The US Supreme Court's Platonic Bankruptcy Code

James Karlin*
Jeremy Weinstein

In the American and English common law systems, courts decide lawsuits between two litigants. Usually, courts base their decisions on existing precedents—previously reported decisions. When there is no clear precedent, or the court does not like the existing precedent, the court devises a new precedent. Even though that new precedent did not actually exist before and so could not have been discovered by the parties to the lawsuit, it nevertheless is the law and binds them because the court in its decision “discovered” the law that existed when the court articulated it.

A foundational legal scholar of the common law, William Blackstone, explained in 1765 that judicial decisions are “evidence” of the law, and that overruled prior cases are not bad law, but rather mistaken evidence of it. The great common law scholar and US Supreme Court Justice Oliver Wendell Holmes wrote that “Judicial decisions have had retrospective operation for near a thousand years.” The logic of court “discovery” inexorably conquers all other logic; for example, the Supreme Court upheld in 1898 the invalidation of municipal bonds that were previously found valid, when the court “discovered” it was wrong the first time to validate them.

* James Karlin is a graduate student of philosophy. Email: jamkarlin@gmail.com
Jeremy Weinstein is an attorney in Walnut Creek, California. Email: jweinstein@jweinsteinlaw.com

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1 1 W. Blackstone, Commentaries 68-71 (1765).

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This is in contrast to legislated law, which generally is not supposed to be “ex post facto,” or govern or punish conduct that took place before the law was passed. Statutes, which are enacted by Congress or Parliament, are interpreted and applied by the courts, and although courts often expand or narrow statutes in ways that may differ from their plain text, until quite recently statutes wouldn’t seem to have an existence that is completely outside of their texts.

The U.S. Supreme Court, in its May 2019 decision in *Mission Products Holdings v. Tempnology*, held that a trademark licensee was entitled to keep using the trademark even though when Congress changed the Bankruptcy Code to protect intellectual property licensees in a licensor’s bankruptcy, it did not include trademarks.

Most noteworthy for purposes of philosophy is language in its opinion by which the Supreme Court characterized the words Congress added to the Bankruptcy Code over time as “legislative interventions”:

> “Each of the provisions [in the Bankruptcy Code] emerged at a different time, over a span of half a century. … And each responded to a discrete problem—as often as not, correcting a judicial ruling … . Read as generously as possible …, this mash-up of legislative interventions says nothing much of anything about the content of [the Bankruptcy Code’s] general rule.”

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7 *Tempnology*, 139 S.Ct. at 1664.
When Congress protected intellectual property other than trademarks, it invited the courts to develop equitable treatment for trademarks. For the Supreme Court to respond not to that invitation and instead pronounce that Congress engages in “legislative interventions” when Congress writes a law that it entirely creates, must mean that the Supreme Court believes there is a Bankruptcy Code that is independent of the “legislative interventions” of its author; there is apparently some more perfect “Bankruptcy Code” out there that goes far deeper than what study of its legislative history reveals, that the Supreme Court can “discover.”

This “discovery” of a more perfect “Bankruptcy Code” bears a striking resemblance to Socrates’ argument at the conclusion of the Phaedo, a Platonic dialogue documenting the final hours of Socrates’ life. The Phaedo is set at Socrates’ death bed as he prepares to drink hemlock, having been sentenced to death by the Athenian government. The subject of this dialogue is, naturally, what happens at the moment of death – are we utterly annihilated, or is there something about our beings that is immortal?

Throughout the dialogue, Socrates argues that the soul is the aspect of our being that is immortal. The argument most pertinent to the Supreme Court’s Tempnology decision comes in Socrates’ final hypothesis, “that there’s some Beautiful Itself by Itself and a Good and a Big and all the others. If you give me those and grant that they are, I hope, from them, to show you the cause and to discover how the soul is something deathless.”

This hypothesis arose from the logical difficulty that Socrates ran into when attempting to determine the precise reason, or cause, for one thing being bigger than another. It can be said that one person is bigger than another “by a head.” It can also be said that one person

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9 Plato, Phaedo 101 B.
is smaller than another “by a head.” But how, he asks, can smallness and bigness be
determined by the same standard, “by a head,” when big and small are two different
things? Moreover, how can something be considered big “by a head,” when a head is
something small? Instead, Socrates argues that things are only big and small according to
their participation in Bigness and Smallness. For instance, Simmias is bigger than Socrates
because he participates in Bigness to a greater degree than Socrates. Likewise, Socrates is
smaller than Simmias because he participates in Smallness to a greater degree than
Simmias. Both Socrates and Simmias contain various degrees of Bigness and Smallness,
and it is by their participation in these standards, which exist independently of Simmias
and Socrates, that the two men may be compared. The same goes for paintings – one piece
of art is not more beautiful than another due to its having more colors or shapes, but due
to its greater participation in the Beautiful.

Therefore, there are “Forms” of qualities like Bigness and Beauty that both exist outside
of material things, and also allow us to accurately understand and compare material things.
Socrates is quick to note that the destruction of a material thing does not entail the
destruction of the “Form” in which it participated. Snow, for example, participates in Cold.
Yet snow melts at the approach of fire. This does not mean that Cold has melted as well,
but that the material snow can no longer participate in Cold with the approach of Heat.
The “Forms” themselves are eternal, unchanging, and beyond the realm of material things.
In fact, material things, which pass in and out of existence, take their meaning from the
“Forms,” which have always existed.

It is from an investigation of material things that we discover the existence of “Forms.”
By comparing Simmias and Socrates, we realize that there must exist perfect standards of
Bigness and Smallness outside of Simmias and Socrates themselves. The Supreme Court’s
claim that the “mash-up of legislative interventions says nothing much of anything about
the content of [the Bankruptcy Code’s] general rule” leads to an identical conclusion: by
looking at particular examples of bankruptcy, we realize that there must exist a perfect
standard, or “Form,” of Bankruptcy Code that is eternal, unchanging, and beyond the
material world.

This forces us to ask whether, just as a painting participates in Beauty to varying degrees,
a person or a company may participate to a greater or lesser extent in Bankruptcy. By the
Supreme Court’s argument, it follows that particular instances of bankruptcy take their
meaning from some “Form” of bankruptcy that has always existed as a fundamental aspect
of our world, just like Bigness and Smallness.

This fundamental aspect can be perceived by the members of the Supreme Court like the
philosophers of Plato’s Republic, and unlike the Congressional authors of the Bankruptcy
Code itself, who are apparently merely prisoners chained to the wall, observing only the
shadows.¹⁰

Then again, perhaps Justice Kagan meant nothing so profound, and rather was engaging
in an intellectual shorthand consistent with the rest of her opinion, which relied not so
much on precedent as it did on textbooks, a 30 year old law review article, and an analogy
of possession being nine-tenths of the law.

And, sometimes there is law in the Supreme Court’s absent words. The “rule” in Moore v.
Bay,¹¹ “one of the most fundamental propositions of our bankruptcy law,”¹² and also “one
of the most glaring misconstructions to be encountered in the history of Anglo-American

¹⁰ Plato, Republic, 514a-520a.
¹² Grant Gilmore, Security Interests in Personal Property 466 (1965).
law” was “discovered” by the Supreme Court but can hardly be divined from reading the “brief, cryptic and unsatisfactory opinion” written by Justice Holmes.

So even judicial decisions and codes written by legislatures can be mere imitations of the Forms of the law that exist eternally outside of their written texts, which the courts will discover for us.

14 1 Grant Gilmore, Security Interests in Personal Property 507 (1965).
15 1 Grant Gilmore, Security Interests in Personal Property 466 (1965).