BANKRUPTCY—UNDER THE "OPT-OUT" PROVISION OF SECTION 522(b)(1) OF THE BANKRUPTCY REFORM ACT STATES MAY PROHIBIT DEBTORS FROM ELECTING THE FEDERAL SCHEDULE OF EXEMPTIONS ALLOWED BY STATE LAW WITHOUT VIOLATING THE UNIFORMITY REQUIREMENT OF THE BANKRUPTCY CLAUSE OF THE UNITED STATES CONSTITUTION. *In re Sullivan* (7th Cir. 1982).

Illinois debtors Scott Sullivan and Willis West filed voluntary petitions in bankruptcy[1] and tried to claim the numerous federal exemptions of section 522(d) of the Bankruptcy Reform Act of 1978.[2] As is expressly permitted by section 522(b)(1),[3] a recently enacted Illinois statute prohibits a

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1. *In re* Sullivan, 680 F.2d 1131, 1132 (7th Cir. 1982). *See* 11 U.S.C. § 301 (Supp. IV 1980)(voluntary petition to liquidate).

2. *Id. See* Bankruptcy Reform Act, Pub. L. No. 95-598, 92 Stat. 2549 (1978)(codified at 11 U.S.C. §§ 101-151326 (Supp. IV 1980)) [hereinafter referred to as Bankruptcy Reform Act].

3. The pertinent provision of section 522(b)(1) provides, "(b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate either—(1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize . . . ." 11 U.S.C. § 522(b)(1)(Supp. IV. 1980).

The lengthy provisions of section 541 merely detail all property of the debtor which becomes property of the debtor's estate at the time of commencement of a bacnkruptcy case. 11 U.S.C. § 541 (Supp. IV 1980).

A debtor who elects not to use the federal schedule of exemptions located in section 522(d) or who is unable to use them because state law has opted out pursuant to section 522(b)(1), nevertheless, may take advantage of the alternative federal exemptions. 11 U.S.C. § 522(b) (Supp. IV 1980). The alternative to the exemption provisions of section 522(b)(1) as set forth in section 522(b)(2) allows an individual debtor to exempt:

> (2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place; and (B) any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law.

11 U.S.C. § 522(b)(2) (Supp. IV 1980).

A debtor who chooses against the federal exemptions of section 522(d) or whose state has opted out of the federal exemptions pursuant to section 522(b)(1) is entitled to both the exemptions granted him under the law of his state *and* all applicable federal nonbankruptcy exemptions. 11 U.S.C. § 522(b). Federal nonbankruptcy exemptions include those found in: 5 U.S.C. § 8346 (Supp. IV 1980) (civil service retirement benefits); 22 U.S.C. § 4060(c) (Supp. IV 1980) (foreign service retirement and disability payments); 33 U.S.C. § 916 (1976) (Longshoreman's and Harbor Workers' Compensation Act death and disability benefits); 38 U.S.C. § 3101 (1976 & Supp. IV 1980) (special pensions paid to winners of the Congressional Medal of Honor); 42 U.S.C. § 407 (1976) (social security payments); 42 U.S.C. § 1717 (1976) (injury or death payments from war risk hazards); 43 U.S.C. § 175 (1976) (federal homestead lands on debts contracted before issuance of the patent); 45 U.S.C. § 231(m) (1976) (Railroad Retire-

debtor's use of the federal exemptions.[4] The bankruptcy judges in both cases upheld the trustees' objections to the debtors' reliance on the federal exemptions listed in section 522(d).[5] Debtor West appealed to United States District Court for the Central District of Illinois, which affirmed without opinion,[6] while debtor Sullivan appealed directly to the Seventh Circuit.[7]

On appeal, presenting issues of first impression at the United States circuit court of appeals level,[8] Sullivan and West argued that the opt-out provision of section 522(b)(1) is invalid on constitutional grounds.[9] First, appellants contended that "the opt-out section violates the constitutional provision that empowers Congress 'to establish uniform laws on the subject of bankruptcies.' "[10] The debtors' second argument maintained "that section 522(b)(1) unconstitutionally delegates Congressional power to the states."[11]

In reply, the Seventh Circuit noted that despite disparities between the exemption provisions allowed by Illinois and federal law,[12] section 522(b)(1) is not unconstitutional because the Constitution only requires federal bankruptcy laws to be geographically uniform[13] and it is not "an unconstitutional delegation of federal power for the federal bankruptcy laws to recognize state exemption laws."[14] The Seventh Circuit *held*, affirmed.[15] Under the opt-out provision of section 522(b)(1) of the Bankruptcy Reform Act states may prohibit debtors from electing the federal schedule of exemptions and instead require debtors to use exemptions allowed by state law without violating the uniformity requirement of the bankruptcy clause of the United States Constitution. *In re Sullivan*, 680 F.2d 1131 (7th Cir. 1982).

The *Sullivan* decision is of significance in all states having or contemplating legislation prohibiting its residents from using the federal exemp-

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ment Act annuities and pensions); 45 U.S.C. § 352(e) (1976) (unemployment insurance); 46 U.S.C. § 601 (1976) (wages of fishermen, seamen, and apprentices). *See* H.R. REP. No. 95-595, 95th Cong., 1st Sess. 360, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6316.

4. 1981 Ill. Legis. Serv. 280 (West) (to be codified at ILL. ANN. STAT. ch. 110, § 1201). which provides:

> 1. In accordance with the provisions of Section 522(b) of the Bankruptcy Code of 1978 (11 U.S.C. 522(b)) residents of this State shall be prohibited from using the federal exemptions provided in Section 522(d) of the Bankruptcy Code of 1978 (11 U.S.C. 522(d)), except as may otherwise be permitted under the laws of Illinois.

5. *In re* Sullivan, 680 F.2d at 1132.

6. *Id.*

7. *Id.*

8. *Id.* at 1131.

9. *Id.* at 1131-32.

10. *Id.* (quoting U.S. CONST. art. I, § 8, cl. 4).

11. *Id.* at 1132.

12. *Compare* 1981 Ill. Legis. Serv. 280 (West) (to be codified at ILL. ANN. STAT. ch. 110, § 1201) *with* 11 U.S.C. § 522(d) (Supp. IV 1980). *See, e.g., infra* notes 22-25 and accompanying text.

13. *In re* Sullivan, 680 F.2d at 1138. *See infra* text accompanying note 37.

14. *In re* Sullivan, 680 F.2d at 1138.

15. *Id.*

tions of section 522(d) and allowing the states' own exemption laws to be used in bankruptcy proceedings.[16] In 1981, Iowa enacted a bankruptcy exemption law pursuant to the provisions of section 522(b)(1).[17] Iowa's statute is almost identical to the Illinois opt-out provision[18] held valid by the court in *Sullivan*.[19] Despite criticisms of the constitutionality of section 522(b)(1) and the appropriateness of states enacting legislation pursuant to that section,[20] the court's opinion is well grounded in judicial precedent and sound

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16. As of the date of this writing, thirty-two states had passed opt-out legislation pursuant to the provisions of 11 U.S.C. § 522(b)(1) (Supp. IV 1980). The state opt-out statutes are as follows: ALA. CODE § 6-10-11 (Supp. 1981); ARIZ. REV. STAT. ANN. § 33-1133(b) (Supp. 1981-82); ARK. STAT. ANN. § 36-210 (Supp. 1981); COL. REV. STAT. ANN. § 13-54-107 (Supp. 1981); DEL. CODE ANN. tit. 10, § 4914 (Supp. 1981); FLA. STAT. ANN. § 222.20 (West Supp. 1982); GA. CODE ANN. § 51-1601 (Supp. 1981); IDAHO CODE § 11-609 (Supp. 1982); 1981 Ill. Legis. Serv. 280 (West) (to be codified at ILL. ANN. STAT. ch. 110, § 1201); IND. CODE ANN. § 34-2-28-0.5 (Burns Supp. 1982); IOWA CODE ANN. § 627.10 (West Supp. 1982-83); KAN. STAT. ANN. § 60-2312 (Supp. 1981); KY. REV. STAT. § 427.170 (Supp. 1980); LA. REV. STAT. ANN. § 13:3881(B) (West Supp. 1982); ME. REV. STAT. ANN. tit. 14, § 4425 (Supp. 1981-82); MD. CTS. & JUD. PROC. CODE ANN. § 11-504(g) (Supp. 1981); MONT. CODE ANN. § 31-2-106 (1981); NEB. REV. STAT. § 25-15, 105 (Supp. 1980); NEV. REV. STAT. § 21.090 (1981); N.H. REV. STAT. ANN. § 511.2-a (Supp. 1981); N.C. GEN. STAT. § 1C-1601 (Supp. 1981); N.D. CENT. CODE § 28-22-17 (Supp. 1981); OHIO REV. CODE ANN. § 2329.66.2 (Page 1981); OKLA. STAT. ANN. tit. 31, § 1 (West Supp. 1981-82); OR. REV. STAT. § 23.305 (1981); S.C. CODE ANN. § 15-41-425 (Law Co-op. Supp. 1981); S.D. CODIFIED LAWS ANN. § 43-31-30 (Supp. 1982); TENN. CODE ANN. § 26-2-112 (1980); UTAH CODE ANN. § 78-23-15 (Supp. 1981); VA. CODE § 34-3.1 (Supp. 1982); W. VA. CODE § 38-10-4 (Supp. 1982); WYO. STAT. § 1-20-109 (Supp. 1982).

In addition, Minnesota recently enacted a statute which prevents a debtor from claiming any of the federal exemptions of section 522(d) for a period of three years from the date of the filing of an individual bankruptcy petition by the debtor's spouse if the spouse claimed any exemption pursuant to Minnesota law. 1982 MINN. SESS. LAW SERV. ch. 461 (West) (to be codified at MINN. STAT. § 550.371).

17. The Iowa opt-out legislation reads as follows:

> A debtor to whom the law of this state applies on the date of filing of a petition in bankruptcy is not entitled to elect to exempt from property of the bankruptcy estate the property that is specified in 11 U.S.C. sec. 522(d)(1) (1979). This section is enacted for the purpose set forth in 11 U.S.C. sec. 522(b)(1) (1979).

IOWA CODE ANN.] 627].10 (West Supp. 1982-83).

18. *Compare* IOWA CODE ANN. § 627.10 (West Supp. 1982-83) (statute precludes bankruptcy debtor from using the exemptions enumerated in the federal statute) *with* 1981 Ill. Legis. Serv. 280 (West) (to be codified at ILL. ANN. STAT. ch. 110, § 1201) (statute prohibits bankruptcy debtors from using the federal exemptions, except where otherwise permitted under Illinois law).

19. *In re* Sullivan, 680 F.2d at 1137-38.

20. *See In re* Rhodes, 3 BANKR. L. REP. (CCH) ¶ 68,349, at 79,765 (Bankr. M.D. Tenn. Sept. 22, 1981); *In re* Balgemann, 5 COLLIER BANKR. CAS. 2d (MB) 1361 (Bankr. N.D. Ill. 1982). These courts have reasoned that Congress, by inserting the opt-out provision, did not intend, and in any case, is constitutionally prohibited from, delegating complete authority to the states to regulate bankruptcy exemptions because to do so would allow the states to totally frustrate the fresh start of many debtors with which the bankruptcy laws intended to provide. *In re* Rhodes, 3 BANKR. L. REP. ¶ 68,349, at 79,767; *In re* Balgemann, 5 COLLIER BANKR. CAS. 2D AT 1364. *See also* Comment, *Bankruptcy Exemptions: Whether Illinois's Use of the Federal "Opt*

reasoning regarding the wording of the bankruptcy clause.[21]

The *Sullivan* court contrasted the differing exemptions under the federal and Illinois laws[22] and noted that "[t]he contrast is most marked in the case of an unmarried debtor with no dependents."[23] In such a situation the federal exemptions under section 522(d)(1) and (5) permit $7900 of exempt property,[24] while the allowance under Illinois law is $300.[25] In analyzing whether such discrepancies comport with the constitutional provision that Congress may "establish . . . uniform Laws on the subject of Bankruptcies,"[26] the Seventh Circuit relied on the decision of and the reasoning set forth by the United States Supreme Court in *Hanover National Bank v.*

Out" Provision is Constitutional, 1981 S. ILL. U. L. J. 65 [hereinafter referred to as Comment, *Bankruptcy Exemptions*], for one commentator's opinion on why the Illinois opt-out legislation is unconstitutional. *See generally Controversy Surrounding Exemption Uniformity: The Opt Out Provision of Section 522 of the New Bankruptcy Code*, 13 U. TOL. L. REV. 1111, 1128 (1982) (discussing how the opt-out provision frustrates the "fresh start" purpose Congress intended in passing the Bankruptcy Reform Act and concluding that Congress should amend the exemption scheme to prevent "unjustified and unequal treatment under the law.").

21. The bankruptcy clause of the Constitution reads as follows: "The Congress shall have power . . . to establish . . . uniform Laws on the subject of Bankruptcies throughout the United States. . . ." U.S. CONST. art I, § 8, cl. 4.

22. *In re* Sullivan, 680 F.2d at 1132-33.

23. *Id.* at 1133.

24. Section 522(d)(1), (5) reads as follows:

> (d) The following property may be exempted under subsection (b)(1) of this section:
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> (1) The debtor's aggregate interest, not to exceed $7,500 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor.
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> . . . .
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> (5) The debtor's aggregate interest, not to exceed in value $400 plus any unusued amount of the exemption provided under paragraph (1) of this subsection, in any property.

11 U.S.C. §§ 522(d)(1), (5) (Supp. IV 1980).

25. The exemptions for an unmarried debtor with no dependents under Illinois law are:

> 1. The following personal property, owned by the debtor, is exempt from judgment, attachment or distress for rent:
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> . . . .
>
> (c) $300 worth of property, including money, and salary or wages due him or her, to be selected by the debtor, and, in addition, when the debtor is the head of a family and resides with same, $700 worth of other property, to be selected by the debtor.

1981 Ill. Legis. Serv. 280 (West) (to be codified at ILL. ANN. STAT. ch. 110, § 1001).

The Illinois exemption laws are considerably more generous to householders having a family. *See id.* (to be codified at ILL. ANN. STAT. ch. 110, §§ 901, 1001). Such persons may exempt an estate of homestead to the extent in value of $10,000 if occupied as a residence. *Id.* (to be codified at ILL. ANN. STAT. ch. 110, § 901). Also, debtors who are heads of family and reside with them may exempt an additional $700 of personal property. *Id.* (to be codified at ILL. ANN. STAT. ch. 110, § 1001).

26. U.S. CONST. art. I, § 8, cl. 4.

Moyses.[27] The *Moyses* Court "applied the concept of geographical uniformity in upholding the Bankruptcy Act of 1898."[28]

In *Moyses*, plaintiff-bank brought suit in Tennessee upon a Mississippi judgment entered against the defendant-debtor in 1892.[29] Prior to the bank's Tennessee suit, the defendant had moved to Tennessee, filed a voluntary bankruptcy petition, and was adjudged bankrupt discharging him from all his debts, including the one upon which the bank was suing.[30] Defendant's demurrer to the bank's suit was entered.[31] Among the bank's contentions on appeal were assertions that the Bankruptcy Act of 1898 violated the bankruptcy clause of the Constitution[32] in that it: (1) did not establish uniform bankruptcy laws throughout the United States,[33] and (2) delegated certain federal legislative powers to the states in bankruptcy proceedings.[34]

The *Moyses* Court held that the general operation of bankruptcy laws was uniform even though the states may have differences in their laws.[35] Although the Constitution requires bankruptcy laws to be uniform throughout the United States, such uniformity need only be geographic, not personal.[36] The Court reasoned that the bankruptcy system was "uniform throughout the United States, when the trustee takes in each State whatever would have been available to the creditors if the bankruptcy law had not been passed."[37] Exemptions are "not in derogation of the limitation

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27. 186 U.S. 181 (1902).

28. *In re* Sullivan, 680 F.2d at 1133 (discussing the Bankruptcy Act of July 1, 1898, ch. 541, 30 Stat. 544 (1898)(repealed 1978)). *See also infra* text and accompanying note 37 (discussion of geographical uniformity).

29. 186 U.S. at 182-83.

30. *Id.* at 182.

31. *Id.* at 183.

32. *See* U.S. CONST. art. I, § 8, cl. 4.

33. Hanover Nat'l Bank v. Moyses, 186 U.S. at 183.

34. *Id.*

35. *Id.* at 190.

36. *Id.* at 188 ("personal" uniformity is the same as "true" uniformity as it is used throughout this case note. *See infra* text accompanying note 37. Although the term "true uniformity" is not used in the early bankruptcy cases, one commentator found it helpful "[i]n order to make clear the distinction between geographic uniformity and its antipode." *See* Comment, *Bankruptcy Exemptions, supra* note 20, at 72 n.38. The *Sullivan* court took note of the use of the terms "true" and "geographic" uniformity and used them throughout its opinion. *In re* Sullivan, 680 F.2d at 1131, 1133.).

37. Hanover Nat'l Bank v. Moyses, 186 U.S. at 190. Unlike "true" uniformity, geographic uniformity permits, either expressly or implicitly, state-by-state variations. *Id.* at 181; *see generally* Comment, *Bankruptcy Exemptions, supra* note 20, at 72-86 (discussion of true uniformity and geographic uniformity). The Bankruptcy Reform Act's provision that debtors may claim exemptions under either federal or state law (11 U.S.C. § 522(b)(1) (Supp. IV 1980)) *is* geographically uniform because the law applies uniformly to all the states even though the consequences resulting from the Act might not be uniform among all the states. *In re* Sullivan, 680 F.2d at 1133. For example, once states begin to opt-out of the federal schedule of exemptions, as allowed by section 522(b)(1) requiring debtors to use state exemptions rather than federal, varying results will occur in those states with different exemption laws. *Id.* True uniformity

of uniformity because all contracts were made with reference to existing laws, and no creditor could recover more from his debtor than the unexempted part of his assets."[38] Congressional recognition of local law exemptions was not an unlawful delegation of its legislative power.[39] In reaching its decision, the *Moyses* Court relied on two lower court decisions[40] which arose under the Bankruptcy Act of 1867,[41] although in relying upon these cases the Court failed to discuss the differences between the 1867 Act and the 1898 Act.[42]

The debtors in *Sullivan* argued that *Moyses* was inapplicable to their situation because: (1) it was incorrectly decided and Supreme Court cases in recent years[43] indicated a move away from geographic uniformity in bankruptcy cases,[44] and (2) the 1978 Bankruptcy Reform Act is so different from the 1898 Act that it makes reliance on the *Moyses* decision inappropriate.[45] In rejecting the appellants' arguments for the inapplicability of the *Moyses* decision the court first noted the obvious—that it lacked the authority to overrule a Supreme Court case.[46] Additionally, the Seventh Circuit found recent Supreme Court decisions upholding the validity of geographic uni-

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would require that federal law prohibit state-by-state variations and, therefore, a debtor who argues that the Bankruptcy Reform Act's authorization of state opt-out legislation is not uniform must show that the bankruptcy clause requires true uniformity. *Id.* at 1135 (citing Hanover Nat'l Bank v. Moyses, 186 U.S. 181 (1902)). *See also* Comment, *Bankruptcy Exemptions*, *supra* note 20, at 72. An argument for true uniformity in bankruptcy cases runs counter to established precedent. *See* Stellwagen v. Clum, 245 U.S. 605 (1918); Hanover Nat'l Bank v. Moyses, 186 U.S. 181 (1902).

Geographic uniformity was first set forth in tax cases. *In re* Sullivan, 680 F.2d at 1134; *see, e.g.*, Fairbanks v. United States, 181 U.S. 283 (1901); Knowlton v. Moore, 178 U.S. 41 (1900); Head Money Cases, 112 U.S. 580 (1884). *But cf.* Nemetz v. Immigration and Naturalization Service, 647 F.2d 432 (4th Cir. 1981) (uniform federal naturalization standard should be set).

38. Hanover Nat'l Bank v. Moyses, 186 U.S. at 189.

39. *Id.* at 190.

40. *In re* Sullivan, 680 F.2d at 1134 (citing *In re* Deckert, 7 Fed. Cas. 334 (No. 3,728 C.C.E.D. Va. 1874); *In re* Beckerford, 3 Fed. Cas. 26 (No. 1,209 C.C.D. Mo. 1870)). *See also* Hanover Nat'l Bank v. Moyses, 186 U.S. at 189-90.

41. Bankruptcy Act of March 2, 1867, ch. 176, 14 Stat. 517 (1867) (repealed 1878).

42. *In re* Sullivan, 680 F.2d at 1134. The 1867 Act allowed all debtors a uniform federal minimum and, in addition, permitted debtors to exempt from their bankrupt estate property permitted to be exempt under state exemption laws in force in 1864. Bankruptcy Act of March 2, 1867, ch. 176, § 14, 14 Stat. 517, 522-24 (1867) (repealed 1878). The 1898 Act did not list any federal bankruptcy exemptions but, instead, allowed debtors to exempt assets allowed under state law. Bankruptcy Act of July 1, 1898, ch. 541, § 6, 30 Stat. 544, 548 (1898) (repealed 1978). *See also* Comment, *Bankruptcy Exemptions*, *supra* note 20, at 73.

43. The recent Supreme Court cases discussed in *Sullivan* were: *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974); *Railway Labor Executives' Ass'n. v. Gibbons*, 102 S. Ct. 1169 (1982). *In re Sullivan*, 680 F.2d at 1135. *See infra* text accompanying notes 48-65.

44. *In re* Sullivan, 680 F.2d at 1134.

45. *Id.*

46. *Id.*

formity in bankruptcy cases.[47]

In the *Regional Rail Reorganization Act Cases*,[48] for example, the Court upheld the validity of the Regional Rail Reorganization Act of 1973[49] on the grounds, *inter alia*, that it was consistent with the geographic uniformity rule of *Moyses*.[50] The Rail Act was Congress' attempt to solve a rail transportation crisis precipitated when eight major railroads in the northeast and midwest regions of the country entered reorganization proceedings under existing bankruptcy laws.[51] Basically, Congress tried to solve the crisis by requiring "reorganization of the railroads, stripped of excess facilities, into a single, viable system operated by a private, for-profit corporation."[52] One question presented for decision was whether the Rail Act, which operated in only a single statutorily defined region, was geographically nonuniform under the Constitution and *Moyses*.[53] The Court implicitly reaffirmed the validity of *Moyses*[54] and held that the Rail Act did not violate the uniformity requirement of the bankruptcy clause because "[t]he uniformity provision does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems."[55] The Court found that "the Rail Act in fact operates uniformly upon all bankrupt railroads then operating in the United States and uniformly with respect to all creditors of each of these railroads."[56]

Very recently, in *Railway Labor Executives' Association v. Gibbons*,[57] the Court examined a congressional enactment known as the Rock Island Transportation and Employee Assistance Act (RITA),[58] which included employee protection provisions, in response to the reorganization court's ordering the total abandonment of the Rock Island system and discontinuance of service.[59] The Court held that RITA, as amended, was "repugnant to Art. I, § 8, cl. 4 of the Constitution, which empowers Congress to enact 'uniform

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47. *Id.* at 1134-35. *See, e.g.*, Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974); Railway Labor Executives' Ass'n. v. Gibbons, 102 S. Ct. 1169 (1982).

48. 419 U.S. 102 (1974).

49. Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985 (1973) (codified as amended at 45 U.S.C. §§ 701-794 (1976 & Supp. IV 1980)) [hereinafter referred to as Rail Act].

50. Regional Rail Reorganization Act Cases, 419 U.S. at 158-61.

51. *Id.* at 108-09.

52. *Id.* at 109.

53. *Id.* at 158.

54. *Id.* at 158-61.

55. *Id.*

56. *Id.* at 160.

57. 102 S. Ct. 1169 (1982).

58. Rock Island Transition and Employee Assistance Act, Pub. L. No. 96-254, 94 Stat. 399 (1980), *amended by* Staggers Rail Act of 1980, Pub. L. No. 96-448, § 701, 94 Stat. 1895 (1980) (codified at 45 U.S.C. §§ 231f, 726, 825, 902, 911, 913, 916, 1001-1018 (Supp. IV 1980)).

59. Railway Labor Executives' Ass'n. v. Gibbons, 102 S. Ct. at 1172.

laws on the subject of Bankruptcy throughout the United States.' "[60] The Court's decision specifically did *not* impair the right of Congress to define classes of debtors, structure appropriate relief, and apply bankruptcy laws to a particular industry in a particular region.[61] "The uniformity requirement, however, prohibits Congress from enacting a bankruptcy law that, by definition, applies only to one regional debtor,"[62] and RITA was such a law.[63] Even though this was the first time the Supreme Court invalidated a bankruptcy law because of a lack of uniformity, the Court, in dicta, nonetheless noted that bankruptcy laws may be uniform and still recognize state laws even though such recognition could lead to different results in different states.[64] The *Gibbons* Court cited *Moyses* approvingly when it noted that "Congress can give effect to the allowance of exemptions prescribed by state law without violating the uniformity requirement."[65]

The dictum of *Gibbons* clearly indicates that the Supreme Court continues to be unreceptive to attacks on the *Moyses* rule of geographic uniformity.[66] Nevertheless, the debtors in *Sullivan* argued that the *Moyses* rule did not apply because of the detailed federal exemption provisions of section 522(d).[67] The debtors argued that in enacting the new law Congress had "found many state exemption laws to be hopelessly inadequate to serve the needs of and provide a fresh start for modern urban debtors"[68] and that the more generous exemption provisions of section 522(d) attempted to remedy that inadequacy.[69]

The Seventh Circuit examined the legislative evolution of the opt-out provision of section 522(b)(1) in rejecting Sullivan's and West's argument that the *Moyses* geographic rule is inapposite to their case.[70] In noting that the opt-out provision was a compromise between the Senate and House versions,[71] and that only the House bill proposed allowing the debtor a choice between state and federal exemptions,[72] the court held that, where a com-

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60. *Id.* at 1174.
61. *Id.* at 1178.
62. *Id.*
63. *See id.*
64. *Id.* at 1176 (citing Stellwagen v. Clum, 245 U.S. 605, 613 (1918)).
65. *Id.* at 1176 (citing Hanover Nat'l Bank v. Moyses, 186 U.S. at 189-90).
66. *See supra* text accompanying notes 64-65.
67. *In re* Sullivan, 680 F.2d at 1135.
68. *Id.*
69. *See id.* The debtors also argued that the Court in *Moyses* might have upheld the state exemptions because if reliance on the 1898 Act on state exemptions were held unconstitutional, the debtor might have been left without any exemptions. *Id.* The *Sullivan* court flatly refused to accept this line of reasoning because it was not reflected in the *Moyses* opinion. *Id.*
70. *Id.* at 1135-36.
71. 124 Cong. Rec. S17,412 (daily ed. Oct. 6, 1978) (remarks of Sen. De Concini); 124 Cong. Rec. H11,095 (daily ed. Sept. 28, 1978) (remarks of Rep. Edwards).
72. The Senate bill proposed allowing state law to govern exemptions in the same manner as did the law then in effect. S. REP. No. 989, 95th Cong., 2nd Sess. 6, *reprinted in* 1978 U.S.

promise results, the court cannot attribute the motivation of one branch to the entire Congress.[73]

Among the debtors' arguments in *Sullivan* was their reliance on two cases which found a conflict between state exemption laws and section 522(d).[74] The Seventh Circuit found this conflict essentially amounted to a preemption argument.[75] *In re Rhodes*[76] is the only case cited by the *Sullivan* court in which a court facing the identical issue presented in *Sullivan* has invalidated a state's opt-out law.[77] The sole issue in *Rhodes* was whether a Tennessee law[78] prohibiting its residents from using the federal exemptions of section 522(d)[79] should be given effect.[80]

In interpreting the Bankruptcy Reform Act, the *Rhodes* court noted that despite the fact that the opt-out provision was a compromise between the Senate and House versions[81] "Congress obviously did not intend, and, in any event, was constitutionally prohibited from, delegating unfettered authority to the states to regulate bankruptcy exemptions" because "[t]o do so would enable the states to totally frustrate the fresh start of many debtors."[82] The court further reasoned that in enacting subsections (1) and (5) of section 522(d),[83] "Congress rejected the antiquated homestead exemptions which many states provide homeowners with no corresponding relief for non-homeowners."[84] The court found that because the state scheme of exemptions conflicted with federal standards under section 522, the Tennessee law was invalid and allowed the debtor to exempt his property under section 522(d).[85]

The Seventh Circuit noted that other courts considering the same issue have found section 522(b)(1) to be constitutional and have wisely elected not to be persuaded by the *Rhodes* court's reasoning.[86] Not only does section

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CODE CONG. & AD. NEWS 5787, 5792. The House bill proposed allowing the bankrupt debtor to choose between state exemptions and specifically enumerated federal exemptions. *See* H.R. REP. No. 595, 95th Cong. 1st Sess. 126-27, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6087-88.

73. *In re* Sullivan, 680 F.2d at 1136.

74. *Id.* at 1136-37. *See* Cheeseman v. Nachman, 656 F.2d 60 (4th Cir. 1981); *In re* Rhodes, 3 BANKR. L. REP. (CCH) ¶ 68,349, at 79,764 (Bankr. M.D. Tenn. Sept. 22, 1981).

75. *In re* Sullivan, 680 F.2d at 1136.

76. 3 BANKR. L. REP. (CCH) ¶ 68,349.

77. *In re* Sullivan, 680 F.2d at 1136.

78. *See supra* text accompanying note 3.

79. TENN. CODE ANN. § 26-2-112 (1980).

80. *In re* Rhodes, 3 BANKR. L. REP. (CCH) ¶ 68,349, at 79,765.

81. *See supra* text accompanying notes 71-72.

82. *In re* Rhodes, 3 BANKR. L. REP. (CCH) at 79,768.

83. *See supra* text accompanying note 24.

84. *In re* Rhodes, 3 BANKR. L. REP. (CCH) at 79,768.

85. *Id.* at 79,769 (preemption argument).

86. *In re* Sullivan, 680 F.2d at 1136 & n.9. *See In re* Lausch, 16 Bankr. 162 (Bankr. M.D. Fla. 1981), *aff'g* 12 Bankr. 55; *In re* Curry, 5 Bankr. 282 (Bankr. N.D. Ohio 1980); *In re* Ambrose, 4 Bankr. 395 (Bankr. M.D. Ohio 1980). *See also In re* Vasko, 6 Bankr. 317 (Bankr. N.D.

522's treatment of exemptions reflect "at the very least a mixed intention on the part of Congress,"[87] but the *Rhodes* court's analysis completely failed to recognize the explicit opt-out choice Congress granted to the states in section 522(b)(1).[88]

The debtors in *Sullivan* also relied upon the Fourth Circuit case of *Cheeseman v. Nachman.*[89] In *Cheeseman,* the court of appeals reversed the bankruptcy court's order denying the debtor-wife the use of the Virginia homestead exemption.[90] The appellate court granted her the exemption, in addition to the exemption claimed by her co-debtor husband, based, in part, on the provisions of section 522(m).[91] This decision was made despite a Virginia statute,[92] similar to the Illinois opt-out statute,[93] in which Virginia excluded from the use of the debtor the federal exemptions under section 522(d).[94] The Cheesemans, living together as husband and wife, had filed a joint bankruptcy petition and each claimed the homestead exemption under Virginia law.[95] The Virginia homestead exemption law "is available to every 'householder' or 'head of family.' "[96] The bankruptcy court held that Mrs. Cheeseman was not a householder or head of family under Virginia law.[97] The Fourth Circuit found that Mrs. Cheeseman was a "householder" under Virginia law,[98] and granted her the requested homestead exemption.[99] In addition to holding that Mrs. Cheeseman was entitled to the homestead exemption for policy reasons, the Fourth Circuit also found such a construction mandated by section 522(m) of the Act.[100] Under this section Congress has the power to establish uniform bankruptcy laws under the Constitution and, as a result, the court "must adopt an interpretation of Virginia's law that does not conflict with the Act's exemption provision."[101] Thus, section

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Ohio 1980) (which also includes analysis of the legislative purpose behind the opt-out provision of section 522(b)(1)). *But see In re* Balgemann, 5 COLLIER BANKR. CAS. 2d (MB) 1361 (Bankr. N.D. Ill. 1982) (holding the Illinois opt-out provision to have gone beyond the authority Congress delegated to the states and to be in direct conflict with the congressional policies behind the federal exemptions of section 522(d)). Clearly, *Balgemann* is now superseded by *Sullivan. See* supra text accompanying note 46.

87. *Id.* at 1136.

88. *Id.*

89. 656 F.2d 60 (4th Cir. 1981).

90. *Id.* at 63-64.

91. *Id.*

92. VA. CODE § 34-3.1 (Supp. 1982).

93. 1981 Ill. Legis. Serv. 280 (West) (to be codified at ILL. ANN. STAT. ch. 110, § 1201).

94. Cheeseman v. Nachman, 656 F.2d at 62.

95. *Id.* at 61.

96. *See id.* (citing VA. CODE § 34-4 (Supp. 1982)).

97. Cheeseman v. Nachman, 656 F.2d at 62.

98. *Id.*

99. *Id.*

100. Section 522(m) provides: "This section shall apply separately with respect to each debtor in a joint case." 11 U.S.C. § 522(m) (Supp. IV 1980).

101. Cheeseman v. Nachman, 656 F.2d at 63.

522(m) was found inconsistent with a construction of Virginia law permitting only one householder per residence.[102]

The *Sullivan* court refused to apply any preemption analysis which might have been found in *Cheeseman,*[103] instead finding the preemption issue of *Cheeseman* to be irrelevant to the facts of its case.[104] The *Sullivan* court merely noted that "*[i]f* Congress has the power to permit states to set their own exemption levels, the Illinois provisions are constitutional."[105] The Seventh Circuit also noted that the differing state and federal exemptions are not in conflict either with the new Bankruptcy Reform Act or congressional intent.[106] Obviously, if Congress has the constitutional authority to delegate to the states the right to set their own exemption standards, the reason for the inapplicability of the *Cheeseman* preemption analysis to the facts of *Sullivan* is the fact that different subsections of section 522 are involved.[107] In *Cheeseman,* section 522(m), by its very words, seemed to usurp all other provisions of the entire section.[108] Dissimilarly, the availability of the federal exemptions listed in section 522(d) is clearly dependent upon the nonexistence of a state's opt-out law as allowed in section 522(b)(1).[109]

Relying upon this analysis, the Seventh Circuit absolutely rejected Sullivan's and West's arguments that Congress lacked the power to grant the states the right to opt-out as is given in section 522(b)(1).[110] This rejection again relied on *Moyses* and also on a forcefully written opinion by Chief Justice Marshall in *Sturges v. Crowninshield.*[111] In *Sturges* the plaintiff-holder of two promissory notes sued the defendant-maker who pleaded as a defense that he had been discharged from the obligation under a New York bankruptcy law operating in the absence of a federal law.[112] The Marshall Court held, *inter alia,* that as long as Congress did not exercise its constitutional power to pass uniform state laws on bankruptcy the states are not forbidden to enact their own.[113] The Court concluded that:

> [T]he power granted to congress may be exercised or declined, as the wisdom of that body shall decide. If, in the opinion of congress, uniform laws concerning bankruptcies ought not to be established, it does not fol-

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102. *Id.* at 64.
103. *In re* Sullivan, 680 F.2d at 1137.
104. *Id.*
105. *Id.* (emphasis added).
106. *Id.*
107. *Compare* 11 U.S.C. § 522(b)(1) (Supp. IV 1980) *with* 11 U.S.C. § 522(m) (Supp. IV 1980).
108. *See supra* text accompanying note 98.
109. *See supra* text accompanying note 3.
110. *In re* Sullivan, 680 F.2d at 1138.
111. 17 U.S. (4 Wheat.) 122 (1819).
112. *Id.* at 122.
113. *Id.* at 196. *See also* Ogden v. Saunders, 25 U.S. (12 Wheat.) 212, 280 (1827) (rejecting any exclusive power of Congress over bankrupts).

> low, that partial laws may not exist, or that state legislation on the subject must cease. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the states.[114]

The Supreme Court has previously upheld the Bankruptcy Act of 1898 against an attack based on an alleged unlawful delegation of legislative power.[115] The Seventh Circuit saw no reason to apply such an argument to the new law in *Sullivan*.[116]

The Seventh Circuit, in concluding, noted that *if* the Constitution required "true" uniformity in its bankruptcy laws and not just geographic uniformity, the federal bankruptcy laws would be unconstitutional.[117] But because the Seventh Circuit had to rely on Supreme Court precedent and was unable to distinguish the Bankruptcy Reform Act from the 1898 Act "in such a way as to make *Moyses* inapposite,"[118] the court clearly had no choice but to find the 1978 Act constitutional.[119]

The Seventh Circuit in *In re Sullivan* restated the right of Congress under the Constitution and the Bankruptcy Reform Act to retain the areas of bankruptcy over which it is permitted to exercise jurisdiction, while leaving other areas (e.g., exemptions) to the discretion of the several states.[120] More specifically, the Seventh Circuit reiterated the principle that uniformity of bankruptcy laws is limited only by the requirement that they be geographically uniform even if the effect on debtors in the several states is unequal.[121] The wisdom of such a law might be questioned, but its constitutionality is supported by precedent and sound judicial reasoning.[122] If Iowa's opt-out law, or that of any other state, is going to be overturned, it should not occur in any court lower than the United States Supreme Court in view of the holding of *Moyses*,[123] even though that decision came under an earlier bankruptcy act.[124] The chance that such a reversal in the Supreme

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114. Sturges v. Crowninshield, 17 U.S. (4 Wheat.) at 195-96.
115. Hanover Nat'l Bank v. Moyses, 186 U.S. at 190.
116. *In re* Sullivan, 680 F.2d at 1137.
117. *Id.* at 1137-38.
118. *Id.* at 1138.
119. *Id.*
120. *See supra* text accompanying notes 64-65, 86.
121. *In re* Sullivan, 680 F.2d at 1133-35.
122. *See* Stellwagen v. Clum, 245 U.S. 605 (1918); Hanover Nat'l Bank v. Moyses, 186 U.S. at 181; Fairbanks v. United States, 181 U.S. 283 (1901); Knowlton v. Moore, 178 U.S. 41 (1900); Head Money Cases, 112 U.S. 580 (1884); Ogden v. Saunders, 25 U.S. (12 Wheat.) at 212; Sturges v. Crowninshield, 17 U.S. (4 Wheat.) at 122.
123. Hanover Nat'l Bank v. Moyses, 186 U.S. at 181 (1902).
124. Act of July 1, 1898, ch. 541, 30 Stat. 544 (1898) (repealed 1978).

Court will occur in the near future is remote because of the apparent continued recognition of geographic uniformity in the federal courts.[125]

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125. *See supra* text accompanying notes 64-65, 86.