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Defending State Exemptions in Bankruptcy

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DEFENDING STATE EXEMPTIONS IN BANKRUPTCY

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Abstract

Throughout the past century's cyclical battles for bankruptcy reform, legislators and scholars have debated the need for federal control over bankruptcy estate exemptions. Millionaire criminals and Wall Street hucksters shielding assets from creditors provide perennial fuel for the argument that bankruptcy exemptions inspire systemic abuse. Few legislators, scholars, or pundits, however, have investigated the actual economic and social policy wisdom in state-specific exemptions as they affect the lives of millions of Americans. This Article examines the origins and policy implications of state-specific exemption laws and argues in favor of limited federal deference to state law.

I. INTRODUCTION

How much should state laws be allowed to conflict with federal bankruptcy law and policy? Let's consider a hypothetical: Debbie Debtor buys a house in the state of Grimes, which has a generous homestead exemption law and has opted out of related federal law. A hurricane strikes, Debbie's house floods, and it loses some of its value. Fortunately, the home is insured. But the flooding destroys the community economy, and Debbie loses her job and

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acquires significant unsecured debt before regaining her footing. She files for bankruptcy protection so that she can start anew. Question: should the insurance check for the home damage count as an exempt asset? On the one hand, Grimes law grants exemptions only to real estate, not to any related cash proceeds. On the other hand, the insurance money is an effective substitute for an asset that would've been exempt, but for Debbie's misfortune. If the cash is not exempt, the trustee will distribute it to credit card companies that never bargained for a piece of Debbie's house, and thus receive a windfall from the flood damage.[2]

Cases have come out both ways: for instance, in *In re Gilley*, a small farmer received and retained restitution from a chemical company that damaged his soil.[3] In *In re Plant*, the court handed over to the trustee for distribution to creditors a homeowner's settlement check for negligent construction by a contractor.[4] This disparity raises interesting questions of how much latitude the federal government should provide to states to implement their own exemption laws. Over the past twenty years, many parties have argued that states should not be able to pass laws applicable only in bankruptcy, a hypothetically federal system. The disparate results under varying state laws may seem antithetical to a system the Founding Fathers called "uniform."

The current consumer bankruptcy exemption regime derives from centuries-old traditions of state law competence over property rights, family law, and debtor-creditor relations.[5] It flies in the face, however, of the general movement toward a centralized, standardized federal bankruptcy law. Scholars have debated this controversy between age-old state law and more modern federal law throughout the past few decades.[6] In 2005, Congress passed the Bankruptcy

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[2] *See* 11 U.S.C. § 522 (2011) (including no provisions for insurance or other cash proceeds as resulting from damage to a homestead). As this Article will show, however, the courts' equitable powers and the "fresh start" ideology of bankruptcy trump these statutory concerns. Thus, in this scenario, Debbie's insurance check would almost certainly be exempted in any state or under federal law.

[3] *In re* Gilley, 236 B.R. 441, 442–47 (Bankr. M. D. Fla. 1999).

[4] *In re* Plant, 300 B.R. 22, 23–24 (Bankr. D. Ariz. 2003).

[5] *See infra* notes 38-157 and accompanying text.

[6] *See, e.g.*, Judith Schenk Koffler, *The Bankruptcy Clause and Exemption Laws: A Reexamination of the Doctrine of Geographic Uniformity*, 58 N.Y.U. L. REV. 22 (1983) (arguing for a return to ideas of uniformity propounded by the framers of the constitution); Justin Pratt, *The Inequitable Situation: A Look at the Bankruptcy Exemption After Five Years of Judicial Interpretation*, 3 EST. PLAN. & COMMUNITY

Abuse Prevention and Consumer Protection Act (BAPCPA),[7] intended to reinforce federal oversight.[8]

Even since BAPCPA, scholars continue to criticize the Bankruptcy Code for allowing so much variation in outcome simply based on age-old, state-specific property laws.[9] Questions remain as to whether this subservience to state law compromises the Code's effectiveness.[10] On the one hand, scholars and creditors' lobbyists complain that some state laws are too generous to debtors and thus

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PROP. L.J. 97 (2010) (advocating reform of 2005 federal legislation meant to harmonize state and federal exemption laws); Victor D. López, *State Homestead Exemptions and Bankruptcy Law: Is it Time for Congress to Close the Loophole?*, 7 RUTGERS BUS. L.J. 143 (2010) (recommending expansive federal control over homestead exemptions in bankruptcy); David A. Simole & David L. Rosendorff, *Homestead Exemption No Longer Debtors' Paradise*, 24-JAN AM. BANKR. INST. J. 6 (2006) (reviewing efficacy of 2005 legislation in reconciling state and federal law); Matthew J. Kemner, *Personal Bankruptcy Discharge and the Myth of the Unchecked Homestead Exemption*, 56 MO. L. REV. 683 (1991) (examining pre-bankruptcy planning issues in light of federal requirements and variations in state law); Ryan P. Rivera, *State Homestead Exemptions and Their Effect on Federal Bankruptcy Laws*, 39 REAL PROP. PROB. & TR. J. 71 (2004) (recommending a uniform cap on state homestead exemptions); Timothy R. Tarvin, *Bankruptcy, Relocation, and the Debtor's Dilemma: Preserving Your Homestead Exemption Versus Accepting the New Job Out of State*, 43 LOY. U. CHI. L.J. 141 (2001) (illustrating failure of current federal law to prevent abuse and protect creditors); Jeremy Berkowitz et al., *Bankruptcy Exemptions and the Market for Mortgage Loans*, 42 J. L. & ECON. 809 (1999) (finding that variation in state exemption laws has little impact on consumer market for secured credit).

[7] Pub. L. No. 109-8, 119 Stat. 23 (2005) (codified as it pertains to this Article at 11 U.S.C. §522 (2011) unless otherwise noted).

[8] *See* H.R. Rep. No. 109-31, pt. 1, at 2 (2005) (declaring bill's purpose to increase debtor financial responsibility and payout to creditors); López, *supra* note 6, at 145; Pratt, *supra* note 6, at 101–07; Samole & Rosendorf, *supra* note 6, at 6.

[9] *See, e.g.*, López, *supra* note 6, at 166–68; Pratt, *supra* note 6, at 117–21 (recommending further federal oversight as BAPCPA reform); Brook E. Gotberg, *Restructuring the Bankruptcy System: A Strategic Response to Stern v. Marshall*, 87 AM. BANKR. L.J. 191, 233–45 (advocating a "strategic approach to 'uniform' bankruptcy law"); Daniel A. Austin, *Bankruptcy and the Myth of 'Uniform' Laws*, 42 SETON HALL L. REV. 1081, 1166 (2012) (arguing that state-specific laws allow discrimination on the basis of state citizenship); *see also* Edward Stechschulte, Comment, *The (Un)Constitutionality of State-Enacted Bankruptcy-Specific Exemptions: Using Ohio Revised Code Section 2329.66(A)(18) as a Mechanism for Analysis*, 40 U. TOL. L. REV. 761, 782–83 (arguing that state bankruptcy-specific exemptions are per se unconstitutional); Koffler, *supra* note 6, at 105–06 (lamenting lack of uniformity in pre-BAPCPA period).

[10] *See* sources cited in *supra* note 9.

discourage personal financial responsibility and encourage abuse of the bankruptcy discharge.[11] Critics also argue that the laws are out-of-date, reflecting 19th century values and garnering 19th century results.[12] Some critics even raise the possibility that federal deference to state law would be unconstitutional.[13] These critics have propounded a movement for "uniform" bankruptcy laws reflecting the language of the U.S. constitution.

These arguments overlook the fact that in *Plant*, *Gilley*, and a plethora of other cases, judges decided to grant or not grant exemptions based on uniform bankruptcy principles.[14] In other words,

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[11] *See, e.g.*, Bankruptcy Reform: Hearings Before the Senate Judiciary Comm., 98th Cong., 1st Sess. 486, 488 (1983) (argument by the International Consumer Credit Association that exemptions unfairly allow consumers to avoid debts); Personal Bankruptcy: Oversight Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 97th Cong., 1st & 2d Sess. 669 (1981–82) (argument of American Retail Federation in favor of minimum repayment plan); Edward Dufner, *With Consumer Bankruptcies Soaring, The Rules Could Be In For A Tightening*, The Morning Call (Mar. 16, 1997) (describing creditors' lobbyists input on draft legislation for a uniform exemption ceiling).

[12] *Compare, e.g.*, Jordan B. Cherrick*, The Homestead Act: An Important Law to Protect the Family But a Law in Need of Reform,* 65 MASS. L. REV. 175, 175 (1981*)*; Rivera, *supra* note 6, at 100–01 (noting that dollar limits in some states are too low to protect significant assets), *with* Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1108 (2009) (arguing that dollar limits are often too high because minimal asset protection is required to ensure a family's fresh start in the modern period); *see also* Vern Countryman, *For a New Exemption Policy in Bankruptcy*, 14 RUTGERS L. REV. 678, 681–84 (1960) (arguing that state exemption laws are out of date, reflecting legislative apathy); H.R. Rep. No. 95-595, at 126 (1978) (stating that state exemption laws are "outmoded, designed for more rural times, and hopelessly inadequate to serve the needs of and provide a fresh start for modern urban debtors"). Statutory language is itself sometimes arcane. *See, e.g.*, M.A. G.L. c. 235 §34 (granting exemption for "2 cows, 12 sheep, 2 swine and 4 tons of hay", presumably as necessary for subsistence farming).

[13] *See*, *e.g.*, Austin, *supra* note 9, at 1166–68 (arguing that some exemption laws are unconstitutional); Koffler, *supra* note 6, at 23–28 (describing the "constitutional mandate" of uniformity and critiquing the exemption provisions of the 1978 act); Stechschulte, *supra* note 7, at 782 (declaring certain state exemption laws unconstitutional).

[14] *See* Plant, 300 B.R. at 24 (noting that debtor's exemption was unharmed by negligence of defendant); Gilley, 236 B.R. at 446–47 (describing conditions for exemption that protect the law's "real, underlying purpose") (citing Hill v. First. Nat. Bank, 84 So. 190, 193 (Fla. 1920); *see, e.g.*, *In re* Thurston, 2007 WL 1860892, No. 99–11836–JNF, at *13 (Bankr. D. Mass. June 27, 2007) (denying exemption

specific results in bankruptcy cases often depend upon what the debtor's fresh start requires or justifies. Mr. Gilley, for instance, demonstrated intent to reinvest the restitution proceeds into his property and thus re-establish his previous equity holding.[15] By contrast, Ms. Plant's intentions remained unclear, and the court doubted that there had been actual damage to her home equity position; thus, the settlement did not operate as a substitute for her exempt asset.[16] In cases denying exemptions, courts have widely noted that their decisions reflected specific distrust for the debtor and their intentions.[17]

The Code does not require uniform application throughout the fifty states. States should be free to modify the allowed exemptions based on unique concerns reflecting the complex interplay of cost of living, property rights, and the socioeconomic status and rights of families. Thus, the dollar amounts, physical size, specific definitions, and intra-state transferability of homesteads should remain exclusive to state law. Bankruptcy courts can adequately resolve any resulting conflicts between state and federal law.

This Article refutes the idea that state exemptions lead to unfair or unconstitutional results. Available data shows that differences in state exemption value limits have no statistical effect on filings and that the current federal law, while flawed, does impede

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where debtor's "belated amendments to his Schedules suggest concealment of an asset and prejudice to creditors, who may have questioned the Debtor about his claims against the abutter to his real property had they been adequately disclosed"); *In re* Wiesner, 267 B.R. 32, 38 (Bankr. D. Mass. 2001) (denying exemption after post-petition fire destroyed homestead, also killing debtor); *In re* Ziegler, 239 B.R. 375, 379–80 (Bankr. C.D. Ill. 1999) (denying exemption of proceeds after debtors sold home to other family members with no intent to invest in new homestead).

[15] Gilley, 236 B.R. at 446.

[16] *See* Plant, 300 B.R. at 24–25. The debtor had failed to initially claim the cause of action as an asset and had made a number of misstatements, including an overestimation of her equity. *Id.* Mr. Gilley also made some disclosure errors, but the tone of the Gilley decision indicates favorability to the debtor's plight. *See* Gilley, 236 B.R. at 442–43.

[17] *See, e.g.*, Thurston, 2007 WL 1860892 at *13 (denying exemption on basis of concealment of assets), Ziegler, 239 B.R. at 379–90 (denying exemption on basis of bad faith); *In re* White, 389 B.R. 693, 697 (B.A.P. 9th Cir. 2008) (noting that bankruptcy court's denial of exemption on statutory grounds related to debtor's frittering away homestead sale proceeds on speculative derivatives trading); *In re* Orlando, 359 B.R. 395, 400 (Bankr. D. Mass. 2007) (finding that debtor's bad faith concealment of assets justified denial of exemption).

malfeasance by wealthy debtors.[18] In fact, the existing exemption regime allows judges leeway to accomplish the bankruptcy system's primary goals. Furthermore, it reserves to states their ability to innovate and adapt policy to local needs and cultural norms.

Part II of this Article provides background information regarding the homestead exemption, its legislative and political history, and the underlying relationship between state and federal law.[19] Part III analyzes perceived problems with the exemption regime.[20] Part IV offers two arguments in favor of the current, semi-uniform regime for exemptions in consumer bankruptcy.[21]

II. BACKGROUND

Chapter 5 of the Bankruptcy Code creates a separate legal entity that succeeds to the debtor's property.[22] That entity, the "estate," is managed by a court-appointed trustee or, in the case of reorganization under chapter 11, by the debtor itself.[23] The trustee or debtor-in-possession ("DIP") collects all of the debtor's assets into the estate and pays distributions to creditors therefrom.[24]

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[18] *See, e.g.,* Tarvin, *supra* note 6, at 187–203 ("the arbitrary nature of the present rule is potentially harsh to creditor and debtor alike because it fails to consider whether the debtor has benefited from the relocation or whether the creditor has been harmed"); Leslie A. Shames, *Calling a Fraud a Fraud: Why Congress Should Not Adopt a Uniform Cap on Homestead Exemptions*, 16 BANKR. DEV. J. 191, 203–04 (reviewing statistical literature); Teresa A. Sullivan et al., As We Forgive Our Debtors 241–44 (1989) (showing no difference in bankruptcy filings between low-limit states and unlimited exemption states).

[19] *See infra* notes 22–157 and accompanying text.

[20] *See infra* notes 158–255 and accompanying text.

[21] *See infra* notes 257–280 and accompanying text.

[22] 11 U.S.C. § 541(a)(2011); *see* Owen v. Owen, 500 U.S. 35, 308 ("[a]n exemption is an interest withdrawn from the estate (and hence from the creditors) for the benefit of the debtor"); *In re* Reed, 184 B.R. 733, 737–38 (Bankr. W.D. Tex. 1995) (discussing case law regarding nature of exemption); *see also* Tristan Axelrod, Comment, *Seventh Circuit Court of Appeals in Sunbeam Prods., Inc. v. Chi. Am. Manuf., LLC Sets a New Course for Trademark License Rejection in Bankruptcy*, 40 RUTGERS L. REC. 118, 121–22 (2013) (discussing the nature of the estate as relevant to the trustee's rejection power).

[23] 11 U.S.C. §§ 323(a) at 704(granting the trustee authority and enumerating its specific duties).

[24] *See id.* § 704. Duties of the trustee include collection and dispersal of funds, investigation of possible legal claims by and against the debtor, and others. *Id.*

The debtor has the option to claim some assets as exempt from the estate and thus exempt from distribution to creditors.[25] The most common exemptions operate at state law outside of bankruptcy as part of the state's traditional regulation of personal and real property. Exemption laws protect debtors from creditors in a manner analogous to state laws governing asset division following divorce or intestate succession—i.e., they form part of a body of mostly state-specific laws governing what a citizen owns that may be accessed by other persons through the legal system.

Typically the largest and most valuable exemption laws render some portion of a debtor's primary residence, or "homestead," exempt from creditors.[26] This Article will thus focus mostly on homestead exemption issues, although similar policy concerns exist with regard to automobiles and other personal property.

In bankruptcy, state exemptions operate in tandem with federal exemptions under the terms of the Code. Primarily, the Code and its case law allow states to enact their own legislation describing the circumstances and extent to which the exemption may be claimed.[27] States can either "opt out" of the federal homestead exemptions and

[25] *See* 11 USC § 522. Exemption often conflicts with the trustee's desire to maximize payout. *See, e.g.*, Plant, 300 B.R. at 23 (reopening debtor's case at trustee's request); Gilley, 236 B.R. at 442 (responding to trustee motion to deny exemption); Reed, 184 B.R. at 737–38 (discussing ramifications of trustee motion to avoid transfer of exempt assets). The trustee has two fundamental tasks: first, to ensure the debtor's "fresh start" free from previous burdens, and second, to maximize the value of the estate and thus the payout to creditors. *See* 11 U.S.C. § 704. Duties of the trustee include collection and dispersal of funds, investigation of possible legal claims by and against the debtor, and others. *Id.*

[26] The homestead exemption applies under federal law to "real or personal property that the debtor or their dependents use as a residence" or otherwise claim as a homestead. 11 U.S.C. § 522(d)(1). In other words and very generally under similar state laws, a debtor who owns their own home is able to shield some portion of it from unsecured creditors. *See, e.g.*, *id.* (granting exemption up to $15,000). Non-homestead exemptions tend to be comparatively limited in dollar value. *See, e.g.*, *id.* at § 522(d) (limiting exemptions at $15,000 for homesteads, $2,400 for an automobile, and up to $8,000 in aggregate for all personal property); *compare, e.g.*, M.A. G.L. c. 188 § 1 (allowing homestead exemption up to $500,000), *with id.* c. 235 § 34 (allowing personal property exemption of various assets typically valued under $5,000 and limited thereabouts).

[27] *See* 11 U.S.C. § 522(b)(3)(A); Owen, 500 U.S. at 305–06; *see also Storer v. French* (*In re* Storer), 58 F.3d 1125, 1128 (6th Cir. 1995) (allowing state exemptions that are either more or less restrictive than the federal exemptions).

limitations, or allow debtors to choose the more beneficial of the two.[28] The Code, however, sets limitations on the dollar amounts of exemptions in the event that the state does not enact its own exemptions.[29] Furthermore, both the Code and state laws declare limitations on the transfer of property, acquisition of equity prior to the exemption claim, and the types of non-real property assets that can substitute for equity in the claim.[30] These limitations are intended to prevent debtors from abusing the exemption to improperly hide money from creditors.[31]

The complex interplay of state and federal law in this area is a microcosm for the two broad and conflicting goals of bankruptcy in general. On the one hand, the fresh start for the honest but unfortunate debtor allows citizens to resume socially and economically productive lives without crushing debt and without becoming a burden on the public.[32] On the other hand, bankruptcy attempts to assure fair and equal treatment for similarly situated creditors.[33] By the now-traditional understanding of bankruptcy policy, the former requires that the debtor retain housing and the tools and sustenance to sustain family and business life,[34] while the latter requires that the debtor

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[28] Because property law is generally under the domain of states, the relevant state law would be that of the debtor's claimed homestead, which will also be that in which the debtor files for protection. *See* 11 U.S.C. § 522(b)(3)(A). Most states opt out of the federal exemptions. *See* López, *supra* note 6, at 148–65 (describing laws of every state and noting significant trends).

[29] *See* 11 U.S.C. § 522(d).

[30] *See id.* §522(b),(p),(q) (noting timing and transfer limits); *see, e.g.*, ARIZ. REV. STAT. ANN. § 33–1101 (2014) (permitting exemption of identifiable cash proceeds within eighteen months of sale date); Mass. G.L. c. 188, §11(a) (allowing exemption of proceeds as resulting from sales, takings, and natural disasters).

[31] *See* Tarvin, *supra* note 6, at 147–53.

[32] *See Grogan v. Garner*, 498 U.S. 279, 286–87 (1991) (noting the primary purpose of bankruptcy to unburden honest debtors from pressures of financial failure).

[33] *See* Nathanson v. N.L.R.B., 344 U.S. 25, 29 (1952) (noting that equality of distribution to creditors of similar classes is the dominant theme of U.S. bankruptcy law); James W. Bowers, *Groping and Coping in the Shadow of Murphy's Law: Bankruptcy Theory and the Elementary Economics of Failure*, 88 MICH. L. REV. 2097, 2101–02 (1990) (describing bankruptcy as a collective remedy defined by equal treatment of creditors of similar classes).

[34]*See* Laura B. Bartell, *The Peripatetic Debtor: Choice of Law and Choice of Exemptions*, 22 EMORY BANKR. DEV. J. 401, 402–03 (2006) (describing commonly understood and evolving policy behind exemptions).

liquidate all possible assets to maximize payouts to deserving parties.[35]

Exactly how and why the law exists as it does today requires a brief overview of two centuries' worth of legislative and judicial decisions. Section A describes the history of the homestead exemption in state law.[36] Section B describes the evolution of federal bankruptcy law and the rising conflict with state exemptions.[37]

A. Evolution of Exemptions in State Law

State exemptions arose in the 19th century amid the needs of states to encourage settlement, protect the rights of citizens endangered by the physical and financial hardships of frontier life, and counteract the common temptation to move to greener pastures in face of mounting debts. Subsection 1 recounts the development of state exemptions in the pre-modern era.[38] Subsection 2 provides a brief history of that development in three sample states.[39]

1. State Land Grants Require State Consumer Protection

Land ownership has been inextricable from citizenship and social life since European colonists first arrived on the continent.[40]

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[35] *See* H.R. Rep. No. 109-31, pt. 1, at 2–8 (2005); Wells M. Engledow, *Cleaning Up the Pigsty*: *Approaching a Consensus on Exemption Laws*, 74 AM. BANKR. L.J. 275, 276–77 (2000) (advocating for a system of "bankruptcy ethics" to limit debtors' ability to plan for bankruptcy).

[36] *See infra* notes 38–102 and accompanying text.

[37] *See infra* notes 103–155 and accompanying text.

[38] *See infra* notes 40–60 and accompanying text.

[39] *See infra* notes 61–102 and accompanying text.

[40] *See* Stephen M. Feldman, *Democracy and Dissent: Strauss, Arendt, and Voegelin in America*, 89 DENV. U. L. REV. 671, 671–72 (2012) (noting founders' belief in land ownership as promoting civic virtue) (*citing* LETTER FROM THOMAS JEFFERSON TO JAMES MADISON (Dec. 20, 1787), reprinted in 2 GREAT ISSUES IN AMERICAN HISTORY: FROM RECONSTRUCTION TO THE PRESENT DAY 112, 115 (Richard Hofstadter ed., 1982); Tanya D. Marsh, *Sometimes Blackacre is a Widget: Rethinking Commercial Real Estate Contract Remedies*, 88 NEB. L. REV. 635, 644–48 (2010) (recounting importance of land ownership in American political, commercial, and social culture); *see also* MacKenzie Breitenstein, *The Ideal Homestead Exemption: Avoiding Asset Conversion and Fraud but Still Protecting Dependents*, 58 DRAKE L. REV. 1121, 1124–26 (2010) (noting relationship of

Colonial governments originally granted voting rights only to landowners.[41] Furthermore, as Europeans moved westward into the continent, some territorial governments offered inducement to settlers in the form of land grants guaranteed free of interference from prior creditors.[42]

Colonial-era innovations in real estate ownership and citizenship, combined with the need for commercial regulation of trans-Atlantic trade, established an aura of legislative entitlement in the area of debtor-creditor relations.[43] America's ability to grant and protect land, create a uniform currency and credit market, and engage in cross-oceanic trade was unprecedented.[44] The first several decades of the country's history saw legislatures struggling to regulate in unknown and unstable territory.[45] The federal government initially left

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homestead exemptions to historic state policies promoting land ownership); Stern, *supra* note 12, at 1105–09 (summarizing historical conception of homeownership).

[41] *See* Christopher Collier, *The American People as Christian White Men of Property: Suffrage and Elections in Colonial and Early National America, in* VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY: ESSAYS ON THE HISTORY OF VOTING AND VOTING RIGHTS IN AMERICA 19, 22–23 (Donald W. Rogers ed., 1990) (noting requirement of land ownership for voting in colonial governments); JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 47 (1992) (noting state property ownership requirements for voting at time of constitution); Barbara Stark, *Deconstructing the Framers' Right to Property: Liberty's Daughters and Economic Rights*, 28 HOFSTRA L. REV. 963, 973–81 (2000) (describing historical relationship between voting and economic rights).

[42] *See* Marsh, *supra* note 56, at 644–45 (noting colonial land grant policies and resulting cross-colonial competition to attract settlers).

[43] *See* Koffler, *supra* note 6, at 35, 54 (describing pre-constitutional state bankruptcy law and policy); *see*, *e.g.*, Charless & Blow v. Lamberson, 1 Iowa 435, 439 (1855) (noting the propriety of homestead exemptions in light of state policy); Interpretive Commentary, Tex. Const. art. 16, § 50 (1973) (noting Texas's colonial-era entitlement to protect debtors from creditors in interest of public policy).

[44] *See generally* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (describing cultural, financial, legal, and military developments as a result of American independence).

[45] *See* David A. Skeel, Jr., *The Genius of the 1898 Bankruptcy Act*, 15 BANKR. DEV. J. 321, 323–24 (noting that "the standard story of American bankruptcy history is a tale of bust and boom" but that legislative history also reflects controversy between agrarian and commercial values).

the business of property law, including land grants and debtor real estate protection, almost entirely to the states and territories.[46]

By the mid-19th century, in the face of cyclical land busts and bank failures and mindful of the country's growing commercial economy, state governments recognized that mere grants of land were insufficient to stabilize settlement and commerce.[47] Citizens required legal protection to offset the physical and financial risks of life on the developing agricultural and urban frontiers.[48] Women and minorities, indispensable constituencies of the new political order, were likewise demanding their own rights and protections.[49] Exemptions exploded across the country in response.[50]

Exemptions for homes, tools, clothing, and other essential property have remained inextricable from policy conceptions of family life, debtor-creditor relations, and socially valuable behavior

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[46] *See id.* The short-lived bankruptcy acts of the 19th century did include exemptions for personal property. *See* Bankruptcy Act of 1800, 2 Stat. 19, 23 (1800); Bankruptcy Act of 1841, 5 Stat. 440, 443 (1841); Bankruptcy Act of 1867, 14 Stat. 517, 522–23 (1867).

[47] *See* Alison D. Morantz, *There's No Place Like Home: Homestead Exemption and Judicial Constructions of Family in Nineteenth-Century America*, 24 LAW & HIST. REV. 245, 252–55 (2006); Skeel, *supra* note 42, at 323–24. Land grants effectively caused a race to the bottom, as with each financial panic, families tore up stakes and moved to new territories to the west. *See* Morantz, at 252–55. As the frontier moved onward, older states experimented with economic policies to protect and stabilize their already-settled populations. *See id.*

[48] *See id.* (also noting involvement of activists in the land reform, abolition, temperance, and labor movements).

[49] *See id.*

[50] *See* Paul Goodman, "The Emergence of the Homestead Exemption in the United States: Accommodation and Resistance to the Market Revolution, 1840–1880," Journal of American History 80 (1993): 470–98. Reconstruction and the South's post-bellum poverty hastened the advent of exemption laws as former slave states feared that insolvent Southerners' farmland would be snatched up at auction by northern carpetbaggers and free blacks. *See* Eric Foner, A SHORT HISTORY OF RECONSTRUCTION (New York: Harper & Row, 1990), 45–48; Goodman, "The Emergence of the Homestead Exemption in the United States" at 491. Furthermore, states equated enforcement of debts incurred by white men to buy property—including slaves, now freed—to slavery itself. *See* Donald R. Korobkin, *Bankruptcy Law, Ritual, and Performance*, 103 COLUM. L. REV. 2124, 2141–43 (2003) (describing Congressional debate of the 1867 Bankruptcy Act). By 1868, every Southern state had passed an exemption law. Morantz, *supra* note 45, at 253. *But see* 14 Stat. 517, 522–23 (limiting post-bellum bankruptcy homestead exemptions to 1864 state exemption levels).

since the 19th century.[51] Protection of debtor property was bound intimately to similar protections for laborers, women, and others who pursued greater liberty in the 19th century.[52] In fact, some scholars argue that the homestead exemption was the first "social safety net," predating the Depression-era New Deal by many decades.[53] Furthermore, homestead exemptions continued to evolve and grow along with, and sometimes in conflict with, federal power and federal social welfare programs that grew after the New Deal.[54] Thus, judges and scholars realized that a coherent discourse and jurisprudence of the subject could influence and help stabilize public policy.[55]

In the modern era, state exemptions carry the weight of almost 200 years of state-law policy and precedent.[56] The only remaining states without homestead exemptions are the northern bastions of Pennsylvania and New Jersey.[57] Texas, with its frontier ethos and constitutional exemption dating to at least 1829, grants an exemption

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[51] *See* Goodman, *supra* note 48, at 470–98; Korobkin, *supra* note 50, at 2141–43; Morantz, *supra* note 45, at 250–51.

[52] *See* Morantz, *supra* note 45, at 253.

[53] *See id.*; THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES (Cambridge: Harvard University Press, 1992).

[54] *See infra* notes 122-155 and accompanying text (describing policy conflicts relating to state exemption laws).

[55] *See, e.g.*, *Hanover National Bank v. Moyses*, 186 U.S. 181, 189–190 (1902) (holding that bankruptcy uniformity permits recognition of state exemption laws despite disparate results in different states); Ry. *Labor Exec. Ass'n v. Gibbons*, 455 U.S. 457, 469 (1982) (discussing uniformity of exemption laws and holding the 1978 act constitutional); Morantz, *supra* note 45, at 250 ("[d]ecades before such definitions were thought to figure in public policy, what it meant to be a husband or wife, a provider or dependent—and even what it meant to be a "family"—preoccupied U.S. judges struggling to develop a coherent body of homestead exemption jurisprudence"); Austin, *supra* note 9, at 1139–41 (describing problems with coherence of current doctrine).

[56] *See, e.g.*, Ark. Const. art. IX, § 3 (granting homestead exemption to debtors who are "married or the head of a family"); *infra* notes 61-102 and accompanying text (describing development of exemption law in Florida, Arizona, and Massachusetts).

[57] *See* 42 PA. CONS. STAT. § 8124 (2007); N.J. REV. STAT. § 2A:17-17 (2008). Citizens of those states may rely on minimum exemptions in the federal Bankruptcy Code. 11 U.S.C. §522(d)(1).

of unlimited dollar value.[58] Subpart 2 of this Part provides a descriptive overview of three sample states.[59] Part B of this Section describes the development of the federal Code and its interaction with these variegated state laws.[60]

2. State Exemptions in Federal Bankruptcy: Three Examples

a. Florida

Florida was one of many states to pass homestead exemption laws to protect families in the wake of the Civil War.[61] The original homestead exemption, enshrined in the state constitution, was unlimited in real estate value, as long as the property was no larger than 160 acres outside an incorporated city or town or ½ acre inside.[62] It also included a personal property exemption up to one thousand dollars and a requirement that the debtor be a head of household.[63] The 160-acre and head-of-household restrictions reflect restrictions on land grants in the Homestead Act of 1862.[64] The 1862 act, passed by a northern Congress during the Civil War, also limited grants to applicants who had not "borne arms against the United States Government" and who farmed the land for five years and improved it.[65] Thus, Florida's exemption originally protected a certain class of debtor that moved to and speculated within the frontier state in the wake of the Civil War. Value limits on homesteads might have been

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[58] Tex. Const. art. 16, § 51 (2007); *see* Interpretive Commentary, Tex. Const. art. 16, § 50 (1973) (noting Texas's colonial-era entitlement to protect debtors from creditors in interest of public policy).

[59] *See infra* notes 61-102 and accompanying text.

[60] *Infra* notes 103-157 and accompanying text.

[61] *See* Fla. Const. of 1868, art. IX (1868); De Cottes v. Clarkson, 43 Fla. 1, 9–10 (Fla. 1901) (describing purpose and liberal interpretation of the exemption); Josephine W. Thomas, *Increasing the Homestead Tax Exemption: "Tax Relief" or Burden on Florida Homeowners and Local Governments?*, 35 STETSON L. REV. 509, 517–18 (2006).

[62] Fla. Const. of 1868, art. IX, §1 (1868).

[63] *Id.*; De Cottes, 43 Fla. at 9–10 (determining head of household interpretation).

[64] *See* Homestead Act, 12 Stat. 392 (1862) (authorizing grants of up to 160 acres of federal land to citizens who had not "borne arms against the United States Government").

[65] *Id.*

difficult to prove at the time because the relevant homestead tracts had been granted at fixed value without ever being commercially traded.[66]

Despite the anachronistic size constraints, Florida's exemption is substantially unchanged with regard to debtor-creditor relations.[67] The physical size limits remain at 160 acres and ½ acre depending upon incorporation, and even the accompanying personal property exemption remains at one thousand dollars.[68] In 1968, Florida removed the requirement that debtors claiming exemptions be the heads of family households.[69] The exempt property does still inure to the debtor's family members after death.[70]

Florida's courts, including its federal bankruptcy judges, interpret the homestead exemption with notable liberality.[71] The state's supreme court extended the exemption to single women in 1901.[72] The same court also decided in 1962 to include the proceeds of sales of the homestead, as long as the debtor displayed good faith and the intention to reinvest in a new home.[73] The courts have further extended the proceeds inclusion to substitute housing expenses and, as noted in *Gilley*, restitution damages.[74]

The state legislature and its courts have repeatedly, and in many circumstances, declined to limit the exemption. Florida's constitution does not diminish the exemption for debtors who are

[66] Moreover, an appraisal value of a farming homestead likely correlated more to its farming capacity than its location and fixtures. Thus, the propriety of the size-limited exemption today is highly doubtful.

[67] *Compare* Fla. Const. of 1868, art. IX (1868) (setting terms of exemption), *with* Fla. Const. art. X, §4 (same).

[68] Fla. Const. art. X, §4(a)(2).

[69] *Compare id.* (requiring debtor be head of household), *with* Fla. Const. of 1968, art. VII, §6 (no head of household requirement); *see* Vandiver v. Vincent, 139 So.2d 704, 707–08 (Fla. Dist. Ct. App. 1962) (describing history and purpose of homestead exemption).

[70] Fla. Const. art. X, §4(b).

[71] *See, e.g.*, Gilley, 236 B.R. at 444–45 (extending exemption to proceeds of litigation related to damaged equity position and describing interpretive history of the exemption); Orange Brevard Plumbing & Heating Co. v. La Croix, 137 So.2d 201, 206 (Fla. 1962); De Cottes, 43 Fla. at 9–10 (granting status as head of household to single mother and describing liberal purpose of the exemption).

[72] De Cottes, 43 Fla. at 9–10.

[73] Orange Brevard, 137 So.2d at 206.

[74] *See In re* Binko, 258 B.R. 515, 517–18 (Bankr. S.D. Fla. 2001) (including expenses on substitute housing during the search for a new home); Gilley, 236 B.R. at 444–45.

convicted criminals of any kind.[75] The state's courts have even declared that "a homestead acquired by a debtor with the specific intent to hinder, delay, or defraud creditors is not excepted" from protection under Florida's constitution.[76] The permissiveness of Florida's exemption has drawn heavy criticism, particularly from out-of-state creditors.[77] Such criticism eventually resulted in changes to the federal bankruptcy code, discussed in Part B below.[78]

b. Arizona

The history of Arizona in the 19th century includes a series of complicated disputes and deals between the United States, Mexico, and the Confederacy.[79] By the close of the Civil War, however, the territory existed in more or less its present geographical form, under the control of the U.S. federal government.[80] The United States began encouraging frontier settlement, and by at least 1877, the territory's statutes included a homestead exemption.[81] The exemption was limited to $5,000 in value, and included provisions specific to the territory's dry terrain and hardscrabble lifestyle: water rights and

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[75] *See* Fla. Const. art. X, § 4. There are exceptions for taxes and contractual requirements. *Id.* There are also limited exceptions for fraudulent or egregious conduct, and for avoiding alimony and child support payments. *See* Dyer v. Beverly & Tittle, P.A., 777 So.2d 1055, 1059 (Fla. Dist. Ct. App. 2001) (fraudulent or egregious conduct); Brose v. Brose, 750 So.2d 717, 717–19 (Fla. Dist. Ct. App. 2000).

[76] Havoco of America v. Hill, 790 So.2d 1018, 1030 (Fla. 2001).

[77] *See, e.g.*, 148 Cong. Rec. 2938 (2002) (statement of Sen. Kohl) (announcing proposal to cap homestead equity at $175,000); Editorial, *Protecting Rich Bankrupts*, N.Y. TIMES, Aug. 13, 1999, at A20 (bankruptcy reform proposal "should at least be amended to keep Texas and Florida from providing such blatant protection to once wealthy deadbeats"); *see generally* Melissa B. Jacoby, *Negotiating Bankruptcy Legislation Through the News Media*, 41 HOUS. L. REV. 1091 (2004) (describing the role of lobbyists in propounding bankruptcy reform legislation).

[78] *See infra* notes 140-157 and accompanying text (describing legislative history and effect of BAPCPA).

[79] *See* "*Documents Leading to Statehood*," Ariz. State Library, Archives and Pub. Records, http://www.azlibrary.gov/sla/documents-leading-statehood (last visited January 30, 2015). (documenting legal status of Arizona territory in U.S. history, not including Native American claims).

[80] *See id.*

[81] *See* Hancock v. Herrick, 3 Ariz. 247, 251 (Supreme Ct. Terr. Ariz. 1891) (*citing* Comp. Laws 1877, c. 37, §§1-2).

irrigation fixtures were to run with the exemption, as would protections for wives as well as liens granted to mechanics, laborers, and vendors.[82]

Arizona's exemption has not been repealed, but has been modified over time. In 1913, a year after its grant of statehood, Arizona decreased the value limit of the exemption to four thousand dollars.[83] Today, the exemption stands at $150,000—a theoretical 50% increase from 1913 dollars to 2014 dollars, but for the most part a decrease in terms of consumer real estate purchase and retention power.[84] Furthermore, the exceptions for laborers, mechanics, and vendors have been removed.[85] Thus, the exemption continues in a substantially simpler form.

Arizona's courts maintain a tradition of strict construction of statutory law, requiring themselves to "apply the plain meaning of the statute and . . . not interpret the [homestead] statute to create an exemption the legislature did not intend."[86] The plain meaning of the statute includes within the exemption only equity value of the homestead.[87] It does not include, and thus courts decline to include, insurance payments, restitution, or any other non-equity holdings.[88]

c. Massachusetts

Massachusetts's homestead exemption differs from the previous examples in that by the 19th century it was not a frontier state with vast tracts of available land for white settlers.[89] Thus, the impetus

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[82] *Id.*

[83] Ariz. Civil Code 1913, par. 3288.

[84] Note that this is still vastly higher than the federal exemption. Arizona opts out of the federal exemption. Other Exemption Laws, ARIZ. REV. STAT. ANN. § 33–1133 (1980).

[85] *See* Homestead Exemptions; Persons Entitled to Hold Homesteads, ARIZ. REV. STAT. ANN. § 33–1101 (2004).

[86] Plant, 300 B.R. at 24 (citing *In re* Hoffpauir, 125 B.R. 269, 271–74 (Bankr. D. Ariz. 1990); *see In re* McNabb, 326 B.R. 785, 788–91 (Bankr. D. Ariz. 2005).

[87] ARIZ. REV. STAT. ANN. § 33–1101 (2014).

[88] Plant, 300 B.R. at 24; *cf.* Hoffpauir, 125 B.R. at 271–74 (denying extension of personal property exemption to personal injury and employment disability claims).

[89] In fact, the 1862 Homestead Act applied only outside the original 13 colonies, reflecting the view that Massachusetts and the other original states were completely settled. *See* 12 Stat. 392 (1862).

for its homestead protections was primarily to protect the rights of wives whose debtor husbands were considered to hold full title to the homestead.[90] Massachusetts passed a Homestead Act in 1855 that exempted from creditor attachment designated homesteads up to eight hundred dollars in value, with specific provisions protecting wives and widows.[91]

Massachusetts' exemption remained unchanged for nearly a century before it began to catch up with modern views of bankruptcy and exemptions as social insurance.[92] From 1939 to 2004, the state legislature steadily raised the exemption value from $800 to $500,000, while keeping the terms and interpretation of the statute essentially the same.[93] Unlike in Arizona or Florida, the state's judges show a high degree of variation in their interpretations of statutory law.[94] This caused serious concern in 2008, when financial crisis struck the nation, resulting in a glut of consumer bankruptcies[95] and renewed concerns about bankruptcy abuse and effectiveness.[96] Massachusetts

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[90] *See* Lazell v. Lazell, 8 Allen 575, 576–77 (Mass. 1864); Drury v. Bachelder, 11 Gray 214, 215–17 (Mass. 1858).

[91] Homestead Act of 1855; Gen. Stat. 1860, c. 104; *see* Woods v. Sanford, 9 Gray 16, 16 (Mass. 1857).

[92] *See* Gen Stat. 1921, c. 188; Gen. Stat. 1932, c. 188.

[93] *See* Gen Stat. 1939, c. 188; Gen. Stat. 1970, c. 188; Gen. Stat. 2004, c. 188.

[94] *See, e.g.*, Thurston, No. 99–11836–JNF, 2007 WL 1860892, at *8 (Bankr. D. Mass. 2007). (denying exemption of all cash proceeds due to absence from statutory language); *compare* Wiesner, 267 B.R. at 36 (denying exemption of insurance proceeds after post-petition fire burned down debtor's residence), *with In re* Cunningham, 354 B.R. 547, 556–57 (D. Mass. 2006) (holding that once property is exempt, it remains exempt regardless of alterations and transfers); *compare In re* Kelly, 334 B.R. 772, 775 (Bankr. D. Mass. 2005) (finding that MA G.L. c. 188 § 1, omitting mobile home exemptions, required strict interpretation), *with* Gray, 378 B.R. 728, 734–35 (Bankr. D. Mass. 2007) (finding that MA G.L. c. 188 § 1 contained ambiguities that must be resolved liberally in favor of granting exemptions to debtors).

[95] *See* United States Court Statistics, Bankruptcy Statistics: 12-month period ending in December, United States Courts, *available at* http://www.uscourts.gov/Statistics/BankruptcyStatistics/12-month-period-ending-december.aspx (last visited Jan. 30, 2015). (offering year by year data to show that non-business bankruptcy filings nearly tripled between 2006 and 2010).

[96] *See, e.g.*, Omer Kimhi, *Chapter 9 of the Bankruptcy Code: A Solution in Search of a Problem*, 27 YALE J. ON REG. 351, 395 (2010) (arguing that state intervention would be more effective than bankruptcy in curing the oncoming glut of municipal bankruptcies); Adam J. Levitin, *In Defense of Bailouts*, 99 GEO. L.J. 435, 513–14 (2011) (arguing that bankruptcy requires accompaniment by effective

legislators, responding to intense criticism that the state's antiquated laws and inconsistent judicial decisions were resulting in excessive litigation that failed to protect homeowners, overhauled the system with the Homestead Act of 2010.[97]

The new law complicated the exemption while greatly broadening the types of assets it would cover. There would be not one but two exemptions: an automatic $125,000 exemption for all homeowners, and a $500,000 exemption for those that file a homestead declaration with the county registry of deeds.[98] Furthermore, the homestead itself was redefined to include proceeds from sales and insurance policies.[99] Other definitions provided for the rights of the disabled, elderly, and children.[100]

It is not clear how Massachusetts judges will interpret the new law, or in practical terms how much the law will benefit the state's residents.[101] It should be noted, however, that unlike Arizona, Massachusetts does not opt out of the federal exemptions. Thus, it is possible that some minimum benefits are preserved in the event that the exemption is denied under state case law.[102]

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non-bankruptcy measures such as bailouts and haircuts); Michael Simkovic, *Paving the Way for the Next Financial Crisis*, 29 No. 3 BANKING & FIN. SERVICES POL'Y REP. 1, 1–2 (2010) (describing how bankruptcy priority rules create systemic risk by privileging complex securities' rights to payment); Alan M. White & Caroline Reid, *Saving Homes? Bankruptcies and Loan Modifications in the Foreclosure Crisis*, 65 FLA. L. REV. 1713, 1736–37 (2013). (using empirical data to show that bankruptcy filing did not effect successful debtor loan modifications during the financial crisis).

[97] *See In re* Edward R. Szwyd, 346 B.R. 290, 291 n.1 (Bankr. D. Mass. 2006) (criticizing antiquated homestead law); Jennifer B. McKim, "*New Law Clarifies Mass. Homestead Protections*," Boston Globe, Dec. 18, 2010; *see generally* Justin H. Dion et al, *More Homestead Protection and Predictability for Massachusetts Homeowners?: Examining the Expanded Coverage Under an Act Relative to the Estate of Homestead*, 35 W. NEW ENG. L. REV. 99 (2013) (describing problems with old law and innovations under the 2010 act).

[98] Mass. Gen. Laws Ann. ch. 188, §1 (2014).

[99] *Id.*

[100] *Id.*

[101] *See* Dion, *supra* note 97, at 123.

[102] In other words, debtors denied exemptions due to any peculiarity of Massachusetts law might still be eligible for federal exemptions under 11 U.S.C. § 522(d)(1) (2010).

B. Exemptions and the Assertion of Federal Power over Bankruptcy

Unlike state protections, the origins of modern federal exemption law lie mostly in the 20th century. As Congress enacted laws to keep pace with the country's rapidly changing consumer lending marketplace, the concept of a uniform "fresh start" policy arose concurrently with state exemptions.[103] The following section describes the ascendancy of federal authority over bankruptcy and the area of exemptions.[104]

1. From the Founding to 1978

The ratification of the United States Constitution in 1789 granted Congress the power to legislate for "uniform laws on the subject of Bankruptcies."[105] By that time, the states were already enacting their own bankruptcy laws.[106] Congress at first displayed no initiative in exercising the power.[107]

For the first hundred years of the country's history, Congress passed temporary bankruptcy acts to respond to economic crises.[108] A 1796 banking crisis resulted in the 1800 Bankruptcy Act, which granted limited protections to wealthy merchants until its expiration in 1803.[109] Congress next exercised the power in 1841 to respond to the

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[103] *See infra* notes 105-157 and accompanying text.

[104] *See infra* notes 105-157 and accompanying text.

[105] U.S. Const. art. 1, § 8, cl. 4.

[106] *See* Koffler, *supra* note 6, at 35–37 (describing early history of federal bankruptcy law). States retained and experimented with their bankruptcy powers until 1819, when the Supreme Court ruled state discharge laws unconstitutional. *See* Sturges v. Crowninshield, 17 U.S. 122, 208 (1819).

[107] CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 10 (1935) (quoting William Smith of South Carolina as saying that bankruptcy legislation was too "intricate and perplexing" for the Congress of 1790); *see also* Koffler, *supra* note 6, at 41–47 (describing bankruptcy debate and legislation from 1790 to 1841).

[108] *See* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 14–21 (1995); Todd J. Zywicki, *The Past, Present, and Future of Bankruptcy Law in America*, 101 MICH. L. REV. 2016, 2018 (2003).

[109] Bankruptcy Act of 1800, ch. 19, 2 Stat. 19, *repealed* by Act of Dec. 19, 1803, ch. 6, 2 Stat. 248. The Bankruptcy Act of 1800 was not meant as a general social safety net. *See* Tabb, *supra* note, at 14–15. The Panic of 1797 had ruined founding father Robert Morris, among other prominent Americans. *See id.* Morris, who had personally financed much of the Revolutionary War and constructed the

Panic of 1837.[110] This time, needing to protect small businesses and family farmers, Congress allowed voluntary commencement of cases by "all persons whatsoever."[111] The 1841 Act was repealed in 1843, apparently having served its purpose.[112] Congress returned to the subject only in 1867, when it passed comprehensive legislation necessary to address the Panic of 1857 and the economic collapse and political reintegration of the former Confederacy.[113] The 1867 Act expired in 1878, and Congress enacted no bankruptcy laws for twenty years thereafter.[114]

The early bankruptcy laws carried little in the way of exemptions. The 1800 and 1841 Acts allowed limited exemptions for personal property such as bedding and tools, and may have operated in tandem with evolving state exemptions.[115] The 1867 Act incorporated state homestead exemptions at their 1864 levels.[116]

The Bankruptcy Act of 1898 was the first federal law to be passed not in reaction to an economic crisis, but as an adaptation to

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new nation's currency and banking system, had retired from government and leveraged his fortune via frontier real estate investments. *See id.*; Fredrick P. Corbit, *The Founding Fathers' Influence on Bankruptcy Law*, 26-AUG AM. BANKR. INST. J. 50, 51 (2007). His bankruptcy was considered a profound embarrassment to his legacy and to the nation itself, which responded with a bankruptcy act intended as a limited bailout. *See id.*

[110] *See* Tabb, *supra* note 108, at 16–18.

[111] Bankruptcy Act of 1841, ch. 9, 5 Stat. 440, *repealed* by Act of Mar. 3, 1843, ch. 82, 5 Stat. 614.

[112] *Id.*; *see* Warren, *supra* note 107, at 81–82 (noting that over thirty thousand debtors filed bankruptcy and received discharges in less than 18 months).

[113] *See* Ch. 176, 14 Stat. 517, *repealed* by Act of June 7, 1878, ch. 160, 20 Stat. 99 (1878); Tabb, *supra* note 108, at 18–21. In fact, the 1867 act included a specific provision requiring "all citizens of the United States petitioning to be declared bankrupt shall on filing such petition, and before any proceedings thereon, take and sub-scribe an oath of allegiance and fidelity, to the United States, which oath petition, shall be filed and recorded with the proceedings in bankruptcy." Ch. 176, 14 Stat. 517.

[114] Act of June 7, 1878, ch. 160, 20 Stat. 99 (1878); *see* Tabb, *supra* note 108, at 21.

[115] *See* 2 Stat. 19, 5 Stat. 440.

[116] 14 Stat. 517, 522–23 (1867). Thus, Confederate and Reconstruction exemptions would not apply. Warren, *supra* note 107, at 110–11. These restrictions were relaxed over time. *See* Ch. 339, 17 Stat. 334 (1872); Kener v. La Grange Mills, 231 U.S. 215, 217 (1913).

economic growth.[117] By that time, large corporations dominated the transportation, communication, and manufacturing sectors of the national economy; furthermore, such corporations owed and held loans across state boundaries.[118] The new federal law provided procedures for individual discharge and corporate wind-downs that allowed for fair debt collection and rehabilitation while minimizing impact on the larger economy.[119] It is considered the beginning of modern bankruptcy law.[120]

The 1898 Act eliminated federal exemptions and fully incorporated all state exemptions, leaving debtors in non-exemption states at the mercy of their creditors.[121] The act was amended comprehensively during the Great Depression, to streamline

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[117] *See* DAVID A. SKEEL, DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 35–43 (2001); Tabb, *supra* note 108, at 23–26 (noting effect of financial crises in 1884 and 1893 but describing shift of debate toward permanent legislation).

[118] *See* Zywicki, *supra* note 108, at 2019 (detailing extent of corporate and industrial growth in the late 19th century as precedent to bankruptcy reform).

[119] *See* Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1978); Tabb, *supra* note 108, at 23–28; Skeel, *supra* note 117 at 35–43 (noting growing impact of national corporations and interstate debts in the late 19th century and resulting requirement of comprehensive bankruptcy laws); *see also* Garrard Glenn, *The Basis of the Federal Receivership*, 25 COLUM. L. REV. 434, 436–46 (1925) (describing legal issues with the system of equity receivership that preceded and coincided with early corporate bankruptcy laws and facilitated some corporate reorganizations); D.H. Chamberlain, *New-Fashioned Receiverships*, 10 HARV. L. REV. 139, 142–43 (1896) (same). The 1867 act had provided some protections for corporations. 14 Stat. at 534–35. Initially under the 1898 act, corporations were only eligible for involuntary filings. 30 Stat. at 547. This changed in 1910. Ch. 412, § 3, 36 Stat. at 839 (1910). Reorganization capability was added during the Great Depression. Act of June 7, 1934, ch. 424, 48 Stat. 911, 912–25; *see also* Tabb, *supra* note 108, at 23–30 (describing decades-long debate and legislation regarding reorganization for farms, railroads, and other corporations).

[120] *See* Skeel, *supra* note 117 at 43; Zywicki, *supra* note 108, at 2019–20 (reviewing Skeel) (noting that unanticipated but equally influential effects of the law included its benefits to debtors and bankruptcy attorneys); *see also generally* David A. Skeel, *The Genius of the 1898 Bankruptcy Act*, 15 BANKR. DEV. J. 321 (1999) (cautioning against the view of the 1898 act as inevitable and explaining its passage and longevity via a confluence of political factors).

[121] Ch. 541, § 6, 30 Stat. at 548. Although there was an attempt to protect individual debtors from excessive court fees, even this was apparently intended as a favor to creditors, as it maximized estate payout. *See* Skeel, *supra* note 120, at 332.

procedures and facilitate corporate reorganization.[122] It remained intact until 1978, though occasionally altered by case law and some discrete statutory amendments.[123]

The primary innovation of 20th century insolvency law was the idea of bankruptcy not as a moral and financial punishment, but as a policy tool to encourage socially productive behavior.[124] In *Local Loan v. Hunt* in 1934, the Supreme Court noted that bankruptcy "gives to the honest but unfortunate debtor…a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."[125] This ethos, now known as the debtor's "fresh start," developed along with statutory and case law for several decades.[126] It is now viewed as equally important or more

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[122] *E.g.*, Chandler Act of 1938, ch. 575, 52 Stat. 840; *see* Tabb, *supra* note 108, at 27–32 (describing reforms between 1898 and 1978).

[123] *See* Tabb, *supra* note 108, at 27–32.

[124] *See Local Loan v. Hunt*, 292 U.S. 234, 244 (1934) (citing cases interpreting the purpose of the 1898 bankruptcy act as being the restoration of citizens to economic productivity); Richard M. Hynes, *Optimal Bankruptcy in a Non-Optimal World*, 44 B.C. L. REV. 1, 75 (2002) (noting that bankruptcy has a social insurance function that encourages debtor risk-taking in amoral terms); Robert Weisberg, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, 39 STAN. L. REV. 3, 32–34 (1986) (noting that bankruptcy law derives its moral and legal rhetoric from a legal tradition by which "credit could be morally affirmative, the currency of trust and honor by which virtuous merchants bound themselves"); *cf.* James Monroe Olmstead, *Bankruptcy a Commercial Regulation*, 15 HARV. L. REV. 829, 843 (1902) ("While the humanitarian or relief features are meritorious, it should be constantly borne in mind that this principle of the law is merely an incident to its main purpose, and should not prove a menace to the permanency of a system intended for the perpetual benefit of merchants in general"). Note that bankruptcy is not and has never been morally neutral. *See* Local Loan, 292 U.S. at 244 (requiring debtors to be "honest but unfortunate" to gain discharge); *see generally* Korobkin, *supra* note 50 (noting at 2154–55 that "the debtor publicly stages his own powerlessness to change circumstances; he displays that his seeking to avoid his debts cannot be a moral choice, for he lacks the agency to choose. At the same time, in order to prove worthy of forgiveness, the debtor must submit himself to the moral inventory embodied in the rules governing the granting or denial of discharge. By these various forms of surrender and submission, the debtor struggles to separate himself from the characterological implications of his bankruptcy filing, and thereby qualifies the meaning of the social breach that he is concurrently committing").

[125] *Local Loan*, 292 U.S. at 244 (citing previous cases to the same effect).

[126] *See* Jacoby, *supra* note 77, at 1117–28 (describing pre-BAPCPA legislative debate over fresh start ideology); *see, e.g.*, *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 371–76 (2007) (holding that the "fresh start" implies a requirement of

important than the principle of equitable and efficient distribution of the debtor's property to creditors.[127]

2. The 1978 Bankruptcy Act and BAPCPA

a. The Fresh Start, the 1978 Act, and Resulting Criticism

The Bankruptcy Act of 1978 enshrined the fresh start, expanding the relief available to debtors in the form of exemptions for assets viewed as necessary for the sustenance of the debtor's economic and social life.[128] It provided a set of federal exemptions for debtor property, which operated in tandem with applicable non-bankruptcy property protections.[129] The act also recognized state exemptions, and furthermore allowed states to "opt out" of the federal exemptions in favor of their own.[130] Thirty-some states opted out; the

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debtor good faith where a debtor attempts to convert from chapter 7 to chapter 13); Grogan, 498 U.S. 279 at 286–87 (holding that the "fresh start" policy does not require a debtor-friendly burden of proof where creditors show fraud in order to bar discharge under 11 U.S.C. 523(a)). *NLRB v. Bildisco and Bildisco*, 465 U.S. 513, 528 (1984) (noting that "[t]he fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources").

[127] *Compare Marrama*, 549 U.S. at 367 ("[t]he principal purpose of the Bankruptcy Code is to grant a 'fresh start"'), *with Union Bank v. Wolas*, 502 U.S. 151, 161 (1991) (observing "the prime bankruptcy policy of equality of distribution among creditors of the debtor").

[128] *See* H.R. Rep. No. 95-595, at 117–18 (1977) (describing Congressional intent); Koffler, *supra* note 6, at 31–32. More generally, scholars after 1978 agree that bankruptcy plays a central role in restoring the debtor's physical and emotional health as well, thus creating an environment to encourage debtor entrepreneurship. *See generally* John M. Carnetzky, *The Individual and Failure: A Theory of the Bankruptcy Discharge*, 32 ARIZ. ST. L.J. 393 (2000) (theorizing bankruptcy as fostering debtor entrepreneurship); Adam Feibelman, *Defining the Social Insurance Function of Consumer Bankrutptcy*, 13 AM. BANKR. INST. L. REV. 129 (2005) (illustrating the role of bankruptcy in debtors' physical, mental, and financial health, and situating bankruptcy among other government social programs).

[129] *See* Bankruptcy Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 § 522 (1978) (codified as amended in 11 U.S.C.)

[130] *See id.*

remainder allowed debtors to choose the preferable set of exemptions.[131]

The 1978 Act drew heavy criticism on three accounts:

First, the high dollar limits of some state exemptions allowed wealthy, high-profile debtors to maintain their wealth while discharging millions of dollars of debt brought on by their own recklessness and criminality.[132] Critics worried that malefactors such as Enron and Tyco executives and accused murderer O.J. Simpson would be able to shield their wealth from victims with homes in Florida and Texas.[133] This problem was commonly known as the "millionaire's mansion" loophole.[134]

Second, and similarly, many commentators and lenders feared that the 1978 exemptions were too permissive of debtors who intentionally transferred wealth into exempt assets in contemplation of bankruptcy.[135]

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[131] *Compare* Kemner, *supra* note 4, at 687 (noting thirty-nine states had opted out by 1991), *with* CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY § 9.16, at 688 (1997) (noting thirty-five opt-outs by 1997).

[132] *See, e.g.*, David J. Morrow, *Key to a Cozier Bankruptcy: Location, Location, Location*, N.Y. TIMES, Jan. 7, 1998, at A1; Philip Shenon, *Home Exemptions Snag Bankruptcy Bill*, N.Y. TIMES, Apr. 6, 2001, at A1; *Protecting Rich Bankrupts,* N.Y. TIMES, Aug. 13, 1999, at A20.

[133] *See, e.g.*, Philip Shenon, *Enron's Many Strands: Home As Shield From Creditors Is Under Fire*, N.Y. TIMES, April 4, 2002, at A1 (quoting political sources); Megan Mcardle, *How OJ Simpson May Help Keep Dick Fuld From Stiffing His Shareholders*, The Atlantic, Jan. 27, 2009, available at http://www.theatlantic.com/business/archive/2009/01/how-oj-simpson-may-help-keep-dick-fuld-from-stiffing-his-shareholders/4625/ (last visited Mar. 26, 2014) (describing how fears over Simpson's plan to shelter assets under Florida exemption law led to BAPCPA reforms). These concerns were probably for naught: neither O.J. Simpson nor any of the best known Enron executives actually did file for bankruptcy protection. At the time, however, a number of famous people were in fact filing for bankruptcy, raising questions about the moral righteousness of the system for those whose notoriety indicated prospective earning power. *See* Melissa B. Jacoby & Diane Leenheer Zimmerman, *Foreclosing on Fame: Exploring the Uncharted Boundaries of the Right of Publicity*, 77 N.Y.U. L. REV. 1322, 1323–28 (2002).

[134] *See, e.g.*, 151 Cong. Rec. H1993-2048 (daily ed. Apr. 14, 2005) (statement of Rep. Sensenbrenner); *see also* Jacoby, *supra* note 77, at 1128–36 (summarizing media coverage).

[135] *See* sources cited *supra* notes 133-134.

Third, combined with state variations in dollar limits on exemptions, it appeared possible for debtors to "forum shop" by transferring wealth to debtor-friendly states prior to bankruptcy.[136]

The statistical significance of these concerns was probably minimal.[137] They gave rise, however, to serious complaints about the fairness of the bankruptcy system.[138] Deference to state law seemed to disproportionately benefit wealthy debtors.[139]

Perhaps more importantly, the late 20th century saw dramatic growth in credit availability to the American public.[140] The combination of heightened lending activity and debtor-friendly bankruptcy legislation caused lenders increasing concern that the bankruptcy discharge would be abused by free-spending profligates.[141] Scholars worried that the risks of credit market distortion—as lenders raised interest rates to counterbalance default risk in high-limit exemption states—outweighed the benefits of consumer protection.[142] Statistics showed some basis for concern,

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[136] *See* Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815, 824–28 (1987) (responding to Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775 (1987)).

[137] *See infra* notes 228-255 and accompanying text.

[138] *See generally* Jacoby, *supra* note 77 (describing public criticism of the 1978 law leading to the enactment of BAPCPA).

[139] *See* sources cited, *supra* notes 133-134.

[140] *See* Federal Reserve, "*Consumer Credit Outstanding*," available at http://www.federalreserve.gov/releases/g19/HIST/cc_hist_sa_levels.html (last visited Mar. 26, 2014) (showing growth in outstanding consumer credit from $262 billion in 1978 to $2.2 trillion in 2005).It is unlikely that either expanding credit markets or bankruptcy laws caused the other; rather, technological and policy innovations encouraged both developments.

[141] *See* H.R. Rep. No. 109-31, pt. 1, at 2–8 (2005) (introducing the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 as a comprehensive package of reform measures pertaining to both consumer and business bankruptcy cases); *See generally* Jacoby, *supra* note 77 (providing numerous examples of criticism); *see generally* Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485 (2005) (describing actions of coalition of consumer creditors that collaborated to effect passage of BAPCPA); More cynically, one might argue that lenders saw no real risk of abuse; rather, that they acknowledged bankruptcy filings as profit loss and exercised their lobbying power to maximize profit.

[142] *See, e.g.*, Ronald J. Mann, *Optimizing Consumer Credit Markets and Bankruptcy Policy*, 7 THEORETICAL INQUIRIES L. 395, 413–16 (2006); Richard Posner, The Bankruptcy Reform Act, The Becker-Posner Blog (Mar. 27, 2005), http://www.becker-posner-blog.com/2005/03/the-bankruptcy-reform-act--

although the data actually indicated that high exemption limits mostly just prompted credit companies to charge higher rates to poor families that had no homestead equity to exempt in the first place.[143] Regardless, these worries resulted in lobbying for more uniform laws, and after nearly a decade of debate, Congressed passed BAPCPA.[144]

b. BAPCPA, Exemption Reform, and the Law Today

BAPCPA severely limited the ability of debtors to alter their financial structure to maximize exemption amounts. After BAPCPA, state exemptions were still recognized and states could continue to opt out of existing federal exemptions.[145] However, BAPCPA installed five distinct look-back periods with which courts could limit or forbid a debtor's exemptions:

1. If the debtor has not lived in the same state continuously for two years, they may not qualify for that state's exemption.[146]

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posner.html ("[c]ritics have derided [BAPCPA] as mean-spirited and hard on the poor, but they overlook the most important effect that the bill is likely to have, and that is to reduce interest rates").

[143] *See* Richard M. Hynes, *Credit Markets, Exemptions, and Households with Nothing to Exempt*, 7 THEORETICAL INQUIRIES L. 493, 517 (2006) (employing data from Reint Gropp, John Karl Scholz & Michelle J. White, *Personal Bankruptcy and Credit Supply and Demand*, 112 Q. J. ECON. 217 (1997)).

[144] *See In re* Feddersen, 355 B.R. 738, 743 (Bankr. S.D. Ill. 2006) ("Congress had ample time and the input of a resourceful and vocal secured creditor lobby to effectuate its intent"); *In re* Brown, 346 B.R. 868, 875 (Bankr. N.D. Fla. 2006) ("secured and unsecured creditors' lobbies were represented during the drafting and enactment of BAPCPA"); Bradford W. Botes, *New Bankruptcy Filing Strategies in a Post-BAPCPA Era*, *in* UNDERSTANDING THE EFFECTS OF BAPCPA: LEADING LAWYERS ON EXAMINING BAPCPA CHANGES, ADOPTING NEW FILING STRATEGIES, AND ANALYZING CONSUMER BANKRUPTCY TRENDS 43, 43 ("BAPCPA was bought and paid for by bankers and credit card company lobbyists whose intention was to wring every drop of money out of people seeking bankruptcy protection"); Jensen, *supra* note 141, at 498–99; Barry Rehfeld, Top Creditor Lobbyist Tassey Goes for Broke, Am. Banker, (May 17, 2001, at 1:00 AM), http://www.americanbanker.com/issues/166_95/-149969-1.html (explaining origins of BAPCPA language and structure in a report produced by a top creditor lobbyist); *see also* Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47, 102 (1997) (noting that prior to the 1978 act, "[c]reditors may also have tried to use the opportunity of exemption reform to gain competitive advantages in the credit market").

[145] 11 U.S.C. § 522(2011).

[146] *See* 11 U.S.C. § 522(b)(3) (2012).

2. If the debtor has not satisfied the two-year continuity requirement above, the court looks to the state of domicile in the six month period preceding that two-year period.[147]

3. If the debtor has acquired a new homestead within 1,215 days (3 years, four months) of filing, the value of the exemption is limited to the value of the debtor's previous homestead plus $125,000.[148]

4. If the debtor is a convicted felon or has debts resulting from securities violations, fraud, intentional torts, or other serious offenses listed in section 522(q) of the Code, the exemption is limited to $125,000 regardless of applicable state law.[149]

5. If the debtor's actions in the ten years prior to the filing evidence intent to hinder, delay, or defraud creditors, the court has discretion to reduce the exemption proportionately.[150]

Even after BAPCPA, a significant amount of criticism has focused on the perceived non-uniformity of bankruptcy laws.[151] Scholars and creditors' advocates have argued forcefully against the deference of federal law to state law in the area of exemptions.[152] These arguments fall into three categories. First, that state laws are ineffective and overly diverse, leading to unfair results.[153] Second,

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[147] *See id.* In other words, the court looks to "the first six months of the period beginning precisely two and one-half years prior to the bankruptcy filing" in order to ascertain whether the debtor *might* be eligible for an exemption in that state. *See* Tarvin, *supra* note 6, at 154–55. If that sounds overly complicated, arbitrary, and potentially harmful, it's because it is. *See generally* Tarvin, *supra* note 6.

[148] *See* 11 U.S.C. § 522(p) (2012). Note that what kinds of 'interest' count as part of that $125,000 was for a time a matter of disagreement among the courts. *See* Wallace v. Rogers (*In re* Rogers), 513 F.3d 212, 217–23 (5th Cir. 2008) (describing case law). Courts were unsure whether an 'interest' might include purchase of title, or acquisition of any type of equity. *See* Pratt, *supra* note 6, at 102–03. This appears resolved in favor of the former following a Circuit-level reversal of the most prominent 'equity interest' case. *See* Greene v. Savage (*In re* Greene), 583 F.3d 614, 618–25 (9th Cir. 2009). Thus, the 1,215-day look-back period asks whether the debtor purchased *title* to the property during the period, as opposed to adding to its equity value or altering its status as a homestead. *See id.* at 625; Rogers, 513 F.3d at 223.

[149] *See* 11 U.S.C. § 522(q) (2012).

[150] *See id.* § 522(o).

[151] *See* sources cited, *supra* note 9.

[152] *See id.*

[153] *See* sources cited, *supra* note 12.

that the language and/or intent of the Constitution require absolutely uniform federal control over bankruptcy law.[154] Third, that non-uniformity encourages debtors to forum shop and transfer wealth to exempt assets in order to abuse the discharge.[155] Part III of this Article will describe and analyze these arguments in detail.[156] Part IV will present two counter-arguments in favor of limited deference to state exemption laws.[157]

III. THE UNIFORMITY MOVEMENT

Creditors' advocates and some scholars have raised three significant arguments against the centuries-old policy of deference to state exemptions in bankruptcy. This Part addresses and dismisses each argument individually.[158] Section A of this Part discusses the claim that deference to arcane laws leads to inequitable results.[159] Section B describes the controversy over constitutional language and intent.[160] Section C discusses the claim that pre- and post-BAPCPA bankruptcy law facilitates irresponsible debtor behavior.[161]

A. Fairness Critiques Survive Despite Expansive Judicial Powers

Contrary to some claims,[162] judicial and legislative authority effectively safeguards the fairness of the bankruptcy process.

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[154] *See* sources cited, *supra* note 13.
[155] *See* sources cited, *supra* note 11.
[156] *See infra* notes 158-255 and accompanying text.
[157] *See infra* notes 257-280 and accompanying text.
[158] *See infra* notes 158-255 and accompanying text.
[159] *See infra* notes 162-191 and accompanying text.
[160] *See infra* notes 192-227 and accompanying text.
[161] *See infra* notes 228-255 and accompanying text.
[162] *See* sources cited, *supra* notes 6-13 (debating merits of state exemption policy); *supra* note 12 and accompanying text (providing examples of arcane language and scholarly debate regarding fairness). This Article will restrict its focus on the issue of fairness to the question of fairness to debtors. In the consumer context, creditors have greater bargaining power, the ability to adjust lending practices and interest rates, and complete information about state and federal debtor-creditor laws. Furthermore, the practice of debtor forum shopping and discharge abuse is not statistically significant. *See infra* notes 228-255 and accompanying text. Thus, in statistically relevant consumer circumstances, creditors receive what they bargain for. The situation is not unfair to creditors, regardless of its political merits.

Furthermore, bankruptcy is in fact more uniform and equitable than its detractors would likely admit. This Section will document two areas of case law that demonstrate the evolution of statutory and case law toward effective bankruptcy policy.[163] Subsection 1 addresses whether courts should grant exempt status to cash proceeds as substitutes for damaged exempt assets.[164] Subsection 2 describes the ongoing state-law policy battle over exemptions for mobile homes.[165]

1. The Proceeds Problem

In re Plant and *In re Gilley*, cited in the Introduction to this Article, serve as examples of a specific problem in exemption policy. In brief, state exemptions guarantee protection for some assets, thus inducing debtors into economic behaviors that might otherwise be too risky. But if those assets are damaged by no fault of the debtor, the debtor is often reimbursed, and the proceeds—insurance or court judgments—are often not protected by statute.[166]

At first glance, the failure of the federal and state legislatures to protect debtor proceeds appears as a deep flaw in the bankruptcy system. The conflicting elements of the statutory regimes leave debtors unable to access statutory protections previously granted. A closer look, however, reveals broad agreement in reasoning and little real controversy.[167] In effect, by granting judges and states discretion

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As to the fairness of particular value limits of state exemptions, this Article takes no position. Value limits of exemptions represent a balance of state policies, with land development and insolvency protection on one side and moral chastisement, creditor protection, and lower consumer lending rates on the other. *See supra* notes 140-143 and accompanying text.

[163] *See infra* notes 162-191 and accompanying text.

[164] *See infra* notes 166–176 and accompanying text.

[165] *See infra* notes 178-192 and accompanying text.

[166] *See, e.g.*, Plant, 300 B.R. at 22, 24 (noting lack of statutory protection for proceeds in Arizona); *In re* Simpson, 238 B.R. 776, 779 (Bankr. S.D. Ill. 1999) (noting that Illinois law exempted the debtor's "interest" in personal property, which did not include insurance proceeds); Gilley, 236 B.R. at 446–47 (discussing exemption case law as evolved from Florida constitutional law).

[167] The most real controversy between courts on the issue of changes to asset character appears when debtors die after filing their petition. On the one side are cases saying that the debtor can't fulfill the purpose of the exemption. *See, e.g.*, Wiesner, 267 B.R. at 38 ("debtor is deceased; he cannot benefit from the fresh start bankruptcy was intended to provide, nor will the exempted assets give him the foundation upon which to build his start"). On the other side are cases saying that

to employ their own methods, Congress has protected the uniform bankruptcy virtue of the debtor's fresh start.[168]

Judicial deference is important because there are limits to statutory protection. For instance, Massachusetts would exempt the insurance payment as a substitute for home equity.[169] But imagine if Deborah Debtor loses her home in a flood after a dam breaks, and she has no flood insurance. Instead, she receives a $300,000 settlement check from the utility company that caused the damage through negligent construction of the dam. Under current Massachusetts statutory law, the restitution check for the utility's involuntary conversion of Deborah's property would still be available to Deborah's creditors.[170]

In fact, under common law there are strong protections of debtor assets in this situation. Throughout the states, bankruptcy courts have explicitly[171] or implicitly[172] required debtors to satisfy a three-pronged test to maintain exemptions in proceeds as substitutes for the damaged exempt asset: (1) the debtor must evidence an intent to reinvest the proceeds to repair or replace the asset;[173] (2) the

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property once exempt is no longer property of the estate. *See* Reed, 184 B.R. at 737–38.

168 Some states employ a combination of statutory and case law to ensure fairness in such situations. *See, e.g.*, White v. Brown (*In re* White), 389 B.R. 693, 697 (B.A.P. 9th Cir. 2008) (implying good faith reinvestment requirement into Arizona exemption allowing rollover of sale proceeds); Hoffpauir, 258 B.R. at 456–57 (interpreting Idaho exemption statute, which exempted some proceeds, to also exempt alleged 'surplus' resulting from asset appreciation and insurance payment calculated for replacement value as opposed to market value); Orange Brevard, 137 So. 2d at 206 (describing conditions by which proceeds may be exempted pursuant to Florida's constitution). Others, such as Massachusetts, now attempt to provide protections within statutory law. *See* Mass. GEN. LAWS ch. 188, §1 (2010); Dion, *supra* note 97, at 123.

169 *See* Mass. GEN. LAWS ch. 188, § 1 (2010) (defining "home" to include proceeds of insurance policies).

170 *See id.*

171 The multi-prong test is explicit in Florida. *See* Binko, 258 B.R. at 517.

172 *See infra* notes 173-175 (providing case examples).

173 *See, e.g.*, White, 389 B.R. at 697 (denying exemption where proceeds could not be identified as a result of debtor's risky and complicated investments); Wiesner, 267 B.R. at 32, 38 (removing exemption where debtor's death in fire that destroyed homestead also eliminated possibility of reinvestment); *See, e.g.*, Binko, 258 B.R. at 517 (stating requirement). This prong includes a duty to keep the proceeds identifiable as proceeds of damage to equity. *See, e.g.*, White, 389 B.R. at

debtor's conduct must evidence good faith;[174] and (3) in the case of insurance or litigation proceeds, the proceeds must arise from demonstrable damage to the debtor's equity position.[175] Satisfying these prongs, debtors see their proceeds exempt.

This three-prong test demonstrates that the uniform bankruptcy goal of the debtor's fresh start transcends variations in state law. In all cases identified in the research for this Article, judges granted exemptions consistent with fresh start principles, regardless of

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697 (citing explicit requirement in ARIZ. REV. STAT. ANN. § 33–1101(C) (2014)); Binko, 258 B.R. at 517; Ziegler, 239 B.R. at 375, 379.

[174] *See* Hannigan v. White (*In re* Hannigan), 409 F.3d 480, 481 (1st Cir. 2005) ("a bankruptcy court has discretion to deny the amendment of exemptions where the amendment would prejudice creditors or where the debtor has acted in bad faith or concealed assets"); *see, e.g.*, Thurston, No. 99-11836-JNF, 2007 WL 1860892, at *13 (denying exemption where debtor's actions showed concealment of assets); Binko, 258 B.R. at 517 (stating requirement); Ziegler, 239 B.R. at 379 (stating good faith requirement and denying exemption on such grounds); Gilley, 236 B.R. at 446 (granting exemption upon conclusion of debtor's good faith).

[175] *See, e.g.*, Plant, 300 B.R. at 24 (denying exemption where "there is no evidence to support any decline in the value of the Debtor's homestead as a result of Jentra's negligence"); Simpson, 238 B.R. at 779–81 (denying exemption of insurance proceeds for automobile because Illinois law regarded insurance contracts as private indemnities running separate from the asset itself; therefore, proceeds could not operate as a substitute for an exempt asset); Gilley, 236 B.R. at 443–44 (granting exemption where "[t]he property was contaminated as a result of the use of Benlate, and is not now suitable for growing either strawberries or the other crops previously raised on the property"). *Simpson* is a fascinating test case of this prong in that the court actually noted the apparent unfairness of its decision but chalked it up to the debtor's timing in filing for bankruptcy:

> "While it is unfortunate the debtor here must forego the full benefit of his motor vehicle exemption simply because of the happenstance of the timing of the accident and the insurer's payment of his claim, the debtor's bankruptcy filing was a voluntary act that was subject to his control and timing, even though the accident was not. Having availed himself of the protections and privileges afforded by the Bankruptcy Code, the debtor cannot complain about the limits imposed by its provisions." Simpson, 238 B.R. at 780–81.

The court implied that if the accident that damaged the debtor's vehicle had occurred after the filing, the result might have changed. *See id.* In other words, as long as the choice of law belonged entirely to the court, the fresh start principle would govern. This case probably differs from others herein cited because it concerns a motor vehicle exemption. Motor vehicles are more easily replaceable than homesteads; thus, the debtor's choice to file for bankruptcy before replacing his vehicle may have signaled a desire to maintain the cash proceeds instead of reinvesting.

state law requirements and despite substantial discussion thereof. Judicial reasoning is not always explicit on these points, and some minor controversies remain.[176] However, there is little doubt that where the general fairness of bankruptcy law is concerned, bankruptcy judges do not tolerate arcane or misguided state laws that would grant windfalls to undeserving parties.[177]

2. The Mobile Home Controversy

Another example of theoretically arcane or unfair state laws can be found in the controversy over whether mobile homes should qualify as homesteads for purposes of exemption. Historically, legislators and judges considered ownership of land and the construction of permanent buildings thereon to be intrinsic elements of citizenship, family life, and economically productive behavior.[178] The times, however, have changed, and not all states have changed their statutory definitions of homesteads to suit changing economic realities.[179]

Mobile homes are generally considered personal property.[180] The debtor owns the structure, which is moveable, though perhaps not

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[176] *See, e.g.*, *supra* note 167 (describing controversy over effect of debtor's post-petition death on exemption status); *supra* note 175 (describing variation in law based on timing of debtor filing relative to asset damage).

[177] This is not to suggest that bad laws are acceptable because judges do not enforce them. Recall that exemptions are typically state laws that operate both inside and outside bankruptcies. In the bankruptcy context, judges may override laws that unfairly conflict with bankruptcy principles on a factual basis using their equitable authority.

[178] *See supra* notes 40-42 and accompanying text (describing historical importance of land ownership in American life).

[179] *See, e.g.*, Ark. Const. art. IX, § 3 (defining homestead without regard to particular definitions); MISS. CODE ANN. § 85-3-21 (2014) (exempting only property fully owned by the debtor); NEB. REV. STAT. § 40-101 (2014) (exempting "dwelling house[s]" and land) *see generally* Robert Laurence, *Mobile Homesteads, and in Particular the Exempt Status of Mobile Homes Located on Rented Lots: The Laws of Arkansas, Mississippi, Nebraska, and Utah Compared and the Principle of the Liberal Construction of Exemption Statutes Analyzed*, 57 ARK. L. REV. 221 (2004) (describing relationship between statutory and common law mobile home exemptions in several states).

[180] *See* Dion, *supra* note 97, at 112; Laurence, *supra* note 179, at 231–32; *Summary of State Laws and Court Cases Regarding the Zoning, Placement, and Tax Treatment of Manufactured Housing*,

easily. The debtor usually rents a piece of land on which the home is situated.[181]

Courts acknowledge that for purposes of functionality to the debtor, the mobile home serves a purpose similar to that of a traditional homestead.[182] The value of the home, however, often exceeds the dollar limit for statutory exemptions on personal property.[183] Denial of exemption thus could force debtors to choose between their homes and their personal belongings. Recognizing this identity of purpose, and needing to protect the low-income families that tend to reside in mobile homes, some states began to introduce statutory protections in the mid-20th century.[184]

The process has been slow and remains incomplete with respect to statutory law.[185] It is further complicated by the complex interactions in many states between state constitutions, statutes, and case law.[186] For instance, under the definition contained in 11 U.S.C.

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http://www.manufacturedhousing.org/lib/showtemp_detail.asp?id=606&a (last visited Jan. 28, 2015).

[181] *See* Dion, *supra* note 97, at 112; Regina Lewis, Quick Tips: *Mobile Homes as Lower-Cost Housing*, USA Today, Aug. 8, 2013, 8:49 PM, http://www.usatoday.com/story/money/personalfinance/2013/08/03/money-quick-tips-mobile-homes-hosuing/2610469/.

[182] *See, e.g.*, *In re* Carlson 303 B.R. 478, 487 (B.A.P. 10th Cir. 2004) (finding exemption of mobile home on leased property consistent with legislative purposes); Gray, 378 B.R. at 730–36 (finding ambiguity in Massachusetts statute that could be resolved with reference to legislative intent to protect home structures); *In re* Buzzell, 110 B.R. 440, 442 (Bankr. D. Neb. 1990) (holding that exemption definitions turn on debtor use, not structure identity).

[183] *See* Lewis, *supra* note 181 (noting typical mobile home costs between $25,000 and $100,000). Personal property exemptions are typically well under $20,000. *See, e.g.*, 11 U.S.C. § 522(d)(3) (2012) (allowing aggregate exemption of $8,000 in personal property).

[184] *See, e.g.*, N.Y. C.P.L.R. § 5206(a)(4) (2011); 1979 Kan. Sess. Laws 868. Common law mobile home exemptions preceded statutory exemptions in some cases by several decades. *See, e.g.*, *In re* Foley, 97 F. Supp. 843, 846–47 (D. Neb. 1951); *In re* Williams, 24 F. Supp. 440, 441 (D. Or. 1938); Clark v. Vitz, 190 S.W.2d 736, 738 (Tex. Civ. App. 1945). At least one scholar called for uniform mobile home exemptions as early as 1950. *See* George L. Haskins, *Homestead Exemptions*, 63 HARV. L. REV. 1289, 1295 (1950) ("if the function of homestead legislation is protection of the home, it should be immaterial whether the home is a mere chattel or has achieved the dignity of an estate in land or a chattel real").

[185] *See* Laurence, *supra* note 179, at 226 (describing failure of state law to protect mobile homeowners as "basic foolishness").

[186] *See id.*

§ 522(p), a mobile home could qualify for a homestead exemption of up to $22,975.[187] This exemption would be inapplicable, however, in opt-out states that grant no homestead status to mobile homes.[188] Thus, in some states, mobile homeowners in bankruptcy are at risk of losing their homes despite federal laws and otherwise liberally construed exemptions.

The failure to exempt mobile homes discriminates against a large portion of the population.[189] Mobile homeowners are disproportionately poor and are often priced out of real estate ownership.[190] Ownership of a permanent home on rented real estate may be the best substitute. Thus, as with the proceeds problem described in the previous subsection, this loophole may effectively prevent debtors from re-entering the housing market, and force them to rely on other forms of government assistance.

It is not clear whether states benefit from this exemption decision. On the one hand, states may wish to refrain from exempting mobile homes to encourage those who can possibly own their own property to do so. On the other hand, if land ownership is not possible for a large section of the population, states without mobile home exemptions effectively deny debt relief to their poorer citizens. As a result, the states may see an increased need for expensive social services, as well as increases in the costly problems that more generally arise from a lack of affordable housing.

As with proceeds, courts have struggled to reconcile mobile home exemptions with the fundamental precepts of federal bankruptcy law.[191] Although this situation may be non-uniform, it is an example of the federalist system working as designed. Unlike with the proceeds issue, the mobile home controversy reflects a genuine state legislative concern over fundamental values such as land ownership and the social safety net. A decision to limit exemptions

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[187] *See* 11 U.S.C. § 522(d)(1) (2012) (granting homestead exemption in "real property *or personal property* that the debtor or a dependent of the debtor uses as a residence") (emphasis added). The dollar amount is adjusted every three years based on the Consumer Price Index for All Urban Consumers, published by the Department of Labor. 11 U.S.C. § 104 (2012). The amount cited was most recently adjusted on April 1, 2014.

[188] *See* Laurence, *supra* note 179, at 225–26.

[189] *See id.*

[190] *See id.*

[191] *See* sources cited, *supra* notes 179–184.

for mobile homes does not allow creditors to gain windfalls from misfortunes beyond the debtor's control. It merely attempts to encourage a certain type of economic behavior. Such policy objectives merit deference to state law.

A. Addressing Constitutional Concerns

This section analyzes the claims of some scholars that state-by-state variation is per se abhorrent to the bankruptcy system.[192] Subsection 1 describes and dismisses the constitutional arguments for uniform bankruptcy law.[193] Subsection 2 addresses the related claims of some scholars that federal uniformity in bankruptcy law would be strategically advantageous.[194]

1. The Words and Intentions of the Founders

Judges and scholars have occasionally struggled with the theory of the bankruptcy clause of the Constitution as evidence that state-by-state variation in treatment of parties in bankruptcy should not be tolerated.[195] The text of the Constitution authorizes Congress to pass uniform laws on the subject of bankruptcy.[196] The meaning of 'uniformity' in any constitutional context is the subject of some debate.[197]

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[192] *See infra* notes 195-227 and accompanying text; *see also, e.g.*, Austin, *supra* note 9, at 1166–68 (arguing that some exemption laws are unconstitutional); Koffler, *supra* note 6, at 23–28 (describing the "constitutional mandate" of uniformity and critiquing the exemption provisions of the 1978 act); López, *supra* note 6, at 166 (describing state laws as violating the spirit of the Fifth and Fourteenth amendments and representing Congress's abdication of the bankruptcy clause); Stechschulte, *supra* note 97, at 782 (declaring state exemption laws unconstitutional).

[193] *See infra* notes 195-211 and accompanying text.

[194] *See infra* notes 220-227 and accompanying text.

[195] *See, e.g.*, Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 188 (1902) (noting requirement of "geographic" uniformity); Austin, *supra* note 9, at 1166–68; Koffler, *supra* note 6, at 106 (describing non-uniformity under the 1978 act as a "serious disorder afflicting our Constitution"); López, *supra* note 6, at 166; Stechschulte, *supra* note 9, at 782 (declaring certain state exemption laws unconstitutional).

[196] U.S. Const. art. I, § 8, cl. 4.

[197] *See* Austin, *supra* note 9, at 1141–63; Koffler, *supra* note 6, at 77–87.

One concern is that the word "uniform" appears in only two other contexts in the Constitution—taxation[198] and naturalization.[199] Courts have interpreted the word inconsistently in those contexts. [200] But bankruptcy is not similar to taxation or naturalization, which concern rights and obligations under federal law. By contrast, the Constitution leaves property law generally to the states.[201] What little information we have about the intent of the bankruptcy clause indicates that "uniformity" in bankruptcy was merely meant to coordinate bankruptcy procedures so as to facilitate interstate commerce.[202]

The Supreme Court has mostly disregarded these concerns for two reasons. First, the Court noted in 1902 that the then-current Bankruptcy Code and its relevant forebears were in fact uniform, in that they assign to the debtor's creditors everything contained within the debtor's estate.[203] The assets relegated to the debtor's estate are a matter of local property law, not federal law.[204] Thus, the Code *is* uniform with respect to what Congress has placed under federal purview.

Second, the Court has noted that the language of the bankruptcy clause authorizes, but does not require, uniform

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[198] U.S. Const. art. I, § 8, cl. 1.

[199] *Id.* cl. 4.

[200] *See* Moyses, 186 U.S. at 190 (allowing bankruptcy deference to state exemption laws under concept that "uniformity is geographical"); Knowlton v. Moore, 178 U.S. 41, 90 (1900) (requiring geographic uniformity for taxation, without respect to state property laws); Nemetz v. INS INH, 647 F.2d 432 (4th Cir. 1981) (granting naturalization petition where petitioner was denied due to violation of state anti-homosexuality law); Austin, *supra* note 9, at 1141–63; Koffler, *supra* note 6, at 77–87.

[201] *See* Moyses, 186 U.S. at 190 (noting that as a result of general federal deference to state property law, bankruptcy uniformity does not contemplate personal uniformity, i.e., similar results for all debtors regardless of location).

[202] *See* Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 377 (2006) (observing that "the Framers, in adopting the Bankruptcy Clause, plainly intended to give Congress the power to redress the rampant injustice resulting from States' refusal to respect one another's discharge orders"); THE FEDERALIST NO. 42 (James Madison) ("The power of establishing uniform laws of bankruptcy is . . . intimately connected with the regulation of commerce"); Koffler, *supra* note 6, at 35–37 (describing early legislative history, including relationship to national and international commerce).

[203] *See* Moyses, 186 U.S. at 188–191.

[204] Butner v. U.S., 440 U.S. 48, 54–57 (1979).

bankruptcy laws.[205] Indeed, for significant portions of the country's history, Congress has declined to exercise its bankruptcy power.[206] When it has chosen to enact bankruptcy laws, those laws have been uniform as to matters within federal purview, as noted above.

Courts have similarly refuted claims that the legislative history or the intention of the framers demands absolute uniformity in the area of exemptions.[207] There is no evidence demonstrating that the framers' intentions were to seize all authority for the federal government.[208] What little evidence exists indicates that the framers disliked the pre-constitutional situation, whereby discharges applied on a state-by-state basis and thus debtors could be thrown in prison upon crossing state lines.[209] Perhaps most important in this debate, however, is that there is practically no record of specifically *what* the framers intended for federal bankruptcy law other than to resolve the problem of cross-border discharge recognition.[210] There was little debate, no formal discussion, and certainly no intent to pass any laws.[211] Arguments as to bankruptcy uniformity on these grounds thus appear highly speculative.

Some question exists as to whether the current regime complies with the broad mandate of "geographic uniformity" instituted by the Supreme Court in 1902.[212] Some evidence suggests that the Court returned to the issue in *Central Virginia Community College v. Katz* in 2006.[213] In that case, the Court held that sovereign immunity doctrine did not prevent a trustee from suing a government

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[205] Brown v. Smart, 145 U.S. 454, 457 (1892) (noting that in the absence of federal law, states may enact their own bankruptcy laws).

[206] *See supra* notes 105-127 and accompanying text (describing pre-1978 legislative enactments).

[207] *See* Katz, 546 U.S. at 377.

[208] *See id.*; Koffler, *supra* note 6, at 35–37; *supra* notes 105-127 and accompanying text (describing pre-1978 legislative enactments).

[209] *See* Katz, 546 U.S. at 377; Tabb, *supra* note 108, at 13 (noting that "bankruptcy received only passing attention from the framers at the Constitutional Convention of 1787" but that the issue was considered necessary due to discriminatory state laws).

[210] *See* Olmstead, *supra* note 124, at 831; Tabb, *supra* note 108, at 13.

[211] *See* Austin, *supra* note 9, at 1151–52; Tabb, *supra* note 108, at 13; Olmstead, *supra* note 124, at 831.

[212] *See* Austin, *supra* note 9, at 1157–68.

[213] *See id.* at 1158–59.

agency to avoid a preferential transfer.[214] In an unnecessary and perhaps poorly phrased footnote, the Court stated that "Congress has the power to enact bankruptcy laws the purpose and effect of which are to ensure uniformity in treatment of state and private creditors."[215] Read broadly, this could indicate a legal mandate to ensure complete personal uniformity.[216] But such a reading would have the Court expressing disapproval of other areas of bankruptcy law generally viewed as constitutional: for instance, Code section 507. In that section, the Code provides priority distribution rights to some creditors over others based on the origins of their claims.[217] Those claims may vary greatly due to the underlying state laws regulating property rights.[218] While scholars vigorously debate the merits of priority laws per se, and the relative priority status of various creditor types, neither scholars nor the courts object on constitutional grounds to the disparate treatment of some creditors by merit of their state status.[219] This fact suggests that *Katz* should be interpreted narrowly, and not applied to the issue of exemptions.

2. A Matter of Strategy?

On a related note, some scholars also argue that uniform federal exemption control would be generally beneficial with regard to public confidence in the Constitution.[220] Scholarship in this vein tends to focus on the duty of the federal government to provide due

[214] Katz 546 U.S. at 378–79.

[215] *See id.* at 377 n.13.

[216] *See* Austin, *supra* note 9, at 1159 ("Pushed to its logical conclusion, this would seem to require Congress to harmonize the bankruptcy laws so that the treatment of parties in a bankruptcy case is indistinguishable from the standpoint of geography").

[217] 11 U.S.C. § 507(a)(8) (2011).

[218] *See, e.g.*, *id.* § 507(a)(1) (granting first priority to claims based on domestic support obligations). Because domestic relations laws vary greatly from state to state, domestic support obligations will vary accordingly in bankruptcy. Exemptions, like domestic support laws, are state-specific laws meant to determine individual property rights and ensure their survival through citizens' traumatic experiences.

[219] *See generally* Shu-Yi Oei, *Taxing Bankrupts*, 55 B.C.L. REV. 375 (2014) (weighing arguments for and against priority treatment for tax creditors).

[220] *See, e.g.*, Gotberg, *supra* note 9, at 233–45; Koffler, *supra* note 6, at 105–06 (analogizing proposed bankruptcy reforms to the Platonic ideals supposedly espoused by the Framers); López, *supra* note 6, at 166.

process and equal protection under the law.[221] Some also cite potential benefits to consumers and creditors due to increased fairness or the perception thereof.[222] Similarly, some scholars and attorneys argue that complete federal control over bankruptcy would benefit businesses by increasing the predictability and efficiency of legal outcomes.[223]

With respect to consumer bankruptcy, strategic uniformity arguments masquerade in constitutional language while espousing highly ideological viewpoints irrelevant to real-life debtor and creditor behaviors. Such arguments in fact ignore that consumers routinely purchase products, sign contracts, and engage in innumerable everyday functions unquestionably governed by state-level commercial and property law.[224] Furthermore, they choose to enter bankruptcy proceedings in large part due to state-law non-bankruptcy concerns.[225] Unlike in the business context, consumer debtors can rarely shop for the best forum when they do file bankruptcy or when disputes otherwise arise.[226]

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[221] *See, e.g.*, Gotberg, *supra* note 9, at 235; López, *supra* note 6, at 166; *see also* Storer, 58 F.3d at 1127–30 (holding state opt-out statutes constitutional).

[222] *See, e.g.*, Gotberg, *supra* note 9, at 235; López, *supra* note 6, at 166.

[223] *See, e.g.*, Lawrence J. Bugge, *Commercial Law, Federalism, and the Future,* 17 DEL. J. CORP. L. 11, 18–19 (1992) (arguing that a more uniform federal system would decrease costs and increase predictability for businesses); Gotberg, *supra* note 9, at 235 (same, citing Bugge). As Ms. Gotberg shows, there are worthy arguments to be made for more uniformity in business bankruptcies. Her solution to create a separate administrative agency for consumer bankruptcy is compelling, but beyond the scope of this Article.

[224] *See* Butner, 440 U.S. at 54–57.

[225] *See*, *e.g.*, Lars Lefgren & Frank McIntrye, *Explaining the Puzzle of Cross-State Differences in Bankruptcy Rates*, 52 J.L. & ECON. 367, 377–80 (2009) (noting that wage garnishment laws correlate significantly to filing data).

[226] *See* Juliet M. Moringiello, *Has Congress Slimmed Down the Hogs?: A Look at the BAPCPA Approach to Pre-Bankruptcy Planning*, 15 WIDENER L.J. 615, 635–39 (2006) (noting that high exemptions effectively help only high-asset, high-debt creditors); *cf.* U.S. Courts, 2013 Bankruptcy Filings for 12-month Period Ending Dec. 31, 2013, available at http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2013/1213_f2.pdf (last visited Mar. 31, 2014) (showing that 70% of consumer bankruptcies are filed under chapter 7). In recent history, about 95% of chapter 7 filings are no-asset cases. *See* Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 18 (1996) (recounting historical progression toward commonality of no-asset filing); NAT'L BANKR. REV. COM'N, BANKRUPTCY: THE NEXT TWENTY YEARS, FINAL REPORT 137 (1997).

Debtors' property law requirements are, indeed, local.[227] Moreover, they vary based on geography, cultural values, and cost of living. Federal uniformity cannot account for the localized needs of consumer debtors, because bankruptcy is so closely tied to localized property law. Thus, federal uniformity would deprive consumers of the benefits of their bargains in the short term, and of the increased flexibility of state variation in the long term. For these reasons as well as the mere impracticality of trampling upon two hundred years of deference to state law, Congress has made the "strategic" decision not to sledgehammer all states into exemption uniformity.

A. Do State Exemptions Create Poor Debtor Incentives?

The argument that the state exemption system encourages financial irresponsibility and abuse of the bankruptcy discharge likewise falls flat. This section addresses the claims of creditors' advocates and shows that exemption abuse has never been a statistically significant problem.[228] Moral outrage aside,[229] the biggest policy concern on the exemption issue should be the tradeoff between debtor protections in bankruptcy and consumer interest rates outside bankruptcy.[230]

Data collected by the government and the scholarly community belies the most prominent arguments for exemption uniformity. When bankruptcy reform became a prominent topic of discussion in the mid-1990s, much attention focused on the perception of systemic abuse by millionaires shielding wealth in mansions in Florida, Texas, and a handful of other states with unlimited homestead exemptions.[231] This resulted in a perverse confluence of partisan support for bankruptcy reform proposals.[232] Conservatives

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[227] *See* Butner, 440 U.S. at 54–57.

[228] *See infra* notes 230-252 and accompanying text.

[229] This Article takes no moral position. It should be noted, however, that legislation designed to specifically solve the "millionaire mansion" problem could very easily harm the middle class debtors exemption laws should protect. The goal of the Code should be to incentivize productive activity, not to choose deserving parties. As discussed in Part II(A) above, the equitable powers of the judiciary are the proper forum for determining just desserts.

[230] *See infra* notes 253-255 and accompanying text.

[231] *See* Jacoby, *supra* note 77, at 1129–36.

[232] *See generally* Jacoby, *supra* note 77.

complained that the federal system and its deference to powerful state exemption laws allowed profligate citizens to discharge debts without the social stigma that had once accompanied bankruptcy.[233] Liberals declined to argue the point, and instead decried the unfairness of the proposed bankruptcy reform that rendered bankruptcy filing more difficult for all but the very wealthy.[234] Thus, it seemed for a period of nearly a decade that Congress was close to passing an omnibus bankruptcy bill that would clamp down on state exemption power.[235]

There was a problem with the public outcry against the "millionaire's mansion" loophole: it lacked any basis in statistical relevance.[236] Multiple studies revealed no statistically significant abuse of bankruptcy and exemption laws by any citizens, rich or poor.[237] In fact, data overwhelmingly showed that the vast majority of

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[233] *See, e.g.*, Robert D. Hershey Jr., *Creditors Lead Push to Curb Bankruptcy*, N.Y. TIMES, May 10, 1998, at BU10 ("'The only reasonable explanation [for the increase in bankruptcy filings] is that the stigma of bankruptcy is all but dead....'" (quoting Rep. George Gekas (R-Penn.)); Peter Pae & Stephanie Stoughton, *Personal Bankruptcy Filings Hit Record: Easy Credit Blamed, Congress May Act*, WASH. POST, June 7, 1998, at A1 ("[N]ow [bankruptcy is] no big deal. It's a way of doing business. I can't completely explain why the stigma is gone, but it's gone." (quoting Rep. Bill McCollum (R-Fla.)); *Bloomberg News, Filings Worry Greenspan*, Times-Picayune, Mar. 20, 1997, at C6 (quoting Alan Greenspan as saying that "personal bankruptcies are soaring because Americans have lost their sense of shame in filing for bankruptcy court protection").

[234] *See* Jacoby, *supra* note 77, at 1129–31; Susan Schmidt, *Torricelli's Money Push Also Raises Some Hackles: Business Fills Senate Democratic Coffers*, WASH. POST, June 17, 2000, at A1 (noting resentment of Democratic politicians).

[235] *See* Jacoby, *supra* note 77, at 1098–1107 (describing legislative history).

[236] *See* Scott Fay et al., *The Household Bankruptcy Decision*, 92 AM. ECON. REV. 706, 714–16 (2002) (noting that a nationwide homestead exemption cap of $100,000 would impact 0.004% of bankruptcy filings); Gen. Accounting Office, Pub. No. GAO/GGD-99-118R, Bankruptcy Reform: Use of the Homestead Exemption by Chapter 7 Bankruptcy Debtors in the Northern District of Texas and the Southern District of Florida in 1998, at 1–3 (1999), available at http://www.gao.gov/archive/1999/gg99118r.pdf [Hereinafter GAO Study] (showing that about 1% of bankruptcy filers in Texas and Florida carried over $100,000 in homestead equity); Todd J. Zywicki, *Why So Many Bankruptcies and What to Do About It: An Economic Analysis of Consumer Bankruptcy Law and Bankruptcy Reform 102* (George Mason Univ. Sch. of Law, Law & Econ. Working Paper Series No. 03-46, 2003), available at http://ssrn.com/abstract_id =454121 (noting that "the impact of the unlimited homestead exemption on bankruptcy filings is relatively trivial" and that any changes in exemption policy would probably not impact filing rates).

[237] *See* sources cited, *supra* note 236.

bankruptcy filings were by middle- and lower-class families unlikely to own real estate free of significant mortgage obligations.[238] Furthermore, statutory controls existed that prevented criminals and tortfeasors from transferring assets to exempt status.[239]

The media manipulation that resulted in BAPCPA's passage is well documented.[240] Interestingly, much of the lobbying push for the bill carried an intense anti-intellectual tone, with numerous lobbyists and journalists complaining about the "bankruptcy establishment."[241] This supposedly tight-knit group included creditors' attorneys in addition to debtors' attorneys and scholars.[242] This line of argument, however, combined with media hype in the burgeoning 24-hour news age, allowed lobbyists and journalists to ignore the facts and realities of consumer bankruptcy.

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[238] *See* GAO Study, *supra* note 227, at 2 (showing median homestead exemptions in Florida and Texas of under $10,000); Elizabeth Warren, *The Economics of Race: When Making It to the Middle Is Not Enough*, 61 WASH. & LEE L. REV. 1777, 1780–87 (describing results of demographic studies of bankruptcy filers).

[239] *See* 11 U.S.C. § 523 (2011) (excepting certain debts from discharge). Section 523, which has remained consistent in substance since the 1898 act, excepts from discharge any debts acquired as a result of fraud, crime, intentional torts, etc. *See* Robert J. Bein, *Subjectivity, Good Faith and the Expanded Chapter 13 Discharge*, 70 MO. L. REV. 655, 663–67 (2005) (describing history of discharge and exceptions).

[240] *See generally* Jacoby, *supra* note 77 (describing the process by which BAPCPA was negotiated by politicians and lobbyists via the news media).

[241] *See, e.g.*, BILL MCCOLLUM, BANKRUPTCY REFORM: A RETURN TO RESPONSIBILITY, HILL (May 20, 1998) (describing a "campaign of false information being disseminated by bankruptcy attorneys, bankruptcy 'experts' and other people maligning the legislation to further their agendas," but finding that "after subjecting the multitude of half-truths and false statements disseminated by the critics...to the light of day, they just don't stand up"); Tom Hamburger, *Auto Firms See Profit in Bankruptcy-Reform Bill Provision*, WALL ST. J., Mar. 13, 2001, at A28 [hereinafter Hamburger, Auto Firms See Profit in Bankruptcy-Reform] ("The bankruptcy establishment likes the system the way they have been running it.") (quoting an industry analyst); Jacob M. Schlesinger, *Card Games: As Bankruptcies Surge, Creditors Lobby Hard to Get Tougher Laws*, WALL ST. J., June 17, 1998, at A1 [hereinafter Schlesinger, As Bankruptcies Surge] (stating that the bankruptcy establishment simply prefers the status quo); *see also* Jacoby, *supra* note 77, at 1092 (describing the phenomenon).

[242] *See* sources cited, *supra* note 241.

Little has changed. Because of either poor drafting, lack of will, or creative judicial interpretation,[243] BAPCPA arguably failed to limit homestead exemptions and prevent abuse by millionaires.[244] Arguments for exemption uniformity on these same grounds continue to be offered.[245] Indeed, the "bankruptcy establishment" seems to have retreated somewhat after BAPCPA, in part as bankruptcy took a backseat to other social insurance programs after the financial crisis, and in part due to fatalism over their rejection by political authorities.[246]

BAPCPA may have decreased the utilization of unlimited homestead exemptions to some extent.[247] The law's biggest impact was the installation of a "means test," by which wealthy debtors are shunted into Chapter 13 to attempt to pay off debts under a long-term plan, potentially followed by discharge.[248] The combination of the means test with the new Code provisions limiting debtor movement, malfeasance, and pre-bankruptcy planning effectively impede rich,

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[243] *See, e.g.*, *supra* note 148 (describing judicial resolution of controversy over when a debtor is deemed to have acquired an interest in the homestead for purpose of revised § 522).

[244] *See* Elijah M. Alper, *Opportunistic Informal Bankruptcy: How Bapcpa May Fail to Make Wealthy Debtors Pay Up*, 107 COLUM. L. REV. 1908, 1942–43 (2007); Leigh J. Francis, *Calling All Debtors, Want to Defraud Your Creditors? Here Is How: The Tenancy by the Entirety Loophole and the Nullification of Section 522(O), (P), and (Q) of the 2005 Bankruptcy Amendments*, 18 U. MIAMI BUS. L. REV. 1, 51–52 (2010).

[245] *See supra* note 9 and accompanying text (listing post-BAPCPA pro-reform publications).

[246] *See* Stephen J. Lubben, *Do Empirical Bankruptcy Studies Matter?*, 20 AM. BANKR. INST. L. REV. 715, 715–16 ("it is too easy to dismiss a study that conflicts with one's policy preferences by pointing to some other factor or interpretation that might explain the results. More research is called for, while policy proceeds irrespective of evidence").

[247] *See* Bruce M. Price & Terry Dalton, *From Downhill to Slalom: An Empirical Analysis of the Effectiveness of BAPCPA (And Some Unintended Consequences)*, 26 YALE L. & POL'Y REV. 135, 204–05 (2007) (finding with empirical evidence that BAPCPA "forced higher-wealth individuals, who also have more debt, into plans in which they must repay a portion of their debts"); *cf.* Robert M. Lawless et al., *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349, 386 ("[t]he higher debt-to-income ratios among the families that filed bankruptcy in 2007 suggest that Americans are struggling harder than ever before they collapse into bankruptcy").

[248] *See* Lawless, *supra* note 247, at 385–86 (explaining that focus on the means test fails to account for types of debt and debt-to-income ratios).

morally blameworthy debtors from moving to Florida to shelter money from victims.[249] Of course, shelters exist for some wealthy debtors already living in high-exemption states.[250]

Similarly, individuals remain free to move to high-limit exemption states and simply not file for bankruptcy, daring their creditors to sue in state court to avoid transactions or bypass exemptions.[251] However, it bears repeating that this "loophole" has no statistical relevance. The vast majority of the millions of Americans who file for bankruptcy each year have little to no homestead equity to exempt.[252]

In fact, the most important exemption-related issue for most Americans was rarely mentioned during the years of BAPCPA hype: the consumer loan interest rate tradeoff.[253] As previously noted, all citizens of high-limit exemption states tend to pay higher interest rates as a result of those laws and the attendant greater default risk borne by lenders.[254] Poor citizens bear the brunt of the rate increase for two reasons: first, poor citizens rely most on consumer lending, and second, poor citizens are less likely to own their homes and thus less likely to benefit from the exemptions.[255] While bankruptcy has always protected the middle and upper classes more than the poor, the Code's purpose is not understood to encompass an actual wealth transfer from the poor to the rich. Yet, inside or outside bankruptcy, high homestead exemption laws may comprise such a transfer.

It is worth noting that draconian federal exemption controls could have the simple effect of discouraging bankruptcy filings as debtors struggle to keep their assets as long as possible. But such an outcome, rather than preventing bankruptcy abuse, might simply

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[249] *See* Moringiello, *supra* note 226, at 638 (explaining that BAPCPA "may result in fewer bankruptcy filings by those few very high asset, high debt individuals who can afford to move to another state to escape their creditors").

[250] *See* 11 U.S.C. § 522 (listing no restrictions for debtors that already maintain a homestead in the filing state). *But see* 11 U.S.C. §§ 523, 727 (restricting discharge on basis of debtor malfeasance).

[251] *See* Moringiello, *supra* note 226, at 638–39; *cf.* Havoco of Am. v. Hill, 790 So.2d 1018, 1030 (Fla. 2001) (noting that "a homestead acquired by a debtor with the specific intent to hinder, delay, or defraud creditors is not excepted" from state-law exemption).

[252] *See supra* notes 236-239 and accompanying text.

[253] *See* Posner, *supra* note 142.

[254] *See supra* notes 142-144 and accompanying text.

[255] *See supra* notes 142-144 and accompanying text.

encourage debtors to rely more heavily on non-bankruptcy exercise of state exemption laws.[256] In state courts, creditors could access more assets, but with the significant loss of bankruptcy's predictability and preference for equal treatment of similarly situated creditors. Meanwhile, excessive litigation would drain available assets into the coffers of attorneys. In other words, overly harsh federal exemptions could raise creditor litigation costs and decrease debtor payout. State exemption laws applicable in bankruptcy therefore represent another state policy balance meant to encourage filings to the extent beneficial to all parties within each state's economy.

IV. Arguments for Non-Uniformity

Lawmakers could resolve concerns about the fairness and advisability of the bankruptcy system as described in Part III in the short term. Section A of this Part proposes methods for bankruptcy courts to achieve optimal results using existing statutory powers.[257] Section B discusses the steps state legislatures can take to ensure that their laws maximize the welfare of both debtors and creditors.[258]

A. Courts Can and Do Use Code Provisions to Ensure Equitable Results Consistent With the Goals of the Bankruptcy Regime

Bankruptcy courts occupy a unique realm in American law. Situated as a unit within the courts of each federal district, bankruptcy courts nevertheless derive authority from Congress under the first article of the U.S. Constitution.[259] Their jurisdiction and practices are more severely limited by legislation than the district and appellate courts.[260] They are considered separate from the district courts empowered under the Constitution's third article.[261] Regardless, they

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[256] *See, e.g.*, Fla. Const. art. X, §4(a)(2) (exempting debtor property without regard to bankruptcy status); *cf.* Havoco, 790 So.2d at 1030 (allowing homestead exemption without regard for debtor's good faith).

[257] *See infra* notes 259-272 and accompanying text.

[258] *See infra* notes 273-280 and accompanying text.

[259] 28 U.S.C. §§ 151–59 (2011) (organizing and documenting authority of bankruptcy courts); Stern v. Marshall, 131 S. Ct. 2594, 2627 (2011) (Scalia, J., concurring) (*noting* Article I authority of bankruptcy courts).

[260] *See* 28 U.S.C. §§ 157, 1334.

[261] *See id.* at § 151.

consider the case law of the Article III courts—the Supreme Court, as well as the Circuit appellate courts and to a lesser extent Bankruptcy Appellate Panels (BAPs) and federal district courts—as precedents to bind their decision-making.[262]

In addition to the bankruptcy courts' place in the crossroads of the internal federal government structure, they stand in a peculiar intersection of state and federal law.[263] In its essence, bankruptcy law is property law, a fundamental domain of the states. Very few issues may be contested or adjudicated in bankruptcy courts without knowledge of the property rights of the parties under state law.[264] And yet, once property rights are determined, the actions of the courts and the parties may be determined under federal law.

The multiple conflicting elements inherent to the existence of bankruptcy courts manifest themselves prominently in the issue of exemptions. As previously discussed, exemptions are beasts of state law, often backed by centuries of legislative precedent. Modern bankruptcy law is much younger, and only relatively recently has it attempted to enforce its own comprehensive system to shield significant debtor assets from attachment by creditors.[265]

Perhaps most troubling for the courts is the fact that the precedential sources on the exemption issue derive from a complex

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[262] Like all federal courts, bankruptcy courts follow the doctrine of stare decisis in respecting the decisions of "superior" courts. The value of precedent to and among the bankruptcy courts is a matter of heated debate, and was especially so when BAPs were introduced in the 1990s. *See generally* Daniel J. Bussel, *Power, Authority, and Precedent in Interpreting the Bankruptcy Code*, 41 UCLA L. REV. 1063 (1994) (arguing that an "appropriate and sensible distribution of law-making power given the institutional framework" requires adherence to BAP precedent); Christopher F. Carlton, *Greasing the Squeaky Wheels of Justice: Designing the Bankruptcy Courts of the Twenty-First Century*, 14 BYU J. PUB. L. 37 (1999) (arguing for greater precedential value for bankruptcy courts); David A. Levin, *Precedent and the Assertion of Bankruptcy Court Autonomy: Efficient or Arrogant?*, 12 BANKR. DEV. J. 185 (1995) (arguing that development of bankruptcy law requires adherence to BAP precedent).

[263] *See supra* notes 22-157 and accompanying text (describing concurrent development of state and federal laws relating to bankruptcy).

[264] *See* Stern, 131 S. Ct. at 2630 (Breyer, J., dissenting) (noting the prevalence of state law claims among the millions of bankruptcy filings each year).

[265] *Compare* Tabb, *supra* note 108, at 7–8 (describing origins of bankruptcy law in 16th century British statutes that treated insolvent citizens as criminals), *with supra* notes 140-150 (describing the recent efforts of Congress to harmonize state and federal laws).

mix of state, federal, legislative, and common law sources. For instance, nearly every federal circuit court has noted that each state's exemption laws should be construed "liberally in favor of the debtor."[266] In interpreting state law, however, bankruptcy courts must sometimes note that as a pure matter of state law, some exemptions have traditionally been interpreted via strict adherence to the letter of state legislation.[267] How can courts comply with a duty to "liberally" interpret a law apparently meant to be interpreted as literally and narrowly as possible?

The answer is that the federal courts must, and do, acknowledge the overwhelmingly federal nature of the bankruptcy system in the modern period. As the Supreme Court has repeatedly noted, the debtor's "fresh start" is the fundamental goal of consumer bankruptcy.[268] Of course, a general goal should not necessarily trump a specific statute.[269] But there are cases in which the state legislation unequivocally and unfairly impedes the debtor's fresh start—for instance, a tortfeasor or random accident destroys the debtor's homestead and the debtor receives recompense in the form of a previously non-exempt asset.[270] In such cases, it is necessary and appropriate for the bankruptcy courts to expand state law to carry out the provisions and intent of the Code.[271]

In many cases, however, the fact-specific fairness of the parties' plight will not be so obvious and will implicate delicate matters of state and federal policy. For instance, the states' decision not to include mobile homes within homestead exemption laws is, hopefully, a deliberate choice to value private land ownership and development over renting.[272] Some states may prefer the former to

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[266] *See, e.g.*, *In re* Caron, 82 F.3d 7, 10 (1st Cir.1996); KLC, Inc. v. Trayner, 426 F.3d 172, 176 (2nd Cir. 2005*); In re* Barker, 768 F.2d 191, 196 (7th Cir. 1985).

[267] *See, e.g.*, Plant, 300 B.R. at 24 (citing Hoffpauir, 125 B.R. at 271–74); Kelly, 334 B.R. at 775.

[268] *See supra* notes 124-127 and accompanying text.

[269] *See* Varity Corp. v. Howe, 516 U.S. 489, 522 (1996) ("specific enactments trump general ones in carefully constructed statutes"); *compare* 11 U.S.C. § 522(d) (requiring deference to states that have opted out of federal exemption laws), *with id.* § 105(a) (granting expansive power to effectuate "any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title").

[270] *See supra* notes 166-176 and accompanying text.

[271] *See* 11 U.S.C. § 105(a).

[272] It could also be legislative inertia, malfeasance, or poor incentivization. *See* Posner, *supra* note 142, at 94–108; Susan Rose-Ackerman, *Risk Taking and*

encourage land cultivation and home construction. Others may view increased protection of mobile homeowners as a necessary adaptation to economic realities. Furthermore, the value limits on homestead exemptions and particular exceptions within state laws tend to be idiosyncratic for specific reasons: acknowledging the economic realities of each state and the need to protect some particularly vulnerable citizens.

Although the bankruptcy courts should interpret homestead laws "liberally in favor of the debtor," a general judicial expansion of federal power over state exemptions would be unnecessary. It would be unwise, unfounded, and an explicit imposition on the longstanding rights of states in an area where the federal government has already taken effective control. Judges already act in the interest of federal policy, rendering bankruptcy "uniform" to the extent that federal policy demands in the area of exemptions.

B. Exemptions Are the Proper Domain of the States

Bankruptcy non-uniformity in the area of exemptions is a proper result of the federalist system. Although some scholars have argued that state exemption laws are out of date, few have sought to place them within the context of the traditional role of state legislation. As Justice Louis Brandeis noted, states at their best are "laboratories of democracy," in which policies may be tested at the local level before gaining more widespread adoption.[273] State legislative authority has two particular benefits worth mentioning here: first, it allows states to pursue policy goals specific to their geographic and economic realities; and second, it provides instruction to other states and the federal government on the effectiveness of various policies and methods.[274]

Reelection: Does Federalism Promote Innovation?, 9 J. LEGAL STUD. 593, 594 (1980) (arguing that risk-averse nature of politicians impedes innovation at state level).

[273] New State Ice. Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see also* U.S. Const. amd. 10 (reserving powers to the states). *But see* Rose-Ackerman, *supra* note 271, at 594 (arguing that risk-averse nature of politicians impedes innovation at state level).

[274] *See, e.g.*, Allen Wilson, Note and Comment, *More than Just a Boon to Wealthy Debtors: How Texas Homestead Law Helped Insulate Texas from the Foreclosure Typhoon*, 64 BAYLOR L. REV. 999 (2012) (arguing that Texas

Scholars may have a point, however, in that some state laws are out of date or poorly drafted.[275] As a result, bankruptcy judges are placed in the difficult position of having to disregard state laws where federal policy so requires.[276] Furthermore, evidence is scant to show that state exemptions actually achieve legislative aims to encourage economic risk-taking and manage consumer credit markets.[277]

Unfortunately, it is difficult to engage in any serious legislative conversation about bankruptcy because of the tendency of lobbyists and the news media to purposefully ignore economically meaningful data.[278] While it is fairly common and simple to engage in discussion of how bankruptcy law incentivizes behavior once a debtor is effectively insolvent and thus contemplating filing, it is more difficult for legislators to understand and discuss without judgment the fact that individual debtors engage in routine activities in the knowledge that failure is possible.[279] Doing so, however, forces recognition that consumers figure bankruptcy laws and related state law into their contemplation of the expected value of risk-taking.

To truly understand state exemption laws and their role in the federal system, states should undertake to isolate the effect of the laws to the greatest extent possible and study their effects. Such studies should thus compare different state policies, accounting for particular exceptions and varieties of implementation. Furthermore, the studies should control for the cost of living in each state, consumer lending

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exemption law shielded the state from the effects of the 2008–09 financial crisis on homeowners); *see also* Posner, *supra* note 142, at 94–108 (describing the pre-1978 policy debate over exemptions and the political factors influencing the resulting legislation). Posner states that the best argument for federal control is one of "spillovers," i.e. externality problems that could cause states to compete with each other in a "race to the bottom." *Id.* at 97–98. With some explanation, Posner dismisses the spillover debate and states that "[t]he normative case for federal control of exemption policy, however, was weak." *Id.* at 97–100. Thus these pre-1978 arguments have not been included in this Article, which is intended to address arguments raised roughly since 1997, in the ongoing debate over what became BAPCPA. Likewise, this Article focuses more on policy effectiveness than political economy, though Posner's Article is fascinating reading for those interested in how the sausage is made.

[275] *See supra* note 12, at 162–191 and accompanying text.

[276] *See supra* notes 259-272 and accompanying text.

[277] *See* Hynes, *supra* note 143, at 517; Posner, *supra* note 142, at 94–108.

[278] *See generally* Jacoby, *supra* note 77 (describing process by which bankruptcy reform was negotiated through news media).

[279] *See id.*

costs, as well as distinctions involving geography and development density.[280] Only by knowing exactly how their laws affect the behavior of debtors (and thus creditors as well) will state politicians be able to have an intelligent discussion.

V. Conclusion

The history of exemptions shows good reason for the federal Code's allowance of variation between states. Debtors need to be able to move between states to engage in socially and economically beneficial activities. States need to be able to enact policy agendas based on ever-changing, location- and culture-specific factors.

There are two specific reasons why the Code's deference to state exemptions serves all interests. First, the current regime properly allows states to experiment with new law and policy in pursuit of localized policy goals. Second, the regime allows judges to navigate federal and state laws, applying them as faithfully as possible while serving the central bankruptcy policies of the debtor's fresh start and equal treatment of similarly situated creditors. Thus, the Code encourages debtors to enter the federal bankruptcy system and earn a fresh start with state-protected assets, while also providing creditors with the equal treatment state law cannot provide.

Legislators and scholars should be wary of arguments for uniformity in consumer bankruptcy. Recent history shows that moralistic and constitutional concerns serve as a mere façade for the greed of unsecured creditors. Excessive federal controls discourage bankruptcy filings without diminishing the ability of wealthy criminals and tortfeasors to abuse state-law protections. Exemption policy discussions should instead favor a state-level, data-driven approach to examine how laws actually impact debtor behavior and further policy goals.

[280] Some states already do this by limiting exemptions with respect to size. But a hard-line size limit (e.g., Florida's 160 unincorporated acres vs. 1 incorporated) may be inadequate given the wide range in land value from downtowns to suburbs to open farmland.