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A Few Predictions for Justice Gorsuch's Bankruptcy Jurisprudence

Megan McDermott*

INTRODUCTION

With Neil Gorsuch recently confirmed to the Supreme Court,¹ this is a good opportunity to make some predictions about how Justice Gorsuch is likely to impact bankruptcy law. Why should we care about bankruptcy law in particular? First, as I explain in a forthcoming law review article, bankruptcy law is one of the most fertile fields for statutory interpretation questions.² As a result, bankruptcy decisions are a particularly useful lens through which to analyze a judge's approach to statutory interpretation. Second, the Supreme Court's frequent decisions regarding the scope of bankruptcy courts' power and authority

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1. Adam Liptak and Matt Flegenheimer, "Neil Gorsuch Confirmed by Senate as Supreme Court Justice," N.Y. TIMES, April 7, 2017, <https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html> [<https://perma.cc/4Q4Z-58A9>].

2. See, e.g., Megan McDermott, *Justice Scalia's Bankruptcy Jurisprudence: The Right Judicial Philosophy for the Modern Bankruptcy Code?*, UTAH L. REV. (forthcoming) (manuscript at 3) (on file as University of Wisconsin Legal Research Paper 1405, May 8, 2017) <https://ssrn.com/abstract=2931159> (citing Hon. Marjorie O. Rendell, 2003 – *A Year of Discovery: Cybergeneics and Plain Meaning in Bankruptcy Cases*, 49 VILL. L. REV. 887, 887 (2004), <http://digitalcommons.law.villanova.edu/vlr/vol49/iss5/1> [<https://perma.cc/C79J-BBLQ>] (arguing that the Bankruptcy Code "provides a proving ground for theories of statutory construction")); *id.* at 11–14 (explaining that the modern bankruptcy code gave Justice Scalia a unique opportunity to shape practice through his approach to statutory interpretation).

have extremely broad impact, as they provide critical guidance to the hundreds of bankruptcy judges who are collectively handling close to a million consumer and business bankruptcy cases each year.³ Yet bankruptcy law is often considered *sui generis*⁴ in academic circles,⁵ which suggests that our current academic discourse may be overlooking significant evidence about how the Supreme Court's decisions impact lower courts and societal interests.⁶

JUSTICE SCALIA'S IMPACT ON MODERN BANKRUPTCY LAW

It's no secret that Judge Gorsuch admires Justice Scalia and has adopted several aspects of his judicial philosophy into his own jurisprudence.⁷ It's also no secret that Justice Scalia played an oversized role in the development of modern bankruptcy law.⁸ Indeed, Justice Scalia often exhorted his colleagues to be mindful of the important role that the Supreme Court plays in shaping this area of the law. For example, as he noted in *Radlax Gateway Hotel LLC v. Amalgamated Bank*:

The Bankruptcy Code standardizes an expansive (and sometimes unruly) area of law, and it is our obligation to interpret the Code clearly and predictably using well established principles of statutory construction.⁹

In my forthcoming article, I identify the ways in which Justice Scalia sought to fulfill this vision of bringing predictability and clarity to the expansive and unruly Bankruptcy Code.¹⁰ Specifically, I argue that Justice Scalia's bankruptcy jurisprudence had four main features: (1) a holistic approach to the statutory text of the Code when trying to fill the gaps left by Congress;¹¹ (2) a belief that the

3. See McDermott, *supra* note 2 at 3–4. For information on current filings and trends, see United States Courts Judiciary News, *March 2017 Bankruptcy Filings Down 4.7 Percent* (Apr. 19, 2017), <http://www.uscourts.gov/news/2017/04/19/march-2017-bankruptcy-filings-down-47-percent> [<https://perma.cc/P46C-ASMT>].

4. *Sui generis* is Latin for “in a class of its own.” In other words, scholars who write broadly about the law don't often include bankruptcy law in their analysis, whereas bankruptcy scholars and practitioners tend to write narrowly to other specialists within the field.

5. See McDermott, *supra* note 2 at 3, n.4 (citing Douglas G. Baird, *Bankruptcy's Uncontested Axioms*, 108 YALE L.J. 573, 595–96 (1998), http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2012&context=journal_articles [<https://perma.cc/RQ6T-VMRD>]) (according to the “traditionalist” view, the fundamental differences between bankruptcy and other areas of the law suggest that it should be “meaningfully separated from every other part of our legal universe”).

6. See McDermott, *supra* note 2 at 3–4 (“[T]o overlook Justice Scalia's contributions to the bankruptcy field is to ignore a major aspect of his impact on the courts and on the public”).

7. See, e.g., Neil Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905, 906 (2016), <http://scholarlycommons.law.case.edu/caselrev/vol66/iss4/3> [<https://perma.cc/ALY3-VXL2>].

8. See McDermott, *supra* note 2 at 8–11 and Appendix B.

9. 566 U.S. 639, 649 (2012), <https://supreme.justia.com/cases/federal/us/566/11-166/opinion3.html> [<https://perma.cc/45JH-CDHF>].

10. See McDermott, *supra* note 2 at 22–23.

11. *Id.* at 23–26.

Supreme Court should impose clear rules to circumscribe the scope of bankruptcy courts' authority and power;¹² (3) an often Kantian approach to textual justice, regardless of the outcome;¹³ and (4) unabashed disdain for most reliance on legislative history.¹⁴ This essay uses these four factors to compare Judge Gorsuch's bankruptcy decisions with Justice Scalia's bankruptcy writings.

At the outset, the opportunities for comparison are somewhat limited. Justice Scalia played an outsized role in modern bankruptcy jurisprudence, authoring twenty-five bankruptcy opinions, concurrences, and dissents between 1988 and 2015—more than any other justice during this period.¹⁵ His totals include eleven majority or unanimous opinions, second only to Justice Thomas, who wrote thirteen. Most of the other Justices on the Court trail far behind.¹⁶ In contrast, Judge Gorsuch authored just over a half dozen published bankruptcy decisions during his ten-year stint on the Tenth Circuit.¹⁷ But despite its limited quantity, the evidence is compelling that Justice Gorsuch will have a similar impact on bankruptcy law, with one notable exception: his apparent willingness to indulge legislative history.

A Holistic Approach to the Code

Regarding the first feature of Justice Scalia's bankruptcy jurisprudence, I argue elsewhere that Justice Scalia's decisions in cases like *United Savings Ass'n v. Timbers of Inwood Forest Associates*,¹⁸ and *Hartford Underwriters Ins. Co. v. Union Planters Bank*,¹⁹ demonstrate a holistic understanding of the Code and model a rule-based textualist approach in which he uses the questions that

12. *Id.* at 26–37.

13. *Id.* at 37–44.

14. *Id.* at 44–51.

15. *Id.* at 10, Appendix B (showing that through the 2014–15 Term, Justice Scalia had written in more modern bankruptcy cases than any other justice).

16. *Id.* at 11, Appendix B. During the relevant period, Justice Ginsburg wrote seven lead opinions; Justice Sotomayor wrote four; Justices Breyer, Alito, and Chief Justice Roberts each wrote two; and Justices Kennedy and Kagan wrote one.

17. *In re Renewable Energy Dev. Corp.*, 792 F.3d 1274 (10th Cir. 2015), <http://www.leagle.com/decision/In%20FCO%2020150710054/IN%20RE%20RENEWABLE%20ENERGY%20DEVELOPMENT%20CORP> [<https://perma.cc/7M9H-YFNE>]; *In re Woolsey*, 696 F.3d 1266 (10th Cir. 2012), <http://law.justia.com/cases/federal/appellate-courts/ca10/11-4014/11-4014-2012-09-04.html> [<https://perma.cc/6E5M-KN9T>]; *TW Telecom Holdings Inc. v. Carolina Internet Ltd.*, 661 F.3d 495 (10th Cir. 2011), <http://law.justia.com/cases/federal/appellate-courts/ca10/11-1068/11-1068-2011-11-15.html> [<https://perma.cc/KCL7-9FNA>]; *In re Dawes*, 652 F.3d 1236 (10th Cir. 2011); *In re Krause*, 637 F.3d 1160 (10th Cir. 2011), <http://law.justia.com/cases/federal/appellate-courts/ca10/09-3129/09-3129-2011-06-21.html> [<https://perma.cc/Y655-M3NN>]; *In re C & M Properties LLC*, 563 F.3d 1156 (10th Cir. 2009), <http://law.justia.com/cases/federal/appellate-courts/ca10/07-4232/07-4232-2011-03-14.html> [<https://perma.cc/4XFM-CCFT>]; *In re Haberman*, 516 F.3d 1207 (10th Cir. 2008), <http://law.justia.com/cases/federal/appellate-courts/ca10/06-3324/06-3324-2011-03-14.html> [<https://perma.cc/7XDC-ELPX>].

18. 484 U.S. 365 (1988), <https://supreme.justia.com/cases/federal/us/484/365/> [<https://perma.cc/NXR3-J99X>].

19. 530 U.S. 1 (2000), <https://supreme.justia.com/cases/federal/us/530/1/case.html> [<https://perma.cc/KN4C-CLU6>].

Congress did answer in the statutory text to answer the questions that Congress left unaddressed.²⁰ There's some evidence that Judge Gorsuch already follows Justice Scalia's model in this regard, and will likely replicate his example on the Supreme Court.

In particular, Judge Gorsuch's decision in *In re Dawes*, exemplifies both the holistic approach that Justice Scalia used when interpreting the Bankruptcy Code, as well as the rule-based textualism that Justice Scalia applied to discern the objective meaning of statutory language.²¹ In *Dawes*, the Tenth Circuit had to weigh in on a circuit split about whether a family farmer could use a Chapter 12 plan to sell farm property and treat the resulting IRS claim for capital gains as an unsecured, non-priority debt.²² The question centered on whether the capital gains taxes were administrative expenses under 11 U.S.C. § 503(b), that are in turn eligible for priority downgrade under 11 U.S.C. § 1222(a)(2)(A).²³ Specifically, are the capital gains taxes arising from the sale of estate property considered "taxes incurred by the estate" within the meaning of Section 503(b)?²⁴

The Eighth Circuit had answered this question "yes,"²⁵ while the Ninth Circuit had reached the opposite conclusion.²⁶ In siding with the Ninth Circuit, Judge Gorsuch first looked to the "plain language" of Section 503(b).²⁷ After consulting the textualist's trusted references—Black's Law Dictionary, Webster's Third Edition, and the Oxford English Dictionary—he explained that the question of who has "incurred" a tax requires an assessment of who is "liable" for the tax.²⁸ Because tax law clearly makes the property owner liable for the tax, he concluded that the Eighth Circuit erred in holding that this type of tax was "incurred by the estate."²⁹

However, Judge Gorsuch's decision did not stop there. Instead, he went well beyond the plain meaning argument in order to evaluate the ways in which "the larger structure of the bankruptcy code" cast doubt on the debtor's proposed interpretation.³⁰ In particular, he focused on the precision with which Congress had described other types of administrative expenses under Section 503(b), a precision that was missing from debtor's proposed interpretation.³¹ He also pointed to a provision from Chapter 13 to develop an argument using the canon

20. See McDermott, *supra* note 2 at 23–26.

21. See 652 F.3d 1236 (10th Cir. 2011).

22. *Dawes*, 652 F.3d at 1237–38.

23. *Id.* at 1238.

24. *Id.* at 1238–39.

25. *Id.* at 1239 (citing *Knudson v. IRS*, 581 F.3d 696 (8th Cir. 2009), <https://www.courtlistener.com/opinion/1266472/knudson-v-irs/> [<https://perma.cc/3WBB-77MX>]).

26. *Id.* at 1239 (citing *United States v. Hall*, 617 F.3d 1161, 1163 (9th Cir. 2010)).

27. *Id.*

28. *Id.* at 1239–40.

29. *Id.* at 1240–41.

30. *Id.* at 1241.

31. *Id.*

against superfluity: specifically, because 11 U.S.C. § 1305 allowed the government the *option* of having post-petition taxes paid through a Chapter 13 plan, this meant that Congress did not envision that these liabilities would *automatically* be considered taxes incurred by the estate.³² Finding no reason to construe Chapter 12 any differently, he concluded that reading greater meaning into the text of Chapter 12 beyond the clear statutory language would risk upsetting whatever legislative compromise the actual text reflects.³³ *Dawes* demonstrates that Judge Gorsuch is ready, willing, and able to implement the holistic and text-based approach to the Bankruptcy Code that Justice Scalia pioneered.³⁴

Clear Rules to Determine the Scope of Bankruptcy Courts' Authority

Likewise, regarding the second feature of Justice Scalia's jurisprudence, Judge Gorsuch appears to agree with the view that the rules regarding a bankruptcy judge's power and authority should be clear and easy to apply. As I argue in my forthcoming article, Justice Scalia's concurrence in *Stern v. Marshall* is an example of his commitment to clear and predictable rules that dictate the scope of bankruptcy courts' authority.³⁵ Indeed, Justice Scalia dedicated most of his *Stern* concurrence to criticizing Chief Justice Roberts' majority opinion for failing to offer a test that was both based on the text of Article III and easy for courts to apply.³⁶ But at the tail end of his concurrence, Justice Scalia dropped a head-turning suggestion that could redefine the contours of the Article III question: "Perhaps historical practice permits non-Article III judges to process claims against the bankruptcy estate."³⁷ However, because no party had thought to brief arguments about historical practices, this question would need to be reserved for another day.³⁸

In his decision for *In re Renewable Energy Development Corporation*, Judge Gorsuch picks up this thread from *Stern* and weaves it into a tapestry.³⁹ The *Renewable Energy* decision arose from a conflict of interest between a Chapter 7 trustee and a former client whom the trustee had first consulted as a valuation expert and had then (allegedly) encouraged to take part in transactions that ultimately created problems for the estate.⁴⁰ Eventually, the hopelessly

32. *Id.* at 1241–42.

33. *Id.* at 1243 (citing John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 18 (2001), <https://ssrn.com/abstract=2849561> [<https://perma.cc/9LYV-96A3>]).

34. See McDermott, *supra* note 2 at 25–26.

35. *Id.* at 47 (discussing *Stern v. Marshall*, 564 U.S. 462 (2011), <https://supreme.justia.com/cases/federal/us/564/462/> [<https://perma.cc/UL59-64PQ>]).

36. *Stern*, 564 U.S. at 503–05 (Scalia, J. concurring), <https://supreme.justia.com/cases/federal/us/564/462/concurrence.html> [<https://perma.cc/N34Z-YT4W>].

37. *Id.* at 504–05.

38. *Id.* at 505.

39. 792 F.3d 1274 (10th Cir. 2015).

40. *Id.* at 1276–77.

conflicted trustee was replaced. At that point, the former client tried to bring state law claims—including malpractice and breach of fiduciary duty—against the former trustee.⁴¹ The former client filed in federal district court, relying on diversity jurisdiction, but the trustee sought to have the case referred to the bankruptcy court. The district court agreed, on the theory that the claims would be heard by a judge who was already well familiar with the details of the transactions.⁴² However, hearing these state law claims in bankruptcy court presented an Article III problem under *Stern v. Marshall*, and Judge Gorsuch properly read *Stern* to bar the bankruptcy court from hearing any matters arising under state law that could not be resolved by the claims allowance process.⁴³

But Judge Gorsuch was not quite satisfied with this easy answer. Instead, he took up Justice Scalia's invitation in *Stern* and engaged in an extended discussion, largely *sua sponte*,⁴⁴ about the nature of English law at the time of Article III, and the ways in which the historical difference between summary and plenary jurisdiction should shape current understandings about the proper scope of a bankruptcy court's power.⁴⁵ He further noted that Justice Thomas and Chief Justice Roberts had expressed some receptiveness to these sorts of arguments,⁴⁶ perhaps in an effort to spur the dissatisfied trustee to file a petition for certiorari to the Supreme Court before retreating back to district court. (Despite this noble effort, no petition was filed.)

At any rate, although this learned discussion about the proper understanding of Article III did not have an immediate impact, it indicates that Judge Gorsuch is more than prepared to entertain a historical argument that would redefine the scope of Article III. And, assuming he is correct that he has the votes,⁴⁷ whichever future litigant repeats the *Renewable Energy* argument may succeed in expanding the scope of a bankruptcy court's jurisdiction, which in turn could introduce new clarity into this otherwise thorny and uncertain area of bankruptcy practice.⁴⁸

41. *Id.* at 1277.

42. *Id.*

43. *Id.* at 1279.

44. *See id.* at 1282 (noting that the trustee's brief only alluded to a historical argument and made no effort to develop it).

45. *Id.* at 1281–82.

46. *Id.* at 1282 (citing *Wellness International Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1951 (2015) (Roberts, C.J., dissenting), <https://supreme.justia.com/cases/federal/us/575/13-935/dissent5.html> [<https://perma.cc/KNB6-Q8AD>]; *id.* at 1967–68 (Thomas, J., dissenting), <https://supreme.justia.com/cases/federal/us/575/13-935/dissent6.html> [<https://perma.cc/4A8W-2DZY>]).

47. *See id.*

48. *See generally* Tyson A. Crist, *Stern v. Marshall: Application of the Supreme Court's Landmark Decision in the Lower Courts*, 86 AM. BANKR. L.J. 627 (2012) (describing the “upheaval” and “consternation” caused by *Stern*).

Kantian Textualism

Regarding the third feature, Justice Scalia's bankruptcy writings often exemplified a Kantian form of textualism wherein he frequently urged the clearest reading of a statute regardless of the outcome, including outcomes that could have dramatic effects on commercial markets.⁴⁹ I label this brand of textualism "Kantian" after the philosopher Immanuel Kant, whose philosophy was known by the phrase "do justice though the world may perish." The label is appropriate for several of Justice Scalia's bankruptcy decisions, where he followed the text where it led—even when the outcomes were most undesirable from a commercial law standpoint. But perhaps the most well-known example of this Kantian approach is Justice Scalia's dissent in *Dewsnup v. Timm*,⁵⁰ in which he castigated the majority for distorting the text of 11 U.S.C. § 506 in order to avoid giving ordinary debtors a windfall at the expense of their mortgage creditors.⁵¹ In contrast to his six colleagues in the majority, Justice Scalia was content to follow the text and give consumers this windfall because, as he put it, "bankruptcy law has little to do with natural justice."⁵²

Will Justice Gorsuch also be a Kantian textualist? As a Court of Appeals Judge bound by his own circuit's precedent, not to mention Supreme Court decisions, Judge Gorsuch has had fewer opportunities to demonstrate the kind of Kantian textualism that characterizes many of Justice Scalia's bankruptcy decisions. However, Judge Gorsuch has made no secret of his own distaste for the outcome in *Dewsnup*. For example, after grappling with a threshold question about appellate jurisdiction in *In re Woolsey*,⁵³ Judge Gorsuch proceeded to lay out what he believed to be the proper application of 11 U.S.C. §506(d)—stripping off a wholly unsecured mortgage from the Chapter 13 debtors' deeply underwater property.⁵⁴

But unfortunately for the debtors, this was not the last word. After having demonstrated the "simple syllogism" at work in Section 506,⁵⁵ Judge Gorsuch then admitted that "the law in this corner of bankruptcy practice doesn't follow such a straight path."⁵⁶ Instead, he pointed to *Dewsnup* as "a gnarled bramble

49. See McDermott, *supra* note 2 at 26–37. For example, his decision in *Timbers* is estimated to have cost undersecured lenders billions of dollars in post-petition interest, at least some of which may have trickled down to pay employees or other unsecured creditors. *Id.* at 24 n.116 (citing Lee Dembart and Hon. Bruce Markell, *Alive at 25? A Short Review of the Supreme Court's Bankruptcy Jurisprudence, 1979–2004*, 78 AM. BANKR. L.J. 373, 374 (2004)).

50. 502 U.S. 410, 435–36 (1992), <https://supreme.justia.com/cases/federal/us/502/410/> [<https://perma.cc/2HC8-6XSY>]. For a discussion of the negative reaction to *Dewsnup*, see Mary Josephine Newborn, *Undersecured Creditors in Bankruptcy*, 25 ARIZ. ST. L.J. 547, 581–85 (1993).

51. 502 U.S. at 423–36 (Scalia, J. dissenting).

52. *Id.* at 435.

53. 696 F.3d 1266, 1268–72 (10th Cir. 2012).

54. *Id.* at 1272–73.

55. *Id.* at 1273.

56. *Id.*

blocking what should be an open path”⁵⁷ leading to “a topsy-turvy result.”⁵⁸ In other words, a result that does not follow the text of the Code, which clearly authorizes bankruptcy judges to grant a potential future windfall to consumer debtors with underwater mortgages.⁵⁹

If his harsh language in *Woolsey* is any indication, Judge Gorsuch is more than ready to take up Justice Scalia’s mantle of Kantian textualism. Moreover, decisions like *Woolsey* run counter to pronouncements that Judge Gorsuch consistently elevates corporate interests above those of consumers.⁶⁰ Like Justice Scalia, who was more than willing to let the ordinary consumer win if that’s what the text of a statute commanded,⁶¹ *Woolsey* suggests that Judge Gorsuch would also have no problem ruling against commercial interests, if that result represents the most reasonable reading of the Bankruptcy Code.⁶²

Legislative History: A Significant Break?

The remaining factor for consideration is Justice Scalia’s frequent objections to using legislative history to help determine Congress’s intent.⁶³ Although Justice Scalia did not always object to other justices’ use of legislative history and even occasionally indulged it in his own decisions,⁶⁴ his bankruptcy concurrences and dissents are replete with examples of his effort to rid bankruptcy practice of any mention of legislative history.⁶⁵ An extreme example comes from *Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997), where he refused to join a footnote in an otherwise unanimous decision, even though

57. *Id.* at 1278.

58. *Id.* at 1273.

59. *In re Woolsey*, 696 F.3d at 1274.

60. *See, e.g.*, Remarks of Elizabeth Warren, Apr. 4, 2017 (“Time after time, in case after case, Judge Gorsuch showed a remarkable talent for creatively interpreting the law in ways that benefited large corporations and that harmed working Americans, women, children, and consumers.”) *Elizabeth Warren: Trump ‘has shown contempt for our Constitution,’* BOSTON GLOBE, Apr. 4, 2017, <https://www.bostonglobe.com/news/politics/2017/04/04/elizabeth-warren-gorsuch-has-shown-contempt-for-our-constitution/KtE4k0qAIIM39FGvwFN2jI/story.html> [https://perma.cc/JD7G-GOR4].

61. *See* McDermott, *supra* note 2 at 30–34; *see also id.* at 37.

62. Interestingly, though, Judge Gorsuch suggests that the windfall of a straightforward reading of 11 U.S.C. § 506(d) would not flow to the consumers but rather to unsecured creditors. *See Woolsey*, 696 F.3d at 1274.

63. *See* McDermott, *supra* note 2 at 37–44.

64. *See id.* at 62–64 (citing *Timbers*, 484 U.S. at 365, <https://supreme.justia.com/cases/federal/us/484/365/case.html> [https://perma.cc/P257-9Q2Q]).

65. *See* McDermott, *supra* note 2 at 37–44 (citing and quoting *Begier v. IRS*, 496 U.S. 53, 67–68 (1990) (Scalia, J., concurring), <https://supreme.justia.com/cases/federal/us/496/53/case.html> [https://perma.cc/9ESA-7EJ7]); *id.* at 36 (citing and quoting *Union Bank v. Wolas*, 502 U.S. 151, 163 (1991) (Scalia, J., concurring), <https://supreme.justia.com/cases/federal/us/502/151/> [https://perma.cc/F9JU-U3XX]); *id.* at 37–38 (citing and quoting *Milavetz, Gallop & Milavetz, P.C.*, 559 U.S. 229, 253–54 (2010) (Scalia, J., concurring), <https://supreme.justia.com/cases/federal/us/559/229/concurrence.html> [https://perma.cc/73B4-H87W]).

that footnote merely explained why the Court was not considering legislative history arguments.⁶⁶ Even that was too much of an indulgence for Justice Scalia.

Importantly, this is one factor where Judge Gorsuch appears to differ significantly from Justice Scalia. At times in his bankruptcy writings, Judge Gorsuch has followed Justice Scalia's lead in expressing skepticism about reliance on particular aspects of legislative history. For example, his decision in *Dawes* criticizes the debtors for relying on a Senator's statement in 1999 regarding a proposal that was not enacted into law until 2005.⁶⁷ In a very Scalia-esque critique of this argument, he wrote:

We suppose it's possible for a senator's remarks to linger in the hearts and minds of his colleagues and influence their work years later, but to assume as much would take us well beyond ordinary legislative history analysis and require us to engage in the sort of "psychoanalysis of Congress the Supreme Court has repeatedly warned against."⁶⁸

But notably, Judge Gorsuch cited three non-Scalia decisions to support the suggestion that courts should be cautious when parties argue legislative history in unprincipled ways.⁶⁹ While it's a stretch to read much into case citations, these choices seem particularly interesting when juxtaposed with the many detailed criticisms Justice Scalia had about the misuse of the legislative history of the Bankruptcy Code.⁷⁰ Yet Judge Gorsuch overlooked these more pointed and specific criticisms in favor of more general citations involving the legislative history of other statutes. If Judge Gorsuch intended to signal a break from Justice Scalia's views on the legislative history behind the Bankruptcy Code, this is certainly one way to do it.

And in an even more noteworthy departure from Justice Scalia, Judge Gorsuch acknowledged that legislative history may play a role in courts' interpretation of statutes, even suggesting that he might weigh a "convincing counterindication in the legislative history" alongside the "plain language and larger statutory structure of the code."⁷¹ Likewise, in *In re Haberman*,⁷² Judge Gorsuch unapologetically turned to legislative history to buttress his conclusions regarding the rights of a trustee who avoids a lien using 11 U.S.C. § 544(a)(1).⁷³

66. *Id.* at 41 (discussing Justice Scalia's refusal to join footnote 4 in *Associates Commercial Corp. v. Rash*, 520 U.S. 953, 963 (1997)).

67. *Dawes*, 652 F.3d at 1243–44.

68. *Id.*

69. *Id.* at 1244 (citing *United States v. Public Util. Comm'n of Cal.*, 345 U.S. 295, 319 (1953) (Jackson, J., concurring); *Massachusetts v. EPA*, 549 U.S. 497 (2007); and *Doe v. Chao*, 540 U.S. 614, 619–21 (2004)).

70. See, e.g., *Begier*, 496 U.S. at 67–68 (Scalia, J., concurring); *Union Bank*, 502 U.S. at 163 (Scalia, J., concurring); *id.* at 37–38 (citing and quoting *Milavetz, Gallop & Milavetz, P.C.*, 559 U.S. at 253–54 (Scalia, J., concurring)).

71. *Dawes*, 652 F.3d at 1244.

72. 516 F.3d 1207 (10th Cir. 2008).

73. 516 F.3d at 1210 (citing and quoting S. Rep. No. 95-989 at 91 (1978) and H.R. Rep. No. 95-595 at 376 (1977)).

These two examples from Judge Gorsuch's bankruptcy decisions suggest that his approach to legislative history may be a clear break from Justice Scalia's approach. That said, perhaps his indulgence of legislative history reflects his role as an appellate judge and will evolve once he arrives on the high court.⁷⁴ Along those lines, Justice Scalia's own stance appears to have evolved after a few early terms in which he wavered in his approach to legislative history.⁷⁵ On the other hand, perhaps Judge Gorsuch's measured use of legislative history represents an effort to return to the sort of nuanced and careful consideration of legislative history that some argue is the best path to vindicating Congressional intent.⁷⁶ It remains to be seen whether this would be a positive development for bankruptcy law, given the fact that the Bankruptcy Code's lengthy legislative history is particularly challenging to review and apply in a manner that is both principled and cost effective for courts and litigants.⁷⁷

CONCLUSION

In sum, the body of evidence available from Judge Gorsuch's bankruptcy writings suggests that the Supreme Court is gaining a textualist who is more than ready to take a holistic approach when interpreting some of the more challenging provisions of the Bankruptcy Code. And, in a perhaps radical departure from the period of 1986 to 2015, the incoming textualist may be willing to consider legislative history arguments when interpreting the Bankruptcy Code. Indeed,

74. See McDermott, *supra* note 2 at 63–64. The earliest evidence is inconclusive, as Justice Gorsuch made no mention of legislative history in his first foray into statutory interpretation on the Supreme Court. See *Henson v. Santander Consumer USA*, 137 S. Ct. 1718 (2017), <https://supreme.justia.com/cases/federal/us/582/16-349> [<https://perma.cc/ZFH9-Y6T7>]. In that case, the Court faced the question of whether a company that purchases defaulted debt and then collects it for its own account is a “debt collector” within the meaning of the Fair Debt Collection Practices Act. Both parties extensively cited legislative history in debating whether the FDCPA could fairly be read to include Santander's activities. See Petitioner's Brief dated Feb. 17, 2017 at 2, 18, 34, 35, and 53 (citing S. Rep. 95-382 (1977)); Respondent's Brief dated March 20, 2017 at 3, 32, 33, 37, 38, 46 (citing S. Rep. 95-382 (1977)) and *id.* at 3, 37, 38 (citing H.R.Rep.No. 131, 95th Cong., 1st Sess. (1977)). But Gorsuch bypassed this debate entirely, pointing to petitioner's admission that the defaulted debt industry is a recent development that Congress was not aware of when it passed the FDCPA. Slip Op. at 9 (citing Br. for Pet. at 8). Because legislation is “the art of compromise” with “limitations expressed in statutory terms” often being “the price of passage,” the Court would not speculate about compromises Congress might make if faced with this new business model. *Id.*

75. See *id.* at n.285 (citing Antonin Scalia, A MATTER OF INTERPRETATION 36 (1997)).

76. See generally Victoria Nourse, MISREADING LAW, MISREADING DEMOCRACY 68–69 (2016) (arguing that by following five simple principles, courts can do a better job of determining what parts of legislative history are most relevant to Congress's understanding of what statutory text means).

77. See McDermott, *supra* note 2 at 38–39 (citing Eric Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47, 54–56, 67 (1997), <https://ssrn.com/abstract=10460> [<https://perma.cc/P97R-ZHV4>] (discussing the problems with the legislative history of the Bankruptcy Reform Act of 1978); Jean Braucher, *The Challenge to the Bench and Bar Presented by the 2005 Bankruptcy Act: Resistance Need Not Be Futile*, 2007 U. ILL. L. REV. 93, 100 (2007), <https://illinoislawreview.org/wp-content/ilr-content/articles/2007/1/Braucher.pdf> [<https://perma.cc/EU7H-8A45>] (discussing the problems with the legislative history of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005)).

Justice Gorsuch may even be willing to consider legislative history arguments as a counterindication to the text of the Bankruptcy Code, a possibility that the Court had shifted far away from in recent years under Justice Scalia's watch. If so, this may reopen new lines of arguments about the intended application of various provisions of the Bankruptcy Code. Let the briefing wars begin.