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# Rethinking Criminal Contempt in the Bankruptcy Courts

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## Rethinking Criminal Contempt in the Bankruptcy Courts

John A. E. Pottow\*  
&  
Jason S. Levin\*\*

### INTRODUCTION

Judicial actors in bankruptcy have been around for well longer than the National Conference of Bankruptcy Judges, but it is safe to say that there has been a long, steady march toward increased respectability of these curious legal beasts. Many have ruminated about their unique and sometimes controversial role in the modern judicial system,<sup>1</sup> and the Supreme Court's recent jurisprudence has brought a renewed focus on the role of bankruptcy judges within the federal judiciary. On the constitutional level, the Court's *Stern* trilogy has dragged into the fore the uncertain and contested nature of bankruptcy judge authority to exercise the judicial power of the United States under Article III.<sup>2</sup> And on the statutory level, indirectly invoking concerns of adjudicative legitimacy, the Court has offered similar comments on the scope of a bankruptcy judge's inherent equitable authority in the *Law v. Siegel* case.<sup>3</sup> There is an inescapable subtext to these cases (although perhaps walked back a bit in *Wellness Int'l Network, Ltd. v. Sharif*): bankruptcy judges are not fully "real" judges, and so they have to be watched with suspicion lest they unravel our constitutional principles as we know them.<sup>4</sup> This has some wondering whether the march toward greater respectability and acceptance has marched right off a cliff, triggering a backlash on these judicial upstarts, with the Supreme Court opinions leading the way.<sup>5</sup>

It is of course too early to tell whether we are in a new era of bankruptcy judge (dis)respectability. Only time will tell. But this Article performs a specific case study, on one discrete area of bankruptcy court authority, based upon a particular assumption in that regard. The assumption is this: certain high-salience judicial events—here, the recent Supreme Court bankruptcy judge decisions, coupled with earlier constitutional precedents involving the limits of Article III – can trigger overreaction and hysteria. Lower courts may read these Supreme Court decisions as calling into question the permissibility of certain bankruptcy court practices under the Constitution, and justifying a wholesale scale-back of all bankruptcy court power. One need go no further than *Stern v. Marshall*, which induced such shock waves it required the Court to

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<sup>1</sup> See, e.g., G. Eric Brunstad, Jr., *Bankruptcy and the Problems of Economic Futility: A Theory on the Unique Role of Bankruptcy Law*, 55 BUS. LAW. 499, 499 n.1 (2000) (collecting scholarly views).

<sup>2</sup> See *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015); *Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165 (2014); *Stern v. Marshall*, 564 U.S. 462 (2011).

<sup>3</sup> 134 S. Ct. 1188 (2014).

<sup>4</sup> "The next time Congress takes judicial power from Article III courts, the encroachment may not be so modest—and we will no longer hold the high ground of principle. The majority's acquiescence in the erosion of our constitutional power sets a precedent that I fear we will regret." *Wellness*, 135 S. Ct. at 1950 (Roberts, C.J., dissenting).

<sup>5</sup> See Randolph J. Haines, *The Conservative Assault on Federal Equity*, 88 AM. BANKR. L.J. 451 (2014).

revisit the matter twice in barely as many years while the ink was still drying.<sup>6</sup> And *Law*, close on *Stern*'s heels, made some comments in dictum casting at least some doubt on the strength of the Court's support for bankruptcy judges exercising inherent equitable power, sending off further ripples of anxiety.<sup>7</sup>

This backlash motivated us to reconsider one especially thorny area of bankruptcy court authority, namely, the propriety of issuing criminal contempt citations.<sup>8</sup> While the issue has been brewing in the federal courts for years, the Supreme Court's recent skepticism over the authority of bankruptcy courts makes renewed analysis of the debate timely. Perhaps perversely, we want to go in the opposite direction from where our assumption of a hysteria bubble might lead. That is, post *Stern* and *Law*, we might expect many lower courts to be even more anxious about the power of bankruptcy courts to award such sanctions, i.e., that these judges should learn to stay in their place and not overstep their authority, which has once again attracted the watchful eye of the Court.<sup>9</sup> But we decided to go another way—why not go back to first principles and, instead of having to *defend* the propriety of bankruptcy courts issuing criminal contempt orders, ask whether there is anything wrong with bankruptcy judges so doing, i.e., to start with a presumption that *such relief is just fine* until convinced otherwise.

As we dug through the case law, it will surprise few readers to learn that there were firmly established circuit precedents prohibiting bankruptcy courts from imposing criminal contempt sanctions in no uncertain terms.<sup>10</sup> But the more we went through the cases, especially against the backdrop of historical practice in the bankruptcy courts and their predecessors, the more we became convinced that these opinions were flawed—the result of overreadings of Supreme Court precedents and unfounded policy concerns. They lacked solid constitutional

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<sup>6</sup> *Stern*, 564 U.S. 462 (2011); see also *In re Ambac Financial Grp., Inc.*, 457 B.R. 299, 308 (Bankr. S.D.N.Y. 2011) (noting that “*Stern v. Marshall* has become the mantra of every litigant who, for strategic or tactical reasons, would rather litigate somewhere other than the bankruptcy court”), *aff'd*, No. 10-B-15973 SCC, 2011 WL 6844533 (S.D.N.Y. Dec. 29, 2011), *aff'd*, 487 F. App'x 663 (2d Cir. 2012); Tyson A. Crist, *Stern v. Marshall: Application of the Supreme Court's Landmark Decision in the Lower Courts*, 86 AM. BANKR. L.J. 627 (2012) (detailing the “upheaval” caused by *Stern*).

<sup>7</sup> *Law v. Siegel*, 134 S. Ct. 1188, 1194–95 (2014) (Scalia, J.).

<sup>8</sup> Robert J. Martineau, *Contempt of Court: Eliminating the Confusion Between Civil and Criminal Contempt*, 50 U. CIN. L. REV. 677 (1981) (“Few legal concepts have bedeviled courts, judges, lawyers and legal commentators more than contempt of court.”). It is now widely accepted that bankruptcy judges possess the authority to impose civil contempt. See, e.g., *In re Downs*, 103 F.3d 472, 477 (6th Cir. 1996) (highlighting that a bankruptcy judge possesses the same authority to impose civil sanctions as a district court judge); *In re Skinner*, 917 F.2d 444, 450 (10th Cir. 1990) (citing *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982)) (“[T]he delegation of civil contempt power to bankruptcy courts does not ‘impermissibly remove[] . . . [sic] ‘the essential attributes of the judicial power’ from the Article III district courts . . .”).

<sup>9</sup>

This notion of a pumped-up § 105 was relatively short-lived and rebuked by the Supreme Court in a unanimous decision decided last term[, *Law v. Siegel*] . . . While it is often tempting to override the mandate of a statutory requirement in circumstances where, like here, the Code does not seem logical or application of the Code section will yield a harsh result, § 105(a) is not a panacea to correct judge-perceived legislative mistakes.

*In re Martinez*, 515 B.R. 383, 385–86 (Bankr. S.D. Fla. 2014).

<sup>10</sup> See, e.g., *In re Dyer*, 322 F.3d 1178, 1194–95 (9th Cir. 2003); *In re Hipp, Inc.*, 895 F.2d 1503, 1510 (5th Cir. 1990).

foundation. In other words, to invoke once again our intentionally provocative image, these decisions appeared to be based upon, and aimed to increase, bankruptcy hysteria.

This Article concludes that there is nothing intrinsically problematic from a constitutional, statutory, or policy perspective with bankruptcy courts issuing criminal contempt orders. To reach this conclusion requires more than a few steps. This Article begins with a lay of the land, assaying current judicial treatment of bankruptcy courts' contempt power. It then examines the historical context of bankruptcy judges, paying particular attention to the *sui generis* role bankruptcy courts have played in the judiciary's evolution. Next, it considers the various statutory concerns in light of the complex legislative innovations regarding bankruptcy courts in the United States. After that, the Article considers constitutional jurisprudence regarding Article III and other provisions. Finally, the Article discusses pertinent collateral policy concerns that we deem to have played a significant role in the evolution of criminal contempt powers in the bankruptcy courts.

## I. THE LAY OF THE LAND

### A. CIRCUIT COURT DISAGREEMENT AND CONFUSION

The question whether bankruptcy judges possess criminal contempt power is an unsettled and divisive question among the lower courts. A seminal case denying such a power is the Fifth Circuit's opinion in *In re Hipp*.<sup>11</sup> Although it used the constitutional avoidance doctrine to interpret 18 U.S.C. § 401 and 11 U.S.C. § 105, the court's analysis was unquestionably driven by Article III of the Constitution: "The principal constitutional concern here arises from the fact that bankruptcy judges do not have life tenure during good behavior and protection against diminished compensation which Article III, section 1, requires for federal judges exercising 'the judicial power of the United States.'"<sup>12</sup> In light of these constitutional concerns, the Fifth Circuit held that § 105 of the Bankruptcy Code, which empowers a bankruptcy court to issue any "order, process, or judgment that is necessary or appropriate to carry out the provisions of this title[,]"<sup>13</sup> could not be read to include criminal contempt powers.<sup>14</sup> The court cited the *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* plurality decision,<sup>15</sup> and then analyzed the provisions of the 1978 Bankruptcy Code struck down by that decision, the Federal Rules of Criminal Procedure, and the jurisprudence pertaining to magistrate judge contempt authority.<sup>16</sup> (The Fifth Circuit did concede § 105 could authorize civil contempt orders.<sup>17</sup>)

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<sup>11</sup> 895 F.2d 1503 (5th Cir. 1990).

<sup>12</sup> *Hipp*, 895 F.2d at 1510.

<sup>13</sup> 11 U.S.C. § 105(a).

<sup>14</sup> While nominally adhering to the avoidance doctrine, the court revealed its constitutional conclusion in a footnote wherein it expressed that it just thought the practice was unconstitutional. *See Hipp*, 895 F.2d at 1511 n.16 (denying that bankruptcy courts have an inherent criminal contempt authority).

<sup>15</sup> 458 U.S. 50 (1982).

<sup>16</sup> 895 F.2d at 1506–21. The Court also noted that the Sixth Amendment would confer a right to a jury trial for sentences of incarceration more than six months. *Id.* at 1509 (citing *Frank v. United States*, 395 U.S. 147 (1969)).

<sup>17</sup> *Id.* at 1517.

The Eighth Circuit's opinion in *In re Ragar*, which responded to a lawyer's appeal for criminal contempt fines levied against him by the bankruptcy court, came to the nearly opposite result.<sup>18</sup> In reaching this conclusion, the court embraced a generous reading of § 105, noting “[t]he plain meaning of the statute authorizes at least as much as [the criminal contempt order] here.”<sup>19</sup> *Ragar* did not directly contradict *Hipp*, however, because the bankruptcy court there had entered only a presumptive finding of criminal contempt; the contemnor was entitled to de novo reconsideration in district court (although in another Eighth Circuit case a direct order was upheld).<sup>20</sup> The Eighth Circuit made clear it disagreed with the Fifth Circuit's belief that § 105 could not house the power to order a finding of criminal contempt in no uncertain terms: “With all respect, we think this is simply wrong.”<sup>21</sup> The Court expanded, “An order of criminal contempt, no less than one of civil contempt, is necessary or appropriate to enforce the order whose violation it is imposed, and the statute in pursuance of which that order was itself entered.”<sup>22</sup>

Other courts have their own approaches. For example, the Ninth Circuit also believes there is constitutional infirmity with bankruptcy judges imposing sanctions based on criminal contempt, but its belief is founded on due process.<sup>23</sup> While the Ninth Circuit, too, purported to be merely interpreting § 105 not to authorize “serious non-compensatory fines” through the avoidance doctrine, its holding was equally driven by constitutional angst, albeit directed at due process: “Our interpretation of the language of § 105(a) is reinforced by the fundamental due process considerations we discussed in *Hanshaw*.”<sup>24</sup> Thus, in the Ninth Circuit, apparently *some* criminal contempt is acceptable—“relatively mild” fines—but not too much.<sup>25</sup> In fact, the Ninth Circuit has gone back and forth on bankruptcy judge limits, initially finding bankruptcy judges cannot even enter orders of civil contempt,<sup>26</sup> but then backtracking to recast the prohibition as principally on criminal contempt.<sup>27</sup> The Sixth Circuit, too, follows this hybrid approach of allowing “some” criminal contempt.<sup>28</sup> The Seventh Circuit appears not to want to touch the

<sup>18</sup> 3 F.3d 1174, 1177–80 (8th Cir. 1993).

<sup>19</sup> *Id.* at 1178; see *Jove Eng'g, Inc. v. I.R.S.*, 92 F.3d 1539, 1554 (11th Cir. 1996). Courts' contradictory perceptions of § 105's purportedly clear text is sometimes dispiriting. Cf. *In re Terrebonne Fuel & Lube, Inc.*, 108 F.3d 609, 613 (5th Cir. 1997) (finding that the plain language of § 105 is “unambiguous” in its grant of solely civil contempt power and *not* criminal contempt).

<sup>20</sup> *Ragar*, 3 F.3d at 1177–78; see *Isaacson v. Manty*, 721 F.3d 533, 538–39 (8th Cir. 2013).

<sup>21</sup> *Ragar*, 3 F.3d at 1179.

<sup>22</sup> *Id.* The Eighth Circuit appears to have implicitly acknowledged the authority of bankruptcy courts to issue criminal contempt orders (not just a presumptive finding subject to de novo review), although in doing so it did not directly address Article III issues. *Isaacson v. Manty*, 721 F.3d at 538–39 (8th Cir. 2013).

<sup>23</sup> See *Dyer*, 322 F.3d at 1194–95 (9th Cir. 2003) (citing *F.J. Hanshaw Enters., Inc. v. Emerald River Dev., Inc.*, 244 F.3d 1128, 1137–38 (9th Cir. 2001)).

<sup>24</sup> *Id.* at 1194–95 (noting that bankruptcy courts are “ill-equipped” to protect the due process rights, such as the right to a jury trial; also noting “fundamental constitutional questions” under Article III); accord *In re John Richards Homes Bldg. Co.*, 552 F. App'x 401, 415–16 (6th Cir. 2013).

<sup>25</sup> *Dyer*, 322 F.3d at 1193; see also *Hanshaw*, 244 F.3d at 1140 n.10 (declining to determine “the precise limit for a ‘serious’ sanction entitling an individual to a jury trial”).

<sup>26</sup> *In re Sequoia Auto Brokers Ltd., Inc.*, 827 F.2d 1281 (9th Cir. 1987), *superseded by statute*, Pub. L. 95–598, 92 Stat. 2549 (1978), *as recognized in In re Rainbow Magazine, Inc.*, 77 F.3d 278 (9th Cir. 1996).

<sup>27</sup> *In re Rainbow Magazine, Inc.*, 77 F.3d 278, 281 (9th Cir. 1996).

<sup>28</sup> *John Richards Homes Bldg.*, 552 F. App'x at 415–16.

issue with a ten-foot pole.<sup>29</sup> Thus, while it is clear that most courts have problems with bankruptcy judges entering judgments of criminal contempt, for many the reasoning is not always consistent. Indeed, the rationale tends to bounce around from constitutional to statutory, and even policy grounds.<sup>30</sup> Certainly the matter has never gotten to the Supreme Court. Accordingly, we proceed in this Article to unpack, and then critique, the reasons advanced for objecting to bankruptcy court criminal contempt power.

## B. PRELIMINARY MATTERS OF LEXICOLOGY AND TAXONOMY

Leaving aside for the moment the added complications when judges who lack full Article III protections get involved, the law surrounding criminal contempt is already, putting matters charitably, “uncertain.” In the common sentiment of one court, “A proceeding to punish for contempt is *sui generis*.”<sup>31</sup> Contempt goes back centuries through the common law, and the ability—some would say the inalienable right—of judges to issue orders of contempt has never been defined with anything approaching clarity.<sup>32</sup> Nonetheless, there are some baseline distinctions that are generally agreed to, even if the debate over their legal significance persists. The reader should be familiarized with three specific distinctions before proceeding further.

First, there is a difference between a court’s *inherent authority* to police conduct within its jurisdiction and the authority to issue *contempt* orders. Although there is large overlap between these two concepts, and, indeed, the basis of the power to issue a contempt order may well stem from a court’s inherent authority, jurisprudence has treated these two as analytically distinct. The distinction has to do with the need and consequence of statutory authorization. Consider, for example, the specific grant of statutory authority to magistrate judges to issue contempt awards.<sup>33</sup> One could take the position that absent such a grant, magistrate judges would be impotent to issue any order of contempt and would instead rely on district court judges to mete out any contempt-like remedy deemed necessary under the circumstances. Under this approach, unless and until Congress acts, there is no power of contempt. Indeed, there is a federal criminal contempt statute for the district (and circuit) courts, 18 U.S.C. § 401, which confers/codifies the power to issue certain contempt orders:

A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as—  
 (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

<sup>29</sup> *Cox v. Zale Delaware, Inc.*, 239 F.3d 910, 917 (7th Cir. 2001) (noting that the court could “save the issue of the bankruptcy judges’ criminal-contempt powers for another day”).

<sup>30</sup> *See, e.g., John Richards Homes Bldg.*, 552 F. App’x 401; *Dyer*, 322 F.3d 1178; *Ragar*, 3 F.3d 1174, 1177 (8th Cir. 1993) (noting that questions concerning bankruptcy court criminal contempt power “have divided the Circuits”); *In re Hipp*, 895 F.2d 1503 (5th Cir. 1990).

<sup>31</sup> *In re Paleais*, 296 F. 403, 406 (2d Cir. 1924). A divided Michigan Supreme Court recently struggled with whether civil contempt should be considered a tort. *See In re Bradley Estate*, 835 N.W.2d 545 (Mich. 2013).

<sup>32</sup> *See, e.g., John Richards Homes Bldg.*, 552 F. App’x 401; *Dyer*, 322 F.3d 1178; *Ragar*, 3 F.3d 1174; *Hipp*, 895 F.2d 1503.

<sup>33</sup> *See Bingman v. Ward*, 100 F.3d 653, 658 (9th Cir. 1996) (holding that the restriction against magistrate judges’ imposition of criminal contempt is “not unwise”).

- (2) Misbehavior of any of its officers in their official transactions;
- (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.<sup>34</sup>

By contrast, to the extent that a court possesses “inherent authority,” it would presumably be self-executing, not beholden to Congress to pass enabling legislation. And perhaps more controversially, it would be beyond Congress’s authority to purport to restrict such authority without wandering into separation of powers concerns. Moreover, as a threshold matter to the possession of “inherent authority,” there might be a definitional question: is the tribunal a “court” in the first place?<sup>35</sup> Finally, there might even be a taxonomy question: even if the tribunal is a court, is there a hierarchy of courts, where some possess inherent authority and some do not, or where some possess more inherent authority than others? None of these questions has been definitely resolved by the Supreme Court, but the relevant point for present discussion is that there is a core “inherent” power of courts to police conduct that likely requires no statutory authorization.

Second, within the specific domain of contempt, there has developed a division between *direct* and *indirect* contempt.<sup>36</sup> Direct contempt is contempt committed in the presence of the court, such as disrupting the judicial proceedings.<sup>37</sup> Indirect contempt occurs outside the courtroom, such as threatening a judge or otherwise impugning the court itself, albeit not in the judge’s immediate presence.<sup>38</sup> The distinction matters because some believe it is the relevant threshold for delineating the scope of a court’s inherent authority and may circumscribe a sphere within which Congress cannot curtail the contempt power.<sup>39</sup> It may also reflect (although this, too, is far from clear in the constitutional jurisprudence) an area in which the Due Process Clause and related procedural provisions accord contextually fewer rights to a putative contemnor.<sup>40</sup> This distinction has been recognized in the modern Rules of Criminal Procedure, which accord judges the power to punish direct contempt summarily in the absence of independent prosecution:

Notwithstanding any other provision of these rules, the court (other than a magistrate judge) may summarily punish a person who commits criminal

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<sup>34</sup> 18 U.S.C. § 401; *see also In re Bradley*, 588 F.3d 254, 265 (5th Cir. 2009) (recognizing that “[w]hile the criminal contempt power is limited by 18 U.S.C. [§] 401, civil contempt remains a creature of inherent power”). The federal criminal contempt statute is implemented through FED. R. CRIM. P. 42, which adds restrictions on its use.

<sup>35</sup> *Cf. Freytag v. Comm’r*, 501 U.S. 868, 888–89 (1991) (finding that, at least for purposes of the Appointments Clause, the Article I Tax Court fits Article II’s definition of a “Court of Law,” and thus as a non-Article III tribunal exercises the “judicial power of the United States”).

<sup>36</sup> “Before the 19th century was out, a distinction had been carefully drawn between contempts occurring within the view of the court, for which a hearing and formal presentation of evidence were dispensed with, and all other contempts where more normal adversary procedures were required.” *Bloom v. Illinois*, 391 U.S. 194, 204 (1968) (citing *In re Terry*, 128 U.S. 289 (1888) and *Ex parte Savin*, 131 U.S. 267 (1889)); *see also* Ronald J. Rychlak, *Direct Criminal Contempt and the Trial Attorney: Constitutional Limitations on the Contempt Power*, 14 AM. J. TRIAL ADVOC. 243 (1990) (discussing the evolution of contempt).

<sup>37</sup> *United States v. Marshall*, 451 F.2d 372, 373 (9th Cir. 1971).

<sup>38</sup> *Id.*

<sup>39</sup> *See United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 839–44 (1994) (Scalia, J., dissenting).

<sup>40</sup> *Id.* at 838 (Blackmun, J.).

contempt in its presence if the judge saw or heard the contemptuous conduct and so certifies; a magistrate judge may summarily punish a person as provided in 28 U.S.C. § 636(e). The contempt order must recite the facts, be signed by the judge, and be filed with the clerk.<sup>41</sup>

Finally, there is a distinction between *civil* and *criminal* contempt. The canonical articulation of the divide is that civil contempt is used to enforce compliance with a court order, and thus the punishment, be it fine or confinement, has to be defeasible upon compliance. The contemnor is said to “carry the keys of their prison in their own pocket.”<sup>42</sup> The associated fines are typically payable to the aggrieved party.<sup>43</sup> Criminal contempt involves, as its name implies, a transgression against the State (here, technically, its court) and can warrant non-compensatory punishment, either fines or imprisonment.<sup>44</sup> Because criminal contempt triggers criminal procedural rights, the contemnor is entitled to due process.<sup>45</sup> This distinction holds even though there is considerable overlap between the content and justification of many civil and criminal contempt orders. Consider, by contrast, that punitive damages in tort law—whose express purpose is to punish—trigger no general rights to counsel and other accoutrements of criminal due process, only loose constitutional oversight of the proportionality of the award under the Eighth Amendment.<sup>46</sup> Unsurprisingly, congressional statutes and judicial rules more closely police criminal contempt awards.<sup>47</sup>

While there are many other distinctions of relevance, e.g., whether imprisonment or merely payment of money is ordered, these three divisions seem the ones most in need of scrutiny. For example, whether some relief falls within the inherent authority of a court implicates separation of powers, as perhaps does whether it is direct or indirect contempt; whether a contempt order is deemed “criminal” implicates the Due Process Clause and associated constitutional protections. But what’s especially relevant for purposes of this Article is these divisions unquestionably do work, whether or not stemming from a constitutional compulsion, in the case law. In sum, these divisions in the contempt terrain, whether coterminous with constitutional boundaries or not, are well established and guiding, perhaps subconsciously, legislative and judicial analysis of the contempt power.

## II. HISTORICAL CONTEXT

### A. EARLY ENGLISH BANKRUPTCY COMMISSIONERS

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<sup>41</sup> FED. R. CRIM. P. 42(b). Congress has also seized upon the indirect/direct division in according magistrate judges greater authority to enter final judgments for direct contempt. See 28 U.S.C. § 636(e) (allowing final entry of judgment if penalty is under \$5,000 or imprisonment of thirty days).

<sup>42</sup> *Gompers v. Buck’s Stove & Range Co.*, 221 U.S. 418, 442 (1911) (quoting *In re Nevitt*, 117 F. 448, 461 (8th Cir. 1902)); *accord Penfield Co. of Cal. v. SEC*, 330 U.S. 585, 590 (1947).

<sup>43</sup> *Gompers*, 221 U.S. at 441.

<sup>44</sup> *Id.*

<sup>45</sup> *Bagwell*, 512 U.S. at 826 (1994).

<sup>46</sup> See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574–75 (1996).

<sup>47</sup> See, e.g., FED. R. CRIM. P. 42(b) (prescribing restrictions on criminal contempt proceedings, such as inability of trial court to prosecute absent an independent prosecutor and mandatory recusal if the alleged contumacious conduct involved insult of the presiding judge).

As is well known, the English judicial system constructed a division still relevant in today's modern judicial system—the distinction between “common law” or “law” courts and “chancery” or “equity” courts.<sup>48</sup> These two systems, while complementary, maintained different juridical processes. The law courts revolved around three defining procedures: “the writ . . . , the jury, and single issue pleading.”<sup>49</sup> Such proceedings contained formalized mechanisms designed to ensure litigants a predictable application of the law. Courts of equity, by contrast, were designed to offer flexibility and to “provide comprehensive determinations which could not be obtained through the common law courts.”<sup>50</sup> But the dichotomy was both porous and incomplete. For example, the early Ecclesiastical courts maintained power over matters such as “family law, divorce, and probate proceedings.”<sup>51</sup>

Situated somewhat uniquely within this system were early English bankruptcy commissioners, who wielded considerable authority. The source of this expansive and unique power was codified in the English bankruptcy acts of the 16th, 17th and 18th centuries,<sup>52</sup> which were “centered around the construct of a bankrupt’s ‘estate.’”<sup>53</sup> Bankruptcy cases began when the Lord Chancellor would issue a “Commission of Bankrupt,” naming five commissioners, all of whom were lawyers, to carry out the case.<sup>54</sup> The five commissioners, or quorum of three, were tasked with oversight of the estate and case,<sup>55</sup> determining the status of the bankrupt,<sup>56</sup> distributing the bankrupt’s assets, and discharging the bankrupt’s debts.<sup>57</sup> Once assigned the case, the commissioners had to meet with the bankrupt’s creditors a minimum of three times (presaging our modern § 341 hearings).<sup>58</sup> This was a necessary step in the process of examining the bankrupt and having the individual deliver his property to the commissioners or assignees for

<sup>48</sup> See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 914 (1987).

<sup>49</sup> *Id.*

<sup>50</sup> See Marcia S. Krieger, “*The Bankruptcy Court Is a Court of Equity*”: *What Does That Mean?*, 50 S.C. L. REV. 275, 278 (1999) (citation omitted).

<sup>51</sup> James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 716 n.323 (2004).

<sup>52</sup> 13 Eliz. c. 7 (1570) (Eng.); 1 Jac. c. 15 (1604) (Eng.); 21 Jac. c. 19 (1623) (Eng.); 5 Geo. 2, c. 30 (1732) (Eng.); 5 Geo. 4, c. 98, § 1 (1824) (Eng.). In 1571, the Elizabethan statute bestowed upon the Lord Chancellor exclusive bankruptcy jurisdiction to “appoint commissioners under the great seal.” John C. McCoid, II, *Right to Jury Trial in Bankruptcy: Granfinanciera, S.A. v. Nordberg*, 65 AM. BANKR. L.J. 15, 29 (1991). The English bankruptcy acts were revised in 1824. See An Act to Consolidate and Amend the Bankruptcy Law, 5 Geo. 4, ch. 98, § 1 (1824) (Eng.); accord Thomas E. Plank, *Why Bankruptcy Judges Need Not and Should Not Be Article III Judges*, 72 AM. BANKR. L.J. 567, 575–76 n.55 (1998).

<sup>53</sup> Ralph Brubaker, A “*Summary*” *Statutory and Constitutional Theory of Bankruptcy Judges’ Core Jurisdiction After Stern v. Marshall*, 86 AM. BANKR. L.J. 121, 123 (2012).

<sup>54</sup> 13 Eliz. c. 7, § 2 (1570) (Eng.); accord Plank, *supra* note 52, at 567 n.57.

<sup>55</sup> See *id.* at 576.

<sup>56</sup> It was necessary to satisfy two jurisdictional requirements during this time: the bankrupt in question was a “merchant who had committed an act of bankruptcy.” *Id.* at 581.

<sup>57</sup> *Id.* at 576.

<sup>58</sup> 5 Geo. 2, c. 30, §§ 1, 2 (1732) (Eng.); accord 2 WILLIAM BLACKSTONE, COMMENTARIES \*478–87; see generally 11 U.S.C. § 341 (required statutory meeting for debtor examination by creditors).

adjudication of the estate.<sup>59</sup> The commissioners' power, while considerable, was difficult to classify:

It was the commissioners who took the bankrupt's property, assigned it, and distributed the proceeds to creditors who had proved their claims. This power was said to combine legal and equitable jurisdiction. Necessarily making determinations of law and fact as they carried out these duties, the commissioners clearly functioned in a judicial fashion, and colloquially, at least, they could be labeled a court.<sup>60</sup>

The commissioners notably possessed significant enforcement power. For example, under one early statute commissioners were permitted literally to seize a recalcitrant bankrupt.<sup>61</sup> They could issue written or oral interrogatories to examine the debtor and others summoned to creditor meetings.<sup>62</sup> Additionally, commissioners could penetrate all aspects of the bankrupt's property, including houses, warehouses, trunks, and chests.<sup>63</sup> They could thus seize all property the debtor possessed, either actually or constructively.<sup>64</sup> The commissioners even were permitted to imprison non-debtor individuals for failure to answer questions satisfactorily,<sup>65</sup> and they could make judges of the courts of record or the justices of the peace issue warrants for the imprisonment of any debtor "proved before them to become bankrupt."<sup>66</sup> These powers, it

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<sup>59</sup> Plank, *supra* note 52, at 576. The commissioners had the power to appoint temporary assignees to hold all of the bankrupt's property. 5 Geo. 2, c. 30, §§ 30 (1732) (Eng.).

<sup>60</sup> McCoid, *supra* note 52, at 29–30.

<sup>61</sup> 1 Jac. c. 15, § 6 (1604) (Eng.).

<sup>62</sup> 5 Geo. 2, c. 30, § 16 (1732) (Eng.).

<sup>63</sup> 21 Jam., ch. 19, § 8 (1623) (Eng.); *accord* Plank, *supra* note 52, at 585–87.

<sup>64</sup> 5 Geo. 2, c. 30, § 14 (1732) (Eng.).

<sup>65</sup> 5 Geo. 2, c. 30, § 16 (1732) (Eng.). Individuals imprisoned by the commissioners could seek release by writ of habeas corpus. *See* Plank, *supra* note 52, at 578–79 n.74. Part of § 16 of the 1732 Act read:

[I]n case any such bankrupt or bankrupts, or other person or persons, shall refuse to answer, or shall not fully answer to the satisfaction of the commissioners, or the major part of them, all lawful questions put to him, her or them, by the said commissioners, or the major part of them, as well by word of mouth, as by interrogatories in writing, or shall refuse to sign and subscribe his, her or their examination so taken down or reduced into writing as aforesaid (not having a reasonable objection either to the wording thereof or otherwise, to be allowed by the said commissioners) it shall and may be lawful to and may be lawful to and for the said commissioners, or the major part of them, by warrant under their hands and seals, to commit him, her or them to such prison, as the said commissioners, or the major part of them shall think fit, there to remain without bail or mainprize [sic], until such time as such person or persons shall submit him, her or themselves to the said commissioners, and full answer make to the satisfaction of the said commissioners to all such questions as shall be put to him, her or them as aforesaid, and sign and subscribe such examination as aforesaid, according to the true intent and meaning of this act.

Note that this power might be likened to civil contempt, not criminal, because the intent of the power was coercive, but the distinction between civil and criminal contempt does not appear to have been robust back in this era, so it is difficult, if not impossible, to conjecture what additional powers (if any) the commissioners might have had, had the divide been conceived then as significant.

<sup>66</sup> *Id.* Commissioners could then order by warrant the delivery of the incarcerated bankrupt to the commissioners to continue the case. The commissioners' powers extended even further, as they could also issue a warrant to search "any other person or persons" reasonably suspected of possessing the bankrupt's property. *Id.* It is not entirely clear whether commissioners had the power to issue the warrants themselves, as historical accounts are limited. Section 36 of the 1732 Act indicates that, even if the commissioners did not possess authority to issue the warrants

seems fair to say, granted commissioners substantial authority in presiding over their bankruptcy proceedings that “touch[ed] all Matters relating to the Person, Trade, Dealings, Estate and Effects” of the alleged bankrupt.<sup>67</sup>

Interestingly, the commissioners’ authority did not go unquestioned. While bankruptcy participants maintained the ability to challenge the findings of the commissioners,<sup>68</sup> legal commentators of the time were not entirely satisfied with such recourse and were quick to criticize the commissioners’ relatively unfettered status under the overarching bankruptcy procedures of the time. Perhaps most famously, Blackstone grumbled that proceedings presented before the commissioners were an “*extrajudicial* method of proceeding, which is allowed merely for the benefit of commerce.”<sup>69</sup> Blackstone was not alone in his critique, as, in 1783, James Bland Burges published a study of bankruptcy in England and proposed reform.<sup>70</sup> Burges was most critical of how Parliament had effectively altered the rights of the English subject to the common law, bemoaning the inherent issues in granting “temporary judges” operating somewhat aside the traditional courts of law and equity the ability to seize property, sell estates, and imprison individuals.<sup>71</sup> Burges went so far as to claim that individuals “became subject to an unknown law, and were excluded from the common blessing of a trial by jury.”<sup>72</sup> Nonetheless, despite Burges’ criticism, he did not recommend abandoning the practice of referring bankruptcy matters to commissioners, perhaps suggesting that the pragmatic functionalism of today’s bankruptcy proceedings has an historic pedigree.<sup>73</sup> The system, while perceived to be flawed, was nonetheless accepted.

Similarly, Edward Christian also examined the unique nature of English commissioners.<sup>74</sup> Christian likewise observed that commissioners had been granted “large and extensive powers.”<sup>75</sup> In fact, as early as 1583, commissioners referred legal matters to the Court of Common Pleas for assistance, which later served as the “foundation for the Lord Chancellor’s

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themselves, commissioners maintained other avenues for imprisoning bankrupts:

[I]n case such bankrupt or bankrupts shall neglect or refuse to attend, or, on such attendance, shall refuse to assist in such discovery, without good and sufficient cause to be shewn [sic] to the commissioners, or the major part of them, . . . are hereby empowered [sic] and required to issue a warrant or warrants, directed to such person or persons as they shall think proper, for apprehending such bankrupt or bankrupts. . . .

*Id.* at § 36.

<sup>67</sup> *Id.*

<sup>68</sup> See, e.g., *Ex parte Bowes* (1798) Eng. Rep. 86, 87, 90-91; 4 Ves. Jun. 168, 170, 176-77 (noting that an alleged bankrupt or creditor could petition for the Chancery Court to review the commissioners’ findings). Parties could also take a more proactive step by filing an action in the law courts or the Court of Chancery, which gives us a robust rational choice explanation of the prevalence of the practice. See Plank, *supra* note 52, at 577 n.62–63. Most of the actions instituted in the law courts were conducted before a jury trial. See *id.* at 577–78 n.66.

<sup>69</sup> BLACKSTONE, *supra* note 58, at \*477 (emphasis added).

<sup>70</sup> JAMES B. BURGESS, *CONSIDERATIONS ON THE LAW OF INSOLVENCY: WITH A PROPOSAL FOR REFORM* (London, T. Cadell 1783).

<sup>71</sup> *Id.* at 213–15.

<sup>72</sup> *Id.* at 215.

<sup>73</sup> See Plank, *supra* note 52, at 592.

<sup>74</sup> See 1 & 2 EDWARD CHRISTIAN, *THE ORIGIN, PROGRESS, AND PRESENT PRACTICE OF THE BANKRUPT LAW, BOTH IN ENGLAND AND IN IRELAND* (2d ed. 1818).

<sup>75</sup> 2 *id.* at 8.

later practice of referring legal questions to the law courts.”<sup>76</sup> The only “broad limitation” to the power granted to the commissioners was quasi-appellate: “the power of the courts of record—the Lord Chancellor sitting in the Court of Chancery or the law courts—to ensure that the commissioners’ adjudications conformed to the requirements of the law.”<sup>77</sup> To be clear, the Lord Chancellor lacked express supervision over the commissioners,<sup>78</sup> but he maintained the ability to review petitions from bankrupts or creditors who questioned the decision of the commissioners, although even that was subject to seemingly jurisdictional constraints.<sup>79</sup> Further, given the Lord Chancellor’s ability to appoint new commissioners, there existed a likely unspoken constraint.<sup>80</sup> Still, despite the occasional critique from scholars like Christian (who later served as a commissioner himself), Parliament did not alter or reconsider the expansive delegation of authority to the commissioners.<sup>81</sup> And it is equally clear that the commissioners exercised what we would now call “judicial power”: they had the authority to issue the certificate necessary for discharge of the bankrupt, inexorably affecting the property and contract rights of the parties,<sup>82</sup> albeit subject to confirmation by a court of equity.<sup>83</sup>

## B. AMERICAN ANALOGUES: PENNSYLVANIA’S 1785 ACT

Pre-Constitution, early iterations of American bankruptcy statutes adopted practices similar to those of the English, bestowing upon bankruptcy commissioners the power to decide nearly all matters relating to the bankruptcy proceeding.<sup>84</sup> Pennsylvania’s 1785 Act for the Regulation of Bankruptcy is perhaps most similar to the procedures detailed above. In essence, the Act served as a “revised composite of the English bankruptcy acts.”<sup>85</sup> Instead of a Lord

<sup>76</sup> Plank, *supra* note 52, at 594.

<sup>77</sup> *Id.* at 595. “[T]he primary function of the law courts was not the determination of facts by the jury[, which was frequently empaneled,] but the resolution of legal questions: the resolution of ‘case.’” *Id.* at 595 n.173. Rationales behind granting commissioners this authority are rooted in efficiency. *See id.* at 596. This discussion of efficiency, and arguably flexibility, perhaps relates to the overarching debate concerning whether bankruptcy courts are courts of equity.

<sup>78</sup> *Id.* at 594.

<sup>79</sup> *Id.* For constraints on the Chancellor’s power to review the judgment of the commissioners, see *Clarke v. Capron*, (1795) 30 Eng. Rep. 832, 2 Ves. Jun. 666–68. In *Clarke*, after the commissioners awarded creditors a dividend and the assignees sought to have proof of one of the creditor’s debt expunged, the Lord Chancellor concluded that because the petition had not been raised before the commissioners entered their order, he could not override the dividend, as it “would totally defeat the summary proceeding under commissions.” *Id.* at 669. *Clarke* thus demonstrates that, despite the stature of the Lord Chancellor, there were limitations on his ability to question the commissioners’ decisions. In fact, the Lord Chancellor went so far as to claim: “Sitting here I have no more right to reverse an order of the commissioners than the Court of King’s Bench.” *Id.* at 667–68.

<sup>80</sup> *See* 2 CHRISTIAN, *supra* note 74, at 11–16; *accord* THOMAS DAVIES, *THE LAWS RELATING TO BANKRUPTS* 165 (London, Henry Linton 1744).

<sup>81</sup> There appears to be a deliberate vagueness concerning the procedures during this time, which could be in part to some of the economic justifications for granting commissioners this power. *See* Plank, *supra* note 52, at 596.

<sup>82</sup> Commissioners had to certify to the Lord Chancellor “that the bankrupt had made a full discovery of his assets and had otherwise complied with the act” as an apparently unreviewable precondition of discharge. *Id.* at 589. While the Lord Chancellor was tasked with approving the certificates of discharge, “[t]he commissioner had full discretion over whether to certify the discharge; the bankrupt could not compel the commissioners to do so.” *Id.*

<sup>83</sup> 5 Geo. 2, c. 30, § 10 (1732) (Eng.).

<sup>84</sup> *See* Brubaker, *supra* note 53, at 124–26.

<sup>85</sup> Plank, *supra* note 52, at 602–03. The first federal bankruptcy statute, the Bankruptcy Act of 1800, authorized bankruptcy commissioners “to take into their possession, all the estate, real and personal, of every nature and

Chancellor issuing a commission of bankruptcy, the Supreme Executive Council was tasked with this duty.<sup>86</sup> The American commissioners maintained many of the same abilities as their English counterparts, including the power to imprison the bankrupt or related persons for failure to appear or to answer questions satisfactorily<sup>87</sup> and to “[b]reak open the houses, chambers, shops, warehouses, doors, trunks or chests of the bankruptcy and seize the ‘body, goods, money and other estate, deeds, books of account or other writings’ of the bankrupt (directly or by warrant authorizing third persons).”<sup>88</sup>

Thus, it appears that early bankruptcy commissioners—both in America and England—wielded considerable power within their bailiwick of bankruptcy. Given their unique placement as quasi-judicial adjudicators with varying appellate oversight, however, it is difficult to characterize their role as exclusively fitting within the tradition of either law or equity.<sup>89</sup> They did not use juries, and pleadings and processes were summary, but they acted pursuant to the bankruptcy statutes and occasionally referred matters to the courts of law for interpretation.<sup>90</sup> Whatever their proper characterization—whether the adjudicators were considered “adjuncts” of law, equity, or neither—it is clear they had contempt-like power, including the power to imprison recalcitrant litigants.<sup>91</sup>

After considering the history and role of bankruptcy commissioners, we are ready to engage in an informed analysis of the statutory and constitutional considerations underlying the question whether today’s bankruptcy judges have the authority to exercise criminal contempt power.

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description to which the said bankrupt may be entitled, either in law or equity, in any manner whatsoever, and cause the same to be inventoried and appraised to the best value.” Bankruptcy Act of 1800, ch. 19 §5, 2 Stat. 19 (repealed 1803). The 1800 Act gave bankruptcy commissioners power over a debtor’s estate so complete that a commissioner could “imprison recalcitrant third parties in possession of the estate’s assets.” *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 370 (2006). Similarly, the Bankruptcy Acts of 1841 and 1867 gave federal courts jurisdiction over “all matters and proceedings in bankruptcy” and authorized federal courts to appoint bankruptcy commissioners to exercise that jurisdiction. Bankruptcy Act of 1841, ch. 9 § 6, 5 Stat. 440 (repealed 1843); *accord* Bankruptcy Act of 1867, ch. 176 § 6, 14 Stat. 517 (repealed 1878).

<sup>86</sup> Act for the Regulation of Bankruptcy, 1785 PA. STAT. § 23.

<sup>87</sup> 1785 PA. STAT. § 14.

<sup>88</sup> Plank, *supra* note 52, at 605 n.219. The statutes make this sound like civil contempt more than criminal contempt. What we would probably consider today as criminal contempt in bankruptcy proceedings triggered indictment and punishment in pillory with ear removal, but trial had to occur before a Court of Record, implying that the bankruptcy commissioners could not effect such punishment on their own. *See* 1785 PA. STAT. § 14.

<sup>89</sup> *See* Pfander, *supra* note 51, at 719.

<sup>90</sup> *See* Krieger, *supra* note 50, at 277–92.

<sup>91</sup> 1785 PA. STAT. §§ 13, 15. This authority is largely similar to § 16 under 1732 English Act. *See supra* notes 61–67. A complementary debate concerns the existential identity of bankruptcy courts—are bankruptcy courts truly courts of equity? And, if not, does it matter? We ultimately believe that such a distinction does not matter for present purposes. In reaching this conclusion, we share two observations: (1) the statutory constitution of bankruptcy courts does not preclude their being “courts of equity”; and (2) Supreme Court constraints on equitable powers, per *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), are inapposite, because contempt has been around since the origin of courts. For a full account of the issues, see Adam J. Levitin, *Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime*, 80 AM. BANKR. L.J. 1 (2006), and Alan M. Ahart, *The Limited Scope of Implied Powers of a Bankruptcy Judge: A Statutory Court of Bankruptcy, Not a Court of Equity*, 79 AM. BANKR. L.J. 1 (2005).

### III. STATUTORY CONSIDERATIONS

#### A. INHERENT AUTHORITY: IS STATUTORY AUTHORIZATION EVEN REQUIRED?

Can today's bankruptcy courts issue criminal contempt orders? For some, if not many, that inquiry raises the antecedent question whether bankruptcy courts have been authorized by statute to do so. Long-gone are the days of common law crime and, indeed, Congress has a contempt statute in the Criminal Code.<sup>92</sup> Thus, at first blush, it might seem that for criminal contempt, enabling legislation is *required* as a precondition for bankruptcy court authority.

We are not so sure, because contempt is a curious legal beast that seems to have at least some component ontologically interwoven into the definition of "court."<sup>93</sup> As early as 1873, in *Ex Parte Robinson*, the Supreme Court noted that "[t]he power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice."<sup>94</sup> *Robinson*, which dealt with the minor misdeeds of a lawyer who was disbarred, is a foundational U.S. case for the conception of inherent authority. The language above is a frequent starting point of both judicial and scholarly work on contempt.<sup>95</sup> Yet important as this broad pronouncement was, it was not absolute. Of particular importance to the Court was the unproblematic fact that "the [contempt] power ha[d] been limited and defined by the act of Congress of March 2d, 1831,"<sup>96</sup> which specified that lower courts were limited to addressing contempt in the following instances:

1st, where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice; 2d, where there has been misbehavior of any officer of the courts in his official transactions; and, 3d, where there has been disobedience or resistance by any officer, party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the courts.<sup>97</sup>

The Court's recognition of a congressional prerogative to circumscribe or delineate the contempt power continued in its discussion of the seventeenth section of the Judiciary Act of 1789.<sup>98</sup> Courts derived the power "to punish [contempts] by fine or imprisonment" from this

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<sup>92</sup> 18 U.S.C. § 401.

<sup>93</sup> *See, e.g.*, *United States v. Hudson*, 11 U.S. 32, 34 (1812) ("Certain implied powers must necessarily result to our Courts of justice from the nature of their institution . . . which cannot be dispensed with in a Court, because they are necessary to the exercise of all others."); *see also* *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980) (citing *Hudson*); *Anderson v. Dunn*, 19 U.S. 204, 227 (1821) ("Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates.").

<sup>94</sup> *Ex parte Robinson*, 86 U.S. 505, 510 (1873).

<sup>95</sup> *See, e.g.*, *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991) (White, J.); *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 795 (1987) (Brennan, J.); Laura B. Bartell, *Contempt of the Bankruptcy Court—A New Look*, 1996 U. ILL. L. REV. 1, 1 n.2.

<sup>96</sup> *Robinson*, 86 U.S. at 510.

<sup>97</sup> Act of Mar. 2, 1831, ch. 99, 4 Stat. 487, *quoted in Robinson*, 86 U.S. at 511.

<sup>98</sup> Judiciary Act of 1789, ch. 20, 1 Stat. 73.

Act,<sup>99</sup> which, in the eyes of the Court, proved to be more than ample authority to police litigants, rendering it unnecessary to call upon any inherent powers the court might nonetheless possess.<sup>100</sup> In recognition of the statutory restriction to these punishments alone, the Court declined to uphold the lower court's additional sanction of disbarment, finding "fine or imprisonment" adequate.<sup>101</sup> The Court's terse opinion in *Robinson* also cautioned that courts must not haphazardly invoke such power, sounding in rights that we would now consider moored in due process: "The principle that there must be citation before hearing, and hearing or opportunity of being heard before judgment, is essential to the security of all private rights."<sup>102</sup>

It was not until a little over a century later, in *Chambers v. NASCO, Inc.*, that the Court had the opportunity to seriously revisit the contempt power, holding that it is "firmly established" that contempt, whether provided for by statute or not, is an "inherent power" of all courts.<sup>103</sup> Finding that this criminal power is inherent, however, need not create a common law crime. While contempt may seem like a common law crime, it exists as a sui generis incidence of a court's existence, something engrained in the court's structure.<sup>104</sup> Yet existence of a power is one thing, but scope is another. Thus, the questions remain as to the scope of this "inherent authority" with regard to criminal contempt. For example, is it only direct contempt power that is inherent, which would require indirect contempt to be grounded in statute? And even if there is an inherent, inalienable contempt power of courts that requires no congressional authorization, how much can Congress "shape" the exercise of this inherent power by prescribing limits on its execution, without affronting the separation of powers, such as those apparently found unremarkable in *Robinson*?<sup>105</sup>

The Court wrestled with the issue of inherent authority to impose punishment in *Chambers*.<sup>106</sup> The case stemmed from a terminated business transaction between Calcasieu Television and Radio, Inc. ("CTR") and NASCO, Inc. ("NASCO"). In it, G. Russell Chambers ("Chambers"), the sole shareholder and director of CTR, executed a contract to sell his business and broadcast license to NASCO. The deal required the FCC approval; however, before the parties agreed upon the filing date with the FCC, Chambers reneged. NASCO filed suit, and

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<sup>99</sup> *Id.*

<sup>100</sup> *Ex parte Robinson*, 86 U.S. 505, 512 (1873).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 513. The Court also appeared to have due process concerns when stating that, in regard to the contemnor, "before judgment disbaring him can be rendered he should have notice of the grounds of complaint against him and ample opportunity of explanation and defence [sic]." *Id.* at 512.

<sup>103</sup> 501 U.S. 32, 44 (1991) (citing *Robinson*, 86 U.S. at 510); see also Bartell, *supra* note 95, at 1 n.2 (reviewing and critically evaluating precedent concerning the inherent power of bankruptcy courts).

<sup>104</sup> See *Myers v. United States*, 264 U.S. 95, 103 (1924) (noting contempt is a sui generis proceeding); *United States v. Cohn*, 586 F.3d 844, 845, 849 (11th Cir. 2009) (per curiam) (finding that § 401 "is supported by the Supreme Court's consistent categorization of criminal contempt as a sui generis offense").

<sup>105</sup> Some courts discussing inherent power address the "dignity" of Article III courts, see, e.g., *Bingman*, 100 F.3d at 658 (9th Cir. 1996). But surely sanctioning is an essential, if not oft-invoked, power of all courts, regardless of their Article III status. In fact, such inherent authority even extends to certain Article I courts. See *Dixon v. Comm'r*, 79 T.C.M. (CCH) 1803 (2000) (imposing additional sanctions, some of which were on the grounds of inherent power); *Westreco, Inc. v. Comm'r*, 60 T.C.M. (CCH) 824 (1990) (same). Given that the Tax Court possesses statutory contempt power, see 26 U.S.C. § 7456(c), resort to inherent authority for contempt is unlikely.

<sup>106</sup> 501 U.S. 32 (1991).

Chambers and his attorneys obfuscated the judicial proceedings by engaging in both unethical and abusive conduct, such as “(1) attempt[ing] to deprive this [c]ourt of jurisdiction by acts of fraud, nearly all of which were performed outside the confines of th[e district c]ourt, (2) fil[ing] false and frivolous pleadings, and (3) attempt[ing], by other tactics of delay, oppression, harassment and massive expense to reduce plaintiff to exhausted compliance.”<sup>107</sup> (In the taxonomy of contempt, these transgressions would be considered indirect contempt because, at least arguably, they did not occur in the presence of the judge.)<sup>108</sup>

After reviewing the litigant’s unsavory conduct,<sup>109</sup> the lower courts did not find satisfaction in the punishment provided for in either 28 U.S.C. § 1927, which prescribes financial penalties against “attorney[s] or other person[s] admitted to conduct cases in any court of the United States . . . who so multipl[y] the proceedings in any case unreasonably and vexatiously[.]”<sup>110</sup> or Federal Rule of Civil Procedure 11, with its well-known prohibition on abusive pleadings.<sup>111</sup> The trial court had found § 1927 inapplicable because “the statute applies only to attorneys, and therefore would not reach Chambers [a self-styled “strategist”], and additionally because the statute was not broad enough to reach ‘acts which degrade the judicial system,’ including ‘attempts to deprive the Court of jurisdiction, fraud, misleading and lying to the Court.’”<sup>112</sup> Similarly, Rule 11 simply did not fit the acts in question given the timing of the bulk of the wrongful acts: “the falsity of the pleadings at issue did not become apparent until after the trial on the merits, so that it would have been impossible to [as Rule 11 requires] assess sanctions at the time the papers were filed.”<sup>113</sup> Thus, the question was whether the aghast trial court could impose its own sanctions under its inherent authority, even if the provisions of § 1927 or Rule 11 were not triggered, or whether it was bound to the confines of those statutory and rules-based provisions and could not go beyond them. The contemnor argued that the statute and rule “occupied the field,” so to speak, and thus the trial court’s imposition of sanctions under inherent authority was improper.<sup>114</sup>

In a divided opinion, the Court found that the trial court was not bound by these statutes and rules and could always resort to its inherent authority.<sup>115</sup> Provided a contemnor receives an “appropriate hearing . . . the party may be sanctioned for abuses of process occurring beyond the courtroom, such as disobeying the court’s orders,” notwithstanding the restrictions on Rule 11 to conduct in the pleadings and § 1927 to attorneys.<sup>116</sup> The majority thus embraced the notion of

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<sup>107</sup> *Id.* at 41 (citation omitted). The district court characterized the conduct as “emasculat[ing] and frustrat[ing] the purposes of th[e] rules and the powers of the [c]ourt. . . .” *Id.* at 36.

<sup>108</sup> Despite the fact that the Court characterized the bulk of the acts as indirect contempt, it is possible to argue that some of them could be characterized as direct. *See id.* at 56–57 (detailing that “nearly” all the conduct occurred outside the courtroom).

<sup>109</sup> Such acts consisted of the filing of frivolous motions and pleadings, as well as the violation of a preliminary injunction by refusing to allow the other party to inspect CTR’s corporate records. *Id.* at 38–39.

<sup>110</sup> 28 U.S.C. § 1927.

<sup>111</sup> FED. R. CIV. P. 11.

<sup>112</sup> *Chambers*, 501 at 41–43 (citations omitted).

<sup>113</sup> *Id.* at 41 (citation omitted).

<sup>114</sup> *Id.* at 42–43.

<sup>115</sup> *Id.* at 46–51.

<sup>116</sup> *Id.* at 57; *see also* *Link v. Wabash R. Co.*, 370 U.S. 626, 630–31 (1962) (reminding that inherent powers are “governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to

inherent authority, but it did not see this decision as uprooting the precedent that Congress can play a role in delineating the scope of that power. It reminded readers that although Congress cannot outright preempt the inherent authority of federal courts, it can tinker and limit such authority “by statute or rule[.]”<sup>117</sup> The Court did not, consistent with its hesitance toward over-specification of the contempt power, explicate what permissible constraints Congress could enact by statute or delegate to the Court by rule.<sup>118</sup>

Justice Scalia’s dissent was unusual because it seemed at first to be a concurrence, arguing for an inherent authority of courts that was immune from congressional abrogation. “Some elements of [] inherent authority are so essential to the ‘[t]he judicial Power,’ . . . that they are indefeasible, among which is a court’s ability to enter orders protecting the integrity of its proceedings.”<sup>119</sup> Thus, while agreeing this core domain carried a quasi-inalienable right of the judiciary to reach beyond procedural rules and statutes and into inherent authority,<sup>120</sup> Justice Scalia quarreled “with the Court’s statement that a court’s inherent power reaches conduct “beyond the court’s confines” that does not “interfer[e] with the conduct of trial.”<sup>121</sup> Turning to those inalienable powers, he also stressed restraint in light of the unchecked criminal power of the judiciary to punish, admonishing that “[a] court must use the prescribed means [to protect their proceedings] unless for some reason they are inadequate.”<sup>122</sup> Justice Scalia found contempt unnecessary here where Rule 11 sanctions would have sufficed.<sup>123</sup>

It thus seems fair to ask whether statutory authorization is even required for bankruptcy court criminal contempt if we accept, following *Chambers*, that not all contempt authority requires such authorization because it stems from inherent powers of the court itself, intrinsic in the definition of what it means to be a court. Yet the dividing line is unclear between “inherent” criminal contempt power and “statutorily authorized” criminal contempt power. Certainly Justice Scalia’s division between contempt powers Congress can preempt and powers upon which Congress cannot intrude is a plausible one, sounding in the direct/indirect contempt

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achieve the orderly and expeditious disposition of cases”).

<sup>117</sup> *Chambers*, 501 U.S. at 47 (citing *Ex parte Robinson*, 86 U.S. 505, 512 (1873)).

There is, therefore, nothing in the other sanctioning mechanisms or prior cases interpreting them that warrants a conclusion that a federal court may not, as a matter of law, resort to its inherent power to impose attorney’s fees as a sanction for bad-faith conduct. This is plainly the case where the conduct at issue is not covered by one of the other sanctioning provisions.

*Id.* at 50.

<sup>118</sup> *See id.* at 47–48.

<sup>119</sup> *Id.* at 58 (Scalia, J., dissenting). As the Court itself previously pronounced:

Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. To fine for contempt—imprison for contumacy—inforce the observance of order, & c. are powers which cannot be dispensed with in [sic] a Court, because they are necessary to the exercise of all others: and so far our Courts no doubt possess powers not immediately derived from statute. .

*United States v. Hudson*, 11 U.S. 32, 34 (1812).

<sup>120</sup> *See Chambers*, 501 U.S. at 58–60 (Scalia, J., dissenting).

<sup>121</sup> *Id.* at 60 (citation omitted).

<sup>122</sup> *Id.*

<sup>123</sup> *See id.* Justice Scalia was not alone in his stance, as Chief Justice Rehnquist and Justices Souter and Kennedy dissented on the merits, finding resort to criminal contempt facially improper in light of the availability of other procedural mechanisms (even though these Justices declined to embrace Justice Scalia’s conception of the contempt power). *See id.* at 60–63 (Kennedy, J., dissenting).

divide, but it sheds no light on the corollary question: do perhaps some of the more “peripheral” forms of contempt power *require* congressional authorization?

Moreover, even if there is a core of inherent criminal contempt authority that requires no statutory authorization, a further complication asks whether—wherever that scope of inalienable inherent authority is—can (or even must?) the line be drawn differently for federal courts, like bankruptcy courts, presided over by judges who lack the full protections of Article III? Full exploration of this important question must be bracketed until this Article turns to the constitutional jurisprudence regarding the bankruptcy courts’ exercise of judicial power, but two signposts can be considered at present. First, while inherent authority has been recognized in so-called Article I courts that fall under the public rights exception to Article III, such as the Tax Court,<sup>124</sup> that court also has an explicit statutory grant of contempt power, complete with restrictions.<sup>125</sup> So the Tax Court example tells us both that Article I courts can exercise criminal contempt, but also that the authority has been prescribed by statute, leaving us little more informed on whether the statutory grant is required or whether it could otherwise flow from this inherent power.

Second, the Supreme Court has given indications that bankruptcy courts do indeed have at least some inherent powers, although it is not clear whether they would include criminal contempt. Most notable in recent years was the Court’s decision in *Marrama v. Citizens Bank of Massachusetts*.<sup>126</sup> That case has been described as an important return to historical practice from case law that had previously limited “exercise of judicial discretion by bankruptcy courts.”<sup>127</sup> *Marrama* dealt with a chapter 7 debtor who misrepresented the value of his real property and

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One source of authority must necessarily be implied from the power of the [Tax] Court to prescribe rules of practice and procedure. The second source of authority is inherent in the Court’s obligation, as a judicial body, to protect the integrity of its processes and to regulate the proceedings and parties or representatives of parties that appear before the Court. These sources of authority adequately empower the Court to prevent any party from undermining the Court’s discovery Rules.

Westreco, 60 T.C.M. (CCH) 824 (1990); *see also* Dixon, 79 T.C.M. (CCH) 1803 (2000) (imposing additional sanctions, some of which were on the grounds of inherent power).

<sup>125</sup> 26 U.S.C. § 7456(c); *see also supra* note 1055 (discussing the Tax Court’s contempt power). As one commentator explains:

The Tax Court was established in 1942 as an independent agency in the Executive Branch succeeding the Board of Tax Appeals created in 1924. The 1969 Tax Reform Act gave the Tax Court the status of a Constitutional court, making it part of the Legislative Branch of Government. . . . The Tax Court now has the same power as a U.S. District Court to punish contempt and to enforce its orders. . . . A Tax Court decision may be appealed to the federal Court of Appeals for the appropriate circuit.

James Thurston, *Attorney’s Fees for Prevailing Taxpayers*, 19 GOLDEN GATE U. L. REV. 237, 242 n.29 (1989) (citation omitted). The Tax Court also possesses additional sanctioning power pursuant to Rule 104(c) of the Rules of Practice and Procedure, which authorizes the use of contempt for disobedience of court orders. *See* I.R.C. Rule 104(c)(3) (2016). Congress has also statutorily granted other non-Article III courts, such as military courts-martial, direct contempt power with a set penalty. *See* 10 U.S.C. § 848.

<sup>126</sup> 549 U.S. 365 (2007).

<sup>127</sup> Jeffrey W. Warren & Shane G. Ramsey, *Revisiting the Inherent Equitable Powers of the Bankruptcy Court: Does Marrama v. Citizens Bank of Massachusetts Signal a Return to Equity?*, 26 AM. BANKR. INST. J. 22, Apr. 2007, at 63.

concealed the fact that he had transferred any property in the preceding year.<sup>128</sup> Once the true value of his property was determined, and the trustee notified Marrama's counsel that he was going to seize the property as an asset of the estate, Marrama attempted to convert the case to chapter 13, in order to divest the trustee of control.<sup>129</sup> The bankruptcy court determined that Marrama's actions constituted bad faith and barred conversion of his case under its inherent power and/or § 105.<sup>130</sup> Justice Stevens, for the Court, reinforced the inherent sanctioning power of courts, noting that even in the absence of a textual basis, a bankruptcy court maintains the inherent authority to perform certain functions and has "used [such] statutory and equitable authority to craft various remedies for a range of bad faith conduct: requiring accounting or reporting of assets; enjoining debtors from alienating estate property; penalizing counsel; assessing costs and fees; *or holding the debtor in contempt.*"<sup>131</sup> Justice Stevens stressed the familiar notion that this power must not be used in contravention of the Bankruptcy Code, but only supplementally.<sup>132</sup>

*Marrama's* vitality on this point, however, was subsequently called into question by *Law v. Siegel*.<sup>133</sup> While not repudiating *Marrama's* discussion suggesting the existence of the bankruptcy court's inherent power, *Law* was hardly effusive in its characterization, relegating discussion of this question to dictum. Justice Scalia, writing for the majority, harrumphed that, "[a]t most, *Marrama's* dictum suggests that in some circumstances a bankruptcy court *may* be authorized to dispense with futile procedural niceties in order to reach more expeditiously an end result required by the Code."<sup>134</sup> He further reminded, "*Marrama* most certainly did not endorse, even in dictum, the view that equitable considerations permit a bankruptcy court to contravene express provisions of the Code."<sup>135</sup> He closed by assuring that the Court's "decision today does not denude bankruptcy courts of the essential "authority to respond to debtor misconduct with meaningful sanctions."<sup>136</sup> The best read of *Law* is thus of tepid ongoing support for bankruptcy court inherent power. It does seem to accept that there is "some" power, whether under § 105 alone or also under inherent power, at least to sanction. But, clearly, even after *Law*, the extent of that power to impose criminal contempt remains unexplored at best.

Accordingly, while it seems appropriate to conclude bankruptcy courts possess at least a modicum of inherent authority to sanction, and presumably (although not explicitly) to find a party in contempt, it is equally appropriate to be cautious and assume that not all, if any, of the criminal contempt power, especially for indirect contempt, can be securely grounded in the inherent power of the bankruptcy court. This is perhaps especially so if one finds important the historical practice, where (as best as we can tell) contempt-like powers, while routinely

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<sup>128</sup> See *Marrama*, 549 U.S. at 368.

<sup>129</sup> *Id.* at 368–69.

<sup>130</sup> *Id.* at 369–70.

<sup>131</sup> *Id.* at 383 (emphasis added).

<sup>132</sup> See *id.* ("[W]hatever steps a bankruptcy court may take pursuant to § 105(a) or its general equitable powers, a bankruptcy court cannot contravene the provisions of the Code."); *In re Terex Corp.*, 984 F.2d 170, 173 (6th Cir. 1993) (citing *United States v. Energy Resources Co.*, 495 U.S. 545, 549 (1990)) ("The bankruptcy court's equitable actions, however, cannot contravene specific provisions of the Bankruptcy Code.").

<sup>133</sup> 134 S. Ct. 1188 (2014).

<sup>134</sup> *Id.* at 1197 (2014) (emphasis added).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 1198.

deployed, were usually exercised under a statutory grant of authority. As such, this Article proceeds on the assumption that statutory authorization is required for the imposition of criminal contempt—but it does so “arguendo only,” given that the power may well already exist inherently. Thus, the hunt for a statutory grant of bankruptcy court criminal contempt authority continues.

## B. 18 U.S.C. § 401

Looking at statutes for a grant of authority for contempt, a starting point—and, one (naïvely) might think, an ending point—is the general federal criminal contempt statute, found at 18 U.S.C. § 401. The statute provides that “[a] court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other,” and limits it to the following: “(1) [m]isbehavior of any person in its presence or so near thereto as to obstruct the administration of justice; (2) [m]isbehavior of any of its officers in their official transactions; [and] (3) [d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command.”<sup>137</sup> Reliance on § 401 as the statutory basis for bankruptcy court contempt authority is stymied, however, because of an important wrinkle: it is not clear that bankruptcy courts are “courts of the United States” for purposes of this statute. (And yes, it is possible that “courts” might be defined differently based on context. For example, the Tax Court was held to be a “Court of Law” for purposes of the Appointments Clause,<sup>138</sup> but whether it is a “court of the United States” under § 401 has yet to be determined. Frustratingly, this question is unlikely ever to be resolved, given the specific grant of authority for Tax Court contempt under 26 U.S.C. § 7546(c); that renders resort to § 401 presumably unnecessary.)

The reason why the bankruptcy courts may not be courts of the United States pertains to the tortured history of the briefly lived—and unconstitutional—recomposition of the bankruptcy courts under the 1978 Code. When Congress tried to make bankruptcy courts full-fledged “adjunct” courts (whatever that meant), with co-equal adjudicative power to the district courts in an expanded domain of matters “related to” bankruptcy, and yet not accord bankruptcy judges the life-tenure protections of Article III back in 1978, the provisions were swiftly struck down by the Court in *Northern Pipeline*.<sup>139</sup> One provision of that ill-fated law expanded the definition of “courts of the United States,” to explicitly include these new bankruptcy courts.<sup>140</sup> In its scramble to largely codify the Emergency Rule that filled the gap after the 1978 provisions were invalidated, Congress deleted this language in the 1984 Act,<sup>141</sup> leading to the negative

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<sup>137</sup> 18 U.S.C. § 401.

<sup>138</sup> See *Freytag v. Comm’r*, 501 U.S. 868, 888 (1991) (“[The Appointments] Clause does not limit the ‘Courts of Law’ to those courts established under Article III . . . . The Appointments Clause does not provide that Congress can vest appointment power only in ‘one Supreme Court’ and other courts established under Article III, or only in tribunals that exercise broad common-law jurisdiction.”); see U.S. Const., art. II, § 1, cl. 2.

<sup>139</sup> 458 U.S. 50, 87 (1982) (invalidating bankruptcy courts’ grant of general jurisdiction under the Bankruptcy Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549).

<sup>140</sup> Pub. L. No. 95-598, § 213, 92 Stat. 2549, 2661 (1978).

<sup>141</sup> Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 336 (1984) (codified at 28 U.S.C. § 151 (1988)). For the full text of the Emergency Rule, see *White Motor Corp. v. Citibank, N.A.*, 704 F.2d 254, 265–67 (6th Cir. 1983).

implication that the *new new* bankruptcy courts – now styled “units” of the District Court – were no longer “courts of the United States.”<sup>142</sup>

This implication may be sound. After all, part of the justification of the revised bankruptcy court structure’s compliance with Article III was that the bankruptcy courts returned to their pre-1978 subservience to the district courts, reliant on voluntary references of jurisdiction from the district court—references that could be withdrawn.<sup>143</sup> As such, it seems a bit rich to say in one breath that they are not separate courts from the district courts but in another to say that they are nonetheless their own “courts” of the United States. Then again, mere deletion of a provision that may have been redundant in the first place seems a poor basis to divine congressional intent of anything. Certainly, in a cognate context (although not without disagreement), bankruptcy courts have been deemed “courts established by an act of Congress” for purposes of the All Writs Act.<sup>144</sup> Moreover, even if one makes the argument that the bankruptcy courts are not their own “courts” of the United States, then that conclusion simply raises the necessary follow-up: Well, what are they?<sup>145</sup> And the answer, following the logic of the chain, is that they are mere units of the district court—which everyone agrees *are* courts of the United States. Thus, we are left not so much with a classification question but a delegation question: can bankruptcy judges exercise the contempt authority of district courts within the scope of their duly referred jurisdiction?<sup>146</sup>

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<sup>142</sup> Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 336 (1984) (codified at 28 U.S.C. § 151 (1988)).

<sup>143</sup> 28 U.S.C. § 157(d); *see also* Laura B. Bartell, *Motions to Withdraw the Reference - an Empirical Study*, 89 AM. BANKR. L.J. 397 (2015) (surveying effects of 157(d)); *cf.* Act of July 1, 1898, ch. 541, § 2, 30 Stat. 544, 546 (as amended) (repealed 1979) (employing reference system of, literally, “referees”).

<sup>144</sup> *See In re Int’l Power Sec. Corp.*, 170 F.2d 399, 402 (3d Cir. 1948); *In re Stanwyck*, 450 B.R. 181, 200 (Bankr. C.D. Cal. 2011); *In re GTI Capital Holdings, LLC*, 420 B.R. 1, 11 (Bankr. D. Ariz. 2009) (citations omitted).

Pursuant to 28 U.S.C. § 1651(a), referred to as the ‘All Writs Act,’ ‘[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable usages and principles of law.’ Bankruptcy courts, being courts established by Act of Congress, ‘have the power to regulate vexatious litigation pursuant to 11 U.S.C. § 105 and 28 U.S.C. § 1651.’

*GTI Capital Holdings, LLC*, 420 B.R. at 11. *But cf. In re Ozenne*, 818 F.3d 514 (9th Cir. 2016) (holding, in short-lived opinion prior to its withdrawal and vacatur, that Bankruptcy Appellate Panels lack jurisdiction to issue writs of mandamus pursuant to the All Writs Act because they were not “established by an Act of Congress”), *vacated*, 828 F.3d 1012 (9th Cir. 2016). The All Writs Act is codified at 28 U.S.C. § 1651(a) (2000).

<sup>145</sup> *See* David S. Kennedy & Tisha L. Federico, *If the United States Bankruptcy Court Is Not a “Court of the United States,” Then What Is It?*, 28 U. MEM. L. REV. 859 (1998) (highlighting the debate in defining bankruptcy courts in in forma pauperis proceedings); *see also* 28 U.S.C. § 1915 (detailing proceedings in forma pauperis and relevant language from statute).

<sup>146</sup> Professor Laura Bartell seems negatively inclined, opining that any attempt to “search for the contempt power of the bankruptcy court, as if that entity were some congressionally created judicial body,” will be “misled by titles and ignore the reality of the amendments wrought by BAFJA.” Bartell, *supra* note 95, at 28. She further complains that a “bankruptcy judge wielding the contempt power is a sheep in the wolf’s clothing of a ‘judicial officer of the district court’ exercising the authority of an Article III judge.” *Id.* Others have different takes. *See, e.g., United States v. Guariglia*, 962 F.2d 160, 163 (2d Cir. 1992) (finding, in approving a contempt award, that “a district court may, in the first instance, punish for criminal contempt a violation of an order of a bankruptcy court where the bankruptcy court is a ‘unit’ of the district court imposing the punishment”).

Accordingly, while there are decent arguments that the bankruptcy courts are indeed “courts of the United States” for purposes of § 401, or at the very least that bankruptcy judges are officers who may exercise the authority of the district courts of the United States, there is enough uncertainty that, once again, it seems imprudent to rely upon this statute as the grant of authority for bankruptcy judges to exercise criminal contempt.<sup>147</sup> The search must continue.

### C. 11 U.S.C. § 105 (AND RELATED CONTEMPT RULES)

The next logical place for a statutory grant of authority for bankruptcy courts to issue criminal contempt orders is 11 U.S.C. § 105, the Bankruptcy Code’s catch-all provision.<sup>148</sup> Section 105, in part, provides that “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”<sup>149</sup> To say that § 105 and its progenitors under prior Acts have been altered and amended throughout history is an understatement. In fact, as it stands today, the provision is nearly four times the length of the original enactment.<sup>150</sup>

Prior to the first permanent bankruptcy act of 1898,<sup>151</sup> courts under the various ad hoc bankruptcy legislations in the 19th century had power to punish contemnors, but only for direct contempt.<sup>152</sup> The 1898 Act developed this contempt power with several relevant provisions, §§ 2(13), (15), and (16). These terms provided bankruptcy courts with the jurisdiction to “(13) enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment; . . . (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

<sup>147</sup> This might be especially so given § 401’s different treatment of magistrate judges, judicial officers who bear intentional similarity to bankruptcy judges.

<sup>148</sup> See, e.g., 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) (characterizing § 105 as the Code’s “catch-all” provision).

<sup>149</sup> 11 U.S.C. § 105(a); see also John Richards Homes Bldg. Co., LLC, 475 B.R. at 595 (E.D. Mich. 2012), *aff’d sub nom*, *In re John Richards Homes Bldg. Co.*, 552 F. App’x 401 (6th Cir. 2013) (“[A]n order need not be strictly ‘necessary’ under § 105(a); the phrase ‘necessary or appropriate’ is disjunctive, rather than conjunctive.”). *Contra Dyer*, 322 F.3d at 1193 (9th Cir. 2003) (“[T]he language of § 105(a) authorizes only those remedies ‘necessary’ to enforce the bankruptcy code.”). Judicial opinions vary in their interpretation of this essential provision. For an example on the generous end of the spectrum, see *United States v. Energy Res. Co.*, 495 U.S. 545, 549 (1990) (noting that the “statutory directive” of § 105 is “consistent with the traditional understanding that bankruptcy courts, as courts of equity, [which] have broad authority to modify creditor-debtor relationships). Whatever its proper interpretation, § 105 serves an essential role in the bankruptcy judge’s toolkit and has now come to achieve commonplace reliance. See Richard L. Levine, *An Enhanced Conception of the Bankruptcy Judge: From Case Administrator to Unbiased Adjudicator*, 84 W. VA. L. REV. 637, 653 (1982) (noting that, even in 1982, courts “ha[d] begun to develop a concept of [§ 105 as having] almost unlimited power”).

<sup>150</sup> See 4 *Collier on Bankruptcy* ¶ 105.LH (Lawrence P. King et al. eds. 16th ed., rev. 2011).

<sup>151</sup> Bankruptcy Act of 1898, ch. 541, 29 Stat. 544 (repealed 1979). Prior limited duration acts were enacted in 1800 (see Act of Apr. 4, 1800, ch. 19, 2 Stat. 19, repealed by Act of Dec. 19, 1803, ch. 6, 2 Stat. 248.), 1841 (see Act of Aug. 19, 1841, ch. 9, 5 Stat. 440, repealed by Act of Mar. 3, 1843, ch. 82, 5 Stat. 614.), and 1867 (see Act of Mar. 2, 1867, ch. 176, 14 Stat. 517, repealed by Act of June 7, 1878, ch. 160, 20 Stat. 99.). For a thoughtful and reflective historical critique of the Bankruptcy Act of 1898, see David A. Skeel, Jr., *The Genius of the 1898 Bankruptcy Act*, 15 BANKR. DEVS. J. 321 (1999) and, for a general overview of bankruptcy history, see DAVID A. SKEEL, JR., *DEBT’S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* (2003).

<sup>152</sup> See Plank, *supra* note 52, at 576 n.57.

provisions of this Act;<sup>153</sup> [and] (16) punish persons for contempts committed before referees. . . .”<sup>154</sup> Two observations from the 1898 Act provisions are warranted. First, under § 41, the referees in bankruptcy did not have specific authority to enter contempt orders; even for direct contempt, they were limited to certifying findings of contempt to the district court, which had to enter the final order (albeit in a summary manner for direct contempt allegations).<sup>155</sup> Second, Congress explicitly specified the parameters of contempt by statute; there is no such legislative detail in the 1978 Code.<sup>156</sup>

In 1964, roughly seventy years after the first Act, Congress enacted § 2075 of Title 28,<sup>157</sup> supplementing § 30 of the 1898 Act, which was governed by “General Orders in Bankruptcy and Official Forms that were adopted by the Supreme Court.”<sup>158</sup> Section 2075 expressly provided for the promulgation of rules that “shall not abridge, enlarge, or modify any substantive right.”<sup>159</sup> Under its power conferred under § 2075, the Supreme Court adopted, in 1973, Bankruptcy Rules and Official Bankruptcy Forms, superseding earlier bankruptcy orders. Not only did this enactment transform the title of “Referee in Bankruptcy” to the now-used “Bankruptcy Judge,”<sup>160</sup> but it also introduced former Bankruptcy Rule 920 (“Rule 920”).<sup>161</sup> Rule 920 allowed

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<sup>153</sup> Section 2(a)(15) harkens back to the All Writs Act and to two sections of the First Judiciary Act of 1787. See Daniel B. Bogart, *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*, 35 ARIZ. ST. L.J. 793, 799 (2003).

<sup>154</sup> Act of July 1, 1898, ch. 541, § 2, 30 Stat. 544, 546 (as amended) (repealed 1979).

<sup>155</sup>

SEC. 41. CONTEMPTS BEFORE REFEREES. A person shall not, in proceedings before a referee, (1) disobey or resist any lawful order; process, or writ; (2) misbehave during a hearing or so near the place thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; or (4) refuse to appear after having been subpoenaed, or, upon appearing, refuse to take the oath as a witness, or, after having taken the oath, refuse to be examined according to law: Provided, That no person shall be required to attend as a witness before a referee at a place outside of the State of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day’s attendance shall be first paid or tendered to him. The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court.

*Id.*

<sup>156</sup> Cf. 11 U.S.C. §§ 101 *et seq.* (containing now only § 105).

<sup>157</sup> 28 U.S.C. § 2075 (1964) (amended).

<sup>158</sup> Belinda K. Orem, *The Impenitent Contemnor: The Power of the Bankruptcy Courts to Imprison*, 25 CAL. BANKR. J. 222, 224 n.13 (2000).

<sup>159</sup> 28 U.S.C. § 2075.

<sup>160</sup> FED. R. BANKR. P. 901(7) (as amended in 1973; renumbered as Rule 7001 in 1983).

<sup>161</sup> In full, Former Rule 920 read:

Rule 920. Contempt Proceedings.

(a) Contempt committed in proceedings before referee.

(1) Summary disposition by referee—Misbehavior prohibited by § 41a (2) of the Act may be punished summarily by the referee as contempt if he saw or heard the conduct constituting the contempt and it was committed in his actual presence. The order of contempt shall recite the facts and shall be signed by the referee and entered of record.

(2) Disposition by referee upon notice and hearing—Any other conduct prohibited by § 41a of the

bankruptcy judges to issue small-fine contempt orders directly (\$250 or less) *without* certification to the district court. If the bankruptcy judge believed that contumacious behavior necessitated imprisonment or a fine exceeding \$250, the then-standard process of certifying facts to the district court governed.<sup>162</sup> Depending on one's perspective, the rule's partial dispensing with certification either impermissibly expanded the power of bankruptcy judges to issue contempt orders in contravention of § 2075, or was an incremental exercise of the inherent powers of the courts to police direct contempt that was never Congress' prerogative to circumscribe in the first place.<sup>163</sup>

Notably, Justice Douglas dissented to the rule's passage.<sup>164</sup> Despite his concern, however, it seems that the promulgation of this rule, as evidenced by an Advisory Committee Note, was recognition of a court's inherent power to enforce orders and to punish the violation of such orders.<sup>165</sup>

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Act may be punished by the referee only after hearing on notice. The notice shall be in writing and shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the contempt charged and whether the contempt is criminal or civil or both. The notice may be given on the referee's own initiative or on motion by a party, by the United States attorney, or by an attorney appointed by the referee for that purpose. If the contempt charged involves disrespect to or criticism of the referee, he is disqualified from presiding at the hearing except with the consent of the person charged.

(3) Limits on punishment by referee—A referee shall not order imprisonment nor impose a fine of more than \$250 as punishment for any contempt, civil or criminal.

(4) Certification to district judge—If it appears to a referee that conduct prohibited by § 41a of the Act may warrant punishment by imprisonment or by a fine of more than \$250, he may certify the facts to the district judge. On such certification the judge shall proceed as for a contempt not committed in his presence.

(b) Contempt committed in proceedings before district judge—Any contempt committed in proceedings before a district judge while acting as a bankruptcy judge shall be prosecuted as any other contempt of the district court.

(c) Right to jury trial—Nothing in this rule shall be construed to impair the right to jury trial whenever it otherwise exists.

FED. R. BANKR. P. 920(4) (repealed 1983).

<sup>162</sup> *Id.*

<sup>163</sup> *Cf.* Bankruptcy Act of 1898, ch. 541, 29 Stat. 544, § 41 (repealed 1979) (requiring referee certification of all matters of contempt).

<sup>164</sup> “[I]t is for me alarming to vest appointees of [the] bankruptcy courts with the power to punish for contempt . . . . Extension of the contempt power to administrative arms of the bankruptcy court is not consistent with close confinement of the contempt power.” *In re Reed*, 11 B.R. 258, 264 n.7 (Bankr. D. Utah 1981) (citation omitted). Justice Douglas went on to comment on the “minor” role that proponents claimed this statute would have. His concern, while not without merit, appears to be almost reactionary. *Id.* (noting that although the Advisory Notes state the grant is “minor,” the Rule changes Sec. 41, “which has been with us at least since 1898”).

<sup>165</sup>

The premise of the change in procedure for dealing with minor contempts is that the certification requirement of § 41b of the Act [11 U.S.C. § 69(b) (1976) (repealed 1978)] has in effect deprived the referee of the necessary power to protect proceedings before him from petty disturbances and acts of disobedience because of the inordinate inconvenience entailed by the statutory procedure for the judge and the referee.

FED. R. BANKR. P. 920 Advisory Committee's Note (1982) (repealed 1983); *see also In re Fidelity Mortg. Inv'rs*, 550 F.2d 47, 50 (2d Cir. 1976) (chronicling how Rule 920 was premised on the statutory authority of § 41(a) of the 1898 Act); Barbara D. Gilmore, *Contempt and Sanction Powers of the Bankruptcy Court*,

If Rule 920 was an incremental (and for some, like Justice Douglas, invalid) advancement of bankruptcy judge contempt authority, the ill-fated 1978 Code was a leaping stride. Three provisions of the 1978 Code plausibly expanded the bankruptcy courts' contempt power, although two of the three were later repealed. First, as discussed above, the new bankruptcy courts were designated pursuant to 28 U.S.C. § 451 as "courts of the United States":

The term 'court of the United States' includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the Court of International Trade and any court created by Act of Congress the judges of which are entitled to hold office during good behavior, and bankruptcy courts, the judges of which are entitled to hold office for a term of 14 years.<sup>166</sup>

This statutory designation in § 451 made clear that the statutory contempt power of 18 U.S.C. § 401 for "courts of the United States" explicitly applied to bankruptcy courts.<sup>167</sup>

Second, 28 U.S.C. § 1481 announced for good measure that "[a] bankruptcy court shall have the powers of a court of equity, law, and admiralty."<sup>168</sup> This prescription assured that inherent authority, to the extent it includes contempt, could not be less in bankruptcy courts than it is in the district courts. That said, Congress' conferral of this expansive authority on the new bankruptcy courts, while remarkable, also placed restrictions on these newly empowered courts as well—shackles that did not fetter the district courts. Namely, § 1481 provided that "[a] bankruptcy court . . . may not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warrant[] a punishment of imprisonment."<sup>169</sup> Thus, the constitution of the 1978 bankruptcy courts expressly recognized considerable, but not unfettered, contempt authority for bankruptcy judges.

Third, § 105 was added, capturing the "necessary and appropriate" power that traced its way from the All Writs Act's progenitors to § 2(15) of the 1898 Act.<sup>170</sup> Recall that § 2(15) of the 1898 Act granted bankruptcy judges the power 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."<sup>171</sup> Section 105(a)'s broad grant of discretion, mirroring this language, thus overlapped right out of the gates with § 1481 as a basis for contempt authority. This intrinsic redundancy may thus have served as a secondary grant of statutory authority for contempt. But we will never know because before any sort of meaningful

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18 J. BANKR. L. & PRAC. 6 ART. 1, 2–3 (2009) (providing general overview of contempt under the Bankruptcy Rules of 1973).

<sup>166</sup> Pub. L. No. 95-598, § 213, 92 Stat. 2549, 2661 (1978).

<sup>167</sup> 28 U.S.C. § 1481 (1982) (repealed 1984). Some have stated that connection between § 105 and the All Writs Act is "empty" and perhaps "redundant." Nickles & Epstein, *supra* note 148, at 15 (noting that, in terms of "supplemental law, . . . [§] 105 is largely, even completely, redundant"); Levitin, *supra* note 91, at 31–35.

<sup>168</sup> 28 U.S.C. § 1481 (1978).

<sup>169</sup> *Id.* § 241(a), 92 Stat. at 2671 (codified at 28 U.S.C. § 1481).

<sup>170</sup> See Levitin, *supra* note 91, at 30–31.

<sup>171</sup> Act of July 1, 1898, ch. 541, § 2, 30 Stat. 544, 546 (as amended) (repealed 1979).

analysis could be conducted on the interpretative scope of § 105 in the light of § 1481, the scheme was struck down.<sup>172</sup> Indeed, right from the get-go, § 105(a) was already “doubly redundant” to some extent, because the All Writs Act itself *already applied to bankruptcy courts*,<sup>173</sup> thus making § 105(a) and its predecessor § 2(15) of the 1898 Act awash with gratuity. In fact, legislative history concedes that “§ 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.*<sup>174</sup> Such language reveals that perhaps § 105 was indeed formulated as a catch-all provision or “Super All Writs Act.”<sup>175</sup> It also importantly recognizes that the historical power of bankruptcy commissioners carried into early U.S. bankruptcy practice came with all sorts of equitable authority that “regular” courts may not have used, even under the All Writs Act.

This begs the question of what the All Writs Act already did for the bankruptcy court and if § 105 was, in fact, redundant.<sup>176</sup> The All Writs Act was originally enacted in the Judiciary Act of 1789.<sup>177</sup> It has been characterized as a “necessary” statute “because federal courts maintain limited jurisdiction and hav[e] only those powers expressly granted by Congress.”<sup>178</sup> Thus, the All Writs Act provides the necessary procedural tools, specifically the “various historic common-law writs,” that federal courts use to “exercise their limited jurisdiction.”<sup>179</sup> Our point here is not to parse the All Writs Act to see if it confers additional authority on bankruptcy courts (or if § 105 confers additional authority not captured by the All Writs Act, which its legislative history suggests it seeks to do). Rather, our point is simply to lay down a marker that the All Writs Act itself might be a basis for the statutory grant of criminal contempt authority. To be sure, the reader may well ask, if the All Writs Act, kicking around in some form since 1787, grounds the statutory conferral of contempt power to federal courts, what work does the general federal contempt statute, 18 U.S.C. § 401, do? An answer might stem from 18 U.S.C. § 401: it only applies to “courts of the United States,” which bankruptcy courts were in 1978 but quite plausibly no longer are, since 1984. Thus, the All Writs Act may give non-courts of the United States—but courts that are nonetheless “created by act of Congress,” assuming that is a different standard—a statutory basis for contempt.

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<sup>172</sup> See *Northern Pipeline Constr. Co. v. Marathon*, 458 U.S. 50 (1982).

<sup>173</sup> See *In re Int'l Power Sec. Corp.*, 170 F.2d 399, 402 (3d Cir. 1948); *In re Kristan*, 395 B.R. 500, 511 (B.A.P. 1st Cir. 2008).

<sup>174</sup> H.R. REP. NO. 95-595, at 316–17 (1977) (emphasis added), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6273–74; *see also* Bogart, *supra* note 153, at 830 n.121 (detailing the intersection of § 105 and the All Writs Act).

<sup>175</sup> One query is whether such open-ended statutory drafting was as an implicit recognition by the legislature that bankruptcy courts operate in equity and, therefore, require greater flexibility. *See supra* note 91 (considering debate over whether bankruptcy courts are “courts of equity”); *cf.* Levin, *supra* note 91 (arguing that they are not courts of equity but do have broad discretion in crafting federal common law of bankruptcy).

<sup>176</sup> *See* Bogart, *supra* note 153; *see also* Ralph Brubaker, *Nondebtor Releases and Injunctions in Chapter 11: Revisiting Jurisdictional Precepts and the Forgotten Callaway v. Benton Case*, 72 AM. BANKR. L.J. 1, 15 (1998) (“[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.”).

<sup>177</sup> Judiciary Act of 1789, ch. 20, 1 Stat. 73.

<sup>178</sup> *United States v. New York Tel. Co.*, 434 U.S. 159, 187 (1977) (Stevens, J., dissenting).

<sup>179</sup> *Id.*

Yet that answer only half-satisfies. Surely the purpose of the All Writs Act is not simply to apply to the sliver of courts, which perhaps includes the bankruptcy courts, which are *not* “courts of the United States” but *are* “courts created by act of Congress”? If so, then perhaps the true relevance of 18 U.S.C. § 401 is not as an *enabling* statute, but as a *restrictive* statute.<sup>180</sup> That is, Congress’ enactment of the law was partially gratuitous, because courts can to some extent impose their own contempt sanctions under their inherent power and/or the All Writs Act. Rather, the contempt statute is principally relevant for adding the constraints on the contempt remedy which, as discussed above, the Supreme Court thinks is within Congress’ rights—at least to some degree.<sup>181</sup>

Whatever the proper construction of the All Writs Act, the federal contempt statute, and the 1978 Bankruptcy Code, it is evident that Congress intended bankruptcy courts to exercise both civil and criminal contempt power through its statutory innovations of §§ 451, 1481, and 105.<sup>182</sup> This structure, however, was short-lived.

#### D. 11 U.S.C. § 105 *POST-BAFJA* (AND MORE RELATED CONTEMPT RULES)

In 1982, the Supreme Court decided *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, finding that the 1978 jurisdictional grant to bankruptcy courts violated Article III.<sup>183</sup> The plurality opinion first held that the new courts did not qualify as Article I “legislative” courts,<sup>184</sup> rejecting the rationale that Congress’ power in establishing “uniform Laws on the subject of Bankruptcies throughout the United States” saved the regime.<sup>185</sup> More specifically, the Justices stated that such an interpretation would allow Congress to “create courts free of Art[icle] III’s requirements whenever it finds that course expedient.”<sup>186</sup> The opinion also resisted the suggestion that, as situated under § 1471 of Title 28, bankruptcy courts were simply “adjuncts” of the district courts like that of administrative agencies and magistrates.<sup>187</sup>

The *Northern Pipeline* decision’s effective date was initially stayed to provide Congress with time to cure the constitutional defect, but Congress failed to meet the deadline. The Administrative Office of the United States Courts drafted an “Emergency Rule,”<sup>188</sup> which

<sup>180</sup> Cf. *In re Bradley*, 588 F.3d 254, 265 (5th Cir. 2009) (recognizing that “[w]hile the criminal contempt power is limited by 18 U.S.C. [§] 401, civil contempt remains a creature of inherent power”).

<sup>181</sup> See *supra* text accompanying notes 115–23.

<sup>182</sup> See Bartell, *supra* note 95, at 6–7 (summarizing three reasons Congress intended to confer bankruptcy courts with contempt power in the 1978 Code: (i) bankruptcy courts were created as “adjuncts” of the district courts, meaning they possessed inherent power; (ii) they were deemed “courts of the United States,” meaning they possessed statutory contempt power; and (iii) Congress explicitly granted bankruptcy courts the “powers of a court of equity, law and admiralty”).

<sup>183</sup> 458 U.S. 50, 87 (1982) (plurality opinion); *id.* at 91–92 (Rehnquist, J., concurring).

<sup>184</sup> *Id.* at 63 (plurality opinion).

<sup>185</sup> *Id.* at 72 (quoting U.S. CONST., art. I, § 8, cl. 4).

<sup>186</sup> *Id.* at 73.

<sup>187</sup> *Id.* at 76–89. The Court did recognize Congress’ “broad discretion to assign factfinding functions to an adjunct created to aid in the adjudication of congressionally created statutory rights”; however, the Court found that Congress lacks this discretion when it concerns “rights not created by it.” Bartell, *supra* note 95, at 8.

<sup>188</sup> For the full text of the Emergency Rule, see *White Motor Corp. v. Citibank, N.A.*, 704 F.2d 254, 265–67 (6th Cir. 1983). See also Orem, *supra* note 1588, at 227 n.32 (describing the Emergency Rule).

reinstated—and expanded—former Rule 920 regarding bankruptcy court criminal contempt power. Like Rule 920, it expressly provided that bankruptcy judges could impose criminal contempt sanctions for direct contempt but that they lacked the power to punish indirect criminal contempt or warrant imprisonment. Interestingly, the Emergency Rule’s direct contempt sanctions had no cap, in contrast to the \$250 cap under prior Rule 920.<sup>189</sup>

Congress eventually enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984 (“BAFJA”).<sup>190</sup> BAFJA returned bankruptcy judges to subservience to district judges, only hearing such matters that the Article III judges might choose to refer.<sup>191</sup> Bankruptcy judges could “hear and determine” all “core proceedings” arising under Title 11 or arising in cases under Title 11.<sup>192</sup> Regarding possible bases for contempt, BAFJA also amended § 451 to exclude bankruptcy courts from the category of “courts of the United States,” and thus withdrew the access to statutory contempt power under 18 U.S.C. § 401. This was coupled with the somewhat elusive repeal of § 1481.<sup>193</sup> As outlined above, ill-fated § 1481, with some restrictions, granted bankruptcy courts “the powers of a court of equity, law, and admiralty.”<sup>194</sup> Section 1481 was initially slated in the 1978 Code to take effect on April 1, 1984.<sup>195</sup> Congress passed a series of legislative postponements pushing back this date in trying to fix the constitutional infirmities during the stopgap period of the Emergency Rule.<sup>196</sup> The final rendering of § 1481 became effective on June 28, 1984, pursuant to these legislative pushbacks.<sup>197</sup> Twelve days later, however, on July 10, 1984, BAFJA went into effect.<sup>198</sup> BAFJA’s haphazard statutory drafting resulted in uncertainty regarding whether § 1481 was repealed barely a fortnight after its enactment. The confusion arose from two inconsistent provisions in the new law: on the one hand, BAFJA § 121(a) provided that § 1481, effective as of June 28, 1984, would cease to be effective until BAFJA’s enactment, thus envisioning yet another postponement, but ultimate effectiveness, of § 1481;<sup>199</sup> on the other hand, BAFJA § 113 provided that § 1481 “shall not be effective.”<sup>200</sup> There is understandable confusion concerning §

<sup>189</sup> Emergency Rule (d)(1)(B)(i)–(ii) (limiting the bankruptcy court’s indirect contempt power but lifting a monetary cap on direct contempt findings); FED. R. BANKR. P. 920(a)(3) (detailing a monetary cap on direct contempt findings that was in force prior to the Emergency Rule).

<sup>190</sup> Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98–353, 98 Stat. 333 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C.).

<sup>191</sup> 28 U.S.C. § 157(a).

<sup>192</sup> 28 U.S.C. § 157(b).

<sup>193</sup> Pub. L. No. 98–353, 98 Stat. 333 (1984). Some courts have considered § 1481 still in force. See *infra* note 201

<sup>194</sup> 28 U.S.C. § 1481 (1982) (repealed 1984) (highlighting that § 1481 is “the concomitant of the bankruptcy court[’]s increased jurisdiction, and is necessary to enable the bankruptcy court to exercise that jurisdiction and its powers under the bankruptcy code. It is in addition to any power granted under 28 U.S.C. [§] 1651 (the All Writs Statute) or under section 105.”).

<sup>195</sup> Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2682, § 402(b).

<sup>196</sup> See Pub. L. No. 98-249, 98 Stat. 116 (1984); Pub. L. No. 98-271, 98 Stat. 163 (1984); Pub. L. No. 98-299, 98 Stat. 214 (1984); Pub. L. No. 98-325, 98 Stat. 268 (1984).

<sup>197</sup> See Pub. L. No. 98-325, 98 Stat. 268 (1984).

<sup>198</sup> Pub. L. No. 98-353; 98 Stat. 333 (1984).

<sup>199</sup> *Id.* § 121(a) (providing § 121(a) was “amended in subsections (b) and (e) by striking out ‘June 28, 1984’ each place it appears and inserting in lieu thereof ‘the date of enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984’”).

<sup>200</sup> *Id.* § 113 (providing § 113 was “amended by striking out ‘shall take effect on June 28, 1984’ and inserting in lieu thereof ‘shall not be effective’”).

1481's status,<sup>201</sup> because it was either made finally effective or it was outright repealed upon BAFJA's enactment.

Notwithstanding some courts' invocation of § 1481 as still-good law, the consensus seems to be that it was repealed.<sup>202</sup> As Professor Levitin explains, the common notion is that BAFJA § 121(a) existed "to postpone the effective date of [§] 1481 . . . to take care of the hiatus which then existed between June 28th and July 10th."<sup>203</sup> Section 121(a)'s sole purpose might thus have been "to postpone the effective date until [§] 1481 became ineffective by virtue of [§] 113."<sup>204</sup> Complicating the matter is the lack of legislative history specifically addressing § 1481's (likely) repeal. Nonetheless, it is plausible to believe that if Congress did in fact intend to repeal § 1481, it was because such an expansive jurisdictional grant contravened *Northern Pipeline's* holding.<sup>205</sup> But, as Levitin also notes, if that was its intent, it seems odd that Congress would continue with a trend of postponements, rather than repealing § 1481 from the outset.<sup>206</sup> This mess is relevant to the present discussion because if bankruptcy courts have all powers of law and equity, they would necessarily have the contempt power, both inherent and pursuant to statute under the federal contempt law. In sum, if § 1481 is still good law, the search for a statutory basis for bankruptcy court contempt power ends.

As for § 105 itself, BAFJA did not leave it entirely unchanged, as clause (a) was amended to read "court" instead of "bankruptcy court,"<sup>207</sup> and clause (c) was added to clarify that § 105 does not provide bankruptcy courts with any form of independent jurisdiction beyond that outlined in Title 28.<sup>208</sup> But we don't think these changes affect the bottom line: the

<sup>201</sup> For example, courts have invoked § 1481 as a source of bankruptcy court contempt power in cases as recent as 1996 and 1999. *See In re Muncie*, 240 B.R. 725, 727 (Bankr. S.D. Ohio 1999) ("This Court has statutory power under 28 U.S.C. § 1481, 11 U.S.C. § 105(a) and Bankruptcy Rule 9020 to enter a finding of civil contempt and to award actual damages for violations of the automatic stay. . . ."); *In re Elder-Beerman Stores Corp.*, 197 B.R. 629, 632 (Bankr. D. Ohio, 1996) (discussing the bankruptcy court's contempt power "recognized in 28 U.S.C. § 1481"). These courts at least were backed up by the then-printed U.S. Code; in the 2000 printing of the Code, however, § 1481 was quietly removed. *See Levitin, supra* note 91, at 27–30 (discussing statutory revisions).

<sup>202</sup> *Skinner*, 917 F.2d at 449 n.6 (10th Cir. 1990); *In re Kaiser Steel Corp.*, 911 F.2d 380, 390 (10th Cir. 1990) (recognizing that, in response to the *Northern Pipeline* decision, § 1481 was repealed); *In re Hipp, Inc.*, 895 F.2d 1503, 1516–17 (5th Cir. 1990); *cf. In re Haddad*, 68 B.R. 944, 948 (Bankr. D. Mass. 1987) (concluding that in matters of direct contempt where imprisonment is not warranted "bankruptcy courts may properly exercise criminal contempt powers to the same extent that Congress intended they have them under § 1481").

<sup>203</sup> Levitin, *supra* note 91, at 29.

<sup>204</sup> *Id.*

<sup>205</sup> *See id.*

<sup>206</sup> *See id.*

<sup>207</sup> 11 U.S.C. § 105(a).

<sup>208</sup> 11 U.S.C. § 105(c) provides:

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.

Section 105(a) also had a third sentence added in 1986 that provided:

No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

consensus is that BAFJA repealed short-lived § 1481, leaving the bankruptcy courts, arguably no longer “courts of the United States,” with lonely § 105 as the sole statutory fount for the contempt power.<sup>209</sup>

This consensus allows curiously opposed conclusions. The first is that because all the contempt power conferred on bankruptcy courts was housed in repealed §§ 451 and 1481 back when § 105 was first added to the 1978 Code, § 105 was never designed or intended to grant a power to impose contempt sanctions. Several scholars take this view.<sup>210</sup> The second interpretation, however, which even these skeptics admit is equally textually possible,<sup>211</sup> is that the flexible language of § 105 is perfectly sufficient to house a contempt power, and this belt was never needed before the suspenders of §§ 451 and 1481 were repealed. In other words, possible redundancy in 1978 was remedied by repeal in 1984 of the redundancy-inducing provisions. Indeed, recall that redundancy was immanent in the Code already with § 105’s intentional overlap with the All Writs Act. A scale-tipper in preferring one of these two diametric interpretations might be the consequences of the first interpretation’s stripping bankruptcy courts of any statutory basis for the contempt power, which might well violate the Supreme Court’s pre-Code practices doctrine, especially given the long pedigree of contempt-like sanctions.<sup>212</sup>

Post-BAFJA, the Rules continued to develop on the apparent assumption there was indeed contempt authority. Of course, we do not know whether the revisions occurred pursuant to the second interpretation of § 105 set out above (as a statutory basis for contempt power) or pursuant to a belief that the inherent power of the bankruptcy courts required no such authorization, so long as the contempt power was limited to certain types of egregious conduct (say, direct contempt). Whatever the thinking, shortly after BAFJA was enacted, in 1986, the Advisory Committee on Bankruptcy Rules promulgated several amendments. Most notable for present purposes were the 1987 revisions to Bankruptcy Rule 9020 (as former Rule 920 had come to be numbered).<sup>213</sup>

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Pub. L. No. 99-554, § 203, 100 Stat. 3088, 3097 (1986) (codified at 11 U.S.C. § 105(a) (1994)).

<sup>209</sup> See *In re Haddad*, 68 B.R. 944, 948 (Bankr. D. Mass. 1987) (“Until the 1986 Amendments . . . courts seeking to divine the contempt powers of bankruptcy judges had as their only source [section] 105(a). . . .”); see also Bartell, *supra* note 95, at 15 (noting the significance of the amendments to §§ 1481 and 451, which served as the most obvious statutory bases for bankruptcy court contempt powers).

<sup>210</sup> *Id.* at 33–34.

<sup>211</sup> See *id.* at 31–34.

<sup>212</sup> See, e.g., *Hamilton v. Lanning*, 560 U.S. 505, 517 (2010) (“[T]he Court will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.”) (internal quotation marks omitted). And as Professor Schwartz reminds, the goal in 1978, as ratcheted back in 1984, was to give bankruptcy judges more, not less power, than they had under prior practice.

Congress in 1978 wanted to elevate the stature of the bankruptcy courts rather than reduce it. This goal produced the replacement of the bankruptcy referee system with ‘real judges’ who are appointed for substantial terms and paid high salaries. To grant these new judges less authority to make policy than the referees they replaced would have been irrational.

Alan Schwartz, *The New Textualism and the Rule of Law Subtext in the Supreme Court’s Bankruptcy Jurisprudence*, 45 N.Y.L. SCH. L. REV. 149, 186 (2001); see also *supra* Part II (discussing historical practice of bankruptcy commissioners).

<sup>213</sup> Rule 920 was renumbered in 1983 and largely tracked the Emergency Rule’s treatment of bankruptcy court contempt.

#### CRIMINAL CONTEMPT PROCEDURES:

Perhaps chastened by *Northern Pipeline's* smack-down of bankruptcy judges, an early draft of revised Rule 9020 proposed to make the district court the sole forum for hearing and determining *all* contempt motions, limiting bankruptcy judges to certifying facts.<sup>214</sup> The committee did not approve such a turning back of the bankruptcy court clock, but it did take away the power of the bankruptcy court to enter final judgments of contempt, a power that existed under former Rule 920 and then-effective Rule 9020.<sup>215</sup> The 1987 amendment allowed bankruptcy judges only to enter what might be considered “presumptive” judgments, subject to *de novo* review in district court upon timely party objection.<sup>216</sup> In relevant part, revised Rule 9020 provided:

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(a) Procedure

(1) Summary Disposition. Criminal contempt which may be punished by a bankruptcy judge acting pursuant to 28 U.S.C. § 1481 may be punished summarily by a bankruptcy judge if he saw or heard the conduct constituting the contempt and if it was committed in his actual presence. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(2) Disposition After a Hearing. Criminal contempt which may be punished by a bankruptcy judge acting pursuant to 28 U.S.C. § 1481, except when determined as provided in paragraph (1) of this subdivision, may be punished by the bankruptcy judge only after a hearing on notice. The notice shall be in writing, shall state the essential facts constituting the criminal contempt charged and describe the contempt as criminal and shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense. The notice may be given on the court's own initiative or on application of the United States attorney or by an attorney appointed by the court for that purpose. If the contempt charged involves disrespect or criticism of a bankruptcy judge, that judge is disqualified from presiding at the hearing except with the consent of the person charged.

(3) Certification to District Court. If it appears to a bankruptcy judge that criminal contempt has occurred, but the court is without power under 28 U.S.C. § 1481, to punish or to impose the appropriate punishment for the criminal contempt the judge may certify the facts to the district court.

(b) Right to Jury Trial. Nothing in this rule shall be construed to impair the right to jury trial whenever it otherwise exists.

FED. R. BANK. P. 9020 (1983) (amended 1987, 1991, 2001).

<sup>214</sup> See *In re L.H. & A. Realty, Inc.*, 62 B.R. 910, 914 n.4 (Bankr. D. Vt. 1986) (noting the proposal and controversy surrounding contempt power).

<sup>215</sup> FED. R. BANK. P. 9020 (1983) (amended 1987, 1991, 2001). While the Advisory Committee might have stated in their notes that “bankruptcy judges may . . . not have the power to punish for contempt[,]” this does not appear to have dissuaded them in forming Rule 9020. Letter from Morey L. Sear, on behalf of Advisory Committee on Bankruptcy Rules, to Edward T. Gignoux, Chairman of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (June 13, 1986), in Preface to 1995-2 COLLIER PAMPHLET EDITION BANKRUPTCY RULES at lxxxvii-lxxxviii (Lawrence P. King et al. eds.).

<sup>216</sup>

Contempt Proceedings

(a) Contempt Committed in Presence of Bankruptcy Judge. Contempt committed in the presence of a bankruptcy judge may be determined summarily by a bankruptcy judge. The order of contempt shall recite the facts and shall be signed by the bankruptcy judge and entered of record.

(b) Other Contempt. Contempt committed in a case or proceeding pending before a bankruptcy judge, except when determined as provided in subdivision (a) of this rule, may be determined by the bankruptcy judge only after a hearing on notice. The notice shall be in writing, shall state the essential facts constituting the contempt charged and describe the contempt as criminal or civil and shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense. The notice may be given on the court's own initiative or on application of the United

The [contempt] order shall be effective 10 days after service of the order and shall have the same force and effect as an order of contempt entered by the district court unless, within the 10 day period, the entity named therein serves and files objections prepared in the manner provided in Rule 9033(b).<sup>217</sup>

The 1987 amendments and their “presumptive judgment” approach thus appear to have staked out a middle ground between the ability to enter a final order on the one hand and complete reliance on district courts under the certification regime (as had been briefly proposed) on the other. But there is no denying that they rolled back the authority of bankruptcy courts to impose criminal contempt.<sup>218</sup>

Finally, by 2001, the rule makers threw in the towel and repealed Rule 9020 altogether, simply saying that contempt matters henceforth were to be governed by Rule 9014’s motion practice, sidestepping what constraints, if any, circumscribe the bankruptcy courts’ contempt

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States attorney or by an attorney appointed by the court for that purpose. If the contempt charged involves disrespect to or criticism of a bankruptcy judge, that judge is disqualified from presiding at the hearing except with the consent of the person charged.

(c) Service and Effective Date of Order; Review. The clerk shall serve forthwith a copy of the order of contempt on the entity named therein. The order shall be effective 10 days after service of the order and shall have the same force and effect as an order of contempt entered by the district court unless, within the 10 day period, the entity named therein serves and files objections prepared in the manner provided in Rule 9033(b). If timely objections are filed, the order shall be reviewed as provided in Rule 9033.

(d) Right to Jury Trial. Nothing in this rule shall be construed to impair the right to jury trial whenever it otherwise exists.

FED. R. BANKR. P. 9020 (1987) (amended 1991, 2001).

The 1987 version of Rule 9020(a) tweaked that bankruptcy judges could “determine” contempt, unlike the 1983 version, which provided that bankruptcy judges could “punish” contempt, a distinction that may have intended either to effect a substantive change or merely to unify a standard for civil and criminal contempt. FED. R. BANK. P. 9020 (1983) (amended 1991, 2001). Few courts have probed this issue. For one example, consider *In re Kennedy*, 80 B.R. 673 (Bankr. D. Del. 1987) (noting possibly peculiar construction of Rule 9020, under which, if intending to suggest the power to “determine” does not include the power to “punish,” a contemnor could simply fail to raise an objection to a “determined” order and thereby prevent its enforcement given the bankruptcy court’s lack of power to “punish”). A more likely reading of revised Rule 9020 is found in *Miller v. Mayer*, which held that the ability to “determine” is inclusive of the ability to “punish.” 81 B.R. 669, 678 (Bankr. M.D. Fla. 1988).

<sup>217</sup> FED. R. BANKR. P. 9020(c) (1987) (amended 1991, 2001).

<sup>218</sup> For some, even the 1987 version of Rule 9020 ran into constitutional problems. Consider the court in *Hipp*, which found that the Rule did not authorize bankruptcy courts to make a first-stage determination and enter a presumptive order, even for direct contempt; rather, district court involvement was deemed required. *See Hipp*, 895 F.2d at 1521. The Fifth Circuit paid close attention to the principle discussed in *United States v. Raddatz*, 447 U.S. 667 (1980), of “the one who decides must hear,” and the principle from *Gomez v. United States*, 490 U.S. 858 (1989), which provides that “absent waiver by the defendant, the conduct of all critical stages of criminal trials . . . must be before the judicial officer having jurisdiction to render the judgment of acquittal or conviction and sentence.” Because Rule 9020 allowed the bankruptcy judge to enter a presumptive order of contempt, subject to a ten-day objection period, the district court’s “review” might result in an order of contempt being decided by a district court that did not itself hear the evidence against the contemnor. In the *Hipp* court’s judgment, this violated these two guiding principles.

power.<sup>219</sup> Advisory Committee Notes reveal that this change was made because “[i]ssues relating to the contempt power of bankruptcy judges are substantive and are left to statutory and judicial development, rather than procedural rules.”<sup>220</sup> The plain language of Bankruptcy Rules 9020 and 9014 now permit parties to seek orders of civil contempt by motion, but it does not speak directly to criminal contempt, which presumably originates by court action, *sua sponte*, rather than party motion.<sup>221</sup> It is unclear whether this silence regarding criminal contempt in current Rule 9020 was intended to strip criminal contempt authority from bankruptcy judges or simply to kick matters back to a literally unruly state of nature where bankruptcy courts have no guidance on the exercise of the criminal contempt power that is conferred by inherent authority, § 105, or both.<sup>222</sup>

The evolution (and devolution) of the Rules sheds limited light on the proper interpretation of § 105. On the one hand, it would seem that the Rules proceeded on the assumption that there was a contempt authority elsewhere conferred in need of regulation by rule, which implies § 105 would indeed be the requisite statutory hook after the repeal of §§ 451 and 1481. On the other hand, it is conceivable that the 2001 amendments were a confession of error intended to express a belief that no such authority was ever conferred by § 105 in the first place. If the latter is the case, then we revert to the pre-existing statutory interpretation question: if § 105 was not intended to confer a contempt power in 1978—because other, more explicit statutory provisions were so doing—is its interpretation fixed? Or could language that meant one thing in 1978, and that would have to confront such canons of statutory interpretation as the aversion of surplusage, mean another thing in 1984, when seemingly broad language would not have to be tamped down to avoid redundancy concerns?<sup>223</sup> Even critics of reading § 105 expansively admit such an argument is textually plausible,<sup>224</sup> and so it may be appropriate to return to first principles. Namely, given (1) that bankruptcy courts exercised at least some types of contempt powers in the past, (2) that § 105’s legislative intent was to serve as a catch-all to pick up additional powers missed by the All Writs Act, and (3) that courts are loath to infer a redesign of pre-Code practice in the absence of some clear congressional indication (with generic *Northern Pipeline* hysteria not cutting it), should one not have pause? Namely, should one not be skeptical that § 105’s wide-sweeping text—that confers authority to do anything “necessary

<sup>219</sup> “Rule 9014 governs a motion for an order of contempt made by the United States trustee or a party of interest.” FED. R. BANK. P. 9020.

<sup>220</sup> FED. R. BANK. P. 9020 Advisory Committee Note (2001), 6B Bankr. Service L. Ed. § 59:693.

<sup>221</sup>

[May] an action for criminal contempt in a congressionally created court . . . constitutionally be brought in the name and pursuant to the power of a private person, rather than in the name and pursuant to the power of the United States[?] The answer to that question is no. The terrifying force of the criminal justice system may only be brought to bear against an individual by society as a whole, through a prosecution brought on behalf of the government.

Robertson v. U.S. *ex rel.* Watson, 560 U.S. 272, 273 (2010) (Roberts, C.J., dissenting) (internal quotation omitted); *see also* Note, *Permitting Private Initiation of Criminal Contempt Proceedings*, 124 HARV. L. REV. 1485 (2011) (arguing that initiation of criminal contempt proceedings by private individuals does not violate the due process right to disinterested public prosecution).

<sup>222</sup> Certainly no suggestion has been made that bankruptcy courts require enabling *rules* to exercise criminal contempt authority.

<sup>223</sup> *See, e.g.*, Freeman v. Quicken Loans, Inc., 132 S. Ct. 2034, 2043 (2012).

<sup>224</sup> *See* Bartell, *supra* note 95, at 33–34.

and appropriate” to carry out the provisions of Title 11—somehow fails to authorize the power, when necessary and appropriate, to order criminal contempt sanctions? We think so.

### E. IMPLIED RESTRICTIONS ON 11 U.S.C. § 105

Thus far we have tried to interpret § 105 on its own to discern if it is a solid statutory foundation for criminal contempt, and we have come to the initial conclusion that it is. Yet the statutory conversation cannot end there, for as we all know the statute must not be interpreted in isolation. A necessary further inquiry is whether other statutory provisions counsel clawing back this presumptively broad reading of § 105 as it regards the contempt power. There are smatterings of statutory arguments making exactly such a claim, but we ultimately believe none of them can carry much weight. Nonetheless, in an abundance of lawyerly caution, we address them here.

First, internal to the Bankruptcy Code, other provisions, for example, §§ 303<sup>225</sup> and 363,<sup>226</sup> explicitly authorize the award of punitive sanctions, which are at least analogous to criminal contempt, and so if Congress did not say more about punitive sanctions in the Code, courts should be hesitant to expand punitive powers through § 105 beyond these domains.<sup>227</sup> This argument is flawed because both sections address harms directly inflicted upon debtors: § 303 deals with a false accusation of insolvency and allows punitive damages against bad-faith transgressors, almost like damages for libel, which are paid directly to the solvent “debtor.” Similarly, § 362 addresses individual debtors whose creditors knowingly violate the automatic stay, perhaps seizing essential personal property. There, again, the harm is inflicted quite poignantly upon the aggrieved debtor. By contrast, criminal contempt is an infraction against the court;<sup>228</sup> indeed, the awards presumptively do not get paid to the debtor but to the State or a deserving non-profit.<sup>229</sup> As such, it is difficult to glean anything at all from §§ 303 and 362 regarding criminal contempt against “the court.”

Second, internal not just to the Code but to § 105 itself, is the constraint of requiring “necessity” and “appropriateness.” Some courts have held that criminal contempt is not statutorily available to bankruptcy courts because resort to such heavy-handed relief is not “necessary” to effectuate the provisions of the Bankruptcy Code.<sup>230</sup> This argument strikes us as intrinsically false, because given something as inherently discretion-laden as the imposition of criminal contempt, it seems implausible to pre-determine that there are no conceivable sets of

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<sup>225</sup> 11 U.S.C. § 303(i).

<sup>226</sup> 11 U.S.C. § 363(n).

<sup>227</sup> See *John Richards Homes Bldg. Co.*, 475 B.R. 585 (E.D. Mich. 2012), *aff’d sub nom*, *In re John Richards Homes Bldg. Co.*, 552 F. App’x 401 (6th Cir. 2013).

<sup>228</sup> See *Sequoia Auto Brokers*, 827 F.2d 1281, 1283 n.1 (9th Cir. 1987) (“Criminal contempt is a completed act of disobedience; the sentence is punitive to vindicate the authority of the court.”). Technically, some have noted that the crime is against the court – and the particular court – and not the people. See JOHN P. DAWSON ET AL., *CONTRACTS: CASES AND COMMENT* (10th ed. 2013), but we need not dwell on that because the relevant point is that the harm is “public.”

<sup>229</sup> See, e.g., *In re Gravel*, 556 B.R. 561 (Bankr. D. Vt. 2016) (awarding punitive sanctions under Rule 3002.1(i) and § 105 to a “non-profit legal services entity”).

<sup>230</sup> See, e.g., *Hipp*, 895 F.2d at 1503.

facts that would warrant the imposition of criminal contempt (on the theory that civil contempt is quite enough as a matter of law).

Third, external to the Bankruptcy Code is 28 U.S.C. § 636(e),<sup>231</sup> which addresses the contempt authority of magistrate judges, who are the most similarly situated federal judicial officers to bankruptcy court judges. Indeed, BAFJA's legislative history makes clear bankruptcy judges were modeled after magistrate judges: one legislative sponsor of BAFJA explained that "[t]he powers that bankruptcy judges exercise" will be "identical to those exercised by magistrates," including the power to "enter a binding judgment" as long as "the parties consent."<sup>232</sup> Post-2000, magistrate judges gained the authority to punish direct contempt summarily in a revision to 28 U.S.C. § 636,<sup>233</sup> which some found controversial,<sup>234</sup> expanding on the previous authority only to certify contempt findings to district judges.<sup>235</sup> Section 636 is explicit about granting magistrate judges the power to find contempt and sits in contrast to § 105's general language. Thus, this line of argument goes, when Congress wants federal judges who lack full Article III protections to issue contempt, it thinks hard about it and enacts specifically gradated statutes, like § 636 (or short-lived § 1481).<sup>236</sup>

<sup>231</sup> 28 U.S.C. § 636(e).

<sup>232</sup> 130 Cong. Rec. E 1109-10 (daily ed. Mar. 20, 1984) (statement of Rep. Kastenmeier).

<sup>233</sup> Section 636 now provides:

Summary criminal contempt authority.—

A magistrate judge shall have the power to punish summarily by fine or imprisonment, or both, such contempt of the authority of such magistrate judge constituting misbehavior of any person in the magistrate judge's presence so as to obstruct the administration of justice. The order of contempt shall be issued under the Federal Rules of Criminal Procedure.

28 U.S.C. § 636(e)(2).

<sup>234</sup> See Mark S. Kende, *The Constitutionality of New Contempt Powers for Federal Magistrate-Judges*, 53 HASTINGS L.J. 567, 595-96 (2002) (arguing the amendments are unconstitutional); cf. *Multidistrict, Multiparty, Multiforum Jurisdiction Act of 1999 and Federal Courts Improvement Act of 1999: Hearing on H.R. 2112 and H.R. 1752 Before the Subcomm. On Courts & Intellectual Prop. of the H. Comm. on the Judiciary*, 106th Cong. 48 (1999) (statement of Joel B. Rosen, U. S. Mag. J., United States District Court for the District of New Jersey) ("[The tailored magistrate judge contempt authority was] proposed as a clear distinction between magistrate judges and [A]rticle III, a bright line, if you will, since magistrate judges already have the authority to impose that penalty for certain misdemeanors."). Magistrates were initially forced to certify all matters of contempt under the Federal Magistrates Act ("FMA"). Pub. L. No. 90-578, 82 Stat. 1107 (1968) (codified as amended at 28 U.S.C. §§ 604, 631-639, 1915 (1988), and 18 U.S.C. §§ 3060, 3401-3402 (1994)); see also *Taberer v. Armstrong World Indus., Inc.*, 954 F.2d 888, 901-08 (3d Cir. 1992) (discussing the contempt power under the FMA).

<sup>235</sup> 28 U.S.C. § 636(e) (1994) (amended 2001) (ultimately amended to accord magistrate judges more contempt authority after multiple demurred proposed amendments).

<sup>236</sup> Or the Tax Court's explicit conferral of authority:

(c) Incidental powers. The Tax Court and each division thereof shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

- (1) misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
- (2) misbehavior of any of its officers in their official transactions; or
- (3) disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

It shall have such assistance in the carrying out of its lawful writ, process, order, rule, decree, or command as is available to a court of the United States. The United States marshal for any district in which the Tax Court is sitting shall, when requested by the chief judge of the Tax Court, attend any session of the Tax Court in such district and may otherwise provide, when requested by the chief judge of the Tax Court, for the security of the Tax Court, including the personal protection of

The problem we have with this argument is two-fold. First, the fact that Congress is persnickety elsewhere provides no basis for the induction of a rule of statutory construction. Maybe Congress felt lazier with BAFJA; there's no crime in that. Moreover, the magistrate judges have no analogue to § 105, so we are comparing apples with oranges; Congress may well have felt, quite correctly we would argue, that bankruptcy judges did not need such a statutory provision to confer a power for criminal contempt, as it was already there in § 105. Second, and more importantly, bankruptcy judges, while similar, are not identical to magistrate judges, for the very reasons summarized in the first section of this Article on historical practice. Bankruptcy adjudicators have always had near-plenary authority within their cabined domain of adjusting debtor-creditor relations, the constitutional “core” referred to in *Northern Pipeline*.<sup>237</sup> Accordingly, Congress may have felt a more compelling need to spell out what magistrate judges can do; this does not support an implication of hesitance for bankruptcy judges acting within their properly defined sphere of bankruptcy.<sup>238</sup>

Still another statutory argument that bankruptcy courts are incompetent to impose criminal contempt sounds in 28 U.S.C. § 157. Some courts have noted that § 157 only confers on bankruptcy courts authority to adjudicate “core proceedings,”<sup>239</sup> and criminal contempt arguably is not a core proceeding, because it is a standalone criminal prosecution.<sup>240</sup> This is a simple statutory misreading: core proceedings are those that arise under the Code or “arise in” a case under Title 11.<sup>241</sup> The contempt citation arises *in* the bankruptcy case; its ancillary prosecution, if required, cannot be decoupled from its underlying predicate, even if it is captioned and conducted as a separate trial. Moreover, whether an ancillary trial is required in

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Tax Court judges, court officers, witnesses, and other threatened persons in the interests of justice, where criminal intimidation impedes on the functioning of the judicial process or any other official proceeding. . . .

26 U.S.C. § 7456(c).

<sup>237</sup> *Northern Pipeline*, 458 U.S. at 71 (plurality opinion).

<sup>238</sup> Pertaining to non-core proceedings, however, we are hesitant to emphasize a distinction between magistrate judges and bankruptcy judges. The fact that parties can veto bankruptcy judge adjudication, just as they may veto magistrate judge adjudication, narrows the gap between the judicial actors in this context.

<sup>239</sup> 28 U.S.C. § 157(b)(2).

<sup>240</sup> *See, e.g., Hipp*, 895 F.2d at 1518. These courts likely derive inspiration from the Supreme Court's decision in *Gompers*, 221 U.S. at 445, and *Bray v. United States*, for the proposition that contempt is “not a part of the original cause.” 423 U.S. 73, 75 (1975) (per curiam). In *Gompers*, the Court held that a lower court prosecution of criminal contempt by the parties in the underlying cause was improper because contempt is a separate proceeding. 221 U.S. at 451–52 (“If this had been a separate and independent proceeding at law for criminal contempt, to vindicate the authority of the court, . . . it could not, in any way, have been affected by any settlement which the parties to the equity cause made in their private litigation.”). In *Bray*, the Court interpreted a statutory appellate jurisdiction restriction on cases “arising under [the Economic Stabilization Act of 1970] or under regulations or orders issued thereunder” that was intended to corral appeals to a special temporary appellate court charged with ensuring uniform interpretation of the law. *Bray*, 423 U.S. at 74. A criminal contempt proceeding, tried in district court, arising out of a violation of an order under the statute, did not implicate the need for uniformity by going to the special court and hence could find its criminal appeal in the regularly presiding circuit court of appeal. *Id.* at 74–76. In bankruptcy, by contrast, jurisdiction attaches not just to cases “arising under” the Code, but to all proceedings “arising in” cases under the Code (and indeed, those “related to” such cases). 28 U.S.C. § 157. This intentionally broader jurisdictional grant renders reliance on these Supreme Court cases, with their boilerplate observations that criminal contempt proceedings are “separate” from their underlying causes, of limited utility.

<sup>241</sup> 28 U.S.C. § 157(b)(1).

the first place stems from the dictates of due process considerations, see *infra* section IV.B, which do not always require trial (let alone separate trial). Recall that direct contempt can be traditionally punished summarily and so would never be a “separate proceeding,” let alone a non-core one.

Finally, there are issues of statutory coherence that might counsel restrictively reading § 105. Consider, for example, that the federal contempt statute and Federal Rules of Criminal Procedure 42 impose numerous restraints on the exercise of contempt authority, such as when the original judge may preside over the contempt trial.<sup>242</sup> This concern strikes us as important. But that is a question of restriction, not of empowerment—how *narrowly* to read the contempt power statutorily conferred in § 105 (armed by canons of statutory interpretation, such as the absurdity doctrine,<sup>243</sup> which might come into play if a bankruptcy judge tried to exercise broader contempt power than a district judge)—not to question *whether* the power exists under that section’s fairest reading.

After what we flatter (and condemn) ourselves is an exhaustive review, it is evident that—from a statutory standpoint—there is no problem with according bankruptcy courts criminal contempt power under § 105. Therefore, any problems arising with the vesting of this power in the bankruptcy courts must be due to constitutional concerns, to which this Article next turns.

#### IV. CONSTITUTIONAL CONSIDERATIONS

Since there is no statutory impediment to bankruptcy courts exercising criminal contempt power, we turn our attention to whether there are constitutional concerns that nonetheless preclude the exercise of that power. Equally, exploration of constitutional concerns might counsel revisiting the earlier statutory interpretations through the avoidance doctrine.<sup>244</sup> And indeed, constitutional arguments have featured prominently in the circuit court opinions holding that bankruptcy courts lack criminal contempt power.<sup>245</sup> Accordingly, discussion proceeds to a review of the myriad constitutional arguments that have been advanced regarding constraints on bankruptcy courts’ contempt power. In our view, none of them presents a valid challenge to the bankruptcy courts’ authority.

##### A. ARTICLE III

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<sup>242</sup> See FED. R. CRIM. P. 42(a)(3) (providing, in part, “[i]f the criminal contempt involves disrespect toward or criticism of a judge, that judge is disqualified from presiding at the contempt trial or hearing unless the defendant consents. . .”).

<sup>243</sup> See, e.g., *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (“[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.”).

<sup>244</sup> See, e.g., *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005) (“[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court.”).

<sup>245</sup> See, e.g., *Hipp*, 895 F.2d at 1509; *John Richards Homes*, 552 F. App’x at 401.

The Supreme Court seems to have made its peace with the core exercise of bankruptcy judges' power as equivalent to the exercise of that power by Article III judges under its tortured public rights doctrine.<sup>246</sup> While the Court has been coy about the issue—never explicitly blessing bankruptcy court core authority, *e.g.*, offering only in *Northern Pipeline* that it “may well be” a public right—it seems to have grown weary of the issue.<sup>247</sup> *Northern Pipeline*'s invalidation of the 1978 bankruptcy court structure started the ball rolling with a negative holding. Rather than say bankruptcy court authority over core adjudications was acceptable, the plurality (and concurrence) held that private rights adjudication of what we could now call non-core matters by judges who lack the full protections of Article III was not acceptable:

But the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case. The former may well be a ‘public right,’ but the latter obviously is not.<sup>248</sup>

Private rights, such as matters involving common law liability for breach of contract, the plurality concluded, “lie at the core of the historically recognized judicial power” that could not be removed from Article III jurists.<sup>249</sup>

*Northern Pipeline*'s plurality failed to attract a majority. Then-Justice Rehnquist and Justice O'Connor were unwilling to shoehorn Article III into the tripartite typology of courts-martial, territorial courts, and public rights, pushed by Justice Brennan for the plurality,<sup>250</sup> and so the contours of Article III remained unsettled after the decision.<sup>251</sup> This left Congress fumbling for the constitutional threshold in designing BAFJA, clinging to the core/non-core distinction excerpted above.

#### Later Article III jurisprudence sidelined Justice Brennan's rigidity of formal

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<sup>246</sup> See, *e.g.*, *Wellness Intern. Network, Ltd. v. Sharif* 135 S. Ct. 1932, 1944–45 (2015); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982) (plurality opinion). The so-called public rights doctrine traces its origins largely back to *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1855), wherein the Court stated:

[T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.

<sup>247</sup> *Northern Pipeline*, 458 U.S. at 71 (plurality opinion); see also *Arkison*, 134 S. Ct. at 2171 (expressing no reservation of constitutionality of bankruptcy courts presiding over core proceedings).

<sup>248</sup> *Northern Pipeline*, 458 U.S. at 71 (plurality opinion).

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and . . . to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

U.S. CONST. art. III, § 2.

<sup>249</sup> *Northern Pipeline*, 458 U.S. at 70 (plurality opinion).

<sup>250</sup> See *id.* at 63–73 (outlining tripartite framework).

<sup>251</sup> See *id.* at 89–92 (Rehnquist, J., concurring).

categorization of permissible non-Article III exercise of federal judicial power. For example, *Thomas v. Union Carbide Agr. Products Co.*, commanding a majority, found Justice Brennan sidelined in concurrence, with its disavowal of bright-line distinctions between private rights and public rights: “The enduring lesson of *Crowell [v. Benson]* is that practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III.”<sup>252</sup> Functionalism’s domination over the Court became complete in the 1986 decision of *Commodity Futures Trading Commission v. Schor*, in which the Court proclaimed: “[T]his Court has rejected any attempt to make determinative for Article III purposes the distinction between public rights and private rights.”<sup>253</sup> In *Schor*, the Court held that the analysis of whether a non-Article III tribunal may exercise judicial power of the United States without running afoul Article III involves consideration of:

[T]he extent to which the ‘essential attributes of judicial power’ are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.<sup>254</sup>

Holding that the CFTC could adjudicate a common law breach of contract counterclaim when resolving a brokerage fee dispute that was voluntarily brought before the CFTC on a matter squarely within its administrative grant of authority, the Court clarified that Article III protects both individual litigant rights and structural rights regarding the separation of powers.<sup>255</sup> While the litigant’s consent to proceed before the CFTC vitiated any claim of individual right infringement, so too did his consent inform the structural analysis, by creating diminished concerns of congressional encroachment.<sup>256</sup> These considerations led the Court to apply its multi-factored balancing and find no impermissible attempt by Congress to encroach upon the federal judiciary in giving the CFTC private law counterclaim adjudication power: “[T]he magnitude of any intrusion on the Judicial Branch can only be termed *de minimis*.”<sup>257</sup> Justice Brennan, now out in the cold methodologically, dissented.<sup>258</sup>

Although many thought *Schor* settled the Article III jurisprudence, at least methodologically, the Court’s next bankruptcy case, *Granfinanciera, S.A. v. Nordberg*, raised some new doubts, with the majority reviving *Northern Pipeline*’s tripartite categorization in

<sup>252</sup> *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 587 (1985); *see also id.* at 595–600 (Brennan J., concurring) (contending *Northern Pipeline* plurality opinion test was not as inflexible as some feared).

<sup>253</sup> *Schor*, 478 U.S. at 853.

<sup>254</sup> *Id.* at 851.

<sup>255</sup> *Id.* at 854–58.

<sup>256</sup>

In such circumstances, separation of powers concerns are diminished, for it seems self-evident that just as Congress may encourage parties to settle a dispute out of court or resort to arbitration without impermissible incursions on the separation of powers, Congress may make available a quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences.

*Id.* at 855.

<sup>257</sup> *Id.* at 856.

<sup>258</sup> *Id.* at 865–67 (Brennan, J., dissenting).

dictum regarding the scope of the Seventh Amendment.<sup>259</sup> In *Granfinanciera*, with Justice Brennan now authoring, the Court held that the scope of the Seventh Amendment right is somehow analogous (perhaps coterminous) with the Article III right, which in turn the Court characterized as invoking the formalist analysis of the *Northern Pipeline* plurality rejected in *Schor*.<sup>260</sup> Worse from a clarity perspective, the Court pointedly remarked in a footnote that while core adjudication of bankruptcy rights by bankruptcy courts *may* be consistent with Article III, the jury was technically still out:

We do not suggest that the restructuring of debtor-creditor relations is in fact a public right. This thesis has met with substantial scholarly criticism . . . and we need not and do not seek to defend it here. Our point is that even if one accepts this thesis, the Seventh Amendment entitles petitioners to a jury trial.<sup>261</sup>

Nonetheless, as the decades passed, bankruptcy courts and parties settled into the core/non-core distinction, mostly shrugging off *Granfinanciera* as a dictum-laden quirk. Indeed, the Court's *per curiam* announcement the next year in *Langenkamp v. Culp*—finding no Seventh Amendment right to jury trial in defending a preferential transfer action when the defendant willingly files a claim in the bankruptcy court—seemed to confirm that *Granfinanciera* was the exception.<sup>262</sup> *Langenkamp's* reasoning was that if the parties willingly file claims in bankruptcy court, they cannot complain about lack of jury trials in those courts (and, if one accepts the dictum of *Granfinanciera* equating the Seventh Amendment rights with Article III rights, the lack of full Article III judges).<sup>263</sup>

Until *Stern*. When the *Stern* bombshell fell a couple decades later, Article III jurisprudence seemed upended once again, triggering the most recent wave of bankruptcy hysteria. *Stern's* constitutional analysis turned largely on the plurality opinion of *Northern Pipeline*, and *Schor* found itself sidelined as an afterthought (to the bewilderment of the dissent).<sup>264</sup> Indeed, *Stern* seemed hostile to the perceived danger of flexible functionalism eroding the constitutionally protected lines of Article III, stating:

No 'public right' exception excuses the failure to comply with Article III in doing so, any more than in *Northern Pipeline*. . . . What is plain here is that this case involves the most prototypical exercise of judicial power: the entry of a final,

<sup>259</sup> *Granfinanciera*, 492 U.S. at 52–55 (1989).

<sup>260</sup> *Id.* at 52–59. *Granfinanciera* held that the defendant of a fraudulent conveyance claim who did not consent to trial in bankruptcy court, filed no claim in the bankruptcy court, and generally wanted nothing to do with the bankruptcy system, could not be forced to trial in bankruptcy court without a jury. *Id.* at 58–65. This was because the Seventh Amendment afforded it the right to a jury trial based on the fact that fraudulent conveyances had been tried in the law courts with juries in pre-1787 England. *Id.* at 40–64. Because the Bankruptcy Code (at the time) provided for no juries in bankruptcy court, the system was unconstitutional under the Seventh Amendment. *Id.* at 41–50. Congress reacted by passing 28 U.S.C. § 157(e), allowing bankruptcy court jury trials when the parties (and the presiding district court) consent.

<sup>261</sup> *Id.* at 55–56 n.11.

<sup>262</sup> 498 U.S. 42, 42–45 (1990) (*per curiam*).

<sup>263</sup> *Id.*

<sup>264</sup> 564 U.S. at 491–92 (devoting minimal attention to the *Schor* factors); *id.* at 510 (Breyer, J., dissenting) (analyzing *Schor* factors).

binding judgment *by a court* with broad substantive jurisdiction, on a common law cause of action, when the action neither derives from nor depends upon any agency regulatory regime. If such an exercise of judicial power may nonetheless be taken from the Article III Judiciary simply by deeming it part of some amorphous “public right,” then Article III would be transformed from the guardian of individual liberty and separation of powers we have long recognized into mere wishful thinking.<sup>265</sup>

*Stern*’s holding, now famous, was that Congress’ division of § 157 into core and non-core actions did not properly track the constitutional parameters of core bankruptcy power that modern-day bankruptcy commissioners could adjudicate. As a result, some items statutorily listed as core under § 157(b)(2) could not, constituent with Article III, be tried before bankruptcy judges over a party’s objection.<sup>266</sup> While *Stern* threw the Article III case law into doubt, it also seemed to double down on the relevance of the core/non-core distinction in bankruptcy as a constitutional premise. To be sure, *Stern* at first suggested that the bankruptcy court’s core permissibility had yet to be authoritatively approved by the Court,<sup>267</sup> but the opinion’s focus on distinctions between core/non-core functions seems implicitly to accept it.<sup>268</sup> The Court acknowledged that, pursuant to 28 U.S.C. § 157(c)(2), “parties may consent to entry of final judgment by bankruptcy judge[s] in non-core case[s],”<sup>269</sup> and so the idea of bankruptcy judges entering at least some final adjudications in the same manner as full Article III district judges was not viewed as intrinsically problematic. Justice Scalia in his separate opinion also strongly hinted that historical practice would be a more than adequate justification for the adjudicative authority of bankruptcy courts over core proceedings.<sup>270</sup>

By the time *Executive Benefits Ins. Agency v. Arkison* was decided, the unanimous Court seemed now to have taken bankruptcy court authority as unremarkable over core—or, more precisely, “constitutionally” core—proceedings. Justice Thomas stated for the Court:

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<sup>265</sup> *Id.* at 487, 494–95.

<sup>266</sup> *Id.* at 487, 482–505.

[T]he Bankruptcy Court in this case exercised the ‘judicial Power of the United States’ in purporting to resolve and enter final judgment on a state common law claim. . . . The judicial powers the courts exercise in cases such as this remain the same, and a court exercising such broad powers is no mere adjunct of anyone.

*Id.* at 487.

<sup>267</sup> *Id.* at 487, 482–505 (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989)).

<sup>268</sup> *See id.* at 462, 482–503.

<sup>269</sup> *Id.* at 478–80.

<sup>270</sup>

[I]n my view an Article III judge is required in all federal adjudications, unless there is a firmly established historical practice to the contrary. For that reason—and not because of some intuitive balancing of benefits and harms—I agree that Article III judges are not required in the context of territorial courts, courts-martial, or true ‘public rights’ cases. . . . Perhaps historical practice permits non-Article III judges to process claims against the bankruptcy estate. . . ; the subject has not been briefed, and so I state no position on the matter.

*Id.* at 504–05 (Scalia, J., concurring) (internal citations omitted).

If a matter is core, the statute empowers the bankruptcy judge to enter final judgment on the claim, subject to appellate review by the district court. If a matter is non-core, and the parties have not consented to final adjudication by the bankruptcy court, the bankruptcy judge must propose findings of fact and conclusions of law. Then, the district court must review the proceeding *de novo* and enter final judgment.<sup>271</sup>

True, this could technically be a mere recitation of the statute, not an endorsement of its constitutionality, but significantly, Justice Thomas felt the need to add no footnotes or conditional language regarding bankruptcy judges' core adjudicative authority that so conspicuously hedged *Northern Pipeline*, *Granfinanciera*, and *Stern* itself.

The final installment of the *Stern* trilogy, *Wellness*, however, did more. *Wellness* quashed any suggestion that *Stern* had lurched into a new direction of Article III jurisprudence and instead reaffirmed the vitality of the functionalist *Schor* test.<sup>272</sup> Thus, while many commentators (justifiably) had fretted that *Stern* set to usher in a new regime of formalism to overrule, *sub silencio*, *Schor*'s functionalism,<sup>273</sup> *Wellness* confirmed that *Schor* remained good law, functionalism and all, thus quieting—at least for now—the constitutional cacophony.

Although the constitutional core functioning of bankruptcy courts has never been formally processed through the *Schor* test, the workaday assumption of its constitutionality in *Executive Benefits* and *Wellness* comes as close as possible to “constitutional estoppel” if not an outright holding regarding its acceptability. Contrary argument would be a tough row to hoe, particularly in light of Justice Scalia’s signal that he might jump ship; in his *Stern* concurrence he suggested historical exceptionalism that would presumably complement as a gloss any lingering vitality to *Northern Pipeline*'s attempted taxonomy.<sup>274</sup> Indeed, we further know that the four Justices in *Stern*'s dissent thought that non-consensual bankruptcy court adjudication was unproblematic (at least over cases in which the litigant files a claim in the underlying bankruptcy case):

[S]*chor*, [in balancing several factors] requires us to determine pragmatically whether a congressional delegation of adjudicatory authority to a non-Article III judge violates the separation-of-powers principles inherent in Article III. . . . Insofar as the majority would apply more formal standards, it simply disregards recent, controlling precedent. . . . Applying *Schor*'s approach here, I conclude that the delegation of adjudicatory authority before us is constitutional. A grant of

<sup>271</sup> *Arkison*, 134 S. Ct. at 2172. Justice Thomas' subsequent reference to the *Stern* language surrounding core matters and *Northern Pipeline*'s considerations is perhaps a de facto acceptance of bankruptcy judges having final adjudicatory authority in core bankruptcy matters. See *id.* at 2172–74.

<sup>272</sup> See *id.* at 1944–45.

<sup>273</sup> See, e.g., Erwin Chemerinsky, *Formalism Without a Foundation: Stern v. Marshall*, 2011 S. CT. REV. 183, 203–12; Kent L. Richland, *Stern v. Marshall: A Dead-End Marathon?*, 28 EMORY BANKR. DEV. J. 393, 412–16 (2012). But cf. Ralph Brubaker, *The Constitutionality of Litigant Consent to Non-Article III Bankruptcy Adjudication*, 32 No. 12 BANKR. LAW LETTER 1, 12 (Dec. 2012) (suggesting *Stern* could be subsumed within the *Schor* framework).

<sup>274</sup> See *Stern*, 564 at 503–05 (Scalia, J., concurring). Note that Justice Scalia—doubtless careful to permit a majority—styled his clearly critical opinion a full “concurrence.”

authority to a bankruptcy court to adjudicate compulsory counterclaims does not violate any constitutional separation-of-powers principle related to Article III.<sup>275</sup>

It is thus difficult to imagine a situation in which the Supreme Court could now backtrack and find Article III infirmity in bankruptcy court adjudication of core proceedings.

What does all this constitutional wrangling have to do with contempt powers? We think two connections become immediately apparent. First, none of the *Schor* factors speaks to criminal contempt.<sup>276</sup> While these factors do speak of the “essential attributes of judicial power,” there is no suggestion in *Schor*, *Wellness*, or any of the other opinions that contempt is such an attribute. Or perhaps more pointedly in reference to the current state of lower court bankruptcy jurisprudence, there is certainly no suggestion that the imposition of criminal contempt would be any more essential as an “attribute” of judicial power than civil contempt, with its ability to jail recalcitrant litigants, which most if not all lower courts in the bankruptcy context agree is constitutionally untroubling.<sup>277</sup> And although the Court has never explicated the “essential attributes of judicial power” with even remote precision, one could infer that contempt is not one of them. Indeed, Judge Posner has pragmatically observed, “[T]here is little practical difference between a presiding judge and a presiding magistrate so far as the contempt power is concerned. Judicial interpretation of Rule 42(a) of the Federal Rules of Criminal Procedure has significantly curtailed the power of summary contempt.”<sup>278</sup> Regarding the essential attributes of judicial power, he concluded that the power to impose contempt “is about as crucial as the [judge’s] robe.”<sup>279</sup> Indeed, Congress has the authority to find people in contempt,<sup>280</sup> and it would be strange to think of Congress as exercising an essential attribute of judicial power. Rather, it is more likely that essential attributes of judicial power involve *judging*—adjudicating and dispositively resolving disputes involving legal rights.<sup>281</sup>

The second connection is found in the core/non-core distinction in bankruptcy jurisdiction. If contempt is conceived as non-core to the bankruptcy function, then the bankruptcy court’s exercise of that power might be on shakier constitutional footing than if it is core. To address this concern, we might repair to historical practice to see whether bankruptcy courts entered orders of contempt.<sup>282</sup> But we might equally consider contempt as appurtenant to

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<sup>275</sup> *Id.* at 519 (Breyer, J., dissenting) (internal citation omitted) (“Considering these factors together, I conclude that, as in *Schor*, ‘the magnitude of any intrusion on the Judicial Branch can only be termed *de minimis*.’ I would similarly find the statute before us constitutional.”).

<sup>276</sup> See *Schor*, 478 U.S. at 851.

<sup>277</sup> See e.g., *Dyer*, 322 F.3d at 1192 (9th Cir. 2003); *Skinner*, 917 F.2d at 450 (10th Cir. 1990); *In re Walters*, 868 F.2d 665, 670 (4th Cir. 1989).

<sup>278</sup> *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1049 (7th Cir. 1984) (Posner, J., dissenting) (internal citation omitted).

<sup>279</sup> *Id.*

<sup>280</sup> The Supreme Court has recognized and reinforced Congress’ inherent contempt power throughout history. See, e.g., *Anderson v. Dunn*, 19 U.S. 204 (1821); *McGrain v. Daugherty*, 273 U.S. 135 (1927). For a detailed discussion of iterations of statutory congressional contempt power and other historical nuances, see TODD GARVEY & ALISSA M. DOLAN, CONGRESS’S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: A SKETCH, CONGRESSIONAL RESEARCH SERVICE (2014), <https://www.fas.org/sgp/crs/misc/RL34114.pdf>

<sup>281</sup> See *Schor*, 478 U.S. at 854.

<sup>282</sup> See *supra* Part II (canvassing historical practice).

the underlying proceeding, and hence core for a core proceeding and non-core for a non-core proceeding. And even that might be too simplistic an analysis, because some contempt, such as direct, might be more linked—dare we say, “core”—to the relevant proceeding and presiding judicial officer. Consider again that even magistrate judges have authority to remedy direct contempt, albeit limited to small fines.<sup>283</sup> Regardless, however, of whether we consider the contempt power to be core or non-core, there remains an inescapable conclusion from the Supreme Court’s Article III jurisprudence: it nowhere indicates the scope or exercise of the contempt power (criminal or civil) as being constitutionally relevant in considering the various challenges to bankruptcy judges and other jurists who lack the full protection of Article III.

This seemingly straightforward stance renders all the more mystifying repeated lower court invocation of bankruptcy court criminal contempt as somehow invoking unspecified “Article III concerns.”<sup>284</sup> These concerns appear to come from nowhere other than hysteria—they certainly find no provenance in the pronouncements of the Supreme Court. So what causes them? As best we can tell, the contempt power’s significance to Article III constitutional doctrine stems from two circuit cases that preceded *Schor* and snowballed through repeated citation. These cases addressed the constitutionality of the consensual adjudication regime of then-magistrates (the issue that finally was resolved by the Court in *Wellness* in the bankruptcy context in line with the unanimous direction of the courts of appeals case law on magistrate judges).<sup>285</sup> In wrestling with then-even-more uncertain jurisprudence, the Ninth Circuit relied on the fact that magistrate judges could not exercise contempt authority under § 636 of the Judicial Code (as it then existed) in upholding § 636(c)’s provision authorizing magistrate judges to preside over civil trials and enter final judgments, just as district judges could, with party consent. *Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, expressly pointed to the fact that magistrate judges, even when presiding over these consensual trials, could not impose contempt.<sup>286</sup> The Ninth Circuit spoke of “preserving” the Article III authority for full district judges, highlighting that the “[d]istrict courts retain the power to adjudge a party in contempt [and that §§] 636(c)(3) and (4) provide for appellate review. . . . The Act imposes no limits on review by the Supreme Court. [Thus,] Article III courts retain full authority over questions of law.”<sup>287</sup>

Two months later, the Seventh Circuit, in *Geras v. Lafayette Display Fixtures, Inc.* echoed *Pacemaker*’s reliance on the reservation of the contempt power to the district court as insulating § 636 from Article III attack. It stated that “perhaps some clear line of demarcation between the power of an Article III judicial officer and a magistrate is required[; s]uch a line of distinction may be found in the allocation of the contempt power[.]”<sup>288</sup> These stray comments

<sup>283</sup> See 28 U.S.C. § 636(e)(2)-(3).

<sup>284</sup> See, e.g., *Bingman*, 100 F.3d 653 (9th Cir. 1996); *In re Sequoia Auto Brokers Ltd., Inc.*, 827 F.2d 1281 (9th Cir. 1987).

<sup>285</sup> *Wellness*, 135 S. Ct. at 1949; see, e.g., *Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 725 F.2d 537, 545 (9th Cir. 1984) (en banc) (holding statute authorizing magistrate judges to preside over and enter final judgments in all civil trials upon the consent of the parties constitutional under Article III).

<sup>286</sup> 725 F.2d 537, 545–46 (9th Cir. 1984) (en banc).

<sup>287</sup> *Id.* at 545.

<sup>288</sup> *Geras*, 742 F.2d at 1044 (7th Cir. 1984). *Geras* presaged *Schor*’s reliance on pragmatics, implicitly recognizing that lower-level jurists within the Article III judiciary might be needed to make the system work notwithstanding

from *Pacemaker* and *Geras* seem to anchor the claim that the reserving contempt authority to Article III judges is not just a *feature* of § 636 but, rather, a *requirement* that rescues it from constitutional oblivion.

We think these cases have been sorely overread. The claim that magistrate judges' lack of contempt authority has constitutional significance appears at best to be a case of misguided reverse-engineering. The argument seems to be *because* § 636 did not give magistrate judges contempt authority, their ability to adjudicate civil trials upon consent of the parties did not violate Article III. That conclusion does not flow from any of the articulated factors in *Schor*'s pragmatic balancing. In fact, quite the contrary and as confirmed by *Wellness*, *Schor* counsels that consent is dispositive to the personal rights of Article III and, while not dispositive, important to the structural analysis.<sup>289</sup> Notwithstanding *Geras*' harping on the contempt power as constitutionally significant (if not decisive), *Wellness* makes not a peep about the contempt power's reservation to district courts having any relevance. Given these Supreme silences, it seems that these earlier circuit court cases' references to the contempt power were misfires.<sup>290</sup> The inability of subsequent case law to reconcile precedents like *Pacemaker* and *Geras* with the superseding Supreme Court opinion of *Schor* (and now *Wellness*) is regrettable and perpetuates the misapprehension that the contempt power has Article III relevance. As the foregoing analysis demonstrates, we have no indication from the Supreme Court that it does—and strong negative inference that it does not.

## B. DUE PROCESS

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first-best ideals: “In the best of all possible constitutional worlds, there would perhaps be no non-Article III judicial officers. Judicial independence and the purity of the constitutional grant of judicial power might be best assured by barring the door entirely to those unclothed with the constitutional protections.” *Id.* at 1045. Yet this is not the world, and we know it. As Justice Sotomayor wrote for the Court, “[I]t is no exaggeration to say that without the distinguished service of [bankruptcy and magistrate judges], the work of the federal court system would grind nearly to a halt.” *Wellness*, 135 S. Ct. at 1939. *Geras* also provoked a notable dissent from Judge Posner, who, never one to forgo empirics, estimated that 0.1% of federal criminal proceedings starting in 1983 were for contempt in dismissing the contempt power as irrelevant, adding “there is little practical difference between a presiding [Article III] judge and a presiding magistrate so far as the contempt power is concerned.” 742 F.2d at 1049.

<sup>289</sup> *Schor*, 478 at 855; *see also Wellness*, 135 S. Ct. at 1944 (“Allowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers so long as Article III courts retain supervisory authority over the process.”). The Supreme Court’s magistrate judge Article III jurisprudence is equally consistent. *See, e.g., Peretz v. United States*, 501 U.S. 923, 932 (1991) (Stevens, J.) (“Petitioner’s consent also eliminates [the] concern that a general authorization should not lightly be read to deprive a defendant of any important privilege.”). The Court explained:

We do not face a procedure under which ‘Congress [has] delegate[d] to a non-Art. III judge the authority to make final determinations on issues of fact.’ . . . Rather, we confront a procedure under which Congress has vested in Art. III judges the discretionary power to delegate certain functions to competent and impartial assistants, while ensuring that the judges retain complete supervisory control over the assistants’ activities.

*Id.* at 938–39.

<sup>290</sup> In an analogous context, when Congress was considering expanding the authority of magistrate judges to issue the power to “try and punish contempts,” the Department of Justice chimed in that it had “serious doubts” about the contempt provision, but without much analysis. Thirty years later, when limited contempt power was again proposed in 1997, the DOJ upped the ante by suggesting that “giving contempt power to non-Article III judges raises some constitutional concerns.” Nonetheless, the DOJ never challenged the rules, so it is not clear how deep-felt their worries truly were. *See Kende, supra* note 2344, at 568–69 (discussing DOJ letters).

The inapplicability of Article III concerns to contempt does not end the constitutional inquiry. The Supreme Court has equally made clear that there are relevant constitutional constraints on the contempt power, regardless of the Article III stature of the federal jurist, and the principal ones sound in due process.<sup>291</sup>

The contempt power is uniquely situated in terms of constitutional protections. Historically there were only the loosest of constraints on the power of the English courts to police the litigants before them. Per one characteristic pronouncement, “The sole adjudication of contempts, and the punishment thereof . . . belongs exclusively, and without interfering, to each respective Court.”<sup>292</sup> The Supreme Court in this country has grappled with what sorts of due process protections, if any, must be accorded a putative contemnor.<sup>293</sup> While acknowledging that when contempt crosses into the criminal sphere, the Constitution requires procedural rights, the Court has been vague on just when those rights come into play. Its jurisprudence suggests a continuum that varies protection as a function of the severity of the contempt sanction to be imposed.<sup>294</sup>

One anchor in the due process analysis is the hoary distinction between criminal contempt and civil contempt.<sup>295</sup> For example, in *Gompers v. Bucks Stove & Range Co*, the Court distinguished criminal from civil contempt for purposes of determining the rights to be accorded the putative contemnor.<sup>296</sup> In a unanimous opinion, the Court reversed the D.C. Circuit’s contempt conviction against Samuel Gompers, the famed labor union leader, and two of his associates for violating a preliminary injunction, because he was not accorded sufficient due process protections for a finding of criminal contempt.<sup>297</sup> The Court, while trying to categorize the underlying contempt, noted a persistent difficulty: “It may not always be easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both.”<sup>298</sup> Despite this challenge, the Court went on to distinguish the importance of the underlying nature of the contempt:

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<sup>291</sup> See, e.g., *Bagwell*, 512 U.S. 821 (1994). Procedural issues concerning due process rights arise through numerous constitutional provisions, not just the Due Process Clause, such as the right to counsel in the Sixth Amendment, the right to jury in Article III and the Sixth Amendment, and the Re-Examination Clause of the Seventh Amendment, coupled with incorporation into state law through the Fourteenth Amendment. U.S. Const. art. III; U.S. Const. amends. VI, VII, and XIV.

<sup>292</sup> *Ex parte Kearney*, 20 U.S. (7 Wheat.) 38, 44 (1822) (citing *Case of Brass Crosby*, 95 Eng. Rep. 1005, 1014 (K.B. 1771)). Although short-lived, the Supreme Court’s initial practice largely resembled the English practice of unfettered power to administer contempt. See, e.g., *Ex parte Kearney*, 20 U.S. 38, 42–44 (1822) (holding that the Court lacked authority to review a lower federal court’s contempt order because of both common law and statutory restraints). See generally Earl C. Dudley, Jr., *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 VA. L. REV. 1025 (1993) (arguing for a “conceptual simplification of the contempt process” and “some additional procedural protections to safeguard against the unjustified imposition of severe coercive sanctions”).

<sup>293</sup> See, e.g., *Bagwell*, 512 U.S. 821 (1994); *Gompers*, 221 U.S. at 418.

<sup>294</sup> See *id.* at 838–39.

<sup>295</sup> See *Dudley*, *supra* note 292, at 1035–43.

<sup>296</sup> 221 U.S. 418, 441–43 (1911).

<sup>297</sup> *Id.* at 451–52.

<sup>298</sup> *Id.* at 441 (citation omitted).

It is not the fact of punishment, but rather its *character and purpose*, that often serve to distinguish between the two classes of cases. If it is for *civil contempt* the punishment is *remedial*, and for the *benefit of the complainant*. But if it is for *criminal contempt* the sentence is *punitive*, to *vindicate the authority of the court*.<sup>299</sup>

The distinction was born, and the “character and purpose” test became foundational.<sup>300</sup> The Court also went on to recognize that “punishment by imprisonment,” which *Gompers et al.* were appealing, could be “remedial as well as punitive, and many civil contempt proceedings have resulted not only in the imposition of a fine, payable to the complainant, but also in committing the defendant to prison.”<sup>301</sup> Parsing the contempt order in this way was important for the Court, even if this sanction could be the same, because if the contempt is “merely” civil, it does not trigger the due process protections accorded criminal defendants, and so the Court’s insistence on nuance in classification was understandable.

Eighty-three years later the Court waded into contempt standards again in *United Mine Workers of America v. Bagwell*.<sup>302</sup> The underlying proceedings involved an ugly labor dispute, with an injunction barring “rock throwing, the puncturing of tires, threatening, following or interfering with respondents’ employees, placing pickets in other than specified locations, and roving picketing.”<sup>303</sup> When the union violated the injunction, contempt fines of \$64 million amassed. Because the fines were monetary, the Virginia Supreme Court held they sounded in civil contempt, rather than criminal, in part due to its conclusion, following (but distinguishing) *Gompers*, that the purpose was remedial in attempting to induce compliance with the court’s order.<sup>304</sup>

The Supreme Court reversed, holding that the lower court’s contempt award was criminal, rather than civil, and thus the contemnor had the right to a jury trial.<sup>305</sup> In doing so, the Court noted that there was no way to purge the fines through compliance, because the fines were levied after the failure to comply.<sup>306</sup> Noteworthy about *Bagwell* was not just a disagreement with the court below and reversal on the civil vs. criminal classification question, but also the shift in the Court’s analysis, focusing on more functional considerations in meting out due process rights for contempt.<sup>307</sup> For example, the Court highlighted that “indirect contempts involving discrete, readily ascertainable acts, such as turning over a key or payment of a judgment properly may be adjudicated through civil proceedings since the need for extensive,

<sup>299</sup> *Id.* (emphasis added).

<sup>300</sup> *See, e.g., Bagwell*, 512 U.S. at 827–28; *Shillitani v. United States*, 384 U.S. 364, 369 (1966).

<sup>301</sup> *Gompers*, 221 U.S. at 441–42.

<sup>302</sup> 512 U.S. 821 (1994).

<sup>303</sup> *Id.* at 843.

<sup>304</sup> *Id.* at 825–26.

<sup>305</sup> *Id.* at 826–27. The Court rejected the suggestion that fees announced in advance for non-compliance could be analogized to civil contempt, “declin[ing] to conclude that the mere fact that the sanctions were announced in advance rendered them coercive and civil as a matter of constitutional law.” *Id.* at 837.

<sup>306</sup> *Id.* (“The fines are not coercive day fines, or even suspended fines, but are more closely analogous to fixed, determinate, retrospective criminal fines which petitioners had no opportunity to purge once imposed.”).

<sup>307</sup> *See Philip A. Hostak, International Union, United Mine Workers v. Bagwell: A Paradigm Shift in the Distinction Between Civil and Criminal Contempt*, 81 CORNELL L. REV. 181 (1995).

impartial factfinding is less pressing.”<sup>308</sup> Juxtaposed to these “discrete” matters, the Court compared “out-of-court disobedience to complex injunctions[, which] often require elaborate and reliable factfinding.”<sup>309</sup> While both the opinion and Justice Scalia’s concurrence focused on the evolution of orders and their correlating complexity, the underlying message was one of context rather than dichotomy, i.e., “allowing a relatively unencumbered contempt power when its exercise is most essential, and requiring progressively greater procedural protections when other considerations come into play.”<sup>310</sup> On the facts of the case, the Court held that “[u]nder these circumstances, criminal procedural protections such as the rights to counsel and proof beyond a reasonable doubt are both necessary and appropriate to protect the due process rights of parties and prevent the arbitrary exercise of judicial power.”<sup>311</sup> (The Court did not opine what protections, if any, would be necessary for direct contempt, as *Bagwell* was the culmination of multiple indirect contempts.)<sup>312</sup>

In addition to gradation in procedural protections based on the underlying offense, procedural protections also appear to vary with the severity of sanction when courts invoke their contempt powers. The *Bagwell* court concluded that multi-million dollar fines against a labor union were “serious” and thus triggered the right to a jury trial.<sup>313</sup> *Bagwell* reiterated that the jury trial right was not absolute, however, even if the contempt is labeled “criminal” in nature, because “imposition only of *serious* criminal contempt fines triggers the right to jury trial.”<sup>314</sup> Where to draw the “serious” contempt fines line is far from clear. In an earlier case, the Court found that a \$10,000 fine did not trigger protections of Article III and the Sixth Amendment, relying on the then-prevailing statutory definition of “petty offense.”<sup>315</sup> Nor does jail in itself

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<sup>308</sup> *Bagwell*, 512 U.S. at 833.

<sup>309</sup> *Id.* at 833–34.

<sup>310</sup> *Id.* at 832. Justice Scalia’s historically focused opinion paid special attention to the complex nature of modern court orders in gauging the degree of constitutional protection due the contemnor:

[The modern decree] differs in almost every relevant characteristic from relief in the traditional model of adjudication, not the least in that it *is* the centerpiece. . . . It provides for a complex, ongoing regime of performance rather than a simple, one-shot, one-way transfer. Finally, it prolongs and deepens, rather than terminates, the court’s involvement with the dispute.

*Id.* at 842 (Scalia, J., concurring) (citation omitted). Justice Scalia concluded: “It is not that the times, or our perceptions of fairness, have changed . . . ; but rather that the modern judicial order is in its relevant essentials not the same device that in former times could always be enforced by civil contempt.” *Id.* at 843–44.

<sup>311</sup> *Id.* at 834.

<sup>312</sup> *Bagwell*, 512 U.S. at 837 (recognizing that “[t]he union’s sanctionable conduct did not occur in the court’s presence or otherwise implicate the court’s ability to maintain order and adjudicate the proceedings before it”).

<sup>313</sup> *Id.* at 837–39.

<sup>314</sup> *Id.* at 837 n.5 (emphasis added) (citing *Bloom v. Illinois*, 391 U.S. 194, 210 (1968)). The Ninth Circuit has noted the distinction between “serious” and “relatively mild” sanctions but declined to offer a precise definition. *See Dyer*, 322 F.3d at 1193 (9th Cir. 2003); *Hanshaw*, 244 F.3d at 1139 n.10 (9th Cir. 2001). It is unclear whether criminal contempt – or perhaps criminal contempt with “serious” fines – should be considered a felony. *See United States v. Cohn*, 586 F.3d 844, 848 (11th Cir. 2009) (“[C]riminal contempt is best categorized as a sui generis offense, rather than a felony or misdemeanor.”). There is some Supreme Court dictum suggesting that Article III concerns may spring back into relevance if contempt is considered a felony. *See Gomez v. United States*, 490 U.S. 858, 871–72 (1989) (interpreting the Federal Magistrate Act’s reference to magistrate judges’ authority to preside over civil and small criminal matters forecloses their authority to preside over felony cases absent party consent under the open-ended catch-all provision of 28 U.S.C. § 636(b)(2); referencing constitutional avoidance doctrine).

<sup>315</sup> *Muniz v. Hoffman*, 422 U.S. 454, 477 (1975). In reaching its decision, the Court considered 18 U.S.C. § 1(3) (1982 ed., Supp. V) (repealed 1984), which defined petty offenses as crimes for which a penalty “does not exceed

suggest that a sanction is sufficiently serious to trigger the jury trial right as a procedural protection in contempt according to the Court, consistent with its precedent that jail punishments of less than six months do not trigger the Article III and Sixth Amendment rights to jury trial.<sup>316</sup> Lower courts, too, provide disparate assessments of seriousness based on quantum assessed. For example, the Eleventh Circuit, in *In re E.I. DuPont De Nemours & Co.-Benlate Litig.*, had “little trouble concluding that the [roughly \$7 million] sanctions the district court imposed were overwhelmingly punitive—and thus criminal—in nature,”<sup>317</sup> whereas the First Circuit has found that fines totaling \$1 million a month were civil in nature.<sup>318</sup>

Thus, there is nothing one could accurately describe as clear law specifying the due process constraints on the contempt power. The most one can say is the law makes clear that such constraints exist. Worse, “seriousness” of the sanction injects a new variable into the sliding scale of required due process protections. The best we can ascertain is that while the criminal/civil divide is important, there is an under-specified balancing that goes on that analyzes the severity of the punishment to be imposed (and other considerations) in gauging the level of procedural protections required under the Constitution. Indeed, we think some of these due process concerns animate the constraints of Federal Rule of Criminal Procedure 42 (set out in the margin), which, for example, requires prosecution of a criminal contempt to be conducted by an independent prosecutor, i.e., not the judge him- or herself,<sup>319</sup> as seemingly would have occurred

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imprisonment for a period of six months or a fine of not more than \$5,000 for an individual and \$10,000 for a person other than an individual, or both.” *Id.* at 476–77. Although 18 U.S.C. § 1(3) was repealed, the petty offense distinction is currently codified at 18 U.S.C. § 19.

<sup>316</sup> *Frank v. United States*, 395 U.S. 147, 150 (1969) (finding that “sentences for criminal contempt of up to six months may be constitutionally imposed without a jury trial”); *Duncan v. Louisiana*, 391 U.S. 145, 159–60 (1968) (holding same regarding non-contempt crimes).

<sup>317</sup> 99 F.3d 363, 368 (11th Cir. 1996). The court highlighted that there was not a “compensatory aspect to the contempt order” and “there was no coercive aspect to the district court’s contempt order.” *Id.*

<sup>318</sup> See *AngioDynamics, Inc. v. Biolitec AG*, 780 F.3d 420, 425–28 (1st Cir.), *cert. denied*, 136 S. Ct. 535 (2015). The court focused on the corporation’s ability to purge the fines with compliance. *Id.* at 427 (“The fine accumulates over time, incentivizing Defendants to cure the contempt promptly. . . . Defendants thus retain the power to end the accruing of the fines and avoid the potential fiscal catastrophe invoked in their brief.”). In the process of litigation, the contempt fines surpassed \$160 million, nearly seven times the amount of the original award. *Id.* at 427. The First Circuit remanded the case and instructed “the district court to amend the sanction order so that the fines cease to accrue at some total amount.” *Id.*

<sup>319</sup> “The court must request that the contempt be prosecuted by an attorney for the government, unless the interest of justice requires the appointment of another attorney. If the government declines the request, the court must appoint another attorney to prosecute the contempt.” FED R. CRIM. P. 42(a)(2); see also *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 803 (1987) (establishing the principle codified in Rule 42). In full, Rule 42 provides:

- (a) Disposition After Notice. Any person who commits criminal contempt may be punished for that contempt after prosecution on notice.
  - (1) Notice. The court must give the person notice in open court, in an order to show cause, or in an arrest order. The notice must:
    - (A) state the time and place of the trial;
    - (B) allow the defendant a reasonable time to prepare a defense; and
    - (C) state the essential facts constituting the charged criminal contempt and describe it as such.
  - (2) Appointing a Prosecutor. The court must request that the contempt be prosecuted by an attorney for the government, unless the interest of justice requires the appointment of another attorney. If the government declines the request, the court must appoint another attorney to prosecute the contempt.

in the good old days of English common law.<sup>320</sup> Rule 42 similarly compels recusal when the criminal contempt involves “disrespect toward or criticism of a judge.”<sup>321</sup> Although it is far from certain the Supreme Court would consider each of these rules constitutionally compelled,<sup>322</sup> these constraints established by rule surely reflect the due process concerns of the “awesome power” of criminal contempt.<sup>323</sup> Note, too, that Rule 42 reveals an inherent gradation of the procedural protections for the contemnor; one where the citing judge is the specific target of the contempt requires more protection, which seems an acknowledgement that there is no one size fits all due process outfit.<sup>324</sup>

So far, so good (even if so far, so vague). Matters gets confusing, however, when lower courts addressing the issue of bankruptcy judges’ criminal contempt authority conflate due process constraints, which apply to all courts, with Article III constraints on bankruptcy judges. Some suggest that while district court judges might be able to award criminal contempt awards, bankruptcy judges should be limited to “minor” monetary criminal contempt awards in order to comply with the Constitution. One such case, *In re John Richards Homes Building Co., LLC*, explicitly held that “[constitutional] concerns are magnified for bankruptcy courts, which have limited jurisdiction, are less capable of providing the necessary procedural protections than district courts, and are not Article III courts.”<sup>325</sup> We do not see the Article III concern.

In sum, we believe that several provisions of the Constitution impose material constraints on the exercise of the criminal contempt power, but we see no sound basis for the position that

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(3) Trial and Disposition. A person being prosecuted for criminal contempt is entitled to a jury trial in any case in which federal law so provides and must be released or detained as Rule 46 provides. If the criminal contempt involves disrespect toward or criticism of a judge, that judge is disqualified from presiding at the contempt trial or hearing unless the defendant consents. Upon a finding or verdict of guilty, the court must impose the punishment.

(b) Summary Disposition. Notwithstanding any other provision of these rules, the court (other than a magistrate judge) may summarily punish a person who commits criminal contempt in its presence if the judge saw or heard the contemptuous conduct and so certifies; a magistrate judge may summarily punish a person as provided in 28 U.S.C. § 636(e). The contempt order must recite the facts, be signed by the judge, and be filed with the clerk.

FED. R. CRIM. P. 42.

<sup>320</sup> Under early English common law, “the contempt power extended even to summary execution, and there was no avenue for appellate review.” Dudley, *supra* note 292, at 1034; *see also* Case of Brass Crosby, 95 Eng. Rep. 1005, 1014 (K.B. 1771) (highlighting Blackstone’s observation that “[t]he sole adjudication of contempts, and the punishment thereof . . . belongs exclusively, and without interfering, to each respective Court”).

<sup>321</sup> FED. R. CRIM. P. 42(a)(3).

<sup>322</sup> *Cf. Bagwell*, 512 U.S. 821, 844 (1994):

When an order governs many aspects of a litigant’s activities, rather than just a discrete act, determining compliance becomes much more difficult. Credibility issues arise, for which the factfinding protections of the criminal law (including jury trial) become much more important. And when continuing prohibitions or obligations are imposed, the order cannot be complied with (and the contempt ‘purged’) in a single act; it continues to govern the party’s behavior, on pain of punishment—not unlike the criminal law.

<sup>323</sup> *Bingman*, 100 F.3d at 657 (9th Cir. 1996). “That one and the same person should be able to make the rule, to adjudicate its violation, and to assess its penalty is out of accord with our usual notions of fairness and separation of powers.” *Bagwell*, 512 U.S. at 841 (Scalia, J., concurring).

<sup>324</sup> *See* FED. R. CRIM. P. 42(a)(3).

<sup>325</sup> 552 F. App’x 401, 415 (6th Cir. 2013) (emphasis added).

Article III, § 2 does.<sup>326</sup> Due process is a constraint on *all* courts and has nothing to do with Article III stature. We acknowledge that the Court’s contempt jurisprudence is far from unambiguous but feel compelled to observe that courts issuing decisions which start with the premise that there is a significant nexus between the criminal contempt power and Article III both misread the controlling precedents and conflate two distinct strands of constitutional jurisprudence. Essentially, they mix Article III apples with Due Process oranges.<sup>327</sup>

### C. OTHER CONSTITUTIONAL CONSIDERATIONS

There are still other arguments sounding in constitutionality that suggest a problem with bankruptcy judges exercising criminal contempt power. Although none is persuasive, we touch on them briefly here for sake of completeness.

First, some courts have raised “[t]he one who decides must hear”<sup>328</sup> principle in holding that bankruptcy judges cannot adjudicate criminal contempt. They apparently begin with the assumption that bankruptcy judges cannot impose criminal contempt and then go a step further to conclude that bankruptcy judges are also unable to issue an order subject to review by the district court (as the ten-day objection rule of former Rule 9020 had provided).<sup>329</sup>

This principle can trace its lineage to English law when review was often conducted upon written record, but this principle has never worked its way into the relevant Article III jurisprudence.<sup>330</sup> In fact, the closest connection we found on this point was a comment in the dissent of *United States v. Raddatz*, the case upholding magistrate judges’ ability to hear suppression motions in criminal trials subject to district court review and plenary authority to conduct a rehearing de novo.<sup>331</sup> Justice Marshall dissented from the holding that the district court’s oversight and ability to order a new hearing sufficed for Article III, protesting thus:

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<sup>326</sup> Interestingly, the public rights doctrine has been interpreted as inapplicable in criminal matters, as such cases “traditionally have been regarded as requiring judicial resolution.” Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 952 n.208 (1988). That said, magistrate judges do have jurisdiction to try petty criminal offenses. See 28 U.S.C. § 636(a)(4); FED. R. CRIM. P. 58(b)(2) (“At the defendant’s initial appearance . . . the magistrate judge must inform the defendant of . . . the right to trial, judgment, and sentencing before a district judge—unless the charge is a petty offense. . .”).

<sup>327</sup> We concede, of course, that there may be indirect restriction. For example, if due process requires the right to a jury, then a bankruptcy court is bound by the strictures of § 157(e).

<sup>328</sup> *Morgan v. United States*, 298 U.S. 468, 481 (1936).

<sup>329</sup>

[W]e conclude that *de novo* district court review—and certainly where that review is wholly on the basis of the bankruptcy court trial record—is not a sufficient basis on which to predicate a section 401(3) criminal contempt conviction for violation of a bankruptcy court order, notwithstanding that the district court may purport to itself render the judgment of conviction and impose the sentence. On the contrary, such criminal contempts must be tried before the district court.

*Hipp*, 895 F.2d at 1513 (impugning former Rule 9020).

<sup>330</sup> See, e.g., *Local Gov’t Bd. v. Arlidge* [1915] A.C. 120 (reversing *King v. Local Gov’t Bd.* (1914) 1 K.B. 160).

<sup>331</sup> 447 U.S. 667, 679-81 (1980). Chief Justice Burger stated in the Court’s opinion:

In passing the 1976 amendments to the Federal Magistrates Act, Congress was alert to Art. III values concerning the vesting of decisionmaking power in magistrates. Accordingly, Congress made clear that the district court has plenary discretion whether to authorize a magistrate to hold

[J]udicial factfinding on the basis of a written record carries an intolerably high risk of error. Any experienced lawyer is aware that findings of fact frequently rest on impressions of demeanor and other factors which do not appear on the face of the record. . . . [And] the notion that, as a matter of basic fairness, a person facing the prospect of grievous loss is entitled to relate his version of the facts to the official entrusted with judging its accuracy.<sup>332</sup>

We have no quarrel with these general observations of dictum, but they beg the question whether the bankruptcy judge can render the decision in the first instance. For the reasons belabored above, we see no intrinsic reason under Article III jurisprudence why the bankruptcy judge cannot both *hear* and *decide*, and so the constitutional principle of “the one who decides must hear” is fully satisfied by residing the decision-making authority with the bankruptcy judge.<sup>333</sup>

Second, some courts have raised concern over the democratic deficit, pointing to the segregation of the contempt power from general legislative control over the promulgation of substantive crimes.<sup>334</sup> And the unchecked nature of the contempt power has caused anxiety at the Supreme Court, tracing back to *In re Terry*.<sup>335</sup> The Ninth Circuit has expressed even greater concern over this notion of a democratic deficit undergirding contempt, explicitly worrying about Congress’ lack of involvement, even with regard to civil contempt. In *In re Dyer*, an appeal of a bankruptcy court’s punitive sanction against a creditor who violated the automatic stay, the court fretted that the ability of bankruptcy judges to impose contempt sanctions beyond the confines of § 362(h)’s provision for intentional stay violations raised constitutional concerns analogous to common law crimes:

When a court merely implements the will of Congress—such as by awarding punitive damages to litigants under § 362(h)—there is no concern that a court is abusing judicial power shielded from direct democratic control. In contrast, the contempt power is ‘uniquely liable to abuse,’ in part because ‘[u]nlike most areas of the law, where a legislature defines both the sanctionable conduct and the penalty to be imposed, civil contempt proceedings leave the offended judge solely responsible for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct.’<sup>336</sup>

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an evidentiary hearing and that the magistrate acts subsidiary to and only in aid of the district court. Thereafter, the entire process takes place under the district court’s total control and jurisdiction.

*Id.* at 681 (internal citations omitted). This drew a dissent from Justice Marshall. *Id.* at 696 (Marshall, J., dissenting).

<sup>332</sup> *Id.* Justice Marshall did not claim that a district judge must preside over all litigation stages, rather his objection was to magistrates presiding over “cases involving case-dispositive issues that are impossible to resolve on the basis of the written record.” *Id.* at 698.

<sup>333</sup> See *supra* text accompanying notes 328–32.

<sup>334</sup> See, e.g., *Hipp*, 895 F.2d at 1513.

<sup>335</sup> 128 U.S. 289, 313 (1888).

<sup>336</sup> *Dyer*, 322 F.3d at 1194–95 (9th Cir. 2003) (citation omitted).

The court further noted that “[a]dditional procedural protections are therefore required before that authority can be used in a punitive fashion.”<sup>337</sup> The court’s negative disposition toward bankruptcy court authority strikes us as odd. Article III concern is generally rooted in the notion that judges ought to be independent of Congress; yet here, the court seems to be saying litigants need the protection of Congress when courts exercise their contempt powers. It is certainly legitimate to expect bankruptcy courts to exercise wise restraint when imposing contempt citations. However, this argument, like so many others, again leaves us wondering what that expectation—or even requirement—has to do with the fact that bankruptcy judges lack the mantle of Article III. On the contrary, if the concern is immunity from political pressures and accountability, then that concern should attach with equal if not greater vigor to the exercise of contempt authority by a life-tenured Article III district judge.

Reflecting on these various constitutional arguments, the trend is clear: courts rely on a hodge-podge of constitutional doctrines dressed in Article III clothing—that are actually entirely unrelated to Article III jurisprudence—all in the service of a misguided attempt to prove the constitutional infirmities of bankruptcy judge contempt powers. It is our view that the courts making these arguments are simply falling victim to, or amplifying, what we see as bankruptcy hysteria. On close examination, their arguments simply do not withstand scrutiny.

## V. PRUDENTIAL CONSIDERATIONS

Finally, there are a host of prudential considerations that might counsel against bankruptcy courts imposing sanctions for criminal contempt. These do not flow from alleged constitutional impediments, but they nonetheless warrant comment.

The first concern is jury trials. Given that criminal contempt proceedings may carry a right to a jury,<sup>338</sup> and given the statutory consent requirement for a jury trial in bankruptcy court,<sup>339</sup> it may be that contemnors are unlikely to consent to proceeding before a bankruptcy judge. The solution to this is simple: don’t worry about it. Since it is wholly unclear whether the contemnors will consent to a jury trial, there is no reason for bankruptcy judges to shy away from criminal contempt on the pre-emptive empirical fear that the litigants may trend toward non-consent.<sup>340</sup>

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<sup>337</sup> *Id.* at 1195.

<sup>338</sup> *See Frank*, 395 U.S. at 150 (1969) (holding that sentences for criminal contempt in excess of six months trigger the right to a jury trial).

<sup>339</sup> Recall that bankruptcy courts possess the right to hold jury trials pursuant to 28 U.S.C. § 157(e).

<sup>340</sup> Even before § 157(e) was added after *Granfinanciera*, the Article III courts perceived no problem with allowing bankruptcy courts to conduct jury trials, even without the consent provision that came to be added by § 157(e):

The question whether to allow bankruptcy judges to conduct jury trials has not been answered for us by Congress. It has been left to us. We should decide it in the way most consistent with sensible judicial administration, and without concern that Article I judicial officers may appear to be encroaching on the turf-usurping [] prerogatives-of Article III judges. We should answer the question “yes.”

*In re Grabill Corp.*, 967 F.2d 1152, 1161 (7th Cir. 1992) (Posner, J., dissenting).

The second concern is that bankruptcy judges are not familiar with criminal law, criminal proceedings, or the Federal Rules of Criminal Procedure. This strikes us as a more real problem, because bankruptcy judges are not familiar with prosecutors, plea allocutions, and the like. Then again, jury trials are themselves rare beasts in bankruptcy courts already, so it is not clear that the “marginal unfamiliarity” of the criminal process is any worse than allowing bankruptcy courts to preside over civil juries.<sup>341</sup> Still, one would want a judge capable and comfortable with the criminal process to preside over a criminal trial. Perhaps a solution would be a *sua sponte* recommendation of the bankruptcy court that the reference be withdrawn, or the case re-assigned to another bankruptcy judge, whenever the court feels uncomfortable adjudicating the matter before it.<sup>342</sup>

The third trouble is what to do with the core/non-core distinction and relatedly what to do about consent (wholly apart from the jury right concerns). If we conclude that bankruptcy courts can impose criminal contempt, and we do not condition the authority to enter those awards on the consent of the parties, then an odd bootstrapping potential arises. Recall that bankruptcy courts cannot constitutionally enter final judgments in non-core matters absent consent of the parties; absent such consent they must restrict themselves to reports and recommendations to the district court.<sup>343</sup> If that is so, then should a bankruptcy court be able to enter a final judgment of criminal contempt if the underlying proceeding in which the conduct occurred is non-core? The answer is not intrinsically clear to us. On the one hand, it could be argued that the greater consent to bankruptcy court final judgment over non-core proceedings under § 157(c)(2) subsumes the lesser consent over any contempt proceedings appurtenant thereto. On the other hand, especially when the criminal power of the State is involved, one can say that consent to entry of civil judgment should not provide the basis for an implication of consent to adjudication of criminal proceedings by the same judicial officer. Perhaps then we might require express consent to the contempt proceeding.<sup>344</sup>

But what if the non-core matter is under § 157(c)(1), and hence the bankruptcy court is only authorized to enter a report and recommendation because the parties have withheld consent? Would giving the bankruptcy court the power to enter final judgment in a contempt matter when

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<sup>341</sup> See *In re Grabill Corp.*, 976 F.2d 1126, 1126 n.2 (7th Cir. 1992) (order denying rehearing en banc) (Coffey, J., concurring) (citation omitted) (noting “only 6 jury trials have resulted from the 241,559 bankruptcy filings in the Northern District of Illinois [between 1985 and 1992] (4 were held in district court and 2 in bankruptcy court)”; see also Stephen J. Ware, *Similarities Between Arbitration and Bankruptcy Litigation*, 11 NEV. L.J. 436 (2011) (noting rarity of civil jury trials in bankruptcy court); David L. Tillem, *An Overview of Bankruptcy Litigation*, 2008 WL 5939819, at \*7 (2008) (“[J]ury trials are a rare occurrence in the bankruptcy forum . . .”).

<sup>342</sup> Perhaps Judge Posner’s dissent in *Geras* vitiates some of these concerns, see *supra* note 288, in highlighting the rarity of contempt proceedings. In light of contempt’s rarity (let alone “serious” contempt triggering major due process concerns), Judge Posner wryly observed, “We are told that by a happy coincidence [that the power to hold someone in contempt of court] is [a] crucial thing—that by this, and this alone, shall a federal judge be recognized. Actually it is about as crucial as the robe.” *Geras*, 742 F.2d at 1049 (Posner, J., dissenting). If contempt proceedings constituted a substantial portion of the federal docket, or if there was a reason to believe that such proceedings necessitated skillsets that bankruptcy judges substantially lacked, then perhaps there would be more of a reason to give pause. Consider, too, that some bankruptcy judges are formerly magistrate judges, and “baby judge school,” attended by magistrate and bankruptcy judges, can presumably add whatever to its curriculum is desired.

<sup>343</sup> 28 U.S.C. § 157(c).

<sup>344</sup> Cf. *Wellness*, 135 S. Ct. at 1947-48 (2015) (distinguishing express from implied consent).

the parties have exercised their Article III right to adjudication before an Article III district judge create an odd bootstrap where the bankruptcy court would have more adjudicative authority in contempt – and possibly criminal contempt – than it would have in the underlying proceeding? We confess this gets us into deeply uncomfortable territory, especially in light of the touchy constitutional terrain bankruptcy judges occupy in the first place. The countervailing concern is that if the contempt power (at least some degree of it, e.g., direct contempt) is intrinsic to the functioning of a court, then it might be problematic to declaw a judge of punitive power in his or her courtroom.<sup>345</sup>

Finally, it might be helpful to compare the contempt authority accorded magistrate judges by statute.<sup>346</sup> While, for the reasons discussed above, we note that bankruptcy judges likely have more authority as a matter of historical precedent, at least within their bailiwick of bankruptcy, than magistrate judges, it may nonetheless be prudent to consider the restrictions under § 636 as applying to bankruptcy judges. For example, it might make sense for bankruptcy judges to follow the pattern of district court judges' contempt authority for core matters, but subject themselves, perhaps by Rule, to the same restrictions as magistrate judges for non-core matters. The advantage of doing so would be to prevent the odd situation where bankruptcy judges have asymmetric power with counterpart judicial officers. Again, this flows from neither statutory nor constitutional compulsion, but just as the Emergency Rule eventually found its way into BAFJA, the bankruptcy system might function more effectively if these restraints were codified in statute—a kind of adoption of bankruptcy contempt best practices.

## CONCLUSION

We have gone on long enough. The Constitution imposes important constraints on the exercise of judicial power by judges who lack the full protections of Article III. The Constitution also imposes important constraints on the exercise of the contempt power. These provisions are unrelated and frequently conflated by many courts. Freed of this analytical confusion, we have no problem reading § 105 for what it is—an expansive conferral of statutory authority (assuming, arguendo, that such a grant is required in the first place) for bankruptcy courts to exercise contempt powers. We recognize that there are prudential and pragmatic considerations that flow from our conclusion, and we look forward to courts and policymakers working them out. We just want them to do so reasonably, without hysteria.

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If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls 'the judicial power of the United States' would be a mere mockery.

*Gompers*, 221 U.S. at 450. Magistrate Judges may impose summary direct contempt. 28 U.S.C. § 636(e)(2). They may enter prosecution-on-notice contempt with party consent in other situations. *Id.* at § 636(e)(3). One might explore in subsequent work whether they feel defanged under this approach.

<sup>346</sup> See 28 U.S.C. § 636(e).