AMERICAN BANKRUPTCY INSTITUTE

2018 Winter Leadership Conference

Historical Perspectives: Bankruptcy and the U.S. Supreme Court

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CONCURRENT SESSION

2018

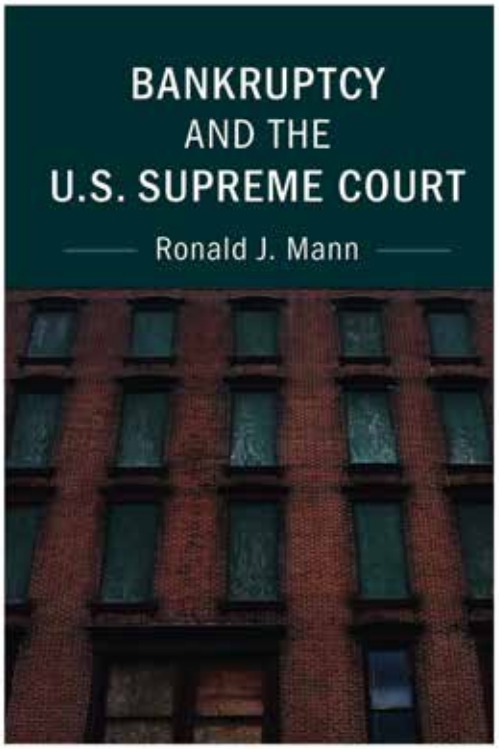
Bankruptcy and the U.S. Supreme Court

Ronald J. Mann
Columbia Law School

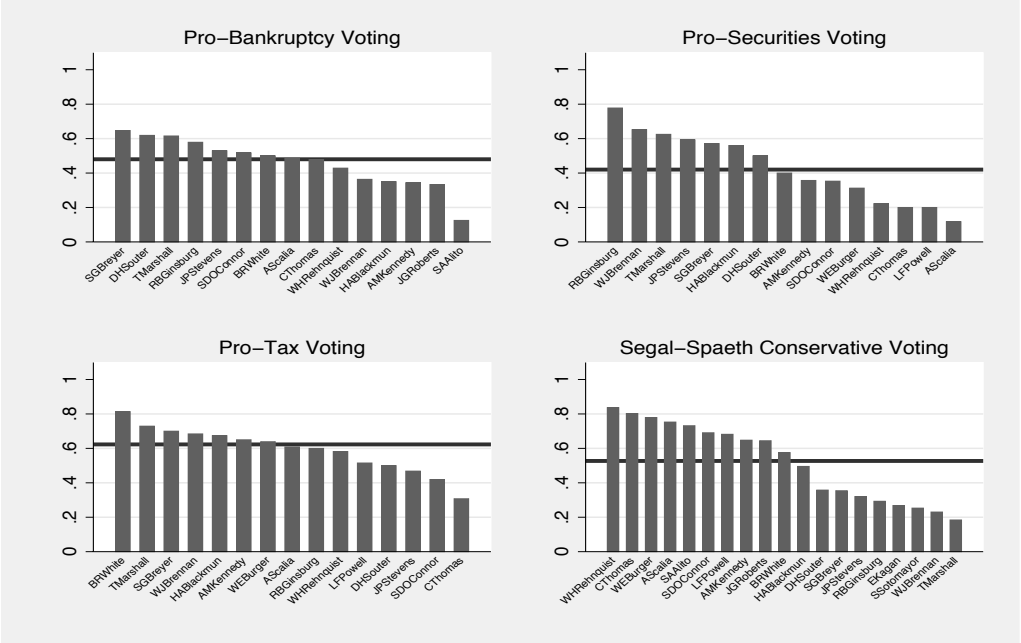
Motivation: Impoverished Literature on Judicial Decisions

- Traditional Poli Sci View: "Attitudinal"
  - Pritchett 1948 → Segal and Spaeth (1993, 2002)
    - Law as "necromancy or finger painting"
  - American Political Development (institutions)
    - Kahn & Kersch 200, Powe 2009, etc.
- Legal academia: Purely textual
  - Rasmussen 1993; Dembart & Markell 2004; Bussel 2000

- Supreme Court's 86 Bankruptcy Code decisions
- Case studies of seven early "close" cases
- Archive of Justices' papers
  - Grant from NCBJ
  - Online at bksct.net



Voting Direction (Non-Unanimous Cases)



Source: Supreme Court Database; Data from Epstein & Posner; author's calculations; reference lines indicate mean likelihood of indicated vote among all Justices

Minor Premise: The Narrow Way

- 86 cases in 36 years (2.4/year)
  - 3.5% of all civil cases
- 37% of decisions (32/86) are "broad"
  - 25% (5/20) in close cases (3-4 dissents)

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Rejected Explanation 1: Plain Meaning

- "Plain" ≠ Narrow
- Decisions ≠ "Plain"
  - BFP/Kelly
    - Lens of Midlantic
- "Plain" says nothing in text-less cases
  - Rehnquist's "judicial 'darkling plain' where ignorant armies have clashed by night"

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Rejected Explanation 2: Boredom

- "These cases just bore them to tears."
- Problems
  - Boredom ≠ Narrow
  - Justices don't seem bored
    - Rejecting clerk advice (Kelly)
    - Post-Conference shifts
      - ❖ Bildisco and Midlantic
    - "New" answers to old questions
      - ❖ Dewsnup, BFP

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Scalia on *Owen v Owen*

MEMORANDUM TO THE CONFERENCE:

I was as firm as any of you in my opinion that the judgment in this case had to be an affirmance. I have found it impossible, however, to write it that way. The principal difficulty is that the case-law interpreting the phrase "impairs an exemption to which the debtor would have been entitled" is unanimous, with respect to the federally listed exemptions, to the effect that a lien excluded from an exemption nonetheless impairs it. I am unwilling to contradict this unanimous line of authority, since lien avoidance for the most important federal exemptions is nonexistent on any other assumption; and I cannot find a way to distinguish this authority from cases involving state exemptions.

I hope you may agree with me, but otherwise the opinion will have to be reassigned.

Sincerely,

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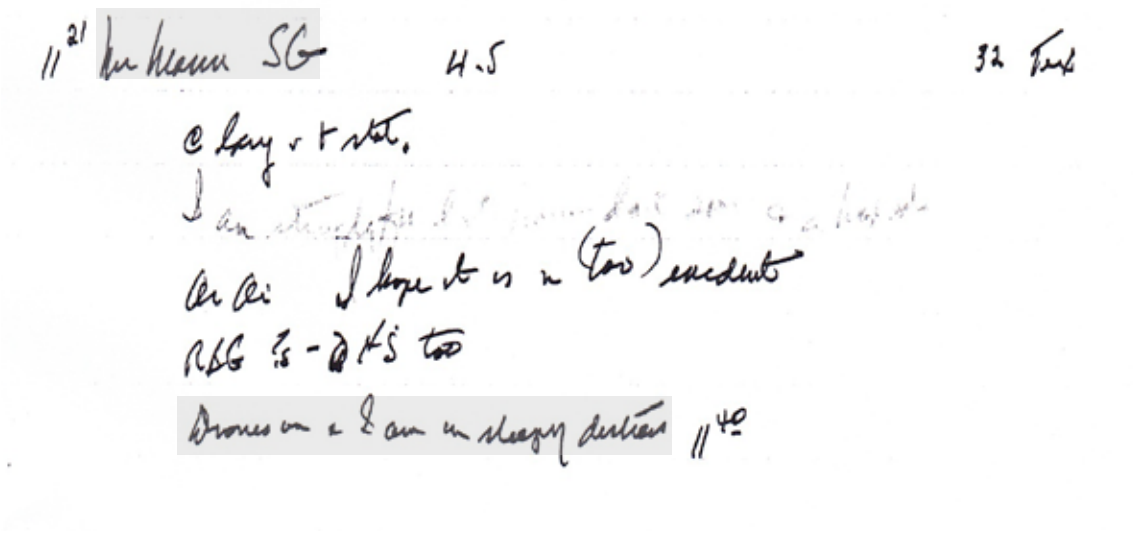
Counterevidence of Boredom!



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Better Explanation 1: Role of OSG

- Code not only lacks an agency advocate, it has an opponent in OSG
- Advocate for narrow Code 83% (50/60)
  - 67% narrow w/ OSG → 44% narrow w/o
  - Secured creditors win 78% (14/18)
    - OSG represents creditor agencies
  - Taxes prevail 73% (8/11)
    - OSG represents IRS
  - Discharge narrowed 60% (9/15)
    - OUST's institutional mission

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Better Explanation 2: Unexamined "Knowledge"

- Lacking an expert agency, Court relies all too often on what it thinks it knows.
  - General preconceptions about industry
  - Simple factual errors generalizing from limited experience
  - Putting good questions to ill-informed advocates
- Interacts directly w/ OSG Role

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Example 1: The Creditor's "Bargain"

- "Of course, th[e lien passing through bankruptcy is] what the lienholder **bargained for**." {*Dewsnup* argument}
- "[T]he creditor's lien stays with the real property until foreclosure. That is what was **bargained for** by the mortgagor and the mortgagee. {*Dewsnup* opinion}
- "The [rights to retain the lien until full payment and foreclose for nonpayment] are the rights that were **bargained for** by the mortgagor and the mortgagee." {*Nobelman* opinion}
- "Isn't [credit bidding] pretty much what he **bargained for** when he insisted on security before giving the loan?" {CJ at RadLAX argument}

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Example 2: Ill-Grounded Generalizations

- "You know, I'm not familiar with the widespread practice of taking a second mortgage on a business loan unless it's your father-in-law. * * * * It seems to me quite rare." {Scalia at *Caulkett* argument.}
- Rehnquist relying on his "fair amount of experience representing creditors in bankruptcy under the Act" at *Timbers* argument.

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Example 3: Ill-Placed Questions

- Asking Tim Dyk about use of lawyers by bankruptcy filers (*Taylor*)
- Asking Larry Wallace about allocation of costs after tax lien foreclosures (*Ron Pair*)

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Thanks!