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Introduction to the Articles Presented by Three Rising Stars in Bankruptcy Scholarship

*The Honorable Samuel L. Bufford**

Bankruptcy law is one of the fundamental legal structures necessary to the functioning of a market economy. In the common law tradition of the United States and England, bankruptcy law dates back to 1542.¹ Bankruptcy law's origins are even more ancient, with roots extending back to at least to the Hammurabi Code² and the Law of Moses.³ In the transition to market economies and Western-style legal systems in Central and Eastern Europe, the development of a viable bankruptcy law is one of the first priorities.⁴ Thus, the United States bankruptcy law⁵ that forms the background for this symposium is central to the economy and commercial life in the United States.

The *Chapman Law Review's* Bankruptcy Symposium seeks to facilitate discussion among young bankruptcy scholars, and between these scholars and the local bankruptcy community, students, faculty and distinguished scholars. These scholars have engaged in research in important and exciting areas of bankruptcy law. In addition, the symposium provides a forum for these scholars to present papers which will make a substantial contribution to bankruptcy scholarship.

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¹ The first bankruptcy law in England came during the reign of Henry the VIII in 1542. See An Act Against Such Persons as do Make Bankrupts, 34 & 35 Hen. 8, Ch. 4 (1542) (Eng). See generally Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 329 n.21 (1991). A more commonly known statute was enacted in the reign of Elizabeth I. See An Act Touching Orders for Bankrupts, 13 Eliz., ch. 7 (1570) (Eng.).

² See CHILPERIC EDWARDS, *HAMMURABI CODE AND THE SINAITIC LEGISLATION* § 117 (3d ed. 1921) (providing for the discharge of a debt after the wife, son or daughter of the debtor has worked for the creditor for three years). The commentary to this translation provides extensive notes on the provisions relating to debt and distraint. *Id.* at 76-77.

³ Deuteronomy 15:1-5.

⁴ See, e.g., Samuel L. Bufford, *Bankruptcy Law in European Countries Emerging from Communism: The Special Legal and Economic Challenges*, 70 AM. BANKR. L.J. 459, 463-65 (1996).

⁵ Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 (1999), and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

In my judgment, these aspirations have been admirably met. Professor David Epstein and I spent an entire day with these young scholars, discussing their work and insights with the Chapman community. The discussion highlighted several insights into bankruptcy law and policy, which will animate further discussion on this subject.

In the remainder of this introduction, I comment briefly on the distinctive contributions that each of these papers makes to bankruptcy scholarship, and begin the further discussion of these issues.

I. PROFESSOR FREDERICK TUNG'S PAPER

Professor Frederick Tung's paper addresses a distinctive problem for a future claims representative (FCR) that arises only in mass tort bankruptcy cases. Professor Tung's position is that this agent has a distinct disadvantage because she has no principal to whom she is responsible. Instead, she is responsible to the bankruptcy judge who appointed her. Professor Tung posits that this fact raises additional, unique problems for mass tort cases.

A. Mass Tort Bankruptcy Cases Generally

Mass tort cases are rare in the bankruptcy system. During some 14 years as a bankruptcy judge, I have handled more than 75,000 bankruptcy cases, including more than 2,500 chapter 11 cases. However, I have never presided over a mass tort case, nor will most bankruptcy judges. Indeed, one could almost make a short list of all the mass tort cases: A.H. Robins, Dow Corning, UNR, Piper Aircraft, and the asbestos cases (Johns-Manville, Eagle Picher and Amatex).

Nonetheless, mass tort bankruptcy cases are extremely important, because of their massive size. They typically consume significant amounts of judicial time and resources. Administration costs of mass tort bankruptcy are equally astronomical. A mass tort case concentrates in a single forum thousands, perhaps hundreds of thousands, of separate litigation actions that would otherwise consume large amounts of financial, legal and judicial resources in many jurisdictions cumulatively.

This consolidation of litigation emphasizes the necessity of a workable bankruptcy system for mass torts cases. No other procedure for centralizing such large numbers of cases exists, when these potential/actual suits may be filed in any jurisdiction in the United States, in either federal or state court.⁶ Exclusively, bank-

⁶ The Judicial Panel on Multidistrict Litigation has the power to transfer federal court cases involving one or more common questions of fact to a single judge. *See* 28 U.S.C. § 1407 (1999). However, the Panel does not have the power to transfer state court cases.

ruptcy law can bring large numbers of cases filed in numerous state courts into a single collective proceeding. Further, the procedure imposes an automatic stay on all of those cases pending in other jurisdictions around the country. No other procedure provides for a centralized system of collecting assets and administering claims to minimize the transaction costs. No other procedure has the power to bring all of the relevant assets to bear to solve the mass tort problem before the magnitude of the claims is determined. No other procedure has the power to restructure the finances of the tortfeasor to assure the just resolution of all of the mass tort claims. No other procedure has the power to resolve multitudes of tort liabilities without trying on its merits each claim that is not settled. No other procedure has nearly the power to encourage settlement of large numbers of claims in a reasonable time frame. No other procedure has the power to free assets of the mass tortfeasor to continue in business free and clear of the mass tort claims.

The bankruptcy system provides tools for dealing with mass torts that are far more efficient, albeit not perfect, for administration of such suits than any available alternatives. Thus, the development of concepts and rules for handling mass tort cases is invaluable when such cases are filed.

Professor Tung limits his paper to certain types of mass tort cases. In particular, he limits his analysis to cases involving temporally segregated causal occurrences from manifestation of damages. In some cases the delay in manifestation results from a delay in the development of symptoms, as in the asbestos, Dalkon Shield and breast implant cases. In other cases, such as Piper Aircraft, products manufactured by the debtor may cause injury long after they have entered into the stream of commerce.

These kinds of mass tort bankruptcy cases will surely continue to be filed in the future.⁷ In addition to the recurrence of cases like those that we have already seen, yet-unimagined occurrences which will precede the suffering will give rise to more mass tort bankruptcies.

In re Celotex Corp. "Technifoam" Prods. Liab. Litig., 68 F.R.D. 502, 504 n.2 (J.P.M.L. 1975). Furthermore, such a transfer is for pretrial purposes only; a case must be returned to its original venue for trial, absent consent of the parties. See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40 (1998).

⁷ For example, the tobacco companies are presently trying to amend tort law and to fashion settlements with state and federal governments to avoid mass claims that drive individual companies into bankruptcy. In addition, handgun manufacturers are already turning to the bankruptcy courts to deal with claims that their products are unreasonably unsafe and might cause actionable harm to large numbers of people who have not yet been shot.

B. Tort Claims in Bankruptcy

Tort claimants, as a general rule, tend to get less than their share of assets due them in a bankruptcy case. Tort claimants wrestle with the unliquidated character of their claims, while claimants with greater priority, such as contract claimants, argue that their claims entitle them to recovery. Contract claimants typically contend as a matter of policy that they have supplied the cash, or goods, or services, with a definite market value, for which they deserve payment. In contrast, tort claimants do not provide cash, goods, services, or even anything of value.

Additionally, contract claimants argue that tort claims, both present and future, tend to be vastly inflated, and should not be given credibility, and thus bargaining power, commensurate with their size. Only when a settlement is reached, or a judgment affirmed, can a definite amount be attached to a tort claim. Mass tort claims are usually unliquidated, and thus uncertain. While bankruptcy law provides for the estimation of unliquidated claims, the procedures for conducting such an estimation are undeveloped; often, neither the parties, nor the judges, know how to correctly estimate the value of these claims. Finally, the punitive damages that frequently accompany tort recoveries must be subordinated to most other claims,⁸ resulting in a typically valueless punitive damages component expressed in a reorganization plan.

C. Future Claimants

Future claimants are in a more precarious position. These potential claimants must compete with present tort claimants, whose claims are usually a large part of the unsecured debt in a mass tort bankruptcy case. These existing claims may be sufficient to eliminate the entire equity of the firm.

However, these future claimants may constitute a substantial class, whose injuries either have not yet occurred or have not yet manifested. Clearly, identification of the members of this class, at the time of the bankruptcy filing, is impossible to determine. Typically, contract creditors want to exclude claimants from sharing in the assets of a bankruptcy estate or being part of the reorganization plan.

In an attempt to deal with these problems, the bankruptcy system has developed a process of appointing a special legal repre-

⁸ See § 726(a)(4). While this section does not apply strictly in a chapter 11 reorganization, the priorities in chapter 11 cases tend to be treated similarly to chapter 7, because § 1129(a)(7)(A)(ii) requires that a creditor voting against a plan receive as much as that creditor would receive in a chapter liquidation.

sentative who serves as the FCR for the future claimants.⁹ A trust fund is set aside for the future claimants, a payment mechanism is established, and a channeling injunction is issued to prohibit future claimants from pursuing any claims except those against the fund.¹⁰

Professor Tung contends that under this system future claimants are likely to receive proportionally less compensation in a reorganization. Equal treatment with the other unsecured creditors, whether the debtor is liquidating or reorganizing, would seem more appropriate. However, future claimants typically get nothing at all.¹¹

Professor Tung finds two constraints on the function of the FCR in a mass tort case bankruptcy which may impair her ability to effectively represent the interests of future claimants. First, he finds that the FCR is beholden to the presiding judge, rather than a client, for appointment, employment of professional assistance, and receipt of compensation for services.¹² Second, the FCR is constrained by the norms of large case participation, which promote a deal rather than the obstruction of the confirmation of a consensual reorganization plan. Both of these factors, in Professor Tung's view, may lead the FCR to be less effective than an agent for an existing claimant.

D. The Agency Problem

Professor Tung focuses on the difficulties encountered in effective representation of future claimants in the bankruptcy process. He points out that future claimants could easily be the dominant creditor group,¹³ and could have a legitimate claim to a majority ownership of the reorganized firm.¹⁴ At the same time, if they are not given sufficient notice of the bankruptcy case, their claims

⁹ Professor David Epstein, a panelist at this conference, was the FCR in the Piper Aircraft case. *Epstein v. Official Comm. of Unsecured Creditors*, 58 F.3d 1573, 1574 (11th Cir. 1995); see *In re Piper Aircraft Corp.*, 162 B.R. 619 (Bankr. S.D. Fla. 1994).

¹⁰ See, e.g., *In re Eagle-Picher Indus., Inc.*, 203 B.R. 256, 280 (Bankr. S.D. Ohio 1996). See also *In re Joint E. & S. Dists. Asbestos Litig.*, 878 F. Supp. 473, 572 (E.D.N.Y. 1995).

¹¹ In contrast, future claimants under the Bankruptcy Act were not entitled to participate in the benefits, because their claims were not "provable," i.e., they could be liquidated or estimated with reasonable certainty. See § 57(d), 11 U.S.C. § 93(d) (repealed 1978) (the Bankruptcy Act). In 1978, Congress repealed the Bankruptcy Act, effective October 1, 1979.

¹² See Fredrick Tung, *The Future Claims Representative in Mass Tort Bankruptcy*, 3 CHAP. L. REV. 43, 67.

¹³ *Id.* at 54. Actually, Professor Tung says that the future claimants will be the dominant creditor group. However, this appears to be somewhat of an overstatement, because in some cases the victims with manifest illness or injury will exceed those not yet injured or suffering. For example, in the A.H. Robins and the Dow Corning cases, the future claimants may be a smaller group than those already suffering, because the product causing injury had been removed from the marketplace.

¹⁴ *Id.*

against the debtor cannot be barred, and the debtor cannot dispose of its liability to them in the bankruptcy case.¹⁵ Finally, the contingency of the future claims and their temporal dispersion makes them difficult to quantify.¹⁶

The heart of Professor Tung's paper lies in his discussion of the agency problems of the FCR. The future claimants cannot choose their own agent, because their identity is unknown.¹⁷ The future claimants thus have no ability to select an agent who will best represent them. In addition, they cannot fire the agent if the agent's representation is less than adequate.¹⁸ Instead, the judge, or the U.S. Trustee, chooses the FCR, and determines the terms of her appointment.¹⁹ Typically, the FCR is appointed at the request of the debtor and other stakeholders. The debtor and stakeholders' interests lie in maximizing their own recoveries in the bankruptcy resolution.²⁰

A chapter 11 reorganization is fundamentally an exercise in the negotiation of benefits by each of the stakeholders. In consequence, the success of the FCR is largely determined by her negotiating skill. Professor Tung argues, however, that because the FCR has no principals, she finds it more difficult to bargain effectively for the class of future claimants. Thus, the FCR has a unique negotiating handicap: while she can bluster, she has the least credible threat to defect.²¹

This contention may not be entirely correct. It is very difficult, if not impossible, to confirm a plan of reorganization over the objection of an FCR. This may put the FCR in a stronger bargaining position than the other parties. An FCR may not be subject to cramdown in case there is not a consensual plan.²² If a plan provides an insufficient share of the assets to provide for the future claimants, the FCR will oppose a plan, and it can proceed only under the cramdown provision. Opposition by the FCR may be sufficient to doom such a plan.²³

In addition, Professor Tung contends that a mass tort case is a "megabankruptcy," and that such cases have their own culture and group norms.²⁴ One of the most important norms of this group is that a megabankruptcy case requires that a plan be confirmed,

¹⁵ *Id.* at 52.

¹⁶ *Id.* at 53.

¹⁷ *Id.* at 59-67.

¹⁸ *Id.* at 64.

¹⁹ *Id.*

²⁰ *Id.* at 61.

²¹ *Id.* at 75.

²² See § 1129(b).

²³ At his oral presentation, Professor Epstein reported he believed, in the *Piper Aircraft* case, he could not be crammed down, which gave him substantial negotiating power. See Epstein, *supra* n. 9.

²⁴ See Tung, *supra* note 12, at 73.

and that the plan be a consensual plan.²⁵ In addition, social norms require that everyone at the bargaining table receive a share, which includes creditor classes giving up a share to equity. According to Professor Tung, the future claims fund is the easiest source for such a share.²⁶

I agree with Professor Tung that equity must be given a share to facilitate a consensual plan. I am informed that the value of obtaining equity's consent to a plan is approximately a 15% share in the reorganized debtor. However, I am less inclined than Professor Tung to expect that this share is likely to come from the fund for future claimants. I think that the share for future claimants tends to be less than they should receive. However, I think that the primary problem for fully funding a proportionate share for the future claimants lies in the difficulty in valuing their claims.

E. Role of the Bankruptcy Judge

While lacking a traditional principal, the FCR is actually under the control of the judge. The performance of the FCR is dominated by the judge, who controls both the FCR's retention of professionals, and the fees paid to both her and her hired professionals.²⁷

Professor Tung asserts that the judge's interest in a mass tort case lies mainly in promoting her prestige and reputation. These factors are at issue much more in a mass tort case because it will normally be the largest and most important of the judge's entire judicial career.²⁸ Thus the judge is very interested in achieving a successful reorganization.²⁹ This goal is more important than the zealous representation of the rights of future claimants.³⁰ In consequence, the judge may choose an FCR who is more likely to go along with a plan than to fight for the rights of the future claimants.³¹

I respectfully disagree with Professor Tung's description of the role of the bankruptcy judge in a mass tort case. My experience is that judges are not particularly invested in the success of reorganizations.³² In fact, some 73% of chapter 11 cases do not

²⁵ *Id.* at 74.

²⁶ *Id.* at 75.

²⁷ *Id.* at 67.

²⁸ *Id.* at 69.

²⁹ *Id.*

³⁰ *Id.* at 70.

³¹ In Professor Tung's view, only this consideration can explain the fact that the judge in the *Robins* case chose an FCR who was very junior and had very little experience, in a case where the other players were very seasoned large case attorneys. *Id.*

³² Professor Tung points to the selection of a junior, inexperienced lawyer as the FCR in the *A.H. Robins* case as evidence that the judge in a mass tort case has an investment in

lead to the confirmation of a plan of reorganization.³³ a substantial majority are either converted to chapter 7 or dismissed. The parties in interest, not the judge, are principally responsible for determining whether a business is worth more dead or alive. The parties will conclude whether a negotiated plan which distributes assets is preferable to the statutory plan in chapter 7.

Furthermore, bankruptcy judges rarely appoint an FCR. While the Bankruptcy Code and rules are silent on the issue, bankruptcy courts usually turn to the U.S. Trustee for the selection of an FCR, subject to confirmation by the court.³⁴ Where the U.S. Trustee selects the FCR, the bankruptcy judge is less likely to feel any investment in the outcome of the efforts of the FCR.

II. PROFESSOR TODD ZYWICKI'S PAPER

In his article, Professor Todd Zywicki performs a great service in pulling together a substantial body of economic studies that bear on the economics of credit cards.³⁵ These studies are published in disparate sources that are generally difficult to find. Professor Zywicki analyzes these studies to determine what they collectively teach us about credit card debt, and its relation to consumer bankruptcy cases. I comment here on a few of his points.

A. The Changing Role of Credit Cards

The role of credit cards in the United States economy has changed quite dramatically in the last twenty years, and has become far more extensive. Credit cards now play several roles in the economy that they did not play in the past. First, credit cards now serve as a transactional medium, where they have replaced checks and cash. Second, credit cards have shifted the risk of providing credit from individual merchants to third-party credit card issuers. Third, credit cards provide lending functions for consumers, by permitting them to make purchases and to pay when they are able. Fourth, credit cards are utilized extensively to finance business debt, due to their convenience over traditional methods

the outcome. The case was unusual, however. It was handled largely by a district judge, not the bankruptcy judge. Notably, an FCR is typically chosen by the United States Trustee, not by the judge.

³³ This figure is calculated from data contained in Ed Flynn, *Who is Filing Chapter 11?*, AMER. BANKR. INST. J., Feb. 1999, at 30.

³⁴ This practice follows the procedure applicable to the appointment of a chapter 11 trustee or an examiner. See 11 U.S.C. § 1104 (1999); FED. R. BANKR. P. 2007.1. The appointment process was different in the *A.H. Robins* case, because it was an early mass torts case and was filed before the adoption of the United States Trustee program (except in certain pilot districts).

³⁵ Professor Zywicki is also writing a companion piece on credit cards and bankruptcy, which has not yet been published.

of business credit. This change in the use and structure of credit cards raises concerns about credit card issuer profitability.

B. The Level of Credit Card Profits

Are credit card profits too high? Professor Zywicki's response is unclear. While he devotes substantial attention to explaining how credit card interest rates may reasonably vary substantially from rates for other loans, he never explicitly states whether his explanation explains the variance.

I think that Professor Zywicki does not believe he needs to answer this question directly. He holds the standard economist's view that unreasonably high profits last only for a short term, absent barriers to entry. If the players in a market are making unusual profits, they will quickly attract competitors desiring to share the profits, who will drive the profit level down to a competitive level.³⁶ In the medium term, this strategy by competitors will make any market competitive, unless barriers to entering the market exist.³⁷

Professor Zywicki argues that the barriers to entry in the credit card market are indeed low. He notes that the principal players in this market today did not have a substantial market share even a few years ago; thus demonstrating market competitiveness. In the long run, credit card interest rates will reflect the credit risks that issuers underwrite and the costs of doing business in this particular market.

However, this test may be too blunt. In their Horizontal Merger Guidelines, the Antitrust Division of the Department of Justice and the Federal Trade Commission (FTC) use a much more delicate measure. For evaluating horizontal mergers, they consider a market competitive if a single seller who raises its prices by 5% would lose enough sales to make the price increase unprofitable.³⁸ For example, if the market rate for credit card interest is 18.0%, this market is competitive only if a credit card issuer who raises its rates to 18.9% (a 5% increase) would lose enough business that the rate increase would be unprofitable.

Further, the Antitrust Division and the FTC measure the concentration of a market by using the Herfindahl-Hirschman Index (HHI) of market concentration.³⁹ "The HHI is calculated by summing the squares of the individual market shares of all the partici-

36 PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 136 (15th ed. 1995).

37 LAWRENCE ANTHONY SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 114 (1977).

38 U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMM'N, *HORIZONTAL MERGERS GUIDELINES* § 1.5 (1997), <www.usdoj.gov/atr/public/guidelines/horiz_book/toc.html>. There are a number of other analyses that the Department of Justice and the FTC perform to determine the competitiveness of a market. *Id.*

39 *Id.*

pants.”⁴⁰ A market with an HHI of less than 1000 is considered unconcentrated; an HHI between 1000 and 1800 is moderately concentrated, and an HHI exceeding 1800 is highly concentrated.⁴¹

Professor Zywicki does not give us the market shares for the major players in the credit card market, and I do not know where such data can be found.⁴² For example, if a player has a 40% share of the market, then the market would be highly concentrated.⁴³ If two players each have a 20% share of the credit card market, then the market likely would qualify as moderately concentrated.⁴⁴ However, if no issuer controls over 10% of the market, then it will likely qualify as an unconcentrated market, absent entry barriers.⁴⁵

However, the credit card market has a substantial entry barrier. The barrier is marketing: the role of the billions of direct mail credit card solicitations and millions of hours of credit card marketing.⁴⁶ A credit card issuer that cannot send out large quantities of credit card solicitations and make millions of telemarketing calls, or who is not willing to take on this expense, may lose its customers to those who do. Even at a response rate of one percent, those who send out large numbers of credit card solicitations may slowly, if not quickly, take market share away from any issuer who does not match this solicitation rate. Even “affinity” credit cards require substantial marketing efforts.

C. Does Too Much Credit Card Debt Cause High Rates of Bankruptcy Filings?

Professor Zywicki contends that high levels of credit card debt do not cause high rates of consumer bankruptcy filings. I am inclined to agree. Cases clearly exist where debtors have gone on a spending spree, and run up credit card balances with the intent to discharge these debts in bankruptcy. However, my experience in

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² The only information that I have been able to find is that the top 10 credit card issuers had a 75.5% share of total receivables, apparently at the middle of 1999. See *Credit Cards, 1999 Near-Term Prosperity; Long-Term Threats to Income* (visited March 9, 2000) <<http://www.smrresearch.com/cc99.htm>>.

⁴³ The HHI index calculation for the 40% market share alone would be 1600 (40 x 40).

⁴⁴ The HHI index calculation for each of the two 20% market shares would be 800 (20² + 20²). The squares of the market shares for the others likely would be at least another 200, which would make the total HHI index calculation exceed 1000.

⁴⁵ If 10 market participants each controls 10% of the market, the HHI index for each participant is 100, and the total is 1000 (10² + 10² + 10² + 10² + 10² + 10² + 10² + 10² + 10² + 10² + 10²). If the market distribution is more widely dispersed to any extent, the total cannot reach 1000.

⁴⁶ See Charles A. Docter, *Impact of Credit Card Use on Consumer Bankruptcies*, AM. BANKR. INST. J., Feb. 1998, at 1, 42.

handling more than 75,000 bankruptcy cases is that these cases are unusual, and perhaps even rare.

Sullivan, Warren & Westbrook have documented the causes of consumer bankruptcy.⁴⁷ The principal causes are divorce,⁴⁸ job loss,⁴⁹ injury and illness.⁵⁰

Improvident credit card charges may play a role in consumer bankruptcies. Undisciplined credit card spending may push a consumer debtor over the brink, so that she is no longer able to pay her debts and thus concludes that she needs bankruptcy relief. In a typical scenario, the debtor takes on credit card debt at a manageable level, given the debtor's income and expenses. Then she suffers an economic catastrophe — she loses her job, gets a divorce, becomes ill or is injured. At this point, she is no longer able to service the credit card debt.

Sometimes the debtor uses credit card borrowings to try to bridge the gap until the economic catastrophe is overcome. If this effort is unsuccessful, the credit card issuer is likely to charge bankruptcy abuse. However, the line of credit issued when the account was opened is an invitation to use it when needed.⁵¹

III. PROFESSOR GEBBIA-PINETTI'S PAPER

Professor Gebbia-Pinetti's paper is a fascinating, valuable, and insightful study in statutory interpretation as conducted by the United States Supreme Court. Her study is distinctive in three ways: it is an empirical study of every Bankruptcy Code decision the Supreme Court has issued; it examines the Court's methods, not merely its holdings; and it examines and compares each separate opinion, majority, concurrence and dissent, rather than simply focusing on the methods used in the majority opinions. The statute that she chooses for her study is the United States Bankruptcy Code. Since it went into effect on October 1, 1979, the Code has given rise to forty-eight decisions by the Court beginning in 1982. In carrying out her analysis, Professor Gebbia-Pinetti examines each of the Supreme Court opinions at issue, including the concurring and the dissenting opinions.

47 TERESA A. SULLIVAN, ELIZABETH WARREN AND JAY LAWRENCE WESTBROOK, *THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT* (Yale University Press, forthcoming 2000); see generally TERESA A. SULLIVAN, ELIZABETH WARREN AND JAY LAWRENCE WESTBROOK, *AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA* (1989) [hereinafter *AS WE FORGIVE OUR DEBTORS*].

48 *AS WE FORGIVE OUR DEBTORS*, *supra* note 47, at 160 n.8; 181-82.

49 *Id.* at 8, 196.

50 *Id.* at 8, 166-77.

51 Professor Zywicki does not appear to quarrel with this analysis. He argues this realization is a fundamental feature of credit card lending, and that it is one of the important reasons why credit card interest rates have remained sticky.

Professor Gebbia-Pinetti uses a two-step system for her analysis. First, she catalogs the various methods of statutory interpretation the Court uses in the forty-eight decisions, to determine which method or combination of methods of statutory interpretation the Court utilizes in each opinion. Second, she examines the results of this analysis, to look for patterns of statutory interpretation by the Supreme Court.

Professor Gebbia-Pinetti's purpose is to determine whether, for purely statutory interpretation, the Supreme Court's opinions reveal either (1) a consistent interpretive method or (2) consistent patterns of interpretation.⁵² Furthermore, what Professor Gebbia-Pinetti hopes to do, but leaves for another day, is to use an analysis of the unique characteristics of the Bankruptcy Code and overarching principles and theories of statutory interpretation to critique the Court's chosen methods for interpreting the Bankruptcy Code.⁵³ Additionally, this study fits into a larger context of debate, which has been raging for at least twenty years among judges, practitioners, and scholars of law and other disciplines (such as philosophy, linguistics, and political science), on interpretive models and interpretive methods for statutory analysis. The proper methods of statutory interpretation have stimulated substantial literature, and there are several schools of thought on the issue.⁵⁴

A. Results

Professor Gebbia-Pinetti finds that the Supreme Court generally decides bankruptcy cases based upon principles of statutory interpretation, rather than on substantive bankruptcy policy.⁵⁵ Although half of the forty-eight cases that she analyzes were decided without dissent, these opinions do not disclose a consistent interpretive method. At the same time, apart from constitutional questions and conflicts with other statutes, most of the separate opinions are founded on disputes as to interpretive method.⁵⁶ In particular, these disputes center on two canons of interpretation: the "plain meaning" canon and the "pre-Code" canon. The pre-Code canon suggests a discriminate use of the plain meaning canon for practices under the Bankruptcy Code which vary widely from established practices under the Bankruptcy Act.⁵⁷

⁵² See Karen M. Gebbia-Pinetti, *Interpreting the Bankruptcy Code: An Empirical Study of the Supreme Court's Bankruptcy Decisions*, 3 CHAP. L. REV. 173, 180. [hereinafter *Interpreting the Bankruptcy Code*]

⁵³ *Id.*

⁵⁴ See generally Karen M. Gebbia-Pinetti, *Statutory Interpretation, Democratic Legitimacy and Legal-System Values*, 21 SETON HALL LEGIS. J. 233, 234 & nn.1-2 (1997).

⁵⁵ See Gebbia-Pinetti, *supra* note 52 at 97.

⁵⁶ *Id.*

⁵⁷ See Gebbia-Pinetti, at 274.

Professor Gebbia-Pinetti concludes that the Supreme Court Justices disagree among themselves as to the proper method for interpreting the Bankruptcy Code.⁵⁸ She finds Justice Scalia and Justice Thomas at one pole, favoring a textual approach as the primary method of statutory interpretation for the Bankruptcy Code. Conversely, she finds Justice Stevens at the other pole favoring a more flexible interpretative model. In between, she finds the other Justices, who tend to be less textual than Justices Thomas and Scalia, but not so flexible as Justice Stevens.⁵⁹ The method of interpretation utilized in a particular case turns, at least in part, on the identity of the Justice who writes the majority, or unanimous, opinion.

The complete absence of Supreme Court opinions deciding bankruptcy cases on policy grounds is surprising. Published bankruptcy opinions in the lower courts, including the courts of appeals, often rest on policy grounds. Furthermore, much of the bankruptcy scholarship in recent years is based on policy analysis and arguments. Professor Gebbia-Pinetti leaves this suggestive issue also for another day.

Additionally, the Supreme Court does not rely heavily on congressional intent in interpreting the Bankruptcy Code. For example, even in *Fidelity Financial Services, Inc. v. Fink*,⁶⁰ where the Supreme Court based a bankruptcy decision on the intent of Congress, the unanimous opinion authored by Justice Souter found the intent in the text, structure and history of the provision at issue, and not in legislative history.⁶¹ The Supreme Court is apparently very reluctant to use legislative history to interpret the Bankruptcy Code. Instead, the Court, especially since Justice Scalia joined, is more apt to consult text, structure and broad history rather than specific statements in the legislative history.

I believe this reluctance to base statutory interpretation on congressional legislative history is sometimes well placed. The quality of legislative history is uneven: sometimes it is written by congressional staffers after the fact, where part of the purpose is to correct legislative deficiencies, or even to adopt positions that Congress refused to take.

However, the legislative history of the Bankruptcy Code is one of the best examples of legislative history, and is routinely consulted by lower courts and scholars, as well as practicing attorneys, as a reasonably authoritative guide to interpreting the Bankruptcy Code.

⁵⁸ *Id.* at 294.

⁵⁹ *Id.*

⁶⁰ 522 U.S. 211 (1998).

⁶¹ *Id.* at 221.

B. Scope of the Study

Although her study provides valuable data concerning Bankruptcy Code interpretation, Professor Gebbia-Pinetti cautions that her study alone is not a comprehensive examination of every aspect of Bankruptcy Code interpretation. Other topics that merit examination include (i) whether the interpretive methods employed by the lower courts differ from the methods employed by the Supreme Court in bankruptcy cases, and, if so, how the constraints of precedent affect lower courts' interpretive methods; (ii) the extent to which the use of conflicting interpretive methods causes splits among the courts in bankruptcy cases; and (iii) the binding or persuasive effect of rationale and interpretive method.

Indeed, Professor Gebbia-Pinetti will chair a panel of scholars, practitioners, and judges who will explore these and other topics further in a program entitled "Everything You Always Wanted to Know About Interpreting the Bankruptcy Code," at the 2001 concurrent annual meeting of the American Bar Association Business Bankruptcy Committee and the National Conference of Bankruptcy Judges.

Building on the insightful analysis of Bankruptcy Code interpretation at the United States Supreme Court that Professor Gebbia-Pinetti has given, I outline here my own views of the differences in interpretive methods that appear in the lower courts. These comments go beyond the scope of Professor Gebbia-Pinetti's paper. However, her paper's excellent description of interpretive methods utilized by the Supreme Court makes it much easier to articulate these differences that appear at the lower court level.

1. Statutory Interpretation in the Lower Courts

In order to determine how lower courts interpret the Bankruptcy Code, we should look at the written opinions and other decisions of the lower courts. There are several important differences between judicial reasoning in statutory construction cases by the Supreme Court and such reasoning by a lower court. These differences make the reasoning process at the Supreme Court different in important respects from that by the lower courts.

In my experience as a judge, the task of a lower court, in a statutory interpretation case, is to decide each case that comes before it on the facts of the individual case,⁶² according to the ap-

⁶² Making findings of fact is another role of the trial court that is absent at the Supreme Court, and in any other appellate court. While fact finding is a very important task of the trial court, my comments focus only on the application of the law to the facts, a task which both the trial courts and the appellate courts perform.

plicable law as the court can discern it, based on appropriate methods of statutory interpretation. These methods include all of those used by the Supreme Court, although only some may be applied in a particular case, some are not utilized by the Supreme Court at all. The lower courts are, of course, obligated to follow the teachings of the Supreme Court. Yet, one of the most important results of Professor Gebbia-Pinetti's study shows a vast dichotomy exists between the Supreme Court's approach and that of the lower courts, and indeed, of commentators.

2. The Role of Precedent

Perhaps the most important difference between the Supreme Court and lower courts is that the Supreme Court is not bound by the precedents of any higher court. Indeed, the Supreme Court is also not bound by its own precedents. The general approach of the Supreme Court to precedent is therefore quite different from that of the lower courts. For the most part, the Supreme Court devotes its attention to its own precedents, and gives little consideration to the published opinions of lower courts.

However, the lower courts are frequently bound by precedents in making their decisions. The reasoning of a lower court must include a consideration of such binding precedents. Usually the binding precedents come from a higher court with appellate jurisdiction over the lower court making the decision. In addition, for at least some circuit courts, binding precedents include prior decisions of the same court.⁶³ In a published opinion, the reasoning of a lower court must take account of the relevant binding precedents, and show how the decision in the case at issue is consistent with them.

Non-binding published decisions of other courts also have precedential value in the lower courts. In a bankruptcy court, for example, the published opinions of other bankruptcy courts are entitled to deference, the published opinions of district courts are entitled to great deference, and the published opinions of courts of appeals of other circuits are entitled to very great deference. In contrast, such deference to an opinion of another court is almost unknown in the Supreme Court.

⁶³ In the Ninth Circuit, for example, a rule prohibits a three-judge panel from overruling prior precedent in the Circuit. Only an en banc panel has the authority to overrule such a prior decision. See FED. R. APP. P. 35(a)(1): ("An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions . . ."). The Ninth Circuit Court rule regarding rehearings en banc (R. 35-1) states:

When the opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity, the existence of such conflict is an appropriate ground for suggesting a rehearing en banc.

Furthermore, a non-binding decision of a circuit court receives special consideration in a different circuit. A circuit court will not normally take a position contrary to that of another circuit without giving substantial consideration to whether its decision will create, or extend, a split of the circuits.

3. Practices Under Bankruptcy Act

One of the most important grounds for interpretation of the Bankruptcy Code in the Supreme Court is the practice under the Bankruptcy Act, which was repealed in 1978.⁶⁴ The Supreme Court's inconsistent treatment of practice under the Bankruptcy Act as a basis for interpreting the Code, in Professor Gebbia-Pinetti's view, may leave lawyers with insufficient guidance on this issue.⁶⁵ However, practices under the Bankruptcy Act are rarely important in the lower courts. The bankruptcy courts have handled some 15 million cases under the Code. Published decisions under the Code fill more than 240 volumes of the West Bankruptcy Reporter.⁶⁶ The circuit courts and bankruptcy appellate panels have published thousands of opinions interpreting various provisions of the Code. Only an occasional reported opinion at the trial or intermediate appellate level considers pre-Code law, and only a rare opinion considers that law important in deciding a new case.

The Supreme Court turns to pre-Code practice in interpreting the Code only because, as pointed out *supra*, it refuses to be informed by the wealth of case law interpreting the Code at the lower court level. The Supreme Court should base its Bankruptcy Code interpretation on practice under the Code as reported in lower court published opinions, rather than on pre-Code practice under a quite different statute.

4. Functional Analysis

Professor Gebbia-Pinetti notes the lack of functional analysis in Supreme Court decisions interpreting the Bankruptcy Code.⁶⁷ There may be a good reason for the lack of functional analysis by the Supreme Court. Most of the Supreme Court Justices are entirely lacking in substantial bankruptcy practice experience. Their law clerks have come straight from law school and prior clerkships, and likewise lack bankruptcy practice experience.

⁶⁴ Pub. L. No. 95-598, Title IV, § 401(a), 92 Stat. 2682 (1978) (the repealer provided: "the Bankruptcy Act [Act July 1, 1843, c.541, 30 Stat. 544, as amended] is repealed").

⁶⁵ See Gebbia-Pinetti, *supra* note 52, at 297.

⁶⁶ The publication of West Bankruptcy Reporter coincided with the Bankruptcy Code's taking effect. The first several volumes include some opinions in cases filed under the Act. These soon gave way to cases filed almost exclusively under the Code.

⁶⁷ See Gebbia-Pinetti, *supra* note 52, at 274.

Functional analysis of bankruptcy statutory provisions may be beyond the expertise of the Supreme Court.

C. What Difference Does Interpretive Method Make?

Many legal scholars think that a court's choice of an interpretive method in a particular case is quite important.⁶⁸ I disagree. .

1. Results of Varying Interpretive Methods

Scholars have charged that the Supreme Court's use of varying interpretive methods in Bankruptcy Code interpretation produces undesirable results. Professor Gebbia-Pinetti summarizes the criticisms:

[T]he Court's use of [varying] interpretive methods undermines predictability and stability, increases costs, ignores congressional intent, impairs bankruptcy law by preventing the Court from developing a coherent bankruptcy policy and jurisprudence, leaves the lower courts with inadequate guidance concerning how to interpret the Bankruptcy Code, and contributes to confusion and split decisions among the lower courts.⁶⁹

Indeed, one could posit the opposite view on most of these charges: that the method of reasoning adopted in a Supreme Court decision does not affect the outcome at all; that it does not affect the predictability or stability of the law; that it does not impair the development of bankruptcy policy and jurisprudence; and, that it does not lead to confusion or split decisions among the lower courts.⁷⁰ I leave the development of these arguments for another day.

One of these complaints is accurate. Where statutory interpretation is based on plain meaning, congressional intent is disregarded. This interpretation is premised on the view that Congress enacted the statute, not its intent. If the statute and the intent diverge, the statutory language must govern. If Congress made a mistake, according to this view, then Congress, not the courts, should fix the error. This position, in my view, merits credence. In fact, I utilize this method quite often for deciding the easy cases that come to my court. However, these are not cases in which I would write an opinion for publication.

⁶⁸ Professor Gebbia-Pinetti appears to agree with the view of these other scholars. However this point is not central to her paper.

⁶⁹ Gebbia-Pinetti, *supra* note 52, at 176-77, and sources cited therein. While Professor Gebbia-Pinetti does not tell us whether she agrees with these charges, they provide the context for her study.

⁷⁰ There clearly is one additional context where Professor Gebbia-Pinetti's results are very important. If a lawyer has a case pending before the United States Supreme Court, the article provides very useful information for choosing which arguments to make to the Court.

However, the Supreme Court's utilization of a consistent method of interpreting the Bankruptcy Code might not give useful guidance to the lower courts. As explained in more detail *infra*,⁷¹ a method of statutory interpretation adopted by the Supreme Court is not binding on lower courts. Thus, its impact is, at best, only persuasive.

My perspective is different than Professor Gebbia-Pinetti's. I believe that when a Supreme Court Justice signs onto an opinion, the Justice agrees with the result in the particular case, and with the rule of law on which it is based. The Justice may not agree that the reasoning in the opinion is the best way to explain the result, but likely the Justice agrees that the reasoning in the opinion is a suitable way to explain it. The Justice may take the view that, if she were writing the opinion herself, she might use a different interpretive method to arrive at the same result.

I believe some Supreme Court Justices agree with this view. Others, notably Justice Scalia and Justice Thomas, frequently do not. In the federal appellate courts generally, I believe that this view is often adopted. Indeed, an appellate judge may be charged with a lack of collegiality if the judge refuses to accede to this viewpoint.

An analogy may help illustrate my view. In the days of the Roman Empire it was said that all roads led to Rome. Thus whichever road one took, one arrived at the same place. "Rome" in my analogy includes both the result and the applicable rule for arriving at the result (the *ratio decidendi*). The method of statutory interpretation may be different, just as the road leading to Rome may be different. For many Justices in many Supreme Court cases, as well as for lower appellate court judges, I suggest that this analogy explains why they sign onto opinions that differ in interpretive method from what a Justice or judge might write herself.

An opinion by a trial judge, in contrast, picks only a single road to Rome, because the only judge involved in the opinion is the author. However, a different trial judge might write a different opinion based on a different interpretive method arriving at the same result. Nonetheless, the two judges would agree both on the outcome and on the rule of law on which the outcome is based.

This analogy leaves unanswered how a Justice or judge decides that "Rome" is the proper destination in the first place. This is a complex issue, and is beyond the scope of this comment. How a Justice or judge arrives at a result for a particular case is a very different question from how the judge explains and justifies it, which is what is found in a written opinion.

⁷¹ See text at notes p. 39, *infra*.

Does the choice of interpretive method lead to a different result in any of the Supreme Court bankruptcy cases? The answer is not clear. Professor Gebbia-Pinetti shows that there are twenty cases out of forty-eight where the dissent argues that the majority has adopted the wrong interpretive method, and that the result should be different.⁷² However, the majority may have arrived at the same result using a different interpretive method, even the one argued for in the dissent. Thus the evidence is inconclusive on this issue.

2. Binding Force of Interpretive Method

The methods of statutory interpretation utilized by the Supreme Court do not bind lower courts. Lower courts are bound by the holdings of a higher court. The holding in a particular case is the particular rule, or rules, of law which, when applied to the facts of the particular case, lead to its outcome. For example, in *Norwest Bank Worthington v. Ahlers*⁷³ the Supreme Court held that "future labor, management, or expertise" does not constitute new "value" sufficient to qualify for the possible exception or corollary to the absolute priority rule codified in Section 1129 (b).⁷⁴ In contrast, the Court declined to decide in *Ahlers* whether the new value rule itself, first articulated in *Case v. Los Angeles Lumber Products Co.*,⁷⁵ continued to be viable under the Bankruptcy Code.⁷⁶

The holding in *Ahlers* that labor, experience and expertise do not qualify as new value (known as the "sweat equity" rule) is binding on lower courts. However, the method of reasoning that the Court used to arrive at its holding is not binding on lower courts. While lower courts may find the method of reasoning persuasive, they may not.

Indeed, federal trial and appellate courts traditionally have used a wide variety of methods of reasoning to arrive at their conclusions. These methods include all those Professor Gebbia-Pinetti discusses in her article, and others as well.

Methods of statutory interpretation are widely debated, and vary from judge to judge and from time to time. Changes in the future composition of the Court will likely result in different views of statutory interpretation. In addition, as Professor Gebbia-Pinetti points out, the same Justice may use different methods of interpretation from case to case, with no explanation for choosing one method over another on a particular occasion.

⁷² See Gebbia-Pinetti, *supra* note 52, at 273.

⁷³ 485 U.S. 197 (1988).

⁷⁴ *Id.* at 203.

⁷⁵ 308 U.S. 106 (1939).

⁷⁶ See *Ahlers*, 485 U.S. at 205, 206.

D. Statutory Adjudication vs. Constitutional Adjudication

Finally, I should say a word about the contrast between statutory adjudication and constitutional adjudication. One of the principal roles of the United States Supreme Court is to serve as guardian of the United States Constitution. The Court is the final step in the judicial review of the constitutionality of either federal or state law.

There is a striking difference between statutory adjudication and constitutional adjudication at the level of the Supreme Court. Constitutional principles are painted in broad language, such as "the privileges or immunities of citizens of the United States,"⁷⁷ "the equal protection of the laws,"⁷⁸ and "the freedom of speech, or the press."⁷⁹ These principles are elaborated in case law, often with no implementing legislation. In contrast, even an unannotated version of the Bankruptcy Code runs 164 pages.

Constitutional adjudication provides much more room for disagreement among the Supreme Court Justices, because the text is so much shorter and unlimiting. For the same reason, the Justices are much more likely to disagree as to the application of a constitutional provision in a particular case, and dissents are much more likely.

For an example of constitutional adjudication, consider the Supreme Court's recent Eleventh Amendment opinions,⁸⁰ each decided by a five-to-four majority. The Eleventh Amendment seems to have a plain meaning. However, none of the recent Eleventh Amendment decisions, beginning with the *Seminole Tribe*⁸¹ case, is supportable based on a "plain meaning." At the same time, none of these recent opinions, whether majority or dissenting, even argues for a plain meaning interpretation of the amendment.

IV. CONCLUSIONS

The foregoing comments only begin to touch on the important insights in the papers presented at this symposium. Each of the papers is important and makes a substantial contribution to bankruptcy scholarship. My comments in this introduction begin the further development of these insights.

Finally, it is important to recognize the valuable contributions that have been made by the organizers of this symposium.

⁷⁷ See U.S. CONST. amend. XIV, § 1.

⁷⁸ *Id.*

⁷⁹ *Id.* amend. I.

⁸⁰ See *Kimel v. Florida Bd. of Regents*, ___ U.S. ___, 120 S. Ct. 631 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

⁸¹ 517 U.S. 44 (1996).

Dean Parham Williams and Professor Denis Binder, faculty advisor to the *Chapman Law Review*, deserve special credit for developing the programs that made this symposium possible. Professor Danny Bogart conceived the idea for this symposium, and put much hard work into bringing it to fruition. In addition, the dedicated editors and staff of the *Chapman Law Review* have worked hard to put together the symposium and this law review issue. Special recognition goes to the Editor-in-Chief, Michelle L. Knowles, for her outstanding work and leadership in attending to all of the details that made the symposium go smoothly.

