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Changing the Philosophy of the Supreme Court: Discussion of the Influence a More Conservative Court Will Have on Bankruptcy Cases

International Women's Insolvency and Restructuring Confederation Panel
2021 Association of the New Jersey Federal Bar
Honorable William H. Gindin Bench Bar Conference

1. *Introduction: Ancient history in brief*
    a. The Supreme Court in the really early years
    b. The Court's role in promoting and undermining receiverships
    c. The Court's role under the Bankruptcy Act
2. *The Court and the 1978 Code*
    a. Overview
        i. Has never been a liberal majority during the life of the Code
        ii. But this era (1978 to 2010) does feature justices who do not totally track the Presidents who appointed them (*e.g.*, Justices White and Souter)
        iii. And Professor Klee (who studied bankruptcy cases from 1898 to 2008) has found that political background only matters in bankruptcy cases that involve the government:
            1. He found that Justices appointed by Republicans are more likely to favor the debtor against the government,
            2. But in all other bankruptcy cases, there was no statistically significant difference among Justices
    b. Lots of bankruptcy cases are unanimous – perhaps reflecting the Justices' lack of interest in the topic in general.
3. *Three cases that might have implications for the future*
        i. U.S. v. Ron Pair Enterprises, 489 U.S. 235 (1989).
            1. Facts: In a 5-4 decision, the Supreme Court held that section 506(b) of the Bankruptcy Code permits a creditor to receive postpetition interest on an oversecured claim even if the creditor does not have an agreement providing for interest on the claim (*e.g.*, the IRS).
                a. *Section 506(b) provides*: To the extent that an allowed secured claim is secured by property the value of which… is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement or State statute under which such claim arose.

2. Majority: The majority held that because the phrase "interest on such claim" is offset by commas and followed by the conjunctive term "and any," it is independent from the remainder of section 506(b).
3. Dissent: Serious changes from pre-Code practice should not turn on punctuation.
4. Takeaway: This case began the Court's turn towards a "hard" form of plain meaning analysis of the Code, one that favors text over policy arguments.

ii. BFP v. Resolution Trust Corp., 511 U.S. 531 (1994).

1. Facts: The debtor's property in Newport Beach, California was sold in a foreclosure sale prepetition, which the debtor challenged as a fraudulent transfer. BFP argued that because the fair market value of the property at the time of the foreclosure sale was $725,000, the $433,000 foreclosure sale price was not "reasonably equivalent value" under section 548.
2. Majority: The majority purported to apply the plain meaning of section 548, but used history and concerns about federal-state relations to reject any suggestion that "reasonably equivalent value" should necessarily mean something like "about fair market value." The Court held that a foreclosure sale may be set aside only if the purchase price is so low that it "shock[s] the conscience or raise[s] a presumption of fraud or unfairness." In all other cases, the sale price must be deemed "reasonably equivalent value."
3. Dissent: In a lengthy dissent, four members of the Court said that the analysis should start and end with the statutory text. Justice Souter argued that bankruptcy courts were best suited to consider whether a particular fact pattern involved "reasonably equivalent value" and that the majority's consideration of 400 years of mortgage foreclosure history was a backdoor way to override the plain meaning of the statute. The dissent argued that Congress never intended reasonably equivalent value to allow a "peppercorn" price to be sufficient for a "California beachfront estate."
4. Takeaway: In carving out an exception for real property
5. foreclosures, the majority suggests that "the 'important' policy favoring security of title should count more and the 'important' bankruptcy policies should count less." (Souter, J., dissenting opinion). This suggests an important exception to the normal "plain meaning" approach to the Code, especially when "ancient" areas of law are involved.

iii. Central Virginia Community College v. Katz, 546 U.S. 356 (2006).

1. Facts: The Petitioners in *Katz* were several educational institutions in Virginia that were deemed arms of the State and thus entitled to sovereign immunity. The Court held that sovereign immunity did not prevent bankruptcy courts from hearing preference claims against a state entity arising under sections 547 and 550 of the Code.
2. Majority: To the extent an action seeking the return of preferential payments goes beyond *in rem*, the text of the Bankruptcy Clause provides a more expansive power to establish "uniform laws on the subject of Bankruptcies throughout the United States." The Court concluded that the question the respondents and petitioners had raised — whether Congress had "abrogated" sovereign immunity in § 106 — was irrelevant because the states had waived that sovereign immunity through the Constitution with respect to bankruptcy cases.
3. Dissent: Justice Thomas, writing for four members in dissent, argued that the 14th Amendment was the only valid exception to sovereign immunity. He argued that the historical record "refute[d] . . . the majority's premise that the Framers placed paramount importance on the enactment of a nationally uniform bankruptcy law."
4. Takeaway: The case may represent the last decision by a group of Justices that were more focused on providing a workable bankruptcy system, and less focused on state's rights.[1]

[1] In Allen v. Cooper, No. 18-877, 2020 WL 1325815 (U.S. Mar. 23, 2020), the Court held that state sovereign immunity applies to intellectual property matters and that *Katz* was limited to the Bankruptcy Clause (and does not apply to other Congressional powers under Article I). Justice Kagan wrote that "[i]n bankruptcy, we decided, sovereign immunity has no place" and everything in *Katz* "is about and limited to the Bankruptcy Clause; the opinion reflects what might be called bankruptcy exceptionalism." The Bankruptcy Clause, she explained, "was *sui generis* . . . among Article I's grants of authority," and the states waived sovereign immunity in bankruptcy cases by having adopted the Constitution. Justice Thomas concurred to note that he still felt that *Katz* was wrongly decided. Justice Breyer, joined by Justice Ginsburg, concurred and reiterated his "longstanding view" that *Seminole Tribe* (which held sovereign immunity could not be abrogated under the Commerce Clause) was wrongly decided.