Bankruptcy Reform and the Constitution: Retroactive Application of Section 522(f)(2) Takes Private Property

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BANCRUPTCY REFORM AND THE
CONSTITUTION: RETROACTIVE
APPLICATION OF SECTION 522(f)(2)
"TAKES" PRIVATE PROPERTY

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Bankruptcy is premised in part on the desire to allow individuals to retain enough assets to begin life over. As part of this premise, Congress enacted section 522(f)(2) of the Bankruptcy Act of 1978. This provision allows debtors to avoid nonpossessory, nonpurchase money security interests in otherwise exempt property. This provision has created problems, however, as debtors have argued that it acts retroactively to void security interests created before the Act's enactment date. In Rodrock v. Security Industrial Bank, the Supreme Court will decide whether Congress intended such retroactive application to occur, and if it did, whether such action constitutes a "taking" under the fifth amendment. This article will argue that principles of statutory construction, as applied historically in bankruptcy cases, should result in a finding that Congress did not intend for retroactive application. Alternatively, the article will argue that application to security interests created prior to Nov. 6, 1978, violates the fifth amendment's prohibition of taking private property without just compensation.‡

I. INTRODUCTION

In 1978, the United States Congress overhauled the federal bankruptcy laws. As part of that recodification, Congress enacted section 522(f)(2)† of the Bankruptcy Act of 1978

‡ Ed.
† 11 U.S.C. § 522(f)(2) (Supp. III 1979). This section provides that:
   (f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the
(hereinafter referred to as the Act). The provision allows debtors to avoid nonpossessory, nonpurchase money security interests in otherwise exempt property. Along with section 522(f)(1), the legislation reflects Congress' desire to allow debtors to retain some property in order to make a new start in life.

Application of section 522(f)(2) has created problems, however, when the creditor obtained the nonpossessory, nonpurchase money security interest prior to November 6, 1978, the enactment date of the Act. The United States Supreme Court likely will decide the issue of retroactive application of section 522(f)(2) in the near future. Seven cases, consolidated in the lower court extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—

2) a nonpossessory, nonpurchase-money security interest in any—
(a) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;

A nonpossessory, nonpurchase-money security interest is created when a creditor provides a loan which is secured by property not obtained by use of the loan itself and not pledged to the creditor. Compare U.C.C. §§ 9-107, 9-305 (Anderson 1971).


For purposes of § 522(f) analysis, security interests and judicial liens may be placed in three categories. Those which came into being prior to Nov. 6, 1978, the Act's enactment date, may be referred to as "pre-enactment" interests. The term "gap liens" may be applied to interests created between Nov. 6, 1978, and Oct. 1, 1979, the Act's effective date. "Post-enactment" liens are those created after Oct. 1, 1979. This article deals only with the constitutionality of applying § 522(f)(2) to "pre-enactment" interests.

A recent decision has collected cases dealing with application of § 522(f)(2) at each stage of this time continuum. In re Morris, 12 Bankr. 321, 325 n.6 (Bankr. N.D. Ill 1981). In this well-researched opinion, the court detailed the evolution of bankruptcy law from medieval England to the present and examined the cases decided by the Supreme Court during the 1930s concerning the taking and due process questions presented by statutes which impaired property interests. The court concluded that application of § 522(f)(2) to interests created prior to the Act's enactment, between the enactment and effective dates, or after the effective date did not violate the Constitution, either as a taking of private property for public use without just compensation or as a violation of due process.

See also, Comment, 94 Harv. L. Rev. 1616 (1981).
decision of Rodrock v. Security Industrial Bank, are before the Court. Each challenges retroactive application of the statute on two premises. First, the finance companies and banks which brought the cases argue that Congress did not intend for 522(f)(2) to apply retroactively. Second, they claim that if Congress did intend for such application, such action constitutes a "taking" in violation of the fifth amendment.

In all seven cases consolidated in Rodrock, the debtors borrowed money prior to November 6, 1978, the date Congress approved the legislation, from local banks or finance companies. The lenders secured these loans with personal property of the debtors. The security interests were non-possessory and non-purchase money in nature. In the case of the Rodrock family, the collateral consisted of fifteen items of household furniture, including a color television set and a sewing machine with table valued at $580. In another case, furniture, kitchenware, a sewing machine and a movie projector valued at $540 were used to secure a loan. In both of these cases, the collateral for the loans represented every household item owned. The fact situations in the other five cases were similar to these.

After October 1, 1979, all seven families found themselves unable to pay their bills, and all filed bankruptcy petitions. They also claimed that the property used as collateral for their loans was exempt under section 522(f)(2); therefore, the creditors' liens on that property should be voided. In each case, the creditors moved to dismiss the debtor's complaint for lien avoidance on two grounds. First, the creditors argued that Congress had not intended section 522(f)(2) to be applied retroactively. Second, they claimed that retroactive application, if intended by Congress, was unconstitutional as a taking. The lower courts dismissed the debtors' complaints, although for differing reasons.

A bankruptcy judge in Kansas held that the Congress had not intended for section 522(f)(2) to apply to a security interest

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which came into being before the legislation's enactment date.\textsuperscript{7} Bankruptcy judges in Colorado ruled that Congress had intended retroactive applications, but that such action violated the fifth amendment.\textsuperscript{8} The United States Court of Appeals for the Tenth Circuit found that Congress had intended section 522(f)(2) to apply to security interests which vested prior to October 1, 1979, the effective date of the Reform Act.\textsuperscript{9}

If the Reform Act were applied only to those cases commenced after October 1, 1979, which involved security interests which came into existence after that date, there would be no bankruptcy law applicable to cases filed after October 1, 1979, but involving security interests which were fixed prior to October 1, 1979.\textsuperscript{10}

Relying heavily on the 1938 Supreme Court decision of \textit{Louisville Joint Stock Land Bank v. Radford},\textsuperscript{11} the court said that section 522(f)(2) could not constitutionally be applied to a creditor's security interest which came into being prior to the enactment date of the Reform Act. "In the instant cases, the creditors acquired rights in specific property prior to the enactment of the Reform Act, and, under Radford, these vested rights cannot be taken from the creditor for the benefit of the debtor."\textsuperscript{12}

As noted, the Rodrock cases pose both issues of statutory construction and of constitutional application. If the Supreme Court declines to apply section 522(f)(2) retroactively, then the creditors' constitutional challenge becomes moot. If the Court does find that Congress intended that the provision be applied retroactively, then the Court must reach the issue of the legislation's constitutionality.

This article will deal with each issue in turn, arguing first that traditional principles of statutory construction, especially

\textsuperscript{10} \textit{Id.} at 1196-97.
\textsuperscript{11} 295 U.S. 555 (1935).
\textsuperscript{12} 642 F.2d at 1197.
as they have been applied to bankruptcy statutes, require prospective application only. Should the Court find that Congress intended retroactive application, then the provision should be declared unconstitutional because such action destroys property rights created prior to enactment of the statute.

II. STATUTORY CONSTRUCTION

The Supreme Court may avoid the constitutional question in Rodrock by construing section 522(f)(2) as having prospective application only. Both the legislative history of the Bankruptcy Reform Act of 1978 and case law involving statutory construction of prior bankruptcy statutes support prospective application of section 522(f)(2).

The Bankruptcy Reform Act contains no express provision stating or necessarily implying that section 522(f)(2) voids security interests created prior to the enactment date of the Code. The law merely provides that “(e)xcept as otherwise provided in this title, this Act shall take effect on October 1, 1979.”

Thus, in determining the question of retroactive application, a court must consider the legislative history of the Act.

The legislative history does not suggest that Congress intended for section 522(f)(2) to apply retroactively. Rather, the legislative history reveals an awareness of the problems created by retroactive application and an intent to preserve the constitutionally protected interests of secured creditors. For example, with respect to a similar provision of the Act concerning exemptions, section 522(c), the House and Senate Judiciary Committee Reports state that: “(t)he bankruptcy discharge will not prevent enforcement of valid liens. The rule of Long v. Bullard, [citations omitted], is accepted with respect to the enforcement of valid liens on nonexempt property as well as on exempt property. Cf. Louisville Joint Stock Land Bank v. Radford [citation omitted].” This express “acceptance” of the enforceability of

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13 11 U.S.C. § 402(a). With certain administrative exceptions, cases commenced before Oct. 1, 1979, continue to be governed substantively and procedurally by the prior Bankruptcy Act. Id. at § 403(a-e).

14 Id. at § 522(c).

valid liens and the citation to Radford show Congress' concern for pre-existing rights.

In addition to this evidence of congressional intent, the Supreme Court should apply "the first rule of construction"—a statute should be presumed to apply prospectively only unless a contrary intent is "the unequivocal and inflexible import of its terms and the manifest intention of the legislature." Here, no "unequivocal and inflexible" expression of such intent exists. Rather, to the extent the legislative history reflects Congress' understanding regarding retroactive application, the evidence points in the opposite direction.

Judicial construction of amendments to the prior bankruptcy statute reinforces these general principles of construction and points toward prospective application. In various cases concerning amendments to the Bankruptcy Act of 1898, courts avoided impairment of vested property rights by applying the statutes prospectively. In each instance, courts declined to apply the amendments retroactively.

For example, in 1910, Congress gave a bankruptcy trustee essentially the same rights possessed by a lien creditor. In a challenge to the statute, the Court refused to apply the provision retroactively, thus avoiding the constitutional problem.17

We are of the opinion that the act should not be construed to impair it. We do not need to consider whether or how far in any event the constitutional power of Congress would have been limited. It is enough that the reasonable and usual interpretation of such statutes is to confine their effect, so far as may be, to property rights established after they were passed . . . The opposite construction would not simply extend a remedy, but would impute to the act of Congress an intent to take away rights lawfully retained, and unimpeachable at the moment when they took their start.18

18 Id. at 639-40.
During the Great Depression, Congress passed the Chandler Act as part of the country's economic recovery program. The legislation provided that a landlord's lien on a renter's personal property would have priority in bankruptcy proceedings only with respect to rent due "within three months before the date of bankruptcy." The question then arose as to the effect of the Act on a lien created more than three months prior to the legislation's effective date. The United States Court of Appeals for the Eighth Circuit held that the landlord's statutory lien for rent was a property right which had vested prior to the effective date of the Chandler Act. Therefore, retroactive application of the Act would destroy the lien on rent owed beyond the three-month cutoff period. To avoid declaring the act unconstitutional, the court stated that:

There is nothing contained in the Chandler Act to indicate that Congress intended that [it] should be construed retroactively; and in the absence of explicit language requiring such construction we are not disposed to so construe it, especially when to do so would result in depriving a citizen of a vested right. It is the general rule that a retrospective operation will not be given to a statute which interferes with antecedent rights, unless such be the unequivocal and inflexible import of its terms and the manifest intention of the legislature.

Consequently, the Eight Circuit applied the Act prospectively. Similar constructions have been given to statutes approved by Congress in 1952 and 1966. Use of this construction has avoided the necessity of declaring the statutes unconstitutional as a violation of the fifth amendment. This construction should be applied in Rodrock for the same reason.

III. RETROACTIVE APPLICATION OF SECTION 522(f)(2)

As noted above, the Supreme Court will reach the fifth amendment claim only if it decides that Congress intended section

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21 107 F.2d 721 (8th Cir. 1939).
22 Id. at 726 (emphasis added). See also, Miles Corp. v. Lindel, 107 F.2d 729 (8th Cir. 1939); In re Michael's Cafeteria, 52 F. Supp. 799 (E.D. La. 1943).
522(f)(2) to apply to security interests created prior to November 6, 1978, the enactment date of the Bankruptcy Reform Act of 1978. In that event, the Court's ruling in Louisville Joint Stock Land Bank v. Radford\(^\text{24}\) should control, and retroactive application to security interests created prior to the Act's enactment date should be declared unconstitutional.

A. *Louisville Joint Stock Land Bank v. Radford*

In 1934, Congress departed from a series of previous bankruptcy amendments which had been applied prospectively only and enacted the Frazier-Lemke Act.\(^\text{25}\) The Act was to apply retroactively and would impair vested security interests. In *Radford*, however, the Court ruled that such retroactive application constituted a taking of private property for public use without just compensation by impairing vested security interests.\(^\text{26}\)

*Radford* got its start in 1922 in Christian County, Kentucky, when William W. Radford, Sr. and his wife mortgaged their 170-acre farm to the Louisville Joint Stock Land Bank. The farm, then appraised at approximately $18,000, was mortgaged to secure loans totalling $9,000, with the debt to be repaid in installments over 34 years at six percent interest. As the years passed, the Radfords began to feel the economic pressures of the Great Depression. In 1931, they were unable to pay their property taxes. In 1932 and 1933, they failed to pay taxes or the installments on the principal and interest due on the loan. In 1933, the Radfords defaulted by failing to keep their covenant with the Louisville Joint Stock Land Bank to secure insurance on the buildings located on the farm. At this point, the bank stepped in and encouraged the Radfords to refinance their indebtedness under the recently enacted Emergency Farm Mortgage Act.\(^\text{27}\) When they refused to refinance, the bank declared the entire in-

\(^{24}\) 295 U.S. 555 (1935).


\(^{26}\) 295 U.S. 555. The fifth amendment provides in relevant part:

"No person . . . shall be . . . deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

\(^{27}\) Act of May 12, 1933, Pub. L. No. 73-101, 48 Stat. 31, 41.
debtedness immediately due and payable, and began foreclosure proceedings in June, 1933. The suit was stayed when Radford took steps to avail himself of section 75 of the Bankruptcy Act.28 He filed a petition in the District Court for the Western District of Kentucky for a composition29 of his debt. The petition was approved and a meeting of the creditors was held, but Radford failed to obtain acceptance of the required number of creditors as well as the amount of composition proposed. The bank then offered to accept a deed of the mortgaged property in full satisfaction of the indebtedness, and to assume the obligation to pay the unpaid taxes. When Radford refused to execute the deed, a Kentucky state court entered judgment ordering a foreclosure sale on June 30, 1934.

However, two days prior to the state court judgment, Congress had enacted the Frazier-Lemke Act.30 That Act provided that a farmer who failed to obtain the consent of the number of creditors requisite to a composition under section 75 could take alternative courses of action with respect to mortgaged property.

On August 6, 1934, and again on November 10, 1934, Radford filed amended petitions praying that he be adjudged a bankrupt, that his property, whether free or encumbered, be appraised, and that he have the relief provided for in the Frazier-Lemke Act.31

Under Frazier-Lemke, the bankrupt could, with the mortgagee's assent, purchase the property at its then appraised value and take title and immediate possession of the property. In exchange, the bankrupt had to agree to make deferred payments of the purchase price within specified time periods.32

Additionally, if the mortgagee refused to agree to the purchase arrangement the bankrupt could require the bankruptcy court to stay proceedings for a period of five years. The

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29 Composition is an agreement between a debtor and creditors in lieu of distribution of the debtor's property in bankruptcy.
31 Id.
32 The debtor had to pay 2.5 percent of the principal within two years, 2.5 percent within three years, 5 percent within four years, 5 percent within five years and the balance within six years. Id. at 1290.
bankrupt would then retain possession of the property, under the control of the court, if he paid a reasonable rent to be distributed among the secured and unsecured creditors. At any time within five years of the stay, the debtor could pay the court the appraised value of the property. The court then would turn over full possession and title of the property to the debtor, who could then apply for discharge of the indebtedness. This provision was to apply only to debts existing at the time the Act became effective.

In response to Radford's amended petition, the district court adjudged him a bankrupt within the meaning of the Frazier-Lemke Act, and appointed a Referee to commence proceedings under the Act. The Referee ordered an appraisal of Radford's property. The fair and reasonable value was found to be $4,445 in December, 1934.

The Louisville Joint Stock Land Bank refused to consent to the sale of the property to Radford for that price so the Referee ordered all proceedings on the mortgage stayed for a period of five years. The bank then brought an action asserting that the Frazier-Lemke Act, as applied, had taken from the bank without compensation, and given to Radford, rights in specific property of substantial value. The bank claimed that the Act was unconstitutional as a taking under the fifth amendment. Radford prevailed in the district court, and in the United States Court of Appeals for the Sixth Circuit, but the Supreme Court reversed. Mr. Justice Brandeis, writing for a unanimous Court, stated:

The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment. Under the bankruptcy power Congress may discharge the debtor's (pre-existing) personal obligation, because, unlike the States, it is not prohibited from impairing the obligation of contracts. [citation omitted]. But the effect of the Act here complained of is not the discharge of Radford's personal obligation. It is the taking of substantive rights in specific property acquired by the Bank prior to the Act.

35 Id. at 1289.
34 295 U.S. at 577.
36 Louisville Joint Stock Land Bank v. Radford, 74 F.2d 576 (6th Cir. 1935).
37 295 U.S. at 589-90.
Mr. Justice Brandeis noted that prior bankruptcy laws had affected creditors' remedies or created certain exemptions for unencumbered property. However, the Frazier-Lemke Act was unique in compelling the holder of a mortgage to surrender to the debtor both title and possession of the secured property, even though the debt remained unpaid. Thus, the Act reduced the creditor's property interest to the mere right to retain its lien until the bankrupt, sometime within the five-year period, chose to satisfy the debt by paying the appraised value of the farm. This, the Court held, worked a substantial impairment of the bank's vested property rights in violation of the fifth amendment.

The province of the Court is limited to deciding whether the Frazier-Lemke Act as applied has taken from the Bank without compensation, and given to Radford, rights in specific property which are of substantial value... As we conclude that the Act as applied has done so, we must hold it void. For the Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagees, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public.

A discussion of Radford would be incomplete without mention of Mr. Justice Cardozo's opinion in W. B. Worthen Co. v. Kavanaugh, decided shortly before Radford. In Worthen, the Supreme Court overturned Arkansas' legislation which retroactively diminished certain remedies available to holders of bonds issued by one of the state's municipal improvement districts. Noting that the legislation suspended the obligation to

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38 The fact that Congress had enacted the Frazier-Lemke Act to remedy what it saw as a serious substantive evil did not justify violating the fifth amendment. Id. at 601. Substantive property rights may not be invaded simply because the legislature would prefer to "promote the public's good rather than the private welfare of its (secured) creditors." United States Trust Co. v. New Jersey, 431 U.S. 1, 29 (1977). Consequently, the simple fact that section 522(f)(2) was designed to provide debtors with additional relief in bankruptcy does not eliminate the constitutional guarantees of the fifth amendment.

39 295 U.S. at 601-02.
40 295 U.S. 56 (1935).
pay principal and interest, and deprived the bondholders of their right to take possession of the mortgaged property during the term allowed for redemption, the Supreme Court found an unconstitutional taking.

With studied indifference to the interests of the mortgagee or to his appropriate protection they have taken from the mortgage the quality of an acceptable investment for a rational investor . . . So viewed they are seen to be an oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to collateral security.  

The applicability of Radford and Worthen to Rodrock is inescapable. The bankruptcy power of Congress is subject to the fifth amendment, and bankruptcy legislation which substantially impairs pre-existing security interests is unconstitutional as a taking. Retroactive application of section 522(f)(2) would effect an even more substantial impairment than those declared unconstitutional in Radford and Worthen. In Radford, Congress sought to prohibit the bank from foreclosing its mortgage for five years while the debtor retained title and possession. In Worthen, the Arkansas legislature sought to suspend temporarily the bondholders' right to interest, principal and possession. In contrast, retroactive application of section 522(f)(2) would completely and permanently destroy the creditor's security interest in specified property, a result so severe it was not even attempted by the legislation held unconstitutional in Radford and Worthen.

B. Radford Progeny

Courts and commentators have recognized the Radford decision as a seminal exposition of fundamental fifth amendment

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41 Id. at 60. See also the lower court's holding in W. B. Worthen Co. v. Delinquent Lands, 189 Ark. 723, 75 S.W.2d 62 (1934).
42 U.S. Const. art. 1, § 8, ch. 4.
43 An important distinction exists between an unconstitutional "taking" by destroying or substantially impairing a security interest in a debtor's property, and discharging an unsecured personal debt in bankruptcy, thereby impairing the obligation of a contract. Bankruptcy legislation may constitutionally discharge a debtor from his pre-existing personal obligations, Morse v. Hovey, 1 Barb. Ch. (N.Y.) 404 (1846), but a vested security interest in the debtor's property may not be destroyed or substantially impaired. Radford, 295 U.S. at 588-90. That the Congress may constitutionally impair contractual expectations does not alter the absolute prohibition exemplified by Radford and its progeny against taking or substantially impairing secured rights in property. See, e.g., the Gold Clause Cases, Perry v. United States, 294 U.S. 330 (1934); Norman v. Baltimore and Ohio R.R. Co., 294 U.S. 240 (1934); Legal Tender Cases, 79 U.S. (12 Wall) 457 (1870).
principles.\textsuperscript{44} The Supreme Court has repeatedly reaffirmed the vitality of the fifth amendment command that government may not take or substantially impair vested security interests held by creditors.\textsuperscript{45}

After the invalidation of the original Frazier-Lemke Act in \textit{Radford}, Congress amended the Act.\textsuperscript{46} In \textit{Wright v. Mountain Trust Bank},\textsuperscript{47} the Supreme Court reviewed the application of the amended Act to pre-existing security interests. Contrasting the amended Act with its predecessor, the Court noted that Congress had been careful in the latter legislation to ensure that a secured creditor’s lien would not be destroyed or substantially impaired.\textsuperscript{48} Thus, the amended Frazier-Lemke Act provided that existing liens were to remain in full force and effect, and that the properties covered by such liens were subject “to the payment of the claims of the secured creditors, as their interests may appear.”\textsuperscript{49} Moreover, the amended Frazier-Lemke Act’s three-year stay on mortgage foreclosures was inapplicable if the debtor was incapable of refinancing the property to satisfy the lien.\textsuperscript{50} Because the amended Frazier-Lemke Act preserved the secured creditor’s rights to retain his lien and to move against the collateral by judicial sale, it did not violate the fifth amendment principles set out in \textit{Radford}.

The legislation approved in \textit{Wright} operated on pre-existing liens in a wholly different fashion than would retroactive application of section 522(f)(2). The amended Frazier-Lemke Act preserved pre-existing security interests; retroactive application of section 522(f)(2) would permanently divest the creditor of that property interest. Thus, the amended Frazier-Lemke Act is an object lesson in how Congress can provide debtor relief without destroying or substantially impairing the value of creditors’ liens.\textsuperscript{51} Retroactive application of section 522(f)(2) does not achieve this balance.

\textsuperscript{47} 300 U.S. 440 (1937).
\textsuperscript{48} Id. at 457.
\textsuperscript{49} Id. at 458.
\textsuperscript{50} Id. at 461.
\textsuperscript{51} See also, \textit{Wright v. Union Central Life Ins. Co.}, 311 U.S. 273 (1940).
Following *Radford* and *Wright*, the United States Court of Appeals for the Eighth Circuit, in *Ginsberg v. Lindel*, found that the fifth amendment barred a construction of the Chandler Act of 1938 which would void a pre-existing landlord's lien for rent.\(^5^2\) Specifically finding that the Chandler Act would be unconstitutional if applied to pre-existing liens, the Court held:

Congress, in the exercise of the bankruptcy power, . . . may not take a property right from one creditor and transfer it without compensation to another without violating the Fifth Amendment. When the vested lien of the landlord is taken away by an order of the bankruptcy court and the property impressed with that lien is given to the general creditors of the bankrupt, the landlord is clearly deprived of a property right without just compensation. That is as true when the property right is a landlord's lien as when it is a mortgage.\(^5^3\)

In 1960 the Supreme Court again considered the question previously addressed in *Radford*, *Wright*, and *Ginsberg*. In *Armstrong v. United States*,\(^5^4\) the Court again held that the fifth amendment protected a vested security interest from retroactive destruction. Specifically, the Court ruled that items employed in the construction of a naval vessel could not be seized by the federal government where such seizure would destroy a materialman's pre-existing security interest in the items.\(^5^5\) In words which apply equally strongly to *Rodrock*, Mr. Justice Black declared:

> The total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking' and is not a mere 'consequential incidence' of a valid regulatory measure. Before the liens were destroyed, the lienholders admittedly had compensable property. Immediately afterwards, they had none. This was not because their property vanished into thin air. It was because the Government for its own advantage destroyed the value of the liens, something that the Government could do because its property was not subject to suit, but which no private purchaser could have done. Since this acquisition was for a public use, however accomplished, whether with an intent

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\(^{52}\) 107 F.2d 721 (8th Cir. 1939).

\(^{53}\) *Id.* at 726. See also, In re Chicago R.I. and R. Ry. Co., 90 F.2d 312, 314 (7th Cir. 1937).

\(^{54}\) 364 U.S. 40, 44-46 (1960).

\(^{55}\) *Id.* at 46-48.
or not, the Government's action did destroy them and in the circumstances of this case did thereby take the property value of those liens within the meaning of the Fifth Amendment.52

In 1977, the Supreme Court again reaffirmed the prohibition against impairing such property interests. The Court declared unconstitutional a statute which impaired a bondholder's interest in revenue originally pledged by the state as security for the bonds.57

Thus, in an unbroken succession of cases beginning with Radford, the federal courts have protected vested security interests such as those possessed by the banks and finance companies in Rodrock. These cases all support the lower courts' holding in Rodrock that section 522(f)(2) is unconstitutional if applied retroactively. As one court stated:

Radford stands for the proposition that a substantive right in specific property cannot be substantially impaired by legislation enacted after the right has been created without doing violence to the property owner's rights to due process. In this context, it is clear that secured creditor's rights are substantial.60

After reviewing the post-Radford cases and considering the United States' argument that Radford did not remain "good" law, the court further noted that "although Radford may be old, it is far from dead. Indeed, it stands as a venerable and vigorous sentinel of due process rights."59

IV. CONCLUSION

The issues in Rodrock are not difficult to solve. Retroactive application of section 522(f)(2) directly conflicts with long-settled

52 Id. at 48-49. There is no doubt that bankruptcy legislation such as section 522(f), which a debtor argues should be construed as retroactively impairing a lienholder's pre-existing property right, would be a taking for "public use" within the meaning of the Fifth Amendment. Regional Rail Reorganization Act Cases, 419 U.S. 102, 155 n.43 (1974). By seeking to provide relief to debtors, the Congress serves the "public interest." Personal Fin. Co. of Colorado v. Day, 126 F.2d 281, 282 (10th Cir. 1942). As noted above, however, this does not justify violating the Constitution.

57 Id. at 633. See also, In re Gifford, 50 U.S.L.W. 2454 (7th Cir. Feb. 9, 1982) (Radford remains valid law).
principles of statutory construction and constitutional law. A fundamental principle of statutory interpretation requires that courts avoid constructions which would even raise serious questions of constitutionality. Another such principle counsels that amendments to existing laws should be applied prospectively.60 Indeed, bankruptcy amendments have been interpreted uniformly to avoid retroactive impairment of vested rights. Nothing in the language of the present Act or section 522(f)(2) itself compels a different conclusion. Rather, what evidence exists manifests congressional awareness of this policy and an intent to respect it.

If Congress did intend for section 522(f)(2) to apply retroactively, it did so for presumably benign purposes. But as Mr. Justice Holmes warned more than 50 years ago, courts are "in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."61 This admonition is especially applicable to this case. The benign purposes of Congress can be achieved prospectively. Thus, the consistent counsel of past cases, such as Radford, should be heeded. Substantial impairment of vested property rights constitutes a "taking" prohibited by the fifth amendment.

Notions of property which cannot be taken without compensation are necessarily slippery and substantially arbitrary. Insofar as a change in law prospectively restricts what an individual will be allowed to have as property, the law may have its way without substantial objection. But when the rules are changed abruptly and then applied retroactively to destroy interests for the benefit of others receiving transactional benefits flowing from the interests to be destroyed, there is a degree of crassness that, at some point, must make a constitutional difference.62

60 "[I]t is presumed that provisions added by the amendment affecting substantive rights are intended to apply prospectively. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 22.36, at 200 (4th ed. (1972)); see also, id. at § 41.02.