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Symposium Issue: The Role of Equity in the Bankruptcy Court
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*227 COURTING EQUITY IN BANKRUPTCY

*228 I. INTRODUCTION

Are bankruptcy courts properly called courts of equity? Various justices of the Supreme Court seem to assume so,[1] but other judges and academics have asked this question in many different ways, with many different answers. ***229** [2] The point of this article is to question whether the question is well formed. That is, can it be answered without first knowing or agreeing on what a "court" is or what "equity" means? I think not. This article thus attempts to explore these protean concepts to achieve a better understanding of what is asked by the opening question.

Start first with bankruptcy. Congress vested bankruptcy jurisdiction in Article III district courts.[3] As "inferior courts" established by acts of Congress, district courts have the "judicial Power" as provided for in the Constitution.[4] This "power" includes equity powers.[5] It thus follows that, unless Congress removes or limits that power when conferring jurisdiction over statutory bankruptcy cases, district courts are courts of equity when it comes to the Code.[6] But that is trivial. District courts are courts of equity with respect to any federal statute that they apply.[7]

I will have more to say on what it means to be a court of equity with respect to a statutory area later, but for now, the focus is on whether the congressional permission for Article III courts to delegate bankruptcy matters to non-Article III bankruptcy judges alters the analysis. Put another way, a threshold question is whether Article III courts *may* designate bankruptcy judges as units of the district court and delegate to bankruptcy judges such equitable powers and discretion as may be necessary and appropriate for them to administer the bankruptcy laws to the same extent as the district courts.[8] Or, is such delegation unnecessary if a collection of bankruptcy ***230** judges is a legitimate court[9] that is automatically imbued with certain equitable powers and discretion, bounded by statute?

II. COURTS

To call a body a "court" is to infuse that body with a collection of powers that cohere with the usage of the word "court" in legal parlance.[10] Among these powers are the powers to compel testimony and to render independently enforceable decrees. Adding "of equity" to "court" generally is understood to imbue a court with different and somewhat more expansive powers than a "court of law" or a "statutory court." I explore this distinction below.

For purposes of this article, I assume that the phrase "court of equity" has two discrete components: one describes a "court," and the second is that the "court," so described, exercises powers of "equity." I explore these concepts separately.

A. STATUTORY POWERS OF COURTS

Courts have assumed that the bankruptcy power did not exist at common law and that bankruptcy remedies were creatures of statute.[11] Partial recognition ***231** of this status lies in the Constitution's allocation of the bankruptcy power to the legislature[12] and the power over common law and equity matters to the courts.[13]

The current system creates statutory bankruptcy rights and then vests the power to administer those rights in the existing Article III court system.[14] This vesting, however, comes with an option: Article III district courts can delegate all bankruptcy functions and duties to a separate system of bankruptcy judges.[15] Examining such delegation informs whether bankruptcy courts may exercise powers of a court of equity.

1. *District Courts and Bankruptcy*

Congress created an entire title of the United States Code to address bankruptcy. That title, title 11, is mostly freestanding and agnostic as to who or what body administers it. The directive designating who exercises the Code's power is found in title 28 of the United States Code, which concerns the judiciary. In title 28, Congress gave original and exclusive jurisdiction over bankruptcy cases to "the district courts."[16] The same section also grants to "the district courts" original but not exclusive jurisdiction over civil proceedings arising in, arising under, or related to cases under title 11.[17]

A "district court" is comprised of all of the district judges appointed to a particular district.[18] A "district judge" is someone nominated by the president and confirmed by the Senate for a particular judicial district[19] and who serves for life or during good behavior, whichever ends first.[20] A "district judge," as ***232** a congressionally established "inferior court" of the United States, is invested with the "judicial Power" of the United States.[21]

District courts undoubtedly are "courts." That means, for my purposes, that they have whatever jurisdiction Congress gives to them (in the case of bankruptcy, whatever jurisdiction flows from § 1334), plus whatever jurisdiction is inherent in their status as "courts."

Accordingly, Congress created a bankruptcy statute using its powers under the Constitution's bankruptcy clause and then vested jurisdiction over that statute in the district courts, which have the full "judicial Power [over] all Cases, in Law and Equity."[22] Because district courts are possessed of the "judicial Power," they possess the full power of equity with respect to matters, including bankruptcy, that come before them.

2. *District Courts and Referral of Delegated Jurisdiction*

By contrast, the same analysis does not apply to bankruptcy judges. The source of jurisdiction for bankruptcy judges is § 157(a) of title 28. It permits, but does not require, district courts to refer "to the bankruptcy *judges* for the district"--not the bankruptcy *court* for the district[23]-- all bankruptcy cases and "any or all proceedings arising under title 11 or arising in or related to a case under title 11."[24] According to the statute, the judges receiving this referral "shall constitute a unit of the

district court to be known as the bankruptcy court for that district."[25] The bankruptcy court thus receives, through ***233** the order of referral, all powers to decide bankruptcy cases and proceedings, in accordance with the statute and with local district court rules.

Thus, unless the equitable power is reserved in the district court's referral or withheld or withdrawn by the Constitution, a statute, or a court rule, the bankruptcy court presumptively receives all equitable powers over cases and proceedings referred as were possessed by the district court that referred them. As stated in § 152(b), "Bankruptcy judges shall serve as judicial officers of the United States district court established under Article III of the Constitution."

The text of § 157(a) leaves little doubt that Congress permitted district courts to delegate their entire bankruptcy jurisdiction and power to bankruptcy judges. Much doubt, however, exists about whether that delegation is permitted by the Constitution. Bankruptcy judges are not appointed under Article III and, thus, do not have the full "judicial Power" granted to district court judges under section 2 of Article III of the Constitution. Cases from *Northern Pipeline*[26] to *Stern*[27] to *Wellness International*[28] demonstrate the struggle over exactly what types of cases require decision by a judge holding the "judicial Power" and what cases can be referred to, and decided by, judges who do not wield that "judicial Power."

That debate has consumed much paper and ink (and electrons), and I do not wish to wade into it here. Congress unquestionably could create a court with jurisdiction over traditional equitable matters and choose not to give the judges of that court all of the protections of Article III.[29] Indeed, Congress created a bankruptcy statute using its powers under the Constitution's bankruptcy clause and then vested jurisdiction over that statute in the *district courts*, which have the full "judicial Power [over] all Cases, in Law and Equity." District courts possess equitable powers and have initial bankruptcy jurisdiction. These courts may, but are not compelled to, refer this power to the bankruptcy judges in their districts.

3. *Bankruptcy Courts as "Courts"*

Under the delegation permitted by § 157(a), bankruptcy judges can make final decisions on matters of *statutory* bankruptcy law (at least to the extent that the provision does not usurp or overlap a cognate common law or constitutional doctrine).[30] That is the essence of § 157(b)'s grant of the power to bankruptcy judges to "hear *and determine* all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11."[31] This ***234** power is supplemented by § 151:

> Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.[32]

So bankruptcy judges can make binding rulings on core matters[33] such as motions related to the automatic stay[34] or as to the scope and effect of the discharge,[35] i.e., matters alien to the common law but commonplace under the Code. These binding decisions are subject to appeal, not de novo review, so that factual findings made in connection with them, for example, are subject to the clearly erroneous standard of review.[36]

The powers granted to bankruptcy judges do not stop there. Congress realized that bankruptcy judges, in the exercise of their duties, would need to decide matters that were not statutory-- e.g., the amount owed to a debtor on a common-law contract[37] or the effect of disputes between two non-debtors that might affect other claims against the debtor.[38] Bankruptcy judges were given the power to "hear," but *not* determine, such matters under the ***235** so-called "related matter" jurisdiction.[39] Absent consent, the statutory norm is that matters related to a bankruptcy case may be the subject of a bankruptcy judge's report and recommendation to the district court, which the district court would then review de novo, even if the bankruptcy judge examined and resolved factual matters in reaching the recommendation.[40] After *Wellness International Network, Ltd. v. Sharif*,[41] however, many (if not most) of these related matters are heard and determined by consent of the parties so that appeal would be the proper method of review.[42]

In summary, bankruptcy judges have the power to finally determine some matters, even without the parties' consent. In addition, they have the power to compel testimony.[43] The combination of these two powers likely is sufficient to categorize them as a "court," with all the powers a court naturally holds.

B. "INHERENT" POWERS OF COURTS

Not everything a bankruptcy judge does is specified by statute. From ordinary aspects such as hours of operation, to everyday matters such as designating who may appear to represent clients, to the extraordinary power of contempt, many aspects of what bankruptcy judges do are not found in a jurisdictional statute.

For courts other than bankruptcy courts, the powers not specifically granted are often collectively referred to as "inherent" powers. Do bankruptcy judges have those powers?

1. *Inherent Powers of District Courts*

The Supreme Court addressed federal courts' "inherent power" to manage their dockets and enforce their orders in *Chambers v. NASCO, Inc*.[44] There, Chambers was the sole shareholder of a company involved in nasty contract litigation with NASCO.[45] During the litigation, Chambers misbehaved in numerous ways. He tried to deprive the court of jurisdiction by selling to a third party the property subject to the contract, defied a preliminary injunction directing him to allow NASCO to inspect corporate records, ***236** and with the help of his attorney, filed meritless motions and pleadings along with other delaying tactics.[46]

After losing an appeal in the initial litigation, Chambers found himself before the district court on remand to answer for his misdeeds.[47] Although the district court refused to impose sanctions under 28 U.S.C. § 1927 or Federal Rule of Civil Procedure 11, it did impose significant monetary sanctions under its inherent power for Chambers's bad faith conduct.[48] The district court awarded NASCO all of its attorneys' fees and costs, totaling close to one million dollars.[49]

The Supreme Court affirmed. In doing so, the Court relied on tradition and necessity to find some power for the court to perform its duties. The Court stated, "It has long been understood that '[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.'"[50] According to the Court, "These powers are 'governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'"[51]

What are these powers? Historically, they have included the power to regulate appearances before the court (including the power to deny, permanently or temporarily, the privilege of attorneys to appear before a court)[52] and the power of contempt.[53]

*237 2. *Inherent Powers of Bankruptcy Judges*

Do bankruptcy judges enjoy similar inherent powers? Since *Chambers*, the Supreme Court has toyed with the issue. In *Marrama v. Citizens Bank of Massachusetts*,[54] for example, the Court was faced with a chapter 7 debtor's arguable bad-faith attempt to convert his case to one under chapter 13, a conversion that would have allowed him to reclaim control of estate assets and arguably would have protected him from claims of prepetition fraudulent transfers. The debtor argued that the Code gave him the absolute right to convert.[55] After all, § 706(a) states that "[t]he [chapter 7] debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time,"[56] a right congressional history had characterized as "absolute."[57]

The *Marrama* majority rejected this view, relying primarily on the "abuse of process" language contained in § 105.

> [T]he broad authority granted to bankruptcy judges to take any action that is necessary or appropriate "to prevent an abuse of process" described in § 105(a) of the Code, is surely adequate to authorize an immediate denial of a motion to convert filed under § 706 in lieu of a conversion order that merely postpones the allowance of equivalent relief and may provide a debtor with an opportunity to take action prejudicial to creditors.[58]

But the Court hinted at an alternate holding based upon inherent authority. The argument was sparse but complete:

> ***238** Indeed, ... even if § 105(a) had not been enacted, the inherent power of every federal court to sanction "abusive litigation practices" might well provide an adequate justification for a prompt, rather than a delayed, ruling on an unmeritorious attempt to qualify as a debtor under Chapter 13.[59]

Such an observation, combined with its less-than-unequivocal "might well provide" qualification, left the issue unsettled.

The Court's reticence to declare inherent powers in bankruptcy judges resurfaced in *Law v. Siegel*,[60] a case in which a fraudulent debtor tried to hornswoggle the court and trustee into believing that the debtor's house was subject to bogus mortgages that made it uneconomic for the trustee to sell the property. After much wasteful litigation, Law's frustrated bankruptcy trustee sought to surcharge Law's homestead exemption to pay for his excessive and unjustified attempts to perpetuate fraud on the court. The lower courts agreed, but the Supreme Court granted *certiorari* and ruled in Law's favor, primarily on the basis that nothing in the Code permits a trustee to surcharge a state-law exemption.[61]

In its analysis, the Court seemed to flirt with declaring that bankruptcy judges have inherent powers. It twice referred to inherent powers of bankruptcy courts but each time qualified the bankruptcy court's possession of inherent powers with "may"--language indicating that the issue has not yet been decided.[62]

Despite the Court's dithering, many lower courts have found that bankruptcy courts have inherent powers similar to those held by district courts.[63] Some, however, have not. In particular, some Article III courts have questioned the accuracy of Congress's designation of the bankruptcy judges in a district as a "court." The decision in *In re Hipp*[64] is the most famous. There, the court stated: "[W]e are unsure even that today's bankruptcy courts are 'courts' in a generic sense not defined strictly by Article III .... In short, today's bankruptcy courts are arguably at least as much like magistrates or ***239** even administrative agencies as they are like other non-Article III courts."[65]

After *Stern*,[66] the Seventh Circuit Court of Appeals echoed this sentiment.[67] In *In re Ortiz*, Aurora, a medical health care provider, had filed over 3200 proofs of claim against Wisconsin-based debtors.[68] Each of these proofs of claim allegedly violated the medical privacy rights of the debtors under Wisconsin law. The bankruptcy judge found the filings to be clear violations of state law and entered summary judgment against Aurora, which appealed directly to the Seventh Circuit.[69]

The Seventh Circuit, however, dismissed for lack of jurisdiction.[70] It rested its dismissal on the fact that the case required application of Wisconsin law and that after *Stern*, such state-law claims could be decided only by a judge possessing the "judicial Power."[71] Because bankruptcy judges do not possess the "judicial Power," the bankruptcy judge's decision regarding Wisconsin law was not supported by the Constitution and was no more an order that could be appealed from than some jottings on a paper bag.[72]

When the alternate argument was made that the bankruptcy court had the inherent power to regulate its claims docket by sanctioning someone who filed proofs of claim that violated state law, the Seventh Circuit was unimpressed.

> Aurora argues that the debtors' claims are different than Vickie's counterclaim [in *Stern*] because the debtors' claims go to the heart of the bankruptcy judge's management of its Chapter 13 cases. Every court, it maintains, has authority to resolve disputes claiming that the way one party acted in the course of the court's proceedings

> violated another party's rights. Yet Aurora assumes that bankruptcy judges are akin to Article III judges by citing cases involving not *legislative* courts but *Article III* courts.[73]

Although the Seventh Circuit did not state so explicitly, the last sentence quoted above certainly leaves the impression that inherent powers of regular ***240** courts should not be assumed to inhere in "legislative" courts such as those comprised of bankruptcy judges.

More recently, the Ninth Circuit Court of Appeals faced the issue of whether a bankruptcy appellate panel was a "court established by Act of Congress."[74] In *In re Ozenne*, a majority held that it was not (and thus found that the BAP had no powers under the All Writs Act to deal with a mandamus issue).[75] The opinion was later neutered by an en banc opinion that evaded the issue by finding that jurisdiction did not exist even if the BAP was a court.[76] The initial opinion, however, was not "depublished," leaving its logic for another day.

These cases may well be outliers. As stated in *Collier on Bankruptcy*: "The majority of cases conclude that all courts, whether created pursuant to Article I or Article III of the Constitution, have inherent civil contempt power to enforce compliance with their lawful judicial orders, and no specific statute is required to invest a court with civil contempt power."[77] But, as shown by *Hipp*, *Ortiz* and *Ozenne*, doubt remains.

a) Section 105 and Contempt

The Bankruptcy Code, however, includes § 105, which states:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.[78]

Section 105's text would seem to grant to bankruptcy courts the powers generally bundled up and referred to as the inherent powers, including the contempt power.[79] Many courts have examined § 105 to find that it preserves ***241** (if you believe in inherent powers)[80] or grants (if you are a textualist) at least civil contempt power to bankruptcy courts.[81] Indeed, in *Taggart v. Lorenzen*,[82] the Court relied upon precedents grounded exclusively in equity practice in determining when contempt for violation of a statutory injunction was appropriate.[83]

Section 105, however, could be broader. For one thing, it does not expressly grant contempt powers to bankruptcy judges even though Congress did so for non-Article III magistrate judges. Section 636(e) of title 28 states that:

> (1) In general.--A United States magistrate judge serving under this chapter shall have within the territorial jurisdiction prescribed by the appointment of such magistrate judge ***242** the power to exercise contempt authority as set forth in this subsection.[84]

This statutory authority possessed by magistrate judges includes "the power to punish summarily by fine or imprisonment, or both, such contempt of the authority of such magistrate judge constituting misbehavior of any person in the magistrate judge's presence so as to obstruct the administration of justice,"[85] as well as the ability to "exercise the civil contempt authority of the district court."[86]

b) Scary Issues

Even if Congress had expressly given contempt powers to bankruptcy judges, a problem would remain: to what extent are contempt and other inherent powers essential and nonassignable components of the judicial Power of the United States? When viewed in this light, issues seemingly simple become maddeningly complex. Does a bankruptcy judge have the power to impose the broad range of penalties associated with the contempt power? In *Chowdhury v. Hansmeier*,[87] for example, the Minnesota bankruptcy judge had found parties in contempt for refusing to comply with post-judgment discovery and, after many hearings, imposed a daily fine for noncompliance, to be paid to the injured litigant. The bankruptcy court also ordered civil incarceration until compliance and prepared a report and recommendation for the district court judge to that effect.[88] The district court reversed the daily fine to the extent payable to a party (coercive fines, it noted, are payable only after certain findings are made, and then only into the court's registry).[89] This left for consideration the incarceration recommendation pertaining to the same conduct, which the district court found appropriate and for which it issued arrest warrants for the contemnors.[90]

This suggests that certain punitive sanctions, short of incarceration, might be permissible if specifically authorized in furtherance of the bankruptcy court's jurisdiction.[91] For example, may a bankruptcy judge impose a ***243** penalty that specifically is authorized by a text, such as Rule 9011? Does it matter if the penalty is authorized by text and relates to something that could only exist in bankruptcy? If a bankruptcy judge possesses inherent powers, are such powers limited if their exercise results in a penalty authorized only by common law and not by statute?

Finally--and this is the scary, elemental issue--does that part of the judicial Power that can be wielded only by Article III judges include the power to find facts that are entitled to deference by courts wielding the judicial Power? That is, can a bankruptcy judge find malign intent and have that factual finding reviewed by an Article III judge under a clear-error or clearly erroneous standard? Can such a finding be respected in another action involving common facts?[92] I leave these questions for another time because the simple designation of a collection of bankruptcy judges as a "bankruptcy court" does not answer these questions. Nor, as will next be seen, does applying the modifier "of equity" to the term "court."

C. SUMMARY OF THE POWERS OF A BANKRUPTCY JUDGE

Bankruptcy judges located in a particular district form a tribunal that Congress has designated as a court.[93] Congress gave Article III courts the power to delegate to these bankruptcy judges the jurisdiction and power to decide matters of bankruptcy, a subject alien to the common law. These bankruptcy matters include the application of the automatic stay to litigation, the power to confirm reorganization plans, and the vindication of the discharge. This delegation also includes the power to hear and determine most matters related to a bankruptcy proceeding, even if not specifically provided for by statute. In all these matters, bankruptcy courts can enter final orders, with their factual findings subject only to clearly erroneous review.

These collections of judges, these courts, possess not only the specifically delegated powers in title 28 but also inherent powers to run their tribunals. Much as the Supreme Court has found that Congress, a non-judicial body, has inherent powers to achieve its goals, bankruptcy courts have inherent powers to oversee their operations. These powers arise either from the courts' very existence as a body or tribunal charged with administering the ***244** bankruptcy laws or by district court referral, which is provided for and blessed by Congress.

In addition, congressionally delegated bodies have given to bankruptcy courts the power to manage discovery, to compel testimony, and to take evidence, all subject to the same rules that are applicable to district courts.

III. EQUITY

As noted, bankruptcy courts and their predecessors are often called "courts of equity." Much discussion has resulted from the addition of the words "of equity" to "courts."[94] One cause of the debate is that "equity" has neither a unique nor a standard definition. A good start on the many definitions of equity is Professor Samuel Bray's definition in *A Student's Guide to the Meanings of "Equity."*[95] In this short piece, Professor Bray sets out three variations of the definition of equity:

equity, n.

1. The recognition of an exception to a general rule.

2. A moral reading of the law.

3. The doctrines and remedies developed in the English courts of equity, especially the Court of Chancery.[96]

I will take these in reverse order to analyze whether bankruptcy courts are courts "of equity" as this definition describes.

A. EQUITY'S DOCTRINES AND REMEDIES

Professor Bray's third definition of "equity" looks to "doctrines and remedies developed in the English courts of equity, especially the Court of Chancery."[97] In this sense, bankruptcy courts indisputably are courts of equity as shown, for example, by the scope of the definition of property of the estate, by the definition of "claim," and by the claims resolution process.

At commencement of a case, an estate is created. So says § 541(a).[98] That ***245** estate, in turn, is comprised of "all legal *or equitable* interests of the debtor in property."[99] As a result, to the extent that the doctrines developed in equity create property rights,[100] § 541(a)(1) transfers those property rights into the bankruptcy estate. They then come within the exclusive jurisdiction of the bankruptcy court.[101]

Bankruptcy courts have jurisdiction not only over the debtor's equitable interests in property but also over equitable claims that may be asserted against the debtor and the estate created by § 541(a). The definition of "claim" under § 101(5) includes all "equitable" claims, and the discharges granted under the various chapters cover all "claims."[102]

Finally, Congress set up the claims resolution process to allow bankruptcy judges to apply equitable doctrines to defeat or reduce asserted claims, both in the allowance process[103] and otherwise.[104] Section 502(b)(1), for example, states that a bankruptcy judge may disallow a claim if "such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured."[105] One class of objections under nonbankruptcy law would be those objections a nonbankruptcy court, applying precedent from equity, could use to reject a claim or reduce its amount. Put another way, the broad phrasing of § 502(b)(1) gives a bankruptcy judge access to the same panoply of equitable reasons to disallow a claim as would be available to a state-court judge or a federal district judge.[106] This broad vesting of powers ***246** to decide claims on the same basis as under nonbankruptcy law thus vests bankruptcy judges with the powers of courts of equity, including invocation of such traditional equitable defenses as fraud, duress, and mistake.[107]

B. EQUITY'S MORAL READINGS

Professor Bray's second definition for equity--"[a] moral reading of the law"[108]--presumably means that a court, acting under this sense of "equity," has the power to create rights and remedies responsive to particular situations even though no legislation addresses it and no precedent supports it. The right or remedy created responds to a need to adjust rights or expectations so that relations or rights are just and fair.

Professor Bray's example dates to 17th Century England,[109] when an endorser of four notes paid the amount of the notes into court and then sought to enforce an oral indemnity to compel return of the funds because it was given to induce him to give the endorsements in the first place. The endorser could find neither a common-law right nor a statutory remedy to address his particular case; nonetheless, Lord Mansfield, speaking for King's Bench, held that "the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."[110]

The *Restatement (Third) of Restitution and Unjust Enrichment* describes the explanation of *Moses* as follows:

> ***247** Explaining restitution as the embodiment of natural justice and equity gives the subject an undoubted versatility, an adaptability to new situations, and (in the eyes of many observers) a special moral attractiveness. Restitution in this view is the aspect of our legal system that makes the most direct appeal to standards of equitable and conscientious behavior as a source of enforceable obligations.[111]

Although this justification legitimately is objectionable given its arbitrary nature,[112] in some circumstances, bankruptcy courts are asked to apply similar standards so that they can be considered courts of equity by Professor's Bray's second definition. Such circumstances include direct instructions from Congress for bankruptcy judges to reach equitable results.

1. *General Congressional Directives for Bankruptcy Courts to "Do Equity"*

Many provisions of the Bankruptcy Code grant to bankruptcy judges the equitable discretion to, more or less, "do the right thing." For example, Congress included directions in the Code to bankruptcy judges to make "equitable" divisions of estate and non-debtor assets in such diverse cases as those involving grain storage,[113] customer property in stockbroker liquidations,[114] excess partnership assets,[115] and community property.[116] Congress also conditioned the right to convert a case to chapter 12 on the conversion being "equitable."[117] Finally, the legislative history indicates that in fashioning adequate protection, an elemental concept in most bankruptcies, it was "expected that the courts will apply the concept [of adequate protection] in ***248** light of facts of each case and general equitable principles."[118] These are just a few of the instances of the direct grant of equitable powers in this second, moral, sense.[119]

2. *Extraordinary Grants of Powers to "Do Equity"*

As sweeping as these grants of equitable powers may be, Congress added at least three other legislative grants of power that arguably are more dramatic: the power to equitably subordinate claims; the power to eliminate a secured creditor's interest in proceeds; and the power to ignore finality in claims disputes.

a) Section 510(c) and Equitable Subordination

The most obvious example of this type of grant appears in § 510(c)(1). That section states that "the court may ... under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim."[120] Although this section allows bankruptcy courts to alter the order of distributions, it does not list or detail what these "principles of equitable subordination" are. The legislative history suggests that the section not only codified existing judge-made law[121] but also permitted courts, presumably courts sitting in bankruptcy, to continue to refine and shape these equitable principles.[122] Indeed, the legislative history describes § 510(c) as "recogniz[ing] the inherent equitable power of the court under current law, and the practice followed with respect to contractual provisions."[123]

***249** Equitable subordination, thus, has been used to subordinate otherwise legitimate insider claims when the insiders inadequately capitalized the debtor, or when debtors fraudulently dealt with creditors for the debtors' personal benefit.[124] Non-insider claims also have been subordinated when the non-insider has engaged in egregious conduct such as fraud, spoliation, or overreaching.[125]

b) Section 552(b) and the "Equities of the Case"

Professor Westbrook, in his contribution to the symposium of which this Article is a part, identifies the second type of legislative grant of equitable power.[126] Section 552(a) of the Code neuters the effect of after-acquiredproperty clauses[127] from and after the commencement of a bankruptcy case.[128] Section 552(b)(1),[129] however, provides an exception. If property of the estate is sold or otherwise disposed after commencement of the case, bankruptcy law will not disrupt or unsettle pre-bankruptcy law or agreements that extend a non-debtor's rights to any "proceeds, produces, offspring or profits" of the property sold.[130] In many cases, especially when a lender has ***250** a blanket security interest on all assets, a proceeds claim will be identical to an after-acquired-property claim, essentially writing § 552(a) out of the Code.

But Congress anticipated this result by including § 552(b)(1) as an exception to the proceeds exception. A bankruptcy court may ignore a valid statelaw-proceeds claim "to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise."[131] As Professor Westbrook exclaims, with his customary brio, "Holy Grant Gilmore!"[132] This provision allows a court to ignore or terminate state-law property rights to proceeds if the "equities of the case" dictate. As with equitable subordination, however, Congress never defined the "equities of the case."

The legislative history indicates that this "provision allows the court to consider the equities in each case. In the course of such consideration the court may evaluate any expenditures by the estate relating to proceeds and any related improvement in position of the secured party."[133] That's it. Courts have found that equities favor the estate whenever estate funds are used to augment or increase the value of property of the estate or to preclude a partially-secured creditor from improving its position at the expense of the estate when the estate has otherwise been used to increase value.[134]

***251 c) Section 502(j) and the "Equities of the Case"**

The third and last legislative grant affects the claims-resolution process, which is at the core of bankruptcy; it is the process by which creditors' entitlements to the bankruptcy estate are measured. As already argued,[135] by allowing bankruptcy courts to disallow claims that are "unenforceable against the debtor and property of the debtor, under any agreement or applicable law," Congress gave bankruptcy courts the ability to permit equitable defenses to asserted claims. But Congress went further. In § 502(j), Congress expanded the court's power to assess claims. Section 502(j) states in part: "A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case."[136]

With this language, Congress altered the rules of finality of decisions in bankruptcy. A claim once considered can be reconsidered, consistent with the "equities of the case," *even after* the original determination is final and not subject to appeal. As one court saw it, § 502(j) "permits a court to reconsider the allowance or disallowance of a claim even after a final order has been entered if cause is demonstrated by the moving party."[137] Indeed, in furtherance of this power, Rule 9024 explicitly excepts reconsideration of claims from the normal one-year rule found in Civil Rule 60(c).[138]

This provision underscores congressional intent to give bankruptcy courts the power to reach equitable results--that is, to determine a claimant's recovery rights "according to the equities of the case"--even if normal procedure would impair or prevent that result. By easing or eliminating rules on finality, § 502(j) can be viewed as giving bankruptcy courts greater powers than non-bankruptcy courts. The ability to alter creditor entitlements even after a seemingly final determinations demonstrates a significant grant of powers to mold results to fit the equities of the situation and reach an overall result that is equitable.[139]

***252 C. EQUITY'S EXCEPTIONS TO GENERAL RULES**

Professor Bray's first example of "equity"-- "[t]he recognition of an exception to a general rule"-- is probably the most common sense of equity applied to courts of equity. Equity in this sense is often heedlessly used to describe or justify deviation from the consequence of an accepted rule or standard when its application would be deemed unjust or unfair. In its best application, however, this sense of equity is a reflection of the notion that not all consequences of general rules can be anticipated, and when confronted with an unanticipated consequence, individual justice should trump the need to extend a brittle general rule.

This sense of equity is ancient. Aristotle observed that "the very nature of the equitable [is] a rectification of law where law falls short by reason of its universality."[140] In law, the "rectification" can manifest in many ways: clarifying an ambiguous statutory term, creating a new remedy for an acknowledged wrong,[141] or even developing a new right where none previously existed.[142] When a bankruptcy judge engages in any of these activities, the justification for the action ultimately taken is often that the bankruptcy court is acting as a "court of equity."

1. ***Discretion and Equity***

One common thread in such rectification activities is the exercise of discretion;[143] that is, the choosing between two or more choices that are each reasonable, lawful, and possible.[144] Such an exercise of discretion is the essence ***253** of this sense of equity.[145] In bankruptcy, this notion is complicated because as noted,[146] bankruptcy judges have certain powers to act, some of which are delegated by district courts and others of which are inherent. That power to act, however, does not provide the rules to apply.

2. ***Discretion Limited by the Source of Jurisdiction: The Boundaries Set by the Code***

In bankruptcy, those rules come from acts of Congress, such as title 11 and the jurisdictional provisions of title 28; however, as Aristotle noted, positive law often is less than complete. If equity exists to fill the gaps necessary to achieve the goals of positive law, then bankruptcy judges should have equity powers to achieve the goals of title 11 and related statutes. The idea is simple but not easy, given the broad reach of bankruptcy over every aspect of a debtor's financial life and the sometimes discordant provisions and goals of title 11.

But a bankruptcy judge's equity power to create exceptions to the general rules of title 11 rises or falls on the breadth of the corpus of text and rules to be applied. A bankruptcy judge-- indeed, even a judge invested with the "judicial Power"-- does not possess the power to issue orders contrary to express provisions of title 11. As stated by the Supreme Court, ***254** "[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code."[147] In § 105(a) of the Code, however, Congress permitted courts to enter orders in aid of their bankruptcy jurisdiction. This recursive incorporation of powers and jurisdiction beyond the Code's operative sections gives rise to questions of how far a bankruptcy court can go to achieve an "equitable" result.

The mediation between these two propositions thus far has been the province of statutory interpretation.[148] How far a court can go to reach a just or fair result in the absence of text prohibiting such a result is impacted by the scope of the test itself.

The Court's recent decision in *Law v. Siegel*[149] illustrates the issue. The debtor, Law, had fabricated a deed of trust on his house to preclude his chapter 7 trustee, Siegal, from selling the house and distributing to Law's creditors the sale proceeds exceeding Law's state homestead exemption. Siegal discovered the fabrication and avoided the fraudulent mortgage, but only after protracted litigation. The trustee, much aggrieved by the debtor's fraudulent actions, sought to surcharge Law's statutory homestead exemption. Section 522, which governs exemptions, contains no such deduction; nor does any other provision of the Bankruptcy Code. Still, the trustee argued that a surcharge was equitable and necessary to promote justice; after all, the trustee's fees to disentangle Law's lies reduced the return to other creditors. The lower courts approved the surcharge.

The Court disagreed and reversed the lower courts, seeing no room for equity-influenced exceptions to a detailed statutory scheme. As the Court stated: "The Code's meticulous--not to say mind-numbingly detailed--enumeration of exemptions and exceptions to those exemptions confirms that courts are not authorized to create additional exceptions."[150] In short, the Court was convinced that there were no gaps in coverage, no room to reach a "just" result because Congress presumably had thoroughly considered the issue. On this point, the Court was clear. Siegal had "suggest[ed] that [some lower court] decisions reflect[ed] a general, equitable power in bankruptcy courts to deny exemptions based on a debtor's bad-faith conduct. For the reasons we have given, the Bankruptcy Code admits no such power."

Law relied much on Congress's "meticulous" scheme to find no room for equity to create exceptions. But, simple schemes also can preclude individual exceptions. In *Popular Auto, Inc v. Reyes-Colon (In re Reyes-Colon),*[151] creditors ***255** had been long pursuing a slippery debtor and finally had commenced an involuntary petition against him. The problem was that only two creditors signed the involuntary petition (which claimed that there were fewer than 12 creditors[152]) and those petitioning creditors could not convince other parties to join. After many years of litigation over the issue, the bankruptcy court found that the debtor had more than 11 creditors, thus facially rendering the involuntary petition invalid.[153] The petitioning creditors, however, requested the court to create an exception for "special circumstances" so they could continue to prosecute their case.[154]

Relying on *Law,* the First Circuit denied the request:

> [T]he Supreme Court held that bankruptcy courts "may not contravene specific statutory provisions" when they exercise their statutory and inherent powers .... The Court acknowledged that its holding "may produce inequitable results for trustees and creditors in other cases," but recognized that Congress, in creating the Bankruptcy Code, "balanced the difficult choices that exemption limits impose on debtors with the economic harm that exemptions visit on creditors."
>
> ...
>
> ... [*Law*] forecloses employing equity to waive this plain statutory requirement.[155]

3. *The Range of Permissible Discretion and Equity*

Although the Code stands as a hard boundary on equitable discretion in bankruptcy, there remains space for a court legitimately to find exceptions to general rules.[156] Given the nature of equity and the breadth of bankruptcy, a detailed and definitive outline may not yet be possible, but areas for allowed exceptions can be sketched. In particular, equitable discretion can be exercised when necessary to correct errors caused by the court system itself, when courts and counsel work to achieve bankruptcy goals through methods and practices not explicitly provided in the Code, and even when new rights are necessary to achieve specific goals of the Code. I explore instances of each of these below.

*256 a) Obvious Uses of Equity to Create Exceptions: Correcting Court-Induced Errors

The most obvious exception that courts can make to general rules is when compliance with the rules is thwarted or precluded by mistakes or errors made by the court itself. For example, almost all courts permit exceptions to rules regarding claim filing deadlines if the late filing is due to an error of the court or the court clerk.[157] As stated by the Ninth Circuit, "The equitable power given to courts by 11 U.S.C. § 105(a) would be meaningless if courts were unable to correct their own mistakes."[158] In short, "bankruptcy courts may call upon principles of equity to shield unwitting parties and correct their own errors."[159]

b) Tolerable Uses of Equity to Create Exceptions: Fashioning Better Remedies for Existing Rights

Beyond correcting the court's own mistakes, the analysis becomes less uniform. Courts and counsel, however, have used equity's exceptions to fashion procedures and practices designed to implement the Code's implicit policies. In particular, many of these exceptions concern lawyers' fees.

In one sense, the self-interest of lawyers is no surprise. In another, however, good lawyering permits the bankruptcy system to operate more efficiently so that bankruptcy courts have an interest in ensuring that rigid rules do not preclude ethical and efficient lawyers from being paid for their services. Two practices are useful to examine: so-called "nunc pro tunc" approvals of employment and interim-fee orders in large chapter 11 cases.

Concerning employment, many courts provide that no lawyer may be paid from estate funds until his or her employment is approved by the court under § 327 of the Code. Literal application of this requirement, however, would result in the inundation of courts with first-day employment applications in cases of any size, and lawyers might not work on cases until those applications were approved. As a consequence, courts often retroactively approve employment applications at least to the date of their filing, if not to an ***257** earlier date when work commenced.[160] This exception to the general "no approval/no pay" rule has much to commend it and little to oppose it, especially if the application with request for relation-back is noticed to parties in interest. Thus, it is an exception that make sense.[161]

***258** The practice of discounted interim-fee awards without court approval in large chapter 11 cases is similar but not as uncontroversial. Firms representing the debtor and committees in large chapter 11 cases often incur monthly time and costs in the millions of dollars. Section 331 of the Code, however, generally requires that fee applications be limited to one every three months, although the provision expressly allows more frequent applications if the court approves, and under the Code, such compensation may be allowed and disbursed only after notice and hearing.[162]

This limitation, however, often works a hardship on bankruptcy lawyers. As a result, many courts will enter so-called "*Knudsen* orders," under which firms submit bills on a monthly basis to be paid at eighty to ninety percent of their face amount without court approval, subject to quarterly interim fee applications under which the "retainage" is approved and paid. In *U.S. Trustee v. Knudsen Corp. (In re Knudsen Corp.)*,[163] the court placed the following limitations on this practice:

> However, in the *rare* case where the court can make the following findings, a fee retainer procedure like the one here may be authorized:
>
> 1. The case is an unusually large one in which an exceptionally large amount of fees accrue each month;
>
> 2. The court is convinced that waiting an extended period for payment would place an undue hardship on counsel;
>
> 3. The court is satisfied that counsel can respond to any reassessment in one or more of the ways listed above;[164] ***259** and
>
> 4. The fee retainer procedure is, itself, the subject of a noticed hearing prior to any payment thereunder.[165]

Most notably, this procedure allows for payment to a professional without court approval. That feature has drawn criticism that the procedure is "illegal."[166] But, similar to the nunc pro tunc orders, the various means of ensuring that there is no discrepancy between what the court ultimately approves and what was paid--generally enforced through holdbacks of twenty to thirty percent--achieves the Code's goals of ensuring that all fees and expenses paid for by the estate are reasonable and necessary as required by § 330. The practice assumes that most professionals are honest and that not every penny need be accounted for before payment - assumptions that are not unreasonable and, most importantly, do not impair achievement of the goal of ensuring that fees and expenses paid are reasonable.

These, of course, are equitable concerns. The "rule," although not expressly stated, is that nothing gets paid until the court approves everything; however, that is impractical. If enforced strictly, the system would be less efficient and less able to meet the goal of reorganization though chapter 11. It is an example not of creating new rights, but of adapting implementation of existing rules to meet practical needs after consideration of the ultimate interests of all parties. It is designed to ensure that at the end of the process, the result is the same as if the rule were strictly followed. In short, it is an example of how equity modifies *remedies*--the fee approval process--in ways unspecified in the Code while at the same time leaving *rights*--that no professional is paid more than what is reasonable-- unimpaired.[167]

c) Debatable Uses of Equity to Create Exceptions: New Rights

Little support exists for creating new rights by way of equitable exceptions. As aptly and famously put by one court, § 105 and equity powers do not "authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission ***260** to do equity."[168]

It is tautological that rights, once created, are durable; they apply to all instances for which they were created with the intent that they will be fair or just. But rights tend to be universal--i.e., by definition, they cover all instances of a specified action or situation--and so are subject to the same objection and need for exceptions that Aristotle saw long ago.[169] A right created as an exception to a rule may itself require exceptions within that exception to yield fair and just results.

In bankruptcy, this inherent limitation operates within the larger limitation of the Code itself. As indicated, equity is restrained in bankruptcy by the Code's text and its implemented outcomes. A key example of this limitation has been the use of equitable subordination under § 510(c). As examined,[170] Congress has given courts the power to define the scope of subordination. This power, however, is not plenary. The Supreme Court said as much in *United States v. Noland*,[171] a case that indicated a restricted scope for § 510(c). In *Noland*, the lower courts had subordinated payment of an administrative claim-- a nonpecuniary, tax-loss penalty claim--which had arisen on conversion of the chapter 11 case to one under chapter 7.[172] The subordination was "equitable" in that the amount of the claim did not represent any loss to the governmental taxing authority and was a penalty designed with nonbankruptcy situations in mind. Further, every dollar paid to the tax collector was a dollar taken away from holders of prepetition claims.

As stated by the Sixth Circuit:

> ***261** The essence of bankruptcy is equity .... We do not see the fairness or the justice in permitting the Commissioner's claim for tax penalties, which are not being assessed because of pecuniary losses to the Internal Revenue Service, to enjoy an equal or higher priority with claims based on the extension of value to the debtor, whether secured or not. Further, assessing tax penalties against the estate of a debtor no longer in existence serves no punitive purpose .... To hold otherwise would be to allow creditors who have supported the business during its attempt to reorganize to be penalized once that effort has failed and there is not enough to go around. Furthermore, to hold otherwise could result in rewarding the debtor-in-possession, the party who failed to pay the taxes on time, to the detriment of the creditors.[173]

The Supreme Court reversed, explaining:

> The answer turns on Congress's probable intent to preserve the distinction between the relative levels of generality at which trial courts and legislatures respectively function in the normal course .... But if the provision also authorized a court to conclude on a general, categorical level that tax penalties should not be treated as administrative expenses to be paid first, it would empower a court to modify the operation of the priority statute at the same level at which Congress operated when it made its characteristically general judgment to establish the hierarchy of claims in the first place. That is, the distinction between characteristic legislative and trial court functions would simply be swept away, and the statute would delegate legislative revision, not authorize equitable exception. We find such a reading improbable in the extreme.[174]

In short, the Court held that a judge cannot alter a legislature's judgment on the relative fairness of a statutory priority scheme.[175]

***262** Nonetheless, can a court alter or adjust a right so long as it does not alter the scheme? The issue has arisen in so-called "equitable disallowance" or "recharacterization" of claims, when insiders denominate funds transferred to a debtor as "debt" rather than as equity. Such recharacterization allows insiders to argue that as creditors, they should be able to share pro rata with other creditors on insolvency. Other creditors, who had no say in the initial characterization, object, which raises traditional notions of equity holders' risks and rewards.

Some courts have found a federal source for the disallowance of such insider claims based on "equity." Others have denied that any federal right could exist, reasoning that § 502 contains no such grounds for disallowance and that any alteration of a nonbankruptcy right automatically alters the distribution scheme Congress drafted.

Based on the Court's reasoning in *Noland,* no such manner of disallowance should be permitted. But that may be a brittle application. In *Whither Recharacterization*,[176] Dean Lawrence Ponoroff dismantles this argument. First, it may very well be that equitable recharacterization is a recognized doctrine under nonbankruptcy law used by nonbankruptcy courts to reduce or eliminate claims to an insolvent's res.[177] That would nestle with Congress's grant of equitable powers to courts in § 502(b)(1).[178] Also, one could argue that "no-fault" equitable subordination was an anticipated and permitted extension of the law when § 510(c) was enacted in 1978.[179] This would also be consistent with congressional efforts to bestow particular types of equitable discretion in discrete cases.[180]

The general conclusion is that no maxim is without exception, which again draws on Aristotle's ancient observation of equity's essence.[181] The intricate and labyrinthian construction of the Code--with its outright grants of equitable power in § 502(b)(1) and its incorporation of the power to protect jurisdiction in § 105--provides legitimate grounds for many practices and procedures not explicitly set out in the Code's text. These legitimate avenues of authorization ought not to be overlooked.

IV. CONCLUSION

Is a bankruptcy court a court of equity? In my opinion, no crisp, clear ***263** answer exists.[182] The bankruptcy judges in any district form a court. As I have argued, it is a court with inherent powers in addition to the statutory powers granted by Congress. These inherent powers cover matters from the mundane to the profound, from setting the hours of operation to jailing parties in civil contempt.

The bankruptcy court is also a court that has various equitable powers: it decides claims against the estate using equitable principles; it is granted the power to decide various matters using equitable principles; and it often creates practices and procedures unanticipated by the text of the Code, but which efficiently implement the Code's policies. At all times, however, a court's exercise of equity powers in bankruptcy cases is limited by the text of the Code.

Many of these limitations, however, are not unique to bankruptcy courts. The Code itself exerts limits on Article III judges and justices, judicial officers who are possessed of the full "judicial Power" of the United States. Because bankruptcy courts' jurisdiction and powers under the Code are wholly derivative on the bankruptcy power vested in the district courts, it follows that limitations on district courts also are limitation on bankruptcy courts.

Is there something a district court could do in a bankruptcy case under its general equitable powers that a bankruptcy court could not? The clear answer is yes, and the line of cases from *Stern* to the present focus on the necessity of possessing the judicial Power to decide certain types of disputes. Beyond that very significant limitation (and any specific limitation on referral of cases from district courts), however, bankruptcy courts possess equitable powers parallel to those held by district courts. Bankruptcy courts, thus, can shape their dockets, run their courtrooms, and fashion remedies to the same extent as any other court. In the end, bankruptcy courts are courts with equitable powers.

Footnotes

a1 Professor of Bankruptcy Law and Practice, Northwestern Pritzker School of Law. Thanks are due to Professor James Pfander and Judge Whitman Holt for their comments, which saved many, many errors, and to Melissa Sanchez for her research assistance. Special thanks are due to the other "witnesses"-- Professors Laura Coordes, Diane Lourdes Dick, and Jay Lawrence Westbrook--and the "senators"--Professors Melissa Jacoby and Kenneth N. Klee, and Richard Levin--who gave papers and public comments at the *American Bankruptcy Law Journal's* symposium on *Equitable Powers of the Bankruptcy Court 40 Years After the Enactment of the Bankruptcy Code*. The symposium took place on October 31, 2019, and was part of the 2019 Meeting of the National Conference of Bankruptcy Judges. All errors that remain, of course, are mine alone.

1 Young v. United States, 535 U.S. 43, 49-50 (2002) (Scalia, J.) ("[B]ankruptcy courts ... are courts of equity and 'appl[y] the principles and rules of equity jurisprudence.'" (quoting Pepper v. Litton, 308 U.S. 295, 304 (1939) (Douglas, J.))); United States v. Noland, 517 U.S. 535, 539 (1996) (Souter, J.) ("[T]he bankruptcy court ... is a court of equity ....") (citation omitted); United States v. Energy Res. Co., Inc., 495 U.S. 545, 549 (1990) (White, J.) ("These statutory directives are consistent with the traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships."); Granfinanciera v. Nordberg, 492 U.S. 33, 57 (1989) (Brennan, J.) ("'[[B]ankruptcy] courts are essentially courts of equity ....'" (quoting Katchen v. Landy, 382 U.S. 323, 327 (1966) (White, J.))); Norwest Bank Worthington, v. Ahlers, 485 U.S. 197, 206 (1988) (White, J.) ("[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code.").
Such characterizations were also made in cases involving jurisdictional statutes related to bankruptcy enacted before the passage of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984). *See, e.g.*, Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Prot., 474 U.S. 494, 514-15 (1986) (Rhenquist, J., dissenting) ("While the Bankruptcy Court is a court of equity, the Bankruptcy Code 'does not authorize freewheeling consideration of every conceivable equity.'" (quotation omitted)); N.L.R.B. v. Bildisco & Bildisco, 465 U.S. 513, 527 (1984) (Rehnquist, J.) ("The Bankruptcy Court is a court of equity, and in making this determination it is in a very real sense balancing the equities, as the Court of Appeals suggested."); *Katchen*, 382 U.S. at 327; Young v. Higbee Co., 324 U.S. 204, 214 (1945) (Black, J.) ("Courts of bankruptcy are courts of equity and exercise all equitable powers unless prohibited by the Bankruptcy Act."); Prudence Realization Corp. v. Geist, 316 U.S. 89, 95 (1942) (Stone, J.) ("The court of bankruptcy is a court of equity to which the judicial administration of the bankrupt's estate is committed ...."); SEC v. U.S. Realty & Improvement Co., 310 U.S. 434, 455 (1940) (Stone, J.) ("A bankruptcy court is a court of equity ... and is guided by equitable doctrines and principles except in so far as they are inconsistent with the Act."); *Pepper*, 308 U.S. 304; Taylor v. Standard Gas & Elec. Co., 306 U.S. 307, 323 (1939)

(Roberts, J.) ("[T]he [bankruptcy] court, in approving a plan, was authorized and required, as a court of equity, to recognize the rights and the status of the preferred stockholders ...."); Wayne United Gas Co. v. Owens-Ill. Glass Co., 300 U.S. 131, 136 (1937) (Roberts, J.) ("It is true the bankruptcy court applies the doctrines of equity ...."); Cont'l Ill. Nat'l Bank & Trust Co. v. Chi., Rock Island & Pac. Ry. Co., 294 U.S. 648, 675 (1935) (Sutherland, J.) ("[C]ourts of bankruptcy are invested 'with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings.' They are essentially courts of equity, and their proceedings inherently proceedings in equity ...." (citation omitted)); Local Loan Co. v. Hunt, 292 U.S. 234, 240-41 (1934) (Sutherland, J.) ("[C]ourts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity."); Bardes v. First Nat'l Bank of Hawarden, 178 U.S. 524, 535 (1900) (Gray, J.) ("Proceedings in bankruptcy generally are in the nature of proceedings in equity ...."); *Ex parte* City Bank of New Orleans, 44 U.S. 292, 311-13 (1845) (Story, J.) (discussing the equity powers of the district court, sitting in bankruptcy).

2 I do not write on a blank slate. Some of the key articles in this discourse are Randolph J. Haines, *The Conservative Assault on Federal Equity*, 88 AM. BANKR. L.J. 451 (2014); Alan M. Ahart, *A Stern Reminder that the Bankruptcy Court is Not a Court of Equity*, 86 AM. BANKR. L.J 191 (2012); Michael D. Sousa, *Equitable Powers of a Bankruptcy Court: Federal All Writs Act and § 105 of the Code*, AM. BANKR. INST. J., July/Aug. 2006, at 28; Adam J. Levitin, *Toward A Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime*, 80 AM. BANKR. L.J. 1 (2006); Alan M. Ahart, *The Limited Scope of Implied Powers of a Bankruptcy Judge: A Statutory Court of Bankruptcy, Not a Court of Equity*, 79 AM. BANKR. L.J. 1 (2005); Steve H. Nickles & David G. Epstein, *Another Way of Thinking About Section 105(a) and Other Sources of Supplemental Law Under the Bankruptcy Code*, 3 CHAP. L. REV. 7 (2000); Marcia S. Krieger, *''The Bankruptcy Court is a Court of Equity'': What Does That Mean?*, 50 S.C. L. REV. 275 (1999). All but two of these articles were written by judges or former judges.

3 28 U.S.C. § 1334(a) (2018).

4 "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST., art. III, § 1.

5 "The judicial Power shall extend to all Cases, in Law *and Equity*, arising under this Constitution, [and] the Laws of the United States ...." U.S. CONST., art. III, § 2 (emphasis added).

6 In this article, I use "Code" to refer to the Bankruptcy Code as found in title 11 of the United States Code.

7 Professor Coordes reviews this aspect of equity with respect to other non-Article III tribunals. Laura N. Coordes, *Narrowing Equity in Bankruptcy*, 94 AM. BANKR. L.J. 303, 319-22 (2020).

8 I do not mean to address the thorny issues of what types of cases require determination by a court with the judicial Power. Put another way, the focus of this article is not on the limits that *Stern v. Marshall*, 564 U.S. 462 (2011), places on bankruptcy judges. Rather, I am interested in whether Congress has permissibly created bankruptcy courts, as we know them, in such a way that they are "courts" capable of receiving a grant of equitable powers from Article III courts.

9 In this sense, I am using a bankruptcy "court" as a collective noun to describe a collection of bankruptcy judges, just

as a "murder" of crows describes a collection of crows. *See infra* notes 23-25 and accompanying text.

10 As noted by Professor James Pfander, the Constitution speaks generally of "courts" and sparingly of "tribunals." James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 650-51 (2004). To address many of the problems noted in this article, Professor Pfander would distinguish between Article III courts and Article I tribunals. Professor Pfander argues that adopting such a distinction would
suggest[ ] that Congress enjoys a degree of flexibility in creating Article I tribunals. On such a reading, the Inferior Tribunals Clause may empower Congress to create inferior "tribunals" with judges who lack Article III protections. While these tribunals must remain inferior to the Supreme Court and the judicial department, Article I does not require that they employ life-tenured judges and Article III does not formally invest these tribunals with the judicial power of the United States.
Id. at 650-51.

11 *See, e.g., In re* Elmira Steel Co., 109 F. 456, 476 (N.D.N.Y. 1901) ("The provisions of the bankrupt act, which are in derogation of the common law, under which, by proceedings in invitum, parties are against their consent deprived of rights, must in their interest be construed strictly, and, as so construed, closely followed."); Stuart v. Hines, 33 Iowa 60, 70 (1871) ("The act being summary in its nature, and in derogation of the common law, must receive a strict construction, and cannot be enlarged so as to include cases not provided for."). This view has never been embraced explicitly by the United States Supreme Court. Indeed, under the leadership of Justice William O. Douglas, the Court permitted bankruptcy courts to exercise many non-standard remedies not specifically authorized by statute. Justice Douglas' bankruptcy jurisprudence essentially assumed that bankruptcy courts had full equity powers to fashion remedies appropriate to the harm discovered. *See, e.g.*, Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215, 219 (1941) (permitting bankruptcy court to consolidate non-debtor's assets to prevent fraud, stating that "[t]he power of the bankruptcy court to subordinate claims or to adjudicate equities arising out of the relationship between the several creditors is complete."); Pepper v. Litton, 308 U.S. 295, 304 (1939) (Court permits bankruptcy court to subordinate distribution to insider who asserted claim as part of fraudulent scheme against the corporation, stating that "this Court has held that, for many purposes, 'courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity.'") (quoting Local Loan Co. v. Hunt, 292 U. S. 234, 240 (1934)). Of course, these cases were decided when the congressional grant of jurisdiction invested courts "with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings." Bankruptcy Act of 1898, ch. 541, § 2, 30 Stat. 544, 545 (1898), amended by Chandler Act, ch. 575, 52 Stat. 840 (1938). The Bankruptcy Act was repealed by the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.

12 U.S. CONST., art. I, § 8, cl. 4.

13 U.S. CONST., art. III, § 2.

14 Congress could - and at least once, in 1800 (Act of Apr. 4, 1800, ch. 19, 2 Stat. 19 (repealed 1803)), did - create a bankruptcy system that is primarily administrative, with enforcement of completed administrative decisions left to the courts. *See* Ralph Brubaker, *Article III's Bleak House (Part I): The Statutory Limits of Bankruptcy Judges' Core Jurisdiction*, 31 No. 8 BANKR. L. LETTER 1 at n.39 (Aug. 2011).

15 28 U.S.C. § 157(a) (2018).

16 28 U.S.C. § 1334(a) (2018).

17 28 U.S.C. § 1334(b) (2018).

18 28 U.S.C. § 132(b) (2018) ("Each district court shall consist of the district judge or judges for the district in regular active service.").

19 28 U.S.C. § 133 (2018).

20 "The Judges, both of the supreme and inferior courts, shall hold their Offices during good Behaviour ...." U.S. CONST., art. III, § 1. The compensation of a district judge cannot be reduced during service; the Constitution states that an Article III judge's compensation "shall not be diminished during their Continuance in Office." U.S. CONST., art. III, § 1.

21 "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST., art. III, § 1; *see also* 28 U.S.C. § 132(c) (2018) ("[T]he judicial power of a district court with respect to any action, suit or proceeding may be exercised by a single judge, who may preside alone and hold a regular or special session of court at the same time other sessions are held by other judges.").

22 U.S. CONST., art. III, § 2

23 28 U.S.C. § 157(a) (2018) (emphasis added). The operative term in the statute is "bankruptcy judge." Section 151 of title 28 states: "In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district." 28 U.S.C. § 151 (2018). This statute uses "bankruptcy court" as a collective noun for the collection of all bankruptcy judges in a district; that is, the presumption is that a bankruptcy court describes a collection of judges (excepting one-judge districts such as Montana and Hawaii) who have their official duty station in a particular judicial district. As a result, a pedant would say that the statement "I appeared before the bankruptcy court today" is a grammatical error unless all bankruptcy judges in that district were somehow sitting en banc or unless that bankruptcy judge had the power to commit and bind all bankruptcy judges in that district.

24 28 U.S.C. § 157(a) (2018); *see also* Schulman v. Cal. Water Res. Control Bd. (*In re* Lazar), 200 B.R. 358, 366 (Bankr. C.D. Cal. 1996) (recognizing that each district court is authorized to adopt a general order of reference for bankruptcy cases); *cf.* Walls v. Wells Fargo Bank, N.A., 255 B.R. 38 (E.D. Cal. 2000) (exercising discretion not to refer claims involving the FDCPA that might require jury trial).

25 28 U.S.C. § 151 (2018).

26 N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

27 Stern v. Marshall, 564 U.S. 462 (2011).

28 Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665 (2015).

29 I argue that this is what Congress likely has done in 11 U.S.C. § 502(b)(1). *See infra* Section III.A.

30 *E.g.*, Granfinanciera v. Nordberg, 492 U.S. 33, 39-49 (1989).

31 28 U.S.C. § 157(b) (2018) (emphasis added). Matters arise *under* title 11 if a proceeding seeks relief available only under a substantive Code provision (e.g., a preference action under § 547). Bethlahmy, IRA v. Kuhlman (*In re* ACI-HDT Supply Co.), 205 B.R. 231, 234 (B.A.P. 9th Cir. 1997); Ehrlich v. Am. Express Travel Related Servs. Co. (*In re* Guilmette), 202 B.R. 9, 12 (Bankr. N.D.N.Y. 1996); Artra Group, Inc. v. Salomon Bros. Holding Co. (*In re* Emerald Acquisition Corp.), 170 B.R. 632, 640 (Bankr. N.D. Ill. 1994). Matters arise *in* a case if the proceeding involves the administration and structuring of the estate (e.g., an attorney fee application; an order confirming plan; a borrowing order) that would not exist but for the bankruptcy case. *See* Wood v. Wood (*In re* Wood), 825 F.2d 90, 97 (5th Cir. 1987); Dall v. Bank One, Chic., N.A. (*In re* Dally), 202 B.R. 724, 727 (Bankr. N.D. Ill. 1996).

32 28 U.S.C. § 151 (2018).

33 Congress specified core matters in 28 U.S.C. § 157(b)(2)(A)-(P). The Supreme Court, however, has determined that this list is overbroad to the extent, for example, that a compulsory counterclaim to an action brought by the estate is a claim that can be decided only by a court possessing the judicial power of the United States. Stern v. Marshall, 564 U.S. 462 (2011).

34 *See, e.g.*, Ritzen Grp., Inc. v. Jackson Masonry, LLC, 140 S. Ct. 582, 592 (2020) ("[A]djudication of the motion for relief from the automatic stay ... is 'final."').

35 *See, e.g.*, Taggart v. Lorenzen, 139 S. Ct. 1795, 1799 (2019) ("[C]ivil contempt [for violation of the bankruptcy court's discharge order] may be appropriate if there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful.").

36 Under Federal Rule of Bankruptcy Procedure 7052, as supplemented by Federal Rule of Bankruptcy Procedure 9014(c), all factual findings in adversary proceedings and contested matters are subject to Federal Rule of Civil Procedure 52, which in turn, states, "Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." FED. R. CIV. P. 52(a)(6).

37 *See, e.g.* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

38 These might "include a suit by the beneficiary of a supersedeas bond purchased by the debtor against the bonding

company, suits by creditors against guarantors, a contribution action between the debtor's codefendants, a suit alleging fraud against a defendant that had been indemnified by a debtor and a suit by creditors of the debtor against defendants that allegedly perpetrated a fraud." 1 COLLIER ON BANKRUPTCY ¶ 3.01[3][e][ii][B] (Richard Levin & Henry J. Sommer eds., 16th ed. 2020) (footnotes omitted).

39 28 U.S.C. § 157(c)(1) (2018).

40 *Id.*; *see also* FED. R. BANKR. P. 9033.

41 575 U.S. 665 (2015).

42 Indeed, this outcome is anticipated by the statute, which provides that "the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear *and determine* ...." 28 U.S.C. § 157(c)(2) (2018) (emphasis added).

43 *See* FED. R. BANKR. P. 9016 (incorporating the subpoena powers of Federal Rule of Civil Procedure 45).

44 501 U.S. 32 (1991).

45 *Id*. at 35.

46 *Id*. at 36-39.

47 *Id*. at 40.

48 *Id*. at 41-42. Rule 11 could not be used because Chambers had not signed any documents. Because § 1927 only applies to attorneys, it also was unavailable.

49 *Id*. at 40.

50 *Id*. at 43 (alteration in original) (quoting United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812)).

51 *Id*. (quoting Link v. Wabash R.R. Co., 370 U.S. 626, 630-31 (1962)).

52 As Chief Justice Marshall stated in *Ex parte* Burr, 22 U.S. (9 Wheat.) 529 (1824):
[T]he profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him. On the other, it is extremely desirable that the respectability of the bar should be maintained, and that its harmony with the bench

should be preserved. For these objects, some controlling power, some discretion ought to reside in the Court ....
....
... The power is one which ought to be exercised with great caution, *but which is, we think, incidental to all Courts*, and is necessary for the preservation of decorum, and for the respectability of the profession.
Id. at 530-31 (emphasis added).

53 As Justice Field stated in *Ex parte* Robinson, 86 U.S. (19 Wall) 505, 510 (1873):
The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.
In *United States v. Hudson and Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812), the Court held that inherent powers, under the name of contempt, did not extend to crimes that were not specified by statute or recognized at common law. Nonetheless, the Court stated:
Certain implied powers must necessarily result to our Courts of justice from the nature of their institution .... To fine for contempt--imprison for contumacy--inforce [*sic*] the observance of order, &c. are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others: and so far our Courts no doubt possess powers not immediately derived from statute ....
Id.

54 549 U.S. 365 (2007).

55 *Id*. at 370.

56 *Id*. at 371 (quoting 11 U.S.C. § 706(a)).

57 Section 706(a) "gives the debtor the one-time absolute right of conversion of a liquidation case to a reorganization or individual repayment plan case." S. REP. NO. 95-989, at 94 (1978); *see also* H.R. REP. NO. 95-595, at 380 (1977) (using nearly identical language).

58 *Marrama*, 549 U.S. at 375.

59 *Id*. at 375-76 (citing Roadway Express, Inc. v. Piper, 447 U.S. 752, 765 (1980)).

60 571 U.S. 415 (2014).

61 *See id*. at 420-23.

62 *Cf. id*. at 421 (stating that the bankruptcy court "*may* also possess 'inherent power ... to sanction 'abusive litigation practices.'" (alteration in original) (emphasis added)), 427 ("The court *may* also possess further sanctioning authority under either § 105(a) or its inherent powers." (emphasis added)).

63 *See, e.g.*, Gowdy v. Mitchell (*In re* Ocean Warrior, Inc.), 835 F.3d 1310, 1316 (11th Cir. 2016) ("Civil contempt power is inherent in bankruptcy courts since all courts have authority to enforce compliance with their lawful orders." (citation omitted)); Mapother & Mapother, P.S.C. v. Cooper (*In re* Downs), 103 F.3d 472, 477 (6th Cir. 1996) ("Bankruptcy courts, like Article III courts, enjoy inherent power to sanction parties for improper conduct." (citing *In re* Rainbow Magazine, Inc., 77 F.3d 278, 284-84 (9th Cir. 1996))).

64 Griffith v. Oles (*In re* Hipp, Inc.), 895 F.2d 1503 (5th Cir. 1990).

65 *Id*. 1514-15; *see also* Laura B. Bartell, *Contempt of the Bankruptcy Court--A New Look*, 1996 U. ILL. L. REV. 1.

66 Stern v. Marshall, 564 U.S. 462 (2011).

67 Ortiz v. Aurora Health Care, Inc. (*In re* Ortiz), 665 F.3d 906 (7th Cir. 2011).

68 *Id*. at 908.

69 *Id*. at 909-10.

70 *Id*. at 915.

71 *Id*. at 914 ("*Stern v. Marshall* makes plain that the bankruptcy judge in our cases 'exercised the "judicial Power of the United States" in purporting to resolve and enter final judgment on' the debtors' Wisconsin state-law claims. *Stern*, 564 U.S. at 2611. We thus hold that the bankruptcy judge lacked authority under Article III to enter final judgments on the disclosure claims").

72 *See id*. at 913-14.

73 *Id*. at 913.

74 Ozenne v. Chase Manhattan Bank (*In re* Ozenne), 818 F.3d 514, 516 (9th Cir.), *rev'd en banc*, 841 F.3d 810 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 1589 (2017).

75 *Id*. at 515-16.

76 Ozenne v. Chase Manhattan Bank (*In re* Ozenne), 841 F.3d 810 (9th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 1589 (2017).

77 2 COLLIER ON BANKRUPTCY ¶ 105.02[1][a] (Richard Levin & Henry J. Sommer eds., 16th ed. 2020). As recently stated by the Eleventh Circuit: "Accordingly, any court--bankruptcy court included--has inherent powers to punish contempt against it, as a means of protecting itself as an institution." Green Point Credit, LLC v. McLean (*In re* McLean), 794 F.3d 1313, 1319 (11th Cir. 2015).

78 11 U.S.C. § 105(a) (2018).

79 *See, e.g.*, Alderwoods Grp., Inc. v. Garcia, 682 F.3d 958, 967 n.18 (11th Cir. 2012) ("Civil contempt power is inherent in bankruptcy courts since all courts have authority to enforce compliance with their lawful orders." (citation omitted)); Joubert v. ABN AMRO Mortg. Grp., Inc. (*In re* Joubert), 411 F.3d 452, 455 (3d Cir. 2005) (stating that § 105 provides bankruptcy courts with a contempt remedy); Jones v. Bank of Santa Fe (*In re* Courtesy Inns, Ltd., Inc.), 40 F.3d 1084, 1089, 32 C.B.C.2d 498, 506 (10th Cir. 1994) ("We believe, and hold, that § 105 intended to imbue the bankruptcy courts with the inherent power recognized by the Supreme Court in *Chambers* [*v. NASCO, Inc.*, 501 U.S. 32 (1991)]."); Mapother & Mapother, P.S.C. v. Cooper (*In re* Downs), 103 F.3d 472, 477 (6th Cir. 1996) ("Bankruptcy courts, like Article III courts, enjoy inherent power to sanction parties for improper conduct.").

80 The inherent powers of federal courts are those which "are necessary to the exercise of all others." United States v. Hudson, 7 Cranch 32, 34, 3 L. Ed. 259 (1812). The most prominent of these is the contempt sanction, "which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the court. Roadway Exp., Inc. v. Piper, 447 U.S. 752, 764 (1980) (quoting Cooke v. United States, 267 U.S. 517, 539 (1925)).

81 *See, e.g.*, Alderwoods Grp., Inc. v. Garcia, 682 F.3d 958, 967 n.18 (11th Cir. 2012) ("Civil contempt power is inherent in bankruptcy courts since all courts have authority to enforce compliance with their lawful orders.") (citation omitted); Price v. Lehtinen (*In re* Lehtinen), 564 F.3d 1052, 1058 (9th Cir. 2009); Joubert v. ABN Mortg. Group, Inc. (*In re* Joubert), 411 F.3d 452, 455 (3d Cir. 2005) (stating that § 105 provides bankruptcy courts with a contempt remedy); Jones v. Bank of Santa Fe (*In re* Courtesy Inns, Ltd., Inc.), 40 F.3d 1084, 1089 (10th Cir. 1994) ("We believe, and hold, that § 105 intended to imbue the bankruptcy courts with the inherent power recognized by the Supreme Court in [Chambers v. NASCO, Inc., 501 U.S. 32 (1991)]."); *In re* Downs, 103 F.3d at 477 ("Bankruptcy courts, like Article III courts, enjoy inherent power to sanction parties for improper conduct."). The Ninth Circuit seems to find power to impose punitive penalties so long as they are not "serious." Knupfer v. Lindblade (*In re* Dyer), 322 F.3d 1178, 1193 (9th Cir. 2003) ("Although 'relatively mild' non-compensatory fines may be necessary under some circumstances, the language of § 105(a) simply does not allow for the serious punitive penalties here assessed (a minimum of $50,000 and, under the trustee's theory, over $200,000). As we did in [*F.J. Hanshaw Enterprises, Inc. v. Emerald River Development, Inc.*, 244 F.3d 1128 (9th Cir. 2001)], we leave for another day the development of a precise definition of the term 'serious' punitive (criminal) sanctions." (citations omitted)). Some academics have even posited that § 105 justifies criminal contempt power. *See, e.g.*, John A. E. Pottow & Jason S. Levin, *Rethinking Criminal Contempt in the Bankruptcy Courts*, 91 AM. BANKR. L.J. 311 (2017).

82 139 S. Ct. 1795 (2019).

83 As the Court put it:
[T]he statutes specifying that a discharge order "operates as an injunction," § 524(a)(2), and that a court may issue any "order" or "judgment" that is "necessary or appropriate" to "carry out" other bankruptcy provisions, § 105(a), bring with them the "old soil" that has long governed how courts enforce injunctions.

Id. at 1801.

84 28 U.S.C. § 636(e)(1) (2018).

85 28 U.S.C. § 636(e)(2) (2018). Significantly, the criminal contempt power is limited by paragraph (5) which states, "The sentence imposed by a magistrate judge for any criminal contempt provided for in paragraphs (2) and (3) shall not exceed the penalties for a Class C misdemeanor as set forth in sections 3581(b)(8) and 3571(b)(6) of title 18." 28 U.S.C. § 636(e)(5) (2018).

86 28 U.S.C. § 636(e)(4) (2018).

87 Nos. 18-cv-3403, 19-cv-0156 (WMW), 2019 WL 1857111, at *1 (D. Minn., April 25, 2019).

88 *Id*. at *5.

89 *Id*. at *4.

90 *Id*. at *6-7.

91 *See, e.g.*, Bessette v. Avco Fin. Servs., 230 F.3d 439, 445 (1st Cir. 2000) (noting that "bankruptcy courts across the country have appropriately used their statutory contempt power to order monetary relief, in the form of actual damages, attorney fees, and punitive damages" for violations of § 524); *In re* Perviz, 302 B.R. 357, 372 (Bankr. N.D. Ohio 2003) ("[B]ankruptcy courts have the inherent power to punish parties for their contemptuous violation of the discharge injunction through the imposition of punitive damages."); Vazquez v. Sears, Roebuck & Co. (*In re* Vazquez), 221 B.R. 222, 227, 232 (Bankr. N.D. Ill. 1998) (awarding punitive damages pursuant to § 105).

92 A bankruptcy judge, for example, could find a debt nondischargeable for fraud but not liquidate the claim. One of the elements of fraud typically is injury. Would a state court in a later action in which the amount was at issue have to give issue-preclusive effect to the bankruptcy court's finding that there was injury? Or a bankruptcy court could find that a home's value fit within a homestead exception--what would be the issue-preclusive effect of that finding of value on state taxing agencies who had notice of the proceeding?

93 28 U.S.C. § 151 (2018).

94 For a discussion of "courts," see *supra* Section II.A.

95 Samuel L. Bray, *A Student's Guide to the Meanings of Equity*, OSF (July 20, 2016), https://osf.io/9vrjx/ (last visited June 7, 2020) (reposted by Eugene Volokh, THE VOLOKH CONSPIRACY (July 21, 2016, 4:54 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/07/21/a-studentsguide-to-the-meanings-of-equity

/).

96 *Id*. at 1.

97 *Id*.

98 11 U.S.C. § 541(a)(1) (2018) states:
(a) The commencement of a case ... creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

99 *Id*. (emphasis added).

100 An exception lies in § 541(d), which excludes any equitable interest in property from passing into the estate if the debtor held only legal title without also possessing the equitable interest in the property to which the debtor held title. 11 U.S.C. § 541(d) (2018).

101 28 U.S.C. § 1334(e)(1) (2018) (providing that the district court has exclusive jurisdiction "of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate"). This assumes, of course, that the district court has referred (and can refer) its jurisdiction over such property to the bankruptcy court under the referral authorization contained in 28 U.S.C. § 157(a). *See supra* Section II.A.2.

102 11 U.S.C. §§ 727(b) (2018) (providing that "a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case"); 1141(d)(1)(A) (2018) (providing that "the confirmation of a plan--(A) discharges the debtor from any debt that arose before the date of such confirmation"); 1228(a) (2018) (providing that "after completion by the debtor of all payments under the plan, ... the court shall grant the debtor a discharge of all debts provided for by the plan, allowed under section 503 of this title, or disallowed under section 502 of this title"); 1328(a) (2018) (providing that "as soon as practicable after completion by the debtor of all payments under the plan, ... the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title"). Section 101(12) defines "debt" as "liability on a claim." 11 U.S.C. § 101(12) (2018).

103 11 U.S.C. § 502(b)(1) (2018).

104 11 U.S.C. § 558 (2018).

105 11 U.S.C. § 502(b)(1) (2018).

106 A likely argument exists that, in some cases, only a court with the "judicial Power of the United States" could hear or determine such equitable claims. That argument, separate from whether a jury should hear such claims, raises the issue of the effect of a disallowance on nonbankruptcy proceedings. If a bankruptcy judge is merely determining who shares in property of the estate, that would seem to be within the bankruptcy power allocated to Congress. If, however, there are effects outside of bankruptcy, such as issue or claim preclusion against third parties, significant questions are raised. *See* United States v. Raddatz, 447 U.S. 667, 682-84 (1980) (upholding use of a magistrate as an adjunct to the district court); Crowell v. Benson, 285 U.S. 22, 50-51 (1932) (upholding use of an administrative agency fact-finder as an adjunct to the district court). *See generally* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 77 (1982) (plurality) (referring to *Crowell* and *Raddatz* as "cases in which we approved the use of administrative agencies and magistrates as adjuncts to Art. III courts"). Also see Justice Thomas' musing in *Wellness International Network, Ltd. v. Sharif*:

If the judges should sit to hear ... controversies [beyond their cognizance], they would not sit as a court; at the most they would be arbitrators only, and their ... decision could not be binding as a judgment, but only as an award.

135 S. Ct. 1932, 1968 (2015) (Thomas, J., dissenting) (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 399 (1868)).

107 *See* 4 COLLIER ON BANKRUPTCY ¶ 502.03[2][b] (Richard Levin & Henry J. Sommer eds., 16th ed. 2020).

108 Bray, *supra* note 95, at 1.

109 Moses v. MacFerlan, (1760) 97 Eng. Rep. 676 (KB), *cited in* Bray, *supra* note 95, at 3.

110 *Id*. at 681, *quoted in* Bray, *supra* note 95, at 3.

111 RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. b (2011).

112 *Id*. ("In numerous cases natural justice and equity do not in fact provide an adequate guide to decision, and would not do so even if their essential requirements could be treated as self-evident.").

113 11 U.S.C. § 557(d)(2)(D) (2018).

114 11 U.S.C. §§ 752(a) (2018). The Senate Report indicated that "[i]t is anticipated that the court will apportion such administrative claims on an equitable basis between the general estate and the customer property of the debtor." S. REP. 95-989, at 103 (1978); *see also* 11 U.S.C. §766(h) (2018), for which the House Report indicated that "Section 767(a) [enacted as § 766(h)] provides for the trustee to distribute customer property pro rata according to customers' net equity claims. The court will determine an equitable portion of customer property to pay administrative expenses." H.R. REP. NO. 95-595, at 392 (1977).

115 11 U.S.C. § 723(d) (2018). The Senate Report stated that "Subsection (d) provides for the case where the total recovery from all of the bankrupt general partners is greater than the deficiency of which the trustee sought recovery. This case would most likely occur for a partnership with a large number of general partners. If the situation arises, the

court is required to determine an equitable redistribution of the surplus to the estate of the general partners." S. REP. 95-989, at 95 (1978).

116 11 U.S.C. § 726(c) (2018).

117 11 U.S.C. § 1112(d) (2018). Indeed, initially Congress drafted the list of "causes" for a motion to dismiss or convert to be non-exhaustive, and open to equitable additions. "This list is not exhaustive. The court will be able to consider other factors as they arise, and to use its equitable powers to reach an appropriate result in individual cases." S. REP. 95-989, at 117 (1978); H.R. REP. NO. 95-595, at 406 (1977).

118 H.R. REP. NO. 95-595, at 339 (1977).

119 Another example might be 11 U.S.C. § 523(d) (2018), under which a court may assess attorneys' fees and costs against a creditor who unsuccessfully seeks to declare a debt nondischarageable unless "special circumstances would make the award unjust." As originally enacted, the statute read "clearly inequitable" instead of "unjust;" the legislative history gives no reason for the change.
I do not include § 1129(b)(1)'s requirement that a cramdown plan be "fair and equitable" as to a dissenting class. 11 U.S.C. § 1129(b)(1) (2018). The history of the statute indicates that Congress first required nonconsensual plans to be "fair" and only added "and equitable" several years later as part of an effort to construct a statute that would mirror judicial decisions of that time. *See* Bruce A. Markell, *Fair Equivalents and Market Prices: Bankruptcy Cramdown Interest Rates*, 33 EMORY BANKR. DEV. J. 91, 96 (2016).

120 11 U.S.C. § 510(c) (2018).

121 H.R. REP. NO. 95-595, at 359 (1977) (citing Pepper v. Litton, 308 U.S. 295 (1939); Taylor v. Standard Gas & Elec. Co., 306 U.S. 307 (1938)).

122 124 CONG. REC. 32,398 (1978) (statement of Rep. Edwards), 33,998 (statement of Sen. DeConcini). In lieu of a Conference Report, members of Congress read virtually identical statements into both the House and Senate records on the bill that became current title 11. 124 CONG. REC. 32,391 (1978) (statement of Rep. Rousselot) (noting that this procedure imbued such remarks with "the effect of being a conference report"). The Supreme Court has agreed with this characterization. *See* Begier v. IRS, 496 U.S. 53, 64 n.5 (1990) ("Because of the absence of a conference and the key roles played by Representative Edwards and his counterpart floor manager Senator DeConcini, we have treated their floor statements on the Bankruptcy Reform Act of 1978 as persuasive evidence of congressional intent.").

123 H.R. REP. NO. 95-595, at 396 (1977).

124 4 COLLIER ON BANKRUPTCY ¶ 510.05[3][e] (Richard Levin & Henry J. Sommer eds., 16th ed. 2020).

125 *Id*. ¶ 510.05[4].

126 Jay Lawrence Westbrook, *Equity in Bankruptcy Courts: Public Priorities*, 94 AM. BANKR. L.J. 203, 224 (2020).

127 After-acquired property clauses allow a secured party's security interest to attach to property acquired by the debtor after the debtor authenticates a security agreement, meaning that the attachment becomes automatic if the newly-acquired property meets the specifications of the security agreement. Such clauses are specifically validated by Article 9. U.C.C. § 9-204(a) (AM. LAW INS. & UNIF. LAW COMM'N 2010).

128 Section 552(a) states that "property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case." 11 U.S.C. § 552(a) (2018).

129 Section 552(b)(1) provides:
[I]f the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds, products, offspring, or profits of such property, then such security interest extends to such proceeds, products, offspring, or profits acquired by the estate after the commencement of the case to the extent provided by such security agreement and by applicable nonbankruptcy law, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.
11 U.S.C. § 552(b)(1) (2018). Section 552(b)(2) is drafted similarly and applies to real property rents. 11 U.S.C. § 552(b)(2) (2018).

130 Under Article 9, "proceeds" is an extremely expansive concept, *see* U.C.C. § 9-102(a)(64) (AM. LAW INS. & UNIF. LAW COMM'N 2010), including "whatever is acquired upon the sale, lease, license, exchange, or other disposition of collateral." *Id*. In addition, Article 9 provides for automatic attachment of a security interest to proceeds, U.C.C. § 9-203(f) (AM. LAW INS. & UNIF. LAW COMM'N 2010), a relatively expansive process for automatic perfection in proceeds, U.C.C. § 9-315(c) (AM. LAW INS. & UNIF. LAW COMM'N 2010), and priority in proceeds identical to the priority held by the original collateral from which the proceeds came, U.C.C. § 9-322(b)(1) (AM. LAW INS. & UNIF. LAW COMM'N 2010). Generally, the word "proceeds" in § 552(b) is given the same scope as the word "proceeds" under Article 9. *See In re* Las Vegas Monorail Co., 429 B.R. 317, 343 (Bankr. D. Nev. 2010).

131 11 U.S.C. § 552(b)(1) (2018). A similar exception exists in § 552(b)(2).

132 Westbrook, *supra* note 126, at 224. I believe Professor Westbrook was referring to the following statement of Grant Gilmore, the principal drafter of the original text of Article 9:
[W]hy on earth should the fruits of a known insolvent's labors feed the assignee while all the other creditors starve? Furthermore, there was something worth thinking about in the limitations that the nineteenth-century courts had placed on the mortgagee's claim to after-acquired property: does it make any sense to award everything to a secured party who stands idly by while a doomed enterprise goes down the slippery slope into bankruptcy?
Grant Gilmore, *The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman*, 15 GA. L. REV. 605, 627 (1981).

133 124 CONG. REC. 32,400 (1978) (statement of Rep. Edwards), 34,000 (statement of Sen. DeConcini).

134 *See, e.g.*, Wolters Vill., Ltd. v. Village Props., Ltd. (*In re* Village Props., Ltd.), 723 F.2d 441, 444 (5th Cir.) (stating that the purpose of the equity exception "was to cover cases where an expenditure of the estate's funds increases the value of the collateral. The House Report gives as an example the situation where raw materials are converted into inventory at the expense of the estate (which would thus deplete the fund available for the general unsecured creditors)." (citation omitted)), *cert. denied*, 466 U.S. 974 (1984); *In re* Cafeteria Operators, L.P., 299 B.R. 400, 409-10 (Bankr. N.D. Tex. 2003) (quoting *id*.); *In re* Patio & Porch Sys., Inc., 194 B.R. 569, 575 (Bankr. D. Md. 1996) ("This 'equities of the case' provision is intended to prevent secured creditors from receiving windfalls and to allow bankruptcy courts broad discretion in balancing the interests of secured creditors against the general policy of the Bankruptcy Code, which favors giving debtors a 'fresh start.'"); Nanuet Nat'l Bank v. Photo Promotion Assocs., Inc. (*In re* Photo Promotion Assoc., Inc.), 61 B.R. 936, 939 (Bankr. S.D.N.Y. 1986) ("The equity exception ... requires a bankruptcy court to balance the rights between prepetition security interests and those of the creditors of the estate.").

135 *See supra* Section III.A.

136 11 U.S.C. 502(j) (2018).

137 Slobodian v. Capital for Merchants, LLC (*In re* ABS Ventures, Inc.), 523 B.R. 443, 448 (Bankr. M.D. Pa. 2014). *But see* 4 COLLIER ON BANKRUPTCY ¶ 502.11[3] (Richard Levin & Henry J. Sommer eds., 16th ed. 2020) ("To the extent a claim has been allowed or disallowed pursuant to an adversary proceeding or other contested litigation process, however, rules of finality and appeal *might* apply and thus review may be available under Bankruptcy Rule 9024 but not section 502(j)." (emphasis added)).

138 Rule 9024 states, in part: "Rule 60 F.R.Civ.P. applies in cases under the Code except that (1) a motion to reopen a case under the Code or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(c)." FED. R. BANKR. P. 9024.

139 There is a mild analogy to the historic conception of equity as a palliative to the harshness of the common law.

140 ARISTOTLE, NICOMACHEAN ETHICS bk. V, at 26-27 (Martin Ostwald trans., Princeton Hall 1962) (c. 384 B.C.E.). A more recent translation renders the line as: "This is the nature of what is decent, a setting straight of a law, insofar as it leaves something out as a result of being universal." ARISTOTLE, NICOMACHEAN ETHICS bk. V, at 26-27 (Joe Sachs trans., Focus Publishing 2002). Yet another translation reads: "[T]he nature of the equitable is a correction of law where it is defective owing to its universality." ARISTOTLE, NICOMACHEAN ETHICS, bk. V, at 26-27 (David Ross trans., Oxford Univ. Press 2009). This latter translation was recently used by Justice Breyer. Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663, 688 (2014) (Breyer, J., dissenting).

141 *E.g.*, Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944) ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case").

142 In the bankruptcy context, one might look at first-day motion practice in chapter 11, when courts enter many orders that are not anticipated by the Code but deemed necessary to the success of the case, such as orders regarding

payment of employees for prepetition periods or for roll-ups of prepetition debt to be replaced by postpetition financing.

143 Similar to "equity," many shades of meaning are contained with "discretion," including the quality of being discreet. The meaning stated in text is close to the definition 3b in Webster's Unabridged Third New International Dictionary: "power of free decision or choice within certain legal bounds." *Discretion*, Definition 3b, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED (2020), https://unabridged.merriam-webster.com/unabridged/discretion (last visited June 14, 2020). Professor Coordes has some good insights on this issue. *See* Coordes, *supra* note 7, at 322-25; *see also* Daniel J. Bussell, *Doing Equity in Bankruptcy*, 34 EMORY BANKR. DEV. J. 13 (2017); Levitin, *supra* note 2.

144 Sir Edward Coke famously discussed judicial discretion as follows: "For discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections; for as one saith, '*talis discretio discretionem confundit*."' Rooke's Case (1598) 77 Eng. Rep. 207; 5 Co. Rep. 99 b. Not all English judges saw discretion in such even terms. Lord Camden is reported to have said:
The discretion of a judge is the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends upon the constitution, temper, and passion. In the best, it is oftentimes caprice, in the worst it is every vice, folly, and passion, to which human nature is liable.
CHARLES PRATT CAMDEN & WILLIAM MURRAY MANSFIELD, LORD CAMDEN'S ARGUMENT IN *Doe on the demise of Hindson & ux, & al. v. Kersey*, wherein Lord Mansfield's argument in *Wyndham v. Chetwynd*, is considered and answered 53 (1766). Chief Justice Marshall, however, impliedly rejected Lord Camden's view. In *Osborn v. Bank of the United States*, 22 U.S. 738, 866 (1824), he wrote:
Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.

145 An extremely interest finding of Professor Dick's empirical study, published as part of this Symposium, is that seventy-one percent of the responding judges perceived a difference between equitable powers and discretion to act, although one such judge indicated that the two were "pretty close cousins." Diane Lourdes Dick, *Equitable Powers and Judicial Discretion: A Survey of U.S. Bankruptcy Judges*, 94 AM. BANKR. L.J. 265, 286 (2020).

146 *See supra* Section II.A.

147 Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988) (White, J.).

148 For a good examination of the issue, *see* Levitin, *supra* note 2. Contributors to this Symposium have also focused on this point. *See* Coordes, *supra* note 7, at 317-18; Westbrook, *supra* note 126 at 223.

149 571 U.S. 415 (2014).

150 *Id*. at 424.

151 922 F.3d 13 (1st Cir. 2019).

152 *See* 11 U.S.C. § 303(b)(2) (2018).

153 *In re* Reyes-Colon, 922 F.3d at 22.

154 *See id*. at 16.

155 *Id*. at 21-22; *see also* Sunbeam Prods., Inc. v. Chi. Am. Mfg., LLC, 686 F.3d 372, 375 (7th Cir. 2012) ("What the Bankruptcy Code provides, a judge cannot override by declaring that enforcement would be 'inequitable.'").

156 It appears that many bankruptcy judges exist in this space; Professor Dick's work illustrates a significant divergence among bankruptcy judges as to the proper range of discretion. Dick, *supra* note 145, at 269-73.

157 *See, e.g.*, Coggin v. Coggin (*In re* Coggin), 30 F.3d 1443, 1450-51 (11th Cir. 1994); Nicholson v. Isaacman (*In re* Isaacman), 26 F.3d 629, 632-33 (6th Cir. 1994); Themy v. Yu (*In re* Themy), 6 F.3d 688, 689-90 (10th Cir. 1993); Ward v. Yaquinto (*In re* Ward), 585 B.R. 806, 818-19 (N.D. Tex. 2018).

158 Anwiler v. Patchett (*In re* Anwiler), 958 F.2d 925, 929 (9th Cir.), *cert. denied*, 506 U.S. 882 (1992).

159 *In re* Ward, 585 at 819; *see also* Francis v. Riso (*In re* Riso), 57 B.R. 789, 793 (D.N.H. 1986) ("[A] bankruptcy court cannot create substantive rights in exercising its equity powers .... Allowing [the creditor] to go forward with his objection, however, will not create a substantive right ..., but merely allow him to *exercise* that substantive right."). When the late filing is the fault of the participants and not the court, courts hold that § 105 cannot be used to extend time limits. *See, e.g.*, Omni Mfg., Inc. v. Smith (*In re* Smith), 21 F.3d 660, 665 (5th Cir. 1994) (in which the debtor applied for an extension of the bar date to add to the mailing matrix a creditor omitted from the original filing and the court held that § 105 cannot be used to justify such an action and that the bankruptcy court should have simply declared the debt to be nondischargeable due to the omission of the creditor).

160 *See, e.g., In re* Jarvis, 53 F.3d 416, 419 (1st Cir. 1995) ("In light of the purposefully nonmechanical nature of equity, we think it is appropriate that bankruptcy courts should be permitted to entertain *post facto* applications for professional services under section 327(a).").
Recently, the Supreme Court held that federal courts could not use nunc pro tunc orders to fill past jurisdictional gaps. In *Roman Catholic Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano*, 140 S. Ct. 696 (2020), the Court reviewed the post-removal orders of a Puerto Rico trial court. Normally, such orders, and the actions taken in reliance on them, would be void because state courts have no jurisdiction after removal. But the federal court to which the case had been removed later remanded the lawsuit, and its remand order stated that the remand was effective as of the filing date of the removal petition - that is, the order was entered nunc pro tunc to the date of the removal. The Court found this impermissible, holding that "'[n]unc pro tunc orders are not some Orwellian vehicle for revisionist

history-- creating 'facts' that never occurred in fact."' *Id*. at 701 (quoting United States v. Gillespie, 666 F. Supp. 1137, 1139 (N.D. Ill. 1987)). In short, a court may not validate actions taken pursuant to a void order by manufacturing, after-the-fact, the elimination of the order that created the invalidity; it may not enter an order saying that the removal effectively never occurred.

The issues in *Acevedo Feliciano* are absent with the types of employment orders discussed here. The period before which counsel is officially retained is nothing like a period in which jurisdiction to act is missing; rather than ignoring the effect of an order, nunc pro tunc employment orders simply acknowledge the delay of a power granted. Such nunc pro tunc orders merely allow a court to manage its docket while ultimately ensuring compliance and adherence to § 327. That is, nunc pro tunc employment orders ensure that professionals follow the Code before they are paid. How a court equitably decides whether to grant retention retroactively, thus authorizing payment for services, is a decision vested within the exigencies of the case. *See* note 161 *infra*.

161 Often, this relation-back standard is modified if the application is made long after the work started. In *In re Arkansas Co., Inc.*, 798 F.2d 645, 650 (3d Cir. 1986), the court noted the following factors for approval of such a process:

[1] whether the applicant or some other person bore responsibility for applying for approval; [2] whether the applicant was under time pressure to begin service without approval; [3] the amount of delay after the applicant learned that initial approval had not been granted; [4] the extent to which compensation to the applicant will prejudice innocent third parties; and [5] other relevant factors.

See also Lazzo v. Rose Hill Bank (*In re* Schupbach Invs., L.L.C.), 808 F.3d 1215, 1220 (10th Cir. 2015); *In re* Sedgwick, 560 B.R. 786, 795 (C.D. Cal. 2016). Most courts that have addressed the issue have held that ignorance, negligence, and oversight do not constitute extraordinary circumstances. *See* 3 COLLIER ON BANKRUPTCY ¶ 327.03[3] (Richard Levin & Henry J. Sommer eds., 16th ed. 2020).

Since *Acevedo Feliciano*, at least one bankruptcy court has misread the opinion to preclude nunc pro tunc employment orders altogether. In *In re Benitez*, No. 8-19-70230-reg, 2020 WL 1272258, at *1 (Bankr. E.D.N.Y. Mar. 13, 2020), the court had before it a motion to authorize an attorney's employment as of eleven months before filing of the motion seeking retention. Rather that employing the equitable considerations going to extraordinary circumstances, the court misread *Acevedo Feliciano* to deprive it of the ability to affect legal relations created or existing before the date of the order. *Id*. at 2 ("Based upon its analysis of the law this Court will no longer require or grant *nunc pro tunc* retentions."). The court issued this dicta even though "in this Court's view, *nunc pro tunc* or retroactive retention is not necessary." *Id*. at 5.

Such an overbroad reading ignores the Supreme Court's characterization of nunc pro tunc orders as an accepted part of a court's tool kit. *See Acevedo Feliciano*, 140 S. Ct. at 700-01 ("Federal courts may issue *nunc pro tunc* orders, or "now for then" orders, ... to "reflect the reality" of what has already occurred[.]" (citations omitted)). More importantly, however, *Benitez* misconstrues *Acevedo Feliciano*: nunc pro tunc employment orders do not bestow or validate rights, or change existing orders, that could not have been given or changed in a prior period; i.e., they do not rewrite history. Rather, they merely allow the court, subject to a finding of extraordinary circumstances, to order that the start date of the ability to be paid should coincide with the start date of the provision of services. This ameliorative function - similar to allowing nunc pro tunc orders to correct situations arising "through inadvertence of the court," *id*. at 701, is at the core of equitable powers; as argued above, courts can always correct their own errors. *See supra* Section III.C.3.a. In the context of nunc pro tunc employment orders, a bankruptcy court is not manufacturing jurisdiction where there was none but ensuring both compliance with the Code and administrative efficacy in incentivizing professionals to provide their services. Any abuse of this process is effectively dealt with by imposition of the "extraordinary circumstances" test mentioned above.

162 11 U.S.C. § 331 (2018).

163 84 B.R. 668 (B.A.P. 9th Cir. 1988).

164 These methods were outlined by the court as follows:
The ability to recover fees may be assured by a variety of methods including, without limitation, the following:
retainer payments are for only a percentage of the amount billed so that the likelihood or necessity of repayment is minimal;
counsel can post a bond covering any possible reassessment;
counsel's financial position makes it certain that any reassessment can be repaid; [and] funds paid prior to allowance are held in a trust account until a final or interim fee allowance is made.
Id. at 672.

165 *Id*. at 672-73. This procedure has been incorporated into the local rules of at least one district. S.D. FLA. LBR 2016-1(B)(3)(b). At least one court has declined to routinely adopt these procedures. *See In re* Haven Eldercare, LLC, 382 B.R. 180 (Bankr. D. Conn. 2008).

166 Lynn M. LoPucki & Joseph W. Doherty, *Routine Illegality in Bankruptcy Court, Big-Case Fee Practices*, 83 AM. BANKR. L.J. 423 (2009). This article was subject to a rebuttal, Martin J. Bienenstock, et al., *Response To "Routine Illegality in Bankruptcy Court, Big-Case Fee Practices,"* 83 AM. BANKR. L.J. 549 (2009), which resulted in a reply, Lynn M. LoPucki & Joseph W. Doherty, *Routine Illegality Redux*, 85 AM. BANKR. L.J. 35 (2011).

167 Professor Westbrook describes a similar situation involved the "Grand Bargain" reached in the City of Detroit bankruptcy. Westbrook, *supra* note 126, at 218-22.

168 United States v. Sutton, 786 F.2d 1305, 1308 (5th Cir. 1986); s*ee also* Willms v. Sanderson, 723 F.3d 1094, 1103 (9th Cir. 2013) ("More generally, § 105(a) is not a 'roving commission to do equity.'" (quoting Pac. Shores Dev., LLC v. At Home Corp. (*In re* At Home Corp.), 392 F.3d 1064, 1070 (9th Cir. 2004) (quoting Saxman v. Educ. Credit Mgmt. Corp. (*In re* Saxman), 325 F.3d 1168, 1175 (9th Cir. 2003)))); Jamo v. Katahdin Fed. Credit Union (*In re* Jamo), 283 F.3d 392, 403 (1st Cir. 2002) ("But section 105(a) does not provide bankruptcy courts with a roving writ, much less a free hand. The authority bestowed thereunder may be invoked only if, and to the extent that, the equitable remedy dispensed by the court is necessary to preserve an identifiable right conferred elsewhere in the Bankruptcy Code."); *see also* 2 COLLIER ON BANKRUPTCY ¶¶ 105.01[2], 105.05 (Richard Levin & Henry J. Sommer eds., 16th ed. 2020). For a possibly contrary, though generally disfavored, view as to the expansiveness of the power under § 105(a), see Sears, Roebuck & Co. v. Spivey, 265 B.R. 357, 371 (E.D.N.Y. 2001) ("Section 105 of the Bankruptcy Code bestows on bankruptcy courts a specific equitable power to act in accordance with principles of justice and fairness. Bankruptcy courts have broad latitude in exercising this power.").

169 *See supra* note 140.

170 *See supra* notes 120-125 and accompanying text.

171 517 U.S. 535 (1996).

172 The Sixth Circuit held, "Because of the nature of postpetition, nonpecuniary loss tax penalty claims in a Chapter 7

case, we believe such claims are susceptible to subordination." United States v. Noland (*In re* First Truck Lines, Inc.), 48 F.3d 210, 218 (6th Cir. 1995), *rev'd*, 517 U.S. 535 (1996). Given the postpetition nature of the claim, it would be entitled to payment in full as an administrative claim before any payment would be made to creditors holding prepetition claims.

173 *Id*. at 218.

174 *Noland*, 517 U.S. at 540-41.

175 *Noland*, 517 U.S. at 542-43 (stating that § 510(c) permits a court to make exceptions to a general rule only when justified by particular facts). The Court reaffirmed this position in *United States v. Reorganized CF & I Fabricators of Utah*, 518 U.S. 213, 229 (1996). It held there that even when a claim in question is not entitled to a statutory priority (as was the administrative claim in *Noland*), subordination cannot be wholly based on the nature of the claim itself. *Id*. (describing *Noland* as having nothing to do with the fact that the claim in that case was entitled to administrative priority, but with the reordering of priority on a categorical basis).

176 Lawrence Ponoroff, *Whither Recharacterization*, 68 RUTGERS U. L. REV. 1217 (2016).

177 *Id*. at 1265-71.

178 *See supra* Section III.A.

179 *See* Ponoroff, *supra* note 176, at 1282-88.

180 *See supra* Section III.B.

181 *See supra* note 140.

182 This may be why, in the words of one judge, "the bankruptcy court is a court of equity" is the most frequently uttered substantive phrase by attorneys in her courtroom. *See* Krieger, *supra* note 2, at 297.

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