SUPREME COURT OF THE UNITED STATES

No. 92–1370

BFP, PETITIONER *v.* RESOLUTION TRUST CORPORATION, AS RECEIVER OF IMPERIAL FEDERAL SAVINGS ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[May 23, 1994]

JUSTICE SOUTER, with whom JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE GINSBURG join, dissenting.

The Court today holds that by the terms of the Bankruptcy Code Congress intended a peppercorn paid at a noncollusive and procedurally regular foreclosure sale to be treated as the "reasonabl[e] equivalent" of the value of a California beachfront estate. Because the Court's reasoning fails both to overcome the implausibility of that proposition and to justify engrafting a foreclosure-sale exception onto 11 U. S. C. §548(a)(2)(A), in derogation of the straightforward language used by Congress, I respectfully dissent.

The majority presents our task of giving meaning to §548(a)(2)(A) in this case as essentially entailing a choice between two provisions that Congress might have enacted, but did not. One would allow a bankruptcy trustee to avoid a recent foreclosure-sale transfer from an insolvent debtor whenever anything less than fair market value was obtained, while the second would limit

the avoidance power to cases where the foreclosure sale was collusive or had failed to comply with state-prescribed procedures. The Court then argues that, given the unexceptionable proposition that forced sales rarely yield as high a price as sales held under ideal, “market” conditions, Congress's “omission” from §548(a)(2)(A) of the phrase “fair market value” means that the latter, narrowly procedural reading of §548(a)(2)(A) is the preferable one.

If those in fact were the interpretive alternatives, the majority's choice might be a defensible one.[1] The

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[1]I note, however, two preliminary embarrassments: first, the gloss on §548(a)(2)(A) the Court embraces is less than entirely hypothetical. In the course of amending the Bankruptcy Code in 1984, see *infra*, Congress considered, but did not enact, an amendment that said precisely what the majority now says the current provision means, *i.e.*, that the avoidance power is confined to foreclosures involving collusion or procedural irregularity. See S. 445, 98th Cong., 1st Sess., §360 (1983). Even if one is careful not to attach too much significance to such a legislative nonoccurrence, it surely cautions against undue reliance on a different, entirely speculative congressional “omission.” See *ante*, at 6 (the statute “seemingly goes out of its way to avoid” using “fair market value”); but cf. *ante*, at 14 (reasonably equivalent value will “continue” to have a meaning “similar to fair market value” outside the foreclosure sale context).

In this case, such caution would be rewarded. While the assertedly “standard,” *ante*, at 6, phrase “fair market value” appears in more than 150 distinct provisions of the Tax Code, it figures in only two Bankruptcy Code provisions, one of which is entitled, suggestively, “Special tax provisions.” See 11 U. S. C. §346. The term of choice in the bankruptcy setting seems to be “value,” unadorned and

first, equating "reasonably equivalent value" at a foreclosure sale with "fair market value" has little to recommend it. Forced-sale prices may not be (as the majority calls them) the "very antithesis" of market value, see *ante*, at 6, but they fail to bring in what voluntary sales realize, and rejecting such a reading of the statute is as easy as statutory interpretation is likely to get. On the majority's view, laying waste to this straw man necessitates accepting as adequate value whatever results from noncollusive adherence to state foreclosure requirements. Because properties are "simply worth less," *ante*, at 7, on foreclosure sale, the Court posits, they must have been "worth" whatever price was paid. That, however, is neither a plausible interpretation of the statute, nor its only remaining alternative reading.[2]

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undefined, which appears in more than 30 sections of the Bankruptcy Code, but which is, with respect to many of them, read to mean "fair market value." See also §549(c) ("present fair equivalent value"); §506(a) ("value [is to] be determined in light of the purpose of the valuation and of the proposed disposition or use of such property"); S. Rep. No. 95–989, p. 54 (1978) ("[M]atters [of valuation under §361] are left to case-by-case interpretation and development. . . .Value [does not] mean, in every case, forced sale liquidation value or full going concern value. There is wide latitude between those two extremes.".) To the extent, therefore, that this negative implication supplies ground to "suspect," see *ante*, at 6, that Congress could not have meant what the statute says, such suspicion is misplaced.

[2]The majority's statutory argument depends similarly heavily on the success of its effort to relegate "fair market value" to complete pariah status. But it is no short leap from the (entirely correct) observation that a property's fair market value will not be dispositive of whether "less than reasonably equivalent value"

The question before the Court is whether the price received at a foreclosure sale after compliance with state procedural rules in a non collusive sale must be treated conclusively as the "reasonably equivalent value" of the mortaged property and in answering that question, the words and meaning of §548(a)(2)(A) are plain. See *Patterson* v. *Shumate*, 504 U. S. ___, ___ (slip. op., at 7) (1992) (party seeking to

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was obtained on foreclosure to the assertion that market value has "no applicability," *ante*, at 6, or is not "legitimate evidence," *ante*, at 18, of whether the statutory standard was met. As is explored more fully *infra*, the assessed value of a parcel of real estate at the time of foreclosure sale is not to be ignored. On the contrary, that figure plainly is relevant to the Bankruptcy Code determination, both because it provides a proper measure of the rights received by the transferee and because it is indicative of the extent of the debtor's equity in the property, an asset which, but for the pre-bankruptcy transfer under review, would have been available to the bankruptcy estate, see *infra*, at 16–18.

It is also somewhat misleading, similarly, to suggest that "no one would pay as much," *ante*, at 7, for a foreclosed property as he would for the same real estate purchased under leisurely, market conditions. Buyers no doubt hope for bargains at foreclosure sales, but an investor with a million dollars cash in his pocket might be ready to pay "as much" for a desired parcel of property on forced sale, at least if a rival, equally determined millionaire were to appear at the same auction. The principal reason such sales yield low prices is not so much that the properties become momentarily "worth less," *ante*, at 7 (on the contrary, foreclosure-sale purchasers receive a bundle of rights essentially similar to what they get when they buy on the market) or that foreclosing mortgagees are under the compulsion of

defeat plain meaning of Bankruptcy Code text bears an "exceptionally heavy burden") (internal quotation marks omitted); *Perrin* v. *United States*, 444 U. S. 37, 42 (1979) (statutory words should be given their ordinary meaning). A trustee is authorized to avoid certain recent pre-bankruptcy transfers, including those on foreclosure sales, that a bankruptcy court determines were not made in exchange for "a reasonably equivalent value." Although this formulation makes no pretense to mathematical precision, an ordinary speaker of English would have no difficulty grasping its basic thrust: the bankruptcy court must compare the price received by the insolvent debtor and the worth of the item when sold and set aside the transfer if the former was substantially

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state law to make no more than the most desultory efforts to encourage higher bidding, but rather that such free-spending millionaires are in short supply, and those who do exist are unlikely to read the fine print which fills the "legal notice" columns of their morning newspaper. Nor, similarly, is market value justly known as the "antithesis" of foreclosure-sale price, for the important (if intuitive), reason that properties with higher market values can be expected to sell for more on foreclosure.

("[un]reasonabl[y]") "less than" the latter.[3] Nor would any ordinary English speaker, concerned to determine whether a foreclosure sale was collusive or procedurally irregular (an enquiry going exclusively to the process by which a transaction was consummated), direct an adjudicator, as the Court now holds Congress did, to ascertain whether the sale had realized "less than a reasonably equivalent value" (an enquiry described in quintessentially substantive terms).[4]

Closer familiarity with the text, structure, and history of the disputed provision (and relevant amendments), confirms the soundness of the plain reading. Before 1984, the question whether foreclosure sales fell within bankruptcy courts' power to set aside transfers for "too little in return" was, potentially, a difficult one. Then, it might plausibly have been contended that §548 was most concerned with "fraudulent" conduct by debtors on the brink of bankruptcy, misbehavior unlikely to be afoot when an insolvent debtor's property is sold, against his wishes, at foreclosure.[5] Indeed, it could further have been

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[3]Indeed, it is striking that this is what the Court says the statute (probably) does mean, with respect to almost every transfer other than a sale of property upon foreclosure. See *ante*, at 14.

[4]The Court protests, *ante*, at 16, that its formulation, see *ante*, at 4, deviates only subtly from the reading advanced here and purports not to disagree that the statute compels an enquiry "into the relationship of the value received and the worth of the property transferred," *ante*, at 16. Reassuring as such carefully chosen words may sound, they can not obscure the fact that the "comparison" the majority envisions is an empty ritual. See *infra,* n. 10.

[5]The Court notes correctly that fraudulent conveyance laws were directed first against insolvent debtors' passing assets to friends or relatives, in order to keep

argued, again consonantly with the text of the earlier version of the Bankruptcy Code, that Congress had not understood foreclosure to involve a "transfer" within the ambit of §548, see, *e.g., Abramson* v. *Lakewood Bank & Trust Co.*, 647 F. 2d 547, 549 (CA5 1981) (Clark, J., dissenting), cert. denied, 454 U. S. 1164 (1982) (Bankruptcy Act case), on the theory that the "transfer" from mortgagor to mortgagee occurs, once and for all, when the security interest is first created. See generally *In re Madrid*, 725 F. 2d 1197 (CA9), cert. denied, 469 U. S. 833 (1984).

In 1984, however, Congress pulled the rug out from under these previously serious arguments, by

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them beyond their creditors' reach (the proverbial "Elizabethan deadbeat who sells his sheep to his brother for a pittance," see Baird & Jackson, Fraudulent Conveyance Law and Its Proper Domain, 38 Vand. L. Rev. 829, 852 (1985)), and then later against conduct said to carry the "badges" of such misconduct, but bankruptcy law had, well before 1984, turned decisively away from the notion that the debtor's state of mind, and not the objective effects on creditors, should determine the scope of the avoidance power. Thus, the 1938 Chandler Act provided that a transfer could be set aside without proving any intent to "hinder, delay, or defraud," provided that the insolvent debtor obtained less than "fair consideration" in return, see 11 U. S. C. §107(d)(2) (1976), and the 1978 Bankruptcy Code eliminated scrutiny of the transacting parties' "good faith." Compare 11 U. S. C. §107(d)(1)(e) (1976). At the time when bankruptcy law was more narrowly concerned with debtors' turpitude, moreover, the available "remedies" were strikingly different, as well. See, *e.g.*, 21 Jac. I., ch. 19, §6 (1623), 4 Statutes of the Realm 1228 (insolvent debtor who fraudulently conceals assets is subject to have his ear nailed to pillory and cut off).

amending the Code in two relevant respects. See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98–353 §§ 401(1), 463(a), 98 Stat. 368, 370. One amendment provided expressly that "involuntar[y]" transfers are no less within the trustee's §548 avoidance powers than "voluntar[y]" ones, and another provided that the "foreclosure of the debtor's equity of redemption" itself is a "transfer" for purposes of bankruptcy law. See 11 U. S. C. §101(54) (1988 ed., Supp. IV).[6] Thus, whether or not one believes (as the majority seemingly does not) that foreclosure sales rightfully belong within the historic domain of "fraudulent conveyance" law, that is exactly where Congress has now put them, cf. *In re Ehring*, 900 F. 2d 184, 187 (CA9 1990), and our duty is to give effect to these new amendments, along with every other clause of the Bankruptcy Code. See, *e.g.*, *United States* v. *Nordic Village, Inc.*, 503 U. S. ___, ___ (1992) (slip op., at 6); *United Savings Assn. of Texas* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 374–75 (1988); see also *Dewsnup* v. *Timm*, 502 U. S. ___, ___ (1992) (slip op., at 7) (SCALIA, J., dissenting). The Court's attempt to escape the plain effect of §548(a)(2)(A) opens it to some equally

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[6]As noted *supra*, an earlier version of the Senate Bill contained a provision that would have added to §548 the conclusive presumption the Court implies here. See S. 445, 98th Cong., 1st Sess., §360 (1983) ("A secured party or third party purchaser who obtains title to an interest of the debtor in property pursuant to a good faith prepetition foreclosure, power of sale, or other proceeding or provision of nonbankruptcy law permitting or providing for the realization of security upon default of the borrower under a mortgage, deed of trust, or other security agreement takes for reasonably equivalent value within the meaning of this section"). The provision was deleted from the legislation enacted by Congress.

plain objections.

The first and most obvious of these objections is the very enigma of the Court's reading. If a property's "value" is conclusively presumed to be whatever it sold for, the "less than reasonabl[e] equivalen[ce]" question will never be worth asking, and the bankruptcy avoidance power will apparently be a dead letter in reviewing real estate foreclosures Cf. 11 U. S. C. §361(3) ("indubitable equivalent").[7] The Court answers that the section is not totally moribund: it still furnishes a way to attack collusive or procedurally deficient real property foreclosures, and it enjoys a vital role in authorizing challenges to other transfers than those occurring on real estate foreclosure. The first answer, however, just runs up against a new objection. If indeed the statute fails to reach noncollusive, procedurally correct real estate foreclosures, then the recent amendments discussed above were probably superfluous. There is a

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[7]Evidently, many States take a less Panglossian view than does the majority about the prices paid at sales conducted in accordance with their prescribed procedures. If foreclosure sale prices truly represented what properties are "worth," *ante*, at 7, or their "fair and proper price," *ante*, at 14, it would stand to reason that deficiency judgments would be awarded simply by calculating the difference between the debt owed and the "value," as established by the sale. Instead, in those jurisdictions permitting creditors to seek deficiency judgments it is quite common to require them to show that the foreclosure price roughly approximated the property's (appraised) value. See, *e.g.*, Tex. Prop. Code Ann. §§51.003–51.005 (Vernon Supp. 1992); see generally *Gelfert* v. *National City Bank*, 313 U. S. 221 (1941); cf. *id.*, at 233 ("[T]he price which property commands at a forced sale may be hardly even a rough measure of its value").

persuasive case that collusive or seriously irregular real estate sales were already subject to avoidance in bankruptcy, see, *e.g.*, *In re Worcester*, 811 F. 2d 1224, 1228, 1232 (CA9 1987) (interpreting §541(a)), and neither the Court nor the respondents and their amici identify any specific case in which a court pronounced itself powerless to avoid a collusive foreclosure sale. But cf. *Madrid*, 725 F. 2d, at 1204 (Farris, J., concurring). It would seem peculiar, then, that for no sound reason, Congress would have tinkered with these closely-watched sections of the Bankruptcy Code, for the sole purpose of endowing bankruptcy courts with authority that had not been found wanting in the first place.[8]

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[8]That is not the only aspect of the majority's approach that it is hard to square with the amended text. By redefining “transfer” in §101, Congress authorized the trustee to avoid any “foreclosure of the equity of redemption” for “less than a reasonably equivalent value.” In light of the fact, see, *e.g.*, Lifton, Real Estate in Trouble: Lender's Remedies Need an Overhaul, 31 Bus. Law 1927, 1937 (1976), that most foreclosure properties are sold (at non-collusive and procedurally unassailable sales, we may presume) for the precise amount of the outstanding indebtedness, when some (but by no means all) are worth more, see generally Wechsler, Through the Looking Glass: Foreclosure by Sale as *De Facto* Strict Foreclosure — An Empirical Study of Mortgage Foreclosure and Subsequent Resale, 70 Cornell L. Rev. 850 (1985), it seems particularly curious that Congress would amend a statute to recognize that a debtor “transfers” an “interest in property,” when the equity of redemption is foreclosed, fully intending that the “reasonably equivalent value” of that interest would, in the majority of cases, be presumed conclusively to be zero.

To the extent that the Court believes the amended

The Court's second answer to the objection that it renders the statute a dead letter is to remind us that the statute applies to all sorts of transfers, not just to real estate foreclosures, and as to all the others, the provision enjoys great vitality, calling for true comparison between value received for the property and its “reasonably equivalent value.” (Indeed, the Court has no trouble acknowledging that something “similar to” fair market value may supply the benchmark of reasonable equivalence when such a sale is not initiated by a mortgagee, *ante*, at 14.) This answer, however, is less tenable than the first. A common rule of construction calls for a single definition of a common term occurring in several places within a statute, see *Bray* v. *Alexandria Women's Health Clinic*, 506 U. S. ___, ___ (1993) (slip op., at 19); *Dewsnup* v. *Timm*, 502 U. S. ___,___ (slip op., at 3) (SCALIA, J., dissenting) (“'normal rule[s] of statutory construction'” require that “'identical words *used in the same section of the same enactment*'” must be given the same effect) (emphasis in original), and the case for different definitions within a single text is difficult to make, cf. *Bray, supra*, at ___ (slip op., at 5) (SOUTER, J., concurring in part). But to give a single term two different and inconsistent meanings (one procedural, one substantive) for a single occurrence is an offense so unlikely that no common prohibition has ever been thought necessary

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§548(a)(2)(A) to be addressed to “collusive” sales, meanwhile, a surprisingly indirect means was chosen. Compare 11 U. S. C. §363(n) (authorizing trustee avoidance of post-petition sale, or, in the alternative, recovery of the difference between the “value” of the property and the “sale price,” when the “sale price was controlled by an agreement”). Cf. *ante*, at 6 (citing *Chicago* v. *Environmental Defense Fund*, ___ U. S. ___, ___ (1994) (slip op., at 9)).

to guard against it.[9] Cf. *Owen* v. *Owen*, 500 U. S. 305, 313 (1991) (declining to "create a distinction [between state and federal exemptions] that the words of the statute do not contain"); *Union Bank* v. *Wolas*, 502 U. S. ___, ___ (1991) (slip op., at 11) the "statutory text . . . makes no distinction between short-term debt and long-term debt"). Unless whimsy is attributed to Congress, the term in question cannot be exclusively procedural in one class of cases and entirely substantive in all others. To be sure, there are real differences between sales on mortgage foreclosures and other transfers, as Congress no doubt understood, but these differences may be addressed simply and consistently with the statute's plain meaning.[10]

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[9]Indeed, the Court candidly acknowledges that the proliferation of meanings may not stop at two: not only does "reasonably equivalent value" mean one thing for foreclosure sales and another for other transfers, but tax sales and other transactions may require still other, unspecified "benchmark[s]." See *ante*, at 5, n. 3.

[10]The Court's somewhat mischievous efforts to dress its narrowly procedural gloss in respectable, substantive garb, see *ante*, at 6–7;16, make little sense. The majority suggests that even if the statute must be read to require a comparison, the one it compels dooms the trustee always to come up short. A property's "value," the Court would have us believe, should be determined with reference to a State's rules governing creditors' enforcement of their rights, in the same fashion that it might encompass a zoning rule governing (as a matter of state law) a neighboring landowner's entitlement to build a gas station. But the analogy proposed ignores the patent difference between these two aspects of the "regulatory background" *ante*, at 8: while the zoning ordinance would reduce the value of the property "to

The "neologism," *ante*, at 6, "reasonably equivalent value" (read in light of the amendments confirming that foreclosures are to be judged under the same standard as are other transfers) has a single meaning in the one provision in which it figures: a court should discern the "value" of the property transferred and determine whether the price paid was, under the circumstances, "less than reasonabl[e]." There is

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the world," foreclosure rules affect not the price any purchaser "would pay," *ante*, at 7, but rather the means by which the mortgagee is permitted to extract its entitlement from the entire "value" of the property.

Such distinctions are a mainstay of bankruptcy law, where it is commonly said that creditors' "substantive" state law rights "survive" in bankruptcy, while their "procedural" or "remedial" rights under state debtor-creditor law give way, see *e.g.*, *United Savings Assn. of Texas* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 370–371 (1988) (refusing to treat "right to immediate foreclosure" as an "interest in property" under applicable nonbankruptcy law); *Owen* v. *Owen*, 500 U. S. 305 (1991) (bankruptcy exemption does not incorporate state law with respect to liens); *United States* v. *Whiting Pools, Inc.*, 462 U. S. 198, 206–207 (1983); see also *Gelfert* v. *National City Bank of N.Y.*, 313 U. S., at 234 ("[T]he advantages of a forced sale" are not "a . . . property right" under the Constitution). And while state foreclosure rules reflect, *inter alia*, an understandable judgment that creditors should not be forced to wait indefinitely as their defaulting debtors waste the value of loan collateral, bankruptcy law affords mortgagees distinct and presumably adequate protections for their interest. See 11 U. S. C. §§548(c), 550(d)(1); *id.*, §362(d); *Wright* v. *Union Central Life Ins. Co.*, 311 U. S. 273, 278–279 (1940), along with the general

thus no reason to rebuke the courts of appeals for having failed to "come to grips," *ante*, at 7, with the implications of the fact that foreclosure sales cannot be expected to yield fair market value. The statute has done so for them. As courts considering nonforeclosure transfers often acknowledge, the qualification "reasonably equivalent" itself embodies both an awareness that the assets of insolvent debtors are commonly transferred under conditions that will yield less than their optimal value and a judgment that avoidance in bankruptcy (unsettling as it does the expectations of parties who may have dealt with the debtor in good faith) should only occur when it is clear that the bankruptcy estate will be substantially augmented. See, *e.g.*, *In re Southmark Corp.*, 138 B. R. 820, 829–830 (Bkrtcy. Ct. ND Tex. 1992) (court must compare "the value of what went out with value of what came in," but the equivalence need not be "dollar for dollar") (citation omitted); *In re Countdown*, 115 B. R. 18 (Bkrtcy. Ct. Conn. 1990) (". . . [S]ome disparity between the value of the collateral and the value of the debt does not necessarily lead to a finding of lack of reasonably equivalent

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promise that the debtor's estate will, effectively, be maximized in the interest of creditors.

The majority professes to be "baffled," *ante*, at 8, n. 5, by this common-sense distinction between state zoning laws and state foreclosure procedures. But a zoning rule is not merely "price-affecting," *ante*, at 8: it affects the property's value (*i.e.*, the price for which any transferee can expect to re-sell). State-mandated foreclosure procedures, by contrast, might be called "price-affecting," in the sense that adherence solely to their minimal requirements will no doubt keep sale prices low. But state rules hardly forbid mortgagees from making efforts to encourage more robust bidding at foreclosure sales; they simply fail to furnish sellers any reason to do so, see *infra*.

value.”).[11]

I do not share in my colleagues' apparently extreme discomfort at the prospect of vesting bankruptcy courts with responsibility for determining whether “reasonably equivalent value” was received in cases like this one, nor is the suggestion well taken that doing so is an improper abdication. Those courts regularly make comparably difficult (and contestable) determinations about the “reasonably equivalent value” of assets transferred through other means than foreclosure sales, see, *e.g.*, *Covey* v. *Commercial Nat. Bank*, 960 F. 2d 657, 661–662 (CA7 1992) (rejecting creditor's claim that resale price may be presumed to be “reasonably equivalent value” when that creditor “seiz[es] an asset and sell[s] it for just enough to cover its loan (even if it would have been worth substantially more as part of an ongoing enterprise)”); *In re Morris Communications N.C., Inc.*, 914 F. 2d 458 (CA4 1990) (for “reasonably equivalent value” purposes, worth of entry in cellular phone license “lottery” should be discounted to reflect probability of winning); cf. *In re Royal Coach Country, Inc.*, 125 B. R. 668, 673–674 (Bkrtcy. Ct. MD Fla.

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[11]Indeed, it is not clear from its opinion that the Court has “come to grips,” *ante*, at 7, with the reality that “involuntary” transfers occur outside the real property setting, that legally voluntary transfers can be involuntary in fact, and that, where insolvent debtors on the threshold of bankruptcy are concerned, transfers for full, “fair market” price are more likely the exception than the rule. On the Court's reading, for example, nothing would prevent a debtor who deeded property to a mortgagee “in lieu of foreclosure” prior to bankruptcy from having the transaction set aside, under the “ordinar[y],” *ante*, at 14, substantive standard.

1991) (avoiding exchange of 1984 truck valued at $2,800 for 1981 car valued at $500), and there is every reason to believe that they, familiar with these cases (and with local conditions) as we are not, will give the term sensible content in evaluating particular transfers on foreclosure, cf. *United States* v. *Energy Resources Co.*, 495 U. S. 545, 549 (1990); *NLRB* v. *Bildisco & Bildisco*, 465 U. S. 513, 527 (1984); *Rosen* v. *Barclays Bank of N.Y.*, 115 B. R. 433 (EDNY 1990).[12] As in other § 548(a)(2) cases, a trustee seeking avoidance of a foreclosure-sale transfer must persuade the bankruptcy court that the price obtained on pre-bankruptcy transfer was, "unreasonabl[y]" low, and as in other cases under the provision, the gravamen of such a claim will be that the challenged transfer significantly and needlessly diminished the bankruptcy estate, *i.e.*, that it extinguished a substantial equity interest of the debtor and that the foreclosing mortgagee failed to take measures which (consistently with state law, if not required by it) would have augmented the price realized.[13]

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[12]It is only by renewing, see *ante*, at 17, its extreme claim, but see *supra*, n. 2, that market value is wholly irrelevant to the analysis of foreclosure-sale transfer (and that bankruptcy courts are debarred from even "referring" to it, *id.*) that the Court is able to support its assertion that evaluations of such transactions are somehow uniquely beyond their ken.

The majority, as part of its last-ditch effort to salvage some vitality for the provision, itself would require bankruptcy judges to speculate as to the price "that would have been received if the foreclosure sale had proceeded according to [state] law." *ante*, at 15; compare *ante*, at 9 (expressing skepticism about judicial competence to determine "such a thing" as a "fair" forced-sale price).

[13]In this regard and in its professions of deference to

Whether that enquiry is described as a search for a benchmark “'fair' forced-sale price,” *ante*, at 9, or for the “price that was reasonable under the circumstances,” cf. *ante*, n. 4, is ultimately, as the Court itself seems to acknowledge, see *ante*, at 9, of no greater moment than whether the rule the Court discerns in the provision is styled an “exception,” an “irrebuttable presumption,” or a rule of per se

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the processes of local self-government, the Court wrongly elides any distinction between what state law commands and what the states permit. While foreclosure sales “under state law” may typically be sparsely attended and yield low prices, see *infra*, at 18, these are perhaps less the result of state law “strictures,” *ante*, at 6, than of what state law fails to supply, incentives for foreclosing lenders to seek higher prices (by availing themselves of advertising or brokerage services, for example). Thus, in judging the reasonableness of an apparently low price, it will surely make sense to take into account (as the Court holds a bankruptcy court is forbidden to) whether a mortgagee who promptly re-sold the property at a large profit answers, “I did the most that could be expected of me” or “I did the least I was allowed to.”

I also do not join my colleagues' in their special scorn for the “70% rule” associated with *Durrett* v. *Washington Nat. Ins. Co.*, 621 F. 2d 201 (CA5 1980), which they decry, *ante*, at 9, as less an exercise in statutory interpretation than one of “policy determination[].” Such, of course, it may be, in the limited sense that the statute's text no more mentions the 70% figure than it singles out procedurally regular foreclosure sales for the special treatment the Court accords them. But the *Durrett* “rule,” as its expositor has long made clear, claims only to be a description of what foreclosure prices have, in practice, been found “reasonabl[e],” and as such, it is consistent (as the majority's “policy

validity. The majority seems to invoke these largely synonymous terms in service of its thesis that the provision's text is “ambiguous” (and therefore ripe for application of policy-based construction rules), but the question presented here, whether the term “less than reasonably equivalent value” may be read to forestall all enquiry beyond whether state law foreclosure procedures were adhered to, admits only two answers, and only one of these, in the negative, is within the “apparent authority,” *ante*, at 9 conferred on courts by the text of the Bankruptcy Code.[14]

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determination” is not), with the textual directive that one value be compared to another, the transfer being set aside when one is unreasonably “less than” the other. To the extent, moreover, that *Durrett* is said to have announced a “rule,” it is better understood as recognizing a “safe harbor” or affirmative defense for bidding mortgagees or other transferees who paid 70% or more of a property's appraised value at the time of sale.

[14]The Court's criticism, *ante*, at 16–17, deftly conflates two distinct questions: is the price on procedurally correct and noncollusive sale presumed irrebuttably to be reasonably equivalent value (the question before us) and, if not, what are the criteria (a question not raised here but explored by courts that have rejected the irrebuttable presumption)? What is “plain” is the answer to the first question, thanks to the plain language, whose meaning is confirmed by policy and statutory history. The answer to the second may not be plain in the sense that the criteria might be self-evident, see *supra*, n. 13, but want of self-evidence hardly justifies retreat from the obvious answer to the first question. Courts routinely derive criteria, unexpressed in a statute, to implement standards that are statutorily expressed, and in a proper case this Court could (but for the majority's decision) weigh the relative merits of the subtly

What plain meaning requires and courts can provide, indeed, the policies underlying a national bankruptcy law fully support. This case is a far cry from the rare one where the effect of implementing the ordinary meaning of the statutory text would be "patent absurdity," see *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 452 (1987) (SCALIA, J., concurring in judgment), or "demonstrably at odds with the intentions of its drafters," *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235, 244 (1989) (internal quotation marks omitted).[15] Permitting avoidance of procedurally regular foreclosure sales for low prices (and thereby returning a valuable asset to the bankruptcy estate) is plainly consistent with those policies of obtaining a maximum and equitable distribution for creditors and ensuring a "fresh start" for individual debtors, which the Court has often said are at the core of federal bankruptcy law. See *Stellwagen* v. *Clum*, 245 U. S. 605, 617 (1918); *Williams* v. *United States Fidelity & Guaranty Co.*, 236

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different approaches taken by courts that have rejected the irrebuttable presumption.

[15]Tellingly, while the Court's opinion celebrates fraudulent conveyance law and state foreclosure law as the "twin pillars" of creditor-debtor regulation, it evinces no special appreciation of the fact that this case arises under the Bankruptcy Code, which, in maintaining the national system of credit and commerce, embodies policies distinct from those of state debtor-creditor law, see generally *Stellwagen* v. *Clum*, 245 U. S. 605, 617 (1918), and which accordingly endows trustees with avoidance power beyond what state law provides, see *Board of Trade of City of Chicago* v. *Johnson*, 264 U. S. 1, 10 (1924); *Stellwagen*, 245 U. S. at 617; 11 U. S. C. §§541(a), 544(a).

U. S. 549, 554–555 (1915). They are not, of course, any less the policies of federal bankruptcy law simply because state courts will not, for a mortgagor's benefit, set aside a foreclosure sale for “price inadequacy” alone.[16] The unwillingness of the state courts to upset a foreclosure sale for that reason does not address the question of what “reasonably equivalent value” means in bankruptcy law, any more than the refusal of those same courts to set aside a contract for “mere inadequacy of consideration,” see Restatement (Second) of Contracts §79 (1981), would define the scope of the trustee's power to reject executory contracts. See 11 U. S. C. §365 (1988 ed. and Supp. IV). On the contrary, a central premise of the bankruptcy avoidance powers is that what state law plainly allows as acceptable or “fair,” as between a debtor and a particular creditor, may be set aside because of its impact on other creditors or on the debtor's chances for a fresh start.

When the prospect of such avoidance is absent, indeed, the economic interests of a foreclosing mortgagee often stand in stark opposition to those of the debtor himself and of his other creditors. At a typical foreclosure sale, a mortgagee has no incentive

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[16]Although the majority accurately states this “'black letter'” law, it also acknowledges that courts will avoid a foreclosure sale for a price that “shock[s] the conscience,” see *ante,* at 11, a standard that has been invoked to justify setting aside sales yielding as much as 87% of appraised value. See generally R. Washburn, The Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales, 53 S. Cal. L. Rev. 843, 862–870 (1980). Moreover, while price inadequacy “alone” may not be enough to set aside a sale, such inadequacy will often induce a court to undertake a sort of “strict scrutiny” of a sale's compliance with state procedures. See, *e.g.*, *id.*, at 861.

to bid any more than the amount of the indebtedness, since any "surplus" would be turned over to the debtor (or junior lienholder), and, in some states, it can even be advantageous for the creditor to bid less and seek a deficiency judgment. See generally Washburn, The Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales, 53 S. Cal. L. Rev. 843, 847–851 (1980); Ehrlich, Avoidance of Foreclosure Sales as Fraudulent Conveyances: Accommodating State and Federal Objectives, 71 Va. L. Rev. 933, 959–962 (1985); G. Osborne, G. Nelson & D. Whitman, Real Estate Finance Law §8.3, p. 528. (1979) And where a property is obviously worth more than the amount of the indebtedness, the lending mortgagee's interests are served best if the foreclosure sale is poorly attended; then, the lender is more likely to take the property by bidding the amount of indebtedness, retaining for itself any profits from resale. While state foreclosure procedures may somewhat mitigate the potential for this sort of opportunism (by requiring for publication of notice, for example), it surely is plausible that Congress, in drafting the Bankruptcy Code, would find it intolerable that a debtor's assets be wasted and the bankruptcy estate diminished, solely to speed a mortgagee's recovery.

Confronted with the eminent sense of the natural reading, the Court seeks finally to place this case in a line of decisions, *e.g.*, *Gregory* v. *Ashcroft*, 501 U. S. 452 (1991), in which we have held that something more than mere plain language is required.[17]

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[17]The Court dangles the possibility that *Gregory* itself is somehow pertinent to this case, but that cannot be so. There, invoking principles of constitutional avoidance, we recognized a "plain statement" rule, whereby Congress could supplant State powers

Because the stability of title in real property may be said to be an "important" state interest, the Court suggests, see *ante*, at 13, the statute must be presumed to contain an implicit foreclosure-sale exception, which Congress must override expressly or not at all. Our cases impose no such burden on Congress, however. To be sure, they do offer support for the proposition that when the Bankruptcy Code is truly silent or ambiguous, it should not be read as departing from previous practice, see, *e.g.*, *Dewsnup* v. *Timm*, 502 U. S. ___ (1992); *Butner* v. *United States*, 440 U. S. 48, 54 (1979). But we have never required Congress to supply "clearer textual guidance" when the apparent meaning of the Bankruptcy Code's text

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"reserved under the Tenth Amendment" and "at the heart of representative government," only by making its intent to do so unmistakably clear. Unlike a State's authority to "determine the qualifications of their most important government officials," (*e.g.*, to enforce a retirement age for state judges mandated by the state constitution, at issue in *Gregory*), the authority of the States in defining and adjusting the relations between debtors and creditors has never been plenary, nor could it fairly be called "essential to their independence." In making the improbable contrary assertion, the Court converts a stray phrase in *American Land Co.* v. *Zeiss*, 219 U. S. 47 (1911), which upheld against substantive Due Process challenge the power of a State to legislate with respect to land titles (California's effort to restore order after title records had been destroyed in the calamitous 1906 San Francisco earthquake) into a pronouncement about the allocation of responsibility between the National Government and the States. Cf. *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. ___ (1992) (slip op., at 3–4) (SCALIA, J., concurring in part) (emphasizing the inapplicability of "clear-statement" rules to ordinary pre-emption cases).

is itself clear, as it is here. See *Ron Pair*, 489 U. S. at 240 ("[I]t is not appropriate or realistic to expect Congress to have explained with particularity every step it took. Rather, as long as the statutory scheme is coherent and consistent, there generally is no reason to inquire beyond the plain language of the statute"); cf. *Dewsnup*, 502 U. S., ___ (slip op., at 15) (SCALIA, J., dissenting) (Court should not "venerat[e] 'pre-Code law'" at the expense of plain statutory meaning).[18]

We have, on many prior occasions, refused to depart from plain Code meaning in spite of arguments that doing that would vindicate similar, and presumably equally "important," state interests. In *Owen* v. *Owen*, 500 U. S. 305 (1991), for example, the Court refused to hold that the state "opt-out" policy embodied in §522(b)(3) required immunity from avoidance under §522(f) for a lien binding under Florida's exemption rules. We emphasized that "[n]othing in the text of §522(f) remotely justifies treating the [state and federal] exemptions differently." 500 U. S. at, 313. And in *Johnson* v. *Home State Bank*, 501 U. S. 78 (1991), we relied on plain Code language to allow a debtor who had "stripped" himself of personal mortgage liability under Chapter 7 to reschedule the remaining indebtedness under Chapter 13, notwithstanding a plausible contrary argument based on Code structure and a complete dearth of precedent for the manoeuver under state law and prior bankruptcy practice.

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[18]Even if plain language is insufficiently "clear guidance" for the Court, further guidance is at hand here. The provision at hand was amended in the face of judicial decisions driven by the same policy concerns that animate the Court, to make plain that foreclosure sales and other "involuntary" transfers are within the sweep of the avoidance power.

The Court has indeed given full effect to Bankruptcy Code terms even in cases where the Code would appear to have cut closer to the heart of state power than it does here. No "clearer textual guidance" than a general definitional provision was required, for example, to hold that criminal restitution could be a "debt" dischargeable under Chapter 13, see *Davenport*, 495 U. S., at 563–564 (declining to "carve out a broad judicial exception" from statutory term, even to avoid "hamper[ing] the flexibility of state criminal judges"). Nor, in *Perez* v. *Campbell*, 402 U. S. 637 (1971), did we require an express reference to state highway safety laws before construing the generally-worded discharge provision of the Bankruptcy Act to bar application of a state statute suspending the driver's licenses of uninsured tortfeasors.[19]

Rather than allow state practice to trump the plain meaning of federal statutes, cf. *Adams Fruit Co.* v.

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[19]Only over vigorous dissent did the Court read the trustee's generally worded abandonment power, 11 U. S. C. §554, as not authorizing abandonment "in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards." *Midlantic Nat. Bank* v. *New Jersey Dept. of Environmental Protection*, 474 U. S. 494, 502 (1986); compare *id.*, at 513 (REHNQUIST, J., dissenting) ("Congress knew how to draft an exception covering the exercise of 'certain' police powers when it wanted to"); cf. also L. Cherkis & L. King, Collier, Real Estate Transactions and the Bankruptcy Code, p. 6–24 (1992) (post-*Midlantic* cases suggest that "if the hazardous substances on the property do not pose immediate danger to the public, and if the trustee has promptly notified local environmental authorities of the contamination and cooperated with them, abandonment may be permitted").

Barrett, 494 U. S. 638, 648 (1990), our cases describe a contrary rule: whether or not Congress has used any special "preemptive" language, state regulation must yield to the extent it actually conflicts with federal law. This is no less true of laws enacted under Congress's power to "establish . . . uniform Laws on the subject of Bankruptcies," U. S. Const., Art. I, §8, cl. 4., than of those passed under its Commerce Clause power. See generally *Perez* v. *Campbell*, *supra*; cf. *id.*, at 651–652 (rejecting the "aberrational doctrine. . . that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration"); *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. ___, ___ (1992) (slip op., at 2–3) (SCALIA, J., concurring in part) (arguing against a "presumption against preemption" of "historic police powers").

Nor, finally, is it appropriate for the Court to look to "field preemption" cases, see *ante*, at 13–14, to support the higher duty of clarity it seeks to impose on Congress. As written and as applied by the majority of courts of appeals to construe it, the disputed Code provision comes nowhere near working the fundamental displacement of the state law of foreclosure procedure that the majority's rhetoric conjures.[20] To the contrary, construing §548(a)(2)(A)

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[20]Talk of "'radica[l] adjust[ments to] the balance of state and national authority,'" *ante,* at 13, notwithstanding, the Court's submission with respect to "displacement" consists solely of the fact that some private companies in *Durrett* jurisdictions have required purchasers of title insurance to accept policies with "specially crafted exceptions from coverage in many policies issued for properties purchased at foreclosure sales." *ante*, at 13 (citing Cherkis & L. King, *supra*, at 5–18 to 5–19). The source cited by the Court reports that these exceptions have been demanded when mortgagees

as authorizing avoidance of an insolvent's recent foreclosure-sale transfer in which "less than a reasonably equivalent value" was obtained is no more preemptive of state foreclosure procedures than the trustee's power to set aside transfers by marital dissolution decree, see *Britt* v. *Damson*, 334 F. 2d 896 (CA9 1964), cert. denied (1965); *In re Lange*, 35 B. R. 579 (Bkrtcy. Ct. ED MO. 1983), "preempts" state domestic relations law,[21] or the power to reject executory contracts, see 11 U. S. C. §365, "displaces" the state law of voluntary obligation. While it is surely true that if the provision were accorded its plain meaning, some States (and many mortgagees) would take steps to diminish the risk that particular

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are the purchasers, but have not been required in policies issued to third-party purchasers or their transferees, *id.*, and that such clauses have neither been limited to *Durrett* jurisdictions, nor confined to avoidance under federal bankruptcy law. See *id.*, at 5–10 (noting one standard exclusion from coverage for "[a]ny claim, which arises . . . by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws"). Nothing in the Bankruptcy Code, moreover, deprives the States of their broad powers to regulate directly the terms and conditions of title insurance policies.

The "federally created cloud" on title seems hardly to be the Damoclean specter that the Court makes it out to be. In the nearly 14 years since the *Durrett* decision, the Bankruptcy Reports have included a relative handful of decisions actually setting aside foreclosure sales, nor do the States, either inside or outside *Durrett* jurisdictions, seem to have ventured major changes in the "diverse networks of . . . rules governing the foreclosure process." See *ante*, at 10.

[21] But cf. *Wetmore* v. *Markoe*, 196 U. S. 68 (1904) (alimony is not a "debt" subject to discharge under the Bankruptcy Act).

transactions would be set aside, such voluntary action should not be cause for dismay: it would advance core Bankruptcy Code purposes of augmenting the bankruptcy estate and improving the debtor's prospects for a “fresh start,” without compromising lenders' state-law rights to move expeditiously against the property for the money owed. To the extent, in any event, that the respondents and their numerous amici are correct that the “important” policy favoring security of title should count more and the “important” bankruptcy policies should count less, Congress, and not this Court, is the appropriate body to provide a foreclosure-sale exception. See *Wolas*, 502 U. S., at ___ (slip op., at 11). See also S. 1358, 100th Cong., 1st Sess. (1987) (proposed amendment creating foreclosure-sale exception).

Like the Court, I understand this case to involve a choice between two possible statutory provisions: one authorizing the trustee to avoid “involuntar[y] . . . transfers [including foreclosure sales]. . . [for] less than a reasonably equivalent value,” see 11 U. S. C. §548(a), and another precluding such avoidance when “[a] secured party or third party purchaser . . . obtains title to an interest of the debtor in property pursuant to a good faith prepetition foreclosure. . . proceeding . . . permitting . . . the realization of security upon default of the borrower,” see S. 445, 98th Cong., 1st Sess., §360 (1983). But that choice is not ours to make, for Congress made it in 1984, by enacting the former alternative into law and not the latter. Without some indication that doing so would frustrate Congress's clear intention or yield patent absurdity, our obligation is to apply the statute as Congress wrote it. Doing that in this case would produce no frustration or absurdity, but quite the opposite.