BANKRUPTCY—AVOIDANCE OF LIENS—SECTION 522(F) OF BANKRUPTCY CODE HELD TO APPLY PROSPECTIVELY ONLY—*United States v. Security Industrial Bank*, 103 S. Ct. 407 (1982).

In an effort to promote the generally acknowledged goal of debtor rehabilitation through bankruptcy legislation,[1] Congress has provided that certain classes of property may be excluded from the bankruptcy estate.[2] These exemptions include such property as the debtor's homestead and household goods.[3] To ensure the effectiveness

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[1] H.R. REP. No. 595, 95th Cong., 1st Sess. 126 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6087-88. The current bankruptcy code is the Bankruptcy Reform Act of 1978. 11 U.S.C. §§ 101-151326 (Supp. IV 1980). In the 1982 case of Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858 (1982), the Supreme Court held that the 1978 Act impermissibly enlarged the jurisdiction of the bankruptcy courts in granting them jurisdiction over all "civil proceedings arising under title 11 [the Bankruptcy title] or arising in or *related* to cases under title 11." *Id.* at 2862 (quoting 28 U.S.C. § 1471(b) (1976 & Supp. III 1979)). The jurisdictional grant empowers bankruptcy judges to hear cases "involving claims that may affect the property of the estate once a [bankruptcy] petition has been filed." *Id.* In the Court's view, such a grant of jurisdiction vests article III judicial power in non-article III judges who do not enjoy the protections of life tenure and immunity from a reduction in salary. *Id.* at 2866-67. In holding that its decision would apply only prospectively, the Court stayed its judgment until October of 1982 to give Congress the opportunity to rectify the situation. *Id.* at 2880. That deadline was subsequently extended until December 24, 1982. United States v. Security Indus. Bank, 103 S. Ct. 407, 410 n.5 (1982). To date, Congress has taken no action on the matter, and the deadline was not extended again. Thus, bankruptcy proceedings are currently in somewhat of a state of confusion. One of the appellees in United States v. Security Indus. Bank, 103 S. Ct. at 410 n.5, argued that the *Northern Pipeline* decision was controlling. The Supreme Court noted, however, that because *Northern Pipeline* was intended to apply prospectively only, it did not affect that case. *Id.*

[2] Generally, the bankruptcy estate is made up of "all legal or equitable interests of the debtor in property" as of the date of the filing of the petition in bankruptcy. 11 U.S.C. § 541(a)(1) (Supp. IV 1980).

[3] The exemption provisions of the Code are found at 11 U.S.C. § 522 (Supp. IV 1980), with the specific property exempted being set forth at § 522(d). Generally, exempt property includes the "homestead exemption, exemptions for personal and household goods, tools of the trade, a small amount of jewelry, and the loan value of a life insurance policy . . . and benefits under social security, unemployment, welfare, and pension plans, and certain tort judgments." H.R. REP., *supra* note 1, at 126, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS at 6087 (footnote omitted). As indicated in the legislative history of the Code, the choice and level of exemptions have generally been considered a matter of state law. *Id.* To a certain extent, state law has failed to keep pace with the needs of modern debtors and is inadequate to serve the ends of debtor rehabilitation. Thus, the Code affords debtors the opportunity to elect between state and federal exemptions. *Id.* This choice of exemptions policy has not gone unchallenged, however, given that a state may, under certain circumstances, void a debtor's right to elect federal exemptions. 11 U.S.C. § 522(b)(1) (Supp. IV 1980). A recent decision of the Seventh Circuit court upheld the constitutionality of a state's power to "opt out" of the federal exemption scheme. *In re* Sullivan, 680 F.2d 1131 (7th Cir. 1982). For a view on the potential state-federal exemption conflict, see generally Vukowich, *Debtors' Exemption Rights Under the Bankruptcy Reform Act*, 58 N.C. L. REV. 769 (1980), and Comment, *Exemptions and Lien Avoidance Under the Bankruptcy Reform Act of 1978 and Ohio Law*, 14 AKRON L. REV. 632 (1981).

of such exemptions,[4] Congress has further provided that regardless of whether exemptions have been waived,[5] debtors may avoid the fixing of certain types of liens on their property interests to the extent that such liens would impair an otherwise allowable exemption under section 522(f).[6] As might be expected, the lien avoidance provision has generated a flood of litigation in bankruptcy courts nationwide, focusing on whether the application of the provision to liens existing prior to the enactment of the present Bankruptcy Code conflicts with fifth amendment due process guarantees.

As the various bankruptcy courts began to address the issue, a split emerged as to the constitutionality of retroactive application.[7] One of the key elements of disagreement was the proper analytical approach for resolving the issue. As the cases reached the appeals level, a similar split appeared. The Court of Appeals for the Tenth Circuit, in *Rodrock v. Security Industrial Bank*,[8] was the first appeals

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[4] Many courts, recognizing that one of the principal goals of a discharge in bankruptcy is to give the debtor an opportunity to begin anew "unhampered by the pressure and discouragement of preexisting debt," Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934), have found that liens on exempt property that remain in effect after discharge serve to defeat the congressional aim of providing debtors with a fresh start. *See, e.g., In re* Pillow, 8 Bankr. 404, 420 (D. Utah 1981). Unless a debtor can avoid encumbrances on certain exempt property, the debtor would, in the words of one court, "be left financially fresh, but without a start." *In re* Pommerer, 10 Bankr. 935, 946 (D. Minn. 1981).

[5] *See* 11 U.S.C. § 522(e),(f) (Supp. IV 1980).

[6] 11 U.S.C. § 522(f) (Supp. IV 1980). This section 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 a lien impairs an exemption to which the debtor would have been entitled under subsection (b) of the section, if such lien is—
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> (1) a judicial lien; or
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> (2) a nonpossessory, nonpurchase-money security interest in any—(A) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor; (B) implements, professional books, or tools of the trade of the debtor or the trade of a dependent of the debtor; or (C) professionally prescribed health aids for the debtor or a dependent of the debtor.

Id.

[7] The majority of cases involving section 522(f) has dealt with the avoidance of liens arising from nonpossessory nonpurchase-money security interests under section 522(f)(2). In this area the courts have been sharply divided. Relatively few cases have considered the constitutionality of section 522(f)(1), which provides for the avoidance of judicial liens, but courts that have addressed the issue have been in virtually full agreement on the constitutionality of the statutory provision. For an extensive list of decisions on this subject, see Note, *Constitutionality of Retroactive Lien Avoidance Under Bankruptcy Code Section 522(f)*, 94 HARV. L. REV. 1616, 1616 n.9 (1981).

[8] 642 F.2d 1193 (10th Cir. 1981), *aff'd sub nom.* United States v. Security Indus. Bank, 103 S. Ct. 407 (1982).

court to decide the question. It found section 522(f)(2) unconstitutional as applied retroactively because it effected "a taking without just compensation" in violation of the fifth amendment takings clause.[9] Shortly thereafter, the Court of Appeals for the Third Circuit, in *In re Ashe*,[10] specifically declined to follow the Tenth Circuit and upheld the constitutionality of section 522(f)(1) as applied retroactively based on its view of the expansiveness of Congress' powers under the bankruptcy clause and the nature of bankruptcy legislation itself.[11]

In assessing the constitutionality of section 522(f)(1),[12] which authorizes the avoidance of judicial liens, Judge Gibbons of the Third Circuit suggested that, in fact, retroactivity was not even the issue.[13] In his view, the very purpose of the bankruptcy laws is to modify existing legal relationships retroactively,[14] and this power embraces both the power to set uniform standards in the area of exemptions[15] and the power to release debtors from their contractual obligations retroactively.[16] Operating thus on a presumption of retroactivity, the court rejected a "just compensation" analysis as the applicable standard of scrutiny.[17] One reason for this was its belief that *Louisville Joint Stock Land Bank v. Radford*,[18] the chief support for the use of a "takings" analysis, had, quite simply, applied the just compensation standard incorrectly.[19] In the court's opinion, the just compensation standard would apply only to instances in which private property is appropriated for an actual public use.[20] Although it recognized that a

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[9] *Id.* at 1198.

[10] 669 F.2d 105 (3rd Cir. 1982). *Ashe* involved the application of section 522(f)(1) to a confession of judgment note.

[11] *Id.* at 111.

[12] See *supra* note 6 for the text of the exemption provision.

[13] Judge Gibbons declared that it is in the nature of bankruptcy to operate retrospectively. 669 F.2d at 110. Thus, he did not explore the effects of retroactive application.

[14] *Id.*

[15] *Id.* at 109-10.

[16] *Id.* at 110 (citing Hanover Nat'l Bank v. Moyses, 186 U.S. 181 (1819)). See *infra* note 63 for a discussion of *Moyses*.

[17] 669 F.2d at 110.

[18] 295 U.S. 555 (1935). For a full discussion of *Radford*, see *infra* notes 66-80 and accompanying text.

[19] 669 F.2d at 111. The court also noted that the holding in *Radford* had been limited by subsequent Supreme Court decisions, most notably Wright v. Vinton Branch of the Mountain Trust Bank, 300 U.S. 440 (1937). *See supra* notes 152-57 and accompanying text.

[20] 669 F.2d at 110. In this regard, the *Ashe* court was operating on a different conception of a "taking" than the *Radford* court and courts basing their holdings on *Radford*. *See infra* notes 66-80 and accompanying text. Particularly instructive is the *Ashe* court's reference to Penn Cent. Transp. Co. v. City of New York, 437 U.S. 104 (1978). There the United States Supreme Court observed that, while the fifth amendment prohibits the Government from forcing certain

just compensation standard would impose certain restrictions on Congress' plenary powers, if indeed there were an appropriation of private property for a public use,[21] the court suggested that if the avoidance of the types of liens covered by section 522(f) could be classified as a taking at all, it must be characterized as "a taking for the private use of the Debtors, not for the general use of the public or the particular use of a governmental agency."[22] The court thus perceived the measure as designed to rearrange the relative economic positions of the parties[23] rather than a taking of private property for a public use.[24]

Given his perception of section 522(f) as classic economic regulation, Judge Gibbons concluded that the United States Supreme Court's decisions in the area of legislation adjusting economic priorities mandated a "rational basis" test[25] as the applicable standard of

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individuals to bear burdens which should be borne by the public at large, the Government would be rendered impotent if it were obliged to offer full compensation whenever its regulations or programs adversely affected some economic interest incident to property. *Id.* at 124. The Court recognized that it is often difficult to distinguish between an interference resulting from legislation designed to rearrange relative economic positions in the public interest and a prohibited taking "without just compensation." *Id.* at 123-24. It asserted, however, that the nature and extent of the interference with the private rights must be so substantial as to constitute an outright invasion of such rights. *Id.* at 124.

[21] 669 F.2d at 110. The *Ashe* court noted that a just compensation standard would apply even in the context of a bankruptcy proceeding if private property were actually appropriated for public use. *Id.* (citing Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974); New Haven Inclusion Cases, 399 U.S. 392 (1970); *In re* Penn Cent. Transp. Co., 494 F.2d 270 (3d Cir. 1974)).

[22] 669 F.2d at 110. Justice Blackmun also adopted this view in United States v. Security Ind. Bank, 103 S. Ct. 407, 415 (1982) (Blackmun, J., concurring).

[23] 669 F.2d at 111.

[24] *Id.* at 110.

[25] The court adopted as the applicable standard of scrutiny the test set forth in United States v. Carolene Products, 304 U.S. 144 (1938). *Carolene Products* involved a fifth amendment due process challenge to a legislative provision prohibiting the interstate shipment of adulterated skim milk. *Id.* at 146. The Court first characterized the prohibition of the shipment of such milk as a permissible exercise of Congress' power to regulate interstate commerce. *Id.* at 152. It stated unequivocally that the constitutionality of regulatory legislation which affected ordinary commercial transactions would be upheld if there were any set of facts tending to support the assumption "that it rests upon some rational basis within the knowledge and experience of the legislators." *Id.*

This application of a rational basis test to bankruptcy legislation had already appeared, though under a different label, as early as Hanover Nat'l Bank v. Moyses, 186 U.S. 181 (1902). There the Supreme Court held that Congress may promulgate any regulations in the area of bankruptcy provided they are "not so grossly unreasonable as to be incompatible with fundamental law." *Id.* at 192. Moreover, recent decisions of the Supreme Court have also indicated that legislation adjusting the relative economic positions of various parties is presumed to be constitutional unless it can be shown "that the legislature has acted in an arbitrary and irrational way." Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976). For a discussion of *Usery*, see *infra* notes 187-89 and accompanying text.

scrutiny.[26] Noting the breadth of Congress' power to achieve the recognized end of debtor rehabilitation,[27] the court concluded that Congress' decision to permit a debtor to avoid a creditor device in direct conflict with the "fresh start" aim of a discharge in bankruptcy[28] was a rational way of striking the balance between debtor rehabilitation and payment of creditors.[29] In reply to the argument that the bankruptcy power does not extend to an impairment of the property rights of secured creditors, Judge Gibbons reiterated that the bankruptcy power is limited only by the requirements of rational basis review.[30] In this regard, the court noted the general acceptance of Congress' power to enact bankruptcy laws affecting property rights arising out of a contractual relationship created under state law.[31] From this proposition the court reasoned that such a situation should logically extend as well to property rights conferred by contract and considered liens on specific property under state law.[32] While acknowledging that congressional action in the area of security interests could lead to widespread reluctance to extend credit,[33] Judge Gibbons asserted that such a situation was beyond the scope of judicial inquiry, the court's only concern being whether the actual congressional choice rests on some rational basis.[34]

The view espoused in *In re Ashe* was adopted subsequently by the Court of Appeals for the Seventh Circuit in *In re Gifford*,[35] thus setting the stage for resolution of the retroactivity issue by the United States Supreme Court. Given the divergence of opinion and the anticipation with which final resolution was awaited in the business community,[36] the Supreme Court decision in *United States v. Security Industrial Bank*[37] warrants closer analysis.

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[26] 669 F.2d at 110.

[27] *Id.* at 110-11; *see supra* note 1.

[28] *See supra* note 4.

[29] 669 F.2d at 111.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] 688 F.2d 447 (7th Cir. 1982).

[36] Indicative of the interest the case aroused is the fact that on the day after the decision was handed down, the case was prominently reported in such publications as the *New York Times*, *see* N.Y. Times, Dec. 1, 1982, at D1, col. 1., the *Wall Street Journal*, *see* Wall St. J., Dec. 1, 1982, at 4, col. 1., the *New York Law Journal*, *see* N.Y.L.J., Dec. 1, 1982, at 1, col. 2, and *American Banker*, *see* Am. Banker, Dec. 1, 1982, at 1, col. 3., the latter two papers giving the decision front page coverage.

[37] 103 S. Ct. 407 (1982).

In *Security Industrial Bank* the Court considered seven cases consolidated for appeal in the Court of Appeals for the Tenth Circuit.[38] In each of the seven cases the debtors obtained a loan from the creditors and granted them, as collateral for the loan, a security interest in what was essentially every household good they owned.[39] This personal property ranged from kitchenware and sewing machines[40] to television sets and furniture,[41] and, in at least two cases, none of the items was worth more than $200.[42] The security interests were nonpossessory nonpurchase-money interests[43] under which the debtors retained possession of the property purportedly serving as collateral for the loan. The proceeds of the loan were not used to purchase the collateral therefor.[44]

The liens in question had been acquired prior to the enactment of the present Bankruptcy Code.[45] In each case, however, the debtor filed for bankruptcy after the effective date of the Code,[46] which

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[38] The cases involved were Jackson v. Security Indus. Bank and Stevens v. Liberty Loan Corp., 4 Bankr. 293 (D. Colo. 1980); Rodrock v. Security Indus. Bank and Knezel v. Security Indus. Bank, 3 Bankr. 629 (D. Colo. 1980); Hoops v. Freedom Fin. & Security Indus. Bank, 3 Bankr. 635 (D. Colo. 1980); Schulte v. Beneficial Fin. of Kansas, Inc. and Hunter v. Beneficial Fin. of Kansas, Inc., 8 Bankr. 12 (D. Kan. 1980) [*aff'd sub nom.* Rodrock v. Security Indus. Bank, 642 F.2d 1193 (10th Cir. 1981), *aff'd sub nom.* United States v. Security Indus. Bank, 103 S. Ct. 407 (1982)].

[39] 103 S. Ct. at 409.

[40] Rodrock v. Security Indus. Bank, 3 Bankr. 629, 630-31 n.2 (D. Colo. 1980), *aff'd*, 642 F.2d 1193 (10th Cir. 1981), *aff'd sub nom.* United States v. Security Indus. Bank, 103 S. Ct. 407 (1982). In *Rodrock*, the total value of the collateral used was $580, while in Knezel v. Security Indus. Bank, the collateral was worth $540. *Id.*

[41] One of the chief criticisms of this type of security interest is that it covers items with basically no resale value. *See* H.R. REP., *supra* note 1, at 127, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS at 6088. One bankruptcy court, describing the interests as " 'dragnet' security interests," noted that the goods subject to such liens have generally only "garage sale" value and that "[a]dministrative burdens and expenses, as well as the absence of any market, make salvage and resale impracticable." *In re* Pillow, 8 Bankr. 404, 406 (D. Utah 1981).

[42] *See* Jackson v. Security Indus. Bank, 4 Bankr. 293, 294 (D. Colo. 1980), *aff'd sub nom.* Rodrock v. Security Indus. Bank, 642 F.2d 1193 (10th Cir. 1981), *aff'd sub nom.* United States v. Security Indus. Bank, 103 S. Ct. 407 (1982). Under section 522(d)(3), the debtor may claim an exemption of a maximum of $200 in any particular item. 11 U.S.C. § 522(d)(3) (Supp. IV 1980).

[43] 103 S. Ct. at 409. As defined by one court, "[t]he taking of a security interest in property which is already owned by the debtor results in the creation of merely a *non-purchase* money security interest." First Hardin Nat'l Bank v. Damron, 5 Bankr. 357, 358 (W.D. Ky. 1980) (emphasis in original). This is in contrast to the situations in which a seller retains an interest in an item purchased to secure payment or one person advances funds to another to enable that person to acquire rights in specific property, both of which arrangements give rise to a purchase-money security interest. *Id.*

[44] 103 S. Ct. at 409. This is the nature of such an interest. *See supra* note 43.

[45] 103 S. Ct. at 409. The current Bankruptcy Code was enacted by Congress on October 6, 1978 and signed into law on November 6, 1978. *Rodrock*, 642 F.2d at 1195.

[46] 103 S. Ct. at 409. The Code became effective on October 1, 1979. *Id.* A number of cases have dealt with the issue whether section 522(f)(2) is intended to apply during the post-

provided for the exclusion from the bankruptcy estate of certain items of personal property covered by the respective creditors' liens.[47] The debtors sought to avoid these liens under section 522(f)(2), claiming an exemption for the various household goods collateralizing the security agreements previously entered into.[48] The effect of allowing the exemptions would have been to relegate the nonpossessory nonpurchase-money creditors to the rank of unsecured creditors.[49] This status guaranteed them only minimal payment on their claims, which amounted, in certain cases, to an entitlement of only one dollar.[50]

In objecting to the claims for exemptions, the affected creditors asserted that to permit debtors to avoid a lien incident to a security interest that had vested prior to the enactment date of the Bankruptcy Code would amount to a deprivation of rights in specific property in violation of fifth amendment due process guarantees.[51] The Tenth Circuit, in reliance on the 1935 Supreme Court decision in *Louisville Joint Stock Bank v. Radford*,[52] agreed. Although it acknowledged that Congress may, in the exercise of its bankruptcy powers, discharge a debtor from his contractual obligations,[53] the court declared that such powers do not extend to the taking of a creditor's vested rights in specific property for the benefit of a debtor.[54] The court noted that the avoidance provision would work an even more severe impairment of the secured creditor's rights than did the moratorium on mortgage foreclosure proceedings in *Radford*[55] because the creditor ultimately

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enactment pre-effective, or "gap," period. The highest court to consider the question thus far has determined that section 522(f) may constitutionally be applied to nonpossessory nonpurchase-money security interests arising during that eleven month period. *See In re* Webber, 674 F.2d 796 (9th Cir. 1982). Noting that all of the liens in *Security Industrial Bank* arose pre-enactment, the Supreme Court specifically declined to address the issue of post-enactment pre-effective liens. 103 S. Ct. at 414 n.11.

[47] 103 S. Ct. at 409; *see supra* note 3.

[48] 103 S. Ct. at 409; *see supra* note 6.

[49] *See* Rodrock v. Security Indus. Bank, 3 Bankr. 629, 630 (D. Colo. 1980), *aff'd*, 642 F.2d 1193 (10th Cir. 1981), *aff'd sub nom.* United States v. Security Indus. Bank, 103 S. Ct. 407 (1982).

[50] *See id.*

[51] Schulte v. Beneficial Fin. of Kansas, Inc., 8 Bankr. 8, 14 (D. Kan. 1980); Jackson v. Security Indus. Bank, 4 Bankr. 293, 294 (D. Colo. 1980); Rodrock v. Security Indus. Bank, 3 Bankr. 629, 630 (D. Colo. 1980); Hoops v. Freedom Fin. & Security Indus. Bank, 3 Bankr. 635, 636 [*aff'd sub nom.* Rodrock v. Security Indus. Bank, 642 F.2d 1193 (10th Cir. 1981), *aff'd sub nom.* United States v. Security Indus. Bank, 103 S. Ct. 407 (1982)].

[52] 295 U.S. 555 (1935).

[53] 642 F.2d at 1197.

[54] *Id.*

[55] *Id.* at 1197 n.4. For a discussion of *Radford* and the way in which the interest at stake was affected by section 75(s) of the Frazier-Lemke Act of 1934, see *infra* notes 67-80 and accompanying text.

would be deprived of all rights in the collateral.[56] Thus, the Tenth Circuit held invalid the application of section 522(f)(2) to security interests that had vested before the 1978 Code was enacted.[57] The United States, which had intervened in each case, appealed [58] and the Supreme Court noted probable jurisdiction.[59]

Justice Rehnquist affirmed the judgment of the United States Court of Appeals for the Tenth Circuit.[60] The Court noted that it would address the constitutional issues raised by retroactive application of section 522(f)(2) only to the extent necessary to ascertain whether such application posed sufficiently serious questions as to its constitutionality to justify the Court's disposing of the case through statutory construction rather than resolution of the underlying constitutional issue.[61] The Court began this exercise by defining the analytical approach it would employ. In reply to the Government's argument that section 522(f)(2) represented a rational exercise of the powers granted to Congress under the bankruptcy clause,[62] the Court asserted that while such an attempt to provide debtors with a fresh start was indeed rational, and while the bankruptcy power had traditionally been used to release debtors from their contract liabilities retroactively,[63] an entirely distinct constitutional analysis is required

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[56] 642 F.2d at 1197 n.4.

[57] *Id.* at 1198.

[58] 103 S. Ct. at 410.

[59] United States v. Security Indus. Bank, 102 S. Ct. 969 (1982).

[60] 103 S. Ct. at 414.

[61] *Id.* at 412 (citing Lorillard v. Pons, 434 U.S. 575 (1978)). *Lorillard* was a recent case employing a judicial preference for statutory construction. Such an approach is not new. As expressed by Justice White early in this century:

> It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity . . . . [T]he rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.

United States v. Delaware & Hudson Co., 213 U.S. 366, 407-08 (1908) (citations omitted).

[62] 103 S. Ct. at 410.

[63] *Id.* In acknowledging Congress' authority to impair contractual obligations, the Court made reference to its 1902 decision in Hanover Nat'l Bank v. Moyses, 186 U.S. 181 (1902). In that case, the creditor recovered a judgment on a promissory note against the debtor in Mississippi where the debtor was domiciled. After the judgment was rendered, the debtor changed his domicile to the State of Tennessee where he filed a voluntary petition in bankruptcy seeking a discharge from all his debts, including the creditor's outstanding judgment against him. Over the creditor's objection, the Court upheld the legislation authorizing discharge of the debt. *Id.* at 182-84. This case is advanced by those supporting the constitutionality of section 522(f) as the leading authority for the proposition that Congress has been granted plenary power to regulate in the areas of bankruptcy, which grant empowers Congress to "discharge the debtor from his contracts and legal liabilities, as well as to distribute his property." *Id.* at 188; *see, e.g., In re*

where bankruptcy legislation seeks to impair property interests retroactively.[64] In such cases, the Court declared, the pertinent issue is whether private property is taken without just compensation,[65] a standard developed in *Louisville Joint Stock Land Bank v. Radford.*[66]

Radford, a 1935 decision of the United States Supreme Court, had invalidated section 75(s) of the Frazier-Lemke Act of 1934[67] which enabled a mortgagor in financial distress to purchase the mortgaged property at an appraised value under a deferred payment plan but with immediate possession.[68] Failing approval of such an arrangement by the mortgagee,[69] the mortgagor would be permitted to apply to the court for a five year moratorium on all foreclosure proceedings, paying a reasonable rental value to be distributed among the mortgagor's secured and unsecured creditors.[70] In striking down the provision, the Court observed that measures for the relief of mortgagors in distress had always been founded on the preservation of the mortgagees' substantive rights because compensation in the form of full payment of the debt with interest was contemplated.[71] No prior bankruptcy legislation had ever attempted "to enlarge the rights or privileges of the mortgagor as against the mortgagee."[72] While acknowledging Congress' ability to discharge a debtor from personal obligations under its broad bankruptcy powers,[73] the Court in *Radford* asserted that the legislation in question did not, in fact, seek to discharge the debtor from his contractual liabilities,[74] but sought instead to permit the mortgagor to retain possession of the mortgaged

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Gifford, 688 F.2d 447 (7th Cir. 1982); *In re* Ashe, 669 F.2d 105 (3rd Cir. 1982); *In re* Ward, 14 Bankr. 549 (S.D. Ga. 1981); *In re* Pillow, 8 Bankr. 404 (D. Utah 1981). Of particular interest to those who seek to apply section 522(f) retroactively is the *Moyses* Court's observation that all debts are created subject to Congress' expansive bankruptcy powers. 186 U.S. at 189. Persons who challenge the constitutionality of section 522(f) as applied retroactively maintain that *Moyses* addressed the impairment of contract rights only and did not extend Congress' bankruptcy powers to permit the impairment of property rights. *See, e.g.,* Note, *supra* note 7, at 1621.

[64] 103 S. Ct. at 410.

[65] *Id.*

[66] 295 U.S. 555 (1935).

[67] Pub. L. No. 486, ch. 869, 48 Stat. 1289 (1934) (amended 1935).

[68] 295 U.S. at 575. Payments were to be graduated at the rate of 2.5% within two years, 2.5% within three years, 5% within four years, 5% within five years and the outstanding balance within six years, with a yearly interest rate of 1% on all deferred payments. *Id.*

[69] The mortgagee's refusal to agree to immediate purchase on the deferred payments basis would bring the parties within the scope of paragraph 7 of section 75(s). *Id.* This paragraph was the provision in controversy in *Radford.*

[70] 295 U.S. at 575-76.

[71] *Id.* at 579.

[72] *Id.* at 582.

[73] *Id.* at 589.

[74] *Id.* at 590.

premises.[75] Such a law operated, in the Court's opinion, to deprive the mortgagee of substantial rights in specific property without compensation,[76] thereby resulting in a significant impairment of the mortgagee's security interest.[77] In reply to the mortgagor's contention that such impairment was not "arbitrary and unreasonable" [78] because it resulted from legislation enacted to remedy a national economic emergency,[79] the Court concluded that regardless of the nature and extent of the public interest, "private property shall not be thus taken even for a wholly public use without just compensation."[80]

In view of its earlier decision in *Radford*, the Court in *Security Industrial Bank* emphasized that no matter how "rational" particular bankruptcy legislation may be, it must be examined in terms of whether it effects a "taking" in violation of fifth amendment guarantees.[81] Thus, the Court adopted a "takings" approach and rejected the Government's suggestion that "rational basis" review be employed. In a further effort to avoid application of the "takings" prohibition, the Government argued that what was "taken" in this case was not, strictly speaking, "property" as that term had traditionally been defined for due process purposes.[82] In this connection, the Government

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[75] *Id.* at 594.

[76] *Id.* at 601-02. In deciding that the Frazier-Lemke Act operated to deprive the mortgagee of substantive rights in specific property acquired under state law, the *Radford* Court pointed to five property rights held by the mortgagee:

1. The right to retain the lien until the indebtedness thereby secured is paid.
2. The right to realize upon the security by a judicial public 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.
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. at 594-95. Section 75(s) was subsequently upheld in amended form. *See* Wright v. Vinton Branch of the Mountain Trust Bank, 300 U.S. 440 (1937). For an account of the ultimate evisceration of *Radford's* "five property rights," see *In re* Pillow, 8 Bankr. 404, 414 n.15 (D. Utah 1981).

[77] 295 U.S. at 595.

[78] *Id.* at 598.

[79] *Id.* The debtor in *Radford* attempted to characterize section 75(s) as legislation enacted for a "permissible public purpose," namely to alleviate the economic distress of mortgagors during the Depression. *Id.* This formulation seems to be responsible, in part, for the confusion the *Radford* decision has engendered. As indicated *infra* at notes 141-50, the "public use" concept under the fifth amendment taking clause involves an entirely different set of circumstances.

[80] *Id.* at 602.

[81] 103 S. Ct. at 410.

[82] *Id.* at 410-11.

suggested that because the Supreme Court had, in certain instances, expanded the notion of "property" to provide due process protection to common law contract rights,[83] then by the same token property rights and contract rights should be afforded the same measure of protection under the takings clause.[84] The Government argued further that bankruptcy legislation had traditionally placed all creditors on a more or less equal footing,[85] treating secured and unsecured creditors in much the same way.[86] In reply to these contentions, the Court stated simply, without further elaboration, that regardless of how bankruptcy legislation had resolved the contract right-property right dichotomy, "the contractual right of a secured creditor to obtain repayment of his debt may be quite different in legal contemplation from the property right of the same creditor in the collateral."[87]

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[83] *Id.* The Government made reference to two Supreme Court decisions that had labeled as "property" certain rights which had theretofore not been specifically considered as such. In Goldberg v. Kelly, 397 U.S. 254 (1969), the Court was asked to decide whether the termination of welfare benefits without an evidentiary hearing prior to termination constituted a due process violation. *Id.* at 255. In considering the nature of the right, the Court noted that welfare benefits are a "matter of statutory entitlement for the persons entitled to receive them," *id.* at 262, and should be viewed "as more like 'property' than a 'gratuity'." *Id.* at n.8. The dissent in *Goldberg* found that this characterization "somewhat strains credulity." *Id.* at 275 (Black, J., dissenting). In Arnett v. Kennedy, 416 U.S. 134 (1973), the Supreme Court addressed the issue of whether the standard and procedure for discharge of nonprobationary civil servants complied with due process guarantees. *Id.* at 147-48. In holding that they did, the Court noted that the petitioner's "expectancy of employment" was properly characterized as a property interest, but was conditioned on the procedural limitations set forth in the legislation creating the right. *Id.* at 155.

[84] 103 S. Ct. at 411.

[85] *Id.*

[86] *Id.* One bankruptcy court, in an exhaustive historical discussion, argued that bankruptcy legislation is founded on a principle of equality among creditors, with the focus being on the amount of creditors' respective debts, rather than the nature of the debts. *In re* Pillow, 8 Bankr. 404, 421-24 (D. Utah 1981). Citing sources covering bankruptcy legislation from colonial America to the days of the Uniform Commercial Code, the *Pillow* court noted that the tradition of lien avoidance and subordination of security interests under certain circumstances illustrates the blurring of the distinction between secured and unsecured creditors. *Id.* at 423. This argument goes too far, however. While bankruptcy does operate on a principle of "equality among creditors," it also operates on the basis of classes of creditors, with due deference being given to the nature of the claim of each class.

[87] 103 S. Ct. at 411. While the Court was resisting any attempt to equate contract rights and property rights, *see infra* notes 160-63, its formulation raises an issue which is not then addressed. The Court cites to Hanover Nat'l Bank v. Moyses, 186 U.S. 181 (1902), which it viewed as limiting Congress' bankruptcy powers to the impairment of contracts. *See supra* note 63. It then cites *Radford*, apparently for the proposition that "the position of a secured creditor, who has rights in specific property, differs fundamentally from that of an unsecured creditor, who has none." 295 U.S. at 588. What the Court does not consider, however, is what rights the creditor acquired in the property and whether, in fact, the "property right" asserted may, in fact, be no more than incidental to, rather than distinct from, the contractual right to be paid. For consideration of the latter view, see generally, *In re* Pommerer, 10 Bankr. 935, 947 (D. Minn. 1981); *In re* Paden, 10 Bankr. 206, 209 (E.D. Pa. 1981); *In re* Mahoney, 15 Bankr. 482, 484

The Court, in considering the effect of retroactive application, declared that retroactive application of section 522(f)(2) to avoid the liens in question would serve to abridge the creditors' property rights *in toto*.[88] The Government, while not disputing that the creditors' interest would be effectively destroyed, contended that the interest of a nonpossessory nonpurchase-money lienor is "insubstantial,"[89] thus providing a ground for distinction. The Court summarily dismissed the argument with a statement to the effect that although "[t]he 'bundle of rights' which accrues to a secured party is obviously smaller than that which accrues to an owner in fee simple,"[90] the interest of a secured creditor is nonetheless property. Support for this proposition was found in *Radford* and *Armstrong v. United States*.[91]

In *Armstrong*, another "takings" case, petitioners supplied materials to a shipbuilder who had entered into a contract with the United States for the construction of navy boats.[92] The Government's agreement stipulated that default on the part of the shipbuilder would entitle the Government to take title to and possession of all work, completed and uncompleted, along with all construction materials acquired.[93] Upon the shipbuilder's default, the Government did indeed exercise its rights and took possession of all unused materials, including those supplied by petitioners and for which petitioners had not been paid.[94] Petitioners objected, claiming that the Government had destroyed their liens[95] on the boat hulls and on material they had

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(W.D.N.C. 1981); Note, *Bankruptcy—Section 522(f) of the 1978 Code—Constitutionality of Its Application to Security Interests Pre-Dating Enactment of the Code*, 27 WAYNE L. REV. 1281, 1300-02 (1981).

[88] 103 S. Ct. at 411.

[89] *Id.*

[90] *Id.* This reply to the Government's argument misses the point entirely. The Government was not contending that anything other than property was involved. Rather, the Government was urging the Court to examine exactly what rights the lien conferred upon the holder and to distinguish the lien from the types of interests generally afforded fifth amendment protection. *See infra* notes 166-75 and accompanying text. The characterization of the nonpossessory nonpurchase-money security interest as an "insubstantial" property right has been the subject of much comment. In support of this view, see generally *In re* Gifford, 688 F.2d 447, 456 (7th Cir. 1982); *In re* Ward, 14 Bankr. 549, 561 (S.D. Ga. 1981).

[91] 364 U.S. 40 (1961).

[92] *Id.* at 41.

[93] *Id.*

[94] *Id.*

[95] The liens asserted to have been destroyed were authorized under ME. REV. STAT. ch. 178, § 13 (1954) which provided that any person who "furnishes labor or materials for building a vessel has a lien on it therefor, which may be enforced by attachment thereof within 4 days after it is launched . . . . He also has a lien on the materials furnished before they become part of the vessel, which may be enforced by attachment . . . ." 364 U.S. at 41.

furnished, in violation of the fifth amendment takings clause.[96] Finding the materialmen's right to attach specific property for the satisfaction of their claims to be a compensable property interest within the meaning of the fifth amendment,[97] the Supreme Court agreed. The Court acknowledged the difficulty in distinguishing between a compensable taking by the government and the abrogation of an interest as a consequence of valid regulation.[98] Nonetheless, the Court held that the Government had acquired a direct benefit by precluding enforcement of the materialmen's liens through its contract enabling it to take title to materials subject to the liens of persons who were not parties to the contract.[99] As a direct beneficiary, therefore, the Government was required to compensate the lienors for the value of the liens destroyed.[100]

The Government in the instant case argued that *Armstrong* was not controlling because section 522(f)(2) did not effect a taking of private property for the Government's own use.[101] Rather, the Government asserted, section 522(f)(2) is of a purely economic nature and is designed to adjust priorities among various private parties.[102] In response to this argument, the Court pointed out that certain governmental action had been previously characterized as a taking despite the fact that it had not involved an "outright acquisition . . . by the government for itself."[103] Notwithstanding, the Government urged

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[96] 364 U.S. at 42.

[97] *Id.* at 44. In support of this holding, the Court relied on its decision in *Radford*. The Court noted that the petitioners had made no attempt to enforce their lien through attachment, but indicated nonetheless that they were entitled to attach the specific property to satisfy their claim. *Id.* Additionally, the Court stated that the lien had attached to the material "by operation of law" and found no basis for permitting the owner of the property to impair that right of attachment through a contract with another party. *Id.* at 45.

[98] *Id.* at 48-49.

[99] *Id.*

[100] *Id.* at 49. The relevance of *Armstrong* to a determination of the constitutionality of section 522(f)(2) was also suggested in Note, *supra* note 7, at 1630-31. A contrary view was expressed by the Seventh Circuit, however, in *In re* Gifford, 668 F.2d 447, 456 (7th Cir. 1982), where the court distinguished a nonpossessory nonpurchase-money security interest from a farm mortgage or materialman's lien. The court noted that a mortgage or materialman's lien "attach[es] to property of the debtor that has directly benefited from the loan or work done." *Id.* The lien in *Armstrong* arose, for example, because Armstrong has supplied the shipbuilder with the very materials appropriated by the Government. With the nonpossessory nonpurchase-money lienholder, on the other hand, "the borrowed money . . . was not lent to purchase or improve the household goods listed in the security agreement." *Id.* Moreover, section 522(f) does not provide a direct benefit to the Government as did the appropriation in *Armstrong*. *Id.* at 460.

[101] 103 S. Ct. at 412.

[102] *Id.* For a similar view, see *In re* Ashe, 669 F.2d 105 (3rd Cir. 1982); *In re* Gifford, 668 F.2d 447 (7th Cir. 1982); *see also infra* notes 177-92 and accompanying text.

[103] 103 S. Ct. at 412 (citing Loretto v. Teleprompter Manhattan CATV Corp., 102 S. Ct. 3164 (1982); Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980); Pennsylvania Coal Co.

that a taking analysis was inappropriate in view of the value of the liens to the creditors holding them, namely as an instrument of leverage rather than a means of foreclosure.[104] Although the Court did not reject this suggestion categorically, it found the state's characterization of the liens as property to be more compelling and did not explore the argument further.[105] The Court thus concluded that there was considerable doubt as to whether section 522(f)(2) would pass constitutional muster if applied retroactively and sought a way to apply it prospectively only.[106]

In attempting to divine the congressional intent as to retroactivity, the Court of Appeals for the Tenth Circuit had concluded that section 522(f)(2) would necessarily apply retroactively because if it applied prospectively only, no law would apply to cases filed after the effective date of the Code but involving security interests taken prior to that date given that the old bankruptcy act had been repealed.[107] The Supreme Court found this approach inadequate. While noting that the 1978 Code applies to all bankruptcy petitions filed after the effective date,[108] the Court suggested that Congress may well have

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v. Mahon, 260 U.S. 393 (1922)). These cases may be readily distinguished from the instant case. In *Loretto*, the Court considered the effect of a state statute requiring landlords to permit the installation of cable television facilities on their property. 102 S. Ct. at 3169. The Court found that the regulation resulted in a taking without compensation, but the holding revolved around the *permanent, physical* nature of the intrusion on real property. *Id.* at 3171. Indeed, the Court noted that its holding was limited to cases of a permanent physical occupation, *id.* at 3179, and recognized that regulations may legitimately be imposed restricting the use of private property. *Id.* at 3172, 3179. In *Pruneyard*, the Court examined whether a state could require a shopping center owner to permit the dissemination of pamphlets and petitions on its property. 447 U.S. at 749. In holding that it could, the Court asserted that the temporary physical invasion of property authorized by the state did not amount to a taking because the owner's right to exclude certain individuals was not shown to be "essential" to the use or economic value of [the] property." *Id.* at 754. In *Pennsylvania Coal*, the Supreme Court considered whether a prohibition on the removal of coal in such a way as to cause the subsidence of homes, streets or buildings constituted a taking. 206 U.S. at 412-13. The Court held that although the government need not compensate individuals for every diminution in the value of their property, *id.* at 413, an act which makes it commercially impossible to use property for the purpose for which it was acquired diminishes property beyond the permissible limits. *Id.* at 415. Of the three cases, only *Pennsylvania Coal* would seem to be applicable to the instant case if section 522(f) is viewed as a use restriction. *Pennsylvania Coal* does, however, also fall within the category of a permanent physical invasion within the meaning of *Loretto*.

[104] 103 S. Ct. at 412.

[105] *Id.*

[106] *Id.*

[107] 642 F.2d at 1196-97.

[108] 103 S. Ct. at 413. In his concurring opinion, Justice Blackmun declared that he saw "nothing in the statute . . . that speaks or hints of only prospective applicability or that compels it." *Id.* at 415 (Blackmun, J., concurring). The Seventh Circuit, in determining the scope of application of section 522(f), noted that of all the substantive provisions of the current Bank-

intended that property rights be impaired only in connection with liens arising after the Code was enacted.[109] If this is true of section 522(f)(2), then the other provisions of the Code would still apply to the liens because they exist independently under state law.[110]

On the question of application of legislation generally, the Court declared it beyond dispute that legislation operates prospectively, unless retroactivity be the " 'manifest intention of the legislature.' "[111] This is particularly true where retroactive application would serve to abridge previously acquired rights.[112] As an example of the application of this principle in the bankruptcy context, the Court referred to its 1914 decision in *Holt v. Henley*.[113] The creditor in *Holt* had installed a sprinkler system on the premises of the eventual bankrupt, under a conditional sales agreement specifying that the system would remain the property of the creditor until it was paid for.[114] A statute enacted subsequent to the date of the agreement placed the bankruptcy trustee in the position of a lienholder with a prior claim.[115] The Supreme Court refused to read the amendment in such a way as to destroy the rights of the creditor, finding that retroactive application would "impute to the act of Congress an intent to take away rights lawfully retained, and unimpeachable at the moment when they took their start."[116] Similarly, the Court in the instant case declared that while bankruptcy legislation had traditionally been held to apply to

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ruptcy Code, only section 522(f) gives no indication as to when it is to apply. It held, however, that because no exception was carved out for section 522(f) in the provision of the Code stipulating that only the 1978 Code was to apply to proceedings commenced after the effective date, then the provision necessarily applied retroactively. *See In re* Gifford, 688 F.2d 447, 450 (7th Cir. 1982).

[109] 103 S. Ct. at 413.

[110] *Id.*

[111] *Id.* (quoting Union Pac. R. Co. v. Laramie Stock Yards Co., 231 U.S. 190, 199 (1913)).

[112] 103 S. Ct. at 413.

[113] 232 U.S. 637 (1914).

[114] *Id.* at 638.

[115] *Id.* at 639. Under the applicable state law, the type of sales arrangement entered into was void "as to creditors . . . and as to purchasers for value without notice from the vendee," *id.* at 638-39, unless the sale was registered. Several months after the conditional sales contract was executed, the eventual bankrupt executed a mortgage deed purportedly covering the existing and after-acquired plant on the mortgaged premises. Thus, in addition to the bankruptcy trustee, who was claiming priority over the conditional seller by virtue of an amendment to the bankruptcy laws, the mortgagees were also claiming priority by virtue of the mortgagor's acquisition of the sprinkler system during the term of the mortgage. *Id.* at 640. The Court also dismissed the latter claim finding that the mortgagees were not purchasers for value as against the conditional seller because the sprinkler system had been installed after the mortgage was executed and the mortgagees had thus "made no advance on the faith of it." *Id.* at 640-41.

[116] *Id.* at 640.

preexisting contract rights,[117] there was no precedent for extending such applicability to preexisting property rights.[118] Thus the Court held that section 522(f)(2) should not be interpreted to destroy preexisting property rights because Congress had not clearly indicated its intention that it do so.[119] This holding, in turn, permitted the Court to avoid resolution of the underlying constitutional issue.

Justice Blackmun, in a concurring opinion, found the instant case to be indistinguishable from *Holt* because it too had involved "a preexisting agreement, a subsequent change in the then Bankruptcy Act, and the Court's preservation of the pre-existing right."[120] Finding *Holt* dispositive on that ground alone, he asserted that the statute should be held to apply prospectively only and that the majority should have refrained from examining the legislation in the context of a taking.[121] Were it not for *Holt*, however, Justice Blackmun would have reached the constitutional issue and found retroactive application both valid and appropriate.[122] While acknowledging that the measure in question could well be a "rational" exercise of Congress' bankruptcy powers,[123] Justice Rehnquist had avoided all reference to the congressional purpose underlying section 522(f). Justice Blackmun, however, appeared to suggest that Congress' purpose in enacting the provision and the nature of the interest avoided were of predominant importance. On the one hand, he characterized the section 522(f)(2) exemptions as both designed "to protect the debtor's essential needs and to

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[117] 103 S. Ct. at 413 (citing Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 188 (1902)); *see supra* note 63.

[118] 103 S. Ct. at 413. In this connection, the Court distinguished certain cases advanced by the Government in support of its argument that bankruptcy legislation may impair previously acquired property rights. *See id.* at 413 n.10 (distinguishing Claridge Apartments Co. v. Commissioner, 323 U.S. 141 (1944) (tax benefits, not property rights, involved); Dickinson Indus. Site, Inc. v. Cowan, 309 U.S. 382 (1940) (change in procedural rules not affecting property rights)). With regard to Carpenter v. Wabash Ry., 309 U.S. 23 (1940), another case cited by the Government, the Court noted that while giving personal injury judgment creditors priority over mortgagees "may have disadvantaged the mortgagees by reducing the amount of cash available to pay their notes, it did not affect their property right in the collateral securing the mortgages." 103 S. Ct. at 414 n.10. It is difficult to see how this differs from section 522(f), since both statutes rearrange priority positions and diminish the amount of funds available for the satisfaction of particular debts. Section 522(f), in conjunction with section 522(d), provides for the protection of exemptions up to clearly specified amounts. *See* 11 U.S.C. § 522(d) (Supp. IV 1980). Section 522(d) is not a blanket exemption. If, in practical effect, the lien of a nonpossessory nonpurchase-money lienholder is totally avoided, it is due to the limited worth of the collateral and its disproportionate value with respect to the amount of the loan.

[119] 103 S. Ct. at 414.

[120] *Id.* at 416 (Blackmun, J., concurring).

[121] *Id.*

[122] *Id.* at 415 (Blackmun, J., concurring).

[123] *Id.* at 410.

enable him to have a fresh start economically,"[124] and "limited as to kinds of property and as to values."[125] On the other hand, he noted, the amount of the lien is disproportionate to the value of the property;[126] moreover, because the liens are general, they attach to no specific property and the lienholder has no power to prevent the debtor from disposing of the property allegedly supporting the liens.[127] Additionally, Justice Blackmun viewed the lien avoidance measure as a congressional response to abuse by creditors whose arrangements with debtors amount to contracts of adhesion and who use these devices to threaten debtors to maintain payments even after a discharge in bankruptcy rather than with any true intention of foreclosing on the collateral.[128] Justice Blackmun contended that the statute represented an economic regulation which attempted to adjust priorities.[129] Therefore, he suggested that a "takings" analysis was inappropriate because no private property had been appropriated for a public use.[130]

By applying a strict takings standard to section 522(f), the majority in the instant case demonstrated that it was not prepared, as was the concurrence, to permit economic realities to influence its decisions in the area of lien avoidance. This position, as well as the Court's presumption of prospectivity in the area of bankruptcy legislation in reliance on such cases as *Holt v. Henley,* raises a number of issues. First, it is questionable whether *Holt v. Henley* is necessarily controlling authority in this case. Second, the Court, by adhering to the *Radford* "takings" rationale, fails to recognize what post-*Radford* decisions have emphasized, namely that Congress may, in the exercise of its bankruptcy powers, affect property rights in many ways provided the congressional action does not amount to an unreasonable

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[124] *Id.* at 415 (Blackmun, J., concurring).

[125] *Id. See* 11 U.S.C. § 522(d),(f) (Supp. IV 1980).

[126] 103 S. Ct. at 415 (Blackmun, J., concurring). The disproportionate relationship between the amount of the lien and the value of the collateral purportedly securing it is one of the arguments most frequently advanced in support of retroactive application of section 522(f). *See, e.g., In re* Gifford, 688 F.2d 447, 456 (7th Cir. 1982); *In re* Rapp, 16 Bankr. 575, 579 (S.D. Fla. 1981); *In re* Pillow, 8 Bankr. 404, 419 (D. Utah 1981); *In re* Ambrose, 4 Bankr. 395, 400 (N.D. Ohio 1980).

[127] 103 S. Ct. at 415 (Blackmun, J., concurring).

[128] *Id.* This was one of the Government's principal contentions. *See supra* note 82 and accompanying text. This recognition of the value to creditors of nonpossessory nonpurchase-money security interests in household goods is reflected in the legislative history of the statute as well. *See* H.R. REP., *supra* note 1, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963.

[129] 103 S. Ct. at 415 (Blackmun, J., concurring). This view of section 522(f) as economic regulation was adopted by two courts of appeals prior to the decision in this case. *See In re* Gifford, 688 F.2d 447 (7th Cir. 1982); *In re* Ashe, 669 F.2d 105 (3rd Cir. 1982); *see also infra* notes 180-92 and accompanying text.

[130] 103 S. Ct. at 415 (Blackmun, J., concurring).

impairment of such rights.[131] Third, even assuming that *Radford* may furnish the proper analytical framework for dealing with cases arising under section 522(f)(2), the court does not explore whether a different constitutional approach may be equally justified given the nature and purpose of the legislation at issue.

In *Holt,* the Court applied a presumption against retroactivity to a statute placing trustees in bankruptcy in the position of a lienholder with priority over creditors who sold under a conditional sales contract.[132] While it is true that the Court in *Holt* construed the statute as affecting only property rights arising after the statute became effective,[133] thereby preserving the rights of the conditional seller, *Holt* would appear to be distinguishable from *Security Industrial Bank* because the legislation in question was of an entirely different nature. First of all, title remained with the creditor in *Holt* [134] and the statute, if applied retroactively, would operate to divest the creditor of title. In addition, by giving the bankruptcy trustee priority status, the measure served to enhance the size of the bankruptcy estate,[135] thereby adding to the assets of the debtor to be distributed to his creditors. Therefore, the measure in fact served to benefit certain classes of creditors in the form of increased distributions at the expense of the creditor whose lien was subordinated to the lien of the trustee.[136] In effect, the legislation did not benefit the debtor directly because the property was ultimately to be distributed to his creditors.

The lien avoidance provision being challenged in this case, however, serves an entirely different purpose. It is designed to allow the debtor to retain what is, in fact, but a minimal amount of personal property representing the basic necessities required for a "fresh start"

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[131] *See, e.g.*, Wright v. Vinton Branch of the Mountain Trust Bank, 300 U.S. 440, 470 (1937).

[132] 232 U.S. at 639.

[133] *See id.*

[134] *Id.* at 638. Under the terms of the agreement with the debtor, the sprinkler system was to remain the property of the creditor until it was paid for. In addition, the creditor reserved the right to remove the system from the premises upon default by the debtor. *Id.*

[135] The bankruptcy trustee functions as the representative of the estate. *See* 11 U.S.C. § 323 (Supp. IV 1980). In his capacity as representative of the estate, he attends to the "proper disposition of the debtor's property to his creditors." 1 L. KING, COLLIER BANKRUPTCY MANUAL ¶ 323.02 (3d ed. 1981). In order to carry out this duty, title to all of the bankrupt's nonexempt property must vest in the trustee. *Id.* The basic contention in *Holt* was that retroactive application of this provision in question would have given the trustee title to property that he would not otherwise have had, thereby adding that asset to the distributable estate. 232 U.S. at 639.

[136] Because distributions in bankruptcy are on a *pro rata* basis, 11 U.S.C. § 726(b) (Supp. IV 1980), the amount available for distribution to each class of creditors would be increased by the inclusion of the otherwise exempt asset. Thus, the creditor whose claim was denied would receive only that distribution allowed for the class to which he was relegated.

after bankruptcy.[137] As such, the measure affords a direct benefit to the debtor. Moreover, although a nonpossessory nonpurchase-money security interest is indeed recognized as a form of security interest under Article 9 of the Uniform Commercial Code,[138] creditors who use such devices do not retain or take title to the property purportedly serving as collateral.[139] This is in sharp contrast to the position of the creditor in *Holt* whose agreement with the eventual bankrupt specified that the sprinkler system was to remain the property of the creditor until it was paid for.[140] These differences as to retention of title and parties benefited would warrant the Court's distinguishing *Holt v. Henley* and not viewing it as dispositive.

If *Holt* is removed as an impediment to applying bankruptcy legislation retroactively to preexisting rights, the need to reach the constitutional issues raised by retroactive application of section 522(f)(2) becomes clear. Moreover, because the Court has set forth at length its position on the underlying constitutional issue even as it declined to decide it, the analytical approach employed should be examined. In considering the legislation, the Court engaged in a *Radford* analysis and applied a just compensation standard thereunder. Although it is tempting to characterize the impairment of a lien through bankruptcy legislation as governmental action which forces certain individuals to bear a burden which should be borne by the public at large,[141] the avoidance of creditor devices which frustrate the rehabilitative ends of the federal bankruptcy power simply does not amount to a compensable taking as that notion has historically been understood. While precisely what constitutes a taking has been largely determined on a case-by-case basis,[142] traditionally certain factors have been examined by the courts. These include the use for which the property is appropriated and its economic effect on the

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[137] *See supra* notes 1-4 and accompanying text.

[138] In this connection, the Court noted that while the Uniform Commercial Code may set priorities based on possession or the purchase-money nature of a security interest, neither lack of possession nor lack of a purchase money relationship makes the lien any less a security interest. Rather, the Court looked to the definitional section of the Code and found that Congress, in defining a lien, made no distinctions based on possession or a purchase money relationship. 103 S. Ct. at 411 n.6. *See* 11 U.S.C. § 101(28) (Supp. IV 1980).

[139] *See supra* note 20.

[140] 232 U.S. at 638. *See also supra* note 113.

[141] Although the Supreme Court has been unable to decide on a definition of what constitutes a taking within the meaning of the fifth amendment, one of the most commonly quoted formulations is found in Armstrong v. United States, 364 U.S. 40 (1960). There the Court declared that "[t]he Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.* at 49.

[142] *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123-24 (1978).

individual property owner, the unexpected interference with property rights, and the disproportionate impact on the individual affected.[143]

Applying these factors to the liens avoided under section 522(f), the conclusion may be drawn that first, although the economic effect on a creditor whose lien is avoided may not be *de minimis*, the avoidance of a nonpossessory nonpurchase-money security interest in personal property and household goods to the extent it infringes on what Congress has perceived to be necessary for a fresh start does not amount to the total or substantial deprivation of a property right [144] contemplated by the takings clause. Second, although the rehabilitation of debtors is a matter of public concern,[145] the enlargement of the rights of debtors against the rights of their creditors does not represent a taking of private property for a public use.[146] Third, because the possibility of a debtor's filing in bankruptcy is at least implicitly contemplated in every extension of credit, and because Congress' power to discharge debtors from their legal liabilities is universally acknowledged,[147] the interference with such liens cannot be characterized as wholly unexpected.[148] Finally, the nature of the particular

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[143] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

[144] *See, e.g., In re* Gifford, 688 F.2d 447, 456-59 (7th Cir. 1982); *In re* Pillow, 8 Bankr. 404, 418-19 (D. Utah 1981).

[145] Obviously, providing debtors with the basic necessities in the interest of preventing their becoming public charges after a discharge in bankruptcy works to support the economic well-being of the public at large. The term "public use," however, has an entirely different connotation as evidenced by the cases in which a taking for a public use was alleged. *See, e.g.*, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978) (designation of private premises as landmark thereby prohibiting certain uses not taking); United States v. Causby, 328 U.S. 256 (1946) (government authorization of direct overflights impairing use of land as chicken farm constitutes taking); Miller v. Schoene, 276 U.S. 272 (1928) (order that diseased ornamental trees be cut down to prevent damage to fruit-bearing trees not taking); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (prohibition on mining of coal causing subsidence of house, except under certain conditions constitutes taking); United States v. Cress, 243 U.S. 316 (1971) (repeated flooding of land due to water projects amounts to taking). The debtor in *Radford* alleged that even if the moratorium on mortgage foreclosure proceedings constituted a substantial impairment of the mortgagee's rights, the legislation was not unreasonable because it was enacted for "a permissible public purpose," i.e., to permit farmers to retain possession of their farms. 295 U.S. at 598. This argument may have been largely responsible for the confusion between matters in the public interest and the public use doctrine because it was in reply to this argument that the Court made its frequently quoted statement that "however great the Nation's need, private property shall not be thus taken even for a *wholly public use* without just compensation." *Id.* at 602 (emphasis added).

[146] *See In re* Gifford, 688 F.2d 447 (7th Cir. 1982); *In re* Ashe, 669 F.2d 105 (3d Cir. 1982); *see also* 103 S. Ct. at 415 (Blackmun, J., concurring).

[147] *See infra* notes 192-95 and accompanying text.

[148] One of the recurring factors to which the Supreme Court has pointed in its effort to define a taking is "the extent to which the regulation has interfered with distinct investment-backed expectations." Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). With

devices whose avoidance is authorized and the role such devices play in the debtor-creditor relationship militate against the argument that impairment of such interests visits economic injury on a disproportionately small number of persons.[149] Rather, they tend to support the view that the avoidance of such liens is an integral part of an economic regulatory scheme. Thus, as even the three-member concurrence recognized in this case,[150] a "takings" analysis is clearly inappropriate.

The Government's apparent effort to persuade the Court that contract rights and property rights are synonymous for due process purposes,[151] and the Court's refusal to consider the nature and effect of the legislation in question, may have prompted the Court to try to force this case into the somewhat outdated mold of *Radford*. By restricting itself to the *Radford* "takings" rationale, the Court overlooked subsequent decisions that reflected an effort on its part to accommodate socioeconomic legislation within the overall due process context. However convinced the Supreme Court may have been in 1935 that enabling a mortgagor to remain in possession of mortgaged premises while foreclosure proceedings were stayed impermissibly enlarged the rights of debtors as against their creditors in violation of fifth amendment due process guarantees,[152] it retreated from this position in subsequent decisions. Most notably, in *Wright v. Vinton Branch of the Mountain Trust Bank*,[153] the Court upheld a slightly amended form of substantially the same legislation.[154] The Court's

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regard to the expectations of creditors who use the devices covered by section 522(f), it is clear that the resort of debtors to such drastic means of obtaining credit by which they often waive rights to exemptions unwittingly should put creditors on notice that the debtors' insolvency may be imminent. With bankruptcy being more than a remote possibility, such creditors may be charged with knowledge that their interests may be impaired by current and future bankruptcy laws. *See, e.g., In re* Prima Co., 88 F.2d 785 (7th Cir. 1937).

[149] As the "taking" cases indicate, the governmental action in question generally affects a single individual or a limited group of individuals in a geographic proximity. *See supra* note 145. Bankruptcy legislation, on the other hand, affects the public at large and is aimed at recurring practices and remedies that are inextricably linked to the health of the national economy.

[150] 103 S. Ct. at 415 (Blackmun, J., concurring).

[151] *Id.* at 410-11. *See supra* notes 82-84 and accompanying text.

[152] *See Radford*, 295 U.S. at 580.

[153] 300 U.S. 440 (1937).

[154] Under the amended version of the legislation, proceedings against the mortgagor would be stayed for a period of three years, rather than five years, with the mortgagor to remain in possession subject to the court's control. 300 U.S. at 460. During this period, the mortgagor was to pay a "reasonable rental," with the first payment to be made within one year of the issuance of the stay order. *Id.* at 467. The rent was to cover taxes and maintenance, with the remainder to be distributed to the mortgagor's creditors. *Id.* at 461-62. The court was granted the power to terminate the stay and order a sale in the event of default by the mortgagor. *Id.* at 462. In upholding the constitutionality of the legislation, the Court noted that the amended statute

departure from *Radford* in only two years evidenced an expanded view of the scope of Congress' bankruptcy powers. In *Radford* the Court had considered anything less than full payment of the indebtedness with interest to constitute a prohibited impairment of the mortgagee's rights.[155] The Court in *Wright*, however, giving greater deference to Congress' broad powers under the bankruptcy clause to pursue debtor rehabilitation, declared that a provision resulting in a modification of the mortgagee's rights would be upheld provided such modification were not "unreasonable."[156]

The shift in focus in *Wright* and later decisions represented not so much a diminishing regard for previously acquired rights as a recognition of the breadth of Congress' powers under the bankruptcy clause and the economic realities of the debtor-creditor relationship.[157] The

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preserved most of the mortgagee's rights that had been found to be impaired in *Radford*. *Id.* at 458. For an enumeration of these rights, see *supra* note 76. The Court indicated that *Radford* did not require the preservation of all five rights. Rather, said the Court, "the effect of the statute in its entirety was to deprive the mortgagee of his property without due process of law." 300 U.S. at 457. Finding no substantial modification of the mortgagee's rights, the Court declared:

> A court of bankruptcy may affect the interests of lien holders in many ways. To carry out the purposes of the Bankruptcy Act, it may direct that all liens upon property be marshalled, or that the property be sold free of encumbrances and the rights of all lien holders be transferred to the proceeds of the sale. Despite the peremptory terms of a pledge, it may enjoin sale of the collateral, if it finds that the sale would hinder or delay preparation or consummation of a plan of reorganization. It may enjoin like action by a mortgagee which would defeat the purpose of subsection(s) to effect rehabilitation of the former mortgagor.

Id. at 470 (citations omitted).

In addressing the applicability of *Radford* as controlling authority, the Supreme Court, in the instant case, made no reference to *Wright*. The Tenth Circuit, for its part, noted that while cases such as *Wright* "may well refine the rule of *Radford*, . . . they do not destroy [its] fundamental teaching . . ." 642 F.2d at 1198. Other courts, however, have found that *Wright* has substantially limited the scope of *Radford*. *See, e.g., In re* Gifford, 668 F.2d 447 (7th Cir. 1982); *In re* Ashe, 669 F.2d 105 (3rd Cir. 1982); *In re* Rapp, 16 Bankr. 575 (S.D. Fla. 1981); *In re* Pillow, 8 Bankr. 404 (D. Utah 1981); *see also* V. WOOD, DUE PROCESS OF LAW 1932-1949 (1951).

[155] 295 U.S. at 580; *see supra* notes 67-80 and accompanying text.

[156] 300 U.S. at 470; *see supra* note 154.

[157] *See, e.g.*, Wright v. Union Cent. Life Ins. Co., 304 U.S. 502 (1937). Here the statute challenged extended the period for a foreclosure sale provided by state law to mortgagors. *Id.* at 504. The party who had purchased the property at the judicial sale contended that such an extension violated fifth amendment due process guarantees. *Id.* at 515. In upholding the legislation, the Court emphasized the rehabilitative goal of the statute and of bankruptcy legislation generally. *Id.* at 514. Moreover, the Court noted that any suggestion that Congress cannot alter property rights is "futile" because "bankruptcy proceedings constantly modify and affect the property rights established by state law." *Id.* at 517. In this regard, the Court declared that property rights are not immune from impairment through the exercise of Congress' bankruptcy powers merely because they have arisen under state law. Rather, Congress may, in the exercise of its powers, direct a bankrupt court to affect property rights within the limits of due process. *Id.* at 518; *see also* V. WOOD, *supra* note 154.

Court was beginning to look at precisely what rights particular legislation abridged and what rights it preserved,[158] a process involving consideration of whether specific legislation affected the remedy for enforcing the debt or indeed affected the underlying debt. This approach, which is reflected in the concurring opinion of Justice Blackmun,[159] would require the Court to look closely at the nature of the obligation and the purpose and effect of the statute claimed to impair it. This task involves more than merely drawing a line between traditional contract rights and traditional property rights and categorically invalidating all legislation intended to apply retroactively to the latter. By the same token, respect for basic constitutional principles would require that some distinction between the two be preserved. This flexibility seemed to elude the Court in the instant case. The Government appeared to be arguing that because contract rights had in the past been *raised* to the level of property rights under certain circumstances and afforded increased protection, then under other circumstances property rights may be *lowered* to the level of contract rights and afforded decreased protection.[160] The Government was not contending, as the Court understood it to be,[161] that the interest of the nonpossessory nonpurchase-money lienholder was something other than a property interest. Rather, what the Government suggested was that although the lienholder had acquired a property interest in the household items securing the loan, such property interest was "insubstantial."[162] Consequently, the impairment thereof was not a compen-

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[158] *See, e.g.*, Wright v. Union Cent. Life Ins. Co., 304 U.S. 502, 516 (1938) (rights of purchaser preserved, possibility of enjoyment merely delayed); Kuehner v. Irving Trust Co., 299 U.S. 445, 452 (1937) (fifth amendment does not prohibit legislation affecting creditor's remedy for enforcing debt if statute effects "fair, reasonable and equitable distribution of [debtor's] assets."); Wright v. Vinton Branch of the Mountain Trust Bank, 300 U.S. 440, 470 (1936) (question is whether statute modifies "secured creditor's rights, remedial or substantive").

[159] *See* 103 S. Ct. at 415 (Blackmun, J., concurring).

[160] *See id.* at 410-11; *see supra* notes 82-84 and accompanying text.

[161] *See id.* at 411; *see supra* notes 89 & 90 and accompanying text.

[162] 103 S. Ct. at 411. The attempt to characterize the property interest of the nonpossessory nonpurchase-money lienholder as insubstantial has evoked comment on both sides of the issue as attempts have been made to determine what "substantial" means. Certain courts have held the lien to be "insubstantial" because the collateral supporting it has only *de minimis* value. *See, e.g., In re* Rapp, 16 Bankr. 575, 579 (S.D. Fla, 1981); *In re* Ward, 14 Bankr. 549, 562 (S.D. Ga. 1981); *In re* Pillow, 8 Bankr. 404, 419 (D. Utah 1981). This assertion has been countered with the argument that due process protection is not predicated on the dollar value of the collateral. *See, e.g., In re* Webber, 674 F.2d 796, 803 (9th Cir. 1982).

Other courts have held the lien to be "insubstantial" because its value lies in the threat of foreclosure. *See, e.g., In re* Gifford, 688 F.2d 447 (7th Cir. 1982); *see also* 103 S. Ct. at 415 (Blackmun, J., concurring). This focus on the motives of the creditor has been criticized as "draw[ing] a distinction too fine for the Constitution to permit." Note, *supra* note 7, at 1632; *see also In re* Gifford, 668 F.2d 447, 468 (7th Cir. 1982) (Pell, J., dissenting).

sable taking.[163] While the Government's attempt to equate contract rights and property rights may have obscured its contention with regard to the substantiality of the lienholders' interest, its basic approach was sound. Yet in its determination to cast this as a violation of the takings clause within the meaning of *Radford*—which has itself been criticized for having misapplied the takings clause—the majority failed to consider the very nature of the interests, namely that they attach to no specific property but rather to a general fund of property, if any.[164] This the concurrence recognized.[165]

The lower courts that have upheld the constitutionality of the provision have focused on the nature of the interest avoided and concluded that this type of interest, although arguably recognized as a property interest under state law,[166] does not rise to the level of property as contemplated by the fifth amendment guarantee against retroactive impairment.[167] Of particular importance is the fact that these interests apply generally and, as Justice Blackmun noted, "as a practicable matter, there is nothing to prevent the debtor's selling the property and replacing it or not replacing it, just as he chooses."[168] Thus, since the nonpossessory nonpurchase-money lienholder cannot prevent the disposition of the debtor's personal property,[169] the lienholder may be left with no meaningful lien at all. This is in sharp contrast to a mortgage or purchase-money security interest under which specific property is dedicated to the satisfaction of the underlying debt.[170] Moreover, again unlike the mortgage or purchase-money

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[163] 103 S. Ct. at 411.

[164] As a practical matter, because the lien is a blanket interest in all of the debtor's personal property, the fund of property to which it attaches may change on a regular basis, and in fact may be depleted over the life of the loan. For a discussion of the general as opposed to the specific nature of the lien, see Comment, *supra* note 3, at 643-44; *see also In re* Mahoney, 15 Bankr. 482, 484 (W.D.N.C. 1981); *In re* Ward, 14 Bankr. 549, 563 (S.D. Ga. 1981).

[165] 103 S. Ct. at 415 (Blackmun, J., concurring).

[166] In the instant case, the fact that a nonpossessory nonpurchase-money security interest is considered to be property under state law was not even disputed. *Id.* at 411 n.6.

[167] *See, e.g., In re* Gifford, 688 F.2d 447, 457-59 (7th Cir. 1982); *In re* Ward, 14 Bankr. 549, 562-63 (S.D. Ga. 1981); *In re* Paden, 10 Bankr. 206, 209 (E.D. Pa. 1981); *In re* Pillow, 8 Bankr. 404, 418-19 (D. Utah 1981).

[168] 103 S. Ct. at 415 (Blackmun, J., concurring).

[169] *Id.*

[170] It is in the nature of a mortgage, for example, that the mortgagee obtains an indefeasible interest in the specific property described in the mortgage instrument. There is no question, furthermore, that a mortgagee is a priority creditor only as to the specific property described in the mortgage agreement and may not assert a priority interest in any other real property to satisfy the mortgage debt. If the value of the mortgaged property is insufficient to satisfy the debt, the mortgagee becomes a general unsecured creditor for the amount of the deficiency unless the mortgagee has taken steps to assure itself of a priority position with regard to other real or personal property. 1 G. GLENN, MORTGAGES § 5.1 (1943). This relationship between the

security interest where the value of the collateral is directly proportionate to the amount of the debt, the value of the household goods bears little relationship, if any, to the amount of the debt they purportedly secure.[171] Finally, as Justice Blackmun pointed out, reflecting the view of the lower courts upholding the provision, the lien has "little direct value and weight in its own right."[172] It serves as leverage in the debtor-creditor relationship,[173] rather than affording the creditor reasonable prospects for the satisfaction of his debt.[174] Even the majority acknowledged this,[175] but its dedication to the takings analysis prevented it from exploring the implications of this aspect.

It is somewhat simplistic to resolve this issue by arguing that because a compensable taking was found in *Radford* where there was only a partial destruction of the mortgagee's rights, then *a fortiori* section 522(f)(2) works an impermissible taking because "the governmental action . . . would result in a complete destruction of the property right of the secured party."[176] Such an argument ignores the economic realities of the respective situations. Even assuming that the action in *Radford* was properly characterized as a taking, the Court must, as Congress clearly did, recognize the distinction between a

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specific property and the funds advanced also exists with a purchase money security interest pursuant to which the seller of a particular article may retain an interest in the article to secure payment or a party advancing the funds for the purchase of an item may retain an interest in the property acquired. First Hardin Nat'l Bank v. Damron, 5 Bankr. 357, 358 (W.D. Ky. 1980).

[171] 103 S. Ct. at 415 (Blackmun, J., concurring); *see In re* Gifford, 688 F.2d 447, 456-57 (7th Cir. 1982); *In re* Ward, 14 Bankr. 549, 561 (S.D. Ga. 1981); *In re* Pillow, 8 Bankr. 404, 419 (D. Utah 1981); *In re* Ambrose, 4 Bankr. 395, 399 (N.D. Ohio 1980); *see also* H.R. REP., *supra* note 1, at 126, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 6087-88; Note, *supra* note 87, at 1300-01.

[172] 103 S. Ct. at 415 (Blackmun, J., concurring).

[173] H.R. REP., *supra* note 1, at 126, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS at 6087-88.

[174] *Id; see also In re* Gifford, 688 F.2d 447, 456 (7th Cir. 1982); *In re* Ambrose, 4 Bankr. 395, 400 (N.D. Ohio 1980). In discussing the value of a nonpossessory nonpurchase-money lien, the latter court noted:

> A creditor who makes a loan and takes a nonpurchase-money security interest in highly depreciable household goods as security for the loan, does not actually take the household goods as security for the loan because there is no belief by the creditor that the household goods are worth the amount of the loan . . . . Thus, such creditor is rarely willing to take the household goods in lieu of the debt in case of default.

Id. Most courts upholding retroactive application of section 522(f)(2) have subscribed to this view. For a criticism of this view, see Note, *supra* note 7, at 1632.

[175] 103 S. Ct. at 412.

[176] *Id.* at 411; *see also* Rodrock v. Security Indus. Bank, 642 F.2d 1193, 1197 (10th Cir. 1981), *aff'd sub nom.* United States v. Security Indus. Bank, 103 S. Ct. 407 (1982); *In re* Glynn, 13 Bankr. 647, 650 (D.S.C. 1981); *In re* Jackson, 4 Bankr. 293 (D. Colo. 1980), *aff'd sub nom.* Rodrock v. Security Indus. Bank, 642 F.2d 1193 (10th Cir. 1981), *aff'd sub nom.* United States v. Security Indus. Bank, 103 S. Ct. 407 (1982); Note, *supra* note 7, at 1631.

mortgage on real property and the desperation-type consumer financing covered by section 522(f)(2). This approach also overlooks the fact that there is some precedent for viewing the issue as one of economic regulation.[177] Such an approach was adopted by the Third Circuit in its decision in *In re Ashe*,[178] which employed a radically different standard of review to reach a contrary conclusion. While the Third Circuit's opinion may be criticized for having adopted what is perhaps an excessively broad view of the bankruptcy power,[179] its view of bankruptcy legislation as inherently retroactive and its characterization of section 522(f) as an economic regulation raise issues that the Court should have addressed in the instant case. Although the three-member concurrence recognized that "the statute is essentially economic regulation and insubstantial at that,"[180] the majority did not even entertain the idea that the measure might be viewed as something other than a taking for a public use without just compensation. Yet if economic regulation is defined as legislation "adjusting the burdens and benefits of economic life,"[181] there is at least equal, if not greater, justification for examining section 522(f) on the basis of something other than a takings analysis.

In enacting section 522(f), Congress has taken what is essentially an economic relationship and examined how that relationship impedes the congressional purpose of ensuring debtors a fresh start in bankruptcy. Because the types of liens whose avoidance is authorized deny debtors what are truly the basic necessities, Congress has seen fit to shift the burden of the commercial relationship to a certain extent to the creditor by denying the latter this particular remedy for enforcing the debt.[182] If, by relegating the creditor to the status of an

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[177] 103 S. Ct. at 415 (Blackmun, J., concurring).

[178] 669 F.2d 105 (3d Cir. 1982).

[179] That Judge Gibbons recognized very few limitations on the bankruptcy power is evidenced by his suggestion that Congress may impair mortgages if it sees fit. *See id.* Regardless of the current view on the applicability of *Radford*, all courts have recognized that at some point Congress' power to impair rights in bankruptcy is limited by the nature of the interest retained. Serious obstacles are usually erected to avoid the impairment of mortgages. *See* text accompanying notes 170-71.

[180] 103 S. Ct. at 415 (Blackmun, J., concurring).

[181] Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976). Many courts have relied on the *Usery* formulation to uphold the validity of section 522(f). *See, e.g., In re* Gifford, 688 F.2d 447 (7th Cir. 1982); *In re* Paden, 10 Bankr. 206 (E.D. Pa. 1981); *In re* Ambrose, 4 Bankr. 395 (N.D. Ohio 1980); *In re* Beck, 4 Bankr. 661 (C.D. Ill.), *appeal dismissed*, 642 F.2d 1196 (7th Cir. 1980).

[182] According to Justice Blackmun, the measure affects the nonpossessory nonpurchase-money lienholder's remedy and not the underlying debt. 103 S. Ct. at 415 (Blackmun, J., concurring); *see also In re* Ambrose, 4 Bankr. 395, 401 (D. Ohio 1980); *In re* VanGorkon, 4 Bankr. 689, 691 (D.S.D. 1980).

unsecured creditor for that portion of the debt, Congress has effectively eliminated the nonpossessory nonpurchase-money creditor's prospects for satisfaction of the debt,[183] such a result is merely incidental to the legitimate exercise of congressional power.[184]

Such an approach subjects section 522(f) to constitutional scrutiny on two levels. First, although the assumption is that bankruptcy legislation is inherently retroactive, the provision must nonetheless be tested by the standard applicable to all legislation operating retroactively, namely whether the "retroactive effects are so wholly unexpected and disruptive that harsh and oppressive consequences follow."[185] Second, once retroactive application is found to be permissible, the provision must be tested by the standard applicable to all economic legislation, namely whether there is any set of facts tending to support "the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."[186] With regard to the former standard, the Supreme Court indicated in its 1976 decision in *Usery v. Turner Elkhorn Mining*,[187] a case involving the imposition of a new obligation in connection with a former employment relationship,[188] that "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations."[189] Clearly, the possibility of bankruptcy is inherent in every extension of credit. This is particularly true in the last-resort type of financing that gives rise to nonpossessory nonpurchase-money security

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[183] Because the creditors in such circumstances would receive only a nominal amount as general unsecured creditors, see *supra* text accompanying notes 49-50, it has been argued that a total deprivation occurs. *See* sources cited *supra* note 176. Other courts that have specifically addressed the issue of the changed status do not agree. For example, the Seventh Circuit noted that "Congress has not entirely destroyed Thorp's [the creditor] expectation of repayment but instead has substituted for it the rights of an unsecured creditor, which need not be equal in value to the expectations allegedly taken." *In re* Gifford, 688 F.2d 447, 459 (7th Cir. 1982).

[184] *In re* Ashe, 669 F.2d 105 (3d Cir. 1982); *In re* Gifford, 688 F.2d 447, 460 (7th Cir. 1982); *In re* Pillow, 8 Bankr. 404, 420 (D. Utah 1981); *In re* Ambrose, 4 Bankr. 395, 400 (D. Ohio 1980).

[185] *In re* Financial Inc., 594 F.2d 1275 (9th Cir. 1979).

[186] United States v. Carolene Products Co., 304 U.S. 144, 152 (1938). See *supra* note 25.

[187] 428 U.S. 1 (1976). *Usery* involved a constitutional challenge to certain provisions of federal mining legislation requiring coal mine operators to compensate miners, former miners, and their survivors for death or total disability due to black lung disease resulting from their employment in the mines. The mine operators objected to the allocation of financial responsibility for the payment of death or disability payments for individuals who had ceased to work for them before the law was enacted. *Id.* at 12.

[188] Retroactive legislation is defined as a statute "which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty or attaches a new disability, in respect to transactions or considerations already past." *In re* Ward, 14 Bankr. 549, 557-58 (S.D. Ga. 1981) (quoting 16A, AM. JUR. 2D CONSTITUTIONAL LAW § 661, at 641 (1979)).

[189] *Usery*, 428 U.S. at 16.

interests in personal property and household goods. And just as clearly, creditors traditionally have been charged with knowledge of Congress' power to affect their rights through the enactment of legislation in the area of bankruptcy.[190] Hence the impairment resulting from retroactive application of section 522(f) cannot properly be characterized as unexpected. With regard to the latter standard, the nature of the interest avoided[191] and the purpose served by such avoidance[192] demonstrate that Congress has indeed developed a rational way to balance the competing interests inherent in the debtor-creditor relationship. Were Congress eventually to diminish creditors' rights to the point of providing for debtors in excess of their needs, the congressional action might not withstand rational basis scrutiny. Such is not the case, however, with the legislation in question here.

The Court obviously had some justification for disposing of the instant case through statutory construction. Its decision, however, may well prompt Congress to clarify its intent regarding retroactive application. Should Congress declare that the statute is indeed to operate retroactively, the Court's position on the constitutionality of the provision as thus applied is evident: that retroactive application of section 522(f) would result in a taking of private property for a public use without just compensation.[193] It is this aspect of the Court's decision that presents the greatest problem, for such a position fails to give due weight to the Court's own expanding view of the scope of the bankruptcy clause, in general, and the economic purpose of section 522(f) in particular.

M. Sheilah O'Halloran

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[190] *See* Wright v. Union Cent. Life Ins. Co., 304 U.S. 502, 516 (1937); *see also, In re* Prima, 88 F.2d 785, 788 (7th Cir. 1937). In the latter case, the Court of Appeals for the Seventh Circuit noted that legislation in the area of debtor relief is subject to different constitutional limitations than legislation affecting other rights and obligations in the debtor-creditor relationship. Indeed, said the court, the debtor and creditor "were and are chargeable with knowledge that their rights and remedies, in case the debtor becomes insolvent, and is adjudicated a bankrupt, are affected by existing bankruptcy laws and all future lawful bankruptcy legislation which might be enacted." *Id.*

[191] *See supra* notes 118-28, 137-39, & 164-75 and accompanying text.

[192] *See supra* notes 1, 2, 104, 124 & 128 and accompanying text.

[193] 103 S. Ct. at 411-12.