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To Except or Not to Except: Examining the Subchapter V Dischargeability Debate Through Practical Reasoning Principles of Statutory Interpretation

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INTRODUCTION

In 1949, Lon L. Fuller published *The Case of the Speluncean Explorers*; a fictionalized judicial proceeding involving four cave explorers who, upon becoming trapped in a cave without food, killed and ate another explorer to survive.[1] Fuller's piece was told from the perspective of several justices of the Supreme Court of Newgarth, as they considered whether the four remaining explores were guilty of murder. The justices' dialogue revolved around a Newgarthian criminal statute and whether the explorers—having agreed to kill the other man as a means of survival—fell within the statute's sole self-defense exception.[2]

Yet, each of Fuller's fictionalized justices examined and interpreted the statute, and how it should or should not apply to the explorers, differently. One justice argued that "No statute, whatever its language, should be applied in a way that contradicts its purpose," which, if considered, would set the explorers free.[3] Another focused on the "exact language of the statute" over any perceived underlying purpose, and instead posited that it is not the Court's place to "relieve the mistakes of [the Newgarthian] representatives" by simply reshaping a statute's text to fit outside, moral considerations. [4] A third justice proposed that law, like all government, "is a human affair, and that men are ruled, not by words on paper or by abstract theories, but by other men." [5] Although the explorers' conviction was upheld, it was done so because the fictional court was "evenly divided" and therefore the justices never fully resolved the interpretive issue. [6]

Fuller's fictionalized debate continues to serve as a "microcosm of this century's debates over the proper way to interpret statutes." [7] It illustrates not just the collision of conflicting theories about positive and natural law, but the continual struggle in identifying a methodology for interpreting statutes in a consistent manner. Aside from Fuller's theoretical scenario, statutory interpretation conflicts have primarily revolved around the perpetual search for a "consensus on the proper method for deciding statutory controversies …" [8]

This article identifies Practical Reasoning as the most complete interpretive methodology and then applies it to one of the thorniest problems besetting interpretation of the Bankruptcy Code, nondischargeabilty under Subchapter V. This article posits that Practical Reasoning—a statutory interpretation methodology developed by Professors William Eskridge and Phillip Frickey—presents the most comprehensive framework for resolving such conflicts. This framework is particularly useful in Code-driven areas of law, like bankruptcy, which heavily depend on statutory interpretation. A case study of a current bankruptcy conflict illuminates the value in adhering to an interpretive process reflecting Practical Reasoning's framework, as well as the drawbacks of following suboptimal interpretive analyses.

This argument is presented in three parts. Part I summarizes the flawed development of foundational approaches to statutory interpretation, and the respective flaws inherent in each methodology. It also introduces and explains the Practical Reasoning model as a response to the interpretive gaps of the primary methodologies as well as a layered and workable approach for judges to utilize.

Part II further explores how statutory interpretation conflicts develop by presenting a bankruptcy case study: the current Subchapter V debate as to whether corporate debtors in a nonconsensual reorganization are excepted from discharging certain debts under § 1192 of the Bankruptcy Code notwithstanding that the Code, since its 1979 effective date, imposes those exception only on "individuals," i.e., natural persons. Additionally, it examines and unpacks three distinct approaches to § 1192's proper interpretation: the Fourth Circuit's interpretation, the Ninth Circuit Bankruptcy Appellate Panel's opposing interpretation, and Judge Paul Bonapfel's interpretive approach in response to these interpretations.

Finally, Part III evaluates each of these approaches within the Practical Reasoning framework. This article argues that Judge Bonapfel's approach is ultimately correct, but not simply because of the answer reached in his interpretation of § 1192; rather, his approach should be adopted and applied because it best reflects the process and goals of the Practical Reasoning model. Conversely, this article unpacks the competing approaches, and highlights why those approaches, although compelling, reflect the growing and unnecessary split among courts regarding § 1192's interpretation and application. Adopting Judge Bonapfel's approach instead provides guidance for practitioners and subsequent courts in developing more sustainable, complete arguments regarding Subchapter V dischargeability, and would resolve the current interpretative split before it grows any larger.

ANALYSIS

I. THE COMPLEX AND CONTINUING DEVELOPMENT OF STATUTORY INTERPRETATION.

A. The Foundational Theories of Statutory Interpretation.

Statutory interpretation has historically centered around three primary interpretative doctrines: intentionalism, purposivism, and textualism. [9] Each of these "grand theories" revolves around an "anchoring value" that provides an "objective standard that will constrain the discretion of judicial interpreters." [10]

Intentionalism's thematic anchor is legislative intent, in which, "[t]he object of genuine interpretation is to discover the rule which the law-maker intended to establish; to discover the intention which the law-maker made the rule, or the sense which he attached to the words wherein the rule is expressed." [11] Not only does intentionalism require the court to act as "the enacting legislature's faithful servant, discovering and applying the legislature's original intent," but it seeks to "inhibit[ ] judicial lawmaking" by "requiring courts to follow the legislature's intentions" in furtherance of democratic principles. [12]

Despite the allure of interpreting a statute using this methodology, intentionalism's fundamental flaw is that it is arguably "inconsistent with the actual operation of the legislative process." [13] In other words, the legislative materials that provide weight to an intentionalist interpretation of a statute—such as committee reports or statements by sponsors of the legislation—might not be either "representative" or "accurate" evidence of congressional intent. [14] As legal scholar Max Radin once articulated:

> Even if the contents of the minds of the legislature were uniform, we have no means of knowing that content except by external utterances or behavior of these hundreds of men, and in almost every case the only external act is the extremely ambiguous one of acquiescence, which may be motivated in literally hundreds of ways, and which by itself indicates little or nothing of the pictures which the statutory description imply. [15]

Frustrated with the inherent inconsistencies of intentionalism, theorists like Radin, Henry Hart, and Albert Sacks developed purposivism; an alternative interpretative theory founded on the notion that "'every statute must be conclusively presumed to be a purposive act.'" [16] Given that there is an underlying purpose behind every law, judges must therefore work towards "identifying that purpose and deducing the interpretation with which it is most consistent[ly] resolves interpretive ambiguities." [17] This assumption drove purposivist theorists to focus on uncovering the "mischief" the legislature was attempting to cure when it enacted the statute, rather than the illusory intentions of those comprising the legislature. [18]

Purposivism's benefits, however, are arguably drowned out by the drawbacks inherent in its foundation. William Eskridge and Philip Frickey make this point clear. "Modern political theory … renders the political theory assumptions of purposivist statutory interpretation highly controversial." [19] Eskridge and Frickey note that "reasonable people in the legislature do not always produce reasonable results," and that some enacted statutes "are little else than backroom deals." [20] This "congeries of different sometimes conflicting purposes" emphasizes the "indeterminate" nature of purposivism as a foundational theory. It relies too heavily on an ideal version of Congress that, functionally, does not exist. [21]

The glaring flaws of intentionalism and purposivism, and the historical pushback they ultimately received, led to the adoption of the third foundational approach: textualism. Textualism's dominance in statutory interpretation derives from its obvious anchoring in the statute's actual language. It revolves around the notion that, "[]he beginning, and usually the end, of statutory interpretation should be the apparent meaning." [22]

Stretching as far back as Justice Holmes's memorable phrase that, "[w]e do not inquire what the legislature meant; we ask only what the statute means," [23] textualism's notoriety and usage were strengthened through notable textualists such as Justice Scalia and Judge Frank Easterbrook and their criticisms of other foundationalist theories. [24] Its protection of "legislative supremacy and judicial constraint" have taken various forms; a "stricter" version where the statute's text is the "sole legitimate interpretative source," and a "less ambitious" version that uses the text as a "best guide" to understanding more abstract concepts like legislative intent and purpose. [25]

Yet, textualism also has its own foundational issues. As Eskridge and Frickey noted, textualist theories "oversimplify the meaning of statutory texts, are not so determinate as they sound, and ignore other values our polity considers important." [26] "Stricter" versions of textualism "fail to consider that the meaning of text is strongly influenced by context." [27] Additionally, all variations of textualism, despite purporting "universal objectivity," overlook "the importance of the interpreter's own context, including current values." [28] In other words, textualism has largely ignored that "the interpreter's perspective will always interact with the text and historical context." [29]

The respective incompleteness of each of the foundational approaches has left statutory interpretation, as a consistently functioning tool in a judge's possession, with noticeable, practical gaps. The current interpretive landscape of bankruptcy law highlights the presence of such gaps.

B. The Current State of Statutory Interpretation in Bankruptcy Law

Bankruptcy law's heavy reliance on statutory interpretation provides a useful lens for evaluating the different interpretive theories. As noted through previous research regarding the Supreme Court's most prominent bankruptcy decisions, the Court's decisions "have often been the battleground for the competing jurisprudential theories denominated purposivism and textualism."[30] In fact, Judge Waldron and co-author Neil Berman discussed that despite the contemporary reliance on textualism in most other areas of the law, this "default approach" has, on several occasions, yielded to the Court's focus on a particular provision of the Bankruptcy Code's purpose instead.[31]

A prime example of this change in approach is the Court's holding in *Marrama v. Citizens Bank of Massachusetts*, where Justice Stevens's opening remarks concerned the "principal purpose of the Bankruptcy Code," rather than a discussion of the text of §§ 706(a) and 1307(a), (c).[32] As past scholarly treatment of *Marrama* has noted, the majority's focus on the Code's purpose and the dissent's focus on the respective subsections' text is an interpretive inversion even in comparison to the Court's subsequent decisions, such as *Travelers Casualty and Surety Company of America v. Pacific Gas and Electric Company*.[33] Although *Marrama*, as far as an analytical approach, is more of an outlier, it still highlights the relatively "unpredictable" nature of the Supreme Court's interpretative methodology.[34]

This "methodological polymorphism" by the Court, as Jean Braucher phrased it, is even more complicated in lieu of lower courts' methodologies as well in two respects.[35] First, Braucher identified courts' overreliance on a particular statute's "plain meaning" and the analytical "error" of thinking that a court can simply stop its analysis entirely without checking the supposed plain meaning of the words against other provisions in the statute as a whole, its legislative history, or any related purpose behind the statute.[36] Avoiding this common trap is a lesson that Braucher argued both judges and practitioners should seek to keep in mind, especially considering the Supreme Court's occasional predilection for adopting a more purposivist approach to statutory interpretation.[37]

Second, lower courts application of various methodologies have produced a parallel universe of inconsistent holdings similar to the Supreme Court, especially in the context of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA).[38] As noted by Judge Waldron and Berman, lower courts have inconsistently concluded whether (i) "And" means "And" or whether "And" means "Or," (ii) the word "Allowed" in § 521(a)(6) should be ignored or given full effect, and (iii) § 362(c)(3) terminates a limited stay as to property of the debtor only or as to property of the estate as well.[39] Each of the decisions seemingly rely on different foci and different interpretative starting points. This ultimately creates a sense of "confusion" and "contradiction," from the Supreme Court down, regarding which principles and methodologies courts intend to use when engaging in statutory interpretation issues involving bankruptcy.[40]

The need for clarity and consistency has forced these same scholars to encourage a more "holistic" approach to statutory interpretation that avoids the all too common "mechanistic and rigid procedure" applied by many courts.[41] Most notably, Judge Waldron and Mr. Berman suggested an approach that: (1) analyzes the text's plain meaning to determine its ambiguity; (2) considers other textual canons and the text's legislative history to help inform the text's plain meaning; (3) engages in "additional analysis" to determine an "articulable" congressional purpose consistent with the plain meaning; and (4) evaluates additional factors such as scrivener's error, absurdity in the proposed plain meaning, and any constitutional avoidance issues that might prevent the court from adopting its interpretation in full.[42]

Although the aforementioned scholarship did not put a definitive name to this suggested "holistic" approach, this article argues that such an approach not only already exists, but could be implemented as a means of resolving much of the confusion and contradiction currently permeating within bankruptcy cases involving statutory interpretation. Indeed, that approach is the Practical Reasoning methodology created by Professors Eskridge and Frickey.

C. The Practical Reasoning Methodology of Statutory Interpretation.

In response to the incompleteness of the traditional methodologies of statutory interpretation, legal scholars like Professors Eskridge and Frickey designed an alternative approach that fused each of the theories' best characteristics into a workable formula for interpreting statutes. Practical Reasoning, conceived in 1990, was a vehement response to the foundationalist theories of intentionalism, purposivism, and textualism, arguing that all three "cannot redeem their claim to follow from the very nature of majoritarian democracy, that they do not yield objective and determinate answers, and that they cannot convincingly exclude other values, including current values." [43] The Practical Reasoning model refuses to "privilege intention, purpose or text as the sole touchstone of interpretation," and instead builds out an adaptable framework that incorporates each foundational theory's anchoring value. [44]

Thematically, practical reasoning is built on several principles. First, the methodology was inspired by Aristotle's own practical reasoning philosophy, in that "one can determine what is right in specific cases, even without a universal theory of what is right." [45] Second, it incorporates hermeneutics—the study of interpretation—and adopts the notion that "the text lacks meaning *until* it is interpreted." [46] In essence, "[t]he interpretive process is creative, not mechanical," which recognizes that statutory meaning "involves the interpreter's choice among several competing answers." [47]

Finally, Practical Reasoning recognizes the "complex nature of human reasoning," and that "[w]hen solving a problem, we tend to test different solutions, evaluating each against a range of values and beliefs we hold as important." [48] That means decision-making is never "linear and purely deductive," but "spiral and inductive[.]" [49] The interpreter "consider[s] the consistency of the evidence for each value before reaching a final decision, and even then check[s their] decision against the values [they] esteem the most." [50]

To ground these ideas, Eskridge and Frickey articulated the interpreter's task through a useful metaphor: the statutory "cable." [51] The "cable" approach recognizes that, "[i]n many cases of statutory interpretation … the threads will not all run in the same direction," and in those cases, "the result will depend upon the strongest overall combination of threads." [52] Eskridge and Frickey reasoned that while "[l]egal arguments are often constructed as chains," and are therefore susceptible to their "weakest link," those same arguments "tend to be more successful when they are cable-like." [53] They posited that "a cable's strength relies not on that of individual threads, but upon their cumulative strength as they are woven together." [54] The interpreter—the judge—is therefore tasked with weaving together the text, its most probable purpose, legislative history, and current values in search of the "strongest overall combination of threads." [55]

While cabling the interpretive threads was the argumentative technique, Eskridge and Frickey proposed that the order of operations in addressing these various threads follow a "funnel-shaped" framework. [56] The model "suggests [a] hierarchy of sources" in which judges may begin with "more focused, concrete inquiries, typically with a more limited range of arguments," such as the statute's text, before evaluating more abstract interpretive concepts like the statute's purpose or the legislature's intention. [57] Each analytical step recognizes the highpoints of the foundational theories, such as "textual arguments carry the greatest argumentative weight," or that the "most authoritative historical evidence is the legislative history of the statute." [58]

The funnel framework logically transitions from the bottom up into even more "abstract inquiries having less connection to text and legislative expectations." [59] Here, the interpreter can consider "current values, such as ideas of fairness, related statutory policies, and (most important) constitutional values," in close statutory cases where the interpretation might otherwise lead to an absurd result. [60] The interpreter, at this point, should logically attempt to "cable" these inquiries with the more grounded interpretive threads as their analysis concludes.

Professors Eskridge and Frickey's methodology is not the only contemporary methodology, nor is it without its practical imperfections. As to competing methodologies, scholars have consistently noted that the current Supreme Court continues to employ a "modern textualism" approach derived from Justice Scalia's "new textualism" approach. [61] It does not have a monopoly, however. Corpus linguistics is a burgeoning methodology that applies a more data-driven analysis surrounding text and language, which according to its proponents, substantially reduces the impact of the interpreters' subjectivity on the interpretive equation. [62] As to practical drawbacks, even Eskridge and Frickey noted that it may be "difficult to translate" Practical Reasoning from theory to application because of the reality that many law clerks, rather than judges, are the ones writing opinions and are "less experienced" in terms of implementing interpretive skills. [63]

However, Practical Reasoning remains influential among statutory interpretation scholars, and has been explicitly referenced in judicial opinions as well.[64] Furthermore, from a normative perspective, scholars have emphasized that even seemingly textualist-based courts, like the Supreme Court, "are far more pluralist in their use of a wide array of interpretative tools and methods than modern textualism advocates or permits."[65] Although it may not be explicitly referenced in even the Supreme Court's opinions, Professor Anita Krishnakumar has noted that even the self-proclaimed textualist judges "invoke practical consequences in 21.2%–44.4% of the opinions they author, and statutory purpose in 9.8%–19.4% of the opinions they author."[66]

This empirical data seemingly indicates that courts, no matter how they may label their preferred methodology, are inherently drawn towards Practical Reasoning's foundational components. In fact, it would seem to suggest that other contemporary theories, such as the ideal model for new textualism, are neither "practically plausible" nor "normatively desirable" as staples for statutory interpretation.[67]

Notwithstanding its methodological competition and potential drawbacks, Practical Reasoning presents the most useful model for resolving complex and perseverative statutory conflicts. This is especially true in code-based areas of the law such as bankruptcy, given that not only are courts routinely required to decipher and apply the best interpretation of the Code's text, but, as previously established, such a task can provide a plethora of inconsistent outcomes without a consistent approach. Bankruptcy therefore provides fertile ground for exploring how statutory interpretation can affect the functionality and scope of the Code's respective chapters, and also can create significant variance in the courts' outcomes. Bankruptcy is also ideal for highlighting how Practical Reasoning, when implemented correctly, can minimize that variance. This is where the current interpretive split regarding discharge exceptions under Subchapter V of the Code enters the picture.

II. STATUTORY INTERPRETATION & BANKRUPTCY CASE STUDY: ARE CORPORATE DEBTORS EXCEPTED FROM DISCHARGE UNDER SUBCHAPTER V OF THE BANKRUPTCY CODE?

A. Subchapter V and Discharge Exceptions under § 1192.

In the bankruptcy law context, Practical Reasoning provides profound capabilities in terms of resolving statutory conflicts under a viable framework. More importantly, it provides the necessary vehicle for evaluating how and why conflicting interpretations may succeed or falter in comparison to each other. As this article explores and untangles the current conflict within Subchapter V of the Bankruptcy Code, Practical Reasoning will serve as the analytical lens with which the competing interpretations will be evaluated.

Prior to such analysis, it is imperative to examine the context surrounding the Subchapter V discharge debate. In 2019, Congress enacted the Small Business Reorganization Act ("SBRA") as an additional subchapter to Chapter 11 of the Bankruptcy Code.[68] Alternatively known as "Subchapter V," SBRA was enacted in response to continued concern that "small business debtors," despite comprising "most chapter 11 business [reorganization] cases," were also "the least likely to reorganize successfully," under traditional Chapter 11 provisions.[69] Subchapter V's purpose, therefore, was to "streamline the bankruptcy process by which small business debtors reorganize and rehabilitate their financial affairs."[70] This streamlined approach would in theory allow debtors to not only "file bankruptcy in a timely, cost-effective manner," but also potentially remain in business to the benefit of their owners, employees, and customers.[71]

One of Subchapter V's main components in effectuating that purpose is its discharge provisions—most notably, its discharge provision related to confirmation of a nonconsensual—or "cramdown"—plan.[72] This potential "cramdown discharge," however, has particular requirements, which are found in § 1192.[73] Section 1192 allows the small business debtor to potentially "discharge … all debts … *except* … (2) any debt 'of the kind specified in section 523(a).'"[74] Put more succinctly, § 1192 essentially allows a debtor—seeking to confirm a "cramdown" plan—to discharge the debts owed to creditors other than debts "of the kind" specified as exceptions in § 523(a) of the Code.[75]

Section 523(a), most notably, does not apply to just Subchapter V cases. It enumerates "exceptions" that apply to all bankruptcy chapters. These exceptions limit a debtor's ability to discharge their debts during bankruptcy.[76] Contemporaneous with Subchapter V's enactment, § 523(a) was amended to include in its preamble that: "A discharge under section … 1192 … does not discharge an *individual* debtor from any debt," that falls within one of the statute's types of non-dischargeable debts.[77]

This textual contrast between the specific language of §§ 523(a) and 1192(2) is at the epicenter of the current interpretative conflict over Subchapter V dischargeability. The two provisions present significant statutory inconsistencies as to whether, in Subchapter V cases, the exceptions in § 523(a) apply only to Subchapter V debtors who are individuals or also apply to Subchapter V debtors who are corporations. On one hand, § 1192 "makes no distinction based on whether the debtor is an individual or corporation," and "[s]tanding alone, therefore, the language states that the § 523(a) exceptions [also] apply to discharges of a corporation." [78] On the other hand, § 523(a)'s preamble seemingly "leads to a different conclusion," in that it specifically states that § 1192 does not discharge an *individual* debtor from any type of debt found in § 523(a). [79]

This contrast has, naturally, spawned considerable debate and competing interpretations. First, there is the Fourth Circuit's "corporations included" approach, which held that § 1192's text should be interpreted to apply § 523(a)'s discharge exceptions to both individual and corporate debtors under Subchapter V. Second, there is the bankruptcy courts' "corporations excluded" approach, which have generally held that § 523(a)'s exceptions, even in a Subchapter V discharge, only apply to individual debtors. [80] Finally, there is the Bonapfel approach, which is Judge Paul Bonapfel's extensive analysis of the other two interpretations where he ultimately sides with the "corporations excluded" approach, but with different interpretive considerations. The three approaches are explored below.

B. Interpretation #1: the Fourth Circuit's "Corporations Included" Approach.

The Fourth Circuit's holding in *In re Cleary Packaging, LLC* ("*Cleary*") is the standard-bearer for the "corporations included" approach and serves as the most useful starting point in understanding the conflict. [81] The dispute in *Cleary* primarily revolved around the debtor, Cleary Packaging, LLC, seeking to discharge a $4.7 million judgment against it for tortious and contractual interference claims by one of its creditors—Cantwell-Cleary Co. [82]

The issue boiled down to whether Cleary Packaging—a corporate debtor—could discharge this judgment which, for individual debtors, would be excepted from discharge as a "willful and malicious injury by the debtor to another entity or to the property of another entity" under § 523(a)(6). [83] As Cleary Packaging argued and as the lower bankruptcy court initially held, § 523(a)'s exceptions did not apply to corporate debtors, and therefore its $4.7 million debt was dischargeable. [84]

The Fourth Circuit disagreed with both Cleary Packaging and the lower bankruptcy court's holding and reversed, finding that the conflict between §§ 523 and 1192 should be resolved by "giv[ing] § 1192(2) precedence over the more general § 523(a) and thereby except[ing] Cleary Packaging's $ 4.7 million debt from a discharge, as it is a type of debt listed in § 523(a)." [85] The Fourth Circuit's holding and rationale present several interesting arguments, including its "textual review, the provisions' context in the Bankruptcy Code, and practical and equitable considerations …" [86] Each of these arguments is addressed in turn.

The Fourth Circuit's textual argument focused primarily on resolving § 1192(2)'s inclusion of the term "debtors," which does not reference a particular type of debtor, and § 523(a)'s limiting language, which addresses only individual debtors. [87] *Cleary* sought to resolve this conflict by acknowledging § 1192(2)'s inclusion of both "debt" and "of the kind" to show that the latter is modifying the former. [88] In essence, "the combination of the terms 'debt' and 'of the kind' indicated that Congress intended to reference only the *list of non-dischargeable debts* found in § 523(a)," establishing that § 1192 is referring to the "*kind of debt*" listed in § 523(a) rather than the "*kind of debtor*." [89]

Cleary reinforced its argument that the ordinary usage of "of the kind" alongside "debt" was a congressional "shorthand to avoid listing all 21 types of debts [in § 523(a)]," by adding that any remaining tension between §§ 523(a) and 1192 should be resolved by allowing the "more specific provision" to control. [90] Under this rationale, § 1192 would be the controlling provision since it only addressed Subchapter V discharges, while § 523(a) enumerated "numerous discharge provisions of the Bankruptcy Code ..."[91]

The Fourth Circuit transitioned that textual analysis into a larger, contextual argument of why § 1192's function "within the Bankruptcy Code and the Bankruptcy Code's structure support [its] interpretation."[92] First, the court noted Congress had "conscientiously defined and distinguished the kinds of debtors covered by each provision," such as § 1141(d).[93] Regarding § 1141(d)—which sets forth the extent to which a Chapter 11 debtor is discharged from its debts on the confirmation of its plan—the court highlighted that Congress had specifically separated the "scope of discharge" for each type of debtor, where § 1141(d)(2)–(5) specifically applied dischargeability exceptions to individual debtors and § 1141(d)(6) specifically incorporated two types of § 523(a) exceptions to apply to corporate debtors.[94]

The existence of this distinction in the types of debtors applicable to § 523(a) debts under § 1141, contrasted with the absence of that distinction in § 1192, led the court to conclude that Congress must have intended § 1192 to have a broader scope.[95] In conjunction, if § 523(a)'s preamble includes both §§ 1141 and 1192, it would be irreconcilable to permit § 1141(d)(6) to except debts for corporate debtors, but disallow § 1192(2)'s application to corporate debtors, despite both specifically referencing § 523(a) exceptions.[96]

Second, *Cleary* found that the "conceptually similar" language imported from Chapter 12 (the Code chapter for family farmers) into Subchapter V (the Code chapter for small businesses) provided further contextual evidence.[97] The "virtually identical" language in § 1228(a)—which also included "any debt ... of a kind specified in section 523(a)"—had previously been interpreted to apply discharge exceptions to both individual and corporate debtors.[98] Following the presumption of statutory consistency, a common interpretive canon of construction, the Fourth Circuit argued: "To give different interpretations to the same language in the same statute would ignore the rationality of using the same language in describing a different proceeding of the Bankruptcy Code, as was done with the adoption of Subchapter V."[99]

Cleary's last contextual argument was more purposivist in nature, and considered the interpretation of § 1192 in light of its "juxtaposition in Chapter 11 with traditional Chapter 11 provisions, reflecting its distinctive purpose within that Chapter."[100] The court identified Subchapter V's "primary goal" as being to both to simplify Chapter 11 reorganizations and to reduce their overall costs to all small business debtors.[101] In furtherance of that goal, the court reasoned that Congress "deliberately altered" the applicability of Chapter 11's traditional provisions in Subchapter V because traditional provisions, like § 1141(d), made distinctions regarding which kinds of debtors received discharge, whereas Subchapter V provisions, like § 1192, potentially benefit all debtors regardless of type.[102]

The Fourth Circuit's concluding point relied almost entirely on principles of "fairness and equity."[103] The court asserted that Subchapter V's elimination of the absolute priority rule—which protects classes of creditors in a traditional, non-consensual Chapter 11 plan from violation of the baseline structural seniority of creditors to equity—indicated Congress's intention to "provide an additional layer of fairness and equity to creditors to balance against the altered order of priority that favors the debtor."[104] Subchapter V plans allow for small business owners to also "retain ownership interests" following reorganization, even if non-consenting creditors are not paid in full. This gave a Subchapter V debtor, in the court's mind, "greater priority over creditors than would ordinarily apply."[105] The only sensible balance to such debtor-friendly provisions, the could concluded, would be to interpret § 1192 as a creditor safety valve in cases involving debts incurred by fraud or willful and malicious injury.[106]

The Fourth Circuit's approach was well-articulated and thorough, given the nuances and statutory complexity of the issue at hand. Its holding, however, was largely met with stark opposition by the bankruptcy courts, and have since produced contrasting interpretations.

C. Interpretation #2: the Bankruptcy Courts' "Corporations Excluded" Approach.

Although bankruptcy courts in several jurisdictions rejected the Fourth Circuit's interpretation in *Cleary*, the Ninth Circuit Bankruptcy Appellate Panel's ("BAP") holding in *In re Off-Spec Solutions, LLC* ("*Off-Spec*") serves as a prime example. [107] As one of the most recent [108] of the bankruptcy courts' contrary interpretation, *Off-Spec* echoed many of the same arguments in prior bankruptcy court holdings, while also providing additional considerations.

Textually, the BAP's primary focus was on utilizing the "presumption against redundancy," or "surplusage," canon as a means of showing how §§ 523(a) and 1192's respective texts both needed to be given effect without rendering each other "inoperative or superfluous." [109] Additionally, *Off-Spec* countered *Cleary*'s reliance on the general/specific canon by noting that "[w]hat counts for application of the general/specific canon is not the nature of the provisions' prescriptions but their scope." [110] Put another way, the BAP reasoned that even if that canon did apply, § 523(a) would control § 1192 because it is § 523(a) that "specifically except[s] from discharge certain debts for individuals." [111]

Off-Spec's contextual arguments proposed, contrary to *Cleary*, that "[S]ubchapter V remains a part of [C]hapter 11, and its discharge provisions should be interpreted consistent with the overall statutory scheme in [C]hapter 11." [112] The BAP aligned Subchapter V's purpose with that of Chapter 11's by stating, "[i]n establishing [C]hapter 11 under the Bankruptcy Code in 1978, Congress intentionally departed from pre-Code practice and eliminated exceptions to discharge for corporate debtors." [113] To reinforce that argument, *Off-Spec* noted not only was this purpose evident from the fact that Congress had only limited corporate discharge once under § 1141(d)(6), but even that single limitation to corporate discharge "took eight years to become law." [114]

In addressing *Cleary*'s contextual arguments regarding other bankruptcy provisions with near-identical "of the kind" language, *Off-Spec* instead argued that § 523(a)'s applicability to all bankruptcy chapters meant that § 1192's reference to § 523(a) was nothing more than a redundancy meant to "reiterate[ ] that the debts listed in § 523(a) are not dischargeable for individual debtors under the specified discharge provision." [115] In other words, § 1192's specific inclusion of § 523(a) was a "statutory drafting" error and likely "congressional inadvertence" rather than an emblem of Congress's intent. [116]

Furthermore, *Off-Spec* urged that *Cleary*'s conclusions based on "of the kind" being included in § 1192 were interpretively short-sighted, given that this language "appear[ed] to have been taken directly from § 1328(c)," a Chapter 13 provision that exclusively applies to individual debtors. [117] Therefore, the "replication" of this identical language across a myriad of statutory provisions, in the Court's mind, would not indicate a different meaning or purpose, but instead serve as a consistent reminder that § 523(a) exceptions only apply to individual debtors. [118]

Finally, *Off-Spec* countered *Cleary*'s "fairness and equity" arguments by stating that, absent "an express indication by Congress" that § 1192 was intended to "balance" Subchapter V creditor interests differently than the rest of Chapter 11, any interpretation along those lines would be "unavailing." [119] While acknowledging that its own interpretation was "vexing," in that a corporate debtor's dischargeability under § 1192 would actually be broader than under a consensual plan, the BAP found it "more difficult to believe" that an "opaque reference" to § 523(a) would uproot Chapter 11 proceedings without clearer statement from Congress. [120]

D. Interpretation #3: Judge Bonapfel's Approach.

Although Judge Bonapfel's statutory interpretation analysis is not embedded in a judicial opinion, he is one of the foremost experts on Subchapter V's enactment and overall function within the Code. [121] This makes his extensive and comprehensive analysis of both the "corporations included" and "corporations excluded" approaches invaluable. Originally conceived in his *A Guide to the Small Business Reorganization Act of 2019* supplement, Judge Bonapfel's approach was more recently displayed in his and Robert Schaaf's 2023 article, *Do § 523(a) Exceptions to Discharge Apply to The Discharge of a Corporation in a Subchapter V Case After 'Cramdown' Confirmation Under § 1191(b)?*

Although Bonapfel and Schaaf ultimately reached most of the same conclusions as the bankruptcy courts' interpretation, his analysis differs in important ways. [122] As much as his approach functioned as a response to *Cleary*, it was equally considerate in unpacking the methodology the courts like *Off-Spec* deployed in reaching the opposite interpretation.

Notwithstanding the extensive prologue about Subchapter V bankruptcies, Bonapfel and Schaaf's analysis also began with §§ 523(a) and 1192's text. As an initial observation, however, they noted that the "key to proper interpretation" was to not only recognize that SBRA amended § 523(a) to include § 1192 simultaneously with § 1192's enactment, but that "[t]his contemporaneous legislation must have meaning." [123] While this consideration would seemingly end the analysis in favor of the "corporations excluded" approach because its conclusion better harmonizes both texualist and intentionalist arguments regarding §§ 523(a) and 1192, they acknowledged that the "corporations included" approach was sufficiently "plausible" to require further examination. [124]

That analysis naturally transitioned from the text, under the principle that, "[w]hen a statute is capable of two or more meanings, the interpretive task is to determine the intent of Congress." [125] This intent is generally uncovered using several interpretive tools, such as "discussion of the existing [C]hapter 11 statute governing exceptions to corporate discharge," Subchapter V's legislative history, and the greater "structure" of the Bankruptcy Code in relation to §§ 1141(d) and 1192. [126]

Judge Bonapfel and Schaaf's discussion of § 1192's legislative history, as well as their examination of §§ 1141(d) and 1192's supposed textual discrepancy, diverged somewhat from that in *Off-Spec*. [127] Bonapfel and Schaaf considered both a Judiciary Committee Report from the House of Representatives as well as retired bankruptcy Judge A. Thomas Small's testimony before Congress, both of which preceded § 1192's enactment. [128] Each of these legislative materials—neither of which discussed any sort of planned, drastic change in corporate dischargeabilty under Subchapter V—reinforced, in Judge Bonapfel and Schaaf's opinion, that Congress "carefully and deliberately decided that the discharge of a corporation would not be subject to exceptions." [129]

Regarding §§ 1141(d) and 1192(2), Bonapfel and Schaaf addressed the "troublesome" contradiction in the bankruptcy courts' approach to § 1141(d)(6). The analysis highlighted that the courts' argument—that §§ 1141(d)(6) and 1192(2) cannot be applied in the same way—resulted in an application where corporate debtors would have certain debts excepted from discharge under a consensual plan (§ 1141) but not under a nonconsensual plan (§ 1192). [130] This discrepancy would mean "a corporation has incentive to seek cramdown confirmation rather than consensual confirmation so that it receives a broader discharge …" [131]

An even more "absurd" contradiction that Bonapfel and Schaaf noted, similar to *Cleary*, was the "specific language of § 1141(d)(6)(A)," and the way its application under the bankruptcy courts' interpretation would create an incongruity with § 1192. [132] If § 1192 cannot apply to corporate debtors, but § 1141 contains identical text and would apply § 523(a) to corporate debtors, then "application of [§ 1192's] meaning to the same words in § 1141(d)(6)(A)" would be paradoxically stating that a corporation is excepted from discharge under § 1141(d) for debts falling under § 523(a)(2)(A) or (B), but that those exceptions could also only ever apply to individuals. [133]

Judge Bonapfel and Mr. Schaaf, unlike *Cleary* or *Off-Spec*, identified solutions for resolving both issues. As to the functional absurdity of potentially better discharge exceptions under nonconsensual plans, they aptly noted that § 1141(d)(6) "rarely arises" in Chapter 11 proceedings, and in the 18 years of its existence, only one court has ever applied its discharge exceptions. [134] In other words, any discrepancy in the scope was mitigated by the fact that one of the two conflicting provisions was almost never applied.

As to the textual absurdity in §§ 1141(d)(6)(A) and 1192(2), the "correct premise" was that the same words do not "require" the same meaning because § 1141(d)(6)(A) was enacted as a "stand-alone provision" that addressed a "specific problem" in corporate debtor reorganizations involving materially false representations regarding a debtor's financial condition made to domestic governmental units. [135] Conversely, § 1192(2) was enacted in alignment with Chapter 12 provisions with similar language and an entirely different "purpose and effect" that preceded § 1141(d)(6)(A)'s enactment. [136] Digging even further, the authors noted that *Cleary*'s utilization of §§ 1192 and 1228's textual likeness was "imprecise" and "wrong" because, ultimately, "nothing in the legislative history of [C]hapter 12 indicates Congress intended to change the policy of exceptionless discharges for corporations in [C]hapter 12 cases." [137]

Bonapfel and Cleary's subsequent arguments challenged *Cleary*'s purposivist interpretation by pragmatically questioning how adding exceptions to discharge furthers Subchapter V's purpose in simplifying reorganizations for small business debtors. [138] They also challenged *Cleary*'s analysis in identifying Subchapter V's purpose being an equal, balanced treatment between debtors and creditors. As their analysis articulated, "the fact that [*Cleary*'s] ruling *has* that result does not provide a reason *why* that should be the result or why the same treatment is important," and that "logic requires that a conclusion [regarding § 1192's purpose] … rest[s] on something more than the determination that § 1192 has that result." [139]

This commentary directly reflects Professors Eskridge and Frickey's own sentiments on purposivism's weakness, in that it allows a court to "elaborate a statute," but in turn may actually "undo a deliberate and precisely calibrated deal worked out in the legislative process." [140] Bonapfel and Schaaf's argument was essentially that, by attributing a purpose to Subchapter V without the requisite evidence to prove that purpose's existence, *Cleary* effectively undermined what was, in their mind, an intentional statutory scheme designed to insulate corporations from § 523(a)'s discharge exceptions.

Bonapfel and Schaaf also found *Cleary*'s "equity and fairness" policy argument to be logically insufficient as well. [141] Here, they echoed many of *Off-Spec*'s sentiments regarding the actual "fairness" that corporate debtor discharge exceptions would provide, but also extensively walked through the practical implications of *Cleary*'s argument. [142] They also argued that *Cleary*'s "connection of discharge exceptions to elimination of the absolute priority rule is not an appropriate one, and exceptions to discharge do not add an additional layer of fairness and equity for creditors," because absolute priority only pertains to classes of creditors while dischargeability applies to individual creditors. [143] Thus, *Cleary*'s policy rationale was logically inconsistent.

The analysis even went so far as to proffer that nondischargeability "creates an incentive for a debtor to minimize payments to creditors with dischargeable debts," and even "increases the probability of liquidation." [144] Those issues would seemingly run counter to not only Subchapter V's purpose but *Cleary*'s own arguments. In essence, "application of exceptions to discharge … tips the scale in favor of the creditor whose debt is excepted," while it simultaneously "threatens the ability of a debtor to reorganize." [145] These inherent policy concerns in the Fourth Circuit's rationale, according to Bonapfel and Schaaf, did not "withstand careful scrutiny." [146]

Bonapfel and Schaaf admitted that their analysis was in tension with a public opinion survey, where the majority of respondents agreed with the proposition that corporate debtors should be excepted from discharge for debts involving fraud or willful and malicious injury. [147] They even noted that *Cleary*'s conclusion was likely "consistent with the classic formation of the 'fresh start' policy of the bankruptcy laws that bankruptcy relief is for the 'honest but unfortunate debtor.'" [148]

The authors pointed out, however, that historical policy favoring only the "honest but unfortunate debtor," that Congress furthered by enacting the exceptions to discharge applicable to individuals was ultimately outweighed by the "better" textual argument that the bankruptcy courts presented, and by the legislative and historical context surrounding Chapter 11 and Subchapter V. The Code's providing for the discharge of a corporation without exceptions, by comparison, rested on the need for finality of a confirmed plan that was essential for the reorganization of a corporation, and on equality principles that require equal treatment of similarly situated creditors. [149] From Judge Bonapfel and Mr. Schaaf's perspective, these arguments, working in conjunction with each other, provided a more fully-realized interpretation of § 1192 and a more sustainable application of § 523(a)'s discharge exceptions.

Overall, the three approaches to § 1192 present extensive and well-considered interpretive processes. Yet, to capitalize on all of the benefits of statutory interpretation, it is important to delineate which of the interpretations is best suited as the preferred model for future interpretations. The Practical Reasoning methodology facilitates that delineation by identifying the ideal approach among the three competing options.

III. ANALYZING THE § 1192 INTERPRETATIONS USING THE PRACTICAL REASONING METHODOLOGY.

The goal in evaluating the Fourth Circuit's, the BAP's, and Judge Bonapfel and Mr. Schaaf's approaches to § 1192 is to evaluate which interpretation adheres best to the Practical Reasoning framework as a model interpretation for subsequent courts. Critiquing each of the approaches for their ability to "cable" interpretive arguments within Practical Reasoning's funneled framework helps uncover the strongest examples of what sustainable statutory interpretation analyses could, and should, look like for future Subchapter V dischargeability cases.

A. Analyzing* Cleary*'s approach under the Practical Reasoning methodology.

Of the three approaches, the Fourth Circuit's "corporations included" interpretation is the weakest from a Practical Reasoning perspective. Although, textually, *Cleary* reflects many of the initial considerations that Eskridge and Frickey articulated, in that it "approach[es] the statutory text as a reasonably intelligent reader would and give[s] the text its most commonsensical reading," the Fourth Circuit's methodology lacks the cohesive "cabling" of these various tools as intended by Eskridge and Frickey. [150]

The Fourth Circuit's textual dissection of § 1192 is compelling. First, its naturalistic reading of "debt," in conjunction with the "of the kind" modifier, provides formidable evidence that § 1192's particular focus is on the type of debts within § 523(a), not the type of debtors. Second, utilizing evidence that the ordinary usage of "kind" generally indicates "category" or sort, *Cleary* also created a strong textual foundation. [151] Finally, this foundation is further reinforced by intersplicing its final textual argument—that § 1192's more specific nature should be controlling over the allegedly more generalized § 523(a)—to functionally serve as a contingency plan against opposing interpretations to its first two points. [152]

Yet, where *Cleary* faltered is in the brevity with which it designated § 1192 as the more specific provision simply because § 523(a) references multiple provisions within the Code while § 1192 pertains only to Subchapter V. [153] The court similarly failed to identify how it reached its own premise in applying the general/specific canon, as it explicitly acknowledged that the canon only applied when two conflicting provisions cannot be "harmonized." [154]

That analysis ultimately triggers more questions than it answers. Even if *Cleary*'s arguably premature usage of the general/specific canon were accepted on its face as appropriate in a Practical Reasoning textual analysis, the court's conclusion that the more "general" provision should be based on the number of referenced provisions is incomplete. *Cleary* simply did not explain why the specificity of a provision would not arguably turn on other characteristics such as the particular subject matter (the types of debtors) within the provision. This argument could just as easily be refuted by taking the position, as *Off-Spec* did, that § 523(a) is the more specific provision because it specifically refers to only one type of debtor instead of all debtors like § 1192. [155]

The court's argument would arguably be stronger if it were "cabled" with any additional evidence to support that initial premise. Instead, it mirrors many of the interpretive issues that Eskridge and Frickey highlighted regarding "stricter" textualism, as the court failed to completely consider the effect that other interpretive threads might have on § 1192's plain meaning.

Contextually, *Cleary*'s analysis was much more aligned with Eskridge and Frickey's proposition that, "[t]extual analysis should further consider how the statutory provision at issue coheres with the general structure of the statute, since other provisions in the statute might shed light on the one being interpreted." [156] Setting aside the effectiveness of its argument, *Cleary* adhered to Eskridge and Frickey's "coherence" method. The Fourth Circuit spent considerable time cabling its textual interpretation of § 1192 by comparing its language with other provisions in the Code such as §§ 1141 and 1228. [157] From an analytical standpoint, *Cleary* effectively expanded the scope of its analysis by introducing the textual similarities between § 1192(2) and other chapters' similar provisions, all while tethering its arguments to the statute's text.

This strategy highlights two things. First, it allowed the court to utilize the "presumption of statutory consistency" canon by pointing out, despite all three provisions containing identical language, § 1192 was the only one being interpreted by the bankruptcy courts in a contradictory fashion to the other two provisions. [158] Second, it also allowed the court to utilize past precedent to show that its interpretation of § 1192 aligned with other bankruptcy courts' interpretations of § 1228(a). [159] Both points contributed to a strong interpretive cable in favor of finding § 1192's applicability to all Subchapter V debtors.

Cleary's purposivist arguments faltered as a model from the Practical Reasoning perspective. Although the Fourth Circuit did not engage in the level of purposivist analysis that the Supreme Court did in *Marrama*, its reliance on § 1192's supposed purpose creates similar issues from an analytical standpoint. In essence, *Cleary* did not address any of the more "authoritative historical evidence," such as Subchapter V's historical background or legislative history, before moving too quickly up the Practical Reasoning funnel into proclaiming Subchapter V's purpose. [160] Although Eskridge and Frickey acknowledged that legislative history can often be "illusory" or "trumped up to skew the interpretive process" through political gamesmanship, they still considered its status as "second-best" to a textual interpretation and worthy of analysis for uncovering a statute's purpose. [161]

Cleary did not address either Subchapter V's historical context or its legislative history materials, which may have provided more insight in either direction. Rather, the Fourth Circuit focused on Subchapter V's "juxtaposition" with traditional Chapter 11 provisions, and the "distinctive purpose" that juxtaposition entailed. [162] That "distinctive purpose," however, was never fully fleshed out beyond the court's proposition that Congress meant to simplify small business reorganizations by "deliberately" limiting traditional Chapter 11 provisions with respect to Subchapter V. [163]

Regardless of whether equal application is Subchapter V's primary purpose, the Fourth Circuit's explanation falls victim to Eskridge and Frickey's cautionary note that "purposivist analysis is inherently ambiguous." [164] Although *Cleary* may be correct as to Subchapter V's purpose in contrast to the rest of Chapter 11, the court's analysis did not cable any supportive legislative materials or historical considerations to reinforce that argument. The analysis fails for the same reason a purposivist interpretation, in isolation, often does; it remains too abstract and susceptible to better, more cabled arguments.

The Fourth Circuit's final "fairness and equity" argument, however, aligned with Practical Reasoning's "evolutive considerations" in allowing the interpreter to evaluate the "gravitational pull" of certain values, like fairness, on a particular interpretation. [165] *Cleary* squarely adhered to this element of Eskridge and Frickey's model. The court's fairness analysis—based on the premise that Subchapter V's discharge provisions provide balance to creditors against the elimination of traditional Chapter 11 rules like the absolute priority rule—is a compelling justification cabled with its textual interpretation. [166] Although the other two approaches provide arguably stronger arguments, *Cleary*'s focus on fairness reflects Practical Reasoning's acceptance that "current policies and values will inevitably be important to the dialectic of interpretation." [167]

B. Analyzing* Off-Spec*'s approach under the Practical Reasoning methodology.

Procedurally, *Off-Spec*'s version of the "corporations excluded" approach is likely the superior interpretive analysis compared to *Cleary*. From a Practical Reasoning perspective, *Off-Spec* underscores how a court might improve upon another court's interpretive process through additional considerations and a stronger cabling of its arguments.

Textually, the notable difference between *Off-Spec* and *Cleary* is the way in which *Off-Spec* forecasted the various textual canons that would inevitably influence its interpretive process. [168] What this avoided was the "chain's weakest link" issue that Eskridge and Frickey identified, as the BAP instead interwove the plain meaning rule, the canon against surplusage, and the presumption against changes in the Code absent more clear indication by Congress. [169] Therefore, each textual argument *Off-Spec* made was supported by yet another textual backstop to reinforce its original point.

What is also notable about *Off-Spec*'s textual argument is its respectful consideration of *Cleary*'s interpretation. Not only does it note that "[f]acially, these sections appear to conflict," but that its interpretation is the "better one," rather than the only one. [170] This is the type of "open dialogue" with differing positions that Eskridge and Frickey advocated for, and it naturally improved the overall analysis by showing that the BAP was reaching its interpretation in light of opposing and compelling arguments.

Another textual strength was *Off-Spec*'s deployment of the surplusage canon in conjunction with §§ 523(a) and 1192's legislative background. As the BAP noted: "Congress amended § 523(a) to add § 1192 to the list of discharge provisions to which it applies" as part of SBRA's enactment. [171] Given the context of the amendment, "[i]nterpreting § 1192 to extract from § 523(a) only the list of nondischargeable debts, without its limitation to individuals, would render the amendment surplusage.”[172] From a cabling perspective, this was an effective strategy, as it mirrored Eskridge and Frickey's argument that, “[e]vidence of the statute's background, together with the text, at least suggests the original meaning of the statute.”[173] From a funneling framework perspective it was also compelling, as it seamlessly transitioned from a textual argument to a statutory background argument, back into a textual surplusage argument, all within the same paragraph.

Off-Spec's contextual arguments, alternatively, represent its extensive, albeit imperfect, analysis from a Practical Reasoning perspective. The BAP did, however, raise several effective interpretive arguments to contrast Cleary's interpretation. First, one of *Off-Spec*'s strongest arguments was its examination of Chapter 11's enactment, as a means of evaluating why corporate debtors have historically never been subject to § 523(a) discharge exceptions. The BAP not only noted that Congress “made an intentional decision to depart from pre-Code practice” by eliminating corporate debtor discharge in 1978, but that “[s]ince then, the corporate discharge has been ‘strenuously protected.’”[174]

Alongside this argument was the previously-mentioned position that § 1141(d)(6)—despite containing nearly identical language to § 1192 and having § 523(a) exceptions that do apply to corporate debtors—also had a legislative history suggesting Congress's reluctance to except dischargeable debts for corporate debtors. *Off-Spec* cleverly introduced § 1141(d)(6)'s legislative background, showing that it took nearly eight years to enact a provision with only two § 523(a) exceptions, as a means of arguing how unlikely it was that Congress then decided to include all twenty-one of § 523(a) exceptions in § 1192 without any pushback.[175] Although the court's specific inclusion of legislative materials could have made this point stronger, this was another example of a well-cabled argument that used several textual canons to excavate Congress's intent.[176]

The other significantly strong contextual argument was *Off-Spec*'s retort to *Cleary*'s position that §§ 1192 and 1228 contained near-identical language, and therefore should be interpreted the same.[177] Rather than attempt to argue against the literal language of both provisions, the BAP followed the “presumption of statutory consistency” canon and acknowledged they should be “interpreted similarly.”[178] However, by tracing the legislative background of the phrase “of a kind” to § 1328, *Off-Spec* used the statutory consistency canon against *Cleary*.[179] It unpacked § 1228(a)'s legislative background to show that it was “closely modeled after Chapter 13,” and that Chapter 13 was only applicable to individual debtors.[180]

This formed an effective syllogism: if § 1192 derived from § 1228(a), § 1228(a) in turn derived from § 1328, and § 1328 only applied to individuals, then § 1192 also derived from § 1328 and can only apply to individuals too. It effectively undercut *Cleary*'s contention that § 1192 should “carry a different meaning or serve a different purpose” than the provisions its language pulls from.[181] What works from a Practical Reasoning perspective is that each argument was inherently rooted in uncovering the § 1192's textual meaning. *Off-Spec* adhered to Eskridge and Frickey's prescription that statutory interpretation should not be a “mechanical” exercise, and instead one where the interpreter “test[s] different understandings of the text in an ongoing effort to determine its proper interpretation.”[182]

Off-Spec's contextual arguments were not without their own interpretive faults. Its first major imperfection was its “redundancy” argument, in that Chapter 5's inherent applicability to all bankruptcy chapters means “it is not strictly necessary for any of the discharge provisions to refer to § 523 to render the debts nondischargeable.”[183] As previously stated, the BAP argued that common issues such as “congressional inadvertence” are sufficient in explaining why a section like § 1192 might explicitly reference § 523(a), and yet that reference would have no additional effect.[184] Notwithstanding the accuracy of that argument, it falters from an interpretive perspective because its hand-waving at statutory redundancy cuts against the BAP's own usage of the surplusage canon mere paragraphs before. The BAP's argument that *Cleary*'s interpretation would result in § 523(a) having “no effect” under § 1192 does little to explain how *Off-Spec*'s interpretation would avoid making nearly all of § 1192(2) superfluous in exchange.[185] That is not to say the BAP's position is wrong; only that it missed the opportunity to better explain how Congress diligently avoided overhauling Chapter 11 dischargeability with well-crafted provisions, yet inadvertently included redundancies in § 1192's text at the same time.

Off-Spec's explanation of § 1192 in relation to Chapters 12 and 13, while effective, also missed the opportunity to better engage with the rebuttal to the statutory consistency canon. While tracing back to § 1328's text works substantively, it does not completely acknowledge the argument that §§ 1192 and 1228 serve much different functions than § 1328. Therefore, Congress may have deployed § 1328's identical language in a different manner by emphasizing its different use.

Off-Spec's response to *Cleary*'s policy arguments, however, returned to a more comprehensive analysis from a Practical Reasoning standpoint. Where it primarily succeeded was its pragmatic recognition that its own policy argument created a distinct absurdity. At the same time, it did not frame *Cleary*'s policy rationale—that § 1192 was intended to protect creditors' interests—as incorrect; only that the Fourth Circuit's explanation was "more difficult to believe." [186]

This is important to recognize. *Off-Spec* simultaneously considered *Cleary*'s opposing interpretation and refuted it by reference to both SBRA's purpose and its text. [187] Doing so reflects the intended function of evolutive considerations at the top of the Practical Reasoning funnel, and how the more abstract values in consideration are stronger when they are tethered to their impact on the text. While *Cleary*'s policy argument fits the Practical Reasoning model to a certain extent, *Off-Spec*'s analysis is likely a more fitting example of what Eskridge and Frickey envisioned.

C. Analyzing Judge Bonapfel and Mr. Schaaf's approach under the Practical Reasoning methodology.

Of the three approaches, Bonapfel and Schaff's approach is the most reflective of not only how the Practical Reasoning methodology should work, but why the model is so beneficial to statutory interpretation. Although their Subchapter V analysis never explicitly adopted Eskridge and Frickey's framework, it inherently valued the same interpretive arguments, and impressively cabled those arguments throughout. Their argumentative framework serves as a prime example of what the process behind statutory interpretation should look like.

As previously stated, Bonapfel and Schaaf's analysis reached the same outcome as *Off-Spec* and the other bankruptcy courts using the same interpretive tools. Yet, its exploration of the same arguments, as well as its consideration of *Cleary*'s opposing interpretation, are what give it a stronger fidelity to the Practical Reasoning model.

Textually, Bonapfel and Schaaf focused on the same §§ 523(a) and 1192 dilemma that both *Cleary* and *Off-Spec* emphasized, but took a more considerate position in explaining why *Cleary*'s arguments were accurate in principle, but improper in application. [188] While the analysis made the same surplusage argument as *Off-Spec*, it diverged in the way it cabled that surplusage argument while responding to *Cleary*'s plain meaning argument in defining "kind." [189]

In other words, Bonapfel and Schaaf pointed out that *Cleary*'s conclusion—that "kind" in § 1192 refers to a category or sort of debts rather than specifying a type of debtor—was unpersuasive, since "[a] 'category' or 'sort' of debts can be the debts of an individual just as much as a 'category' or 'sort' of debts is only the debts themselves." [190] This approach allowed them to engage with two opposing interpretations of the plain meaning of § 1192's text, and then determine which was stronger based on whether one would render § 523(a)'s inclusion of § 1192 superfluous.

This cabling became even tighter as Bonapfel and Schaaf addressed *Cleary*'s general/specific provision argument. Unlike *Off-Spec*, they did not necessarily dispute the semantics of whether §§ 523(a) or 1192 was the actual "specific" provision, but instead posited that the application of the canon altogether was inappropriate "when the result makes the general one superfluous." [191] In the span of just a few paragraphs, Bonapfel and Schaff's analysis used the interpretive tools that *Off-Spec* used, but in a way that gave more credence to *Cleary*'s position. In doing so, Bonapfel and Schaff's counters to *Cleary* produced even more formidable arguments from an interpretation standpoint.

In moving up the Practical Reasoning funnel to Bonapfel and Schaff's next layer of arguments, their contextual analysis also distinguished itself from *Cleary* and *Off-Spec* by including § 1192's legislative history and its overall context within the rest of Chapter 11. Although *Off-Spec* also touched on the historical background of Chapter 11 discharges, their analysis went a step further and cabled Subchapter V's legislative materials to further illustrate how § 1192 derives from the same historical considerations. [192] As they put it, § 1192's legislative history is "important for what it says as well as for what it does not say." [193]

To illustrate what the legislative history did and did not say, Bonapfel and Schaaf cabled two equally important tools of statutory interpretation related to legislative history into one argument: the use of committee reports related to § 1192 and the colloquially termed "presumption against hiding elephants in mouseholes." [194] The Judiciary Committee report argument—that Congress's use of the phrase "any debt that is otherwise nondischargeable," logically referred to § 523(a) in its traditional application—could have succumbed to the intentionalist pitfall of overreliance on scant legislative materials if it were by itself. [195] However, this argument was propped up by also recognizing that, had Congress meant something differently than the Judiciary Committee report, there would be statutory evidence to show it. [196]

The argument regarding the similarities between §§ 1141(d) and 1192(2) was another successful contextual argument that distinguished itself from *Off-Spec*'s analysis. While large portions of the analysis resemble *Off-Spec*'s and other bankruptcy courts' contextual arguments, what distinguishes this approach was in its consideration of where *Cleary*'s best two, and the bankruptcy courts' weakest two, arguments were in this respect.

What is important to note about this argumentatively candid approach is the way it is juxtaposed with one of the primary concerns Eskridge and Frickey noted about the Supreme Court's statutory interpretation cases: that the Court "unrealistically asserts that all of the interpretive factors support the Court's interpretation ..." [197] As Eskridge and Frickey put it: "This style of suppressing disagreement defeats the whole purpose of practical reasoning, that of understanding opposing evidence and trying to derive a *practical solution* in the specific case at hand." [198] Bonapfel and Schaff's approach is that exact type of practical solution, as it navigated through the anomalous language within §§ 1141(d) and 1192, and searched for a rational, and sustainable answer.

Embracing the textual discrepancies allowed the analysis to build upon *Off-Spec*'s discussion of §§ 1228(a) and 1328 by also walking through Chapter 12's legislative background in contrast to Subchapter V's. Once again, this process allowed Bonapfel and Schaaf to cable historical and legislative considerations with the textual canon that "the meaning of the words in the comprehensive legislation does not have to be the same as their meaning in a statute with limited effect where a different meaning is clear." [199]

Equally reflective of how Practical Reasoning's funnel framework was intended to function, Bonapfel Schaff's purposivist arguments also excelled in this respect. Where it presents a stronger example of Practical Reasoning is in its extensive consideration of why *Cleary*'s purposivist and "fairness and equity" arguments were incongruous. Bonapfel and Schaaf may have agreed with *Cleary*'s arguments about Subchapter V's purpose, but his analysis cabled that proposition with the "evolutive considerations" at the top of the Practical Reasoning funnel in a way that *Cleary* did not. *Cleary*'s purposivist and evolutive, policy-related arguments were not woven together to support each other. Bonapfel and Schaaf's approach, however, took the same purposivist premise but incorporated the necessary discussion of fairness and equity between creditors and debtors into that purposivist argument. [200]

What is also interesting about Bonapfel and Schaaf's policy discussion is the way in which it grounded the highly abstract nature of a policy argument in statutory interpretation. Eskridge and Frickey noted that the "attribution of purpose" by an interpreter will "inevitably be influenced by the interpreter's current context." [201] Bonapfel and Schaaf's analysis of the "real-life considerations" involved in a small business reorganization, in the context of which interpretation of § 1192 was fairer to creditors, was a near-perfect representation of the interpreter's job in properly attributing that statutory purpose. [202]

Bonapfel and Schaaf's conclusion also reflected the necessary pragmatism of a Practical Reasoning analysis, adhering to the "candid 'to and fro' play among the various interpretive considerations" by positing what the public opinion survey might say about § 1192's dischargeability. [203] Even in the face of *Cleary*'s compelling interpretation, coupled with the idea that *Off-Spec* and Bonapfel and Schaaf's interpretation could create perverse outcomes in terms of which types of debts corporate debtors can discharge, this pragmatism underscores why his interpretive process is still stronger. Regardless of whether Bonapfel and Schaaf proclaimed a particular framework or methodology in the analysis, they incorporated Practical Reasoning's argumentative techniques and considerations throughout.

CONCLUSION

Practical Reasoning's "distinctive features" have always been "its focus on the concrete and avoidance of opinions that sweep more broadly than necessary … its willingness to acknowledge indeterminacy and conflicting values rather than indulge in makeweight arguments … and its effort to engage in a dialectic of interpretation …"[204] Eskridge and Frickey believed that avoiding the pitfalls in foundationalist theories of statutory interpretation would theoretically "improve the quality" of judicial opinions and provide "solid guidance for lower courts … and for Congress …"[205]

Bonapfel and Schaaf's interpretation of § 1192's discharge exceptions for small business corporate debtors is a prime example of Practical Reasoning's benefits to statutory interpretation. It inherently reflects the Practical Reasoning framework in action, and in turn presents a grounded application of what considerate and layered statutory interpretation should look like. Conversely, *Cleary* and *Off-Spec*'s interpretations reflect some of the interpretive pitfalls Practical Reasoning sought to remove. *Cleary*'s analysis, while formidable, relied too heavily on textualist principles without fully examining § 1192's context, and provided an abstract, incomplete purposivist argument. *Off-Spec*'s analysis, while procedurally stronger than *Cleary*, did not fully engage with all the interpretive arguments at its disposal in the manner that Judge Bonapfel did and the way that Eskridge and Frickey prescribed.

Understanding the strengths and virtues of Bonapfel and Schaaf's approach remain essential, given that the current Subchapter V landscape indicates that the discharge debate is nowhere near finished and that *Cleary* was not an anomalous interpretation devoid of support. In fact, three very recent holdings involving § 1192—two of which support *Cleary*—indicate that the interpretive split is becoming a chasm.

First, in the Fifth Circuit's recent holding in *In re GFS Industries, L.L.C.* ("*GFS*"), the court explicitly adopted the "corporations included" approach, and followed a near identical interpretive process to *Cleary*.[206] Building upon *Cleary*'s argumentative structure, *GFS* reinforced its interpretation by contextualizing § 523(a)'s amendment as a "'mere conforming amendment'"—rather than the interpretive trump card that *Off-Spec* and Bonapfel and Schaaf believed it to be—as well as building out Subchapter V's purpose as a "compromise" that the discharge exceptions protect.[207]

Second, the Bankruptcy Court in District of Oregon's holding in *In re Van's Aircraft, Inc.* sided with *Cleary* by further dissecting the various discharge provisions in the Code into two categories: sections that allow § 523(a) to limit dischargeability and those, like § 1192, that limit the types of debts within that particular section's language and only broadly reference § 523(a).[208] In the court's holding, it found that, rather than § 523(a) being the controlling restriction on which debtors were eligible for discharge under § 1192, "the reference to § 523(a) serves just as the location of the excepted debt types," and therefore "has no role in the discharge-narrowing work" in sections like § 1192(2).[209]

While the court acknowledged that this approach created a surplusage situation that courts like *Off-Spec* had managed to avoid, it cleverly responded that "'applying the rule against surplusage is, absent other indicators, inappropriate'" when the contrary approach "'respects the words of Congress.'"[210] The court's self-awareness in recognizing that its own reading, and therefore *Cleary*'s, "gives no effect to the preamble," is justified by reinforcing that its interpretation could not be a "repugnancy" when it ultimately "hews to the literal text of [§] 1192(2)."[211] Both the categorical approach to the provisions and the level of frankness in choosing between two unsatisfactory interpretations, while useful, introduce yet more components into the interpretive process not previously utilized by either *Cleary* or *Off-Spec*.

Finally, and most recently, the Bankruptcy Court for the Northern District of Florida addressed this current divergence in case law, and ultimately found that the *Off-Spec* "corporations excluded" approach to be more "convincing."[212] There, the court held that decisions like *Off-Spec* "provide the best statutory interpretation of § 1192's incorporation of 523(a) by giving effect to all the statutory language," which not only provides a more consistent application of § 523(a), but also comports with SBRA's purpose.[213]

What these three recent holdings highlight is the necessity for a comprehensive statutory interpretation methodology like Practical Reasoning. *Cleary*'s continued resonance and growing support indicates why subsequent courts need comprehensive interpretive frameworks like Practical Reasoning's to resolve the Subchapter V discharge debate.[214] The current landscape regarding Subchapter V dischargeability illustrates this necessity. These divergent holdings underscore that subsequent courts may continue to add interpretive ingredients to prior holdings without a foundational recipe to guide their analyses, obscuring the ability to evaluate § 1192 with more consistent and universal methods.

Future holdings may ultimately disagree with Bonapfel and Schaaf's conclusions, but his approach nevertheless provides the strongest example of *how* a court could and should reach those conclusions. As this article shows, utilizing Practical Reasoning and mirroring Bonapfel and Schaaf's analysis provides courts with some semblance of clarity in avoiding the interpretive stalemates that have continually plagued statutory interpretation as far back as Fuller's Speluncean Explorers debate.

Footnotes

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1 Fuller, The Case of the Speluncean Explorers, 62 Harv. L. Rev. 616, 617–19 (1949).

2 Fuller, *supra* note 1, at 624–25.

3 Fuller, *supra* note 1, at 628.

4 Fuller, *supra* note 1, at 637.

5 Fuller, *supra* note 1, at 638.

6 Fuller, *supra* note 1, at 645.

7 Eskridge, Jr., The Case of the Speluncean Explorers: Twentieth-Century Statutory Interpretation in a Nutshell, 61 Geo. Wash. L. Rev. 1731, 1732 (1993).

8 Aprill & Staudt, Theories of Statutory Interpretation (And Their Limits), 38 Loy. L.A. L. Rev. 1899, 1901 (2005).

9 See Eskridge & Frickey, Statutory Interpretation as Practical Reasoning, 42 Stan. L. Rev. 321, 324 (1990) (“In the post-World War II era … legal scholars have preferred theories that offer a unitary foundation for statutory interpretation.”) [hereinafter Practical Reasoning].

10 Practical Reasoning, *supra* note 9, at 325.

11 Pound, Spurious Interpretation, 7 Colum. L. Rev. 379, 381 (1907).

12 Practical Reasoning, *supra* note 9, at 325–26.

13 Practical Reasoning, *supra* note 9, at 327.

14 Practical Reasoning, *supra* note 9, at 327.

15 Radin, Statutory Interpretation, 43 Harv. L. Rev. 863, 870–71 (1930).

16 Practical Reasoning, *supra* note 9, at 333 (quoting Henry M. Hart & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law, 1156 (tentative ed. 1958)).

17 Practical Reasoning, *supra* note 9, at 333.

18 Practical Reasoning, *supra* note 9, at 332 (citation omitted).

19 Practical Reasoning, *supra* note 9, at 335.

20 Practical Reasoning, *supra* note 9, at 335.

21 Practical Reasoning, *supra* note 9, at 335.

22 Practical Reasoning, *supra* note 9, at 339.

23 Holmes, The Theory of Legal Interpretation, 12 Harv. L. Rev. 417, 419 (1899).

24 See Easterbrook, The Role of Original Intent in Statutory Construction, 11 Harv. J.L. & Pub. Pol'y 59, 62 (1988) ("The use of original *intent* rather than an objective inquiry into the reasonable import of the language permits a series of moves. Each move greatly increases the discretion, and therefore the power, of the court.").

25 Practical Reasoning, *supra* note 9, at 340–41.

26 Practical Reasoning, *supra* note 9, at 341.

27 Practical Reasoning, *supra* note 9, at 342.

28 Practical Reasoning, *supra* note 9, at 342–43.

29 Practical Reasoning, *supra* note 9, at 343.

30 Waldron & Berman, Principled Principles of Statutory Interpretation: A Judicial Perspective After Two Years of BAPCPA, 81 Am. Bankr. L.J. 195, 203 (2007) [hereinafter Principled Principles].

31 Principled Principles, *supra* note 30, at 203.

32 Marrama v. Citizens Bank of Massachusetts, 549 U.S. 365, 367, 127 S. Ct. 1105, 166 L. Ed. 2d 956, 47 Bankr. Ct. Dec. (CRR) 221, 57 Collier Bankr. Cas. 2d (MB) 1, Bankr. L. Rep. (CCH) P 80850 (2007).

33 See Principled Principles, *supra* note 30, at 208 (noting that *Travelers*, decided within less than a month of the Marrama holding, began with a more traditional textual analysis).

34 Braucher, A Guide to Interpretation of the 2005 Bankruptcy Law, 16 Am. Bankr. Inst. L. Rev. 349, 356 (2008).

35 Braucher, *supra* note 34, at 357.

36 Braucher, *supra* note 34, at 357.

37 Braucher, *supra* note 34, at 357.

38 See Principled Principles, *supra* note 30, at 199–202.

39 See Principled Principles, *supra* note 30, at 199–202.

40 Principled Principles, *supra* note 30, at 210.

41 Principled Principles, *supra* note 30, at 204.

42 Principled Principles, *supra* note 30, at 228.

43 Practical Reasoning, *supra* note 9, at 345.

44 Practical Reasoning, *supra* note 9, at 345.

45 Practical Reasoning, *supra* note 9, at 324.

46 Practical Reasoning, *supra* note 9, at 346.

47 Practical Reasoning, *supra* note 9, at 346–47.

48 Practical Reasoning, *supra* note 9, at 348.

49 Practical Reasoning, *supra* note 9, at 348.

50 Practical Reasoning, *supra* note 9, at 348.

51 Practical Reasoning, *supra* note 9, at 350–51.

52 Practical Reasoning, *supra* note 9, at 351.

53 Practical Reasoning, *supra* note 9, at 351.

54 Practical Reasoning, *supra* note 9, at 351.

55 Practical Reasoning, *supra* note 9, at 351.

56 Practical Reasoning, *supra* note 9, at 353–54.

57 Practical Reasoning, *supra* note 9, at 353–54.

58 Practical Reasoning, *supra* note 9, at 354, 356.

59 Practical Reasoning, *supra* note 9, at 358.

60 Practical Reasoning, *supra* note 9, at 359.

61 See Anita S. Krishnakumar, Textualism in Practice, 6 (Georgetown Uni. L. Ctr. , Working Paper, 2023) (highlighting that modern textualism's key features include emphasizing ordinary meaning and limiting the scope of available interpretive tools, among others).

62 Zoldan, Corpus Linguistics and the Dream of Objectivity, 50 SHLR 401, 407–10 (2019).

63 Practical Reasoning, *supra* note 9, at 378.

64 See Uzelac, Reviving the Privacy Protection Act of 1980, 107 Nw. L. Rev. 1437, 1453 (2013) (highlighting that, in considering statutory ambiguity, a Practical Reasoning approach that considers the merits of competing arguments is proper); see also In re Nadler, 122 B.R. 162, 169–170, 21 Bankr. Ct. Dec. (CRR) 251, 24 Collier Bankr. Cas. 2d (MB) 1287, Bankr. L. Rep. (CCH) P 73982 (Bankr. D. Mass. 1990) (highlighting that the court's conclusion was in alignment with statutory hermeneutics, a foundational theory of the Practical Reasoning Approach).

65 Krishnakumar, *supra* note 61, at 18.

66 Krishnakumar, *supra* note 61, at 47.

67 Krishnakumar, *supra* note 61, at 60.

68 See Bonapfel, A Guide to the Small Business Reorganization Act of 2019, 93 Am. Bankr. L. J. 571 (2019), reprinted in SBRA: A Guide to Subchapter V of the U.S. Bankruptcy Code (rev. supp. June 2022).

69 H.R. Rep. No. 116-171, at 3–4 (2019) (citation omitted) (internal quotations omitted).

70 H.R. Rep. No. 116-171 at 1.

71 H.R. Rep. No. 116-171 at 4 (citation omitted) (internal quotations omitted).

72 See 11 U.S.C.A. § 1191(a) ("The court shall confirm a plan under this subchapter only if all of the requirements of section 1129(a), other than paragraph (15) of that section, of this title are met.").

73 Bonapfel & Schaaf, Do § 523(a) Exceptions to Discharge Apply to The Discharge of a Corporation in a Subchapter V Case After 'Cramdown' Confirmation Under § 1191(b)?, 32 No. 4 J. Bankr. L. & Prac. NL Art. 1, § IV (2023).

74 Bonapfel & Schaaf, *supra* note 73, at § IV (citing 11 U.S.C.A. § 1192(2)) (emphasis added).

75 11 U.S.C.A. § 1192(2).

76 11 U.S.C.A. § 523(a)(1) to (20).

77 11 U.S.C.A. § 523(a)(1) to (20) (emphasis added).

78 Bonapfel & Schaaf, *supra* note 73, at § IV.

79 Bonapfel & Schaaf, *supra* note 73, at § IV.

80 Some bankruptcy courts have adopted the Fourth Circuit's approach, such as the Bankruptcy Court for the District of Colorado, which recently held that the Cleary interpretation provides a "far more compelling and persuasive" statutory analysis of § 1192. In re ETG Fire, LLC, 670 B.R. 884, 2025 WL 915381, *13 (Bankr. D. Colo. 2025).

81 See In re Cleary Packaging, LLC, 36 F.4th 509 (4th Cir. 2022).

82 *Cleary*, 36 F. 4th at 511.

83 *Cleary*, 36 F. 4th at 512.

84 *Cleary*, 36 F. 4th at 512; see In re Cleary Packaging LLC, 630 B.R. 466, 476, 70 Bankr. Ct. Dec. (CRR) 112 (Bankr. D. Md. 2021), rev'd and remanded, 36 F.4th 509 (4th Cir. 2022).

85 *Cleary,* 36 F. 4th at 513.

86 *Cleary,* 36 F. 4th at 513.

87 *Cleary,* 36 F. 4th at 514–15; Compare 11 U.S.C.A. § 1182(1) (defining "debtor" under Subchapter V without specific reference to individuals or corporations) with 11 U.S.C.A. § 523(a) ("A discharge under section … 1192 … does not discharge any individual debtor …").

88 *Cleary,* 36 F. 4th at 515.

89 *Cleary,* 36 F. 4th at 515 (emphasis in text).

90 *Cleary,* 36 F. 4th at 515.

91 *Cleary,* 36 F. 4th at 515.

92 *Cleary,* 36 F. 4th at 515.

93 *Cleary,* 36 F. 4th at 516.

94 *Cleary,* 36 F. 4th at 516; Compare 11 U.S.C.A. § 1141(d)(2) ("A discharge under this chapter does not discharge a debtor who is an individual from any debt excepted from discharge under section 523(a) of this title.") with 11 U.S.C.A. § 1141(d)(6) ("the confirmation of a plan does not discharge a debtor that is a corporation from any debt (A) of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a) …").

95 *Cleary,* 36 F. 4th at 516 ("Yet Congress purposefully addressed both individual and corporate debtors when defining the right of discharge in Subchapter V proceedings.").

96 *Cleary,* 36 F. 4th at 516.

97 *Cleary,* 36 F. 4th at 516.

98 *Cleary,* 36 F. 4th at 516.

99 *Cleary*, 36 F. 4th at 516; see also William N. Eskridge, Jr. et al., Cases and Materials On Statutory Interpretation, 854, Thomson Reuters (2012) ("Presumption of statutory consistency: interpret the same or similar terms in a statute the same way.") [hereinafter Cases and Materials].

100 *Cleary*, 36 F. 4th at 517.

101 *Cleary*, 36 F. 4th at 517.

102 *Cleary*, 36 F. 4th at 517.

103 *Cleary*, 36 F. 4th at 517.

104 *Cleary*, 36 F. 4th at 517.

105 *Cleary*, 36 F. 4th at 517–18.

106 *Cleary*, 36 F. 4th at 517–18.

107 In re Off-Spec Solutions, LLC, 651 B.R. 862 (B.A.P. 9th Cir. 2023); see also In re Satellite Restaurants Inc. Crabcake Factory USA, 626 B.R. 871, 70 Bankr. Ct. Dec. (CRR) 12 (Bankr. D. Md.

2021); see also In re GFS Industries, LLC, 647 B.R. 337 (Bankr. W.D. Tex. 2022), rev'd and remanded, 99 F.4th 223 (5th Cir. 2024).

108 As of early summer 2025.

109 *Off-Spec*, 651 B.R. at 866 (citation omitted) (internal quotations omitted); see also Cases and Materials*, supra* note 99, at 854 ("Presumption against redundancy: avoid interpreting a provision in a way that would render other provisions of the statute superfluous or unnecessary."); see also Marx v. General Revenue Corp., 568 U.S. 371, 386, 133 S. Ct. 1166, 185 L. Ed. 2d 242, 84 Fed. R. Serv. 3d 1486 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.").

110 *Off-Spec*, 651 B.R. at 868 (quoting RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 648, 132 S. Ct. 2065, 182 L. Ed. 2d 967, 56 Bankr. Ct. Dec. (CRR) 144, 67 Collier Bankr. Cas. 2d (MB) 483, Bankr. L. Rep. (CCH) P 82218 (2012)) (internal quotations omitted).

111 *Off-Spec*, 651 B.R. at 868.

112 *Off-Spec*, 651 B.R. at 868.

113 *Off-Spec*, 651 B.R. at 868.

114 *Off-Spec*, 651 B.R. at 869 (citation omitted).

115 *Off-Spec*, 651 B.R. at 870.

116 *Off-Spec*, 651 B.R. at 870 (citation omitted) (internal quotations omitted).

117 *Off-Spec*, 651 B.R. at 870–71.

118 *Off-Spec*, 651 B.R. at 870–71.

119 *Off-Spec*, 651 B.R. at 872–73.

120 *Off-Spec*, 651 B.R.at 873.

121 Notwithstanding the materials included in this article, Judge Bonapfel has remained a prolific thought leader regarding the entirety of Subchapter V's interpretation and implementation, and has provided numerous guides and supplements since 2019 for practitioners and courts to apply Subchapter V's provisions appropriately.

122 Bonapfel & Schaaf, *supra* note 73, at § V(A) ("The foregoing analysis of the texts of the statutes favors the bankruptcy courts' interpretation.").

123 Bonapfel & Schaaf, *supra* note 73, at § V(A).

124 Bonapfel & Schaaf, *supra* note 73, at § V(A).

125 Bonapfel & Schaaf, *supra* note 73, at § V(B)(1).

126 Bonapfel & Schaaf, *supra* note 73, at § 5.

127 See Bonapfel & Schaaf, *supra* note 73, at § V(B)(4) (acknowledging that there are two statutory issues that arise from the bankruptcy courts' interpretation of § 1141(d)(6) in comparison to § 1192(2)).

128 Bonapfel & Schaaf, *supra* note 73, at n. 249–250.

129 Bonapfel & Schaaf, *supra* note 73, at § V(B)(2).

130 Bonapfel & Schaaf, *supra* note 73, at § V(B)(4).

131 Bonapfel & Schaaf, *supra* note 73, at § V(B)(4).

132 Bonapfel & Schaaf, *supra* note 73, at § V(B)(4).

133 Bonapfel & Schaaf, *supra* note 73, at § V(B)(4).

134 Bonapfel & Schaaf, *supra* note 73, at § V(B)(4).

135 Bonapfel & Schaaf, *supra* note 73, at § V(B)(4); see also 11 U.S.C.A. § 1141(a)(6)(A).

136 Bonapfel & Schaaf, *supra* note 73, at § V(B)(4); see also Cases and Materials, *supra* note 99, at 854 (explaining that the presumption of statutory consistency canon can be rebutted when there is evidence Congress was using a similar term in a different way).

137 Bonapfel & Schaaf, *supra* note 73, at § V(B)(5).

138 Bonapfel & Schaaf, *supra* note 73, at § V(B)(6).

139 Bonapfel & Schaaf, *supra* note 73, at § V(B)(6).

140 Practical Reasoning, *supra* note 9, at 335.

141 Bonapfel & Schaaf, *supra* note 73, at § V(B)(7).

142 Bonapfel & Schaaf, *supra* note 73, at § V(B)(7)(a)-(b).

143 Bonapfel & Schaaf, *supra* note 73, at § V(B)(7)(b).

144 Bonapfel & Schaaf, *supra* note 73, at § V(B)(7)(b).

145 Bonapfel & Schaaf, *supra* note 73, at § V(B)(7)(b).

146 Bonapfel & Schaaf, *supra* note 73, at § V(B)(7)(b).

147 Bonapfel & Schaaf, *supra* note 73, at § VI.

148 Bonapfel & Schaaf, *supra* note 73, at § VI.

149 Bonapfel & Schaaf, *supra* note 73, at § VI.

150 Practical Reasoning, *supra* note 9, at 354–55.

151 *Cleary*, 36 F. 4th at 514–15; see Cases and Materials, *supra* note 99, at 852 (“Follow ordinary usage of terms, unless Congress gives them a specified or technical meaning.”).

152 Cases and Materials, *supra* note 99, at 855 (“Specific provisions targeting a particular issue apply instead of provisions more generally covering the issue.”).

153 *Cleary*, 36 F. 4th at 515 (“Thus, while § 523(a) references numerous discharge provisions of the Bankruptcy Code, § 1192(2) is the more specific, addressing only Subchapter V discharges.”).

154 *Cleary*, 36 F. 4th at 515 (citation omitted).

155 See *Off-Spec*, 651 B.R. at 868 ("If we were unable to reconcile these statutes, the general/specific canon would countenance an interpretation that § 523(a) controls § 1192.").

156 Practical Reasoning, *supra* note 9, at 355.

157 See *Cleary*, 36 F. 4th at 515–17 ("The context of § 1192(2) within the Bankruptcy Code and the Bankruptcy Code's structure further support our interpretation.").

158 See Cases and Materials*, supra* note 99, at 854 ("Presumption of statutory consistency: interpret the same or similar terms in a statute the same way.").

159 See *Cleary*, 36 F. 4th at 516–17 (highlighting that two other bankruptcy court decisions had found that § 1228(a)'s identical reference to debts of the kind specified in § 523(a) were meant to except both corporate and individual debtors from discharge); see, e.g., In re JRB Consol., Inc., 188 B.R. 373 (Bankr. W.D. Tex. 1995).

160 Practical Reasoning, *supra* note 9, at 356–58.

161 Practical Reasoning, *supra* note 9, at 356–57.

162 *Cleary*, 36 F. 4th at 517.

163 *Cleary*, 36 F. 4th at 517.

164 Practical Reasoning, *supra* note 9, at 358.

165 Practical Reasoning, *supra* note 9, at 358–59 (articulating that these considerations are part of a "dynamic process" that evaluates changing "social and legal circumstances" as well as "current values" like fairness).

166 *Cleary*, 36 F. 4th at 517–18.

167 Practical Reasoning, *supra* note 9, at 360.

168 See *Off-Spec*, 651 B.R. at 866 (starting with the plain meaning of § 1192, while referencing the various canons of construction that might trigger if the plain meaning is ambiguous).

169 See *Off-Spec*, 651 B.R. at 866–67; see also Cases and Materials, *supra* note 99, at 851("Plain meaning rule: follow the plain meaning of the statutory text, except when textual plain meaning requires an absurd result or suggest a scrivener's error.").

170 *Off-Spec*, 651 B.R. at 866–67.

171 *Off-Spec*, 651 B.R. at 867.

172 *Off-Spec*, 651 B.R. at 867.

173 *Off-Spec*, 651 B.R. at 867.

174 *Off-Spec*, 651 B.R. at 868–69.

175 *Off-Spec*, 651 B.R. at 869.

176 See Cases and Materials*, supra* note 99, at *854*-55 (articulating "textual integrity" canons, such as interpreting provisions to avoid inconsistency with the overall structure of the statute, avoiding broad readings of statutory provisions where Congress has provided broader policy elsewhere, and presuming that statutory exceptions are read narrowly).

177 See 11 U.S.C.A. § 1228(a)(2) ("[T]he court shall grant the debtor a discharge of all debts … except any debt … (2) of a kind specified in section 523(a) of this title …").

178 Cases and Materials, *supra* note 99, at 854; *Off-Spec*, 651 B.R. at 870.

179 See *Off-Spec*, 651 B.R. at 870–71.

180 *Off-Spec*, 651 B.R. at 871 (quoting In re BDT Farms, Inc., 21 F.3d 1019, 1021 n.3, 25 Bankr. Ct. Dec. (CRR) 818, Bankr. L. Rep. (CCH) P 75888 (10th Cir. 1994)) (internal quotations omitted).

181 *Off-Spec*, 651 B.R. at 871.

182 Practical Reasoning, *supra* note 9, at 351.

183 *Off-Spec*, 651 B.R. at 870.

184 *Off-Spec*, 651 B.R. at 870.

185 *Off-Spec*, 651 B.R. at 870.

186 *Off-Spec*, 651 B.R. at 870.

187 See *Off-Spec*, 651 B.R. at 871–72.

188 Bonapfel & Schaaf, *supra* note 73, at § IV-VI.

189 Bonapfel & Schaaf, *supra* note 73, at § IV(A).

190 Bonapfel & Schaaf, *supra* note 73, at § IV(A).

191 Bonapfel & Schaaf, *supra* note 73, at § V(A).

192 Bonapfel & Schaaf, *supra* note 73, at § V(B)(2).

193 Bonapfel & Schaaf, *supra* note 73, at § V(B)(2).

194 Bonapfel & Schaaf, *supra* note 73, § V(B)(2) (citing Whitman v. American Trucking Associations, 531 U.S. 457, 468, 121 S. Ct. 903, 149 L. Ed. 2d 1, 51 Env't. Rep. Cas. (BNA) 2089, 31 Envtl. L. Rep. 20512 (2001); see also Cases and Materials, *supra* note 99, at 857–58 ("Presumption against hiding elephants in mouseholes: Congress usually does not alter the fundamental details of a regulatory scheme in vague or ancillary provisions.") (citing Gonzales v. Oregon, 546 U.S. 243, 267, 126 S. Ct. 904, 163 L. Ed. 2d 748 (2006)).

195 Bonapfel & Schaaf, *supra* note 73, at § V(B)(2).

196 Bonapfel & Schaaf, *supra* note 73, at § V(B)(2).

197 Practical Reasoning, *supra* note 9, at 366.

198 Practical Reasoning, *supra* note 9, at 366 (emphasis added).

199 Bonapfel & Schaaf, *supra* note 73, at § V(B)(4); see also Cases and Materials, *supra* note 99, at 854 (stating that the presumption of statutory consistency is rebutted when evidence suggests Congress was using the same terms differently).

200 Bonapfel & Schaaf, *supra* note 73, at § V(B)(6) ("Discussion of the Fourth Circuit's analysis … requires a review of related economic and legal issues that the business reorganization of a corporation presents …").

201 Practical Reasoning, *supra* note 9, at 358.

202 Bonapfel & Schaaf, *supra* note 73, § V(B)(7)(a).

203 Practical Reasoning, *supra* note 9, at 363.

204 Practical Reasoning, *supra* note 9, at 371.

205 Practical Reasoning, *supra* note 9, at 371.

206 Matter of GFS Industries, L.L.C., 99 F.4th 223, 2024 WL 1644229 (5th Cir. 2024).

207 Matter of GFS Industries, L.L.C., 99 F.4th 223, 2024 WL 1644229, *4, 6 (5th Cir. 2024). The primary distinctions between the Fifth and Fourth Circuit are two-fold. First, the Fifth Circuit rebuts the BAP and Judge Bonapfel's usage of legislative materials to harmonize §§ 523(a) and 1192 by essentially arguing those materials are overstated in importance; something that is never fully explored in *Cleary*. Second, *GFS* provides a more apt summation of how Subchapter V could be viewed as a fair trade of benefits for both creditors and debtors, providing a more tangible purposivist argument.

208 In re Van's Aircraft, Inc., 2024 WL 2947601, *5 (Bankr. D. Or. 2024).

209 In re Van's Aircraft, Inc., 2024 WL 2947601, *5 (Bankr. D. Or. 2024).

210 In re Van's Aircraft, Inc., 2024 WL 2947601, *6 (Bankr. D. Or. 2024) (citation omitted).

211 In re Van's Aircraft, Inc., 2024 WL 2947601, *6 (Bankr. D. Or. 2024).

212 In re Davidson, 2025 WL 511226, *5 (Bankr. N.D. Fla. 2025).

213 *Davidson*, 2025 WL 511225, at *5.

214 Since the drafting of this article, the Eleventh Circuit issued a ruling on July 9, 2025, adopting the "corporations included" approach and aligning with the Fourth and Fifth Circuits. See In re 2 Monkey Trading, LLC, 142 F.4th 1323, 74 Bankr. Ct. Dec. (CRR) 193 (11th Cir. 2025).

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