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THE PERIPATETIC DEBTOR:
CHOICE OF LAW AND CHOICE OF EXEMPTIONS

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We live in a mobile society. Every year, more than fourteen million U.S. residents move.1 Of these, about nineteen percent migrate to a different state, up from only sixteen percent in 1994.2 When a citizen of one state moves to another, he or she becomes subject to the laws of the new state to the same extent as one who has resided in the new jurisdiction all of his or her life. This general principle, however, is not necessarily applicable to the new state’s exemptions laws if the relocating person becomes a debtor in bankruptcy. Under § 522(b)(3)(A) of the U.S. Bankruptcy Code (“Code”), if the debtor has not been domiciled in the same state for the 730 days immediately preceding the filing date of the bankruptcy petition, the new state’s exemption laws may not apply to the debtor.3 Instead, Congress has directed the applicable exemptions for those recently relocated debtors who may or must be governed by state (as opposed to federal) exemptions4 are the exemptions established by the law of their former domicile rather than their new one.5

But what happens when the state whose exemption laws apply according to the Code either (1) embraces choice of law principles that would make its exemption laws inapplicable to the foreign debtor or (2) has substantive limitations in its exemption laws that preclude the foreign debtor from taking advantage of them (a situation that has been described as “functionally

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2 Id. at 2–3.


4 Under § 522(b)(1) of the Code, an individual debtor is permitted to exempt property specified in § 522(d) or, alternatively, in federal law other than § 522(d) or in state or local law applicable to the debtor. Id. § 522(b)(1). Each state may by law deny those debtors to whom its exemptions are applicable the option of selecting the federal exemptions in § 522(d). Id. § 522(b)(2).

5 The applicable exemptions are those provided by state or local law applicable at the place in which the debtor’s domicile was located for 180 days immediately preceding the 730-day period or for a longer portion of such 180-day period. Id. § 522(b)(3)(A).
restrictive substantive rules")? Did Congress intend to allow a state to reject application of its exemptions to the foreign debtor?

In Part I of this Article I will explore at the development of the exemption provision in federal bankruptcy law and the policy underlying the federal/state law dichotomy. In Part II, I will review traditional choice of law doctrine with respect to the selection of applicable law in inter-state disputes. Part III examines the efforts of federal bankruptcy courts to handle the choice of law problems created by § 522(b)(3) of the Code and suggests that applying general choice of law principles would steer them towards interpreting federal bankruptcy law, rather than state law, to resolve the issues. In the final Part, I discuss how the language of § 522(b) supports the conclusion that Congress intended to incorporate state exemption laws without any substantive limitations on their applicability. I further suggest Congress has failed to resolve the issue adequately in the 2005 amendments to the Code, even if Congress intended to ignore traditional choice of law principles that would permit it to override limitations on the applicability of that state law.

I. CONGRESSIONAL TREATMENT OF EXEMPTIONS

Excluding some property from the reach of creditors historically has been justified on two principal grounds. First, it has been seen as a way of ensuring

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6 Robert A. Sedler, Functionally Restrictive Substantive Rules in American Conflicts Law, 50 S. CAL. L. REV. 27, 30 (1976). Professor Sedler describes such rules as rules that contain “limitations on the applicability of a rule of substantive law that inhere within the substantive rule itself.” Id. at 32.


8 It has been suggested the adoption of the first exemption law in the United States by Texas in 1839, before it became a part of the United States in 1845, was motivated by the desire to attract settlers who might be interested in protection from creditors. See Richard M. Hynes et al., The Political Economy of Property Exemption Laws, 47 J.L. & ECON. 19, 23 (2004) (citing Paul Goodman, The Emergence of Homestead Exemptions in the United States: Accommodation and Resistance to the Market Revolution, 1840–1880, 80 J. AM. HIST. 470, 477 (1993)). Advertisements aimed at prospective settlers highlighted the new exemption laws. See Goodman, supra, at 477.

One commentator has identified five policies that influenced the development of exemption law:

(1) To provide the debtor with property necessary for his physical survival;
(2) To protect the dignity and the cultural and religious identity of the debtor;
(3) To enable the debtor to rehabilitate himself financially and earn income in the future;
(4) To protect the debtor's family from the adverse consequences of impoverishment;
(5) To shift the burden of providing the debtor and his family with minimal financial support from society to the debtor's creditors.
the debtor had property necessary to continue to be a productive member of society, i.e., financial rehabilitation. Therefore, early exemption laws protected tools of the trade (those tools and implements necessary for carrying on a trade or business). As the economy expanded, exemptions came to represent a broader humanitarian goal of protecting debtors and their dependents from destitution. Of course, there was an economic justification for this goal as well. Those residents who were completely without resources would require financial assistance from the state. By preventing creditors from taking all available property from the debtor, exemptions shifted the cost of maintaining the debtor from the state onto the creditors.

The earliest U.S. bankruptcy laws, the Acts of 1800 and 1841, contained their own lists of limited uniform bankruptcy exemptions. State law


11 See, e.g., McGreevy, supra note 9, at 1234; Woodward, supra note 9, at 338.


13 See, e.g., Deutsch, supra note 9, at 207–08; Engledow, supra note 9, at 279; McGreevy, supra note 9, at 1234.

14 Act of Apr. 4, 1800, ch. 19, 2 Stat. 19 (establishing a uniform system of bankruptcy throughout the United States). This statute provided only for involuntary bankruptcy proceedings against merchants. Id. at 20–21. The only exempt property was the bankrupt’s necessary wearing apparel, beds and bedding, and the necessary wearing apparel of his wife and children. Id. at 23. The bankrupt was also allowed a set percentage of the assets recovered for creditors, depending on the size of the distribution. Id. at 30.

15 Act of Aug. 19, 1841, ch. 9, 5 Stat. 440 (establishing a uniform system of bankruptcy throughout the United States). This Act was the first to allow voluntary bankruptcy and covered all debtors, not merely merchants. Id. at 441–42. Exempt property consisted of necessary household and kitchen furniture along with other articles and necessities of the bankrupt, as well as the wearing apparel of the bankrupt, his wife, and children—taking into account the family, condition, and circumstances of the bankrupt—that did not exceed $300 in value in the aggregate. Id. at 443.
exemptions were not recognized. The Act of 1867,17 which was repealed in 1878, also included federal exemptions for apparel of the bankrupt, his wife, and children, as well as household and kitchen furniture and other articles and necessaries not exceeding $500 in value.18 The Act of 1867, however, took a new approach allowing the bankrupt to exempt any other property specified under the state exemption laws of the bankrupt’s domicile at the time of the commencement of bankruptcy proceedings in an amount not exceeding the amount allowed under those laws as in effect in 1864.19

The first permanent U.S. bankruptcy law, the Bankruptcy Act of 1898, went even further, eliminating federal exemptions entirely.20 Instead, section 6 of the Act explicitly stated:

This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition.21

The approach was controversial. In Hanover National Bank v. Moyses,22 the U.S. Supreme Court rejected the contention that, in failing to provide uniform federal exemptions, Congress had acted beyond its power to enact a “uniform” system of bankruptcy law under the Bankruptcy Clause to the U.S. Constitution (“Bankruptcy Clause”).23 The Court concluded creditors were not harmed because they “contracted with reference to the rights of the parties thereto under existing [state] exemption laws,”24 and the uniformity required by the Constitution was “geographical, and not personal.”25 Thus, the decision of Congress to incorporate state exemption law was found constitutionally permissible because it uniformly gave all creditors access to exactly that

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16 See 2 Stat. at 23; 5 Stat. at 443.
17 Act of Mar. 2, 1867, ch. 176, 14 Stat. 517 (establishing a uniform system of bankruptcy throughout the United States).
18 Id. at 522–23. It also exempted the uniform, arms, and equipments of soldiers. Id. at 523.
19 Id.
21 Id. § 24.
22 186 U.S. 181 (1902).
23 U.S. CONST. art. I, § 8, cl. 4.
24 186 U.S. at 189.
25 Id. at 188.
property they could have reached outside of bankruptcy.\textsuperscript{26} When the Act was amended in 1938, section 6 was amended only slightly and did not change the deference to state law.\textsuperscript{27}

Many commentators criticized the incorporation of state exemption laws into the federal bankruptcy case,\textsuperscript{28} noting state law exemptions were not enacted with bankruptcy liquidation in mind;\textsuperscript{29} were in many cases so antiquated as to conflict with the fresh start policy of federal bankruptcy laws;\textsuperscript{30} and were nonuniform, providing dramatically different treatment of debtors who lived in different states but were similar in all other respects.\textsuperscript{31} Their arguments proved persuasive to the Commission on the Bankruptcy Laws of the United States ("Commission"), which recommended in its 1973 Report that uniform federal bankruptcy exemptions be adopted.\textsuperscript{32} As the Commission stated, "[b]y eliminating the reference to nonbankruptcy law much litigation and considerable inequity due to state procedural requirements

\textsuperscript{26} Id. at 189–90.
\textsuperscript{27} Section 6 was amended to read as follows:

This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the United States or by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months immediately preceding the filing of the petition, or for a longer portion of such six months than in any other State: Provided, however, That [sic] no such allowance shall be made out of the property which a bankrupt transferred or concealed and which is recovered or the transfer of which is avoided under this Act for the benefit of the estate, except that, where the voided transfer was made by way of security only and the property recovered is in excess of the amount secured thereby, such allowance may be made out of such excess.


\textsuperscript{30} See, e.g., Countryman, supra note 28, at 681 (describing "extreme obsolescence" of state exemption laws); Note, Bankruptcy Exemptions: Critique and Suggestions, 68 YALE L.J. 1459, 1465 (1959) (exemptions "[p]resumably useful in a rural society [and] have little relevance today"); see also H.R. REP. NO. 95-595, at 126 (1978), as reprinted in 1978 U.S.C.C.A.N. 5963, 6087 ("Most [state exemption laws] are outmoded, designed for more rural times, and hopelessly inadequate to serve the needs of and provide a fresh start for modern urban debtors.").

\textsuperscript{31} See Bankruptcy Exemptions, supra note 30, at 1468–69.
are avoided. Questions as to the applicable law, its scope, and whether a law provides an exemption within the meaning of section 6 of the Act are mooted.\[^{33}\]

An alternative approach advocated by the National Conference of Bankruptcy Judges became the basis of a bankruptcy bill in the House of Representatives.\[^{34}\] The bill provided federal exemptions, but would have allowed debtors to elect either the federal exemptions or those provided by the state of the debtor’s domicile.\[^{35}\]

The law as enacted rejected the Commission’s approach, which proved politically unpalatable, and adopted a last minute compromise\[^{36}\] between the exemption scheme proposed by the National Conference of Bankruptcy Judges (endorsed by the House\[^{37}\]) and the limitation to state exemption law contained in the Bankruptcy Act (proposed by the Senate\[^{38}\]). Although Congress included federal exemptions in the new Code and provided the debtor the option to elect the federal exemptions or the applicable state exemptions as the House bill had provided, Congress inserted a new provision consistent with the Senate bill that permitted each state to enact a law making the federal exemptions unavailable to its residents.\[^{39}\] As a result, under current § 522(b)(2) of the Code, the debtor has a choice between federal and state exemptions unless the applicable state law “specifically does not so authorize”\[^{40}\] the so-called “opt-out” provision.\[^{41}\] The opt-out provision has

\[^{33}\] Id. at 128.
\[^{34}\] H.R. 16643, 93d Cong., 120 CONG. REC. 30,970 (1974).
\[^{35}\] Id. at § 4-503(b).
\[^{37}\] H.R. 8200, 95th Cong., 123 CONG. REC. 35,644 (1977). The bill proposed to allow the debtor to exempt either:

- (1) property that is specified under subsection (d) of this section [522]; or in the alternative,
- (2) (A) any property that is exempt under Federal, State, or local law, other than subsection (d) of this section, that is applicable on the date of the filing of the petition at the place in which the debtor’s domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place . . .

\[^{38}\] S. 2266, 95th Cong., 123 CONG. REC. 36,091 (1977).
\[^{39}\] In remarks on the floor of the Senate, Senator Wallop characterized the compromise as “an important victory for the rights of States to determine exemptions for the debtors of their States.” 124 CONG. REC. 33,992 (1978) (remarks of Sen. Wallop). Sen. Wallop was concerned about protecting debtors who lived in states, like his own state of Wyoming, that granted exemptions more generous than those provided under § 522(d). Id.
attracted substantial academic criticism, and uniform federal exemptions were proposed once again by the Commission in its 1997 Report. However, the political realities that doomed the same proposal when made by the Commission on the Bankruptcy Laws of the United States in 1973 killed the 1997 proposal as well; the opt-out provision remained in the 2005 amendments to the Code.

Because the opt-out clause was drafted quickly, it provides no guidance on the scope of the state’s power to regulate with respect to exemptions when the state has exercised its right to confine its residents to those exemptions. The language of the statute does not tell us what Congress meant when it provided that exempt property is “any property that is exempt under State or local law that is applicable on the date of the filing of the petition.”

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45 11 U.S.C. § 522(b)(2)

46 The 95th Congress was set for adjournment on Oct. 14, 1978. Differences between the House and Senate bills were resolved without formal conference only days before adjournment, delayed by the controversy over the constitutional status of bankruptcy judges. The bill was passed on Oct. 6, 1978. See Kenneth N. Klee, Legislative History of the New Bankruptcy Law, 28 DEPAUL L. REV. 941, 954–56 (1979). The opt-out clause has been called “unconsidered” by Congress. See Haines, supra note 42, at 6.

interpret this phrase (and the issue is one of statutory interpretation), we must look to general choice of law principles for guidance.

II. CHOICE OF LAW PRINCIPLES

There are many situations in modern life when the facts giving rise to litigation could lead to the application of the laws of more than one jurisdiction. The constitutional constraints on the applicability of a particular state's laws are limited. The state whose substantive law is applied to the dispute "must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."48

For a debtor who has moved within the 730 days prior to bankruptcy, either the state in which he or she is currently residing or the state from which he or she moved could be seen as having the requisite state interest in applying its exemption laws to the debtor's bankruptcy. The state in which the debtor is newly settled has an interest in ensuring its residents retain the property specified in its exemption statutes as they emerge from bankruptcy so they will not require state assistance and can become productive citizens who will contribute to the state's economy.49 The state from which the debtor moved has an interest in protecting the expectations of creditors who dealt with the debtor while he or she resided there by limiting the debtor's exempt property to that provided by the state's laws.50

The conflict of laws principles applicable to exemptions outside of bankruptcy are set forth in the Restatement (Second) of Conflict of Laws section 132 (1971).51 Under that section:

The local law of the forum determines what property of a debtor within the state is exempt from execution unless another state, by reason of such circumstances as the domicil [sic] of the creditor and the debtor within its territory, has the dominant interest in the

49 See, e.g., In re O'Hara, 162 F. 325, 327 (M.D. Pa. 1908).
51 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 132 (1971) [hereinafter RESTATEMENT].
question of exemption. In that event, the local law of the other state will be applied.\(^\text{52}\)

Comment (b) to section 132 notes that under the then-applicable Bankruptcy Act,\(^\text{53}\) "the local law of the State of the debtor's domicil [sic] governs exemptions.\(^\text{54}\)

Section 522(b)(3)(A) continues to make the law of the debtor's domicile (or former domicile) the applicable law for exemptions.\(^\text{55}\) The Restatement choice of law rule on applicable exemption law\(^\text{56}\) is preempted in bankruptcy; the law of the domicile (or former domicile) of the debtor, as specified in the Code, provides the applicable exemption law regardless of the "dominant interest" of any other state that might prevail in the choice of law analysis outside of bankruptcy.\(^\text{57}\)

That Congress designated which of the two interested states supplies the law relating to bankruptcy exemptions, however, does not complete the choice of law analysis. The language of § 522(b)(3)(A) refers to property that is exempt under "State or local law" applicable on the date of filing at the place of the present or former domicile of the debtor. What did Congress mean by its invocation of "State or local law" of the applicable domiciliary state? Although this is an issue of legislative interpretation, general principles used in interpreting choice of law designation in private agreements inform the analysis.

Assume the parties to a contract specify an applicable law for a particular contract provision. If that provision is one for which the parties could have included explicit language in the agreement that mirrors the substantive provisions of the selected law, Restatement section 187(1) suggests the choice

\(^{52}\) Id.

\(^{53}\) 11 U.S.C. § 9 (1976) (repealed 1978) provided the Bankruptcy Act "shall not affect the allowance to bankrupts of the exemptions which are prescribed by . . . the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months immediately preceding the filing of the petition. . . ."

\(^{54}\) RESTATEMENT, supra note 51, § 132 cmt. b


\(^{56}\) RESTATEMENT, supra note 51, § 132.

\(^{57}\) See, e.g., In re Anselmi, 52 B.R. 479, 493 (Bankr. D. Wyo. 1985) (citing § 132 to apply Wyoming exemption law (domicile of debtors and forum) to household goods in Mexico); cf. In re Pederson, 105 B.R. 622, 624-25 (Bankr. D. Colo. 1989) (concluding Colorado, the debtors' domicile, had the "dominant interest" under § 132, and Colorado exemption law should apply).
of law provision is valid. In such situations, the designation of applicable law is not really a choice of law provision, but rather merely a shorthand way of including the substantive provisions the parties wish to include, an "incorporation by reference."

What is the scope of the state law thus incorporated? When parties to a contract specify the law of a particular state governs the contract, unless they indicate to the contrary, their designation will be deemed to select the local law of the applicable state, excluding any choice of law rules that would lead courts in the chosen state to apply the local law of a different jurisdiction.

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Whether the parties could have legally included such an explicit provision is determined by the local law of the state whose law would be applicable in the absence of a valid choice of law designation in the contract, that is, "the state which, with respect to that issue, has the most significant relationship to the transaction and the parties." RESTATEMENT, supra note 51, § 188.

Even if the issue is not one the parties could have resolved by including a specific provision in their contract, when the parties to a contract specify the law to govern their rights and duties, that chosen law will be applied unless the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or . . . application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which . . . would be the state of the applicable law in the absence of an effective choice of law by the parties.


"Local law" of a state is defined as "the body of standards, principles and rules, exclusive of its rules of Conflict of Laws, which the courts of that state apply in the decision of controversies brought before them." Comment (b) to Restatement section 132, in interpreting the exemption provision of the Bankruptcy Act (which referred simply to "state laws") to make applicable the "local law" of the applicable state, supports this interpretation.

What if the state does not want its law to be selected? That is, what if the substantive provisions of the designated state’s law (as opposed to state choice of law principles) would render the state substantive law inapplicable to the parties or transaction with respect to which it has been chosen because they lack a sufficient domestic nexus? When parties to a private contract have made a valid choice of law under the principles of Restatement section 187, even when the applicable state law on its face seems to limit its application to wholly domestic transactions, a court may appropriately decline to interpret the limiting language of section 187 as precluding the statute’s applicability to a foreign transaction.

For example, in *First Wisconsin National Bank of Madison v. Nicolaou*, the parties signed a security agreement providing enforcement was to be "governed by the Internal laws of Wisconsin." The secured party repossessed the collateral in California using self-help, which was appropriate under California law, but the debtor claimed the actions violated Wisconsin law. The court first refused to apply a Wisconsin statute that would have made applicable the law of the state where the collateral was located at the time of the repossession because it was not part of the "internal" law of Wisconsin. The court then examined another Wisconsin statute that generally precluded merchants from taking possession of collateral "in this state" other than by legal process. The secured party contended that the statute by its terms applied only to repossessions occurring in Wisconsin. Because the state legislature had no power or jurisdiction to regulate conduct outside its borders, the court rejected this interpretation finding the words "in this state" imposed no additional geographic limitation on the scope of the

61 RESTATEMENT, supra note 51, § 4.
62 See First Wis. Nat'l Bank of Madison, 270 N.W.2d at 585.
63 Id. at 584.
64 Id.
65 Id. at 585.
66 Id.
67 Id.
Therefore, when the parties invoked Wisconsin law in their contract, they did not make the statute applicable to California repossessions, but agreed to abide by the restrictions in Wisconsin law (notwithstanding its jurisdictional limitations) even if they conducted the repossession outside the boundaries of Wisconsin.

Indeed, despite the large number of cases declining to apply the designated state law when the state law itself limits its applicability to residents or local businesses (particularly in the franchise context) on the theory that the state law was not intended to have extraterritorial effect, litigants have persuasively argued that this conclusion is an erroneous application of choice of law principles. The issue of whether the parties are bound by the limitations imposed by a particular state’s laws should be a question of contract interpretation, not state legislative intent. The state legislature never intends to enact laws having extraterritorial impact because it has no jurisdiction to do so. The designation of the law of a particular state by private parties does not

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68 Id.
69 Id. at 586.
71 See George F. Carpinello, Testing the Limits of Choice of Law Clauses: Franchise Contracts as a Case Study, 74 MARQ. L. REV. 57, 78-79 (1990) (“Although a state’s franchisee protection law may apply, by its terms, only to franchisees within that state, when the franchisor agrees to be bound by the whole body of that state’s law, it agrees that such protective legislation will apply to the subject relationship.”).
72 See C.A. May Marine Supply Co. v. Brunswick Corp., 557 F.2d 1163, 1166 (5th Cir. 1977) (“Obviously, the legislature passed the law to protect [resident] dealers, . . . [b]ut that does not mean that parties, one or both of which have some reasonable contact with the State [], may not agree to clothe themselves with the rights and duties of citizens of that state when determining their respective rights under their contract.”); Infomax Office Sys., Inc. v. MBO Binder & Co., 976 F. Supp. 1247, 1254 (S.D. Iowa 1997) (in choosing governing law, “parties . . . clearly intended for courts applying this law to act as if the parties were within the ambit of Illinois law,” despite the lack of the chosen state’s interest in applying its law).
73 See Sandberg v. McDonald, 248 U.S. 185, 195 (1918) (“Legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction.”).
give the chosen law extraterritorial effect. 74 A court enforcing the governing law provision does not render the selected state law applicable on an extraterritorial basis. 75 Rather, it merely enforces the contractual provision that incorporates state law because that was the intent of the parties. 76

Similarly, choice of law decisions suggest the intrinsic limitations in the substantive law of the state designated by § 522(b)(3)(A) are not necessarily binding in a federal bankruptcy case. 77 The question is whether Congress intended to incorporate not only the state law exemptions, but the state law limitations on the applicability of those exemptions as well. The courts generally have not only failed to answer that question, but have generally failed to recognize federal legislative intent is relevant at all.

III. APPLYING CHOICE OF LAW PRINCIPLES TO BANKRUPTCY EXEMPTIONS FOR NONRESIDENT DEBTORS

Despite the existence of these conflict of law precepts, most courts have failed to apply them to the issue of bankruptcy exemptions. Instead, courts have analyzed whether the exemption laws of the state whose laws are made applicable by the operation of § 522(b)(3) can be given extraterritorial effect as a matter of state law.

75 But cf. Thomas M. Pitegoff, Choice of Law in Franchise Relationships: Staying Within Bounds, 14 FRANCHISE L.J. 89, 117-18 (1995) (arguing choice of law should be limited by territorial constraints unless the parties clearly indicate a desire for extraterritorial application of the chosen state law).
76 See Infonax Office Sys., 976 F. Supp. at 1254 ("enforcing the parties' choice of law does not in any way give 'extraterritorial' effect to the laws of Illinois: the contract, not the law of Illinois, is enforced in Iowa."); see also Carpinello, supra note 71, at 79 ("In essence, section 187 allows the parties, subject to the limitations set forth in paragraph 2, to place themselves within the ambit of the selected governing law when the legislature passing the chosen law only insisted upon its application within that state.").

The impact of a contractual choice of applicable law should be contrasted in this context with situations in which the applicable law is selected by the forum court based on general choice of law principles. In these latter cases, when the applicable local law selected by the forum court explicitly limits its operation to residents or domiciliaries, or when it applies by its terms only to property located within the state, most forum courts conclude extending its applicability to those persons or property not within its language is impermissible because it would give the applicable law "extraterritorial effect." See, e.g., Hoff Supply Co. v. Allen-Bradley Co., 750 F. Supp. 176, 178 (M.D. Pa. 1990); Mahl v. Aaron, 809 N.E.2d 953, 957 (Ind. Ct. App. 2004) (quoting DeLotel v. DeLotel, 24, 140 Cal. Rptr. 553 (Cal. Ct. App. 1977)); Prater v. Prater, 9 S.W. 361, 363 (Tenn. 1888). But when the parties bind themselves by contract to abide by the law of a state that might otherwise not have jurisdiction over a transaction, their intent should be effectuated.

77 See infra Part III.
The answer to that question is generally no. State courts have been almost uniformly reluctant to extend the reach of their state exemptions to nonresidents, or to property not within their boundaries. When state domiciliaries file for bankruptcy, those domiciliaries have been unable to protect foreign property. Therefore, when state law explicitly limits the operation of its exemption laws to domiciliaries, residents, or property within the state's boundaries, some courts have applied those limitations even when § 522(b)(3) directs that state law be applicable to the foreign debtor without property in the state.

When state law does not contain express limitations, bankruptcy courts have been more willing to read the state exemptions expansively to cover the debtor's property outside of the state in order to effectuate the intent of Congress in the Code. In the leading case of Arrol v. Broach (In re Arrol), the court allowed a debtor who had moved from California to Michigan shortly before bankruptcy to claim the California homestead exemption for the debtor's Michigan property, noting the California exemption statute did not

78 See, e.g., DeLotel, 140 Cal. Rptr. at 554-55; Ferneau v. Armour & Co., 303 S.W.2d 161, 167 (Mo. Ct. App. 1957); Prater, 9 S.W. at 363. But see Guidry v. Sheet Metal Workers Nat'l Pension Fund, 39 F.3d 1078, 1987 (10th Cir. 1994) (allowing a Texas resident to claim Colorado exemptions for funds in Colorado bank account); Bond v. Turner, 54 P. 158 (Or. 1898) (extending benefit of Oregon exemption law to nonresident); Bergman v. Bergman, 888 S.W. 2d 580, 585-86 (Tex. Ct. App. 1994) (Applying Restatement section 132 to allow a nonresident to protect retirement benefits paid by Texas company from garnishment under Texas exemption statute).


80 See, e.g., Palais v. DeJarnette (In re Scharton's Estate), 145 F.2d 953, 955 (4th Cir. 1944) (denying Massachusetts resident Virginia homestead exemption for Virginia property; applicability of Massachusetts homestead exemption not raised); In re Owings, 140 F. 739, 741 (E.D.N.C. 1905) (denying North Carolina resident homestead exemption for property in Maryland); In re Peters, 91 B.R. 401, 403-04 (Bankr. W.D. Tex. 1988) (denying Texas resident homestead exemption in property located in Brazil); In re Schmidt, No. 1-86-01102, 1987 WL 40053, at *2 (Bankr. W.D. Tex. Sept. 2, 1987) (denying Texas resident homestead exemption for proceeds of Iowa house); cf. In re Calhoun, 47 B.R. 119, 122 (Bankr. E.D. Va. 1985) (noting although debtor had to be a resident to take advantage of Virginia exemptions, debtor-resident could have applied Virginia homestead exemption to non-Virginia homestead property if he had complied with Virginia law on filing homestead deed).

81 See, e.g., In re Hawkins, 15 B.R. 618 (Bankr. E.D. Va. 1981) (denying D.C. resident Virginia exemptions despite applicability of Virginia exemptions under § 522(b)).

82 170 F.3d 934 (9th Cir. 1999).
explicitly limit the homestead exemption to property in California. Courts have reached the same conclusion with respect to Arizona, Georgia, Minnesota, Missouri, Oregon, Virginia, and Wisconsin exemption statutes. In other cases, no party asserted that territorial limitations on exemptions preclude their applicability, and the bankruptcy court simply applied the exemption law of the state indicated by § 522(b) to property outside its borders. Even where state law contains no explicit limitations, some bankruptcy courts have been reluctant to give state exemption law extraterritorial force by allowing that law to shield out-of-state property when the Code makes the state’s laws applicable to the debtor.

This analysis is flawed because the question as stated—whether the applicable state would give extraterritorial reach to its own exemption laws—is not the correct inquiry. The Code is a federal statute, by referring to property designated as exempt under the state law applicable under the language of § 522(b)(3)(A), it renders state law applicable. It is Congress, not the state legislature, that has given the state statute “extraterritorial” effect. Congress has designated a “governing law” for exemptions that would not be applied by normal territorial principles of domicile of the debtor at the time of filing. The appropriate question is how to interpret the federal law selecting that state

83 Id. at 936; cf. In re McNabb, 326 B.R. 785, 787 (Bankr. D. Ariz. 2005) (suggesting if California exemptions were applicable, they could apply to Arizona homestead).
86 See In re Drenttel, 403 F.3d 611, 614–15 (8th Cir. 2005).
89 See In re Calhoun, 47 B.R. 119, 122-23.
90 See In re Stevens, 23 F. 2, 3 (W.D. Wis. 1870).
91 But cf. In re Weza, 248 B.R. 470, 473 (Bankr. D.N.H. 2000) (holding although New Hampshire homestead exemption may be applicable to foreign property, it is not applicable unless debtor resides at the property).
94 See Countryman, supra note 28, at 697–98.
95 Generally, one would expect a debtor to be governed by exemption laws of the state where he or she is domiciled to the same extent as the debtor is subject to all other laws of that state.
governing law, not how to interpret the state law so chosen. That interpretive effort is aided by resort to the choice of law principles discussed above.

Even when courts have applied general conflicts rules to determine the applicability of state exemption laws, they fail to recognize the impact of those rules on any limitations imposed by state laws. For example, in In re Drenttel the Eighth Circuit concluded that Minnesota's homestead exemption could be applied to protect the residence recently acquired by the debtors in Arizona.\(^9\) The bankruptcy trustee contended that, by making Minnesota law applicable for exemption purposes, Congress intended all of Minnesota law on that issue be examined, including Minnesota conflict of laws principles.\(^9\) The trustee maintained that a Minnesota court would not apply Minnesota law to a homestead outside of the state.\(^9\) But the court—consistent with the approach of Restatement section 4 (which it never cited)—concluded Congress intended only the local exemption law of Minnesota to be applicable, not its choice of law rules.\(^9\) To interpret § 522(b)(3) as including choice of law rules, the court noted, could result in the designated state applying the law of the state to which the debtors had just moved (in this case, Arizona), a sort of renvoi Congress clearly intended to preclude.\(^10\)

The court's analysis up to this point was completely consistent with basic conflicts principles. Rather than stop there and apply Minnesota law, however, the court went on to look at the "language" of the Minnesota exemption statute to see if the homestead exemption "can be applied" to an Arizona homestead as a matter of state law.\(^10\) With this analysis, it returned to the flawed question of whether a particular state's exemptions can be given extraterritorial effect. Although the court concluded Minnesota's exemption statute could be read to protect an Arizona homestead,\(^10\) it was wrong from a jurisdictional stand-point. A state has no power to provide protection from execution to property not within its boundaries; state exemption law cannot be given extraterritorial effect as a matter of state law, and cases have consistently so held.\(^10\)

\(^9\) 403 F.3d 611 (8th Cir. 2005).
\(^9\) Id. at 613.
\(^9\) Id.
\(^9\) Id. at 614.
\(^10\) Id. at 614 n.3.
\(^10\) Id. at 614–15.
\(^10\) Id. at 615.
But if Code § 522(b)(3) gives state exemption laws extraterritorial effect, it does so as a matter of federal law. It incorporates by reference the applicable exemption scheme of a particular state (a state determined by the 730-day/180-day formula). As noted by the Sixth Circuit in In re Stockburger, concerns regarding the extraterritorial effect of state law are “misplaced.”\textsuperscript{104} When state law is incorporated into § 522(b), “state law [becomes] part of the federal statutory scheme; so it is federal law being given effect, not state law.”\textsuperscript{105}

The federal statute can be analyzed as if it were a contractual choice of law provision, albeit one that is not consensual on the nongovernmental party to the contract. Congress has power under the Bankruptcy Clause to preempt state exemption laws for bankruptcy cases, so its designation of applicable state exemption law is equally binding on the debtor and the states that might otherwise have an interest. However, even if Congress was not empowered by the Constitution to specify applicable exemption law, under Restatement section 187(1) a contractual choice of law should be honored to the extent the choice is one that could have been addressed directly in the contract. Because the Bankruptcy Clause gives Congress the power to list specific exemptions that a debtor may claim in bankruptcy, by analogy, its decision to incorporate by reference state exemptions would be equally enforceable.

Under Restatement section 187(3), unless Congress explicitly indicated to the contrary (which it did not), the applicable state law incorporated into Code § 522(b)(3)(A) is deemed to be the substantive exemption law of the applicable state without regard to conflicts of law principles applied by that state that might render the substantive law inapplicable to the foreign debtor. Such an interpretation is compelled by inclusion of the 730-day limit in § 522(b)(3)(A).

Assume a debtor has lived in State A (which has very limited exemptions) for many years, but moves to State B (which has more generous exemptions). Within 730 days thereafter, debtor files for bankruptcy. Section 522(b)(3)(A) states the debtor’s exempt property is “any property that is exempt under . . .

\textsuperscript{104} Farinash v. Stockburger (In re Stockburger), 106 F.3d 402 (Table), No. 96-5409, 1997 WL 41202, at *2 (6th Cir. Jan. 31, 1997) (unpublished table decision).
\textsuperscript{105} Id.
State or local law that is applicable... at the place in which the debtor’s domicile... was located for 180 days immediately preceding the 730-day period [immediately preceding the date of the filing of the petition].” In our example, this place is State A.

Assume under State A’s choice of law principles, the courts of State A would apply State B’s exemption laws to the debtor because they would find State B has dominant interest in the issue as described in Restatement section 132. If the invocation of “State law” in § 522(b)(3)(A) were interpreted to include State A’s choice of law principles, the bankruptcy court would be required to give effect to the exemptions specified under the laws of State B, just as a court in State A would do. In permitting such a renvoi, the bankruptcy court would defeat the Congressional intent of preventing a debtor from “shopping” for more favorable exemption laws by moving within 730 days of bankruptcy. Congress could not have intended its designation of “State law” to include choice of law principles that would result in the application of substantive law of the state to which the debtor has moved. The Eighth Circuit was correct in its application of choice of law rules in In re Drenttel.

Therefore, we must interpret the language of § 522(b)(3)(A) to make reference to the substantive law of the applicable state, excluding any choice of law principles that would result in the applicability of a state not selected by Congress. What is the impact on the debtor, though, if it is not state choice of law principles that render the designated state law inapplicable, but the provisions of the state exemption laws themselves? What happens if the applicable substantive state law is not by its terms applicable to the debtor because it is available only to debtors who live in the state or to property within its borders?

The Congressional decision to incorporate by reference state exemption law answers this question as well. Even if the applicable state law has internal

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106 See, e.g., Cole, supra note 42, at 231.
107 This principle was ignored in In re Nelms where the court assumed that when § 522(b)(2) directed application of Michigan law, it also required the application of Michigan conflict of laws rules that would look to the situs of real property to determine its exempt status. No. 04-53521, 2005 WL 318802 (Bankr. E.D. Mich. Feb. 4, 2005). The court viewed the impact of the Michigan choice of law rules as creating the equivalent to a territorial limitation on the real property exemption laws of Michigan, a conclusion that is not be justified by § 522(b)(2).
108 403 F.3d 611, 614 (8th Cir. 2005); see also Arrol v. Broach (In re Arrol), 170 F.3d 934, 936 (9th Cir. 1999) (finding the conflicts of laws principles of the applicable state “simply irrelevant”).
restrictive provisions that would render it inapplicable—in whole or in part—to the debtor and the debtor’s property, the Congressional designation of the state’s exemption laws as applicable law should be interpreted to incorporate those exemptions without the limitations. Here the question is not whether the state intended its exemptions to have an extraterritorial effect (which it clearly did not). Instead, the touchstone should be Congressional intent in making reference to that state law.

Let us return to the hypothetical we just considered. Assume our debtor moves from State A to State B within 730 days prior to filing for bankruptcy. Section 522(b)(3)(A) states the debtor’s exempt property is the property that is exempt under the law of State A. Now suppose the exemption laws of State A provide its exemptions are available only to residents of State A and exemptions applicable to nonresidents are determined by the exemption laws of their state of residence. Do the substantive provisions of the exemption law of State A render the laws of State B applicable to our debtor? The question is not purely academic. Idaho exemption law includes a provision stating nonresidents of the state “are entitled to the exemptions provided by the law of the jurisdiction of their residence” rather than the exemptions provided by Idaho law.\(^\text{109}\) Can Idaho exemption law make applicable to the debtor the exemptions that Congress intended to deny him by inserting the 730-day limitation? It seems unlikely any court would conclude § 522(b)(3)(A) can be read to permit this result.

But what if State A does not explicitly direct nonresidents to the exemption law of the state in which they reside, but merely confines the application of its own exemption law to its residents or domiciliaries? The result should be the same. Congress did not intend to allow the state whose exemptions it incorporated to override the designation by a provision of state law and thereby put the debtor into exemption-limbo.

When Congress confined a debtor who has moved within 730 days of bankruptcy to the exemptions he or she would be entitled to under the law of the state where the debtor was domiciled during the 180 days prior to that 730 days (or the longer part of that 180 days), Congress intended to put the debtor into the same position as the debtor would have been had the debtor not made the recent move.\(^\text{110}\) Congress did not intend to punish the debtor for moving by providing the debtor less favorable exemptions than the debtor would have

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had by staying put; it merely intended to discourage moves for the purpose of seeking more favorable exemptions prior to a bankruptcy filing.\footnote{See generally Cole, supra note 42, at 230–31.} The incorporation of state exemptions in § 522(b)(3)(A) should be read as a short-hand way for Congress to avoid restating the exemption laws of the state from which the debtor moved, which it clearly had the power to do. If it had restated those laws in full, it would undoubtedly have excluded any provision that precluded their applicability to the debtor in question. Its incorporation by reference should be read to intend the same result.

Put another way, by adopting the opt-out provision, Congress enacted a federal exemption scheme that incorporates the categories and amounts of exempt property specified in the law of the applicable state if the state chooses to opt out. The incorporation was never intended to go further.\footnote{Because § 522(b)(2) and (b)(3) looks to state law merely to identify the “property” that is exempt, rather than deferring to state exemption law generally as had the Bankruptcy Act, those subsections narrow the scope of deference to state law. See Morris Stern, State Exemption Law in Bankruptcy: The Excepted Creditor as a Medium for Appraising Aspects of Bankruptcy Reform, 33 Rutgers L. Rev. 70, 93–94 (1980).} The specification of the individual debtor who may take advantage of those categories and amounts is an issue of federal law, and has been set forth by Congress in § 522(b)(3)(A). Any restrictive provision included in state law that “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”\footnote{Hines v. Davidowitz, 312 U.S. 52, 67 (1941).} is invalid under the Supremacy Clause, even if that was not its purpose.\footnote{See Perez v. Campbell, 402 U.S. 637, 651–52 (1971).}

The analysis is similar to that undertaken by the Supreme Court in \textit{Owen v. Owen} where the issue was the extent to which § 522(b) delegated to the states control over exemption policy under the Code.\footnote{500 U.S. 305, 309-10 (1991).} Under Florida law, although homesteads are exempt from judgment liens, liens on the property that attached before the property became a homestead are excepted.\footnote{Id. at 307.} A Florida debtor whose homestead was encumbered with a preexisting judgment lien sought to avoid the lien under § 522(f)(1). The lower courts refused to allow avoidance of the lien, applying Florida law to the issue.\footnote{Id. at 307–08.} The Supreme Court reversed.\footnote{Id. at 314.}
The judgment creditor argued when Florida exemptions are used in a bankruptcy case by virtue of the opt-out provision, they must be used subject to all limitations imposed by Florida law.\(^{119}\) Therefore, the exemption the debtor would enjoy under Florida law was not impaired by the preexisting judgment lien, and § 522(f)(1) should not be available to avoid it.\(^{120}\)

The Supreme Court first concluded § 522(f) could certainly be used to avoid liens that impaired federal exemptions, even when there was no equity in the purportedly exempt property because of the lien at issue.\(^{121}\) The question was whether § 522(f) should be interpreted differently when the applicable exemptions were state-created rather than federal because of the opt-out clause.\(^{122}\) The Court noted § 522(f) begins with the language "[n]otwithstanding any waiver of exemptions," which it interpreted to mean that it was intended to override a waiver that would have been effective under state law.\(^{123}\) It continued,

> Just as it is not inconsistent with the policy of permitting state-defined exemptions to have another policy disfavoring waiver of exemptions, whether federal- or state-created; so also it is not inconsistent to have a policy disfavoring the impingement of certain types of liens upon exemptions, whether federal- or state-created. We have no basis for pronouncing the opt-out policy absolute, but must apply it along with whatever other competing or limiting policies the statute contains.\(^{124}\)

As a result, if the requirements of § 522(f)(1) were met, it would allow the avoidance of a lien despite its validity under state law.\(^{125}\)

The designation of the state whose exemptions are to apply to the recently departed debtor in § 522(b)(3) also represents a considered policy judgment of Congress. As was true in *Owen*, the opt-out provision can be given effect by using the substantive exemptions provided under state law, even while refusing

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\(^{119}\) *id.* at 309.

\(^{120}\) *Id.*

\(^{121}\) *Id.* at 312.

\(^{122}\) *Id.* at 313.

\(^{123}\) *Id.*

\(^{124}\) *Id.*

\(^{125}\) *Id.* at 314. On remand, the Eleventh Circuit concluded the debtor could not avoid the lien under § 522(f)(1) in any event because the judgment was recorded prior to the acquisition of the property by the debtor. As a result, the debtor never had a property interest in the homestead prior to the "fixing of the lien," which might be subject to avoidance under § 522(f)(1). *Owen v. Owen* (*In re Owen*), 961 F.2d 170, 171 (11th Cir. 1992).
to apply the state-created limitations on applicability of those exemptions because those limitations conflict with federal bankruptcy policy.\textsuperscript{126}

CONCLUSION

If Congress had wished to do so, it could have provided in the Code that debtors who moved from one state to another within a certain number of days of bankruptcy (730, for example), are confined to the federal exemptions provided by § 522(d), notwithstanding any decision on opt-out by the location of their prior domicile or their new domicile. Given our peripatetic population, perhaps such an approach would be one more small step towards uniform federal exemptions, which many scholars have supported,\textsuperscript{127} and which the National Bankruptcy Review Commission recommended in its 1997 Report.\textsuperscript{128}

But the Code does not so provide. Section 522(b)(2) explicitly gives effect to the decision of the state whose law it makes applicable to opt out of the federal scheme. That decision of a state to decline to authorize election of the federal exemptions is itself intended to be binding on those who are subject to the state’s exemption laws. A state has no interest, or indeed power, to decide whether someone who is \textit{not} subject to its exemption laws can elect to apply them. In § 522(b)(2), however, Congress made that state decision to opt out applicable to a debtor to whom the state itself would find the law inapplicable. There is no doubt about the power of Congress to do so under its constitutional authority to enact uniform bankruptcy laws.\textsuperscript{129}

Similarly, Congress has the power to make the substantive content of state exemptions applicable to debtors under circumstances where the state would decline contradictory to do so. That is precisely what § 522(b)(3)(A) was intended to do. It would be anomalous to read § 522(b)(2) to make applicable to the non-domiciliary the state law on opt-out while reading § 522(b)(3)(A) to


\textsuperscript{127} See supra note 39.

\textsuperscript{128} See supra note 40.

\textsuperscript{129} U.S. CONST. art. I., § 8, cl. 4.
permit the same state to make its exemption laws inapplicable to the non-domiciliary now confined to those exemptions. If this were the appropriate reading, any state could undercut the requirements of § 522(b)(3)(A) simply by providing explicitly in its exemption statutes that they apply only to residents or to property physically located in the state (as some states have done). If all states enacted such provisions, the debtor who moved within 730 days of bankruptcy would have no exemptions at all.

In response to this concern, Congress inserted a new provision in § 522(b)(3) in the 2005 amendments to that section. After listing the property subject to exemption in paragraphs (A) through (C), Congress inserted a new sentence that reads: "If the effect of the domiciliary requirement under subparagraph (A) is to render the debtor ineligible for any exemption, the

130 For example, among the states that limit their homestead exemptions to "residents" of, persons "domiciled" in, or "citizens" of the state are Alabama, ALA. CODE § 6-10-2 (2005); Arizona, ARIZ. REV. STAT. ANN. § 33-1101 (2005); Arkansas, ARK. CONST. art. 9 §§ 3-5 and ARK. CODE ANN. § 16-66-210 (2006); Indiana, IND. CODE § 34-55-10-2 (2005); Kentucky, KY. REV. STAT. ANN. § 427.060 (West 2005); Mississippi, MISS. CODE ANN. § 85-3-21, -23 (2005); Montana, MONT. CODE ANN. § 25-13-606, -615 (2005); North Carolina, N.C. CONST. art. X § 2 and N.C. GEN. STAT. § 1C-1601(a)(1) (2005); Ohio, OHIO REV. CODE ANN. § 2329.66(A)(1)(b) (West 2006); Oklahoma, OKLA. STAT. tit. 31, §§ 31-1(A)(1), 31-3 (2005); South Carolina, S.C. CODE ANN. § 15-41-30(1) (2004); South Dakota, S.D. CODIFIED LAWS ANN. § 43-31-1 (2006); Virginia, VA. CODE ANN. §§ 34-1, 34-4 (2005); Wisconsin, WIS. STAT. § 815.20 (2005); and Wyoming, WYO. STAT. ANN. 1-20-101 (2005). Other homestead exemptions explicitly cover only property within the state's geographic boundaries. See, e.g., HAW. REV. STAT. § 651-92(a) (2005); TEX. PROP. CODE ANN. § 41.002(d) (Vernon 2005); UTAH CODE ANN. § 78-23-3(2)(a) (2005). Some states also limit the applicability of their personal property exemptions to residents or domiciliaries. See, e.g., ALA. CODE § 6-10-5, -6; IND. CODE § 34-55-10-2; IOWA CODE ANN. § 627.6 (2005); KAN. STAT. ANN. § 60-2304 (2005); KY. REV. STAT. ANN. § 427.010(1); MONT. CODE ANN. § 25-13-606, -608, -609; NEB. REV. STAT. § 25-1552 (2006); N.M. STAT. ANN. § 42-10-10 (West 2005); N.C. CONST. art. X, § 1; N.C. GEN. STAT. § 1C-1601(a); N.D. CENT. CODE § 28-22-15(5) (2005); OHIO REV. CODE ANN. § 2329.66(A); OKLA. STAT. tit. 31, § 31-1(A); S.C. CODE ANN. § 15-41-30; TENN. CODE ANN. § 26-2-103, -104 (2005); VA. CODE ANN. §§ 31-4, 34-4, 34-26.

131 The issue was first raised by Dennis K. Burke, Acting Assistant Attorney General, Office of Legislative Affairs, Department of Justice, in a letter, dated April 19, 1999, to Representative Hyde of the Committee of the Judiciary. The letter provided comments on H.R. 833, which was then before the Committee for mark-up. Although endorsing the proposal in section 126 of the bill that would allow the debtor who had not been domiciled in a state for 730 days prior to filing to claim exemptions under the law of the state where the debtor was previously domiciled, Mr. Burke expressed the Department's concern that the provision might not be "effective." The letter continued:

Much of this will depend on how states limit their exemptions or permit individuals to claim exemptions. Without a full understanding of how state exemption laws are applied, unintended gaps will still arise under this proposal as debtors attempt to claim exemptions under the laws of another state in which they no longer reside or have property. It is unlikely, for example, that a Missouri debtor could claim the Texas homestead for the debtor's new Missouri residence—two years after the debtor has moved himself and his property from Texas—thus leaving the debtor with no homestead exemption to claim.

debtor may elect to exempt property that is specified under subsection (d)."132 But this "fix" was neither necessary nor sufficient.

The fix was unnecessary because, as discussed in Part III above, the language of § 522(b)(3)(A) should be read to incorporate the applicable state's exemptions without regard to any conflict of laws principles, or any limiting language, that restricts the applicability of the exemptions to persons not including the debtor. If § 522(b)(3)(A) were analyzed under traditional choice of law principles, its requirements would never render the debtor ineligible for the applicable state exemptions, and therefore the debtor would always have exemptions available.133 The new language should never be applicable.

The fix was insufficient because many states do not limit the availability of all their exemptions. Assume for purposes of this discussion that by including the new language Congress intended to indicate restrictive provisions in the applicable state law confining state exemptions to persons not including the debtor are to be given effect. Unless the restrictive provisions apply to every category of state exemption, the debtor will still be denied the benefit of the federal exemptions. For example, the state law may protect only homestead property within the boundaries of the state from execution while imposing no restriction on personal property exemptions. The restrictive language would preclude a nonresident from claiming a homestead exemption while permitting use of other state categories. If Congress intended in such circumstances to permit the debtor to elect the federal homestead exemption,134 the language included in § 522(b)(3) does not accomplish that result. So long as applicable

133 Again, this is a different analysis than would prevail under the Bankruptcy Act of 1898 in which Congress did not purport to "affect" existing state exemption law. See supra text accompanying note 21. Because Congress did not enact any exemptions as a matter of federal legislation in the Act, a debtor who was not entitled to exemptions under the applicable state law (or who had no U.S. domicile) could be denied exemptions completely. See, e.g., Bankruptcy Exemptions, supra note 30, at 1481–82; Countryman, supra note 28, at 696 n.118.
134 The homestead exemption certainly was the focus of the Department of Justice comments on the provision that gave rise to the new language. See supra note 131. It is possible Congress did not intend this result. The House Report describes the provision as follows, "If the effect of this provision [§ 522(b)(3)(A)] is to render the debtor ineligible for any exemption, the debtor may elect to exempt property of the kind described in the Federal exemption notwithstanding the state has opted out of the Federal exemption allowances." H.R. REP. NO. 109-31, pt. 1, at 72, as reprinted in 2005 U.S.C.C.A.N. 88, 140 (emphasis added). The italicized language suggests an item-by-item determination of whether a category of exemption is available to a debtor. If the category is not available, the language suggests the federal "exemption" (not "exemptions") could be used. The enacted law instead refers generally to property specified under § 522(d).
state law in the opt-out state permits the debtor any exemption, even if it denies the debtor others, the debtor is not allowed to elect federal exemptions.

The compromise of the opt-out in the Code represents to many a triumph of states' rights over creeping federalism. But the triumph is limited in scope. Congress did not decline to legislate with respect to exemptions, as it had under the Bankruptcy Act. Instead, Congress made state law exemptions applicable as a matter of federal law. Interpretation of that federal law, using general principles of choice of law, compels the conclusion that Congress deferred to the states with respect to the content of those exemptions, but not as to their applicability. When § 522(b)(3)(A) makes state exemptions applicable to a debtor who has moved from the designated state, the state can not say nay.