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The drafters of the Bankruptcy Reform Act of 19781 expressed concern with the status of state exemption provisions.2 One policy consideration behind the new Code was to provide a “fresh start” for debtors.3 Yet, in many instances, state exemptions allowable in bankruptcy were hopelessly outdated and served only to frustrate the possibility of this fresh start.4 A contemporary exemption scheme was needed, and a last-minute compromise between the House and Senate led to the enactment of the present exemption provision, section 522.5 Section 522(b)(2) allows a debtor to choose between exemptions set forth in state law and a federal exemption package.6 However, subsection (b)(1) potentially limits this choice.7 This provision grants debtors the above described election unless the state enacts legislation which specifically denies its citizens access to the federal exemptions.8 Such state action is known as “opting out” of the federal exemption scheme. Section 522 represents a marked departure from the exemption provision of the Code's predecessor, section 6 of the Bankruptcy Act of 1898.9

3 Id. at 118, reprinted in 1978 U.S. CODE CONG. & AD. NEWS at 6078.
4 Id. at 126, reprinted in 1978 U.S. CODE CONG. & AD. NEWS at 6087.
6 Id. § 522(b)(1). See infra note 8.
8 Section 522(b) provides:

(b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate either—

(1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,

(2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place; and

(B) any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law.

11 U.S.C. § 522(b) (emphasis added).
the former Act's section 6 were primarily those prescribed by state law. This recent litigation suggests that this departure from the former exemption scheme poses serious questions concerning the constitutionality of section 522. This note first considers whether section 522(b) violates the uniformity requirement of the bankruptcy clause of the Constitution by providing for an election between state and federal exemptions and by granting power to the states to opt out of the federal scheme. Second, this note discusses whether the grant of power to the states to opt out of the federal exemption scheme unlawfully delegates power to the states in violation of the bankruptcy and supremacy clauses of the Constitution. This note examines the methods by which Congress may lawfully delegate, and thus defer, to state law and considers whether those methods have been used in section 522. It is argued that the grant of power in section 522(b)(1) is unlawful because it does not conform to any permissible method of deferral to state law. Finally, this note suggests that by enacting section 522 Congress may have defined the minimum level of allowable exemptions, and some state exemption provisions can thus be declared unconstitutional because they conflict with federal law. However, this analysis, while effectuating the Code's policy of providing a fresh start for debtors, overlooks the issue of whether the opt-out power has been unlawfully delegated to the states. Section 522(b)(1) remains vulnerable to such a challenge.

Section 6 provided:

Exemptions of Bankrupts. This Title shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the United States or 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 immediately preceding the filing of the petition, or for a longer portion of such six months than in any other State: Provided, however, That no such allowance shall be made out of the property which a bankrupt transferred or concealed and which is recovered or the transfer of which is avoided under this Title for the benefit of the estate, except that, where the voided transfer was made by way of security only and the property recovered is in excess of the amount secured thereby, such allowance may be made out of such excess.

Id.

See, e.g., Cheeseman v. Nachman, 656 F.2d 60 (Bankr. 4th Cir. 1981); In re Rhodes, 14 Bankr. 629 (Bankr. M.D. Tenn. 1981); In re Sullivan, 11 Bankr. 432 (Bankr. C.D. Ill. 1981), aff'd, 6 COLLIER BANKR. CAS. 2d (MB) 972 (Bankr. 7th Cir. May 19, 1982); In re Ragsdale, No. 80-2335 (Bankr. E.D. Va. Apr. 9, 1981); In re Bloom, 5 Bankr. 451 (Bankr. N.D. Ohio 1980).

The supremacy clause provides:

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.
THE UNIFORMITY REQUIREMENT

The United States Constitution grants Congress the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States." The framers of the Constitution intended by "uniform" has been revived as a potent issue in recent challenges to the constitutionality of section 522. The Supreme Court has long interpreted uniformity to mean geographical uniformity, as opposed to personal uniformity, allowing bankruptcy law to have different effects on debtors in the various states. Justification for the Court's interpretation, whether this interpretation was intended by the framers, and what effects it should have on section 522, are explored below.

The Intended Meaning of Uniformity

There is little commentary discussing the incorporation of the bankruptcy clause into the Constitution, yet the meaning of the phrase "uniform Laws on the subject of Bankruptcies" is crucial to an analysis of whether section 522 meets the uniformity requirement. One authority states that the grant of power to Congress to establish bankruptcy laws resulted from "the importance of preserving harmony, promoting justice, and securing equality of rights and remedies among the citizens of all the States." The framers seemed concerned with the injustice and

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18 U.S. CONST. art. I, § 8, cl. 4.
186 U.S. at 190. Geographic uniformity requires, in part, that the same law be in effect throughout the United States, that the law have a "general operation" throughout the states. Personal uniformity, referred to as "true uniformity" by one writer, see infra note 22, would require that the federal bankruptcy law not allow state-by-state variations. See infra text accompanying notes 19-51.
15 See generally P. COLEMAN, DEBTORS AND CREDITORS IN AMERICA (1974); 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1102-1115 (1873); C. WARREN, BANKRUPTCY IN UNITED STATES HISTORY (1972); Nadelmann, On the Origin of the Bankruptcy Clause, 1 AM. J. LEGAL HIST. 215 (1957); Radin, The Nature of Bankruptcy, 89 U. PA. L. REV. 1 (1940).
20 J. STORY, supra note 19, § 1107.
It is obvious, that if the power is exclusively vested in the States, each one will be at liberty to frame such a system of legislation upon the subject of bankruptcy and insolvency as best suits its own local interests and pursuits . . . . In short, diversities of almost infinite variety and object may be introduced into the local system, which may work gross injustice and inequality, and nourish feuds and discontents in neighboring States.

Id.
inequality which would result from allowing the states to enact bankruptcy laws which could operate differently in each state.\textsuperscript{21} The early bankruptcy acts and the historical climate surrounding the drafting of the bankruptcy clause suggest that the framers intended uniformity to mean that bankruptcy laws may not be enacted if they have differing effects on the citizens of the various states—a “true uniformity” was required.\textsuperscript{22} Despite this seeming intention, the uniformity requirement has not been construed to compel a uniform effect on all debtors in every state.

The Hanover Analysis

In \textit{Hanover National Bank v. Moyses},\textsuperscript{23} the forerunner of section 522\textsuperscript{24} was attacked as lacking constitutional uniformity.\textsuperscript{25} The challenged provision, section 6 of the Bankruptcy Act of 1898,\textsuperscript{26} specified that exemptions allowable in bankruptcy were primarily those prescribed by state law.\textsuperscript{27} The effect of section 6 was to allow each state to retain its own exemption scheme resulting in state-to-state variations. Petitioner’s theory rested on the fact that creditors were treated differently in the various states. Although such an effect had been present since the earliest forms of the

\textsuperscript{21} Id.

\textsuperscript{22} See Comment, \textit{Bankruptcy Exemptions: Whether Illinois’s Use of the Federal “Opt-Out” Provision is Constitutional}, 1981 S. ILL. U.L.J. 65, 72-85. The writer describes the events and debates surrounding the enactment of the bankruptcy clause, reviews the earliest bankruptcy acts, and argues that the framers intended the uniformity requirement to mean “true uniformity”: federal law may not allow state-by-state variations.

\textsuperscript{23} 186 U.S. 181 (1902).

\textsuperscript{24} 11 U.S.C. § 522.

\textsuperscript{25} 186 U.S. at 183. Some scholars have supported the reference to state laws in the exemption provisions of the various bankruptcy acts with a strict construction of the bankruptcy clause. Suggesting that the framers did not intend that there be one uniform national bankruptcy law, Nadelmann writes: “[I]t is no accident . . . that the Bankruptcy Clause speaks of ‘uniform laws,’ rather than one ‘uniform law,’ which Congress may pass on the subject of bankruptcies, thus leaving Congress a free hand in adopting, if it is so desired, different laws for different types of debtors.” Nadelman, supra note 19, at 227. Such an analysis is inappropriate as a justification for reference to state law in the exemption provisions. It is, however, appropriate to an issue hotly debated by the drafters of the Bankruptcy Acts of 1800 and 1841: what is the nature of bankruptcies? It was in this context that Nadelmann made the observation. Id. The debates discussed whether “bankruptcies” in the Constitution meant bankruptcy as defined in England, which was applicable only to “traders,” or whether it encompassed other forms of insolvency and could apply to banks and other contracting parties. The plural of bankruptcy in the Constitution supports the proposition that “bankruptcy,” as intended by the framers, encompasses many forms of insolvency. C. Warren, supra note 19, at 6-8. For a review of the various attempts at defining the scope of “bankruptcies,” see Radin, supra note 19. Thus, an analysis of the use of the plural in the phrase “uniform laws” aids in the delination of what “bankruptcies” encompass, not in an interpretation of the meaning of “uniform.”

\textsuperscript{26} Ch. 541, § 6, 30 Stat. 544, 548 (codified as amended at 11 U.S.C. § 24 (1976)).

\textsuperscript{27} See supra note 10.
Act, this was its first uniformity challenge. The Court produced a two-tiered analysis which may not have carried out the framers' intention of true uniformity, but which did at least vindicate contractual expectations. Under Hanover, variations in bankruptcy law are permissible, so long as there is both general uniformity and geographic uniformity.

The Court ruled that “uniformity is geographical and not personal,” and that “the provision of the Act of 1898 as to exemptions is [not] incompatible with the rule.” According to the Court, the geographic uniformity required by the Constitution permitted variations between the bankruptcy provisions of several states. But the Court’s analysis implicitly recognizes a broader and more fundamental uniformity requirement, that of general uniformity. The Court reasoned that the “general operation of the law is uniform although it may result in certain particulars differently in different States.” Section 6 had a uniform general operation over all the states in that it deferred to state law in every instance. Geographic uniformity under this analysis would not permit Congress to enact one set of bankruptcy exemptions for the northern states and a different exemption package for the southern states. The Hanover Court’s reasoning supports the inclusion of a general uniformity requirement into its definition of geographic uniformity. The Court stated:

[O]ne of the effects of a bankrupt law is that of a general execution issued in favor of all the creditors of the bankrupt, reaching all his property subject to levy, and applying it to the payment of all his debts according to their respective priorities. It is quite proper, therefore, to confine its operation to such property as other legal process could reach. A rule which operates to this effect throughout the United States is uniform within the meaning of that term, as used in the Constitution.

The “other legal process” to which the Court refers is the operation of state law creditor remedies. The Court reasoned that the respective rights of debtors and creditors at the time their obligation was contracted were ascertainable by reference to state law; thus, section 6 effectuated equitable policies.

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28 One scholar notes that although “the constitutionality of the Act (of 1841) had been long and violently attacked, the Act was passed, achieved its purpose . . . and was repealed, before any decision as to its constitutionality was made by the Supreme Court.” C. WARREN, supra note 19, at 85. In no cases decided under the Act of 1841 did the Court specifically consider the constitutional question. “That which was of doubtful constitutionality in 1841 had become unquestioned law in 1867—and without any specific decision by the Supreme Court.” Id. at 87. Indeed, only recently has the Supreme Court ever found a bankruptcy law in violation of the uniformity requirement of the Constitution. Railway Labor Executives’ Ass’n v. Gibbons, 455 U.S. 457 (1982).

29 186 U.S. at 188 (emphasis added).

30 Id.

31 Id. at 190 (emphasis added).

32 Id. at 189-90 (emphasis added).
This [use of state-promulgated exemptions] is not unjust, as every debt is contracted with reference to the rights of the parties thereto under existing exemption laws, and no creditor can reasonably complain if he gets his full share of all that the law, for the time being, places at the disposal of creditors.\textsuperscript{33}

Because all creditors and debtors within a state contract with reference to the same state laws, a federal law which provides for state-promulgated exemptions has geographic uniformity within the various states despite the differences between the states.\textsuperscript{34} In other words, geographic uniformity requires that similarly situated citizens within a state be treated alike. All state citizens are subject to the same state laws; therefore a bankruptcy law retaining state law treats similarly situated state citizens alike. Since exemptions were determined by state law in every jurisdiction, section 6 had a uniform operation throughout the United States despite the state-to-state variations.

The two-tiered analysis set forth in \textit{Hanover} to determine whether a bankruptcy law is uniform as required by the Constitution asks the following: (1) Whether the federal bankruptcy provision can be said to have a general operation throughout the United States (general uniformity); and if so, (2) Whether the effect of such general uniformity is to treat all similarly situated debtors and creditors within a state alike in bankruptcy (geographic uniformity).\textsuperscript{35}

\textit{Section 6 and Section 522 Distinguished}

Section 6 of the Bankruptcy Act of 1898\textsuperscript{36} provided that allowable bankruptcy exemptions were those prescribed by state law.\textsuperscript{37} Section 522 of the current Code\textsuperscript{38} does not, however, merely defer to state law. Subsection (b)(2) allows a debtor to choose between state exemptions and a federal exemption package.\textsuperscript{39} Subsection (b)(1) permits a state to deny its citizens this election, thereby binding its debtors to the state exemption package.\textsuperscript{40}

Several nonuniform effects potentially result from this situation. First, there may be dissimilar treatment of debtors and creditors in various states. Debtors in Washington, for example, have access to the federal

\textsuperscript{33} \textit{Id.} at 189.

\textsuperscript{34} The federal law meets the "general" uniformity requirement in that it has the same general operation in all the states. See \textit{supra} text accompanying note 31.

\textsuperscript{35} 186 U.S. at 188. \textit{Cf. infra} notes 81-82 and accompanying text (effect of uniformity requirement on delegation power).


\textsuperscript{37} For text of § 6, see \textit{supra} note 10.

\textsuperscript{38} 11 U.S.C. § 522.

\textsuperscript{39} \textit{See supra} note 8.

\textsuperscript{40} \textit{Id.}
exemptions, but debtors in Kentucky are bound to the state exemption package. More significantly, there may be dissimilar treatment of debtors and creditors within a state. Debtor A in a non-opting state may choose to utilize the state exemptions; debtor B in the same state may choose the federal package. The remedies of creditors in each instance may vary dramatically, and this dissimilar treatment underscores the significant difference between the current section 522 and the former section 6: under old section 6 all debtors within a state were bound by a state exemption scheme; there was no potential for dissimilar treatment of intrastate debtors as there is now under section 522.

The Hanover Analysis: Application to Section 522

Courts which have recently sustained the constitutionality of section 522 in the face of uniformity challenges have failed to consider the differences between section 522 and the former section 6, and the depth of analysis provided by the Hanover Court. Rather, these courts interpret Hanover to mean that any exemption provision which applies to all states and defers in any way to state law is uniform under the Hanover guidelines.

Section 522 cannot withstand a proper uniformity analysis under the two-tiered Hanover test. The current provision meets only the requirements of the first part of the test. Section 522 can be said to have general uniformity in that the provision applies throughout the United States; that is, Congress has not adopted one exemption package for half of the states and a different package for the remainder. Section 522 does not, on the other hand, meet the second tier geographic uniformity requirement which mandates that all similarly situated debtors and creditors

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41 To date Washington has not opted out pursuant to § 522(b)(1).
44 See, e.g., In re Lausch, 12 Bankr. 55, 56 (Bankr. M.D. Fla 1981); In re Sullivan, 11 Bankr. 432 (Bankr. C.D. Ill. 1981), aff'd, 6 Collier Bankr. Cas. 2d (MB) 972 (Bankr. 7th Cir. May 19, 1982). In Lausch, the court stated that historically Congress had left the duty of determining exemptions to the states and that in § 522(b), "Congress has again delegated to the states the task of determining bankruptcy exemptions." 12 Bankr. at 56. In Sullivan the court briefly reviewed the Hanover decision and held § 522 to be constitutional under the Hanover guidelines, 11 Bankr. at 432-37. See also In re Ambrose, 4 Bankr. 395 (Bankr. N.D. Ohio 1980).
within a state be treated alike under the bankruptcy law. In non-opting-out states, similarly situated debtors and creditors do not receive like treatment in bankruptcy under section 522. If debtor A chooses the federal exemption package and debtor B chooses the state package, both of the debtors, as well as their creditors, receive different treatment in bankruptcy. Section 6 state exemption provisions were sustained in Hanover because the rights of the parties were ascertainable at the time of the contract. In non-opting-out states it is now more difficult for parties to form a contract with predictable rights and remedies because at the time the obligation is created a creditor will be unable to anticipate which exemption scheme a citizen would choose should he go into bankruptcy. As different protection may be provided under each package, creditors will be unable to protect themselves from the harsh impact of conflicting exemption provisions. If the uniformity of section 522 is sustained, creditors must contract not only with reference to state law, but also with reference to potential debtor rights provided by federal law. Furthermore, sustaining this sort of uniformity will continue to thwart the fresh start policy underlying the Code. States which opt out of the federal scheme can maintain state exemption provisions which are less generous than those provided for in section 522(d), thereby frustrating the possibility of a fresh start for its bankrupt citizens.

The Hanover Court justified its validation of section 6 on the ground that the rights of debtors and creditors were ascertainable at the time of the contract; that justification is not present under section 522. If indeed the framers of the Constitution intended a true uniformity of bankruptcy laws, that intent has been frustrated by the Hanover Court's allowance of state-to-state variations in exemption provisions. Constitutionally required uniformity should not be completely abandoned by courts which ignore the Hanover analysis and blindly apply its result.

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45 See supra note 35 and accompanying text.
46 To date nineteen states and the District of Columbia allow their citizens an election between the state and federal exemptions: Alaska, California, Connecticut, Hawaii, Illinois, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New Mexico, New York, Pennsylvania, Rhode Island, Texas, Vermont, Washington, and Wisconsin. See supra notes 32-34 and accompanying text.
47 See supra note 35 and accompanying text.
48 To determine whether it is feasible for a creditor to protect him or herself notwithstanding the debtor's right to choose between exemption schemes requires a careful examination of the relation between the federal exemption package and exemptions provided by state law. For articles comparing various state exemption schemes to the federal scheme, see sources cited supra note 35.
49 See supra note 3 and accompanying text.
UNLAWFUL DELEGATION OF POWER TO THE STATES

In 1819 the Supreme Court held that the power given to the United States to pass bankruptcy laws is not exclusive.52 States could discharge debts among their own citizens provided Congress did not pre-empt the field.53 However, beyond this deceptively simple declaration many problems exist. When Congress has acted, thereby pre-empting state law to some extent, it may still desire to delegate some matters to the states. It has done so with the exemption provisions of the Bankruptcy Reform Act of 1978.54 Because the bankruptcy power is exclusive to the extent exercised,55 congressional attempts to defer to state legislation within an otherwise comprehensive bankruptcy scheme must be closely examined. The uniformity requirement, however it may be construed,56 demands some degree of exclusivity;57 and so uniformity must be taken into account when considering delegation as well as when considering uniformity in and of itself.

Generally speaking Congress has exclusive bankruptcy power and may defer to state law in only three ways: (1) by applying the federal law to an existing structure of state-created rights and obligations; (2) by explicitly incorporating the state law into federal law; or (3) by remaining silent and allowing concurrent state power to act.58 The question now addressed is whether Congress, through enactment of section 522(b)(1), has deferred by permitting states to opt out—in a permissible manner—or whether such a grant of authority to the states represents an unlawful delegation of power in violation of the bankruptcy and supremacy clauses of the Constitution.59 Challenges to the constitutionality of section 522(b)(1) on this ground have not been accepted by the courts.60 In fact, the unlawful

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53 Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819); see generally P. COLEMAN, supra note 19, at 31-36 (discussing the constitutionality of state insolvency laws). This power to discharge is limited in that states may discharge contractual obligations incurred after the enactment of the abrogating law, but are prohibited from applying that law retrospectively to obligations incurred prior to the law's enactment. See Sturgis v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819).
56 See supra notes 19-35 and accompanying text.
57 That is to say, bankruptcy law cannot be both uniform and at the same time subject to the legislation of multiple sovereigns. Thus, to the degree that bankruptcy must be uniform, the power to legislate in that area must be exclusively federal. See generally Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 193-96 (1819).
58 In re Rahrer, 140 U.S. 545, 558, 560 (1891). Hertz, supra note 51, at 342.
59 U.S. Const. art. I, § 8, cl. 4; art. VI, cl. 2.
60 See, e.g., In re Sullivan, 6 COLLIER BANKR. CASES 2d (MB) 972 (Bankr. 7th Cir. May 19, 1982), aff'd 11 Bankr. 432 (Bankr. C.D. Ill. 1981); In re Ragsdale, No. 80-2335 (Bankr. E.D. Va. Apr. 9, 1981).
delegation challenge has been typically dismissed with a mere citation to the 1891 Supreme Court decision of In re Rahrer. These recent cases have failed to correctly apply or even comprehend the Rahrer analysis.

The petitioner in Rahrer challenged an 1890 federal statute, promulgated under the commerce power, which provided that all liquor transported into any state was to be subject to the laws of that state. In was argued that the statute resulted in an unlawful delegation to the states of a power vested exclusively in Congress. The Supreme Court reached the conclusion that the power was not exclusive.

The Rahrer analysis began with a discussion of the grant of the article I powers to Congress. The Court noted that the proposition that "Congress can neither delegate its own powers nor enlarge those of a State," is too obviously true to admit of argument. However, as to the challenged statute, the Court reasoned:

Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the States, or to grant a power not possessed by the States, or to adopt state laws. It has taken its own course and made its own regulation, applying to these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in state laws dealing with such property.

The principle upon which local option laws, so called, have been sustained is, that while the legislature cannot delegate its power to make a law, it can make a law which leaves it to municipalities or the people to determine some fact or state of things, upon which the action of the law may depend. . . .

140 U.S. 545 (1891). This trend seems to have begun in 1902 when the Supreme Court, in Hanover Nat'l. Bank v. Moyses, 186 U.S. 181 (1902), dismissed an unlawful delegation challenge to § 6 of the 1898 Bankruptcy Act in the same manner. The Court merely cited Rahrer, stating: "Nor can we perceive in the recognition of the local law in the matter of exemptions . . . any attempt by Congress to unlawfully delegate its legislative power." Id. at 190.

For the most part, recent decisions have ignored the analysis set forth in Rahrer. See infra notes 85-99 and accompanying text. The decision in In re Sullivan, 6 COLLIER BANKR. CAS. (MB) 972, 980 (Bankr. 7th Cir. May 19, 1982), affg 11 Bankr. 432 (Bankr. C.D. Ill. 1981), on the delegation issue relied upon Hanover in which the court dismissed an unlawful delegation challenge to § 6 of the 1898 Bankruptcy Act with a mere citation to Rahrer.

The challenged statute provided:

That all fermented, distilled or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

Wilson Act, ch. 728, 26 Stat. 313 (1890) (codified at 27 U.S.C. § 121 (1976)). The functional similarity of this statute to § 6 of the 1898 Bankruptcy Act is worth noting. See infra note 68 and accompanying text.

140 U.S. at 550-54.
Id. at 565.
Id. at 560.
Id. at 561-62 (emphasis added).
The thrust of this analysis is to sustain the validity of a congressional act which leaves to the states the determination of some fact or condition upon which federal law may apply. Section 6 of the 1898 Bankruptcy Act allowed the states to specify the fact or condition of what property the bankruptcy law could operate upon. Such delegation, allowing states to declare what property was included in the debtor's estate, was clearly constitutional in this sense.\(^8\) Section 522 is not a constitutional delegation of power under \textit{Rahrer}, as will be shown below in a detailed analysis of the three permissible methods of delegation.

\textit{Applying Federal Law to an Existing Structure of State-Created Rights and Obligations}

Section 6 of the 1898 Bankruptcy Act deferred to state law by applying federal law to an existing structure of state-created rights and obligations.\(^9\) Exempt property was excluded from the bankruptcy estate.\(^7\) The bankruptcy court had jurisdiction only to determine the merits of the bankrupt's claim to exemptions; after this threshold determination, the bankruptcy court's jurisdiction and control over the exempt property ceased.\(^7\) Under the old Act, state law did not direct the use of federal power, but rather identified the connection between the particular rights or obligations created by the state and a given person.\(^7\)

The 1978 Code provisions which define the parameters of the debtor's estate are substantially different from the provisions of the old Act. The debtor's estate now includes "all legal or equitable interests of the debtor in property as of the commencement of the case."\(^7\) Consequently, this expanded definition gives the bankruptcy courts jurisdiction over all the debtor's property, including any exempt property.\(^7\) This jurisdictional expansion affects Congress' ability to delegate to the states the power to enact bankruptcy exemption provisions.

The application of federal law to an existing structure of state-created rights and obligations requires Congress to determine the relationship between bankruptcy and state law remedies.\(^7\) Section 522(b)(1) allows the states to determine when federal bankruptcy law will apply (by not opting out) or when non-bankruptcy state law will apply (by passing legislation opting out of the federal scheme). Consequently, Congress no longer defers

\(^{68}\) Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 190 (1902).

\(^{69}\) See supra note 8.


\(^{71}\) W. LAUBE, W. HILL & L. KING, \textit{COLLIER BANKRUPTCY MANUAL} ¶ 6.01 (2d ed. 1982).

\(^{72}\) Specifically, § 6 merely deferred to property rights created by the states for its citizens. These property rights were the connection between a debtor and exempt property.


\(^{74}\) \textit{4 COLLIER ON BANKRUPTCY} ¶ 541.01 (L. King 15th ed. 1982).

\(^{75}\) Hertz, supra note 51, at 343.
to state law by applying federal law to an existing structure of state-created rights as it did under the old Act; instead Congress has delegated the power to control federal law to the states.\textsuperscript{[36]}

Section 522, permits states to determine to which of the debtor's property bankruptcy will apply only when the debtor elects the state exemptions or the state opts out. By granting states the power to opt out, thus guaranteeing the application of state law in every such instance, Congress has not merely delegated the power to specify a fact or condition, but to choose the substantive content of a bankruptcy law. Such delegation is impermissible under \textit{Rahrer}.

That states can now direct the relationship between the bankruptcy law and property already within federal jurisdiction\textsuperscript{[77]} is further support for this contention. The opt-out clause empowers the states to control property within federal jurisdiction,\textsuperscript{[78]} whereas the challenged statute in the \textit{Rahrer} case "imparted no power to the state not then possessed," but allowed immediate local jurisdiction over imported property.\textsuperscript{[34]} In sum, the opt-out provision impermissibly delegates power to the states by allowing them to specify to what state-created rights federal bankruptcy law will apply.

\textbf{Incorporation of State Law as Federal Law}

Section 522(b)(1) cannot be sustained under the theory that Congress incorporated state opt-out legislation as its own law. The \textit{Rahrer} court stated that

\begin{quote}
Congress [cannot] transfer legislative powers to a State nor sanction a state law in violation of the Constitution, and if it can adopt a state law as its own, \textit{it must be one that it would be competent for it [Congress] to enact itself, and not a law passed in the exercise of the police power.}\textsuperscript{[35]}
\end{quote}

\textsuperscript{[36]} Hertz briefly outlines this argument and concludes: "In sum, improper delegation of power under subparagraph 522(b)(1) appears to be a serious question." \textit{Id.} at 343-44.

\textsuperscript{[37]} See supra notes 73-74 and accompanying text.


\textsuperscript{[39]} 140 U.S. at 564. In addition, the Court noted that "[t]he framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject matter specifically committed to its charge." \textit{Id.} at 562. However, it cannot be said that the congressional intent behind § 522(b)(1) was to dispose of bankruptcy exemptions. By including all the property of the debtor in the bankruptcy estate and thus conferring federal jurisdiction over such property, in addition to setting forth a detailed exemption package, Congress intended to \textit{establish} bankruptcy laws, not dispose of them.

\textsuperscript{[40]} \textit{Id.} at 560 (emphasis added). The Assimilative Crimes Act is an example of Congress adopting state law as its own. The Act provides:

\begin{quote}
Whoever within or upon a federal enclave is guilty of any act or omission which although not made punishable by Congress, would be punishable if committed within the jurisdiction of the state in which the enclave is located, is guilty of a like offense and subject to a like punishment.
\end{quote}

When considering whether Congress may constitutionally incorporate state opt-out legislation into the federal bankruptcy law, uniformity considerations merge with delegation considerations. Congress cannot attempt to adopt the state's opt-out legislation as bankruptcy law because to do so would create different bankruptcy exemption schemes for different states. There would be one package of "federal exemptions" for opting-out states (derived from the state law) and a different "federal package" for non-opting-out states (set forth in section 522). This result violates the first tier of Hanover, the general uniformity requirement. Thus, Congress cannot adopt the states' opt-out legislation as a federal bankruptcy law, because it cannot grant the states the power to do what it itself does not have the power to do.

Deferral by Congressional Silence

Congress may also defer to the states by permitting a state to legislate in an area where Congress is competent to legislate but has chosen not to. However, Congress has clearly acted with regard to exemptions allowable in bankruptcy and thus the delegation of power found in section 522(b)(1) cannot be sustained under this final permissible method of deferral. Thus it is clear that the opt-out authority granted to the states by section 522(b)(1) was not granted through a permissible means of delegation and represents an unconstitutional delegation of power to the states.

Dodging the Delegation Issue: A Pre-emption Analysis

Several recent decisions have considered the constitutionality of state exemption provisions by analyzing the pre-emptive effect of section 522 on those state provisions. In an action to determine the amount of an

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States v. Sharnack, 355 U.S. 286 (1958). The Court noted: "Rather than being a delegation by Congress of its legislative authority to the States, it is a deliberate continuing adoption by Congress for federal enclaves of such unpre-empted offenses and punishments as shall have been already put in effect by the respective States for their own government." Id. at 294.

1 See supra note 35 and accompanying text.

2 140 U.S. at 560. As a practical matter, the opt-out provision results in a situation in which Congress does not attempt to adopt state law, but rather allows the states to decide whether or not to adopt federal law.

3 See sources cited supra note 58.

4 See generally L. Tribe, AMERICAN CONSTITUTIONAL LAW §§ 6-25 (1978) (discussing ramifications on state regulations when Congress has validly decided to "occupy the field").

5 Cases applying this pre-emption analysis include: Cheeseman v. Nachman, 656 F.2d 60 (Bankr. 4th Cir. 1981); In re Balgermann, 16 Bankr. 780 (Bankr. N.D. Ill. 1982); In re Rhodes, 14 Bankr. 629 (Bankr. M.D. Tenn. 1981); In re Vasko, 6 Bankr. 317 (Bankr. N.D. Ohio 1980).
allowable exemption, the debtor in *Cheeseman v. Nachman* proposed a liberal construction of Virginia's homestead exemption. The court ruled that a liberal construction was required because Congress had enacted a specific exemption provision, and the Virginia law should not be interpreted to conflict with the more generous federal exemption provision.

Support for this position was found in the policies underlying the enactment of section 522, described in the legislative history: "In developing the Act's exemption law, Congress observed that under prior law exemptions had been determined by reference to state laws which had become so outdated in many instances that they were 'hopelessly inadequate to serve the needs of and provide a fresh start for modern urban debtors.'"

The *Cheeseman* court reasoned that the states "should [not] be left free to classify which bankrupt debtors should be entitled to exemptions when the classification conflicts with federal law." Although not specifically addressing the question of whether the power granted by the opt-out provision was constitutionally delegated, the court held that Congress had generally pre-empted state law with regard to exempt property interests in bankruptcy cases and thus the states could not enact laws which conflict with the federal exemption scheme. To avoid this pre-emption problem, the court gave the state law a narrow construction.

A Tennessee bankruptcy court subsequently adopted the *Cheeseman* analysis in *In re Rhodes*. In *Rhodes*, the debtor-plaintiff attacked the constitutionality of Tennessee's opt-out legislation. The issue, according to the court, was whether Tennessee's opt-out statute should be pre-empted or given effect. The court rejected the defendant's argument that section 522(b)(1) represented congressional recognition of the concurrent state power to enact bankruptcy laws when not specifically pre-empted by federal law. The court found instead that "Congress clearly ha[d] pre-empted state law with regard to the exemption of property interests in bankruptcy cases . . . ." According to the *Rhodes* court, the *Cheeseman* case stands for the proposition that Congress [in setting out a detailed federal exemption scheme] has placed appropriate limitations in the opt-out authority granted to the states.

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*Id.* at 63.


*Id.* at 64.


*Rhodes*, 14 Bankr. at 630.

*Id.* at 631.

*Id.*
OPT-OUT PROVISIONS

The states may exercise that authority only if they provide their citizens with a scheme of bankruptcy exemptions that is not inconsistent with the provisions of § 522. 55

Because the court could not find a way to construe the Tennessee exemption provisions such that the conflict with the federal scheme could be avoided, it held that Tennessee had exceeded its authority under section 522(b)(1). 56

Further support for the Cheeseman and Rhodes analyses is found in the comments of a drafter of section 522:

Another objective of this Code was to enhance the benefits of bankruptcy for consumer debtors—to make sure they get a fresh start. One of the ways this has been accomplished is through the exemption process. . . .

One thing Congress couldn’t agree on was a national exemption statute. . . . Still, Congress did establish a federal floor which the debtor can opt for as an alternative to the exemptions provided by state law. The reason for the federal floor was an inability to agree on a national exemption package which would be applicable in all cases. 57

The commentary went on to state that the opt-out provision came about as a result of compromise because it was felt that the Congress was stepping on people too much, that the state should have some say in this exemption business, as they have had in the past. So each state was given the option of enacting a law that would remove the applicability of the federal exemption package in bankruptcy cases filed in that particular state. It was hoped that, in the process of doing that, any state which did that would review its own exemption laws and up-date those laws accordingly. 58

The “federal floor” is the minimum package of exemptions allowable in bankruptcy by federal law. Thus, where a state opts out and provides for less generous exemptions, that state law conflicts with the federal standards. 59 In enacting a detailed federal exemption package, Congress

55 Id. at 633-34.
56 Id. at 634-35. The court permitted Tennessee debtors to continue to have the option of exempting property pursuant to the federal scheme. Id. at 635.
58 Id. at 18. Because the final version of § 522 was a last-minute compromise between the House and Senate, the constitutional considerations of that version were never explored. Interview with Hon. Joe Lee, Bankruptcy Judge for the Eastern District of Kentucky, in Lexington, Kentucky (Aug. 1981).
59 As the Rhodes court noted, “Congress obviously did not intend, and, in any event, was constitutionally prohibited from, delegating unfettered authority to the states to regulate bankruptcy exemptions. To do so would enable the states to totally frustrate the fresh start of many debtors.” 14 Bankr. at 633. To prevent the delegation of “unfettered authority,” Congress may only delegate authority to the states if it defines the limits within which the states can exercise that authority. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). The analyses in Cheeseman and Rhodes are firmly rooted in bankruptcy and
had defined the limits within which the states may act. As a result, state-promulgated exemption provisions must be at least as favorable to the debtor as those provided by Congress or they will be suspended.

CONCLUSION

Section 522 of the 1978 Bankruptcy Reform Act is unconstitutional because it violates the uniformity requirement of the Constitution's bankruptcy clause and unlawfully delegates power to the states.

Section 522 cannot withstand a constitutional uniformity challenge under the Hanover analysis which requires both "general uniformity" and "geographic uniformity." Major differences between the previous exemption provision and section 522 have been either overlooked or ignored by courts recently sustaining the uniformity of section 522. The alternative elections provided by section 522(b) yield varying degrees of relief for debtors similarly situated across the United States, and for those debtors domiciled in states which have not opted out, the relief varies within the states. In states that have not opted out, contract rights are no longer governed solely by state law. Creditors are unable to adequately protect their interests unless reference is made to both state and federal exemption provisions because debtors retain the option of electing either set of rights. In addition, the policy of providing a fresh start for debtors which underlies the Code, continues to be thwarted by section 522.

Moreover, section 522 constitutes an unlawful delegation of power to the states because it does not defer to the states by a permissible method. Section 522 represents neither an adoption of state law nor congressional silence, unlike section 6 of the 1898 Act which allowed the states to specify upon what objects federal law may operate. The effect of section 522 is to allow the states to control federal law—they are permitted to enact bankruptcy laws regulating interests under federal jurisdiction in violation of the bankruptcy and supremacy clauses of the Constitution. Recent lower court decisions, although not addressing the constitutionality of Section 522(b)(1), employ an analysis which adequately effectuates the Code's policy of providing a fresh start for debtors. State laws which provide for less generous exemptions than those set forth in section 522 are constitutional law. The Supreme Court has stated.

The Federal Constitution, Article I, § 8, gives Congress the power to establish uniform laws on the subject of bankruptcy throughout the United States. In view of this grant of authority to the Congress it has been settled from an early date that state laws to the extent that they conflict with the laws of Congress, enacted under its constitutional authority, on the subject of bankruptcies are suspended. While this is true, state laws are thus suspended only to the extent of actual conflict with the system provided by the Bankruptcy Act of Congress.

Stellwagen v. Clum, 245 U.S. 605, 613 (1918).
deemed in conflict with federal law, and thus unconstitutional. Although this effectuates the fresh start policy of the Code, the courts must address the primary issue: whether the opt-out power granted to the states by section 522(b)(1) represents an unlawful delegation of power to the states.

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