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The Constitutionality of Bankruptcy-Specific State Exemption Statutes

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I. Introduction

Three years after his state voted to expand its exemptions, listing the types and amounts of property that defaulting debtors could protect from seizure by creditors in a state collection proceeding or bankruptcy case, Representative Whiplash’s political party won back the Governor’s office and a majority in each branch of the legislature. Before election to the state legislature, Representative Whiplash had been an aggressive collections lawyer, working mostly for credit card companies and health care providers, who usually suffered the brunt of the losses when debtors went bankrupt. His campaign was heavily financed by members of those industries and by attorneys with large “collection” practices.

After the election, he spent a few weeks catching up on reading recent cases interpreting his own state’s collection statutes and the bankruptcy code. When he came across several bankruptcy decisions approving the constitutionality of some states’ “bankruptcy-specific” exemption statutes, he got an idea for a new piece of legislation for his state: a bankruptcy specific state exemption statute that permits bankrupt debtors to keep only the clothes they wear to their §341 “first meeting of creditors” in their bankruptcy case. His proposed legislation would permit the exemption statute in state court collection proceedings to stand, permitting debtors to keep most of their clothing, households goods and appliances, a limited amount of equity in a motor vehicle and a house, and professionally prescribed health aids, and a modest amount of cash (enough for a bus ride home from the courthouse, at least). However, it would result in debtors losing nearly everything they had if they sought to discharge their debts in bankruptcy. When asked why he would permit bankrupt debtors to keep the clothes on their backs, Representative Whiplash replied that he had some sense of public decency and didn’t
want to leave deadbeat debtors naked, just penniless.

While the above vignette is a pretty far-fetched, bankruptcy-specific exemption statutes are real. They have been adopted in several states. However, contrary to the above scenario, most states that have adopted bankruptcy specific exemption statutes, have provided exemptions that are more generous for bankrupt debtors than for those who decide to fight it out in state court. However, regardless of whether these bankruptcy specific state statutes are more generous or less generous toward debtors, their existence raises fundamental questions both about the purposes of exemption statutes and about the constitutionality of their provisions.

When a financially troubled debtor files a bankruptcy petition, a bankruptcy “estate” is created and all of his or her property becomes part of that estate. However, the debtor enjoys the right to exempt some of his or her property and prevent the “exempt” assets from being liquidated for distribution to creditors. Allowing debtors to exempt some of their assets from the liquidation process has been a feature of the American bankruptcy process since it's inception. Providing debtor's with a limited right to protect some of their property from the bankruptcy process allows down-on-their-luck Americans to emerge from bankruptcy with enough property to take advantage of the “fresh start" that discharge from their debts provides.

Although one might think that the nature and extent of bankruptcy exemptions would be the same throughout the country, this has not been true since the mid-nineteenth century. Instead, with a few exceptions, bankrupt debtors may exempt only the types and value of property that is exempt under their home state's exemption statute.

The Bankruptcy Act of 1898, that was in effect until 1979, permitted debtors in
bankruptcy to exempt whatever property was exempt by their home state's general exemption statute, from distribution by their creditors. The current Bankruptcy Code, in effect since then, takes a similar, but somewhat more complicated approach. It permits debtors to choose between a list of federal exemptions in § 522(d) of the Bankruptcy Code and the exemptions provided by their home state, but gives states the right to “opt-out” of the federal exemptions, thus depriving their residents of this choice, and leaving them only with the slate of exemptions available under relevant state collection law. 7 Thirty-four states have opted-out. 8 The choice between state and federal exemptions exists in only 16 states, 9 the District of Columbia?, Puerto Rico?, and the U.S. Virgin Islands?. Not surprisingly, these latter states exemption statutes are, broadly speaking, more generous toward debtors than the federal exemptions.[fn- cite to article?] States that have opted out generally have exemption statutes that are more restrictive than the exemptions in § 522(d).

As indicated above, a few states have adopted “bankruptcy-specific” exemption statutes that apply only in bankruptcy cases filed by their residents, but not in routine collection actions brought in state court. States with these types of exemption statues have two sets of exemptions: one for use in state collection proceedings and another for use in bankruptcy cases. 10 The adoption of these bankruptcy specific exemption statutes has raised questions about their constitutional validity.

Courts that have addressed the constitutional propriety of this practice have taken differing views. Some courts have approved the practice, saying that § 522(b) grants state legislatures broad authority to opt-out of § 522(d)’s “uniform” exemptions, 11 and that because of this authority, bankruptcy specific exemption statutes are not preempted by the Bankruptcy
Code. For the most part, these courts also take the view that § 522(b) is within Congress's authority under the bankruptcy clause and that the operation of these statutes does nothing to offend the principle of geographic uniformity that must be satisfied under the Bankruptcy Clause. However, the matter is not beyond dispute. A few courts have held that these types of exemption schemes are unconstitutional, usually on the grounds that they depart from the scope of the authority delegated to the states, or that they conflict with the purposes of the Bankruptcy Code and thus violate the Supremacy Clause, but sometimes that they conflict with the uniformity requirement.

Although the Supreme Court's denial of certiorari in Sheehan v. Jackson, a Fourth Circuit decision approving the constitutionality of the West Virginia bankruptcy-specific exemption statute may portend the ultimate resolution of this issue, the absence of a conflict in the circuits on the issue suggests that there were other reasons for the Court's failure to accept the case for review. Bankruptcy courts and bankruptcy appellate panels have arrived at different conclusions, sometimes involving the same statute. With a conflict now between Bankruptcy Appellate Panels in the 6th and 9th Circuits, resolution by the Supreme Court seems likely, though not inevitable.

The purpose of this article is to evaluate the constitutional validity of these bankruptcy-specific state exemption statutes. It begins by reviewing the Bankruptcy Code's approach to exempt property, and includes a review of the legislative history of the opt-out provision that defers to state legislatures regarding a debtor's ability to use the federal exemption scheme. It then examines in detail existing bankruptcy-specific state exemption statutes, that apply in bankruptcy case, but not in collection actions generally. With this background information, the
article will examine the arguments that have been made regarding the constitutional validity of these statutes and conclude that, although they are consistent with Article I's uniformity clause, and well within Congress's authority to delegate power to the states, they are preempted by the Bankruptcy Code, which was intended to defer to states’ general exemption statutes and not to permit states to adopt bankruptcy-specific exemptions. The article will agree with courts that have concluded that bankruptcy specific state exemption statutes are within the scope of Congress's authority to permit and do not offend the uniformity principle, but that, because they interfere with the purposes of the Bankruptcy Code they are impliedly preempted as an improper obstruction of the fresh start policy that Congress has envisioned.

I. History of Bankruptcy and Bankruptcy Exemptions

A. England and the Colonies

During the 18th century, debtors in England and in the American colonies faced harsh treatment. They were subject to imprisonment, where they might languish for years unless they were able to indenture themselves or find a friend or relative who would pay their debts.\(^17\) Imprisoned debtors were not cared for while they were incarcerated.\(^18\) Instead, they were required to provide for their own food and clothing.\(^19\) In this regard, they were treated worse than criminals, whose most basic needs were supplied. In England, where debtors could be executed, the risk of default was worse.\(^20\) The only exemptions in the colonies, was from the hangman's noose.

A few colonies provided limited relief by permitting debtors to obtain a discharge of their debts.\(^21\) However, those who received a discharge could not safely leave the boundaries of their colony, because the discharge did not have extraterritorial effect. If they were located in another
colony, their creditors might capture them and have them imprisoned, despite their discharge elsewhere. As a result, the framers of the constitution were interested in establishing bankruptcy laws that could be effective throughout the states.22

B. Exemptions in Early Bankruptcy Statutes

The nation's first bankruptcy law, enacted in 1800, specifically preempted state exemption provisions.23 However, its scope was limited, providing only for involuntary bankruptcy proceedings, and then only against “merchants and traders.”24 Debtors could not seek a voluntary discharge. This original act was not long-lived; in 1803, it was repealed.25

The Bankruptcy Act of 184126 similarly adopted a uniform federal exemption statute that permitted debtors to keep property regardless of the limitations imposed by their home states’ exemption statutes. Like the 1801 statute, the Bankruptcy Act of 1841 did not long survive; it was repealed in 1843.27

Significantly, despite vigorous political opposition from Southern agrarian states, who viewed these exemption provisions as improper incursions into states' rights, neither the 1801 Act nor the 1841 statute was constitutionally challenged.28

The country managed for nearly another 25 years without a Bankruptcy Act, until 1867. The Bankruptcy Act of 1867,29 adopted in the wake of the Civil War, lasted longer, but was repealed in 1878.30 It provided for a limited discharge, laden with many exceptions, but for the first time introduced the idea of deferring to state exemption statutes rather than establishing a uniform schedule of exempt assets.31 The Act contained a limited uniform federal exemption,32
but also protected property exempt under state law. At the time, state exemption statutes were relatively favorable toward debtors.

C. Exemptions in the Bankruptcy Act of 1898

It was not until 1898 that the country enjoyed a permanent bankruptcy statute. The Bankruptcy Act of 1898 completely deferred to state exemption statutes. Section 6 of the Act provided: “This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition.”

The bankruptcy clause has long been regarded as an expression of the “federalist origins” of bankruptcy law in the United States. There is no doubt that the history of American bankruptcy law reflected a tension between urban centers in the North, which pushed for the adoption of national bankruptcy legislation, and rural areas in the South, which resisted these efforts, largely out of a concern for losing control over local concerns to the national government in Washington. Thus, after the series of starts and stops throughout the nineteenth century, a permanent bankruptcy law was finally adopted, it protected states rights in a variety of ways, including by permitting states to determine for themselves what property debtors could keep when they sought protection under the national bankruptcy law. The Bankruptcy Act's use of state exemption statutes kept matters in the hands of state legislatures, but resulted in a considerable disparity in the nature and extent of property that debtors could keep when they sought relief from their creditors in bankruptcy. Some states,
particularly Texas and Florida, which had long been regarded as debtor's havens, provided
generous exemptions, particularly for a debtor's home. Other states, provided only limited
exemptions for debtors, both in bankruptcy and in collection cases. There was, of course, a wide
range of exemption protection between these extremes.

D. The Chandler Act

The Chandler Act, adopted in the midst of the Great Depression, made no changes to this
approach. The National Bankruptcy Conference, an influential private organization of
bankruptcy lawyers and scholars, considered proposing the adoption of a uniform federal
exemption scheme, but ultimately rejected returning to this approach out of fear that it would
impair the enactability of the entire legislative package.

E. Bankruptcy Reform Circa 1979

In 1978, when the current Bankruptcy Code was adopted, Congress gave thoughtful
consideration to the exemption provisions it would contain. It considered four separate bills,
each with its own approach to exemptions. What finally emerged was a hybrid approach that
drew features from several of the proposals Congress had considered.

1. Bankruptcy Commission

In 1970, Congress created a Commission on Bankruptcy Laws. It's purpose was to “
study, analyze, evaluate, and recommend changes” in bankruptcy law. The Commission
reported its findings in 1973, which included a comprehensive proposed revision of the
Bankruptcy Act.

The Commission's bill embraced the two traditional functions of bankruptcy law that
have been consistently articulated by the Supreme Court since *Local Loan v. Hunt.* It's primary function was to provide an orderly and comprehensive procedure for the collective resolution of creditor's claims against insolvent debtors. A second, and equally important function was to provide honest debtor's with a “fresh start.”

With this fresh start policy in mind, the Commission gave thoughtful consideration to debtor's exemption rights. The goal of providing a fresh start was achieved in two principal ways: (1) providing debtors with a discharge of most of their debts; and (2) permitting them to “set apart such property from that available generally to creditors” in the form of a uniform Federal exemption. Significantly, the Commission determined that the exemption provision in the Bankruptcy Act of 1898 was ineffective. As the Commission explained:

“As a result of the present Act's deference to other federal and state law as to exemptions, there is no uniformity of treatment of creditors and debtors, and the exemptions available are not the result of reasoned policy but the happenstance of history and location. This is intolerable for what is supposed to be a national, uniform system and destructive to the goal of rehabilitation of individual debtors.”

In particular, the Commission found that the non-uniform approach to exemptions was incompatible with the traditional goal of bankruptcy of providing “equal treatment of creditors.” Creditors of debtors in states with conservative exemption statutes were treated better than those who had advanced funds to debtors with more generous exemption statutes. Uniformity, the Commission concluded would eliminate “the unfairness of existing state exemption laws, most of which are archaic, some of which are unduly generous, and some of which are exceedingly
[stingy], particularly as to urban residents.  

Even a cursory examination of state exemption statutes of the time reveals that they were "a crazy quilt of statutes reflecting influences based on dominant state industries, rising, property values, and diversification of occupational trends within individual states." In subsequently promulgating a proposed Uniform Exemptions Act, the National Conference of Commissioners on Uniform State Laws (NCCUSL), noted:

Students who have examined the exemptions laws of the several states are always astounded by the enormous disparity that characterizes these laws. Some recognize no homestead exemption, and others allow a homestead to be claimed with hardly any effective limitation on its value. Some allow a practically unlimited exemption in an unmatured life insurance policy, whereas others restrict such an exemption to a policy of a specified face amount or to a policy acquired by a specified annual premium. Some allow the exemption of an automobile with little or no qualification, and others do not appear to recognize any exemption of an automobile. Liberal homestead and perhaps other exemption provisions were consciously adopted in some states with a view to attracting settlers, and one hears occasionally that the generosity of exemptions in California, Florida, and Texas is an attraction to emigrants from other states having more penurious provisions. There are no known data indicating whether differences in state exemptions laws influence decisions of people to move or stay, but to the extent debtors can affect their creditors' rights of recovery by changing the laws that govern such recoveries, creditors are subject to risks that are not an ineluctable
feature of our federalism. The risks are run by local creditors as well as those who extend credit through the channels of interstate commerce.  

The uniform exemption scheme the Commission proposed was provided for what at the time seemed like relatively generous protection for clothing, household goods and furnishings, equity in residential real estate, motor vehicles, tools of the trade, life insurance, retirement benefits, and various types of disability and relief benefits.  

The Commission's proposal generated considerable debate. It drew the attention of both the National Bankruptcy Conference and the National Conference of Bankruptcy Judges, both of whom approved generally of federal intervention in exemptions, but who believed that the bankruptcy code should only provide a floor of basic exemption rights while permitting state legislatures to “prescribe more generous exemptions for their domiciliaries if they see fit to do so.”

2. The Bankruptcy Judges Bill

The National Conference of Bankruptcy Judges had its own proposed revision of the Bankruptcy Code, with its own set of exemptions. The “Judge's Bill” introduced the concept of giving debtors a choice between the uniform set of federal exemptions and the exemptions provided by their home state, with the federal exemptions providing a floor for exemptions that the state exemption statute had to meet. If adopted, this would have given debtors in traditional debtor's haven states the advantage of their home states' more generous exemption statute, while establishing a uniform set of federal exemptions in the bankruptcy code as an effective floor for debtors in states with less generous exemptions. Of course, subtle differences
between the proposed federal exemptions and state exemption schemes might have made it difficult to debtors to choose, depending on their array of assets.

The Bankruptcy Commission had considered the alternative of using the bankruptcy code to impose a floor, but not a ceiling on exemptions, but rejected it for three reasons. First, the Commission believed that some state's laws were too generous to debtors, and that imposing a floor without a ceiling was a one-sided approach to the problem of diverse exemption laws. Second, allowing residents of states with more generous exemptions than those provided by the Bankruptcy Code would preserve the inequity of the Bankruptcy Act in treating debtors differently merely because of their state of residence. Third, the Commission believed that permitting debtors to choose between federal and state exemptions might create difficult practical problems involving the relationship between state and federal law. 65

3. House Bill 8200 and Senate Bill 6

Not to be outdone, the House of Representatives, then dominated by Democrats, took an approach similar to that in the Judge's Bill. It's set of uniform federal exemptions established a floor, but debtors were free to select their home state's more generous exemption statute.66 Apart from this, the substance of the exemptions was essentially the same as what was ultimately adopted.

Although it came to the table late, the Senate, dominated at the time by Republicans, submitted its own version of bankruptcy reform. Senate Bill 6 retained the status quo in the Bankruptcy Act by deferring completely to state law, without any set of uniform federal exemptions.67 This, of course, represented no reform at all.68 Members of the Senate were apparently concerned that the set of uniform federal exemptions went too far and that state
The legislatures would do a better job at holding the line on the extent of debtors’ exemption rights. 69

The Senate was also concerned that, married debtors could stack their exemptions, with, for example, the husband choosing the federal exemptions and the wife choosing the state exemptions, in a way that permitted them to retain a “very substantial” amount of property.70

F. Bankruptcy Reform Act of 1978

After passage of both the House and Senate bills in their respective chambers, the House-Senate Conference Committee compromised with an approach that was adopted in the Bankruptcy Reform Act of 197871 and which has been in effect for the past 32 years, with only limited changes.

Under Bankruptcy Code § 522(b) debtors get to choose between the uniform federal exemptions in § 522(d) and the exemptions provided for by state law, unless their home state “opts-out” of the § 522(d) exemptions. Thus, unless state law provides otherwise, a debtor may choose to exempt either the property listed in § 522(d) or the property exempt under the applicable state exemption statute. The language of the statute specifies:

An individual may exempt from property of the estate, the property [that is specified under subsection (d), unless the State law that is applicable to the debtor . . .

Specifically does not so authorize [or] . . . any property that is exempt under Federal law, other than subsection (d) . . . or State or local law that is applicable on the date of the filing of the [debtor's] petition . . . .”72

This basic choice is supplemented by a limited range of exemptions specified in non-bankruptcy federal law73 and a few discreet provisions of the bankruptcy code.74 States that opt out restrict their residents to whatever exemptions may be available under state law.
G. Revisions Since 1979

Since the 1978 Reform Act, the Bankruptcy Code's exemption provisions have been amended three times. In 1984, several of the amounts were changed, and the exemption for household goods and furnishings was subject to an aggregate limit. In 1994, the amounts of the exemptions were again raised, and § 104 was added to provide for an automatic adjustment in the exemptions, every three years, in accordance with changes in the Department of Commerce's Consumer Price Index. The opt-out provision was not changed. A decade later, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, adjusted the dollar amounts, made a variety of retirement assets exempt for all debtors, and imposed several limits on state homestead exemptions. Apart from ensuring that retirement benefits were exempt, and imposing limits on the most generous state homestead exemptions, the basic relationship between the uniform federal exemptions and state exemption statues was not changed.

II. Today's Bankruptcy Exemptions

A. Uniform Federal Exemptions in § 522(d)

A wide variety of exemptions are available under § 522(d). Foremost among them is a “homestead” exemptions for up to $21,625 of each debtor's equity in real or personal property that serves as the debtor's residence. This is supplemented by exemptions for $3450 for each debtor's interest in a motor vehicle, $11,525 for the debtor's interest in clothing and household goods and furnishings, subject to a $550 limit for any individual item. Debtors who still have access to the federal exemptions may also exempt up to $1,450 of jewelry and $2175 in tools.
or his or her trade or business.\textsuperscript{87} Section 522(d)(5) provides a "wild-card" exemption that permits debtors to exempt $1150, plus utilize up to $10,825 of the unused portion of their "homestead" exemption, to protect their interest in "any property."\textsuperscript{88} Section 522(d)(11) exempts a variety of payments including those for wrongful death awards, life insurance payments, and other compensation for loss of future earnings "to the extent reasonably necessary for ... support" as was as up to $21,625 for personal bodily injury awards, but not for pain and suffering or medical payments.\textsuperscript{89} The debtor's interests in unamated life insurance policies\textsuperscript{90} and professionally prescribed health aids are exempt without regard to their value.\textsuperscript{91}

In addition to these exemptions, retirement, IRA, and pension funds are exempt under §§ 522(b)(2) and 522(d)(11) & (2), regardless of whether the debtor's state has opted out of the federal exemption scheme.\textsuperscript{92}

B. State Exemption Statutes

State exemption statutes protect a wide and varied range of property. However, partially due to the influence of § 522(d) for more than thirty years since the Bankruptcy Reform Act was adopted, the degree of variance has become more limited than it was in 1978, when the policy debate over exemptions was held.

All states provide a homestead exemption for real or personal property used by the debtor as his or her residence. Here, however, the extent of protection varies widely, with states protecting from $3500\textsuperscript{93} to $550,000\textsuperscript{94} in the debtor's equity, and a growing number of states limiting the exemption in acreage rather than market value.\textsuperscript{95} This is particularly true of states that have long been regarded as debtor's havens, such as Florida, and particularly Texas, where
vigilance against the scourge of creditor’s collection actions in ingrained in the state's history. 96 New Jersey and Pennsylvania, on the other hand, provides no protection for residential real estate, apart from protecting entireties property from debts owed by a single spouse, 97 with New Jersey also protecting the survivorship interest of a spouse in property held as tenancy by the entirety from creditors of a single spouse. 98

Protection for equity in a motor vehicle is also universal with the value of the exemption ranging from nothing in a few states, where they can still be exempted as “any property” to a whopping $20,000 in Kansas, where cars are apparently particularly important for daily life. Most states protect $2000-$5000, with a few in the $7000-$7500 range. Protection also exists for a wearing apparel and household furnishings, with some states providing unlimited protection, most states imposing an aggregate limit, and many states, like § 522(d)(5), imposing a limit on the value that can be exempted in any single item. Nearly all states provide exemptions for limited amounts of jewelry, aimed primarily at protecting modest wedding rings and engagement rings. Permitting some bankrupt debtors to retain flashy diamonds or fancy Swiss watches, while creditors remain unpaid and less fortunate debtors retain only their modest Cubic Zirconia rings and Timex watches, would detract from the public's perception of the legitimacy of the debt collection and bankruptcy systems.

Undoubtedly influenced by § 522(d)(5), many states provide some sort of “wild-card" exemption, that permits a debtor to exempt his or her interest in “any property." These provisions sometimes mirror § 522(d)(5) in permitting the debtor to expand the amount of the wild-card exemption to utilize any otherwise unused portion of his or her homestead exemption. This type of exemption provides some fairness to renters, who otherwise would receive less
protection than those who purchased and built up some equity in a home prior to falling into financial distress.

Exemptions are also commonly available for various types of retirement assets. ERISA pension plans are protected from creditors’ claims as a result of their federally mandated spendthrift trust provisions. Other retirement assets, such as IRAs are frequently, though not universally exempt under state law.

C. Choice and Opt-out

As described generally above, Bankruptcy Code § 522(b) gives bankrupt debtors a choice between the uniform federal exemption scheme in § 522(d), or the exemptions available under applicable “State or local law.” Debtors who elect their home state's exemptions are also entitled to exempt a limited range of property that is exempt under Federal law other than the bankruptcy code, in both state collection proceedings and bankruptcy cases. However, as explained below, this choice may be denied to debtors whose states have elected, pursuant to Congressional authority, to limit their residents to the state exemption scheme.

What Congress giveth, state legislatures are authorized to taketh away. In most states, the choice provided by § 522(b) is illusory. Debtors' ability to elect the uniform federal exemptions depends on whether their home state has accepted the invitation provided by the Bankruptcy Code and opted-out of the uniform federal exemptions. The federal exemptions in § 522(d) are available “unless the State law that is applicable to the debtor . . . specifically does not so authorize.” 34 states have adopted legislation preventing debtors from electing the § 522(d) exemptions.

Read strictly, § 522(b) does not really authorize states to enact bankruptcy specific
exemptions. Nor does it require the state to adopt any exemption statute at all. Rather, it simply provides that debtors may elect to exempt “[p]roperty . . . that is exempt under . . . State or local law”105 or “[p]roperty . . . specified under subsection [522](d), unless the State that that is applicable to the debtor . . . specifically does not so authorize.”106 This language gives states the authority to prevent debtors from exempting the property scheduled in § 522(d), and leaves them with no choice but to exempt whatever property is exempt under “State or local law that is applicable on the date of the filing of the petition . . . .”107 Applicable state law may provide exemptions that are more generous than are available in § 522(d), less generous than are available under § 522(d), or theoretically may not provide for any exemptions at all.108 Nothing in § 522 authorizes or requires states to adopt an exemption statute.

If a state opts-out, state law exemptions are the only exemptions available to debtors from that state who are in bankruptcy.109 As explained above, the opt-out provision was added as a last-minute compromise between Democrats in the House who favored the uniform set of federal exemptions in § 522(d) and Republicans in the Senate who favored retaining the Bankruptcy Act’s approach of leaving the question of exemptions entirely to the states. 110

There is no serious question that § 522(b)'s opt-out provision is constitutional.111 Early decisions, considering whether the state exemption statutes were required to be at least as generous as the uniform federal exemptions in § 522(d), uniformly held that differences between schedules of exempt property in § 522(d) and state exemption provisions presented no constitutional difficulty. And, the Supreme Court, in Owen v. Owen, expressed the view, in dicta that § 522(b) would countenance a state exemption statute similar to the one described in the
vignette at the outset of this article, in which debtors could exempt nothing at all.\textsuperscript{112} Thus, although it seems clear that states might exempt more property than § 522(d), less property than § 522(d), or no property at all, it remains uncertain whether states may exempt one schedule of property for debtors in bankruptcy cases and another schedule of property for debtors outside of bankruptcy.

Reliance on different state exemption schemes opens the door to possible forum shopping. However, the Bankruptcy Code now goes a long way to restrict these efforts and debtors no longer find it easy to manipulate the state law that will control the state whose exemptions will apply. Section 522(b)(3)(A) now stipulates that the law governing their exemptions is “the place in which the debtor’s domicile has been located for the 730 days\textsuperscript{113} immediately preceding the date of the filing of the [debtor]’s petition.”\textsuperscript{114} If the debtor has not lived in the same state for the two years immediately before her bankruptcy petition, the law of the state where she was domiciled for the six months “immediately preceding the 730-day period or for a longer portion of such 180-day period than in any other place” governs.\textsuperscript{115} Thus, those who have moved to their current state sometime in the last two years will most likely exempt property protected by the exemption statute in their former residence.\textsuperscript{116}

Debtors who move around a lot, and who have neither lived in any one state for the two years before their petition, may find themselves ineligible for any state's exemptions. The 2005 amendments addressed this difficulty by adding language after the end of § 522(b)(3)(C),\textsuperscript{117} permitting debtors who are otherwise ineligible for any states’ exemption statute to take the uniform federal exemptions in § 522(d). This could occur if the otherwise exemption statute
requires debtors to reside in the state to assert the exemptions, or if the exemption statute does not permit debtors to exempt property located outside the state.

Married debtors who own property in the form of a tenancy by the entirety are not subject to these limitations. The domicile rule of § 522(b)(3)(A) is not applicable to § 522(b)(3)(B). That section permits debtors with property held in joint tenancy, or tenancy by the entirety that is protected under state law from the claims of creditors of only one of the joint owners, to protect that property from administration by the bankruptcy trustee.

After § 522(b) was first enacted, married debtors in states that had not “opted-out” sometimes sought to take advantage of differences between their state exemptions and the uniform federal exemptions in § 522(d) by “stacking” them on top of one another. One of them would elect the state exemptions and the other would elect the federal exemptions. Preventing this practice was what originally led California to opt-out and adopt two sets of exemptions, one of which was bankruptcy specific. Congress prohibited the practice in amending § 522(b)(1) to require married debtors filing joint petitions with estates that are to be jointly administered under Bankruptcy Rule 1015(b), to elect the same set of exemptions. If they cannot agree about which slate of exemptions to select, the federal exemptions apply. In rare circumstances, involving joint administration of married debtors who are separated from one another and who have separate assets, each debtor is permitted to make his or her own election of which slate of exemptions will apply. If joint administration of their respective estates is not appropriate, such as where their debts and assets are sufficiently separate, married debtors might also elect different slates of exemptions. Married debtors sometimes seek to sidestep
this limitation by sequentially filing their individual petitions, at different times, so that one
debtor's case is over before the other's has begun.128 This, of course, prevents joint
administration. If detected, one of their creditors might seek to have the earlier of the two cases
reopened129 and have them jointly administered under Rule 1015(b), thus preventing them from
deploying this tactic to stack the two sets of exemptions.

III. Bankruptcy Specific State Exemption Statutes

Several states have gone one step beyond opting out of the federal exemptions. Rather
than merely “opting out” of the federal exemption scheme in § 522(d), these states have adopted
special exemption statutes that apply only in bankruptcy. Although one might suspect that states
inclined to do this would restrict the exemptions that their residents could assert in bankruptcy,
quite the contrary has been true. Most of these bankruptcy-specific exemption statutes
supplement the states general exemption statute by permitting bankrupt debtors to exempt more
property than those who avoid bankruptcy. One state, California, has adopted two completely
separate exemption statutes: one that applies in bankruptcy cases and another that applies in
collection proceedings. Other states have what is essentially a general exemption statute that
applies in both state collection proceedings and bankruptcy cases, but with slight adjustments in
the value of certain categories of property that can be exempted depending on whether the debtor
is in or out of bankruptcy.

The sheer number of cases affected by these statutes is staggering. The number of
consumer bankruptcy cases filed in the states that have adopted these statutes130 totaled over
500,000 cases in 2010, roughly 1/3 of the over 1 ½ million bankruptcy cases filed, that year,131
the overwhelming majority of them consumer cases. What follows is a detailed description of
the bankruptcy specific state exemption statutes involved, and how they differ from the general state exemption statutes debtors may assert in state collection cases.

A. Arkansas

Arkansas’ debtors may choose between the uniform federal exemptions and state exemptions. But, it has enacted additional bankruptcy-specific exemptions that are available only for debtors in bankruptcy. Thus, bankrupt Arkansans enjoy the usual exemptions available in state collection proceedings as supplemented by a more generous set of exemptions that are not available to those whose assets are executed against in state court.

Its general exemption provisions, some of which are contained in the Arkansas State Constitution, protect the usual array of real and personal property. Arkansas distinguishes between “rural” and “urban” homesteads, and protects 160 acres of Arkansas farmland, up to a value of $2500, but protects a minimum of 80 acres of rural property, regardless of its value. Protection for Urban homesteads adheres to a similar pattern, protecting up to 1 acres of land and improvements, worth up to only $2500, but protecting “one-quarter of an acre of land without regard to value.” The Arkansas Constitution also “wearing apparel” without regard to value and up to $200 of an unmarried person's and $500 for a married person or head of a family, in other “personal property.”

In addition to the exemptions supplied by the Arkansas Constitution, Arkansas protects any improvements on public lands that the debtor resides on or cultivates, up to 5 acres of the debtor's interest in family or public graveyards or burial grounds, sixty days worth of wages owed, contributions to the Arkansas Tax-Deferred Tuition Savings Program, workers
compensation benefits, unemployment benefits, life, health, accident and disability insurance proceeds.

In bankruptcy proceedings, Arkansas residents are entitled to an extended list of exemptions, not available in state collection proceedings. These include an additional $800 for unmarried debtors or $1250 for married debtors for any property used as the debtor's residence, or in a burial plot, beyond the homestead exemption contained in the Arkansas Constitution. Bankrupt Arkansans are further entitled to protect an additional $1200 of value in a motor vehicle, their interest in their wedding bands, including any diamond up to \( \frac{1}{2} \) carat in weight, and up to $750 worth in "implements, professional books, or tools", of the debtor's trade or the trade of one of the debtor's dependents.

B. California

California's exemption statutes is the most complicated bankruptcy-specific exemption scheme. Because California who has opted out of the § 522(d) exemptions, California residents may not use the federal exemptions. But, the California Civil Procedure Code permits them to elect between the exemptions in Chapter 4 of title 9 of the Civil Procedure Code, other than those listed in § 703.140(b), and the exemptions listed in § 703.140(b). The alternatives are mutually exclusive. Married debtors who file a joint petition or simultaneous individual petitions must use the same set of exemptions. Like the federal exemptions, the amount of California's exemptions are tied to a fluctuating consumer price index, the "California Consumer Price Index for All Urban Consumers." The amounts change at the same time as the federal exemptions, on April Fools Day, every three years. The last adjustment occurred on April 1,
The first set of exemptions, which are available only to debtors in a bankruptcy proceeding are strikingly similar to the exemptions in Bankruptcy Code § 522(d). They protect $17,425 of a debtor's equity in residential real estate, $2775 in a motor vehicle, $450 in each of the debtor's items of household furnishings, wearing apparel, appliances, books, animals, crops or musical instruments that are held primarily for personal, family, or household use, $1150 in jewelry, and “any property” up to $925 plus any unused portion of the $17,425 residence exemption. They further protect $1750 in tools of the debtor's trade or profession, an unlimited sum of any unmatured life insurance policy, up to $9250 in the loan value of an unmatured life insurance policy, and professionally prescribed health aids, without regard to value. Like § 522(d), it also protects various social security, unemployment, veterans, disability, support, and retirement benefits. Although the amounts are different, the near identity between the categories in § 703.140(b) and those in Bankruptcy Code § 522(d), cannot be ignored. Section 703.140(b) was unquestionably designed to mirror its counterpart in the Bankruptcy Code.

When it was first adopted, § 703.140(b) was adopted to preserve California debtors' ability to chose between the federal exemption scheme in § 522(d) and the California exemptions but at the same time prevent married California debtors from “stacking” their exemptions. “Stacking” occurred when one married debtor elected the federal exemptions and her spouse elected the California exemptions. Through this practice married debtors were at one time able to take advantage of the generous California homestead exemption and simultaneously take
advantage of the more generous personal property exemptions in § 522(d). California prevented this maneuver by opting out of the federal exemptions, but giving its bankrupt debtors a choice between the general California exemption scheme and the bankruptcy specific exemptions in § 703.140(b), without permitting married debtors. 157

A second set of exemptions is available to debtors both bankruptcy proceedings and in collection actions. Those exemptions are in some respects less generous than the exemption bankruptcy specific exemption scheme in § 703.140(b), and in other respects more generous. For example, in a collection proceeding a California debtor may protect only $2300 of equity in a motor vehicle. 158 On the other hand, household goods and furnishings are exempt, without regard to value, if they are “ordinarily and reasonably necessary to, and personally used or procedure for use by” the judgment debtor and his or her family. 159 Jewelry is exempt up to $6075 in value, and unlike the bankruptcy-specific exemptions, § also permits a debtor to exempt heirlooms and works of art up to this amount. 160 The statute also permits exempting up to $2425 worth of “[m]aterial that in good faith is about to be applied to the repair or improvement of a residence.” 161 The general exemption for professionally prescribed health aids is slightly different from the similar provision available only in bankruptcy cases. It protects “[h]ealth aids reasonably necessary to enable the judgment debtor or the spouse or a dependent of the judgment debtor to work or sustain health, and prosthetic and orthopedic appliances.” 162 The exemption that is available only in bankruptcy follows the Bankruptcy Code's language and protects “professionally prescribed health aids” 163 regardless of whether they are “reasonably necessary.” The fact that the general exemption singles out “prosthetic and orthopedic appliance"
creates at least the suggestion that these would not otherwise fit the meaning of a “health aid,” though it is difficult to imagine a bankruptcy court concluding that the debtor could not protect artificial limb from seizure by the bankruptcy trustee, regardless of its characterization.

C. Delaware

The Delaware bankruptcy specific exemption scheme was enacted in 1981, only two years after the current Bankruptcy Code became effective. In enacting the Delaware exemption, the state decided not only opted out of the federal bankruptcy scheme, it created a set of exemptions, which apply not only in bankruptcy, but also in a “state insolvency proceeding,” such as a receivership, or an assignment for benefit of creditors. It has a separate set of exemptions that protect the debtor's assets from judgment creditors in routine collection actions.

The bankruptcy specific exemptions are reasonably generous, though quite different from the exemption scheme in the Bankruptcy Code. With respect to residential real estate, the statute provides a timeline for the allowable exemption in a debtor's home. Debtors may exempt equity in real property or a manufactured home, which is his or her debtor's principal residence, in an amount not to exceed $75,000 in 2010, $100,000 in 2011 and $125,000 in 2012. Delaware exempts personal property, or equity in real property other than the debtor's principal residence up to an aggregate market value of $25,000, without providing a specific list of the types of personal property that may be exempt, or any per-item restriction of the type found in the Bankruptcy Code. The Delaware statute also provides familiar exemptions for a motor vehicle and tools of the trade necessary for purposes of employment in an amount not to exceed $15,000 each. With respect to financial assets, Delaware protects assets held as part of various type
of retirement plans, but provides no other protection for other financial assets.

In some respects the amounts protected or more generous than in the bankruptcy specific exemptions, but in other respects are less generous. It protects the same $15,000 in the value of a car protected by the general exemption statute, contains no “per-item” limit on household goods, furniture, and wearing apparel rather than a $25,000 aggregate limit in the general exemption statute, and protects only $3000 in professional books or tools of the debtor's trade, rather than the $15,000 protected in the general exemption law).

Outside of bankruptcy and other insolvency proceedings, Delaware protects only a limited range of property: “The family Bible, school books and family library, family pictures, a seat or pew in any church or place of public worship, a lot in any burial ground, all the wearing apparel of the debtor and the debtor's family.” Also exempt are $50 or $75 in trade tools (depending on the debtor's county), sewing machines, and curiously, leased pianos. Other personal property is exempt only to the extent of $500, but only for the “head of a family”. Thus, outside of bankruptcy, Delaware protects only limited assets.

D. Georgia

The Georgia bankruptcy specific exemption scheme, dates from 1980, one year after the current Bankruptcy Code went into effect. In enacting Ga. Code § 44-13-100, Georgia not only opted out of the federal bankruptcy scheme, it simultaneously created a set of exemptions, which apply only in bankruptcy. Thus, Georgia has two sets of exemptions. One that applies to debtors in state court collection proceedings, and another that applies in bankruptcy cases. The State has a separate set of exemptions that protect the debtor's assets from judgment creditors outside of bankruptcy proceedings.
The exemptions in collection proceedings are meager. Debtor's may protect only $5000 of real or personal property. This compares with considerably more favorable exemptions in bankruptcy.

The bankruptcy specific exemptions closely resemble the exemption scheme in Bankruptcy Code § 522(d). They exempt up to $10,000 of the debtor's interest in real or personal property used as a residence (or a burial plot), unless it is owned jointly ($20,000). Both exemptions are considerably more generous than the $5000 homestead exemption available against judgment creditors outside of bankruptcy.

Like most exemption statutes, Georgia's bankruptcy specific statute also protects a fairly generous $3500 of the debtor's interest in a motor vehicle, $300 per item of household good and furnishings, wearing apparel, appliances, books, animals, crops and musical instruments, up to an aggregate limit of $5000, only $500 of jewelry, $1500 of tools of the debtor's trade or professional books, and a wild-card exemption for up to $600 of any unused amount of the homestead exemption. As with most other states exemption statutes, professionally prescribed health aids are exempt without regard to value.

Except for the values, which were last changed in 2001, these exemptions closely resemble those in the Bankruptcy Code. In some respects the amounts protected are more generous than in the bankruptcy specific exemptions, but in other respects are less generous. Georgia protects $5000 in the value of a car, $1500 more than the Bankruptcy Code and imposes no "per-item" limit on household goods, furniture, and wearing apparel, (vs. a $300 per item limit), and permits debtors to keep $3000 in professional books or tools of the debtor's trade, rather than only $1500.
With respect to financial assets, Georgia’s bankruptcy exemption statute is quite generous, and, as with other portions of its bankruptcy specific exemption statute, closely follows the exemption scheme in the Bankruptcy Code. It protects the full amount of any “unmeasured” life insurance the debtor owns, without regard to the identity of the insured. However, it does not apply if the debtor is claiming a credit life insurance contract.183

Like § 522(d), it also protects social security benefits, unemployment compensation, public assistance benefits, veterans’ benefits, disability, illness or unemployment benefits, reasonable support or alimony, pension payments, IRAs, crime victim’s reparation law, wrongful death award payments, life insurance payments, personal injury awards up to $10,000, and compensation for lost earnings.184

E. Iowa

Iowa opted-out of the federal exemptions in Bankruptcy Code § 522(d),185 but enacted a general exemption statute that closely resembles the exemptions found there. Exemptions include the usual ones for a debtor’s residence of up to a half-acre lot in the city or forty acres outside of town,186 up to $7000 equity in a motor vehicle187, wearing apparel, household goods and furnishings $7000 in value, with the latter exemption displaying an unusual degree of modernity in expressly extending to “television sets, record or tape playing machines, compact disc players, satellite dishes, cable television equipment, computers, software, printers, digital video disc players, video players, and cameras.”188 Iowa exempts $1000 in jewelry, but up to a $7000 in “wedding or engagement rings.189 It also protects tools of the debtor's trade or business, with separate exemptions for those engaged in the business of farming.190 “one
shotgun, and either one rifle or one musket,191 the debtor's burial plot up to an acre,192 and "libraries, family bibles, portraits, pictures and paintings" worth up to an aggregate value of $1000.193 Like nearly every state,194 it exempts professionally prescribed health aids195 A wide array of financial assets are also protected, including social security, unemployment, and public assistance benefits,196 veterans and disability benefits197, support payments198, and a wide variety of pension and retirement benefits and accounts.199 Except for the generous homestead exemption and dollar amounts for various items, and aside from some of the specific protections for shotguns, rifles, muskets, various types of electronic entertainment gear, and the specific farm equipment exemption, these are all similar to the exemptions in the uniform federal exemption scheme in Bankruptcy Code § 522(f). In bankruptcy proceedings, but not otherwise, Iowa debtors may exempt up to $1000 in both “accrued wages and in state and federal tax refunds as of the date of filing of the petition.”200 This is one of the most limited bankruptcy-specific exemption provisions among those covered by this article, and it has not yet, in a reported decision, drawn the attention of a bankruptcy trustee seeking to have it declared unconstitutional.

F. Maryland

Maryland has opted out, and makes its general state collection exemption statute available to bankrupt debtors, but supplements it with several additional exemptions available only to those in bankruptcy. Its general exemption statute contains no exemption for residential real estate. But, those in bankruptcy may exempt up to whatever amount is protected in the Bankruptcy Code, currently $21,625.201 Maryland provides no exemption for a debtor's motor vehicle, but grants bankrupt debtors a supplemental $5000 exemption in any real or personal property, that
might be used to protect equity they have in one or more vehicles.\textsuperscript{202}

The general exemption statute protects a wide variety of the usual types of personal property including household goods and furnishings, wearing apparel, appliances, books, and tools of a debtor's trade, subject to various limits. These exemptions might also be expanded, to the extent that it has not been used to exempt a car, with the $5000 bankruptcy-specific exemption for any property.\textsuperscript{203}

With respect to financial assets, the Maryland exemptions are very generous and adhere to the pattern found in most other states by protecting proceeds of retirement assets, life insurance policies, annuity contracts or other money payable by a fraternal benefit society.\textsuperscript{204} Depending on the location, Maryland also provides an exemption for certain wages earned. Finally, Maryland protects security benefits, unemployment compensation, public assistance benefits, veterans' benefits, disability, illness or unemployment benefits, reasonable support or alimony, pension payments, IRAs, crime victim's reparation law, wrongful death award payments, life insurance payments, court awards and compensation for lost earnings.\textsuperscript{205}

G. Michigan

Unlike most states that have bankruptcy-specific exemption statutes, Michigan, has not opted out of Bankruptcy Code § 522(d)'s uniform federal exemption scheme. Instead, Michigan residents can choose between the exemption scheme in § 522(d) and the Michigan exemptions. Until 2005, Michigan debtors had been able to use only Michigan's traditional general exemption statute, in § 600.6023 of the Michigan Code. It exempts a comprehensive schedule of property, including family pictures, six months worth of a family's provisions and fuel,\textsuperscript{206} a combination of household goods, furniture, utensils, books and appliances worth up to $1000\textsuperscript{207} a church "
seat, pew, or slip,” “all cemeteries, tombs, and rights of burial while in use as respositories of the
dead of the judgment debtor's family or kept for burial of the judgment debtor, a collection of
“10 sheep, 2 cows, 5 swine, 100 hens, 5 roosters, and a sufficient quantity of hay and grain”
sufficient to keep them for six months, plus any “tools, implements, materials, stock,
apparatus, team, vehicle, motor vehicle, horses, harness, or other things to enable a person to
carry on a profession, trade, occupation, or business . . . “ worth up to $1000. It also protects
“[a]rms and accouterments required by law to be kept by a person.” These historic categories
have been supplemented with exemptions for various types of life, health, casualty, and
disability insurance, shares worth up to $1000 in a state chartered savings and loan
association, and funds in an IRA or other ERISA pension plan. Michigan also
protects 40 acres of a rural “homestead” or a single urban residential lot of apparently any size,
but neither parcel is exempt beyond a meager $3500 in value. Michigan's traditional statute
contains an unusual but sensible provision protecting a deceased debtor's homestead, without
regard to value “during the minority of his or her children.” Thus, a judgment debtor's
children are protected from their parents’ financial difficulties, but only if their parent dies before
the creditors are able to satisfy their judgments from the land. Like most exemptions, it does
not apply to protect the land from foreclosure of a consensual mortgage, making this protection
of somewhat limited utility.

In 2005, Michigan adopted a bankruptcy-specific exemption statute, that was a result of several
years of work by an Advisory Committee appointed by the Michigan House of Representatives
Civil and Judiciary Committee. The Advisory Committee had recommended adjusting the
amounts of property protected by general exemption statute, such as by increasing the homestead exemption to $30,000, and up to $45,000 if the debtor or one of his or her dependents was over 65 years old. However, this step proved politically unacceptable to various creditor interests. Instead, the legislature adopted a new exemption statute that was available only to debtors in bankruptcy.

There has been considerable dispute in Michigan over whether the Michigan Legislature intended that the new schedule would become the “exclusive list” of exemptions available to Michigan debtors who did not elect the federal exemptions in Bankruptcy Code § 522(d).

The extensive overlap between the exemptions in the new bankruptcy-specific exemption provision and the general exemption statute would seem to buttress this conclusion. However, the United States District Court in In re Sassak, ruled that the new statute was not intended to be the “exclusive” exemption statute for bankrupt Michigan residents, but that the new exemptions supplement the traditional schedule of exemptions. Thus, although the question has not been resolved by the Michigan Supreme Court, it now appears that Michiganders can elect the federal exemptions in § 522(d) or those provided under state law in both the general exemption statute in Michigan Code § 600.6023 and in the bankruptcy-specific exemption statute contained in Michigan Code § 600.5451.

Section 600.5451 protects many of the same types of property as are protected by the general Michigan exemption statute, but provided additional protection for assets not addressed by the older law. Although it is difficult to imagine a creditor or a bankruptcy trustee seizing a debtor's wheelchair or prosthesis, the bankruptcy specific statute for the first time protects “professionally prescribed health aids.” It adds an exemption for a debtor's household pets,
It adds coverage for jewelry up to $3000 and adds exemptions for $2775 in a motor vehicle and up to $500 in “1 computer and its accessories.”

At the same time, it contains a few restrictions on the traditional categories, that are bound to cause interpretive problems because of the absence of these limitations in the traditional version of the law in § 600.6023. For example, § 600.6023 exempts “all wearing apparel” while the newer § 600.5451 exempts “wearing apparel, excluding furs.” It imposes a $450 per item and a $3000 aggregate limit on various types of household goods, furniture, books, and appliances that is not found in the general statute, and a $500 limit on a “seat, pew, or slip” in a “house of public worship” that is not found in the general statute’s “church pew” exemption.

Likewise, it imposes a $2000 value limit on the debtor’s “crops, farm animals, and feed . . . .” that is missing from the general exemption for these items, and a $2000 limit on tools of the debtor's trade that is missing from the general exemption.

Like the Bankruptcy Code, and several other state exemption statutes, the dollar values in Michigan's exemption statute are now keyed to the Federal “Consumer price index” and will adjust every three years, to prevent inflation from eating away at the exemptions.

H. Montana

Montana’s exemption statute opt’s out of the uniform federal exemptions, and provides a short supplemental list of assets that are exempt in bankruptcy cases, even though they are not exempt in state collection proceedings. Montana’s general exemption statute protects the same types of property that many other states exempt, including up to $250,000 in equity in residential real estate, a debtor's interest in a motor vehicle up to a value of $2500,
a burial plot, up to $600 per item and $4500 in aggregate value of household furnishings, appliances, jewelry, wearing apparel, books, firearms and other sporting goods, animals, feed, crops, and musical instruments, and up to $3000 in value in any of the debtor's implements, professional books, or tools of his or her trade. Also exempt are professionally prescribed health aids.

Financial assets that are exempt in Montana includes 75% of a debtor's wages, social security benefits, veterans benefits IRA and Roth IRA benefits to the extent of the debtor's “deductible” or “qualified” contributions, medical benefits to be used for “medical, surgical, or hospital care,” support payments, various state pension benefits, certain group life insurance, other unmatured life insurance, disability insurance, unemployment insurance, workers compensation benefits, silicosis benefits, public assistance benefits, crime victim compensation payments, and annuity payments.

Montana's bankruptcy specific exemption statute also protects private retirement benefits that qualify for favorable treatment under various provisions of the Internal Revenue Code, and unemployment benefits that are not otherwise protected by the general exemption statute. Since adoption of this bankruptcy specific exemption provision, Congress has amended § 522(b)(3)(C) of the Bankruptcy Code to make most of the retirement benefits covered by the Montana statute exempt, regardless of whether the debtor elects the state exemption scheme, and regardless of whether the debtor's home state has opted-out of the uniform federal exemptions in § 522(d).
I. New York

New York has opted out of the exemptions in § 522(d).\textsuperscript{257} Rather than simply opting out, New York has implemented a bankruptcy-specific exemption statute that permits New York debtors to exempt the real and personal property that they could protect from their creditors in a state court enforcement action,\textsuperscript{258} supplemented by a list of additional exemptions that are available only in bankruptcy.\textsuperscript{259} The additional bankruptcy exemptions are for up to $2,400 of equity in a motor vehicle and various rights to payment, such as those for social security benefits, unemployment compensation, public assistance benefits, veterans benefits, disability benefits, alimony or support, and certain retirement benefits.\textsuperscript{260}

To some extent, these additional bankruptcy specific exemptions emulate portions of § 522(d) that are not otherwise replicated in the New York exemption statute. These additional exemptions mitigate the effect of what otherwise might be viewed as an archaic exemption statute, which retains vestiges of exemption statutes prevalent in the late 19th and early 20th century: a stove and sixty-days worth of fuel, a sewing machine, a church pew, the family bible, and “necessary food for the team [of horses?]” for sixty days.\textsuperscript{261}

New York’s traditional exemption statute provides no protection for a wide variety assets that are viewed as a customary part of daily life. New York exemption statute, for example, provides no exemption for motor vehicles. While living without a car might be suitable, and indeed preferred, for those who live in New York City, it is impractical for those who live outside the city.

New York’s statute precludes its bankrupt residents from claiming a few exemptions that they would be entitled to in state collection proceeding. New York limits imposes a $10,000 limit on
the exempt amount of the aggregate value of otherwise exempt items of tangible personal property (wearing apparel, household goods, tools of the trade, etc.) and certain insurance policies and annuity contracts, even though this limit would not apply if the debtor, instead of filing a bankruptcy petition, had simply asserted her exemptions in a state collection proceeding. 262

At the same time, New York permits bankrupt debtors, but no others, who have not claimed a real estate exemption, and who have not used up the additional $5000 personal property and annuities exemption, to protect up to $2500 in cash, so long as the aggregate amount of exempt personal property, annuities, and cash, does not exceed the $5000 limit. One wonders how many bankrupt debtors have an extra $2500 of cash, that they have not paid to their bankruptcy lawyer or otherwise spent on rent and groceries, but, the New York legislature apparently believed that this would provide some fairness for bankrupt New York debtors who lacked equity in a home. 263

J. Ohio

Ohio's exemption statute was revised in 2009. It's general exemption scheme protects property from “execution, garnishment, attachment, or sale to satisfy a judgment or order . . .” 264 It is patterned after Bankruptcy Code § 522(d), and thus protects many of the same categories of property protected in bankruptcy. Thus, it protects up to $20,200 of a debtor's equity in a residence, up to $3,225 in a motor vehicle, and up to $525 per item and $10,775 aggregate in “wearing apparel, appliances, books, animals, crops, musical instruments, firearms, and hunting and fishing equipment that are held primarily for the [debtor's] personal, family, or household use . . ..” 265 Ohio also protects $1350 worth of jewelry, 266 and $2025 in “implements, professional books, or tools of the person's profession, trade, or business, including agriculture.” 267 Ohio also
protects the usual collection of support benefits, welfare payments, unemployment compensation, and retirement assets that most states protect,\textsuperscript{268} as well as funds held in an Ohio tuition savings account.  \textsuperscript{269}

Ohio has opted out of the § 522(d) exemptions,\textsuperscript{270} but all of these same assets are also protected in bankruptcy cases. Ohio's only “bankruptcy specific” exemption protects the debtor's “aggregate interest in any property, not to exceed one thousand seventy-five dollars.” The genesis of Ohio's bankruptcy specific exemption seems to be rooted in an effort to emulate the Bankruptcy Code's wild-card provision.\textsuperscript{271}

K. West Virginia

The West Virginia bankruptcy specific exemption scheme, dates from 1981, two years after the current Bankruptcy Code became effective. In enacting West Virginia Code § 38-10-4, West Virginia not only opted out of the federal bankruptcy scheme,\textsuperscript{272} it created a set of exemptions, that apply only in bankruptcy.\textsuperscript{273} It has a separate set of exemptions that protect the debtor's assets from judgment creditors.\textsuperscript{274}

The bankruptcy specific exemptions closely resemble the exemption scheme in Bankruptcy Code § 522(d). They exempt up to $25,000 of the debtor's interest in real or personal property used as a residence (or a burial plot).\textsuperscript{275} It provides additional protection for residential real estate (and maybe also burial plots), up to $250,000 in value, for bankrupt physicians who have commenced their bankruptcy case in part due to a “medical professional liability action” but only if the doctor has professional liability insurance for at least $1 million per occurrence.\textsuperscript{276} Both exemptions are considerably more generous than the $5000 homestead exemption available against judgment
creditors outside of bankruptcy.\textsuperscript{277}

Like most exemption statutes, West Virginia's bankruptcy specific statute also protects the debtor's interest in up to $2400 in a motor vehicle, $400 per item of household good and furnishings, wearing apparel, appliances, books, animals, crops and musical instruments, up to an $8000 aggregate limit), $1000 of jewelry, up to $1500 in tools of the debtor's trade or professional books,\textsuperscript{278} and a wild-card exemption for up to $800 of any unused amount of the homestead exemption.\textsuperscript{279} Consistent with the pattern in most states, professionally prescribed health aids are exempt without regard to value.\textsuperscript{280} Except for the values, these exemptions closely resemble those in the Bankruptcy Code. In some respects the amounts protected are more generous than in the state's general exemption statute, but in other respects are less generous..

With respect to financial assets, West Virginia's bankruptcy exemption statute is quite generous, and, as with other portions of its bankruptcy specific exemption statute, closely follows the exemption scheme in the Bankruptcy Code. It protects the full amount of any "unmeasured" life insurance the debtor owns, without regard to the identity of the insured\textsuperscript{281} and up to $8000 in accrued dividends or interest, or loan value of unmeasured life insurance contracts owned by the debtor under which the debtor or one of the debtor's dependent's is the insured.\textsuperscript{282}

Like § 522(d), it also protects social security benefits, unemployment compensation, public assistance benefits, veterans benefits, disability, illness or unemployment benefits, reasonable support or alimony, pension payments, IRAs, SEPs, crime victim reparation payments, wrongful death award payments, life insurance payments, personal injury awards up to $15,000, compensation for lost earnings, and certain prepaid tuition accounts.\textsuperscript{283}
None of these exemptions are available in West Virginia collection cases. In those proceedings, judgment debtors may protect funds on deposit in an FDIC insured account up to either $1000 or 125% of the amount of the “annualized federal poverty level of such individual's household divided by the number of pay periods for such individual per year,” IRA and SEP accounts. However, the debtor's total exemptions, for all types of personal property other than IRA and SEP accounts, may not exceed $15,000.

Thus, West Virginia's bankruptcy exemption statute is, in nearly every respect, far more generous toward debtors than its general exemption statute. However, it should be noted that it remains unclear whether the bankruptcy specific exemptions are intended to supplement the general exemptions, or to supplant them.

IV. Policies & Purposes of Exemptions

Exemption statutes operate together with the Bankruptcy Code's discharge provisions, to provide debtors in bankruptcy with a “fresh start.” Exemptions protect debtors from the worst consequences of financial distress. Nearly universal exemptions for wearing apparel, cooking equipment, appliances, bedding, and modest amounts of other household goods and furnishings make the proverbial cartoon of a bankrupt debtor, clothed only in a barrel, an archaic fiction. In this respect, exemptions ensure that debtors retain what they need to survive. This rationale also explains modern exemptions for limited amounts of cash and bank accounts. It also explains modern exemptions for various types of retirement assets, workers compensation benefits, personal injury awards, support, and, of course, wages. It might help explain limited homestead exemptions. Exemptions also enhance debtors’ ability to get back on their financial feet, and resume
economically productive activity, by allowing them to retain assets that are key to self-
sustenance in modern society: a car to use to travel to work and tools necessary to the debtor's job or trade. Exemptions such as those for life insurance policies, annuities, and other similar assets provide a further measure of protection for debtors' families.

Most exemption statutes explicitly extend exemptions to protect residential and other key assets that are used primarily by the debtor's dependents, even if the debtor makes no use of them. Likewise, exemptions such as these guard against the debtor's need for social assistance, either currently, as in the case of exemptions for wages, social security benefits, support payments and other streams of income, or in the future, as reflected in exemptions for various types of insurance, retirement accounts, and social security benefits.

Exemptions are also economically efficient. Protection for many basic household items, tools, motor vehicles and other common items, guard against the risk that the utility of these assets will be sacrificed in favor of creditors, who are likely to receive far less value for them when they are sold than the debtor would retain from their retention. The replacement cost of many of these items is likely to be far higher than any marginal value that would be paid to creditors if they were seized and sold. In more technical terms, if this type of property were surrendered, debtors would bear the cost of the difference between the significantly depreciated market value of the items and the higher value of their future consumption. As Professor Jackson explains: “assets relinquished by the debtor in order to obtain discharge may be more valuable to him than they are to his creditors.”

Exemptions also sidestep the externalities caused by debtors' failure to accurately evaluate the future value of these assets when they apply for credit. This of course explains why non-
purchase money security interests in some types of property, primarily household goods, clothing, and tools of the debtor's trade are avoidable by bankrupt debtors, at least to the extent that they impair his or her exemptions, 522(f), and why the Federal Trade Commission has adopted a rule prohibiting many such security interests in the first place. 297 Rather than encumbering these assets, the debtor could, of course, sell them. 298 But, debtors who sell their assets are more likely to have a clear comprehension of what like may be like without them, than those who merely encumber them with a lien. 299

Despite these policies, exemptions are sometimes criticized. Without regular amendment, they easily become anachronistic. Statutes, like the one that still prevails in collection proceedings in Michigan today, that protected a specified number of horses, cows, chickens, and pigs, together perhaps with a specified number of cords of wood, 300 might have been perfectly suitable for nineteenth century agrarian society, but are little more than quaint relics today. 301 Even if the categories of exempt property remain well suited to modern lifestyle – will “household goods," “furniture," and “wearing apparel" ever go out of style? – the utility of the exemptions can become eroded by inflation if dollar limits on the amount of the exemptions are not regularly amended. Some jurisdictions have followed the example set by the bankruptcy code, 302 and provided for periodic adjustment of these limits based on the Department of Labor's “Consumer Price Index." 303

While most state exemption statutes modernized the categories of exempt assets in ways that reflect modern lifestyles, this criticism remains valid with respect to dollar value limits in state exemption schemes that have not been adjusted to keep pace with inflation. Forward looking
states have guarded against the inevitable effect of inflation by building in “cost of living” adjustments that automatically increase the dollar limits on a periodic basis, that are usually indexed to the Department of Labor's “consumer price index.”

Bankruptcy specific exemption schemes that are more generous than exemption statutes that apply in collection proceedings might encourage financially troubled debtors to seek relief from their debts in bankruptcy. It has been suggested that they might discourage creditors from filing involuntary petitions. Neither suggestion seems plausible. The available evidence suggests that individual debtors seek bankruptcy protection for to obtain the benefit of the automatic stay and to discharge their debts generally, rather than to take advantage of differences between bankruptcy a state’s bankruptcy specific exemption and its generally applicable set of exemptions. The most important feature of bankruptcy is the discharge that protects the debtor’s post-bankruptcy earnings out of reach of creditors. Without the ability to obtain a judgment against the debtor, these earnings are protected against future wage garnishment actions.

V. Preemption of State Exemption Statutes

A. Basic Preemption Doctrine

State and federal powers overlap to an extensive degree, with only a few governmental powers reserved exclusively to Congress. Thus, nearly all federal legislation has some impact on state law. Article VI, clause 2 of the United States Constitution – the Supremacy Clause – provides that the “Constitution and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” The Supremacy Clause invalidates state statutes if they are inconsistent with, or contrary to, the purposes or objectives of federal law. As
the Court explained in *Perez v. Campbell*,309 “[S]tate legislation which frustrates the full
effectiveness of federal law is rendered invalid by the Supremacy Clause.”310 Basic preemption
document recognizes three principal ways in which a state statute can be preempted: express
preemption, implied “field” preemption, and implied conflict preemption.311 The Supreme Court
summarized these three mechanisms for preemption in *Gade v. National Solid Waste*

*Management Association*:312

Pre-emption may be either expressed or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, and conflict pre-emption, where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.313

In determining whether a state statute is pre-empted, Supreme Court decisions frequently indicate that there is a presumption against preemption.314 Although some scholars have criticized the presumption,315 it is frequently invoked by the Court in analyzing preemption issues,316 with a heritage extending back over nearly one hundred years,317 though some Justices have recently questioned the scope of the presumption.

This presumption is in keeping with the more general presumption in favor of the
constitutionality of state legislation. The Supreme Court has long expressed its preference for finding state statutes constitution, where it is possible to do so. It has indicated that “every reasonable presumption must be indulged in favor of the validity of such enactment.” 318

The Court's 2009 decision in Wyeth v. Levine 319 illustrates the presumption against preemption. The action against pharmaceutical manufacturer Wyeth was based on its alleged failure to provide an adequate warning of risks associated with the use of an antinausea medication. The Court emphasized the presumption against preemption, referring to it as one of “two cornerstones of our pre-emption jurisprudence” and rejected the claim that the Federal Drug Administration's drug approval process, which included approval of the drug's label, preempted the state law claim. Justice Stevens, quoting cases going back to 1947, explained: “[i]n all pre-emption cases, and particularly in those in which Congress has ‘legislated ... in a field which the States have traditionally occupied, ... we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.’” 320 Justice Stevens further explained that the presumption is based, not on a historic absence of federal regulation in a field, “but upon historic presence of state law.” 321

In another of the Court's 2009 decisions, Altria Group Inc. v. Good, 322 cigarette smokers successfully pursued claims under the Maine Unfair Trade Practices Act, claiming that cigarette manufacturer's advertising of their products was fraudulent. The Supreme Court rejected the manufacturer's claim that the Federal Cigarette Labelling and Advertising Act and the FTC's efforts to enforce the Act preempted actions under the state statute. Writing for the Court, Justice Stevens again invoked the presumption against preemption, even though the Federal act
specifically provided for preemption of state claims by indicating that “when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily ‘accept the reading that disfavors pre-emption.”\(^3\)

1. Express Preemption

Congress may expressly declare its intent to preempt a state statute.\(^4\) Thus, if Congress, pursuant to its power to regulate interstate commerce\(^5\) has expressly prohibited states from regulations the commercial activity involved, state regulations are pre-empted, and void.\(^6\) Express preemption occurs when Congress unmistakably indicates that the federal statute displaces what would otherwise be applicable state laws.\(^7\) This usually involves examining whether the plain meaning of the federal statutory language demonstrates Congress' intent to displace any existing state law. As the Court explained in \textit{CSX Transportation, Inc. v. Easterwood},\(^8\) ‘[i]f the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.’\(^9\)

Examples of express pre-emption abound. A widely recognized example is in the Federal Employee Retirement Income Security Act of 1974. It expressly provides that its provisions “supersede any and all State laws insofar as they may now or hereafter related to any employee benefit plan.”\(^10\) The Copyright Act, likewise, expressly preempts state law,\(^11\) as does the Commercial Space Launch Act,\(^12\) and the Medical Device Amendments of 1976.\(^13\) Other examples abound.

Of course, there are sometimes questions about the scope of the express preemption. In
Cippollone v. Liggett Group, Inc., for example, the Court decided that the Federal Cigarette Labeling and Advertising Act\(^{334}\) expressly preempted state tobacco liability suits, based on the manufacturer's failure to warn, but did not otherwise preempt state damage actions.\(^{335}\) On the other hand, the Food and Drug Act is commonly cited as an example of a federal statute that expressly preempts state law, but which left the scope of the intended preemption uncertain.\(^{336}\) As the Court explained in *Medtronic, Inc. v. Lohr*,\(^{337}\) involving a similar issue with respect to federal regulation of medical devices,\(^{338}\) it is frequently necessary to “identify the domain expressly preempted,” by the statutory language, framework, and history.\(^{339}\)

2. Impressed “Field Preemption”

Second, a state statute may be impliedly preempted when Congress has legislated comprehensively in a way that “occupies the field”\(^{340}\) and leaves no room for additional state regulation.\(^{341}\) Thus, preemption may occur even when there is no direct conflict between federal and state law. Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be inferred because “[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it . . . [or] because “the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose.”\(^{342}\) Thus, where the federal regulatory scheme pervasively deals with behavior that is also regulated by state law, the Court infers that Congress intended to regulate that behavior completely, with no room remaining for state involvement. When Congress occupies a field, state laws that appear to complement the federal regulatory scheme or fill gaps left untouched by federal regulation, are preempted. Congress has effectively cordoned
off the field and left no room for state intervention.\textsuperscript{343} 

A clear example is supplied in \textit{Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission},\textsuperscript{344} where Supreme Court determined that except with respect to limited powers that were expressly ceded back to the states that “the federal government has occupied the entire field of nuclear safety concerns . . . .”\textsuperscript{345} except the limited powers expressly ceded to the states. When the federal government completely occupies a given field or an identifiable portion of it, as it has done here, the test of preemption is whether ‘the matter on which the state asserts the right to act is in any way regulated by the federal government’.”\textsuperscript{346} This theory of implied “field preemption” is not without its critics. Legal scholars have long criticized the doctrine both for its chaotic structure and for its muddy application.\textsuperscript{347} Justice Clarence Thomas has been critical of the doctrine as not sufficiently based on clear expression of Congressional intent,\textsuperscript{348} and the Court has sometimes announced a general reluctance to apply the doctrine in the absence of some express statement of legislative intent. For example, in \textit{Hillsborough County, Florida v. Automated Medical Laboratories, Inc.},\textsuperscript{349} Justice Marshall explained that comprehensive and detailed federal regulation of an area should not be taken as an expression of federal intent to occupy an entire field, in the absence of some express indication of Congress's intent to do so. His opinion explained that “[a]s a result of their specialized functions, agencies normally deal with problems in far more detail than does Congress. To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy
Clause jurisprudence. He further explained that “state and local regulation related to matters of health and safety can normally coexist with federal regulations” and thus that the court would only “seldom infer, solely from the comprehensiveness of federal regulations, an intent to pre-empt in its entirety a field related to health and safety.”

Justice Thomas’s dissent in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, echoed this attitude, noting that the Court’s “recent cases have frequently rejected field pre-emption in the absence of statutory language expressly requiring it.” Similar expressions of the Court’s reluctance to infer preemption through extensive and complex regulation are found elsewhere in the Court’s preemption jurisprudence.

With respect to bankruptcy laws generally, there is little doubt but that Congress has occupied the field. The Court’s early decision in *Sturges v. Crowninshield*, made it clear that state bankruptcy statutes, like ones that had existed in New York and Pennsylvania, were “suspended” by very existence of the Bankruptcy Act of 1800. In 1827, in *Ogden v. Saunders*, the Court determined that states could not discharge debts owed to a citizen of another state, though they could enact legislation discharging debts incurred to their own citizens after the state statute was passed. This, however, was in the absence of a national bankruptcy law.

Later, in 1929, the Supreme Court struck down an Arkansas statute that set up an alternative system for distributing an insolvent debtor’s assets and for granting the debtor a discharge. *International Shoe Co v. Pinkus* held that this type of state statute established “intolerable inconsistencies” with the United States Bankruptcy Act, which had been in effect since 1898. The Court explained that in enacting the Bankruptcy Act, “Congress did not intend to give
insolvent debtors seeking discharge, or their creditors seeking to collect claims, [a] choice between the relief provided by the Bankruptcy Act and that specified in state insolvency laws. States may not pass or enforce laws to interfere with or complement the Bankruptcy Act or to provide additional or auxiliary regulations."^{360} According to the Court, the Arkansas statute was “within the field entered by Congress when it passed the Bankruptcy Act.”^{361}

But, of course, this does not address the more specific question of whether specific provisions of the Bankruptcy Code preempt similar state laws, or the precise question involved here, of whether the Bankruptcy Code preempts bankruptcy specific state exemption statutes.

3. Actual Conflict with Federal Law

Finally, state law is preempted when it actually conflicts with federal law. Courts recognize that federal law might conflict with and thus preempt state law in two ways.^{362} The most obvious type of conflict preemption occurs when a federal statute or regulation directly contradicts state law in a way that makes compliance with both laws impossible.^{363} Widely cited examples include the Federal maple syrup labeling statute involved in *McDermott v. Wisconsin*,^{364} and federal exemption statutes prohibiting creditors from seizing various types of federal retirement benefits in *Hisquierdo v. Hisquierdo*,^{365} and *McCarty v. McCarty*.^{366} Even where it would not be impossible for a part to comply with both state and federal law, an actual conflict exists where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”^{367}

An example of conflict preemption taken from the history of American Bankruptcy law, that might easily be viewed as either impossibility preemption or obstacle preemption, is found in
Despite the specification in the Bankruptcy Act, that debtor's could not receive a discharge from their debts more than once every six years, a state statute granted residents of the state the opportunity to obtain earlier relief. The Court found that there were “intolerable inconsistencies” between the provision in the Bankruptcy Act that prevented a discharge more than once every six years and the state statute involved.

Cases involving direct actual conflict are easy to resolve. More problematical are cases involving a state statute that impedes the achievement of the objectives of a federal statute or regulation. It should be obvious that the mere fact that state and federal standards are different, does not mean that they are in conflict. Federal law may impose a floor and leave states free to impose more exacting standards. The difficulty in many cases is in determining whether an established federal standard was intended to apply uniformly throughout the country, with no permissible deviations, or whether Congress intended to leave states free to impose a more burdensome regulatory standard.

An example of a federal rule that is clearly intended to operate as a floor, is found in the Consumer Credit Protection Act's limitations on wage garnishment. The federal statute generally prohibits states from allowing more than 25% of a debtor's take-home pay from being garnished to satisfy a non-support creditor's claim. More is permitted to be garnished to satisfy unpaid child and spousal support. However, states are free to impose higher restrictions on the amount that may be garnished, and some states do not permit any wage garnishments, other than for support.

A more difficult case involving a possible actual conflict with the Bankruptcy Code is
found in the Ninth Circuit’s 2005 decision in *Sherwood Partners, Inc. v. Lycos, Inc.* It dealt with where a California statute permitting an assignee for the benefit of creditors to recover a preferential transfer to a creditor was preempted by the Bankruptcy Code. The question was whether the state statute could “peaceably coexist” with the Bankruptcy Code. The court believed that this analysis required it to determine the essential goals and purposes of federal bankruptcy law, and then to decide whether the state statute was consistent with those goals. The Ninth Circuit determined that the state statute interfered with the bankruptcy code's system for “equitable distribution through a distinctive form of collective proceeding.” The court emphasized that permitting recovery of the transfer, and then distributing the recovered sum to creditors according to the state scheme for distributing assets in an “assignment for benefit of creditors” would frustrate the purposes of the Bankruptcy Code's system.

Another example of in bankruptcy law, of a state statute that interferes with the purposes of a federal statute is found in *Perez v. Campbell,* and other state statutes that attach adverse consequences to obtaining a bankruptcy discharge. In *Perez,* an Arizona highway safety statute authorized the suspension of the driver's license and vehicle registration of drivers who failed to pay judgments against them that arose as a result of their negligent operation of a motor vehicle. After Mr. Perez's Chapter 7 discharge, the state suspended his driver's license. The Supreme Court determined that the state statute impaired operation of the Bankruptcy Code's fresh start policy, which permits discharge of tort judgments involving simple negligence.

Thus, even though our nation's bankruptcy system depends on state law to a very large degree, some of its aspects conflict with the Bankruptcy Code. As the Ninth Circuit's decision in
and the Supreme Court's decision in Perez indicate, whether bankruptcy specific state exemption statutes are preempted depends on the purposes and goals of the Bankruptcy Code and how these bankruptcy specific state exemption schemes may facilitate or frustrate those goals.

B. Preemption of Bankruptcy Exemptions

This background provides the framework for examining the relationship between the Bankruptcy Code's exemption provisions and state bankruptcy specific exemption provisions to determine whether the latter are preempted. As will be seen, there is no express preemption of state bankruptcy exemption provisions, or can it be said that Congress has “occupied the field” of bankruptcy exemptions. However, a careful examination of the history and purposes of Bankruptcy § 522 demonstrates that Congress intended for bankrupt debtors to receive either the benefits of the uniform federal exemptions or those of the state's general exemption statute, and not to permit states to discriminate between bankrupt debtors and others in enacting state exemption statutes that would operate pursuant to § 522(b). This result is consistent with the conclusion that other scholars have drawn regarding Congress's intent to treat the bankruptcy state on a par with the role of a judicial lien creditor of the debtor. 383

1. No Express Preemption of Bankruptcy Specific Exemptions

Section 522(b) makes it clear that Congress has not expressly preempted state exemption statutes in bankruptcy. Quite to the contrary, § 522(b)(2) delegates considerable authority to the states over bankruptcy exemptions. As explained above, for over eighty years the Bankruptcy Act delegated authority to state legislatures to establish exemptions used in bankruptcy. The constitutionality of this delegation has never been seriously questioned. In its 1991 decision in Owen v. Owen, which dealt with preemption of § 522(f)'s avoiding power, the Supreme Court indicated in dicta that "[n]othing in subsection (b) (or elsewhere in the Code) limits a state's
power to restrict the scope of its exemptions; indeed, it could theoretically accord no exemptions at all. 384 Other courts, that have addressed the issue directly, have consistently ruled that this delegation is constitutionally valid. 385

The Bankruptcy Reform Act of 1979 buttressed this delegation by permitting states to opt out of the Bankruptcy Code's uniform exemptions and leaving debtors in states that accepted this invitation, with no alternative but to use their home state's exemption statute. Congress impliedly, and some might say expressly authorized states to create exemption statutes that can be used in bankruptcy cases. Thus, although serious questions exist about the extent of Congress's delegation, nothing in the text of § 522(b) or elsewhere in the Bankruptcy Code can be taken as an express preemption of exemption laws generally or bankruptcy exemptions in particular. For example, if the state exemption law provides that the exemption is ineffective as against an international tort claim, that state exemption law conflicts with section 522(c) of the Bankruptcy Code. Section 522(c) provides that exemptions are effective against all claims, including many nondischargeable claims, and the Bankruptcy Code preempts contrary state law. In re Scott, Elsewhere, Congress has adopted a few federal exemptions, applicable in bankruptcy and otherwise. The most important such express preemption exists with respect to wage garnishments.

The Federal Consumer Credit Protection Act expressly prohibits wage garnishment of more than 25% of an individuals disposable earnings. 386 Somewhat more can be garnished in favor of a creditor seeking to recover “support.” 387 “Disposable earnings” are “that part of earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld.” 388 States are permitted to protect more earnings, but the
Consumer Credit Protection Act establishes an express minimum that states must exempt from wage garnishment.\textsuperscript{389}

Other federal statutes impose other mandatory exemptions, both in and out of bankruptcy. In bankruptcy proceedings, the Bankruptcy Code specifically exempts “retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code,”\textsuperscript{390} regardless of whether the debtor's state has opted out of the uniform federal exemptions.\textsuperscript{391} Bankruptcy Code § 522(b)(3)(C) expressly exempts state exemption laws, in bankruptcy cases by expressly providing for these retirement funds to be exempt.\textsuperscript{392}

The Bankruptcy Code has also expressly preempted state exemption law by placing a few express limits on some of the most generous state exemptions. Section 522(n), added in 2005, prevents a debtor from asserting an exemption in more than $1 million in an Individual Retirement Account (IRA), but allows this ceiling to be raised by the court “if the interests of justice so require.” The Bankruptcy Code also prevents debtors from exempting a residence or burial plot that the debtor acquired any time during the ten years before his petition through the conversion of non-exempt property “with the intent to hinder, delay, or defraud a creditor.”\textsuperscript{393} This limits the ability of debtors in states like Texas and Florida, which have extraordinarily generous exemptions for residential real estate, from protecting otherwise non-exempt assets by using them to purchase an exempt residence in those states.\textsuperscript{394}

The Bankruptcy Code also expressly prohibits married debtors in states that have not opted out, from “stacking” their exemptions by having one spouse elect the state exemptions and the other spouse elect the federal uniform exemptions in § 522(d). Married debtors who have a
choice between the state and federal exemptions are expressly required to make the same choice.

Other federal law, outside the bankruptcy code, expressly exempts a long laundry list of federal benefits. These federal exemptions are available to debtors both in and outside of bankruptcy. They are exempt in bankruptcy regardless of whether the debtor's state has opted out of the uniform federal bankruptcy exemptions in § 522(d).

A similar example of express preemption of exemptions, outside of bankruptcy, is found in the Internal Revenue Code. Section 6334 exempts a very limited range of personal assets, and makes it clear that these are the only exemptions available to individuals in tax collection proceedings.

Thus, Congress has expressly preempted state exemption law in only a few respects, by establishing a few federal exemptions for a limited categories of federal benefits and for specified types of retirement plans, and by imposing limits on unusually generous state exemptions.

2. Federal Occupation of the Exemption Field

Although Congress has only expressly preempted bankruptcy specific state exemption statutes, it has gone a long way toward occupying the field of bankruptcy. Before adoption of the Bankruptcy Act of 1898, during periods when there was no federal bankruptcy law in effect, some states enacted their own bankruptcy statutes, and the Supreme Court ratified the validity of these statutes, removing any doubt about whether the bankruptcy clause of the Constitution itself preempted states from adopting their own bankruptcy laws. But, since the adoption of the Bankruptcy Act of 1898, the predecessor of the current Bankruptcy Code, the nation has not been
without a comprehensive bankruptcy statute.

The Bankruptcy Code is pervasive in much the same way as the Copyright Act, The Patent Act, the Immigration Act,402 and other federal statutes occupying fields specifically designated in Article I, Section 8 of the Constitution as within the scope of Congressional prerogative. The Bankruptcy Clause, which establishes Congressional authority to enact laws dealing with bankruptcy,403 requires that such laws must “uniform.” The Bankruptcy Code occupies an entire title of the United States Code and provides “a comprehensive system of rights, obligations and procedures”404 dealing with bankruptcy. It is accompanied by its own court system, and is administered by its own set of bankruptcy judges,405 procedures,406 clerks of courts, case trustees, and administrative agency in the form of the Office of the United States Trustee.407

Nevertheless, many state statutes deal with some features of bankruptcy law. Most states have state receivership statutes that authorize court-supervised equitable or statutory receiverships to administer the assets of insolvent debtors located within the state.408 Likewise, assignments for the benefit of creditors are sometimes used to divide up the assets of insolvent debtors.409

Many provisions of the Bankruptcy Code expressly or impliedly defer to state law.410 Bankruptcy law necessarily depends on state law to determine the validity of creditors’ claims as well as the nature and extent of a debtor’s property.411 Likewise, it depends on state law to determine the existence, scope, and perfection, of creditors’ liens,412 and empowers bankruptcy trustees to take advantage of state law, when possible, to set aside any pre-bankruptcy transfer
that state law would permit another creditor to avoid.413

The Code's reliance on state law was recognized in *Butner v. United States*.414 *Butner* involved a competition between a bankruptcy trustee and a mortgage lender for rents collected by the debtor between the time of the debtor's bankruptcy petition and the time the lender was permitted to foreclose. In reaching the conclusion that the lender's interest prevailed, the Court recognized that property interests were creatures of state law, and that the lender's property interest would yield to the trustee's claim, unless this conflicted with a specific provision of the bankruptcy code. The Court held that “the federal bankruptcy court should take whatever steps are necessary to ensure that the mortgagee is afforded in federal bankruptcy court the same protection he would have under state law if no bankruptcy had ensued.” 415

Thus, it is clear that Congress has not come close to occupying the field of state laws that might have an impact on bankruptcy cases. Despite this, Congress may still have occupied the field of bankruptcy exemptions, though in a limited way. The real question is whether Congress's scheme for bankruptcy exemptions presents an actual conflict, not with state exemption statutes, but with state exemption statutes that apply only in bankruptcy cases.

3. Actual Conflict with State Bankruptcy Specific Exemptions

Whether bankruptcy specific state exemption provisions actually conflict with the Bankruptcy Code, depends on the legislative purpose of the bankruptcy exemption scheme. As explained above, a federal statute preempts state law if it is impossible to comply with both state and federal law, or if the state law “obstruct[s] the basic objectives of the federal law” in question - the Bankruptcy Code.

Section 522(c) provides a limited example of an actual conflict with some state exemption
provisions. It provides that “property exempted under [§ 522] is not liable during or after the [debtor's bankruptcy] case for any debt of the debtor that arose . . . before the commencement of the case . . . .” This language preempts the effect in bankruptcy of state statutes that make property exempt only for some debts. The Virginia exemption statute applicable in In re Scott, purported not to apply to debts that were incurred for intentional torts. The court ruled that the Virginia statute was preempted “because Congress, acting in an area where it has paramount jurisdiction, has specifically legislated as to the type of claims that can be enforced against exempt property.”

Section 522(c) similarly preempted a Massachusetts Homestead Act provision that subject the debtor's residence to judicial liens for debts incurred before the exemption was adopted. In In re Weinstein, the First Circuit found that this directly contradicted the language in § 522(c) that makes property designated as exempt in bankruptcy invulnerable to “any debt of the debtor that arose . . . before commencement of the [bankruptcy] case . . . .” Because § 522(c) preempted limits on the availability of the exemption, the debtor was able to invoke Bankruptcy Code § 522(f) to avoid a judicial lien on his residence, to the extent that it impaired his exemption. The court explained that while both the Massachusetts statute and the Bankruptcy Code “limit the debts for which exempt property remains liable, the Massachusetts exceptions protect debts left unprotected by § 522(c).” Accordingly, the Massachusetts statute presented an actual conflict with § 522(c), which the court characterized as “devoid of ambiguity.” The reference to “any debt” thus has the preemptive effect of expanding the scope of a state exemption statute.
Bankruptcy courts and Bankruptcy Appellate Panels that have addressed the preemption of bankruptcy-specific exemption statutes have drawn differing conclusions. Some courts have regarded the delegation to state legislatures in § 522(b) as seemingly boundless, while other states have viewed them as more limiting and have regarded bankruptcy specific exemption provisions as in conflict with the purpose of the Bankruptcy Code's exemption scheme.

The decision in Sheehan v. Peveich, is the most influential among decisions that have rejected the claim that bankruptcy-specific state exemption statutes are preempted. In Sheehan, the Fourth Circuit gave short shrift to the contention that West Virginia's bankruptcy-specific exemption statute was preempted. The court recognized the three ways in which federal law might preempt state legislation, through express preemption, by occupying the field, or through an actual conflict. But, it viewed § 522(b) as having expressly authorized states to “preempt' the federal legislation in question, in this case, the Bankruptcy Code. The court in Sheehan did not doubt that Congress could require state exemption statutes to “apply equally to bankruptcy and non-bankruptcy cases" but would not impose that requirement in the absence of a such a restriction on their freedom.

In reaching this conclusion, the court regarded the question of whether a bankruptcy-specific exemption statute was preempted as no different than the question of whether a state exemption scheme was unconstitutional merely because it was less generous than the uniform federal exemptions in § 522(d). That question had been resolved without dissent by several Court of Appeals decisions in the early 1980's such as In re Sullivan, Rhodes v. Stewart, and In re McManus. Quoting Rhodes, the court explained: “There can be no preemption . . . where Congress 'expressly and concurrently authorizes' state legislation on the subject. . . . ‘In
such instance, rather than preempting the area, Congress expressly authorizes the states to ‘
preempt’ the federal legislation.”^434

The *Sheehan* court's treatment is consistent with an earlier Tenth Circuit decision, which
relegated the preemption argument to a footnote, characterizing the trustee's preemption claim as
“meritless.”^435 In *In re Kulp*, the court took the simplistic approach that there was no conflict
between the Bankruptcy Code the Colorado exemption provision that was not available to
Colorado residents outside of bankruptcy,^436 “because [§ 522] expressly delegates to states the
power to create bankruptcy exemptions.”^437

Bankruptcy court decisions drawing the same conclusion have usually resolved the issue
in the same simple terms - rather than preempting state law, the bankruptcy code delegates broad
authority to state legislatures to enact whatever exemption statute they wish. These courts make
no distinction between the authority to enact a general exemption statute that will be used in
bankruptcy cases pursuant to § 522(b) and a bankruptcy specific exemption statute that applies
pursuant to § 522(b), but not otherwise. In *In re Morrell*, quite apart from concluding that §
522(b) conflicted with state law, the Court viewed the opt-out provision as one that encouraged
states to adopt their own statutes.^^438 It detected nothing in the legislative history of § 522 that
would justify the conclusion that states were to be prohibited from enacting bankruptcy-specific
exemptions.^^439 In *In re Vasko*,^440 the court saw no conflict between Ohio's bankruptcy specific
wild-card exemption and the basic objectives of bankruptcy to provide debtors with a fresh start.
Similarly, *in re Shumker* the court viewed § 522(b)(2) as “a clear ‘signal' to each state . . . that
each state could validly adopt its own bankruptcy exemption scheme.”^441
The strongest argument that the Bankruptcy Code obstructs the basic objectives of the Bankruptcy Code's exemption scheme is found in Bankruptcy Judge Martel's dissent in the Ninth Circuit Bankruptcy Appellate Panel's decision in In re Applebaum. Applebaum involved a bankruptcy trustee's challenge to the constitutionality of California's bankruptcy-specific exemptions available under California Civil Procedure Code § 703.040. The trustee based his objection on several grounds, including federal preemption due to what he claimed was an actual conflict with the Bankruptcy Code's exemption provisions. The majority found California's bankruptcy specific exemptions constitutional. In reaching its decision, the court deployed the standard two-step analysis derived from Perez v. Cambpell of first construing the purpose and effect of the federal and state statutes in question, and then determining whether they are in conflict.

Following the lead of decisions like Sheehan v. Peveich, the majority first explained that Bankruptcy Code § 522(b) "'allows the States to define what property a debtor may exempt from the bankruptcy estate that will be distributed among his [sic] creditors.'" The court viewed this delegation in § 522(b) as "broad." It quoted the Supreme Court's decision in Owen v. Owen: "'If a state opts out [of the § 522(d) federal exemptions], then its debtors are limited to the exemptions provided by state law. Nothing in subsection [522](b) (or elsewhere in the Code) limits a State's power to restrict the scope of its exemptions; indeed, it could theoretically accord no exemption at all.'"

The court then noted that the Fifth Circuit had ruled that § 522(b)'s language "'implicitly indicates a state may exempt the same property in 522(d), more property than that included in 522(d) or less property than that. In fact states may also prescribe their own requirements for exemptions
which may either circumscribe or enlarge the list of exempt property.\textsuperscript{448}

The court was, of course, correct that § 522(b) permits states to adopt their own exemption provisions and to force their own residents who file bankruptcy cases to use the state exemption statute in their bankruptcy cases. Courts that have addressed the issue have universally held that state exemption statutes are constitutionally valid, under § 522(b), even if they depart substantially from the federal exemptions provided in § 522(d).\textsuperscript{449} Thus, state exemption schemes that deviate from the exemptions in § 522(d) are not preempted, merely because they fail to mirror those exemptions.

However, neither \textit{Owen}, \textit{McMannus}, or any of these other decisions, address the preemption of bankruptcy specific exemption provisions. However, the \textit{Applebaum} majority, like other courts that have addressed the issue, viewed the question of whether the state had the authority to establish its own exemption scheme and the question of whether it had the power to adopt a bankruptcy specific exemption scheme that is not otherwise available, as if they were the same issue.

The precise operation § 522(b)(3)(A) is relevant to the analysis. It defines exempt property as “\textit{any} property that is exempt under federal law, ... or State or local law that is applicable” in the state where the debtor is domiciled at the time of his or her petition.\textsuperscript{450} There would seem to be little doubt about the plain meaning of the word “\textit{any}.” Moreover, several other provisions of the bankruptcy code use the phrase “applicable nonbankruptcy law” to refer to both state and federal law that applies outside of the context of bankruptcy proceedings.\textsuperscript{451} This phrase also appears in § 522(b)(3)(B), in referring to “tenancy by the entireties” rules that operate to protect property held in this form from administration in bankruptcy cases involving only one
of the married co-owners of the property. In general, when Congress uses specific language in one section of a statute, but omits it from another, courts presume that Congress did so intentionally, with the purpose of attributing different meanings to the two provisions.

*Applebaum* and similar decisions rely on the absence of this phrase in §522(b)(3)(A) to buttress the conclusion that “any property that is exempt under ... State ... law ...” permits states to adopt a bankruptcy specific exemption scheme. The fact that § 522(b)(3)(B) uses this exact phrase to incorporate state tenancy by the entireties rules, suggests that if Congress had intended § 522(b)(3)(A) to refer to non-bankruptcy specific state laws, that it would have referred to “nonbankruptcy law” to refer to the type of state exemption laws that applied.

This argument overlooks the fact that the places where the Bankruptcy Code uses the phrase “applicable nonbankruptcy law,” uniformly refer to either state or federal law outside the bankruptcy code that deal with other issues, and not to state law that deals specifically with bankruptcy. Moreover, when the original text of § 522(b)(3)(B) was adopted, bankruptcy specific exemption schemes, of the type currently in place, did not exist. Thus, it seems unlikely that Congress meant to refer to state legislation that did not exist and that had not been contemplated.

Finally, the argument has been made that Congress could have taken action in any of the several amendments of the Bankruptcy Code that have been adopted since the advent of state bankruptcy specific exemption schemes, and chose not to do so. The *Applebaum* court advanced this argument by noting that Congress has previously demonstrated its ability to correct perceived problems with state exemption schemes, as it did in 2005 when it imposed limits on the “mansion loophole” which permitted a debtor to move to a state with a more generous homestead exemption statute before filing his or her bankruptcy petition. Without going so far as saying that
Congress’ failure to act to expressly preempt bankruptcy specific state exemptions schemes reflects its support for their existence, the Applebaum court was content that Congress would take steps to correct the consequences of its decision, if it was concerned about them.\textsuperscript{455}

As noted above Bankruptcy Judge Markel’s dissent advanced the argument in support of preemption. His view is that § 522 conflicts with Congressional objectives with respect to exemptions. He emphasized several specific legislative comments made by various members of the House and Senate, concerning § 522(b), at the time Congress was considering its adoption. He focused on remarks by the principal sponsors of the bills proposing various versions of what became the Bankruptcy Reform Act of 1979, Representative Edwards in the House, and Senator DeConcini in the Senate.

Representative Edwards explained that the opt-out provision in § 522, that appeared in H.R. 8200 represented “a compromise on the issue of exemptions between the position taken in the House bill\textsuperscript{456}, and that taken in the Senate amendment.”\textsuperscript{457} He further explained that the effect of the compromise was to permit the States “may, by passing a law, determine whether the Federal exemptions will apply as an alternative to State exemptions in bankruptcy cases.”\textsuperscript{458}

Senator DeConcini explained the compromise: “In the area of exemptions, it was agreed that a Federal exemption standard will be codified but that the States could at any time reject them in which case the State exemption laws would continue to prevail.”\textsuperscript{459} His remarks were echoed by Senator Wallop who explained: “In the area of exemptions, we have won an important victory for the rights of States to determine exemptions for the debtors of their States, [sic] Reduced Federal exemptions will be provided by the law but States by legislation may elect not to have them apply [sic] their debtors.”\textsuperscript{460}
In Judge Markel's view, these remarks indicate that the opt-out provision was nothing more than a means for states to elect whether their residents “would have access to the federal slate of bankruptcy exemptions enumerated in § 522(d)” and not as a delegation of authority to states to enact a exemptions for exclusive use in bankruptcy cases. Judge Markell further noted that the legislative history is devoid of any indication that those involved in § 522(b)'s enactment sought to expand states' authority to adopt bankruptcy specified exemption statutes. In his view, all Congress did was to allow states to reject or let stand the uniform federal exemptions in § 522(d).

It should be significant, in this respect, that, at the time, no state had a bankruptcy specific exemption statute. State exemption statutes were state exemption statutes and nothing more.

Another argument advanced by Judge Markel, was that bankruptcy specific exemption statutes may not even qualify as “exemption statutes” within the meaning of § 522(b). Section 522(b)(3) permits individual debtors to “exempt from property of the estate the property listed in either paragraph (2) [of § 522(b)] or, in the alternative, paragraph (3) [of § 522(b)]. Section 522(b)(3) provides that “Property listed in this paragraph is . . . any property that is exempt under Federal law, other than [§ 522(d)], or State law or local law . . .” The Bankruptcy Code contains no definition of “exempt” or “exemption,” but, as Judge Markel explained, “courts traditionally have defined the term in a manner that would not cover state bankruptcy-specific exemptions.”

In support of this contention he cited Smalley v. Laugenour, where the Court, in affirming the res judicata effect of a bankruptcy court decision regarding a debtor's exemption rights, explained its conception of exemptions in bankruptcy as derived from “property [that] is not subject to levy and sale under [state law].”
Judge Markel also relied on *In re Kantner*[^468] which struck down a California statute that purported to prohibit transfers of personal injury claims to the bankruptcy trustee. *Kantner* recognizes that although states are free to establish their own exemption statutes, they may not adopt legislation that otherwise interferes with a Bankruptcy Trustee's ability to recover assets of a debtor's bankruptcy estate. California Code of Civil Procedure § 688.1 provided: “Nothing in this section shall be construed to permit an assignee by operation of law of a party to a personal injury action to acquire any interest in or lien rights upon moneys recovered by such party for general damages.” The reference to “an assignee by operation of law” applied directly to a bankruptcy trustee. If effective, the provision would have frustrated the purpose of §§ 70(a)(5) and 70(c) of the Bankruptcy Act, by preventing the debtor's bankruptcy trustee from acquiring the debtor's interest in his or her personal injury claims.

Section 70(a)(5) was the precursor of § 541(a) of the current Bankruptcy Code, though it operated with respect to exemptions in a different way than the current law.[^469] Section 70(a)(5) provided: “The trustee . . . shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under his Act, except insofar as it is to property which is held to be exempt . . . .” The court found that the state statute was preempted because it interfered with the operation of the Bankruptcy Act.

The *Kantner* court acknowledged that “California obviously has the right to amend its law to expand the classes of property which are exempt from the claims of creditors . . . . [but that] exemptions [are] provided by state law in an effort to assist the bankrupt in making a fresh start, to protect the expectations of creditors and debtors under state law, and to eliminate any inducement for creditors to seek involuntary bankruptcy petitions as a means of reaching assets.
unavailable to them in state courts because of exemption provisions.\textsuperscript{470} It held that § 688.1 was not "a general exemption provision." Quite to the contrary, it specifically permitted judgment creditors to obtain a lien on the debtor's property. Its only effect was to limit the assignment of the debtor's right "by operation of law." This was intended to limit the power of a bankruptcy trustee to reach the asset, even though creditors could execute against the asset in state court, and thus "it cannot be an exemption provision" within the meaning of the Bankruptcy Act.

Judge Markel's suggestion that bankruptcy specific exemption statutes are not exemption statutes is well founded. Exemption statutes are provisions that protect certain assets from the reach of a debtor's creditors. Assets that are exposed to seizure by a debtor's creditor, in a state collection proceeding are not exempt, at least not in the customary sense of the term. State provisions that seek to protect property from a bankruptcy trustee that would not be protected from creditors in a state collection proceeding obstruct the operation of the Bankruptcy Code. Congressional policy, reflected by § 522(b), is that a debtor's property can be protected from administration in bankruptcy even though it may not be exempt under state collection law if the property is within the scope of the federal exemptions in § 522(d), but only if the state has not opted out. Permitting states to adopt bankruptcy specific exemption statutes obstructs federal law, by permitting state legislatures to determine the extent to which property should be insulated from a bankruptcy trustee to a greater extent than it is insulated from creditors outside of bankruptcy.

It has been some time since anyone has raised doubts about whether states have the power to adopt less generous bankruptcy exemptions than the federal exemptions in § 522(d).\textsuperscript{471} It seems that states might eliminate bankruptcy exemptions altogether by "opting out" of the federal
exemption scheme and refusing to adopt a general exemption statute. But, it could do so only at the expense of subjecting debtors assets to the claims of creditors generally. It seems unlikely that states could adopt a bankruptcy specific exemption scheme that provided for no exemptions, while at the same time establishing a general exemption scheme that protected assets from seizure in a state collection proceeding. Such a statute would discourage debtors from seeking protection under the bankruptcy code in a way that would frustrate if not obstruct Congress's purpose in adopting the Bankruptcy Code generally.

For many years federal bankruptcy relief has provided debtors with two key benefits: discharge of their debts and the ability to retain limited amounts of "exempt" property. Both benefits facilitate Congress's fresh start policy. If states were permitted to adopt a bankruptcy specific "no exemptions" provision, debtors would be forced to choose between these benefits: filing for bankruptcy and discharging their debts, or retaining their general state exemptions in a state collection proceeding, but foregoing a bankruptcy discharge. This choice would conflict with Congress's purpose in enacting the bankruptcy code.

This is true even though states would not act beyond their authority in eliminating exemptions generally, for all debtors. Doing so would be harsh, but it would not leave debtors to face a choice that was incompatible with Congressional policy. Debtors could choose to discharge their debts in bankruptcy, without foregoing the right to claim some of their property as exempt. If there were no exemptions, regardless of whether debtors were in bankruptcy or not, the consequences of seeking bankruptcy relief would be compatible with Congressional policy. Bankrupt debtors would get a fresh start that their counterparts in state court would not receive, but at no additional cost.

If a state could not adopt a bankruptcy-specific exemption statute that exempted no
property, while leaving its general exemption statute intact, it seems similarly unconstitutional for a state to adopt a bankruptcy specific exemption statute that is more generous toward debtors than its general exemption statute.

VI. Improper Delegation

As explained above, most courts conclude that state bankruptcy specific exemptions are not preempted because § 522(b) expressly delegates to the states the authority to adopt exemption provisions for use in bankruptcy cases. This conclusion raises the question of whether any such delegation is beyond the scope of Congress's power.

The contention that Congress generally lacks the power to delegate authority to enact exemption provisions to the states has been routinely rejected nearly every time it has been raised. States and the federal government have concurrent power to adopt exemption statutes for use in bankruptcy cases. Federal authority stems from the Bankruptcy Power, and there is little doubt that Congress could, if it wished, adopt a uniform system of bankruptcy exemptions, like the ones originally proposed in the Bankruptcy Commission's Bill and in H.R. 8200, that were rejected when the current Bankruptcy Code as adopted in 1978.472

The improper delegation argument flies in the face of the “long-established principle that the states retain the power to enact bankruptcy laws so long as they do not conflict with federal bankruptcy legislation.”473 Although Congress has the authority to adopt bankruptcy statutes, this power is concurrent with the power of the states, so long as any such laws a state adopts do not conflict with federal law. This principle was established by Justice Marshall's opinion in Sturges v. Crowninshield:474

[T]he power granted to congress may be exercised or declined, as the wisdom of that
body shall decide. If in the opinion of congress, uniform laws concerning bankruptcies ought not to be established, it does not follow that partial laws may not exist, or that state legislation of the subject must cease. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the states.

*Sturges* dealt with the precise issue confronted in cases involving claims that Congress lacks authority to delegate the power to adopt exemption statutes, to the states. The court held that Illinois's power to establish exemption provisions for bankrupt debtors in Illinois as long as the Illinois exemption statute did not conflict with any existing federal bankruptcy statute. Where the state, in adopting an exemption statutes, exercises a power it holds apart from any delegation from Congress, there can be no improper delegation.475

*Sturges*, and later decisions rejecting the contention that the Bankruptcy Code's deferral to exemption statutes is an improper delegation of federal power, make it clear that arguments based on any improper delegation are poorly founded. Exemption statutes have been an integral part of state collection law since ratification. The colonies had their own exemption statutes, and nothing in the Constitution took the power to create such exemption statutes away. In this respect, the Bankruptcy Code's reliance on state exemption statutes is no different from the Bankruptcy Code's deferral to state contract and property law generally.

Bankruptcy Code § 522(b) does not delegate any authority to the states. Rather, it simply defers to any state exemption statute that may exist. The only limiting feature in Congress's ability to defer to state law is the requirement that the state exemption provision not be in conflict with the Bankruptcy Code. But, conflicts between the Bankruptcy Code and otherwise applicable
state law, raises questions of preemption rather than those of improper delegation. The question of whether a bankruptcy specific state exemption scheme is compatible with the goals and purposes of the Bankruptcy Code and either creates an actual conflict with the Code or obstruct's the Code's purpose is a separate issue, explored in the previous section of this Article.

The few courts that have struck down state bankruptcy specific exemption provisions on the grounds of improper delegation have conveniently ignored Sturges and other cases which make it clear that states have inherent power to adopt exemption statutes. The leading decision, in support of the rationale that Congress lacks authority to delegate to the states the power to adopt bankruptcy specific exemption statutes is In re Pontius. 476 Pontius held that Michigan's bankruptcy specific exemption statute was unconstitutional both on the grounds that it violated the Uniformity clause, and on the grounds that § 522(b) improperly delegated Congress's authority over bankruptcy to the states. Its conclusion concerning improper delegation was based on the following analysis:

The Supreme Court has consistently held that Congress may not constitutionally delegate its legislative power. “It does not admit of argument that [C]ongress can neither delegate its own powers, nor enlarge those of a state.” . . . [citation] “Congress cannot transfer its legislative power to the states—by nature this is nondelegable.” . . . [citations].

The Knickerbocker Ice [v. Stewart] decision is especially instructive. That case involved federal maritime law which, like the law on “Bankruptcies,” is reserved under the Constitution to the United States. The Supreme Court stated that “Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country.” [citations] The Court then found that Congress
had attempted to delegate a portion of its legislative function by authorizing states
to enact workers compensation laws applicable in maritime proceedings. Because
the Court recognized that maritime law was within the sole power of Congress, the
power could not be constitutionally delegated.

*Knickerbocker Ice* was an admiralty decision. It dealt with a federal statute that created an
exception to the Judiciary Act of 1789, which permitted workers compensation claims of
maritime workers to be brought in state court, despite the general grant of exclusive jurisdiction
over maritime and admiralty disputes to federal district courts. The federal statute in question
had been adopted in response to a Supreme Court decision holding that state workers
compensation statutes conflicted with the federal government's exclusive authority over maritime
matters because they would result in the “destruction of the very uniformity in respect of maritime
matters which the Constitution was designed to establish, and freedom of navigation between the
states and with foreign countries would be seriously hampered and impeded.” Against this
backdrop the Court in *Knickerbocker* decided that the federal statute which had sought to
circumvent the federal government's exclusive authority over workers compensation claims of
maritime workers, went beyond the authority of Congress in contravention of the exclusive
jurisdiction given to the federal courts over admiralty cases by Article III of the Constitution.

The principle behind *Knickerbocker* was affirmed several years later in *State of
Washington v. W.C. Dawson & Co.*, where the Court ruled that states could not, even with
federal authority, require maritime workers to contribute to a state workers compensation
insurance fund of the type that had been involved in *Knickerbocker Ice*.

The bankruptcy court in *Pontius* drew the analogy between the Constitution's grant of
paramount power to over maritime law to Congress and it's similar authority over bankruptcy law, and held that Congress lacked the power to delegate any of its authority over bankruptcy law to the states. Quoting *Knickerbocker*, the *Pontius* court said:

> The subject was entrusted to it [Congress] to be dealt with according to its discretion—not for delegation to others. To say that, because Congress could have enacted a compensation act applicable to maritime injuries, it could authorize the states to do so, as they might desire, is false reasoning. Moreover, such an authorization would inevitably destroy the harmony and uniformity which the Constitution not only contemplated, but actually established—it would defeat the very purpose of the grant.

> Congress cannot transfer its legislative power to the states—by nature this is nondelegable. 482

The problem with the *Pontius* court's analysis is that *Knickerbocker Ice* has since been drawn into serious question, limited to its specific facts, 483 and probably overruled. 484 For example, in *Prudential Insurance Co. v. Benjamin*, the Supreme Court ruled that a state excise tax that applied only to out-of-state insurance companies was not unconstitutional as a burden on interstate commerce because it had been approved—in the McCarran-Ferguson Act—by Congress. 485 The court explained: “The related contention that Congress' ‘adoption’ of [the state excise tax] statute amounts to an unconstitutional delegation of Congress' legislative power to the states obviously confuses Congress' power to legislate with its power to consent to state legislation.”

In admiralty cases decided since *Knickerbocker Ice* and *W.C. Dawson*, the Court has
relaxed its position considerably, permitting states to “modify or supplement” federal maritime law by establishing grounds for imposing liability that is neither “hostile to the characteristic features of the maritime law or inconsistent with federal [maritime] legislation.” The shift that occurred after the end of the Lochner era is also reflected in cases such as Northern Coal & Dock Co. v. Strand, decided in 1928, in which the Court prevented the implementation of a state remedy in a maritime setting simply because of the existence of an alternative federal remedy, and Sun Ship, Inc. v. Pennsylvania where the Court permitted a state workers' compensation statute to supplement a federal remedial scheme for injured maritime workers.

Like the state excise tax in Prudential, Bankruptcy Code § 522(b) does not delegate authority to states to adopt exemption statutes. Instead, it merely acquiesces in the state's exemption statute much in the same way in which it acquiesces in other state property law that affects creditor's rights to recover from their borrowers. As long as the state law does not conflict with the bankruptcy code, it is not unconstitutional as an improper "delegation" of authority to the states.

VII. Uniformity Provision of the Bankruptcy Clause: “Non-Uniform” Bankruptcy Laws

Another, somewhat more plausible basis on which bankruptcy specific exemption statutes might be unconstitutional, and basis which supplies considerable initial intuitive appeal is the “Uniformity Clause.” The Constitution authorizes Congress to enact “uniform laws on the subject of Bankruptcies.” The uniformity provision was adopted by the framers as a solution to the difficulties that existed as a result of differences in inconsistent state and colonial bankruptcy laws that existed at the time.

At the time the Constitution was framed, a sharp distinction was drawn between “
bankruptcy" and “insolvency” laws. The former were regarded as creditors' remedies, that could be deployed against debtors to compel an orderly distribution of their business assets. They were the rough equivalent of “involuntary bankruptcy" today, but were limited to cases involving "merchant traders" – not consumer debtors. Insolvency laws, on the other hand permitted financially strapped debtors to obtain voluntarily relief, resulting in a discharge. Today, such proceedings are the familiar “voluntary bankruptcy" cases that dominate the bankruptcy system.

The Framers would have understood the term “bankruptcy" to refer to what we now regard as involuntary bankruptcy involving only “merchant traders" as debtors.

Establishing a uniform system would ensure that bankruptcy discharges were enforceable across state lines, with uniform effect. In Federalist No. 42, James Madison explained that “[t]he power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question."

The Framers were concerned that without a uniform system of bankruptcy, states would develop their own laws that would be dominated by “local interests ... [and] domestic preferences [that would quash] the interests of nearby states."

The early debate over the effect of the bankruptcy clause was whether the power to establish laws on bankruptcies was exclusively within the authority of Congress or was concurrent with the state legislatures. This debate was influenced by Congress's initial unwillingness to adopt a permanent bankruptcy statute. Although Congress adopted a Bankruptcy Act in 1800, which permitted debtors to exempt limited property from their creditors,
the law was repealed in 1803. This left debtors and creditors alike with no alternative but state collection law to resolve their disputes.

As a result, in *Sturges v. Crowninshield*, the Court ruled that at least in the absence of federal bankruptcy legislation, states retained the authority to adopt their own insolvency statutes, but that the Contracts clause prevented those statutes from discharging debts that had been incurred before the statute was enacted. Later, in *Ogden v. Saunders*, the Marshall Court held what *Sturges* had implied, that a state statute could be applied prospectively to discharge debts arising from contracts made after the state statute was adopted. However, despite the historic difference between bankruptcy and insolvency, Justice Marshall’s opinion in *Sturges* suggested that this traditional distinction was not dispositive on the question of the scope of the bankruptcy clause.

Modern courts have regarded *Sturges* as little more than an expedient measure made necessary by Congress’s failure to enact a permanent bankruptcy statute. Economic circumstances cried out for a solution and in the absence of a federal bankruptcy law, the Court simply recognized the practical reality that states had no alternative but to deploy systems to resolve competing claims to debtors’ assets. These decisions have regarded bankruptcy legislation as exclusively with the province of Congress and that state statutes purporting to grant debtors a discharge are invalid.

True uniformity in the application of any bankruptcy law in a federalist system would be problematical. By its very nature, bankruptcy law deals with the rights of creditors under state law. And, it necessarily deals with debtors’ property rights that arise under state law. As a
consequence, it would be impossible for a federal bankruptcy law to apply consistently to debtors and creditors in different states, without completely reshaping the contract and property laws of those states.

Perhaps the most obvious illustration of this is the manner in which bankruptcy law deals with property held by a married couple, in the form of “entireties.” The principle distinguishing feature of entireties property is that it is only available to creditors if the debt is owed by both spouses. Only a few states continue to recognize this form of ownership. For bankruptcy law to apply to property owned by married couples in the same way uniformly throughout the country, the Bankruptcy Code would have to eliminate this form of ownership. Other examples abound, whether they are based on the differences in state law on the effect of an improperly recorded deed, the manner of obtaining a perfected judicial lien, state law on fraudulent conveyances, or the exemption statutes.

As explained earlier, differences in state exemption statutes are dramatic. Some states permit debtors to exempt mansions on extensive rural estates, while others limit debtors to a few thousand dollars of equity in their home or their family burial plot. At first blush, it would seem that the uniformity requirement might differences of these types invalid, quite apart from the question of whether states could go further, and enact exemption statutes that apply only in bankruptcy. However, as the history of the Supreme Court’s uniformity clause jurisprudence makes clear, differences in exemptions are permitted. Moreover, it seems likely that bankruptcy-specific state exemption statutes would be found to be compatible with the uniformity clause.

The uniformity provision clause requires federal bankruptcy laws to apply uniformly throughout the United States. Uniformity challenges to the constitutionality of bankruptcy-specific exemptions provisions have usually been based on a passage from the Supreme Court's
decision in *Hanover National Bank v. Moyses*. There, the Court rejected a uniformity clause challenge to the section of the Bankruptcy Act of 1898 that exempted whatever property was exempt under the applicable state exemption statute. The Court indicated the system is, in the constitutional sense, uniform throughout the United States when the trustee takes in each state whatever would have been available to the creditors if the bankrupt law had not been passed. The general operation of the law is uniform although it may result in certain particulars differently in different states.

The Court reached a similar result in 1918 in *Stellwagen v. Clum*, involving a uniformity clause challenge based on differences in the way state fraudulent conveyance laws applied in bankruptcy. Citing *Moyses*, the Court explained:

> Notwithstanding this requirement as to uniformity the bankruptcy acts of Congress may recognize the laws of the state in certain particulars, although such recognition may lead to different results in different states. For example, the Bankruptcy Act recognizes and enforces the laws of the states affecting dower, exemptions, the validity of mortgages, priorities [sic] of payment and the like. Such recognition in the application of state laws does not affect the constitutionality of the Bankruptcy Act, although in these particulars the operation of the Act is not alike in all the states.

The Court's 1982 decision in *Railway Labor Executives' Association v. Gibbons*, is also relevant, though it did not involve differences in the way bankruptcy law applied in different states. In *Gibbons* the Court disapproved the constitutional validity of the Rock Island Railroad Transition and Employee Assistance Act (RITA). RITA required a single bankrupt railroad, the
Rock Island, to pay large sums to displaced employees, thus altering the relationship among claimants to a single debtor's assets.

In reaching its conclusion that the legislation violated the uniformity requirement, the Court reviewed the history of its uniformity clause decisions, noting that it had never before invalidated a bankruptcy law due to a lack of uniformity. The Court explained that

The uniformity requirement is not a straightjacket that forbids Congress to distinguish among classes of debtors, nor does it prohibit Congress from recognizing that state laws do not treat commercial transactions in a uniform manner. A bankruptcy law may be uniform and yet "may recognize the laws of the State in certain particulars, although such recognition may lead to different results in different States."\textsuperscript{509}

Again citing \textit{Hanover National Bank v. Moyes}, the Court explained that the uniformity requirement did not "require the elimination of any differences among the States in their laws governing commercial transactions."

The Court further distinguished earlier decisions that permitted Congress to treat "railroad bankruptcy as a distinct and special problem" and to "take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems. This latter statement refers to the \textit{Regional Railroad Reorganization Act Cases}\textsuperscript{510} where the Court upheld bankruptcy legislation\textsuperscript{511} aimed exclusively at a "rail transportation crisis in the Northeast." But, the Court explained, the legislation before it was completely different from the Rock Island Railroad legislation which on its face applied only to a single railroad. Thus, unlike the situation in the \textit{Regional Railroad Reorganization Act Cases},
there were other railroads being reorganized to which the bankruptcy legislation in question did not apply. Thus, the Court concluded, RITA was nothing more than a “private bill” of the type that could be enacted under the commerce clause, but that was not valid as an exercise of Congress's Bankruptcy power. After Railway Labor Executives' Association v. Gibbons, it was recognized that Congress could adopt bankruptcy legislation that applied to a single industry, or perhaps to members of an industry in a region of the country where members of the region were experiencing financial difficulties, but it could not, consistent with the Bankruptcy Clause, adopt bankruptcy legislation that applied to a single debtor.

These cases establish the modern geographic uniformity rule. As long as the bankruptcy code applies in a geographically uniform manner, it need be personally uniform so that it applies in the same way to every debtor, individually. A bankruptcy law is geographically uniform if (i) the substantive law applied in a bankruptcy case conforms to that applied outside of bankruptcy under state law; (ii) the same law is applied to all debtors within a state and to their creditors; and (iii) Congress uniformly delegates to the states the power to fix those laws. Bankruptcy statutes are not unconstitutional merely because they apply in different ways to debtors and creditors in different states.

Courts have uniformly held that the exemption provisions of the current Bankruptcy Code satisfy the geographic uniformity test. They have concluded that if § 6 of the former Bankruptcy Act, analyzed in Moyes, was constitutional, § 522(b) must also be valid. Like its predecessor in the Bankruptcy Act, § 522(b) permits debtors to exempt property that is exempt under their state's exemption statute.
Likewise, recent lower court decisions, challenging the constitutionality of differences in how the “means test” applies to debtors in different states, and even in different counties, demonstrates the permissive nature of the uniformity clause with respect to differences in how debtors fare in bankruptcy, depending on their location.

The Chapter 7 means test, adopted by Congress in 2005, determines whether debtors are barred from relief based on their financial ability to pay. It applies differently to debtors in different states, and in some respects in different counties, based on differences in state median incomes and living expenses. Debtors might live in different states, directly across the street from one another, and be subject to different standards for eligibility for bankruptcy relief.

In *Schultz v. United States*, the Sixth Circuit ruled that this disparity in treatment did not offend the uniformity clause any more than the disparity in treatment because of state exemption statutes in *Moyes*, or differences in state fraudulent conveyance laws in *Stellwagen v. Clum*.

The court recognized that Chief Justice Marshall had, in *Sturges v. Crowinshield*, expressed concern that the concept of “uniformity is, perhaps, incompatible with state legislation,” but indicated that the Supreme Court's geographic uniformity approach was not offended by the means test's differences in how individual debtors are treated. The Sixth Circuit acknowledged that the uniformity clause “allows different effects in various states due to dissimilarities in state law, so long as the federal law applies uniformly among classes of debtors.”

Circuit Judge Cole, who had previously served as a bankruptcy judge, also relied on *Blanchette v. Connecticut General Insurance. Corp.*, involving the constitutionality of the
Regional Rail Reorganization Act, which applied only to railroads in the northeast transportation corridor. Just as differences in economic conditions in the northeast justified the adoption of a specific bankruptcy statute for railroads in that region, different economic conditions in different states and counties justified rules treating people on different areas differently. If the statute treated debtors in the same financial circumstances differently, the uniformity clause might be a problem. But, the mere fact that debtors who lived in different states, where economic conditions or other applicable laws applied differently, were subject to different treatment in bankruptcy, did not violate the uniformity clause.

When these principles have been applied to bankruptcy-specific exemption statutes, the results have been no surprise. Most courts have rejected the suggestion that bankruptcy specific exemption statutes were incompatible with the principle of geographic uniformity.527 Even judges that have been hostile to these state statutes have usually found them compatible with the uniformity clause.528

A notorious counter example is found in In re Pontius,529 where the bankruptcy court held that a bankruptcy-specific exemption statute in Michigan violated the uniformity clause. The court in Pontius recognized the consistency of the Supreme Court's “geographic uniformity” approach to the uniformity clause. However, it seized on what it viewed as critical language in Moyses: “the system is, in the constitutional sense, uniform throughout the United States, when the trustee takes in each state whatever would have been available to the creditor if the bankrupt[cy] law had not been passed.”530 This, the Michigan bankruptcy court declared was the “precise holding of the interpretation of constitutional uniformity.”531

Defined narrowly in this way, bankruptcy-specific exemption statutes violate the
uniformity clause. The Michigan statute, in question did not permit trustee to take the same property that creditors would have been able to recover in the absence of the Bankruptcy Code. The Michigan statute, and all other bankruptcy-specific exemption statutes, the court explained, accomplished exactly the "opposite result." "Their very purpose" the court recognized, was to "ensure that the bankruptcy trustee does not take whatever property 'would have been available to the creditor' outside of bankruptcy."532

A few other courts have reached the same conclusion, similarly based on the language in *Moyses* that geographic uniformity is maintained only if the state exemption statute permits the trustee to recover the same assets that would have been available to creditors if the bankruptcy code did not exist. The bankruptcy court in *In re Lennen*,533 determined that California's bankruptcy-specific exemption statute was inconsistent with *Moyses* due to lack of geographic uniformity and the court in *In re Mata*,534 reached the same conclusion about Colorado's statute.

Despite the court's analysis, there is reason to doubt whether this conception of the "precise holding" of *Moyses* is accurate. At the time *Moyses* was decided, bankruptcy-specific exemption statutes did not exist. It would not, at the time, have occurred the court that a state would attempt to enact more a generous or more restrictive exemption statute to apply to its citizens who went bankrupt. Thus, when the *Moyses* court referred to property that "would have been available" to creditors in the absence of a federal bankruptcy statute, it was most likely doing nothing more than referring to the status quo relationship between exemptions both in and out of bankruptcy, rather than making a statement about efforts states might make to limit or expand the availability of exemptions in bankruptcy. Moreover, the quoted phrase from *Moyses* indicates only that a state exemption statute that treats debtors in bankruptcy the same as those in
collection proceedings satisfies the uniformity clause, it did not say that this was a necessary feature for it to meet the geographic uniformity test.

The Sixth Circuit's Bankruptcy Appellate Panel reached the same conclusion with respect to the Michigan statute in In re Schafer, on similar grounds. The Bankruptcy Appellate Panel relied on the framers' more general purpose in enacting the uniformity clause, "to replace the 'hodgepodge of bankruptcy relief' with one national system." The court acknowledged that debtors' rights might vary from state to state, but that permitting a state to "differentiate between its own citizens by creating separate property rights or a separate exemption scheme for only those citizens who file for bankruptcy" violated the principle of geographic uniformity. Expanding somewhat on the Pontius court's decision, the court indicated that "Geographic' uniformity requires that within a state, bankruptcy and non-bankruptcy (judgment) debtors and judgment creditors be treated the same. The bankruptcy-specific exemption statute fails the "geographic" uniformity test by not affording a trustee in bankruptcy the same opportunities as a creditor or receiver outside of bankruptcy." Having concluded that Michigan's bankruptcy-specific exemption statute failed to pass the geographic uniformity standard, it declined to address the Supremacy Clause challenge that the trustee had also pursued.

In his Ninth Circuit Bankruptcy Appellate Panel dissent in Applebaum, Bankruptcy Judge Markel, who would have struck down California's bankruptcy-specific exemption statute under the Supremacy Clause, had no quarrel with court's uniformity provision analysis. The majority in Applebaum regarded the uniformity provision as a restriction only on Congress's power, "not a limitation on the states." In drawing this conclusion, the Applebaum court relied on both the text of the
Bankruptcy Clause, and on the Supreme Court's decision in *Railway Labor Executives' Association v. Gibbons*,\(^5\) which struck down a bankruptcy statute that applied to a single debtor, the Rock Island Railroad, on the grounds that it failed to satisfy the uniformity requirement.\(^6\) In *Gibbons* the Court explained that Congress lacked authority to deploy its power over Interstate Commerce to enact a non-uniform bankruptcy statute, because a ruling to the contrary “would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws.”\(^7\) In striking down the bankruptcy statute, in the only decision in which the Court has found a violation of the uniformity requirement, the Court explained that “[t]he uniformity requirement pertains only to Congress: it is an affirmative limitation or restriction on Congress's power, not a limitation on the states.”\(^8\)

The Ninth Circuit Bankruptcy Appellate Panel in *Applebaum* had a more conventional understanding of the uniformity provision than the Sixth Circuit Bankruptcy Appellate Panel found in *Schafer*. It regarded uniformity as requiring the bankruptcy law to “apply equally in form” even though it might not apply equally “in effect” to “all debtors and creditors, or [as in the case of a regional railroad reorganization statute] “to ‘defined classes' of debtors and creditors.”

This comports with decisions in early challenges to § 522(b), that questioned its validity under the Uniformity Clause, not because of the enactment of bankruptcy specific exemption statutes, but because state exemption statutes did not conform to the uniform federal exemptions in § 522(d) and because they were different from one state to the next. These challenges were uniformly rejected. The district court's decision in *In re Lausch* \(^9\) is illustrative. The bankruptcy trustee challenged the constitutionality of § 522(b), which gave debtors a choice between § 522(d)'s exemptions and Florida's general exemption statute, which included the state'
s extremely generous homestead exemption, which permits debtors to retain their homes, subject only to what are usually meaningless limits on the acres surrounding the debtor's mansion.

The trustee's “Uniformity” or “Bankruptcy Clause” challenge was based on the lack of uniformity of the exemptions, as the Constitution requires “throughout the United States.”

The court relied on *Hanover National Bank v. Moyses,* which had upheld § 6 of the former Bankruptcy Act. Section 6 simply provided that exemptions would be governed by state law. The judge in *Luasch* correctly determined that § 522(b) was no more violative of the principle of “geographic uniformity” than former § 6 had been. The court explained bankruptcy laws enacted by Congress are permitted to “recognize the laws of the state in certain particulars, although such recognition may lead to different results in different states.” For example, the Bankruptcy Act recognizes and enforces the laws of the state affecting dower, exemptions, the validity of mortgages, priorities of payment, and the like. Such recognition in the application of state laws does not affect the constitutionality of the Bankruptcy Act, although in these particulars the operation of the act is not alike in all states. It quoted the passage from *Moyses* where the court drew a parallel between differences in state exemption statutes and differences in state laws “affecting dower, . . . the validity of mortgages, priorities of payment, and the like.”

These differences do not affect the constitutionality of § 522(b), even though the operation of the act is not the same in all states. The court ruled that: the exemption provisions under the New Act provide for essentially the same degree and type of uniformity as the corresponding provisions under the Old Act and that they were therefore compatible with the Uniformity Clause.

Most other decisions have relied on *Moyses* to conclude that bankruptcy specific exemption statutes are constitutionally valid, so long as all states have the uniform right to adopt
bankruptcy-specific exemption statutes. One early decision, dealing with a now defunct 
bankruptcy-specific exemption provision from Ohio, explained: “The uniformity which is 
required by the Constitution relates to the law itself and not to its results upon the varying rights 
of debtor and creditor under the laws of the several states.” 550  As long as debtors in the same 
state are treated uniformly, the uniformity clause seems to impose no real barrier to states' 
enactment of bankruptcy specific exemptions.

VIII. Conclusion

The number of state, bankruptcy-specific exemption provisions is increasing. For the 
most part, they are more generous toward debtors in bankruptcy than to those resisting creditors' 
collection efforts in state court. Some of these bankruptcy exemption schemes, as illustrated by 
Michigan's statute, are vastly different from their collection case counterparts. Others, like the 
one in Ohio, which protects only a limited additional amount of property from the bankruptcy 
trustee, are more typical.

The Bankruptcy Code's express deferral to state exemption statutes seems, at first, to 
authorize states to adopt whatever exemption scheme they desire to deploy, or, if they want, to 
opt-out of the federal exemptions and completely eliminate their exemption statutes. There is no 
reason to believe any state would take such drastic action. What remains unresolved is whether 
states might deny bankrupt debtors any exemptions, but continue to provide exemptions to state 
residents who stay out of bankruptcy court. So far, states have not done this. Quite to the 
contrary, when they have adopted separate bankruptcy specific exemption statutes, these statutes 
have tended to be somewhat more generous than their general exemption statutes. However, the 
issue of whether states may adopt more generous bankruptcy specific exemption statutes is the 
same as whether they may adopt less generous bankruptcy specific exemption provisions or even
possibly eliminate exemptions for bankrupt debtors.

The suggestion that bankruptcy specific exemption statutes violate the uniformity clause, which empowers Congress to adopt only uniform bankruptcy legislation seems unfounded. The principle of geographic uniformity is sufficiently broad to permit Congress to allow state legislation that distinguishes between exemptions available in state collection proceedings on the one hand, and in bankruptcy cases on the other. Language in the Supreme Court decision in *Hanover National Bank v. Moyses*, suggesting a contrary result, was more likely to have merely been descriptive of the existing status quo than a normative statement about when the Uniformity Clause requires. Likewise, the suggestion that Congress lacks authority to permit states to enact bankruptcy-specific exemption statutes, ignores modern jurisprudence regarding the concurrent authority of states and the federal government over collection law generally and bankruptcy law specifically. The few recent decisions to the contrary are not well reasoned, and probably disingenuous on this point.

Preemption, on the other hand, provides a sound basis for questioning the Constitutional validity of state bankruptcy-specific state exemption schemes. Although most of these statutes provide for exemptions that are more generous toward debtors than their state collection law counterparts, and provide debtors with a more extensive “fresh start” than they would have if they were limited to the same exemption scheme that applies in collection cases, permitting states to enact bankruptcy-specific exemptions allows for the possibility that a state might adopt a more restrictive set of exemptions for bankrupt debtors, or no exemption at all for these financially strapped individuals. A few bankruptcy specific exemption schemes are more restrictive in some respects than their collection law counterparts. Giving debtors a choice between being able to keep more of their assets if they forego a bankruptcy discharge, and
obtaining the benefits of a bankruptcy discharge at the cost of losing more of their assets is at odds with the goals sought to be achieved by the Bankruptcy Code, and thus obstructs Congress' purpose in implementing its power to adopt Bankruptcy legislation.

Whether the current conflict between bankruptcy appellate panels in the Sixth and Ninth Circuits ultimately results in conflict at the Court of Appeals level, and leads to the type of split in the circuits that will attract the Supreme Court's attention, remains to b

1. Some will remember mortgage banker Snidely Whiplash, the evil wrongdoer in the 1960's era TV cartoon series, Dudley Do-right of the Royal Canadian Mounted Police, which was played as part of the iconic Rocky and Bullwinkle show.


Providing debtors with a fresh start is a relatively new feature of debt collection law. In ancient Rome, debtors who left their debts unpaid for an extended period of time was subject to either the death penalty or slavery. Consistently with the modern "equal treatment of creditors" policy, creditors in Rome enjoyed the right to take pieces of the debtor's remains, which were to be divided proportionally according to the size of each creditor's claim. Richard Ford, Imprisonment for Debt, 25 Mich. L. Rev. 24, 24-25 (1926).

Holy Roman Emperor Constantine adopted the first western exemption statute, by temporarily protecting debtors "slaves, oxen, or implements used for the cultivation of the soil" from seizure to pay taxes.14 Justinian, The Civil Law 263 (S. Scott trans. 1932).

English collection law prevented a debtor's clothing from being seized “from his person to satisfy a debt.” Sunolf v. Alford, 150 Eng. Rep. 1135 (Ct. Exch. 1838). And, during the middle of the 19th century, the Small Debts Act protected a debtor's “actual necessaries” consisting of bedding, wearing apparel, and tools of the trade worth up to five pounds sterling, from seizure to satisfy a debt. Small Debts Act, 1845, 8 & 9 Vict. C. 127, § 8.

The history of exemptions in American bankruptcy law is well documented. Historical Evolution, supra at 344-69. The first American bankruptcy statute, adopted in 1800, contained a uniform exemption provision that was limited to simple household items such as wearing apparel and bedding. Bankruptcy Act of 1800, ch. 19, §§ 5, 6, 2 Stat. 19, 23 (repealed 1803). The Act of 1841 similarly provided for a uniform set of federal exemptions. Bankruptcy Act of 1841, ch. 9, § 3, 5 Stat. 440, 442-43 (repealed 1843). The 1867 Act, adopted in the wake of the Civil War, permitted the debtor to use both the federal exemptions and any more generous state exemption law that might exist. Bankruptcy Act of 1867, ch. 176, § 14, 14 Stat. 517, 522-24 (repealed 1878). It protected wearing apparel and other limited necessities worth up to $500, plus any property exempted by federal nonbankruptcy law. Id. However, states were not permitted to expand their domiciliary's exemptions beyond what had been provided in 1867, the year the Bankruptcy Act was adopted. See generally William Houston Brown, Political And Ethical Considerations Of Exemption Limitations: The “Opt-Out" As Child Of The First And Parent Of The Second, 71 Am. Bankr. L.J. 149, 163-70 (1997); Historical Evolution, supra, 355-56.
5. See supra text accompanying notes 37-42 & 73-76.


7. Constitutional challenges to § 522(b)'s opt-out provision were uniformly unsuccessful.


8. See William J. Woodward, Jr., Exemptions, Opting Out, and Bankruptcy Reform, 43 Ohio St. L.J. 335 (1982).


14. 574 F.3d 248 (4th Cir. 2009), cert. denied, 130 S. Ct 1066 (2010).

15. The arguably conflicting decision in *In re Kanter*, 505 F.2d 228 (9th Cir. 1974), was decided under the Bankruptcy Act.


24. Act of Apr. 4, 1800, ch. 19, § 1, 2 Stat. 19, 20 (specifying the acts of bankruptcy which could result in “any merchant, or other person . . . actually using the trade of merchandise . . . [to be] adjudged a bankrupt”).


32. It provided:
[T]here shall be excepted . . . the necessary household and kitchen furniture, and such other articles and necessaries of such bankrupt as the said assignee shall designate and set apart, having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value . . . the sum of five hundred dollars; and also the wearing apparel of such bankrupt, and that of his wife and children.

uch other property as now is, or hereafter shall be, exempted from attachment, or seizure, or levy on execution by the laws of the United States, and such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process . . . by the laws of the State in which the bankrupt has his domicile . . ., to an amount not exceeding that allowed by such State exemption laws in force in the year [1864].

ne of the primary purposes of the bankruptcy act is to ‘relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh.’ . . . This purpose of the act has been again and again emphasized by the courts as being of public as well
as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.

Id. at 244-45 (citations omitted).

49. The report specified: "The primary function of the bankruptcy system is to continue the law-based orderliness of the open credit economy in the event of a debtor's inability or unwillingness generally to pay his debts. Especially from creditors' perspectives, it is important to have rules that determine rights generally in the debtor's wealth, wherever situated, and thus guide conduct in the open credit economy, as well as the collective processes which effect such rules and permit creditors to realize on their claims. Especially from debtors' perspectives it is important to have sanctuary from the jungle of creditors' pursuit of their individualistic collection efforts, both under law and outside of the law. Relief by way of stay of collection may be all that is needed. It is equally important to be able to obtain authoritative relief, through discharge, from the hardship of unpaid debts." Commission Report, supra note 48, Part I at 71.

50. As the Commission explained: “The second function of the bankruptcy process, on a par with the first, is to rehabilitate debtors for continued and more value-productive participation, i.e., to provide a meaningful "fresh start." Id.


54. *See id.* at 171.

55. *Id."

The Executive Director of The Commission, Professor Frank R. Kennedy, later provided additional information about the Commission's reasoning:

“[t]he Commission had proposed a uniform federal exemption. It was concerned about the wide disparity that exists under the present law for the debtor on the East Coast as opposed to the debtor on the West Coast or in Texas where exemptions are exceedingly generous. Congress, you see, since 1898, has deferred to state law in respect to exemptions under the Bankruptcy Act ... So in Texas a debtor can be a fairly wealthy person and yet have no assets for the creditors because all of the property is exempt. At the same time, on the East Coast, the exemptions are relatively stingy. The Commission thought there ought to be uniformity, and there has been wide approval of that objective. I have always had personal reservations about that matter, but the Commission weighed the competing considerations very well before it adopted a uniform federal exemption recommendation." Frank Kennedy, *New Bankruptcy Act Impact on Consumer Credit*, 33 Bus.Law. 1059, 1063 (1978).


59. Commission Report, supra note 48, Part II, at 125-26. The exemption for household goods and furnishings and motor vehicles combined was $1000. Id. § 4-503(c)(1). Debtor's could exempt up to $5000 of equity in their homes. Id. § 4-503(a)(1). Burial plots were exempt up to $2,500 in value. Id. § 4-503(c)(2). (apparently, debtor's needed their burial plots more than they needed their clothes and their car). Adjusted for inflation, and based on changes in the consumer price index over nearly the last 40 years, these amounts would be worth $5209 (household goods, clothing & a car) $26,045 (residence), and $13,022 (burial plot), in 2011. See http://www.halfhill.com/inflation.html (last viewed April 1, 2011 - no foolin').


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Comm. on the Judiciary, 94th Cong., 1st Sess. (1975)

64. H.R. 32, 94th Cong. § 4-503 (1975).

65. Statement of Professor Frank R. Kennedy, House Hearings, supra/infra note 64 at 170.


66. H.R. 8200, 95th Cong., 1st Sess. § 522(b) (1977), reprinted in App. 3 L. King, K. Klee &
6087-88. It has been suggested that in rejecting the Commission's proposal for a single
uniform bankruptcy exemption statute, the House might have been concerned that
creditors, in states with more generous exemption statutes, might be more inclined to
file involuntary bankruptcy proceedings against debtors, rather than permit them to
rely on the few more generous state exemption statutes that existed around the country
(e.g., Texas and California). Vern Countryman, Consumers in Bankruptcy Cases, 18
Washburn L.J. 1, 4 (1980). See generally Homer Drake, The Judge's Bankruptcy Bill
and the Commission's Bill, A Question of Access to the Judicial Process, 26 Mercer L.
Rev. 1009, 1027-28 (1975); Robert L. Hughes, Code Exemptions: Far-Reaching
Achievement, 28 De Paul L. Rev. 1025, 1027 (1979); Joseph Lee, A Critical
Comparison of the Commission Bill and the Judge's Bill for the Amendment of the
Bankruptcy Act, 49 Am. BAnkr. L.J. 1, 22 (1975).


68. Vern Countryman, Consumers in Bankruptcy Cases, 18 Washburn L.J. 1, 4 (1980).
69. This seems odd in some respects. The early history of American bankruptcy law is replete with examples of efforts to balance the interests of agricultural interests, who were primarily debtors, with those of urban (and Eastern) bankers. To the extent that state legislatures are dominated by agricultural interests, one might think that debtors' interests would receive more protection from state legislators than those of lenders. However, to the extent that state legislators are beholding to bankers and other lenders, the perception that these interests will hold the line against the expansion of debtor's exemption rights, may have been accurate.


82. Exemption statutes protect each debtor individually. For married couples, who jointly own their assets, this effectively doubles the amount of the exemption.


