Note

The Continuing Vitality of *Louisville Joint Stock Land Bank v. Radford*: Persuasive Authority for Cases Declaring Retroactive Application of Section 522(f) Of the Bankruptcy Code Unconstitutional

I. Introduction

The constitutionality of retroactive legislation has traditionally been tested with strict judicial scrutiny. During the Great Depression, the United States Supreme Court struck down retroactive bankruptcy legislation as a violation of the fifth amendment in *Louisville Joint Stock Land Bank v. Radford*.[1] As a result, the Bankruptcy Act[2] was amended, and in subsequent cases the Court upheld the constitutionality of the amended Act, limiting, to a degree, *Radford*.[3] Recently, both *Radford* and succeeding decisions have been resurrected in bankruptcy cases testing the constitutionality of retroactive applications of section 522(f) of the Bankruptcy Code.[4] A number of courts have relied on *Radford* in declaring retroactive application of section 522(f) unconstitutional, while others have upheld the constitutionality of such application, either by minimizing the precedential value of *Radford* or by ignoring the decision completely.

This Note explores the *Radford* decision, its refinement in subsequent decisions, and the continuing precedential value of *Radford* as authority for declaring retroactive application of section 522(f) of the Bankruptcy Code to be in violation of the fifth amendment. This Note supports the decisions invalidating retroactive application of section 522(f) on the authority of the *Radford* decision.

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[1]295 U.S. 555 (1935).

[2]Bankruptcy Act of 1898, 11 U.S.C. §§ 1-1103 (1976) (repealed Oct. 1, 1979, Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 401(a), 92 Stat. 2549) [hereinafter cited as the Act].

[3]Wright v. Union Cent. Life Ins. Co., 311 U.S. 273 (1941); Wright v. Vinton Branch of the Mountain Trust Bank, 300 U.S. 440 (1937).

[4]Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C. §§ 101-151326 (Supp. IV 1980)). Section 522(f) appears in 11 U.S.C. § 522 (f) (Supp. IV 1980).

II. Judicial Review of Retroactive Bankruptcy Legislation: Past and Present

In 1934, Congress enacted the Frazier-Lemke Act,[5] an amendment to section 75 of the Bankruptcy Act[6] designed to protect farmers from Depression foreclosures.[7] The original Act allowed a debtor to retain mortgaged property under court-ordered supervision after obtaining a five-year stay of foreclosure proceedings. At the end of the five year period, the debtor was allowed to pay a court-determined price to redeem the property, with the creditor losing all rights under the mortgage, except for the price paid into court.[8] In the event the debtor defaulted on his payments, the Act allowed the secured creditors to enforce their interests in accordance with the law.[9] Alternatively, if all terms of the sale were complied with, the debtor was allowed to apply for his discharge.[10] Furthermore, the Act was to apply only to mortgage interests created prior to its enactment.[11]

The constitutionality of the Frazier-Lemke Act was tested by the United States Supreme Court in 1934, in *Louisville Joint Stock Land Bank v. Radford*.[12] The Court stuck down the Act, declaring its retroactive application violative of the fifth amendment as an uncompensated taking of "substantive rights in specific property acquired by the Bank prior to the Act."[13]

The following year, the Act was amended,[14] with the intention of preserving the property rights[15] held to have been taken in the *Rad-*

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[5]Pub. L. No. 73-486, 48 Stat. 1289 (1934) (repealed 1978) [hereinafter cited as the Frazier-Lemke Act]

[6]Section 75 was added by An Act of March 3, 1933, Pub. L. No. 72-420, 47 Stat. 1470 (1933).

[7]Note, *Constitutionality of Retroactive Lien Avoidance Under Bankruptcy Code Section 522(f)*, 94 Harv. L. Rev. 1616, 1619 (1981) [hereinafter cited as Harvard Note].

[8]3 Collier on Bankruptcy ¶ 522.29 (15th ed. L. King 1979).

[9]Frazier-Lemke Act, *supra* note 5.

[10]*Id.*

[11]*Id.* at 1291.

[12]295 U.S. 555 (1935).

[13]*Id.* at 590.

[14]Frazier-Lemke Act, Pub. L. No. 74-384, § 6, 49 Stat. 943 (1935) (repealed 1978).

[15]The rights enumerated by the Court were:

1. The right to retain the lien until the indebtedness secured is paid.
2. The right to realize upon the security by public judicial sale.
3. The right to determine when such sale shall be held, subject only to the discretion of the court.
4. The right to protect its interest in the property by bidding at such sale whenever held, and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the proceeds of a fair competitive sale or by taking the property itself.

ford decision. The amended Frazier-Lemke Act was reviewed by the Supreme Court in *Wright v. Vinton Branch of the Mountain Bank.*[16] The Court in *Wright* declared the amended version constitutional, holding that it preserved three of the five rights enumerated in *Radford* and gave bankruptcy courts sufficient discretion to protect a mortgagee's interest.[17]

The scope and application of the second Frazier-Lemke Act was later questioned and upheld in *Wright v. Union Central Life Insurance Co.*[18] The Supreme Court in *Union Central* held that under the Act, "[s]afeguards were provided to protect the rights of secured creditors, throughout the proceedings, to the extent of the value of the property. There is no constitutional claim of the creditor to more than that."[19]

The Court's decisions in *Radford* and the *Wright* cases, along with its decision in *Kuehner v. Irving Trust Co.*[20] have recently been a topic of controversy in certain bankruptcy cases[21] discussing the constitutionality of section 522(f)[22] of the Bankruptcy Reform Act of 1978.[23] Section 522(f) allows the debtor in bankruptcy to avoid judicial liens and certain nonpossessory non-purchase money[24] security interests to the extent these liens impair the debtor's interest in certain personal property that would qualify as an exemption under section 522(b).[25]

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5. The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt.

295 U.S. at 594-95.

[16]300 U.S. 440 (1937).

[17]*Id.* at 458-68.

[18]311 U.S 273 (1941).

[19]*Id.* at 278.

[20]299 U.S. 445 (1937) (upholding congressional authority to impair contractual obligations).

[21]*See* Rodrock v. Security Indus. Bank, 642 F.2d 1193 (10th Cir. 1981), *aff'g* Jackson v. Security Indus. Bank (*In re* Jackson), 4 Bankr. 293 (D. Colo. 1980), and Rodrock v. Security Indus. Bank (*In re* Rodrock), 3 Bankr. 629 (D. Colo. 1980); Malpeli v. Beneficial Fin. Co. (*In re* Malpeli), 7 Bankr. 508 (N.D. Ill. 1980); Oldham v. Beneficial Fin. Co. (*In re* Oldham), 7 Bankr. 124 (D.N.M. 1980); Hawley v. Avco Fin. Servs. (*In re* Hawley), 4 Bankr. 147 (D. Or. 1980).

[22]11 U.S.C. § 522(f) (Supp. IV 1980).

[23]Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C. §§ 101-151326 (Supp. IV 1980)) [hereinafter cited as the Bankruptcy Code or the Code].

[24]U.C.C. § 9-107 defines "purchase money security interest" as a security interest that is

taken or retained by the seller of the collateral to secure all or part of its price . . . or taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used.

[25]Types of exempt property consist mainly of household goods, personal items,

Numerous cases have arisen since section 522(f) was enacted which discuss the constitutionality of the provision when applied to security interests created prior to the enactment date of the Bankruptcy Code.[26] In various cases, the secured creditors have relied on the *Radford* decision as authority for the proposition that such retroactive lien avoidance is violative of the due process or takings clause of the fifth amendment.[27] The debtors, on the other hand, along with the United States as an intervenor in support of the provision,[28] have contended that the *Wright* decisions and the Supreme Court's decision in *Kuehner v. Irving Trust Co.*, have caused such an erosion of *Radford* that it is without vitality.[29]

A. The Radford *Decision*

The Supreme Court's decison in *Louisville Joint Stock Land Bank v. Radford*[30] was the first in a series of cases articulating the constitutional limitations on the power of Congress to enact uniform laws of bankruptcy.[31] The issue in *Radford* was whether the Frazier-Lemke Act[32] was consistent with the United States Constitution.[33]

In 1922 and 1924, Radford, an indebted farmer, mortgaged his farm to the Louisville Joint Stock Land Bank (the Bank) to secure

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crops, tools of the trade, and professionally prescribed health aids. *See* 11 U.S.C. § 522(f)(2)(A) to (C).

[26]There was nearly an 11 month lag between the Code's enactment date, November 6, 1978, and its effective date, October 1, 1979.

[27]The Court in *Radford* invalidated the Frazier-Lemke Act as a violation of the takings clause. 295 U.S. 555, 602 (1934). However, in Wright v. Vinton Branch of the Mountain Trust Bank, 300 U.S. 440 (1937), the Supreme Court described *Radford* as invalidating the Frazier-Lemke Act on due process grounds, rather than on an uncompensated takings basis. *Id.* at 457. This discrepancy has caused some controversy. *See, e.g.*, Note, *Lien Avoidance Under Section 522(f) of the Bankruptcy Code: Is Retrospective Application Constitutional?*, 49 FORDHAM L. REV., 615, 629 n.74 (1981); Harvard Note, *supra* note 7, at 1623, 1629. However, the majority of the bankruptcy courts relying on *Radford* to declare retroactive application of section 522(f) unconstitutional have characterized *Radford* as a "due process" decision. *See, e.g.*, cases cited note 21 *supra*. *But see* Armstrong v. United States, 364 U.S. 40, 44 (1960); Harvard Note, *supra* note 7, at 1630-32 (characterizing the *Radford* decision as relying on the takings clause).

[28]*E.g.*, Rodrock v. Security Indus. Bank, 642 F.2d 1193 (10th Cir. 1981).

[29]Rodrock v. Security Indus. Bank (*In re* Rodrock), 3 Bankr. 629, 631 (D. Colo. 1980).

[30]295 U.S. 555 (1934).

[31]Note, *Constitutional Limitations on the Bankruptcy Power: Chapter XII, Real Property Arrangements*, 52 N.Y.U. L. REV. 362, 384 (1977) [hereinafter cited as NYU Note].

[32]Frazier-Lemke Act, *supra* note 5.

[33]295 U.S. at 573.

loans of $9,000.[34] Subsequently during the Great Depression, Radford defaulted on convenants to pay taxes and to insure buildings on the farm, and also on his payments of interest and principal.[35] The Bank urged Radford to refinance his indebtedness, but he declined to do so.[36]

In June of 1933, the Bank filed a foreclosure suit and sought to appoint a receiver to take possession and control of the premises and to collect rents and profits.[37] The appointment of a receiver was denied, and the foreclosure suit was stayed upon request of a Conciliation Commissioner acting under the authority of section 75 of the Bankruptcy Act which Radford had sought to invoke. Radford attempted to effect a composition of his debts, but failed to obtain the necessary creditor acceptance.[38] Consequently, the state court, on June 30, 1934, ordered a foreclosure sale. However, the Frazier-Lemke Act was passed the preceding week, and Radford filed for relief, praying to be adjudicated a bankrupt and asking for relief under paragraphs 3 and 7 of subsection (s) of the Act.[39]

Paragraph 3 provided for the sale of the bankrupt estate back to the debtor with the consent of the lienholders. This paragraph also outlined a specific payment plan, with payments going to the credit of the lienholders as their interests appeared.[40] Paragraph 7 provided that if the mortgagee did not agree to the purchase outlined in paragraph 3, the debtor could require the court to:

> [S]tay all proceedings for a period of five years, during which five years the debtor shall retain possession of all or any part of his property, under the control of the court, provided he pays a reasonable rental annually for that part of the property of which he retains possession. . . .[41]

The Act specified that its provisions were to apply only to debts existing at the time the Act became effective.[42]

The Bank in *Radford* refused to consent to a sale of the farm under paragraph 3 of the Frazier-Lemke Act, and it objected to Rad-

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[34]*Id.*

[35]*Id.* at 573-74.

[36]*Id.* at 574.

[37]An express covenant contained in the *Radford* mortgage agreement provided for the appointment of a receiver in the event of default.

[38]A composition was a pay-back plan proposed by the debtor. The plan could be implemented only if accepted by both a majority of the number of creditors and any creditors who collectively held over half of the amount of indebtedness.

[39]295 U.S. at 575.

[40]Frazier-Lemke Act, *supra* note 5.

[41]*Id.* at 1291.

[42]*Id.*

ford retaining possession under the five-year stay provided by paragraph 7.[43] The federal court overruled the Bank's objections and went on to adjudicate Radford a bankrupt. Eventually, a court-appointed referee ordered, pursuant to paragraph 7, a five-year stay and left possession of the property with Radford subject to a stipulated rental payment.[44] The Bank appealed all of the referee's orders, but the orders were affirmed in both the federal district court[45] and the Sixth Circuit Court of Appeals.[46]

Throughout the lower court proceedings, and ultimately before the United States Supreme Court, the Bank argued that application of the Frazier-Lemke Act had resulted in an "oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to collateral security."[47] The Bank contended that the Act's solely retrospective application was violative of the fifth amendment.[48] Radford, on the other hand, contended that the Act was valid as a proper exercise of Congress' constitutional power to establish uniform bankruptcy laws.[49]

1. Protection of the Mortgagor Versus the Rights of the Mortgagee.—Before announcing its decision, the Court in *Radford* discussed the historic struggle of courts and legislators to protect mortgagors while preserving the rights of mortgagees. The Court noted several judicial and legislative remedies created to provide relief to mortgagors.[50] The fate of a mortgagor had evolved from the practice of strict foreclosure[51] to the remedy of redemption as well as to statutes allowing the mortgagor to retain possession after default until foreclosure proceedings were complete.[52] However, despite the increased leniency of these remedies, the mortgagee was always to be compensated for the default by full payment of the principal plus interest.[53]

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[43]295 U.S. at 576.

[44]*Id.* at 577-78.

[45]*In re* Radford, 8 F. Supp. 489 (W.D. Ky. 1934).

[46]Louisville Joint Stock Land Bank v. Radford, 74 F.2d 576 (6th Cir. 1935). Both the district and circuit courts also ruled in support of the constitutionality of the Frazier-Lemke Act.

[47]295 U.S. at 578.

[48]*Id.*

[49]*Id.* For a brief discussion of congressional bankruptcy power, *see generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-11, at 250-52 (1978).

[50]295 U.S. at 578-81.

[51]Under the doctrine of strict foreclosure the mortgagor had no right of redemption upon default.

[52]*See* Chaplin, *The Story of Mortgage Law*, 4 HARV. L. REV. 1 (1890) for a discussion of the history of mortgage law.

[53]*See generally* Feller, *Moratory Legislation*, 46 HARV. L. REV. 1061 (1933).

The Court noted that historically, a mortgagee was never compelled to forego his right to insist upon full payment before giving up the security. Even when public sale superseded strict foreclosure, the mortgagee was able to insure his right to full payment by bidding at the sale.[54] Furthermore, statutes providing for retroactive application for the relief of mortgagors had only passed constitutional scrutiny when they were found to preserve the mortgagee's right to full payment through application of the security.[55] The Court in *Radford* emphasized that not until the enactment of the Frazier-Lemke Act had a mortgagee been compelled to relinquish this right to payment in full.[56]

After careful analysis, the Court concluded that prior to this enactment, no federal bankruptcy provision had ever attempted to enlarge the rights and privileges of a mortgagor as against the mortgagee, yet the Frazier-Lemke Act forced the mortgagee to surrender either the possession or the title to the mortgaged property while part of the debt remained unpaid.[57]

2. Constitutionality of the Frazier-Lemke Act. — After rejecting a tenth amendment challenge, the Court focused on the retroactive aspect of the Frazier-Lemke Act. Noting that the Act was retrospective and as "applied purport[ed] to take away rights of the mortgagee in specific property,"[58] the Court reviewed the Act in light of the constitutional constraints of the fifth amendment.[59] Although the fifth amendment does not prohibit congressional impairment of contract rights,[60] the rights at issue in *Radford* were not of a contractual nature. Rather, the rights taken by application of the Frazier-Lemke Act were "substantive rights in specific property acquired by the Bank prior to the Act."[61] As such, these rights in property were within the scope of fifth amendment protection.[62]

To determine the nature of these substantive rights, the Court looked to the property law of Kentucky, the state in which the controversy arose. There was no provision under Kentucky law permit-

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[54]295 U.S. at 579-80.

[55]Home Bldg. and Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

[56]295 U.S. at 579.

[57]*Id.* at 581-82.

[58]*Id.* at 589. The Court indicated that prospective application would be permissible: "The power over property pledged as security after the date of the Act may be greater than over property pledged before. . . ." *Id.*

[59]*See* Harvard Note, *supra* note 7, at 1622-24, discussing Supreme Court decisions on bankruptcy power and the fifth amendment.

[60]*See generally* Hale, *The Supreme Court and the Contract Clause*, 57 HARV. L. REV. 852 (1944).

[61]295 U.S. at 590.

[62]*Id.* at 589.

ting a mortgagor to obtain a release of the mortgaged property before foreclosure without paying his debt in full. Thus, the Court concluded that the controlling purpose of Kentucky law was for the mortgaged property to be devoted primarily to the satisfaction of the debt thereby secured.[63]

However, according to the Court, the Frazier-Lemke Act had substituted only the following alternatives for the rights the mortgagee had acquired under state law:

1) The sale authorized by paragraph 3 "would result merely in a transfer of possession to the bankrupt for six years with an otherwise unsecured promise to purchase at the end of the period for a price less than the appraised value."[64] The mortgagee would probably lose his right to *full satisfaction* of the debt by accepting a price lower than the appraised value.[65]

2) If the sale was not agreed to by the mortgagee, paragraph 7 provides that the mortgagee is compelled

> to surrender to the bankrupt possession of the property for the period of five years . . . . During that period the bankrupt has an option to purchase the farm at any time at its appraised value. . . . The mortgagee is not only compelled to submit to the sale to the bankrupt, but to a sale at such time as the latter may choose. . . . Thus the mortgagee is afforded no protection if the request [for purchase by the bankrupt] is made when values are depressed to a point lower than the original appraisal.[66]

Having left the mortgagee with only these alternatives, the Frazier-Lemke Act was held to have taken from the Bank five substantive *property* rights recognized by the law of Kentucky[67] without just compensation.[68] Therefore, the Court declared the Frazier-Lemke Act void as a violation of the fifth amendment.[69]

III. The Refinement of *Radford* by Subsequent Case Law

In the recent bankruptcy cases on section 522(f) which discuss the vitality of the *Radford*[70] decision, debtors attacking the authori-

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[63]*Id.* at 590-91.

[64]*Id.* at 591.

[65]*Id.*

[66]*Id.* at 592-94.

[67]*Id.* at 594-95. For the five property interests *see* note 15 *supra*. *See also* NYU Note, *supra* note 31, at 384-85.

[68]*See* note 27 *supra*.

[69]295 U.S. at 602.

[70]Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935).

ty of *Radford* have contended that three United States Supreme Court cases decided after *Radford* have had the effect of eroding the precedential value of *Radford*.[71] The cases primarily relied upon are *Kuehner v. Irving Trust Co.*,[72] *Wright v. Vinton Branch of the Mountain Trust Bank*,[73] and *Wright v. Union Central Insurance Co.*[74]

A. Kuehner v. Irving Trust Company: *Distinguishing Between the Impairment of Contract and Property Rights*

The issue in the *Kuehner* case was whether subsection (b)(10) of section 77B of the Bankruptcy Act,[75] which limited a landlord's claim under an indemnity covenant contained in a lease to an amount not to exceed three years rent, was "obnoxious to the Fifth Amendment of the Constitution."[76] As in *Radford*, the case dealt with the impairment of rights under prior agreement between the parties.

In *Kuehner*, the petitioners had entered into a 20-year lease with the United Cigar Stores Company (United). Six years after entering the lease, United declared bankruptcy. Eventually, its trustee, Irving Trust Company, rejected its lease with Kuehner. Kuehner reentered and terminated the leasehold in accordance with the lease which contained a covenant by United to indemnify Kuehner against all loss of rent from such termination. Subsequently, section 77B was enacted and United filed its petition for reorganization. The petition was approved by the court.[77]

Upon review by the Supreme Court, Kuehner attacked section 77B as violative of the constitutional limits of the bankruptcy power of Congress as well as of the fifth amendment. The petitioners relied on a statement in the *Radford* decision to demonstrate the unlawfulness of the statute as an impermissible extension of congressional bankruptcy power.[78] Kuehner asserted that *Radford* stood as persuasive authority for the principle that a statute cannot preserve specific property for the debtor's future use but rather can only protect the bankrupt from liens on future acquisitions.[79] Kuehner asserted that section 77B provided for such a preservation of property and as such was unconstitutional.[80] The Court rejected

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[71] *See* cases cited note 21 *supra*.
[72] 299 U.S. 445 (1937).
[73] 300 U.S. 440 (1937).
[74] 311 U.S. 273 (1941).
[75] 11 U.S.C. § 207 (1976) (repealed 1978).
[76] 299 U.S. at 447.
[77] *Id.*
[78] *Id.* at 448-49.
[79] 299 U.S. at 451.
[80] *Id.*

this contention and found the statute to be within the discretionary power of Congress to effect an equitable distribution of the debtor's assets among his creditors.[81]

Nevertheless, the Court noted that Congress' power was subject to the due process guarantees of the fifth amendment.[82] Kuehner asserted that application of section 77B resulted in a destruction of his rights acquired under the lease. Kuehner conceded that these were not property rights as in *Radford*, but maintained nevertheless that the fifth amendment assured him some protection of these rights.[83] The Court, however, disagreed with this assertion and looked to *Radford* for authority. "As pointed out in [*Radford*] . . . there is, as respects the exertion of the bankruptcy power, a significant difference between a property interest and a contract, since the constitution does not forbid impairment of the obligation of the latter."[84] The Court in *Kuehner* concluded that section 77B was constitutional in that it was merely an impairment of contract rights under a lease and an impairment that was consistent with the fifth amendment and consonant with a fair, reasonable, and equitable distribution of the debtor's assets.[85]

The *Kuehner* case is easily distinguishable from *Radford* because it dealt with the contract rights of a creditor as opposed to a creditor's substantive rights in specific property.[86] Rather than representing a step "in the flight away from *Radford*"[87] *Kuehner* emphasizes the *Radford* principle that congressional bankruptcy power is subject to fifth amendment restraints serving to protect the property rights of a creditor.

B. Wright v. Vinton Branch of the Mountain Trust Bank: *Preserving Three of the Five Rights Enumerated in* Radford

The constitutionality of the Act, as amended after the *Radford* decision, was reviewed by the Supreme Court in *Wright v. Vinton Branch of the Mountain Trust Bank*.[88] In upholding the new amend-

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[81]*Id.*

[82]295 U.S. at 589.

[83]299 U.S. at 452. *Compare* Louisville Joint Stock Land Bank v. Radford, 295 U.S. at 589 ("[u]nder the bankruptcy power Congress may discharge the debtor's personal obligation because unlike the States, it is not prohibited from impairing the obligation of contracts") *with* Harvard Note, *supra* note 7, at 1626 & n.72.

[84]299 U.S. at 451-52.

[85]*Id.* at 452.

[86]Rodrock v. Security Indus. Bank (*In re* Rodrock) 3 Bankr. 629, 633 (D. Colo. 1980).

[87]*Id.*

[88]300 U.S. 440 (1937).

ed version, the Court noted that the Act, in general, met the guidelines of *Radford*.

Writing for the Court in *Vinton Branch*, as he had done in *Radford*, Justice Brandeis interpreted *Radford* as saying that the original Frazier-Lemke Act

> [A]s applied to mortgages given before its enactment . . . violated [the fifth] amendment since it effected a substantial impairment of the mortgagee's security. The opinion enumerates five important substantive rights in specific property which had been taken.
>
> It was not held that the deprivation of any one of these rights would have rendered the Act invalid, but that the effect of the statute in its entirety was to deprive the mortgagee of his property without due process of law.[89]

The Court then noted that the authors of the new Frazier-Lemke Act had made a specific effort to preserve the substantive rights discusssed in *Radford*.[90] The amended version of Frazier-Lemke specifically preserved three of the five enumerated rights: (1) the right to retain the lien until the indebtedness thereby secured is paid,[91] (2) the right to realize upon the security by a judicial public sale,[92] and (3) the right to protect the mortgagee's interest in the property by bidding at such sale whenever held.[93]

The Bank's major challenge to the constitutionality of the amended Act rested upon the contention that the Act denied the Bank the right to determine when a judicial sale of the land could be held, subject only to the court's discretion, and that the Act

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[89]300 U.S. 457. *See* note 27 *supra*.

[90]300 U.S. at 457. "In drafting the new Frazier-Lemke Act, its framers sought to preserve to the mortgagee all of these rights so far as essential to the enjoyment of his security." *Id.*

[91]Paragraph one of the amended Frazier-Lemke Act provided that the debtor's possession "under the supervision and control of the court," would be "subject to all existing mortgages, liens, pledges, or encumbrances" and that "all such existing mortgages, liens, pledges or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges or encumbrances shall be subject to the payment of the secured creditors as their interests may appear." Pub. L. No. 74-384, § 6, 49 Stat. 943 (1935) (repealed 1978).

[92]Paragraph three covered this right: "[U]pon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction." Pub. L. No. 74-384, § 6, 49 Stat. 944 (1935).

[93]Although the Act did not specifically preserve this right in its terms, the Court determined that committee reports and congressional explanations made it clear that the mortgagee was meant to have this right. 300 U.S. at 459. *See* H.R. REP. No. 1808, 74th Cong., 1st Sess. 1, 5, 6 (1935).

therefore violated the fifth amendment.[94] The Bank complained that the new Frazier-Lemke Act gave the debtor an absolute right to a three-year stay, and that such a stay deprived it of its right to determine when the property should be sold.[95]

The Court, however, was of the opinion that the stay was not an absolute one, and that the amended version of the Act gave the court sufficient discretion under paragraphs 2 and 3 to protect the mortgagee's interest.[96] The provisions of paragraph 3 clearly indicated that the stay was not absolute in that the court could order a sale any time it appeared that the debtor could not rehabilitate himself, or if the debtor failed to comply with the provisions of the Act.[97] Paragraph 2 gave the court the additional discretionary power to order additional payments on the principal owed by the debtor if these payments were necessary to protect the creditors from loss or to conserve the security.[98] In light of these protective safeguards, the Court concluded that the amended Act could pass constitutional muster without specifically reserving the creditor's right to determine the date of judicial sale.[99]

The Bank's final argument was that the Act denied the Bank "the right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have rents and profits collected by a receiver for the satisfaction of the debt."[100] The Bank contended that the mortgagor's retention of possession was less favorable than possession by a receiver or trustee. The Court rejected this argument, noting Congress' legitimate interest in aiding victims of the Depression, and pointing out that the mortgagor, vitally interested in the property, could better serve the interests of all concerned.[101] The Court upheld the constitutionality of the amended Frazier-Lemke Act, holding that it specifically preserved three of the five rights outlined in *Radford*,[102] and gave the court sufficient discretion to protect the mortgagee's interest under the other two.[103] As such, the Act did not unreasonably modify the Bank's rights.[104]

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[94]300 U.S. at 460.

[95]*Id.* The stay was provided for in paragraph 2 of section 75.

[96]300 U.S. at 461-64. *See* Harvard Note, *supra* note 7, at 1623.

[97]300 U.S. at 461.

[98]*Id.* at 461-62.

[99]*Id.* at 464.

[100]*Id.* at 465-66.

[101]*Id.* at 466.

[102]Rodrock v. Security Indus. Bank (*In re* Rodrock) 3 Bankr. 629, 633 (D. Colo. 1980).

[103]Harvard Note, *supra* note 7, at 1623.

[104]300 U.S. at 470.

The Court's holding in *Vinton Branch* could be viewed as a limitation upon *Radford* in that it upheld the constitutionality of the Frazier-Lemke Act although the Act only specifically preserved three of the five rights discussed in *Radford*. However, even under the *Radford* decision, the two rights that the amended Act purportedly failed to preserve had strictly been subject to the court's discretion,[105] and the Court in *Vinton Branch* purposefully noted that the amended Act gave the court sufficient discretion to protect the creditor's interest without specific reservation of these rights.[106] Moreover, in its redraft of the Frazier-Lemke Act, Congress reserved the mortgagee's right to retain his lien until full satisfaction of the debt owed, as well as the right to satisfaction of the debt through the secured property. "These are perhaps the quintessential rights of any secured creditor, and to say, therefore, that *Vinton Branch* represents an erosion of *Radford* is to disregard the significance of the rights available to secured creditors following the Frazier-Lemke amendment."[107]

C. Wright v. Union Central Life Insurance Company: *Limiting the Claim of a Secured Creditor*

Of the three cases discussed in this section, *Wright v. Union Central Life Insurance Co.*[108] is perhaps the only decision to significantly limit the *Radford* holding. As in *Vinton Branch*, *Union Central* dealt with the amended version of the Frazier-Lemke Act. The issue in the case was whether under paragraph 3 of the Frazier-Lemke Act, the debtor must be accorded an opportunity, at his own request, to redeem the mortgaged property at a reappraised value before the court could order a public sale.[109]

The controversy in *Wright* emerged from two seemingly inconsistent provisions contained in paragraph 3 of the amended Frazier-Lemke Act. The first stated that "upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a reappraisal of the debtor's property . . . and the debtor shall

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[105]295 U.S. at 594-95. The rights not preserved were

> 3. The right to determine when such sale shall be held, *subject only to the discretion of the court* . . .
>
> 5. The right to control meanwhile the property during the period of default, *subject only to the discretion of the court*, and to have the rents and profits collected by a receiver for the satisfaction of the debt.

Id. (emphasis added).

[106]300 U.S. at 464.

[107]3 Bankr. at 633.

[108]311 U.S. 273 (1940).

[109]*Id.* at 275-76.

then pay the value so arrived at into court."[110] The second provided that "[u]pon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction."[111]

The Court found reconciliation of these two remedies to be a simple task if performed with a careful eye on the purpose and function of the Frazier-Lemke Act which was to aid financially burdened farmers. The Court noted further that the Act provided safeguards to protect the mortgagees' rights, and emphasized that the constitutional limit of these rights was the extent of the value of the property.[112] Having determined that the creditors' rights were protected under the Act, the Court held that the Act and any ambiguities therein must be construed in favor of the debtor.[113] Thus, the lower court decision was reversed, and the debtor was afforded an opportunity to redeem the property prior to judicial sale.[114]

Clearly, the decision of the Court to limit the constitutional claim of a mortgagee to the extent of the value of the property represents a restriction of the *Radford* holding. However, *Union Central* does establish the general principle that a secured creditor is entitled to "the constitutional minimum" of having the value of his collateral applied to the satisfaction of his debt.[115] Arguably, this right to liquidation value was the underlying purpose of the "right to realize upon the security by a public judicial sale,"[116] which right was protected in *Radford* and preserved in *Vinton Branch*. Therefore, although *Union Central* is a refinement of the *Radford* rule, it still leaves intact the principle that liens may not be entirely destroyed and are to be preserved at least to the extent of the property's value.

D. Summary

The Supreme Court's decision in *Radford* declared retroactive application of the original Frazier-Lemke Act unconstitutional as an uncompensated taking of five specific property rights from secured

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[110]Pub. L. No. 74-384, § 6, 49 Stat. 943, 944 (1935) (repealed 1978).

[111]*Id.*

[112]311 U.S. at 278.

[113]*Id.* at 278-79.

[114]*Id.* at 281.

[115]*See* Regional Rail Reorg. Act Cases, 419 U.S. 102, 156 (1974) ("As long as creditors are assured fair value . . . for their properties, the Constitution requires nothing more."); Rosenberg, *Beyond* Yale Express: *Corporate Reorganization and the Secured Creditor's Rights of Reclamation*, 123 U. PA. L. REV. 509, 524-25, 528 (1975).

[116]300 U.S. at 458; 295 U.S. at 594.

creditors.[117] The *Radford* case also stands for the general rule that a substantive right in specific property cannot be *substantially* impaired by legislation enacted after the right has been created.[118] Although the subsequent Supreme Court decisions in *Kuehner*, *Vinton Branch*, and *Union Central* have restricted the number and nature of substantive rights to be protected, they have left intact the general *Radford* principle that a secured creditor has the right to resort to the specific property, to the extent of its value, for satisfaction of his claim.[119] This right of satisfaction cannot be destroyed by retroactive legislation.[120]

IV. *RADFORD* AS APPLIED TO SECTION 522(f)(2): RETROACTIVE LIEN AVOIDANCE OF NONPOSSESSORY NON-PURCHASE MONEY SECURITY INTERESTS AS UNCONSTITUTIONAL

In a number of recent cases dealing with the constitutionality of section 522(f) of the Bankruptcy Code, secured creditors have relied on the decision by the Supreme Court in *Radford*, as refined by subsequent cases, as authority for the proposition that retroactive lien avoidance under section 522(f)(2) is violative of the fifth amendment.[121] This section will demonstrate that the *Radford* case is both applicable and controlling precedent which mandates that retroactive application of section 522(f)(2) be declared unconstitutional.

A. Section 522(f)(2)—Retroactive Lien Avoidance

Section 522(f)(2) of the Bankruptcy Code provides:

> Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—
> . . . (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

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[117]295 U.S. 555 (1934).

[118]3 Bankr. at 632.

[119]*See* Harvard Note, *supra* note 7, at 1623.

[120]For a general discussion of the continuing precedential value of *Radford see* Gifford v. Thorp Finance (*In re* Gifford) No. 81-1174 (7th Cir. Jan. 21, 1982).

[121]*See* note 21 *supra*.

> 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.[122]

Briefly stated, the provision seeks to take from secured creditors all rights they possess under nonpossessory, nonpurchase-money interests in the stated types of property regardless of when these liens were created.[123]

Bankruptcy courts dealing with section 522(f) have declared almost unanimously that it was the intent of Congress that the provision be applied both retroactively and prospectively to allow debtors to avoid liens created prior to the enactment date of the Bankruptcy Code.[124] Most bankruptcy courts are also in accord that section 522(f)(2) can be applied to security interests created during the gap period between the enactment date and effective date of the Code. The rationale of such decisions is that the Code's enactment gives creditors notice that their security interests are avoidable under section 522(f)(2).[125] Yet, no such notice is given to creditors who obtain a security interest prior to the Code's enactment. Consequently, the issue arises whether retroactive application of section 522(f)(2), affecting security interests created prior to the Code's enactment date, is consistent with the Constitution.

B. Section 522(f)(2) and the Frazier-Lemke Act: A Comparison

The similarities between retroactive application of the original Frazier-Lemke Act and that of section 522(f)(2) are immediately apparent. Both provisions were enacted to rehabilitate debtors at the

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[122]11 U.S.C. § 522(f)(2) (Supp. IV 1980).

[123]Rodrock v. Security Indus. Bank, 642 F.2d at 1197 (10th Cir. 1981) ("a complete taking of the secured creditors property interests").

[124]*See, e.g., id. Contra,* Malpeli v. Beneficial Fin. Co. (*In re* Malpeli), 7 Bankr. 508 (N.D. Ill. 1980). However, in a recent decision, the Seventh Circuit held that in order to avoid the constitutional question concerning retroactive application of section 522(f)(2), the court would construe the statute to apply prospectively only. Gifford v. Thorp Fin. Corp., (*In re* Gifford) No. 81-1174 (7th Cir. Jan. 21, 1982). The court in *Gifford* also noted the continuing vitality of the *Radford* decision. *Id.* slip op. at 7.

[125]*See, e.g.*, Seltzer v. General Fin. Corp. (*In re* Seltzer), 7 Bankr. 80, 82 (D. Colo. 1980).

expense of secured creditors.[126] Also, both statutes call for an impairment of secured creditors' interests in specific property, which were created prior to their respective enactment dates.[127]

The differences in the provisions are equally clear. The Frazier-Lemke Act affected security interests in real property, while section 522(f)(2) deals merely with personal property. This distinction is inconsequential for purposes of constitutional analysis.[128]

The extent of the impairment caused by the two statutes is substantially different, though the Frazier-Lemke Act was held by the Supreme Court in *Louisville Joint Stock Land Bank v. Radford* to have taken five specifc property rights from a mortgagee.[129] Section 522(f)(2), however, amounts to a "complete extinction" of the creditors' security interests in the collateral.[130] Yet, this difference is not a basis for distinction of the constitutional ramifications of each provision. Instead, it serves to emphasize that the constitutional restrictions placed on the Frazier-Lemke Act by the *Radford* decision must be applied to section 522(f)(2).

C. Application of Radford *to Section 522(f)(2)*

The *Radford* decision represents the proposition that secured creditors' rights in specific property cannot be substantially impaired by legislation enacted after the right has been created.[131] A secured creditor has the right, at minimum, to the application of the value of the collateral to the satisfaction of his debt.[132]

Retroactive application of section 522(f)(2) provides for total lien avoidance by the debtor, effectively destroying the security interests of the creditor which had vested prior to the statute's enactment date, including the right to liquidation value.[133] Recently, the Supreme Court has noted probable jurisidiction of *Rodrock v.*

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[126]3 Bankr. at 634 ("while the purported goal seems proper in light of 'fresh start' objectives . . . such an objective cannot be achieved at the expense of creditors. . . ."); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 601 (1934) ("The Frazier-Lemke Act as applied has taken from the Bank without compensation, and given to Radford, rights in specific property which are of substantial value").

[127]The original Frazier-Lemke Act, as applied, took five specific rights in the mortgaged property from the mortgagee. *See* note 15 *supra*. Section 522(f) permits complete avoidance of the secured creditors' lien in the secured property. *See* text accompanying notes 122-23 *supra*.

[128]*See* Rodrock v. Security Indus. Bank (*In re* Rodrock) 3 Bankr. 629, 634 (D. Colo. 1980).

[129]295 U.S. 555, 594-95 (1934). *See* note 15 *supra* for the five property rights.

[130]Oldham v. Beneficial Fin. Co. (*In re* Oldham), 7 Bankr. 124, 127 (D.N.M. 1980).

[131]3 Bankr. at 632.

[132]*See* note 115 *supra*.

[133]3 Bankr. at 633 ("total deprivation of substantive rights in specific property").

Security Industrial Bank,[134] in which the Tenth Circuit Court of Appeals affirmed a Colorado bankruptcy court decision which held that under *Radford*, "§ 522(f)(2) could not be constitutionally applied to a creditor's security interest which came into being prior to the enactment date of the [Bankruptcy] Reform Act."[135] The lower Colorado court characterized *Radford* as "a venerable and vigorous sentinel of due process" which "teaches us that an objective [of bankruptcy law] cannot be achieved at the expense of creditors whose rights have attached prior to the enactment of the law."[136] Along with *Rodrock*, bankruptcy decisions from other states have concluded that as determined by *Radford*, the fifth amendment will not permit the "abrogation of creditors' vested rights in specific property" caused by retroactive application of section 522(f)(2).[137] They have recognized the continuing vitality of the Supreme Court's decision and have respected its constitutional guidelines. In a recent opinion, the Seventh Circuit discussed *Radford*, the subsequent cases, including *Rodrock*, and agreed that under the continuing vitality of *Radford*, retroactive application of section 522(f) would be unconstitutional.[138] However, the court avoided the constitutional ramifications of *Radford* by declaring that section 522(f) was to apply prospectively only.[139]

D. The Divergent Trend: Cases Upholding the Constitutionality of Retroactive Application of Section 522(f)

In opposition to the case law invalidating retroactive application of section 522(f)(2) there exists a line of cases upholding the constitutionality of such application.[140] Rather than focusing on the rights of secured creditors, the courts upholding retroactive application have concentrated on the congressional purpose of section 522(f)(2) to pro-

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[134]642 F.2d 1193 (10th Cir.), *prob. juris. noted sub nom.* United States v. Security Indus. Bank, 50 U.S.L.W. 3479 (1981).

[135]3 Bankr. at 633.

[136]*Id.*

[137]*See* cases cited note 21 *supra*.

[138]Gifford v. Thorp Fin. Corp. (*In re* Gifford), No. 81-1174, slip op. at 7, 8 (7th Cir. Jan. 21, 1982).

[139]*Id.* slip op. at 11-12.

[140]*See* Campbell v. Avco Fin. Servs. (*In re* Campbell), 8 Bankr. 425 (S.D. Ohio 1981); Sweeney v. Pacific Fin. Co. (*In re* Sweeney), 7 Bankr. 814 (E.D. Wis. 1980); *In re* Goodrick, 7 Bankr. 590 (S.D. Ohio 1980); Fisher v. Liberty Loan Corp. (*In re* fisher), 6 Bankr. 206 (N.D. Ohio 1980); Curry v. Associates Fin. Servs. (*In re* Curry), 5 Bankr. 282 (N.D. Ohio 1980); Centran Bank v. Ambrose (*In re* Ambrose), 4 Bankr. 395 (N.D. Ohio 1980); Rutherford v. Associates Fin. Servs. (*In re* Rutherford), 4 Bankr. 510 (S.D. Ohio 1980).

tect needy debtors and on the reasonableness of the means chosen to effect that purpose.[141] Several courts have held the provision to be constitutional under the fifth amendment because it is not "so grossly arbitrary and unreasonable as to be incompatible with fundametal law."[142] Moreover, other decisions "have fashioned novel constitutional principles" restricting fifth amendment protection to security interests in property that a creditor would accept instead of payment.[143]

A representative example of cases upholding the constitutionality of section 522(f) is *Fisher v. Liberty Loan Corp.*[144] In *Fisher*, an Ohio bankruptcy court recognized the *Radford* rule, stating: "It has been held that a violation of the fifth amendment due process clause occurs when the retrospective application of a bankruptcy statute destroys vested property rights."[145] The court in *Fisher* discussed the nature of the property rights held to have been taken by the Frazier-Lemke Act in *Radford* and determined that these rights arose (1) from the mortgagee's belief that the secured property was worth the amount of the loan, and (2) from the mortgagee's willingness to take the secured property in lieu of the debt in case the debt was not paid.[146] On the basis of these two factors, the *Fisher* court distinguished the security interest protected in *Radford* from the interest under consideration by summarily concluding that in the case of non-purchase money security interests, the secured creditor neither believes the collateral is worth the amount of the debt nor is he willing to repossess in case of default.[147] Consequently, the court concluded that such security interests could be retroactively impaired without violating the fifth amendment.[148]

1. The Fisher *Court's Reliance on Congressional Findings.*—The court's conclusion was based in part on a congressional report which determined that non-purchase money security interests in a borrower's household goods amounted to little more than a device with which a secured creditor could threaten repossession as a means of collecting payment.[149] According to the report,

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[141]Harvard Note, *supra* note 7, at 1620.

[142]*See, e.g.*, Fisher v. Liberty Loan Corp. (*In re* Fisher), 6 Bankr. 206 (N.D. Ohio 1980); Curry v. Associates Fin. Servs. (*In re* Curry), 5 Bankr. 282 (N.D. Ohio 1980); Centran Bank v. Ambrose (*In re* Ambrose), 4 Bankr. 395 (N.D. Ohio 1980).

[143]Harvard Note, *supra* note 7, at 1620 n.33.

[144]6 Bankr. 206 (N.D. Ohio 1980).

[145]*Id.* at 211.

[146]*Id.* at 212 (*citing In re* Carter, 56 F. Supp. 385, 388 (1944).

[147]6 Bankr. at 212-13.

[148]*Id.* at 214, *contra*, Gifford v. Thorp Fin. Corp., No. 81-1174, slip op. at 10-11.

[149]H.R. Rep. No. 595, 95th Cong., 2d Sess. 127, *reprinted in* [1978] *U.S. Code Cong. & Ad. News* 5963, 6088.

this type of collateral has little resale value and a secured creditor would rarely repossess. Rather, the creditor would prefer to leave the goods in the debtor's possession so as to afford himself collection leverage through threats of repossession.[150] Therefore, to insure the debtor's "fresh start" and to eliminate the "unfair advantage" of the secured creditor with a non-purchase money security interest in the debtor's property, Congress enacted section 522(f).[151]

Although the analysis of the *Fisher* court and of Congress may describe creditor practices in any given case, the generality and apparent conclusiveness of their findings may be misleading. Both discussions distinguish *Radford* and justify retroactive application of section 522(f) on the grounds that in the case of a non-purchase money security interest in household goods: (1) the right to repossession is little exercised because such secured property has little resale value and (2) the right to repossession is used primarily as a means of affording the creditor leverage by which he can obtain payment through threats of repossession.[152] These determinations were made essentially from the debtor's viewpoint, with the predictable consequence of diminishing the importance of the creditor's rights so as to avoid application of *Radford* and the fifth amendment.

There are several defects in such a one-sided analysis. Although the resale value of section 522(f) property may be little, or even less than the debt it secures, the retroactive taking of a security interest covering this property is still subject to constitutional scrutiny.[153] The value of the collateral is not determinative of the worth of the creditor's right. Property need not have a high dollar value for an interest in the property to be worthy of fifth amendment protection.[154]

The fact that non-purchase money security interests are taken primarly to obtain payment does not make these interests distinct from other property rights for purposes of the fifth amendment.[155] Creditors often take security interests as insurance of repayment rather than as a substitute. In this sense, the security interests are commercially valuable to creditors in that leverage guaranteeing repayment is provided. The transaction is also commercially

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[150]*Id.*

[151]6 Bankr. at 212-13; H.R. REP. NO. 595, *supra* note 149, at 127.

[152]For a similar discussion, *see* Rodrock v. Security Indus. Bank (*In re* Rodrock), 3 Bankr. 629, 634 (D. Colo. 1980).

[153]Gifford v. Thorp Fin. Corp. (*In re* Gifford), No. 81-1174, slip op. at 10, 11 (7th Cir. Jan. 21, 1982).

[154]*Id.*

[155]*Id.*

valuable to the debtor because of his inability to obtain a loan without some sort of security.

The determinations made by the congressional report and the court in *Fisher* attempted to cast suspicion on the nature of non-purchase money security interests, yet neither denied the existence of these interests as a vested property interest recognized by law. Characterizing these legally sanctioned security interests as "oppressive"[156] to the debtor does not amount to an abrogation of the secured creditor's property rights.[157] Such a characterization does not entitle Congress to retroactively take those rights. When property rights granted to the creditor by law are taken retroactively, principles of due process embodied in case law such as *Radford* are controlling: substantive rights in specific property cannot be taken by retroactive bankruptcy legislation without violating the fifth amendment.[158]

2. The Fisher *Court's Reliance on Non-Bankruptcy Case Law.*—In its decision to uphold retroactive application of section 522(f), the court in *Fisher* also relied on the Supreme Court's decision in *Usery v. Turner Elkhorn Mining Co.*[159] The *Usery* cases involved federal legislation which required coal mine operators to aid the government in compensating coal miners who had contracted black lung disease.[160] The operators were willing to bear the burden for compensating present and future employees but they objected to the requirement that they aid employees who had terminated their employment prior to the passage of the Act.[161] The operators asserted that this retroactive aspect violated their rights of due process. Nevertheless, the Court upheld the legislation "as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor . . . ."[162] The Court in *Usury* also held "that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations."[163]

The *Usery* decision and the legislation at issue in that case are distinguishable from cases concerning section 522(f) for several reasons. In *Usery*, the Act at issue was based on Congress' competence to allocate the interlocking duties and rights of employers

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[156]6 Bankr. at 214, *quoting In re* Beck, 4 Bankr. 661, 664 (D.C. Ill. 1980).
[157]3 Bankr. at 633-34.
[158]*Id.*
[159]428 U.S. 1 (1976).
[160]*Id.* at 5.
[161]*Id.* at 15.
[162]*Id.* at 18.
[163]*Id.* at 16.

and employees.[164] The Court emphasized the nature of the situation before it, a cost spreading plan within an employee-employer relationship, which could indicate a restriction on the Court's analysis to similar situations. The labor-management sphere is one in which the federal role characteristically involves altering the rights and duties and contractual expectations of parties.[165] If so, the *Usery* decision would not be applicable in cases involving section 522(f) such as *Fisher*.

A further distinction between the *Usery* case and section 522(f) situations is the nature of the affected interests held by the complaining party. In *Usery* the "settled expectations" referred to by the Court were the coal mine operators' beliefs that they had incurred no liability for the disability of former employees.[166] The interest they sought to protect was past profits which the operators thought to be free from any obligation of compensation. Yet because the coal mine operators had profited from their former employees' labor during the time the employees incurred their diability, both Congress and the Court felt it rational that they share the cost.[167] In a section 522(f) case, however, the secured party is not complaining merely because he thought he had escaped some liability. A secured creditor is challenging the complete extinction of a vested property interest granted to him by state law.[168] Thus, the interest of a secured creditor is more than a settled expectation, it is a property right worthy of fifth amendment protection.[169]

3. The Fisher *Court's Discussion of Fifth Amendment Principles.*—In its decision, the *Fisher* court also discussed the general rule that for a law to violate the fifth amendment it "must be so grossly arbitrary and unreasonable as to be incompatible with fundamental law."[170] The court held that the rehabilitative purpose behind section 522(f) and the effect of its aid to the debtor demonstrated the reasonableness of the Act.[171] Yet, once again, the court adopted a rather limited view, discussing creditors' rights only to the extent that the creditors were not denied due process and avoiding the question of whether a taking had occurred.[172]

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[164]*Id.* at 15.
[165]*See, e.g.*, J. I. Case Co. v. NLRB, 321 U.S. 332, 338 (1944).
[166]428 U.S. at 17.
[167]*Id.* at 19.
[168]Oldham v. Beneficial Fin. Co. (*In re* Oldham), 7 Bankr. 124, 127 (D.N.M 1980).
[169]3 Bankr. at 634.
[170]6 Bankr. at 213.
[171]*Id.* at 214.
[172]*Id. See also* Note, *Bankrupcty—Section 522(f) of the 1978 Code—Constitu-*

Nevertheless, it is questionable that an act which causes the total deprivation of a substantive property right created prior to its enactment date is not unreasonable. Although the motivation behind or goal of the statute may be reasonable, the means chosen to carry it out create inequity and constitutional difficulty.[173] As stated in *Radford*, such a goal cannot be achieved at the expense of creditors whose property rights have been created prior to the enactment of the law.

4. Summary of the "Upholding" Cases.—The court in *Fisher*, as well as other bankruptcy courts upholding retrospective application of section 522(f), have overlooked the precedential value of the *Radford* decision by minimizing the value of creditors' rights and concentrating on the needs of debtors and on congressional power in non-bankruptcy situations. "Theses [sic] cases, did not face squarely the impact of *Radford*, and the cases following it when applied to § 522(f)."[174] In its failure to recognize the protection afforded to a secured creditor as enunciated in *Radford*, the constitutional analysis of those courts approving retroactive lien avoidance under section 522(f) is incomplete.

V. Conclusion

As this Note has demonstrated, the Supreme Court's decision in *Louisville Joint Stock Land Bank v. Radford*[175] has withstood both the passage of time and judicial refinement.[176] Its directive is inescapable: Congressional bankruptcy power is subject to the fifth amendment, and bankruptcy legislation which substantially impairs pre-existing security interests is unconstitutional. Retroactive application of § 522(f)(2) of the Bankruptcy Code does more than merely impair secured claims; it provides for their complete extinction.[177] Such retroactive application of section 522(f)(2) should be declared invalid.

Jane E. Magnus

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tionality of Its Application to Security Interest Pre-Drafting Enactment of the Code, 27 Wayne L. Rev. 1281, 1289-98 (1981).

[173] 3 Bankr. at 633-34.

[174] Malpeli v. Beneficial Fin. Co. (*In re* Malpeli), 7 Bankr. 508, 512 (N.D. Ill. 1980).

[175] 295 U.S. 555 (1935).

[176] The continuing vitality of *Radford* has been recognized by the Supreme Court as recently as 1960. *See* Armstrong v. United States, 364 U.S. 40 (1960). Also, the Senate acknowledged the still current principles of *Radford* in the 1978 Senate Report concerning the Bankruptcy Code when it noted the "fifth amendment protection of property interests as enunciated by the Supreme Court," citing *Radford*. *See* S. Rep. No. 989, 95th Cong., 2d Sess. 49, *reprinted in* [1978] U.S. Code Cong. & Ad. News.

[177] Oldham v. Beneficial Fin. Co. (*In re* Oldham) 7 Bankr. 124, 127 (D.N.M. 1980).