A Second Look at the Proposed Uniform Bankruptcy Exemptions: Tennessee as an Example

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The National Bankruptcy Review Commission (Commission), which was created by Congress,[1] reported its recommendations for changes to the Bankruptcy Code[2] to Congress in a written report issued on October 20, 1997.[3] Of the 170 recommendations, the Commission proposed that the exemptions allowable to debtors in bankruptcy be changed in several significant respects. Most importantly, the Commission advocates the wholesale elimination of the use of state law personal property and income exemptions in bankruptcy and the restriction of state homestead exemptions within a federally imposed floor and ceiling. This Essay discusses the Commission's exemption recommendations, illustrates the effect of those recommendations, should they be adopted by Congress, and compares the recommendations to the current use of Tennessee's exemptions in bankruptcy by debtors who are domiciled in Tennessee when

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1. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 602, 108 Stat. 4106, 4147.

2. 11 U.S.C. §§ 101-1330 (1994).

3. *See* NATIONAL BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS (1997) [hereinafter BANKRUPTCY: THE NEXT TWENTY YEARS]. The full report is available in print from the United States Government Printing Office or on the Internet at <http://162.140.225.1/reporttitlepg.html>.

they file for bankruptcy relief.[4]

We have each published articles that advocate a recommendation by the Commission for the abolishment of the current portion of the Bankruptcy Code that permits a state legislature to "opt-out" of the bankruptcy exemptions.[5] This provision requires debtors who are subject to such a state's laws to use that state's exemptions in bankruptcy in lieu of the option to elect the current federal bankruptcy exemptions contained in § 522(d) of the Bankruptcy Code. Moreover, in our prior articles and in testimony before the Commission, we advocated that the exemptions allowable in bankruptcy should be more uniform, in fact as well as in theory, in order to better serve the bankruptcy exemption and "fresh start" policies.[6] These policies involve "issues of debtor relief and rehabilitation that transcend whatever social, historical, or cultural factors account for exemption schema in the several states."[7] In the sensitive balance that the consumer bankruptcy system seeks to strike between debtor protection and creditor rights, this proposal is "neutral." That is to say, on the one hand, it is intended to and would prime the fresh start for debtors residing in states whose exemptions, promulgated with a view toward judgment execution rather than bankruptcy policy, are unreasonably meager.

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4. If the debtor elects or is required to use her state law exemptions, the Bankruptcy Code requires the use of those exemptions in effect "on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place." 11 U.S.C. § 522(b)(2)(A) (1994). If the debtor is domiciled in one state but files bankruptcy in another, the exemption law of the domicile state still applies. *See* Farinash v. Stockburger (*In re* Stockburger), 106 F.3d 402 (unpublished table opinion), No. 96-5409, 1997 WL 41202, at *2 (6th Cir. Jan. 31, 1997).

5. *See* William Houston Brown, *Political and Ethical Considerations of Exemption Limitations: The "Opt-Out" As Child of the First and Parent of the Second*, 71 AM. BANKR. L.J. 149 (1997); Lawrence Ponoroff, *Exemption Limitations: A Tale of Two Solutions*, 71 AM. BANKR. L.J. 221 (1997).

6. *See* Wetmore v. Markoe, 196 U.S. 68, 77 (1904) ("Systems of bankruptcy are designed to relieve the honest debtor from the weight of indebtedness which has become oppressive and to permit him to have a fresh start in business or commercial life . . . .").

7. Ponoroff, *supra* note 5, at 246-47.

On the other hand, it would also ensure that debtors who reside in (or relocate to) states whose exemptions are unusually generous, sometimes infinite, would no longer be able to exploit those exemptions to deprive their creditors of a fair return on their claim while obtaining a complete discharge from debts in bankruptcy.[8] The limitations of this Essay do not permit a restatement of the issues or positions taken in our earlier articles. Nor does this Essay attempt to review the numerous positions that have been staked out in the periodic literature either supporting or disagreeing with the position herein espoused.[9]

I. THE CURRENT BANKRUPTCY EXEMPTION SCHEME

The Bankruptcy Code currently permits a debtor to choose between the federal bankruptcy exemptions described in § 522(d) of the Code and the federal nonbankruptcy exemptions[10] coupled with the debtor's domiciliary state law exemptions.[11] That choice, however, is restricted by the portion of the Code popularly known as the opt-out,[12] under which Congress—in what was essentially a political compromise necessary to achieve passage of the Bankruptcy Reform Act of 1978—permitted state legislatures to restrict bankruptcy debtors to the use of state law, rather than federal bankruptcy, exemptions.[13] In the event a bankruptcy debtor is permitted by the domiciliary state to choose the federal bankruptcy exemptions, a specific list of allowable exemptions with monetary limita-

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8. *See, e.g.*, David J. Morrow, *Key to Cozier Bankruptcy: Location, Location, Location*, N.Y. TIMES, Jan. 7, 1998, at A1.

9. *See* Brown, *supra* note 5 (citing articles that discuss the opt-out, pre-bankruptcy planning and asset conversion, uniform bankruptcy exemptions, and the effect of exemptions on the fresh start policy of bankruptcy); Ponoroff, *supra* note 5 (same).

10. Federal nonbankruptcy exemptions include such items as social security, civil service and other retirement benefits, and service benefits. *See generally* BROWN ET AL., BANKRUPTCY EXEMPTION MANUAL § 5.21-.41 (1997).

11. *See* 11 U.S.C. § 522(b)(2)(A)-(B) (1994).

12. *See* 11 U.S.C. § 522(b)(1) (1994).

13. *See* 2 WILLIAM L. NORTON, JR., NORTON BANKRUPTCY LAW AND PRACTICE 2D § 46:3 (1997); *see also* Brown, *supra* note 5, at 159-60 (discussing legislative compromise that led to the opt-out).

tions is found in the Bankruptcy Code.[14] If, on the other hand, the state legislature in a debtor's domicile has opted out of the bankruptcy exemptions, that debtor must look principally to the specific exemptions found in that state's constitution or statutes, as well as to the federal nonbankruptcy exemptions.

The variation among states' elections under their opt-out authority necessarily leads to the reality that bankruptcy debtors in an opt-out state, such as Tennessee,[15] will not have the same choices of exemptions that are available to debtors in a state that did not opt-out of the bankruptcy exemptions.[16] Moreover, even among opt-out jurisdictions, there is enormous variation in the states' respective exemption schema.[17] This lack of literal uniformity in application of exemption laws has caused some to question whether the opt-out provision passes muster under the Constitution's lodging of exclusive authority in Congress "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."[18] Despite such concerns, under authority of the Supreme Court's interpretation of the use of state law exemptions under the Bankruptcy Act of 1898,[19] other courts, including the Court of Appeals for the Sixth Circuit, have construed the opt-out as constitutional.[20]

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14. *See* 11 U.S.C. § 522(d) (1994).

15. *See* TENN. CODE ANN. § 26-2-112 (1980).

16. *See* Brown, *supra* note 5, at 218-19 (charting states that have exercised their opt-out).

17. *See* BROWN ET AL., *supra* note 10, app. D (comprehensive table of state exemptions).

18. U.S. CONST. art. I, § 8, cl. 4. *See, e.g.*, Judith Schenck Koffler, *The Bankruptcy Clause and Exemption Laws: A Reexamination of the Doctrine of Geographic Uniformity*, 58 N.Y.U. L. REV. 22 (1983) (discussing the constitutional issues presented by a lack of uniformity in bankruptcy exemptions).

19. *See* Hanover Nat'l Bank v. Moyses, 186 U.S. 181 (1902).

20. *See, e.g.*, Storer v. French (*In re* Storer), 58 F.3d 1125 (6th Cir. 1995); Rhodes v. Stewart, 705 F.2d 159 (6th Cir. 1983); *In re* Sullivan, 680 F.2d 1131 (7th Cir. 1982).

II. RECOMMENDATIONS FOR UNIFORM BANKRUPTCY EXEMPTIONS

The recent recommendations from the Commission are not the first efforts to urge Congress to abolish the opt-out and to adopt uniform bankruptcy exemptions. The 1970 Commission on the bankruptcy laws of the United States also made such a proposal,[21] but, as noted, political considerations intervened to prevent adoption. The report from the most recent Commission made the following specific recommendations for exemption-law changes:

> 1.2.1 *Elimination of Opt Out*
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> A consumer debtor who has filed a petition for relief under the Bankruptcy Code should be allowed to exempt property as provided in section 522 of the Code. Subsection (b)(1) and (2) of section 522 should be repealed.
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> 1.2.2 *Homestead Property*
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> The debtor should be able to exempt the debtor's aggregate interest as a fee owner, a joint tenant, or a tenant by the entirety, in real property or personal property that the debtor or a dependent of the debtor uses as a residence in the amount determined by the laws of the state in which the debtor resides, but not less than $20,000 and not more than $100,000. Subsection (m) of section 522 should be revised to reflect that all exemptions except for the homestead exemption shall apply separately to each debtor in a joint case.

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21. *See* COMMISSION ON THE BANKR. LAWS OF THE UNITED STATES, REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, pt. 1, at 170 (1973). Congress established that Commission by Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468.

1.2.3 *Nonhomestead Lump Sum Exemption*

> With respect to property of the estate not otherwise exempt by other provisions, a debtor should be permitted to retain up to $20,000 in value in any form. A debtor who claims no homestead exemption should be permitted to exempt an additional $15,000 of property in any form.

1.2.4 All professionally-prescribed medical devices and health aids necessary for the health and maintenance of the debtor or a dependent of the debtor should be exempt.

1.2.5 *Rights to Receive Benefits and Payments*

> All funds held directly or indirectly in a trust that is exempt from federal income tax pursuant to sections 408 or 501(a) of the Internal Revenue Code should be exempt.

1.2.6 *Rights to Payments*

> Rights to receive future payments (*e.g.*, social security benefits, life insurance) should be exempt, and the debtor's right to receive an award under a crime victim's reparations law or payment for a personal bodily injury claim of the debtor or the debtor's dependent should be exempt.[22]

The Commission's recommendation for abolishment of the opt-out is, in part, a recognition that "current [bankruptcy] exemption policy is channeled away from bankruptcy policymakers toward a variety of state legislatures."[23] Allowing state legislatures to opt-out and then define the extent of exemptions available to domiciliaries of that state necessarily leads to variation as "the norm."[24] Some are not offended by the lack of

22. BANKRUPTCY: THE NEXT TWENTY YEARS, *supra* note 3, at 2-3.
23. *Id.* at 121.
24. *Id.*

national uniformity and would argue that a continued use of state law exemptions in bankruptcy preserves states' opportunities to decide their citizens' exemptions and to maintain some exemptions based upon local or regional differences in need or economy.[25] We, along with others, have suggested that continued reliance upon state law exemptions in bankruptcy ignores the reality that bankruptcy exemptions serve different purposes from those served by state law exemptions, which generally are designed to protect a debtor against a single creditor's collection efforts.[26]

While the argument in favor of continued state control over bankruptcy exemptions is, at heart, a "political or ideological" states' rights issue,[27] some would argue that uniform bankruptcy exemptions would ignore variations in costs of living between the various states or regions.[28] As the Commission's final report found, however, current state law exemptions themselves do not accurately "reflect[] regional variations in cost of living or property use."[29] A comparison of Tennessee's maximum individual homestead of $5000,[30] for example, with the homesteads allowed in the adjacent states supports the Commission's finding and suggests that there is no economic justification for adjoining states with similar economies to have such wide variation in homestead exemptions:

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25. *See, e.g.*, Frank R. Kennedy, *Limitations of Exemptions in Bankruptcy*, 45 IOWA L. REV. 445, 485 (1960) (concluding that there is no compelling need to "impress a federal mold on the exemptions recognizable in bankruptcy"). *But see* Ponoroff, *supra* note 5, at 241-43 (discussing the changes in conditions since Professor Kennedy's article, which argued against continued deference to state exemptions laws in bankruptcy).

26. *See* Brown, *supra* note 5, at 181; *see also, e.g.*, William T. Vukowich, *Debtors' Exemption Rights Under the Bankruptcy Reform Act*, 58 N.C. L. REV. 769, 802-03 (1980) (describing the differences in state and bankruptcy exemption functions).

27. Ponoroff, *supra* note 5, at 240 n.91 (citing THE FEDERALIST, NOS. 45, 46 at 324-36 (James Madison) (Benjamin Fletcher Wright ed., 1961), for evidence that the debate between the extent of federal control and states' rights is as old as the nation).

28. *See* BANKRUPTCY: THE NEXT TWENTY YEARS, *supra* note 3, at 122.

29. *Id.* ("A comparison of state homestead exemptions and the relative cost of living reveals that state homestead exemptions do not reflect a relative cost of living assessment.").

30. *See* TENN. CODE ANN. § 26-2-301(a) (1980 & Supp. 1997).

Mississippi's homestead is $75,000;[31] Arkansas's rural homestead is unlimited in dollar terms while limited to eighty acres;[32] Alabama's, Georgia's, and Kentucky's homesteads are $5000.[33] One may conclude that Mississippi's legislature has been more responsive to debtor's needs and to current economic conditions than have other legislatures in the region or that it has been overly generous to debtors. In either event, how can one conclude that it is rational for a resident of Southaven, Mississippi, to have a $75,000 homestead exemption while a resident of Memphis, Tennessee, has a $5000 exemption?

We do not quarrel with the proposition that Mississippians are entitled to a $75,000 homestead when they rely upon state law in a state court proceeding. It is appropriate for that state's legislature to set an amount the legislature deems adequate in state court collection actions. If, however, a Mississippi resident files for bankruptcy relief, why should that debtor receive a significantly different exemption than would a debtor a mile away but just across the state line, who files her bankruptcy in Tennessee? Moreover, while we lack hard empirical evidence, we wonder, as the trend toward national consolidation in the financial services industry continues, whether Tennessee debtors are paying a higher cost of credit in order to subsidize the greater advantages that their Mississippi neighbors enjoy in bankruptcy. In any event, as we argued in our earlier articles, bankruptcy policies of "fresh start" and discharge are inextricably tied to exemptions.[34] Therefore, we believe it is more appropriate for the same federal government that determines the extent of a bankruptcy discharge or fresh start to determine the extent to which exempt property is available as part of the overall scheme of federal debt relief provided by the Bankrupt-

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31. *See* MISS. CODE ANN. § 85-3-21 (1972).

32. *See* ARK. CONST. art. IX, § 4.

33. *See* ALA. CODE § 6-10-2 (1975); GA. CODE ANN. § 44-13-1 (1983); KY. REV. STAT. ANN. § 427.060 (Michie 1992).

34. *See* Brown, *supra* note 5, at 169; Ponoroff, *supra* note 5, at 224; *see also, e.g.*, Vukowich, *supra* note 26, at 801 ("This fresh start objective is basic to the bankruptcy law of the United States and is dependent upon two key federal policies: the discharge policy and the exemption policy.").

cy Code.

The variations from state to state in exemptions available in bankruptcy, especially in states such as Florida and Texas that enjoy unlimited homestead,[35] encourage "opportunities for forum shopping and prebankruptcy asset conversion."[36] Debtors who flee to such a jurisdiction to file bankruptcy bring criticism upon the bankruptcy system for what is in reality a state law problem. The Commission's conclusion is correct:

> The bankruptcy system was designed to deal with the consequences of financial failure and to reorganize the honest but unfortunate debtor, a fundamental tenet that should be reflected in a national bankruptcy policy. Until the bankruptcy system sets its own carefully balanced exemption policy, the integrity of the system remains at risk, with serious repercussions for all debtors and creditors.[37]

It is not simply the fact that exemptions available in bankruptcy vary from state to state that causes concern or confusion. There is also uncertainty about whether a bankruptcy judge may look solely to state authority for the law governing allowance of exemptions, may rely solely upon federal bankruptcy procedure, or should look both to state and federal law. "Generally, in an opt-out state the bankruptcy court is applying state-created exemptions with allowance in bankruptcy of such exemptions determined by federal law."[38] There are, however, questions concerning disallowance of state law exemptions in a bankruptcy case that are not clearly answerable by reliance solely upon bankruptcy law. For example, if a state's law provides no automatic disallowance of an exemption based upon the debtor's fraud, may the bankruptcy court nevertheless disallow that state law exemption based upon some equitable concept?

This issue has provoked unhealthy controversy and dis-

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35. *See* FLA. CONST. art. X, § 4; TEX. CONST. art. XVI, §§ 50, 51.
36. BANKRUPTCY: THE NEXT TWENTY YEARS, *supra* note 3, at 123.
37. *Id.* at 124.
38. Brown, *supra* note 5, at 199.

agreement in case law, even among decisions emanating from the same district.[39] Recently, two bankruptcy judges in the Eastern District of Tennessee had occasion to discuss the issue. In *In re Sumerell*,[40] the court found no controlling Tennessee authority for the disallowance of an exemption based upon bad faith or fraud that was not related to the acquisition of the property. In *In re Clemmer*,[41] the court concluded that Tennessee's statutory authority did not address disallowance of an exemption on the basis that the debtor attempted to conceal exemptible annuity contracts from his creditors. In both cases, which involved state law exemptions, there was no bankruptcy statute or rule for disallowing the exemptions; thus, the debtors retained certain exempt property notwithstanding evidence of fraud or bad faith. Right or wrong, such results are undesirable, but they are encouraged, if not made inevitable, by the conflict between state law and bankruptcy law, the absence of clear authority for bankruptcy judges to look beyond state law for disallowance of state law exemptions, or both.[42] This problem is merely one illustration of the many difficulties posed by the opt-out and the resulting reliance upon various state exemptions in bankruptcy.

Exemption policy decisions are intrinsically difficult and politically sensitive. As evidence of the debate developing in Congress over the wisdom of the Commission's exemption recommendations, one bill pending before Congress would create yet another bankruptcy commission, whose role would

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39. *Compare In re* Schwarb, 150 B.R. 470, 473 (Bankr. M.D. Fla. 1992) (holding that § 522(b) allows the court to disallow the debtor's right to claim property as exempt where it is shown that the conversion of a nonexempt asset into an exempt asset was done with the intent of placing the asset out of the reach of creditors), *with In re* Barker, 168 B.R. 773, 776 (Bankr. M.D. Fla. 1994) (concluding that there is nothing within § 522 that allows the bankruptcy court to deny an exemption claim on the basis that the property was converted from a nonexempt asset to an exempt asset with intent to hinder, delay, or defraud creditors).

40. 194 B.R. 818 (Bankr. E.D. Tenn. 1996).

41. 184 B.R. 935 (Bankr. E.D. Tenn. 1995).

42. See Ponoroff, *supra* note 5, at 229-36 for discussion of *In re Coplan*, 156 B.R. 88 (Bankr. M.D. Fla. 1993), and *In re Bandkau*, 187 B.R. 373 (Bankr. M.D. Fla. 1995), where the bankruptcy court's equitable remedies created difficult precedent.

be to study and report to Congress on bankruptcy exemption issues, including uniformity.[43] It is likely, however, that the most substantial issue under the current Commission's proposal will not be the concept of uniform bankruptcy exemptions per se, but rather whether the Commission's specific exemption recommendations are "simply too generous to debtors," the same opposition raised to the 1970 Commission's uniformity recommendations.[44] A minority of the latest Commission's members dissented to the exemption and other consumer bankruptcy recommendations, on the ground, among others, that the dollar amounts of the proposed changes were too liberal.[45] Whether the exemptions are in fact too generous or whether they are a better reflection of today's economic needs for debtors is a debate that this Essay will not resolve.[46] Instead, the balance of this Essay will focus on a comparison of Tennessee's present exemptions with those proposed by the Commission in the hope that it will be of value to those trying to make a practical, objective evaluation of the wisdom and desirability of the Commission's exemption proposals.

III. TENNESSEE'S EXEMPTIONS COMPARED TO COMMISSION'S RECOMMENDATIONS

Assuming that Congress adopted the part of the Commission's exemption recommendations for abolishment of the opt-out and establishment of a required list of federal bankruptcy exemptions, there would be a significant change for

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43. *See* Responsible Borrower Protection Bankruptcy Act, H.R. 2500, 105th Cong. § 113 (1997).

44. Ponoroff, *supra* note 5, at 223.

45. *See* Edith H. Jones & James I. Shepard, *Recommendations for Reform of Consumer Bankruptcy Law by Four Dissenting Commissioners* at 26, *in* BANKRUPTCY: THE NEXT TWENTY YEARS, *supra* note 3, at ch. 5.

46. The authors had proposed to the Commission a $40,000 homestead exemption; a $15,000 tangible personal property exemption; an additional exemption of one-half of an unused homestead; unlimited exemptions in health aids; and a continuation of the current income-based exemptions, with some modifications. *See* Letter from William Houston Brown & Lawrence Ponoroff, Commission Members, to Professor Elizabeth Warren, Commission Reporter (Jan. 3, 1997) [hereinafter Letter of January 3, 1997] (on file with Commission and authors).

debtors who are domiciled in and file for bankruptcy relief in Tennessee. The most obvious change would be that such debtors would no longer be required or allowed to use Tennessee's exemptions in bankruptcy. Non-bankruptcy debtors, however, would continue to use the state's exemptions in non-bankruptcy court proceedings.[47] The mere fact that a debtor would have different exemptions available in different judicial forums is not particularly significant, nor does it appear to present any constitutional issue.

Under Article I of the United States Constitution, Congress clearly has authority to establish uniform laws on bankruptcy,[48] and under the Supremacy Clause of Article VI, in the case of direct, obvious conflicts between federal and state law, the resolution is clear: state law must yield.[49] Congress could, of course, modify the current opt-out scheme by eliminating the legislatures' authority to restrict debtors to the states' exemptions, while retaining the bankruptcy debtor's right to choose between the state law and § 522(d) exemptions.[50] We do not support such a legislative change, as the result would be continued fragmentation of bankruptcy exemption policy and encouragement of forum shopping by debtors who could afford to choose a state for filing bankruptcy that offered the highest available exemptions. Uniformity of bankruptcy exemptions, on

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47. While state law exemptions would continue to be claimed in state court proceedings, at the present time, the Federal Debt Collection Procedure Act, which governs suits by the United States against individual defendants in federal courts, provides for a choice by the defendant of the 11 U.S.C. § 522(d) exemptions or the exemptions under the defendant's domiciliary state law. *See* 28 U.S.C. § 3014(a) (1994).

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

49. *See id.* art. VI., cl. 2.

50. Such an option exists under the current Bankruptcy Code, if the debtor's choice has not been preempted by the applicable state's opt-out. *See* 11 U.S.C. § 522(b) (1994). House Bill 3146, 105th Cong. (1998), currently pending before Congress, proposes such an approach. Specifically, section 7(b) of the bill would eliminate the opt-out, establishing the existing federal exemptions in § 522(d) as a uniform national minimum, but retaining the debtor's right to elect her state exemption scheme when the applicable state law is more generous. In addition, however, section 7(a) would limit the debtor's ability to claim an exemption for more than $100,000 of property converted to nonexempt form within a year prior to filing for bankruptcy and made while the debtor was insolvent.

the other hand, encourages predictability for debtors and creditors regarding what is available for exemptions, without regard to venue. The point remains, however, that there is no constitutional impediment to Congress's ability to legislate in the area.

Under the Commission's recommendation, Tennessee's bankruptcy debtors would receive an immediate boost in the allowable homestead. As discussed earlier, the Commission's report proposes to continue the state's authority to determine the homestead amount, but only to the extent that it fits within a federally mandated floor and ceiling. The proposed floor of $20,000[51] is four times higher than the current $5000 Tennessee homestead for a single debtor and almost three times higher than the $7500 available to joint debtors.[52] Thus, effectively, the Commission's proposal would raise the homestead exemption in bankruptcy to $20,000 for Tennessee debtors. The Commission also recommends, however, that the homestead exemption, whatever the amount, would be a household exemption. Thus, in contrast to the other exemptions, which apply on an individual basis, the homestead would be available only once in the same household.[53] Therefore, the exemption available to Tennessee spouses who own their residence as tenants by the entirety would apply jointly to them.[54] It is unclear how this restriction on joint use of the homestead would be enforced in the event that one spouse or joint owner files for bankruptcy relief at a different time than the other owner. Nevertheless, the recommended change is economically a positive one for Tennessee joint residential owners. Unquestionably, in both psychological and economic terms, the homestead is the most significant exemption for the vast majority of consumer debtors.

The Commission's rationale for continuing some measure

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51. *See supra* text accompanying note 22.

52. *See* TENN. CODE ANN. § 26-2-301 (1980 & Supp. 1997).

53. *See* BANKRUPTCY: THE NEXT TWENTY YEARS, *supra* note 3, at 130-32.

54. The Commission's recommendation does not change the state's determination of the extent to which tenancy by the entirety property is subject to creditors' reach. *See id.* at 131.

of state control over the homestead exemption is that the required application of a single federal homestead is subject to the criticism that a fixed amount inadequately recognizes regional differences in the costs of housing. While we are not convinced that the problem is as serious as the Commission obviously considered it to be, the recommendation for a federal floor and ceiling, as opposed to an established amount, does undercut this concern to a certain extent.[55] Moreover, the Commission recognized that the Bankruptcy Code currently provides for a cost of living adjustment to the exemptions every three years, beginning April 1998,[56] and it recommended that this adjustment should apply to the proposed federal floor and ceiling for homesteads.[57]

The Commission has also recommended that all professionally-prescribed health and medical devices or aids be exempt, without regard to their values, so long as they are in fact necessary for the health and maintenance of the debtor or a debtor's dependent.[58] While acknowledging that any one of these items may be expensive, the Commission recognized that it is "antithetical to the rehabilitative goals of bankruptcy" to require debtors to choose between such items and other personal property for exemption purposes, nor should such items be the source of creditor leverage.[59] For Tennessee debtors, this proposal would effect no change from the unlimited exemption allowed under this state's law for "[p]rofessionally prescribed health care aids for the debtor or a dependent of the debtor."[60] Presumably, the term "health care aids" under Tennessee law should be broadly construed to include "medical devices," as that term is used in the Commission's proposal, so long as either is professionally prescribed.

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55. The authors proposed to the Commission a $40,000 homestead exemption for each debtor, adjusted upward for each dependent to a maximum of $55,000. *See* Letter of January 3, 1997, *supra* note 46.

56. *See* 11 U.S.C. § 104(b)(1) (1994).

57. *See* BANKRUPTCY: THE NEXT TWENTY YEARS, *supra* note 3, at 132-33.

58. *See id.* at 138.

59. *Id.*

60. TENN. CODE ANN. § 26-2-111(5) (1980 & Supp. 1997).

Earnings on bonus, pension, profit-sharing, annuity, or similar benefits that are based upon "death, age or length of service" are somewhat restricted under the current Tennessee statute because such benefits are subject to the twenty-five percent limitation on execution that applies to the maximum amount of disposable income that is subject to garnishment.[61] Moreover, in order to be exempt, the latter types of benefits must be subject to tax-exempt status under the Internal Revenue Code.[62] The Commission's recommendation, by contrast, would treat all pension and retirement benefits, which are held in a trust that is exempt from federal income tax, as exempt without regard to the value or other limitation.[63] This recommendation would insulate most pension and retirement plans from creditors, and it would eliminate the current Bankruptcy Code limitation on exemption of such plans to "the extent reasonably necessary for the support of the debtor and any dependent of the debtor."[64] This is not a dramatic change for most bankruptcy debtors, because retirement plans "that are ERISA-qualified or meet the legal requirements for spendthrift trusts already are protected under current laws in all jurisdictions and are not included as property of the bankruptcy estate."[65] The Commission's extension of exempt status to benefits held in trust that meet applicable Internal Revenue Code requirements for tax exemption would include Internal Revenue Code limitations on the amount that a debtor may place into that protection or withdraw in any given year.[66]

Regarding other benefit payments, however, the Commission's recommendation would effect a significant change for Tennesseans. The Commission's position is that certain future payments derived from benefits such as social security, matured life insurance, unemployment, public assis-

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61. *See* TENN. CODE ANN. § 26-2-111(1)(D) (1980 & Supp. 1997).

62. *See* TENN. CODE ANN. § 26-2-111(1)(D) (1980 & Supp. 1997).

63. *See* BANKRUPTCY: THE NEXT TWENTY YEARS, *supra* note 3, at 139.

64. 11 U.S.C. § 522(d)(10)(E) (1994).

65. BANKRUPTCY: THE NEXT TWENTY YEARS, *supra* note 3, at 140-41; *see also* 11 U.S.C. § 541(c)(2) (1994).

66. *See* BANKRUPTCY: THE NEXT TWENTY YEARS, *supra* note 3, at 141.

tance, veterans, disability, illness, crime victims, or personal injury would be totally exempt, again without reference to the amount or value of those future payments.[67] Some of those benefits, specifically social security, unemployment, public assistance, veterans, and disability, currently enjoy unlimited exemption under both Tennessee and federal bankruptcy law.[68] Others, however, are restricted either by amount or by the requirement that the benefit be only in such amount as is "reasonably necessary."[69] In Tennessee, debtors are limited to a $5000 exemption for a crime victim's award;[70] $7500 "on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss";[71] and $10,000 "on account of the wrongful death of an individual of whom the debtor was a dependent."[72] Moreover, if the Tennessee debtor is entitled to more than one of these benefits, the aggregate exemption is capped at $15,000.[73] Regarding compensation for loss of future earnings, Tennessee's exemption allows only such amount derived from the "loss of future earnings . . . to the extent reasonably necessary for the support of the debtor and any dependent of the debtor."[74] While there may be debate upon this and other recommendations in Congress, the Commission found "little evidence that [such benefit] exemption[s are] a likely or frequent subject of scrutiny or abuse and there is little justification for [a monetary] cap."[75] The recommendations for change to the benefit exemptions would effect an improvement for debtors who file for bankruptcy in Tennessee, although creditors may be expected to question whether the proposed unlimited exemptions in those categories are excessively generous.

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67. *See id.* at 142.

68. *See* 11 U.S.C. § 522(d)(10)(A)-(C) (1994); TENN. CODE ANN. § 26-2-111(1)(A)-(C) (1980 & Supp. 1997).

69. 11 U.S.C. § 522(d)(10)(D) (1994).

70. *See* TENN. CODE ANN. § 26-2-111(2)(A) (1980 & Supp. 1997).

71. TENN. CODE ANN. § 26-2-111(2)(B) (1980 & Supp. 1997).

72. TENN. CODE ANN. § 26-2-111(2)(C) (1980 & Supp. 1997).

73. *See* TENN. CODE ANN. § 26-2-111(2) (1980 & Supp. 1997).

74. TENN. CODE ANN. § 26-2-111(3) (1980 & Supp. 1997).

75. BANKRUPTCY: THE NEXT TWENTY YEARS, *supra* note 3, at 142.

The more likely criticism of the recommended bankruptcy exemption changes will be in the creation and amount of a lump-sum personal property exemption, recommended to be $20,000 per debtor, to be applied to any type of property that is not otherwise specifically exempt.[76] Moreover, if the debtor does not claim the homestead exemption, the debtor could apply an additional $15,000 homestead equalization exemption to any type of property. The use of a lump-sum exemption for personal property has long been advocated by some as a means of keeping legislatures out of the "paternalistic" business of deciding which specific items are subject to exemption, a practice that favors a debtor who needs the allowed item but ignores the requirements of the debtor who does not have the same needs.[77] The move toward greater debtor autonomy in selecting particular items to exempt seems sensible and also has the ancillary benefit of eliminating the wasteful litigation that currently takes place over the lawfulness of prebankruptcy conversions of assets.

In terms of the amount of cash allowance exemption for personalty, the Commission's majority defended its choice of amount by pointing out that it is less than the total of the "dollar-limited exemptions in the current federal law."[78] That defense ignores, of course, that every debtor will not claim or be entitled to each of the current § 522(d) exemptions. The dissenting commissioners relied upon the United States Treasury Department's analysis that $40,000 in household personal property exemptions "would raise the non-homestead exemption in 48 states."[79] Tennessee's personal property exemption is

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76. *See id.* at 133. The authors previously had joined with others in supporting a lump-sum or "wild card" exemption. *See* Ponoroff, *supra* note 5, at 238; Letter of January 3, 1997, *supra* note 46; *see also, e.g.*, Lowell P. Bottrell, *Comfortable Beds, a Church Pew, a Cemetery Lot, One Hog, One Pig, Six Sheep, One Cow, a Yolk of Oxen or a Horse, and Your Notary Seal: Some Thoughts About Exemptions*, 72 N.D. L. REV. 83, 94-97 (1996) (recommending that North Dakota and Minnesota adopt a single "wild card" exemption in place of multiple "pigeon holed" personal property exemptions).

77. *See* Ponoroff, *supra* note 5, at 238 n.82 (citing authorities supporting the lump-sum exemption).

78. BANKRUPTCY: THE NEXT TWENTY YEARS, *supra* note 3, at 135.

79. Edith H. Jones & James I. Shepard, *Recommendations for Reform of Consumer*

only $4000 for each debtor.[80] Although other Tennessee exemptions, such as the unlimited cash surrender value for life insurance,[81] $1900 for trade implements,[82] and miscellaneous unlimited items such as necessary wearing apparel[83] would be replaced in bankruptcy by the proposed federal exemption, the typical debtor in Tennessee clearly would benefit from a $20,000 lump-sum exemption.

Tennessee provides for unlimited exemptions for alimony and child support "to the extent that payment becomes due more than thirty days after the debtor asserts a claim to such exemption in any judicial proceeding,"[84] and exempt status also is granted to "[l]iquid assets, stocks, or bonds, to the extent of the amount of any obligations owed by the debtor pursuant to any final court order or judgment for child support."[85] Perhaps by oversight, there is no specific Commission recommendation to change the protection that is typically given to child support recipients,[86] but the recommendations to replace all of the § 522(d) exemptions would delete the current Bankruptcy Code exemption for "alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor."[87] It remains to be seen whether Congress, if it adopted the Commission's lump-sum approach to exemptions, would provide specifically for the continued exemption of support-type future payments. Traditionally, there has been strong support in Congress for protection of these support benefits, as evidenced by Congress giving alimony, maintenance, and support claims a higher prior-

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Bankruptcy Law by Four Dissenting Commissioners at 26, *in* BANKRUPTCY: THE NEXT TWENTY YEARS, *supra* note 3, at ch. 5.

80. *See* TENN. CODE ANN. § 26-2-102 (1980 & Supp. 1997).

81. *See* TENN. CODE ANN. § 56-7-203 (1994 & Supp. 1997).

82. *See* TENN. CODE ANN. § 26-2-111(4) (1980 & Supp. 1997).

83. *See* TENN. CODE ANN. § 26-2-103 (1980 & Supp. 1997).

84. TENN. CODE ANN. § 26-2-111(1)(E)-(F) (1980 & Supp. 1997).

85. TENN. CODE ANN. § 26-2-111(6) (1980 & Supp. 1997).

86. "Certain future rights to payment generally have been beyond the reach of liquidation in a Chapter 7 proceeding. The Commission endorses the continuation of those policies." BANKRUPTCY: THE NEXT TWENTY YEARS, *supra* note 3, at 142.

87. 11 U.S.C. § 522(d)(10)(D) (1994).

ity than tax claims[88] and by the creation of exceptions to discharge for such claims.[89]

Tennesseans, including its legislators, should watch with interest the debate in Congress over exemption changes. One of the salutary effects of the 1970 Commission's recommendation for uniform bankruptcy exemptions, despite its lack of success in Congress, was the focus on exemptions by state legislatures and the amendment of state exemptions to bring them more in line with then current economic conditions.[90]

IV. CONCLUSION

Just as a benefit of the 1970 Commission's exemption recommendations and the debate before Congress leading up to the 1978 Bankruptcy Code encouraged amendment of state exemption laws, we are hopeful, at a minimum, that the present attention on bankruptcy exemptions will have the same beneficial result, encouraging state legislatures, such as Tennessee's, to reexamine their exemption laws. While we support the abolishment of the opt-out provision and congressional enactment of uniform federal exemptions that would be available in all bankruptcy cases, without regard to venue, periodic reexamination of exemption laws is necessary and beneficial. Nevertheless, regardless of the progress made, or likely to be made, in the several states concerning exemption policy and reform, the benefits derived from national uniformity of bankruptcy relief outweigh any continued reliance upon the various state law exemptions in bankruptcy. The justifications for uniformity of exemptions in bankruptcy include: (1) application of federal law and procedure on allowance or disallowance of exemptions; (2) predictability to creditors and debtors that would come from application of a national standard for exemption allowance; (3) greater public respect for the integrity

88. *See* 11 U.S.C. § 507(a)(7) (1994).

89. *See* 11 U.S.C. § 523(a)(5), (15) (1994).

90. *See* James B. Haines, Jr., *Section 522's Opt-Out Clause: Debtors' Bankruptcy Exemptions in a Sorry State*, 1983 ARIZ. ST. L.J. 1, 11; William J. Woodward, Jr., *Exemptions, Opting Out, and Bankruptcy Reform*, 43 OHIO ST. L.J. 335, 344 n.66 (1982).

of the bankruptcy system; (4) elimination of a significant incentive to forum shop or move to a more favorable exemption state just before filing bankruptcy; and (5) control over critical policy issues in bankruptcy, such as fresh start, by one legislative body (Congress) rather than by fifty-one legislatures.

A debate over exemptions should not be feared. Indeed, in light of the work that has already been done, it may be questioned whether an additional private study on exemptions is needed in place of open, public legislative debate. The benefits of such debate should include a more enlightened public and representatives, leading to exemption laws that more accurately reflect current debtor needs and creditor demands.