The Rhetorical Construction of Justice and Money in *Citizens Bank v. Strumpf*

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"[L]aw is the very profession of rhetoric. We are the sons and daughters of Gorgias himself"[1]

Communication-centered analyses of court opinions can challenge assumptions about how judges make decisions and craft them for public consumption. In the forty years since Warren Wright[2] issued his call for the rhetorical analysis of federal judicial opinions, critiques of First Amendment cases[3] and other civil liberties, including such landmark decisions as *Roe v. Wade*[4] and *Brown v. Board of Education*[5] have comprised the bulk of this analysis. Economic issues, especially cases involving bankruptcy or tax issues, have been largely ignored by rhetorical critics. Yet, decisions in economic cases "[become] law and as law prescribe American conduct"[6] just as significantly civil liberties decisions do. In addition, judges make rhetorical choices when they write economic decisions, just as they do when writing civil liberties decisions. The two types of rhetorical choices Hagan found in *Roe v. Wade*: choices of arguments and evidence and "attempts to influence symbolic organization of the world"[7] are equally present in economic cases. Indeed, McCloskey[8] argues that the discipline of economics is itself rhetorical.

Moreover, economic cases directly affect a wide segment of the population. A record 1.6 million bankruptcies were filed in 2003[9], and in April 2004 consumer debt was more than two trillion dollars.[10] Just as legal scholars argue that commercial speech deserves First Amendment protection as just as political speech does because of its centrality to consumer decision-making[11], appellate court decisions in the economic realm deserve study because they prescribe daily conduct as surely as do civil liberties cases. Examination of economic case law would thereby be a step toward answering Lucaites's call to "seriously engage the political and ideological implications of rhetoric and law for *life-in-society*."[12]

This essay will examine those implications in a recent U. S. Supreme Court bankruptcy decision. *Citizens Bank of Maryland v. Strumpf*[13] eroded a basic protection not only for those consumers seeking to rehabilitate their credit problems in Chapter 13 bankruptcy, but also for all their creditors, except the banks where they *both* keep money and have outstanding loans. The *Strumpf* decision authorized those banks to freeze consumers' bank accounts, thus effectively allowing those banks to assert a primary right to collect over other creditors while hampering consumers' ability to get the fresh start that bankruptcy protection was meant to provide.

Just as importantly as expanding the subject matter of the rhetorical examination of law from civil liberties cases to economic cases, this essay also seeks to expand the focus from landmark cases to less well known, unexplored cases. Similar to the traditional focus of public address studies on "great speeches," the burgeoning area of rhetorical study of court opinions has tended to focus on "great decisions." These decisions tend to be bigger not only in terms of the amount of attention they receive in the media and from scholars, but also in the length of the decision itself. For example, the *Bush v. Gore*[14] decision, including dissents, takes 61 pages in *United States Reports*, while the flag burning case *Texas v. Johnson*[15] is 43 pages long, including dissents and concurrences. In contrast, the *Strumpf* decision is only 6 pages long, consisting of ten substantive paragraphs. While *Bush v. Gore* and *Texas v. Johnson* both made the front page of the following day's *New York Times* and were the subject of significant rhetorical analysis[16], *Strumpf* did not appear at all in the next day's *New York Times* and has heretofore not been the subject of a published study in the communication discipline.

Focusing exclusively on great decisions allows the impact of less heralded decisions to go relatively undetected. For example, a quick perusal of the internet reveals that a consultant to creditor's attorneys teaches his clients how to take advantage of debtor's attorneys lack of familiarity with the *Strumpf* decision[17], while at least one bankruptcy court decision has turned on a debtor's attorney's apparent unfamiliarity with the case.[18] Thus the Burkean focus on scholarship toward "making the world a better place"[19] can be furthered by examining and exposing the rhetoric of less well known court decisions.

After a brief review of the facts surrounding *Strumpf* and the decision itself, the following critique will discuss two ways that "justice" is constructed in and through the *Strumpf* decision. The first of these ways is Scalia's rhetorical choice-making. Scalia frames the issue in dispute in a way that avoids issues that cannot be resolved in the bank's favor, and uses a notion of textualism that enables statutory interpretation contrary to legislative history and legitimizes self-help over the rule of law in contravention of Congressional intent. The second way "justice" is constructed through the decision is the amicus brief advocacy of the banking industry, through which they engage in discourse with the Supreme Court to eliminate their need to have discourse with their customers who find themselves in situations similar to that in *Strumpf*. The practical result of the construction of justice in *Strumpf* is that self-help by the powerful is legitimated over the rule of law. The critique also will illustrate how the very notion of "money" is constructed rhetorically in *Strumpf*, through Scalia's decision to rely on the general rule of bank deposits but ignore its corollary. After critiquing the decision, the essay will then use Kenneth Burke's notion of the comic corrective and Robert Ivie's notion of productive criticism to illustrate how the *Strumpf* decision is based on a scapegoating and tragic framing of debtors and suggest ways debtor discourse can be reframed and empowered through comic strategies.

The *Strumpf* Case

On January 25, 1991, Greenbelt, Maryland retiree David Strumpf filed a petition for relief under Chapter 13 of the Bankruptcy Code. Unlike Chapter 7 bankruptcies in which debts are discharged, Chapter 13 allows debtors to propose a repayment plan in which virtually all of their disposable income for a three-to-five year period is paid to a trustee who, in turn, pays off their creditors. Chapter 13 plans customarily call for mortgage arrears to be paid in full, other secured debts to be paid to the extent of the value of the collateral plus interest, and for unsecured creditors to be paid a pro-rated share of the debtor's remaining disposable income. Debtors customarily make mortgage payments that come due after filing the bankruptcy petition and pay for other regular living expenses outside of the Chapter 13 plan. The filing of a bankruptcy petition commences what the Bankruptcy Code calls an *automatic stay* – that is, a prohibition, effective immediately – of various types of activity by creditors. The prohibited activities include any attempt to collect a debt owed by the debtor, to exercise control over the debtor's property. Also prohibited is the exercise of the right of *setoff*, holding money the creditor owes the debtor to offset a debt the debtor owes the creditor, thereby applying mutual debts against each other, as when a debtor has both a savings account and a loan at the same bank. Under the automatic stay provisions of the Bankruptcy Code, all of these prohibited acts may only be done with prior permission of the bankruptcy court.[20] The filing also creates a *bankruptcy estate*, which generally consists of all of the debtor's property interests at the time of filing.[21]

The plan Strumpf filed with his petition called for repayment of the $2550.50 balance of a loan from Citizens Bank (hereinafter referred to as Citizens) as an unsecured debt. Strumpf also maintained a checking account at Citizens. On February 26, 1991, the bankruptcy court mailed a notice of the bankruptcy and a copy of the plan to all of Strumpf's creditors, advising them that a hearing on confirmation of Strumpf's proposed plan would be held on March 20, and that written objections to confirmation of the plan would be heard at that hearing. Citizens did not respond, and the court entered an order confirming the plan on April 8. The bankruptcy court notice also indicated that the deadline for creditors to submit claims to be paid under the plan would be June 13. Citizens failed to file a claim and did not receive any payments from the trustee. On October 2, 1991, Citizens put an "administrative hold" on $3500 of the balance of Strumpf's checking account – that is, the bank "refused to pay withdrawals from the account that would reduce the balance below" $3500.[22] On October 9, Citizens filed a motion seeking relief from the automatic stay – that is, seeking permission to do something that would otherwise be in violation of the stay – and Strumpf responded two days later with a motion seeking to hold Citizens in contempt of court for having already violated the automatic stay. On November 21, the court granted Strumpf's motion and awarded him $900 in damages and fees. On December 2, the court granted Citizen's motion, allowing them to offset the debt with funds from the checking account. By that time, however, Strumpf had withdrawn his money from the checking account. This is what the attorneys who represent creditors commonly refer to as the "banker's dilemma": If the bank freezes funds on deposit, it risks being found in contempt of court, but if it does not, it risks that the funds will not be there when the court authorizes setoff.

Citizens successfully appealed the contempt order to the U. S. District Court in Maryland[23], but the U. S. Court of Appeals for the Fourth Circuit reversed that decision, holding that the freeze violated the automatic stay.[24] A unanimous U. S. Supreme Court, however, agreed with the District Court, finding for Citizens in a decision authored by Justice Scalia and issued on October 31, 1995. While Scalia has made a name for himself as a controversial jurist[25], this was a 9-0 decision of the Court.

Scalia's opinion consists of only ten substantive paragraphs. A paragraph-by-paragraph overview of the key arguments illustrates the focus of Scalia's analysis. The first paragraph frames the issue as "whether the creditor of a debtor in bankruptcy may, in order to protect its setoff rights, temporarily withhold payment of a debt that it owes to the debtor in bankruptcy without violating the automatic stay."[26] Paragraphs two through five provide background. Paragraph two indicates that when Strumpf filed his bankruptcy petition in January 1991 he had both a checking account and a loan with Citizens. The opinion does not mention Citizens' failure to participate in the plan confirmation process or to file a proof of claim. Paragraph three recounts Citizens' October 1991 freezing of the checking account and subsequent motion for relief from the automatic stay and for setoff. Paragraphs four and five summarize the decisions of the lower courts.

In the sixth and seventh paragraphs, Scalia further frames the case as only about setoff. He begins by asserting that it is undisputed that prior to filing the bankruptcy petition, Citizens had the right to set off the defaulted loan against the balance in the checking account and that the exercise of that right was stayed by the bankruptcy petition. Scalia then reaffirms the limited focus of his analysis by contending that the "principal question for decision is whether [Citizens'] refusal to pay its debt to [Strumpf] upon [Strumpf's] demand constituted an exercise of the setoff right and hence violated the stay."[27] Scalia immediately answers that question in the negative, holding that the checking account freeze was not a setoff because it was only a temporary refusal to pay Strumpf from his account while Citizens sought permission to permanently set off the funds. Scalia then further limits the frame of debate by arguing that setoff is not merely the "principal question," but is the only question. He writes:

> Whether that temporary refusal was otherwise wrongful is a separate matter – we do not consider, for example, [Strumpf's] contention that the portion of the account subjected to the 'administrative hold' exceeded the amount subject to setoff. All that concerns us here is whether the refusal *was a setoff.*[28]

Scalia concludes that since the intent was not to permanently reduce the account balance, the account freeze did not constitute a setoff.

Scalia begins the eighth paragraph by citing two Bankruptcy Code provisions. The first holds that while the Bankruptcy Code generally requires debts owed to debtors to be paid to the trustee, an exception is made for debts subject to setoff.[29] The second holds that the Bankruptcy Code generally does not affect setoff rights in effect prior to the bankruptcy filing.[30] He then argues that these provisions would render "odd"[31] an interpretation of the automatic stay provision that requires creditors to pay a claim subject to setoff. In the ninth paragraph, Scalia dismisses the argument that the right of setoff provided in 11 U.S.C. § 553(a) is limited by the qualifying phrase "[e]xcept as otherwise provided in this section and in sections 362 and 363,"[32] in which the automatic stay provisions are contained. He argues that this "otherwise provided" language "merely"[33] means that an actual setoff (in contrast to a temporary refusal to pay) cannot happen prior to a court order granting the bank relief from the stay. Scalia further argues that it would be "foolish"[34] to read the automatic stay provision as requiring immediate payment of a debt subject to setoff, since that would render setoff rights meaningless.

In the tenth paragraph, Scalia holds that Citizens did not violate automatic stay provisions that bar "any act to obtain possession of property of the [bankruptcy] estate or to exercise control over the property of the estate"[35] and "any act to collect, assess, or recover a claim against the debtor that arose before"[36] the filing of the bankruptcy petition. Scalia responded to those arguments by holding that:

> [Strumpf]'s reliance on these provisions rests on the false premise that [Citizens'] administrative hold took something from [Strumpf], or exercised dominion over property that belonged to [Strumpf]. That view might be arguable if a bank account consisted of money belonging to the depositor and held by the bank. In fact, however, it consists of nothing more or less than a promise to pay, from the bank to the depositor [citations omitted], and [Citizens'] temporary refusal to pay was neither a taking of possession of [Strumpf's] property nor an exercising of control over it, but merely a refusal to perform its promise.[37]

As indicated above, Scalia's rhetorical choice-making and the amicus argumentation around Strumpf constructed a notion of justice that legitimated self-help by the powerful over the rule of law. That is the subject of the next section.

The Rhetorical Construction of Justice

It is axiomatic that the rhetoric of judicial decision-making "relies, above all else, upon the denial that it is rhetoric being done."[38] That is, judicial rhetoric is dependent upon the myth that judges do not rhetorically create law, but deductively find it[39] thus "announc[ing] the one true state of facts and the one true meaning of the relevant texts."[40] But, like other texts, the statutes and constitutional provisions that are the subject of judicial interpretation are subject to multiple interpretations. Hence, the Court operates as a "rhetorical body, offering not a necessary deduction from absolute premises, but a choice of arguments to justify the one particular point of view which the majority of justices find most persuasive."[41] In *Strumpf*, those choices manifest themselves through the Scalia's framing of the issue in dispute in a way that allows it to ignore issues that cannot be resolved in the bank's favor and his use of a notion of textualism that enables statutory interpretation contrary to legislative history.

The rhetoric of Scalia's opinion is framed as the technical application of a set of statutory provisions to a set of facts. Scalia's ten paragraphs are written to suggest that it is presenting not *an* interpretation of the Bankruptcy Code, but *the* interpretation of the code, dismissing as irrelevant other interpretations when it acknowledges them at all. Hagan's analysis of the decision in *Roe v. Wade* found that "while avoiding the issue it wants to avoid and while explicitly broadening the area of state interest, the Court implicitly can delimit the nature of that which is the subject of controversy."[42] The *Strumpf* opinion illustrates that this delimitation can occur not only by silently ignoring issues, but by explicitly dismissing them as irrelevant. Justice Scalia's opinion focused on one issue, whether the checking account freeze was a setoff and claimed that "whether [the freeze] was otherwise wrongful is a separate matter."[43] Justice Scalia expressly dismissed the fact that the amount frozen was in excess of the amount Strumpf owed Citizens by simply stating that "we do not consider . . . [the] respondent's contention."[44] He also summarily rejects the notions that the freeze was either an attempt to exercise control over the debtor's property or an attempt to collect a pre-petition debt, which are probably the most compelling arguments that the freeze violated the automatic stay.

Rather than focus on the apparent violation of the automatic stay (a framing that favors consumer interests), Scalia instead focused on whether the freeze constituted a setoff (which favors bank interests). The Court of Appeals found that it was a setoff because it "effectively deprive[s] the debtor of the use of the funds"[45] and that "the length of time a creditor intends to maintain a hold is not relevant"[46] to that analysis. In sharp contrast, the Supreme Court ruled that the freeze was not a setoff but a "temporary refusal to pay"[47] until the bankruptcy court ruled on Citizens' motion for relief from the stay. The basis for this determination is Citizens Bank's intent as demonstrated through their filing a motion to the bankruptcy court to authorize the freeze. Such a filing, Scalia argues, is evidence that Citizens "did not purport permanently to reduce [Strumpf's] account balance"[48] by the amount owed.

While banks routinely penalize ordinary consumers who miss deadlines, the U. S. Supreme Court in this case effectively authorized a bank to disregard the deadlines that a lower court imposed on its dealings with a consumer. Scalia thus portrays Citizens Bank as in compliance with legal procedure by noting that Citizens Bank filed that motion to authorize the freeze with the bankruptcy court, albeit several days *after* freezing the account of its own volition. Unaddressed by Scalia, however, are all the other points in the proceedings when Citizens failed to comply with procedure. In advance of the confirmation hearing, Citizens could have filed a motion objecting to being treated as an unsecured creditor in the plan, and in advance of the claim deadline, Citizens could have filed a proof of claim and thereby received payments from the trustee. Instead, Citizens allowed both deadlines to pass. It was not until almost four months after the deadline for filing claims and more than six months after the court issued the notice of the bankruptcy filing that Citizen's Bank filed their motion with the court seeking relief from the automatic stay and for setoff.

Moreover, framing the freeze as a temporary refusal is problematic because the bank froze the account prior to making the motion. Freezing an account prior to receiving bankruptcy court authorization indeed "begs the critical question, assuming in advance the precondition for its validity. This position converts a bank's potential right for setoff into an allowed claim at the outset."[49] Thus, this was a "temporary freeze" that the bank did not intend to be temporary.

Nonetheless, the Supreme Court overtly advocated this brand of justice, both in the published opinion and at oral argument. When Strumpf's attorney argued that Citizens ought to have sought bankruptcy court permission prior to the freeze, Justice Breyer commented, "[t]hat takes more than an hour, doesn't it? . . . And in that hour the guy runs off with the money."[50] That denies the fact that, like any other creditor, "Citizens assumed the inherent risk of loss to its collateral when it entered into the loan agreement with Strumpf."[51] In other words, had Strumpf withdrawn his funds prior to filing bankruptcy, there would be no possibility for setoff. Indeed, the ironic result of the *Strumpf* decision is that debtors will now enact their own self-help, by closing deposit accounts prior to filing.[52]

The *Strumpf* decision also illustrates how judges can use textualist rhetoric to subordinate legislative will. Scalia's notion of textualism, as he explained it in an interview with the *Jerusalem Post*, is that "judges should be restricted to the text in front of them. . . . According to my judicial philosophy, I feel bound not by what I think the tradition is, but by what the text and tradition actually say."[53] Yet there is no room in Scalia's notion of textualism for reference to legislative history, including congressional committee reports such as the House Judiciary Committee's. In his concurring opinion in *Conroy v. Aniskoff*[54] Scalia wrote that "the greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators."[55] But by limiting his analysis to the statute but not the legislative history – a more detailed, less ambiguous text published for the very purpose of mitigating the ambiguity of the statute – a judge is able to use a statute's polysemy to enact the very judicial activism textualists claim to abhor.

This is seen most clearly in the *Strumpf* decision’s unjustifiable positioning of the bank where the debtor has both a deposit account and an unsecured debt above other creditors. This directly contradicts Congressional intent. The House Judiciary Committee's commentary on the automatic stay argues that “[b]ankruptcy is designed to provide an orderly liquidation procedure under which all claims are treated equally. A race of diligence by creditors for the debtor's assets prevents that.”[56] Lawless[57] notes that judges like Scalia who call themselves textualist claim they are “subordinating judicial preference to legislative will.”[58] Yet the *Strumpf* decision illustrates that by substituting their own judgment for legislative history, judges can use textualist rhetoric to do just the opposite.

This contravening of Congress’s desire for an orderly system of payment to creditors is emblematic of the key result of the manner in which “justice” is constructed in *Strumpf*: the legitimation of self-help over the rule of law. Black's Law Dictionary defines self-help as

> [t]aking an action . . . outside of the normal legal process with legal consequences whether the action is legal or not; for example, a ‘self-help eviction’ may be a landlord's removing the tenant's property and locking the door against the tenant.[59]

Most states do not allow landlords to engage in self-help evictions[60] since the “interests of the landlord in operating a profitable business must be balanced against a tenant’s need for shelter.”[61] Similarly, a working class debtor’s access to her checking account must be weighed against the profitability of a bank. Just as landlord-tenant courts offer landlords an expedited opportunity to reclaim their property from defaulted tenants, bankruptcy courts hold regular motion practice sessions at which banks and other creditors can argue that they should get relief from the automatic stay and debtors defend against those arguments. And just as notice of the eviction proceeding signals to a defaulting tenant that she has a specified amount of time to come up with the rent money, come up with a legal excuse for not paying, or vacate the premises, notice of a motion for relief from the automatic stay signals to a debtor that their lawyer needs to come up with a reason not to allow relief from the stay. In both cases notice and the weighing of competing interests are privileged.

The *Strumpf* decision legitimizes self-help by allowing a bank to freeze a deposit account without first seeking bankruptcy court approval. The automatic stay is arguably the central enactment of the rule of law in bankruptcy procedure. Creditors are prohibited from taking specified actions against the debtor without first obtaining authorization of the bankruptcy court.

The automatic stay is central to both the debtor's interest in financial reorganization and the societal interest in assuring that creditors are repaid equitably.

Moreover, freezing a checking account is a particularly pernicious violation of the automatic stay. The Bankruptcy Court for the Southern District of Ohio noted in a similar case that

> in a Chapter 13 case involving individual debtors of modest means who may require the bank account funds to meet daily expenses for food, clothing and shelter, the bank's actions in disregard of court authority are especially troublesome. Furthermore, Fidelity [the bank] possessed a number of means by which it could have sought relief from the bankruptcy court without the account funds being dissipated. . . . Instead the bank acted as though the automatic stay were not applicable to it.[62]

The Court's construction of justice in *Strumpf* is thus harmful to both debtors and creditors who do not hold depository accounts. The creditors who do hold debtor deposits, though, were the only interest groups who had the court's ear in this case. Just as the rhetorical construction of justice in *Strumpf* can be seen through Scalia's rhetorical choices, it is also evidenced through power relations, which are central to Supreme Court decision making. Caldeira and Wright note that "the Supreme Court each year determines new winners and losers in the struggle for economic, political, and social power" and accordingly, "powerful interests will not stand passively."[63] This power is exerted by filing *amicus curiae* (friend of the court) briefs in which arguments are offered advancing these interests. McGuire concludes that "interest groups are among the most influential players in judicial politics, irrespective of what role the lawyers may play,"[64] while Caldeira and Wright found that the "filing of an amicus brief. . . provides the justices with an indication of the array of social forces at play in the litigation,"[65] At least one Supreme Court justice openly admits to this. Justice Breyer told an audience at Stanford Law School that he considered over 120 amicus briefs in deciding a recent affirmative action decision and that the justices find amicus briefs useful because they are submitted by "people trying to tell us of the impact of our decisions in their bit of the world."[66] The docket indicates that the only social forces that spoke in this manner in *Strumpf* were those that freeze debtor moneys – the United States government through the Internal Revenue Service, which has frozen tax refunds of delinquent taxpayers, and the banking industry. The interests of other creditors and debtors were not represented. A likely reason is the expense of hiring a major law firm to prepare and file an amicus brief, which Caldeira and Wright (1990) claim costs from “$10,000 to $15,000, and quite often more, per brief.”[67]

Amici lined up to take this expense twice, both to encourage the Supreme Court to take this case and then to argue on behalf of Citizens Bank. Five amicus briefs were filed asking the course to take the case. They were filed by the United States government, the American Bankers Association (ABA), the Credit Union National Association (CUNA) and by two large banks that have since merged: Bank America and Nations Bank. After the court had issued a writ of certiorari, thereby agreeing to hear an appeal of the Fourth Circuit’s decision, three amicus briefs were filed, all supporting Citizens Bank’s position. One was by the United States, another by Bank America, and a third by a consortium of banking interests, including the New York Clearing House Association, ABA, CUNA, the Independent Bankers Association of America and several large banks.

The three amicus briefs filed once the court had agreed to take the case featured some variety in argumentative strategies, thus providing the court with a variety of argumentative options. The United States simply argued that a freeze is not a setoff, the option the court ultimately chose to focus on. In addition to that argument, the consortium of banking interests also argued that other provisions of the bankruptcy code anticipate that banks will freeze debtor funds using the same statutory references Scalia makes in the eighth and ninth paragraphs of his opinion. The consortium concluded their brief with a policy argument about the “banker’s dilemma,” a rhetorical choice that serves to remind the court of the interests at stake.

The consortium’s brief also made an argument that the court chose to disregard, an argument that is also the central argument in Bank America Corporation’s amicus brief: that the bankruptcy code “confers secured status on creditors holding a right of setoff” (Brief of Bank America, p. 5) and that destroying that secured claim (by not allowing the freeze) amounts to a taking of the bank’s property without due process, in violation of the Fifth Amendment. As noted above, though, Citizens Bank had ample opportunity to object to being treated as an unsecured creditor prior to confirmation of Strumpf’s repayment plan but failed to do so, and similarly waived its right to receive payments from the trustee by not filing a proof of claim. Instead, Citizens chose to enact self-help by taking Strumpf’s money via a not-yet-authorized freeze. The court’s choice to disregard the constitutional argument and instead focus on the bankruptcy statutes served, intentionally or not, to help frame their opinion as brief and ministerial, thus allowing it to fly under the media radar.

Yet there is no reason to believe that Bank America or the consortium members went to the expense of filing their amicus briefs out of a concern for constitutional rights. Rather, the interest that motivated this expense was national consistency. Lower courts had differed on the issue of bank account freezes, and Harold H. Lichterman, senior counsel at Bank America and the nominal author of their brief, told the *National Law Journal* that “uniformity is very important, particularly with the growing nationalization of banking.”[68] The actual amount of money at risk for the banks, though, is not a concern. Lichterman said that “[t]his has not been a big problem…. It was an issue where national uniformity was important to us.”[69]

Another of the banking industry's concerns was the bother of having to negotiate with debtor attorneys. Bruce Clark, the nominal author of the consortium’s amicus brief, said that “[m]ost of the time you could reach an accommodation on how to treat money in accounts. . . . [b]ut just having that kind of negotiation is time-consuming and expensive.”[70] Thus, another result of this brand of justice is the attempt of the powerful to stifle the very need for discourse with the powerless. The impact of this one-sided argument in *Strumpf* is clear. The Supreme Court focused on the bank's right of setoff at the expense of the debtor’s right of protection under the automatic stay. The manner in which the automatic stay was addressed, though, provides more evidence of the rhetorical choices that are made in the crafting of judicial decisions.

The Rhetorical Construction of Money

As noted above, the automatic stay provisions of the Bankruptcy Code prohibit attempts to obtain or exercise control over the bankruptcy estate[71] or collect a debt that arose prior to the bankruptcy filing.[72] Scalia’s response was that freezing Strumpf’s checking account was not Citizens’ attempt to do any of those things, but was “merely a refusal to perform its promise.”[73] The refusal to perform a promise is the very basis of most successful breach-of-contract lawsuits. Indeed, had Strumpf “merely refus[ed] to perform a promise” to a creditor via self-help (i.e., without filing a bankruptcy petition), the judge hearing the resulting lawsuit would certainly not have been as sympathetic. In Scalia's construction, then, money went from being something constructed as tangible and empirically valuable to being something intangible, a mere promise. Money enjoys that intangible status, though, only when it serves banking interests, not consumer interests.

Indeed, the mechanistic manner in which Scalia applies *the* interpretation of the statute to *the* facts of the case masks his selective emphasis of certain arguments and de-emphasis of others to conform with the desired result. While Scalia is correct that common law holds that "the bank acquires title to the money deposited, and becomes the depositor's debtor for the amount deposited,"[74] he ignores the essential distinction that "[a] deposit differs from an ordinary debt in that, from its very nature, it is constantly subject to the check of the depositor and is always payable on demand."[75] By basing his decision on the general rule but ignoring its corollary, Scalia strategically constructed Strumpf's money – and the money of all subsequent debtors – to suit the court's purposes.

The implication of ignoring the corollary is significant. Even though the funds themselves were not Strumpf's property, the right to withdraw them was part of the estate, and the freeze precluded Strumpf from exercising that right, in violation of §362(a)(3).[76] Similarly, the Supreme Court ignored the fact that, but for the pre-existing debt owed it, Citizens would have no reason to freeze the checking account. As argued above, Citizens thereby attempted to position itself against other creditors. The freeze was therefore an attempt to recover a debt in violation of §362(a)(6). Lawless accordingly contends that the *Strumpf* decision "provides a very formalistic explanation for an obviously pragmatic decision,"[77] as "[n]either logic nor linguistics requires"[78] an administrative freeze to be labeled a "temporary refusal to pay" rather than a setoff. This is consistent with Lawless's larger findings that the Supreme Court's bankruptcy decisions in the 1991 through 1995 terms "often use[d] textualist rhetoric to free itself from a result that the justices may not personally desire"[79] and that those decisions favor "governmental claimants and large institutional creditors at the expense of unsecured trade creditors and debtors."[80]

In the *Strumpf* decision, Lawless further suggests that this realism-in-textualist-clothing can lead to reductio-ad-absurdum applications, since if "a mere failure to pay debts does not violate the automatic stay. . . . one can now argue that a bank could refuse to pay a debtor's account for amounts even above that necessary to protect the bank's setoff rights."[81] How debtors and creditors might work to create dialogue that is more useful for both of their interests and avoids these strained applications is the subject of the next section.

Toward Reframing Debtor Discourse

This essay attempts to enact Ivie's notion of productive criticism,[82] which attempts to invent rhetorical strategies to social problems, principally through use of Burke's comic corrective.[83] Burke saw tragedy, which in turn leads to scapegoating, as the default manner in which people frame events. To mitigate this tendency, Burke suggests a comic corrective, which, in contrast to tragedy, frames our communicative choices "not as *vicious*, but as *mistaken.*"[84] Gusfield explains this perspective by noting that it calls for us to view persons and events differently by "getting outside the box of [one's] own logics"[85] such that we "realize that things are not as they seem,"[86] thus working against our tendency to scapegoat. The *Strumpf* decision works to scapegoat consumers who find themselves needing to file bankruptcy by reinforcing the negative caricature of this group as reprobates and thus deflects our attention from a better solution, one which serves the interests of creditors and debtors alike.

I accordingly propose to reframe and empower debtor discourse through comic strategies. One such strategy would be to reframe debtor discourse in terms of bank interests. Burke tells us that "[c]ommunication cannot be satisfactory unless the matter discussed bears in some notable respect upon the interests of the auditor . . . . We interest a man [sic] by dealing with his interests."[87] Accordingly, he calls for us to frame messages "not by raising a problem [but] . . . by ringing the bells of . . . response."[88] This notion is related to what Burke calls identification, arguing that one only persuades another "insofar as you can talk his [sic] language . . . *identifying* your ways with his."[89]

As an example of this type of reframing, Lax and Sebenius recall "presenting food stamps as a means to increase demand for agricultural products rather than as a welfare program,"[90] so that legislators from agricultural areas who might otherwise be opposed to the food stamp program would support it. Similarly, Osmunson and Miller[91] give the example of Tom Sawyer convincing his friends to whitewash the fence by framing it not as a chore, but as a fun activity. Therefore, the rhetorical challenge for critics is to alter the way the banking community views administrative freezes. Just as food stamps were reframed from welfare to agricultural subsidy and whitewashing was reframed from chore to fun activity, so must administrative freezes be reframed. As an example, if the Supreme Court privileges the voice of the bank where a debtor has deposit accounts over the voices of debtors or other creditors, then one approach is to illustrate the impact on individual banks when they are that other, non-depository creditor. One thus could reframe freezes from “a way to get what’s ours” to “a way to not get what’s ours.” It is typical for an individual to have deposit accounts with only one bank, but to have credit cards or other unsecured debts with several banks. As noted above, the banking industry has conceded that the financial impact on banks of not freezing accounts would be minimal. The impact of a frozen bank account on an individual debtor, however, is significant. It therefore makes sense to frame this issue in terms of the debtor's inability to make other payments, including payments to the Chapter 13 trustee, who in turn pays these very same banks for other debts. If Chapter 13 debtors are unable to make payments to the trustee, that risks pushing those debtors into Chapter 7, thus denying creditors the regular payments they receive from Chapter 13 trustees.

Recent legislative activity by the banking industry suggests another “comic” strategy for reframing debtor discourse with regard to bank account freezes. In perspective by incongruity, a term is “wrench[ed] loose and metaphorically [applied] to a different category,”[92] thus “highlighting inconsistencies in current meanings [and] deconstruct[ing] existing pieties.”[93] Having successfully advocated for a Supreme Court decision that made it at least slightly more difficult for Chapter 13 debtors to make payments to their trustees (and, therefore, their creditors), the banking industry has successfully advocated for legislation to force more people who would otherwise discharge debts in Chapter 7 to file Chapter 13 bankruptcies.[94] This creates a paradox that highlights the banking industry’s disingenuous attitude toward bankrupt individuals. Bankers have successfully advocated for a Supreme Court decision that makes it at least somewhat more difficult for Chapter 13 debtors to pay back what they owe and now clamor for legislation to force more bankrupt individuals into Chapter 13. They do this even in the face of research that shows most Chapter 7 debtors are not able to make such payments.[95] Having created a barrier for debtors who are willing to pay their debts to do so, bankers now seek to force debtors who are unable to pay their debts to do so.

We are thus presented with two examples of how debtors are scapegoated. First, the *Strumpf* court decides to privilege the “banker’s dilemma” regarding deposited funds over the “consumer’s dilemma” regarding access to those funds once one decides to rehabilitate their finances through bankruptcy. Second, the banking industry foments a legislative push to make bankruptcy protection more difficult to obtain. In Burke’s terms, debtors are seen as vicious, not mistaken. Thus, another rhetorical challenge is to reframe the public perception of debtors. Ivie argues that “just as victimage depends upon oversimplifying a situation and caricaturing the

Other, an elaborated account gauges a situation more adequately and therefore with less cause to point the finger of blame falsely." [96] Bartlett and Steele note "the popular view of bankruptcy filers as free spenders who vacation in the Caribbean and buy expensive jewelry on their credit cards."[97] The reality of consumer bankruptcy is more complex. In Sullivan, Warren and Westbrook's survey[98], in which multiple responses were permitted, 67.5 percent of the debtors survey attributed their bankruptcy filing to a job-related problem such as a layoff, demotion or losing overtime hours, while another 19.3 percent cited medical problems and 22.1 percent cited family problems such as divorce. More recently, Himmelstein, Warren, Thorne, and Woolhandler's[99] study links about half of bankruptcy filings to medical causes. As Bartlett and Steele note, these are "the kind[s] of misfortune[s] that could befall anyone."[100]

Indeed, the very notion of a "banker's dilemma" is based on a tragic framing of debtors, one that assumes that debtors are reprobates who will abscond with significant amounts of money. The banking industry concedes that the amount of money at issue in frozen accounts is insignificant, and consistency is what motivated them to pursue the *Strumpf* litigation in the Supreme Court. Banks accordingly can likely afford to reframe their position toward Chapter 13 debtors by consistently choosing not to freeze their accounts as an act of good faith. Upon receiving notice of the bankruptcy filing from the court, they would file claims and motions with the court to assert their rights, just as all other creditors do.

Finally, rhetorical criticism may properly concern itself with not only what is said, but with who says it. The American Civil Liberties Union and similar organizations are always ready to file amicus briefs in furtherance of civil liberties, but there was apparently no coordinate organization representing consumer legal interests before the Supreme Court in *Strumpf*. If Caldeira and Wright[101] and Breyer[102] are correct, then a likely reason the Supreme Court looked only to banking interests is that they were the only interests to file amicus briefs. The unanimous opinion and the tenor of the oral argument suggests that all nine members of the Court have been vigorously persuaded of the "banker's dilemma," but not of the "consumer's dilemma." And they certainly have not been persuaded that the latter risks becoming the former. Economic interests are as important as political interests, and eventually become political interests. Wilson tells us that "the way people vote is influenced by what they think of the economy as a whole as well as by their own personal situation."[103] Research indicates that most consumer bankruptcies are attributable to such unavoidable problems as layoffs, illness and divorce. Accordingly, consumers who today cannot imagine ever filing a bankruptcy petition are closer than they think to facing a *Strumpf*-authorized freeze on their checking account. This illustrates one way in which consumer economic interests deserve the representation they are not currently getting before the Supreme Court.

Conclusion

White asks us not to think of law as a "tool for social control"[104], but rather "as an activity of speech and the imagination."[105] In ten mechanistically written paragraphs, the justices that decided *Strumpf* showed us that law-as-rhetoric and law-as-control are not mutually exclusive, even in an area as seemingly mundane as bankruptcy law. Moreover, *Strumpf* illustrates how in a brief, unheralded case, law-as-rhetoric makes law-as-control possible through such strategies as silently ignoring some issues, explicitly dismissing other issues as irrelevant, and engaging in a form of textualism that looks only at statutes but not at their legislative history. Law-as-control also manifests itself in *Strumpf* by privileging the voice of powerful interests through amicus briefs. These facets of the *Strumpf* decision illustrate the utility of moving rhetorical criticism of judicial opinions from the civil liberties realm to the economic realm and from "great cases" to less well known cases.

Just as significantly, this essay also attempted to further the burgeoning effort to move rhetorical criticism from merely arguing *against* something to also arguing *for* something. Reframing situations in a manner that allows the powerful to identify with the powerless may prove to be a useful way for problems such as the one presented here to be solved. Indeed, the banking industry may soon find its interests aligned with those of its bankrupt customers. When coupled with the *Strumpf* decision, the new bankruptcy reform legislation creates a dilemma that benefits no one. People who cannot afford to make repayments would be forced into Chapter 13 repayment plans while people who can afford to make such payments would be denied access to the very funds they would use to make repayments. Thus, for want of national consistency over an admittedly small amount of money, the banking industry may find itself having caused significant economic harm to people who least can afford it while having made it more difficult to collect even that small amount.

The expansion of legal rhetoric studies into economic cases and small cases and the expansion of rhetorical criticism into a more productive frame are all worthy of future inquiry. In particular, the attempt herein to reframe the problem presented by *Strumpf* is only an initial attempt at a challenging but worthwhile endeavor. In this era of downsizings and corporate scandals, economic issues are becoming even more central to our understanding of rhetoric, politics and justice. As rhetorical critics, we can shed *phronesis*-based light on the legal disposition of those issues, which would fill a long-neglected gap in our research.

Notes

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2. Warren E. Wright, "Judicial Rhetoric: A Field for Research," *Speech Monographs* 31 (1964): 64-72.

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4. 410 U. S. 113 (1973), critiqued in Michael R. Hagan, "*Roe v. Wade*: The Rhetoric of Fetal Life," *Central States Speech Journal* 27 (1976): 192-199.

5. 347 U. S. 483 (1954), critiqued in David M. Hunsaker, "The Rhetoric of *Brown v. Board of Education*: Paradigm for Contemporary Social Protest," *Southern Speech Communication Journal* 43 (1978): 91-109 and Robert A. Prentice, "Supreme Court Rhetoric," *Arizona Law Review* 25 (1983): 85-121.

6. Wright, "Judicial Rhetoric: A Field for Research," 64.

7. Hagan, "*Roe v. Wade*: The Rhetoric of Fetal Life," 192.

8. Deirdre N. McCloskey, *The Rhetoric of Economics*. (Madison: University of Wisconsin Press, 1985).

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12. John L. Lucaites, “Between Rhetoric and ‘the Law”: Power, Legitimacy, and Social Change,” *Quarterly Journal of Speech* 76 (1990): 445, emphasis in original.

13. *Citizens Bank of Maryland v. Strumpf*, 516 US 16 (1995).

14. *Bush v. Gore*, 531 US 98 (2000).

15. Texas v. Johnson, 491 US 397 (1989).

16. See Lewis, “Of Innocence, Exclusion, and the Burning of Flags; and Theodore O. Prosise & Craig R. Smith, “The Supreme Court’s ruling in *Bush v. Gore*: A rhetoric of inconsistency,” *Rhetoric & Public Affairs* 4 (2001): 605-632.

17. “Mapother Means Recovery – Victory Stories From Students,” <http://mapother.com/victory%20stories/> (accessed August 5, 2004).

18. *Dehn v. Arkansas Federal Credit Union*, AP No. 4:02-ap-1108, <http://www.arb.uscourts.gov/orders-rules-opinions/opinions/Evans/Dehn.pdf> (Bankr. E.D. Ark. July 10, 2002) (Accessed February 27, 2005).

19. Rountree, Clarke, & Huglen, Mark, Editors’ Essay: “Toward the Next Phase” KB Journal 1, no. 1 (2004), <http://www.kbjournal.org/modules.php?name=News&file=article&sid=1> (accessed February 25, 2005).

20. U.S. Code, vol 11, sec. 362(a). Please note that the bankruptcy law in effect when Strumpf filed his petition, and therefore described in this article, has been modified in part by the recently enacted Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Public Law 109-8, 119 Stat. 23).

21. U.S. Code, vol 11, sec. 541.

22. *Citizens Bank*, 18.

23. *Citizens Bank of Maryland v. Strumpf*, 138 BR 792 (D. Md. 1992).

24. *Citizens Bank of Maryland v. Strumpf*, 37 F3d 155 (4th Cir. 1994).

25. See, e.g,. David S. Broder, “The Scalia Model, *Washington Post,* June 29, 2003, B7; and David M. Zlotnick, “Justice Scalia and His Critics: An Exploration of Scalia’s Fidelity to his Constitutional Methodology, *Emory Law Journal*, 48 (1999): 1377-1429.

26. *Citizens Bank*, 17.

27. *Citizens Bank*, 19.

28. *Citizens Bank*, 19 (emphasis in original).

29. U.S. Code, vol 11, sec. 542(b).

30. U.S. Code, vol 11, sec. 553(a).

31. *Citizens Bank*, 20.

32. *Citizens Bank*, 20.

33. *Citizens Bank*, 20.

34. *Citizens Bank*, 20.

35. U.S. Code, vol 11, sec. 362(a)(3).

36. U.S. Code, vol 11, sec.362(a)(6).

37. *Citizens Bank*, 21.

38. Wetlaufer, "Rhetoric and its Denial in Legal Discourse," 1555.

39. Prentice, "Supreme Court Rhetoric," 89.

40. Wetlaufer, "Rhetoric and its Denial in Legal Discourse," 1562.

41. Hagan, "*Roe v. Wade*: The Rhetoric of Fetal Life," 195.

42. Hagan, "*Roe v. Wade*: The Rhetoric of Fetal Life," 198.

43. *Citizens Bank*, 19.

44. *Citizens Bank*, 19.

45. *Citizens Bank*, 37 F3d, 158.

46. *Citizens Bank*, 37 F3d, 158

47. *Citizens Bank*, 21.

48. *Citizens Bank*, 19.

49. *In re Wildcat Construction*, 57 BR 981, 986 (Bankr. D. Vt. 1986).

50. Claudia MacLachan, "Banks to Court: Let us Freeze Accounts First," *National Law Journal*, October 16, 1995, A13.

51. Gregory P. Johnson, "Following *Strumpf*: Will Allowance of an Administrative Freeze Begin the Erosion of the Automatic Stay?," *Journal of Bankruptcy Law and Practice* 5 (1996): 197.

52. See Johnson, "Following *Strumpf*," and Gregory C. Baumann, "Bankruptcies Take on a Chill," November 1, 1995, *Daily Record (Baltimore, MD*) (accessed from Dow Jones News Retrieval on May 2, 1996).

53. Dan Izenberg, “Clinging to the Constitution,” *Jerusalem Post*, February 19, 1990 (accessed July 3, 2004 from Lexis/Nexis database).

54. 507 U.S. 511 (1993)

55. *Conroy*, 519.

56. U. S. House Committee on the Judiciary. *Bankruptcy Law Revision*. H. Rpt. 595, reprinted in 1978 U. S. Code Congressional and Administrative News, 5787, as quoted in Brief for the Respondent, 11.

57. Robert M. Lawless, “Legisprudence Through a Bankruptcy Lens. A Study in the Supreme Court’s Bankruptcy Cases,” *Syracuse Law Review* 47 (1996): 1-119.

58. Lawless, “Legisprudence Through a Bankruptcy Lens,” 6.

59. *Black's Law Dictionary*, 6th ed. (St. Paul, MN: West, 1990), 1360.

60. Marcia Henry, “Eviction Defense,” In I. S. Hirsh, (Ed.), *Poverty Law Manual for the New Lawyer*. (Chicago: National Center on Poverty Law, 2002), 126-130, <http://www.povertylaw.org/legalresearch/manual/Eviction.pdf> (accessed July 3, 2004).

61. *West’s Encyclopedia of American Law*, s.v. “self help.”

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70. MacLachlan, “Creditors Victors,” A14.

71. U.S. Code, vol 11, sec. 362.(a)(3).

72. U.S. Code, vol 11, sec. 362.(a)(6).

73. *Citizens Bank*, 21.

74. *Corpus Jurus Secundum* (1996), s.v. “Banks and banking,” sec. 270.

75. *Corpus Jurus Secundum* (1996), s.v. “Banks and banking,” sec. 270.

76. See Johnson, “Following *Strumpf*,” and Marvin E. Jacob, and Stephen Karotkin, and Michele J. Meises, “Supreme Court Upholds Creditor's Right to Freeze Debtor's Funds, *New York Law Journal*, November 17, 1995, 1, 4.

77. Lawless, “Legisprudence Through a Bankruptcy Lens,” 85.

78. Lawless, “Legisprudence Through a Bankruptcy Lens,” 84.

79. Lawless, “Legisprudence Through a Bankruptcy Lens,” 102.

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81. Lawless, “Legisprudence Through a Bankruptcy Lens,” 105.

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