Resisting the Expansion of Bankruptcy Court Power under Section 105 of the Bankruptcy Code: The All Writs Act and an Admonition from Chief Justice Marshall

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INTRODUCTION

For nearly a decade, bankruptcy professionals, scholars, lobbyists, legislators, and judges have mulled sweeping changes to the present bankruptcy process. Yet no proposed revision of the United States Bankruptcy Code¹ (the “Code”) has suggested altering section 105(a), a primary provision of the bankruptcy law that is often used to defeat or mitigate the express language of the Code.² Section 105(a) 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

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¹ The Code is collected as Title 11 of the United States Code and was enacted pursuant to the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.

² Although the actual legislation fails to modify section 105(a), three scholars recently proposed the addition of a new section 105(e), limiting the ability of bankruptcy courts to enjoin or stay a draw under irrevocable letters of credit. See Anton N. Natis, Michael S. Greger, & Michael E. McFadden, Credit Enhancements in Commercial Leasing Transactions: Lessons Learned From the Lines of Dot.Com Bankruptcies and Proposed Legislative Resolutions, 35 Loy. L.A. L. Rev. 787, 805, 810–11 (2002). In that article, the authors take note of cases in which bankruptcy courts have stayed commercial landlords’ attempts to enforce letters of credit given them by their tenants, when the tenants default under lease agreements. Id. at 805–06 (citing Prime Motor Inns, Inc. v. First Fidelity Bank, N.A. New Jersey (In re Prime Motor Inns, Inc.), 123 B.R. 104 (Bankr. S.D. Fla. 1990)). Courts worry that the failure to enjoin landlords’ effective use of negotiated credit enhancement mechanisms will discourage landlords from leasing property to dot.com and similar tenants, because these tenants do not meet traditional criteria of credit worthiness. The authors’ suggested addition to the Code would effectively limit the scope of section 105(a), at least as it applies to letters of credit. Id.
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.\(^3\)

Courts often identify this Code section as the origin of the “broad equitable power” of bankruptcy courts,\(^4\) and relying on this power, grant to themselves the right to disregard or alter the Code’s normal operation.

Although there is disagreement among courts as to the extent of section 105 powers, bankruptcy courts have used this Code section to allow for an enormous array of orders.\(^5\) For example, courts sometimes use section 105 to provide third parties, who have not filed for protection of the Code, both temporary stays from collection and permanent releases of liability. Ordinarily, such non-debtor individuals or entities would have to file their own petitions in order to receive the benefit of section 362\(^6\) (“Automatic stay”) or section 524\(^7\) (“Effect of discharge”). Additionally, courts utilize section 105 to provide a partial discharge of student loans, despite the fact that section 523(a)(8),\(^8\) which excepts student loan debts from discharge, nowhere mentions a partial discharge. Courts even use the broad equitable power under section 105 to order payments to prepetition creditors outside the priority system carefully set by the Code, and to cross collateralize loans of undersecured creditors, shrinking the pot of proceeds available to unsecured creditors.

In this article, the author joins a small but growing chorus of scholarly voices criticizing the over-ambitious use of section 105. Recent scholarship delineates two primary shortcomings in bankruptcy case opinions extending the purview of section 105. First, courts aggressively employing section 105 often premise their decisions on the alleged nature of bankruptcy courts as courts in equity. With broad equitable powers available to them, bankruptcy courts confidently enter orders not found in the Code. Judge Marcia Krieger effectively called into question this characterization of

\(^4\) See infra notes 78–106 and accompanying text.
\(^5\) Professors Steve H. Nickles and David G. Epstein state that “section 105 of the Bankruptcy Code has been cited in thousands of reported cases as an authority to support a wide variety of judicial decisions and actions.” 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, 8 (2000).
\(^7\) Id. § 524.
\(^8\) Id. § 523(a)(8).
bankruptcy courts as courts in equity. Second, given that the Code represents a deliberate (if inconsistent) set of congressional policies adopted pursuant to Article I of the U.S. Constitution, one might discern a violation of constitutionally required separation of powers. Professors Steve Nickles and David Epstein correctly framed this issue.

This article launches two additional assaults on aggressive bankruptcy court use of section 105. The article examines the origin of section 105 for clues to its appropriate application. This examination reveals that section 105 was directly modeled on the language of the federal All Writs Act. Indeed, the original structure of the bankruptcy courts, and their jurisdiction, presumed that bankruptcy courts had full use of the All Writs Act. Section 105 was intended to parallel (but not replace) this non-bankruptcy federal statute and to fill in any gaps that might be bankruptcy specific. Unfortunately, a messy subsequent reordering of the bankruptcy courts as “units” of federal district courts eliminated the All Writs Act as a tool of bankruptcy courts, leaving these courts with only section 105. This article argues that bankruptcy courts should model their application of section 105 on the cautious use of the All Writs Act engaged by other federal courts.

In addition, this article argues that valuable guidance in application of section 105 comes from a voice not usually associated with modern bankruptcy law—that of Justice John Marshall. Justice Marshall died in 1835, 143 years before passage of the Bankruptcy Code of 1978. Although this nation’s first Bankruptcy legislation was enacted in 1800, it was “short lived.” Today, debtors, whether individual or entity, face a

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10. Nickles & Epstein, supra note 5. The views of Professors Nickles and Epstein are examined in Part II, infra.
12. Manuel L. Leal, The Power of the Bankruptcy Court: Section 105, 29 S. TEX. L. REV. 487, 494–95 (1988). Judge Leal explains that, as a result of the 1984 Amendments to the Code, “bankruptcy courts’ power[s] [were] defined only in the Code at [S]ection 105 without reference to the provisions of Title 28.” Id. at 495. Professor Nickles and Epstein call the connection between section 105 and the All Writs Act “empty.” Nickles & Epstein, supra note 5, at 15. They nevertheless “believe that the All Writs Statute still applies to bankruptcy courts, but only indirectly or derivatively as units of the federal district courts.” Id.
14. Bruce H. Mann, Republic of Debtors: Bankruptcy in the Age of American Independence (2002). An excellent list of articles and sources of American bankruptcy law is provided in Krieger, supra note 9, at 277–78 n.4. Judge Krieger’s article is discussed in detail in notes 84–106, infra, and associated text. Although focusing to some extent on the origins of English bankruptcy and insolvency laws, she also provides a list of sources for American bankruptcy law and statutes. Other sources would be articles written by Professor Charles
complex Code and a specialized federal judiciary devoted to its enforcement. One might presume that Justice Marshall, now long dead, had nothing to say that would be useful to scholars and courts on the subject of the Code. This supposition is incorrect. Justice Marshall’s words in the seminal case of *M’Culloch v. Maryland*15 illuminate the limits of the bankruptcy court’s power to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions” of the Code.16

This article will *not* argue that the Necessary and Proper Clause renders unconstitutional the most brazen (or in the words of *Collier on Bankruptcy*, “notorious”)17 uses of section 105.18 Rather, this article will compare the language of section 105(a)—authorizing the court to issue any orders “necessary or appropriate to carry out the provisions” of the Code—with Article I, Section 8, Clause 18 of the U.S. Constitution, which grants Congress the power “to make all Laws which shall be necessary and proper for carrying into Execution” the previous seventeen enumerated congressional powers.19 Bankruptcy courts occasionally (but incorrectly) employ the phrase “necessary and proper” when applying section 105,20 yet no author has seen fit to compare these provisions.


17. 2 COLLIER ON BANKRUPTCY ¶ 105.03, at 105–23 (Lawrence P. King et al. eds. 15th ed., rev. 1999) [hereinafter, “COLLIER”].
18. The Necessary and Proper Clause of the constitution is not controlling, nor is the case law which explains it (limited as it is) directly precedent for the bankruptcy issue.
19. Scholars and judges sometimes refer to the Necessary and Proper Clause as the “Sweeping Clause.” See infra note 194.

Even when bankruptcy courts refuse to broadly apply section 105, they occasionally err in their use of language. See, e.g., *In re Lawson Burich Ass’n., Inc.*, 59 B.R. 681, 686 n.4 (Bankr.
The purposes of these two provisions are similar, and the wording of the former echoes the latter. What is more, a debate about the force and meaning of the Necessary and Proper Clause is active in the world of constitutional law. This article simply seeks to cross-pollinate: to bring the dialogue of constitutional scholarship to bear in the bankruptcy arena. A number of constitutional scholars argue that the Necessary and Proper Clause should be reinvigorated to limit congressional activity. These same scholars, to varying degrees, have questioned the dominant effect of Justice Marshall’s opinion in *M’Culloch*. This article will locate points of useful analogy among the bankruptcy and constitutional provisions; Justice Marshall’s opinion in *M’Culloch*; and the constitutional debate popular today.

Bankruptcy scholars and courts might be surprised to discover that the chief language difference between section 105 and the Necessary and Proper Clause fades in practice. Although the Necessary and Proper Clause is written in the conjunctive, the “*and*” has largely been treated as an “*or*” for much of the Constitution’s history. Constitutional law scholars have now begun to carefully distinguish the meaning of “necessary” and “proper.” This is a practice that would be of use to bankruptcy courts. What is the meaning of “necessary” and “appropriate” in the application of section 105?

Perhaps most importantly, this article will focus on a single sentence in *M’Culloch*, in which Justice Marshall states a rule of construction that bankruptcy courts should find instructive. Justice Marshall states that in no event should Congress ever view the Necessary and Proper Clause as permission to take an action, or to pass a law, that runs counter to an explicit provision of the Constitution. Justice Marshall viewed the Necessary and Proper Clause more as a validation than a limit on congressional action. He interpreted “necessary” and “proper” in terms most generous to Congress. Yet even Justice Marshall would prohibit Congress from utilizing the Necessary and Proper Clause to circumvent some express prohibition of congressional action elsewhere in the Constitution. This article argues that a similar boundary must exist for the application of section 105. Bankruptcy courts often begin evaluation of a

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21. *M’Culloch*, 17 U.S. at 423; see infra note 312 and accompanying text.
section 105 order by paying lip service to a limitation of this kind; Justice Marshall’s words, if heeded, would demand something more.

In *Norwest Bank Worthington v. Ahlers*,22 the modern day Supreme Court opined that whatever equitable powers a bankruptcy court holds may not extend beyond express provisions of the Code. This admonition is nothing more than an echo of Justice Marshall’s similar statement regarding application of the Necessary and Proper Clause. Yet, despite the conventional wisdom of bankruptcy courts that purports to accept the implications of *Ahlers*, some bankruptcy courts use section 105 to bend the Code in contravention to its terms, and as part and parcel of their equitable powers.

Part I of this article describes many (but by necessity not all) of the more extreme uses of section 105 by bankruptcy courts. One theme becomes apparent throughout this analysis: in almost every case in which section 105 is pushed beyond what appears to be the expected contours of the Code, there is variation among the decisions of the courts. Although some bankruptcy courts find it necessary or appropriate to extend section 105, others refuse to take such action in nearly identical scenarios. The argument may therefore be made that courts could achieve an appropriate end in the absence of section 105, or that the consequences of doing so would not be so dire that courts should forswear their duty to hew to the words of the Code.

Part II of the article evaluates the headway made by Professors Epstein and Nickles, and by Judge Krieger. These scholars make a persuasive case against overzealous use of section 105. Yet, courts continue to provide relief not authorized by the Code pursuant to the alleged authority of the catch-all bankruptcy provision.

Part III, therefore, examines additional bases for denying section 105-based requests for extraordinary relief made by parties affected by the

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bankruptcy system. Part III begins by examining the history of section 105, and its derivation from the federal “All Writs Act.” The All Writs Act does not grant federal district and appellate courts unlimited power to enter orders or writs in contravention of other federal statutes, or to require third parties to some federal litigation to act. Similar limitations should bridle bankruptcy courts employing section 105 of the Code. Part III concludes by comparing the language and basic purposes of section 105 to those of the Necessary and Proper Clause.

I. THE PROBLEM

Section 105(a) of the Code states, in pertinent part: “the court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions” of the Code. This provision has an involved history. It derives from section 2(a)(15) of the Bankruptcy Act of 1898, which derives from the federal All Writs Act, which in turn dates to two separate sections of the First Judiciary Act of 1789.


25. First Judiciary Act of September 24, 1789. For an excellent history of the All Writs Act, see Daniel J. Wacker, The “Unreviewable” Court-Martial Conviction: Supervisory Relief under the All Writs Act from the United States Court of Military Appeals, 10 HARV. C.R.-C.L. L. REV. 33, 57–58 & n.113 (1975). As Judge Daniel Wacker notes, the predecessor provisions of the All Writs Act were originally contained in sections 13 and 14 of the First Judiciary Act of September 24, 1789. Id. at n.113. “Section 13 authorized the Supreme Court to grant writs of prohibition or mandamus.” Id. The Court was not limited by its preexisting jurisdiction under this section—that is, this section did not limit the Court to actions “in aid of its jurisdiction.” Id. In contrast, section 14 applied to all federal courts, not just the Supreme Court. Id. Similar to section 105 of the Code, section 14 of the First Judiciary Act permitted federal courts to issue writs that were not otherwise provided for under the statute. However, any such writs or court actions were limited to those actions that were “necessary for the exercise of their jurisdiction.” First Judiciary Act of September 24, 1789, § 14. Judge Wacker states: “Since [the Court] lacked an “in aid of jurisdiction” clause, the Supreme Court had on occasion treated these sections as independent grants of jurisdiction akin to the special supervisory jurisdiction exercised by the Court of King’s Bench at common law. In contrast, section 14 and its successor, section 262 of the Judicial Code, has always been viewed, due to their “in aid of jurisdiction” requirements, as authorizations to grant extraordinary relief only when ancillary to a jurisdiction otherwise acquired by statute over a particular case.” Wacker, at 57-58 & n. 113. Sections 13 and 14 of the First Judiciary Act, respectively, were carried over into section 234 and 262 of the Judicial Code of 1911, ch. 231. Congress revised and consolidated the Judicial Code in 1948 into a single section, 28 U.S.C. § 1651(a) (1948).

Judge Wacker points out that the consolidation of these two provisions into section 1651(a) raised a number of questions. First and foremost, some scholars wondered whether the
Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”26 The All Writs Act permits appellate courts to supervise lower courts,27 and it permits all federal courts,

Supreme Court had lost its plenary supervisory powers, because the “in aid of jurisdiction” language was now applicable to the entire grant of the various federal courts’ powers, including the Supreme Court. Citing both the Reviser’s Note to the 1948 Judiciary Code (H.R. REP. NO. 80–308, at A144–45(1947)) and 9 J. MOORE, FEDERAL PRACTICE (1970), Wacker concludes that the Supreme Court did not suffer a loss of its overall supervisory powers. Id; see also Pa. Bureau of Corr. v. United States Marshals Serv., 474 U.S. 34, 36 (1985) (providing the Supreme Court’s version of the legislative history of the All Writs Act).

The Court notes that section 14 of the Judiciary Act of 1789, 1 Stat. 81–82, which applied to all federal courts, limited writs to those “not specifically provided for by statute.” Pa. Bureau of Corr., 474 U.S. at 40. The Court acknowledges that this phrase dropped out of the All Writs Act in the 1948 consolidation of section 234 and 262 of the Judicial Code of 1911, ch. 231, resulting in 28 U.S.C. § 1651(a) (1948). Id. at 41. This change could signify that Congress intended to widen the scope of the All Writs Act, to permit federal courts to issue writs under the All Writs Act in scenarios where a federal statute seemingly already provided remedies and procedures. However, the Court firmly rejects this view, stating as follows:

Although the legislative history is scant, it appears that Congress then merely consolidated various provisions into [section] 1651 and made “necessary changes in phraseology” without substantive amendment. See H.R. Rep. No. 80–308, A144 (1947). The legislative history did, however, state that the new section was “expressive of the construction recently placed upon [the all writs provision] by the Supreme Court in United States Alkali Export Assn. v. United States, 325 U.S. 196 (1945). In United States Alkali, the Court rejected use of the all writs provision to enable the Court to review a lower court’s determination where jurisdiction did not lie under an express statutory provision.

Id.


27. See generally JAMES MOORE, et. al., 19 MOORE’S FEDERAL PRACTICE, para. 204.01[2][c] (3d. ed. 1997) (stating the “most frequently used writ is the writ of mandamus”). Judge Wacker describes the All Writs Act in the following terms:

The essential requirement of the All Writs Act is that the issuance of a writ be “necessary or appropriate in aid of [a court’s] jurisdiction. The ambiguity of this standard has given rise to considerable judicial confusion. If narrowly construed, the requirement would authorize courts to grant relief only when essential to the exercise of actual jurisdiction over a case. Through the years, however, the Supreme Court has rejected such a restricted view in favor of a more liberal construction. The result has been to mold the All Writs Act into a flexible tool by which appellate courts can supervise the activities of lower tribunals.

Wacker, supra note 25, at 59. Judge Wacker argues that the All Writs Act should permit the Court of Military Appeals (“COMA”) to widen its powers by granting “extraordinary” relief in cases not specifically within the tight jurisdictional binder provided by 10 U.S.C. 866(b) (1970). This provision granted COMA a right to review only trials by court martial in which the potential sentences are severe, including “death, dismissal of a commissioned officer, . . . dishonorable or bad conduct discharge, or confinement of one year or more.” Id. at 36–42. Wacker asserts that, without a broad application of the All Writs Act, a host of bad courts
including federal district courts, to issue non-supervisory orders “necessary or appropriate” to effectuate the purposes of some statute, law or court order otherwise implicit in the jurisdiction of that court. The All Writs Act permits appellate courts to supervise lower federal courts, and to a limited extent, it permits federal courts generally to issue orders applying to private parties.

Section 105 mirrors the All Writs Act, not just in language, but also in purpose. Although there are no federal courts “junior” to the bankruptcy court, bankruptcy courts use section 105 to issue orders as necessary to state law courts and administrative panels. In addition, as this part will make clear, courts use section 105 in a manner not explicitly contemplated by the Code to issue orders to private parties.

Judicial opinions have described the All Writs Act as conferring “interstitial powers” on federal courts—that is, the power to issue orders necessary to fully implement a specific federal scheme or set of laws. Drawing on the limitation contained in the All Writs Act that federal courts may act “in aid of their respective jurisdictions,” courts explain that the Act is only intended to fill in, rather than modify or overrule any specific martial go unreviewed, defeating a Congressional purpose in the establishment of COMA. His argument, although well received by COMA, was essentially rejected by the Supreme Court in Clinton v. Goldsmith, 526 U.S. 529 (1999). In Goldsmith, an Air Force Major was court martialed, but did not receive a “punitive discharge.” Under the law at that time, the Air Force could only drop from its rolls individuals who received court martial with a “punitive discharge.” The Major did not appeal his court martial, but was thereafter dropped from the rolls of the Air Force. He petitioned the U.S. Court of Appeals for the Armed Forces (“CAAF”) for extraordinary relief under the All Writs Act, which the CAAF granted. The Supreme Court unanimously reversed the CAAF, holding that the CAAF’s lack of statutory authority over the rolls of the Air Force eliminated its ability to use the All Writs Act in this case. Goldsmith, 526 U.S. at 531–33. See Martin H. Sitler, The Court Martial Cornerstone: Recent Developments in Jurisdiction, 2000 ARMY LAW. 2, 11–13 (stating “[t]he message the Supreme Court sent in Goldsmith is clear: the CAAF does not have jurisdiction ‘to oversee all matters arguably related to military justice, or to act as a plenary administrator even of criminal judgments it has affirmed’”) (quoting Goldsmith, 526 U.S. at 536).

29. See COLLIER, supra note 17, ¶ 105.01[1], at 105–06.
30. As will be seen in Part III, federal Courts of Appeal have split on the question of whether the All Writs Act serves as an independent basis for removal of actions from state to federal court. This debate finds its reflection in section 105 jurisprudence. Ordinarily, creditors of a debtor that has not filed for bankruptcy resort to state collection law and state law forums. However, bankruptcy courts occasionally stay actions against non-debtor third parties, forcing creditors of these non-parties to deal with the federal bankruptcy court. These unusual non-debtor stays have the same practical impact as a removal of state court action to federal court. The arguments against using the All Writs Act so broadly apply with equal force to the bankruptcy court orders interfering with the rights of non-debtor third parties based on section 105. See infra notes 156–77 and accompanying text.
Section 105 of the Code is textually based upon the All Writs Act. Section 105 was originally intended to operate as the bankruptcy-specific gap-filling power because it was feared the general gap-filling powers of the All Writs Act might be insufficient. This is the critical thread running through the history of section 105: to the extent that this section allowed courts to force private parties to act, or refrain from acting, courts could only act in aid of existing jurisdiction otherwise provided by the law.

The Supreme Court has stated that section 105 conveys to bankruptcy courts “broad authority” to accomplish tasks important to the functioning of the Code, and in particular, the ability to “modify debtor-creditor relationships.” The thorny issue for bankruptcy courts applying section 105 is the same as that for other federal courts applying the All Writs Act: just how broad is this authority? It is often written that there are “two schools of thought.” Some courts apply a liberal reading of section 105, allowing courts to identify objectives of the Code, and to take actions and issue writs necessary to effectuate these objectives. Other courts would read section 105, and the Code itself, much more cautiously.


   "The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling. Although that Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate. We need not categorically rule out reliance on the All Writs Act and the use of Marshals in procuring or safeguarding state prisoner witnesses in the course of federal litigation. There may be exceptional circumstances in which a district court can show clearly the inadequacy of traditional habeas corpus writs, such as where there are serious security risks."

   Id.; see also Taiwan v. United States Dist. Ct., 128 F.3d 712, 717 (9th Cir. 1997) (stating “[they] cannot issue a writ under the Act ‘unless it is designed to preserve jurisdiction that the court has acquired from some other independent source in law’”) (quoting Jackson v. Valdez, 1 F.3d 885, 889 (9th Cir. 1993))).

33. See Leal, supra note 12, at 494. Judge Leal states: “[S]ection 105 was made part of the Code for the sake of continuity from prior law and ease of reference. It is regarded as similar in effect to the All Writs Act.” Id.; see also infra notes 119–33 and accompanying text.


35. Collier, supra note 17, at 105.01[1].

36. See, e.g., id.; Leal, supra note 12 (evaluating a host of actions courts have taken, or chosen not to take, under broad and restrictive applications of section 105).

37. See Collier, supra note 17, at 105.01[2]. Collier states:
It is unclear which reading is the dominant view. Collier and other sources suggest that the broad application of section 105 is now prevalent.\footnote{38} And yet these same sources, citing valid case law,\footnote{39} just as routinely explain that section 105 of the Code contains an ultimate limitation: section 105 does not empower courts to override other explicit provisions of the Code. This apparent contradiction is troubling, precisely because the “broad authority” of bankruptcy courts, liberally read, leads to judicial activism.\footnote{40} The question thus becomes: Why would courts engage in such a confused discourse? Viewed technically, section 105 permits the courts to issue orders that are necessary to carry out provisions of the Code. This is a more
specific word than objectives, goals or purposes. It would seem that this word choice marks a clear, unalterable outer limit of power.

Nevertheless, there are several reasons that a court cognizant of this boundary to the bankruptcy court’s power would engage in a broad application of section 105. Primarily, bankruptcy courts have long been viewed as courts of equity, and equity is notoriously fickle. Supplementing this is the fact that judges and scholars continually engage in a high stakes game of “spot the purpose” where bankruptcy law is concerned (e.g., is bankruptcy law a mechanism for collecting debts, resuscitating debtors, or helping communities?). This legal pastime has seeped into the interpretation and development of section 105. Finally, courts immersed in the daily fray of bankruptcy practice may simply find a liberal use of section 105 too tempting to resist, at least in some scenarios, because it allows the court to successfully deal with a difficult matter or to reorganize a debtor.

To make matters concrete, it may be helpful to identify some of the instances in which bankruptcy courts have utilized section 105 in an expansive manner. What follows is a partial list, ostensibly because the list is too long to summarize fully here. In each case, the bankruptcy court issued orders or took actions for which the Code does not explicitly provide. The question that must be addressed is whether these actions are validly within the bankruptcy court’s scope of power.

41. See COLLIER, supra note 17, ¶ 105.01[1], at 105–06. COLLIER states: “[S]ection 105 uses the term ‘provisions’ and not the term ‘purposes’ in describing the bankruptcy court’s power to affect the mandate of the Bankruptcy Code. The statutory language thus suggests that an exercise of section 105 power be tied to another Bankruptcy Code section and not merely to a general bankruptcy concept or objective.” Id.; see also Nickles & Epstein, supra note 5, at 18. Professors Nickles and Epstein state: “The problems of statutory language are straightforward. Section 105 is limited to orders that ‘carry out the provisions of this title.’ Congress could have used the word ‘policies’ or the word ‘purposes’ in section 105. It did not.” Id. at 18. In fact, as these authors note, some courts “seem to use the words ‘provisions’ and ‘purposes’ interchangeably.” Id. at 18 n.50 (citing Gurny v. Arizona Dept. of Revenue, 192 B.R. 529 (B.A.P. 9th Cir. 1996); Simmons v. Ford Motor Credit Co., 224 B.R. 879 (Bankr. N.D. Ill. 1998).”

42. See Leal, supra note 12, at 497 (noting that courts adopting a broad approach to bankruptcy courts’ powers to enter injunctions “normally begin with the assumption that section 105 has given the bankruptcy court broad equitable powers to exercise its jurisdiction any time there is a threat to the successful rehabilitation of the estate”).

43. “Section 105 of the Bankruptcy Code has been cited in thousands of reported cases as an authority to support a wide variety of judicial decisions and actions.” See Nickles and Epstein, supra note 5, at 8. See also Derrick R. Bolen, section 105(a) and Obtaining Extraordinary Relief from the Bankruptcy Court—Looking Back at 1998, 1999–2000 ANN. SURV. BANKR. L. 271 (reviewing a variety of ambitious section 105 case opinions, and breaking these opinions down into pertinent factual categories).
A. Partial Discharge of Student Loans

Section 523 of the Code provides a limited and exclusive list of “exceptions” to the discharge provided debtors in bankruptcy. One set of creditors—educational loan providers whose loans are governmentally guaranteed—are protected entirely from a discharge when the student/borrower files a petition in bankruptcy. The Code provides only one specific “out” for a bankrupt student: the student may discharge the educational loan if she can demonstrate that allowing the loan to survive the student’s discharge of debts will cause the student “undue hardship.” By its plain language, Code section 523(a)(8) offers two possibilities: either an educational lender obtains a total exception to discharge, or the student debtor obtains a full discharge of her debt. However, in some instances, courts find circumstances that appear to warrant a partial discharge of

45. Id. § 523(a). Over the years, the list of excepted categories of debts has grown. Originally, section 523(a) provided students with two possible “outs” from their student loans. A debt was dischargeable if the loan was due and owing more than seven years prior to bankruptcy filing, or if the debtor was subject to undue hardship because of the debt. As noted by Scott Pashman, “Congress closed” the seven year door in its 1998 modification of the Code. See Scott Pashman, Note, Discharge of Student Loan Debt under 11 U.S.C. Section 523(a)(8): Reassessing “Undue Hardship” After the Elimination of the Seven Year Exception, 44 N.Y.L. SCH. L. REV. 605 (2001). Even before Congress amended section 523(a)(8), it was subject to scholarly debate. See, e.g., Thad Collins, Forging Middle Ground: Revision of Student Loan Debts in Bankruptcy as an Impetus to Amend 11 U.S.C. § 523 (a)(8), 75 IOWA L. REV. 733 (1990) (suggesting a compromise to the rigid all-or-nothing standard used by most courts in reviewing dischargeability of student loans); Darrel Dunham & Ronald A. Bach, Educational Debts Under the Bankruptcy Code, 22 MEM. ST. U. L. REV. 679 (1992) (suggesting that two, rather than five, years is an appropriate period to wait before being able to discharge student debt and cautioning against applying the undue hardship standard too harshly); Robert F. Salvin, Student Loans, Bankruptcy and the Fresh Start Policy: Must Debtors be Impoverished to Discharge Educational Loans?, 71 TULANE L. REV. 139 (1996) (arguing that “strict interpretation of the undue hardship standard is at odds with the fresh-start policy underlying the discharge of debt in bankruptcy” for discharge of student debts).
46. 11 U.S.C. § 523(a)(8).
47. Section 523(a)(8) and the undue hardship exception have been the subject of much debate. Recent articles have taken differing positions. Compare Robert B. Milligan, Putting an End to Judicial Lawmaking: Abolishing the Undue Hardship Exception for Student Loans in Bankruptcy, 34 U.C. DAVIS L. REV. 221, 246–53 (2000) (proposing an amendment to 528(a)(8) making all student loans non dischargeable and arguing that under the present section, partial discharges violate the plain language of the Code), with Pashman, supra note 45, at 605 (arguing for a generous reading of “undue hardship” and, in particular, for courts to permit partial discharge of student debt). See also Cara A. Morea, Note, Student Loan Discharge in Bankruptcy—It Is Time for a Unified Equitable Approach, 7 AM. BANKR. INST. L. REV. 193, 214, 212 (1999) (also a student note, and similarly arguing for more equitable treatment of students).
educational debts. And in fact, notwithstanding the absence of language in the provision that might directly provide bankruptcy courts with the power to grant a partial discharge, bankruptcy courts have done so, relying on section 105 and the equitable power of bankruptcy courts.


Courts in the Ninth Circuit initially accepted a limited application of section 105 to student loan discharge (the “all or nothing” approach). See United Student Aid Funds v. Taylor (In re Taylor), 223 B.R. 747, 754 (B.A.P. 9th Cir. 1998) (holding that a partial discharge under section 105 would trump section 523(a)(8)). However, the Ninth Circuit recently overruled the holding of the Bankruptcy Appellate Panel in Taylor. See In re Saxman, 325 F.3d 1168, 1174–75 (9th Cir. 2003) (determining, as an issue of first impression for the Ninth Circuit, that bankruptcy courts have equitable power under section 105 to partially discharge student loans, although partial discharge is not otherwise provided by section 523(a)(8) of the Code). The Ninth Circuit’s holding is partly limited. According to the court, a debtor will be entitled to a partial discharge only if he can otherwise meet the requirements for a hardship discharge set forth in Brunner v. New York State Higher Educ. Servs. Corp. (In re Brunner), 831 F. 2d 395, 396–97 (2d. Cir. 1987). Id. at 1174. These standards focus on the debtor’s inability to maintain a minimal living, as based the debtor’s current finances, additional exigent detrimental circumstances and the debtor’s good faith attempts to repay the debt. Id. at 1173.

49. The District Court for the Northern District of Georgia made essentially this point in Cox, 273 B.R. at 723. Citing BFP v. Resolution Trust Corp., 511 U.S. 531 (1994), the court stated that the failure of the drafter of the Code to reference partial discharge “suggests that Congress omitted such language . . . intentionally and, therefore, that courts cannot devise their own equitable remedies in student discharge actions.” Cox, 273 B.R. at 723.

50. See infra notes 78–106. Charles Jordan Tabb says, wryly, “[a]n intriguing use of the court’s equitable powers has come in cases in which the court has Solomonically ‘split the baby’ by discharging part of the student loan under the undue hardship provision, concluding that an all or nothing approach is too restrictive.” TABB, supra note 22, at 731–32; see also Nickles & Epstein, supra note 5, at 17 (describing the partial discharge of student loans as a “good example” of courts interpreting section 105 as “direct, fresh, independent grant of supplemental power”). But see 1 NORTON BANKRUPTCY LAW AND PRACTICE 2d (1997) (hereinafter “NORTON”) at 47–146 (the grant of a partial discharge “is not an unreasonable approach as rescheduling or partial discharge is consistent with the concept of undue hardship and avoids a windfall either to the debtor or the creditor.”).
Another much-discussed prerogative annexed by bankruptcy courts has to do with their willingness to protect third-party non-debtors from collection and other actions by creditors of the debtor. Section 362(a) of the Code provides that the debtor and the “debtor’s estate” will be free from a creditor’s attempts to collect a debt; the paragraph is written in an open ended, non-exclusive fashion. This provision is known as the “automatic stay,” and, as the name implies, arises upon operation of law immediately upon a debtor’s filing of a bankruptcy petition. Section 362(b) then provides an exclusive list of exceptions to the operation of the automatic stay.

Section 362 does not provide relief from process to any parties other than the debtor. Nevertheless, a variety of courts have relied upon section 105 to grant relief to third persons who have found themselves subject to claims by creditors of the debtor. Often, these third persons are insiders or central
figures of chapter 11 debtors, but they may also be family related to individual bankruptcy filers. Courts grant relief to these parties because, they argue, failure to do so imperils a successful conclusion to the bankruptcy process. Some of these rulings provide only temporary relief, usually for the duration of the bankruptcy case. Other cases go further,

Courts have not agreed on the propriety of a bankruptcy court's injunction at the behest of principals of a debtor against a creditor from continuing the prosecution against them of a state-court civil action, notwithstanding 28 U.S.C. §2283. Relief is requested because the automatic stay does not protect co-debtors, except in chapter 13 cases. Injunctions may be granted on the theory that the action actually sought recovery of an unsecured debt from the debtor itself, or prosecution of the action would materially impair the debtor's ability to reorganize. The common thread in the cases is that injunctive relief under Code section 105 was necessary and desirable to carry out one or more provisions of Title 11. In essence, injunctive relief was required in the circumstances to protect the debtor estate from substantial depletion and to enable the debtor and other parties in interest to pursue the reorganization process, unimpeded by third-party lawsuits. Except in the extraordinary circumstances of the Manville or Robins reorganizations, or concerning reorganization of a partnership with general partners who are sources of repayment, such injunctions normally terminate upon confirmation of the plan.

NORTON, supra note 50, at 4:52. (citations omitted). But see Marshall Tracht, Will Exploding Guarantees Bomb?, 17 BANKING L.J. 129 (2000) (arguing that section 105 may be appropriately used by bankruptcy courts to disarm guarantees of third parties crucial to the debtor that “explode” on the filing of the debtor’s petition).

56. See, e.g., In re F.T.L., Inc., 152 B.R. at 63–64.


Some courts refuse to extend relief to non-debtor third parties, depending on the circumstances. For example, in the recent case Kadesh v. United Air Lines, 2003 WL 435632 (Bankr. S.D.N.Y. 2003), a managing director of United Airlines sought protection from the bankruptcy court against employment discrimination suit of an employee. United was in chapter 11 at the time, and the debtor was protected by the automatic stay (section 362 of the Code.) The director argued that, although he was not a debtor under the Code, he should be protected by section 105 in a fashion complementary to section 362. The court disagreed,
granting permanent relief from the creditor’s actions even after the conclusion of the bankruptcy. 59 In these cases, the permanent injunction

stating that there was not a “singularity of identity” between the debtor and the insider. Id. at 2. The reader should note that the court did not disavow providing section 105 protection in other cases if the facts warranted.

59. See, e.g., In re Transit Group, Inc., 286 B.R. 811, 818–21 (Bankr. M.D. Fla. 2002). Transit Group is discussed in Deborah A. Crabbe, News at 11: Are Non–debtor Releases/Permanent Injunctions Authorized Under the Bankruptcy Code?, ABI JOURNAL 34 (May 2003). According to Crabbe, “In so ruling, the Florida district court aligned itself with the majority view held by the Second, Third, Fourth, Sixth and Seventh Circuits.” Id. (citing In re Dow Corning Corp., 280 F.3d 648 (6th Cir. 2002); In re Continental Airlines, 203 F.3d 203 (3d Cir. 2000); In re Specialty Equipment Co., 3 F.3d 1043 (7th Cir. 1993); In re Drexel Burnham Lambert Group Inc., 960 F.2d 285 (2d Cir. 1992); In re A.H. Robins Co., 880 F.2d 694 (4th Cir. 1989)). Crabbe also lists the minority of courts rejecting permanent non-debtor releases. Id. at 35 (citing In re Zale Corp., 62 F.3d 746 (5th Cir. 1995); In re Lowenschuss, 67 F.3d 1394 (9th Cir. 1995); In re Western Real Estate Fund Inc., 922 F.2d 592 (10th Cir. 1990)). Crabbe acknowledges the “strong appeal” of relying on section 105 and general equitable powers of the bankruptcy court to permit non-debtor releases. Ultimately, however, she states “the minority’s strict adherence to the plain language doctrine may be detrimental to the flexible approach needed in the large bankruptcy cases being filed today.” Id. at 60; see also A. Mechele Dickerson, Approving Employee Retention and Severance Programs: Judicial Discretion Run Amock?, 11 AM. BANKR. INST. L. REV. 93, 106 n.69 (2003) (listing recent section 105 release opinions).

Professor Ralph Brubaker carefully deconstructs the jurisdictional parameters of the Code (provided in 28 U.S.C. § 1334 (2000)) in order to distinguish between a bankruptcy court’s power to temporarily stay actions against third-party non-debtors, and its power to permanently release claims of creditors against third party non-debtors. Brubaker, Nondebtor Releases and Injunctions in Chapter 11, supra note 55, at 42–49. One imagines that a creditor would be unhappy with any interference by a bankruptcy court in the creditor’s attempts to collect a debt against a party that has not filed its own bankruptcy petition, but the creditor’s pain is undoubtedly sharper where its debt is rendered permanently unenforceable. Professor Brubaker persuasively suggests the issue turns on whether the bankruptcy court is acting to “enjoin,” or in the alternative, to “adjudicate” a claim. In the former, the action of the bankruptcy court does not affect the underlying rights of the parties—the “status quo”—and therefore is not “adjudication.” A permanent release fixes the underlying rights of the parties and is by its very nature adjudication. Id. at 44–45. He further notes that bankruptcy courts, as “units” of federal district courts, have the power to “hear and determine,” that is adjudicate, matters deemed “core” under the Code. Bankruptcy courts have only the power to make recommendations to District Courts as to matters that are within Bankruptcy Code jurisdiction but are otherwise “non core.” Core matters are those that “arise under” or “arise in” the Code. Id. at 43. He states:

Although a nondebtor action is, at best, only a non core proceeding outside a bankruptcy court’s core jurisdiction to adjudicate, a bankruptcy judge nonetheless has core jurisdiction to temporarily stay a Nondebtor action. The Continental Illinois distinction [Continental Ill. Nat’l Bank & Trust Co., v. Chicago, R.I. & P. Ry., 294 U.S. 648 (1935)] between jurisdiction to enjoin and jurisdiction to adjudicate compels the conclusion. Id. at 42. Non-debtors are not protected by the stay of section 362; their property is not organized into an Estate under section 541 and the claims of creditors against them arise under state law or non bankruptcy federal law and exist independently of the debtor’s filing. A
amounts to a discharge of the third party’s liability, with much of the same scope and force as that provided to debtors under Code section 524\(^\text{60}\) (“Effect of discharge”).\(^\text{61}\)

C. Substantive Consolidation of Cases

Sometimes the Code explicitly provides bankruptcy courts with a much-needed power in one arena, but then fails to provide this power in another. One might think that bankruptcy courts would take the hint, recognizing a congressional intention to limit their power. Code section 302\(^\text{62}\) provides that bankruptcy cases of spouses may be consolidated into a single case. But the Code does not provide elsewhere for consolidation of cases. In complex corporate bankruptcies, involving numerous related but not identical entities, bankruptcy courts use section 105 as their basis for “substantively consolidating” several related entity bankruptcies into one case.\(^\text{63}\) This permits a pooling of assets for payment to creditors, and simplifies the process of plan proposal, disclosure, voting and confirmation.\(^\text{64}\) Substantive consolidation therefore serves two reasonable

permanent release of claims against such parties is therefore non-core. Professor Brubaker concludes that this adjudication is not permitted to bankruptcy courts under section 105. \textit{Id. at 60.}\(^\text{60}\) 11 U.S.C. § 524(a) (2000) (voiding “any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor;” enjoining “the commencement or continuation of an action, the employment of process . . . to collect . . . any such debt;” enjoining attempts to collect “property of the debtor”).\(^\text{61}\)

As with the automatic stay, section 524 provides in subsection (b) a list of exceptions in this instance, to the effect of discharge. Congress, therefore, indicated which parties are to receive the benefit of section 524, and which parties are not. Still, instead of demanding that the third parties file their own petitions, some bankruptcy courts use section 105 as the basis for shielding third party non-debtors. \textit{See Bessette v. Avco Fin. Serv.,} 230 F.3d 439, 445–46 (1st Cir. 2000) (finding that section 105 of the Code empowers the court to enforce an order for damages to a discharge injunction under section 524); \textit{In re Hardy,} 97 F.3d 1384 (11th Cir. 1996) (court enforces section 524 via section 105; enforces sanctions against the IRS).


\textit{The Fifth Circuit describes substantive consolidation in the following terms:}
objectives: judicial economy and efficient outcome. But it is not at all clear that it is fair to all creditors, some of whom find they have claims in bankruptcy against a pool of assets that are now subject to a larger pool of unsecured creditors.

D. First Day Orders

Substantive consolidation is not the only tricky section 105 issue that arises in the context of a corporate filing. Very often, the corporate debtor will file a motion with the bankruptcy court, quickly following the filing of the chapter 11 petition, requesting permission to make some payments in connection with prepetition debt. Ordinarily, such payments may be made only within the context of a set of priorities established by section 507 of the Code, or pursuant to the terms of a confirmed plan of reorganization. Some prepetition claims do receive special treatment, such as wages earned by employees of the debtor within 90 days of the filing. However, even these amounts are not necessarily paid to the creditors immediately upon filing. That said, certain creditors—such as trade creditors—can make a

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“[P]ooling the assets of, and claims against, the two entities; satisfying liabilities from the resultant common fund; eliminating inter-company claims; and combining the creditors of the two companies for purposes of voting on reorganization plans.” Fundamentally, “[s]ubstantive consolidation” occurs when the assets and liabilities of separate and distinct legal entities are combined in a single pool and treated as if they belong to one entity.” *In re Babcock & Wilcox Co.*, 250 F.3d 955, 958 n.5 (5th Cir. 2001) (citing COLLIER, supra note 17, and NORTON, supra note 50). Professor Nickles specifically criticizes the use of section 105 as the basis for substantive consolidation in his address before the workshop of bankruptcy judges, and quotes the language above from *In re Babcock and Wilcox, Co.* Nickles, supra note 63, at 3.

65. *See* Nickles, *supra* note 63, at 3. He states:

I use substantive consolidation as an example because like many exercises of supplemental powers, the general and generally unthoughtful view is that substantive consolidation is a clearly legitimate, supplemental power of bankruptcy courts. However, bankruptcy courts’ uses of supplemental powers are frequently founded on shaky, stacked precedent: each case cites an earlier case. Toward the bottom of this stack of cases the underlying reasoning is very thin or completely missing. On second and real thought, the power is less clearly legitimate.


67. *Id.* § 507(a)(3)(A).
plausible argument that failure to pay their claims immediately will terminate any chance of successfully reorganizing the debtor. Utilizing the “doctrine of necessity,” and section 105, some courts permit these postpetition payments on prepetition claims.69

68. The doctrine of necessity has been described as an “exception well established in bankruptcy common law vested in the authority of section 105” to the normal prepetition payment priority scheme. Jo Ann J. Brighton, The Doctrine of Necessity: Is it Really Necessary?, 10 J. BANKR. L. & PRAC. 107 (2000) (criticizing rubber stamp first day orders and the reliance of courts on the doctrine of necessity). Ms. Brighton states: “The concept is that it is in the best interest of all creditors to allow certain prepetition creditors to be paid immediately, because if those creditors are not paid, it would negatively impact all creditors.” Id. Brighton points out that the Code does not itself reference the doctrine of necessity, and there is no single “definitive case” that would seem to project it. Id. at 107–08. The doctrine is a product of federal common law. Id. at 108. As she points out, paying one creditor its prepetition debts, outside the confines of the priority scheme, discriminates against other creditors, and ought to be used only in the presence of “compelling” evidence of the necessity. Id. at 108–09. However, she argues that the dire fate awaiting the debtor in the absence of the order is often exaggerated, and in most cases the court’s grant of the order is not in the interest of all creditors. Id. at 109. She bolsters her conclusion with an analysis of case studies. Included among her case studies are the bankruptcy reorganizations of retailer Montgomery Ward (payment of prepetition severance packages to executives and managers), Eastern Airlines (denial of request for payment of prepetition wages to striking employees), UNR Industries (payment of prepetition workers compensation claims) and Gulf Air (court approved prepetition wage and benefit claims). Id. at 109–14; see generally Russell A. Eisenberg & Frances F. Gecker, The Doctrine of Necessity and its Parameters, 73 MARQ. L. REV. 1 (1989).

Professor A. Mechele Dickerson examines the weakness of the doctrine of necessity in her recent article. See Dickerson, supra note 59. Dickerson brings clarity to the confused case law, in which bankruptcy courts sometimes approve, and sometimes disapprove, employee retention or severance packages. Id. at 108–12.

69. See, e.g., In re Just for Feet, Inc., 242 B.R. 821, 826 (Bankr. D. Del. 1999) (permitting payment to high-profile athletic shoe manufacturers because, it was argued, the shoe retailer could not attract its customer base otherwise); In re Eagle-Picher Indust., Inc., 124 B.R. 1021, 1023 (Bankr. S.D. Ohio 1991) (permitting payments to key toolmakers in order to avoid a loss of debtor’s "competitive position"). Some courts have rejected the debtor’s requests. See, e.g., In re Ionosphere Clubs, Inc, 98 B.R. 174 (1989) (denying request to pay striking workers prepetition wage claims). COLLIER acknowledges, with reluctance, that section 105 may be a basis for first day orders requiring payment of “prepetition wages.” It states:

The ability to ensure that the employees receive their unpaid prepetition salary and do not miss a paycheck is critical to obtaining the stability necessary for the transition to operating as a debtor in possession. If wage claims were not entitled to priority, it would be difficult to justify “first day” orders approving payment of prepetition wages. There is no clear statutory authority for such first day orders, although a court with some confidence in the debtor’s ability to satisfy claims through the third priority could justify the order under section 105.

COLLIER, supra note 17, ¶ 507.05. The National Bankruptcy Review Commission similarly recognized the ambiguity in the law, and therefore a potential harm to third party individuals who may have rights to the wages of employees of chapter 11 debtors. These include children of the employee who have a right to receive support payments. This money often becomes
Court actions granting these requests are commonly known as “first day orders,” and the validity of such orders under the Code is a hotly contested “trapped” upon the filing of the case. Some judges and courts may be more willing than others to provide first day orders for the payment of prepetition wages and benefits accrued but not yet paid out. The Commission, therefore, proposed in section 2.4.14 of its Report that certain wages and benefits earned within 180 days of the filing of the case not be treated as property of the estate. This author suspects that implicit in this recommendation is the understanding of the drafters of the Report that first day orders rest on shaky ground. See BANKRUPTCY: THE NEXT TWENTY YEARS, NATIONAL BANKRUPTCY REVIEW COMMISSION, FINAL REPORT (Oct. 20, 1997).

Not all courts agree that section 105 authorizes the payment of prepetition unsecured claims, outside the context of a plan of reorganization. In the recent case In re Kmart Corp., 291 B.R. 818, 822–23 (N.D. Ill. 2003), the district court overruled the bankruptcy court and explicitly held that neither section 105 nor the “doctrine of necessity” authorize first day orders that contravene provisions of the Code. The court stated:


In her article on the doctrine of necessity, Jo Ann J. Brighton states:

In analyzing the cases where the doctrine of necessity has been applied, and the range of results, it is apparent that there seems to be a high concentration of decisions, reported and unreported, in Southern District of New York and the District of Delaware. What surprised this author most of all while conducting the research for this article, was the significant dollar amounts which were permitted to be paid by debtors in direct contravention to the priority scheme set forth in the Code, with little or no notice to creditors—seemingly, to the detriment of other creditors.
issue. Delaware federal courts grant such orders very quickly, apparently encouraging debtors to file chapter 11 petitions in that jurisdiction (to the chagrin of judges and lawyers located elsewhere in the country).

Brighton, supra note 68, at 109. Steve Nickles, in his remarks to a workshop program for bankruptcy judges, notes that debtors ask to “pay employees and critical suppliers up front.” See Nickles, supra note 63, at 4. He then asks: “What is that? Not only is there no specific authority for such orders, they are inconsistent with specific provisions of the Bankruptcy Code. Equity never heard of first day orders. Equity never heard of the so-called ‘doctrine of necessity.’ Are first-day orders based on inherent power?” Id. 71. Some of the cases approving the combined use of the doctrine of necessity and section 105 for this purpose include Pension Benefit Guaranty Corp v. Sharon Steel Corp. (In re Sharon Steel Corp.), 159 B.R. 730, 736–37 (Bankr. W.D. Pa. 1993); In re UNR Indus., Inc., 143 B.R. 506, 519–20 (Bankr. N.D. Ill. 1992), rev’d. on other grounds, 173 B.R. 149 (Bankr. N.D. Ill. 1994); and In re Quality Interiors, Inc., 127 B.R. 391, 396 (Bankr. N.D. Ohio 1991), cited in Collier, supra note 17, at 105.05[a]. “[S]everal courts have held that authorizing the immediate payment of prepetition indebtedness to selected unsecured claimants impermissibly subordinates the claims of the remaining unsecured creditors.” Collier, supra note 17, at section 105.05[a]; see also Richard I. Aaron, Bankruptcy Law Fundamentals, section 9.02, n.17.2 (2001) (stating that “[s]ometimes first day orders raise more controversial issues about the pay of prepetition claims. The ‘doctrine of necessity’ is the equitable ground which the court may invoke under Bankruptcy Code section 105 to allow payment. How far the doctrine will reach is the question which each court must decide.”)

Cross collateralization of loans is another sophisticated chapter 11 issue purportedly supported by section 105. Financing is the life blood of chapter 11 reorganizations. Lenders making loans post-petition to the debtor receive security in property of the estate pursuant to 11 U.S.C. sections 363 and 364. Some pre-petition lenders have been willing to make post-petition loans to the debtor on the condition that collateral provided for the new loans secure their preexisting loans as well. This would seem contrary to the normal priority scheme established by 11 U.S.C. section 507. Still, some courts have validated these financing agreements, citing section 105. See, e.g., In re Adams Apple, Inc., 829 F.2d 1484 (9th Cir. 1987); Jeff Bohm, The Legal Justification for the Proper Use of Cross-Collateralization Clauses in Chapter 11 Bankruptcy Cases, 59 Am. Bankr. L.J. 289, 295–96 (1985); Charles J. Tabb, A Critical Reappraisal of Cross Collateralization in Bankruptcy, 60 S. Cal. L. Rev. 109, 153–55 (1986) (criticizing the equity powers of the bankruptcy court as a basis for cross collateralization). But see Shapiro v. Saybrook Manufacturing Co. (In re Saybrook Manufacturing Co.), 963 F.2d 1490 (11th Cir. 1992) (rejecting this practice as contrary to provisions of the Code, and specifically stating that “the practice may not be approved by the bankruptcy court under its equitable power”).

72. One pair of bankruptcy scholars have recently written: “Indeed, the popularity of Delaware has led to serious debate regarding whether state of incorporation venue should be eliminated. Although this debate may have a veneer of intellectual honesty, it is really more of a dispute between lawyers who will have the big cases in their own backyard.” John D. Ayer & Michael L. Bernstein, Bankruptcy in Practice 81 (2002). Judge Leif M. Clark, of the Western District of Texas, penned an article in which he sounded nothing less than amazed that a debtor had decided to file a chapter 11 petition in his jurisdiction, rather than Delaware. He begins simply: “We had a new chapter 11 filed today. Not a very big one by Delaware standards, of course—less than $5 million in annual revenues—but the case still required ‘first day orders,’ which we duly heard on the first day.” Hon. Leif M. Clark, First-Day Orders, ABI Journal 30, April 2000. He goes further to note that few chapter 11 filings take place in his
Section 105 (and the alleged equity nature of bankruptcy courts) is cited as support for other extra-code actions of bankruptcy courts, in addition to the 105 actions discussed above. These actions range from bankruptcy court contempt powers (which may legitimately emerge from the court’s “neck of the woods,” while his “colleagues over in Delaware seem to be awash in chapter 11 filings and their attendant first-day orders.” Id.

Professors Theodore Eisenberg and Lynn M. LoPucki explain this bankruptcy forum shopping in their article, Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations, 84 CORNELL L. REV. 967 (1999). Eisenberg and LoPucki employ an empirical analysis to disparage the common justification for the shift in major corporate filings to Delaware. They argue that there is no credible evidence suggesting: “(1) that Delaware resolves bankruptcy cases more quickly, and (2) that Delaware has developed expertise in prepackaged cases.” Id. at 969–70. Instead, they suggest:

Delaware’s replacement of New York in 1990 as the forum shopper’s destination of choice makes sense only in light of the political context in which it occurred. Changes in New York’s judge assignment mechanisms and a bankruptcy venue decision in Delaware [permitting filing in the place of a debtor’s incorporation], in combination with Delaware’s recognized tradition of providing pro-corporate legal structures, may have triggered this shift to Delaware. Once Delaware gained a reputation as a shopping destination, this reputation probably persisted in part because the state had become a safe choice for bankruptcy lawyers and their clients. Id. at 970–71. The authors also point out that this trend is partly attributable to the shoppers’ “dissatisfaction with the home court.” Id. at 971. Where Judge Clark seems dismayed (and disappointed) that the good cases may not be coming his way as a result of bankruptcy court forum shopping, Eisenberg and LoPucki pronounce this trend “embarrassing.” They assert that the primary reason attorneys and their reorganization debtor-clients forum shop is to “obtain or avoid the assignment of particular judges.” Id. at 972–73.

73. The Code does not explicitly provide bankruptcy courts with civil or criminal contempt powers, although one suspects that the vast majority of courts and lawyers believe that bankruptcy courts have at least the power to hold parties in civil contempt. See, e.g., Burd v. Walters, 868 F.2d 665, 669 (4th Cir. 1989) (stating section 105 provides a basis for bankruptcy court’s civil contempt powers). See generally Cornelius Blackshear, Jurisdiction, Venue and Appeal, in UNDERSTANDING THE BASICS OF BANKRUPTCY & REORGANIZATION 745, 779 (Practicing Law Institute 2000). One may argue that section 105 may be correctly used as the source of a bankruptcy court’s contempt order, if the order is necessary to effectively enforce or utilize another specific provision of the Code. For example, a bankruptcy judge may issue a turn over order under section 542 of the Code that is ultimately disobeyed by the party to whom the order is directed. See also In re Spectee Group, Inc., 185 B.R. 146, 155 n.15 (Bankr. S.D.N.Y. 1996) (holding that section 105 “empower[s] the bankruptcy court to award sanctions in conjunction with its inherent powers”).

Some scholars have nevertheless argued that section 105 does not provide bankruptcy courts with contempt powers. See William S. Parkinson, The Contempt Power of the Bankruptcy Court Fact or Fiction: The Debate Continues, 65 AM. BANKR. L.J. 591, 613-19 (1991) (arguing that section 105 does not provide an independent basis for a bankruptcy court to enter a contempt order, and criticizing Mountain America Credit Union v. Skinner (In re Skinner), 917 F.2d 444 (10th Cir. 1990)). According to Judge Parkinson:

Rather, contempt matters in bankruptcy cases are directly analogous to contempts occurring before magistrate judges or administrative law judges. These agencies are precluded from deciding such matters and must certify
them to a district court for initial adjudication. Given the bankruptcy court’s limited authority to adjudicate only matters arising in a bankruptcy case, it would be more constitutionally palatable to have the bankruptcy court follow a similar procedure. While one might sympathize with the difficulties presented by limiting the use of section 105(a) solely for administrative convenience, the breach of established constitutional principles in the name of practical expediency is not the proper means by which to resolve the problem.

Id. at 618–19. See also Leal, supra note 12, at 505–14. Judge Leal argues that contempt powers of a bankruptcy court do not implicate the core proceedings, id. at 507–08, and then states:

No contempt power is mentioned in section 105. Because of the origins and authority of the bankruptcy court as a creature of Congress, it is limited by congressional grant. The restrictive approach [to section 105] relies upon the legislative ability of Congress to generate a clear legislative scheme as to the authority of the bankruptcy court. Congress has not legislatively provided the bankruptcy court with such power. If the authority to order contempt is to be included in the powers of the bankruptcy court, it is Congress that must so legislate to provide the necessary authority.

Id. at 514. Extending Judge Leal’s thought, Bankruptcy Rule 9020 (Bankr. R. 9020 (1987)), pertaining to and by implication permitting the entry of contempt orders, is not a congressional action, and can no more serve as a basis for bankruptcy court contempt powers than does section 105.

The issue of the contempt powers of the bankruptcy court has emerged across all jurisdictions, with differing results. The Ninth Circuit originally determined that bankruptcy courts do not have this power at all, and must refer requests to the District Court for the entry of an appropriate order. Blackshear, supra at 779 (citing In re Rainbow Magazine, Inc., 77 F.3d 278, 284–85 (9th Cir. 1996)). Ultimately, the Ninth Circuit reversed itself, reasoning that bankruptcy courts must have civil contempt powers, because Bankruptcy Rule 9020 provides these powers. See Caldwell v. Unified Capital Corp., (In re Rainbow Magazine, Inc.), 77 F.3d 278 (9th Cir. 1996). The First Circuit (Eck v. Dodge Chemical Co. (In re Power Recovery Systems, Inc.), 950 F.2d 798, 802 (1st Cir. 1991)) and Seventh Circuit (Cox v. Zale Del., Inc., 239 F.3d 910 (7th Cir. 2001)) similarly hold that a bankruptcy court has civil contempt powers based in the existence and promulgation of Bankruptcy Rule 9020. To varying degrees, most of the remaining jurisdictions have relied upon section 105 to determine that bankruptcy courts have civil contempt powers: See Pertuso v. Ford Motor Credit Co., 233 F.3d 417, 423 (6th Cir. 2000); Placid Ref. Co. v. Terrebonne Fuel and Lube, Inc. (In re Terrebonne Fule and Lube, Inc.), 108 F.3d 609, 612–13 (5th Cir. 1997); Kestell v. Kestell (In re Kestell), 99 F.3d 146, 149 (4th Cir. 1996); Mountain Am. Credit Union v. Skinner (In re Skinner), 917 F.2d 444, 447 (10th Cir. 1990). See generally Robert J. Kressel, The Process of Contempt, Workshop for Bankruptcy Judges II, Sponsored by the Federal Judicial Center (Jan. 14, 21002) (unpublished manuscript at 137, on file with author); Laura B. Bartell, Contempt Power of the Bankruptcy Court—A New Look, 1996 U. ILL. L. REV. 1 (1996); Joan Burelson, Contempt Proceedings in Bankruptcy Court, 22 COLO. LAW. 515 (1993).

As Judge Kressel points out, Bankruptcy Rule 9014 (2001) now governs contempt powers. According to the judge, “the new rule makes things simple for parties: if they want contempt orders, they make motions.” Kressel, supra, at 140. The general wisdom suggests that section 105 of the Code does not grant to bankruptcy courts the power to hold parties in criminal contempt, unless the detested act is committed in the court’s presence. See Blackshear, supra, at 778 (citing Matter of Hipp, Inc., 895 F.2d 1503 (5th Cir. 1990)). See generally Belinda K.
inherent power, rather than section 105) to court actions exercising jurisdiction over matters after closing of a case. There is a common


74. It may not be necessary for bankruptcy courts to rest their contempt powers on section 105, however. Judges have *inherent* powers that do not derive from the statutory framework that creates their courts; they must, or all of their orders would be without meaning to a party willing to disobey them. In other words, even if the Code drafters had left out section 105, and the All Writs Act was held inapplicable, bankruptcy judges should still have the ability to place parties in civil contempt. This last thought—that judges have a base level of inherent authority independent of statutory grant—has been previously voiced. See Nickles, *supra* note 63, at 37; Kressel, *supra* note 73, at 138. The Eleventh Circuit explicitly recognized the court’s inherent power to hold parties in contempt in Chambers. Glatter v. Mroz (*In re* Mroz), 65 F.3d 1567 (11th Cir. 1995). Judge Blackshear noted, however, that some courts reject the contention that section 105 is the basis for civil contempt powers, and instead premise this power on its “core” nature in bankruptcy, pursuant to 11 U.S.C. section 157. Blackshear, *supra* note 73, at 778–79 (*citing In re* L.H. & A. Realty, Inc., 62 B.R. 910 (Bankr. D. Vt. 1986)).

Judge Parkinson specifically rejects the notion that bankruptcy courts have inherent contempt powers. Parkinson, *supra* note 73, at 607–09. “Courts” have inherent power to enforce their orders, but, the judge asks, “what is a court?” He asserts that, notwithstanding good practice and policy reasons to find otherwise, a bankruptcy court may not be described as a “constitutionally defensible ‘court.’” *Id.* at 609; see also Leal, *supra* note 12, at 511 (suggesting that bankruptcy courts have “inherent” contempt powers “rely on basic principles that may run afoul of the jurisdictional and authoritative grant”).


Reading one’s earlier work can produce a combination of emotions, from satisfaction in an argument well made, to the realization that one’s views on a subject have changed. In this case, the author admits to both reactions. On the one hand, I stand by my general statement regarding the value of section 105:

Section 105(a) often occupies the role of “catch all” provision, cited, in case law and commentary, at the end of an argument, as if to say: “and if you do not believe there is jurisdiction under these other provisions, there is always section 105(a).” The last resort characterization of this provision suggests *not* that it is to be taken seriously, but that despite or because of its very broad coverage, it is a weak basis for post-confirmation jurisdiction.

Bogart, *supra*, at 376 (emphasis in the original). That said, in my 1998 article I went on to suggest that, under some circumstances, section 105 may independently extend the jurisdiction of the bankruptcy court beyond confirmation of a plan. *Id.* at 377. My purpose was to find some mechanism to allow a bankruptcy court to pull back into its arms allegations that directors of the debtor breached their duty of loyalty following plan confirmation. I continue to believe this is an appropriate objective of bankruptcy courts, and I maintain that bankruptcy courts have this authority under 28 U.S.C. § 1334 (2000). But I now must conclude, as have several other
element to these remarkable cases: bankruptcy courts face immediate dilemmas not resolved by the Code.

scholars, that section 105 does not ever provide a basis for post confirmation jurisdiction. Section 105(c) eliminates this possibility. It states:

The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in Title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of Title 28 from its operation.

11 U.S.C. § 105(c) (2000). Professor Ralph Brubaker clarifies things in his discussion of non-debtor releases. His argument is easily transposed to the issue of post-confirmation jurisdiction. Citing section 105(c), Professor Brubaker states:

Courts that have approved nondebtor releases have done so pursuant to the equitable injunctive powers of bankruptcy courts under § 105 of the Bankruptcy Code. section 105, however, is not an independent source of jurisdiction, a notion that § 105(c) now makes explicit. Therefore, a more searching inquiry into the jurisdictional foundations for such an extraordinary injunction is warranted.

Brubaker, Nondebtor Releases and Injunctions in Chapter 11, supra note 55, at 13. In his later article, Professor Brubaker notes that the chapter 11 debtor exists only because of federal bankruptcy law. This fact therefore results in “the possibility for perpetual federal jurisdiction over the reorganized debtor, a result that certainly is not within the intent of Congress, but nonetheless producing a tension evident in the so-called postconfirmation jurisdiction cases.” Ralph Brubaker, On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory, 41 W M. & MARY L. REV. 743, 826 n.314 (2000); see also Norman N. Kinel & Melissa Zelen Neier, Post-Confirmation Jurisdiction in the Bankruptcy Courts: Does it Ever End? 55 BUS. LAW. 81 (1999) (arguing generally against broad reading of the courts’ jurisdiction post-confirmation). Kinel and Neier similarly argue that, notwithstanding cases suggesting otherwise, section 105 is not an independent basis for jurisdiction. They state, “[t]he bankruptcy courts—which are creatures of article I—have no inherent powers and their jurisdiction is limited to that expressly granted by Congress. Consequently, bankruptcy judges have jurisdiction over proceedings only if they have a statutory basis for that authority.” Id. at 85–86 nn. 28–30 (citing Sequoia Auto Brokers Ltd., 827 F.2d 1281, 1284 (9th Cir. 1987); accord Coporacion de Servicios Medicos Hospitalarios de Fajardo v. Mora (In re Coporacion de Servicios Medicos Hospitalarios de Fajardo), 805 F.2d 440, 443 (1st Cir. 1986)). Kinel and Neier focus, appropriately, on 28 U.S.C. § 1334 (2000). That section provides district courts with original but not exclusive jurisdiction over cases. Id. at 85. At least one of the cases cited by Kinel and Neier, Sequoia Auto Brokers, was overruled by a later opinion by the same court. Caldwell v. Unified Capital Corp. (In re Rainbow Magazine, Inc.), 77 F.3d 278, 284 (9th Cir. 1996) (holding bankruptcy judges have civil contempt powers).

76. There are still more examples of bankruptcy court actions that test the limits of these courts’ section 105 powers. 11 U.S.C. § 1112(b) (2000) provides that only a “party in interest or the United States Trustee or bankruptcy administrator” may request a dismissal of a Chapter 11 or a conversion to chapter 7. Some cases (cited by Judge Leal), hold that, notwithstanding the explicit language of the section, bankruptcy courts have power under section 105 to dismiss a case sua sponte, if the court detects a debtor’s bad faith or abuse of process. See In re Bayou Self, Inc., 73 B.R. 682, 685 (Bankr. W.D. La. 1987). Bayou Self apparently relied on dicta in United Sav. Ass’n v. Timbers of Inwood Forest Assocs. (In re Timbers of Inwood Forest
The bankruptcy process can be compared to a hypothetical “machine.” The Code is both a description of the machine and a tool chest that provides the devices that keep the machine working. Judges are the machine operators. From time to time, the machine fails. Bankruptcy judges root around the Code for the right tool to effect a repair. None of the tools fit precisely, but they do find one—section 105—that might do the trick. It is as though they have to stand in an awkward position, hold this tool upside down, and ignore the warning label on the side instructing the user that section 105 should be used only to fix particular problems (none of which describe the broken machine). But section 105 is all they have, and the work commences. Bankruptcy judges just want to get the job done. Unfortunately, Congress did not provide mechanisms in the Code to permit this to happen.

II. TWO ANSWERS FROM NOTEWORTHY SOURCES

This article is not the first to argue that section 105 is simply not the creature that courts have presumed it to be. Judge Marcia Krieger explains that much of the argument for a liberal use of section 105 derives from the more general notion that bankruptcy courts are courts in equity, and that the section 105 merely codifies the equitable powers of the court. However, Judge Krieger persuasively argues that this general characterization of bankruptcy courts is wrong, and like a house of cards, the legal propositions that rest upon it should fall.

Professors Steve Nickles and David Epstein take a different road by questioning the constitutional authority of bankruptcy courts to circumvent

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77. Actually, the author imagines the machine drawn by Dr. Seuss in the story The Sneetches. DR. SEUSS, THE SNEETCHES, 10–11 (1961). He describes it as a “very peculiar machine.”
statutes created by Congress. In other words, these scholars look into the morass of section 105 cases and spot a breach in the constitutionally required separation of powers.

Each of these arguments is correct. Yet bankruptcy courts continue to interpret section 105 broadly as granting courts powers that the drafters of the Code did not otherwise see fit to provide. This part will very briefly discuss bankruptcy courts’ alleged equitable powers, and the breach in separation of powers that occurs when bankruptcy courts overstep their bounds. This discussion will set the stage for two additional arguments that will, hopefully, persuade bankruptcy courts to limit their use of section 105.

A. Bankruptcy Courts as “Courts in Equity”

That bankruptcy courts are courts in equity is such a basic proposition, it seems almost beyond the point of reasonable attack. And yet it is not at all clear that this description of the nature of bankruptcy courts is accurate. It was the historical duty of courts in equity to take issue with the judgments of courts at law and to offer remedies where law courts failed to do so (if the circumstances warranted). It was the purpose of courts in equity to look beyond the black letter of the law to find a just result. If bankruptcy courts are the inheritors of this tradition, then why be surprised, or offended, if these same courts read their powers broadly?

Read this way, one would extend the argument by asking: What are just results in bankruptcy? A more traditional context for a battle between equity and law would be real estate transactions. A seller breaching a contract to sell property might only owe his buyer damages at law. But a court in equity would award the buyer specific performance, and require the seller to deliver the deed. The court would engage this equitable power only if the buyer had “clean hands”—that is, if the buyer had not in some way misled or defrauded the seller. The court would enforce the contract because the law presumes real property to be unique, and therefore it would be unjust to limit the buyer’s remedy to mere money damages.

78. One set of authors report that “[a] computer search reveals over 350 published decisions stating that the ‘Bankruptcy Court is a court of equity.’” AYER & BERNSTEIN, supra note 72, at 42 n.29. Judge Leal begins his 1988 article noting that bankruptcy law has “its root in the power of equity.” Leal, supra note 12, at 489.

79. See Krieger, supra note 9, at 310 (arguing that a parties’ requests that the bankruptcy court “do justice” almost always “conclude with either a request for a social policy change by judicial decree or for a result different than that required by the Bankruptcy Code”).
Similarly, a bankruptcy court, viewing itself as a court in equity, would issue an order or take action under section 105 only to the extent that it comports with the usual equity maxims, such as the requirement that the groveling party have clean hands.\textsuperscript{80}

It is here that the lawyers’ pastime of spotting purposes in bankruptcy law becomes important.\textsuperscript{81} If the underlying purpose of bankruptcy law is to ensure that the honest debtor receives a discharge, then a court in equity would necessarily resist denying a discharge of an impoverished debtor’s student loans. It is therefore not surprising that, despite the plain language of section 523(a)(8) of the Code, some courts provide for partial discharges of these debts.\textsuperscript{82} If the goal of a bankruptcy is to reorganize the debtor, (which is admittedly implicit in the reorganization chapter), then it makes sense, under the right circumstances, for a court to issue a permanent release of liability on a debt to non-debtor individuals.\textsuperscript{83} This latter court action is representative of a final dynamic. Judges want to resolve disputes and move things along. Section 105 can be the grease that gets this done. Whether or not the power to enter an order providing a non-debtor party a permanent release from liability is based in one aspect of the Code or another, or instead emanates from the equity nature of the bankruptcy court, is in this sense irrelevant. What matters is that courts facing real debtors and recalcitrant parties find a mechanism to resolve the dispute.

Marcia Krieger, District Court Judge for the District Court of Colorado (and formerly a bankruptcy court judge), attacks and debunks this crucial

\begin{itemize}
\item \textsuperscript{80} One suspects that it is hard to actually grovel and still have clean hands.
\item \textsuperscript{81} Over the years, this pursuit has flared into small battles, with many of the most famous names in bankruptcy scholarship taking up key positions. Some maintain that bankruptcy law is a device designed to collect the maximum assets in an organized fashion for creditors’ benefit. See, e.g., Thomas H. Jackson, The Logic and Limits of Bankruptcy Law (1986). Others view bankruptcy law as a community oriented mechanism to deal with market failure and individual error, with “community” read broadly. See, e.g., Karen Gross, Failure and Forgiveness: Rebalancing the Bankruptcy System (1997). Some see (I believe correctly) conflicting and irreconcilable purposes to bankruptcy law, and adopt what is termed a “systems approach.” See Lynn M. LoPucki, The Systems Approach to Bankruptcy, 82 Cornell L. Rev. 479 (1997). Professor John Ayer and Michael Bernstein explain the purposes of the Code in their book Bankruptcy in Practice. They state:

Bankruptcy is about debtors who cannot, or will not, pay their debts. It offers some solace to debtors seeking relief from the burden of their obligations. It offers some protection to creditors who want an efficient and convenient means to liquidate [their] claims. It seeks to preserve the value of the debtor and its assets. These goals often conflict with one another. In some cases it will be possible to reconcile the conflicts; oftentimes, it will not.

\textsuperscript{82} See supra Part I.
\item \textsuperscript{83} Id.
\end{itemize}
assumption that bankruptcy courts are courts in equity. Judge Krieger provides a historical analysis of the American and English bankruptcy court system. She concludes, “American bankruptcy law and procedure did not develop out of bankruptcy proceedings before English chancery courts.”

Instead, “Anglo-American bankruptcy law has always been a creature of statute, separate and distinct from traditional equity jurisprudence.” The mantra that bankruptcy courts are courts in equity results “from judicial rather than legislative action.” And because this “designation has no universal meaning” it more often than not “confuses [rather than] clarifies the role of the bankruptcy court and leads to disappointed expectations.”

Although bankruptcy courts are not technically courts in equity, there are distinct elements of equity in the bankruptcy process. According to

84. See Krieger, supra note 9; Nickles & Epstein, supra note 5. See also AYER & BERSTEIN, supra note 72, at 42 (“No principle of bankruptcy jurisdiction is more familiar—and none easier to misunderstand—than the notion that the bankruptcy court is a ‘court of equity.’ The trouble is that there are just too many and conflicting meanings to the notion of ‘equity.’”).

85. See Krieger, supra note 9, at 276. Chancery courts were the repositories of equity powers, as opposed to courts at law. Id. at 277–81.

86. Id. at 276. Judge Krieger notes that England developed early a system of “official assignees, trustees, commissioners, judges, and the rest of the army of officials by whom the State has from time to time endeavoured to protect creditors.” Id., at 283 (quoting EDWARD STANLEY ROSCOE, THE GROWTH OF THE ENGLISH LAW 169–82 (1911)). Although the English statutes date to 1542, Judge Krieger argues that the real progenitor is the 1570 Statute of Elizabeth. Id. at 282–83. Under this law, creditors pursuing debts against a debtor would submit their “grievances” to the Chancellor. (Recall that the Chancellor was a royal appointee who dispensed equity.) Id. However, although the grievances were filed with the Chancellor, and therefore in an equity arena, the Chancellor immediately farmed the matter out to the army of insolvency bureaucrats mentioned by Edward Roscoe, above. Id. This pattern remained fixed in English law. The Chancellor did not invent insolvency law. Rather, the English Parliament created a statutory framework, and the experts to administer a system. See id. at 282–89. The insolvency system, such as it was, was primarily one in which creditors “appeared before a designated court official and swore that the debt was overdue” or that the debtor was about to engage in a fraudulent conveyance. Id. at 285. A jury trial would decide the issue. If found liable (and one suspects that this was the usual case), then the debtors were “subject to the various writs for collection.” Id. These writs provided for imprisonment for the debtor, a practice that migrated to the United States with the colonists. The crucial point remains: bankruptcy law in England was a creature of statute, whether it contained elements of law or equity.

87. Id. at 276.

88. Id.

89. The problem may be that the law and the court system changed, but assumptions did not. Professors Nickles and Epstein look to the very beginning of bankruptcy law following the adoption of the Constitution. Although the first bankruptcy law was enacted in 1800 (this history is discussed somewhat in note 14, supra, and accompanying text), the technical basis for viewing courts adjudicating bankruptcy matters as courts in equity may have originated with the Bankruptcy Act of 1841. Under this Act, the district courts were “empowered . . . to exercise this jurisdiction summarily in the nature of summary proceedings in equity. The district courts
Judge Krieger, these equity elements include, but are not limited to, the “broad definition of property of the estate,” the automatic stay that affects creditors whether they know of the filing or not, avoidance of liens, and other features of the Code that dramatically interfere with the normal creditor-debtor relationship. Judge Krieger also points out that the bankruptcy process itself contains equitable elements. For example, the Code does not require full-blown trials for many contested matters. Indeed, under section 502(c) a judge may “estimate” the value of a debt if a more formal proceeding would unduly delay the case.

were thereby empowered to effectively act as equity courts for purposes of bankruptcy.” Nickles & Epstein, supra note 5, at 13. But as these authors note, the Supreme Court asserted that absent the express grant of equitable jurisdiction in the 1841 Act, the district court had “no such authority” because no prior legislation conferred this special jurisdiction upon the district court. Id. at 13–14 (quoting Ex parte The City Bank of New Orleans in the Matter of William Christy, 44 U.S. 292, 311–12 (1845)). The innovation of the Bankruptcy Act of 1841 was continued through and included in the Bankruptcy Acts of 1867 and 1898. Id. at 14. The latter legislation stated explicitly that the district courts, as courts in bankruptcy, would be “invested . . . with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings.” Bankr. Act § 2 (repealed). Then, in conjunction with enactment of the Code, Congress passed 28 U.S.C. § 1481, which again stated that bankruptcy courts “shall have the power of a court in equity.” According to Nickles and Epstein, this progression, if it had stopped there, would have supported the argument that bankruptcy courts are courts in equity for the purpose of dealing with matters within their original jurisdiction. Nickles & Epstein, supra note 5, at 14. However, the Constitutional tangle that emerged from Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (holding unconstitutional that portion of the 1978 Code granting bankruptcy courts wide, original jurisdiction), resulted in a flimsy technical fix in 1984. That legislation established bankruptcy courts as “units” of district courts, and limited the bankruptcy courts’ jurisdiction to enter final orders to certain “core” matters, so long as the district court “refers” jurisdiction. See Bogart, supra note 75, at 367 n.239 (1998). That fix also repealed § 1481 of Title 28. “Accordingly, at present, nothing in the Bankruptcy Code or related statutes explicitly gives equity jurisdiction to bankruptcy courts that is different from or greater than the equity jurisdiction of a federal district court.” Nickles & Epstein, supra note 5, at 14.

90. Krieger, supra note 9, at 292–97. Judge Krieger draws upon a wonderful quote by the author Daniel Defoe, in his Essay upon Projects, a commentary on English bankruptcy law. According to Judge Krieger, this essay was intended “to influence Parliament’s consideration of the Statute of Anne.” Id. at 293 (citing Robert Weisberg, Commercial Morality, the Merchant Character, and the History of the Violable Preference, 39 Stan. L. Rev. 3, 13–19 (1986)). Defoe argued that the bankruptcy statute, which would affect commercial parties, should address the four principal types of participants: the “Honest Debtor,” the “Knavish, Designing, or Idle, Extravagant Debtor,” the “moderate Creditor, who seeks but his own,” and finally, the “Rigorous Severe Creditor . . . [who will] have his Debt, whether it be had or no.” DANIEL DEFOE, AN ESSAY ON PROJECTS 206–07 (1967).

91. Id. at 295.

92. Krieger, supra note 9, at 295. Judge Krieger lists numerous other equitable features of bankruptcy law. I would encourage the reader to consult her article directly for a fuller account.

And yet the “legal” nature of the bankruptcy process is never far behind. The Federal Rules of Civil Procedure are, for the most part, incorporated into the Federal Rules of Bankruptcy Procedure. Bankruptcy courts can hear and litigate cases and provide legal relief (i.e., damages). The bankruptcy process has the effect of “fix[ing] all of a creditor’s legal rights against the debtor and in the debtor’s property.” The bankruptcy process may result in res judicata, as would any normal legal action, if the end result is a discharge or confirmed plan of reorganization.

Perhaps one of the most important points, however, is that bankruptcy is not merely the sum of law and equity, but quite a bit more. The administrative process, and the federal nature and reach of American bankruptcy law, suggest that bankruptcy courts are not merely courts in equity. The filing of the petition acts as a stay against attempts to collect the property of the estate wherever located. The federally codified American bankruptcy law descends from the statutory English insolvency law. However, where (at least originally) an “army of bureaucrats and judges” was appointed by a chancellor in equity, bankruptcy judges are appointed in a congressionally mandated process validated by the Constitution.

Despite the real and important differences between a purely equitable court and bankruptcy courts, the Supreme Court and lower federal courts routinely describe bankruptcy courts as courts in equity. This judicial description occurs to some large degree unthinkingly, and disturbingly, because dicta in 19th century Supreme Court opinions have been misused and transposed into present day law.

95. Krieger, supra note 9, at 296.
96. Id.
97. U.S. Const. art. I, § 8, cl. 4 (granting the Congress the power “to establish . . . uniform Laws on the subject of Bankruptcies throughout the United States”).
98. E.g., Young v. United States, 535 U.S. 43, 50 (2002) (bankruptcy courts are “courts of equity”); Langenkamp v. Culp, 498 U.S. 42, 44 (1990) (“[t]he creditor’s claim and the ensuing preference action by the trustee become integral to the restructuring of the debtor-creditor relationship through the bankruptcy court’s equity jurisdiction”); Pepper v. Litton, 308 U.S. 295, 304 (1939) (“[f]or many purposes ‘courts of bankruptcy are essentially courts of equity.’”); In re Dow Corning Corp., 280 F.3d 648 (6th Cir. 2002); In re Grimland, Inc., 243 F.3d 228, 234 (5th Cir. 2001) (“On the one hand, the bankruptcy court is a court of equity and it must undertake an analysis of equitable considerations.”).
99. That is, without the benefit of the careful thought that Judge Krieger gives to the subject.
100. This is covered in detail in Krieger, supra note 9, at 298–300. Briefly, prior to the adoption of the Federal Rules of Civil Procedure in 1938, federal courts “focused on the jurisdiction of federal courts sitting in bankruptcy.” Id. at 298. In this context, “[r]eferences to
Professors Epstein and Nickles bluntly, if forlornly, acknowledge that “bankruptcy courts exercise equity power;” this is a fact born of repetition in countless reported opinions. But they state, nevertheless:

The putative basis [of this equitable power] may be the doubtful authority of 105; the murky authority of the long-ago merger of law and equity in federal courts; unsubstantiated case authority; or something else or nothing whatsoever. The truth is that even without citing authority, bankruptcy courts act as courts of equity in the sense of acting as though they are empowered to apply equitable principles and rules.

Blanket assertions that bankruptcy courts are courts in equity empower section 105. Courts often cite both section 105 and the equitable nature of the bankruptcy court in one breath as support for an action or order. The alleged equitable nature of bankruptcy courts has emboldened these same courts to expand their jurisdiction; to use the Code to implement social policy that is not necessarily implicit to the functioning of the Code; and to lessen the importance of procedure and rules.

the bankruptcy court as a court of equity were most often used in a technical context to define the scope of exclusive or original bankruptcy jurisdiction.” Id. Evaluating the Bankruptcy Act of 1867, the Supreme Court determined that district courts had “exclusive jurisdiction over bankruptcy administration and distribution,” but only concurrent jurisdiction (along with state and other federal courts) of claims that merely impacted the bankruptcy. Id. (citing Lathrop v. Drake, 91 U.S. 516 (1875); Smith v. Mason, 81 U.S. (14 Wall.) 419 (1871)). Those claims that were not under the exclusive jurisdiction of the district court as bankruptcy matters would have to be dealt with in the normal course. Either these matters would be in equity, or these matters would be at law. As Judge Krieger notes, equitable claims would activate different causes of action and process. Id. For example, if a claim was brought at law, a jury trial was permitted, and if in equity, the claim was tried by the court. Apparently, the Court continued this line of reasoning in Bardes v. Hawarden Bank, 178 U.S. 524 (1900), when confronted with the newly passed Bankruptcy Act of 1898. Krieger, supra note 9, at 299 n.168 (quoting Bardes v. Hawarden Bank, 178 U.S. 524, 535 (1900) (“Proceedings in bankruptcy generally are in the nature of proceedings in equity.”)). “References in Lathrop and Bardes to the court’s equitable powers in the bankruptcy administrative process were dicta; these cases focused on the distinction between original and plenary jurisdiction under the 1867 Act.” Krieger, supra note 9, at 299.

101. The Supreme Court decided Local Loan Co. v. Hunt, 292 U.S. 234 (1934), only a few years prior to application of the Federal Rules of Civil Procedure, and the merging of law and equity processes.
102. See Nickles & Epstein, supra note 5, at 16.
103. Id.
104. See Krieger, supra note 9, at 298–300; Nickles & Epstein, supra note 5, at 16–17.
105. See Krieger, supra note 9, at 301–07; Nickles & Epstein, supra note 5, at 16 (“Equity does not empower the judge to create or depart from law in pursuit of conscience or morality.”) (emphasis added).
106. See Krieger, supra note 9, at 307–10. Judge Krieger, and Professors Nickles and Epstein, employ colorful terminology to describe this liberal approach to the Code. Judge
B. Breach of the Constitutional Requirement of Separation of Powers

As noted, federal courts (including the Supreme Court) routinely refer to bankruptcy courts as courts in equity. This view of the source of bankruptcy court power helps explain the overly broad application of section 105. Unfortunately, as Judge Krieger so clearly points out, this characterization is simplistic and wrong.107

Hers is not the only voice questioning the tendency of bankruptcy courts to reach beyond their Congressional mandate. Professors Steve H. Nickles and David G. Epstein criticize a variety of section 105 applications, including substantive consolidation, first day orders and partial discharge of student loans.108 However, they do so largely on constitutional grounds. In writing, and in speeches directly to the judges themselves, they assert that these broad applications of section 105 violate the constitutional imperative of Separation of Powers.109 This is the core of their argument:

The problems of constitutional concepts are different [from statutory interpretation] and more subtle. The constitutional problem is not so much in Congress delegating wide powers to the courts through 105(a). The real problem is that in exercising such wide powers, the courts are making law to the extent of violating the constitutional separation of powers.110

Krieger states that the unrestrained broad authority of the courts results in “Burger King justice” or “justice my way.” Id. at 310. Professors Nickles and Epstein reach for the down to earth sounds of country western and gospel music. They describe section 105 “in musical terms,” repeating a stanza from the Oak Ridge Boys’ Rhythm Guitar. Nickles & Epstein, supra note 5, at 20 (“[e]verybody wants to be the lead singer,” but according to Nickles and Epstein, “section 105 is at most a rhythm guitar.”).

107. Krieger, supra note 9, at 310.
108. Nickles & Epstein, supra note 5, at 17–18.
109. See Nickles, supra note 63. The author expresses his gratitude to Professor Nickles for sharing his program materials. Professor Nickles and Epsteins’ article in the Chapman University Law Review (Nickles & Epstein, supra note 5) was initially prepared in connection with a panel discussion at the 1999 Annual Meeting of the National Conference of Bankruptcy Judges.


The authors are correct that a “problem” exists with respect to separation of powers. However, they should not give up too quickly the assertion that Congressional silence in the face of ambitious bankruptcy court use of section 105 is an improper delegation of congressional power. Justice Marshall treated the issue of whether Congress might permissibly delegate its sole legislative authority to make judicial rules in Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825). In that case, the Court was asked to determine collection rules established by federal courts for enforcing federal court judgments would trump state execution and levy rules. Justice Marshall determined that federal law prevailed, on the basis of the Necessary and Proper
The three branches of government may overlap one another in their duties and programs without running afoul of the constitutional prohibition. In other words, there is no crystalline line of demarcation.\textsuperscript{111} Nickles and Clause of the U.S. Constitution. See William W. Van Alstyne, \textit{The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause}, 40 LAW \& CONTEMP. PROBS. Spring 1976, at 124–25. Professor Van Alstyne states: “Interestingly, Marshall did not find such authority as one vested in the courts by force of article III as an incident of the judicial power,” but rather, in the catch all provision to article I, section 8, clause 18—the Necessary and Proper Clause. \textit{Id.} at 124 (the Necessary and Proper Clause will be discussed in great detail, in Part III, \textit{infra}.) According to Professor Van Alstyne, 

\textit{Wayman v. Southard} is made even more significant by the manner in which Marshall responded to [the delegation issue]. This was the contention of the defendants that, assuming Congress could provide rules specifying the manner in which federal court judgments were to be executed (and that it could do so pursuant to the sweeping clause [the Necessary and Proper Clause]), \textit{Congress could not delegate the power to the courts so to provide}. [Emphasis added] That, in the defendants’ view, would constitute a delegation of legislative power to a nonlegislative branch in contravention of the requirement in article I that “all legislative Powers herein granted shall be vested in a Congress,” and thus must be exercised by Congress itself.

\ldots Marshall discussed the delegation issue as a deeply troublesome one, and he found the federal court power valid because (a) it was clearly provided for by Congress, and (b) it was provided for in respect to something clearly intimate to the operation of the federal judiciary.

\ldots The assumption seems very clear that though the power pertained intimately to the judicial business, \textit{it must be given by Congress} to be exercised at all (because the sweeping clause so requires). When Congress gives it, moreover (as distinguished from itself legislating the particular rule), it may do so only in respect to less important subjects and “under such general provisions to fill up the details.” A broader delegation would violate the requirement of the sweeping clause that Congress alone is to say to what extent and in what manner the judicial power is to be aided in securing the execution of its judgments.

\textit{Id.} (quoting \textit{Wayman v. Southard}, 23 U.S. (10 Wheat.) at 43 (emphasis in the original, except as noted)). Congress has the power to delegate to the bankruptcy bench the authority to take a wide variety of actions. One need show only that Congress “clearly provided” for such authority and that the powers are “intimately connected” to the operation of the federal (in this case, bankruptcy) judiciary. The latter would seem to be clear, with respect to the broad array of actions that bankruptcy courts have taken pursuant to section 105, including substantive consolidation of cases and the like. As to the former, it is not at all clear that Congress clearly provided for district courts (and their bankruptcy court units) to have such powers.

\textcolor{red}{111.} Nickles \& Epstein, supra note 5, at 18. They state:

The division of authority between the three branches of the federal government is not exact or clear, but is flexible. Their responsibilities can permissibly overlap to a point. The overlap is constitutionally too great, that is, the separation of powers is offended, when the whole power of one branch is given to and exercised by another branch; when excessive authority is accumulated in a single branch; or when authority and independence of one or another coordinate branch is undermined.
Epstein suggest instead that separation of powers implies a “flexible, fuzzy scale,” with “unconstitutional law making” on one end, and “lawful exercise of judicial power under statute” on the other. The authors focus on the “clarity and precision” in the stated policies of the statute in question and their relation to the court’s action. Nickles and Epstein argue that a bankruptcy court violates the principle of separation of powers when its decisions or actions do not arise from “specific and certain statutory intention.” In other words, the Code needs to speak its intention to grant certain powers to the courts.

Ultimately, Nickles and Epstein decide that partial discharge of student loans and “other judicial supplements” are outside the ambit of section 105. These judicially annexed powers are simply “too much of a legislatively projected reach from the statute to the decision.”

One could take just about any of the more extreme uses of section 105 described in Part I and see how it runs afoul of Nickles and Epstein’s test. For example, the Code provides in several sections a discharge for the debtor’s debts, but not those of other parties (Enron may file for chapter 11 protection, but Ken Lay should not receive a discharge unless he files his own petition). Applying Nickles and Epstein’s terminology: Is there in any provision (or provisions, taken collectively) of the Code evidencing a specific congressional intention to provide non-debtors with a release that amounts to a discharge? Given the care with which the discharge provisions are spelled out—limits, exceptions and objections to discharge—the answer should be no. Similarly, although a bankruptcy judge may feel a normal and admirable desire to lighten students’ loads by partially discharging their educational loans, can one draw from the Code provisions a specific legislative intention directing a bankruptcy judge’s grant of this relief? Matters are even worse in the case of substantive consolidation. The drafters provided for consolidation of cases in one limited scenario, but failed to do so in the corporate context. Applying normal canons of

112. Id. (citing Mistretta v. United States, 488 U.S. 361, 381 (1989)).
113. Id. at 19.
114. Id.
115. They state: “It is not enough, for separation of powers, that the court’s decision is compatible with relatively undefined or general legislative purposes, not even when these general purposes are clearly and forcefully expressed.” Id.
116. Id. Professor Thomas E. Plank’s recent article, Bankruptcy and Federalism, 71 FORDHAM L. REV. 1063 (2002) spies another constitutional violation committed by federal courts, and to an even larger degree, by Congress. Instead of focusing on section 105 of the Code, Professor Plank examines the limits on congressional and judicial power created by the Bankruptcy Clause (U.S. CONST. art. I, § 8, cl. 4).
117. See supra notes 51–61 and accompanying text.
construction and interpretation, courts should conclude that substantive
consolidation is not “legislatively projected” from the Code at all.

Professors Nickles and Epstein provide a very strong rationale for
bankruptcy courts to refrain from exercising too much power where the
Code does not grant it. If anything, these article I courts, as “units” of the
District Courts, are in an even less secure position to test the “fuzzy”
constitutional scale of separation of powers. Yet, bankruptcy courts
continue to do so.

III. TWO NEW SHOTS ACROSS THE BOW

Scholars debunk the myth of bankruptcy courts as courts of equity, and
then, for good measure, go on to identify a troubling breach in the wall of
Separation of Powers that attends the overly ambitious use of section 105.
This part provides two additional arguments that support a limited use of
section 105. The first focuses on the limited nature of the All Writs Act,
upon which section 105 is based.118 At most, section 105 should go no
further than its predecessor. Recent scholarship suggests that the All Writs
Act is limiting in nature and tone; this should carry over to bankruptcy court
interpretations of section 105. The second line of attack looks (admittedly)
somewhat far afield, to the jurisprudence and history of the Necessary and
Proper Clause of the U.S. Constitution. Although there are obvious
differences in wording, these differences turn out to be less important than
one might first think. The bankruptcy provision and the Constitutional
provision serve similar goals, and case law suggests the two provisions
share a critical limitation.

118. See, e.g., In re Hucke, 127 B.R. 258 (Bankr. D. Or. 1991); In re Love, 18 B.R. 20, 23
(Bankr. N.D. Ga. 1981). The bankruptcy court in Hucke states:
   It is important to note that Congress intended to bring the bankruptcy courts
   within the purview of the All Writs Statute, 28 U.S.C. § 1651 [the All Writs
   Act] by amending 28 U.S.C. § 451 at the time the Code was adopted. The All
   Writs Statute, as the name implies, authorizes courts to issue writs of all
   kinds, including writs of habeas corpus. It is apparent from the legislative
   history just recited, that writs of all kinds, including writs of habeas corpus,
   were considered by Congress when it adopted section 105(a).
   In re Hucke, 127 B.R. at 264. See also Bolen, supra note 43, at 271 (calling section 105 “the
   Bankruptcy Code’s counterpart to the All Writs Statute”).
A. The All Writs Act

The All Writs Act\textsuperscript{119} provides the best model for interpretation and application of section 105 of the Code.\textsuperscript{120} Section 105 is not so much central to the Code as it is an afterthought; the drafters believed that the All Writs Act provided bankruptcy judges—as they were envisioned in the original incarnation of the Code—with sufficient power to implement the provisions of the Code.\textsuperscript{121} In short, the drafters of the Code believed that

\begin{footnotesize}
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  \item[120.] See, e.g., In re NWFX, Inc., 864 F.2d 593, 595 (8th Cir. 1989) (“Section 105 is comparable to the All Writs Statute”); In re Twenver, Inc., 149 B.R. 950, 951 (D. Colo. 1993) (“section 105 is the bankruptcy statute akin to the All Writs Act.”). See also Brubaker, Nondebtor Releases and Injunctions in Chapter 11, supra note 55, at 15 (“[section 105], like its predecessor under the 1898 Act, gives to federal bankruptcy courts the powers of courts of equity granted to all federal courts in the All Writs Act.”) Professor Brubaker nicely explains the interaction of the Federal Anti-Injunction Act (11 U.S.C. § 2283) and section 105 of the Code. Normally, the Anti-Injunction Act prohibits federal courts from enjoining state court proceedings, unless the injunction is expressly authorized by another federal statute. Indeed, according to Professor Brubaker, “[b]ankruptcy injunctions were the first explicit exception to the Anti-Injunction Act, added in 1874 to except ‘cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.’” Id. at 15 n.65 (quoting 17 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4221, at 497 & n.6 (2d ed. 1988)).
  \item[121.] The oft quoted legislative history states: “[S]ection 105 is similar in effect to the All Writs Statute. . . . The section is repeated here for the sake of continuity from current law and ease of reference, and to cover any powers traditionally exercised by a bankruptcy court that are not encompassed by the All Writs Statute.” H.R. REP. NO. 95–595, at 316–17 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6273–74. Professor Brubaker quotes this language as well. See Brubaker, Nondebtor Releases and Injunctions in Chapter 11, supra note 55, at 15 n.63. Professors Nickles and Epstein state:

  The congressional reports behind 105 also explain that “105 is similar in effect to the All Writs Statute, *** under which the new bankruptcy courts are brought [separately] by amendment to 28 U.S.C. 451 [which defines the meaning of court for purposes of title 28].” So, prior to 1984, when bankruptcy courts were separate courts, separate legislation brought them under the All Writs Statute. Section 105 was redundant in this respect. Now, of course, the meaning of court in section 451 does not directly, explicitly include bankruptcy courts. So, the connection between 105 and the All Writs Statute is completely empty.

  Nickles & Epstein, supra note 5, at 15. Nickles and Epstein suggest that bankruptcy courts may still employ the All Writs Act, if only derivatively, under the auspices of the district court. Id. This view is buttressed by case law. See Findley v. Laughead (In re Johns-Manville Corp.), 27 F.3d 48 (2d Cir. 1994) (affirming joint order of district and bankruptcy court staying litigation against and payments from personal injury settlement trust). Tellingly, although the Second Circuit opinion in the just cited incarnation of Manville affirms the joint order of the two courts, the language of the opinion speaks only to the authority of the district court to employ the the All Writs Act. The court states,

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\end{footnotesize}
bankruptcy judges would have the benefit of the All Writs Act. The drafters added section 105 to cover truly unique, bankruptcy specific concerns. Indeed, it was not clear at the time that section 105 would become a central component of bankruptcy law. But for the reorganization and recharacterization of bankruptcy courts as “units” of the district court in 1984, section 105 might well have become the bankruptcy version of the Privileges and Immunities Clause of the U.S. Constitution—a part of the text, but having little value.  

One can distinguish between those All Writ cases in which courts focus on the meaning of “necessary or appropriate” and those in which courts focus on writs issued “in aid of their respective jurisdictions.” In section 105 jurisprudence, the latter phrase is worded differently to allow courts “to carry out the provisions of this title,” yet the meaning of these two provisions is largely the same. Federal courts often (although not always) find real meaning in the jurisdictional limitation. Bankruptcy courts tend to follow this proscription, but with less fervor. As to the phrase common to both provisions—permitting federal and bankruptcy courts to issue “necessary or appropriate” writs—the application differs significantly.

Though there is a substantial question whether the appellants have raised in the Trial Courts the grounds of objection now asserted to the continuation of the litigation and payment stays, we are satisfied that, in any event, the objection to the Order is without merit. The authority of a district court to protect its jurisdiction is recognized by the All Writs Act, 28 U.S.C. § 1651 (1988), and the use of such authority has been specifically approved in the context of the conduct of complex litigation.

Id. at 49.

122. See Leal, supra note 12, at 494 (“In 1978, the All Writs Act was made applicable to the bankruptcy courts, allowing them to issue all writs necessary in aid of their [respective] jurisdiction.”) Judge Leal explains, however, that “[t]his seemingly broad power was limited to an extent when, in the same year, Congress passed section 1481 of Title 28.” Id. That section provided “[a] bankruptcy court shall have the powers of a court of equity, law, and admiralty, but may not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment.” 28 U.S.C. § 1481 (1982) (repealed 1984). When Congress amended the Code in 1984, it omitted section 1481. According to Judge Leal, this change left “the bankruptcy court’s power defined only in the Code at section 105 without reference to the provisions of Title 28. Leal, supra note 12, at 495. Thus, section 105 remained more broad than its analogous provision, section 1651 of Title 28.” Id.


Federal courts applying this phrase in the context of the All Writs Act imbue real limiting power in this language. Again, one might ask, if the All Writs Act is the template for section 105, and section 105 was not meant to add anything significantly different to the palette of a bankruptcy court’s powers, how is it that “necessary or appropriate” is so much more generously applied in interpreting the Bankruptcy Code?

Recent All Writs cases blur the meaning of “necessary” and “appropriate” by requiring “extraordinary circumstances” to support issuance of a writ.125 The word “appropriate” implies discretionary behavior of the court—the court may issue such writs as are appropriate under the circumstances. A court probably cannot be compelled to issue appropriate writs, but may choose to do so in its wisdom. Writs that are necessary are just that; a court must do so if it is in aid of its jurisdiction. That said, “necessity” for purposes of the All Writs Act apparently does not require absolute necessity. The Supreme Court has held that “supplemental powers of the Act are not limited to situations where it is ‘necessary’ to issue the writ or order ‘in the sense that the court could not otherwise physically discharge its appellate duties.’”126 “Extraordinary circumstances” is a phrase that straddles the line between “necessary” and “appropriate”, hinting at the former more than the latter. A circumstance a court deems extraordinary would seem to require something more than an “appropriate” court action as the backdrop of a writ.

Other cases and commentators, often older, note the “flexible” nature of the All Writs Act and the ability of federal courts to fashion remedies as and when needed.127 Recent courts and commentators have tended towards a strict construction of the provision. Section 105 of the Code should be similarly contained.

Cases in which the All Writs Act has been subject to litigation and concern can be broken down into categories based upon the party directed to act (or not act, as the case may be), and the party’s relationship to an underlying federal controversy. The easiest cases are those in which a

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127. See, e.g., Wacker, supra note 25, at 59–63. See also supra note 27 discussing the application of the All Writs Act to military courts of appeals. These courts have found the sands shifting, and their authority under the All Writs Act recently eroded.
federal court directs a lower court to act or refrain from acting. From the outset, the reader should note that most of these cases provide little insight or connection to the bankruptcy law scenario. Bankruptcy courts do not have appellate jurisdiction over any set of lower federal courts.

In other cases, federal courts utilize the All Writs Act to enjoin state courts from acting in some manner, and may even exercise their jurisdiction to remove cases altogether from state to federal court. Removal cases have been the most hotly contested All Writ actions of late, and have spawned both a circuit split and significant scholarship. The approach taken by courts and commentators in these cases form a useful point of departure in evaluating section 105 cases staying action against third party non-debtors. Finally, federal courts occasionally limit the behavior of private parties not tied to the underlying federal litigation. Again, these cases mirror disputes litigated under section 105 of the Code, and provide important guidance.

Courts have been most critical of attempts to utilize the All Writs Act against individuals who are not parties in the underlying federal litigation. These cases are analogous to those cases in which bankruptcy courts have used section 105 to permit both the permanent and temporary staying of actions against non-debtor third persons. The question thus arises: If Congress had not implemented section 105, and the bankruptcy courts were left only with the All Writs Act, would a similar result occur?

128. See, e.g., Taiwan v. U.S. Distr. Ct., 128 F.3d 712 (9th Cir. 1997) (granting writ of mandamus to compel the district court to rescind order requiring Taiwanese national to testify at deposition).

129. Bankruptcy courts supervise trustees and examiners pursuant to 11 U.S.C. §§ 704, 1104–06 (2000), but these individuals are not “lower courts.” Instead, they are immediate delegates of the court’s responsibilities.

130. See, e.g., In re Baldwin-United Corp., 770 F.2d 328 (2d Cir. 1985) (enjoining states from bringing actions against parties who were defendants in a consolidated, multi district class action securities lawsuit). See also Maryland Cas. Co. v. W.R. Grace & Co., 1993 WL 322809 (S.D.N.Y 1993) (“This [the All Writs] Statute permits the Court to enjoin state court actions where necessary to preserve the Court’s jurisdiction or authority over pending matters.”).

131. See infra notes 134–55 and accompanying text.

132. See infra note 134 and accompanying text.

133. See infra notes 156–85 and accompanying text. But see In re Baldwin-United Corporation, 770 F.2d at 338. That case validated a federal court’s injunction against state courts pursuing individuals and entities that were also defendants in federal securities class action litigation. The states were not parties to the underlying litigation. Nevertheless, the Second Circuit affirmed the injunction, stating, “the power to bind non-parties distinguishes injunctions issued under the [All Writs] Act from injunctions issued in situations in which the activities of the third parties do not interfere with the very conduct of the proceeding before the court.” Id. This language is not really identical to a requirement of extraordinary circumstance, but it is close.
1. Removal Cases

There is a split among federal circuit courts on the issue of whether the All Writs Act creates a basis for defendants to remove cases from state courts to federal district courts.\(^{134}\) Pan Atlantic Group, Inc. v. Republic Insurance Co.,\(^{135}\) a case from the Southern District of New York, is informative, and follows the 1993 Second Circuit decision, In re Agent Orange Products Liability Litigation.\(^{136}\) Pan Atlantic Group involved a dispute among members of a “reinsurance syndicate.” (The nature of the dispute is irrelevant to the case, and to this article.) What is crucial, however, is that the syndicate’s governing rules required its members to submit disputes among themselves to arbitration. The plaintiff at first “fiercely resisted [the] arbitration” provided for by the syndicate’s governing agreement.\(^ {137}\) Then, after losing, the plaintiff sought to circumvent the effect of the arbitration. To do so, it brought actions against the winners of the arbitration in state court based in state law breach of contract and interference with contract. The defendant to the state law actions (the same party that had won the arbitration) responded with a proceeding to enforce the arbitration. At this point, Pan Atlantic Group, the plaintiff in the state law actions, removed the case to federal district court pursuant to the All Writs Act.

The district court was asked to decide whether this removal of the state law claims under the All Writs Act was valid. The Second Circuit

\(^{134}\) Professor Joan Steinman reviews the cases and courts in Joan Steinman, The Newest Frontier of Judicial Activism: Removal Under the All Writs Act, 80 B.U. L. Rev. 773, 794–811 (2000). According to Professor Steinman:

The Second, Third, Sixth, Seventh and Eighth Circuits have opined that a removal pursuant to the All Writs Act is proper in some circumstances. The First, Fourth, Fifth, D.C. and Federal Circuits have not addressed the issue, but district courts in the Fourth and Fifth Circuits have approved such removal. The Ninth and Eleventh Circuits declined to approve All Writs removal in the cases in which they addressed the issue but, so far as appears, only because they believed that the facts before them did not present appropriate cases for such removal. The Tenth Circuit has taken the strongest position that the Act does not permit removal of claims otherwise outside federal subject matter jurisdiction.  

Id. at 794. Professor Steinman ultimately sides with the Tenth Circuit.


previously stated that removal would be permissible in some instances. The district court determined, however, that this case was not one of them.\footnote{138}

The district court noted that the case was not removable on the basis of diversity or subject matter jurisdiction.\footnote{139} The court then determined, in accordance with Second Circuit case law, that the case might be removed to federal court if the removing party could show “exceptional circumstances.” According to the court, exceptional circumstances exist if removal is necessary to “prevent the frustration of orders [the federal court] has previously issued in its exercise of jurisdiction otherwise obtained.”\footnote{140} In \textit{Pan Atlantic Group}, the parties were grappling simultaneously in state and federal court even prior to removal of the state law claims. The plaintiff argued that this parallel struggle would distract and interfere with the federal court and its proceedings. The district court rejected the argument, noting:

The proceedings in New York State court, which have been pending for years, have not threatened in any way the orderly progress of the litigation in the federal courts. On the contrary, the New York Supreme Court has acted consistently to enforce the agreement to arbitrate and the arbitration awards, and has done nothing inconsistent with the three actions filed in the Southern District of New York, each of which has itself ruled that the issues must proceed to arbitration.\footnote{141}

Unlike other cases where removal had been ordered, continuance of a state court proceeding would not wreck the disposition of a number of significant and complex federal actions.\footnote{142}


139. \textit{Id.} In \textit{Pan Atlantic Group}, there is no overriding federal legislation that gives federal courts subject matter jurisdiction over special proceedings to enforce arbitration.

140. \textit{Id.} at 643 (quoting \textit{In re Agent Orange Prod. Liab. Litig.}, 996 F.2d at 1431).

141. \textit{Id.} at 644. The court explained the lack of extraordinary circumstances as follows:

While there is a theoretical potential for inconsistent or conflicting judgments in the state court and federal [arbitration] actions, the realistic likelihood of such an occurrence is small. With the issuance of the arbitration awards, the issues remaining before the federal court are those very narrow ones having to do with vacating or affirming the awards. This is not, therefore, an appropriate case in which to invoke the extraordinary power available through the All Writs Act.

\textit{Id.} at 644.

142. \textit{Id.}
The district court contrasted the facts in *Pan Atlantic Group* with those of *Neuman v. Goldberg*, a case in which a single state court action revolved around identical allegations contained in 47 federal court actions that had already been consolidated into a multi-district litigation. In that case, the power of the federal district court to continue its litigation would have been severely impeded by a single state action. The federal court had no power to terminate the state action—it simply removed the action to the same court handling the federal multi-district litigation.

One may argue that the All Writs Act is not the proper basis for removal in any event. *Pan Atlantic Group* indicates that even in a jurisdiction permitting removal under the All Writs Act, this judicial power is deemed very limited.

The requirement of showing exceptional circumstances touches not only upon what is a “necessary or appropriate” writ, but also upon whether a writ is in “aid of a federal [court’s preexisting] jurisdiction.” The problem, as Professor Joan Steinman points out, is that no real jurisdiction (diversity or subject matter) is otherwise truly “obtained.”

What is striking is that the district court, and apparently the Second Circuit, would permit removal of a case in the absence of some other explicit source of jurisdiction.

This willingness of some federal courts to exert jurisdiction where they have none, pursuant to the All Writs Act, seems to be a carbon copy of the willingness of federal bankruptcy courts to exert powers—such as substantive consolidation or staying of actions against third parties—pursuant to section 105, where the Code does not otherwise provide such powers. It should not be surprising that powerful voices criticize this development. Professor Steinman, among others, makes a persuasive case against the removal of cases to federal court based in the All Writs Act. She notes basic textual and interpretive reasons for avoiding this wide-ranging use of the All Writs Act: As to the textual approach, she notes that Congress carefully constructed a regime for removal which is broad and encompasses a wide variety of cases. And there is a striking absence of other statutes that impliedly provide for removal of cases. Furthermore, the normal removal process carries with it a set of detailed procedural rules. What rules, she asks, govern removal under the All Writs Act?

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144. *Id.*
146. *Id.* at 820. This would be true even in cases such as *Neuman*.
147. *Id.*
148. *Id.* at 820–24
combination, a jurist doing solid statutory interpretation would not extend the All Writs Act to removal powers that Congress already provided to courts.149

Professor Steinman also argues that there is a Constitutional barrier to removal under the All Writs Act. The willingness of federal courts to exert jurisdiction not provided for by Congress, and to remove cases from state court, runs contrary to notions of federalism and comity inherent in the Constitutional system. Indeed, she suggests that this concern has only been heightened by recent Supreme Court decisions “constitutionalizing state sovereign immunity and emphasizing the independence of the states as sovereigns.”150 Professor Steinman’s arguments against a broad reading of the All Writs Act to permit removal of cases to federal court may be transposed to the bankruptcy context. Section 105 of the Code was intended to fill in any gaps not otherwise covered by the All Writs Act, which itself was intended to provide only writs and powers that a court could exercise in aid of its already existing jurisdiction. Therefore, the All Writs Act should be the natural barrier for section 105.

For example, the Code provides a series of provisions and priorities for the payment of creditors during the pendency of the bankruptcy case.151 Like the All Writs Act, section 105 of the Code is a directed provision: it grants the court power to further a “provision” of the Code.152 Just what specific provision of the Code does a bankruptcy court further when it issues “first day orders” allowing payments to unsecured creditors, such as trade creditors? No doubt some reorganizations may fail without such payment, and successful reorganization is a policy and purpose of the Code. But the language of section 105 is directed not to policies, but to provisions.153 The rule is that creditors do not receive payments from the debtor’s estate during bankruptcy, unless the creditor can fit its claim into the purview of one of the specific provisions. There is no provision (other than section 105) on which the courts base the implicit right to grant first day orders. Applying Professor Steinman’s approach to section 105, the

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149. Id. at 820–21.
152. This point is made forcefully in Nickles & Epstein, supra note 5, at 18.
153. Id.
first day orders now issued so quickly, with almost rubber stamp practice by certain bankruptcy courts,\(^\text{154}\) fail.

Professor Steinman’s Constitutional argument seems to be a sympathetic echo of Professors Nickles and Epstein’s previously discussed Separation of Powers argument.\(^\text{155}\) Professors Nickles and Epstein were concerned that the decision of the bankruptcy court to operate in a way not specifically authorized by the Code intrudes on the power of the legislative branch. Professor Steinman is concerned that a federal court not intrude in a matter rightly and only before the state court. The core concern is the same, however: in both cases federal courts ignore a boundary set by the Constitution directing courts to act in accordance with a legislative scheme. And in each case, by crossing the respective boundary, federal courts trod the powers of state courts and (in the bankruptcy context) state law collection devices.

2. Actions Against Non Parties

This article asks whether bankruptcy courts routinely mishandle section 105 of the Code. Two uses of this provision that provoke controversy are the temporary stay and permanent release against non-debtor third parties that court sometimes issue in connection with a debtor’s reorganization.\(^\text{156}\) The Code provides no explicit statutory basis for these non-debtor stays. Given the All Writs heritage of section 105, it is interesting to note that a similar issue has come up with respect to the All Writs Act, although with far less frequency: the power of federal courts to issue an order to non-parties to federal litigation.

Using section 105 to either temporarily stay or permanently release actions against a third-party non-debtor may also fall within Professor Steinman’s general rubric. The stay and discharge are carefully thought out and broadly applied provisions, acting to protect both the debtor and the debtor’s property.\(^\text{157}\) And again, to borrow from Professor Steinman, there is no provision in which the stay of third parties is implied; courts rely solely on section 105. When not inhibited by federal bankruptcy law, creditors typically engage state collection law to round up an individual’s

\(^{154}\) See supra notes 66–72 and accompanying text. The same argument may be made against using section 105 to cross-collateralize loans of the debtor with pre-petition debts.

\(^{155}\) See supra notes 108–16 and accompanying text.

\(^{156}\) See supra notes 51–61 and accompanying text, for a list of cases involving temporary or permanent bankruptcy stays against third party non-debtors.

\(^{157}\) The automatic stay is provided under § 362(a) (2000) of the Code, and the Discharge is provided under §§ 524, 727, 1141 and 1328 (2000).
assets in payment of a debt. Unless diversity jurisdiction exists, this occurs in a state law forum. Application of a stay in bankruptcy effectively operates as a removal to federal courts. To the extent that law developed under the All Writs Act does (or should) limit removal, the same should occur for section 105 third-party stays.\textsuperscript{158}

That federal courts can issue orders and writs not specifically provided for by statute is beyond dispute, provided, of course, that the writs are necessary or appropriate to effectuate the provisions of a federal statute.\textsuperscript{159} One court states, “[t]he All Writs Act may be said to provide a federal court with those writs necessary to the preservation or exercise of its subject matter jurisdiction.”\textsuperscript{160} But it is not the purpose of the Act to create new powers in the court that extend beyond legitimate inherent powers of the court, or provide to the court what an explicit statutory scheme denies to the court.\textsuperscript{161}

Therefore, the key limitation on the All Writs Act is that federal courts cannot use it to enlarge a power otherwise specifically provided for and limited by statute. Explicit legislative design trumps the All Writs Act. Absent specific exceptions created by statute, the jurisdiction of district courts is territorial, and the district court cannot issue process beyond its own territorial boundaries.\textsuperscript{162}

But are there times that this restriction—forcing judges to find a congressional exception to this jurisdictional limit—frustrates federal courts? And then, would it be “necessary or appropriate” for a federal court to issue a writ under the All Writs Act beyond these territorial limits? The courts have answered these questions negatively, because to do the opposite

\textsuperscript{158} Several circuits have approved the use of All Writs Act as the basis for removal. See supra notes 134–55 and accompanying text. But Professor Steinman argues, as do Professors Nickles and Epstein, and Judge Krieger, that this is a misapplication of a statute that ought to be of more limited service.

\textsuperscript{159} See Wacker, supra note 25, at 59–60; Steinman, supra note 134, at 778–80.

\textsuperscript{160} ITT Cmty. Dev. Corp. v. Barton, 569 F.2d 1351, 1359 (5th Cir. 1978) (vacating district court civil contempt order against garnishees who failed to turn money over to court registry as demanded by prejudgment garnishment proceeding).

\textsuperscript{161} Id. See also In re Previn, 204 F.2d 417, 418 (1st Cir. 1953) (denying request for writ of mandamus ordering district court to grant motion for jury trial; no finding by Court of Appeals of an abuse of discretion). “The basic purpose of section 1651, and of its statutory predecessors, was to assure to the various federal courts the power to issue appropriate writs and orders of an auxiliary nature in aid of their respective jurisdictions as conferred by other provisions of law.” Id. (emphasis added.)

\textsuperscript{162} See 28 U.S.C. § 2241(a) (2000) (stating district courts may issue writs of habeas corpus “within their respective jurisdictions”).
would contravene a specific congressional directive. The All Writs Act forbids this by permitting the issuance of writs only “in aid of their respective jurisdictions.”

Section 105 of the Code conveys the same requirement in very similar language. It permits the bankruptcy court to issue orders and take actions “to carry out the provisions of this title.” One would expect that bankruptcy courts would read this limitation strictly when responding to requests for a partial discharge of student loans, or for expansion of the stay afforded by the filing of bankruptcy to parties other than the debtor.

Most of the All Writs cases, and presumably instances in which a party requests a court to use its power conferred by the Act, involve writs directed at state or federal courts. There are few cases in which a district court has applied the All Writs Act to enable it to issue an order applying to a non-party. Nevertheless, in United States v. New York Telephone Co., the Supreme Court approved a writ, issued pursuant to the All Writs Act, that ordered a third party to federal litigation to act. In New York Telephone

163. See, e.g., Edgerly v. Kennelly, 215 F.2d 420, 422 (7th Cir. 1954) (holding district court does not have jurisdiction, by writ of habeas corpus, to direct a prison warden to produce a prisoner to serve as a witness in a civil rights action against city officials).


165. 434 U.S. 159, 174 (1977). See generally Steinman, supra note 134, at 857–59. As professor Steinman notes, New York Telephone Co. was superceded by the Second Circuit’s decision in Benjamin v. Malcom, 803 F.2d 46 (2d Cir. 1986) (validating All Writs injunction against state officials who failed to abide by court order reducing inmate population at a detention center). In that case, the Second Circuit held that “the All Writs Act empowers federal courts to issue orders against non-parties to vindicate the constitutional rights of litigants, so the fact that the owners had not been parties to the underlying discrimination suit did not disable the court.” Steinman, supra note 134, at 796.

166. Scholars worry that New York Telephone Co. may be read to suggest that the All Writs Act creates an independent basis of personal jurisdiction over non-parties. See Steinman, supra note 134, at 857–58 (citing Henry Paul Monaghan, Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members, 98 COLUM. L. REV. 1148, 1190 (1998)). Steinman and Monaghan firmly decide, however, that the All Writs Act is not an independent basis for personal jurisdiction. Professor Steinman notes 1) that New York Telephone was literally within the territorial jurisdiction of the court and 2) that New York Telephone was the only party capable of “giving effect” to the court’s writ (it was their phone system). Steinman, supra note 134, at 858 n.372–73. As a result, the court exercised jurisdiction because it had to and no other court could. As Professor Steinman notes, there is a strand of cases and scholarly thought that suggests that “there must be at least one forum somewhere with power to adjudicate every case.” Id. at 858 n.373 (citing Larry L. Teply & Ralph U. Whitten, Civil Procedure 254 (1991)).

This doctrine emerged in the Supreme Court case, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950), cited in Steinman, supra note 134, at 858 n.373; see also United States v. Int’l Bhd. of Teamsters, 907 F.2d 277, 281 (2d Cir. 1990) (“We believe that the All Writs Act requires no more than that the persons enjoined have the ‘minimum contacts’ that are constitutionally required under due process.” (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945))).
Co., the Court directed the telephone company to provide state law enforcement personnel with assistance in determining whether and what extent crimes were being committed by use of “pen registers.” According to the Court, the order was “clearly authorized by the All Writs Act and was consistent with the intent of Congress.”

The ruling was premised on the existence of subject matter jurisdiction and “appropriate circumstances.” The Court stated the test as follows: “The power conferred by the Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice . . . .”

The opinion blurs the line of “necessary” and “appropriate.” The order apparently was both, according to the Court. The Court suggested that “necessary” for purposes of the All Writs Act means something less than absolutely necessary. According to the Court, prior to the consolidation of the two federal writ sections into the All Writs Act, federal courts were willing to exert powers even if the order was not necessary “in the sense that the court could not otherwise physically discharge its appellate duties.” Rather, the All Writs Act authorizes a court to issue a writ that, “despite the absence of express statutory authority” at that particular moment, restores or maintains the effectiveness of some other federal scheme.

Courts cannot issue writs pursuant to the All Writs Act merely because issuance is “convenient.” The writ must connect to a specific preexisting and “extraordinary” statutory need. An example would be the use of the All Writs Act to order discovery in a habeas corpus proceeding, if necessary to render the proceeding effective. In contrast, the Federal District Court for the Southern District of New York denied plaintiffs an injunction

170. Id. As explained in note 25, supra, the “in aid of jurisdiction” language was not part of section 13 of the First Judiciary Act of 1789. Section 13 applied only to the Supreme Court for the purposes of regulating the lower courts.
171. Id. at 173 (quoting Adams v. United States, 317 U.S. 269, 273 (1942)).
172. Id.
173. See Steinman, supra note 134, at 859 (citation omitted).
175. Id. at 42 n.7 (citing Harris v. Nelson, 394 U.S. 286 (1969)).
preventing a garnishment because “this case does not meet the extraordinary circumstances test of the All Writs Act.”\textsuperscript{176}

Summarizing then, the All Writs Act does not create an independent source of jurisdiction; writs issued under the Act must connect tightly to a preexisting federal scheme; and such writs may enjoin non-parties to the underlying litigation only in extraordinary circumstances. Transposing these limitations to the section 105 scenario, writs enjoining actions by creditors against non-debtors must be tied to enforcement of a specific Code section other than section 105 itself. Furthermore, actions of the bankruptcy court would be “necessary or appropriate” only if exercised in connection with “extraordinary” circumstances.\textsuperscript{177} Therefore, although “necessary or appropriate” as it is used in section 105 of the Bankruptcy Code has come to mean something quite general, federal courts applying this same phrase in the context of the All Writs Act stay close to the necessary side of the spectrum.

It may be that, in some limited cases, collection actions against a non-party (the debtor’s insider) may make reorganization impossible. This frustration of a goal of bankruptcy would not be enough, however, to issue a writ. The court action must prevent frustration of the court’s enforcement or application of a specific Code provision,\textsuperscript{178} such as section 362 (the automatic stay).


\textsuperscript{177} In In re Baldwin-United Corp., 770 F.2d at 336–37, the Second Circuit Court of Appeals stayed independent actions brought by a number of States against defendants in federal securities fraud litigation. The States were not parties in the underlying litigation (the parties included only the defendants and the United States government.) Although the Second Circuit did not use the phrase “extraordinary circumstances,” it made clear that the injunction would only be issued if necessary to prevent the third parties from “thwarting” the federal litigation. See also United States v. Int’l Bhd. of Teamsters, 907 F.2d 277, 279–80 (2d Cir. 1990) (upholding a district court All Writs injunction against members and affiliates of union in any litigation in any other court in this circuit). Interestingly, the Court of Appeals held that the circumstances were extraordinary, and the writ was sufficiently “necessary” to warrant issue, despite the availability of an alternative to the writ—in this case, a motion for change of venue under 28 U.S.C. § 1404(a) (1988). Int’l Bhd. of Teamsters, 907 F.2d at 280. The appellate court determined that “[w]here an alternative procedure is available, however, ‘exceptional circumstances’ which ‘show clearly the inadequacy’ of that alternative procedure may still justify issuing the writ.” Id. (quoting Pa. Bureau of Corr., 474 U.S. at 43).

\textsuperscript{178} See supra note 41 and accompanying text.
Professor Steinman argues that the source of a court’s authority to enter any order against non-parties to the litigation under the All Writs Act is “unclear.” 179 The only plausible basis she finds is the fact that no other court seems to be a valid forum for the government to obtain the necessary writ. 180 She terms this “jurisdiction by necessity.” 181 Ultimately, she concludes that New York Telephone Co. should be narrowly understood and applied. 182 And as to the issue of whether the All Writs Act should be used to contravene an established federal statutory scheme defining the limits of federal court jurisdiction, she answers with a resounding “no.” 183 She admits that “some expansion of the federal courts’ powers to exercise personal jurisdiction and to enjoin state court litigation would be convenient.” Professor Steinman nevertheless asserts that the existing tools of the federal courts, jurisdiction and removal doctrines, and injunction rights, are “adequate.” 184

In the same sense, it might be convenient for bankruptcy courts to grant to themselves wider authority to issue orders and take actions. But section 105 of the Code traces its DNA directly to the All Writs Act, and absent a Congressional modification to this provision—perhaps by altering section 105 such that courts could take actions to further specific “policies” underlying the Code—bankruptcy courts should be similarly limited. 185

B. The Necessary and Proper Clause

Article 1, section 8 of the Constitution specifically enumerates 17 powers of Congress. 186 Clause 18 of that section concludes by providing Congress with the power “[t]o make all Laws which shall be necessary and

179. Steinman, supra note 134, at 857.
180. Id. at 858.
181. See supra note 166 and accompanying text.
182. Steinman, supra note 134, at 859.
183. Id. at 883.
184. Id.
185. There is hope that bankruptcy courts disposed to legislate from the bench may hear voices from above. In United States v. Reorganized CF&I Fabricators of Utah, Inc., 518 U.S. 213, 228–29 (1996), the Supreme Court rejected an attempt to use section 510(c) (equitable subordination) to subordinate certain tax claims to the claims of general unsecured creditors. Collier suggests that this opinion “would seem to disfavor use of section 105 as a justification for the payment of such claims.” COLLIER, supra note 17, ¶ 105.05. The Court in that case stated, “[t]he principle is simply that categorical reordering of priorities that takes place at the legislative level of consideration is beyond the scope of judicial authority to order equitable subordination under § 510(c).” Reorganized CF&I Fabricators, 518 U.S. at 229, quoted in COLLIER, supra note 17, ¶ 105.05.
proper for carrying into Execution the foregoing Powers, and all other
Powers vested by this Constitution in the Government of the United States,
or in any Department or Officer thereof.”\textsuperscript{187} It is the first portion of this
 provision with which this article is concerned—the ability of the Congress
to execute the “foregoing Powers.”\textsuperscript{188} After over two hundred years, the
correct meaning, and indeed, whether there is meaning at all, in this
 provision, remains unclear. For the limited purposes of this article, it is
unnecessary to attempt to resolve this debate.\textsuperscript{189} Rather, I wish to reduce to
their essentials a number of views now gestating in the constitutional law
arena for application to section 105 of the Code.

The premise of this article is that an understanding of the Necessary and
Proper Clause of the Constitution will improve and clarify the opinions of
courts and commentators as to section 105 of the Code. There are good
reasons to view the Code and the Constitution as similar, and therefore to
apply some of the constitutional analytical tricks to the Code. In a sense,
each document is a form of trust.\textsuperscript{190} In the Constitution, “We the People”
hand over significant powers to the federal government—divesting both the
state and the individual of some level of dominion and control—in return
for (hopefully) benevolent representative democracy. The Constitution

\textsuperscript{187} Id. § 8, cl. 18.

\textsuperscript{188} A seminal treatment of the meaning of the latter portion of the Necessary and Proper
Clause may be found in Van Alstyne, supra note 110.

\textsuperscript{189} The author does not disclaim any opinion, however. At some point, any thoughtful
person confronting this provision is forced to choose his favored originals, whether Marshall or
Madison or Hamilton, and to emphasize either the arguments of Federalists or Anti-Federalists.
This author believes that the words “necessary and proper” should be read to have some
substantive meaning.

\textsuperscript{190} Although not describing the Constitution in precisely these terms, scholars have
skirted around the edges of the idea. See Valerie M. Fogleman & James Etienne Viator, The
Critical Technologies Approach: Controlling Scientific Communication for the National
Security, 4 BYU J. PUB. L. 293, 349 n.381 (1990) (explaining an adherence to a constitutional
theory of strict constructionism). Fogleman and Viator state:

In short, why should a modern judge's understanding be preferred to the
original understanding? One of the few noninterpretivists to address this
problem is John Hart Ely, who contends that a judge's adherence to tradition
is undemocratic because it allows “yesterday's majority . . . [to] control
today's.” J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL
REVIEW 62 (1980). But the legitimacy of judicial review in a democracy
hangs on the judge's application of the highest expression of the people's
will in a written constitution. Alexander Hamilton's early defense of judicial
review, see THE FEDERALIST NO. 78, at 524 (A. Hamilton) (J. Cooke ed.
1961), and Chief Justice John Marshall's similar defense in Marbury v.
Madison, 5 U.S. (1 Cranch) 137, 176-78 (1803), implicitly assume that the
ratifying citizens of 1787-1788 formed a super-majority that established an
Urtext, namely, our national Constitution.

Id. The “Urtext,” ratified by a supermajority of citizens, is essentially a trust.
spells out the terms of this trust, with powers of trustee shared in a dynamic manner among the judiciary, executive and legislative branches. The Code is explicitly a trust document. The authors adopted trust law language, and the courts have consistently imposed trust law duties on the debtor.\textsuperscript{191}

As already explained, section 105 (like the All Writs Act upon which it is based) is intended to fill in gaps in the bankruptcy court’s powers.\textsuperscript{192} Even in the absence of section 105, bankruptcy courts would likely have the implied power to take steps and issue writs necessary to effectuate provisions of the Code.\textsuperscript{193} In this sense, section 105 may do little more than make doubly clear the existence of these powers. The Code provides that bankruptcy courts may issue orders and writs necessary or appropriate to further provisions of the code. Nevertheless, parties to bankruptcy cases prod bankruptcy courts to expand their powers beyond this basic limitation.

The Necessary and Proper Clause serves a similar gap filling function. Whereas section 105 of the Code concerns powers of a court, the first portion of the Necessary and Proper Clause concerns powers of the federal legislature. The gap filling aspect of the Necessary and Proper Clause may be easier to discern than that of section 105 because article I, section 8 lists a specified set of limited powers. Yet, thoughtfully considered, this distinction matters little. The remaining sections of the Code function much like the first clauses of article I, section 8, and lay out a series of court powers and responsibilities. Perhaps the key difference is what is missing from the Code that is present in the Constitution: The Code has no real corollary to article 1, section 9, which lists powers specifically denied to Congress.

The central bankruptcy question one may ask is: Does section 105 legitimately serve as a basis for court action and power independent, and sometimes in spite of, other provisions of the Code? The constitutional question is similar to the bankruptcy question: Does the Necessary and Proper Clause legitimately serve as a (virtually) independent basis for Congressional action?


\textsuperscript{192} See supra notes 31–33 and accompanying text.

\textsuperscript{193} See Nickles, \textit{supra} note 63 (noting that bankruptcy courts have legitimate inherent and implied powers).
1.  *M’Culloch v. Maryland*

The proper place to begin a discussion of the Necessary and Proper clause is *M’Culloch v. Maryland*, a case which for many years has so dominated discussion of this Constitutional provision as to foreclose substantive development of the law. Research has not revealed any cases in which *M’Culloch* is discussed in bankruptcy jurisprudence. The author therefore begs the reader’s indulgence in recounting briefly the details of the case and highlights of Chief Justice John Marshall’s opinion.

In April 1816 Congress passed legislation incorporating a national bank. Just under two years later, the state of Maryland passed legislation imposing a tax on all banks with branches located in Maryland, but not chartered by the state. This tax was applied to the United States because the national bank opened a branch office for business in Baltimore in May of 1818. As of the time of the appeal to the Supreme Court, the parties admitted that neither the national bank nor its branch had paid the $15,000 that it owed in taxes, assuming the state tax to be constitutional.

The case was well argued by notable attorneys. Indeed, one has new appreciation for the saying that “there is nothing new under the sun,” after reading the briefs and the opinion. Recent scholarship may add much that is new and significant, but sometimes it merely restates what the original

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194.  The Necessary and Proper Clause is oft times called the “Sweeping Clause.” This appellation may be traced nearly to the date it became law. Attorneys to *M’Culloch* refer it to in this manner. Mr. Hopkinson, for defendants, stated: “It was foreseen, and objected by its opponents, that, under the general sweeping power given to Congress, ‘[t]o make all laws which shall be necessary and proper, for carrying into execution the foregoing powers,’ &c. the States might be exposed to great dangers, and the most humiliating and oppressive encroachments, particularly in this very matter of taxation.” *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 344 (1819). See also argument of Mr. Jones, *M’Culloch*, 17 U.S. at 366. The history of this phrase is chronicled in Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 D UKE. L.J. 267, 270–71 & nn. 9–10 (1993) (citing THE FEDERALIST PAPERS, No. 33, at 203 (Alexander Hamilton) (Clinton Rossiter, ed., 1961) and Van Alstyne, *supra* note 110).


196.  Although *M’Culloch* is received as the seminal case applying the Necessary and Proper Clause, it was not the first case in which Justice Marshall confronted this provision. See Van Alstyne, *supra* note 110, at 123–24. Professor Van Alstyne explains that “fifteen years earlier, in *United States v. Fisher* [6 U.S. (2 Cranch) 358, 396 (1805)], [Justice Marshall] set the tone for *M’Culloch v. Maryland* by construing the sweeping clause and the latitude of discretion established for Congress.” *Id.*

197.  *M’Culloch*, 17 U.S. at 318–19. James William M’Culloch was the “cashier” in the Baltimore branch of the national bank. The branch bank carried on traditional banking activities, “by issuing Bank notes and discounting promissory notes, and performing other operations usual and customary for Banks to do and perform.” *Id.*

198.  *Id.* at 319.

199.  No less a figure than Daniel Webster argued on behalf of the United States.
parties argued forcefully at the outset. For example, the attorneys are so well acquainted with the various Federalist Papers\textsuperscript{200} that modern day political science students ought to be impressed. Marshall’s is not a long opinion (certainly by today’s Supreme Court standards), and it hits its mark early. He notes, “The first question made in the cause is, has Congress power to incorporate a bank?”\textsuperscript{201} Marshall’s answer is alternately statutory, political, and policy-based (i.e., issues of federalism). Each of these forms of analysis has its counterpart in a correct evaluation of section 105 of the Code. Later portions of this part will identify these legal doppelgangers.

The pragmatic and political element comes first. Justice Marshall suggests that it is simply too late to question the constitutionality of the bank. Twenty-nine years had already passed since the introduction of the Constitution.\textsuperscript{202} He states that the national bank was “introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department . . . as a law of undoubted obligation.”\textsuperscript{203} According to Marshall, even a “doubtful question . . . if not put at rest by the practice of the government, ought to receive a considerable impression from that practice.”\textsuperscript{204} That this

\textsuperscript{200} Just one example comes in the argument of Mr. Hopkinson, arguing on behalf of the “defendant, in error”—that is, the State of Maryland. He asserts that states have the right of taxation (except where import and export duties are concerned.) Furthermore, the states’ right to tax is “sacred and inviolable . . . and that an attempt on the part of the national government to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any article or clause of its constitution.” \textit{M’Culloch}, 17 U.S. at 344. He demonstrates his facility with the Federalists (and his sarcasm) by next stating:

> With the exception mentioned, the Federal and State powers of taxation are declared to be \textit{concurrent}, and if the United States are justified in taxing State banks, the same equal and concurrent authority will justify the State in taxing the Bank of the United States, or any other bank. The author [Hamilton] begins No. 34 [of The Federalist Papers], by saying, “I flatter myself it has been clearly shown, in my last number, that the particular States, under the proposed constitution, would have co-equal authority with the Union, in the article of revenue, except as to duties on imports.” Under such assurances from those who made, who recommended, and carried, the constitution, and who were supposed to best understand it, was it received and adopted by the people of these United States; and now, after a lapse of nearly thirty years, they are to be informed, that all this is a mistake, all these assurances are unwarranted . . . .

\textit{Id.} at 344–45.

\textsuperscript{201} \textit{Id.} at 401.

\textsuperscript{202} This time period may not seem much now that the Constitution is over two hundred years old. But the march of time is the march of generations. With twenty-nine years of water under the bridge, many of the framers were already old, dead or at the least, handing the reins of power to their children and successors.

\textsuperscript{203} \textit{Id.} at 401.

\textsuperscript{204} \textit{Id.}
argument is political in nature is clear. He states that the national bank “did not steal upon an unsuspecting legislature” but was “opposed with equal zeal and ability.”

The parties to the litigation initially emphasized issues of statutory construction. Although the Constitution requires the exercise of congressional power to be both necessary and proper, Marshall focuses his attention on the word “necessary.” He states that this word “is considered as controlling the whole sentence.” For Marshall, necessary means, “one thing is convenient, or useful, or essential to another.” Marshall only lightly addresses the meaning of the word “proper.”

As constitutional law students learn, Justice Marshall compares the use of the word “necessary” in the Necessary and Proper Clause with its use in other constitutional provisions. Necessity, according to Justice Marshall, does not convey “one single definite idea” and, given the context and other words that make up the provision, may mean many things. He notes that article 1, section 10 prohibits a state from placing duties on imports and exports, unless “absolutely necessary.” In the Necessary and Proper Clause, necessary would mean merely the “means in calculated to produce the end,” where in section 10, “absolutely necessary” would require the Congressional action to be the only method capable of producing the result.

The power to create a national bank is not among the listed powers of Congress in article 1, section 8 of the Constitution. Justice Marshall immediately recognizes the absence of this explicit power. But Justice Marshall suggests that instilling Congress with a specific set of powers in clauses 1 through 17 of section 8 (including the power to collect taxes, create a federal judiciary inferior to the Supreme Court, and to regulate commerce) necessitates a host of implied powers necessary to carry these enumerated powers into their full execution. Marshall suggests that the

205. Id. at 402.
206. Justice Marshall states: “But the argument on which most reliance is placed, is drawn from the peculiar language of this clause.” Id. at 413.
207. Id.
208. Id. Marshall’s organization is supreme. He begins by accepting the validity of one definition argued by the supporters of the Maryland tax: that necessity means “indispensable, and without which the power would be nugatory.” Id. Yet, he notes that words may carry more than one definition. The question is one of fit. Which definition makes the most sense of a phrase, given the context? Or in Justice Marshall’s words: “Is it true, that this is the sense in which the word ‘necessary’ is always used?” Id.
209. Id. at 420–21.
210. M’Culloch, 17 U.S. at 417. He states: Take, for example, the power “to establish post offices and post roads.” This power is executed, by the single act of making the establishment. But, from this has been inferred the power and duty of carrying the mail along the
Necessary and Proper clause codifies the implication of power in the first seventeen grants, and a power need not be “indispensably necessary” to be implied. Marshall also examines the placement of the word “necessary” in the provision: What words precede and follow it (or fail to precede and follow it)? As mentioned, “necessary” is not preceded by “absolutely,” but it is followed by the words “and proper.” Where the word “necessary” suggests rigor and mandated action, the word “proper” suggests just the opposite. Proper laws are discretionary; Congress need not take such action but may choose to do so in its wisdom. Indeed, Marshall points out that the

post road, from one post office to another. And, from this implied power, has again been inferred the right to punish those who steal letters from the post office, or rob the mail. It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post office and post road. This right is indeed essential to the beneficial exercise of the power, but not indispensably necessary to its existence.

Id. 211. One wonders what the Necessary and Proper Clause adds if all it does is grant Congress the right to do what is implied among the enumerated powers. See infra note 317 and accompanying text.

212. Justice Marshall previously announced his view of the meaning of “necessary” in the Sweeping Clause in United States v. Fisher, 6 U.S. (2 Cranch) 358, 396 (1805), in which he stated, “In construing this clause it would be incorrect and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power.” Justice Marshall goes on to state that the framers intended that Congress be afforded a “choice of means” in furthering the provisions of article I, section 8. Id. See Van Alstyne, supra note 110, at 123 (quoting the same language from Fisher).

Part I of this article addressed some of the more expansive uses of section 105, and questioned the basis for the bankruptcy court’s contempt powers. Professor Van Alystne points out an interesting corollary application of the Necessary and Proper Clause. He describes an exchange of essays about M’Culloch—one set written by two Virginia judges who were aghast at Justice Marshall’s expansion of Congressional power, and the other by Justice Marshall in response. In his essay, “Marshall again emphasized the separate importance of the sweeping clause as the proper source of national power (a congressional power), to provide all incidental means of rendering the judicial power fully effective.” Van Alstyne, supra note 110, at 126–27 (citing GERALD GUNther, JOHN MARSHALL’S DEFENSE OF M’Culloch v. Maryland (1969), at 173). Marshall explains that the ability of Congress to define perjury rules arises directly from the Necessary and Proper Clause, because perjury rules are the means of effectuating the constitution the courts and “tribunals inferior to the supreme court.” Id. Similarly, a bankruptcy court may need a contempt power to “effectuate” provisions of the Code.

213. M’Culloch, 17 U.S. at 418. Daniel Webster, arguing for the federal government, went so far as to argue that necessary and proper are synonymous. He stated: “These words . . . in such an instrument, are probably to be considered as synonymous. Necessary powers must here intend such powers as are suitable and fitted to the object . . . .” Id. at 324–25. This view was echoed recently by Professor Akhil Amar.
drafters could easily have crafted the provision to make utterly clear its restrictive nature, but they failed to do so. This omission, he argues, must be treated as deliberate and informative.\textsuperscript{214}

To a very limited degree, Marshall does define “proper.” For Marshall, proper congressional actions are “plainly adapted to [the desired] end, [and those] which are not prohibited, but consist with the letter and spirit of the constitution.”\textsuperscript{215} The letter of the Constitution did not prohibit a national bank. Whether a law comports with the spirit of the document is in the eyes of the majority of the Court. Justice Marshall’s introductory history of the national bank—that the first Congress passed similar legislation after serious debate, probably helps him here. Marshall does not explicitly connect his discussion of what is proper with his treatment of federalism. But it is here that the appropriate balance between state and federal powers is best located.\textsuperscript{216} The “spirit of the constitution” must refer to the broader structure of the document, and the manner in which it resolves a variety of conflicting tensions, state versus federal power, individual rights versus government control, etc.

Marshall looks not just at the particular words, but at the location of the provision in the document. The drafters placed the Necessary and Proper Clause in section 8 of article I, which lists powers specifically granted to Congress, rather than in section 9, which just as specifically lists powers prohibited to Congress. This leads to the conclusion that the provision is meant to “enlarge, not to diminish the powers vested in the government.”\textsuperscript{217}

Marshall deals rather summarily with the federalism argument, at least in the first part of his opinion devoted to the scope of the Necessary and

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Justice Marshall does not state that these terms mean the same thing. However, he does use the word “convenient” to help define “necessity.” Lawyers for the state of Maryland also used the word “convenient” when describing the meaning of the word “proper.” The lines between the words blur repeatedly. This would lend credence to the idea, expressed by Webster, that proper and necessary are in fact synonymous. It is interesting to note that bankruptcy courts, confronting very similar phraseology, do not distinguish between those orders of a court that are necessary and those that are appropriate. Instead, these courts simply repeat the entire phrase, and issue an order because it is “necessary or appropriate.” These words have in fact become synonymous in bankruptcy jurisprudence.

\textsuperscript{214} Id. at 420–21.

\textsuperscript{215} Id. at 421.

\textsuperscript{216} This is essentially Justice Scalia’s point in Printz v. United States. See infra notes 318–26 and accompanying text. What “proper” means is the subject of considerable recent discussion by scholars, who have developed a variety of approaches. Some impute a jurisdictional restriction, while others see civil liberties embedded in what is proper congressional action. See infra notes 279–91 and accompanying text.

\textsuperscript{217} M’Culloch, 17 U.S. at 420.
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Proper Clause. The Constitution establishes a limited government of enumerated powers. To the degree that a power is within congressional ambit, it “is supreme within its sphere of action.” He deems this “one proposition” to have the “universal assent of mankind.” Congress is supreme in whatever is necessary and proper to effectuate the powers listed in clauses 1 through 17 of article 1, section 8. The power to incorporate a national bank, although not explicitly mentioned, is subsumed in and implied from the “great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies.”

Although Justice Marshall sided with the federal government, attorneys for the State of Maryland, and commentators of the day, found arguments to support a less liberal reading of the Necessary and Proper Clause. One of Maryland’s lawyers articulated the dissenting view as well as anyone. Indeed, he found it virtually inconceivable that anyone could reach a viewpoint other than his own. A primary complaint of the attorneys for the state of Maryland focused not on necessary or proper, but instead on the word “and” that connects two. Counsel for the State of Maryland, in his response to Daniel Webster’s liberal reading of “necessary,” stated: “It is not ‘necessary or proper,’ but ‘necessary and proper.’ The means used must have both these qualities.”

Again, the focus was on the necessity

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218. Marshall resolves two questions in *M’Culloch*. First, he answers in the affirmative the question of whether the federal government can create a national bank. The second question, which he answers in the negative, is whether Maryland may constitutionally tax the national bank. Marshall treats issues of federalism and government by enumerated powers in both sections of his opinion, but it is his answer to the first question that is of primary concern here. He states:

This government is acknowledged by all to be one of enumerated powers.

The principle, that it can exercise only the powers granted to it, would seem too apparent . . . . But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.

In discussing these questions, the conflicting powers of the general and State governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.

*Id.* at 405. He states, almost presciently, that tensions between the states and the federal government will continue to arise “as long as our system shall exist.” *Id.* One may make the same point regarding the power of the bankruptcy court and the varying policies that section 105 may be used to advance.

219. *Id.*

220. *Id.*

221. *Id.* at 407.

222. He states: “It would seem that human language could not furnish words less liable to misconstruction!” *Id.* at 366.

223. *Id.* at 367.
He proposed that necessary means “indispensably requisite.”

The opponents of the federal bank brought a number of other well-founded arguments to bear. They did not deny the necessity of implying powers to congress incidental to the great powers listed in article 1, section 8, but argued that the power to create a national bank was simply too significant to be subsumed into the regulation of commerce, the collection of taxes or the raising of armies. And in a more general way, they argued that validating such broad implication of powers would conflict with the basis of the American government as one of enumerated powers.

To sum up, in Justice Marshall’s jurisprudence, necessary laws are those calculated to achieve an end (even though such laws may not be absolutely necessary to achieve their purposes). Proper laws are those that do not

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224. *Id.* This lawyer seemingly accepted a definition of the word proper as “convenient—fit—adapted.” This is interesting, because Justice Marshall’s ultimate definition of the word necessary includes the word “convenient” as well.

225. *Id.* at 365–66. Attorney Jones stated:

For example, the power of coining money implies the power of establishing a mint. The power of laying and collecting taxes implies the power of regulating the mode of assessment and collection, and of appointing revenue officers; but it does not imply the power of establishing a great banking corporation, branching out into every district of the country, and inundating it with a flood of paper money. To derive such a tremendous authority from implication, would be to change the subordinate into fundamental powers; to make the implied powers greater than those which are expressly granted, and to change the whole scheme and theory of the government.

*Id.* at 365.

226. *Id.* Mr. Jones argued that a government of enumerated powers would be subverted by this broad reading of the Necessary and Proper Clause. In so doing, he stated:

It is well known, that many of the powers which are expressly granted to the national government in the constitution, were most reluctantly conceded by the people, who were lulled into confidence by the assurances of its advocates, that it contained no latent ambiguity, but was to be limited to the literal terms of the grant: and in order to quiet all alarm, the 10th article of amendments was added, declaring ’that the powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.’ . . . But it is contended, that the powers expressly granted to the national government in the constitution, are enlarged to an indefinite extent, by the sweeping clause, authorizing Congress to make all laws which shall be necessary and proper for carrying into execution the powers expressly delegated to the national government, or any of its departments or officers.

*Id.* at 365–66.
violate the spirit of the constitution (whatever that may be). Marshall defined *necessary* and *proper* in remarkably similar terms.²²⁷

Professor Randy Barnett now argues, as attorneys for Maryland did at the time,²²⁸ that this congruence of meanings transformed the “and” in “necessary and proper” into an “or.”²²⁹ These are generous boundaries for Congress.²³⁰

2. A Meaningful Diversion: Application of Justice Marshall’s Analysis to section 105

Justice Marshall’s textual analysis of the Necessary and Proper clause should be required reading for new bankruptcy judges. He takes a still-new constitution and interprets primary language, largely by examining the use and placement of words in the document. In this case, Justice Marshall focuses largely on the meaning of “necessary,” but to a lesser extent, also on the meaning of “proper.” The fact that these words appear in several places in the constitution is, for Marshall, telling. Bankruptcy judges engage in (or should engage in) a similar approach to statutory analysis—and certainly as a starting point in their analyses.

It would be poor form for this author to criticize bankruptcy opinions without attempting to perform this type of analysis. For this reason, this part will follow Justice Marshall’s lead, and examine other instances in the Code in which the drafters used the words “necessary” and “appropriate.” As noted below,²³¹ this analysis may not ultimately resolve the section 105 questions at the core of this article. Nevertheless, section 105 uses words

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²²⁸. *See supra* notes 222 and accompanying text.


²³⁰. What is the court’s role in evaluating congressional action? This has been a key issue in much of the literature, but it has less application in this paper. It is the substantive meaning of the words that matter for the purpose of comparing the provisions of the Constitution and the Code. It seems to be conventional wisdom that the Court must evaluate whether “necessity” exists for congressional action, but the “degree of necessity” is a congressional determination. *See, e.g.*, Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle*, 111 HARV. L. REV. 2180, 2234 (1998) (quoting M’Culloch, 17 U.S. at 413). (She also quotes a more elaborate statement of Marshall, from GUNThER, *supra* note 212, at 19–20.) One scholar views the opinion of Marshall in *M’Culloch* favorably, not so much for providing content to the clause, but because the opinion “neutered the framer’s misfeasance” and essentially read “the necessary and proper clause out of the constitution.” *See* Mark A. Graber, *Unnecessary and Unintelligible*, 12 CONST. COMMENT. 167 (1995). Professor Graber suggests “if any provision in the Constitution merits the appellation ‘stupid,’ it is the conclusion of article 1, § 8.”

²³¹. *See infra* notes 267–71 and accompanying text.
common to the rest of the Code, and provides a wonderful opportunity to employ Justice Marshall’s techniques. As will be seen, it is not Justice Marshall’s examination of the meaning of individual words that is truly instructive. Rather, it is his concrete interpretation of the limiting phrase at the end of the Necessary and Proper Clause that informs a correct application of section 105 to the difficult scenarios described in Part I of this article.

Justice Marshall concluded that the word “necessary” in the Necessary and Proper Clause does not mean absolutely necessary, but instead needful. He contrasted the Necessary and Proper Clause with the Import Export Clause—article 1, section 10 of the Constitution—which permits states to place import and export duties on goods only in the event such duties were “absolutely necessary.” Furthermore, he found weight in the pairing of the word “necessary” with the word “proper.” The latter word carries not a sense of the imperative, but of discretion and judgment. From these, and other arguments summarized in this part, Justice Marshall concluded that “necessary” in the Necessary and Proper clause should be read broadly.

“Necessary” and “appropriate” are not independently defined in chapter 1 of the Code, and it would be odd to think they would be. Things, entities and status tend to be defined terms. “Necessary” and “appropriate” are adjectives; words of common meaning, and the authors of the Code are unlikely to have ever thought definitions were required. The Code does provide rules of construction, but these rules of construction are not helpful on the point. The rules define a very limited list of particular words such as “includes” or “including,” which are read to be “not limiting.”

Necessary and appropriate are not on the list.

a. “Necessary”

The word “necessary” appears in several places throughout the Code. Examining the use of this word (as well as words that equate with “appropriate”) leads to the initial conclusion that the drafters of the Code were not quite as careful with, and consistent in the use of, language, as had been the framers of the Constitution. Although even Marshall acknowledges that the drafters cannot have considered the impact of every word choice. See M’Culloch, 17 U.S. (4 Wheat.) at 407 (1819).
sections 330(a)(1)(A), 362(d)(2)(B), 503(b)(1)(A), 523(a)(15), 1142(b), 1305(a)(2), and 1322(a)(1) for the purpose of drawing out the general meaning of “necessary.” Applying an approach similar to that undertaken by Justice Marshall suggests that “necessary” as used in section 105 of the Code truly is liberal in meaning. Where scholars such as Randy Barnett argue that this word should be construed strictly in the Necessary and Proper Clause, these same objections would fail in application to the Code.

Initially, we should note that there is no place in the Code where the drafters use the phrase “absolutely necessary,” thus providing an easy juxtaposition to the mere use of the word “necessary.” We do not have the luxury of this particular device, as Justice Marshall did in his reading of the Constitution. Justice Marshall noted how the word “necessary” was paired with “proper.” “Proper” is a word of discretion and, he argued, it would be incongruous to read necessary strictly when paired immediately

240. Id. § 362(d)(2) (permitting a bankruptcy court to grant relief from the automatic stay with respect to certain property if the debtor has no equity interest in the property and the property is “not necessary to an effective reorganization”).
241. Id. § 503(b)(1)(A) (including among administrative expenses “the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case). Under 11 U.S.C. § 507(a) (1), administrative expenses receive first priority payment in a liquidation.
242. Id. § 523(a)(15) (creating a limited exception to discharge in bankruptcy certain debts incurred in connection with a divorce or separation).
243. Id. § 1142(b) (providing that in chapter 11 reorganizations, the court may “direct” the debtor or any other party to “execute or deliver . . . any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act . . . that is necessary for the consummation of the plan”).
244. Id. § 1305(a)(2) (permitting creditors to file post petition proofs of claims if that claim is “a consumer debt, that arises after the order for relief under [chapter 13], and that is for property or services necessary for the debtor’s performance under the plan”).
245. Id. § 1322(a)(1) (providing that, under a chapter 13 plan, the debtor must submit all or a portion of his future earnings or future income to the “supervision and control of the trustee as is necessary for the execution of the plan”).
247. See supra notes 208–10 and accompanying text.
with a word that invites Congress to operate pursuant to its own judgment. Similarly, in section 105, the word “necessary” is paired with “appropriate.” Furthermore, “necessary” is not connected to “appropriate” with “and,” but with “or.” The argument is therefore even stronger that it would be incorrect to read “necessary” as absolutely necessary, when bankruptcy courts are permitted to take actions that are either necessary or appropriate. Indeed, this usage suggests that the words are virtually interchangeable.

Justice Marshall also looked at other instances in which the framers of the Constitution used the word “necessary.” A similar evaluation may be made of the Code. In one instance, the drafters of the Code created a provision specifically for chapter 11 that parallels section 105. Section 1142(b) is crucial to the implementation of chapter 11 plans of reorganization. Section 1142(b) provides that “the court may direct the debtor and any other . . . party to execute or deliver . . . any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act . . . that is necessary for the consummation of the plan.” Collier states, “the scope of section 1142(b) is considerably broader than merely ministerial acts such as termination or creation of liens.” Yet the absence of the phrase “or appropriate” suggests that a bankruptcy court should be more careful in the exercise of its powers under section 1142(b) than in its exercise of powers under section 105. Courts sometimes issue orders that exceed demands that the debtor complete a deed. Courts may direct third parties to take actions that the court deems necessary to consummate the plan. For example, the principal investor in an entity committed to contribute money under the plan may be required to advance personal funds. This is a decision in the court’s discretion, obviously at the request of a party in interest.

249. Id.
250. See Collier, supra note 17, ¶ 1142.03[1]. “The most common instruments required to be executed under a plan to effect a transfer of property are bills of sale, deeds to property, stock transfers, and similar documents necessary to establish title to property in the reorganized debtor or in a third party.” Id. ¶ 1142.03. As to these garden-variety instruments, it is easy to see that they fall in to the category of “necessary.” If the plan would vest ownership of some property in a third party, a deed must be forthcoming. Similarly, if the property is to be transferred free and clear of liens, a release of the lien must be executed.
251. Id. ¶ 1142.03[1].
Section 523(a)(15)(A) contains the word “necessary” alone as well as the phrase “reasonably necessary.” That section provides an exception to discharge for certain divorce-related debts unless:

the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor . . . and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

In this case, the drafter’s pairing of the words “reasonably necessary” suggests that “necessary” following in the same provision, and without qualifying language, should be read strictly. In other words, a 523(a)(15) creditor should obtain an exception to discharge, unless the debtor can demonstrate something considerably more significant than an inconvenience to the debtor’s business resulting from the payment of the debt.

b. “Appropriate”

One can similarly evaluate the meaning of “appropriate.” First, the reader should note that “appropriate,” as used in section 105, and “proper,” the word chosen by the drafters of the Constitution, are largely indistinguishable. “Appropriate” means “especially suitable or compatible” or “fitting.” This usage is remarkably similar to the language Justice Marshall employs to define “proper” for the purposes of the Necessary and Proper Clause—that is, “plainly adapted to a desired end.” Indeed, one of the definitions offered today for “proper” is “marked by suitability, rightness or appropriateness.”

“Appropriate” is used at different points in the Code. Some examples include section 304(b)(3) (cases ancillary to foreign proceedings) and 1104(c) (appointment of trustee or examiner). Appropriate is broad in meaning. Section 304 provides a mechanism for a representative of a foreign debtor to file a petition in U.S. Bankruptcy Court, if that petition is

253. Id. (emphasis added).
254. MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 57 (10th ed. 1996).
255. See supra notes 213–14 and accompanying text.
256. MERRIAM WEBSTER’S COLLEGIATE DICTIONARY, supra note 254, at 935.
257. 11 U.S.C. § 304(b)(3). In the event that a party in interest does not “controvert” a bankruptcy petition filed by a “foreign representative,” the court may order “appropriate relief.”
258. 11 U.S.C. § 1104(c).
“ancillary” to a foreign proceeding.\textsuperscript{259} In the event a party in interest does not object to the petition, the court has the power to enjoin actions against the debtor or its property, enjoin enforcement of judgment against the debtor, order property turned over to the foreign representative of the debtor’s estate, or “order other appropriate relief.”\textsuperscript{260} Justice Marshall’s view of “appropriate” fits here nicely. Having listed specific powers of the court in sections 304 (b)(1) and (b)(2), appropriate is not a limiting phrase. Instead, it is best understood as empowering the court to take action that fits the desired end—allowing for protection of debtor and creditor interests within the U.S. in accordance with the goals of the Code, while conforming to principles of international comity.\textsuperscript{261}

Section 1104(c) permits the court, after request of a party in interest, to appoint an examiner in a chapter 11 case, where “appropriate.” An examiner is an officer of the court delegated specific fact finding functions by the bankruptcy judge. The ability to appoint an examiner to gather specialized information may be an efficient tool for the court. The Code suggests that prime factual inquiries would involve “any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor.”\textsuperscript{262} By its very language, this list is not exclusive, but it does suggest generally what should

\textsuperscript{259} 11 U.S.C. § 304(a). This does not initiate a full-blown proceeding in bankruptcy court, but it does provide relief to the debtor akin to the automatic stay.

\textsuperscript{260} Id. § 304(b)(3).

\textsuperscript{261} BANKRUPTCY CODE, RULES AND OFFICIAL FORMS 67 (2002) (Revision Notes and Legislative Reports; 1978 Acts) provides:

The court is to be guided by what will best assure an economical and expeditious administration of the estate, consistent with just treatment of all creditors and equity security holders; protection of local creditors and equity security holders against prejudice and inconvenience in processing claims and interests in the foreign proceeding; prevention of preferential or fraudulent disposition of the property of the estate; distribution of the proceeds of the estate substantially in conformity with the distribution provisions of the bankruptcy code; and, if the debtor is an individual, the provision of an opportunity for a fresh start. These guidelines are designed to give the court maximum flexibility in handling ancillary cases.

Id. (emphasis added) (citing S. REP. NO. 95-989). COLLIER suggests that section 304 grants the proverbial “blank check” to courts, when determining what is appropriate under the circumstances. COLLIER, supra note 17, ¶ 304.07.

\textsuperscript{262} 11 U.S.C. § 1104(c). The court is permitted to appoint an examiner where it has not otherwise appointed a trustee; thus the emphasis is on the honesty and competence of the management of the debtor. Where the court appoints a trustee, it has its own hand picked representative running the debtor’s business. In the absence of a trustee appointment, and where a party in interest reasonably suggests that the skills and loyalty of the debtor’s management are in question, an examiner may be well positioned to conduct a thorough investigation.
“fit” and the circumstances under which a court should deny a request. For example, routine appointment of an examiner to perform an accounting function might be an ordinary and sound business practice, because it would provide an expert accountant to aid the debtor in reorganization. However, this order would not be appropriate. The “desired end,” in Justice Marshall’s words, clearly has to do with preventing malfeasance or incompetent behavior by the persons running the debtor’s business.

There are instances in the Code in which the drafters select a word other than “appropriate,” but mean essentially the same thing. For example, section 704 lists the duties of a trustee in a chapter 7 bankruptcy. Subsection (6) provides that the trustee shall “if advisable, oppose the discharge of the debtor.” Collier rather explicitly equates this word with “appropriate.”

Section 1106 of the Code describes the duties of a trustee in a chapter 11 reorganization. This section requires the trustee to “investigate the acts, conduct, assets, liabilities, and financial condition of the debtor . . . and any other matter relevant to the case.” That the Code requires the trustee to investigate the financial condition of the debtor is hardly surprising. The trustee is not working on behalf of the debtor; rather, the trustee is charged with determining the assets and viability of the debtor’s business to allow for the best formulation of a plan of reorganization. The word “relevant,” as used in this section, is very close in meaning to “appropriate.” Section 1106(a)(3), listing the specific obligations of the trustee, gives context and some limitation to the section’s catch-all phrase. This section treats the finances and operation of the debtor’s business and explains whether, and in what structure, the business should continue. But the requirement of a “relevant” inquiry suggests that the trustee has a wide gambit in which to act.

The failure to use the same word consistently throughout the Code hints at a broader application of these terms, rather than a narrower one. The use of varied terms, while certainly not sloppy, indicates that the drafter did not view the precise meaning of each of these words as fixed.

c. A Diversion Nonetheless

Although this part argues that the Necessary and Proper Clause, and its interpretation by the Court, serve as useful tools in deconstructing section 105 of the Code, it is helpful, and only honest, to admit significant

264. COLLIER, supra note 17, ¶ 704.10.
265. This assumes a trustee has been appointed, which is not the norm in chapter 11.
differences between these two provisions. As mentioned, the former deals with congressional powers, and the latter with powers of a set of Article I courts. However, the primary difference lies in the wording. The Necessary and Proper Clause is phrased in the conjunctive; congressional action must be both necessary and proper for the execution of the powers specified in clauses 1 through 17. Section 105 is phrased more liberally, requiring only that a bankruptcy court’s action or writ be necessary or appropriate to carry out the provisions of the Code.267

This difference is less than it seems, for two reasons. First and most importantly, “and” in the Necessary and Proper clause has all but been interpreted as “or” since the seminal Supreme Court case of M’Culloch v. Maryland. Therefore, the requirement that Congressional action be proper has amounted to little in the course of Supreme Court jurisprudence. As a result, the wording of the Necessary and Proper Clause, as actually interpreted by the Court, is the same as “necessary or appropriate” in section 105. Second, as discussed earlier in this part, reading section 105 of the Code in a more consistent fashion with the All Writs Act upon which it is based would emphasize the necessity element of the phrase, effectively reducing the importance of the language “or appropriate.” 268

In the end, the argument about the meaning and impact of “or” rather than “and” in section 105, and the distinction between “necessary” and “appropriate,” are largely diversions, because an action that a bankruptcy court necessarily takes is likely to be appropriate as well. Bankruptcy court opinions that cite section 105 routinely quote the operative phrase “necessary or appropriate” without distinguishing between the two terms. Indeed, the decision of bankruptcy courts to incorporate the “doctrine of necessity” into section 105 blurs the line between necessity and appropriateness.269 Contrary to its name, this doctrine widens the scope of bankruptcy court action and permits bankruptcy courts to act or issue writs when confronted by something less than an absolute necessity.

Professor Ann J. Brighton presents one example of the use of the doctrine of necessity: the significant (and occasionally extravagant) first day orders approved by bankruptcy courts in chapter 11 cases. She concludes

267. There is yet another difference. Drafters of the Necessary and Proper Clause used the word “shall” (Congress has the power to make all laws as “shall be Necessary and Proper”). According to Gary Lawson and Patricia Granger, this indicates the “mandatory” nature of the Necessary and Proper Clause; Congress is truly limited by this provision. Lawson & Granger, supra note 194, at 276. By contrast, the drafters of section 105 provided that the court “may” enter necessary or appropriate orders, suggesting a more flexible limitation.
268. See supra notes 177–79 and accompanying text.
269. See supra notes 165–72 and accompanying text.
that the “necessity” for the order is often ephemeral. This is true, notwithstanding the shrill demand of the debtor in possession that the bankruptcy reorganization would otherwise fail in the absence of the order.

3. Some Recent Constitutional Scholarship and its Application to section 105

Justice Marshall’s view of the Necessary and Proper Clause, as encapsulated in *M’Culloch*, has, until recently, remained unchallenged in Supreme Court jurisprudence. Legal scholars, however, have attacked the opinion. The preceding review of Justice Marshall’s textual analysis is informative in evaluating the content of section 105. Similarly, a review of constitutional scholarship questioning Justice Marshall’s opinion may be transposed to section 105, with interesting results.

Obviously, what the Court decides the Constitution means is what matters most. Nevertheless, scholarship also matters. Some scholars now see “necessary” and “proper” as containing different meanings, and read the conjunctive element of the phrase strictly. Other scholars continue to see the phrase as aspirational, adding little to the Congressional power that would not exist in the absence of this phrase.

Perhaps it would be best to take the language of the clause a step at a time, and cull together the newer characterizations, and the responses to them. Scholars have proposed several approaches to the “necessity”

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270. See Brighton, supra note 68, at 108–09.
271. Id.
272. “Ever since Chief Justice John Marshall’s famous opinion in *M’Culloch v. Maryland*, which construed the Sweeping Clause to require only a minimal ‘fit’ between legislatively chosen means and a valid governmental end, the clause has not been viewed as a significant substantive limitation on congressional authority.” Lawson & Granger, supra note 194, at 271.
273. At least, this is the conventional wisdom. As scholars occasionally point out, the executive and legislative branches evaluate the meaning of the Constitution all the time. But judicial review allows the Court to trump these determinations, even when some might argue that politically motivated determinations might make the most sense of the Constitution. Witness, for example, the recent row over whether the Court was correct to halt the 2000 presidential vote recount in Florida. *Bush v. Gore*, 531 U.S. 98 (2000).
274. See, e.g., Barnett, supra note 229; Jackson, supra note 230, at 2235–36; Lawson & Granger, supra note 194, at 270–74. Professor Jackson states: “The argument in favor of finding some constraints on national power in the ‘Necessary and Proper’ clause has begun to seem attractive to many scholars.” Jackson, supra note 230, at 2235. This scholarship runs parallel with the recent opinion of the Supreme Court, *Printz v. United States*, 521 U.S. 898 (1997), authored by Justice Scalia, questioning important aspects of Justice Marshall’s opinion in *M’Culloch*. 
requirement. Professor Randy Barnett takes the most extreme approach.\textsuperscript{275} Rather than massage Justice Marshall’s language to make it more palatable, Professor Barnett would thrust it aside in favor of the views of James Madison and Thomas Jefferson.\textsuperscript{276} The rather explicit thread in this departure is that Justice Marshall was wrong when he authored \textit{M'Culloch}, and (Professor Barnett asserts) he has been proven wrong by the massive expansion of the federal government since that opinion was handed down.\textsuperscript{277} Under Professor Barnett’s approach, necessity requires a closer fit between means and ends.\textsuperscript{278}

\textsuperscript{275} Barnett, \textit{supra} note 229.

\textsuperscript{276} \textit{Id.} at 755–63. According to Barnett, Madisonian necessity means “that the end cannot be performed in some manner that does not infringe on the retained liberties of the people.” \textit{Id.} at 751. According to Madison, a more liberal reading of the word “necessary” would destroy “the essential characteristic of the Government, as composed of limited and enumerated powers . . . if, instead of direct and incidental means, any means could be used.” \textit{Id.} at 752 (quoting James Madison, 2 Cong. Rec. 1901 (1791)). Similarly, Thomas Jefferson viewed “necessary” as requiring Congress to show that a law was more than “merely convenient for the effecting the enumerated powers. If such a latitude of construction be allowed to this phrase, as to give any non enumerated power, it will go to every one; for there is no one, which ingenuity may not torture into a convenience.” Barnett, \textit{supra} note 229, at 755 (quoting Thomas Jefferson, Opinion of Thomas Jefferson, Secretary of State, on the Same Subject, in \textit{LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES: INCLUDING THE ORIGINAL BANK OF NORTH AMERICA} 91, 93 (M. St. Clair Clarke & D. A. Hall eds., Washington, Gales & Seaton, 1832)). The Necessary and Proper Clause was the bane of the anti-federalists as well. See Van Alstyne, \textit{supra} note 110, at 116 n.52. Professor Van Alstyne states:

Characteristic of antifederalist objections to the sweeping clause were fears that (in connection with the taxing power and/or the preamble to the proposed Constitution) it would readily support acts of Congress completely displacing the authority of state legislatures. \textit{(Citing THE ANTIFEDERALIST PAPERS Nos. 17, 32, 33, 46 (M. Borden ed. 1965))}. The background for these anxieties rested only in part upon the particular wording of the clause. The potential range of the clause was feared also because the clause itself would displace the restrictive clause of the Articles of Confederation (article II provided: “Every state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States in Congress Assembled”) and because no similar restatement of states’ rights (\textit{e.g.,} the tenth amendment) was provided for in the proposed Constitution.

\textit{Id.} at 116 n.52.

\textsuperscript{277} Barnett, \textit{supra} note 229, at 792–93. \textit{But see} McAfee, \textit{supra} note 227, at 17. Professor McAfee states:

Most Americans, and even many legal thinkers, find it difficult to fathom that the Framers of the unamended Constitution saw this limited grant of authority as an adequate alternative to a comprehensive statement of rights in a declaration or bill of rights.

These modern tendencies of thought have been powerfully reinforced by the reality that the Framers’ expectations of significantly limited federal authority have been largely swept aside in the twentieth century. This
Professor Barnett’s call for a tighter relationship between means and ends when interpreting “necessity” for constitutional purposes is similar to Professor Brighton’s criticism of the doctrine of necessity in bankruptcy law. As noted, the necessity doctrine, which is enabled by section 105, has been justified as permitting courts to take a variety of actions. These include the issuance of first day orders requiring the payment of cash outside the normal bankruptcy schedule. One might argue that a tighter fit between ends and means is even more appropriate given the express provisions of the Code specifying what is to be done with the debtor’s cash.

Professor Barnett would enhance the Necessary and Proper clause in two other respects. First, he would give substance to the word “proper.” According to Professor Barnett, improper actions and laws are those that infringe on the “background rights” retained by the people—that is, rights retained by the people and otherwise unenumerated. Therefore, courts are not free to provide any meaning they conceive for the word. And he

expansion of federal power may have been inevitable, in which case the Framers were wrong in assuming that the limited grant of authority would be a sufficient means for securing a wide range of rights in our system of fundamental law. Even if this were true, however, it does not warrant the modern tendency to denigrate their position as disingenuous or obviously implausible, let alone to refuse to acknowledge their argument for limited federal authority as its own distinctive form of rights discourse.

.Id. at 18–19.

278. Professor Barnett does not state that a true strict scrutiny review is required for congressional action to succeed. “Rather, some form of intermediate means-ends fit indicating necessity, and assessment of a measure’s propriety to see if the intention is really to regulate rather than prohibit an exercise of liberty, would be an important step towards both restoring legitimacy to legislation and protecting the liberties of the people.” Barnett, supra note 229, at 792.

279. Id. at 773–74. To this end, Professor Barnett cites the work of Lawson & Granger, supra note 194, and Stephen Gardbaum, Rethinking Constitutional Federalism, 74 TEX. L. REV. 795 (1996). Each of these authors have carefully evaluated the propriety requirement. Without disputing the validity of the approaches of these authors, Professor Barnett zeros in on one particular definition of Lawson and Granger: whether the contested laws infringe on background rights retained by the people that are not otherwise enumerated among the powers of the national government.

280. Again, Barnett’s argument has its reflection in section 105. Appropriate acts and orders of a bankruptcy court pursuant to section 105 should not be totally without limits. However, something must substitute for the constitutionally meaningful “background rights of the people.” Barnett, supra note 229. Bankruptcy law, as provided by the Code, interferes with various well-developed state and federal rules and statutes, many having common-law origin. However, bankruptcy law only regulates or interferes with these statutes and rules to the extent provided by specific bankruptcy provisions (such as the automatic stay of section 362). The equivalent of “background rights” in bankruptcy context then would be the rights and entitlements of persons under state and federal rules that are otherwise unaffected by a petition in bankruptcy. Thus, sections 362 (Automatic Stay) and 524 (Discharge) typically only apply to protect the debtor and the property of the estate. See supra Part I. The use of section 105 to
insists that the phrase “necessary and proper” is truly conjunctive; to be constitutional, a congressional action must meet both elements. A law may be necessary, he states, but nevertheless fail to be proper. For example, a law that entirely bans some form of interstate commerce under a combination of the Commerce Clause and the Necessary and Proper Clause should be held unconstitutional, even if necessary. This would occur because the Necessary and Proper clause cannot expand the substantive limits of article 1, section 8. As Professor Barnett points out, the Commerce Clause only grants congress the right to regulate commerce.281 The word regulate implies that commerce cannot be terminated, although it can be limited. This last criticism of Justice Marshall’s interpretation may be Barnett’s most significant, but it is nevertheless the least valuable for bankruptcy purposes. After all, section 105 reads in the disjunctive, not the conjunctive.

Other scholars stake out similar, if not altogether identical positions. Professor Vicki Jackson also focuses on the necessity requirement.282 One criticism of actually using the Necessary and Proper Clause as a constraint on congressional action is that “there are no further principled standards for determining what is ‘necessary.’”283 Yet, she views this criticism as “irrelevant,” because, “after all, federalism is at bottom a political deal between governmental powers operating within the same territory.”284 The goal, therefore, is to identify the “core principles” of federalism. She asserts that a primary principle is that the national government should take actions and pass laws that are closely “embraced in or connected to an

stay temporarily or permanently discharge actions of a creditor against a third party non debtor interferes with these background rights. Under Professor Barnett’s rubric, these uses of section 105 should be invalid.

281. Barnett, supra note 229, at 774. Lawson and Granger similarly argue that the “and” matters. Lawson & Granger, supra note 194, at 275–76. They admit that the “conjunction merely adds emphasis and that the words “necessary” and “proper” are essentially synonymous. Id. at 275. But, they argue, given a plain and straightforward reading of the clause, “anyone who claims that the word “proper” is redundant bears a heavy burden.” Id. at 276.

282. See Jackson, supra note 230. Professor Jackson zips by the propriety requirement. For example, she states:

Thus, I suggest that when a federal law regulating private conduct is challenged as beyond federal power and appears to be an extension of an area of regulation not obviously within an enumerated power, inquiry should focus on, and thus direct lawmakers in Congress to focus on, both how the measure is connected to a federal power and whether some necessity for federal regulation (above and beyond what the states can do or are doing) has been identified.

Id. at 2245.

283. Id. at 2242.

284. Id. at 2242–43.
Essentially, Professor Jackson provides courts with an approach to temper their discretion. Congress should pass laws that contain a clear statement of the specified enumerated power that a proposed law is intended to further.

This approach has much to commend it, especially in application to section 105. As a trust-like document, the Code creates a process of enumerated powers and limits. The Code focuses on orders entered by bankruptcy courts rather than laws passed by Congress. The Code makes the task easy by stating that section 105 must be employed to further specific Code “provisions.” Thus, to use Professor Jackson’s terminology, bankruptcy courts entering an order pursuant to section 105 should include in the order a clear (and supportable) reference to the Code provision that the order is intended to further.

Professors Gary Lawson and Patricia B. Granger similarly focus on the meaning of proper. They examine the word’s denotative meanings at the time the Constitution became law. Quoting Samuel Johnson’s dictionary, they review and reject four of five possible meanings. They agree that one of the possible definitions is “fit, accommodated” for a purpose. The meaning they find most useful, however, is the following: “Peculiar; not belonging to more; not common.” According to Lawson and Granger, “this usage suggests that a ‘proper’ law is one that is within the peculiar jurisdiction or responsibility of the relevant governmental actor.”

Viewed in this manner, rather than providing Congress with unlimited

285. Id. at 2243.
286. Id. at 2234. She terms this a rule of congressional “etiquette.” She asks why the Court may wish to reinvigorate the Necessary and Proper Clause in the first place? She then lists a variety of rationales. These justifications include, among others, “increasing opportunities for political participation; maximizing choice and utility through state or local government competition and citizens’ rights of exit.” Id. at 2213. However, the most interesting is simply this: “[B]ecause it is in the constitution.” Id. at 2215. Professor Jackson then quite rightly notes that “identifying the it [federalism and its core components] is the problem.” Id.
287. Lawson & Granger, supra note 194, at 291. Professors Lawson and Granger discuss the necessity requirement, but they do not significantly debate Justice Marshall’s reading of the word. They “acknowledge the force of Chief Justice Marshall’s claim that something less than strict indispensability is sufficient.” Id. at 288. Once again, the question is one of a “fit” between ends and “means.” Id.
288. Id. (quoting SAMUEL JOHNSON, THE DICTIONARY OF THE ENGLISH LANGUAGE (1785)). According to the authors, “fit” and “accommodated” for a purpose reflects today’s constitutional definition of “necessary,” muddying the definitional waters.
289. Id. (quoting SAMUEL JOHNSON, THE DICTIONARY OF THE ENGLISH LANGUAGE (1785)).
290. Id. Lawson and Granger bolster this jurisdictional sense of the word by evaluating state constitutions of the time. The word proper was used “in this jurisdictional sense in four state constitutions that were available as models in the decade preceding the drafting of the Federal Constitution.” Id. Applying this definition, the authors decide that M’Culloch presents a “hard case.” Id. at 331.
discretion to find “propriety” as and when it may be convenient, Congress is limited to actions that empower “relevant governmental actors” within their “peculiar jurisdiction or responsibility.”

With bankruptcy courts taking the place of Congress in our scenario, one should ask, what actions of these courts are “within their peculiar jurisdiction or responsibility?” If anything, this sounds much like the continual debate in bankruptcy circles as to which actions are “core” and which actions are “non core.” Bankruptcy courts are permitted to hear and decide core issues, but may only refer findings of fact to district courts as to non core issues. Requests that bankruptcy courts issue orders

291. Id. at 291. According to Lawson and Granger, “necessity” and “propriety” are not only conjunctive, and different in meaning, but subject to judicial review. The authors bolster this view by quoting James Madison in THE FEDERALIST, NO. 44 (whether Congress is successful in its “usurpation” of power “will depend on the executive and judiciary departments”). Id. at 281. But see McAffee, supra note 227, at 69–71. Additionally the Court can look to a specific terminology that is based in the more general language of jurisdiction. As the authors note, this is a language with which courts are familiar and capable of using effectively. Lawson & Granger, supra note 194, at 280–81.

In a recent article, J. Randy Beck challenges the recent substantive readings of the word “proper.” See J. Randy Beck, The New Jurisprudence of the Necessary and Proper Clause, 2002 U. ILL. L. REV. 581 (2002). As far as Professor Beck is concerned, the propriety of a law or rule of Congress does not implicate questions of federalism. Instead, it involves a more specific, and somewhat easier, means/ends evaluation—that is, whether the means Congress chooses to address the ends of the law at question. Id. at 641–48. According to Beck, the statute that the Court invalidated in Printz v. United States, 521 U.S. 898 (1997), discussed infra notes 320–24, was in fact “proper.” He states:

Requiring state law enforcement officials to conduct background checks is a means plainly adapted and really conducive to the end of regulating who may participate in the interstate handgun market. In [this context], commandeering of state officials is not a means remote from legitimate constitutional ends and does not rest upon a long chain of intermediate causal relationships. Rather than pointing to a defect in the means-end relationship, the Printz Court condemned the commandeering power on the ground that it interferes with constitutionally protected sovereign interests of the states. Id. at 630. Although admitting the strength of some of Lawson and Granger’s arguments, Beck argues that “the historical evidence for treating the propriety requirement as an external limitation on congressional power seems relatively thin.” Id. at 638. He suggests that Lawson and Granger’s reading of this Clause would render the Bill of Rights redundant. Id. According to Beck, the Supreme Court’s recent explanation of the Necessary and Proper Clause is equally incorrect, if for somewhat different reasons. Reviewing the clause in the “context of American constitutional history,” he asserts that the “Court’s approach . . . has been precisely backwards.” Id. at 584. The Court failed to invoke the Necessary and Proper Clause in recent and important Commerce Clause cases, including Morrison v. United States, 529 U.S. 598 (2000), and United States v. Lopez, 514 U.S. 549 (1995), where such an analysis would have been, he says, appropriate. Id.

292. See generally TABB, supra note 22, at 233–37.

4. The Real Limitation in the Necessary and Proper Clause, and What Bankruptcy Courts Should Take Home

The prior discussion focused on the meaning of “necessary” and “proper,” and the importance of the conjunctive in the Necessary and Proper Clause. There are lessons in recent constitutional scholarship concerning those issues that would be helpful to bankruptcy courts. Yet, this discussion, though useful, is not the most meaningful point of intersection between the Necessary and Proper Clause and section 105 of the Code. Both provisions conclude with similar limiting language, and it is the force (or lack thereof) of this language that should inform bankruptcy judges faced with demands for broader application of section 105. The Necessary and Proper Clause provides that Congress shall be permitted to make all laws necessary and proper “for carrying into Execution the foregoing Powers.”

Section 105 of the Code permits bankruptcy courts to issue writs and take actions necessary or appropriate “to carry out the provisions of this title.” By their own terms, these provisions empower their respective actors to further only specific provisions in the Constitution or the Code. To the extent that these documents do not provide an overarching power, the gap-filling provisions cannot stand in to provide alternative means.

The question thus becomes, do these documents really mean what they say?

Part I of this article presented a series of scenarios that stretch the boundaries of bankruptcy courts’ section 105 powers. These cases suggest that more than a few courts view this limitation on their section 105 powers as malleable. Yet, despite the aggressive use of section 105 by some bankruptcy courts, many other courts and commentators continue to assert that section 105 does not extend the power and jurisdiction of bankruptcy jurisdiction in the district courts, and 28 U.S.C. § 157 (2000), empowering the district courts to refer cases to bankruptcy courts, which are technically described as “units” of the district court); TABB, supra note 22, at 221-33.

295. This should be a basic proposition when evaluating gap-filling rules such as section 105 of the Code: “‘There is a basic difference between filling a gap left by Congress’ silence and rewriting rules that Congress has affirmatively and specifically enacted.’ Bankruptcy rules are no exception.” Sandra E. Mayerson, Joseph E. Sarachek & Clive R. Swersky, Trading Claims: The New Bankruptcy Game, Any Number Can Play, 587 PLI/COMM 539, 564 (July 15, 1991) (quoting Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978)).
courts beyond the other provisions of the Code.\textsuperscript{296} Although not a section 105 case, the Supreme Court’s opinion in \textit{Norwest Bank Worthington v. Ahlers}\textsuperscript{297} suggests that the limitation encased in section 105 should be believed.\textsuperscript{298}

\textit{Ahlers} involved a chapter 11 reorganization of a family farm. The senior unsecured creditors objected to the plan of reorganization proposed by the debtor, which, among other things, permitted the debtor to retain equity in the family farm in return for the debtor’s contribution of labor and services as “new value.”\textsuperscript{299} The Court rejected the debtor’s contention that the bankruptcy court had the power to prevent the senior unsecured creditors from voting in a class with other unsecured creditors. The Court stated that “the short answer to these arguments is that whatever equitable powers remain in the bankruptcy courts must and can only be exercised

\textsuperscript{296} See infra notes 309–14 and accompanying text. This is nothing new; scholars have been noting this tendency for years. See, e.g., Parkinson, \textit{supra} note 73, at 613–19 (arguing that section 105 should be limited to enforcing provisions of the Code, and that therefore, bankruptcy courts do not possess contempt powers independent of the district courts of which they are units); Kenneth Klee, \textit{Timbers, Ahlers, and Beyond}, 2000 ANN. SURV. BANKR. L. 1, 6–7. In his article, Professor Klee states: \textit{Timbers and Ahlers} are cases with simple holdings based on simple facts decided by a unanimous Supreme Court. Yet the cases raise more questions than they answer. Most of the issues relate to the balance between the rights of debtors, unsecured, undersecured, and oversecured creditors during the case and under a chapter 11 plan. But a few issues are broader in scope. For example, to what extent will the \textit{Ahlers} statement limiting the equitable powers of the Bankruptcy Court be applied across the board? While some courts have recognized that the Bankruptcy Court does not have a “roving commission to do equity,” many bankruptcy judges have operated under a principle of “reorganization uber alles” reminiscent of Professor Festersen’s article \textit{Equitable Powers in Bankruptcy Rehabilitation: Protection of the Debtor and the Doomsday Principle}. If the Bankruptcy Code contains a provision providing a rule, \textit{Ahlers} may be cited for the proposition that it is not within the purview of the courts to engraft an exception that engulfs or eviscerates the rule.

\textit{Id.} at 7 (citations omitted). Professor Festersen’s article, mentioned in the quotation, can be found at 46 AM. BANKR. L.J. 311 (1972); see also Leal, \textit{supra} note 12, at 496–504 (reviewing section 105 case law to the date of that article, and specifically categorizing bankruptcy courts as broad or restrictive in their application of section 105).

\textsuperscript{297} 485 U.S. 197 (1988). \textit{Ahlers} has been the subject of considerable scholarship and debate, not because of its implications for section 105, but primarily for its impact on plans of reorganization and the new value exception to the absolute priority rule in chapter 11. See \textit{supra} note 18 and accompanying text.

\textsuperscript{298} See Mayerson, Sarachek, & Swersky, \textit{supra} note 295, at 564 (citing \textit{Ahlers}). See also Bolen, \textit{supra} note 43, at 272 (stating “[t]he Supreme Court’s admonition has evolved into a rule of law that section 105 cannot be used to create new substantive rights”).

\textsuperscript{299} See Bolen, \textit{supra} note 43, at 199–204.
within the confines of Bankruptcy Code. As described in Part II, the alleged equity nature of bankruptcy courts is routinely argued as the underpinning of section 105, and the Court could just as easily have been referring to that section of the Code.

By their actions, some bankruptcy courts indicate that it is difficult to “just say no” to requests that they expand their powers pursuant to section 105. But there is a significant line of cases reinforcing the ability of courts to offer a negative answer. These cases explicitly state that bankruptcy courts must abide by the plain language of the Code, to the same extent as any other federal court applying a federal statute. State and federal law create entitlements that run through bankruptcy. Absent a specific congressional directive, embedded in the Code, bankruptcy courts reject the contention that they may substitute allegedly more fair and equitable entitlements pursuant to section 105. And where another Code provision specifically provides one answer, section 105 cannot be employed to provide the opposite result. These courts hold that section 105 may not be used to create substantive legal rights that would otherwise not be provided to parties by the Code. This would indicate that section 105 should not be used to circumvent the careful structure of the automatic stay,

300. Id. at 206.
301. See supra notes 78–106 and accompanying text.
302. Circuit courts have made this point. See, e.g., In re Cajun Elec. Power Co-op, Inc., 185 F.3d 446, 462 (5th Cir. 1999); In re Foremost Mfg. Co., 137 F.3d 919, 924 (6th Cir. 1998).
303. See, e.g., In re Reinertson, 241 B.R. 451, 455 (B.A.P. 9th Cir. 1999); In re Plaza de Diego Shopping Ctr., Inc., 911 F.2d 820, 830–31 (1st Cir. 1990); In re Kelly, 841 F.2d 908, 912–13 (9th Cir. 1988); In re American Preferred Prescription, Inc., 265 B.R. 13, 20–21 (E.D.N.Y. 2000) (denying appointment of post-confirmation trustee in chapter 11 cases where there was evidence of debtor’s fiduciary misconduct; court held that section 105 does not provide bankruptcy court with power to appoint trustee in derogation of section 1104(a) of the Code).
304. See Raleigh v. Ill. Dep’t of Revenue, 530 U.S. 15 (2000); see also Leal, supra note 12, at 490–91. He focuses on those case opinions that restrict a bankruptcy court’s use of section 105. Judge Leal states: “In addition, a long standing policy supports application of the restrictive approach to the bankruptcy court’s exercise of its powers under section 105 based on the clear language and intent of bankruptcy statutes and rules.” Id. (citing Official Comm. Of Equity Sec. Holders v. Mabey, 832 F.2d 299 (4th Cir. 1987) (invalidating bankruptcy court’s creation of an emergency fund for Dalkon shield (mass tort) claimants because fund violated provisions of Code)).
a provision that provides a list of specific and limited exceptions.\textsuperscript{307} This also suggests that section 105 may not be used to undermine the payment priority scheme established by the Code—even for the purpose of first day orders.\textsuperscript{308}

Indeed, the plain language of the Code would not seem to permit substantive consolidation of chapter 11 cases,\textsuperscript{309} but as noted, some courts allow substantive consolidation, to promote judicial economy and to facilitate successful reorganizations.\textsuperscript{310} In doing so, they turn a blind eye to this case law.

Oftentimes, courts will refuse to engage section 105 powers with the simple statement that this section of the Code does not authorize them to act as “roving commission[s] to do equity.”\textsuperscript{311}

\textsuperscript{307} Some courts that approve of non debtor stays in principle find reasons to shy away, skirting the thin ice of bankruptcy analysis on which these cases rest. See, e.g., Landsing Diversified Properties, II v. The First Nat’l. Bank and Trust Co. of Tulsa (\textit{In re} Western Real Estate Fund, Inc.), 922 F.2d 592, 600–02 (10th Cir. 1990). The Landsing court describes this type of section 105 use as “special injunctive relief.” \textit{Id.} at 601. Indeed, that court opined that even if such relief is warranted in some cases, it “may not be exercised in a manner that is inconsistent with the other, more specific provisions of the Code.” \textit{Id.} Therefore, given the explicit language of section 524 (Discharge), the court held that a permanent stay of non-debtors is not within the purview of a bankruptcy court’s section 105 powers. \textit{Id.} at 601–02 (citing \textit{In re} American Hardwoods, Inc, 885 F.2d 621 (9th Cir. 1989) and \textit{In re} Rohnert Park Auto Parts, Inc., 113 B.R. 610, 615–17 (B.A.P. 9th Cir. 1990)). \textit{But see} Leal, \textit{supra} note 12, at 519 (although recognizing that “legitimate exercise of a stay in these situations would rely on a common sense application of section 362 . . . and section 541,” bankruptcy courts may legitimately apply a section 105 stay against non debtor parties “where the affairs of the debtor and non-debtor are inextricably interwoven as to create an identity of parties”).

\textsuperscript{308} See Capital Factors, Inc. v. Kmart Corp., 291 B.R. 818 (N.D. Ill. 2003). The \textit{Capital Factors} court explicitly draws upon \textit{Ahlers}. The court cites \textit{Gouveia v. Tazbir}, 37 F.3d 295, 300 (7th Cir. 1994) (“The Supreme Court [citing \textit{Ahlers}] has taught that any grant of authority given to the bankruptcy courts under § 105 must be exercised within the confines of the bankruptcy code.”) Capital Factors, Inc., 291 B.R. at 822.

\textsuperscript{309} \textit{See supra} notes 62–63 and accompanying text.

\textsuperscript{310} \textit{See supra} notes 63–65 and accompanying text.

\textsuperscript{311} United States v. Sutton, 786 F.2d 1305, 1308 (5th Cir. 1986). One court, indirectly quoting \textit{Noonan}, and directly quoting \textit{Chiasson v. J. Louis Matherne & Assocs.} (\textit{In re} Oxford Mgt., Inc.), 4 F.3d 1329, 1334 (5th Cir.1993), states:

\begin{quote}
Section 105(a) empowers the bankruptcy court to exercise its equitable powers—where “necessary” or “appropriate”—to facilitate the implementation of other Bankruptcy Code provisions . . . . Although expansively phrased, section 105(a) affords bankruptcy courts considerably less discretion than first meets the eye, and in no sense constitutes “a roving commission to do equity.”
\end{quote}

\textit{Noonan v. Secretary of HHS} (\textit{In re} Ludlow Hospital Society, Inc.), 124 F.3d 22, 27 (1st Cir. 1997). \textit{See also} \textit{In re} Yaddi, 274 B.R. 843 (B.A.P. 9th Cir. 2002) (reversing bankruptcy court and rejecting use of section 105 to deny a discharge); \textit{In re} Barbieri, 199 F.3d 616 (2d Cir. 1999); \textit{In re} Barron, 264 B.R. 833 (Bankr. E.D. Tex. 2001); \textit{In re} Jestice, 2000 WL 1805312
Ahlers and the mass of cases that repeat the limitation of section 105—that the catch all Code section cannot be used to circumvent the deliberate framework of the Code—find a precursor in Justice Marshall’s opinion in *M’Culloch*. This is true despite Justice Marshall’s generous definitions of propriety and necessity. At the end of his opinion, Marshall asserts that the Necessary and Proper Clause does have limits, notwithstanding the fears of the opponents of a broad reading of the provision. Justice Marshall states:

> Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should the case requiring such a decision come before it, to say that such an act was not the law of the land.\(^\text{312}\)

In other words, the Necessary and Proper Clause does not provide Congress with cover to pass laws that actively conflict with other provisions of the Constitution. Article I, section 9 of the Constitution lists those powers that are specifically denied Congress. The Necessary and Proper Clause is no basis for Congress to ignore the limitations listed in this latter section.

The automatic stay in bankruptcy is defined expansively in section 362(a) of the Code. By contrast, exceptions to the stay are limited to a defined list in section 362(b). Taken together, Congress has made clear that the only exceptions for the stay exist within the confines of section 362(b). For all practical purposes (and paraphrasing Justice Marshall), a court providing third parties with the benefit of the stay are adopting measures that are prohibited by the Code. Justice Marshall’s predisposition to respect what appears to be “proper” and “necessary” Congressional action is clear from his statement that it would be his “painful duty” to invalidate such action. Similarly, although it may not be a bankruptcy court’s desire, it is the court’s duty to reject attempts to use section 105 of the Code in a manner that circumvents other express provisions of the Code. One can make the same case for many of the aggressive uses of section 105,

including substantive consolidation of cases and partial discharge of student loans.

Although debate surrounding the meaning of the Necessary and Proper Clause is now active, it is by no means one sided. Justice Marshall has eloquent defenders. Professor Akhil Reed Amar is chief among them. According to Professor Amar, “a constitutional clause need not add or subtract a new constitutional rule; it is enough if it adds clarity or subtracts confusion.” He vigorously asserts that there is nothing wrong with a bit of redundancy, and that the maxim that each word of the Constitution must have meaning and content (Justice Marshall’s own statement) was a rebuttable presumption. However, and most importantly for this article, scholars like Professor Amar do not see the “necessary and proper” portion of the clause as the limiting factor on Congress. Instead, these authors agree that it is the final portion of the clause, (“for carrying into Execution the foregoing Powers”) which restricts the implicit powers of Congress. Reading section 105 in the same light, it is the final language of the first sentence of that provision (“to carry out the provisions of this title”) that should tame the tendency of bankruptcy courts to “engraft an exception that engulfs or eviscerates [an otherwise existing bankruptcy] rule.”

313. Professor Amar asserts that the Necessary and Proper clause is “a declaratory or clarifying provision designed to remove all doubts.” Akhil Reed Amar, Constitutional Redundancies and Clarifying Clauses, 33 VAL. U. L. REV. 1, 9 (1998).

314. Id. Amar refers to Alexander Hamilton’s Federalist No. 33, in which Hamilton suggests that Congress would have all the powers vested by the Necessary and Proper clause even in the absence of this provision, because these powers result from “necessary and unavoidable implication from the very act of constituting a Federal Government, and vesting it with certain specified powers.” Id. (citing FEDERALIST NO. 33).

315. Id. at 3 (citing Marbury v. Madison, 5 U.S. (Cranch) 137 (1803) (“It cannot be presumed that any clause in the Constitution is intended to be without effect; and therefore such construction is inadmissible, unless the words require it.”)). Amar’s piece is largely designed to refute what he calls the “redundancy objection” that lawyers, law professors and their students routinely raise to the possibility that some language in the Constitution merely serves to clarify important powers or concepts. See also McAffée, supra note 227, at 80–84. At one point, Professor McAffée states:

If the Necessary and Proper Clause had really been the key to defending the Constitution, it seems highly probable that the federalists would have directly invoked its terms at the most critical junctures in the public debate. Far from invoking the Sweeping Clause, however, the federalists offered only that it did not add to the powers of Congress, and that it was merely declaratory of what would have followed from the granting of powers to the national government.

Id. at 82.

316. Id. at 56–57 (“Marshall made a point of emphasizing that the Constitution itself provided a barrier beyond which Congress may not go”); Amar, supra note 313, at 7.

5. One last M’Culloch Concern: The Supreme Court Can Always Change its Mind

As a final note, it is worth pointing out that M’Culloch, although one of the most entrenched of Supreme Court opinions, may now rest on less certain ground. There are probably few constitutional cases so encased in constitutional jurisprudence as M’Culloch v. Maryland. Yet, in Printz v. United States, the Court reinvigorated the Necessary and Proper clause, and challenged Justice Marshall’s liberal reading of “necessary and proper.” The Brady Handgun Violence Prevention Act required local law enforcement officials to conduct background searches on prospective gun purchasers. In Printz, the Supreme Court determined that the background search requirement was unconstitutional on federalism grounds—that commandeering local officials into federal service violates constitutional notions of dual sovereignty and severs the important connection that exists between legislation and accountability. Justice Scalia reached this conclusion despite the fact that, as he admits, the Constitution fails to address the issue of federal commandeering of state officials.

318. 521 U.S. 898 (1997). The Court has cited the clause. See, e.g., Kinsella v. United States, 361 U.S. 234 (1960) (holding that the Necessary and Proper Clause does not empower Congress, in conjunction with Congress’s power to raise and maintain a military, to prosecute the dependent wife of a soldier stationed in a foreign country for a non capital offense); Julliard v. Greenman, 110 U.S. 421 (1884) (otherwise known as the “Legal Tender Case”; holding Congress has the authority to transform notes issued during the civil war into legal tender for payment of private debts). Kinsella is interesting because it suggests that the Necessary and Proper Clause adds little to the congressional powers that the Constitution did not already provide. Powers necessary to effectuate one of the “Great Powers” of article 1, section 8 would be implied in the absence of the Necessary and Proper Clause. Justice Clark states: “[The Necessary and Proper clause] is not itself a grant of power, but a caveat that the Congress possess all the means necessary to carry out the specifically granted ‘foregoing’ powers of section 8 and all other Powers vested by this Constitution.” Kinsella, 361 U.S. at 247. He then quotes James Madison for the proposition that the Necessary and Proper Clause represents “merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those (powers) otherwise granted are included in the grant.” Id. at 247 (quoting VI WRITINGS OF JAMES MADISON, 383 (Galiard Hunt, ed. 1910). M’Culloch remained largely unchallenged in the scholarly arena as well. See Jackson, supra note 230, at 2113–14 & n.153.


320. The majority opinion, and individual dissents written by Justices Breyer, Stevens and Souter return over and over to early constitutional history, and particularly to the Federalist Papers. Printz and Justice Scalia’s opinion are expertly reviewed in a Professor Vicki Jackson’s 1998 article. See Jackson, supra note 230.

321. Printz v. United States, 521 U.S. 898, 905 (1997) (“Because there is no constitutional text speaking to this precise question, the answer . . . must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court.”); see
The case only deals in passing with the Necessary and Proper clause. Yet, Justice Scalia’s comments clearly indicate that this provision of the Constitution may, in the future, be viewed less as granting powers to Congress than as limiting its actions. Printz runs parallel to the emerging constitutional scholarship described earlier in this part of the article.

In M’Culloch, Justice Marshall and a majority of the Court determined congressional legislation establishing a national bank to be “necessary and proper.” Justice Marshall reserved the bulk of his energy for a careful evaluation of necessity. In Printz, Justice Scalia casually rejects the validating power of the Necessary and Proper Clause, focusing instead of the propriety of congressional action.

The government contended that Congress’s mandate that state officials perform background searches of prospective gun purchasers was necessary and proper to effectuate the commerce power, because handguns are part of interstate commerce. Justice Scalia disagreed, bluntly stating that a law cannot be “proper” “if it violates the principle of state sovereignty.” The opinion does not develop a more universal definition or standard of propriety. If it was his intention to develop the meaning of the Necessary and Proper Clause, then Justice Scalia might have focused on the requirement of necessity. As noted by the dissent in M’Culloch and by others at the time, including James Madison, necessity may imply something more than “convenient, useful or essential to another.”

Was it truly necessary for the purpose of reducing handgun crime that the federal government contended that Congress’s mandate that state officials perform background searches of prospective gun purchasers was necessary and proper to effectuate the commerce power, because handguns are part of interstate commerce. Justice Scalia disagreed, bluntly stating that a law cannot be “proper” “if it violates the principle of state sovereignty.” The opinion does not develop a more universal definition or standard of propriety. If it was his intention to develop the meaning of the Necessary and Proper Clause, then Justice Scalia might have focused on the requirement of necessity. As noted by the dissent in M’Culloch and by others at the time, including James Madison, necessity may imply something more than “convenient, useful or essential to another.”

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also Jackson, supra note 230, at 2186. As J. Randy Beck explains, “the Supreme Court subsequently relied upon Printz’s reading of the term “proper” in Alden v. Maine [527 U.S. 706 (1999)].” Beck, supra note 291, at 630. In Alden, the “Court concluded . . . that states enjoy constitutionally protected immunity from suit that is not limited by the express terms of the Eleventh Amendment, and thus applies in state court. Congress lacks the power under article I to abrogate this sovereign immunity of the states, though it may abrogate sovereign immunity when exercising powers granted by the Fourteenth Amendment.” Id.

322. That is not to say that Justice Scalia does not make his view of the usefulness of the Necessary and Proper Clause known. He explains that this provision of the Constitution is the “last, best hope of those who defend ultra vires congressional action.” Printz, 521 U.S. at 924. Professor Jackson cites this language and explains that “commandeering state governments is not a ‘proper’ means” to the congressional end, at least for the purposes of the Necessary and Proper Clause. Jackson, supra note 230, at 2192.


324. Id. at 924. The discussion of the Necessary and Proper Clause comes well into the majority opinion. Justice Scalia’s language betrays impatience with the dissent and the government. He introduces this portion of his analysis by stating: “The dissent of course resorts to the last best hope of those who defend ultra vires congressional action, the Necessary and Proper Clause.” Id.

325. M’Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413 (1819). As noted before, for Marshall, necessity simply requires that Congress employ “any means calculated to produce the end.” Id.
government involve itself in local police behavior by requiring background searches?

Yet, despite the best arguments of some recent scholars, there may be a more elemental reason that the *Printz* majority and Justice Scalia chose not to tangle with Justice Marshall with respect to his pronouncements on necessity. His opinion came too soon following ratification of the Constitution, and represents sound statutory analysis. Even if there are countervailing arguments, it may simply be easier for the Court to revisit the standard of propriety. Justice Marshall did not address the concept of propriety in depth in *M’Culloch*, and therefore left this particular field of attack open.

However, it is crucial to note that Justice Scalia did not question Justice Marshall’s ultimate limiting language. Justice Marshall stated that the Court would be forced to invalidate a congressional action taken pursuant to the Necessary and Proper Clause, if that action contradicted another provision of the Constitution. Nothing in Justice Scalia’s opinion in *Printz* suggests that the Court would retreat from this principle—just the opposite. One expects that this is the one aspect of Justice Marshall’s opinion that Justice Scalia would retain. Therefore, the most important parallel between section 105 of the Code and the Necessary and Proper Clause of the Constitution would very likely remain intact, even if *M’Culloch* ultimately tumbles.

### CONCLUSION

The problem with bankruptcy judges’ overreaching use of section 105 is not their ambition or collective judicial ego. Bankruptcy courts are keenly focused on appropriate objectives: collecting assets, reorganizing debtors if that is possible, untangling complex financial data, and discerning when parties are speaking truthfully or instead dissembling.

The problem stems from the failure of the Code to address fact patterns that emerge regularly and demand resolution—ones that judges (individuals, after all) wish to resolve in as fair and timely a manner as possible. Thus comes the bankruptcy courts’ grant of partial discharge of student loans, temporary stays and permanent releases of actions against third party non debtors, substantive consolidation of cases, and so on. The only statutory authority that bankruptcy courts can find for these actions is section 105 of the Code.

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326. In particular, the work of Randy Barnett. *See supra* notes 274–86 and accompanying text.
Yet, for all the reasons described in this article, section 105 is not a valid basis for any of these extraordinary bankruptcy court actions. Section 105 is genetically derived from the All Writs Act; its language comes directly from this source. At most, section 105 was intended to parallel the All Writs Statute, not extend beyond it. The constitutional pile-up that occurred when the Supreme Court invalidated the original structure and jurisdiction of bankruptcy courts left these courts without the benefit of the All Writs Act, and with only the use of section 105 of the Code. Bankruptcy courts should look to the limited nature and judicial interpretation of the All Writs Act for guidance when evaluating section 105 of the Code.

In its most important aspects, section 105 is similar to the Necessary and Proper Clause of the United States Constitution. The limiting language of section 105, permitting bankruptcy courts to take actions and issue writs “to carry out the provisions of this title” serves the same purpose as the language in the Constitution giving Congress power to enact laws “for carrying into Execution the foregoing Powers.” Justice Marshall in *M’Culloch* and present day scholars agree on one thing: it would be an impermissible use of the Necessary and Proper Clause for Congress to assert power otherwise denied to it by some other provision of the Constitution. Section 105 of the Code should be similarly interpreted.

Some courts, such as the Court in *Ahlers*, hold true to this understanding. Unfortunately, many bankruptcy courts view this only as a rule to be observed in the breach.

The author is not so presumptuous to suppose that bankruptcy judges will immediately cease their more aggressive uses of section 105. Doubtless, when the hard cases come, many judges will continue to do what it seems (to them) they must, despite the lack of support in the Code. The problem results from a tension between facts faced by bankruptcy judges “on the ground” and the limited language of the Code. Still, if Congress is unlikely to fix the Code, then bankruptcy judges must be increasingly consistent and firm in its enforcement.