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Bankruptcy in the Golden Years: The Case for Increasing Exemptions for Elderly Americans

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BANKRUPTCY IN THE GOLDEN YEARS: THE CASE FOR INCREASING EXEMPTIONS FOR ELDERLY AMERICANS

ABSTRACT

This Comment analyzes 11 U.S.C. § 522(d) and several state exemption statutes for their success at providing elderly debtors sufficient exemptions to maintain their quality of life after filing for bankruptcy. Exemptions are assets that are excluded from an individual debtor's estate upon filing for bankruptcy and that serve as protection against creditors stripping the debtor of all pre-petition property interests. State and federal exemptions vary dramatically, with some states carving out additional exemptions specifically for elderly debtors. For example, states like Massachusetts and Maine recognize additional exemptions for elderly debtors with regards to their homesteads.

Bankruptcy filing rates for elderly Americans have increased while elderly debtors continue to receive inconsistent treatment in bankruptcy across various states. Accordingly, similarly situated debtors can face disparate outcomes based solely on their state of residence.

This Comment argues that Congress should follow the lead of states like Massachusetts and Maine by providing additional bankruptcy exemptions for all elderly Americans, because elderly debtors have different fundamental needs and goals from other American debtors. A revised federal exemption statute is the best approach for resolving the unequal state-by-state treatment of elderly debtors, as well as for meeting their unique bankruptcy needs.

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INTRODUCTION

Elderly Americans are filing bankruptcy at higher rates than ever, both in terms of the number of cases filed and as a share of total bankruptcy petitions filed.[1] Filing for bankruptcy used to be predominantly for younger Americans struggling to find stability in early adulthood; however, Americans between the ages of sixty-five and seventy-four are now filing at approximately the same rate as Americans aged twenty-five to thirty-four.[2] Recently, elderly Americans have caught up to other age groups and, as of August 2021, Americans over sixty years old account for 23.41% of bankruptcy filings, though they make up approximately 22.64% of the population.[3] Accordingly, modern issues with managing debt are just as much of a concern for elderly Americans as they are for younger Americans.

Increases in debt levels for elderly Americans would not be as significant of an issue if their increased debt levels were offset by increasing sources of income to pay off creditors. For example, even though corporations and governments continue to increase their debt levels over time, they have largely been able to pay their increased debt through increased productivity and investments.[4] For older individual debtors, however, their reliance on fixed income streams and their difficulty in generating new income combine to exacerbate the issue of growing debt levels. As James Frego and Glen Turpening point out, "[b]ankruptcy is becoming a bigger part of the social safety net for senior citizens where the old system of a secure, lifelong income is being replaced by permanent debt relief."[5]

One factor increasing the amount of older debtors filing for bankruptcy is simply the number of elderly households with outstanding debt obligations.[6] Of households headed by individuals aged sixty-five and over, 61.1% held debt in

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[1] *See* Deborah Thorne, Pamela Foohey, Robert M. Lawless & Katherine Porter, *Graying of U.S. Bankruptcy: Fallout from Life in a Risk Society*, 90 SOCIO. INQUIRY 681, 693 (2020) [hereinafter Thorne, Foohey, Lawless & Porter, *Graying of U.S. Bankruptcy*]

[2] *See id.*; FED. RSRV. BANK OF N.Y., NOVEMBER 2021 QUARTERLY REPORT ON HOUSEHOLD DEBT AND CREDIT 30 (2021).

[3] *See* FED. RSRV. BANK OF N.Y., *supra* note 2, at 30; ADMIN. CMTY. LIVING, U.S. DEP'T OF HEALTH & HUMAN SERVS., 2020 PROFILE OF OLDER AMERICANS 4 (2020).

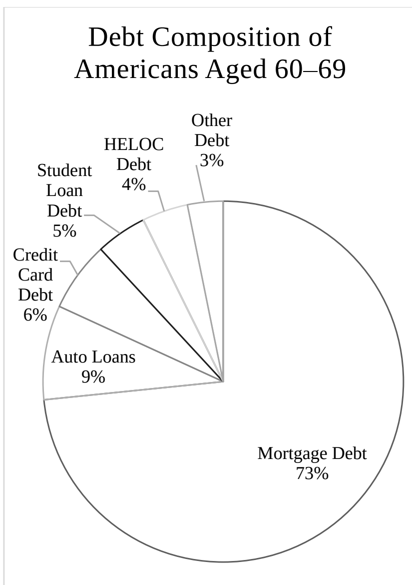
[4] *See* Patricia Buckley et al., *The Pandemic Has Forced Corporate Debt Higher: But Is That a Bad Thing?*, DELOITTE: INSIGHTS 2 (July 15, 2021), https://www2.deloitte.com/us/en/insights/economy/issues-by-the-numbers/rising-corporate-debt-after-covid.html.

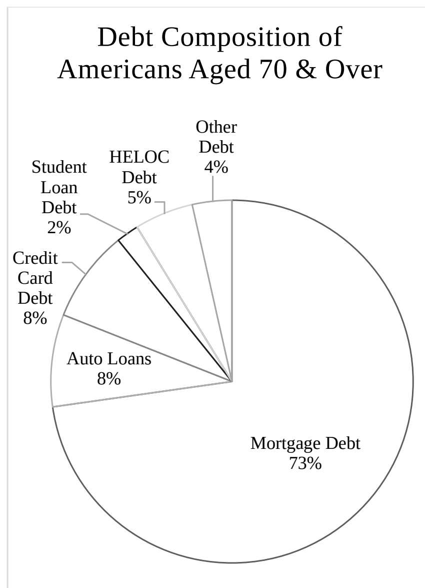
[5] James Frego & Glen Turpening, *Late-Life Bankruptcies: A Growing Safety Net*, 99 MICH. BAR J. 18, 21 (2020).

[6] *See* ZHE LI, CONG. RSCH. SERV., R45911, HOUSEHOLD DEBT AMONG OLDER AMERICANS, 1989–2016, at 1 (2019).

2016 as compared with 37.8% of households in that demographic in 1989.[7] Not only are more elderly households in debt, those elderly households that do carry debt continue, on average, to carry more debt.[8] More elderly Americans are taking out debt and they are taking out more of it, increasing their likelihood of insolvency.[9]

The composition of debt for older debtors shows the types of debt they have the most difficulty repaying. As of the third quarter of 2021, for Americans between ages sixty and sixty-nine, 73.39% of their debt was mortgage debt, 8.45% of their debt was in auto loans, 6.27% of their debt was credit card debt, 4.58% was student loan debt, 4.12% of their debt was in home equity line of credit ("HELOC") debt, and 3.19% of their debt was other debt.[10] For Americans over seventy, 73.05% of their debt was mortgage debt, 8.26% of their debt was in auto loans, 8.26% was credit card debt, 5.28% was HELOC debt, 2.01% was student loan debt, and 3.54% was other debt.[11] Mortgage, auto loans, and credit card debt represent huge burdens for the average older debtor.





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7 *Id.*
8 *See id.*
9 *See id.*
10 *See* FED. RSRV. BANK OF N.Y., *supra* note 2, at 21.
11 *See id.* at 21.

This Comment discusses: (1) the changing financial landscape for elderly Americans, (2) an overview of exemptions and the fresh start doctrine, (3) specific federal exemptions under 11 U.S.C. § 522, (4) representative state exemptions, and (5) how the federal government can create sufficient protection for elderly debtors via amendment to the Bankruptcy Code. This Comment shows that the fresh start promised by bankruptcy is not as attainable for elderly debtors, who often have limited fixed incomes and decreased earning potential, as it is for other similarly situated debtors. To close this gap, the federal government should follow the lead of Massachusetts and Maine and expand upon its exemption schemes to create more generous exemptions for elderly debtors filing for bankruptcy.

I. BACKGROUND

The rise and fall of financial safety nets in the United States helps explain elderly Americans' dependence on bankruptcy as a remedy. Bankruptcy scholars Deborah Thorne, Pamela Foohey, Robert M. Lawless, and Katherine Porter discuss the history of America's treatment of the elderly, writing, "[w]ith the emergence of neoliberalism in the early 1980s, portions of the social safety net that many retired Americans depended on, namely retirement savings and affordable health care, weakened, and the responsibilities for and costs of were shifted to individuals."[12] For individual debtors in the twenty-first century, some of the primary reasons for bankruptcy filings include rising healthcare costs and insufficient income during retirement.[13] In a presentation given to the American Bankruptcy Institute, Kenneth L. Gross explained six of the main drivers of elder bankruptcies as

> (1) the elimination or reduction of equity in homes due to the financial crisis; (2) the increase of student loan debt among the elderly; (3) the historical rise of credit card debt; (4) social security increases that do not keep pace with inflation for the elderly; (5) overcoming of the "stigma" the elderly often placed on filing; and (6) plain old need.[14]

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[12] Thorne, Foohey, Lawless & Porter, *Graying of U.S. Bankruptcy*, *supra* note 1, at 681–82.

[13] *See id.* at 682.

[14] Kenneth L. Gross, *The Increase in Elders Filing for Bankruptcy Relief and Death in Bankruptcy, in* AMERICAN BANKRUPTCY INSTITUTE: 2017 HON. STEVEN W. RHODES CONSUMER BANKRUPTCY CONFERENCE 293 (2017), *available at* https://abi-org-corp.s3.amazonaws.com/materials/BankruptcyAndElderLaw.pdf.

A. *The Changing Financial Landscape for Elderly Americans*

A combination of social movements and changes in federal legislation allowed many retirees in the late twentieth century to retire comfortably.[15] Some of these changes in American society included the passing of the Social Security Act of 1935, the introduction of Medicare and Medicaid in 1965, and private and public employers' provision of defined benefit pension plans to employees.[16] Furthermore, early on after the passage of the Social Security Act, the retirement age for full social security benefits was sixty-five, and Americans on average could expect social security payments to provide 40% of their pre-retirement income.[17]

Recently, the estimated average social security retirement benefit in May 2022 was $1,668 a month,[18] which works out to an expected annual benefit of $20,016. This is noticeably smaller than the annual income of the median working American male in 2020, which is $67,304, and that of the median working American female, which is $49,214.[19] Even though social security income is expected to be only a fraction of working income, as of 2018, a large portion of retirees rely on social security for 90% or more of their monthly income.[20] The lack of retirement income savings plus the lessening utility and certainty of social security payments require elderly Americans to understand that "[t]he social security income [they] will receive will not be adequate to address the costs of housing and day-to-day expenses."[21]

Additionally, the once reliable defined benefit pension plans offered by employers have largely been replaced by employee-owned, defined contribution plans.[22] One hazard of these defined contribution accounts is that individuals may outlive their savings or that investment returns may be unpredictable. Therefore, the cash flow from defined contribution accounts may not be reliable in times of economic downturn.[23] Another major concern is that employees may

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15 Thorne, Foohey, Lawless & Porter, *Graying of U.S. Bankruptcy*, *supra* note 1, at 683.

16 *See id.*

17 *Id.*

18 *How Much Social Security Will I Get?*, AM. ASS'N OF RETIRED PERSONS (June 30, 2022), https://www.aarp.org/retirement/social-security/questions-answers/how-much-social-security-will-i-get.html.

19 *See* EMILY A. SHRIDER ET AL., U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2020, at 27 (2021).

20 *See* Thorne, Foohey, Lawless & Porter, *Graying of U.S. Bankruptcy*, *supra* note 1, at 684.

21 *See* Gross, *supra* note 14, at 299.

22 Thorne, Foohey, Lawless & Porter, *Graying of U.S. Bankruptcy*, *supra* note 1, at 684.

23 *See id.*

save nothing, since contributions to these accounts are voluntary.[24] For example, as of 2016, nearly half of Americans aged fifty-five and over had nothing saved in a retirement account.[25]

An additional issue for elderly debtors is that they sometimes complicate their bankruptcy by waiting too long to file. As a result, they often end up paying creditors for debts that would otherwise be discharged through bankruptcy.[26] This is in part because Americans are told to heavily value credit scores.[27]

Even after filing for bankruptcy, the elderly debtor is still faced with burdensome expenses.[28] A debtor filing for chapter 7 bankruptcy can expect attorney's fees exceeding $1,200.[29] Additionally, the debtor must expend their time and energy throughout the bankruptcy proceedings, and accept the perceived stigma and shame attached to declaring bankruptcy.[30] Beyond just minimal income streams and inadequate savings, the general stress of debt collection is also a cause of bankruptcy filings for elderly debtors.[31]

With this confluence of factors working against Americans adequately saving for retirement, the average older American at or approaching retirement age has $25,000 or less in savings.[32] This is worrisome when combined with increasing costs of living, medical expenses, and unrelenting mortgage payments, particularly during inflationary periods where a small, fixed savings balance will not result in as much buying power as expected.

Inadequate healthcare coverage also places elderly debtors in a pinch financially.[33] Elderly Americans receive health insurance through Medicare, but Medicare does not cover all their medical expenses.[34] In fact, Medicare covers only about 80% of medical expenses.[35] Households in the United States headed by someone who is aged sixty-five or older spend on average $52,141 a year; of

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24 *See id.*

25 *Id.*

26 *See* Gross, *supra* note 14, at 296.

27 *See id.*

28 *See* Pamela Foohey, Robert M. Lawless & Deborah Thorne, *Driven to Bankruptcy*, 55 WAKE FOREST L. REV. 287, 325 (2020) [hereinafter Foohey, Lawless & Thorne, *Driven to Bankruptcy*].

29 *Id.*

30 *See* Brent T. White, *Underwater and Not Walking Away: Shame, Fear, and the Social Management of the Housing Crisis*, 45 WAKE FOREST L. REV. 971, 994 (2010).

31 Thorne, Foohey, Lawless & Porter, *Graying of U.S. Bankruptcy*, *supra* note 1, at 697.

32 Frego & Turpening, *supra* note 5, at 20.

33 *See* Thorne, Foohey, Lawless & Porter, *Graying of U.S. Bankruptcy*, *supra* note 1, at 697.

34 *Id.* at 685.

35 *Id.*

that, an average of $7,030, or 13.5%, is spent on healthcare costs.[36] Healthcare expenditures are the second largest expense for older Americans, behind only housing costs.[37] Medical expenses are a common and persistent issue for older Americans, as more than 84% of people over the age of sixty-five have at least one chronic condition.[38] The United States medical system is built so that if an elderly American faces a chronic illness or an otherwise serious medical difficulty, then the attendant treatment expenses may sink that person into bankruptcy.[39]

Increasing credit card debt may further exacerbate the rate at which older Americans declare bankruptcy.[40] The percentage of households led by someone aged sixty-five to seventy-four who had credit card debt increased to 41% in 2019, up 14% from 1989.[41] While the credit card debt percentage for older Americans has increased, this is still lower than that of the population overall, where 54% of people carry month-to-month credit card debt.[42] Furthermore, for the sixty-five to seventy-four age range, the median credit card balance is $2,850, which is larger than in previous decades.[43] While the outstanding debt amounts are climbing for older Americans, they still hold less credit card debt than the national average: $5,525.[44] Seniors may pay credit card expenses, despite knowing that the debt is easily discharged, because they do not want to hurt their credit score.[45] Often this leads to unnecessarily costly payments because a "credit score is relevant if you are a senior seeking credit, but in a world in which we must make choices, sometimes it is necessary to sacrifice the credit score in favor of preserving the necessary income to meet future expenses."[46]

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[36] U.S. BUREAU OF LAB. STATS., *Table 1300. Age of Reference Person: Annual Expenditure Means, Shares, Standard Errors, and Coefficients of Variation,in* CONSUMER EXPENDITURE SURVEYS 2021 (2022).

[37] *Id.*

[38] *Get the Facts on Senior Debt*, NAT'L COUNCIL ON AGING (Nov. 9, 2020), https://www.ncoa.org/article/get-the-facts-on-senior-debt.

[39] *See* Thorne, Foohey, Lawless & Porter, *Graying of U.S. Bankruptcy*, *supra* note 1, at 702.

[40] *See* Taylor Tepper, *America's Seniors in Debt: A Growing Problem*, FORBES (Mar. 29, 2021), https://www.forbes.com/advisor/retirement/seniors-debt-statistics/.

[41] *Id.*

[42] *See* Lorie Konish, *42% of Americans Have Racked up More Credit Card Debt Since COVID-19 Began*, CNBC (Sept. 27, 2021), https://www.cnbc.com/2021/09/27/42-percent-of-americans-have-increased-their-credit-card-debt-during-covid-19.html.

[43] Tepper, *supra* note 40.

[44] *See* Konish, *supra* note 42.

[45] *See* Gross, *supra* note 14.

[46] *Id.*

Due to their increasing debt burdens and fixed incomes, bankruptcy may become a necessary measure for older debtors. Given the growing set of unprecedented issues facing elderly debtors, the bankruptcy system can only place an individual Band-Aid on massive societal wounds. Bankruptcy is not going to unilaterally fix the cash flow issues that older Americans have faced and will continue to face. When the current elderly population was at the height of their careers, they were promised that they could rely on social security payments, private pension plans, and Medicare coverage to carry them through their old age.[47] While these safety nets still exist, they are not as robust or reliable as anticipated.[48] As the authors of *Graying of U.S. Bankruptcy* summarized, "[w]hen the costs of aging are off-loaded onto a population that simply does not have access to adequate resources, something has to give, and older Americans are more likely than ever to turn to what little is left of the social safety net—personal bankruptcy."[49]

B. Overview of Exemptions and the Fresh Start Doctrine

One reason that the bankruptcy system can serve as a remedy, however incomplete, for debtors including elderly debtors, is that the Code allows for exemptions. The Third Circuit, for example, has discussed the United States exemption system as an essential protection for debtors.

> The historical purpose of . . . exemption laws has been to protect a debtor from his creditors, to provide him with the basic necessities of life so that even if his creditors levy on all of his nonexempt property, the debtor will not be left destitute and a public charge. [This] purpose has not changed.[50]

At the outset of filing for bankruptcy, almost all of the debtor's property goes into the bankruptcy estate.[51] Then, the debtor must actively claim exemptions

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47 *See* Thorne, Foohey, Lawless & Porter, *Graying of U.S. Bankruptcy*, *supra* note 1, at 683–85.

48 *See id.* at 684–85.

49 *Id.* at 685.

50 *In re* Krebs, 527 F.3d 82, 85 (3d Cir. 2008) (quoting H.R. REP. NO. 95-595, at 126 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6087).

51 "Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case" become part of the bankruptcy estate. 11 U.S.C. § 541(a). 11 U.S.C. § 541(b) describes various narrowly-defined interests that do not enter into the estate; these are "excluded" rather than "exempted." *See, e.g.*, Patterson v. Shumate, 504 U.S. 753, 762, (1992) ("If a debtor's interest in a pension plan could be *excluded* in full from the bankruptcy estate, the argument goes, then there would have been no reason for Congress to create a limited *exemption* for such interests elsewhere in the statute" (emphasis in original)).

which in order to remove certain property from the bankruptcy estate.[52] Thereafter, any exempt property cannot be used to satisfy claims against the estate.[53] Exemptions serve two primary purposes for both the debtor and society. First, exemptions can restore economic stability and allow individuals to support themselves and their families. Second, exemptions increase individual self-reliance without need for public support.[54]

Property subject to exemption is not automatically removed from the debtor's bankruptcy estate.[55] All property is property of the estate until an exemption is affirmatively claimed by the debtor or a dependent of the debtor.[56] The federal bankruptcy exemptions are located in Code section 522.[57] Under section 522(*l*), the debtor claims an exemption by filing a list of exempt assets.[58] The property claimed as exempt is removed from the estate unless a party in interest objects, in which case the bankruptcy court will evaluate.[59] In both voluntary and involuntary bankruptcy filings, the debtor must file the list of exemptions with the petition or within fourteen days of the petition date or order for relief.[60]

Section 541(a)(1) lists what is included in the property of the estate at the outset of each bankruptcy case.[61] The statute says that "all legal or equitable interests of the debtor in property as of the commencement of the case" are considered property of the bankruptcy estate.[62] In terms of timing for exemptions, the estate is viewed as a snapshot on the day of filing and any asset that qualifies as of the petition date as exempt will be exempted throughout the entirety of the bankruptcy case, as long as the debtor timely claims their exemption.[63] Any property not exempted will be available to the trustee for the satisfaction of creditors' claims as of the commencement of the bankruptcy case.[64]

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52 Rasmussen v. Unruh (*In re* Unruh), 278 B.R. 796, 805–06 (Bankr. D. Minn. 2002).
53 11 U.S.C. § 522(c).
54 *See In re* Hill, 163 B.R. 598, 601 (Bankr. N.D. Fla. 1994).
55 *See Unruh*, 278 B.R. at 805–06; 11 U.S.C. § 522(*l*).
56 *See Unruh*, 278 B.R. at 805–06; 11 U.S.C. § 522(*l*).
57 11 U.S.C. § 522.
58 11 U.S.C. § 522(*l*).
59 *Id.*
60 FED. R. BANKR. P. 1007(c).
61 11 U.S.C. § 541(a)(1).
62 *Id.* Subject to the narrow exclusions listed in 11 U.S.C. § 541(b), (c)(2). *See supra* note 51.
63 *See* Rockwell v. Hull (*In re* Rockwell), 968 F.3d 12, 19 (1st Cir. 2020).
64 *See* 11 U.S.C. § 541(a)(1).

1. The Role of Exemptions in Chapter 7 and Chapter 13 Bankruptcy Filings

Individual debtors can claim exemptions regardless of which chapter of bankruptcy they file under.[65] With that being said, the exact function of exemptions in the bankruptcy proceedings varies depending on type of bankruptcy filed.[66] An initial decision for individuals filing for bankruptcy is to determine which type of bankruptcy to file for.[67] Chapter 7 and chapter 13 are generally the two most relevant chapters of bankruptcy for individual filers and therefore for exemption analysis.[68]

Generally, after Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"), for an individual or couple to file for chapter 7 liquidation bankruptcy, they would have to be below the median income for the state.[69] This often requires a fairly elaborate means test to determine, over the previous six months, how much income they have received and if they are eligible for chapter 7.[70] One key relevant exclusion for the means test for elderly debtors specifically is that social security income is not included in means test income.[71] Accordingly, even retired individuals who were relatively high earners during their careers may be eligible for chapter 7 if their only current source of income is social security.

In chapter 7, bankruptcy exemptions serve a vital role because almost all the debtor's property automatically goes into the estate. The chapter 7 trustee then administers the estate by selling non-exempt property.[72] The only way to ensure that a property interest is kept by the debtor when going through bankruptcy proceedings in chapter 7 liquidation is for that property to be included in the exemptions.[73]

In chapter 13, a debtor with a regular income stream is looking to repay debts on a payment plan.[74] Importantly, the debtor remains in possession of all of the

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65 11 U.S.C. § 522(b)(1).

66 *See generally* Arthur W. Rummler, *Chapter 13 Saves the World!*, DUPAGE CNTY. BAR ASS'N BRIEF, May 2017, *available at* https://www.dcba.org/mpage/vol290517art4.

67 *Id.*

68 *Id.*

69 *See* 11 U.S.C. § 707.

70 *See id.*

71 42 U.S.C. § 407; *see also In re* Suttice, 487 B.R. 245, 253 (Bankr. C.D. Cal. 2013).

72 Anna Haugen & Jessica Ronay, *Homeward Bound Through the Wild, Wild South: The Application of Florida's Wild Card Exemption on Homestead Property in Bankruptcy*, FLA. BAR J., Dec. 2015, at 28.

73 *Id*. To be clear, property that is excluded from the estate under sections 541(b) and (c)(2) does not need to be exempted to be kept. *See supra* note 51.

74 *See* 11 U.S.C. § 1322(a).

property of the estate.[75] One major requirement to qualify for chapter 13 bankruptcy is to have regular income.[76] This is important because in order to fulfill the plan of repayment, the court and creditors want those entering chapter 13 to be reasonably equipped to make the periodic payments required under the plan.[77]

The role of exemptions is different in chapter 13 than in chapter 7 because in chapter 7 the debtor loses possession of non-exempt property, whereas the chapter 13 debtor retains possession of it.[78] Exemptions help minimize the amount that a debtor has to repay to creditors in a chapter 13 payment plan by lowering the hypothetical liquidation value of the debtor's estate.[79] This allows the debtor to use a lower hypothetical liquidation value for the best-interest-of-creditors test, which requires that creditors receive, over the life of the chapter 13 plan, at least as much as they would receive in a chapter 7 liquidation.[80] Exempting property lowers the "target" amount that the debtor must pay to creditors by excluding it from the liquidation calculation.

2. *The Fresh Start Policy*

Permitting individuals filing under either chapter 7 or chapter 13 to use the above-described exemptions advances the "fresh start" policy of bankruptcy. The fresh start policy is the bankruptcy system's goal of restoring an individual debtor's economic stability after their emergence from the bankruptcy process.[81] Fundamental to a debtor's fresh start after filing for bankruptcy is the debtor's ability to find adequate income and stabilize their finances.[82] This is generally attainable for debtors in the workforce, who have years to establish stable income streams after having acquired relief from burdensome debts.[83] Elderly debtors, however, may be unable or unwilling to work due to physical inability,

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[75] Haugen & Ronay, *supra* note 72, at 30.

[76] 11 U.S.C. § 109(e).

[77] *See* Haugen & Ronay, *supra* note 72, at 30.

[78] Joseph P. Corish Michael, *The Debtor's Dilemma: Disposable Income As the Cost of Chapter 13 Discharge in Consumer Bankruptcy*, 47 LA. L. REV. 47, 52 (1986).

[79] Bud Stephen Tayman, *The Impact of Bankruptcy on A Personal Injury Claim—Whose Claim Is This, Anyway?*, MD. BAR J., Jan.-Feb. 2013, at 6.

[80] Gregory G. Hesse & Cameron W. Kinvig, *"Best Interest of Creditors" Test: Why Those Math Classes Weren't A Total Waste After All*, AM. BANKR. INST. J., March 2008, at 32.

[81] *See, e.g.*, Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393 (1985); Gary E. Sullivan, *A Fresh Start to Bankruptcy Exemptions*, 2018 BYU L. REV. 335, 337 (2018).

[82] Meelad Hanna, *For the Bankrupt Elder, There Is No "Fresh Start": Resisting the Vulture Effect*, 14 SEATTLE J. FOR SOC. JUST. 781, 783 (2016).

[83] *Id.* at 784.

illness, ageism in the workplace, mandatory retirement within their industry, additional caretaker needs, or a combination of all of those reasons.[84] The inability to generate consistent income, coupled with unreliable public and private safety nets, causes "the elderly by and large [to] rely to their detriment on social security income, pension income, and whatever savings they may have."[85]

With fewer opportunities for future income, elderly debtors are less well-positioned than younger debtors to return to a healthy economic baseline and achieve the "fresh start" that the bankruptcy system promises.[86] This means that a robust exemption structure is even more of a necessity for individual elderly debtors filing for bankruptcy—without it, property may be forfeited as part of the bankruptcy process and never recovered post-discharge, since the elderly debtor has poor prospects for future career income. This discrepancy means that policymakers need to think differently about the bankruptcy process for the elderly debtor.[87]

C. Specific Federal Exemptions Under 11 U.S.C. § 522

Congress allows states to create their own exemptions; those exemptions, to be discussed later in this Comment, vary from state to state and differ from the federal exemptions.[88] However, the federal exemptions, found in section 522 of the Code, are the baseline.[89] Some of the exemptions in in this section apply to all individual debtors regardless of if they opt out of the federal exemptions.[90] One example is section 522(b)(3)(C), which allows an individual's tax-exempt retirement accounts to be exempted from the bankruptcy estate.[91] Accordingly, unless there is an issue with an account's tax-exempt status, these retirement accounts will be exempt whether the debtor uses state or federal bankruptcy exemptions.[92] Relevant exemptions for elderly Americans in the Code include: (1) the home equity exemption, (2) the motor vehicle exemption, (3) retirement

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84 *Id.*
85 *Id.*
86 *Id.* at 783.
87 *Id.* at 782–83.
88 *See* 11 U.S.C. § 522(b)(2); Laura B. Bartell, *The Peripatetic Debtor: Choice of Law and Choice of Exemptions*, 22 EMORY BANKR. DEV. J., 401, 408 (2006).
89 11 U.S.C. § 522.
90 *Id.*
91 11 U.S.C. § 522(b)(3)(C).
92 WILLIAM HOUSTON BROWN ET AL., *§ 3:4. Determination of Applicable Exemptions: Section 522(b)*, *in* BANKRUPTCY EXEMPTION MANUAL (2022) (citing Lerbakken v. Sieloff & Assocs. (*In re* Lerbakken), 949 F.3d 432 (8th Cir. 2020)).

income exemptions, (4) the social security exemption, and (5) other smaller exemptions.

1. The Federal Exemption for Home Equity

The federal home equity exemption is codified at 11 U.S.C. § 522(d)(1) and provides for the exemption of "[t]he debtor's aggregate interest, not to exceed $27,900 . . . in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence" from the bankruptcy estate[93]

The Code requires the debtor to have an interest in the real or personal property at issue in order to claim the exemption.[94] In the homestead context, this requires that the debtor have an equity interest in their home—i.e., that the value of the home exceed the secured debt (almost always, a mortgage) owed on the home.[95] The amount of the equity interest is the difference between the home's value and the debt owed on it. Secured debtors will still retain their claims against the property regardless of whether the property is exempt, so the only portion that a trustee could utilize in bankruptcy for the satisfaction of creditors is the equity interest portion.[96] In 2020, the average American between sixty-five and sixty-nine years of age had $136,670 in home equity, representing about 61% of their net worth.[97] Americans aged seventy to seventy-four on average had $153,300 in home equity representing about 72% of their net worth.[98] The average home equity for elderly debtors is significantly higher than the allotted federal exemption for personal residences. This means that the average elderly debtor undergoing bankruptcy would have to sell the home, so that creditors can access all the equity built up in the home in excess of that $27,900 exemption. For Americans under thirty-five, on the other hand, home equity averages $60,500.[99] The flat exemption amount, identical for young and old debtors alike, causes the average older debtor to lose more to creditors through the estate's use of home equity in bankruptcy proceedings than would a younger debtor.

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93 11 U.S.C. § 522(d)(1).

94 *See id.*

95 *See* WILLIAM HOUSTON BROWN ET AL. *§ 5:2. Section 522(d)(1): Residency Exemption*, *in* BANKRUPTCY EXEMPTION MANUAL, *supra* note 92.

96 *See id.*

97 Kathleen Coxwell, *How Do You Compare? Average Cash, Savings, Home Equity and Other Balances*, NEW RET., https://www.newretirement.com/retirement/average-household-savings-home-equity-and-other-balances/ (last visited Sept. 12, 2022).

98 *Id.*

99 WEALTH, ASSET OWNERSHIP, & DEBT OF HOUSEHOLDS DETAILED TABLES 2020, U.S. CENSUS BUREAU (2020), *available at* https://www.census.gov/data/tables/2020/demo/wealth/wealth-asset-ownership.html.

An additional caveat is that the home equity exemption is also only helpful if the debtor owns a home. Thirty-seven percent of American households do not own a home and therefore have no interest that is exempt under section 522(d)(1).[100] For elderly debtors who are not homeowners, an increased residency exemption would not have any tangible impact on their chapter 7 bankruptcy proceedings.[101]

This is where the federal wildcard exemption is beneficial.[102] The wildcard exemption, codified at section 522(d)(5), is a flexible federal bankruptcy exemption which permits exemption of "[t]he debtor's aggregate interest in any property, not to exceed in value $1,475 plus up to $13,950 of any unused amount" of the homestead exemption.[103] This allows debtors who have extra equity in other property, and have already hit the maximum exemption for a given asset class, to preserve additional equity interests from that class from creditors by providing another route for exempting these interests from the bankruptcy estate.[104] This exemption has several benefits for debtors by allowing them to fully maintain property that may be in excess of the categorized exemption amount as a "spillover exemption."[105] Additionally, it serves to specifically benefit debtors who are not homeowners by generously allowing even these debtors to tap into $13,950 of the homestead exemption in order to shield property interests of their choosing.[106] Several states, including Florida, as discussed later, include a similar wildcard exemption to try and benefit those who do not own a home or do not have sufficient built-up home equity in a home to utilize the state's homestead exemptions.[107]

An additional requirement in the federal homestead exemption statute is that the property be used as a residence by either the debtor or a dependent.[108] This may not be as restrictive as it sounds because, "for purposes of this exemption, courts have construed the term 'residence' broadly. For example, 'residence'

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100 *See* Jonathan Eggleston & Donald Hays, *Many U.S. Households Do Not Have Biggest Contributors to Wealth: Home Equity and Retirement Accounts*, U.S. CENSUS BUREAU (Aug. 27, 2019), https://www.census.gov/library/stories/2019/08/gaps-in-wealth-americans-by-household-type.html.

101 *See generally id.*; 11 U.S.C. § 522(d)(1).

102 *See* 11 U.S.C. § 522(d)(2).

103 11 U.S.C. § 522(d)(5).

104 *See id.*

105 *See* Walkington v. Prod. Credit Ass'n (*In re* Walkington), 42 B.R. 67, 72 (Bankr. W.D. Mich. 1984).

106 *See* Martin v. Cox (*In re* Martin), 140 F.3d 806, 808 (8th Cir. 1998).

107 *See generally* WILLIAM HOUSTON BROWN ET AL., *§ 5:6. Section 522(d)(5): Wildcard Exemption, in* BANKRUPTCY EXEMPTION MANUAL, *supra* note 92.

108 11 U.S.C. § 522(d)(1).

was construed by the Second Circuit to include both primary and non-primary residences."[109]

Section 522(d)(1) does not have any special language or increased exemptions for older debtors.[110] This is consistent throughout section 522, where older debtors have the same exemptions available to them, as well as the same exemption threshold limits, as any other debtor.[111]

2. *The Federal Exemption for a Motor Vehicle*

Next, the motor vehicle exemption is also important for many debtors.[112] Section 522(d)(2) permits the debtor to exempt their "interest, not to exceed $4,450 in value, in one motor vehicle."[113] The two key limitations on the exemption are the dollar limit on the debtor's interest and the restriction to one motor vehicle.[114] This, like the homestead exemption, limits the trustee from taking anything other than the equity portion of the value of the car if sold.[115] Additionally, if the debtor has equity in multiple motor vehicles, only one equity interest can fall under this exemption.[116]

Debtors will often hope to keep their cars throughout the bankruptcy proceedings.[117] The bankruptcy system has a fresh start for debtors as one of its goals, but it also attempts to maximize payouts to creditors. Allowing exemptions for additional cars would potentially limit that payout. The utility of this exemption to the debtor, in practice, has a similar limitation as the other bankruptcy exemptions, where nonexempt equity is often captured by the trustee through the sale of the asset and the addition of the proceeds to the estate—minus the debtor's exempted equity.[118] Therefore, the motor vehicle itself is gone even if the debtor can keep the $4,450.

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[109] WILLIAM HOUSTON BROWN ET AL., *§ 5:2. Section 522(d)(1): Residency Exemption*, *in* BANKRUPTCY EXEMPTION MANUAL, *supra* note 92 (quoting Donovan v. Maresca (*In re* Maresca), 982 F.3d 859, 869 (2d Cir. 2020)).

[110] 11 U.S.C. § 522(d)(1).

[111] *See* 11 U.S.C. § 522.

[112] Foohey, Lawless & Thorne, *Driven to Bankruptcy*, *supra* note 28, at 324.

[113] 11 U.S.C. § 522(d)(2).

[114] *Id.*

[115] *Cf.* WILLIAM HOUSTON BROWN ET AL., *§ 5:3. Section 522(d)(2)–Motor Vehicle Exemption*, *in* BANKRUPTCY EXEMPTION MANUAL, *supra* note 92.

[116] *Id.*

[117] Foohey, Lawless & Thorne, *Driven to Bankruptcy*, *supra* note 28, at 324.

[118] *See* Schwab v. Reilly, 560 U.S. 770, 802 (2010) (Ginsburg, J., dissenting).

Additionally, although this motor vehicle exemption amount is periodically adjusted for inflation, that adjustment does not keep pace with the price of cars in America.[119] In November of 2021, the average cost of a used car was $29,011.[120] While the recent uptick in car prices was largely related to inflationary pressures and supply chain issues, the price for vehicles is likely to remain high for the long term.[121] An older debtor who must sell their car and can only keep $4,450 of the equity will have trouble using that money to purchase another used car as transportation. Lacking private motor vehicle transportation could further isolate an elderly person, who may struggle to participate in society without a car. This federal motor vehicle exemption, like the federal personal residency exemption, does not permit any special exemptions for elderly debtors.[122]

3. *Federal Exemptions for Retirement Income*

Retirement income is also addressed in the federal bankruptcy exemption statutes.[123] Section 522(d)(12) says that "[r]etirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986," are exempt.[124] A wide variety of topics are covered by those statutory sections: qualified pension, profit-sharing, and stock bonus plans; taxation of employee annuities; individual retirement accounts; Roth IRAs; definitions and special rules for retirement accounts; deferred compensation plans of state and local governments and tax-exempt organizations; and tax-exemption for certain trusts and corporations.[125] The upshot is that the section 522(d)(12) exemption covers virtually all Code sections that interact with retirement savings accounts.[126]

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[119] *See* Tom Krisher, *$29,000 for an Average Used Car? Would-Be Buyers Are Aghast*, U.S. NEWS (Jan. 3, 2022), https://www.usnews.com/news/business/articles/2022-01-03/29-000-for-an-average-used-car-would-be-buyers-are-aghast.

[120] *Id.*

[121] *Id.*

[122] 11 U.S.C. § 522(d)(2).

[123] 11 U.S.C. § 522.

[124] 11 U.S.C. § 522(d)(12).

[125] *See* 26 U.S.C. § 401 (qualified pension, profit-sharing and stock bonus plans); 26 U.S.C. § 403 (taxation of employee annuities); 26 U.S.C. § 408 (individual retirement accounts); 26 U.S.C. § 408A (Roth IRAs); 26 U.S.C. § 414 (definitions and special rules); 26 U.S.C. § 457 (deferred compensation plans of state and local governments and tax-exempt organizations); 26 U.S.C. § 501(a) (exemption from tax on corporations, certain trusts, etc.)

[126] 11 U.S.C. § 522(d)(12).

Because of its expansive nature, section 522(d)(12) often covers all a debtor's retirement savings; however, this is not always the case.[127] For example, in the 2014 Supreme Court case *Clark v. Rameker*, Justice Sotomayor wrote for a unanimous Court that inherited IRAs are not included in exempt assets under section 522(d)(12).[128] Emphasizing both the spirit and the text of section 522(d)(12).[129] the Court held that the purpose of that statutory provision is to ensure that Americans at retirement have financial resources to fall back on and that, structurally, IRAs and Roth IRAs provide tax consequences if people try to withdraw the funds too early in their lives.[130] This is different from inherited IRAs, where there is no penalty for withdrawal and in fact there is a reverse incentive because the person who inherits the IRA must withdraw the funds within five years of receipt.[131] The Court held that just because inherited IRAs are governed by section 408, similarly to other IRAs, that does not automatically make them retirement funds within the meaning of section 522(d)(12).[132] The court reasoned that if everything governed by section 408 is automatically a retirement fund and qualifies as protected, that would lead to redundancy in the language of section 522(d)(12), which explicitly includes only retirement funds in each of the sections the statute references.[133] As the Supreme Court's analysis in *Clark* shows, just because an interest is covered in the list of statutes given in section 522(d)(12) does not mean that it is automatically protected for the debtor as exempt retirement funds.[134]

Another Supreme Court case fundamental to understanding the scope of the debtor's bankruptcy estate regarding retirement accounts came prior to BAPCPA's passage in 2005.[135] In *Patterson v. Shumate*, the Court held that employer pension plans subject to anti-alienation provisions under the Employee Retirement Income Security Act of 1974 ("ERISA") would be excluded from the debtor's estate.[136] Justice Blackmun wrote for the Court, which held that ERISA-qualified pension plans constitute "applicable non-bankruptcy" law that

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[127] *See* Clark v. Rameker, 573 U.S. 122, 131 (2014); WILLIAM HOUSTON BROWN ET AL., *§ 5:13. Section 522(d)(12), Section 522(b)(3)(C) and Section 522(n): Retirement Fund Exemption*, *in* BANKRUPTCY EXEMPTION MANUAL, *supra* note 92.

[128] *Clark*, 573 U.S. at 127.

[129] *See id.* at 129–32.

[130] *Id.* at 128.

[131] *Id.*

[132] *See id.*; 26 U.S.C. § 408.

[133] *Clark*, 573 U.S. at 130; 11 U.S.C. § 522(d)(12).

[134] *Clark*, 573 U.S. at 131.

[135] Patterson v. Shumate, 504 U.S. 753 (1992).

[136] *Id.* at 760. These are *excluded* under section 541(c)(2) rather than *exempted* under section 522.

makes the debtor's interest non-transferrable to creditors and therefore eligible for exclusion from the estate.[137]

One unique feature within section 522 is that subsection (b)(3)(c) states that the retirement accounts exemption is applicable for all debtors within the United States regardless of if the debtor is using state or federal exemption regimes.[138] Accordingly, retirement funds that qualify in section 522(d)(12) are unique because "either in an opt-out state or under the federal exemptions, the listed retirement funds are exempt from the bankruptcy estate."[139]

An ongoing and unresolved issue related to retirement accounts and income earned on them is whether they qualify as income for chapter 13 debtors to meet the disposable income test.[140] Courts have taken differing approaches. The first approach is that retirement savings in private accounts like IRAs are income but should be considered income at the time of contribution and not at the time of withdrawal.[141] Other courts take the opposite approach and consider the income to be earned when the withdrawal occurs, as the purpose of retirement accounts is essentially to push income generated in the present into the future.[142] The argument hinges mostly on how other retirement income is treated within the tax code.[143]

4. Social Security and Bankruptcy

Social security income supplements some of the lost income from wages for retirees,[144] and is uniquely situated within the federal exemption scheme.[145] Social security income, like most other property interests belonging to the debtor, is either included in the estate or exempted.[146] The Social Security Act in section 407 has anti-alienation language saying, "none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any

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137 *Id.* at 759–60; *see also* 11 U.S.C. § 541(c)(2).

138 *See* 11 U.S.C. § 522(b)(3)(c).

139 WILLIAM HOUSTON BROWN ET AL., *§ 5:13. Section 522(d)(12), Section 522(b)(3)(C) and Section 522(n): Retirement Fund Exemption*, *in* BANKRUPTCY EXEMPTION MANUAL, *supra* note 92.

140 *See* Tara Twomey & Todd F. Maynes, *Protecting Nest Eggs and Other Retirement Benefits in Bankruptcy*, 90 AM. BANKR. L.J. 235, 262 (2016).

141 *Id.* at 264.

142 *Id.*

143 *Id.*

144 *See id.* at 237.

145 *See id.* at 256–61.

146 *See id.* at 242–43.

bankruptcy or insolvency law."[147] This language conflicts with 11 U.S.C. § 541(a)(1) which states that "all legal or equitable interests of the debtor in property" are deemed to be property of the bankruptcy estate.[148]

This conflicting statutory language is not an issue for debtors who utilize the federal exemptions, as social security benefits are explicitly exempted in section 522(d)(10)(A).[149] The question that arises is this: If a debtor chooses or is required to follow a state exemption scheme, does social security income fall outside of the scope of the exemption for all debtors set forth in section 522(b)(3)?[150]

The Eighth Circuit held in *In re Carpenter* that "[42 U.S.C.] § 407 operates as a complete bar to the forced inclusion of past and future social security proceeds in the bankruptcy estate."[151] Accordingly, social security entitlements are not generally considered part of the estate in a bankruptcy proceeding regardless of if the debtor is filing using state exemptions or federal exemptions.[152]

Prior to BAPCPA's passage, courts had split on the question of whether, for the chapter 13 disposable income test, social security income was considered disposable income. However, circuit courts later settled the matter definitively[153]: social security payments are not considered disposable income for the chapter 13 income test.[154]

While the initial payment of social security is neither included in the bankruptcy estate nor included as disposable income for chapter 13 debtors post-BAPCPA, once a social security recipient receives the funds, the funds may lose their exempt status if they are commingled with regularly earned income in a bank account.[155] Generally, this almost never occurs; federal legislation passed

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147 Carpenter v. Ries (*In re* Carpenter), 614 F.3d 930, 932 (8th Cir. 2010) (quoting 42 U.S.C. § 407).

148 11 U.S.C. § 541(a)(1); *Carpenter*, 614 F.3d at 934.

149 11 U.S.C. § 522 (d)(10)(A).

150 *Carpenter*, 614 F.3d at 933 (quoting Carpenter v. Ries (*In re* Carpenter), 408 B.R. 244, 247 (B.A.P. 8th Cir. 2009)).

151 *Id.* at 936.

152 Twomey & Maynes, *supra* note 140, at 236.

153 *See id.* at 257–59 & nn.147–51 (citing, *e.g.*, Baude v. Carroll, 634 F.3d 327 (6th Cir. 2011); Beaulieu v. Ragos (*In re* Ragos), 700 F.3d 220 (5th Cir. 2012); Mort Ranta v. Gorman, 721 F.3d 241 (4th Cir. 2013); Cranmer v. Anderson, 463 B.R. 548 (10th Cir. 2011))

154 *Id.* at 258.

155 *See* Margot F. Saunders & Johnson M. Tyler, *Past, Present and Future Threats to Federal Safety Net Benefits in Bank Accounts*, 16 N.C. BANKING INST. 43, 74–75 (2012).

after BAPCPA has explicitly protected social security payments with commingled funds.[156]

While social security benefits are an important exemption for elderly Americans, other benefits exempted in section 522(d)(10) are also relevant.[157] A key phrase of the provision is that the exemption covers the "right to receive" certain benefits. Courts have largely interpreted this to mean that both present and future benefits are covered by this exemption.[158] Social security benefits are covered in section 522(d)(10), but so are veterans' benefits, disability benefits, unemployment benefits, alimony, and child support payments for a dependent of the debtor.[159]

5. Other Federal Exemptions

The Code also provides for an exemption of up to $14,875 in household goods, with a limit of $700 for each individually exempted item.[160] Additionally, section 522(d)(4) establishes an exemption of $1,875 in jewelry held for personal or family use, and section 522(d)(6) establishes an exemption of $2,800 for any books or tools of the trade.[161] While "tools of the trade" is not a defined term in the Code, courts have looked to a use test to see if the property is actually used in a trade or business by the debtor in determining if the property qualifies for the section 522(d)(6) exemption.[162]

D. Representative State Exemptions

While bankruptcy is a federal system generally, for exemptions, Congress has allowed states to opt out of the federal Code exemptions and create their own.[163] The Code allows individual debtors to choose either state or federal exemptions unless a state opts out of giving debtors in their state the option to choose the federal exemptions.[164] If the state has not opted out, then under section 522(b) of the Code an individual debtor can examine both the federal and state exemptions to decide which to select.[165] The menu of exemptions is

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156 *See id.* at 45.
157 *See* 11 U.S.C. § 522(d)(10).
158 *Id.*; *see* Carmichael v. Osherow (*In re* Carmichael), 100 F.3d 375, 377 (5th Cir. 1996).
159 *See* 11 U.S.C. § 522(d)(10).
160 11 U.S.C. § 522(d)(3).
161 11 U.S.C. § 522(d)(4); 11 U.S.C. § 522(d)(6).
162 *See* LaFond v. LaFond (*In re* LaFond), 791 F.2d 623, 627 (8th Cir. 1986).
163 *See* 11 U.S.C. § 522(b)(2); Bartell, *supra* note 88, at 408.
164 *See* 11 U.S.C. § 522(b)(2).
165 11 U.S.C. § 522(b)(3).

not *à la carte*, however, and the debtor cannot choose exemptions from both the Code and the state law scheme; the debtor must choose exclusively from one or the other.[166] Thirty-two states have opted out of the federal exemptions listed in the Code and require debtors who qualify for their state exemptions to use those exemptions instead.[167] Comparing state exemption schemes provides insights on what individual states see as the optimal balance between providing remedies to creditors and protecting debtors' quality of life post-proceedings. So far, only a few state legislatures have directly addressed the unique position of elderly debtors in their exemption statutes.[168] The only states to do so are Colorado, Hawaii, Maine, Massachusetts, Michigan, and Virginia, all of which have enacted state exemption schemes that directly address the additional needs of elderly debtors.[169]

This Section addresses the general constitutionality of state exemptions, as well as some other issues relevant to state exemptions generally, and then reviews specific exemptions from the states of Texas, Florida, Massachusetts, and Maine, which provide contrasting approaches to exemptions laws and varying levels of relief for elderly Americans.

1. The Constitutionality of State Exemptions and Other Threshold Issues

The constitutionality of the state-by-state opt-out scheme is still heavily debated. The United States Constitution provides that "Congress shall have Power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."[170] The argument against opt-out provisions is this: by allowing individual states to opt out of federal bankruptcy exemptions and create state-specific exemptions, Congress is violating the Bankruptcy Clause of the Constitution.[171]

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[166] 11 U.S.C. § 522(b)(2); 11 U.S.C. § 522(b)(3).

[167] WILLIAM HOUSTON BROWN ET AL., *§ 4:2. Table of States Opting out*, *in* BANKRUPTCY EXEMPTION MANUAL, *supra* note 92.

[168] COLO. REV. STAT. § 38-41-201; HAW. REV. STAT. § 651-92(a); ME. REV. STAT. tit. 14, § 4422; MASS. GEN. LAWS ch. 188, § 1; MICH. COMP. LAWS § 600.5451(m); VA. CODE ANN. § 34-4; *see* WILLIAM HOUSTON BROWN ET AL., *Appendix A. Summary Table of Common State Exemptions*, *in* BANKRUPTCY EXEMPTION MANUAL, *supra* note 92.

[169] COLO. REV. STAT. § 38-41-201; HAW. REV. STAT. § 651-92(a); ME. REV. STAT. tit. 14, § 4422; MASS. GEN. LAWS ch. 188, § 1; MICH. COMP. LAWS § 600.5451(m); VA. CODE ANN. § 34-4; *see* WILLIAM HOUSTON BROWN ET AL., *Appendix A. Summary Table of Common State Exemptions*, *in* BANKRUPTCY EXEMPTION MANUAL, *supra* note 92.

[170] U.S. CONST. art. I, § 8, cl. 4.

[171] Lawrence Ponoroff, *Constitutional Limitations on State-Enacted Bankruptcy Exemption Legislation and the Long Overdue Case for Uniformity*, 88 AM. BANKR. L.J. 353, 410 (2014).

While the Constitution gives Congress the ability to establish uniform laws governing bankruptcy, section 522(b)(2) explicitly permits states to create their own specific bankruptcy exemptions and goes so far as to permit states to opt out of the federal bankruptcy exemptions entirely.[172] Arguing for uniformity in exemptions, Professor Lawrence Ponoroff says that "Congress may delegate to the states the right to avoid certain aspects of federal law as it relates to their citizens, but Congress may not delegate, and arguably has not delegated, to the states authority to establish key features of the federal bankruptcy law."[173] Both circuit courts that have dealt with the issue have held state bankruptcy specific exemptions to be constitutional; the Supreme Court denied certiorari in both cases.[174]

An additional issue with a state-by-state scheme is that the lack of uniformity both creates potential incentives for forum-shopping, while also creating difficult timing issues for exemptions and filings.[175] One of BAPCPA's goals was to prevent alleged abuse of the bankruptcy system by wealthy debtors. One form of abuse discussed by the drafters was the wealthy debtor changing their residence from a state with minimal homestead exemptions to one with much more favorable homestead exemptions, solely to take advantage of those provisions.[176] Congress hoped to minimize bankruptcy abuse by lengthening the amount of time the debtor must have lived in the new state prior to claiming that state's exemptions.[177] Moreover, Congress also limited the debtor's ability to retain exemption eligibility in their previous state.[178] Though Congress addressed this problem, their solution also made claiming exemptions more difficult for well-intentioned debtors who may be looking to move for a variety of health, family, or job-related reasons.[179]

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172 Heather M. Forrest, *Are Bankruptcy-Specific State Exemptions Constitutional?*, AM. BANKR. INST. J., Nov. 2012, at 86; 11 U.S.C. § 522.

173 Ponoroff, *supra* note 171, at 410 (further arguing that federalizing all exemptions would allow the "constitutional showdown over bankruptcy-specific exemptions [to] be avoided").

174 Forrest, *supra* note 172, at 87 (first citing Richardson v. Schafer (*In re* Schafer), 689 F.3d 601 (6th Cir. 2012), *cert. denied*, 568 U.S. 1158 (2013); and then citing Sheehan v. Peveich, 574 F.3d 248 (4th Cir. 2009), *cert. denied*, 558 U.S. 1137 (2010)).

175 Timothy R. Tarvin, *Bankruptcy, Relocation, and the Debtor's Dilemma: Preserving Your Homestead Exemption Versus Accepting the New Job out of State*, 43 LOY. U. CHI. L.J. 141, 145–46 (2011).

176 *Id.* at 145.

177 *Id.*

178 *Id.*

179 *Id.* at 186–87.

To determine which state's exemption scheme applies, bankruptcy courts will look to the debtor's domicile.[180] Generally, a debtor's domicile is established the same way that courts determine domicile for jurisdiction purposes; domicile requires physical presence in the state and intent to remain in the state and make it home.[181] Courts look to commonsense factors to determine intent to stay in a state, including the location of the debtor's property, employment, doctors, automobile registration, voting registration, religious organizations, and other indications of domicile.[182]

Additionally, following BAPCPA's enactment, if a debtor does not live in one state for long enough, they may not meet the additional federal requirements for homestead exemptions in sections 522(o) and 522(p).[183] Importantly, these sections are applicable for both state and federal exemptions, even in opt-out states, or for individual debtors who choose to use the state exemption regime.[184] While in many states debtors may be required to, or may choose to, use state exemptions rather than federal ones, both sections 522(o) and 522(p) serve as limits on state opt-outs for homestead exemptions and are relevant even when debtors use state exemption schemes.[185]

Section 522(p) of the Code says that if a debtor acquires the homestead within the 1,215-day period leading up to the petition date, then any homestead exemptions claimed under state law are limited to $189,050.[186]

Section 522(o) of the Code allows the trustee to look back ten years and see if the homestead interest being claimed as exempt was purchased with otherwise non-exempt funds or with the intent to "hinder, delay or defraud" a creditor.[187] If either of these two requirements are met, then the homestead exemption is reduced.[188]

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[180] *See, e.g.*, Stockburger v. Stockburger (*In re* Stockburger), 106 F.3d 402 (6th Cir. 1997).

[181] *In re* Felix, 562 B.R. 700, 705 (Bankr. S.D. Ohio 2017).

[182] *See* Furr v. Lordy (*In re* Lordy), 214 B.R. 650 (Bankr. S.D. Fla. 1997).

[183] *See* 11 U.S.C. § 522(o), (p).

[184] *See id.*; WILLIAM HOUSTON BROWN ET AL., *§ 4:8 Homestead Caps: Section 522(o), (p), and (q), in* BANKRUPTCY EXEMPTION MANUAL, *supra* note 92.

[185] 11 U.S.C. § 522(o), (p); WILLIAM HOUSTON BROWN ET AL., *§ 4:8 Homestead Caps: Section 522(o), (p), and (q), in* BANKRUPTCY EXEMPTION MANUAL, *supra* note 92.

[186] 11 U.S.C. § 522(p). The inflation adjustments began in 2019 and accordingly, the amount of the claim allowed in 2023 is $189,050.

[187] 11 U.S.C. § 522(o).

[188] *Id.*

2. *Exemptions in Texas*

Texas has passed its own bankruptcy exemptions. However, unlike most states that have done so, it is *not* an opt-out state—Texas debtors can choose either the federal or the state exemptions.[189] The Texas homestead exemption is unlimited in monetary value and only limited by acreage.[190] Texas law also allows for $50,000 of personal property exemption, which includes a limit of one car per person excluded.[191]

Homestead exemptions are generally the most written-about exemption, and the appropriate size of the exemption is frequently debated.[192] This enhanced focus is likely for two primary reasons: (1) states vary tremendously in the generosity of their homestead exemptions, and (2) massive amounts of wealth are embedded in American homes as compared to other exempt assets.[193]

For the homestead exemption, some states match the federal exemption; some are more generous to debtors, and some are quite minimal with exemptions.[194] Commentators have noted that "homestead exemptions vary sharply in value, from just $5,000 in Virginia to $550,000 in Nevada and with seven states having unlimited homestead exemptions."[195]

Texas has a long and interesting history with the homestead exemption, which dates back to the 1840s.[196] Texas adopted the concept of the homestead exemption from the Republic of Mexico and from Spanish common law, which developed prior to English common law on the subject.[197] Texas has had one of the most generous homestead exemptions in the nation since the exemption's creation in the 1840s.[198] Texas has an unlimited-dollar-value homestead exemption for up to 100 acres of rural property for a single adult, up to 200 acres of rural property for a family and up to ten acres of urban property for a

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189 *See* TEX. CONST. art. XVI, §§ 50–51; TEX. PROP. CODE. ANN §§ 41.001–41.002. As is true in all states, the existence of two parallel exemption regimes does not mean that the debtor can mix-and-match between them.

190 *See* TEX. CONST. art. XVI, §§ 50–51; TEX. PROP. CODE. ANN §§ 41.001–41.002.

191 *See* TEX PROP. CODE. ANN. § 42.001.

192 *See, e.g.*, Anthony C. Coveny, *Saying Goodbye to Texas's Homestead Protection: One Step Toward Economic Efficiency with the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 44 HOUS. L. REV. 433, 438–40 (2007).

193 *See* Nathaniel Pattison & Richard M. Hynes, *Asset Exemptions and Consumer Bankruptcies: Evidence from Individual Filings*, 63 J.L. & ECON. 557, 564 (2020).

194 *See id.*

195 *Id.*

196 *See* Coveny, *supra* note 192, at 443.

197 *See id.*

198 *See id.* at 443–45.

residential and/or business homestead.[199] Though Texas law only limits its homestead exemption by acreage, Code sections 522(o) and 522(p) limit the exemption as well.[200]

The necessity of an unlimited homestead exemption has been well-researched and heavily debated.[201] Creditors have argued that the unlimited exemption provided an avenue for inefficiency in the credit market because would-be filers could move to states with unlimited homestead exemptions and then pay fewer creditor claims.[202] This would then lead either to fewer creditors willing to lend to individuals or, more likely, to individuals being charged more for access to credit as risk increases.[203] This particular creditor protection argument is unpersuasive because Congress created Code protections in sections 522(o) and 522(p) that restrict a high-net-worth debtor's ability to move in advance of filing for bankruptcy. Few low or middle income debtors filing in good faith would be hurt by these new Code provisions because (1) they are often below the federal limit of the $189,050 home equity protection set forth in section 522(p) and (2) new purchasers of real property generally do not have much equity in that property to begin with.[204]

One legitimate area of concern for creditors facing unlimited homestead exemptions is the threat of asset conversion.[205] In states like Texas with an unlimited homestead exemption, an individual with significant debts can take the assets they would lose in bankruptcy and apply them to repay a mortgage to gain more equity in a homestead that is exempt.[206] Because of the asset conversion concerns, as well as overt fraud in the form of debtors lying about property ownership or homestead valuation, an unlimited homestead exemption scheme unfairly puts creditors in a position where they are less likely to recover on claims that otherwise should be recoverable.

While an unlimited homestead exemption does achieve the goals of protecting the elderly debtor's estate, the risks of asset conversion and fraud are too great. A high monetary limit to homestead exemption restricted specifically

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199 TEX. CONST. art. 16, § 50(a).
200 TEX. CONST. art. 16, § 50(a); 11 U.S.C. § 522(o), (p).
201 *See* Coveny, *supra* note 192, at 461–62.
202 *See id.* at 463–64.
203 *See id.* at 465–67.
204 *Id.*; 11 U.S.C. § 522(p)(1).
205 *See* MacKenzie Breitenstein, Note, *The Ideal Homestead Exemption: Avoiding Asset Conversion and Fraud but Still Protecting Dependents*, 58 DRAKE L. REV. 1121, 1136 (2010).
206 *See id.*

to elderly Americans would bring most of the same benefits as an unlimited exemption while minimizing the risks of asset conversion and fraud.

3. Exemptions in Florida

Florida is an opt-out state; it does not permit its residents to use the federal exemptions.[207] Like Texas, Florida has an unlimited homestead exemption for individuals. The sole limitation on the exemption is the property's acreage.[208] For property located outside of a municipality, a debtor can exempt a homestead of 160 acres of contiguous land. However, for property located within a municipality, only one half-acre of contiguous land can be exempted.[209] Additionally, Florida has a very limited motor vehicle exemption of $1,000.[210] Just as in Texas, the unlimited monetary value for Florida's homestead exemption raises concerns for asset conversion and fraud and is not an ideal protection for elderly debtors.

In Florida, bankruptcy abuse had been discussed both prior to and after the passage of BAPCPA.[211] BAPCPA did not eliminate bankruptcy abuse by wealthy individuals; former bankruptcy professor and current United States Senator Elizabeth Warren's 2020 presidential campaign pointed out ways in which wealthy individuals could continue to use unlimited homestead exemptions to shield assets from creditors in bankruptcy.[212] Many of the changes made in BAPCPA, like the additions of sections 522(o) and 522(p), as well as ongoing discussions by politicians like Warren, aim to minimize the risk of fraud in unlimited homestead exemption states like Florida and Texas.[213] Therefore, while it is surely helpful for elderly debtors to protect their entire estate, in practice a federal unlimited exemption is not realistic as it would lead to potentially too much bankruptcy abuse by wealthy Americans.

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[207] FLA. STAT. § 222.20.

[208] FLA. CONST. art. X, § 4(a)(1).

[209] *Id.*

[210] FLA. STAT. § 222.25.

[211] *See, e.g.*, Brad Kuhn, *Florida a Bankruptcy Haven*, ORLANDO SENTINEL (Jan. 20, 1992), https://www.orlandosentinel.com/news/os-xpm-1992-01-20-9201180033-story.html; David McLaughlin, Opinion, *Fuld's Florida Folly?*, WALL ST. J. (Jan. 30, 2009, 9:43 AM), https://www.wsj.com/articles/BL-BANKB-101.

[212] *See* Elizabeth Warren, *Fixing Our Bankruptcy System to Give People a Second Chance*, WARREN DEMOCRATS, https://elizabethwarren.com/plans/bankruptcy-reform (last visited Mar. 5, 2023).

[213] *See id.*; 11 U.S.C. § 522(p)(1); 11 U.S.C. § 522(o).

Senator Warren offered plans for creating a more equitable bankruptcy system.[214] Her campaign contended that the exemption systems in the United States are currently failing debtors;[215] noting that "[s]ome states have limited exemptions that make it hard for anyone in those states to save their homes. Meanwhile, certain states exempt the full value of the filer's home from bankruptcy, regardless of how much it's worth. This is ripe for abuse."[216]

One interesting component of Florida's exemption statute is that, like the federal scheme, Florida has a wildcard exemption.[217] The debtor can exempt up to $4,000 in personal property if the debtor does not file for the homestead exemption.[218] This is similar to the federal wildcard exemption, except that the federal scheme permits a debtor a minimal wildcard exemption even if they use the full homestead exemption available to them.[219] In Florida, if the debtor uses the homestead exemption they cannot use the wildcard exemption.[220] This wildcard exemption, as well as the fact that Florida makes it and the homestead exemption mutually exclusive, represents the Florida legislature's recognition of the potentially massive monetary value of the homestead exemption for debtors, and builds in some extra protection specifically for those debtors who are not real property owners and therefore cannot benefit from the homestead exemptions. A wildcard exemption serves as an increasingly beneficial exemption given the increasing number of Americans who do not own homes.

4. *Exemptions in Massachusetts*

Massachusetts, like Texas but unlike Florida, is not an opt-out state. Therefore, debtors can choose between the federal and the state exemptions.[221] Massachusetts's homestead exemption is more generous than the federal homestead exemption.[222] Individual debtors are automatically empowered to exempt up to $125,000 in home equity when filing for bankruptcy. If the debtor takes the additional step of filing for homestead protection with the state, then up to $500,000 in equity can be protected.[223] The necessary form is a two-page

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214 *See* Warren, *supra* note 212.
215 *See id.*
216 *Id.*
217 FLA. STAT. § 222.25.
218 *Id.*
219 *Compare* 11 U.S.C. § 522(d)(5), *with* FLA. STAT. § 222.25.
220 FLA. STAT. § 222.25.
221 Pasquina v. Cunningham (*In re* Cunningham), 354 B.R. 547, 552 (D. Mass. 2006).
222 *See* 11 U.S.C. § 522; *Massachusetts Law About Homesteads*, MASS.GOV (Sept. 23, 2022), https://www.mass.gov/info-details/massachusetts-law-about-homestead.
223 *Id.*

"Declaration of Homestead" that provides background information about the home and the homeowner. It is filed with the state government for a $35 filing fee and protects a significant amount of equity from unsecured creditors.[224] Homestead protection is easy to file, as it only requires the state resident to complete the paperwork showing ownership and to pay the fee.[225]

Importantly, Massachusetts has a separate homestead provision for debtors over the age of sixty-two.[226] For an elderly debtor living alone, this exemption works just like the regular homestead exemption in Massachusetts and allows the debtor to exempt a property interest of $500,000 in a homestead if the debtor files a Declaration of Homestead. However, if the elderly homeowner owns the homestead with another person, they can *each* claim a $500,000 exemption in that property and together exempt $1,000,000—so long as they have jointly filed a Declaration of Homestead.[227] Massachusetts also allows a $15,000 automobile exemption specifically for elderly debtors,[228] as against the $7,500 motor vehicle exemption for other debtors.[229]

Massachusetts's homestead exception for elderly debtors ensures that most debtors can retain their homes and automobiles. Massachusetts has a generous exemption scheme for elderly debtors, without going so far as providing unlimited exemptions as do Texas, Florida, and other states. This exemption scheme is helpful for honest elderly debtors, enabling them to retain their most important assets upon filing bankruptcy. The expanded—but not unlimited—exemptions also minimize possible fraudulent activity by wealthy filers.[230]

Overall, Massachusetts serves as an example of a state that carves out generous exemptions for elderly debtors without creating unlimited exemptions which are open to abuse.

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[224] SEC'Y OF COMMONWEALTH OF MASS., DECLARATION OF HOMESTEAD FOR HOMES OWNED BY NATURAL PERSONS (2020), *available at* https://www.sec.state.ma.us/rod/rodhom/declaration_of_homestead_form_natural_persons.pdf.

[225] *Homestead Protection Act,* SEC'Y OF COMMONWEALTH OF MASS., https://www.sec.state.ma.us/rod/rodhom/homidx.htm (last visited Mar. 5, 2023).

[226] *See* MASS. GEN. LAWS ch. 188, §§ 1–2.

[227] *See id.*

[228] MASS. GEN. LAWS ch. 235, § 34.

[229] *Id.*

[230] *See* Warren, *supra* note 212.

5. *Exemptions in Maine*

In 2021, the Maine Legislature passed "An Act to Increase the Value of Property Exempt from Attachment and Execution."[231] The legislation generally increased the monetary value of existing exemptions. For example, the residence exemption for a debtor's aggregate interest was raised to $80,000 for individual debtors and to $160,000 if the debtor has dependents living with them in the home.[232] Additionally, the debtor's exemption limit for one motor vehicle was increased from $7,500 to $10,000.[233] But this legislation also put Maine much closer in line with Massachusetts in the generosity of its exemption scheme, particularly with respect to its creation of additional exemptions for the real and personal property of debtors over sixty.[234]

A unique feature of Maine's exemption scheme is the additional statutory increase in real property exemptions for debtors sixty years of age or older.[235] If the debtor is over the age of sixty and holds the property alone, they can exempt $160,000 of their aggregate interest—as against $80,000 for younger sole owners.[236] If the debtor holds the property jointly with another person, they can exempt the lesser of $160,000 and their fractional share of ownership in the property times $240,000.[237]

The Maine legislation includes another unique provision for debtors over sixty.[238] Section 4422(1)(B) of the statute states that a surviving spouse can exempt the maximum amount for joint owners of the property if either (1) the deceased spouse is over 67 and the surviving spouse is at least 60 or (2) the surviving spouse is over 67.[239] This narrow provision allows a surviving spouse who meets the age criteria to not lose any fractional share ownership upon spouse's death,[240] which could be the difference between a widow or widower losing their house upon filing bankruptcy or keeping it.

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231 ME. STAT. tit. 14, § 4422.
232 ME. STAT. tit. 14, § 4422(1)(A).
233 ME. STAT. tit. 14, § 4422(2) (amending ME. STAT. tit. 14, § 4422(2) (2017)).
234 ME. STAT. tit. 14, § 4422(1)(B).
235 ME. STAT. tit. 14, § 4422(1)(B).
236 *Id.*
237 *Id.* The equivalent provision for younger debtors permits them to exempt the lesser of $80,000 and their fractional share of ownership in the property times $160,000.
238 *Id.*
239 *Id.*
240 *Id.*

As this exemption provision was drafted, the Maine legislature listened to the concerns of both debtors' interest groups and creditors' rights groups. The initial bill was proposed by Representative Denise Tepler and included no special exemptions for Maine's debtors over sixty.[241] The final version, however, included additional exemptions for debtors over sixty, along with exemptions for elderly surviving spouses.[242]

Representative Tepler testified as to why she initially proposed the legislation;[243] her testimony made no specific mention of the unique needs of elderly debtors and focused more generally on updating the out-of-date exemption thresholds for each type of property.[244] Representative Tepler wrote, "[i]f we retain a statute with out-of-date monetary values, we condemn many of our fellow citizens to spiral into poverty when they get into debt trouble, losing their home and their car, creating a hole that is deep and impossible to climb out of."[245]

Other testimony submitted by Maine residents, however, focused on the unique needs of elderly debtors.[246] Leo J. Delicata, speaking on behalf of Legal Services for the Elderly, Inc., testified in favor of the passage of the elderly-specific adjustments.[247] Delicata, whose organization provides free legal services to elderly Maine residents in need, submitted a written statement that profiled his organization's typical clients:

> In our practice, the fact that an exemption is part of a conversation with a client is not an academic exercise, it means that they are already in financial trouble and they need help. Most of our clients have worked all of their lives and have marginal savings. They were employed before private retirement plans were common and but for their Social Security benefit more than half would have no income at all. The

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241 *See* H.R. 542-737, 130th. Leg., 1st Reg. Sess. (Me. 2021), http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=HP0542&item=1&snum=130.

242 ME. STAT. tit. 14, § 4422(1)(B).

243 *See An Act To Increase the Value of Property Exempt from Attachment and Execution*, *Hearing on LD 737 Before the J. Standing Comm. on the Judiciary*, 130th Me. Leg., 1st Reg. Sess. (2021), *available at* https://legislature.maine.gov/legis/bills/display_ps.asp?snum=130&paper=HP0542PID=1456# [hereinafter *Hearing*] (testimony of Rep. Denise Tepler, House Chair, J. Standing Comm. on Health Coverage Ins. & Fin. Servs.).

244 *See id.*

245 *Id.*

246 *See Hearing*, *supra* note 243 (testimony of Leo J. Delicata, Attorney, Legal Services for the Elderly, Inc.).

247 *Id.*

> poverty rates of older adults vary between counties with the lowest at about 9% and the highest of over 17%.[248]

Striking a balance between debtors being able to continue living their lives and creditors receiving the payments they were promised is critical to a functioning bankruptcy system. Because increasing exemption amounts necessarily means that creditors receive less payment, it is not surprising that some creditor advocates opposed Maine's increased exemptions.[249] Ed Pineau, on behalf of the Maine Credit Union League, argued that with increased exemptions, the cost of doing business for everyone increases.[250]

The creditor-side argument is that increasing exemptions would lead to higher default rates on loans, which would then require higher interest rates on loans and end up hurting consumers.[251] But this argument is not as persuasive in the world of elderly bankruptcy filings. For example, outstanding medical debt owed by elderly Americans as a result of unplanned medical expenses is largely unavoidable; creditors therefore cannot charge more for medical fees just because the patient is less likely to pay back the medical expenses.[252] Additionally, credit card debt accounts for a substantial portion of elderly individuals' debt.[253] In a 2007 speech about the credit card industry, Senator Warren said, "the customers who generate the real profits for the credit card companies are those who stumble and slide, who make payments and miss payments, and who end up paying default rates of interest and penalty fees."[254] The argument that increasing exemptions for the elderly would decrease their ability to get credit cards does not seem plausible—the elderly are often a very profitable client base for credit card companies because of their tendency to miss payments, their lack of income streams beyond borrowing on credit, and their increasing vulnerability to unexpected medical expenses.[255]

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[248] *Id.*

[249] *Hearing*, *supra* note 243 (testimony of Ed Pineau, Lobbyist, Maine Credit Union League).

[250] *Id.*

[251] *Id.*

[252] FED. RSRV. BANK OF N.Y., *supra* note 2, at 21; *No Money or Insurance? Not Vaccinated? Can Hospitals Turn Patients Away?*, AM. PATIENT RIGHTS ASS'N, https://www.americanpatient.org/can-hospitals-turn-patients-away/ (last visited Feb. 19, 2023).

[253] FED. RSRV. BANK OF N.Y., *supra* note 2, at 21.

[254] *Examining the Billing, Marketing, and Disclosure Practices of the Credit Card Industry, and Their Impact on Consumers: Hearing Before the S. Comm. on Banking, Hous. and Urb. Aff*, 110th Cong. 3 (2007) (testimony of Elizabeth Warren, Professor of Law, Harvard Law School), https://www.banking.senate.gov/imo/media/doc/warren.pdf.

[255] Hanna, *supra* note 82, at, 787.

Another argument frequently used to oppose expansion of exemptions is that such expansion invariably gives more leeway to bad actors.[256] Bill Kany, on behalf of the Maine Bankers Association, argued that "dramatically increasing the homestead exemption protects people who have lost lawsuits and owe another party money, as determined by the courts" and that this increase in exemptions could harm tort victims and child support recipients.[257] The public policy in determining an appropriate exemption amount is a balancing act; however, the ramifications for undersized exemptions can be, for example, eviction and sale of a house to pay the debt. Then, the debtor has extremely minimal funds to purchase or rent a new home. This result is antithetical to the bankruptcy system's purpose of providing debtors with a true fresh start.

II. How the Federal Government can Create Sufficient Protection for Elderly Debtors

The best way to resolve the unfair and unequal treatment of elderly debtors across the country is through a revised federal exemption statute that provides greater homestead and motor vehicle exemptions for elderly Americans—one that is comprehensive enough to eliminate the need for opt-in and opt-out schemes. States like Massachusetts and Maine have provided a template for increased homestead exemptions specifically for older debtors. The federal government should model their bankruptcy exemption statutes in section 522 to resemble those of Massachusetts and Maine by acknowledging the specific needs of elderly Americans filing for bankruptcy and providing them with significantly increased homestead exemption and motor vehicle exemption thresholds—while steering clear of virtually unlimited monetary exemptions, like the homestead exemptions currently in force in Texas and Florida.

The current state-by-state exemption model is rife with inconsistencies for elderly debtors, including disparities based on geographic location or minor differences in financial situations. To fix this, a comprehensive set of federal exemptions that properly acknowledges the unique needs of elderly Americans is necessary. This Section: first compares the merits of proposing a model act for states to follow as compared to imposing one federal set of exemptions, and then assesses the constitutionality of treating elderly debtors differently than other debtors.

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[256] *Hearing*, *supra* note 243 (testimony of Bill Kany, Chair, Legislative Committee for the Maine Bankers Association).

[257] *Id.*

A. Model Act vs. Federal Legislation

Since the 1890s, the Uniform Law Commission (the "Commission") has proposed example legislation in areas of the law where it believes uniformity would be beneficial to state legislatures.[258] The Commission's decisions are not binding unless a state legislature passes a bill reflecting the proposed legislation.[259] An example of a widely implemented model act proposed by the Commission is the Uniform Commercial Code, which most states have adopted in full or in part.[260] While model laws like the Uniform Commercial Code can have widespread impact, a more effective approach for bankruptcy would be to expand section 522 of the Code. This approach eliminates states' discretion to opt in or opt out of the federal exemption scheme and thereby encourages uniform treatment of elderly debtors in bankruptcy.

An additional benefit of a purely federal bankruptcy exemption system is that federal exemptions provide debtors with the best opportunity for consistent relief without the complications and timing issues that result from moving throughout the states. For instance, two complicated Code sections, sections 522(o) and 522(p), could be removed wholesale from federal exemption legislation if a federal exemption law were the only option. Thus, the same exemption rules would apply to elderly debtors across the nation.

While uniform model law suggestions allow state flexibility, federal legislation could potentially provide quicker and more substantive relief for elderly debtors. Moreover, there is no guarantee that a model act or uniform law will be implemented by states.[261] Many proposed model acts have never been adopted or have only been adopted in part.[262]

B. Equal Protection Concerns with Unequal Treatment of Elderly Debtors

One concern with creating a federal exemption scheme where older debtors receive different exemptions than other debtors is the potential to violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution.[263]

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[258] Barbara A. Atwood, *The Uniform Law Commission: Its Continuing Relevance to Arizona*, ARIZ. ATT'Y, Apr. 2009, at 30.

[259] *Id.*

[260] *Id.*

[261] *What Is a Model Act?*, NAT'L CONF. OF COMM'RS. ON UNIF. STATE L., https://www.uniformlaws.org/acts/overview/modelacts (last visited Aug. 11, 2022).

[262] *Id.*

[263] *See* Bolling v. Sharpe, 347 U.S. 497, 498 (1954); *see also* Brown v. Bd. of Educ., 347 U.S. 483 (1954). Both Bolling and Brown were decided on the same day. In Brown, the Court held that the Fourteenth Amendment

While there is no amendment directly addressing equal protection for the federal government, it has been read into the Fifth Amendment through the Due Process Clause.[264]

The Equal Protection Clause, as applied to both state and federal legislation, forbids a governmental body from "deny[ing] to any person within its jurisdiction the equal protection of the laws."[265] The Supreme Court has interpreted the Fourteenth Amendment to require laws that discriminate to have sufficiently good reasons for doing so.[266] The level of review varies based on the group being discriminated against. For example, laws that discriminate based on race are subject to strict scrutiny, which requires these laws to be narrowly tailored to a compelling government interest.[267] Alternatively, laws that discriminate based on sex receive intermediate scrutiny, which requires an "exceedingly persuasive" justification.[268] Disparate treatment on the basis of age has not been traditionally given suspect treatment.[269] In an article discussing the doctrine of equal protection, Professor Michael C. Dorf observed:

> Race is suspect; sex is viewed as pretty much, but not exactly like race; therefore, sex is quasi-suspect. Age, however, is too far from race or sex, and everyone gets old anyway, so the Justices (who are not young but are themselves rarely the victims of age discrimination) conclude that age is not suspect. None of the criteria has anything remotely like an on/off character, and thus the whole process is highly subjective.[270]

The validity of laws specifically benefiting elderly people (and therefore ostensibly discriminating against the young) would not be subject to strict scrutiny and would instead likely be reviewed under the rational basis test.[271] The rational basis test only requires a legitimate state interest, giving deference to the legislatures.[272] Courts are hesitant to find a government's stated interest as not legitimate. Therefore, it is likely that a constitutional challenge against a pro-elderly federal exemption scheme would fail, because of the legitimate

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did not allow segregated schooling. Bolling took that ruling and said that the same principles apply to federal statutes, creating the doctrine that has come to be known as "reverse incorporation."

264 Peter J. Rubin, *Taking Its Proper Place in the Constitutional Canon:* Bolling v. Sharpe, Korematsu, *and the Equal Protection Component of Fifth Amendment Due Process*, 92 VA. L. REV. 1879, 1888 (2006).

265 U.S. CONST. amend. XIV, § 1.

266 *See* Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 967 (2002).

267 City of Cleburne. v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

268 *See* Craig v. Boren, 429 U.S. 190 (1976).

269 Dorf, *supra* note 266, at 966–67.

270 *Id.* at 967.

271 *Id.* at 1016.

272 *See id.*

government interest of protecting elderly Americans' well-being and minimizing reliance on public support after bankruptcy.[273]

In *Kimmel v. Florida Board of Regents*, for instance, the Court reasoned that under the Fourteenth Amendment, "a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests. The Constitution does not preclude reliance on such generalizations. That age proves to be an inaccurate proxy in any individual case is irrelevant." [274]

The government can propose legitimate purposes for expanding exemptions for elderly debtors, such as: minimizing dependency on public financial assistance, maintaining quality of life for vulnerable members of the public, and providing meaningful relief from oppressive indebtedness. The constitutionality of increased exemptions for elderly debtors on both the state and federal level is bolstered by the existence of legislation like Medicare and drinking ages, which treat Americans differently based on age.[275]

CONCLUSION

Current state and federal exemption schemes do not sufficiently recognize the unique position of elderly debtors in bankruptcy proceedings and fail to adequately protect these debtors' property. Exemption schemes both federally and in most states do not adequately protect elderly debtors' property. Without consistent state statutes, elderly debtors in states with minimal exemptions can face forced foreclosures and will have nowhere to turn to without future income streams to rely on. States like Massachusetts and Maine have recognized the unique bankruptcy-related needs of elderly Americans and that any assets not kept in a bankruptcy proceeding by an elderly filer may be lost permanently.

By analyzing state exemptions, which vary both in magnitude and type, this Comment demonstrates that a uniform federal exemption law, stripped of the opt-out provision, could provide better and more predictable relief to elderly debtors in bankruptcy. Texas, Florida, Massachusetts, and Maine, exemplify the best and the worst of state exemptions for elderly debtors. Texas and Florida have extremely generous exemption schemes for all debtors, which may infringe

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[273] *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83–84 (2000).

[274] *Id.* at 84.

[275] Nina A. Kohn, *Rethinking the Constitutionality of Age Discrimination: A Challenge to a Decades-Old Consensus*, 44 U.C. DAVIS L. REV. 213, 215 (2010).

upon creditors' ability to protect themselves. Massachusetts and Maine, however, have innovative approaches to handling unique exemptions for elderly Americans. The federal government should model its exemption statute after states like Massachusetts and Maine and increase threshold limits for the homestead and motor vehicle exemptions for elderly Americans.

Living in the midst of a shrinking social safety net and ever-increasing living costs, elderly Americans face unprecedented financial hardship. While the bankruptcy system cannot unilaterally fix the root causes of financial distress, the Code can be amended to make consumer bankruptcy an even more powerful tool of relief for elderly Americans who hope to maintain their quality of life after filing for bankruptcy.

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