

# Textualism's Failures: A Study of Overruled Bankruptcy Decisions

*Daniel J. Bussel*

I.	THE TEXTUALISM DEBATE .....	889
II.	THE STUDY OF OVERRULED BANKRUPTCY DECISIONS. ....	900
III.	SUBSIDIARY FINDINGS .....	918
	A. <i>Congress Does Pay Attention To Bankruptcy</i> <i>Court Cases</i> .....	918
	B. <i>Geography Matters</i> .....	921
	C. <i>Timing Matters</i> .....	924
	D. <i>Constituency Adversely Affected Probably Matters</i> ....	925
	E. <i>Judges' Gender, Season, Chapter, Separate</i> <i>Writing Do Not Matter</i> .....	926
IV.	CONCLUSION.....	928
	APPENDIX I.....	930
	APPENDIX II.....	939
	APPENDIX III .....	943

---

\* Copyright ©2000 by Daniel J. Bussel, Professor of Law, UCLA School of Law, Los Angeles, California. This research was generously supported by the American Bankruptcy Institute Endowment Fund and relied upon resources made available by the Hugh & Hazel Darling Law Library and the UCLA School of Law's Empirical Research Group. In particular, I am greatly indebted to Joseph Doherty and Robert Sockloskie, who are affiliated with the Empirical Research Group, for their assistance in research design and statistical analysis. Tal Grietzer and Jeanhee Kim prepared the appendices and entered data cheerfully, carefully, and efficiently into a computer database to facilitate the statistical analysis. I also had an unusually able research assistant, John Pomeroy, UCLA School of Law, Class of 2001, who made important contributions at all stages of this project. I owe special thanks to my friend and colleague Kenneth N. Klee. His encyclopedic knowledge of bankruptcy law and intimate involvement in bankruptcy legislation over the last twenty-five years made him a unique and invaluable resource in developing Appendix I, *Bankruptcy Cases Superseded by Statute 1979-1998*, and he gave many useful suggestions throughout. Finally, I am most grateful for the valuable suggestions and comments on early drafts that I received from Alvin Cassel, Lisa Hill Fenning, Philip P. Frickey, Mitu Gulati, Ken Karst, Lynn LoPucki, Dan Lowenstein, and Eugene Volokh.

When Moses ascended on high, he found the Holy One, blessed be He, engaged in fixing crowns (decorative markings) to the letters (of the Torah). Said Moses: "Lord of the Universe, who stays Your hand?" (i.e. is there anything lacking in the Torah so that additions are necessary?) He answered, "There will arise a man at the end of many generations, Akiba ben Joseph by name, who will expand upon each decorative marking heaps and heaps of laws."<sup>1</sup>

Judges and legal scholars are engaged in a contentious, wide-ranging, and long-running debate over methods of statutory interpretation. Stripping the debate of some of its nuance without misrepresenting its essence, there are two camps: the "textualists" and the "pragmatists." Cass Sunstein recently argued that the question of interpretive method should be considered in light of evidence whether textualist methods work better or worse than pragmatic ones.<sup>2</sup> To date, however, only limited empirical evidence has been systematically brought to bear on this question.<sup>3</sup>

---

1. *Menahot* 29b as translated and quoted in ELIOT N. DORFF & ARTHUR ROSETT, A LIVING TREE: THE ROOTS AND GROWTH OF JEWISH LAW 196 (1988).

2. See Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 656-61 (1999); see also William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671 (1999) (responding to Sunstein); Adrian Vermeule, *Interpretation, Empiricism, and the Closure Problem*, 66 U. CHI. L. REV. 698 (1999) (responding to Sunstein).

3. Professor Zeppos analyzed Supreme Court decisions for interpretive method and showed that as a descriptive matter the Supreme Court, consistently over the course of the twentieth century, has used a broad range of interpretive sources that cannot be accurately described as textualist or originalist. His empirical work, however, does not directly attempt to compare the quality of textualist and pragmatic interpretation. See Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1091-1120 (1992); see also Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710 (1999) (proposing an alternative conception of the role of custom in commerce and in commercial law); William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1551-52 (1998) [hereinafter Eskridge, *Textualism*] (citing scholarly inquiry into the effects of textualism in a variety of substantive areas); James P. Nehf, *Textualism in the Lower Courts: Lessons from Judges Interpreting Consumer Legislation*, 26 RUTGERS L.J. 1 (1994) (examining how courts have interpreted state consumer-protection laws). In the bankruptcy field, there are two comprehensive surveys and analyses of use of interpretive methods at the Supreme Court level, but to assess the comparative quality of textualist decisionmaking, the authors rely on their bankruptcy expertise and traditional legal argument rather than objective indicators. See Robert M. Lawless, *Legisprudence Through a Bankruptcy Lens: A Study in the Supreme Court's Bankruptcy Cases*, 47 SYRACUSE L. REV. 1 (1996); Charles Jordan Tabb & Robert M. Lawless, *Of Commas, Gerunds and Conjunctions: The Bankruptcy Jurisprudence of the Rehnquist Court*, 42 SYRACUSE L. REV. 823 (1991). Cf. Robert K. Rasmussen, *A Study of the Costs and Benefits of Textualism: The Supreme Court's Bankruptcy Cases*, 71 WASH. U. L.Q. 535 (1993). Professor Eskridge has the most ambitious contribution. He attempted to collect all federal statutory decisions knowingly overridden by the 90th through 101st Congresses and to analyze the subset of those cases decided by the Supreme Court for, inter alia, interpretive method. See generally William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) [hereinafter Eskridge, *Overriding*]; see also *infra* notes 60 (comparing Eskridge methodology to this study), 76, 117, 120 (comparing Eskridge findings to this study).

This Article presents new empirical evidence gleaned from twenty years of interpretation of the United States Bankruptcy Code on the question of the comparative efficacy of textualism as a method of statutory interpretation. Analysis of bankruptcy decisions superseded by amendments to the Code indicates that cases adopting textualist methods of statutory interpretation are disproportionately found within the universe of cases overruled by statute. To the extent that the goal of statutory interpretation is the rational and efficient development and administration of complex statutory schemes in a manner consistent with policy goals democratically selected,<sup>4</sup> this evidence should cause textualists to reconsider their allegiance to their method. It should also reinforce pragmatists' commitment to pragmatic interpretation.

Independently of the textualism/pragmatism debate, analysis of legislatively overruled decisions also gives insight into the types of bankruptcy decisions that get overruled by statute. Additional study of overruled cases in this and other statutory areas may produce valuable policy recommendations for judges and policymakers.

This Article is divided into three parts. Part I describes the debate over textualism and illustrates the competing modes of interpretation using well-known bankruptcy cases decided by the Supreme Court. Part II describes the research design and results from a statistical analysis of the method of interpretation adopted in fifty-eight bankruptcy decisions subsequently overruled by statute. Finally, Part III presents significant subsidiary findings, independent of interpretive method, derived from analysis of the overruled cases. A short conclusion follows.

## I. THE TEXTUALISM DEBATE

Judge Learned Hand observed that "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress

---

4. See Stephen G. Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 847 (1992). Justice Breyer writes:

I assume that law itself is a human institution, serving basic human or societal needs. It is therefore properly subject to praise, or to criticism, in terms of certain pragmatic values, including both formal values, such as coherence and workability, and widely shared substantive values, such as helping to achieve justice by interpreting the law in accordance with the "reasonable expectations" of those to whom it applies.

*Id.*; cf. Lynn M. LoPucki, *The Systems Approach To Law*, 82 CORNELL L. REV. 479, 485 (1997) ("Most legal scholars, judges, and legislators regard law-related systems as purposeful, and they do not hesitate to attribute to laws goals or purposes, even ones distinct from the goals that the legislators who enact them may have had in mind.").

out of the dictionary.”<sup>5</sup> The late respected Judge Hand notwithstanding, a fashion in statutory interpretation has arisen in the land, predicated upon heavy reliance on the dictionary. The textualists hold, oft-times harangue, that legal texts have a meaning that is to be discerned without the aid of any confusing legislative history, other extrinsic evidence of legislative intent, historical background, or most especially, consideration of the social consequences of one interpretation or another.

Debate over interpretive methods has been a central issue in code-based legal systems at least from the time of Justinian<sup>6</sup> to the modern civil law systems of continental Europe and Latin America.<sup>7</sup> Debate over statutory interpretation within the common law stretches back to Coke and beyond.<sup>8</sup> The literature on interpretation is, as one might expect given this ancient and universal pedigree, enormous.<sup>9</sup>

Like textualism, the pragmatic school of statutory interpretation, which has dominated American jurisprudence during most of the twentieth century, generally focuses first on statutory text and context. Pragmatists, however, go further and consider sources outside the text in order to give concrete meaning to the statute in particular circumstances. Traditionally, these nontextual sources include legislative history, pre-enactment law, and other circumstantial evidence of legislative intent examined with reference to the comparative policy implications of various interpretations.<sup>10</sup> This tradition is identified in

---

5. *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945). Compare *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage Co.*, 442 P.2d 641, 643-44 (Cal. 1968) (suggesting the judicial belief in the possibility of perfect verbal expression “is a remnant of a primitive faith in the inherent potency and inherent meaning of words”), with E. Allan Farnsworth, “*Meaning*” in *the Law of Contracts*, 76 *YALE L.J.* 939, 965 (1967) (“Once it is recognized that all language is infected with ambiguity and vagueness, it is senseless to ask a court to determine whether particular language is ‘ambiguous’ or ‘vague’ as opposed to ‘plain.’”).

6. Amusingly, Justinian’s Code expressly forbade further interpretation. As Benjamin Cardozo remarked, this early anti-interpretation legislation is remembered only for its futility. See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 18 (1921).

7. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 95-103 (1994) (comments of Mary Ann Glendon).

8. See, e.g., *Dr. Bonham’s Case*, 8 Coke Rep. 114a, 77 Eng. Rep. 646, 647-48 (K.B. 1610).

9. For an entree and good overview of the authorities, see WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 513-631 (2d ed. 1995). For an engaging literary exploration of legal interpretation issues, see generally JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING* (1984).

10. Professors Eskridge and Frickey describe this “practical reasoning” approach to statutory interpretation as “eclectic.” William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 *STAN. L. REV.* 321, 321-22 (1990) (“When practitioners give advice to clients about what a statute means . . . [t]hey look at the text of the relevant statutory provisions, any legislative history that is available, the context in which the legislation was enacted, the overall legal landscape, and the lessons of common sense and good policy.”).

the bankruptcy caselaw with such cases as *Kelly v. Robinson*,<sup>11</sup> which exempted criminal restitution orders from the Chapter 7 discharge notwithstanding statutory language limiting nondischargeability to criminal fines and penalties that are “not compensation for actual pecuniary loss.”<sup>12</sup> In so doing, *Kelly* quoted *United States v. Heirs of Boisdoré*: “In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.”<sup>13</sup> *Kelly* proceeded to resolve the question against discharge relying on pre-Code law concerning discharge of criminal restitution orders. The *Kelly* Court, of course, also relied on the compelling state interest and federalism concerns in continuing post-bankruptcy enforcement of obligations imposed by state criminal law.

The leading contemporary proponent of the competing textualist method is widely perceived to be Justice Antonin Scalia, notwithstanding his decision to join the majority in *Kelly* with no reservation as to its interpretive method. In subsequent bankruptcy cases this uncharacteristic acquiescence by Scalia in the face of pragmatic statutory construction disappears. In Scalia’s judicial writings, the argument for textualism, and the scorn he heaps on pragmatic interpretive

---

11. *Kelly v. Robinson*, 479 U.S. 36 (1986). See Tabb & Lawless, *supra* note 3, at 828-33. Other Supreme Court cases that famously avoid textual interpretations of the Bankruptcy Code on the basis of policy considerations, pre-Code law, and other pragmatic interpretive sources include: *United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983) (relying on legislative history, pre-Code practice, and reorganization policy in rejecting literal interpretation of § 541(a)); *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494 (1986) (relying on pre-Code practice); *Dewsnup v. Timm*, 502 U.S. 410 (1992) (relying on pre-Code practice and policy in refusing to apply the § 506(a) definition of allowed secured claim in § 506(d) to allow lien strip-down in Chapter 7 cases); and, ironically in light of his extreme textualist rhetoric (see, e.g., *infra* note 14 and accompanying text), Justice Scalia’s majority opinion in *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 542-44 (1994) (finding in the context of a foreclosure sale of real estate for inadequate consideration that the statutory term “reasonably equivalent value” was conclusively presumed to mean whatever price resulted from a regularly conducted non-collusive foreclosure sale on the basis of 400 years of pre-Code fraudulent transfer law in the United States and England and the “essential state interest” in assuring the security of land titles). Scalia’s evident hypocrisy in *BFP* has drawn sharp criticism from scholars. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 83-84 (1994); Daniel A. Farber, *Statutory Interpretation and the Idea of Progress*, 94 MICH. L. REV. 1546, 1550-51 (1996); Philip P. Frickey, *Revisiting the Revival of Theory in Statutory Interpretation*, 84 MINN. L. REV. 199, 208-12 (1999). From the perspective of bankruptcy policy, however, the result in *BFP* seems perfectly sensible. Compare *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992) (following the Supreme Court’s traditional nontextual sovereign immunity jurisprudence to a less fortunate conclusion from the perspective of sound bankruptcy policy), with *Hoffman v. Connecticut Dep’t of Income Maintenance*, 492 U.S. 96, 101-04 (1989) (same).

12. *Kelly*, 479 U.S. at 54-55; see also 11 U.S.C. § 523(a)(7) (1994).

13. *Kelly*, 479 U.S. at 43 (quoting *United States v. Heirs of Boisdoré*, 49 U.S. [8 How.] 113, 122 (1850)).

methods, became increasingly strident and hectoring in the 1990s as it became clear that his colleagues on the Supreme Court, with the exception of Clarence Thomas, do not consistently apply, try to apply, or otherwise share his commitment to, textualism.<sup>14</sup>

Scalia's fullest explication of textualism is set out in the 1996 Tanner Lectures, subsequently published under the title *A Matter of Interpretation: Federal Courts and the Law*.<sup>15</sup> Even in this essay, Scalia does not comprehensively set out the textualist method in a positive way, but rather discusses it intertwined with his critique, which tends toward caricature, of competing interpretive traditions. Two principles nevertheless emerge. First, textualism considers text and statutory context in ascribing meaning to statutes, but not evidence of the intent or the expectations of the legislators, or policy considerations.<sup>16</sup> Second, the meaning of statutes is fixed and unchanging from the time of their promulgation.<sup>17</sup>

Stare decisis, the legal doctrine that settled issues of law should not generally be reopened, is one explicit limit on Scalia's rigorous textualism. Scalia acknowledges that the Supreme Court has not always adopted textualist interpretations, and he concedes that simply abandoning all nontextualist precedent is impossible, and

14. See *Patterson v. Shumate*, 504 U.S. 753, 766 (1992) (Scalia, J., concurring): When the phrase "applicable nonbankruptcy law" is considered in isolation, the phenomenon that three Courts of Appeals could have thought it a synonym for "state law" is mystifying. When the phrase is considered together with the rest of the Bankruptcy Code (in which Congress chose to refer to state law as, logically enough, "state law"), the phenomenon calls into question whether our legal culture has so far departed from attention to text, or is so lacking in agreed-upon methodology for creating and interpreting text, that it any longer makes sense to talk of "a government of laws, not of men."

*Accord* *Union Bank v. Wolas*, 502 U.S. 151, 163 (1991) (Scalia, J., concurring):

It is regrettable that we have a legal culture in which such [legislative history and policy] arguments have to be addressed (and are indeed credited by a Court of Appeals), with respect to a statute utterly devoid of language that could remotely be thought to distinguish between long-term and short-term debt. Since there was here no contention of a "scrivener's error" producing an absurd result, the plain text of the statute should have made this litigation unnecessary and unmaintainable.

See also *Dewsnup v. Timm*, 502 U.S. 410, 420-36 (1992) (Scalia, J., dissenting). On Clarence Thomas, see Lawless, *supra* note 3, at 109; see also *Bank of America N.T. & S.A. v. 203 N. LaSalle Street Partnership*, 119 S. Ct. 1411, 1424-26 (1999) (Thomas, J., concurring).

15. SCALIA, *supra* note 7.

16. See *id.* at 16-23, 29-37. One might separate out textualism that limits inquiry into legislative history from textualism that refuses to take into account policy or prudential considerations. One might further disaggregate textualists into those who will consider committee reports, but not floor statements or hearings, or those who are willing to look to pre-Code law, but not other prudential or policy sources. Scalia refuses to draw any of these distinctions. All legislative history and all prudential considerations are *traf e*. For purposes of this study, I will characterize textualism in Scalia's terms. This is generally consistent with how textualism is understood to be applied in the bankruptcy field. See Lawless, *supra* note 3, at 5-6; *infra* note 26 and accompanying text.

17. See SCALIA, *supra* note 7, at 21-23, 40.

would be irresponsibly destabilizing if it were possible.<sup>18</sup> In addition, Scalia would not apply the text as written if doing so, in his judgment, would lead to an absurd result or if he were convinced that a scrivener's error had occurred. Scalia considers these latter exceptions narrow. Poor draftsmanship is not "scrivener's error," and unfortunate, unfair, or unreasonable results are not "absurd."<sup>19</sup>

Scalia is especially, obsessively scornful of legislative history as an interpretive aid. He acknowledges that legislative history was looked to early in the twentieth century as a means of reining in judicial interpretations of statutes that failed to honor congressional intent.<sup>20</sup> But he claims that legislative history is inherently so manipulable and manipulated by judges and actors in the legislative process that it fails to serve this purpose. Instead, the ability to use legislative history to lend meaning to statutory text frees judges to deviate from the text in order to impose their own unenacted preferences, and allows legislators, their staffs, and special interests to legislate without the inconvenience of obtaining majority votes in both houses or running the risk of a Presidential veto.<sup>21</sup> Scalia sees no practical cost to his blanket refusal to rely on legislative history because, again in his view, legislative history used honestly is of no practical value in lending meaning to text.<sup>22</sup>

It is, of course, interesting that a sitting Supreme Court Justice holds these views, and, indeed that he appears to have become increasingly committed to them over the course of his tenure. Moreover, although textualism (at least in the bankruptcy caselaw) appears to be a method only of convenience for the Court majority and abandoned at will,<sup>23</sup> Scalia has managed to broadly influence his brethren's opinions, though perhaps not their decisions, as his colleagues have come to feel obliged to respond to his separate writing questioning their interpretive methods.

---

18. *See id.* at 139-40.

19. *Id.* at 20-23.

20. *See id.* at 30-31.

21. *See id.* at 25, 29-37.

22. *See id.* at 36. *But see* Breyer, *supra* note 4, at 874 ("[I]n light of the judiciary's important objective of helping to maintain coherent, workable statutory law, the case for abandoning the use of legislative history has not yet been made. Present practice has proved useful; the alternatives are not promising; radical change is too problematic.").

23. *See* Lawless, note 3, *supra*, at 106-13. *Compare* text accompanying *supra* notes 10-13, and cases cited *supra* note 11, with text accompanying *infra* notes 25-38, and cases cited *infra* at note 27. *See also* Kenneth N. Klee & Frank A. Merola, *Ignoring Congressional Intent: Eight Years of Judicial Legislation*, 62 AM. BANKR. L.J. 1, 2 (1988) (describing the Supreme Court bankruptcy jurisprudence as "[a]dopt a 'plain meaning' posture where the language of the statute meets with judicial approval, and use legislative intent to contradict the language of the statute where a literal reading is not kind to the desired result").

From academics, Scalia has drawn much, sometimes scathing, criticism for his textualist views.<sup>24</sup> Pragmatists, and policy-oriented law professors especially, are easily put off by the attitude towards adjudication adopted by textualists. At least when courts create bad law relying upon presumed legislative intentions or policies, one generally has the sense that the court cared enough to try and "get it right." Textualists take no apparent responsibility for trying to "get it right." "Getting it right" is the legislature's job. Textualist courts apply statutes as written.

Scalia's textualism is not simply philistine literalism,<sup>25</sup> but Scalia's rhetoric defending textualism does invite its caricature as such, as indeed do some textualist decisions he has joined. In any event, the Supreme Court has seriously advocated, and more than occasionally imposed, a rigorous textualism that approximates literalism in bankruptcy cases.<sup>26</sup> Consider Justice Blackmun's notorious (to bankruptcy lawyers) opinion in the "comma case," *United States v. Ron Pair Enterprises, Inc.*<sup>27</sup>

Bankruptcy Code § 506(b)<sup>28</sup> provides a limited exception to the ordinary bankruptcy rule that interest on creditor claims stops accruing after bankruptcy.<sup>29</sup> The exception codifies the understanding

---

24. See, e.g., WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 230-34 (1994); SCALIA, *supra* note 7, at 3-47 (criticism of Gordon S. Wood, Laurence H. Tribe, Ronald Dworkin, and Mary Ann Glendon); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 666-91 (1990); Bradley C. Karkkainen, "Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction, 17 HARV. J.L. & PUB. POL'Y 401, 475-77 (1994). But see Mark L. Movsesian, *Are Statutes Really "Legislative Bargains"? The Failure of the Contract Analogy in Statutory Interpretation*, 76 N.C. L. REV. 1145, 1189 (1998); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1836-37 (1998).

25. See SCALIA, *supra* note 7, at 23-25 (discussing textualist as opposed to literal interpretation).

26. See Lawless, *supra* note 3, at 7-100 (reviewing cases); see also Peter H. Carroll, III, *Literalism: The United States Supreme Court's Methodology for Statutory Construction in Bankruptcy Cases*, 25 ST. MARY'S L.J. 143, 147-49 (1993).

27. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235 (1989). Other prominent textual interpretations of the Bankruptcy Code by the Supreme Court include: *Rake v. Wade*, 508 U.S. 464 (1993); *Nobelman v. American Savings Bank*, 508 U.S. 324 (1993); and *Toibb v. Radloff*, 501 U.S. 157 (1991). *United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365 (1988), *Union Bank v. Wolas*, 502 U.S. 151 (1991), and *Patterson v. Shumate*, 504 U.S. 753 (1992), are three prominent decisions that are generally thought of as textual interpretations. These latter cases do indeed rely heavily on textualist arguments to override policy-based arguments favoring alternative interpretations, but they also rely secondarily on other nontextualist sources. See Lawless, *supra* note 3, at 13-19 (discussing *Wolas*), 50-53 (discussing *Patterson*); Tabb & Lawless, *supra* note 3, at 837 (discussing *Timbers*).

28. 11 U.S.C. § 506(b) (1994).

29. *Id.* § 502(b)(2).

under the Bankruptcy Act of 1898<sup>30</sup> that a secured creditor could accrue interest on his claim after bankruptcy to the extent that the value of his collateral exceeded the principal amount of his claim.<sup>31</sup> The collateral, in accordance with the terms of the secured creditor's contract, secures both principal and interest. The exception was thought to preserve the basic bargain of the secured creditor. For those who had no collateral or whose collateral was exhausted, no interest. Before 1979, only consensual secured creditors, those who had bargained for the right to collect interest from their collateral, benefited from this exception.<sup>32</sup> Nonconsensual secured creditors—those (for example tax collectors) whose lien arose by operation of law, rather than by contract—like general unsecured creditors, accrued no interest, even when the value of the property subject to their lien exceeded the principal amount of their claims.

Section 506(b) clearly preserved the historical exception to the no-post-bankruptcy-interest rule in favor of the consensual secured creditor. The question in *Ron Pair* was whether it also expanded the exception to include nonconsensual creditors.<sup>33</sup> This question was of considerable practical importance to the government; the most important nonconsensual secured creditor in bankruptcies generally is the Internal Revenue Service ("IRS"), whose pervasive tax lien against virtually all property of the taxpayer arises by operation of law when assessed taxes go unpaid. Could the IRS collect interest on tax claims secured by tax liens under § 506(b), or were they subject to the ordinary no-interest rule?

Section 506(b) reads:

To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim,

---

30. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, 559-62 (1898) (repealed as subsequently amended by Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 506, 92 Stat. 2549, 2583 effective Oct. 1, 1979).

31. The general no-interest rule is itself a codification of pre-Code law, see *Sexton v. Dreyfus*, 219 U.S. 339, 344 (1911), as is the codified exception in favor of consensual secured creditors with excess collateral, see *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 164-65 (1946).

32. See *United States v. Yorke (In re Kerber Packing Co.)*, 276 F.2d 245, 247-48 (7th Cir. 1960); *United States v. Mighell*, 273 F.2d 682, 684 (10th Cir. 1959); *United States v. Bass*, 271 F.2d 129, 132 (9th Cir. 1959); *United States v. Harrington*, 269 F.2d 719, 722-24 (4th Cir. 1959) (holding that even if there were a general exception for oversecured claims, it would not apply to tax liens); see also *In re Boston & Maine Corp.*, 719 F.2d 493, 496-97 (1st Cir. 1983) (municipal property tax claim), *cert. denied*, 466 U.S. 938 (1984). *But see In re Parchem*, 166 F. Supp. 724, 730 (D. Minn. 1958) (allowing postpetition interest on tax claim), *appeal dismissed upon stipulation*, 261 F.2d 839 (8th Cir. 1958); *accord Ross Nursing Home v. Tuthill (In re Ross Nursing Home)*, 2 B.R. 496, 499-500 (Bankr. E.D.N.Y. 1980).

33. *United States v. Ron Pair Enters.*, 489 U.S. 235, 237 (1989).

and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.<sup>34</sup>

The Supreme Court in *Ron Pair*, in a 5-4 decision, found that the fifth of the seven *commas* in the sentence quoted above allowed the IRS to collect interest.<sup>35</sup> The Court first announced its method of interpretation:

The task of resolving the dispute over the meaning of § 506(b) begins where all such inquiries must begin: with the language of the statute itself. In this case it is also where the inquiry should end, for where, as here, the statute's language is plain, "the sole function of the courts is to enforce it according to its terms." The language before us expresses Congress' intent—that postpetition interest be available—with sufficient precision so that reference to legislative history and to pre-Code practice is hardly necessary.<sup>36</sup>

The Court then examined the "plain language" of the statute:

The relevant phrase in § 506(b) is: "[T]here shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose." "Such claim" refers to an oversecured claim. The natural reading of the phrase entitles the holder of an oversecured claim to postpetition interest and, in addition, gives one having a secured claim created pursuant to an agreement the right to reasonable fees, costs, and charges provided for in that agreement. Recovery of postpetition interest is unqualified. Recovery of fees, costs, and charges, however, is allowed only if they are reasonable and provided for in the agreement under which the claim arose. Therefore, in the absence of an agreement, postpetition interest is the only added recovery available.<sup>37</sup>

Finally, the Court focused on the fifth of the seven commas in the text:

This reading is also mandated by the grammatical structure of the statute. The phrase "interest on such claim" is set aside by commas, and separated from the reference to fees, costs, and charges by the conjunctive words "and any." As a result, the phrase "interest on such claim" stands independent of the language that follows. "[I]nterest on such claim" is not part of the list made up of "fees, costs, or charges," nor is it joined to the following clause so that the final "provided for under the agreement" modifies it as well. The language and punctuation Congress used cannot be read in any other way. By the plain language of the statute, the two types of recovery are distinct.<sup>38</sup>

How disheartening to find five Supreme Court Justices subscribing to such nonsense! For one thing, if § 506(b) "cannot be read in any other way," why did the question split the circuits and indeed the Supreme Court itself? For another, § 506(b) on its face explicitly distinguishes between nonconsensual and consensual secured claims by referring to an "agreement under which the claim arose." This at a minimum should cause a reasonable judge—or any lawyer—to reflect

---

34. 11 U.S.C. § 506(b).

35. *Ron Pair*, 489 U.S. at 241.

36. *Id.* (citations omitted).

37. *Id.*

38. *Id.* at 241-42 (citations and footnotes omitted).

on how this distinction arose, why it exists, and whether the reasons for that distinction might apply to this case. Finally, that the Congress should or could contemplate or achieve a decisive change in law on this point by nothing more than placing a comma before the conjunction "and," or that it could or should realize that this sentence with or without that comma would be susceptible only to the meaning ascribed by the Supreme Court majority, is, to say the least, an entirely unrealistic view of the precision of (in ascending levels of generality) congressional drafting, the English language, and the nature of human communication.

*Ron Pair* shows textualism in a silly light. But a particular absurd application of the textualist method does not demonstrate that textualism is in general absurd. In an unguarded moment, even Scalia might agree that perhaps *Ron Pair* goes a bit far: the comma might not necessarily be dispositive and the text might in fact be ambiguous. But leaving to one side *Ron Pair's* dubious minor premise that § 506(b) was not ambiguous, textualists necessarily embrace *Ron Pair's* major interpretive premise. Finding no ambiguity in the text, the textualist goes no further. *Ron Pair* is bottomed on a judicial abdication of responsibility. The Supreme Court majority is saying: If the text alone seems to us to give the IRS interest on its tax claim based on the punctuation, in settling the law on this point, we will not weigh any considerations based on history, bankruptcy policy and administration, or extrinsic evidence of what Congress really intended.

This agnostic stance with respect to the practical consequences, purpose, and efficacy of a particular construction is an essential characteristic of textualism. Textualists do not deny their agnosticism.<sup>39</sup> Rather, they defend it on three grounds. First, they presume a lack of judicial competence to assess nontextualist sources. On this view, textualism despite its flaws yields better results than pragmatism. Second, they celebrate the "passive virtue" of judicial restraint. Textualism circumscribes the discretion of a nonmajoritarian judiciary and thereby protects the prerogatives of the political branches, lends greater stability to the law by making it easier for private persons to conform their conduct and order their affairs in accordance with the

---

39. See SCALIA, *supra* note 7, at 22:

It may well be that the statutory interpretation adopted by the Court in *Church of the Holy Trinity* produced a desirable result; and it may even be (though I doubt it) that it produced the unexpressed result actually intended by Congress, rather than merely the one desired by the Court. Regardless, the decision was wrong because it failed to follow the text.

law, and, perhaps, enhances the independence of the judiciary.<sup>40</sup> Thirdly, some textualists suggest textualism as the cure for what ails the legislative process. Congress assertedly would draft better statutes if courts consistently used textualist methods. This third defense is a makeweight; there is no evidence that Congress in fact responds to textualist interpretation by improving the technical quality of its work product, and indeed history suggests quite the opposite to be true.<sup>41</sup>

The first, essentially utilitarian, defense of textualism is counterintuitive. On its face, pragmatism seems more consistent with a utilitarian philosophy than textualism. If one accepts, as a utilitarian presumably does, that the goal of statutory interpretation is rational development of complex statutory schemes in a manner consistent with democratically-selected policy goals, then all things being otherwise equal, pragmatic judges, adopting appropriately deferential attitudes towards political choices, when informed by actual circumstances in real cases, should do better in achieving this goal than judges who defer to *ex ante* legislative drafting choices made without consciousness of the real consequences in the present unimagined or foggily anticipated case.

In short, the textualist is hampered in many ways in getting to a sensible answer. He is constrained to defer to a text that was drafted without awareness of the particular facts and circumstances of the case before the court; in an often hectic process involving compromise

---

40. This Article engages in a utilitarian evaluation of textualism, and so the second, essentially legitimacy-based defense is not the focus here. Citing substantial empirical, historical, and anecdotal evidence, many commentators question whether textualism meaningfully circumscribes judicial discretion. *See, e.g.,* SCALIA, *supra* note 7, at 62-63 (comments of Gordon S. Wood); Nehf, *supra* note 3, at 9 (study of judicial interpretations of state consumer protection laws indicates that “[f]ar from being outcome determinative, textualism proved to be an extremely flexible method of justifying virtually any decision the court desired”); Tabb & Lawless, *supra* note 3, at 880-81 (opining that the Rehnquist Court’s “textualist drift” leads to interpretive uncertainty). This evidence and argument naturally undermines textualist assertions that textualism lends greater stability to the law. Many of the same pragmatic commentators, as well as some textualist sympathizers, are especially dubious that textualism (or any other statutory construction method) potentially protects judicial independence. *See* SCALIA, *supra* note 7, at 113-14 (comments of Mary Ann Glendon). Protecting judicial independence seems inapplicable in the context of construction of the Bankruptcy Code. I find it mildly amusing to consider that the integrity of our independent federal judiciary could be remotely compromised by any construction of any section of the United States Bankruptcy Code, whether textualist or pragmatic, however implausible, and however poorly it serves bankruptcy policy or honors legislative intent. It is important for those millions of Americans involved as debtors and creditors in the bankruptcy system that we get bankruptcy law right. But the vitality of our independent judiciary is not plausibly at stake. *But see id.* at 46-47 (essay and response of Antonin Scalia) (discussing implications for judicial independence of nontextualist constitutional interpretation).

41. *Compare supra* note 20 and accompanying text, *with infra* note 46. *See* Eskridge, *Textualism*, *supra* note 3, at 1550-51 (“[T]he new textualism unfairly saddles Congress with obligations it cannot always fulfill.”).

and political posturing; and by persons frequently with little experience in litigation and legal interpretation or relevant expertise in the particular field of law.

Compare the pragmatic jurist who in adjudicating is informed by evidence and argument of the particular facts and circumstances of the case; engaged in a rationalistic, reflective and generally apolitical process; and expert in law and legal method.

The textualists' utilitarian argument rests on a bleak view of judicial competence and a remarkably optimistic estimate of the capacities of politicians. Judges in the textualist world are so much worse at working out the details of bankruptcy policy than legislators that they somehow manage to squander the powerful natural advantages of hindsight, deliberation, and direct experience in administering statutes. Textualists respond by noting that if textualism produces errors, those errors can be readily overcome by new legislation. They also suggest that pragmatists err too, or willfully abuse the pragmatic method to impose policy choices that would not be democratically selected.<sup>42</sup>

Sunstein's hypothesis that "it is disagreement over the underlying empirical issues—not over large concepts of any kind—that principally separates [textualists] and [pragmatists]" and that "with imaginable empirical findings, both [textualists] and [pragmatists] should be flexible enough to move in the direction of their apparent adversaries,"<sup>43</sup> frankly seems pollyannaish. It is extremely unlikely that Justice Scalia will bow to any imaginable empirical evidence on these points. Many textualists appear more deeply committed to their interpretive method than to a vision of law as a living, breathing thing purposively structured to serve the society it regulates. Textualism's formalism is more likely to appeal to those naturally disposed to embrace ideologies other than utility maximizing. Nevertheless, to a pragmatist, the evidence on these points is necessarily relevant to his choice of interpretive method. And at least some academic textualists assert not only that textualism works better,<sup>44</sup> but also that they are open to evidence to the contrary.<sup>45</sup>

---

42. See SCALIA, *supra* note 7, at 17-18. But see *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 113-16 (1991) (Stevens, J., dissenting); Eskridge, *Overriding*, *supra* note 3, at 348 (noting that Congress "rarely" overturns explicitly policy-based statutory decisions).

43. Sunstein, *supra* note 2, at 642-43, 662-66.

44. See SCALIA, *supra* note 7, at 17-18; Movsesian, *supra* note 24, at 1187; Vermeule, *supra* note 24, at 1896. Cf. Eskridge, *supra* note 2, at 672 & n.5 ("Like Scalia, most of the other leading statutory formalists have provided functional as well as formal reasons in favor of their theories.").

45. See, e.g., Vermeule, *supra* note 24, at 1865.

## II. THE STUDY OF OVERRULED BANKRUPTCY DECISIONS

In accepting Sunstein's invitation to test textualism empirically, I choose bankruptcy law as the testing ground because I know bankruptcy, I like it, and I can't imagine ferreting out and analyzing dozens of overruled, say, tax cases to assess textualism in interpreting the Internal Revenue Code. Notwithstanding these personal idiosyncrasies, it turns out that the Bankruptcy Code is one of the best testing grounds in the federal system for the textualist method.

The 1978 Bankruptcy Code is a rather well-worked out, technically drafted, modern and comprehensive statute that is the product of a lengthy and especially thoughtful legislative process and benefits from approximately 100 years of extensive prior federal experience in the field.<sup>46</sup> As such, it minimizes some of the disadvantages that the textualist naturally labors under, and presents the most favorable environment possible for textualist interpretation. Textualism should work better here than almost anywhere else.<sup>47</sup>

Moreover, as previously indicated, the Supreme Court has chosen to make the bankruptcy statute a kind of proving ground for textualist interpretation, regularly adopting textualist interpretations to settle the law on contested questions arising under the Bankruptcy Code.<sup>48</sup> Determining error in the exegesis of a complex statutory

---

46. See WILLIAM MILLER COLLIER, COLLIER ON BANKRUPTCY APP. B, PT. 4(b), at 4-199 to -218 (Lawrence P. King ed., 15th ed. 1996) (describing in detail the ten years and hundreds of participants' efforts culminating in the Bankruptcy Reform Act of 1978). In contrast, the many amendments to the Code since 1978 can often be fairly characterized as patchwork, ill thought-through, or special interest legislation insensitive to the overall structure of the Code and bankruptcy policy. See Peter A. Alces & David Frisch, *On the UCC Revision Process: A Reply to Dean Scott*, 37 WM. & MARY L. REV. 1217, 1238-44 (1996).

47. See SCALIA, *supra* note 7, at 143 (Antonin Scalia response to Mary Ann Glendon) ("[Professor Glendon] makes the point that it is difficult to maintain and apply a coherent theory of statutory interpretation when dealing with statutes that are themselves incoherent—the 'hastily cobbled compromises' of modern regulatory legislation, as opposed to 'carefully drafted codes.' That is unquestionably true."); see also ESKRIDGE, *supra* note 24, at 9-11 (arguing that passage of time renders original meaning of statutes less relevant). Even committed pragmatists William Eskridge and Philip Frickey have argued for textualism in bankruptcy cases. See ESKRIDGE & FRICKEY, *supra* note 9, at 630-31. They note that "although neither of us is a textualist, as appellate judges we might well give especially strong primacy to statutory text in some cases." *Id.* at 630. The authors continue: "Illustratively, the bankruptcy code is mammoth and complex, and neither of us is much familiar with its complicated subject matter. . . . In the complicated corporate bankruptcy case . . . we might pretty much stick with the statutory text." *Id.* at 630-31; see also Eskridge, *Overriding*, *supra* note 3, at 373 ("The preference for plain meaning is most important for recent and detailed statutes."). But see Rasmussen, *supra* note 3, at 538 (characterizing the Code in similar terms but suggesting its structure and form might be thought to facilitate sound pragmatic interpretation); accord Lawless, *supra* note 3, at 4.

48. See Lowell P. Bottrell, *The Supreme Court and the "Plain Meaning" of the Bankruptcy Code: A Review of Recent and Pending Supreme Court Decisions*, 69 N.D. L. REV. 155, 201 (1993);

scheme is generally a question of judgment, and depends upon an assessment of consequences and an understanding of the policies of the statute. Most interpretive "errors" are debatable.<sup>49</sup>

Nevertheless, the textualist suggestion that legislative error-correction is the appropriate safeguard to textualist excess, suggests one reasonable, neutral (but partial) definition of error: interpretations subsequently superseded by statute. Statutory overruling indicates that the law as interpreted does not meet present political and policy goals in a substantial enough way to overcome the very considerable inertia within the legislative process. Given the subsequent legislation, the overruled interpretation is socially costly; the benefits of the overruled interpretation are not realized because of the later statutory change, but all the costs of adjudication and new legislation are paid. And there is an obvious injustice worked on the litigant who loses, and others subject to the court decision that is destined for overruling, while future similarly situated persons obtain the benefit of the later amendment. If textualists make more errors that require statutory overruling, and if it is apparent that statutory overruling is costly, time consuming, and inefficient as error correction, these facts should be relevant to judges in choosing an appropriate method of statutory construction.<sup>50</sup>

Lawyers and law professors ordinarily ignore superseded cases for the obvious reason that they are no longer good law. But the study of statutory overrulings yields valuable insights into the quality and importance of interstitial judicial law making.<sup>51</sup>

I adopted the following method for this study. I compared the originally enacted Bankruptcy Reform Act of 1978 with the 1998 Bankruptcy Code. Working backward from the many changes in statutory language over this twenty-year period, I identified the substantive amendments to each Code section.<sup>52</sup> I then sought to ascertain

---

Carroll, *supra* note 26, at 154-66; Carlos J. Cuevas, *The Rehnquist Court, Strict Statutory Construction and the Bankruptcy Code*, 42 CLEV. ST. L. REV. 435, 439-40 (1994); Walter A. Effross, *Grammarians at the Gate: The Rehnquist Court's Evolving "Plain Meaning" Approach to Bankruptcy Jurisprudence*, 23 SETON HALL L. REV. 1636, 1754-62 (1993); Lawless, *supra* note 3, at 6; Tabb & Lawless, *supra* note 3, at 879-81; Adam J. Wiensch, Note, *The Supreme Court, Textualism, and the Treatment of Pre-Bankruptcy Code Law*, 79 GEO. L.J. 1831, 1839-51 (1991); see also *supra* note 26 and accompanying text.

49. *But see Sunstein, supra* note 2, at 666-68 (defending imaginative reconstruction as a basis for determining error).

50. See *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 113-16 (1991) (Stevens, J., dissenting).

51. See Eskridge, *Overriding, supra* note 3, at 333-35.

52. For a compilation of the amendments and an excellent brief overview of major bankruptcy legislation 1979-1994, see Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 37-43 (1995).

whether in each case the substantive amendment could be fairly said to be a statutory overruling of a case or line of cases or settle a question of interpretation that had divided the federal courts.<sup>53</sup> In order to identify overrulings, I studied the legislative history of each amendment, pre-amendment caselaw, post-amendment caselaw, and both current and superseded treatises. In some cases, the fact of statutory overruling was notorious and known to me and any other bankruptcy specialist in advance. Such cases include *NLRB v. Bildisco & Bildisco*,<sup>54</sup> *Levit v. Ingersoll Rand Financial Corp.*,<sup>55</sup> and *Rake v. Wade*.<sup>56</sup> In the case of the 1994 Amendments, the accompanying section-by-section analysis<sup>57</sup> was an invaluable aid in identifying less notorious overrulings. Reconstructing the reasons for other statutory changes was often very difficult and sometimes inconclusive.

Nevertheless, by this process I identified fifty-eight instances of statutory overruling. Whenever I identified an instance of statutory overruling I sought to further identify the "leading case" in the over-

---

53. Thus I excluded the enactment of Chapter 12—a novel and distinctive blend of Chapter 11 and Chapter 13 reorganizations available only to family farmers. Chapter 12, enacted in 1986, was provoked by the fact that few small farms could successfully reorganize under Chapter 11 given depressed agricultural prices and land values in the mid-1980s. In *Ahlers v. Norwest Bank Worthington (In re Ahlers)*, 794 F.2d 388, 399-403 (8th Cir. 1986), the Eighth Circuit attempted to ameliorate this hardship by promulgating a "sweat equity" doctrine under Chapter 11 that would have facilitated farm reorganizations—at a cost of generally rewriting the balance drawn between debtors and creditors in Chapter 11. The Supreme Court reversed the Eighth Circuit in *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 211 (1988), after Chapter 12 had been enacted. I do not view Chapter 12 as simply a codification of *Ahlers* or other cases that tried to deal with the farm crisis in narrow ways through interpretation nor do I see it as a repudiation of the cases applying general Chapter 11 law to farmers. Similarly in 1984, Congress reworked the balance between consumers and consumer lenders in Chapter 13 based on a complex compromise between these interest groups. I view the amendments to § 707(b) and § 1325 creating the substantial abuse and net disposable income tests not as directed at overruling a particular case or line of cases, but rather as a change in legislative policy. See Karen Gross, *Preserving a Fresh Start for the Individual Debtor: The Case for Narrow Construction of the Consumer Credit Amendments*, 135 U. PA. L. REV. 59, 76-85 (1986). I also excluded instances where Congress seems to have adopted the basic interpretation placed upon a section by the courts but changed a specific term to sweep more parties within (or exclude them from) the protection of the statute. For example, in 1994 Congress changed the grace period for perfection of purchase money security interests under § 547(c)(3)(B) from ten to twenty days. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 203, 108 Stat. 4106, 4121-22 (1994). I did not view this change as repudiating the construction placed on the statute by courts that had held interests perfected after say eighteen days as outside the protection of the original statute. Rather, Congress adopted that construction and simply changed the length of the statutory grace period. Similarly, where dollar limits or other time limits have been changed, I have generally not considered the amendments as overruling cases that had enforced the original limits.

54. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984).

55. *Levit v. Ingersoll Rand Fin. Corp.*, 874 F.2d 1186 (7th Cir. 1989).

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

57. See The Bankruptcy Reform Act of 1994—Section-By-Section Description, 140 CONG. REC. H10764 (daily ed. Oct. 4, 1994).

ruled line. If the Supreme Court had decided the issue, then I deemed the Supreme Court decision to be the leading authority.<sup>58</sup> Otherwise the first fully reasoned published Court of Appeals decision on the point was identified as the “leading case.” If no published Court of Appeals decision was available, I identified the most prominent published decision on the point using whatever indications existed in the legislative history, cases, or treatises, generally giving priority to decisions of district courts or bankruptcy appellate panels over bankruptcy courts, and earlier decisions over later ones.<sup>59</sup>

The list of overruled leading cases is found at Appendix I. Appendix I is intended to be an exhaustive listing of the instances of

---

58. The omission of *Owen v. Owen*, 500 U.S. 305 (1991), from Appendix I is one pseudo-exception to this practice. *Owen* disapproved *McManus v. AVCO Financial Services of La. (In re McManus)*, 681 F.2d 353 (5th Cir. 1982). *McManus* held that a debtor electing to exempt tools of the trade pursuant to the unlimited Louisiana state law exemption statute could not then attack non-possessory non-purchase money liens under § 522(f) that were valid under Louisiana law. See *McManus*, 681 F.2d at 357. *McManus* took the view that the debtor “took the bitter with the sweet”: Debtors could not mix and match generous federal avoiding powers with generous state law exemptions. *Owen* allowed exactly this mix and match technique with regard to the avoidance of judicial liens against real property exempted under Florida homestead law. *Owen*, 500 U.S. at 313. Congress reacted by amending the Code to distinguish non-possessory non-purchase money liens from judicial liens for § 522(f) purposes and limiting the extent of the avoiding power with respect to the consensual liens. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 310, 108 Stat. 4106, 4137 (1994). Some courts and commentators understandably view this amendment as a repudiation of the *Owen* reasoning, see, e.g., *In re Parrish*, 186 B.R. 246 (Bankr. W.D. Wis. 1995), but the *Owen* result stands. But see *Farrey v. Sanderfoot*, 500 U.S. 291, 301 (1991). Accordingly, I did not code *Owen*. I did code *Central National Bank & Trust Co. v. Liming (In re Liming)* 797 F.2d 895 (10th Cir. 1986), which anticipated the *Owen* reasoning in the context of consensual, rather than judicial, liens, and whose result and reasoning were both overruled by the amendment creating the distinction between judicial and consensual liens for § 522(f) avoidance purposes and limiting the avoidability of consensual liens.

59. *Stuart v. Pingree (In re AFCO Development Corp.)*, 65 B.R. 781, 787 (Bankr. D. Utah 1986), is the seminal decision in the line of bankruptcy court decisions that granted each successive bankruptcy trustee a fresh statute of limitations to bring avoiding power actions. *AFCO* appears in Appendix I even though the federal district court for Utah rejected its holding shortly before it was superseded by Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 216, 108 Stat. 4106, 4126. See *Gillman v. Mark Oakes Trucking (In re CVA Assocs.)*, 171 B.R. 122, 127 (D. Utah 1994). It is unclear whether district court decisions in bankruptcy appeals bind bankruptcy courts in subsequent cases within the district. See Daniel J. Bussel, *Power, Authority, and Precedent in Interpreting the Bankruptcy Code*, 41 UCLA L. REV. 1063, 1071-72, 1094-98 (1994). Regardless of whether *AFCO* was formally overruled by *CVA*, *AFCO* is fairly characterized as the leading case in a line of cases that retained significant vitality until the statute was amended. *In re Ionosphere Clubs, Inc.*, 112 B.R. 78 (Bankr. S.D.N.Y. 1990), is excluded from Appendix I. The leading authority for its primary holding on the scope of § 1110 is *Swiss Air Transport Co. v. Texas International Airlines, Inc. (In re Continental Airlines Corp.)*, 57 B.R. 854 (Bankr. S.D. Tex. 1985), a case that is included in this study. *Ionosphere's* secondary holding, that certain beneficial holders of security interests governed by § 1110 lacked standing, had not been followed by any other court and was reversed on appeal, 123 B.R. 166 (S.D.N.Y. 1991), before being superseded by Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106. I did not think it appropriate to characterize *Ionosphere* as a leading case under these circumstances.

statutory overrulings under Title 11, United States Code, 1979-1998.<sup>60</sup> Amendments to the bankruptcy rules, jurisdictional provisions, and criminal statutes related to bankruptcy, or other statutes that may impinge upon bankruptcy, for example the Internal Revenue Code, have not been researched. In two cases, research established that substantive amendments were enacted in direct reaction to unpublished bankruptcy court dispositions.<sup>61</sup> These unpublished cases were excluded from the study to avoid inferring interpretive methodology from insufficient information and because I had little reason to think I had uncovered all the unpublished decisions that might be viewed as

---

60. Appendix I, while limited to overruled bankruptcy cases decided after 1979, is, within that domain, substantially more comprehensive than the cases identified and analyzed by Professor Eskridge in his 1991 study of "overridden" decisions. Eskridge relied on references to overrulings in committee reports reprinted in *United States Code Congressional and Administrative News* (USCCAN). *Id.* at 336-37 & n.11. See Eskridge, *Overriding*, *supra* note 3, at 336-37. But as Eskridge himself acknowledged many amendments are not accompanied by detailed committee reports and many reports do not specifically refer to decisions to be superseded and still others are not reprinted in USCCAN. Although the Eskridge study noted overruled bankruptcy decisions in the period 1967-1990, twenty-two of these were overruled by the Bankruptcy Reform Act of 1978, which of course happened to be accompanied by extensive committee reports. See *id.* at 435-36. Three of the seven additional bankruptcy cases included in Eskridge's study—*NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984), *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990), and *Lubrizol Enterprises v. Richmond Metal Finishers*, 756 F.2d 1043 (4th Cir. 1985)—form part of this study as well. Eskridge identifies *General Accident Insurance Co. v. Cain (In re Cain)*, 96 B.R. 115 (Bankr. N.D. Ohio 1988), as overridden by the Crime Control Act of 1990, Pub. L. No. 101-647, § 3102, 104 Stat. 4789, 4916 (codified at 11 U.S.C. § 523(a)(9) (1994)). See Eskridge, *Overriding*, *supra* note 3, at 424. This study identifies a prior decision from the same court, *City of Akron v. Jackson (In re Jackson)*, 77 B.R. 120 (Bankr. N.D. Ohio 1987), as the leading pre-amendment authority on the question. *Meyer v. Commissioner*, 383 F.2d 883 (8th Cir. 1967) and *Lane v. Haytien Corp.*, 117 F.2d 216 (2d Cir. 1941), are in the Eskridge study but, like the cases overruled by the Bankruptcy Reform Act of 1978, fall outside the time period for this work.

Finally, Eskridge identifies *In re Bastian*, 45 B.R. 717 (Bankr. W.D.N.Y. 1985), which permitted termination of an ERISA regulated pension plan in bankruptcy, as a bankruptcy case. See Eskridge, *Overriding*, *supra* note 3, at 429. *Bastian* involved a conflict between ERISA and the Bankruptcy Code that was ultimately resolved by an amendment to ERISA. It therefore does not appear in Appendix I. The Eskridge study, on the other hand, excludes eighteen cases superseded in the period 1979-1990 that I identify in Appendix I. Twelve of these are bankruptcy court decisions, the rest are Court of Appeals cases not mentioned in USCCAN but which I nevertheless was able to identify as having been intentionally superseded by statute. Even though Eskridge sought to identify all federal decisions overruled between 1967-1990, he analyzed only those Supreme Court decisions overruled within ten years—some eighty-nine cases. See *id.* at 450-55. Only four bankruptcy decisions made the final cut in the Eskridge study. See *id.* at 450-55.

61. See *Lombard-Wall, Inc. v. Bankers Trust Co. (In re Lombard-Wall Inc.)*, 23 B.R. 165, 165-66 (Bankr. S.D.N.Y. 1982) superseded by Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 396, 98 Stat. 333, 366 (codified at 11 U.S.C. § 559 (1994)) (discussed in S. REP. NO. 98-65, at 47 (1983) and in 130 CONG. REC. 20,229 (1984) (remarks of Mr. Glickman)); *In re Los Altos Hotel Assocs.*, No. 5-81-01943, 1981 Bankr. LEXIS 2332 (Bankr. N.D. Cal. Dec. 29, 1981), superseded by Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub.L. No. 98-353, § 512, 98 Stat. 333, 386-87 (codified at 11 U.S.C. § 1129(a)(7)(A) (1994)).

having been superseded by statute. Excluded also are three decisions where the inference that the amendment was provoked by the case decision seemed tenuous and whose interpretive method was in any event difficult to classify.<sup>62</sup> Finally, I excluded three instances of what I deemed to be inadvertent overruling—cases where courts subsequently found that an unintended effect of an amendment was to overrule prior caselaw.<sup>63</sup>

---

62. In *Shell Oil Co. v. Anne Cara Oil Co. (In re Anne Cara Oil Co.)*, 32 B.R. 643, 648 (Bankr. D. Mass. 1983), the court stated in brief dicta that incurable nonmonetary defaults might have precluded assumption of a franchise agreement under § 365. Eleven years later § 365(b)(2)(D) was amended, apparently to excuse cure of incurable nonmonetary defaults. See Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 219(a), 108 Stat. 4106, 4128. Ironically, the Ninth Circuit recently held that the amendment actually had the effect of *codifying* the *Anne Cara Oil* dicta. See *In re Claremont Acquisition Corp.*, 113 F.3d 1029, 1034 (9th Cir. 1997). In *re Texas Extrusion Corp.*, 68 B.R. 712, 715 (N.D. Tex. 1986), *aff'd on other grounds*, 836 F.2d 217 (5th Cir.), *later proceeding* 844 F.2d 1142 (5th Cir.), *cert. denied*, 488 U.S. 926 (1988), involved a subsequent Chapter 11 filing by the wife of the owner of the corporate debtor. The wife had no separate property, only some \$2000 in separate debt, and her filing was evidently a strategic ploy to simply delay the proceedings in the corporate case. See *id.* at 727. The bankruptcy court allowed the plan proponent in the corporate case to proceed to confirmation promptly, notwithstanding the wife's filing, by administratively consolidating the wife's case with the corporate one, terminating her 120-day exclusive period to propose a plan, and retroactively deeming the disclosure statement already approved in the corporate case applicable to her individual case. See *id.* Subsequent to the bankruptcy court's action (but before the district court's affirmance) § 1121(d) was amended to provide that extensions or reductions in exclusivity had to be on the basis of requests made within the exclusivity period itself. See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 506(b), 98 Stat. 333, 385 (codified at 11 U.S.C. § 1121(d) (1994)). This change precludes retroactive changes in the exclusive period. It is not clear, however, that the amended statute would require a different result in the unusual fact situation presented in *Texas Extrusion*. Finally, in *Solon Automated Services, Inc. v. Georgetown of Kettering, Ltd. (In re Georgetown of Kettering, Ltd.)*, 22 B.R. 312, 317 (Bankr. S.D. Ohio 1982), the bankruptcy court indicated in dicta that a confirmation order might be revoked for reasons other than fraud notwithstanding § 1144, which stated that such orders may be revoked "if procured by fraud." Section 1144 was thereafter amended to provide for revocation "if and only if" such order is procured by fraud. See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 515, 98 Stat. 333, 387. Continuing confusion on the grounds for revocation of confirmation orders exists given FED. R. CIV. P. 60(b) and the absence of conforming amendments to Chapters 12 and 13 in the Bankruptcy Amendments and Federal Judgeship Act of 1984. See *Branchburg Plaza Assocs. v. Fesq (In re Fesq)*, 153 F.3d 113, 115-17 (3d Cir. 1998), *cert. denied*, 119 S.Ct. 1253 (1999).

63. See *Union Bank v. Wolas*, 502 U.S. 151 (1991) (holding that the deletion of the 45-day limitation on the ordinary course of business defense to preference avoidance, 11 U.S.C. § 547(c)(2), brought all long-term debt within the defense as well as the short-term commercial paper and trade credit clearly intended by its sponsors); S. REP. NO. 98-65, at 60 (1983); *Hearings on S. 3023, Before the Subcomm. on Judicial Machinery of the Senate, Comm. on Judiciary, 96th Cong. 8-27* (1980) (statements of Mr. Van Cleave of Goldman Sachs & Co. and Mr. Ledinsky of A.G. Becker & Co.); *Hearings on Bankruptcy Reform Act of 1978, Subcomm. on Courts, S. Comm. on Judiciary 97th Cong. 259-60* (1981) (statement of Mr. Gestautas of National Association of Credit Management). The Supreme Court expressly assumed that the bankruptcy trustee was correct in asserting that the amendment was intended to "redress particular problems of specific short term creditors." *Union Bank*, 502 U.S. at 157-58. It went on to state that "[t]he fact that Congress may not have foreseen all of the consequences of a statutory enactment is not

Although there may well be a few instances where further research may have uncovered a line of cases superseded by some overlooked or excluded amendment or where one might quibble about my classification of a particular amendment as a policy change rather than an overruling, or which case is appropriately described as the leading authority for a particular view, I feel confident that Appendix I effectively captures the relevant universe. As we identified cases in the relevant universe, I or a research assistant, filled out a Data Collection Form for each overruled case that (i) recorded certain basic information about the overruled case, and (ii) assessed on a 1-7 scale the degree to which the mode of interpretation adopted by the court was textualist or pragmatic or determined by precedent or not ascertainable.<sup>64</sup> Then I, based on my knowledge of post-amendment

---

sufficient reason for refusing to give effect to its plain meaning." *Id.* at 158. *In re Atlanta-Stewart Partners*, 193 B.R. 79, 82 (Bankr. N.D. Ga. 1996), asserted that the deletion of § 1124(3) (which was done expressly to overrule *In re New Valley Corp.*, 168 B.R. 73 (Bankr. D. N.J. 1993), see *Bankruptcy Reform Act of 1994-Section-By-Section Description* § 214, 140 CONG. REC. H10768 (daily ed. Oct. 4, 1994)), had the unintended consequence of also overruling the artificial impairment line of cases. See *Windsor on the River Assocs. v. Balcor Real Estate Fin., Inc. (In re Windsor on the River Assocs.)*, 7 F.3d 127, 130-32 (8th Cir. 1993). (Professor Kenneth Klee, *supra* note \*, however, who lobbied for the 1994 repeal of § 1124(3) in lieu of amendments to § 1129 directed at overruling *New Valley*, recalls that the implications of § 1124(3)'s repeal for the artificial impairment cases were understood and accepted by legislative staff and lobbyists on all sides at the time.) Finally, also in 1994, Congress made a conforming amendment to § 1123(d) in the course of ensuring that *Rake v. Wade*, 508 U.S. 464, 475 (1993), a Chapter 13 case allowing secured parties unbargained for interest-on-interest in the home mortgage context, was overruled under all possibly applicable chapters of the Code. See *Bankruptcy Reform Act of 1994-Section-By-Section Description* § 305, 140 CONG. REC. H10770 (daily ed. Oct. 4, 1994). The literal language of the amendment draws into question the line of cases disallowing bargained-for penalty interest. See *Great W. Bank & Trust v. Entz-White Lumber & Supply, Inc. (In re Entz-White Lumber & Supply, Inc.)*, 850 F.2d 1338, 1340-42 (9th Cir. 1988). These instances of inadvertent overruling underscore the point made later that statutory overruling is a risky and uncertain business. See *infra* text accompanying notes 78-106. But they are properly excluded from this study. The goal here is to determine the characteristics of those cases that sufficiently disserve Congressional bankruptcy policy that they are deliberately superseded by statute.

64. The data collection form and written coding protocol is attached as Appendix II. The relevant categories of interpretive method on the 1-7 scale are described as follows:

1. Textualist: Code for decisions that make the language of the statute dispositive notwithstanding competing interpretations (if any) based upon legislative history, past practice under the Bankruptcy Act, or policy.
2. Primarily but not exclusively textual: Code for decisions that give decisive weight to the language of the statute, but cite as supportive interpretive sources relevant legislative history, past practice, or policy.
3. Relies on both textual and nontextual sources: Code for decisions that rely on both statutory language and relevant legislative history, past practice, or policy as mutually supporting rationales for the decision.
4. Primarily but not exclusively [pragmatic]. Code for decisions that give decisive weight to relevant legislative history, past practice, or policy, but cite the language of the statute as supportive of the decision.

caselaw, subsequent further amendments, and general knowledge of bankruptcy law, subjectively assessed the efficacy of the subsequent amendment in overruling the decision.

It is no easy matter to specify the appropriate control group with which to compare the set of overruled cases. In a true experiment, the investigator would draw a random sample of pending bankruptcy cases raising statutory interpretation issues, randomly assign interpretive methods to them—some textualist, some pragmatic—and then record Congress' reaction.<sup>65</sup> Fortunately, investigators are not permitted by the Constitution and laws of the United States to conduct such experiments. Nevertheless, considering such an experiment clarifies that the task in selecting a control group is to try to capture a representative (i.e., unbiased) sample of all cases raising questions of statutory interpretation, against which the overruled cases can be compared.

Most reported cases do not purport to settle substantive issues of bankruptcy law. They are decided on procedural or factual grounds or raise issues of state law, or otherwise applicable federal non-bankruptcy law. Others are decided simply on the basis of controlling precedent. After considering many possible sources for a control group (the *Bankruptcy Reporter*, reported federal appellate bankruptcy decisions, "leading decisions" drawn from bankruptcy casebooks, and bankruptcy decisions from the United States Supreme Court), I settled on the universe of federal appellate bankruptcy cases<sup>66</sup> for which

---

5. [Pragmatic]: Code for decisions that make legislative history, past practice, or policy dispositive notwithstanding competing interpretations (if any) based upon the language of the statute.

6. Result controlled by precedent: Decisions dictated by controlling precedent from the same or a higher court.

7. Unable to determine: Please note in Comments why it was not possible to classify the interpretive method.

Predictably, few cases were coded as "result controlled by precedent" (6). In the overruled group, selecting the first published opinion from the highest court deciding the issue predetermined that there would be few, if any, cases controlled by precedent. Similarly, the control group was drawn from published decisions of Courts of Appeals for which certiorari was sought. Both the standards for publication and for the grant of certiorari suggest that few cases controlled by precedent would appear in the control group. In fact, many unpublished decisions eliminated from the cluster samples, *see infra* note 69 and accompanying text, were dispositions that the Court of Appeals had determined were controlled by circuit or Supreme Court precedent.

65. *See* DONALD T. CAMPBELL & JULIAN C. STANLEY, EXPERIMENTAL & QUASI-EXPERIMENTAL DESIGNS FOR RESEARCH 13-24 (1963).

66. *United States Law Week* classifies cases filed in the Supreme Court by subject matter and one of its classifications is "Bankruptcy." Cases so classified by *United States Law Week* formed the universe out of which I randomly selected the control group.

petitions for certiorari were acted upon by the Supreme Court<sup>67</sup> between its 1982 and 1998 Terms,<sup>68</sup> a total of 804 cases.

From this universe of cases I drew six random samples of thirty cases each, for a total of 180 cases.<sup>69</sup> In reading through these cases, I excluded those where there was no reported opinion to analyze and cases that did not raise issues of statutory interpretation under Title 11. I also excluded the one randomly selected case that happened also to have been superseded by statute.<sup>70</sup> The result is a control group of fifty-two United States Court of Appeals cases raising issues of statutory interpretation under Title 11 that were substantial enough to merit a published appellate decision and a petition for certiorari. These fifty-two cases were then summarized on a Data Collection Form, based on the same coding instructions used for the overruled cases collected in Appendix I.<sup>71</sup> The list of fifty-two control cases is found in Appendix III.

To assess the reliability and consistency of the coding, my research assistant, John Pomeroy, and I independently coded the same twenty-nine random cases. The consistency of our results exceeded conventional levels of reliability for research of this kind.<sup>72</sup>

---

67. Cases for which Supreme Court review is sought are at least generally thought by the interested parties to raise questions of federal law and given the well known standards for the grant of certiorari set out in Supreme Court Rule 10, are likely to at least arguably involve legal issues that have divided the lower federal courts.

68. Cases for which certiorari was sought prior to 1982 were very unlikely to involve interpretations of the Bankruptcy Reform Act of 1978. The Act did not apply to cases filed in the bankruptcy court prior to October 1979, and it is unlikely that decisions in cases filed after that date could be litigated through and decided by a Court of Appeals and a petition for certiorari acted upon before October 1982.

69. After the 804 cases were entered into a computer database chronologically, the SAMPLE function on SPSS, a statistical software package, selected successive groups of thirty cases, which were then culled on the bases set forth in the text. After each sample was selected, the cases within the selected sample were eliminated from the database to ensure that the same case was not selected again at random from the universe. After examining the sixth successive sample of thirty, I had fifty-two codable cases for the control group. I felt this was enough so I stopped. This random sampling technique is sometimes referred to as cluster sampling. I used this cluster sampling technique because I did not know in advance how many codable cases would be found in a sample of any given size.

70. See *Lincoln Sav. Bank v. Suffolk County Treasurer (In re Parr Meadows Racing Ass'n)*, 880 F.2d 1540 (2d Cir. 1989), superseded by Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 116, 108 Stat. 4106, 4119 (codified at 11 U.S.C. § 362(a)(9) (1994)).

71. See *supra* note 64 and accompanying text.

72. Inter-rater reliability of the coding of interpretive method was tested by the following technique. Pomeroy and I independently coded the same twenty-nine cases. In five instances, one or the other of us coded as indeterminate cases that the other assigned a number to on the 1-5 scale. In thirteen of the remaining twenty-four cases, we assigned the same number. In only two of the remaining eleven cases did we disagree by more than one unit. Thus, except for these two cases, if I coded the case as textualist (1), Pomeroy coded it as textualist (1) or primarily textualist (2), and if I coded the case as primarily textualist (2), he assigned it textualist (1),

Table 1 compares the cases in the two groups by category of interpretive method:

**TABLE 1: Overruled and Control Groups by Interpretive Method**

Interpretive Method	Control Group	Overruled Cases	Difference*
Textualist	10%	33%	+23%
Primarily Textualist	8%	21%	+13%
Textualist & Pragmatic	19%	22%	+3%
Primarily Pragmatic	21%	7%	-14%
Pragmatic	37%	7%	-30%
Precedent	4%	0%	-4%
Undetermined	2%	10%	+8%
			Sum
N	52	58	110

\*Differences in first 5 categories  $p < .0001$  (2-tailed t-test);  $p < .001$  (chi-square).

Interestingly, even a casual look at the data indicates that textualism is not a dominant mode of statutory interpretation in the Courts of Appeals, even in the bankruptcy area, notwithstanding the Supreme Court's particular insistence for a decade on "plain meaning" constructions of the Bankruptcy Code.<sup>73</sup> Approximately 80 percent of

---

primarily textualist (2), or both textualist and pragmatic methods (3). In one case, Pomeroy coded as 5 a case I had assigned a 3. In the second instance, he assigned 5 to a case I had coded as 2. When we discussed these latter two cases, we agreed upon reflection that both should be coded as 3 for purposes of the main study, though of course for purposes of the inter-rater reliability test, our original codings stood. Other than the change in the coding of this one case, *United Mine Workers of Am. 1992 Benefit Plan v. Leckie Smokeless Coal Co. (In re Leckie Smokeless Coal Co.)*, 99 F.3d 573 (4th Cir. 1996), *cert. denied*, 520 U.S. 1118 (1997), for purposes of the main study, my original coding was used. Statistical analysis of the results of the reliability study indicates good consistency between the raters ( $\gamma = .73$ , Pearson's  $r = .70$ ,  $p < .001$ ). Pomeroy's mean assigned value for the twenty-four cases was 3.88 and mine was 3.96. A paired sample t-test indicates this difference is not statistically significant ( $p = .42$ ) and the small difference would have had no meaningful effect on the results of the main study had it used Pomeroy's coding rather than mine.

73. This is consistent with the findings of Professor Zeppos in his analysis of twentieth-century Supreme Court statutory cases. See Zeppos, *supra* note 3, at 1076 ("The data . . . suggest a number of important findings: (1) the Court's use of authority is not originalist; (2) textual sources, while important, are not exclusively relied upon; (3) practical-consequentialist considerations and other dynamic sources are an acknowledged, important, and constant source of authority in statutory interpretation."). In this respect, it appears that the Courts of Appeals do as the Supreme Court does, rather than as it says.

the control group cases were decided on largely or entirely nontextualist grounds.

Note further that of the fifty-eight overruled cases, thirty-one (54%) were decided on textualist or primarily textualist grounds, while of the fifty-two cases in the control group, nine (18%) were decided on textualist or primarily textualist grounds. Three times as many overruled cases are textualist or primarily textualist. Conversely, thirty control group cases (58%) were decided on pragmatic or primarily pragmatic grounds. This is true of eight overruled cases (14%). That is, more than four times as many control group cases are pragmatic or primarily pragmatic.

Treating the categories of interpretive method used in the coding as discrete and applying the chi-square test to determine statistical significance, these results are significant at the .001 level. Treating the categories of interpretive method as a continuum and applying the t-test procedure, the control group and overruled group exhibit approximately equal variances but significantly different means. The t-test confirms that the control group is significantly more pragmatic than the overruled group, with results at the .0001 level of significance.<sup>74</sup>

Substantially the same results are obtained if only Court of Appeals decisions from the overruled group are compared with the control group.<sup>75</sup> The differences between the groups are not on account of the fact that the overruled group includes bankruptcy court, district court, and Supreme Court as well as Court of Appeals decisions.

There is virtually no chance that the larger number of pragmatic interpretations observed in the control group is a random event. The data strongly support the hypothesis that textualist decisions are more likely to be overruled by Congress than pragmatic ones.<sup>76</sup>

---

74. The mean value control group was 3.71 (.19 standard error). The mean value overruled group was 2.27 (.17 standard error). For purposes of the t-test, the number of observations was control group (49) and overruled group (52) on account of the necessity of disregarding cases that were indeterminate or controlled by precedent.

75. The mean for the overruled Courts of Appeals decisions is 2.30 compared to 2.27 for all overruled decisions. Because of its smaller size (23), the standard error of the mean for the overruled Courts of Appeals decisions group is somewhat larger at 0.27. The distribution for the overruled Courts of Appeals decisions as to interpretive method, however, is virtually identical to Table 1, *supra*. If only Courts of Appeals decisions are compared to the control group, then the chi-square test is significant at the .004 level and the t-test is significant at the <.001 level.

76. This finding is consistent with that of Eskridge's study of overruled Supreme Court decisions, which found that "plain meaning" interpretations were substantially overrepresented in the set of overruled Supreme Court cases, while "purpose or policy" based decisions were generally not scrutinized, or if scrutinized rarely overruled. See Eskridge, *Overriding*, *supra* note 3, at 347-48, 350-51.

Cases subsequently overruled by Congress presumably do not serve current policy goals well, at least in the view of Congress, which after all has the constitutional prerogative to set bankruptcy policy. The observation that overruled cases are disproportionately textualist in method should trouble utilitarian-textualists. The observation is consistent with pragmatic intuitions that pragmatic interpretation leads to superior implementation of existing bankruptcy policy. Moreover, overruled cases are likely to be inconsistent with the intent of the enacting Congress as well. There is no evidence that as a general matter bankruptcy policy has sufficiently changed within the last twenty years such that, on average, honoring the intent of the drafters of the Bankruptcy Reform Act of 1978 would disserve current policy or vice-versa. Most of the overruled cases that form the subject of this research do not raise broad ideological issues, but rather deal with the details of bankruptcy administration and policy. Corrective legislation in such cases is likely to mean that the overruled case was inconsistent with the intent of the enacting Congress as well as current policy.

If one accepts the proposition that cases subsequently overruled by the Congress are not consistent with the legislative intent of the enacting Congress, the observation that overruled cases are disproportionately textualist in method should also trouble at least some judges who adopt textualism for legitimacy reasons. This observation is consistent with the pragmatic intuition that pragmatic interpretation leads on average to statutory interpretation that better approximates congressional intent.<sup>77</sup>

The overruled cases decided on textualist reasoning may improperly apply textualist principles. I did not try to distinguish sound and unsound textualism at work. Nevertheless, if courts consistently end up with results that regularly require overruling because of inadequate facility with the textualist method, textualism remains a less effective method in practice, whatever its merits in theory.

The median time required to overrule these cases was three years, with a minimum of less than one year and a maximum of fifteen years. In twenty cases (34%), legislative correction took five or more years. Overruling by amending the Code is clearly a time-consuming business. Moreover, amending the Code is an uncertain and faulty business. The overrulings generated substantial further

---

77. In any given case, honoring legislative intent and effectively implementing current bankruptcy policy may, of course, be in tension with one another as policy may change over time. See John C. Nagle, *Newt Gingrich, Dynamic Statutory Interpreter*, 143 U. PA. L. REV. 2209, 2215 (1995). They are not, however, necessarily in tension, and for the reasons given in the text are not likely to be generally in tension in the overruled cases being studied.

litigation or serious unintended consequences, or were botched, in thirty-six instances (62%). While these figures simply aggregate my subjective assessments of the efficacy of the amendment based upon my general knowledge of bankruptcy law, experience, and judgment, the types of problems created by reliance on legislative error correction are very real. A few examples of these incomplete or flawed overrulings will illustrate.

Bankruptcy law provides that a bankruptcy trustee may reinstate defaulted contracts and leases that could not ordinarily be reinstated under otherwise applicable law if doing so would benefit the bankruptcy estate. This power of "assumption" is conditioned upon providing a cure of the defaults and adequate assurance of future performance. The basic thought here is that there is no fundamental unfairness in holding the nondebtor party to a deal favorable to the estate so long as defaults are cured and future performance assured.

The history of the Code indicates that while the 1973 Bankruptcy Commission, whose work in large part formed the basis for the Bankruptcy Reform Act of 1978, intended to generally permit bankruptcy trustees to assume executory contracts, it was concerned about the possible application of the assumption power to a contract calling for the debtor's personal services.<sup>78</sup> Where the debtor's personal services were called for, and where otherwise applicable law provided that the nondebtor could refuse to accept performance from anyone else, it seemed wrong that the bankruptcy trustee should be permitted to substitute his performance for that of the debtor. These quite sensible considerations resulted in an exception to the assumption power that in the original Bankruptcy Code was framed as follows: "The trustee may not assume . . . any executory contract . . . if (1)(A) applicable law excuses a party, other than the debtor, to such contract . . . from accepting performance from or rendering performance to the trustee or to an assignee of such contract."<sup>79</sup>

The Bankruptcy Reform Act of 1978, which contained this provision, became effective on October 1, 1979.<sup>80</sup> It soon became apparent that the drafters had not fully appreciated how this language might be interpreted in a Chapter 11 case—where typically there is no trustee, since the debtor continues to operate its business and manage its property as debtor-in-possession. In such a case, starting from first

---

78. See H.R. DOC. NO. 93-137, at 199 (1973) (committee report). See, e.g., *In re Taylor Mfg., Inc.*, 6 B.R. 370 (Bankr. N.D. Ga. 1980) (holding that a lease of real property was not a personal service that could not be assigned).

79. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 365, 92 Stat. 2549, 2575 (1978).

80. See *id.* § 402, 92 Stat. 2549, 2682.

principles there is little reason to preclude the debtor from assuming his or her own personal services contract and continuing to render the personal services called for. Nevertheless, two early cases literally applied this statute to prevent assumption by a debtor in possession on the ground that applicable law would excuse the nondebtor from accepting performance from a “trustee or an assignee” if there were one.<sup>81</sup>

As early as July 1980, wheels were set in motion to correct the problem with § 365(c)(1)(A). Section 27 of Senate Bill 658 (entitled “An act to correct technical errors, clarify and make minor substantive changes to [the Bankruptcy Code]”) was introduced and proposed to substitute “an entity other than the debtor or the debtor in possession” in lieu of “the trustee” in § 365(c)(1)(A).<sup>82</sup> Both this bill and a successor technical corrections bill introduced in the following Congress<sup>83</sup> fell by the wayside in the press of legislative business, but in 1984 Congress passed the Bankruptcy Amendments and Federal Judgeship Act<sup>84</sup> in order to reconstruct the jurisdictional foundations of the bankruptcy system in the wake of *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*<sup>85</sup> Attached to this legislation as a miscellaneous technical amendment was the change to § 365(c)(1)(A) proposed first in 1980.

Unfortunately, the next court decision on the subject construed the now amended statute to achieve the same objectionable result—precluding a Chapter 11 debtor from assuming its own personal services contract.<sup>86</sup> It turns out that merely substituting “an entity other than the debtor or debtor in possession” for “the trustee” left the critical provision reading: “The trustee may not assume . . . an executory contract . . . if (1)(A) applicable law excuses a party, other than the debtor, to such contract . . . from accepting performance from or rendering performance to an entity other than the debtor or debtor in

---

81. See *In re Harms*, 10 B.R. 817, 822 (Bankr. D. Colo. 1981) (holding that limited partnership agreements were not assumable executory contracts under the Bankruptcy Code); *Government Nat'l Mortgage Corp. v. Adana Mortgage Bankers, Inc. (In re Adana Mortgage Bankers, Inc.)*, 12 B.R. 977, 986 (Bankr. N.D. Ga. 1980) (guaranty agreements).

82. S. 658, 96th Cong. § 27(b) (1980). S. 658 was accompanied by a Committee Report, which optimistically explained the technical change to § 365(c)(1):

This amendment makes it clear that the prohibition against a trustee's power to assume an executory contract does not apply where it is the debtor that is in possession and the performance to be given or received under a personal service contract will be the same as if no petition had been filed.

H.R. Rep. No. 96-1195, § 27(b) (1980).

83. See S. 863, 97th Cong. § 27(b) (1981).

84. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984).

85. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

86. See *Pennsylvania Peer Review Org. v. United States (In re Pennsylvania Peer Review Org.)*, 50 B.R. 640, 645-47 (Bankr. M.D. Pa. 1985).

possession or to an assignee of such contract."<sup>87</sup> Of course this sentence read literally still says that if the nondebtor could refuse to accept performance from an assignee under otherwise applicable law, the contract cannot be assumed in bankruptcy.

In 1986, in connection with the agricultural crisis in the farm belt, Congress turned its attention to the Bankruptcy Code again. And so a second technical amendment to § 365(c)(1)(A) was now attached to the Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986.<sup>88</sup> The technical amendment deleted the phrase "or to an assignee of such contract" leaving the critical provision to now read: "The trustee may not assume . . . an executory contract . . . if (1)(A) applicable law excuses a party, other than the debtor, to such contract . . . from accepting performance from or rendering performance to an entity other than the debtor or debtor in possession."<sup>89</sup> But of course this sentence read literally still provides that "if applicable law excuses" the nondebtor from accepting performance "from a party other than the debtor or the debtor in possession," then the contract may not be assumed. In 1988, in *In re West Electronics, Inc.*, the Third Circuit held that § 365(c)(1)(A) as twice amended still meant that the Chapter 11 debtor could not assume its own contract if that contract were not assignable under otherwise applicable law.<sup>90</sup> The *West Electronics* court made no attempt to ascertain the purpose of the 1984 and 1986 Amendments.

For a while it looked as though *West Electronics* would wither and die in the face of strongly critical cases from several bankruptcy courts and the First Circuit rejecting its holding and finding that the true meaning (if not the literal language) of the 1984 and 1986 Amendments was to clarify that in a Chapter 11 case the debtor-in-possession (but not a trustee or assignee) could assume the debtor's personal service and other non-assignable contracts.<sup>91</sup> But just as relief set in that the §365(c)(1)(A) problem was finally, though not elegantly, taken care of, in *In re Catapult Entertainment, Inc.*, the Ninth Circuit

---

87. Act of Nov. 6, 1978, Pub. L. No. 95-598, § 365, 92 Stat. 2549, 2575, as amended by Act of July 10, 1984, Pub. L. No. 98-353, 98 Stat. 333, 362.

88. Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 283(e), 100 Stat. 3088, 3124 (1986).

89. 11 U.S.C. § 365(c)(1)(A) as amended by Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 283(e), 100 Stat. 3088, 3124 (1986).

90. *In re West Electronics, Inc.*, 852 F.2d 79, 83-84 (3d Cir. 1988).

91. See, e.g., *Summitt Inv. & Dev. Corp. v. Leroux*, 69 F.3d 608 (1st Cir. 1995); *Texaco Inc. v. Louisiana Land & Exploration Co.*, 136 B.R. 658 (M.D. La. 1992) (allowing Chapter 11 debtor to assume mineral leases); *In re Hartec Enters. Inc.*, 117 B.R. 865 (Bankr. W.D. Tex. 1990) (defense contracts).

joined the Third in construing the statute literally to preclude assumption by the debtor of contracts nonassignable under otherwise applicable law.<sup>92</sup> *Catapult Entertainment* settled with certiorari pending and the Supreme Court accordingly dismissed the case but did not vacate the Ninth Circuit decision.<sup>93</sup> After twenty years and two “clarifying amendments” we still have not resolved what would seem an elementary and noncontroversial point of Chapter 11 practice—and the ball is now back in Congress’ hands. One can only hope that the third time is the charm.<sup>94</sup>

The story of § 365(c)(1)(A) reads like the plot of *The Marx Brothers Amend The Bankruptcy Code*. Section 365(c)(1)(A) is an extreme example. But it turns out that botched, incomplete, and tardy amendments are the norm in bankruptcy law. Two less aggravated, but more typical, examples follow.

In *Levit v. Ingersoll Rand Financial Corp.*, the Seventh Circuit created an enormous stir in the bankruptcy field when it held (primarily based on a highly technical parsing of the applicable statutes, but with supporting policy-based arguments) that payments to a third party creditor that reduced an insider’s liability on a guarantee to that creditor constituted a voidable preference recoverable from the third party creditor.<sup>95</sup> The effect of this ruling was to extend the voidable preference period for creditors holding insider guarantees from ninety days (the period applicable to ordinary creditors) to one year (the period applicable for insiders). In the 1994 Amendments, Congress added a new subsection to the Code that narrowly overruled *Levit*.<sup>96</sup>

---

92. *Perlman v. Catapult Entertainment, Inc. (In re Catapult Entertainment, Inc.)*, 165 F.3d 747, 754-55 (9th Cir. 1999).

93. *Perlman v. Catapult Entertainment, Inc.*, 120 S. Ct. 369 (1999). See *United States Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994) (denying motion to vacate judgment below in case mooted by settlement).

94. Congress is in fact revisiting § 365(c)(1)(A), see H.R. 833, 106th Cong. § 305 (1999), even proposing a conforming amendment to § 365(e)(2) to remove the current discontinuity between these two subsections that raises the anomalous possibility of § 365 authorizing *ipso facto* termination of an otherwise assumable executory contract. See *Summitt Inv. & Dev. Corp.*, 69 F.3d at 613 (holding that Congress intended to permit a debtor to avoid automatic termination and noting the “absurd result” that would occur if § 365(e)(2) were read otherwise); *In re Cardinal Indus., Inc.*, 116 B.R. 964, 976-82 (Bankr. S.D. Ohio 1990). The lack of such conforming provisions in the 1984 and 1986 Amendments is perhaps more understandable than the failure to properly word § 365(c)(1)(A), but equally artless. H.R. 833 is a controversial and comprehensive bankruptcy reform bill whose fate remains uncertain as of this writing. A companion bill has passed the Senate without these technical amendments to § 365. See S. 625, 106th Cong. (1999).

95. *Levit v. Ingersoll Rand Fin. Corp.*, 874 F.2d 1186, 1194-99 (7th Cir. 1989). In the bankruptcy community, this notorious case is usually referred to as *DePrizio*, the name of the debtor involved in the case.

96. See Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 202, 108 Stat. 4106, 4121 (codified at 11 U.S.C. § 550 (1994)).

*Levit*, however, had generated much respectable commentary speculating on how far its reasoning reached.<sup>97</sup> Even those who generally approved of the holding in *Levit* on statutory or policy grounds, found the implications of *Levit's* theory of recovery of one person's preference from an initial transferee, who had taken in good faith and for value, troubling. Unfortunately, the 1994 Amendment does nothing to clarify the situation with regard to recovery of indirect preferences, it only reverses the result in the particular case of the insider guarantee.<sup>98</sup> We are left with a statute that arguably implicitly ratifies the least defensible extensions of the *Levit* reasoning, while reversing the *Levit* result.<sup>99</sup> Congress is trying again to address one aspect of the continuing *Levit* problem in a technical amendment attached to pending omnibus bankruptcy reform legislation.<sup>100</sup>

In *Durrett v. Washington National Insurance Co.*, the Fifth Circuit voided a regularly conducted state law foreclosure sale of real property as a constructive fraud on creditors, relying on provisions of the Bankruptcy Act of 1898, substantially carried forward into the Bankruptcy Code, that make transfers by insolvents for less than reasonably equivalent value voidable.<sup>101</sup> Although the literal statutory language was amenable to this construction, the decision appalled real estate lenders who had confidently assumed that so long as they complied with state law foreclosure statutes, foreclosure sales could not be upset because of mere inadequacy of price.<sup>102</sup> The story of the botched attempt in 1984 to overrule *Durrett* by statute is recounted by Justice Souter in dissent in *BFP v. Resolution Trust Corp.*<sup>103</sup> In short, the anti-*Durrett* forces attempted to amend two sections of the Code, one expressly bringing foreclosure sales under fraudulent transfer law and the second to create a safe harbor within the fraudulent transfer stat-

---

97. See, e.g., DOUGLAS G. BAIRD, *THE ELEMENTS OF BANKRUPTCY* 191-92 (rev. ed. 1993).

98. See CHARLES JORDAN TABB, *THE LAW OF BANKRUPTCY* 366-69 (1997).

99. See, e.g., *Roost v. Associates Home Equity Servs., Inc. (In re Williams)*, 234 B.R. 801, 803-04 (Bankr. D. Ore. 1999); Richard C. Josephson, *The DePrizio Override: Don't Kiss Those Waivers Goodbye Yet*, 4 BUS. L. TODAY 40 (1994); Adam A. Lewis, *"Did It or Didn't It"? The DePrizio Dilemma*, 10 AM. BANKR. INST. J. 20 (1995); John C. Murray, *DePrizio Lives (in a Mobile Home in Oregon)*, 18 AM. BANKR. INST. J. 14 (1999); Lawrence Ponoroff, *Now You See It, Now You Don't: An Unceremonious Encore for Two-Transfer Thinking in the Analysis of Indirect Preferences*, 69 AM. BANKR. L.J. 203, 203 (1995); Robert Millner, *Is DePrizio Dead . . . or Just Wounded? Lien Avoidance as a Post-reform Act Remedy for Trilateral Preferences*, LENDER LIABILITY NEWS, May 19, 1995, at 12-13.

100. H.R. 833, 106th Cong. § 1116 (1999); S. 625, 106th Cong. § 1216 (1999).

101. *Durrett v. Washington Nat'l Ins. Co.*, 621 F.2d 201, 203-04 (5th Cir. 1980).

102. See GRANT S. NELSON & DALE A. WHITMAN, *REAL ESTATE FINANCE LAW* 603-04 (3d ed. 1993).

103. *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 553-54 & n.6 (1994) (Souter, J., dissenting).

ute for regularly conducted, non-collusive foreclosures. Only the first change made it into the final statute, with the effect being to entrench *Durrett* rather than overrule it. *Durrett* was finally overruled by the Supreme Court in *BFP* ten years later in the teeth of the literal language of the amendment first proposed by the putative *Durrett* overrulers.<sup>104</sup>

The point from these examples is that the Bankruptcy Code is complicated and amendments often have unintended consequences, or fail in part, or, sometimes, fail completely.<sup>105</sup> This appears to be equally true of amendments overruling textualist or primarily textualist decisions as it is of more pragmatic judicial decisions.<sup>106</sup> Relying on legislation to correct judicial misinterpretations is like relying on surgery to correct ills caused by misprescribed drugs. It is costly, risky, and rarely as efficacious as administering the correct medicine in the first place.

Establishing that overruled decisions are disproportionately textualist is instructive, but not conclusive, on the question of which interpretive method leads to more aggregate error. The vast majority of judicial errors, whether based on textualism, pragmatism, or otherwise, are never corrected; they are acquiesced in because statutory overruling is costly, uncertain, time consuming, and often impracticable. These uncorrected errors might not be disproportionately textualist in origin or the magnitude of the injustice worked by the textualist errors in the aggregate might be less than that of the errors of pragmatists, even if the number of textualist errors is greater. Textualists and pragmatists will predictably disagree on these points. One's intuition here is informed by one's belief in the integrity and competence of the judiciary. The evidence from bankruptcy, however, shows that the clearest and most costly errors—the ones requiring legislative correction—are disproportionately textualist in origin.

---

104. *See id.*; *see also supra* note 11.

105. *See supra* note 63 and accompanying text.

106. No statistically significant relationship (Pearson's  $r = .08$ ) appears between efficacy of overruling and interpretive method. "Textualist" or "primarily textualist" decisions were inefficiently overruled 58 percent of the time as opposed to the overall 62 percent rate of flawed overruling.

## III. SUBSIDIARY FINDINGS

*A. Congress Does Pay Attention To Bankruptcy Court Cases*

A large number of bankruptcy court decisions were identified as the leading authority for an overruled interpretation. Table 2 below summarizes the data.

**TABLE 2: Overruled Cases by Court**

Court	Number	Percent
Supreme Court	7	12%
Court of Appeals	24	41%
District Court	4	7%
Bankruptcy Court	23	40%
Total	58	100%

Recall that the method I adopted provided that whenever a Supreme Court, Court of Appeals, Bankruptcy Appellate Panel, or District Court had adopted the interpretation at issue in a reasoned, published opinion, I would code the opinion from the higher court and disregard the bankruptcy court decision. Nevertheless, twenty-three cases (40%) in the overruled sample are bankruptcy court decisions. While it may in part reflect the law professor's tendency to focus on appellate decisions, I was surprised by this. I imagined that bankruptcy court decisions would have very low visibility with the Congress and that those adversely affected by bankruptcy court decisions would be far more likely to appeal or relitigate the issue in the next case than to seek an amendment from Congress.

In part, the large number of bankruptcy decisions overruled may reflect the difficulty of obtaining appellate review under existing law. I have noted elsewhere that "[i]t is an irony of bankruptcy practice that an order may be nonappealable on finality grounds until it becomes nonappealable on mootness grounds."<sup>107</sup> Although there has been considerable judicial flexibility with respect to appellate review of technically interlocutory orders,<sup>108</sup> that flexibility has produced great

107. Bussel, *supra* note 59, at 1070.

108. The "final judgment rule" bars review of most trial court rulings in the federal system until the conclusion of the litigation on the merits by the entry of judgment. *See* Catlin v. United States, 324 U.S. 229, 233-34 (1945); 15A & B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §§ 3905-3915 (2d ed. 1986 & Supp. 1999). In bankruptcy cases, the rights and liabilities of particular parties are frequently decisively determined before the final resolution of the

confusion.<sup>109</sup> There is less confusion regarding mootness, because the doctrine largely continues to be rigorously applied, creating a substantial barrier to meaningful appellate review.<sup>110</sup>

---

case through confirmation, dismissal, closing, or abstention. See generally *Millers Cove Energy Co. v. Moore* (*In re Millers Cove Energy Co.*), 128 F.3d 449 (6th Cir. 1997); *Vylene Enters., Inc. v. Naugles, Inc.* (*In re Vylene Enters., Inc.*), 968 F.2d 887 (9th Cir. 1992); *In re Saco Local Dev. Corp.*, 711 F.2d 441 (1st Cir. 1983). The Courts of Appeals have not been blind to the fact that rigid application of the final judgment rule in bankruptcy would result in rendering most bankruptcy court rulings unreviewable. See 16 WRIGHT ET AL., *supra*, § 3926.2. See, e.g., *In re Marin Motor Oil, Inc.*, 689 F.2d 445, 448-49 (3d Cir. 1982), *cert. denied*, 459 U.S. 1207 (1983); *Suburban Bank of Cary Grove v. Riggsby* (*In re Riggsby*), 745 F.2d 1153, 1154-55 (7th Cir. 1984); see also *Saco Local Dev. Corp.*, 711 F.2d at 443-45. They have struggled to come up with a “pragmatic” definition of finality appropriate to the bankruptcy process. See *Bonner Mall Partnership v. United States Bancorp Mortgage Co.* (*In re Bonner Mall Partnership*), 2 F.3d 899, 903 (9th Cir. 1993), *cert. dismissed as moot*, 513 U.S. 18 (1994); *Mason v. Integrity Ins. Co.* (*In re Mason*), 709 F.2d 1313, 1318 (9th Cir. 1983). In doing so, they have sought to draw on the traditions of the bankruptcy system itself which, before the Bankruptcy Reform Act of 1978, provided generously for interlocutory appeal. In part, this may reflect bankruptcy’s roots in the English Chancery Court. See 1 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 470-73 (7th ed. 1956). Interlocutory review was liberally available in the English Chancery Court. See *id.* at 438 (permitting review even “upon the most trivial points”). The Bankruptcy Act of 1898 provided for interlocutory review of bankruptcy proceedings, but not “controversies in bankruptcy.” *Saco Local Dev. Corp.*, 711 F.2d at 444-45; *Murphy & Robinson Inv. Co. v. Cross* (*In re Cross*), 666 F.2d 873, 877 (5th Cir. 1982). The “proceeding-controversy” distinction predictably caused substantial confusion. See *In re Brisette*, 561 F.2d 779, 781 (9th Cir. 1977) (characterizing the distinction as “obscure and indefensibly confusing”). The Bankruptcy Reform Act of 1978 seemed to have simplified matters by abolishing the proceeding-controversy distinction and permitting the Courts of Appeals to review all final orders and only final orders without reference to the character of the dispute resolved by the order. But the Courts of Appeals have perpetuated the proceeding-controversy distinction in attempting to sort out what counts as “final” under the current statutes. Orders resolving “proceedings” count as “final” under the modern cases because this permits appeal under the current statutes—and this follows the “tradition” of allowing interlocutory review of such matters under the Bankruptcy Act of 1898. See *Saco Local Dev. Corp.*, 711 F.2d at 445. The Courts of Appeals have also made liberal use of two limited exceptions to the final judgment rule generally known as the “collateral order doctrine,” (see, e.g., *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)), and the *Forgay-Conrad* rule. See *Forgay v. Conrad*, 47 U.S. (6 How.) 201 (1848). The collateral order doctrine permits interlocutory review of a final determination of rights collateral to the case that will be “irreparably” lost if appeal is delayed and which are “too important” to be denied review. The *Forgay-Conrad* rule creates an overlapping category of immediately reviewable orders—those which result in the immediate and permanent disposition of property. In addition, the Supreme Court has held that, as in nonbankruptcy federal civil litigation, 28 U.S.C. § 1292(b) allows the Courts of Appeal to accept certified appeals from the federal district courts in their discretion. See *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 254 (1992); see also *infra* note 109.

109. The combination of the traditional rigid final judgment rule and the expansive scope of the many “exceptions” and “pragmatic interpretations” available and liberally applied in bankruptcy cases leads predictably to chaos. Almost no order rendered by a bankruptcy court is “truly” final, and so, if the appellate court wills it, then review under the final judgment rule can be denied. Almost any order, however, can, if the appellate court wills it, be fitted within one of the pragmatically created and applied exceptions.

The finality of district court dispositions of interlocutory bankruptcy court decisions creates nice logical puzzles. The jurisdictional statutes authorize discretionary interlocutory review in the district court or the bankruptcy appellate panels. See 28 U.S.C. §§ 158(a) & (b) (1994). If the district court “finally” disposes of the matter by reversing an interlocutory order of the bankruptcy court,

then can the district court order be reviewed under the final judgment rule? Theoretical possibilities abound, but the Courts of Appeals have generally resisted assuming jurisdiction in this situation. See, e.g., *In re Brown*, 916 F.2d 120, 124 (3d Cir. 1990). The most perplexing difficulty is determining the finality of a district court disposition of an appeal from a final bankruptcy court order. If the district court simply affirms a final bankruptcy court order, the district court action is clearly final as well, and appealable. But if the district court reverses and remands, there is considerable confusion in the cases regarding the finality of the district court action and accordingly the appellate jurisdiction of the Court of Appeals. *Collier*, opting for understatement, notes inter- and intra-circuit splits on the question and describes it as "unresolved." 1 COLLIER ON BANKRUPTCY ¶ 5.09[1], at 5-36 (15th ed. 1996). See, e.g., *Orix Credit Alliance, Inc. v. Delta Resources, Inc.* (*In re Delta Resources, Inc.*), 54 F.3d 722, 727 (11th Cir.) (requiring "significant judicial activity" on remand renders district court order interlocutory), *cert. denied*, 516 U.S. 980 (1995); *Conroe Office Bldg. Ltd. v. Nichols* (*In re Nichols*), 21 F.3d 690, 692 (5th Cir. 1994) (denying review of district court order regarding automatic stay); *Bonner Mall Partnership*, 2 F.3d at 903-04 (determining appealability by difficult balancing of competing policies), *cert. dismissed as moot*, 513 U.S. 18 (1994); *In re West Elecs., Inc.*, 852 F.2d 79, 81-82 (3d Cir. 1988) (explaining that pragmatic approach requires appellate review of important question notwithstanding remand to bankruptcy court); *Riggshy*, 745 F.2d at 1155-56 (holding that remand order is not final); see generally John P. Hennigan, *Toward Regularizing Appealability in Bankruptcy*, 12 BANKR. DEV. J. 583 (1996).

The result of all this is great confusion and ad hocery. Jurisdiction seems to turn on the particular appellate court's perception of the "importance" of a particular decision and its effect on the losing party below. And under the "cumulative finality" principle, an order's finality can be determined by events subsequent to its entry. See *In re Szekely*, 936 F.2d 897, 900 (7th Cir. 1991). Many judges and commentators have noted the untoward effects of the existing ambiguity over the Courts of Appeals' jurisdiction. See 16 WRIGHT ET AL., *supra* note 108, at § 3926; Edith H. Jones, *Bankruptcy Appeals*, 16 T. MARSHALL L. REV. 245, 253 (1991) (discussing "bewildering array of decisions on finality"); Preston T. Towber, *A Uniform Approach To Determining Finality in Bankruptcy Appeals Under 28 U.S.C. Section 158(d)*, 29 S. TEX. L. REV. 587, 587-589 (1988) (discussing "jurisdictional quagmire"); see also *In re Market Square Inn, Inc.*, 978 F.2d 116, 124 (3d Cir. 1992) (Stapleton, J., dissenting) ("[I]t is time for our court to review our jurisprudence and give some content to the concept of finality in bankruptcy cases. The current situation is intolerable."); accord *In re BH & P, Inc.*, 949 F.2d 1300, 1319-20 (3d Cir. 1991) (Hutchinson, J., concurring and dissenting). The National Bankruptcy Review Commission advocates broadening appellate review of interlocutory bankruptcy court orders. See National Bankruptcy Review Commission Report, at Rec. 3.1.4 reprinted in COLLIER, APP. G, *supra* note 46.

The availability of interlocutory review of district court decisions (but not BAP decisions) under § 1292(b) is a possible route for resolution of some important legal questions that arise in interlocutory orders. But § 1292(b) is viewed by the Article III courts as reserved for exceptional matters. See 16 WRIGHT ET AL., *supra* note 108, at §§ 3929-30 (noting inter alia "sparing utilization" of certification procedure); see also Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 HARV. L. REV. 607, 607-08 nn. 5 & 6 (1975). There appear to have been only approximately fourteen such appeals accepted in bankruptcy cases in the more than seven years between March 10, 1992 and August, 1999. I determined the number of § 1292(b) appeals by searching LEXIS, BKRTCY library, COURTS file (Search Terms: 1292(b) and DATE AFT 3/10/92) and identifying the cases in that search that involved § 1292(b) appeals that had been accepted by the Courts of Appeals. This methodology assumes that the Courts of Appeals will cite § 1292(b) when deciding an appeal under that subsection, a logical and customary reference, but not inevitable. I selected the March 10, 1992 date because before *Connecticut National Bank v. Germain*, 503 U.S. 249 (1992), there was a substantial question in the lower federal courts whether the § 1292(b) certification procedure was available in bankruptcy cases.

110. Traditional statements of the bankruptcy mootness doctrine can be found in *In re Continental Airlines*, 91 F.3d 553, 565 (3d Cir. 1996) (en banc), *cert. denied*, 519 U.S. 1057 (1997); *Onouli-Kona Land Co. v. Richards* (*In re Onouli-Kona Land Co.*), 846 F.2d 1170, 1172-73 (9th Cir. 1988); *In re AOV Indus., Inc.*, 792 F.2d 1140, 1148 (D.C. Cir. 1986); *In re Abbotts Dairies*, 788 F.2d

Alternatively, Congress may, presumably at the behest of affected constituencies, simply be unusually proactive in identifying bankruptcy court decisions that reveal a need for clarifying amendments, even in situations where Court of Appeals review might be available. In any event, whether or not owing to lack of access to appellate review, it does appear that those adversely affected by bankruptcy court decisions have more than occasionally successfully obtained relief from Congress, thereby bypassing the appeals route altogether.

### *B. Geography Matters*

One striking additional finding from this research is that the incidence of overruled decisions is not randomly distributed across the nation. While there were insufficient numbers of cases to compare the incidence of overruling on a circuit-by-circuit basis, it is apparent on a regional basis that cases from the Northeast are substantially over-represented in the overruled group and cases from the West are substantially under-represented.

In order to perform a chi-square test to establish the statistical significance of this geographic difference, I classified all overruled cases from any court (bankruptcy court, district court, and court of appeals) within the jurisdiction of the First, Second, Third, and District of Columbia Circuits as "Northeast." Similarly, cases from the Fourth, Fifth, and Eleventh Circuits were classified as "South," the Sixth, Seventh, and Eighth Circuits became "Midwest," and the Ninth and Tenth Circuits, "West." The results are summarized in Table 3.

---

143, 150 n.6 (3d Cir. 1986); *Trone v. Roberts Farms, Inc. (In re Roberts Farms, Inc.)*, 652 F.2d 793, 798 (9th Cir. 1981); 13A WRIGHT ET AL., *supra* note 108, § 3533.2. Perhaps in the last few years appellate courts have begun to exhibit more willingness to review appeals from unstayed confirmation orders. See, e.g., *In re 203 North LaSalle Street Partnership*, 126 F.3d 955, 961 (7th Cir. 1997), *rev'd on other grounds*, 119 S. Ct. 1411 (1999).

**TABLE 3: Overruled and Control Groups by Region**

Region	Control Group	Overruled Cases	Difference*
Northeast	14%	41%	+27%
Midwest	21%	29%	+8%
South	27%	18%	-9%
West	39%	12%	-27%
			Sum
N	52	51**	103
* p < .001 (chi-square)			
** 7 overruled Supreme Court cases not classified in any region.			

The differences in regional distribution between the overruled and control groups is statistically significant at the .001 level. The magnitude of the under-representation of overruled cases arising in the South is modest, as is the overrepresentation of cases from the Midwest. But the magnitude of over-representation of Northeast cases and under-representation of West cases is very large and calls for explanation. More than three times the percentage of cases from the Northeast appear in the overruled group as in the control. Further analysis indicates that with a 95% level of confidence one can predict that between 1.7 and 11.9 times as many cases from the Northeast appear in the overruled cases as would result from random selection.<sup>111</sup>

This regional skewing within the overruled group raises the possibility that the observed difference in method between the control and overruled groups is actually driven by region rather than method. Thus, if, for reasons independent of method, cases from the Northeast are more likely to be overruled, *and* Northeastern courts are more likely to be textualist, then the disproportionate number of textualist decisions in the overruled group could be owing to where the cases originate from rather than how they are reasoned.

In fact, this is not so. Table 4 shows that across all regions, overruled decisions are more textualist in nature than control cases. These differences are statistically significant in all regions except the West, where the small number of overruled cases makes statistical

---

111. The odds of any given overruled case being from the Northeast region are 21:30. Within the control group the odds are 7:45. The ratio between these two figures is 4.5:1. The Cochran-Mantel-Haenszel test statistic reveals that this disparity between the control and overruled groups is statistically significant at the .001 level. One can be 95% confident that the actual disparity in the number of Northeast region cases between the overruled group and the whole universe from which the control was drawn is between 1.7:1 and 11.9:1.

comparison difficult. Nevertheless even in the West, the overruled cases appear to be on average more textualist in nature.<sup>112</sup>

**TABLE 4: Overruled and Control Groups Mean Method Rating by Region**

Cell entries are means of interpretation scores, 1=Textualist, 5=Pragmatic (Figures in parentheses are numbers of cases per cell.)			
Region	Control Group	Overruled Cases	Difference
Northeast	4.5 (6)	2.3 (18)	-2.2
Midwest	3.5 (10)	2.1 (15)	-1.4
South	3.7 (14)	1.9 (7)	-1.8
West	3.6 (19)	2.4 (5)	-1.2
TOTAL	3.7 (49)	2.2 (45)	-1.5

Having ruled out regional differences in the use of textualism as the explanation for the regional skewing, I tentatively suggest five possible cumulative explanations for the observed regional disparity. First, the over-representation from the Northeast may be an artifact of the selection of “leading cases” for analysis as the overruled group. It may be that “leading cases” disproportionately come from the Northeast. Second, courts in the South and especially the West, whether through superior judicial decisionmaking, or otherwise, may decide fewer cases in need of legislative correction. Third, Northeast decisions in need of legislative correction may be more visible to Congress either because of geographic proximity or because powerful constituencies are more affected by such decisions. Certainly the elite bankruptcy bar, banking, and securities industries continue to be centered in New York and may be less sanguine about living with adverse Second Circuit decisions than decisions elsewhere. Fourth, this North-

---

112. This result is confirmed by analysis of variance using group and region as independent variables and mean method rating as a continuous dependent variable. Again, the means of the control and overruled groups are significantly different ( $p < .0001$ ), but there is no main effect for region ( $p = .419$ ), nor for the region by group interaction ( $p = .606$ ). Overall, interpretive style did not differ across regions (as indicated by the non-significant main effect for region), and more importantly, the differences between the overruled and control groups did not change significantly across the four regions (as indicated by the non-significant interaction between the independent variables).

eastern view of the world may be reinforced by the well-documented concentration of very large bankruptcy reorganization cases in the Southern District of New York and Delaware.<sup>113</sup> The stakes are higher if the Second or Third Circuit errs badly because more of the very largest cases fall within their jurisdiction. Finally, the West is dominated by the very large Ninth Circuit, whose decisions, it has been noted, have during much of the period under study been disproportionately corrected by the Supreme Court rather than the Congress.<sup>114</sup>

### C. Timing Matters

The overruled group disproportionately includes older cases. Given that the median amount of time between decision and superseding amendment for the cases on Appendix I is three years and that the last major amendment to the Code was in 1994,<sup>115</sup> one would expect to see very few post-1994 cases in the overruled group. Indeed, there are none. On the other hand, there were increasing numbers of bankruptcy cases, bankruptcy appeals, and certiorari petitions in bankruptcy cases throughout this period, suggesting an overrepresentation of later cases in the control group.<sup>116</sup>

It is nevertheless noteworthy that in the period 1979-1984, twenty-two cases (38%) destined for overruling were decided while only four cases (8%) from the control group date from this period. The overruled group also includes eighteen cases (31%) from 1985-1989 as compared to thirteen (25%) in the control. From 1990-1994 there are eighteen overruled cases (31%) and thirty-five control cases (67%). A

---

113. See Lynn M. LoPucki, *The Trouble With Chapter 11*, 1993 WIS. L. REV. 729, 754 n.107; Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large Publicly-Held Firms*, 1991 WIS. L. REV. 11, 26-33. I note that six of the fifty-eight cases in the overruled group involve debtors with assets exceeding \$100 million while there were three such cases (yielding four opinions for analysis) in the fifty-two case control group. Compare *infra* Appendices I & III, with Lynn M. LoPucki, Bankruptcy Research Database, CaseName Field (unpub. database updated Sept. 25, 1999) (on file with author).

114. See, e.g., David G. Savage, *Ninth Circuit Maintains Reversal Record*, L.A. TIMES, July 3, 1995, at A5.

115. See Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106.

116. In Statistical Year 1982, there were 367,866 bankruptcy cases and 509 bankruptcy appeals filed in the Courts of Appeals. See ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 199, 388 tbl. F-1, B-3 (1982). The mean annual number of petitions for certiorari filed from 1982-1984 and classified as bankruptcy cases by *U.S. Law Week* was thirty-five. See Daniel J. Bussel, Bankruptcy Certiorari Cases (unpub. database created 1999) (on file with author). In Statistical Year 1998, there were 1,436,964 bankruptcy cases and 1203 bankruptcy appeals filed. See *Administrative Office of the United States Courts* <<http://www.uscourts.gov/dir rpt98/index.html>> tbl. F-1, B-3. The mean annual number of cases on certiorari for 1995-1997 was fifty-five. See Daniel J. Bussel, Bankruptcy Certiorari Cases 1982-1998 (unpub. database created 1999) (on file with author).

chi-square test establishes that these differences are statistically significant at the .001 level.

Again, the differences between the control and overruled groups in the 1990s may simply reflect the fact that not enough time has passed for Congress to overrule a fully proportionate share of recent decisions, and it may still get around to it. On the other hand, the relatively large number of overruled cases in the 1979-1984 period may be a reflection of the inevitable learning period for courts, litigants, and Congress in implementing and administering a complex new statute. Given these considerations, it is somewhat surprising that almost as many overruled cases date from the period 1990-1994 as during this initial learning phase. Since textualism is associated with overruling, perhaps the prominent rise of textualism in the late 1980s accounts in part for this observation.

#### *D. Constituency Adversely Affected Probably Matters*

In designing this research, I hypothesized that decisions adversely affecting bankruptcy trustees and debtors were less likely to be overruled by statute because of the absence of a powerful political constituency capable of enlisting the political support necessary to amend the Code.<sup>117</sup> This hypothesis was weakly supported by the data. Table 5 classifies the overruled and control groups by prevailing party.

**TABLE 5: Overruled and Control Groups  
by Prevailing Party**

Prevailing Party	Control Group	Overruled Cases	Difference
Debtor	35%	48%	+13%
Trustee	6%	13%	+7%
Other	60%	39%	-21%
			Sum
N	52	54*	106

\*Four overruled cases not involving debtor or bankruptcy trustee as party-litigant excluded.  $p = .085$  (chi-square);  $p = .05$  (Mantel-Haenszel).

Table 5 indicates that, as hypothesized, cases in which the debtor or trustee prevailed were somewhat over-represented in the overruled group where 48 percent of the cases could be characterized

117. In the bankruptcy context, debtors and trustees roughly correspond to the "diffuse citizenry" that fared poorly in overriding adverse Supreme Court decisions in the Eskridge study. See Eskridge, *Overriding*, *supra* note 3, 348-49, 351-52.

as debtor victories and 13 percent as trustee victories. In the control group the comparable percentages are 35 percent and 6 percent respectively. This finding is at the borderline of statistical significance at the conventional .05 level.<sup>118</sup> When the figures for debtors and trustees are aggregated and compared against the number of non-debtor, non-trustee prevailing parties in Table 6 below, the result is significant at the .05 level.<sup>119</sup> Nevertheless, neither the magnitude of the disparity nor the probability level associated with these findings provides a high degree of assurance that the result is non-random.

**TABLE 6: Overruled and Control Groups by Prevailing Party-Debtor and Trustee Aggregated**

Prevailing Party	Control Group	Overruled Cases	Difference
Debtor or Trustee	40%	61%	+21%
Other	60%	39%	-21%
			Sum
N	52	54*	106

\*Four overruled cases not involving debtor or bankruptcy trustee as party-litigant excluded.  $p = .033$  (chi-square);  $p = .051$  (Fisher's exact 2-tail test).

*E. Judges' Gender, Season, Chapter, Separate Writing Do Not Matter*

In the course of reading and summarizing the overruled and control cases, I gathered information regarding (a) the gender of the writing judges, (b) the month the decision was published, (c) the Bankruptcy Code chapter under which the case was filed, and (d) the existence of any separate writing. For purposes of statistical analysis, comparing the overruled and control groups on a month-by-month basis was infeasible because of the size of the samples. I did, however, perform a chi-square test for the two groups based on the calendar quarter in which the decision was published.

No statistically significant difference existed between control and overruled groups with respect to the judges' gender or the calendar quarter of decision. Indeed, the results appear to be purely random for these factors. This result is reassuring, as I had no particular

118. The probability of this disparity occurring randomly is  $p = .085$  (chi-square);  $p = .05$  (Mantel-Haenszel).

119. The probability of this disparity occurring randomly is  $p = .033$  (chi-square);  $p = .051$  (Fisher's exact 2-tail test).

reason to think that these factors would be significantly related with the incidence of overruling.

More disappointing, I found no statistically significant relationship between separate writing and overruling.<sup>120</sup> Accordingly, there is no evidence to support my initial hypothesis that decisions that sufficiently troubled Congress to warrant overruling were more likely to elicit dissent or separate concurrence when decided. In fact, the raw data may suggest quite the contrary. Only one Court of Appeals decision of the twenty-four such cases in the overruled group<sup>121</sup> provoked separate writing while seven of the fifty-two Court of Appeals cases in the control group did. The chi-square test establishes that this disparity is not statistically significant,<sup>122</sup> but nevertheless these data seem to undercut one classic rationale for separate writing—drawing the attention of the legislature to a problem to encourage improvement of the law through new legislation. Congress appears to be moved by results it disapproves of rather than dissenting or concurring opinions.

The chi-square test was also unable to establish a statistically significant relationship between Bankruptcy Code chapter and incidence of overruling, but the results suggest Chapter 13 cases may be somewhat more likely to be overturned.

---

120. This finding is in sharp contrast to that of Professor Eskridge in his analysis of overruled Supreme Court decisions. See Eskridge, *Overriding*, *supra* note 3, at 350 & tbl. 8 ("Decisions subject to judiciary committee scrutiny were much more likely to have a dissenting opinion and to reflect close division on the Court; this was particularly true of decisions that were ultimately overridden."). These divergent results may arise because of the different time periods covered by the studies, or perhaps more likely, because unanimous or near-unanimous Supreme Court decisions receive greater legislative deference than the lower federal court decisions analyzed here.

121. Overruled bankruptcy court and district court decisions written by a single judge, and overruled Supreme Court decisions, which predictably have a much higher rate of separate writing on account of the larger size of the Court and its stronger tradition of separate writing, have been excluded from this analysis. If these additional cases are included, however, the chi-square test still fails to establish statistically significant differences between the groups.

122.  $p = .16$  (chi-square).

**TABLE 7: Overruled and Control Groups by Chapter**

Chapter	Control Group	Overruled Cases	Difference*
Chapter 7	29%	37%	+8%
Chapter 9	0%	2%	+2%
Chapter 11	61%	46%	-15%
Chapter 12	2%	0%	-2%
Chapter 13	8%	16%	+8%
			Sum
N	51**	57**	108

\* Differences among chapters not significant,  $p = .28$  (chi-square).  
 \*\* Two cases (one in each group) excluded because the chapter could not be determined from the opinion or because cases under different chapters had been consolidated on appeal.

Note that twice as many Chapter 13 cases appear in the overruled group as in the control. The chi-square test establishes that the probability of this result occurring is between .28 (including Chapters 9 and 12 data) and .22 (excluding Chapters 9 and 12 data). While the disproportion observed in the number of overruled Chapter 13 cases therefore fails to meet conventional standards of statistical significance, the observed disproportion is substantial enough to warrant further investigation. One reason to expect an over-representation of Chapter 13 cases in the overruled group is that Chapter 13 cases are less likely to be appealed to the Courts of Appeals and therefore under-represented in a control group drawn exclusively from such cases, while the converse may be true for Chapter 11 cases given the generally greater stakes involved. In reviewing an early draft of this Article, Judge Lisa Hill Fenning suggested that another reason to expect more superseding amendments arising out of the Chapter 13 cases is that Chapter 13 was engrafted upon a Bankruptcy Code drafted primarily with reference to the long experience and predominant influence of sophisticated business bankruptcy professionals and with relatively little input from consumer-oriented professionals. I suspect there is something to this suggestion.

#### IV. CONCLUSION

The evidence drawn from the last twenty years' experience interpreting the Bankruptcy Code is that textualism disproportionately leads to bad decisions (from the perspective of the policy preferences of

the political branches) that result in costly, time-consuming, and inefficient statutory overrulings.

My infant son Eli Javier and I play blocks together. While Eli watches, I meticulously construct a tower out of his blocks. He then crawls over and knocks the tower over. I then rebuild it and Eli then knocks it over again. And again, again, and again. Notwithstanding my substantial advantages in size, experience, and (arguably) coordination, Eli always wins the game because it is much easier to knock over a tower of blocks than to build one. There are risks to bystanders in this game. Often one of Eli's older sisters (or, worst case scenario, his mother) will stumble over the blocks strewn over the family room floor. Although Eli and I nevertheless find this an amusing little game, I hold out high hopes that some day we can actually work together to build a tower that remains standing.

And I hold out the same hopes for Congress and the courts with respect to federal bankruptcy policy. In general, these instances of statutory overrulings in which I have immersed myself are examples of Congress unnecessarily rebuilding some part of the structure of bankruptcy policy that a court has knocked over, sometimes rather casually. It may be amusing to watch Congress fumble around trying to rewrite the statute to get it right. But in the meantime debtors, creditors, and their lawyers must walk gingerly among the ruins.

If we can agree that Congress and the courts should work together to achieve the most sensible and effective statutory scheme possible, the evidence is that over time pragmatic interpretation appears more likely to lead to that result than textualism. Analysis of random bankruptcy cases indicates that pragmatic interpretive methods continue to be the norm in the bankruptcy field. Comparison of the random cases to the overruled ones indicates that pragmatism should remain the dominant mode of statutory construction, at least in bankruptcy cases, even though many nonbankruptcy scholars and judges have assumed or suggested that bankruptcy was one area where textualism might actually yield better results than pragmatism because of the existence of a comprehensive and carefully drafted Code.

**APPENDIX I**  
**Bankruptcy Cases Superseded by Statute 1979-1998**

\* Indicates amendment failed in whole or in part or left related issues unresolved or had unintended consequences.

† Indicates five or more years elapsed between leading decision and amendment.

**A. Textualist**

- \*1. Rake v. Wade, 508 U.S. 464 (1993) (oversecured home mortgagee entitled to interest on arrearages including compound interest not available under mortgage terms), *superseded by* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 305, 108 Stat. 4106, 4134 (codified at 11 U.S.C. §§ 1123(d), 1222(d), 1322(e) (1994)).
- \*2. Pennsylvania Dep't of Pub. Welfare v. Davenport, 495 U.S. 552 (1990) (criminal restitution obligations dischargeable under Chapter 13), *superseded by* Crime Control Act of 1990, Pub. L. No. 101-647, § 3102(b), 104 Stat. 4789, 4916 (codified at 11 U.S.C. § 1328(a)(2) (1994)), *and re-amended by* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 302, 108 Stat. 4106, 4132 (codified at 11 U.S.C. § 1328(a)(3) (1994)).
3. United States Trustee v. Columbia Gas Sys. Inc. (*In re Columbia Gas Sys., Inc.*), 33 F.3d 294 (3d Cir. 1994) (absent bond trustee must invest in government securities or insured deposit accounts), *superseded by* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, §210, 108 Stat. 4106, 4125 (codified at 11 U.S.C. § 345(b) (1994)).
- †\*4. Hillis Motors, Inc. v. Hawaii Auto Dealers' Ass'n, 997 F.2d 581 (9th Cir. 1993) (state regulators asserting control over property of the estate not excepted from automatic stay), *superseded by* Omnibus Consolidated and Emergency Appropriations Act of 1998, Pub. L. No. 105-277, § 603, 112 Stat. 2681, 2681-86 (codified at 11 U.S.C. § 362(b)(4) (Supp. 1998)).
- \*5. City Nat'l. Bank v. Chabot (*In re Chabot*), 992 F.2d 891 (9th Cir. 1993) (judgment lien burdening future appreciation of exempt property does not impair exemption), *superseded by* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 303, 108 Stat. 4106, 4132 (codified at 11 U.S.C. § 522(f) (1994)).
- †6. Ford Motor Credit Corp. v. Dixon (*In re Dixon*), 885 F.2d 327 (6th Cir. 1989) (judicial lien does not impair homestead exemp-

- tion), *superseded by* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 310, 108 Stat. 4106, 4137 (codified at 11 U.S.C. § 522(f) (1994)).
- †\*7. *Central Nat'l Bank & Trust Co. v. Liming (In re Liming)*, 797 F.2d 895 (10th Cir. 1986) (non-purchase money lien in tractor avoidable without regard to value), *superseded by* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 310, 108 Stat. 4106, 4137 (codified at 11 U.S.C. § 522(f) (1994)).
- \*8. *Johnson v. Vanguard Holding Corp. (In re Johnson)*, 708 F.2d 865 (2d Cir. 1983) (successive Chapter 13 filings within six months permitted notwithstanding failure to appear in first case), *superseded by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 301, 98 Stat. 333, 352 (codified at 11 U.S.C. § 109(g) (1994)).
9. *In re Covey*, 650 F.2d 877 (7th Cir. 1981) (creditors holding disputed claims may join involuntary petition), *superseded by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 426, 98 Stat. 333, 369 (codified at 11 U.S.C. § 303(b)(1) (1994)).
- \*10. *Durrett v. Washington Nat'l Ins. Co.*, 621 F.2d 201 (5th Cir. 1980) (real estate foreclosure sale avoidable as constructive fraud), *failed attempt to supersede by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 421(i), 98 Stat. 333, 368, (codified at 11 U.S.C. § 101(54) (1994)), *overruled by* *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994).
- \*11. *In re New Valley Corp.*, 168 B.R. 73 (Bankr. D.N.J. 1994) (unimpaired claims against solvent estate not entitled to post-petition interest), *superseded by* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 213(d), 108 Stat. 4106, 4126 (deleting former 11 U.S.C. § 1124(3) (1994)).
12. *In re Hausladen*, 146 B.R. 557 (Bankr. D. Minn. 1992) (en banc) (tardily filed claims allowed), *superseded by* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 213(a), 108 Stat. 4106, 4125-26 (codified at 11 U.S.C. §§ 502(b)(9) & 726(a)(1) (1994)).
- †13. *Richardson v. Chrysler First Fin. Servs. Corp. (In re Richardson)*, 102 B.R. 254 (Bankr. M.D. Fla. 1989) (reaffirmation hearing required even if attorney files declaration in conformity with § 524(c)), *superseded by* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, §103, 108 Stat. 4106, 4108 (codified 11 U.S.C. § 524 (1994)).
- \*14. *Pennsylvania Peer Review Org. v. United States (In re Pennsylvania Peer Review Org.)*, 50 B.R. 640 (Bankr. M.D. Pa. 1985) (personal services contract may not be assumed by debtor

- in possession without nondebtor party's consent), *superseded by* Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 283(e), 100 Stat. 3088, 3117 (codified at 11 U.S.C. § 365(c) (1994)).
- †\*15. *In re Lyons Mach. Co., Inc.*, 28 B.R. 600 (Bankr. E.D. Ark. 1983) (creditors' committee members not entitled to expense reimbursement), *superseded by* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 110, 108 Stat. 4106, 4113 (codified at 11 U.S.C. § 503(b)(3) (1994)).
16. *In re Spirited, Inc.*, 23 B.R. 1004 (Bankr. E.D. Pa. 1982) (shareholders retaining their shares are deemed to reject because plan does not provide "payment or compensation" to interest holders), *superseded by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 510(d), 98 Stat. 333, 386 (codified at 11 U.S.C. § 1126(g) (1994)).
17. *In re Wahl*, 14 B.R. 153 (Bankr. E.D. Wis. 1981) (each knife, fork and spoon in sterling silver set is an item individually subject to \$200 limit without aggregate limit), *superseded by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 306, 98 Stat. 333, 353 (codified at 11 U.S.C. § 522(d) (1994)).
18. *Buffalo Sav. Bank v. Marston Enters., Inc. (In re Marston Enters., Inc.)*, 13 B.R. 514 (Bankr. E.D.N.Y. 1981) (presumed acceptance of plan is rebuttable if majority of unimpaired class vote to reject plan), *superseded by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, §§ 510, 512(a)(9), 98 Stat. 333, 387 (codified at 11 U.S.C. §§ 1126(f), 1129(a)(10) (1994)).
- \*19. *Government Nat'l Mortgage Corp. v. Adana Mortgage Bankers, Inc. (In re Adana Mortgage Bankers, Inc.)*, 12 B.R. 977 (Bankr. N.D. Ga. 1980) (personal services contract may not be assumed by debtor-in-possession without nondebtor party's consent), *superseded by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 362, 98 Stat. 333, 361-63 (codified at 11 U.S.C. § 365(c) (1994)).

## B. Primarily Textualist

- †\*20. *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365 (1988) (no post-petition adequate protection payments to undersecured creditor based on use value of collateral), *superseded by* Bankruptcy Reform Act of 1994, Pub.

- L. No. 103-394, § 218(b), 108 Stat. 4106, 4128 (codified at 11 U.S.C. § 362(d)(3) (1994)).
21. *United States v. Vecchio (In re Vecchio)*, 20 F.3d 555 (2d Cir. 1994) (late filed priority claims retain priority status subject to equitable discretion of bankruptcy court not to compel disgorgement), *superseded by* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 213, 108 Stat. 4106, 4125-26 (codified at 11 U.S.C. § 726(a)(1) (1994)).
22. *Midatlantic Nat'l Bank v. DeSeno (In re DeSeno)*, 17 F.3d 642 (3d Cir. 1994) (home mortgage may be modified under Ch.11 plan), *superseded by* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 206, 108 Stat. 4106, 4123 (codified at 11 U.S.C. § 1123(b)(5) (1994)).
23. *In re Rosteck*, 899 F.2d 694 (7th Cir. 1990) (post-petition condominium assessments dischargeable), *superseded by* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 309, 108 Stat. 4106, 4137 (codified at 11 U.S.C. § 523(a)(16) (1994)).
- †24. *Lincoln Sav. Bank v. Suffolk County (In re Parr Meadows Racing Ass'n)*, 880 F.2d 1540 (2d Cir. 1989) (post-petition tax liens void under § 362(a)), *superseded by* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 116, 108 Stat. 4106, 4119 (codified at 11 U.S.C. § 362(b)(9) (1994)).
- †\*25. *Levit v. Ingersoll Rand Fin. Corp.*, 874 F.2d 1186 (7th Cir. 1989) (creditor holding insider guarantee subject to extended preference period as the initial transferee of insider preference), *superseded by* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 202, 108 Stat. 4106, 4121 (codified at 11 U.S.C. § 550(c) (1994)).
- †\*26. *Goldrich v. New York State Higher Educ. Serv. Corp. (In re Goldrich)*, 771 F.2d 28 (2d Cir. 1985) (state agency may deny student loan application based on prior bankruptcy discharge of other loans), *superseded by* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 313, 108 Stat. 4106, 4140 (codified at 11 U.S.C. § 525(c) (1994)).
- †\*27. *Mansfield Tire & Rubber Co. v. Pension Benefit Guar. Corp.*, 39 B.R. 974 (N.D. Ohio 1983) (PBGC ineligible to serve on creditors' committees), *superseded by* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 106, 108 Stat. 4106, 4111 (codified at 11 U.S.C. § 101(41) (1994)).
28. *City of Akron v. Jackson (In re Jackson)*, 77 B.R. 120 (Bankr. N.D. Ohio 1987) (damages arising out of drunk driving accident dischargeable unless tort action commenced prepetition), *superseded by* Criminal Victims Protection Act of 1990, Pub. L.

- No. 101-581, § 2, 104 Stat. 2865, 2865 (codified at 11 U.S.C. §§ 523(a)(9) & 1328(a)(2) (1994)), *and* Crime Control Act of 1990, Pub. L. No. 101-647, § 3102(a), 104 Stat. 4789, 4916 (codified at 11 U.S.C. §§ 523(a)(9) & 1328(a)(2) (1994)).
- †29. *Swiss Air Transp. Co. v. Texas Int'l Airlines, Inc. (In re Continental Airlines Corp.)*, 57 B.R. 854 (Bankr. S.D. Tex. 1985) (§ 1110 does not protect non-purchase money security interest), *superseded* by Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 201(a), 108 Stat. 4106, 4119 (codified at 11 U.S.C. § 1110 (1994)).
- \*30. *In re Broadcast Mgmt. Corp.*, 36 B.R. 519 (Bankr. S.D. Ohio 1983) (creditors' committee counsel may not represent individual creditor in same proceeding), *superseded* by Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 324, 98 Stat. 333, 358 (codified at 11 U.S.C. § 1103(b) (1994)).
- \*31. *Sombrero Reef Club, Inc. v. Allman (In re Sombrero Reef Club, Inc.)*, 18 B.R. 612 (Bankr. S.D. Fla. 1982) (timeshare contracts may be rejected and timeshare owner divested of right to use premises), *superseded* by Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, §§ 402-404, 98 Stat. 333, 367 (codified at 11 U.S.C. §§ 365(h)(i) (1994)).

### C. Both Textualist and Pragmatic

- \*32. *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992) (federal government immune from suit for affirmative monetary recovery), *superseded* by Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 113, 108 Stat. 4106, 4117 (codified at 11 U.S.C. § 106(a) (1994)).
- \*33. *First Nat'l Fidelity Corp. v. Perry*, 945 F.2d 61 (3d Cir. 1991) (Chapter 13 debtor may not restructure home mortgage debt over life of Chapter 13 plan even if balance becomes due during plan period), *superseded* by Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 301, 108 Stat. 4106, 4131 (codified at 11 U.S.C. § 1322(c) (1994)).
34. *Lugo v. Paulsen*, 886 F.2d 602 (3d Cir. 1989) (insurance surcharge on account of drunk driving nondischargeable), *superseded* by Criminal Victims Protection Act of 1990, Pub. L. No. 101-581, § 2, 104 Stat. 2865, 2865 (codified at 11 U.S.C. §§ 523(a)(9) & 1328(a)(2) (1994)), *and* Crime Control Act of 1990, Pub. L. No. 101-647, § 3102(a), 104 Stat. 4789, 4916 (codified at 11 U.S.C. §§ 523(a)(9) & 1328(a)(2) (1994)).

- \*35. *Gusam Restaurant Corp. v. Speciner (In re Gusam Restaurant Corp.)*, 737 F.2d 274 (2d Cir. 1984) (court lacks power to sua sponte convert Chapter 11 case to Chapter 7), *superseded by* Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 203, 100 Stat. 3088, 3097 (codified at 11 U.S.C. § 105(a) (1994)).
- \*36. *Foster v. Heitkamp (In re Foster)*, 670 F.2d 478 (5th Cir. 1982) (when a debtor chooses to disburse mortgage payments directly to a mortgagee rather than through the trustee, trustee's percentage fee applicable, although it may be reduced in discretion of court), *superseded by* Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 230, 100 Stat. 3088, 3103 (codified at 11 U.S.C. § 1326(b) (1994)).
37. *Cannady v. Wilson (In re Cannady)*, 653 F.2d 210 (5th Cir. 1981) (spouses may separately elect state and federal exemptions), *superseded by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 306(a), 98 Stat. 333, 353 (codified at 11 U.S.C. § 522(b) (1994)).
- †\*38. *Christians v. Crystal Evangelical Free Church (In re Young)*, 152 B.R. 939 (D. Minn. 1993) (tithes voidable under § 548 as constructively fraudulent), *rev'd*, 82 F.3d 1407 (8th Cir. 1996), *failed attempt to supersede by* Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *declared unconstitutional by* *City of Boerne v. Flores*, 521 U.S. 507 (1997), *superseded by* Bankruptcy Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105-183, §§ 2-3, 112 Stat. 517, 517-18 (codified at 11 U.S.C. §§ 544(b) & 548 (Supp. 1998)).
- †39. *Korvettes, Inc. v. Sanyo Elec., Inc. (In re Korvettes, Inc.)*, 67 B.R. 730 (S.D.N.Y. 1986) (debtor in possession not subject to two year statute of limitations under § 546(a)), *superseded by* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 216, 108 Stat. 4106, 4126 (codified at 11 U.S.C. § 546(a) (1994)).
- \*40. *In re Carlton Restaurant, Inc.*, 151 B.R. 353 (Bankr. E.D. Pa. 1993) (tenant may hold premises under rejected lease terms only by remaining in physical possession), *superseded by* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 205, 108 Stat. 4106, 4122 (codified at 11 U.S.C. § 365(h) (1994)).
41. *In re City of Bridgeport*, 128 B.R. 688 (Bankr. D. Conn. 1991) (express state authorization for municipal corporation to file under Chapter 9 not required), *superseded by* Bankruptcy Re-

- form Act of 1994, Pub. L. No. 103-394, § 402, 108 Stat. 4106, 4141 (codified at 11 U.S.C. § 109(c)(2) (1994)).
- \*42. *In re Baldwin-United Corp.*, 38 B.R. 802 (Bankr. S.D. Ohio 1984) (FDIC ineligible to serve on creditors' committees), *superseded by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 499, 98 Stat. 333, 384 (codified at 11 U.S.C. § 101(41) (1994)).
- \*43. *Gunther v. Kuepper (In re Kuepper)*, 36 B.R. 680 (Bankr. E.D. Wis. 1983) (drunk driving damage claim dischargeable), *superseded by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 371, 98 Stat. 333, 364 (codified at 11 U.S.C. § 523(a)(9) (1994)), *and re-amended by* Criminal Victims Protection Act of 1990, Pub. L. No. 101-581, § 2, 104 Stat. 2865, 2865 (codified at 11 U.S.C. §§ 523(a)(9) & 1328(a) (1994)), *and* Crime Control Act of 1990, Pub. L. No. 101-647, § 3102(a), 104 Stat. 4789, 4916 (codified at 11 U.S.C. §§ 523(a)(9) & 1328(a) (1994) *and re-amended by* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 221, 108 Stat. 4106, 4129 (codified at 11 U.S.C. §§ 523(a)(9) & 1328(a) (1994)).
44. *In re Williams*, 9 B.R. 228 (Bankr. D. Kan. 1981) (liens do not survive discharge under § 524(a)), *superseded by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 308(a), 98 Stat. 333, 354 (codified at 11 U.S.C. § 524(a)(2) (1994)).

#### D. Primarily Pragmatic

- †\*45. *Hoffman v. Connecticut Dep't of Income Maintenance*, 492 U.S. 96 (1989) (Congress failed to abrogate state sovereign immunity with unmistakably clear statutory language), *superseded by* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 113, 108 Stat. 4106, 4117 (codified at 11 U.S.C. § 106 (1994)), *rendered unconstitutional by* *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).
- \*46. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984) (collective bargaining agreement may be rejected based upon balance of the equities, after reasonable efforts to negotiate a modification have failed), *superseded by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 541, 98 Stat. 333, 390 (codified at 11 U.S.C. § 1113 (1994)).
- \*47. *Sullivan v. Town & Country Home Nursing Servs., Inc.*, 963 F.2d 1146 (9th Cir. 1992) (§ 106(a) implied waiver of sovereign immunity applies when federal government recoups

overpayments without filing proof of claim), *superseded by* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 113, 108 Stat. 4106, 4117 (codified at 11 U.S.C. § 106(b) (1994)).

- †\*48. *In re Roach*, 824 F.2d 1370 (3d Cir. 1987) (Chapter 13 debtor may not reinstate home mortgage after foreclosure judgment entered), *superseded by* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 301, 108 Stat. 4106, 4131 (codified at 11 U.S.C. § 1322(c)(1) (1994)).

### E. Pragmatic

- †\*49. *Butner v. United States*, 440 U.S. 48 (1979) (mortgagee's security interest in rents determined by state law), *superseded by* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 214(a), 108 Stat. 4106, 4126 (codified at 11 U.S.C. § 522(b)(2) (1994)).
50. *In re Lybrook*, 951 F.2d 136 (7th Cir. 1991) (property acquired during Chapter 13 case remains property of estate after conversion to Chapter 7), *superseded by* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 311, 108 Stat. 4106, 4138 (codified at 11 U.S.C. § 348(f) (1994)).
- †51. *Simonson v. First Bank of Greater Pittston (In re Simonson)*, 758 F.2d 103 (3rd Cir. 1985) (intervening judicial lien not avoidable if exempt property overencumbered by nonavoidable consensual liens), *superseded by* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 303, 108 Stat. 4106, 4132 (codified at 11 U.S.C. § 522(f) (1994)).
- †52. *Stuart v. Pingree (In re AFCO Dev. Corp.)*, 65 B.R. 781 (Bankr. D. Utah 1986) (statute of limitations runs from the appointment of each successive bankruptcy trustee), *disapproved by In re CVA Assocs.*, 171 B.R. 122 (D. Utah 1994), *superseded by* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 216, 108 Stat. 4106, 4126 (codified at 11 U.S.C. § 546(a) (1994)).

### F. Unable To Determine

- \*53. *Lubrizol Enters. v. Richmond Metal Finishers*, 756 F.2d 1043 (4th Cir. 1985) (nondebtor licensee divested of rights to licensed intellectual property upon rejection), *superseded by* Intellectual Property Protection Act of 1988, Pub. L. No. 100-506, § 1, 102 Stat. 2538, 2538 (codified at 11 U.S.C. § 365(n) (1994)).
- †\*54. *Dallas-Fort Worth Reg'l Airport Bd. v. Braniff Airways*, 26 B.R. 628 (Bankr. N.D. Tex. 1982) (debtor not required to accept or

- reject leases for airport facilities within a specified period of time from filing), *superseded by* Rail Safety Enforcement and Review Act of 1992, Pub. L. No. 102-365, § 19(b), 106 Stat. 972, 982 (codified at 11 U.S.C. § 365(d) (1994)).
- \*55. *In re Bogosian*, 112 B.R. 2 (Bankr. D.R.I. 1990) (Bankruptcy Rule 4001(a)(2) time limits not enforceable in lift stay proceeding), *superseded by* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 101, 108 Stat. 4106, 4107 (codified at 11 U.S.C. § 362(e) (1994)).
- †\*56. *In re Ashkenazy Enters., Inc.*, 94 B.R. 645 (Bankr. C.D. Cal. 1986) (hotel revenues are not real property rents under § 552(b)), *superseded by* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 214, 108 Stat. 4106, 4126 (codified at 11 U.S.C. § 522(b)(2) (1994)).
57. *In re Murray*, 5 B.R. 732 (Bankr. D. Md. 1980) (no good faith defense for purchaser of lands located within county of bankruptcy case under § 549(c)), *superseded by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 464(c), 98 Stat. 333, 379 (codified at 11 U.S.C. § 549(c) (1994)).
- \*58. *In re Utter*, 3 B.R. 369 (Bankr. W.D.N.Y. 1980) (separate classification of co-debtor obligations not permitted under Chapter 13 plan), *superseded by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 316, 98 Stat. 333, 356 (codified at 11 U.S.C. § 1322(b)(1) (1994)).

**APPENDIX II**  
**Coding Instructions & Data Collection Form 1**

**Coding Instructions**

**I. Case name:** Use debtor's name only if caption is "In re" or "Matter of." Otherwise, use usual short title caption (\_\_\_v.\_\_\_) omitting "et al.," "et ux.," etc.

**II. Cite:** Use U.S. cite for Supreme Court, unless only S.Ct. or U.S.L.W. is available. Use F.2d or F.3d cite as applicable for published USCA decisions. Use B.R. cite for all published BAP, bankruptcy court and district court decisions. Use LEXIS or WL cite for all unpublished decisions. Omit all parallel cites.

**III-V.:** These items are generally self evident. If there is no signed opinion, leave *Opinion by* and *Sex* blank.

**VI. Separate Opinions:** Leave blank if no separate writing. Note multiple concurrences or dissents separately. Note in comments interpretative method employed by concurrences and dissents.

**VII. Bankruptcy Code Chapter:** This item is generally self-evident. If the case was converted from one chapter to another by the decision being analyzed, code as a case arising under the chapter being converted from. If the case was converted prior to the decision being analyzed, code as a case under the chapter it has been converted to, unless the issue being litigated arises only in cases filed under the chapter converted from (i.e. if the question is the construction of § 1141, code as Chapter 11 even if the case has already been converted to Chapter 7).

**VIII:** This question assumes that either the debtor or the bankruptcy trustee, or both, are principal litigants in the matter decided; if this is not the case, mark **Not Applicable**. If given the nature of the court's decision it is not possible to identify a prevailing party mark **Not Applicable**. If a non-debtor, non-trustee party prevails against either the debtor or trustee, mark **Neither**. In some matters the bankruptcy trustee and the debtor may be both litigants, but their interests may be aligned and they may therefore prevail or lose together. In this case, assuming they both prevail, mark both **Debtor** and **Trustee**; otherwise, mark **Neither**. If the case is an appeal and the matter is remanded, assume that the appellant is the prevailing party, unless the remand appears highly unlikely to change the result. If the remand appears highly unlikely to change given the nature of the appellate decision, assume the appellee is the prevailing party.

**IX. Overruled by:** Be sure to cite all applicable amendments.

**X. Holding:** Try and keep it to one short descriptive sentence of the key proposition of law decided.

**XI. Interpretive method:**

1. Textualist. Code for decisions that make the language of the statute dispositive notwithstanding competing interpretations (if any) based upon legislative history, past practice under the Bankruptcy Act or policy.

2. Primarily but not exclusively textual. Code for decisions that give decisive weight to the language of the statute, but cite as supportive interpretive sources relevant legislative history, past practice, or policy.

3. Relies on both textual and nontextual sources. Code for decisions that rely on both statutory language and relevant legislative history, past practice, or policy as mutually supporting rationales for the decision.

4. Primarily but not exclusively nontextual. Code for decisions that give decisive weight to relevant legislative history, past practice, or policy, but cite the language of the statute as supportive of the decision.

5. Non-Textualist. Code for decisions that make legislative history, past practice, or policy dispositive notwithstanding competing interpretations (if any) based upon the language of the statute.

6. Result controlled by precedent. Decisions dictated by controlling precedent from the same or a higher court.

7. Unable to determine. Please note in *Comments* why it was not possible to classify the interpretative method.

**XII. Efficacy of overruling:**

1. Failed completely. Congress indicates an intention to overrule a particular case or line of cases in the course of enacting an amendment to the Code, but subsequent litigation makes clear the statutory change failed to effect the result. An example is the failed 1984 attempt to overturn *Durrett*.

2. Failed partially. Congress indicates an intention to overrule a particular case or line of cases in the course of enacting an amendment to the Code, but subsequent litigation makes clear the statutory change failed to fully achieve the result. An example is the very limited success of § 521(2) in requiring debtors to elect redemption, reaffirmation or surrender of collateral.

3a. Succeeded narrowly, but left unresolved issues. Congress successfully overrules a particular holding, but closely related issues that are arguably controlled by the reasoning, but not the holding of the overruled case remain unresolved. The overturning of *Levit v. Ingersoll Rand* by the enactment of § 550(c) is an example.

3b. Succeeded narrowly, but left unintended consequences. Congress successfully overrules a particular holding, but in the course of doing so creates new issues in unrelated areas. An example is the overruling of *New Valley* by the deletion of § 1124(3).

4. Succeeded completely. Decision overturned by amendment, cleanly, and with no apparent unintended consequences.

5. Overruling appears inadvertent. Amendment has the effect of overturning a line of cases, but it is unclear whether Congress intended that consequence. An example may be the deletion of the 45-day requirement for the ordinary course of business defense, § 547(c)(2), discussed in *Union Bank v. Wolas*.



## APPENDIX III

**Randomly Selected Bankruptcy Cases on Certiorari in the Supreme Court of the United States, 1982-1998****A. Textualist**

1. *In re Merchants Grain, Inc.* 93 F.3d 1347 (7th Cir. 1996), *cert. denied*, 519 U.S. 1111 (1997).
2. *Hall Fin. Group, Inc. v. DP Partners Ltd. Partnership (In re DP Partners Ltd. Partnership)*, 106 F.3d 667 (5th Cir.), *cert. denied*, 522 U.S. 815 (1997).
3. *Fukatomi v. United States Trustee (In re Bibo, Inc.)*, 76 F.3d 256 (9th Cir.), *cert. denied*, 519 U.S. 817 (1996).
4. *Palmer v. Levy (In re Levy)*, 951 F.2d 196 (9th Cir. 1991), *cert. denied*, 504 U.S. 985 (1992), *overruled by Cohen v. De La Cruz*, 523 U.S. 213 (1998).
5. *United States v. Mansfield Tire & Rubber Co. (In re Mansfield Tire & Rubber Co.)*, 942 F.2d 1055 (6th Cir. 1991), *cert. denied sub nom.*, *Krugliak v. United States*, 502 U.S. 1092 (1992), *overruled by United States v. Reorganized CF & I Fabricators*, 518 U.S. 213 (1996).

**B. Primarily Textualist**

6. *Frieouf v. United States (In re Frieouf)*, 938 F.2d 1099 (10th Cir. 1991), *cert. denied*, 502 U.S. 1091 (1992).
7. *Colony Square Co. v. Prudential Ins. Co. (In re Colony Square Co.)*, 779 F.2d 653 (11th Cir.), *cert. denied*, 479 U.S. 824 (1986).
8. *Cheadle v. Appleatchee Riders Ass'n (In re Lovitt)*, 757 F.2d 1035 (9th Cir.), *cert. denied*, 474 U.S. 849 (1985).
9. *Rodrock v. Security Indus. Bank*, 642 F.2d 1193 (10th Cir. 1981), *aff'd on other grounds sub nom.*, *United States v. Security Indus. Bank*, 459 U.S. 70 (1982).

**C. Both Textualist and Pragmatic**

10. *Taffi v. United States (In re Taffi)*, 96 F.3d 1190 (9th Cir. 1996) (en banc), *cert. denied*, 521 U.S. 1103 (1997).
11. *United Mine Workers of Am. 1992 Benefit Plan v. Leckie Smokeless Coal Co. (In re Leckie Smokeless Coal Co.)*, 99 F.3d 573 (4th Cir. 1996), *cert. denied*, 520 U.S. 1118 (1997).

12. *Clark v. Balcor Real Estate Fin., Inc. (In re Meridith Hoffman Partners)*, 12 F.3d 1549 (10th Cir. 1993), *cert. denied*, 512 U.S. 1206 (1994).
13. *Hucke v. Oregon*, 992 F.2d 950 (9th Cir. 1992), *cert. denied*, 510 U.S. 862 (1993).
14. *In re Wade*, 991 F.2d 402 (7th Cir. 1992), *cert. denied*, 510 U.S. 870 (1993).
15. *Carolco Television, Inc. v. National Broad. Co. (In re De Laurentiis Entertainment Group, Inc.)*, 963 F.2d 1269 (9th Cir.), *cert. denied*, 506 U.S. 918 (1992).
16. *Grundy Nat'l Bank v. Looney (In re Looney)*, 823 F.2d 788 (4th Cir.), *cert. denied*, 484 U.S. 977 (1987).
17. *Cash Currency Exch., Inc. v. Shine (In re Cash Currency Exch., Inc.)*, 762 F.2d 542 (7th Cir.), *cert. denied sub nom., Fryel v. Cash Currency Exch., Inc.*, 474 U.S. 904 (1985).
18. *Ohio v. Kovacs (In re Kovacs)*, 717 F.2d 984 (6th Cir. 1983), *aff'd*, 469 U.S. 274 (1985).
19. *United States v. Southern States Motor Inns, Inc. (In re Southern States Motor Inns, Inc.)*, 709 F.2d 647 (11th Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984).

#### D. Primarily Pragmatic

20. *Cohen v. De La Cruz (In re Cohen)*, 106 F.3d 52 (3rd Cir. 1997), *aff'd*, 523 U.S. 213 (1998).
21. *HUD v. Cost Control Mktg. & Sales Mgmt.*, 64 F.3d 920 (4th Cir. 1995), *cert. denied*, 517 U.S. 1187 (1996).
22. *Checkers Drive-In Restaurants v. Commissioner of Patents & Trademarks*, 51 F.3d 1078 (D.C. Cir.), *cert. denied*, 516 U.S. 866 (1995).
23. *T-H New Orleans Ltd. Partnership v. Financial Sec. Assurance, Inc. (In re T-H New Orleans Ltd. Partnership)*, 10 F.3d 1099 (5th Cir. 1993), *cert. denied*, 511 U.S. 1083 (1994).
24. *Bonner Mall Partnership v. United States Bancorp Mortgage Co. (In re Bonner Mall Partnership)*, 2 F.3d 899 (9th Cir. 1993), *cert. dismissed as moot*, 513 U.S. 18 (1994), *overruled by Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle Street Partnership*, 119 S. Ct. 1411 (1999).
25. *Besing v. Hawthorne (In re Besing)*, 981 F.2d 1488 (5th Cir.), *cert. denied*, 510 U.S. 821 (1993).
26. *Shearson Lehman Mortgage Corp. v. Laguna (In re Laguna)*, 944 F.2d 542 (9th Cir. 1991), *cert. denied*, 503 U.S. 966 (1992), *overruled by Rake v. Wade*, 508 U.S. 464 (1993), *superseded by Bank-*

ruptcy Reform Act of 1994, Pub. L. No. 103-394, § 305, 108 Stat. 4106, 4134 (codified at 11 U.S.C. §§ 1123(d), 1222(d), 1322(e) (1994)).

27. *Jones v. Atchison (In re Atchison)*, 925 F.2d 209 (7th Cir.), *cert. denied*, 502 U.S. 860 (1991).
28. *Snow v. Green (In re Snow)*, 899 F.2d 337 (4th Cir. 1990), *cert. denied*, 500 U.S. 952 (1991).
29. *New York Typographical Union No. 6 v. Royal Composing Room, Inc. (In re Royal Composing Room, Inc.)*, 848 F.2d 345 (2d Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989).
30. *Shell Oil Co. v. Waldron (In re Waldron)*, 785 F.2d 936 (11th Cir.), *cert. dismissed*, 478 U.S. 1028 (1986).

### E. Pragmatic

31. *Coleman Oil Co. v. Circle K Corp. (In re Circle K Corp.)*, 127 F.3d 904 (9th Cir. 1997), *cert. denied*, 522 U.S. 1148 (1998).
32. *Capital Communications Fed. Credit Union v. Boodrow (In re Boodrow)*, 126 F.3d 43 (2d Cir. 1997), *cert. denied*, 522 U.S. 1117 (1998).
33. *Gendreau v. Gendreau (In re Gendreau)*, 122 F.3d 815 (9th Cir. 1997), *cert. denied*, 523 U.S. 1005 (1998).
34. *Barakat v. Life Ins. Co. (In re Barakat)*, 99 F.3d 1520 (9th Cir. 1996), *cert. denied*, 520 U.S. 1143 (1997).
35. *In re Prince*, 85 F.3d 314 (7th Cir.), *cert. denied*, 519 U.S. 1040 (1996).
36. *Jobin v. MacKay (In re M&L Bus. Mach. Co.)*, 84 F.3d 1330 (10th Cir.), *cert. denied*, 519 U.S. 1040 (1996).
37. *In re Terry Ltd. Partnership*, 27 F.3d 241 (7th Cir.), *cert. denied sub nom.*, *Invex Holdings v. Equitable Life Ins. Co.*, 513 U.S. 948 (1994).
38. *BFP v. Resolution Trust Corp. (In re BFP)*, 974 F.2d 1144 (9th Cir. 1992), *aff'd*, 511 U.S. 531 (1994).
39. *Boston Post Rd. Ltd. Partnership v. FDIC (In re Boston Post Rd. Ltd. Partnership)*, 21 F.3d 477 (2d Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995).
40. *Texas Commerce Bank, N.A. v. Licht (In re Pengo Indus., Inc.)*, 962 F.2d 543 (5th Cir.), *cert. denied*, 506 U.S. 1000 (1992).
41. *Johnson v. Barnhill (In re Antweil)*, 931 F.2d 689 (10th Cir. 1991), *aff'd*, 503 U.S. 393 (1992).
42. *Home State Bank v. Johnson (In re Johnson)*, 904 F.2d 563 (10th Cir. 1990), *rev'd*, 501 U.S. 78 (1991).

43. Owen v. Owen (*In re Owen*), 877 F.2d 44 (11th Cir. 1989), *rev'd*, 500 U.S. 305 (1991).
44. Begier v. IRS, 878 F.2d 762 (3d Cir. 1989), *aff'd*, 496 U.S. 53 (1990).
45. Oberg v. Aetna Cas. & Sur. Co. (*In re A.H. Robins Co.*), 828 F.2d 1023 (4th Cir. 1987), *cert. denied*, 485 U.S. 969 (1988).
46. United States v. Ron Pair Enters., Inc. (*In re Ron Pair Enters., Inc.*), 828 F.2d 367 (6th Cir. 1987), *rev'd*, 489 U.S. 235 (1989).
47. *In re Armstrong*, 812 F.2d 1024 (7th Cir.), *cert. denied*, 484 U.S. 925 (1987).
48. A.H. Robins Co. v. Piccinin, 788 F.2d 994 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986).
49. Torres v. Eastlick (*In re North Am. Coin & Currency, Ltd.*), 767 F.2d 1573, *as modified* 774 F.2d 1390 (9th Cir. 1985), *cert. denied*, 475 U.S. 1083 (1986).

#### **F. Result Controlled by Precedent**

50. Bondholder Comm. v. Williamson County (*In re Brentwood Outpatient*), 43 F.3d 256 (6th Cir. 1994), *cert. denied*, 514 U.S. 1096 (1995).
51. Commonwealth Nat'l Bank v. United States (*In re Ashe*), 712 F.2d 864 (3d Cir. 1983) (on remand), *cert. denied*, 465 U.S. 1024 (1984).

#### **G. Unable To Determine**

52. Fobian v. West Farm Credit Bank (*In re Fobian*), 951 F.2d 1149 (9th Cir. 1991), *cert. denied*, 505 U.S. 1220 (1992).