

RECENT DEVELOPMENTS

AN IMPROPER EXTENSION OF CIVIL LITIGATION BY INDIGENTS: *M. L. B. v. S. L. J.*, 117 S. Ct. 555 (1996).

The Supreme Court has long differentiated between criminal and civil cases in terms of a State's duty to provide *in forma pauperis* procedures to pay court costs for indigent parties.¹ Since *Griffin v. Illinois*,² decided in 1956, the Court has held that court costs cannot be used to prevent criminal defendants from appealing their convictions. However, the Court has generally refused to mandate state or federal subsidization of civil litigation.³

This differentiation was recently jettisoned in *M. L. B. v. S. L. J.*,⁴ in which a 6-3 majority of the Court ruled that Mississippi could not deny appellate review of a parental termination decree based on the appellant's inability to pay record preparation fees. The Court cited the Due Process and Equal Protection Clauses of the Fourteenth Amendment⁵ as the general bases for its decision; but, rather than focusing on a specific textual basis for its holding, it relied instead on precedents springing from *Griffin's* guarantee that court costs could not prevent indigents from appealing *criminal* convictions.⁶ From these precedents, the Court inferred the

1. Until *M. L. B.*, the Court had never forced a State to pay appellate costs of any sort in a civil case, and had been reluctant to make any demands on the States in the civil arena. See *United States v. Kras*, 409 U.S. 434 (1973) (holding that indigents do not have a right to waiver of bankruptcy filing fees); see also *Ortwein v. Schwab*, 410 U.S. 656 (1973) (per curiam) (holding that indigents could be forced to pay a fee to gain judicial review of welfare terminations). But see *Little v. Streater*, 452 U.S. 1 (1981) (holding that an indigent against whom a paternity action had been filed was entitled to state-subsidized blood tests to help determine paternity).

2. 351 U.S. 12 (1956).

3. The Court created an exception to this rule in *Boddie v. Connecticut*, 401 U.S. 371 (1971), in which the Court ruled that denial of access to divorce based on an inability to pay the initial filing fee was a denial of due process. However, *Boddie* did not involve representation or appellate costs.

4. 117 S. Ct. 555 (1996).

5. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

6. See *M. L. B.*, 117 S. Ct. at 560-62.

existence of a class of "quasi-criminal" and domestic cases that fall somewhere between the criminal and civil spheres.⁷

The Court's reasoning in *M. L. B.* has no basis in the Constitution. Although the Court attempted to ground its decision in the Equal Protection and Due Process Clauses, the facts of the case implicate neither. Furthermore, the majority failed to respect the constitutional line between civil and criminal cases.⁸ This Recent Development argues that, although Justice Thomas's dissent went too far in its call to overturn *Griffin*,⁹ the Court's failure to provide a specific constitutional basis for its decision invalidates the majority's reasoning.

Petitioner M. L. B.¹⁰ is the biological mother of two children, a son born in 1985 and a daughter born in 1987, both fathered by her ex-husband, respondent S. L. J.¹¹ In June 1992, M. L. B. and S. L. J. were divorced, and by mutual agreement, the children remained in the custody of their father. S. L. J. remarried in September 1992 and filed in Mississippi Chancery Court in November 1993 to terminate the parental rights of M. L. B., so that the children might be legally adopted by his new wife, J. P. J. The complaint alleged that M. L. B. had not maintained visitation of the children and had discontinued child support payments.¹² M. L. B. counterclaimed that S. L. J. had not allowed reasonable visitation and sought primary custody of the children.¹³

In a decree filed on December 14, 1994, the Chancellor terminated all of M. L. B.'s parental rights, approved adoption of the children by J. P. J., and ordered that the children's birth

7. See *id.* at 567-68. In *Mayer v. Chicago*, 404 U.S. 189 (1971), the Court expanded the *Griffin* holding to non-felony criminal offenses. It referred to Mayer's alleged offense as "quasi-criminal in nature." *Id.* at 196. The majority in *M. L. B.* also relied on *Boddie* to justify the application of *Griffin* and *Mayer* to a domestic civil case in *M. L. B.* See *M. L. B.*, 117 S. Ct. at 562.

8. For a discussion of the constitutional differences between civil and criminal cases, see *infra* notes 66, 76. For a more general, and largely theoretical, discussion of the civil-criminal distinction and its usefulness, see John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875 (1992).

9. See *M. L. B.*, 117 S. Ct. at 575 (Thomas, J., dissenting).

10. As many States do, Mississippi identifies parties in domestic disputes by their initials.

11. See *M. L. B.*, 117 S. Ct. at 559.

12. See *id.*

13. See *id.*

certificates be amended accordingly.¹⁴ He declared that S. L. J. and J. P. J. had proven their case by “clear and convincing evidence”¹⁵ and that there had been “substantial erosion of the relationship between the natural mother, and the minor children,” caused “at least in part by [M. L. B.’s] serious neglect, abuse, prolonged and unreasonable absence or unreasonable failure to visit or communicate with her minor children.”¹⁶

M. L. B. filed a timely appeal in January 1995, paying the \$100 filing fee. She was unable, however, to pay the \$2000 cost of preparing and transmitting the record for appeal¹⁷ and sought leave to appeal *in forma pauperis*. The Supreme Court of Mississippi denied her application in August 1995, stating that under Mississippi law, “the right to proceed *in forma pauperis* in civil cases exists only at the trial level.”¹⁸ The United States Supreme Court overruled in a 6-3 decision, and Mississippi was ordered to provide M. L. B. with the transcript necessary for appeal on remand.¹⁹

Justice Ginsburg, writing for the majority,²⁰ concluded that Mississippi could not deny M. L. B. the opportunity to appeal based on her inability to pay for transcription of the trial

14. *See id.* at 559. M. L. B. was represented by counsel at her hearing, and there was no allegation of due process violations at the trial level. *See id.* at 572 (Thomas, J., dissenting).

15. *Id.* at 559-60. *Santosky v. Kramer*, 455 U.S. 745, 769-70 (1982), held that “clear and convincing” proof is necessary to terminate parental rights.

16. *M. L. B.*, 117 S. Ct. at 559. This language derives from the Mississippi statute governing termination of parental rights. *See* MISS. CODE ANN. § 93-15-103(3) (1994). The Court, citing the petitioner’s brief, noted that the Chancellor mentioned “abuse” although there had been no allegation of abuse in the proceedings. *See M. L. B.*, 117 S. Ct. at 559-60. The implication is that the Chancellor gave less than full attention to this case. However, the language in the statute, AS reported in the Chancellor’s decree, states that among the grounds for termination of parental rights are “serious neglect, abuse, prolonged and unreasonable absence or unreasonable failure to visit or communicate . . .” *Id.* at 559 (emphasis added). This language was not, as the Court seems to imply, sufficient to establish that the Chancellor’s findings were clearly erroneous and therefore reviewable. *See* FED. R. CIV. P. 52(a) (stating that a trial judge’s findings of fact will be set aside on appeal only if they are “clearly erroneous”); *see also* *Anderson v. Bessemer City*, 470 U.S. 564 (1985) (“[W]hen a trial judge’s finding is based on his decision to credit the testimony of one of two or more witnesses . . . that finding, if not internally inconsistent, can virtually never be clear error.”).

17. *See M. L. B.*, 117 S. Ct. at 560.

18. *Id.*

19. *See id.* at 570.

20. Justice Ginsburg was joined by Justices Stevens, O’Connor, Souter, and Breyer. Justice Kennedy concurred. Justice Thomas, joined in full by Justice Scalia and in part by Chief Justice Rehnquist, dissented.

record.²¹ Her opinion relied on a line of cases originating with *Griffin v. Illinois*.²² She began with an examination of *Griffin's* holding that although States are not constitutionally required to provide appellate review of criminal convictions, once a State does so, it cannot prevent indigent criminal defendants from taking advantage of the appeals process.²³ Justice Ginsburg then turned to *Mayer v. Chicago*²⁴ to demonstrate *Griffin's* broader applications. *Mayer* was a non-felony criminal case that stated that a defendant convicted of conduct "quasi-criminal in nature"²⁵ is entitled to the transcript necessary for appeal.

Justice Ginsburg's analysis then moved from cases concerning transcripts for appeal to analogous cases in which the Court held that a State must provide access to its judicial process, notwithstanding a party's inability to pay other court fees.²⁶ The leading case in Justice Ginsburg's arsenal was *Boddie v. Connecticut*,²⁷ in which the Court held that the State could not deny a divorce to a married couple based on their inability to pay a \$40 filing fee. Justice Ginsburg next distinguished *United States v. Kras*,²⁸ which held that indigents do not have a right to waiver of bankruptcy filing fees, and *Ortwein v. Schwab*,²⁹ which held that indigents could be forced to pay a fee to gain judicial review of welfare terminations. She based these distinctions on

21. See *M. L. B.*, 117 S. Ct. at 570.

22. 351 U.S. 12 (1956).

23. See *M. L. B.*, 117 S. Ct. at 561.

24. 404 U.S. 189 (1971). In *Mayer*, the Court declined to limit *Griffin* to felony appeals and required the State to provide transcripts to a criminal defendant convicted of two non-felonies and fined \$500. See *id.* at 193-98 (holding that *Griffin* included non-felonies and requiring the State to provide transcripts to indigent criminal defendants).

25. *Id.* at 196. Justice Ginsburg appeared to lose sight of the fact that although *Mayer* may refer to activity "quasi-criminal" in nature, it remains a criminal, and not a civil, case.

26. Justice Ginsburg also includes a discussion of an indigent's right to state-provided counsel in various situations. See *M. L. B.*, 117 S. Ct. at 562. But this is dicta, as *M. L. B.* was represented by counsel at every stage.

27. 401 U.S. 371 (1971). Justice Ginsburg cites *Boddie* as the prime example of "a narrow category of civil cases in which the State must provide access to its judicial processes without regard to a party's ability to pay court fees," and thus as closely analogous case. *M. L. B.*, 117 S. Ct. at 562. Note that *Boddie* did not involve appellate costs in any way. The majority in *M. L. B.* also cites *Little v. Streater*, 452 U.S. 1 (1981) (holding that application of a Connecticut statute to deny appellant blood grouping tests because of his lack of financial resources violated the Due Process Clause of the Fourteenth Amendment), and *Lindsey v. Normet*, 405 U.S. 56 (1972) (holding that an Oregon statute requiring appellants in landlord-tenant disputes filed under that statute to post a bond violates the Equal Protection Clause), although the majority admits that *Lindsey* is irrelevant and "does not guide our inquiry here." *M. L. B.*, 117 S. Ct. at 562.

28. 409 U.S. 434 (1973).

29. 410 U.S. 656 (1973).

the Court's holdings that bankruptcy and welfare benefits are not "fundamental interests."³⁰ According to Justice Ginsburg, although *Ortwein* expressly stated that the State's choice to permit *in forma pauperis* filings in some classes of civil appeals did not require the state to waive fees in all civil appeals, "the Court has consistently set apart from the mine run of cases those involving state controls or intrusions on family relationships."³¹

The majority then specifically addressed whether parental status is a fundamental right. Justice Ginsburg invoked *Lassiter v. Department of Social Services of Durham County*,³² in which the Court held that the decision whether counsel should be provided in parental termination hearings should be made on a case-by-case basis.³³ Combining the holding in *Lassiter* with that of *Santosky v. Kramer*,³⁴ which laid out the "clear and convincing" standard of proof needed in parental termination cases, the Court concluded that "the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment."³⁵

Finally, Justice Ginsburg addressed the ultimate question: "Does the Fourteenth Amendment require Mississippi to accord M. L. B. access to an appeal—available but for her inability to advance required costs—before she is forever branded unfit for affiliation with her children?"³⁶ She returned here to *Mayer's* expansion of *Griffin* to include petty crimes and treated M. L. B.'s parental termination appeal as the Court has "treated petty [criminal] offense appeals."³⁷ This jump from criminal to civil adjudications was made with the observation that the *Griffin-Mayer* line of cases "reflect both equal protection and due process concerns."³⁸ Reliance on equal protection presented difficulties, Justice Ginsburg admitted, as fee requirements usually need only meet a rational basis test to satisfy the Equal

30. See *M. L. B.*, 117 S. Ct. at 563.

31. *Id.* at 563-64.

32. 452 U.S. 18 (1981).

33. See *id.* at 32.

34. 455 U.S. 745 (1982).

35. *M. L. B.*, 117 S. Ct. at 565 (quoting *Santosky*, 455 U.S. at 774 (Rehnquist, J., dissenting)).

36. *Id.*

37. *Id.* at 565-66.

38. *Id.* at 566. Note the lack of specific textual basis for the civil-criminal jump.

Protection Clause.³⁹ Nevertheless, Justice Ginsburg argued, access to judicial processes “criminal or ‘quasi-criminal in nature’” should not be based on ability to pay.⁴⁰ Justice Ginsburg did not explain her due process argument beyond a statement that “[t]he due process concern hones in on the essential fairness of the state ordered proceedings anterior to adverse state action.”⁴¹

Although *M. L. B.* weakened the bright-line criminal-civil distinction, Justice Ginsburg countered fears of an open “floodgate”⁴² of new rights related to the civil appeals process by constitutionalizing the differences between parental status termination cases (which now fall under *Griffin*) and other civil matters, such as “divorce, paternity, and child custody.”⁴³ These differences include the fact that only parental status termination cases “sever the parent-child bond,”⁴⁴ and “wor[k] a unique kind of deprivation.”⁴⁵

Justice Kennedy’s brief concurrence emphasized “the rights and privileges inherent in family and personal relations.”⁴⁶ He pointed to the Due Process Clause as “quite a sufficient basis for our holding,” citing *Boddie*, *Lassiter*, and *Santosky* as cases that both emphasize rights inherent in family relations and rest solely upon the Due Process Clause.⁴⁷ Justice Kennedy concluded by arguing that although an appeal is not constitutionally required, “given the existing appellate structure in Mississippi, the realities of the litigation process, and the fundamental interests at stake

39. *See id.* at 567.

40. *M. L. B.*, 117 S. Ct. at 568 (quoting *Mayer v. Chicago*, 404 U.S. 189, 196 (1971)). The Court referred here to two exceptions to the general rule that fees must merely meet the rationality standard to pass equal protection muster. These exceptions are: (1) political participation cases; and (2) access to courts in criminal cases. *See id.* at 567-68. As discussed below, the majority’s stretching of the criminal case exception to cover *M. L. B.* relies on an inappropriate misreading of *Mayer*.

41. *Id.* at 566.

42. *Id.* at 569.

43. *Id.* One might wonder how Justice Ginsburg reconciled distinguishing divorce from parental status termination cases with her reliance on *Boddie* (which related to divorce) as a basis for the *M. L. B.* decision.

44. *Id.* at 566.

45. *M. L. B.*, 117 S. Ct. at 569 (quoting *Lassiter v. Department of Soc. Servs. of Durham County*, 452 U.S. 18, 27 (1981)).

46. *Id.* at 570 (Kennedy, J., concurring).

47. *Id.*

in this particular proceeding," Mississippi must allow *M. L. B.*'s appeal to proceed.⁴⁸

Justice Thomas dissented.⁴⁹ He began by examining the line drawn by the majority between parental status termination cases and other civil cases.⁵⁰ Justice Thomas argued that the "inevitable consequence" of *M. L. B.* "will be greater demands on the States to provide free assistance to would be appellants in all manner of civil cases involving interests that cannot . . . be distinguished from the admittedly important interest at issue here."⁵¹

Referring to Justice Ginsburg's reliance on "both equal protection and due process concerns,"⁵² Justice Thomas took issue with the majority's failure to "specify the source of the relief it grants."⁵³ Finding Justice Ginsburg's explanation insufficient, Justice Thomas proceeded to analyze *M. L. B.*'s claim under each Clause, asserting that if "neither Clause affords petitioner the right to a free, civil-appeal transcript . . . no amalgam of the two does."⁵⁴

Justice Thomas's due process analysis began with the principle that the Due Process Clause does not require States to provide any appeal, even in criminal cases.⁵⁵ According to Justice Thomas, the majority's only support for finding a due process violation came from *Boddie*,⁵⁶ which he believed was inapposite because it involved a case in which there was no hearing at all.⁵⁷ Justice Thomas continued by pointing out that *M. L. B.* was represented by counsel, received notice and a hearing, was able

48. *Id.*

49. Justice Scalia joined Justice Thomas's dissent in full; Chief Justice Rehnquist joined Justice Thomas's dissent with the exception of its call to overturn *Griffin*.

50. See *M. L. B.*, 117 S. Ct. at 570-71 (Thomas, J., dissenting).

51. *Id.* at 570.

52. *Id.* (quoting *M. L. B.*, 117 S. Ct. at 566).

53. *Id.*

54. *Id.*

55. See *M. L. B.*, 117 S. Ct. at 570 (Thomas, J., dissenting); see also *Rinaldi v. Yeager*, 384 U.S. 305 (1966) (observing that although the Court had never held that States are required to provide appellate review, once opened, lanes of appellate review must be kept free of unreasoned distinctions); *Griffin v. Illinois*, 351 U.S. 12 (1956) (concluding that there is no right to an appeal and that it is permissible for the initial trial to be the final judicial determination).

56. 401 U.S. 371 (1971) (holding that Connecticut could not deny divorce based on inability to pay filing fee).

57. "*Boddie* has little to do with this case. It, 'of course, was not concerned with post-hearing review.'" *M. L. B.*, 117 S. Ct. at 572 (Thomas, J., dissenting) (quoting *Ortwein v. Schwab*, 410 U.S. 656, 659 (1973)).

to confront the witnesses and evidence introduced against her, and generally received due process at the trial level.⁵⁸ He concluded his due process analysis by pointing out that past Supreme Court decisions dealing with financial obstacles to appellate process were based on equal protection rather than due process grounds.⁵⁹

Proceeding to an equal protection analysis, Justice Thomas criticized the majority's use of disparate impact alone as the basis for finding a violation of the Equal Protection Clause.⁶⁰ He argued that if, as held in *Washington v. Davis*,⁶¹ disparate impact against a suspect class such as a racial minority does not violate the Equal Protection Clause, surely disparate impact against the indigent, not a suspect class, is not a violation of the Clause:⁶² "The lesson of *Davis* is that the Equal Protection Clause shields only against purposeful discrimination . . ."⁶³ Applying this holding, Justice Thomas observed that Mississippi's prepayment requirement for transcripts in civil appeals is facially neutral, with any adverse impact arising from factors other than the State's intent.⁶⁴

Additionally, Justice Thomas criticized the majority's blurring of the distinction between civil and criminal cases. He flatly rejected *Griffin* and its progeny and argued in the alternative that these precedents were improperly extended to the facts of *M. L. B.*⁶⁵ He pointed out that *Griffin* is a criminal case, whereas *M. L. B.* is a civil case, and that "the basic distinction between

58. *See id.*

59. "Those cases in which the Court has required States to alleviate financial obstacles to process beyond a hearing—though sometimes couched in due process terms—have been based on the equal protection proposition that if the State chooses to provide for appellate review, it 'can no more discriminate on account of poverty than on account of religion, race, or color.'" *Id.* (citing *Lewis v. Casey*, 116 S. Ct. 2174, 2189 (1996) (Thomas, J., concurring) (quoting *Griffin*, 351 U.S. at 17)).

60. *Id.* at 572-73. Justice Thomas based this line of attack on *Washington v. Davis*, 426 U.S. 229 (1976), in which the Court "rejected a disparate impact theory of the Equal Protection Clause altogether." *Id.* at 573 (quoting *Lewis*, 116 S. Ct. 2174, 2192 (Thomas, J., concurring)).

61. 426 U.S. 229, 239 (1976).

62. *See M. L. B.*, 117 S. Ct. at 573-74 (Thomas, J., dissenting).

63. *Id.* at 573. "The [Equal Protection] Clause is not a panacea for perceived social or economic inequity . . ." *Id.*

64. *See id.* at 575.

65. *See id.*

the two [types of suits] finds root in the Constitution and has largely retained its vitality in our jurisprudence."⁶⁶

Justice Thomas then compared *Mayer v. Chicago*,⁶⁷ with its guarantee of a transcript in a non-felony criminal appeal, to two other cases: *Scott v. Illinois*,⁶⁸ which held that an indigent defendant charged with a crime not punishable by imprisonment was not entitled to appointed counsel; and *Lassiter v. Department of Social Services of Durham County*,⁶⁹ which held that parental termination hearings called for appointed counsel in some cases. Justice Thomas answered the contradiction between *Scott's* denial of appointed counsel to some criminal defendants and *Lassiter's* grant of appointed counsel to some civil litigants by arguing that *Mayer's* guarantee of assistance to non-felony criminal defendants should be limited, or overruled entirely, bringing it in line with *Scott*.⁷⁰ *Lassiter* would likely fall by the wayside under this scheme. Justice Thomas based this argument on what he sees as a distinction between crimes punishable by imprisonment and those that are not: "Unlike in *Scott* . . . the Court gave short shrift in *Mayer* to the distinction, as old as our Constitution, between crimes

66. *Id.* at 575. The constitutional protections which are offered *only in criminal actions* are contained in the Fifth Amendment (protection against self-incrimination and against double jeopardy), Sixth Amendment (right to defense counsel and speedy and public trial), and Eighth Amendment (protection against cruel and unusual punishment). See U. S. CONST., amends. V, VI, VIII. For example, the Sixth Amendment's right to a public trial exists only in proceedings involving a substantive criminal offense. See *Levine v. United States*, 362 U.S. 610 (1960) (holding that a contempt proceeding is not a criminal proceeding within the meaning of the Sixth Amendment and that the Sixth Amendment's explicit guarantee of a public trial applies only to criminal prosecutions). Note also Article III's guarantee of a jury trial in "all Crimes, except in cases of Impeachment." U. S. CONST., art. III, §2. One area where the line between civil and criminal matters is deliberately blurred is in the field of juvenile proceedings, and thus criminal protections are applied to some juvenile proceedings that are classified as "civil" (although these usually would be criminal cases if they involved adults). The Court has justified this blurring of the civil-criminal line based on the special needs of children and society when dealing with children. See *In re Gault*, 387 U.S. 1 (1967). For a further discussion of the importance and substance of the civil-criminal distinction, see *infra* note 77.

67. 404 U.S. 189 (1971).

68. 440 U.S. 367 (1979).

69. 452 U.S. 18 (1981).

70. See *M. L. B.*, 117 S. Ct. at 575-76 (Thomas, J., dissenting). Justice Thomas argues that the "assertion that civil litigants have no right to the free transcripts that all criminal defendants enjoy is difficult to sustain in the face of our holding that some civil litigants are entitled to the assistance of counsel to which some criminal defendants are not." *Id.* at 576. Justice Thomas' proposal to overturn *Mayer* would mean that the same criminal defendants that are not entitled to the assistance of counsel would not be entitled to free transcripts, thus lessening the contradiction to be found here.

punishable by imprisonment and crimes punishable merely by fines."⁷¹

Although Justice Thomas would have preferred to limit or overrule *Mayer*, he accepted that *Mayer* drew a line between civil and criminal cases and feared the practical impact of the *M. L. B.* majority's narrowing of the civil-criminal divide: "In brushing aside the distinction between criminal and civil cases—the distinction that has constrained *Griffin* for 40 years—the Court has eliminated the last meaningful limit on the free-floating right to appellate assistance."⁷² Justice Thomas concluded by noting that he does not question the wisdom of the many States that provide for *in forma pauperis* civil appeals, especially in parental status termination cases. He merely argued that these should be voluntary actions, because they are not, in his view, mandated by the Constitution.⁷³

The Supreme Court came to the wrong conclusion in *M. L. B.* First, the Court failed to give a compelling reason for dismantling the bright-line distinction between criminal and civil cases. Second, even if the Court's dismantling of that distinction was appropriate, the majority failed to elucidate a new test for determining in which cases the States must provide free appeals and in which cases they may choose not to. Finally, and most importantly, the majority failed to state a specific constitutional basis for its extension of *Griffin*, indicating that there is no such basis. The Court would have been wiser to leave *Griffin* and *Mayer* intact and to decline to extend these decisions into the civil realm. Although it may be unsympathetic to refuse assistance to poor parents in appeals of parental status termination orders, it is not unconstitutional. Simply because a policy is just or wise does not mean that there is a constitutional mandate for that policy.⁷⁴

Prior to *M. L. B.*, the Court's jurisprudence contained a clear civil-criminal distinction, as reflected in *Mayer*. Although Justice Thomas criticized the Court's extension of *Griffin* in *Mayer*,⁷⁵ the

71. *Id.* at 576 (citations omitted).

72. *Id.* at 577-78.

73. *See id.* at 578.

74. For a discussion of the principle that the Constitution should not be used as a basis for courts to usurp the power of the legislature, see Justice Black's dissent in *Goldberg v. Kelly*, 397 U.S. 254, 273-74 (1970).

75. *See M. L. B.*, 117 S. Ct. at 576 (Thomas, J., dissenting).

logic of that extension was clear: *Mayer* was a criminal case, regardless of whether the potential punishment included a prison sentence; if the decision in *Griffin* was correct, it was not much of a stretch to apply that decision in *Mayer*.⁷⁶ But the *M. L. B. Court's* use of *Mayer* as the basis for a right to a transcript in a *civil* appeal is an unwarranted leap for an analogous reason: regardless of the perceived importance of the case to the individuals involved, the critical factor in whether provision of a transcript is required should be whether a case is civil or criminal.⁷⁷ The majority's citation of *Mayer* to support the proposition that some civil appeals require the State to provide transcripts is disingenuous—although the *Mayer* Court did use the term “quasi criminal in nature” to describe *Mayer's* offense, the act to which the Court referred clearly fell on the criminal side of the civil-criminal division.⁷⁸ Indeed, within a year of the *Mayer* decision, the Court had refused even to hear a case that would expand the duties of States in parental status termination cases.⁷⁹

76. Justice Thomas bases his opposition to *Mayer* on the fact that the crime in that case was not a felony, punishable by imprisonment. *See id.* Note, however, Article III's reference to “all Crimes” in the guarantee of a jury trial, as well as the broad reference to “any criminal case” in the Fifth Amendment and the reference to “all criminal prosecutions” in the Sixth Amendment. U. S. CONST., art. III, § 2, cl. 3; amend. V; amend. VI.

77. The distinction between a civil penalty and a criminal penalty is of some constitutional import. The Self-Incrimination Clause of the Fifth Amendment, for example, is expressly limited to ‘any criminal case.’ Similarly, the protections provided by the Sixth Amendment are available only in ‘criminal prosecutions.’ Other constitutional protections, while not explicitly limited to one context or the other, have been so limited by decision of this Court. *See, e.g., Helvering v. Mitchell*, 303 U.S. 391, 399 (1938) (Double Jeopardy Clause protects only against two criminal punishments); *United States v. Regan*, 232 U.S. 37, 47-48 (1914) (proof beyond a reasonable doubt required only in criminal cases).

United States v. Ward, 448 U.S. 242, 248 (1980) (holding that a penalty imposed by the Federal Water Pollution Control Act is civil and does not trigger protections constitutionally guaranteed to a criminal defendant). For further discussion of the constitutional differentiations between criminal and civil trials, see *supra* note 66.

78. *Mayer v. Chicago*, 404 U.S. 189, 196 (1971). In context, the use of the phrase “quasi criminal” by the *Mayer* Court refers to non-felonious offenses, not civil cases of any sort. *See id.*

79. *See* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §16-51, at 1648 (2d ed. 1988) (referring to *Carter v. Kaufman*, 87 Cal. Rptr. 678 (1970), *cert. denied*, 402 U.S. 964 (1971) (denying certiorari in a case where an indigent mother was denied court-appointed counsel in a state civil suit to take away five of her seven children)). *But see Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950) (stating that denial of certiorari usually “carries with it no implication whatever regarding the Court's view on the merits of a case which it has declined to review”).

Beyond its inability to provide a compelling reason for breaching the civil-criminal wall, the *M. L. B.* Court's failure to provide a standard for preventing its holding from being expanded to other types of civil cases further demonstrates the weakness of its decision. In treating *M. L. B.*'s case as similar to a petty criminal appeal,⁸⁰ the Court relied on "decisions acknowledging the primacy of the parent-child relationship."⁸¹ To rationalize this choice, the Court engaged in interest balancing: it reiterated the importance of parental status termination cases, pointed out the potential for error (thereby questioning the judgment of the Mississippi Chancellor), and referred to the limited number of parental status termination appeals as a sign of the State's minimal interest in forcing appellants to pay for transcripts.⁸² It is left to the observer to ponder what other civil appeals might next tug at the heartstrings of the majority—custody, divorce, or foreclosure on a family home? The majority explicitly claimed that the impact⁸³ of *M. L. B.* is limited to parental status termination cases,⁸⁴ but with no constitutional basis for this specific limitation and no new test to explain it, it is difficult to see how future courts could justify a failure to apply *M. L. B.* in other civil cases⁸⁵ that might be thought to interfere with a "fundamental" relationship.⁸⁶

80. See *M. L. B.*, 117 S. Ct. at 565.

81. *Id.*

82. See *id.* at 566. Note that this is not the *Mathews* due process test, discussed in note 99, *infra*. Rather, this interest-balancing argument comes from *Bearden v. Georgia*, 461 U.S. 660, 666-67 (1983), an equal protection case.

83. See 117 S. Ct. at 570-71 (Thomas, J., dissenting).

84. See *id.* at 570.

85. It is difficult to assess the impact of such an extension of *M. L. B.* to other types of civil cases due to the difficulty of collecting empirical data. But one commentator who favored extending the waivers of fees for indigents reported that from 1960 to 1965, only 8.5 percent of all civil actions in the District of Columbia were filed by persons unable to pay filing fees and noted that poor people are less likely than more affluent persons to initiate legal action. See Christopher E. Austin, Note, *Due Process, Court Access Fees, and the Right to Litigate*, 57 N.Y.U. L. Rev. 768, 768-69 n.7 (1982) (citing J. CARLIN, ET AL., *CIVIL JUSTICE AND THE POOR* (1967); John R. Schmertz, *The Indigent Civil Plaintiff in the District of Columbia: Facts and Commentary*, 27 Fed. B.J. 235 (1967)). Although this data is dated, clearly an extension of *M. L. B.* to many types of civil cases would produce a significant additional burden on court systems by removing the financial disincentive to filing suit.

86. Justice Black has noted the difficulty in determining which rights are fundamental:

In my view, the decision in *Boddie v. Connecticut* can safely rest on only one crucial foundation—that the civil courts of the United States and each of the States belong to the people of this country and that no person can be denied access to these courts, either for a trial or an appeal, because he cannot pay a fee, finance a bond, risk a penalty, or afford to hire an attorney. Some may

The final argument against the majority's decision in *M. L. B.* stems from the lack of a clear constitutional basis for its holding. In *Griffin*, on which the *M. L. B.* Court heavily relied, the Court deployed evocative language: "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has."⁸⁷ This decision, rendered in a criminal case, was based on both the Equal Protection and Due Process Clauses.⁸⁸ These Clauses, however, simply do not provide a basis for the outcome of *M. L. B.* The Equal Protection Clause is especially unhelpful to the *M. L. B.* Court's case for several reasons. First, even in *Boddie*, where the Court took the unique position of limiting a State's ability to charge filing fees in a civil proceeding, the Court's holding was not grounded in the Equal Protection Clause.⁸⁹ Second, disparate impact without legislative intent to discriminate, as occurred in *M. L. B.*, is not sufficient to create an equal protection violation.⁹⁰ Third, the Court admits

sincerely believe that the decision in *Boddie* was far more limited in scope—that is, applies only to divorce cases

...

[The] distinction between divorce and different kinds of controversies suggested in the *Boddie* opinion is the degree to which the disputes are regarded as 'fundamental.' . . . And since *Boddie* held that the right to a divorce was 'fundamental,' I can only conclude that almost every other kind of legally enforceable right is also fundamental to our society And I cannot believe that my Brethren would find the rights of a man with both legs cut off by a negligent railroad less 'fundamental' than a person's right to seek a divorce.

Meltzer v. LeCraw & Company, 402 U.S. 954, 955-58 (1971) (Black, J., dissenting) (denying certiorari in several cases attempting to apply *Boddie* to other civil cases). The logic presented by Justice Black in the quote above is very powerful. Substitute "*M. L. B.*" for "*Boddie*" and "parental status termination" for "divorce," and the same nearly irresistible logic can be applied to the Court's decision in *M. L. B.* Simply put, if one accepts the *M. L. B.* decision, it is difficult to make a coherent argument in support of the Court's limitation of that decision. Justice Thomas's fears of an open "floodgate" reflect this. See *M. L. B.*, 117 S. Ct. at 576-78 (Thomas, J., concurring).

87. *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

88. See *id.* at 18.

89. See *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971). Rather, the Court relied only on the Due Process Clause. See *id.* at 374. Justice Harlan, writing for the *Boddie* Court, completely rejected application of equal protection analysis to that case. See *M. L. B.*, 117 S. Ct. at 573 (Thomas, J., dissenting). According to Professor Laurence Tribe,

Justice Harlan had long preferred to locate constitutional protection for the poor in the due process, rather than the equal protection clause. Equal protection doctrine, which focuses on differential treatment of poor people as a class, contains no natural limiting principle which would readily distinguish access fees to divorce proceedings from tuition at a state university or a fee charged for a fishing license. Judicial intervention to redress poverty on the basis of equal protection is therefore in constant danger of becoming either wholesale or unprincipled, both of which Justice Harlan wanted to avoid.

TRIBE, *supra* note 79, at § 16-44, at 1639.

that fee requirements are normally only examined for a rational basis in Equal Protection Clause analysis.⁹¹ This minimal scrutiny makes sense, as "wealth" is not one of the suspect classifications that triggers strict scrutiny.⁹² The *M. L. B.* Court made much of the exception to this rational basis test for "cases criminal or 'quasi criminal in nature,'"⁹³ but that exception simply does not apply in this case.⁹⁴ In light of the low threshold of the rational basis test,⁹⁵ it is almost surely met in the *M. L. B.* case. The combination of these arguments reveals the failure of the Equal Protection Clause to provide a basis for the *M. L. B.* holding.

The Court's use of the Due Process Clause as support for its decision is even less convincing. Based on the majority's opinion alone, it is almost impossible to tell whether the Court views the Due Process Clause as supporting its conclusion, as the Court merely mentions the Clause without further elaboration. The majority satisfies itself with the statement: "The due process concern hones in on the essential fairness of the state-ordered proceedings anterior to adverse state action."⁹⁶ But the Court provides no specific analysis explaining why the process afforded to *M. L. B.* was so insufficient as to rise to the level of a due process violation. In fact, the majority itself undercuts the persuasiveness of its reliance on the Due Process Clause by seemingly conceding that its alternative source of support, the Equal Protection Clause, is more useful; it admits that most of

90. See *M. L. B.*, 117 S. Ct. at 573 (Thomas, J., dissenting) (citing *Washington v. Davis*, 426 U.S. 229 (1976)).

91. See *id.*, 117 S. Ct. at 567 (majority opinion) (citing *Ortwein v. Schwab*, 410 U.S. 656 (1973), for the proposition that fee requirements are normally examined only for rationality under the Equal Protection Clause).

92. For the proposition that wealth does not trigger heightened scrutiny under the Equal Protection Clause, see *James v. Valtierra*, 402 U.S. 137 (1971). Cf. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that the fact that one school district had a greater tax base, and thus more money for education, than another did not operate to discriminate against any suspect class).

93. *M. L. B.*, 117 S. Ct. at 568 (explaining that fees that interfere with the right to participate in political processes or with access to criminal judicial processes are subject to a much higher level of scrutiny).

94. For a discussion of why *M. L. B.* is neither a criminal case nor a case "quasi criminal in nature" within the meaning of *Mayer v. Chicago*, 404 U.S. 189 (1971), as well as a discussion of *Mayer*, *supra* page 911.

95. For an example of the extremely deferential nature of the rational basis test, see *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that laws banning sodomy pass the rational basis test and are constitutional).

96. *M. L. B.*, 117 S. Ct. at 566.

the Court's decisions in cases similar to *M. L. B.* "rest on an equal protection framework."⁹⁷

The prime argument in favor of using due process analysis in cases such as *M. L. B.* and *Boddie*, which extended constitutional protections normally limited to criminal defendants to indigent civil litigants, has been made by Justice Harlan, who argued that such cases seemed well-suited to a case-by-case examination of the nature of the benefit requested and the circumstances of the specific indigent plaintiff.⁹⁸ As the Court has stated in the past, "[D]ue process is flexible and calls for such procedural protections as the particular situation demands."⁹⁹ However, it is almost superfluous to counter a strong due process argument that was not made by the majority, for as Justice Thomas points out, "it is not clear that the majority relies on the Due Process Clause at all."¹⁰⁰

Even if the Court had provided more justification for its reliance on the Due Process Clause, its argument would have been unpersuasive because it is not clear that such a broad application of the Due Process Clause is in any way appropriate.¹⁰¹ Such an argument has been made by Justice

97. *Id.* at 566 (quoting *Bearden v. Georgia*, 461 U.S. 660, 665 (1983)).

98. See *TRIBE*, *supra* note 79, at § 16-44, at 1639, referring to *Boddie v. Connecticut*, 401 U.S. 371 (1971).

99. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1961). These statements carry weight, especially when combined with the *Mathews v. Eldridge* test for identifying the results of due process analysis in this area, which requires analysis of three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Note that this test was used to reach the result in *Lassiter*, in which it was determined that the decision whether counsel should be provided to the poor in parental-status termination cases should be made on a case-by-case basis. It has been argued that the application of the *Mathews* "flexible procedural due process balancing test" would result in a broader reading of *Boddie* and a waiver of many court costs for indigents. See *Austin*, *supra* note 85, at 773. Nonetheless, the Court did not apply the *Mathews* test in *M. L. B.*

100. *M. L. B.*, 117 S. Ct. at 571 (Thomas, J., dissenting).

101. The Due Process Clause protects individuals against deprivation of "life, liberty, or property without due process of law." U.S. CONST. amend. XIV, § 1. Application of this protection "requires the familiar two-stage analysis: We [the Court] must first ask whether the asserted individual interests are encompassed within the Fourteenth Amendment's protection of 'life, liberty, or property'; if protected interests are implicated, we then must decide what procedures constitute 'due process of law.'" *Ingraham v. Wright*, 430 U.S. 651, 672 (1977) (citations omitted). "[T]o determine whether due process requirements apply in the first place, we must look not to the

Black, who argued that application of the Due Process Clause in this type of case was improper:

This . . . is thus only another variant of the view often expressed by some members of this Court that the Due Process Clause forbids any conduct that a majority of the Court believes 'unfair,' 'indecent,' or 'shocking to their consciences.' Neither these words nor any like them appear anywhere in the Due Process Clause. If they did, they would leave the majority of Justices free to hold any conduct unconstitutional . . . [and] the chief value of a written Constitution . . . would have been lost.¹⁰²

The *M. L. B.* Court takes exactly the kind of action Justice Black opposed, trying to fit yet another right under the umbrella of the Due Process Clause that simply is not there.

Plainly put, it is clear that the Court saw a potential for injustice in the fact pattern of this case, and in an effort to avoid this injustice, relied on a twisting of precedent to reach the desired result. The constitutional basis for the majority's decision is murky at best, and Justice Ginsburg's opinion strategically chooses to deal with textual issues only on a vague level. It might be compassionate and fair policy for the States to provide free transcripts in parental status termination cases. Indeed, many States have taken this step already.¹⁰³ Nonetheless, this is a step for Mississippi's legislature to take, not the Supreme Court. The judicial fiat exercised by the majority in *M. L. B.* oversteps the Constitution.

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'weight' but to the *nature* of the interest at stake." *Id.* (quoting *Board of Regents v. Roth*, 408 U.S. 564, 570-71 (1972)). It is doubtful that *M. L. B.* was deprived of a liberty interest, which is often defined as deprivation of a license to marry, drive, or practice an occupation but in one case was merely "thought to encompass freedom from bodily restraint and punishment." *Id.* at 674 (citing *Rochin v. California*, 342 U.S. 165 (1952)). It is further difficult to see how *M. L. B.* was deprived of property, unless *M. L. B.*'s relationship to the children is seen as a property interest. Regardless of the outcome of the question at hand—whether *M. L. B.* has been deprived of life, liberty, or property—the Court, by failing to address this issue, failed to make its case. It was not enough for the Court to merely invoke "due process" as a magical word. The Court needed to support its application of the Due Process Clause through examination of the particular facts of the *M. L. B.* case.

102. *Goldberg v. Kelly*, 397 U.S. 254, 276-77 (1970) (Black, J., dissenting) (holding that an "evidentiary hearing" is necessary to terminate welfare benefits). Note that the *Mathews* test grew out of *Goldberg*. See *Mathews v. Eldridge*, 408 U.S. 471 (1961).

103. Arizona, California, Colorado, Georgia, Iowa, Kansas, Minnesota, Michigan, Ohio, and South Carolina are among these states. See *M. L. B.*, 117 S. Ct. at 567 n.13.

A VALUATION STANDARD THAT IS DIFFICULT TO SWALLOW:
INTERPRETING § 506(a) OF THE BANKRUPTCY CODE IN *Associates
Commercial Corp. v. Rash*, 117 S. Ct. 1879 (1997).

The question of how to value property confronts bankruptcy courts in a variety of contexts, but the question is particularly vexatious to courts when they must value collateral retained by a debtor under Chapter 13's "cram down" provision.¹ Under cram down, the debtor retains the collateral despite the secured creditor's objection and pays the creditor the present value of the allowed secured claim over time; in other words, the present value of the collateral.² In determining the value of the collateral, courts must follow § 506(a), the general provision of the Bankruptcy Code that governs valuation of claims.³ Courts have been divided over how to value collateral under § 506(a) in a cram down situation.⁴ Five circuits have valued collateral at its replacement value or a non-foreclosure value.⁵ The Fifth Circuit

1. See 3 COLLIER ON BANKRUPTCY ¶ 1300.01 (15th ed. 1997). Chapter 13, "Adjustment of Debts of an Individual With Regular Income," provides consumer debtors with an alternative to Chapter 7 liquidation bankruptcy. See also David Gray Carlson, *Car Wars: Valuation Standards in Chapter 13 Bankruptcy Cases*, 13 BANKR. DEV. J. 1, 3-4 (1996) ("The prodigal weight of authority in chapter 11 cases favors going concern value This standard might be viewed as largely settled. But in chapter 13 cases, courts are divided over the relevant valuation standard."). But see 1 NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 247 n.640 (1997) ("The Supreme Court's decision in *Rash* potentially, although not definitively, calls into question all section 506(a) opinions interpreting the appropriate valuation standard.").

2. See 11 U.S.C. §1325(a)(5)(B) (1994).

3. Section 506(a) provides that: "An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property . . ." 11 U.S.C. § 506(a) (1994).

4. When courts value collateral that is the personal property of a consumer debtor in a Chapter 13 situation, they usually consider its "replacement" value to be its retail value and its "foreclosure" or "liquidation" value to be its wholesale value, because the secured party would "liquidate" the collateral in the wholesale market. See Carlson, *supra* note 1, at 3. But see NAT'L BANKR. REVIEW COMM'N, *supra* note 1, at 245 ("The announced standards have not always been clear, evidenced by the fact that judges reach conflicting interpretations of prior court decisions addressing valuation standards.").

5. See *Taffi v. United States (In re Taffi)*, 96 F.3d 1190 (9th Cir. 1996) (en banc), cert. denied, 117 S. Ct. 2478 (1997); *Winthrop Old Farm Nurseries, Inc. v. New Bedford Inst. for Sav. (In re Winthrop Old Farm Nurseries)*, 50 F.3d 72 (1st Cir. 1995); *Metrobank v. Trimble (In re Trimble)*, 50 F.3d 530 (8th Cir. 1995); *Huntington Nat'l Bank v. Pees (In re*

held foreclosure value to be the appropriate value.⁶ Two circuits compromised, valuing the collateral at the midpoint between the foreclosure and the replacement values—a “split-the-difference” approach.⁷ Usually, whether a court valued the collateral at its replacement value or its foreclosure value hinged on which of the two sentences of § 506(a) it considered determinative.⁸

The United States Supreme Court answered this valuation question in *Associates Commercial Corp. v. Rash*,⁹ ruling that the appropriate valuation standard under § 506(a) is the replacement value of the collateral. This decision is unsettling because the language of § 506(a) does not clearly require a replacement value standard, and such a standard is inconsistent with a reading of § 506(a) in relation to the Bankruptcy Code as a whole. Furthermore, the valuation standard set forth by the Court is confusing, despite the Court’s emphasis on the need for a simple rule of valuation. The Supreme Court should instead have adopted a foreclosure, or wholesale, standard of valuation.

In March 1989, Elray Rash purchased a tractor-trailer truck for \$73,700 from a retail truck dealer.¹⁰ Rash traded in his old truck, worth \$16,011, and financed the remainder.¹¹ The dealer retained a lien on the truck to secure its loan and assigned the loan to Associates Commercial Corporation (“ACC”).¹² In March 1992, Rash and his wife Jean filed a petition for bankruptcy under Chapter 13 of the Bankruptcy Code.¹³ The amount outstanding on the truck loan at the time was \$41,171.01.¹⁴ Under their reorganization plan, the Rashses proposed that they keep the truck and pay ACC \$28,500 plus nine percent interest under the cram down provision of § 1325(a)(5)(B).¹⁵ ACC

McClurkin, 31 F.3d 401 (6th Cir. 1994); *Coker v. Sovran Equity Mortgage Corp. (In re Coker)*, 973 F.2d 258 (4th Cir. 1992).

6. See *Associates Commercial Corp. v. Rash (In re Rash)*, 90 F.3d 1036 (5th Cir. 1996), *rev’d*, 117 S. Ct. 1879 (1997).

7. See *General Motors Acceptance Corp. v. Valenti (In re Valenti)*, 105 F.3d 55 (2d Cir. 1997); *In re Hoskins*, 102 F.3d 311 (7th Cir. 1996).

8. See *supra* note 3.

9. 117 S. Ct. 1879 (1997).

10. See *In re Rash*, 90 F.3d at 1038-39.

11. See *id.* at 1039.

12. See *id.*

13. See *id.*

14. See *id.*

15. See *In re Rash*, 90 F.3d at 1039.

asserted that its claim was fully secured, however, and it filed proof of secured claim for \$41,171.01.¹⁶ The Rashes objected to this proof.¹⁷

The United States Bankruptcy Court for the Eastern District of Texas held an evidentiary hearing to determine the value of the Rashes' truck.¹⁸ ACC's expert witness valued the truck at \$41,000, its "current market value," or what an individual would pay if he bought the same truck from a dealer.¹⁹ The Rashes' expert valued the truck at \$31,875, its wholesale value, or what a dealer would pay to buy the truck from either the Rashes or ACC.²⁰ The bankruptcy court agreed with the Rashes' expert and valued the truck at \$31,875.²¹ In light of the court's valuation, the Rashes amended their reorganization plan in order to pay ACC the present value of \$31,875 over the life of the plan, an action that the bankruptcy court confirmed.²² ACC appealed both the order valuing of the truck at \$31,875 and the order confirming the plan.²³ The United States District Court for the Eastern District of Texas consolidated the appeals and affirmed the bankruptcy court's decision.²⁴ The Fifth Circuit Court of Appeals reversed, holding that the Rashes should pay ACC the truck's retail value—the amount they would have to pay to replace the truck.²⁵ The Fifth Circuit granted a rehearing en banc and affirmed the bankruptcy court and district court decisions, supporting a foreclosure valuation standard in an opinion in which nine judges joined and six dissented.²⁶

The United States Supreme Court, with Justice Ginsburg writing for the majority, reversed the Fifth Circuit and held that where a debtor retains the collateral in a Chapter 13 cram down, § 506(a) requires that the collateral be valued at its replacement value.²⁷ The Court highlighted the need for a "simple rule of

16. *See id.*

17. *See id.*

18. *See In re Rash*, 149 B.R. 430, 430-31 (Bkrcty. E.D. Tex. 1993).

19. *See In re Rash*, 90 F.3d 1036, 1039 (5th Cir. 1996).

20. *See id.* at 1039-40.

21. *See id.* at 1040.

22. *See id.*

23. *See id.*

24. *See In re Rash*, 90 F.3d at 1040.

25. *See In re Rash*, 31 F.3d 325 (5th Cir. 1994).

26. *See In re Rash*, 90 F.3d at 1061.

27. Chief Justice Rehnquist, Justice O'Connor, Justice Kennedy, Justice Souter, Justice Thomas, and Justice Breyer joined; Justice Scalia joined in all but note 4, which discounts

valuation"²⁸ and defined replacement value as "the price a willing buyer in the debtor's trade, business, or situation would pay a willing seller to obtain property of like age and condition."²⁹ In footnote six, the Court attempted to clarify its definition:

Our recognition that the replacement-value standard, not the foreclosure-value standard, governs in cram down cases leaves to bankruptcy courts, as triers of fact, identification of the best way of ascertaining replacement value on the basis of the evidence presented. Whether replacement value is the equivalent of retail value, wholesale value, or some other value will depend on the type of debtor and the nature of the property. . . . [R]eplacement value, in this context, should not include certain items. For example, where the proper measure of the replacement value of a vehicle is its retail value, an adjustment to that value may be necessary: A creditor should not receive portions of the retail price, if any, that reflect the value of items the debtor does not receive when he retains his vehicle, items such as warranties, inventory storage, and reconditioning.³⁰

The Supreme Court disagreed with the Fifth Circuit's interpretation of the language of § 506(a)³¹ and determined that the first sentence of § 506(a) "imparts no valuation standard," but instead directs that the claim be split into secured and unsecured claims, with the secured claim "limited to the value of the collateral."³² Thus, the Court read the first sentence of § 506(a) as an instruction on *what* to evaluate, not an instruction on *how* to value collateral.³³

The Court relied on the second sentence of § 506(a) for guidance on how to value the collateral.³⁴ The Court considered this sentence, which instructs courts to determine the value "in light of [its] . . . proposed disposition or use . . .", to be of "paramount importance."³⁵ Justice Ginsburg argued that whether the debtor disposes of or uses the collateral under

the relevance of § 506(a)'s legislative history; and Justice Stevens dissented. See *In re Rash*, 117 S. Ct. at 1881-82.

28. *Id.*, at 1886 (quoting *In re Hoskins*, 102 F.3d 311, 314 (7th Cir. 1996)).

29. *Id.* at 1884 n.2.

30. *Id.* at 1884 n.6.

31. See *supra* note 3.

32. *In re Rash*, 117 S. Ct. at 1884.

33. See *id.* at 1885 (quoting § 506(a)).

34. See *id.*

35. *Id.*

§ 506(a) depends on whether the debtor chooses, under § 1325(a)(5), to retain the collateral or to surrender the collateral to the creditor.³⁶ Justice Ginsburg reasoned that a replacement value “renders meaningful the key words ‘disposition or use.’”³⁷ She found foreclosure value inappropriate because the debtor is not disposing of the property.³⁸ Furthermore, the Court argued that a secured creditor faces more risks when the debtor retains the collateral under § 1325(a)(5)(B) than when the debtor surrenders the collateral under § 1325(a)(5)(C). Specifically, the debtor might default again, and the collateral may depreciate during its continued use.³⁹ Thus, a replacement value should be used so that the creditor is indifferent between § 1325(a)’s two alternatives.⁴⁰

Although the Fifth Circuit used the legislative history of § 506(a) to bolster its decision,⁴¹ the Supreme Court found it “unedifying, offering snippets that might support either standard of valuation.”⁴² According to the Court, the Senate Report commenting on § 506(a) does not provide a compelling argument for foreclosure value because it only repeats the language of § 506(a), and the House Report is unreliable because it comments on a version of the bill lacking the critical second sentence of § 506(a) that Congress added later.⁴³

The Supreme Court also rejected the Seventh Circuit’s “split-the-difference” approach, under which the collateral was valued at the midpoint between its retail and wholesale values.⁴⁴ The Court reasoned that “[s]ection 506(a) calls for the value the property possesses in light of the ‘disposition or use’ in fact ‘proposed,’ not the various dispositions or uses that might have been proposed.”⁴⁵ In addition, the Court rejected the “ruleless”

36. *See id.*

37. *In re Rash*, 117 S. Ct. at 1885.

38. *See id.* at 1886.

39. *See id.* at 1885.

40. *See id.*

41. *See In re Rash*, 90 F.3d 1036, 1055-59 (5th Cir. 1996) (pointing to legislative history that supports the argument that replacement value is not the appropriate valuation standard and to legislative history recording congressional intent to encourage a debtor’s use of Chapter 13 over Chapter 7).

42. *In re Rash*, 117 S. Ct. at 1886 n.4.

43. *See id.* (citing S. REP. NO. 95-989, at 68 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5854; H. REP. NO. 95-595, at 124 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6085).

44. *See id.* at 1886.

45. *Id.*

approach supported by the Second Circuit that allowed for a case-by-case valuation based on individual facts and circumstances.⁴⁶

In his dissent, Justice Stevens argued that although the language of § 506(a) is unclear, foreclosure value is more true to the language of § 506(a).⁴⁷ He argued that the first sentence of § 506(a) requires courts to value collateral from the creditor's perspective that is, the collateral's value in the open market.⁴⁸ With regard to the second sentence of § 506(a), Justice Stevens noted that the purpose of cram down under § 1325(a)(5)(B), and thus the purpose of the "valuation under § 506(a), is to put the creditor in the same shoes as if he were able to exercise his lien and foreclose."⁴⁹ Considering the second sentence's additional instruction to perform the valuation "in light of the . . . proposed disposition or use of such property," Justice Stevens emphasized that § 506(a) is a "utility" provision, a general provision applying to the entire Code.⁵⁰ He argued that although the second sentence might not have effect under cram down, it is not surplusage because it has "operational significance in . . . other Code applications."⁵¹ He also criticized a replacement value standard because it provides a windfall to undersecured creditors at the expense of unsecured creditors.⁵²

The Supreme Court should have initially adopted the standard at which it ultimately arrived—wholesale value.⁵³ Although the Supreme Court's reading of the language of § 506(a) as requiring replacement value is a plausible one, the language of § 506(a) is ambiguous and has alternative interpretations. When deciding an issue of statutory interpretation, "a court should always turn first to one, cardinal canon before all others . . . [A] legislature says in a statute what it means and means in a statute what it says When the words

46. See *id.* at 1886 (citing *In re Valenti*, 105 F.3d 55, 62-63 (2d Cir. 1997)).

47. See *In re Rash*, 117 S. Ct. at 1887 (Stevens, J., dissenting).

48. See *id.*

49. *Id.*

50. *Id.* at 1887.

51. *Id.*

52. See *In Re Rash*, 117 S. Ct. at 1887.

53. See NAT'L BANKR. REVIEW COMM'N, *supra* note 1, at 243 (recommending that Congress enact a statutory provision so that "[a] creditor's secured claim in personal property [is] determined by the property's wholesale price").

of a statute are unambiguous . . . ‘judicial inquiry is complete.’”⁵⁴ But, because the language of § 506(a) is not clear, a court’s interpretation of § 506(a) should not end with its examination of the plain language. As Judge Posner pointed out in *In re Hoskins*, the fact that *both* sides support opposing valuation standards with the “plain language” of § 506(a) is a “bad sign.”⁵⁵

The language of the first sentence of § 506(a) does not clearly require the reading the Supreme Court adopted. The Supreme Court read the first sentence of § 506(a) as indicating only *what* to value, not *how* to value it.⁵⁶ But Congress would have used a more “concise, simple, and direct phrase” than “the value of the creditor’s interest in the estate’s interest in such property” if it had intended the first sentence to refer only to the “value of the collateral.”⁵⁷ Further, the second sentence begins with “[s]uch value,” indicating that the first sentence establishes a “value” on which the second sentence elaborates.⁵⁸ The second sentence of § 506(a) is also ambiguous and does not clearly require the meaning the Supreme Court gave to it. The Supreme Court concentrated on the second sentence’s instruction to consider the “proposed disposition or use” of the property.⁵⁹ The Court reasoned that because the debtor is “using” the property, a foreclosure value is inconsistent with the reality of the situation.⁶⁰ Had Congress intended the second sentence to be dispositive, however, it would have used a stronger phrase than “in light of.”⁶¹ As the Fifth Circuit argued, the phrase “in light of” implies that the court should only *consider* the proposed disposition or use.⁶² Furthermore, the debtor’s retention of the collateral does not require that its

54. *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

55. 102 F.3d 311, 313 (7th Cir. 1996).

56. *See In re Rash*, 117 S. Ct. at 1885.

57. *In re Rash*, 90 F.3d 1036, 1043 (5th Cir. 1996).

58. *See* Brief of Amicus Curiae, National Association of Consumer Bankruptcy Attorneys, Inc. (“NACBA”) in support of Respondents at *12, *Associates Commercial Corp. v. Rash (In re Rash)*, 117 S. Ct. 1879 (1997) (No. 96-454) [hereinafter NACBA Brief].

59. *See In re Rash*, 117 S. Ct. at 1885.

60. *See id.* at 1885-86 (citing *In re Winthrop Old Farm Nurseries*, 50 F.3d 72, 75 (1st Cir. 1995)).

61. *See In re Rash*, 90 F.3d at 1049.

62. *See id.* (defining “in light of” as “[i]n consideration of” (citing THE AMERICAN HERITAGE DICTIONARY 729 (2nd Coll. ed. 1982))).

value be considered only from his perspective.⁶³ The Court's construction of § 506(a) is a possible interpretation, but its language does not clearly require such a reading.

Courts and commentators have provided an alternative interpretation of the language of § 506(a). The Fifth Circuit's analysis of that section, which called for starting with foreclosure value under the first sentence of § 506(a) and adjusting it if a particular disposition or use affects the value, is a plausible reading.⁶⁴ The amicus curiae brief submitted by Donald and Madelaine Taffi in support of the debtor's proposed wholesale valuation standard in *Rash* noted that:

This process will not mandate an automatic 'wholesale' value or an automatic 'retail' value in any given situation but will instead require an examination of the facts relating to the specific creditor in question, to the specific lien in question, to the specific property in question and to the specific plan in question.⁶⁵

The second sentence of § 506(a) also has several alternative readings. It is possible that Congress included the phrase "such value shall be determined in light of the purpose of the valuation" to advise courts that valuation may change throughout a bankruptcy proceeding.⁶⁶ This reading is supported by legislative history, which explains that "valuation early in . . . a proceeding under §§ 361-363 would not be binding upon the debtor or creditor at the time of confirmation of the plan."⁶⁷ It is important to realize that § 506(a) is used to determine the value of secured claims in other Chapters of the Code, including determining whether a debtor meets the requirements to petition for Chapter 13 bankruptcy under § 109(e); whether a secured creditor should be granted relief

63. *See id.* at 1047-48 ("When the collateral is in the hands of the debtor in a Chapter 13 cram down, it is worth something to *both* the debtor and the creditor." (emphasis added)).

64. *See id.*, at 1042-43.

65. Brief for Donald and Madelaine Taffi as Amicus Curiae Supporting Respondents at *4-5, *Associates Commercial Corp. v. Rash* (*In re Rash*) 117 S. Ct. 1879 (1997) (No. 96-454).

66. *See, e.g., In re Rash*, 90 F.3d 1036, 1046 (5th Cir. 1996) (citing *Resolution Trust Corp. v. Murray* (*In re Midway Partners*), 995 F.2d 490, 494 (4th Cir. 1993), *cert. denied* 510 U.S. 1010 (1993); *Schreiber v. United States* (*In re Schreiber*), 163 B.R. 327, 332 (Bankr. N.D. Ill. 1994)).

67. *Id.* at 1046 n.13 (citing S. REP. NO. 95-989, at 68 (1978), *reprinted in* 1978 U.S.C.A.N. 5787, 5854).

from the automatic stay under § 362; whether a secured creditor is adequately protected under § 363; whether there has been a preference granted under § 547; and for redemption under § 722.⁶⁸

Courts and commentators have interpreted the phrase “the value of the collateral shall be determined in light of . . . the proposed disposition or use of the collateral” differently. The National Association of Consumer Bankruptcy Attorneys has argued that courts that interpret § 506(a) as requiring a replacement value “refuse to recognize that some types of securing property do in fact have substantially different values if used in different ways.”⁶⁹ For instance, land could be farmed or could be developed, and each use would result in a different value.⁷⁰ One bankruptcy court set the value of a bankrupt debtor’s land at its higher crop land value, even though the debtor proposed using the land for pasture.⁷¹ Consideration of the disposition or use of the property is necessary to account for “a use or disposition of the collateral that is either destructive or unanticipated in the sense that it would increase the risk of loss to the creditor’s interest in the collateral.”⁷² Bankruptcy courts appreciate the flexibility offered by the second sentence of § 506(a), for “the bankruptcy judge should not have his hands tied.”⁷³

The Seventh Circuit suggested a different reading of the second sentence of § 506(a). Judge Posner believed that § 506(a)’s instruction to consider the disposition or use in a valuation “invites judicial attention” to the problem of “bilateral monopoly.”⁷⁴ A bilateral monopoly occurs when the collateral is “essential to the debtor’s livelihood,” and when “two [people] can bargain over some thing of value only with each other; neither can rely on competition to determine the price of the thing.”⁷⁵ According to Judge Posner, the relationship between a secured creditor and a debtor near default could create a

68. See NACBA Brief, *supra* note 58, at *13.

69. *Id.* at *14.

70. See *id.*

71. See *id.* (citing *Speck v. United States*, 109 B.R. 1021 (Bankr. D.S.D. 1989)).

72. *In re Rash*, 90 F.3d 1036, 1049 (5th Cir. 1996) (quoting *In re Claesys*, 81 B.R. 985, 992 (Bankr. D.N.D. 1987)).

73. NACBA Brief, *supra* note 58, at *13 (citing *Speck*, 109 B.R. at 1021).

74. *In re Hoskins*, 102 F.3d 311, 315 (7th Cir. 1996).

75. *Id.*

bilateral monopoly outside of bankruptcy.⁷⁶ If the debtor defaults, the creditor receives only the forced sale value and the debtor must buy a replacement at fair market value if the collateral is a necessity.⁷⁷ At any value between the forced sale value and the fair market value, both parties would be better off than if the secured party repossessed the collateral and sold it at its foreclosure value.⁷⁸ Therefore, the parties will negotiate a price somewhere between these two points and reschedule the debtor's payments where the "use" of the collateral is important to the debtor.⁷⁹

The Supreme Court should have considered the Bankruptcy Code as a whole to determine Congress's intent with respect to § 506(a). An examination of this section in relation to the Code as a whole suggests a foreclosure value standard.⁸⁰ Given the numerous and contradictory interpretations of the language of § 506(a), one cannot conclude that it is unambiguous. In situations where the language of the statute does not provide clear guidance, judicial inquiry should not end with an examination of that language. Often, courts rely on legislative history when faced with such an ambiguous statute.⁸¹ In this case, however, the legislative history of § 506(a) is unreliable. For instance, the House Report refers to a version of the bill that did not contain the critical second sentence of § 506(a).⁸² Even if the legislative history is reliable, it points in both directions.⁸³ Thus, courts must rely on supplemental rules of statutory interpretation to determine the meaning of § 506(a).

Section 1325(a)(5) presents the debtor's surrender of the collateral to the creditor and the debtor's retention of the collateral for use in his reorganization as alternatives.⁸⁴ If the

76. *See id.*

77. *See id.*

78. *See id.* at 316.

79. *See In re Hoskins*, 102 F.3d 311, 316 (7th Cir. 1996).

80. *See Carlson*, *supra* note 1, at 7.

81. *See Blum v. Stenson*, 104 S. Ct. 1541, 1548 (1984) ("Where, as here, the resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear.").

82. *See In re Rash*, 117 S. Ct. at 1886 n.4 (citing *In re Rash*, 90 F.3d 1036, 1056 (5th Cir. 1996) (quoting H.REP. NO. 95-595, at 124 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6085)).

83. *See In re Hoskins*, 102 F.3d at 314.

84. *See* 11 U.S.C. §§ 1325(a)(5)(B),(C) (1994).

creditor would receive wholesale value under § 1325(a)(5)(C) when the debtor surrendered the collateral and the creditor sold it, one would expect that, under § 1325(a)(5)(B), the creditor would not receive more than wholesale, or the creditor would be better off under cram down.⁸⁵ Given the symmetry of § 1325(a)(5), it is beyond the power of the courts to contradict the intention of Congress and to provide extra compensation where Congress has not so provided.

Proponents of a replacement value standard argue that the two alternatives do not produce equal results, because a secured creditor is exposed to extra risk when the debtor continues to use the collateral.⁸⁶ If the debtor defaults a second time and the collateral has continued to depreciate, the secured creditor will receive less than if it had foreclosed initially, and thus, is worse off under § 1325(a)(5)(B).⁸⁷

These fears do not justify a replacement value standard. Chapter 13 provides several protections for secured creditors to ensure that they are not worse off under § 1325(a)(5)(B). Most significantly, § 1325 requires that the debtor pay the secured creditor the present value of its secured claim over the life of the plan.⁸⁸ The total payments under the plan include both the principal amount of the secured claim and interest. In setting the interest rate, most courts use the "new loan approach," which treats cram down as though the creditor were making "a new loan in the amount of the value of the collateral rather than repossess[ing] it, and the creditor is entitled to interest on his loan."⁸⁹ The interest rate under this approach equals "the rate the debtor would pay a commercial lender for a loan of equivalent amount and duration considering the risk of default and any security."⁹⁰ Thus, the discount accounts not only for the time value of money, but also for the increased risk to the

85. See *In re Rash*, 90 F.3d at 1047.

86. See, e.g., *id.* at 1049.

87. See *id.*

88. See 11 U.S.C. § 1325(a)(5)(B)(ii) (1994).

89. Todd J. Zywicki, *Cram Down and the Code: Calculating Cramdown Interest Rates Under the Bankruptcy Code*, 19 T. MARSHALL L. REV. 241, 249 (1994). But see *id.* at 250. A minority of courts use the "cost of funds" approach, under which the court sets the cramdown interest rate according to what it would cost the creditor to borrow to replace the funds it is not receiving because of the debtor's retention. This rate does not account for the additional risk to the secured creditor. *Id.*

90. *Id.* at 249 (citing *In re Camino Real Landscape Maintenance Contractors, Inc.*, 818 F.2d 1503, 1504 (9th Cir. 1987)).

creditor. In *Rash*, the debtor's plan paid ACC nine percent interest, well above the rate on a risk-free government bond.⁹¹ Second, the debtor is required to "adequately protect the security or the creditor may obtain relief from the automatic stay imposed by U.S.C. § 362 and repossess the property."⁹² Third, the secured creditor can protect itself by changing the terms of its lending, such as the amount of the down payment and the interest rate it sets.⁹³

Any loss to the creditor resulting from an inability to foreclose immediately is negligible and does not justify providing the creditor with extra protection. Replacement value proponents do not address the windfall that the secured creditor receives if the debtor does not default. Furthermore, compensation should be based on "actual risk, not a universally-presumed risk incorporated into a valuation standard applicable to all debtors and all situations."⁹⁴

The "best interests of the creditors test" in § 1129 of the Bankruptcy Code provides additional support for a foreclosure value standard.⁹⁵ Under this test, unsecured creditors must receive from a debtor's reorganization plan at least the amount they would have received in a Chapter 7 liquidation.⁹⁶ This test indicates that Congress intended a liquidation standard to be used in reorganizations.⁹⁷ If unsecured creditors are provided the value they would have received from their claims under liquidation, it is likely that secured creditors claims were intended to be treated similarly.⁹⁸

Courts have also weighed arguments based on principles of equity. A party should not receive "a windfall merely by reason of the happenstance of bankruptcy."⁹⁹ Supporters of a replacement value standard argue that a wholesale value standard would

91. See *In re Rash*, 117 S. Ct. at 1887 n.* (Stevens, J., dissenting).

92. NACBA Brief, *supra* note 58, at 6.

93. See *In re Rash*, 90 F.3d at 1053 (citing 2 KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY § 5.48, at 5-134 (2d ed. 1994 & Supp. 1995)).

94. NAT'L BANKR. REVIEW COMM'N, *supra* note 1, at 258.

95. See 11 U.S.C. §§ 1129(a)(7)(A)(ii); 1325(a)(4) (1994); see also Carlson, *supra* note 1, at 55.

96. See Carlson, *supra* note 1, at 55.

97. See *id.*

98. See *id.*

99. *Butner v. United States*, 440 U.S. 48, 55 (1979) (quoting *Lewis v. Manufacturers Nat'l Bank*, 364 U.S. 603, 609 (1961)).

allow a debtor to value collateral at its wholesale value in his plan and sell the collateral at its higher retail value, “pocketing the difference.”¹⁰⁰ This argument is unrealistic, especially for individual wage-earners filing for bankruptcy under Chapter 13. As the National Bankruptcy Review Commission notes, “the debtor is ill-equipped to take the steps that add the requisite value that would be necessary to fetching a retail price, such as providing a warranty, reconditioning, offering credit terms, or being well located in a shopping area.”¹⁰¹ Proponents of a replacement value standard have argued that replacement value should be used because the “surplus exists only because of [the creditor’s] collateral.”¹⁰² However, the debtor’s contribution of labor generates part of the surplus.¹⁰³

The Supreme Court stressed the need for a clear standard, but it set forth an ambiguous standard.¹⁰⁴ Although the Supreme Court reversed the Fifth Circuit’s holding that wholesale value is the appropriate value and adopted a replacement value, footnote six of its opinion seems to support a wholesale value.¹⁰⁵

The Supreme Court specifically rejected the Second Circuit’s “ruleless approach allowing use of different valuation standards based on the facts and circumstances of individual cases.”¹⁰⁶ Yet a comparison between the language of *In re Valenti*,¹⁰⁷ whose “ruleless” approach the Court avoided, and the language of footnote six reveal that the two opinions have similar language. *Valenti* provided that “the correct result is that no fixed value, whether it be retail, wholesale, or some combination of the two, should be imposed on every bankruptcy court”¹⁰⁸ Similarly, the Supreme Court noted that although it was adopting a replacement standard, “[w]hether replacement value is the equivalent of retail value, wholesale value, or some other value will

100. See *In re Rash*, 90 F.3d 1036, 1054 (5th Cir. 1996).

101. See NAT’L BANKR. REVIEW COMM’N, *supra* note 1, at 257-58.

102. *In re Rash*, 90 F.3d at 1072 (Smith, J., dissenting).

103. See *id.* at 1052 n.21 (majority opinion).

104. See NAT’L BANKR. REVIEW COMM’N, *supra* note 1, at 246 (noting that the “application of the standard is fraught with ambiguity”).

105. See *id.* at 251 (“Following the Supreme Court’s instructions in footnote six, a court likely would start with retail and subtract most costs that comprise the difference between the retail and wholesale prices.”).

106. *In re Rash*, 117 S. Ct. at 1886 n.5.

107. See *In re Valenti*, 105 F.3d 55 (2d Cir. 1997).

108. *Id.* at 62 (emphasis added).

depend on the type of debtor and the nature of the property.”¹⁰⁹ In addition, both courts suggest fact-based calculations. *Valenti* highlighted the language of the legislative history of § 506(a), pointing out that “[c]ourts [must] . . . determine value on a case-by-case basis, taking into account the *facts of each case*”¹¹⁰ The Supreme Court also noted that its holding “leaves to bankruptcy courts, as triers of fact, identification of the best way of ascertaining replacement value on the *basis of the evidence presented*.”¹¹¹

In footnote six, the Supreme Court instructed bankruptcy courts to subtract certain retail costs from the replacement value.¹¹² But, “[r]etail value is simply wholesale value plus the costs of selling at retail”¹¹³ One commentator notes that “the distinction between wholesale and retail prices is a false one. Retail prices reflect value added by the retailer. If the cost of value added by the retailer were to be removed from retail value, the remainder would be wholesale value.”¹¹⁴ Thus, because the Supreme Court instructed courts to remove these costs, what is left is the wholesale value.¹¹⁵ The Court would have provided a much clearer rule consistent with congressional intent that collateral should be valued at its foreclosure value if the Court had adopted a wholesale standard initially.¹¹⁶

In holding that replacement value is the appropriate value under Chapter 13 cram down, the Supreme Court disregarded the ambiguity and the number of possible interpretations of § 506(a). The Court chose only one plausible interpretation without considering its consistency with the remainder of the Code, which points to a foreclosure value standard instead. Moreover, the Court’s opinion establishes a confusing valuation standard. The Court held that replacement value is the appropriate standard, but its instruction in footnote six to deduct certain retail costs suggests in effect a wholesale value. In

109. *In re Rash*, 117 S. Ct. at 1886 n.6 (emphasis added).

110. *In re Valenti*, 105 F.3d at 62 (emphasis added).

111. *In re Rash*, 117 S. Ct. at 1886 n.6 (emphasis added).

112. *See id.*

113. *In re Hoskins*, 102 F.3d 311, 312 (7th Cir. 1996) (citing *Samson v. Alton Banking & Trust Co.* (*In re Ebbler Furniture & Appliances, Inc.*), 804 F.2d 87, 92 (7th Cir. 1986) (Easterbrook, J., concurring)).

114. Carlson, *supra* note 1, at 7.

115. *See* NAT’L BANKR. REVIEW COMM’N, *supra* note 1, at 251.

116. *See id.*

a Chapter 13 cram down situation similar to the Rashes' reorganization, the appropriate valuation standard is the wholesale value of the collateral.

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