These are taxes which employers must withhold from employee pay checks. The withheld funds are held in "trust" for the federal government.<sup>87</sup> The Court in *Begier* faced the issue of whether trust fund taxes paid by the debtor shortly before the filing for bankruptcy were a voidable preference under the Bankruptcy Code. The Court held that they were not.

As a general matter, section 547 of the Bankruptcy Code allows the trustee to recapture certain payments made by the debtor to unsecured or undersecured creditors ninety days prior to the filing for bankruptcy.<sup>88</sup> For a payment to be a preference, the debtor must transfer "property of the estate" to the creditor.<sup>89</sup> "Property of the estate" is defined in section 541(a) to include all property in which the debtor has a legal or equitable interest.<sup>90</sup> Section 541(d) of the Code, however, excludes from "property of the estate" property that the debtor holds in trust for another.<sup>91</sup> Thus, in the context of *Begier*, to the extent that monies that the debtor paid to the IRS came from a trust of which the IRS was the beneficiary, these monies were not property of the debtor's estate, and hence the transfer of these funds to the IRS could not be set aside as preferential transfers.

The statutory scheme governing the payment of trust fund taxes makes it clear that by the time the debtor paid the monies to the government, they had become trust fund monies. All monies paid to the IRS by the corporation are trust fund monies by definition.<sup>92</sup> This conclusion, however, does not resolve the issue. While the payment of the monies to the IRS may not be a preferential transfer, the conversion of funds from the debtor's sole property into monies held in trust for the IRS might itself be a preferential transfer. If this were the case, the IRS would still have to refund the monies that it received to the extent that such monies be-

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Hoffman v. Connecticut Dept. of Income Maintenance, 492 U.S. 96 (1989). In the third case, the Court turned to policies emanating from federalism rather than a close analysis of the statutory text to reach the result that it did. Kelly v. Robinson, 479 U.S. 36 (1986).

86. *Begier*, 496 U.S. at 53.

87. 26 U.S.C. § 7501 (1988).

88. 11 U.S.C. § 547 (1988).

89. 11 U.S.C. § 547(b) (1988).

90. 11 U.S.C. § 541(a) (1988).

91. 11 U.S.C. § 541(d) (1988).

92. 26 U.S.C. § 7501 (1988).

came trust fund monies within ninety days of the debtor's filing for bankruptcy.<sup>93</sup> The debtor in *Beiger* never placed the monies that it withheld from its employees in a separate account.<sup>94</sup> Thus, if the monies acquired trust fund status only when they were actually paid, the IRS would still face preference liability.

The Supreme Court, however, held that the monies paid to the IRS had acquired trust fund status at the time that the monies were withheld from the employees' paychecks. In reaching this conclusion, the Court first looked to the relevant tax statute, which provides that the trust is established whenever the employer "collect[s] or withhold[s]" the amount of the tax.<sup>95</sup> Relying on its reading of this language, the Court held that the trust is created when the employees are paid.<sup>96</sup>

One issue remained to be resolved. The Court still had to decide whether the particular dollars that were paid to the IRS were funds that were held in trust. In other words, there was a problem of tracing the monies that were withheld from the paychecks to those monies that were ultimately paid. It is one thing to say that the debtor held monies in trust for the IRS; it is quite another to say that the monies which the IRS received were the monies which were held in trust. Tracing was a problem in *Begier* because the tax code places a trust on the "amount" of the taxes rather than any specific funds, and the debtor in *Begier* did not maintain a segregated account for trust fund taxes. Thus, one cannot use normal tracing rules for trust funds because it is unclear which monies were held in trust. Indeed, the entire inquiry seems a bit metaphysical. When monies are "withheld" from an employee's paycheck, the employee has simply received less than the employee otherwise would. No identifiable funds exist which would have been the employee's but for the withholding. Nevertheless, the Court had to decide whether the monies paid to the IRS could be deemed to be the monies that were withheld from the employees' paychecks.

The Court found no statutory guidance on this issue.<sup>97</sup> Neither the Bankruptcy Code nor the Internal Revenue Code addressed the tracing issue.<sup>98</sup> Faced with this lack of guidance, the Court turned to the legisla-

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93. See 11 USC § 550 (stipulating party for whose benefit transfer is made incurs liability).

94. 496 U.S. at 56.

95. 26 U.S.C. § 7501 (1988).

96. 496 U.S. at 61-62.

97. *Id.* at 62.

98. The Court did not mention its earlier decision under the Bankruptcy Act of Cunningham v. Brown, 265 U.S. 1 (1924). Some lower courts have read *Cunningham* as holding that federal bank-

tive history of the Bankruptcy Code. This history stated quite clearly both that all voluntary payments by the debtor to the IRS were by definition trust fund payments (a conclusion which the Court had reached through textual analysis), and, more importantly, that the payments had been trust fund monies since the time that they were withheld.<sup>99</sup> The legislative history thus supplied the sole basis for the Court's ultimate decision.

Justice Scalia concurred in the judgment. Not surprisingly, he found the majority's use of legislative history objectionable.<sup>100</sup> Justice Scalia claimed, however, that a close reading of the text of the Internal Revenue Code would yield the same result. Justice Scalia argued that the trust arose when the taxpayer identified the funds as trust funds monies by writing a check to the IRS, but that this identification meant that the monies had been held in trust at the time of withholding. In other words, Justice Scalia, unlike the majority, found that the statute itself required a relation back from the time of identification to the time of withholding. Justice Scalia reached this conclusion because he read the tax statute as evincing an intent to create a trust immediately upon the withholding of the taxes from the employees' wages.<sup>101</sup>

*Begier* thus provides some insight into the limits of the Supreme Court's textualist approach. The lesson from *Begier* is that a majority of the Court is willing to look at legislative history when the statute itself provides no guidance. In *Begier* the Court had perhaps the most compelling case for relying on legislative history; no statute appeared to address the issue and legislative history spoke directly to the point. Only Justice Scalia was content to ignore the clear legislative history and strain to resolve the case by drawing inferences from the statutory text.

Cases like *Begier*, with no textual guidance and clear legislative history on point, inevitably arise. That the court chooses to follow the legislative history is not surprising nor terribly interesting. More interesting than *Begier* for insight into the limits of the Supreme Court's current interpretative approach are the remaining three cases in which the Court departed from textualism. In these cases the court reached a result

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ruptcy law itself requires that those claiming to have received monies held in trust be able to trace the monies they received to the monies that were in trust. See *Elliott v. Bumb*, 356 F.2d 749 (9th Cir.), cert. denied, 385 U.S. 829 (1966). The Court's decision in *Begier*, by not imposing a strict tracing requirement, implicitly rejects this reading of *Cunningham*.

99. 496 U.S. at 63-67.

100. *Id.* at 67.

101. *Id.* at 70-71.

contrary to that indicated by the language of the Bankruptcy Code. These cases are *Hoffman v. Connecticut Department of Income Maintenance*,<sup>102</sup> *United States v. Nordic Village, Inc.*,<sup>103</sup> and *Kelly v. Robinson*.<sup>104</sup> In *Hoffman* and *Nordic Village*, the Court overrode clear statutory language and legislative history to construe the Bankruptcy Code's waiver of sovereign immunity narrowly, while in *Kelly* the Court engaged in dynamic interpretation to protect a government's restitution order from discharge.

Consider first the interpretative issues regarding the Bankruptcy Code's waiver of sovereign immunity. Section 106 of the Code has three subsections, each of which contains a waiver of the sovereign immunity of both federal and state governments. The first two waivers, contained in subsections (a) and (b) are quite narrow. Subsection (a) waives the government's immunity against claims which arose out of the same transaction or occurrence as did a claim which the government is asserting against the debtor. Subsection (b) waives sovereign immunity against any claim to the extent that that claim is used as a setoff against a claim which the government is asserting against the debtor. Subsection (c) is broader. Section 106(c)(1) provides that "notwithstanding any assertion of sovereign immunity . . . a provision of this title that contains 'creditor,' 'entity,' or 'governmental unit' applies to governmental units."<sup>105</sup> Section 106(c)(2) further provides that a decision under a provision which contains the trigger words listed in subsection (c)(1) "binds governmental units."

The Court first addressed this statutory scheme in *Hoffman v. Connecticut Department of Income Maintenance*.<sup>106</sup> In *Hoffman*, a plurality of the Court held that section 106(c) did not waive a state's immunity against a money judgment issued by the bankruptcy court under a section of the Code which contained one of the trigger words listed in section 106(c). The Court noted that sections 106(a) and (b) clearly waive the government's sovereign immunity for a narrow set of money judgments. Accordingly, the plurality held that subsection (c) applies only to injunctive or declaratory relief.<sup>107</sup> The plurality bolstered its argument

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102. 492 U.S. 96 (1989).

103. 112 S. Ct. 1011 (1992).

104. 479 U.S. 36 (1986).

105. 11 U.S.C. § 106(c) (1988).

106. 492 U.S. 96 (1989).

107. *Id.* at 101-02.



by noting that subsection (c)(2) would have been unnecessary if subsection (c)(1) were as broad a waiver of immunity as the debtor contended.<sup>108</sup> The plurality concluded by invoking the court's previous cases under which legislative history could not be used to find a waiver of sovereign immunity even if the statutory language was ambiguous.<sup>109</sup>

Justice Scalia concurred in the judgment, arguing that Congress does not have the power to waive a state's sovereign immunity.<sup>110</sup> Justice O'Connor issued a brief statement noting that she agreed with Justice Scalia, but also with the plurality's interpretation of section 106(c) and therefore joined that opinion.<sup>111</sup>

Four justices dissented. Justice Marshall found the language of section 106(c) "unmistakably clear."<sup>112</sup> Responding to the majority's argument concerning the redundancy between sections 106(c)(1) and (2), Justice Marshall saw in such overlap the efforts of drafters attempting to satisfy the court's earlier sovereign immunity cases by making the waiver of sovereign immunity as clear as possible. Justice Stevens joined Justice Marshall's opinion, but also issued a separate opinion in which he reviewed section 106(c)'s legislative history and concluded that it supported Justice Marshall's interpretation. This history revealed that section 106 as originally drafted contained only subsections (a) and (b). Subsection (c) was added later, and its sponsors stated that it was intended as an express waiver of sovereign immunity covering many issues. Thus, section 106 was not written as an integrated whole. This history explains the contrast between the narrow waivers found in subsections (a) and (b) and the broad waiver contained in subsection (c).

*Hoffman* thus left the precise scope of subsection 106(c) unresolved. Four justices opined that the provision did not waive a government's sovereign immunity for monetary damages, while four other justices argued that it did. The Court resolved this conflict in *United States v. Nordic*

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108. *Id.* at 102.

109. *Id.* at 103-04. The Court first enunciated the requirement that the language be unmistakably clear without resort to legislative history in 1985, seven years after Congress enacted the Code. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985). Eskridge and Frickey have noted that the Court's change to a super-clear statement rule in the sovereign immunity area "has played a kind of 'bait and switch' trick on Congress." William N. Eskridge, Jr. and Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 622 (1992).

110. 492 U.S. at 105.

111. *Id.*

112. *Id.* at 106.

*Village*.<sup>113</sup> Here the question was whether section 106(c) waived the federal government's immunity to monetary damages. The answer was no. This time a majority of the Court, in an opinion written by Justice Scalia, endorsed the reading of section 106(c) advanced by the plurality in *Hoffman*. The Court began by noting that waivers of sovereign immunity are to be strictly construed. The opinion then noted that subsection (c) stands in contrast to the narrow waivers of subsections (a) and (b). Moreover, the application of subsection (c) to monetary claims would reduce the independent effect of these first two subsections to "trivial application[s]."<sup>114</sup> Also, such a reading would give no independent effect to subsection (c)(2). Under the Court's interpretation, the sole effect of section 106(c)'s waiver of sovereign immunity is to allow the bankruptcy court to determine and discharge a debt which the debtor owed to the government.

The Court also proffered a second reading of the statutory language. It suggested that perhaps the application of subsection (c) was limited by the requirements of subsections (a) and (b). In other words, the waiver in subsection (c) only reaffirmed the waiver contained in the first two requirements. Thus, the redundancy in the statute was not between subsections (c)(1) and (c)(2), but rather between subsections (a) and (b) on the one hand, and subsection (c) on the other. The Court admitted that its reading of the text was not the only possible one, but opined this reading was "plausible" and hence enough to prevent the statute from waiving the government's immunity.<sup>115</sup> The Court again refused to consult the legislative history to clear up what is at best an ambiguous statute.

Justice Stevens, joined by Justice Blackmun, again dissented. The dissent again noted that subsection (c) states that "notwithstanding any assertion of sovereign immunity," if a Code provision contains one of the trigger words, it applies to the government and the government is bound by the bankruptcy court's determination. Thus, "[t]he literal text of the Act unquestionably forecloses the defense of sovereign immunity."<sup>116</sup> Moreover, this reading was confirmed by section 106(c)'s legislative his-

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113. 112 S. Ct. 1011 (1991).

114. *Id.* at 1015.

115. One can compare Justice Scalia's position in the context of sovereign immunity with his general position on how statutes should be read. *See, e.g.*, *Chisom v. Roemer*, 111 S. Ct. 2354, 2372 (1991) ("[O]ur job is not to scavenge the world of English usage to discover whether there is any possible meaning of [statutory language] which suits our preconception . . . ; our job is to determine . . . the *ordinary* meaning [of the words].").

116. 112 S. Ct. at 1018.

tory. Indeed, the reading offered by the majority is impossible to square with either the drafting process behind the statute or the comments made in support of the provision.

The Court's opinions in both *Hoffman* and *Nordic Village* are certainly not textualist. The limitations that the Court placed on the language of subsection (c) have no support in the text of the statute. Instead, the Court engaged in an extreme form of dynamic interpretation. The Court crafted a policy designed to restrict claims against the government whenever possible.<sup>117</sup>

The final bankruptcy case in which the Court failed to engage in textualist analysis is *Kelly v. Robinson*.<sup>118</sup> *Kelly* presented the issue of whether a debtor who filed for Chapter 7 bankruptcy could discharge an obligation to pay a criminal restitution order. In a Chapter 7 bankruptcy, debtors surrender all of their assets to their creditors, except those which the law "exempts." In exchange, debtors receive a discharge of all "debts." Section 523(a) of the Code, however, contains restrictions on this discharge. In particular, section 523(a)(7) provides that a debt is not discharged in a Chapter 7 proceeding if it stems from "a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss."

The debtor in *Kelly* was under a court order to repay the Connecticut Department of Income Maintenance \$6,000 based on the wrongful receipt of \$10,000 in welfare benefits. The debtor argued that this obligation was discharged in a Chapter 7 proceeding. The state made two arguments in response to this contention: first, that the order of restitution was not a "debt" within the meaning of the Bankruptcy Code, and thus not discharged; and second, that if the restitution order was a debt, it was removed from the scope of discharge by section 523(a)(7). The Supreme Court agreed with this latter argument and held that section 523(a)(7) excluded the restitution order from discharge.

The Court's analysis began not with the language of the text, but with the law's treatment of restitution obligations before the passage of the Code.<sup>119</sup> Even though the language of the Bankruptcy Act appeared to discharge restitution orders, courts had found such obligations nondis-

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117. A full discussion of the merits of this policy is beyond the scope of this article. For an insightful analysis of the Court's recent trend toward super-clear statement rules, see Eskridge and Frickey, *supra* note 110.

118. 479 U.S. 36 (1986).

119. *See id.* at 44-47.

chargeable. Thus, the Court concluded that "Congress enacted the Code in 1978 against the background of an established judicial exception to discharge for criminal sentences, including restitution orders."<sup>120</sup> The Court then turned to policy considerations. It noted that federal law as a general matter respects state criminal law decisions. This being the case, the Court did "not think Congress lightly would limit the rehabilitative and deterrent options available to state criminal judges. . . . This reflection of our federalism also must influence our interpretation of the Bankruptcy Code in this case."<sup>121</sup>

Only after canvassing these policy considerations—which did not include bankruptcy policy—did the Court in *Kelly* turn to the language of the Bankruptcy Code. The Court did not decide whether the term "debt" encompassed restitution orders, but expressed doubt that it did.<sup>122</sup> Turning to section 523(a)(7), the Court found its language "subject to interpretation."<sup>123</sup> The monies paid under a restitution order are clearly paid to the state (although then turned over to the victim), and the Court held that the payment was for the "benefit" of the state because the restitution order served a penal function.<sup>124</sup> Finally, the Court held that the restitution payments were "not compensation for actual pecuniary loss"<sup>125</sup> because the state court judge in imposing the restitution order had the discretion to order restitution of less than the full amount of the injury.<sup>126</sup>

Justice Marshall's dissent, which was joined by Justice Stevens, characterized the majority's reading of the statutory text as strained at best. Justice Marshall noted that the Connecticut statute authorizing restitution states that one purpose of the restitution order is to compensate the injured party for the loss it suffered.<sup>127</sup> Thus, he argued that the order seemed to fall outside the sweep of section 523(a)(7). As to the prebankruptcy practice on which the Court relied, Justice Marshall noted that Congress codified the appropriate scope of discharge for penal orders in

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120. *Id.* at 46.

121. *Id.* at 49.

122. *Id.* at 50. Despite these doubts, the Court later held that restitution orders are in fact "debts" under the Code. See *Pennsylvania Dept. of Pub. Welfare v. Davenport*, 495 U.S. 552 (1990).

123. 479 U.S. at 50.

124. *Id.* at 51-53.

125. 11 U.S.C. § 523(a)(7) (1988).

126. 479 U.S. at 53.

127. *Id.* at 55-56.

section 523(a)(7), and that the Court should follow the language of that codification.<sup>128</sup>

The Supreme Court's decision in *Kelly* is a dynamic one which focuses on the policy of federalism. Had the Supreme Court in *Kelly* engaged in a textualist approach, it would have reached the opposite result. Section 527(a)(7) removes from the scope of discharge debts which, among other things, are "not compensation for actual pecuniary loss." The theory of restitution is that it restores what the wrongdoer has taken. That the judge has the discretion to issue an order to restore less than the amount taken—the point seized on by the majority in *Kelly*—does not make the monies to be paid any less compensatory. Few would assert that compensation necessarily means only full compensation. An order for partial compensation is still compensatory. Therefore, had the Court engaged in its standard textualist approach in *Kelly*, it would have reached the opposite conclusion.

Thus, in three of the four times that the Court departed from textualism in interpreting the Bankruptcy Code, it did so to further what it viewed as important governmental interests. The Court's devotion to governmental interests is also evinced by its practice in deciding which bankruptcy cases to review. Nineteen of the cases in the sample came to the Court after the courts of appeals were split on the issue. The Court took another case to resolve a split among the bankruptcy courts,<sup>129</sup> and *Nordic Village* resolved an issue that had split the Court itself in *Hoffman*. Putting these two cases together with the nineteen circuit splits, twenty-one of the twenty-four cases were reviewed to clear up uncertainty in the law.<sup>130</sup> In only three cases did the Court grant review in the absence of a split in the lower courts or its own opinions. The petitioning party in each of those three cases was the government. In two of these cases, the federal government was the petitioning party,<sup>131</sup> in the final case it was a state government.<sup>132</sup> Not only was the government seeking review in all of these cases, it prevailed on the merits in all of them. Thus, while private parties must wait for a circuit split to have the Supreme Court review an issue involving the interpretation of bank-

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128. *Id.* at 58.

129. See *Pennsylvania Dept. of Pub. Welfare v. Davenport*, 495 U.S. 552 (1990).

130. Thus, 87.5% of the cases involved a split among the circuits or members of the court.

131. See *MC Corp v. Board of Governors of the Fed. Reserve Sys.*, 112 S. Ct. 459 (1991); *Holywell Corp v. Smith*, 112 S. Ct. 1021 (1992).

132. See *Kelly*, 479 U.S. 36.

ruptcy law, the government has ready access to the Court when it feels aggrieved by an appellate court decision. This finding comports with the Court's willingness to ignore textualism to further governmental interests.

This is not to say that the Supreme Court is a puppet of the government. The government has lost bankruptcy cases in the Court.<sup>133</sup> Rather, the Court has identified certain interests—sovereign immunity, federalism, and the need for access to the Court—and these interests, when they are present, drive the Court's results. The court jettisons textualism when such an approach would encroach on what the Court views as the government's vital interests.

This concern for governmental interests directly conflicts with the proffered justifications for textualism. One normative justification proponents offer for textualism is that only the text of the statute has gone through the constitutionally prescribed law making process.<sup>134</sup> Other considerations which might affect the analysis, such as legislative history or general policy considerations, have not. This is true, however, regardless of whether the law in question touches on governmental interests. Moreover, other parts of the Constitution, such as the Eleventh Amendment, provide express protection for governmental interests. Consequently, there seems to be little reason to abandon a practice supposedly mandated by Article I to protect judicially created governmental interests.<sup>135</sup> In other words, the Court double counts. The general textualist practice protects structural concerns, but these concerns are augmented when a governmental interest is involved. Textualism, as the Court practices it, is thus justified as protecting governmental interests. Nevertheless, textualism is jettisoned when it is seen as impinging on other governmental interests.

A second justification for textualism comes from public choice theory.<sup>136</sup> Public choice scholars view legislation as the product of tradeoffs

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133. The government was the losing party in *United States v. Energy Resources, Co.*, 495 U.S. 545 (1990), and filed an amicus brief in support of the position that was rejected in *United Sav. Ass'n v. Timbers of Inwood Forest Assoc.*, 484 U.S. 365 (1988).

134. See *Thompson v. Thompson*, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring); Zeppos, *Scalia's Textualism*, *supra* note 1, at 1616-17; Zeppos, *supra* note 2, at 1300-04.

135. Eskridge and Frickey argue that the best possible defense for the Court's super-clear statement rules, such as that invoked in *Hoffman* and *Nordic Village*, is that they protect constitutional norms which are either unenforced or underenforced. See Eskridge and Frickey, *supra* note 110, at 629-32. However, they ultimately reject this justification. See *id.* at 632-45.

136. See Zeppos, *Scalia's Textualism*, *supra* note 1, at 1617.

among interest groups. They imply from this the proposition that courts should only give interest groups the deals that they were able to place in the statutory language. To do otherwise would make it easier for special interests to gain results which do not promote the public interest. Thus, the public interest is furthered by following statutory text. Yet if this is the case, one would think that the government would not deserve the special protection implicit in the Court's departure from textualism. Congress is comprised of representatives from the states, and the federal government has ready access to the lawmaking process. The government thus has the ability to protect itself. To the extent that statutory language disfavors governmental interests, this simply means that Congress decided that such interests should give way. The government is not the type of entity which tends to be exploited by legislative action. Thus, the Court's overriding concern with governmental interests conflicts with the proffered reasons for its textualist approach.

The Court's blatant desire to further governmental interests also conflicts with the textualist argument that following statutory language is necessary to cabin judicial discretion. The Court's decisions in *Hoffman*, *Nordic Village*, and *Kelly* are nothing more than judicial policy making. While one may find the merits of these policies attractive, the inescapable fact is that they are policies none the less. Thus, the Court's bankruptcy cases reveal that the Court will follow textualism where it does not have a strong commitment to a certain policy, but will abandon textualism where a policy which it cares about is implicated. The Court's departure from textualism robs textualism of much of its normative appeal. To the extent that textualism is used as a normative theory of interpretation, it has some appeal.<sup>137</sup> Yet, if the Court departs from textualism on occasion, some other theory must explain the court's approach.<sup>138</sup> Subpart III(B) of this Article offers a pragmatic reason for the Court's use of textualism in interpreting the Bankruptcy Code.

### *B. The Pragmatic Case for the Supreme Court's Textualist Approach to the Bankruptcy Code*

The Supreme Court in deciding bankruptcy cases will occasionally depart from textualism to further certain policies that it deems important.

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137. For a defense of textualism, see Schauer, *Statutory Construction*, *supra* note 1; Schauer, *Response*, *supra* note 2; Easterbrook, *Domains*, *supra* note 2.

138. For a detailed explanation of why textualism cannot supply a foundational theory for statutory interpretation, see ESKRIDGE, *JURISPRUDENCE* Ch. 1.

Bankruptcy policy is not one them. Putting aside the four cases discussed in the previous section, in the twenty remaining bankruptcy cases, the Court relied on the text of the statute before it, rather than on any notion of bankruptcy policy, to reach its result.

This part of the Article argues that the Court's exclusive focus on statutory text in the bankruptcy arena produces better results than would obtain were the Court to embrace dynamic interpretation. The argument proceeds as follows. First, the Article shows that the Court's current practice is not in fact a façade for actually promoting one view of bankruptcy policy over another. The Article next shows that the outcome in a majority of the Court's cases would have remained the same had the Court used dynamic interpretation. As to those cases where the result would have changed, the Article argues that the cost of these cases is small so long as one does not a priori privilege one view of bankruptcy over another. Moreover, given that the lower courts which implement the Bankruptcy Code are often sensitive to bankruptcy policy, it is unlikely that the Court's failure to consider bankruptcy policy would often lead to results which have no basis in some conception of bankruptcy policy. Against these relatively small costs, there is the benefit that the Court can provide greater certainty in the law. Thus, from a pragmatic standpoint, the Court should continue on its textualist course in interpreting the Bankruptcy Code.

### 1. *The Irrelevance of Bankruptcy Policy in the Supreme Court*

Not only does the Court fail to rely on bankruptcy policy expressly in any of its opinions, but it also is readily apparent that the Court's textualist approach is not a mask for a "hidden agenda" in the bankruptcy area. The Court reaches results that are not universally consistent with any theory of bankruptcy law. Some results comport with the economic account of bankruptcy law, while others coincide with the traditional explanation.

Consider, for example, the Supreme Court's decisions in *United Savings Ass'n v. Timbers of Inwood Forest Associates*<sup>139</sup> and *United States v. Ron Pair Enterprises*.<sup>140</sup> *Timbers* addressed the treatment of a secured creditor whose collateral is worth less than the debt it is owed. The Bankruptcy Code gives such a creditor two claims: a secured one for the

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139. 484 U.S. 365 (1988).

140. 489 U.S. 235 (1989).



amount of the collateral, and an unsecured one for the remainder of the debt.<sup>141</sup> The Code does not allow interest to accrue on these claims.<sup>142</sup> For example, if a creditor is owed \$10,000, and its debt is backed by collateral worth \$8,000 when the bankruptcy petition is filed, the creditor would have a secured claim for \$8,000 and an unsecured claim for \$2,000. At the end of the bankruptcy proceeding, secured claims are paid in full,<sup>143</sup> and unsecured claims share pro rata in the remaining assets.<sup>144</sup> At issue in *Timbers* was treatment of the secured claim during the pendency of the bankruptcy proceeding.

The Bankruptcy Code allows the holder of the secured claim to request "adequate protection of [its] interest in property" during the bankruptcy proceeding.<sup>145</sup> If the debtor fails to provide such protection, the bankruptcy court will allow the creditor to foreclose on the collateral.<sup>146</sup> The Code does not define what constitutes "adequate protection"; rather, it provides three examples of the way in which a Court may provide such protection.<sup>147</sup> The third of these is "relief . . . as will result in the realization by [the creditor] of the indubitable equivalent of [its] interest."<sup>148</sup> All agree that to the extent that the creditor's collateral is declining in value, adequate protection requires that the secured creditor be compensated for this decline. So if in the preceding example the collateral's value was decreasing by \$100 a month, the creditor, after asking for adequate protection, would either be compensated for this loss or allowed to foreclose on the collateral.

The fighting issue in *Timbers* was whether the undersecured creditor who asked for adequate protection was entitled to compensation for the temporal depreciation of the value of its collateral as well as for the physical depreciation. Even if the value of the collateral is stable in nominal dollars, it is depreciating in an economic sense. Recovering \$8,000 today is simply not the same as recovering \$8,000 in two years. The undersecured creditor in *Timbers* asserted that this decline in the value of its claim must be offset through adequate protection. The Court, however,

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141. 11 U.S.C. § 506(a) (1988).

142. See 11 U.S.C. § 502(b)(2) (1988) (no claim for unmatured interest). The only exception to this is for creditors whose collateral exceeds the amount of the debt. See 11 § U.S.C. 506(b) (1988).

143. 11 U.S.C. § 724 (1988).

144. 11 U.S.C. 726.

145. 11 U.S.C. § 362(d)(1) (1988).

146. *Id.*

147. 11 U.S.C. § 361 (1988).

148. 11 U.S.C. § 361(3) (1988).

held that "adequate protection" did not protect the creditor from such temporal depreciation.

The Supreme Court's unanimous opinion, written by Justice Scalia, was textualist. The Court began with the fact that what was to be protected under the statute was the creditor's "interest in property" of the debtor. It admitted that the phrase "interest in property" was ambiguous standing alone.<sup>149</sup> The Court concluded, however, that when the Bankruptcy Code was read as a whole, it became clear that the secured creditor should receive compensation only for physical depreciation. The Court pointed to section 506(b), which grants an oversecured creditor interest on its claim, and section 502(b)(2), which disallows postpetition interest in all other situations. The Court opined that compensating the undersecured creditor for temporal depreciation would conflict with this statutory scheme.<sup>150</sup> The Court also asserted that protecting the undersecured creditor against temporal depreciation would be inconsistent with section 362(d)(2) of the Code, which allows a creditor to have the stay lifted if the debtor has no equity in the collateral and the collateral is not needed for an effective reorganization. According to the Court, allowing the undersecured creditor to lift the stay for lack of adequate protection if he is not protected against temporal depreciation would allow him to lift the stay when the debtor held no equity in the property even if the property was necessary for the reorganization effort. Thus, the Court reasoned, section 362(d)(2) would have no independent effect.<sup>151</sup> The Court rejected the undersecured creditor's arguments which were based on the legislative history of the Code.<sup>152</sup>

The Court's decision might have changed had it engaged in dynamic interpretation. Dynamic interpretation would begin with the frank admission that the text of the Code is ambiguous. The Court's textual arguments are by no means compelling. The interest provision discusses the general treatment of contractual interest. This treatment occurs automatically under the Code. Adequate protection, on the other hand, has nothing to do with the terms of the contract and must be requested by the creditor. The Court's concern that it might read section 362(d)(2) out of the Code also fails to satisfy. Requiring the debtor to pay temporal depreciation as part of adequate protection would not allow the credi-

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149. 484 U.S. at 371.

150. *Id.* at 371-73.

151. *Id.* at 374-76.

152. *Id.* at 379-80.

tor to foreclose on the property whenever the debtor has no equity left in the collateral. It would simply require the debtor to compensate the creditor for such depreciation if the debtor is to prevent foreclosure. Moreover, other textual sources suggest the conclusion rejected by the court. The Code makes clear in section 1129 that the phrase "indubitable equivalent" includes temporal depreciation.<sup>153</sup> Finally, the legislative history also fails to answer the question. Thus, a court employing dynamic interpretation would admit that the Code was ambiguous on this point, and choose the interpretation that best furthered bankruptcy policy.

From a policy perspective, the Court's result in *Timbers* is certainly consistent with the traditional view of bankruptcy. This view exalts the reorganization of financially troubled firms. The likelihood for a successful reorganization is increased to the extent that debtors do not have to pay money to creditors during the bankruptcy proceeding.<sup>154</sup> More cash on hand makes it easier for the corporation to meet current expenses, which the corporation must do even though it has filed for bankruptcy.<sup>155</sup> Not compensating undersecured creditors for the temporal depreciation of their collateral also gives those creditors an incentive to work toward a quick reorganization. Taken together, these factors lead to the conclusion that granting temporal depreciation would impede the goal of furthering reorganizations.<sup>156</sup>

The holding in *Timbers*, however, conflicts with the economic account of bankruptcy.<sup>157</sup> In the reorganization context, the economic account posits that it is the goal of bankruptcy law to ensure efficient deployment of the firm's assets. If a single person owned all the assets of the firm, that person would have the appropriate incentives to put the firm's assets

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153. See 11 U.S.C. § 1129(b)(2)(A) (1988).

154. For an argument on this score, see Note, "Adequate Protection" and the Availability of Postpetition Interest to Undersecured Creditors in Bankruptcy, 100 HARV. L. REV. 1106 (1987).

155. See 11 U.S.C. § 503 (1988); 11 U.S.C. § 363 (1988) (debtor may use, sell or lease property in ordinary course of business during bankruptcy); 11 U.S.C. § 364 (1988) (debtor may incur debt in ordinary course); 11 U.S.C. § 363 (1988) (costs of running business receive priority status).

156. Note, *supra* note 154; Raymond T. Nimmer, *Secured Creditors and the Automatic Stay: Variable Bargain Models of Fairness*, 68 MINN. L. REV. 1 (1983)

157. The normative argument is set forth in Douglas G. Baird and Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. CHI. L. REV. 97 (1984). The statutory argument for this position can be found in Thomas O. Kelly III, Comment, *Compensation for Time Value as Part of Adequate Protection During the Automatic Stay in Bankruptcy*, 50 U. CHI. L. REV. 305 (1983).

to their highest valued use. A single owner bears the marginal cost of a wrong decision and enjoys the marginal benefit of a correct one. However, if multiple owners of a firm exist, those making the deployment decision will be concerned with their own return rather than the total return to all of the owners of the firm. To overcome this divergence of interests, reorganization law should attempt to place the decision making authority in the party that bears both the marginal costs and benefits of the decision. Unsecured creditors, who control the bankruptcy proceeding to some extent, stand to realize the marginal gain by the efficient deployment of the assets. Thus, unsecured creditors should bear the marginal costs. Unsecured creditors will only bear these costs if they compensate secured creditors for the true cost of delay—temporal and physical depreciation. If unsecured creditors do not bear these costs, they have an incentive to delay because such delay works a redistribution from the secured creditors to themselves.

*Timbers* is thus a case in which the Court's textualist approach furthers the traditional account of bankruptcy at the expense of the economic account. The Court's decisions, however, do not always dovetail with the results suggested by the traditional view of bankruptcy law. Consider in this respect the Court's decision in *United States v. Ron Pair Enterprises*,<sup>158</sup> which fortuitously corresponds with the economic rather than the traditional account of bankruptcy law. *Ron Pair* held that a nonconsensual oversecured creditor was entitled to postpetition interest on its claim. Section 506(b) of the Bankruptcy Code provides that an oversecured creditor shall be allowed "interest on [its] claim, and any reasonable fees, costs, or charges provided for under the agreement under which [its] claim arose."<sup>159</sup> The interpretative issue before the Court was whether the "agreement" establishing the claim must encompass the "interest" that the creditor sought. If so, a nonconsensual secured creditor—in this case the IRS, which had obtained a tax lien on the debtor's property—would not be entitled to postpetition interest because, by definition, its secured claim is not based on an agreement between the parties. A five member majority held that under the plain language of the statute the oversecured creditor was entitled to interest; only fees, costs and charges must be in the agreement if they are to be recovered.<sup>160</sup> The dissent asserted that the majority's analysis rested solely on the comma

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158. 489 U.S. 235 (1989).

159. 11 U.S.C. § 506(b).

160. 489 U.S. at 241-43.

between "interest" and "and," and that such punctuation should not control the outcome of the case. The dissent would thus have looked to pre-Code practice, under which interest was not recoverable in this type of situation.<sup>161</sup>

*Ron Pair* is like *Timbers* because the outcome that would have resulted through the use of dynamic interpretation turns on whichever view of bankruptcy policy one adopts. The dissent is correct that the majority's reading turns on the existence of the comma between "interest" and "and." Moreover, the legislative history makes no mention of the appropriate treatment of oversecured nonconsensual creditors. These traditional sources of statutory interpretation fail to present a compelling case for one reading of the statute or the other. The outcome under a dynamic approach would thus turn on which interpretation best promoted the policies that bankruptcy advances.

The economic explanation of bankruptcy law would support the holding in *Ron Pair*. Outside of bankruptcy, there is no doubt that the oversecured creditor is entitled to interest on its claim. There is no bankruptcy reason to alter this result simply because a bankruptcy petition is filed. The need to overcome the collective action problem, which drives the economic account of bankruptcy law, provides no basis to curtail the rights of the oversecured nonconsensual creditor. Indeed, curtailing such rights would give the debtor an incentive to file for bankruptcy simply to take advantage of the rule change. Outside of bankruptcy, the debtor would have to pay interest on the oversecured claim; inside of bankruptcy it would not. To avoid this state of affairs, the economic account suggests that all oversecured creditors should be allowed postpetition interest.

This conclusion, however, conflicts with a practical reasoning approach based on the traditional view of bankruptcy law.<sup>162</sup> As with *Timbers*, the payment of money reduces the chance of having a plan of reorganization confirmed. Moreover, because the creditor did not bargain for the protection of excessive collateral, there is no countervailing reason to allow the oversecured nonconsensual creditor interest on its claim. The traditional account would respect creditors who in the bargaining process took sufficient collateral to cover both their claims and interest. Failing to do so might make it more difficult for the debtor to

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161. *Id.* at 249-54.

162. See Tabb and Lawless, *supra* note 42, at 844 ("The Court's decision makes little sense in the larger context of the Bankruptcy Code and the policies behind it.").

obtain credit in the first instance. Such concern, however, does not exist with the nonconsensual creditor. Payments to such creditors simply reduce the funds available to other creditors. Thus, those advocating the traditional view would deny nonconsensual oversecured creditors interest under section 506(b).

Comparing *Timbers* and *Ron Pair* demonstrates the candor of the Court's opinions. Whereas the result in *Timbers* favors the traditional account at the expense of the economic account, the result in *Ron Pair* comports with the economic account while conflicting with the traditional account. The upshot of these conflicting decisions is that one cannot deem the Court's textualist approach a façade for advancing one view of bankruptcy policy over the other.

Furthermore, the Court's results in its bankruptcy cases do not consistently favor one type of party over another. Sometimes creditors win,<sup>163</sup> as they did in *Ron Pair*, sometimes they lose as they did in *Timbers*.<sup>164</sup> The results in these cases are best explained through reasoning given by the Court. Therefore, we do not have to wonder whether the Court speaks candidly in its opinions.<sup>165</sup> It does.

The bottom line is that the Court cares little for bankruptcy policy. While the perceived needs of the government force the Court to jettison its textualist approach, bankruptcy policy—of either stripe—does not rise to such a level. To say that the Court has a bankruptcy jurisprudence would thus be misleading; it has no jurisprudence at all in this area.

## 2. *The Pragmatic Case for Textualism in Bankruptcy Cases*

The Court's failure to articulate a coherent bankruptcy policy does not necessarily imply that one should condemn the Court's approach. Indeed, this Article ultimately concludes that textualism is a superior strategy for the Supreme Court in the context of the Bankruptcy Code. Perhaps the largest difficulty in assessing the Court's performance in its bankruptcy cases is determining the relevant baseline for measurement. If one were to take fealty to the statutory language as the baseline, one would reach a different conclusion than if one measured the Court's per-

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163. See *Dewsnup v. Timm*, 112 S. Ct. 773 (1992); *Ron Pair*, 489 U.S. 235 (1989).

164. See *Timbers*, 484 U.S. 365 (1988); *Patterson v. Shumate*, 112 S. Ct. 2242 (1992).

165. On the dispute surrounding whether the Court should be candid in its analysis compare David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987) with Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353 (1989).

formance against the requirement of whether it articulated a coherent bankruptcy policy. As with many areas of legal analysis, one's view of the appropriate goal often drives the assessment of the current state of affairs.

The baseline that I use in the Article is one set by the proponents of dynamic interpretation. Namely, that one should measure the Court's output against the results it produces. I select this baseline both because I am a consequentialist and thus believe that all law should be measured against the consequences that it produces, and also because this is the stated goal of those who advocate a switch to dynamic interpretation. If dynamic interpretation does not produce a gain over textualism when measured by this criterion, then the case for such interpretation, at least in the context of the Code, falls by its own weight.

In assessing the consequences of the Court's textualist approach, it is necessary to ascertain the role which the Court plays in the administration of the Bankruptcy Code. This is a function both of the Court's own opinions, and the impact that these opinions have on the judicial administration of the Code. The fact that one must assess the impact of the Court's own decisions is hardly a novel proposition. What is often overlooked, however, is that the Court does not implement statutes autonomously. Rather, it operates in a hierarchical structure. In the case of the Code, the Court shares implementation duties with appellate courts, district courts, and bankruptcy courts. Only by situating the Court within this hierarchy can one assess the true impact of its decisions in the bankruptcy area.<sup>166</sup>

When one examines the Court's bankruptcy cases, it becomes readily apparent that the Court plays a systemic role in the implementation of the Bankruptcy Code. The Court does not act as an institution which attempts to delineate a coherent bankruptcy policy. Unlike other statutory areas, such as civil rights, where the Court delves into the policy behind the statute,<sup>167</sup> the Court in bankruptcy pays no attention to the policies which animate bankruptcy law. This is not to say, however, that the Court plays no coherent role in this area of the law. The Court does

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166. Professor Eskridge has also recently noted the common failure to situate the Court in its role in the judicial hierarchy in assessing its results. See ESKRIDGE, *JURISPRUDENCE*, Ch. 2.

167. See, e.g., *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 989 (1988) ("[W]e must determine whether the reasons that support the use of disparate impact analysis apply to subjective employment practices, and whether such analysis can be applied in this new context under workable evidentiary standards.").

play an important role because it provides certainty to the system. The Court's major function is to resolve circuit splits. Recall that 87.5% of the cases in the survey—those not involving a governmental interest—came to the Court to resolve some sort of split in the law.<sup>168</sup> Thus, when the Court is not faced with a governmental interest, it has adopted a procedural rather than substantive role. The Court intervenes only when confusion in the law exists. The Court resolves this confusion without any attention to bankruptcy policy. The unavoidable conclusion is that the Court is much more concerned with ensuring uniformity in the implementation of federal bankruptcy law than with the content of such law.

The Court itself in *United States v. Energy Resources*<sup>169</sup> signalled its desire to leave the crafting of substantive bankruptcy law to the lower courts. Like *Begier*,<sup>170</sup> *Energy Resources* involved trust fund taxes. The debtor in *Energy Resources* owed both trust fund and nontrust fund taxes when it filed for bankruptcy. As required by the Bankruptcy Code, the debtor's plan of reorganization provided that the debtor would pay all of these taxes in full during the next six years.<sup>171</sup> The plan also provided that the payments would be credited to the trust fund portion of the unpaid taxes first. The IRS objected to this provision. Corporate officers are personally liable for the payment of trust fund taxes, and the IRS desired to keep the officers as a potential source of payment for as long as possible.

The Bankruptcy Code does not address the ordering problem. The Court in holding that bankruptcy judges have the power to designate the allocation of the payments pointed to two provisions of the Code—section 1123(b)(5), which allows a plan to contain “any . . . appropriate provision not inconsistent with the applicable provisions of this title,” and section 105(a), which empowers the bankruptcy court to “issue any order, process, or judgment that is necessary to carry out the provisions of this title.” According to the Court, “[t]hese statutory directives are consistent with the traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships.”<sup>172</sup> In other words, the Court was more than happy to leave the

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168. See *supra* note 130 and accompanying text.

169. 495 U.S. 545 (1990).

170. For a discussion of *Begier*, see *supra* notes 86-102 and accompanying text.

171. See 11 U.S.C. § 1129(a)(9)(C) (1988).

172. 495 U.S. at 549.



matter to the discretion of the bankruptcy court. The bankruptcy court, not the Supreme Court, could decide whether or not allowing the payment of trust fund taxes first was consistent with bankruptcy policy.

To determine whether the consequences of the Supreme Court adopting its procedural role in the implementation of the Bankruptcy Code are beneficial, one must contrast this role to that proposed by the advocates of dynamic interpretation. Those who wish to see the Court take what they view as a more overtly dynamic approach to statutory construction assert that the Court's job is to further public policy consistent with the text and history of the statute. The Court under this theory, upon finding no answer in the statute or legislative history, should "examine the consequences of giving the invoker [of the statute] what he wants and then estimate whether those consequences will on the whole be good ones."<sup>173</sup> The first question to be addressed is what benefits would be gained from a shift to dynamic interpretation. After examining any policy gains attributable to a shift to dynamic interpretation, this Article examines the costs inherent in the Court's shifting role in the hierarchical structure from a procedural to a substantive one.

*a. The Limited Gains From Adopting Dynamic Interpretation*

Proponents of dynamic interpretation assert that adoption of such a practice would lead to decisions that better effectuated public policy. The gain, however, does not seem as large as that suggested by dynamic theorists. Most of the cases which the Court has handled, like *Farrey v. Sanderfoot*,<sup>174</sup> would have come out the same way had the Court engaged in dynamic interpretation and embraced either vision of bankruptcy policy. Of the Court's twenty textualist bankruptcy opinions, the decision would have remained the same under a dynamic approach in fourteen of them regardless of which view of bankruptcy policy was adopted. Only two of these twenty cases would have reached a different result had the Court used dynamic interpretation in conjunction with either view of bankruptcy policy.<sup>175</sup> One case would have been decided differently had the Court used practical reasoning and embraced the eco-

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173. Posner, *supra* note 2, at 300.

174. 111 S. Ct. 1825 (1991). For a discussion of *Farrey*, see *supra* notes 25-41 and accompanying text.

175. See *Johnson v. Home State Bank*, 111 S. Ct. 2150 (1991); *Toibb v. Radloff*, 111 S. Ct. 2197 (1991).

conomic account of bankruptcy,<sup>176</sup> and three cases might have had different outcomes had the Court used practical reasoning with a focus on the traditional account of bankruptcy.<sup>177</sup> Accordingly, 70% of the cases would have come out the same way had the Court practiced dynamic interpretation, 10% would have come out differently, and 20% may have come out differently depending on the factors which the Court viewed as relevant under a practical reasoning approach. Given that the Court would ultimately decide either one or three of the cases in the last category the same under practical reasoning, the Court, at worst, reached the same result using its textualist approach as it would have if it had used a dynamic approach in 75% of the cases.

Nevertheless, a number of cases would have come out differently had the Court used dynamic interpretation. The proponents of dynamic interpretation might suggest that any improvement over the current system would argue for a change in interpretative focus. After all, a small gain is better than no gain at all. To assess this claim, it is first necessary to determine the benefits in terms of bankruptcy policy that would result. Only two cases would have been decided differently regardless of the bankruptcy policy endorsed by a dynamic approach. These cases are *Toibb v. Radloff*<sup>178</sup> and *Johnson v. Home State Bank*.<sup>179</sup> Both deal with access to certain chapters of the Bankruptcy Code. When the practical import of these cases are examined, it becomes clear that the benefits to bankruptcy policy of changing both decisions would be trivial.

In *Toibb v. Radloff*,<sup>180</sup> the Supreme Court decided that an individual debtor who was not engaged in business could file for reorganization under Chapter 11 of the Bankruptcy Code. The Court argued that "the plain language of the Bankruptcy Code disposes of the question before us."<sup>181</sup> Section 109 provides that, with exceptions not relevant in *Toibb*, a "person" eligible to file for Chapter 7 can file for Chapter 11. "Person" is defined in the Code, and a "person" who can file for Chapter 7 undoubtedly includes an individual. Given that the Code does exclude some entities that are "persons" under the Code from filing for Chapter 7, and thus Chapter 11 as well, the Court declined to exclude any indi-

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176. See *Timbers*, 484 U.S. 365 (1988).

177. See *Ron Pair*, 489 U.S. 235 (1989); *Dewsnup*, 112 S. Ct. 773 (1992); and *MCorp v. Board of Governors of the Fed. Reserve Sys.*, 112 S. Ct. 459 (1991).

178. 111 S. Ct. 2197 (1991).

179. 111 S. Ct. 2150 (1991).

180. 111 S. Ct. 2197 (1991).

181. *Id.*

viduals from filing for Chapter 11 even though *Toibb* had no on-going business. The Court's decision is thus an illustration of the familiar *expressio unis* principle. The Court rejected the lower court's reliance on the Code's legislative history as limiting Chapter 11 relief to those engaged in a business. The Court first noted that legislative history could not displace a clear text. It then suggested that the legislative history was not clear on the point. The Court also rejected the proffered policy arguments for keeping those without businesses from reorganizing under Chapter 11.

Justice Stevens dissented. He admitted the "plausib[ility]" of the majority's argument, but concluded that "[w]hen the statute is read as a whole . . . it seems quite clear that Congress did not intend to authorize a 'reorganization' of the affairs of an individual consumer debtor."<sup>182</sup> Justice Stevens found section 109 unclear as to whether it merely excluded those not eligible for Chapter 7 relief from filing for Chapter 11 or whether it affirmatively authorized all those eligible for Chapter 7 to file for Chapter 11 as well. He then examined the Code's legislative history, which "convince[d him] that consumer debtors may not avail themselves of Chapter 11."<sup>183</sup>

The truth of the matter is that few people, if any, thought of this issue when the Bankruptcy Code was drafted. A court using dynamic interpretation would admit this fact and then examine the policy implications of its decision. Certainly, Chapter 11 was not drafted with the case of the individual consumer debtor in mind. For most persons, Chapter 13 provides greater relief than Chapter 11. However, as in *Toibb*, an individual may desire to file to under Chapter 11 when he cannot qualify for relief under Chapter 13.<sup>184</sup> In such a situation, a Chapter 11 plan of reorganization is the only way for an individual to retain his nonexempt assets. From an economic point of view, there is little reason to keep the assets of a debtor together if the debtor is not engaged in an ongoing business. The rationale for the existence of Chapter 11 simply has no place in this context. Moreover, it is difficult to think of an argument based on traditional bankruptcy policy which would allow consumer debtors to file for Chapter 11 because the traditional justification for Chapter 11 is to save financially troubled firms.

Although *Toibb* is wrongly decided, the cost of this decision is un-

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182. *Id.* at 2202.

183. *Id.* at 2202-03.

184. *Id.* at 2198 n.1.

doubtedly quite small. A nonbusiness debtor will rarely benefit from proceeding under Chapter 11. Debtors who can qualify for Chapter 13 prefer to file under that provision. As to those nonbusiness debtors unable to file for Chapter 13, Chapter 11 offers little benefit over Chapter 7. Most importantly, the discharge granted in Chapter 11 does not extend to debtors that do not engage in business after confirmation of the plan of reorganization.<sup>185</sup> Thus, the debtor still owes all of its prebankruptcy debts. Consequently, it is highly doubtful that *Toibb* will open the floodgates to a significant number of Chapter 11 cases. Added to this is the Chapter 11 requirement that a creditor receive at least as much under a plan of reorganization as it would have under a Chapter 7 liquidation.<sup>186</sup> This qualification suggests that the loss to creditors associated with allowing nonbusiness debtors to file for Chapter 11 is quite small. While *Toibb* is thus wrongly decided from the perspective of dynamic interpretation, the cost of this error is, at worst, minimal.

The second case in which the Court's decision would change under dynamic interpretation is *Johnson v. Home State Bank*.<sup>187</sup> In this case the Court addressed the propriety of so-called "Chapter 20" bankruptcies. These bankruptcies occur when an individual debtor who owns mortgaged property first files a Chapter 7 petition. The Chapter 7 proceeding discharges the individual's personal liability on the debt obligation, thus leaving the mortgage holder only with a lien on the property itself.<sup>188</sup> After the Chapter 7 proceeding ends, the debtor immediately files for Chapter 13 before the lien holder can foreclose on the property. In the Chapter 13 proceeding, the debtor proposes a plan to pay the mortgage over time. The net effect of this maneuver is an unconsented rescheduling of the mortgage and a loss of individual liability on the debt.

The Court viewed *Johnson* as presenting the question whether the mortgage holder's lien on the property in the subsequent Chapter 13 proceeding constituted a "claim" against the debtor after the debtor's personal liability was discharged. Only a "claim" can be rescheduled under Chapter 13. Relying on its statement in *Pennsylvania Department of*

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185. 11 U.S.C. § 1141(d)(3)(B) (1988).

186. 11 U.S.C. § 1129(a)(7) (1988).

187. 111 S. Ct. 2150 (1991).

188. 11 U.S.C. § 727(b) (1988) (discharge of personal liability). The doctrine of a lien "passing through" bankruptcy was first enunciated in *Long v. Bullard*, 117 U.S. 617 (1886).

*Public Welfare v. Davenport*<sup>189</sup> that a “‘right to payment’ [means] nothing more nor less than an enforceable obligation,”<sup>190</sup> the Court had “no trouble concluding that a mortgage interest that survives the discharge of a debtor’s personal liability is a ‘claim.’”<sup>191</sup> The Court noted that this textualist conclusion was buttressed by other sections of the Code and confirmed by the Code’s legislative history. The Court rejected the mortgage holder’s claim that serial filings allowed the debtor to escape the limits that Congress placed on the remedies available in Chapter 7 and Chapter 13 respectively. The Court based its rejection on the ground that the Code expressly prohibits certain serial filings, but not the combination at issue here.

If the Court had used a dynamic approach to statutory interpretation in *Johnson*, it would have likely reached a different result. The Code neither authorizes nor prohibits Chapter 20 bankruptcies. The legislative history suggests that Congress viewed Chapter 7 and Chapter 13 as alternative remedies. This distinction makes sense from the standpoint of bankruptcy policy, both economic and traditional.<sup>192</sup> The core notion of Chapter 7 is that the debtor surrenders all nonexempt assets in exchange for a discharge of her past unsecured debts; the debtor thus keeps all of her future income. The core notion of Chapter 13 is that the debtor keeps current assets in exchange for a promise to devote her future disposable income for a period of years to pay her past debts. Neither purpose suggests that the debtor should be able to combine these alternate schemes so as to turn a recourse loan into a nonrecourse loan and alter the payment schedule.

Moreover, the effect of the maneuver in *Johnson* is to evade the limitations which Congress placed on Chapter 13. The Bankruptcy Code allows debtors to file for Chapter 13 only if they have unsecured debts of less than \$100,000 and secured debts of less than \$350,000.<sup>193</sup> The debtor in *Johnson* could not have filed for Chapter 13 initially because his debts exceeded these limitations. The Court, however, approved this end run around the Chapter 13 limitations despite the fact that such action comports with neither view of appropriate bankruptcy policy.

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189. 495 U.S. 552 (1990).

190. 111 S. Ct. at 2154 (quoting *Pennsylvania Dept. of Pub. Welfare v. Davenport*, 495 U.S. 552, 559 (1990)). The bracketed language was added by the Court in *Johnson*.

191. 111 S. Ct. at 2154.

192. For a traditionalist’s disagreement with *Johnson*, see Tabb and Lawless, *supra* note 42, at 875-77.

193. 11 U.S.C. § 109(e) (1988).

The cost of the Court's decision in *Johnson* is somewhat higher than the cost of its decision in *Toibb*, but still not substantial. Recall that *Johnson* approved a debtor's filing for Chapter 13 immediately after the debtor had completed a Chapter 7 proceeding. *Johnson* thus allows some debtors to file for Chapter 13 who otherwise would have been forced to live with the results of their prior Chapter 7 bankruptcy. Because the initial Chapter 7 proceeding cannot lower the amount of secured debt, it allows those debtors who meet the secured debt limitation on Chapter 13 but not the unsecured debt limitation on that provision to eventually file for Chapter 13. Thus, *Johnson* will lead to more debtors filing for Chapter 13 than would otherwise be the case. This increase in the number of debtors in Chapter 13 will only be a cost to the extent that Chapter 13 itself imposes some type of unwanted costs. Chapter 13 allows a debtor to keep nonexempt assets in exchange for a promise to pay creditors the value of such assets.<sup>194</sup> If the bankruptcy judge imposes a low interest rate in computing future payments, this ability may benefit debtors at the expense of creditors. The judge must discount future payments to present value to ensure that the creditor is receiving the value of its claim. If too low an interest rate is used, the creditor will end up receiving less than the present value of its claim. In this way, Chapter 13 may benefit debtors. Such a problem would not arise in the Chapter 20 context, however, because the debtor has already surrendered all nonexempt assets in the Chapter 7 bankruptcy.

A second benefit of Chapter 13 deals with that provision's effect upon secured claims. Chapter 13 allows debtors to keep the collateral in exchange for promising creditors that they will pay the creditors the present value of the collateral over the life of their Chapter 13 plan.<sup>195</sup> This plan may last at the longest five years.<sup>196</sup> To keep collateral in a Chapter 7 proceeding, on the other hand, the debtor must either reaffirm the underlying obligation, thus promising to pay the creditor's entire claim regardless of the value of the collateral, or the debtor must pay the creditor the value of the collateral immediately.<sup>197</sup> By filing for a Chapter 13, the debtor receives the benefit of judicial valuation of the property, and the opportunity to pay this valuation over time. *Johnson* allows some debtors who do not meet the eligibility requirements for Chapter 13 to garner

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194. 11 U.S.C. § 1325(a)(4) (1988).

195. 11 U.S.C. § 1325(a)(5)(b)(ii) (1988).

196. 11 U.S.C. § 1322(c) (1988).

197. 11 U.S.C. § 722 (1988).

this benefit for themselves. To the extent that errors in the valuation process result in undercompensated creditors, this is a cost of *Johnson*. The cost, however, appears relatively small. Few debtors meet only the secured (but not the unsecured) claim limits.

Moreover, the valuations probably do not have a wide variance. The maximum amount of secured claims that a debtor may have and still be able to file for Chapter 13 is \$350,000. It seems unlikely that there would be substantial variations in valuing what is ultimately relatively small inexpensive collateral. Most of the collateral at issue would be land.<sup>198</sup> While there will be room for judicial judgment in this context, the feasible valuations should fall in a fairly narrow range.

Thus, while *Toibb* and *Johnson* were both decided wrongly from the perspective of dynamic interpretation, the costs of these decisions are relatively trivial.

Four other cases might have changed if the Court had engaged in dynamic interpretation rather than its textualist approach. Whether the actual results in these cases represent costs of the Court's current interpretive practice depends upon one's view of bankruptcy policy. If one views the economic account of bankruptcy as best identifying appropriate bankruptcy policy, then one would consider *Timbers* wrongly decided. *Timbers* is a major case, perhaps the most important of the Court's decisions. The cost of the *Timbers* opinion is that it raises the cost of credit to those seeking to borrow money.<sup>199</sup> Creditors who take collateral know that as a result of *Timbers* they will not be compensated for the delay caused by bankruptcy if their collateral is less than the amount of their claim. Thus, creditors will charge the debtor a higher interest rate in the first instance.<sup>200</sup>

Of course, from the traditional perspective, the cost imposed on debtors by *Timbers* is outweighed by the promotion of reorganizations. Giving less cash to the undersecured creditors leaves more assets in the control of the debtor. A debtor may use these assets to fund its continued operation while it attempts to formulate a plan of reorganization.

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198. A debtor could not use Chapter 20 to modify the debt on her house because Chapter 13 does not allow for the modification of residential mortgages. See 11 U.S.C. 1322(b)(2); *Nobelman v. American Savings Bank*, 61 U.S.L.W. 4531 (1993).

199. I discuss the relationship between bankruptcy law and the cost of credit at length in *Rasmussen, Debtor's Choice*, *supra* note 10, at 56-58.

200. For an elaboration of the link between bankruptcy rules and the initial lending decision, see *id.* at 55-68.

Moreover, the secured creditor has incentive to agree to a reorganization plan because it is not compensated for the delay caused by the bankruptcy proceedings. Before discussing how to evaluate cases such as *Timbers* in which the assessment of the result turns on one's view of bankruptcy policy, consider the other cases which have this same feature.

The result in three of the Supreme Court's bankruptcy cases would have changed if the Court had used dynamic interpretation and embraced the traditional view of bankruptcy policy. These cases are *Ron Pair, MCorp v. Board of Governors of the Federal Reserve System*,<sup>201</sup> and *Dewsnup v. Timm*.<sup>202</sup> The Court in *Ron Pair* gave more to oversecured nonconsensual creditors, and thus reduced the probability of reorganization plan confirmation. The less money the debtor can commit to the reorganization plan, the less likely it is that the debtor's creditors will accept such a plan. The overall effect of this decision depends to a large extent on the number of oversecured nonconsensual creditors that appear in bankruptcy. My sense is that this number is relatively small. The largest creditor in this category is the IRS. The IRS obtains a lien upon all of the debtor's property upon the debtor's failure to pay taxes.<sup>203</sup> However, the lien will only be effective in bankruptcy if the government has perfected it through filing.<sup>204</sup> Thus, for the government to be an oversecured creditor in bankruptcy, it must before bankruptcy learn of the nonpayment of taxes, and take affirmative action to perfect the lien at a time when the debtor's unencumbered assets exceed the amount of its claim. Such actions are unlikely to occur in a high percentage of cases. The effect of *Ron Pair* thus is not large. Certainly, it is not nearly as large as the effect of *Timbers*.

Similarly, the Supreme Court's decision in *MCorp* does not appear to impose large costs from the perspective of the traditional view of bankruptcy law. The Court in *MCorp* held that section 362 of the Bankruptcy Code, which automatically stays most collection efforts against a debtor, did not stay ongoing administrative proceedings by the Federal Reserve Board investigating MCorp's financial transactions. Section 362(a) stays many actions against the debtor. Section 362(b)(4), however, exempts actions "by a governmental unit to enforce such governmental unit's police or regulatory power." The Court held that the

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201. 112 S. Ct. 459 (1991).

202. 112 S. Ct. 773 (1992).

203. 26 U.S.C. § 6321 (1988).

204. 26 U.S.C. § 6323 (1988).



Board's actions "[fell] squarely within" this exception.<sup>205</sup> The Court's unanimous opinion also rejected MCorp's argument that the bankruptcy court had to decide whether the exercise of regulatory power was legitimate because such a reading of the statute would conflict with agency discretion and be inconsistent with the limited authority Congress has granted bankruptcy courts.

The Supreme Court would have reached the same conclusion had it used a dynamic approach informed by the economic account of bankruptcy law. The statutory language is clear, and under the economic account of bankruptcy, the general justification for staying nonbankruptcy decision-making processes and deciding all claims against debtors in a single forum is efficiency.<sup>206</sup> It is cheaper to resolve the many claims against the debtor all at once. Moreover, there is no reason to think that the bankruptcy court cannot replicate the judicial proceedings that otherwise would have occurred. This justification does not hold where, as in the case of administrative agencies, the bankruptcy court is institutionally incompetent to serve as a substitute for the nonbankruptcy forum.<sup>207</sup> A court is a fundamentally different decisionmaking body than an administrative agency. Dynamic interpretation coupled with the economic account of bankruptcy would thus allow administrative proceedings to continue despite the filing of a bankruptcy petition.

If the Court used dynamic interpretation in conjunction with the traditional account of bankruptcy law, however, *MCorp* might have come out the other way. To cabin the capacious language of the Bankruptcy Code, one could point to legislative history which indicates that section 362(b)(4) is to be given a narrow construction so as to apply only to government actions that "protect the public health and safety."<sup>208</sup> Many lower courts have relied on this history to narrow the reach of section 362(b)(4)'s broad language.<sup>209</sup> They use this legislative history to conclude the administrative actions should be allowed to go forward only

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205. 112 S. Ct. at 464.

206. See Thomas H. Jackson, *Translating Assets and Liabilities to the Bankruptcy Forum*, 14 J. LEGAL STUD. 73, 85 (1985); Robert K. Rasmussen, *Bankruptcy and the Administrative State*, 42 HASTINGS L.J. 1567, 1575-76 (1991).

207. See Rasmussen, *supra* note 207.

208. See 124 CONG. REC. S17,406 (daily ed. Oct 6, 1978) (statement of Sen. DeConcini); 124 CONG. REC. 32,395 (1978) (statement of Rep. Edwards).

209. See, e.g., *Missouri v. United States Bankr. Ct.*, 647 F.2d 768, 775-77 (8th Cir. 1981), *cert. denied* 454 U.S. 1162 (1982); *EEOC v. Hall's Motor Transit Co.*, 789 F.2d 1011, 1013-14 (3d Cir. 1986); *NLRB v. Continental Hagen Corp.*, 932 F.2d 828,833-34 (9th Cir. 1991).

when such actions are designed to further public policy rather than to protect the government's pecuniary interest. The traditional account would posit that as a policy matter it is preferable to have a bankruptcy court decide as many issues as possible so that the bankruptcy judge can ensure that the goal of securing an effective reorganization is not slighted.

Because most administrative actions do promote public policy, they would not be stayed. Indeed, while the district court in *MCorp* concluded that the action by the Federal Reserve was stayed because the action was designed to promote the government's pecuniary interest, the court of appeals did not rule on the issue. It is not too much of a stretch to characterize the action at issue as one in furtherance of public policy. Thus, while *MCorp* did not recognize the limits on the exception from the automatic stay advocated by those from the traditional school of bankruptcy, the practical effect of the Court's failure to do so may be quite small. Many administrative actions clearly would not be stayed. As for the rest, such as the proceeding in *MCorp*, it is unclear whether or not the action would be stayed.

Finally, the Court's decision in *Dewsnup* again applies to a limited class of cases.<sup>210</sup> The Court in *Dewsnup* addressed the question whether section 506(d) of the Bankruptcy Code allows a debtor to "strip down" a lien. In *Dewsnup*, the creditor, Timm, loaned the Dewsnups \$119,000. The loan was secured by a lien on two pieces of real estate owned by the Dewsnups. The Dewsnups defaulted on the loan and filed for bankruptcy. After a trial, the bankruptcy court concluded that the land securing the loan was worth \$39,000. The Dewsnups invoked subsection 506(d) in order to reduce the amount of Timm's lien to the value of the collateral.

Section 506(d) provides that "[t]o the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void . . . ."<sup>211</sup> The Court held that this provision did not allow for strip down. The Court noted that the statutory language was ambiguous and therefore could be read either as allowing strip down whenever a claim exceeded the value of the collateral, as the Dewsnups argued, or allowing

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210. Professor Howard has noted the harms which could occur if *Dewsnup* were extended beyond the situation before the Court. See Margret Howard, *Dewsnapping The Bankruptcy Code*, 1 J. Bankr. L. & Prac. 513, 517-24 (1992). The Court was careful to leave these problems for another day. See 112 S. Ct. at 778 ("We . . . focus upon the case before us and allow other facts to await their legal resolution on another day.")

211. 11 U.S.C. § 506(d) (1988).

strip down only if the claim at issue was disallowed, as Timm and the Department of Justice, appearing as *amicus curiae*, argued. Given this ambiguity, the Court turned to pre-Code practice, and disallowed strip down. I consider this to be a textualist result. Justice Blackmun first read the text of the statute, and when this was not plain, he invoked a canon of construction to decide the issue.<sup>212</sup>

Justice Scalia, joined by Justice Souter, dissented. For Justice Scalia, there was no ambiguity in the statutory text. He read the section as allowing strip down. He opined that the alternative reading adopted by the Court would make the word "secured" in section 506(d) redundant, and would also be contrary to the use of the term "allowed secured claim" in other parts of the Code.

Neither the majority nor the dissent employed dynamic interpretation in reaching its result. Such an approach would candidly admit the ambiguous nature of section 506(d), and look to the policy consequences of the decision at hand. Followers of the economic view of bankruptcy would first note that the principal effect of reading section 506(d) to allow strip down would be to allow the debtor to capture any increase in the value of the property occurring after stripdown but before the property was sold. Moreover, such a reading would give the debtor the benefit of a judicial valuation of the property. Even if judges were unbiased in the direction of their inevitable errors, bias in favor of debtors would be the actual result. If a debtor does not agree with the judge's valuation, the debtor can still have the foreclosure sale. On the other hand, if the creditor believes that the valuation is low, it has no remedy; it is stuck with that valuation. Finally, combining the strip down interpretation with the result in *Johnson*,<sup>213</sup> which approved the filing of a Chapter 13 bankruptcy immediately after the debtor had completed a Chapter 7 bankruptcy, a debtor could use Chapter 7 to discharge personal liability on the claim and strip down the lien to the value of the collateral, and

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212. I do not mean to imply that using canons of construction necessarily mean that an opinion is textualist. For example, Cass Sunstein has offered a set of cannons which embody normative policy judgments. See Sunstein, *supra* note 2. Nevertheless, textualists also rely on canons of construction. The difference between dynamic interpretation and textualism is not that one uses canons and the other does not; rather, it is the substance of the canons themselves. Dynamic canons are self-consciously normative. They are designed to implement certain policies. Textualist canons, on the other hand, purport to be common sense rules of interpretation rather than policy judgments. The canon invoked by Justice Blackmun in *Dewsnup* is a textualist canon.

213. 111 S. Ct. 2150 (1991).

then file for Chapter 13 and reschedule the payments on the reduced lien. There is little reason to suggest that any of these effects is efficient.

A practical reasoning approach relying on traditional bankruptcy policy would reach a contrary result.<sup>214</sup> Under this view, strip down simply replicates state law foreclosure proceedings—the creditor is left with the value of the collateral. Moreover, allowing strip down precludes the creditor from extracting from the debtor any subjective value which the debtor attaches to the property. At an actual foreclosure sale, the creditor can bid in its claim even though this claim exceeds the value of the collateral. Because the creditor does not have to put any new money on the table, it can force the bidding beyond the market price of the collateral up to the subjective value which the debtor attaches to the land. This tactic both impairs the debtor's fresh start and violates the notion of creditor equality because the mortgage holder will get paid in full on part of its unsecured claim. These policy concerns coupled with the ambiguous language of section 506(d) would lead to a result at odds with the one reached by the majority in *Dewsnup*.

Yet in what circumstances is the holding in *Dewsnup* applicable? The Supreme Court has held that Chapter 13 forbids any modification of the rights of the holder of a residential mortgage.<sup>215</sup> Thus the holding in *Dewsnup* has no effect on residential mortgages in Chapter 13. Putting aside the case of *Dewsnup* only has an effect where the debtor wants to retain the property at issue. After *Dewsnup*, the debtor must attend the foreclosure sale and bid against the mortgage holder for the land. Had *Dewsnup* come out the other way, the debtor could have petitioned the judge to place a value on the land. The debtor could then have paid the mortgage holder this amount to retain the property free of any liens. Thus, the cost of *Dewsnup* is the difference between what the debtor will have to pay at the foreclosure sale and what the debtor would have had to pay on a judicial valuation. The debtor cannot object that the judge would have provided a break in the price. Rather, the debtor's argument is that because the debtor values the property much more than anyone else, and the mortgage holder knows that, the mortgage holder will "stick it to the debtor" at the foreclosure sale.<sup>216</sup> Again, the number of cases in which this will hold true does not seem to be great. Moreover, to

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214. See Margaret Howard, *Stripping Down Liens: Section 506(d) and the Theory of Bankruptcy*, 65 AM. BANKR. L.J. 373 (1991).

215. See *Nobelman v. American Savings Bank*, 61 U.S.L.W. 4531 (1993).

216. See *id.*

the extent that reversing *Dewsnup* would have decreased the return to creditors, this would have led to an increase in the price of credit.

While these three cases might have come down differently had the Court followed a dynamic approach tied to traditional notions of bankruptcy policy, the factual situation presented in each of these cases tends to be uncommon.

There remains one more potential cost to the Supreme Court's use of textualism. That is the possibility that by not looking at bankruptcy policy, the Court simply misses the issue in the case before it. The one example of this happening in the context of the Bankruptcy Code is the Court's opinion in *Union Bank v. Wolas*, which addressed the treatment of the debtor's payments on long-term debt immediately prior to the filing for bankruptcy.<sup>217</sup> The Code requires that those who receive preferential transfers from the debtor before the bankruptcy filing must return the payments to the debtor. Generally, a preferential transfer is a payment to a creditor who would not have been paid in full if it had not received the payment and instead received a distribution at the close of the bankruptcy case.<sup>218</sup> Such transfers in essence prefer one unsecured creditor at the expense of other such creditors. Section 547 of the Code identifies preferential transfers by first setting forth a bright-line test in subsection 547(b), and then providing certain safe harbors in subsection 547(c) to protect certain payments which fall within the reach of subsection 547(b). In *Wolas*, the payments at issue were regular installments on the debtor's long-term debt. All parties agreed that these payments fell within subsection 547(b). At issue was whether or not the payments were exempt from preference liability under the ordinary course of business exception contained in section 547(c)(2). For exemption under that provision, the debtor must have incurred the debt in the "ordinary course" of both the debtor's and the creditor's business, the debtor must have paid the debt in the ordinary course of both entities' businesses, and the debtor must have made the payment according to "ordinary business terms."<sup>219</sup> The Ninth Circuit in a previous case held that payments on long-term debts could never qualify for the ordinary course exemption.<sup>220</sup> It therefore held that the payments at issue in *Wolas* were preferences. The Supreme Court, in an unanimous decision, reversed.

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217. 112 S. Ct. 527 (1991).

218. 11 U.S.C. § 547 (1988).

219. 11 U.S.C. § 547(c)(2) (1988).

220. See *In re CHG Int'l, Inc.*, 897 F.2d 1479 (9th Cir. 1990).

The Court opined that “the text provides no support for [the trustee’s<sup>221</sup>] contention that § 547(c)(2)’s coverage is limited to short-term debt.”<sup>222</sup> As to the Court’s argument in favor of its holding, that was pretty much that. The text of the statute in no way excepted long-term debt from its ambit, and the Court was not going to create such an exception.

The remainder of the Court’s opinion was spent rejecting the opposing arguments. The Court rejected the trustee’s reliance on the statute’s legislative history because “[t]he fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning.”<sup>223</sup> The Court also rejected the trustee’s arguments based on the policies that preference law seeks to promote. Although the Court admitted that its holding was inconsistent with the bankruptcy policy of providing equal treatment for all unsecured creditors, it found that its opinion was consistent with the bankruptcy policy of discouraging creditors from racing to the court house and thereby dismembering the debtor.<sup>224</sup>

Justice Scalia issued a short concurrence. He stated that “[i]t 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.”<sup>225</sup>

Despite Justice Scalia’s parting shot at the lower courts which have yet to embrace textualism, the Supreme Court missed the basic issue in *Wolas* even from a textualist perspective. Section 547(c)(2) requires that for payments to qualify for ordinary course treatment, the debtor had to incur the underlying debt in the debtor’s “ordinary course of business.” The interpretive issue is what constitutes the appropriate baseline in assessing whether or not a debt was incurred in the ordinary course of business. Specifically, the question is should the bankruptcy court determine whether this particular debtor ordinarily incurs this type of debt, or whether this is the type of debt that firms such as the debtor ordinarily incur. To illustrate this distinction, assume that the debtor is a small,

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221. The trustee is the person responsible for administering the bankruptcy estate, which is comprised of the assets that the debtor owned prior to filing a bankruptcy petition.

222. 112 S. Ct. at 530.

223. *Id.* at 531 (citation omitted).

224. *Id.* at 533.

225. *Id.* at 534.

closely-held company manufacturing disk drives. Early in the firm's existence it borrowed \$1 million from a bank. The proceeds of this loan were used to provide operating capital for the business. The debtor has been paying off this loan, and has not incurred any other long term loans. Was this loan incurred in the ordinary course of business? If the court looks solely at the debtor's business, the answer is "no." The loan was a one-time event; it was not "ordinary." However, all similar firms may incur long-term debt in order to finance their initial operations. Using similar firms as the baseline would thus lead to the conclusion that the loan was in the ordinary course of business because all similar businesses incur long-term debt at some time.

While the Court thus missed the basic interpretative issue in *Wolas*, the Code's text would have yielded an answer. Although the text of section 547(c)(2) does not provide any guidance on the issue, the phrase "ordinary course of business" appears elsewhere in the Code. In these other provisions, it is clear that the term means the ordinary course of this debtor's business, and not the ordinary course of business for similar firms.<sup>226</sup> The textualist judge would then invoke the canon of construction that the same words in the same statute are given the same meaning.<sup>227</sup> Thus, the textualist judge would conclude that long-term debts are not incurred in the ordinary course of the debtor's business if the actual debtor has not routinely incurred such debts.

Applying dynamic interpretation to *Wolas* would not have changed the result.<sup>228</sup> A court using this method would candidly admit that the text of section 547 does not provide any definitive guidance. It would then examine the provision's history, which is as follows. When the Code was enacted in 1978, the ordinary course exception applied only to debts that were incurred forty-five days before they were paid.<sup>229</sup> Section 547(c)(2) thus enabled the debtor to acquire and repay short-term credit

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226. See, e.g., 11 U.S.C. § 363(c)(1) (1988) (stipulating that debtor may operate in the "ordinary course of business" without court approval); 11 U.S.C. § 364(a) (1988) (stipulating that debtor may incur unsecured debt in the "ordinary course of business"). The legislative history to section 364 makes clear that incurring a "substantial loan" is not in the ordinary course of business. See S. REP. No. 989, 95th Cong., 2d Sess. 57-58 (1978).

227. See, e.g., *Washington Metro. Transit Auth. v. Johnson*, 467 U.S. 925, 935-36 (1984); *BankAmerica Corp v. United States*, 462 U.S. 122, 129 (1983); *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980); *Northcross v. Board of Educ.*, 412 U.S. 427, 428 (1973); *Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972).

228. For a detailed examination of this issue, see Lissa L. Broome, *Payments on Long-Term Debt as Voidable Preferences: The Impact of the 1984 Bankruptcy Amendments*, 1987 DUKE L.J. 78.

229. 11 U.S.C. § 547(c)(2) (1982) (current version at 11 U.S.C. 547(c)(2) (1988)).

without fear of preference liability. The 1984 amendments to the Code removed the forty-five day limitation. The 1984 amendments were not accompanied by any legislative history explaining the reason for the deletion. Congressional hearings on an earlier version of the amendments focused on the arbitrariness of the forty-five day limitation; many extensions of short-term credit exceeded forty-five days. Nothing in these hearings, however, expressly stated that Congress intended to limit section 547(c)(2) to short-term credit. Given this lack of a clear answer in either the text of the statute or its legislative history, a practical reasoning approach would decide the issue based on bankruptcy policy.

Both competing accounts of bankruptcy policy favor the exclusion of long-term debt from the "ordinary course of business" language in section 547(c)(2). The economic explanation of bankruptcy law views preference law as responding to the problem of gun jumping.<sup>230</sup> Creditors as a group are better off beginning a bankruptcy proceeding rather than relying on state debt collection law. However, every individual creditor would, absent preference law, have an incentive to attempt to secure payment in full before such a proceeding began and thus escape the pro rata sharing mandated by bankruptcy law. Preference law is designed to discourage such attempts to opt out of bankruptcy's collective proceeding by forcing those who engage in opt out behavior to return the fruits of their efforts. From this perspective, it is easy to see why the ordinary course of business exception exists. If a transaction is in the ordinary course of business, then there is no attempt to opt out, and thus preference liability should not attach.

This rationale for preference law is similar to the policy, identified by the Supreme Court in *Wolas*, of not precipitating a race to the courthouse. The Court, however, erred in suggesting that excluding long-term debts from preference liability would accentuate this problem. The creditors' knowledge that they will have to return preferential payments decreases their incentive to attempt collection from debtors before bankruptcy begins.<sup>231</sup> Including long-term debt within section 547(c)(2) actually hinders this policy.

The danger of long-term loans that the debtor itself does not ordinarily incur comes from the fact that such loans are often for a substantial

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230. See Jackson, *supra* note 10, at 122-50.

231. The extent to which current law provides an appropriate incentive not to engage in preferential activity is open to question. See John C. McCoid, II, *Bankruptcy, Preferences and Efficiency: An Expression of Doubt*, 67 VA. L. REV. 249, 264-65 (1981).



amount. Long-term loans are usually start up loans and lines of credit. Default on such loans often gives the creditor the de facto power to terminate the debtor's business. The loan agreements accompanying these loans usually have covenants which upon default allow the lender to demand repayment of the entire loan. The loan's size ensures that the debtor cannot meet the demand for payment in full. Thus, the nature of these loans is that the debtor has an incentive to prefer the lender at the expense of its other creditors. Failing to pay one supplier will not terminate the business; neglecting to pay the financing bank will. Thus, the gun jumping in effect occurs when the loan is made. The nature of the loan itself ensures that the debtor, when faced with financial hardship, will pay the long-term lender to the exclusion of others. Thus, long-term loans should not be held to be made in the ordinary course of business for the purposes of section 547(c)(2).

A dynamic interpretation based on the traditional view of preference law would lead to the same result. One of the policies behind this view is the equality of similarly situated creditors. According to the traditional explanation of bankruptcy law, preference law is designed to protect such sharing. Thus, one should read the exceptions to preference liability narrowly. The narrow reading in this case would exclude long-term debt. The Code needs an exclusion for short-term debt in order to allow the firm outside of bankruptcy to secure trade credit. Many typical business transactions involve short-term credit, the absence of which would accelerate the firm's slide into bankruptcy. Those embracing this rationale for section 547(c)(2), which included the Ninth Circuit, view the elimination of the forty-five day rule as simply the removal of an arbitrary line rather than an extension of the ordinary course limitation to long-term debt. Such an extension in their view would too far impinge on the policy of equal treatment of creditors.<sup>232</sup>

The Court's failure to identify the real issue in *Wolas* ultimately causes little harm because its decision does not preclude a holding that debtors do not ordinarily incur long-term debt. Nevertheless, the case illustrates a potential cost of textualism; by not examining the policy implications of its decision, the Court may fail to appreciate the question that it is being asked to decide. Arguably, a switch to dynamic interpretation would preclude such mistakes.

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232. See *In re CHG Int'l, Inc.*, 897 F.2d at 1483-85.

*b. The Benefits of Textualism*

There is thus a cost to the Supreme Court's use of textualism from both points of view of bankruptcy policy. This does not mean, however, that proponents of various bankruptcy policies necessarily want the Court to switch its interpretive practice. For both the traditional and economic scholars, textualism is a second best strategy. In other words, those who favor the economic account of bankruptcy law prefer the results generated by textualism to those generated by dynamic interpretation coupled with the traditional view of bankruptcy. For such persons, gaining the benefit of changing the results in *Toibb* and *Johnson* would not be worth the cost of losing the results in *Ron Pair*, *MCorp*, and *Dewsnup*. Similarly, those who hold the traditional view prefer the results generated by textualism to those that would arise under a dynamic approach tied to the economic account of bankruptcy law. For such persons, the loss of the result in *Timbers* would in no way be compensated for by the switch in the results of *Toibb* and *Johnson*. The benefits of switching from textualism to a dynamic approach thus turn on one's view of bankruptcy policy and whether the Court endorses that view or its opposite. Each group prefers textualism to a dynamic approach that embraces the view of bankruptcy policy that it opposes.

Clearly, those embracing the economic account prefer dynamic interpretation tied to that account over the Court's current textualist practice. Similarly, adherents to the traditional account favor dynamic interpretation tied to their view of bankruptcy policy over the Court's current practice. Thus, for both camps, the preferred strategy is dynamic interpretation tied to their own vision of bankruptcy law, with textualism as a second best solution. The least preferred strategy is dynamic interpretation coupled with the view of bankruptcy law endorsed by the competing scholars.

That dynamic interpretation is not a dominant strategy for bankruptcy scholars stems from textualism's disdain for policy analysis. Deciding cases without regard to bankruptcy policy ensures that some decisions comport with one view of bankruptcy policy, while others dovetail with the competing view. Thus, in cases where the statutory language does not mandate a particular result, textualism ensures that advocates of one policy perspective will embrace some decisions, while those following a different policy perspective will embrace others. Of course, some decisions will depart from any sensible view of bankruptcy policy. However, so long as this last category of cases is not large, advocates of competing

policies prefer incurring the costs associated with these decisions in exchange for the benefit of having a positive probability of prevailing in cases in which the Court can read the statute in more than one way.

Thus, a switch to dynamic interpretation without specification of the vision of bankruptcy policy that would accompany such a switch entails risks for both camps of bankruptcy theorists. This state of affairs makes it difficult to assess the benefits of moving away from the Court's current textualist practice. If one were willing a priori to privilege one view of bankruptcy policy over the other, assessing the gains would be easy. To the extent that more cases are "correctly" decided, the better dynamic interpretation is over textualism. However, one would attribute such gains as much to the assumption of which bankruptcy policy is appropriate as to the change in interpretative method. If one is unwilling to grant either the traditional or economic view a privileged position, the gains from a switch to dynamic interpretation are illusive. What for one side is a gain, is for the other side a loss.

Thus, it is far from clear that a switch to dynamic interpretation from textualism would promote bankruptcy policy. A high degree of convergence between the two interpretive approaches exists. A substantial majority of the cases would have been decided the same way had the Court engaged in dynamic interpretation. Moreover, if there is disagreement it cannot be assumed that switching to the results generated by dynamic interpretation would net a benefit. Only if one makes the a priori judgment as to which view of bankruptcy policy is best can one confidently assert that there would be a gain by switching to dynamic interpretation.

A proponent of dynamic interpretation might assert that the relatively high convergence between textualism and practical reasoning in this data set is a mere coincidence. Perhaps in the next seven terms the costs of the Court's approach will increase dramatically. Perhaps the set of cases which diverge from any sensible bankruptcy theory will increase drastically in both number and importance. There are two reasons to think not.

The first is that the strong pull of the text of the Bankruptcy Code often mandates a certain result regardless of the pull of competing policies. For example, consider the case of *Pennsylvania Department of Public Welfare v. Davenport*.<sup>233</sup> The Court in *Davenport* addressed the issue left open in *Kelly*; namely, whether a restitution order was a "claim"

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233. 495 U.S. 552 (1990).

under the Bankruptcy Code. The Court had to address this issue because Chapter 13, under which the debtor filed, unlike Chapter 7, did not contain a provision excepting fines from discharge.<sup>234</sup> The statutory language at issue was so capacious that the Court could not help but determine that a restitution order was a claim. Section 101(4) provides that "'claim' means right to payment. . . ."<sup>235</sup> Thus, while one could invoke the same policy concerns that supported the Court's decision in *Kelly*, neither these considerations nor any bankruptcy policies are strong enough to override the clear text. Indeed, Congress reacted to *Davenport* not by changing the definition of claim, but rather by adding a provision in Chapter 13 preventing the discharge of restitution orders. Thus, part of the reason one can expect a continued convergence between textualist results and those of dynamic interpretation in the context of the Bankruptcy Code is the strong force of the statutory language.

There is a second reason to expect that, at a minimum, the Court's decisions in the bankruptcy arena will be consistent with one of the competing visions of bankruptcy policy. What is often overlooked is that the Supreme Court operates in a hierarchical regime. Bankruptcy decisions are rendered not only by the Supreme Court, but also by bankruptcy courts, district courts, and the courts of appeals.

The triumph of textualism in the Supreme Court has not extended to the lower courts. The bankruptcy courts, district courts, and courts of appeals still often engage in a more dynamic approach.<sup>236</sup> Moreover, this dynamic approach is little constrained by the Court's decisions; the Court's focus on the text of the provision before it gives the lower courts little guidance regarding what policies to entertain. Indeed, the Court gives the lower courts virtually a free hand to assess the consequences of any decision they render. Thus, while the Supreme Court turns a blind eye toward the policies of bankruptcy law, the same can not be said of the lower courts.

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234. Congress, subsequent to *Davenport*, enacted a provision protecting such debts from discharge under Chapter 13. See 11 U.S.C. § 1328(a)(3) (Supp. III 1991).

235. 11 U.S.C. 101(4) (1988). This provision has subsequently been renumbered to 11 U.S.C. 101(5).

236. Bankruptcy decisions in the courts of appeals that used policy in reaching the result include *Grundy Nat'l Bank v. Tandem*, 754 F.2d 1436, 1440-41 (4th Cir. 1985); *Lend Lease v. Briggs Trans. Co.*, 780 F.2d 1339, 1348-51 (8th Cir. 1985); *In re CHG International, Inc. v. Barclays Bank*, 897 F.2d 1479 (9th Cir. 1990); *Gaglia v. First Fed. Sav. & Loan Assoc.*, 889 F.2d 1304, 1308 (3d Cir. 1989). Judge Posner has expressly rejected the Supreme Court's textualist approach. *Central States Pension Fund v. Lady Baltimore Foods*, 960 F.2d 1339 (7th Cir.), *cert. denied* 113 S. Ct. 179 (1992).

The dynamic approach in the lower courts has two salutary effects in assessing the benefits of the Court's current textualist practice. The first is that these courts, especially the bankruptcy courts, may be better suited to identify bankruptcy policies than the Supreme Court. These courts have more exposure and experience in bankruptcy matters than the Supreme Court. The Supreme Court has handled twenty-four cases involving interpretation of the Bankruptcy Code in the past seven years, while the lower courts have handled thousands. This is especially true of the bankruptcy courts which specialize in bankruptcy law. Thus, the lower courts often reach correct results without guidance from the Supreme Court.

As to those cases that do reach the Supreme Court, the interpretive practice of the lower courts has a damping effect on the costs that might arise from the Court's textualist practice. Recall that the Court tends to entertain cases only where the lower courts have split on the issue.<sup>237</sup> That lower courts often engage in a dynamic approach to statutory interpretation ensures that in many cases the lower courts have analyzed the competing policies and reached differing results. This reduces the chance that the Court will hear a case where its textualist approach will lead to results which all would denounce as bad policy. For a case to get to the Court, it often means that a lower court has found merit in each of the opposing positions.<sup>238</sup> Thus, while textualism will inevitably generate some costs from a policy perspective because it at times generates decisions that depart from both visions of bankruptcy policy, there is reason to think that these costs will not increase above those found in this study.<sup>239</sup>

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237. See *supra* note 130 and accompanying text.

238. This being the case, one may wonder why a substantial majority of the Court's decisions would remain the same under a dynamic approach embracing either of the competing views of bankruptcy policy. This state of affairs is explained by the strong pull of the text of the Bankruptcy Code. Often the two competing schools of bankruptcy policy might indeed produce different policy prescriptions. But dynamic interpretation is not the unrestrained implementation of what the judge views as the best policy. Thus, while bankruptcy theorists may often favor different results, often the Code of the text requires the dynamic interpreter to choose a particular result. In other words, to say that a result is supported by bankruptcy policy is not to say that it is supported by the text of the Code.

239. One open issue is whether the strategy combination of the Supreme Court using textualism and the lower courts using dynamic interpretation forms a stable equilibrium. The Court, especially Justice Scalia, has levelled attacks at the lower courts' failure to follow textualism. See, e.g., *Wolas*, (Scalia, J., concurring). If the lower courts change their interpretative practice based on these attacks, the desirable affects of their current practice would be lost. Whether or not the lower courts will change their practice turns on the utility functions of the lower court judges.

Against the costs of the Supreme Court's current textualist practice, one must weigh the benefits. These benefits occur mostly in the area of managing judicial resources. The Court has a limited amount of resources to expend in deciding cases. In using these resources, the Court must make two decisions: the number of cases to take and the time to spend on each case. The number of cases that the Court hears has remained relatively constant over time.<sup>240</sup> All cases, however, are not created equal. One would expect that the Court would allocate its resources first to deciding constitutional cases. The Court is the final arbiter of such cases; there is little expectation that Congress will settle the matter if the Court does not, and Congress cannot change the Court's decision once it is rendered.<sup>241</sup> This lack of congressional control over decisions increases the costs of erroneous decisions by the Court. Given this state of affairs, one would hope that the Court would allocate its resources first to constitutional matters. The Court should be the expert in interpreting the Constitution.

If the Court engaged in dynamic interpretation as a routine matter, it would most likely spend more time on a statutory case than it does under a textualist approach. The Court under textualism does not have to decide upon which view of bankruptcy should guide its inquiry, and how the relevant policy considerations affect the case before it. Devoting less energy to mastering the nuances of bankruptcy policy and then applying them in each case allows the Court to do one of two things. Least likely, the Court can allocate time that it would have spent on bankruptcy cases under a dynamic approach to constitutional cases. This is unlikely because the Court probably allocates the necessary resources to interpreting the Constitution first, and only then considers other cases.

Empirically this appears to be the case. The increase in the Court's bankruptcy docket seems to have coincided with a decrease in its constitutional docket. For example, in the 1986 Term, when the Court decided one bankruptcy case, it also decided fourteen First Amendment cases, six Fifth Amendment cases, three Due Process cases, and one Supremacy Clause case. In the 1990 Term, when it decided six bankruptcy cases, the Court decided eight First Amendment cases, three

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240. The number of cases disposed of by the Supreme Court by written opinion, as compiled by the Harvard Law Review, for the six terms before this past term is as follows: 1986 Term—175; 1987 Term—167; 1988 Term—170; 1989 Term—151; 1990 Term—129; 1991 Term—127.

241. As Justice Jackson observed, "We are not final because we are infallible, we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

Commerce Clause cases, one Fourteenth Amendment case, and one Appointments Clause case. In the 1991 Term, the Court decided nine bankruptcy cases, ten First Amendment cases, eight Commerce Clause cases, three takings cases, and one political question case. Thus, it appears that a heavy bankruptcy docket corresponds to a light constitutional docket.

Moreover, an inverse correlation appears to exist between the number of bankruptcy cases that the Court hears and its total docket. The past 1990 and 1991 Terms witnessed a decrease in the Court's overall docket. In the prior four Terms, the Court had been disposing of an average of 166 cases by written opinion. During the 1990 and 1991 Terms, this number has dropped to 128. The natural inference from this fact is that the bankruptcy cases are some of the last cases put on the docket. The Court will decide such cases when it has a relatively smaller number of what it views as important cases before it. The Court's resource constraints thus make it more likely that the Court will decide a bankruptcy case when it has fewer other cases to decide. In other words, bankruptcy cases are the marginal cases.

In this situation, the more likely effect of the Court's current interpretive practice is that it can decide more bankruptcy cases than it otherwise would. This is so for two reasons. One, already mentioned, is that it takes more time to write a dynamic opinion than a textualist one. Second, the Court's switching to dynamic interpretation would probably generate more opinions. Disagreement will more likely occur among the justices over what constitutes appropriate bankruptcy policy than over what the words of the Code mean. Under the Court's current practice, few bankruptcy cases involve more than two opinions.<sup>242</sup> An increase in the number of opinions would again decrease the number of bankruptcy cases that the Court could handle. Thus, more disputes are resolved more quickly under the Court's current practice than would be if the Court heeded its academic critics.

Deciding cases more quickly is undoubtedly a benefit. While academic theorists may argue for years over the proper resolution of an issue, for many businesses affected by bankruptcy law it is probably more important to have a settled result than the right result. Businesses need certainty in the law so that they can plan their transactions knowing what will happen if they or their contracting opposite end up in bankruptcy.

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242. Of the 24 cases in this study, only one case—the Court's sovereign immunity decision in *Hoffman*—had more than two opinions.

Textualism, to the extent that it allows the Court to resolve more circuit splits than dynamic interpretation, benefits those who must live in the shadow of the law.

The last effect that one should consider in assessing the competing regimes of textualism and dynamic interpretation is the influence of the two regimes on future legislators. I, along with my colleague Jason Johnston, have elsewhere argued that textualism may benefit the democratic process by preventing legislators from sending different signals to their constituents and the courts.<sup>243</sup> To the extent that the Court has policy preferences of which the legislators are aware but their constituents are not, legislators who share the Court's preferences can deceive their voters by passing a vague statute which they know will be interpreted the way they prefer, but may well be contrary to the preferences of a majority of their constituents. Thus, to the extent that one believes that statutory interpretation should promote representative democracy, textualism appears superior to dynamic interpretation.

The actual benefits of a shift to dynamic interpretation are thus far from clear. The outcome in only two of the Court's textualist cases would change under any conceivable bankruptcy policy. These two cases, moreover, do not loom large in the administration of bankruptcy law. Four other cases might change, but whether such change would produce a benefit is far from clear. For both camps of bankruptcy theorists, textualism is a second best strategy. Without textualism the Court is forced to subscribe to one of the competing versions of bankruptcy law. Making this choice is a cost to those whose view of bankruptcy law is not selected. In addition, a switch to dynamic interpretation would increase the amount of uncertainty surrounding bankruptcy law. While the Court's cases evince little knowledge about bankruptcy policy, it would be more costly in terms of bankruptcy policy if the Court entered the fray under the banner of dynamic interpretation.

### CONCLUSION

In the end, the assessment of the Supreme Court's textualist approach in bankruptcy cases turns on a comparison of a number of diverse factors. Surprisingly, it does not appear that monumental consequences turn on whether the Court abandons its current approach in favor of a

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243. See Jason S. Johnston & Robert K. Rasmussen, *White Noise: Statutory Interpretation and Legislative Strategy and Performance* (August 1993) (On file with author).



more openly dynamic one. The benefits of such a switch largely depend on which policies the Court would rely in interpreting the ambiguous provisions of the Bankruptcy Code. Against these potential benefits are the costs of a decrease in the Court's ability to resolve circuit splits quickly, and the effects that it may have on future congressional behavior. There is an important lesson here for those carrying on the debate over the process of statutory interpretation. They should look to the consequences of adopting the competing regimes across a number of cases rather than single cases to determine whether their debate really matters.

This conclusion is also important for bankruptcy scholars. Such scholars often write articles in which the implicit or explicit objective is to convince the Supreme Court to rule a certain way in a particular case.<sup>244</sup> To the extent that the authors make their pleas based on bankruptcy policy, these pleas will fall on deaf ears. Perhaps it is time for those of us in the academy to focus more on what good bankruptcy law should look like rather than attempting to influence Supreme Court decisions.

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244. See, e.g., William R. Mitchelson, Jr., Comment, *Waiver of the Attorney-Client Privilege by the Trustee in Bankruptcy*, 51 U. CHI. L. REV. 1230 (1984) (trying to influence Court's decision in *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985)).