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**THE SUPREME COURT, THE SOLICITOR GENERAL AND
BANKRUPTCY: BFP v. RESOLUTION TRUST CORPORATION**

Ronald J. Mann^{*}

Abstract

This chapter tells the story behind BFP v. Resolution Trust Corporation. I see BFP as a case that pitted relatively plain statutory language supporting the debtor-in-possession against policy interests supporting a secured creditor. I argue that an important explanation for the Supreme Court's decision to favor policy over the language of the statute was its perception of a need to protect the availability of non-bankruptcy remedies for secured creditors. Accordingly, I situate my discussion of BFP in the context of the role that the federal government has played in the Supreme Court's cases interpreting the Bankruptcy Code. In general, I contend, the Supreme Court's decisions evince a general skepticism about broad application of the Bankruptcy Code, which often has led to surprisingly narrow interpretations of relatively clear language. That reading challenges the common understanding of bankruptcy law as a domain of the Court's plain-language interpretative practice.

I. INTRODUCTION

Speculators borrow money to purchase a house in Newport Beach, California. They make no down payment, and fail to make any of the mortgage payments. After a few months, the lender, a local savings and loan association, forecloses, selling the house at auction for well under the purchase price (though more than the mortgage). The borrowers then file for bankruptcy, and, in the bankruptcy proceeding, try to invalidate

^{*} Ben H. & Kitty King Powell Chair in Business & Commercial Law, University of Texas School of Law. I thank Bob Rasmussen for inviting me to participate, and Mechele Dickerson, Dan Keating, Dan Klerman, Bob Rasmussen, Margo Schlanger, and Jay Westbrook for useful comments on an earlier draft. Although I represented the Resolution Trust Corporation in the litigation of the *BFP* case in the Supreme Court, the views that I express here are my own and do not represent the views of the Office of the Solicitor General, Justice Department, the (now defunct) Resolution Trust Corporation, or any other agency of the United States. Similarly, although I worked as a law clerk for Justice Powell while the Court was considering *Kelly v. Robinson* and *Norwest Bank Worthington v. Ahlers*, my discussion of those cases should not be attributed to Justice Powell or any other member of the Court. References to briefs and appendices refer to the record in the Supreme Court in *BFP v. Resolution Trust Corporation*, No. 92-1370 (O.T. 1993).

the foreclosure sale as a fraudulent transfer, arguing that the house was worth substantially more than the sales price. After the lower courts dismissed the borrowers' claim, the Supreme Court granted certiorari to resolve a circuit conflict. Following full briefing and argument, the Court held in *BFP v. Resolution Trust Corporation*¹ that a bankruptcy court does not have the power to overturn a real property foreclosure that is properly conducted under state law.

The case involved interpretation of a provision of the Bankruptcy Code that permits a bankruptcy trustee (or debtor-in-possession) to avoid certain transfers of property if the debtor "received less than a reasonably equivalent value in exchange for such transfer."² Thus, the legal question in *BFP* was whether the consideration received in a foreclosure sale constitutes "reasonably equivalent value" as a matter of law, without respect to whether the amount approximated the ordinary fair market value. I represented the Resolution Trust Corporation in the Supreme Court, arguing that bankruptcy courts should not have the power to second-guess the bidding that takes place at regularly conducted and noncollusive foreclosure sales without clearer language to that effect in the Bankruptcy Code.³

¹ 511 U.S. 531 (1994).

² 11 U.S.C. § 548(a)(1)(B)(i).

³ My account is influenced by my own participation in the case. For more objective accounts, see Robert M. Lawless, *Legisprudence Through a Bankruptcy Lens: A Study in the Supreme Court's Bankruptcy Cases*, 47 *Syracuse L. Rev.* 1, 70-77 (1996) (suggesting that the opinion evidences Justice Scalia's discomfort at the nontextualist approach and would have been better served by more frank pragmatism); Elizabeth Warren and Jay Lawrence Westbrook, *The Law of Debtors and Creditors* 571 (5th ed. 2005) (expressing ambivalence about the policies served by the outcome and amusement at the "dueling plain meanings" urged in the competing opinions).

Yet even I can readily acknowledge that the most natural reading of the statute would support some assessment of the price received at the sale. Thus, from my perspective, this case presents a conflict between policy and the result that follows most naturally from the statute. Considering the nature of that conflict, it might come as a surprise that Justice Scalia is the author of the more holistic opinion, which gives priority to institutional concerns. In this case, it is Justice Souter who provides the strongly worded dissent peppered with a biting reliance on the plain language of the statute. However, before I discuss that opinion in detail, I provide some background on the history of the legal issue. Then, I turn back to the case itself, emphasizing the facts of the underlying transactions, the lower court decisions, and the Supreme Court opinions and the process by which those opinions were issued. Finally, placing the Court's decision in the broader context of bankruptcy decision-making, I emphasize two features of the case and its background. The first is the aftermath of the S&L crisis of the 1980's, which aligned the federal government with the interests of secured creditors in bankruptcy cases. The second is the perspective the Court holds on bankruptcy law – a narrow, insular, and technical area, in which the Court's general approach is to minimize conflicts associated with unduly broad applications of bankruptcy powers.

II. FORECLOSURE AS A FRAUDULENT CONVEYANCE

Like many bankruptcy cases, *BFP* presents a conflict between the powers of a bankruptcy court and rights under a separate legal regime. On the one hand, bankruptcy law generally requires that creditors suffer equally from a debtor's financial distress.⁴

⁴ Douglas G. Baird, *Elements of Bankruptcy* chs. 7, 8 (4th ed. 2006); Warren & Westbrook, *supra* note 3, at 484, 490-91.

Among other things, this means that one creditor should not profit to the detriment of other creditors through transactions with a distressed debtor before formal bankruptcy proceedings begin.⁵ Thus, bankruptcy law prohibits both transfers that the debtor makes fraudulently or for inadequate consideration (both are called fraudulent transfers),⁶ and payments that the debtor makes to creditors shortly before bankruptcy (labeled preferences).⁷

On the other hand, real property law provides rules that specify when, and under what circumstances, conveyances become final. Even though foreclosure prices are often just a fraction of the sales prices achieved through other types of market transactions, those rules generally prohibit challenges to foreclosure sales based solely on price.⁸ The rationale is that rules interfering with the finality of foreclosure sales make it harder for third parties to bid and thus depress the prices received at those sales. Thus, the market for distressed real property could suffer if the purchaser's title depends upon a judge's after-the-fact determination of a "fair" valuation of the property.

The bankruptcy and real property regimes potentially conflict when property of a distressed borrower is sold at a foreclosure sale for substantially less than its fair market value and that borrower later goes bankrupt. Invalidating such a sale would further the

⁵ Baird, *supra* note 4, ch. 7; Warren & Westbrook, *supra* note 3, at 484-510.

⁶ 11 U.S.C. § 548.

⁷ 11 U.S.C. § 547.

⁸ Grant S. Nelson & Dale A. Whitman, *Real Estate Finance Law* § 7.20 (4th ed. 2001); *Restatement of the Law of Property (Mortgages)* 3rd § 8.3. Given the reality of low-price foreclosure sales, the debtor's recourse is to protect itself either by bidding for the property up to a fair value at the foreclosure sale or by selling the property in a consensual transaction before the foreclosure and applying the proceeds against the debt. See generally Ronald J. Mann, *Strategy and Force in the Liquidation of Secured Debt*, 96 Mich. L. Rev. 159 (1997).

interests of non-foreclosing creditors in maximizing the value of the bankruptcy estate, at least in a case in which the property was worth more than the total amount due to the foreclosing creditor. At the same time, invalidating such a sale would interfere with the ability of the secured-credit system to redeploy collateral to a solvent owner in an expeditious manner. Rules that lengthen the period when collateral remains in the hands of the distressed borrower impose costs by interfering with the effective rehabilitation and use of land and improvements.

The question is whether fraudulent transfer rules under the bankruptcy regime apply to foreclosure sales that the real property regime validates. The problem is complicated somewhat by the long history of rules banning and invalidating fraudulent transfers, which predate the first bankruptcy statute by centuries. Thus, they have been, and remain, a common feature of state law, parallel to the applicable provisions of the Bankruptcy Code. Most famously, Britain's 1571 Statute of Elizabeth invalidated any conveyance made with the intention to hinder, delay, or defraud creditors.⁹ Many states adopted similar statutes, long before the adoption of a general federal bankruptcy law in 1898.¹⁰

Even after the adoption of the Bankruptcy Act of 1898, this continued to be a fertile field for state legislative activity.¹¹ Thus, NCCUSL in 1918 promulgated the

⁹ Act Against Fraudulent Deeds, 13 Eliz., c. 5.

¹⁰ See National Conference of Commissioners on Uniform State Laws, Uniform Fraudulent Transfer Act: Summary, available at http://nccusl.org/Update/uniformact_summaries/uniformacts-s-ufta.asp [hereinafter NCCUSL UFTA Summary].

¹¹ For a lucid discussion of the legal framework before and after *BFP*, see Marie T. Reilly, A Search for Reason in "Reasonably Equivalent Value" After *BFP v. Resolution Trust Corp.*, 13 Am. Bankr. Inst. L. Rev. 261 (2005).

Uniform Fraudulent Conveyance Act (the UFCA). The UFCA provided a uniform template for harmonizing the preexisting body of state fraudulent conveyance law, which had consisted of a patchwork of specific statutes modeled on the Statute of Elizabeth. Twenty-six states eventually adopted the UFCA.¹² However, most state law now tracks the 1984 Uniform Fraudulent Transfer Act (the UFTA), which has been adopted in 42 states.¹³ Of importance to this discussion, both the UFTA and the UFCA permit a court to invalidate a transfer not only because of a showing of actual or intentional fraud by the debtor/transferor, but also upon a showing of constructive fraud – generally some showing that the debtor received an inadequate consideration for the transferred assets.¹⁴

Although the 1984 UFTA harmonized state fraudulent transfer law with the federal fraudulent transfer provisions enacted in the Bankruptcy Act of 1978,¹⁵ the problem in *BFP* reflects a slight difference between the federal and state definitions. The question is how to deal with involuntary transfers (such as foreclosure sales). One possibility would be that involuntary transfers are not covered. The debtor can hardly be said to defraud its creditors when one of its creditors compels the conveyance. However, if the purpose is to prevent one creditor from getting an unfair share of the borrower's property, then a case can be made for examining involuntary transfers. On that point, the UFCA did not refer specifically to involuntary transfers,¹⁶ but a few cases applying it had

¹² See NCCUSL UFTA Summary, *supra* note 10.

¹³ See NCCUSL UFTA Summary, *supra* note 10.

¹⁴ UFCA § 4 (transfers without “fair consideration”); UFTA § 3 (transfers without “reasonably equivalent value”).

¹⁵ See NCCUSL UFTA Summary.

¹⁶ See UFCA § 1 (definition of “Conveyance” that does not refer to “involuntary” actions).

concluded that it nevertheless extended to foreclosure and execution sales, at least in cases where the sales or underlying loans were alleged to be collusive.¹⁷

Responding to those rulings, both the UFTA and the Bankruptcy Code make it plain that their avoidance powers extend to involuntary transfers.¹⁸ Because foreclosure sales typically do not bring high prices, the natural question arises whether such a sale can be overturned as a fraudulent conveyance. In the language of both the UFTA and the Bankruptcy Code, the issue is whether the sale returns a “reasonably equivalent value” for the transferred asset.¹⁹ Under the UFTA, the answer is plain: the UFTA states specifically that a person that buys at “a regularly conducted, noncollusive foreclosure sale” gives reasonably equivalent value.²⁰ Despite repeated and pervasive amendments of the Bankruptcy Code, Congress has not to this day spoken directly to the question.

¹⁷ See *Hearn 45 St. Corp. v. Jano*, 27 N.E.2d 814 (N.Y. 1940) (overturning foreclosure sale based on fictitious judgment and gratuitous mortgage); *Lefkowitz v. Finkelstein Trading Corp.*, 14 F. Supp. 898, 899 (S.D.N.Y. 1936) (overturning collusive foreclosure sale where purchaser immediately conveyed the assets to the children of the defaulting borrower); *Catabene v. Wallner*, 85 A.3d 300, 302 (N.J. 1951) (permitting attack on foreclosure sale based on gratuitous mortgage); see also UFTA § 1 comment 12.

¹⁸ See the definitions of “transfer” in UFTA § 1(12) and Bankruptcy Code § 101(54). Congress added the reference to “involuntary” transfers in Section 101 in 1984. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 463(a), 98 Stat. 333, 378-79. As discussed below, the *BFP* Court held in substance that the purpose of those amendments was to ensure that bankruptcy courts could invalidate collusive foreclosure sales. 511 U.S. at 543 n.7. As Justice Souter points out, that reading closely resembles a bill that Congress considered, but did not enact. S. 445, 98th Cong., 1st Sess. § 360 (1983) (protecting noncollusive foreclosure sales) (discussed in 511 U.S. at 554 n.6 (Souter, J., dissenting)). Thus, Congress arguably rejected the position espoused by the majority and codified in the UFTA.

¹⁹ The term, which is not used elsewhere in the Bankruptcy Code, appears to derive from the references to “fair equivalent” value in Bankruptcy Act § 67d, 11 U.S.C. § 107(d) (1976) (repealed 1978). It appeared first in the bill proposed by the Bankruptcy Commission. Commission Bill § 4-608, Report of the Commission on the Bankruptcy Laws of the United States, Part II, H.R. Doc. No. 137, 93rd Cong., 1st Sess. 175-76 (1973). From there, it found its way into the Bankruptcy Code as adopted by Congress in 1978 and then into the Uniform Fraudulent Transfer Act promulgated by NCCUSL in 1984.

²⁰ UFTA § 3(b).

Thus, all that can be discerned from the statute (Section 548) is that a bankruptcy court is authorized to invalidate a sale for less than “reasonably equivalent value.”

Because the UFCA and the parallel language in the old Bankruptcy Act extended to constructive fraud,²¹ it is difficult in hindsight to understand why it was not until 1980 that a federal court first squarely faced the question whether the fraudulent transfer provisions of federal bankruptcy law could overturn a foreclosure sale validly conducted under state law. Confronted with that question, the Fifth Circuit in *Durrett v. Washington National Insurance Co.*²² considered a Texas foreclosure in which an unrelated third party purchased real estate for the amount of the outstanding debt. Responding to evidence supporting a finding that the debt was only 57% of the hypothetical fair market value of the property, the Fifth Circuit invalidated the sale. Surprisingly, despite the imprecision of the statute,²³ the Fifth Circuit seemed to adopt an almost absolute rule requiring invalidation of foreclosure sales returning less than 70% of fair market value.²⁴

²¹ See Bankruptcy Act § 67d, 11 U.S.C. § 107(d) (1976) (repealed 1978) (permitting invalidation of a transfer for which the debtor does not receive a “fair equivalent”).

²² 621 F.2d 201 (5th Cir. 1980).

²³ The relevant provision of the Bankruptcy Act allowed the court to invalidate a transfer for which the debtor did not receive the “fair equivalent.” Bankruptcy Act § 67d, 11 U.S.C. § 107(d) (1976) (repealed 1978). Later courts did not view that language as different in any important respect from the Code’s Section 548. E.g., *Lawyers Title Ins. Corp. v. Madrid* (In re Madrid), 21 B.R. 424, 426 (B.A.P. 9th Cir.) (“In its essential respects, [Section 548] tracks section 67d of the former Bankruptcy Act.”), *aff’d* on other grounds, 725 F.2d 1197 (9th Cir. 1982).

²⁴ See 621 F.2d at 203 (“We have been unable to locate a decision of any district or appellate court dealing only with a transfer of real property [attacked under this statute], which has approved the transfer for less than 70 percent of the market value of the property.”).

At the time, the result in *Durrett* shocked real estate professionals²⁵ and had a destabilizing effect on the industry, at least in Texas.²⁶ For example, promptly after *Durrett* title insurance regulators responded by requiring insurers to include an exception to title insurance policies that left foreclosure purchasers exposed to the risk of *Durrett* litigation.²⁷ More seriously, the publicity surrounding the decision spawned similar challenges around the country. For the most part, however, other courts were not as receptive to those challenges. First, *In re Madrid* produced a contrary view from the Ninth Circuit's Bankruptcy Appellate Panel, which held that the price received at a noncollusive foreclosure sale is by definition reasonably equivalent value under Section

²⁵ E.g., Ray E. Sweat, Title Insurance in 1984: Jurisdiction and the Bankruptcy Amendments and Federal Judgeship Act of 1984, 251 PLI/Real 327, 351 (1984) (CLE presentation suggesting that *Durrett* “knocked [existing lending arrangements] into a cocked hat”); Warren & Westbrook, *supra* note 3, at 571 (characterizing *Durrett* as a “judicial bombshell”). The Supreme Court in *BFP* characterized *Durrett* as “unprecedented,” explaining that “[t]o our knowledge no prior decision had ever applied the ‘grossly inadequate price’ badge of fraud under fraudulent transfer law to set aside a foreclosure sale.” 511 U.S. at 542.

²⁶ Although *Durrett* troubled insurers and likely affected the market for distressed real estate, I doubt that it affected the Texas real estate market more broadly. The institutional lenders that I represented during that time did adopt policies of bidding 70% of the appraised value in foreclosure sales. But the limited ex ante likelihood that a loan would lead to a foreclosure sale that would be followed by a bankruptcy with a colorable *Durrett* claim makes it difficult to believe that those lenders raised interest rates or otherwise limited the extension of credit.

²⁷ See Texas Department of Insurance, Form T-1, Exclusions from Coverage 5, at 4 (Jan. 1, 1993) (exclusion from Owner Policy of Title Insurance for “[a]ny claim which arises out of the transaction vesting [title] in the [insured] * * * , by reason of the operation of the federal bankruptcy * * * laws * * * being deemed a fraudulent conveyance”); see also Debra Pogrud Stark, The Emperor Still Has Clothes: Fraudulent Conveyance Challenges After the BFP Decision, 47 S.C. L. Rev. 563, 610 (1996) (discussing the relevant policy exception and attributing it to *Durrett*). The title insurance question was a major topic in the Supreme Court's deliberations. First, it was raised in the briefs of the RTC and the Federal Home Loan Mortgage Corporation (supporting the RTC as an amicus). Brief of Federal Respondent at 28 n.21; Federal Home Loan Mortgage Corporation et al. Amicus Br. 13 & n. 10 (discussing similar forms promulgated by the American Land Title Association). It also was a topic of interest to Justice O'Connor at the oral argument, 1993 U.S. Trans. LEXIS 114, *25-*26, was emphasized in the Court's opinion, 511 U.S. at 544, and dismissed as insignificant in Justice Souter's dissent, 511 U.S. at 568 n.20 (Souter, J., dissenting).

548.²⁸ The *Madrid* court explained: “We decline to follow Durrett’s 70% fair market value rule for the reason that a regularly conducted sale, open to all bidders and all creditors, is itself a safeguard against the evils of private transfers to relatives and favorites.”²⁹ After the Sixth Circuit took a view similar to the view of the Ninth Circuit,³⁰ the Seventh Circuit responded by offering yet another answer: a vague test under which courts should consider “all the facts and circumstances” in deciding whether to invalidate a sale.³¹

To sum up, when the *BFP* case began in California, this question had been squarely considered by three of the courts of appeals (the Fifth, Sixth, and Seventh), with each taking a distinctly different view of the protection a foreclosure sale should receive in bankruptcy.³²

III. THE CASE

A. The Dispute

The facts of *BFP* play out like a law school hypothetical, with a strong scent of misconduct by the defaulting borrowers and of carelessness by the foreclosing lender. In the underlying purchase and loan transactions, Wayne and Marlene Pedersen borrowed about \$350,000 from Imperial Savings Association to purchase a home in Newport

²⁸ *Lawyers Title Ins. Corp. v. Madrid* (In re Madrid), 21 B.R. 424 (B.A.P. 9th Cir.), aff’d on other grounds, 725 F.2d 1197 (9th Cir. 1982).

²⁹ 21 B.R. at 426-27.

³⁰ *In re Winshall Settlor’s Trust*, 758 F.2d 1136 (6th Cir. 1985).

³¹ 856 F.2d 815 (7th Cir. 1988).

³² The circuit conflict deepened considerably during the course of litigation in this case, as three additional courts of appeals adopted the *Bundles* approach articulated by the Seventh Circuit. *Barrett v. Commonwealth Federal Savings & Loan Ass’n*, 939 F.2d 20 (3rd Cir. 1991);

Beach, California from Sheldon and Ann Foreman. Originally, the purchase price was \$350,000 plus certain rare coins. Before the sale closed in the fall of 1987, however, press reports indicating that Wayne Pedersen had been involved in the fraudulent sale of rare coins made the Foremans understandably reluctant to accept the coins. Accordingly, the sale was restructured so that the consideration would be \$350,000 in cash (the proceeds of the Imperial loan) plus a \$200,000 promissory note from a newly formed partnership ironically named BFP (composed of the Pedersens and another individual named Russell Barton), which ultimately took title to the property.³³ To complicate matters further, only Wayne executed the deed from the Pedersens to BFP; he signed Marlene's name to the BFP deed without her permission.³⁴ The Foremans retained a second lien on the house to secure the obligation of BFP to pay that note.³⁵

In any event, neither BFP nor the Pedersens made any payments on the Imperial loan. When the Foremans stopped making those payments after a few months, Imperial commenced foreclosure proceedings.³⁶ The foreclosure sale was delayed by an involuntary bankruptcy proceeding filed by Off Road Vehicles – Recreation and Family Campground, Inc. (ORV). ORV claimed title to the property based on a separate deed

Cooper v. Ashley Communications, Inc. (In re Morris Communications NC, Inc.), 914 F.3d 458 (4th Cir. 1990); Grissom v. Johnson (In re Grissom), 955 F.2d 1440 (11th Cir. 1992).

³³ BFP v. Imperial Savings & Loan Ass'n (In re BFP), 974 F.2d 1144, 1145 (9th Cir. 1991); see also Joint Appendix 45-47 (reprinting allegations regarding the fraudulent coin incident in adversary complaint filed in the bankruptcy court).

³⁴ The courts eventually concluded that the deed was valid despite the forgery. 974 F.2d at 1147-48.

³⁵ Because the Foremans' lien was inferior to the Imperial lien, it did not survive the Imperial foreclosure sale, at which the Foremans apparently did not bid. That explains why the Foremans continued making payments on the Imperial loan even after selling the property to the Pedersens.

from the Pedersens (both signed this instrument – apparently designed to defraud their partner Russell Barton). Because the Pedersens executed the ORV deed after the BFP deed, and without the consent of Barton, the bankruptcy court held the ORV deed invalid and dismissed the ORV bankruptcy proceeding.³⁷ At that point, the Imperial foreclosure proceeded, producing a July 1989 sale of the property to a stranger to the earlier transactions, Russell Osborne, for about \$430,000. That price was about 125% of the Imperial debt, but only about 75-80% of the Pedersens' original purchase price.³⁸

Then, shortly after the foreclosure sale, a state court, responding to a complaint from the Foremans based on the fraudulent behavior of the Pedersens, rescinded the sale from the Foremans to the Pedersens.³⁹ But because Osborne already had purchased at the foreclosure sale, without knowledge of the malfeasance of the Pedersens, the decree invalidating the initial conveyance came too late to affect Osborne's status as a bona fide purchaser for value. Osborne resold the property five months later for about \$660,000.⁴⁰ Shortly thereafter, Wayne Pedersen pleaded guilty to federal charges of mail fraud (based on a nationwide telemarketing operation associated with his coin business) and then went

³⁶ Joint Appendix 52 (adversary complaint filed in the bankruptcy court).

³⁷ Joint Appendix 24 (docket entries in ORV bankruptcy).

³⁸ The parties vigorously contested the validity of the foreclosure sale, but the Ninth Circuit rejected those claims and they were not pressed in the Supreme Court. 974 F.2d at 1149 n.7.

³⁹ Joint Appendix 252-81; see 974 F.2d at 1147 n.3.

⁴⁰ 974 F.2d at 1145-46; Pet. 5-6 & n.2.

into hiding. He remained a fugitive through the date of the Supreme Court's decision in this case.⁴¹

* * * * *

A cynic might suppose that a loan to a borrower prone to engage in such transactions reflects a failure to consider the "character" of the borrower.⁴² Among other things, for example, the record makes it quite clear that the borrowers did not plan to occupy the home, but to flip it. Thus, the Pedersens transferred the property to BFP as part of the transaction in which they borrowed funds from Imperial to pay to the Foremans.⁴³ Also, the record makes it clear that the newspaper reports about Pedersen's fraudulent activity occurred weeks *before* Imperial made the loan – those reports were serious enough to convince the Foremans to alter the deal but apparently did not concern Imperial's loan officer.⁴⁴

To put the lender's diligence in context, it is useful to recite a few facts about what was going on with Imperial during this time. During the early 1980's, Imperial had been one of the nation's largest thrift holding companies, but the mismatch between the high rates it paid on deposits and the low rates it earned on mortgages gave it a negative

⁴¹ See James Granelli, Partners Take Gamble – And Lose, Los Angeles Times, May 24, 1994, at D1.

⁴² Federal Deposit Insurance Corporation, An Examination of the Banking Crises of the 1980s and Early 1990s, 29-31 (1999) (suggesting that risky lending was responsible for a large share of the S&L crisis); see George E. Ruth, Commercial Lending 99 (1999) (discussing importance of "character" in commercial lending).

⁴³ Because loans on investment purchases of real estate tend to be riskier than loans on owner-occupied real estate, many savings and loan associations are unwilling to make such loans.

⁴⁴ See 974 F.2d at 1145-46 (reporting the sequence of events leading up to the sale from the Foremans to the Pedersens).

return on equity throughout the early 1980s. All told, it incurred about \$140 million in losses between 1981 and 1985.⁴⁵ In the mid-1980's, however, a controlling share of Imperial was acquired by a compatriot of Michael Milken's named Victor Goulet.⁴⁶ Goulet promptly installed Kenneth Thygerson as CEO. Thygerson was an evangelical Midwesterner who led Imperial rapidly into the realm of higher-risk junk bonds and collateralized debt obligations,⁴⁷ purchased from Milken's firm Drexel Burnham Lambert.⁴⁸ The higher income from those investments kept Imperial afloat for several years, but when Milken's empire unraveled in the early 1990's, those investments went bad and Imperial became insolvent.⁴⁹ Eventually, the RTC spent about \$400 million to resolve claims arising out of Imperial's failure.⁵⁰

B. The Lower Courts

After the failure of their efforts to exclude Barton from a share of the profits and to prevent the foreclosure by Imperial, the Pedersons took BFP into Chapter 11, hoping to

⁴⁵ See Larry Tye, *A Model of S&L Failure: Stumbling on a New Playing Field*, *Boston Globe*, July 15, 1990, at 1.

⁴⁶ Press reports suggest that Goulet's acquisition was financed by a friend of Milken's named Fred Carr. See Benjamin Stein, *On the Junk Heap—The Trashing of a Multi-Billion Dollar California S&L*, *Barron's*, Oct. 9, 1989.

⁴⁷ Imperial apparently has the dubious distinction of being the purchaser of the first collateralized debt obligations ever syndicated. Gregory Cresci, *Merrill, Citigroup Record CDO Fees Earned in Top Growth Market*, *Bloomberg.com* (Aug. 30, 2005).

⁴⁸ See Stein, *supra* note 46.

⁴⁹ The FDIC and RTC sued Milken claiming that he was responsible for large losses by S&Ls investing in the junk bonds he marketed through Drexel. *FDIC, RTC Suing Milken on S&L Junk Losses*, *National Mortgage News*, Jan. 28, 1991, at 23.

⁵⁰ *The Savings and Loan Crisis: Lessons from a Regulatory Failure* 265-70 (James R. Barth et al. eds. 2004).

recapture the profits that Osborne made when he resold after the foreclosure.⁵¹ In the bankruptcy court, BFP promptly filed an adversary proceeding arguing that the foreclosure sale was a fraudulent conveyance under Section 548 of the Bankruptcy Code. BFP contended that the property was worth about \$750,000.⁵² The bankruptcy court concluded that the sale was properly conducted and not collusive and accordingly granted separate motions to dismiss BFP's complaint.⁵³ BFP appealed separately from the bankruptcy court's rulings on motions by Osborne (the purchaser) and Imperial (the lender). The Osborne appeal went to the district court, which summarily rejected BFP's claims, relying on *Madrid*.⁵⁴ The Imperial appeal went to the Bankruptcy Appellate Panel, which also rejected BFP's claims.⁵⁵

The Ninth Circuit consolidated appeals from the district court and bankruptcy appellate panel decisions and affirmed. By the time the issue came to a head, Imperial had failed and been taken over by the Resolution Trust Corporation. The court of appeals recognized the disarray in the existing circuit court decisions. Following the lead of its bankruptcy appellate panel, the court, in an opinion written by Judge Sneed, chose to

⁵¹ It would seem rational that the Pedersons would not have wanted BFP to file for bankruptcy before the ORV ruling, but it is not clear why BFP did not file after the ORV ruling but before the foreclosure sale occurred. Perhaps they waited until Osborne had sold the property, at which point they could be sure it was worth more than the debt.

⁵² For what it is worth, zillow.com attributes a current value to the property (225 Via Genoa in Newport Beach) of slightly more than \$1.7 million. Notwithstanding the price obtained by Osborne in 1989, the historical analysis at zillow.com site suggests that the property did not reach a persistent valuation above \$600,000 until about 1999.

⁵³ Pet. App. 28-32 (granting Osborne motion to dismiss); Pet. App. 33-40 (granting Imperial motion to dismiss).

⁵⁴ Pet. App. 41-48.

⁵⁵ 132 B.R. 748 (1991). Bankruptcy Judge Volinn dissented from the B.A.P. decision, arguing that the panel should adopt the *Bundles* approach, which by that time had become the majority rule in the courts of appeals. 132 B.R. at 751-52.

adopt the Sixth Circuit's approach, holding that the price at a noncollusive, regularly conducted foreclosure sale is by definition reasonably equivalent value under Section 548.⁵⁶ The opinion acknowledged that the Seventh Circuit's approach presented a "persuasive" "plain-language interpretation" of the statute, but rejected that approach based on the conclusion that "broader considerations require a different result."⁵⁷ Specifically, the court explained, a rule leaving foreclosure sales subject to post-hoc price assessments would "undermin[e] the price maximizing objectives of [the statute] because potential buyers will discount their assessment of the true market value of the property to reflect this uncertainty. * * * It makes little sense to interpret [the statute] in a way that will discourage healthy foreclosure bidding."⁵⁸

C. The Supreme Court

BFP's counsel (a solo practitioner in Newport Beach) promptly filed a petition for a writ of certiorari, bringing the case to the Supreme Court. The respondents were the purchaser at the sale (Osborne) and the RTC, acting as receiver for Imperial. Osborne, predictably enough, filed a brief in opposition to the petition. The RTC, however, filed a brief recommending that the Court grant the petition, noting the stark conflict in the courts of appeals and suggesting that the recurrence of the question demonstrated its importance.⁵⁹

⁵⁶ 974 F.2d 1144 (9th Cir. 1992).

⁵⁷ 974 F.2d at 1148.

⁵⁸ 974 F.2d at 1148-49 (relying on Scott B. Ehrlich, Avoidance of Foreclosure Sales as Fraudulent Conveyances: Accommodating State and Federal Objectives, 71 Va. L. Rev. 933 (1985)).

⁵⁹ The FDIC and RTC were two of the largest creditors in foreclosure proceedings in Texas, which was one of the locations hit hardest by the S&L crisis. The application of the *Durrett* rule in the Fifth Circuit (which includes Texas) made it plausible for the RTC and the

In hindsight, reasonable minds can differ about the importance of the question. In truth, the question can be presented only in a reasonably unusual situation marked by considerable volatility in real-estate prices. First, the property has to be sold at foreclosure at a time when the property's value is relatively low. If the property were known to be valuable at the time of foreclosure, the debtor typically could prevent the foreclosure by filing for bankruptcy *before* the sale rather than afterwards. Then, the property would have to appreciate substantially and rapidly. The increase has to be large enough to produce a value that would repay the loan of the foreclosing lender and produce a surplus sufficient to justify the litigation costs; the increase has to be rapid enough to support a bankruptcy filing sufficiently soon after the foreclosure sale to permit a challenge in the bankruptcy court. The existence of the circuit conflict shows that the scenario is not wholly unrealistic, but at the same time, it is fair to say that the facts are atypical.

Despite the RTC's concession, the available files (currently only the file of Justice Blackmun)⁶⁰ show that the pool memorandum (prepared by one of Justice White's clerks) recommended that the Court deny review. The concern of the law clerks was that the case might be moot. Even if the Court did overturn the decision of the Ninth Circuit, it is not clear that the bankruptcy court could provide meaningful relief to BFP.⁶¹

FDIC to take advantage of the opportunity to get a case before the Court in which *Durrett* might be overturned.

⁶⁰ Justice Blackmun's file is available in the Library of Congress in Box 637 of Justice Blackmun's papers.

⁶¹ The concern was that Osborne (the purchaser at the foreclosure sale) already had sold the property. The law clerks, at least, were persuaded that Section 550(a) would permit the

Influenced by that problem, Justice Blackmun voted to deny the petition. Ultimately, however, the Court granted review.

At the argument, the most active questioners were Justices Scalia, O'Connor, and Souter. Interrupting petitioner's counsel at the beginning of the argument, Justice Scalia suggested that it was senseless to place a value on foreclosed property that ignored that the property would be sold at foreclosure.⁶² Justice Souter pressed both respondents on his view that the statutory reference to "value" could not be read to support an inquiry limited solely to compliance with state procedures.⁶³ Justice O'Connor was primarily concerned about the potential adverse effects of the decision on foreclosure bidding.⁶⁴

bankruptcy court to enter a monetary judgment against Osborne if (as seemed likely) the property itself had passed into the hands of a good-faith purchaser. Justice Blackmun's file contains no evidence about the deliberations regarding the grant of certiorari.

⁶² Justice Scalia commented:

If you're willing to individualize [at all], why not go all the way and say, this is not only property of a sort that's being sold at a foreclosure sale, but is property that's being sold on a rainy Tuesday when some of the best buyers in town are on summer vacation? * * * It is property that is subject to foreclosure under certain State rules * * * and whatever it fetches under those rules has to be the fair value of that particularly individuated property.

1993 U.S. Trans. LEXIS 114 *5, *10 (attribution to Justice Scalia based on author's personal recollection).

⁶³ Speaking to counsel for the RTC, he asked: "I have difficulty squaring your argument, I admit, with the language of the statute * * * It seems to me that if [you are right] they took a very obtuse way to require that." 1993 U.S. Trans LEXIS 114, *25, *31. Speaking to counsel for Osborne, he explained: "[T]he trouble, it seems to me, with your argument is that if the phrase in question * * * means nothing more than you say it does * * * it would have been infinitely simpler for Congress simply to say that a bona fide sale conducted in accordance with the requirements of State statutory or common law will be conclusively presumed to realize a fair or sufficient value." 1993 U.S. Trans LEXIS 114, *38-*39.

⁶⁴ Speaking to petitioner's counsel, she asked: "[I]f we accept your condition – position, wouldn't one of the practical effects be to mean that you could get – a seller could get still less at a foreclosure sale because it would be relatively more easy to upset the result of a foreclosure sale?" 1993 U.S. Trans LEXIS 114, *16. Speaking to counsel for the RTC, she sought a detailed explanation of ways in which foreclosure sales differed from voluntary sales. 1993 U.S. Trans LEXIS 114, *20-*21.

At conference on the Friday after the argument, the Justices were closely divided. Five Justices voted to affirm and four Justices were set on reversal. But among the Justices voting to affirm, there was considerable doubt about how to explain the decision. The Chief Justice, for example, would have accepted a rebuttable presumption, apparently one that would extend to all sales that could not be overturned under state law. Justices O'Connor and Thomas aligned themselves with the Chief Justice, though Justice O'Connor suggested (in Justice Blackmun's report) that she "would like to adopt C9 rule but [the] stat[ute] [provides] no support." Justice Scalia pressed the view he had articulated at oral argument, articulating what Justice Blackmun regarded as a "rigid categorical rule" supported by "illusory logic." Justice Kennedy aligned himself with Justice Scalia, commenting, "we shouldn't get into this."

The Chief Justice assigned the majority opinion to Justice Scalia, whose opinion gained five votes with only minor changes. First, the Chief Justice sought clarification that the opinion would offer conclusive protection for any foreclosure sales that could not be overturned under state law; the original draft had suggested loosely that a bankruptcy court could overturn any sale that suffered from "[a]ny irregularity." Second, Justices O'Connor and Kennedy debated the proper way to describe the plain statement rule.⁶⁵

⁶⁵ Generally speaking, plain statement rules are rules of statutory interpretation in the form of a "presumption[n] * * * that can only be rebutted by clear statutory text." William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593, 597 (1992). Here, the Justices were debating how much reliance the Court needed to place on a plain-statement rule to justify the tacitly admitted departure from the plain meaning of the statute. Justice O'Connor seemed to think a great deal of reliance was required. Justice Kennedy, in contrast, seemed to think both that very little reliance was necessary and that the federalism concerns raised by *BFP* were inadequate to justify application of a strong plain-statement rule.

Justice Kennedy thought that the opinion's reference to *Gregory v. Ashcroft*⁶⁶ was inappropriate, because that case "applies to the more touchy situation when a federal law impinges upon a 'most fundamental' aspect of state sovereignty." Justice O'Connor, by contrast (the author of the Court's opinion in *Ashcroft*), advised Justice Scalia that she "hope[d] you will not drop the citation and reference to Gregory v. Ashcroft. It has relevance to the issue in this case in my view." Ultimately, Justice Scalia dropped the extended discussion of *Ashcroft* that appeared in the original draft, retaining only the "cf." citation that appears in the final opinion.

Justice Scalia's final opinion relies heavily on the point he pressed at oral argument. He reasoned: "An appraiser's reconstruction of 'fair market value' could show what similar property would be worth if it did not have to be sold within the time and manner strictures of state-prescribed foreclosures. But property that *must* be sold within those strictures is simply *worth less*."⁶⁷ He continued: "No one would pay as much to own such property as he would pay to own real estate that could be sold at leisure and pursuant to normal marketing techniques."⁶⁸ Most strikingly, he offered a bold analogy to the effect of zoning laws and other general property regulations:

And it is no more realistic to ignore that characteristic of the property (the fact that state foreclosure law permits the mortgagee to sell it at forced sale) than it is to ignore other price-affecting characteristics (such as the fact that state zoning law permits the owner of the neighboring lot to open a gas station).⁶⁹

⁶⁶ 501 U.S. 452 (1991).

⁶⁷ 511 U.S. at 539.

⁶⁸ 511 U.S. at 539.

⁶⁹ 511 U.S. at 539. Justice Scalia's basic argument is something of a tangent. The question is not whether a foreclosure sale produced "fair market value," but whether it produced

Justice Scalia's opinion also recognized that a federal rule invalidating these sales extended fraudulent transfer law substantially beyond its traditional boundaries. He made this point in two distinct ways. First, he noted with what reads as little conviction that such a rule would entrench on areas traditionally reserved to the states.⁷⁰ He went on, however, to argue with considerable vigor that a broad federal rule would be so inconsistent with the centuries-long tradition of fraudulent transfer law that the Court could not plausibly infer congressional intent adequate to justify such an intrusive result.⁷¹ In the end, this is the most persuasive part of the Court's opinion. If the rules against fraudulent transfers are designed to deter fraudulent transactions by overturning them, it is odd to say that a transaction conducted under the auspices of the State is fraudulent. It makes sense to use a nebulous concept like "reasonably equivalent value" to justify a flexible examination of transactions that an insolvent conducts with another private party. But it is hard to accept such a vague formulation as directing an indeterminate scrutiny of transactions that are conducted under mandatory rules of state law.

Justice Souter's dissent calls the Court to account for "derogation" from "the straightforward language used by Congress."⁷² He starts by characterizing the decision as "hold[ing] that * * * a peppercorn paid at a non-collusive and procedurally regular

"reasonably equivalent value." As emphasized in the RTC's brief, the term "reasonably equivalent" value is a unique term in the Bankruptcy Code. Although the Court recognized that "reasonably equivalent" value is not the same thing as "fair market value," nothing in the statute compelled the Court to infer that any objective post hoc assessment of "value" was irrelevant.

⁷⁰ 511 U.S. at 539-40. As discussed above, the desultory tone of this section of the opinion apparently is attributable to deletions made to accommodate Justice Kennedy.

⁷¹ 511 U.S. at 540-43.

⁷² 511 U.S. at 572 (Souter, J., dissenting).

foreclosure sale [is] to be treated as the ‘reasonable equivalent’ of the value of a California beachfront estate.”⁷³ He directly confronts the central point of Justice Scalia’s opinion: the argument that a property subject to foreclosure is simply “worth less,” and thus that fair market value cannot be relevant in determining reasonably equivalent value for such a property. Justice Souter retorts aptly that this is “neither a plausible interpretation of the statute,” “nor [the] only * * * alternative” to “equating ‘reasonably equivalent value’ at a foreclosure sale with ‘fair market value.’”⁷⁴

Having rejected Justice Scalia’s reading, Justice Souter took a much broader view of a bankruptcy court’s power to pursue such core bankruptcy policies as obtaining a maximum and equitable distribution for creditors and ensuring a “fresh start” for individual debtors by avoiding foreclosure sales.⁷⁵ He explained that in his view the statute’s reference to “reasonably equivalent” value plainly indicates that the “fair” market value is relevant to the bankruptcy determination. Recommending something closely akin to the *Bundles* approach adopted by the Seventh Circuit, Justice Souter

⁷³ 511 U.S. at 571-72 (Souter, J., dissenting).

⁷⁴ 511 U.S. at 550-51 (Souter, J., dissenting).

⁷⁵ Although Justice Souter’s discussion of the language of the statute is compelling, his discussion of bankruptcy policy is less impressive, primarily because it does not match the facts of the case. First, the idea that reversal of the Ninth Circuit would further a fresh start is a considerable stretch, given the likelihood in most cases that any value recovered would go to unsecured creditors and attorney’s fees. That is particularly true in this case, where Wayne Pedersen was a fugitive from justice throughout the bankruptcy proceeding and the Supreme Court’s process. Similarly, because no creditors appeared to complain about unfavorable treatment, Justice Souter’s concern about equitable distribution among creditors seems off point. A third point relates to Justice Souter’s views about the foreclosure process. He suggests that the mortgagee’s interests are best served if the foreclosure sale is poorly attended, because then the lender is more likely to take the property by bidding the amount of the indebtedness and retain the profits from resale. In *BFP*, however, as in *Durrett*, the winning bidder was an unrelated third party. More broadly, Justice Souter’s argument assumes what is often untrue, that the collateral is worth substantially more than the debt. See Mann, *supra* note 8 (case studies on commercial foreclosures documenting how rarely lenders resell collateral for more than the underlying debt).

contended that “the bankruptcy court must compare the price received by the insolvent debtor and the worth of the item when sold and set aside the transfer if the former was substantially ([un]reasonably) ‘less than’ the latter.”⁷⁶ In his view, this reading is much more faithful to the statutory language than a reading that has “reasonably equivalent value” turn solely on procedure.⁷⁷

IV. THE SUPREME COURT, THE SOLICITOR GENERAL, AND STATUTORY INTERPRETATION

What can the decision in *BFP* teach us about the Supreme Court’s approach to bankruptcy law? My thesis is that *BFP* reflects the Court’s resistance to expanding the bankruptcy system to interfere with other legal systems. When the bankruptcy regime threatens to transgress rights and expectations founded in other bodies of law, the Court tends toward the “use of a strong interpretive principle” to narrow the substantive reach of the Code.⁷⁸ That is not to say, of course, that the Court has never upheld broad applications of the bankruptcy laws.⁷⁹ It is to say, however, that the Court’s baseline perception is one of doubt.⁸⁰

⁷⁶ He remarked: “Nor would any ordinary English speaker, concerned to determine whether a foreclosure sale was collusive or procedurally irregular * * * direct an adjudicator * * * to ascertain whether the sale had realized ‘less than a “reasonably equivalent value”’ * * * .” 511 U.S. at 573-74 (Souter, J., dissenting).

⁷⁷ 511 U.S. at 552 (Souter, J., dissenting).

⁷⁸ Ronald J. Mann, *The Rise of State Bankruptcy-Directed Legislation*, 25 *Cardozo L. Rev.* 1805, 1808 (2004) (explaining that the Court’s typical deference to legitimate state regulation should not extend to state laws that are primarily directed at affecting bankruptcy outcomes).

⁷⁹ In general, it is clear that the Bankruptcy Code gives bankruptcy courts much greater power than they had under the old Bankruptcy Act. See Warren & Westbrook, *supra* note 3, at 110-11. Thus, from the perspective of practitioners under the Act, decisions in early cases like *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984) (bankruptcy court can reject collective bargaining agreement), and *Ohio v. Kovacs*, 469 U.S. 274 (1985) (bankruptcy court can discharge

Thus, the Court's decisions evince a decided willingness to defer to important governmental interests on which the bankruptcy power otherwise might intrude. This is where the role of the Solicitor General becomes crucial. In my view, the posture that the Solicitor General has taken in bankruptcy cases over time has had a cognizable effect on the decisions that the Court in fact has rendered. The Court of course does not *always* defer to governmental interests. Still, when the Solicitor General can convince the Court that its position is reasonable and that a contrary outcome would harm important interests, the Court is likely to give the benefit of the doubt to the Solicitor General's narrower interpretation, even when (as in *BFP*) that result does considerable injury to the language of the statute. Indeed, I think that is more likely to be true in bankruptcy cases than in other private law cases, because the Solicitor General's view is less likely to reflect the agency bias that will be apparent in cases in which an agency defends its own programs.

Because my premise is that a complete explanation of the decision in *BFP* should account for the role that the Solicitor General played, it is interesting to provide some

environmental injunction), would have seemed shocking, however much the language of the Code compelled them.

⁸⁰ My original view was that the Court simply has little interest in bankruptcy cases. Yet I found that view hard to reconcile with the pattern of the cases. Most of the cases that are conspicuously atextual point in a single direction, which supports bankruptcy skepticism rather than a lack of interest. Moreover, the high rate of close cases (11 of 59 cases had at least 3 dissenting votes) is difficult to reconcile with apathy. Finally, my experience as a law clerk makes me think that the Justices are not disinterested in the cases, but perhaps just more sympathetic towards and familiar with the legal systems that govern foreclosures, criminal penalties, corporate governance and the like than they are with the importance of a coherent bankruptcy regime. For example, Justice O'Connor had a personal experience with the foreclosure process, which might have disposed her to value finality. SANDRA DAY O'CONNOR & H. ALAN DAY, *LAZY B x*, 95 (2002) (providing a fascinating discussion of her family's efforts to foreclose on a defaulting ranch hand who was given an interest in the family ranch).

details about the relatively unnoticed role that the federal government has played in the Supreme Court's bankruptcy practice. Other writers have noticed that the Supreme Court often defers to the government in bankruptcy cases in which the government is a party, but what they have not noticed is the pervasiveness of the Solicitor General's role as a party and amicus in bankruptcy cases.⁸¹ Surprisingly enough, for the person that considers bankruptcy law a "private law" topic of little general interest, the Solicitor General has appeared in about two-thirds of the Court's cases interpreting the Bankruptcy Code⁸² (39 of 59 (66%) by my count).⁸³ Of those 39 cases, the government was a party in 18 and appeared as an amicus in the other 21.

To understand why the Solicitor General has appeared in such a large share of these cases, it is useful to analyze the varied interests that the federal government might have in bankruptcy. Recognizing that any categorization is arbitrary and subjective, I have tried to break the cases down into five general categories, which seem to have some explanatory value.

⁸¹ Bob Rasmussen noted the Court's occasional deference to the government many years ago, but he sees it as a rare exception to an overwhelmingly textualist approach. See Robert K. Rasmussen, *A Study of the Costs and Benefits of Textualism: The Supreme Court's Bankruptcy Cases*, 71 Wash. U. L.Q. 535, 563 (1993) ("This is not to say that the Supreme Court is a puppet of the government. * * * * The court jettisons textualism when such an approach would encroach on what the Court views as the government's vital interests."). See also Lawless, *supra* note 3, at 114-15 (suggesting a general bias in favor of creditors and governmental claimants). By contrast, as I explain below, I see the government's role as influencing the Court's decisions in a wide range of cases.

⁸² 11 U.S.C. §§ 1 – 1532. Because the Code represents such a major shift from prior law, I limit my discussion to cases under the Code.

⁸³ I omit cases like *Central Trust Co. v. Official Creditors' Committee*, 454 U.S. 354 (1982), involving transition rules from the old Act, *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), involving broad constitutional questions, and *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), involving questions about mootness.

A. Agency Cases

In agency cases, the Solicitor General typically appears on behalf of a federal regulatory agency whose interests are threatened by a bankruptcy stay or discharge. These are cases like *Ohio v. Kovacs*, which involved the ability of a debtor to discharge an environmental obligation in bankruptcy,⁸⁴ or *Patterson v. Shumate*, which involved the ability of a bankrupt debtor to protect an ERISA retirement plan.⁸⁵ It is easy to see why the Office of the Solicitor General would appear in such cases, and easy to understand why the Court would be interested in the views of the federal government. The Solicitor General has appeared in ten agency cases: five times as a party (once each on behalf of the NLRB, CFTC, PBGC, ICC, and FCC),⁸⁶ and five times as an amicus (twice in environmental cases on behalf of the EPA, twice in ERISA cases on behalf of the Department of Labor, and once in a case involving an order of the ICC).⁸⁷ The only obvious counterexample is *Rousey v. Jacoway*, a 2005 ERISA bankruptcy case.⁸⁸ Given the concern about agency bias expressed above, it should be no surprise that the Solicitor

⁸⁴ 469 U.S. 274 (1985).

⁸⁵ 504 U.S. 753 (1992).

⁸⁶ *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984); *CFTC v. Weintraub*, 471 U.S. 343 (1985); *PBGC v. LTV Corp.*, 496 U.S. 633 (1990); *ICC v. Transcon Lines*, 513 U.S. 138 (1995); *FCC v. NextWave Personal Communications, Inc.*, 537 U.S. 293 (2003).

⁸⁷ *Ohio v. Kovacs*, 469 U.S. 274 (1985) (EPA); *Midlantic Nat'l Bank v. New Jersey Dep't of Environmental Protection*, 474 U.S. 494 (1986) (EPA); *Patterson v. Shumate*, 504 U.S. 753 (1992) (ERISA); *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1 (2004) (ERISA); *Security Services v. KMart Corp.*, 511 U.S. 431 (1994) (ICC).

⁸⁸ 544 U.S. 320 (2005).

General has prevailed in only six of the nine cases of this type in which it has presented oral argument.⁸⁹

B. Tax Cases

Tax cases also are an easy category to understand. Insolvent businesses and individuals often owe money to taxing authorities, and taxing authorities typically have special rights in bankruptcy. Thus, it is not surprising that the Solicitor General frequently appears in tax cases. By my count, there are eight tax cases: seven in which the IRS was a party⁹⁰ and one in which the Solicitor General appeared as an amicus in support of a state tax-lien claimant.⁹¹ Interestingly, although the IRS lost its first two cases in the Supreme Court, its views have prevailed in all of these cases in the last fifteen years.⁹²

C. United States Trustee Cases

The third category is cases implicating interests of the Office of United States Trustee. Although some of the cases involve anomalous questions like whether

⁸⁹ The Solicitor General's view did not prevail in *NextWave*, *Bildisco*, and *Kovacs*. The Solicitor General did not present oral argument in *Midlantic*.

⁹⁰ *United States v. Whiting Pools*, 462 U.S. 198 (1983); *United States v. Energy Resources Co.*, 495 U.S. 545 (1990); *Begier v. IRS*, 496 U.S. 53 (1990); *Holywell Corp. v. Smith*, 503 U.S. 47 (1992); *United States v. Noland*, 517 U.S. 535 (1996); *United States v. Reorganized CF&I Fabricators*, 518 U.S. 213 (1996); *Young v. United States*, 535 U.S. 435 (2002). I do not include *United States v. Nordic Village*, 503 U.S. 30 (1992), treating that case instead as a sovereign immunity case. I recognize it is somewhat arbitrary to put *Nordic Village* in that category, but leave *Whiting Pools* in the IRS category, but in my view, the sovereign immunity issues in *Whiting Pools* are heavily influenced by context, while *Nordic Village* is a pure sovereign immunity case.

⁹¹ *Raleigh v. Illinois Dep't of Revenue*, 530 U.S. 15 (2000).

⁹² The views of the IRS did not prevail in *Whiting Pools* or in *Energy Resources*, but it did succeed in *Begier*, *Holywell Corp.*, *Noland*, and *Young*. I leave for another day the question whether this reflects selection bias (the Solicitor General might be doing a good

individuals can file for Chapter 11,⁹³ most of them involve the breadth of the bankruptcy discharge. The Office of the United States Trustee typically has an interest in urging that the discharge not be available to wrongdoers.⁹⁴ Altogether, there are seven trustee cases. The Solicitor General has appeared to represent a party in two of those cases,⁹⁵ and as an amicus in five of them.⁹⁶ The only case of this type in which the Solicitor General chose not to appear is *Kawaauhau v. Geiger*, a 1998 dischargeability case.⁹⁷ Again, as with the tax cases, this is an area in which the Court appears to have given considerable credence to the institutional position of the government. The alleged wrongdoer has lost all of the seven cases listed above except the sole case (*Kawaauhau*) in which the Solicitor General did not appear.

D. Sovereignty Cases

Another category involves conflicts between the broad powers of bankruptcy courts and general sovereign powers. There are four sovereignty cases (two involve sovereign immunity and two involve efforts to discharge criminal penalties). The Solicitor General has appeared in three of them, twice as an amicus⁹⁸ and once on its own

job of selecting cases for litigation in the Supreme Court) or something about the Court's views on bankruptcy tax.

⁹³ *Toibb v. Radloff*, 501 U.S. 157 (1991).

⁹⁴ See 11 U.S.C. § 727(c) & (d) (statutory grant of authority for the United States trustee to object to discharge of debtor or to seek revocation of discharge).

⁹⁵ *Toibb and Lamie v. United States Trustee*, 540 U.S. 526 (2004).

⁹⁶ *Grogan v. Garner*, 498 U.S. 279 (1991); *Field v. Mans*, 516 U.S. 59 (1995); *Cohen v. De la Cruz*, 523 U.S. 213 (1998); *Archer v. Warner*, 538 U.S. 314 (2003); *Kontrick v. Ryan*, 540 U.S. 443 (2004).

⁹⁷ 523 U.S. 57 (1998).

⁹⁸ *Hoffman v. Connecticut Dep't of Income Maintenance*, 492 U.S. 96 (1989) (sovereign immunity); *Pennsylvania Dep't of Public Welfare v. Davenport*, 495 U.S. 552 (criminal fine). The Solicitor General did not participate in *Kelly v. Robinson*, 479 U.S. 36 (1986).

behalf.⁹⁹ Again, it is easy to understand why the Solicitor General would wish to appear in these cases. As previous commentators have noted, the decisions in these cases are notorious for their atextual approaches.¹⁰⁰

E. Secured Credit Cases

The final category (which includes *BFP*) involves conflicts between secured creditors and other claimants on the bankruptcy estate. Unlike the preceding categories, the nine cases in this group present a conundrum: why would the federal government have a strong interest in the way assets are distributed among distinct groups of creditors in bankruptcy proceedings? To understand the government's interest, it is necessary to look to the banking and savings and loan crises of the 1980's and 1990's. By the conclusion of those crises, more than 1600 banks and 1000 thrifts were closed¹⁰¹ and the federal taxpayers had contributed hundreds of billions of dollars to ensure the adequacy of the FDIC and FSLIC deposit insurance funds.¹⁰² Those crises are complex historical events. For example, the ill-handled deregulation of S&L interest rates was a major

⁹⁹ *United States v. Nordic Village*, 503 U.S. 30 (1992). I could also include here *United States v. Whiting Pools*, 462 U.S. 198 (1983), but I have included that case as a tax case.

¹⁰⁰ See Rasmussen, *supra* note 81, at 560-64 (noting the nontextual analysis of *Hoffman v. Connecticut Dep't of Income Maintenance*, *United States v. Nordic Village* and *Kelly v. Robinson*); Daniel J. Bussel, *Textualism's Failures: A Study of Overruled Bankruptcy Decisions*, 53 *Vand. L. Rev.* 887, 890-81 (2000) (article by former O'Connor clerk who worked on *Kelly* ridiculing the opinion in that case, which Justice O'Connor joined); Lawless, *supra* note 3, at 27-33 (criticizing the textual analysis of *Nordic Village*).

¹⁰¹ FDIC, *supra* note 42, at 3; Timothy Curry & Lynn Shibut, *The Cost of the Savings and Loan Crisis: Truth and Consequences*, 13 *FDIC Banking Review* 26 (2000).

¹⁰² FDIC, *supra* note 42, at 39; Curry & Shibut, *supra* note 101; James R. Barth et al., *Rethinking Bank Regulation: Till Angels Govern* (2005).

contributor to the depth of the S&L crisis,¹⁰³ with excessive levels of deposit insurance and an undue reluctance to close large institutions being other significant factors.¹⁰⁴

Ultimately, for whatever reason, the government bore the great majority of the losses related to those crises. Among other things, this meant that by the mid-1980's the government found itself one of the largest holders of distressed debt in this country.¹⁰⁵ At this point, the perspective of the federal government, as a participant in bankruptcy policy debates, shifted sharply. Until then, the principal interest that the federal government had in bankruptcy was in the first class of cases presented above (agency cases). Thus, four of the first five cases that received plenary decisions from the Supreme Court under the Bankruptcy Code (a group that brings us up through October Term 1985) were agency cases, and the last one was a case to which the IRS was a party.¹⁰⁶ When secured credit cases first began to appear on the Court's argument calendar in the mid 1980's, the Solicitor General did not appear regularly. Of the first six cases that reached the Supreme Court, the government was a party in two (one as a

¹⁰³ FDIC, *supra* note 42, at 9-10, 172-78.

¹⁰⁴ FDIC, *supra* note 42, at 38-46; 176; Barth, *supra* note 102; Gary H. Stern & Ron J. Feldman, *Too Big to Fail: The Hazards of Bank Bailouts* (2004).

¹⁰⁵ I cannot adduce data to support this statement, but rely on the collective portfolios of the FDIC, FSLIC, RTC, FmHA, and the SBA. The first three entities held distressed debt that they acquired when they closed failed private institutions. The last two entities, by contrast, have an institutional mission that obligates them to make risky loans.

¹⁰⁶ *United States v. Whiting Pools*, 462 U.S. 198 (1983) (IRS); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984); *Ohio v. Kovacs*, 469 U.S. 274 (1985) (amicus on behalf of EPA); *CFTC v. Weintraub*, 471 U.S. 343 (1985); *Midlantic Nat'l Bank v. New Jersey Dep't of Environmental Protection*, 474 U.S. 494 (1986) (amicus on behalf of EPA). I omit here a *per curiam* decision regarding transition rules, to which the United States was a party, *Central Trust Co. v. Official Creditors' Committee of Geiger Enters.*, 454 U.S. 354 (1982), and two cases assessing the constitutionality of provisions of the Code, to which the government also was a party, *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *United States v. Security Industrial Bank*, 459 U.S. 70 (1982).

secured creditor,¹⁰⁷ one as an unsecured creditor¹⁰⁸); the Solicitor General filed amicus briefs in support of secured creditors in two (but did not present oral argument),¹⁰⁹ and did not appear at all in two cases.¹¹⁰

By the early 1990's, however, the Office of the Solicitor General began to participate regularly in cases presenting conflicts between the interests of secured creditors and other claimants on the estate. Thus, starting in 1991, for a five year period running through 1997, the Solicitor General appeared in all of these cases except one (five out of six),¹¹¹ presenting argument on behalf of the secured creditors in each of the five, once as a party (*BFP*), but four times as an amicus.¹¹² Of import here, the Solicitor General's stated justification for appearing in those cases as an amicus was its oft-repeated explanation that the financial crises of the 1980's had left the federal

¹⁰⁷ *United States v. Ron Pair Enters.*, 489 U.S. 235 (1989).

¹⁰⁸ *United States v. Security Industrial Bank*, 459 U.S. 70 (1982). This is not, strictly speaking, a case interpreting the Bankruptcy Code, because it involves the constitutionality of Section 522(f). Nevertheless, it does present a square conflict between the interests of secured and unsecured creditors. Accordingly, I include it in that category.

¹⁰⁹ *United Savings Ass'n v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365 (1988); *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1998).

¹¹⁰ *Johnson v. Home State Bank*, 501 U.S. 78 (1991); *Union Bank v. Wolas*, 502 U.S. 151 (1991).

¹¹¹ The Solicitor General did not appear in *Nobelman v. American Savings Bank*, 508 U.S. 324 (1993).

¹¹² The Solicitor General argued as an amicus in *Dewsnup v. Timm*, 502 U.S. 410 (1992); *Rake v. Wade*, 508 U.S. 464 (1993); *Citizens Bank v. Strumpf*, 516 U.S. 16 (1995); *Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997). I omit from this list *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994). Although the lower-court decision involved the new-value rule (an issue ultimately resolved in *Bank of America Nat'l Trust & Savings Ass'n v. 203 N. LaSalle Street Partnership*, 526 U.S. 34 (1999)), the Supreme Court's argument and decision involved the propriety of vacating an appellate court decision when the parties settle after the decision. The Solicitor General appeared, arguing that it was appropriate to vacate the decision (an outcome that would have furthered the interests of the secured creditors in that case).

government (through the FDIC, FSLIC, and RTC) as one of the largest secured creditors in bankruptcy proceedings.¹¹³

More recently, as the importance of the government's role as a secured creditor has diminished, the Solicitor General has participated less regularly on behalf of secured creditors. Thus, it has argued on behalf of secured creditors only once in the four cases decided after 1997.¹¹⁴ Indeed, the increasing difficulties of the Pension Benefit Guaranty Corporation presage a period in the not-too-distant future in which the Solicitor General properly might become a leading advocate for *unsecured* creditors.

When *BFP* is viewed in this context, the effectiveness of the SG's participation in these cases is noteworthy.¹¹⁵ Secured creditors have won all seven of the cases in which the Solicitor General has argued on their behalf, but only five of the nine cases in which

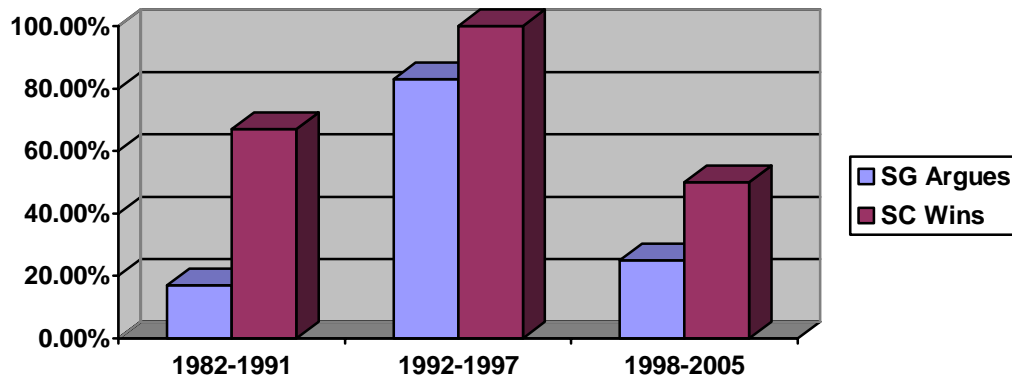
¹¹³ See, for example, the motions seeking divided argument in *Dewsnup*, *Rake*, & *BFP* (copies on file with author). As I discuss below, the Solicitor General's practices have changed in recent years, as those crises have faded from memory and other interests (such as the role of the PBGC) have come to the fore. Thus, since 1997, the Solicitor General has appeared in only two of the four cases of this type, once arguing as an amicus in support of unsecured creditors (*Till v. SCS Credit Corp.*, 541 U.S. 465 (2004)), and once arguing as an amicus in support of secured creditors (*Bank of America Nat'l Trust & Savings Ass'n v. 203 N. LaSalle Street Partnership*, 526 U.S. 34 (1999)). The cases in which the Solicitor General did *not* appear are *Fidelity Financial Services v. Fink*, 522 U.S. 211 (1998) and *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000).

¹¹⁴ *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004) (arguing for unsecured creditors); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.* 531 U.S. 1 (2000) (no participation); *Bank of America Nat'l Trust & Savings Ass'n v. 203 N. LaSalle Street Partnership*, 526 U.S. 434 (1999) (arguing for secured creditors); *Fidelity Financial Services v. Fink*, 522 U.S. 211 (1998) (no participation). *Till* is particularly interesting because the Government's brief in that case relies explicitly on the interest of the IRS in limiting the rights of secured creditors.

¹¹⁵ I do not think that participation can be regarded as effective solely because the Solicitor General prevails in a large share of the cases in which it appears, because the Solicitor General is free to decline to participate in any case in which the position that furthers a government interest appears too weak to defend. However, when the Solicitor General embarks on a practice of appearing to defend an interest in almost every case in which that interest is before the Court, and when the side that the Solicitor General defends prevails in every case, there is some reason to think that the Solicitor General's appearance is relevant to the outcome.

the Solicitor General did not argue on their behalf. Of even greater interest, the three periods discussed above map surprisingly well with the Court's decisions in those cases: the only period in the Court's history in which secured creditors have won reliably is the period in which the Solicitor General consistently appeared in the Court on their behalf.

FIGURE ONE: SG PARTICIPATION AND OUTCOMES IN SECURED CREDITOR CASES



My discussion is of course speculative, and not readily susceptible of proof. Certainly many factors influence Supreme Court decisions other than the views of the Solicitor General. There plainly is a selection bias as well – the Solicitor General has considerable control over the cases that come before the Court when the United States is a party, and in other cases, the Solicitor General need not participate if the arguments on the “government” side are unappealing.

In addition, the question of “deference” is tied up with the merits of the cases that come before the Court. Those who think the analysis in *BFP* and *Dewsnup* is

transparently correct¹¹⁶ will see no reason to credit the Solicitor General's appearance in those cases as promoting positions to which the Court might have wished to defer. I do think, however, that the discussion above offers good reason to think that in close cases – and *BFP* certainly was a close case – the views of the Solicitor General will be important to the Court's final decision. Most importantly, in both of those cases the position articulated by the Solicitor General was one that would play to the Court's general skepticism about bankruptcy powers – an argument that the Bankruptcy Code should be interpreted to permit as little interference as possible with the ordinary course of a secured creditor's enforcement of its security interest.

V. CONCLUSION

The discussion above is intentionally loose and hypothetical. I do not offer a theory to explain all of the Supreme Court's bankruptcy cases. Nor have I identified the only important element of Supreme Court decision-making in bankruptcy cases. For example, some cases (like *BFP*, *Ahlers*, and *LaSalle*) might be viewed more narrowly as illustrating the doubt that Justices have about the capacity of bankruptcy courts to value property. But as the discussion above suggests, those same cases also demonstrate the hesitancy of the Court to allow the Bankruptcy Code to interfere with the accepted baselines of other regimes. I read *Ahlers* and *LaSalle* as examples of the Court's reluctance to allow the bankruptcy court to overturn the basic corporate norm that creditors must be paid before shareholders.

¹¹⁶ For a critical perspective on *Dewsnup*, see Lawless, *supra* note 3, at 20-27 (characterizing the decision as “nontextualist” and suggesting that the best that can be said for it is that it is “result-oriented”).

Other cases seem to display a rigidly textualist interpretive stance, *Ron Pair* being the most commonly noted example here. But that argument cannot take us too far in a domain in which all of the cases must, of necessity, start from statutory language. If the Court's bankruptcy jurisprudence was unusually or inordinately textualist, we would find cases where the Court applied statutory language literally, in the face of persuasive policy norms and commonsense justifications for a contrary result. Yet there are few such cases in the bankruptcy canon – and *Ron Pair* certainly is not one of them. By contrast, as I illustrate above, many of the Court's bankruptcy cases illustrate a startling willingness to depart from relatively clear textual indications in favor of institutional concerns.

Similarly, federalism surely influences the Justices in some of the cases (like *Kelly*, *Nordic Village*, and *BFP*). There is at first glance perhaps little obvious difference between deference to the States and bankruptcy skepticism. Thus, it seems clear that the Justices are reluctant to allow any federal statute to interfere with the state criminal process (the problem in *Kelly*) or to impose monetary liability on the States (the issue in *Nordic Village*). Yet the Justices typically would not treat the real-estate foreclosure system as being sufficiently important to State sovereignty to warrant special protection from federal intrusion. The debate between Justices O'Connor and Kennedy in *BFP* reflects a tension in their views on this subject.

To summarize, I see the Bankruptcy Code as a relatively unusual type of legislation – a broad and intentionally transformative piece of legislation without any dominant agency support in the Executive Branch.¹¹⁷ The lack of a strong agency to

¹¹⁷ See Lee Dembart & Bruce A. Markell, *Alive at 25? A Short Review of the Supreme Court's Bankruptcy Jurisprudence*, 78 Am. Bankr. L.J. 373 (2004).

enforce and interpret the Code has had two related effects on the jurisprudence under the Code. First, it has left the Court to discern for itself the importance of bankruptcy policy, the result being that the Court has a much less forceful sense of the Code's importance than it has for parallel legislation in fields like environmental law, labor law, and pension regulation. At the same time, the lack of an agency focused on the Code has meant that the federal interest in bankruptcy cases in most cases has come from some other legal regime, and thus has tended to support a less intrusive interpretation of the Code, not the broad interpretation that administering agencies typically develop. Together, those two effects have resulted in a jurisprudence exemplified by *BFP*'s adoption of a reading of the Code much narrower than the plain language would suggest.