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Lien Avoidance Under Section 522(f) of the Bankruptcy Code: Is Retrospective Application Constitutional?

Joseph C. Hutcheson, II

LIEN AVOIDANCE UNDER SECTION 522(f) OF THE BANKRUPTCY CODE: IS RETROSPECTIVE APPLICATION CONSTITUTIONAL?

INTRODUCTION

Section 522(f)[1] of Title I (the Code) of the Bankruptcy Reform Act of 1978 (the Act)[2] grants debtors[3] the power to avoid[4] judicial liens[5]

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1. 11 U.S.C. § 522(f) (Supp. II 1978). "Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien . . . that . . . impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—(1) a judicial lien; or (2) a nonpossessory, nonpurchase-money security interest in any—(A) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor; (B) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or (C) professionally prescribed health aids for the debtor or a dependent of the debtor." *Id.* "'[L]ien' means charge against or interest in property to secure payment of a debt or performance of an obligation." *Id.* § 101(28).

2. Pub. L. No. 95-598, 92 Stat. 2549 (1978). The Bankruptcy Reform Act consists of four titles. Title I contains the substantive bankruptcy law. 92 Stat. 2549-657 (codified at 11 U.S.C. §§ 101-151326 (Supp. II 1978)). Title II creates a new bankruptcy judicial system. 92 Stat. 2657-73 (codified in scattered sections of 28 U.S.C. (Supp. II 1978)). Title III amends various other statutes. 92 Stat. 2673-82 (codified in scattered sections throughout the U.S.C. (Supp. II 1978)). Title IV provides for the transition between the old and new laws. 92 Stat. 2682-88. As of this writing, the proposed Technical Amendments to the Bankruptcy Reform Act, S. 658, 96th Cong., 1st Sess. (1979), 125 Cong. Rec. S12172 (daily ed. Sept. 7, 1979) (as amended), was still under consideration in Congress. The latest amended version of S. 658 does not substantively change § 522(f). *See id.* § 37(f), 126 Cong. Rec. H11729 (daily ed. Dec. 3, 1980).

3. For purposes of the Code, "debtor" means the person or municipality for whom bankruptcy relief is at issue. 11 U.S.C. § 101(12) (Supp. II 1978). This broad definition of "debtor," which includes businesses that are liquidating or reorganizing, eased various drafting problems. S. Rep. No. 989, 95th Cong., 2d Sess. 23 (1978) [hereinafter cited as Senate Report], *reprinted in* [1978] U.S. Code Cong. & Ad. News 5787, 5809; H.R. Rep. No. 595, 95th Cong., 2d Sess. 310 (1977) [hereinafter cited as House Report], *reprinted in* [1978] U.S. Code Cong. & Ad. News 5963, 6267. The Code does not use the term "bankrupt." The use of "debtor" was felt to carry less of a stigma. House Report, *supra*, at 310, *reprinted in* [1978] U.S. Code Cong. & Ad. News at 6267.

4. The power of avoidance in § 522(f) requires the debtor to take "some affirmative action" to enjoy the benefits of the section, "rather than [voiding the] liens . . . automatically . . . by operation of law." *Bankruptcy Reform Act of 1978: Hearings on S. 2266 and H.R. 8200 before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 687 (1977) [hereinafter cited as *1977 Senate Hearings*] (statement of Hon. Joe Lee). The trustee and the

and certain nonpossessory non-purchase money security interests[6] to the extent that the liens encumber the debtor's interest in assets otherwise exempt from creditors' claims.[7] The section only applies to

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debtor also share other powers of avoidance beyond the scope of this Note. *See* 11 U.S.C. § 522(h) (Supp. II 1978) (debtor can avoid certain liens, preferences, and fraudulent conveyances to the extent a trustee does not attempt to avoid and an exemption could be claimed).

5. 11 U.S.C. § 522(f)(1) (Supp. II 1978). The Code defines "judicial lien" as a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." *Id.* § 101(27).

6. *Id.* § 522(f)(2). The Code defines "security interest" as a "lien created by an agreement." *Id.* § 101(37). This definition is broader than that of the U.C.C. because it is not limited to realty. *Compare id. with* U.C.C. §§ 9-102(1)(a),-104 (j). "A security interest is not enforceable" unless the secured party possesses the collateral, or the debtor has signed a security agreement, U.C.C. § 9-203(1), and only security interests that are perfected by security agreements, as opposed to possession, are subject to avoidance by the debtor. 11 U.S.C. § 522(f)(2) (Supp. II 1978). Both the Code and the U.C.C. define a "security agreement" as an agreement that "creates or provides for a security interest." *Id.* § 101(36); U.C.C. § 9-105 (1)(*l*). The Code does not provide a definition for "purchase-money security interest." *See* Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, 93d Cong., 1st Sess. 180 n.36 (1973) [hereinafter cited as Commission Report], *reprinted in* App. 2 Collier on Bankruptcy 180 n.36 (15th ed. L. King 1980). The U.C.C. defines purchase money security interests as those securing an obligation that financed the acquisition of the collateral, whether taken by the seller or a third party. U.C.C. § 9-105. Collateral is the property encumbered by the security interest. *Id.* § 9-105(1)(c). Purchase money security interests are excluded from the debtor's avoidance powers. 11 U.S.C. § 522(f)(2) (Supp. II 1978).

7. The debtor's interests in assets are made exempt by exclusion in court from the bankruptcy estate, which is used to satisfy creditors' general, or unsecured, claims. 11 U.S.C. §§ 522(b)(*l*), 541 (Supp. II 1978). Section 522(f)(1) permits the avoidance of judicial liens on any exempt assets to the extent of the exemption the debtor could otherwise claim. *Id.* § 522(f)(1). Federal exemptions include a $7,500 interest in the debtor's residence, a $1,200 interest in a motor vehicle, $200 of family and household personality, $750 of professional items, certain life insurance proceeds, health aids, and other incidental items. *Id.* § 522(d). Section 522(f)(2) is more limited. Both possessory and purchase money security interests are excluded, and the creditor's lien is only subject to avoidance if it encumbers certain household, professional, or health items. *See* note 1 *supra*. The Code permits debtors to choose, and states to require, the use of state, rather than federal, exemptions. 11 U.S.C. § 522(b) (Supp. II 1978). In such a case, state exemptions would apply under § 522(f). *See* 124 Cong. Rec. S17406 (daily ed. Oct. 6, 1978) (remarks of Sen. Wallop). State exemptions vary widely. For example, while exemptions in Connecticut and Maryland are mostly limited to necessary personality, Conn. Gen. Stat. Ann. § 52-352b (West Supp. 1980); Md. Cts. & Jud. Proc. Code Ann. § 11-504 (Supp. 1980), South Dakota grants an absolute exemption on the homestead and a $30,000 exemption on proceeds derived from its sale. S.D. Comp. Laws Ann. § 43-45-3 (Supp. 1980). Both New York and Texas exempt $10,000 of the debtor's interest in an urban residence. N.Y. Civ. Prac. Law § 5206(a)1-3 (McKinney Supp. 1980); Tex. Rev. Civ. Stat. Ann. art. 3833(a)(3) (Vernon Supp. 1980). Although New York exempts only certain necessary personal assets, N.Y. Civ. Prac. Law § 5205 (McKinney Supp. 1980), Texas gives families a blanket $30,000 exemption on a variety of personal items. Tex. Rev. Civ. Stat. Ann. art. 3836 (Vernon Supp. 1980).

individuals[8] and may be invoked in debt reorganizations, income recipient proceedings, and liquidations.[9] The exemption provisions allow a debtor to retain a limited interest in his residence, clothes, professional tools, health aids, and household furniture after a discharge in bankruptcy.[10] The debtor is given "a new opportunity in life and a clear field for future effort"[11] or, more succinctly, a fresh start.

This fresh start was not assured under the old bankruptcy law. Although non-business bankruptcies now comprise over eighty per cent of the number filed each year,[12] until 1978, bankruptcy law emphasized business bankruptcies.[13] This emphasis allowed over-

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8. Exemption provisions in the Code are only available to individual debtors. 11 U.S.C. § 522(b) (Supp. II 1978).

9. Except for certain provisions involving railroad reorganizations, "chapters 1, 3 and 5 of [the Code] apply in a case under chapter 7, 11 or 13." *Id.* § 103. Section 522(f) is contained in chapter 5, which deals with creditors and their claims, the debtor's duties and benefits, and the estate. Debt reorganization is covered by chapter 11, *id.* §§ 1101-1174, income recipient proceedings by chapter 13, *id.* §§ 1301-1330, and liquidations by chapter 7. *Id.* §§ 701-766.

10. *See id.* § 522.

11. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934); *accord*, Lines v. Frederick, 400 U.S. 18, 19 (1970) (per curiam).

12. [1977] Dir. Admin. Office U.S. Courts Ann. Rep. 131; *see* H.R. Rep. No. 927, 91st Cong., 2d Sess. 2 [hereinafter cited as 1970 House Report], *reprinted in* [1970] U.S. Code Cong. & Ad. News 3559, 3560; Apilado, Dauten & Smith, *Personal Bankruptcies*, 7 J. Legal Stud. 371, 371-72 (1978); Countryman, *Consumers in Bankruptcy Cases*, 18 Washburn L.J. 1, 1 (1978) [hereinafter cited as Countryman I]. The number of non-business bankruptcies has increased dramatically since World War II. *See* House Report, *supra* note 3, at 116, *reprinted in* [1978] U.S. Code Cong. & Ad. News at 6076; Commission Report, *supra* note 6, at 33-59, *reprinted in* App. 2 Collier on Bankruptcy 33-59 (15th ed. L. King 1980); D. Stanley & M. Girth, Bankruptcy: Problem, Process, Reform 2 (1971) (Brookings Institution study); Apilado, Dauten & Smith, *supra*, at 371-72; Countryman I, *supra*, at 1; Comment, *Protection of a Debtor's "Fresh Start" under the New Bankruptcy Code*, 29 Cath. U.L. Rev. 843, 844 (1980) [hereinafter cited as *Fresh Start*]. The percentage of bankruptcies attributable to consumers did drop somewhat during the last decade. *See* [1977] Dir. Admin. Office U.S. Courts Ann. Rep. 131. The percentage of consumer bankruptcies has increased in 1980, however, due to the Code's favorable treatment of consumer debtors. N.Y. Times, July 28, 1980, § D, at 2, col. 1, *id.*, Apr. 20, 1980, § 3, at 23, col. 1.

13. House Report, *supra* note 3, at 2, *reprinted in* [1978] U.S. Code Cong. & Ad. News at 5966 ("The second major problem under current bankruptcy law is the inadequacy of relief that the Bankruptcy Act provides for consumer debtors."); *id.* at 116-17, *reprinted in* [1978] U.S. Code Cong. & Ad. News at 6076; 1970 House Report, *supra* note 12, at 2, *reprinted in* [1970] U.S. Code Cong. & Ad. News at 3559; Anderson, *Debtor and Creditor Consumers and the Bankruptcy Reform Act*, 2 W. New Eng. L. Rev. 5, 6 (1979); Pickard, *The New Bankruptcy Code, Part I: A Review of Some of the Significant Changes in Bankruptcy Law*, 10 Mem. St. L. Rev. 177, 182 (1980) [hereinafter cited as Pickard I]; Note, *Bankruptcy Exemptions: A Full Circle Bank to the Act of 1800?*, 53 Cornell L. Rev. 663, 663 (1968).

reaching creditors to obtain blanket security interests on all of the debtor's assets, waivers of statutory exemptions from attachment to satisfy debts, and other one-sided provisions, through contracts of adhesion.[14] These provisions enabled creditors to obtain enforceable liens on the debtor's theoretically exempt assets and coerce repayment by threatening to repossess the assets that, though often of limited resale value to the creditor, would be expensive for the debtor to replace.[15] Because exemptions were defined by state law[16] and were excluded *ab initio* from the bankruptcy estate,[17] federal bankruptcy

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14. *See* House Report, *supra* note 3, at 126-27, *reprinted in* [1968] U.S. Code Cong. & Ad. News at 6087-88; *Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 1st & 2d Sess. 760-65 (1975-76) [hereinafter cited as *House Hearings*] (statement of David Williams); *id.* at 939-40, 946 (statement of Ernest Sarason, Jr.); Commission Report, *supra* note 6, at 169, 173; Currie, *Exempt Property and Bankruptcy: Secured and Waiver Claims*, 31 La. L. Rev. 73 (1970); Neustadter, *Consumer Insolvency Counseling for Californians in the 1980s*, 19 Santa Clara L. Rev. 817, 870-71 (1979); Pickard, *The New Bankruptcy Code, Part II: The Interests of Secured Creditors under the New Bankruptcy Code*, 10 Mem. St. L. Rev. 215, 227 (1980) [hereinafter cited as Pickard II]; Vukowich, *The Bankruptcy Commission's Proposal Regarding Bankrupts' Exemption Rights*, 63 Cal. L. Rev. 1439, 1468 (1975); *Fresh Start, supra* note 12, at 860; Note, *Bankruptcy Exemptions: Critique and Suggestions*, 68 Yale L.J. 1459, 1470, 1494-97 (1959) [hereinafter cited as *Exemptions Critique*].

15. *House Hearings, supra* note 14, at 760, 762 (statement of David Williams) (summarizing findings of an investigation of 130 consumer finance company offices). "The consumer who applies for credit also signs a form instrument which is prepared by the legal department of the firm he deals with. This instrument asserts every right, waiver, and remedy which local law permits or tolerates. . . . To a varying extent, the typical consumer credit contract contains, an assignment of future wages, a blanket security interest in all of the household property owned or held by the consumer and his family, a waiver of statutory exemptions, a waiver of the right of notice upon default and damages upon tortious repossession of collateral, liquidated damages for late or extended payments, a provision imposing attorney's fees in the event of a default whether or not suit is filed, and, in those few jurisdictions which still permit the practice, a confession of judgment. . . . The blanket security interest in household goods, combined with the related boilerplate waiver of statutory exemptions has at least three uses. It is an effective lever for securing refinancings [against the debtor's best interests] at appropriate stages of the collection cycle. It is used occasionally for limited economic recovery by actual seizure of the property. Finally, a blanket lien on household goods is among the most effective levers available for securing an anticipatory reaffirmation of a debt which is otherwise dischargeable in bankruptcy. . . . We believe that the documented lack of economic value for certain household necessities makes them a special case for the purpose of your deliberations." *Id.*

16. Bankruptcy Act, ch. 541, § 6, 30 Stat. 548 (1897-99), *as amended by* Chandler Act, ch. 575, § 6, 52 Stat. 847 (originally codified at 11 U.S.C. § 24 (1976) (replaced by 11 U.S.C. § 522(b)(2)(A) (Supp. II 1978)).

17. The debtor's property was transferred to the bankruptcy estate "except in so far as it [was] exempt." Bankruptcy Act, ch. 541, § 70(a), 30 Stat. 565 (1897-99) (originally codified at 11 U.S.C. § 110(a) (1976) (replaced by 11 U.S.C. § 541(a) (Supp. II 1978))).

courts did not have jurisdiction to resolve disputes concerning exempt assets.[18] Under the old law, if a state court upheld a lien obtained on assets that would otherwise be exempt, repossession could leave the debtor without assets for a fresh start.[19]

Congress enacted several measures, including section 522(f), in the new Code to assure that starting afresh meant more for bankrupt individuals than becoming destitute.[20] Exempt property now is included *ab initio* in the estate[21] and usually protected from antecedent claims once exempted.[22] Waivers of exemptions executed for unsecured creditors are no longer enforceable.[23] Although valid liens on assets worth more than the amount of the applicable exemption[24] survive the discharge,[25] the potential for abuse has been reduced by sec-

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18. Lockwood v. Exchange Bank, 190 U.S. 294, 300-01 (1903). Assets were vulnerable to claims by repossession or judicial proceeding. *See* 1A Collier on Bankruptcy ¶ 6.05[1]-[3] (14th ed. J. Moore 1978); Countryman, *For a New Exemption Policy in Bankruptcy*, 14 Rutgers L. Rev. 678, 709-13 (1960) [hereinafter cited as Countryman II]; Currie, *supra* note 14; Kennedy, *Limitations on Exemptions in Bankruptcy*, 45 Iowa L. Rev. 445, 462-69 (1960); *Exemptions Critique*, *supra* note 14, at 1475-78, 1494-97. The House report speaks of § 522(f)(1) as providing a means to protect the debtor from "a creditor [who] beats the debtor into court." House Report, *supra* note 3, at 126-27, *reprinted in* [1978] U.S. Code Cong. & Ad. News at 6087. Thus, creditors may not enforce the waiver of exemptions with a judicial lien obtained in a state court. H. Miller & M. Cook, A Practical Guide to the Bankruptcy Reform Act 190 (1979); *see* Countryman II, *supra*, at 708-32; Kennedy, *supra*, at 449-53, 462-69; Vukowich, *supra* note 14, at 1469; *Exemptions Critique*, *supra* note 14, at 1470.

19. *See* Countryman II, *supra* note 18, at 681-84; Kennedy, *supra* note 18, at 462-69; *Exemptions Critique*, *supra* note 14, at 1469-70, 1494-97.

20. House Report, *supra* note 3, at 4, *reprinted in* [1978] U.S. Code Cong. & Ad. News at 5966; *see* Senate Report, *supra* note 3, at 1-6, *reprinted in* [1978] U.S. Code Cong. & Ad. News at 87-92; House Report, *supra* note 3, at 4, 117-18, *reprinted in* [1978] U.S. Code Cong. & Ad. News at 5966, 6077-78; 123 Cong. Rec. H11698-99 (daily ed. Oct. 27, 1977) (remarks of Rep. Edwards); *House Hearings*, *supra* note 14, at 938 (statement of Ernest Sarason, Jr.); *id.* at 979 (statement of Hon. Clive Bare); *id.* at 1006 (testimony of Hon. Clive Bare); *id.* at 1284 (statement of Hon. Joe Lee); *cf. House Hearings*, *supra* note 14, at 1256 (statement of Robert Ward) (§ 522(f) may harm the availability of credit to consumer).

21. "The commencement of a case . . . creates an estate . . . comprised of . . . all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1) (Supp. II 1978). This provision altered the rule of Lockwood v. Exchange Bank, 190 U.S. 294 (1903), under which exemptions were beyond the jurisdiction of bankruptcy courts. Senate Report, *supra* note 3, at 82, *reprinted in* [1978] U.S. Code Cong. & Ad. News at 6324; House Report, *supra* note 3, at 368, *reprinted in* [1978] U.S. Code Cong. & Ad. News at 6324.

22. 11 U.S.C. § 522(c) (Supp. II 1978).

23. *Id.* § 522(e).

24. *See* note 7 *supra* and accompanying text.

25. Liens subject to avoidance under § 522(f) are excepted from the continuing protection of § 522(c). 11 U.S.C. § 522(c)(2) (Supp. II 1978). This provision is in-

tion 522(f) avoidance provisions[26] and the debtor's right in a liquidation to redeem at current value certain exempt personal assets.[27] In addition, Congress permitted the reaffirmation of non-business debt only after scrutiny by the bankruptcy court.[28] Thus, section 522(f) is part of a congressional scheme to enhance an individual debtor's fresh start by protecting exemptions and reducing the likelihood of coerced reaffirmation.

This change, however, raises various constitutional problems. Because a creditor's rights vary depending on whether the new or old law applies, creditors have challenged the section in cases brought after the effective date of the Code. The bankruptcy courts, in response, have split on whether the section is constitutional when applied retrospectively[29] to liens created prior to the Code's

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tended to continue the rule of Long v. Bullard, 117 U.S. 617 (1886), that valid liens on exempt property are enforceable. Senate Report, *supra* note 3, at 76, *reprinted in* [1978] U.S. Code Cong. & Ad. News at 5862; House Report, *supra* note 3, at 361, *reprinted in* [1978] U.S. Code Cong. & Ad. News at 6317. Of course, "to the extent that [a] lien impairs an exemption," it does not survive if it is one that may be avoided under § 522(f). 11 U.S.C. § 522(f) (Supp. II 1978).

26. *See* notes 1-7 *supra* and accompanying text. If the debtor chooses federal exemptions when they are more liberal than those under state law, § 522(f)(1) will protect the debtor from judgments in state court obtained against federally exempt assets. *But see* note 7 *supra* (states may prohibit use of federal exemptions).

27. 11 U.S.C. § 722 (Supp. II 1978). Section 722 applies only to the extent that the lien exceeds the exemption amount, and protects liens on consumer goods and abandoned property. *Id.*

28. 11 U.S.C. § 524(c), (d) (Supp. II 1978). This provision was debated intensely. *See, e.g.*, 124 Cong. Rec. S14719 (daily ed. Sept. 7, 1978) (remarks of Sen. Wallop) (prohibiting reaffirmation "is a mistake"); 124 Cong. Rec. S14743 (daily ed. Sept. 7, 1978) (statement of Sen. Kennedy) ("efforts by lending firms to reinstate their power to have new life breathed into discharged debts are, to me, unconscionable").

29. "Retrospective" is used in this Note to mean the effect legislation has when it diminishes rights or increases obligations established prior to the legislation's enactment or effective date. The term "retroactive" will mean the effect legislation has when it takes effect on a date prior to the legislation's enactment or is directed at past events. Using these definitions, § 522(f) could be retrospective, but not retroactive, because the Code was not effective before enactment, and is applied only when the bankruptcy petition is filed. 11 U.S.C. §§ 301-306 (Supp. II 1978). Although distinguishing retrospective from retroactive may clarify the ways statutes alter existing rights, it is not done by courts. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 692 & n.1 (1960); Smith, *Retroactive Laws and Vested Rights*, 5 Tex. L. Rev. 229, 232-33 (1927) [hereinafter cited as Smith I]. As a recent example of this failure to distinguish, see Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976), in which the Court engages in a constitutional analysis of the *retrospective* effect of a statute, *id.* at 14-17 (emphasis added), but later refers to that analysis as a "discussion of *retroactivity*." *Id.* at 24 (emphasis added). Nonetheless, similar distinctions have been drawn by commentators. *See* Hochman, *supra*, at 692; Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 Cal. L. Rev. 216, 217-18 (1960); Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775, 781-83 (1936); *cf.* Smith I, *supra*, at 233 (every law "extinguishes rights acquired under previously existing laws").

enactment[30] or effective date.[31] This Note discusses whether section 522(f) should be construed to apply retrospectively[32] and whether retrospective application is an unconstitutional infringement on the rights of lienors.[33] This Note argues that retrospective application is

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30. The Code was enacted on November 6, 1978, Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, and holders of liens created prior to that date have challenged § 552(f). *E.g.*, Fisher v. Liberty Loan Corp., 6 Bankr. Rep. (West) 206, 211-14 (Bankr. N.D. Ohio 1980) (upheld); Curry v. Associates Fin'l Servs., 5 Bankr. Rep. (West) 282, 290-91 (Bankr. N.D. Ohio 1980) (upheld). Pierce v. Oklahoma Health Servs. Fed. Credit Union, 4 Bankr. Rep. (West) 671, 672-74 (Bankr. W.D. Okla. 1980) (invalidated); Centran Bank v. Ambrose, 4 Bankr. Rep. (West) 395, 400-01 (Bankr. N.D. Ohio 1980) (upheld); Jackson v. Security Indus. Bank, 4 Bankr. Rep. (West) 293, 296-98 (Bankr. D. Colo. 1980) (invalidated). Hawley v. Avco Fin'l Servs., Inc., 4 Bankr. Rep. (West) 147, 149-50 (Bankr. D. Cr. 1980) (invalidated); Rutherford v. Associates Fin'l Servs. Co., 4 Bankr. Rep. (West) 510, 511-13 (Bankr. S.D. Ohio 1980) (upheld); Hoops v. Freedom Fin. & Sec. Indus. Bank, 3 Bankr. Rep. (West) 635, 637-40 (Bankr. D. Colo. 1980) (invalidated); Rodrock v. Security Indus. Bank, 3 Bankr. Rep. (West) 629, 631-33 (Bankr. D. Colo. 1980) (invalidated).

31. For most provisions, including § 522, the Code's effective date was October 1, 1979. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 402(a), 92 Stat. 2682. Fewer cases have invalidated retrospective application to liens created during the period between enactment and effectiveness because the creditor has had notice of the new law. *E.g.*, Dotson v. Bradford, No. R-80-124, slip op. at 5-6 (D. Nev. Sept. 26, 1980) (upheld); *In re* Primm, 6 Bankr. Rep. (West) 142, 146-47 (Bankr. D. Kan. 1980) (upheld); Pockat v. Thorp Fin. Corp., 6 Bankr. Rep. (West) 24, 25 (Bankr. W.D. Wis. 1980) (upheld); Baker v. GFC Corp., 5 Bankr. Rep. (West) 397, 399-401 (Bankr. W.D. Mo. 1980) (upheld); *In re* Beck, 4 Bankr. Rep. (West) 661, 664 (Bankr. C.D. Ill. 1980) (upheld); U.S. Life Credit Corp. v. Steinart, 4 Bankr. Rep. (West) 354, 358 (Bankr. W.D. La. 1980) (upheld). *But see* Lucero v. Security Indus. Bank, 4 Bankr. Rep. (West) 659, 660 n.2, 661 (Bankr. D. Colo. 1980) (invalidated after parties stipulated that judicial lien is a property right). Because this notice argument weakens any challenge to retrospective application, this Note will focus on liens created prior to enactment.

32. *E.g.*, Dotson v. Bradford, No. R-80-124, slip op. at 3-6 (D. Nev. Sept. 26, 1980) (retrospective application construed); Fisher v. Liberty Loan Corp., 6 Bankr. Rep. (West) 206, 211 (Bankr. N.D. Ohio 1980) (retrospective application construed); Curry v. Associates Fin. Servs., 5 Bankr. Rep. (West) 282, 288-93 (Bankr. N.D. Ohio 1980) (retrospective application construed); Pierce v. Oklahoma Health Servs. Fed. Credit Union, 4 Bankr. Rep. (West) 671, 672-74 (Bankr. W.D. Okla. 1980) (retrospective application not construed after finding of unconstitutionality); Centran Bank v. Ambrose, 4 Bankr. Rep. (West) 395, 398-99 (Bankr. N.D. Ohio 1980) (retrospective application construed); Head v. Home Credit Co., 4 Bankr. Rep. (West) 521, 524 (Bankr. D. Tenn. 1980) (retrospective application construed); U.S. Life Credit Corp. v. Steinart, 4 Bankr. Rep. (West) 354, 358 (Bankr. W.D. La. 1980) (retrospective application construed); Jackson v. Security Indus. Bank, 4 Bankr. Rep. (West) 293, 295 (Bankr. D. Colo. 1980) (retrospective application construed); Hawley v. Avco Fin'l Servs., 4 Bankr. Rep. (West) 147, 149 (Bankr. D. Or. 1980) (retrospective application denied after finding unconstitutional); Hoops v. Freedom Fin., 3 Bankr. Rep. (West) 635, 637 (Bankr. D. Colo. 1980) (retrospective application construed); Rodrock v. Security Indus. Bank, 3 Bankr. Rep. (West) 629, 634 (Bankr. D. Colo. 1980) (retrospective application construed).

33. *E.g.*, Fisher v. Liberty Loan Corp., 6 Bankr. Rep. (West) 206, 211-14 (Bankr. N.D. Ohio 1980) (upheld); *In re* Primm, 6 Bankr. Rep. (West) 142, 146-47

appropriate as a matter of statutory construction, and is not unconstitutional as an unjust taking or as a violation of substantive due process.

I. Retrospective Construction

Before addressing the constitutional limits on congressional power to affect pre-existing liens with new bankruptcy legislation, it must first be established, as a matter of statutory construction, that Congress has exercised the bankruptcy power retrospectively. Because section 522(f) interferes with the rights of lienors whose interests are subject to avoidance provisions,[34] retrospective construction is disfavored unless the Act's language, or congressional intent, clearly require retrospective application.[35]

(Bankr. D. Kan. 1980) (upheld); Pockat v. Thorp Fin. Corp., 6 Bankr. Rep. (West) 24, 25 (Bankr. W.D. Wis. 1980) (upheld); Baker v. GFC Corp., 5 Bankr. Rep. (West) 397, 399-400 (Bankr. W.D. Mo. 1980) (upheld); Curry v. Associates Fin'l Servs., 5 Bankr. Rep. (West) 282, 290-91 (Bankr. N.D. Ohio 1980) (upheld); Pierce v. Oklahoma Health Servs. Fed. Credit Union, 4 Bankr. Rep. (West) 671, 674 (Bankr. W.D. Okla. 1980) (would be unconstitutional if retrospectively applied); *In re* Beck, 4 Bankr. Rep. (West) 661, 664 (Bankr. C.D. Ill. 1980) (upheld); Centran Bank v. Ambrose, 4 Bankr. Rep. (West) 395, 400-01 (Bankr. N.D. Ohio 1980) (upheld); Jackson v. Security Indus. Bank, 4 Bankr. Rep. (West) 293, 296-98 (Bankr. D. Colo. 1980) (unconstitutional); Hawley v. Avco Fin'l Servs., 4 Bankr. Rep. (West) 147, 149-50 (Bankr. D. Or. 1980) (unconstitutional if applied retrospectively); Rutherford v. Associates Fin'l Servs., 4 Bankr. Rep. (West) 510, 511-13 (Bankr. S.D. Ohio 1980) (upheld); Hoops v. Freedom Fin. & Sec. Bank, 3 Bankr. Rep. (West) 635, 637-40 (Bankr. D. Colo. 1980) (unconstitutional); Rodrock v. Security Indus. Bank., 3 Bankr. Rep. (West) 629, 631-33 (Bankr. D. Colo. 1980) (unconstitutional).

34. *See* notes 1, 7 *supra* and accompanying text.

35. The well-established rule of construction is that a statute interfering with property rights should not be applied retrospectively unless the statute's language is "clear, strong, and imperative, . . . or . . . the intention of the legislature cannot otherwise be satisfied." United States v. Heth, 7 U.S. 398, 412, 3 Cranch 399, 413 (1806) (Paterson, J.) (collector's commission); *accord*, Greene v. United States, 376 U.S. 149, 160 (1964) (right to back pay based on prior judgment); Union P.R.R. v. Laramie Stock Yards Co., 231 U.S. 190, 199 (1913) (railroad right of way); United States Fidelty & Guar. Co. v. United States *ex rel.* Struthers Wells Co., 209 U.S. 306, 314 (1908) (materialman's bond); *see, e.g.*, Holt v. Henley, 232 U.S. 637, 639-40 (1914) (sales contract security interest); Sikora v. American Can Co., 622 F.2d 1116, 1121-22 (3d Cir. 1980) (existing retirement plan); National Consumer Information Center v. Gallegos, 549 F.2d 822, 826-27 (D.C. Cir. 1977) (funding by federal government); *cf.* Bradley v. School Board, 416 U.S. 696, 711, 715, 720 (1974) (obligation to pay attorney's fee in desegregation case does not infringe on a matured right); Koger v. Ball, 497 F.2d 702, 706 (4th Cir. 1974) (no "right" to discriminate against employees on basis of race). This rule has been applied by bankruptcy courts construing § 522(f). *See, e.g.*, Fisher v. Liberty Loan Corp., 6 Bankr. Rep. (West) 206, 211 (Bankr. N.D. Ohio 1980); U.S. Life Credit Corp. v. Steinart, 4 Bankr. Rep. (West) 354, 358 (Bankr. W.D. La. 1980); Head v. Homes Credit Co., 4 Bankr. Rep. (West) 521, 524 (Bankr. D. Tenn. 1980); Jackson v. Security Indus. Bank, 4 Bankr. Rep. (West) 293, 295 (Bankr. D. Colo. 1980).

The language of the Act supports retrospective application of section 522(f). The Act took effect, and the prior federal bankruptcy law was repealed, "on October 1, 1979";[36] exceptions to application of the new Code are express.[37] One exception, the savings clause, provides that "the substantive rights of parties" are to be determined under the old law in cases commenced under the old law.[38] Because no similar exception applies to cases arising after the effective date, the new substantive rules should apply even to liens created prior to the effective date.[39] This interpretation is consistent with that of other bankruptcy statutes construed to be retrospective.[40]

The legislative history of the Act, however, arguably supports the conclusion that retrospective application was not intended. Preliminary drafts of the savings clause prepared by the Commission on the Bankruptcy Law of the United States[41] and the National Conference of Bankruptcy Judges[42] expressly required retrospective application.[43]

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36. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 402(a), 92 Stat. 2682. Certain amendments to scattered sections of the United States Code are made effective on other dates. *Id.* § 402(b)-(e), 92 Stat. 2682.

37. The effective date of October 1, 1979 governs "[e]xcept as otherwise provided" in Title IV. *Id.* § 402(a), 92 Stat. 2682.

38. *Id.* § 403(a), 92 Stat. 2683.

39. The repeal of a statute destroys its future effectiveness except as to proceedings already closed or as provided in savings clauses. 1A C. Sands, Sutherland's Statutes and Statutory Construction §§ 23.33, 23.39 (4th ed. 1972).

40. Dickinson Indus. Site, Inc. v. Cowan, 309 U.S. 382, 383 (1940) (construing Chandler Act, ch. 575, § 6, 52 Stat. 840, 940 (1938) (repealed 1979) (replaced by Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (Title I codified at 11 U.S.C. §§ 101-151326 (Supp. II 1978))); New York Credit Men's Adjustment Bureau, Inc. v. A. Jesse Goldstein & Co., 276 F.2d 886, 888-89 (2d Cir. 1960) (construing similar language); Coin Machine Acceptance Corp. v. O'Donnell, 192 F.2d 773, 777-78 (4th Cir. 1951) (construing similar language); *In re* Old Algiers, Inc., 100 F.2d 374, 375 (2d Cir. 1938) (construing similar language). *see* Plumb, *The Recommendations of the Commission on the Bankruptcy Laws—Exempt and Immune Property*, 61 Va. L. Rev. 1, 138 & n.803 (1975). *But see* Holt v. Henley, 232 U.S. 637, 639-40 (1914) (act construed as prospective, but without analysis); Ginsberg v. Lindel, 107 F.2d 721, 726 (8th Cir. 1939) (retrospective construction rejected when retrospectivity made the act unconstitutional); Miles Corp. v. Lindel, 107 F.2d 729, 732 (8th Cir. 1939) (same).

41. H.R. 31, 94th Cong., 1st Sess. (1975), *reprinted in House Hearings, supra* note 14, app. at 2. The same bill was introduced in the Senate as S. 236, 94th Cong., 1st Sess. (1975). Klee, *Legislative History of the New Bankruptcy Law*, 28 DePaul L. Rev. 941, 944 & n.29 (1979); *see* 121 Cong. Rec. 641 (1975) (introduced by Sen. Burdick).

42. H.R. 32, 94th Cong., 1st Sess. (1975), *reprinted in House Hearings, supra* note 14, app. at 2. The same bill was introduced in the Senate as S. 235, 94th Cong., 1st Sess. (1975). Klee, *supra* note 41, at 943-44 & n.30; *see* 121 Cong. Rec. 641 (1975) (introduced by Sen. Burdick).

43. H.R. 31, 94th Cong., 1st Sess., § 10-103 (a) (1975), *reprinted in House Hearings, supra* note 14, app., at 320-21 (the new bankruptcy law "shall apply in all cases or proceedings instituted after its effective date, regardless of the date of occurrence

During the House hearings in 1976, however, a consultant to the bankruptcy commission suggested certain exceptions to retrospective application or a "separability clause" to avoid and lessen the impact of constitutional challenges to the Act.[44] Although the consultant raised no significant constitutional argument against retrospective application of federal exemptions,[45] it could be argued that Congress did not intend retrospective application because the express language in the savings clause requiring retrospectivity was dropped,[46] and a separability clause was not inserted.[47]

This argument fails to consider other indications of congressional intent concerning retrospective application. First, numerous substantive and editing changes were made by the congressional staff, including the collection of all transition provisions in a separate title.[48] The express language of the preliminary drafts may have been altered in the pursuit of clarity, brevity, and organization, rather than deleted to demonstrate intent.[49] Second, many constitutional problems concerning the retrospectivity of particular provisions were addressed by rewriting those provisions[50] and by evincing intent favoring

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of any of the operative facts determining legal rights, duties, or liabilities hereunder"); H.R. 32, 94th Cong., 1st Sess., § 11-103(a) (1975), *reprinted in House Hearings, supra* note 14, app., at 320-21 (same).

44. *House Hearings, supra* note 14, at 2034, 2066-67 (statement of William Plumb, Jr.); *The Bankruptcy Reform Act: Hearings on S. 235 and S. 236 before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 806, 837-38 (1975) [hereinafter cited as *1975 Senate Hearings*] (same).

45. *House Hearings, supra* note 14, at 2066 (statement of William Plumb, Jr.); *1975 Senate Hearings, supra* note 44, at 837 (same).

46. The same provision of the Bankruptcy Reform Act only refers to the substantive rights of parties whose cases are commenced under the old Act. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 403(a), 92 Stat. 2683. The deletion during drafting of a retroactive provision can be evidence of intended prospective application if no other indicia of legislative intent are present. *See* Bradley v. School Bd., 416 U.S. 696, 716 n.23 (1974); Yakim v. Califano, 587 F.2d 149, 150 (3d Cir. 1978).

47. 1 Collier on Bankruptcy ¶ 7.12 (15th ed. L. King 1980).

48. *See* Klee, *supra* note 41, at 945. *Compare* H.R. 32, 94th Cong., 1st Sess. §§ 11-101 to -104 (1975), *reprinted in House Hearings, supra* note 14, app., at 320-25 *with* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, title IV, 92 Stat. 2682 (1978).

49. Congress worked on the proposed legislation for two years, during which time countless drafting changes were made. *See* Klee, *supra* note 41, at 945-57. Given the complexity and duration of the drafting process, the elimination of language from an early draft hardly supports a conclusive inference of legislative intent. *See* note 46 *supra* and accompanying text.

50. The consultant expressed concern over § 4-405(b), which eliminated state recognized priorities in marital property interests for creditors. *House Hearings, supra* note 14, app., at 140 (congressional staff comments). Priorities are treated quite differently, however, in the Code. *See* 11 U.S.C. § 507 (Supp. II 1978). Another provision in the commission's bill of concern to the consultant, § 4-601(a)(5)(A), included

separability.[51] Because a congressional choice to address a matter in one part of a statute and not another is presumed to be intentional,[52] the alteration of some substantive provisions precludes the inference of a general prohibition against retrospectivity. Third, even after deletion of the express language, statements on the floor of the House[53] and Senate,[54] as well as the House Report,[55] evidence congressional intent to apply the Act retrospectively. Fourth, retrospective application is required to prevent courts from being without federal law to apply in cases commenced after repeal of the old law, involving liens existing prior to repeal.[56] Because Congress was specific when it in-

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community property in the bankruptcy estate regardless of state law. *House Hearings, supra* note 14, app., at 163-64 (congressional staff comments). This provision was changed to conform to current state laws on community property. National Bankruptcy Conference, [Proposed] Bankruptcy Act of 1975, *reprinted in House Hearings, supra* note 14, app., at 357, 358 n.2; *see* 11 U.S.C. § 541 (Supp. II 1978). Section 4-601(c), which terminated interests "such as dower and [curtesy]" upon the filing of bankruptcy, *House Hearings, supra* note 14, app., at 165-66, and § 5-203(c), which permitted the partition sale of an insolvent spouse's interests in jointly owned property "regardless of consent or nonbankruptcy law," *id.* at 197 (congressional staff comments), also raised concern as to their retrospective application. Section 4-601(c) of the commission's bill has been dropped. *See* 11 U.S.C. § 541 (Supp. II 1978). Section 5-203(c) has been modified to better reflect the interests of co-owners. *See* 11 U.S.C. § 363(f), (h) (Supp. II 1978). In addition, important adequate protection provisions benefitting certain secured creditors and co-owners were added. *Id.* §§ 361-363.

51. House Report, *supra* note 3, at 462, *reprinted in* [1978] U.S. Code Cong. & Ad. News at 6417-18.

52. *Cf.* United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972) (per curiam) (Congress presumed to act intentionally in choosing where to include language); Pena-Cabanillas v. United States, 394 F.2d 785, 789 (9th Cir. 1968) ("where Congress has carefully employed a term in one place and excluded it in another, it should not be implied where excluded"); Health Care Serv. Corp. v. Califano, 466 F. Supp. 1190, 1196 (N.D. Ill.) (similar), *aff'd*, 601 F.2d 934 (7th Cir. 1979).

53. 124 Cong. Rec. H11147, H11109 (daily ed. Sept. 28, 1978) (remarks of Rep. Edwards). Additional, but less extensive, remarks were made by Representative Edwards on the date of the act's passage. 124 Cong. Rec. H11866 (daily ed. Oct. 6, 1978) (remarks of Rep. Edwards). Sections 402(a) and 403(a) were not mentioned at that time. Representative Edwards spent more time than any other legislator on the Bankruptcy Reform Act. Klee, *supra* note 41, at 941 n.6.

54. 124 Cong. Rec. S17425 (daily ed. Oct. 6, 1978) (remarks of Sen. DeConcini).

55. House Report, *supra* note 3, at 287-88, *reprinted in* [1978] U.S. Code Cong. & Ad. News at 6243-44. Although the Bankruptcy Reform Act was amended after the House Report, *see* Klee, *supra* note 41, at 949-57, sections 402(a) and 403(a) remained unchanged. *Compare* Bankruptcy Reform Act of 1978, Pub. L. 95-598, §§ 402(a), 403(a), 92 Stat. 2682-83 *with* H.R. 8200, §§ 402(a), 403(a), 95th Cong., 1st Sess. (1977), *reprinted in* App. 3 Collier on Bankruptcy 602 (15th ed. L. King 1980) (bill filed with house report).

56. *E.g.*, Fisher v. Liberty Loan Corp., 6 Bankr. Rep. (West) 206, 211 (Bankr. N.D. Ohio 1980); Curry v. Associates Fin'l Servs., 5 Bankr. Rep. (West) 282, 288-90 (Bankr. N.D. Ohio 1980); Jackson v. Security Indus. Bank, 4 Bankr. Rep. (West) 293, 295 (Bankr. D. Colo. 1980); Hoops v. Freedom Fin., 3 Bankr. Rep. (West) 635, 637 (Bankr. D. Colo. 1980); Rodrock v. Security Indus. Bank, 3 Bankr. Rep. (West) 629, 634-35 (Bankr. D. Colo. 1980).

tended to defer to state law, implying deference, when it is not express, would frustrate congressional intent.[57] Finally, Congress intended substantial reform of substantive and procedural bankruptcy law,[58] including how it relates to individual debtors.[59] This congressional intent to reform would be partially frustrated by delaying the Code's effectiveness as to liens created prior to enactment. Congressional intent to apply section 522(f) retrospectively, however, raises various constitutional issues concerning limits of the bankruptcy power.

II. Constitutional Limitations

Section 522(f) was passed pursuant to congressional power "to establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."[60] This power extends to all "relations between [a] . . . debtor and his creditors,"[61] is supreme over state law,[62] but is not absolute.[63] The breadth and supremacy of the bankruptcy

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57. *See* note 52 *supra* and accompanying text. State law governs only the choice of exemptions. 11 U.S.C. § 522(b)(1) (Supp. II 1978); *see* note 7 *supra* and accompanying text.

58. Senate Report, *supra* note 3, at 1-3, *reprinted in* [1978] U.S. Code Cong. & Ad. News at 5787-89; House Report, *supra* note 3, at 3-5, *reprinted in* [1978] U.S. Code Cong. & Ad. News at 5965-66; 123 Cong. Rec. H11696-97 (daily ed. Oct. 27, 1977) (remarks of Rep. Rodino).

59. *See* note 20 *supra* and accompanying text.

60. U.S. Const. art. I, § 8, cl. 4.

61. Wright v. Union Cent. Life Ins. Co., 304 U.S. 502, 513-14 (1938) (quoting *In re* Reiman, 20 F. Cas. 490, 496-97 (S.D.N.Y. 1874) (No. 11,673)); *accord*, United States v. Bekins, 304 U.S. 27, 47 (1938); Continental Ill. Nat'l Bank & Trust Co. v. Chicago, Rock Island & P. Ry., 294 U.S. 648, 672-73 (1935). *See generally* Regional Rail Reorg. Act Cases, 419 U.S. 102, 153-54 (1974); Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 186 (1902). Congress' bankruptcy power has only been seriously questioned in one Supreme Court opinion. Ashton v. Cameron County Water Improvement Dist. No. 1, 298 U.S. 513, 529-30 (1936) (municipal bankruptcy statute exceeds bankruptcy power because it infringes on states' powers). *But see* United States v. Bekins, 304 U.S. 27, 49-52 (1938) (municipal bankruptcy statute upheld). The Court has stated that the power is "incapable of final definition." Wright v. Union Cent. Life Ins. Co., 304 U.S. 502, 513 (1938); *see* Regional Rail Reorg. Act Cases, 419 U.S. 102, 154 (1974).

62. Butner v. United States, 440 U.S. 48, 54 (1979); Perez v. Campbell, 402 U.S. 637, 649-56 (1971); Kalb v. Feuerstein, 308 U.S. 433, 439 (1940); International Shoe Co. v. Pinkus, 278 U.S. 261, 265 (1929); Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 187-88 (1902); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 123-24 (1819); *see* Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (proper test of supremacy clause is whether statute is "an obstacle" to congressional purpose).

63. Like other plenary powers of Congress, the bankruptcy power is subject to the due process and "takings" clauses of the fifth amendment. Regional Rail Reorg. Act Cases, 419 U.S. 102, 122-56 (1974); New Haven Inclusion Cases, 399 U.S. 392, 489-95 (1970); Wright v. Union Cent. Life Ins. Co., 304 U.S. 502, 515-16 (1938); Wright v. Vinton Branch of the Mountain Trust Bank, 300 U.S. 440, 470 (1937);

power, and section 522(f)'s clear relationship to that power,[64] however, have prevented constitutional challenges to the section as prospectively applied.[65] Rather, cases weighing section 522(f)'s constitutionality have focused on liens created prior to the enactment and effectiveness of the Code.[66] Even the constitutional challenge to the bankruptcy law based on retrospective application, however, is limited. No provision in the Constitution prohibits civil legislation that interferes with a preexisting right or takes effect on a prior date.[67]

Kuehner v. Irving Trust Co., 299 U.S. 445, 452-56 (1937); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 581, 589, 601-02 (1935); Continental Ill. Nat'l Bank & Trust Co. v. Chicago, Rock Island & P. Ry., 294 U.S. 648, 680-81 (1935). Because of the broad definition of the power, *see* note 61 *supra* and accompanying text, however, only two statutes have been held unconstitutional by the Supreme Court. Ashton v. Cameron County Water Improvement Dist. No. 1, 298 U.S. 513, 530-32 (1936) (municipal bankruptcy statute); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 601-02 (1935) (farmer mortgage redemption statute). Even these holdings have been limited. *See* United States v. Bekins, 304 U.S. 27, 49-52 (1938) (municipal bankruptcy statute upheld); Wright v. Vinton Branch of the Mountain Trust Bank, 300 U.S. 440, 470 (1937) (revised mortgage redemption statute upheld). *See also* Helvering v. Griffiths, 318 U.S. 371, 400-01 & n.52 (1943) (*Radford* and *Mountain Trust* compared as an example of when the Court has erred and changed its position when confronted with similar legislation in a later case).

64. The purpose of § 522(f), fostering the debtor's "fresh start," has long been recognized as within the bankruptcy power. *See, e.g.*, Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934); note 11, 20 *supra* and accompanying text.

65. The only prospectively applied bankruptcy statute held unconstitutional by the Supreme Court permitted state subdivisions to seek bankruptcy relief. Ashton v. Cameron County Water Improvement Dist. No. 1, 298 U.S. 513, 531-32 (1936) ("an invasion of the sovereignty of the States"). *But see* United States v. Bekins, 304 U.S. 27, 49-52 (1938) (voluntary reorganization in bankruptcy for state subdivisions upheld). The constitutionality of a bankruptcy statute usually is challenged when congressional action affects liens either through the retrospective application of new legislation, the implementation of complex debt reorganization plans, or both. *E.g.*, Regional Rail Reorg. Act Cases, 419 U.S. 102, 108-17, 121-22 (1974) (reorganization statute applied to pre-existing obligations); New Haven Inclusion Cases, 399 U.S. 392, 489-95 (1970) (railroad reorganization); Reconstruction Fin. Corp. v. Denver & R.G.W.R., 328 U.S. 495, 509 (1946) (same); Wright v. Union Cent. Life Ins. Co., 311 U.S. 273, 275-76, 278-79 (1940) (farmer mortgage redemption statute); Wright v. Union Cent. Life Ins. Co., 304 U.S. 502, 513-14 (1938) (same); Adair v. Bank of Am. Nat'l Trust & Sav. Ass'n, 303 U.S. 350, 354-55 (1938) (same); Wright v. Vinton Branch of the Mountain Trust Bank, 300 U.S. 440, 455-56 (1937) (same); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 572-73 (1935) (same); Continental Ill. Nat'l Bank & Trust Co. v. Chicago, Rock Island & P. Ry., 294 U.S. 648, 667-76 (1935) (newly enacted railroad reorganization statute).

66. *See* cases cited notes 30-31 *supra*.

67. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16 (1976); FHA v. Darlington, Inc., 358 U.S. 84, 91 (1958); Lichter v. United States, 334 U.S. 742, 788-89 (1948); Fleming v. Rhodes, 331 U.S. 100, 107 (1947); Carpenter v. Wabash Ry., 309 U.S. 23, 27-28 (1940); Welch v. Henry, 305 U.S. 134, 146 (1938); Norman v. Baltimore & O.R.R., 294 U.S. 240, 304-05 (1935); Louisville & N.R.R. v. Mottley, 219 U.S. 467, 480-86 (1911); Greenblatt, *Judicial Limitations on Retroactive Civil Legislation*, 51 Nw. U.L. Rev. 540, 540 (1956); Hochman, *supra* note 29, at 693-94; Smith

The ex post facto clause[68] applies to retroactive criminal penalties.[69] The contract clause[70] expressly applies to the states.[71] Only the fifth amendment's limitations on the power of the federal government to interfere with private property interests is applicable.[72]

I, *supra* note 29, at 229; Smith, *Retroactive Laws and Vested Rights II*, 6 Tex. L. Rev. 409, 409 (1928) [hereinafter cited as Smith II]; Stimson, *Retroactive Application of Law—A Problem in Constitutional Law*, 38 Mich. L. Rev. 30, 30-33 (1939).

68. U.S. Const. art I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

69. Harisiades v. Shaughnessy, 342 U.S. 580, 593-96 (1952); Carpenter v. Pennsylvania, 58 U.S. (17 How.) 456, 462-63 (1855); Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798).

70. U.S. Const. art I, § 10, cl. 1.

71. *Id.* ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts."); *see* United States R.R. Retirement Bd. v. Fritz, 101 S. Ct. 453, 458 (1980) (elevated scrutiny used in contract clause case not applied in lieu of rational basis test for federal economic regulation); Duke Power Co. v. Carolina Envt'l Study Group, Inc., 438 U.S. 59, 82-83 (1978) (same); Fleming v. Rhodes, 331 U.S. 100, 107 (1947) (if Congress were limited by the contract clause, contracts made in anticipation of legislative action would "nullif[y]" the "paramount powers of Congress"); Kuehner v. Irving Trust Co., 299 U.S. 445, 451-52 (1937) (contract clause not applicable to federal government); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 589 (1935) (same); Continental Illinois Nat'l Bank & Trust v. Chicago, Rock Island & P. Ry. Co. 294 U.S. 648, 680 (1935) (same); Todd Shipyards Corp. v. Witthuhn, 596 F.2d 899, 903 (9th Cir. 1979) (same); Norfolk, B. & C. Lines, Inc. v. Director, Office of Workers' Compensation Programs, 539 F.2d 378, 381 (4th Cir. 1976) (same), *cert. denied*, 429 U.S. 1078 (1977); Pension Benefit Guar. Corp. v. Ouimet Corp., 470 F. Supp. 945, 956 (D. Mass. 1979) (same). Certain contractual obligations of the federal government to private parties are protected property rights under the fifth amendment. Perry v. United States, 294 U.S. 330, 353-54 (1935) (change in method of bond payment by the government unconstitutional); Lynch v. United States, 292 U.S. 571, 577-79 (1934) (repeal of laws permitting renewal of war risk insurance unconstitutional).

72. *See* Duke Power Co. v. Carolina Envt'l Study Group, Inc., 438 U.S. 59, 69-70 (1978); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 14-17 (1976); Regional Rail Reorg. Act Cases, 419 U.S. 102, 122-25 (1974); FHA v. Darlington, Inc., 358 U.S. 84, 90-92 (1958); Lichter v. United States, 334 U.S. 742, 788 (1948); Fleming v. Rhodes, 331 U.S. 100, 102-07 (1947); Wright v. Vinton Branch of the Mountain Trust Bank, 300 U.S. 440, 470 (1937); Kuehner v. Irving Trust Co., 299 U.S. 445, 452-56 (1937); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 589 (1935); Lynch v. United States, 292 U.S. 571, 579 (1934). Applying the fifth amendment assumes that some infringement of rights has been caused by the government. Because § 522(f) gives the power of avoidance to the debtor, it is arguable that this regulation of the debtor-creditor relationship involves no government action. *See* Flagg Bros. v. Brooks, 436 U.S. 149, 157 (1978) (statute permitting private enforcement of warehouseman's lien upheld against fourteenth amendment due process challenge on grounds that there had been no state action). This assertion is not supportable. In *Flagg Bros.*, the Court distinguished the facts from other cases in which state action had been found on the basis of "overt official involvement." *Compare* 436 U.S. at 157 ("total absence" of overt involvement) *with* North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 606 (1975) (writ of garnishment issued by court clerk without notice or hearing violative of due process); Fuentes v. Shevin, 407 U.S. 67,

The fifth amendment provides that "[n]o person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."[73] The Supreme Court, in analyzing deprivations by government, views the due process and takings clauses as complementary.[74] Although a precise formula "for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government" may not be possible, certain facts must be present to render a deprivation unconstitutional.[75] First, the claimant must have a property interest that is compensable.[76] Second, if the deprivation is caused by a regulation,[77] the claimant must show that the

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80, 96-97 (1972) (seizure of assets by state officials without notice or hearing violative of due process); Sniadach v. Family Fin. Corp., 395 U.S. 337, 338, 341-42 (1969) (garnishment summons issued by court clerk without notice or hearing violative of due process). This distinction, which has been criticized as too narrow an application of the state action requirement, *see* L. Tribe, American Constitutional Law 107 (Supp. 1979) ("distinction . . . [is] wholly arbitrary"); Note, *Creditors' Remedies as State Action*, 89 Yale L.J. 538, 553-60 (1980), is not applicable to the issue here. Section 522(f) permits avoidance to the extent that a lien "impairs an exemption to which the debtor would have been entitled" without the encumbrance. *See* note 7 *supra*. To claim an exemption, however, the debtor must file with the bankruptcy court, while a "party in interest" may object. 11 U.S.C. § 522(*l*) (Supp. II 1978). Once exempted, property is protected from claims pre-dating the case except as specifically provided in the Code. *Id.* § 522(c). Thus, judicial involvement with § 522(f) avoidance is even more extensive than that evident in *North Georgia Finishing, Fuentes,* and *Sniadach*.

73. U.S. Const. amend. V. The analysis used to determine whether a taking is permissible under the fifth amendment is similar to that of whether a taking is permissible under state police power. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 122 (1978); Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226, 238-39 (1897); *see* Andrus v. Allard, 444 U.S. 51, 65 (1979) (follows *Penn Central*, which involved an alleged state taking, to uphold a deprivation by the federal government).

74. Regional Rail Reorg. Act Cases, 419 U.S. 102, 155-56 (1974); Moore v. City of E. Cleveland, 431 U.S. 494, 514 (1977) (Stevens, J., concurring). *Compare* Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 601-02 (1935) (holding statute unconstitutional under the just compensation clause) *with* Wright v. Vinton Branch of the Mountain Trust Bank, 300 U.S. 440, 446 (1937) (describing *Radford* as based on the due process clause). The connection may be explained by the requirement of just compensation. If a public "taking" is found to have occurred, then a means to compensate the owner must be provided as a matter of procedural due process. Regional Rail Reorg. Act Cases, 419 U.S. 102, 156 (1974).

75. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); *see* Agins v. City of Tiburon, 100 S. Ct. 2138, 2141 (1980); Andrus v. Allard, 444 U.S. 51, 65 (1979).

76. *See* United States R.R. Retirement Bd. v. Fritz, 101 S. Ct. 453, 458 (1980); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 101 S. Ct. 446, 450 (1980); Kaiser Aetna v. United States, 444 U.S. 164, 178-80 (1979); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124-25 (1978); United States v. Petty Motor Co., 327 U.S. 372, 375-76 (1946).

77. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124-27 (1978). *Compare* United States v. Causby, 328 U.S. 256, 261-62 (1946) (property infringed

regulation is invalid or that the impact on the property is severe.[78] Third, if a taking[79] is found, the claimant must also show that the property is not put to a public use[80] or that a means is not provided for compensation.[81] Under due process analysis, the claimant must show that the statute does not have a legitimate purpose and that the means chosen to effect that purpose are arbitrary or irrational.[82]

A. *Unjust Takings*

1. Compensable Property

To challenge a government action as an unjust taking of private property, a claimant must show that the property interest is compensable and, thus, protected from takings within the meaning of the fifth amendment.[83] Most liens are protected, including real property mortgages,[84] railroad bonds,[85] statutory liens to protect a landlord's

by government's use of claimant's air space held to be a taking) *with* Andrus v. Allard, 444 U.S. 51, 64-68 (1979) (regulation of artifacts made from protected birds held not to be a taking).

78. *E.g.*, Agins v. City of Tiburon, 100 S. Ct. 2138, 2141 (1980); Andrus v. Allard, 444 U.S. 51, 67 (1979); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 127, 138 (1978).

79. "Taking" is used to indicate that an impairment by the government of protected property rights has been so severe that the constitution requires compensation for the impairment. *See* Andrus v. Allard, 444 U.S. 51, 65 (1979); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123-24 (1978); Regional Rail Reorg. Act Cases, 419 U.S. 102, 117-18 (1974). As opposed to "taking," which is a conclusive legal term, deprivation refers to the factual question of impairment or diminution of a property interest.

80. *See* Berman v. Parker, 348 U.S. 26, 32-33 (1954); United States *ex rel.* TVA v. Welch, 327 U.S. 546, 551-52 (1946); United States v. General Motors Corp., 323 U.S. 373, 377-78 (1945).

81. *See* Regional Rail Reorg. Act Cases, 419 U.S. 102, 155 (1974); Armstrong v. United States, 364 U.S. 40, 48-49 (1960); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 601-02 (1935).

82. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15-17 (1976); *see* Duke Power Co. v. Carolina Envt'l Study Group, Inc., 438 U.S. 59, 82-92, 94 & n.39 (1978). Equal protection analysis "largely track[s] and duplicate[s]" due process analysis if no other substantive rights are involved. *Id.* at 93; *see* United States R.R. Retirement Bd. v. Fritz, 101 S. Ct. 453, 458-60 (1980) (classifications in economic regulations not violative of equal protection unless arbitrary or irrational). Except for the means to compensate a taking, procedural due process issues are beyond the scope of this Note.

83. *See* note 76 *supra*.

84. *See* Wright v. Union Cent. Life Ins. Co., 311 U.S. 273, 278 (1940) (Union Central II); Borchard v. California Bank, 310 U.S. 311, 317 (1940); John Hancock Mut. Life Ins. Co. v. Bartels, 308 U.S. 180, 186-187 (1939); Wright v. Union Cent. Life Ins. Co., 304 U.S. 502, 517 (1938) (Union Central I); Wright v. Vinton Branch of the Mountain Trust Bank, 300 U.S. 440, 470 (1937); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 601-02 (1935).

85. *See* Regional Rail Reorg. Act Cases, 419 U.S. 102, 121-24, 148-56 (1974); New Haven Inclusion Cases, 399 U.S. 392, 489-93 (1970); Reconstruction Fin. Corp. v. Denver & R.G.W.R.R , 328 U.S. 495, 533 (1946).

claim for rent,[86] and a subcontractor's claim for labor and materials.[87] Congress also has conceded that protection extends to judicial liens and other non-exempt security interests.[88]

Although every general type of lien may be protected,[89] this constitutional protection only applies to certain rights attached to the lien.[90] Whether these rights include the use of liens to compel repayment by threatening repossession of an asset of low current value, but relatively high replacement cost, is significant when evaluating the constitutional impact of section 522(f).[91] In *Louisville Joint Stock Land Bank v. Radford*,[92] the Supreme Court reasoned that rights under state law permitting a mortgagee to retain a lien until full repayment warranted protection under the takings clause.[93] Although this language may have been dicta,[94] it was apparent that the Court

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86. Miles Corp. v. Lindel, 107 F.2d 729, 731 (8th Cir. 1939), Ginsberg v. Lindel, 107 F.2d 721, 728 (8th Cir. 1939).

87. Armstrong v. United States, 364 U.S. 40, 46-48 (1960).

88. 11 U.S.C. § 522(c)(2) (Supp. II 1978); *see* Senate Report, *supra* note 3, at 76, *reprinted in* [1978] U.S. Code Cong. & Ad. News at 5862; House Report, *supra* note 3, at 361, *reprinted in* [1978] U.S. Code Cong. & Ad. News at 6317. Congress also acknowledged constitutional protection of liens in deciding to include adequate protection provisions for certain interests. 11 U.S.C. §§ 361-364 (Supp. II 1978); *see* Senate Report, *supra* note 3, at 49, *reprinted in* [1978] U.S. Code Cong. & Ad. News at 5835; House Report, *supra* note 3, at 339, *reprinted in* [1978] U.S. Code Cong. & Ad. News at 6295.

89. Liens created by consent or statute and encumbering realty or personalty have been afforded constitutional protection. *See* notes 84-87 *supra* and accompanying text.

90. *See* Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 590-95 (1935).

91. *See* note 15 *supra* and accompanying text.

92. 295 U.S. 555 (1935).

93. The statute at issue in *Radford*, the Frazier-Lempke Act, permitted farmers to redeem mortgages at the appraised value of the property. Frazier-Lempke Act, ch. 869, 48 Stat. 1289 (1934). The Court found that the statute deprived the mortgagee of five property rights: (1)"[t]he right to retain the lien until the indebtedness thereby secured is paid"; (2)"[t]he right to realize upon the security by a judicial public sale"; (3)"[t]he right to determine [the time of] such sale . . . , subject only to the discretion of the court"; (4)"[t]he right to protect its interest in the property by bidding at such sale . . . , to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through the receipt of the proceeds of a fair competitive sale or by taking the property itself"; and (5) "[t]he right to control . . . the property during . . . default." 295 U.S. at 594-95.

94. *Radford* may be supportable solely on the basis of a deprivation of the collateral's resale value, rather than on the more expansive reading of creditors' constitutionally protected rights. Under the first of two alternatives provided by the Act, the farmer could, with the creditor's consent, buy back the mortgage at a price based on current value, but with payment of eighty-five percent of the price deferred for six years at the miniscule interest rate of one percent. Frazier-Lempke Act, ch. 869, § s(3), 48 Stat. 1289 (1934). The Court concluded that this provision effectively required conveyance at "less than the appraised value." 295 U.S. at 591-92. Alterna-

intended a secured creditor to have a constitutional right to choose to liquidate the collateral or to hold the lien as a means to compel full repayment of the face amount of the obligation, even when the value of the collateral was less than that of the loan secured.[95] This reasoning, however, is problematic because the creditor would have an unqualified right to retain the lien until full repayment of the underlying indebtedness. Consequently, the creditor could veto any effort by Congress to rehabilitate the debtor in bankruptcy by decreasing a debtor's indebtedness, and permitting the debtor to retain certain assets to regain financial self-sufficiency and productivity.[96]

Apparently recognizing this policy consideration, the Court now will protect only the lienor's right to the value of the encumbered asset. For example, a mortgage claim is not compensable property if its repossession value to the claimant is negligible.[97] A debtor rehabilitation statute that permits the secured creditor to demand the resale value of the property, similar to the one invalidated in *Radford*,[98] and railroad reorganizations in which secured creditors re-

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tively, without the creditor's consent, the farmer could stay foreclosure for up to five years with the continuing option to purchase at current value. Frazier-Lempke Act, ch. 869, § s(7), 48 Stat. 1289 (1934). This five year stay could permit the debtor to unfairly exploit fluctuations in value after his default to the creditor's disadvantage. 295 U.S. at 592-93, 596-97. Under both alternatives, the creditor is deprived of value in the property securing the loan. In addition to its use of excessive language in its holding, the Court has since described its decision in *Radford* as an "error." Helvering v. Griffiths, 318 U.S. 371, 400-01 & n.52 (1943).

95. The rights listed by the Court, *see* note 93 *supra*, protected the face value of the mortgagee's claim and the resale value of the encumbered property. *See* Note, *Constitutional Limitations on the Bankruptcy Power: Chapter XII Real Property Arrangements*, 52 N.Y.U. L. Rev. 362, 384-85 (1977) [hereinafter cited as *Constitutional Limitations*].

96. "While the rights of the bondholders are entitled to respect, they do not command Procrustean measures. They certainly do not dictate that rail operations vital to the Nation be jettisoned despite the availability of a feasible alternative. The public interest is not merely a pawn to be sacrificed for the strategic purposes or protection of a class of security holders . . . ." Penn-Central Merger & N. & W. Inclusion Cases, 389 U.S. 486, 510-11 (1968); *see Constitutional Limitations*, *supra* note 95, at 387.

97. *In re* 620 Church St. Bldg. Corp., 299 U.S. 24, 27 (1936). Claimants held $67,250 in junior mortgages on the bankrupt debtor's principal asset, a building. *Id.* at 26. The building was encumbered by a first mortgage of $445,500 and had an appraised value of only $245,025. *Id.* Thus, the claimants had no interest in the property's resale value.

98. "Safeguards were provided [in the statute] to protect the rights of secured creditors . . . to the extent of the value of the property . . . . There is no constitutional claim of the creditor to more than that." Wright v. Union Cent. Life Ins. Co., 311 U.S. 273, 278 (1940) (Union Central II) (citations omitted); *see* Borchard v. California Bank, 310 U.S. 311, 317 (1940); John Hancock Mutual Life Ins. Co. v. Bartels, 308 U.S. 180, 186-87 (1939); Wright v. Union Cent. Life Ins. Co., 304 U.S. 502, 517 (1938) (Union Central I); Wright v. Vinton Branch of the Mountain Trust Bank, 300 U.S. 440, 470 (1937).

ceive the resale value of their collateral,[99] do not interfere with value protected by the fifth amendment. Thus, a lien is constitutionally protected only to the extent that resale of the encumbered asset can cover the creditor's claim and not to the extent that its retention may be used to compel repayment.[100]

If the property encumbered has no value as a source of repayment, section 522(f) liens are not constitutionally protected property interests.[101] Often, the property rights encumbered by section 522(f) liens have a high coercive, but only nominal resale, value and are rarely repossessed.[102] On occasion, foreclosing creditors have even discarded the assets.[103] Interests avoidable under section 522(f)(2) exclude purchase money, possessory security interests, and encumbrances on certain personal assets.[104] Thus, section 522(f)(2) affects only marginally compensable property. Because judicial liens avoidable under section 522(f)(1) encumber a wider range of assets,[105] however, they will more frequently have value as a source of repayment. Accordingly, the factual determination of value, and whether the lienor's interest is compensable, depends on the specific property encumbered by the specific lien.

2. Economic Impact and Purpose

If a lien is compensable, the extent of the "economic impact" on the property and the purpose of the deprivation become relevant to whether interference with its use constitutes a taking.[106] "Economic impact" analysis focuses on whether the statute or regulation unduly deprives the owner of existing or future uses of the property.[107] Se-

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99. Regional Rail Reorg. Act Cases, 419 U.S. 102, 156 (1974) (reorganization complies with fifth amendment requirements "[a]s long as creditors are assured fair value, with interest, for their properties"); New Haven Inclusion Cases, 399 U.S. 392, 489-90 (1970) (similar reasoning).

100. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 101 S. Ct. 446, 450 (1980) ("a mere unilateral expectation or an abstract need is not a property interest entitled to protection").

101. *See* notes 97-100 *supra* and accompanying text.

102. *See* notes 14-15 *supra* and accompanying text.

103. *See* Curry v. Associates Fin. Servs., 5 Bankr. Rep. (West) 282, 290 (Bankr. N.D. Ohio 1980).

104. *See* notes 1, 7 *supra*.

105. Section 522(f)(1), unlike § 522(f)(2), is not limited by the type of exempt assets subject to avoidance. A debtor could even avoid a lien on his residence up to the amount of his exemption. *See* Lucero v. Security Indus. Bank, 4 Bankr. Rep. (West) 659, 660-61 (Bankr. D. Colo. 1980).

106. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123-28 (1978). The Court has described *Penn Central* as its "most recent exposition on the Takings Clause." Andrus v. Allard, 444 U.S. 51, 65 (1979).

107. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 127-28 (1978) (landmark preservation law upheld); *see* Agins v. City of Tiburon, 100 S. Ct. 2138,

vere economic impact to property may be warranted by and is weighed against the purpose of and need for the deprivation.[108] The major limitation on permissible economic impact by the government is that the owner must retain some "beneficial" and "reasonable use" in the property.[109] When an owner is permitted to retain possession, statutes causing even severe impairments to the property's usefulness have been upheld.[110] Without some remaining reasonable use, however, the economic impact, alone, may constitute a taking.

A reasonable beneficial use of a lien after avoidance under section 522(f) will often exist as a matter of fact.[111] First, if the assets are worth more than the exemption amount, the lien retains a reasonable beneficial use and the creditor can recover the excess.[112] Second, if the lien covers assets other than those exempted, the creditor can still repossess the non-exempt assets.[113] Third, even liens covering only exempt assets worth less than the exemption amount had a reasonable remaining use that has since been lost through no act of the government. The Code became effective eleven months after enactment[114] and was not applied to pending cases.[115] The reasonable

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2141 (1980) (zoning ordinance upheld); Andrus v. Allard, 444 U.S. 51, 65-66 (1979) (prohibiting sale of artifacts upheld).

108. *See, e.g.*, Andrus v. Allard, 444 U.S. 51, 65-67 (1979) (prohibition of sale of artifacts made from eagles); United States v. Central Eureka Mining Co., 357 U.S. 155, 166-69 (1958) (forced closing of gold mines to make workers and equipment available for war effort); Miller v. Schoene, 276 U.S. 272, 279 (1928) (forced cutting of red cedar trees to protect nearby orchards). *But see* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (prohibition of mining under residential property despite specific reservation of mineral and mining rights in deed conveying surface to homeowners held unconstitutional).

109. Agins v. City of Tiburon, 100 S. Ct. 2138, 2142 (1980); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 138 (1977). An express limitation on the degree of economic impact is that the owner retain the right to exclude others from the physical invasion of property. Kaiser Aetna v. United States, 444 U.S. 164, 178-180 (1979). Although the right to exclude others may be the very essence of possessing land, the creditor's right to collateral under nonpossessory liens is hardly exclusive, being subject to rights of the debtor and, depending on priorities, other creditors. Section 522(f)(2) only permits the avoidance of nonpossessory liens. 11 U.S.C. § 522(f)(2) (Supp. II 1978).

110. *See* note 108 *supra*.

111. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124, 136-38 (1978).

112. *See* Jordan v. Borda, 5 Bankr. Rep. (West) 59, 61 (Bankr. D.N.J. 1980).

113. Not all liens are subject to avoidance. *See, e.g.*, Moore v. Household Fin. Corp., 5 Bankr. Rep. (West) 669, 670 (Bankr. S.D. Ohio 1980); Credithrift of Am. Inc. v. Meyers, 2 Bankr. Rep. (West) 603, 605-06 (Bankr. E.D. Mich. 1980); Abt v. Household Fin. Co., 2 Bankr. Rep. (West) 323, 325-26 (Bankr. E.D. Pa. 1980); notes 1, 7, 14 *supra*.

114. The Act was enacted on November 6, 1978. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549. It took effect on October 1, 1979. *Id.* § 402(a), 92 Stat. 2682 (1978).

115. *Id.* § 403(a), 92 Stat. 2683 (1978).

use surviving the government's act was the eleven month period during which the creditor could have developed alternate means of protecting the interest secured by the lien.[116]

Even if avoidance under section 522(f) leaves no reasonable remaining use, the requirement can be criticized as an inappropriate legal standard. If the economic impact is outweighed by the public purpose when mine operations have been closed,[117] a forest cut down,[118] and the pursuit of one's livelihood prevented,[119] a similar result would seem appropriate when a creditor is deprived of a lien encumbering an asset that has only nominal value.[120] That the reasonable remaining use standard depends largely on the definition of the property right[121] and has been used primarily to uphold deprivations by government,[122] perhaps demonstrates that a result, not a standard, is sought. Distinctions based on whether the deprivation is complete are strained and arbitrary. The defects of the test are apparent when it affords greater constitutional protection to liens of nominal value than property interests worth several hundred thousand dollars.[123]

Provided the economic impact is not too severe, the benefit to the public generated by a deprivation will outweigh its economic impact

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116. For example, a judgment lienor could have enforced the lien prior to the Code's effective date or obtained a judicial lien on a non-exempt asset. In many cases, the holder of a security interest could also have taken action. If default preceded the effective date, the creditor could have repossessed the asset. U.C.C. § 9-503. Moreover, if a debtor attempted to postpone bankruptcy until the Code became effective, the creditor could commence an involuntary proceeding under the old bankruptcy law. *See* 11 U.S.C. § 22(b) (1976) (replaced with 11 U.S.C. § 303 (Supp. II 1978)). Finally, creditors could have required new collateral for any loan renewals and negotiated for new collateral in the case of loans maturing after the effective date. The prudent lienor would have obtained new liens more than three months before the effective date to preclude preference avoidance under the Code, *see* 11 U.S.C. § 547(b)(4)(A) (Supp. II 1978), and would have retained the original lien in the event of such avoidance under the old Act. *See* 11 U.S.C. § 96 (1976) (replaced with 11 U.S.C. § 547 (Supp. II 1978)).

117. Goldblatt v. Town of Hempstead, 369 U.S. 590, 594-95 (1962); United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958).

118. Miller v. Schoene, 276 U.S. 272, 278-80 (1928).

119. Andrus v. Allard, 444 U.S. 51, 64-68 (1979); Mugler v. Kansas, 123 U.S. 623, 658-59 (1887).

120. *See* notes 14-15 *supra* and accompanying text.

121. In Kaiser Aetna v. United States, 444 U.S. 164 (1979), the deprivation of the right to exclude others from land was held to leave the owner with no remaining reasonable use of his property. By narrowly defining the protected property right as the right to exclude, the Court made it impossible for the government to successfully argue that other remaining uses existed. *Id.* at 179-80.

122. *See, e.g.*, Agins v. City of Tiburon, 100 S. Ct. 2138, 2142 (1980); Andrus v. Allard, 444 U.S. 51, 65-68 (1979); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 131, 135-38 (1978).

123. For example, the Court has upheld a decrease in property value from $800,000 to $60,000. Hadacheck v. Sebastian, 239 U.S. 394, 405 (1915). Liens sub-

when the deprivation is caused by valid regulatory measures.[124] Unlike takings found despite the clear presence of a public need,[125] the purpose of section 522(f) is not to appropriate private property for an enterprise unique to government. Rather, the section places the government as a "mediator in the process of competition among" private interests.[126] Under takings analysis, courts will not "effectively compel the government to regulate by purchase."[127]

Not all government regulation, however, is permissible. Regulations prohibiting uses of property must substantially relate to a legitimate public purpose, or the general welfare.[128] Section 522(f) easily withstands this analysis. Congressional efforts to protect the exempted property of individual debtors under section 522(f) are well within the bankruptcy power to legislate debtor relief.[129] Given the Court's deference to the bankruptcy power, the significance of individual bankruptcies to the enactment of the Code, and the role of exemptions in the Code, the section serves at least a legitimate, and

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ject to avoidance under section 522(f) are usually of nominal compensable value. *See* notes 14-15 *supra* and accompanying text.

124. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124, 127-28 (1978).

125. *E.g.*, Griggs v. Allegheny County, 369 U.S. 84, 89-90 (1962); Armstrong v. United States, 364 U.S. 40, 46-48 (1960); United States v. Causby, 328 U.S. 256, 263-65 (1946); Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 329-30 (1922).

126. *See* Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 62 (1964).

127. Andrus v. Allard, 444 U.S. 51, 65 (1979) (emphasis deleted).

128. Agins v. City of Tiburon, 100 S. Ct. 2138, 2141 (1980) (land use regulation upheld); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 138 (1978) (landmark preservation law upheld); Moore v. City of E. Cleveland, 431 U.S. 494, 513-14 (1977) (Stevens, J., concurring) (law limiting co-habitation overruled); Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928) (inflexible application of zoning ordinance arbitrary and unconstitutional); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (zoning ordinance upheld); *see* Andrus v. Allard, 444 U.S. 51, 64-68 (1979) (control of sale of eagle artifacts upheld); Goldblatt v. Town of Hempstead, 369 U.S. 590, 594-95 (1962) (closing mine to protect neighboring residential owners).

129. *See* Wright v. Union Cent. Life Ins. Co., 311 U.S. 273, 278 (1940) (Union Central II); notes 11, 61 *supra* and accompanying text. In light of congressional findings that liens subject to avoidance under § 522(f) often arise from contracts of adhesion and serve to frustrate the debtor's fresh start, it could be argued that these property interests are nuisances subject to prohibition by legislative act. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 144-46 (1978) (Rehnquist, J., dissenting). Efforts to characterize cases upholding property deprivations as valid preventions of nuisances have been criticized on the grounds that, without wrongdoing, imposing the label "nuisance" is merely an excuse to favor one property use over another. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, 80 Harv. L. Rev. 1165, 1196-99 (1967); Sax, *supra* note 126, at 49-50. Liens subject to § 522(f), however, often do arise from the wrongful conduct of creditors. *See* notes 14-15 *supra* and accompanying text. Thus, this argument supports a finding that Congress' purpose outweighs the harm to private property interests.

probably an important,[130] purpose. Thus, the section does not take; it validly regulates.

Even if the usual effect of a statute is not to cause a taking, however, its application to a particular claimant may still cause a sufficiently severe economic impact that a taking will be found.[131] This requires a consideration of the constitutional consequences of such a finding.

3. Valid Takings

Private property may not be taken except for a public use and adequate compensation. Public use has been defined expansively.[132] Exercises of the bankruptcy power have not been questioned on the grounds of public use, even if a taking, or the likelihood of a taking, has been found.[133] Further, protecting the debtor's fresh start assists the debtor's dependents and, ultimately, society by enabling the debtor to be self-supporting and productive.[134] Therefore, property taken by retrospective application of section 522(f) is applied to a public use within the meaning of the fifth amendment.

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130. In recent contract clause cases, the Supreme Court has used elevated standards of review to determine if the impairment of contractual rights by exercises of the state police power are permissible. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 245 (1978) ("The severity of the impairment" of a contract "measures the height of the hurdle of the state legislature must clear."). When the impairment has been severe, the Court has required the statute to be "reasonable and necessary to serve . . . important purposes." United States Trust Co. v. New Jersey, 431 U.S. 1, 29 (1977) (state abrogation of own liability unconstitutional). Although inappropriate in due process and equal protection challenges to federal regulation of private economic interests, *see* note 71 *supra*, the Court might demand more than a substantial relationship between statutory means and purpose before finding a deprivation not to be a taking. The debtor's fresh start is clearly an important purpose within Congress' bankruptcy power. *See* notes 11, 61 *supra*. The retrospective application of section 522(f) is reasonable. *See* notes 159-69 *infra* and accompanying text. Having a few assets after bankruptcy certainly seems necessary to allow the debtor to start afresh, not only because creditors have used liens on such assets in a coercive manner, *see* notes 14-15 *supra* and accompanying text, but because they would provide the debtor with a modest base to use in his own financial rehabilitation.

131. A takings analysis not only considers the general effect of the challenged statute, but burdens on the particular claimant as well. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 136 (1978); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

132. *See* Berman v. Parker, 348 U.S. 26, 34 (1954); TVA v. Welch, 327 U.S. 546, 551-52 (1946); American Dredging Co. v. Dutchyshyn, 480 F. Supp. 957, 961-62 (E.D. Pa.), *aff'd*, 614 F.2d 769 (3d Cir. 1979).

133. *See* Regional Rail Reorg. Act Cases, 419 U.S. 102, 124-25 (1974); *cf.* Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 601-02 (1935) (act found unconstitutional for lack of compensation, not lack of public use).

134. House Report, *supra* note 3, at 116, *reprinted in* [1978] U.S. Code Cong. & Ad. News at 6076-77; Donnelly, *The New (Proposed?) Bankruptcy Act: The Development of its Structural Provisions and their Impact on the Interests of Consumer-Debtors*, 18 Santa Clara L. Rev. 291, 329-30 (1978).

A taking of property for a public use also must be adequately compensated. Nothing in the Code provides compensation for liens avoided under section 522(f).[135] The Tucker Act,[136] however, gives the Court of Claims jurisdiction to hear claims "founded . . . upon the Constitution," and can afford adequate compensation.[137] Although it only grants jurisdiction and creates no substantive right,[138] the Tucker Act gives the means to enforce the government's implied promise under the fifth amendment to compensate a public taking.[139] It provides a legal remedy of money damages; "[s]tatutory recognition" of the particular claim is not necessary.[140] The Tucker Act has been held to provide the means for adequate compensation of a railroad debt reorganization statute,[141] a limitation on liability for nuclear reactor accidents,[142] and the revocation of a dredging permit by the Army Corps of Engineers.[143]

The proper inquiry to determine if the Tucker Act is applicable to takings resulting from section 522(f) is whether Congress intended to withdraw suits based on the Code from the Tucker Act's protection.[144] Because the Bankruptcy Reform Act of 1978 does not

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135. No case holding the retrospective application of § 522(f) to be unconstitutional has found the Code to provide compensation or has addressed the Tucker Act question. *See* cases cited notes 30-31 *supra*. One court has observed, however, without citing support, that the avoidance provision deprives lienors of their property for a private purpose. Hoops v. Freedom Fin., 3 Bankr. Rep. (West) 635, 636 (Bankr. D. Colo. 1980).

136. 28 U.S.C. § 1491 (Supp. II 1978).

137. *Id.*; *see* Duke Power Co. v. Carolina Envt'l Study Group, Inc., 438 U.S. 59, 94 n.39 (1978) (alternative holding); Regional Rail Reorg. Act Cases, 419 U.S. 102, 125-26 (1974); Jacobs v. United States, 290 U.S. 13, 15-17 (1933); American Dredging Co. v. Dutchyshyn. 480 F. Supp. 957, 961-62 (E.D. Pa.), *aff'd*, 614 F.2d 769 (3d Cir. 1979). District courts may also hear claims against the United States for amounts up to $10,000. 28 U.S.C. § 1346(a)(2) (Supp. II 1978).

138. United States v. Testan, 424 U.S. 392, 398 (1976).

139. Jacobs v. United States, 290 U.S. 13, 16 (1933).

140. *Id.*

141. Regional Rail Reorg. Act Cases, 419 U.S. 102, 136, 148-56 (1974).

142. Duke Power Co. v. Carolina Envt'l Study Group, Inc., 438 U.S. 59, 94 n.39 (1978) (construing 42 U.S.C. § 2210 (1976)).

143. American Dredging Co. v. Dutchyshyn, 480 F. Supp. 957, 961, 962 (E.D. Pa.), *aff'd*, 614 F.2d 769 (3d Cir. 1979).

144. Regional Rail Reorg. Act Cases, 419 U.S. 102, 125-26 (1974); *see* Duke Power Co. v. Carolina Envt'l Study Group Inc., 438 U.S. 59, 94 n.39 (1978). This approach is justified by several rules of construction. The repeal of a statute should not be implied. Amell v. United States, 384 U.S. 158, 165-66 (1966); United States v. Borden Co., 308 U.S. 188, 198-99 (1939); Lynch v. United States, 292 U.S. 571, 586 (1934). Accordingly, when one statute does not expressly repeal another, it is presumed that the two are intended to co-exist. Morton v. Mancari, 417 U.S. 535, 551 (1974). In addition, it is presumed that statutes are intended to conform with the Constitution. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 571 (1973); United States v. Johnson, 323 U.S. 273, 276 (1944). Thus, when the Tucker Act may serve to compensate a taking caused by another statute,

expressly repeal the Tucker Act, the legislative history must be probed.[145] Although certain provisions of the Code[146] were designed to provide constitutional protection to lienors,[147] the House and Senate reports[148] do not preclude application of the Tucker Act. Despite numerous amendments to other statutes, no amendment was made of the Tucker Act.[149] Thus, the Tucker Act should be applied to compensate takings arising under section 522(f).

B. *Substantive Due Process*

If section 522(f) liens withstand takings analysis, the substantive requirements of the due process clause must still be met. In *Usery v. Turner Elkhorn Mining Co.*,[150] the Court articulated the standard of due process review for retrospective federal statutues.[151] Assuming the legislative act is within the enacting body's legitimate power,[152] the challenging party must show that the act, and its retrospective application, are arbitrary and irrational.[153] The Court reasoned that retrospective application was justified if the burdened parties had benefitted from the now remedied problem, without unfair disadvantage because of their reliance on prior law.[154] No unfair disadvantage is present if the burdened parties would not have behaved differently had they possessed knowledge of the statute or the social problem remedied.[155] Lower courts have also weighed the relative equities

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the presumption is that it should apply unless congressional intent to the contrary is evident.

145. Regional Rail Reorg. Act Cases, 419 U.S. 102, 129, 135-36 (1974).

146. 11 U.S.C. §§ 361-364 (Supp. II 1978).

147. Senate Report, *supra* note 3, at 49-58, *reprinted in* [1978] U.S. Code Cong. & Ad. News at 5835-44; House Report, *supra* note 3, at 175, 338-46, *reprinted in* [1978] U.S. Code Cong. & Ad. News at 6136, 6294-303.

148. *See* reports cited note 147 *supra*.

149. *See* Bankruptcy Reform Act, Pub. L. No. 95-598, tit. III, 92 Stat. 2673 (codified in scattered sections of U.S.C. (Supp. II 1978)).

150. 428 U.S. 1 (1976).

151. *Id.* at 15-17.

152. *Id.* at 15.

153. *Id.* at 15-17; *see* Nachman Corp. v. Pension Benefit Guar. Corp., 592 F.2d 947, 960 (7th Cir. 1979); Adams Nursing Home, Inc. v. Mathews, 548 F.2d 1077, 1080 (1st Cir. 1977).

154. 428 U.S. at 17.

155. *Id.* Despite this language, reliance on existing law rarely has been used to determine if a statute is violative of due process. *E.g.*, Fleming v. Rhodes, 331 U.S. 100, 106-07 (1947); Carpenter v. Wabash Ry., 309 U.S. 23, 26-27 (1940); Louisville & N.R.R. v. Mottley, 219 U.S. 467, 474-75 (1911); *see* Norman v. Baltimore & O.R.R., 294 U.S. 240, 304-06 (1935). *But see* Welch v. Henry, 305 U.S. 134, 147 (1938) (reliance on existing law considered). The Court's deference to the reliance of parties on prior law has been criticized. Note, *Constitutionality of Retroactive Land Statutes—Indiana's Model Dormant Mineral Act*, 12 Ind. L. Rev. 455, 485 (1979). *But see* Brown, *Vested Rights and the Portal-to-Portal Act*, 46 Mich. L. Rev. 723,

among affected parties,[156] provisions limiting the burden,[157] and the degree of prior regulation.[158]

Section 522(f) does not violate due process under this analysis. The creditor affected by section 522(f) previously benefitted from the coercive use of liens covered[159] and has not been unfairly disadvantaged. The breadth of the contractual provisions imposed on the debtor,[160] the nominal resale value of the assets,[161] and the limitations on voiding security interests[162] support the conclusion that creditors would not have behaved differently with knowledge of section 522(f). Because creditors' conduct is the source of the problem addressed in the legislation, prior knowledge of the problem remedied probably existed and certainly would not have led to different practices.[163] Creditors had numerous opportunities to learn of section 522(f) before effectiveness. Congress delayed the Code's effective date for eleven months;[164] consumer finance interests participated in legislative hearings;[165] and the Code was not applicable to cases filed before the effective date.[166] Moreover, the equities clearly weigh in the debtor's favor,[167] the avoidance powers are limited,[168] and Congress has long

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746-47 (1948) (parties' expectations based on prior law relevant); Hochman, *supra* note 29, at 696 (same); Smith II, *supra* note 67, at 427 (same); Stimson, *supra* note 67, at 37-38 (same).

156. Nachman Corp. v. Pension Benefit Guar. Corp., 592 F.2d 947, 960 (7th Cir. 1979).

157. Nachman Corp. v. Pension Benefit Guar. Corp., 592 F.2d 947, 960-61 (7th Cir. 1979); Pension Benefit Guar. Corp. v. Ouimet Corp., 470 F. Supp. 945, 958 (D. Mass. 1979).

158. Nachman Corp. v. Pension Benefit Guar. Corp., 592 F.2d 947, 960 (7th Cir. 1979); Adams Nursing Home, Inc. v. Mathews, 548 F.2d 1077, 1081 (1st Cir. 1977).

159. *See* notes 14-15 *supra* and accompanying text. In *Turner Elkhorn*, the statute burdened only coal mine operators whose employees had been harmed by the health hazard it sought to remedy. 428 U.S. at 18. Imposing a burden on all coal mining companies as a class had been posited as a more equitable manner of retrospective application. *Id.* Because retrospective application was only required to be rational, the Court did not find the distinction to be significant to its constitutional analysis. *Id.* at 18-19. Thus, in the rare case in which a lienor has not used liens to coerce debtors, the imposition of the burden on this party as a member of a class would still be rational.

160. *See* note 15 *supra*.

161. *Id.*

162. *See* 11 U.S.C. § 522(f)(2) (Supp. II 1978).

163. *See* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 17-18 (1976).

164. Bankruptcy Reform Act of 1978, Pub. L. 95-593, § 402(a), 92 Stat. 2682.

165. *See House Hearings*, *supra* note 14, at 1359 (statement of National Consumer Finance Association); *1975 Senate Hearings*, *supra* note 44, at 124 (statement of Walter Vaughn).

166. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 403(a) 92 Stat. 2683.

167. *See* notes 14-15 *supra* and accompanying text.

168. The debtor may only avoid liens to the extent they interfere with an exemption. 11 U.S.C. § 522(f) (Supp. II 1978).

regulated bankruptcy relationships.[169] Consequently, a substantive due process challenge to section 522(f) is unlikely to succeed.

CONCLUSION

Bankruptcy law strikes a balance between the competing interests of creditors and debtors. When the debtor defaults, creditors certainly deserve a fair distribution of assets and protection of their property interests. Yet, to have meaning, bankruptcy law must shelter the debtor from lingering claims and afford at least some means to regain financial self-sufficiency. Thus, section 522(f) should be upheld in order to save the debtor from destitution, regardless of when his obligations arose.

Joseph C. Hutcheson, II

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169. Congress enacted its first bankruptcy statute in 1800. Act of Apr. 6, 1800, ch. 19, 2 Stat. 19 (1800) (repealed by Act of Dec. 19, 1803, ch. 6, 2 Stat. 248 (1803)). Under the Bankruptcy Act of 1898, liens in general were subject to extensive regulation. *See* Bankruptcy Act, §§ 67(a)-(c) (formerly codified at 11 U.S.C. § 107(a)-(c) (1976) (replaced by 11 U.S.C. §§ 349(b), 547(b), (d), 551 (Supp. II 1978))).