

Balancing Bankruptcy and Environmental Law: *Midlantic National Bank v. New Jersey Department of Environmental Protection*

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Introduction

Congress's 1978 adoption of the Bankruptcy Code was a legislative landmark, the culmination of a decade of attention to a woefully antiquated bankruptcy system largely left intact since the nineteenth century. Senate hearings in 1968 led to the appointment of a prestigious bipartisan Bankruptcy Commission, which produced a massive report, which served in turn as a template for a statute that brought wholesale change to almost every aspect of the bankruptcy system.¹ So what would the Supreme Court do with this new statute? The Court's persistent doubts about the constitutionality of the Code's broad allocation of authority to bankruptcy courts led to

an extended series of decisions trimming back the Code's jurisdictional grant, starting with *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*² and continuing with *Granfinanciera v. Nordberg*³ and *Stern v. Marshall*.⁴ Less well known, by comparison, is the persistently narrow interpretation of the Code in the Court's statutory cases, which routinely subordinate the needs of a broad and effective bankruptcy process to the policies of other federal and state legal regimes.⁵

The roots of the Court's narrow interpretive frame lie in one of the earliest of the Court's decisions under the Code, *Midlantic National Bank v. New Jersey Department of Environmental Protection*.⁶ *Midlantic* presented a classic problem of statutory interpretation, in which the Code's provisions

for the protection of the estate conflicted directly with developing rules for environmental law. More broadly, the case offered the Court its first chance to assess Congress's broadening of the bankruptcy regime: case law under the old Bankruptcy Act had limited the bankrupt's ability to ignore environmental law, but language in the Code suggested that Congress contemplated a much broader freedom of action going forward.

The result was a considered refusal to credit the broadened language of the new Code. Justice Lewis F. Powell's opinion for the Court adopted a clear-statement rule under which it would presume that provisions of the Bankruptcy Code have the same meaning as predecessor provisions of the Bankruptcy Act. What is most surprising about the decision, though, is not apparent on its face—how close the Court came to ruling in favor of the bankrupt. As the internal papers of the Justices show, Justice Powell “stole” a Court in this case. The decision at Conference favored the bankrupt; it was only a changed vote by Justice John Paul Stevens that led to the Court's adoption of *Midlantic's* Code-narrowing clear-statement rule.⁷

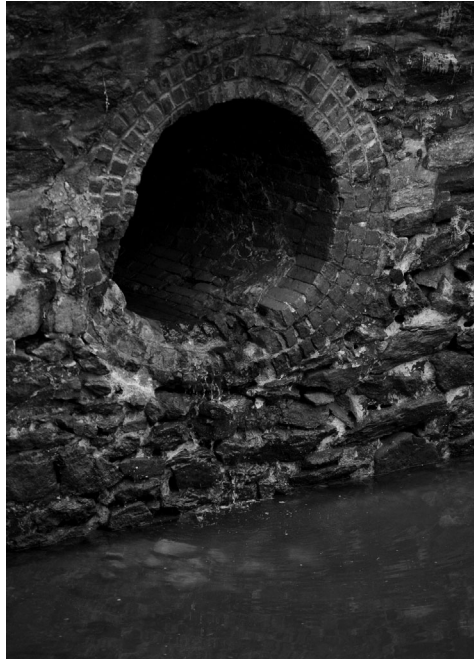
Political Background

Midlantic came to the Court in the mid-1980s, just as state and federal efforts to curtail pollution reached their zenith. Environmental disasters in the post-World War II era, including the Cuyahoga River fire in 1969 and Three Mile Island in 1979, convinced much of the public that stricter measures were necessary to control industrial pollution.⁸ State pollution programs began in earnest in the 1960s, but the federal government became involved in the 1970s with the creation of the Environmental Protection Agency, major amendments to the Clean Air Act, and the passage of the Clean Water Act.⁹ Most important was the 1980 adoption of the Comprehensive

Environmental Response, Compensation, and Liability Act (CERCLA).

The rise of federal activity in this period led to an uneasy tension with state efforts to combat environmental pollution. Although the premise of federal environmental intervention was that the federal government's efforts would complement state laws,¹⁰ federal programs often preempted more aggressive state programs. Scholars routinely explain that the passage of federal environmental laws reflected rent-seeking by polluters who sought lax federal regulations to preempt the increasingly effective regulation at state and local levels.¹¹ Those critics often point to the 1965 enactment of the Motor Vehicle Pollution Control Act, which stymied state efforts to place harsh limits on automobile exhaust emissions. It surprised no one that major economic interests, sensing that some form of environmental regulation was inevitable, sought standardized (lower) federal pollution limits, often successfully.¹²

That left significant uncertainty about how state pollution laws would coexist with their federal counterparts. For example, the New York and New Jersey statutes at issue in *Midlantic* dated to the 1970s.¹³ New York's statute explicitly attempted to integrate state law with federal environmental protection efforts; the statute's stated purpose was to “regulate the management of hazardous waste . . . in this state and to do so in a manner consistent with the Federal Solid Waste Disposal Act [and other federal laws].”¹⁴ New York required the owners and operators of waste-processing facilities to go through a permitting process and prohibited the “disposal of hazardous waste without authorization.”¹⁵ Disposal under that statute included “the abandonment, discharge, deposit, injection . . . or placing of any substance so that such substance or any related constituent thereof may enter the environment.”¹⁶ New Jersey's pollution control laws were similar, explicitly prohibiting the unauthorized disposal of hazardous waste.¹⁷



Notorious polluter Russell W. Mahler operated Quanta Resources Corp. under a variety of names during the 1970s and early 1980s and was at the center of several high-profile dumping scandals. His companies collected waste oil from large industrial firms and separated out the reusable oil for resale. But then they dumped the highly toxic byproducts in rivers.

Widespread public concern about the environment drove the regulatory efforts. For example, polls throughout the 1970s and early 1980s showed a public anxious about the effects of pollution. A 1982 Roper survey showed that thirty-seven percent of Americans still thought that government environmental protection laws and regulations had not gone “far enough.”¹⁸ Similarly, forty-four percent of Americans told pollsters in 1984 that they thought environmental pollution was a “very serious threat” to citizens like themselves, and fifty-six percent thought there was “too little involvement by the government in the environment.”¹⁹

Bankruptcy Abandonment under the Act and the Code

Midlantic would turn on the long-recognized power of the bankruptcy trustee

to “abandon” property. Within bankruptcy law, abandonment is a technical term, which entails the relinquishment of title or control of property by the bankruptcy trustee. A trustee typically abandons property when it is burdensome to the estate, in the sense that there is little reason to expect that continued exploitation of the property will produce a return for creditors of the estate. Once the trustee has abandoned the property, lien holders on the property have the opportunity to foreclose and take title. If lien holders do not choose to foreclose and if the debtor has no interest in continued use of the property, the state takes over responsibility for the abandoned property.

As it happens, the old Bankruptcy Act, which had been in force from 1898 until the Code’s 1978 adoption, had not codified the trustee’s power to abandon. Rather, trustees abandoned burdensome property through the exercise of their larger power to dispose of the estate’s assets. In discerning a right to

abandon as part of the right to dispose, case law under the Act limited the abandonment power in important ways. Specifically, with some variation, the leading cases generally prohibited abandonment that would violate a statute or endanger public health and safety. For example, a leading Fourth Circuit decision under the Act, *Ottenheimer v. Whitaker*, considered the power of a trustee to abandon the debtor's floating barges. The Fourth Circuit found abandonment impermissible, based on the conclusion that abandonment of the barges would have resulted in their eventual sinking, which would have violated a federal statute forbidding the obstruction of navigable waterways. That decision, like others, rested on the uncodified status of the abandonment power: "[T]he judge-made rule [of abandonment] must give way when it comes into conflict with a statute enacted to ensure the safety of navigation."²⁰ The oft-cited Pennsylvania bankruptcy court decision in *Lewis Jones* provides another salient example. The *Lewis Jones* court refused to permit three public utilities to abandon underground steam lines because the trustee's plan did not provide for the sealing of the abandoned lines. The bankruptcy court found that there were no applicable local health and safety laws forbidding abandonment, but nevertheless held that the court's equitable power to "safeguard the public interest" was broad enough to obligate the trustee to seal the steam lines.²¹

In the Code, however, Congress explicitly codified the abandonment power. Specifically, Section 554(a) provides broadly, with no exceptions, that "the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate."²² That set the stage for the obvious question: whether the unqualified codification should be read literally, thus permitting abandonment of property merely because it is

burdensome, or more narrowly, implicitly adopting the qualifications developed in case law under the old Act.

The Factual Setting

Midlantic arises out of the sordid affairs of Quanta Resources Corp., a corporate waste-processing business owned and operated by notorious polluter Russell W. Mahler. Mahler had operated Quanta under a variety of names during the 1970s and early 1980s and had been at the center of several high-profile dumping scandals. Mahler, dubbed a "toxic waste entrepreneur" by *The New York Times*, was in the business of oil reclamation. His companies collected waste oil from large industrial firms such as Ford and Alcan Aluminum and treated the waste to separate out and then resell reusable oil; the byproducts of the waste oil reclamation process were highly toxic. Mahler operated three terminals for processing waste oil; two in New York, in Syracuse and Long Island City, and one in Edgewater, New Jersey. He also owned more than two dozen trucks that transported the waste oil. As it happens, instead of dumping the byproducts in state-designated and -authorized areas, Mahler directed his employees to dump the waste into sewers, landfills, and, in one case, an abandoned mine shaft. Contemporary observers concluded that Mahler had saved millions of dollars by dumping carcinogen- and mutagen-contaminated oil byproducts in unlawful locations in New York and New Jersey.²³

Mahler was finally caught in 1978 after he began directing his truck drivers to an auto service garage near Wilkes-Barre, Pennsylvania. His drivers would hook their trucks to a hose outside the garage that led through a bore hole down into an abandoned coal mine. An anonymous tip led investigators to the garage and the bore hole.

Unfortunately, the mine overflowed before state officials were able to act, dumping hundreds of gallons of toxic waste oil into the Susquehanna River, which was, among other things, a source of drinking water for the nearby city of Danville. When Pennsylvania authorities investigated, they readily discovered many other instances of Mahler's illegal dumping. At that point, with the discovery of his activities in New York and New Jersey, the entire scheme unraveled. Subsequent investigations by New York and New Jersey officials revealed Mahler's deft maneuverings through state and city political circles. In one instance, Mahler, apparently through the payment of kickbacks to state officials, was able to secure a contract for the cleanup of a lagoon that Mahler's own illegal dumping had contaminated. Then, instead of transporting the lagoon's waste to an authorized dump site, Mahler simply piped some of the waste across the road and dumped the rest into a New York landfill. Mahler's activities eventually resulted in large fines, though not much jail time. Remarkably, his total sentences amounted to only four years—one year from a Pennsylvania conviction for illegal dumping and three years from a federal conviction for conspiracy to bribe city officials.²⁴

In 1980, after the Pennsylvania criminal investigation was under way, Mahler sold his waste processing company to a Wall Street investment firm, Warburg Paribas Becker Inc. The investors renamed the business "Quanta," presumably hoping to obscure the Mahler connection. The new owners of Quanta were able to borrow \$600,000 from Midlantic National Bank for working capital, in return for which they granted Midlantic a security interest in a variety of things, including Quanta's inventory (waste oil); apparently Mahler's continuing participation as vice president of sales did not trouble Midlantic.²⁵ Quanta also successfully obtained a temporary operating permit from

New Jersey environmental regulators. Unfortunately, less than a month later, New Jersey regulators found PCB-contaminated oil during an inspection of Quanta's Edgewater facility. New Jersey authorities directed that Quanta promptly cease operations. The company entered bankruptcy in the fall of 1981, when negotiations between New Jersey regulators and Quanta officials about cleanup of the site proved unproductive.²⁶

Quanta's waste oil storage containers and its processing facilities were in poor physical condition when the company entered bankruptcy. PCBs contaminated 400,000 gallons of waste oil at the Edgewater facility and 70,000 gallons at the Long Island City facility. To make matters worse, the storage tanks at both facilities had begun to leak; substantial PCB contamination extended beneath the surface of the soil at both sites. Still, because a portion of Quanta's waste oil inventory was not contaminated with PCBs, the estate was able to sell some of Quanta's waste oil for \$288,000. It was the view of the bankruptcy trustee that the properties, in their contaminated state and factoring in their mortgages, had no value to the estate. Thus, because cleaning up the toxic contamination would have resulted in a net loss to the estate, the trustee sought to abandon both the New York and New Jersey properties.²⁷ If he were successful, the \$288,000 would be distributed to Midlantic as proceeds of the inventory in which it had held a security interest. If not, the trustee would expend those funds to clean up the properties and Midlantic would take little or nothing.

Relying on the newly enacted Section 554, the trustee petitioned the bankruptcy court to allow abandonment of both sites. At the bankruptcy court hearing considering the proposed abandonment, regulators from New York and New Jersey argued that the trustee should not be allowed to abandon the properties in their present state because they presented a danger to the environment and the general public. New York also argued

that it should receive a first lien on the Long Island City property to the extent of any monies that New York might expend to bring the abandoned property into compliance with state law. The bankruptcy judge rejected those arguments, refusing to grant New York priority and permitting abandonment of the New York and New Jersey properties. When the district court agreed with the bankruptcy court's decision, the case came to the Third Circuit.²⁸

At the Third Circuit, in addition to arguing that Congress had meant to incorporate pre-Code practices into Section 554(a), New York argued that 28 U.S.C. § 959(b) independently barred the trustee from abandoning property in contravention of state law. That statute provides that:

a trustee . . . shall manage and operate the property in his possession as such trustee, receiver, or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

New York contended that the trustee's decision to abandon fell within his "management" and "operation" of the property and therefore had to be conducted in compliance with state law. The trustee disagreed, arguing that "management" and "operation" referred only to the trustee's responsibilities in a Chapter 11 bankruptcy where the trustee administers the estate as an ongoing concern. The Third Circuit devoted significant coverage to the Section 959(b) issue and concluded that the provision was not an independent prohibition on the trustee's abandonment power—but rather a clear indication that "the congressional scheme was not intended to subjugate state and local regulatory laws."²⁹

On the bankruptcy question, the Third Circuit panel voted 2-1 to reverse the district court, holding that the Bankruptcy Code did not authorize the Quanta trustee to abandon the properties in contravention of state environmental law. The Third Circuit acknowledged the wide leeway that Section 554 (a) granted trustees to abandon burdensome property, but the court contended that Congress had intended to incorporate pre-Code judicial exceptions into the law. The judges explained that "where it is argued that Congress intended to withdraw police power from a state, that intention must be unmistakable."³⁰ Because Congress had not explicitly overruled pre-Code exceptions to the abandonment power, the court concluded that Section 554 implicitly incorporated those exceptions. In dissent, Judge Gibbons harshly criticized the majority's use of an interpretive principle to overcome the unequivocal language of Section 554(a). He also argued that putting the financial cost of cleanup on the estate raised the specter of an unconstitutional taking by forcing the estate's secured creditors to bear the price of cleanup in the form of reduced payouts.³¹

Midlantic at the Supreme Court

The facts on the ground changed substantially before the case reached the Supreme Court. State regulators had stepped into the void left by the bankruptcy trustee and had secured both sites. New York cleanup efforts were complete; remediation in New Jersey was well under way. Thus, by the time the Justices considered the case, it was clear that no environmental catastrophe would flow from the trustee's unilateral abandonment of the contaminated sites.

That circumstance left the states in a less than ideal position. They had argued that the bankruptcy court should not permit



Members of the Supreme Court who decided *Midlantic National Bank v. New Jersey Department of Environmental Protection* in 1985 pictured during a ceremony held at the Supreme Court the following Term: from left to right, William J. Brennan, Jr., Byron White, Thurgood Marshall, Harry Blackmun, Lewis F. Powell, William H. Rehnquist, John Paul Stevens, and Sandra Day O'Connor.

the trustee to abandon the property because of the environmental havoc that would result. However, because they had stepped into the gap left by the trustee and eliminated that threat to public health and safety, the states refocused the Court's attention away from the public risk of a contaminated water supply and back to the private "Who should pay?" aspect of the case. Because the states had covered, or were preparing to cover, the costs of cleanup, the only live issue left in the case was whether the estate could be forced to reimburse the state treasuries for the funds they had expended to clean up the bankrupt's properties. The states argued that because the trustee should not have been allowed to abandon the sites, it was reasonable to force the estate to pay for cleanup that the estate should have conducted itself.

The resulting conflict between the environmental and bankruptcy laws split the Justices down the middle. For one group of

Justices, a majority at the Conference, using restrictions on the trustee's power to abandon as a way to shift the cost of clean-up to the bankruptcy estate was an impermissible interference with the bankruptcy priority rules that would elevate the otherwise unsecured claims of environmental regulators above the secured claims of Midlantic. The remaining Justices, a minority at Conference but ultimately the prevailing group, could not tolerate the potential harm from unilateral abandonment, with the attendant removal of all oversight of dangerous public hazards.

When the case came to the Court, the law clerks from all sides of the Court, so far as the record appears, regarded the case as unexceptional. The pool memo from a clerk of Chief Justice Warren Burger recommended that the Court deny review, emphasizing that the Third Circuit had decided a question of first impression.³² Justice Powell's clerk agreed, commenting in annotations on the pool memo that "CA3's holding appears to be

reasonable” and that “I think that this Court should wait for other CA’s to consider the question.” Justice Harry A. Blackmun’s clerk thought that “CA3 certainly seems to have reached the sound result—I do not see why the private interests of creditors who dealt with the bankrupt sh[ould] prevail over the public interest in enforcement of its environmental laws.” He agreed that he was “less prepared to say how firmly grounded in the statute is the result,” but concluded that “given the . . . absence of other case law on the matter, the Court should probably hold off.” No record of the Justices’ discussions survive, but plainly at least four of the Justices took a contrary view; the Court granted review in February of 1985.³³

The Bench memoranda from the Blackmun and Powell clerks, the only ones available, displayed similar views of the case. Both clerks found the pre-Code case law much more compelling than the language of the Code. Blackmun’s clerk emphasized the pre-Code common law restrictions on bankruptcy courts’ abandonment powers and argued that “nothing in the legislative history of the 1978 Act or § 554(a) suggests that Congress meant to disturb this traditional notion of the abandonment power.”³⁴ Fore-shadowing the discussion of Justice Powell’s majority opinion, she argued that “[t]he normal rule of statutory construction is that when Congress intends for legislation to make an important change in the way a judicially created concept should be interpreted it says so.”³⁵ Reducing the trustee’s unqualified reading of Section 554(a) to absurdity, she argued that no court would permit a trustee to abandon a contaminated truck in the middle of a busy tunnel or abandon a stick of dynamite on a company furnace. Because these “abandonments” could not be acceptable, she concluded that the statutory abandonment power could not be unequivocal. For her, the question was one of the reasonableness of particular limits on the abandonment power.³⁶ Following a similar line of reasoning, Justice Powell’s clerk

argued that the Court should affirm the Third Circuit decision, applying the same general interpretive principle to conclude that Congress’s adoption of Section 544 implicitly recognized the judicially created limitations on the trustee’s abandonment power.³⁷

Oddly inattentive to the operative language of the statute, the clerks found the policy arguments for the environmental side of the case powerful. The clerks pointed out that there were good reasons to impose the costs of cleanup on Quanta’s creditors rather than on the public at large. Specifically, the clerks concluded that the creditors, unlike the general public, had assumed the risk that Quanta’s violation of environmental statutes would adversely affect their economic fortunes.³⁸ Similarly, both clerks argued that allowing the trustee to abandon environmentally contaminated properties would risk allowing firms involved in toxic waste industries to transfer their liabilities for environmental cleanup to the state while distributing still-valuable property among the creditors.³⁹ The clerks were particularly critical of Midlantic’s argument that forcing the trustee to clean up a property amounted to an unconstitutional taking of Midlantic’s security interest. Because Quanta had been subject to environmental laws before it declared bankruptcy, neither clerk could see why the continuing application of those laws in bankruptcy would amount to an impermissible or unforeseeable change in the creditors’ ability to recoup their investment.⁴⁰

It was clear from the oral argument that the views of the Justices would be more disparate than the clerks’ memoranda might suggest. The harshest questioning about the environmental hazards came from Chief Justice Burger, who seemed incredulous that the trustee could insist on an unqualified power of abandonment. For those Justices, the actual facts of the case were almost wholly irrelevant. What mattered were the implications for future scenarios: “Do you mean that the trustee could abandon a burning

building . . . ? [The court] cannot say, well, wait a minute, you can't abandon it without taking some precautions against having this property be a public danger?"⁴¹

For his part, Justice Stevens seemed concerned that a vote for the creditors would send the wrong message:

Couldn't one argue . . . that the signal ought to be that you should not be lending money to these companies unless you are satisfied they will be able to comply with the environmental laws? That that is just another precaution that the business community ought to take before financing a venture like this . . . ?⁴²

On the other side, equally skeptical questions challenged lawyers for New Jersey and New York about whether conditioning abandonment of a property on the trustee's clean-up efforts was akin to creating a priority claim for the state. For example, Justice Sandra Day O'Connor pressed New York's Solicitor General for much of his time on the priority problem: "[I]sn't this really a question of priority of claims? It seems to me the abandonment question in this context is pretty much of a red herring."⁴³

The Justices also challenged the state's lawyers as to why the state should have a right of reimbursement after Quanta's bankruptcy filing that they would not have had under ordinary state law. Justice Rehnquist, for example, wanted to know whether, if the property had been abandoned from the bankrupt's estate, "how are you any worse off than before Quanta's bankruptcy?" When the New York Solicitor General responded that the debtor "was completely without assets to do anything about the situation," Justice William H. Rehnquist retorted, "But I presume that was the case on the day it filed for bankruptcy."⁴⁴ In a similar vein, Justice O'Connor was concerned that under state law the state "would have to come in and take whatever measures it wanted to take, and by its own law try to get

priority to be recouped," and she wondered, "[W]hy should the filing of a bankruptcy change that outcome?"⁴⁵ For Justice Powell, at least, those interchanges seemed to present the strongest claims for affirmance; he noted that "WHR agrees with SO'C that the problem here is priority of claims, not abandonment."

At Conference on the Friday after the argument, the Justices voted to reverse the Third Circuit by a vote of 5 to 4. The Chief Justice and Justices White, Rehnquist, Stevens, and O'Connor favored the unqualified right to abandon urged by the trustee and the bank; Justices William J. Brennan, Thurgood Marshall, Blackmun, and Powell favored the regulators' concerns about public safety. Justice Powell's notes suggest that the Justices favoring the trustee stressed the language of the Code. The Chief Justice, for example, argued that the "[p]lain language of [the] statute permits abandonment. Here the CA created priority of claims not authorized by [the] Act [sic]."⁴⁶ Similarly, Justice White commented that the "statute rewrites Bankruptcy Act" and asked "Why should unsecured creditors be required to bear this burden?"⁴⁷ In the same vein, Justice Rehnquist thought that the trustee had a "clear right to abandonment" and that the question was one "of priority."⁴⁸ Most importantly in light of what was to come, Justice Stevens qualified his vote for reversal by characterizing the case as "close," commenting, as Justice Powell's Conference notes indicate, that there "must be some discretion [to limit abandonment] [i]f abandonment itself increases the hazard," and offering the example of a "bomb [that] may explode."⁴⁹

For his part, Justice Powell's initial view of the case was quite conflicted. His preliminary memorandum, written after reading the briefs but before receiving anything from his clerk, suggested that he was "inclined to agree" with the court of appeals "[d]espite the unequivocal language of §554(a)."⁵⁰ He was particularly impressed with the argument, which he attributed to the Solicitor General, that

"§554 is a codification of a judge-made rule that . . . had recognized that the trustee's abandonment authority was subject * * * to general police powers of the states."⁵¹ At the Conference, he professed that his vote in favor of the state regulators was "tentative," indicating that he would "want to re-read Gibbon[s]'s dissent [from the decision of the court of appeals]."⁵² Indeed, he was so uncertain about his vote that his Conference notes reported the vote on the case as 5-3, with his own vote excluded from the tally.⁵³

Chief Justice Burger assigned the majority opinion to Justice Rehnquist, who quickly circulated a draft that closely tracked the position he had taken at the Conference. He noted that the "Bankruptcy Code expressly authorizes abandonment for the first time in the history of bankruptcy legislation," and that the language, "absolute in its terms, . . . makes no mention of other factors to be balanced or weighed and permits no easy inference that Congress was concerned about state environmental regulations."⁵⁴ In his view, the legislative history suggesting ratification of case law under the Act fell "far short of" the "extraordinary clarity" necessary to "read into unqualified statutory language exceptions or limitations based upon legislative history."⁵⁵ Justice Rehnquist offered a pedestrian resolution, implementing the

language of the Code as best as its text could be understood, buttressed by his sense of Congress's intent in the Code to make the bankruptcy process more comprehensively effective.

Justice Rehnquist did not, however, limit his analysis entirely to the text. Rather, reflecting the discussion at the argument and at the Conference, he closed his proposed opinion by repeating the point he made at the Conference, arguing that the regulators'

interest in these cases lies not just in protecting public health and safety but also in protecting the public fisc.

. . . Barring abandonment and forcing a cleanup, however, would effectively place [the regulators'] interest in protecting the public fisc ahead of the claims of other creditors. Congress simply did not intend that § 554 abandonment hearings would be used to establish the priority of particular claims in bankruptcy.⁵⁶

Apparently, in an effort to respond to the concerns of Justice Stevens, who was the fifth vote for Justice Rehnquist's Conference majority, Justice Rehnquist's draft also included a paragraph softening the statutory

Justice Stevens *Rev*

*Close case.
If abandonment itself increases
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must be some discretion. There may
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new situation caused by abandonment.*

Justice Powell made this Conference note on October 18, 1985 regarding Justice Stevens's qualifying of his vote for reversal by characterizing the case as "close." It reads: "Close Case. If abandonment itself increases the hazard (bomb may explode) there must be some discretion. There may be a custodial duty to meet a new situation caused by abandonment."

analysis. The draft emphasized that the holding did “not exclude the possibility that there may be a far narrower condition on the abandonment power than that advanced by [the regulators] here, such as where abandonment by the trustee might itself create a general emergency that the trustee would be uniquely able to guard against.”⁵⁷ Referring to an example from the Solicitor General’s brief, abandonment of “dynamite sitting on a furnace in the basement of a schoolhouse,” and commenting that he “kn[e]w of no cases in which trustees have sought to abandon dynamite under such circumstances,” he suggested that “the existence of the narrow exception which we reserve would surely embrace that situation.”⁵⁸

Justice O’Connor joined Justice Rehnquist’s opinion on the day that he circulated it, and Justice Byron R. White followed suit the following Monday.⁵⁹ Justice Rehnquist then circulated a second draft, which included only a single substantive revision, a footnote related to the question whether it was important that “abandonment itself violates state law.”⁶⁰ That discussion, which appeared in footnote 4 of the draft majority opinion, would turn out to be the focal point of subsequent discussions. The footnote broadened Justice Rehnquist’s discussion of that problem to emphasize the importance of bankruptcy policy, contending that allowing state law to trump the right of abandonment would “plainly frustrate the federal bankruptcy policy of expeditiously reducing the assets of the estate to money for distribution to creditors,” and thus that the Bankruptcy Code should preempt any laws purporting to restrict abandonment.⁶¹

Justice Brennan assigned the dissent to Justice Powell, perhaps hoping to shore up Powell’s hesitant vote.⁶² Noting that his “vote to affirm was quite tentative” and that he “[f]ound the case troubling,” Justice Powell nevertheless responded that he would “be glad to try [his] hand at a dissent.”⁶³ Moving quickly, Justice Powell circulated his draft

dissent less than two weeks after Justice Rehnquist circulated his draft majority opinion.⁶⁴

The records include a typescript and a printed draft of Justice Powell’s dissent that precede the first circulated draft. The main substantive revision softened the “verbal bomb shell” (Justice Powell’s words),⁶⁵ with which his clerk began the draft for a dissent. Justice Powell worried that the rhetorical flourish might be “injudicious” unless it were “accurate in every respect.”⁶⁶ The draft began with the same hypothetical discussed above, about the abandonment of dynamite on a stove in the basement of a school, followed by a caustic description of the environmental contamination at issue in *Midlantic*, both drawn almost word-or-word from the brief of the Solicitor General.⁶⁷

The draft dissent could not have taken a methodological tack more different from that of the majority draft. Frankly acknowledging the limited importance of the statutory text to his position, Justice Powell rested directly on the scope of the abandonment power under the Act. Part I of the draft detailed the “judicially-developed doctrine designed to protect legitimate state or federal interests.”⁶⁸ Justice Powell emphasized a “rule of statutory construction” requiring “specific intent” to recognize legislation as shifting the meaning of a statute that courts previously had interpreted.⁶⁹ Indeed, though he offered no citations to support the claim, Justice Powell went so far as to assert that “[t]he Court has followed this rule with particular care in construing the scope of bankruptcy codifications.”⁷⁰

Part II emphasized that the all but unqualified abandonment power recognized by Justice Rehnquist’s draft was unprecedented, an easy point given the paucity of prior judicial or legislative attention.⁷¹ Finally, Part III emphasized Congress’s undisputed concerns about “protecting the environment against toxic

pollution,” as support for Justice Powell’s “unwilling[ness] to presume that . . . § 554(a) . . . implicitly overturned long-standing restrictions on the common-law abandonment power.”⁷²

Notably, from the earliest stages of drafting, Justice Powell’s opinion closely tracked several portions of the analysis offered in the brief of the Solicitor General. The Solicitor General did not present oral argument, but did file a brief in support of the states, arguing for a narrow reading of the trustee’s abandonment power. For example, the discussion of Section 959(b) in the earliest drafts of the opinion imported quotes and significant analysis from the Solicitor General’s discussion. Specifically, both the Solicitor General and Justice Powell concluded that Section 959(b) applied to abandonment, in part because Section 959 addresses both “management” and “operation” of property and courts are “obliged to give effect, if possible, to every word Congress used.”⁷³ Justice Powell also borrowed the Solicitor General’s analysis of the origins of Section 959 and accepted the Solicitor General’s dismissive view of Midlantic’s Takings Clause arguments by not addressing them.⁷⁴ The central substantive standard of Justice Powell’s ultimate opinion—the requirements for abandonment—is closely rooted in the nuisance principles that the Solicitor General recommended to the Court.⁷⁵ Most importantly of all, Justice Powell found his core interpretive link—infusing the language of the Code with Bankruptcy Act jurisprudence—in the brief of the Solicitor General.⁷⁶

Justices Brennan, Marshall, and Blackmun promptly joined Justice Powell’s draft dissent without requesting any changes; those “joins” gave Justice Powell four votes for his draft dissent, while Justice Rehnquist still had only three votes for his draft majority opinion.⁷⁷ Justice Rehnquist responded with a third draft of his proposed opinion; the most important change was a revision trying to

downplay Justice Powell’s health and safety concerns and emphasizing that a requirement that the trustee provide notice before abandoning hazardous property would “[i]n almost all cases . . . give the State adequate opportunity to step in and provide needed security.”⁷⁸ When Chief Justice Burger joined Justice Rehnquist’s opinion that same day,⁷⁹ four Justices had agreed to each of the opinions, but there had been no word from Justice Stevens.

The next day, Justice Stevens weighed in with a detailed memorandum explaining that he had decided to switch his vote. He noted that the original draft majority opinion had troubled him in several ways and that he had started by trying “to formulate some suggested editorial changes that would clarify the scope of the holding, or perhaps identify the contours of the dynamite exception.”⁸⁰ However, Justice Stevens went on to explain that “further study of the case has undermined my confidence in my Conference vote.”

Justice Stevens expressed much more concern with Justice Rehnquist’s policy views than with his statutory analysis. Specifically, he questioned Rehnquist’s characterization of the issues in the case as solely about “who pays.” He maintained that if the case had been about the simple shifting of financial responsibility for cleanup

from one party to another—if abandonment did nothing more than . . . make an adjustment in the rights of various creditors—state law could be ignored in deciding whether or not to approve abandonment. But if the abandonment has health as well as financial consequences, and if it is prohibited by state law because of the health consequences, I think the trustee has some duty to comply with state law.⁸¹

Because the case as presented to the bankruptcy court in fact involved allegations

of health hazards related to the abandonment, Stevens thought it improper to dispose of the case solely as a financial matter. Once he had reached that conclusion, he had become “persuaded that the key to the case is the discussion in your [i.e., Justice Rehnquist’s] footnote 4,”⁸² discussed above. On that point, he could not conclude “[u]nder our normal preemption analysis” that Congress intended to preempt state laws about abandonment. Accordingly, “[w]ith some embarrassment, I have therefore concluded that I must change my vote.”⁸³

Because Justice Stevens’s change of heart meant that Justice Powell was now writing for the majority, Justice Powell promptly circulated an opinion with the necessary revisions to serve as an opinion for the Court rather than as a dissent.⁸⁴ Again, Justices Brennan and Blackmun promptly joined, followed a few weeks later by Justice Marshall; none requested substantive changes.⁸⁵

Justice Stevens, however, was not so easily satisfied. Just as Justice Stevens had found the abandonment power in Justice Rehnquist’s opinion too broad, he thought Justice Powell’s made it too narrow. Writing to Justice Powell in early January, Justice Stevens agreed that abandonment in *Midlantic* “was clearly improper” because the trustee took no steps to reduce danger related to abandonment.⁸⁶ Once again Justice Stevens was much less worried about the correct resolution of *Midlantic* than about problems that had not yet arisen. For example, he worried about what should happen in cases in which the trustee (or the judge) acted more cautiously: “[W]hat if the bankruptcy judge had imposed conditions that required the trustee to . . . forestall any imminent danger of a serious tragedy? The last paragraph of your opinion seems to state that such an abandonment would also be impermissible.”⁸⁷ Justice Stevens made his problem quite clear:

I found that I could not subscribe to Bill Rehnquist’s proposed disposition

because it seemed to authorize the trustee to abandon without any constraint whatsoever imposed by State law. You have convinced me that position is untenable. I am also inclined to believe that the opposite extreme would be equally unsatisfactory. Specifically, I could not subscribe to a holding that the State could veto any abandonment, no matter how many safety precautions were taken and no matter how much money the estate had spent in an effort to rectify the problem.⁸⁸

Justice Stevens closed with a gentle suggestion that “it might be wise to narrow our holding.”⁸⁹

Anxious to gain a majority for his opinion, Justice Powell sent back revised pages of his opinion privately to Justice Stevens, indicating that he “believ[ed that] these meet your concerns” but noting that he would “of course, consider any language changes you may suggest.”⁹⁰ Justice Stevens responded with a request for yet another round of clarifying revisions, in which he focused on the possibility that a state might seek to bar abandonment for reasons unrelated to public health and safety.⁹¹ With little other choice, Justice Powell agreed to those revisions as well. Papering over the leverage Justice Stevens was exercising, Justice Powell commented with characteristic grace that he was “glad to make the changes suggested” and that he was “assuming that these changes will be satisfactory to [the Justices] who have joined me, as I view your language as a clearer statement of what the opinion already purports to say.”⁹² In any event, when Justice Stevens finally agreed to join the opinion,⁹³ Justice Powell had obtained his hard-fought majority.⁹⁴

It was, in truth, an overstatement to suggest that the changes did not shift the opinion at all. They did, however, leave the core of Justice Powell’s reasoning intact,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 5, 1985

*95966
argument*

Re: 84-801 - Midlantic National Bank v.
New Jersey Department of
Environmental Protection
84-805 - O'Neill v. City of New York

Dear Bill:

When I first read your circulating draft, I was troubled by three comments: (1) the statement on page 1 that the abandonment power is "not subject to any general requirement of compliance with state regulatory laws"; (2) the conclusion in footnote 4 on page 11 that a state prohibition against the disposal of hazardous wastes is preempted by § 554(a); and (3) the "dynamite-in-the-schoolhouse" example that is used on page 14 to illustrate the scope of a possible condition on abandonments that themselves create emergencies that the trustee is uniquely able to guard against. I therefore thought that I would try to formulate some suggested editorial changes that would clarify the scope of the holding, or perhaps identify the contours of the dynamite exception, but further study of the case has undermined my confidence in my Conference vote.

Justice Stevens weighed in with a detailed memorandum on December 5, 1985 explaining that he had decided to switch his Conference vote.

as the final version indicated that the abandonment power was conditioned on the bankruptcy court's "formulat[ion of] conditions that will adequately protect the public's health and safety" and specifically that "a trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards."⁹⁵ More importantly, the changes resulted in a majority opinion

justifying a heavily skeptical treatment of the Code's reforms rather than the "we call them like Congress wrote them" approach Justice Rehnquist had offered.⁹⁶

The Legacy of *Midlantic*

It is easy to speculate how things might have changed if just one vote were

different, if Justice Stevens had been slightly less engaged in the case, perhaps, and had maintained the view he expressed at the Conference. If Justice Powell's dissent had been slower to appear, would Justice Stevens have tried harder to reach an accommodation with Justice Rehnquist? A similar pattern appeared two Terms earlier in the deliberations over *NLRB v. Bildisco & Bildisco* (1984).⁹⁷ The Justices had divided 5-4 at Conference, Chief Justice Burger assigned the majority opinion to Justice Rehnquist, and Justice Stevens had substantial misgivings about his vote. In that case, however, after extended correspondence and structural recasting of the opinion, Justice Rehnquist managed to retain control of the outcome.⁹⁸

More broadly, if Justice Powell's draft dissent had remained just that—the comments of four dissenters—would the Court ever have moved so far down the path it has chosen, in which the Bankruptcy Code so regularly gives way to the interests of other federal and state regulatory schemes? The legacy of *Midlantic* is plain; the Court has cited the decision with frequency, more than a dozen times, always for its strong presumption against derogation from prior statutory interpretation. If *Midlantic* is the turning point in the Court's bankruptcy jurisprudence, the interactions among Justices Rehnquist, Powell, and Stevens over the decision of that case are the crux of the entire subject.

In a case that divided the Court so closely, the involvement of the Solicitor General is especially noteworthy. It is not simply that Justice Powell's dissent-turned-majority relied so heavily on the Solicitor General's presentation for language, examples, and legal reasoning, although the level of borrowing on those points is itself remarkable. What is crucial is the borrowing from the Solicitor General, with no substantial precedential authority, of the central jurisprudential contribution of *Midlantic*,

the presumption that Congress's labored recodification of bankruptcy law was designed to change nothing. We can only wonder whether the Solicitor General's contribution would have been more nuanced had the Solicitor General seen protection of the bankruptcy process as an important institutional interest. As it is, we know now that the Solicitor General's arguments here laid the foundations for what turned out to be a decades-long project of narrowing the impact of the 1978 Code.

ENDNOTES

¹ For good summaries of that process, see David A. Skeel, *Debt's Dominion: A History of Bankruptcy Law in America* (Princeton, N.J.: Princeton Univ. Press, 2003); Charles J. Tabb, "The Bankruptcy Reform Act in the Supreme Court," 49 *U. Pittsburgh L. Rev.* 477 (1987); Kenneth N. Klee, "Legislative History of the New Bankruptcy Code," 54 *Am. Bankr. L.J.* 275 (1980); Susan Block-Lieb, "What Congress Had to Say: Legislative History as a Rehearsal of Congressional Response to *Stern v. Marshall*," 86 *Am. Bankr. L.J.* 55 (2012).

² 458 U.S. 50 (1982).

³ 492 U.S. 33 (1989).

⁴ 131 S. Ct. 2594 (2011).

⁵ The Court's persistently narrowing bankruptcy jurisprudence is the focus of my book: Ronald Mann, *Bankruptcy and the U.S. Supreme Court* (forthcoming, Cambridge Univ. Press, 2017).

⁶ 474 U.S. 494 (1986).

⁷ The papers of Justices Blackmun, Brennan, Marshall, Powell, and White are available for *Midlantic*. Images of the briefs in this case and of all of the Justices' papers are posted online at www.bksct.net. Citations in this article to briefs and to internal documents are to the files in No. 84-801, *Midlantic Nat'l Bank v. New Jersey Dep't of Environmental Protection*.

⁸ Jonathan H. Adler, "The Fable of Federal Environmental Regulation: Reconsidering the Federal Role in Environmental Protection," 55 *Case Western Reserve L. Rev.* 93, 101 (2004).

⁹ The E.P.A. was organized under President Nixon in 1970, the major amendments to the Clean Air Act granting it authority in that area followed later that year, and the Clean Water Act followed in 1972.

¹⁰ Brief for the United States at 1.

¹¹ Adler, "The Fable of Federal Environmental Regulation," at 102.

¹² *Id.*, at 103.

¹³ New York passed a set of comprehensive environmental regulations in 1978, and New Jersey passed an environmental package in 1970.

¹⁴ N.Y. Emtl. Conserv. § 27-0900 (McKinney 1980).

¹⁵ N.Y. Emtl. Conserv. § 27-0914 (McKinney 1980).

¹⁶ N.Y. Emtl. Conserv. § 71-2702 (McKinney 1980). (“[N]o solid waste facility shall accept or receive for disposal, any hazardous waste [or] chemical waste, . . . unless such facility has installed a system for the interception, collection and treatment of any and all leachate generated at the facility, and has obtained approval from the department for the entire system.”)

¹⁷ N.J. Stat. Ann. § 13:1E-42 (West 1980).

¹⁸ Karlyn Bowman & Everett Carl Ladd, **Attitudes Toward the Environment: Twenty Five Years After Earth Day** (Washington, D.C.: AEI Press, 1995).

¹⁹ *Id.*, pp. 20-23.

²⁰ 198 F.2d 289, 297-98 (4th Cir. 1952).

²¹ *In re Lewis Jones*, 1 Bankr. Ct. Dec. 277, 280 (Bankr. E.D. Pa. 1974).

²² The Bankruptcy Code is codified as Title 11 of the United States Code. References in this article to Sections refer to that enactment.

²³ Lydia Chavez, “Toxic Waste Entrepreneur,” *New York Times* (May 27, 1982), D1.

²⁴ Chavez, “Toxic Waste Entrepreneur”; Ralph Blumenthal, “Accused Polluter Was Paid to Clean up Sites,” *New York Times* (May 7, 1982), B20; The Associated Press, “\$1.1 Million Fine in Dumping Case,” *New York Times* (July 21, 1984), 31.

²⁵ Brief for Petitioner at 12. From the vantage point of the present era, the bank’s casual approach to “know your customer” considerations is jarring.

²⁶ Chavez, “Toxic Waste Entrepreneur”; Josh Barbanell, “A Court Bolsters Toxic Waste Law,” *New York Times* (July 28, 1984), A9.

²⁷ Brief for Petitioner at 12-13; Brief for the United States at 9.

²⁸ The text simplifies the procedural path considerably. The bankruptcy court decided the New York and New Jersey questions separately. When it decided the New York issues, the City appealed the decision to authorize abandonment, but the state, which had sought priority over Midlantic, did not appeal. After the district court affirmed, the case went to the Third Circuit, because the bankruptcy was in New Jersey, even though the relevant property was in New York, in the Second Circuit. When the bankruptcy judge later authorized abandonment of the New Jersey property, the parties consented to a direct appeal from the bankruptcy court to the Third Circuit, which consolidated the two cases for consideration. *In re Quanta Res. Corp.*, 739 F.2d 927, 928 (3d Cir. 1984).

²⁹ *In re Quanta Res. Corp.*, 739 F.2d 912, 919 (3d Cir. 1984) [hereinafter *In re Quanta Res. Corp.*].

³⁰ *Id.* at 916.

³¹ *Id.*, at 925 (Gibbons, J., dissenting).

³² Pool Memo (Jan. 26, 1985) (by Michael Lazerwitz).

³³ The comments of the law clerks appear on the copies of the pool memo in the files of Justices Powell and Blackmun, respectively.

³⁴ Bench Memorandum from Pamela Karlan to Justice Blackmun (Aug. 12, 1985), 26.

³⁵ Blackmun Bench Memorandum, 28.

³⁶ Blackmun Bench Memorandum, 28.

³⁷ Bench Memorandum from Cabell Chinnis to Justice Powell (Aug. 28, 1985), 3.

³⁸ Powell Bench Memorandum, 6; Blackmun Bench Memorandum, 32.

³⁹ Powell Bench Memorandum, 6-7; Blackmun Bench Memorandum, 33.

⁴⁰ Powell Bench Memorandum, 7; Blackmun Bench Memorandum, 31-32.

⁴¹ Transcript of Oral Argument (Oct. 16, 1985), 7-8.

⁴² *Id.*, 24.

⁴³ Transcript of Oral Argument, at 29.

⁴⁴ Transcript of Oral Argument, 28.

⁴⁵ *Id.*, 30.

⁴⁶ Conference Notes of Justice Powell (Oct. 18, 1985), 1.

⁴⁷ *Id.*

⁴⁸ *Id.*, 3.

⁴⁹ *Id.*

⁵⁰ Memorandum to File from Justice Powell (Jul. 26, 1985), 4.

⁵¹ *Id.*, 5-6.

⁵² Powell Conference Notes, 2.

⁵³ *Id.*, 1.

⁵⁴ Justice Rehnquist, first draft of Majority Opinion, circulated Nov. 15, 1985, 6-7.

⁵⁵ *Id.*, 8. The legislative history was quite weak, even by the standards of the 1980s. As the Rehnquist draft emphasized, the proffered history amounted to a citation to the Collier treatise in a document prepared not in support of the Bankruptcy Code itself but rather in support of a predecessor statute, the proposed Bankruptcy Act of 1973. The Collier treatise, in turn, though not quoted itself in the legislative history, stated that “recent cases illustrate . . . that the trustee in the exercise of the power to abandon is subject to the application of general regulations of a police nature.” 4A **Collier on Bankruptcy** ¶ 70.42(3) (1967); see First Rehnquist Majority Draft, 10 (discussing the history). Justice Rehnquist noted with considerable justification: “A Senator or Congressman seeking to familiarize himself with the statutory provision for abandonment in the Code, therefore, in order to divine that the statutory power to abandon was to be conditioned on compliance with state police power regulations, would not merely have had to look at the legislative history of the precursor to the Code, but also would have had to read the several-page treatise section cited in that earlier legislative history.” *Id.*, 10.

⁵⁶ *Id.*, 13-14.

⁵⁷ *Id.*, 13.

⁵⁸ *Id.*

⁵⁹ Memorandum from Justice O'Connor to Justice Rehnquist (Nov. 15, 1985); Memorandum from Justice White to Justice Rehnquist (Nov. 18, 1985).

⁶⁰ Second Draft of Majority Opinion of Justice Rehnquist (Nov. 21, 1985), 11 n.4.

⁶¹ *Id.*

⁶² Memorandum from Justice Brennan to Justice Powell (Oct. 21, 1985).

⁶³ Memorandum from Justice Powell to Justice Brennan (Oct. 21, 1985).

⁶⁴ Draft of Dissenting Opinion of Justice Powell (Nov. 26, 1985).

⁶⁵ Memorandum from Justice Powell to Cabell Chinnis, (Nov. 21, 1985).

⁶⁶ Memorandum from Justice Powell to Cabell Chinnis (Nov. 23, 1985).

⁶⁷ Compare First Chambers Draft of Dissenting Opinion of Justice Powell (Nov. 20, 1985), 1, with Brief for the United States, 23.

⁶⁸ Powell Dissent Draft, 2.

⁶⁹ *Id.*, 3.

⁷⁰ *Id.*

⁷¹ *Id.*, 3-7.

⁷² *Id.*, 7, 8.

⁷³ Compare Brief for the United States, 18 (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)), with Printed Chambers Draft of Dissenting Opinion of Justice Powell (Nov. 22, 1985), 6 (also quoting Reiter).

⁷⁴ Compare Brief for the United States, 20, with Powell Dissent Printed Chambers Draft, 7.

⁷⁵ Compare Brief for the United States, 39, with Third Draft of Majority Opinion of Justice Powell (Jan. 17, 1986), 12.

⁷⁶ Compare Brief for the United States, 25-26, with Powell Dissent Printed Chambers Draft, 2-3.

⁷⁷ Memorandum from Justice Brennan to Justice Powell (Nov. 26, 1985); Memorandum from Justice Blackmun to Justice Powell (Nov. 29, 1985); Memorandum from Justice Marshall to Justice Powell (Dec. 2, 1985).

⁷⁸ Third Draft of Majority Opinion of Justice Rehnquist (Dec. 4, 1985), 13.

⁷⁹ Memorandum from Chief Justice Burger to Justice Rehnquist (Dec. 4, 1985).

⁸⁰ Memorandum from Justice Stevens to Justice Rehnquist (Dec. 5, 1985), 1.

⁸¹ Stevens Dec. 5 Memorandum, 3.

⁸² *Id.*

⁸³ *Id.*, 4.

⁸⁴ First Draft of Majority Opinion of Justice Powell (Dec. 27, 1985).

⁸⁵ Memorandum from Justice Brennan to Justice Powell (Dec. 30, 1985); Memorandum from Justice Blackmun to Justice Powell (Dec. 30, 1985); Memorandum from Justice Marshall to Justice Powell (Jan. 21, 1986). Justice Blackmun sent a separate note mentioning two minor typographical errors. Private Memorandum from Justice Blackmun to Justice Powell (Dec. 30, 1985).

⁸⁶ Memorandum from Justice Stevens to Justice Powell (Jan. 7, 1986). Justice Powell's draft dissent had included a passage noting the trustee's failure to take "even relatively minor" protective steps. Powell Dissent Draft, 3 n.3. Justice Powell lengthened the passage substantially in the proposed majority (First Powell Majority Draft, 4 n.3), presumably in response to the concerns Justice Stevens had expressed in his Dec. 5 Memorandum.

⁸⁷ Stevens Jan. 7 Memorandum, 1.

⁸⁸ *Id.*, 1-2.

⁸⁹ *Id.*, 2.

⁹⁰ Memorandum from Justice Powell to Justice Stevens (Jan. 9, 1986).

⁹¹ Memorandum from Justice Stevens to Justice Powell (Jan. 14, 1986).

⁹² Memorandum from Justice Powell to Justice Stevens (Jan. 15, 1986).

⁹³ Memorandum from Justice Stevens to Justice Powell (Jan. 17, 1986).

⁹⁴ Although the last vote from Justice Marshall did not come in until a few days after Justice Stevens joined, the records do not suggest that Justice Marshall had any concerns about the opinion. Memorandum from Justice Marshall to Justice Stevens (Jan. 21, 1986).

⁹⁵ Third Draft of Majority Opinion of Justice Powell (Jan. 17, 1986), 12. On December 30, Justice Powell had circulated a second draft of his majority opinion, which made only stylistic changes. Second Draft of Majority Opinion of Justice Powell (Dec. 30, 1985). Those revisions responded to Justice Powell's view, noted on his personal copy of the draft, that the first draft of the majority opinion had so many errors that it was "no credit to our Chambers," which prompted the question to his clerk whether he was following the Chambers policy that he should "have another clerk read a draft before it goes to the printer."

⁹⁶ In the vein of providing an objective assessment, Charles Tabb concludes that Justice Rehnquist has much the better of the argument, characterizing Justice Powell's opinion as "arguably at odds with the Code's distribution scheme." Charles Jordan Tabb, "The Bankruptcy Reform Act in the Supreme Court," 49 *U. Pittsburgh L. Rev.* 477, 540 (1987).

⁹⁷ 465 U.S. 513 (1984).

⁹⁸ I discuss those events in detail in a chapter of my forthcoming **Bankruptcy and the U.S. Supreme Court**.