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Bank of America National Trust & Savings Ass'n v. 203 North LaSalle Street Partnership: A Different Interpretation

Karen Gebbia
Golden Gate University School of Law, kgebbia@ggu.edu

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BANK OF AMERICA NATIONAL TRUST & SAVINGS ASS'N v. 203 NORTH LASALLE STREET PARTNERSHIP: A DIFFERENT INTERPRETATION

Karen M. Gebbia-Pinetti[a1]

INTRODUCTION

LaSalle Street, heart of Chicago's famed financial district, has long been synonymous with daring investments and desirable real estate. Perhaps it was only a matter of time before LaSalle Street also became synonymous with a real estate investment gone bad.

The story of 203 North LaSalle Street is archetypical of real estate investments. A real estate investment partnership that had no other significant assets owned a substantial part of the 203 North LaSalle Street building,[1] just as thousands of other real estate partnerships own thousands of other downtown office buildings across the United States. Like hundreds of other single asset real estate partnerships, the 203 North LaSalle Street Partnership fell upon financial hard times and filed a chapter 11 reorganization case to *452 prevent the mortgagee from foreclosing on the building.[2] As in many such cases, the financially decimated partners sought to retain their interests in the partnership in order to avoid breathtakingly large personal tax liabilities. The LaSalle partners expected to incur approximately twenty million dollars of personal tax obligations in the event of liquidation.[3]

The bankruptcy court, district court, and court of appeals allowed the partnership to retain ownership of the reorganized debtor under a "new value," cramdown plan.[4] The mortgagee, Bank of America,[5] vigorously objected at every stage and asked the Supreme Court to grant certiorari to determine whether new value, cramdown plans of reorganization are permissible under the Bankruptcy Code.[6]

A. Absolute Priority, New Value, and the Bankruptcy Code

On May 4, 1998, when the Supreme Court granted certiorari in *Bank of America National Trust & Savings Association v. 203 North LaSalle Street Partnership*,[7] bankruptcy commentators rejoiced. Finally, they proclaimed, the Court would decide whether the so-called "new value" exception (or corollary) to the absolute priority rule had survived the enactment of the Bankruptcy Code.[8]

Bankruptcy watchers had waited long and rather impatiently for enlightenment on the parameters of this fundamental component of reorganization leverage — twenty years since the enactment of the Bankruptcy Code,[9] and *453 ten years since the Court last considered, but failed to resolve, the issue.[10] During this period of uncertainty, the circuit courts of appeal had split widely over the viability of new value plans.[11] Two circuits had expressly approved new value plans;[12] two had rejected such plans because the old equity holders *454 had been given the exclusive right to contribute new value and obtain the new equity;[13] and several had declined to determine whether such plans were permissible under the Bankruptcy Code.[14]

1. Absolute Priority and the New Value Exception / Corollary

The new value question arises only when the debtor's pre-bankruptcy equity holders (either shareholders of a corporation or partners in a partnership) seek to obtain or retain an interest in the reorganized debtor under a chapter 11 "cramdown" plan of reorganization. Questions concerning the viability of new value plans are rooted in bankruptcy law's so-called "absolute priority rule."[15]

a) The Bankruptcy Act's Absolute Priority Rule and New Value Exception

Originally, the "absolute priority rule" was an uncodified, judicially developed doctrine that courts applied to implement the "fair and equitable" requirement in reorganization cases under the former Bankruptcy Act.[16] *455 The rule essentially required that a reorganization plan pay creditors in full before it could make any distribution to equity holders.[17]

Although absolute priority is often considered to be a bankruptcy doctrine, it embodies the fundamental corporate law precept that prohibits distributions to shareholders when creditors remain unpaid.[18] The same basic concept applies when a partnership dissolves. This priority rule is quite easy to apply when a corporation (or partnership) liquidates (either in or out of bankruptcy) - equity holders receive nothing if the liquidation proceeds are inadequate to pay creditors. Indeed, the Bankruptcy Code expressly codifies this distribution scheme in chapter 7 liquidation cases.[19] When a corporation liquidates, there is no new value question and no competition for "ownership" of the post-liquidation equity because there is no ongoing business operation.

Reorganization complicates the priority equation because the business's assets are not liquidated and distributed. Instead, the reorganized debtor uses the assets as part of the ongoing business operations. Creditors typically are paid from the reorganized debtor's cash flows. Consequently, even if the old equity interests are extinguished, someone will own the equity of the reorganized entity. If the reorganized business is viable, its equity will have some value. The Bankruptcy Code has created this value by allowing the insolvent debtor to eliminate debt, pay other debt over time, and emerge from bankruptcy solvent.

Who should own the new equity - the principal secured creditor who had the right to foreclose upon and sell the assets as a going concern, general creditors whose claims have not been paid in full, old equity holders, some new party? Should the new owner be required to "pay" for the value that the reorganization has created? If so, how is the value determined? What if the new entity's success depends upon a capital contribution that the old equity holders are willing to make only in exchange for the new equity, and that no *456 other entity is willing to make at all?[20] These questions lie at the heart of new value plans.

A majority of creditors may prefer reorganization over liquidation, even if the reorganization plan provides for the continuation of old equity / management.[21] Under a truly "absolute" priority rule, however, the court could not confirm a plan that made any distribution to equity holders unless the plan also made full payment to creditors. Even under a less absolute rule that allowed distributions to equity holders with creditors' consent, a single, dissident, holdout creditor could reject the plan, prevent confirmation, and possibly force a liquidation unless the debtor paid the holdout's claim, or perhaps all claims, in full. Of course, if one creditor holds out, other creditors may hold out for similar favorable treatment.

In recognition of these complexities, courts applying the Bankruptcy Act's absolute priority rule developed an exception under which equity holders might retain/obtain interests in the reorganized debtor in return for contributing "new value" toward the reorganization effort.[22] The most often-cited articulation of the elements of this exception is contained in dicta in the well-known Bankruptcy Act case, *Case v. Los Angeles Lumber Products Co.*[23] Under the new value exception, an old equity holder may obtain or retain an interest in the reorganized debtor only if he contributes "new capital in money or money's worth, reasonably equivalent to the property's value, and necessary for successful reorganization."[24] This exception softened the Bankruptcy Act's absolute priority rule and obviated some of the concerns caused by holdout creditors.

*457 **b) The Bankruptcy Code's Modified Absolute Priority Rule and Possible New Value Corollary**

The question today's courts and practitioners face is whether the pre-Code, judicially developed "new value" exception to the pre-Code, judicially developed "absolute priority" doctrine retains its viability under the Bankruptcy Code, in which Congress codified a modified absolute priority rule that does not contain an express new value exception.

When a corporation (or partnership) liquidates under chapter 7 of the Bankruptcy Code, the Bankruptcy Code imposes an "absolute" priority rule. The debtor receives no distribution unless creditors are paid in full.[25] Congress did not, however, extend this simple, absolute, priority rule to chapter 11 cases. Instead, the chapter 11 rule contains two components, the first of which is often overlooked because it is not truly a priority rule.

First, when a debtor reorganizes under chapter 11 of the Bankruptcy Code, the "best interests test" requires that the creditors receive at least as much as they would have received in a chapter 7 liquidation.[26] Although this test effectively incorporates the chapter 7 distribution scheme into chapter 11 cases, it changes the character of the chapter 7 rule from a "priority" rule into a mere minimum requirement. For example, if a creditor that would have received ten percent of its claim in a chapter 7 case receives fifteen percent of its claim in a chapter 11 case, the best interests test is satisfied. This is true even if a junior class of equity holders, who would receive no distribution in the chapter 7 case, receives some distribution in the chapter 11 case. The best interests test does not provide the creditor with a "priority" argument, such as: "In a chapter 7 case, the equity holders would receive nothing unless I was paid in full; therefore the equity holders can receive nothing in a chapter 11 case until I am paid in full."

Instead, the relationship between what creditors receive and what equity holders receive depends upon whether the plan is consensual (i.e., each class votes in favor of confirmation) or non-consensual (i.e., one of more classes vote against confirmation).[27] If the plan is non-consensual, the Bankruptcy Code's "cramdown" provisions allow the court to confirm a plan, in certain *458 circumstances, despite a class of creditors' objection.[28] If a class of unsecured claims votes against the plan, the court may confirm the plan (i.e., "cram down" the plan over the creditors' rejection) if the plan is "fair and equitable" to the rejecting class.[29] The fair and equitable test prohibits old equity holders from receiving or retaining property under a chapter 11 plan "on account of" their prior interests if (i) a senior class of unsecured claims rejects the plan, and (ii) the members of that senior class receive less than full payment on their claims.[30] For equity holders seeking to retain an interest in the reorganized debtor without paying creditors in full, the meaning of the phrase "on account of" if critical.

Note that the Bankruptcy Code rule allows old equity holders to retain an interest even if a senior class is not paid in full if (i) the senior class accepts the plan (i.e., the plan is not a cramdown plan), and (ii) the plan satisfies the Bankruptcy Code's other requirements for confirmation of a consensual reorganization plan (including the best interests test).[31] In other words, under a consensual plan, there is no priority rule. This is because the Bankruptcy Code establishes classification and voting requirements under which a majority of creditors in each class can bind the minority in that class. In essence, this scheme replaces the Bankruptcy Act's absolute priority paradigm with a paradigm under which creditors' choice carries greater weight.[32] Indeed, some critics of new value plans have argued that the Bankruptcy Code's elimination of the single-creditor holdout problem has obviated the *459 need for a new value exception.[33] Under this reasoning, if the debtor cannot convince the requisite majority of creditors in a class to vote for a plan that allows equity holders to retain an interest, then the creditors have the right to demand full payment or liquidation.

The weakness in this argument is that the "class" that typically rejects the plan and opposes the new value contribution very often consists of, or is overwhelmingly dominated by, a single creditor. This occurs because, in today's financing climate, a single creditor (the "principal creditor") often holds senior liens on virtually all of the debtor's assets. This is particularly true in small businesses and single asset real estate enterprises. When the debtor files bankruptcy, valuation often reflects that the principal creditor is woefully undersecured.[34] This creditor's deficiency claim commonly is large enough to control the voting. If the principal creditor's deficiency claim is classified together with the other general, unsecured claims, the principal creditor's vote to reject the plan may prevent the class of unsecured claims from accepting the plan.[35] If the claim is classified separately, so that the general, unsecured class accepts the plan, the court will nevertheless be required to apply the cramdown criteria to the separate, rejecting class that consists solely of the principal creditor's deficiency claim.[36] This scenario is strikingly common in single asset real estate cases, but also occurs in other cases.[37]

In single asset real estate cases, the mortgagee's leverage frequently arises from a deficiency claim that would not exist outside of bankruptcy. Generally, section 506(a) of the Bankruptcy Code splits an undersecured creditor's claim into a secured claim equal to the value of the collateral and an *460 unsecured claim for the deficiency.[38] Commercial real estate mortgage loans, however, are often non-recourse. Consequently, out of bankruptcy, the lender whose collateral is inadequate to pay its claim in full will have no deficiency claim. Section 1111(b)(1) accords the non-recourse creditor a deficiency claim in the debtor's bankruptcy case, as if the creditor had held a recourse claim. Section 1111(b)(2) then allows the creditor to elect to treat the entire claim as secured; that is, to look solely to the collateral and waive the deficiency claim. The purpose of section 1111(b) is to prevent the debtor from filing bankruptcy during a slump in the real estate market, stripping the lender's claim down to the value of the collateral, and then usurping the potential post-bankruptcy increase in collateral value.[39] The effect of section 1111(b)(1), however, is often to create a huge deficiency claim that allows the mortgagee to control the voting on the plan.

The principal creditor's rejection of the plan does not necessarily suggest bad faith, animus, or an attempt to use holdout leverage to obtain favorable treatment. The creditor (in single asset real estate cases, typically the mortgagee) may have legitimate business reasons for preferring that the debtor's business be liquidated. Moreover, under its security agreement or mortgage, this creditor likely had the right to recover much of the going concern value by foreclosing upon and selling virtually all of the debtor's assets as a going concern. The debtor's chapter 11 filing prevented the creditor from exercising this right. Indeed, many (if not most) single asset real estate bankruptcy cases are filed on the eave of foreclosure in an effort to stay the foreclosure and preserve the "business."[40]

Nevertheless, other creditors may want to avoid liquidation and preserve their ongoing relationships with the debtor. As a practical matter, however, the debtor may need a capital contribution in order to reorganize successfully. The old equity holders may be the only viable source of capital. For example, the *LaSalle* partners have a clear incentive to contribute several million dollars to avoid a twenty million dollar tax obligation. A third party buyer has no such incentive. Moreover, in closely held entities, the owners / managers may have little incentive to continue operating the business unless *461 they have a stake in the equity.[41] If a debtor that seeks to reorganize by obtaining a capital contribution from old equity holders in exchange for an interest in the reorganized entity cannot do so without paying the mortgagee's deficiency claim in full, the debtor's plan likely will fail. Nothing in the Bankruptcy Code's history or language suggests that Congress foresaw or intended that section 1111(b) would give a single, non-recourse creditor such throat-choking leverage over the debtor's reorganization case.

Consequently, "new value" plans typically pit the former owners against the undersecured principal creditor and resurrect the Bankruptcy Act single-creditor holdout problem. The Bankruptcy Code provides little express guidance concerning this leverage dual between the principal creditor and the old equity holders because it says nothing about the rights of equity holders who contribute new value to fund the reorganization plan.

Textual analyses of the fair and equitable requirement generally turn on the meaning of the phrase "on account of."[42] Bankruptcy scholars and commentators have argued that "new value" should be viewed as a "corollary" rather than an "exception" to the absolute priority rule. This view is based largely on the argument that an equity holder who contributes money or money's worth that is at least equivalent in value to the property or interest that the equity holder receives, receives property "on account of" his new contribution, not "on account of" his old equity interest. One challenge that critics raise in response to this argument is that fairness and equity cannot be established if the old equity holders are given the exclusive right to make such a contribution.

Consequently, two new value questions have confronted the courts: (i) is a grant of property to an old equity holder who makes a new value contribution an impermissible grant of property "on account of" the prior equity interest, and (ii) is the grant to an old equity holder of an exclusive right to acquire the new equity by making a new value contribution an impermissible grant of property "on account of" the prior equity interest? During the past two decades, practitioners have had little choice except to follow (or challenge) the conflicting cases in their own districts and circuits while they awaited the Supreme Court's guidance on these questions.

*462 2. The Supreme Court's Pre-*LaSalle* Guidance (or Lack Thereof)

Before *LaSalle*, the Court granted certiorari in two cases that challenged new value plans.

a) Norwest Bank Worthington v. Ahlers

The Court first considered the viability of a post-Code, new value plan in a unanimous 1988 case, *Norwest Bank Worthington v. Ahlers*.[43] In *Ahlers*, farmer debtors proposed to continue managing the farm (i.e., to contribute their future labor, experience, and expertise to the farm operation) and retain their interests in the farm.[44]

Consider the approach the *Ahlers* Court took to the interpretive problem presented by the new value question. The *Ahlers* Court stated the Bankruptcy Code rule, reviewed the history of the absolute priority rule under the former Bankruptcy Act, and discussed pre-Code precedent that allowed equity holders to retain interests in a reorganized debtor in exchange for "new value." The Court then considered whether the new value exception or corollary retained its viability under the Bankruptcy Code.[45]

To bankruptcy experts' great disappointment, the Court expressly declined to determine whether the new value corollary had survived the enactment of the Bankruptcy Code.[46] The Court held, however, that the debtors' promise to contribute future "labor, experience, and expertise"[47] to the reorganization effort would be inadequate because the Court had found a virtually identical contribution to be inadequate in a leading case interpreting the Bankruptcy Act rule.[48]

In essence, the *Ahlers* Court engaged in a common-law-type analysis in which it compared the facts of the case at bar to the facts of the leading pre-Code case.[49] To justify using Bankruptcy Act precedent to interpret the Bankruptcy *463 Code, the Court reviewed the Bankruptcy Code's history and confirmed that the Bankruptcy Code had not liberalized the pre-Code doctrine.[50] In other words, because any Bankruptcy Code rule that might have survived was at least as restrictive as the Bankruptcy Act rule, a contribution that was inadequate under the Bankruptcy Act would be inadequate under the Bankruptcy Code.

Ahlers confirmed that any new value contribution must be in the form of money or money's worth. The decision provided practitioners with little guidance, however, concerning either the viability of new value plans or the meaning of the fair and equitable test's "on account of" language.

Ahlers was a unanimous, eight-to-zero opinion written by Justice White. None of the other justices (including the formalist, Justice Scalia) objected to the Court's reasoning, or to the Court's heavy reliance upon pre-Code practices and Bankruptcy Act precedents to interpret the Bankruptcy Code.

b) *In re* Bonner Mall Partnership

In 1994, bankruptcy practitioners' hopes rose once again when the Court granted certiorari in *U.S. Bancorp Mortgage Company v. Bonner Mall Partnership*.[51] In *Bonner Mall*, the former equity holders proposed to contribute 1.2 million dollars in working capital and to subsidize capital shortfalls for thirty-two months in return for obtaining one-half of the newly-issued common stock of the reorganized debtor.[52] Because the equity holders proposed to make a "money or money's worth" contribution, *Bonner Mall* avoided the *Ahlers* problem.

In its *Bonner Mall* opinion, the Ninth Circuit was the first circuit to hold expressly that the new value doctrine had survived. It did so using a "plain language analysis" bolstered by deference to pre-Code practice.[53]

Before the Court could hear argument, however, the parties reached a settlement. *464 The Court dismissed the appeal as moot and denied the principal creditor's request to vacate the ninth circuit's opinion.[54]

3. *LaSalle*—the Failure of a Hoped For Answer

In 1997, in In re *203 North LaSalle Street Partnership*,[55] the Seventh Circuit essentially agreed with the Ninth Circuit's *Bonner Mall* decision.

In *LaSalle*, the Bank of America ("Bank") held an undersecured, non-recourse claim for approximately 93 million dollars. The collateral (the fifteen floors of the building) was worth only 54.4 million dollars. Because section 1111(b)(1) granted the claim recourse status, the Bank held a secured claim of 54.5 million and an unsecured deficiency claim of 38.5 million.[56] The debtor's plan separately classified the deficiency claim and proposed to allow the old equity holders to acquire the new equity for a new value, monetary contribution having a present value of 4.1 million dollars.[57] Only the class comprising the Bank's deficiency claim voted to reject the plan.

In support of its conclusion that the new value corollary had survived the enactment of the Bankruptcy Code, the Seventh Circuit relied heavily upon an interpretive canon that directs courts to defer to pre-Code judicial practices if the Bankruptcy Code's text is ambiguous.[58]

The court concluded that the old equity holders acquired the new equity "on account of" their new contribution rather than "on account of" their old equity positions because there was no direct relationship between the old position and the new position.[59]

A few months later, however, the Second Circuit refused to approve a new value plan that had given the old equity holders the exclusive opportunity to acquire the new equity for new value. In *Coltex Loop Central Three Partners* *465 *v. BT/SAP Pool C Associates* (In re *Coltex Loop Central Three Partners*),[60] the Second Circuit concluded that the old equity holders had acquired the new equity "on account of" their old interests because they would not have been permitted to participate in the new value contribution "but for" their status as equity holders.[61] The court refused to consider pre-Code practices because it found the fair and equitable test's "on account of" language to be unambiguous. It also reasoned that pre-Code practices were irrelevant because the Bankruptcy Code had significantly altered pre-Code law.[62]

The Court granted certiorari in *LaSalle* to resolve the circuit split. After waiting a year and a day for the Court's ruling,[63] bankruptcy practitioners' hopes for clear guidance were once again dashed. In *LaSalle*, the Court issued a non-committal, dicta-strewn opinion in which it refused to determine whether the new value corollary had survived the enactment of the Bankruptcy Code.[64] The Court also added to the new value equation an ill-defined marketing requirement designed to counter the effects of the old equity holders being granted an exclusive option to acquire the new equity.[65] Three justices objected to the Court's interpretive method and declined to join the majority opinion.[66]

Many bankruptcy experts have castigated the Court for failing to resolve the new value question.[67] Others, however, have praised the Court for recognizing the leverage inherent in exclusivity.[68] Most importantly, bankruptcy experts have begun pragmatically to consider the issues that *LaSalle* leaves *466 open, such as how the Court's newly expressed marketing requirements might be satisfied.[69]

What no commentators have done, however, is consider the implications of the interpretive methods the justices employed in *LaSalle*. This essay undertakes that analysis. It concludes that disputes concerning interpretive method explain the separate opinions in *LaSalle* and that these disputes conform to a strong pattern of interpretive rifts among the justices in bankruptcy cases. It also considers whether an understanding of these disputes can help bankruptcy watchers predict the Court's likely approach in future bankruptcy cases.

a) The purposive, "pre-Code practice" dicta laden majority opinion

Justice Souter authored the majority opinion in *LaSalle*. He mustered five other votes - those of Chief Justice Rehnquist and Justices Breyer, Ginsburg, Kennedy, and O'Connor.

The Court declined to rely solely on the Bankruptcy Code's text because the language was "inexact."[70]

Instead, the Court turned to history. Rather than engaging in detailed perusal of legislative history, however, the Court focussed primarily on a broader analysis of the historical development of the absolute priority doctrine and its new value exception / corollary.[71]

First, the Court examined the pre-Code judicial development of the absolute priority rule and the new value corollary.[72] It characterized the corollary as an "observation" that the Court had made in dictum in a pre-Code case.[73] *LaSalle*, in its own dictum, seemed to embrace this "observation" when it stated that:

[t]he upshot is that this history does nothing to disparage the possibility apparent in the statutory text, that the absolute priority rule now on the books as subsection [1129] (b)(2)(B)(ii) may carry a new value corollary. Although there is no literal reference to "new value" in the phrase "on account of such junior claim," the phrase could arguably carry such an implication in modifying *467 the prohibition against receipt by junior claimants of any interest under a plan while a senior class of nonconsenting creditors goes less than fully paid.[74]

History provided inadequate guidance, however, because Congress had added to the fair and equitable test the phrase "on account of," which was not part of either the pre-Code doctrine or the prior proposed bills that Congress had rejected.[75] Consequently, the Court was forced to confront directly the meaning of this cryptic phrase.

The Court considered three possible interpretations of the phrase. It selected among them using reasoning that drew upon the text, context, practical considerations, and bankruptcy policy. First, the Court considered whether the phrase "on account of" translated to "in exchange for." Under this reading, any significant new value contribution would be sufficient to demonstrate that the retention of equity was not "on account of" the old equity interest. The Court rejected this interpretation because it was not a "commonsense" interpretation and, as a practical matter, it would not provide an objective measure of the fair and equitable requirement.[76]

Instead, the Court concluded that, under a commonsense reading, "on account of" means "because of." This required the Court to consider the degree of causation necessary to determine whether the retention of equity was "because of" the old interest or "because of" the new contribution. Again, the Court considered two alternatives. It rejected an argument that the fair and equitable test barred any retention of value by old equity because this interpretation would have made the words "on account of" surplusage. Also, as a practical matter, the Court recognized that old equity might be in the best position to buy the new equity. Finally, the Court reasoned that a rule that allowed old equity holders to acquire the new equity in return for a new contribution was consistent with Bankruptcy Code policy because it read section 1129 "as intended to reconcile the two recognized policies underlying Chapter 11, of preserving going concerns and maximizing property available to satisfy creditors ...."[77]

Despite this careful, thorough analysis, the Court concluded that it did not need to determine whether the new value corollary had survived or what degree of causation was necessary to demonstrate that old equity holders had received property "on account of" their old equity interest.

Instead, the Court concluded that, under either definition, old equity would *468 be receiving property "on account of" its old interest if it received the exclusive opportunity to acquire the new ownership interest.[78] Stated simply, the opportunity to acquire ownership is valuable "property," similar to a purchase option, for which someone might pay. Even if the ownership is acquired for market value (like an option exercised at market value), the exclusive right to buy has value.[79]

The old equity holders in *LaSalle* had, in fact, been given the exclusive opportunity to acquire the new equity interest. This opportunity arose because the debtor had filed its plan within the exclusivity period and the creditors were not given an opportunity to present or consider competing plans.[80] Consequently, the Court concluded that the plan did not satisfy the elements of any new value corollary that might have survived the enactment of the Bankruptcy Code.[81] The Court declined to suggest what type of marketing or bidding would meet the requisite opportunity for competition.[82] For example, would termination of exclusivity be sufficient; would an auction be required? Not surprisingly, much of the post-*LaSalle* commentary had considered what type of marketing might satisfy the Court's concerns.[83]

From an interpretive perspective, the Court based its ultimate holding on the "option" analogy and broad, purposive reasoning. The Court noted that the Bankruptcy Code sought to decrease the occasions upon which the bankruptcy courts would be called upon to make valuation determinations. This "policy/purpose" is apparent in the Bankruptcy Code's class voting scheme. Accordingly, "statutory coherence" disfavored an interpretation that would call for a judicial valuation of the property received by the old equity holders when other means of market valuation might be available.[84]

Although the Bankruptcy Code clearly favors creditor choice, this begs the question whether the cramdown requirement's "on account of" language permits new value plans. The Bankruptcy Code gives the debtor an exclusive period in which to file and attempt to confirm a plan. The Bankruptcy Code does not ensure that creditors receive the "best deal," only that they receive a deal that meets the Bankruptcy Code's minimum requirements. On the *469 other hand, exclusivity forecloses the creditors from considering any alternate deal.

Although no court has yet applied *LaSalle* to a new value plan in a published opinion,[85] two courts have cited *LaSalle* in other contexts for the proposition that the Bankruptcy Code contains a "purpose" or "policy" of reducing judicial valuations.[86] One other court applied *LaSalle's* interpretation of the phrase "on account of" to guide its own interpretation of the phrase "by reason of" in an exemption provision.[87]

The *LaSalle* majority's interpretive method was characterized by a broadly probing, flexible, purposive analysis. Although the Court found textual ambiguity, it did not expressly embrace the lower courts' classic articulation of the canon of deference to pre-Code practice.[88] First, because the Court's discussion of pre-Code law was not determinative, it was not necessary for the Court to apply the pre-Code canon. Second, and perhaps more significantly, the Bankruptcy Code changed the absolute priority rule so substantially that, although the history provided useful background, the pre-Code practices could not be applied easily under the Bankruptcy Code. Consequently, although the Court examined the phrase "on account of" against the backdrop of pre-Code practice, the Court ultimately interpreted the phrase by analogy to an "option" and in light of perceived bankruptcy policies and purposes.

The Court was not reticent to mention non-textual bankruptcy policies to confirm an apparent meaning derived from the text, context, and a historical analysis of the development of the absolute priority doctrine. These policies included not only the well-established, competing policies of fostering reorganization and maximizing value, but also a perceived legislative purpose of reducing judicial valuations.

In summary, the Court employed a flexible, purposive interpretive method that appears to have been concerned with preserving important legal system values, such as consistency with prior law (vertical coherence), consistency *470 with the Bankruptcy Code's internal structure (textual coherence), and consistency with broad "policies" or "purposes" that the Court found to be inherent in the statute's text and structure (policy coherence). The opinion also touches upon, but does not fully analyze, the practical implications of the Court's holding.[89]

b) The formalist concurring opinion

Justice Thomas, in a concurrence that Justice Scalia joined, agreed that the plan should not be confirmed.[90] These two formalist justices wrote separately, however, to object to the Court's "approach to interpretation."[91] They advocated textual interpretation in place of the Court's more flexible analysis of history, pre-Code practice, and Bankruptcy Code purposes and policies.[92]

First, the concurring justices argued that the Bankruptcy Code's text does not expressly authorize pre-petition equity holders to receive or retain property in exchange for an infusion of new value.[93] Rather, it provides that a plan is fair and equitable if either (i) each holder of a claim in the objecting senior class is paid in full, or (ii) no holder of an interest in the junior class retains any property "on account of" its junior interest.[94]

After consulting two dictionaries, the concurring justices concluded that the "common understanding" of the phrase "on account of" denoted some type of causal relationship between the junior interest and the property retained.[95] (Recall that the majority also claimed the mantle of "commonsense" interpretation.) Applying this definition, the concurring justices concluded that equity holders received at least two types of property on account of their prior interests - the equity itself, and the exclusive opportunity *471 to acquire the equity.[96] The concurring justices also concluded that old equity holders "undoubtedly" received at least one of these - the exclusive opportunity - "on account of" their old equity positions.[97] Having reached this conclusion by an allegedly exclusively "textual" analysis, the concurring justices rejected the majority's "speculations about the desirability of a 'market test"' as dicta.[98]
Second, they launched a broad criticism of the Court's interpretive method. They complained that:

[t]he majority also underestimates the need for a clear method for interpreting the Bankruptcy Code. It extensively surveys pre-Code practice and legislative history, ... but fails to explain the relevance of these sources to the interpretive question apart from the conclusory assertion that the Code's language is "inexact" and the history is "helpful." ... This sort of approach to interpretation of the Bankruptcy Code repeats a methodological error committed by this Court in *Dewsnup v. Timm*. ...

... *Dewsnup's* approach to statutory interpretation enables litigants to undermine the Code by creating "ambiguous" statutory language and then cramming into the Code any good idea that can be garnered from pre-Code practice or legislative history.[99]

First, the concurrence argued that the Court should not have referred to pre-Code practice unless the statute truly was ambiguous.[100] These two justices found no ambiguity even though the courts were widely split on the issue and the Supreme Court itself had previously declined to decide whether the new value doctrine had survived the Bankruptcy Code.[101]

*472 Second, the concurring justices suggested that, even if the Bankruptcy Code truly was ambiguous, the Court should not have engrafted onto the Bankruptcy Code concepts developed in a pre-Code era because the Bankruptcy Code had substantially changed pre-Code law.[102] This criticism is interesting because the majority did not expressly apply the pre-Code canon, but rather, essentially agreed that the Bankruptcy Code had altered the absolute priority rule in ways that made pre-Code practices less relevant.

At least two published opinions have already cited Justice Thomas's concurrence for the proposition that the mere existence of a dispute over a statute's meaning does not necessarily create ambiguity.[103]

Justices Thomas and Scalia were not, however, the only justices who disagreed with the majority's interpretive approach.

c) The flexible, pragmatic, pre-Code practice dissenting opinion

In striking contrast to Justices' Thomas's and Scalia's concurrence, Justice Stevens's *LaSalle* dissent reflected impatience with the Court's continued refusal to resolve the new value question.[104]

In his opinion, Justice Stevens clearly embraced the application of pre-Code practices to Bankruptcy Code issues. He argued, first, that the Court should have held, rather than merely observed in dictum, that the holder of a junior claim does not receive property "on account of" his prior interest when he receives property based upon adequate new value.[105] To Justice Stevens, this result was obvious because the Court had unequivocally accepted the new value corollary in pre-Code case law.[106]

When read in light of Justice Douglas' opinion in *Case v. Los Angeles Lumber* [citation omitted], the meaning of this provision in perfectly clear. Whenever a *473 junior claimant receives or retains an interest for a bargain price, it does so "on account of" its prior claim. On the other hand, if the new capital that it invests has an equivalent or greater value than its interest in the reorganized venture, it should be equally clear that its participation is based on the fair price being paid and that it is not "on account of" its old claim or equity.[107]

Second, Justice Stevens argued that the Court's objections to the plan because of lack of market testing or bidding were "unsupported by either the text of 11 U.S.C. § 1129(b)(2)(B)(ii) or the record in this case."[108] According to Justice Stevens, the sole issue should have been the fairness of the price. If the price was fair, it should not have mattered whether the old equity or a third party made the offer.[109] It also should not have mattered what process the court employed to determine the price. The fair and equitable requirement, Justice Stevens argued, was substantive, not procedural. The Bankruptcy Code does not require an auction to determine value, no party requested an auction, and the bankruptcy courts are well equipped to determine value.[110]

In summary, Justice Stevens applied a consequentialist, pragmatic interpretive method that eschewed the majority's reluctance to decide the new value question, and that honored vertical coherence by embracing the pre-Code new value practice with little concern that the Bankruptcy Code's language change had altered that practice.

B. *Assessing* LaSalle's *Place in Bankruptcy Code Legisprudence*

In a recent, comprehensive study all of the Court's Bankruptcy Code decisions, I sought to determine the extent to which interpretive method has been a driving force in the Supreme Court's bankruptcy jurisprudence.[111] This study was rooted in the hypothesis that interpreters could learn at least as *474 much, if not more, about the Court's interpretive method by considering the types of issues that caused the justices to agree and disagree among themselves, as they could learn by examining only the Court's majority opinions. To test this hypothesis, the study focused not simply on the Court's majority opinions, but rather, on the extent to which disputes over interpretive method caused justices to diverge from the majority and write separate concurring or dissenting opinions.

This study revealed several strong patterns woven throughout the Court's bankruptcy decisions. These include:

*In one-half of the Court's Bankruptcy Code decisions, the justices all agreed on the result.

*Nevertheless, in more than two-thirds of the Court's Bankruptcy Code cases, one or more justices wrote separate opinions.

*The justices generally decided bankruptcy cases based upon principles of statutory interpretation rather than, for example, based upon substantive bankruptcy policy.

*Nevertheless, even the Court's unanimous cases did not consistently employ one, single interpretive method. The Court's unanimous opinions do not reveal any obvious criteria for choosing among these divergent methods.

*Disputes among the justices over interpretive method led to a substantial majority of the justices' separate opinions. These separate opinions reveal two significant patterns of discord. First, particular justices disagreed strongly and consistently with other justices concerning interpretive method. Second, these disputes centered upon two prominent components of bankruptcy interpretation - the plain meaning canon and the pre-Code practice canon.

*The overwhelming majority of cases in which the justices disagreed with each other for reasons unrelated to interpretive method involved either constitutional (or quasi-constitutional) questions or tensions between the Bankruptcy Code and other applicable non-bankruptcy law. An inordinately large percentage of the Court's major splits arose from constitutional questions. A substantial number of the cases involving tensions between the Bankruptcy Code and other law caused disputes among the justices concerning how to reconcile the Bankruptcy Code's plain language, pre-Code law, and a "canon" of deference to important federal or state laws or governmental interests.

*475 *LaSalle*, which is the Court's most recent Bankruptcy Code decision, represents a culmination of the Court's bankruptcy jurisprudence, in several ways. First, the separate opinions are based upon disputes concerning interpretive method. Second, these disputes relate to the major interpretive elements that have caused rifts among the justices in other cases, including what constitutes plain meaning, and what role history and pre-Code practice should play in Bankruptcy Code interpretation. Third, the justices who have carried the banner for more formalistic interpretation (Justices Scalia and Thomas) and more flexible interpretation (Justice Stevens), wrote separately in *LaSalle*. Fourth, *LaSalle* raised a hotly contested issue which has widely splits the circuit courts of appeal[112] and which has come before the Court three times without a definitive resolution.[113]

In bankruptcy cases, disputes concerning the role of broad history and pre-Code practice have caused greater divergence among the justices than disputes concerning the role of legislative history.

Broad history and pre-Code practice exist on a continuum of interpretive inquiry that is designed to foster vertical coherence - i.e., a consistent progression in the law. For example, an interpreter might examine the provisions of prior law (either the Bankruptcy Act or prior versions of the Bankruptcy Code), judicial interpretations of those provisions, judicial doctrines created to fill gaps in prior law, prior congressional action (including enactment of the Bankruptcy Code and of amendments to the Bankruptcy Code), and judicial interpretations of the Bankruptcy Code.

In a significant number of the Court's non-constitutional bankruptcy opinions, the Court considered the broad history of the Bankruptcy Code provisions in issue, but did not expressly refer or defer to pre-Code practice.[114] In these cases, the Court typically examined prior law, amendments, and judicial interpretations, and considered how the relevant bankruptcy doctrine had developed over time.

In approximately one-fourth of the Court's non-constitutional Bankruptcy *476 Code cases (including *LaSalle*, albeit in dictum), the Court expressly considered pre-Code practice as part of its review of the Bankruptcy Code's history.[115] Five of these were unanimous decisions.[116] In addition, in two cases in which the Court did not defer to pre-Code practice, dissenters argued that Court should have deferred to pre-Code practice.[117]

These cases demonstrate the significance of broad history and pre-Code practice in the Supreme Court's bankruptcy jurisprudence. The justices disagree, however, concerning whether and when the Court should consult broad history or pre-Code law.[118] These disputes are particularly evident in tensions between the plain meaning canon and the pre-Code practice canon. Some justices (most notably Justice Blackmun, who is no longer on the Court) discount the Bankruptcy Code's text if the text seems to be inconsistent *477 with pre-Code practice and Congress has not expressly stated in the legislative history that it intended to alter pre-Code practice.[119] Others (most notably Justices Scalia and Thomas) consider pre-Code practice only if the text contains a gap or ambiguity, yet they virtually never concede that the Bankruptcy Code contains a gap or ambiguity.[120]

For example, in *Kelly v. Robinson*,[121] the Court relied upon pre-Code practice to defer to state criminal processes.[122] In contrast, in *Pennsylvania Department of Public Welfare v. Davenport*[123] the Court embraced the same pre-Code canon that it had applied in *Kelly*, but concluded that Congress had, indeed, evinced in the language an intent to alter the pre-Code practice of deference to state criminal processes.[124] Both cases were decided over strident dissents.[125]

Similarly, in *Dewsnup v. Timm*,[126] the justices split over the scope, application, and interaction between the plain meaning rule and the pre-Code canon. The majority rejected a seemingly "plain" textual meaning because that meaning conflicted with pre-Code practice, and Congress had not clearly evinced its intent to change pre-Code practice.[127]

The Court reasoned that the divergent views espoused by the parties and *478 amici demonstrated that the language was ambiguous.[128] The Court then rejected the "words have the same meaning throughout the statute" canon in favor of a pre-Code canon.
Were we writing on a clean slate, we might be inclined to agree with petitioner that the words "allowed secured claim" must take the same meaning in § 506(d) as in § 506(a). But, given the ambiguity in the text, we are not convinced that Congress intended to depart from the pre-Code rule that liens pass through bankruptcy unaffected.[129]

In perhaps the strongest statement yet of the Court's pre-Code practice canon, the Court explained that:

> [w]hen Congress amends the bankruptcy laws, it does not write "on a clean slate." [citations omitted] Furthermore, this Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history. [citations omitted] Of course, where the language is unambiguous, silence in the legislative history cannot be controlling. But, given the ambiguity here, to attribute to Congress the intention to grant a debtor the broad new remedy ... without the new remedy's being mentioned somewhere in the Code itself or in the annals of Congress is not plausible, in our view, and is contrary to basic bankruptcy principles.[130]

*479 Justice Scalia answered with a stinging dissent, which Justice Souter joined.[131] The *Dewsnup* dissent castigated the Court for deferring to pre-Code practice when the text was clear and for "replac[ing] what Congress said with what it thinks Congress ought to have said - and in the process disregard[ing], and hence impair[ing] for future use, well-established principles of statutory construction."[132] Similarly, the dissent complained that:

> [t]he principal harm caused by today's decision is not the misinterpretation of § 506(d) of the Bankruptcy Code. ... The greater and more enduring damage of today's opinion consists in its destruction of predictability, in the Bankruptcy Code and elsewhere. By disregarding well-established and oft-repeated principles of statutory construction, it renders those principles less secure and the certainty they are designed to achieve less attainable. When a seemingly clear provision can be pronounced "ambiguous" sans textual and structural analysis, and when the assumption of uniform meaning is replaced by "one-subsection-at-a-time" interpretation, innumerable statutory texts become worth litigating.[133]

In this concise statement of his interpretive philosophy, Justice Scalia objected to three aspects of the Court's interpretive method. He argued that the Court manufactured an ambiguity,[134] failed to apply holistic textualism, *480 [135] and improperly considered pre-Code practice and legislative history.[136]
The dissent did not absolutely prohibit all uses of the pre-Code canon, but it articulated a narrower canon under which the Court may consult pre-Code practice only if the statute contains a gap or true ambiguity. The dissent acknowledged that:

> [w]e have, of course, often consulted pre-Code behavior in the course of interpreting *gaps* in the express coverage of the Code, or *genuinely ambiguous* provisions. And we have often said in such cases that, absent a *textual* footing, we will not presume a departure from longstanding pre-Code practice [[citing *Midlantic National Bank v. New Jersey Department of Environmental Protection*,[137] and *Kelly v. Robinson*[138]]. But we have never held pre-Code practice to be determinative in the face of what we have here: contradictory statutory text. To the contrary, *where "the statutory language plainly reveals Congress' intent" to alter pre-Code regimes* [citing *Pennsylvania Department of Public Welfare v. Davenport*[139]], *we have simply enforced the new Code according to its terms, without insisting upon "at least some discussion [of the change from prior law] in the legislative history,"* .... Congress' careful reexamination and entire rewriting of those provisions supports the conclusion that, regardless of whether pre-Code practice is retained or abandoned, the text means precisely what it says.[140]

These disputes among the justices have left the lower courts without adequate *481 guidance concerning the Court's perspective on pre-Code practice. This confusion has been particularly evident in new value cases. A striking demonstration of the uncertainty concerning the Court's preferred Bankruptcy Code interpretive method occurred in 1991 in the Fifth Circuit case of *Phoenix Mutual Life Insurance Company v. Greystone III Joint Venture* (In re *Greystone III Joint Venture)*.[141]

In *Greystone*, the court was asked to consider whether the new value exception to the absolute priority rule had survived the enactment of the Bankruptcy Code. In an opinion that relied on a perceived trend toward textualism in the Supreme Court,[142] the Fifth Circuit held that "[n] either in the Code's language, nor in the context of a previous, different reorganization law, nor in legislative history, nor in policy is there room for a 'new value exception' to the absolute priority rule now defined by § 1129(b)

(2)(B).”[143] Less than two months later, however, the Supreme Court issued its divided opinion in *Dewsnup*,[144] in which the majority relied heavily on pre-Code practice.

Within forty-three days after the Court issued *Dewsnup*, the Fifth Circuit had received a petition for rehearing, granted it, and issued a terse withdrawal of the portion of its *Greystone* opinion that had resolved the absolute priority question.[145] Although the Fifth Circuit did not expressly state the reason for withdrawing the opinion, Judge Jones, the author of the original opinion, identified *Dewsnup* as the culprit in her dissent from the rehearing.[146] She noted that:

> [h]ow one should approach issues of a statutory construction arising from the Bankruptcy Code has been clouded, in my view, by *Dewsnup v. Timm* [[citation omitted]. Nevertheless, in reaffirming what I wrote about the “new value exception” in Part IV of the original opinion, and therefore in voting against a rehearing, I would hope to stand with Galileo, who, rebuffed by a higher temporal *482 authority, muttered under his breath, “Eppur si muove.” (“And yet it moves.”).[147]

This same uncertainty led to the circuit split between *LaSalle*, *Coltex*, and *Bonner Mall*. In *LaSalle*, the Seventh Circuit cited *Dewsnup* for the proposition that “[w]hen Congress amends the bankruptcy laws, it does not write ‘on a clean slate”’ and that “[i]n this case, there can be no question that ‘Congress must have enacted the Code with a full understanding’ of the absolute priority rule and its new value corollary.”[148] Similarly, in *Bonner Mall*, the Ninth Circuit reasoned that “[w]here the text of the Code does not unambiguously abrogate pre-Code practice, courts should presume that Congress intended it to continue unless the legislative history dictates a contrary result.”[149] In contrast, in *Coltex*, the Second Circuit found that the text was not ambiguous and that its result was consistent with *Dewsnup* because the courts were not required to consult pre-Code practice if the text contained no ambiguity.[150]

Justices Scalia and Thomas commented on *Dewsnup* and *Greystone* in their *LaSalle* concurrence.[151] They noted that the interpretive confusion created by *Dewsnup* apparently had prompted the Fifth Circuit to withdraw its decision on the new value issue in *Greystone*. They also argued that the majority's interpretive method in *LaSalle*, which found ambiguity and consulted broad history and pre-Code practices to interpret the ambiguous phrase, “only thickens the fog.”[152]

Before we conclude that Justice Scalia and Thomas will always spurn pre-Code practice and the other justices will embrace pre-Code practice (some heartily, others uneasily), however, consider Justice Scalia's cryptic, intriguing comment in *Dewsnup* concerning statutory ambiguity and significant *483 state or federal interests. Justice Scalia's dissent noted that, in *United States v. Ron Pair Enterprises, Inc.*,[153] “[h]aving found a ‘natural interpretation of the statutory language [that] does not conflict with any significant state or federal interest, nor with any other aspect of the Code,’ ... we deemed the pre-Code practice to be irrelevant.”[154] Hidden within this seemingly innocuous comment is the hint that Justice Scalia might find ambiguity or defer to non-bankruptcy law if the Bankruptcy Code's apparently plain textual meaning clashes with non-bankruptcy law that protects some important state or federal interest. Indeed, this is essentially what occurred in *BFP v. Resolution Trust Corp.*,[155] in which Justice Scalia, writing for the majority, held that the Bankruptcy Code's fraudulent transfer provisions could not be used to set aside a non-collusive foreclosure sale that had been conducted in accordance with state law. This principle appears nowhere in the Bankruptcy Code.

The Court's approach to the relationship between plain meaning and pre-Code practice is complicated by the fact that many of the clashes between these two canons have arisen when the Bankruptcy Code was in tension with other state or federal law.[156] *Dewsnup* and *LaSalle* demonstrate that most of the justices apply (or decline to apply) the pre-Code canon without regard to whether the case involves a clash between the Bankruptcy Code and non-bankruptcy law. Justices Scalia and Thomas, however, have used the pre-Code practice canon, or analogous reasoning, to defer to important state or federal laws or governmental interests in cases in which they might otherwise have found no ambiguity.

Compare the six cases in which the Bankruptcy Code came into tension with other state or federal law:[157]

Midlantic National Bank v. New Jersey Department of Environmental Protection *484 [158] presented a tension between the bankruptcy abandonment power and environmental law. The Court identified a pre-Code canon that limited the abandonment power, and used the pre-Code canon to defer to environmental law.[159]

Ohio v. Kovacs[160] presented a tension between bankruptcy law and environmental law. The Court declined to defer to environmental law, and did not use a pre-Code canon.[161]

Kelly v. Robinson[162] presented a tension between bankruptcy and criminal restitution law. The Court identified a pre-Code practice of deference to criminal processes, and applied the pre-Code canon to defer to state criminal restitution law.[163]

Pennsylvania Department of Public Welfare v. Davenport[164] presented a tension between bankruptcy and criminal restitution law. The Court declined to defer to criminal restitution law. The Court cited the pre-Code canon, but concluded that Congress had evinced in the Bankruptcy Code's language its intent to alter the pre-Code practice of deference to state criminal processes.[165]

NLRB v. Bildisco & Bildisco[166] presented a tension between bankruptcy and labor law. The Court declined to defer to labor law, and did not identify any pre-Code practice of deference to labor law.[167]

BFP v. Resolution Trust Corp.[168] presented a tension between bankruptcy avoidance powers and state foreclosure law. The Court, using reasoning analogous to the pre-Code canon, found that the two bodies of law had coexisted for *485 centuries. Therefore, the Court found that bankruptcy fraudulent conveyance law could not be used to set aside a regularly conducted state foreclosure sale.[169]

These cases reveal a three-to-three split. In the three cases in which non-bankruptcy law trumped bankruptcy law, the Court relied heavily on a pre-Code practice of bankruptcy law deference to the other law.[170] In other words, the Court essentially assumed that Congress knew of this deferential practice and intended to continue this practice of deference. This type of finding was critical because the Supremacy Clause[171] makes federal law superior to state law. The Court, therefore, could only defer to state law if the federal law, itself, embodied a policy or practice of deference. Also, in each of these cases, the Court employed non-bankruptcy-centric reasoning.

In contrast, in the three cases in which the Court held that bankruptcy law trumped non-bankruptcy law, the Court employed bankruptcy-centric reasoning and found no pre-Code practice of deference.[172]

Although Justices Scalia and Thomas vigorously objected to non-textual interpretation in cases such as *Dewsnup* and *LaSalle* (neither of which presented any tension between the Bankruptcy Code and any state or federal law or governmental interest), they bent over backwards to avoid a plain textual meaning in *BFP* so that they could, instead, defer to state law. This deference apparently is rooted in some ill-defined, unarticulated, and doctrinally suspect notion of federalism.

C. Conclusion

LaSalle both complicates and clarifies the Court's interpretation of the Bankruptcy Code. It complicates the Court's method because it fails to resolve the growing uncertainty concerning when the Court will rely upon only the text, and when it will consider pre-Code law or broad bankruptcy history.

*486 It sheds light on the Court's approach, however, because it suggests that the majority of the Court employs an interpretive method that is both less rigid that Justices Thomas's and Scalia's formalist approach, and less dynamic that Justice Stevens's flexible approach. In other words, six of the justices are more liberal than Justices Scalia and Thomas in their willingness to find ambiguity and to consult Bankruptcy Code history, including pre-Code practice, to clarify that ambiguity. These same justices, however, are more conservative than Justice Stevens in their reluctance to embrace a definitive rule when the facts allow them to avoid doing so. This suggests that the Court may have a six-justice interpretive center, a two-justice interpretive "right," and a single-justice interpretive "left."

Footnotes

a1 Associate Professor of Law, University of Hawaii School of Law; J.D. Georgetown University Law Center. A version of this article will appear in 2000 WILEY BANKRUPTCY LAW UPDATE (Shapiro & Peterman, eds.) (forthcoming 2000).

1 The 203 North LaSalle Street Partnership owned 15 floors of the 203 North LaSalle Street building. It also held a 3.1 million cash account. *See* Bank of America Nat. Trust and Sav. Ass'n v. 203 North LaSalle Street Partnership, 526 U.S. 434, 119 S. Ct. 1411, 1414-15, 143 L. Ed. 2d 607, 34 Bankr. Ct. Dec. (CRR) 329, 41 Collier Bankr. Cas. 2d (MB) 526, Bankr. L. Rep. (CCH) ¶ 77924 (1999); Matter of 203 North LaSalle Street Partnership, 126 F.3d 955, 958, 31 Bankr. Ct. Dec. (CRR) 658, 38 Collier Bankr. Cas. 2d (MB) 1275, Bankr. L. Rep. (CCH) ¶ 77529 (7th Cir. 1997); Bank of America, Illinois v. 203 North LaSalle Street Partnership, 195 B.R. 692, 696, Bankr. L. Rep. (CCH) ¶ 77035 (N.D. Ill. 1996); In re 203 North LaSalle Street Ltd. Partnership, 190 B.R. 567, 573, 28 Bankr. Ct. Dec. (CRR) 303, 34 Collier Bankr. Cas. 2d (MB) 1521 (Bankr. N.D. Ill. 1995), order aff'd, 195 B.R. 692, Bankr. L. Rep. (CCH) ¶ 77035 (N.D. Ill. 1996). It is not unusual for two or more entities to own separate parts of a large office building.

2 *See* 119 S. Ct. at 1414; 126 F.3d at 958; 195 B.R. at 696; 190 B.R. at 575.

3 *See* 119 S. Ct. at 1414; 126 F.3d at 958; 195 B.R. at 698; 190 B.R. at 576.

4 *See* 126 F.3d at 962-68; 195 B.R. at 707-09; 190 B.R at 586-88. New value and cramdown are discussed *infra* at Part A. In *LaSalle*, 60 percent of the partnership interests changed hands; however, the new partnership consisted exclusively of former partners, which was critical for the preservation of the entity's tax shelter. *See LaSalle*, 119 S. Ct. at 1415 n.11.

5 The original mortgagee was Bank of America. As a result of a merger, the mortgagee became known as Bank of America National Trust and Savings Association by the time the case reached the Supreme Court. *See LaSalle*, 119 S. Ct. at 1414 n.1. For simplicity, this essay will refer to the mortgagee as Bank of America or "Bank."

6 11 U.S.C. §§ 101-1330 (1994).

7 Bank of America Nat. Trust and Sav. Ass'n v. 203 North LaSalle Street Partnership, 526 U.S. 434, 119 S. Ct. 1411, 143 L. Ed. 2d 607, 34 Bankr. Ct. Dec. (CRR) 329, 41 Collier Bankr. Cas. 2d (MB) 526, Bankr. L. Rep. (CCH) ¶ 77924 (1999).

8 *See, e.g.*, Jonathan Backmun, *In* LaSalle, *the Supreme Court Does it Again - Nothing*, 16 THE BANKR. STRATEGIST 1 (June 1999); Russell H. Hippe, Jr., LaSalle: *Does the Code Dispense With New Value*?, NORTON BANKR. L. ADVISOR, Jun. 1999, at1; David R. Kuney, *Bankruptcy*, THE NAT'L L.J., July 6, 1998, at B4; George H. Singer, *Supreme Court Clarifies "New Value Exception" to Absolute Priority Rule - Or Does It*?, 92 AM. BANKR. INST. L.J. 1, 1 (July 1999).

9 The Bankruptcy Code was enacted in 1978, became effective on October 1, 1979 (*see* § 402 Pub. L. 95-598, Title IV, Nov. 6, 1978, 92 Stat. 2682), and has been amended numerous times since its enactment. *See* The Bankruptcy Reform Act of 1978 (Pub. L. No. 95-598, 92 Stat. 2549), as amended by The Bankruptcy Amendments and Federal Judgeship Act of 1984 (Pub. L. No. 98-353, 98 Stat. 333), The Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986 (Pub. L. No. 99-554, 100 Stat. 3114), The Retiree Benefits Bankruptcy Protection Act of 1988 (Pub. L. No. 100-334, 102 Stat. 610), The Crime Control Act of 1990 (Pub. L. No. 101-647, 104 Stat. 4789), The Energy Policy Act of 1992 (Pub. L. No. 102-486, 106 Stat. 2776), The Rail Safety Enforcement and Review Act of 1992 (Pub. L. No. 102-365, 106 Stat. 972), The Violent Crime Control and Law Enforcement Act of 1994 (Pub. L. No. 103-322, 108 Stat. 1796), The Bankruptcy Reform Act of 1994 (Pub. L. No. 103-394, 108 Stat. 4106), The ICC Termination Act of 1995 (Pub. L. No. 104-88, 109 Stat. 803), and other minor amendments.

10 The Court had twice before granted certiorari but failed to resolve the question. *See* Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 108 S. Ct. 963, 99 L. Ed. 2d 169, 17 Bankr. Ct. Dec. (CRR) 201, 18 Collier Bankr. Cas. 2d (MB) 262, Bankr. L. Rep. (CCH) ¶ 72186 (1988) (discussed *infra* at notes 43-50 and accompanying text); In re Bonner Mall Partnership, 2 F.3d 899, 24 Bankr. Ct. Dec. (CRR) 883, 29 Collier Bankr. Cas. 2d (MB) 668, Bankr. L. Rep. (CCH) ¶ 75374 (9th Cir. 1993), cert. granted, 510 U.S. 1039, 114 S. Ct. 681, 126 L. Ed. 2d 648 (1994) (discussed *infra* at notes 51-54 and accompanying text).

11 *See LaSalle*, 119 S. Ct. at 1417; *see also infra* notes 12-14.
For a discussion of the absolute priority rule and its new value exception / corollary, see generally Edward S. Adams, *Toward a New Conceptualization of the Absolute Priority Rule and its New Value Exception*, 1993 DET. C. L. REV. 1445 (1993); John D. Ayer, *Rethinking Absolute Priority after* Ahlers, 87 MICH. L. REV. 963 (1989); G. Eric Brunstad, Jr. & Mike Sigal, *Competitive Choice Theory and the Broader Implications of the Supreme Court's Analysis in* Bank of America v. 203 North LaSalle Street Partnership, 54 BUS. LAW. 1475 (1999); Richard E. Coulson, *"New Value" and the Absolute Priority Rule in Chapter 11 Cramdowns*, 48 CONSUMER FIN. L. Q. REP. 220 (1994); Kenneth N. Klee, *Cram Down II*, 64 AM. BANKR. L.J. 229 (1990); David Kuney, *Aftermath of* Bonner Mall: *Evolution of Regression on the Notion of New Value*, 5 BANKR. L. & P. 3 (1996); Bruce Markell, *Owners, Auctions and Absolute Priority in Bankruptcy Reorganizations*, 44 STAN. L. REV. 69 (1991); Raymond T. Nimmer, *Negotiated Bankruptcy Reorganization Plans: Absolute Priority and New Value Contributions*, 36 EMORY L.J. 1009 (1987); Linda J. Rusch, *The New Value Exception to the Absolute Priority Rule in Chapter 11 Reorganizations: What Should the Rule Be*?, 19 PEPP. L. REV. 1311 (1992); Ronald Trost, Joel G. Samuels, Kevin T. Lantry, *Survey of the New Value Exception to the Absolute Priority Rule and the Preliminary Problem of Classification*, SD24 ALI-ABA 401 (1998); Elizabeth Warren, *A Theory of Absolute Priority*, 1991 ANN. SURV. AM. L. 9 (1992); James J. White, *Absolute Priority and New Value*, 8 COOLEY L. REV. 1 (1991); *see also* G. Eric Brunstad, Jr., Mike Sigal & William Schorling, *Review of the Proposals of the National Bankruptcy Review Commission Pertaining to Business Bankruptcy: Part One*, 53 BUS. LAW. 1381 (1998).

12 *See* Matter of 203 North LaSalle Street Partnership, 126 F.3d 955, 958, 31 Bankr. Ct. Dec. (CRR) 658, 38 Collier Bankr. Cas. 2d (MB) 1275, Bankr. L. Rep. (CCH) ¶ 77529 (7th Cir. 1997), judgment rev'd, 526 U.S. 434, 119 S. Ct. 1411, 143 L. Ed. 2d 607, 34 Bankr. Ct. Dec. (CRR) 329, 41 Collier Bankr. Cas. 2d (MB) 526, Bankr. L. Rep. (CCH) ¶ 77924 (1999); In re Bonner Mall Partnership, 2 F.3d 899, 24 Bankr. Ct. Dec. (CRR) 883, 29 Collier Bankr. Cas. 2d (MB) 668, Bankr. L. Rep. (CCH) ¶ 75374 (9th Cir. 1993), cert. granted, 510 U.S. 1039, 114 S. Ct. 681, 126 L. Ed. 2d 648 (1994); *see also* In re U.S. Truck Co., Inc., 800 F.2d 581, 14 Bankr. Ct. Dec. (CRR) 1327, 15 Collier Bankr. Cas. 2d (MB) 553, 123 L.R.R.M. (BNA) 2849, Bankr. L. Rep. (CCH) ¶ 71460 (6th Cir. 1986) (pre-*Ahlers*); In re Potter Material Service, Inc., 781 F.2d 99, 13 Bankr. Ct. Dec. (CRR) 1381, Bankr. L. Rep. (CCH) ¶ 70930 (7th Cir. 1986) (pre-*Ahlers*).

13 *See* In re Coltex Loop Central Three Partners, L.P., 138 F.3d 39, 32 Bankr. Ct. Dec. (CRR) 179, 39 Collier Bankr. Cas. 2d (MB) 656, Bankr. L. Rep. (CCH) ¶ 77634 (2d Cir. 1998); In re Bryson Properties, XVIII, 961 F.2d 496, 22 Bankr. Ct. Dec. (CRR) 1391, 26 Collier Bankr. Cas. 2d (MB) 1290, Bankr. L. Rep. (CCH) ¶ 74545 (4th Cir. 1992). Both of these opinions were written by the Honorable Jane Restani, Court of International Trade, sitting by designation.

14 *See, e.g.*, Matter of Wabash Valley Power Ass'n, Inc., 72 F.3d 1305, 34 Collier Bankr. Cas. 2d (MB) 877, Bankr. L. Rep. (CCH) ¶ 76739 (7th Cir. 1995); Matter of Woodbrook Associates, 19 F.3d 312, 30 Collier Bankr. Cas. 2d (MB) 551, Bankr. L. Rep. (CCH) ¶ 75780 (7th Cir. 1994); John Hancock Mut. Life Ins. Co. v. Route 37 Business Park Associates, 987 F.2d 154, 23 Bankr. Ct. Dec. (CRR) 1537, 28 Collier Bankr. Cas. 2d (MB) 440, Bankr. L. Rep. (CCH) ¶ 75104 (3d Cir. 1993); Unruh v. Rushville State Bank of Rushville, Mo., 987 F.2d 1506, 24 Bankr. Ct. Dec. (CRR) 43, Bankr. L. Rep. (CCH) ¶ 75159 (10th Cir. 1993); Matter of Greystone III Joint Venture, 995 F.2d 1274 (5th Cir. 1991), modified on reh'g, 995 F.2d 1284 (1992); Matter of Snyder, 967 F.2d 1126, 23 Bankr. Ct. Dec. (CRR) 287, 27 Collier Bankr. Cas. 2d (MB) 285, Bankr. L. Rep. (CCH) ¶ 74754 (7th Cir. 1992); In re Anderson, 913 F.2d 530 (8th Cir. 1990); Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting, 908 F.2d 1351, 20 Bankr. Ct. Dec. (CRR) 1305, 23 Collier Bankr. Cas. 2d (MB) 1118, Bankr. L. Rep. (CCH) ¶ 73565 (7th Cir. 1990).

15 *See generally* sources cited *supra* note 11.

16 The Bankruptcy Code superseded the former Bankruptcy Act of 1898. *See* The Bankruptcy Act of 1898 (act July 1, 1898, ch. 541, 30 Stat. 544) (repealed 1938), as amended by the Chandler Act of 1938 (ch. 575, 52 stat. 840) (repealed 1979) (hereinafter, the "Bankruptcy Act"). The fair and equitable requirement, which was developed in equity receivership cases, was codified at section 77B(f)(1) of the Bankruptcy Act, but not defined. *See* Bankruptcy Act of 1898, 11 U.S.C. § 205, 48 Stat. 911, 918 (1934) (repealed 1938). The Chandler Act repealed section 77B and replaced it with Chapter X of the Bankruptcy Act of 1938. *See* Bankruptcy Act of 1898, 11 U.S.C. § 621(2), 52 Stat. 883, 897 (1938) (repealed 1979).

17 *See* Northern Pac. R. Co. v. Boyd, 228 U.S. 482, 508, 33 S. Ct. 554, 57 L. Ed. 931 (1913) (fairness and equity require that "the creditors ... be paid before the stockholders could retain equity interests for any purpose whatsoever") (an equity receivership case); Louisville Trust Co. v. Louisville, N.A. & C. Ry. Co., 174 U.S. 674, 684, 19 S. Ct. 827, 43 L. Ed. 1130 (1899); *see also* Mason v. Paradise Irr. Dist., 326 U.S. 536, 66 S. Ct. 290, 90 L. Ed. 287 (1946); Marine Harbor Properties v. Manufacturer's Trust Co., 317 U.S. 78, 63 S. Ct. 93, 87 L. Ed. 64 (1942); *see generally* *LaSalle*, 526 U.S. 434, 119 S. Ct. 1411, 1417-19; sources cited *supra* note 11.

18 *Cf.* Brunstad & Sigal, *supra* note 11, at 1496-98 & n.76 (fair and equitable requirement reflects the familiar rule).

19 *See infra* note 25 and accompanying text.

20 For a variety of reasons, equity holders may be willing to make a capital contribution to ensure the reorganization's success - including to preserve a family business, retain their management jobs, preserve tax benefits, etc.

21 In one Illinois case, for example, creditors overwhelmingly favored a plan that allowed old equity to retain their interests even though a third party sought to outbid the old equity. Creditors and employees feared that the third party would buy the company and shut it down to eliminate competition. (The case, Kewanee Boiler, in which the author of this essay represented the creditors' committee, is not reported.)

22 *See generally* *LaSalle*, 526 U.S. 434, 119 S. Ct. 1411, 1417-19.

23 Case v. Los Angeles Lumber Products Co., 308 U.S. 106, 60 S. Ct. 1, 84 L. Ed. 110 (1939).

24 *See* *Los Angeles Lumber*, 308 U.S. at 118-22; *accord* *Ahlers*, 485 U.S. at 197, 201; Bank of America Nat. Trust and Sav. Ass'n v. 203 North LaSalle Street Partnership, 526 U.S. 434, 119 S. Ct. 1411, 1416, 143 L. Ed. 2d 607, 34 Bankr. Ct. Dec. (CRR) 329, 41 Collier Bankr. Cas. 2d (MB) 526, Bankr. L. Rep. (CCH) ¶ 77924 (1999); *see also* cases cited *supra* note 17; Brunstad & Sigal, *supra* note 11, at 1500-01 nn. 93-97.

25 *See* 11 U.S.C. § 726 (1994).

26 *See* 11 U.S.C. § 1129(a)(7) (1994). Because reorganization is designed to create more value than liquidation, some, if not all, of the stakeholders may receive more under a chapter 11 plan than they would in a chapter 7 case. Consequently, the best interests test does not require that no entity receive more than its chapter 7 share. Chapter 11 does not guarantee that creditors will receive the best possible treatment, however. Although creditors vote on the plan, the debtor or other plan proponent fixes the terms of the plan, within the Bankruptcy Code's limits.

27 For a discussion of the voting requirements, *see infra* note 35 and accompanying text.

28 See 11 U.S.C. § 1129(b) (1994) (establishing the requirements for cramdown).

29 *Id.* Section 1129(b) also requires that the plan not unfairly discriminate. *Id.* This typically becomes an issue in new value plans only if the principal creditor challenges the classification of its deficiency claim.

30 *See id.* §§ 1129(a)(8), 1129(b)(1), 1129(2)(B)(i), (ii).

31 *See id.* § 1129(a).

32 *See generally* *LaSalle*, 526 U.S. 434, 119 S. Ct. 1411, 1424 n.28; In re Coltex Loop Central Three Partners, L.P., 138 F.3d 39, 44, 32 Bankr. Ct. Dec. (CRR) 179, 39 Collier Bankr. Cas. 2d (MB) 656, Bankr. L. Rep. (CCH) ¶ 77634 (2d Cir. 1998); Matter of 203

North LaSalle Street Partnership, 126 F.3d 955, 966, 31 Bankr. Ct. Dec. (CRR) 658, 38 Collier Bankr. Cas. 2d (MB) 1275, Bankr. L. Rep. (CCH) ¶ 77529 (7th Cir. 1997), judgment rev'd, 526 U.S. 434, 119 S. Ct. 1411, 143 L. Ed. 2d 607, 34 Bankr. Ct. Dec. (CRR) 329, 41 Collier Bankr. Cas. 2d (MB) 526, Bankr. L. Rep. (CCH) ¶ 77924 (1999) (acknowledging that "To the extent that the new value corollary was, in pre-Code days, a device that gave the plan proponent some leverage in dealing with minority creditors, its necessity may not be as great today as it was in an earlier period," but arguing that new value is a significant source of funding and that Congress gave no hint of abolishing it); In re Bonner Mall Partnership, 2 F.3d 899, 914-15, 24 Bankr. Ct. Dec. (CRR) 883, 29 Collier Bankr. Cas. 2d (MB) 668, Bankr. L. Rep. (CCH) ¶ 75374 (9th Cir. 1993), cert. granted, 510 U.S. 1039, 114 S. Ct. 681, 126 L. Ed. 2d 648 (1994); Brunstad & Sigal, *supra* note 11, at 1478-79; Brunstad, Sigal & Schorling, *supra* note 11.

33 *See, e.g., Bonner Mall*, 2 F.3d at 914-15; Nicholas L. Georgakopoulos, *New Value, Fresh Start*, 3 STAN. J. L. BUS. & FIN. 125 (1997).

34 A claim is undersecured when the amount of the claim exceeds the value of the collateral.

35 *See* 11 U.S.C. § 1126 (1994). A class of claims accepts a plan if creditors holding at least two-thirds in amount and more than one-half in number of the allowed claims that actually vote accept the plan. *Id.* § 1126(c).
In *LaSalle*, for example, the mortgagee's 34.5 million dollar unsecured deficiency claim dwarfed the remaining aggregate unsecured creditors' claims of 90,000 dollars. *See LaSalle*, 526 U.S. 434, 119 S. Ct. 1411, 1415 & n.10.

36 *See* 11 U.S.C. § 1129(b) (1994).

37 *See, e.g., LaSalle*, 526 U.S. 434, 119 S. Ct. 1411, 1416-17 & n.15; In re Coltex Loop Central Three Partners, L.P., 138 F.3d 39, 32 Bankr. Ct. Dec. (CRR) 179, 39 Collier Bankr. Cas. 2d (MB) 656, Bankr. L. Rep. (CCH) ¶ 77634 (2d Cir. 1998); Matter of 203 North LaSalle Street Partnership, 126 F.3d 955, 31 Bankr. Ct. Dec. (CRR) 658, 38 Collier Bankr. Cas. 2d (MB) 1275, Bankr. L. Rep. (CCH) ¶ 77529 (7th Cir. 1997); In re Bonner Mall Partnership, 2 F.3d 899, 24 Bankr. Ct. Dec. (CRR) 883, 29 Collier Bankr. Cas. 2d (MB) 668, Bankr. L. Rep. (CCH) ¶ 75374 (9th Cir. 1993), cert. granted, 510 U.S. 1039, 114 S. Ct. 681, 126 L. Ed. 2d 648 (1994).

38 *See* 11 U.S.C. § 506(a) (1994).

39 *Id.* § 1111(b); *see also* Matter of Woodbrook Associates, 19 F.3d 312, 318, 30 Collier Bankr. Cas. 2d (MB) 551, Bankr. L. Rep. (CCH) ¶ 75780 (7th Cir. 1994) (noting that no payment on such a deficiency claim is required to meet the best interests test because the claim would receive no distribution in a liquidation case).

40 *See, e.g., LaSalle*, 119 S. Ct. at 1414; *Coltex*, 138 F.3d at 41; *Bonner Mall*, 513 U.S. at 19-20.

41 *See, e.g., LaSalle*, 126 F.3d at 963 (noting that "in the course of a reorganization, 'additional funds will be essential to the success of the undertaking, and it may be impossible to obtain them, unless stockholders are permitted to contribute and retain an interest sufficiently valuable to move them,"' quoting Kansas City Terminal Ry. Co. v. Central Union Trust Co. of New York, 271 U.S. 445, 46 S. Ct. 549, 70 L. Ed. 1028 (1926)).

42 *See* 11 U.S.C. § 1129(b)(2)(B) (1994).

43 Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 108 S. Ct. 963, 99 L. Ed. 2d 169, 17 Bankr. Ct. Dec. (CRR) 201, 18 Collier Bankr. Cas. 2d (MB) 262, Bankr. L. Rep. (CCH) ¶ 72186 (1988) (per White, J.).

44 *Id.* at 199, 204-05.

45 *Id.* at 201 n.1, 202-03; *see also* 11 U.S.C. § 1129(b)(2) (1994) (stating the conditions under which a plan is "fair and equitable" to a dissenting class).

46 *Ahlers*, 485 U.S. at 203 n.3.

47 *Id.* at 199, 204-05. Bankruptcy practitioners refer to this type of contribution as "sweat equity."

48 *Id.* at 204-05; *see* Case v. Los Angeles Lumber Products Co., 308 U.S. 106, 60 S. Ct. 1, 84 L. Ed. 110 (1939).

49 *Ahlers*, 485 U.S. at 204-05.

50 *Id.* at 205-06 (noting that, when Congress enacted the Bankruptcy Code, it rejected a proposed "liberalization" of the absolute priority rule that would have allowed equity to retain an interest in exchange for a contribution similar to the contribution found to be inadequate in *Los Angeles Lumber*); *see also id.* at 206 (noting that the legislative history stated that section 1129 codified the absolute priority rule).

51 In re Bonner Mall Partnership, 2 F.3d 899, 24 Bankr. Ct. Dec. (CRR) 883, 29 Collier Bankr. Cas. 2d (MB) 668, Bankr. L. Rep. (CCH) ¶ 75374 (9th Cir. 1993), cert. granted, 510 U.S. 1039, 114 S. Ct. 681, 126 L. Ed. 2d 648 (1994).

52 *Bonner Mall*, 2 F.3d at 901, 905.

53 *Id.* at 908-10, 912-13.

54 *Bonner Mall,* 513 U.S. 18.

55 Matter of 203 North LaSalle Street Partnership, 126 F.3d 955, 31 Bankr. Ct. Dec. (CRR) 658, 38 Collier Bankr. Cas. 2d (MB) 1275, Bankr. L. Rep. (CCH) ¶ 77529 (7th Cir. 1997).

56 *Id.* at 958-59.

57 *Id.* at 959, 967.

58 *Id.* at 965; Bank of America, Illinois v. 203 North LaSalle Street Partnership, 195 B.R. 692, 707, Bankr. L. Rep. (CCH) ¶ 77035 (N.D. Ill. 1996) (reasoning that "(1) the language of Section 1129(b)(2)(B) cannot unambiguously be applied in the context of a contribution of new value by the debtor's owners; (2) given this genuine ambiguity, it is appropriate to look at pre-Code practice for aid in interpretation; (3) prior to the adoption of the Code ... the availability of the 'new value' approach to reorganization was generally recognized; (4) nothing in the legislative history of the Code, or the language of the Code itself, gives any clear indication that Congress intended to eliminate the new value approach," quoting In re Bonner Mall Partnership, 2 F.3d 899, 905-17 (9th Cir. 1993)).

59 *LaSalle,* 126 F.3d 955, 965-68.

60 In re Coltex Loop Central Three Partners, L.P., 138 F.3d 39, 32 Bankr. Ct. Dec. (CRR) 179, 39 Collier Bankr. Cas. 2d (MB) 656, Bankr. L. Rep. (CCH) ¶ 77634 (2d Cir. 1998).

61 *Id.* at 44.

62 *Id.* at 43-44.

63 *LaSalle* was decided on May 4, 1999, one year and one day after the Court had granted certiorari.

64 *See LaSalle,* 526 U.S. 434, 119 S. Ct. 1411, 1422-24 (concluding that it was unnecessary to decide whether the new value exception remained viable because the elements of any such exception had not been satisfied).

65 *Id.*

66 *See LaSalle,* 526 U.S. 434, 119 S. Ct. 1411, 1424 (Thomas, J., concurring); *LaSalle,* 526 U.S. 434, 119 S. Ct. 1411, 1426 (Stevens, J., dissenting).

67 *See* Backmun, *supra* note 8; Brunstad & Sigal, *supra* note 11; Hippe, *supra* note 8; Kuney, *supra* note 8; Singer, *supra* note 8; Bruce H. White & William L. Medford, *Conducting Equity Auctions Under* LaSalle - *The Fog Thickens,* 1999 AM. BANKR. INST. J. 144.

68 *See* Robin E. Phelan; *Exploring With* LaSalle, NORTON BANKR. L. ADVISOR, July 1999, at 1; REPORT OF THE NATIONAL BANKRUPTCY REVIEW COMMISSION § 2.4.15 at 545 (1997)

69 *See generally* sources cited *supra* notes 8, 67, 68.

70 *See LaSalle,* 526 U.S. 434, 119 S. Ct. 1411, 1417, 1419-22.

71 *Id.* at 1417-19 & n.25.

72 *Id.*

73 *Id.* at 1418. *See* Case v. Los Angeles Lumber Products Co., 308 U.S. 106, 121-22, 60 S. Ct. 1, 84 L. Ed. 110 (1939).

74 *LaSalle,* 119 S. Ct. at 1419.

75 *Id.* at 1419 ("Although hornbook law has it that 'Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded,' ... the phrase 'on account of' is not *silentium* ....").

76 *Id.* at 1419-20.

77 *Id.* at 1420-21.

78 *Id.* at 1422-24.

79 *Id. See generally* Georgakopoulos, *supra* note 33 (criticizing the option analogy approach).

80 *See* 11 U.S.C. § 1121 (1994). The bankruptcy court in *LaSalle* had rejected the Bank's motion to terminate exclusivity and instead had extended exclusivity, for cause. The Bank did not appeal. *See LaSalle*, 119 S. Ct. at 1414 & n.5.

81 *Id.* at 1424.

82 *Id.*

83 *See* sources cited *supra* notes 8, 67, 68.

84 *See LaSalle*, 119 S. Ct. at 1423-24; *see generally* Brunstad & Sigal, *supra* note 11 (assessing the competitive choice approach).

85 *Cf.* In re Young, 1999 U.S. App. LEXIS 18315 (7th Cir. August 3, 1999) (remanding a new value plan case in light of *LaSalle*); *see also* Citicorp Real Estate, Inc., v. PWA, Inc. (In re Georgetown Building Assocs. Ltd. Partnership), 240 B.R. 124, 35 Bankr. Ct. Dec. (CRR) 95 (Bankr. D.D.C. Oct. 15, 1999) (citing *LaSalle* for the proposition that an “interest” is an equity interest); In re Cajun Elec. Power Co-op., Inc., 185 F.3d 446, 34 Bankr. Ct. Dec. (CRR) 1091 (5th Cir. 1999) (citing *LaSalle's* discussion of the absolute priority rule in a case reversing an injunction that the lower court had entered because of an alleged violation of the Bankruptcy Code's distribution scheme).

86 *See* In re Dow Corning Corp., 237 B.R. 380, 397 n.11, 34 Bankr. Ct. Dec. (CRR) 982 (Bankr. E.D. Mich. 1999), *as amended*; In re Mama's Original Foods, Inc., 234 B.R. 500, 504, 34 Bankr. Ct. Dec. (CRR) 649, Bankr. L. Rep. (CCH) ¶ 77991 (Bankr. C.D. Cal. 1999).

87 *See* In re Bogue, 240 B.R. 742, 1999 Bankr. LEXIS 1367, *18 (Bankr. E.D. Wis. 1999).

88 *See supra* note 58.

89 *See LaSalle*, 526 U.S. 434, 119 S. Ct. 1411, 1414 (noting that a huge tax liability would be imposed if anyone other than the former partners acquired the property, but not taking this into consideration in its analysis).

90 *See LaSalle*, 526 U.S. 434, 119 S. Ct. 1411, 1424 (Thomas, J., concurring).

91 *Id.*

92 *See id.* (“Our precedents make clear that analysis of any statute, including the Bankruptcy Code, must not begin with external sources, but with the text itself.”).

93 *Id.*

94 *Id.* at 1424-25; *see* 11 U.S.C. § 1129(b)(2)(B) (1994).

95 *Id.* at 1424 (citing RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 13 (2d ed. 1987) (defining “by reason of” and “because of”) and WEBSTER'S THIRD NEW WORLD INTERNATIONAL DICTIONARY 13 (1976) (defining “for the sake of,” “by reason of,” and “because of”)).

96 *Id.* (concluding that the plan violated the fair and equitable requirement because a rejecting senior class was not paid in full but a junior class would receive property on account of its interest).

97 *Id.* at 1425.

98 *Id. Cf.* Brunstad & Sigal, *supra* note 11, at 1479 (arguing that this reasoning is not dicta because it is essential to the Court's holding).

99 *See LaSalle*, 526 U.S. 434, 119 S. Ct. 1411, 1425 (Thomas, J., concurring).

100 *Id.* at 1425-26 (acknowledging that the Court had found ambiguity in Midlantic Nat. Bank v. New Jersey Dept. of Environmental Protection, 474 U.S. 494, 106 S. Ct. 755, 88 L. Ed. 2d 859, 13 Bankr. Ct. Dec. (CRR) 1262, 13 Bankr. Ct. Dec. (CRR) 1269, 13 Collier Bankr. Cas. 2d (MB) 1355, 23 Env't. Rep. Cas. (BNA) 1913, Bankr. L. Rep. (CCH) ¶ 70923, 16 Envtl. L. Rep. 20278 (1986), but suggesting that instances of ambiguity were rare: “Even assuming the relevance of pre-Code practice in those rare instances when the Code is truly ambiguous ....”).

101 Other courts have cited this wide split as evidence of ambiguity. *See, e.g.*, Matter of 203 North LaSalle Street Partnership, 126 F.3d 955, 964-65, 31 Bankr. Ct. Dec. (CRR) 658, 38 Collier Bankr. Cas. 2d (MB) 1275, Bankr. L. Rep. (CCH) ¶ 77529 (7th Cir. 1997). In contrast, in Patterson v. Shumate, 504 U.S. 753, 112 S. Ct. 2242, 119 L. Ed. 2d 519, 23 Bankr. Ct. Dec. (CRR) 89, 26 Collier Bankr. Cas. 2d (MB) 1119, 15 Employee Benefits Cas. (BNA) 1481, Bankr. L. Rep. (CCH) ¶ 74621A (1992), the Court unanimously held that the Bankruptcy Code's language was unambiguous even though the lower courts had been split. In that case, however, the split arose because some courts had applied the clear text whereas others had applied presumed congressional intent, which they had discerned in the misleading legislative history. Also, in *Patterson*, the courts' analysis was not complicated by pre-Code practice because no such practice was relevant.

102 *See LaSalle*, 526 U.S. 434, 119 S. Ct. 1411, 1425 (Thomas, J., concurring) (noting that the Bankruptcy Code had made significant changes in both the substantive and procedural laws of bankruptcy, and arguing that "[h] ence, it makes little sense to graft onto the Code concepts that were developed during a quite different era of bankruptcy practice"); *cf.* U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235, 240, 109 S. Ct. 1026, 103 L. Ed. 2d 290, 18 Bankr. Ct. Dec. (CRR) 1150, Bankr. L. Rep. (CCH) ¶ 72575, 89-1 U.S. Tax Cas. (CCH) ¶ 9179, 63 A.F.T.R.2d 89-652 (1989) (per Blackmun, J.) (making a similar argument).

103 *See* Goshen Irrigation District v. United States, 1999 U.S. Dist. LEXIS 14207, *112-13 (D. Wyo. June 24, 1999); In re Simpson, 238 B.R. 776, 780 (Bankr. S.D. Ill. 1999).

104 *See LaSalle*, 526 U.S. 434, 119 S. Ct. 1411, 1426 (Stevens, J., dissenting).

105 *Id.* at 1426-27.

106 *Id.*

107 *Id.* at 1427.

108 *Id.*

109 *Id.* at 1430. *See also id.* at 1427 (arguing that if an old equity holder receives the new equity at a bargain price, it receives property "on account" of its old interest, but if it receives the new equity at a fair price, it does not receive property "on account" of its old interest); *id.* at 1428-29 (noting that the text does not require competitive bidding).

110 *Id.* at 1429.

111 *See* Karen M. Gebbia-Pinetti, *Interpreting the Bankruptcy Code: An Empirical Study of the Supreme Court's Bankruptcy Decisions*, 3 CHAPMAN L. REV. 173 (2000).
For analyses of limited numbers of the Supreme Court's bankruptcy decisions, *see* Lowell P. Botrell, *The Supreme Court and the "Plain Meaning of the Bankruptcy Code: A Review of Recent And Pending Supreme Court Decisions*, 69 N.D. L. REV. 155 (1993); Peter H. Carroll, III, *Literalism: The United States Supreme Court's Methodology for Statutory Construction in Bankruptcy Cases*, 25 ST. MARY'S L.J. 143, 212-15 (1993); Carlos Cuevas, *The Rehnquist Court, Strict Statutory Construction, and The Bankruptcy Code*, 42 CLEV. ST. L. REV. 435 (1994); Carlos J. Cuevas, *Public Values and the Bankruptcy Code*, 12 BANKR. DEV. J. 645 (1996); Thomas G. Kelch, *An Apology for Plain Meaning Interpretation of the Bankruptcy Code*, 10 BANKR. DEV. J. 289, 301-38 (1994); Kenneth N. Klee & Frank A. Merola, *Ignoring Congressional Intent: Eight Years of Judicial Legislation*, 62 AM. BANKR. L.J. 1 (1988); Eric W. Lam, *The Limit and Inconsistency of Application of the Plain Meaning Rule to Selected Provisions of the Bankruptcy Reform Act of 1994*, 20 HAMLINE L. REV. 111 (1996); Robert M. Lawless, *Legisprudence Through a Bankruptcy Lens: A Study in the Supreme Court*, 47 SYRACUSE L. REV. 1, 6, 109-11 (1996); Bruce A. Markell, *Conspiracy, Literalism, and Ennui at the Supreme Court: An Examination of Bankruptcy Cases Decided From 1990 to 1993*, 41 FED. BAR NEWS & J. 174, 181-83 (1994); 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); Charles Jordan Tabb, & Robert M. Lawless, *Of Commas, Gerunds, and Conjunctions: The Bankruptcy Code Jurisprudence of the Rehnquist Court*, 42 SYRACUSE L. REV. 823, 879-85 (1991); Charles Jordan Tabb, *The Bankruptcy Reform Act in the Supreme Court*, 49 U. PITT. L. REV. 477, 570-75 (1988); Adam J. Weinsch, *The Supreme Court, Textualism, and the Treatment of Pre-Bankruptcy Code Law*, 79 GEO. L.J. 1831, 1854-62 (1991).

112 *See supra* notes 11-14 and accompanying text.

113 *See supra* notes 10, 43-54.

114 *See, e.g.*, Fidelity Financial Services, Inc. v. Fink, 522 U.S. 211, 118 S. Ct. 651, 139 L. Ed. 2d 571, 31 Bankr. Ct. Dec. (CRR) 1329, 38 Collier Bankr. Cas. 2d (MB) 1155, Bankr. L. Rep. (CCH) ¶ 77595 (1998); Field v. Mans, 516 U.S. 59, 116 S. Ct. 437, 133 L. Ed. 2d 351, 28 Bankr. Ct. Dec. (CRR) 231, 33 Collier Bankr. Cas. 2d (MB) 1323, Bankr. L. Rep. (CCH) ¶ 76700 (1995); Patterson v. Shumate, 504 U.S. 753, 112 S. Ct. 2242, 119 L. Ed. 2d 519, 23 Bankr. Ct. Dec. (CRR) 89, 26 Collier Bankr. Cas. 2d (MB) 1119, 15 Employee Benefits Cas. (BNA) 1481, Bankr. L. Rep. (CCH) ¶ 74621A (1992); Grogan v. Garner, 498 U.S. 279, 111 S. Ct. 654, 112 L. Ed. 2d 755, 21 Bankr. Ct. Dec. (CRR) 342, 24 Collier Bankr. Cas. 2d (MB) 1, Bankr. L. Rep. (CCH) ¶ 73746A, 70 A.F.T.R.2d 92-5639 (1991); Johnson v. Home State Bank, 501 U.S. 78, 111 S. Ct. 2150, 115 L. Ed. 2d 66, 21 Bankr. Ct. Dec. (CRR) 1293, 24 Collier Bankr. Cas. 2d (MB) 1171, Bankr. L. Rep. (CCH) ¶ 73993 (1991).

115 *See* Bank of America Nat. Trust and Sav. Ass'n v. 203 North LaSalle Street Partnership, 526 U.S. 434, 119 S. Ct. 1411, 143 L. Ed. 2d 607, 34 Bankr. Ct. Dec. (CRR) 329, 41 Collier Bankr. Cas. 2d (MB) 526, Bankr. L. Rep. (CCH) ¶ 77924 (1999) (dictum); Cohen v. de la Cruz, 523 U.S. 213, 221, 118 S. Ct. 1212, 140 L. Ed. 2d 341, 32 Bankr. Ct. Dec. (CRR) 400, 38 Collier Bankr. Cas. 2d (MB) 1891, Bankr. L. Rep. (CCH) ¶ 77644 (1998); U.S. v. Reorganized CF & I Fabricators of Utah, Inc., 518 U.S. 213, 221, 116 S. Ct. 2106, 135 L. Ed. 2d 506, 29 Bankr. Ct. Dec. (CRR) 271, 35 Collier Bankr. Cas. 2d (MB) 463, 20 Employee Benefits Cas. (BNA) 1289, Bankr. L. Rep. (CCH) ¶ 76971, 96-1 U.S. Tax Cas. (CCH) ¶ 50322, 77 A.F.T.R.2d 96-2562 (1996); U.S. v. Noland, 517 U.S. 535, 539, 116 S. Ct. 1524, 134 L. Ed. 2d 748, 28 Bankr. Ct. Dec. (CRR) 1331, 35 Collier Bankr. Cas. 2d (MB) 1, Bankr. L. Rep. (CCH) ¶ 76920, 96-1 U.S. Tax Cas. (CCH) ¶ 50252, 77 A.F.T.R.2d 96-2143 (1996); Dewsnup v. Timm, 502 U.S. 410, 417-20, 112 S. Ct. 773, 116 L. Ed. 2d 903, 22 Bankr. Ct. Dec. (CRR) 750, 25 Collier Bankr. Cas. 2d (MB) 1297, Bankr. L. Rep. (CCH) ¶ 74361A (1992); Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 202-05, 108 S. Ct. 963, 99 L. Ed. 2d 169, 17 Bankr. Ct. Dec.

(CRR) 201, 18 Collier Bankr. Cas. 2d (MB) 262, Bankr. L. Rep. (CCH) ¶ 72186 (1988); United Sav. Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 108 S. Ct. 626, 98 L. Ed. 2d 740, 16 Bankr. Ct. Dec. (CRR) 1369, 17 Collier Bankr. Cas. 2d (MB) 1368, Bankr. L. Rep. (CCH) ¶ 72113 (1988); Kelly v. Robinson, 479 U.S. 36, 44-49, 107 S. Ct. 353, 93 L. Ed. 2d 216, 14 Bankr. Ct. Dec. (CRR) 1383, 14 Bankr. Ct. Dec. (CRR) 1384, 15 Collier Bankr. Cas. 2d (MB) 890, Bankr. L. Rep. (CCH) ¶ 71475 (1986); Midlantic Nat. Bank v. New Jersey Dept. of Environmental Protection, 474 U.S. 494, 501, 106 S. Ct. 755, 88 L. Ed. 2d 859, 13 Bankr. Ct. Dec. (CRR) 1262, 13 Bankr. Ct. Dec. (CRR) 1269, 13 Collier Bankr. Cas. 2d (MB) 1355, 23 Env't. Rep. Cas. (BNA) 1913, Bankr. L. Rep. (CCH) ¶ 70923, 16 Envtl. L. Rep. 20278 (1986); U.S. v. Whiting Pools, Inc., 462 U.S. 198, 208, 103 S. Ct. 2309, 76 L. Ed. 2d 515, 10 Bankr. Ct. Dec. (CRR) 705, 8 Collier Bankr. Cas. 2d (MB) 710, Bankr. L. Rep. (CCH) ¶ 69207, 83-1 U.S. Tax Cas. (CCH) ¶ 9394, 52 A.F.T.R.2d 83-5121 (1983).

116 *See Cohen*, 523 U.S. 213; *Noland*, 517 U.S. 535; *Ahlers*, 485 U.S. 197; *Timbers*, 484 U.S. 365; *Whiting Pools*, 462 U.S. 198.

117 *See* Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 565, 110 S. Ct. 2126, 109 L. Ed. 2d 588, 20 Bankr. Ct. Dec. (CRR) 833, 22 Collier Bankr. Cas. 2d (MB) 1067, Bankr. L. Rep. (CCH) ¶ 73382 (1990) (Blackmun, J., dissenting); U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235, 249-55, 109 S. Ct. 1026, 103 L. Ed. 2d 290, 18 Bankr. Ct. Dec. (CRR) 1150, Bankr. L. Rep. (CCH) ¶ 72575, 89-1 U.S. Tax Cas. (CCH) ¶ 9179, 63 A.F.T.R.2d 89-652 (1989) (O'Connor, J., dissenting).

118 A complete analysis of the Court's approach to pre-Code practice is beyond the scope of this essay.

119 *See, e.g.*, *Dewsnup*, 502 U.S. 410 (per Blackmun, J.); *Davenport*, 495 U.S. at 565 (Blackmun, J., dissenting); *Ron Pair*, 489 U.S. at 249-55 (O'Connor, J., dissenting).

120 *See, e.g.*, *LaSalle*, 119 S. Ct. at 1424 (Thomas, J., concurring); *Dewsnup*, 502 U.S. at 420 (Scalia, J., dissenting).

121 Kelly v. Robinson, 479 U.S. 36, 107 S. Ct. 353, 93 L. Ed. 2d 216, 14 Bankr. Ct. Dec. (CRR) 1383, 14 Bankr. Ct. Dec. (CRR) 1384, 15 Collier Bankr. Cas. 2d (MB) 890, Bankr. L. Rep. (CCH) ¶ 71475 (1986).

122 *Id.*

123 Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 110 S. Ct. 2126, 109 L. Ed. 2d 588, 20 Bankr. Ct. Dec. (CRR) 833, 22 Collier Bankr. Cas. 2d (MB) 1067, Bankr. L. Rep. (CCH) ¶ 73382 (1990).

124 *Id.*

125 *See Davenport*, 495 U.S. at 564 (Blackmun, J., dissenting); *Kelly*, 479 U.S. at 53 (Marshall, J., dissenting).

126 Dewsnup v. Timm, 502 U.S. 410, 112 S. Ct. 773, 116 L. Ed. 2d 903, 22 Bankr. Ct. Dec. (CRR) 750, 25 Collier Bankr. Cas. 2d (MB) 1297, Bankr. L. Rep. (CCH) ¶ 74361A (1992) (per Blackmun, J.). This was a six-to-two decision because Justice Thomas took no part in the consideration of the case.

127 *Id.* In *Dewsnup*, the Court considered the interplay between Bankruptcy Code subsections 506(a) and (d). *See* 11 U.S.C. § 506(a), (d) (1994). Under section 506(a), a secured creditor's "allowed secured claim" is equal to the lesser of the amount of the claim or the value of the collateral. *See* 11 U.S.C. § 506(a) (1994). This shorthand statement of the effect of section 506(a) applies if the debtor is the sole owner of the collateral and the claim is a recourse claim. Section 1111(b)(1) creates essentially the same result for non-recourse claims. *See id.* § 1111(b)(1). Consequently, if an "undersecured" creditor holds a claim for one million dollars, but the collateral is worth only seven hundred thousand dollars, the creditor will have an allowed secured claim of seven hundred thousand dollars and an unsecured claim of three hundred thousand dollars. The creditor in *Dewsnup* held such an undersecured claim. *See Dewsnup*, 502 U.S. at 413. Section 506(d) allows a debtor to avoid a lien to the extent that the lien secures a claim that is not an "allowed secured claim." *See* 11 U.S.C. § 506(d) (1994). This section allows the debtor to avoid a lien when the underlying claim has been found to be invalid. The debtor argued that section 506(d) also allowed the Court to "strip down" an undersecured creditor's lien to the judicially determined value of the property. *See Dewsnup*, 502 U.S. at 415. Avoiding the lien would make it easier for the debtor to confirm a plan of reorganization over the creditor's objection. The Court denied the strip down, even though only the "secured" portion of the claim was an "allowed secured claim" under section 506(a). The Court reached this result by declining to apply section 506(a)'s definition of "allowed secured claim" to section 506(d). Instead, the Court concluded that the debtor could not avoid the lien if the creditor's claim was both "allowed" (i.e., was a valid claim not subject to disallowance or avoidance) and "secured" (i.e., any portion of the allowed claim was secured by any of the debtor's property). *Id.* at 420; *see* 11 U.S.C. § 506(a) (1994).

128 *Dewsnup*, 502 U.S. at 416.

129 *Id.* at 417.

130 *Id.* at 419-20. This iteration of the manner in which the Court will reconcile the text and pre-Code practice is quite similar to the interpretive philosophy stated in the *Davenport* dissent. *See* Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 565, 110 S. Ct. 2126, 109 L. Ed. 2d 588, 20 Bankr. Ct. Dec. (CRR) 833, 22 Collier Bankr. Cas. 2d (MB) 1067, Bankr. L. Rep. (CCH) ¶ 73382 (1990) (Blackmun, J., dissenting). Not surprisingly, the same justice, Justice Blackmun, wrote both. Because Justice Blackmun is no longer in the Court, the continued viability of his flexible test is unclear. Only four of the justices who joined Justice Blackmun's majority opinion in *Dewsnup* remain on the Court today. (These are Chief Justice Rehnquist, and Justices Kennedy,

O'Connor, and Stevens.) Justices Blackmun and White (who also joined the *Dewsnup* majority) have been replaced by Justices Thomas, Ginsburg, and Breyer.

131 *See Dewsnup,* 502 U.S. at 420 (Scalia, J., dissenting).

132 *Id.*

133 *Id.* at 435.

134 First, the dissent undertook a natural or plain meaning reading. According to the dissent, section 506(d) "[r]ead naturally and in accordance with other provisions of the statute" "unambiguously provides" that the lien is avoidable. *Id.* at 420; *see also id.* at 425-27 (arguing that the majority's reading created redundancy in § 506(d), was not consistent with a "natural reading," "natural meaning," or "straightforward reading," and created a practical absurdity). Disagreement among self-interested litigants cannot create an ambiguity because "[t]his mode of analysis makes every litigated statute ambiguous." *Id.* at 432.

135 Second, the dissent applied a holistic textual analysis. The dissent argued that the phrase "allowed secured claim," used in section 506(d) "obviously bears" the meaning set forth in section 506(a) and "inevitably means" the same thing when that phrase is used throughout the Bankruptcy Code. *Id.* at 421. In a "clear and unmistakable pattern of usage," the Bankruptcy Code is similarly consistent in its use of the phrases "allowed unsecured claim" and "allowed claim." *Id.* at 422. The dissent argued that "the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning ... must surely apply, a fortiori, to use of identical words in the same section of the same enactment." *Id.* (internal quotation marks omitted; citations omitted); *cf.* Patterson v. Shumate, 504 U.S. 753, 766-67, 112 S. Ct. 2242, 119 L. Ed. 2d 519, 23 Bankr. Ct. Dec. (CRR) 89, 26 Collier Bankr. Cas. 2d (MB) 1119, 15 Employee Benefits Cas. (BNA) 1481, Bankr. L. Rep. (CCH) ¶ 74621A (1992) (Scalia, J., concurring) (criticizing the majority's approach in *Dewsnup*). According to the dissent, the majority replaced this "normal and sensible" rule with a "one-section-at-a time" approach. *Dewsnup,* 502 U.S. at 423.

136 *Dewsnup,* 502 U.S. at 432-35.

137 Midlantic Nat. Bank v. New Jersey Dept. of Environmental Protection, 474 U.S. 494, 106 S. Ct. 755, 88 L. Ed. 2d 859, 13 Bankr. Ct. Dec. (CRR) 1262, 13 Bankr. Ct. Dec. (CRR) 1269, 13 Collier Bankr. Cas. 2d (MB) 1355, 23 Env't. Rep. Cas. (BNA) 1913, Bankr. L. Rep. (CCH) ¶ 70923, 16 Envtl. L. Rep. 20278 (1986).

138 Kelly v. Robinson, 479 U.S. 36, 107 S. Ct. 353, 93 L. Ed. 2d 216, 14 Bankr. Ct. Dec. (CRR) 1383, 14 Bankr. Ct. Dec. (CRR) 1384, 15 Collier Bankr. Cas. 2d (MB) 890, Bankr. L. Rep. (CCH) ¶ 71475 (1986).

139 Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 110 S. Ct. 2126, 109 L. Ed. 2d 588, 20 Bankr. Ct. Dec. (CRR) 833, 22 Collier Bankr. Cas. 2d (MB) 1067, Bankr. L. Rep. (CCH) ¶ 73382 (1990).

140 *Dewsnup,* 502 U.S. at 433-34 (Scalia, J., dissenting) (emphasis added).

141 Matter of Greystone III Joint Venture, 995 F.2d 1274 (5th Cir. 1991), modified on reh'g, 995 F.2d 1284 (1992).

142 *See Greystone,* 995 F.2d at 1281-84 (original opinion prior to modification of rehearing) (issued November 19, 1991).

143 *Id.* at 1284.

144 Dewsnup v. Timm, 502 U.S. 410, 112 S. Ct. 773, 116 L. Ed. 2d 903, 22 Bankr. Ct. Dec. (CRR) 750, 25 Collier Bankr. Cas. 2d (MB) 1297, Bankr. L. Rep. (CCH) ¶ 74361A (1992) (issued January 15, 1992).

145 *Greystone,* 995 F.2d 1274, *modified on reh'g*, 995 F.2d at 1284 ("In withdrawing this portion of the panel opinion we emphasize that the bankruptcy court's opinion on the 'new value exception' to the absolute priority rule has been vacated and we express no view whatsoever on that part of the bankruptcy court's opinion.").

146 *Id.* at 1285 (Jones, J., dissenting) (voting against rehearing, reaffirming the original opinion, which she had written, and arguing that *Dewsnup* had clouded the approach to statutory construction of the Bankruptcy Code).

147 *Id.*

148 Matter of 203 North LaSalle Street Partnership, 126 F.3d 955, 965, 31 Bankr. Ct. Dec. (CRR) 658, 38 Collier Bankr. Cas. 2d (MB) 1275, Bankr. L. Rep. (CCH) ¶ 77529 (7th Cir. 1997).

149 In re Bonner Mall Partnership, 2 F.3d 899, 913, 24 Bankr. Ct. Dec. (CRR) 883, 29 Collier Bankr. Cas. 2d (MB) 668, Bankr. L. Rep. (CCH) ¶ 75374 (9th Cir. 1993), cert. granted, 510 U.S. 1039, 114 S. Ct. 681, 126 L. Ed. 2d 648 (1994).

150 In re Coltex Loop Central Three Partners, L.P., 138 F.3d 39, 43, 32 Bankr. Ct. Dec. (CRR) 179, 39 Collier Bankr. Cas. 2d (MB) 656, Bankr. L. Rep. (CCH) ¶ 77634 (2d Cir. 1998).

151 Bank of America Nat. Trust and Sav. Ass'n v. 203 North LaSalle Street Partnership, 526 U.S. 434, 119 S. Ct. 1411, 1424, 143 L. Ed. 2d 607, 34 Bankr. Ct. Dec. (CRR) 329, 41 Collier Bankr. Cas. 2d (MB) 526, Bankr. L. Rep. (CCH) ¶ 77924 (1999) (Thomas, J., concurring, joined by Scalia, J.).

152 *Id.* Although some have cited the concurrence's "thickens the fog" comment in the context of the substance of the Court's opinion (i.e., the issues left open by the majority), Justice Thomas used this phrase to refer to majority's foggy interpretive approach, not its substantive holding. *Cf.* White & Medford, *supra* note 67.

153 U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235, 109 S. Ct. 1026, 103 L. Ed. 2d 290, 18 Bankr. Ct. Dec. (CRR) 1150, Bankr. L. Rep. (CCH) ¶ 72575, 89-1 U.S. Tax Cas. (CCH) ¶ 9179, 63 A.F.T.R.2d 89-652 (1989), is one of the Court's most highly criticized five-to-four opinions.

154 *Dewsnup*, 502 U.S. 410, 434-35 (Scalia, J., dissenting).

155 *See* BFP v. Resolution Trust Corp., 511 U.S. 531, 114 S. Ct. 1757, 128 L. Ed. 2d 556, 25 Bankr. Ct. Dec. (CRR) 1051, 30 Collier Bankr. Cas. 2d (MB) 345, Bankr. L. Rep. (CCH) ¶ 75885 (1994).

156 *See infra* note 157.

157 *See BFP*, 511 U.S. 531; Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 110 S. Ct. 2126, 109 L. Ed. 2d 588, 20 Bankr. Ct. Dec. (CRR) 833, 22 Collier Bankr. Cas. 2d (MB) 1067, Bankr. L. Rep. (CCH) ¶ 73382 (1990); Kelly v. Robinson, 479 U.S. 36, 107 S. Ct. 353, 93 L. Ed. 2d 216, 14 Bankr. Ct. Dec. (CRR) 1383, 14 Bankr. Ct. Dec. (CRR) 1384, 15 Collier Bankr. Cas. 2d (MB) 890, Bankr. L. Rep. (CCH) ¶ 71475 (1986); Midlantic Nat. Bank v. New Jersey Dept. of Environmental Protection, 474 U.S. 494, 106 S. Ct. 755, 88 L. Ed. 2d 859, 13 Bankr. Ct. Dec. (CRR) 1262, 13 Bankr. Ct. Dec. (CRR) 1269, 13 Collier Bankr. Cas. 2d (MB) 1355, 23 Env't. Rep. Cas. (BNA) 1913, Bankr. L. Rep. (CCH) ¶ 70923, 16 Envtl. L. Rep. 20278 (1986); Ohio v. Kovacs, 469 U.S. 274, 105 S. Ct. 705, 83 L. Ed. 2d 649, 12 Bankr. Ct. Dec. (CRR) 541, 11 Collier Bankr. Cas. 2d (MB) 1067, 21 Env't. Rep. Cas. (BNA) 2169, Bankr. L. Rep. (CCH) ¶ 70163, 15 Envtl. L. Rep. 20121 (1985); N.L.R.B. v. Bildisco and Bildisco, 465 U.S. 513, 104 S. Ct. 1188, 79 L. Ed. 2d 482, 11 Bankr. Ct. Dec. (CRR) 564, 9 Collier Bankr. Cas. 2d (MB) 1219, 5 Employee Benefits Cas. (BNA) 1015, 115 L.R.R.M. (BNA) 2805, Bankr. L. Rep. (CCH) ¶ 69580, 100 Lab. Cas. (CCH) ¶ 10771 (1984).

158 *Midlantic*, 474 U.S. 494.

159 *Id.*

160 *Kovacs*, 469 U.S. 274.

161 *Id.*

162 *Kelly*, 479 U.S. 36.

163 *Id.*

164 Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 110 S. Ct. 2126, 109 L. Ed. 2d 588, 20 Bankr. Ct. Dec. (CRR) 833, 22 Collier Bankr. Cas. 2d (MB) 1067, Bankr. L. Rep. (CCH) ¶ 73382 (1990).

165 *Id.*

166 N.L.R.B. v. Bildisco and Bildisco, 465 U.S. 513, 104 S. Ct. 1188, 79 L. Ed. 2d 482, 11 Bankr. Ct. Dec. (CRR) 564, 9 Collier Bankr. Cas. 2d (MB) 1219, 5 Employee Benefits Cas. (BNA) 1015, 115 L.R.R.M. (BNA) 2805, Bankr. L. Rep. (CCH) ¶ 69580, 100 Lab. Cas. (CCH) ¶ 10771 (1984).

167 *Id.*

168 BFP v. Resolution Trust Corp., 511 U.S. 531, 114 S. Ct. 1757, 128 L. Ed. 2d 556, 25 Bankr. Ct. Dec. (CRR) 1051, 30 Collier Bankr. Cas. 2d (MB) 345, Bankr. L. Rep. (CCH) ¶ 75885 (1994).

169 *Id.*

170 *See BFP*, 511 U.S. 531; Midlantic Nat. Bank v. New Jersey Dept. of Environmental Protection, 474 U.S. 494, 106 S. Ct. 755, 88 L. Ed. 2d 859, 13 Bankr. Ct. Dec. (CRR) 1262, 13 Bankr. Ct. Dec. (CRR) 1269, 13 Collier Bankr. Cas. 2d (MB) 1355, 23 Env't. Rep. Cas. (BNA) 1913, Bankr. L. Rep. (CCH) ¶ 70923, 16 Envtl. L. Rep. 20278 (1986); Kelly v. Robinson, 479 U.S. 36, 107 S. Ct. 353, 93 L. Ed. 2d 216, 14 Bankr. Ct. Dec. (CRR) 1383, 14 Bankr. Ct. Dec. (CRR) 1384, 15 Collier Bankr. Cas. 2d (MB) 890, Bankr. L. Rep. (CCH) ¶ 71475 (1986).

171 *See* U.S. CONST. art. VI, cl. 2.

172 *See* Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 110 S. Ct. 2126, 109 L. Ed. 2d 588, 20 Bankr. Ct. Dec. (CRR) 833, 22 Collier Bankr. Cas. 2d (MB) 1067, Bankr. L. Rep. (CCH) ¶ 73382 (1990); Ohio v. Kovacs, 469 U.S. 274, 105 S. Ct. 705, 83 L. Ed. 2d 649, 12 Bankr. Ct. Dec. (CRR) 541, 11 Collier Bankr. Cas. 2d (MB) 1067, 21 Env't. Rep. Cas. (BNA) 2169, Bankr. L. Rep. (CCH) ¶ 70163, 15 Envtl. L. Rep. 20121 (1985); N.L.R.B. v. Bildisco and Bildisco, 465 U.S. 513, 104 S. Ct. 1188, 79 L. Ed. 2d 482, 11 Bankr. Ct. Dec. (CRR) 564, 9 Collier Bankr. Cas. 2d (MB) 1219, 5 Employee Benefits Cas. (BNA) 1015, 115 L.R.R.M. (BNA) 2805, Bankr. L. Rep. (CCH) ¶ 69580, 100 Lab. Cas. (CCH) ¶ 10771 (1984).

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