Determining the Constitutionality of the Bankruptcy Code "Opt-Out" Provision: A Critical Look at *In re Sullivan*

I. Introduction

Although every federal bankruptcy law has allowed exemptions of some kind to bankrupt debtors,[1] the Bankruptcy Reform Act of 1978 (the Code)[2] represents a substantial departure from previous bankruptcy legislation regarding exemptions.[3] The Code's exemption section[4] allows a debtor to choose between the specific exemptions provided in the Code[5] and the exemptions allowed under state, local, and nonbankruptcy federal law,[6] but the Code makes this choice sub-

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[1]In general, exempted property is that property which the law allows a debtor to retain free from the claims of creditors. *See* 31 Am. Jur. 2d *Exemptions* § 1 (1967).

[2]Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101-151326 (Supp. IV 1980). The Code became effective on October 1, 1979. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 402(a), 92 Stat. 2549, 2682.

[3]The four bankruptcy laws which preceded the Code are the Bankruptcy Act of 1898, ch. 451, 30 Stat. 544 (previously codified at 11 U.S.C. §§ 1-1255 (1976) (repealed 1978)); the Bankruptcy Act of 1867, ch. 176, 14 Stat. 517 (repealed 1879); the Bankruptcy Act of 1841, ch. 9, 5 Stat. 440 (repealed 1843); and the Bankruptcy Act of 1800, ch. 19, 2 Stat. 19 (repealed 1803).

[4]11 U.S.C. § 522 (Supp. IV 1980). Section 522 provides in pertinent part:

> (b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate either—
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> (1) property that is specified under subsection (d) of this section, *unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize*; or, in the alternative,
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> (2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than at any other place; and
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> (B) any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest . . . is exempt from process under applicable nonbankruptcy law.

Id. (emphasis added). Section 541, referred to in subsection 522(b), lists the property of the debtor which is included in the estate placed in the control of the bankruptcy trustee. *Id.* § 541.

[5]The exemptions in subsection 522(d) are based on those provided in the Uniform Exemptions Act (U.E.A.), promulgated by the National Conference of Commissioners on Uniform State Laws. H.R. Rep. No. 595, 95th Cong., 1st Sess. 361, *reprinted in* [1978] U.S. Code Cong. & Ad. News 5963, 6317 [hereinafter cited as House Report].

[6]11 U.S.C. § 522(b)(2)(A) (Supp. IV 1980). *See* note 4 *supra*. Examples of nonbankruptcy federal exemptions include: Longshoremen's and Harbor Workers' Compensation Act death and disability benefits, 33 U.S.C. § 916 (1976); special pensions paid to

ject to one very important prohibition. Under the so-called "opt-out" provision of the Code,[7] a state may deny to its domiciliaries the specific federal exemptions provided in the Code. Therefore, a debtor domiciled in a state which has opted out is limited in a federal bankruptcy proceeding to the exemptions allowed under state, local, and nonbankruptcy federal law.[8]

The opt-out provision of the Code raises two serious constitutional issues. The first issue raised is whether the Code satisfies the constitutional requirement that federal bankruptcy legislation must be "uniform . . . throughout the United States."[9] Because the opt-out provision allows each state to decide that only the various and diverse state exemptions will be available to its domiciliaries in

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winners of the Congressional Medal of Honor, 38 U.S.C. § 3101(a) (1976); social security payments, 42 U.S.C. § 407 (1976); injury or death compensation payments from war risk hazards, 42 U.S.C. § 1717 (1976); federal homestead lands on debts contracted before issuance of the patent, 43 U.S.C. § 175 (1976); Railroad Retirement Act annuities and pensions, 45 U.S.C. § 231m (1976); veterans benefits, 45 U.S.C. § 352(e) (1976); wages of fishermen, seamen, and apprentices, 46 U.S.C. § 601 (1976). *See* HOUSE REPORT, *supra* note 5, at 360.

[7]11 U.S.C. § 522(b)(1) (Supp. IV 1980). *See* note 4 *supra*.

[8]To date, thirty-two states have taken this step. *See* ALA. CODE § 6-10-11 (Supp. 1981); ARIZ. REV. STAT. ANN. § 33-1133 (Supp. 1982); ARK. STAT. ANN. § 36-210 (Supp. 1981); COLO. REV. STAT. § 13-54-107 (Supp. 1981); DEL. CODE ANN. tit. 10, § 4914 (Supp. 1981); FLA. STAT. ANN. § 222.20 (West Supp. 1981); GA. CODE ANN. § 51-1601 (Supp. 1981); IDAHO CODE § 11-609 (Supp. 1981); ILL. ANN. STAT. ch. 52, § 101 (Smith-Hurd Supp. 1981); IND. CODE § 34-2-28-0.5 (Supp. 1981); IOWA CODE § 627.10 (Supp. 1982); KAN. STAT. ANN. § 60-2312 (Supp. 1981); KY. REV. STAT. § 427.170 (Supp. 1980); LA. REV. STAT. ANN. § 13:3881(B) (West Supp. 1981); Act of June 5, 1981, ch. 431, § 2, 1981 Me. Legis. Serv. No. 3 at 886 (to be codified at ME. REV. STAT. ANN. tit. 7, § 4421); MD. CTS. & JUD. PROC. CODE ANN. § 11-504(g) (Supp. 1981); H.B. 495, 1981 Mont. Laws (effective Oct. 1, 1981); NEB. REV. STAT. § 25-15, 105 (Supp. 1980); NEV. REV. STAT. § 21.090(3) (1982); N.H. REV. STAT. ANN. § 511:2-a (Supp. 1981); Act of June 2, 1981, ch. 490, § 1, 1981 N.C. Adv. Legis. Serv. No. 6 at 20 (to be codified at N.C. GEN. STAT. § IC 1601(f)); N.D. CENT. CODE § 28-22-17 (Supp. 1981); OHIO REV. CODE ANN. § 2329.662 (Page 1981) (repealed effective Sept. 28, 1983, unless reenacted by subsequent legislation); OKLA. STAT. ANN. tit. 31, § 1(B) (West Supp. 1981); OR. REV. STAT. § 23.305 (1981); S.C. CODE § 15-41-425 (Supp. 1981); S.D. CODIFIED LAWS ANN. § 43-45-13 (Supp. 1981); TENN. CODE ANN. § 26-2-112 (1980); UTAH CODE ANN. § 78-23-15 (Supp. 1981); VA. CODE § 34-3.1 (Supp. 1981); W. VA. CODE § 38-10-4 (Supp. 1981); WYO. STAT. § 1-20-109 (Supp. 1981). In addition, California has used its opt-out authority to restrict a husband and wife to the same exemption provisions (either state or federal) in a joint case. CAL. CIV. PROC. CODE § 690(b) (West Supp. 1981).

Illinois and Tennessee have had their opt-out statutes invalidated because they conflict with section 522 of the Code and therefore are void under the supremacy clause of the Constitution. Bradshaw v. Beneficial Fin. Co. (*In re* Balgemann), 16 Bankr. 780 (Bankr. N.D. Ill. 1982); Rhodes v. Stewart (*In re* Rhodes), 14 Bankr. 629 (Bankr. M.D. Tenn. 1981). These cases are discussed in the text accompanying notes 166-72 *infra*.

[9]U.S. CONST. art. I, § 8, cl. 4. "The Congress shall have Power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." *Id.*

bankruptcy, the Code's satisfaction of the uniformity requirement has been challenged in numerous bankruptcy and district court cases.[10] The second issue raised by the opt-out provision is the question of unlawful delegation. The Constitution prohibits Congress from delegating to the states its essential legislative functions.[11] Because the opt-out provision specifically authorizes the states to decide whether to prohibit the federal exemptions, the opt-out provision has been attacked as an unlawful delegation by Congress of its power to enact bankruptcy laws.[12]

In *In re Sullivan*,[13] decided May 19, 1982, the Court of Appeals for the Seventh Circuit became the first appellate court to address these two constitutional issues. In *Sullivan*, the appellate court considered two consolidated appeals.[14] In both cases, the debtors had attempted to claim the specific exemptions provided in the Code.[15] The trustees objected because the Illinois opt-out statute[16] restricted the debtors to the exemptions provided by Illinois law.[17] The bankruptcy judges sustained the trustees' objections, and the debtors appealed. On appeal, the debtors argued that the opt-out provision violates the uniformity requirement of the bankruptcy clause of the Constitution and constitutes an unlawful delegation by Congress of its bankruptcy power to the states.[18] The appellate court rejected both arguments and affirmed the lower courts' decisions.[19]

This Note criticizes the *Sullivan* court's reliance on the Supreme

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[10]*See, e.g.*, Kosto v. Lausch (*In re* Lausch), 16 Bankr. 162 (M.D. Fla. 1981); *In re* Vasko, 6 Bankr. 317 (Bankr. N.D. Ohio 1980).

[11]The Supreme Court has determined that two constitutional provisions, taken together, require this prohibition. Article I, section 1 of the United States Constitution provides that, "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ." Article I, section 8, clause 18 of the United States Constitution states that Congress is authorized "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its general powers. *See* Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1934).

[12]*See, e.g.*, Kosto v. Lausch (*In re* Lausch), 16 Bankr. 162 (M.D. Fla. 1981); Rhodes v. Stewart (*In re* Rhodes), 14 Bankr. 629 (Bankr. M.D. Tenn. 1981).

[13]680 F.2d 1131 (7th Cir. 1982).

[14]The decision of the Bankruptcy Court for the Central District of Illinois in *In re* Sullivan, 11 Bankr. 432 (Bankr. C.D. Ill. 1981), was appealed directly to the court of appeals under an agreement with the United States pursuant to 28 U.S.C. § 1293(b). 680 F.2d at 1132. The other case, *In re* West, No. 81-1084 (C.D. Ill. 1981), was appealed from the District Court for the Central District of Illinois, which had affirmed, without opinion, the decision of the bankruptcy court. 680 F.2d at 1132.

[15]*See* 680 F.2d at 1132.

[16]ILL. ANN. STAT. ch. 52, § 101 (Smith-Hurd 1981).

[17]680 F.2d at 1132.

[18]*Id.* at 1131-32.

[19]*Id.* at 1138.

Court's decision in *Hanover National Bank v. Moyses*[20] to find that the Code meets the constitutional requirement of uniformity. In *Sullivan*, the court interpreted *Moyses* as adopting the nondiscrimination test of uniformity which was enunciated in earlier Supreme Court cases construing the revenue clause of the Constitution.[21] This Note argues that *Moyses* did not adopt the nondiscrimination test of uniformity, but adopted a uniformity test requiring equality of exemptions in and out of bankruptcy. Further, this Note argues that although the opt-out provision of the Code satisfies the nondiscrimination test of uniformity, it does not satisfy the test requiring equality of exemptions in and out of bankruptcy. Therefore, if *Moyses* is controlling as to the issue of the Code's uniformity, then the opt-out provision must be held unconstitutional.

This Note also criticizes the *Sullivan* court's resolution of the unlawful delegation issue. This Note argues that the unlawful delegation issue should be resolved by the application of a two-step analysis. The courts must determine first whether a delegation exists. If so, the courts must then determine whether the delegation is lawful. When this two-step analysis is applied to the opt-out provision, this Note concludes that the opt-out provision should be construed as a lawful delegation of bankruptcy power by Congress to the states.

Finally, this Note briefly discusses the consequences of the delegation issue for the constitutionality of state exemption laws under the supremacy clause.

II. BACKGROUND

A full understanding of the opt-out provision and the attendant constitutional questions it raises necessitates an examination of the history of the Code and the policy considerations which prompted its enactment.

The Code's predecessor, the Bankruptcy Act of 1898,[22] allowed debtors in bankruptcy proceedings the exemptions prescribed by the laws of their domiciliary states.[23] By allowing the debtor to claim

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[20]186 U.S. 181 (1902).

[21]*See* notes 42-57 *infra* and accompanying text.

[22]Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1978).

[23]Section 6 of the 1898 Act provided:

> This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the United States or by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months immediately preceding the filing of the petition, or for a longer portion of such six months in any other State.

Id. § 6, *as amended by* Chandler Act, ch. 575, § 6, 52 Stat. 840, 847 (1938).

exemptions and by discharging the debtor from his financial obligations, the 1898 Act sought to grant the debtor an economic fresh start.[24] In the years following the enactment of the 1898 Act, the United States changed from a predominately rural to a more urban society. Many states' exemption statutes, however, failed to change with the times. As a result, the efficacy of the generally static state exemptions to provide a realistic economic fresh start, particularly to urban dwellers, dwindled.[25] In addition, there were vast differences among the states' exemption statutes. While some states provided very generous exemptions to their domiciliaries, other states allowed debtors only a meager allowance with which to begin anew.[26] By 1960, legal commentators were advocating reform; some favored the revision of state exemption statutes,[27] and others supported the enactment of exclusive federal exemptions.[28]

In response to these criticisms, Congress formed the Commission on the Bankrupty Laws of the United States in 1970.[29] The Commission filed a report of its findings with Congress on July 30, 1973,[30] along with a draft of its proposed new federal bankruptcy act.[31] As introduced in the House, the proposed act provided a set of exclusive federal exemptions and eliminated the use of state exemptions in bankruptcy proceedings.[32]

The National Conference of Bankruptcy Judges, however, was opposed to the use of exclusive federal exemptions and decided to draft its own reform legislation. The so-called Judges' Bill[33] gave bankrupts a choice between the list of federal exemptions set out in

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[24]*See* Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934); Williams v. United States Fidelity & Guaranty Co., 236 U.S. 549, 554-55 (1915); Wetmore v. Markoe, 196 U.S. 68, 77 (1904).

[25]For example, one well-known bankruptcy authority noted that, as late as 1976, Connecticut's exemption law provided debtors with only a meager set of exemptions including "two cords of wood, two tons of hay, five bushels each of potatoes and turnips, [and] ten bushels each of Indian corn and rye." The statute had not been changed since 1821. Countryman, *Consumers in Bankruptcy Cases*, 18 WASHBURN L.J. 1, 2 (1978) (citing CONN. GEN. STAT. ANN. § 52-352 (West 1976)).

[26]Western states typically were much more generous to debtors in granting exemptions than were eastern states. *See generally* Note, *Bankruptcy Exemptions: Critique and Suggestions*, 68 YALE L.J. 1459, 1468-69 (1959).

[27]*See, e.g.*, Kennedy, *Limitations of Exemptions in Bankruptcy*, 45 IOWA L. REV. 445 (1959).

[28]*See, e.g.*, Countryman, *For a New Exemption Policy in Bankruptcy*, 14 RUT. L. REV. 678 (1960); Note, *supra* note 26.

[29]Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468.

[30]REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 137, 93d Cong., 1st Sess., pt. I (1973).

[31]*Id.*, pt. II.

[32]H.R. 10792, 93d Cong., 1st Sess. § 4-503 (1973).

[33]H.R. 32, 94th Cong., 1st Sess. (1975).

the Commission's bill, and those exemptions provided under state, local, and nonbankruptcy federal law.[34]

The alternate-exemptions scheme of the Judges' Bill ultimately was adopted by the House of Representatives in section 522 of the House's version of the bankruptcy reform bill.[35] In the final draft of the Senate reform bill, however, the Senate retained the 1898 Act's reference to state law and rejected the Commission's recommendations and the compromise position of the Judges' and House bills.[36] As the result of a hurried compromise between the House and Senate, the final enacted version of the Code retained the House's alternate-exemptions scheme, but allowed the states to opt out of the federal exemptions.[37] Because little or no legislative history exists to illuminate Congress intent in enacting the opt-out provision,[38] the difficulty of determining the constitutionality of the provision is exacerbated.

III. The Uniformity Issue

Three constitutional provisions contain a uniformity requirement: the bankruptcy clause,[39] the naturalization clause,[40] and the revenue clause.[41] The term "uniform," as it is used in the Constitution, has been interpreted to require something less than intrinsic or absolute uniformity under the bankruptcy and revenue clauses. The Supreme Court first addressed the uniformity requirement in tax cases construing the revenue clause.[42]

Representative of these tax cases is *Knowlton v. Moore*.[43] In *Knowlton*, the executors of a will alleged that because the then current revenue act taxed different legacies at different rates based on the amount of the legacy, the act violated the uniformity requirement of the revenue clause.[44] The revenue clause provides that, "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, . . . but all Duties, Imposts and Excises shall be uniform throughout the United States."[45]

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[34]*Id.* § 4-503.

[35]H.R. 8200, 95th Cong., 2d Sess. § 522 (1977).

[36]S. 2266, 95th Cong., 2d Sess. § 522 (1977).

[37]124 Cong. Rec. 32,398 (1978) (remarks of Rep. Edwards).

[38]*See In re* Sullivan, 680 F.2d 1131, 1136 (7th Cir. 1982).

[39]U.S. Const. art. I, § 8, cl. 4.

[40]*Id.*

[41]*Id.*, cl. 1.

[42]*See, e.g.*, Fairbank v. United States, 181 U.S. 283 (1901); Knowlton v. Moore, 178 U.S. 41 (1900); Head Money Cases, 112 U.S. 580 (1884).

[43]178 U.S. 41 (1900).

[44]*Id.* at 83-84.

[45]U.S. Const. art. I, § 8, cl. 1.

The executors argued that the uniformity requirement commanded an intrinsic uniformity which required that excises, duties, and imposts must operate equally upon all persons and property.[46] In rejecting this argument, the Court relied on the debates over the revenue clause at the Constitutional Convention. The Court concluded that the drafters' sole intent in imposing a uniformity requirement on congressional revenue power was to prevent the possible discrimination by Congress against one or more states.[47] The Court, referring to such uniformity as "geographical uniformity,"[48] found that the revenue act satisfied the uniformity requirement.[49] Therefore, the Supreme Court adopted a nondiscrimination test of uniformity under the revenue clause, such that Congress was prohibited from discriminating among the states in enacting revenue laws.[50]

In 1902, just two years after deciding *Knowlton*, the Supreme Court first addressed the uniformity required by the bankruptcy clause. In the landmark case of *Hanover National Bank v. Moyses*,[51] the Court stated, in dicta, that the uniformity required under the bankruptcy clause was "geographical and not personal."[52]

Because the Court in *Moyses* referred to the uniformity required by the bankruptcy clause as geographical, the *Sullivan* court interpreted *Moyses* as adopting the same nondiscrimination test of geographical uniformity developed in *Knowlton* and the other early tax cases. The *Sullivan* court referred to "the" concept of geographical uniformity,[53] and cited *Moyses* and the tax cases together in support of the geographical interpretation.[54] It appears that the debtors in *Sullivan* also believed that *Moyses* adopted the nondiscrimination test of geographical uniformity because the debtors argued that *Moyses* was either incorrectly decided or not applicable to the Code.[55] Although the *Sullivan* court stated that, "[a]rguably the uniformity provision relating to bankruptcies had a different focus" than the uniformity provision of the revenue clause,[56] the court claimed that no support could be found for this distinction in the *Moyses* decision or in later Supreme Court cases.[57]

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[46]178 U.S. at 84.
[47]*Id.* at 89.
[48]*Id.* at 106.
[49]*Id.* at 107-09.
[50]*Id.* at 89.
[51]186 U.S. 181 (1902).
[52]*Id.* at 188.
[53]680 F.2d at 1133-34.
[54]*Id.* at 1133.
[55]*Id.* at 1134.
[56]*Id.*
[57]*Id.* at 1134-35.

The *Sullivan* court's analysis is subject to attack on two grounds. First, the term "uniform" need not be given the same meaning under both the revenue and bankruptcy clauses. As pointed out in *Sullivan*, the uniformity requirement under the naturalization clause has not been interpreted as demanding only geographical uniformity.[58] Second, a strong argument can be made that *Moyses* developed a different test of geographical uniformity for the bankruptcy clause than the nondiscrimination test of the tax cases. A proper analysis of the *Moyses* decision and the cases on which it relied supports this argument.

The bankruptcy laws of 1800[59] and 1841[60] did not allow debtors in bankruptcy proceedings to claim state exemptions.[61] The first act allowing state exemptions was enacted in 1867. The 1867 Act allowed debtors to claim the state exemptions only as they existed in 1864, and permitted their application only if the state exemptions exceeded the $500 upper limit imposed by the act.[62]

The use of state exemption laws in the 1867 Act prompted arguments for the first time that the recognition of state exemptions by the federal bankruptcy law would violate the constitutional uniformity requirement. Although several lower court decisions upheld the constitutionality of the 1867 Act on this issue,[63] the Supreme Court did not address the problem until it decided *Moyses* in 1902.[64] In *Moyses*, the Court construed the 1898 Act which allowed debtors to claim only the exemptions provided by their domiciliary states.[65]

In *Moyses*, the creditor bank had brought suit on a judgment against Moyses for nonpayment of his promissory note. The bank, unable to collect on the judgment because of Moyses's discharge in

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[58]*Id.* at 1135. *See also* Hertz, *Limits to the Naturalization Power*, 64 GEO. L.J. 1007, 1013-17 (1976) (arguing that the naturalization clause requires more than geographical uniformity).

[59]Bankruptcy Act of 1800, ch. 19, 2 Stat. 19 (repealed 1803).

[60]Bankruptcy Act of 1841, ch. 9, 5 Stat. 440 (repealed 1843).

[61]Under the Bankruptcy Act of 1800, debtors in bankruptcy proceedings were not allowed exemptions under state exemption statutes. Rather, the act stipulated what exemptions the debtor was allowed, permitting the debtor to retain certain specified property, such as clothing and household necessities. Bankruptcy Act of 1800, ch. 19, § 5, 2 Stat. 19, 23 (repealed 1803). In addition, the debtor could retain a portion of his other assets, such portion determined as a percentage of the total assets available to creditors. *Id.* § 34. The Bankruptcy Act of 1841 provided a similar exemption subject, however, to a flat $300 maximum limit. Bankruptcy Act of 1841, ch. 9, § 3, 5 Stat. 440, 442 (repealed 1843).

[62]Bankruptcy Act of 1867, ch. 176, § 14, 14 Stat. 517, 522-23 (repealed 1879).

[63]*E.g.*, Darling v. Berry, 13 F. 659 (C.C.D. Iowa 1882); *In re* Beckerford, 3 F. Cas. 26 (C.C.D. Mo. 1870) (No. 1,209).

[64]186 U.S. 181 (1902).

[65]*See* note 23 *supra*.

bankruptcy, argued that the 1898 Act was unconstitutional. The bank alleged, *inter alia*, that because the 1898 Act gave debtors in bankruptcy proceedings the exemptions provided by the various laws of their domiciliary states, the 1898 Act did not establish a uniform bankruptcy law and therefore was void.[66] The Supreme Court rejected the bank's arguments and held the 1898 Act to be constitutional.[67]

Although the Court stated, in dicta, that the 1898 Act satisfied the geographical uniformity required by the Constitution,[68] the Court *specifically held* that:

> [T]he system is, in the constitutional sense, uniform throughout the United States, *when the trustee* [in bankruptcy] *takes in each State whatever would have been available to the creditors if the bankrupt law had not been passed.* The general operation of the law is uniform although it may result in certain particulars differently in different States.[69]

The *Moyses* test states, in effect, that the uniformity requirement is satisfied if creditors, through the bankruptcy trustee, take pro rata in bankruptcy the same amount of property that they could have taken to satisfy their claims in state court proceedings by means of judicial process. In other words, to be uniform the bankruptcy act must grant the same exemptions to debtors in bankruptcy that are available to debtors outside of bankruptcy.

As noted by the *Sullivan* court, the Supreme Court based its holding in *Moyses* on two earlier federal circuit court decisions, *In re Beckerford*[70] and *In re Deckert*.[71] In *Beckerford*, the court found support for the uniformity of the 1867 Act on two grounds. First, the law was uniform with respect to the distribution of the debtor's assets because the law distributed equally among creditors that property which was not exempt.[72] Second, the amount of assets available to creditors in and out of bankruptcy was uniform because the existing state exemptions also were the exemptions in bankruptcy.[73]

In *Deckert*, Chief Justice Waite, sitting as Circuit Justice, reiterated the position taken in *Beckerford* to justify the 1867 Act's uniformity. He stated that because "every debt is contracted with

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[66]186 U.S. at 183.
[67]*Id.* at 190.
[68]*Id.* at 188.
[69]*Id.* at 190 (emphasis added).
[70]3 F. Cas. 26 (C.C.D. Mo. 1870) (No. 1,209).
[71]7 F. Cas. 334 (C.C.E.D. Va. 1874) (No. 3,728).
[72]3 F. Cas. at 27.
[73]*Id.*

reference to the rights of the parties thereto under existing exemption laws, . . . no [bankruptcy] creditor can reasonably complain if he gets his full share of all that the law, for the time being, places at the disposal of [judgment] creditors."[74] Therefore, the courts in both *Beckerford* and *Deckert* upheld the uniformity of the 1867 Act because creditors were able to obtain the same amount of property in bankruptcy that they could obtain outside of bankruptcy under state law. In other words, they upheld the uniformity of the 1867 Act because the exemptions were the same both in and out of bankruptcy. This is precisely the rationale which was followed by the Supreme Court in *Moyses*.

It could be argued that the Court in *Moyses* did not intend equality of exemptions in and out of bankruptcy to be an exclusive test of uniformity, but merely one example of uniform operation. However, the Court's reliance on *Deckert* and *Beckerford* disputes this argument. In *Deckert*, the court noted that the uniformity of the 1867 Act was sustained because it "subject[ed] to the payment of debts under its operation *only* such property as could [be reached] by judicial process . . . ."[75] The court in *Deckert* also stated that it was proper to confine the 1867 Act's operation to such property.[76] Therefore, these earlier cases, which the Court in *Moyses* solely relied upon, determined that the uniformity requirement under the bankruptcy clause was one of equality and fairness in its "operations"[77] upon debtors and creditors.[78] As the *Sullivan* court noted,[79] the Court in *Moyses* relied exclusively on *Beckerford* and *Deckert*. Although it had decided *Knowlton* just two years earlier, the Supreme Court did not cite *Knowlton* for the geographical uniformity established in *Moyses*.[80] This implies that the Court in *Moyses* intended to adopt the uniformity interpretation set out in *Beckerford* and *Deckert*, rather than follow the nondiscrimination test of uniformity enunciated by the Supreme Court in *Knowlton*.

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[74]7 F. Cas. at 336. *Deckert* involved the 1873 amendment to the 1867 act, 17 Statutes at Large 577, which set bankruptcy exemptions equal to state exemptions as they existed in 1871. Because bankruptcy exemptions did not, as a result, follow existing state laws, the court found the amendment unconstitutional. 7 F. Cas. at 336. *But see In re* Smith, 22 F. Cas. 413, 414 (C.C.N.D. Ga. 1876) (No. 12,996). That the original act of 1867 set exemptions as they existed in 1864, 14 Statutes at Large 523, seems to have been overlooked in both *Beckerford* and *Deckert*.

[75]7 F. Cas. at 336 (emphasis added).

[76]*Id.*

[77]"A bankrupt law, therefore, to be constitutional . . . must be *uniform in its operations*, not only within a state, but within and among all the states." *Deckert*, 7 F. Cas. at 335 (emphasis added).

[78]*See* Countryman, *supra* note 28, at 681.

[79]680 F.2d at 1134.

[80]186 U.S. at 188.

Prior to *Knowlton*, a lower court applied a nondiscrimination test to determine the uniformity of bankruptcy exemptions in *Darling v. Berry*.[81] In addition, the *Darling* court pointed out that the test of uniformity developed in *Beckerford* and *Deckert* was a different test than the nondiscrimination test, which was later adopted in *Knowlton*.[82] In *Darling*, the court severely criticized Justice Waite's view of the bankruptcy uniformity requirement as expressed in *Deckert* and later adopted in *Moyses*. The *Darling* court stated that courts which had "treat[ed] the question as depending rather upon the *operation* or working of the law, than upon its *application* according to its own terms to the various states of the Union" had "applied to it an erroneous test of uniformity."[83] The court then refined its reference to the law's *application* to the various states. "[W]hen a bankrupt, revenue, or naturalization law is made *by its terms applicable alike to all the states of the Union, without distinction or discrimination*, it cannot be successfully questioned on the ground that it is not uniform, in the sense of the [C]onstitution . . . ."[84]

Although the *Darling* court conceded that the use of existing state exemptions in bankruptcy was fair and just, it admonished that justice and the constitutional requirement of uniformity should not be confused.[85] In criticizing the *Deckert* court's uniformity test of fairness of operation, the *Darling* court stated that, "All that the [C]onstitution intends is that [C]ongress shall not pass partial revenue and bankruptcy laws. *It shall not prescribe one law for this state or section, and a different law for that state or section.*"[86]

Although *Darling* was effectively overruled by *Moyses*, *Darling* clearly shows that the interpretation of the bankruptcy uniformity requirement in *Beckerford*, *Deckert*, and *Moyses* differs from the interpretation of the revenue uniformity requirement in the tax cases. The Court in *Moyses* must have been aware of its decision in *Knowlton* just two years earlier, yet the Court relied on the older *Beckerford* and *Deckert* circuit court decisions. Therefore, even though the Court in *Moyses* stated in dicta that the uniformity required by the bankruptcy clause was geographical, the test the Court adopted in *Moyses* is not the same geographical uniformity test enunciated in the tax cases. Rather, the *Moyses* test is one of

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[81]13 F. 659 (C.C.D. Iowa 1882).

[82]*See* text accompanying notes 43-50 *supra*.

[83]13 F. at 667 (emphasis added).

[84]*Id.* (emphasis added). For a comment on the court's inclusion of naturalization law in this statement see Hertz, *supra* note 58, at 1014. The court later left out any reference to naturalization law in a similar statement. *See* text accompanying note 86 *infra*.

[85]13 F. at 668.

[86]*Id.* at 667 (emphasis added).

fairness of operation of the bankruptcy act on the creditors and debtors of each state. The test requires that creditors be able to obtain the same amount of assets in bankruptcy as they can out of bankruptcy.

Although this Note has shown that the *Moyses* test of bankruptcy uniformity differs from the nondiscrimination test enunciated in *Knowlton*, this distinction is insignificant if the opt-out provision is constitutional under either test. It is apparent that the opt-out provision satisfies the nondiscrimination test of uniformity. The Code initially provides specific federal exemptions to the debtors of each state. In addition, the Code permits any state to opt out of the federal exemptions. The Code, by its terms, is applicable alike to all the states without discrimination and therefore is uniform under the nondiscrimination test of geographical uniformity.

The opt-out provision, however, is not constitutional under the *Moyses* test. The *Moyses* test of uniformity requires that creditors, through the bankruptcy trustee, take pro rata in bankruptcy the same amount of property that they could have taken to satisfy their claims in state court by means of judicial process. Stated another way, under the *Moyses* test a bankruptcy law is uniform with regard to exemptions only if debtors obtain the same exemptions in and out of bankruptcy.[87]

The problems with a general uniformity test based on equality of exemptions in and out of bankruptcy are readily apparent. If Congress had followed the Commission's recommendation and had enacted a bankruptcy law which provided only an exclusive federal list of exemptions, the *Moyses* test would not be satisfied. Even though bankruptcy exemptions would be the same throughout the United States, those exemptions would necessarily differ from the exemptions under the various states' laws. Similarly, the *Moyses* test is not met when debtors in states which have not opted out of the federal exemptions choose the exemptions in subsection 522(d) instead of state and nonbankruptcy federal exemptions. This failure to conform to *Moyses* results even though the exemptions claimed by the debtors in those different states are more uniform, in terms of being identical, than the supposedly uniform exemptions the debtors would have claimed under the 1898 Act. One possible answer to this dilemma is that the *Moyses* test is not a general test of uniformity, but is to be applied only in the specific instance when state exemption laws are given effect in bankruptcy.

The 1898 Act clearly satisfied this limited interpretation of the *Moyses* test. Because the 1898 Act adopted the existing state exemptions as those which would be recognized in bankruptcy, exemptions

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[87] *See* text accompanying note 69 *supra*.

were the same both in and out of bankruptcy. However, exemption legislation enacted in several states under the opt-out provision of the Code raises the question of whether the Code satisfies even this narrow interpretation of *Moyses*. Ohio's exemption law is representative of such legislation.

Ohio, exercising its power under subsection 522(b)(1), opted out of the federal exemption plan and denied the list of exemptions in subsection 522(d) to its domiciliaries.[88] Ohio also revised its list of exemptions, generally increasing the amount of property debtors can exempt and updating its law as to the types of property exempted.[89] In this respect, Ohio has done basically what other opt-out states have done.[90] However, Ohio's exemption legislation was unprecedented in declaring that two particular exemptions are available to debtors *only* in bankruptcy proceedings.[91] As a result, in Ohio a bankruptcy trustee will get less property for distribution to creditors than creditors will obtain by judicial process in state courts. *Moyses* expressly prohibits this result when state exemption laws are used in bankruptcy proceedings.

An Ohio bankruptcy trustee raised precisely this point in *In re*

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[88]OHIO REV. CODE ANN. § 2329.662 (Page 1981). The Ohio statute provides: "Pursuant to the 'Bankruptcy Reform Act of 1978,' 92 Stat. 2549, 11 U.S.C. 522(b)(1), this state specifically does not authorize debtors who are domiciled in this state to exempt the property specified in . . . [Code section] 522(d)." OHIO REV. CODE ANN. § 2329.662 (Page 1981) (repealed effective Sept. 28, 1983, unless reenacted by subsequent legislation).

[89]OHIO REV. CODE ANN. § 2329.66 (Page 1981). For a thorough examination and analysis of the Ohio exemption statute see Fisher, *The Federal Exemption Scheme: Delayed Until 1983 For Ohio Bankrupts*, 49 U. CIN. L. REV. 791 (1980). See also Note, *Ohio Opts Out of the Federal Bankruptcy Exemptions and Revises Its Exemption Laws*, 5 U. DAYTON L. REV. 461 (1980).

[90]*See generally* ARIZ. REV. STAT. ANN. § 33-1133 (Supp. 1981); IND. CODE § 34-2-28-1 (Supp. 1981); NEB. REV. STAT. § 25-15, 105 (Supp. 1981).

[91]OHIO REV. CODE ANN. § 2329.66(A)(4)(a), .66(A)(17) (Page 1981). The statute provides, in pertinent part, as follows:

> 2329.66 Exempted interests and rights.
>
> (A) Every person who is domiciled in this state may hold property exempt from execution, garnishment, attachment, or sale to satisfy a judgment or order, as follows:
>
> . . . .
>
> (4)(a) The person's interest, not to exceed four hundred dollars, in cash on hand, money due and payable, money to become due within ninety days, tax refunds, and money on deposit with a bank, building and loan association, savings and loan association, credit union, public utility, landlord, or other person. *This division applies only in bankruptcy proceedings.*
>
> . . . .
>
> (17) The person's interest, not to exceed four hundred dollars, in any property, except that *this division applies only in bankruptcy proceedings.*

Id. (emphasis added).

Vasko.[92] Although the *Vasko* court cited an earlier Ohio case which had addressed the uniformity requirement,[93] the court refused to address the issue raised by the trustee. Because the trustee attacked the validity of the *state's* exemption law, rather than challenging the constitutionality of the Code itself, the *Vasko* court was spared the difficult task of resolving this obvious conflict.[94] The court recognized that the uniformity requirement is "only controlling as to the congressional exercise of power."[95]

Eventually the Code will be challenged as violating the *Moyses* test because the opt-out provision allows state exemption statutes like the one in Ohio. Posited in this context, the uniformity issue would be properly raised. When this challenge arises, a proper application of *Moyses* demands that the opt-out provision be found unconstitutional. Notwithstanding the arguments raised in *Darling* against the test of uniformity later adopted in *Moyses*, a lower court "obviously lacks the authority to overrule a Supreme Court case."[96] If the opt-out provision is to be found constitutional, the Supreme Court must resolve the uniformity issue by reassessing its decision in *Moyses*.

IV. The Unlawful Delegation Issue

A. The Sullivan *Court's Resolution of the Unlawful Delegation Issue*

In addition to arguing that the opt-out provision violates the bankruptcy uniformity requirement, the debtors in *Sullivan* argued that the opt-out provision constitutes an unlawful delegation by Congress of its power to enact bankruptcy laws.[97] The court in *Sullivan* rejected this argument on three grounds. First, the court found that the exemptions in section 522 of the Code have not preempted state exemptions.[98] Second, the court determined that the opt-out provision is not a delegation of congressional authority because the states have concurrent power to enact bankruptcy laws.[99] Third, the court relied on *Moyses* to support its finding that no unlawful delegation exists under the Code.[100]

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[92]6 Bankr. 317 (Bankr. N.D. Ohio 1980).
[93]*Id.* at 319 (citing *In re* Hill, 4 Bankr. 310 (Bankr. N.D. Ohio 1980)).
[94]*See* 6 Bankr. at 318.
[95]*Id.* at 320.
[96]*In re* Sullivan, 680 F.2d 1131, 1134 (7th Cir. 1982).
[97]*Id.* at 1132.
[98]*Id.* at 1136-37.
[99]*Id.* at 1137.
[100]*Id.*

In rejecting the reasoning of two cases on which the debtors relied, *In re Rhodes*[101] and *Cheeseman v. Nachman*,[102] the *Sullivan* court addressed only the preemption analysis raised in these cases. In both *Rhodes* and *Cheeseman*, the courts had found that by enacting the specific federal bankruptcy exemptions in the Code, Congress had preempted state law on the subject of exemptions.[103] Both courts had found a fresh start policy in the section 522 exemption scheme; therefore, if state law exemptions conflicted with this fresh start policy, the state exemption scheme was void.[104]

The *Sullivan* court refused to apply this preemption analysis to the opt-out provision. Because of the compromise between the House and Senate which resulted in the opt-out provision of the Code, the *Sullivan* court found that the fresh start policy of the exemption provision could be attributed only to the House version, and not to the final enacted version of the Code.[105]

The court in *Sullivan* also stated that a preemption analysis is not applicable where the states are specifically permitted by Congress to opt out of the federal exemptions.[106] The *Rhodes* court determined that because the exemptions in the Code had preempted the state exemptions, the opt-out provision was a delegation by Congress of its bankruptcy power to the states.[107] That delegation was lawful, however, because the federal exemption scheme in section 522 set limits on the states' bankruptcy power.[108] "[T]he delegation of authority to the states to 'opt-out' has been carefully circumscribed and the states may exercise that authority only if they provide their citizens with a scheme of bankruptcy exemptions that is not inconsistent with the provisions of § 522."[109] However, the *Sullivan* court failed to address the delegation finding in *Rhodes*. Instead, the *Sullivan* court determined that there was no delegation because the states have concurrent bankruptcy power.

The court in *Sullivan* stated that the debtors had "overlook[ed] the long-established principle that the states retain the power to enact bankruptcy laws so long as they do not conflict with federal bankruptcy legislation."[110] To support this statement, the *Sullivan*

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[101]Rhodes v. Stewart (*In re* Rhodes), 14 Bankr. 629 (Bankr. M.D. Tenn. 1981).
[102]656 F.2d 60 (4th Cir. 1981).
[103]14 Bankr. at 631; 656 F.2d at 63.
[104]14 Bankr. at 631-33; 656 F.2d at 64.
[105]680 F.2d at 1135-36.
[106]*Id.* at 1136.
[107]14 Bankr. at 631.
[108]*Id.* at 631-34.
[109]*Id.* at 634 (construing Cheeseman v. Nachman, 656 F.2d 60 (4th Cir. 1981)).
[110]680 F.2d at 1137.

court cited the Supreme Court case of *Sturges v. Crowninshield.*[111] In that case, one of the questions posed was whether the constitutional grant to Congress to enact uniform bankruptcy laws was exclusive, or whether the states still retained concurrent authority to pass bankruptcy laws.[112] The Court held that:

> [T]he power granted to [C]ongress may be exercised or declined, as the wisdom of that body shall decide. If, in the opinion of [C]ongress, uniform laws concerning bankruptcies ought not to be established, it does not follow, that partial laws may not exist, or that state legislation on the subject must cease. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the states.[113]

The court in *Sullivan* determined that Illinois was exercising its own concurrent bankruptcy power in enacting its exemption law. Therefore, because the Illinois law did not conflict with the opt-out provision of Congress, no unlawful delegation could be found.[114]

Finally, the *Sullivan* court again relied on the *Moyses* decision which addressed the unlawful delegation issue under the 1898 Act.[115] The Court in *Moyses* stated: "Nor can we perceive in the recognition of the local law in the matter of exemptions . . . any attempt by Congress to unlawfully delegate its legislative power."[116] Finding no relevant differences between the 1898 Act and the Code, the court in *Sullivan* determined that the Code likewise did not constitute an unlawful delegation.[117]

B. The Proper Resolution of the Unlawful Delegation Issue: A Two-Step Analysis

The *Sullivan* court's analysis is faulty on all three grounds. When federal and state laws conflict, the federal law is not rendered invalid. Rather, under the supremacy clause of the Constitution,[118]

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[111]17 U.S. (4 Wheat.) 122 (1819).

[112]*Id.* at 123.

[113]*Id.* at 195-96. "Partial" in this context clearly means "not general" or "not total." The word was used to mean "biased" or "discriminatory" in *Darling v. Berry*, discussed *supra*. *See* text accompanying note 86 *supra*.

[114]680 F.2d at 1137.

[115]*Id.*

[116]186 U.S. at 190.

[117]680 F.2d at 1137.

[118]U.S. CONST. art. 6, cl. 2.

the conflicting state law must yield.[119] In *Rhodes*, the debtors attacked the state law;[120] consequently, the *Rhodes* preemption analysis was warranted. However, the debtors in *Sullivan* challenged the constitutionality of the Code, not the constitutionality of Illinois law.[121] Because the delegation issue involves the propriety of congressional action, not a conflict between federal and state law, preemption is irrelevant to the unlawful delegation issue. By addressing only the preemption analysis of *Rhodes* and the possible conflict between the federal and Illinois law,[122] the *Sullivan* court clouded the essential issues in the debtors' unlawful delegation argument.

The unlawful delegation issue should properly be resolved by the application of a two-step analysis. First, it must be determined whether the opt-out provision is a recognition of concurrently held bankruptcy power, or a delegation of bankruptcy power to the states. Second, if the opt-out provision is found to be a delegation, then it must be determined whether that delegation is lawful.[123]

1. Step One: Delegated or Concurrently Held Power?—In attempting to determine the position taken by the *Sullivan* court with regard to this question, certain statements in the court's opinion, which at first appear contradictory, should be noted. The court charged that the debtors had "overlook[ed] the long-established principle that the states *retain* the power to enact bankruptcy laws,"[124] and stated that by establishing exemption laws for bankruptcy, Illinois was "exercising its *own* power."[125] These statements suggest that the opt-out provision was held to be valid in *Sullivan* because the provision did not affect the concurrent bankruptcy power of the states. However, the court also stated that "Congress has *specifically directed* that a State can choose to declare section 522(d) inapplicable to its citizens."[126] This statement clearly suggests a congressional delegation of power to the states. By making the above statements, the *Sullivan* court inadvertently pointed out something which every other court has failed to notice. That is, that under the opt-out provision, the states possess two different powers: the power to enact bankruptcy exemptions, *and* the power to deny the federal exemptions to their domiciliaries.

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[119]*See* Perez v. Campbell, 402 U.S. 637 (1971); International Shoe Co. v. Pinkus, 278 U.S. 261 (1929); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819).

[120]14 Bankr. 629 (Bankr. M.D. Tenn. 1981).

[121]680 F.2d at 1132.

[122]*Id.* at 1137. *See* text accompanying note 113 *supra*.

[123]*See* Rhodes v. Stewart (*In re* Rhodes), 14 Bankr. 629, 631 (Bankr. M.D. Tenn. 1981).

[124]680 F.2d at 1137 (emphasis added).

[125]*Id.* (emphasis added).

[126]*Id.* at 1136.

Clearly, the first of these two powers is concurrently held by the states. The list of specific federal bankruptcy exemptions in the Code represents only a limited exercise by Congress of its bankruptcy exemption power, because debtors may continue to claim the state exemptions in bankruptcy.[127] Contrary to the opinion of the *Rhodes* court, and as the court in *Sullivan* recognized,[128] the exemptions in the Code cannot be considered as preempting state law exemptions.

Courts which have recognized the concurrent bankruptcy exemption power of the states under the Code have considered that power conclusive in supporting the constitutionality of the Code against the delegation argument.[129] However, the inquiry cannot stop here. The nature of the power which the states exercise to opt out of the federal exemptions must also be analyzed.

The power to opt out of the federal exemptions cannot logically be a concurrently held power. Unlike the power to enact state bankruptcy exemption laws, the power to deny the federal exemptions could not have existed prior to the enactment of those federal exemptions by Congress. The ability of the states to deny the federal exemptions necessarily requires the enactment of those exemptions by Congress. Furthermore, the language of the opt-out provision is clearly permissive, rather than deferential.[130] Thus, the opt-out provision must be viewed as a delegation by Congress of its bankruptcy power to the states.

2. Step Two: Lawful or Unlawful Delegation?—Having determined that Congress has delegated to the states the power to opt out of the federal exemptions, it must be determined whether that delegation is lawful or unlawful.

As noted above, the *Sullivan* court, in rejecting the debtors' unlawful delegation argument, cited the following holding in *Moyses*: "Nor can we perceive in the recognition of the local law in the matter of exemptions . . . any attempt by Congress to unlawfully delegate its legislative power."[131] The court in *Sullivan* did not discuss its interpretation of this holding. However, in at least one case, *In re Lausch*,[132] the court has understood the statement in *Moyses* to mean that, under the 1898 Act, Congress delegated to the states the authority to determine bankruptcy exemptions, but that such a

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[127]*See* Kosto v. Lausch (*In re* Lausch), 16 Bankr. 162, 165 (M.D. Fla. 1981).

[128]*See* notes 105-06 *supra* and accompanying text.

[129]*See, e.g.*, Kosto v. Lausch (*In re* Lausch), 16 Bankr. at 165.

[130]*See* Stern, *State Exemption Law in Bankruptcy: The Excepted Creditor as a Medium for Appraising Aspects of Bankruptcy Reform*, 33 RUT. L. REV. 70, 94 (1980).

[131]186 U.S. at 190.

[132]12 Bankr. 55 (Bankr. M.D. Fla.), *aff'd*, 16 Bankr. 162 (M.D. Fla. 1981).

delegation was lawful.[133] Therefore, the *Lausch* court reasoned, *Moyses* supports the congressional delegation of bankruptcy exemption power under the Code.[134]

The constitutionality of the Code on the delegation issue cannot be supported by *Moyses* for one very significant reason. The Court in *Moyses* did not find that the 1898 Act constituted a lawful delegation, but rather that, in merely recognizing state exemptions, Congress had not delegated any bankruptcy power to the states. To support its holding, the Court in *Moyses* cited the earlier Supreme Court case of *In re Rahrer*.[135] An analysis of the Court's opinion in *Rahrer* clearly supports the above conclusion and shows that the lawfulness of the delegation under the opt-out provision cannot be supported by *Moyses*.

Although later Supreme Court cases have decided that Congress may, in complex areas of legislation, leave the making of subordinate rules to selected instrumentalities,[136] the Court in *Rahrer* did not take that position. In *Rahrer*, the Court flatly stated that, "It does not admit of argument that Congress can neither delegate its own powers nor enlarge those of a State."[137] The Court also stated that although some laws had been sustained on the grounds "that while the legislature cannot delegate its power to make a law, it can make a law which leaves it to municipalities or the people to determine some fact or state of things, upon which the action of the law may depend . . . we do not rest the validity of the act of Congress on this analogy."[138] Furthermore, if the use of state law was upheld in *Rahrer* as a lawful delegation of power, then the states would have possessed power under a grant of authority from Congress. The Court in *Rahrer* stated, however, that Congress had not granted power to the states, but that the states were exercising power which they already possessed.[139]

Similarly, Congress, in enacting the 1898 Act, did not grant bankruptcy power to the states in the area of exemptions. The states have always had the authority to decide what property debt-

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[133]*Id.* "In enacting the opt out provision . . . Congress has *again delegated* to the states the task of determining bankruptcy exemptions." 12 Bankr. at 56 (emphasis added).

[134]12 Bankr. at 56.

[135]140 U.S. 545 (1891).

[136]*See* Schechter Poultry Corp. v. United States, 295 U.S. 495, 529-30 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935).

[137]140 U.S. at 560.

[138]*Id.* at 562.

[139]The Court stated that the law "imparted no power to the State not then possessed, but allowed imported property to fall . . . within the local jurisdiction." *Id.* at 564.

ors may keep free from the claims of creditors in actions for attachment and execution in state courts.[140] Congress merely provided that these state laws would be recognized as the exemptions available to debtors in bankruptcy proceedings under the 1898 Act. Courts and other authorities, in referring to exemptions under the 1898 Act as governed by nonbankruptcy law, have recognized this distinction.[141] Therefore, *Moyses* cannot support the position that the opt-out provision is constitutional as a lawful delegation of congressional bankruptcy power, because there was no delegation under the 1898 Act. The question of unlawful delegation in the context of bankruptcy exemption legislation is therefore one of first impression under the Code.[142]

In addressing the delegation issue, one commentator has stated in a recent article that under the nondelegation doctrine Congress must "determine the relationship between bankruptcy and nonbankruptcy remedies."[143] Only by doing so, he argues, can Congress control the degree to which bankruptcy is encouraged or discouraged, which is a matter for Congress alone to decide.[144] The 1898 Act clearly had this effect because it tied bankruptcy exemptions to state nonbankruptcy exemptions.[145] This interpretation of the delegation issue fails to recognize, however, that if Congress enacts exclusive federal exemptions, which it is surely within its power to do,[146] it necessarily leaves the relationship between bankruptcy and non-

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[140]Bronson v. Kinzie, 42 U.S. (1 How.) 311, 315 (1843).

[141]*See In re* Rhodes, 14 Bankr. at 631 ("The [exemption] provision in the [1898 Act] . . . permitted a bankrupt to exempt only property prescribed by nonbankruptcy law—generally by state exemption statutes."); Countryman, *supra* note 25, at 2 ("In the present Bankruptcy Act . . . [t]he bankrupt is allowed such exemptions as his state laws allow him to hold exempt from creditors' claims in nonbankruptcy debt collection cases."); *see also*, Kanter v. Moneymaker (*In re* Kanter), 505 F.2d 228, 230 (9th Cir. 1974); Hertz, *Bankruptcy Code Exemptions: Notes on the Effect of State Law*, 54 AM. BANKR. L.J. 339, 343 (1980).

[142]The Bankruptcy Acts of 1800 and 1841 provided exclusive federal exemptions without reference to state laws. *See* notes 59-61 *supra* and accompanying text. Under the 1867 Act, Congress merely adopted state exemption laws as they existed in 1864, amending the law in 1873 to reflect state exemptions as they stood in 1871. *See* note 62 *supra*. As outlined above, under the 1898 Act Congress merely determined that the exemptions available to debtors in nonbankruptcy state court actions would be recognized as the exemptions in bankruptcy.

[143]Hertz, *supra* note 141, at 343.

[144]*Id.* at 343-44.

[145]*See* Kanter v. Moneymaker, 505 F.2d at 230 ("The Bankruptcy Act recognizes the exemptions provided by state law in an effort . . . to eliminate any inducement for creditors to seek involuntary bankruptcy petitions as a means of reaching assets unavailable to them in state courts because of exemption provisions.").

[146]The 1800 and 1841 Acts demonstrate this power. *See* notes 59-61 *supra* and accompanying text.

bankruptcy remedies to the states. It is not enough to say that if Congress decides that there will be only federal bankruptcy exemptions without reference to state law, that "Congress is the decision-maker."[147] In that situation, the states are clearly free to set nonbankruptcy state exemptions at any level relative to the federal exemptions. Congress has determined only that the desirability of providing debtors with the exemptions in subsection 522(d) overrides the desirable effects of tying bankruptcy to nonbankruptcy exemptions.

Although the court in *In re Rhodes* incorrectly assessed the precise nature of the power delegated under the Code,[148] it correctly recognized the considerations relevant to determining the legality of a particular delegation. In *Rhodes*, the court cited the Supreme Court's decision in *Schechter Poultry Corp. v. United States*[149] for the proposition that Congress may only delegate authority to the states if it defines the limits within which the states may exercise that authority.[150] In *Schechter*, the Court stated that:

> the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in *laying down policies* and *establishing standards*, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply.[151]

Therefore, in order to delegate opt-out power to the states so that the states can determine the subordinate rules of exemptions, Congress must provide the states with a *policy* and *standards* to guide them in making the opt-out decision.

The fresh start policy immediately presents itself as the only policy available to support the Code's constitutionality. The court in *Sullivan* determined that, because of the opt-out provision, the fresh start policy could be attributed only to the House version of the reform bill, and not to the final enacted version of the Code.[152] However, the context in which the *Sullivan* court reviewed the fresh start argument is readily distinguishable. In *Sullivan*, the debtors raised the fresh start policy to support their argument that the Code was unconstitutional.[153] Because the opt-out provision is a con-

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[147]Hertz, *supra* note 141, at 343.
[148]*See* text accompanying note 103 *supra*.
[149]295 U.S. 495 (1935).
[150]14 Bankr. at 631.
[151]*Id.* at 530 (emphasis added).
[152]*See* note 105 *supra* and accompanying text.
[153]680 F.2d at 1135.

gressional delegation of power to the states, recognition of the fresh start policy is necessary, instead, to support the Code's constitutionality. Also, that Congress intended to allow the states to ignore the fresh start policy is not the only possible interpretation of the opt-out provision. There is support for the view that the opt-out compromise was the result of concern by the states that a husband and wife, in a joint case, could separately choose both the state and subsection 522(d) exemptions and retain a very substantial amount of property.[154] Furthermore, courts in other cases have recognized the fresh start policy, notwithstanding the opt-out provision.[155]

Therefore, because the Code must be given a constitutional construction if possible,[156] the courts should uphold the constitutionality of the opt-out provision by recognizing a fresh start policy in the Code.

In *Schechter*, the Court recognized what "unquestionably was the major policy of Congress"[157] with respect to the act in question. Nonetheless, the Court declared the delegation of congressional power in that act unconstitutional because Congress had "supplie[d] no standards" to guide the holder of the delegated authority in exercising that power.[158] In the same respect, unless Congress has supplied those states which opt out of the federal scheme with a standard to guide them in enacting fresh start exemptions, the Code is unconstitutional. Such a standard clearly exists in subsection 522(d), the federal list of exemptions. By setting out in subsection 522(d) what it considers a fresh start set of exemptions, Congress has provided the states with a yardstick against which to measure their own exemption laws.[159] The delegation by Congress of opt-out power to the states is constitutional because it is accompanied by a fresh start policy and standards to guide the states in their exercise of that delegated power.

V. Consequences of the Delegation Issue for the Constitutionality of State Exemption Laws Under the Supremacy Clause

Both the concurrent power and lawful delegation rationales will support the constitutionality of the Code on the delegation issue. It

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[154]*See* S. Rep. No. 989, 95th Cong., 2d Sess. 6, *reprinted in* [1978] U.S. Code Cong. & Ad. News 5787, 5792. *See also* Cal. Civ. Proc. Code § 690(b) (West 1981).

[155]*E.g.*, *In re* Vasko, 6 Bankr. 317, 322 (Bankr. N.D. Ohio 1980).

[156]*See* NLRB v. Jones & Laughlin Steel Corp., 310 U.S. 1, 30 (1937).

[157]295 U.S. at 536.

[158]*Id.* at 541-42.

[159]*See* Cheeseman v. Nachman, 656 F.2d 60, 63 (4th Cir. 1981), *construed in* Rhodes v. Stewart (*In re* Rhodes), 14 Bankr. 629, 634 (Bankr. M.D. Tenn. 1981).

should be recognized, however, that these two rationales have different consequences for the constitutionality of state exemption laws. Under the supremacy clause of the Constitution,[160] state laws, including exemption laws, are void to the extent that they conflict with the bankruptcy laws of Congress.[161] Such a conflict exists if the state law stands as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[162]

The concurrent power rationale does not mandate that a congressional policy and standard be found in order to uphold the constitutionality of the opt-out provision. If, as in *Sullivan*, a fresh start policy is not attributed to the Code, the states may opt out and provide no exemptions to their domiciliaries without frustrating congressional intent.[163] If a fresh start policy, though not mandated, nevertheless is found to exist, then the states' exemptions must provide debtors with a fresh start.[164]

Courts which adopt the concurrent power rationale and find a fresh start policy in the Code may simply determine the fresh start qualities of the states' exemptions in an ad hoc fashion, without reference to federal exemptions.[165] As long as the states' exemptions do not obstruct the fresh start purpose of the Code, they will be upheld. The same is not true, however, if the opt-out provision is held to be a delegation of power. The purpose of mandating that Congress provide a standard when it delegates power is to give the state legislatures and the judiciary a yardstick against which to measure the state action.

In *In re Balgemann*,[166] and in *In re Rhodes*,[167] the courts considered state opt-out legislation under the Code, and found that the exemption section of the Code indicates a policy against discriminating in favor of homeowners.[168] Under subsection 522(d)(1), a debtor may exempt $7,500 worth of real and personal property used as a residence.[169] Under subsection 522(d)(5), a debtor who does not own $7,500 worth of residential property may exempt *any property*,

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[160]U.S. CONST. art. 6, cl. 2.

[161]Perez v. Campbell, 402 U.S. 637, 649 (1971).

[162]Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

[163]*See* Foster v. City Loan and Sav. Co. (*In re* Foster), 16 Bankr. 467, 469 (N.D. Ohio 1981).

[164]*See In re* Vasko, 6 Bankr. 317, 322 (Bankr. N.D. Ohio 1980).

[165]*See id.* at 320 ("A reading of the Ohio law clearly shows that it is an exemption statute with the purpose of protecting debtors and enabling them to achieve a fresh start.").

[166]Bradshaw v. Beneficial Fin. Co. (*In re* Balgemann), 16 Bankr. 780 (Bankr. N.D. Ill. 1982).

[167]Rhodes v. Stewart (*In re* Rhodes), 14 Bankr. 629 (Bankr. M.D. Tenn. 1981).

[168]16 Bankr. at 783; 14 Bankr. at 634.

[169]11 U.S.C. § 522(d)(1) (Supp. IV 1980).

not to exceed in value the unused portion of the $7,500 allowed under subsection 522(d)(1) plus $400.[170] By enacting subsection 522(d)(5), Congress intended to eliminate any discrimination between homeowners and non-homeowners, and to give "all debtors potentially the same $7,900 stake."[171] The *Balgemann* and *Rhodes* courts, finding that the exemption statutes of Illinois and Tennessee, respectively, lacked an exemption similar to that in subsection 522(d)(5) of the federal standard, invalidated the states' opt-out decisions as violative of the supremacy clause.[172]

Whether the logic of these cases will be extended to require a comparison of the *amounts* of exemptions allowed under subsection 522(d) with those in the states' statutes has yet to be determined, and is beyond the scope of this Note. At the very least, which view the courts take of the delegation issue will have serious consequences for those states which similarly discriminate against homeowners.[173] Those courts that view the opt-out provision as a delegation of power will require states' exemptions to reflect the nondiscrimination standard in section 522.

To summarize, if the concurrent power rationale is adopted, and no fresh start policy is found to have been expressed, then the states could constitutionally opt out of the federal exemptions and provide no exemptions to bankrupt debtors. If the concurrent power rationale is followed and a fresh start policy is found to exist, then states which opt out must provide bankrupt debtors with fresh start exemptions. If the lawful delegation rationale is adopted, as it should be, then the fresh start policy *must* be found to exist. Furthermore, not only must the opt-out states provide fresh start exemptions, but those exemptions must comport with the federal standards for fresh start exemptions which are set out in subsection 522(d).

VI. Conclusion

Although courts continue to uphold the constitutionality of the Code based on *Moyses*, this Note has shown that the Code does not meet the geographical interpretation of bankruptcy uniformity in *Moyses*. *Moyses* set forth a uniformity test of fairness of operation

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[170] *Id.* § 522(d)(5).

[171] *In re* Smith, 640 F.2d 888, 891 (7th Cir. 1981).

[172] 16 Bankr. at 783; 14 Bankr. at 634-35.

[173] A partial list of other states which have opted out and do not provide an exemption similar to that in subsection 522(d)(5) includes: Arizona, Ariz. Rev. Stat. Ann. §§ 33-1121 to -1131 (Supp. 1981); Indiana, Ind. Code § 34-2-28-1 (Supp. 1981); Kansas, Kan. Stat. Ann. §§ 60-2301 to -2310 (Supp. 1981); and Ohio, Ohio Rev. Code Ann. § 2329.66 (Page 1981).

on debtors and creditors, not the nondiscrimination test of uniformity expressed in early tax cases construing the revenue clause. When the correct interpretation of *Moyses* is applied to the opt-out provision of the Code, the Code is unconstitutional. Therefore, the *Sullivan* court incorrectly found the opt-out provision uniform under *Moyses*. If the opt-out provision is to be sustained as constitutional under the bankruptcy clause, the Supreme Court must overrule its decision in *Moyses* and expressly adopt the nondiscrimination test as the proper test of uniformity under the bankruptcy clause.

This Note also has shown that the *Sullivan* court's resolution of the delegation issue was wrong. The power to opt out of the federal exemptions in subsection 522(d) cannot be a power held concurrently by the states, and therefore must have been congressionally delegated. When Congress delegates authority it must provide the states with a policy and standards to guide them in exercising the delegated power. Therefore, for the opt-out provision to be constitutional, the courts should find that a fresh start policy has been expressed in the Code, and that subsection 522(d) reflects the standards for that policy.

Finally, this Note has pointed out that the resolution of the delegation issue will have consequences for the constitutionality of state exemption laws. The courts should consider those consequences in resolving the unlawful delegation issue.

RICHARD C. RICHMOND