

2000

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Recommended Citation

David G. Epstein and Steve H. Nickles, *Another Way of Thinking About Section 105(a) and Other Sources of Supplemental Law Under the Bankruptcy Code*, 3 Chap. L. Rev. 7 (2000).

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BANKRUPTCY SYMPOSIUM

Another Way of Thinking About Section 105(a) and Other Sources of Supplemental Law Under the Bankruptcy Code*

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I. INTRODUCTION

We are involved in research exploring the wholesale authority of bankruptcy courts to *supplement* the provisions of the Bankruptcy Code. By supplement, we mean to make decisions or take actions that are not provided for in applicable, specific statutes. Such a decision or action is “supplemental law.”

Our use of the phrase “supplemental law” and our research does not include either artful interpretation or exercises of discretion that a particular statute allows. We only consider the court’s authority to decide or act beyond, or different from, statutory provisions on the basis of general authority apart from the provisions themselves.

* This article was prepared for a panel discussion at the 1999 Annual Meeting of the National Conference of Bankruptcy Judges.

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*** Charles E. Tweedy Jr. Chair in Law, University of Alabama. David Epstein, by nature an ungrateful sort, acknowledges the support of the University of Alabama School of Law Foundation and the Tweedy family, and the earlier support of his partners at King & Spalding, which enables him and his family to live really well. David Epstein also is grateful to Steve Nickles for doing all of the work on this article and to Alabama colleagues such as Tony Freyer, Susan Hamill, Jerry Hoffman, Wythe Holt, and Ken Randall for their critical and/or encouraging comments and suggestions. Since David Epstein ignored all of their suggestions, Steve Nickles bears full responsibility for any errors in this paper.

Our principal focus is Bankruptcy Code section 105(a),¹ which we'll refer to simply as 105. It allows a bankruptcy court "to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions"² of the Code. This section derives from the superseded Bankruptcy Act, section 2a(15),³ which allowed "courts of bankruptcy" to "make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of [the] act."⁴ Section 2a(15) was cited dozens of times in reported decisions under the old Bankruptcy Act. 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.⁵

Even in the early days of the Code, in 1982, Richard Levine, the first Director and Counsel, Executive Office for the United States Trustees, warned that on the basis of 105, courts "have begun to develop a concept of almost unlimited power."⁶ Ten years later, in 1992, Chaim Fortgang and Erin Enright, prominent New York bankruptcy practitioners, wrote that 105 "has developed into the 'catchall' provision of the Bankruptcy Code."⁷ This concept has now fully matured. Today, 105 is the authority behind an incredibly long list of powers now exercised by bankruptcy courts.

Lawyers now commonly stand on 105 whenever the Code fails clearly to support their clients' position. They often seem to interpret 105 as a boundless source of power that enables the bankruptcy judge to make up the law as she goes along and, in so doing, to go where no member of Congress has gone before. Some judges and lawyers believe that 105 enables a bankruptcy court to hang or otherwise fit decisions within the framework of bankruptcy law whether or not the bankruptcy statutes accommodate the decisions.

In this article we discuss the role of 105 in bankruptcy law generally rather than in specific bankruptcy cases. We mention a few cases as examples. Mainly, we aim at 105. We work toward an understanding of this section that explains our view of the bot-

¹ 11 U.S.C. § 105(a) (1999).

² *Id.*

³ Bankr. Act § 2a(15); 11 U.S.C. § 12(a)(15) (repealed).

⁴ *Id.*

⁵ To state the obvious [or at least what is obvious to us old timers] there were fewer bankruptcy cases and virtually no reports of the decisions of bankruptcy judges under the Bankruptcy Act.

⁶ Richard L. Levine, *An Enhanced Conception of the Bankruptcy Judge: From Case Administrator to Unbiased Adjudicator*, 84 W. VA. L. REV. 637, 653 (1982).

⁷ Chaim J. Fortgang and Erin Enright, "Carry Out the Provisions" and Section 105, at 3, (Paper presented at New York University Law School Workshop on Bankruptcy and Business Reorganization (1992)).

tom issue that determines the proper role and use of 105 and also the proper role and use of supplemental law generally.

Our view of section 105 as a source of supplemental law is different from the view reflected by bankruptcy court decisions and actions. We do not believe that 105 authorizes “supplemental law.” Indeed, we think 105 is largely, even completely, redundant. We also think that some present uses of 105 are of questionable constitutional validity.

Preliminarily, in order to focus clearly on section 105 and the scope of authority the section gives bankruptcy courts, we separate other possible sources of authority for bankruptcy courts to supplement the Bankruptcy Code. There are three such sources: (1) inherent power, (2) federal common law and (3) equitable nature of bankruptcy courts.

First, all courts have certain, inherent power. This power is real but small and limited to process closely related to the conduct of court and functioning process.

Next, we consider the power of bankruptcy courts to create federal common law. We also consider the courts’ power on the basis of state law to supplement the Bankruptcy Code with principles of common law and equity, especially including the principles of traditional equity jurisprudence. These powers exist but are tightly, narrowly constrained. We conclude that they are not sources of very wide, general authority for applying supplemental law under the Bankruptcy Code.

Then we consider the legitimacy and meaning of the oft-quoted description of bankruptcy courts as “courts of equity.” We trace the source and find the meaning of this description. It means that apart from state law and as a matter of federal law, bankruptcy courts can apply principles of equity jurisprudence. These principles are an ancient source of supplemental law, but the principles of equity jurisprudence are doctrinally limited by their own terms and are also situationally limited by any applicable statute that contradicts or restrains them. Moreover, these principles *do not* include any power simply to do what seems fair, i.e. to “do equity.” Such a power requires a specific statutory license and even then is restrained by legislative purpose and judicial precedent.

Finally we get to 105 as a basis of wholesale authority for bankruptcy courts to supplement the provisions of the Bankruptcy Code. The end of our search is anticlimactic. At most, and depending on whom you believe, 105 merely restates the power given elsewhere for bankruptcy courts to issue necessary process and to act as courts of equity in applying principles of equity jurisprudence. Section 105 is not itself a larger or wider or even different source of supplemental law.

Many cases dispute our conclusion. They apply 105 in many ways that are well beyond the limits of equity jurisprudence. These cases make law under 105 as if the section were a delegation of lawmaking power by Congress to the courts. This interpretation may be supported by good policy, but it is not supported by statutory language. Moreover, the Constitution forbids it. Indeed, the practice of bankruptcy courts making law in any non-proximately, legislatively guided sense is unconstitutional under any congressional grant of supplemental power to the courts. It is unconstitutional regardless of the statutory basis of the power and whether or not the judicial law fits perfectly within the scope of the delegated power.

II. INHERENT POWER (PROCEDURAL COMMON LAW)

Federal district courts possess inherent authority to make procedural common law for the purpose of protecting "their proceedings and judgments in the course of discharging their traditional responsibilities."⁸ Presumably, bankruptcy courts derivatively share this authority. Enforcing compliance with court orders through the exercise of the contempt power is an obvious example of a court's inherent power.⁹

To a very small extent the courts' inherent authority is constitutionally protected. For the most part, however, this authority can be controlled or overridden by Congress. Indeed, even the Supreme Court is constitutionally limited in establishing federal rules of procedures. The role of the Court in promulgating and maintaining the federal rules is on the basis of a congressional delegation of authority in the Rules Enabling Act.¹⁰

The Rules Enabling Act limits the Court to making rules for practice and procedure only. Affecting substantive rights is flatly prohibited, and the meaning of "substantive rights" for this purpose may be growing.¹¹ Therefore, the courts' statutory authority to make procedural common law is shrinking. Also, the tiny inherent authority that the courts possess on their own is even more limited. It is not a source of meaningful supplemental law under the Bankruptcy Code.

⁸ *Degen v. United States*, 517 U.S. 820, 823, 116 S. Ct. 1777, 1780, 135 L. Ed. 2d 102 (1996).

⁹ See *In re McLean Indus.*, 68 B.R. 690, 695 (Bankr. S.D.N.Y. 1986) ("All courts . . . have inherent contempt powers to enforce compliance with their lawful orders."). *But cf.* *Kellogg v. Chester*, 71 B.R. 36, 37 (Bankr. N.D. Tex. 1986) ("[S]ection 105 in the first instance grants to bankruptcy courts the power to issue final orders of contempt insofar as such orders are necessary or appropriate to carry out the provisions of title 11.").

¹⁰ 28 U.S.C. § 2072 (1994).

¹¹ See generally Leslie M. Kelleher, *Taking "Substantive Rights" (In the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47 (1998).

III. MAKING AND APPLYING SUBSTANTIVE COMMON LAW

A. As A Matter Of Federal Law

Everybody remembers from the first year of law school that there is no federal, *general*, substantive common law, especially not in diversity cases. *Erie*¹² and its progeny “so hold.” We know this truth from the “canned briefs” we bought when we were first-year law students. Federal courts, unlike state courts, are not common-law courts.¹³ Federal courts “do not possess a general power to develop and apply their own rules of decision,”¹⁴ because:

As the general structure of the Constitution and the tenth amendment make clear, the framers anticipated that the federal government would exercise only specifically enumerated powers. All other powers were reserved to the states or the people. The federal judiciary, as a branch of the federal government, is also limited by this specific enumeration of powers. Thus, any assertion by the judiciary of a general power to make law would encroach upon the powers reserved to the states.¹⁵

On the other hand, *Erie* does not control in matters covered by federal statutes. In these matters it is possible, though not certainly clear, that federal courts enjoy some little room to make true federal common law.¹⁶

Moreover, federal courts make what we will call *interpretative* federal common law. Here we adopt Professor Field’s rightly wide definition of federal common law, which is “any rule of federal law created by a court (usually * * * a federal court) when the substance of that rule is not clearly suggested by federal enactments — constitutional or congressional.”¹⁷ Making federal common law probably happens most often when federal courts interpret federal statutes by adding gloss or inferring a rule after finding that the statute permits the addition or inference, either generally or with respect to a particular matter or issue.¹⁸

¹² *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938) (“[t]here is no federal general common law”).

¹³ *City of Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981).

¹⁴ *Id.*

¹⁵ Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 13-14 (1985).

¹⁶ CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* § 60 (5th ed. 1994).

¹⁷ Martha Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 890 (1986). Cf. Martin Redish, *Federal Common Law and American Political Theory: A Response to Professor Weinberg*, 83 NW. U.L. REV. 853, 857 (1989) (“When a court engages in statutory interpretation, it asks ‘What did the legislature intend?’ When it creates common law, it asks ‘what is the best policy choice?’”).

¹⁸ Defining federal common law so broadly, especially including interpretation, is not uncommon. In fact, it is accepted. See Martha Field, *supra* note 17, at 890-92; Thomas W. Merrill, *supra* note 15, at 4-5.

Bankruptcy courts are units of the district courts.¹⁹ Presumably, therefore, bankruptcy courts share or derivatively enjoy the district courts' power of making federal common law. This power, which is separate from 105, enables bankruptcy courts legitimately to supplement the Code, if only interstitially, with substantive law.

In bankruptcy, however, the federal statutory and incorporated state law are very comprehensive, and any constitutional or policy reasons for looking to state law for filler are strong. While federal common law can sometimes trump otherwise applicable state law when the federal interest in doing so is sufficiently strong, the Supreme Court has clearly held that state law is not easily trumped by federal common law created by bankruptcy judges.²⁰

Also, the Supreme Court has been equally clear that the Code's literal language must be followed closely so that proper occasion for interpretative law is small.²¹ Very little room is therefore left for making federal common law under the Bankruptcy Code.

In any event, bankruptcy-made federal common law is not the sort of supplemental law that concerns us in this presentation. Bankruptcy judges create federal common law, whatever the source or reference, under and within the bounds of the bankruptcy statute. Our concern is limited to judges' deciding or acting beyond, or different from, statutory provisions on the basis of general authority apart from the provisions themselves.

B. As A Matter Of State Law

Bankruptcy courts more often create state common law. It happens whenever the courts look to state law for substantive rights and liabilities of the debtor and other parties. These rights and liabilities are almost always governed by state law. In consulting state law for this purpose the bankruptcy courts make common law by interpreting applicable state statutes or by applying and developing pertinent state common law.

This state common law is not, however, the true supplemental law that interests us. The bankruptcy courts are applying and are constrained by specific statutes, or they are projecting common law that is also limited by state statutory law and by local precedent. Moreover, in creating state common law the bankruptcy

¹⁹ 28 U.S.C. § 151 (1999).

²⁰ *Butner v. United States*, 440 U.S. 48, 54, 99 S.Ct. 914, 918 (1979).

²¹ See generally Robert K. Rasmussen, *A Study of the Costs and Benefits of Textualism: The Supreme Court's Bankruptcy Cases*, 71 WASH. U. L.Q. 535 (1993); Adam James Wiensch, Note, *The Supreme Court, Textualism, and the Treatment of Pre-Bankruptcy Code Law*, 79 GEO. L.J. 1831, 1859 *et seq.* (1991).

courts are adding to state law on which the Bankruptcy Code operates rather than to the Code itself.

Sometimes an applicable state statute empowers courts to use, as a kind of supplemental law, state-law principles of common law and equity. The best example is Uniform Commercial Code section 1-103,²² which provides:

Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.²³

Bankruptcy courts applying local U.C.C. law will rely on 1-103 as authority to supplement the statute with principles of common law and equity. This process, too, is enabled and constrained by state law and does not add supplemental law to the Bankruptcy Code. Furthermore, the Bankruptcy Code can itself displace state law principles of common law and equity.²⁴

IV. BANKRUPTCY COURTS AS COURTS OF EQUITY

Separately, bankruptcy courts apply equitable principles to directly affect the Bankruptcy Code on the basis of the bankruptcy court's supposed (though foggy) status as a court of equity. Bankruptcy courts are commonly described as being or having the powers of "courts of equity."²⁵ Until recently, clear statutory support existed for this status. No longer. Today, any such support is, at best, uncertain and vague.

The first federal bankruptcy law, the 1800 Act, gave bankruptcy jurisdiction to the district courts. The second law, the 1841 Act, also empowered the district courts to exercise this jurisdiction summarily in the nature of summary proceedings in equity. The district courts were thereby empowered to effectively act as equity courts for purposes of bankruptcy. The Supreme Court made clear that, absent this equitable jurisdiction power given by the 1841 Act, "the District Courts of the United States possess no eq-

²² U.C.C. § 1-103.

²³ *Id.*

²⁴ *In re Omegas Group, Inc.*, 16 F.3d 1443, 1452-53 (6th Cir. 1994) (State-law imposing constructive trust on property debtor obtained by fraud is inconsistent with goals of bankruptcy and is displaced by bankruptcy law.).

²⁵ *E.g.*, *Local Loan v. Hunt*, 292 U.S. 234, 240, 54 S.Ct. 695, 697 (1934) ("But otherwise courts of bankruptcy are essentially courts of equity and their proceedings inherently proceedings in equity."); *Kaiser Aerospace & Elec. Corp. v. Teledyne Indus., Inc.*, 229 B.R. 860, 871 (Bankr. S.D. Fla. 1999) ("Section 105(a)'s broad statutory directive that bankruptcy courts shall have the power to issue any order necessary to effectuate a Chapter 11 plan is consistent with the general understanding that these tribunals are courts of equity.").

uity jurisdiction whatsoever; for the previous legislation of Congress conferred no such authority upon them."²⁶

The district courts' equity power in bankruptcy matters was explicitly continued under the 1867 Act²⁷ and the 1898 Act. The critical language of the 1898 Act was the very first part — the introductory part — of section 2:

[T]he district courts of the United States * * * are hereby made courts of bankruptcy, and are hereby invested * * * with such jurisdiction at law *and in equity* as will enable them to exercise original jurisdiction in bankruptcy proceedings * * * .

This language meant that "[a] bankruptcy court is a court of equity, . . . guided by equitable doctrines and principles except in so far as they are inconsistent with the [bankruptcy statute]."²⁸ To be a court of equity means "at least * * * that, in the exercise of the jurisdiction conferred upon it, it [the bankruptcy court] applies the principles and rules of equity jurisprudence."

More recently, in 1978, Congress enacted section 1481 of Title 28 which provided in pertinent part that "[a] bankruptcy court shall have the powers of a court of equity." However, when the provisions of title 28 relating to bankruptcy courts were amended in 1984 making the bankruptcy court a "unit" of the district court, section 1481 was repealed.²⁹ 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.³⁰

It is generally assumed, however, that, under the Code, bankruptcy courts are equity courts³¹ and can apply equitable principles and rules. Section 105(a) is sometimes cited as the basis for this status and power.³²

²⁶ *Ex Parte*, *The City Bank of New Orleans in the Matter of William Christy*, 44 U.S. 292, 311-12 (1845).

²⁷ The Bankruptcy Act of 1867 again designated the district courts as courts of bankruptcy but did not expressly provide for them to act in equity. It was implicit that in bankruptcy, the district courts acted as courts of equity.

²⁸ *SEC v. United States Realty & Improvement Co.*, 310 U.S. 434, 455, 60 S. Ct. 1044, 1053 (1940) (citing Bankruptcy Act § 2).

²⁹ See *Industrial Tool Distrib., Inc.*, 55 B.R. 746, 749 fn.6 (Bankr. N.D. Ga. 1985).

³⁰ Cf. Robert A. Greenfield, *The National Bankruptcy Conference's Position on the Court System Under the Bankruptcy Amendments and Federal Judgeship Act of 1984 and Suggestions for Rules Promulgation*, 23 HARV. J. ON LEGIS. 358, 360 (1986).

³¹ E.g. *United States v. Energy Resources, Inc.*, 495 U.S. 545, 549, 110 S.Ct. 2139, 109 L. Ed. 2d 580 (1990); *In re Nikoloutsos*, 199 F.3d 233, 236 (5th Cir. 2000); But for a very recent, thoughtful, very rare cautionary view, see generally Honorable Marcia A. Krieger, *"The Bankruptcy Court Is a Court of Equity": What Does That Mean?*, 50 S.C. L. REV. 275 (1999).

³² Section 105 has been cited (probably wrongly) as independent authority for using supplemental equitable principles in bankruptcy. *In re Momentum Mfg. Corp.*, 25 F.3d 1132 (2d Cir. 1994) (Section 105 supports bankruptcy court applying the doctrine of equitable estoppel.); *In re Lapiana*, 909 F.2d 221 (7th Cir. 1990) (Bankruptcy rights are subject to

It is simply not true that 105 is the basis for equity jurisdiction of courts in bankruptcy. The legislative history of the section flatly reports that section 105(a) is “derived from”³³ Bankruptcy Act section 2a(15). Reconsider the language of section 2:

a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such *jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act*, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—(15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act: *Provided, however*, That an injunction to restrain a court may be issued by the judge only; make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act.³⁴ (emphasis added).

The italicized prefatory language in section 2 is the statutory basis for bankruptcy courts’ equitable power. Subsection 2a(15) did not itself give equity power to the bankruptcy courts. So, section 105, as the modern successor of only subsection 2a(15), cannot itself give the courts this power.

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].”³⁵ So, prior to 1984, when bankruptcy courts were separate courts, separate legislation brought them under the All Writs Statute.³⁶ 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.

We believe that the All Writs Statute still applies to bankruptcy courts, but only indirectly or derivatively as units of the federal district courts. Still, the All Writs Statute is not a source of equity power or other supplemental law. It is a source of process only that must be closely related to fairly clear legislative intent.

well-recognized equitable defenses, such as estoppel; and the courts possibly can create new equitable defenses.).

³³ S. REP. NO. 95-989, at 51 (1978), *reprinted in* U.S.C.C.A.N. 5787, 5837; H.R. REP. NO. 95-595, at 342 (1978), *reprinted in* U.S.C.C.A.N. 5963, 6298.

³⁴ Bankr. Act § 2a(15); 11 U.S.C. § 12(a)(15) (repealed).

³⁵ H.R. REP. NO. 95-595 (1977).

³⁶ 28 U.S.C. § 1651 (1994).

Nevertheless, bankruptcy courts exercise equity power. The putative basis may be the doubtful authority of 105; the murky authority of the long-ago merger of law and equity in federal courts;³⁷ 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.

Equitable principles and rules, however, are not a source of general authority to act beyond or different from the Bankruptcy Code. So, even if there is a real and lawful basis for bankruptcy judges to assume the role of equity chancellors, this role gives them little legitimate reason or room to add substantive, supplemental law to the Bankruptcy Code.

Equity does not empower the judge to create or depart from law in pursuit of conscience or morality. It is a subset of principles, rules, and remedies well constrained by hundreds of years of precedent that fairly precisely defines equity. The important principles of equity were long ago all developed:³⁸

[E]quity became a system of positive jurisprudence, peculiar indeed, and differing from the common law, but founded upon and contained in the mass of cases already decided. The Chancellor was no longer influenced by his own conscience * * *. [Also,] * * * there can be no more capricious enlargement according to the will of individual chancellors.³⁹

Although equitable principles can be adapted to novel conditions, "the broad and fruitful principles of equity have been established and cannot be changed by any judicial action."⁴⁰

Moreover, these concrete principles are only applied to aid law, not to contradict law or even add to law. The Supreme Court forcefully made this point in its recent decision, *Grupo Mexicano de Desarrollo SA v. Alliance Bond Fund, Inc.*,⁴¹ holding that the equity jurisdiction conferred on federal courts by the 1789 Judiciary Act did not empower a court to freeze assets for the benefit of creditors. The Court stated:

We do not question the proposition that equity is flexible; but in the federal system, at least, the flexibility is confined within the

³⁷ The district courts, and presumably the bankruptcy courts operating as units of the district courts, "have original jurisdiction of all civil actions arising under the Constitution, laws, or treatises of the United States." 28 U.S.C. § 1331 (1999). Because of the merger of law and equity in federal courts, some people interpret "civil actions" in section 1331 to encompass traditional equity jurisdiction. John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 147 n.173 (1998).

³⁸ 1 POMEROY, EQUITY JURISPRUDENCE § 59, at 75 (Spencer Symons, 5th ed. 1941).

³⁹ *Id.* at 75-76.

⁴⁰ *Id.* § 60, at 78.

⁴¹ 527 U.S. 308 (1999).

broad boundaries of traditional, equitable relief. To accord a type of relief that has never been available before – and especially (as here) a type of relief that has been specifically disclaimed by longstanding judicial precedent – is to invoke a “default rule,” . . . not of flexibility but of omnipotence.⁴²

Clearly, equitable principles are subordinate and subservient to all law,⁴³ including statutory law. So, especially when federal courts apply comprehensive federal statutes, the use of equity is triggered by, and strictly limited by, the letter and clear sense of the statutes. As courts of equity, therefore, bankruptcy courts are not empowered to go beyond or depart from the Bankruptcy Code and create supplemental law.

V. SECTION 105(a)

Collier and other secondary sources have classified and criticized the cases construing section 105.⁴⁴ Some of these reported decisions seem premised on the implicit if not explicit interpretation of section 105 as a direct, fresh, independent grant of supplemental power to the bankruptcy courts.⁴⁵

Under this broad interpretation, 105(a) does not re-state inherent or equitable powers of courts elsewhere provided and otherwise limited. Rather, through 105(a), Congress separately delegated to bankruptcy courts the authority to act to the limits of a wholly independent meaning of 105(a).

Under this broad meaning, 105(a) could be interpreted as a basis of authority to fill in, extend, or retract the Bankruptcy Code in unprovided-for cases and unanticipated circumstances in ways that are beyond particular provisions but within the largest goals of bankruptcy. We can imagine appealing policy arguments that support giving bankruptcy courts such authority.

We believe that some uses of 105(a) can only be explained by interpreting and applying the statute this way. Good examples are partial discharge of student loans,⁴⁶ substantive consolida-

⁴² *Id.* at 333.

⁴³ Admittedly, though, distinguishing equity from common law is very artificial in that the worlds are largely merged by procedure and also by judicial legislation that has absorbed much of the former into the latter. For present purposes, distinguishing equity from common law is also pointless because there is no general, federal common law and also because we are entirely interested in the exercise of equitable powers within and under statutes.

⁴⁴ *E.g.*, 2 COLLIER ON BANKRUPTCY ¶ 105.01[2] (15th ed. 1999); Manuel D. Leal, *The Power of the Bankruptcy Court: Section 105*, 29 S. TEX. L. REV. 487 (1988).

⁴⁵ *E.g.*, *In re Morgan*, 182 F.3d 775 (11th Cir. 1999) (tolling of priority period); *In re Brown*, 239 B.R. 204 (Bankr. S. D. Cal. 1999)(partial discharge of student loan).

⁴⁶ See generally Cara A. Morea, Note, *Student Loan Discharge in Bankruptcy—It Is Time for a Unified Equitable Approach*, 7 AM. BANKR. INST. L. REV. 193 (1998).

tion,⁴⁷ payment of “necessary” unsecured claims early in a Chapter 11 case,⁴⁸ and permanently stretching the discharge to protect non-debtors.⁴⁹

We do not say that these uses are bad bankruptcy policies. We do, however, say that such uses raise problems of statutory language and constitutional concepts.

The problems of statutory language are straight-forward. 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.⁵⁰

The problems of constitutional concepts are different 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. It makes no difference that Congress may have desperately wanted, clearly intended, and explicitly provided for the courts to have such power. Congress cannot widen the constitutional limits of judicial power.

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 the authority and independence of one or another coordinate branch is undermined.⁵¹

With respect to the judicial branch the special concerns are law that “impermissibly threatens the institutional integrity of the Judicial Branch”⁵² or the assignment of “tasks that are more properly accomplished by [other] branches.”⁵³ So, when the Con-

⁴⁷ See generally Mary Elizabeth Kors, *Altered Egos: Deciphering Substantive Consolidation*, 59 U. PITT. L. REV. 381 (1998).

⁴⁸ See generally CHARLES JORDAN TABB, *THE LAW OF BANKRUPTCY* § 11.12 (1997).

⁴⁹ See generally Ralph Brubaker, *Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-debtor Releases in Chapter 11 Reorganizations*, 1997 U. ILL. L. REV. 959 (1997).

⁵⁰ Some courts, however, seem to use the words “provisions” and “purposes” interchangeably. *E.g.*, *In re Gurny*, 192 B.R. 529, 539 (B.A.P. 9th Cir. 1996); *In re Simmons*, 224 B.R. 879, 884 (Bankr. N.D. Ill. 1998). See also *In re Offshore Diving and Salvaging, Inc.*, 1999 WL 961763 (E.D. La 1999) (“This court agrees that recognizing equitable power to toll Section 507 under § 105(a) does not violate any Bankruptcy Code provision or policy and is in fact consistent with Congressional policy. Accordingly, the Court affirms the bankruptcy court’s determination that Section 105(a) is broad enough to provide for equitable tolling of the priority period in 507(a).”).

⁵¹ *Mistretta v. United States*, 488 U.S. 361, 381, 109 S. Ct. 647, 659, 102 L. Ed. 2d 714, 786 (1989).

⁵² *Id.* at 383.

⁵³ *Id.*

gress delegates certain authority to the courts, the seemingly decisive issue in terms of separation of powers is whether the particular authority is more properly exercised by another branch.

It's a fuzzy scale generally that applies fully to law making. Courts cannot create law in the sense of exercising Article I legislative power. On the other hand and at the other extreme, applying and interpreting legislation are necessary and essential judicial functions. In a sense, applying and interpreting law creates law (albeit not "supplemental law"). In sum, the rule is probably that courts cannot make law "except in conjunction with the lawful exercise of * * * judicial power."⁵⁴

In judging the legality of a court's role under a statute, the separation-of-powers issue is whether, on a flexible, fuzzy scale, the role exceeds lawful exercise of judicial power under the statute and thus becomes unconstitutional law making. We think it depends in large part on the proximity between the court's "legislative" decisions under the statute and the clarity and precision of the policies expressed through the statute.

The issue is whether the court's decision is necessary to a fairly specific and certain statutory intention that drives and guides the judge's decision making and her related actions. 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.

The likelihood of unconstitutional law-making by courts in applying statutes is directly related to the distance between the courts' decisions or actions under the statute and a well-defined congressional judgment about the matter behind the statute. The farther the stretch, the more likely judicial lawmaking is unconstitutional.

So, the ultimate question about partial discharge and all other judicial supplements to the Bankruptcy Code is whether they are too much of a legislatively projected reach from the statute to the decision. If so, the supplements may violate the Constitution even if they somehow satisfy the language of 105(a).

It's possible, too, that such supplements are not saved by having roots in traditional equity jurisprudence. Remember: we are not completely sure if, why, and to which extent bankruptcy courts are courts of equity. We are sure that even if they are fully courts of equity, this status gives little reason or room for making supplemental law. Also, it is never been entirely clear how far the Constitution permits the judicial branch, either on its own or through congressional grant, to exercise equitable power, but we

⁵⁴ *Id.* at 417 (Scalia, J., dissenting).

cannot imagine that any such authority trumps Article I of the Constitution. Courts cannot exercise Article I legislative power directly through 105 or any other statute or indirectly through equity.

VI. CONCLUSION

For more than thirty years and in thousands of reported cases, bankruptcy judges and lawyers have thought about section 105. They have thought about 105 in terms of statutory interpretation, in terms of legislative history, in terms of other reported decisions, in terms of bankruptcy policy, in terms of doing equity. We recognize that these cases are of real importance and value to the bench and bar, which is why we are developing a Web site that collects all of these cases and also collects other supplemental law authorities.

We suggest, however, that from now on, judges and lawyers should also think of 105 in constitutional terms. We join the call of Professor Robert F. Nagel of the University of Colorado Law School who, writing more than 20 years ago about the limits of federal courts' equitable remedies generally, urged: "[l]egal commentators and courts should begin the potentially constructive business of deciding how separation of powers applies to the scope of equitable relief in particular cases."⁵⁵

Finally, we suggest that judges and lawyers also think of section 105 in musical terms when deciding how the section fits within the whole of the Bankruptcy Code. We join the lament of the Oak Ridge Boys in their gospel classic, *Rhythm Guitar*:

Nobody wants to play rhythm guitar behind Jesus.
It seems like everybody wants to be the lead singer in the band
I know it's hard to get a beat on what's divine
When everybody's pushing toward the head of the line
I don't think that its working out at all the way He planned.

We suggest that, musically and constitutionally, section 105 is at most a rhythm guitar.⁵⁶

⁵⁵ Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 724 (1978).

⁵⁶ While we both agree that section 105 corresponds to a rhythm guitar, at least one of the authors is ill-equipped to identify what corresponds to Jesus.