
BANKRUPTCY LAW — FIFTH CIRCUIT APPLIES DOCTRINE OF CONSTITUTIONAL AVOIDANCE TO UPHOLD ATTORNEY SPEECH RESTRICTIONS IN BANKRUPTCY CODE. — *Hersh v. United States ex rel. Mukasey*, 553 F.3d 743 (5th Cir. 2008).

Judges construe laws in order to discern the intent of the lawmakers, or so the saying goes.¹ It is from this notion that the doctrine of constitutional avoidance first emerged.² Premised on the assumption that lawmakers intend to steer their laws clear of constitutional defects, avoidance aided judges in choosing between two plausible interpretations of an ambiguous statute. But as scholars and courts grew less concerned with legislative intent and more concerned with the vindication of exogenous values, the doctrine was transformed. Where it once applied only in cases of ambiguity, it is now occasionally misapplied in cases where there is no serious doubt as to the statute's meaning.³ In these latter cases, judges simply rewrite unconstitutional legislation to make it constitutional. Enter Section 526(a)(4) of the Bankruptcy Code.⁴

In its 2005 amendments to the Bankruptcy Code (BAPCPA⁵), Congress enacted Section 526(a)(4), which prohibits a debt relief agency from advising a debtor “to incur more debt in contemplation of” bankruptcy.⁶ Since its enactment, five federal district courts and one federal appellate court have held the provision unconstitutional.⁷ Re-

¹ *Schooner Paulina's Cargo v. United States*, 11 U.S. (7 Cranch) 52, 60 (1812) (Marshall, C.J.).

² *See* *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

³ *Cf.* Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1554 (2000).

⁴ 11 U.S.C. § 526(a)(4) (2006).

⁵ Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified in scattered sections of 11 U.S.C.).

⁶ 11 U.S.C. § 526(a)(4) (“A debt relief agency shall not . . . advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.”).

⁷ *See* *Milavetz, Gallop & Milavetz, P.A. v. United States*, 541 F.3d 785 (8th Cir. 2008); *Conn. Bar Ass'n v. United States*, 394 B.R. 274 (Bankr. D. Conn. 2008); *Olsen v. Gonzales*, 368 B.R. 886 (Bankr. D. Or. 2007); *Zelotes v. Adams*, 363 B.R. 660 (Bankr. D. Conn. 2007); *In re Reyes*, 361 B.R. 276 (Bankr. S.D. Fla. 2007); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 355 B.R. 758 (Bankr. D. Minn. 2006); *Zelotes v. Martini*, 352 B.R. 17 (Bankr. D. Conn. 2006); *Olsen v. Gonzales*, 350 B.R. 906 (Bankr. D. Or. 2006); *Hersh v. United States*, 347 B.R. 19 (Bankr. N.D. Tex. 2006). The other courts to have been presented with the issue have declined to consider it for reasons of justiciability. *See* *U.S. Trustee v. Reyes (In re Reyes)*, No. 07-20689-CIV, 2007 WL 6082567, at *7 (Bankr. S.D. Fla. Dec. 19, 2007) (reversing Bankruptcy Court's ruling as an improper advisory opinion); *Jackson v. McDow (In re Jackson)*, No. 05-44941-B, 2006 WL 2781052, at *1 (Bankr. D.S.C. Sept. 25, 2006) (holding that the appellant did not properly file her motion as an adversary proceeding); *Geisenberger v. Gonzales*, 346 B.R. 678, 682–83 (Bankr. E.D. Pa. 2006) (dismissing case for lack of standing). Petitions for writs of certiorari have been filed in two circuit court cases, and appeals are pending before the Second and Ninth Circuits.

cently, in *Hersh v. United States ex rel. Mukasey*,⁸ the Fifth Circuit split from this trend by holding that the doctrine of constitutional avoidance should be applied to Section 526(a)(4).⁹ In its decision, the court overlooked key statutory precedents and, as a result, failed to recognize that the statutory text is unambiguous. By applying avoidance to an unambiguous text, the court misapplied the doctrine and engaged in judicial legislation.

Soon after BAPCPA became effective, Susan Hersh, a Texas bankruptcy attorney, filed suit against the United States, the U.S. Attorney General, the State of Texas, and the Texas Attorney General.¹⁰ Hersh requested a declaratory judgment that Section 526(a)(4) is unconstitutional and further sought an injunction against enforcement of the provision.¹¹

The United States District Court for the Northern District of Texas found in Hersh's favor with respect to Section 526(a)(4).¹² The court held that the provision "imposes limitations on speech beyond what is 'narrow and necessary.'" ¹³ Specifically, the provision prohibits attorneys from advising debtors to incur more debt even when doing so would be prudent and lawful.¹⁴ The court gave several illustrations.¹⁵ For instance, a debtor might refinance a mortgage at a lower rate (incurring more debt overall in exchange for lower monthly payments) to forestall an impending bankruptcy. Alternatively, a debtor might buy a car ahead of bankruptcy to ensure reliable transportation to work, so that he will retain his job and be able to make payments in bankruptcy. In these and similar cases, a debtor might incur additional secured debt that will not be discharged in bankruptcy. Such incursions of debt are not abusive,¹⁶ yet Section 526(a)(4) still prohibits attorney

⁸ 553 F.3d 743 (5th Cir. 2008).

⁹ *Id.* at 753.

¹⁰ *Id.* at 747. Texas and its Attorney General were dismissed from the case. *Id.*

¹¹ *Id.* Hersh also requested declaratory and injunctive relief with respect to Sections 527 and 528 and later amended her complaint to allege that the prohibitions on "debt relief agencies" do not apply to attorneys. *Id.*

¹² *Hersh*, 347 B.R. at 21. The court dismissed all of Hersh's other claims. *Id.*

¹³ *Id.* at 25 (failing both strict and intermediate scrutiny).

¹⁴ *Id.*

¹⁵ *See id.* at 24.

¹⁶ Several other courts and scholars have recognized the existence of such nonabusive circumstances of incurring debt in contemplation of bankruptcy. *See, e.g.,* Jean Braucher, *The Challenge to the Bench and Bar Presented by the 2005 Bankruptcy Act: Resistance Need Not Be Futile*, 2007 U. ILL. L. REV. 93, 138–39 (borrowing to pay for emergency medical treatment, child support, and taxes; borrowing from a relative with the intention to repay even though the debt will be discharged; borrowing against a pension or exempt property); Samuel L. Bufford & Erwin Chemerinsky, *Constitutional Problems in the 2005 Bankruptcy Amendments*, 82 AM. BANKR. L.J. 1, 15–16 (2008) (borrowing to guarantee a child's educational loan); Deborah H. Devan, *Attorneys' Ethical Obligation Clash with Recent Amendments to Bankruptcy Code*, MD. B.J., May–June 2007, at 4, 9 (borrowing to prevent wage garnishment or attachment); *see also, e.g.,* Milavetz, Gal-

advice in favor of them. The court thus issued a declaratory judgment that Section 526(a)(4) violates the First Amendment and permanently enjoined the “United States, its agents, and all people acting in active concert with it” from enforcing the provision.¹⁷

The Fifth Circuit reversed in relevant part.¹⁸ Writing for the panel, Judge Garwood¹⁹ identified the phrase “in contemplation of” as the key phrase defining the scope of speech prohibited by the statute.²⁰ He conceded that, “if interpreted literally,” the provision would create “a blanket restriction on attorneys” and “prohibit some attorney advice that would not be abusive to the bankruptcy system”; thus the provision “would raise serious constitutional problems because . . . it would restrict some speech that is protected by the First Amendment.”²¹ In order to avoid this literal meaning, Judge Garwood construed the statute more narrowly. He interpreted it to prohibit only “advice to a debtor to incur debt in contemplation of bankruptcy *when doing so would be an abuse of the bankruptcy system*.”²² This version of the statute, Judge Garwood concluded, affects only unprotected speech and raises no constitutional questions.²³

Judge Garwood supported his use of constitutional avoidance with five reasons. First, he noted that the Supreme Court has on several occasions given a restrictive meaning to (otherwise plainly unrestricted) statutory language in order to avoid constitutional infirmities.²⁴ Second, he cited Black’s Law Dictionary and select cases to demonstrate that the phrase “in contemplation of” can be used to describe actions taken in furtherance of bankruptcy abuse.²⁵ Third, he argued that the civil remedies afforded for violations of Section 526(a)(4), which specify the recovery of actual damages, suggest that the provision was intended only for abusive situations, where there is

lop & Milavetz, P.A. v. United States, 541 F.3d 785, 793–94 (8th Cir. 2008); Zelotes v. Adams, 363 B.R. 660, 665 (Bankr. D. Conn. 2007); Zelotes v. Martini, 352 B.R. 17, 24 (Bankr. D. Conn. 2006).

¹⁷ *Hersh*, 553 F.3d at 749.

¹⁸ *Id.* The circuit court first affirmed that attorneys qualify as “debt relief agencies” under 11 U.S.C. § 101(12A) and, as such, are subject to the regulations contained in 11 U.S.C. §§ 526–528. *Id.* at 752. The court also affirmed that the disclosure requirements of 11 U.S.C. § 527(b) do not constitute unconstitutionally compelled speech. *Id.* at 768.

¹⁹ Judge Garwood was joined by Judges Clement and Elrod.

²⁰ *Hersh*, 553 F.3d at 748, 753, 758.

²¹ *Id.* at 754.

²² *Id.* at 756 (emphasis added).

²³ *Id.* at 756, 763. Judge Garwood noted that the government has some leeway to regulate attorney speech in furtherance of a substantial governmental interest, *see id.* at 756, and argued that the government may prohibit speech in the interest of preventing abuse of the bankruptcy system and prohibiting the facilitation of fraudulent or criminal activity, *id.* at 754–56.

²⁴ *Id.* at 757–58 (citing *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Boos v. Barry*, 485 U.S. 312 (1988); *United States v. Witkovich*, 353 U.S. 194 (1957)).

²⁵ *See id.* at 758–59 & n.17.

a significant risk of harm to the debtor.²⁶ Fourth, he appealed to BAPCPA's more general aim of preventing abuse to argue that Section 526(a)(4) in particular is limited to abusive situations.²⁷ Fifth, he noted that Section 526(a)(4) is positioned next to three other provisions proscribing abusive behavior.²⁸

The Fifth Circuit stands alone in its interpretation of Section 526(a)(4); every other court to consider the issue has held the provision unconstitutional.²⁹ The *Hersh* court's evasion of such a result using constitutional avoidance was inappropriate. Avoidance should only apply where the statutory text is ambiguous. The relevant text here — "in contemplation of" — is not ambiguous. The phrase has an undisputed plain meaning and a widely recognized settled meaning in the bankruptcy context. Deviation from this unambiguous meaning is not justified by either the *Hersh* court's reasoning regarding legislative intent or scholarly contentions regarding prudential concerns.

To be sure, the avoidance canon need not always give the preferred reading of a statute, or else the canon would do no work.³⁰ But application of the canon is premised upon the existence of ambiguity.³¹ If the statute's command is unambiguous, a court may not evade that command and engage in willful misconstruction.³² Here, there is no plausible ambiguity: the text's plain and settled meaning evidences a clear statutory command.

The plain meaning of the words "in contemplation of" is broad and unrestricted, as indicated by various dictionaries,³³ interpret-

²⁶ *Id.* at 759–60 (for example, dismissal of a petition or denial of discharge).

²⁷ *Id.* at 760–61.

²⁸ *Id.* at 761 (citing 11 U.S.C. § 526(a)(1)–(3) (2006)).

²⁹ See cases cited *supra* note 7. The provision has been held to be overbroad and has failed both strict scrutiny and intermediate scrutiny because of its lack of narrow tailoring. *Id.* The provision is also viewpoint-specific and, as such, is presumptively invalid. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–29 (1995).

³⁰ See *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 358 (1998) (Scalia, J., concurring in the judgment).

³¹ See *Clark v. Martinez*, 543 U.S. 371, 385 (2005) ("The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction . . ."); Young, *supra* note 3, at 1576 ("The avoidance canon . . . comes up only when there is doubt, not about the statute's constitutionality, but about what the statute means in the first place.").

³² See *Miller v. French*, 530 U.S. 327, 341 (2000) ("We cannot press statutory construction to the point of disingenuous evasion even to avoid a constitutional question." (quoting *United States v. Locke*, 471 U.S. 84, 96 (1985)) (internal quotation marks omitted)).

³³ See, e.g., AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 396 (4th ed. 2000) (defining "contemplation" as "[i]ntention or expectation: *sought further information in contemplation of a career change*"); WEBSTER'S NEW WORLD COLLEGE DICTIONARY 314 (4th ed. 1999) (defining "contemplation" as "expectation or intention"). For a discussion of dictionaries as the principal extrinsic aid for discerning plain meaning, see generally John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 88 & n.64 (2006).

ers,³⁴ and the *Hersh* court itself.³⁵ The phrase merely conveys action taken with the intention or expectation of filing bankruptcy. This plain meaning forms an important starting point for understanding Congress's intent.³⁶

The phrase "in contemplation of" also has a settled meaning in bankruptcy law. Most notably, the phrase appears in Section 329(a) of the Bankruptcy Code, which regulates the disclosure of payments made to an attorney for services rendered "in contemplation of" bankruptcy.³⁷ In this context, the phrase is not limited to describing only those payments for services that are illegal or abusive, but rather covers *any* payment made to an attorney where the payor was influenced by the possibility or imminence of bankruptcy.³⁸ The Supreme Court cemented this interpretation as controlling in the 1933 case *Conrad, Rubin & Lesser v. Pender*.³⁹ In what is recognized as "the leading case" on the issue,⁴⁰ the Court explained that an action is taken in contemplation of bankruptcy if "the thought of bankruptcy was the impelling cause" of the action.⁴¹ This interpretation has been reiterated

³⁴ See, e.g., *Conn. Bar Ass'n v. United States*, 394 B.R. 274, 283–84 (Bankr. D. Conn. 2008) (finding no indication that the phrase is limited); *Zelotes v. Martini*, 352 B.R. 17, 24 n.8 (Bankr. D. Conn. 2006) (finding that a limited reading strains the text); *Hersh v. United States*, 347 B.R. 19, 24 (Bankr. N.D. Tex. 2006) (finding that the phrase may apply to both abusive and nonabusive situations).

³⁵ See *Hersh*, 553 F.3d at 754 (conceding that, if interpreted literally, "[t]he statute does not expressly qualify its restriction on attorneys" but rather "creates a blanket restriction" applicable to advice to incur "any debt" in contemplation of bankruptcy "under any circumstances"); *id.* at 757 (impliedly conceding that the court's own restrictive construction is against the statute's "plain words" (quoting *United States v. Witkovich*, 353 U.S. 194, 199 (1957)) (internal quotation mark omitted)).

³⁶ See *Locke*, 471 U.S. at 95.

³⁷ 11 U.S.C. 329(a) (2006). No court yet to have considered this issue has taken note of Section 329(a).

³⁸ *Tripp v. Mitschrich*, 211 F. 424, 426–27 (8th Cir. 1914); see also, e.g., *In re Prudhomme*, 43 F.3d 1000, 1004 (5th Cir. 1995) (holding that evidence suggesting that the debtors, who were in desperate financial straits, consulted an attorney for representation to restructure debt and resolve disputes with their largest creditor supported a finding that the fee was paid in contemplation of bankruptcy); *In re Greco*, 246 B.R. 226, 231 (Bankr. E.D. Pa. 2000) (holding that a \$2,200 payment to an attorney two months before bankruptcy for legal research concerning the effect of bankruptcy on the debtor's student loans was "in contemplation of" bankruptcy); *In re Rheuban*, 121 B.R. 368, 379 (Bankr. C.D. Cal. 1990) (finding that the debtor acted "in contemplation of bankruptcy" upon entering into a fee agreement with a firm to represent him in connection with criminal investigation and litigation arising out of the debtor's business relationship with a savings and loan); *In re GIC Gov't Sec., Inc.*, 92 B.R. 525, 533 (Bankr. M.D. Fla. 1988) (concluding that payments made to attorneys retained on the eve of bankruptcy to resist efforts by the State of Florida to revoke the debtor's securities registration were "in contemplation of" bankruptcy).

³⁹ 289 U.S. 472 (1933).

⁴⁰ *In re J.J. Bradley & Co.*, 6 B.R. 529, 534 (Bankr. E.D.N.Y. 1980).

⁴¹ *Conrad*, 289 U.S. at 479 (construing section 96(d) of former Title 11, the predecessor to current 11 U.S.C. § 329(a)). "[P]rinciples enunciated by pre-Code cases interpreting [section 96(d) of former Title 11] are still controlling." *GIC Gov't Sec.*, 92 B.R. at 530.

throughout the lower courts⁴² and is “well-settled” in bankruptcy law.⁴³ Even where the phrase appears in the Federal Rules of Bankruptcy Procedure,⁴⁴ it is treated as having the same meaning as that attributed to it in Section 329(a).⁴⁵ Furthermore, where the phrase appears in other titles of the U.S. Code,⁴⁶ courts have read it in a similarly broad way to imply a loose causal relationship⁴⁷ — never confined exclusively to circumstances of illegality or abuse, or otherwise read as narrowly as in *Hersh*.

This history of use across the Code and the accompanying statutory precedent resolves the meaning of the phrase in Section 526(a)(4). When the same phrase is used elsewhere in the Code, it is presumed that all iterations are intended to have the same meaning.⁴⁸ That meaning has long been defined by the courts, and Congress is presumed to be aware of such entrenched judicial interpretations, especially when operating within a complex regulatory regime.⁴⁹ By using the phrase again in BAPCPA, against the backdrop of this well-settled meaning, Congress is presumed to have incorporated that settled meaning.⁵⁰ This is all the more so because Section 329(a) and its accompanying precedent are specifically recognized as part of the foun-

⁴² See, e.g., *In re Zepecki*, 277 F.3d 1041, 1045 (8th Cir. 2002); *In re Pac. Far E. Line, Inc.*, 644 F.2d 1290, 1292 (9th Cir. 1981); *Felix v. Eurell*, 85 F.2d 151, 152 (3d Cir. 1936).

⁴³ See *Schilling v. Heavrin (In re Triple S Restaurants, Inc.)*, 130 F. App'x 766, 771 (6th Cir. 2005).

⁴⁴ See FED. R. BANKR. P. 2006, 2017, 2019.

⁴⁵ See, e.g., *In re Brown*, 371 B.R. 486, 497 & n.53 (Bankr. N.D. Okla. 2007).

⁴⁶ See 12 U.S.C. §§ 91, 1786, 1787, 1821(e)(12), 1828, 1833a, 2277a-10b (2006); 15 U.S.C. § 78jjj(c)(1) (2006); 16 U.S.C. § 4600-2 (2006); 18 U.S.C. §§ 152, 1519 (2006); 25 U.S.C. § 2206 (2006); 26 U.S.C. § 108 (2006); 35 U.S.C. § 135(c) (2006); 41 U.S.C. §§ 103, 108, 110 (2006); 50A U.S.C. § 2091 (2006).

⁴⁷ See, e.g., *FDIC v. Goldberg*, 906 F.2d 1087, 1091 (5th Cir. 1990) (12 U.S.C. § 91) (determining certain transfers to be “in contemplation of insolvency” if the bank’s officers “knew, or ought to have known, that at the time of the transfers the suspension of the regular business of the bank was imminent” (emphasis omitted) (quoting *Bender v. Etnier*, 26 F. Supp. 484, 487 (M.D. Pa. 1939))); *CTS Corp. v. Piher Int'l Corp.*, 727 F.2d 1550, 1556 (Fed. Cir. 1984) (35 U.S.C. § 135(c)) (determining that the phrase requires “a causal relationship”); *In re Woodward*, 229 B.R. 468, 474 (Bankr. N.D. Okla. 1999) (18 U.S.C. § 152) (stating that a debtor acts “in contemplation of bankruptcy” where the debtor “‘is influenced by the possibility or imminence’ of a bankruptcy filing” (quoting *In re GIC Gov't Sec., Inc.*, 92 B.R. 525, 531 (Bankr. M.D. Fla. 1988))).

⁴⁸ See, e.g., *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932); see also *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371-72 (1988) (applying the same-words-same-meaning principle to the Bankruptcy Code).

⁴⁹ See *California v. Fed. Energy Regulatory Comm'n*, 495 U.S. 490, 498-99 (1990) (noting the “deference [the] Court must accord to longstanding and well-entrenched decisions, especially those interpreting statutes that underlie complex regulatory regimes”).

⁵⁰ See *Rowe v. N.H. Motor Transp. Ass'n*, 128 S. Ct. 989, 994 (2008) (“[W]hen judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well.” (quoting *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85 (2006)) (internal quotation marks omitted)).

dation on which Congress builds when it amends the bankruptcy laws,⁵¹ and there is no indication that Congress meant to alter that foundation.⁵²

In the face of this plain and settled meaning, the *Hersh* court erroneously applied constitutional avoidance and inserted eleven new words into the statute. In doing so, the court did exactly what it is barred from doing: it literally rewrote the statute.⁵³

The reasons set forth by the *Hersh* court for its construction are unpersuasive. First, the Supreme Court cases that the *Hersh* court cites as condoning judicial revision are outdated⁵⁴ and distinguishable.⁵⁵ The Court has honored settled meanings and statutory consistency far more forcefully and frequently.⁵⁶ Second, Black's Law Dictionary expressly allows for the phrase "contemplation of bankruptcy" to be used to describe nonabusive circumstances. The dictionary notes that the phrase is *often* coupled with bankruptcy abuse, not *exclusively* so.⁵⁷ The select lower court cases that Judge Garwood cites are merely examples of this occasion of use.⁵⁸ Third, the remedies afforded for violations of the provision are as meaningful in nonabusive situations as abusive ones. Attorneys can be required to surrender their fees or charges, pay actual damages, and submit to civil penalties or an injunction against their practice.⁵⁹ Even in nonabusive situations, the actual damages component can be significant: the monetary consequence of incurring debt includes the additional principal and interest incurred as well as incidental costs (for example, closing costs and default penalties). Finally, legislative intent and structure are too vague

⁵¹ See *Emil v. Hanley*, 318 U.S. 515, 521 (1943) (noting that when Congress amends the bankruptcy laws, it is "not writing on a clean slate" and identifying Section 329(a) (then Section 96(d)) as part of the well-understood background norms of bankruptcy law).

⁵² Cf. *Chisom v. Roemer*, 501 U.S. 380, 396 & n.23 (1991) (expressing a presumption that a prior legal rule should be retained if no one in legislative deliberations even mentioned the rule or discussed any changes in the rule). There is no mention or discussion in the legislative record of altering the settled meaning of "in contemplation of" as set forth in *Conrad*.

⁵³ See, e.g., *United States v. Albertini*, 472 U.S. 675, 680 (1985) (noting that the avoidance canon "is not a license for the judiciary to rewrite language enacted by the legislature"); see also Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533 (1947) ("To go beyond [the meaning of the words as used by the legislature] is to usurp a power which our democracy has lodged in its elected legislature.").

⁵⁴ Compare cases cited *supra* note 24, with *Rowe*, 128 S. Ct. 989.

⁵⁵ None of the cases involved an alternative settled meaning that made Congress's intent clear.

⁵⁶ See sources cited *supra* notes 48–53.

⁵⁷ Compare BLACK'S LAW DICTIONARY 336 (8th ed. 2004) ("contemplation of bankruptcy") (noting a context in which the phrase is "often" used), with *id.* ("contemplation of death") (narrowing the actual meaning of the phrase to a specific application).

⁵⁸ The nineteenth-century English cases he cites are irrelevant in the face of more modern Supreme Court precedent to the contrary.

⁵⁹ See 11 U.S.C. § 526(c) (2006) (stating that an attorney may be subject to actions by the debtor, state, and court).

here; there is no intent indicated specifically for Section 526(a)(4) in the way that a settled judicial meaning is indicated specifically for the provision's key phrase. Besides, statutes are commonly broader than any one enunciated purpose.⁶⁰

Prudential justifications for avoidance set forth by scholars are also inapposite. Honoring the assumed general intention of Congress to enact constitutionally sound provisions⁶¹ (a tenuous assumption on its own terms⁶²) is irrelevant here since the provision at issue has a specifically intended settled meaning. Excising only part of a provision in order to preserve a workable regulation (instead of leaving a regulatory hole) is unnecessary here because the constitutional parts of the provision are already actionable: professional codes⁶³ and court-imposed sanctions⁶⁴ already proscribe attorneys from advising a debtor to incur debt in contemplation of bankruptcy when doing so would be abusive.⁶⁵ Avoiding confrontation with the political branches in order to preserve judicial legitimacy⁶⁶ is inapplicable here because rewriting

⁶⁰ See *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (noting that, "in the context of an unambiguous statutory text," the applications expressly envisioned are irrelevant); *Brogan v. United States*, 522 U.S. 398, 403 (1998) ("[I]t is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy . . . [T]he reach of a statute often exceeds the precise evil to be eliminated."); Philip P. Frickey, *From the Big Heat to the Big Sleep: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 251 (1992) (discussing the claim that "judges could reach wrong results" by "promoting a public policy purpose gleaned from the statute rather than following the true lines of legislative compromise").

⁶¹ See, e.g., James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 79 (1994) ("[L]egislators should be regarded as . . . reasonably responsible in not wanting to enact an unconstitutional law."); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 469 (1989) (asserting that one of the avoidance canon's functions is to follow Congress's "implicit interpretive instructions" by "respond[ing] to Congress' probable preference for validation over invalidation" (internal quotation marks omitted)).

⁶² Empirically, there may be no such preference. See Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 92 ("[T]here is no evidence whatsoever that members of Congress are risk-averse about the possibility that legislation they believe to be wise policy will be invalidated by the courts."); see also HENRY J. FRIENDLY, *Mr. Justice Frankfurter and the Reading of Statutes*, in *BENCHMARKS* 196, 210 (1967).

⁶³ See MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2007) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . ."); see also *Attorney Grievance Comm'n v. Culver*, 849 A.2d 423 (Md. 2004) (employing Rule 1.2(d) to sanction attorney who advised debtor to incur credit card debt to pay counsel fees).

⁶⁴ See FED. R. BANKR. P. 9011 (Rule 11 sanctions); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 (2000) (sanctions deriving from court's inherent power).

⁶⁵ Debtors are also subject to regulation in cases of abuse. See 11 U.S.C. § 523(a)(2)(C) (2006) (nondischargeability); *id.* § 707(b)(3)(B) (dismissal).

⁶⁶ See Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1608 (2001) (noting that, by using the canon, "the Court minimizes potentially power-sapping confrontations with coordinate branches, portrays itself as temperate in character, conserves judicial capital, and,

a statute in a manner inconsistent with the legislature's intent is as corrosive to the interbranch relationship as wholesale invalidation.⁶⁷ In fact, it can be even more harmful: by not returning the task of drafting and compromise to the three political institutions that originally negotiated BAPCPA⁶⁸ (the House, the Senate, and the President), the court risks producing a result that will favor one or two of the institutions,⁶⁹ creating a statute that is impossible to alter and could never have passed on its own.⁷⁰ Finally, vindicating underlying constitutional values⁷¹ is immaterial here because First Amendment values are equally, if not better, vindicated by invalidation.⁷²

The proper course of action is simply to strike Section 526(a)(4) from the Bankruptcy Code. The provision's meaning is clear and is clearly unconstitutional. Engaging in constitutional avoidance despite this unambiguous meaning is a misapplication of the doctrine. Ambiguity is the indispensable anchor of the doctrine of constitutional avoidance: without it, there is no logical limit to the doctrine's application. In short, if a court may avoid invalidating this statute, it need not invalidate any statute.

through all this, solidifies its claim to exercise the power of judicial review"); Sunstein, *supra* note 61, at 469 (framing purposes of avoidance in terms of separation of powers values).

⁶⁷ Schauer, *supra* note 62, at 74 ("[A] strained interpretation of a federal statute that avoids a constitutional question is [no] less a judicial intrusion than the judicial invalidation on constitutional grounds of a less strained interpretation of the same statute.").

⁶⁸ BAPCPA was the product of a decade-long legislative reform initiative that involved extensive hearings, amendments, debate, and negotiation. See generally Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485 (2005).

⁶⁹ See JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE 105 (1997).

⁷⁰ See *id.* at 102–03; Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 605 (1995) (noting that legislators "have little incentive to spend precious political capital vindicating the claimed 'real' intention of the prior legislature that enacted the law"); cf. Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 46 (1984) ("What Congress wanted was the compromise, not the objectives of the contending interests."); Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983).

⁷¹ See William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1020–22 (1989) (noting that constitutional avoidance can be used to enforce public values); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331 (2000) (defending the canon of avoidance as a means "to promote some goal with a constitutional foundation"); Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1963 (1997); Young, *supra* note 3, at 1587.

⁷² See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 710–24 (1978) (arguing that invalidation is preferable to the narrowing of an overbroad statute where the judicially inserted limiting construction is vague in its terms); cf. Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L. REV. 1, 55 (1996) ("By 'tiptoeing' around speech incursions with the avoidance canon rather than directly condemning them, the Court impoverished us as a polity.").