RETHINKING THE JURISDICTION OF BANKRUPTCY COURTS OVER POST-CONFIRMATION FEDERAL TAX LIABILITIES: TOWARDS A NEW JURISPRUDENCE OF 11 U.S.C. § 505

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I. INTRODUCTION

The resolution of tax liabilities is a critical factor in bankruptcy filings and successful resolution of bankruptcy cases in the United States.[1] This suggests that the ability of bankruptcy courts to address issues of tax liability is important to the success or failure of bankruptcy reorganizations. The authority of bankruptcy courts to determine tax liability is governed by § 505 of the United States Bankruptcy Code. Section 505(a) states:

> Except as provided in paragraph (2) of this subsection, the court may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction.[2]

In the plain text of § 505(a)(1), there is absolutely no reference to the context in which this adjudicative authority is granted to the

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1. *See* Elizabeth Warren and Jay Lawrence Westbrook, *Financial Characteristics of Businesses in Bankruptcy*, 73 AM. BANKR. L.J. 499, 559 (1999) (finding that 20% of failed businesses surveyed "specifically identify federal taxes as the source of their troubles and the reason they ended up in the bankruptcy court").

2. 11 U.S.C. § 505(a)(1) (2003). The exceptions to the general rule listed in § 505(a)(2) are: (A) for taxes already contested and adjudicated by a judicial or administrative tribunal, and (B) limitations on the time period in which the court may determine the right of the estate to a tax refund. § 505(a)(2).

bankruptcy court. Indeed, the plain language of the statute does not even mention the designation "bankruptcy court" at all. The context in which the bankruptcy court's authority to make these determinations is granted must be gleaned from references to the "trustee," the "debtor" and the "estate" in § 505(a)(2) and (b).[3]

The breadth of the literal wording of § 505(a) has given rise to difficulties in interpreting the reach of bankruptcy courts' authority to determine tax liabilities. One leading treatise notes that the only real restrictions on the reach of § 505 are that (1) the liability must not have been adjudicated prior to the commencement of the Title 11 case, and (2) the requirement that there be present an "actual case or controversy."[4] These limitations are not very substantial, nor do they provide information about the types of tax liabilities bankruptcy courts have authority to determine, or how long that authority persists. In the face of the potentially tremendous reach of the statute, courts have noted that "[t]aken at face value, without recourse to the legislative history, § 505 makes the Bankruptcy Courts a second tax court system, empowering the Bankruptcy Court to consider 'any' tax whatsoever, on whomsoever imposed."[5]

The potentially unlimited jurisdiction that a literal reading of § 505(a) would allow suggests that such a reading is unfeasible. Indeed, bankruptcy courts have not employed § 505(a) for an unlimited range of purposes. Rather, they have attempted to circumscribe the authority granted by the provision and to distinguish uncontroversial applications of § 505 from applications that are more suspect.[6] One of the key issues courts have faced has been the extent to which bankruptcy courts may employ § 505 in determining tax liabilities that may arise after the bankruptcy case has been discharged. In Chapter 11 reorganizations – the focus of this paper – this discharge takes place at the time the plan of reorganization is confirmed.[7] In deciding this question, bankruptcy

3. 11 U.S.C. § 505(a)(2), (b).

4. 15 COLLIER ON BANKRUPTCY ¶ TX5.04[2] (Lawrence King, ed., 15th ed. rev. 2002).

5. *In re* Interstate Motor Freight System, 62 B.R. 805, 809 (Bankr. W.D. Mich. 1986); *quoted in* Michigan Employment Security Commission v. Wolverine Radio Co. (*In re* Wolverine Radio Co.), 930 F.2d 1132, 1139 (6th Cir. 1991).

6. For instance, several courts have held that § 505 does not confer jurisdiction on bankruptcy courts to determine the tax liability of a party other than the debtor or the bankruptcy estate. *See, e.g., In re* Brandt-Airflex Corp., 843 F.2d 90 (2d Cir. 1988); American Principals Leasing Corp. v. United States, 904 F.2d 477 (9th Cir. 1990). *But see* Quattrone Accountants, Inc. v. IRS, 895 F.2d 921 (3d Cir. 1990) (holding that § 505 clarifies rather than lim its jurisdiction and is hence wholly inapplicable to the question of bankruptcy court jurisdiction over non-debtor tax liability).

7. 11 U.S.C. § 1141(d)(1) (2003). However, if the Chapter 11 plan involves a liquidation of

courts have for the most part looked to sources outside of § 505 to determine the proper application of § 505, rather than engaging in analysis of § 505 itself. Such sources include the "actual case or controversy" requirement of the United States Constitution and the "core proceedings" constraints contained in Title 28 of the United States Code.[8] This chosen approach of the bankruptcy courts may reflect historical debates over the jurisdiction of bankruptcy courts peculiar to the United States and may also stem from considerations of bankruptcy and tax policy.[9]

Although it is possible that looking to sources outside of § 505 rather than rigidly circumscribing § 505 itself may lead to increased flexibility in employing this provision; bankruptcy court analyses of the constitutional requirements, jurisdictional provisions, and their relationship to § 505 have also been confusing and inconsistent. The analysis of whether there is an actual case or controversy or whether a given matter is a "core proceeding" necessitates an individualized analysis of the circumstances of every case. Furthermore, the use of such an approach requires positing a complex underlying theory of the relationship between § 505 with the surrounding jurisdictional and constitutional constraints that limit it. Courts thus far have not given adequate consideration to such theoretical underpinnings, thus contributing to the inconsistency.

This paper argues that the current approach that bankruptcy courts have taken in circumscribing the reach of § 505 over liabilities that may arise after the plan has been confirmed and discharged is unsatisfactory. Instead of turning to jurisdictional and constitutional sources external to § 505, the reach of § 505(a) should be determined through imposing a bright line limitation internal to § 505 itself. It is the contention of this paper that based on the location of § 505 in the Bankruptcy Code, the overall structure of the Code, and the legislative history of the provision, the authority contained in § 505 should be limited to determinations of pre-petition and post-petition-pre-confirmation tax matters, designations that will be elaborated later. Such an approach simplifies and clarifies the relationship of § 505 to the statutory and constitutional provisions

all or substantially all the property of the estate and a cessation of business operations, then confirmation of the plan does not discharge the debtor. § 1141(d)(3). Such liquidating Chapter 11s are not the focus of this paper.

8. *See* U.S. CONST. art. III, § 2, cl. 1; 28 U.S.C. § 157(b) (2003).

9. *See generally* ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE LAW OF DEBTORS AND CREDITORS 933-77 (4th ed. 2001) (discussing the history of federal bankruptcy court jurisdiction).

surrounding it and takes some of the burden of circumscribing jurisdiction off of these provisions. It is also consistent with the overall structure of the United States Bankruptcy Code and bankruptcy system as a whole. In addition, this approach should not significantly compromise important bankruptcy policy goals inherent in the bankruptcy system.

Part II of this paper delineates the categories of tax issues that are under consideration and briefly describes how they have been treated in bankruptcy court analyses. Part III examines the issues at stake in the decision regarding how to limit § 505. Formulating a clear answer to this question will illuminate the policy consequences of the model proposed in this paper. Part IV summarizes the ways in which bankruptcy courts currently employ constitutional and statutory limitations external to § 505 in addressing questions pertaining to their jurisdiction over tax matters in a variety of cases and points out inconsistencies and irregularities in these analyses. It also explores the policy rationales for this type of approach to limiting § 505. Part V proposes a reading of § 505 that suggests a principle internal to that provision that limits its reach. It argues that in the light of the overall structure of the Bankruptcy Code and the legislative history of § 505, § 505 is most appropriately applied only to tax liabilities that arise for time periods prior to the filing of the bankruptcy petition and during the administration of the estate, or "gap." Finally, Part VI considers the policy implications of the proposed approach to understanding § 505 and argues that, despite the increased simplicity gained using this model, there are few significant adverse public policy consequences that are implicated.

II. THE UNIVERSE OF TAX MATTERS UNDER CONSIDERATION

A central feature of the United States bankruptcy system lies in the clear distinction it draws between liabilities arising before the commencement of the bankruptcy case – that is, the date of filing of the bankruptcy petition – those arising during the period of administration of the estate, and those arising after the case has been discharged.[10] These clear lines are maintained throughout the treatment of claims in bankruptcy. Generally, claims that arise before the filing of the petition

10. The liabilities arising during the period of estate administration (that is, between the filing of the bankruptcy petition and the discharge of the case) may be referred to as "gap" liabilities, because they arise in the gap between the filing of the bankruptcy petition and the confirmation of the plan of reorganization in reorganization bankruptcies.

and during the period of administration of the bankruptcy estate are paid out of the property of the estate and are resolved in the bankruptcy while those arising after the confirmation of the plan are beyond the reach of the bankruptcy proceeding.[11]

The analyses of commentators on the authority of bankruptcy courts to determine tax liabilities under § 505 have recognized this division of liabilities into those arising in the pre-petition time period, the post-petition-pre-confirmation time period (commonly referred to as the "gap" or estate administration period) and the post-confirmation time period that is a fundamental feature of bankruptcy law as a whole.[12] Generally speaking, the authority of bankruptcy court to determine under § 505(a) the tax liabilities of the debtor that arose before the filing of the bankruptcy petition is not in question, and bankruptcy court authority to determine "gap" tax liabilities is also quite clear.[13] However, the treatment of tax liabilities arising after the confirmation of the plan of reorganization have been less univocal.[14] It is clear that § 505 does not allow bankruptcy courts jurisdiction over post-confirmation taxes that are totally unrelated to the bankruptcy – for instance, taxes owed by the reorganized debtor for tax years after the bankruptcy.[15] However, the treatment of other types of post-confirmation tax liabilities in bankruptcy is less clear. Most significantly, courts have split over whether a bankruptcy court has jurisdiction to determine the tax consequences of a plan of reorganization.[16]

Although the delineation of these three timeframes – pre-petition, "gap," and post-confirmation – is a bright line, it is often difficult to

11. *See* 11 U.S.C. § 101(5) (2003) (defining "claim"); §§ 501-502 (2003) (describing the filing of proofs of claims and the claims resolution process); § 503 (2003) (pertaining to treatment of administrative expenses in the "gap"); § 541 (2000) (defining "property of the estate"); § 1141(d)(1)(A) (2003) (limiting discharge to debts arising before the date of confirmation).

12. *See, e.g.*, Jack F. Williams, *National Bankruptcy Review Commission Tax Recommendations: Notice, Jurisdiction, and Corporate Debtors*, 14 BANKR. DEV. J. 261, 268-80 (1998).

13. *See id.* at 270-74.

14. *See id.* at 274 (stating that post-confirmation tax liability "presents some of the most important and problematic jurisdictional issues in all of bankruptcy" and features "a violent clash between bankruptcy and tax policies").

15. *See* GORDON D. HENDERSON & STUART J. GOLDRING, TAX PLANNING FOR TROUBLED CORPORATIONS § 1013, at 609-10 (2004) (citing *In re* Callan, Bankr. D. Ala. (Mar. 13, 1992), *reprinted at* 92 TNT 84-85).

16. *See, e.g., In re* Goldblatt, 106 B.R. 522 (Bankr. N.D. Ill. 1989) (concluding that a bankruptcy court could determine responsibility for tax on interest earned on money in Creditors' Deposit Account created under the plan of reorganization). *But see In re* Antonelli, 1992 WL 435879 (Bankr. D. Md. 1992) (holding that a bankruptcy court could not declare whether parties were exempt from stamp tax on transfers of property to and by a trust created under the plan).

determine whether a particular liability falls into a particular category. This can in part be attributed to the potentially limitless range of fact situations that may arise in a bankruptcy case. The confusion associated with making such classifications has resulted in inaccurate analyses of the issues. Such inaccuracies must be apprehended and corrected before a cogent internal theory of the application of § 505 may be developed. Furthermore, a clear understanding of the content of this timeframe-based classification is fundamental to understanding the basics of bankruptcy court jurisdiction and power over both tax and non-tax matters. Therefore, in the interests of analytical precision, it is appropriate at this point to revisit the classification of tax matters into pre-petition, "gap," and post-confirmation liabilities.

A. Pre-Petition Tax Liabilities

The most clear-cut example of a pre-petition tax liability is a liability that arises for a tax year prior to the filing of a bankruptcy petition. For example, if the bankruptcy petition is filed in 2003, tax liabilities for the 2002 tax year will be considered pre-petition taxes, regardless of whether the liability has been assessed at the time the bankruptcy petition is filed.[17] However, not all cases involving pre-petition tax liabilities are so clear-cut. For instance, there is the question of how to treat a tax refund that is not determined to exist until after the bankruptcy petition has been filed. In regard to refunds, taxpayers may attempt to argue that overpayment and refund issues that come before the court after the bankruptcy petition has been filed are post-petition tax determinations that may not be set off against the IRS's pre-petition claim.[18] However, refunds have generally been held to accrue as of the end of the taxable year, regardless of whether the tax refund is determinable by the time of filing of the bankruptcy petition, since it is the timing of accrual of the refund that determines whether it is pre-petition or post-petition.[19] Hence, tax refunds that accrue in a pre-

17. *E.g.*, United States v. Redmond, 36 B.R. 932, 934 (Bankr. D.C. Kan. 1984) (holding that in bankruptcy, for purposes of determining when a tax was incurred, the date of accrual, not the date of assessment, controls) (citing *In re* Scrap Disposal, Inc., 24 B.R. 178, 180 (Bankr. S.D. Cal. 1982) (holding that tax due on corrected assessment after bankruptcy filing but that related back to pre-petition period was incurred pre-petition and not entitled to administrative expense priority)).

18. *See, e.g., In re* Harbaugh, 99 B.R. 671 (Bankr. W.D.Pa. 1989), *rev'd* Harbaugh v. United States, 1989 WL 139254 (W.D. Pa. 1989), *aff'd* 902 F.2d 1560 (3d Cir. 1990) (concluding that a tax refund that accrued in a year prior to bankruptcy is a pre-petition claim, even though assessed post-petition); *In re* Wilson 29 B.R. 54 (Bankr. W.D. Ark 1982).

19. *See, e.g., In re* Rozel, Inc., 120 B.R. 944 (Bankr. N.D. Ill. 1990) (concluding that the right to refund for pre-petition tax year arises pre-petition, even if not claimed till after the petition and

bankruptcy tax year are considered pre-petition liabilities, even if the refunds are not determined until after the petition has been filed.

Similarly, after a claim has been filed against the estate of the debtor, either the taxing authority or the debtor may, provided such proceeding is not already pending in Tax Court, request under § 505 that the Bankruptcy Court determine the individual tax liability of the debtor for taxes that are not dischargeable in the bankruptcy, in addition to determining the validity of claims against the estate.[20] Even though such taxes are not dischargeable in bankruptcy, they are valid pre-petition claims, since the liabilities themselves arose before the filing of the bankruptcy petition. Commentaries on § 505 are quite clear that bankruptcy courts may hear these liabilities under § 505.

The question of determining responsible person liability under I.R.C. § 6672 is another problematic area. Responsible personal penalties are not dischargeable in bankruptcy.[21] Hence, in some cases, the IRS purposely does not file a claim for such penalties in the bankruptcy, preferring instead to go after the debtor after the bankruptcy case has been discharged.[22] Some may argue that this liability is a post-petition matter if it is ultimately resolved outside the bankruptcy proceeding. However, courts have held that such responsible person liability is a pre-petition obligation, since the behavior that gave rise to the penalty occurred pre-petition.[23]

B. Tax Liabilities of the Estate During the "Gap"

Tax liabilities arising after the filing of the bankruptcy petition but

return claiming it is not due till after the petition date); *In re* Ferguson, 83 B.R. 676 (Bankr. E.D. Mo. 1988) (noting that a tax refund arose at the end of the taxable year); *In re* Conti, 50 B.R. 142 (Bankr. E.D. Va. 1985) (concluding that a refund related to 1982 tax year, though unclaimed and unpaid until after the bankruptcy petition in 1984, accrued at the end of the 1982 tax year and was still a pre-petition asset subject to setoff).

20. *See* 11 U.S.C.A. § 505 (West 2003) (Legislative Statements).

21. *See* 11 U.S.C. §§ 523(a)(7) (2003), 1141(d) (2003). *See also In re* Garrett, 1991 WL 101549 (Bankr. E.D. Va. 1991) (holding that I.R.C. § 6672 responsible person liability is a tax and not a penalty under the Bankruptcy Code and hence is not dischargeable under § 523(a)(7)) (citing George v. California State Board of Equalization (*In re* George), 95 B.R. 718 (B.A.P. 9th Cir. 1989)); Matlock v. United States (*In re* Matlock), 104 B.R. 389 (Bankr. N.D. Okla. 1989); *In re* Clate, 69 B.R. 506 (Bankr. W.D. Pa. 1987); Clark v. United States (*In re* Clark), 64 B.R. 437 (Bankr. M.D. Fla. 1986); *In re* Hatchett, 31 B.R. 833, 835 n.2 (Bankr. E.D. Va. 1983)).

22. *See, e.g.*, Kilen v. United States (*In re* Kilen), 129 B.R. 538 (Bankr. N.D. Ill. 1991); *In re* Huddleston, 994 WL 764193 (Bankr. W.D. La. 1994).

23. *See, e.g.*, IRS v. Lee, 184 B.R. 257 (W.D. Va. 1995) (holding that debtors' responsible person liability to IRS for corporation's pre-petition failure to remit withholding taxes was pre-petition debt, even if IRS did not learn of liability till after petition); *In re* Friesenhahn, 169 B.R. 615 (Bankr. W.D. Tex. 1994).

before the confirmation of the plan of reorganization also receive different treatment than pre-petition and post-confirmation tax liabilities. As is the case with other liabilities incurred by the estate during the period of estate administration, these are treated as administrative expenses, except to the extent that they are priority taxes.[24] These administrative expenses will generally be paid off ahead of most other priority claims in the bankruptcy, as well as ahead of the general unsecured creditors.[25]

"Gap" tax liabilities are distinguished from pre-petition tax liabilities because they are not "claims" of creditors of the pre-bankruptcy debtor that arose prior to the bankruptcy, but rather are liabilities of the entity created at the time of the bankruptcy filing – the estate. In the case of determinations of tax liability, the ability of bankruptcy courts to hear "gap" tax liabilities is squarely addressed in § 505(b), which provides a procedure that trustees in bankruptcy or debtors in possession can use to obtain a determination by taxing authorities of the amount of taxes owed by the estate for the administration period.[26] Such a determination is important because the amount of administrative expense taxes owed will impact the payout available to other (general unsecured) creditors in the bankruptcy.

C. Post-Confirmation Tax Liabilities

The designation "post-confirmation tax matter" in the bankruptcy claims context, and as used in this paper, is properly applied to liabilities arising post-confirmation. As discussed above, the clear delineation of claims in bankruptcy is squarely based on the time period over which the tax accrued and in which the liability arose, rather than on the moment at which the issue is before the bankruptcy court. For example, a liability that arose for a tax year prior to confirmation is still a pre-confirmation claim, even if – for whatever reason – the issue does not come before the court until after the plan of reorganization has been confirmed.[27]

Under the general categorization of post-confirmation tax liabilities, some liabilities are clearly outside the reach of the bankruptcy court, while the treatment of others is less clear. Perhaps the most debated type of post-confirmation liabilities is the category of post-confirmation tax

24. 11 U.S.C. § 503(b)(1)(B) (2003); 11 U.S.C. § 507(a)(8) (2003). These § 507(a)(8) priority taxes are paid off after the § 503(b) administrative expenses in the order specified under § 507(a). 11 U.S.C. § 507(a).

25. *See* 11 U.S.C. § 507 (2003).

26. *See* 11 U.S.C. § 505(b) (2003).

27. *See supra* notes 17-19 and accompanying text.

consequences of plans of reorganization.[28] The reason for this is twofold. First, obtaining a determination of the tax consequences of a plan of reorganization before the plan is confirmed may be vital to the success or failure of the plan. The interest in confirming a plan of reorganization that has a good chance of success has led to discussions of whether and how § 505 may be interpreted to allow bankruptcy courts to declare the tax consequences of such plans. Second, the debate over bankruptcy court jurisdiction to adjudicate post-confirmation federal tax matters under § 505(a) takes place against the backdrop of the enactment and subsequent reduction in scope of § 1146(d) of the Bankruptcy Code.[29] In effect, subject to certain procedural requirements, this section allows the bankruptcy court to declare the state and local tax consequences of Chapter 11 plans of reorganization.[30] Although the House bill had initially included the power to declare federal tax consequences in § 1146(d), the reference to federal taxes was later removed in the Senate amendment.[31] In light of what might have been if the final statute had included federal taxes, much of the debate has centered around whether or not bankruptcy courts may declare the federal tax consequences of Chapter 11 plans, in addition to state and local tax consequences, and if so, where such authorization lies.[32]

Although determinations of federal tax consequences of Chapter 11

28. *See* Williams, *supra* note 12, at 274-76; *see also* Donald D. Haber, *The Declaratory Powers of Bankruptcy Courts to Determine the Federal Tax Consequences of Chapter 11 Plans*, 3 AM. BANKR. INST. L. REV. 407 (1995); Robert A. Jacobs, *The Bankruptcy Court's Emergence as Tax Dispute Arbiter of Choice*, 45 TAX LAW. 971, 992 (1992).

29. 11 U.S.C. § 1146(d) (2003).

> The court may authorize the proponent of a plan to request a determination, limited to questions of law, by a State or local governmental unit charged with responsibility for collection or determination of a tax on or measured by income, of the tax effects, under section 346 of this title and under the law imposing such tax, of the plan. *In the event of an actual controversy, the court may declare such effects after the earlier of (1) the date on which such governmental unit responds to the request under this subsection; or (2) 270 days after such request*

Id. (emphasis added).

30. *See id.*

31. 8 COLLIER ON BANKRUPTCY ¶ 1146.LH[2] (Lawrence King, ed., 15th ed. rev. 2003). The legislative history reflects that federal tax consequences were excluded from the statutory language just before enactment to facilitate smooth passage through Congress, with the intention of addressing the federal rules in the next Congress, an eventuality that has not come to pass. *Id*. *See also* Haber, *supra* note 28, at 423.

32. *See, e.g.*, Haber, *supra* note 28, at 425 ("[B]ecause the impact of federal income tax issues can have a dramatic effect on the ability to confirm an Chapter 11 plan, the question becomes: Does the lack of reference to federal taxes in section 1146(d) present an insurmountable obstacle to a bankruptcy court declaring the federal income tax effects of a Chapter 11 reorganization plan under section 505 of the Bankruptcy Code?").

plans are an important post-confirmation issue, this type of question does not exhaust the universe of post-confirmation tax issues that must be considered. Indeed, framing the issue in terms of tax consequences of reorganization plans alone may be conceptually misleading, because such a categorization emphasizes impact-based considerations rather than highlighting the analytically precise categories based on time period that are so fundamental to bankruptcy law in general. Post-confirmation tax issues may or may not be related to the reorganization plan or even to the bankruptcy. For instance, courts may be requested to determine the tax liabilities of the reorganized debtor for tax years after the bankruptcy petition, on the theory that the extent of tax liability will impact the success of the plan.[33] A request of this type will usually not fall within the jurisdiction of the bankruptcy court.[34]

In some cases, it may be difficult to separate genuine post-confirmation tax matters that actually arise post-confirmation from tax matters that come before the court after confirmation but are actually not post-confirmation matters. When bankruptcy courts have been called on (after confirmation) to determine whether tax refunds that are for pre-petition taxes but become due to debtors after confirmation can be setoff against pre-petition debt are an example.[35] As noted above, such issues are actually pre-petition tax issues.[36] To take a more ambiguous example, the debtor in one case made a pre-confirmation request that the bankruptcy court determine that he had no state or federal responsible person liability to the IRS. This determination would occur after confirmation, and there were as yet no claims or assessments of such liability by the IRS.[37] As has been noted, responsible personal liability is also properly considered a pre-petition liability.[38]

III. THE POLICY IMPLICATIONS OF INTERPRETING § 505'S APPLICABILITY TO POST-CONFIRMATION TAX MATTERS

An understanding of the delineation of tax matters into pre-petition, post-petition-pre-confirmation, and post-confirmation tax liabilities

33. *See* HENDERSON & GOLDRING, *supra* note 15, at 610 (citing *In re* Callahan Bankr. D. Ala. (Mar. 13, 1992); *In re* Holly's, Inc., 172 B.R. 545 (Bankr. W.D. Mich. 1994)).

34. *See id.*

35. *See supra* notes 18-19 and accompanying text. *See also In re* Gordon Sel-Way, Inc., 239 B.R. 741 (Bankr. E.D. Mich. 1999) (discussed *infra* p. 29).

36. *But see In re* Gordon Sel-Way, 239 B.R. 741 (holding that overpayments arose after confirmation, even though it was for pre-petition tax year, because the tax was not paid till after confirmation).

37. *See In re* Schwartz, 192 B.R. 90 (Bankr. D.N.J. 1996).

38. *See supra* Part II.A and accompanying notes 22-24.

enables determination of exactly what is at stake in the question of the scope of jurisdiction over post-confirmation tax matters available under Bankruptcy Code § 505. As a preliminary matter, one notes that Title 11 contains broad provisions under which bankruptcy courts may attempt to assert jurisdiction over certain matters. Among these are 11 U.S.C. § 105, which provides that the bankruptcy court "may issue any order, process, or judgment necessary or appropriate to carry out the provisions of this title," and 11 U.S.C. § 1142, which provides that "the court may direct the debtor and any other necessary party to . . . perform any act . . . that is necessary for the consummation of the plan."[39] The question therefore arises as to why these provisions cannot be applied to allow courts to determine post-confirmation tax claims. The answer lies in the existence and terms of the Declaratory Judgment Act.[40] The Act provides:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.[41]

In other words, since § 505 and § 1146 are the only two Bankruptcy Code exceptions to the prohibition of declaratory judgments with respect to federal taxes in the Act, and since most determinations of post-confirmation tax liabilities will necessarily be declaratory judgments, bankruptcy courts must find that a federal tax matter falls under § 505 or § 1146 in order to issue such judgment. Section 1146 does not provide for the declaration of federal tax consequences of Chapter 11 plans.[42] Hence, it follows that bankruptcy courts must rely on § 505 in making these determinations. If § 505 is determined – by virtue of its location and legislative history – to apply only to pre-petition claims, then

39. 11 U.S.C. §§ 105, 1142 (2003).
40. 28 U.S.C. § 2201(a) (2003).
41. *Id*. (emphasis added).
42. *See supra* notes 31-32 and accompanying text.

bankruptcy courts will be unable to render declaratory judgments to determine post-confirmation federal taxes at all. Absent the constraints of the Declaratory Judgment Act, the bankruptcy court might be able to determine some post-confirmation tax issues by applying other provisions of the Bankruptcy Code, subject to the general jurisdictional provisions of Title 28. However, the presence of the general prohibition against declaratory judgments of federal tax liabilities in the Act, outside of § 505 and § 1146, means that these other provisions may not be utilized to determine such tax liabilities.

This eventuality raises serious policy concerns about the impact of a narrow reading of § 505. If § 505 is interpreted to only authorize bankruptcy court jurisdiction to decide pre-petition and "gap" claims, and not post-confirmation claims, then courts will have no statutory authorization to determine post-confirmation tax claims. This may lead to detrimental results in cases where future tax liabilities cannot be determined with certainty but where these tax liabilities may adversely affect the success or failure of the bankruptcy reorganization. For example, as several commentators have pointed out, the ability of debtors to obtain declaratory judgments regarding the tax consequences of Chapter 11 plans of reorganization can be critical in determining the success or failure of the reorganization.[43] Hence, the outcome of how the jurisdictional reach of § 505 is interpreted may implicate the degree to which the broader goals of bankruptcy reorganization are helped or hindered and, correspondingly, the degree to which goals of tax policy are helped or hindered. The following subsections address some of the important bankruptcy and tax policy goals that may be affected.

A. The Interest in Asserting Sufficient Jurisdictional Reach Such That Important Goals in Bankruptcy Policy are Met

Perhaps the two most traditional objectives of the liquidation bankruptcy process in general are: (1) achieving an equitable and centralized distribution of the debtor's assets in bankruptcy; and (2) providing the debtor with the benefits of a "fresh start."[44] These two goals are of primary importance, at least in the context of liquidation bankruptcies. In terms of reorganization bankruptcies – cases under

43. *See, e.g.*, Haber, *supra* note 28; Jacobs, *supra* note 28; Williams, *supra* note 12, at 279-80 (arguing that preventing a bankruptcy court from determining tax consequences of a plan of reorganization may force the court to deny confirmation due to lack of feasibility of the plan, if feasibility turns on these tax consequences).

44. *See* WARREN & WESTBROOK, *supra* note 9, at 177.

Chapter 11 and Chapter 13 of the Bankruptcy Code – a slightly modified policy is at work. In reorganization cases, the concern is with successful rehabilitation of the debtor – a fresh start of sorts, but with the debtor continuing as a going concern. This is achieved by centralizing and rewriting all pre-petition liabilities in the form of a plan of reorganization.[45] The interest in debtor rehabilitation is particularly acute in Chapter 11 business cases because a Chapter 7 discharge is not available for entities that are not individuals.[46] Hence, in the absence of discharge in business cases, there is no fresh start available for a debtor corporation in liquidation. In effect, this is a guarantee of corporate demise.[47]

Against the backdrop of these broad bankruptcy policies lie the specific policy concerns embedded in § 505. The authority granted by the statute, at least with regard to determinations of pre-petition tax liabilities – reflects congressional concern with protecting creditors from dissipation of assets of the debtor's estate, which might occur if the debtors, while in desperate financial situation, failed to contest a tax assessment.[48] At the same time, it also ensures finality of tax liability determinations that were reached prior to the bankruptcy by prohibiting bankruptcy court redeterminations of tax liabilities that have already been contested and determined by administrative or judicial tribunals.[49]

In addition to the policy goals behind § 505 that appear concerned with protecting creditors in general from asset dissipation and the IRS in particular from having previous determinations set aside, the broader goals of the federal bankruptcy process – such as equitable distributions, administrability and rehabilitation of the debtor through maximum efficiency and centralization – also come into play in the determination of the reach of § 505 over post-confirmation tax matters.

1. The Importance of Rehabilitation of the Debtor and the Fresh Start

The concern with debtor rehabilitation is an important reason in

45. *See, e.g.*, 11 U.S.C § 1129 (2003) (listing requirements for confirmation of plan); § 1141 (2000) (describing the effects of confirmation of the plan).

46. *See* 11 U.S.C. § 727(a)(1) (2003).

47. *See* WARREN & WESTBROOK, *supra* note 9, at 499 (stating that "[l]iquidation is, as the term suggests, death").

48. *E.g.*, *In re* Galvano, 116 B.R. 367, 372 (Bankr. E.D.N.Y. 1990) (citing *In re* Northwest Beverage, Inc., 46 B.R. 631 (Bankr. N.D. Ill. 1985) and *In re* Fiedel Country Day School, 55 B.R. 229, 231 (Bankr. E.D.N.Y. 1985)).

49. *Id*. at 372-73.

favor of applying § 505(a) to post-confirmation tax issues. Tax issues arising after plan confirmation – whether as consequences of the plan of reorganization or otherwise – can have a substantial impact on whether the plan of reorganization succeeds.[50] For instance, with regard to plans of reorganization, it may be important for a debtor to know the tax consequences of a proposed plan of reorganization before confirmation. This is because unexpected adverse tax consequences may jeopardize the debtor's chances of successfully making payments to creditors under the plan. While it is possible for debtors to ascertain tax consequences of the plan by obtaining an advance ruling from the IRS, this may be time-consuming and value-diminishing in the bankruptcy context due to time value of money concerns.[51] As one author notes:

> Chapter 11 debtors need to have the ability to reorganize in an efficient and orderly manner. Because successful corporate restructuring in bankruptcy often depends upon the favorable tax consequences of that restructuring, there should be a uniform method for Chapter 11 debtors to obtain binding rulings regarding the tax effects of their reorganization plans.[52]

It is equally important that debtors have a way of determining potential negative tax consequences of proposed plans of reorganization so as to avert them in a timely manner.

Tax consequences of the reorganization plan aside, other types of post-confirmation tax issues may have no less impact on the success of a plan of reorganization. The amount of other taxes that the debtor is assessed as liable for during periods after a plan has been confirmed will affect the amount of money available to make payments to other creditors under the plan. In the interest of assuring success of reorganization plans – and thereby the rehabilitation of the debtor – a strident proponent of a broad reading of § 505 may argue that bankruptcy court jurisdiction over post-confirmation tax issues is appropriate, at least as far as those liabilities affect plan success, and

50. *See, e.g.*, Jacobs, *supra* note 28, at 1014 (stating "as some of the recent cases … demonstrate, the plans of reorganization and the substantive rights of the creditors and, in some cases, stockholders, depend upon the resolution of tax issues arguable not considered 'ripe' for resolution outside of bankruptcy").

51. Rev. Proc. 2003-1, 2003-1 I.R.B. 1, § 8.02(4). The IRS processes requests for letter rulings and determination letters in the order that they are received and will only grant expeditious handling to requests when "a factor outside a taxpayer's control creates a real business need to obtain a letter ruling or determination letter before a certain time in order to avoid serious business consequences." *Id*. Even in such cases, the Service will not assure that the request will be processed by the time requested. *Id.*

52. Haber, *supra* note 28, at 438.

even at the risk of opening the door to perpetual bankruptcy court jurisdiction.

2. Administrative Considerations

Another common argument for bankruptcy jurisdiction over post-confirmation tax issues is that the bankruptcy court is most familiar with the affairs of the ex-debtor and the bankruptcy case in general, and hence is the most suitable court to hear the case.[53] A related concern is that requiring the ex-debtor to go to another forum to have an issue determined that has an impact on the bankruptcy plan's success is not in the interest of judicial economy and may slow down the process of plan confirmation.

These administrative concerns become especially crucial when it comes to post-confirmation tax issues. Unlike pre-petition tax liabilities, it is difficult for the debtor and the IRS to have these issues resolved as part of the claims resolution process of the bankruptcy proceeding under §§ 501 and 502.[54] In these contexts, § 505(a) read broadly may be a valuable tool for the debtor in assembling all potential post-confirmation payouts and liabilities such that a more feasible plan is proposed and confirmed.

One should also note that for plans of reorganization, § 1129(a)(11) requires the bankruptcy court to determine the feasibility of such plan as part of the plan confirmation process.[55] The feasibility determination requires consideration of a number of factors, including consideration of federal tax matters.[56] Arguably, a statement of federal tax consequences of the plan of reorganization and their impact on financial projections

53. *See, e.g.*, Haber, *supra* note 28, at 435; HENDERSON & GOLDRING, *supra* note 15, at 568.

54. 11 U.S.C. § 501(a) allows a creditor to file a proof of claim. 11 U.S.C. § 501(a) (2003). If the creditor does not file a proof of his claim, the statute allows the debtor or trustee to file such a proof of claim, hence preventing the escape of such claims from the bankruptcy net (a concern especially if the claim is excepted from bankruptcy discharge under § 523). 11 U.S.C. § 501(c). In cases where there is an objection to a claim, the bankruptcy court, after notice and a hearing, will determine the allowed amount of such claim. 11 U.S.C. § 502(b) (2003).

55. 11 U.S.C. § 1129(a)(11) (2003) (stating that a requirement for a court to confirm a plan is that "[c]onfirmation of the plan is not likely to be followed by liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan").

56. *E.g., In re* Future Energy Corp., 83 B.R. 470, 503 (Bankr. S.D. Ohio 1988) (reasoning that feasibility determination should include consideration of "any . . . related matter which determines the prospects of a sufficiently successful operation to enable performance of the provisions of the plan"); *see also In re* Prudential Energy Co., 58 B.R. 857, 864 (Bankr. S.D.N.Y 1986) (noting that feasibility requirement is not met where, among other things, debtor's revenue projections failed to take into account effects of prospective tax revision legislation).

should be made available both to the court and to the creditors in the disclosure statement.[57] However, the feasibility determination is clearly not binding as to the actual amount of tax that will eventually be assessed, as demonstrated by the fact that plans of reorganization do fail.[58] In cases where the federal tax consequences of the plan may not be certain, allowing a § 505(a) determination by the bankruptcy court would facilitate a more accurate and binding determination of the tax consequences of the plan.

3. The Interest in Centrality and Equity

Another facet of the notion that the bankruptcy court is the most appropriate forum to decide post-confirmation tax issues is the interest in achieving the centralized and equitable distribution discussed above. It is clear that in the bankruptcy context, where the size of the pie is limited, questions and consequences of distribution are not to be avoided. Arguably, the *ex ante* knowledge that there are undoubtedly insufficient assets to go around makes the bankruptcy context unique. In such a situation, the bankruptcy court and Code serve an important function. Whereas the debtor and each individual creditor are acting and planning in their own self interest, albeit – particularly in the reorganization context – with an eye on keeping the debtor afloat in order to assure its ultimate viability as a going concern, the bankruptcy court is charged with balancing the varied and conflicting interests of all of the various parties.

Thus, for example, in deciding the allowed amount of a claim under § 502(b), the bankruptcy court is necessarily sentient that its decision impacts not only the claimant and the debtor, but also has unavoidable impact on various third-parties. Allowing a larger claim amount to a secured creditor will directly reduce the amounts available to satisfy the general unsecured creditors. That the interests of third-parties are inextricably connected to the resolution of disputes between any two parties renders the determination of such disputes in the bankruptcy

57. *See* 11 U.S.C. § 1125 (2003).

58. *See, e.g.*, Nancy Rhein Baldiga, *Is this Plan Feasible? An Empirical Legal Analysis of Plan Feasibility*, 101 COM. L.J. 115 (1996) (noting that no more than 44% of Chapter 11 plans challenged for feasibility were successfully consummated); Susan Jensen-Conklin, *Do Confirmed Chapter 11 Plans Consummate? The Results of a Study and Analysis of the Law*, 97 COM. L.J. 297 (1992) (reporting that 10% of studied plans were consummated). *See also* Gerald F. Munitz, *Chapter 22: Feasibility and Recidivism*, 820 PLI/COMM 763 (2001) (arguing that a stricter feasibility standard would significantly reduce the incidence of debtors re-filing under Chapter 11 after the failure of their first Chapter 11 plans).

context different that in other contexts. Bankruptcy courts, by virtue of their position, are in the ideal position to resolve such disputes, while keeping the interests of all parties in the bankruptcy in view.[59]

Hence, for the above reasons, bankruptcy courts are often touted as the best forum for the resolution of post-confirmation tax issues. Conversely, the bankruptcy court's ability to function as such a central arbiter is easily compromised if the tax creditor is allowed to hold the debtor hostage by denying or stalling on an advance ruling, even though the tax events are quite certain. If the application of § 505 is limited to pre-confirmation claims, we stand to lose these valuable policy gains.

B. The Interest in Ensuring that Federal Tax Policies are Not Thwarted

On the other side of the debate lie several important federal tax policies. Those in favor of a constrained reading of § 505 often point to these tax policies to support their viewpoint. The importance of both the federal tax and bankruptcy systems is reflected in the inclusion of both the congressional power to tax and the power to establish uniform bankruptcy laws in Article I of the U.S. Constitution.[60] Problematically, the inclusion of both these federal institutions in Article I results in the virtual impossibility of declaring one federal policy to be more important than the other. The sometimes-conflicting nature of these two important federal policies is especially clear in regards to determinations of post-confirmation tax liabilities. Indeed, one commentator has written that the question of post confirmation tax liability "presents some of the most important and problematic jurisdictional issues in all of bankruptcy," and is the scene of "a violent clash between bankruptcy and tax policies."[61] In light of these conflicting policies, it is important to maintain balance such that the interests of the taxing authority are given adequate consideration by the bankruptcy system.

1. Equity and the Avoidance of Forum Shopping

Not surprisingly, the policy considerations from the IRS's standpoint are very different from those considered important in bankruptcy policy. Nowhere is this more clear than in regard to the matter of achieving equity. As shown above, the bankruptcy viewpoint

59. Indeed, perhaps it is because bankruptcy courts have to resolve distributions in bankruptcy fairly and equitably through a collective process, while keeping in mind the interests of all parties, that various parties perceive them as either pro-debtor or anti-creditor.

60. *See* U.S. CONST. art. I, § 8, cl. 1, 4.

61. Williams, *supra* note 12, at 274.

focuses on achieving an equitable distribution among creditors of the estate through a centralized resolution of claims.[62] From the tax policy perspective, the interest in equity cuts in the opposite direction. Since bankruptcy courts are widely perceived as pro-debtor, it follows that a person of this persuasion may expect any determination by the bankruptcy court to favor the debtor over the taxing authority.[63] From this perspective, allowing the bankruptcy courts to determine post-confirmation tax liabilities in effect gives the bankrupt debtor access to another adjudicative forum that is unavailable to other taxpayers; an effect that will encourage forum shopping through the filing of a bankruptcy petition. Hence, equitable treatment of taxpayers is seen as best achieved by having the post-confirmation tax liabilities of the post-bankruptcy entity determined by the same courts and on the same timeline as for other taxpayers who are not in bankruptcy.

2. The Interest in Revenue Collection

A corollary of the notion that bankruptcy courts are pro-debtor is the fear that an expansive reading of § 505 will adversely impact the revenue collection goals of the taxing authority. Indeed, the Bankruptcy Code recognizes the importance of revenue collection even in the face of the fresh-start policy in provisions that make certain taxes non-dischargeable.[64] The concern is that allowing § 505 to extend broadly to cover post-confirmation tax liabilities – which, arguably, are unrelated to the bankruptcy – will further diminish the ability of the taxing authority to collect revenue by allowing the bankruptcy court to dictate the amounts owed to it.

Hence, the point of view of tax policy takes a very different approach to the utility and fairness of the bankruptcy system, while prizing other policy considerations. The IRS website announces clearly that bankruptcy should not be a way for a debtor to solve all her problems and obtain a fresh start.[65] The policy implications for the

62. *See* 11 U.S.C. §§ 501, 502 (2003).

63. *See, e.g.*, Thomas L. Ambro & Mark D. Collins, *Why Delaware?* (adapted from DELAWARE LAWYER (Sept. 1997)), *available at* http://www.state.de.us/corp/bankrupt.htm (last visited Apr. 25, 2003) (stating that "[t]he perception that bankruptcy judges generally are 'pro debtor' pervades the entire American bankruptcy system").

64. *See, e.g.*, 11 U.S.C. § 523(a)(1) (2003) (exempting certain priority taxes from discharge).

65. *See* Internal Revenue Service, *Closing a Business – Declaring Bankruptcy*, DIGITAL DAILY, *available at* http://www.irs.gov/businesses/small/article/0,,id=98701,00.html (last visited Apr. 25, 2003) ("Bankruptcy is not a quick cure for wiping your credit slate clean and giving you a fresh start. Alimony, child support, and most taxes survive bankruptcy and will still be owed. Declaring bankruptcy is a last resort to solving financial problems.").

taxing authority must be balanced with other bankruptcy policies in the analysis.

C. The Interest in Maintaining the Internal Consistency and Realizability of the Bankruptcy System As A Whole

In addition to important bankruptcy and tax policies at stake in our determination of how § 505 should be read lies the consistent workings and fundamental structure of the United States bankruptcy system as a whole. As indicated above, a key feature of the bankruptcy system is the clear delineation of liabilities into the pre-petition, post-petition-pre-confirmation, and post-confirmation time periods.[66] Of concern in the determination of the scope of § 505 is the question of how such a determination impacts this delineation. For example, if other post-confirmation claims were not determinable by the bankruptcy court in the bankruptcy proceeding, it would be anomalous if post-confirmation tax claims were deemed determinable. Furthermore, even if one were to argue that bankruptcy courts should be allowed to resolve certain types of post-confirmation tax liabilities, in the interests of fairness to different types of creditors, the content of this exception should be determined under the same standard as any other claim in bankruptcy, absent clear legislative intent to the contrary. To allow bankruptcy courts special powers to determine post-confirmation tax claims beyond what is the norm for other creditors would be inconsistent.

This desired rationality is not just a matter of internal consistency. Conformity with the broader working of the bankruptcy code may serve as an indicator of whether our interpretation of § 505 is in line with the intentions of its architects, whose architectonics have taken place against the backdrop of the bankruptcy system as a whole. Insofar as the intent of the architects of the statute is given weight, consistency with broader bankruptcy code workings can enable us to conform with this intent.

In summary, due to the constraints imposed on determinations of federal tax liabilities in the Declaratory Judgment Act, at stake in answering the question of the breadth of the grant of authority to the bankruptcy court under § 505 are several important bankruptcy and tax policies, both substantive and structural. It is therefore important that any workable interpretation of § 505 addresses these policy considerations and conscientiously balances them.

66. *See supra* Part II.

IV. CURRENT TREATMENT OF POST-CONFIRMATION TAX MATTERS BY THE BANKRUPTCY COURTS

A glance at bankruptcy court decisions reveals that the analyses of bankruptcy courts of their own authority to decide various types of tax liabilities – particularly post confirmation tax matters – under a § 505 analysis have not been uniform, both in terms of the content of court analyses and the holdings in various cases.[67] Although the tripartite division into pre-petition, "gap," and post-confirmation liabilities is an important feature of the bankruptcy system, courts have not in fact gone about determining whether or not to hear a case based on a direct analysis of the timeframe in which it arises. They have turned instead to the statutory and constitutional provisions surrounding § 505 in order to determine its proper scope.[68] The two main jurisdictional requirements that have been considered by courts are: (1) the requirement that in order for the bankruptcy judge to hear the matter, it must be a "core proceeding" under 28 U.S.C. § 157(b); and (2) the requirement that the actual case or controversy requirements contained in the United States Constitution and reiterated in the Declaratory Judgment Act are met.[69] In general, cases that come before the courts pre-confirmation tend to raise questions pertaining to whether or not the actual case or controversy requirements of the U.S. Constitution and the Declaratory Judgment Act are satisfied. In contrast, cases before the courts after the plan has been confirmed tend to focus on whether the matter is a core proceeding.[70] This observation is in accordance with the dictates of common sense: if a tax liability that arises post-confirmation is before the court prior to confirmation of the plan, it is likely that the events surrounding it may not have occurred yet, or that a case between the taxing authority and the debtor has not been filed, hence raising case or controversy concerns. On the other hand, if the same issue does not come before the court until the plan has been confirmed, there are legitimate concerns about whether or not there is sufficient relationship between the post-confirmation tax matter and the "core" of the bankruptcy proceeding, as well as about whether or not asserting

67. *See supra* note 16 and accompanying text.

68. In some cases, the attention paid by courts to § 505 is quite scarce. *See, e.g.*, *In re* Antonelli, 1992 WL 435879 (Bankr. D. Md. 1992).

69. *See* 28 U.S.C. § 157(b) (2003); U.S. CONST. art. III, § 2, cl. 1; 28 U.S.C. § 2201(a) (2003).

70. *See, e.g.*, *In re* Antonelli, 1992 WL 435879 (discussing actual case or controversy requirement). *But see In re* Goldblatt Bros., Inc., 106 B.R. 522 (Bankr. N.D. Ill. 1989) (discussing core proceeding requirement).

jurisdiction over such cases may lead to perpetual jurisdiction of the bankruptcy court over the affairs of the reorganized debtor, justified on pragmatic grounds.

This section takes a closer look at the ways in which courts have undertaken their analyses of the "core proceeding" and the "actual case or controversy" requirements in determining whether or not § 505 may apply and points to problematic features of how courts have proceeded.

A. Core Proceedings.

28 U.S.C. § 157(b) provides:

> Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title [relating to appeals].[71]

Bankruptcy judges may also hear proceedings that – though not "core" – are "otherwise related to a case under title 11" under 28 U.S.C. § 157(c).[72] In such proceedings, the bankruptcy judge may only submit proposed findings of fact and conclusions of law to the district court for *de novo* review and may not enter final orders or judgments.[73] Thus, in effect, for bankruptcy judges to enter a final order or judgment on a matter, the matter has to be a "core proceeding" arising under title 11 or arising in a case under title 11.

Although 28 U.S.C. § 157(b)(2) includes a list of examples of core proceedings, the statute states that the list contains only examples and is not exclusive.[74] Because the term "core proceeding" is not defined by statute, bankruptcy courts are left to determine – drawing from examples listed in (b)(2) – whether a given matter is a "core proceeding." Furthermore, the exact relationship between § 505 and the jurisdictional provisions of Title 28 is unclear, since 11 U.S.C. § 505 was enacted before 28 U.S.C. § 157.[75] These circumstances have led to a lack of

71. 28 U.S.C. § 157(b) (2003). 28 U.S.C. § 157(a) provides that "[e]ach district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district." *Id*.

72. 28 U.S.C. § 157(c)(1).

73. *Id*.

74. 28 U.S.C. § 157(b)(2). Collier groups the fifteen examples listed into four categories: (1) matters of administration; (2) avoiding actions; (3) matters concerning property of the estate; and (4) others. *See* 1 COLLIER ON BANKRUPTCY ¶ 3.02[3] (Lawrence King, ed., 15th ed. rev. 2003).

75. 11 U.S.C. § 505 was enacted in the 1978 Bankruptcy Reform Act, while 28 U.S.C. § 157 was enacted in 1984 as part of the Amendments Act. *In re Goldblatt Brothers*, 106 B.R. at 526,

uniformity in court analyses of what constitutes a "core proceeding."[76]

One case in which the court engaged in a "core proceedings" analysis in interpreting the reach of § 505 was *In re Gordon Sel-Way*.[77] The case involved a Chapter 11 debtor seeking to compel turnover of a tax refund against which the federal government claimed the right to setoff, under § 505.[78] Sel-Way had filed its Chapter 11 petition on July 1, 1988, and a plan was confirmed in 1991.[79] Sel-Way had confirmed a plan in which the IRS's unsecured claim for unemployment tax penalties was to receive a 20% payout.[80] However, due to ongoing litigation, all proceeds were paid to the other unsecured creditors and the IRS claim was never paid. When Debtor's federal employment (FUTA) overpayment in question arose after the plan had been confirmed, the government claimed a right to setoff. The bankruptcy court held that the refund arose post-petition and could not be offset against a pre-petition tax debt.[81] However, the district court reversed, stating that the plan of reorganization converted the government's unsecured claim into a post-petition obligation (since it was not discharged but grouped with other claimants) and that the government was entitled to a 20% payout on its claim.[82] The court held that because both debts were post-petition, there was requisite mutuality to permit offset.[83]

The jurisdictional issues that were raised in *Gordon Sel-Way* were representative of the treatment of the issue of "core proceedings" often found in cases before the court after the plan has been confirmed. The government argued that the claim was not a "core proceeding" because the debtor's right to refund did not arise until after the plan had been confirmed.[84] The government also argued that the bankruptcy court lacked "related to" jurisdiction because the estate was terminated as of the moment of confirmation, and only the estate was authorized to seek a

discusses this problem. *See infra* pp. 31-35.

76. *See, e.g.*, COLLIER, *supra* note 74, at ¶ 3.02[2] ("The battleground has been and will continue to be over the relationship among 'core proceedings,' civil proceedings that are not 'core proceedings,' and civil proceedings . . . that are not within the bankruptcy jurisdiction granted by § 1334 [granting original jurisdiction to the federal district courts] at all.").

77. *See In re* Gordon Sel-Way, Inc., 239 B.R. 741 (Bankr. E.D. Mich. 1999).

78. *Id*. at 744.

79. *Id*. at 743.

80. *Id*. The tax penalties were for the years 1987-1990. *Id*.

81. *Id*. at 744.

82. *Id*. at 751. Whether the court's analysis that the claim became a post-petition obligation is accurate is another question. *See infra* pp. 43.

83. *Id*.

84. *Id*. at 746.

tax refund under the Bankruptcy Code.[85] The government contended that once the estate terminates, the debtor is required to bring his suit in the district court of the Court of Federal Claims.[86]

In holding that Sel-Way's claim was a core proceeding over which the government had jurisdiction, the district court noted that § 157(b)(2), which lists non-exclusive examples of core proceedings, includes "proceedings impacting liquidation of the estate's assets or adjustment of the debtor-creditor . . . relationship."[87] The court then stated:

> In order for jurisdiction to exist under § 157 after a plan has been confirmed, 11 U.S.C. § 1142 requires that the relief sought is 'necessary for the consummation of the plan.' Because the FUTA refund is necessary for Sel-Way to fund its reorganization Plan, the court finds the requirement of § 1142 has been met and jurisdiction exists.[88]

Hence, although the court related the analysis to the examples in § 157(b)(2), the court in effect decided the question of whether Sel-Way's claim was a core proceeding by asking whether or not it met the test in § 1142 of being "necessary for consummation of the plan."[89] This impact-based test used in *Gordon Sel-Way* does not mirror the intent behind the core proceedings concept, the analysis of which should center around whether or not the case was "arising under" or "arising in" a Title 11 case. These are concepts concerned with the nature of the proceeding; that is, whether the cause of action is created by Title 11 or are otherwise "arising in," rather than its impact on the reorganization's success.[90] Though the question of "core proceeding" is jurisdictional in nature, the use of § 1142 in determining that issue reflects the infiltration of broader policy concerns in determining the narrow jurisdictional issue. It is not the contention of this paper that § 1142 should never be used in determining whether the court has jurisdiction to hear a post-confirmation claim. Rather, this paper argues that its application should be independent of the core proceeding analysis, which should be treated

85. *Id*.

86. *Id*.

87. *Id*. at 747 (citing 28 U.S.C. § 157(b)(2)(O) (2003)).

88. *Id*. (citing 11 U.S.C. § 1142 (2003)).

89. 11 U.S.C. § 1142(b) (2000).

90. *See, e.g.*, COLLIER, *supra* note 74, at ¶ 3.02[2] (stating that "[c]ore proceedings are, at most, those that arise in Title 11 cases or arise under Title 11" and defining proceedings "arising under" Title 11 as those in which the case of action is created by Title 11 and those "arising in" Title 11 as those in which the cause of action is not created by Title 11 but which could also not have been "subject to a lawsuit absent the filing of the bankruptcy case"). This analysis focuses on the nature of the proceeding and not its impact.

as a separate and distinct question.

A key problem with employing a Title 28 "core proceedings" analysis in interpreting the scope of § 505 is that implicit in such an analysis is a conception of a complex relationship between § 505 and § 157 that necessarily presupposes an understanding of § 505 as inherently jurisdictional rather than substantive. This problem comes to light in *In re Goldblatt Brothers*.[91] In *Goldblatt*, the Creditors' Deposit Account (CDA) was created following plan confirmation, pursuant to debtor's plan of reorganization, out of which administrative claims, priority claims, and pro-rata general unsecured claims were to be paid.[92] The CDA was to be administered by a committee of unsecured creditors.[93] Some years after confirmation, the committee filed a complaint against the IRS and the Illinois Department of Revenue, seeking declaratory judgment under 28 U.S.C. § 2201 and 11 U.S.C. § 505 that it was not responsible for paying federal and state income tax on interest earned on money in the CDA, or for filing state income tax returns related to the fund.[94] The IRS and Department of Revenue moved to dismiss the complaint, arguing that § 505(a)(1) allowed the bankruptcy court to determine only the tax liability of debtors, and that since the Committee and CDA were not debtors, the court lacked subject matter jurisdiction under § 505(a)(1).[95]

In examining the jurisdictional question, the court stated that § 505 should not be read in isolation from general jurisdictional provisions, and posited the following relationship between § 505 of the Bankruptcy Code and 28 U.S.C. § 157:

> [I]n the absence of any provision expressly excluding federal and state income taxation from the adjudicative power of bankruptcy courts, determination of whether a bankruptcy court can adjudicate tax issues would be evaluated under § 157 standards like any other jurisdiction issue. If the tax dispute involved a core controversy, then a bankruptcy court could enter final enforceable orders.[96]

In positing thus, the court rejected the argument implicit in the

91. *In re* Goldblatt Bros., Inc., 106 B.R. 522 (Bankr. N.D. Ill. 1989).

92. *Id*. at 523.

93. *Id*.

94. *Id*.

95. *Id*.

96. *Id*. at 525. Elsewhere, the court states that "[u]nder the Court's holding today, the parameters of the bankruptcy court's jurisdiction over the subject matter of federal and state income taxation under 11 U.S.C. § 505(a)(1) corresponds with general principles governing a bankruptcy court's power to adjudicate at least core matters under 28 U.S.C. § 157." *Id*. at 529.

government's position that the specific jurisdiction of § 505 over tax issues limits the more general jurisdiction allowed by § 157.[97] The court reasoned that absent clear congressional intent to the contrary,

> the jurisdictional grant over this specific substantive area of law must be read to correspond with the general rules governing the adjudicative powers of bankruptcy court. Otherwise § 505(a)(1)'s very broad language would actually vest less authority in a bankruptcy court to adjudicate tax matters than would otherwise exist in its absence.[98]

These statements by the court demonstrate a clear reading or usage of § 505 as a provision concerned with reach rather than content. It is of note that this reading of § 505 requires specifying the relationship between § 505 and the jurisdictional provisions of Title 28, which is no easy task. In *Goldblatt*, the court determined this relationship by interpreting both provisions as co-extensive. However, since the Declaratory Judgment Act explicitly circumscribes the declaration of federal tax liabilities to be narrower than it would otherwise be under other general bankruptcy provisions, it is unclear whether the Act in fact intended the court's power under § 505 to be coextensive.

The court went on to conclude that the tax issue was in fact a core proceeding.[99] The court first cited some of the examples in § 157(b)(2) – "matters concerning the administration of the estate, allowance or disallowance of claims against the estate, and confirmations of plans."[100] The court then stated:

> The CDA account was created as an integral part of the Debtor's confirmed plan. Entrustment of the CDA and assignment of the claims review function to the Committee clearly expedited the Debtor's reorganization and emergence from Chapter 11. The CDA provided a vehicle through which the process of allowing and disallowing claims could be conducted efficiently . . . . These functions are at the heart of the bankruptcy process. Further, the CDA's existence is inextricably tied to the reorganization effort; when the processing and distribution of claims are completed, the CDA will be closed. There is no question that this court retained jurisdiction to resolve contested claims against the CDA even though Debtor's duties were discharged after it funded the account . . . .

97. *Id*. at 528. It is worth mentioning that the court notes that positing this relationship between § 505 and § 157 does not mean § 505 is superfluous.

98. *Id*. at 529.

99. *Id*. at 526.

100. *Id.* (citing 28 U.S.C. § 157(b)(2)(A), (B), (L) (2000)).

> Income on funds held in the CDA has been earned post confirmation while administration of the CDA has been under jurisdiction of this Court. The CDA was created to carry out the Plan. . . . It is therefore clear that issues as to taxability of income earned on funds held in the CDA is [sic] within this Court's core jurisdiction to administer the estate and implement the confirmation process.[101]

Using this analysis, the court concluded that the court had jurisdiction over the CDA and the Committee's request.[102]

Unlike the *Gordon Sel-Way* court, the *Goldblatt* court did not invoke a § 1142 standard for determining whether jurisdiction existed, even though the assertion of jurisdiction in *Goldblatt* was also arguably "necessary for the consummation of the plan."[103] Rather, it started with a list of examples from § 157 and then attempted to bring the facts of the case within the province of those examples. However, like the *Sel-Way* court, the *Goldblatt* court did consider the impact of its decision on the reorganization of the debtor. Both the entry of impact-based considerations into the core proceedings analysis and the lack of uniformity in applying the core proceeding standard are of concern. In addition, as this paper argues, the jurisdictional reading of § 505 that is implicated when the courts use the § 157 core proceedings analysis to limit § 505 is also misleading. A satisfactory theory of the operation of § 505 must address these flaws in the current approach.

B. Actual Case or Controversy

Satisfaction of the case or controversy requirement of Article III of the U.S. Constitution is another key concern that manifests itself in bankruptcy court opinions addressing jurisdiction.[104] The importance that the case or controversy requirements be satisfied is highlighted by the fact that the case or controversy requirement is accorded emphasis in the Declaratory Judgment Act, which reiterates that declaratory judgments, though possible in some cases, may only be given if there is an actual case or controversy present.[105] In their examinations of this constitutional requirement, courts have also arrived at mixed results.

For example, in *In re Antonelli*, the court found that it lacked jurisdiction to render a declaratory judgment that the debtor who set up a

101. *Id*.
102. *Id*. at 530.
103. 11 U.S.C. § 1142(b) (2003).
104. *See* U.S. CONST. art. III, § 2, cl. 1.
105. *See* 28 U.S.C. § 2201 (2003).

liquidating trust was exempt from stamp or transfer tax on transfers to and by the trust under § 1146(c), because the actual case or controversy requirement of Article III of the U.S. Constitution was not yet met.[106] The court noted that whether an actual case or controversy existed was a facts-and-circumstances question, a matter of degree, and that a precise test to determine the existence of an actual case or controversy had not been developed by the courts.[107] It did, however, cite a line of cases noting that the question to be decided is "whether the facts alleged, under all the circumstances, show that there is a substantial controversy between parties having adverse legal interests of sufficiency *immediacy* and *reality* to warrant the issuance of a declaratory judgment."[108] The court noted:

> [t]he proposed third-party transfers are not imminent as the Plan must still be confirmed, the property transferred to the liquidating trust, and then prospective buyers solicited and the transactions executed. Moreover, many factors such as market conditions, financing arrangements, and Plan objectives will inf luence [sic] and dictate the length of time it takes to sell these properties.[109]

Therefore, the court held that it would be improper for it to render a determination at this point, since such a ruling would essentially be "an advisory opinion on a hypothetical set of facts."[110]

Hence, the court in *Antonelli* focused on the time frame within which the events would occur. Emphasizing the lack of imminence of the events to be decided, the court determined that the requisite case or controversy did not exist, even though the question was quite clearly one of law under § 1146(c) that could have been decided with reasonable certainty given the content of the proposed plan. The court even conceded that its holding represented a triumph of substance over form and would adversely impact the debtor's reorganization.[111]

In *In re Kilen*, by contrast, the court held that there was an actual case or controversy such that the court could decide the debtor's motion for declaratory judgment regarding whether the debtor had responsible person liability under I.R.C. § 6672, or the amount, if any.[112] Even though the IRS had not filed a proof of claim, the bankruptcy court

106. *In re* Antonelli, 1992 WL 435879 (Bankr. D. Md. 1992).
107. *Id*. at *2.
108. *Id*. (emphasis in original) (citations omitted).
109. *Id*. at *3.
110. *Id*.
111. *See id*.
112. Kilen v. United States (*In re* Kilen), 129 B.R. 538 (Bankr. N.D. Ill. 1991).

allowed the debtor to file a claim on behalf of the IRS and then oppose it himself. Like the *Antonelli* court, the *Kilen* court, citing language from the Supreme Court's opinion in *Babbitt v. United Farm Workers National Union*, noted that the existence of case or controversy was a distinction of degree and that no precise test existed.[113] However, unlike the *Antonelli* court, the *Kilen* court did not primarily emphasize the time frame of the events. Rather, it first noted that "the basic element of the case or controversy requirement is that there be individual injury" and that "the Constitution requires 'actual or threatened injury as a result of the putatively illegal conduct of the defendant.'"[114] The court then noted that "ripeness" was an element in the case or controversy requirement, and that "ripeness" was to be determined under the Supreme Court's two-part test, which considers: "(1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration."[115] The court interpreted the test as follows: "This test 'assumes the existence of concrete injury' and then asks 'if the injury is of sufficient magnitude to overcome the problems of contingency or speculation in the decision on the merits.'"[116] Using this test, the court determined that the harm to Kilen was of "sufficient magnitude so as to outweigh any perceived problems of speculation or contingency."[117] The standard employed by the *Kilen* court is in contrast to that in *Antonelli*, since it emphasizes the existence of injury rather than time-based considerations of when the events arose.

The holding of the court in *Kilen* also stands in contrast to the court's holding in *Allis-Chalmers Corp. v. Goldberg* (*In re Hartman Material Handling Systems, Inc.*).[118] In *Allis-Chalmers*, the debtor filed in Chapter 11. The bankruptcy court had found that the principal purpose of Allis-Chalmers' plan of reorganization was not tax avoidance and had confirmed the plan.[119] Shortly afterward, the IRS notified the reorganized debtor "that its future use of [net operating losses] might by challenged under I.R.C. § 269."[120] In 1990, the IRS issued proposed

113. *Id*. at 544 (citing *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 296 (1979)).

114. *Id*. (quoting Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 157 (1983) (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982))).

115. *Id*. (citing *Abbott Lab. v. Gardner*, 387 U.S. 136, 148 (1967)).

116. *Id*. (citing Nichol, *supra* note 114, at 175).

117. *Id*. at 545.

118. Allis-Chalmers Corp. v. Goldberg (*In re* Hartman Material Handling Systems, Inc.), 141 B.R. 802 (Bankr. S.D.N.Y. 1992).

119. *Id*. at 805.

120. *Id*. at 807.

regulations addressing the interaction between I.R.C. § 269, I.R.C. § 382 and 11 U.S.C. § 1129(d).[121] These regulations became final in 1992.[122] The regulations stated the IRS's belief that a bankruptcy court's finding for plan confirmation purposes that principal purpose was not tax avoidance was not controlling for I.R.C. § 269 purposes.[123] The debtor then requested the bankruptcy court's ruling on the retroactive applicability of I.R.C. § 269 and its regulations to the creditors' acquisition pursuant to the Chapter 11 plan. With regard to the question of whether the court could determine in advance the post-confirmation net operating loss (NOL) tax rights of the former debtor, the court held that such determination would not be proper, because the debtor had not yet attempted to use its NOLs.[124] The court held that since

> a § 269 action had not ripened at the time of confirmation (and still has not ripened) . . . any ruling would have to consider post-confirmation events which were not even known at the time of confirmation to determine a speculative future tax liability of the former Debtor. Such a ruling would establish a precedent for a former debtor to return to bankruptcy court to have any and all of its future tax consequences determined.[125]

The court therefore held that it would be improper for it to determine in advance the post-confirmation NOL tax rights of a former debtor where the debtor had not yet attempted to use them.[126] The attempted use of the NOLs would be the event triggering the existence of a case or controversy.

In yet another case, the court employed a test used in the *Armstrong World Industries* case, noting that in the declaratory judgment context, the court must look at: "(i) whether there is an adversity of interest between the IRS and the Debtors, (ii) the conclusivity that the court's determination will have on the legal relationship between the parties, and (iii) the practical help that results from the court's decision."[127] The court concluded that even though the IRS had not yet attempted to assess the debtor with liability, "it is the very fact of Schwartz's bankruptcy case and its fresh start purpose that gives rise to an adversity of interest

121. *Id*.
122. *Id*.
123. *Id*. at 808.
124. *Id.* at 812.
125. *Id*. at 812-13.
126. *Id*. at 812.
127. Schwartz v. Gardiner (*In re* Schwartz), 192 B.R. 90, 93 (Bankr. D.N.J. 1996) (citing *Armstrong World Industries, Inc. by Wolfson v. Adams*, 961 F.2d 405, 411 (3d Cir. 1992)).

among the parties in this adversary proceeding."[128] The court also found requisite conclusivity and practical utility in the bankruptcy context, since all issues relating to the bankruptcy can be determined quickly and conclusively in the bankruptcy court forum.[129]

Hence, while the *Antonelli* court looked only at the timeframe in which the prospective events were to occur, the *Kilen* court in effect employed a balancing test, balancing the injury to the debtor with the decree of speculation in making the decision. *Schwartz* looked for adversity of interests and conclusivity, and concluded that both of these requirements were met irrespective of what other policy concerns were implicated. These represent three different approaches that bankruptcy courts have taken in determining whether actual case or controversy exists so as to allow it to decide a matter pre-confirmation, when the events to be decided may not have occurred yet. *Allis-Chalmers*, a case occurring post-confirmation, required the actual attempted use of the NOLs by the debtor and found case or controversy to be lacking, since the debtor had not yet tried to use its NOLs. That the standards employed in the above cases have not been consistent is problematic.

Furthermore, the use of actual case or controversy jurisprudence to restrict the use of § 505 by courts is especially difficult in the bankruptcy context. A fundamental characteristic of the United States bankruptcy system is the ability to bring together claims such that they can be heard in one common forum, hence preserving the fresh start of the debtor or the continuation of the corporate debtor as a going concern.[130] This feature is exemplified in the treatment of environmental claims and mass torts in bankruptcy proceedings. In some cases, bankruptcy has the power to accelerate such claims, for instance, by setting up a trust out of which future claimants who may not yet exist are to be paid.[131] Accelerating such claims that may be presently unmatured or contingent not only protects the fresh start of the debtor corporation, but also serves the purpose of ensuring a more equitable allocation of assets between

128. *Id*. at 94.

129. *See id.*

130. *See, e.g.*, 11 U.S.C. § 101 (5)(A) (2003) (defining "claim" broadly to mean "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured"); 11 U.S.C. § 362(a) (2003) (filing of bankruptcy petition operates as automatic stay on all actions to collect, perfect or enforce any claims or liens); § 541(a) (2003) (creating a bankruptcy estate comprised of a listed types of property, "wherever located and by whomever held", upon commencement of a bankruptcy case); § 1141(d)(1) (2003) (stating that confirmation of plan of reorganization discharges any debt arising before the date of confirmation).

131. *See, e.g.*, Kane v. Johns-Manville Corp., 843 F.2d 636 (2d Cir. 1988).

presently ripe claims and future claims that, though arising pre-petition, are not yet ripe.[132] Some critics have characterized this feature of the bankruptcy system as ignoring the case or controversy requirement in Article III and as, therefore, unconstitutional.[133] However, it is far from clear that the Bankruptcy Code actually operates in the absence of a case or controversy. Several courts have recognized that the existence of a case or controversy is a matter of degree, and that courts may well probably hear a case if all liability-creating acts have already occurred, and perhaps even in the face of future contingencies.[134] In either case, the point remains: treatment of pre-petition claims within the confines of the bankruptcy is a permitted function of a bankruptcy court, even in cases where suit has not yet been brought by certain parties in interest, who may not yet be identifiable or even known to exist.

Rather than applying the case or controversy requirement as the limiting factor in allowing them to resolve such environmental or mass tort claims, bankruptcy courts in this arena have instead focused on the time period in which the claim "arises." The critical factor in determining whether the court may hear a matter is the time period in which the conduct giving rise to the debtor's liability occurred. Several courts have held with respect to environmental claims and mass torts that whether or not actual symptoms have manifested themselves, or whether there is actual ripeness, the "claim" itself arises at the time of

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132. *See, e.g.*, Alan Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. PA. L. REV. 2045, 2055 (2000).

> An important goal in resolving mass tort liability that affects future claimants is assuring that present tort claimants with manifested injuries and causes of action do no exhaust the defendant's assets before future claimants manifest injuries . . . . The Bankruptcy Code, with its provisions or acceleration, estimation, and classification of claims that have not yet ripened into matured causes of action, provides an appropriate framework for dealing with these problems.

Id.

133. *See, e.g.*, Ralph E. Avery, *Article III and Title 11: A Constitutional Collision*, 12 BANKR. DEV. J. 397 (1996).

134. *See, e.g.*, Golden v. Zwickler, 394 U.S. 103, 108 (1969); Evers v. Dwyer, 358 U.S. 202, 203 (1958). *See also* 10B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 2757 (1998).

> There is little difficulty in finding an actual controversy if all of the acts that are alleged to create liability already have occurred . . . . It is clear that in some instances a declaratory judgment is proper even though there are future contingencies that will determine whether a controversy ever actually becomes real . . . . courts also have not hesitated to issue a declaration if "one or both parties have taken steps or pursued a course of conduct which will result in "imminent" and "inevitable" litigation, provided the issue is not settled and stabilized by a tranquilizing declaration.

Id. (citing *Bruhn v. STP Corporation*, 312 F. Supp. 903, 906 (D.C. Colo. 1970) (quoting BORCHARD, DECLARATORY JUDGMENT, 57 (2d. ed. 1941))).

the conduct that resulted in the liability.[135] Hence, if the conduct leading to the liability occurred pre-petition, the court would have jurisdiction to hear it, whether or not the symptoms themselves appeared only after the bankruptcy petition.

The treatment of environmental and mass torts claims in the bankruptcy system illustrates a key feature of the bankruptcy system; as long as the conduct out of which a claim arises occurred before the petition was filed, the bankruptcy court has the ability to bring together such claims and resolve them in the bankruptcy. As long as a pre-petition "hook" exists for the claim, the absence of what may conventionally be regarded as case or controversy or "ripeness" has not proven to be an insurmountable barrier to a streamlined resolution of such claims within the confines of the bankruptcy system. In the bankruptcy tax context, focusing on the lack of conventional case or controversy, rather than on the time periods in which the tax matter arises would be fundamentally inconsistent with the treatment of future claims elsewhere in bankruptcy law.

C. Problems with the Current Approach

The foregoing analysis provides examples of how courts have used a "core proceedings" and an "actual case or controversy" analysis in determining whether a determination of tax liabilities falls within their jurisdiction. As these cases demonstrate, these approaches have resulted in inconsistency, both in terms of differing standards being used in making the determination and also in terms of inconsistency with other parts of bankruptcy law.

Apart from these inconsistencies, however, the courts in these cases have also failed to make analytically precise distinctions between pre-petition, "gap," and post-confirmation claims. For instance, in *Gordon Sel-Way*, the court treats as post-petition a refund that, though dealt with only after the plan had been confirmed, arose with respect to pre-petition tax years.[136] With regard to the pre-petition tax years, such a refund is

135. *See, e.g., In re* Jensen, 127 B.R. 27 (B.A.P. 9th Cir. 1991) (holding that environmental claim arose at the time of the debtor's conduct and was hence pre-petition and dischargeable) The court cited for support *In re A.H. Robins*, 63 B.R. 986, 993 (Bankr. E.D. Va. 1986) (noting that claim arose "at the time when the acts giving rise to the alleged liability were performed") (quoting *In re Johns-Manville Corp.*, 36 B.R. 743 (Bankr. S.D.N.Y. 1984)). *See generally* WARREN & WESTBROOK, *supra* note 9, at 756-789 (discussing the treatment of environmental and mass torts claims in bankruptcy).

136. *In re* Gordon Sel-Way, 239 B.R. 741 (Bankr. E.D. Mich. 1999).

more accurately considered a pre-petition refund.[137] This lack of an analytical "bright line," together with the inconsistent and varying standards for determining what constitutes a "core proceeding" or where an actual case or controversy is present, may open the door to limitless jurisdiction on the part of the bankruptcy court, motivated by impact-based rather than formal concerns.[138] This inconsistency places the integrity of the bankruptcy system as a whole at risk.

It is not the contention of this paper that the jurisdictional provisions of Title 28 and the requirements of the United States Constitution be ignored. On the contrary, even determinations of pre-petition and "gap" liabilities under § 505 should be subject to these general jurisdictional requirements. However, due to the lack of certainty in regard to what constitutes a core proceeding and of what is required in order for an actual case or controversy to exist, a more realizable limiting principle on the reach of § 505 is required in addition to the work being performed by these general jurisdictional principles, especially where the liability at issue is not a typical pre-petition or "gap" claim. The absence of this principle has resulted in a fuzzy line between what liabilities a bankruptcy court may or may not determine. The likelihood of this line being crossed and jurisdiction being illicitly expanded is high in a situation where the result may have a significant practical impact on the success or failure of a plan of reorganization.

V. A CONTEXTUAL APPROACH TO DETERMINING THE REACH OF § 505

An analysis of current bankruptcy court approaches reveals that in deciding the extent of their jurisdiction, bankruptcy courts do not consider the applicability of § 505 based on whether the tax matter before them is a pre-petition, "gap," or post-confirmation matter. Furthermore, many courts do not consider the limits of § 505 at all, relying instead on other statutory and constitutional provisions to set limits on jurisdiction. As the preceding section demonstrates, such an approach yields analyses that are uneven across cases, inconsistent with

137. *See supra* notes 18-19 and accompanying text.

138. *See also The Effect of Confirmation of a Chapter 11 Plan of Reorganization: The Effect of Confirmation on the Federal Court's Continuing Bankruptcy Jurisdiction*, BANKR. L. LETTER, Jan. 2002, at 8, 9 (arguing that a problem with the *in rem* approach implicit in the Pacor functional test to determining "related to" jurisdiction is that it "roams in the direction of perpetual federal jurisdiction" and advocating an in personam approach that distinguishes the bankruptcy estate from the reorganized debtor that emerges after bankruptcy and limits jurisdiction over the latter); Ralph Brubaker, *One Hundred Years of Federal Bankruptcy Law and Still Clinging to an In Rem Model of Bankruptcy Jurisdiction*, 15 BANKR. DEV. J. 261 (1999).

other aspects of the bankruptcy code and system, and ultimately faulty in their understanding of the meaning and function of § 505. In light of the shortcomings of the current approach, this paper proposes a different reading of § 505 that enunciates limitations on the jurisdiction conferred by that section derived from an examination of § 505 itself. Such a reading is motivated by two concerns.

First, in order to be consistent with the fundamental nature of the bankruptcy process, a stronger interpretive distinction should be made based on the time period – pre-petition, gap or post-confirmation – in which the tax liability arises. Unfortunately, such a distinction has thus far not been strongly noted in the case law.[139] This is despite the fact that a key feature of the bankruptcy process is that bankruptcy creates a bright line temporal divide between pre-petition claims.[140] The existence of this bright line distinction in the bankruptcy system must be kept in mind in determining the reach of § 505. Second, in order to eliminate the shortcomings of an analysis that focuses on external constitutional and statutory provisions in interpreting the scope of § 505, it is essential to place more emphasis on the content of § 505 itself.

In the light of these dual concerns, an analysis focused on § 505 itself reveals three key reasons why this section should be applied only to pre-petition and administrative claims. First, the overall organization of Title 11 and the placement of § 505 within the Bankruptcy Code in the Chapter and Subpart addressing creditors and claims suggests that § 505 was only meant to apply to pre-petition and gap claims. Second, the legislative history of the section supports this argument. Third, such an approach would be the most consistent with the overall operation of the bankruptcy system.

A. The Organization of Title 11 and the Placement of § 505 Within

The Bankruptcy Code is organized by Chapters, each of which addresses a particular aspect of bankruptcy. For instance, Chapter 1 contains "General Provisions," such as definitions, rules of construction,

139. *See generally supra* Part IV.

140. *See, e.g.,* WARREN & WESTBROOK, *supra* note 9, at 755.

> Timing matters in bankruptcy because the heart of the system is the sharp cleavage separating the debtor's pre-filing past and the debtor's post-filing future. Pre-filing creditors are grouped together for a collective resolution of the claims against the debtor. Post-filing creditors are creditors of the new estate and, when the estate is closed, of the emergent debtor. Those post-filing claims are fully enforceable against the estate and the post-bankruptcy debtor, unlike the pre-filing claims that may be entitled to only pro rata distributions.

Id.

and waivers of sovereign immunity with reference to particular sections.[141] Chapter 3 deals with "Case Administration" and Chapter 5 addresses the handling of claims and their distribution, discharge and the avoiding powers of the trustee in bankruptcy in regard to property of the estate.[142] The placement of a particular section within a particular Chapter, therefore, is informative as to what the section is attempting to address. For example, § 1146, "Special Tax Provisions" must be understood as pertaining to special tax provisions only with regard to Chapter 11 reorganizations.[143]

Likewise, given the organization of the Bankruptcy Code, the placement of § 505 provides important information about the purposes and intended reach of the section. Section 505 falls within Subchapter I of Chapter 5, which is entitled "Creditors, the Debtor, and the Estate."[144] Subchapter I pertains to "Creditors and Claims."[145] For instance, § 501 applies to "Filing of Proofs of Claims or Interests" and addresses, among other things, the process by which the creditor – or the debtor on the creditor's behalf – may file a proof of claim.[146] Section 502 speaks to allowance of claims and the claims objection process.[147] Section 503 addresses the allowance of administrative expenses, which are post-petition claims that accrue during the period of estate administration.[148] Section 506 addresses the determination of secured status and treatment of secured claims, and § 507 deals with the treatment of priorities in bankruptcy.[149]

Subpart I of Chapter 5 is a crucial instrumentality in defining the way in which claims are handled in the bankruptcy process. The broad definition of "claim" in § 101 serves an important function in this regard.[150] Upon filing the bankruptcy petition, both a wide-reaching automatic stay is in effect and a bankruptcy estate is created.[151] The creditors can no longer pursue the rights and processes available to them

141. 11 U.S.C. ch. 1 (2003). Note that there are no even-numbered chapters in Title 11 with the exception of Chapter 12, which addresses the bankruptcy of family farmers.

142. *Id.* at chs. 3, 5.

143. 11 U.S.C. § 1146 (2003).

144. 11 U.S.C. ch. 5.

145. 11 U.S.C. ch. 5, subch. I.

146. 11 U.S.C. § 501 (2003).

147. 11 U.S.C. § 502 (2003).

148. 11 U.S.C. § 503 (2003).

149. 11 U.S.C. §§ 506, 507 (2003).

150. *See* 11 U.S.C. § 101(5) (2003) (defining "claim" broadly to mean "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured").

151. *See* 11 U.S.C. §§ 362, 541 (2003).

under state law before the bankruptcy and must instead bring "claims" against the bankruptcy estate, which are handled in the single bankruptcy forum.[152] Thus, the filing of the bankruptcy petition in effect serves to bring "claims" that were previously owed to the pre-bankruptcy debtor and dealt with under state law (such as Article 9 or real estate common law) into the thrall of the federal bankruptcy law. These claims are claimable only against the bankruptcy estate, whether or not they are "reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured."[153] Upon the discharge of a bankruptcy case – which, in Chapter 11, occurs upon confirmation of the plan – the estate ceases to exist; therefore liabilities arising after confirmation cannot be claims against the estate.[154]

The placement of § 505, titled "Determination of Tax Liability," in the same Subpart and Chapter as the sections pertaining to how creditors and their claims are dealt with in the bankruptcy proceeding is instructive as to the purposes and reach of § 505. The importance of the placement of § 505 has been noted in *In re Wolverine Radio*, in which the court noted that the placement of § 505 within the Bankruptcy Code is instructive as to its limitations, stating:

> Given the legislative history of section 505 and its placement in a chapter of the Bankruptcy Code denoted "Creditors, the Debtor and the Estate," section 505 is not applicable where the court is not dealing with the interrelationship and effect of creditors and their claims on the bankrupt debtor.[155]

Since obligations that arise after a Chapter 11 confirmation – or after a discharge in bankruptcies under other chapters – are by definition not claimable against the estate, the *Wolverine* court's statement in effect implies that § 505(a) is inapplicable to post-confirmation claims.

Even supposing the *Wolverine* court was correct in its analysis of the applicability of § 505, the question remains as to why the language of § 505 is so broad if it only was meant to apply to pre-petition and "gap" claims. Indeed, one might ask, if § 505 was only supposed to address "claims" like any other claims, why was there a need for § 505 at all? This objection has particular credence since the authority of the bankruptcy court to determine the amounts of disputed claims is

152. *See generally* 11 U.S.C. §§ 501, 502 (2003).
153. 11 U.S.C. § 101(5) (2003).
154. *See id.* § 1141(b) (2003).
155. *In re* Wolverine Radio 930 F.2d 1132, 1140 (6th Cir. 1991).

unequivocally granted under § 502(b).[156]

The answer to this question lies in the special nature of the IRS as a creditor of the bankruptcy estate. While most of the creditors in a bankruptcy would have been able to pursue their claims at state law if the bankruptcy petition had not been filed, this is not the case in regard to federal tax liabilities of the debtor. The backdrop against which the bankruptcy takes place is not one of state law but is rather one of *federal* tax law. The creditor in this case is a federal governmental entity with its own system of courts and its own Code governing taxation.[157] Absent the bankruptcy, the IRS would have been left to pursue its claims in the tax courts (or federal district courts) under federal tax law. In light of the special nature of the creditor in the tax context, the presence and function of § 505 in Chapter 5 Subpart becomes clear. The bankruptcy courts may determine the amounts of other disputed claims, though previously handled in state court.[158] Equally, § 505 emphasizes that the bankruptcy courts are authorized to determine the amount of taxes or penalties relating to taxes that would otherwise have been adjudicated in the federal tax courts or district courts. In effect, § 505 makes it clear that the special nature of the tax claims creditor as a federal entity does not prevent such claims from being dealt with by bankruptcy courts in the bankruptcy system in the same manner as other claims and creditors who, before the bankruptcy, were subject to state law.[159] In the same way that bankruptcy brings in claims that would otherwise have been determined under state law and allows bankruptcy courts to determine their amounts, tax claims that would otherwise have been brought in tax court are also covered by the bankruptcy and determinable by the bankruptcy courts.

Underlying this reading of § 505 is a different understanding of the

156. *See* 11 U.S.C. § 502(b) (2003).

157. *See generally* I.R.C. § 1 *et seq.* (2003). *See also* LYNN M. LOPUCKI & ELIZABETH WARREN, SECURED CREDIT: A SYSTEMS APPROACH 95-96 (4th ed. 2003).

> Reference to "the Code" sometimes offers an opportunity for friendly competition among commercial lawyers as to the identity of the true bearer of the title "the Code." Tax mavens refer to the Internal Revenue Code as "the Code," commercial law generalists refer to the U.C.C. as "the Code," and debtor-creditor specialists refer to the federal bankruptcy statute as "the Code." The whole area is such a barren ground for jokes that no one seems inclined to fix the problem and remove this tiny source of humor.

Id. For further reading regarding the analytics of statutory coordination, see Frances R. Hill, *Toward a Theory of Bankruptcy Tax: A Statutory Coordination Approach*, 50 TAX LAW. 103 (1996).

158. *See* 11 U.S.C. § 502 (2003).

159. *See* 11 U.S.C. § 505 (2003).

nature of § 505. As mentioned previously, the approaches taken by the courts in *In re Gordon Sel-Way* and *In re Goldblatt* presume a reading of § 505 as a provision that specifies the breadth of the bankruptcy court's jurisdiction.[160] Under this paper's interpretation of § 505, the section is more accurately characterized as a *substantive* provision, that is, one that specifies the *content* of the bankruptcy court's authority concerning a special type of bankruptcy claim. That the code sections surrounding § 505 are also substantive provisions that contain information as to what the bankruptcy court can and cannot do with regard to claims in the bankruptcy proceeding suggest that this interpretation is correct.

That the nature of § 505 as a substantive rather than a jurisdictional provision that should be understood in the context of its placement in the Code was noted by the Third Circuit in *Quattrone Accountants, Inc. v. IRS*, a case in which the court decided that it lacked jurisdiction to determine the tax liability of the principal of the debtor accounting firm.[161] In determining that § 505 did not control the issue, but rather merely served to deny bankruptcy court jurisdiction over a case that had previously been adjudicated, the court stated:

> Although appellant . . . correctly asserts that the language of the section does not expressly limit its application to debtors, Congress' intent clearly was not to create another tax court, and thus the meaning of Section 505 must be determined from the statute as a whole . . . . This section is contained in a subchapter denoted "Creditors and Claims" which is in a chapter of the bankruptcy code denoted, "Creditors, the Debtor, and the Estate." This context highlights the limited application of Section 505. Further, the other provisions in the subchapter deal with the interrelationship and effect of creditors and their claims on the bankrupt debtor. Given the placement of Section 505, this would be an unusual location to insert a provision granting broad jurisdictional powers.[162]

The court therefore concluded that "Section 505 was intended to *clarify* the bankruptcy court's jurisdiction over tax claims, not *limit* its jurisdiction only to debtors."[163] While the issues in *Quattrone* are different from the ones addressed in this paper, the approach taken by the *Quattrone* court is similar in that it is cognizant of the context in which the provision exists and sentient of the clarification function of the provision rather than focusing merely on its jurisdictional breadth.

160. *See supra* Part IV.
161. Quattrone Accountants, Inc. v. IRS, 895 F.2d 921 (3d Cir. 1990).
162. *Id*. at 925.
163. *Id*. at 924.

In sum, § 505 has been placed in proximity with other sections of the Bankruptcy Code that address the treatment of claims and creditors in the bankruptcy in Subpart I of Chapter 5. These code sections are specifically targeted at addressing "claims" against the estate in the bankruptcy, which are by definition those debts that arise on the pre-petition side of the temporal divide, regardless of when they are actually before the court, in addition to administrative expenses incurred by the estate during the "gap" between the filing of the petition and the confirmation of the plan. Given the placement of § 505, we may infer that this section, like those surrounding it, was intended to apply to treatment of claims arising pre-petition and in the "gap," and not to post-confirmation claims, with regard to which a post-confirmation reorganized debtor must fend for itself outside of the bankruptcy.

B. Evidence of Legislative History Considerations

The legislative history of § 505 tends to support the proposition that § 505 was only intended to be applied to pre-discharge tax liabilities; that is, liabilities arising prior to the filing of the bankruptcy petition and those arising during the period of administration of the estate. The legislative history of § 505 makes no mention of § 505's applicability to post-confirmation matters whatsoever.[164] In fact, in their comments regarding § 505, both the House and Senate stated:

> Where no proceeding in the Tax Court is pending at the commencement of the bankruptcy case, the tax authority can, under the House amendment, file a claim against the estate for a *prepetition* tax liability and may also file a request that the bankruptcy court hear arguments and decide the merits of an individual debtor's personal liability for the balance of any nondischargeable tax liability not satisfied from assets of the estate . . . .
>
> [W]here the tax authority does not file a claim or a request that the bankruptcy court determine dischargeability of a specific tax liability, the debtor could file such a request on his own behalf, so that the bankruptcy court would then determine both the validity of the claim against assets in the estate and also the personal liability of the debtor for any nondischargeable tax.[165]

164. *See generally*, H.R. REP. NO. 95-595 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963 (the section-by-section analysis of the House Report excludes any analysis of § 505 whatsoever).

165. 124 CONG. REC. H11,110 to 11,111 (daily ed. Sept. 28, 1978); S17,426-17,428 (daily ed. Oct. 6, 1978), *reprinted in* 4 COLLIER ON BANKRUPTCY, ¶ 505.LH[2][a] (Lawrence King, ed. 15th

The types of proceedings on which these comments are focused, in conjunction with the lack of mention of post-confirmation application in the legislative history, suggest that § 505 was intended to apply to determinations of tax liability in conjunction with the resolution and disputation of claims in the bankruptcy process, that is, pre-petition liabilities.[166]

Furthermore, in its general comments on Chapter 5 of the Bankruptcy Reform Act, the Senate Report states that "Chapter 5 reflects the policy of the revision of the Bankruptcy Act to include all of the property of the debtor in the bankruptcy case and to allow the trustee more easily to recover property that may have been transferred by the debtor."[167] This comment clearly implies that the focus of Chapter 5 is on the actions and property of the debtor prior to the bankruptcy filing and on debts owing by the debtor as of the day of the bankruptcy filing. Nowhere in its legislative history is Chapter 5 or its provisions contemplated as applying to post-confirmation claims.

Because there are no allusions to the treatment of post-confirmation tax liabilities under § 505 in the legislative history, much of what can be taken from that history is gleaned by inference. However, the omission of any reference to § 505's applicability to post-confirmation tax claims, along with more general statements of the intent and policy behind the Bankruptcy Reform Act, suggests that its drafters did not intend application of § 505 to post-confirmation tax liabilities. While lack of legislative intent does not completely preclude such application, it may have important implications for the integrity of the fundamental structure of how bankruptcy operates.

C. Consistency with Bankruptcy Policy as a Whole

Observations about the context and placement of § 505 within the Bankruptcy Code as well as the fact that the legislative history of the provision does not seem to have contemplated an application to post-confirmation tax liabilities are both powerful arguments in favor of limiting jurisdiction granted to bankruptcy courts under § 505 to determinations of pre-petition and post-petition pre-confirmation tax

ed. rev. 2002) (emphasis added).

166. *See also Quattrone Accountants*, 895 F.2d at 925 ("The legislative history of Section 505 emphasizes that it permits the bankruptcy court to determine the tax liability of a debtor 'that has not been contested before or adjudicated by a judicial or administrative tribunal of competent jurisdiction before the bankruptcy case.'") (quoting S. REP. NO. 95-989 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5853).

167. S. REP. NO. 95-989, at 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5791.

liabilities. Limiting the reach of the statute in this manner avoids a strained reading of the statute to reach liabilities that appear outside of its grasp.

Such a limitation is also in accord with the structure of the Bankruptcy Code and the United States Bankruptcy System as a whole. As discussed earlier, the clear separation of liabilities based on the time periods in which they arise in Chapter 11 – pre-petition, "gap," or post-discharge – and the exit of the debtor from the jurisdiction of the bankruptcy system upon discharge of his bankruptcy case are key features of the bankruptcy system.[168] Limiting § 505's application to pre-petition and "gap" liabilities is consistent with this feature of the broader system.

The merits of such an approach do not go merely to internal consistency and a streamlined Bankruptcy Code. By disallowing the application of § 505 to post-confirmation tax claims in a context where other types of post-confirmation claims are generally outside the reach of the bankruptcy court, a differentiated treatment of tax liabilities that may be unfair to the tax creditor and inconsistent with the treatment of other types of claims may be eschewed.

If § 505 is read, as has been suggested, as a substantive grant of authority to the bankruptcy courts to determine tax liability, and it is apparent that there is no clear and unequivocal intent to differentiate the treatment of post-confirmation federal tax claims from other types of post-confirmation claims, then limiting § 505's reach to determinations of pre-petition and "gap" tax liabilities provides valuable consistency with the broader goals of bankruptcy policy and with the treatment of other creditors. Indeed, where there has been an intent to allow bankruptcy courts to determine post-confirmation state and local tax matters, the legislature has shown itself perfectly capable of making this intent explicit.[169] Absent a similar, clear manifestation of intent in regard to post-confirmation federal taxes, the jurisdiction of bankruptcy courts should not be artificially expanded by taking a literalist approach to § 505(a).

VI. THE IMPACT OF THE MODEL: POLICY IMPLICATIONS IN PERSPECTIVE

Under the above analysis, § 505 is understood to allow bankruptcy

168. *See supra* Part II.
169. *See* 11 U.S.C. § 1146(d) (2003) (providing a procedure for a proponent of a plan of reorganization to request bankruptcy court determination of state or local tax effects of the plan).

courts to determine only pre-petition claims and liabilities of the bankruptcy estate accrued during its administration. Post-confirmation tax liabilities, such as determinations of consequences of plans of reorganization, are beyond the jurisdiction conferred to the bankruptcy courts by § 505. In light of the important policy considerations discussed in Part III, it is important in evaluating this interpretation of § 505 to determine what exactly the policy effects are of this narrower reading of § 505's jurisdiction. Such an evaluation reveals that although the reading of § 505 proposed by this paper will cut back on the ability of bankruptcy courts to determine certain post-confirmation tax liabilities, the types of cases that will actually be affected are actually smaller in number than commentators would suppose. The gains made both in terms of the application of a consistent legal standard and also in terms of consistency with the Bankruptcy Code and system as a whole far outweigh the reductions in jurisdiction entailed by this proposal.

There are two major reasons why the reduction of jurisdiction implied by this model is less serious than one might think on first glance. First, the clear delineation of what constitutes a post-confirmation liability greatly constrains the types of cases that are actually legitimately post-confirmation liabilities. Second, although on the surface it appears that the Declaratory Judgment Act constitutes a total prohibition on courts' ability to determine and post-confirmation federal tax matter outside of § 505, cases from outside the bankruptcy context suggest that the reach of the Act may not be as total as is supposed.

A. The Reduction in Scope of what Constitutes a Post-Confirmation Tax Liability

As a preliminary matter, it is important to note that once "post-confirmation matters" are accurately understood as those that actually "arise" after plan confirmation, the number of cases that might previously have been considered post-confirmation tax liabilities decreases dramatically. For example, "hybrid" tax issues that stem from pre-petition conduct, but traverse the gap and remain "alive" after the confirmation should properly be classified as pre-petition tax liabilities. These "hybrid" issues may therefore, at the request of the debtor or the creditor, be properly decided under § 505. This implies that as long as other general jurisdictional provisions (such as those in Title 28) are met, cases such as *In re Schwartz* and *In re Kilen*, in which debtor's made a pre-confirmation request for determination of their I.R.C. § 6672 responsible person liability and the courts decided the issue, may be decided under § 505, since the events upon which such liability would be based occurred pre-petition.[170] Though such cases are sometimes cited as examples in favor of courts' broad jurisdiction in making determinations of post-confirmation tax consequences,[171] these cases are actually fundamentally different from cases in which the liability to be determined is a post-confirmation question. Requests for determination of responsible person liability that has not yet been assessed may be considered claims arising pre-petition that may be decided using § 505, because the conduct took place before the bankruptcy petition was filed.[172] As noted, the fact that the penalty is exempt from discharge does not stop the debtor from seeking a determination of the liability in the context of the bankruptcy plan as part of the claims process.[173] This is consistent with the treatment of other claims exempt from discharge in bankruptcy: debtors may nonetheless seek a determination of such claims from the bankruptcy court during the bankruptcy process, even though a creditor has not filed a claim and even if the debt remains after the bankruptcy case is discharged.[174]

Another genre of cases that would be considered pre-confirmation under this analysis are those cases in which the liability is a pre-petition tax liability but, for whatever reason, that liability ends up having to be resolved after the plan has been confirmed and the case discharged. These pre-petition liabilities should fall under the jurisdiction granted by § 505, although they may be beyond the jurisdiction of the court for other reasons, such as *res judicata*, or failure to meet the general jurisdictional requirements. For instance, in *In re Van Dyke*, the liquidating agent of a trust that was created under debtor's confirmed Chapter 11 plan sued for a refund of an alleged tax overpayment under § 505(a) after the plan had been confirmed.[175] The IRS's claim had been estimated at the time of confirmation, and the court's opinion notes that "the confirmed plan unmistakably contemplates that the liability for the 1987 taxes would be fixed at some future point in the bankruptcy proceeding" and remarked that "[t]his bankruptcy case is not yet

170. *See In re* Schwartz, 192 B.R. 90 (Bankr. D.N.J. 1996); Kilen v. United States (*In re* Kilen), 129 B.R. 538 (Bankr. N.D. Ill. 1991).

171. *See, e.g.*, Haber, *supra* note 28, at 419-20; Jacobs, *supra* note 28, at 998-99. *But see* HENDERSON & GOLDRING, *supra* note 15, at § 1013.3.2.

172. *See supra* text accompanying notes 22-24.

173. *See supra* text accompanying note 21.

174. *See id.*

175. *In re* Van Dyke, 275 B.R. 854, 856 (Bankr. C.D. Ill. 2002).

over."[176] The court also noted that the confirmation order had authorized the court to retain jurisdiction to determine disputes over the administration of the assets of the estate, and that determination of the amount of claims is "a primary function of bankruptcy law and is at the core of bankruptcy administration."[177] Under these circumstances – where the plan had contemplated future modification of the plan, the bankruptcy proceeding was still in progress (albeit "substantially consummated"), and the plan had authorized retention of jurisdiction – it was proper for the bankruptcy court to determine the right to a refund under § 505. The tax matter at issue here was a pre-petition tax issue, and that court's use of § 505 in this case was based on a claims determination analysis. The court's analysis in *Van Dyke* is therefore consistent with the analytical model presented in this paper.

On the other hand, it must be conceded that imposing a bright line rule that § 505 does not apply to post-confirmation tax liabilities does result in a narrowing of the kinds of cases § 505 applies to, and reinforces the inability of the courts to hear cases concerning genuinely post-confirmation tax issues. For instance, at first glance, the theory implies that the application of § 505 in *In re Goldblatt* – another case frequently cited as evidence that courts may determine post-confirmation tax consequences of plans of reorganization – was improper, since the matter in *Goldblatt* was a post-confirmation tax matter.[178] This reading of § 505 also implies that *In re Antonelli* – in which the court was requested pre-confirmation to determine the tax consequences of establishing and operating a trust to be set up under a Chapter 11 plan, but found that it had no jurisdiction to do so – was rightly decided, if for the wrong reasons.[179] In *Antonelli*, the court held that it could not make such a determination because the requisite case or controversy did not exist.[180] However, the model presented by this paper suggests that the problem in *Antonelli* was really that the issue the court was asked to decide did not arise from any pre-petition event, act or occurrence. It was therefore not properly treated under the Chapter 5, Subpart I, claims process. If there had been a pre-petition "hook," the tenuousness of the case or controversy requirement should not have been an impermeable barrier to the court's exercise of jurisdiction.

176. *Id*. at 861-62.

177. *Id*. at 862.

178. However, as will be discussed, the inability to apply § 505 to *Goldblatt* should not prevent the bankruptcy court from deciding that type of issue. *See infra* pp. 62-63.

179. *In re* Antonelli, 1992 WL 435879 (Bankr. D. Md. 1992).

180. *Id*. at *3.

B. The Nature of the Prohibition Against Determinations of Federal Taxes Under the Declaratory Judgment Act

As explained above, the Declaratory Judgment Act provides that where there is an actual case or controversy and if the court has jurisdiction, any United States court may declare the rights and other legal relations of any "interested party" seeking such declaratory judgment.[181] However, federal taxes are excepted from the Declaratory Judgment Act.[182] Proceedings under § 505 and § 1146 of the Bankruptcy Code are exceptions to the federal tax exception.[183] It is because of this exception and the exception to this exception that the reach of § 505 is so significant. The widespread perception is that if § 505 is not employed in tax matters with post-confirmation dimensions that come before the bankruptcy court, it will be impossible for bankruptcy courts to hear such matters at all. Determining the extent to which this is true requires a closer look at the requirements of the Declaratory Judgment Act.

Under traditional jurisdictional principles, a court could only act when a controversy has matured to the point where a plaintiff has a remedy that can be imposed, such as an injunction or judgment for damages.[184] However, in the light of the hardships imposed by situations in which there exists an actual controversy but which are not yet ripe for imposition of an affirmative remedy, a declaratory judgment remedy is a useful remedy.[185] Indeed, a leading treatise notes:

> The remedy made available by the Declaratory Judgment Act and Rule 57 is intended to minimize the danger of avoidable loss and the unnecessary accrual of damages and to afford one threatened with liability an early adjudication without waiting until an adversary should see fit to begin an action after the damage has accrued. It relieves potential defendants "from the Damoclean threat of impending litigation which a harassing adversary might brandish, while initiating suit at his leisure – or never." It permits actual controversies to be settled before they ripen into violations of law or a breach of contractual duty and it helps avoid a multiplicity of actions by affording an adequate, expedient, and inexpensive means for declaring

181. 28 U.S.C. § 2201 (2003).
182. *Id*.
183. *Id*.
184. *See* WRIGHT, ET AL, *supra* note 134, at § 2751 ("Until a controversy had matured to a point at which [complainant is entitled to remedy], and the person entitled thereto sought to invoke it, the courts were powerless to act.").
185. *See id.*

in one action the rights and obligations of litigants.[186]

On the other hand, while the hardships imposed in the absence of the declaratory judgments remedy are a rationale for the existence of said remedy, a countervailing interest of the Internal Revenue Service in the area of tax collection has led to the provision of an exception to the ability of courts to render declaratory judgment in the area of federal taxes. For instance, courts have indicated "the powerful governmental interests in protecting the administration of the tax system from premature judicial interference" as a rationale for the Declaratory Judgment Act federal tax exception.[187]

However, there is evidence that suggests that the Declaratory Judgment Act may reach less widely than one might think. Courts have noted that the Act's legislative history indicates that "the congressional intent was to create a prohibition as to actions concerning federal taxes coterminous with that provided in the Anti-Injunction Act so as to preclude circumvention of the provisions of the Anti-Injunction Act through the maintenance of an action seeking declaratory relief only."[188] Courts have concluded that this means that "despite its broad language, the Declaratory Judgment Act bars only declaratory relief sought 'for the purpose of restraining the assessment of collection of any tax.'"[189] It follows that while the Act may indeed prohibit courts from deciding whether or how much tax is due, in cases where the declaratory relief would not result in restraining the IRS from actually collecting a tax, the application of the Act is less certain.

In fact, cases do hold that a court may issue declaratory judgment if the court is resolving another dispute, even if the resolution of that dispute ultimately gives rise to tax consequences.[190] For instance, the Declaratory Judgment Act has been held inapplicable to questions dealing with the disposition of a tax refund.[191] Some courts have also

186. *Id*. (quoting *Japan Gas Lighter Ass'n v. Ronson Corp.*, 257 F. Supp. 219, 237 (D.N.J. 1966)).

187. Daines v. Alcatel, S.A., 105 F. Supp. 2d 1153, 1160 (E.D. Wash. 2000) (quoting *Bob Jones Univ. v. Simon*, 416 U.S. 725, 747 (1974)).

188. Dominion Trust Co. v. United States, 786 F. Supp. 1321, 1323 (M.D. Tenn. 1991) (quoting *Lugo v. Smith*, 453 F. Supp. 677, 690 (N.D. Ohio 1978) (citation omitted)); *see also* Ecclesiastical Order of the ISM of AM, Inc. v. IRS, 725 F.2d 398, 404-05 (6th Cir. 1984) ("[T]he two Acts, though not similarly worded, are, as the majority notes, to be interpreted coterminously."), *quoted in* Dominion Trust, 786 F. Supp. at 1323; Anti-Injunction Act, I.R.C. § 7421 (2003) (providing that no suit to restrain the assessment or collection of any tax shall be maintained in any court by any person).

189. Church of Scientology v. Egger, 539 F. Supp. 491, 494 (D.D.C. 1982).

190. *See generally* WRIGHT, ET AL, *supra* note 134, at § 2762.

191. *See* Nelson v. Regan, 560 F. Supp 1101 (D. Conn. 1983).

held the Act inapplicable to a case where the court was asked to declare not whether tax was due or how much, but only the question of which of two entities was liable for the otherwise unchallenged assessment.[192] While such distinctions may appear facile, the existence of these cases indicates that in the bankruptcy context, declaratory judgment in cases such as *In re Goldblatt* (liability as between two parties), *In re Gordon Sel-Way* (refund claim) and *In re Van Dyke* (refund claim) would not be prohibited under the Declaratory Judgment Act even if § 505 were not applied. Rather, since the federal tax exception would not apply, courts could decide – subject to constitutional and general jurisdictional provisions – to assert jurisdiction over the post-confirmation tax matters under Title 11 provisions other than § 505.[193]

The foregoing analysis shows that the universe of cases to which the limitations of the Declaratory Judgment Act would be determinative outside of § 505 is actually quite small. Requests for determinations that are not declaratory (i.e., those which are ripe or in which immediate remedy can be given) would not be prevented by the Act. Even if the judgment requested were declaratory, the Declaratory Judgment Act would be bounded in its relationship with the Anti-Injunction Act and would not apply to determinations of tax refunds or determinations of which party was responsible to pay the tax. The Act also would not apply if the court were deciding an unrelated issue that merely happened to give rise to tax consequences.

Given the small universe of cases to which the Declaratory Judgment Act prohibition would actually apply in the absence of § 505 as well as the aforementioned exclusions, it seems clear that the specter of the lack of jurisdiction that could arise stemming from this paper's reading of § 505 is not as frightening as one might imagine. The authority and reach of other code provisions informs us that § 505 is not the beginning and end of this debate. It is true that the reading of § 505(a) proposed by this paper would prevent the bankruptcy court from

192. *See, e.g.*, Henshel v. Guilden, 300 F. Supp. 470 (S.D.N.Y. 1969) (declaration of which of two entities was liable for tax was not declaratory judgment "with respect to Federal Taxes" barred by Declaratory Judgment Act); Dominion Trust Co. v. United States, 786 F. Supp. 1321 (court was not barred from deciding case by Declaratory Judgment Act where sole issue was whether tax should be paid out of trust assets or by defendant). *But see* Daines v. Alcatel, S.A., 105 F. Supp. 2d 1153, 1160-61 (E.D. Wash. 2000) (disagreeing with Henshel).

193. For example, the court could assert jurisdiction under 11 U.S.C. § 105 (providing that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title") or 11 U.S.C. § 1142 (providing that "[t]he court may direct the debtor and any other necessary party to perform any. . . act, including the satisfaction of any lien, that is necessary for the consummation of the plan").

determining issues that amount to actual determinations of post-confirmation tax liability. However, in the light of the important federal tax policies articulated in the Declaratory Judgment Act and the dangers inherent in a relentless expansion of jurisdiction, it is clear that this contraction of jurisdiction is well justified.

VII. CONCLUSION

This paper argues for the imposition of a limitation on the jurisdiction granted by § 505 based on the time period in which the tax liability in question arises. A close examination of § 505 in the context of its legislative history and placement in the Bankruptcy Code shows that § 505 is essentially a feature of the claims determination process in bankruptcy, and as such should only be applied to determinations of tax liabilities arising with respect to tax periods before the bankruptcy petition is filed, as well as post-petition but pre-confirmation tax liabilities. It is true that § 505 is not the only parameter that determines the existence of jurisdiction to determine these claims and that more general jurisdictional provisions must also be considered in determining the ultimate existence of jurisdiction. However, the applicability of § 505 should not be allowed to rest solely on the scope of these broader jurisdictional provisions, since this would lead to inconsistency and lack of rationality in the treatment of tax claims and could lead to ever-expanding jurisdiction, especially in consideration of other aspects of the bankruptcy system. Rather, restrictions on the applicability of § 505 should be sought within the statute itself.

In support of its position, this paper also argues that the extent of the policy losses associated with this more circumscribed interpretation of § 505 has been overstated. Many of the matters that are often labeled post-confirmation liabilities are more properly considered pre-petition liabilities. Furthermore, the inapplicability of § 505 to post-confirmation tax liabilities does not cast a lethal blow to bankruptcy court ability to consider and decide all post-confirmation issues, assuming that compliance with other general jurisdictional requirements are met. The net cast by the prohibition in the Declaratory Judgment Act is wide but not impermeable.

In conclusion, circumscribing the reach of § 505 such that it does not become the catchphrase that allows bankruptcy courts free reign to determine post-confirmation tax consequences may seem like an alarming outcome to policy-oriented bankruptcy practitioners. Policy concerns have often been cited as a reason to take a “common sense” approach toward the role of the bankruptcy court in commandeering the reorganization and ensuring its success. However, it is important that the interest in ensuring a successful reorganization does not lead to a compromise of federal tax policies or to sloppy construction of the statute in a way that compromises the integrity and rationality of the bankruptcy system as a whole. Ultimately, a close look at the actual content of the limitations placed by the Declaratory Judgment Act and the constitutional and statutory restraints demonstrates that analytical precision and policy efficacy need not be mutually exclusive.