

Creating a Calamity

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*It takes a lot to create a calamity in the commercial arena. Transactional attorneys spend a good deal of their time drafting around the calamities of the past. The Supreme Court's decision in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004), nevertheless deserves the label. The issue before the Court was straight-forward—how should bankruptcy courts ascertain the appropriate interest rate in a Chapter 13 plan? At one level the case is a calamity in that the Court failed to produce a majority opinion. This issue called for a clear rule. While some rules may be better than others, the overriding concern should have been to provide definitive guidance on this oft recurring issue. Here, the Court failed.*

Till bids for calamity status on a second score as well. The opinions show little regard for commercial law. To be sure, Justice Scalia's opinion demonstrates that he at least understood the basic functioning of bankruptcy law and credit practices. The same cannot be said for the remaining opinions. Justice Thomas, accusing all of textual infidelity, authored an opinion which adopted a measure that no court of appeals had endorsed. He argued that, though virtually unnoticed, the Bankruptcy Code mandated that Chapter 13 debtors pay the same rate of interest as the country's most solvent financial institutions. Justice Stevens did little better. His opinion suggests that, for those in Chapter 13 who are seeking to repay their secured debts over time, one should start with the prime rate, and then add one percent to three percent. To be sure, one could articulate a rationale for this formula approach that comports with the dynamics of Chapter 13. (We need an easy-to-implement rule; we know that collateral tends to be valued too high, so a rule that sets interest too low may achieve a rough balance.) Unfortunately, this is not the tack that Justice Stevens took. His opinion rests on the assertion that Chapter 13 provides sufficient safeguards so that a modest increase in the prime rate represents the true risk to creditors. This reasoning cannot be squared with what we know about Chapter 13 practice. Moreover, by suggesting that courts can provide a more accurate assessment of default risk than markets, Justice Stevens's opinion creates the possibility for mischief across the Bankruptcy Code.

Selecting a single case or decision as your “commercial calamity” is a challenging task. The problem is not so much in finding a decision in the commercial law that is wanting in some respects. Such decisions abound. Teaching commercial law would not be nearly as fun as it is if all decisions were correct. Who does not enjoy the thrill of having students realize that the opinion that seemed so obviously correct last night (or a few minutes before

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class) cannot withstand careful scrutiny? For better or for worse, it does not appear that judges are selected based on their ability to navigate through our commercial law jurisprudence. Thus, the challenge posed by the question is not so much to find a decision that is wanting in some respect; rather, it is to define the metric by which one measures “calamity” status. Like many things in law, where you go in will determine where you come out.

There are a number of ways in which one could view a case as a calamity. There are many silly decisions that involve a lot of money, but they tend to be one-off occurrences. Telling Texaco that it owes \$10 billion to Pennzoil for what most would view as part of the normal rough and tumble in a merger setting is surely a calamity to Texaco, but it has little lasting effect on the economy as a whole. Texaco shareholders are upset; Pennzoil shareholders rejoice; diversified shareholders rue the transactions costs incurred in moving the money around. Yet on a going-forward basis, the risk of similar decisions can be easily handled. Shortly after the decision, lawyers tattooed their documents with legends that there was no legally enforceable deal. Fool me once, shame on you. Fool me twice, shame on me.

The dynamic nature of commercial practice ensures that many ill-founded decisions do not rise to the level of calamity status. The future costs of many decisions are capped by the costs of contracting around. The UCC is too generous in awarding consequential damages? A simple term in the contract rectifies matters. The common law errs in not awarding attorneys’ fees to those who vindicate their contractual rights in court? A few lines of text move the parties to the solution that they prefer. Indeed, as contracting costs decrease due to decreasing transaction costs, the harm imposed by an ill-fitting default rule decreases as well.

Even some mandatory rules do not generate as much costs as one might think. Perhaps the balance between costs and accuracy tilts toward a strong version of the parol evidence rule.¹ One may not be able to change this directly by contract, as courts may well object to any attempt to alter their interpretative rules. Even the most clearly worded merger clause may not do the trick.² But one can accomplish the desired result indirectly. Simply find an arbitration forum that follows the interpretive methodology that the parties, at the time of contracting, find more attractive.³

¹ See Eric Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Contractual Principles of Interpretation*, 146 U. PA. L. REV. 533, 534 (1998); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 591 (2003).

² See RESTATEMENT (SECOND) OF CONTRACTS § 209 cmt. b (1978) (merger clause “may not be conclusive”).

³ On using arbitration to contract around mandatory rules, see Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 710 (1999).

Looking solely at the cost that a decision entails may thus not be the best way to identify a calamity. One alternative standard for singling out one case for special condemnation would be identifying the most brazen attempt to rewrite the law. The sin here is a lack of respect for the rule of law. For example, Justice Douglas, in one of his first opinions on the Supreme Court, interpreted the Bankruptcy Act in a way that aligned the law with his prior views of the matter.⁴ The better reading of prior case law would have endorsed relative priority, but Justice Douglas enshrined absolute priority into our bankruptcy system. Moreover, he undertook this act of transformation while protesting that he was simply following existing law. Yet this act of judicial fiat, while perhaps a fitting start to Justice Douglas's career,⁵ does not seem to have led to much damage. Indeed, in the case itself, the bondholders ended up with the stock of the reorganized company, and the outbreak of World War II ensured that the stock was worth more than the principal on the old bonds.⁶ Absolute priority may not have been the better reading of prior law, but it is certainly a result that we can live with. Indeed, from a policy matter, some would view this as the better result.⁷ To the extent that Justice Douglas's judicial craft raises hackles, his effort here did not become an exemplar followed by other judges.

So what is left? How about *Till v. SCS Credit Corp.*?⁸ I am open to arguments that there are worse cases out there along some metric—certainly the other participants in this symposium have put forth worthy contenders—but I am comfortable in applying the label “calamity” to this one. This case is a calamity at two levels. First, it is an area where the legal system needs a rule of decision. Contract simply will not work. The Supreme Court's fundamental task was not so much to get it right as it was to get it done. On

⁴ For a discussion of Justice Douglas and the decision in *Case v. Los Angeles Lumber*, see Douglas G. Baird & Robert K. Rasmussen, *Boyd's Legacy and Blackstone's Ghost*, 1999 S. CT. REV. 393.

⁵ See BRUCE ALLEN MURPHY, *WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS* (Random House 2003).

⁶ See 2 ARTHUR STONE DEWING, *THE FINANCIAL POLICY OF CORPORATIONS* 1309 n.“o” (5th ed. 1953).

⁷ Indeed, many proposals to reform bankruptcy law pivot on the need to respect contractual priority. See, e.g., Barry E. Adler & Ian Ayers, *A Dilution Mechanism for Valuing Corporations in Bankruptcy*, 111 YALE L.J. 83, 88 (2001); Philippe Aghion et al., *The Economics of Bankruptcy Reform*, 8 J.L. ECON. & ORG. 523, 523–60 (1992); Lucian Arye Bebchuk, *A New Approach to Corporate Reorganizations*, 101 HARV. L. REV. 775, 778 (1988); Mark J. Roe, *Bankruptcy and Debt: A New Model for Corporate Reorganization*, 83 COLUM. L. REV. 527, 537 (1983). For a defense of absolute priority, see Alan Schwartz, *The Absolute Priority Rule and the Firm's Investment Policy*, 72 WASH. U. L.Q. 1213 (1994).

⁸ 541 U.S. 465 (2004).

this score, it failed. Second, the opinions generated in the case are a calamity in that they suggest that the Court cares little about commercial law. It would be one thing if the failure to decide stemmed from an overriding normative dispute among the justices. Had the opinions diverged because of a fundamental disagreement over the method of statutory interpretation or over a dispute as to the conceptual foundation of the law at issue, one could perhaps justify the result on the grounds that all battles worth fighting require sacrifice. But *Till* was not such a case. This lack of care untethers the application of the Bankruptcy Code from any sensible bankruptcy policy.

The issue in *Till* seems straightforward enough. The Tills had bought a used truck on credit. The purchase price, including taxes and fees, was a bit more than \$6700. The Tills paid \$300 in cash, and promised to pay the rest off in about two and a half years, at an interest rate of 21%. Such an interest rate would strike many as excessive, but the Tills' financial profile forced them into the sub-prime market, where rates such as these are common. The total payments under the loan were slated to be \$8,285.24. Things did not go as planned, however, and the Tills encountered financial difficulties. They filed for Chapter 13 bankruptcy a year after the loan was signed.⁹

The Tills wanted to keep their truck. In this, the Tills were like many debtors who try to rearrange their debts under Chapter 13. Chapter 13 allows a debtor to retain possession of non-exempt assets, provided that certain requirements are met. The lender, of course, still has to be paid. That is the whole point in having collateral. All agreed that the value of the truck today was \$4000,¹⁰ though the lender was still owed \$4,894.89. This valuation meant that the lender had a secured claim for \$4000, and an unsecured one for the remainder.¹¹ The Bankruptcy Code allows Chapter 13 debtors to retain collateral so long as they promise that "the value . . . of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim."¹² Thus, "the value . . . of property" to be paid under the plan to the creditor had to be \$4000.

⁹ *Id.* at 469–70.

¹⁰ The appropriate standard for valuing automobiles was a contested issue in many Chapter 7 and Chapter 13 cases. The Supreme Court resolved this issue in *Associates Commercial Corp. v. Rash*, 520 U.S. 953, 962 (1997), though Congress tweaked this result through legislation in 2005. See 11 U.S.C.S. § 506(a)(2) (West Supp. 2006) (setting forth a valuation standard for personal property when the debtor is an individual).

¹¹ See 11 U.S.C.S. § 506(a) (West Supp. 2006).

¹² 11 U.S.C. § 1325(a)(5)(B)(ii) (1994). The recent amendments to the Bankruptcy Code restrict bifurcating a secured loan on an automobile into its secured and unsecured portion to vehicles purchased more than 910 days before bankruptcy. For newer cars, the amount of the claim is the amount of the total claim. See 11 U.S.C. § 1325(a) (1994). This change in the method for ascertaining the amount of the secured claim does not affect the interest rate issue raised in *Till*.

Had the Tills had \$4000 in cash, they could have given this to the lender and thus satisfied the statutory requirement. The Tills, not surprisingly, did not have \$4000 in cash that they could fork over to their lender. Thus, they wanted to pay the lender over time. So, what stream of payments over the three-year life of the Tills' Chapter 13 plan would have a "value" of \$4000? The answer to this question turns on the appropriate rate of interest. The Tills suggested an interest rate of 9.5%. They arrived at this figure by using the "formula" approach adopted by a number of courts.¹³ They began with the prime rate, which at the time was 8%, and added 1.5% to account for the fact that they were not as good a bet to repay the loan as were the customers to whom banks offer their prime rate. An add-on in this amount is within the range of what prior courts had endorsed.¹⁴

The lender thought that a higher rate was more appropriate. It reasoned that if it could get its hands on the Tills' truck, it could sell it for \$4000, and then loan this money out at 21%. The lender was in the business of making sub-prime loans, and it charged all of its customers a 21% rate of interest.¹⁵ In other words, because the lender is making a "coerced loan" to the debtor, it should receive the same rate of interest as if it had lent the money to a similar borrower in an arms-length relationship.¹⁶

One may think that the bankruptcy court would have selected one of these approaches, or perhaps something in between, and that would have been that. After all, if we assume that the Tills fulfilled the payment terms of their Chapter 13 plan, the difference between the two contenders was \$807.44 paid over a three-year period, seemingly not much over which to make a federal case.

Of course, things are more complicated. It is easy to glean what was at stake. The difference undoubtedly mattered to the Tills. People tend to file

¹³ See, e.g., *In re Fowler*, 903 F.2d 694, 698 (9th Cir. 1990); *In re Valenti*, 105 F.3d 55, 64 (2d Cir. 1997), *abrogated on other grounds by* *Assocs. Commercial Corp. v. Rash*, 520 U.S. 953 (1997).

¹⁴ See *In re Valenti*, 105 F.3d at 64 (collecting cases).

¹⁵ *Till v. SCS Credit Corp.*, 541 U.S. 465, 471 (2004).

¹⁶ See *id.* The data collected by Matthew O'Brien suggests that even the higher rate may be too low. Matthew H. O'Brien, *Tilling the Cram Down Landscape: Using Securitization Data to Expose the Fundamental Fallacies of Till*, 59 VAND. L. REV. 257, 291 (2006). He notes that the sub-prime securitization market provides information that suggests the default rate for sub-prime loans is a bit less than 12%. *Id.* While there have been only two studies of default rates on Chapter 13 plans, both show default rates substantially higher. *Id.* at 290–92. Indeed, if one were to use these default rates, O'Brien calculates that an appropriate rate of interest would be somewhere between 36% and 83%. *Id.* at 291–92. In other words, those who file for Chapter 13 and seek to pay for their collateral over time present lenders with a greater risk of default than does the general sub-prime market.

for bankruptcy only when they are facing severe financial distress. For people whom even after bankruptcy will struggle, \$800 is not a trifling matter. Despite the fact that \$800 is a lot of money to the Tills, it does not mean that they would necessarily find it in their interest to press the point vigorously. Even putting aside the cost of litigating the matter, the costs of failing to resolve the bankruptcy case promptly and having their financial situation broadcast to the world may well have exceeded any benefits the Tills would have won by an outright victory. That the Tills' case made it to the Supreme Court cannot be attributed to litigiousness on their part.

This leaves the lender. From its perspective, the \$800 was surely dwarfed by the amount of money it spent litigating the case. What mattered, of course, was not the money at stake in this case, but rather what legal rule would govern future cases of this type. The lender is a repeat player in bankruptcy, and how courts determine the applicable rate of interest in a Chapter 13 plan is an issue that matters a lot to it. In 2004, there were approximately 450,000 Chapter 13 cases.¹⁷ To be sure, not every Chapter 13 debtor has a car, but it is probably a safe bet that at least half of them do. Over 85% of all American households own at least one car.¹⁸ While one could conjecture that the less affluent may be less likely to own a car, and there is no requirement that a debtor keep her car, it is still likely the case that a substantial majority of the wage earners filing for Chapter 13 seek to retain a vehicle under their Chapter 13 plan. Also, while the \$4000 value of the Tills' car does not strike me as exceptionally high, I know of no data that provides a solid handle on the average value of the cars that Chapter 13 debtors seek to retain.¹⁹ Yet if we take half of the Chapter 13 cases and assume that the amount at stake in *Till* represented an average in these cases, that comes out to \$180 million at stake for 2004 alone. One can easily see why there was enough at stake for the lenders to push this case to the Supreme Court.²⁰

¹⁷ See THE 2005 BANKRUPTCY YEARBOOK & ALMANAC 5 (Christopher M. McHugh & Thomas A. Sawyer eds., 2005).

¹⁸ See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2006, at 475 (125th ed. 2005).

¹⁹ In their pioneering work, Sullivan, Warren, and Westbrook examined a set of debtors who filed in 1981. They report that \$3460 was the average value of cars that were collateral for loans from finance companies. See TERESA A. SULLIVAN ET AL., AS WE FORGIVE OUR DEBTORS 308 tbl.17.3 (1989). Using the Consumer Price Index as the benchmark, this is equal to more than \$7400 today.

²⁰ In the Supreme Court, the lender's counsel of record was noted appellate bankruptcy attorney Eric Brunstad. Brunstad specializes in appellate bankruptcy work, and it is safe to assume that his fees in the case exceed the amount at issue many times over.

Of course, in the long term, what was at stake in *Till* was the allocation of risk among those who borrow to purchase their cars. Lenders can assess who possesses a risk relatively easily these days. In a world with credit scoring, poor repayment prospects are easy to uncover. A number of borrowers will file for Chapter 13 and attempt to keep their collateral. The interest rate that bankruptcy courts approve will affect what all outside of bankruptcy pay. Lenders will adapt to any future rule. To the extent that they receive a higher rate of payments in Chapter 13 plans, this will put downward pressure on the rates that they charge their risky borrowers.²¹ The more money lenders receive from borrowers that default, the less they will have to charge all of their borrowers. Conversely, reducing what lenders can recover in bankruptcy would induce lenders to charge more to all who present the risk of filing for bankruptcy.²² Lenders will get their profits, and the only question is from whom. What is at issue is what will be the relative burdens among those risky borrowers who file for Chapter 13 and those who do not.

While lenders may thus be indifferent in the long-run, they care a lot in the intermediate-run. They already have a portfolio of existing loans, a large number of which will end up in Chapter 13. What they recover on these loans depends on which rule is in effect. As a matter of first approximation, the higher the interest rate, the more they will receive.²³ Indeed, based on the calculations above, it seems safe to assume that a total transfer of hundreds of millions of dollars was at stake in setting the rule by which interest rates in Chapter 13 plans are calculated. We can thus see why the lender, supported by other lenders, would be eager to push this case to a definitive resolution.

The early skirmishes in *Till* were inconclusive. The bankruptcy court sided with the Tills, endorsing the 9.5% rate that they proposed.²⁴ The district court, on the other hand, went with the lender and its 21% rate.²⁵ The Seventh Circuit articulated yet a third way to approach the problem.²⁶ It said that the proper place to begin was with the contract rate—here 21%—and

²¹ For a formal demonstration of this point, see Alan Schwartz, *Valuation of Collateral*, in *BANKRUPTCY STORIES* (Robert K. Rasmussen ed., forthcoming 2007).

²² Also, to the extent that lenders in this area are running up against interest-rate ceilings, the interest-rate-in-bankruptcy issue may also affect the ability of some to get financing in the first instance.

²³ Exactly how much more they will recover is uncertain. Higher interest rates make it more likely that a debtor will not be able to complete the plan. Should the plan fail, the lender will keep any payments received and can recover its collateral.

²⁴ *Till v. SCS Credit Corp.*, 541 U.S. 465, 471–72 (2004).

²⁵ *Id.* at 472.

²⁶ *In re Till*, 301 F.3d 583, 591 (7th Cir. 2002), *rev'd*, 541 U.S. 465 (2004).

then allow each side to argue why this rate does not reflect the risk of default posed by this debtor.

The dissent in the court of appeals articulated yet a fourth position.²⁷ It argued that the rate should be based on what it would have cost the lender to obtain the funds elsewhere. The thought here is that, by not getting the \$4000 from the Tills, the lender would have to turn to other sources of capital in order to meet the borrowing demand of its customers. So long as the lender had sufficient sources to fund all prospective loans, the cost of these funds represents the true cost to the lender of not getting its hands on the \$4000 today.

The Supreme Court thus had four approaches from which to choose. It would be hard to label the adoption of any of the four a calamity. Adopting a higher rate would benefit lenders in the short-run and those risky borrowers who do not file for Chapter 13 in the long-run. A lower rate will help those with existing loans who file for bankruptcy (at the expense of lenders) as well as those with future loans who file for bankruptcy (at the expense of risky borrowers who do not file for bankruptcy). One's view of appropriate bankruptcy policy may tug one way or the other, but few would see any calamities lurking.

The Supreme Court, however, was able to create one. In an opinion by Justice Stevens, four justices endorsed the formula approach put forth by the Tills. Justice Scalia, writing on behalf of four justices, found the contract approach articulated by the Seventh Circuit a better fit with the statute. Justice Thomas wrote for himself. He concurred in the judgment reversing the court of appeals, but did not join Justice Steven's opinion, thus leaving that opinion a vote shy of majority status. Despite the many opinions generated in the lower courts, both in this case and in similar ones, Justice Thomas came up with an argument advanced by no party in this litigation and adopted by no court. He argued that, as he read the text, it appeared to him that the interest rate the Tills should pay should be equal to the risk free rate.²⁸

Here is the first calamity. The Supreme Court's decision fails to resolve definitively the question that the Court was asked to address. To see the problem, consider what a bankruptcy judge should do if she is confronted with the following three cases. In the first case, she is met with a version of *Till*. The debtor financed the purchase of his car with a loan at 21%. Due to rising interest rates, three-year treasury notes are yielding 7%, and the prime interest rate that banks charge their best customers is 10%. If the debtor

²⁷ *Id.* at 596 (Rovner, J. dissenting).

²⁸ Justice Thomas, in a footnote, suggests that the prime rate may best approximate the risk-free rate. See *Till*, 541 U.S. at 488 n.2 (Thomas, J., concurring). However, the better gauge of a risk-free rate of return is the obligations of the federal government.

proposes a plan based on an 11.5% interest rate, the court should approve the plan.²⁹ This is just *Till* revisited.

But things can become more complicated. Let's assume that the next case our intrepid bankruptcy judge receives is from a debtor who, at the time he financed his car, was a better risk than either the Tills or the debtor in our first case. His contract called for an interest rate of 10%. The debtor proposes to use this interest rate in his plan. The court should approve this plan as well. The Stevens approach of prime-plus would approve any interest rate 11.5% or higher (assuming a 1.5% risk premium as in *Till*), Justice Thomas's risk-free rate interpretation would endorse any plan based on an interest rate of 7% or above, and Justice Scalia's contract rate reading of the statute would validate a rate of 10% or greater. So, the second debtor would receive an interest rate based on Justice Scalia's reading of the statute.

As for our third debtor, he had sterling credit at the time of the car loan, and was able to borrow the funds for his car at a 6.5% interest rate. To garner judicial approval of his plan, our third debtor will have to base his interest rate on the approach created by Justice Thomas. To see why, Justice Scalia's analysis would approve a plan at a 6.5% rate, but this plan would only pass muster with four justices. Justice Thomas's reading of the statute would approve of any plan based on an interest rate of 7% or higher. So, for our third debtor, 7% it is.

This is a calamity. Pity the poor lawyer who has to explain the vagaries of these results to his clients. Sometimes being a better credit risk at the time of the loan matters; sometimes it does not. Sometimes the prevailing prime rate matters; sometimes it does not. Sometimes the key is the interest rate that the federal government pays; sometimes it is not. Now, one may be tempted to salvage some respect for the Court by noting that one can locate enough wiggle room to not have the unseemly effect just described. Justice Scalia's opinion allows for evidence to be introduced that would show that the contract rate is no longer appropriate.³⁰ One may be tempted to argue that this would allow the interest rates in the second and third cases to rise to the level set forth in Justice Stevens's opinion. After all, the contract interest rate reflected a low risk of default, and one would suppose the fact that debtor filed for bankruptcy implies this rate no longer reflects the risk that this debtor possesses.

Yet there are at least two problems with such a face-saving attempt. The first is that it is easy to imagine situations where the debtor has experienced a single event that has increased his debt load but, once this new debt is scaled

²⁹ Justice Stevens's opinion directly supports the use of the 11.5% rate. Justice Scalia's opinion would endorse the 21% figure. While Justice Thomas would prefer 7%, 11.5% is closer to that number than is 21%.

³⁰ See *Till*, 541 U.S. at 492 (Scalia, J., dissenting).

back, he will remain a relatively safe risk. For example, the debtor's financial distress may stem solely from a judgment in a traffic accident that exceeded the limits of his insurance. Once this debt is discharged, the debtor can service his remaining debts with ease. For him, the low contract rate of interest is indeed appropriate.

More importantly, however, there is little to be said for any approach that places large information burdens on the bankruptcy court. Each bankruptcy judge, on average, handles thousands of cases a year.³¹ The system survives in large part because although it is judicial in name, it is administrative in practice. The large majority of cases never require any decision by the bankruptcy judge. The system really is not designed to adjudicate the facts of each individual debtor. Any hope that detailed judicial evaluation of the extent to which the debtor's actual ability to repay has changed since the original contract would be feasible founders on reality.

It may be that bankruptcy courts will steer clear of this miasma of shifting interest rates through poor counting. They may well treat Stevens's opinion as a majority opinion even though it is not. Indeed, some courts so far have seemed to take this approach.³² Of course, it is unclear whether such creative accounting will withstand appellate scrutiny. In any event, it is little redemption for the Court's performance that its ill-effects are tempered by lower courts not taking it seriously. The result in *Till* is a calamity, pure and simple.

There is a second calamity as well, at least for those who care about commercial law. Indeed, it is this second calamity that, in my mind, pushes *Till* to the top of list. The Court's handling of the case betrays a certain disdain for commercial law. The three opinions express a decided lack of interest in commercial law in different ways.

Let's start with Justice Thomas. Justice Thomas was content to issue an opinion that left the issue before the Court in an inconclusive draw. One problem is that Justice Thomas's opinion strikes one as odd on its own terms. It contains, as Justice Scalia pointed out, a fundamental inconsistency. If the

³¹ See THE 2005 BANKRUPTCY YEARBOOK & ALMANAC 5, 350-97 (Christopher M. McHugh & Thomas A. Sawyer eds., 2005) (reporting over 1.5 million bankruptcy cases filed in 2004 and listing 340 bankruptcy judges).

³² See, e.g., *In re Smith*, 310 B.R. 631, 633 (D. Kan. 2004) ("[T]he Supreme Court held that the formula approach . . . was the appropriate method . . ."); *In re Cachu*, 321 B.R. 716, 719 (Bankr. E.D. Cal. 2005) ("The Supreme Court . . . adopted a formula method . . ."); *In re Soards*, 344 B.R. 829, 831 (W.D. Ky. 2006) ("The Supreme Court adopted the 'formula' or 'risk plus' analysis in determining the appropriate rate of interest."). Indeed, at least three courts have applied the formula method of Stevens's opinion even though the contract rate was below prime. See *Soards*, 344 B.R. at 832; *In re Pryor*, 341 B.R. 648, 651 (Bankr. C.D. Ill. 2006); *In re Scruggs*, 342 B.R. 571, 575 (Bankr. E.D. Ark. 2006).

plan in *Till* provided that the Tills would give the lender a note issued by a friend of the Tills, the court would have to determine the value of the note at the date of the plan. Such valuation would include the risk that the friend would not pay. If the plan requires payments by the Tills, however, Justice Thomas believes that the risk of nonpayment is no longer taken into consideration. This is surely an odd result. Nothing in the Bankruptcy Code even remotely suggests that Congress gave debtors this type of break.

Moreover, no court had adopted Justice Thomas's reading.³³ The statutory language at issue is not of recent vintage, and bankruptcy courts by and large do not have reputations for being pro-creditor. In such a situation, prudence would suggest that the meaning that Justice Thomas found in the statute was not there.

Yet even if we put aside legitimate questions about the quality of the position that Justice Thomas expressed, there is still the troubling fact that he expressed them at all. As is evidenced by *Till* itself, lower courts have struggled with this issue. One can find four different positions in the opinions generated in the *Till* litigation prior to the issue reaching the Court. The courts of appeals generally had divided on the issue, one which occurs in hundred of thousands of cases a year. What the lower courts simply needed was a decision telling them which rule to apply.

Faced with this pressing need, Justice Thomas issued his opinion of one. While Justice Thomas did not articulate the reasons behind his decision to write separately, it is easy to see what they were not. It is common knowledge that Justice Thomas adheres to a textualist method of interpretation. Yet it is difficult to consider this case to be a fitting ground to score points for the textualist cause. To be sure, Justice Thomas did accuse his brethren of textual infidelity. "Both the plurality and the dissent ignore the clear text of the statute in an apparent rush to ensure that secured creditors are not undercompensated in bankruptcy proceedings."³⁴ He asserted that the text was plain because the court had to determine the "value, as of the effective date of the plan, of property to be distributed under the plan."³⁵ Justice Thomas argued that the word "property" required that one only look at what the plan called for. Yet, what about the words "to be?" These could easily be interpreted as requiring the court to make a guess as to what will in fact be distributed. Justice Thomas, in essence, assumes that all

³³ See *Till*, 541 U.S. at 506 (Scalia, J., dissenting) ("Circuit authority uniformly rejects the risk-free approach. . . . Justice Thomas identifies no decision adopting his view.").

³⁴ *Id.* at 486 (Thomas, J., concurring).

³⁵ *Id.* (Thomas, J., concurring) (citing 11 U.S.C. § 1325(a)(5)(B) (1994)).

promised payments will be made. A more realistic approach would reflect the risk of nonpayment.³⁶

Indeed, there is nothing to suggest that Justice Scalia is a faint-hearted textualist. His opinion in *Till* focuses squarely on the text of the Bankruptcy Code.³⁷ While few would characterize Justice Stevens as a textualist, his opinion would not raise textualist hackles. Its conclusion that some risk premium needs to be included rests firmly on the statutory text.³⁸ Justice Stevens and Justice Scalia agree on what the statute requires—a stream of payments, the present value of which (including the risk of nonpayment) equal the value of the collateral—it is the method for determining this number on which they part company. *Till* is simply not a case where the decision turns on a justice's methodological commitments.

If it is not a dispute over method, what explains Justice Thomas's opinion? The most likely explanation is that he simply reads the statute differently from the rest of his colleagues. After due consideration, he concluded that the statute is best read as requiring a risk-free rate of return.

This conclusion, however, does not necessarily mandate that the Court be left fractured. Justice Thomas was presented with a choice. All of his brethren rejected his reading of the statute. While Justice Thomas was obviously not persuaded by their arguments, they are at least reasonable, and Justice Thomas does not suggest differently. He had three options. One, which he exercised, was to write an opinion that set forth his interpretation of the provision at issue.

A second route Justice Thomas could have taken would have been to vote with one or the other group of four, hence providing a clear rule of decision to the lower courts. Judges do not necessarily endorse all of the arguments of the opinions that they join. While there are obviously no data on this score, one would expect that there are situations where a justice, rather than setting out her own views, simply joins the opinion that is closest to her conception of the appropriate resolution of the case.

Alternatively, Justice Thomas could have articulated his resolution of the interpretative issue before him, but joined one of the other two opinions in order to provide a majority. He could have noted that, in his opinion, all prior courts had gone astray. Yet, with the lower courts in disarray and no support among his colleagues for his opinion, he could have decided which of the two other opinions better captured the language of the statute.

³⁶ See *id.* at 505 (Scalia, J., dissenting) (recognizing that “[b]ecause there is no guarantee that the promised payments will in fact be made, the value of this property right must account for the risk of nonpayment”).

³⁷ See *id.* (Scalia, J., dissenting).

³⁸ See *id.* at 474–77.

This choice presents a question of the judge's role. We have known at least since Bickel that there are virtues in not pressing one's principles at every turn.³⁹ Respect for the need to implement a workable law should at times trump a judge's impulse to boldly state his opinion as if he were the sole decision-maker writing on a clear slate. To be sure, no one suggests that judges should reflexively bow to the will of their colleagues. One can easily imagine situations where other concerns dictate striking out alone. Yet to the extent that one places any value of the running of the system, *Till* would be a case where this concern should dominate.

Justice Scalia, in his opinion, is not as tone-deaf to the situation as is either Justice Thomas, or, as we shall see, Justice Stevens. He reads the statute as requiring that the secured creditor receive compensation for the risk of nonpayment. His approach presumes that, as a general matter, markets will provide better information about this risk than would a bankruptcy judge. However, in other cases Justice Scalia has demonstrated that his commitment to textualism means that he will eschew any attempt to create a sensible body of commercial law doctrine.⁴⁰ To be sure, if one posits that the justices have no expertise or interest in commercial law, one can defend such an approach when it is used to pick among plausible readings of the statute.⁴¹ Such an approach, however, reveals little sympathy for commercial law as a discipline.

Yet the most troubling opinion is that authored by Justice Stevens. Justice Stevens's result can be defended, for reasons I will explain shortly; however, it cannot be done on its own terms. Justice Stevens claims that prime plus 1.5% compensates the lender for the risk posed by the Chapter 13 plan. This is laughable. A spread of 150 basis points is by no stretch of the imagination adequate compensation for the risk which the lender is undertaking. The rate endorsed by Justice Stevens would imply that the average Chapter 13 debtor presents the same risk as does the Ford Motor Company. Ford is undeniably going through difficult economic times. Still, no investor would be willing to swap a \$1000 Ford bond for a \$1000 repayment obligation in a Chapter 13 plan if both carried the same interest rate. Chapter 13 plans fail at an alarming rate. A bump of one to three percent over the prime rate falls woefully short of compensating this risk. Justice Stevens's opinion simply cannot be squared with commercial reality.

³⁹ See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 111–98 (Yale 2d ed. 1962) (describing the “passive virtues” in constitutional decisionmaking).

⁴⁰ See, e.g., *United Savings Ass'n of Tex. v. Timbers of Inwood Forest Assoc's.*, 484 U.S. 365 (1988).

⁴¹ For such an attempt, see 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).

One can, however, offer an intelligible defense of the result that Justice Stevens reaches. Sensible commercial law policy suggests that secured lenders should get a promise equal to the value of their collateral. In setting the value of the collateral, however, the Supreme Court and Congress have given secured creditors a windfall. The Bankruptcy Code, codifying and in some respects extending the Court's holding in *Rash*, now provides that secured creditors are to receive the retail of the car.⁴² This is a higher amount than the creditor would receive had it foreclosed on its collateral. About the best that can be said of this benchmark is that it is relatively easy to ascertain. Thus, in a world where valuations of collateral are systematically too high, interest rates that are systematically too low may move us closer to the correct amount.

Justice Stevens's stated rationale, however, creates the possibility of mischief by reaching this result through reasoning that implies that courts perform better than markets in making valuation decisions. The opinion can infect other areas of bankruptcy practice. The implicit message to judges is that they need not attempt to square their analysis with any coherent theory of bankruptcy practice. Justice Stevens fails to provide a robust methodology by which future interpretative questions can be adjudicated.⁴³

The costs of such an approach can be seen in a recent bankruptcy court decision, *In re Mirant Corp.*⁴⁴ Few would confuse *Mirant* with the *Tills*. The *Mirant* corporate group consists of eighty-three related companies. The enterprise produces and markets electric power. When it filed for bankruptcy in 2003, it listed assets in excess of \$20 billion. In formulating a plan for reorganization, the parties sparred over valuation, including the value of the securities that the unsecured creditors were to receive. These creditors were by and large sophisticated investors who made investments in a number of companies. The court opined that "*Till* makes clear that the market in fact does not properly measure the value of an obligation undertaken in a plan."⁴⁵ Thus, for determining the value that a creditor receives under a plan, the court believed that the formula approach was appropriate. It was for the court, not the market, to assess the worth of the debtor's securities.

⁴² See 11 U.S.C.S. § 506(a)(2) (West Supp. 2006).

⁴³ When a statute provides little guidance and the judge is unsure of foot in the area, one possible approach is attempting to hew to the signposts of the past. See Douglas G. Baird & Robert K. Rasmussen, *Boyd's Legacy and Blackstone's Ghost*, 1999 S. CT. REV. 393. Such an approach would have obvious parallels to Cass Sunstein's call for the justices to use a minimalist approach in constitutional cases. See CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (Harvard 1999). Justice Stevens, however, makes no attempt to draw guidance from other parts of the Code or other decisions.

⁴⁴ 334 B.R. 800 (Bankr. N.D. Tex. 2005).

⁴⁵ *Id.* at 822.

It makes little sense, however, to interpret the Bankruptcy Code in this fashion. It is one thing to acknowledge that, in the absence of a market determination, value is uncertain.⁴⁶ It is quite another to insist that bankruptcy judges over the long-run will do a better job of valuing a company than would the market.⁴⁷ Justice Stevens's approach in *Till* leaves us with a Bankruptcy Code bereft of intellectual foundations. We are in a nether world where bankruptcy judges believe that, in valuing publicly traded companies in a plan of reorganization, "the value to be ascertained . . . is not necessarily what a willing buyer would pay."⁴⁸ This is a calamity.

⁴⁶ See Douglas G. Baird & Donald S. Bernstein, *Absolute Priority, Valuation Uncertainty, and the Reorganization Bargain*, 115 YALE L.J. 1930 (2006).

⁴⁷ Other bankruptcy courts have also held that *Till* applies in a Chapter 11 case. See *In re Cantwell*, 336 B.R. 688, 693 (Bankr. D. N.J. 2006); *In re Prussia Assoc.'s.*, 322 B.R. 572, 589 (Bankr. E.D. Pa. 2005).

⁴⁸ *Mirant*, 334 B.R. at 818 n.56.

