THE NEW TEXTUALISM AND THE RULE OF LAW SUBTEXT IN THE SUPREME COURT'S BANKRUPTCY JURISPRUDENCE

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Among the most important questions to ask when doing policy analysis is what should the state attempt to achieve, and which state institutions are competent to do what tasks? Harry Wellington taught me to ask the second question in a serious and sustained way. This lesson has been important to my work and I am grateful to Harry for teaching it to me; though I am much less grateful to him for this than for his decades of friendship. This essay attempts to exhibit the unfortunate consequences that can flow from neglecting Harry's great work on the competencies of legal institutions.

1. INTRODUCTION

1.1 The new textualism

An effective Supreme Court majority, for the last fifteen or so years, has often employed a method of statutory interpretation that is called "the new textualism."¹ There are two traditional ways to interpret statutes. The first searches directly for the actual intent of the enacting legislature. Controversy now exists concerning what evidence a court should consider when conducting this search. Denote by E the full set of evidential categories that may be relevant to an intent finding. Then E is constituted by

E₁: The words of the statute.

E₂: The legislative history of the statute.

E₃: The economic and social context in which the statute was passed (the problems the statute was meant to solve).

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1. This term originated in William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621 (1990).

E₄: Past legal practice (for example, judicial constructions of prior, relevant statutes).

A court doing traditional statutory interpretation will consider evidence in all of these categories.

The direct search for actual intent runs out when a court finds the statutory section at issue to have more than one possible meaning, *after* the court has used whatever evidence it thought appropriate to consider from categories E₁ - E₄. Then the second traditional method comes into play. The court attributes a purpose to the enacting legislature and rationally elaborates that purpose to answer the question posed by the statutory section at issue.² The second method can proceed on two levels.

L₁: Attribute to the enacting legislature a policy, P, such as ensuring at least some compensation from a bankrupt's estate to the victims of the bankrupt's illegal actions. Then give to a statutory section that implicates P (for example, the section regulating when fraud claims against a debtor are discharged) the linguistically plausible interpretation, p, that best implements P.

L₂: Attribute to the legislature a broad goal, G, such as to increase the amount of credit available to firms and persons. Next, choose from the set of policies {P₁, P₂, . . . P_N} that could plausibly advance the broad goal G, the particular policy, P_i, that the section at issue implicates. Then proceed as in L₁.

The new textualism is defined by what it rejects. There are two significant aspects of this rejection: First, a new textualist court will not consider, or will give little weight to, legislative history and context evidence—categories E₂ and E₃.³ Second, a new textualist court is reluctant to attribute policy purposes to the enacting legislature.⁴

2. The attributed goal or purpose must be consistent with whatever evidence of actual intent the interpreting court believes should be considered. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 1374 (William N. Eskridge, Jr. and Philip P. Frickey eds., Foundation Press 1994) (1958).

3. A majority of Supreme Court cases interpreting the Bankruptcy Code consider legislative history (See Appendices), but it seldom is dispositive; the general trend is to give much less weight to history or context than to the statute's words.

4. As examples from the bankruptcy field, a unanimous Court recently stated: "In any event, we do not sit to assess the relative merits of different approaches to various bankruptcy problems. Achieving a better policy outcome . . . is a task for Congress, not the courts." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530

Commentators have observed that the Court often refers to policy norms in its opinions, despite its expressed reluctance to use them.⁵ In the bankruptcy field, the Court is new textualist in that while it sometimes mentions policy considerations, it almost never reasons from a policy to a result except when a case implicates two statutory schemes (ERISA and the Bankruptcy Code, for example), and the question is which scheme should control. The words in either statute seldom can settle the issue in such cases.⁶

These defining features of the new textualism presuppose a particular view regarding the obligation of courts to follow the legislative will. On this view, the drafters' intention should be treated much as it is treated under the objective theory of contract. The relevant intention for a court is the meaning that a reasonable interpreter would attach to the words rather than some "real" meaning.

Finally, the new textualist belief that legislative intent is most reliably discerned from a statute's words and past legal practice implies the further belief that these sources will almost always answer interpretative questions.⁷ As a consequence, the Court's search for the meaning of a statutory section is not confined to the section's words alone; rather, the search extends to an exegesis of the entire statute. The meaning of a statutory phrase sometimes will be clear in at least one of the sections that uses the phrase; then a textualist court can give to the phrase the same meaning wherever it appears in the statute.⁸

U.S. 1 (2000). Another majority opinion recited: "The problem is that such judgments [regarding the valuation of collateral] represent policy determinations which the Bankruptcy Code gives us no apparent authority to make." *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994). In an earlier case, Justice Scalia concurred in a new textualist opinion, *except* for one paragraph in it that began: "The result . . . accords with the provision's main purpose." *Farry v. Sanderfoot*, 500 U.S. 291, 300 (1991).

5. See, e.g., Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1 (1998).

6. For bankruptcy examples, see, e.g., *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213 (1996); *Patterson v. Shumate*, 504 U.S. 753 (1992).

7. The Court's faith in the words raises the question whether a statute can have a meaning that is both plain and contestable. If so, the Court apparently is not giving the word "plain" its plain meaning. If not, there is a question why meanings the Court considers plain are often contested. Justices Thomas and Scalia recently attempted to answer the latter question: "A mere disagreement among litigants over the meaning of a statute does not prove ambiguity: it usually means that one of the litigants is simply wrong." *Bank of America Nat'l Trust and Savings Assoc. v. North LaSalle St Partnership*, 526 U.S. 434 (1999) (concurring opinion).

8. The Court in *United Saving Assoc. of Texas v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365 (1988) thus explained that "Statutory Construction . . . is a holistic en-

1.2 This Essay's Claims

The merits of the new textualism have been the subject of an enormous literature, a large majority of which rejects the method. This essay focuses on the Court's bankruptcy jurisprudence to make three claims. First, the case for the new textualism is a little stronger than is commonly thought, but ultimately fails to persuade, partly for reasons that are in the literature and partly for new reasons set out here.

Regarding the second claim, the new textualism has two plausible justifications: to advance the rule of law virtues of predictability and certainty;⁹ and to create incentives for the legislature to draft more carefully and to deliberate more fully about its goals.¹⁰ A tension can exist between the first justification and the method itself. To see how,

deavor." Another bankruptcy example of holistic interpretation is *Citizens Bank of Maryland v. Stumpf*, 516 U.S. 16 (1995). The Court's holism sometimes extends to discerning a meaning from one statute and applying that meaning to interpret an independent statute. For a criticism of this interpretative practice, see William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 PENN. L. REV. 171 (2000).

9. Justice Scalia put this justification clearly in a dissent. The majority, in *Dewsnip v. Timm*, 502 U.S. 410 (1992), found a statutory ambiguity that it resolved by reference to past practice (evidential category E₄). Justice Scalia argued that the "principal harm" in the majority opinion

is not the misinterpretation of section 506(d) of the Bankruptcy Code. The disposition that misinterpretation produces brings the Code closer to prior practice and is, as the Court irrelevantly observes, probably fairer from the standpoint of natural justice. (I say irrelevantly because a bankruptcy law has little to do with natural justice.) The greater and more enduring damage of today's opinion consists in its destruction of predictability, in the Bankruptcy Code and elsewhere. By disregarding well-established and oft-repeated principles of statutory construction, it renders those principles less secure, and the certainty they are designed to achieve less attainable.

A similar defense is in Adam J. Wiensch, *The Supreme Court, Textualism, and the Treatment of Pre-Code Bankruptcy Law*, 79 GEO. L. J. 1831 (1991). Robert Rasmussen defends the method on a different ground, arguing that textualist opinions are justifiable just because they advance no discernable bankruptcy policies; in his view, bankruptcy policy is better made by the lower courts. Robert K. Rasmussen, *A Study of the Costs and Benefits of Textualism: The Supreme Court's Bankruptcy Cases*, 77 WASH. U. L. Q. 535 (1993). Rasmussen may have the relative competencies of the higher and lower courts right, but if bankruptcy policy is appropriately made by some courts, it is questionable whether the highest court should neglect the subject altogether.

10. See William N. Eskridge, *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509 (1998). Doubts have been raised about whether Congress will or can respond to such incentives. See *id.*; Elizabeth Garrett, *Legal Scholarship in the Age of Legislation*, 34 TULSA L.J. 679 (1999); Nicholas S. Zeppos, *Justice Scalia's Textualism: The 'New' New Legal Process*, 12 CARDOZO L. REV. 1597 (1991). Justice Scalia has argued that a Federal court's use of legislative history violates separation of powers because only the statute's words, not the

let a statute recite: "Unfair contracts are not enforceable." A faithful interpretation of this text would confer discretion on the trial courts to police the process of contract formation and the substance of agreements. The exercise of a judicial discretion this broad, however, may conflict with the rule of law virtues. This essay's second claim holds that, at least in the bankruptcy field, the Court prefers the initial justification of the new textualism to the method itself. As a consequence, the Court will struggle, sometimes against text, to withdraw as much discretion as is possible from the bankruptcy and district courts.¹¹ Put another way, the Court's goal is to find interpretations of the Bankruptcy Code that restrict the lower courts to the making of the most ministerial judgments that text and circumstances permit.

This goal is advanced, for example, by interpretations that confine factual inquiries to questions of historical fact rather than to "mixed" questions of law and fact. Thus, the Court has held that bankruptcy judges should not inquire whether foreclosure proceedings actually obtained fair market value, but rather whether mortgagees complied with the statutory requirements these proceedings must satisfy, such as giving all parties notice of sale.¹² And the value of a secured claim, in the Chapter 13 context, is not to be found by valuing the lien collateral itself, but rather by asking how much remains unpaid under the mortgage.¹³ Valuation inquiries often are uncertain when done straight,¹⁴ and courts conducting them are widely believed to adopt valuation criteria that follow, at least partly, from the courts' policy preferences. The second claim here is that Supreme Court interpretations of the Bankruptcy Code strive more to avoid such inquiries than to be faithful to the statutory text.

This essay's third claim is that pursuit of the rule of law virtues through the vehicle of statutory interpretation will generally be point-

legislative history, were subject to bicameralism and presentment. See ANTONIN SCALIA, A MATTER OF INTERPRETATION 17 (1997). This view seems too implausible to analyze.

11. Modern bankruptcy law began with the Bankruptcy Act of 1898. An analysis of the political economy that produced this statute is David A. Skeel, Jr., *The Genius of the 1898 Bankruptcy Act*, 15 BANKR. DEV. J. 321 (1999). The Act was extensively revised in 1938 and 1978, but the early court centered approach has been retained. The bankruptcy process thus is regulated by the district and bankruptcy courts, not by administrators.

12. See *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994).

13. See *Nobelman v. American Savings Bank*, 508 U.S. 324 (1993). This and the prior case are discussed in more detail *infra* Part 3.2.

14. See, e.g., Monica Hartman, *Selecting the Correct Cramdown Interest Rate in Chapter 11 and Chapter 13 Bankruptcies*, 47 UCLA L. REV. 521 (1999).

less. A statute that confers substantial discretion on those who administer it permits these actors largely to avoid the effect of episodic discretion reducing readings by appellate courts. A statute that confers little discretion will itself confine its administrators if construed in traditional ways.

1.3 Methodological issues

Two methodological issues should be noted at the outset. To understand the first, realize that this essay's second claim has a broader implication: If the Court's use of the new textualism is partly pretextual in the bankruptcy field, then the Court's use of it may be partly pretextual elsewhere. This implication is suggested here rather than embraced because it is bad methodology to induct a theory from a set of data and then use the data to test the theory. Confining an interpretative base to one legal field, as this essay does, thus precludes conclusively rejecting competing hypotheses regarding what the Court is doing generally (or perhaps in bankruptcy itself). Nevertheless, there is enough evidence in support of the claim to make it a candidate in the set of explanatory theories that scholars should consider when analyzing the current Court's use of statutes.¹⁵

Regarding the second issue, this Essay assumes that the Court votes sincerely: That is, the Court's statutory interpretation decisions are analyzed as if they reflect the Court's own views regarding bankruptcy and interpretation, untempered by the Justices' concern that Congress will amend the Bankruptcy Code to restore its view of the law. Sincere voting is assumed because Congressional overrides are rare in any event,¹⁶ and occur when the Court makes high visibility decisions that have substantial political impact.¹⁷ In such cases, inter-

15. There is a claim that the Court's interpretative method has changed in the last five years, to permit recourse to arguably reliable historical indicia of legislative intent, such as conference committee reports. See Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205 (2000). This author's data set includes only one bankruptcy case. It also is unclear how firmly established this trend is.

16. See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991).

17. The weight of the evidence supports the view that the Court votes sincerely. See, e.g., Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and the Courts*, 91 AM. POL. SCI. REV. 28 (1997); Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. L. REV. 251 (1997) (summarizing studies). Revesz finds that judges on the D.C. Court of Appeals, which sometimes acts as a court of last resort in the regulatory area, vote strategically visà vis other

est groups lobby strongly for change. Bankruptcy decisions do not fit this description for two reasons. First, as will appear below, they commonly involve matters that are more important to the parties than to organized constituencies. Second, with competitive credit markets, the costs of inefficient bankruptcy decisions fall on consumer and business debtors generally. This is because creditors in competitive markets adjust to the law in place, earning zero pure profits in all equilibria: Inefficient decisions that raise costs thus only raise interest rates, to the disadvantage of debtors generally. Debtors as a group are too unorganized to lobby effectively. The data also show that reversals of the Court's bankruptcy decisions tend to occur when the Code is generally amended, which is a rare event.¹⁸ This Essay thus supposes the Court to be following its own policy preferences.

Part 2 of this Essay considers the new textualism on its own merits. Part 3 attempts to show, by argument and illustration, that the Court is more strongly committed to rule of law virtues (and hence to discretion minimizing constructions) than it is committed to the new textualism itself. Part 4 is a conclusion, which argues that attempting to implement rule of law virtues through statutory interpretation is a mistake.

2. THE NEW TEXTUALISM

2.1 *The case for the new textualism*

This Part focuses on what has come to be the defining feature of the new textualism: its exclusion of legislative history and the social and economic context from the set of data on which to base an interpretation. Legislative history and context are thought to be institutionally inappropriate interpretive bases for four reasons. First, legislative history will support a much larger number of possible meanings than the statutory text will. As a consequence, a court that makes extensive use of data in evidential categories E_2 and E_3 is actually putting itself in

judges but not *visa vi* Congress. See Richard L. Revesz, *Strategic Voting on the D.C. Circuit?: A Case Study of Challenges to Health-and-Safety Regulation*, Mimeo (2001). For studies showing that Congress overrides the Court's statutory interpretation decisions only when large political interests have been affected. See Joseph Ignagni, James Meernik & Kimi Lynn King, *Statutory Construction and Congressional Response*, 26 AMER. POLITICS QUARTERLY 459 (1998); Note, *Congressional Reversal of Supreme Court Decisions: 1945-1957*, 71 HARV. L. REV. 1324 (1958).

18. See Eskridge, *supra* note 16.

the position to pick the meaning that accords with the court's policy preferences rather than the legislature's policy preferences.

Second, legislative history can be manipulated by specially placed actors in the legislative process, such as committee members or committee staff, to create a "record" that misrepresents the intentions of legislators who voted for the statute. Misrepresentation is possible because the typical legislator is unaware of the history that the "inside" actors create. Courts also cannot easily separate manufactured from real evidence of legislative intent; indeed, it is the goal of legislative insiders to make separation difficult. On this view, a court that relies heavily on legislative history often will adopt the meaning of a legislative minority rather than the view of the larger body, or even the court's own view.

Third, there is no legislative intention to find. To attribute a collective intention to a legislative body is to commit a fallacy of composition. Social choice theory is said to show that majority voting outcomes cycle, so that the outcome of any vote is either random or the product of agenda control. A majoritarian legislature therefore can enact only words; it cannot enact intentions. It follows that courts should apply the words as best they can rather than search for a nonexistent intent.¹⁹

Fourth, an analogy has been drawn between statutory and contract interpretation. The goal of contract interpretation is said to be to ascertain parties' actual intentions in making a contract. This goal implies what is called contextual interpretation, according to which all evidence that could bear on the parties' actual intent is admissible, including evidence of prior negotiations and the parties' practice under the existing contract and earlier contracts. It is argued, in this literature, that a broader evidentiary base restricts rather than expands the number of textual meanings that the interpreter can plausibly defend; the additional evidence commonly will exclude meanings that the contract drafters did not intend.²⁰ The analogy to contract thus

19. Some commentators claim that this conclusion does not follow. Rather, courts should attribute purposes to legislatures that are consistent with the words and the social and economic context, in order to help protect disfavored groups or otherwise to reach just results. See WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994); Jonathan M. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 *STAN. L. REV.* 1 (2000). It is unnecessary to pursue this line of analysis here.

20. This view is applied to statutory interpretation in Stephen F. Ross & Daniel Tranen, *The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory*

appears to defeat the first reason supporting textualism set out above—that the broader the evidentiary basis for an interpretation the more meanings there are for an interpreter to “find.”²¹

A new textualist proponent may accept this refutation because, on a deeper view, the analogy to contract arguably supports the improving legislative performance justification for the new textualism set out in Part 1.2. Contextual interpretation is implied by autonomy theories of contract. These all hold that a party should be held liable in contract just when, and because, he agreed to be held liable.²² Hence, an autonomy theorist wants a court to inquire, as broadly as is necessary, into what a party actually agreed to before the court exercises coercion against that party. A more broadly applicable theory of interpretation in Contract Law, however, is and long has been the objective theory of contract.²³ Courts that apply the objective theory commonly give words their dictionary meanings, and this tends to preclude resort to much besides the contract itself.

The objective theory of contract has an efficiency justification: applying it creates incentives for careful drafting and supplies parties with standard vocabularies in which to cast transactions. Regarding vocabularies, if courts give the same interpretations to words that appear in currently litigated contracts that courts gave to those words in prior cases, parties will better know what language choices will best implement their contractual intentions. Careful drafting and standard legal vocabularies, in turn, will increase predictability and reduce dispute costs. The actual intentions of particular sets of parties are appropriately sacrificed, it is said, to the achievement of these virtues. A legislature also could draft more carefully and use words and phrases to

Interpretation, 87 GEO. L. J. 195 (1998), which argues for the extensive use of legislative history. “Thus, the stated goal of contract interpretation under the Code is much the same as it was at common law, namely, ascertaining the intent of the parties to the contract.” See John M. Breen, *Statutory Interpretation and the Lessons of Llewellyn*, 33 LOY. L.A. L. REV. 263, 286-87 (2000) (arguing for the use of prior statutory drafts when interpreting the Uniform Commercial Code).

21. A study of Supreme Court statutory interpretation cases in another field argued that recourse to legislative history did narrow the range of interpretations the Court could reach. See Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351 (1994).

22. See, e.g., Hanoeh Sheinman, *Contractual Liability and Voluntary Undertakings*, 20 OXFORD J. LEGAL STUD. 205 (2000); Randy E. Barnett, *A Consent Theory of Contracts*, 86 COLUM. L. REV. 269 (1986); CHARLES FRIED, *CONTRACT AS PROMISE* (1981).

23. See Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427 (2000).

which legal meanings have been attached in prior cases. And by these means predictability and cost reduction also can better be realized. Hence, if a contract analogy is relevant to statutory interpretation, that analogy actually supports the new textualism rather than impeaches it.

There is a second possible analogy to contract. The Court sometimes uses what is called a rule of clear statement, which holds that if Congress intended a certain result, it should have said so more clearly in the statute.²⁴ This rule is said to be similar to the penalty default in Contract Law. A penalty default is a judicial construction of a contract that is unfavorable to the drafter in order to create an incentive for the drafter, and other similarly situated drafters, to make more clear the legal relationship that the contract actually creates. The new textualist insistence on clarity in statutes similarly creates an incentive for Congress to draft more carefully (and perhaps to think more clearly).²⁵

The new textualism will produce discretion reducing readings of any statute because the method tethers interpreters to the statutory text rather than permitting them to engage in either form of a policy inquiry described above. That the method reduces discretion is one of its principal appeals. Part 2 next argues that the justifications for the new textualism are unpersuasive. These justifications, recall, are that legislative intent can be manipulated; there are no legislative intentions to find; and that statutes should be interpreted objectively—in the way courts often construe contracts. If these justifications fail,

24. For examples of the rule in the bankruptcy field see *Reorganized CF&I Fabricators*, 518 U.S. at 221 (“Congress could, of course, have intended a different interpretative method for reading terms used in the Code. . . . But if it had so intended we would expect some statutory indication. . .”); *Kawaahau v. Geiger*, 523 U.S. 57, 57 (1998) (“Had Congress meant to exempt debts arising from unintentionally inflicted injuries, it might have described instead ‘willful acts that cause injury.’ Or Congress might have selected an additional word or words, *i.e.*, ‘reckless’ or ‘negligent’ to modify ‘injury.’”); *Cohen v. DeLaCruz*, 523 U.S. 213, 222 (1998) (If Congress wished to limit nondischargeability to restitutionary claims “one would expect Congress to have made unmistakably clear its intent to distinguish among theories of recovery in this manner.”)

25. Penalty defaults were first clearly explained in Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989). The analogy from these rules to statutory interpretation has been drawn by Cass R. Sunstein, *Justice Scalia’s Democratic Formalism*, 107 YALE L.J. 529, 557 (1997). (“[s]tatutory default rules might also operate to elicit information, with the purpose of encouraging Congress to act in a certain way, by creating appropriate incentives. . . . Textualism has, as part of its defense, the idea that it will encourage Congress to state its will clearly. Similarly, the ban on use of legislative history imposes on Congress an incentive to say what it means in the constitutionally favored form.”)

reading federal statutes to implement rule of law virtues must be defended in a different way.

2.2 *The case against the new textualism*

2.2.1 The manipulability of legislative history

The view that legislative history is an unreliable evidentiary basis from which to infer legislative intent reduces to a claim either that the legislature is indifferent to policy outcomes or a claim that a legislature, as a matter of law, cannot delegate to members of its own body. The former claim is implausible and the latter claim seems institutionally inappropriate for a court to act upon. Regarding implausibility, make these assumptions:

- A₁: Individual legislators care about policy outcomes, either from a sense of individual commitment or because what the legislature does can affect the probability of a legislator's reelection.
- A₂: The legislature creates a system of committees whose task is to implement the policy preferences of the larger body.
- A₃: Legislative committees routinely thwart the will of the larger body by creating legislative histories that will lead the courts who read them to interpret statutes in ways that the larger body would have rejected.

These assumptions cannot all hold. If A₁ is true, then A₃ must be false—that is, the legislature will ensure that committees are faithful. This can be (and often is) done through the appointment power. The larger body appoints its committees and can choose a committee's membership such that the median committee member has the same policy preferences as the median legislative member. Alternatively, the legislature can choose committee members on the basis of their expertise, but then exercise oversight over committee products. A legislature that failed to monitor committees with minority preferences would find over time that courts (reliant on legislative history) were creating a set of laws that the legislature did not prefer.²⁶ The legislature then would change the system. Also, committee members who

26. Oversight will often be exercised initially by those whom a statute affects. For example, if courts read a statute that the legislature passed to protect the environment actually to harm the environment, parties such as the Sierra Club will complain to friendly administrative agencies or legislators. By these means, the legislature will know that a committee had sabotaged the preferences of the larger body. A good analysis of

were found to have engaged in sabotage would suffer a reputational loss. This loss would adversely affect the ability of a member to serve her constituents or advance her own policy agenda. These arguments imply that there is no equilibrium of the game between the larger body and the committee where the larger body chooses policies that its committees routinely thwart by disingenuous drafting or the creation of false histories. There also is no evidence that committees fail to serve the wishes of the Congress as a whole, nor is there any evidence that legislators are indifferent to policy.²⁷

A version of the argument that legislative history is manipulable may perhaps be rescued by restating the initial premise— A_1 —as A'_1 : on the new assumption, the larger body holds preferences on a high level of abstraction. For example, the larger body wants to preserve family farms and the viability of local farming communities through a system of subsidies. The legislature then delegates to committees composed of farm state legislators the task of creating a subsidy system. So long as the resultant product does not break the budgetary bank, members of the larger body are relatively indifferent to the statutory details, or to legislative history designed to inform courts as to how those details are to be implemented. To summarize, legislative history will reflect legislative intent in either of two ways: the history will represent the actual policy preference of the larger body; or the history will represent the policy preference of a subgroup to whom the larger body has delegated the policy making task. In either case, a court that is searching for actual intent (rather than searching for “intent” as courts do when applying the objective theory of contracts) should take legislative history into account.

Excluding legislative history from a court’s interpretative base thus is justifiable if it is justifiable for a court to require that all policy

how private oversight functions is in Arthur Lupia & Matthew D. McCubbins, *Learning From Oversight: Fire Alarms and Police Patrols Reconstructed*, 10 J.L. ECON. & ORG. 96 (1994).

27. Congress likely does not solve its agency cost problem perfectly, so that some committees occasionally will have slack to influence judicial interpretations. The claim in text is that slack on the scale that the new textualism supposes—a widespread distortion of the process—is unlikely. Regarding data, a recent study found that the median member of House “prestige committees”—Appropriations, Rules, Ways and Means and Budget—had the same preferences as the median member of the House Floor; while the median member of House “policy committees”—Banking, Education and Labor, Energy and Commerce, Foreign Affairs, Judiciary and Government Operations—historically was to the left of the Floor median, reflecting Democratic control of the House. See David Epstein & Sharyn O’Halloran, *Legislative Organization Under Separate Powers*, forthcoming 17 J. L. ECON. & ORG. (2001). These findings, as well as a large political science literature, both suggest and presuppose that Congress chooses its committees with a view to retaining policy control.

choices, from broad to narrow, be made by the body at large rather than be delegated to committees. This requirement is not justifiable for two reasons. First, the requirement is impossible to satisfy. A large legislature such as the Congress, that must enact complex statutes in a wide variety of areas, cannot function without delegating the resolution of important issues to subgroups. Second, under our structural constitution, the legislature has the power to choose its own organization. Therefore, the first justification for the new textualism, that legislative history may not reflect appropriately held legislative preferences, should be rejected.

2.2.2 There an intent for courts to find

Congress makes decisions by majority rule. When a legislature uses majority rule to choose among three or more alternatives, it is possible for collective preferences to be intransitive: the legislators may prefer alternative A to alternative B, and B to C, but also prefer C to A. If the social preference is intransitive, the result of any vote will not be normatively meaningful. A statute that reflects choice A is no more the “true” legislative preference than would have been a statute that reflected C; for the same legislators who chose A would have chosen C were they given the chance. When such voting cycles exist, majority rule is said to exhibit the Condorcet paradox. It is difficult to rule out the possibility that the paradox will affect legislative choice,²⁸ but theorists argue that voting outcomes have normative appeal if they are Condorcet winners. A Condorcet winner beats all other alternatives in pair-wise voting. Thus, if A defeats B when the two alternatives are matched, and A also beats C, then it is thought justifiable to say that the legislator/voters prefer A. Put more relevantly, if A is the statute that the legislature passed, and A is the Condorcet winner, then the legislature actually intended to enact A. The task for a reviewing court in this event is to implement the legislature’s actual will.

28. Letting d be the number of dimensions to a policy choice (i.e., giving debtors a fresh start, discouraging improvident borrowing, increasing credit availability), and n be the number of voters, then it is possible for almost all preference profiles of the voters (their rankings over the relevant dimensions), to exhibit the Condorcet paradox when

$$d \geq \frac{3(n-3)}{2}.$$

As this inequality indicates, the larger is n relative to d (the bigger the legislature relative to the complexity of what it has to decide) the less likely the paradox is to occur.

A court seldom could *know* whether a statute is a Condorcet winner or the result of an intransitive social choice because courts cannot reconstruct the preference profiles of the legislator/voters. Requiring true knowledge is too high a standard, however. To restrict the search for real intent on the ground that there is no real intent (but rather incoherence) is to deny that the legislature has an intention, in a normatively meaningful sense of the phrase "to intend." But if it is highly likely that enacted statutes are Condorcet winners, and if a Condorcet winning statute would reflect a normatively meaningful intention, then it is highly likely that the legislature intended to enact the statute at bar. As it happens, in the case least favorable to the existence of a Condorcet winner, when there are only three voters and the relevant choice has three dimensions, it has recently been shown that a Condorcet winner exists slightly over 94% of the time. When the number of voters is increased, this probability increases as well.²⁹ Congress has hundreds of voters. A federal court that takes Congress to have an intention, the precise contours of which a court may have to discern, thus would seldom be mistaken. Comity among the branches of government then appears to imply that a court should take its legislature to have chosen when the probability is so high that the legislature actually has chosen.

29. For citations and further explanation see Alan Schwartz, *Statutory Interpretation, Capture, and Tort Law: The Regulatory Compliance Defense*, 2 AM. L. & ECON. REV. 1, 11-16 (2000). The results recited in text rest on the assumption that the "average" voter can vote for or against all outcomes with equal probability. This assumption implies that these outcomes have equal merits for the electorate. When the assumption that outcomes have equal merits is relaxed, it has recently been shown that the likelihood of a Condorcet winner actually increases. See A. S. Tangian, *Unlikelihood of Condorcet's Paradox In a Large Society*, 17 SOC. CHOICE & WELFARE 337 (2000). Another recent analysis modeled a number of different assumptions regarding voter preferences and concluded: "In all of these different situations that were contrived to make majority rule cycles as likely as possible, we still expect to have a P [pairwise] M [majority] R [rule] W [winner] in over 90 percent of cases for large electorates with three candidates. That probability would certainly be significantly greater for typical situations that are not contrived to make majority rule cycles more likely to occur." WILLIAM V. GEHRLEIN, "CONDORCET'S PARADOX AND THE LIKELIHOOD OF ITS OCCURRENCE: DIFFERENT PERSPECTIVES ON BALANCED PREFERENCES" 26 (Mimeo 2000). A candidate in this literature is formally equivalent to a dimension of a policy choice. Finally, the search for voting cycles in real legislative processes has been largely unavailing. See Peter Kurrild-Klitgaard, *An Empirical Example of the Condorcet Paradox of Voting in a Large Electorate*, 107 PUBLIC CHOICE 135 (2001).

2.2.3 The Contract Analogy Revisited

The efficiency premise of the objective theory of contracts is attractive for two related reasons. The first recognizes that a very large majority of agreements that Contract Law regulates are made between firms. While firms are constituted of persons, who have intentions, a firm is a legal entity that lacks an intention in the Kantian sense. Second, firms function in markets, and public policy toward markets has long been to encourage their efficient performance, subject to the normative constraints the state imposes. On these two reasons, an interpretative theory of contracts that rejects a search for the “intention” of a company in favor of a search for readings that will further transactions thus produces a net normative gain. Efficiency increases at little cost to autonomy virtues.³⁰

These reasons do not apply to statutory interpretation. It has been shown that legislatures commonly do have intentions (they are the Condorcet winners). It is these intentions that give statutes their normative force: The law is authoritative because the people’s representatives have made it, not because the law is implied by a particular normative theory. To be sure, a legislature can realize the virtues of an objective theory of interpretation, by directing courts to use one, but there always is the prior question whether the legislature has made that choice. If not, the statute at issue should not be read with an objective methodology.

This conclusion may appear to go by too quickly. If the legislature can choose the courts’ interpretative strategy, than this strategy actually is a default rule, and the issue becomes whether an objective or subjective interpretative theory is the better default. Two considerations go into choosing a default rule—the costs of contracting out of each of the possible rules (other things equal, the default is best that is easiest for dissenters to change); and the likely preferences of the parties. These considerations imply that traditional theories of statutory interpretation are the better defaults. Regarding the first consideration, a legislature would incur the same costs whether it was con-

30. An implication of this rights consequentialist view is that courts should search for actual intent when interpreting the contracts of commercially unsophisticated persons. One who knows how courts interpret contracts and makes a contract regardless has signed on to the regnant interpretative theory. Also, sophisticated parties sometimes can implement idiosyncratic intentions by careful use of the standard conventions. Autonomy theories of contract interpretation are attractive to philosophers partly because the parties in their illustrations always are natural persons.

tracting out of the new textualism or contracting out of the traditional theories. To see why, let Congress prefer courts to have a certain amount of interpretive discretion, denoted by D. Then suppose that the regnant default was for courts to use all arguably relevant legislative history. If D implied a narrower evidentiary base than this, Congress would disclaim the default and then make D precise by specifying evidentiary sources: The statute's words; committee reports; and so forth. Now suppose that the default was new textualist but D implied a broader evidentiary base than textualism permits. Congress would disclaim the textualist default and again specify the permissible evidentiary sources. Therefore, holding the Congressional interpretive preference constant, the costs of contracting into or out of the new textualism apparently are the same.

The issue, then, is what the Congressional preference is. From the 1930's to the middle 1980's, the Federal courts used a wide variety of legislative sources to interpret Federal laws. Congress seemed not to object to this practice. Indeed, Congress actively cooperated with the courts by writing committee reports with judicial review in mind and by holding question and answer sessions on the floors of both Houses. It was the Court, not Congress, that changed its view regarding the appropriate use of legislative history. Congress's preferences are germane when choosing an interpretative default, however, and its preferences appear to favor the traditional methods of statutory construction. Further, if the view is correct that expanding the interpretive base permits courts better to discern the legislature's real intent, then Congress would want the interpretative base expanded; for it would be irrational of a legislature to pass a statute that it did not want the courts to apply. Thus, if the search is for a default interpretative theory, the new textualism is a poor default.³¹

The second contract analogy that may support the new textualism is between the penalty default and the rule of clear statement. To evaluate this analogy, it is helpful to formalize the rule. Let a party urge

31. Contracting parties sometimes prefer formalist methods of interpretation because these permit informal methods of resolving disputes to flourish. See Lisa B. Bernstein, *The Questionable Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710 (1999). It may be argued that legislators have a similar preference for the same reason, but the argument seems questionable. Published sources of legislative history, such as committee reports and floor question and answer sessions, reflect the results of legislative deals, not the process of creating them, which is private. Because courts only search over the published sources, traditional methods of statutory interpretation seemingly would not preclude congress persons from making trades.

on the Court an interpretation, denoted p_P , of a statutory section, where p_P is drawn from the set of interpretations that may advance bankruptcy policy P . The Court should reject the interpretation if p_P could not implement P , so it must be assumed that the party's interpretation is plausible. Let the statute's words permit an alternative interpretation r_i , where r_i can be chosen to implement one of three distinct sets of possible policies or constraints (formally, $i \in \{L, S, C\}$): L is the set of policies directed to the workings of the legislature (to encourage clear drafting, careful deliberation and the like); S is a set of substantive policies that the Court prefers to P (a different way to run a bankruptcy system, for example); C is a set of constraints to which the legislature may be insufficiently attentive (not to violate the first amendment, for example). The Constitution prohibits the Court from drawing interpretations from the policy distribution S , so the Court must choose the party's interpretation p_P unless r_i could be drawn from the distribution L (a linguistically permissible interpretation r_L exists that might induce desirable legislative change),³² or from the distribution C (the Court chooses interpretation r_C to avoid constitutional concerns). When a statute is not close to a constitutional line, the rule of clear statement thus tells courts to choose interpretation r_L from L rather than p_P from P when r_L is linguistically permissible and could be efficacious.

This application of the rule is difficult to justify by an analogy to contract. The normative desirability of the penalty default rests on the differential expertise of the contract drafter and the contract recipient: the drafter, that is, knows what the contract as written achieves but the typical recipient—a consumer, say—does not. In this circumstance, the recipient's choice to sign is uninformed, at a cost to the recipient if a dispute arises and at a cost to market efficiency. Hence, it is justifiable to construe the contract to create an incentive for clearer drafting. In the realm of statutory interpretation, the courts are important recipients, and they generally will know what a typically drafted statute achieves (for example, a court will know that the proposed interpretation P_p implements P , and that P is a bankruptcy policy). There is no differential expertise between courts and Congress at reading statutory words. Another recipient of a statute is the public that is affected by it. Members of the public, however, do not read the Statutes at Large to

32. Authorities cited in note 10, *supra*, argue that the set L may be empty (judicial interpretations may be unable to induce desirable legislative change).

learn the details of complex statutory schemes such as the Tax and Bankruptcy Codes. The public commonly is informed by lawyers, accountants and other trained professionals. There is no differential expertise between legislative drafters and these recipients. The analogy to contract thus supports the rule of clear statement only as applied to laws that citizens are supposed to know by reading them, and that thus should be transparent to the typical person. This appears to be a much smaller legal category than the set of federal statutes to which the rule is now applied. And when the rule of clear statement is inapplicable, courts should implement the law that the legislature wrote.

To summarize, the new textualism is a poor interpretative method because it unjustifiably excludes relevant "direct" evidence of a legislature's intentions—the evidence that falls in the categories of legislative history and the prior social and economic context.³³ It is these intentions that give statutes their normative force. Further, if Congress is taken to have intentions over interpretive theories, then a theory that

33. A recent paper stated: "The relevant question is whether legislative history increases the incidence of error, over the run of cases, when considered by judges constrained by the structural limitations of the judicial process. . ." The author's primary claim is that,

distinctive features of legislative history [as an evidential category], particularly its volume and heterogeneity, may increase the risk of erroneous judicial interpretation, even if an unbiased interpreter, acting under no constraints of time, information, or expertise, would find that the legislative history reliably reflects a collective intention concerning the relevant interpretative question.

Adrien Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 59 STAN. L. REV. 1833, 1876, 1874 (1998). The argument deserves more time than this essay can give it, but three comments are in order: (a) If courts are experts and time is costless, then the heterogeneity and volume problems disappear; courts will have the ability and time to consider all evidence; (b) These problems also exist in cases with complex records, such as antitrust cases, that are not thought to pose serious problems for the judicial process; (c) The paper is unclear as to what is meant by an erroneous interpretation. Suppose that the distribution of possible meanings for a statutory section is distributed normally around the true mean. Then the use of legislative history could cause error if it shifted judicial determinations further from the true mean than those determinations would be without that history; or the use of history increased the variance of judicial outcomes. The paper discusses only one case in detail and offers no data for either proposition. Also, there is a complex normative issue: if the use of legislative history increases variance but brings judicial outcomes closer to the true mean, there is a tradeoff between accuracy in the general run of cases and predictability in particular cases; while if the use of legislative history reduces variance but moves outcomes further from the true mean, there is a different tradeoff between accuracy and predictability. The volume and heterogeneity problems could not justify a ban on the use of legislative history until the particular tradeoff that history poses is identified, and it is then argued that that tradeoff should be resolved against the use of history.

truncates the search for legislative intent is a poor majoritarian interpretative default. Finally, there seems little need for a penalty interpretative default. Indeed, the strength of the case against the new textualism raises the question just how committed the Court is to it. Part 3 next argues that this commitment is largely instrumental: The Court's ultimate goal is to advance rule of law virtues, and it is textualist when that could advance this goal, but not otherwise.

3. PURSUING RULE OF LAW VIRTUES IN BANKRUPTCY CONTEXTS

3.1 *Interpretative Methods in the Cases*

Two kinds of evidence support the claim that the Court's use of the new textualism is pretextual. The first suggests that the Court does not take seriously the interpretative methods it claims to be using. The second is the results the cases reach. Regarding methods, the Court often claims to rely on the plain meaning of the statutory text. This claim is difficult to credit because the Court generally gets statutory interpretation cases when and because there is a conflict among the circuits. In the bankruptcy field, circuit court conflicts tend to reflect bankruptcy court conflicts. It seems unlikely that the clear meaning of a statutory text would have eluded this many interpreters, some of whom are experts in the bankruptcy field. In addition, lower court opinions and Supreme Court dissents commonly exhibit linguistically plausible meanings of the text at issue that differ from the reading the majority adopts. In these circumstances, the majority is likely to understand that while it may be adopting the best reading of the statute (according to some normative criterion), it is not adopting the only reading that a good faith interpreter could reach.³⁴

The Court also uses holistic statutory interpretation and past practice inconsistently. Regarding the former, the cases commonly recite that words that have a certain meaning in one Code section should be given the same meaning in other sections. The premise is that drafters adhere to consistent word usages within the same document. There

34. As examples of the argument above, in *Patterson*, three courts of appeal settled on an interpretation of Bankruptcy Code section 541(c)(2) that the Court rejected, reciting that "the plain language of the Bankruptcy Code . . . is our determinant." See 504 U.S. at 756. In *Barnhill v. Johnson*, 503 U.S. 393 (1992), the Court found no ambiguity in a statutory phrase that six courts of appeal had read differently in an analogous context. Unless the majority believed that the circuit courts in these and similar cases were unusually obtuse or badly motivated, the majority would have to know that the relevant texts could have more than one linguistically plausible meaning.

are reasons to believe that the Court is less committed to holism than the words of the cases suggest. The Bankruptcy Code has existed continuously since 1898 and has gone through several extensive revisions. Also, any complex statute is the product of a large number of creators. Inconsistent or vague word usages are to be expected. A legally sophisticated person thus will realize that it is a category mistake to treat a statute such as the Code as if it were the instantaneous product of a single mind, and so to force on this statute a consistency that it cannot bear.

Perhaps of more relevance, the Court abandons its preference for consistent usage when to give the same words different meanings would better confine future actors' discretion. *Barnill*³⁵ is illustrative. The bankrupt there had paid a debt with a check that was delivered to the creditor on the 92nd day before bankruptcy, but was paid by the drawee bank within 90 days of the petition.³⁶ A transfer from a debtor to its creditor that is made *within* 90 days of bankruptcy, section 547(b) of the Code provides, may be recovered by the bankruptcy trustee as a voidable preference.³⁷ The Code defines transfer, in section 101(54), as "every mode . . . absolute or conditional . . . of disposing of or parting with property. . ."³⁸; and the creditor argued that delivery of the check to it outside of the 90 day preference period was a conditional transfer of the bankrupt's property, the condition being the drawee bank's later payment.³⁹

The question when a transfer is made from the debtor to a creditor also is implicated under section 547(c), which provides that a transfer from a debtor *to* a creditor made within 90 days of bankruptcy is not preferential if the transfer is substantially contemporaneous with a transfer *from* the creditor to the debtor, or is made in the ordinary

35. 503 U.S. at 393.

36. *See id.* at 394.

37. *See* 11 U.S.C. § 547 (b)(4)(A) (2000).

38. 11 U.S.C. § 101 (54) (2000).

39. *See Barnill*, 503 U.S. at 393. The buyer's argument has some support in the Uniform Commercial Code. Section 2-511(3) states: "Subject to the provisions of . . . Section 3-310, payment by check is conditional and is defeated as between the parties by dishonor." U.C.C. § 511(3) (1998). Comment 4 adds: "This article recognizes that the taking of a seemingly solvent party's check is commercially normal and proper and . . . is not to be penalized in any way." *Id.* Section 3-310(b) recites that "if . . . an uncertified check is taken for an obligation [of the buyer to pay], the obligation is suspended to the same extent the obligation would be discharged if an amount of money equal to the amount of the instrument were taken." U.C.C. § 3-310(b) (1998).

course of the debtor's business.⁴⁰ The sponsors of the Code in the House and Senate said that a transfer from the debtor should be deemed made, under 547(c), when a check is delivered; and six courts of appeal had adopted that construction. The Court in *Barnill* refused to extend this construction beyond section 547(c), holding that a transfer is made under 547(b) when the check is finally paid. It stated that subsection (c) is

“designed to encourage creditors to continue to deal with troubled debtors on normal business terms by obviating any worry that a subsequent filing might require the debtor to disgorge . . . an earlier received payment. But given this specialized purpose, we see no basis for concluding that the legislative history . . . explicitly confined by its terms to §547(c), should cause us to adopt a ‘date of delivery rule’ for the purpose of §547(b).⁴¹

The Court thus construed subsection 547(b) to provide that a “transfer” of a check occurs when the drawee bank pays it, and also construed subsection 547(c) to provide that a “transfer” of a check occurs when the debtor delivers it, though the Code contains a unitary definition of the transfer concept that applies to both subsections. The Court did not abandon its preference for holistic statutory interpretation in order to further a bankruptcy policy. Rather, the Court noted: “There is some force in petitioner’s claim that he did, in fact, gain something when he received the check.”⁴² This gain was the right to sue the drawer of the check—the debtor—on the instrument if the drawee bank refused to pay.⁴³ The Court rejected petitioner’s claim, however, because “[t]o treat petitioner’s nebulous right to bring suit as a ‘conditional transfer’ of the property would accomplish a near limitless expansion of the term ‘conditional’.”⁴⁴ The Court, that is, chose a construction of the statute that required the bankruptcy court to make a ministerial finding—when did the drawee bank pay?—rather than a finding that could implicate legal and policy considerations—was the creditor’s conditional claim on the debtor’s property as of a particular

40. See 11 U.S.C. § 547 (c) (2000).

41. *Barnhill*, 503 U.S. at 402.

42. *Id.* at 400.

43. Under negotiable instruments law, a suit on an instrument sometimes is easier to win than a suit on the underlying obligation itself.

44. *Barnill*, 503 U.S. at 401.

date sufficiently strong to justify the legal conclusion that the creditor received a transfer as of then?⁴⁵

The Court's use of past judicial practice (interpretations of prior bankruptcy laws or of state laws) to interpret the current Code also appears partly pretextual. The use of past practice to read current statutes raises the question when the prior legal usage is sufficiently well established to make plausible a claim that the legislature was aware of it. The Court, at least in the bankruptcy field, has not attempted to answer this question.⁴⁶ In the absence of criteria for assessing past practice, prior cases are likely to play a justificatory rather than a generative role regarding the statutory reading the Court adopts. As evidence for this view, the Court will sometimes say that only a clear legislative intent to upset a settled past usage can prevail over that usage; but in other cases it will hold that past usage cannot overcome the Bankruptcy Code's clear meaning.⁴⁷

45. The Court's reluctance to answer, or to permit lower courts to answer, the question that *Barnhill* poses by reference to bankruptcy purposes also is revealed in the Court's refusal to pursue the implications of the limited policy view it did take. Recall that the Court attributed to section 547(c) the purpose of encouraging firms to deal with troubled debtors; the encouragement takes the form of relieving the seller of goods or services who takes a check within the 90 day preference period of the worry that it has received a preference that it later will have to disgorge. The seller only has to worry about whether the check will later clear. Under the holding here, a seller who receives a check outside the 90 day period must worry not only about whether the check will clear but also must worry about whether it has received a preference. Since sellers seldom know just when bankruptcy will occur, however, they seldom know whether they are inside or outside the 90 day preference period. Thus, after *Barnhill* any seller who is offered payment by check, whether inside or outside the 90 day period, will continue to have the preference worry that the Court read section 547(c) to relieve. The policy consideration the Court recited therefore seems to imply that both 547 subsections should give the same meaning to the word "transfer". The Court did not pursue this possibility because it does not answer bankruptcy questions by reference to bankruptcy policies.

46. A thoughtful attempt to answer the question for a statute such as the Bankruptcy Code is in Douglas G. Baird and Robert K. Rasmussen, *Boyd's Legacy and Blackstone's Ghost*, 1999 SUP. CT. REV. 403, 433, which argues that "appellate judges [should] adopt a minimalist common law methodology," which requires them to distill principles from prior judicial interpretations that are consistent with, and can illuminate, language in the current law.

47. As examples, in *Field v. Mans*, 516 U.S. 59 (1995), the Court held that when Congress uses a phrase that has a common law meaning, it intends to adopt that meaning, while in *Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000), the Court assumed that Congress was unaware of a widely used common law doctrine. See note 60, *infra*. Also, in *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992), the Court remarked that "this Court has been reluctant to . . . interpret the Code . . . to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history."; while in *United States v. Ron Pair Enterprises, Inc.*, 489 U.S.

In addition, an analysis of the views of some justices regarding the relevance of past practice calls into question the Court's commitment to textualism itself. This suggestion is best pursued by considering three syllogisms to which some members of the Court appear committed:

A.

- I. Major Premise: Courts are bound only by intentions that actual legislators are likely to have held when they voted for the law.
- II. Minor Premises:
 - (a) A legislator cannot hold an intention regarding a statute unless the legislator reads the statute.
 - (b) Legislators read statutes before voting on them.
- III. Conclusion: The legislature intends to enact the statutory words.

B.

- I. Major Premise: As in A.
- II. Minor Premises:
 - (a) A legislator cannot hold an intention regarding legislative history, such as Committee Reports and floor statements, unless the legislator reads, or was present at the creation of, that history.
 - (b) The typical legislator is unaware of the legislative history of the statutes she votes for.
- III. Conclusion: The legislature does not intend to adopt the sense of the legislative history that legislative insiders create.

C.

- I. Major Premise: As in A.
- II. Minor Premises:

235 (1989), the Court distinguished its use of past practice in two prior cases to interpret the Code because the interpretation it had to consider in those cases "was in clear conflict with state or federal laws of great importance", while in the instant case "the natural interpretation of the statutory language does not conflict with any significant state or federal interest." Why the relevance of prior practice should turn on whether a possible conflict exists between the Code and other federal law was not explained.

- (a) A legislator can hold an intention regarding the relevance of past legal usage even if the legislator is unaware of that usage.
- (b) The typical legislator is *unaware* of legal usages that existed under prior laws.⁴⁸

III. Conclusion: The legislature takes past practice into account when creating a current statute, so that courts should consider past practice when attempting to ascertain the intent of the current legislature.

A rational person who is committed to Syllogisms A and B cannot also be committed to Syllogism C because the Minor Premises of A and B conflict with the Minor Premises of C. Some members of the Court, however, assert belief in all of these syllogisms, which calls into question the justices' belief in any of them.

Part 3.1 thus suggests that the Court is not pursuing textualism as an end in itself.⁴⁹ Part 3.2 will go on to argue that the Court phrases opinions that have a substantive goal in a textualist way. The goal is give readings to the Bankruptcy Code that maximally confine the discretion of other actors in the bankruptcy system.

48. In *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 530 (1989), Justice Scalia, in concurrence, said: "The meaning of terms on the statute books must be determined . . . on the basis of which meaning is . . . most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, *by a benign fiction*, we assume Congress always has in mind." (emphasis added).

49. A prior commentator has also observed the Court's inconsistent use of interpretative methods. See Robert M. Lawless, "Legisprudence Through a Bankruptcy Lens: A Study in the Supreme Court's Bankruptcy Cases", 47 *Syracuse L. Rev.* 1 (1996). This article studies cases from the 1991-96 terms, nineteen in all. Its chief claim is that the Court uses "textual" interpretation as a pretext. "The justices place a higher value on reaching the result they prefer. In any given case, the Court will use textual or nontextual theories of interpretation depending on which theory most persuasively supports the outcomes the Court desires." (111). After striking five cases that he could not code, the author concludes from the remainder: "Since 1991, the Court has favored governmental claimants and large institutional creditors at the expense of unsecured trade creditors and debtors." (114). This pattern, if it exists, disappears when the period under study is expanded backwards and forwards in time: in the larger sample, the Court seems systematically to favor no one. Another commentator concluded after an exhaustive study that the Court uses varying interpretative methods in the bankruptcy field, but did not ask whether the Court was pursuing a particular normative goal. See Karen M. Gebbia-Pinetti, "Interpreting the Bankruptcy Code: An Empirical Study of the Supreme Court's Bankruptcy Decisions", 3 *Chapman L. Rev.* 173 (2000).

3.2 Discretion Reducing Readings in the Cases

A claim that a court is privileging one set of readings of a statute over another seems best justified qualitatively. Whether the Court actually requires the actors who administer a statute to exercise the minimum amount of discretion is a function of the set of linguistically permissible readings of the statutory section at issue,⁵⁰ the type of tasks the relevant legal institution permits the actors to perform and the possible policies the statute could be thought to advance. It is difficult to quantify such variables. Section 3.2 of this Essay therefore sets out an interpretation.

Statutory construction often presents one of two basic questions: Should the statute be read to cover a case that the words literally do not include because the reason of the section is applicable to the unincorporated case? Or should the statute be read to exclude a case that the words literally include because the reason of the section is inapplicable to the included case? Bankruptcy cases raise these questions in heightened form because the governing statute is hard to revise. It was created in 1898, revised extensively in 1938 and 1978, and has not been seriously revised since; there also are recent failures to make major changes. The Court sometimes does extend the Code's reach and at other times limits it, but these results do not flow from a consideration of the reasons that did or could have produced the Code sections at issue; rather, the results reflect the concrete implications of a flight from discretion. Thus, the *Barnhill* case discussed above applied the preference section to a creditor who had received a check before the 90 day preference period, not because the reason of the preference rules so implied but to avoid a consideration of those reasons.

The case of *Cohen v. DeLaCruz*,⁵¹ discussed next, represents a similar expansion animated by the same motive. The petitioner there was an insolvent landlord who had violated New Jersey's rent control law. That law awarded attorneys fees and treble damages to tenant victims. Section 523 of the Bankruptcy Code sets out the categories of debt that cannot be discharged in bankruptcy. Relevant here, subsection (a)(2)(A) excepts from discharge "any debt . . . for money . . . to the extent obtained by . . . actual fraud." Petitioner conceded that the part

50. There was a conflict among the circuit courts of appeal in all of the cases discussed below except the sovereignty immunity cases discussed at notes 88-90, *infra*. This suggests that more than one linguistically plausible reading of the statutory sections the Court construed was possible.

51. 523 U.S. 213 (1998).

of the judgment against him that required him to repay excess rents was nondischargeable because a violation of the rent control law was fraudulent under New Jersey law; but he also argued that the part requiring him to pay the victims twice actual damages in addition should be discharged. This was because the excess rent had been the property of the tenant creditors before petitioner "obtained" it; in contrast, the trebled portion of the judgment did not reflect monies that the tenants had ever owned, so petitioner could not have "obtained" these monies from them. Therefore, a Code section whose purpose was to compensate the victims of fraud could not be stretched to deny petitioner a fresh start regarding property that the victims did not lose.

To see how the Court rejected this seemingly plausible textual argument, realize that the Code uses the phrase "any debt. . . for" to introduce ten exception to discharge subsections of 523(a). These are debts for: (a)(1)[taxes], (a)(2)[money obtained by fraud], (a)(4)[fraud committed while acting in a fiduciary capacity], (a)(6)[willful injury], (a)(8)[government insured educational benefits], (a)(9)[death or injury caused by a drunken driver], (a)(12)[failure to maintain the capital of a Federally insured bank], (a)(13)[restitutionary orders under title 18, USC], (a)(16)[condo and coop fees payable "after the order for relief" by one who continues to occupy the dwelling], and (a)(17)[court fees imposed for instituting frivolous litigation]. On the authority of Black's Law Dictionary and the American College Dictionary, the Court held that the introductory phrase "any debt . . . for" means "any debt with respect to."⁵² This holding would make the phrase have the same meaning in each of the "parallel provisions" that it introduces. The Court then used this holistic interpretation to find, under the "most straightforward reading of §523(a)(2)(A)," that the treble damage portion of petitioner's obligation was incurred "with respect to" his obligation to pay compensatory damages, and so was included in the category of debts that cannot be discharged in bankruptcy.⁵³

As suggested above, the petitioner landlord should have won were the Court to have found that the purpose of refusing to discharge "any debt . . . for money . . . to the extent obtained by" actual fraud was to increase the likelihood that victims of fraudulent acts would be compensated; this compensatory goal is achieved by refusing to discharge

52. *Id.* at 214.

53. *Id.*

the obligation to pay actual damages plus attorneys fees to fraud victims. Petitioner also should have won if Congress believed that here, as in many other contexts, sufficient deterrence is achieved by the payment of compensatory damages. On the other hand, petitioner would justifiably have lost if Congress believed that the policies underlying punitive sanctions, when states impose them, are strong enough to overcome the fresh start policy underlying the bankruptcy discharge. The Court, however, did not make a policy analysis at all, but rather sought to resolve the issue here, and to resolve similar discharge issues, for itself and for future courts, by using two dictionaries to assign a unitary meaning to the relevant section's introductory phrase.⁵⁴

In the next two cases, the Court refused to apply the Code to an unincorporated case. The Hartford Insurance Company sold workers compensation insurance to the bankrupt during a reorganization (of which Hartford was unaware).⁵⁵ The reorganization failed and the bankrupt was liquidated, with insufficient funds to meet its insurance premium obligation. Section 506(c) of the Code provides: "The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving . . . such property to the extent of any benefit to the holder of such claim [i.e., the secured party]." Had the Hartford not sold insurance, the State could have closed the bankrupt down. Accordingly, the Hartford sought to charge the bankrupt's premium obligation to a secured party under section 506(c). The Court remarked that if Congress wanted to allow creditors to recover necessary preservation expenses from secured parties "it could easily have used . . . [a] formulation" to do that.⁵⁶ "Similarly, had Congress intended the provision to be broadly available, it would simply have said so. . . ."⁵⁷ Therefore, "the most natural reading of §506(c) is that it extends only to the trustee."⁵⁸ The Hartford must carry an "exceptionally heavy" burden to overcoming this reading.⁵⁹

The Hartford made two arguments. It cited a number of lower court cases and some early Supreme Court cases, all of which permitted parties other than the trustee to recover expenses from secured

54. Recall that in *Barnhill* the Court refused to assign a unitary meaning to the word "transfer" that was used twice in the same statutory section. The common factor in these cases appears to be the Court's choice of a discretion reducing interpretation.

55. *Hartford Underwriters*, 530 U.S. at 4.

56. *Id.* at 8.

57. *Id.*

58. *Id.* at 9.

59. *Id.*

parties that were necessary to preserve the collateral. The Court rejected this appeal to past practice on the ground that the practice was not “sufficiently widespread and well recognized to justify the conclusion of implicit adoption by the Code. We have no confidence that Congress was aware of the practice.”⁶⁰ The Hartford also argued that the reason of the statute justified its claim. To allow property to deteriorate is wasteful. A trustee, however, would not spend the general creditors’ money to preserve property that the creditors could not reach (because the secured party ultimately would take it). Hence, the law encourages the trustee to preserve property by permitting her to recover preservation expenses. The logic of the argument apparently applies to any party, not an intermeddler, who preserves the property of a secured claimant. The Court did not reject this logic, but rather explained that if the creditor won here, then “[e]ach such claim would require inquiry into the necessity of the services at issue and the degree of benefit to the secured party. . . . could therefore impair the ability of the bankruptcy court to coordinate proceedings, as well as the ability of the trustee to manage the estate.”⁶¹ The Court did not explain why an “inquiry into the necessity of the services at issue and the degree of benefit to the secured party” would affect bankruptcy administration adversely when the inquiry was triggered by a creditor, but would not have this effect when the inquiry was triggered by a trustee who represents the creditors.⁶² The Court, more likely, would not extend section 506(c) to creditors because to do that would encourage case by case inquiries whose fact specific nature might reduce predictability in bankruptcy administration.⁶³

60. Justice Scalia authored this unanimous opinion. Recall his view that courts for good reasons adopt the “benign fiction” that Congress is aware of past legal practices when it enacts laws, though the courts *know* that in the usual case Congress is unaware. *See supra* note 48. In addition, the Hartford’s claim was functionally identical to a common law suit for unjust enrichment. If the Hartford cannot recover expenses incurred to preserve the secured party’s collateral, the secured party apparently would be unjustly enriched. The prior cases that allowed similar claims thus were unjust enrichment cases; it seems plausible to believe that the unjust enrichment doctrine was “sufficiently widespread and well recognized” to justify an inference that Congress was aware of it.

61. *Hartford Underwriters*, 530 U.S. at 22.

62. *Id.* at 22.

63. The Court’s distaste for case by case inquiries also is reflected in its reluctance to permit equitable considerations to be taken into account. For example, in *Taylor v. Freeland & Kronz, et al.*, 503 U.S. 638 (1992), a trustee failed to object within the required 30 day period to a debtor’s request for an exemption that would put certain of

To understand the second refusal to extend the Code that is discussed here, recall that an individual debtor can file for bankruptcy under Chapter 7, and will receive a discharge upon surrendering his nonexempt assets to his creditors. In 1978, Congress created a Chapter 13, which permits a debtor to declare bankruptcy yet keep his nonexempt assets, provided that he pays a court approved portion of his future income to creditors for the duration of the "Chapter 13 Plan" (usually, three to five years). The debtor is discharged upon successful completion of his Plan. Section 1328(a) explicitly carried over to Chapter 13 the exceptions to a Chapter 7 discharge that are set out in subsections 523(a)(5) [debt for alimony]; (a)(8) [government insured educational benefits] and (a)(9) [death or injury caused by a drunken driver]. Section 523(a)(7) also excepts from discharge a debt "to the extent such debt is for a fine, penalty or forfeiture payable to and for the benefit of a governmental unit." The Chapter 13 analogue, in section 1328(a)(3), prohibits discharge of "any debt for restitution, or a criminal fine, included in a sentence on the debtor's conviction of a crime."

In a prior case,⁶⁴ the Court had held that section 523(a)(7) barred a Chapter 7 discharge for restitution obligations imposed as a condition of probation. In this case,⁶⁵ the debtors filed under Chap-

the debtor's property beyond his creditors' reach. Three circuit courts and several bankruptcy courts had held that the thirty day period could be tolled for equitable reasons, in particular the lack of prejudice to the debtor and the improvement in bankruptcy administration that would result from not holding busy trustees to rigid deadlines. The Court responded: "Deadlines may lead to unwelcome results, but they prompt parties to act and they produce finality." And in *Grupo Mexicano De Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), the Court refused to permit an unsecured creditor to enjoin a debtor from dissipating assets on the ground that, as of the Judiciary Act of 1789, equity barred unsecured creditors from holding property rights in their debtors' assets if they had not first obtained a judgment on the underlying obligation. Four dissenters argued that traditional equitable *principles* would permit the injunction on the instant record: the debtor offered no defense to the action, the creditor was certain to win and the asset dissipation was proceeding, so that without a preliminary injunction the creditor's legal right to collect would be rendered fruitless. The majority responded:

We do not decide which side has the better of these arguments. . . . Because such a remedy was historically unavailable from a court of equity, we hold that the District Court had no authority to issue the preliminary injunction preventing petitioners from disposing of their assets pending adjudication of respondent's contract claim for money damages.

64. See *Kelly v. Robinson*, 479 U.S. 36 (1986).

65. See *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552 (1990).

ter 13, and sought to discharge the same category of obligation (they had committed welfare fraud). To understand what the Court did, it is helpful to begin with what it could have done. Section 1328(a)(3) did not apply literally to the case because the debtors' state imposed duty to make restitution was imposed as a condition of their probation, not as part of a criminal sentence. Assume, however, sections 523(a)(7) and 1328(a)(3) had the same goal. Then a court that wanted to apply the Code in accordance with its purposes, as *Kelly* did, could have refused to discharge the obligation at issue by finding that while Chapter 13 discharges "any debt," the obligation here was not a debt.⁶⁶ This would have been a linguistically plausible construction because the state enforces the restitution obligation not by an action for money, but by the threat of parole revocation; probation orders thus do not create debtor/creditor relationships.

The Court found instead that the obligation was a debt and thus dischargeable. Section 101(11) defines a debt as a "liability on a claim," which is a "right to payment." According to the majority, "[t]he plain meaning of a 'right to payment' is nothing more or less than an obligation, regardless of the objectives the State seeks to serve in imposing the obligation."⁶⁷ Though no one had a "claim" against the debtors, in the sense of a right to sue them for money, the debtors had an "obligation" to make restitutionary payments. This was the debt that Chapter 13 discharged. The Court felt itself justified in rejecting the prior legal practice because "the statutory language plainly reveals Congress' intent";⁶⁸ this language was the definition of a debt just quoted and the Code's failure to make all of section 523(a)(7) applicable to Chapter 13.

Restitutionary obligations of the sort involved here had become part of the sentencing process for a number of state law crimes. Sections 523 and 1328 seem to reflect a Congressional judgment that the goal of facilitating the states' choice of criminal sanctions overrides the goal of giving certain criminal debtors a complete fresh start. The result here apparently is at odds with that balance. The Court, however, did not object to the balance, nor did it ask what bankruptcy or other

66. The two dissenters observed that "Under pre-Code practice, nondischargeability of a criminal restitution order would be evidence that it was not a debt at all. Congress gave no indication that it intended to break with this pre-Code conception" *Id.* at 572.

67. *Id.* at 559.

68. *Id.* at 557.

goals could be served by discharge of the obligation at issue. Rather, it read the Code to provide that any section 523(a) exception to discharge not also set out in section 1328 is thereby inapplicable in Chapter 13; in ruling on discharge, that is, the bankruptcy court is supposed only to compare the section 523(a) exception list to the 1328(a) exception list. Our opinion, Justice Marshall explained for the majority, will be “guided by the fundamental canon that statutory interpretation begins with the language of the statute itself.”⁶⁹ The opinion’s methodology, however, implies that statutory interpretation should end where it begins.⁷⁰

In the last two detailed illustrations this essay gives, the Court adopted interpretations that overrode seemingly clear statutory language in order to reduce the discretion of the bankruptcy courts. Section 541(a)(1)(B)(i) permits the trustee or the debtor to “avoid any transfer of an interest of the debtor in property . . . if the debtor, voluntarily or involuntarily, received less than a reasonably equivalent value in exchange for such transfer. . . .” In *BFP*,⁷¹ the debtor’s property was sold at a state foreclosure sale. The debtor later filed for bankruptcy and sought to set the foreclosure sale aside because it allegedly brought much less than the property was worth. There were three separate rules in the courts of appeal: (a) the foreclosure sale price is a “reasonably equivalent value” as a matter of law if the sale complied with the state’s procedural requirements (proper notice was given, no one was prevented from bidding, and so forth); (b) the foreclosure sale price is presumptively reasonably equivalent value (when the sale was conducted in compliance with state law), but the bankruptcy court can ask whether a particular sale was sufficiently unsatisfactory to overcome the presumption; (c) the foreclosure sale must recover at least 70% of fair market value.⁷² The Court chose rule (a).

This choice is difficult to justify on textualist grounds. Initially, the Code authorizes the bankruptcy court to set aside a transfer if the debtor did not receive “reasonably equivalent value,” which apparently implies that the court should ask whether the debtor received reasonably equivalent value. Compliance with state procedures is germane to this inquiry but cannot conclude it; for the state procedures may be

69. *Id.*

70. *Id.* The dissent argued that this methodology reflected a departure from past practice; and later cases are more in the vein of this opinion than earlier ones.

71. *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1993).

72. *See id.*

poorly designed to maximize value. Further, it had long been the law that a foreclosure sale not conducted in accordance with applicable state law could be set aside. Section 548(a) of the 1978 Code authorized the bankruptcy court to upset only voluntary transfers by the debtor. In 1984, the phrase "or involuntary" was added to section 548 to ensure that the section applied to foreclosures. If only improperly conducted foreclosure sales can be upset, however, the new phrase would have achieved nothing; for procedurally irregular sales were unlawful before 1984. Textualist interpretations are not supposed to discard text.

The two competing rules that lower courts had chosen would have required the bankruptcy court to make an independent evaluation of state foreclosure sales. Such an inquiry could be substantive—was the foreclosure price high enough?—or procedural—were the state procedures well designed to maximize value? The Court initially rejected a substantive inquiry: "The problem is that such judgments represent policy determinations which the Bankruptcy Code gives us no apparent authority to make."⁷³ The Court then rejected a procedural inquiry: "To specify a federal 'reasonable' foreclosure price is to extend federal bankruptcy law well beyond the traditional field of fraudulent transfers into realms of policy where it has not ventured before."⁷⁴ The Court added: "we are called upon to have faith that bankruptcy courts will be able to determine whether a property's foreclosure sale price falls unreasonably short of its 'optimal value' . . . whatever that may be."⁷⁵ A majority lacked this faith, and so adopted the interpretation of section 548 that prevented bankruptcy courts from asking whether a foreclosure price reflected "a reasonably equivalent value in exchange" at all.⁷⁶

This case poses a difficult policy choice. On the one hand, the object of the Bankruptcy Code, broadly speaking, is to maximize the size of the estate available to creditors because this reduces credit costs *ex ante*.⁷⁷ This goal, as the dissenters argued, may be best served by permitting bankruptcy courts to upset low foreclosure prices. On the other hand, case by case inquiries into the reasonableness of those

73. *Id.* at 540.

74. *Id.*

75. *Id.* at 548.

76. *Id.* at 542-43.

77. See, e.g., Alan Schwartz, *A Contract Theory Approach to Business Bankruptcy*, 107 YALE L.J. 1807 (1998).

prices could create substantial uncertainty for secured creditors, and thus chill credit availability. The language of the statute suggests, but does not absolutely compel, the conclusion that Congress resolved this tradeoff in favor of case by case inquiries. The majority did not attempt to rebut this conclusion because it was not interested in the tradeoff. Rather, its goal was to prevent the bankruptcy law in action from being made on the basis of such tradeoffs.⁷⁸

Nobleman v. American Savings Bank,⁷⁹ took a similar tack in the consumer context. Section 1322(b)(2) provides that a Chapter 13 plan can “modify the rights of secured claims, *other than* a claim secured only by a security interest in real property that is the debtor’s principal place of residence. . . .” There could be two ways to read this language, denoted here x and y. The x reading uses an interpretative canon called the “rule of last antecedent.” This canon makes the “other than” language refer to the phrase “secured claim,” which is its last antecedent, rather than the word “rights,” which is further from the operative language. Under the x reading, a court would be required to value the secured claim in the debtor’s residence. For example, if the unpaid portion of the mortgage is \$100,000 but the value of the residence is \$50,000, then the “secured claim” is worth \$50,000; and the prohibition against modification would then imply that the Plan could not give the mortgagee less than \$50,000. The Court said that the x reading is “quite sensible as a matter of grammar. But it is not compelled.”⁸⁰ The y reading, which seems not to use interpretative canons, makes the “other than” language refer to the trailing phrase “a claim secured only by.” Section 101(5) provides that a claim is “any right to payment, whether secured or unsecured.” Under the y reading, then, a Plan cannot modify a “claim”. In the illustration here, the mortgagee has a contract claim—a “right to payment”—of \$100,000, so a

78. In a similar vein, the Court in *Bank of America National Trust & Savings Association v. 203 North LaSalle Street Partnership*, 526 U.S. 434 (1999) rejected a construction of the Code that would have permitted the bankruptcy court to determine whether a contribution by the old shareholders to a reorganized firm was sufficiently substantial to warrant the shareholders’ participation in the new firm. The Court instead chose a construction that would require the market – an auction – to value the shareholders’ contribution. This outcome is plausible on policy grounds, but likely was adopted because it withdrew discretion from the lower courts to make the mixed law and fact inquiry that the alternative, plausible construction of the Code would have permitted.

79. 508 U.S. 324 (1993).

80. *Id.* at 330.

Chapter 13 plan could not be adopted if it modified this right by proposing to pay the mortgagee less than \$100,000.

The Court held that the y reading "is the more reasonable one, since we cannot discern how" otherwise to apply section 1322(b).⁸¹ The difficulty arises because it "appears to be impossible" to reduce the creditor bank's mortgage to the fair market value of the collateral "without modifying the bank's rights" under the mortgage.⁸² That is to say, it is impossible to give the mortgagee \$100,000—its "right to payment" under the mortgage—while also giving it \$50,000—the value of its "secured claim."⁸³ The Court thus *assumed* that reading y reflected the correct interpretation of section 1322(b), and it then rejected reading x because that interpretation conflicted with reading y. No justification was offered for this assumption.

Turning to policy, Chapter 13 applies to persons, and the most important secured obligation most people incur is their home mortgage. Strengthening the real property mortgagee's rights *ex post* results in more favorable terms for borrowers *ex ante*. A great deal of federal legislation suggests that Congress, as a general matter, wants to favor home ownership. If section 1322(b) can be taken to reflect such a policy, the issue is whether the more linguistically plausible x reading, which is less favorable to creditors *ex post*, or the y reading, which is more favorable, best advances the Congressional goal. The Court, however, rejected the x reading on weak grounds without making any inquiry into purpose. This apparently is because the x reading would require a bankruptcy court to value the collateral while the y reading asks the court only to find how much is unpaid under the mortgage, an essentially ministerial act.

Three things about the cases summarized above, and others that could be described, deserve further mention. First, very few of the cases are 5-4 decisions. This essay thus describes the *Court's* bankruptcy jurisprudence. Second, the cases advance no coherent view of bankruptcy in general, nor do they consistently pursue any bankruptcy policy. As one more example, *Pennsylvania Department of Public Welfare v. Davenport*⁸⁴ biases consumer debtors toward the use of Chapter 13 because Chapter 13 contains fewer express exceptions to discharge and that case prevented the courts from adding others. On the other

81. *Id.* at 331.

82. *Id.*

83. *Id.*

84. 495 U.S. 552 (1990).

hand, *Associates Commercial Corp. v. Rash*,⁸⁵ biases consumers toward Chapter 7 because the holding there reduces the surplus the debtor could realize in Chapter 13 if he chose to retain collateral subject to a security interest.⁸⁶ Prior extensive surveys of the Court's bankruptcy cases also are consistent with the conclusion here; none of these surveys establish a substantive direction in which the Court seeks to take bankruptcy policy. Rather, the case results are random from a policy point of view: the common thread flows from the Court's view of the appropriate amount of discretion the bankruptcy courts should exercise when applying the Code.

Third, the cases raise routine issues in the administration and application of the Code. Thus, they may reflect the Court's general view as to how the usual regulatory statute should function. The Court's preferences regarding discretion, however, apparently spill over to, or perhaps are influenced by, its views on more basic issues. This possibility is suggested by the Court's bankruptcy sovereign immunity deci-

85. 520 U.S. 953 (1997).

86. For readers interested in bankruptcy policy, *Rash* involved a Chapter 13 plan that was crammed down over a secured creditor's objection. Such a plan may permit the debtor to keep the collateral (here a truck that debtors used in their business), provided that the plan gives the creditor the "value" of the collateral in installments. There were three valuation standards in the courts of appeal: replacement value (r); foreclosure value (f); and an intermediate value (i), where $r > i > f$. The bankruptcy court chose f but the Court chose r . To understand the implication of the Court's choice, let the debtor value the collateral at v . If a debtor files under Chapter 13, her surplus from keeping the collateral would be $v - r$ (she must pay r to the secured creditor and keeps collateral valued at v). If the debtor were to file under Chapter 7, the creditor would be entitled to foreclose, in which case it would receive f , the foreclosure value. The debtor, however, could negotiate to keep the collateral by offering to pay the creditor more than f . Since the debtor would not pay above v , the bargaining range in Chapter 7 is $v - f$; and if β indexes the debtor's bargaining power ($0 \leq \beta \leq 1$), the debtor's surplus from Chapter 7 bargaining is $\beta(v - f)$. The debtor would use Chapter 7 if she would do better there than she would do in Chapter 13; or if $\beta(v - f) > v - r$. Now assume that the Court had chosen the foreclosure value for Chapter 13. Then choosing Chapter 13 would become a weakly dominated strategy for debtors. To see why, realize that if the Court had affirmed the bankruptcy court by choosing f , then the debtor could retain the collateral in Chapter 13 by paying the secured creditor only f ; the debtor's Chapter 13 surplus then would have been $v - f$. Recall that the debtor's Chapter 7 surplus is $\beta(v - f)$. Hence, the debtor would do as well in Chapter 7 as in Chapter 13 only if she had all the bargaining power ($\beta = 1$); in the usual case debtors are less powerful, and so would do better in Chapter 13. The Court's choice of the replacement value standard, by shrinking the debtor's possible Chapter 13 surplus from $v - f$ to $v - r$ (recall that $r > f$), thereby ensured that in some cases debtors would prefer to bargain in Chapter 7. The Court gave no reason for pushing consumer debtors toward one bankruptcy chapter rather than the other.

sions, which appear to disregard plain meaning, legislative history and context to preclude government liability for bankruptcy related monetary judgments.⁸⁷ As is well known, the Court requires an unmistakably clear statement in the statute itself that sovereign immunity has been waived. Without such a requirement, the Court and lower courts could have to consider tradeoffs, through many statutory sections, of a more effective Bankruptcy Code as against the legitimate right of governments to avoid suit.⁸⁸ The Court's (very) clear statement rule withdraws judicial discretion to make these tradeoffs.⁸⁹ Thus, it appears that the Court's preference for textualist modes of interpretation is subordinate to its preference for the rule of law virtues themselves.⁹⁰

87. See *United States v. Nordic Village, Inc.*, 503 U.S. 30, 31 (1992) (An officer of the debtor used the debtor's money to pay the officer's Federal tax liability; the Government need not return the money to the debtor's estate); *Hoffman v. Conn. Dep't of Income Maint.*, 492 U.S. 96, 108 (1989) (holding that states need not return avoidable preferences or pay for services rendered to them).

88. To get a better sense of what is meant, Section 106(a) and (b) of the 1978 Code waived sovereign immunity in two cases: When the government asserted a claim in a bankruptcy, then (a) it waived immunity for a claim against it "that arose out of the same transaction or occurrence"; and (b) it waived immunity for setoffs and counterclaims. Section 106(c) went on to provide that, except for (a) and (b), and "notwithstanding any assertion of sovereign immunity," (1) "a provision of this title that contains 'creditor', 'entity', or 'government unit' applies to government units"; and (2) "a determination by the [bankruptcy] court of an issue arising under such a provision binds governmental units." The quoted words in 106(c)(2) were called the "trigger words." In holding that subsection (c) did not waive sovereign immunity at all, the plurality opinion in *Hoffman* explained: "Under petitioner's interpretation of 106(c) . . . the only limit [to a finding of waiver] is the number of provisions of the Bankruptcy Code containing one of the trigger words. With this 'limit', 106(c) would apply in scattershot fashion to over 100 Code provisions." The dissent weighed the hampering of bankruptcy administration in this context (eliminating states as defendants makes the preference prohibitions less effective) against the inroads on state sovereignty, but a majority of justices were unwilling to make, or permit other courts to make, such case by case inquiries.

89. In 1994, Congress responded to the bankruptcy sovereign immunity cases by amending section 106 to provide that "sovereign immunity is abrogated as to a governmental unit . . . with respect to" 60 listed Code sections. There is a question how much of this response continues to be effective after *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). For a recent analysis, see Laura B. Bartell, *Getting to Waiver – A Legislative Solution to State Sovereign Immunity after Seminole Tribe*, 17 Bkcty Dev. J. 17 (2001).

90. *United States v. Noland*, 517 U.S. 535 (1996), may seem a counter example to the argument here because the Court ordered case by case inquiries to be made regarding whether certain claims can be equitably subordinated. The case, however, appears on a deeper level to be consistent with the discretion limiting theme of this essay. Government tax claims receive an administrative priority, which means that the Government is paid before ordinary creditors. Section 510(c)(1) provides that "after notice

4. CONCLUSION: PURSUING RULE OF LAW VIRTUES THROUGH STATUTORY INTERPRETATION

The Court often uses a textualist mode of statutory interpretation. This mode is justified because it perhaps encourages the Congress to draft more carefully and to deliberate more fully, and also because textualism arguably produces more predictability and certainty in the administration of statutes—what this essay has called the rule of law virtues. Part 2 above, following much of the literature, argues that these justifications for the new textualism fail, so that the method should be abandoned. Part 3 argues that the Court, at least in the bankruptcy field, is more committed to the rule of law virtues than to textualism, and will abandon the method when it would produce interpretations that, in the Court's view, would reduce predictability and certainty. The Court, that is, is reluctant to read literally statutes that literally confer substantial discretion on other actors in the bankruptcy system.

This Essay concludes with three claims: First, in the cases discussed here the Court is concerned with rule of law virtues, not the appropriate allocation of decisional authority; second, attempting to pursue rule of law virtues through the vehicle of statutory interpretation likely is futile; third, when interpreting the Bankruptcy Code, courts should use the interpretive method that attributes particular policies or broad goals to the legislature, and then rationally elaborates either norm form to decide concrete cases.

and a hearing, the court may under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim. . . ." The Sixth Circuit read this subsection to subordinate *all* Government claims to recover penalties for nonpayment of taxes to the claims of contract creditors because "[t]o hold otherwise would be to allow creditors who have supported the business during its attempt to reorganize to be penalized once that effort has failed and there is not enough to go around." See *In re First Truck Lines, Inc.*, 48 F.3d 210, 218 (6th Cir. 1995). The Court reversed, holding that if 510(c) "authorized a court to conclude on a general, categorical level that tax penalties should not be treated as administrative expenses to be paid first, it would empower a court to modify the priority statute at the same level at which Congress operated when it made its characteristically general judgment to establish the hierarchy of claims in the first place. That is, the distinction between characteristic legislative and trial court functions would simply be swept away, and the statute would delegate legislative revision, not authorize equitable exception. We find such a reading improbable in the extreme." See 517 U.S. at 540. Requiring case by case inquiries in the circumstances of this case thus limited the lower courts' discretion rather than expanded it.

Regarding the first claim, the current Court is concerned with how power is allocated as between levels of government and as between legislatures and agencies. It is perhaps the Court's recognition of the importance of locating authority appropriately that has led it to retain much of the Chevron doctrine, although that doctrine grants agencies substantial discretion to interpret statutes.⁹¹ Given the Court's adherence to *Chevron*, an alternative explanation for the Court's bankruptcy jurisprudence could hold that the Court is acting on either of two beliefs: (a) Congress preferred to allocate to itself the authority to make bankruptcy policy rather than allocate that power to the bankruptcy and lower Federal courts; or (b) bankruptcy policy is best made legislatively.

Neither version of this power-allocation explanation is persuasive. Regarding version (a), Congress in 1978 wanted to elevate the stature of the bankruptcy courts rather than reduce it. This goal produced the replacement of the bankruptcy referee system with "real judges" who are appointed for substantial terms and paid high salaries. To grant these new judges less authority to make policy than the referees they replaced would have been irrational.⁹² Further, and as detailed below, the Bankruptcy Code confers considerable discretion on the bankruptcy courts. This delegation also is inconsistent with the view that Congress in 1978 wanted to concentrate most policy making authority in itself (where it had never been). Regarding version (b), it takes some expertise to administer bankruptcy estates efficiently; and bankruptcy court judges appear to possess as much expertise at interpreting their governing statute and making policy under it as the typical administrator possesses in her sphere. Therefore, neither version of the power-allocation explanation for the Court's bankruptcy cases seems persuasive. This Essay thus suggests that the Court's adherence to *Chevron* and its restrictive readings of the Bankruptcy Code are consistent phenomena. There is a feature of administrative agencies that would be salient to a court concerned with appropriate power allocations: Agencies have a more or less direct connection to the political process, either through the President or the Congress. The Federal

91. See Thomas W. Merrill and Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001).

92. For a general discussion of the penchant of Congress to increase the status of non-Article III judges, see Judith Resnik, *Uncle Sam Modernizes his Justice: Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, — GEO. L.J. — (forthcoming 2001).

courts lack this connection. As a consequence, the Court likely regards itself as possessing more freedom to pursue its own view of statutory interpretation when reviewing non-Article III judges and the lower Federal courts that supervise them than it possesses when reviewing the interpretive exercises of the Federal administrative agencies.

Regarding the second claim this Conclusion discusses, a commonplace among bankruptcy scholars is that the Code confers a great deal of discretion on the bankruptcy and district courts. There are disputes about whether the Code does this primarily for political economy reasons (to benefit the bankruptcy bar, for example) or substantive reasons, and about whether so much discretion is a good thing; but how the Code works is not much debated. For lay readers, this consensus may be made more vivid by considering a partial list of litigable issues in the typical Chapter 11 reorganization.⁹³

- a) A trustee can “use, sell, or lease” the bankrupt’s property only “after notice and a hearing” concerning how important the property is to the successful completion of the bankruptcy proceeding.⁹⁴
- b) The filing of a petition operates as an automatic stay of collection efforts, but “On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay . . . for cause, including the lack of adequate protection of an interest in property of such party in interest” and for other reasons, such as that “the debtor does not have an equity in such property,” which could require a valuation hearing, and that “such property is not necessary for an effective reorganization,” which requires the application of judgment.⁹⁵
- c) “The court, after notice and a hearing, may authorize the trustee [or the debtor in possession] to obtain” secured credit with priority over prior secured parties, which requires a preliminary finding as to whether the debtor’s prospects justify the need for subordinating secured parties.⁹⁶

93. In the common lexicon, many of the Code sections summarized below use standards rather than rules.

94. 11 U.S.C. § 363(b)(1) (2000).

95. 11 U.S.C. § 362(d) (2000).

96. 11 U.S.C. § 364(c) (1993).

- d) The debtor in possession or trustee "subject to the court's approval may assume or reject any executory contract or unexpired lease," but if, as usually happens, there has been a default, the court must decide if the debtor in possession or trustee has provided the solvent party with "adequate assurance of future performance under such contract or lease."⁹⁷
- e) The court must determine the value of the property subject to a security interest because a creditor is considered secured only to the extent of that value. The Code directs that "[s]uch value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest."⁹⁸
- f) A plan of reorganization will put creditors in classes, such as a class of senior secured debt, but a creditor can be put "in a particular class only if such claim or interest [of the creditor] is substantially similar to the other claims or interests of such class," which the court is to decide.⁹⁹
- g) A party in interest cannot solicit consent from other parties to a proposed plan of reorganization "unless. . . there is transmitted to each holder [of a claim] the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information."¹⁰⁰
- (i) "The court shall confirm a plan only if all of the following requirements are met," including a finding that "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further reorganization, of the debtor. . . ."¹⁰¹ The court, that is, must find that the reorganized firm will earn positive profits.
- i) The court may confirm a plan although a class of creditors dissents provided that "the plan does not discrimi-

97. 11 U.S.C. § 365(a) (1993); 11 U.S.C. § 365(b) (2000) .

98. 11 U.S.C. § 506(a) (1993).

99. 11 U.S.C. § 1122(a) (1993)

100. 11 U.S.C. § 1125(b) (1993).

101. 11 U.S.C. § 1129(a)(11) (1993).

nate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired [i.e., will not be paid in full] under, and has not accepted, the plan.”¹⁰²

- j) Chapter 11 contains a number of other rules that require discretion in their application, and the Code explicitly provides that “[a] party in interest, including the debtor, the trustee, . . . a creditor. . . an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.”¹⁰³

A bankruptcy court thus retains a large discretion to pursue its view of the proper functioning of Chapter 11, despite the Supreme Court opinions summarized above, because the court can affect the process at a large number of points.¹⁰⁴ Therefore, there is as little predictability and certainty in the administration of the bankruptcy law as there would have been had the Court decided none of the cases discussed here. Put simply, Supreme Court attempts to implement rule of law virtues when the subordinate legal actors enforce statutes such as the Bankruptcy Code appear to be as effective as putting a band aid on a strainer. To be sure, a commitment to these virtues could be made effective when other legal actors are attempting to inject more discretion into a statutory scheme than Congress put there. In such cases, however, the commitment is unnecessary; the Court need only apply the law as Congress intended. This Essay thus raises a new objection to the regnant mode of statutory construction in the Supreme Court, which is that the Court’s enterprise is either pointless or epiphenomenal.

Finally, regarding what the Court should do, competing theories of statutory interpretation view courts and legislatures as partners. The legislature enacts a program and the courts attempt to apply the program in light of the current information that actual cases generate.¹⁰⁵

102. 11 U.S.C. § 1129(b)(1) (1993).

103. 11 U.S.C. § 1109(b) (1993).

104. Actors with adjudicatory power who are subject to review by courts with different preferences than the actors hold can effectively realize their goals by resting their decisions on the facts rather than on constructions of the law. Fact centered decisions are harder for appellate courts to reverse. See Emerson H. Tiller and Pablo T. Spiller, *Strategic Instruments: Legal Structure and Political Games in Administrative Law*, 15 J. LAW, ECON. & ORG. 349 (1999). This strategy is available to the bankruptcy courts.

105. An interesting recent argument holds that a rational legislature, in an uncertain world, would prefer courts to make policy because “Judicial review *adds* information to the policy process that legislatures often cannot or will not acquire and, even if

The new textualism rejects this vision, but even strong believers in the rule of law seldom are believers in taking the road to nowhere. If that choice is ruled out, the Bankruptcy Code has two features that are relevant to interpretation: It is difficult to amend and it contains a mix of precise procedural directions and vague substantive standards. An interpretative mode for bankruptcy that takes these features into account would adopt a textualist approach to the directions, but enforce the standards in light of the high level goals that animated the Congress.

they might acquire the same information, legislatures often cannot or will not act upon that information in ways that courts do.” On this view, a legislature can prefer activist courts even though those courts sometimes might deviate from the legislature’s ideal point. See James R. Rogers, *Information and Judicial Review: A Signaling Game of Legislative-Judicial Interaction*, 45 Amer. J. Pol. Sci. 84, 87 (2001).

The key to and an explanation of Appendix A follows:

- “T” in Appendix A refers to the text of *the statute* at issue. A “✓” in this column indicates that the Court consulted the text of the statute but did not find it dispositive. A “+” in this column indicates that the court relied primarily on the text of the statute in deciding the case.
- “L” in Appendix A refers to *legislative history* (including committee reports, statement, and other information in the Congressional Record).
- “LP” refers to *policy norms drawn from legislative history*. This category is essentially a subset of legislative history. It is used to distinguish policy norms with a basis in legislative history from policy norms selected by judges.
- “JP” refers to *judicially selected policy norms*. A judicially selected policy norm may be used, among other things, to argue that a particular interpretation should be embraced or rejected because of the potential policy consequences that would be produced.
- “C” refers to *canons of construction*.
- “D” refers to *dictionaries* (whether general or legal).
- “SS” refers to *secondary sources* (state or federal) or *other sections of the Bankruptcy Code* besides the section at issue in the case.
- “P” refers to *judicial precedents* (including previous decisions by the Supreme Court or other federal or state courts).

Each category counts opinions making substantive use of a particular interpretative resource. The empirical analysis is therefore more than just a form of counting citations. For example, where the Court used a particular resource to set out the procedural history of the case or for points not relevant to the statutory interpretation question, this was not counted as substantive. By the same token, as long as an opinion identified an interpretative resource as a legitimate source of judicial guidance on the statute’s meaning, the use is counted as substantive, even if the Court ultimately did not enlist that resource in its argument.

APPENDIX A

Case	Year	Type	Author	T	L	LP	JP	C	D	SS	St	P	Dy
Hartford Underwriters Insurance Co. v. Union Planters Bank, 530 U.S. 1	2000	M	Scalia	+			✓	✓		✓	✓	✓	
Bank of America Nat'l Trust and Savings Assoc. v. 203 N. LaSalle St. Partnership, 526 U.S. 434	1999	M	Souter	✓	✓		✓	✓		✓	✓	✓	✓
		C	Thomas	+			✓		✓		✓		
		D	Stevens	✓							✓	✓	
Cohen v. DeLaCruz, 523 U.S. 213	1998	M	O'Conn.	+	✓	✓		✓	✓		✓	✓	
Kawaaauhau v. Geigerm 523 U.S. 57	1998	M	Ginsb.	+	✓			✓			✓	✓	
Fidelity Financial Servs., Inc. v. Fink, 522 U.S. 211	1998	M	Souter	+	✓						✓		
Associates Commercial Corp. v. Rash, 520 U.S. 953	1997	M	Ginsb.	+	✓		✓			✓		✓	
		C	Scalia										
		D	Stevens	✓			✓						
United States v. Reorganized CF&I Fabricators of Utah, Inc., 518 U.S. 213	1996	M	Souter	✓	✓		✓				✓	✓	✓
		D/C	Thomas				✓						
		C	Scalia										
United States v. Noland, 517 U.S. 535	1996	M	Souter	✓	✓		✓			✓		✓	✓
Field v. Mans, 516 U.S. 59	1995	M	Souter	✓	✓	✓		✓		✓	✓	✓	
		C	Ginsb.										
		D	Breyer										

Case	Year	Type	Author	T	L	LP	JP	C	D	SS	St	P	Dy
Citizens Bank of Maryland v. Stumpf, 516 U.S. 16	1995	M	Scalia	+							✓	✓	
Celotex Corp. v. Edwards, 514 U.S. 300	1995	M	Rehnq.	+	✓	✓				✓	✓	✓	
		D	Stevens	✓			✓				✓	✓	
BFP v. Resolution Trust Corp., 511 U.S. 531	1994	M	Scalia	+			✓	✓	✓	✓	✓	✓	
		D	Souter	+			✓			✓	✓	✓	
Rake v. Wade, 508 U.S. 464	1993	M	Thomas	+					✓	✓	✓	✓	
Nobelman v. American Savings Bank, 508 U.S. 324	1993	M	Thomas	+			✓				✓	✓	
		C	Stevens	✓	✓								
Pioneer Investment Servs. Co. v. Brunswick Assoc. Limited Partnership, 507 U.S. 380	1993	M	White	+	✓		✓		✓		✓	✓	
		D	O'Conn.	+			✓		✓			✓	
Patterson v. Shumate, 504 U.S. 753	1992	M	Blackm.	+	✓			✓			✓	✓	
		C	Scalia	+				✓					
Taylor v. Freeland & Kronz, 503 U.S. 638	1992	M	Thomas	+			✓						
		D	Stevens	✓			✓					✓	✓
Barnhill v. Johnson, 503 U.S. 393	1992	M	Rehnq.	+							✓	✓	
		D	Stevens	+				✓			✓	✓	
Holywell Corp. v. Smith, 503 U.S. 47	1992	M	Thomas	+					✓		✓	✓	
United States v. Nordic Village, Inc., 503 U.S. 30	1992	M	Scalia	✓			✓				✓	✓	✓
		D	Stevens	✓	✓		✓			✓		✓	✓
Dewsnup v. Timm, 502 U.S. 410	1992	M	Blackm.	✓	✓						✓	✓	

Case	Year	Type	Author	T	L	LP	JP	C	D	SS	St	P	Dy
		D	Scalia	+			✓	✓			✓	✓	
Union Bank v. Wolas, 502 U.S. 151	1991	M	Stevens	+	✓	✓					✓	✓	
		C	Scalia	+									
Mcorp Financial, Inc. v. Board of Governors of the Federal Reserve System, 502 U.S. 32	1991	M	Stevens	+			✓				✓	✓	
Toibb v. Radloff, 501 U.S. 157	1991	M	Blackm.	+	✓	✓					✓	✓	
		D	Stevens	✓	✓						✓	✓	
Johnson v. Home State Bank, 501 U.S. 78	1991	M	Marshall	+	✓	✓					✓	✓	
Owen v. Owen, 500 U.S. 305	1991	M	Scalia	+							✓	✓	
		D	Stevens	+	✓						✓	✓	
Farrey v. Sanderfoot, 500 U.S. 291	1991	M	White	+	✓	✓			✓			✓	
		C	Kennedy										
Grogan v. Garner, 498 U.S. 279	1991	M	Stevens	✓	✓	✓					✓	✓	✓
Begier v. IRS, 496 U.S. 53	1990	M	Marshall	✓	✓	✓			✓		✓	✓	✓
		C	Scalia	+						✓	✓		
Pennsylvania Department of Public Welfare v. Davenport, 495 U.S. 552	1990	M	Marshall	+	✓		✓	✓		✓	✓	✓	
		D	Blackm.	✓	✓		✓			✓	✓	✓	✓
United States v. Energy Resources Co., 495 U.S. 545	1990	M	White	+			✓			✓	✓		
Hoffman v. Connecticut Department of Income Maintenance, 492 U.S. 96	1989	P	White	✓			✓				✓	✓	✓
		C	Scalia				✓						✓
		D	Marh.	+	✓		✓				✓	✓	

Case	Year	Type	Author	T	L	LP	JP	C	D	SS	St	P	Dy
		D	Stevens	✓	✓		✓				✓	✓	
United States v. Ron Pair Enterprises, Inc., 489 U.S. 235	1989	M	Blackm.	+	✓						✓	✓	
		D	O'Conn.	+							✓	✓	
Norwest Bank Worthington v. Ahlers, 485 U.S. 197	1988	M	White	+	✓		✓					✓	
United States Assoc. of Texas v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365	1988	M	Scalia	+	✓			✓			✓	✓	
Kelly v. Robinson, 479 U.S. 36	1986	M	Powell	✓	✓		✓			✓	✓	✓	✓
		D	Marshall	✓	✓		✓			✓	✓	✓	✓
Midlantic National Bank v. New Jersey Dep't of Environmental Protection, 474 U.S. 494	1986	M	Powell	✓	✓	✓	✓			✓	✓	✓	✓
		D	Rehnq.	+	✓					✓	✓	✓	
Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343	1985	M	Marshall	✓	✓		✓			✓	✓	✓	✓
Ohio v. Kovacs, 469 U.S. 274	1985	M	White	+	✓	✓					✓		
		C	O'Conn.										
NLRB v. Bildisco and Bildisco, 465 U.S. 513	1984	M	Rehnq.	✓	✓		✓				✓	✓	✓
		C/D	Brennan	✓			✓			✓	✓	✓	✓
Unites States v. Whiting Pools, Inc., 462 U.S. 198	1983	M	Blackm.	+	✓	✓						✓	
United States v. Security Industrial Bank, 459 U.S. 70	1982	M	Rehnq.	✓			✓	✓				✓	✓
		C	Blackm.				✓						✓
							✓						✓

Case	Year	Type	Author	T	L	LP	JP	C	D	SS	St	P	Dy
							✓						✓
							✓						✓
							✓						✓
							✓						✓

APPENDIX B
INTERPRETIVE RESOURCES USED BY THE SUPREME COURT

Interpretive Resources	Majority/Plurality Opinions	Other Opinions	Total Opinions
1. Statutory language	100% (43/43)	73% (24/33)	88% (67/76)
2. Legislative history	67% (29/43)	30% (10/33)	51% (39/76)
a. Policy norms from legislative history	28% (12/43)	3% (1/33)	17% (13/76)
3. Judicially selected policy norms	47% (20/43)	48% (16/33)	47% (36/76)
4. Secondary sources (treatises, articles, etc.)	26% (11/43)	21% (7/33)	24% (18/76)
5. Dictionary	16% (7/43)	6% (2/33)	12% (9/76)
6. Canons of construction	23% (10/43)	9% (3/33)	17% (13/76)
7. Precedent	91% (39/43)	52% (17/33)	74% (56/76)
8. Other statutes or other sections of the same statute	81% (35/43)	48% (16/33)	67% (51/76)
TEXTUALIST Opinions	72% (31/43)	76% (25/33)	74% (56/76)
DYNAMIC Opinions	28% (12/43)	24% (8/33)	26% (20/76)