



10-1982

## United States v. Security Industrial Bank

Lewis F. Powell Jr.

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Court .....

Argued ....., 19...

Submitted ....., 19...

Voted on....., 19...

Assigned ....., 19...

Announced ....., 19...

No. 81-184

United States

vs.

SECURITY INDUS. BK.

Also motion of appellee Beneficial Finance of Kansas, Inc. to enlarge questions presented. Response requested and received.

Other cases involving validity of new Bankruptcy Act are on the way - according to WGB there will be one in Jan

Note

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.				✓									
Brennan, J.				✓									
White, J.				✓									
Marshall, J.				✓									
Blackmun, J.				✓									
Powell, J.				✓									
Rehnquist, J.				✓									
Stevens, J.	✓			note				81-546		81-150			These already been granted a note
O'Connor, J.	✓			"				"		"			



CFR with view to Note

Probably Note

meb 09/22/81

CA 10 invalidated, when applied retroactively, sections of New Bankruptcy Act that exempted "household furnishings"

Reps were pre-new Act secured creditors holding ~~then~~ valid lien on furniture.

S G urges Note

Many cases pending

PRELIMINARY MEMORANDUM

October 9, 1981 Conference  
List 1, Sheet 1  
No. 81-184

Appeal from CA10  
(Seth, McWilliams & Doyle)

UNITED STATES  
(intervenor in Bankruptcy Court)

v.

SECURITY INDUSTRIAL BANK, et al.  
(secured creditors)

Federal/Civil Timely

Response Rec'd.  
~~Does~~ Adds nothing  
Note: Mary

1. SUMMARY: The question presented is whether a provision of the new Bankruptcy Act--allowing a debtor to keep some household goods, some other personal items, and some tools of his trade--

CFR? or Note. It might be nice to wait for further development by the CAs (only CA 10 has ruled) but question raised is substantial, and I do not see any way to avoid appeal. Mary



operates to deprive secured creditors whose interest predates the Act of their property without due process of law.

2. FACTS AND DECISION BELOW: The new bankruptcy law was enacted in 1978. In a provision applicable in personal bankruptcy, Bankruptcy Act §522(d)(3), (4), (6), & (9), 11 U.S.C. §522(d)(3), (4), (6), & (9) (Supp. III) the Act exempts (and thereby allows the debtor to keep) the following items from the "bankrupt estate": (1) household goods, furnishings, appliances, books, animals, crops, and musical instruments held primarily for the personal, family or household use of the debtor or his dependent (a maximum of \$200 per item is exempted); (2) jewelry held primarily for personal, family, or household use of the debtor or his dependent (a maximum of \$500 total is exempted); (3) any implements, professional books, or tools of the debtor's trade or the trade of his dependent (a maximum of \$750 is exempted); and (4) professionally prescribed health aids for the debtor or his dependent.

This case involves seven different suits brought in four *7 suits* bankruptcy courts and consolidated on appeal to the CA10. In each case, a creditor acquired a nonpossessory, nonpurchase-money security interest in the debtor's household furnishings and appliances before the President signed the new Bankruptcy Act *chattel mortgages or cond. sales act on furniture & appliances* into law. In each case, the debtor instituted a bankruptcy proceeding after Oct. 1, 1979, the effective date of the Act, and claimed exemptions for the items under §522(d). In each case, the creditors objected to the exemptions on the ground that their property had been taken without due process.



Pursuant to 28 U.S.C. §2403(a), the United States was notified that the constitutionality of a federal statute had been drawn into question, and the United States intervened in each bankruptcy court to defend the constitutionality of the statute. In each case, the bankruptcy court ruled against the debtor.

The CA10 affirmed. The court held that Congress intended the Bankruptcy Act to apply retrospectively and that such application was unconstitutional under Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935). The court did not explicitly state which clause of the fifth amendment was violated, though it did note that the statute effected a "complete taking of the secured creditors' property interests" in these cases. *CA10 held Congress intended retroactive effect but this was violation*

3. CONTENTIONS: The SG argues that the question presented in this appeal is substantial. He reports that the section's constitutionality has been at issue "in a flood of litigation." Of the seven cases filed initially in four bankruptcy courts and consolidated in the CA10 proceeding, three courts held (in five cases) that the Act was unconstitutional as applied to pre-enactment security interests and one court held (in two cases) that the statute should be construed as applying only prospectively so as to avoid constitutional problems. In addition, the SG cites 15 bankruptcy courts that have held the statute constitutional as applied to pre-enactment security interests and 7 other courts that have held it unconstitutional. Another four have avoided the constitutional issue by holding that Congress did not intend retroactive application. Although no other CA has, as yet, ruled on the issue, the CA7 heard argument in a case raising the same issue



on Sept. 21, 1981, and the CA4 is scheduled to hear argument in such a case on Oct. 5.

The SG also argues that the CA10 took too narrow a view of Congress' power to regulate bankruptcy in overruling retrospective application of the statute in the case at bar. He is, however, unable to cite any case upholding a similar interference with secured creditors' rights.

The courts holding the statute unconstitutional have relied heavily on Louisville Bank v. Radford, 295 U.S. 555 (1935), which held unconstitutional a provision enacted in 1934 limiting a mortgagee's ability to perfect, after default, his interest in farms mortgaged to him prior to default. The SG tries to limit Radford to its facts by interpreting it as simply a holding that, in that instance, Congress went too far.

4. DISCUSSION: The question presented appears to be substantial. In Radford, the Court held that the fifth amendment <sup>5<sup>th</sup></sup> applies to bankruptcy statutes and that Congress can not take a <sup>specific</sup> piece of property from one person and give it to another. <sup>to bankruptcy statute</sup> Radford can be distinguished on the ground that it involved a secured interest in a specific piece of land rather than a floating lien (household goods, for example, may come and go under the nonpossessory, non-purchase money interest present in the case at bar) over certain categories of personal possessions. That difference is, however, rather technical, and the effect of the <sup>you</sup> recent act is not unlike the act challenged in Radford.

I recommend a note of probable jurisdiction. There is no opposition.

*Radford involved interest in land (mtg). Here the lien was a "~~floating~~" "floating" one on household goods.*



09/22/81

Becker

Opin in petn







CFR

Caldwell

*CG*

January 8, 1982 Conference  
List 7, Sheet 5

No. 81-184

UNITED STATES

Motion of Solicitor General  
to Defer Briefing and Oral  
Argument

v.

SECURITY INDUSTRIAL BANK, et al.

CA 10

SUMMARY: After probable jurisdiction was noted in this case the SG as appellant discovered legislation pending in Congress that would, if enacted, render this case moot. He now moves to defer briefing and oral argument in the belief that final action on the bill will be taken in the spring. An opposition to the motion has been filed by one of the appellees.

FACTS AND CONTENTIONS: The Court noted probable jurisdiction in this case on December 14, 1981 to determine whether §522(f)(2) of the Bankruptcy Code violates the Fifth Amendment as applied to certain security interests acquired before enactment of that section.

*Grant. It was the SG who appealed this case. I would defer to his evaluation of and willingness to await the new legislation.*  
*ju*



The SG advises that subsequent to the NPJ, he discovered that H.R. 4786 had been introduced in the House of Representatives on October 20, 1981. He submits that among the amendments to the Bankruptcy Code that the bill would effect is the repeal of that portion of §522(f)(2) which is at issue in these proceedings.<sup>1/</sup> As such, he argues that the case would become moot if the bill is enacted. He adds that there is a substantial possibility that final action on the bill may be taken this spring.

OPPOSITION: Beneficial Finance of Kansas, one of the appellees, opposes the SG's motion contending: (1) that passage of the bill is by no means certain because it is controversial and still in an early stage of the legislative process; (2) that even assuming passage, there is no reason to believe enactment would take place prior to the end of this Term; (3) that the specific amendment at issue here may not survive the legislative process; (4) that the case will not be rendered moot because the proposed legislation does not purport to be retroactive; and (5) that the constitutionality of retroactive invalidation of judicial liens will remain to be litigated even if the proposed legislation invalidates judicial liens which attached prior to enactment of §522(f)(2).

Further, Beneficial submits that this case should proceed to resolution since its underlying issue, i.e., constitutionality of provisions of the Bankruptcy Reform Act, is currently proceeding

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1/Section 8(c) of the bill provides:

Section 522(f) of title 11, United States Code, is amended by striking out "lien is" and all that follows through the period and inserting in lieu thereof "lien is a judicial lien."



toward resolution in two other cases where probable jurisdiction was noted.<sup>2/</sup>

DISCUSSION: First, Beneficial's claim that this case is substantially similar to No. 81-150 and No. 81-546 seems belied by the fact that on December 14, 1981, the Court denied Beneficial's motion to consolidate with those two appeals.

Secondly, it does appear that the proposed legislation goes to the heart of the issue presented in this appeal. Caution and judicial economy would seem to dictate that the Court await final action on the bill, assuming "normal" legislative progress.

A CFR from the remaining parties might be helpful (with a view toward a grant).

1/6/82

Caldwell

PJC

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<sup>2/</sup>Beneficial observes that probable jurisdiction was noted in Northern Pipeline Construction Co. v. Marathon Pipeline Co., No. 81-150, and United States v. Marathon Pipeline Co., No. 81-546. These cases appealed from a judgment holding that the Bankruptcy Reform Act unconstitutionally grants "extended jurisdiction" to non-Article III bankruptcy judges.



*Court* . . . . .

*Argued* . . . . ., 19...

Submitted . . . . ., 19...

*Voted on....., 19...*

Assigned . . . . ., 19...

*Announced* . . . . ., 19...

No. 81-184

UNITED STATES

**VS.**

## SECURITY INDUSTRIAL BANK

Motion to dispense with printing joint appendix

Grant

[illegible]



GRANT  
Schlueter

OK

February 26, 1982 Conference  
List 3, Sheet 5

No. 81-184

Motion to Dispense with  
Printing Joint Appendix

UNITED STATES

v.

SECURITY INDUSTRIAL BANK, et al.

SUMMARY: The SG, on behalf of the appellant (United States) and with consent of the appellees, seeks leave to dispense with filing a joint appendix. Probable jurisdiction was noted on December 7, 1981.

DISCUSSION: This case addresses the constitutionality of §522(f)(2) of the Bankruptcy Reform Act of 1978 as applied to security interests created before the Act. The SG states that the issue is purely legal in nature and that the parties do not intend to rely on any matters not already printed in the appendix to the petn. Because the issue is apparently a legal one and any necessary reference materials are already before the Court, the motion should be granted.

There is no response.

2/24/82

Schlueter

PJC

Grant, RP



April 16, 1982 Conference  
List 5, Sheet 2

No. 81-184

UNITED STATES (Intervenor  
in Bankruptcy Court)

Motion of Appellee Beneficial  
Finance of Kansas, Inc. to Schedule  
Oral Argument During April, 1982  
Session

v.

SECURITY INDUSTRIAL BANK,  
et al. (Secured Creditors)

SUMMARY: Noting that only the SG's reply brief remains to be filed, resps move to schedule oral argument during the April session and dispose of this case in the 1982 Term. This case involves the question of whether the new Bankruptcy Act deprives secured creditors (such as resps) of due process by permitting debtors to retain various goods and property.

CONTENTIONS: Resps argue that: (1) Because of the diminishing value of the secured interests in this case, time works to the detriment of the resps who are being deprived of their right to the property. (2) Severe injustice will fall on those creditors who must await final resolution of this case; the importance of prompt disposition is demonstrated by the accelerated handling by the lower courts. (3) Resps have raised the question of the

Dang. jw



unconstitutionality of the Bankruptcy Act--an issue also presented in the Northern Pipeline cases now set for argument on April 27. The relationship of these cases thus counsels joint consideration.

DISCUSSION: Although disposition of the Northern Pipeline cases may have some impact on this case, resps have not demonstrated any compelling reasons for accelerating oral arguments at this late date.

Therefore, the motion should be denied.

There is no response.

4/14/82

Schlueter

PJC



Voted on....., 19... April 16, 1982

*Argued* . . . . ., 19...

Assigned . . . . ., 19...

No. 81-184

Submitted . . . . ., 19...

*Announced* . . . . ., 19...

UNITED STATES

**vs.**

SECURITY INDUSTRIAL BANK

Motion of appellee Beneficial Finance of Kansas, Inc. to schedule oral argument during April, 1982 session.

[illegible]



Review of 10/5 - Excellent memo.

mfs 09/29/82

Mike concludes:

1. Rodford remains sound law. It has been repeatedly approved & follows. I cited it in my Iranian Asset case.

2. More recent cases: e.g. Union Central would require same result - i.e. that the creditors' prop. interest in the collateral may not be "taken" w/o just compensation.

3. 56 "distinctions" are mentioned.

No principled difference between real & personal prop.

4. If § 522(f)(2) is applied retroactively it is unconstitutional.

5. Whether it ~~must~~<sup>must</sup> be so construed is perhaps debatable. Leg. hist. - such as it is - supports retroactive intent.

BENCH MEMORANDUM  
I am tentatively inclined to construe it prospectively.

No. 81-184

United States v. Security Industrial Bank

Michael F. Sturley

September 29, 1982

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#### Questions Presented

(1) Does Bankruptcy Code § 522(f)(2), which allows an individual debtor to avoid certain nonpossessory, nonpurchase-money security interests, apply retroactively?

(2) If so, does retroactive application violate the Fifth Amendment?



Outline of Memorandum

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I. BackgroundA. The Statute

Under the rationale that bankruptcy should provide debtors with a "fresh start," §522 of the new Bankruptcy Code (the "Code") governs exemptions. Subsection (b) allows an individual debtor to exempt certain property from his estate, including the property specified in subsection (d) (unless state law explicitly rejects this federal list). Subsection (d)(3), for example, includes household furnishings and appliances valued at less than \$200 each. Under subsection (c), exempt property generally is not subject to creditors' claims. To prevent circumvention of §522, subsection (e) invalidates waivers of exemptions. Similarly, subsection (f) governs certain security interests:

Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is--

*"Waiver"  
not  
allowed*

\* \* \*

(2) a nonpossessory, nonpurchase-money security interest in any--

(A) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;

(B) implements, professional books, or tools, of the trade or the debtor or the trade of a dependent of the debtor; or

(C) professionally prescribed health aids for the debtor or a dependent of the debtor.

11 U.S.C. §522(f) (Supp. IV). Under the previous Bankruptcy Act (the "Bankruptcy Act"), exemptions were governed principally by state law. 11 U.S.C. §24 (1976).



## B. Facts

Before the passage of the Code, various individuals (the "Debtors"), nominal appellees here, granted nonpossessory, nonpurchase-money security interests in their household furnishings and appliances to appellees banks and finance companies (the "Creditors"). After the effective date of the Code, the Debtors instituted bankruptcy proceedings, claiming exemptions under §522 for items that were subject to the Creditors' security interests.

## C. Decisions Below

Each Debtor filed a complaint in bankruptcy court to avoid the Creditor's lien under §522(f)(2). Each Creditor moved to dismiss the complaint, arguing that application of §522(f)(2) to a security interest acquired before passage of the Code violated the Fifth Amendment. The United States intervened in each case to defend the constitutionality of the provision.

In two cases, the bankruptcy court dismissed the complaint on the ground that Congress had not intended §522(f)(2) to apply retroactively. In five cases, the bankruptcy court held that Congress had intended retroactive application, but nevertheless dismissed the complaint on the ground that §522(f)(2), as thus applied, violated the Fifth Amendment.

The seven cases were consolidated for appeal. CA10 decided that Congress had intended §522(f)(2) to apply retroactively, but relying on Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935), it held that this application of §522(f)(2) violated the Fifth Amendment.



## II. Discussion

As a logical matter, the first question to arise is the proper construction of §522. In the present case, however, the proper construction of the section depends in large measure on the constitutionality of its retroactive application. I will begin, therefore, with a discussion of the constitutional implications of retroactivity, and then discuss whether this is what Congress intended.

### A. The Legal Rights Involved

There is considerable confusion about the legal status of a creditor with a nonpossessory security interest. Some is evident in the parties' briefs; greater confusion may be found in various lower court opinions addressing this issue, and in the secondary literature commenting on those cases. To clarify the subsequent discussion, I begin with a brief summary of my analysis of the legal rights involved. Strictly speaking, these rights are determined by state law, and could vary from state to state. The governing principles, however, are either well established by common law, or codified in the Uniform Commercial Code. They should be essentially the same in all states.

In the paradigm case, the debtor will owe money to the creditor, and the debt will be secured by a "security interest" in specific, identified collateral, which may or may not be worth more than the debt. The creditor has both a contract interest and a property interest. His contract interest, which is independent of the security, is in the debtor's obligation to repay

non-possessory security interest - normally a state law matter. But now codified by



the debt. If the collateral is destroyed, for example, the obligation to repay the debt will remain. Or if the security interest is worth less than the debt, the creditor has the right to a deficiency judgment.

The "security interest" itself is a property interest in the collateral, which generally may be enforced against third parties. The creditor does not have a fee simple absolute in possession, of course, but he does have a "bundle of rights" over the collateral. The precise nature of the various rights in the bundle is not important for present purposes, but one will be the right to recover the debt from the proceeds of the sale of collateral under certain circumstances. *Yes*

Although they may seem obvious, three errors are responsible for much of the misanalysis that has taken place on this issue. It is a mistake to speak of the Creditors' obtaining the rights of unsecured creditors in substitution of their rights as secured creditors. This is not a substitution, for they already have the rights of unsecured creditors under the Debtors' independent contractual obligation to repay the debt. (In a nonrecourse situation, a secured creditor would lack the rights of an unsecured creditor.) It is also a mistake to confuse the value of the property interest with the value of the contract interest. The former is limited by the latter, but if the debt is worth more than the collateral, the property interest is limited to the value of the collateral. Finally, it is a mistake to think of the Creditors' property interests as an all-or-nothing proposi- *of course*



tion. They have a bundle of rights, and it is possible for some to be lost while others are retained.

B. Constitutionality under the Takings Clause

The SG argues at length that §522 is a reasonable exercise of Congress's bankruptcy power. This may be true, but it is a separate question whether an otherwise valid regulation operates as a taking of property requiring compensation. See, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. \_\_\_, \_\_\_, 102 S.Ct. 3164, 3171 (1982); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). It is undisputed that the "bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment." Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 589 (1935).

(1) Radford and its Continued Validity. Radford, on which CA10 relied, is the case most directly on point. There the Court, in a unanimous opinion by Justice Brandeis, considered the constitutionality of the Frazier-Lemke Act, which limited a mortgagee's power to foreclose a mortgage on certain farms. The Court specifically identified five rights--five strands in the bundle of rights constituting the property interest--that the Act denied the mortgagee. Id., at 594-95. But the Act did not destroy the mortgagee's property interest entirely. Its effect was to either postpone the interest by five years, or permit the mortgagor to defeat the interest upon payment of what amounted to roughly three-quarters of the farm's appraised value. See id.,

mtg.  
on  
farms

case  
most  
directly  
on point.



at 591-92 & n.21. The Court, finding "that the taking of [the five] rights from the mortgagee effects a substantial impairment of the security," id., at 595, held that the Act "has taken from the [mortgagee] without compensation, and given to [the mortgagor], rights in specific property which are of substantial value," id., at 601.

The Frazier-Lemke Act was amended by Congress, and returned to haunt the Court for several years. In Wright v. Vinton Branch of the Mountain Trust Bank of Roanoke, 300 U.S. 440 (1937), the Court, in another unanimous opinion by Justice Brandeis, upheld the constitutionality of the amended Act. This time the Court found that Congress had undeniably preserved three of the rights that the original Act had taken. Id., at 458. And Congress sought to preserve all of the mortgagee's rights "so far as essential to the enjoyment of his security." Id., at 457.

The Vinton Branch opinion is somewhat confusing, since it speaks of deprivation of property without due process rather than taking of property without compensation, even when discussing Radford. Since Radford was only two years old at the time, I find it difficult to believe that the Court intended to retreat from its earlier analysis without comment. I would explain the confusion as follows: In Radford, the deprivation of rights was sufficient to constitute a taking. Since there was no compensation, the Act failed under the Takings Clause. A taking without compensation, however, is also a violation of due process, for when the deprivation constitutes a taking, the Constitution specifies that due process requires compensation. In Vinton Branch,



on the other hand, the deprivation was not sufficient to constitute a taking. It was therefore necessary to continue the analysis, and decide if the deprivation was nevertheless without due process. The amended Act survived this challenge, too. Vinton Branch does not deny that some impairments of liens will be serious enough to constitute a taking.

Two subsequent cases support the view that Radford's analysis has not been rejected. In Wright v. Union Central Life Insurance Co., 311 U.S. 273 (1940), the support is weak dicta. The Court was again construing the amended Frazier-Lemke Act. This time it held that the mortgagor <sup>(owner)</sup> had the right, under the Act, to redeem his farm at its appraised value. Although the mortgagee loses his right to a public sale, he is still protected to the extent of the value of the property. The Court noted that this was the extent of his constitutional protection. Id., at 278-79. The Act was constitutional because there was not a substantial impairment of the security, such as had been found in Radford.

In Armstrong v. United States, 364 U.S. 40 (1960), there is <sup>✓</sup> stronger support for Radford. There the government's acquisition of ten ships under construction operated to make certain materialmen's liens unenforceable. The Court held that "[t]he total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking'." Id., at 48.

The SG argues that the "Court quickly retreated from the broad implications of the Radford decision." SG's Brief, at 28.



He points to Vinton Branch as an example of the retreat, but, as noted above, I am unconvinced by this interpretation. At most there was a retreat on the question of whether the specific deprivation effected by the Frazier-Lemke Act was a "taking," but even this is doubtful. The original and amended versions were simply placed on different sides of the "taking" line. He also points to Union Central. Since Union Central protected the mortgagee's essential right to the value of the lien, however, any erosion is not enough to help the SG here. Finally, the SG cites a footnote in Helvering v. Griffiths, 318 U.S. 371, 400-01 n.52 (1943), as a "candi[d] acknowledge[ment] that [in Radford and Vinton Branch] the Court fell into error and was required by Congress to re-examine an earlier decision." SG's Brief, at 29. But in fact the footnote is merely given as an example of a case where Congress has been willing to enact laws that may require the Court to reexamine earlier decisions.

I feel confident that the Court has not yet undercut Radford, at least not to the extent claimed by the SG. The Court relies on it heavily in Armstrong, 364 U.S., at 44. (The SG does not even mention Armstrong in the section of his brief discussed in the last paragraph.) In the Iranian claims case, you cited Armstrong and Radford for the "settled" principle "that an attachment entitling a creditor to resort to specific property for the satisfaction of a claim is a property right compensable under the Fifth Amendment." Dames & Moore v. Regan, 453 U.S. 654, 690 n.1 (1981) (opinion of POWELL, J., concurring). I think the Court is justified in continuing to rely on Radford.

SG  
does  
not

Radford  
not  
undercut

I rely  
on  
Radford

Clearly



(2) The Application of Radford. Assuming that Radford retains its vitality, the next step is to determine if it applies here. Certainly the basic facts are essentially the same: Congress has passed a law under its bankruptcy power that deprives a secured creditor of a property right in a lien. The SG suggests several distinctions, however, so I will examine these in turn.

First, the Frazier-Lemke Act at issue in Radford was not an ordinary bankruptcy law, since it did not discharge any obligations and did not apply prospectively. The SG seems to be hinting that the Act failed in a balancing process because there was not a sufficient public interest. But the Radford Court explicitly stated that it did not decide whether the statute was within Congress's bankruptcy power. It assumed that it was, and then applied a strict property analysis. 295 U.S., at 589, 598-602.

Second, the mortgage in Radford covered real property.

*But the lien in Armstrong covered personal prop.*  
This distinction must fail, for the lien in Armstrong covered personal property. Furthermore, such a distinction would be dangerous. Although real property was the primary form of wealth when the Takings Clause was adopted, and continues to occupy a privileged place in Takings Clause doctrine, see, e.g., Loretto, supra; Kaiser Aetna v. United States, 444 U.S. 164 (1979), its place in society has generally been replaced by personal property.

*Personal prop. is now more widely owned than real estate - the imp. prop. in 1789.*

Third, the SG argues that the property interests at issue here are insubstantial, since they are generally worth much less than the debt and the Creditors do not wish to obtain possession of the collateral. To begin with, there is no support in

yes!



the record for the view that the liens are de minimis. On the contrary, the parties in Rodrock, one of the cases below, stipulated that the collateral consisted of 15 items (including a sewing machine and a color television) worth \$580. Juris stmt app, at 17a n.2. In Knezel, the total value was \$540. Ibid. (The amount of the debt is not clear in either case.) There is no theoretical limit on the size of the lien, for §522(d)(3) places only a \$200 per item limitation on the exemption. A hundred items could support a \$20,000 lien. And the fact that the Creditors would prefer repayment of the debt to repossession of the collateral is not a significant distinction. It is true of almost every secured creditor.

More importantly, the SG's argument misconstrues the relevant substantiality. In determining whether a particular deprivation of property rights is sufficient to constitute a "taking," the Court will often look at the extent to which the government's action deprives the person of his property rights. In the terms of the familiar analogy, it will decide how many strands are taken from the bundle of rights, and whether this action destroys the value of the bundle. The Court does not rely on the total length of the bundle, nor even the length of the strands taken. It is worse for the government to take a person's entire interest in a small amount of property, e.g., Armstrong, than to take only a portion of a person's interest in very valuable property, e.g., Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978), even though the former is far less valuable in absolute terms. See also Loretto, supra, 458 U.S.,



at \_\_\_\_, 102 S.Ct., at 3176 ("Such an appropriation is perhaps the most serious form of invasion of an owner's property interests.... [T]he government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand.")

Fourth, the SG argues that the liens are not interests in "specific property," but blanket liens covering all of a debtors household goods. This argument is not supported by the facts of the case. In at least two of the cases below, it appears that the liens are on specific items of property that were identified at the time of the security agreement. Furthermore, blanket liens are recognized as valid property interests under the Uniform Commercial Code. In any event, it would be unworkable to hold §522(f) constitutional when applied only to blanket liens.

Fifth, the SG argues that §522 does not destroy all nonpossessory, nonpurchase-money security interests, since it does not take effect except in bankruptcy, and does not impair liens on nonexempt property. While this argument may be relevant in determining the reasonableness of the statute, it is irrelevant in the Takings Clause context. The government cannot defend one taking on the ground that it did not take other property, too. The Act in Radford did not destroy all farm mortgages.

Sixth, the SG argues that the Creditors do not have strong, legitimate interests in the liens that are destroyed by §522. This argument is based in part on the assumption that they should have known that the Bankruptcy Act was about to be amended, and in part on the Congressional finding that these liens are



*SG fails to  
distinguish Radford*

often unconscionably obtained by overreaching creditors. The notice argument is frivolous. The Creditors were entitled to rely on the well-established law upholding the rights of secured creditors, even in bankruptcy. See, e.g., Kuehner v. Irving Trust Co., 299 U.S. 445 (1937); Long v. Bullard, 117 U.S. 617 (1886). The fairness argument is not supported by any evidence in the present case. To the extent it is true in the present case, §522 is unnecessary, for the liens could be avoided under state law. To the extent it is generally true, it is irrelevant in the Takings Clause context. A strong public purpose is not sufficient to dispense with the compensation requirement. Pennsylvania Coal Co. v. Mahon, supra, 260 U.S., at 415.

In sum, I find none of the SG's supposed distinctions between Radford and the present case to be persuasive. In fact, the principal distinction that I see suggests that this case is much more compelling than Radford. The Frazier-Lemke Act deprived mortgagees of five strands from their bundle of rights, but it preserved at least some (perhaps most) of the value of their security. Here §522 destroys the liens entirely. The Creditor in Rodrock loses its \$580 security interest, and is left with only its unsecured claim, which is worth \$1. The Knezel Creditor, who loses a \$540 lien, would also receive \$1 as an unsecured creditor. Section 522 thus takes a much greater share of the Creditors' property interests than the Frazier-Lemke Act did in Radford. Unless the Court overrules (or ignores) Radford, it practically requires affirmance here.

*Yes*  
*No G about this*



*None recent cases  
also support a taking  
here*

(3) The Advisability of Overruling Radford. Even if Radford were not directly on point, I would recommend affirming the decision below on the basis of the Court's recent Takings Clause cases. The general principles are discussed in Penn Central, supra, where the Court identified two factors to be considered in what is essentially an ad hoc factual inquiry. First is the "economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." 438 U.S., at 124. Second "is the character of the governmental action." Ibid.

The "distinct investment-backed expectations" are clear. There was unambiguous state law allowing the Creditors to obtain enforceable property interests. The bankruptcy law had always distinguished between secured and unsecured creditors, and this Court had enforced liens in bankruptcy. Relying on these factors, the Creditors invested money in loans to the Debtors on the strength of the security interests at issue here. The economic impact of \$522 is devastating, as the Creditors have lost all of their security. The case is thus much stronger than Loretto, supra, where the government took a small slice of all the strands, or Kaiser Aetna, supra, where the government took the entire length of a single strand. Here the government took the entire bundle with all the strands.

I find the "character of the governmental action" factor to be somewhat puzzling. It does not make any difference that the "taking" is for the benefit of the Debtors rather than for the immediate use of the government, for "the deprivation of the



former owner rather than the accretion of a right or interest to the sovereign constitutes the taking." United States v. General Motors, 323 U.S. 373, 378 (1945). The taking in Pennsylvania Coal Co. v. Mahon was for the benefit of surface owners, the taking in Kaiser Aetna was for the benefit of Hawaiian boat owners, and the taking in Loretto was for the benefit of a cable television company. The governmental action here seems little different from any of those cases.

In sum, the principles of Radford are consistent with the Court's other Takings cases, and should not be overruled now. It should be applied to affirm the present case.

C. Constitutionality under the Due Process Clause

The SG focuses his argument on the reasonableness of §522, treating this case as turning on substantive due process. There is confusion in the lower courts on which clause of the Fifth Amendment is applicable here, and this Court contributed to the confusion with its change of analysis between Radford and Vinton Branch. In many respects, though, the due process argument is really a straw man. Substantive due process has been largely discredited, and it seems highly unlikely that the Court would find a due process violation here in the absence of a taking of compensable property. I mention the issue here, since it has been the object of such attention in the case, but I do not think that due process analysis adds much to the resolution of the issues. If you would like me to discuss this point in greater detail, however, I will be happy to do so. *Really irrelevant to this case*  
*No!*



D. The Proper Construction of §522(f)(2)

In the discussion thus far, I have assumed that §522(f) should be construed to apply retroactively. On that construction, I would recommend holding that the section violates the Takings Clause. The Court need not reach this constitutional issue, however, if §522(f) is construed to apply only to liens created after the enactment of the Code in November 1978.

CA10 construed §522(f) to have retroactive effect, and in the absence of constitutional difficulties, this view has much to recommend it. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, §402(a), 92 Stat. 2549, 2682, stated that the Code "shall take effect on October 1, 1979" except as otherwise provided. The savings provisions, Reform Act §403, provide that cases commenced before the effective date shall continue to be governed by the Bankruptcy Act rather than the Code. It should have been clear to Congress that cases commenced shortly after the effective date might involve rights vested before the enactment date, less than a year before. But there is no explicit provision excepting §522(f).

On the other hand, there is a colorable argument that Congress did not intend retroactive application of §522(f), at least to the extent that it would create constitutional questions. Early drafts of the savings provisions would have explicitly required retroactive application in cases such as this, but one of the witnesses testifying before Congress suggested that there were constitutional difficulties with the approach. The draft provision was eliminated. As the SG correctly notes, the



witness was one of many, and there were numerous drafting changes. It is not clear whether Congress focused on the witness's statement, or if the change was made in response to it. But it is at least a colorable argument, and accepting it would allow the Court to avoid the constitutional issue.

In addition to the straightforward language of the Reform Act, there are two other arguments for the proposition that Congress intended retroactive application. Neither is compelling. First, the SG contends that denying retroactive application "would have postponed for many years a reform long overdue." SG's Brief, at 9. The arguments in support of this contention, however, relate solely to the need for the reform. Id., at 24-25. There is nothing to suggest that the reform would be significantly delayed if §522(f) applied only prospectively. We do not have copies of the actual contracts at issue here, but apparently they are typically of limited duration. In re Gifford, \_\_\_ F.2d \_\_\_, \_\_\_ n.7 (CA7 1982) (en banc) (Pell, J., dissenting) (36 month contract). Since long-term debt is not secured by these types of liens, most liens created before November 1978 have already expired by their terms. The one exception would be if the same security agreement were used to secure additional extensions of credit, but these new extensions would create new rights that would be subject to §522 in any event.

Second, CA10 noted that Reform Act §401(a) repealed the Bankruptcy Act. Thus if §522 does not have retroactive effect, there is a "statutory gap." Juris stmt app, at 8a. This argument fails for several reasons. CA10 overlooked the fact that



*Ambiguous leg. history - we can*  
the Bankruptcy Act made no provision for exemptions, or avoiding ~~con-~~<sup>liens</sup> liens on exemptions, so its repeal is irrelevant. Prior to 1979, <sup>state</sup> state law governed exemptions, and there is no reason it could not continue to do so. Congress certainly did not see any problem with applying state law in this field, since §522(b)(1) explicitly allows state law to override the federal list of exemptions, and §522(b)(2)(A) explicitly allows a debtor to claim the benefit of state exemptions in lieu of the federal list. (Two-thirds of the states have opted out of the Code's exemption list.) Finally, there is no "gap" problem if only subsection (f) is construed to have no retroactive effect. The list of exempt property would remain the same, although preexisting liens would continue to be recognized.

The legislative history is fuzzy enough here that the statute could be construed either way without great difficulty. Were it not for the constitutional problems, I would recommend construing §522(f) as having retroactive effect, but that course does cause serious (even dispositive) constitutional problems. "It is well settled that [the] Court will not pass on the constitutionality of an Act of Congress if a construction of the statute is fairly possible by which the construction may be avoided." United States v. Clark, 445 U.S. 23, 27 (1980). See also NLRB v. Catholic Bishop, 440 U.S. 490, 500 (1979) ("an Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains available"). Construing §522(f) to have only prospective effect may not be the most obvious construction, but it is at least "fairly possible." Per-



haps it would be the best course to follow here. It would effectively eliminate a constitutional violation without having to declare another portion of the Code unconstitutional.

### III. Conclusion

I recommend that the judgment below be affirmed. Section 522(f) operates to deprive the Creditors of their entire property interest in the liens without compensation. This is a violation of the Fifth Amendment's Takings Clause. Radford is directly on point, and is consistent with the Court's more recent Takings cases. It may be preferable, however, to construe §522(f) as having only prospective effect, and thus avoid reaching this constitutional issue. Such a construction is not the most obvious interpretation of the statute, but it is not unreasonable.



Validity of § 522(f) of Bankruptcy  
— exempting household furniture, etc.,  
must be construed retroactively (as CA 10  
held) & if so is it invalid (also as  
CA 10 held).



## Horowitz (SG)

Motor vehicles & homes are not covered  
by § 522(f)

~~The~~ Act as whole seems to ~~assume~~  
apply retroactively. No ev. that  
Congress intended Act to ~~apply~~  
~~retroactive~~ not to apply  
retroactively.

(Can't we construe <sup>only</sup> § 522 as  
prospective).

SG relies on the peculiar  
nature of this property.

~~The~~  
Act applies only to persons  
who go bankrupt.



## Field (Rush)

Statute in effect treated these  
debtor as general creditors.

It elevates liens on real estate  
to those on tangible personal prop.

Crest problem can be avoided by  
a prospective interpretation.

## Horowitz (SG - reply)

Lien is only partially destroyed  
i.e. up to \$200. ~~There~~

Cites Eagle feather case.



Radford (1935) - unanimous

Supreme Court of the United States

<sup>Memorandum</sup>  
Wagner - Lenker Act  
(Farm mortgages)

Loretto v Teleprompter  
1982 (ATV Corp)  
(TM lost + Tem)

Wright v Vinton Branch  
1937 Bk

Several others:

Armstrong v U.S. 1960

Personal prop  
- materialmen's lien

Under § 522, creditors  
lose entire security.



*Aff'm - 5-4*  
*Varying reasons*

The Chief Justice

*Aff'm*  
*Court Act to apply prospectively.*

Justice Brennan

*Rev on Court. Q*

*Not easy to court Act prospectively, but would not dissent.*

*If we reach Court. issue, would*  
*Reverse CA 10 & sustain validity of Act.*  
*Radford is good law, but the property*  
*interest is significantly different here.*

Justice White

*Aff.*

*Act was intended to apply retroactively.*

*On merits, would aff'm. Radford*  
*line of user controls. No difference*  
*here between real & personal prop.*



Justice Marshall *Rev.*

*Agree with WJ B.*

Justice Blackmun *Rev.*

*Merely re-adjustment - not a  
taking. Analyses of Penn Central apply*

Justice Powell *affirm*

*I'd try to construe Act prospectively  
On Court Q, also would affirm.*



Justice Rehnquist

Affirm

On Court issue, affirm.

Radford line - including Lovette  
- require a holding of taking.

Ausmordt 102 U.S. 620 will  
help on prospective construction

Justice Stevens

Rev.

Judge Pell's opinion helps in  
to construing statute prospectively.

- but leg. hist. here precludes this

On Court. Q, there is a difference  
between a Govt taking prop. for its  
use and taking prop. ~~for~~ for  
private purposes.

Radford may be to contrary but we  
don't have to follow it in Baukumpsky  
Case.

Justice O'Connor

Affirm

Doubtful whether we can construe  
prospectively. Language of statute  
itself can be read prospective

I reach merits, Radford  
controls.



To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Stevens  
Justice O'Connor

*Received*  
*10/21*  
*WJP*

From: **Justice Rehnquist**

Circulated: **OCT 21 1982**

Recirculated: \_\_\_\_\_

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 81-184

**UNITED STATES, APPELLANT v. SECURITY  
INDUSTRIAL BANK ET AL.**

**ON APPEAL FROM THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

[October —, 1982]

JUSTICE REHNQUIST delivered the opinion of the Court.

This case concerns the effect of 11 U. S. C. § 522(f)(2), which permits individual debtors in bankruptcy proceedings to avoid liens on certain property. The Court of Appeals consolidated seven appeals from the Bankruptcy Courts for the Districts of Kansas and Colorado. In each case the debtor was an individual who instituted bankruptcy proceedings after the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 ("the Act"), became effective on October 1, 1979. In each case one of the appellees had loaned the debtor money and obtained and perfected a lien on the debtor's household furnishings and appliances before the Act was enacted on November 6, 1978. None of these liens were possessory, and none secured purchase-money obligations.

Included within the personal property subject to the appellees' liens were household items which are exempt from the property included within the debtors' estates by virtue of subsections (b) and (d) of § 522.<sup>1</sup> The debtors claimed these

<sup>1</sup>The exemptions were designed to permit individual debtors to retain exempt property so that they will be able to enjoy a "fresh start" after bankruptcy.

Subsections (b) and (d) of § 522 provide in pertinent part:

(b) [A]n individual debtor may exempt from the property of the estate

*Join*



2 UNITED STATES *v.* SECURITY INDUSTRIAL BANK

exemptions in their respective bankruptcy proceedings, relying on § 522(f)(2) to avoid the liens. That section provides:

“Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—

(2) a nonpossessory, nonpurchase-money security interest in any—

(A) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;

(B) implements, professional books, or tools, of the trade of the debtor or of a dependent of the debtor; or

(C) professionally prescribed health aids for the debtor or a dependent of the debtor.”

The appellees asserted that application of § 522(f)(2) to liens acquired before the enactment date would violate the

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... (1) property that is specified under subsection (d) of this section.

(d) The following property may be exempted under subsection (b)(1) of this section:

(3) The debtor’s interest, not to exceed \$200 in value in any particular item, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family or household use of the debtor or a dependent of the debtor.

(4) The debtor’s aggregate interest, not to exceed \$500 in value, in jewelry held primarily for the personal, family, or household use of the debtor or the dependent of the debtor.

(6) The debtor’s aggregate interest, not to exceed \$750 in value, in any implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor.

(9) Professionally described health aids for the debtor or a dependent of the debtor.



Fifth Amendment. The United States intervened in each case to defend the constitutionality of the federal statute,<sup>2</sup> but the bankruptcy courts in each case refused to apply § 522(f)(2) to abrogate liens acquired before the enactment date.<sup>3</sup>

The Court of Appeals consolidated the cases and affirmed the judgments of the bankruptcy courts. 642 F. 2d 1195 (CA10 1981). It held that the Act was intended to apply retrospectively, and thus was designed to invalidate liens acquired before the enactment date. It also held, however, that such an application violates the Fifth Amendment. The court stated that § 522(f)(2) effects a "complete taking of the secured creditors' property interest," and is thus invalid under *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555 (1935). The United States appealed, and we noted probable jurisdiction. — U. S. — (1982).

The appellees, of course, defend the judgment of the Court of Appeals.<sup>4</sup> The government argues at some length that

<sup>2</sup> See 28 U. S. C. § 2403(a).

<sup>3</sup> In *Schulte v. Beneficial Finance of Kansas, Inc.*, No. 79-11718, and *Hunter v. Beneficial Finance of Kansas, Inc.*, No. 79-11745, the Bankruptcy Court for the District of Kansas noted that retrospective application of § 522(f)(2) creates constitutional problems and held that it should be applied only prospectively. In *Jackson v. Security Industrial Bank*, No. 80 C 1078, *Stevens v. Liberty Loan Corp.*, No. 80 Mc 0056, *Rodrock v. Security Industrial Bank*, No. 80 M 0014, and *Knezel v. Security Industrial Bank*, No. 80 M 0224, the Bankruptcy Court for the District of Colorado concluded that § 522(f)(2), as applied retrospectively, violates the Due Process Clause of the Fifth Amendment. In *Hoops v. Freedom Finance*, No. 80 K 0294, the Bankruptcy Court for the District of Colorado concluded that § 522(f)(2), as applied retrospectively, violates "substantive due process."

<sup>4</sup> Appellee Beneficial Finance of Kansas, Inc. asserts that the judgments should be affirmed because the Act violates Article III of the Constitution by granting judicial power to non-Article III bankruptcy judges. See *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, — U. S. — (1982) (plurality opinion); *id.*, at — (REHNQUIST, J., concurring in the judgment). Since we affirm the judgment of the Court of Ap-



retrospective application of § 522(f)(2) to these liens would not violate the Fifth Amendment. It contends that the enactment is a “rational” exercise of Congress’ bankruptcy power, that for “bankruptcy purposes” property interests are all but indistinguishable from contractual interests, that these particular interests were “insubstantial” and therefore their destruction does not amount to a “taking” of property requiring compensation. We do not decide the constitutional question reached by the Court of Appeals. We address it only to determine whether the attack on the retrospective application of the statute raises substantial enough constitutional doubts to warrant the employment of the canon of statutory construction referred to *post*, 8–10.

It may be readily agreed that § 522(f)(2) is a rational exercise of Congress’ authority under Article I, Section 8, Clause 4, and that this authority has been regularly construed to authorize the retrospective impairment of contractual obligations. *Hanover National Bank v. Moyses*, 186 U. S. 181, 188 (1902). Such agreement does not, however, obviate the additional difficulty that arises when that power is sought to be used to defeat traditional property interests. The bankruptcy power is subject to the Fifth Amendment’s prohibition against taking private property without compensation. *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555 (1935). Thus, however “rational” the exercise of the bankruptcy power may be, that inquiry is quite separate from the question whether the enactment takes property within the prohibition of the Fifth Amendment.

The government apparently contends (Brief for the United States, at 30–32) that because cases such as *Arnett v. Kennedy*, 416 U. S. 134 (1974) and *Goldberg v. Kelly*, 397 U. S. 254 (1970) defined “property” for purposes of the Due Process Clause sufficiently broadly to include rights which at common law would have been deemed contractual, traditional

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peals on other grounds, we find it unnecessary to consider this contention.



property rights are entitled to no greater protection under the takings clause than traditional contract rights. It argues that "bankruptcy principles do not support a sharp distinction between the rights of secured and unsecured creditors." Brief for the United States, at 31. However "bankruptcy principles" may speak to this question, our cases recognize, as did the common law, that the contractual right of a secured creditor to obtain repayment of his debt may be quite different in legal contemplation from the property right of the same creditor in the collateral. Compare *Hanover National Bank v. Moyses*, *supra*, with *Louisville Joint Stock Land Bank v. Radford*, *supra*, and *Kaiser-Aetna v. United States*, 444 U. S. 164 (1979).

Since the governmental action here would result in a complete destruction of the property right of the secured party, the case fits but awkwardly into the framework of analysis employed in *Penn Central Transportation Co. v. New York City*, 438 U. S. 194 (1978) and *PruneYard Shopping Center v. Robbins*, 447 U. S. 76 (1980), where governmental action affected some but not all of the "bundle of rights" which comprise the "property" in question. The government argues that the interest of a secured party such as was involved here is "insubstantial," apparently in part because it is a nonpurchase-money, non-possessory interest in personal property. The "bundle of rights" which accrues to a secured party is obviously smaller than that which accrues to an owner in fee simple, but the government cites no cases supporting the proposition that differences such as these relegate the secured party's interest to something less than property.<sup>5</sup> And our decisions in *Radford*, *supra*, and *Armstrong*

<sup>5</sup> At oral argument the government conceded that the liens at issue in this case are treated as property under state law. Tr. Oral Arg., at 21.

Both Kansas and Colorado have adopted the Uniform Commercial Code. Although under the Code the priority among secured parties is often affected by the purchase money or possessory character of security interests,



*v. United States*, 364 U. S. 40 (1961), militate against such a proposition.

In *Radford*, we held that the Frazier-Lemke Act, June 28, 1934, c. 869, 48 Stat. 1289, violated the takings clause. The bank held a nonpurchase-money mortgage on Radford's farm. Radford defaulted and instituted bankruptcy proceedings. The Frazier-Lemke Act, which by its terms applied only retrospectively, permitted the debtor to purchase the property at its appraised value regardless of the amount of the mortgage.<sup>6</sup> We held the statute was void because it effected a "taking of substantive rights in specific property acquired by the Bank prior to" its enactment. 295 U. S., at 590. In his opinion for the Court, Justice Brandeis stated:

"[T]he Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public."

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see, *e. g.*, § 9-312, these characterizations do not affect the nature of the security interest. See §§ 9-107 (defining "purchase money security interest"), 9-305 (providing for perfection of security interests by possession).

Section 101(28) of the Act defines a lien as a "charge against or interest in property to secure payment of a debt or performance of an obligation." It does not make distinctions based on the purchase-money or possessory nature of a lien.

<sup>6</sup>The Frazier-Lemke Act permitted the farmer, if the mortgagee assented, to purchase the property at its then appraised value, acquiring both title and possession, on a deferred payment plan. If the mortgagee refused to assent, the court was required to stay all proceedings for 5 years, during which time the farmer could retain possession by paying a reasonable rent. After 5 years the property could be reappraised, but the farmer still had the right to purchase it free and clear for the appraised value regardless of the amount of the lien. See *Radford*, *supra*, at 557-558.



*Id.*, at 602.

In *Armstrong*, materialmen delivered materials to a prime contractor for use in constructing navy personnel boats. Under state law, they obtained liens in the vessels.<sup>7</sup> The prime contractor defaulted on his obligations to the United States, and the government took title to and possession of the uncompleted hulls and unused materials, thus making it impossible for the materialmen to enforce their liens. We held that this constituted a taking:

“The total destruction by the government of all compensable value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment ‘taking’ and is not a mere ‘consequential incidence’ of a valid regulatory measure.”

364 U. S., at 48.

The government seeks to distinguish *Armstrong* on the ground that it was a classical “taking” in the sense that the government acquired for itself the property in question, while in the instant case the government has simply imposed a general economic regulation which in effect transfers the property interest from a private creditor to a private debtor. While the classical taking may indeed be of the sort that the government describes, our cases show that takings analysis is not limited to outright acquisitions by the government for itself. See *Loretto v. Teleprompter Manhattan CATV Corp.*, — U. S. —, 102 S.Ct. 3164 (June 28, 1982); *PruneYard Shopping Center v. Robbins*, *supra*; *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 415 (1922).

The government finally contends that because the resale value of household goods is generally low, and because creditors therefore view the principal value of their security as a lever to negotiate for reaffirmation of the debt rather than as

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<sup>7</sup> Under the Uniform Commercial Code definition, these statutory liens would be nonpossessory, nonpurchase-money liens in personal property. See note 5, *supra*.



a vehicle for foreclosure, the property interests involved here do not merit protection under the takings clause. While this contention cannot be dismissed out of hand, it seems to run counter to the state's characterization of the interest as property, see note 5, *supra*, and to our reliance in other "takings" cases on state law characterizations, see, e. g., *Kaiser-Aetna v. United States*, *supra*, 444 U. S. 164, 179, and also to at least some of the implications of *Radford*, *supra*, and *Armstrong*, *supra*.

The foregoing discussion satisfies us that there is substantial doubt whether the retroactive destruction of the appellees' liens in these cases comports with the Fifth Amendment. We now consider whether, as a matter of statutory construction, § 522(f)(2) must necessarily be applied in that manner. We consider the statutory question because of the "cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided." *Lorillard v. Pons*, 434 U. S. 575, 577 (1978), quoting *Crowell v. Benson*, 285 U. S. 22, 62 (1932).

The Court of Appeals thought § 522(f)(2) must apply retroactively, that is, to liens which attached before the enactment date because "there would be no bankruptcy law applicable to cases involving such liens if it did not. 642 F. 2d, at 1197. The court apparently thought that if § 522(f)(2) does not apply to liens which came into existence before the Act was enacted, then no part of the Act could apply to cases involving such liens. This is not necessarily the case. The liens, of course, exist under state law independently of the Act. Although the Act, in general, is effective for all cases commenced after its effective date, Congress might have intended that provisions which drastically affect previously vested property rights apply only to interests which came into effect after the Act was enacted. If § 522(f)(2) is such a provision, the remainder of the Act would not affect the enforceability of these liens, but would still apply to these

Yes



liens and these cases. We think that the analysis of the Court of Appeals did not adequately dispose of the question as to the retrospective effect of § 522(f), and we therefore pursue the inquiry further.

The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student. Compare *Sands*, Sutherland's Statutory Construction § 106 with *Linkletter v. Walker*, 381 U. S. 618, 622-625 (1965). This Court has often pointed out that

the first rule of construction is that legislation must be considered as addressed to the future, not to the past. . . . The rule has been expressed in varying degrees of strength but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature."

*Union Pacific R. Co. v. Laramie Stock Yards Co.*, 231 U. S. 190, 199 (1913) (citations omitted). See e. g., *United States Fidelity & Guaranty Co. v. Struthers Wells Co.*, 209 U. S. 306, 314 (1908) ("The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other."); *United States v. The Peggy*, 5 U. S. (1 Cranch) 103, 110 (1801).

This principle has been repeatedly applied to bankruptcy statutes affecting property rights. In *Holt v. Henley*, 232 U. S. 637 (1914), the Court had before it a new statute granting bankruptcy trustees the position of a lienholder with priority over sellers on conditional sales contracts. Act of June 25, 1910, c. 412, § 8, 26 Stat. 838, 840. This provision, like § 522(f)(2), could be read literally to divest property interests which had been created before it was enacted. The 1910



statute, like the Act, applied to all bankruptcy cases instituted after it became effective.<sup>8</sup> Nonetheless, the Court followed the lead of the lower courts in refusing to infer retroactivity absent an explicitly "expressed intent of Congress." *Arctic Ice Machine Co. v. Armstrong County Trust Co.*, 192 F. 114, 116 (CCA 3 1911). See also *In re Schneider*, 203 F. 589, 590 (E.D. Pa. 1913). In his opinion for the unanimous Court, Justice Holmes stated "that the reasonable and usual interpretation of [bankruptcy] statutes is to confine their effect, so far as it may be, to property rights established after they were passed." 232 U. S., at 639. See *Auffm'ordt v. Rasin*, 102 U. S. 620, 622 (1881).

The government nonetheless contends that bankruptcy statutes are usually construed to apply to preexisting rights. This statement is unobjectionable in the context of traditional contract rights, *Hanover National Bank v. Moyses*, *supra*, 186 U. S., at 188, but none of the cases cited by the government extend it to property rights such as those involved here. *Claridge Apartments Co. v. Commissioner*, 323 U. S. 141 (1944), involved rights to certain tax benefits, not to property rights. *Dickinson Industrial Site, Inc. v. Cowan*, 309 U. S. 382, 383 (1940), dealt with the application of new procedural rules to a bankruptcy proceeding that was pending when the new statute was enacted. Allowing an appeal to the Circuit Court rather than the District Court in that case did not eliminate any property rights. *Carpenter v. Wabash Ry.*, 309 U. S. 23 (1940), involved a provision giving personal injury judgments the status of operating expenses and thus priority over mortgagees in ongoing railroad reorganizations. Although that statute may have disadvantaged the mortgagees by reducing the amount of cash available to pay their notes, it did not affect their property right in the

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<sup>8</sup>The transition provisions of the 1910 statute, *id.*, § 14, 36 Stat. at 842, are, in substance, the same as those of the Act. Pub. L. No. 95-598, Title IV, §§ 402, 403(a), Nov. 6, 1978, 92 Stat 2682, 2683.



collateral securing the mortgages. *McFaddin v. Evans-Snyder-Buel Co.*, 185 U. S. 505 (1902), considered a curative statute providing the methods by which valid mortgages could be created in the Indian Territory. The *Legal Tender Cases*, 79 U. S. (12 Wall.) 457, 549-550 (1870), decided only that debts could be paid in legal tender as defined by Congress at the time of payment without impairing the obligation of contracts.

Thus the government has not cited, and we have not found, any authority casting doubt on the principle of statutory construction deducible from *Holt* and *Auffmordt*: No bankruptcy law shall be construed to eliminate property rights which existed before the law was enacted in the absence of an explicit command from Congress. In light of this principle, the legislative history of the 1978 Act suggests that Congress may not have intended that § 522(f) operate to destroy pre-enactment property rights.

An early version of the Act contained a explicit requirement that all its provisions "shall apply in all cases or proceedings instituted after its effective date, regardless of the occurrence of any of the operative facts determining legal rights, duties or liabilities hereunder." H.R. 31, 94th Cong., 1st Sess., § 10-103(a) (1975), reprinted in Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 before the Subcomm. on Civil and Constitutional Right of the House Comm. on the Judiciary, 94th Cong., 1st Sess. (1975), n. 14 app., at 320-321. This provision may or may not have been deleted directly in response to the comments of witness William Plumb to the effect that retroactive invalidation of liens may be an unconstitutional taking. *Id.*, at 2066-2067. Nonetheless, Congress's elimination of an explicit command is some evidence that it did not intend to depart from the usual principle of construction. See *Bradley v. Richmond School Board*, 416 U. S. 696, 716, n. 23 (1974) ("We are reluctant to read into the statute the very . . . limitation that Congress eliminated.").



"Accordingly, in the absence of a clear expression of Congress' intent to" apply § 522(f)(2) to property rights established before the enactment date,<sup>9</sup> "we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the" takings clause. *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U. S. 490, 507 (1979).<sup>10</sup> The judgment of the Court of Appeals must therefore be

*Affirmed*

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<sup>9</sup> Because all of the liens at issue in this case were established before Congress passed the Act, we have no occasion to consider whether § 522(f)(2) should be applied to liens established after Congress passed the Act, but before it became effective.

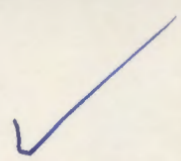
<sup>10</sup> "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' . . . Obviously there is danger that the courts' conclusion as to legislative purpose will be unconsciously influenced by the judges' own views or by factors not considered by the enacting body. A lively appreciation of the danger is the best assurance of escape from its threat but hardly justifies an acceptance of a literal interpretation dogma which withholds from the courts available information for reaching a correct conclusion. A few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to a settled policy, 'excepting as a different purpose is plainly shown.'" *United States v. American Trucking Association*, 310 U. S. 534, 543-544 (1940) (footnotes omitted).



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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

October 21, 1982



Re: No. 81-184 - U.S. v. Security Industrial Bank

Dear Bill:

I await the dissent.

Sincerely,

*TM*  
T.M.

Justice Rehnquist

cc: The Conference



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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

October 21, 1982

Re: No. 81-184 - United States v. Security Industrial Bank

Dear Bill:

I shall be writing a dissent in this case in due course.

Sincerely,

*H.A.B./*  
*by wsm*

Justice Rehnquist

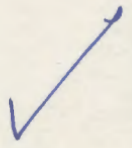
cc: The Conference



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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

October 22, 1982



Re: 81-184 - United States v. Security  
Industrial Bank

Dear Bill:

As you may recall from the Conference discussion, I have flip-flopped on this case more than once. I ended up with a vote to reverse, but I find your opinion especially persuasive, particularly your reliance on Justice Holmes' opinion in Holt v. Henley, 232 U.S. 637, a case that seems to be squarely in point. I am therefore inclined to join your opinion, but since I did vote the other way I believe I should withhold a final commitment until I have the benefit of whatever other writing may circulate.

Respectfully,

Justice Rehnquist

Copies to the Conference





CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

October 22, 1982

MEMORANDUM TO THE CONFERENCE

Re: No. 81-184, United States v. Security Industrial Bank

Justice O'Connor has suggested that the opinion in this case be revised to deal explicitly with the issue of the jurisdiction of the bankruptcy courts. I agree and suggest rewriting the last sentence of footnote 4 to read as follows:

Because our decision in Northern Pipeline is prospective only, id., at \_\_\_\_, and because we have stayed the issuance of our mandate in that case to December 24, 1982, \_\_\_\_, U.S. \_\_\_\_, that decision does not affect the judgment in this case.

As I recall, the issue was not addressed in our conference discussion of the case. I am circulating this memo to the entire conference, not just to those who voted to affirm, because it seems to me that one's views on this issue would not depend on one's views on the merits. I propose to incorporate the above revision unless I am advised that it will not command the support of a majority of the conference.

Sincerely,



October 22, 1982

81-184 U.S. v. Security Industrial Bank

Dear Bill:

Please join me.

Sincerely,

Justice Rehnquist

lfp/ss

cc: The Conference

Bill: I have requested my law clerk Mike Sturley to discuss a couple of minor points with your clerk. I like your opinion. It makes a stronger case for prospective construction of §522(f)(2) than I had thought possible.



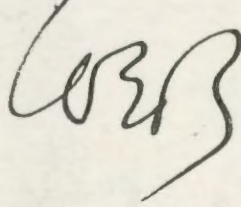
October 26, 1982

Re: 81-184 - U.S. v. Security Industrial Bank

Dear Bill:

I join.

Regards,

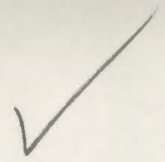


Justice Rehnquist

Copies to the Conference



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



CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

October 26, 1982

No. 81-184 United States v. Security  
Industrial Bank

Dear Bill,

Please join me in the second draft of  
your opinion in the referenced case.

Sincerely,

Justice Rehnquist

Copies to the Conference



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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

October 27, 1982

✓

Re: 81-184 - United States  
v. Security Industrial Bank

Dear Bill,

I shall await the dissent in this case.

Sincerely yours,

*By*

Justice Rehnquist

Copies to the Conference

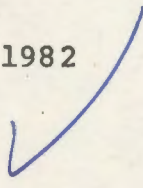
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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

November 18, 1982

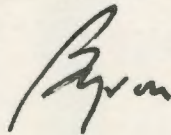


Re: 81-184 - United States  
v. Security Industrial Bank

Dear Bill,

I now join your proposed opinion for the  
Court in this case.

Sincerely yours,



Justice Rehnquist

Copies to the Conference

cpm



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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

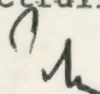
November 18, 1982

Re: 81-184 - United States v. Security  
Industrial Bank

Dear Bill:

Please join me.

Respectfully,



Justice Rehnquist

Copies to the Conference



CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

November 22, 1982

RE: No. 81-184 United States v. Security Industrial Bank

Dear Harry:

Please join me.

Sincerely,

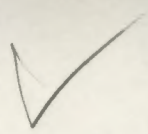
*Bill*  
7

Justice Blackmun

Copies to the Conference



CHAMBERS OF  
JUSTICE THURGOOD MARSHALL



November 23, 1982

Re: No. 81-184- U.S. v. Security Industrial Bank

Dear Harry:

Please join me in your concurring opinion.

Sincerely,

*T.M.*  
T.M.

Justice Blackmun

cc: The Conference



