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Bankruptcy Federalism: A Doctrine Askew

Margaret Howard*

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I. INTRODUCTION

For too long, *Younger v. Harris*¹—unexamined and taken for granted—has served to keep bankruptcy’s promised benefits tantalizingly out of the reach of some debtors. By seriously limiting the circumstances under which a federal court can enjoin state criminal proceedings, *Younger* has effectively eliminated all of the exceptions to the Anti-Injunction Act. That

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1. 401 U.S. 37 (1971); see also George D. Brown, *When Federalism and Separation of Powers Collide—Rethinking Younger Abstention*, 59 GEO. WASH. L. REV. 114, 117 (1990) (“*Younger* is anything but dead . . .”).

alone is worthy of discussion and has attracted some attention, but none of that attention has taken a bankruptcy focus, even though bankruptcy is one of the eviscerated exceptions. Re-examination of *Younger* through a bankruptcy lens is long overdue, and recent developments, although seemingly unrelated to these questions, make a renewed discussion timely.

The need for a federal injunction against state criminal proceedings arises when those proceedings serve a debt-collection purpose and, in addition, involve a debt that is (or, under a proper construction of law, ought to be) dischargeable.² This Article argues that *Younger* should not be an impediment to such an injunction, given the uniqueness of bankruptcy and the distinctions between it and the civil rights context from which *Younger* evolved.

This Article will begin with the Anti-Injunction Act and its bankruptcy exception.³ This Article will then discuss *Younger*'s judicially-created abstention doctrine that all but repeals the statute's exceptions,⁴ as well as the interpretation given *Younger* by *Mitchum v. Foster*,⁵ which was decided the following year.⁶ While convincing arguments against *Younger* have been made for decades, this Article's goal is more modest—to demonstrate why the bankruptcy exception to the Anti-Injunction Act should be given its full force, *Younger* (and *Mitchum*) to the contrary notwithstanding.⁷

This Article will then review the Bankruptcy Code's injunction provisions,⁸ demonstrating that, notwithstanding an exception to the automatic stay, criminal proceedings rooted in statutes having a collection, rather than penal, purpose are not immune from the reach of a bankruptcy court injunction designed to protect a debtor's right to discharge.

Finally, this Article will demonstrate that certain restitutionary obligations should be dischargeable in Chapter 7 bankruptcy cases. To do so, this Article will undertake the text-based analysis of the Code eschewed by the Supreme Court when, undoubtedly misled by *Younger*, it held to the contrary in *Kelly v. Robinson*.⁹

The scope of discharge is for Congress to determine and, to date, Congress has been unresponsive to arguments that restitution ordered by a state criminal court, pursuant to a collection-oriented criminal statute, should be a dischargeable obligation.¹⁰ Concededly, the argument for discharge of

2. The best example of such a proceeding is a bad check prosecution because such statutes are ubiquitous. However, other examples abound. See *infra* note 279 and accompanying text.

3. See *infra* text accompanying notes 11–22.

4. See *infra* text accompanying notes 23–60.

5. 407 U.S. 225 (1972).

6. See *infra* text accompanying notes 61–85.

7. See *infra* text accompanying notes 86–174.

8. See *infra* text accompanying notes 175–215.

9. 479 U.S. 36 (1986). See *infra* text accompanying notes 216–325.

10. See *infra* text accompanying notes 217–21.

such obligations is narrow, but an argument is available nonetheless. In any event, its narrowness does not affect the point here—namely, that federalism doctrines should not protect state efforts to determine the scope of a federal bankruptcy discharge by criminalizing the failure to pay certain debts. Congress determines the scope of discharge, through the vehicle of the Bankruptcy Code.

II. ABSTENTION

A. *Anti-Injunction Act*

The Anti-Injunction Act dates to 1793, when its predecessor was first passed.¹¹ As originally worded, it flatly prohibited a federal court from enjoining a state court proceeding.¹² There were no exceptions. Although the meaning and intent of that provision have been the subject of some discussion,¹³ and courts quickly crafted a number of judicial exceptions to the statute's broad scope,¹⁴ it is the later legislative amendments that are

11. See Act of Mar. 2, 1793, ch. 22, § 5, 1 Stat. 333.

12. The statute, which was part of the Judiciary Act of 1793, provided in full:

And be it further enacted, That writs of ne exeat and of injunction may be granted by any judge of the supreme court in cases where they might be granted by the supreme or a circuit court; (a) but no writ of ne exeat shall be granted unless a suit in equity be commenced, and satisfactory proof shall be made to the court or judge granting the same, that the defendant designs quickly to depart from the United States; *nor shall a writ of injunction be granted to stay proceedings in any court of a state*; nor shall such writ be granted in any case without reasonable previous notice to the adverse party, or his attorney, of the time and place of moving for the same.

Id. § 5, 1 Stat. at 334–35 (emphasis added).

13. The reasons for passage of the original provision “are not wholly clear.” *Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng’rs*, 398 U.S. 281, 285 (1970). In the absence of any record of debates surrounding the Judiciary Act of 1793, of which the Anti-Injunction Act was a part, the Supreme Court in *Toucey v. New York Life Insurance Co.*, 314 U.S. 118 (1941), found it more probable “that the provision reflected the prevailing prejudices against equity jurisdiction” than that it “reflected the then strong feeling against the unwarranted intrusion of federal courts upon state sovereignty.” *Id.* at 131. Even so, the *Toucey* Court immediately cast the Anti-Injunction Act in federalism terms:

[T]he purpose and direction underlying the provision are manifest from its terms: proceedings in the state courts should be free from interference by federal injunction.

The provision expresses on its face the duty of “hands off” by the federal courts in the use of the injunction to stay litigation in a state court.

Id. at 132. There has been no turning back.

14. The Supreme Court recounted this history in *Mitchum v. Foster*, 407 U.S. 225 (1972), which is discussed in text, *infra*, at notes 61–85. Because it had “recognized that exceptions must be made to [the Anti-Injunction Act’s] blanket prohibition if the import and purpose of other Acts of Congress were to be given their intended scope,” the Court over the years found that at least six federal laws, other than bankruptcy, have empowered federal courts to enjoin state proceedings.

significant for bankruptcy purposes. For it was in the very first amendment, enacted in 1874, that Congress expressly made bankruptcy an exception to the Anti-Injunction Act.¹⁵ The statute was amended again in 1948,¹⁶ at which time it took its current form: “A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.”¹⁷

Bankruptcy is an “expressly authorized” exception to the Anti-Injunction Act—a fact that has been accepted for well over 100 years, even though bankruptcy is no longer expressly mentioned in the statute.¹⁸ The legislative history accompanying the Bankruptcy Reform Act of 1978 specifically states that § 105 is “an authorization, as required under 28 U.S.C. § 2283, for a court of the United States to stay the action of a State court,”¹⁹ and courts at every level have recognized the exception both before and after revision of the Bankruptcy Code in 1978.²⁰

Mitchum, 407 U.S. at 234. These included, for example, “legislation providing for removal of” state proceedings to federal court. *Id.* In addition, the Court recognized “implied” exceptions to the Anti-Injunction Act’s general prohibition of federal injunctions, including an “*in rem*” exception intended to prevent interference by a state court with a federal court’s jurisdiction over a res, and a “relitigation” exception that enabled a federal court to prevent relitigation in state court of an issue previously decided by a federal court. *Id.* at 235. A third exception permitted an injunction when the federal plaintiff was the United States or “a federal agency asserting ‘superior federal interests.’” *Id.* at 235–36. See also *Toucey*, 314 U.S. 118; Martin H. Redish, *The Anti-Injunction Statute Reconsidered*, 44 U. CHI. L. REV. 717, 720 (1977) [hereinafter Redish, *Anti-Injunction Statute*].

15. The exception permitted an injunction “where such injunction may be authorized by any law relating to proceedings in bankruptcy.” Revised Statutes of 1874, ch. 12, § 720, 18 Stat. 136.

16. Act of June 25, 1948, ch. 646, 62 Stat. 968. This amendment came in response to the Court’s decision in *Toucey*, in which the Court cast “considerable doubt upon the approach to the anti-injunction statute reflected in its previous decisions.” *Mitchum*, 407 U.S. at 236. *Toucey* “expressly disavowed the ‘relitigation’ exception to the statute, and emphasized generally the importance of recognizing the statute’s basic directive ‘of “hands off” by the federal courts in the use of the injunction to stay litigation in a state court.’” *Id.* (quoting *Toucey*, 314 U.S. at 132). *Toucey* “threatened to destroy most of the judicial exceptions” by returning “to a literal interpretation” of the statute’s broad language. Note, *Federal Court Stays of State Court Proceedings: A Re-examination of Original Congressional Intent*, 38 U. CHI. L. REV. 612, 612 (1971). According to the Reviser’s notes for 28 U.S.C. § 2283, the purpose of the amendment was both to overrule *Toucey* and to restore a pre-*Toucey* understanding of the law: “[T]he revised section restores the basic law as generally understood and interpreted prior to the *Toucey* decision.” Reviser’s Notes, H.R. Rep. No. 308, 80th Cong., 1st Sess., A181–182 (1947).

17. 28 U.S.C. § 2283 (2006) (originally enacted as Act of June 25, 1948, ch. 646, § 2283, 62 Stat. 869, 968).

18. *Brown v. Shriver (In re Brown)*, 39 B.R. 820, 826 (Bankr. M.D. Tenn. 1984) (“Though the specific reference to bankruptcy has been removed from the anti-injunction statute, it is well recognized that the ‘expressly authorized’ exception in § 2283 includes injunctions authorized under the bankruptcy laws.”).

19. H.R. REP. NO. 95-595, at 317 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6274; S. REP. NO. 95-989, at 29 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5815.

20. See, e.g., *O’Shea v. Littleton*, 414 U.S. 488 app. at 512 (1974) (Douglas, J. dissenting) (listing bankruptcy among seven statutes recognized as exceptions to the Anti-Injunction Act); *Davis v. Sheldon (In re Davis)*, 691 F.2d 176, 177 (3d Cir. 1982) (stating that bankruptcy is an expressly authorized exception to the Anti-Injunction Act); *U.S. Home Corp. v. Los Prados Cmty. Ass’n (In re*

If that were not enough, bankruptcy could very easily fall within either of the other statutory exceptions as well. Surely, if a state court is attempting to take action inconsistent with the Bankruptcy Code's dictates, then one could characterize a federal injunction as "necessary in aid of [the federal court's] jurisdiction."²¹ Or, if a bankruptcy court has issued an order—such as a discharge or a plan confirmation—then later inconsistent action by a state court could be enjoined by the federal court "acting to protect or effectuate its judgments."²² Of course, one exception, alone, should be as efficacious as all three. The point is merely to emphasize that bankruptcy court injunctions are, in every respect, completely consistent with the Anti-Injunction Act's exceptions.

B. *Younger v. Harris*

Under ordinary principles of statutory construction, the Anti-Injunction Act's prohibition against injunctions in the absence of an exception should carry a negative inference—that an injunction *is* appropriate when one of the statutory exceptions applies. That is hardly the case, however, given the Supreme Court's monumental decision in *Younger v. Harris*.²³ In *Younger*, a defendant being prosecuted in state court for violating the state's Criminal Syndicalism Act sought a federal injunction on the grounds that the state statute unconstitutionally infringed upon his rights to free speech. Although a three-judge court granted the injunction, the Supreme Court reversed, concluding that the injunction violated "the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances."²⁴ The Court referred to the Anti-Injunction Act as the expression of Congress's long-standing "desire to permit state courts to try state cases free from interference by federal courts,"²⁵ and recited some of the Anti-Injunction Act's history as a justification for federal court abstention. The Court, however, did not rely directly on the Anti-Injunction Act in reaching its decision.²⁶ Rather, the Court found that the

U.S.H. Corp. of N.Y), 280 B.R. 330 (Bankr. S.D.N.Y. 2002) (holding that an injunction issued to effectuate a plan confirmation order is an "expressly authorized" exception to the Anti-Injunction Act).

21. 28 U.S.C. § 2283.

22. *Id.*

23. 401 U.S. 37 (1971). *Younger's* companion cases were *Samuels v. Mackell*, 401 U.S. 66 (1971); *Boyle v. Landry*, 401 U.S. 77 (1971); *Perez v. Ledesma*, 401 U.S. 82 (1971); *Dyson v. Stein*, 401 U.S. 200 (1971); and *Byrne v. Karalexix*, 401 U.S. 216 (1971).

24. *Younger*, 401 U.S. at 41.

25. *Id.* at 43.

26. Justice Stewart, in concurring, acknowledged this much more expressly than did the

noninterference policy derives from two sources— first, equity, and second, comity, which the Court labeled “Our Federalism” “for lack of a better and clearer way to describe it.”²⁷

The first source—equity—is based on the doctrine that “courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.”²⁸ Equity was hardly the crux of *Younger*’s analysis,²⁹ however, and equity has, in fact, receded as a rationale for federal court abstention.³⁰

The second source—comity, or “Our Federalism”³¹—was the “more vital”³² of the two. It is based, in the Court’s view, upon

a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.³³

majority: “In basing its decisions on policy grounds, the Court does not reach any questions concerning the independent force of the federal anti-injunction statute . . .” *Id.* at 55 (Stewart, J., concurring). Professor Fiss, however, has described the Court’s rationale of “Our Federalism” as derived from the Anti-Injunction Act. Owen M. Fiss, *Dombrowski*, 86 YALE L.J. 1103, 1118 (1977).

The Court did state that it had “no occasion” to decide whether the Anti-Injunction Act “would in and of itself be controlling under the circumstances of this case.” *Younger*, 401 U.S. at 54. That statement, however, has been read as the Court’s refusal to consider whether § 1983 is an exception to the Anti-Injunction Act—a different question than whether the Anti-Injunction Act could have provided the grounds for a decision in the case presented, in the absence of any exception.

27. *Younger*, 401 U.S. at 44. According to Professor Fiss, the majority in *Younger* “did not analyze, rigorously or otherwise, the underlying tenets of federalism.” Fiss, *supra* note 26, at 1118. Rather, the Court “merely gave us a new shibboleth.” *Id.*

28. *Younger*, 401 U.S. at 43–44.

29. Anthony J. Dennis, *The Illegitimate Foundations of the Younger Abstention Doctrine*, 10 U. BRIDGEPORT L. REV. 311, 321 (1990); Douglas Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief*, 1977 SUP. CT. REV. 193, 224; Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 86 (1984) [hereinafter Redish, *Abstention*].

30. Brown, *supra* note 1; Barry Friedman, *A Revisionist Theory of Abstention*, 88 MICH. L. REV. 530, 536 n.24, 556 n.118 (1989); Martin H. Redish, *The Doctrine of Younger v. Harris: Deference in Search of a Rationale*, 63 CORNELL L. REV. 463, 464 n.6 (1978) [hereinafter Redish, *Doctrine of Younger*].

31. *Younger*, 401 U.S. at 44. Although comity and federalism may, in fact, be distinct concepts, Laycock, *supra* note 29, at 224, the Court treated them so similarly, and they bear so strong a resemblance, that no distinction need be drawn for present purposes.

32. *Younger*, 401 U.S. at 44.

33. *Id.* This respect runs both ways, of course, requiring “sensitivity to the legitimate interests of both State and National Governments.” *Id.* Despite the Court’s call for balance, however, nothing of the sort has been achieved by *Younger* and its progeny. Ann Habermeld, Note, *A Reexamination of the Non-Dischargeability of Criminal Restitutive Obligations in Chapter 13 Bankruptcies*, 43 HASTINGS L.J. 1517, 1561 (1992); Redish, *Doctrine of Younger*, *supra* note 30, at 487–88.

Thus, the Court held “that a federal court must not, save in exceptional and extremely limited circumstances, intervene by way of either injunction or declaration in an existing state criminal prosecution.”³⁴

Younger also expressed several policy considerations.³⁵ One is a fairly straightforward forum allocation preference, either as a preference for relief in the criminal forum in which parties already find themselves, or as a preference for relief in a state forum able to decide issues that can properly be raised there.³⁶

A second consideration underlying *Younger* was the Court’s concern that federal courts should not impugn the competence of state courts.³⁷ *Younger* stressed the availability of a state forum in which the defendant’s constitutional challenge could be presented.³⁸ Thus, removal of the issue from state court by means of a federal injunction would imply either incompetence or a lack of confidence in the state courts.³⁹ Either would constitute an affront.⁴⁰

34. *Younger*, 401 U.S. at 56 (Stewart, J., concurring).

35. See generally Redish, *Doctrine of Younger*, *supra* note 30, at 465–66.

36. *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1281–85 (1977).

37. Redish, *Abstention*, *supra* note 29, at 87 (“*Younger* rests largely on the desire to avoid insulting state judiciaries by questioning their competence or good faith.”); *id.* at 91 (“The social policy harms thought to be avoided by *Younger* abstention include the fear that state judges will be insulted by the doubts raised about their competence to enforce federal rights.”); Redish, *Doctrine of Younger*, *supra* note 30, at 465–66 (citing, as first among the Court’s “four conceivable bases for limiting the injunctive powers of federal courts” in *Younger*, “the desire to avoid slighting state courts by questioning their competence or willingness to enforce federal constitutional rights . . .”); see also *Steffel v. Thompson*, 415 U.S. 452, 460–61 (1974) (noting that in *Younger*, the Court was “cognizant that a pending state proceeding, in all but unusual cases, would provide the federal plaintiff with the necessary vehicle for vindicating his constitutional rights, and, in that circumstance, the restraining of an ongoing prosecution would entail an unseemly failure to give effect to the principle that state courts have the solemn responsibility, equally with the federal courts ‘to guard, enforce, and protect every right granted or secured by the [C]onstitution of the United States’” (quoting *Robb v. Connolly*, 111 U.S. 624, 637 (1884))).

38. Redish, *Abstention*, *supra* note 29, at 107.

39. Redish, *Doctrine of Younger*, *supra* note 30, at 465–66.

40. *Developments in the Law—Section 1983 and Federalism*, *supra* note 36, at 1289–90 n.98 (“The notion of affront contains a built-in normative component—it depends on the removal from a state court of an issue that would normally be tried in that court under circumstances that suggest the removal is motivated by a lack of confidence.”); Daniel Jordan Simon, Comment, *Abstention Preemption: How the Federal Courts Have Opened the Door to the Eradication of “Our Federalism,”* 99 NW. U. L. REV. 1355, 1367 (2005) (“[A]ny suggestion that state courts are inadequate adjudicators of federal questions of any kind has been soundly rejected by the Supreme Court in the strongest terms. Indeed, the very existence of *Younger* flies in the face of such a stance because it defers to state courts to rule on constitutional issues and endorses their ability to do so at the exclusion of the federal court system.” (footnotes omitted)).

A good bit of ink has been spilled addressing the question whether *Younger*’s confidence in the competence of state courts was well-placed, especially in the civil rights context. See Redish,

In *Younger*, the Court also sought to avoid needless friction between the state and federal systems,⁴¹ especially when important state interests (such as enforcement of its criminal laws) are involved.⁴² This policy can be further refined into two more specific subparts, one substantive and the other procedural: a desire to avoid federal interference with a state's enforcement of its substantive policies; and a desire to avoid disruption of a state's judicial processes.⁴³ These subparts are interrelated and, in fact, the desire to avoid needless friction may subsume and summarize the other primary policy underlying *Younger*,⁴⁴ because "friction" may be generated by a federal affront to the competency of a state court.⁴⁵ The fact that the policies

Doctrine of Younger, *supra* note 30, at 483 ("Harsh reality may justify doubts about the competence of state courts in enforcing federal rights."). Cf. Laycock, *supra* note 29, at 234 ("The large volume of *Younger* litigation gives rise to its own inferences: with so many prosecutors fighting to stay in state court and so many defense lawyers fighting to get into federal court, one must wonder if they are all wrong about where their clients' interests lie."). See generally Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (criticizing the assumption that state and federal courts are equally competent forums for addressing federal constitutional rights).

41.

[U]nless there is nothing to the federalism and comity arguments advanced by the Court in favor of abstention, sweeping all cases falling under the head of federal jurisdiction into federal court may threaten interests essential to the smooth operation of a government organized around dual sovereigns with coordinate court systems. There is bound to be serious friction in a dual court system where the federal courts—while mouthing platitudes about coequal responsibility—nonetheless consistently trump efforts of the state courts.

Friedman, *supra* note 30, at 548–49 (footnote omitted).

42. See *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431–32 (1982) (holding that *Younger*'s doctrine of federal abstention is particularly applicable when important state interests are involved).

43. Redish, *Abstention*, *supra* note 29, at 91; Redish, *Doctrine of Younger*, *supra* note 30, at 466. Later cases, particularly *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1 (1987), reveal how low the threshold is for what qualifies as an important state interest. In that case, which involved litigation between two private parties (both well-represented and powerful corporations), the mere existence of a state proceeding seems to have been enough:

[T]his case involve[s] challenges to the processes by which the State compels compliance with the judgments of its courts. Not only would federal injunctions in such cases interfere with the execution of state judgments, but they would do so on grounds that challenge the very process by which those judgments were obtained. So long as those challenges relate to pending state proceedings, proper respect for the ability of state courts to resolve federal questions presented in state-court litigation mandates that the federal court stay its hand.

Id. at 13–14 (footnotes omitted).

44. The policies are undoubtedly overlapping. See, e.g., David Mason, Note, *Slogan or Substance? Understanding "Our Federalism" and Younger Abstention*, 73 CORNELL L. REV. 852, 868 (1988) ("[U]nduly interfere" simply restates the inadequacy prerequisite."); Simon, *supra* note 40, at 1364 (suggesting that *Younger*'s exception for bad faith prosecutions is sufficient to cover prosecutions under statutes that are "flagrantly and patently" unconstitutional "in every clause, sentence and paragraph.").

45. See Robert B. Funkhouser et al., Comment, *Texaco Inc. v. Pennzoil Co.: Some Thoughts on the Limits of Federal Court Power over State Court Proceedings*, 54 FORDHAM L. REV. 767, 811–12 (1986) (suggesting that the fundamental policy underlying the Supreme Court's decision in *Younger* was the desire to avoid "federal-state friction" that emerges when federal courts interfere with state court proceedings under the assumption that state courts are incompetent to adjudicate certain

underlying *Younger* are somewhat contradictory⁴⁶ need not detain us.

Younger was not without exceptions. After noting the three statutory exceptions found in the Anti-Injunction Act,⁴⁷ the Court recognized that “a judicial exception to the longstanding policy evidenced by the statute has been made where a person about to be prosecuted in a state court can show that he will, if the proceeding in the state court is not enjoined, suffer irreparable damages.”⁴⁸ After reviewing earlier cases, however, the Court concluded that “even irreparable injury is insufficient unless it is ‘both great and immediate.’”⁴⁹ As if that limitation were not enough, the Court added that “the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered ‘irreparable.’”⁵⁰ This assertion was premised on the assumption that the criminal proceeding was brought lawfully and in good faith, so a prosecution brought in bad faith or to harass the defendant could be described either as the other side of that coin or as another exception to *Younger*.⁵¹ Finally, the Court admitted that the requisite irreparable injury might be established, in the absence of bad faith and harassment, if the statute at issue is “flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.”⁵²

claims).

46. See Redish, *Doctrine of Younger*, *supra* note 30, at 473–74 (noting that *Younger*’s exceptions for bad faith prosecutions and prosecutions under flagrantly unconstitutional statutes are inconsistent with a desire to avoid affronting state courts). The inconsistencies mount when other Supreme Court decisions are taken into account. See, e.g., Friedman, *supra* note 30, at 540 (“A key ingredient in the *Younger* cases is the Court’s presumption that state courts are sufficient to protect federal civil rights Never mind that precisely the opposite presumption justified *Monroe v. Pape*, 365 U.S. 167 (1961)]’s expansion of federal jurisdiction in civil rights cases in the first place.”).

47. *Younger v. Harris*, 401 U.S. 37, 43 (1971). These exceptions were of no particular relevance, apparently, given that the Court did not rely on the Anti-Injunction Act.

48. *Id.* at 43.

49. *Id.* at 46 (quoting *Fenner v. Boykin*, 271 U.S. 240, 243 (1926)).

50. *Id.* The assumption is that such a defendant has an adequate remedy at law, thus negating one of the fundamental requirements for equitable relief, and simultaneously rendering the “friction” of a federal injunction “needless.”

51. That was the factual box into which the Supreme Court in *Younger* placed its earlier decision in *Dombrowski v. Pfister*, 380 U.S. 479 (1965), in which the Court had permitted an injunction to issue. *Younger*, 401 U.S. at 47–48. The Court in *Younger* expressly disavowed any statements in *Dombrowski* that could be read to permit equitable relief, in the absence of bad faith or harassment, whenever the state criminal statute is facially unconstitutional. *Id.* at 50.

52. *Younger*, 401 U.S. at 53–54 (quoting *Watson v. Buck*, 313 U.S. 387, 402 (1941)). This exception has provided the analytical foundation for a so-called “preemption exception.” See Simon, *supra* note 40, at 1366 (describing the origins of the preemption exception to *Younger*). This exception is built on the proposition that states have “no interest in creating or enforcing laws where the federal government has preempted the area of law.” *Id.* at 1368. This exception, which has

Those exceptions are designed to capture the sorts of unusual circumstances in which a federal injunction can appropriately be issued against a state proceeding. Although this concept can be expressed in various ways, the Supreme Court said in *Middlesex County Ethics Committee v. Garden State Bar Ass'n*⁵³ that *Younger* “and its progeny espouse a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances.”⁵⁴

Because *Younger*'s exceptions are rarely satisfied, “*Younger* abstention is all but total.”⁵⁵ In effect, *Younger* slammed the door on federal injunctions of state criminal proceedings,⁵⁶ and did so without addressing the proper role of the Anti-Injunction Act. More specifically, the Court did not address whether 42 U.S.C. § 1983 is an expressly authorized exception to the Anti-Injunction Act.⁵⁷ By assuming that § 1983 is not such an exception,

never been endorsed by the Supreme Court, is arguably inconsistent with *Younger*'s holding that federal remedies are unavailable to state defendants subjected to prosecution under unconstitutional statutes, *id.* at 1373, and with *Younger*'s underlying rationale of parity between state and federal courts, *id.* at 1376–77.

53. 457 U.S. 423 (1982).

54. *Id.* at 431.

55. Redish, *Abstention*, *supra* note 29, at 88; *see also* Fiss, *supra* note 26, at 1135 (concluding that *Younger* and its progeny have essentially vested complete power to select the forum for litigation of constitutional questions in the state district attorneys). The exception for a statute unconstitutional “in every clause, sentence and paragraph” has been described as “practically useless,” since a prosecution premised on such a statute would surely carry no reasonable likelihood of success and, therefore, would fall under the bad faith exception. Simon, *supra* note 40, at 1364. In addition, Professor Laycock opined that this exception “has become meaningless” in the wake of *Trainor v. Hernandez*, 431 U.S. 434 (1977). Laycock, *supra* note 29, at 198.

56. *Younger* has, of course, been expanded into both civil and administrative contexts, and to cases in which a state is not even a party. *See* *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1 (1987) (applying *Younger* although a state was not a party to the action); *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619 (1986) (administrative proceedings); *Middlesex*, 457 U.S. at 423 (civil proceedings). Note, however, Justice Stewart's admonition in *Younger* that the Court was not dealing “with the considerations that should govern a federal court when it is asked to intervene in state civil proceedings, where, for various reasons, the balance might be struck differently.” *Younger*, 401 U.S. at 55 (Stewart, J., concurring). Apparently, the Court has paid no mind.

This expansion has been the subject of critical commentary. *See, e.g.*, Ann Althouse, *The Misguided Search for State Interest in Abstention Cases: Observations on the Occasion of Pennzoil v. Texaco*, 63 N.Y.U. L. REV. 1051, 1090 (1988) (“[T]he Supreme Court has simply lost track of the original purpose behind the *Younger* abstention doctrine.”); Georgene M. Vairo, *Making Younger Civil: The Consequences of Federal Court Deference to State Court Proceedings—A Response to Professor Stravitz*, 58 FORDHAM L. REV. 173, 176 (1989) (“The ease and complacency with which the Supreme Court extended the *Younger* abstention doctrine in a civil context [in *Pennzoil*], however, is very disturbing.”). *But see* Ruggiero J. Aldisert, *On Being Civil to Younger*, 11 CONN. L. REV. 181, 217 (1979) (“From a doctrinal point of view, I find it difficult to distinguish persuasively between civil and criminal proceedings. The concerns of federalism that support federal noninterference in criminal cases are also relevant in civil cases.”).

57. The Court expressly declined to decide this question, but did so without actual mention of § 1983:

Because our holding rests on the absence of the factors necessary under equitable principles to justify federal intervention, we have no occasion to consider whether 28 U.S.C. § 2283, which prohibits an injunction against state court proceedings “except as

the Court could simply have found the otherwise-absolute language of the Anti-Injunction Act controlling.⁵⁸ Instead, the Court used the Act solely as a source for the policies of noninterference,⁵⁹ upon which it constructed a *judicial* standard for determining the appropriateness of an injunction.⁶⁰

C. *Mitchum v. Foster*

A year later, in *Mitchum v. Foster*,⁶¹ the Court finally resolved the question it had ducked in *Younger* and held that § 1983 is an expressly authorized exception to the Anti-Injunction Act⁶²—a monumental holding in the civil rights field. Although its relevance for bankruptcy was not immediately apparent, *Mitchum* is central to the present undertaking because the opinion addressed both *Younger* and the Act, and provided a glimpse—however incomplete and problematic—into the relationship between the two. Consideration of both cases, therefore, reveals the theoretical difficulties of the Court’s federalism jurisprudence—difficulties that appear in the bankruptcy context as well.

Mitchum began by reiterating the Court’s rejection, in *Atlantic Coast*

expressly authorized by Act of Congress” would in and of itself be controlling under the circumstances of this case.

Younger, 401 U.S. at 54. Justice Stewart, again, was more forthcoming: “[W]e do not decide whether the word ‘injunction’ in § 2283 should be interpreted to include a declaratory judgment, or whether an injunction to stay proceedings in a state court is ‘expressly authorized’ by . . . § 1983.” *Id.* at 55 (Stewart, J., concurring). The majority’s refusal to decide that question was the basis, in part, for Justice Douglas’s dissent in *Younger*: “I hold to the view that § 1983 is included in the ‘expressly authorized’ exception to § 2283.” *Id.* at 62 (Douglas, J., dissenting).

58. As Professor Maraist noted, “federal courts refrain from enjoining pending state court proceedings not because Congress in the Anti-Injunction Act has denied them jurisdiction to do so, but because the judicial doctrine of comity compels them not to do so.” Frank L. Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski*, 48 TEX. L. REV. 535, 542 (1970).

59. See Fiss, *supra* note 26, at 1128 (“*Younger* . . . focused exclusively on § 2283 as a policy oracle . . .”).

60. It may be true that “[i]n *Younger* itself . . . the Court has shown its conviction that the statutory safeguards to federalism provided by Congress are insufficient,” Simon, *supra* note 40, at 1377, but that does not address the source of the Court’s authority to arrogate that power unto itself.

The Court’s audacity seems even greater upon consideration of an observation made by Professor Eisenberg in a commentary on *Mitchum v. Foster*, 407 U.S. 225 (1972): “Recent scholarship, which implicitly supports *Mitchum*, suggests that the original 1793 version of the anti-injunction statute sought merely to prohibit individual Supreme Court Justices from enjoining state proceedings and was not intended to be a comprehensive ban on federal injunctions against state proceedings.” Theodore Eisenberg, *Mitchum v. Foster*, in 4 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1750 (Leonard W. Levy & Kenneth L. Karst eds., 2nd ed.2000).

61. *Mitchum*, 407 U.S. 225.

62. *Id.* at 243.

Line Railroad Co. v. Brotherhood of Locomotive Engineers,⁶³ of the argument that the Anti-Injunction Act “merely states a flexible doctrine of comity”⁶⁴ that would permit issuance of an injunction even in circumstances not covered by an exception. Rather, according to the *Mitchum* Court, the statute absolutely bars issuance of a federal injunction against a pending state proceeding “in the absence of one of the recognized exceptions.”⁶⁵

Mitchum reviewed previously established exceptions to the Anti-Injunction Act⁶⁶ and concluded that § 1983 is among those “expressly authorized.”⁶⁷ The Court’s rationale rested on the “vast transformation from the concepts of federalism”⁶⁸ prevailing at the time the Anti-Injunction Act was passed, brought about by the era of Reconstruction. “The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people’s federal rights—to protect the people from unconstitutional action under color of state law, ‘whether that action be executive, legislative, or judicial.’”⁶⁹

Mitchum, therefore, was premised on the very suspicion of state courts that *Younger* disclaimed,⁷⁰ yet, the *Mitchum* Court asserted its adherence to *Younger*:

In so concluding, we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding. These principles, in the context of state criminal prosecutions, were canvassed at length last Term in *Younger v. Harris*, and its companion cases. They are principles that have been emphasized by this Court many times in the past. Today we decide only that the District Court in this case was in error in holding that, because of the anti-injunction statute, it was absolutely without power in this § 1983 action to enjoin a proceeding pending in a state court under any circumstances whatsoever.⁷¹

63. 398 U.S. 281(1970).

64. *Mitchum*, 407 U.S. at 228.

65. *Id.* at 229. This suggests the Court’s respect for the Anti-Injunction Act’s wording when no exception is present. Interestingly, the Court does not seem to show a similar respect when one is. See *infra* text accompanying notes 72–73.

66. See *supra* note 14 and accompanying text.

67. *Mitchum*, 407 U.S. at 243. Professor Redish virtually mocked this result: “In what may be one of the most bizarre contortions of Supreme Court analysis, the Court in *Mitchum* found section 1983 to be an ‘implied’ express exception (an oxymoron if ever there was one)” Redish, *Abstention*, *supra* note 29, at 87; see also Friedman, *supra* note 30, at 599 n.307 (describing *Mitchum* as a case “in which the Court perverted legislative intent and strained any reasonable interpretation of the English language”).

68. *Mitchum*, 407 U.S. at 242.

69. *Id.* (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1879)).

70. See *supra* note 40 and accompanying text.

71. *Mitchum*, 407 U.S. at 243 (citations omitted).

This language intimates that *Younger* remains an obstacle for a party seeking issuance of a federal injunction, even when an exception to the Anti-Injunction Act is involved.⁷² But the Court seemed not to notice the analytical difficulty of this position—if an exception to the statute *is* present, how can the Court effectively slam the door on issuance of the requested injunction, as *Younger* did, by adding such stringent judicial limitations on the legislative language that the statutory exception is effectively negated?⁷³ That approach, in effect, uses a judicially crafted doctrine to eviscerate an act of Congress.

This analytical problem is compounded by language in *Mitchum* addressing the relationship between *Younger* and the Anti-Injunction Act:

[I]f § 1983 is not within the statutory exception, then the anti-injunction statute would have absolutely barred the injunction issued in *Younger* . . . and there would have been no occasion whatever for the Court to decide that case upon the “policy” ground of “Our Federalism.” Secondly, if § 1983 is not within the “expressly authorized” exception of the anti-injunction statute, then we must overrule *Younger* and its companion cases insofar as they recognized the permissibility of injunctive relief against pending criminal prosecutions in certain limited and exceptional circumstances. For, under the doctrine of *Atlantic Coast Line*, the anti-injunction statute would, in a § 1983 case, then be an “absolute prohibition” against federal equity intervention in a pending state criminal *or* civil proceeding—under any circumstances whatever.⁷⁴

The Court seemed, by these observations, to recognize the superior position of the Anti-Injunction Act: the statute would have provided the (negative) answer to the question of whether an injunction could properly issue if § 1983 had not been an exception; and, if no exception had been at play, the Court could not have permitted even the limited non-statutory exceptions noted in *Younger*. The Court said that if § 1983 were not an exception to the

72. That conclusion is bolstered by the Court’s remand “for further proceedings consistent with this opinion.” *Id.* at 243. Although the exact issues to be considered on remand were not specified (as is not unusual) reversal of the lower court’s denial of an injunction, on the grounds of disagreement with the lower court’s conclusion that the Anti-Injunction Act barred an injunction, leaves open the question whether equity’s requirements for an injunction were satisfied. On remand, *Younger* might have been expected to present a formidable bar to an affirmative answer.

73. Professor Redish found it “inconceivable that Congress would vest in the federal judiciary total discretion to overrule the product of the congressional balancing process.” Redish, *Abstention*, *supra* note 29, at 88. Without further refinement, however, that is exactly where *Younger* has left us.

74. *Mitchum*, 407 U.S. at 231.

Anti-Injunction Act, then the Act would have presented an absolute bar to an injunction and *Younger* could not properly have permitted issuance of an injunction in “certain limited and exceptional circumstances.”⁷⁵ If the Act is completely determinative when no exception is present, however, should it not also be determinative when one is?⁷⁶ If an injunction may *not* issue in the absence of an exception to the Anti-Injunction Act,⁷⁷ then why is there not a negative pregnant—specifically, that an injunction *may* issue when an exception *is* applicable?

This difficulty, unsurprisingly, has not gone unnoticed by commentators in the decades since *Younger* and *Mitchum* were decided. The relationship between the two cases is decidedly problematic—it was described by Professor Brown as “muddied at best.”⁷⁸ Yet, the solution he proposed does leave *Younger* as a hurdle to be surmounted even when an exception to the Anti-Injunction Act is present: “The best way to harmonize the two is that *Mitchum* leaves intact the federal courts’ authority to engage in federalistic abstention even though Congress wants it to hear the equitable action as an initial matter.”⁷⁹

That proposed solution (if such it was) leads directly to Professor Redish’s attack against *Younger* on separation-of-powers grounds.⁸⁰ As he

75. *Id.*

76. *Cf.* Redish, *Abstention*, *supra* note 29, at 88 (“[I]f *Mitchum* is valid, *Younger* abstention represents an effective reversal of the congressional decision to make section 1983 an exception to the Anti-Injunction Act.”).

77. *See Mitchum*, 407 U.S. at 231.

78. Brown, *supra* note 1, at 146. Professor Brown, however, was aware of the difficulties posed by *Younger*’s failure to adopt a statutory approach: “Whatever the source [of law applied in *Younger*], the Court has not been forthright in discussing its authority to utilize that source, given the possibility that statutes address the matter directly.” *Id.* at 120.

Another commentator, describing the relationship between the two cases as “curious,” noted the question without proposing a solution: “[O]ne might well ask why, if § 1983 qualifies as an express exception from the letter of the statute, it does not also qualify as an exception to judge-made rules derived from the statute. The question is not addressed by the Court.” *Developments in the Law—Section 1983 and Federalism*, *supra* note 36, at 1288 n.88.

79. Brown, *supra* note 1, at 146. Professor Bartels also noted this difficulty and proposed a similar solution, as the only way to square the results in *Younger* and *Mitchum*. Robert Bartels, *Avoiding a Comity of Errors: A Model for Adjudicating Federal Civil Rights Suits that “Interfere” with State Civil Proceedings*, 29 STAN. L. REV. 27, 49 (1976).

80. *See generally* Redish, *Abstention*, *supra* note 29. In the process, Professor Redish noted the inconsistencies between *Younger* and *Mitchum*:

In *Younger*, the Court found the injunction improper, purely as a matter of judge-made principles. It expressly declined to consider whether the injunction was barred by the Anti-Injunction Act. One year later in *Mitchum v. Foster*, the Court, in a highly questionable opinion, found that section 1983 constituted an implied yet “expressly authorized” congressional exception to the Anti-Injunction Act. It nevertheless continued to adhere to the terms of *Younger*’s judge-made abstention doctrine. In what may be one of the most bizarre contortions of Supreme Court analysis, the Court in *Mitchum* found section 1983 to be an “implied” express exception (an oxymoron if ever there was one) because of the grave mistrust of the state judiciaries expressed by the drafters of the statute. Yet *Younger* rests largely on the desire to avoid insulting state judiciaries by questioning their competence or good faith.

argued, “neither total nor partial judge-made abstention is acceptable as a matter of legal process and separation of powers”⁸¹ Rather, “Congress . . . has established a network of federally protected substantive rights and simultaneously vested the federal courts with jurisdiction to enforce those laws, and the Supreme Court lacks the authority to ignore or invalidate those statutes merely because of disagreement with their substance.”⁸²

Of course, Professor Redish’s argument, *Younger*, and *Mitchum* all arose out of the same context—constitutionally protected civil rights, including rights of free speech. (Although the majority in *Younger* neither mentioned the words “civil rights” nor referred to § 1983—that was left to the concurring⁸³ and dissenting⁸⁴ opinions—the civil rights context was

Id. at 86–87 (footnotes omitted). Professor Redish made the point even more directly in an earlier article:

[T]he greatest enigma in light of the *Mitchum* reasoning is the continued vitality—indeed, expansion—of the doctrine of *Younger v. Harris*. Although the *Younger* doctrine assumes that section 2283 is no bar to issuance of a federal injunction in section 1983 suits, it nevertheless provides that as a matter of purely judge-made policy a federal court usually should not restrain a state prosecution, even to vindicate constitutional rights. The *Younger* doctrine assumes that an individual’s federal constitutional rights can be adequately vindicated by raising them as defenses in the course of state prosecutions. Yet, if we are to believe the legislative history as detailed in *Mitchum*, the driving force behind the adoption of the Civil Rights Act was the conviction that state courts are unable to perform effectively the very function *Younger* assumes they can and do perform continuously. It is therefore difficult to see how *Mitchum* and *Younger* can coexist, although the seeming inconsistency appears not to have troubled the Court.

Redish, *Anti-Injunction Statute*, *supra* note 14, at 737–38 (footnotes omitted).

81. Redish, *Abstention*, *supra* note 29, at 74; *cf.* Bartels, *supra* note 79, at 32 n.18 (“[I]t may be that the Supreme Court’s discretion is not properly exercised when it effectively removes from the federal courts cases over which they clearly have been given jurisdiction.”).

82. Redish, *Abstention*, *supra* note 29, at 77. In the face of that argument, going to the structure of our fundamental institutions, it is insufficient simply to observe that “[i]n *Younger* itself, as with other abstention doctrines created by the Court, the Court has shown its conviction that the statutory safeguards to federalism provided by Congress are insufficient.” Simon, *supra* note 40, at 1377. The problem is to ascertain what gives the Court the right.

83. Justice Stewart did so in the process of noting what the Court did not decide:

In basing its decisions on policy grounds, the Court does . . . not decide whether the word “injunction” in § 2283 should be interpreted to include a declaratory judgment, or whether an injunction to stay proceedings in a state court is “expressly authorized” by § 1 of the Civil Rights Act of 1871, now 42 U.S.C. § 1983.

Younger v. Harris, 401 U.S. 37, 55 (1971) (Stewart, J., concurring). The other concurring opinion, by Justice Brennan, made no mention of either. *Id.* at 56–58 (Brennan, J., concurring).

84. As the Court observed in *Mitchum*, Justice Douglas was the only member of the Court in *Younger* who took a position on the question whether § 1983 was an “expressly authorized” exception to the Anti-Injunction Act. *Mitchum v. Foster*, 407 U.S. 225, 226–27 n.4 (1972). Obviously, in the course of doing so he mentioned both civil rights and § 1983 repeatedly, putting particular emphasis on the latter. *See Younger*, 401 U.S. at 59–65.

nevertheless unmistakable.⁸⁵) That context was of particular relevance in *Mitchum* because of the Court's reliance on the history and purposes of the civil rights legislation that provided the basis for the defendant's claim to federal relief. Congress had given those matters to the protection of the federal courts; thus, the Anti-Injunction Act imposed no bar.

D. *Younger and Mitchum in Bankruptcy*

The analytical problems with *Younger*, and the compelling criticisms leveled against it, have not deterred subsequent courts from applying it even when an exception to the Anti-Injunction Act is involved.⁸⁶ And, if *Younger* is thought to be applicable, the only alternative available to a litigant trying to obtain a federal injunction (and to the court willing to issue one) is a struggle to fit within one of *Younger's* exceptions.⁸⁷ These efforts have been met with mixed results in bankruptcy cases.⁸⁸

Non-bankruptcy cases have also relied on *Younger's* exceptions in finding abstention inappropriate. One of those cases, *Richmond*,

85. Redish, *Abstention*, *supra* note 29, at 85; *Developments in the Law—Section 1983 and Federalism*, *supra* note 36, at 1281–83.

86. For example, several cases relied on *Younger* as authority for their holdings that bankruptcy injunctions should not issue against state criminal prosecutions for various sorts of financial crimes. See *Fussell v. Price (In re Fussell)*, 928 F.2d 712, 713 (5th Cir. 1991); *Davis v. Sheldon (In re Davis)*, 691 F.2d 176, 178 (3rd Cir. 1982); *Barnette v. Evans (In re Barnette)*, 673 F.2d 1250, 1251–52 (11th Cir. 1982); *cf. Mason, supra* note 44, at 856–57 (“The *Younger* doctrine comes into play when a federal plaintiff brings an action under one of these express exceptions [to the Anti-Injunction Act].”).

87. See *supra* notes 47–54 and accompanying text. Another alternative is to ignore *Younger*, of course, although that may not be the most satisfactory solution analytically. See, e.g., *In re Lake*, 11 B.R. 202 (Bankr. S.D. Ohio 1981) (issuing an injunction upon determining that the criminal proceeding had been brought for the purpose of collecting a debt, with no mention whatsoever of *Younger*).

88. Debtors have experienced some success at the bankruptcy and district court levels, but any lower-court success evaporates once a case gets to the Courts of Appeal. In *In re Simonini*, 282 B.R. 604 (W.D.N.C. 2002), for example, the district court engaged in a careful analysis of *Younger's* exception for patently unconstitutional statutes, and concluded that a “prosecution eviscerates the express purpose of the Bankruptcy Code by abusing the protection afforded by *Younger* when it collects debt for profit in the name of a criminal action.” *Id.* at 614. On appeal, the circuit court reversed with little more than a citation to *Younger*. *Simonini v. Bell (In re Simonini)*, 69 F. App'x 169, 171 (4th Cir. 2003).

Other appellate decisions have at least provided some analysis before refusing to grant an injunction. For example, in *Barnette*, the court found that the debtor was not facing the sort of grave injury *Younger* requires when he obtained an injunction from the bankruptcy court, prohibiting the prosecutor and creditor-witness from continuing a prosecution for theft by deception, as soon as a grand jury indictment was issued:

There had been no criminal conviction and no discharge of the debt. The bankruptcy court reasoned that an injunction was necessary to protect the integrity of its proceedings since *if* there were a criminal conviction the mandatory restitution sentence would conflict with the discharge order *if* the debt created by the theft were discharged. As the appellant's brief described the rationale: if we had some ham, we could have ham and eggs, if we had some eggs.

Barnette, 673 F.2d at 1252.

Fredericksburg & Potomac Railroad Co. v. Forst,⁸⁹ provides a striking parallel to the bankruptcy context. In *Forst*, the court was presented with a long-running dispute between a railroad and state taxing authorities.⁹⁰ In particular, the court was confronted with the Tax Injunction Act,⁹¹ which bars federal courts from interfering with state tax processes when a state remedy is available, and with section 306 of the Railroad Revitalization and Regulatory Reform Act,⁹² which prohibits state tax assessments inconsistent with a designated ratio and includes an explicit exception to the Tax Injunction Act.⁹³ The *Forst* district court held, *inter alia*, that abstention was required by *Younger*, but the Fourth Circuit reversed that holding: “Because Congress created in § 306 a clear exception to the principles of comity that underlie *Younger* abstention, we believe this case presents just such extraordinary circumstances.”⁹⁴ The court recognized Congress’s “profound respect for the integrity of state sovereignty in taxation matters.”⁹⁵ Abstention, nevertheless, was inappropriate:

In the narrow context of state taxation of railroad property, Congress has determined that the principles of comity that underlie the Tax Injunction Act—the principles that also underlie *Younger* abstention—simply do not apply. Section 306 defines an entire category of cases in which “extraordinary circumstances” exist to justify federal court intervention in state taxation matters. Consequently, the district court abused its discretion by abstaining under *Younger*.⁹⁶

The parallel between *Forst* and bankruptcy cases is clear. Just as section 306 was an exception to the Tax Injunction Act, bankruptcy is an exception to the Anti-Injunction Act. Congress’s respect for state integrity in criminal matters is no less profound than in tax matters. For that reason, bankruptcy bows to state criminal matters when they are truly at issue. Bankruptcy does not, however, bow to collection matters; they present another “clear exception to the principles of comity that underlie *Younger*

89. 4 F.3d 244 (4th Cir. 1993).

90. *Id.* at 246.

91. 28 U.S.C. § 1341 (2006).

92. 49 U.S.C. § 11503 (1976), amended by ICC Termination Act of 1995, Pub. L. No. 104-88, § 102(a), 109 Stat. 844.

93. *Forst*, 4 F.3d at 245, 247.

94. *Id.* at 251–52.

95. *Id.* at 252.

96. *Id.*

abstention”⁹⁷ and constitute “extraordinary circumstances” within both *Middlesex* and *Forst*.

Forst is unsatisfactory in another respect, however. By finding that the statutory exception in the Tax Injunction Act constituted “extraordinary circumstances” within *Younger*, *Forst* effectively collapsed *Younger*’s analysis into a statutory question—if an exception to the Anti-Injunction Act applies, then an exception to *Younger* is automatically found. *Younger* has no independent force. Yet we know that *Mitchum* did “not question or qualify in any way” the federalism principles on which *Younger* was based.⁹⁸ If *Younger* is to remain a separate hurdle for a state defendant, then something more than a statutory exception is needed before “extraordinary circumstances” arise.

Forst and the other cases that struggle with *Younger*’s exceptions prove the need for a better approach. One is available. It begins with an acknowledgement that *Younger*’s policy justifications are as inapt in a bankruptcy context as critiques of *Younger* are well taken. There are compelling distinctions between *Younger* and bankruptcy cases, and when the policy underpinnings of *Younger* (as elaborated and clarified in *Mitchum*⁹⁹) are applied in the context of bankruptcy, it rapidly becomes evident that *Younger* should not be transplanted wholesale from the civil rights context into this very different world. The policy considerations simply do not have the same resonance.

Younger rested, in part, on the fact that the state defendant in that case had an opportunity to present his constitutional arguments as a defense to the criminal charges.¹⁰⁰ That opportunity was a foundational consideration in the Supreme Court’s refusal to permit issuance of a federal injunction. A state criminal proceeding being used primarily as a collection device, however, will not afford the debtor-defendant an equivalent opportunity to raise and present questions about the scope of his or her bankruptcy discharge. The scope of discharge is an issue ancillary to the criminal charge,¹⁰¹ and it cannot be addressed by the state criminal court.

97. *Id.* at 251–52.

98. *Mitchum v. Foster*, 407 U.S. 225, 243 (1971).

99. *Id.*

100. See *Younger v. Harris*, 401 U.S. 37, 49 (1971) (“Here a proceeding was already pending in the state court, affording [the defendant] an opportunity to raise his constitutional claims. There is no suggestion that this single prosecution against [the defendant] is brought in bad faith or is only one of a series of repeated prosecutions to which he will be subjected. In other words, the injury that [he] faces is solely ‘that incidental to every criminal proceeding brought lawfully and in good faith,’ and therefore under the settled doctrine we have already described he is not entitled to equitable relief ‘even if such statutes are unconstitutional.’” (citation omitted) (quoting *Douglas v. City of Jeannette*, 319 U.S. 157, 164 (1943) and *Watson v. Buck*, 313 U.S. 387, 400 (1941))).

101. Cf. *Morgan v. Wofford*, 472 F.2d 822, 826 (5th Cir. 1973) (holding *Younger* inapplicable when state defendant had no procedural mechanism to raise constitutional challenges to a state statute mandating repayment as a condition of probation).

At least one case, *Barnette v. Evans*, 673 F.2d 1250 (11th Cir. 1982), appears to be to the

Dischargeability, unlike unconstitutionality in *Younger*, is not a substantive defense.

An even more important policy consideration was that of avoiding an affront to state courts, which *Younger* relied upon and *Mitchum* set aside in light of Congress's intent to "interpose the federal courts . . . as guardians of the people's federal rights . . ." ¹⁰² In the bankruptcy context, however, any concern about impugning the competence of state courts is quite beside the point. Here, the argument is even more powerful than it was in *Mitchum*, for it is not merely Congress that has imposed the federal courts; it is the Constitution itself. The Constitution allocates governance over bankruptcy

contrary:

If *Barnette* believed the prosecution for theft was a subterfuge for collection of a debt, he could have raised the issue as a defense in the state criminal proceeding. See *Tolbert v. State*, 294 Ala. 738, 321 So. 2d 227, 232 (1975). In *Younger* terms, *Barnette* may have contested the purported debt collection in a single criminal proceeding.

Barnette, 673 F.2d at 1252. The *Tolbert* case, cited in *Barnette*, involved a defendant charged under the state's bad check statute who alleged that the statute was unconstitutional on several grounds. *Tolbert*, 321 So. 2d at 230. Bankruptcy was not involved. The court's statement regarding the defendant's right to assert defenses came in response to the defendant's allegation that her due process rights were violated, *id.* at 231, 232,—a proposition that has no bearing whatsoever on the question of whether a "defense" of dischargeability in bankruptcy can be asserted in a state criminal prosecution.

The court in *Barnette* did not bother to note that, on the very page it cited, *Tolbert* aimed pointed criticism at the use of bad check statutes as a debt collection device:

Petitioner next contends that the act is nothing more than a means whereby a criminal statute is used to enforce a civil debt, and therefore is violative of [the state constitutional provision banning imprisonment for debt]. Every state in the union, except Vermont, has a criminal statute dealing with bad checks. Many of these statutes have been challenged on the ground that they allow imprisonment for debt. Most of them have survived the constitutional challenge. But we agree with the petitioner that if improperly employed to collect a civil debt, such would be an unconstitutional application of such statutes. We further agree that such statutes lend themselves to use by the unscrupulous who seek only payment of debts and have no interest in criminal prosecution other than as a means of collecting money allegedly due them. This court has repeatedly condemned the use of threat of prosecution as a means of collection of worthless checks.

Additionally, this court has spoken with respect to the constitutional provision prohibiting imprisonment for debt, and recognized that this prohibition established a broad public policy ". . . inimical . . . to the incarceration of a debtor as a means of coercing payment . . . [.]” *Carr v. State*, 106 Ala. 35, 38, 17 So. 350, 351 (1894). Some courts, also recognizing that such statutes can be improperly utilized, have specifically recognized that the innocent drawer who may be wrongfully prosecuted has a remedy of malicious prosecution against the payee.

....

. . . [I]n upholding the constitutionality of the Worthless Check Act, we should not be misunderstood as sanctioning its use for debt-collecting purposes. In addition to subjecting himself to a suit for malicious prosecution, a party using this statute for debt-collecting purposes may be subject to liability for abuse of process.

Tolbert, 321 So. 2d at 232 (some citations omitted).

102. *Mitchum*, 407 U.S. at 242.

matters exclusively to Congress,¹⁰³ and Congress has given federal courts exclusive jurisdiction over bankruptcy proceedings.¹⁰⁴ Federal courts issuing injunctions cannot be seen as insulting the state courts when Congress, acting pursuant to its constitutional power, has constructed a system under which particular issues are given over to the protection of those very federal courts. If this is an affront,¹⁰⁵ Congress and the Constitution must share the blame.¹⁰⁶

The argument is even stronger when the state proceeding has a collection purpose because the affront runs the other way—the very existence of the proceeding itself is an affront to the bankruptcy process.¹⁰⁷ Such efforts at an end-run around bankruptcy discharge should have no claim to protection, under *Younger*, from a federally-issued corrective order. Thus, relief deriving from the bankruptcy court would neither hamper state judicial proceedings that are legitimately aimed at deterring criminal behavior¹⁰⁸ nor serve as an affront to state courts.

The other policy underpinnings of *Younger* are similarly rebutted in a bankruptcy context. A desire to avoid needless friction between the state and federal systems—whether avoiding federal interference with a state’s enforcement of its substantive policies, or not disrupting a state’s judicial processes¹⁰⁹—fades when “friction” is not needless, but is in fact a result of the system’s fundamental structure. The Supremacy Clause prohibits a state from pursuing substantive policies that interfere with the achievement of bankruptcy’s goals, whether those policies were designed to undermine the bankruptcy system¹¹⁰ or have that effect collaterally.¹¹¹ No greater

103. The Constitution provides that “Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.” U.S. CONST. art. I, § 8, cl. 4.

104. See 28 U.S.C. § 1334(a) (2006).

105. See Redish, *Doctrine of Younger*, *supra* note 30, at 482 (“When Congress grants federal courts exclusive jurisdiction under a particular act, it often implies something negative about state courts.”).

106. See Dennis, *supra* note 29, at 341 (“The words and deeds of the Farmers [sic] as well as the structure of the Constitution itself demonstrate that Congress is the body entrusted with the task of defining the relationship between the federal and state sovereigns.”); cf. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 548–49 (1984) (suggesting that the structure of the Constitution itself regulates the balance of federal-state relations).

107. John P. Hennigan, Jr., *Criminal Restitution and Bankruptcy Law in the Federal System*, 19 CONN. L. REV. 89, 123 (1986) (“If bankruptcy law entitles a debtor to be free of collection proceedings, those proceedings hardly provide an adequate forum for asserting federal rights.”).

The same proposition can be drawn from the contexts of speedy trials and double jeopardy. In those cases, courts grant relief despite *Younger* “because the proceeding itself represents the harm that the constitutional provision protects against.” Simon, *supra* note 40, at 1378.

108. For a discussion of a statute not directed at genuinely criminal behavior, see *infra* notes 283–308 and accompanying text.

109. See *supra* text accompanying note 43.

110. For example, statutory liens that are effective only in the event of insolvency or upon commencement of a bankruptcy proceeding are avoidable under Bankruptcy Code § 545(1) because they are “thinly disguised attempts to impose state-determined priorities in bankruptcy.” *In re Loreto Winery Ltd.*, 898 F.2d 715, 718 (9th Cir. 1990).

disruption of state judicial processes can be found than the automatic stay, which brings most judicial proceedings to a screeching halt.¹¹²

When discharge first became a feature of bankruptcy under English law three hundred years ago, failure to pay one's debt was a criminal¹¹³—even capital¹¹⁴—offense. Because discharge effectively opened the doors of the debtors' prison,¹¹⁵ bankruptcy has been in tension with criminal law from the earliest days:

But at present the laws of bankruptcy are considered as laws calculated for the benefit of trade, and founded on the principles of humanity as well as justice: and to that end they confer some privileges, not only on the creditors, but also on the bankrupt or debtor himself. On the creditors, by compelling the bankrupt to give up all his effects to their use, without any fraudulent concealment: on the debtor, by exempting him from the rigor of the general law, whereby his person might be confined at the discretion of his creditor, though in reality he has nothing to satisfy the debt: whereas the law of bankrupts, taking into consideration the sudden and unavoidable accidents to which men in trade are liable, has given them the liberty of their persons, and some pecuniary emoluments, upon condition they surrender up their whole estate to be divided among their creditors.

111. For example, a trustee may assign certain executory contracts and unexpired leases even though otherwise-applicable state law would prohibit an assignment. 11 U.S.C. § 365(f)(1) (2006).

112. See *infra* text accompanying notes 175–98.

113. See 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 470–71 n.1 (15th ed. 1809) (“Throughout the three first statutes the bankrupt is uniformly called an offender, and the original design of the bankrupt laws appears to have been to prevent and defeat the frauds of criminal debtors . . .”).

114. In *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), the Court noted that at the time of the Constitutional Convention death was “the ultimate penalty for debt then in effect in England.” *Id.* at 369. Apparently, the only vote cast at the Convention against inclusion of the Bankruptcy Clause was based on fear that it would authorize a similar penalty for debt in the United States. *Id.*

115. The Court reviewed this history in *Katz*:

The term “discharge” historically had a dual meaning; it referred to both release of debts and release of the debtor from prison. Indeed, the earliest English statutes governing bankruptcy and insolvency authorized discharges of persons, not debts. One statute enacted in 1649 was entitled “An Act for discharging Poor Prisoners unable to satisfy their Creditors.” The stated purpose of the Act was to “Discharge . . . the person of [the] Debtor” “of and from his or her Imprisonment.” Not until 1705 did the English Parliament extend the discharge (and then only for traders and merchants) to include release of debts.

Id. at 364 (citations omitted).

In this respect our legislature seems to have attended to the example of the Roman law. I mean not the terrible law of the twelve tables; whereby the creditors might cut the debtor's body in pieces, and each of them take his proportionable share But I mean the law of *cession*, introduced by the christian emperors; whereby if a debtor *ceded*, or yielded up all his fortune to his creditors, he was secured from being dragged to a [jail]¹¹⁶

That tension remains to this day, in the sense that the Bankruptcy Code requires an examination into the character of a proceeding in order to determine whether its purpose is the collection of a dischargeable debt. The fact that “Our Federalism” compels deference when a genuinely penal statute is at issue¹¹⁷ does not alter the propriety of the inquiry.

One of the justifications for *Younger*—that it expresses a forum allocation preference¹¹⁸—is not as directly rebutted, because state courts share jurisdiction over certain grounds for nondischargeability of debts in bankruptcy.¹¹⁹ The availability of removal, however, makes federal courts the preferred (and usual) forum even when state courts can otherwise hear the case.¹²⁰

Rather than searching for exceptions to *Younger* that might permit an injunction in a particular case, it makes much more sense to acknowledge that *Younger*'s policy justifications do not survive close scrutiny in the bankruptcy context (setting aside the question whether they survive close scrutiny in any context at all). Professor Redish's separation-of-powers critique¹²¹ is equally applicable to a bankruptcy system in which Congress has allocated jurisdiction, in the proper exercise of its constitutionally-conferred power, to federal courts. Those courts should be no more able to

116. BLACKSTONE, *supra* note 113, at 471–72 (footnote omitted).

117. *See supra* text accompanying notes 31–34.

118. *See supra* text accompanying note 32.

119. Section 523(c)(1) requires that the dischargeability of certain types of debts—specifically, debts based on the debtor's fraud, § 523(a)(2), breach of fiduciary duty or larceny, § 523(a)(4), and debts incurred as a result of willful and malicious injury, § 523(a)(6)—be timely litigated in the bankruptcy court. If nondischargeability on those three grounds is not raised in the bankruptcy court, the debts are discharged and nondischargeability cannot be raised later. 11 U.S.C. § 523(c)(1) (2006). Nondischargeability of other debts, however, including those for certain fines, penalties and forfeitures, § 523(a)(7), can be litigated after the bankruptcy case is over, in any court of competent jurisdiction.

120. If a bankruptcy court has jurisdiction over a proceeding filed in state court after the bankruptcy case has begun, that matter can be removed from state court to the bankruptcy forum. Proceedings dealing with the dischargeability of particular debts are within the core jurisdiction of bankruptcy courts, 28 U.S.C. § 157(b)(2)(I), and, thus, subject to removal, 28 U.S.C. § 1452(a). If the bankruptcy case has already been closed, it can be reopened for the purpose of hearing the issue. *See* 11 U.S.C. § 350(b); *Aguiluz v. Bayhi (In re Bayhi)*, 528 F.3d 393 (5th Cir. 2008) (bankruptcy reopened to hear matter, removed from state court, dealing with nondischargeability of a student loan under § 523(a)(8)); *Kowalski v. Romano (In re Romano)*, 59 F. App'x 709 (6th Cir. 2003) (approving reopening of bankruptcy case, thirteen years later, to hear nondischargeability issues).

121. *See supra* text accompanying notes 80–82.

abstain in bankruptcy matters, when jurisdiction is given, than in civil rights cases. (This proposition is hardly novel; the notion that federal courts should not eschew their conferred jurisdiction has a venerable history.¹²²) This text-based critique is even more direct in the bankruptcy context than in *Younger*, given the fact that bankruptcy is an express exception to the Anti-Injunction Act. If that exception is to have any force, it must mean something like what it says.

This argument runs headlong into *Mitchum*'s suggestion that finding an exception to the Anti-Injunction Act does not displace *Younger*. One crucial difference between bankruptcy and the civil rights context, however, should be of determinative significance. Section 1983, although a monumental piece of legislation, is comprised of only seventy-three words. Within those few words are no standards governing the propriety of an injunction in a particular case. One of the reasons for not finding § 1983 an exception to the Anti-Injunction Act, pre-*Mitchum*, was concern that doing so would open a floodgate of cases¹²³ or create other similarly "disastrous" results.¹²⁴ Section 1983, a generic civil rights statute, applies to a limitless array of

122. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) ("It is most true that this Court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."); *New Orleans Pub. Serv., Inc. (NOPSI) v. Council of New Orleans*, 491 U.S. 350, 358 (1989) ("Our cases have long supported the proposition that federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred."); *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976) ("Abstention from the exercise of federal jurisdiction is the exception, not the rule.").

The Court in *NOPSI* addressed the juxtaposition of these two concepts—that courts should not abstain from exercising their conferred jurisdiction, on the one hand, and abstention from interference with state proceedings, on the other—by asserting that the former

does not eliminate, however, and the categorical assertions based upon it do not call into question, the federal courts' discretion in determining whether to grant certain types of relief—a discretion that was part of the common-law background against which the statutes conferring jurisdiction were enacted. Thus, there are some classes of cases in which the withholding of authorized equitable relief because of undue interference with state proceedings is "the normal thing to do," *Younger v. Harris*, 401 U.S., at 45.

NOPSI, 491 U.S. at 359 (citations omitted). This attempted reconciliation falls quite short because, as Professor Redish noted years before *NOPSI* was decided, *Younger* does not represent a grant of "judicial discretion to restrike the balance in individual cases." Redish, *Abstention*, *supra* note 29, at 88. Rather, its "narrow set of rarely-used exceptions" renders its abstention "all but total." *Id.*

123. Cf. Redish, *Abstention*, *supra* note 29, at 85 ("Statutes such as § 1983 . . . use language which, if woodenly and anachronistically read, can be interpreted to provide an 'absolute' right of access to the federal courts." (quoting Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 622 n.49 (1981))).

124. See *id.* at 92. Such concerns are hardly applicable in bankruptcy, given that the parties are already involved in a federal court proceeding before a judge charged with determining pertinent issues, such as the dischargeability of particular debts.

possible constitutional violations. Although it is an exception to the Anti-Injunction Act (per *Mitchum*), standards are needed because our dual structure of legislative and judicial authority could sensibly envision that an injunction should not be permissible in every case involving that exception. *Younger* provides the standard—federal courts might properly exercise discretion, despite the presence of a (judicially-created) statutory exception,¹²⁵ and *Younger* provides the otherwise-missing, but necessary, filter.

Treating *Younger* as a separate hurdle, standing beside and independent of the Anti-Injunction Act, makes more sense in the context of § 1983 than in the context of bankruptcy, given § 1983's lack of standards by which to determine whether an injunction, although not barred by the Act, is appropriate in a particular case. Bankruptcy provides its own filter, however, through the Bankruptcy Code's thorough and complex statutory structure. The Bankruptcy Code is a statute not of seventy-three words, but of many thousands. Within its confines are at least three different sources of injunction,¹²⁶ each cabined by appropriate and detailed standards.¹²⁷

The irrelevance of *Younger* is perhaps best illustrated by a hypothetical. Suppose that state taxing authorities begin civil collection proceedings against a taxpayer who files bankruptcy three weeks later. Cases decided since *Younger* have held its principles applicable to civil proceedings when an important state interest is involved,¹²⁸ and tax collection is surely such an interest—perhaps even the most important of a state's civil concerns. Yet bankruptcy clearly stops such a proceeding,¹²⁹ *Younger* and its progeny notwithstanding.¹³⁰

This outcome is so widely understood that no discussion of *Younger*

125. This is the way that several commentators interpret *Younger*, outside of the bankruptcy context. Professor Friedman, for example, proposed a “revisionist” answer to Professor Redish’s separation-of-powers concerns:

The difficulty with congressionally granted jurisdiction is that, as with much legislation, those statutory allocations necessarily are somewhat imprecise. Given the nature of Congress’ task, it is difficult for Congress to draft jurisdictional statutes that do anything more than carve out rough contours as to when federal jurisdiction is necessary or inappropriate. Oftentimes, those grants are overbroad, and the Supreme Court has sought to make a more sensitive allocation.

Friedman, *supra* note 30, at 599 (footnote omitted); see also Brown, *supra* note 1, at 142–43 (“An alternative response to Professor Redish’s strict reading of the statutes is to view them as important, even central, but not as providing definitive answers or as constituting the only source to which one must look to resolve questions of abstention and similar matters. . . . [I]t makes sense under this view to consider Congress as having enacted them against a background of traditions and understandings about how courts operate.”).

126. 11 U.S.C. §§ 105, 362(a), 524 (2006).

127. See *infra* text accompanying notes 175–215.

128. See, e.g., *Moore v. Sims*, 442 U.S. 415, 423 (1979).

129. Admittedly, in this hypothetical the injunction comes through the vehicle of § 362 rather than § 105 or § 524, but that difference is unimportant for purposes of the illustration.

130. See, e.g., *Raleigh v. Ill. Dep’t of Revenue*, 530 U.S. 15, 25 (2000) (noting that tax litigation pending at the time the taxpayer files for bankruptcy is subject to the automatic stay).

ever appears, but a broad interpretation of *Younger* (as it has evolved) would lead to the opposite conclusion—that no bankruptcy stay can ever halt a proceeding in which a state has an important interest, unless of course one of *Younger*'s exceptions is applicable. *Younger* is absent in this case not because an exception is found; rather, *Younger* is absent because it is totally irrelevant and inapplicable in the first place. The Bankruptcy Code provides authority that is both necessary and sufficient. Without doubt, bankruptcy injunctions are appropriate when the core functions of bankruptcy are at stake, despite the high degree of a state's interest in particular proceedings. The Bankruptcy Code—alone—is applicable, and it—alone—defines the limits of appropriate injunctions.

Nothing in *Younger* compels a different conclusion. In fact, *Younger* was built around a call for balancing the interests of the state and federal governments.¹³¹ In the bankruptcy arena, the Bankruptcy Code itself strikes the necessary balance. Here, *Younger* is, very simply, superfluous.

This approach is much more satisfactory than an effort to squeeze within one of *Younger*'s exceptions, even if that effort is occasionally successful. Arguably, “extraordinary circumstances” are present not only when the prosecution is venal, but also when Congress, in the exercise of its power under Article I, § 8, Clause 4 of the Constitution, has committed the issue to the federal courts. Otherwise, in order to defeat the provisions of the Bankruptcy Code, powerful creditors need only obtain the sympathetic ear of a state legislature willing to clothe collection proceedings in criminal garb.¹³² One can imagine the appeal of such “criminalized” collection statutes in states that are home to major credit card issuers.¹³³ The effect

131. *Younger v. Harris*, 401 U.S. 37, 44 (1971) (“The concept [of ‘Our Federalism’] does not mean blind deference to ‘States’ Rights’ any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.”). The “balance” actually struck in *Younger* was decidedly tipped in favor of the states, however. Haberfelde, *supra* note 33, at 1561.

132. Creditors clearly have already done so, at least as far as bad check statutes are concerned. *See infra* notes 283–308 and accompanying text. They also have done so in other, more particularized, instances. *See infra* note 279.

133. Apparently only one commentator (so far) has intimated that the failure to pay credit card obligations should be criminalized. Todd J. Zywicki, *The Economics of Credit Cards*, 3 CHAP. L. REV. 79 (2000). Professor Zywicki discerned no “principled distinction” between a credit card obligation and the obligation on a check:

Everyone knows that you are only supposed to write checks if you have adequate funds to honor them. The burden is on the check-writer to be responsible to make sure that she has sufficient funds to honor the check—it is not the bank's responsibility. Again, it is

would be to undermine Congress's carefully crafted balancing of the interests of debtors vis-à-vis creditors and of creditors among themselves. Nothing could be more damaging to a bankruptcy system committed to the exclusive jurisdiction of the federal courts.¹³⁴

This goes beyond a suggestion that *Younger* is inapplicable in areas preempted by federal law.¹³⁵ The usual understanding of the preemption doctrine prescribes that, under the Supremacy Clause, states may not enact laws inconsistent with federal statutes and that state courts must interpret and enforce federal statutes.¹³⁶ Bankruptcy laws are no different than other federal statutes in the first respect—states may no more enact insolvency laws that are inconsistent with the Bankruptcy Code than they may enact statutes inconsistent with other federal provisions.¹³⁷ In the second respect, however, bankruptcy is not just another field subject to federal preemption; it is not similar to civil rights matters, which are within the power and (presumably¹³⁸) the competence of state courts. In bankruptcy matters, state courts generally may not interpret and enforce the federal law.¹³⁹ Instead, by committing bankruptcy matters to the exclusive jurisdiction of the federal courts, federal law supplants state insolvency laws not only substantively, but jurisdictionally as well. Bankruptcy is, by its nature, a “*federal judicial process.*”¹⁴⁰ State courts have no role.

hard to see how this responsibility changes when an individual uses a credit card to pay for the purchase, rather than a check. In both cases, the individual is promising to honor the obligation with sufficient cash revenues when the appropriate time comes.

Id. at 90. Interestingly, Professor Zywicki seems to have given no thought to the possibility that the real transgression may lie in criminalizing the nonpayment of debts when those debts take the form of bad checks, rather than in failing to expand the types of debts for which imprisonment may be imposed. Cf. William Waller, *Kickin' em While They're Down: Consumer Bankruptcy Reform*, 35 J. ECON. ISSUES 871, 877 (2001) (stating, hopefully as a sarcastic exaggeration, that “from the creditor’s perspective things have really gone to hell since the death penalty for bankruptcy was lifted.”).

Fortunately, other commentators apparently disagree. See, e.g., Donald R. Korobkin, *Bankruptcy Law, Ritual, and Performance*, 103 COLUM. L. REV. 2124, 2138 (2003) (“Over the centuries it became increasingly clear that holding the debtor’s body in prison was an inadequate means of achieving the economic equivalent to contractual performance.”).

134. See 28 U.S.C. § 1334 (2006) (conferring exclusive jurisdiction over bankruptcy proceedings to the federal courts).

135. See *supra* note 52.

136. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824) (holding that federal law preempts state laws that “interfere with, or are contrary to, the laws of Congress” pursuant to the Supremacy Clause of the Constitution).

137. See *Stellwagen v. Clum*, 245 U.S. 605, 613 (1918) (“In view of this grant of authority [over bankruptcy] to the Congress it has been settled from an early date that state laws to the extent that they conflict with the laws of Congress, enacted under its constitutional authority, on the subject of bankruptcies are suspended.”).

138. See *supra* note 40 and accompanying text.

139. For a discussion of the scope of state court jurisdiction over issues of dischargeability, see *supra* note 120.

140. Ralph Brubaker, *Explaining Katz’s New Bankruptcy Exception to State Sovereign Immunity: The Bankruptcy Power as a Federal Forum Power*, 15 AM. BANKR. INST. L. REV. 95, 129 (2007).

The approach advocated here is perhaps a rejection of Professor Redish's separation-of-powers critique, which might be construed as a call for no exercise of discretion in any of the cases falling within an exception to the Anti-Injunction Act,¹⁴¹ whether that exception is § 1983, bankruptcy, or something else.¹⁴² This approach, however, is more modest; it leaves *Younger* and *Mitchum* intact in the context out of which they arose—civil rights¹⁴³—while simultaneously curtailing extension of the abstention doctrine into the markedly different arena of bankruptcy. It also has the advantage of negating the necessity for strained efforts to find an applicable exception to *Younger*.¹⁴⁴

Professor Brubaker's argument was developed in the wake of *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), as a possible solution to sovereign immunity questions:

If federal bankruptcy "law," in its essence, is creation of a federal judicial process, then Congress's acknowledged power to directly regulate states, and thus subject the states to the force of supreme federal bankruptcy "laws," implies that Congress has the power to subject states to the bankruptcy jurisdiction of federal courts and bind states to that uniform *federal judicial* process, because that's what federal bankruptcy "law" is. The peculiar accommodation of state sovereignty embodied in the *Seminole-Alden* framework simply does not work for bankruptcy "law." It is totally contradictory and nonsensical to say that states are bound by federal bankruptcy "law," but that their constitutional sovereign immunity exempts them from being subjected to the jurisdiction of federal bankruptcy courts, if that federal judicial process *is* federal bankruptcy "law." On this reasoning, then, bankruptcy *is* simply an *exception* to state sovereign immunity.

Brubaker, *supra* at 129 (footnotes omitted). Although Professor Brubaker confessed a personal disbelief in his theory because of its lack of limits, *see id.* at 131, the theory does provide a useful analogy to the abstention context.

141. *See Brown, supra* note 1, at 141–42.

142. For a discussion of the statutory and judicially-created exceptions to the Anti-Injunction Act, *see supra* notes 14–20 and accompanying text.

143. The Supreme Court has only occasionally engaged in a *Younger* analysis outside the context of § 1983. In *NOPSI*, 491 U.S. 350 (1989), the Court held *Younger* inapplicable and reversed the lower court's decision to abstain from exercising jurisdiction to review non-judicial ratemaking proceedings. *Id.* at 353, 369, 373. In the course of its opinion, the Court cautioned "that federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred." *Id.* at 358. The Court did not mention the Anti-Injunction Act, but its holding—that the state action was not a "proceeding" to which *Younger* applied, *id.* at 369–70,—would have also supported a holding that the Anti-Injunction Act was similarly inapplicable. In the context at issue in this Article, the Anti-Injunction Act is inapplicable not because the requisite type of "proceeding" is lacking, but because bankruptcy is an express exception.

144. One of the exceptions—for bad faith or harassment in the prosecution—is often at issue. *See, e.g., P. Steven Kratsch & William E. Young, Criminal Prosecutions and Manipulative Restitution: The Use of State Criminal Courts for Contravention of Debtor Relief*, 1984 ANN. SURV. BANKR. L. 107, 117. The Bankruptcy Code, however, is relevant only to debt collection. The private motives of prosecutors and the animus, or lack thereof, lurking behind their prosecutions is not bankruptcy's business. When bankruptcy's central purposes are implicated and compromised, the court's focus should rest on correction and repair; the prosecutor's motives remain irrelevant.

E. *The Sovereign Immunity Analogy*

Younger relied heavily on varying kinds of interests that a state enjoys, such as its interest in pursuing its substantive legislative goals¹⁴⁵ and its interest in noninterference with the functioning of its courts.¹⁴⁶ Despite the importance and validity of these interests, this Article argues that they are not determinative of—or even relevant to—questions regarding the appropriateness of an injunction in a particular bankruptcy case. Support for that argument can be drawn from an analogous context—sovereign immunity. *Younger* and sovereign immunity are different aspects of federalism, directed at different types of intrusion upon the states. Under the former, a state court is protected from a federally-issued injunction; under the latter, a state is protected from being subjected to a federally-based lawsuit. In both situations, however, states are subjected to some sort of intrusive federal process. Thus, consideration of sovereign immunity helps illuminate the present discussion.

The leading and most recent sovereign immunity case in the bankruptcy field is *Central Virginia Community College v. Katz*.¹⁴⁷ In *Katz*, the Court drew “[t]he ineluctable conclusion . . . that States agreed in the plan of the Convention not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to ‘Laws on the subject of Bankruptcies.’”¹⁴⁸ In so holding, the Court rested on reasoning having remarkable resonance with *Younger* and *Mitchum*.

The *Katz* Court reviewed the history of the Bankruptcy Clause,¹⁴⁹ finding that the Framers intended it to constitute a federal response to problems presented by states’ refusals to honor discharges granted by sister states.¹⁵⁰ The Bankruptcy Clause is broader than its animating purpose,

145. See *supra* note 43 and accompanying text.

146. See *supra* note 43 and accompanying text.

147. 546 U.S. 356 (2006). In *Katz*, a bookstore filed bankruptcy within ninety days of making payments to several state educational institutions. See *id.* at 360. The trustee sought to avoid the payments as preferences under 11 U.S.C. § 547(b), and to recover the money for the benefit of the estate. See *id.* The creditors’ motion to dismiss on the grounds of sovereign immunity was denied by the bankruptcy court. See *id.* The district court and the Sixth Circuit affirmed on the grounds that Congress had abrogated sovereign immunity in § 106 of the Bankruptcy Code. See *id.* at 361. Although the Supreme Court granted certiorari to decide that question, see *id.*, which had been left open by its earlier opinion in *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004), the decision in *Katz* did not rest on § 106. See *Katz*, 546 U.S. at 362.

148. *Katz*, 546 U.S. at 377.

149. This parallels the historical survey undertaken by the court in *Mitchum v. Foster*, 407 U.S. 225, 238–43 (1972), to support the conclusion that Congress intended, via § 1983, to impose the federal courts between the states and the people, in order to guard against state action violative of constitutional rights. See *supra* notes 68–69 and accompanying text.

150. See *Katz*, 546 U.S. at 377. The Court discussed two cases, *James v. Allen*, 1 U.S. (1 Dall.) 188 (1786), and *Millar v. Hall*, 1 U.S. (1 Dall.) 229 (1788), in which debtors whose debts were discharged in New Jersey and Maryland, respectively, were arrested for nonpayment of debts when they crossed into Pennsylvania. In the former case, the court held that discharge under New Jersey’s insolvency laws was effective only in New Jersey. See *James*, 1 U.S. at 190. In the latter, the court

however, because “its coverage encompasses the entire ‘subject of Bankruptcies.’”¹⁵¹ The Framers understood that the Clause would permit federal courts to issue orders—any orders, including those sounding in equity—ancillary to bankruptcy’s *in rem*¹⁵² jurisdiction.¹⁵³ As support, the Court pointed to passage of the first bankruptcy legislation in 1800,¹⁵⁴ which included a specific grant of habeas corpus power to federal courts to order the release of debtors from state prisons¹⁵⁵—sixty-seven years before that writ became available to state prisoners generally.¹⁵⁶ The Court found the grant of habeas power “remarkable,”¹⁵⁷ in part, because no objection to it was raised at a time that was “rife with discussion of States’ sovereignty and their amenability to suit.”¹⁵⁸

Thus, the Court concluded that the states had “agreed in the plan of the Convention”¹⁵⁹ to forego sovereign immunity defenses, as far as bankruptcy proceedings were concerned:

The scope of this consent was limited; the jurisdiction exercised in bankruptcy proceedings was chiefly *in rem*—a narrow jurisdiction that does not implicate state sovereignty to nearly the same degree as other kinds of jurisdiction. But while the principal focus of the bankruptcy proceedings is and was always the res, some exercises of bankruptcy courts’ powers—issuance of writs of habeas corpus included—unquestionably involved more than mere adjudication of rights in a res. In ratifying the Bankruptcy Clause, the States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts.¹⁶⁰

The Court offered one caveat, or narrowing principle: “We do not mean to suggest that every law labeled a ‘bankruptcy’ law could, consistent with

held that discharge in one state is sufficient to constitute discharge everywhere. See *Millar*, 1 U.S. at 232. Interestingly, the same lawyer won both cases, representing the creditor in the former and the debtor in the latter. He was also a delegate to the Constitutional Convention. See *Katz*, 546 U.S. at 366–68.

151. *Katz*, 546 U.S. at 370.

152. *Id.* at 362 (“Bankruptcy jurisdiction, at its core, is *in rem*.”).

153. *Id.* at 370.

154. Bankruptcy Act of 1800, ch. 18–19, 2 Stat. 19 (1800) (repealed 1803).

155. See *id.*, ch. 19, § 38, 2 Stat. at 32.

156. *Katz*, 546 U.S. at 374.

157. *Id.* at 374.

158. *Id.* at 375.

159. *Id.* at 377.

160. *Id.* at 378 (footnote omitted).

the Bankruptcy Clause, properly impinge upon state sovereign immunity.”¹⁶¹ Thus, only those provisions that are enacted in furtherance of the bankruptcy power, however the scope of that power is determined,¹⁶² can be enforced without regard to sovereign immunity.¹⁶³

Admittedly, *Katz* presents substantial analytical problems in its own right.¹⁶⁴ Perhaps *Katz* was ultimately made necessary by the Court’s decades of incoherent Eleventh Amendment analysis, beginning with its refusal to read and apply the Amendment as written¹⁶⁵ and continuing through its decision in *Seminole Tribe of Florida v. Florida*.¹⁶⁶ If so, one cannot help but notice a parallel to the Court’s failure to read the Anti-Injunction Act as written and, instead, its crafting in *Younger* of a judicial doctrine that effectively repeals statutory provisions.

In any event, much of what the Court said in *Katz*¹⁶⁷ applies directly to an analysis of *Younger*. First, the *in rem* nature of bankruptcy jurisdiction recalls the judicially-created *in rem* exception to the Anti-Injunction Act.¹⁶⁸ Although not necessarily apropos, given that *Mitchum* treated *Younger* as operating within an exception to the Act,¹⁶⁹ *Younger* regarded the Anti-Injunction Act as informative on the question of policy. If bankruptcy’s *in rem* nature justifies the setting aside of sovereign immunity in bankruptcy matters, then that nature should similarly justify setting aside judicially-created limits on federal injunctions issued to effectuate provisions of the Bankruptcy Code.

Secondly, because the Bankruptcy Clause is grounded historically in vindicating bankruptcy discharge through the release of imprisoned debtors,

161. *Id.* at 378 n.15.

162. See Brubaker, *supra* note 140, at 131–33.

163. See generally Randolph J. Haines, *Federalism Principles in Bankruptcy After Katz*, 15 AM. BANKR. INST. L. REV. 135 (2007).

164. See generally Brubaker, *supra* note 140; Thomas E. Plank, *State Sovereignty in Bankruptcy After Katz*, 15 AM. BANKR. INST. L. REV. 59 (2007); Martin H. Redish & Daniel M. Greenfield, *Bankruptcy, Sovereign Immunity and the Dilemma of Principled Decision Making: The Curious Case of Central Virginia Community College v. Katz*, 15 AM. BANKR. INST. L. REV. 13 (2007).

165. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1475–76 (1987); Vicki C. Jackson, *One Hundred Years of Folly: The Eleventh Amendment and the 1988 Term*, 64 S. CAL. L. REV. 51 (1990); Redish & Greenfield, *supra* note 164, at 20.

166. 517 U.S. 44 (1996).

167. Because the Court’s earlier decision in *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004), involved discharge, and this Article is concerned with the protection of discharge, it may appear that *Hood* is more relevant than *Katz*. That is true to the extent that *Hood* characterized the adversary proceeding to determine dischargeability of a particular debt involved in that case as ancillary to bankruptcy’s *in rem* jurisdiction. See *id.* at 447. On the other hand, *Hood* stressed that the debtor’s efforts did not expose the state to coercive process, see *id.* at 450, and distinguished a proceeding to recover a preference, see *id.* at 454,—the type of process involved in *Katz*—presumably as an example of the type of coercive process that does constitute an affront to state sovereign immunity. Thus, *Katz* involved a coercive process much more akin to a federally-issued injunction, making it the more relevant of the two cases.

168. See *supra* note 14.

169. See *supra* text accompanying notes 74–77.

the Framers would have expected bankruptcy's power to be focused on state officials and, perhaps, state courts.¹⁷⁰ Here, of course, the federal bankruptcy power is not being used to deal with the states' failure to recognize discharges granted by sister states; rather, it is being used to address the failure of some states to respect the scope of discharge granted by Congress in the Bankruptcy Code. Either way, invocation of a federal court's power vindicates the discharge authorized by the Bankruptcy Code.¹⁷¹

Finally, the *Katz* Court concluded that a federal judicial process constituting an affront to state sovereign immunity is permissible as long as it is within the power granted to Congress by the Bankruptcy Clause.¹⁷² The tension between the state and federal sovereigns, inherent in the context of sovereign immunity,¹⁷³ is not unlike the systemic tension that arises when a federal court enjoins a state proceeding. If the affront involved in the sovereign immunity context is rooted in the Constitution itself, and hence permissible, then the affront inherent when injunctions are issued to enforce provisions of the Bankruptcy Code are similarly systemic and permissible. *Younger's* concern about such an affront is neither here nor there.¹⁷⁴

The only question left, therefore, is to ask what the Bankruptcy Code provides.

170. To the extent that "imprisonment for debt was not a criminal proceeding," the interests of states in enforcing their criminal laws would not have been implicated. Plank, *supra* note 164, at 78–79.

171. One cannot say that a federal injunction in this circumstance vindicates any purpose the Framers might have had in regards to discharge, because discharge did not become a feature of bankruptcy law for another 100 years. See Brubaker, *supra* note 140, at 130–31. Rather, a federal injunction vindicates a more modern bankruptcy purpose, but a purpose no less essential for its modernity.

172. Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 379 (2006).

173. See Brubaker, *supra* note 140, at 126.

Of course, the concurrent propositions of states' sovereign immunity and Congress's plenary legislative powers are at cross-purposes with one another. Congress's Article I power to regulate the conduct of the states is inevitably undermined to the extent the states retain an immunity from suits to enforce valid federal laws. . . .

The internal tension thus created between state sovereign immunity and the role of the federal courts in enforcing the supremacy of federal law is nowhere more evident than with respect to federal bankruptcy laws, which by their very nature exist as a federal judicial process.

Id.

174. See Haines, *supra* note 163, at 139 ("[T]he complete 'alienation of State sovereignty' implies not only that sovereign immunity is inapplicable, but also that federalism principles in general should have no place in bankruptcy law, except to the extent otherwise indicated by Congress. Indeed, in the absence of an express indication of contrary Congressional intent, courts should assume that Congress intended to establish a uniform national law on the subject of bankruptcy that pays no heed whatsoever to state law.").

III. INJUNCTIONS UNDER THE BANKRUPTCY CODE

The Bankruptcy Code determines the availability of an injunction when a state criminal proceeding is used to collect a dischargeable debt, and the Code's provisions permit an injunction in an appropriate case.¹⁷⁵

The Bankruptcy Code has three independent, but interrelated, provisions under which injunctions may issue—§ 362, § 105 and § 524. The first of these, § 362, is the well-known automatic stay—"that miraculous omnipresence"¹⁷⁶—which becomes effective upon the initiation of a bankruptcy proceeding.¹⁷⁷ Section 362(a) provides for an automatic stay, "applicable to all entities," of any sort of proceeding designed "to recover a claim against the debtor that arose before the commencement of the [bankruptcy] case."¹⁷⁸ The automatic stay is subject to a number of exceptions, however, enumerated in § 362(b).¹⁷⁹ Among them is § 362(b)(1), which provides an exception for "the commencement or continuation of a criminal action or proceeding against the debtor."¹⁸⁰

Section 362(b)(1) removes criminal proceedings from the reach of the automatic stay,¹⁸¹ but it does nothing more than this. The exception does not address and does not affect the applicability of other injunctive provisions found in the Bankruptcy Code.¹⁸² Proceedings that are nominally criminal

175. See *supra* notes 110–12 and accompanying text.

176. *In re Brown*, 39 B.R. 820, 827 (Bankr. M.D. Tenn. 1984).

177. See 11 U.S.C. § 362 (2006).

178. *Id.* § 362(a).

179. *Id.* § 362(b).

180. *Id.* § 362(b)(1). Subsection 362(b)(4), which excepts proceedings in exercise of police or regulatory power from the automatic stay, adds nothing to the analysis. Criminal proceedings are most directly addressed by § 362(b)(1), and it is more than sufficient to make the automatic stay inapplicable.

181. *Id.*

182. Indeed, § 362(b)(1) does not affect the applicability of non-injunctive Bankruptcy Code provisions either, as illustrated by *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990). In that case, the Court held that a criminal restitution obligation could be discharged in Chapter 13 (as then drafted). Amicus argued, *inter alia*, that § 362(b)(1) reflected congressional intent to except such an obligation from discharge because "it would be anomalous to construe the [Bankruptcy] Code as eliminating a haven for criminal offenders under the automatic stay provision while granting them sanctuary from restitution obligations under Chapter 13." *Id.* at 560. The Court rejected that argument, however:

We find no inconsistency in these provisions. Section 362(b)(1) ensures that the automatic stay provision is not construed to bar federal or state prosecution of alleged criminal offenses. It is not an irrational or inconsistent policy choice to permit prosecution of criminal offenses during the pendency of a bankruptcy action and at the same time to preclude probation officials from enforcing restitution orders while a debtor seeks relief under Chapter 13. Congress could well have concluded that maintaining criminal prosecutions during bankruptcy proceedings is essential to the functioning of government but that, in the context of Chapter 13, a debtor's interest in full and complete release of his obligations outweighs society's interest in collecting or enforcing a restitution obligation outside the agreement reached in the Chapter 13 plan.

Id. at 560–61. Chapter 13 has since been amended by the addition of § 1328(a)(3), which legislatively reversed *Davenport*.

get an automatic pass rather than an automatic stay under § 362, but they may then be subjected to the case-by-case inquiry of § 105.¹⁸³ This is made abundantly clear in prominent Bankruptcy Code commentary, in the Code's legislative history, and in numerous cases.

COLLIER's explains it as follows: "Notwithstanding the exemption from the *automatic* stay, the bankruptcy court still retains the power to enjoin these acts if, under section 105, the traditional factors favoring an injunction are present."¹⁸⁴ Other commentators agree. Professors Epstein, Nickels, and White, authors of another leading bankruptcy treatise, write that "[a]ny action that escapes the stay, either because the action is not covered by section 362(a) or is excepted by (b), is nevertheless subject to discretionary injunction based on section 105(a)."¹⁸⁵

The legislative history to the Bankruptcy Code, cited in COLLIER's analysis of this proposition, is consistent:

The effect of an exception is not to make the action immune from injunction.

The court has ample other powers to stay actions not covered by the automatic stay. Section 105 . . . grants the power to issue orders necessary or appropriate to carry out the provisions of title 11 By excepting an act or action from the automatic stay, the bill simply requires that the trustee move the court into action, rather than requiring the stayed party to request relief from the stay. There are some actions, enumerated in the exceptions, that generally should not be stayed automatically upon the commencement of the case, for reasons of either policy or practicality. Thus, the court will have to determine on a case-by-case basis whether a particular action which may be harming the estate should be stayed.¹⁸⁶

While § 105 does not constitute a roving commission to be used by the bankruptcy court "as a panacea for all ills confronted in the bankruptcy

183. See 11 U.S.C. §§ 105, 362(b)(1).

184. 2 COLLIER ON BANKRUPTCY ¶ 105.04[3], at 105–78 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2010).

185. 1 DAVID G. EPSTEIN, STEVE H. NICKLES & JAMES J. WHITE, BANKRUPTCY § 3-21(e)(ii), at 244 (1992); see also *id.* § 3-22, at 245 ("The stay of section 362(a) is the only injunction that results automatically from the debtor's bankruptcy, but section 362(a) is not the only law for enjoining conduct that affects the bankruptcy.").

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

case,¹⁸⁷ or as permission to contradict specific provisions of the Bankruptcy Code,¹⁸⁸ neither is it so narrow that it can be used only when a specific Bankruptcy Code provision expressly justifies it.¹⁸⁹ Rather, § 105 is appropriately used to achieve the purposes and policies of the Bankruptcy Code as expressed in the statute itself. Thus, obligations that vindicate a state's penal interest, as well as debts shown to have been incurred through a debtor's fraud, will be nondischargeable—these obligations will not be affected by any of the three injunctions in the Bankruptcy Code. But nominally-criminal proceedings that are collection proceedings at heart will be caught, as they should be.

Court decisions reinforce this interpretation of § 362(b). In *Sylvestre v. Safeway, Inc. (In re Sylvestre)*,¹⁹⁰ the court held that § 362(b)(1) applies to all criminal actions, but observed that the Bankruptcy Code's other injunctive provisions remain available: "Clearly the use of criminal process to collect debts may frustrate the purpose of the automatic stay. The remedy, however, lies in a separate injunction."¹⁹¹ Similarly, the court in *Gruntz v. County of Los Angeles (In re Gruntz)*, noted that § 105 is available when an exception renders the automatic stay inapplicable.¹⁹² These cases, and others, make the law clear on this point—the only effect of § 362(b)(1)'s exception is to require the court to determine, on a case-by-case basis, whether the state proceeding can be enjoined under one of the Bankruptcy Code's other injunctive provisions.

Sections 362(b) and 105 are routinely applied in exactly that fashion in cases presenting other fact patterns. In *A.H. Robins Co. v. Piccinin*,¹⁹³ for example, the court stated that § 105 is properly used "to enjoin actions excepted from the automatic stay which might interfere in the rehabilitative process whether in a liquidation or in a reorganization case."¹⁹⁴ Thus, § 105 permitted the bankruptcy court to enjoin proceedings against non-debtors—the debtor's co-defendants in tort suits—despite the limitation of § 362(a)'s automatic stay to proceedings directed toward debtors, because continuation of the suits would thwart the debtor's effort to obtain benefits the Bankruptcy Code was designed to provide.¹⁹⁵

It would be a tremendous leap to suggest, relying on the Bankruptcy

187. COLLIER, *supra* note 184, ¶105.01[2], at 105-6.

188. See Official Comm. of Equity Sec. Holders v. Mabey, 832 F.2d 299, 302 (4th Cir. 1987).

189. Indeed, if that were required, § 105 would be entirely superfluous.

190. No. 91-2689, 1992 U.S. App. LEXIS 12244 (4th Cir. May 27, 1992).

191. *Id.* at *3.

192. 202 F.3d 1074, 1087 (9th Cir. 2000) (en banc) ("There also is a procedural avenue to forfend state actions that are not subject to the automatic stay but that threaten the bankruptcy estate: a request for an injunction under 11 U.S.C. § 105. The bankruptcy court's injunctive power is not limited by the delineated exceptions to the automatic stay, nor confined to civil proceedings.")

193. 788 F.2d 994 (4th Cir. 1986).

194. *Id.* at 1003 (quoting *In re Johns-Manville Corp.*, 26 B.R. 420, 425 (Bankr. S.D.N.Y. 1983)).

195. See *id.* at 1008.

Code's preliminary deference to actions that are nominally criminal (per § 362(b)(1)) and the apparent nondischargeability of penal obligations,¹⁹⁶ that § 105's broad "all writs" provision can never apply to a state collection proceeding masquerading as a criminal prosecution. Just as the courts recognized in *Sylvestre*, *Gruntz* and *Piccinin*, § 105 may be employed to enjoin proceedings not otherwise subject to the automatic stay.¹⁹⁷ When a "criminal" statute is enacted and employed to serve a purely collection purpose that would contravene the purposes of bankruptcy, as those purposes have been expressed in the language of the Bankruptcy Code itself, a bankruptcy court has authority under § 105 to enjoin that state proceeding.¹⁹⁸

196. Section 523(a)(7) excepts penal obligations "payable to and for the benefit" of the government from discharge. 11 U.S.C. § 523(a)(7) (2006). Its proper interpretation is discussed later. See *infra* notes 238–82 and accompanying text.

197. See *Sylvestre v. Safeway, Inc. (In re Sylvestre)*, No. 91-2689, 1992 U.S. App. LEXIS 12244 (4th Cir. May 27, 1992); *Gruntz*, 202 F.3d 1074; *Piccinin*, 788 F.2d 994.

198. The Ninth Circuit's decision in *Gruntz v. County of Los Angeles* might appear to be inconsistent with this assertion, because it held that the automatic stay exception for criminal proceedings, § 362(b)(1), applies without regard to the collection motive underlying that proceeding. See *Gruntz*, 202 F.3d at 1085–86. There is no inconsistency because this Article agrees that § 362(b)(1) applies to all criminal proceedings, whether collection-oriented or not. The collection purpose that is irrelevant under § 362(b)(1), however, is anything but irrelevant under § 105 and § 524.

Gruntz directly supports the position advocated in this Article in another respect as well. A second issue in that case, besides the question whether the automatic stay prevents a criminal prosecution for willful failure to pay child support, was whether the *Rooker-Feldman* doctrine bars relitigation in bankruptcy court of a state criminal court judgment that the automatic stay does not apply. See *Gruntz*, 202 F.3d at 1078. The County had argued that it does. See *id.* at 1077–78. Although *Gruntz*'s holding in the negative has been sharply criticized, *Siskin v. Complete Aircraft Services (In re Siskin)*, 258 B.R. 554, 563 (Bankr. E.D.N.Y. 2001), that holding provides analogous support for this Article's argument that the Bankruptcy Code empowers a federal court to determine whether a state proceeding, although nominally criminal, is a collection action in disguise. Much of what the *Gruntz* court said regarding the *Rooker-Feldman* doctrine is equally applicable to the federalism analysis:

[T]he *Rooker-Feldman* doctrine is not implicated by collateral challenges to the automatic stay in bankruptcy. A bankruptcy court simply does not conduct an improper appellate review of a state court when it enforces an automatic stay that issues from its own federal statutory authority. In fact, a reverse *Rooker-Feldman* situation is presented when state courts decide to proceed in derogation of the stay, because it is the state court which is attempting impermissibly to modify the federal court's injunction.

The rule urged by the County would undermine the principle of a unified federal bankruptcy system, as declared in the Constitution and realized through the Bankruptcy Code. If state courts were empowered to issue binding judgments modifying the federal injunction created by the automatic stay, creditors would be free to rush into friendly courthouses around the nation to garner favorable relief. The bankruptcy court would then be stripped of its ability to distribute the debtor's assets equitably, or to allow the debtor to reorganize financial affairs. "Such an exercise of authority would be inconsistent with and subvert the exclusive jurisdiction of the federal courts by allowing state courts to create their own standards as to when persons may properly seek relief in

The third bankruptcy provision under which an injunction can issue, § 524(a), provides that a bankruptcy discharge “operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect . . . any [discharged] debt as a personal liability of the debtor.”¹⁹⁹ This permanent injunction comes into effect when discharge is granted²⁰⁰ and applies to all prepetition debts.

Because the grant of discharge simultaneously terminates the automatic stay,²⁰¹ the discharge injunction found in § 524(a) is often described as picking up where the stay leaves off.²⁰² The two provisions are not co-extensive, however, and § 524 must be applied according to its own terms. No case demonstrates this better than *Brown v. Shriver (In re Brown)*.²⁰³ In *Brown*, the debtor was charged with driving under the influence and, under a pretrial diversionary program, was ordered to pay restitution for property damage he had caused.²⁰⁴ He failed to make full restitution, which was a condition of his probation. Instead, Brown filed bankruptcy, received a discharge covering the obligation,²⁰⁵ and sought an injunction against efforts to revoke his probation.²⁰⁶ The court first characterized the prosecutor’s argument that the restitution obligation was not a “debt” as requiring “a level of distortion of language most appropriate for the actions of legislatures and not courts.”²⁰⁷ The court then noted that the propriety of an injunction, once an obligation is discharged, is not determined under § 105, with its “principle motivation” and “bad faith” tests,²⁰⁸ but under § 524.²⁰⁹ That provision is not coextensive with § 362:

cases Congress has specifically precluded those courts from adjudicating.” It is but slight hyperbole to say that chaos would reign in such a system.

Gruntz, 202 F.3d at 1083–84 (quoting *Gonzales v. Parks (In re Gonzales)*, 830 F.2d 1033, 1035 (9th Cir. 1987)).

199. 11 U.S.C. § 524(a).

200. See *In re Dorner*, 125 B.R. 198, 201 (Bankr. N.D. Ohio 1991).

201. See 11 U.S.C. § 362(c)(2)(C).

202. See, e.g., *In re Dorner*, 125 B.R. at 201 (“When discharge is granted, the automatic stay of section 362 is dissolved and replaced by permanent injunctive provisions of section 524.”).

203. 39 B.R. 820 (Bankr. M.D. Tenn. 1984).

204. See *id.* at 821.

205. See *id.* The court found § 523(a)(7) inapplicable because restitution was to be paid to an aggrieved creditor rather than to the government. See *id.* For a discussion of the scope of § 523(a)(7), see *infra* notes 238–82 and accompanying text.

206. See *Brown*, 39 B.R. at 821.

207. *Id.* at 822.

208. *Kratsch & Young*, *supra* note 144, at 117–19. Courts asked to decide whether an exception to *Younger* is appropriate have developed two principal approaches. Under one, an injunction can be granted only if the prosecutor initiated the criminal proceeding in bad faith. Under the other, courts look to the motives of the complaining creditor. For a discussion of the merits, and lack thereof, of these approaches, see *id.* The approach advocated in this Article obviates the need for these tests, since *Younger*’s exceptions are irrelevant.

209. See *Brown*, 39 B.R. at 827 n.12.

The entry of a discharge in bankruptcy has a broader effect than § 362 on criminal proceedings which involve the collection or recovery of debt. The discharge injunction replaces the protection afforded a debtor by the automatic stay. Unlike the stay of § 362, there is no exception to the § 524 discharge injunction for criminal proceedings against the debtor. A criminal proceeding continued or initiated to recover or collect a discharged debt is enjoined by the § 524 discharge injunction and falls outside of the protection otherwise afforded by the Anti-Injunction Act.^[210] Considerations of comity and equity are overcome by the stated Congressional preference to protect discharged debtors in bankruptcy.²¹¹

Because nothing remained of the criminal court's original order but the element of debt collection, the court in *Brown* held that an injunction should issue.²¹²

Of course, § 524 applies only to obligations that are dischargeable. A number of cases, including *Brown*, approved the use of an injunction only because the underlying debt was dischargeable. For example, the court in *In re Penny*²¹³ issued an injunction only because it found that the state proceedings at issue were designed to collect a debt. The court added, however, that "if the debt is ultimately found to be *not* dischargeable, no federal purpose would be served by continuing to enjoin the state prosecution, notwithstanding the court's strong opinion that such proceedings abuse the process of courts."²¹⁴ Similarly, the court in *Howard v. Allard*²¹⁵ found that an injunction against the debtor's prosecution on bad check charges was appropriate because the proceeding was intended to collect a potentially dischargeable debt, but held that the injunction would not be made permanent unless and until the debt was actually discharged. Thus, a determination of dischargeability is indispensable.

210. Here, of course, the court should have referred to the protections afforded by *Younger*.

211. *Brown*, 39 B.R. at 828–29 (footnote omitted).

212. *See id.* at 830.

213. 414 F. Supp. 1113 (W.D.N.C. 1976).

214. *Id.*; *see also* *Daulton v. Caldwell*, 966 F.2d 1025, 1028 (6th Cir. 1992) ("It is undisputed that the Bankruptcy Code precludes the use of criminal actions to collect debts which have been discharged in bankruptcy."); *Barnette v. Evans (In re Barnette)*, 673 F.2d 1250, 1253 (11th Cir. 1982) (reversing a bankruptcy judge's injunction when the dischargeability of the debt had not yet been determined). Significantly, the holding in *In re Byrd*, 256 B.R. 246, 256 (Bankr. E.D.N.C. 2002)—that a debtor could not recover funds previously paid to Nevada officials in order to get out of jail—turned in part on the court's conclusion that a restitution order would *not* have been dischargeable. Although the court's reading of the Code is incorrect, *see* discussion *infra* Part IV, the case does illustrate the importance of dischargeability to the appropriateness of injunctive relief.

215. 122 B.R. 696 (W.D. Ky. 1991).

IV. DISCHARGEABILITY OF RESTITUTIONARY OBLIGATIONS

The Bankruptcy Code has several provisions relevant to the discharge of restitutionary obligations. Two of them are found in § 523, which applies to all bankruptcy cases unless a particular chapter addresses the issue directly.²¹⁶ The first and most important of these, § 523(a)(7), speaks not of restitution, but of a debt “for a fine, penalty, or forfeiture.”²¹⁷ That provision is substantially more complicated than it first appears, and we will return to it momentarily. The second, § 523(a)(13), prohibits the discharge of “any payment of an order of restitution” entered pursuant to the federal criminal code.²¹⁸

Of the other chapters, only Chapter 13 addresses the dischargeability of restitutionary obligations. One provision, § 1328(a)(3), prohibits the discharge of a debt “for restitution, or a criminal fine, included in a sentence on the debtor’s conviction of a crime.”²¹⁹ Another, § 1328(a)(4), applies to obligations “for restitution, or damages, awarded in a civil action against the debtor as a result of willful or malicious injury” to another person.²²⁰ Chapter 11, on the other hand, simply cross-references § 523, leaving issues of discharge in an individual debtor’s Chapter 11 case to the same analysis governing Chapter 7 cases.²²¹

Under these provisions, all restitutionary obligations are nondischargeable in Chapter 13 cases, and federal restitutionary obligations are clearly nondischargeable in Chapter 7 and Chapter 11 cases. Whether state restitutionary orders are also nondischargeable depends upon the interpretation of § 523(a)(7).

That provision may appear, at first blush, to render debts arising out of bad check prosecutions nondischargeable, as the Supreme Court so interpreted in *Kelly v. Robinson*.²²² In *Kelly*, the debtor pleaded guilty to second-degree larceny for wrongfully receiving \$9,933 in welfare benefits.²²³ Her prison sentence was suspended and she was placed on probation for five years.²²⁴ Probation was conditioned on restitution of the amount wrongfully received, but the judge’s order specified that she was to pay \$100 a month for as long as she was on probation.²²⁵ That created a

216. See 11 U.S.C. § 103 (2006).

217. *Id.* § 523(a)(7). If a debt is covered by § 523, it is simultaneously excepted from discharge under § 727(b), which provides that a Chapter 7 discharge includes all of the debtor’s prepetition debts, “[e]xcept as provided in section 523.” *Id.* § 727(b).

218. *Id.* § 523(a)(13).

219. *Id.* § 1328(a)(3).

220. *Id.* § 1328(a)(4).

221. See *id.* § 1141(d)(2).

222. 479 U.S. 36 (1986).

223. See *id.* at 38.

224. See *id.* at 38–39.

225. See *id.* at 38.

restitutionary obligation of \$6,000—substantially less than the amount she had wrongfully received.²²⁶ She later filed bankruptcy and argued that her restitutionary obligation was discharged,²²⁷ but the Supreme Court held the debt within § 523(a)(7)'s discharge exception.²²⁸

The *Kelly* Court engaged in little, if any, hard-nosed statutory analysis. Rather, the Court looked to pre-Code practice,²²⁹ the general policy of non-interference in state criminal proceedings,²³⁰ and a conclusion that the criminal justice system operates “for the benefit of society as a whole.”²³¹ Against that background, the Court simply asserted that nothing in § 523(a)(7)'s language allows the discharge of obligations for criminal restitution, which then opened the way for the Court to focus on federalism.²³² Essentially, the Court in *Kelly* found the statute satisfied by a single factor—characterization of the debtor's obligation as a penal sanction.²³³ The entire statutory analysis was collapsed into that one element.²³⁴

Examination of the statutory language, however, casts considerable doubt on the Court's cavalier conclusion. Section 523(a)(7) has three requirements: (1) a debt constituting “a fine, penalty, or forfeiture;” (2) that is “payable to and for the benefit of a governmental unit;” and (3) that is “not compensation for actual pecuniary loss.”²³⁵ If the provision is to apply, each requirement should be met.

226. *See id.* at 39 n.2. The Supreme Court observed that this created “some uncertainty” as to the amount the debtor was ordered to pay. *Id.*

227. *See id.* at 39.

228. *See id.* at 53.

229. *See id.* at 47. The Court cited *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494 (1986), for the proposition that Congress is presumed to be aware of relevant case law when it legislates on a particular issue and that it will expressly indicate any intent to change existing law. *See Kelly*, 479 U.S. at 47. As one commentator has noted, however, the Court overlooked the conflicting case law on the question whether criminal restitution is dischargeable in bankruptcy. Deborah A. Ballam, *Kelly v. Robinson Revisited: Dischargeability of Restitution Obligations in Chapter 13 Bankruptcy Proceedings*, 34 ST. LOUIS U. L.J. 1, 4–5 (1989).

230. *See Kelly*, 479 U.S. at 47; *supra* text accompanying notes 31–34.

231. *Kelly*, 479 U.S. at 52. Perhaps the Court's failure to inquire more deeply is excusable given that it was not confronted with a criminal statute designed primarily as a debt collection device, with little or no penal purpose. *Kelly* should not be applied without a more searching analysis, however, when collection-oriented statutes are at play.

232. *See id.* at 52–53.

233. *See id.*

234. *See id.*

235. 11 U.S.C. § 523(a)(7) (2006).

A. “Fine, Penalty, or Forfeiture”

The *Kelly* Court held that § 523(a)(7) “creates a broad exception for all penal sanctions, whether they be denominated fines, penalties, or forfeitures”²³⁶ (or, clearly, even none of the above). The only important inquiry as far as the Court was concerned is whether the obligation is “penal” in nature, not whether it is within the statute’s express language.²³⁷ Under this reasoning, restitutionary obligations will almost automatically be swept into the statute’s reach.²³⁸

This conclusion flies in the face of the usual rules of statutory construction, which the *Kelly* Court seems to have cast away by calling for a resort to statutory policy.²³⁹ One can certainly find support for concluding that subsection (a)(7) is targeted toward penal obligations, under the canon of construction *noscitur a sociis*—“a word is known by the company it keeps.”²⁴⁰ Thus, “fine” and “penalty” lead one to conclude that Congress was taking aim at wrongdoing and that “forfeiture” carries a similar connotation.²⁴¹ Identifying a penal character in the phrase, however, does not justify the Court’s illogical leap to the conclusion that *all* penal obligations are included. The maxim *expressio unius est exclusio alterius*—inclusion of one thing implies the exclusion of another²⁴²—counsels to the contrary. Thus, use of the terms “fine,” “penalty,” and “forfeiture” carries the implication that other types of obligations—such as restitution—are excluded.

All of this would be true even if restitutionary obligations were in fact penal in character. The fact that they often are not²⁴³ makes the argument against *Kelly* even more compelling.

236. *Kelly*, 479 U.S. at 51.

237. *Id.* at 52–53.

238. A few obligations have escaped, however, even though apparently within the express words of the statute. In *Hickman v. Texas (In re Hickman)*, 260 F.3d 400 (5th Cir. 2001), for example, the debtor—a surety on criminal bail bonds—sought to discharge more than \$50,000 in bail bond forfeiture judgments. *See id.* at 401. The court concluded that the statutory phrase encompasses penal obligations, not obligations that are essentially contractual as are the damages incurred by professional bail bondsmen when defendants fail to appear. *See id.* at 407.

239. The Court asserted that “[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.” *Kelly*, 479 U.S. at 43 (1986).

240. *Hickman*, 260 F.3d at 403 (1995).

241. *Id.* at 403–04. This reasoning, in part, led the court in *Hickman* to hold bail bond forfeiture judgments dischargeable in the bail bondsman’s bankruptcy. *See id.* at 407.

242. *See* BLACK’S LAW DICTIONARY 620 (8th ed. 2004).

243. For a discussion of such a statute, see *infra* notes 283–308 and accompanying text.

B. “Payable to and for the Benefit of a Governmental Unit”

Section 523(a)(7) only excepts from discharge those obligations “payable to *and* for the benefit of a governmental unit.”²⁴⁴ The Code’s use of the conjunction was certainly not inadvertent. To give the conjunction effect, § 523(a)(7) can only be read to require that the obligation at issue be payable *to* the government and, *in addition*, be *for the benefit* of the government. Both elements must be satisfied in order to except the obligation from discharge.

The Court in *Kelly*, of course, did not address the question of how to interpret “for the benefit of a governmental unit”²⁴⁵ when the victim of the debtor’s financial fraud is not the government itself and the government is required to pay the restitution over to a nongovernmental victim. In *Kelly*, not only was the victim the government itself (because the debtor pleaded guilty to welfare fraud),²⁴⁶ but the Connecticut statute at issue did not give the victim of a debtor’s financial fraud an enforceable right to receive the proceeds of the debtor’s restitution.²⁴⁷

Two court decisions, *In re Towers*²⁴⁸ and *In re Rashid*,²⁴⁹ have directly confronted the issue of how to interpret “for the benefit of a governmental unit” when the disappointed creditor is not the government itself and any restitution must be paid over to that creditor. Both of these courts held that restitution payments flowing to creditors are not made for the benefit of the public.²⁵⁰

In *Towers*, the State of Illinois won a civil restitution order compelling the debtor to repay victims of his fraud.²⁵¹ The State then sought a determination that the obligation was not affected by the discharge in either of the debtor’s two subsequent Chapter 7 proceedings.²⁵² The court

244. 11 U.S.C. § 523(a)(7) (2006) (emphasis added).

245. *Id.*

246. See *Kelly v. Robinson*, 479 U.S. 36, 38 (1986). That has also been true in subsequent cases. In *Thompson v. Virginia (In re Thompson)*, 16 F.3d 576 (4th Cir. 1994), the costs of prosecution—an issue in the case—were clearly payable both to and for the government’s benefit. See *id.* at 580.

247. See *Kelly*, 479 U.S. at 40; see also U.S. Dep’t of Hous. & Urban Dev. v. Cost Control Mktg. & Sales Mgmt. of Va., Inc., 64 F.3d 920, 927 (4th Cir. 1995) (noting that the governmental unit that collected restitution was not legally obligated to turn those funds over to the victims).

248. 162 F.3d 952 (7th Cir. 1998).

249. 210 F.3d 201 (3d Cir. 2000).

250. See *Towers*, 162 F.3d at 955–56; *Rashid*, 210 F.3d at 207–09.

251. See *Towers*, 162 F.3d at 953. The fact that the restitution order was entered in a civil, rather than criminal, proceeding has provided later courts a ground on which to distinguish *Towers*. See, e.g., *Colton v. Verola (In re Verola)*, 446 F.3d 1206, 1209 (11th Cir. 2006); *Thompson*, 16 F.3d at 580; *Etzel v. American Standard Ins. Co.*, No. 06-CV-0119, 2006 U.S. Dist. LEXIS 60175, at *9 (E.D. Wis. 2006).

252. See *Towers*, 162 F.3d at 953.

concluded that restitution is not “for the benefit of” the government when governmental officials *will* pass amounts collected in restitution along to the victims, even in the absence of a mandate to that effect.²⁵³ The court in *Towers* also dismissed, on the basis of the statute’s clear wording, any argument that the state’s benefit need not be pecuniary, but can be found in a generalized deterrence to fraud:

Some language in *Kelly* suggests this possibility. But the context in which “benefit” appears—“payable to and for the benefit of a governmental unit”—implies that the “benefit” in question is the benefit of the money that is “payable to” the governmental unit. In *Kelly* the government received and kept the money; not so here. Citizenry at large may get the benefit of deterrence, but neither the people of Illinois nor any governmental unit receives a *financial* benefit from the restitution that Towers has been directed to pay²⁵⁴

The case is even stronger if restitution is required to be paid directly to the disappointed creditor, because in no respect does that constitute restitution “to and for the benefit” of a governmental unit. Additionally, in such a case the mandate that was missing in *Towers* is present—any restitution that is by chance paid to the governmental unit *must* be passed along.

Circumstances such as these, along with the fact that the beneficiaries of any ordered restitution would be private parties, put a case squarely within the reasoning of *Rashid*. In *Rashid*, the debtor was convicted of criminal fraud and ordered to pay more than \$1.6 million in restitution to his victims.²⁵⁵ He then filed a Chapter 7 petition and argued that the restitutionary obligation was dischargeable under § 523(a)(7) of the Bankruptcy Code.²⁵⁶ The court found the requirement that restitution be “payable to and for the benefit of a governmental unit” was not satisfied.²⁵⁷ *Rashid* distinguished *Kelly* on the same grounds noted in *Towers*—that in *Kelly*, “[a] governmental unit kept the restitution and deposited the monies into the state treasury.”²⁵⁸ Restitution flowing to private parties, however, is neither “payable to” nor “for the benefit of a governmental unit”:

253. *Id.* at 956.

254. *Id.*

255. *See Rashid*, 210 F.3d at 203. The restitution order in *Rashid*, entered pursuant to federal criminal law, came before § 523(a)(13) was added to the Bankruptcy Code in 1994. Considerations of federalism are not at work when a federal restitution order is at issue—a point that provides grounds for distinguishing *Rashid*.

256. *See id.* at 203.

257. *Id.* at 207.

258. *Id.*

The word “payable” clearly casts an economic light over the phrase that suggests that the benefit must be conferred from the monetary value of the debt to be paid by the defendant and not the more abstract benefit of criminal deterrence.

Similarly, we would pervert the clear, unambiguous language of § 523(a)(7) if we found that Rashid’s restitution obligation was “payable to” a governmental unit. Although the record is unclear whether Rashid’s restitution obligations were to be directly paid to his victims or were to pass through a governmental unit before reaching the victims, it is clear that the benefit—the money—is ultimately payable to the victims.²⁵⁹

That Congress clearly meant the conjunctive—requiring that restitution be paid to *and* for the benefit of a governmental unit—becomes even more evident when contrasted with other provisions in the Code in which the disjunctive is used in this very phrase. When Congress meant the alternative—“to *or* for the benefit” of a particular entity—it said so.²⁶⁰ Thus, § 523(a)(7) only applies when restitution is payable both to a governmental unit and for its financial benefit. Neither of those requirements is satisfied when restitutionary payments flow to private parties.

C. “Not Compensation for Actual Pecuniary Loss”

Finally, § 523(a)(7) requires that the obligation at issue be noncompensatory—that is, that it not carry a debtor-creditor character.²⁶¹ The legislative history indicates that the subsection was designed to distinguish obligations that “are penal in nature, as distinct from so-called ‘pecuniary loss’ penalties which, in the case of taxes, involve basically the collection of a tax under the label of a ‘penalty.’”²⁶²

259. *Id.* at 208 (citing *Towers*, 162 F.3d at 955).

260. Section 547, for example, permits the avoidance of preferential transfers made “to *or* for the benefit of a creditor.” 11 U.S.C. § 547 (2006) (emphasis added). This disjunctive means exactly what it says, as is seen by examination of the infamous “*Deprizio*” case, *Levit v. Ingersoll Rand Financial Corp.*, 874 F.2d 1186 (7th Cir. 1989), and the statutory provision added to change its result, 11 U.S.C. § 550(c). See Margaret Howard, *Avoiding Powers and the 1994 Amendments to the Bankruptcy Code*, 69 AM. BANKR. L.J. 259, 265 (1995). Similarly, § 547(c)(4) provides for an exception to avoidance of a preferential transfer made “to *or* for the benefit of a creditor” when the creditor later extends new value to the estate. 11 U.S.C. § 547(c)(4) (emphasis added.); cf. § 550(a)(1) (permitting the recovery of an avoided transfer from “the initial transferee of such transfer *or* the entity for whose benefit such transfer was made.”) (emphasis added).

261. See 11 U.S.C. § 523 (a)(7).

262. S. REP. NO. 95-598, at 79 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5865.

The Court in *Kelly* did not discuss this statutory element with any degree of specificity,²⁶³ although it necessarily found the element satisfied.²⁶⁴ It was here that Justice Marshall, dissenting in *Kelly*, parted company with the majority.²⁶⁵ As he reasoned, “[w]ere the restitution order purely penal, the statute would not connect the amount of restitution to the damage imposed. Tying the amount of restitution to the amount of actual damage sustained by the victim strongly suggests that the payment is meant to compensate the victim.”²⁶⁶

The phrase “actual pecuniary loss” also appears in several other sections of the Code, with the most relevant of these being § 507(a)(8)(G).²⁶⁷ It provides a priority for “a penalty related to a claim . . . in compensation for actual pecuniary loss.”²⁶⁸ The effect of this subsection is to give a tax liability, collectible under tax law as a penalty, the same priority as the underlying tax obligation; but a tax penalty that “is punitive in nature and is not compensation for actual pecuniary loss” remains a general unsecured claim.²⁶⁹ Such a noncompensatory penalty is paid only after full satisfaction of both timely- and tardily-filed unsecured claims, as provided in § 726(a)(4).²⁷⁰ As a result, these claims will be paid only if the estate is large enough that money would otherwise be left over and returned to the debtor.

Although § 362(b)(4) does not use so clear a phrase, its application also depends upon the distinction between collection purposes and the exercise by a governmental unit of its police or regulatory powers.²⁷¹ The subsection provides an exception to the automatic stay for a proceeding that vindicates a “governmental unit’s . . . police and regulatory power, including the

263. See *Kelly v. Robinson*, 479 U.S. 36, 53 (1986).

Because criminal proceedings focus on the State’s interests in rehabilitation and punishment, rather than the victim’s desire for compensation, we conclude that restitution orders imposed in such proceedings . . . are not assessed ‘for . . . compensation’ of the victim. The sentence following a criminal conviction necessarily considers the penal and rehabilitative interests of the State. Those interests are sufficient to place restitution orders within the meaning of section 523(a)(7).

Id.

264. See *Pa. Dep’t of Welfare v. Davenport*, 495 U.S. 552, 558–59 (1990).

265. See *Kelly*, 479 U.S. at 56–57 (Marshall, J., dissenting). Justice Marshall also took issue with the Court’s “serious doubts,” *id.* at 50, as to whether criminal penalties are “debts,” *id.* at 56.

266. *Id.* at 55.

267. 11 U.S.C. § 507(a)(8)(G) (2006). The phrase appears in two provisions other than § 507(a)(8)(G). First, § 365(b)(1)(B) prohibits the trustee from assuming a contract on which default has occurred, without compensating the non-debtor for actual pecuniary loss. See *id.* § 365(b)(1)(B). Second, § 522(d)(11)(D) allows an exemption for payments “on account of personal bodily injury, not including . . . compensation for actual pecuniary loss.” *Id.* § 522(d)(11)(D).

268. *Id.* § 507 (a)(8)(G).

269. C. RICHARD MCQUEEN & JACK F. WILLIAMS, *TAX ASPECTS OF BANKRUPTCY LAW & PRACTICE* § 8:22 (3d ed. 1997).

270. See 11 U.S.C. § 726(a)(4).

271. See *id.* § 362(b)(4).

enforcement of a judgment *other than a money judgment*.²⁷² Application of this subsection depends upon a finding that the government was pursuing its police or regulatory interests, as opposed to its pecuniary interests.²⁷³

Kelly rested on the penal nature of the obligation at issue.²⁷⁴ The “criminal” or penal nature of that restitution order was the keystone of the Court’s decision, and the holding depended on the Court’s view that the particular restitution obligation at issue in the case vindicated the criminal interests of the state.²⁷⁵ *Kelly* leaves ample room for a different outcome when the statute at issue is not truly penal, but was designed for collection.

Similar distinctions are required when prosecutions under other types of collection-oriented criminal statutes are at issue. A court must determine whether the prosecution is penal or pecuniary in nature instead of simply accepting the “criminal” context as the end of the analysis; an obligation’s penal character is determinative,²⁷⁶ not its label.²⁷⁷

Although restitution may be penal in nature, it does not follow that restitution is automatically and inherently so. The simple fact is that some criminal statutes—chief among them bad check statutes,²⁷⁸ but others as

272. *Id.* (emphasis added).

273. *See, e.g., Missouri v. U.S. Bankr. Court for the E. Dist. of Ark.*, 647 F.2d 768 (8th Cir. 1981) (holding that state grain laws, although regulatory in nature, were designed primarily to protect pecuniary interests in the debtor’s property and, therefore, were not an exercise of police or regulatory power within § 362(b)(4)); *see also In re North*, 128 B.R. 592 (Bankr. D. Vt. 1991) (holding suspension of a chiropractor’s license was designed to collect state taxes and, therefore, did not fall within the exception of § 362(b)(4)); 124 Cong. Rec. H11,089 (daily ed. Sept. 28, 1978) (statement of Rep. Don Edwards that § 362(b)(4) was “intended to be given a narrow construction . . . and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate.”); *cf. Ohio v. Kovacs (In re Kovacs)*, 681 F.2d 454, 456 (6th Cir. 1982) (holding § 362(b)(5) (since repealed and incorporated into § 362(b)(4)) inapplicable to a proceeding “seeking what in essence amounted to a money judgment”), *vacated*, 459 U.S. 1167 (1983).

274. *See Kelly v. Robinson*, 479 U.S. 36, 53 (1986).

275. *Id.* Other courts similarly recognize that the obligations excepted from discharge under § 523(a)(7) are those “essentially penal in nature.” *Virginia v. Collins (In re Collins)*, 173 F.3d 924, 931 (4th Cir. 1999) (citing *Kelly*, 479 U.S. at 51). Reiterating that point, *Collins* observed that “a sanction must be penal to be exempt from discharge under § 523(a)(7).” *Id.* at 932.

276. It cannot be the case that all restitutionary obligations are nondischargeable under § 523(a)(7) without regard to their penal character. If that were true, then § 523(a)(13), which was added in 1998, is completely superfluous. That section makes restitution ordered under federal criminal statutes nondischargeable. It accomplished nothing if all restitution was already nondischargeable under § 523(a)(7).

277. *See U.S. Dep’t of Hous. & Urban Dev. v. Cost Control Mktg. & Sales Mgmt. of Va., Inc.*, 64 F.3d 920, 928 (4th Cir. 1995).

278. *See Sanford H. Kadish, The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157, 166 (1967) (“Merchants, of course, are aware of the risk of accepting payment in checks, but expectedly prefer not to discourage sales. The effect of the insufficient-fund bad-check laws, therefore, is to enable them to make use of the resources of the criminal law to reduce what, in

well²⁷⁹—are often designed, or at least administered, as debt collection

a sense, are voluntarily assumed business risks.”); James McCafferty & Gary M. Bubis, *Criminal Restitution and the Bankruptcy Discharge: Should We Reopen Debtors’ Prison?*, 10 CRIM. JUST. J. 27, 27 (1987) (“The use of ‘bad check’ criminal prosecutions . . . to collect civil obligations has become commonplace in many jurisdictions.”); Kratsch & Young, *supra* note 144, at 108 (“Use of state criminal laws to coerce the collection of discharged debts is a nationwide problem. . . . The United States Bankruptcy Court for the Middle District of Tennessee found creditor use of the Tennessee bad check statute to collect discharged debts ‘ingrained’ in the state’s criminal justice system.” (citing *Whitaker v. Lockert (In re Whitaker)*, 16 B.R. 917 (Bankr. M.D. Tenn. 1982) (permanently enjoining prosecution for passing bad checks because the criminal statute was used for collection)); *Lare v. Norton (In re Lare)*, 24 B.R. 959, 962 (D. Md. 1982) (holding that criminal proceedings, found *not* to have been instituted in order to collect a debt, are protected under § 362(b)(1)).

The distinction between punitive and pecuniary prosecutorial motives distinguishes cases holding injunctions inappropriate from cases that do not. For example, in *Fussell v. Price (In re Fussell)*, 928 F.2d 712 (5th Cir. 1991), the court declined to issue an injunction because the debtor did not challenge the validity of the criminal statute under which he was charged, *id.* at 717, and its collection purpose was, at most, questionably revealed in the statements of prosecutors rather than on the face of the provision, *id.* at 714.

The court in *Taylor v. Widdowson (In re Taylor)*, 16 B.R. 323 (Bankr. D. Md. 1981), noted that bankruptcy courts have an obligation to police against collection abuse:

A Bankruptcy Court must exercise its jurisdiction to determine whether a given criminal proceeding has been instituted as a method for the collection of a civil debt dischargeable under the [Bankruptcy] Code. Were bankruptcy courts to permit prosecutions which have as their ultimate purpose the collection of debts to proceed in state criminal courts unimpeded and unsupervised, an intolerable distortion of the elaborate machinery of the bankruptcy laws devised to fix the rights of creditors against the Debtor and the Debtor’s property would be created. In such instances, comity dictates that federal, rather than state, interests prevail.

Id. at 326.

279. Child support obligations are another example of the criminalization of nonpayment. Kadish, *supra* note 278, at 166–67. Obligations for family support are rarely, if ever, dischargeable in bankruptcy, however, so bankruptcy courts will not be called upon to enjoin a state prosecution for nonpayment of those debts in order to protect the bankruptcy discharge. See 11 U.S.C. § 523 (a)(5) (2006) (excepting domestic obligations from bankruptcy discharge); 11 U.S.C. § 1328(a)(2) (2006) (also excepting domestic obligations from bankruptcy discharge).

So-called “compromise statutes” provide another example. These statutes permit dismissal of criminal charges upon proof that the victim has received satisfaction for his or her injuries. See, e.g., CAL. PENAL CODE § 1378 (West 2009) (“If the person injured appears before the court in which the action is pending at any time before trial, and acknowledges that he has received satisfaction for the injury, the court may, in its discretion, on payment of the costs incurred, order all proceedings to be stayed upon the prosecution, and the defendant to be discharged therefrom.”) Discussions of these statutes often center upon their status as exceptions to the usual rule that victims do not participate in setting the level of punishment assigned to a wrongdoer. See, e.g., Jeremy D. Andersen, *Victim Offender Settlements, General Deterrence, and Social Welfare*, Paper 402, HARV. JOHN M. OLIN CENTER FOR LAW, ECON., & BUS. 24–43 (January 2003), http://www.law.harvard.edu/programs/olin_center/papers/pdf/402.pdf. Clearly, these statutes provide a convenient way to satisfy debts and, in fact, are often used to do just that. See, e.g., *State v. Johnston*, 367 P.2d 891 (Mont. 1962) (noting that local custom allowed a party to escape prosecution upon making restitution for a debt).

Private prosecutions can also serve a debt-collection purpose if aggrieved creditors who cannot persuade a prosecutor to pursue an available criminal charge are able instead to pursue the charge on their own. See, e.g., Comment, *Private Prosecution: A Remedy for District Attorneys’ Unwarranted Inaction*, 65 YALE L.J. 209, 215 (1955). Such prosecutions carry additional risks beyond debt collection. See *Ganger v. Peyton*, 379 F.2d 709 (4th Cir. 1967) (holding that defendant’s due process rights were violated when the prosecuting attorney was simultaneously

devices.²⁸⁰ Statutes that measure the restitutionary award by the victim's losses (as many, if not most, do) are squarely compensatory,²⁸¹ and statutes that mandate payment to the victim (either directly or through a governmental unit acting as conduit) betray a collection purpose.²⁸²

representing defendant's wife in a divorce proceeding based on the same alleged assault).

Other examples derive from a different context—namely, whether incarceration for certain crimes contravenes state constitutional bans on imprisonment for debt. Many of these cases involve statutes that criminalize simple nonpayment and, for that reason, courts often find them unconstitutional. These obligations would almost certainly be dischargeable in bankruptcy. *See, e.g., State v. Bartos*, 423 P.2d 713, 715 (Ariz. 1967) (holding ordinance permitting imprisonment for nonpayment of “sewer rental charge” a “debt collecting device under the guise of penal laws” and, therefore, unconstitutional imprisonment for debt); *Turner v. State*, 168 So. 2d 192 (Fla. Dist. Ct. App. 1964) (invalidating provision in county code making nonpayment of garbage fee a crime punishable by imprisonment); *State v. Madewell*, 309 A.2d 201 (N.J. 1973) (holding provision making it a misdemeanor merely to fail to return an overdue rental vehicle after a seventy-two-hour demand an unconstitutional imprisonment for debt); *Oklahoma ex rel. Moss v. Couch*, 841 P.2d 1154 (Okla. Crim. App. 1992) (holding prosecution for failure to pay wages violated constitutional provision prohibiting imprisonment for debt); *State v. Enloe*, 734 P.2d 520 (Wash. Ct. App. 1987) (holding statute criminalizing intentional failure to pay agricultural products unconstitutional imprisonment for debt).

280. Because these statutes may require fraud on the part of the defendant, they may appear to be punishing fraud rather than nonpayment. The statutes often presume fraud, however, rendering any such argument completely specious. *See Hennigan, supra* note 107, at 119–20 n.166.

In addition, the mere issuance of a bad check hardly seems fraudulent, given research indicating that a substantial percentage of account holders do not balance their checkbooks. A survey by Moebis Research Services found that nearly 87% of people do not balance their checkbooks. Kevin Risner, *A Balancing Act*, ADVERTISER-TRIBUNE (August 30, 2008), available at <http://www.moebis.com/AboutUs/Moebisintheneeds/tabid/57/ctl/Details/mid/484/ItemID/26/Default.aspx>. Another survey, by the University of Idaho Extension, found that only 48% of teenagers had even learned how to balance their checkbooks. “Welcome to the Real World,” available at http://www.extension.uidaho.edu/impacts/Pdf_99/welcome-99.pdf (last visited March 1, 2010). Similarly, an article in the Memphis Commercial Appeal reported that only 34% of parents had taught their teenagers how to balance a checkbook and that 54% of college students had overdrawn their accounts. Don Wade, *Teens at a Loss on Personal Finance*, COM. APPEAL, August 18, 2009, available at <http://www.commercialappeal.com/news/2009/aug/18/teens-at-loss-on-finance/>. That means, of course, that more than half of all college students wrote one or more bad checks.

281. *See supra* note 266 and accompanying text. Even an award that is not primarily compensatory, however, may include sums intended to reimburse the government for its costs of prosecution; if such an amount is included, that portion is compensation for actual pecuniary loss. The court in *In re Towers*, 162 F.3d 952 (7th Cir. 1998), for example, distinguished the portion of the restitutionary award that was intended to reimburse the government's costs of prosecution from the portion measured by the victims' losses:

Illinois was not a victim of Towers' fraud except to the extent criminal activity induced the state to expend part of its law-enforcement budget. The bankruptcy judge concluded that the \$50,000 earmarked to reimburse Illinois for the costs of investigation and prosecution is excluded by this language and therefore dischargeable; the \$210,000, however, is “not compensation for actual pecuniary loss.”

Id. at 955 (internal citation omitted).

282. *See Gordon Mehler, Criminal Prosecution and Restitution Under the Bankruptcy Code*, 1983 ANN. SURV. AM. L. 817, 818–19.

Nevada's statutory scheme provides a useful example, because it has been examined in the case law and because its legislative history is both available and damning. The Nevada statute presumes that the drawer of a bad check intended to defraud the holder if that drawer failed to pay the full amount of the instrument to the holder within the designated period after receiving notice of the check's return.²⁸³ Prosecution is unlikely, however, because the statute²⁸⁴ allows the district attorney to establish a restitution program for a person believed to have violated other provisions.²⁸⁵ If restitution is paid, no criminal charges are filed and any pending charges are dropped. Finally, the statute requires any person who either passes three or more bad checks in ninety days, or one bad check in the amount of \$250 or more to pay restitution regardless of any other penalties imposed upon conviction.²⁸⁶ Thus, under the Nevada statutory scheme, full restitution is mandated at every phase and, if it is made promptly, prosecution ceases.

Moreover, this restitution is ultimately paid to the holder of the bad check, not to the county. The "Bad Check Complaint Form" employed by the Bad Check Diversion Unit (BCDU) states that the district attorney is the creditor's "agent to endorse and cash any negotiable instrument tendered by or on behalf of the drawer of the check."²⁸⁷ According to one court, this makes the district attorney the "agent of the creditor for collection purposes."²⁸⁸

It is evident at every step that Nevada's procedures for handling bad checks were designed only to collect. First, by definition, no crime is committed, despite the most fraudulent intent imaginable, if the drawer pays the full amount of the instrument to the holder²⁸⁹ within the designated period after receiving notice of the instrument's return.²⁹⁰

Second, the standard first letter sent to debtors, as a matter of first contact from the prosecutor's office, clearly indicates that criminal charges

283. See Nev. REV. STAT. §§ 205.130, 205.132(1)(b) (2009).

284. See *id.* § 205.466.

285. See *id.* §§ 205.130, 205.0832, 205.380.

286. *Id.* § 205.130.

287. Bad Check/Marker Complaint Form, Clark County District Attorney, Bad Check Diversion Unit, available at http://www.accessclarkcounty.com/depts/district_attorney/bcu/Documents/BCUComplaintEng.pdf (last visited Sept. 22, 2010).

288. *In re Simonini*, 282 B.R. 604, 618 (W.D.N.C. 2002), *vacated sub nom.*, *Simonini v. Bell* (*In re Simonini*), 69 F. App'x 169 (4th Cir. 2003).

289. Restitution collected through the diversionary program is payable directly to the creditor and, if any restitution is collected by the county, it must be turned over to the creditor. See *Hearing on S.B. 68 Before the S. Comm. on Judiciary*, 69th Sess. 5 (Nev. Feb. 11, 1997), available at <http://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1997/SB068,1997.pdf>. The fact that restitutionary payments end up in the pocket of the previously disappointed creditor implicates two of the statutory elements: the payment is compensatory and, therefore, violates the statutory requirement that the obligation not be "compensation for actual pecuniary loss"; and the payment is not "to and for the benefit of a governmental unit," as discussed *supra* notes 244–60 and accompanying text.

290. See Nev. REV. STAT. § 205.132(1)(b).

are imminent *unless* the obligation is repaid: “If you wish to avoid having to appear in court on those charges, you must appear IMMEDIATELY at our office to pay off all the bad checks we are holding. . . . We will then stop processing of those charges.”²⁹¹

That letter is consistent with the statutory authority that created the BCDU, requiring that “[f]ull restitution [be] made to the alleged victim,”²⁹² and with the statute mandating restitution as a penalty upon criminal conviction.²⁹³ Restitution cannot be in an amount less than the debt.²⁹⁴ Restitution measured by the debt strongly signals that the statute is pecuniary. The Connecticut statute involved in *Kelly* allowed the offender to “make restitution, in an amount [he or she] can afford to pay or provide in a suitable manner, for the loss or damage caused” by the offense.²⁹⁵ Restitution that is not measured by the victim’s loss is more likely penal in character than is a restitutionary obligation equivalent to the amount of the debt.²⁹⁶

Finally, and perhaps most significantly, admissions in the legislative history reveal that this statutory scheme was designed, from its inception, to collect debts. The following discussion occurred in hearings before the Senate Judiciary Committee, held in early 1997, dealing with a provision to increase the fees charged to individuals who write bad checks:

[Tom] Pitaro [representing Nevada Attorneys for Criminal Justice] . . . was told by a bankruptcy attorney that certain casinos will not go to bankruptcy court because they let the district attorney collect for them

. . . .

In response to the suggestion the District Attorney’s Office was acting like a collection agency, Mr. Thompson [Assistant District Attorney for Clark County] declared, “Of course we are!” He stated people were prosecuted and sent to prison for committing offenses,

291. See, e.g., *In re Simonini*, 282 B.R. at 617.

292. NEV. REV. STAT. § 205.469(1)(c).

293. See *id.* § 205.130(1).

294. *In re Simonini*, 282 B.R. at 620 (“To put it bluntly, the statute appears to be aptly paraphrased as stating: ‘No matter what you do, get this defendant to make full restitution.’”).

295. CONN. GEN. STAT. § 53a-30(a)(4) (1985).

296. See *U.S. Dep’t of Hous. & Urban Dev. v. Cost Control Mktg. & Sales Mgmt. of Va., Inc.*, 64 F.3d 920, 927 (4th Cir. 1995).

however, because jails were full they do not want to lock people up for writing bad checks. They just want victims repaid the money taken from them. They were willing to not prosecute and dismiss the case if the money was repaid.²⁹⁷

The same Mr. Thompson, at a later hearing before the Assembly Committee on Judiciary regarding the same amendment, testified about the history of the Bad Check Unit:

[T]he Nevada legislature decided it did not want to prosecute and put into jail individuals who wrote bad checks, what they really wanted to do was to get them to do the right thing: pay the amount of money they owed the person they had written the bad check to.

The legislature authorized district attorneys throughout the state to set up a restitution program, a diversionary program that would tell someone who had written a bad check, under the threat of prosecution, that they would be allowed to enter a program to pay back the person they had written the bad check to. If the amount of money owed, plus the fee for the service of the Bad Check Collection Unit collecting it, was paid back, then the individual was not prosecuted or the case was dismissed if it had already been filed.

....

David Gibson, Legislative Representative, Clark County Public Defender's Office, . . . stated it was remarkable what kind of response was received when a District Attorney notified someone they were going to be prosecuted.²⁹⁸

What is missing here is any concern with the penal interests of the state. Instead, the focus is on collection and collection only, as a bankruptcy court in North Carolina found (albeit in quite a different fact pattern). In *In re Byrd*,²⁹⁹ the debtor was arrested in North Carolina on an outstanding Nevada warrant more than a year after entry of discharge in bankruptcy.³⁰⁰ The warrant was based on unpaid checks issued to casinos in Las Vegas.³⁰¹ While the debtor was in jail, his wife collected the amount owed and wired it

297. *Hearing on S.B. 68*, *supra* note 289, at 9, 11.

298. *Hearing on S.B. 68 Before the S. Comm. on Judiciary*, 69th Sess. 38, 41 (Nev. Apr. 17, 1997), available at <http://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1997/SB068,1997.pdf>.

299. 256 B.R. 246 (Bankr. E.D.N.C. 2000).

300. *See id.* at 248–49.

301. *See id.* at 248.

to the Clark County District Attorney.³⁰² Nevada then quashed the arrest warrant, dismissed the case, and paid the money over to the casinos.³⁰³ The debtor was released from jail and filed a motion to show cause why the casinos and district attorney had not violated the discharge injunction.³⁰⁴

The debtor's (unsuccessful) effort to recover funds paid to the state in order to obtain his release from jail is quite unlike the dischargeability questions with which this Article is concerned. Nevertheless, *Byrd's* relevance is its conclusion that characterization of Nevada's process as anything other than debt collection is "wholly untenable."³⁰⁵ The lack of Nevada's penal interest in these bad check cases is evident from *Byrd's* description of the procedures:

The record makes clear that the only "criteria" for acceptance into the program, which is run not through the Nevada state courts but rather by the district attorney's office and other law enforcement agencies or even private contractors of the district attorney's choosing, was the payment of full restitution to *Byrd's* former creditors, through Clark County's trust fund. The court gives no credence to Clark County's argument that "*Byrd voluntarily* chose to enter the deferred prosecution program." The court finds further that *Byrd* was automatically admitted into the "program" as a matter of course, and that payment of the discharged debts and accompanying fines was the single criteria [sic] for "admittance." Moreover, the money could come from any source. The fact that *Byrd's* spouse was able to come up with the bail amount while her husband waited in jail serves no rehabilitative purpose whatsoever. Real rehabilitative measures involve flexibility, thought, and some personalization dependent not only on what a victim lost, but on what a particular offender should do to make amends. Requiring *Byrd* to pay a certain amount each month, based on his circumstances, conceivably could serve a rehabilitative purpose; requiring him to find it immediately or stay in jail, does not."³⁰⁶

302. *See id.* at 249.

303. *See id.*

304. *See id.*

305. *Id.* at 253. The court also expressed concern about the Clark County officials' "lack of candor regarding the purposes of its prosecution." *Id.*

306. *Id.* (citations omitted); *accord* *Desert Palace, Inc. v. Baumblit* (*In re Baumblit*), 15 F. App'x 30, 36 (2d Cir. 2001) (finding that referral to Nevada's Bad Check Unit violated the automatic stay because it is a collection program).

The structure and legislative history of Nevada's bad check scheme reveal that no penal interest is at stake. In that state, and many others with similar statutes, the focus is entirely on payment.³⁰⁷ Restitution is mandatory, and it must be in the amount of the debt. Payment prevents future prosecution, and payment terminates pending prosecution. And when collection is the story, § 523(a)(7)'s requirement that the obligation not be "compensation for actual pecuniary loss"³⁰⁸ is not met.

D. Kelly and Federalism

The outcome in *Kelly* seems to have rested not on statutory language, but primarily on the Court's conception of federalism—its "deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings."³⁰⁹ Unsurprisingly, the authority cited for this proposition was *Younger*.³¹⁰ Only after reviewing the "powerful" interests states have in administering their criminal justice systems without federal interference did the Court turn to the statute.³¹¹

But federalism was not powerful enough to be determinative in the absence of a statutory section providing for nondischargeability when that fact pattern came before the Court in *Pennsylvania Department of Public Welfare v. Davenport*.³¹² The facts were quite similar to those in *Kelly*—a conviction for welfare fraud, followed by an order of restitution imposed as a condition of probation.³¹³ The Davenports, however, filed their petition under Chapter 13 rather than Chapter 7,³¹⁴ rendering § 523(a)(7)

307. In *In re Whitaker*, 16 B.R. 917 (Bankr. M.D. Tenn. 1982), the court issued an injunction against a prosecutor under § 524(a) because the proceeding was entirely payment-oriented:

The court is especially concerned about the ultimate goals of this criminal prosecution. It is a matter of common knowledge that creditors in Tennessee frequently resort to the threat of a criminal prosecution to compel the payment of a civil debt. In many, if not most instances, criminal prosecutions brought under the bad check and similar statutes are ultimately resolved by the criminal charges being withdrawn in return for the payment of restitution and costs by the defendant. This is so engrained in the criminal system of this state that the creditor Martin referred to his practice of dealing with bad checks as "turn[ing] them into the Sessions Court for collection."

. . . The district attorney's offer "to nolle the criminal case upon restitution and cost" indicates that the motivation of this prosecution was not punishment but the recovery of a discharged debt. In such a case, the issuance of an injunction is required in order to effectuate the judgment of the bankruptcy court.

Id. at 922 (emphasis added). Interestingly, the court's citation for the last-quoted proposition was *Younger*. *Id.*

308. 11 U.S.C. 523(a)(7) (2006).

309. *Kelly v. Robinson*, 479 U.S. 36, 47 (1986).

310. *Id.*

311. *Id.* at 50.

312. 495 U.S. 552 (1990).

313. *Id.* at 555–56.

314. *Id.* at 563–64.

inapplicable.³¹⁵ The Supreme Court's opinion focused in part on whether a restitution obligation is a "debt"³¹⁶—a question on which *Kelly* had professed "serious doubts."³¹⁷ But the second major element in *Davenport* was federalism, and the Court came to the oft-overlooked conclusion³¹⁸ that federalism was not weighty enough to override the Bankruptcy Code's discharge provisions:

Nor do we conclude lightly that Congress intended to interfere with States' administration of their criminal justice systems. *Younger v. Harris*, 401 U.S. 37, 46 (1971). As the Court stated in *Kelly*, permitting discharge of criminal restitution obligations may hamper the flexibility of state criminal judges in fashioning appropriate sentences and require state prosecutors to participate in federal bankruptcy proceedings to safeguard state interests. Certainly the legitimate state interest in avoiding such intrusions is not lessened simply because the offender files under Chapter 13 rather than Chapter 7. Nonetheless, the concerns animating *Younger* cannot justify rewriting the Code to avoid federal intrusion. Where, as here, congressional intent is clear, our sole function is to enforce the statute according to its terms.³¹⁹

Under the authority of *Davenport*, federalism concerns clearly do not prohibit a bankruptcy court from "interfering" with a state's criminal proceedings in order to give effect to bankruptcy's discharge provisions.³²⁰

315. At the time, § 1328(a) provided for the discharge of all prepetition debts upon completion of the plan; neither of the two exceptions was applicable. Congress added § 1328(a)(3), which legislatively overruled *Davenport*, in 1990. See Criminal Victims Protection Act of 1990, Pub. L. 101-581, § 3(3), 104 Stat. 2865 (codified as amended at 11 U.S.C. § 1328(a)(3) (1990)); see also Crime Control Act of 1990, Pub. L. 101-647, § 3103(3), 104 Stat. 4789, 4944-45 (codified as amended at 11 U.S.C. § 1328(a)(3) (1990)) (further amended by Bankruptcy Reform Act of 1994, Pub. L. 103-394, § 302, 108 Stat. 4106, 4132 (codified at 11 U.S.C. § 1328(a)(3) (1994))).

316. *Davenport*, 495 U.S. at 557-58.

317. *Kelly v. Robinson*, 479 U.S. 36, 50 (1986).

In light of the established state of the law—that bankruptcy courts could not discharge criminal judgments—we have serious doubts whether Congress intended to make criminal penalties "debts" within the meaning of [§ 101(5)]. But we need not address that question in this case, because we hold that § 523(a)(7) preserves from discharge any condition a state criminal court imposes as part of a criminal sentence.

Id.

318. Perhaps *Davenport* is overlooked because its result was overruled legislatively when Congress added § 1328(a)(3) to the Bankruptcy Code. The amendment did not overrule the Court's assessment of the relationship between the Bankruptcy Code and general principles of federalism, however.

319. *Davenport*, 495 U.S. at 564 (citation omitted).

320. The *Davenport* dissent put the issue in just those terms, finding notable that "absent from the

Implicit therein is the conclusion that bankruptcy courts can issue injunctions designed to protect that very discharge.³²¹ If the Court had so understood in *Younger*, perhaps it would have placed the emphasis where it properly belonged—on the statutory language itself—rather than assuming state interests so powerful that even two federal statutes and the United States Constitution could not overcome them.

V. GENERAL BANKRUPTCY POLICIES

The bankruptcy system is grounded in two essential policies. One is the “fresh start,” which recognizes that, for both humanitarian and societal reasons, individuals should be permitted to start over economically.³²² The fresh start is effectuated primarily through discharge. Discharge is available only to the “honest but unfortunate” debtor,³²³ and the Bankruptcy Code’s own provisions separate the deserving from the undeserving. The discharge exceptions of § 523(a) carry most of this duty and courts should measure a debtor’s entitlement by an objective, language-based interpretation.

The other fundamental bankruptcy policy is equality—that is, the principle that similar creditors should be treated alike.³²⁴ This equality principle replaces the state law “race of diligence” under which certain creditors might recover in full while others are left with little or nothing.³²⁵ Although the “fresh start” reflects the respects in which bankruptcy affects the interests of creditors vis-à-vis the debtor, the equality principle regulates creditors *inter se*.

Code’s definition (and from the legislative history) of both ‘debt’ and ‘claim’ is any indication that Congress intended the discharge provisions to extend into the criminal sphere.” *Id.* at 566 (Blackmun, J., dissenting). The dissent also disagreed with the majority on federalism grounds:

I do not believe that Congress so cavalierly would have disregarded the States’ overwhelmingly important interest in administering their criminal justice systems free from the interference of a federal bankruptcy judge. Every State and the District of Columbia presently authorize the use of restitution orders. A bankruptcy court discharge of a criminal restitution order is a deep intrusion by the federal courts into the State’s sovereign power. It vacates a criminal sentence that has presumably been entered in full accord with all substantive and procedural mandates of the Constitution. I seriously doubt that “Congress lightly would limit the rehabilitative and deterrent options available to state criminal judges.”

Id. at 572–73 (citation omitted) (quoting *Kelly*, 479 U.S. at 49). Of course, the fact that an injunction is possible does not carry the necessary implication that it was authorized or ordered lightly.

321. Such a conclusion follows from the well-understood proposition that a court has the inherent power to make its orders effective. *Cf. Shillitani v. United States*, 384 U.S. 364, 370 (1966) (“There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt.”).

322. CHARLES JORDAN TABB, *THE LAW OF BANKRUPTCY* § 1.1, at 3 (2d ed. 2009).

323. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

324. TABB, *supra* note 322, § 1.1, at 3 (“Liquidation bankruptcy cases serve two independent purposes: relief of debtors, and equitable treatment of creditors.”); *see also id.* § 7.7, at 674 (noting that “[t]he equality principle is only a touchstone, however, rather than a universally applicable rule” because of the Bankruptcy Code’s priority scheme).

325. *Id.* § 1.1, at 4.

When a collection scheme is clothed in criminal garb, the favored creditor has an opportunity to make itself whole while the debtor's other unsecured creditors must be satisfied with their pro rata portion of the debtor's non-exempt assets. In that respect, favored creditors obtain an unfair bankruptcy advantage with the assistance of the state. The Bankruptcy Code undoubtedly has many provisions that treat certain creditors specially, thereby reflecting numerous congressional judgments that certain creditors are deserving of particular protection in the context of their mutual debtor's bankruptcy. It is also true that Congress has chosen to favor many creditors who have rights under restitutionary judgments, even when those judgments have risen out of collection-oriented criminal proceedings. But it is the Bankruptcy Code that is determinative, not a state legislature's willingness to criminalize the nonpayment of debt or otherwise make the state's criminal processes available to disappointed creditors.

VI. CONCLUSION

The Anti-Injunction Act prevents a federal court from enjoining a state criminal proceeding in the absence of an exception. That construction prescribes that an injunction is permissible when an exception, such as bankruptcy, is involved. The Supreme Court's decision in *Younger v. Harris*, however, constitutes a judicially-created bar to the application of the Anti-Injunction Act according to its terms. That is arguably objectionable in any context, although a defense can be mounted in the civil rights context out of which *Younger* arose—namely, that § 1983 is so general a statute, although also an exception to the Anti-Injunction Act, that some standard is needed by which to measure the appropriateness of an injunction in a particular case. But bankruptcy is different, because the Code provides ample boundaries to protect legitimate interests of the states, to the extent that those interests are not oriented toward the collection of debts. Thus, the Bankruptcy Code should provide the standard for determining whether an injunction is appropriate.

Under the Bankruptcy Code, state criminal proceedings are not subject to the otherwise-ubiquitous automatic stay. That exception, however, does not insulate a state proceeding from an injunction under either § 105 or § 524. An injunction can issue under either of those sections in order to protect a debtor's right to discharge.

The question, therefore, becomes whether a restitution obligation, imposed by a state court in a criminal proceeding is dischargeable. The answer to that question is currently mixed, given that Bankruptcy Code provisions explicitly bar the discharge of such debts in Chapters 11 and 13.

In Chapter 7, most courts similarly find such debts nondischargeable under the Supreme Court's decision in *Kelly v. Robinson*. That decision, however, was misdirected by an erroneous understanding of the scope of *Younger* and a misinterpretation of the relevant provision of the Bankruptcy Code.

Even if *Kelly* were convincingly shown to be wrongheaded, leading future courts to permit the discharge in Chapter 7 of restitution obligations, one need only look to recent history to safely predict that Congress might respond by clarifying the Bankruptcy Code to resurrect *Kelly*'s result. That is, after all, exactly what Congress did in the wake of *Davenport*. Be that as it may; at least the right body would be making the policy decision. And *Younger* would be properly laid to rest, at least in the bankruptcy world.