
Ralph Brubaker
ON THE NATURE OF FEDERAL BANKRUPTCY JURISDICTION: A GENERAL STATUTORY AND CONSTITUTIONAL THEORY

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The words we have to construe are not only words with a history. They express an enactment that is part of a serial, and a serial that must be related to Article III of the Constitution, the watershed of all judiciary legislation, and to the enactments which have derived from that Article.... These give content and meaning to its pithy phrases [and] must be considered [as] part of an organic growth—part of the evolutionary process of judiciary legislation that began September 24, 1789, and projects into the future.

Justice Frankfurter in Romero v. International Terminal Operating Co.†

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INTRODUCTION

Consumer debtors seeking relief from a federal bankruptcy court now number well in excess of one million per annum, and another two million individuals are employed by businesses filing for the bankruptcy protection of a federal court.\(^1\) Bankruptcy, therefore, is a substantial and significant component of the charge of the federal courts. Yet, the jurisdiction in bankruptcy remains one of the most enduring puzzles of our federal court system.\(^2\) Congress, of course, has plenary legislative power "on the subject of Bankruptcies."\(^3\) For the most part, however, creditors' and debtors' rights and obligations in bankruptcy are governed by state law, not federal law.\(^4\) For example, a creditor may assert a right to payment from a debtor founded upon a disputed state-law cause of action. Likewise, among the debtor's assets, to which the creditors lay claim, may be similar state-law

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causes of the debtor against others. Bankruptcy brings all such state-law disputes into federal court, but without any diversity-of-citizenship requisite, and thus, the constitutional source of this federal "judicial Power"\(^5\) is not at all self-evident. The Supreme Court consistently has confirmed the propriety of the federal jurisdiction in bankruptcy, but has been cryptic, parsimonious, and inconsistent in its explanations of this judicial province.\(^6\)

The Supreme Court's abstruseness is, of course, fuel for the scholarly engine, and bankruptcy has become the seemingly inscrutable crucible of federal jurisdiction theory. In fact, because it is not easily explained by traditional theory, most scholars rely upon bankruptcy to buttress novel and unconventional departures that would accommodate the apparent anomaly of federal bankruptcy jurisdiction.\(^7\) These efforts, however, have not grappled with the parallel and equally bedeviling problem of charting

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5. U.S. CONST. art. III, § 2, cl. 1.
6. Professor Wright, in responding to inquiries from the House Judiciary Committee, frustratingly stated that "I do not know how many angels can stand on the head of a pin until the Supreme Court tells me." By way of explanation for this exasperation, he made the following observations regarding the constitutional source of federal bankruptcy jurisdiction:

Although we know from *Williams v. Austrian* and *Schumacher v. Beeler* that "constitutional courts" can hear plenary actions in a bankruptcy case, we do not know why this is so. As astute a student of federal jurisdiction as Felix Frankfurter tried to explain this in his opinion in the *National Mutual* case. He spoke to the matter again in *Textile Workers Union v. Lincoln Mills.* Yet the explanations he offers in those two opinions do not seem to me to be wholly consistent.

Letter from Charles Alan Wright to Chairman Rodino (June 4, 1976) (citations omitted), reprinted in SUBCOMM. ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE HOUSE COMM. ON THE JUDICIARY, 95TH CONG., CONSTITUTIONAL BANKRUPTCY COURTS app. II, at 73 (Comm. Print No. 3 1977) [hereinafter CONST. BANKR. CTS.]. All of the cases noted in Professor Wright's letter are discussed infra Part II, notes 212-395 and accompanying text.

the outermost bounds of the statutory grant of federal bankruptcy jurisdiction, which contemplates a federal forum for any proceeding "related to" a bankruptcy case. This provision for pervasive federal bankruptcy jurisdiction is the most extensive in our history, and indeed, was designed to be as broad as the Constitution permits. The extant jurisdictional structure, therefore, provides a contextual framework that proves critical for testing constitutional theories of federal bankruptcy jurisdiction.

In the absence of clear constitutional guidance, jurisprudential demarcation of the content of the statutory grant, not surprisingly, has been chaotic. In fact, the case law has developed in a vacuum-like separation from constitutional principles that would define the reach of federal bankruptcy jurisdiction. This disconnect is aggravated by the literal breadth of the statute itself, which on its face extends to any dispute, even one wholly between third parties and not directly involving the debtor nor the debtor's bankruptcy estate, but that nonetheless is in some manner "related to" the debtor's bankruptcy case. The dominant test for "related to" bankruptcy jurisdiction in such a third-party dispute, the so-called Pacor test, merely asks "whether the outcome of that [third-party] proceeding could conceivably have any effect on the estate being administered in bankruptcy."

When one ponders such an approach to third-party "related to" bankruptcy jurisdiction for an operating business attempting reorganization in Chapter 11 bankruptcy proceedings, the prospect of potentially limitless federal bankruptcy jurisdiction is not beyond the pale. As one court noted when asked to pass on the validity of IRS liens on the property of certain third parties, because the Chapter 11 debtor anticipated using that property to help finance its reorganization:

The desires of every Chapter 11 debtor are affected by a myriad of external indirect effects created by the circumstances in which it operates[,] whether they arise from the ebbs and

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9. See infra notes 208, 222-24 and accompanying text.
10. See infra Part III.B.1, notes 461-73 and accompanying text.
11. So-called for the opinion that produced it, Pacor, Inc. v. Higgins, 743 F.2d 984 (3d Cir. 1984), discussed infra Part III.B, notes 455-560 and accompanying text.
12. Pacor, 743 F.2d at 994 (emphasis omitted).
flows of commerce, the effects of governmental action or the acts of third parties with respect to property of nondebtors, [all having some] impact on a debtor's attempt to reorganize ....

Thus, the pressures pushing at the edges of federal bankruptcy jurisdiction are immense, and even more so as federal bankruptcy proceedings rapidly assume great importance in the larger scheme of federal jurisdiction and dispute resolution in general, especially in confronting the difficulties of complex litigation such as mass torts. The Supreme Court highlighted the challenge presented by “related to” bankruptcy jurisdiction over third-party disputes in Celotex Corp. v. Edwards, decided in the Chapter 11 reorganization proceedings of Celotex Corp.—one of many asbestos manufacturers whose massive potential liability for asbestos-related personal injuries precipitated a Chapter 11 filing. In that case, the Court stated that “Congress did not delineate the scope of ‘related to’ jurisdiction, but its choice of words suggests a grant


of some breadth,” while cautioning that “a bankruptcy court’s ‘related to’ jurisdiction cannot be limitless.”17 The Court noted that nearly all circuits have embraced the Pacor test,18 but (wisely) did not find it necessary to adopt any particular test in order to decide the case before it.19 Pacor is manifestly inadequate, as it simply provides no principled limits for third-party “related to” bankruptcy jurisdiction. The issue of the outermost bounds of federal bankruptcy jurisdiction is rife with litigation, and scores of circuit court opinions have done virtually nothing to clarify the appropriate jurisdictional standards. In fact, Pacor has produced a state of affairs in which jurisdictional determinations are essentially arbitrary—with countless instances of identical factual and procedural postures producing diametrically disparate results on nominal application of the same “test.”20

18. “The First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits have adopted the [Third Circuit’s] Pacor test with little or no variation. The Second and Seventh Circuits, on the other hand, seem to have adopted a slightly different test.” Id. at 308-09 n.6 (citations omitted); see also Elscint, Inc. v. First Wis. Fin. Corp. (In re Xonics, Inc.), 813 F.2d 127, 131 (7th Cir. 1987) (stating that “related to” jurisdiction over a third-party dispute depends on whether “it affects the amount of property available for distribution or the allocation of property among creditors”); Turner v. Ermiger (In re Turner), 724 F.2d 338, 341 (2d Cir. 1983) (determining that third-party “related to” jurisdiction requires a “significant connection” to the debtor’s bankruptcy case).
19. Likewise, the dissent agreed “that the facts of this case do not require us to resolve whether [Pacor] articulates the proper test for determining the scope of the district court’s ‘related to’ jurisdiction.” Celotex, 514 U.S. at 319 n.5 (Stevens, J., dissenting). Quite apart from this Article’s strident criticism of the Pacor test, the Celotex case would have been an inappropriate vehicle for announcing a test for third-party “related to” bankruptcy jurisdiction, as that case involved jurisdiction to temporarily enjoin, rather than adjudicate, a third-party dispute. Such injunctive jurisdiction is distinct from and not limited by a federal bankruptcy court’s adjudicative jurisdiction. See Brubaker, supra note 13, at 1042-67; Larry Peitzman & Margaret S. Smith, The Secured Creditor’s Complaint: Relief from the Automatic Stays in Bankruptcy Proceedings, 65 CAL. L. REV. 1216, 1220-23 (1977).
20. See Michigan Employment Sec. Comm’n v. Wolverine Radio Co. (In re Wolverine Radio Co.), 930 F.2d 1132, 1142 (6th Cir. 1991) (noting that “[a]lthough several circuit courts have adopted the definition of ‘related to’ that is supplied by the Third Circuit in Pacor, the application of that definition has produced varying results”); Burns v. First Citizens Bank & Trust Co. (In re Rainbow Sec. Inc.), 173 B.R. 508, 511 (Bankr. M.D.N.C. 1994) (noting that cases “have reached opposite conclusions regarding jurisdiction when applying the same test to fact situations which are very similar”); Susan Block-Lieb, The Case Against Supplemental Bankruptcy Jurisdiction: A Constitutional, Statutory, and Policy Analysis, 62 FORDHAM L. REV. 721, 735-37 (1994); Brubaker,
The daunting disarray of the case law cries out for a new approach, and this Article proffers a comprehensive, unifying statutory and constitutional theory that would vastly simplify and bring principled limits to third-party "related to" bankruptcy jurisdiction. Given the intended expanse of that provision, the limits of "related to" bankruptcy jurisdiction are constitutional limits. The search for a sensible solution to the statutory conundrum of federal bankruptcy jurisdiction, therefore, becomes meaningful only if it is explicitly coupled with a coherent constitutional explanation for our federal bankruptcy jurisdiction—an explanation that has eluded both courts and scholars. This interpretive method will succeed, of course, only if it is, in fact, possible to formulate a determinate constitutional theory of federal bankruptcy jurisdiction, and this Article undertakes that task.

How, then, do we ascertain the boundaries of a statutory bankruptcy jurisdiction that admits of no limits other than those imposed by constitutional principles of judicial federalism, when the essence of our federal bankruptcy jurisdiction seems to defy the logic of those constitutional standards? This Article heeds the sage counsel gleaned from the opening salvo to Justice Frankfurter, and therefore, approaches interpretation of the grant of federal bankruptcy jurisdiction as a multifaceted historical inquiry that must begin by exploring statutory antecedents. From this historical understanding, we then can fashion a reconciliation with the Constitution's provisions for federal judicial power and comparable congressional conferrals of the same. The result is a comprehensive theory of federal bankruptcy jurisdiction that integrates constitutional theory with an interpretive theory for the bankruptcy jurisdiction statute.

To that end, Part I traces the historical evolution of the scope of federal bankruptcy jurisdiction. This historical survey reveals the backdrop of an English model of bankruptcy jurisdiction, against which a unique American conception of federal bank-

supra note 13, at 1072-73 n.441 (citing many examples); Darrell Dunham, Bankruptcy Court Jurisdiction, 67 UMKC L. REV. 229, 229 (1998) (noting that "a connection justifying jurisdiction may be found in one case, while in a factually similar case another court will hold that the connection with a pending bankruptcy is too attenuated"); E. Scott Fruehwald, The Related to Subject Matter Jurisdiction of Bankruptcy Courts, 44 DRAKE L. REV. 1, 6-22 (1995).
ruptcy jurisdiction competed and ultimately prevailed. Pursuant thereto, a general grant of federal jurisdiction over "bankruptcy proceedings" brought the federal judicial power to bear on any dispute to which a bankruptcy estate was a party. In addition to this general federal bankruptcy jurisdiction over all claims by and against a bankruptcy estate, the historical inventory of Part I also discloses settings in which federal bankruptcy jurisdiction extended to incidental disputes through principles of supplemental jurisdiction. The origins of supplemental bankruptcy jurisdiction include perhaps the earliest instance of an express congressional grant of supplemental jurisdiction, which created a federal bankruptcy jurisdiction in certain third-party disputes necessary to the administration of a bankruptcy estate. In the current jurisdictional statute, Congress consciously designed as broad a federal bankruptcy jurisdiction as imaginable. Yet, the assumption that there must be some constitutional limit to federal bankruptcy jurisdiction has left the courts groping to find the perimeter of third-party "related to" bankruptcy jurisdiction, but without a constitutional compass.

Part II relies upon the sum total of our historical experience with federal bankruptcy jurisdiction to construct a constitutional theory. An approach grounded in the Article I Bankruptcy Power is explored and rejected as incapable of defining the content of third-party "related to" bankruptcy jurisdiction, as inconsistent with the Supreme Court's view that Article III contains the source and limits of the federal judicial power, and ultimately as unnecessary.

Article III federal question jurisprudence has obvious import, but scholars have misunderstood its proper application to bankruptcy, largely because of a misleading emphasis on the role of a federal bankruptcy trustee. Because the trustee is merely a representative of the federally created bankruptcy estate, the historical concept of a general federal bankruptcy jurisdiction of all claims by and against a bankruptcy estate is sustained by a conventional federal entity theory of constitutional federal questions. Although this federal entity theory of constitutional federal questions does not explain third-party "related to" bankruptcy jurisdiction over state-law claims to which the federal bankruptcy estate is not a party, combining the federal entity theory with
a proper conception of supplemental bankruptcy jurisdiction will both account for and define these third-party "related to" claims.

Supplemental jurisdiction has been tendered as the source of federal bankruptcy jurisdiction over all state-law claims forming one constitutional bankruptcy "case." This supplemental bankruptcy jurisdiction theory, though, adopts an in rem model of a bankruptcy "case" that does not fully explain third-party "related to" bankruptcy jurisdiction. Moreover, such an in rem theory misconstrues the relevant constitutional "case" in bankruptcy.

The appropriate constitutional explanation for the entirety of federal bankruptcy jurisdiction materializes only when one recognizes that the fundamental jurisdictional unit in bankruptcy is an individual bankruptcy "proceeding" raising a justiciable controversy between adverse parties. The resulting constitutional theory is an almost stunningly simple and orthodox combination of (1) the federal entity theory, which explains the historical concept of a general federal bankruptcy jurisdiction over all claims by and against a bankruptcy estate as independent, free-standing constitutional federal questions, and (2) conventional supplemental jurisdiction of "related" third-party claims.

The simplicity of the constitutional framework developed in Part II permits direct incorporation of constitutional principles into a basic theory for interpretation of the bankruptcy jurisdiction statute that would vastly streamline jurisdictional inquiries. Part III constructs the interpretive theory by identifying and removing the extraneous separation of powers influence that has skulked into "related to" bankruptcy jurisdiction. Under this interpretive theory, third-party "related to" bankruptcy jurisdiction is seen as a grant of supplemental jurisdiction over any claim sharing a conventional supplemental relationship with (1) a claim created by the Bankruptcy Code, or (2) a claim to which a bankruptcy estate is party.

Part III then uses this Article's interpretive theory to critique the Pacor test for third-party "related to" bankruptcy jurisdiction, which is both unconstitutionally overinclusive and, at the same time, decidedly underinclusive in terms of the intended function of federal bankruptcy jurisdiction. Pacor not only announced the prevailing "conceivable effect" test, but also maintained, in a similarly influential manner, that third-party "related
to” bankruptcy jurisdiction is not supplemental jurisdiction. Thus, for example, if a bankruptcy trustee brings an action against two defendants and those defendants assert state-law cross-claims for contribution and indemnification against each other, under *Pacor*, the federal courts have no supplemental jurisdiction to hear those cross-claims. In fact, as a result of *Pacor*, bankruptcy appears to be the only context in which the federal courts cannot entertain such cross-claims through supplemental jurisdiction.

*Pacor*’s hostility to supplemental jurisdiction, though, was based upon a fundamental misapprehension of both bankruptcy law and the Supreme Court’s supplemental jurisdiction jurisprudence. *Pacor*, thus, recklessly repudiated the widely heralded values of supplemental jurisdiction and, in its place, adopted a functional, outcome-oriented test that is hopelessly indeterminate and entirely incompatible with Congress’s design for a fair, efficient, pervasive federal bankruptcy jurisdiction. The *Pacor* test has fostered endless jurisdictional litigation and has imposed an antiquated in rem jurisdictional structure on federal bankruptcy litigation—and a poorly conceived one at that—which actually abrogates centuries-old in rem precepts of bankruptcy jurisdiction. Moreover, the extreme inconsistencies in the case law since *Pacor* demonstrate that the courts have covertly infused modern transactional, in personam principles of supplemental jurisdiction into third-party “related to” bankruptcy jurisdiction, even in the face of professed adherence to *Pacor*’s proscriptions against supplemental jurisdiction.

The contradictory and confused case law of third-party “related to” bankruptcy jurisdiction is simply a product of the tension presented as the manifest efficacy of modern joinder practice, now generally available in federal litigation through the 1990 supplemental jurisdiction statute,21 confronts the anachronistic aberration of *Pacor*. The same tension is evident in divisive disagreements over the proper application of the supplemental jurisdiction statute in bankruptcy and what is now dubbed “supplemental” bankruptcy jurisdiction. The simple, but robust theory developed in this Article simultaneously responds to the under-

lying source of discord in both "related to" and "supplemental" bankruptcy jurisdiction, by revealing the fallacy in that distinction. The answer lies not in tinkering with the Judicial Code,\textsuperscript{22} but in a proper recognition and express acknowledgment that \textit{Pacor} was wrong: The existing grant of third-party "related to" bankruptcy jurisdiction is unrestricted supplemental bankruptcy jurisdiction.

I. The Evolution of Federal Bankruptcy Jurisdiction

Where we are and from whence we came in the matter of federal bankruptcy jurisdiction, like much of American law, is a complex amalgam of English ideas transmuted by our unique American experiment. The present-day statutory provision for bankruptcy jurisdiction in the federal courts is a remarkably succinct grant of "original and exclusive jurisdiction of all [bankruptcy] cases" and "original but not exclusive jurisdiction of all civil proceedings arising under [the Bankruptcy Code], or arising in or related to [bankruptcy] cases."\textsuperscript{23} The conciseness of this provision, though, conceals a treasure trove of historical esoterica surrounding issues of allocation of judicial power as between various tribunals. The most well-known of these, by virtue of the decision in \textit{Northern Pipeline Construction Co. v. Marathon Pipe Line Co.},\textsuperscript{24} is the appropriate division of federal bankruptcy jurisdiction as between Article III federal courts and specialized non-Article III adjuncts—a division of responsibilities closely approximating an English ancestry that divided bankruptcy jurisdiction between bankruptcy commissioners and the courts of law and equity.\textsuperscript{25}

\textsuperscript{22} Cf. Block-Lieb, supra note 20, at 829-32 (proposing that Congress amend the general supplemental jurisdiction statute to address concerns unique to the bankruptcy context); Dunham, supra note 20, at 282 (suggesting "a clarifying amendment to either section 1367 or to . . . the provision referring bankruptcy cases to the bankruptcy judges" to "make explicit whether supplemental jurisdiction [sic] is available to the bankruptcy court").

\textsuperscript{23} 28 U.S.C. § 1334(a)-(b).

\textsuperscript{24} 458 U.S. 50 (1982), discussed infra notes 163-66 and accompanying text and Part III.A.1, notes 418-30 and accompanying text.

This Article, however, addresses an aspect of bankruptcy jurisdiction for which our English traditions provide no direct analogues: allocation of judicial power as between federal and state courts. As the concurrent nature of the above-quoted jurisdictional provision indicates, federal bankruptcy proceedings do not completely divest state courts of authority to adjudicate controversies implicating the debtor or the debtor's bankruptcy estate. The extent of state-court involvement in that regard, though, will be inversely proportional to that of the federal courts. This judicial federalism issue regarding the scope of federal bankruptcy jurisdiction (vis-à-vis state-court jurisdiction) was, of course, unknown to the English system. Yet, English notions regarding the nature of bankruptcy jurisdiction have permeated the development of federal bankruptcy jurisdiction in a subtle and even unconscious manner. Indeed, as revealed in this Part, the historical struggle to determine the nature and extent of federal "bankruptcy proceedings" has been largely a struggle against an English model of "bankruptcy proceedings." Nonetheless, a uniquely American conception of federal bankruptcy jurisdiction appeared in our early American bankruptcy statutes and persevered, such that a general grant of federal jurisdiction over "bankruptcy proceedings" was consistently construed to encompass all claims by or against a bankruptcy estate—what this Article refers to as a general federal bankruptcy jurisdiction.

The present jurisdictional statute, of course, goes beyond a general federal bankruptcy jurisdiction of all claims by and against the bankruptcy estate, in its "related to" jurisdiction over third-party disputes not directly involving the estate. This third-party jurisdiction, though, also has historical origins in

26. See Minnesota Co. v. St. Paul Co., 69 U.S. (2 Wall.) 609, 633 (1864) (noting that practice in the English courts is not determinative "in the sense which this court has sanctioned with reference to the line which divides the jurisdiction of the Federal courts from that of the State courts").

27. See infra notes 676-78 and accompanying text. See generally 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) (discussing the impact of history on modern bankruptcy jurisdiction).


29. See infra Part I.B.1, notes 74-111 and accompanying text.

30. See infra Part I.C, notes 162-211 and accompanying text.
notions of supplemental bankruptcy jurisdiction.\textsuperscript{31} Tracing the evolution of federal bankruptcy jurisdiction in this Part, therefore, will help us find the hidden meaning in the jurisdictional statute's delineation of "arising under," "arising in," and "related to" proceedings.\textsuperscript{32} The jurisdictional language employed in previous statutes echoes in the current statute, including "related to" jurisdiction of third-party disputes.\textsuperscript{33}

The historical survey in this Part is significant not only for lexical discovery of the origins of statutory jurisdictional phrases, but also because it plays a decisive role in the quest to find the outermost limits of third-party "related to" bankruptcy jurisdiction through a constitutional theory of federal bankruptcy jurisdiction. Both the historical concept of a general federal bankruptcy jurisdiction\textsuperscript{34} and ideas of supplemental bankruptcy jurisdiction\textsuperscript{35} reappear in this Article's constitutional theory. Moreover, the appropriate constitutional theory emerges only after the structure of these predecessor statutory provisions reminds us of the justiciable "case" or "controversy" to which the judicial power attaches in federal bankruptcy proceedings.\textsuperscript{36}

\textbf{A. Early American Bankruptcy Statutes: The Birth of a General Federal Bankruptcy Jurisdiction}

Bankruptcy would not become a permanent institution in this country until 1898.\textsuperscript{37} Earlier legislation proved sporadic and short-lived, but nonetheless contained jurisdictional provisions that elucidate the nature of "bankruptcy proceedings" in federal court. From those provisions, the Supreme Court forged a unique (given our English bankruptcy heritage) and enduring vision of a federal jurisdiction in bankruptcy. The bankrupt's

\textsuperscript{31} See infra Part I.B.2, notes 112-61 and accompanying text.
\textsuperscript{32} See infra Part III.A, notes 411-54 and accompanying text.
\textsuperscript{33} See infra Part I.B.2.b, notes 124-42 and accompanying text. For ease of later reference, quotations of jurisdictional provisions in this Part will add emphasis to those portions with linguistic similarity to the present jurisdictional statute.
\textsuperscript{34} See infra Part II.B, notes 253-327 and accompanying text.
\textsuperscript{35} See infra Part II.C, notes 328-95 and accompanying text.
\textsuperscript{36} See infra Part II.C.2, notes 343-69 and accompanying text.
"estate," central to the administration of the bankruptcy law, was also the focal jurisdictional concept, and federal jurisdiction of "bankruptcy proceedings" was established as a general jurisdiction over all claims by or against the estate.

1. The Bankruptcy Act of 1800

The very first United States bankruptcy statute, the Bankruptcy Act of 1800 (the 1800 Act), contained no general jurisdictional provisions, although it did provide that certain proceedings would take place in federal court. These provisions, however, did not rise to the level of a general federal bankruptcy jurisdiction over all claims by and against a bankruptcy estate.

Under the 1800 Act, the "estate and effects" of a bankrupt debtor passed to a fiduciary comparable to the modern-day bankruptcy trustee, designated an assignee, who would take such property in trust for the benefit of the bankrupt's creditors. The statute specifically provided for trial before a federal judge with respect to many justiciable controversies arising out of the administration of the bankrupt's estate, including adjudication of creditors' claims to share in the estate. Vesting of the bankrupt's estate in the assignee included among the estate

38. Ch. 19, 2 Stat. 19 (amended 1801 & 1802 and repealed 1803), reprinted in 10 COLLIER ON BANKRUPTCY 1721-37 (James Wm. Moore et al. eds., 14th ed. 1978) [hereinafter COLLIER (14th ed.)].

39. See Bankruptcy Act of 1800 § 6 (providing for appointment of an assignee and assignment of the "bankrupt's estate and effects" to the assignee); id. § 18 (stating that "assignment of [bankrupt's] estate . . . vest[s] the same in the assignees . . . in trust, for the use of all and every the creditors [sic] of such bankrupt, who shall come in and prove their debts"). See generally Comegys v. Vasse, 26 U.S. (1 Pet.) 193, 217-21 (1828) (Story, J.).

40. See Bankruptcy Act of 1800 § 3 (requiring a jury trial before a district court to determine whether a person was a merchant subject to a commission of bankruptcy and had committed an act of bankruptcy); id. § 52 (allowing for a jury trial, in the discretion of the district court, "in case either the bankrupt or creditor shall think him or herself aggrieved by the determination of the said judge or commissioners, relative to any material fact, in the commencement or progress of the said proceedings").

41. See id. § 58 (providing "[t]hat any creditor . . . [a]nd in like manner the assignee or assignees of such bankrupt may object to the consideration of any particular claim by the commissioners, and require that the same should be referred to a jury . . . and a jury shall be impaneled, as in other cases, to try the same in the circuit court for the district").
property any causes of action belonging to the bankrupt, such as "all the debts due to such bankrupt," and the 1800 Act authorized the assignee to sue on such actions to recover money or property for the estate. Nothing in the 1800 Act, however, expressly granted any jurisdiction over these suits to the federal courts, and the fleeting duration of that statute left no precedent regarding federal jurisdiction over such suits.

2. The Bankruptcy Act of 1841

After a nearly forty-year hiatus in federal bankruptcy law, the Bankruptcy Act of 1841 (the 1841 Act) brought the first explicit statutory grant of a general federal jurisdiction over all "bankruptcy proceedings." Although the 1841 Act was also very transitory, the purposes and scope of its jurisdictional provisions did receive meaningful judicial illumination, from which comes the

42. Id. § 13; see also id. § 5 (defining the bankrupt estate to include "all the estate, real and personal, of every nature and description to which the said bankrupt may be entitled, either in law or equity, in any manner whatsoever"); THOMAS COOPER, THE BANKRUPT LAW OF AMERICA COMPARED WITH THE BANKRUPT LAW OF ENGLAND 308, 317-19 (Fred B. Rothman & Co. 1992) (1801).

43. Section 13 of the 1800 Act provided that the assignee "shall have such remedy to recover the same, in his . . . own name . . . as such bankrupt might or could have had, if no commission of bankruptcy had issued." Bankruptcy Act of 1800 § 13.

44. The famous Midnight Judges Act of 1801, as part of a broader effort to widen federal judicial power, also amended the 1800 Act to give the circuit courts and district courts concurrent jurisdiction "of all cases which shall arise . . . under the [1800] act." Act of Feb. 13, 1801, ch. 4, § 12, 2 Stat. 89, 92 (repealed 1802) (emphasis added). See generally FALLON ET AL., supra note 2, at 34 (discussing the general political climate surrounding enactment and repeal of the Midnight Judges Act). The scope of this jurisdictional grant, however, was uncertain. One can find instances of 1800 Act assignees suing on the bankrupt's actions in federal court, but without specification of the grounds for federal jurisdiction. See, e.g., Richards v. Maryland Ins. Co., 12 U.S. (3 Cranch) 84 (1814); Tucker v. Oxley, 9 U.S. (5 Cranch) 34 (1809); Wood v. Owings, 5 U.S. (1 Cranch) 239 (1803). Given the construction placed on similar language in the jurisdictional grant of the subsequent 1841 Act, it is conceivable that the assignee could sue in federal court based upon federal bankruptcy jurisdiction over cases that "arise under" the bankruptcy statute. See infra Part I.A.2, notes 45-57 and accompanying text. Alternatively, these suits may have been maintained in federal court based upon diversity of citizenship as between the bankrupt and the defendant—jurisdictional standing to which the assignee may have succeeded by virtue of section 13 of the 1800 Act. See Bankruptcy Act of 1800 § 13, quoted supra note 43; cf. infra notes 81, 92 and accompanying text.

notion of a general federal bankruptcy jurisdiction over all claims by and against a bankruptcy estate.

The operative provision of the 1841 Act gave the federal district courts “jurisdiction in all matters and proceedings in bankruptcy arising under this [1841] act.”\(^{46}\) The statute specified certain classes of “cases and controversies in bankruptcy” encompassed within this broad jurisdictional grant, including the catchall category of “all acts, matters, and things to be done under and in virtue of the bankruptcy.”\(^{47}\) In the prominent case of *Ex parte Christy*,\(^ {48}\) Justice Story accorded these 1841 Act jurisdictional provisions a most generous content.

In construing the reach of federal bankruptcy jurisdiction under the 1841 Act, Justice Story first noted that “the assignee is vested with all the rights, titles, powers, and authorities, to sell, manage, and dispose of the estate and property of the bankrupt, . . . and to sue for and defend the same, . . . as fully as the bankrupt might before his bankruptcy.”\(^ {49}\) Thus, he interpreted jurisdiction over “all matters and proceedings in bankruptcy arising under” the 1841 Act to “reach[,] all cases where the rights, claims, and property of the bankrupt, or those of his assignee, are concerned, since they are matters arising under the act, and are necessarily involved in the due administration and settlement of the bankrupt’s estate.”\(^ {50}\) Accordingly, federal district courts possessed jurisdiction over assignee suits on a bankrupt’s causes of action against others as part of the “bankruptcy proceedings.”\(^ {51}\)

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46. Bankruptcy Act of 1841 § 6 (emphasis added).
47. *Id.* (emphasis added). That particular clause provided, in full:

And the jurisdiction hereby conferred on the district court shall extend to all cases and controversies in bankruptcy arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to all cases and controversies between such creditor or creditors and the assignee of the estate, whether in office or removed; to all cases and controversies between such assignee and the bankrupt, and to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy.

*Id.*

48. 44 U.S. (3 How.) 292 (1845).
49. *Id.* at 312; see Bankruptcy Act of 1841 § 3.
51. At issue in *Ex parte Christy* was the assignee’s suit to recover real estate
The holding in *Ex parte Christy* is a notable interpretation for several reasons. Initially, Justice Story included these assignee suits among the federal "bankruptcy proceedings" even though such assignee suits to recover money or property for the estate were *not* specifically designated as a class of "cases and controversies in bankruptcy" falling within the general jurisdictional grant over "proceedings in bankruptcy." Additionally, Justice Story considered such suits to be within the district court's general jurisdiction over the "bankruptcy proceedings" in the face of another more specific section that expressly placed jurisdiction over such assignee suits—denoted "suits at law and in equity" against a so-called adverse claimant—in both of the federal trial courts of the day: the district courts and the now-defunct circuit courts. Thus, Story attributed these assignee suits to the gen-

seized from the bankrupt in mortgage foreclosure proceedings in state court prior to commencement of the bankruptcy proceedings, where the assignee was challenging the validity of the underlying mortgages. *See id.* at 293-97, 308-11; *see also* Nugent v. Boyd, 44 U.S. (3 How.) 426, 426-28, 434-37 (1845) (finding federal bankruptcy jurisdiction under the 1841 Act where the "controversy was between the bankrupt's assignee, on one side, and a mortgage creditor and purchasers at the sale under state process of the mortgaged premises, on the other"). Justice Story, sitting as a Circuit Justice, previously had held that the 1841 Act's general bankruptcy jurisdiction extended to an assignee suit to collect a debt owing to the bankrupt. *See* Mitchell v. Great Works Milling & Mfg. Co., 17 F. Cas. 496, 496, 499-501 (C.C.D. Me. 1843) (No. 9662). An intriguing aside raises the possibility that Justice Story was tacitly functioning in dual capacities, as he is widely reputed to have been the principal draftsman of the 1841 Act. *See* Peter J. Coleman, Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy, 1607-1900, at 23 (1974); Gerald T. Dunne, Justice Joseph Story and the Rise of the Supreme Court 385 (1970); James McClellan, Joseph Story and the American Constitution 258 (1971); R. Kent Newmyer, Supreme Court Justice Joseph Story: Statesman of the Old Republic 329 (1985); 2 William W. Story, Life and Letters of Joseph Story 407 (New Book Mfg. Co. 1971) (1851); Morris Weisman, Story and Webster and the Bankruptcy Act of 1841, 46 Com. L.J. 4 (1941).

53. *See* Bankruptcy Act of 1841 § 6, quoted *supra* notes 46-47 and accompanying text.

54. For a discussion of the relationship between the district courts and the old circuit courts, see Fallon et al., *supra* note 2, at 28-31. Section 8 of the 1841 Act provided as follows:

*And be it further enacted,* That the circuit court within and for the district where the decree of bankruptcy is passed, shall have concurrent jurisdiction with the district court of the same district of all suits at law and in equity which may and shall be brought by any assignee of the bankrupt against any person or persons claiming an adverse interest, or
eral provision for "bankruptcy proceedings," which made no specific mention of such suits in its illustrative listing of "bankruptcy proceedings," and notwithstanding the existence of a separate stand-alone provision devoted exclusively to jurisdiction of such suits.

Moreover, and most significantly, Justice Story found the general federal jurisdiction over "bankruptcy proceedings" to reach these assignee suits to recover money or property for the estate, despite the fact that such suits would not be within the more circumscribed English notion of "bankruptcy proceedings." English assignees could not pursue such an action in the "bankruptcy proceedings" in the English Court of Bankruptcy. The assignee could proceed on such a "suit at law or in equity" only through a formal complaint in a court of law or by a formal bill in chancery, depending upon the character of the action itself as either legal or equitable in nature. Thus, Justice Story's conception of federal "bankruptcy proceedings" in an American federalist scheme nonexistent in England, perhaps not surprisingly, was an incisive departure from our English traditions and ideas of a jurisdiction in bankruptcy.55

55 Only a few years before Justice Story penned the Ex parte Christy opinion, Vice-Chancellor Shadwell concisely summarized the reach of English bankruptcy jurisdiction this way:

[T]he jurisdiction in bankruptcy has authority to deal only with that which is the bankrupt's estate; but has no power to determine what is the bankrupt's estate. If the question be a legal one it must be tried at law; and if it be an equitable one, it must be decided in this Court. But when you have determined what is the property of the bankrupt, the whole administration of it falls under the jurisdiction of the Court in bankruptcy.

Halford v. Gillow, 60 Eng. Rep. 18, 20 (Ch. 1842). Justice Story's vision of a general federal bankruptcy jurisdiction, then, to the extent it encompassed assignee disputes with adverse claimants, was broader than that which had evolved in England regarding the jurisdiction of bankruptcy commissioners under the supervision of the Lord Chancellor, subsequently vested in "The Court of Bankruptcy" in 1831. See John C. McCoid, II, Right to Jury Trial in Bankruptcy: Granfinanciera, S.A. v. Nordberg, 65 AM. BANKR. L.J. 15, 29-33 (1991); Plank, supra note 25, at 575-78,
As Professor McCoid has noted, "[i]f ever there was a precedent for the legitimacy of a bankruptcy court with a broad jurisdiction, it is Ex parte Christy," and pursuant thereto, a general federal jurisdiction of all "matters and proceedings in bankruptcy" extended to "the ascertainment and adjustment of all claims and rights in favor of or against the bankrupt's estate." Thus, in our federal system of dual sovereigns with both state and federal courts, the American model of bankruptcy jurisdiction was established as that of a general federal jurisdiction over any claim to which a bankruptcy estate is a party, whether that claim is made by or against the estate.

3. The Bankruptcy Act of 1867

The next bankruptcy statute, the Bankruptcy Act of 1867 (the 1867 Act), contained jurisdictional provisions very similar to those of the 1841 Act, and the Supreme Court afforded these provisions a similarly broad ambit. The federal district courts exercised "original jurisdiction . . . in all matters and proceedings in bankruptcy," which extended to certain specified "cases and controversies" and "to all acts, matters, and things to be done under and in virtue of the bankruptcy." Like its immediate predecessor, the 1867 Act also gave the old federal circuit

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56. McCoid, supra note 55, at 34-35.
57. Ex parte Christy, 44 U.S. (3 How.) 292, 314 (1845).
59. Bankruptcy Act of 1867 § 1 (emphasis added). The specified categories of controversies falling within this general federal bankruptcy jurisdiction were as follows: And the jurisdiction hereby conferred shall extend to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all parties; and to the marshalling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors; and to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy.

Id.
courts jurisdiction over an assignee’s “suits at law or in equity” to recover money or property from an adverse claimant.\(^6\) Circuit court jurisdiction over such assignee suits, though, was concurrent with the district courts’ general jurisdiction over “all matters and proceedings in bankruptcy.” Moreover, that general federal bankruptcy jurisdiction, in what seems to have been a codification of the Ex parte Christy holding, now specifically embraced “the collection of all the assets of the bankrupt”\(^6\) and, thus, subsumed assignee suits against adverse claimants.\(^6\)

As established through the 1841 and 1867 Acts, then, a general federal jurisdiction of “all matters and proceedings in bankruptcy” entailed: (1) adjudication of all claims by and against the estate, which determined the full extent of the estate property and all those entitled to share in it, and (2) all other proceedings incident to administering the estate for the benefit of creditors.\(^6\)

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60. See supra note 54 and accompanying text. Section 2 of the 1867 Act provided, in relevant part:

Said circuit courts shall also have concurrent jurisdiction with the district courts . . . of all suits at law or in equity which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest or owing any debt to such bankrupt, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to, or vested in such assignee; . . . .

Bankruptcy Act of 1867 § 2.

61. Id. § 1.


63. These two types of proceedings falling within general federal bankruptcy jurisdiction were articulated by Justice Bradley as follows:

Of this [district court bankruptcy jurisdiction] there are two distinct classes: first, jurisdiction as a court of bankruptcy over the proceedings in bankruptcy initiated by the petition, and ending in the distribution of assets amongst the creditors, and the discharge or refusal of a discharge of the bankrupt; secondly, jurisdiction as an ordinary court, of suits at law or in equity brought by or against the assignee in reference to alleged property of the bankrupt, or to claims alleged to be due from or to him. The language conferring this jurisdiction of the district courts is very broad and general. It is, that they shall have original jurisdiction . . . in all matters and proceedings in bankruptcy. The various branches of this jurisdiction are afterwards specified; resulting, however, in the two general classes before mentioned.

Lathrop v. Drake, 91 U.S. at 517. The suit at issue in Lathrop was by an assignee
The 1867 Act, however, was repealed in 1878, and this expansive, all-encompassing approach to federal bankruptcy jurisdiction was not replicated when federal bankruptcy legislation next appeared, twenty years later. Yet, the concept of federal jurisdiction in "bankruptcy proceedings" as a general grant of judicial power over all claims by and against the bankruptcy estate, nonetheless, persisted.

B. The Bankruptcy Act of 1898:
A Federalism-Inspired Retrenchment Forces Reaffirmation of the Nature of Federal Bankruptcy Proceedings and Spawns Supplemental Bankruptcy Jurisdiction

The expanse of a general federal bankruptcy jurisdiction over all claims by and against a bankruptcy estate, under the 1841 and 1867 Acts, was seen as a concomitant to effectual and efficient administration of bankruptcy estates. This jurisdictional scheme, however, produced a persistent tension between the federal interest in estate administration and the localized interests of particular litigants, witnesses, and attorneys, who often found the federal forum inconvenient as compared with state courts. In fact, each of the three early "temporary" bankruptcy statutes was repealed, in large part, because of the relative inconvenience of the federal courts. Furthermore, in the making of the first bankruptcy statute in the era of what has since been "permanent" federal bankruptcy law—the Bankruptcy Act of 1898 (the 1898 Act)—there were widely held "states' rights"
misgivings about conferring too much power on the federal courts. This was particularly true amongst Southerners, who deeply disdained the “carpetbagging” federal judges. The 1898 Act, therefore, responded to this animosity toward a general federal jurisdiction over “all matters and proceedings in bankruptcy” by narrowing the compass of federal bankruptcy jurisdiction. The structure of those 1898 Act jurisdictional provisions, although considerably more complex than predecessors or present-day progeny, provides meaningful insights for a rational conception of the nature of federal bankruptcy jurisdiction. This Part I.B, therefore, analyzes the salient features of the 1898 Act.

In retracting federal bankruptcy jurisdiction, the 1898 Act essentially returned to the English, bifurcated model of bankruptcy jurisdiction. Thus, the federal courts, for the most part, were affirmatively denied jurisdiction over suits to recover money or property from an adverse claimant brought by the estate’s representative, now known as the bankruptcy trustee. In our federal system, then, absence of federal jurisdiction over a trustee’s suits meant that the trustee had to bring such suits in state court. As explored below, the return of the English model of bankruptcy jurisdiction also brought a perhaps inevitable}


67. See David A. Skeel, Jr., The Genius of the 1898 Bankruptcy Act, 15 BANKR. DEV. J. 321, 323, 331-32, 334-35 (1999); Charles Jordan Tabb, A Century of Regress or Progress? A Political History of Bankruptcy Legislation in 1898 and 1998, 15 BANKR. DEV. J. 343, 355, 359-60, 362-64, 380 (1999). The more general mood of this period was also one of reducing the extent of federal jurisdiction, which had surged precipitously through the enactments of Reconstruction Congresses. See FALLON ET AL., supra note 2, at 35-37.

68. See Williams v. Austrian, 331 U.S. 642, 648-49 & n.15 (1947); id. at 662-67 (Frankfurter, J., dissenting); Schumacher v. Beeler, 293 U.S. 367, 374 (1934); Toledo Fence & Post Co. v. Lyons, 290 F. 637, 645 (6th Cir. 1923); 31 CONG. REC. 1785 (1898) (statement of Rep. Henderson, Chairman, House Judiciary Committee). Even with its measures to abate federal bankruptcy jurisdiction, the principal objection to the 1898 Act was “with the extensive powers it confers on the Federal courts.” H.R. REP. NO. 55-65, pt. 2, at 149 (1898) (entitled “Views of the Minority”); see also 31 CONG. REC. 1793 (1898) (statement of Rep. Underwood); id. at 1803-04 (statement of Rep. Henry).

69. See supra notes 25, 55 and accompanying text.

70. See infra Part I.B.1.a, notes 74-100 and accompanying text.
conceptual struggle between the English and early American visions regarding the nature of "bankruptcy proceedings." These competing paradigms clashed after the 1938 corporate reorganization amendments, which forced the issue once again. In 1947, though, in the William v. Austrian case, the early American model of a federal bankruptcy jurisdiction, as originally conceived by Justice Story, ultimately prevailed. The idea of a federal jurisdiction in "bankruptcy proceedings" endured as a general jurisdiction over all claims by and against a bankruptcy estate, including a trustee's suit to recover money or property from an adverse claimant—even though such a suit would not be a part of the more limited English concept of bankruptcy jurisdiction and "bankruptcy proceedings."  

By sacrificing efficient administration of bankruptcy estates to a bankruptcy jurisdiction that was bifurcated between state and federal courts, the 1898 Act increased the need to maintain litigation efficiencies through other devices. Thus, as this Part I.B discloses, both the statute itself and judicial practice expanded the reach of federal bankruptcy jurisdiction through identifiable applications of the modern concept of supplemental jurisdiction. In our search for the full range of federal bankruptcy jurisdiction, then, we can draw on the experience of both (1) the 1898 Act's ultimate renewal of the concept of a general federal bankruptcy jurisdiction over all claims by and against a bankruptcy estate, and (2) the 1898 Act's formation and development of principles of supplemental bankruptcy jurisdiction.

1. General Federal Jurisdiction over Claims by and Against the Bankruptcy Estate

Like prior acts, the 1898 Act also employed the jurisdictional language of federal "bankruptcy proceedings." The 1898 Act, however, restricted federal bankruptcy jurisdiction by reference to plenary suits "at law and in equity." The statutory labyrinth by which this was accomplished was so ensnared in the differing procedural conventions for bankruptcy litigation (summary ver-

71. 331 U.S. 642 (1947), discussed infra notes 107-09 and accompanying text.
72. See infra Part I.B.1b, notes 101-11 and accompanying text.
73. See infra Part I.B.2, notes 112-61 and accompanying text.
sus plenary process) that it threatened to erase the established understanding of the scope of federal "bankruptcy proceedings." After the 1938 corporate reorganization amendments, though, the Supreme Court resuscitated the early American notion of federal "bankruptcy proceedings" as a general jurisdiction over all claims to which the bankruptcy estate is a party, whether made by or against the estate.

a. Section 23's Restrictions and Misleading Distinction

The 1898 Act designated the federal district courts as "courts of bankruptcy,"\(^74\) and as originally enacted, section 2 of the 1898 Act vested those courts "with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings,"\(^75\) later changed to "jurisdiction in proceedings under this [1898] Act."\(^76\) As with previous statutes, section 2 then enumerated specific matters within the district court's general jurisdiction over the bankruptcy proceedings.\(^77\) The broadest of these jurisdictional categories was the extensive commission in section 2a(7) to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided"\(^78\)—thus, signaling the substantial restrictions on federal bankruptcy jurisdiction effected by the 1898 Act.

Like both the 1841 and 1867 Acts, the 1898 Act also contained a separate section addressing the jurisdiction of the federal circuit courts over trustee suits to recover money or property

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74. Bankruptcy Act of 1898, supra note 66, § 1(10).
75. Bankruptcy Act of 1898, Pub. L. No. 55-171, 30 Stat. 544, 545 (emphasis added); see also 1 COLLIER (14th ed.), supra note 38, ¶ 2.02[1] (reprinting the original text of 1898 Act § 2).
76. Chandler Act of 1938, Pub. L. No. 75-696, 52 Stat. 840, 842 (emphasis added); see also 1 COLLIER (14th ed.), supra note 38, ¶ 2.02[2] (marking the text of 1898 Act § 2 to reflect the 1938 amendments); infra note 104 (explaining the superficial nature of this change).
77. See supra notes 47, 59 and accompanying text. The concluding clause of section 2 also contained the saving provision, that "nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated." Bankruptcy Act of 1898, supra note 66, § 2b.
78. Bankruptcy Act of 1898, supra note 66, § 2a(7) (emphasis added).
from an adverse claimant. This section 23, though, was also the provision whereby Congress “otherwise provided” and retracted federal bankruptcy jurisdiction. In the process, section 23 triggered substantial uncertainty regarding the conceptual nature of federal “bankruptcy proceedings.”

In its original form, section 23 (a and b) of the 1898 Act provided as follows:

SEC. 23. JURISDICTION OF UNITED STATES AND STATE COURTS.—a The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

b Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant.

Understanding the import and controversy generated by section 23 requires some background in the differing procedural modes of bankruptcy litigation. Section 23a’s reference to “controversies at law and in equity” plainly suggested the established notion of a plenary suit, which was an ordinary civil action, as distinguished from summary bankruptcy proceedings.

79. See supra notes 54, 60 and accompanying text.
80. See Bardes v. Hawarden Bank, 178 U.S. 524, 535 (1900) (noting that the “words herein otherwise provided” [in section 2a(7)] evidently refer to section 23”).
81. Bankruptcy Act of 1898, 30 Stat. at 552 (emphasis added); see also 10 COLLIER (14th ed.), supra note 38, at 1799 & nn.7-9 (reprinting the original text of 1898 Act § 23a-b).
82. “[J]urisdiction . . . of all suits at law or in equity . . . is the regular jurisdiction between party and party, as described in the Judiciary Act and the third article of the Constitution,” Morgan v. Thornhill, 78 U.S. (11 Wall.) 65, 80 (1870), and such an action “could only be enforced by a plenary suit, at law or in equity,” Bardes, 178 U.S. at 532. A plenary suit was conducted according to normal rules of civil procedure, including summons and complaint, formal pleadings, discovery and trial, all according to the timetables for and in precisely the same manner as a normal civil action. Summary proceedings, by contrast and as the name indicates, were much less
Because circuit court jurisdiction under the 1841 and 1867 Acts was over assignee "suits at law or in equity" against an adverse claimant, this required an independent plenary suit in the circuit court, commenced by a formal bill or complaint. Section 23a of the 1898 Act, by referring to "controversies at law or in equity" in circuit court, likewise addressed such plenary circuit court suits against adverse claimants. The manner in which the district courts previously exercised jurisdiction over "all matters and proceedings in bankruptcy," though, was largely through more informal summary proceedings.

By its terms, the district court's general federal bankruptcy jurisdiction under the 1841 Act was "to be exercised summarily, in the nature of summary proceedings in equity." The 1867 Act did not specify the process—summary or plenary—for district courts to use in exercising their general bankruptcy jurisdiction, but the Supreme Court held that actions against adverse claimants were governed by a summary process, initiated by a motion or petition, with a relatively short notice period before a hearing, where the evidence would often be presented through affidavits. See 2 COLLIER (14th ed.), supra note 38, ¶ 23.02[2].

83. Bankruptcy Act of 1867, ch. 176, § 2, 14 Stat. 517, 518 (repealed 1878), quoted supra note 60; see also Bankruptcy Act of 1841, ch. 9, § 8, 5 Stat. 440, 446 (repealed 1843), quoted supra note 54.


86. Bankruptcy Act of 1867 § 1; Bankruptcy Act of 1841 § 6.

87. Bankruptcy Act of 1841 § 6. Summary process in bankruptcy proceedings was a tradition imported from England. See Ex parte Matthews, 26 Eng. Rep. 1266, 1267 (Ch. 1754); COOPER, supra note 42, at 117. Assignee suits against adverse claimants, though, were not encompassed within the English "bankruptcy" jurisdiction and, thus, required plenary suit in a court of law or equity. See supra note 55 and accompanying text. Justice Story, nonetheless, concluded that the 1841 Act's general summary jurisdiction of "proceedings in bankruptcy" in the district courts encompassed assignee disputes with adverse claimants via summary process. See Christy, 44 U.S. (3 How.) at 314, 317. Although subsequent bankruptcy statutes generally were construed to require plenary proceedings in actions to recover money or property from adverse claimants in either federal district or circuit court, Justice Story's original notion, that such actions are subsumed within the scope of general federal bankruptcy jurisdiction, endured. As explained in the text, however, the manner of proceeding (summary versus plenary) continued to complicate inquiries into the nature and extent of jurisdictional grants over "bankruptcy proceedings."
The district courts, though, summarily resolved all other bankruptcy proceedings brought before them.\(^8\) The procedural backdrop against which section 23 of the 1898 Act was enacted, therefore, was one in which assignees pursued adverse claimants through formal plenary suits commenced in either a federal district or circuit court; all other "bankruptcy proceedings," however, were conducted by summary processes in district court.

The obvious intent of section 23 of the 1898 Act, in sharp contradistinction to the 1841 and 1867 Acts, was to contract the bankruptcy jurisdiction of the federal courts. The Supreme Court, thus, interpreted section 23a and 23b, in concert, as withholding jurisdiction from both circuit and district courts in trustee suits against adverse claimants, except in the limited circumstances specified.\(^9\) Section 23a accomplished this by permitting a trustee's plenary suit "at law or in equity" in federal circuit court only in those instances where the bankrupt would have independent grounds for maintaining the cause of action in circuit court.\(^9\) Section 23b, then, although not referring specifically to the federal district courts, but to state and federal courts in general, likewise provided that the federal district courts

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\(^8\) See Marshall v. Knox, 83 U.S. (16 Wall.) at 554-57; Smith v. Mason, 81 U.S. (14 Wall.) at 429-33 & 432 n.† (citing Ex parte Bacon, 2 Molloy 441). In doing so, the Court adopted the English practice requiring a formal plenary suit in assignee actions to recover money or property from an adverse claimant. See GEORGE TAYLOR, THE BANKRUPT LAW, ACT OF MARCH 2, 1867, WITH NOTES AND REFERENCES TO ENGLISH DECISIONS 61-62 (Washington, D.C., Wm. H. Moore 1867) (citing Ex parte Bacon).


\(^9\) See Bardes, 178 U.S. at 525-27, 534-39. The Bardes case held that section 23b limited the jurisdiction of federal courts to entertain a trustee suit to recover a prebankruptcy fraudulent conveyance by the bankrupt. See id. at 539. After the Bardes case, Congress amended section 23b to except from its limitations trustee suits to avoid liens and recover preferential and fraudulent transfers. See Act of June 25, 1910, Pub. L. No. 61-294, § 7, 36 Stat. 838, 840; Act of Feb. 5, 1903, Pub. L. No. 57-62, § 8, 32 Stat. 797, 798-99. Thus, while overturning the precise holding of the Bardes case, Congress left intact its interpretation of section 23b as applied to all other trustee suits against adverse claimants.

\(^9\) See, e.g., Bush v. Elliott, 202 U.S. 477, 477-78, 480-84 (1906) (finding circuit court jurisdiction over a trustee's suit where the bankrupt was of diverse citizenship from the defendant).
could entertain “suits by the trustee” only if the bankrupt could have sued in district court or the defendant consented to district court jurisdiction.

The theoretical conundrum introduced by section 23 came with its juxtaposition in subsection 23a of “controversies at law and in equity, as distinguished from proceedings in bankruptcy.” Section 23a seemed to draw such a sharp dichotomy between plenary suits “at law and in equity” against adverse claimants, on the one hand, and “proceedings in bankruptcy,” on the other, that a plenary suit against an adverse claimant could in no way be considered a bankruptcy proceeding—an implication reinforced by the more limited English notion of “bankruptcy proceedings,” which did not include plenary suits against adverse claimants. Recall, however, that under both the 1841 and 1867 Acts, general federal jurisdiction in the district courts over “all matters and proceedings in bankruptcy” fully subsumed suits “at law and in equity” against adverse claimants, including those under the 1867 Act which could be maintained only through a formal plenary suit.

92. See, e.g., Spencer v. Duplan Silk Co., 191 U.S. 526, 526-27, 531-32 (1903) (finding district court jurisdiction over a trustee’s suit where both the bankrupt and the trustee were of diverse citizenship from the defendant).

93. See, e.g., Schumacher v. Beeler, 293 U.S. 367, 368-71, 377 (1934). Although the 1867 Act practice requiring a formal plenary suit against an adverse claimant continued under the 1898 Act, the concept of jurisdiction by consent also extended to the manner of proceeding, such that the defendant could consent to both federal jurisdiction and summary process. See 2 COLLIER (14th ed.), supra note 38, ¶ 23.08, 23.14.

94. Bankruptcy Act of 1898, supra note 66, § 23a (emphasis added), quoted as originally enacted supra text accompanying note 81.

95. See supra notes 25, 55, 69-70 and accompanying text; cf. 1 WM. MILLER COLLIER, THE LAW AND PRACTICE IN BANKRUPTCY UNDER THE NATIONAL BANKRUPTCY ACT OF 1898 § 2, at 38 (Frank B. Gilbert & Fred E. Rosbrook eds., 13th ed. 1923) [hereinafter COLLIER (13th ed.)] (describing “the district courts while sitting in bankruptcy” as “exercising a distinct jurisdiction” analogous to that of “[t]he English court of bankruptcy in the London district [which] is in effect a separate court, devoted exclusively to bankruptcy matters”).

The misleading "distinction" intimated by section 23a was not only inconsistent with the jurisprudence of the 1841 and 1867 Acts, but in addition, the statutory "distinction" could be fully explained by the fact that section 23a, in its original form, applied only to the circuit courts. Both the 1841 and 1867 Acts strictly limited the original bankruptcy jurisdiction of the circuit courts to plenary suits "at law and in equity" against adverse claimants; this contrasted sharply with the broader, general bankruptcy jurisdiction that those previous Acts gave to the district courts over "all matters and proceedings in bankruptcy." A comparison of section 23a's constraints on the jurisdiction of the circuit courts with section 23b's circumscription of district court jurisdiction reinforces this interpretation. With respect to the district courts, who had enjoyed a general jurisdiction over "all matters and proceedings in bankruptcy"...
bankruptcy" under both the 1841 and 1867 Acts, section 23b restricted their jurisdiction with nothing more than a terse reference to "suits by the trustee," without any mention of or differentiation from the more general concept of "proceedings in bankruptcy." The false dichotomy suggested by section 23a in addressing the peculiarities of circuit court jurisdiction, though, directly (and impertinently) implicated the district courts after the demise of the circuit courts in 1911, because section 23a thereafter expressly governed jurisdiction of the district courts over "controversies at law or in equity, as distinguished from proceedings in bankruptcy."

b. The "Bankruptcy Proceedings" in a Corporate Reorganization

The conceptual uncertainty wrought by section 23 regarding the nature and scope of federal "bankruptcy proceedings" came to a head in 1938, when Congress enacted the corporate reorganization provisions of Chapter X. With the enactment of Chapter X, Congress evidently sought to afford the federal courts broader jurisdiction in reorganization proceedings than they enjoyed in "straight" or "ordinary" bankruptcy liquidation proceedings. Thus, the 1938 amendments expressly made section 23 inapplicable in Chapter X reorganization proceedings, and thereby, activated the full breadth of section 2's general federal jurisdiction.

99. Compare Bankruptcy Act of 1898, supra note 66, § 23b, with id. § 23a, both quoted as originally enacted supra text accompanying note 81.
100. Compare Bankruptcy Act of 1898, supra note 66, § 23b, with id. § 23a, both quoted as originally enacted supra text accompanying note 81.
102. For a review of the legislative background, see Williams v. Austrian, 331 U.S. 642, 654-58, 661-62 (1947), and id. at 675-79 (Frankfurter, J., dissenting).
103. See Bankruptcy Act of 1898, supra note 66, § 102.
"jurisdiction in bankruptcy proceedings" to "cause the estates of bankrupts to be collected" in corporate reorganization proceedings. If, however, a trustee's plenary suit against an adverse claimant was not a "bankruptcy proceeding," as insinuated by section 23a, merely abrogating section 23 in reorganization proceedings would not, in itself, expand federal jurisdiction to permit federal courts to entertain such plenary suits of reorganization trustees.

The Supreme Court resolved this issue in the momentous case of Williams v. Austrian, which rationalized general federal jurisdiction of "bankruptcy proceedings" and reaffirmed Justice

104. See supra note 75 and accompanying text. In including "reorganization" proceedings within the scope of the Act, the term "bankruptcy proceedings" in section 2 was redesignated "proceedings under this [1898] Act." See supra note 76 and accompanying text. Chapter X's corporate reorganization predecessor was section 77B, enacted in 1934, which expressly provided that "courts of bankruptcy shall exercise original jurisdiction in proceedings for relief of debtors, as provided in section 77B" and "[in proceedings under this section [77B] . . . the jurisdiction and powers of the court . . . with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication [as a bankrupt] had been filed." Act of June 7, 1934, Pub. L. No. 73-296, §§ 77A, 77B(o), 48 Stat. 911, 912, 922. Prior to the enactment of section 77B, a corporate reorganization could be accomplished through the 1898 Act's composition provisions. See 6 COLLIER (14th ed.), supra note 38, ¶ 0.03, at 21-22, 25-28. And the Supreme Court clearly considered federal jurisdiction of "bankruptcy" proceedings to include compositions. See Wilmot v. Mudge, 103 U.S. 217, 219 (1880) (interpreting the 1867 Act, a "composition proceeding is . . . a part of the proceedings in bankruptcy, and one of the modes which the bankrupt law authorizes of releasing the debtor and securing to his creditors an equal share of his means"). Thus, the 1938 change from jurisdiction in "bankruptcy proceedings" to "proceedings under this [1898] Act" appears to be a purely cosmetic one.

105. Bankruptcy Act of 1898, supra note 66, § 2a(7), quoted supra text accompanying note 78.

106. Chapter X also contained a provision giving the reorganization court all the powers of a federal court presiding over an equity receivership. See Bankruptcy Act of 1898, supra note 66, § 115. As discussed infra Part II.C.1, notes 332-42 and accompanying text, a federal receivership court had jurisdiction over plenary suits by the receiver against adverse claimants. It was unclear, however, whether the Chapter X provision giving the reorganization court the "powers" of a receivership court was jurisdictional in nature. See Williams v. Austrian, 331 U.S. at 659-60 & n.45; THOMAS K. FINLETTER, THE LAW OF BANKRUPTCY REORGANIZATION 181-82 (1939); 1 JAMES WM. MOORE & ROBERT STEPHEN OGLEBAY, MOORE AND OGLEBAY ON CORPORATE REORGANIZATION ¶ 3.18, at 665 & n.34 (1948).

107. 331 U.S. 642 (1947). At issue was federal district court jurisdiction over the Chapter X trustees' state-law action against officers and directors of the corporate debtor alleging a conspiracy to misappropriate corporate assets. See id. at 645-46.
Story's broad view of the concept. The Court confirmed (1) that the lineage of section 2's general jurisdiction over "bankruptcy proceedings" and "proceedings under this [1898] Act" is directly traceable to 1867 and 1841 Act jurisdiction of "all matters and proceedings in bankruptcy," and (2) that such a general federal bankruptcy jurisdiction fully embraces plenary trustee suits against adverse claimants.

Thus, despite momentary uncertainties caused by inartful legislative drafting and variations in the mode of particular proceedings (i.e., summary versus plenary)—a distinction that con-

108. See id. at 646-48, 661 (citing with approval Babbitt v. Dutcher, 216 U.S. 102, 106-08 (1910) (tracing 1898 Act § 2 to 1867 Act § 1 to 1841 Act § 6)). In fact, the "proceedings under this [1898] Act" jurisdictional language has specific ancestry in every previous bankruptcy statute. See Bankruptcy Act of 1867, ch. 176, § 1, 14 Stat. 517, 517, 518 (repealed 1878) (jurisdiction of "all matters and proceedings in bankruptcy," including "all acts, matters, and things to be done under and in virtue of the bankruptcy" (emphasis added)), discussed supra note 59 and accompanying text; Bankruptcy Act of 1841, ch. 9, § 6, 5 Stat. 440, 445 (repealed 1843) (jurisdiction of "all matters and proceedings in bankruptcy arising under this [1841] act," including "all acts, matters, and things to be done under and in virtue of the bankruptcy" (emphasis added)), discussed supra notes 46-47 and accompanying text; Act of Feb. 13, 1801, ch. 4, § 12, 2 Stat. 89, 92 (repealed 1802) (jurisdiction of "all cases which shall arise . . . under the [1800] act" (emphasis added)), discussed supra note 44.

109. See Williams v. Austrian, 331 U.S. at 646-62; William T. Plumb, Jr., The Tax Recommendations of the Commission on the Bankruptcy Laws—Tax Procedures, 88 HARV. L. REV. 1360, 1456 n.548 (1975) ("Although Christy . . . was viewed generally as a discredited dictum in Bardes v. Hawarden Bank, the Bardes reading of the earlier Acts was itself repudiated by the Court in Williams v. Austrian." (citations omitted)).

110. The confusion was greatly compounded by a compilation error in the Revised Statutes of 1874 that inaccurately denoted federal jurisdiction over "all matters and proceedings in bankruptcy" to be exclusive of state court jurisdiction—an error that was not corrected until 1978. See infra note 358 and accompanying text. This error, though, when combined with section 23's misleading distinction between "proceedings in bankruptcy" and "controversies at law and in equity," generated a deceptively attractive (but false) impression that federal jurisdiction over "proceedings in bankruptcy" was exclusive, but the "exclusive jurisdiction . . . does not extend to matters at law or in equity which may grow out of bankruptcy proceedings." 1 LOVELAND, supra note 65, § 28, at 96 (noting that supposedly "[t]his principle is recognized by section 23 of the act of 1898"); see also REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. No. 93-137, pt. II, at 32 (1973) [hereinafter 1973 COMM'N REPORT] (stating that for "independent suits between assignees in bankruptcy and adverse claimants, . . . concurrent jurisdiction . . . was recognized to lie in the federal and state courts" and thus "inferentially the jurisdiction of proceedings in bankruptcy was exclusively vested in the federal courts").
continues to influence thinking about and the jurisprudence of bankruptcy jurisdiction— the concept of a general federal bankruptcy jurisdiction under the 1898 Act remained the same as under the 1841 and 1867 Acts. General federal jurisdiction over "bankruptcy proceedings" was ineluctably linked to the construct of the bankruptcy estate and its administration, including resolution of all claims by and against the estate. A general federal bankruptcy jurisdiction over all claims to which the estate was party, though, did not fix the absolute capacity of federal bankruptcy jurisdiction, as the 1898 Act itself further expanded federal bankruptcy jurisdiction to certain third-party disputes not directly involving the bankruptcy estate. This and other examples represent the apparent origins of supplemental bankruptcy jurisdiction.

2. Supplemental Bankruptcy Jurisdiction

There was an appreciable recognition under the 1898 Act that, although somewhat inconsistent with the general desire to withhold the full measure of bankruptcy jurisdiction from the federal courts, administration of the estate might implicate controversies not directly involving the estate itself, but nonetheless properly resolved in federal court as an incident to federal jurisdiction over the bankruptcy estate. Furthermore, the federal courts' developing practice of entertaining otherwise jurisdictionally

111. The most prominent examples are the Court's decisions in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989), and Langenkamp v. Culp, 498 U.S. 42 (1990). Through these decisions, the Court tied both (1) the permissible bounds of a non-Article III bankruptcy judge's jurisdiction (over "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power," Marathon, 458 U.S. at 71 (Brennan, J., plurality opinion)), and (2) the extent of the constitutional right to a jury trial in bankruptcy proceedings (in actions not "integral to the restructuring of debtor-creditor relations," Granfinanciera, 492 U.S. at 58 (Brennan, J.)), to the 1898 Act's divide between summary and plenary proceedings. See Douglas G. Baird, Bankruptcy Procedure and State-Created Rights: The Lessons of Gibbons and Marathon, 1982 SUP. CT. REV. 25, 42-47; Brubaker, supra note 13, at 1082 & n.404; S. Elizabeth Gibson, Jury Trials and Core Proceedings: The Bankruptcy Judge's Uncertain Authority, 65 AM. BANKR. L.J. 143, 170 (1991). In a much less obvious manner, these historical procedural differences, via Marathon, also continue to restrict the scope of federal bankruptcy jurisdiction. See infra Part III.A.1 & D.2, notes 418-30, 659-84 and accompanying text.
deficient claims through the doctrines of ancillary and pendent jurisdiction, which are now collectively known as supplemental jurisdiction, found its way into certain aspects of 1898 Act jurisprudence. As applied to third-party disputes—to which the bankruptcy estate was not a party—this concept actually received express acknowledgment in the 1898 Act's jurisdictional provisions and one of the earliest Supreme Court cases decided thereunder. Understanding these early instances of supplemental bankruptcy jurisdiction is an important component of this Article's theory of the conceptual expanse of federal bankruptcy jurisdiction.

a. The Impostor in Section 2a(20)

Tracing the development of supplemental jurisdiction under the 1898 Act is difficult because of uneven usage of the terminology of supplemental jurisdiction. Much confusion can be attributed to section 2a(20), enacted in 1910, which provided the following:

The courts of the United States... as courts of bankruptcy... are hereby invested, within their respective territorial limits... with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act... to—

(20) Exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy...

This textual reference to "ancillary jurisdiction" can easily be mistaken for a statutory version of supplemental bankruptcy

113. See infra Part II.C.3, notes 370-95 and accompanying text.
115. Bankruptcy Act of 1898, supra note 66, § 2a(20) (emphasis added).
jurisdiction, an assumption that points toward a misleading paradigm for a theory of supplemental bankruptcy jurisdiction. Supplemental jurisdiction, though, is a doctrine extending the subject matter jurisdiction of the federal courts, whereas section 2a(20)'s so-called ancillary jurisdiction owed its existence solely to the geographic principles of personal jurisdiction.

As the introductory phrase of section 2 indicated, unlike the nationwide service-of-process provisions governing contemporary bankruptcy proceedings, the 1898 Act initially limited the geographic reach of a federal district court sitting in bankruptcy to the territorial bounds of the particular federal district. Thus, for example, when a trustee wished to bring a plenary suit against a defendant situated beyond the process of the district where the bankruptcy proceedings were pending, the trustee was forced to sue that defendant in another federal district court that could effect service on the defendant. Section 2a(20) pro-

116. See, e.g., Block-Lieb, supra note 20, at 781-84 & nn.346, 351-52; cf. Rosenberg, supra note 7, at 977-80, app. at 1026-28 (discussing this aspect of 1898 Act jurisdiction as a theory of "pendent courts").

117. See infra Part II.C, notes 328-95 and accompanying text (discussing the in rem equitable receivership model of supplemental jurisdiction). Thus, Professor Block-Lieb equates section 2a(20) with the doctrine of Freeman v. Howe, 65 U.S. (24 How.) 450 (1860), discussed infra notes 371-78 and accompanying text. See Block-Lieb, supra note 20, at 782 n.346.

118. See FED. R. BANKR. P. 7004(d), 9014.

119. See 1 COLLIER (14th ed.), supra note 38, ¶ 2.11[1]. Adoption of the Federal Rules of Civil Procedure in 1938, also made applicable in bankruptcy proceedings, made the process of the district courts coextensive with state boundaries and state long-arm jurisdiction. See Rosenberg, supra note 7, at 977-78. There was authority for nationwide service of process in certain summary proceedings in reorganization cases, but it was unclear whether such nationwide personal jurisdiction had any applicability in "straight" liquidation proceedings. See Mussman & Riesenfeld, supra note 96, at 97-99. With the adoption of the 1973 Bankruptcy Rules, the bankruptcy courts were given nationwide service of process in all summary proceedings, in both reorganization and liquidation cases. See FED. R. BANKR. P. 704(f)(1) & advisory committee's note (1973) (superseded 1983), reprinted in 13 COLLIER (14th ed.), supra note 38, at 7-60, ¶ 704.01, at 7-55 to -66. Plenary proceedings, however, continued to be governed by the more restrictive territorial service provisions of the Federal Rules. See id. ¶ 701.03, at 7-7, ¶ 704.09, at 7-102 to -103.

120. Therefore, when the 1973 Bankruptcy Rules were adopted, the advisory committee predicted that "[t]he availability of nationwide service of process under Rule 704(f)(1) [in any summary proceeding] should substantially reduce the need for ancillary proceedings." FED. R. BANKR. P. 217(b) advisory committee's note (1973) (superseded 1983), reprinted in 12 COLLIER (14th ed.), supra note 38, ¶ 217.01, at 2-192.
vided express jurisdictional authority for such an "ancillary" suit in another federal district, and merely codified what the Supreme Court consistently held to be the case, even before enactment of Section 2a(20): Section 2's grant to the federal district courts of jurisdiction over "bankruptcy proceedings" vested all district courts with bankruptcy jurisdiction, not just the "home" court in which the debtor was adjudicated a bankrupt.

Thus, section 2a(20)'s "ancillary" jurisdiction was not of the sort that later came to be known as supplemental jurisdiction—an incidental jurisdiction over a related, supplemental claim that would not "be within the original jurisdiction of the district court if it were the sole claim pleaded in a complaint commencing a civil action in the district court as between a single plaintiff and a single defendant." The subject matter jurisdiction of an 1898 Act "ancillary" court was precisely the same as that of the "home" court—an independent, freestanding general federal jurisdiction of any "bankruptcy proceeding" involving the estate (as restricted by section 23), even on a single claim by the trustee against a single defendant. Nonetheless, the modern notion of supplemental jurisdiction did appear in 1898 Act jurisprudence, but without the "ancillary" insignia.

b. "Necessity" Jurisdiction over Third-Party Disputes

The most significant prototype of supplemental bankruptcy jurisdiction under the 1898 Act came in what may be the earliest express statutory grant to the federal courts of supplemental


122. See Babbitt v. Dutcher, 216 U.S. 102, 105-15 (1910); In re Madson Steele Co., 216 U.S. 115, 116-17 (1910); see also Lazarus, Michel, & Lazarus v. Prentice, 234 U.S. 263, 267 (1914) (stating that section 2a(20) was a codification of Babbitt v. Dutcher); Lovell v. Newman, 227 U.S. at 418-19 (same). The same principle held under both the 1841 and 1867 Acts. See Burbank v. Bigelow, 92 U.S. 179, 181-82 (1876) (decided under the 1867 Act); Lathrop v. Drake, 91 U.S. 516, 516-18 (1876) (same); Ex parte Martin, 16 F. Cas. 874, 874-75 (C.C.D. Mass. 1842) (No. 9149) (Story, Circuit Justice) (decided under the 1841 Act). Cases predating section 2a(20) also used the misleading terminology of "ancillary" jurisdiction to describe the bankruptcy jurisdiction of federal courts other than the home court.

123. ALI, JUDICIAL CODE PROJECT, supra note 112, at 37; see id. at 39 (stating that a supplemental claim is not a freestanding claim).
jurisdiction. The 1898 Act itself created federal bankruptcy jurisdiction over certain incidental, third-party disputes, in what this Article refers to as “necessity” jurisdiction, which takes on special significance in light of the current statute’s third-party “related to” bankruptcy jurisdiction.

The broad jurisdictional grant in section 2a(7) of the 1898 Act over bankruptcy proceedings to “cause the estates of bankrupts to be collected, reduced to money and distributed,” also contained the further authorization to “determine controversies in relation thereto.” Moreover, section 2a(6) gave the district courts jurisdiction to “bring in . . . additional persons or parties in proceedings under this [1898] Act when necessary for the complete determination of a matter in controversy.” In Bryan v. Bernheimer, the Supreme Court read this provision to authorize jurisdiction in the nature of the contemporary concept of supplemental jurisdiction over third-party disputes to which the bankruptcy estate is not party. Although the lower courts severely restricted the reach of this third-party jurisdiction, Bryan clearly augured not only the “supplemental” bankruptcy jurisdiction that is a topic of current debate, but also the coming accretion of federal courts’ more general invocation of principles of supplemental jurisdiction.

In Bryan, pursuant to the provisions of an Alabama statute, Abraham executed a general assignment for the benefit of credi-

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124. Bankruptcy Act of 1898, supra note 66, § 2a(7) (emphasis added). As the Court noted in the Bardes case, this language went beyond that of corresponding provisions of prior acts. See Bardes v. Hawarden Bank, 178 U.S. 524, 535 (1900); see also In re Baudouine, 101 F. 574, 576 (2d Cir. 1900) (“Standing alone, the language of clause 7 would seem to be sufficiently comprehensive to authorize the determination by courts of bankruptcy of every controversy relating to the estates of bankrupts.”).


126. 181 U.S. 188 (1901).

127. Cf. 1 COLLIER (14th ed.), supra note 38, ¶ 2.38 & ¶ 2.39, at 257-58 (stating that § 2a(6) provided statutory coverage for the broad joinder provisions of the Federal Rules made applicable in bankruptcy); infra note 143 and accompanying text (discussing the relationship between joinder rules and the development of supplemental jurisdiction).

128. See infra Part III.D, notes 613-84 and accompanying text.

129. See infra Part I.B.2.c-d, notes 143-61 and accompanying text.
tors, conveying all of his property, consisting of an inventory of goods, to Davidson as assignee for the benefit of Abraham’s creditors. \(^{130}\) Shortly thereafter, some of Abraham’s creditors filed a bankruptcy petition against him in federal district court. After the petition filing, Davidson sold all of Abraham’s inventory to Bernheimer, who commenced retail sales of the goods. Under orders of the federal district court presiding over Abraham’s bankruptcy proceedings, though, the federal marshal seized all of the remaining inventory from Bernheimer. \(^{131}\) The district court then determined that, by virtue of the bankruptcy filing, “Bernheimer acquired no title to the said goods, or to the proceeds of the sales thereof made by him... superior to the title of [Abraham’s] bankrupt estate” \(^{132}\) and ordered Bernheimer to turn over proceeds from his retail sales to the bankruptcy estate. \(^{133}\)

On appeal, the Supreme Court held that the district court had jurisdiction to determine the bankruptcy estate’s claim against Bernheimer to recover this property and that the rights of the estate superseded those of Bernheimer. \(^{134}\) Because Bernheimer had already paid Davidson for the inventory, though, the Court considered it “manifestly inequitable that Bernheimer should lose both the goods themselves and the price which he had paid to Davidson for them.” \(^{135}\) Even though that was an issue in which Abraham’s bankruptcy estate had no direct interest and to which the estate would not be a party, \(^{136}\) the Court nonethe-

\(^{130}\) See Bryan, 181 U.S. at 188-89. For a general description of state-law assignments for the benefit of creditors, see Melvin G. Shimm, The Impact of State Law on Bankruptcy, 1971 DUKE L.J. 879, 888-92.

\(^{131}\) See Bryan, 181 U.S. at 189.

\(^{132}\) Id. at 192 (quoting the district court order).

\(^{133}\) See id.

\(^{134}\) See id. at 197. The district court had jurisdiction over the claim against Bernheimer because, as against the bankruptcy estate, Bernheimer had no substantial defense to turnover of the funds and, therefore, was not considered an adverse claimant within the jurisdictional bar of section 23. See infra notes 174-75 and accompanying text. In addition, the Court held that Bernheimer had consented to district court jurisdiction of the dispute—another exception to the jurisdictional constraints of section 23. See supra note 93 and accompanying text.

\(^{135}\) Bryan, 181 U.S. at 198.

\(^{136}\) The relationship among the parties with respect to their claims against each other can be represented graphically as follows:
less remanded, pointing to section 2a(6) as authority for the district court to bring in Davidson in order to settle the equities as between he and Bernheimer, presumably through a third-party claim for return of the purchase price.\textsuperscript{137} Of particular note is the fact that such a third-party impleader claim by a defendant is now a common context for the application of supplemental jurisdiction.\textsuperscript{138}

As the Court indicated in \textit{Bryan}, under the terms of section 2a(6), jurisdiction over a dispute between third parties, not directly involving the estate, existed only “when necessary for the complete determination of a matter in controversy.”\textsuperscript{139} Section 2a(6)’s necessity requirement subsequently evolved in the lower courts into a rather stringent standard: “[A] bankruptcy court does have jurisdiction to resolve a dispute between third parties ‘if it is impossible to administer completely the estate of the bankrupt without determining the controversy.’”\textsuperscript{140} Not surprisingly, then, the courts considered very few third-party disputes necessary to estate administration, and these generally concerned conflicting claims to ownership of the stock interests or

\begin{tikzpicture}
  \node (Davidson) at (0,0) {Davidson};
  \node (Abraham's Bankruptcy Estate) at (-2,-2) {Abraham’s Bankruptcy Estate};
  \node (Bernheimer) at (2,-2) {Bernheimer};
  \node (claim for purchase price) at (0,-3) {claim for purchase price};
  \node (claim for goods and sales proceeds) at (0,-4) {claim for goods and sales proceeds};
  \draw[->] (Davidson) -- (claim for purchase price);
  \draw[->] (Abraham's Bankruptcy Estate) -- (claim for goods and sales proceeds);
  \draw[->] (claim for goods and sales proceeds) -- (Bernheimer);
\end{tikzpicture}

\textsuperscript{137} See \textit{Bryan}, 181 U.S. at 198.


\textsuperscript{139} Bankruptcy Act of 1898, \textit{supra} note 66, § 2a(6) (emphasis added).

\textsuperscript{140} Uranga v. Geib (\textit{In re Paso Del Norte Oil Co.}), 755 F.2d 421, 425 (5th Cir. 1985) (quoting First State Bank & Trust Co. v. Sand Springs State Bank, 528 F.2d 350, 353 (10th Cir. 1976) (emphasis added)).
debt obligations of the debtor.\textsuperscript{141} In fact, the third-party dispute in \textit{Bryan} itself almost certainly would not meet such an impossibility-of-administration standard, since the bankruptcy estate had no direct interest in the outcome of the defendant’s third-party claim.\textsuperscript{142} This restrictive statutory version of supplemental bankruptcy jurisdiction, however, was not the only example of supplemental jurisdiction in 1898 Act jurisprudence.

c. Ancillary Jurisdiction of the Estate’s Counterclaims

The adoption of the Federal Rules of Civil Procedure in 1938, with its provisions for liberal joinder of claims and parties, accelerated the development of a more generous resort to supplemental jurisdiction, which permits a federal court to entertain otherwise jurisdictionally deficient claims that are logically and transactionally related to a claim with an independent jurisdictional basis.\textsuperscript{143} To take the most common example, in instances where a plaintiff pursues a claim founded upon federal question jurisdiction, the federal district court has what was formerly known as ancillary jurisdiction to hear the defendant’s state-law counterclaims “arising out of the transaction or occurrence that is the subject matter of the [plaintiff’s] claim,” designated com-
pulsory counterclaims by the Federal Rules.\textsuperscript{144} This brand of supplemental jurisdiction over compulsory counterclaims also appeared in bankruptcy practice under the 1898 Act.

Recall that section 23 of the 1898 Act, to a very large extent, affirmatively denied federal bankruptcy jurisdiction in suits by the bankruptcy estate on a debtor’s state-law causes of action.\textsuperscript{145} However, the Supreme Court’s sanction of ancillary jurisdiction over compulsory counterclaims in \textit{Moore v. New York Cotton Exchange}\textsuperscript{146} raised the possibility of ancillary jurisdiction over a bankruptcy estate’s state-law action, when asserted as a counterclaim to a creditor’s claim against the estate.\textsuperscript{147} This prospect first took shape in the context of equitable receivership proceedings and eventually gained widespread acceptance in bankruptcy. In \textit{Alexander v. Hillman},\textsuperscript{148} the Court applied \textit{Moore}'s ancillary jurisdiction principles to counterclaims by a receiver against creditors who had filed claims in federal receivership proceedings.\textsuperscript{149} The lower courts, relying upon \textit{Hillman}, concluded that a

\textsuperscript{144} \textit{FED. R. CIV. P.} 13(a); see \textit{13 WRIGHT ET AL., supra} note 138, § 3523, at 106-08 & n.59.
\textsuperscript{145} See \textit{supra} Part \textit{I.B.1.a}, notes 74-100 and accompanying text.
\textsuperscript{146} 270 U.S. 593, 609-10 (1926); see also \textit{Baker v. Gold Seal Liquors, Inc.}, 417 U.S. 467, 469 n.1 (1974). The compulsory counterclaim in the \textit{Moore} case was made pursuant to Equity Rule 30, which served as the model for the compulsory counterclaim rule of the subsequent Federal Rules. See \textit{FED. R. CIV. P.} 13 advisory committee’s note 1, 1937 adoption (“This is substantially [former] Equity Rule 30 . . . broadened to include legal as well as equitable counterclaims.” (alteration in original)).
\textsuperscript{147} The creditor’s claim and the estate’s state-law counterclaim can be represented graphically as follows:

\textsuperscript{148} 296 U.S. 222 (1935).
\textsuperscript{149} See \textit{id.} at 239-43 (citing Equity Rule 30 and \textit{Moore}). In \textit{Hillman}, clearly there was subject matter jurisdiction over the receiver’s counterclaims, through the in rem ancillary jurisdiction principles discussed \textit{infra} notes 336-39, 371-73 and accompanying text. See \textit{Hillman}, 296 U.S. at 237-38 (citing \textit{White v. Ewing}, 159 U.S. 36 (1895), and
bankruptcy trustee's compulsory counterclaims against a creditor likewise were within the jurisdiction of the federal bankruptcy court, notwithstanding the circumscription of section 23.150

Noticeably absent from the compulsory counterclaim cases was any reference to section 2a(6)'s necessity standard; like general principles of supplemental jurisdiction, this jurisdiction was, rather overtly, premised largely upon considerations of fairness, procedural convenience, and judicial economy.151 More-

Pope v. Louisville, New Albany & Chicago Ry. Co., 173 U.S. 573 (1899)). The Hillman Court, thus, invoked Moore's counterclaim jurisdiction principles merely to support personal jurisdiction over the creditors with respect to the receiver's counterclaims. See Hillman, 296 U.S. at 238-43. Nonetheless, the ensuing bankruptcy cases applying Hillman extended its rationale to subject matter jurisdiction, the context in which Moore was decided.

150. See In re Los Angeles Trust Deed & Mortgage Exch., 464 F.2d 1136, 1138-39 (9th Cir. 1972); Nissho Am. Corp. v. Humphreys (In re Behring & Behring), 445 F.2d 1096, 1098-1100 (5th Cir. 1971); In re Carnell Constr. Corp., 424 F.2d 296, 297-99 (3d Cir. 1970); Katchen v. Landy (In re Katchen's Bonus Corner, Inc.), 336 F.2d 535, 535-37 (10th Cir. 1964), aff'd on other grounds, 382 U.S. 323 (1966); Cherno v. Engine Air Serv., Inc. (In re Thiem Supply Co.), 330 F.2d 191, 193 (2d Cir. 1964); Peters v. Lines, 275 F.2d 919, 923-26 (9th Cir. 1960); Dwyer v. Franklin (In re Majestic Radio & Television Corp.), 227 F.2d 152, 154-57 (7th Cir. 1955); Inter-State Nat'l Bank v. Luther (In re Garden Grain & Seed Co.), 221 F.2d 382, 386-90 (10th Cir. 1955); Conway v. Union Bank of Switz., 204 F.2d 603, 606-07 (2d Cir. 1953); In re Solar Mfg. Corp., 200 F.2d 327, 329-31 (3d Cir. 1952); In re Petroleum Conversion Corp., 196 F.2d 728, 728 (3d Cir. 1952); Columbia Foundry Co. v. Lochner, 179 F.2d 650, 651-35 (4th Cir. 1950); Floro Realty & Inv. Co. v. Steem Elec. Corp., 128 F.2d 338, 340-41 (8th Cir. 1942); Florance v. Kesge, 93 F.2d 784, 785-86 (4th Cir. 1939); cf. Daniel v. Guaranty Trust Co., 285 U.S. 154, 161-62 (1932) (holding that no jurisdiction existed over a trustee's counterclaim that was unrelated to the creditor's claim against the estate).

151. See Peters v. Lines, 275 F.2d at 925; Solar Mfg., 200 F.2d at 331 & n.2; Lochner, 179 F.2d at 632-34; cf. Hillman, 296 U.S. at 241-43. In fact, such efficiency concerns prompted calls by many to extend jurisdiction to even the estate's unrelated, permissive counterclaims against creditors. See, e.g., Liman v. United Kingdom Mut. S.S. Assurance Assoc. (In re Seatrate Corp.), 297 F. Supp. 577, 580-81 (S.D.N.Y.) (dictum), appeal dismissed, 418 F.2d 9 (2d Cir. 1969); 1 COLLIER (14th ed.), supra note 38, ¶ 2.40, at 266, 268; 2 id. ¶ 23.08(6), at 557-58; 4 id. ¶ 68.20, at 948-51; Martin Gendel, Jurisdiction of a Referee in Bankruptcy to Render Affirmative Judgment on a Counterclaim in Favor of a Trustee, 26 S. CAL. L. REV. 167, 171-72 (1953); James Wm. Moore, Res Judicata and Collateral Estoppel in Bankruptcy, 68 YALE L.J. 1, 35-39 & n.186 (1958); Robert Stephen Oglebay, Some Developments in Bankruptcy Law Regarding Summary Jurisdiction and the Determination of the Effect of Discharges, 21 J. NAT'L ASSN REFEREES BANKR. 18, 20 (1946); William J. Rochelle, Jr. & John L. King, Summary Jurisdiction in Bankruptcy: Katchen v. Landy and Questions Left Unanswered, 1966 DUKE L.J. 669, 693-94; Charles Seligson & Lawrence P. King,
over, in the famous bankruptcy case of *Katchen v. Landy*,\(^\text{162}\) which also relied heavily upon *Hillman*\(^\text{163}\) and procedural simplification ideals,\(^\text{154}\) the Supreme Court favorably cited the counterclaim cases as fully in accord with its decision\(^\text{155}\) upholding summary bankruptcy jurisdiction over a trustee's preference action against a creditor who had filed a claim against the bankruptcy estate.\(^\text{156}\) Thus, 1898 Act jurisprudence clearly recognized the ap-

\(\text{ Jurisdiction and Venue in Bankruptcy, 36 J. NAT'L ASS'N REFEREES BANKR. 73, 83 (1962). }\)

\(\text{See supra note 66, }\text{§§ 23b, 60b; supra note 90. A preference suit, though, usually was pressed against an adverse claimant, thus requiring a plenary suit in federal district court rather than summary proceedings before a referee. See 2 COLLIER (14th ed.), supra note 38, ¶ 23.1517; supra note 93. Because there was clearly federal jurisdiction over the trustee's preference suit in }\text{Katchen, therefore, all that was at issue was summary jurisdiction of a federal bankruptcy referee versus plenary jurisdiction of a federal district court, which, from the standpoint of determining the outer limits of federal bankruptcy jurisdiction (vis-à-vis state-court jurisdiction), was insignificant in comparison to the compulsory counterclaim cases. Katchen's significance, then, in addition to its express approval of the compulsory counterclaim cases, is that the Court balked at the potential statutory grounding for the compulsory counterclaim cases. Although not present in }\text{Hillman, nor the earliest cases applying }\text{Hillman in the bankruptcy context, later cases began characterizing the filing of a proof of claim as implied consent to federal jurisdiction over the trustee's counterclaims. See, e.g., Dwyer v. Franklin (In re Majestic Radio & Television Corp.) 227 F.2d 152, 156 (7th Cir. 1955); Inter-State Nat'l Bank v. Luther (In re Garden Grain & Seed Co.), 221 F.2d 382, 386-87, 389-90 (10th Cir. 1955); In re Nathan, 98 F. Supp. 686, 688-93 (S.D. Cal. 1951). Consent, of course, was another express exception to section 23, clearly giving federal courts jurisdiction over an action by the bankruptcy estate with the defendant's consent. See Bankruptcy Act of 1898, supra note 66, §§ 2a(7), 23b; supra note 93 and accompanying text. In }\text{Katchen, though, the Court specifically refused to base its holding upon a consent rationale. See Katchen, 382 U.S. at 332 n.9; cf. Clarence Clyde Ferguson, Jr., The Consensual Basis of Subject-Matter Jurisdiction in Matters of Bankruptcy: Fact and Fiction, 14 Rutgers L. Rev. 491, 511-17 (1960) (criticizing the implied consent theory as a basis for }\text{Katchen.}}\)
plicability of general principles of ancillary jurisdiction, and the same was true for its supplemental sibling, pendent jurisdiction.

d. The Estate's Avoidance Actions and Pendent State-Law Claims

The federal courts' primary use of what was formerly known as pendent jurisdiction was the variety labeled pendent-claim jurisdiction, which the Supreme Court consistently approved throughout the twentieth century.\(^{157}\) Pursuant thereto, the courts found the 1898 Act's grant of independent federal jurisdiction over a trustee's avoidance action to also carry an incidental, supplemental jurisdiction over the trustee's pendent state-law claims against the same defendant.

Shortly after its enactment, Congress amended section 23 to remove from its jurisdictional bar trustees' plenary suits under certain bankruptcy avoidance provisions, including actions to recover preferential and fraudulent transfers.\(^{158}\) Thus, when a trustee pursued such a claim in federal court, the joinder of
related state-law claims against the defendant, having no independent jurisdictional basis by virtue of section 23's jurisdictional constraints, presented a classic case for the invocation of pendent-claim jurisdiction. Although there were some who believed that section 23's express restrictions on federal bankruptcy jurisdiction precluded such pendent jurisdiction, the dominant attitude in the lower courts favored this pendent-claim jurisdiction as "[t]he proper balance between the evils of piecemeal litigation in different courts and undesirable federal handling of state law claims."

In sum, then, the historical background preface the present jurisdictional statute imparts two significant parameters at the peripheral borders of federal bankruptcy jurisdiction. A general federal jurisdiction over "proceedings in bankruptcy" enveloped all claims to which a bankruptcy estate was party. Additionally, principles of supplemental jurisdiction were employed to hear disputes with no independent basis for federal jurisdiction, but that nonetheless were properly resolved in a federal court as an incident to federal bankruptcy jurisdiction over claims by and against a bankruptcy estate. This incidental, supplemental bankruptcy jurisdiction even brought to the federal bankruptcy forum certain third-party disputes not directly involving the bankruptcy estate, through the 1898 Act's "necessity" jurisdiction. Our present statute fully exploits both of these jurisdictional

159. A trustee's bankruptcy avoidance claim and a related state-law claim against a defendant can be represented graphically as follows:

| Bankruptcy Estate | (1) avoidance claim | (2) related state-law claim | Defendant |

160. See Kaigler v. Gibson, 264 F. 240, 242-43 (N.D. Ga. 1920) ("The denial of jurisdiction is as authoritative and binding as are the permissions of the exceptions to it."); 2 COLLIER (14th ed.), supra note 38, ¶ 23.15[5], at 616-18 & n.44.

concepts in what Congress intended to be the most complete and pervasive federal bankruptcy jurisdiction possible.

C. The Bankruptcy Reform Act of 1978: Pervasive Federal Jurisdiction Renews an Unexpected Constitutional Quandary

Enactment of the current Bankruptcy Code in the Bankruptcy Reform Act of 1978 (the 1978 Reform Act)\textsuperscript{162} repealed the 1898 Act and also brought a new jurisdictional system to bankruptcy law, with the most expansive federal bankruptcy jurisdiction in our history. Of course, the subsequent decision in \textit{Northern Pipeline Construction Co. v. Marathon Pipe Line Co.}\textsuperscript{163} would necessitate a restructuring of this new jurisdictional scheme, and the Bankruptcy Amendments and Federal Judgeship Act of 1984 (the 1984 BAFJA amendments)\textsuperscript{164} accomplished this reorganization. \textit{Marathon} and the 1984 BAFJA amendments, however, addressed a separation of powers issue, and \textit{Marathon}'s proscription, at its most basic level, was that the entirety of the 1978 Reform Act's pervasive federal bankruptcy jurisdiction cannot be assigned to non-Article III bankruptcy courts.\textsuperscript{165} That separation of powers holding speaks solely to the proper allocation of federal bankruptcy jurisdiction as between Article III and non-Article III federal tribunals. \textit{Marathon} and the 1984 BAFJA amendments, though, say nothing about the issue analyzed in this Article, which pertains to the scope of federal bankruptcy jurisdiction.\textsuperscript{166} Irrespective of the type of federal judicial officer who will exercise it (Article III or non-Article III), what is the full extent of federal bankruptcy jurisdiction?

The scope of federal bankruptcy jurisdiction is, of course, a judicial federalism issue going to the allocation of judicial power

\begin{footnotes}
\footnotetext[162]{\textsuperscript{162}. Pub. L. No. 95-598, 92 Stat. 2549.}
\footnotetext[163]{\textsuperscript{163}. 458 U.S. 50 (1982), discussed \textit{infra} Part III.A.1, notes 418-30 and accompanying text.}
\footnotetext[164]{\textsuperscript{164}. Pub. L. No. 98-353, 98 Stat. 333.}
\footnotetext[165]{\textsuperscript{165}. \textit{See Marathon}, 458 U.S. at 87 n.40 (Brennan, J., plurality opinion) ("It is clear that, at the least, the new bankruptcy judges cannot constitutionally be vested with jurisdiction to decide this state-law contract claim against [defendant] Marathon.").}
\footnotetext[166]{\textsuperscript{166}. Nonetheless, \textit{Marathon} and BAFJA have had an inadvertent, invidious impact upon construction of the reach of "related to" bankruptcy jurisdiction. \textit{See infra} Part III.A.1 & D.2, notes 418-30, 659-84 and accompanying text.}
\end{footnotes}
as between the federal courts and the state courts. What disputes can we essentially take from the state courts and place before the federal courts through our pervasive federal bankruptcy jurisdiction? The 1984 BAFJA amendments made no changes whatsoever in the scope of federal bankruptcy jurisdiction, which is still defined by the same statutory grant as that of the 1978 Reform Act. That provision, however, effects a sea change from the restrictive federal bankruptcy jurisdiction of the 1898 Act.

The 1898 Act's splintering of bankruptcy jurisdiction between federal and state courts produced a number of deleterious consequences. In fact, when Congress embarked upon comprehensive reform of bankruptcy law in the 1970s, the foremost impetus for and target of those efforts was bankruptcy jurisdiction, and the particular difficulties Congress was confronting help inform the nature and scope of their response. Congress's chief aim was to rid federal bankruptcy jurisdiction of the in rem jurisdictional strictures embodied in the 1898 Act—in rem concepts imported with the 1898 Act's adoption of the bifurcated, English model of bankruptcy jurisdiction. As further explained in this Part I.C, the 1978 jurisdictional expansion sought to simplify jurisdictional inquiries with a statutory grant of an awesome magnitude, incorporating both a general federal bankruptcy jurisdiction of all claims to which a bankruptcy estate is party and an unrestricted jurisdiction over "related" third-party disputes. At
the same time, though, Congress accorded federal bankruptcy courts the flexibility to decline to exercise their bankruptcy jurisdiction on a case-by-case basis, through an express provision authorizing discretionary abstention—a privilege generally unavailable to the federal courts. This unique, discretionary abstention power is central to this Article's theory regarding the nature of "related to" bankruptcy jurisdiction in third-party disputes.

The primary vice of the 1898 Act's jurisdictional regime was that it engendered an excessive amount of preliminary litigation over jurisdictional issues surrounding the bifurcation of bankruptcy jurisdiction. The distinction between summary and plenary proceedings that found its way into section 23's jurisdictional divide was bound up with notions of in rem and in personam jurisdiction. In rem jurisdiction over all property in the actual or constructive possession of the federal bankruptcy court and proceedings to administer that property for the benefit of creditors (so-called summary bankruptcy jurisdiction exercised through summary processes) continued unfettered under the 1898 Act.

A trustee's action to recover money or property from a third party, however, was considered a summary in rem proceeding (in the constructive possession of the court) only if the defendant had no substantial defense to turnover of the property. Third parties who could present more than a colorable defense were considered adverse claimants whom the trustee could pursue only through a plenary in personam suit and subject to section 23's restrictions on federal jurisdiction over such suits. Section 23 left summary (in rem) federal bankruptcy jurisdiction undisturbed, but contracted the scope of so-called plenary (in personam) federal bankruptcy jurisdiction.

Of course, because the summary-plenary determination in a trustee's suit turned on the substantiality of turnover defenses, any jurisdictional contest in a trustee suit required a "minitrial"
on the merits,\textsuperscript{176} and the murky contours of the substantiality doctrine itself generated even more litigation.\textsuperscript{177} Moreover, both trustees and defendants had practical and strategic incentives for suing and resisting suit, respectively, in federal court.\textsuperscript{178} The inevitable by-products of the 1898 jurisdictional structure, then, were expense and delay, both of which are particularly pernicious in the bankruptcy context. The congressional commission charged with study and reform recommendations, the Commission on the Bankruptcy Laws of the United States (the Commission), therefore, set the tone for subsequent legislation by recommending a "comprehensive grant of jurisdiction" that "would greatly diminish the basis for litigation of jurisdictional issues which consumes so much time, money, and energy of the bank-

\textsuperscript{176} See 2 COLLIER (14th ed.), supra note 38, ¶ 23.07[1].  
\textsuperscript{177} See 2 id. ¶ 23.07[2]; Vern Countryman, Scrambling to Define Bankruptcy Jurisdiction: The Chief Justice, the Judicial Conference, and the Legislative Process, 22 HARV. J. ON LEGIS. 1, 6 (1985). As the leading commentary indicated: Naturally, each case depends upon its own particular facts, and when one in possession asserts an adverse claim, the question may be presented as to whether the court has exceeded its jurisdiction in investigating the colorable character of the claim and has in fact determined the controversy on its merits on disputed evidence. 2 COLLIER (14th ed.), supra note 38, ¶ 23.07[3], at 532. For a flavor of the complex doctrine and the extent of litigation surrounding the question of a substantial versus a merely colorable defense, see 2 id. ¶ 23.06[2]-[12]; see also JAMES ANGELL MACLACHLAN, HANDBOOK OF THE LAW OF BANKRUPTCY § 24, at 19 (1956) ("When a 'summary' proceeding in the bankruptcy court is appropriate and when a plenary suit is required is one of the most involved and controversial questions in the entire field of bankruptcy." (footnotes omitted)).  
\textsuperscript{178} Because a defendant could consent, either expressly or impliedly (e.g., by failure to object), to jurisdiction in the federal bankruptcy court, see supra note 93 and accompanying text, a trustee could bring suit in federal court solely in the hopes of obtaining jurisdiction by consent. See Frank R. Kennedy, An Adversary Proceeding Under the New Bankruptcy Rules, with Special Reference to a Sale Free of Liens, 79 COM. L.J. 425, 430-32 (1974); Lawrence P. King, Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984, 38 VAND. L. REV. 675, 689 n.44 (1985). The concept of implied consent itself added yet another jurisdictional battleground in federal bankruptcy court. See 2 COLLIER (14th ed.), supra note 38, ¶ 23.08[2]-[6]. The added expense and delay of pursuing litigation in other and perhaps multiple forums, though, would nonetheless push the trustee toward federal court. Defendants could wield these prospective burdens, as well as those flowing from extended litigation over federal jurisdiction, as very powerful bargaining levers in negotiations with the trustee. See 1973 COMM’N REPORT, supra note 110, pt. I, at 90. Defendants were also prone to resist federal jurisdiction because of prevailing impressions that the bankruptcy court was "trustee friendly." Id.
ruptcy system and of those involved in the administration of the debtor's affairs."

The Commission's proposal was, rather explicitly, organized around the historical concept of a general federal bankruptcy jurisdiction over all claims to which a bankruptcy estate is party, consciously derived from the jurisdictional systems of the 1841 and 1867 Acts. Thus, the Commission's proposed statute contemplated federal bankruptcy jurisdiction of "all controversies that arise out of a [bankruptcy] case," with specific provision for all claims by and against the estate, and with a catchall for "all other actions in which the trustee... is a party plaintiff

179. 1973 Comm'n Report, supra note 110, pt. I, at 90. The Commission cited delay as "critical" in bankruptcy cases, "particularly in the business cases where litigation is most likely to occur... because of the prejudicial effect it might have on prospects for rehabilitating an enterprise in financial distress and the aggravated risk of deterioration of the estate in the course of liquidation." Id. at 89. With respect to expense and the estate's obviously "limited resources with which to wage such litigation," the Commission stated that "it is common knowledge that trustees have often foregone litigation to recover assets of estates because of the potential expense and other difficulties." Id. at 90; see also S. Rep. No. 95-989, at 17-18 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5803-04; H.R. Rep. No. 95-595, at 13-14, 43 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 5974-75, 6004; Countryman, supra note 177, at 6; Frank R. Kennedy, The Bankruptcy Court Under the New Bankruptcy Law: Its Structure and Jurisdiction, 55 Am. Bankr. L.J. 63, 85-86 (1981).


In addition to the general jurisdictional grant quoted in the text, the Commission's bill provided that "[t]he jurisdiction of the bankruptcy courts shall also extend to the determination of... any other issue of law or fact arising in the course of administration of a debtor's estate under this Act." 1973 Comm'n Report, supra note 110, pt. II, § 2-201(b)(9) (emphasis added).

182. See 1973 Comm'n Report, supra note 110, pt. II, § 2-201(a)(5) (providing jurisdiction over "controversies involving property of the estate of the debtor without regard to who has possession").

183. See id. § 2-201(a)(6) (providing jurisdiction over "objections to claims, whether secured or not, against the estate").
or defendant.\textsuperscript{184} Congress subsequently would build upon the Commission's design of a general federal bankruptcy jurisdiction of all disputes involving the bankruptcy estate and add to it an unqualified, unconditional "related to" bankruptcy jurisdiction in third-party disputes not directly involving the bankruptcy estate.

After extensive hearings in both the House and the Senate, and consultations with bankruptcy and constitutional law experts, a simplified, broader jurisdictional provision emerged.\textsuperscript{185} As enacted in the 1978 Reform Act,\textsuperscript{186} and preserved in current law by the 1984 BAFJA amendments, this measure gives the federal district courts "original and exclusive jurisdiction of all cases under" the Bankruptcy Code, \textsuperscript{187} as well as "original but not exclusive jurisdiction of all civil proceedings arising under [the Bankruptcy Code], or arising in or related to cases under" the Bankruptcy Code.\textsuperscript{188}

This jurisdictional grant was designed to be every bit as broad as that of the Commission bill,\textsuperscript{189} which utilized the model of a general federal bankruptcy jurisdiction of all claims by and

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\footnote{184. Id. § 2-201(a)(9).}
\footnote{185. See Klee, supra note 169, at 943-46. This simplified jurisdictional approach first appeared in H.R. 6, 95th Cong. § 244(a) (1977) (proposing a new 28 U.S.C. § 1471).}
\footnote{187. 28 U.S.C. § 1334(a) (1994).}
\footnote{188. Id. § 1334(b) (emphasis added). This concurrent jurisdiction over civil proceedings originally was formulated as "civil proceedings arising under or related to cases" under the Bankruptcy Code. H.R. 6, 95th Cong. § 244(a) (1977) (proposing a new 28 U.S.C. § 1471(b)). In a subsequent bill, this expression became "civil proceedings arising under [the Bankruptcy Code] or arising under or related to cases under" the Bankruptcy Code. H.R. 8200, 95th Cong. § 243(a) (1977) (proposing a new 28 U.S.C. § 1471(b)). The substitution of proceedings "arising in" a bankruptcy case, in the place of proceedings "arising under" a bankruptcy case, was the product of informal negotiations between the managers of the House and Senate bankruptcy legislation, first offered on the floor of the House. See 124 Cong. Rec. 32,350, 32,385 (1978) (proposing a new 28 U.S.C. § 1471(b)); Klee, supra note 169, at 953-54. There is nothing in the legislative history or the nature of these changes to suggest that they were anything other than mere clarifying modifications of the original language. See Kelley v. Nodine (In re Salem Mortgage Co.), 783 F.2d 626, 633 n.17 (6th Cir. 1986) (stating that "it appears to be a stylistic change"). Statutes providing for general federal bankruptcy jurisdiction have at various times employed both the "under" and the "in" terminology, separately and in combination. See supra Part I.A-B.1, notes 37-111 and accompanying text.}
\end{footnotes}
against the estate. In fact, consistent with the thrust of similar language in the 1898 Act, there was explicit recognition in the legislative process that "related to" bankruptcy jurisdiction went beyond claims by and against the estate and would embrace disputes between third parties having some relationship to the bankruptcy case. The legislative record variously characterizes the expanse of this jurisdictional provision as "pervasive," "complete," "comprehensive," "as broad [a] jurisdiction as

190. See Bankruptcy Act of 1898, supra note 66, § 2a(6)-(7), discussed supra Part I.B.2.b, notes 124-42 and accompanying text. The breadth of the 1978 Reform Act's jurisdiction was intended to fully incorporate all matters provided for in section 2a of the 1898 Act. See H.R. Rep. No. 95-595, at 446, reprinted in 1978 U.S.C.C.A.N. at 6401. 191. The Chairman of the Commission, in comparing the jurisdictional provisions of the Commission's bill, testified that "related to" jurisdiction "does not even require, for example, that the trustee be a party to the litigation, as long as it can be determined to be 'related to' the bankruptcy proceeding." Bankruptcy Court Revision: Hearings on H.R. 8200 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 95th Cong. 73 (1977) [hereinafter H.R. 8200 Hearings] (statement of Harold Marsh); accord id. at 114 (statement of Judge Wesley E. Brown, Chairman, Judicial Conference Ad Hoc Committee on Bankruptcy Legislation); id. at 213 (statement of Herbert Minkel, Esq.); id. at 213-14 (statement of Arthur Moller, Esq.); Bankruptcy Reform Act of 1978: Hearings on S. 2266 and H.R. 8200 Before the Subcomm. on Improvements in Judicial Mach. of the Senate Comm. on the Judiciary, 95th Cong. 484 (1977) [hereinafter S. 2266 Hearings] (statement of Harold Marsh). Parallel legislation in the Senate more explicitly adopted the estate-as-a-party jurisdictional approach, through a grant of concurrent jurisdiction "of all civil proceedings by or against a debtor in possession, a trustee, or other representative of the estate of a debtor." S. 2266, 95th Cong. § 202 (1977) (proposing an amended 28 U.S.C. § 1334(b)). In explaining an amendment that conformed relevant portions of this Senate bill to those of the House bill, the committee report described the change in jurisdictional scope as "expanded to include all controversies arising out of"—the language of the Commission bill's estate-as-a-party grant—"or related to a [bankruptcy] case." S. Rep. No. 95-939, at 153 (1978) (emphasis added), reprinted in 1978 U.S.C.C.A.N. 5787, 5939; see also S. 2266, 95th Cong. § 216 (1978) (replacing former section 202 of the bill in proposing an amended 28 U.S.C. § 1334), reprinted in 17 ALAN N. RESNICK & EUGENE M. WYPSKI, BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY doc. 53 (1979). Such an "expansion," then, obviously contemplated federal jurisdiction over proceedings not "by or against a debtor in possession, a trustee, or other representative of the estate of a debtor," but nonetheless "related to" the debtor's bankruptcy case.


possible," and "as broad as can be conceived." The fullness of this jurisdictional grant prompted concerns of unwarranted encroachment into the business of the state courts and a proposed "jurisdiction by detriment" amendment (the Danielson-Railsback amendment) that received initial approval on the floor of the House. This amendment, though, threatened to undo the principal objectives of jurisdictional reform, by reintroducing splintered bankruptcy jurisdiction akin to the bifurcated jurisdiction of the 1898 Act, with the potential for preliminary litigation over the need for a federal forum in any particular action. Thus, after additional hearings and an additional committee report devoted to the drawbacks of the Danielson-Railsback amendment, the House reversed its vote and defeated the "jurisdiction by detriment" proposal.

The "jurisdiction by detriment" advocates, to some extent, overstated the intrusiveness of pervasive federal bankruptcy
jurisdiction, because both the Commission bill\textsuperscript{202} and the jurisdictional provisions that ultimately became law\textsuperscript{203} tempered expansive federal jurisdiction by giving federal bankruptcy courts a concomitantly broad, discretionary power to abstain from hearing any given proceeding and leave the parties to a nonbankruptcy forum.\textsuperscript{204} Thus, the new jurisdictional structure, which the Commission originally visualized, was one that removed wooden jurisdictional limitations, but retained enough flexibility to accommodate the interests of the states in the development and administration of their laws, the convenience interests of litigants and witnesses involved in particular disputes, and the general public interest in fair and economical resolution of litigation.\textsuperscript{205} From the beginning, then, an indispensable element of this pervasive federal bankruptcy jurisdiction was a symbiotic, synergistic discretionary abstention power.\textsuperscript{206}

\textsuperscript{202} "Nothing in this section precludes the bankruptcy court from permitting an action, proceeding, or matter within its jurisdiction to be commenced or continued in another court having jurisdiction of the subject matter." 1973 COMM'N REPORT, supra note 110, pt. II, § 2-201(c), at 31.

\textsuperscript{203} "Subsection (b) or (c) of this section [granting pervasive federal bankruptcy jurisdiction] does not prevent a district court or a bankruptcy court, in the interest of justice, from abstaining from hearing a particular proceeding arising under [the Bankruptcy Code] or arising in or related to a case under [the Bankruptcy Code]." Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 241(a), 92 Stat. 2549, 2669 (enacting 28 U.S.C. § 1471(d) (1982) (repealed 1984)). The 1984 BAPJAJA amendments, Pub. L. No. 98-353, § 101, 98 Stat. 333, expressly added to the "interest of justice" ground, abstention "in the interest of comity with State courts or respect for State law." 28 U.S.C. § 1334(c)(1) (1994). This amendment merely codified a federalism concern underlying the original "interest of justice" language. See S. REP. NO. 95-989, at 154 (1978) (stating that the abstention power "recognizes there may be cases in which it is more appropriate to have a State court hear a particular matter of State law"), reprinted in 1978 U.S.C.C.A.N. 5787, 5940; cf. Block-Lieb, supra note 172, at 796-806.


\textsuperscript{206} The House committee responsible for the even broader jurisdictional provisions ultimately enacted, adopted much of the Commission's reasoning verbatim. See H.R.
The drafters of the 1978 Reform Act, somewhat ironically, thought that the "powerful" breadth of the jurisdictional provisions would "leave no doubt as to the scope of the bankruptcy court's jurisdiction over disputes," and the legislative history reveals virtually no regard for just how far "related to" jurisdiction extends. In fact, the only limitations suggested are whatever limits the Constitution imposes. That constitutional issue,


[In order to insure that the jurisdiction of the bankruptcy court is exercised only when appropriate to the expeditious disposition of bankruptcy cases, the bill codifies present case law relating to the power of abstention in particular proceedings by the bankruptcy court. Occasions arise when determination of an issue is best left to a court that decides similar issues regularly, especially if the issue is one that requires a particular expertise that the bankruptcy court does not have. For example, in Thompson v. Magnolia Petroleum, the Supreme Court required a bankruptcy court to defer to a State court for determination of a particularly unusual question of State real property law. The power of abstention is necessary to the effective and meaningful exercise of the expanded jurisdiction granted by this bill.]

Id. at 51, reprinted in 1978 U.S.C.C.A.N. at 6012 (emphasis added). Testimony in congressional hearings also reinforced this symbiotic relationship between expansive jurisdiction and discretionary abstention. See, e.g., H.R. 8200 Hearings, supra note 191, at 239, 242 (statements of Prof. Vern Countryman, George Triester, Prof. Frank Kennedy, and William Rochelle on behalf of the National Bankruptcy Conference); id. at 108-07 (statement of Louis Levit, Commercial Law League); S. 2266 Hearings, supra note 191, at 832 (statement of Charles A. Horsky, Chairman, National Bankruptcy Conference); The Bankruptcy Reform Act: Hearings on S. 235 and S. 236 Before the Subcomm. on Improvements in Judicial Mach. of the Senate Comm. on the Judiciary, 94th Cong. 35 (1975) (statement of Prof. Frank Kennedy, Executive Director, Commission on Bankruptcy Laws of the United States); H.R. 31/32 Hearings, supra note 181, pt. 1, at 584 & n.1 (statement of George Triester, Vice-Chairman, National Bankruptcy Conference). For discussions of the role of abstention in third-party disputes encompassed within "related to" jurisdiction, see H.R. 8200 Hearings, supra note 191, at 213-14 (statements of Herbert Minkel, Esq. and Arthur Moller, Esq.); H.R. 31/32 Hearings, supra note 181, pt. 1, at 315-16 (statement of Daniel Cowans, Esq.).

207. Id. at 51, reprinted in 1978 U.S.C.C.A.N. at 6012. Testimony in congressional hearings also reinforced this symbiotic relationship between expansive jurisdiction and discretionary abstention. See, e.g., H.R. 8200 Hearings, supra note 191, at 239, 242 (statements of Prof. Vern Countryman, George Triester, Prof. Frank Kennedy, and William Rochelle on behalf of the National Bankruptcy Conference); id. at 108-07 (statement of Louis Levit, Commercial Law League); S. 2266 Hearings, supra note 191, at 832 (statement of Charles A. Horsky, Chairman, National Bankruptcy Conference); The Bankruptcy Reform Act: Hearings on S. 235 and S. 236 Before the Subcomm. on Improvements in Judicial Mach. of the Senate Comm. on the Judiciary, 94th Cong. 35 (1975) (statement of Prof. Frank Kennedy, Executive Director, Commission on Bankruptcy Laws of the United States); H.R. 31/32 Hearings, supra note 181, pt. 1, at 584 & n.1 (statement of George Triester, Vice-Chairman, National Bankruptcy Conference). For discussions of the role of abstention in third-party disputes encompassed within "related to" jurisdiction, see H.R. 8200 Hearings, supra note 191, at 213-14 (statements of Herbert Minkel, Esq. and Arthur Moller, Esq.); H.R. 31/32 Hearings, supra note 181, pt. 1, at 315-16 (statement of Daniel Cowans, Esq.).


209. The committee report in the House quoted the following passage from the Commission's report:

Litigation of jurisdictional issues would not be eliminated since the exis-
though, is one that has persistently perplexed the most eminent scholars of the federal court system.

In the legislative debates over the 1978 Reform Act's jurisdictional provisions, the looming and distinct separation of powers problems introduced by the Reform Act's non-Article III bankruptcy judges completely overshadowed the constitutional federalism issues embedded in the outermost boundaries of federal bankruptcy jurisdiction. Not surprisingly, though, ensuing case law charting the farthest reaches of statutory bankruptcy jurisdiction has been almost completely random. Without a clear vision of the constitutional dimension of federal bankruptcy jurisdiction, interpreting the statutory grant is an aimless and haphazard endeavor. Thus, Part II formulates a comprehensive constitutional theory of federal bankruptcy jurisdiction, which then is employed in Part III to design an interpretive theory for the bankruptcy jurisdiction statute.

II. A CONSTITUTIONAL THEORY OF FEDERAL BANKRUPTCY JURISDICTION

The capaciousness of a general federal bankruptcy jurisdiction over all claims by and against a bankruptcy estate and the absence of jurisdiction is always questionable in a federal tribunal. As part of the federal government the bankruptcy courts would be courts of limited jurisdiction, and it would always be open to a party haled into such a court to object that there was not sufficient connection between the litigation and any legitimate federal concern to warrant the assumption of jurisdiction. See MacLachlan § 197, at 212. H.R. REP. NO. 95-595, at 46 n.29 (quoting 1973 COMM'N REPORT, supra note 110, pt. I, at 100 n.29), reprinted in 1978 U.S.C.C.A.N. at 6008 n.29. The cited discussion in the MacLachlan hornbook alludes to the constitutional federal question issues discussed infra Part II.B, notes 253-327 and accompanying text. See also H.R. 31/32 Hearings, supra note 181, pt. I, at 315-16 (detailing an exchange between Ken Klee, committee counsel, and Daniel Cowans, Esq., regarding "constitutional restrictions on comprehensive jurisdiction" in third-party disputes); 123 CONG. REC. 35,681 (1977) (statement of Rep. Railsback) ("We would expand the jurisdiction within what we believe to be constitutional limits, a concept that is endorsed by all of the interested groups."); cf. MACLACHLAN, supra note 177, § 219, at 245-46 (alluding again to the constitutional federal question issue).

210. See generally CONST. BANKR. CTS., supra note 6 (discussing the status and constitutional considerations surrounding the proposed bankruptcy courts).

211. See supra note 20 and accompanying text.
sence of any definitive constitutional rationale for its existence have made bankruptcy jurisdiction a popular testing ground for various unconventional constitutional theories of federal jurisdiction. In many respects, however, these exegeses have proceeded from faulty assumptions about the bankruptcy process and distorted paradigms of bankruptcy jurisdiction. Properly conceived, federal bankruptcy jurisdiction is, in all its permutations, fully explained by traditional constitutional theory. The constitutional account of federal bankruptcy jurisdiction developed in this Part, then, not only reinforces the durability and versatility of orthodox federal jurisdiction theory, but it also holds the solution for many of the most knotty problems concerning the sweep of the statutory grant of federal bankruptcy jurisdiction.

The most elementary aspect of federal bankruptcy jurisdiction is the power to entertain "all civil proceedings arising under title 11 [the Bankruptcy Code]." This "arising under" bankruptcy jurisdiction was designed to replicate general federal question jurisdiction where the source of federal law under which a claim is made is the federal Bankruptcy Code. Thus, for example, when a trustee seeks to recover a preferential transfer pursuant to the cause of action created by section 547 of the Bankruptcy Code, this action is constitutionally secure in federal court as an Article III claim "arising under... the Laws of the United States." This conventional "arising under," federal question jurisdiction, though, is but a small component of federal bankruptcy jurisdiction.

A general federal bankruptcy jurisdiction, in assigning to the federal courts all claims by and against a debtor's bankruptcy estate, also permits federal adjudication of state-law claims that do not constitute Article III "Controversies... between Citizens of different States." The Supreme Court has affirmed unswervingly the constitutionality of federal bankruptcy jurisdiction over nondiverse state-law claims; it has not, however, clearly or consistently articulated the basis for this conclusion. Indeed, in

216. Id.
declaring the 1978 Reform Act's jurisdictional provisions unconstitutional on separation of powers grounds—because they permitted a non-Article III adjunct to adjudicate a Chapter 11 debtor's state-law breach-of-contract action—all of the opinions in the Marathon case unceremoniously assumed that there would be no constitutional bar to an Article III federal court entertaining the action. 217

In the ensuing congressional scramble to restructure the federal bankruptcy court system, the lurking uncertainty regarding the constitutional foundation for far-reaching federal bankruptcy jurisdiction of state-law claims belatedly surfaced. 218 One prod-

217. See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 72 n.26, 84 n.36 (1982) (Brennan, J., plurality opinion) (stating that the debtor's state-law contract action "may be adjudicated in federal court on the basis of its relationship to the petition for reorganization," even though "Congress has not purported to prescribe a rule of decision for the resolution of [the debtor's] contractual claims"); id. at 89 (Rehnquist, J., concurring) (stating that if the lawsuit "is to be resolved by an agency of the United States, it may be resolved only by an agency which exercises 'the judicial power of the United States' described by Art. III of the Constitution"); id. at 92 (Burger, C.J., dissenting) (opining that with respect to a "traditional" state common-law action, not made subject to a federal rule of decision and related only peripherally to an adjudication of bankruptcy under federal law," all of the "problems arising from today's judgment can be resolved simply by providing that ancillary common-law actions, such as the one involved in these cases, be routed to the United States district court"); id. at 95 (White, J., dissenting) (reasoning that "if the Court is correct that such a state-law claim cannot be heard by a bankruptcy judge," then "cases such as these would have to be heard by Art. III judges"); see also ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 4.5.3, at 237 (2d ed. 1994) ("None of the justices . . . indicate[d] that it would be unconstitutional to vest an Article III judge with the bankruptcy courts' power to decide state law claims.").

In subsequent testimony to Congress, Professor Redish characterized this as "the ultimate irony in Northern Pipeline":

Both the plurality and concurrence opinions reach the conclusion that the one type of case which must be heard by an article III court is a suit between private litigants over a state-created cause of action, a case that arguably does not even fall within the terms of article III, except when diversity of citizenship is present.


uct of this concern was a revival of the once-repulsed "jurisdiction by detriment" proposal, previously put forth and defeated in congressional debate over the 1978 Reform Act. The renewed version of this proposal, now in a much weaker form, was enacted as the so-called mandatory abstention provisions of the 1984 BAFJA amendments, ostensibly requiring abstention in favor of proceedings in state court under specified circumstances. Some in Congress championed mandatory abstention, which supplements the 1978 Reform Act's broader discretionary ("permissive") abstention provisions, as an appropriate response to the constitutional "problems" associated with an overly extensive federal bankruptcy jurisdiction. Of course, if federal bankruptcy jurisdiction is set at the constitutional maximum, in accordance with the design of the 1978 Reform Act, then by definition, it will not produce an unconstitutionally broad federal jurisdiction. Moreover, the "new" bankruptcy court structure of the


219. See supra notes 197-201 and accompanying text.

220. Mandatory abstention is as follows:

Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a [bankruptcy] case... but not arising under [the Bankruptcy Code] or arising in a [bankruptcy] case, with respect to which an action could not have been commenced in a court of the United States absent [bankruptcy] jurisdiction... , the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

28 U.S.C. § 1334(c)(2) (1994). Because the federal bankruptcy court retains a certain amount of discretion to determine what is necessary for a state court adjudication to be considered "timely," the "mandatory" abstention moniker is somewhat misleading. Case law confirms that timeliness must "be referenced against the needs of the [bankruptcy] case, rather than against an absolute time guideline," 1 COLLIER (15th ed.), supra note 66, ¶ 3.05[2], at 3-71, and "[t]he bankruptcy court is best able to coordinate the timing of the proceeding with the needs of the bankruptcy case," JOHN SILAS HOPKINS, III, THE BANKRUPTCY LITIGATOR'S HANDBOOK § 11.09, at 82 (1993).

221. See Block-Lieb, supra note 172, at 831-34.

222. To the extent the Supreme Court's general federal abstention jurisprudence is of constitutional proportions (a matter of considerable uncertainty), such general abstention doctrines would be equally applicable in the bankruptcy context, even without the
1984 BAFJA amendments fully retained the 1978 Reform Act's scheme of an all-encompassing federal jurisdiction over all civil proceedings "arising under" the Bankruptcy Code, or "arising in"

mandatory abstention statute. See id. at 820, 833-34 & n.257; cf. ALI, JUDICIAL CODE PROJECT, supra note 112, at 109, 93 (discussing the general power of a federal court to abstain, which is "supported by no clear consensus of justification," as being "subsumed within the power to decline to exercise supplemental jurisdiction"). Thus, contentions that the mandatory abstention statute was of constitutional compulsion seem misplaced. See 1997 COMM'N REPORT, supra note 168, at 723 (opining that mandatory abstention has "no bearing on the constitutionality of the current bankruptcy court"); Block-Lieb, supra note 172, at 833 n.256 ("If bankruptcy jurisdiction is constitutionally conferred on district courts, then the Constitution does not require district courts to abstain from its exercise."); Galligan, supra note 7, at 15-16 n.54 (arguing that if bankruptcy jurisdiction is unconstitutionally broad, "abstention is an illogical response"); rather, "[n]o jurisdiction is the only answer"); cf. Bobroff v. Continental Bank (In re Bobroff), 766 F.2d 797, 802 n.3 (3d Cir. 1985) (stating that the mandatory abstention statute "presuppose[s] that 'related to' jurisdiction exists"). BAFJA's mandatory abstention provisions actually were touted as some sort of miraculous constitutional cure-all, remedying even the Marathon separation of powers problem—a position that also seems unfounded. See Block-Lieb, supra note 172, at 827-31.

A more rational explanation for the mandatory abstention provision is that it is a legislative accommodation of the persistent efficiency-federalism tension inherent in a general federal bankruptcy jurisdiction—the same tension that produced the restrictive jurisdictional provisions of the 1898 Act and the ill-fated "jurisdiction by detriment" proposal in 1978. See S. REP. No. 98-55, at 18-19, 41 (1983) (stating that the mandatory abstention provision "draws an equitable balance between the legitimate interests of federalism—federal courts deciding federal law, State courts deciding State law—and the important interests promoted by the 1978 Act in consolidating as much jurisdiction as possible in a single decision-making body"); 130 CONG. REC. 17,157 (1984) (statement of Sen. Dole) (considering the contours of mandatory abstention and noting that "[c]ertainly, comity between Federal and State courts depends upon the mutual respect that each of those divisions of the national judiciary has for the jurisdiction of the other," but "I believe that it is equally essential that a bankruptcy court—or district court hearing a bankruptcy proceeding—have the ability to expeditiously dispose of all claims that may be pressed by or against a debtor"); id. at 17,156 (statement of Sen. Hatch) (describing the need for an "acceptable compromise" on a mandatory abstention provision that acknowledges "the wisdom of respecting the authority of State courts to adjudicate purely State law issues, and the advisability of fashioning an efficient bankruptcy system"); 129 CONG. REC. 9924 (1983) (statement of Sen. Heflin) (noting that "[t]he 1978 act significantly expanded the scope of Federal jurisdiction" and the mandatory abstention provision "gives increased respect for State courts and State laws by according greater opportunity for purely State law issues to be adjudicated in State court"); id. at 9922 (statement of Sen. Thurmond) ("The new [abstention] provisions do not entirely reverse the changes enacted by the 1978 act but merely attempt to establish a more appropriate balance between the scope of responsibilities of Federal and State tribunals."); see also Galligan, supra note 7, at 65.
or "related to" bankruptcy cases. The constitutional "problem" presented by this pervasive bankruptcy jurisdiction statute, thus, remains one of determining what the constitutional maximum for federal bankruptcy jurisdiction is, and this Part ventures into that thicket.

Initially, this Part explores Congress's Article I Bankruptcy Power, which itself can be credibly construed to contain an authority to place adjudication of state-law claims in the federal courts. This, however, invites a dangerous demise of Article III's limits on the federal judicial power, through open-ended theories of "protective jurisdiction." In addition, an Article I theory of federal bankruptcy jurisdiction, tellingly, reveals nothing about the proper interpretation and bounds of third-party "related to" bankruptcy jurisdiction.

Constitutional federal question jurisprudence, and its "original federal ingredient" theory for adjudication of state-law claims in federal court, has been recognized widely as having substantial sway in bankruptcy, but without any consensus on the extent of its application. The visibility of the federal bankruptcy trustee, being a real person, obscures the artificial legal person on whose behalf the trustee acts, the federal bankruptcy estate—thus, eclipsing the "original federal ingredient" in Chapter 11 reorganization cases in which no trustee is appointed. Because both the Bankruptcy Code and the bankruptcy jurisdiction statute

223. 28 U.S.C. § 1334(b); see supra notes 185-88 and accompanying text. The BAFJA amendments addressed the Marathon separation of powers holding by altering the allocation of this pervasive jurisdiction as between the Article III district courts and their non-Article III adjuncts, the bankruptcy courts. See 28 U.S.C. § 157; infra Part III.A.1, notes 418-30 and accompanying text. This division of judicial responsibilities displays many of the features of the adjunct referee system employed under the 1898 Act. See Brubaker, supra note 13, at 1042-45, 1059-61.

224. As Professor Block-Lieb has noted, like the 1978 Reform Act, the 1984 BAFJA amendments also sought to retain a federal bankruptcy jurisdiction as expansive as is constitutionally permissible: "The fragmentation of bankruptcy jurisdiction among federal district courts, bankruptcy courts and state courts conflicts with the bankruptcy goal of expeditious administration. Therefore, Congress sought to divide bankruptcy jurisdiction among these courts only as much as the Constitution required." Block-Lieb, supra note 172, at 813-14.

225. See infra Part II.A, notes 231-52 and accompanying text.

226. See infra Part II.B.1, notes 269-91 and accompanying text.
personify the federal bankruptcy estate, even in Chapter 11 reorganization cases, Justice Story's archetype of a general federal bankruptcy jurisdiction over all claims by and against a bankruptcy estate is fully explained by a federal entity theory of constitutional federal questions.227

The ultimate test for a constitutional theory, though, is presented by federal bankruptcy jurisdiction over third-party disputes to which the bankruptcy estate is not a party—claims that are not explained by a federal entity theory. Supplemental jurisdiction is the obvious candidate, yet scholars have improperly assumed that supplemental state-law claims in bankruptcy are ancillary to the federal bankruptcy "case," employing an anachronistic in rem theory of ancillary jurisdiction.228 A bankruptcy "case," though, is not the equivalent of an ordinary civil "case." Bankruptcy contains a unique admixture of ordinary adversarial litigation, contested administrative hearings, and judicial oversight of an administrative process—some of which contains litigable controversies and some of which does not. An attempt to find a uniform theory that explains all of bankruptcy jurisdiction as one constitutional "case," then, seems predestined to fall short, and the in rem bankruptcy "case" theory ultimately proves inadequate for the task.

The complex nature of a bankruptcy "case" distracts and conceals the essential character of federal jurisdiction over the various justiciable controversies that arise during the course of administration of a bankruptcy estate. Individual bankruptcy "proceedings" have always provided the relevant jurisdictional unit in bankruptcy.229 Explaining federal bankruptcy jurisdiction over all of these bankruptcy "proceedings," therefore, is simply a matter of combining two conventional constitutional theories in a perfectly orthodox manner. All claims by and against a bankruptcy estate have an independent, freestanding basis for federal jurisdiction as constitutional federal questions to which a federal entity is party. "Related to" bankruptcy jurisdiction in third-

227. See infra Part II.B.2, notes 292-327 and accompanying text.
228. See infra Part II.C.1, notes 332-42 and accompanying text.
229. See infra Part II.C.2, notes 343-69 and accompanying text.
party disputes, then, simply reduces to a form of modern in personam supplemental jurisdiction over third-party claims "related to" the constitutional federal question claims by and against the bankruptcy estate.\(^\text{230}\) Moreover, this constitutional theory provides the clarity necessary to a principled interpretive framework for the bankruptcy jurisdiction statute.

A. An Article I Approach:  
\textit{The Bankruptcy Power as a Federal Forum Power}

Relying upon Congress's Article I Bankruptcy Power to explain federal bankruptcy jurisdiction over state-law claims is tempting, yet treacherous and, ultimately, unhelpful and unwarranted. An Article I approach to federal bankruptcy jurisdiction, reflected more generically in "protective jurisdiction" theories, provides no assistance in discerning the appropriate contours of third-party "related to" bankruptcy jurisdiction.

Most of the Supreme Court's discussions\(^\text{231}\) of Congress's constitutional power to vest bankruptcy jurisdiction in the federal courts simply rely upon Congress's power under Article I "[t]o establish... uniform Laws on the subject of Bankruptcies throughout the United States."\(^\text{232}\) This approach has definite appeal, as bankruptcy "law," for the most part, functions not to create distinct federal grounds for recovery or relief, but to create an alternative means for enforcing existing substantive rights, most of which are grounded in state law. The historical role of bankruptcy has been to provide a centralized mechanism for collection of a debtor's assets and distribution of those assets among all of the debtor's creditors,\(^\text{233}\) and in our Anglo-American

\(^{230}\) See infra Part II.C.3, notes 370-95 and accompanying text.  
\(^{232}\) U.S. CONST. art. I, § 8, cl. 4.  
\(^{233}\) See Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 186 (1902) (stating that the
experience, bankruptcy’s centralized collection-distribution function has been administered as a judicial process. Thus, it is perfectly logical to conclude that congressional power to enact uniform national bankruptcy “laws” necessarily, and even primarily, envisions the power to place adjudication of all disputes incident to administering bankruptcy estates in federal court.

Bankruptcy Power “extends to all cases where the law causes to be distributed, the property of the debtor among his creditors; this is its least limit”) (quoting In re Klein, 14 F. Cas. 716, 718 (C.C.D. Mo. 1843) (No. 7865) (Catron, Circuit Justice)). As Professor Radin put it: “Unless we intend to bring the creditors into one large group, and adjust their common claims to a fund consisting of a single debtor’s property, there is no reason to have recourse to bankruptcy.” Max Radin, The Nature of Bankruptcy, 89 U. PA. L. REV. 1, 5 (1940); see also Baird, supra note 111, at 35 (noting that “bankruptcy law provides a single forum and procedures that are directed specifically at the problem of identifying claims and gathering assets,” and a “bankruptcy proceeding is principally a forum in which all of a debtor’s creditors can gather, assemble the debtor’s assets, and divide them among themselves, according to the rights that state law gives them”); Louis Edward Levinthal, The Early History of Bankruptcy Law, 66 U. PA. L. REV. 223, 225 (1918) (stating that “[a]ll bankruptcy law . . . no matter when or where devised and enacted . . . aims, first, to secure an equitable division of the insolvent debtor’s property among all his creditors” through “[a] special process of collective execution . . . directed against all of the property of the debtor, resorted to for the common benefit and at the common expense of all the creditors”); Charles Jordan Tabb, The Historical Evolution of the Bankruptcy Discharge, 65 AM. BANKR. L.J. 325, 329 n.21 (1991) (characterizing “the essence of a bankruptcy procedure” as “collection of the debtor’s assets, liquidation, and distribution on a pro rata basis to all creditors”).


235. Accordingly, a prominent commentary of a previous generation reasoned as follows:

The constitutional grant of power to Congress to enact laws with respect to “bankruptcies” necessarily carries with it, by implication, power to regulate and deal with all incidents of the subject. By its very nature, the administration of insolvency cases is a judicial function . . . or at least a matter for judicial supervision. Adequate handling of such matters requires the determination of a series of points of law in the light of facts presented even in the simplest instance and frequently runs into numer-
The lure of an Article I approach to federal bankruptcy jurisdiction has spawned a more universal theory of an Article I power to invest state-law claims in the federal courts—the so-called protective jurisdiction theory.\textsuperscript{236} Analogizing to the bankruptcy model, this theory posits that there may well be many other instances where Congress, within the realm of its enumerated Article I legislative powers, perceives independent value in a federal tribunal, but without the need for substantive federal law governing parties’ rights and obligations.\textsuperscript{237} Under this theory, then, Congress’s legislative prerogatives include extending the federal judicial power to state-law claims if “necessary and proper”\textsuperscript{238} to protect a federal forum interest.

To the extent protective jurisdiction relies solely upon Congress’s Article I powers, it rings inharmoniously with the conventional wisdom that the Framers intended Article III as both the source and limits of the federal judicial power. Moreover, Article III seems to contemplate only a very narrow class of federal “protective” jurisdiction over state-law claims, through the Diversity Clause.\textsuperscript{239} In an attempt to bring protective juris-

\begin{itemize}
\item 1 Remington, supra note 65, § 13, at 27.
\item 237. See Rosenberg, supra note 7, at 948-51. For an extensive discussion of such federal forum interests, see Goldberg-Ambrose, supra note 7, at 566-83.
\item 238. U.S. Const. art. I, § 8, cl. 18.
\item 239. See Tidewater, 337 U.S. at 589 (Jackson, J., plurality opinion).
\item 240. In the Tidewater case, a majority of the Court advanced this reasoning forcefully in three separate opinions rejecting Justice Jackson’s effort to discard Article III as a limitation on federal jurisdiction. See id. at 607-16 (Rutledge, J., concurring); id. at 626-45 (Vinson, C.J., dissenting); id. at 646-52 (Frankfurter, J., dissenting). Oddly enough, though federal jurisdiction was upheld in the Tidewater case (extending diver-
diction within the confines of Article III, some have suggested that such a congressional grant of federal jurisdiction over state-law claims could be considered a species of Article III's "arising under," federal question jurisdiction. Where do these scholars find the federal law that such an action "arises under"? In the federal jurisdictional statute itself, enacted pursuant to one of Congress's Article I powers.241 In addition to the troubling circularity of this reasoning, it does not respond to the concern that Article III was designed to restrain the federal judicial power. Given the nearly limitless field of Congress's Article I concerns, this approach to federal jurisdiction could, indeed, undermine any intended checks against endless encroachments of the federal judicial power into a protected sphere of state autonomy over the development and administration of state law.242 And therein lies the ultimate predicament presented by protective jurisdiction; theories of protective jurisdiction inevitably lead to a confounding quest for meaningful, workable limits. Our bankruptcy context presents a vivid example.

The statutory grant of federal bankruptcy jurisdiction over any and all state-law claims "related to" a pending bankruptcy case was designed to be as broad as is constitutionally permissible.243 Protective jurisdiction theory as a constitutionalometer, however, provides absolutely no guidance on the appropriate content of "related to" bankruptcy jurisdiction. The most expans-

241. See Alexander M. Bickel & Harry H. Wellington, Legislative Purpose and the Judicial Process: The Lincoln Mills Case, 71 HARV. L. REV. 1, 20-21 (1957); Wechsler, supra note 236, at 225 ("A case is one 'arising under' federal law within the sense of Article III whenever it is comprehended in a valid grant of jurisdiction as well as when its disposition must be governed by the national law.").

242. Indeed, Professor Wechsler acknowledged that "[t]here is hardly any limit to the cases it would draw today." Wechsler, supra note 236, at 225. For an insightful discussion of the state autonomy implications from federal adjudications of state-law actions, see Goldberg-Ambrose, supra note 7, at 595-608. On the role of the courts in safeguarding state autonomy, by exposition of constitutional limits on congressional action, see William T. Mayton, "The Fate of Lesser Voices": Calhoun v. Wechsler on Federalism, 32 WAKE FOREST L. REV. 1083 (1997).

243. See supra notes 209, 222-24 and accompanying text.
sive form of protective jurisdiction would afford nearly conclusive legitimacy to all congressional enactments, relying on the political process to confine federal jurisdiction within acceptable bounds. This approach, of course, eschews the task of defining limits, and ironically then, in the context of "related to" bankruptcy jurisdiction, actually fixes the jurisdiction-limiting function in the politically insular federal judiciary. Not only does this result contradict a major premise of the theory and present a startling opportunity for one branch's self-aggrandizement, but as evidenced by the case law, the absence of coherent limiting principles also leads to arbitrary and inconsistent decision making.

More limited theories of protective jurisdiction, such as balancing tests and active federal program or policy prerequisites, likewise produce hopelessly inconclusive results, because

244. Professor Galligan employs this version of protective jurisdiction to explain bankruptcy jurisdiction. See Galligan, supra note 7, at 54-72. Significantly, other than noting the issue, nowhere does Galligan confront the difficulties of determining what claims are sufficiently "related to" a bankruptcy case to trigger federal jurisdiction. See id. at 9 n.35.

245. See supra note 20 and accompanying text.

246. See, e.g., Goldberg-Ambrose, supra note 7, at 609-16 (suggesting that protective jurisdiction grants be scrutinized under the Tenth Amendment, balancing state autonomy interests against federal forum interests); Rosenberg, supra note 7, at 958-59 (proposing "a standard of scrutiny more exacting than a necessary-and-proper standard of deference," such that "the forum-based interest must be a substantial one," and "the jurisdictional grant must not be broader than the forum-based interest warrants"). A desire to minimize the expense and delay of auxiliary jurisdictional litigation counsels in favor of clear guidance to courts and litigants regarding jurisdictional thresholds, and thus, it seems particularly inappropriate for jurisdiction to turn on a case-specific balancing of interests. See Carlos Manuel Vázquez, Nite and Day: Coeur D'Alene, Breard, and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine, 87 GEO. L.J. 1, 84 (1998). On the evils generally wrought by the ascension of balancing tests, see T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 YALE L.J. 943 (1987).

247. Professor Forrester, as one of the original architects of protective jurisdiction theory, thought that in order to make the federal judicial power fully coextensive with the legislative, as intended by the Framers, "where Congress has set up a broad legislative program and policy . . . it may be argued that Congress is acting within the constitutional intent . . . in granting jurisdiction to the federal courts over all litigation connected with and forming a part of such a program." Forrester, supra note 236, at 120. Along similar lines, Professor Mishkin's formulation was "an articulated and active federal policy regulating a field . . . permits the conferring of jurisdiction on the national courts of all cases in the area—including those substantively governed by state law." Paul J. Mishkin, The Federal "Question" in the District Courts, 53 COLUM. L. REV. 157, 192 (1953); see also Donald H. Wollett & Harry H. Wellington,
they assume the existence of a determinate jurisdictional grant, to which the appropriate protective-jurisdiction litmus can then be applied. Such a litmus test, however, cannot generate the solution to be tested, and the requisite definitive grant of federal jurisdiction does not exist for "related to" bankruptcy jurisdiction. "Related to" bankruptcy jurisdiction is not self-defining, and protective jurisdiction theory as a referent provides no readily discernible limits, much like the prevailing test for "related to" bankruptcy jurisdiction itself.\textsuperscript{248}

Relying on protective jurisdiction theory to support the constitutionality of federal bankruptcy jurisdiction is also precarious, because the Supreme Court has shown no inclination to accept such a theory.\textsuperscript{249} In fact, the Court has rejected the proposition of protective jurisdiction theorists that a federal jurisdictional statute, standing on its own, can be the federal law on which Article III federal question jurisdiction is premised.\textsuperscript{250} Perhaps

\textit{Federalism and Breach of the Labor Agreement}, 7 STAN. L. REV. 445, 476-79 (1955). The federal bankruptcy system would seem to constitute such an active federal program or policy, but nonetheless, the nagging question of the permissible limits of the "related to" bankruptcy jurisdiction remains unanswered.

\textsuperscript{248} See infra Part III.B.1, notes 461-73 and accompanying text.

\textsuperscript{249} Only Justices Black and Burton joined Justice Jackson's opinion in the Tidewater case. See National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949) (Jackson, J., plurality opinion). Justices Burton and Harlan invoked the appellation "protective jurisdiction" in the \textit{Lincoln Mills} case, although their reasoning seemed to rely upon traditional principles of constitutional federal questions. See \textit{Textile Workers Union v. Lincoln Mills}, 353 U.S. 448, 460 (1957) (Burton, J., concurring) (reasoning "that some federal rights may necessarily be involved . . . and hence that the constitutionality of [a collective bargaining agreement jurisdiction statute] can be upheld as a congressional grant . . . of what has been called 'protective jurisdiction'"); infra Part II.B, notes 253-327 and accompanying text. More recently, Justice O'Connor, for a unanimous Court, noted that "[w]e have, in the past, not found the need to adopt a theory of 'protective jurisdiction' to support Art. III 'arising under' jurisdiction." \textit{Mesa v. California}, 489 U.S. 121, 137 (1989).

\textsuperscript{250} See, e.g., \textit{Mesa}, 489 U.S. at 136 (stating that "a pure jurisdictional statute, seeking to do nothing more than grant district court jurisdiction over cases in which a federal officer is a defendant . . . cannot independently support Art. III 'arising under' jurisdiction"); \textit{Verlinden B.V. v. Central Bank of Nigeria}, 461 U.S. 480, 495-96 (1983) (upholding federal jurisdiction under the \textit{Foreign Sovereign Immunities Act}, because the Act "does not merely concern access to the federal courts" and distinguishing "prior cases in which this Court has rejected congressional attempts to confer jurisdiction on federal courts simply by enacting jurisdictional statutes" as "the statutes at issue in these prior cases sought to do nothing more than grant jurisdiction over a particular class of cases").
bankruptcy is sufficiently unique that it provides a narrower basis on which to premise an Article I theory of federal jurisdiction, but such an enterprise is unnecessary. Traditional federal jurisdiction theory fully explains federal bankruptcy jurisdiction and provides principled limits for third-party "related to" bankruptcy jurisdiction, through an appropriate blend of principles of constitutional federal questions and supplemental jurisdiction.

B. Constitutional Federal Questions and a Federal Entity Theory

In the main, federal bankruptcy jurisdiction is constitutional federal question jurisdiction. As demonstrated in this Part II.B, a bankruptcy estate is a federally created entity, such that any claim to which a bankruptcy estate is a party, even a state-law claim, contains federal law as an "original ingredient" within the meaning of Osborn v. Bank of the United States. Some question whether the claims of a Chapter 11 debtor-in-possession, as opposed to those of a bankruptcy trustee, contain an original federal ingredient. This misplaced focus on the estate's representative, rather than the estate itself, however, fails to fully personify the bankruptcy estate and, as a result, misperceives the nature of both trustee and debtor-in-possession suits. The relevant federal party in such suits is a federal entity, not a federal official. A general federal bankruptcy jurisdiction over all claims by and against a federal bankruptcy estate fits squarely within

251. Justice Frankfurter hinted at this in his opinion in the Lincoln Mills case. See Lincoln Mills, 353 U.S. at 483-84 (Frankfurter, J., dissenting). Indeed, the "uniformity" requirement in the Bankruptcy Clause can be read to contemplate a uniform federal process when Congress enacts bankruptcy legislation. See Baird, supra note 111, at 26-36. Nonetheless, the Marathon case, although decided in the very different context of separation of powers issues, seems to refute the notion that the Article I Bankruptcy Power gives license to Congress to skirt Article III's constraints on the exercise of federal judicial power. See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 72-76 (1982) (Brennan, J., plurality opinion); cf. Seminole Tribe v. Florida, 517 U.S. 44, 72-73 (1995) ("The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.").

252. As Professor Goldberg has noted: "[W]e must distinguish those cases that are encompassed by conventional readings of the arising under clause of article III from those that are not. Only in the latter need some concept of protective jurisdiction be invoked at all." Goldberg-Ambrose, supra note 7, at 547; see also Verlinden, 461 U.S. at 491 n.17.

accepted principles of constitutional federal question jurisdiction, irrespective of the estate's representative on such claims. The only aspect of federal bankruptcy jurisdiction that is not constitutional federal question jurisdiction is "related to" jurisdiction over third-party disputes.

Any analysis of Article III's provision for "Cases . . . arising under . . . the Laws of the United States," must begin with the now-settled principle that Article III constitutional federal questions comprehend much more than statutory "arising under" bankruptcy jurisdiction or its counterpart in the general federal question statute, despite the linguistic equivalence of the constitutional and statutory "arising under" phrases. Mr. Chief Justice Marshall charted the contours of constitutional "arising under" jurisdiction in his celebrated and pernicious Osborn opinion.

Osborn presented the issue of the ability of the Bank of the United States, a federally chartered corporation, to bring suit in federal court. The statute creating the Bank conferred on it the capacity to sue and be sued as an entity "in all State Courts having competent jurisdiction, and in any Circuit Court of the United States." In granting the circuit courts jurisdiction over any and all claims by or against the Bank, the statute clearly raised the specter of federal adjudication of nondiverse state-law actions. Nonetheless, the Court upheld the constitutionality of

255. "The district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 [the Bankruptcy Code] . . . ." 28 U.S.C. § 1334(b) (1994); see supra notes 212-15 and accompanying text.
256. "The district courts shall have original jurisdiction of all civil actions arising under the . . . laws . . . of the United States." 28 U.S.C. § 1331.
259. See id. at 816-17.
260. Id. at 817 (quoting the statutory provision).
261. The particular action at issue in the Osborn case was clearly one "arising under" federal law, as the Bank was challenging the constitutionality of the State of Ohio's levy of a tax on the Bank. See Harry Shulman & Edward C. Jaegerman, Some Jurisdictional Limitations on Federal Procedure, 45 YALE L.J. 393, 404 (1936). However, the companion case of Bank of the United States v. Planters' Bank, 22 U.S. (9 Wheat.) 904 (1824), argued by the same counsel and decided in tandem with Osborn,
the statute as a permissible grant of Article III "arising under" jurisdiction, and Justice Marshall's reasoning remains the bed-rock of constitutional federal question jurisprudence.

Because the Bank was a juridical person created by federal law, Justice Marshall considered federal law an "original ingredient" in any action by or against the Bank, which "is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law. Can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the law?" Any action by or against the Bank necessarily involved the preliminary issue of the Bank's capacity to acquire and assert such rights or incur such obligations—an issue governed by the federal law of its creation. Consequently, even state-law causes of action asserted by or against the Bank constituted cases "arising under" federal law for purposes of Article III.

The prevailing scholarly consensus postulates that when a bankruptcy trustee sues on a debtor's state-law cause of action in federal court, because the bankruptcy trustee is a federal official (an officer of the federal bankruptcy court), the trustee's right to bring the action is an original federal ingredient, placing the action within Osborn's "original ingredient" theory of constitutional federal questions. That is where agreement ends,

263. Id. at 823.
264. See id. at 823-24. As Justice Marshall emphasized, the original federal ingredient supporting federal jurisdiction need not be one that will be contested in the action. See id. at 824. Indeed, since jurisdiction must be established at the outset, on the allegations of the plaintiff's complaint, it cannot depend upon whether the defendant will deny the existence of the original federal ingredient. See Alan D. Hornstein, Federalism, Judicial Power and the "Arising Under" Jurisdiction of the Federal Courts: A Hierarchical Analysis, 56 IND. L.J. 563, 565-66, 578-84 (1981); Note, The Outer Limits of "Arising Under," 54 N.Y.U. L. REV. 978, 979-81, 983, 986-88, 991 (1979).
265. See AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS app. C, at 482-83 (1969); Bickel & Wellington, supra note 241, at 21-22 & n.83; Block-Lieb, supra note 20, at 774-76; Cross, supra note 7, at 1229-33; Ferguson, supra note 156, at 499-501; Ray Forrester, The Nature of a "Federal Question," 16 TUL. L. REV. 362, 367, 373-74 (1942); Galligan, supra note 7, at 33-34; Goldberg-Ambrose, supra note 7, at 551-53; Mishkin, supra note 247, at 194-95; Plumb, supra note 109, at 1458-61. But see National Mut. Ins. Co. v. Tide-
however; and in particular, suits by a Chapter 11 debtor-in-possession are the source of considerable consternation. Can a debtor, by filing a petition for reorganization under Chapter 11 of the Bankruptcy Code—and thereby obtaining the federal designation "debtor in possession,"266 with the rights and duties of a bankruptcy trustee267—constitutionally gain immediate access to federal court under Osborn?268 The answer to this difficult question rests on the important distinction between the bankruptcy estate and the representative of the bankruptcy estate. Properly conceived, a debtor-in-possession's suit is the exact equivalent of a trustee's with respect to the original federal ingredient. The constitutionality of a general federal bankruptcy jurisdiction over all claims by and against a bankruptcy estate is a direct application of Osborn, whether the estate is represented by a trustee or a debtor-in-possession.

1. Trustee as Representative of the Bankruptcy Estate

Understanding the nature of debtor-in-possession suits begins by clarifying the nature of trustee suits. Suits by a bankruptcy trustee have been characterized improperly as federal-official suits. Such suits, though, are maintained on behalf of a distinct federal entity, the bankruptcy estate, that serves as a mechanism for transfer of a debtor's assets to creditors.

To say that a trustee sues on a constitutional federal question because the trustee's status as a federal official presents an orig-

water Transfer Co., 337 U.S. 582, 594-99 (1949) (Jackson, J., plurality opinion) (relying erroneously on narrower statutory federal question jurisprudence); Rosenberg, supra note 7, at 980 (arguing that a trustee's suit contains no original federal ingredient within the meaning of Osborn, using a rationale similar to that discussed infra Part II.B.2, notes 292-327 and accompanying text).


267. See id. § 1107(a).

268. Compare Cross, supra note 7, at 1230 n.158 (opining that "a case involving a debtor in possession cannot be readily fit into the 'federal party' theory"), and Galligan, supra note 7, at 34-35 (same), and Goldberg-Ambrose, supra note 7, at 554 n.67 ("Such suits cannot satisfy any conventional test for arising under jurisdiction because they do not contain even the minimal federal element present in the trustees' suits."). with Block-Lieb, supra note 20, at 777-78 (rejecting Galligan's and Cross's views as based upon an overly "narrow reading of Osborn"). As discussed infra Part II.B.2, notes 292-327 and accompanying text, Professors Cross, Galligan, and Goldberg read Osborn correctly, but misjudge the nature of debtor-in-possession suits.
inal federal ingredient, per the standard analysis, is incomplete and misleading. The bankruptcy trustee is not the real party in interest, plaintiff in such a suit. Although the Bankruptcy Code expressly gives the trustee "capacity to sue and be sued," in that capacity, the trustee merely acts as "the representative of the [bankruptcy] estate." It is the bankruptcy estate, not the trustee, that succeeds to "all legal or equitable interests of the debtor in property," including causes of action against third parties. Indeed, the estate is central to our scheme of federal bankruptcy law. Since the Roman law of cession (cessio bonorum), bankruptcy law has concerned itself with transfer of a debtor's property to the debtor's creditors. The mechanism for such transfer in Anglo-American law has been the construct of a bankrupt's "estate," vested in trust to a representative of the creditor collective. Thus, the state-law rights and obligations

269. See, e.g., Cross, supra note 7, at 1229-33; Galligan, supra note 7, at 33-34; Goldberg-Ambrose, supra note 7, at 552-53. Professor Block-Lieb's analysis is much more sensitive to the trustee's role as representative of the bankruptcy estate. See Block-Lieb, supra note 20, at 774-77.

270. 11 U.S.C. § 323(b).

271. Id. § 323(a).

272. Id. § 541(a)(1).

273. See 5 COLLIER (15th ed.), supra note 66, ¶ 541.08.

274. See 1 LOVELAND, supra note 65, § 1. Early English bankruptcy legislation provided that "the bankrupt's property was to be seized by a common agent and thereafter there was to be a distribution pro rata of the proceeds." JONES, supra note 234, at 18. Professor Glenn found that such a transfer process was available amongst traders, even before English bankruptcy legislation, through the customary practices of the Law Merchant. See Garrard Glenn, Essentials of Bankruptcy: Prevention of Fraud, and Control of Debtor, 23 VA. L. REV. 373, 386-88 (1937).

275. As Professor Levinthal stated: "Some agency must be given control over all the property of the debtor... to collect, manage and distribute all the assets." Levinthal, supra note 233, at 227. "In order to work out [the] general objects of bankruptcy, it is necessary to devise and establish a systematic method of managing the debtor's estate during the pendency of the process." Id. Professor Carlson ably demonstrates how competing theories of the transfer of property to the bankruptcy estate inform the contours of the estate's avoiding powers in David Gray Carlson, Bankruptcy's Organizing Principle, 26 FLA. ST. U. L. REV. 549 (1999).

276. See 1 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 470 (A.L. Goodhart & H.G. Hanbury eds., 7th ed. rev. 1956) (stating that English assignees introduced by 1707 statute "were subject to the Chancellor's equitable jurisdiction as trustees"); Tabb, supra note 37, at 9 (stating that eighteenth-century assignees were "so named because the bankruptcy estate was assigned to them"). The concept of a bankruptcy estate was certainly a familiar one by the time of the Constitutional Convention. See F. REGIS NOEL, A HISTORY OF THE BANKRUPTCY LAW 55-56, 69-70 (1919);
adjudicated in bankruptcy are attributed to our incorporeal construct, the bankruptcy estate, not to the bankruptcy trustee personally.\textsuperscript{277} The federal party of import in bankruptcy is the bankruptcy estate, not the bankruptcy trustee.

Care in identifying the relevant federal party is warranted, because maneuvering Osborn's original ingredient theory can, at times, be quite a ticklish travail, especially in the realm of federal-official suits.\textsuperscript{278} The most straightforward application of Osborn, however, comes on the facts of Osborn itself, a suit by or against a federally created entity.\textsuperscript{279} Indeed, the Supreme Court recently fully reaffirmed the vitality of Osborn in such context.\textsuperscript{280} More-

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\textsuperscript{277} Nadelmann, supra note 234, at 221-22.


\textsuperscript{279} See Matasar, supra note 7, at 1445 n.206; Mishkin, supra note 247, at 187 ("At the very least, [Osborn] establishes that the judicial power under the federal question clause of Article III may be brought to bear upon any litigation to which a congressionally chartered corporation is a party, though the substantive rule for decision be state-made.").

\textsuperscript{280} In American National Red Cross v. S.G., 505 U.S. 247 (1992), the Court con
over, Osborn's federal entity implications readily transfer to federal bankruptcy jurisdiction, because "[w]hen a bankruptcy petition is filed, a new entity is created—the bankruptcy estate."281 Consistent with the historical purpose of bankruptcy law to transfer a single debtor's property to multiple creditors, the estate concept serves one of the most basic functions of a fictional legal entity: personification of property. Constructing the juridical person simplifies the Byzantine relationships propogated by multiple owners, including jurisdictional and joinder complexities inherent in lawsuits involving numerous parties.282 To that end, the Bankruptcy Code expressly authorizes the bankruptcy estate to sue and be sued as an entity, in the same manner that a corporation can sue and be sued as an entity.283

A general federal bankruptcy jurisdiction, then, as originally articulated by Justice Story in Ex parte Christy—284—a power to hear all claims by and against the bankruptcy estate—is nothing more than an Osborn federal entity approach to bankruptcy jurisdiction. In fact, although not mentioning Osborn, Justice Story nonetheless expressly linked his construction of a general federal bankruptcy jurisdiction to Osborn's constitutional federal question jurisprudence.285 Indeed, in Claflin v. Houseman, Justice Story construed a provision in the Red Cross's federal charter statute as conferring "original jurisdiction on federal courts over all cases to which the Red Cross is a party," id. at 248, and summarily affirmed the constitutionality of the grant on the strength of Osborn, see id. at 264-65. Such a result was not a foregone conclusion. For example, in the Lincoln Mills case, one of the Court's leading authorities on federal jurisdiction, Justice Frankfurter, questioned and seemed to repudiate Osborn's federal entity theory. See Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 479-84 (1957) (Frankfurter, J., dissenting). 281. ELIZABETH WARREN, BUSINESS BANKRUPTCY 41 (1993).


284. 44 U.S. (3 How.) 292 (1845), discussed supra Part I.A.2, notes 45-57 and accompanying text.

285. In response to an argument that a statutory provision preserving state-law rights in bankruptcy precluded federal adjudication of such rights, Justice Story responded that "[s]uch a conclusion would be at war with the whole theory and practice under the judicial power given by the Constitution and laws of the United States." Christy, 44 U.S. (3 How.) at 316. And in reading the statutory grant of "jurisdiction in all matters and proceedings in bankruptcy arising under this act," Bankruptcy Act of 1841, ch. 9, § 6, 5 Stat. 440, 445 (repealed 1843), to encompass all claims by and
tice Bradley described federal bankruptcy jurisdiction over an assignee's suit in precisely those terms: "exactly the same as that of the Bank of the United States" pursuing "a right arising under a law of the United States, as much so as can be affirmed of a case of an assignee in bankruptcy."  

against the estate, he opined that "[i]n this respect the language of the act seems to have been borrowed from the language of the Constitution, in which the judicial power is declared to extend to cases arising under the . . . laws . . . of the United States." Christy, 44 U.S. (3 How.) at 313. "[I]t seems perfectly clear, that congress possess[es] a complete constitutional authority to enact such a law for such an object; for the judicial power, by the constitution, extends 'to all cases . . . arising under . . . the laws . . . made under their authority.'" Mitchell v. Great Works Milling & Mfg. Co., 17 F. Cas. 496, 499 (C.C.D. Me. 1843) (No. 9662) (Story, Circuit Justice).  

In enacting the 1978 Reform Act, Congress specifically relied upon Ex parte Christy as support for the constitutionality of pervasive federal bankruptcy jurisdiction:  

The constitutionality of a grant of a jurisdiction in bankruptcy in such comprehensive terms should not be subject to any serious doubt. The jurisdictional grants to the court of bankruptcy by the Acts of 1841 and 1867 were almost as extensive, and the Supreme Court gave the provisions of those Acts a generous construction and approval of their constitutionality.  


286. 93 U.S. 130 (1876).  
287. Id. at 135. Although he would later recant this version, see supra notes 251, 280 and infra note 333, Justice Frankfurter, in his Tidewater dissent, seemed to suggest a federal entity theory of bankruptcy jurisdiction:  

When a petition for bankruptcy is filed, there may be outstanding claims by the bankrupt against debtors and by creditors against the bankrupt. Of course Congress has power to determine whether all such claims—those for, and those against, the bankrupt estate—should be enforced through the federal courts. . . . This is so because in the exercise of its power to "pass uniform laws on the subject of bankruptcies" Congress may deem it desirable that the federal courts be utilized for all the claims that pertain to the bankrupt estate . . . . The congeries of controversies thus brought into being by reason of bankruptcy may be lodged in the federal courts because they arise under "the Laws of the United States," to wit, laws concerning the "subject of bankruptcies." It is a matter of congressional policy whether there must be a concourse of all claims affecting the bankrupt's estate in the federal court . . . .  

National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 652 n.3 (1949) (Frankfurter, J., dissenting). In that case, Justice Rutledge also reasoned that "federal court adjudication of disputes arising pursuant to bankruptcy . . . is conventional federal-question jurisdiction," id. at 611 (Rutledge, J., concurring), relying upon Toledo Fence & Post Co. v. Lyons, 290 F. 637 (6th Cir. 1923), which espoused, at length, an
Such a federal entity theory of bankruptcy jurisdiction enables the federal courts to "protect" the federal interest in expeditious administration of bankruptcy estates, and it remains true to the idea that Article III's "arising under" jurisdiction was intended to make the judicial power "coextensive" with the legislative. Federal bankruptcy "law"—providing for collection and distribution of a debtor's property—operates through the construct of a federal bankruptcy "estate," and it is this congressionally created entity to which the federal judicial power attaches. Thus, the Court's cryptic references to federal bankruptcy jurisdiction as a product of the Bankruptcy Power are best understood as connoting federal jurisdiction over Article III cases "arising under" federal bankruptcy law. Moreover, this federal entity theory of general federal bankruptcy jurisdiction also holds for claims by and against the estate of a Chapter 11 debtor-in-possession.

Osborn rationale for federal bankruptcy jurisdiction, see id. at 640-43.

288. Indeed, Osborn itself has been described as a type of protective jurisdiction. See Mishkin, supra note 247, at 186-88; Rosenberg, supra note 7, at 965 (describing Osborn as "the grandfather of the theory of protective jurisdiction").

289. "If there are such things as political axioms, the propriety of the judicial power of a government being co-extensive with its legislative, may be ranked among the number." THE FEDERALIST NO. 80, at 535 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); see also Forrester, supra note 265, at 364-67; Rosenberg, supra note 7, at 944 & n.62 (collecting many references by the Framers to the coextensive nature of the legislative and judicial powers by virtue of Article III's "arising under" jurisdiction).

290. As Justice Story stated: "The obvious design of the bankrupt act . . . was to secure a prompt and effectual administration and settlement of the estate of all bankrupts," and "[t]he judicial power of the United States is, by the Constitution, competent to all such purposes; and congress, by the act, intended to secure the complete administration of the whole system in its own courts, as it constitutionally might do." Christy, 44 U.S. (3 How.) at 312, 320. Furthermore, in speaking of the Constitution's "arising under" jurisdiction and the Bankruptcy Power, Justice Story stated that "[t]he judicial power has, in this respect, under the constitution, always been construed to be co-extensive with the legislative powers, upon the plain ground, that the constitution meant to provide ample means to accomplish its own ends by its own courts." Mitchell v. Great Works Milling, 17 F. Cas. at 499.

291. Cf. Ferguson, supra note 156, at 499, 502-03 ("There would appear to be no bar to the exercise of Article III powers to vindicate the federal interest in the uniformity of law enacted by Congress by authorizing federal courts to adjudicate cases and controversies involving matters of bankruptcy to which the trustee is a party."); Mussman & Riesenfeld, supra note 96, at 89 (explaining concisely the authority for federal bankruptcy jurisdiction as "[t]he scope of the bankruptcy clause in conjunction with the judiciary article of the Constitution" (emphasis added)).
2. Debtor-in-Possession as Representative of the Bankruptcy Estate

The theoretical difficulties with federal jurisdiction of state-law claims by and against a Chapter 11 debtor-in-possession present the problem of the sham jurisdictional entity. A Chapter 11 reorganization estate, though it may be difficult to envisage, is not a sham whose only purpose is to create federal jurisdiction. In fact, federal law actually constructs a more elaborate federal entity in the form of a reorganization estate than it does in the case of a liquidating Chapter 7 estate. A complex of multifarious legal relationships are embodied in and restructured through the federal reorganization estate, all toward the same end as that of a Chapter 7 estate: transfer of a debtor's assets to creditors. Thus, Osborn's federal entity theory sustains federal jurisdiction over all claims by and against a Chapter 11 reorganization estate.

In Osborn, Justice Johnson, in dissent, raised the issue of the mere jurisdictional entity, whereby Congress declares a person or entity a "federal corporation" solely for purposes of bringing suits involving such person into federal court. Chief Justice Marshall apparently agreed that such a congressional act would be meaningless and indistinguishable from a bare jurisdictional grant, which cannot itself supply an original federal ingredient. Thus, in identifying original federal ingredients that give

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292. Justice Johnson formulated the issue as follows:

But if the plain dictates of our senses be relied on, what state of facts have we exhibited here? Making a person, makes a case; and thus a government which cannot exercise jurisdiction unless an alien or citizen of another State be a party, makes a party . . . and then claims jurisdiction because it has made a case. If this be true, why not make every citizen a corporation sole, and thus bring them all into the Courts of the United States quo minus?


293. Justice Marshall responded in this way:

This distinction is not denied; and, if the act of Congress was a simple act of incorporation, and contained nothing more, it might be entitled to great consideration. But the act does not stop with incorporating the Bank. It proceeds to bestow upon the being it has made, all the faculties and capacities which that being possesses.

Id. at 827 (Marshall, C.J.).

294. See supra note 250 and accompanying text.
rise to constitutional federal questions under Osborn, one must
distinguish between those congressional enactments that are
"the source of the legal relationships which the plaintiff neces-
sarily relies upon in asserting the claim,"295 and those that do
nothing more than open the doors of the federal court to the
plaintiff.296

Those who deny the existence of an original federal ingredient
in a suit by a Chapter 11 debtor-in-possession297 apparently
believe that in such a case, federal law governs none of the un-
derlying legal relationships and merely attempts to grant the
debtor access to federal court through the hollow federal title of

295. Goldberg-Ambrose, supra note 7, at 549, quoted with approval in Gutierrez de
"If those relationships are federally created, even in small part, the claim should be
reated as one that arises under federal law, within the meaning of article III . . . ."
Goldberg-Ambrose, supra note 7, at 549.
296. "The plaintiff must appear in court arguing, 'My right to win has a federal
element in it,' not, 'My
right to be here has a federal element in it.'" Rosenberg,
supra note 7, at 969; see also Note, supra note 264, at 979 & n.9 (characterizing this
as a requirement that plaintiff's complaint must rely upon federal "primary relation-
ships," within the Hohfeldian meaning of that term).

This seems to be the nub of the problem with which Justice Frankfurter wrestled
in the Lincoln Mills case, in which he appeared to question the validity of Osborn's
federal entity theory. See Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 479-
84 (1957) (Frankfurter, J., dissenting); supra note 280. The congressional enactment at
issue in that case provided that a labor union could acquire rights and obligations
and sue and be sued as an entity and gave the federal district courts jurisdiction in
any suit by or against a labor union for breach of a collective bargaining agreement,
without regard to diversity of citizenship. See Lincoln Mills, 353 U.S. at 449-50 (quot-
ing section 301 of the Taft-Hartley Act). Labor unions, as unincorporated associations
under state law, apparently did not enjoy such entity status under the laws of many
states. Labor unions, however, existed independent of federal law, and apparently
some states had already conferred similar entity status on labor unions. See Forrester,
supra note 236, at 117-18. For labor unions that already enjoyed entity status, then,
the federal enactment seemed to do nothing more than place their state-law contract
disputes in federal court. The Lincoln Mills majority avoided this problem by construc-
ting the statute to authorize the federal courts to fashion a federal common law gov-
erning the collective bargaining agreements subject to the statute, thus, upholding the
constitutionality of the jurisdictional provision as conventional "arising under" federal
question jurisdiction. See Lincoln Mills, 353 U.S. at 456-57. Such a federal common
law solution to bankruptcy's jurisdictional dilemma is unavailable, however, as the
Court has interpreted federal bankruptcy statutes as not authorizing this sort of fed-
eral common law. See Butner v. United States, 440 U.S. 48, 54-55 (1979); Cross,
supra note 7, at 1225-28.
297. See sources cited supra note 268.
“debtor-in-possession.” This view, however, like that of the federal-official approach to trustee suits, proceeds from an incomplete understanding of the debtor-in-possession concept and, as a result, overlooks the most important legal relationships at stake in debtor-in-possession suits.

The idea of a debtor-in-possession flows from the presumption in Chapter 11 reorganization proceedings that, in an effort to maximize the value of the debtor’s assets, the debtor’s business will continue to operate despite the filing of the bankruptcy petition, and a trustee will not be appointed. Thus, unlike a Chapter 7 liquidation case, which contemplates a trustee’s expeditious sale of all assets and distribution of the proceeds to creditors, in a Chapter 11 reorganization, absent unusual circumstances, the prepetition debtor remains in possession of all assets, operating the business.

In the prototypical case of a corporate Chapter 11 debtor, then, prepetition management ordinarily retains control of the debtor’s business operations during the reorganization proceedings. This creates the deceptive appearance that the “debtor in possession is the debtor itself; it is not a federally created entity

298. Thus, Professor Galligan restates the argument of Justice Johnson: “If all Congress has to do to grant federal jurisdiction, without providing a rule of decision, is to ‘create’ a federal juridical entity, then whenever it wanted a federal court to hear a case Congress could so legislate by engaging in semantics.” Galligan, supra note 7, at 35.


300. See 11 U.S.C. § 1101(1) (1994) (the debtor is a debtor-in-possession, unless a trustee is appointed); id. § 1107(a) (a debtor-in-possession assumes the rights and duties of a trustee); id. § 1108 (a debtor-in-possession may operate the debtor’s business, unless the court orders otherwise).

301. See id. §§ 701-702 (providing for the appointment of a trustee in every Chapter 7 case); id. § 704(1) (the Chapter 7 “trustee shall collect and reduce to money the property of the estate . . . and close such estate as expeditiously as is compatible with the best interests of parties in interest”). The Chapter 7 trustee can operate the debtor’s business only with specific authorization from the court and “for a limited period, if such operation is in the best interest of the estate and consistent with the orderly liquidation of the estate.” Id. § 721.

302. Cause for replacing debtor’s management with a Chapter 11 trustee is limited to extreme misconduct, such as fraud or gross mismanagement. See id. § 1104(a)(1). Although the Code also contains a more permissive best-interests-of-the-estate ground for appointment of a trustee in section 1104(a)(2), the courts are extremely hesitant to appoint a trustee in Chapter 11 cases. See CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY § 11.6, at 778-79 (1997).
like the Bank of the United States or the bankruptcy trustee." As just demonstrated in Part II.B.1, though, in a trustee’s suit the bankruptcy trustee is not the “federally created entity” of concern, it is the bankruptcy estate, and the same holds true in reorganization cases under Chapter 11. Debtor as debtor-in-possession assumes the responsibilities of representative of the estate, and just as in cases where a trustee serves, “the bankruptcy ‘estate’ is a separate and distinct legal entity.”

Although considerably more complex in its operation, the estate construct in Chapter 11 serves precisely the same purpose as in ordinary Chapter 7 liquidation proceedings: the historical role of transferring a debtor’s assets to creditors. This transfer is less evident, however, because a “reorganization,” in its purest form, envisions a reorganized debtor emerging from bankruptcy conducting the same business operations as the prebankruptcy debtor. From a corporal perspective, then, the asset transfer is utterly anticlimactic, because the assets remain in their original use. In a legal and financial sense, though, the transfer of assets in reorganization can be much more direct, as the reorganization effects a change in ownership of the assets.

The reorganized debtor is a creature of the Chapter 11 plan of reorganization. Confirmation of the reorganization plan by the
court extinguishes all prebankruptcy debts and ownership interests and simultaneously substitutes an entirely new capital structure. Prebankruptcy creditors receive distributions according to the terms of the confirmed plan of reorganization. The "estate" concept is critical to determining appropriate distributions to creditors because the reorganization plan can be confirmed only if it provides creditors at least as much value as they would receive through a liquidation of the estate. Thus, when the bankruptcy "estate" pursues a state-law action against a third party, whether at the hands of a trustee or a debtor-in-possession, that action is maintained for the benefit of creditors as an asset of the federal bankruptcy estate.

In actuality, federal law plays a more involved role in debtor-in-possession cases than in Chapter 7 trustee cases. In a Chapter 7 liquidation, the federal bankruptcy estate is a very simple entity, with the trustee merely collecting the debtor's assets, in kind, and reducing them to cash for distribution. In reorganization of an operating business, though, the function of federal law and the bankruptcy "estate" is much more elaborate and complex. A reorganized debtor is clearly an entity produced by federal law—that governing Chapter 11 reorganization plans and the establishment of the reorganized debtor's new capital/ownership structure. Between filing of the bankruptcy

311. See TABB, supra note 302, § 5.1, at 273.
312. This is known as the "best interests of creditors" test. See 11 U.S.C. § 1129(a)(7)(A).
313. See TABB, supra note 302, § 1.22, at 68-72.
314. Thus, the possibility for perpetual federal jurisdiction over the reorganized debtor, a result that certainly is not within the intent of Congress, but nonetheless producing a tension evident in the so-called postconfirmation jurisdiction cases. See NATIONAL BANKR. CONF., REFORMING THE BANKRUPTCY CODE: THE NATIONAL BANKRUPTCY CONFERENCE'S CODE REVIEW PROJECT 58-54 (rev. ed. 1997); Daniel B. Bogart, Unexpected Gifts of Chapter 11: The Breach of a Director's Duty of Loyalty Following Plan Confirmation and the Postconfirmation Jurisdiction of Bankruptcy Courts, 72 AM. BANKR. L.J. 303, 335-85 (1998); Ronald W. Goss, Defining the Scope of Retained Jurisdiction in Chapter 11 Plans, 18 J. CONTEMP. L. 1 (1992); Frank R. Kennedy & Gerald
petition and confirmation of a plan of reorganization, then, federal law and the federal bankruptcy estate attempt to preserve and enhance the business and assets during this period in which the business's capital structure is, in effect, in a state of suspension pending negotiation, promulgation, and confirmation of a plan of reorganization. Thus, federal law, inter alia, enjoin enforcement of claimants' prebankruptcy rights, channeling them into the bankruptcy court for resolution and eventual treatment under a reorganization plan; closely regulates all aspects of the ongoing financing and operation of the business; (3) introduces an interim regime of internal governance and fiduciary obligation, including a distinct body of law

K. Smith, Postconfirmation Issues: The Effects of Confirmation and Postconfirmation Proceedings, 44 S.C. L. REV. 621, 622-44 (1993); Norman N. Kinel & Melissa Zelen Neier, Post-Confirmation Jurisdiction in the Bankruptcy Courts: Does It Ever End?, 55 BUS. LAW. 81 (1999). The estate theory of federal bankruptcy jurisdiction formulated in this Article can provide a useful framework for resolution of these cases, but that is a matter that must be pursued in a subsequent article.


318. See id. §§ 363-366, 503.

regarding control of "derivative" litigation, and (4) arms the estate with an arsenal of unique federal causes of action in the form of the so-called avoiding powers—all under the watchful supervision of official constituent committees, the Justice Department, and a federal bankruptcy court.


320. The estate's representative in litigation is not limited to a trustee or debtor-in-possession. In certain circumstances, it may be appropriate for some other party, such as a creditor or a statutory committee, to prosecute litigation on behalf of the estate in a manner analogous to the process by which a shareholder pursues derivative litigation on behalf of a corporation outside of bankruptcy. See generally 2 CHAPTER 11 THEORY AND PRACTICE: A GUIDE TO REORGANIZATION § 10.26 (James F. Queenan, Jr. et al. eds., 1994) [hereinafter CHAPTER 11 THEORY AND PRACTICE]; 7 COLLIER (15th ed.), supra note 66, ¶ 1103.05[5]-[6]; Lawrence K. Snider, The Chapter 11 Creditors' Committee Right to Institute Suit, 2 J. BANKR. L. & PRAC. 779 (1992). Indeed, in the context of litigating creditors' claims against the estate, this concept receives express recognition in the Code itself, which authorizes a "party in interest" to object to the allowance of a creditor's claim. 11 U.S.C. § 502(a); see FED. R. BANKR. P. 3007 advisory committee's note; 3 CHAPTER 11 THEORY AND PRACTICE, supra, § 21.46, at 21:129-131; 4 COLLIER (15th ed.), supra note 66, ¶ 502.02[2].


322. See id. §§ 1102-1103 (appointment, powers, and duties of creditors' and equity security holders' committees); cf. id. § 1109 (right of the SEC and other parties in interest to appear and be heard on any issue); FED. R. BANKR. P. 2018(d) (right of a labor union or employees' association "to be heard on the economic soundness of a plan affecting the interests of the employees"). For excellent accounts of the important role of creditors' committees in the reorganization process, see Daniel J. Bussel, Coalition-Building Through Bankruptcy Creditors' Committees, 43 UCLA L. REV. 1547 (1996); Kenneth N. Klee & K. John Shaffer, Creditors' Committees Under Chapter 11 of the Bankruptcy Code, 44 S.C. L. REV. 995 (1993).

323. The office of United States trustee, appointed by the Attorney General, is
A reorganization estate, then, even with a debtor-in-possession at the helm, truly exists as a unique federal entity and not a mere jurisdiction-conferring sham. It is an intricate being designed to effect the historical task of transfer of a debtor's assets to creditors, while concurrently undertaking the formidable responsibility of managing a business that has no owners. The mere act of filing the Chapter 11 petition so drastically alters the rights and obligations of the prebankruptcy debtor


324. As Professor Frost has noted, “[g]overning a corporation during a Chapter 11 reorganization presents a special case of the age-old problem of the separation of ownership and control.” Frost, Corporate Governance in Bankruptcy, supra note 319, at 103.

325. Professor Warren put it very effectively:

When a bankruptcy petition is filed, a new entity is created—the bankruptcy estate. Metaphorically, bankruptcy is much like death: One entity ceases to function, and an estate succeeds to the obligations and property of the deceased. Much like the law of decedents’ estates, the law of bankruptcy governs the operation of the post-filing business and the disposition of property of the pre-bankruptcy debtor. In effect, the old, pre-bankruptcy debtor has no more property, no more contractual rights, and no more power to pay bills or to incur new obligations. At filing, the new bankruptcy estate succeeds to all the rights—and receives some new ones of its own.

The cleavage between the old debtor and the post-filing estate occasioned by the act of filing a bankruptcy petition is critical to the bankruptcy system. The conceptual separation between the old debtor and the new estate helps to explain both the new powers enjoyed by the post-filing estate and the new limitations imposed on the estate’s operation. The bankruptcy court exercises supervision over the estate that no court would ordinarily exercise over a non-bankrupt business. At the same time, the creditors’ rights are sharply curtailed, in that collection against the estate is modified and channeled through the bankruptcy court.

WARREN, supra note 281, at 41-42. Even though the Supreme Court has for a particular purpose said “it is sensible to view the debtor-in-possession as the same ‘entity’ which existed before the filing of the bankruptcy petition,” the Court immediately qualified this as the same entity, but not really the same entity: “but empowered by virtue of the Bankruptcy Code to deal with its contracts and property in a manner it could not have employed absent the bankruptcy filing.” NLRB v. Bildisco & Bildisco, 465 U.S. 513, 528 (1984). As Michael Andrew points out, the Court’s confusion was of the same ilk as that infecting “original ingredient” analysis:

A number of courts in executory contracts cases [including Bildisco] have puzzled over whether the debtor in possession is a “new entity” as
that any action by or against the newly constituted federal bankruptcy estate, even on a state-law claim, contains an original federal ingredient within the meaning of Osborn.\textsuperscript{326}

Osborn and a federal entity theory of constitutional federal questions, therefore, fully explain Justice Story's idea of a general federal bankruptcy jurisdiction over all claims by and against the bankruptcy estate, whether the estate is represented by a trustee or a debtor-in-possession. Federal bankruptcy jurisdiction has come to encompass more, however, and through the statute's "related to" bankruptcy jurisdiction, it embraces federal adjudication of nondiverse state-law claims to which the bankruptcy estate is not a party. Osborn's original federal ingredient theory simply cannot be stretched to reach such third-party claims without running afoul of the Court's edict that the jurisdictional statute itself does not furnish the original ingredient for federal jurisdiction.\textsuperscript{327} The constitutional basis for federal

\textsuperscript{326} It is worth noting that the Marathon case involved a Chapter 11 debtor-in-possession suing on a state-law cause of action, and Justice Brennan's brief footnote approving the constitutionality of federal jurisdiction over such an action, in addition to references to the Court's previous bankruptcy cases, cited for support Osborn, Justice Rutledge's Tidewater opinion regarding bankruptcy as constitutional federal question jurisdiction, and the portion of Justice Frankfurter's Lincoln Mills dissent that discussed bankruptcy jurisdiction in the same terms. \textit{See} Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 72 n.26 (1982) (Brennan, J., plurality opinion); supra notes 217, 280, and 287.

\textsuperscript{327} \textit{See} supra note 250 and accompanying text; accord Cross, \textit{supra} note 7, at 1232 (reasoning that "third-party suits accordingly lack even the minimal federal ingredient required to fit within Article III"). Professor Block-Lieb constructs an argument that would bring all "related to" bankruptcy jurisdiction within the sweep of Osborn, by positing the original federal ingredient in third-party "related to" claims as the debtor's bankruptcy filing. \textit{See} Block-Lieb, \textit{supra} note 20, at 778-79. Since the debtor's
bankruptcy jurisdiction over these third-party claims does find support, however, in a different aspect of the Osborn opinion: that portion suggesting principles of supplemental jurisdiction. Properly identifying the constitutional nature of these third-party claims also unveils the obscured meaning of the statutory grant of federal jurisdiction over all claims "related to" a bankruptcy case.

C. Constitutional Supplemental Jurisdiction

In addition to establishing the original federal ingredient theory of constitutional federal questions, Justice Marshall's Osborn opinion also revealed another constitutional basis for federal adjudication of state-law claims, in what has come to be known as supplemental jurisdiction. Justice Marshall reasoned that "when a question to which the judicial power . . . is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the [federal] Courts jurisdiction of that cause, although other questions of fact or law may be involved in it," because "the constitution declares, that the judicial power shall extend to all cases arising under the constitution, laws, and treaties of the United States," and "[t]here is scarcely any case, every part of which depends on the constitution, laws, or treaties of the United States." That rationale supported federal adjudication of state-law claims to which the Bank of the United States was a party as constitutional federal questions. In addition, though, it also portended the now-familiar Gibbs supplemental jurisdiction formula for adjudication of nondiverse state-law claims that contain no fed-

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329. Id. at 819 (emphasis added).
330. Id. at 820.
eral ingredient at all, if "the relationship between [a constitutional federal question] claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.'"331

The prevailing model for a supplemental theory of federal bankruptcy jurisdiction depicts state-law claims in bankruptcy as ancillary to the debtor's federal bankruptcy "case." This Part II.C analyzes and critiques that model, which is founded upon an inapt in rem theory of supplemental jurisdiction that is insufficient to fully explain "related to" bankruptcy jurisdiction over third-party claims. The bankruptcy "case" is not the primary jurisdictional unit in bankruptcy; individual bankruptcy "proceedings" present the justiciable controversies for exercise of the federal judicial power in bankruptcy. Reconstructing the bankruptcy model around these "proceedings" produces a more flexible in personam theory of federal bankruptcy jurisdiction. Additionally, this in personam model is fully consistent with established supplemental jurisdiction theory and Congress's desire, in enacting the 1978 Reform Act, to loose federal bankruptcy jurisdiction from the in rem constraints of the past. Most significantly, though, this in personam theory bears the principled interpretive standards for third-party "related to" bankruptcy jurisdiction that are so sorely lacking in extant jurisprudence.

1. The Equitable Receivership Paradigm

Many have played with the prospect that federal bankruptcy jurisdiction over state-law claims is a species of supplemental jurisdiction, an idea that seems to have entered the academic discourse through Professor Mishkin332 and that Justice Frankfurter also tendered at one point.333 The model for this approach


332. See Mishkin, supra note 247, at 194 n.161. Having made the suggestion, Professor Mishkin then concluded that "use of some other approach seems more apt." Id.

333. Justice Frankfurter's version was as follows:

[If] all the suits by the trustee . . . are regarded as one litigation for the collection and apportionment of the bankrupt's property, a particular suit by the trustee, under state law, to recover a specific piece of property might be analogized to the ancillary or pendent jurisdiction cases in
comes from the common-law precursor to statutory bankruptcy reorganizations,\textsuperscript{334} federal equity receivership proceedings.\textsuperscript{335}

The jurisdictional basis for receivership proceedings in federal court was by way of an equitable creditors' bill, seeking an application of a debtor's assets toward satisfaction of creditors' claims\textsuperscript{336} and founded upon diversity of citizenship as between a plaintiff, judgment creditor and the defendant debtor.\textsuperscript{337} Once

which, in the disposition of a cause of action, federal courts may pass on state grounds for recovery that are joined to federal grounds.

Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 483 (1957) (Frankfurter, J., dissenting); cf. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 92 (1982) (Burger, C.J., dissenting) (stating that the "problems arising from today's judgment can be resolved simply by providing that ancillary common-law actions, such as the one involved in these cases, be routed to the United States district court" (emphasis added)).


335. See Matasar, supra note 7, at 1470 (analogizing bankruptcy jurisdiction to equity receivership jurisdiction); Mishkin, supra note 247, at 194 n.161 (same). The converse also seems to be true. In its receivership cases, the Supreme Court was prone to analogize to general federal bankruptcy jurisdiction. See, e.g., Riehle v. Margolies, 279 U.S. 218, 223 (1929) (citing the bankruptcy case of Kelley v. Gill, 245 U.S. 116 (1917)); White v. Ewing, 159 U.S. 36, 40 (1895) ("In this particular, the jurisdiction of the [federal] Court does not materially differ from that of the District Court in bankruptcy, the right of which to collect the assets of a bankrupt estate we do not understand ever to have been doubted.").

336. See Finletter, supra note 106, at 3-10; 1 Moore & Oglebay, supra note 106, ¶ 0.04, at 30-33; Garrard Glenn, The Basis of the Federal Receivership, 25 Colum. L. Rev. 434 (1925). The intervention of equity, premised upon inadequacy of legal remedies, required the plaintiff, judgment creditor to present an execution on the judgment that had been returned unsatisfied. Consent by the defendant to the receivership petition, however, removed this requisite. See Stanley L. Sabel, Equity Jurisdiction in the United States Courts with Reference to Consent Receiverships, 20 Iowa L. Rev. 83 (1934). In the late 1920s, though, the Supreme Court began to overtly question the continuing validity of the consent receivership device. See Henry J. Friendly, Some Comments on the Corporate Reorganizations Act, 48 Harv. L. Rev. 39, 41-45 (1934).

337. See Garrard Glenn, The Law Governing Liquidation § 154, at 256 (1935); 1 Moore & Oglebay, supra note 106, ¶ 0.04, at 34; David McC. Wright, Jurisdiction and Venue in Federal Equity Receivership of Corporations, 24 Va. L. Rev. 29, 33 (1937).
this diversity jurisdiction attached, ancillary jurisdiction enabled the federal receivership court to consider the claims of any of the debtor’s creditors, regardless of citizenship, as well as any suit by the receiver to collect the debtor’s assets.

Efforts to both develop and refute an ancillary or supplemental theory of federal bankruptcy jurisdiction have employed the receivership paradigm that state-law claims can be entertained in federal bankruptcy court if they are ancillary to the federal petition for bankruptcy relief, forming one constitutional bankruptcy “case.” There are a number of problems, however, with attempts to transport the receivership exemplar into the bankruptcy context—problems that incipiently misdirected these previous experiments with a supplemental approach to bankruptcy jurisdiction. Using an appropriate bankruptcy model, however, supplemental jurisdiction does, indeed, supply the

338. See Baggs v. Martin, 179 U.S. 206, 207-09 (1900); Rouse v. Hornsby, 161 U.S. 588, 588-91 (1896); Rouse v. Letcher, 156 U.S. 47, 49-50 (1895); People’s Bank v. Calhoun, 102 U.S. 256, 261-62 (1880). Grant Gilmore cited the equity receivership as one of the few post-Civil War examples of a pre-Civil War “tradition of judicial creativity” in the federal courts, which, “proceeding without statutory warrant, invented the equity receivership for the reorganization of insolvent corporations—a remarkable instance of an innovative judicial response to an unprecedented economic situation.” GRANT GILMOR, THE AGES OF AMERICAN LAW 60-61 (1977). The degree of inventiveness involved is illustrated by the fact that federal receivership jurisdiction over all creditors’ claims, regardless of citizenship, seems inconsistent with the complete diversity rule of Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806). See Friendly, supra note 336, at 45 n.24.


342. See 11 U.S.C. §§ 301, 303(b) (1994) (providing that a bankruptcy “case . . . is commenced by the filing with the bankruptcy court of a petition”).
crucial missing component for a comprehensive, cohesive theory of federal bankruptcy jurisdiction.

2. Clarifying the Jurisdictional Unit in a Bankruptcy "Case"

The equitable receivership model is unsuitable for federal bankruptcy jurisdiction, because it improperly characterizes the basic jurisdictional unit in bankruptcy as a bankruptcy "case." As explored in this Part II.C.2, however, it is unclear whether the so-called bankruptcy case, in and of itself, presents any justiciable "case" or "controversy" within the meaning of Article III of the Constitution. A bankruptcy "case" is much like an empty box, into which are placed all of the bankruptcy "proceedings" that arise in the course of administration of a particular debtor's bankruptcy estate, and the relevant jurisdictional unit to which the judicial power attaches in bankruptcy is an individual bankruptcy "proceeding." Thus, our constitutional theory must explain the basis for federal jurisdiction over each of these bankruptcy "proceedings," not the debtor's bankruptcy "case."

The "hook" for ancillary federal jurisdiction in the equitable receivership cases was the creditors' bill of a diverse plaintiff, to which all subsequent ancillary claims were appended, and whose bankruptcy analogue would be the initial bankruptcy petition commencing a debtor's bankruptcy "case" in federal court. Such a supplemental approach for federal bankruptcy jurisdiction is problematic, though, due to the considerable uncertainty surrounding the question whether the mere filing of a bankruptcy petition—in particular, the typical voluntary petition filed by the debtor—creates any justiciable "case or controversy" to which the judicial power and supplemental jurisdiction can attach.343

343. Compare Ralph E. Avery, Article III and Title 11: A Constitutional Collision, 12 BANKR. DEV. J. 397, 417-18 n.137 (1996) (arguing that the bankruptcy petition itself does not present any justiciable controversies), and Hon. Robert E. DeMascio, For Fourteen Years, in ROBERT E. DEMASCIO ET AL., FOURTEEN YEARS OR LIFE: THE BANKRUPTC Y COURT DILEMMA 1, 3 (1983) (same), with Block-Lieb, supra note 20, at 773 n.301 (concluding that a bankruptcy case is a justiciable controversy, analogizing to naturalization proceedings), and Galligan, supra note 7, at 39-40 & n.145 (same). For an interesting discussion of how justiciability and joinder doctrines, in combination, define a constitutional "case," see Susan Bandes, The Idea of a Case, 42 STAN. L. REV. 227 (1990); see also ALI, JUDICIAL CODE PROJECT, supra note 112, at 106
In drafting the Bankruptcy Code, Congress recognized that the vast majority of all bankruptcies present no disputes at all and, consequently, expressed a desire to restrict the role of the federal bankruptcy court to adjudication of actual controversies that do arise.344 Thus, the filing of a voluntary bankruptcy petition by a debtor, in and of itself, "constitutes an order for [bankruptcy] relief,"345 and that bankruptcy "relief" does not necessarily present the court with any justiciable controversies between adverse parties.346 In the equitable receivership context, the justiciable controversy to which ancillary federal jurisdiction was incident was the unpaid claim of the plaintiff creditor against the defendant debtor,347 not the creditor's request for appointment of a receiver to administer the debtor's assets for the benefit of creditors.348 Although the Supreme Court never ruled on


345. 11 U.S.C. § 301; see 1973 COMM'N REPORT, supra note 110, pt. I, at 121 (stating that "voluntary petitions do not pose any issues requiring judicial resolution").

346. For example, take the case of a corporate debtor with no remaining assets that files a Chapter 7 petition for purposes of "waving the white flag" to creditors. See Douglas G. Baird, The Initiation Problem in Bankruptcy, 11 INT'L REV. L. & ECON. 223, 225-27 (1991). The petition is not seeking a distribution of assets to unpaid creditors, because the debtor has no assets, and the petition is not requesting discharge of indebtedness, because a corporation is ineligible for discharge in a Chapter 7 case. See 11 U.S.C. § 727(a)(1). The only "relief" at stake seems to be access to a stay of creditor collection actions, but that relief is automatically granted without any involvement by the court. See id. § 362(a).


348. Thus, the Court opined that the mere fact a railroad is engaged in interstate commerce does not present a justiciable controversy warranting appointment of a federal receiver: "Jurisdiction to appoint a receiver . . . in cases of railroads engaged in interstate commerce has existed by reason of diversity of citizenship in the various cases between the parties to the litigation . . . ." Id. at 109 (emphasis added); cf. Mitchell v. Maurer, 293 U.S. 237, 243-44 (1934) (holding that a federal court could not grant a state court receiver an ancillary receivership in federal court, because "such an application is not ancillary to any proceedings in any federal court").
the controversial practice of a debtor itself initiating federal receivership proceedings without creditor involvement, it did characterize such a procedure as "certainly one of unusual character." A voluntary bankruptcy petition filed by a debtor, therefore, does not neatly fit the receivership pattern of a distinct controversy between a creditor and the debtor, initiating a justiciable "case" in federal court.

It is entirely unnecessary, however, to resolve the speculative issue of the justiciability of a bankruptcy petition, because focus upon the bankruptcy petition and ensuing bankruptcy "case" is misplaced and misconstrues the applicable jurisdictional unit in bankruptcy. Equating a bankruptcy "case," within the meaning of the bankruptcy jurisdiction statute, with a "case" under Article III of the Constitution underestimates the complexity and uniqueness of the bankruptcy "case." In fact, as a jurisdictional unit, a bankruptcy "case" is an invention of the drafters of the 1978 Reform Act. Every prior jurisdictional statute authorized federal jurisdiction over bankruptcy "proceedings," specifically identified as various "cases and controversies" arising

349. See 1 MOORE & OGLEBAY, supra note 106, ¶ 0.04, at 32.
352. Cf. Letter from Professor Jo Desha Lucas to Representative Peter W. Rodino, Jr., Chair, House Judiciary Committee (June 23, 1976) (stating that "[t]he position of cases 'in bankruptcy' constitutionally is not altogether free from doubt" and raising the issue "whether the bankruptcy proceeding itself is a 'case in equity' [under Article III] or a thing sui generis provided for by Article I"), reprinted in CONST. BANKR. CTS., supra note 6, app. II, at 58. As Professor King has noted, in the bankruptcy jurisdiction statute, the "word 'case' is a term of art," and the statute "carefully distinguish[es] between the words 'case' and 'proceeding,' recognizing that a case commenced under the Bankruptcy Code differs substantially from a typical civil action commenced in state or federal court to resolve a two-party dispute." King, supra note 178, at 676-77. Professor Tabb also emphasizes "the unique nature of bankruptcy cases," which are "composed of many different types of matters and 'proceedings.' These proceedings range in complexity from uncontested administrative tasks to full-scale adversarial litigation. Traditional civil lawsuits of the 'A versus B' variety comprise only a small portion of a typical bankruptcy case." TABB, supra note 302, ¶ 4.1, at 217. Likewise, the Advisory Committee on Bankruptcy Rules recently stated that "the bankruptcy case is not, in and of itself, litigation involving a legal dispute in the traditional sense." COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., REQUEST FOR COMMENT ON PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE 5 (1998).
during the administration of a bankruptcy estate.\textsuperscript{353} Indeed, the 1973 Commission's proposed statute, in introducing statutory "case" jurisdiction,\textsuperscript{354} referred to the bankruptcy "case" solely in terms of jurisdiction over such "controversies."\textsuperscript{355}

A bankruptcy "case," then, has no content in and of itself, but rather is defined by the various "proceedings" over which the statute also grants the federal courts jurisdiction.\textsuperscript{356} The only reason for a separate grant of exclusive jurisdiction over bankruptcy "cases,"\textsuperscript{357} in light of the seemingly contradictory

\textsuperscript{353} See supra Part I.A-B.1, notes 37-111 and accompanying text.

\textsuperscript{354} The concept was simultaneously incorporated into the 1973 Bankruptcy Rules, as described in the Advisory Committee notes:

A proceeding initiated by a petition for an adjudication under the Bankruptcy Act is designated a "bankruptcy case" for the purpose of these rules. The term embraces all the controversies determinable by the court of bankruptcy . . . arising during the pendency of the case. This usage of the word "case" conforms to that employed in many provisions of the Bankruptcy Act. The word "proceeding" as used in these rules generally refers to a litigated matter arising within a case during the course of administration of an estate.


\textsuperscript{355} "The jurisdiction of the bankruptcy courts shall extend to the determination of all controversies that arise out of a case commenced under this Act." 1973 COMM'N REPORT, supra note 110, pt. II, § 2-201, at 30 (emphasis added); \textit{see also} id., pt. I, at 6, 81-82, 85, 90, 126; id. pt. II, at 31-32. Congress employed similar language in describing the new jurisdictional scheme as a "comprehensive grant of jurisdiction to the bankruptcy courts over all controversies arising out of any bankruptcy or rehabilitation case." H.R. REP. No. 95-595, at 46 (1977) (emphasis added), \textit{reprinted in} 1978 U.S.C.C.A.N. 5963, 6007; \textit{see also} S. REP. No. 95-989, at 153 (1978) (stating that jurisdiction "is expanded to include all controversies arising out of or related to a case" (emphasis added)), \textit{reprinted in} 1978 U.S.C.C.A.N. 5787, 5939.


\textsuperscript{357} See 28 U.S.C. § 1334(a). Likewise, the statute also contains an in rem grant of
grant of concurrent jurisdiction over bankruptcy "proceedings," appears to be a statutory recognition of the concept that the federal bankruptcy court "has an exclusive and nondelegable control over the administration of an estate in its possession."
That exclusive "case" control over estate administration includes the power to permissively abstain from any given bankruptcy "proceeding" and direct the litigation into a state court, which retains a concurrent jurisdiction over the proceeding. 360 Not-

bankruptcy jurisdiction provision "should probably be read to mean that the bankruptcy court in which a [bankruptcy] case . . . is pending will have exclusive jurisdiction to administer the estate of the debtor"). For an extremely thoughtful recent opinion exploring the jurisdictional essence of the bankruptcy "case" and emphasizing its role as a control mechanism for estate administration, see Menk v. Lapaglia (In re Menk), 241 B.R. 896 (B.A.P. 9th Cir. 1999):

In short, virtually every act a bankruptcy judge is called upon to perform in a judicial capacity is a "civil proceeding" within § 1334(b).

If virtually all judicial acts are taken in "civil proceedings" within the subject-matter jurisdiction of § 1334(b), then the existence of a "case" under § 1334(a) has less importance in bankruptcy litigation.

This brings us back to the "case" and to the puzzle of how § 1334(a) fits into the scheme, given our conclusion that the main source of subject-matter jurisdiction for judicial acts is § 1334(b).

The § 1334(a) "case" has two main functions. It provides for the existence, and the nonjudicial administration, of the estate under which the prime function is the performance of the duties of the trustee under the supervision of the U.S. Trustee. Second, it serves as the administrative mechanism by which the debtor receives a discharge and a fresh start.

In other words, the bankruptcy "case" is an administrative exercise that occurs under the auspices of the court . . . .

Id. at 909-10 (emphasis added).

360. See 28 U.S.C. § 1334(c)(1). Indeed, the Thompson Court's statement regarding an "exclusive and nondelegable control" is immediately followed by: "But the proper exercise of that control may, where the interests of the estate and the parties will best be served, lead the bankruptcy court to consent to submission to state courts of particular controversies . . . ." Thompson v. Magnolia Petroleum, 309 U.S. at 483; see also 1973 COMM'N REPORT, supra note 110, pt. II, at 32-33 ("Although it is often said that the jurisdiction of the bankruptcy court over the administration of debtors' estates under the present Act is nondelegable, this proposition has never prevented the court's consent to submission of particular litigation to other courts."); Kennedy, Automatic Stay I, supra note 357, at 189 & n.67 (noting that although "Congress has manifestly concluded that the bankruptcy court must have control of litigation against the debtor . . . in order to be able to supervise and facilitate its rehabilitation," the "bankruptcy court's need for control of litigation does not necessarily require the court to conduct all litigation against the debtor"). In fact, the Supreme Court's discussions of "exclusive" federal bankruptcy jurisdiction over estate administration consistently recognize the corollary discretionary power to abstain from hearing particular proceedings. See Callaway v. Benton, 336 U.S. 132, 142 n.11 (1949); Gardner v. New Jersey, 329 U.S. 565, 577, 583-84 (1947); Thompson v. Texas Mexican Ry. Co., 328 U.S. 134, 138-41 (1946); Meyer v. Fleming, 327 U.S. 161, 163-64, 169 (1946); Mangus v. Miller, 317 U.S. 178, 185-88 (1942); Foust v. Munson S.S. Lines, 299 U.S. 77, 83-84 (1936); Ex parte Baldwin, 291 U.S. 610, 615-19 (1934); Straton v. New, 283 U.S. 318, 320-23,
withstanding this overarching, aggregative "case" jurisdiction to control conduct of all the "proceedings" involved in administration of the estate, the primary jurisdictional unit in bankruptcy—the equivalent of a nonbankruptcy "case" or "civil action"—has always been and remains a particular, individual bankruptcy "proceeding" raising a justiciable controversy.  


In addition to the permissive abstention provision contained in the bankruptcy jurisdiction statute, the Bankruptcy Code itself also recognizes one aspect of discretionary abstention, by providing for relief from the automatic stay of creditor collection actions, to permit litigation of creditor claims in a nonbankruptcy forum "for cause." 11 U.S.C. § 362(d)(1) (1994); see H.R. REP. NO. 95-595, at 343 (1977) (stating that "a desire to permit an action to proceed to completion in another tribunal may provide . . . cause"), reprinted in 1978 U.S.C.C.A.N. 5963, 6300. The 1898 Act contained a similar provision for adjudication of claims against the estate in a nonbankruptcy forum, at the discretion of the bankruptcy judge. See Bankruptcy Act of 1898, supra note 66, § 57d (providing "[t]hat an unliquidated or contingent claim shall not be allowed unless liquidated or the amount thereof estimated in the manner and within the time directed by the court"); id. § 11b ("The court may order the receiver or trustee to enter his appearance and defend any pending suit against the bankrupt."); 1A COLLIER (14th ed.), supra note 38, ¶ 11.09; 3 id. ¶ 57.15[3.2]-[3.3]; see also Bankruptcy Act of 1867, ch. 176, § 21, 14 Stat. 517, 527 (repealed 1878) (providing in a clause for stay of creditors' suits "that if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed as aforesaid").

361. In nonbankruptcy federal jurisdiction, the Judicial Code consistently employs the jurisdictional unit of a "civil action." See, e.g., 28 U.S.C. § 1331 (jurisdiction of "civil actions" arising under federal law); id. § 1332(a) (jurisdiction of "civil actions" in controversies between citizens of different states); cf. id. § 1333(1) (jurisdiction of any "civil case" in admiralty); see also FED. R. CIV. P. 1 (establishing that the Federal Rules govern procedure "in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty" (emphasis added)); FED. R. CIV. P. 2 ("There shall be one form of action to be known as 'civil action."); FED. R. CIV. P. 81(a)(1) (providing that the Federal Rules do not apply to "proceedings in bankruptcy," except to the extent specified in the Bankruptcy Rules). See generally ALI, JUDICIAL CODE PROJECT, supra note 112, at xv, 29-30.

362. See FED. R. BANKR. P. 9001(2) (defining "action" or "civil action" for purposes of the Bankruptcy Rules to mean "an adversary proceeding or, when appropriate, . . . proceedings to . . . determine any other contested matter"); Ayer, supra note 356, at 312; cf. ALI, JUDICIAL CODE PROJECT, supra note 112, at 29 (discussing other jurisdictional provisions in the Judicial Code that use "proceedings" as the jurisdictional unit in lieu of "civil action"). This is illustrated most clearly with respect to bankruptcy appellate jurisdiction, where it is firmly established that the relevant unit is a "proceeding," not the entire bankruptcy "case." See 1 COLLIER (15th ed.), supra note 66, ¶ 5.07[1][b]; John P. Henningan, Jr., Toward Regularizing Appealability in Bankruptcy,
cordingly, at an early date the Supreme Court recognized in a particular bankruptcy "proceeding," an assignee's plenary suit in federal court under the 1867 Act, that "the jurisdiction intended to be conferred is the regular jurisdiction between party and party, as described in the Judiciary Act and the third article of the Constitution."\(^{363}\) Explaining the constitutional nature of federal bankruptcy jurisdiction, therefore, is a matter of explaining federal jurisdiction over each of the assorted bankruptcy "proceedings" that may arise in the administration of a given debtor's bankruptcy case.

Recognizing that the conceptual jurisdictional unit in bankruptcy is something less than the whole bankruptcy "case" is significant, because it means that the entirety of bankruptcy jurisdiction over state-law claims need not be justified by one uniform constitutional theory. Indeed, a search for the one true theory seems to be the primary stumbling block for many prior scholarly endeavors.\(^{364}\) An Osborn federal entity theory, though, sustains federal jurisdiction over any claim or cause of action to which the bankruptcy estate is party, which subsumes all of federal bankruptcy jurisdiction except third-party "related to"

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364. For example, after rejecting (1) protective jurisdiction as theoretically unpalatable, and (2) Osborn as insufficient to explain bankruptcy jurisdiction over third-party disputes, Professor Cross concludes that a new, expanded theory of ancillary jurisdiction must be devised "to include atypical federal cases such as bankruptcy." Cross, supra note 7, at 1214-24, 1229-33, 1240-51, 1242; see also infra note 380. Likewise, Professor Block-Lieb initially attempts to formulate an Osborn theory that would reach even third-party "related to" claims, but concludes that this approach essentially is indistinguishable from protective jurisdiction. See Block-Lieb, supra note 20, at 778-79; see also supra note 327. Thus, she also explores Cross's ancillary theory to explain bankruptcy jurisdiction over state-law claims and alternates between the all-encompassing Osborn and all-encompassing ancillary theories in her analysis. See Block-Lieb, supra note 20, at 779-91.
Thus, in only this narrow class of third-party "related to" bankruptcy jurisdiction do we need resort to an alternative jurisdictional theory, such as supplemental jurisdiction.

Realigning the jurisdictional unit in bankruptcy also permits an entirely different formulation for a theory of supplemental bankruptcy jurisdiction. The constitutionality of third-party "related to" claims is not dependent upon an ancillary relationship to the bankruptcy petition (à la the receivership model) if such claims share a supplemental nexus with some other claim having an independent jurisdictional basis in one of the constitutional "categories" of federal jurisdiction. Because any claim to which the bankruptcy estate is a party has an independent jurisdictional basis in Article III's federal question category (the "freestanding" claim), federal courts can constitutionally entertain any third-party dispute (the "supplemental" claim) with a relationship to the estate claim sufficient to conclude that the freestanding estate claim and supplemental third-party claim are "but one constitutional case."

In terms of constitutional jurisdiction theory, then, a bankruptcy "case" is a misnomer. The so-called bankruptcy case can contain multiple "cases" in the constitutional sense of the term "case": "a cluster of claims for relief by various parties... that would ordinarily be subject to joint adjudication in a single proceeding in the interests of judicial economy, convenience, and fairness to litigants." Proper conceptualization of the jurisdic-

365. See supra Part II.B, notes 253-327 and accompanying text.
366. For an illuminating discussion on linking a "freestanding" claim in a constitutional "category" with "supplemental" claims forming part of the same constitutional "case," see Denis F. McLaughlin, The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis, 24 ARIZ. ST. L.J. 849, 891-93 (1992); see also ALI, JUDICIAL CODE PROJECT, supra note 112, at xvii, 20, 102, 103, 106, 113. "If federal judicial power is extended by Article III to any one of these factually or transactionally related claims on the basis of its federal nature... federal judicial power extends as well to the entire 'case or controversy' of which that claim is a part." Id. at 106. "Thus, there is constitutional authority for original jurisdiction to be conferred on the district courts over an entire action, or 'case,' based upon the presence of a federal 'ingredient' as to any claim in that action." Id. at 113.
367. The terminology of the jurisdictionally "freestanding" claim is borrowed from ALI, JUDICIAL CODE PROJECT, supra note 112, at xvii, 37, 53.
369. ALI, JUDICIAL CODE PROJECT, supra note 112, at 106 (quoting Gibbs, 383 U.S. at
tional unit in bankruptcy in this manner clears the way for a more flexible, in personam theory of supplemental bankruptcy jurisdiction that was unavailable in the equitable receivership context, which relied upon an in rem theory of ancillary jurisdiction.

3. Shifting from an In Rem to an In Personam Model of Bankruptcy Jurisdiction

Explaining the constitutionality of third-party “related to” bankruptcy jurisdiction hinges on the constitutional theory on which we premise our general federal bankruptcy jurisdiction over all claims by and against a bankruptcy estate. The Osborn federal entity theory regards all claims to which a bankruptcy estate is party as constitutional federal questions, whereas the receivership model would portray state-law claims by and against a bankruptcy estate as supplemental claims. In exploring these competing theories in this Part II.C.3, though, principles of ancillary receivership jurisdiction prove somewhat misplaced in the bankruptcy context, because unlike bankruptcy, there has never been a statute giving the federal courts general jurisdiction over all claims by and against a receivership estate. Thus, since federal jurisdiction is dependent upon both constitutional and congressional authorization, an Osborn federal entity theory was simply unavailable to buttress federal receivership jurisdiction, for lack of statutory imprimatur. Federal receivership jurisdiction over nondiverse state-law claims, then, could look only to an in rem theory of ancillary jurisdiction for support. Such an in rem theory, though, will not sustain “related to” bankruptcy jurisdiction over third-party disputes. If, however, we regard the federal bankruptcy estate as a jurisdictional person (per Osborn), rather than a jurisdictional res (per the receivership paradigm), the independent constitutional federal question jurisdiction over all in personam claims by and against the bankruptcy estate will furnish supplemental jurisdiction in any “related” third-party dispute (per Gibbs).

726).
370. See Ex parte McCardle, 74 U.S. (7 Wall.) 506, 512-13 (1869); Sheldon v. Sill, 49 U.S. (8 How.) 441, 448-49 (1850); ALI, JUDICIAL CODE PROJECT, supra note 112, at 107.
What is regarded as the earliest form of ancillary jurisdiction posited that when a federal court, in the course of a suit with a proper jurisdictional basis, obtained possession and control of property, that court could entertain all conflicting claims to that property, regardless of the state or federal character of the claims or the citizenship of the parties, through the court's ancillary jurisdiction.\textsuperscript{371} For a federal receivership court sitting in diversity under a creditors' bill, resulting in the appointment of a receiver for all of the debtor-defendant's property, this in rem brand of ancillary jurisdiction provided authority to entertain all creditors' claims to the res thus created.\textsuperscript{372} Moreover, the Supreme Court later expanded this in rem rationale to include the receiver's suits to enhance the res by pursuing the debtor's causes of action in federal court.\textsuperscript{373}

This in rem ancillary scheme of receivership jurisdiction could, of course, be transformed into an Osborn federal entity jurisdiction by simply recharacterizing it as a jurisdiction over all claims by and against a federally created entity: the federal


\textsuperscript{373} \textit{See} White v. Ewing, 159 U.S. 36, 39 (1895) (citing \textit{Freeman v. Howe}, \textit{Krippendorf v. Hyde}, and \textit{Rouse v. Letcher}); \textit{cf} Dewey v. West Fairmont Gas Coal Co., 123 U.S. 329, 331-33 (1887) (in a diversity suit for breach of contract, holding that ancillary jurisdiction existed to seek recovery of a fraudulent conveyance by the insolvent defendant, without regard to citizenship of the recipient of the transfer); Stewart v. Dunham, 115 U.S. at 64 (holding that nondiverse claimants could join a creditors' bill against fraudulent conveyance defendants, because "it would be merely a matter of form whether the new parties should come in as co-complainants, or before a master, under a decree ordering a reference to prove the claims of all persons entitled to . . . benefit" from any assets recovered). As Justice Brandeis stated: "The appointment of a receiver of a debtor's property by a federal court confers upon it, regardless of citizenship and of the amount in controversy, federal jurisdiction to decide all questions incident to the preservation, collection and distribution of the assets." Riehle v. Margolies, 279 U.S. 218, 223 (1929).
receivership estate. In fact, when the Court construed the general federal question statute itself as incorporating *Osborn* in toto, the Court indicated that general federal receivership jurisdiction was, indeed, merely an exercise of statutory federal question jurisdiction. Subsequent prudential limitations on the scope of the federal question statute, though, removed this statutory grounding for general federal receivership jurisdiction and left in rem ancillary concepts as the only basis for federal jurisdiction of nondiverse state-law claims by and against the receivership res.

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374. See, e.g., White v. Ewing, 159 U.S. at 39-40 (stating that “where parties are brought before the court for the purpose of the payment to them of claims they may hold against the estate, and cases where it is sought to recover of them claims which the receiver insists they owe the estate,” that “the receiver in such cases appears as a party to the suit . . . only because he represents . . . the estate of an insolvent corporation,” and “[i]n this particular, the jurisdiction of the [federal] Court does not materially differ from that of the District Court in bankruptcy”); McNulta v. Lochridge, 141 U.S. 327, 331-32 (1891) (stating that a receiver’s “position is somewhat analogous to that of a corporation sole,” and “[i]f actions were brought against the receivership generally . . . without stating the name of the individual, it would more accurately represent the character or status of the defendant,” because “[a]ctions against the receiver are in law actions against the receivership, or the funds in the hands of the receiver”).

375. See *Pacific Ry. Removal Cases*, 115 U.S. 1, 10-14 (1885) (construing the federal question statute to encompass all suits against federally chartered railroads).


377. The dissent’s view in the *Pacific Railway Removal Cases*, that statutory federal question jurisdiction is not coextensive with the constitutional provision, ultimately prevailed. See 115 U.S. at 24 (Waite, C.J., dissenting). With respect to federally chartered corporations, Congress subsequently restricted the holding of that case by statute. See 28 U.S.C. § 1349 (1994). The Court also distanced itself from that case’s broad construction of the federal question statute. See *Romero v. International Terminal Operating Co.*, 358 U.S. 586, 590-91 (1959) (Frankfurter, J.) (characterizing the case as an “unfortunate decision”); *Gully v. First Nat’l Bank*, 299 U.S. 109, 114 (1936) (Cardozo, J.) (stating that “the doctrine of the charter cases was to be treated as exceptional”); *Puerto Rico v. Russell & Co.*, 288 U.S. 476, 485 (1933) (Stone, J.) (stating that “their doctrine has not been extended to other classes of cases”).

378. Justice Fuller, therefore, was forced to perform a fairly clumsy logical gymnastics routine in an attempt to escape from his previous *Cox* opinion. See *Pope v. Louisville, New Albany & Chicago Ry. Co.*, 173 U.S. 573, 578-80 (1899) (Fuller, J.) (opining that the receivership estate as a party does not create a statutory federal question); see also *Gableman v. Peoria, Decatur & Evansville Ry. Co.*, 179 U.S. 335, 339-41
The bankruptcy jurisdiction statute unquestionably contains a general federal bankruptcy jurisdiction over all claims by and against the bankruptcy estate. Therefore, we could, in a similar manner, alternatively characterize the federal bankruptcy estate as either a jurisdictional person or a jurisdictional res. General federal bankruptcy jurisdiction could be explained as either (1) Osborn federal entity jurisdiction over all claims by and against our jurisdictional person, the federally created bankruptcy estate, or (2) in rem ancillary jurisdiction over all claims by and against the jurisdictional res of the bankruptcy estate. The context in which an in rem versus an in personam theory makes a difference, though, is not with respect to the constitutionality of a general federal bankruptcy jurisdiction over all claims by and against the bankruptcy estate; the sticking point for federal bankruptcy jurisdiction is “related to” jurisdiction of third-party disputes to which the estate is not a party. Only through an in personam, Osborn federal entity theory of general federal bankruptcy jurisdiction can we explain the constitutionality of these third-party claims that the Osborn federal entity theory itself does not reach.

In the context of bankruptcy jurisdiction over third-party actions, the Supreme Court has stated “that the ‘related to’ language of §1334(b) must be read to give [federal] jurisdiction over more than simply proceedings involving the property of the debtor or the estate.”^379^ In receivership proceedings, by contrast, any such third-party dispute that did not directly involve the ancillary res of the receivership estate was beyond the reach of the in rem ancillary jurisdiction of a federal receivership court.^380^ Our current bankruptcy jurisdiction statute, therefore,

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(1900) (Fuller, J.) (same); cf. Bausman v. Dixon, 173 U.S. 113, 114-15 (1899) (Fuller, J.) (reaching the same conclusion under the Supreme Court appellate jurisdiction statute). Justice Brandeis subsequently characterized such a construction of the federal question statute as “in harmony with the trend of legislation providing that the federal character of the litigant should not alone confer jurisdiction upon a federal court.” Gay v. Ruff, 292 U.S. 25, 35 (1934).


380. In rejecting ancillary jurisdiction over a nondiverse third-party dispute in receivership proceedings, the Supreme Court stated that “no controversy can be regarded as dependent or ancillary unless it has direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit.”
clearly extends federal bankruptcy jurisdiction beyond the capacity of the in rem foundation undergirding receivership jurisdiction, and it is also that pervasive statute that frees federal bankruptcy jurisdiction from the strictures of such an in rem model. Because the bankruptcy jurisdiction statute gives the federal courts bankruptcy jurisdiction over all claims by or against a federal bankruptcy estate, all such claims have both an independent statutory and constitutional basis for federal jurisdiction, using an Osborn federal entity theory of bankruptcy jurisdiction, without any need for resort to principles of ancillary or supplemental jurisdiction. Consequently, this independent statutory and constitutional jurisdiction of the federal courts over our jurisdictional person, the federal bankruptcy estate, will anchor supplemental jurisdiction over third-party disputes "related to" constitutional federal question claims by and against our juris-


Professor Cross proffers an expanded ancillary jurisdiction theory that would encompass all state-law claims adjudicated in a bankruptcy "case" as the equivalent of a single constitutional "case," including third-party "related to" disputes. See Cross, supra note 7, at 1240-48; see also supra note 364. To the extent it includes third-party disputes, this theory finds no support in the Court's in rem receivership cases, and to the extent individual state-law claims entertained in the bankruptcy "case" are factually or transactionally unrelated to each other, Cross's theory admittedly finds no support in the Gibbs test for the requisite supplemental nexus. See Cross, supra note 7, at 1240-41. Nonetheless, Cross posits that the statutory requirement in bankruptcy that all state-law claims be "related to" the bankruptcy case is a sufficient ancillary connection. See id. at 1242-44. Cross relies upon postjudgment ancillary enforcement jurisdiction for his expanded supplemental linkage. See id. at 1244. Subsequently, however, the Court has held that such postjudgment enforcement jurisdiction cannot be used to impose liability upon a third party through an independent, unrelated cause of action that is beyond the scope of Gibbs's supplemental relationship test. See Peacock v. Thomas, 516 U.S. 349, 354-59 (1996). Additionally, and like protective jurisdiction, Cross's theory offers no suggestions for determining when a state-law claim is sufficiently "related to" a bankruptcy case to invoke federal jurisdiction. Thus, Cross's theory reintroduces the circularity of protective jurisdiction that frustrates efforts to delineate principled limits for third-party "related to" bankruptcy jurisdiction. See supra notes 241-48 and accompanying text. Not surprisingly, then, Cross, who emphatically rejects "protective jurisdiction, in each of its variants, [as] fundamentally unsound" nonetheless states that his "expanded view of ancillary jurisdiction resembles the doctrine of protective jurisdiction." Cross, supra note 7, at 1224, 1248. 381. See supra Part II.B, notes 253-327 and accompanying text.
dicational person—an in personam approach to supplemental bankruptcy jurisdiction. Such an in personam theory of supplemental bankruptcy jurisdiction is entirely consistent with the simultaneous maturation of both general principles of supplemental jurisdiction and federal bankruptcy jurisdiction.

From a notional perspective, linking a theory of supplemental bankruptcy jurisdiction to the federal receivership paradigm freezes bankruptcy jurisdiction in an extremely anachronistic stage of supplemental jurisdiction. Supplemental jurisdiction has long since evolved beyond the in rem concepts employed in the receivership cases, which were justified under a strict "necessity" rationale, to now encompass logical groupings of in personam disputes in the interest of broader "considerations of judicial economy, convenience and fairness to litigants." In rem notions, of course, figured prominently in the bankruptcy jurisdictional scheme of the 1898 Act, and its statutory version of supplemental bankruptcy jurisdiction likewise was expressly restricted to cases of "necessity" in the administration of the res. The inequities and inefficiencies of such a restrictive in rem regime, however, produced clear strands of in personam supplemental bankruptcy jurisdiction even under the 1898 Act.

As early as 1901, the obiter dictum of the Bryan v. Bernheimer opinion, although couched in terms of the 1898 Act.

382. See Krippendorf v. Hyde, 110 U.S. 276, 285 (1884) (characterizing such jurisdiction as "a necessary resort to prevent a failure of justice"); Minnesota Co. v. St. Paul Co., 69 U.S. (2 Wall.) 609, 632-33 (1864) (stating that if "property is still in the hands of the receiver of the court," then "nothing can be plainer than that any litigation for its possession must take place in that court, without regard to the citizenship of the parties," characterizing such in rem jurisdiction as "necessary" and citing Freeman v. Howe, 65 U.S. (24 How.) 450, 460 (1860)); CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 9, at 34-35 (5th ed. 1994). But cf. Richard D. Freer, A Principled Statutory Approach to Supplemental Jurisdiction, 1987 DUKE L.J. 34, 50-51 (suggesting that the "necessity" rationale was, in reality, a veiled efficiency determination); Richard A. Matasar, A Pendent and Ancillary Jurisdiction Primer: The Scope and Limits of Supplemental Jurisdiction, 17 U.C. DAVIS L. REV. 103, 153 (1983) (noting that "[s]uch necessity is more akin to fairness").


384. See supra notes 170-75 and accompanying text. Of course, the content of this in rem bankruptcy jurisdiction, to the extent it did not include the estate's suits against adverse parties, was somewhat different than that of the receivership model.

385. See Bankruptcy Act of 1898, supra note 66, § 2a(6)-(7), discussed supra Part I.B.2.b, notes 124-42 and accompanying text.

386. 181 U.S. 188, 198 (1901), discussed supra Part I.B.2.b, notes 124-42 and accom-
Act’s “necessity” jurisdiction over third-party claims, actually foreshadowed the most expansive uses of supplemental jurisdiction in third-party disputes that the Gibbs standard would subsequently bring to the federal courts.\textsuperscript{387} Moreover, in the same year as Gibbs itself, Katchen v. Landy,\textsuperscript{388} drawing on the Hillman case and similar tendencies in the receivership context,\textsuperscript{389} plainly ushered into bankruptcy the modern in personam rationale for supplemental jurisdiction. In fact, the Hillman case itself seems to mark the general transition in the federal courts from an in rem to an in personam approach to supplemental jurisdiction by recognizing that a relationship to a jurisdictional res is not the only supplemental connection of consequence.\textsuperscript{390} Thus, although the receiver’s counterclaims in that case could enhance the receivership res and were within accepted limits of in rem ancillary jurisdiction,\textsuperscript{391} the litigation efficiencies from resolving related claims and counterclaims together meant that in personam ancillary concepts were also at play.\textsuperscript{392}

The 1978 Reform Act’s expansion of federal bankruptcy jurisdiction mirrors the conceptual progression of supplemental jurisdiction principles. One of Congress’s clearer messages in enacting “related to” bankruptcy jurisdiction was that this pervasive federal bankruptcy jurisdiction means abandoning in rem confines in favor of full in rem and in personam bankruptcy jurisdiction.\textsuperscript{393} In fact, this all-encompassing jurisdictional scheme was justified as a policy matter on precisely the same grounds of pro-

\begin{footnotes}
\footnote{387. See 28 U.S.C. § 1367(a) (1994) (providing that general “supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties”).}
\footnote{388. 382 U.S. 323 (1966), discussed \textit{supra} Part I.B.2.c, notes 143-56 and accompanying text.}
\footnote{389. See Katchen, 382 U.S. at 335 (quoting Alexander v. Hillman, 296 U.S. 222, 241-42 (1935)).}
\footnote{390. The Court, therefore, now acknowledges that its statement in \textit{Fulton National Bank v. Hozier}, 267 U.S. 276, 280 (1925), that “no controversy can be regarded as dependent or ancillary unless it has direct relation to property or assets actually or constructively drawn into the court’s possession or control by the principal suit,” was “an excessively limited description of the doctrine.” Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 379 (1994).}
\footnote{391. See Hillman, 296 U.S. at 237-38.}
\footnote{392. See \textit{id.} at 238-43.}
\footnote{393. See \textit{supra} note 170 and accompanying text.}
\end{footnotes}
cedural convenience, fairness, and judicial economy that have driven the parallel transformation of supplemental jurisdiction.394

Personification of the federal res as a bankruptcy "estate," then, to the extent fully accommodated in the jurisdictional statute providing a federal forum for all claims by and against the bankruptcy estate, accomplishes a full-scale in rem to in personam jurisdictional shift. Claims by and against the bankruptcy estate, while having in rem counterparts in the receivership cases and 1898 Act jurisprudence, also take on a distinctly in personam character as freestanding constitutional federal question claims to which a federal entity is a party. Moreover, these freestanding in personam claims will sustain supplemental jurisdiction over "related" in personam disputes between third parties.

394. See supra note 205 and accompanying text.
395. Of course, the 1898 Act jurisprudence itself recognized the in personam aspect of the estate's claims against adverse parties. See supra notes 174-75 and accompanying text. Even the Supreme Court's receivership cases, with their heavy emphasis on the in rem nature of claims by and against the receivership estate, at times acknowledged the in personam facets of such claims. Thus, in Riehle v. Margolies, 279 U.S. 218 (1929), Justice Brandeis stated that despite exclusive in rem jurisdiction over the receivership estate, "the appointment of the receiver does not necessarily draw to the federal court the exclusive right to determine all questions or rights of action affecting the debtor's estate." Id. at 223. He then expounded upon the dual nature of creditors' claims against the estate:

[An order which results in the distribution of assets among creditors has ordinarily a twofold aspect. In so far as it directs distribution, and fixes the time and manner of distribution, it deals directly with the property. In so far [sic] as it determines, or recognizes a prior determination of the existence and amount of the indebtedness of the defendant to the several creditors seeking to participate, it does not deal directly with any of the property. The latter function, which is spoken of as the liquidation of a claim, is strictly a proceeding in personam. Of course, no one can obtain any part of the assets, or enforce a right to specific property in the possession of a receiver, except upon application to the court which appointed him.]

Id. at 224; cf. supra notes 357-60 and accompanying text (discussing the extent of exclusive federal bankruptcy jurisdiction over the res of the bankruptcy estate and its administration). But cf. Katchen v. Landy, 382 U.S. 323, 329-30 (1966) (in the bankruptcy context, stating that "[t]he whole process of proof, allowance, and distribution [on creditors' claims] is, shortly speaking, an adjudication of interests claimed in a res" (quoting Gardner v. New Jersey, 329 U.S. 565, 574 (1947)); Meyer v. Fleming, 327 U.S. 161, 170 (1946) (stating that "the filing of a claim in bankruptcy . . . is a claim against assets in the hands of the bankruptcy court, not an action in personam").
The constitutional theory of federal bankruptcy jurisdiction developed in this Part II hence reveals itself as nothing more than traditional, accepted principles of federal jurisdiction. Claims on causes of action "arising under" the Bankruptcy Code are conventional federal questions; a general federal bankruptcy jurisdiction over all claims by and against a bankruptcy estate is constitutional federal question jurisdiction under an Osborn federal entity theory; and "related to" bankruptcy jurisdiction over third-party disputes is supplemental bankruptcy jurisdiction under a straightforward application of Gibbs. This systematic articulation of the constitutional foundations of federal bankruptcy jurisdiction not only brings clarity and congruity to what has been improperly regarded as an anomalous irregularity in Article III jurisprudence, but it also points up the deficiencies in the courts' varying interpretations of the outer limits of statutory bankruptcy jurisdiction. The constitutional framework outlined in this Part II can be readily translated into a more principled and consistent interpretive theory for the federal bankruptcy jurisdiction statute.

III. A STATUTORY THEORY OF FEDERAL BANKRUPTCY JURISDICTION

If we combine the constitutional theory of federal bankruptcy jurisdiction developed in Part II with the history of American bankruptcy jurisdiction traced in Part I, a theory for interpreting the current jurisdictional statute emerges. Only through this historical, constitutional prism can we compensate for the skew that the Marathon case has placed upon the meaning of the jurisdictional statute, recognize the serious errors of the Pacor opinion and its seemingly indelible imprint upon "related to" bankruptcy jurisdiction, account for the glaring contradictions in the case law of third-party "related to" bankruptcy jurisdic-

397. See infra Part III.A, notes 411-54 and accompanying text.
tion, and understand the impetus behind and senselessness of the raging debate over so-called supplemental bankruptcy jurisdiction.

This Part begins by identifying a rather surprising by-product of the Marathon opinion. Although Marathon involved only an issue of separation of powers, it nonetheless has had an inadvertent, invidious impact upon construction of the scope of federal bankruptcy jurisdiction, through the 1984 BAFJA amendments’ use of the “arising under,” “arising in,” and “related to” jurisdictional nexuses as a means of dividing federal bankruptcy jurisdiction between the district courts and the bankruptcy courts.

When we interpret the jurisdictional nexuses without this separation of powers influence, however, we discover the meaning of third-party “related to” bankruptcy jurisdiction. “Arising under” bankruptcy jurisdiction is conventional federal question jurisdiction over claims created by the Bankruptcy Code, whether or not the bankruptcy estate is a party to the claim. “Arising in” bankruptcy jurisdiction can be seen as a grant of general federal bankruptcy jurisdiction over all claims by and against the bankruptcy estate—constitutional federal questions under an Osborn federal entity theory. “Related to” bankruptcy jurisdiction, then, is supplemental jurisdiction over any third-party dispute sharing a conventional supplemental relationship with a claim “arising under” the Bankruptcy Code or a claim to which the bankruptcy estate is party.

This Part next critiques the Third Circuit’s seminal Pacor opinion, which promulgated the Pacor test, and which flatly contradicts the thesis of this Article in its declaration that third-party “related to” bankruptcy jurisdiction is not supplemental jurisdiction. Pacor, however, did not meaningfully address the constitutional implications of third-party “related to” bankruptcy jurisdiction and, indeed, announced a “conceivable effect” test that is unconstitutionally broad on its face. Additionally,

399. See infra Part III.C, notes 561-612 and accompanying text.
400. See infra Part III.D, notes 613-84 and accompanying text.
401. See infra Part III.A.1, notes 418-30 and accompanying text.
402. See infra Part III.A.2, notes 431-54 and accompanying text.
403. See Pacor, 743 F.2d at 994.
404. See infra Part III.B.1, notes 461-73 and accompanying text.
Pacor’s rejection of supplemental jurisdiction was based upon bad bankruptcy law\(^{405}\) and a thoughtless, reflexive response to a sudden Supreme Court brake on the expansion of supplemental jurisdiction—one that was simply inapposite to “related to” bankruptcy jurisdiction.\(^{406}\) In rejecting a supplemental approach to third-party “related to” bankruptcy jurisdiction, Pacor instead espoused a functional, outcome-oriented test that cannot fully advance the adjudicative efficiency goals of federal bankruptcy jurisdiction\(^{407}\) and that locks federal bankruptcy jurisdiction into an awkward nineteenth-century in rem jurisdictional time warp.\(^{408}\)

Moreover, the very courts that purport to apply the Pacor test and heed its prohibition against supplemental jurisdiction have simultaneously engaged in an unstated incorporation of supplemental jurisdiction principles into third-party “related to” bankruptcy jurisdiction and, consequently, have produced a body of case law riddled with conspicuous contradictions and inconsistencies.\(^{409}\) It is this very same Pacor paradox that has precipitated the melee over “supplemental” bankruptcy jurisdiction.\(^{410}\) Congress gave the bankruptcy courts unrestricted supplemental bankruptcy jurisdiction in 1978 in the form of third-party “related to” bankruptcy jurisdiction, and we must cut the Gordian knot and simply acknowledge that Pacor was badly mistaken.

A. Deconstructing the Bankruptcy Jurisdiction Statute

Consistent with the premise developed in Part II that the conceptual jurisdictional unit in bankruptcy is an individual “proceeding” rather than the bankruptcy “case,”\(^{411}\) the methodology employed in this Part III.A utilizes the three nexuses contained in the bankruptcy jurisdiction statute—“arising under,” “arising in,” and “related to”\(^{412}\)—to identify those “claims”\(^{413}\) that each

\(^{405}\) See infra Part III.B.2, notes 474-83 and accompanying text.

\(^{406}\) See infra Part III.B.3, notes 484-96 and accompanying text.

\(^{407}\) See infra Part III.B.4, notes 497-517 and accompanying text.

\(^{408}\) See infra Part III.B.5, notes 518-60 and accompanying text.

\(^{409}\) See infra Part III.C, notes 581-612 and accompanying text.

\(^{410}\) See infra Part III.D, notes 613-84 and accompanying text.

\(^{411}\) See infra Part II.C.2, notes 343-69 and accompanying text.

\(^{412}\) “[T]he district courts shall have original . . . jurisdiction of all civil proceedings
type of proceeding was designed to envelop. This approach, of course, also proceeds from the assumption that the bankruptcy jurisdiction statute operates in the same fashion as all other federal jurisdiction statutes: "[O]riginal jurisdiction attaches on a claim-by-claim or 'claim-specific' basis."414 This Article departs from the prevailing analysis of bankruptcy's jurisdictional nexuses, though, because it is employed for a very different purpose.

The statute's jurisdictional nexuses have evolved into catachrestic compartments that mark the boundaries between the limited jurisdiction of non-Article III bankruptcy judges and the residual authority of the Article III district courts. The nexuses could not have been designed for such a purpose, however, as their original function was to vest the entirety of this federal jurisdiction in non-Article III bankruptcy judges,415 and the ex post separation of powers gloss impedes the task at hand, which is delineating the outer bounds of federal bankruptcy jurisdiction—implicating principles of judicial federalism rather than

\[\text{arising under [the Bankruptcy Code] or arising in or related to [bankruptcy] cases . . . .}\]


413. The term "claim" is used here in its jurisdictional sense, as "an assertion by one claiming party of a right to some form of judicial relief [against] one defending party" and "is defined in terms both of a particular pair of parties and of a particular legal theory of the right to relief." ALI, JUDICIAL CODE PROJECT, supra note 112, at 19-20.

414. Id. at 4; accord Halper v. Halper, 164 F.3d 830, 838 (3d Cir. 1999) (expressly adopting "a claim by claim analysis to determine the extent of a Bankruptcy Court's jurisdiction"). Recognizing the claim-specific nature of federal jurisdiction statutes is one of the primary conceptual foundations for the ALI's project for the revision of the supplemental jurisdiction statute. Indeed, the ALI described its project as "assert[ing] that the original jurisdiction of the district courts is claim-specific in a pervasive and fundamental sense that pertains to the entire statutory and constitutional structure of federal subject-matter jurisdiction." ALI, JUDICIAL CODE PROJECT, supra note 112, at 29. "Thus jurisdictional analysis requires a conception of the fundamental unit of litigation that breaks down the litigative unit . . . . into every theory of relief . . . . as between every claiming and defending party . . . . so that claims arising under federal law may be distinguished from claims that do not . . . ." Id. at 35; see John B. Oakley, The Christianson Case, Federal Jurisdiction, and the Problem of the Litigative Unit: When Does What "Arise Under" Federal Law?, 76 TEX. L. REV. 1829, 1831-32, 1858-59 (1998); John B. Oakley, Integrating Supplemental Jurisdiction and Diversity Jurisdiction: A Progress Report on the Work of the American Law Institute, 74 IND. L.J. 25 (1998).

415. "Obviously, then, Congress did not select these terms in 1978 to assure that it would be able to allocate the exercise of jurisdiction the way it did six years later in the 1984 amendments." Simmons v. Johnson, Curney & Fields, P.C. (In re Simmons), 205 B.R. 834, 844 n.22 (Bankr. W.D. Tex. 1997).
separation of powers. In particular, we seek to capture the elusive meaning of the statutory grant of "related to" jurisdiction in third-party disputes. For that purpose, then, we must reinvent bankruptcy's jurisdictional nexuses, through an experimental interpretive exercise.

By embarking on that course in this Part III.A, we will discover that Congress actually codified throwaway dicta from the Marathon case in the 1984 BAFJA amendments. As a result, a bankruptcy estate's suit on a debtor's state-law action is now regarded as a "related to" bankruptcy proceeding. Our historical survey of the development of American bankruptcy jurisdiction, however, suggests that such a Marathon action by the estate is characterized more suitably as an "arising in" proceeding—as part of Justice Story's original vision of a general federal jurisdiction over "all matters and proceedings in bankruptcy." "Arising under" and "arising in" proceedings, therefore, can be seen as statutory grants of federal jurisdiction over all constitutional federal question claims "arising" during the administration of a bankruptcy case—claims created by the Bankruptcy Code ("arising under") and claims by and against a bankruptcy estate ("arising in"). Hence, this interpretive exercise reserves "related to" bankruptcy jurisdiction for third-party disputes, which our constitutional theory indicates is supplemental jurisdiction. The significance of hypothetically removing Marathon claims from the "related to" category in this manner comes from its crystallization of the appropriate test for third-party "related to" bankruptcy jurisdiction: A third-party claim is "related to" a debtor's bankruptcy case if it shares a conventional supplemental relationship with one of bankruptcy's constitutional federal question claims.

1. Marathon's Transmogrification of "Related to" Jurisdiction

A statutory theory of federal bankruptcy jurisdiction for purposes of exploring the outermost limits of federal jurisdiction (vis-à-vis that of the state courts) must begin with a recognition

416. See Brubaker, supra note 13, at 1062-64.
417. See Ex parte Christy, 44 U.S. (3 How.) 292 (1845) (Story, J.), discussed supra Part I.A.2, notes 45-57 and accompanying text.
that the basic grant of federal jurisdiction over "arising under," "arising in," and "related to" proceedings was constructed in the 1978 Reform Act, long before the Marathon holding necessitated the complicated allocation of that jurisdiction between the district courts and their adjunct bankruptcy courts in the 1984 BAFJA amendments.\footnote{418}{See supra notes 217-24 and accompanying text and Part I.C, notes 162-211 and accompanying text.} Although Marathon and BAFJA contemplated no change whatsoever in the sum total of federal bankruptcy jurisdiction,\footnote{419}{Because Marathon did not compel Congress to reduce the scope of bankruptcy jurisdiction, it seems plain that Congress intended no change in the scope of jurisdiction set forth in the 1978 Act when it later enacted section 1334 of the 1984 Act." Wood v. Wood (In re Wood), 825 F.2d 90, 93 (5th Cir. 1987).} they have nonetheless converted the statute's three jurisdictional nexuses into terms of art that draw a divide in this federal bankruptcy jurisdiction between: (1) "core" proceedings "arising under" or "arising in," in which a bankruptcy judge can enter final orders,\footnote{420}{Bankruptcy judges may hear and determine . . . all core proceedings arising under [the Bankruptcy Code], or arising in a [bankruptcy] case . . . and may enter appropriate orders and judgments, subject to [appellate] review . . . ." 28 U.S.C. § 157(b)(1) (1994) (emphasis added).} and (2) noncore "related to" proceedings, in which only a district court can enter final orders\footnote{421}{A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a [bankruptcy] case and "shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge . . . after reviewing de novo . . . ." Id. § 157(c)(1) (emphasis added).} absent consent of the parties to a bankruptcy court adjudication.\footnote{422}{See id. § 157(c)(2).} This separation of powers function of the jurisdictional nexuses has yielded the unwitting, unnatural, and unnoticed side effect of obfuscating the intended reach and supplemental nature of "related to" bankruptcy jurisdiction.

Marathon declared the bankruptcy estate's suits on a debtor's state-law actions to be beyond the constitutional capacity for final adjudication by a limited tenure, non-Article III bankruptcy judge. In so doing, Justice Brennan's plurality opinion repeatedly depicted such an action by the bankruptcy estate as falling within the "related to" jurisdictional grant of the 1978 Reform Act.\footnote{423}{See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 455 U.S. 50, 54,}
Subsequently, then, "related to" became the jurisdictional category in which the 1984 BAFJA amendments restricted the powers of the non-Article III bankruptcy judges. Accordingly, the Court recently characterized "related to" bankruptcy jurisdiction as including two types of actions: (1) Marathon-like "causes of action owned by the debtor which become property of the estate... and (2) suits between third parties which have an effect on the bankruptcy estate."424

When viewed in historical context, however, the all-encompassing, pervasive "related to" bankruptcy jurisdiction was not necessary to authorize the bankruptcy estate to pursue a Marathon-like action in federal court. As Part I of this Article demonstrated, a general federal bankruptcy jurisdiction over all claims by and against the bankruptcy estate under both the 1841 and 1867 Acts was established with "arising under" and "in bankruptcy" terminology, alone, and nothing that even resembled "related" jurisdiction.425 Likewise, under the 1898 Act such a general federal bankruptcy jurisdiction in corporate reorganization cases was accomplished with a simple reference to "bankruptcy proceedings" and "proceedings under this [1898] Act."426 The broader "related" language of section 2a(7) of the 1898 Act, in conjunction with and as constrained by section 2a(6), were the vehicles for the narrow "necessity" jurisdiction of certain third-party disputes.427

As recognized in the 1978 Reform Act's legislative process, then, the primary significance of the "related to" grant was to bring "related" third-party disputes into federal court.428 Although it was unnecessary to specify the precise jurisdictional nexus for an estate's suits before Marathon,429 the estate's action

74, 76, 81, 85, 87 n.40 (1982) (Brennan, J., plurality opinion) (emphasizing "related to" jurisdiction).
425. See supra Part I.A.2-3, notes 45-63 and accompanying text.
426. See supra Part I.B.1.b, notes 101-11 and accompanying text.
427. See supra Part I.B.2.b, notes 124-42 and accompanying text.
428. See supra notes 190-91, 206 and accompanying text.
429. "Nor did the relevant authorities interpreting the 1978 Act treat the three bases of jurisdiction as distinct from one another." William L. Norton, Jr. & Richard Lieb, Jurisdiction and Procedure Under the 1984 Bankruptcy Amendments, 1985 ANN.
in *Marathon*, nevertheless, could easily be characterized as a proceeding “arising in” the debtor’s bankruptcy case, since an action by the bankruptcy estate itself is, in the words of Justice Story, “necessarily involved in the due administration and settlement of the bankrupt’s estate.” Thus, if we put aside the separation of powers concerns of *Marathon* and BAFJA and, for the moment, read bankruptcy’s jurisdictional nexuses solely through our historical lens of judicial federalism, a *Marathon* action by a bankruptcy estate is an “arising in” proceeding, not a “related to” proceeding.

2. Reconstructing Bankruptcy’s Jurisdictional Nexuses

Placing *Marathon* actions in the “arising in” category, rather than the “related to” category, means that “arising under” and “arising in” proceedings are synonymous with all constitutional federal questions in bankruptcy, and “related to” bankruptcy jurisdiction is conventional supplemental jurisdiction over third-party disputes “related to” these constitutional federal questions.


If a *Marathon* action is an “arising in” proceeding, as suggested by the history of American bankruptcy jurisdiction, then federal jurisdiction over all proceedings “arising in” a bankruptcy case equates nicely with the historical and constitutional concept of a general federal bankruptcy jurisdiction over all claims by and
against a bankruptcy estate. Our constitutional theory tells us that this general federal bankruptcy jurisdiction of claims by and against the estate is constitutional federal question jurisdiction under an Osborn federal entity theory.431

Under this view, then, the bankruptcy version of statutory federal question jurisdiction—jurisdiction over proceedings "arising under" the Bankruptcy Code—assures a federal bankruptcy forum for federally created, conventional federal question claims that do not directly involve the estate, such as those concerning an individual debtor's discharge of indebtedness. The "fresh start" surrounding an individual debtor's discharge implicates an object somewhat distinct from the asset-transfer function of the bankruptcy estate,432 but one that likewise raises Article III claims "arising under" federal law—as conventional federal questions. Thus, for example, when a particular creditor objects to discharge of its debt, asserting that the debt is one excepted from the discharge pursuant to section 523 of the Bankruptcy Code,433 the parties to that action are the creditor and the individual debtor; the bankruptcy estate is not a party.434 Nonetheless, because the bankruptcy discharge is solely a creature of the federal Bankruptcy Code, the nondischargeability action is within both statutory and constitutional "arising under" jurisdiction.435

431. See supra Part II.B, notes 253-327 and accompanying text.
435. Another example of a third-party claim "arising under" the Bankruptcy Code is section 506(c), which provides for surcharge of a secured creditor's collateral for "the reasonable, necessary costs and expenses of preserving, or disposing of, such property
Thus, if we remove the separation of powers influence from the bankruptcy jurisdiction statute, "arising under" and "arising in" bankruptcy jurisdiction can be seen as grants of federal jurisdiction over all constitutional federal question claims that arise during a bankruptcy case—those involving bankruptcy causes of action and those involving the bankruptcy estate. The most to the extent of any benefit to the holder of such claim." 11 U.S.C. § 506(c). In those courts that construe this provision as granting a preservation claimant standing to recover such expenses directly from a secured creditor, a federal bankruptcy court has jurisdiction to hear such a third-party action as one "arising under" section 506(c) of the Bankruptcy Code. See Publicker Indus. Inc. v. United States (In re Cuyahoga Equip. Corp.), 980 F.2d 110, 114 (2d Cir. 1992); In re Parque Forestal, Inc., 949 F.2d 504, 510 (1st Cir. 1991); see also Maryland v. Antonelli Creditors' Liquidating Trust, 123 F.3d 777, 784 (4th Cir. 1997) (finding bankruptcy jurisdiction to declare the tax effects of a third-party sale where the bankruptcy court determined that section 1146 of the Bankruptcy Code governed such sales). 436. See National City Bank v. Coopers & Lybrand, 802 F.2d 990, 993-94, 993 (8th Cir. 1986) (concurring in the district court's assessment of a third-party dispute, that the action did not 'arise under' or 'arise in' . . . because [the Chapter 11 bankruptcy debtor is not a party to the action and no relief under [the Bankruptcy Code] is sought']); Holloway v. HECI Exploration Co. Employees' Profit Sharing Plan, 76 B.R. 563, 568 (N.D. Tex. 1987) (indicating that a third-party action "does not arise under [the Bankruptcy Code] because it [does not] state[] a cause of action created by [the Bankruptcy Code]" and it "does not arise in a [bankruptcy] case because the [defendant] is not a [bankruptcy] debtor"), aff'd, 862 F.2d 513 (5th Cir. 1988); Young v. Sultan Ltd. (In re Lucasa Int'l Ltd.), 6 B.R. 717, 719 (Bankr. S.D.N.Y. 1980) (characterizing the trustee's preference action as "plainly a civil proceeding arising under or in the case for which he stands as trustee" (emphasis added)). The House Report faintly echoes this approach in its enumeration of specific matters encompassed within the jurisdictional grant:

The jurisdiction of the bankruptcy court [will] includ[e] proceedings to which the trustee [as representative of the estate] is a party, proceedings to which the debtor is a party if the outcome of the proceeding will have an impact on the case (such as determination of exemptions, determination of dischargeability of debts, liquidation of non-dischargeable debts, and determination of any right granted under [the Bankruptcy Code]), and all proceedings involving the administration of the case.

H.R. REP. NO. 95-595, at 49 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6010 (citations omitted). An individual debtor's exemption proceedings can involve both bases for constitutional federal question jurisdiction, as their availability can be a matter determined solely by reference to the Bankruptcy Code. See 11 U.S.C. § 522(d). In addition, the bankruptcy estate, as the recipient of the debtor's nonexempt property, is a party to exemption proceedings, at the behest of the trustee or any creditor. See FED. R. BANKR. P. 4003(b). Likewise, administrative proceedings invariably involve either matters of federal bankruptcy law or the estate and its representative as a party. See Block-Lieb, supra note 20, at 733, 773-75, 780-81 n.338. Proceedings to liquidate nondischargeable debts are discussed infra Part III.C.2, notes 583-612 and accompanying text.
revealing aspect of this exercise, however, is its effect upon construction of the broadest of bankruptcy's jurisdictional categories—"related to" bankruptcy proceedings.

b. "Related to" Proceedings: Supplemental Jurisdiction over Third-Party Disputes

If "arising under" proceedings account for all claims under bankruptcy causes of action and "arising in" proceedings subsume all claims to which a bankruptcy estate is party, then the unique role of bankruptcy's "related to" jurisdiction is in the realm of claims that do not "arise under" the Bankruptcy Code, such as state-law claims, and to which the bankruptcy estate is not a party. Our constitutional theory tells us that federal bankruptcy jurisdiction over such third-party state-law claims is a species of supplemental jurisdiction.\(^{437}\)

This interpretation of "related to" proceedings not only finds support in the 1978 Reform Act's legislative history,\(^{438}\) it also accords with common usage of the jurisdictional nomenclature of "related" proceedings.\(^{439}\) In the isolated instances in which Con-

\(^{437}\) See supra Part II.C, notes 328-95 and accompanying text.

\(^{438}\) For a discussion of the 1978 Reform Act legislative history that characterizes "related to" jurisdiction as directed toward third-party disputes, see supra notes 190-91, 206 and accompanying text. It was not until the legislative deliberations concerning the 1984 BAFJA amendments, however, that there was any express acknowledgment in Congress that "related to" bankruptcy jurisdiction may be a form of supplemental jurisdiction. The most extensive expression of this view came in the form of Representative Sawyer's "questioning" of witnesses in committee hearings. See Bankruptcy Court Act of 1983: Hearing on H.R. 3 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 98th Cong. 243-45, 252 (1983). One witness, Joseph E. Friend, President of the Commercial Law League of America, appended to his testimony an article that noted "the judicially developed doctrines of ancillary and pendent jurisdiction . . . can be the basis for district courts' acting with respect to matters within the compass of 'civil proceedings related to [bankruptcy] cases under title 11.'" Id. at 151 (reprinting Charles F. Vihon, Delegation of Authority and the Model Rule: The Continuing Saga of Northern Pipeline, 88 CoM. L.J. 64, 68 (1983)).

\(^{439}\) See Block-Lieb, supra note 20, at 780-81. Thus, Congress's 1990 Federal Courts Study Committee, in recommending codification of supplemental jurisdiction, described it in general terms as "the authority of federal courts to hear and determine, without an independent basis of federal jurisdiction, claims related to matters properly before them." REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 47 (1990) (emphasis added).
gress has sought to expressly create supplemental jurisdiction, it has used the “related” terminology, and to the extent that a grant of “related” jurisdiction has a plain or ordinary meaning, it is recognized as connoting supplemental jurisdiction. Furthermore, the symbiosis between pervasive “related to” bankruptcy jurisdiction and bankruptcy’s discretionary, permissive abstention “in the interest of justice, or in the interest of comity with State courts or respect for State law” replicates that of supplemental jurisdiction, which likewise “is a doctrine of discretion informed by “the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction.” Indeed, Professor Kennedy, who served as Executive

440. See 28 U.S.C. § 1338(b) (1994) ("The district courts shall have original jurisdiction of any civil action asserting a [state-law] claim of unfair competition when joined with a substantial and related claim under the [federal] copyright, patent, plant variety protection or trademark laws." (emphasis added)); id. § 1367(a) (giving "the district courts . . . supplemental jurisdiction over all other claims that are so related to claims in the action within [statutory] original jurisdiction that they form part of the same case or controversy under Article III" (emphasis added)).

441. Thus, in Finley v. United States, 490 U.S. 545 (1989), Justice Scalia characterized section 1338(b)’s “related” claim jurisdiction, enacted in 1948, as a codification of pendent-claim jurisdiction “accomplished by wording that could not be mistaken.” Id. at 555. By contrast, under the prevailing Pacor test for third-party “related to” bankruptcy jurisdiction, discussed infra Part IIIB, notes 455-560 and accompanying text, “there is a cause component in ‘related to’” such that “[r]elated to is a term of art in bankruptcy jurisdiction, where its meaning is not as broad as it is in ordinary parlance.” Bass v. Denney (In re Bass), 171 F.3d 1016, 1022 (5th Cir. 1999).

442. 28 U.S.C. § 1334(c)(1), discussed supra notes 202-06 and accompanying text.


ing what the state courts may... determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision.” Meredith v. City of Winter Haven, 320 U.S. 228, 234 (1943). Yet, “[a] bankruptcy court commonly sends its trustee into state courts to have complex questions of local law adjudicated.” England v. Louisiana State Bd. of Med. Exam’rs, 375 U.S. 411, 423 (1964) (Douglas, J., concurring) (citing Thompson v. Magnolia Petroleum Co., 309 U.S. 478 (1940)). Likewise, “the unsettled nature of state law” is an “entirely appropriate factor[] for the District Court to consider” in declining to exercise supplemental jurisdiction. Moor v. County of Alameda, 411 U.S. 693, 716 (1973).

Professor Block-Lieb notes the “logic of th[e] position” that permissive bankruptcy abstention is analogous to federal courts’ discretion to decline an exercise of supplemental jurisdiction. Block-Lieb, supra note 172, at 835. Yet, she rejects such a broad, discretionary role for permissive bankruptcy abstention, apparently on the rationale that, like other grants of federal jurisdiction, federal bankruptcy jurisdiction is granted to the district courts in unequivocal, nondiscretionary terms. See 28 U.S.C. § 1334(b) (providing that “the district courts shall have original but not exclusive jurisdiction of all bankruptcy proceedings” (emphasis added)). Thus, Professor Block-Lieb sees bankruptcy abstention as more akin to nonbankruptcy abstention doctrines, which “are narrowly defined because these judicially-crafted doctrines exist in apparent conflict with the obligation of a federal court to exercise the jurisdiction conferred on it by statute.” Block-Lieb, supra note 172, at 836. The bankruptcy jurisdiction statute, however, is an obligatory, nondiscretionary grant of federal jurisdiction only when one subdivision of the jurisdictional statute is read in complete isolation from the immediately succeeding subdivision of the same statutory section, which qualifies the seemingly nondiscretionary grant of bankruptcy jurisdiction with the proviso that “[n]othing in this section prevents a district court... from abstaining from hearing a particular bankruptcy proceeding.” 28 U.S.C. § 1334(c)(1) (emphasis added). Thus, because the bankruptcy jurisdiction statute itself expressly authorizes abstention broadly “in the interest of justice, or in the interest of comity with State courts or respect for State law,” id., bankruptcy abstention is fundamentally different than the nonbankruptcy abstention doctrines, which carry no express statutory countenance at all. As Professor Shapiro sagely observed, “Congress has undoubted authority to expand or narrow the range of permissible discretion, and the challenge of responsible statutory construction is to determine the extent to which it has done so.” David L. Shapiro, Jurisdiction and Discretion, 60 N.Y.U. L. Rev. 543, 583 (1985); cf. Wilton v. Seven Falls Co., 515 U.S. 277, 286-87 (1995) ("The statute's textual commitment to discretion, and the breadth of leeway we have always understood it to suggest, distinguish the declaratory judgment context from other areas of the law in which concepts of discretion surface.").

To some extent, Professor Block-Lieb’s more constrictive view of the bankruptcy abstention statute also seems to be a product of the prevailing functional approach to “related to” jurisdiction:

If related to jurisdiction is narrowly defined according to its functional purpose, then there would be no need to abstain from bankruptcy jurisdiction in order to achieve this functional goal. Where resolution of the proceeding would not expedite administration of the bankruptcy case, bankruptcy jurisdiction would not exist, thus rendering a determination to abstain on this ground irrelevant.
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Director of the 1973 Commission and who was an active participant in the congressional process for the 1978 Reform Act.\textsuperscript{445} contemporaneously opined that "related to" jurisdiction of third-party disputes "requires a consideration of the potential reach of a concept or doctrine of ancillary jurisdiction."\textsuperscript{446}

This revisionist version of bankruptcy's jurisdictional nexuses, thus, views (1) "arising under" jurisdiction as including federally created bankruptcy claims, whether or not the estate is a party, (2) "arising in" jurisdiction as all claims to which the bankruptcy estate is a party, and (3) "related to" jurisdiction as supplemental jurisdiction over third-party claims. Of course, this view differs significantly from the popular version of the jurisdictional nexuses only insofar as it casts a \textit{Marathon} action as an "arising in" rather than a "related to" proceeding. The object of this exercise, however, is not an attempt to relabel \textit{Marathon} actions, which now will be forever coupled with "related to" bankruptcy jurisdiction as codified by BAFJA. For purposes of determining those core proceedings that can be finally adjudicated by a non-Article III bankruptcy court, a \textit{Marathon} action cannot be considered a core "arising in" proceeding and must be characterized as a noncore "related to" proceeding; nothing in this analysis is meant to suggest otherwise. Again, though, that separation of powers concern is not the focus of this Article, which addresses only the judicial federalism dimension of "related to" jurisdiction, regarding the reach of \textit{federal} bankruptcy jurisdiction.\textsuperscript{447}

\textsuperscript{445} Block-Lieb, \textit{supra} note 172, at 842. As this Article discusses, though, \textit{infra} Part III.B.4, notes 497-517 and accompanying text, a functional approach to "related to" bankruptcy jurisdiction is misguided precisely because it ignores Congress's clear design for permissive abstention, not "related to" jurisdiction, to serve such a functional role. \textit{Cf. infra} note 665 (discussing Block-Lieb's concerns about "supplemental" bankruptcy jurisdiction). A proper construction of both "related to" bankruptcy jurisdiction and permissive bankruptcy abstention simply cannot be obtained by considering each in isolation from the other; they were enacted and must be interpreted in tandem, as an integrated package. \textit{Cf. Shapiro, supra,} at 575 ("The specific context and terms of a statutory grant of jurisdiction may either broaden or narrow the scope of normally permissible discretion (both as to the meaning of the grant and as to its exercise).").


\textsuperscript{447} As Professor Tabb has correctly noted, finding the "proper scope of related pro-
The troublesome aspect of "related to" jurisdiction in determining the scope of federal bankruptcy jurisdiction is third-party "related to" jurisdiction, not Marathon jurisdiction. Marathon actions are unquestionably a component of federal bankruptcy jurisdiction, whether categorized as "arising in" or "related to" proceedings. The modest ambition of this analytical deconstruction, that hypothetically recharacterizes Marathon actions as "arising in" proceedings, is merely to correct widely held misconceptions regarding the supplemental nature of "related to" bankruptcy jurisdiction, solely in an effort to properly construe the parameters of third-party "related to" jurisdiction.

From the standpoint of judicial federalism and the scope of federal bankruptcy jurisdiction, classifying a Marathon action as a "related to" proceeding is misleading only when combined with the proposition that "related to" jurisdiction is a form of supplemental jurisdiction. As our constitutional theory demonstrates, Marathon claims are not supplemental claims; a Marathon claim is a freestanding constitutional federal question claim. The insinuation of Marathon claims into the "related to" category, to the extent this carries the implication that Marathon claims are supplemental claims, actually perpetuates the misplaced in rem receivership model of supplemental bankruptcy jurisdiction.
and Part III.D of this Article demonstrates how this has con-founded analysis of "supplemental" bankruptcy jurisdiction.\textsuperscript{450} The only "related to" claims that are properly considered supple-mental are third-party "related to" claims.

The other virtue of this alternative, experimental rendering of bankruptcy's jurisdictional nexuses is that it clarifies the approp-riate relationship necessary for an exercise of third-party "re-lated to" jurisdiction. The statutory grant affords "jurisdiction of all civil proceedings . . . related to [bankruptcy] cases,"\textsuperscript{451} which of course, requires some conception of the bankruptcy "case" and how the proceeding is "related to" the bankruptcy case. If a Mar-athon claim is "related to" a bankruptcy case, then it must be because the claim has the potential to enhance the bankruptcy estate—a formulation very much in accord with an in rem juris-dictional model and the dominant outcome-oriented, functional test for third-party "related to" bankruptcy jurisdiction.\textsuperscript{452} A bankruptcy "case" within the meaning of the jurisdictional stat-ute, however, is merely a collective reference to all of the civil "proceedings" associated with a particular debtor's bankruptcy filing.\textsuperscript{453} A proceeding "related to" the "case," then, is one that is

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\textit{grounds}, 131 B.R. 799, 802 (S.D. Ohio 1990); McGraw v. Liberty Airlines, Inc. (\textit{In re Bell & Beckwith}), 55 B.R. 872, 876 (Bankr. N.D. Ohio 1985); Allard v. Benjamin (\textit{In re DeLorean Motor Co.}), 49 B.R. 900, 907 n.6 (Bankr. E.D. Mich. 1985). Several cir-cuits have employed this model for determining the fate of a pending bankruptcy proceeding upon dismissal of the debtor's bankruptcy case, analogizing to the discre-tion to retain or dismiss supplemental claims upon final disposition of all freestanding federal claims. See Chapman v. Currie Motors, Inc., 65 F.3d 78, 80-82 (7th Cir. 1995); Querner v. Querner (\textit{In re Querner}), 7 F.3d 1199, 1201-03 (5th Cir. 1993); Carraher v. Morgan Elecs., Inc. (\textit{In re Carraher}), 971 F.2d 327, 328 (9th Cir. 1992); Smith v. Commercial Banking Corp. (\textit{In re Smith}), 866 F.2d 576, 579-80 (3d Cir. 1989). But cf. Porges v. Gruntal & Co. (\textit{In re Porges}), 44 F.3d 159, 162-63 & n.2 (2d Cir. 1995) (noting the imperfection in the analogy, because "unlike a lawsuit in which a claim that gives rise to federal subject matter jurisdiction coexists with pendent or ancillary state claims, an adversary proceeding and the companion bankruptcy case constitute two distinct proceedings"); Fidelity & Deposit Co. v. Morris (\textit{In re Morris}), 950 F.2d 1531, 1533-34 (11th Cir. 1992) (same). The same result, of course, could be achieved more directly through a straightforward application of the permissive bankruptcy abstention statute.

450. See infra Part III.D.2, notes 659-84 and accompanying text.


452. See supra notes 371-73 and accompanying text and infra Part III.B.1 & 5, notes 461-73, 518-60 and accompanying text.

453. See supra notes 351-63 and accompanying text.
\end{flushleft}
"related to" another proceeding in the case, and supplemental jurisdiction theory tells us that both our (1) "arising under" bankruptcy claims and (2) "arising in" estate-as-a-party claims are freestanding constitutional federal questions that will sustain supplemental jurisdiction over (3) "related" third-party claims. Thus, rethinking the jurisdictional nexuses, freed from BAFJA's separation of powers taint, replaces the outcome-oriented, functional test for third-party "related to" bankruptcy jurisdiction, which has proven so unmanageable, with a conventional supplemental jurisdiction test.

Hence, the key interpretive insight that springs from this Article's comprehensive, unifying constitutional and statutory theory of federal bankruptcy jurisdiction is not in regard to Marathon actions; rather, it is in the solution this theory yields for the statutory interpretation quandary presented by the seemingly limitless "related to" bankruptcy jurisdiction over third-party disputes. Stripped of the hypothetical, revisionist nexus labels used in its derivation, the interpretive theory propounded by this Article is that a third-party claim should be considered "related to" a debtor's bankruptcy case if it shares a conventional supplemental linkage with either (1) a claim asserted under a cause of action created by the Bankruptcy Code, or (2) a claim asserted by or against the debtor's bankruptcy estate. Equipped with this more accurate understanding of the supplemental nature of federal bankruptcy jurisdiction in third-party disputes, one can readily appreciate how and why the extant jurisprudence of third-party "related to" bankruptcy jurisd-

454. In tabular form, this Article's theory can be summarized as follows:

<table>
<thead>
<tr>
<th>Statutory Bankruptcy Jurisdiction</th>
<th>Claims Encompassed</th>
<th>Constitutional Basis</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;arising under&quot; proceedings</td>
<td>(1) claims created by the Bankruptcy Code</td>
<td>&quot;arising under&quot; federal law constitutional federal questions</td>
</tr>
<tr>
<td>&quot;arising in&quot; proceedings</td>
<td>(2) claims by and against a bankruptcy estate</td>
<td>&quot;arising under&quot; federal law Osborn federal entity theory</td>
</tr>
<tr>
<td>&quot;related to&quot; proceedings</td>
<td>third-party claims &quot;related to&quot; (1) or (2)</td>
<td>constitutional &quot;case&quot; Gibbs supplemental jurisdiction</td>
</tr>
</tbody>
</table>
diction has gone awry. This Article’s interpretive theory also brings a thoroughly illuminating perspective to the cognate struggle with so-called supplemental bankruptcy jurisdiction.

B. Pacor’s Mutilation of Third-Party “Related to” Jurisdiction

One of the first circuit-level cases to grapple with “related to” bankruptcy jurisdiction in a third-party dispute was the Third Circuit’s opinion in *Pacor, Inc. v. Higgins*.\(^{455}\) Although the *Pacor* court boldly announced what would become the almost universally accepted standard for third-party “related to” bankruptcy jurisdiction,\(^ {456}\) its opinion transparently displays the contradictory impulses that portend the ensuing havoc that the *Pacor* test has wrought.

*Pacor* is fundamentally at odds with the interpretive theory developed in this Article. The thesis of this Article is that third-party “related to” bankruptcy jurisdiction is supplemental jurisdiction; *Pacor* says that third-party “related to” bankruptcy jurisdiction is *not* supplemental jurisdiction. *Pacor*, though, has been widely influential in the courts and commentary as the unquestioned, eminent authority on third-party “related to” bankruptcy jurisdiction. Thus, the remainder of this Article will take great pains to discredit *Pacor* and demonstrate not only that its test should be abandoned, but for all practical purposes, that has already occurred. Given the disheartening disorder of the decisions, the real issue is formulating a suitable replacement test that accommodates all of the underlying tensions in the case law, which is the object of the interpretive theory proposed in this Article.

This Part III.B initially examines how *Pacor* recognized but did not deal with the constitutional implications of third-party “related to” bankruptcy jurisdiction. In fact, *Pacor*’s functional “conceivable effect” test has such conceptual vastness that it is almost certainly unconstitutionally overreaching. *Pacor* expressly rejected principles of supplemental jurisdiction as a curb on third-party “related to” bankruptcy jurisdiction. *Pacor*’s hostility to supplemental jurisdiction, though, can be attributed to both a

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455. 743 F.2d 984 (3d Cir. 1984).
456. See *supra* note 18 and accompanying text.
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fundamental misunderstanding of bankruptcy law and a mis-
reading of the Supreme Court's misgivings about general supple-
mental jurisdiction doctrine. Thus, while Pacor also recognized
the adjudicative efficiency goals of "related to" bankruptcy juris-
diction, it needlessly ignored the contributions that supplemen-
tal jurisdiction holds in that regard, opting instead for an out-
come-oriented, functional test that is not designed to facilitate
such efficiencies. Pacor attempted to confine the expanse of
third-party "related to" jurisdiction with an ill-conceived "auto-
matic liability" principle that has fertilized jurisdictional litiga-
tion and that is inconsistent with the flexibility built into the
jurisdictional structure through the abstention provisions.

The ultimate contradiction in Pacor that this Part III.B expos-
es is that its test is a supplemental jurisdiction test, but an
anachronistic in rem test that precludes modern in personam
principles of supplemental jurisdiction. Furthermore, the Pacor
test is a gauche in rem test that negates some of the most basic
in rem functions of bankruptcy jurisdiction. In the end, then,
Pacor discredits itself; third-party "related to" bankruptcy ju-
risdiction is supplemental jurisdiction even under the Pacor test,
and there is no legitimate basis on which to restrict it to an in
rem supplemental relationship. Third-party "related to" bank-
rruptcy jurisdiction must be recognized as a form of both in rem
and in personam supplemental jurisdiction.

The dispute that propagated the Pacor opinion originated in
state court with an asbestos personal injury suit against an
asbestos supplier, Pacor, Inc., in which Pacor impleaded the
asbestos manufacturer, Johns-Manville Corp., on a third-party
complaint for indemnification.457 When Johns-Manville sub-

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457. The parties' claims can be represented graphically as follows:

\[
\begin{array}{c}
\text{Johns-Manville} \\
\uparrow \\
\text{indemnification} \\
\downarrow \\
\text{Plaintiff} \\
\rightarrow \\
\text{Pacor}
\end{array}
\]

\[
\text{personal injuries}
\]
sequently commenced Chapter 11 proceedings, Pacor removed the entire suit to federal court, asserting the existence of federal bankruptcy jurisdiction over both its indemnification claim against Johns-Manville's Chapter 11 estate and the "related" third-party personal injury claim against Pacor. While the Third Circuit acknowledged that Pacor's indemnification claim against Manville was a proper subject of federal bankruptcy jurisdiction, it held that the third-party personal injury claim against Pacor fell outside "related to" bankruptcy jurisdiction.

1. The "Conceivable Effect" Test and Unlimited Bankruptcy Jurisdiction

The Pacor court began its search for the meaning of third-party "related to" bankruptcy jurisdiction by correctly noting that "Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate," and the court added that even a grant of such breadth nonetheless evokes "a statutory, and eventually constitutional, limitation to the power of a bankruptcy court." Rather than probe those constitutional limits, however, Pacor perpetuated the constitutional dilemma of third-party "related to" jurisdiction

In the ordinary parlance of civil procedure, Pacor's impleader claim against Manville would be considered the "third-party" claim. Because that was the claim against Manville's bankruptcy estate, though, the "third-party" claim for purposes of "related to" bankruptcy jurisdiction was the personal injury claim against Pacor.

458. See Pacor, 743 F.2d at 986. The current version of the bankruptcy removal statute, which is substantially identical to the 1978 Reform Act version at issue in Pacor, provides that "[a] party may remove any claim or cause of action in a civil action... to the district court for the district where such civil action is pending, if such district court has [bankruptcy] jurisdiction of such claim or cause of action." 28 U.S.C. § 1452(a) (1994). Upon removal of the state-court action to federal court, Pacor simultaneously sought transfer of the entire action to the district in which Manville's Chapter 11 proceedings were pending, so that both the personal injury claim against Pacor and Pacor's indemnification claim against Manville could be heard in the same forum. See Pacor, 743 F.2d at 986.

459. See Pacor, 743 F.2d at 987, 994.

460. See id. at 994-96.

by announcing a functional test that permits plainly unconstitutional exercises of federal bankruptcy jurisdiction.

Employing the constitutional limits of federal bankruptcy jurisdiction developed in this Article, as embodied in the interpretive theory for third-party "related to" bankruptcy jurisdiction set forth above, by announcing a functional test that permits plainly unconstitutional exercises of federal bankruptcy jurisdiction.

Employing the constitutional limits of federal bankruptcy jurisdiction developed in this Article, as embodied in the interpretive theory for third-party "related to" bankruptcy jurisdiction set forth above, would have made easy work of the Pacor case. Pacor's indemnification claim against Manville's Chapter 11 estate had an independent constitutional basis for federal jurisdiction as an Osborn federal question claim against a federal entity. Thus, the third-party personal injury claim against Pacor could be heard in federal court if it shared a supplemental nexus with the Pacor-Manville indemnification claim. Under the "common nucleus of operative fact" supplemental linkage, endorsed by the Supreme Court in the Gibbs case, an impleader claim for indemnification or contribution is uniformly considered part of the same constitutional "case" as the claim that triggers the impleader. In fact, that sort of "logical dependence" between two claims is generally considered a much closer coupling than the more permissive "common nucleus of operative fact" standard. Thus, constitutional principles of federal jurisdiction would lead one to conclude that there was federal bankruptcy jurisdiction over both (1) the Pacor-Manville indemnification claim, as a freestanding constitutional federal question, and (2) the third-party claim against Pacor that gave rise to the indemnification claim, as a matter of accepted principles of supplemental jurisdiction.

Other than acknowledging that there must be some constitutional limit to third-party "related to" bankruptcy jurisdiction, though, the Pacor court made no attempt to discern that limit or

462. See supra Part III.A, notes 411-54 and accompanying text.
464. See sources cited supra note 138.
465. Thus, as the Supreme Court stated in Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365 (1978), an impleader "complaint depends at least in part upon the resolution of the primary lawsuit. Its relation to the original claim is thus not mere factual similarity, but logical dependence." Id. at 376 (emphasis added) (citation omitted); see Richard D. Freer, Compounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute, 40 EMORY L.J. 445, 459 (1991); Freer, supra note 382, at 70-71; Matasar, supra note 382, at 171-72; McLaughlin, supra note 366, at 881 n.177.
examine the constitutionality of federal bankruptcy jurisdiction over the third-party dispute before it. Rather, the court seemed intent on announcing a "test"—one that actually defies principled limits:

The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy. . . . An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.466

The Pacor test, then, requires a functional, case-specific inquiry into the utility of the bankruptcy forum with respect to any particular third-party dispute, as judged by the outcome-oriented impact of the dispute on administration of the bankruptcy estate. Such a case-by-case functional query, though, seems manifestly inconsistent with the legislative process that brought about "related to" bankruptcy jurisdiction in the 1978 Reform Act. The functionality of the Pacor test reverberates with clear overtones of the defeated "jurisdiction by detriment" proposal—requiring a determination of the need for a federal forum in a given dispute. Such a functional approach to bankruptcy jurisdiction was repudiated as inconsistent with the objects of comprehensive "related to" jurisdiction,467 which itself was premised on an explicit rejection of any such case-specific approach to determining the existence of federal bankruptcy jurisdiction.468

In addition, the Pacor test, originally suggested by the Collier treatise,469 is so broad on its face that literal application could

466. Pacor, 743 F.2d at 994.
467. See supra notes 197-201 and accompanying text.
468. See supra note 206. But see Richard Lieb, Jurisdiction and Venue in Bankruptcy Litigation, 1982 ANN. SURV. BANKR. L. 69, 107 (arguing that "the scope of subject matter jurisdiction of the Bankruptcy Courts is elastic," and the "related to" jurisdiction "is flexible and . . . may be telescopically expanded or contracted by a court to reach a just result"). Mr. Lieb's approach, like Pacor, overlooks the role of permissive abstention in assuring the necessary flexibility in the exercise of federal bankruptcy jurisdiction. See infra notes 506-14 and accompanying text.
469. See Reed et al., supra note 359, at 131 (quoting Collier's proposed test of
lead to patently unconstitutional exercises of federal bankruptcy jurisdiction over nondiverse state-law claims. For example, were an individual to file bankruptcy owning stock in a corporation, the Pacor test apparently would permit federal bankruptcy jurisdiction over any claim by or against the corporation with a potential impact on the value of the corporation's stock, because of the "conceivable effect" on the value of the individual shareholder's bankruptcy estate—regardless of whether the claim itself contains any "federal ingredient" and regardless of whether the claim shares a supplemental relationship with another claim pending in federal court.

"whether the outcome of the proceeding could conceivably have any effect upon the estate being administered"); David L. Bryant, Note, Selective Exercise of Jurisdiction in Bankruptcy-Related Civil Proceedings, 59 Tex. L. Rev. 325, 329-30 (1981) (quoting the same proposed test).

470. In espousing the proposed test, Collier also opined that "[c]onceptually, there is no limit to the reach of this jurisdiction." Reed et al., supra note 359, at 131 (quoting Collier); see also S. Rep. No. 98-55, at 18 n.53a (1983) (quoting Collier as claiming "no conceptual limits' to Federal jurisdiction under 1978 Act"); 130 Cong. Rec. 13,066 (1984) (statement of Sen. Hatch) (citing Collier for the proposition "that the Bankruptcy Reform Act jurisdictional grant has no conceptual limit"). Many have noted the difficulties in constraining a functional, utilitarian approach to federal bankruptcy jurisdiction. See In re Chicago, Rock Island & Pac. R.R. Co., 794 F.2d 1182, 1188 (7th Cir. 1986) (Easterbrook, J.) (rejecting an argument that "amounts to saying that courts have jurisdiction when there is a utilitarian reason for them to do so. But jurisdiction is the power to decide. It must be conferred, not assumed."); Brubaker, supra note 13, at 1075-77; Dunne, supra note 13, at 957 (noting "the soaring jurisdiction afforded . . . in a universe where everything is related to everything else"); Reed et al., supra note 359, at 131-32 (arguing that "the determination of whether a particular proceeding is 'related to' the [bankruptcy] case is a jurisdictional determination, not a utilitarian assessment of whether . . . it would be more efficient or just for the bankruptcy court to' assume jurisdiction, and "almost any proceeding in which . . . the property rights or interests of the debtor will be directly or indirectly affected will have to be deemed to be 'related to' the debtor's [bankruptcy] case" under the proposed Collier, now Pacor test); supra note 13 and accompanying text.

471. Indeed, the Sixth Circuit so indicated in the context of litigation involving a corporation wholly owned by an individual who had filed bankruptcy proceedings, because "[r]esolution of the state court action would have a substantial effect on the monetary value of [the corporation's] shares, and thus would have a substantial effect on the value of [the individual shareholder's] bankruptcy estate." 8300 Newburgh Rd. Partnership v. Time Constr., Inc. (In re Time Constr., Inc.), 43 F.3d 1041, 1045 & n.7 (6th Cir. 1995). On the same principle, then, if I have invested heavily (or maybe even not so heavily) in a particular public corporation, my bankruptcy filing will confer federal bankruptcy jurisdiction over any state-law dispute involving the public corporation that could have a "substantial effect" on the value of my stockholdings or,
Perceptibly wary of the irresolute specter of an unconstitutional exercise of federal bankruptcy jurisdiction, the Pacor court concluded that the outcome of the third-party personal injury claim against Pacor, on which the Pacor indemnification claim against Manville's bankruptcy estate was wholly dependent, could not have any conceivable effect on Manville's bankruptcy estate. The means by which the Pacor court came to this incredible non sequitur speaks volumes for the confusion the courts have encountered and escalated by following the lead of Pacor.

2. Frenville Strikes Again

Pacor's first misstep, and a substantial factor contributing to Pacor's assault on supplemental jurisdiction principles, is attributable to the Third Circuit's notoriously misguided jurisprudence with respect to a correlative provision of the Bankruptcy Code—that which defines the "claims" that can be made against using the Pacor formulation itself, a "conceivable effect" on the value of my shares. This relationship can be represented graphically as follows:

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Individual Debtor's
Bankruptcy Estate

stock
ownership

Plaintiff → Corporation → Defendant
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472. The court's only other mention of the constitutional issue was to note that in enacting the 1984 BAFJA amendments, "[t]he legislative history reveals that Congress was concerned about the constitutionality of granting to the federal courts 'related to' jurisdiction in cases where no independent basis for federal jurisdiction existed." Pacor, Inc. v. Higgins, 743 F.2d 984, 996 n.16 (3d Cir. 1984); see infra note 510; see also Home Ins. Co. v. Cooper & Cooper, Ltd., 889 F.2d 746, 749 (7th Cir. 1989) (Easterbrook, J.) ("We have read [related to' bankruptcy jurisdiction] narrowly not only out of respect for Article III, but also to preserve the jurisdiction of state courts over questions of state law involving persons not party to the bankruptcy.").

473. See Pacor, 743 F.2d at 995-96.
a bankruptcy estate. The *Pacor* court seemed to assume that the Pacor-Manville indemnification claim, although properly removed to federal court according to the Third Circuit, was not ripe for consideration by a federal bankruptcy court until the third-party personal injury claim against Pacor was finally resolved: "The fact remains that any judgment received by the plaintiff [against Pacor] could not itself result in even a contingent claim against Manville, since Pacor would still be obligated to bring an entirely separate proceeding to receive indemnification." At best, [the third-party personal injury claim] is a mere precursor to the potential ... claim for indemnification by Pacor against Manville. Thus, the bankruptcy estate could not be affected in any way until the Pacor-Manville ... action is actually brought and tried.

This aspect of the *Pacor* opinion is an unfortunate by-product of the Third Circuit's unduly narrow view, contemporaneously memorialized in the infamous *Frenville* case, regarding the sweep of bankruptcy and the "claims" against a bankruptcy estate that are cognizable in bankruptcy proceedings. Contrary to the myopic approach of *Pacor* and *Frenville*, a "claim" against a bankruptcy estate is broadly defined in the Bankruptcy Code in a manner that would not only permit, but also require Pacor (under compulsion of bankruptcy's automatic stay and discharge injunction) to assert its contingent indemnification rights ag-

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474. See supra note 459 and accompanying text. In fact, the district court had remanded this indemnification claim to the bankruptcy court for consideration of Pacor's motion to transfer venue of the claim to the district in which Manville's Chapter 11 proceedings were pending. See *Pacor*, 743 F.2d at 987.


476. Id.

477. Id.


479. As used in the Bankruptcy Code, "claim' means . . . 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. § 101(5)(A) (1994).

480. Commencement of a bankruptcy case, in and of itself, operates as an automatic stay of all creditor collection actions of whatever nature. See id. § 362(a). Thereafter, creditors can pursue their rights against the debtor only by way of a proof of claim against the debtor's bankruptcy estate, filed in the bankruptcy court, with the bankruptcy court determining the allowability of any claim to which an objection is posed.
against Manville's bankruptcy estate, even without final resolution of the third-party personal injury action against Pacor for which indemnification was sought.\(^{481}\) Indeed, the bankruptcy court presiding over Manville's reorganization proceedings so held.\(^{482}\)

Significantly, bankruptcy's "acceleration" of Pacor's indemnification claim is not unlike the procedural rules that permitted Pacor to assert its indemnification claim in the same action in which Pacor was sued as a defendant.\(^{483}\) By invoking the Frenville rationale, then, Pacor was bucking the spirit of both (1) comprehensive bankruptcy relief and (2) modern joinder practice in federal court, which of course, is dependent upon principles of supplemental jurisdiction. A third-party "related to" jurisdiction that would permit the federal bankruptcy court to hear both Pacor's bankruptcy "claim" against Manville's bankruptcy estate and the third-party personal injury claim against Pacor that gives rise to that bankruptcy "claim" would seem to complement and facilitate the smooth functioning of the Bankruptcy Code's liberal definition of bankruptcy "claims." Pacor's nullification of such a supplemental approach to third-party "related to" jurisdiction, though, did not stop at the indirect implications of its Frenville rationale.

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\(^{481}\) See id. §§ 501(a), 502(a)-(b). A bankruptcy discharge then extinguishes "claims" that are not fully satisfied from the debtor's bankruptcy estate, and the debtor's discharge replaces the automatic stay with a permanent discharge injunction. See id. §§ 101(5) & (12), 362(c)(2)(C), 524(a), 727(b), 1141(d)(1)(A), 1228(c), 1328(c).

\(^{482}\) See Brubaker, supra note 13, at 1004-07. The Bankruptcy Code provides that a bankruptcy court "shall . . . estimate[] for purposes of allowance . . . any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the [bankruptcy] case." 11 U.S.C. § 502(c)(1).

3. An Unwarranted Repudiation of Supplemental Jurisdiction

If Pacor had rested its holding merely on the faulty supposition that there was not yet any Pacor-Manville indemnification "claim" over which the federal courts could exercise bankruptcy jurisdiction, the conclusion that there could be no "related to" bankruptcy jurisdiction in the third-party claim against Pacor would not be at all bothersome. In fact, if one were to properly view third-party "related to" bankruptcy jurisdiction as a grant of conventional supplemental jurisdiction, that conclusion would be mandated, because supplemental jurisdiction cannot be based upon a relationship to a claim that has not been asserted in federal court. The Pacor court, however, compounded its initial error by disavowing any role at all for supplemental jurisdiction principles in the realm of third-party "related to" bankruptcy jurisdiction.

Although not part of the "test" announced by the Third Circuit and adopted in its sister circuits, the Pacor opinion nonetheless appended the following commentary:

On the other hand, the mere fact that there may be common issues of fact between a civil proceeding and a controversy involving the bankruptcy estate does not bring the matter within the scope of ["related to" bankruptcy jurisdiction]. Judicial economy itself does not justify federal jurisdiction. See generally Aldinger v. Howard, 427 U.S. 1, 15, 96 S.Ct. 2413, 2420, 49 L.Ed.2d 276 (1976).
The unmistakable target of this missive was Gibbs's "common nucleus of operative fact" test and supplemental jurisdiction in general, as evidenced by the reference to Aldinger.\textsuperscript{487}

The Pacor court made no effort to actually engage in the supplemental jurisdiction analysis prescribed by Aldinger, which undoubtedly would not have precluded an application of supplemental jurisdiction in this particular context.\textsuperscript{488} Nonetheless, Aldinger and the Supreme Court's subsequent opinion in Finley v. United States\textsuperscript{489} did, indeed, present a significant obstacle to the unrestricted exercise of supplemental jurisdiction by the federal courts. Those cases, however, were reacting to a quirk in general supplemental jurisdiction doctrine, which had developed "without specific examination of jurisdictional statutes"\textsuperscript{490} and thus did not appear entirely consistent with "the necessity that jurisdiction be explicitly conferred."\textsuperscript{491} Of course, if third-party "related to" bankruptcy jurisdiction is itself a grant of supplemental jurisdiction, as its phrasing and legislative purposes suggest, then the statutory authorization hurdle confronting the Aldinger and Finley cases is completely nonexistent in the bankruptcy context.\textsuperscript{492} As the Aldinger opinion specifically noted,
"[t]here are, of course, many variations in the language which Congress has employed to confer jurisdiction upon the federal courts," and "[o]ther statutory grants . . . might call for a different result." 493

The general principle of the Aldinger case on which Pacor relied, then, and its restrictions on the exercise of supplemental jurisdiction in the absence of any express statutory authorization, were utterly inapposite to the task before the Pacor court, which was presented with construction of a specific grant of "related to" bankruptcy jurisdiction. Indeed, Congress subsequently overturned both Aldinger and Finley by vesting the federal courts with general "related to" jurisdiction in the 1990 supplemental jurisdiction statute. 494 Thus, it is not "judicial economy itself" that gives federal courts supplemental bankruptcy jurisdiction; it is the statutory grant of "related to" bankruptcy jurisdiction that does so—a prospect that the Pacor court refused to even consider.

So while Pacor purported to effectuate congressional intent regarding this "comprehensive" third-party "related to" bankruptcy jurisdiction, in order to enable federal bankruptcy courts to "deal efficiently and expeditiously with all matters connected with the bankruptcy estate," 495 the court cavalierly discarded the body of jurisdictional tenets developed precisely for such an end. Moreover, subsequent courts have entrenched Pacor's faux pas by repeatedly and mechanically parroting its reasoning. 496

494. See 28 U.S.C. § 1367(a) (1994) ("[T]he district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." (emphasis added)). For further discussion of the general supplemental jurisdiction statute, see supra notes 439-40 and accompanying text.
496. See, e.g., Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers (In re Dow Corning Corp.), 86 F.3d 482, 489 (6th Cir. 1996); Feld v. Zale Corp. (In re Zale Corp.), 62 F.3d 746, 753-54 (5th Cir. 1995); Specialty Mills, Inc. v. Citizens State Bank, 51 F.3d 770, 774 (8th Cir. 1995); Miller v. Kemira, Inc. (In re Lemco Gypsum, Inc.), 910 F.2d 784, 789 (11th Cir. 1990); Home Ins. Co. v. Cooper & Cooper, Ltd., 889 F.2d 746, 749 (7th Cir. 1989).
4. Disregard of First Principles and the Role of Abstention

By repudiating principles of supplemental jurisdiction, the Pacor court was forced to look elsewhere for checks on its “conceptually limitless” test for third-party “related to” bankruptcy jurisdiction. Thus, considerations of convenience and judicial economy mysteriously gave way to preclusion doctrine. In the process, the Third Circuit pressed a wooden “automatic liability” limitation into a role reserved by Congress for the flexible abstention provisions. As a result, Pacor has multiplied jurisdictional litigation and undermined the essential purpose of pervasive federal bankruptcy jurisdiction in facilitating adjudicative efficacy.

According to the Third Circuit, the third-party personal injury claim against Pacor was not “related to” Manville’s bankruptcy case, because “the outcome of [that third-party personal injury] action would in no way bind Manville . . . [s]ince Manville is not a party” and “could not be bound by res judicata or collateral estoppel.” Of course, strict adherence to preclusion principles would mean there is virtually no “related to” jurisdiction of third-party disputes, as res judicata can bind only parties and their privies. Thus, the Pacor opinion held out the possibility that the outcome of other third-party claims might be “related to” a bankruptcy case if, as a practical matter, they give rise to “automatic liability” for the bankruptcy estate, such as a debtor’s contractual liability that might arise when a creditor recovers from the debtor’s guarantor.

Lost in Pacor’s search for “automatic liability” for the estate, though, is the initial inquiry the Third Circuit acknowledged as

497. See supra note 470.
498. Pacor, 743 F.2d at 995.
500. See Pacor, 743 F.2d at 995; see also Belcufine v. Aloe, 112 F.3d 633, 636-37 (3d Cir. 1997) (finding creditors' claims against the Chapter 11 debtor's officers/directors were within "related to" jurisdiction where the estate had "automatic liability" under corporate indemnification provisions); IRS v. Kaplan (In re Kaplan), 104 F.3d 589, 591-95 (3d Cir. 1997) (finding "related to" jurisdiction over a nondebtor corporation's trust fund tax liability to the IRS, because of the automatic liability of the officer/director Chapter 11 debtors for those taxes).
the function of third-party "related to" bankruptcy jurisdiction: whether entertaining the third-party personal injury action against Pacor in federal court would promote "efficient and expeditious" resolution of Pacor's indemnification rights vis-à-vis Manville's bankruptcy estate. One suspects that the Pacor court thought not and that Pacor was seizing upon Manville's bankruptcy filing as a means of delaying the plaintiff's personal injury suit, which Pacor removed to federal court "on the eve of the commencement of trial" in state court. Hence, the Third Circuit admonished Pacor that "[b]ankruptcy jurisdiction . . . was not conferred for the convenience of those not in bankruptcy."

501. See supra note 461 and accompanying text. As the Fourth Circuit noted in a similar circumstance, any recovery on the third-party claim would "changel[e] the character of [the] indemnification claim against [the debtor's estate] from contingent and unliquidated to certain and liquidated" and "would obviate the need to estimate the amount of [the indemnification] claim under Bankruptcy Code § 502(c), which requires that a contingent or unliquidated claim be estimated if the bankruptcy court determines that the fixing or liquidation of a claim would unduly delay the administration of the bankruptcy case." Owens-Illinois, Inc. v. Rapid Am. Corp. (In re Celotex Corp.), 124 F.3d 619, 626 (4th Cir. 1997).

502. Hanna v. Philadelphia Asbestos Co., 743 F.2d 996, 998 n.1 (3d Cir. 1984). Hanna was a companion case to Pacor, decided on the same day and also involving Pacor in an identical procedural posture, as both defendant and indemnification claimant against Manville, attempting removal of the entire action to federal court. See id. at 998.

503. Pacor, 743 F.2d at 996; see also Feld v. Zale Corp. (In re Zale Corp.), 62 F.3d 746, 757 n.28 (5th Cir. 1995) (arguing that "[o]therwise, creditors would have too much incentive to push a failing enterprise into bankruptcy not for the debtor's sake, but for their own interests"). In the identical-twin Hanna case, the Third Circuit quoted at length from the district court opinion:

[It] does seem to me that the move to remove and then transfer to New York is primarily a tactical ploy on the part of Pacor, Incorporated.

. . .

The plaintiffs who have a claim for serious personal injuries and presumably a death action and a survival action, based on Pennsylvania law, may be delayed in the trial of the case for a very extensive period of time and . . . I don't see how the transferring from one district to another and then possibly back again here or to state court, can possibly be in the interest of judicial economy. It is that type of juggling of cases and moving them around that causes delay and I think it rightly causes many persons to be discouraged with the whole judicial system.

We agree with the district court that the Hanna-Pacor dispute must be remanded. Indeed, we rest our decision on a consideration even more basic than the equities of the situation. As we discussed at length in [Pacor], an action by a consumer such as Hanna or Higgins against a
The Third Circuit's belief that Congress did not design bankruptcy jurisdiction to accommodate the convenience and economy interests of any litigant other than the bankruptcy estate is demonstrably at odds with Congress's express desire to "provide[e] a mechanism for assuring convenience to all parties to particular litigation and ensuring that the more general public interest in a fair and expeditious disposition of the litigation will be appropriately balanced in the final selection of a forum." Pacor, by contrast, imposes a jurisdictional regime that not only tolerates, but essentially requires the litigation of factually related claims in separate tribunals, given the restrictions imposed upon creditors' forum choice by bankruptcy's automatic stay. If fair and efficient bundling of all related claims is unavailable in federal bankruptcy court, then oftentimes such bundling will not be attainable at all, as bankruptcy's automatic stay precludes assertion of claims against the debtor in any forum other than the bankruptcy court. Moreover, and paradoxically, Pacor's single-minded focus upon the bankruptcy estate turns a blind eye to any added expense and inconvenience visited upon creditors (such as Pacor)—the very constituency for whose ultimate benefit bankruptcy proceedings are supposedly conducted—in the prosecution of their claims against the bankruptcy estate.

An equally disturbing aspect of Pacor, and an outgrowth of its functional approach to third-party "related to" bankruptcy jurisdiction, is that it completely ignores the role of permissive abstention and its interplay with pervasive "related to" jurisdiction in "insur[ing] that the jurisdiction of the bankruptcy court is exercised only when appropriate to the expeditious disposition of bankruptcy cases." Thus, in the Pacor case, exerting federal

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bankruptcy jurisdiction over the third-party personal injury claim against Pacor, merely for the sake of any marginal efficiencies that could be obtained in resolving Pacor's indemnification rights against Manville's bankruptcy estate, was likely wholly insufficient to justify the extreme delay and duplication of effort that Manville's complex reorganization proceedings would impose upon the ultimate determination of the personal injury claim against Pacor.\(^a\) The most that this establishes, however, is that the third-party personal injury claim at issue in Pacor presented an appropriate case for permissive\(^b\) or even mandatory abstention, a conclusion that may frequently follow where the “federal” claim that moors a “related to” third-party dispute is a creditor’s claim against the bankruptcy estate.\(^c\)

\(^a\) Simultaneously qualified by the abstention provision... [which is] sufficient to keep federal jurisdiction from becoming overextended. Congress wisely chose a broad jurisdictional grant and a broad abstention doctrine over a narrower jurisdictional grant so that the district court could determine in each individual case whether hearing it would promote or impair efficient and fair adjudication of bankruptcy cases. Kelley v. Nodine (In re Salem Mortgage Co.), 783 F.2d 626, 635 (6th Cir. 1986); accord Wood v. Wood (In re Wood), 825 F.2d 90, 93 (5th Cir. 1987) (“The abstention provisions of the Act demonstrate the intent of Congress that concerns of comity and judicial convenience should be met, not by rigid limitations on the jurisdiction of federal courts, but by the discretionary exercise of abstention when appropriate in a particular case.”); Bryant, supra note 469, at 331-36.

\(^b\) See supra notes 501-03 and accompanying text.

\(^c\) Indeed, this was precisely the basis on which the district court declined jurisdiction in Pacor's companion case, by remand to state court. See Hanna v. Philadelphia Asbestos Co., 743 F.2d 996, 1001-02 (3d Cir. 1984), discussed supra notes 502-03. Because the third-party personal injury claim at issue in Pacor was already pending and ready for trial in state court, it would likely fall within the mandatory abstention provision of the 1984 BAFJA amendments. See 28 U.S.C. § 1334(c)(2), discussed supra note 220 and accompanying text. Indeed, even though the BAFJA amendments were inapplicable to the Pacor case itself, the court specifically noted that the newly enacted mandatory abstention provision would preclude any exercise of federal jurisdiction over the third-party personal injury claim against Pacor, a prospect that the Pacor court, like many in Congress, erroneously believed was a reason to doubt the constitutional validity of “related to” bankruptcy jurisdiction over the third-party personal injury claim. See Pacor, Inc. v. Higgins, 743 F.2d 984, 996 n.16 (3d Cir. 1984); supra notes 218-24, 472 and accompanying text.

\(^d\) The significant differences in procedure and litigation incentives between adjudication of a “core” claim against the bankruptcy estate and a “noncore” third-party “related to” claim may often erase any countervailing procedural efficiencies from join-der of those core and noncore claims. For example, litigation of creditors' claims, which typically yield mere cents on the dollar, is notoriously “summary,” to use the
Pacor's rigid jurisdictional bar in the absence of "automatic liability," however, forecloses a federal forum even in those instances where the federal bankruptcy court would prove more expeditious than state-court litigation.

"Automatic liability" as a curb on Pacor's conceptually limitless "conceivable effect" test has not found much favor in other circuits, nor has any other limiting principle. Little wonder, then, that Pacor's legacy is a fairly arbitrary body of case law on

without any jury trial rights. See 28 U.S.C. § 157(b)(1), (b)(2)(B); Langenkamp v. Culp, 498 U.S. 42, 44-45 (1990); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 58-59 & n.14 (1989). By contrast, conduct of noncore "related to" proceedings, which yield 100+ dollars, is essentially indistinguishable from nonbankruptcy civil litigation, including retention of any constitutional right to a jury trial in a Article III district court. See 28 U.S.C. § 157(d)-(e); 6 NORTON, supra note 16, § 143:13; 1 SALERNO ET AL., supra note 434, § 3.46. Even in such a circumstance, though, joinder of the creditor's claim with a related third-party claim may yield pretrial efficiencies, while also preserving the possibility of subsequent severance of the claims for separate trials if necessary. Cf., e.g., Masterwear Corp. v. Rubin Baum Levin Constant & Friedman (In re Masterwear Corp.), 241 B.R. 511, 519-21 (Bankr. S.D.N.Y. 1999) (abstaining from a defendant's third-party impleader claims after the estate's claim against the defendant had settled and summary judgment on the third-party claims was denied, because the third-party claims would have to be tried to a jury in a district court if retained in federal court). See generally Hawkins v. Eads (In re Eads), 135 B.R. 387, 397-98 (Bankr. E.D. Cal. 1991) (noting that "the interests of judicial economy during the pretrial stage and . . . the convenience of the parties" comes from "comprehensive discovery in a single forum" and acknowledging that "there is a possibility that the calculus of judicial economy and convenience could change as trial nears if the third-party claims become cumbersome to try in view of the circumscribed power of bankruptcy judges" and the potential jury trial rights of some parties, but concluding that "those are problems that may or may not arise and do not affect the analysis of subject-matter jurisdiction" since "the exercise of the discretion to assume jurisdiction [or abstain] remains open throughout the litigation"); infra note 515 and accompanying text (discussing pretrial efficiencies from joinder of related claims). Moreover, with respect to creditors' personal injury and wrongful death claims against a bankruptcy estate, special provisions of the Judicial Code preserve such a tort creditor's right to a jury trial in a district court. See 28 U.S.C. §§ 157(b)(2)(B), (b)(5), 1411(a). Therefore, such a tort claim against the estate and a related third-party claim could advance in tandem on similar procedural tracks.

512. "It has become clear following Pacor that 'automatic' liability is not necessarily a prerequisite for a finding of 'related to' jurisdiction." Lindsey v. O'Brien, Tanaki, Tanzer & Young Health Care Providers (In re Dow Corning Corp.), 86 F.3d 482, 491 (6th Cir. 1996); see also Kelley v. Nodine (In re Salem Mortgage Co.), 783 F.2d 626, 635 (6th Cir. 1986) (noting "that the statute does not require a finding of definite liability of the estate as a condition precedent to holding an action related to a bankruptcy proceeding").
third-party "related to" bankruptcy jurisdiction. Accordingly, Pacor's construction of an awkward, functional jurisdictional test—which is conceptually limitless yet simultaneously expected to do the work of the abstention provisions—has vastly proliferated jurisdictional litigation, with prerequisite jurisdictional issues regularly contested in appeals to the circuit courts. Abstention decisions, by contrast, are discretionary determinations on which such appeals are expressly prohibited by statute.\footnote{513} Pacor, then, frustrates another primary goal of the 1978 Reform Act’s expansion of federal bankruptcy jurisdiction—that of reducing wasteful jurisdictional litigation.\footnote{514}

The internal contradictions of Pacor’s “limitless, but not limitless” schizophrenia go to the core purpose of third-party “related to” jurisdiction. At the same time that the “conceivable effect” aspect of the Pacor test seems unconstitutionally overinclusive, another aspect of the Pacor test makes it decidedly underinclusive with respect to its stated goal of facilitating efficient and expeditious litigation of all matters connected with a bankruptcy estate. Because of its outcome-oriented focus, the Pacor test simply cannot fully effectuate efficient adjudication. In asking whether the “outcome” of a third-party dispute can have a conceivable effect upon the bankruptcy estate, the Pacor test assigns no significance to the process of resolving the third-party claim that precedes final judgment. Of course, it is in the pre-outcome stage of dispute resolution where adjudicative efficiencies are achieved, by placing logically and factually related claims before the same court for consolidated or coordinated pretrial and/or trial proceedings—a fact that is completely ignored by Pacor’s “outcome” blinders.\footnote{515}

\footnote{513. An abstention decision by a bankruptcy judge may be reviewed by a district court or bankruptcy appellate panel, but further review by appeal to a circuit court of appeals is limited to reviewing a lower court’s denial of a request for mandatory abstention. See 28 U.S.C. § 1334(d); 1 COLLIER (15th ed.), supra note 66, ¶ 3.05[5]-[6].}
\footnote{514. See supra notes 174-79 and accompanying text.}
\footnote{515. See Robert G. Bone, Revisiting the Policy Case for Supplemental Jurisdiction, 74 IND. L.J. 139, 142 (1998) (noting that whereas “most lawsuits settle . . . the cost savings that matter most to an efficiency analysis are those at the pretrial stage”). Indeed, Judge Easterbrook as much as acknowledged this gap in the outcome-oriented approach in Home Insurance Co. v. Cooper & Cooper, Ltd., 889 F.2d 746 (7th Cir. 1989), by noting that although entertaining certain third-party disputes had “a nexus}
The outcome-oriented, functional inquiry required by *Pacor* actually mirrors the in rem concepts of ancillary jurisdiction employed in the equitable receivership context.\(^5\) Thus, despite the Third Circuit’s sweeping language deriding supplemental jurisdiction principles,\(^5\) the test itself, as established by *Pacor*, is not so much a rejection of supplemental jurisdiction as it is a rejection of a modern in personam approach to supplemental jurisdiction. *Pacor*’s outcome-based test has simply restricted third-party “related to” bankruptcy jurisdiction to a more primitive in rem supplemental relationship.

5. *The Inartful In Rem Nature of the Pacor Test*

By revisiting the in rem origins of supplemental jurisdiction, we can easily recognize the *Pacor* test as an effort to articulate an in rem supplemental nexus for third-party “related to” bankruptcy jurisdiction, but in the most crude and inept fashion. In fact, *Pacor* actually has thrown into question long-settled precepts regarding the in rem functions of bankruptcy jurisdiction. Under *Pacor*, possession of property by a federal bankruptcy court no longer provides the court authority to determine conflicting claims to the property. Moreover, resolution of intercreditor disputes regarding the appropriate recipient of a bankruptcy distribution has also faded from the in rem powers of a federal court. The *Pacor* test is absolute folly, even in its own niggardly in rem domain, and therefore must be abandoned.

“Related to” bankruptcy jurisdiction should exist for any third-party dispute that shares an in rem supplemental connection with a claim by or against a bankruptcy estate. Additionally, though, third-party “related to” jurisdiction also should incorporate a modern in personam test for supplemental jurisdiction.

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516. *See supra* Part II.C.3, notes 370-95 and accompanying text.

517. *See supra* notes 486-87 and accompanying text.
Even though the Supreme Court has approved the "common nucleus of operative fact" test as a constitutionally appropriate supplemental relationship, this method of grouping related in personam claims, looking to the shared transactional origin of the claims, does not seem to preclude the more functional, outcome-oriented in rem linkage that the Court utilized in its earlier receivership cases. Thus, a claim to a particular res that carries an independent basis for federal jurisdiction will support federal jurisdiction over nondiverse state-law claims against the same res, even when the claims themselves do not otherwise share any common transactional origin. This in rem approach to supplemental jurisdiction, by necessary implication, also encompasses third-party inter se disputes between claimants with respect to their relative rights in the res. Indeed, bankruptcy's earliest form of supplemental jurisdiction, the 1898 Act's "necessity" jurisdiction over those third-party disputes considered integral to complete administration of the estate, was precisely this brand of in rem supplemental jurisdiction.

The Pacor test for third-party "related to" bankruptcy jurisdiction, by asking whether the outcome of a third-party dispute will have an effect on the bankruptcy estate, is simply an attempt at a more expansive in rem supplemental nexus. Pacor essentially regards the bankruptcy estate as a jurisdictional res, and a particular claim is within federal bankruptcy jurisdiction, according to Pacor, if the claim has a sufficient outcome-oriented, functional relationship to the jurisdictional res—Pacor's "effect on the estate" test. The in rem focus of such an outcome-based

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518. See supra notes 371-73 and accompanying text.
519. Commentators agree that in rem supplemental concepts survive the Gibbs common-nucleus test. See Richard D. Freer, Interpleader, in 4 Moore, supra note 138, § 22.04[2][c], at 22-62 to -63; Matasar, supra note 7, at 1463-66.
521. See supra Part I.B.2.b, notes 124-42 and accompanying text.
test is even clearer under the Seventh Circuit's variation, which examines whether the third-party dispute can "affect[] the amount of property available for distribution or the allocation of property among creditors." Moreover, several circuits have expressly likened third-party "related to" bankruptcy jurisdiction to the in rem "necessity" concepts of 1898 Act jurisprudence.

In fact, the third-party disputes in which the courts have had the least difficulty applying the Pacor test are those that most readily lend themselves to an in rem analysis. Thus, when claimants assert conflicting rights in property of the estate, the Pacor test easily affords federal jurisdiction to resolution of

(arguing that the fundamental essence of bankruptcy jurisdiction is more in rem than in personam, relying on the Pacor test). The Third Circuit itself acknowledged that "[p]roceedings affecting the res are within the court's jurisdiction; proceedings not affecting the res are not." Torkelsen v. Maggio (In re Guild & Gallery Plus, Inc.), 72 F.3d 1171, 1182 (3d Cir. 1996) (quoting Gibson, supra, at 64); see also Feld v. Zale Corp. (In re Zale Corp.), 62 F.3d 746, 753 (5th Cir. 1995) ("Those cases in which courts have upheld 'related to' jurisdiction over third-party actions do so because the subject of the third-party dispute is property of the estate, or because the dispute over the asset would have an effect on the estate." (footnotes omitted)).

523. Elscint, Inc. v. First Wis. Fin. Corp. (In re Xonics, Inc.), 813 F.2d 127, 131 (7th Cir. 1987). The Xonics court elaborated on its in rem rationale as follows:

The bankruptcy jurisdiction is designed to provide a single forum for dealing with all claims to the bankrupt's assets. It extends no farther than its purpose. That two creditors have an internecine conflict is of no moment, once all disputes about their stakes in the bankrupt's property have been resolved.

Id.

524. See Resolution Trust Corp. v. Best Prods. Co. (In re Best Prods. Co.), 68 F.3d 26, 32 (2d Cir. 1995) (noting that "[d]etermination of the priority rights of various creditors to assets of the Debtor was necessary to administer the estate and was not merely a dispute between two creditors"); Gardner v. United States (In re Gardner), 913 F.2d 1515, 1518 (10th Cir. 1990) (citing the 1898 Act case of Gordon v. Shirley Duke Assocs. (In re Shirley Duke Assocs.), 611 F.2d 15 (2d Cir. 1979)); FDIC v. Majestic Energy Corp. (In re Majestic Energy Corp.), 835 F.2d 87, 89-91 (5th Cir. 1988) (citing the 1898 Act case of Uranga v. Geib (In re Paso Del Norte Oil Co.), 755 F.2d 421 (5th Cir. 1985)); Xonics, 813 F.2d at 131-32 (citing the 1898 Act cases of Paso Del Norte and Jones v. Yorke (In re Friendship Med. Ctr., Ltd.), 710 F.2d 1297 (7th Cir. 1983)); see also Lieb, supra note 468, at 107-08, 108 (arguing that although "necessity" jurisdiction "case law developed under the former Bankruptcy Act, its theory should be applicable in cases under the Code"). But cf. Wood v. Wood (In re Wood), 825 F.2d 90, 93 & n.12 (5th Cir. 1987) (citing Paso Del Norte and comity considerations as relevant to permissive abstention analysis, because "[t]here is no necessary reason why that concern must be met by restrictive interpretations of the statutory grant of [related to] jurisdiction").
intercreditor claims concerning that property. Likewise, when the estate asserts a claim to property, assets, or a "fund" in the hands of another, the courts have readily concluded that there is "related to" jurisdiction over any third-party claims against the same res.

525. Such claims can be represented graphically as follows:

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See CoreStates Bank, N.A. v. Huls Am., Inc., 176 F.3d 187, 190-93, 203-04 (3d Cir. 1999) (intercreditor claim under a contractual subordination agreement regarding entitlement to funds distributed pursuant to the debtor's reorganization plan); Spartan Mills v. Bank of Am. Ill., 112 F.3d 1251, 1256 (4th Cir. 1997) (lien priority dispute between creditors: "We have little difficulty in concluding that the... bankruptcy court had subject matter jurisdiction over all of [the debtor's] assets and any lien contest in respect to them."); Best Prods., 68 F.3d at 31 (intercreditor dispute regarding enforcement of a contractual subordination agreement: "Fixing the order of priority of creditor claims against a debtor is an integral and historic bankruptcy function" and "the power to prioritize distributions has long been recognized as an essential element of bankruptcy law"); Xonics, 813 F.2d at 131 (noting that "[a]djusting competing claims of creditors to the property of a bankrupt is the central function of bankruptcy law").

526. Such claims can be represented graphically as follows:

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The Xonics court gave the following example: "Suppose A, B, and C claim interests in a pool of oil. If A is a bankrupt, the bankruptcy court could determine the interests of all three in the property under 'related to' bankruptcy jurisdiction ... ." 813 F.2d at 131; see Continental Nat'l Bank v. Sanchez (In re Toledo), 170 F.3d 1340, 1342-47 (11th Cir. 1999) (action to determine the relative interests of various parties, includ-
These in rem cases could also be explained by the interpretive theory proposed by this Article, as follows: Claims by or against the bankruptcy estate are freestanding constitutional federal questions, furnishing "related to" bankruptcy jurisdiction over any third-party claim sharing an in rem supplemental nexus. Furthermore, explicitly casting third-party "related to" jurisdiction in such cases as an in rem form of supplemental jurisdiction is actually far superior to continued adherence to Pacor, because the Pacor formulation has led many courts to adopt a more inhibiting form of in rem jurisdiction than existed under the 1898 Act. This phenomenon is illustrated amply by the Tenth Circuit

opinion in *Gardner v. United States*,\(^5\text{27}\) and the Seventh Circuit's *Xonics* case.\(^5\text{28}\)

\textit{a. One Step Backward:
No Jurisdiction Incident to Possession}

The \textit{Pacor} test actually undoes the centuries-old aim of bankruptcy jurisdiction of enabling a court to determine the appropriate disposition of all property within its possession. A stark example of this bewildering result is the Tenth Circuit's *Gardner* case.

In *Gardner*, Mr. Gardner filed a Chapter 7 petition, but only after Mrs. Gardner had commenced divorce proceedings in state court and after the IRS had filed a tax lien against Mr. Gardner. After the bankruptcy filing, the Chapter 7 trustee took possession of all of the Gardners' nonexempt property, and the bankruptcy court lifted the automatic stay to permit the Gardners' state-court divorce action to proceed for purposes of, inter alia, division of the marital property. The bankruptcy court, however, specifically ordered that the state-court property division would not be binding as against the bankruptcy trustee. In those divorce proceedings, the state court awarded Mrs. Gardner nearly all of the property, and Mrs. Gardner then brought an action in bankruptcy court against the trustee and the United States seeking to recover the property awarded to her in the state-court divorce proceedings. The bankruptcy court held that entry of the state-court divorce decree divested Mr. Gardner of any interest he had in the property, thereby extinguishing the government's tax lien and thus awarded the property to Mrs. Gardner.\(^5\text{29}\) The government appealed this decision, challenging the bankruptcy court's jurisdiction to adjudicate the validity of its lien, and in a slavish application of the \textit{Pacor} test, completely devoid of historical perspective, the Tenth Circuit

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\(^5\text{27}\) Gardner v. United States (\textit{In re Gardner}), 913 F.2d 1515 (10th Cir. 1990), discussed \textit{infra} Part III.B.5.a, notes 529-39 and accompanying text.

\(^5\text{28}\) Elscint, Inc. v. First Wis. Fin. Corp. (\textit{In re Xonics, Inc.}), 813 F.2d 127 (7th Cir. 1987), discussed \textit{infra} Part III.B.5.b, notes 540-60 and accompanying text.

agreed with the government that the bankruptcy court was without jurisdiction.\textsuperscript{530}

The Tenth Circuit's reasoning was as follows: Once the bankruptcy court determined that Mr. Gardner (and perforce Mr. Gardner's bankruptcy estate, which succeeded to Mr. Gardner's property interests)\textsuperscript{531} had no interest in the property, the outcome of the third-party dispute between Mrs. Gardner and the government could have no effect on the bankruptcy estate. This third-party dispute, therefore, could not meet the \textit{Pacor} threshold for third-party "related to" jurisdiction.\textsuperscript{532} Initially, the court overlooked the resolute principle that federal jurisdiction is established as of the date a claim is asserted, and subsequent events, such as final disposition of other related claims, cannot deprive a federal court of jurisdiction that existed at the outset of the suit.\textsuperscript{533}

More fundamentally, though, the \textit{Pacor} test's beguiling emphasis on the property interests of the bankruptcy "estate"—which we can assume did not include this property—seems to exclude one of the most historically significant determinants of bankruptcy jurisdiction: possession of the property.\textsuperscript{534} Mr. Gardner's bankruptcy estate, through the trustee, was in possession of the property at all relevant times, thus placing the property in the possession of the court itself via the court's officer, the bankruptcy trustee.\textsuperscript{535} The most basic function

\textsuperscript{530} See \textit{Gardner}, 913 F.2d at 1517.


\textsuperscript{532} See \textit{Gardner}, 913 F.2d at 1517-19.


\textsuperscript{534} See 1 \textit{COLLIER} (14th ed.), supra note 38, § 2.46; 2 id. § 23.04[2]; supra note 174 and accompanying text. Indeed, under the broad definition of property of the estate in the Bankruptcy Code, a debtor's bare naked possession can itself be considered an interest in property to which the bankruptcy estate succeeds. See 3 \textit{NORTON}, supra note 16, § 51:4, at 51-14 to -15.

\textsuperscript{535} See 2 \textit{COLLIER} (14th ed.), supra note 38, § 23.05[2], at 474-75.
of bankruptcy jurisdiction has always been to determine disputes incident to proper distribution of all property in the court's possession. And until this dispute between Mrs. Gardner and the IRS was resolved, the bankruptcy court had no basis on which to direct the trustee as to the appropriate disposition of this property—with both the IRS and Mrs. Gardner asserting conflicting claims to the property.  

Whether federal judicial resources should be devoted to such a third-party conflict, in which the bankruptcy estate has no interest other than as a mere stakeholder, is a legitimate inquiry, but one that can be fully addressed through a discretionary determination of the propriety of abstention. In those cases, however, where convenience, economy, and comity considerations suggest that the bankruptcy court should resolve the third-party dispute, the *Pacor* test forces the court to either deny jurisdiction nonetheless or disingenuously assume jurisdiction by simply ignor-

536. The dissenting opinion in *Gardner* pointed out both of the fundamental flaws in the majority's jurisdictional analysis: "At the time Mrs. Gardner brought this action seeking to be awarded the property held by the trustee, the court had jurisdiction over the property. . . . [O]nce jurisdiction attached, that jurisdiction continued for the full resolution of the rights to the property." *Gardner*, 913 F.2d at 1521 (Bright, J., dissenting). "Once the bankruptcy court acquired jurisdiction over the . . . property, that jurisdiction continued to determine all controversies relating to claims of any and all parties to that property. Thus, the bankruptcy court could determine the priorities between the parties." *Id.* at 1520 (Bright, J., dissenting).

537. The dissent believed that *Gardner* was just such a case, where "it would be a waste of time for a bankruptcy court to bifurcate the proceedings in the unusual manner prescribed by the majority." *Id.* at 1521 (Bright, J., dissenting). The absurd extreme is illustrated by *Graziadei v. Graziadei (In re Graziadei)*, 32 F.3d 1408 (9th Cir. 1994). That case also involved concurrent state-court divorce proceedings and the husband's Chapter 7 bankruptcy proceedings. The state court ordered the husband to pay the wife's attorney's fees from the exempt portion of the proceeds of a sale of the debtor's homestead, and this judgment was affirmed by the Nevada Supreme Court. *See id.* at 1410 & n.1. The Chapter 7 trustee had sold the husband's homestead and was in possession of all of the proceeds, exempt and nonexempt, and the bankruptcy court ordered the trustee to distribute the exempt portion to the husband and the wife's attorney in accordance with the state-court division order. The Ninth Circuit, though, reasoning that the bankruptcy estate had no interest in the exempt property, held that the bankruptcy court was without jurisdiction to order the trustee to distribute a portion of the husband's exempt property to the wife's attorney, even though the state courts had already definitively determined that to be the appropriate disposition of the property! *See id.* at 1410-11 & n.2. The comical ending to this *Pacor* farce is that the Ninth Circuit's holding required the attorney to "return the funds to the Trustee," who was directed to "dispose of the funds in the manner required by law,"
ing the idiom of the *Pacor* test and emphasizing that it is an "expansive definition" and "is to be broadly interpreted." If we were to abandon *Pacor* more forthrightly, though, a more sensible and defensible resolution of such cases would be possible.

When the bankruptcy estate is in possession of property, any party seeking to dispossess the estate is asserting a constitutional federal question claim against a federal entity. To the extent that more than one party seeks to recover property the estate holds, the inter se claims of those parties with respect to their relative rights in that property share an in rem supplemental relationship with their claims against the estate and, therefore, can be entertained in federal court through "related to" bankruptcy jurisdiction.

If a state court should more properly resolve the third-party disputes of the competing claimants, the

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id. at 1411, which presumably would mean immediate return of the funds back to the attorney from whence they came.

538. Canal Corp. v. Finnman (*In re Johnson*), 960 F.2d 396, 403 (4th Cir. 1992). In *Johnson*, defrauded pyramid-scheme investors brought a class action seeking to impose a constructive trust on funds in the possession of a Chapter 7 trustee. The bankruptcy court determined that the funds were held by the bankruptcy estate in constructive trust (and thus were not the property of the bankruptcy estate, but the property of the defrauded investors) and later ordered distribution of those funds among the defrauded investors. See *id.* at 397-99. Investors excluded from this distribution challenged the bankruptcy court’s jurisdiction over distribution of the funds on the same grounds as that of the *Gardner* case—once the court determined the estate had no interest in the property, the court no longer had jurisdiction over investors’ competing interests in the fund. See *id.* at 399, 401. The Fourth Circuit obviously believed that bifurcating jurisdiction in that manner would be awkward and unmanageable, noting that "determination of the proper beneficiaries of that trust is inextricably tied to the finding of a constructive trust." *Id.* at 402. And although the Fourth Circuit had already adopted the *Pacor* test, the *Johnson* court ducked its application and, in fact, gave it no mention whatsoever.

539. Such claims can be represented graphically as follows:

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Property in Possession of Bankruptcy Estate

Claimant 1 ↔ Claimant 2
"related to"
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federal bankruptcy court remains free to abstain and allow distribution of the property to await such a state-court determination.

b. Two Steps Backward: No Jurisdiction Incident to Distribution

The Seventh Circuit effected a more subtle, yet equally noteworthy, degeneration in the in rem facet of third-party "related to" bankruptcy jurisdiction in the Xonics case. Xonics reversed sub rosa the Seventh Circuit's own 1898 Act precedent by holding that there is no federal bankruptcy jurisdiction over an intercreditor dispute as to the appropriate recipient of a distribution from a bankruptcy estate.

In the Xonics case, two secured creditors, Elscint and First Wisconsin, had a priority dispute over $280,000 that was being held in escrow by an independent escrow agent, and the Chapter 11 debtor-in-possession had formally abandoned any interest in these funds. This property, thus, was neither property of the bankruptcy estate nor property in the estate's possession. The bankruptcy court, therefore, concluded that it had no jurisdiction to determine the secured creditors' dispute as to these funds.

The Seventh Circuit, however, raised the possibility that there may be "related to" jurisdiction over this third-party dispute, because the secured creditors' relative rights in these funds might affect distributions to unsecured creditors, for whom $1.3 million was available in the debtor's bankruptcy estate.

Elscint and First Wisconsin had claims against the debtor in the amount of $22 million and $17 million, respectively. Elscint had collateral worth only $10 million, thus leaving it with a $12 million unsecured deficiency claim that would share with other unsecured creditors in the bankruptcy estate's $1.3

540. Elscint, Inc. v. First Wis. Fin. Corp. (In re Xonics, Inc.), 813 F.2d 127 (7th Cir. 1987).
541. See 11 U.S.C. § 554(a) (1994) (allowing the trustee to abandon burdensome or inconsequential estate property after notice and a hearing).
543. See Xonics, 813 F.2d at 132.
544. See id. at 130 n.1.
Elscint, therefore, asserted that there was third-party "related to" bankruptcy jurisdiction over the disputed $280,000, because if it recovered the $280,000, the amount of its unsecured deficiency claim would be $280,000 smaller, thereby increasing the recoveries of other unsecured creditors from the estate's distribution fund.\textsuperscript{546}

First Wisconsin, however, contended that the outcome of the priority dispute would have no effect on other unsecured creditors.\textsuperscript{547} First Wisconsin presumably made this argument because it was in a position similar to Elscint's, with both insufficient collateral to fully satisfy its $17 million claim and, thus, a substantial unsecured deficiency claim against the bankruptcy estate's $1.3 million distribution fund. Under this scenario, then, if Elscint recovered the $280,000, its unsecured deficiency claim would fall by $280,000, but First Wisconsin's unsecured deficiency claim would be $280,000 higher, and vice versa if First Wisconsin recovered the $280,000. Thus, as far as other unsecured creditors were concerned, regardless of the outcome of the Elscint-First Wisconsin priority dispute, they would share the $1.3 million distribution fund with one $280,000 unsecured deficiency claim (of either Elscint or First Wisconsin) and distributions to other unsecured creditors would be completely unaffected by the outcome of this priority dispute.\textsuperscript{548}

The Seventh Circuit remanded for findings on this factual issue, but agreed

\textsuperscript{545} See id. at 132. An undersecured creditor such as this has an unsecured claim against the bankruptcy estate to the extent that the creditor's collateral is insufficient to fully satisfy its claim. See 11 U.S.C. § 506(a).

\textsuperscript{546} See Xonics, 813 F.2d at 132.

\textsuperscript{547} See id.

\textsuperscript{548} The relationship among these claims can be graphically represented as follows:
with First Wisconsin’s legal position regarding “related to” bankruptcy jurisdiction over the priority dispute: “If the payments to creditors other than Elscint and First Wisconsin . . . depend on the disposition of the competing claims to the $280,000, then the district court has [‘related to’ bankruptcy] jurisdiction . . . and if not, not.”

The difficulty with this approach to “related to” bankruptcy jurisdiction is that it disregards the bankruptcy distribution issue that was squarely presented by this third-party priority dispute, even in the scenario where other unsecured creditors are unaffected. The outcome of this priority dispute would, unquestionably, affect the relative dividends of Elscint and First Wisconsin from the bankruptcy estate’s $1.3 million distribution fund; one of the two would recover $280,000 in the priority dispute, and the other would have a corresponding $280,000 unsecured deficiency claim against the bankruptcy estate. So the priority dispute would determine which of the two creditors would receive this unsecured dividend from the bankruptcy estate. The Seventh Circuit, though, seemed to preclude this sort of intercreditor dispute from the purview of third-party “related to” bankruptcy jurisdiction, and the courts have vacillated over their power to entertain such disputes using the *Pacor* test. Yet,

549. *Xonics*, 813 F.2d at 132.
550. This can be represented graphically as follows:

551. In *Owens-Illinois, Inc. v. Rapid American Corp. (In re Celotex Corp.)*, 124 F.3d
619 (4th Cir. 1997), a creditor who had filed a proof of claim against the Celotex Chapter 11 estate also sought the same damages from a third party, who had in turn filed a contingent claim against the debtor's estate for indemnification of any amounts paid to the creditor. See id. at 622-23. The Fourth Circuit held that there was "related to" jurisdiction of the creditor's third-party suit, because any recovery in that action would reduce the creditor's claim against the bankruptcy estate and simultaneously change the character of the defendant's contingent, unliquidated indemnification claim against the bankruptcy estate into a fixed, liquidated indemnification claim. See id. at 626. Of course, this third-party action had the same potential as in the Xonics case to merely change the identity of the creditor asserting the unsecured claim for these damages, with no effect on other creditors' dividends. In response to an argument to that effect, then, the Fourth Circuit was careful to point out that the creditor's recovery in the third-party suit would not "reduce its claim against the Celotex bankruptcy estate by the same amount that it would increase [the defendant's indemnity] claim," since the defendant's indemnity claim was a contractual one, under which it was also "entitled to indemnification from Celotex for costs that it incurs in defending itself" in the third-party suit. Id. This fact, though, seemed completely extraneous to the court's reasoning regarding the effect of the third-party dispute on the bankruptcy estate, which laid no emphasis on anything other than its potential effect on the creditor's and defendant's unsecured claims against the bankruptcy estate. See id. at 626-27; see also Randall & Blake, Inc. v. Evans (In re Canion), 196 F.3d 579, 585-86 (5th Cir. 1999) (responding to a similar argument that regardless of the outcome of the creditor's third-party suit, through subrogation the debtor's estate "will still owe the same sum, the only possible difference being to whom the sum is owed," by demonstrating that subrogation would likely be unavailable and, thus, "the total amounts due on claims against [debtor]'s bankruptcy estate would be decreased"); infra note 559 and accompanying text. Moreover, even the Pacor case itself indicated that a creditor's third-party claim against a guarantor would be "related to" the debtor's bankruptcy case, because of the substitution of the guarantor's indemnification claim against the estate for the creditor's claim against the estate if the creditor's third-party claim against the guarantor were successful. See Pacor, Inc. v. Higgins, 743 F.2d 984, 995-96 (3d Cir. 1984); accord Apex Inv. Assocs. v. TJX Cos., 121 B.R. 522, 524-27 (N.D. Ill. 1990); Boco Enters., Inc. v. Saastopankkien Keskus-Osake-Pankki (In re Boco Enters., Inc.), 204 B.R. 407, 410 (Bankr. S.D.N.Y. 1997); Burns v. First Citizens Bank & Trust Co. (In re Rainbow Sec. Inc.), 173 B.R. 508, 511-12 (Bankr. M.D.N.C. 1994). But see Work/Family Directions, Inc. v. Children's Discovery Ctrs., Inc. (In re Santa Clara County Child Care Consortium), 223 B.R. 40, 49 (B.A.P. 1st Cir. 1998) (finding no "related to" jurisdiction of creditor's third-party action against the debtor's guarantor, because "the substitution of creditors in the case . . . will not affect the debt structure of the debtor"); Liddle & Robinson, L.L.P. v. Daley (In re Daley), 224 B.R. 307, 314 (Bankr. S.D.N.Y. 1998) (stating that jurisdiction of such an intercreditor dispute exists only "if the other creditors will be affected"); Royal Bank v. Selig (In re Selig), 135 B.R. 241, 245 (Bankr. E.D. Pa. 1992) (determining that potential substitution of one creditor for another is insufficient to supply "related to" jurisdiction over a third-party claim); cf. Adams v. Prudential Sec., Inc. (In re Foundation for New Era Philanthropy), 201 B.R. 382, 390, 392-97 (Bankr. E.D. Pa. 1996) (concluding that a third-party dispute that would only change the identity of the creditor asserting a claim against the estate can be "related to" a Chapter 11 case, but not a Chapter 7 case).
under the 1898 Act, in a leading case on in rem "necessity" jurisdiction in third-party controversies, the Seventh Circuit had already held that determining the appropriate party entitled to receive dividends from a bankruptcy estate was, indeed, an appropriate basis on which to entertain a third-party intercreditor dispute.552

The Xonics court associated third-party "related to" bankruptcy jurisdiction with the 1898 Act's in rem "necessity" jurisdiction553 and proclaimed that "[a]djusting competing claims of creditors to the property of a bankrupt is the central function of bankruptcy law."554 However, the court then incongruously interpreted third-party "related to" bankruptcy jurisdiction in a more restrictive manner than the in rem concepts of the 1898 Act. Although such "related to" bankruptcy jurisdiction does, indeed, have ancestry in the 1898 Act,555 the former statutory language by which the courts confined third-party jurisdiction to those instances where "necessary" to estate administration556 was not carried forward in the now-unqualified grant of third-party "related to" bankruptcy jurisdiction, and any translation that constrains third-party jurisdiction even more than did the 1898 Act is dubious at best.557 In expanding the bounds of federal bankruptcy jurisdiction, the 1898 Act's requirement of administrative necessity for entertaining a third-party dispute has been replaced by a case-by-case discretionary assessment of the propriety of permissive abstention and, in certain instances, mandatory abstention.558

553. See supra note 524 and accompanying text.
554. Xonics, 813 F.2d at 131.
555. See Bankruptcy Act of 1898, supra note 66, § 2a(7), quoted supra text accompanying note 124.
556. See id. § 2a(6), quoted supra text accompanying notes 125, 139.
558. Cf. Wood v. Wood (In re Wood), 825 F.2d 90, 93 & n.12 (5th Cir. 1987) (citing 1898 Act "necessity" jurisprudence and comity considerations as relevant to a permissive abstention analysis, because "[t]here is no necessary reason why that concern
When the validity, amount, or priority of a creditor's claim against the bankruptcy estate is dependent upon the outcome of a third-party dispute in which that creditor is embroiled, this supplies an in rem supplemental connection between the creditor's constitutional federal question claim against the estate and the third-party claim, and this should be the touchstone of third-party "related to" bankruptcy jurisdiction. In fact, although couched in the language of the Pacor test rather than the in rem supplemental test suggested here, such an in rem distributional rationale nonetheless appears to be the basis on which many courts have found "related to" bankruptcy jurisdiction over various third-party disputes.\textsuperscript{559}

must be met by restrictive interpretations of the statutory grant of [related to] jurisdiction\textsuperscript{a}). In fact, abstention seemed entirely appropriate in the Xonics case itself, as the pro rata unsecured dividend on the disputed $280,000 amount surely would have been a fairly insignificant sum, given the size of Elseint's and First Wisconsin's secured and unsecured deficiency claims. Additionally, the Seventh Circuit specifically noted that litigation to resolve other claims between Elseint and First Wisconsin was already underway in another district and could easily provide an alternative forum for resolution of this dispute over the $280,000, and final distributions to unsecured creditors from the bankruptcy estate had to await the outcome of this litigation in any event. See Xonics, 813 F.2d at 130 n.1.

In Wisconsin Department of Industrial, Labor & Human Relations v. Marine Bank Monroe (In re Kubly), 818 F.2d 643 (7th Cir. 1987), involving a priority dispute over collateral provided by the debtors' co-obligor, the Seventh Circuit acknowledged that the outcome of this third-party priority dispute over the co-obligor's property would affect the amount of one creditor's unsecured deficiency claim against the debtors' bankruptcy estate, but nevertheless held that there was no "related to" bankruptcy jurisdiction because the debtors' bankruptcy case was apparently a "no asset" Chapter 7 case, in which unsecured creditors would receive no dividend. See id. at 644-45. Of course, this leaves the existence of jurisdiction to the vagaries of whether a trustee eventually could discover assets for the estate, or the likelihood of such an eventuality. See Liddle & Robinson, L.L.P. v. Daley (In re Daley), 224 B.R. 307, 314-15 (Bankr. S.D.N.Y. 1998) (considering the jurisdictional issue and noting that "it is impossible to tell ... whether anything would come into the estate, and if there were funds available, whether they would be sufficient to satisfy any administrative claims of the trustee and then yield something for creditors"); cf. FED. R. BANKR. P. 3002(c)(5) (providing an extended deadline for filing proofs of claim in a "no asset" case where "subsequently the trustee notifies the court that payment of a dividend appears possible"). In Kubly, then, it seems preferable to conclude that the in rem nexus with the creditor's unsecured deficiency claim against the bankruptcy estate produces "related to" bankruptcy jurisdiction over the third-party dispute regarding priority in the co-obligor's property, but abstention is entirely appropriate or mandated where the estate may well have no assets to distribute to unsecured creditors.

559. See, e.g., Randall & Blake, Inc. v. Evans (In re Canion), 196 F.3d 579, 584-87
(5th Cir. 1999) (finding “related to” jurisdiction in creditor’s third-party action, because it could reduce the creditor’s claim against the bankruptcy estate); Continental Nat’l Bank v. Sanchez (In re Toledo), 170 F.3d 1340, 1342-47 & n.7 (11th Cir. 1999) (finding “related to” jurisdiction over an action to determine the validity of a mortgagee’s lien on a nondebtor’s property, because it would affect the amount of the mortgagee’s unsecured deficiency claim against the debtor’s estate); Halper v. Halper, 164 F.3d 830, 837-38 (3d Cir. 1999) (stating that a creditor’s action on a third-party guaranty of the debtor’s obligations could “conceivably affect” the debtor’s estate, because “finding the guaranty to be enforceable would provide [the] creditor . . . an alternative source of recovery effectively diverting . . . claims from the bankrupt estate”); Home Ins. Co. v. Adco Oil Co., 154 F.3d 739, 741 (7th Cir. 1998) (finding that “related to” jurisdiction extended to an injured party’s third-party claim against the debtor’s insurer because the injured party “is a creditor, and the disposition of the [third-party] claim may affect how much [the injured party] and other creditors receive”); Owens-Illinois, Inc. v. Rapid Am. Corp. (In re Celotex Corp.), 124 F.3d 619, 626 (4th Cir. 1997) (concluding that a creditor’s action against the Chapter 11 debtor’s codefendant was “related to” the bankruptcy case, because any recovery in the third-party action would reduce the creditor’s claim against the bankruptcy estate); Gibson v. Rotunno, 104 F.3d 837, No. 96-4076, 1996 WL 731600, at *1 (10th Cir. Dec. 20, 1996) (unpublished table decision) (finding that a dispute over ownership of the debtor’s stock was within “related to” jurisdiction, because its resolution determined the proper recipient of reorganization plan distributions); Bergstrom v. Dalkon Shield Claimants Trust (In re A.H. Robins Co.), 86 F.3d 364, 371-73 (4th Cir. 1996) (holding that the reorganization court had “related to” jurisdiction to limit attorneys’ contingency fees on reorganization plan distributions, because fee levels determined the distribution amounts to claimants); Coar v. National Union Fire Ins. Co., 19 F.3d 247, 248-49 (5th Cir. 1994) (concluding that a creditor’s direct action against the debtor’s insurer under the Louisiana direct-action statute was “related to” the debtor’s Chapter 7 case, because any insurance recovery would reduce the creditor’s claim against the bankruptcy estate); National Union Fire Ins. Co. v. Titan Energy, Inc. (In re Titan Energy, Inc.), 837 F.2d 325, 329-34 (8th Cir. 1988) (same, but concluding that abstention was appropriate); Kaonohi Ohana, Ltd. v. Sutherland (In re Kaonohi Ohana, Ltd.), 873 F.2d 1302, 1303-05, 1306-07 (9th Cir. 1989) (finding that a creditor’s third-party action for specific performance was “related to” the debtor’s bankruptcy case, because its outcome would affect the creditor’s claim for damages against the bankruptcy estate); Nationwide Mut. Fire Ins. Co. v. Eason, 736 F.2d 120, 131-33 (4th Cir. 1984) (same, in the context of creditors’ claims against the debtor’s surety bond); FDIC v. Majestic Energy Corp. (In re Majestic Energy Corp.), 835 F.2d 87, 88-91 (5th Cir. 1988) (concluding that a shareholder/creditor’s dispute with a pledgee of the debtor’s stock was “related to” the debtor’s Chapter 11 case, because resolution of the third-party dispute determined the proper recipient of distributions under the debtor’s plan of reorganization); Dogpatch Properties, Inc. v. Dogpatch U.S.A., Inc. (In re Dogpatch U.S.A., Inc.), 810 F.2d 782, 786 (8th Cir. 1987) (finding that a secured creditor’s action against the debtor’s codefendants was “related to” the debtor’s bankruptcy case, because any recovery would reduce the creditor’s claim against the bankruptcy estate); Baum v. Roberts (In re Powell), 224 B.R. 409, 410-12 (Bankr. E.D. Mo. 1998) (finding that bankruptcy jurisdiction existed in a dispute over ownership of claims, because it was ancillary to allowance and disallowance of the creditors’ claims against the bankruptcy estate); cf. Canion, 196 F.3d at 586 n.27 (noting in connection with a creditor’s third-
Under the influence of *Pacor*, third-party "related to" bankruptcy jurisdiction has become an in rem variety of supplemental jurisdiction, but a clumsy and inadequate one. Explicit recognition that third-party "related to" jurisdiction fully incorporates in rem supplemental relationships to all claims by and against a bankruptcy estate would be a step in the right direction, yet incomplete in and of itself. In enacting "related to" bankruptcy jurisdiction, Congress unmistakably designed such comprehensive jurisdiction to transcend the in rem concepts of the 1898 Act, and third-party "related to" bankruptcy jurisdiction must be recognized as integrating both traditional in rem and modern in personam philosophies of supplemental jurisdiction. Indeed, the dissonance in the third-party "related to" case law largely seems to be a furtive movement toward in personam supplemental jurisdiction, and the same catalyst underlies the so-called supplemental bankruptcy jurisdiction cases.

C. Inching Toward In Personam Third-Party "Related to" Jurisdiction

The proof of *Pacor*'s peccadillos lies in the courts' unwillingness to actually adhere to its formulae. The *Pacor* "test" has survived, apparently unscathed, but given the great disparities in its application, the test itself is virtually meaningless. The *Pacor* test and the case law demonstrate an evident in rem slant on third-party "related to" bankruptcy jurisdiction. Yet, there is also a discernible tendency to consider factual and transactional relationships between claims, which of course, resembles the modern in personam structure of supplemental jurisdiction embodied in the *Gibbs* "common nucleus of operative fact" test. *Pacor*'s catch phrases assaulting *Gibbs*, although often restated,
have been completely emptied of any content other than deceptiveness and delusion. In fact, at the same time that the courts, in shows of allegiance to Pacor, decry jurisdiction founded on shared facts and judicial economy, they nonetheless simultaneously chant the contradictory slogan that they must interpret third-party "related to" bankruptcy jurisdiction to "avoid the inefficiencies of piecemeal adjudication and promote judicial economy."¹⁶¹

Thus, the compelling merit of modern joinder practice has provoked an inevitable clash with Pacor's platitudes, and the courts have naturally progressed toward a transactional, in personam view of third-party "related to" bankruptcy jurisdiction, even in the face of repeated denials. The Emperor has no clothes! In recognition of reality, the courts should simply abandon the Pacor test and its hollow maxims and expressly acknowledge third-party "related to" bankruptcy jurisdiction for what it is—unrestricted in rem and in personam supplemental jurisdiction.

This Part III.C maintains that the courts have fashioned a purported corollary to the Pacor test that actually functions as an escape valve through which they can invoke in personam principles of supplemental jurisdiction under the rubric of "inter-twined parties" and "joint conduct"—justified on the same fairness, convenience, and economy rationales as in personam supplemental jurisdiction. Additionally, the courts have consistently accepted, without even questioning its validity, what is undeniably an exercise of third-party, in personam supplemental jurisdiction that is not explained by any of the prevailing tests for federal bankruptcy jurisdiction: adjudication of a nondis-

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¹⁶¹. Miller v. Kemira, Inc. (In re Lemco Gypsum, Inc.), 910 F.2d 784, 787 (11th Cir. 1990) (emphasis added). But see id. at 789 ("The mere fact that there may be common issues of fact between a civil proceeding and a controversy involving the bankruptcy estate does not bring the matter with the scope of ['related to' bankruptcy jurisdiction]. Judicial economy itself does not justify federal jurisdiction." (emphasis added) (citing Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984))). For similarly inconsistent recitations, see Lindsey v. O'Brien, Taneki, Tanzer & Young Health Care Providers (In re Dow Corning Corp.), 86 F.3d 482, 487, 489 (6th Cir. 1996); Feld v. Zale Corp. (In re Zale Corp.), 62 F.3d 746, 752, 753-54 (5th Cir. 1995); Specialty Mills, Inc. v. Citizens State Bank, 51 F.3d 770, 774 (8th Cir. 1995).
chargeable state-law claim against an individual debtor in a personal capacity.

1. Joint Conduct and Intertwined Parties

Shared facts and judicial economy, although taboo according to Pacor's platitudes, are the driving forces behind the "joint conduct" and "intertwined parties" adjuncts to third-party "related to" bankruptcy jurisdiction—an obvious attempt to incorporate in personam principles of supplemental jurisdiction in spite of Pacor's celebrity.

The drift toward a transactional, in personam approach to third-party "related to" bankruptcy jurisdiction began in one of the first circuit treatments after Pacor, the Sixth Circuit's opinion in the Salem Mortgage case. In that case, the debtors were mortgage brokers, and their Chapter 11 filings were closely followed by a class action suit in the bankruptcy court by defrauded mortgagors against the debtors, against investors to whom the debtors had assigned the mortgages, and against various officers of the debtors. The bankruptcy court proposed an order that would certify the class and approve a settlement of the action, but the district court found no jurisdiction over the third-party claims against the assignee-investors and the debtors' officers, relying upon Pacor's reasoning. The Sixth Circuit, however, disagreed. Although the Sixth Circuit subsequently would come to embrace the Pacor test and even prattle Pacor's platitudes, Salem Mortgage unveiled a very different vision of third-party "related to" bankruptcy jurisdiction.

Rather than an outcome-oriented analysis of the third-party claims, the Sixth Circuit found "related to" bankruptcy jurisdic-

563. See id. at 629-30 & n.7.
564. See Kelley v. Salem Mortgage Co. (In re Salem Mortgage Co.), 34 B.R. 902 (Bankr. E.D. Mich. 1983), dismissed, 41 B.R. 420, 421-23 (E.D. Mich. 1984), rev'd, 783 F.2d 626 (6th Cir. 1986). The district court reasoned that "[t]he only connection that these [defendants] have with the bankruptcy action is that . . . they may have potential claims against the debtors if the borrowers proceeded in state court against them. This tenuous connection with the bankruptcy proceedings is an insufficient basis for jurisdiction." Salem Mortgage, 41 B.R. at 423.
566. See Dow Corning, 86 F.3d at 489.
tion over the third-party claims "[b]ecause of the nature of these mortgage transactions" that gave rise to the defrauded mortgagors' claims against all of the defendants, including the debtors. 567 Of course, the focus upon the shared factual/transactional origin of the claims betrays Salem Mortgage as relying upon just the sort of "common issues of fact between a [third-party] civil proceeding and a controversy involving the bankruptcy estate" that was forbidden by Pacor. 568 The court, therefore, distinguished Pacor by emphasizing "that the parties in the mortgage transactions in this proceeding are more intertwined than the parties in Pacor." 569

To the extent that the Sixth Circuit did analyze the "effects" of the third-party claims upon the bankruptcy estate, the court did not appraise the potential "outcome" of those claims, per the Pacor test and the district court's opinion. 570 Instead, the Sixth Circuit pointed out how the proposed settlement of these third-party claims would facilitate settlement of the mortgagors' claims against the estate. 571 Significantly, one of the commonly acclaimed

567. Salem Mortgage, 783 F.2d at 634. The defrauded mortgagors' claims can be represented graphically as follows:

Nondebtor
Defendants

Bankruptcy
Estate

"related to"

Defrauded
Mortgagors


569. Salem Mortgage, 783 F.2d at 635 (emphasis added).

570. See supra notes 475-77, 515, 564 and accompanying text.

571. See Salem Mortgage, 783 F.2d at 630 & n.12, 634. Likewise, in Munford v. Munford, Inc. (In re Munford, Inc.), 97 F.3d 449 (11th Cir. 1996), the Eleventh Circuit acknowledged that the defendants' third-party cross-claims against each other had no potential effect on the bankruptcy estate under the Pacor test. Nonetheless, the court concluded that there was "related to" bankruptcy jurisdiction over the defendants' third-party cross-claims because of their "nexus" to a proposed settlement of the estate's claims against the defendants. See id. at 453-54; accord Feld v. Zale Corp. (In re Zale Corp.), 62 F.3d 746, 757-59 (5th Cir. 1995); Silverman v. General Ry. Signal Co. (In re Leco Enters., Inc.), 144 B.R. 244, 246-47, 250 (S.D.N.Y. 1992); cf. Coar v. National Union Fire Ins. Co., 19 F.3d 247, 249 (5th Cir. 1994) (finding "related to" jurisdiction over plane crash victims' suits against the debtor's insurer, inter alia, because of "an order by the bankruptcy judge compelling his approval of all proposed settlements arising out of the crash"). Of course, the corollary, contradictory platitude, à la
values of the modern transactional test for supplemental jurisdiction is its capacity for fostering settlement of complex multi-party disputes through the comprehensive discovery facilitated by joinder of logically related claims in one forum. 572

Thus, even though the Sixth Circuit chose to distinguish *Pacor* on its facts rather than openly question its facile logic, the Sixth Circuit clearly endorsed a third-party "related to" bankruptcy jurisdiction that looks remarkably similar to transactional, in personam supplemental jurisdiction, including a proper recognition of the accommodating role of permissive abstention. 573 The Fifth Circuit quickly followed suit in the influential *Wood* case. 574

In *Wood*, a claimant filed a complaint in the bankruptcy court challenging the actions of the Chapter 11 debtors and a code-fendant. 575 The *Wood* court adopted the *Pacor* test for the Fifth Circuit, 576 but identified the pivotal determinant of "related to" bankruptcy jurisdiction over the third-party claim at issue as the fact that "the plaintiff challenged the combined actions of both the debtors and . . . a non-debtor." 577 The court found support in the Sixth Circuit's *Salem Mortgage* opinion for third-party "related to" jurisdiction "when the plaintiff alleges liability resulting from the joint conduct of the debtor and non-debtor defendants." 578 This mutual origin of claims furnishes third-party
"related to" bankruptcy jurisdiction, according to the Fifth Circuit, because of a recognized judicial economy flowing from claims joinder through supplemental jurisdiction: "Resolution of the dispute [involving the debtor] will necessarily involve . . . consideration of [the nondebtor defendant's] involvement in those actions," and thus, a duplication of effort if the third-party action must be pursued as a separate, independent action in another court.\(^5\)

The Fifth Circuit, therefore, plainly skirted Pacor's proscriptions against jurisdiction founded upon shared facts and judicial economy. Like the Sixth Circuit, though, the Fifth Circuit has shrouded the discord in feigned adherence to Pacor's disdain for supplemental jurisdiction principles.\(^6\) Nevertheless, the "inter-twined parties" and "joint conduct" reasoning have provided the courts a ready and frequent escape from the in rem dictates of Pacor.\(^7\) In fact, many decisions seem to assume that third-party "related to" bankruptcy jurisdiction is simply the equivalent of transactional supplemental jurisdiction.\(^8\)

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579. Id. In remanding the case, the Fifth Circuit advised the district court to address any particular "concerns of comity and judicial convenience" with respect to the plaintiff's claims through a "discretionary exercise of abstention." Id. at 93 & n.14a.

580. See Randall & Blake, Inc. v. Evans (In re Canion), 196 F.3d 579, 585 (5th Cir. 1999); Feld v. Zale Corp. (In re Zale Corp.), 62 F.3d 746, 753 (5th Cir. 1995).


582. In Doddy v. Oxy USA, Inc., 101 F.3d 448 (5th Cir. 1996), plaintiffs' state-law claims against several defendants were removed to federal court when one of the defendants filed bankruptcy. See id. at 454. The Fifth Circuit held that granting the debtor-defendant summary judgment on the plaintiffs' claims had no effect on the district court's continuing jurisdiction over the plaintiffs' third-party claims against the nondebtor defendants. The Fifth Circuit reasoned that "the court always had subject matter jurisdiction over the [plaintiffs'] claims, first by virtue of [the bankruptcy jurisdiction statute] and then through its decision to retain jurisdiction over the [plaintiffs'] state-law claims under [the supplemental jurisdiction statute]." Id. at 456 n.4; accord Boco Enters., Inc. v. Saastopankkien Keskus-Osake-Pankki (In re Boco Enters., Inc.), 204 B.R. 407, 409-13 (Bankr. S.D.N.Y. 1997); see also Fisher v. Apostolou, 155 F.3d 876, 882 (7th Cir. 1998) (concluding that "related to" jurisdiction of creditors' third-party claims existed because the claims were based on "the same acts, performed by the same individuals, as part of the same conspiracy" as claims by the
The "intertwined parties" and "joint conduct" assays indicate that third-party "related to" bankruptcy jurisdiction has already assimilated transactional, in personam principles of supplemental jurisdiction, despite the courts' proclamations to the contrary. Considerations of procedural convenience, judicial economy, and fairness are driving this facet of third-party "related to" bankruptcy jurisdiction in the same manner that *Gibbs* transformed debtors' estates); W.A. Lang Co. v. Anderberg-Lund Printing Co. (*In re Anderberg-Lund Printing Co.*), 109 F.3d 1343, 1346-47 (8th Cir. 1997) (finding jurisdiction over a third-party claim because the "factual and legal issues presented . . . were closely related to those of a pending claim involving the estate); Sanders Confectionery Prods., Inc. v. Heller Fin., Inc., 973 F.2d 474, 482, 484 & n.5 (6th Cir. 1992) (finding "related to" jurisdiction over third-party claims against a creditor because of their factual relationship with the creditor's claim against the bankruptcy estate, variously characterized as "the same facts," an "identity of causes of action," "identity of the facts creating the right of action and of the evidence necessary to sustain each action," and "the same core of operative facts"); Kaonohi Ohana, Ltd. v. Sutherland (*In re Kaonohi Ohana, Ltd.*), 873 F.2d 1302, 1307 (9th Cir. 1989) (noting that the plaintiff's claim against the bankruptcy estate and a "related to" claim against a nondebtor third party "are interrelated and consolidation for trial would seem advisable"); Creasy v. Coleman Furniture Corp., 763 F.2d 656, 662 (4th Cir. 1985) (upholding "related to" jurisdiction over a third-party action that "raises the identical issues raised in the bankruptcy proceeding" asserted by the bankruptcy estate); ABF Capital Management v. Askin Capital Management, L.P., 957 F. Supp. 1308, 1322-23 (S.D.N.Y. 1997); *In re Ralph Lauren Womenswear, Inc.*, 204 B.R. 363, 374 (Bankr. S.D.N.Y. 1997); *In re Wood*, 52 B.R. 513, 522 (Bankr. N.D. Ala. 1985); *cf. In re Dow Corning Corp.*, 187 B.R. 934, 937-38 (E.D. Mich. 1995) (noting that the supplemental jurisdiction statute also uses "related to" terminology and holding that the court had no supplemental jurisdiction over breast implant claims against the debtor's codefendants, because "the non-debtors have not shown that the claims against them are so 'intertwined' with the Debtor's interests in the bankruptcy action"), rev'd, 86 F.3d at 492-94 & n.11 (finding "related to" bankruptcy jurisdiction over the third-party claims because the claims were sufficiently "intertwined" with the claims against the debtor).

In some complex disputes involving third-party claims with a clear transactional relationship to claims involving the bankruptcy estate, the courts do not even bother with a jurisdictional analysis and summarily conclude that there is "related to" bankruptcy jurisdiction over all claims because of the estate's involvement. See, e.g., Robinson v. Michigan Consol. Gas Co., 918 F.2d 579, 580-84 (6th Cir. 1990); Steyr-Daimler-Puch of Am. Corp. v. Pappas, 852 F.2d 132 (4th Cir. 1988), affg 35 B.R. 1001 (E.D. Va. 1983); DuVoisin v. Foster (*In re Southern Indus. Banking Corp.*), 809 F.2d 329, 330-31 (6th Cir. 1987). For an interesting example involving both in rem and in personam claims by multiple parties in state-court foreclosure proceedings involving a cemetery, subsequently removed to federal court when the cemetery filed bankruptcy, see the following decisions from the case of *In re Memorial Estates, Inc.*: 950 F.2d 1364 (7th Cir. 1992); 797 F.2d 516 (7th Cir. 1986); 90 B.R. 886 (N.D. Ill. 1988); 1987 WL 16931 (N.D. Ill. Sept. 8, 1987), denying reconsideration of 1986 WL 22008 (N.D. Ill. July 16, 1986); 1985 WL 1750 (N.D. Ill. May 20, 1985).
supplemental jurisdiction. This phenomenon, though, is most evident with respect to an aspect of federal bankruptcy jurisdiction that can be explained only by reference to in personam tenets of supplemental jurisdiction—jurisdiction to enter a money judgment against an individual debtor on a nondischargeable debt.

2. Claims by and Against an Individual Debtor

The true supplemental nature of federal bankruptcy jurisdiction over third-party claims is nicely illustrated in the context of state-law claims made by or against an individual bankruptcy debtor personally, as distinguished from claims by or against the individual debtor's bankruptcy estate. Although less obvious than other third-party disputes, a state-law claim by or against an individual debtor personally is analytically identical to any other state-law claim to which the federal bankruptcy estate is not a party. Any such third-party state-law controversy contains no independent basis for federal jurisdiction. The Pacor test has precluded federal bankruptcy jurisdiction over state-law claims made by an individual debtor in a personal capacity, but it has not prevented adjudication of nondischargeable state-law claims against an individual debtor personally. This inconsistency undeniably defies Pacor's proscription against transactional, in personam supplemental jurisdiction.

If an individual debtor is pursuing a state-law action against a third party in a personal capacity, not on behalf of the bankruptcy estate, then there is no independent basis for federal bankruptcy jurisdiction over the action. Employing the interpretive theory developed above, the debtor's action is a third-party state-law dispute to which the bankruptcy estate is not a party and, thus, contains no "original federal ingredient" that could sustain independent federal jurisdiction. The Pacor test

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583. See supra Part III.A.2.a, notes 431-36 and accompanying text.
584. Such an action can be represented graphically as follows:

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Individual Debtor  -->  Third Party
            Bankruptcy Estate
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concurs in this result: Such an action brought solely for the benefit of an individual debtor can have no effect on the bankruptcy estate and, therefore, is not "related to" the debtor's bankruptcy case in a *Pacor* sense. An individual debtor's suit against a third party has independent federal bankruptcy jurisdiction only when the cause of action "arises under" the Bankruptcy Code, as in the case of a damages suit for bankruptcy discrimination or willful violation of the automatic stay.

Now consider our previous example of the creditor who contends that its state-law claim against an individual debtor cannot be discharged in the debtor's bankruptcy case, because the claim is of a kind that section 523 excepts from discharge, such as a tort claim for willful and malicious injury. The creditor's request for a bankruptcy court declaration that the debt is nondischargeable is, without question, a constitutional and statutory federal question claim "arising under" the Bankruptcy Code, because the bankruptcy discharge is relief established by federal bankruptcy law and section 523 expressly authorizes such a declaration regarding the effect of the federal bankruptcy discharge.

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585. *See* Community Bank v. Boone (*In re Boone*), 52 F.3d 958, 961 (11th Cir. 1995) (debtor's postpetition tort claims); Yerasi v. Metropolitan Sav. & Loan Ass'n (*In re Yerasi*), 921 F.2d 282, No. 89-56296, 1990 WL 223046, at *1-*2 (9th Cir. Dec. 28, 1990) (unpublished table decision) (debtor's damages action from postpetition foreclosure sale); Bobroff v. Continental Bank (*In re Bobroff*), 766 F.2d 797, 798-800, 802-04 (3d Cir. 1985) (debtor's postpetition tort claims); Turner v. Ermiger (*In re Turner*), 724 F.2d 338, 340-41 (2d Cir. 1983) (debtor's exempted state-law cause of action); *cf.* Georgou v. Fritzshall, 178 F.3d 453, 454 (7th Cir. 1999) (granting a motion to amend the pleadings to identify the debtors' bankruptcy estates, rather than the debtors themselves, as the plaintiffs, because "[i]f they really are the plaintiffs, then the suit has no business being in federal court" (emphasis omitted)); Black v. U.S. Postal Service (*In re Heath*), 115 F.3d 521, 522-24 (7th Cir. 1997) (finding no "related to" jurisdiction over a postconfirmation suit by the Chapter 13 trustee on behalf of an individual debtor and not the estate). As the *Boone* court put it, under the *Pacor* test, "[t]o fall within the court's jurisdiction, the . . . claims must affect the estate, not just the debtor." *Boone*, 52 F.3d at 961 (quoting Wood v. Wood (*In re Wood*), 825 F.2d 90, 94 (5th Cir. 1987)).


587. *See* id. § 362(h).

588. *See supra* notes 433-35 and accompanying text.


590. Either the creditor or the debtor may request a declaration regarding the dischargeability of any debt. *See* Fed. R. BANKR. P. 4007(a). Section 523(c)(1), in effect, gives the bankruptcy court exclusive jurisdiction to determine the applicability of
By contrast, though, now imagine that the creditor requests that the bankruptcy court, in addition to declaring the debt nondischargeable, also liquidate the debt and enter a money judgment on the debt against the individual debtor personally. Under the statutory-constitutional theory expounded in this Article, there is no independent, freestanding basis for federal bankruptcy jurisdiction over the creditor's request for a money judgment against the individual debtor. Such a request is purely a state-law claim to which the federal bankruptcy estate is not party. Just as there is no independent federal jurisdiction over a state-law claim brought by the debtor in an individual capacity, likewise, there is no independent federal jurisdiction over such a state-law claim against the debtor personally.891 Indeed, before the 1970 discharge amendments to the 1898 Act, although many federal courts found in the doctrine of Local Loan Co. v. Hunt892 the authority to issue declarations as to the dischargeability of particular debts as an incident to the federal discharge,893 they

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certain discharge exceptions, including the 523(a)(6) exception, whereas other discharge exceptions can be litigated collaterally. See 11 U.S.C. § 523(c)(1); FED. R. BANKR. P. 4007 & advisory committee's note. See generally 3 NORTON, supra note 16, §§ 47:65-66. Whereas the Bankruptcy Code itself contemplates dischargeability declarations in federal court, the problems surrounding anticipation of a federal defense that plague the general federal question statute are avoided. Moreover, the bankruptcy discharge has itself become more than a mere affirmative defense to a creditor's state-law claim. See infra notes 592-94 and accompanying text.

591. Such claims can be represented graphically as follows:

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                      Individual Bankruptcy
Debtor             Estate
                      
                      (1) declare debt nondischargeable
                      (2) liquidate and enter money judgment

                      Creditor
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592. 292 U.S. 234 (1934). The Hunt Court held that a federal bankruptcy court that had issued a discharge order had injunctive jurisdiction in "unusual circumstances" to protect or effectuate that decree by enjoining suit on a debt within the scope of the discharge. Id. at 239-42. See generally Garrard Glenn, Effect of Discharge in Bankruptcy: Ancillary Jurisdiction of Federal Court, 30 VA. L. REV. 531 (1944).

refused to liquidate nondischargeable debts and enter money judgments against debtors for lack of federal jurisdiction.\(^{594}\)

In 1970, Congress amended the 1898 Act to expressly codify the authority of federal bankruptcy courts to "determine the dischargeability of debts."\(^{595}\) Moreover, in order to address concerns about multiplicity of suits in state and federal court,\(^{596}\) those amendments further provided that "if any debt is determined to be nondischargeable, [the court] shall determine the remaining issues, render judgment, and make all orders necessary for the enforcement thereof."\(^{597}\) In the subsequent 1978 Reform Act, while not specifically empowering federal bankruptcy courts to render money judgments on nondischargeable debts, Congress

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594. See, e.g., Camden Lime Co. v. Borek (In re Borek), 180 F. Supp. 567, 571 (D.N.J. 1960) (finding no independent federal jurisdiction over the nondiverse state-law claim against the debtor and noting that "entering judgment against the individual bankrupt in no way aids the administration of the bankrupt's estate . . . but only aids the individual creditor in pursuing his individual rights against the bankrupt"); In re Anthony, 42 F. Supp. 312, 316 (E.D. Ill. 1941) (finding that, even in cases where Hunt permits a federal bankruptcy court to determine dischargeability of a debt, the court "cannot carry through and render a judgment upon a creditor's unreleased claim upon which execution may issue against the bankrupt's after-acquired assets").

The federal courts, thus, have consistently considered the dischargeability issue to be a jurisdictional "claim" distinct from the creditor's claim on the underlying debt. See generally Insurance Co. of N. Am. v. NGC Settlement Trust & Asbestos Claims Management Corp. (In re National Gypsum Co.), 118 F.3d 1056, 1062-64 (5th Cir. 1997) (rejecting an argument that a federal declaratory action regarding the collateral effects of the discharge was an improper attempt to premise federal question jurisdiction upon anticipation of a federal defense); Lee-Benner v. Gergely (In re Gergely), 110 F.3d 1448, 1453-54 (9th Cir. 1997) (holding that the statute of limitations on a federal nondischargeability action is independent of the state-law limitations period on the underlying debt); McKendry v. Resolution Trust Co. (In re McKendry), 40 F.3d 331, 334-37 (10th Cir. 1994) (same); cf. Brown v. Felsen, 442 U.S. 127, 132-39 (1979) (finding that res judicata did not preclude an assertion in a federal-court nondischargeability action that the debt was procured by fraud, despite the fact that the creditor had not plead fraud as a basis for the debt in a prebankruptcy state-court action liquidating the debt); see also supra notes 413-14 and accompanying text (discussing the scope of a "claim" for jurisdictional purposes).

595. Bankruptcy Act of 1898, supra note 66, § 2a(12).

596. See 1A COLLIER (14th ed.), supra note 38, ¶ 17.28A[4], at 1742.4; Countryman, supra note 593, at 19, 21-22, 31-32 (tracing and summarizing the legislative history of the 1970 amendments).

597. Bankruptcy Act of 1898, supra note 66, § 17c(3); see also id. § 2a(12) (providing for jurisdiction to "determine the dischargeability of debts, and render judgments thereon" (emphasis added)).
clearly intended such authority to continue under the aegis of the Reform Act's pervasive federal bankruptcy jurisdiction.\footnote{598} Notwithstanding Congress's desire that the federal courts should have bankruptcy jurisdiction under the current statute, if we apply the prevailing jurisdictional tests to the creditor's request for a money judgment on a nondischargeable debt, we come to the inescapable conclusion that there is no federal bankruptcy jurisdiction. A state-law claim on which a creditor seeks a money judgment does not "arise under" the Bankruptcy Code. Furthermore, it does not "arise in" the bankruptcy case under the standard test for "arising in" proceedings, because the creditor's claim against the debtor would exist in exactly the same form even in the absence of the debtor's bankruptcy filing.\footnote{599} Indeed, that is precisely the upshot of the determination

\footnote{598} The 1973 Commission's proposed bill would have explicitly provided for federal bankruptcy jurisdiction over "complaints . . . requesting determination of the effect of a discharge, and seeking judgment on a debt excepted from discharge." \textit{1973 COM\textsc{\char13}M\textsc{\char13}N REPORT, supra} note 110, pt. II, \S\ 2-201(a)(4), at 30 (emphasis added); \textit{see id.} \S\ 4-506(d), at 137 ("If the court determines a debt to be nondischargeable in a proceeding commenced under this section, it shall determine any remaining issues concerning liability on the debt unless, for cause shown and in the interest of justice, the court suspends or declines the exercise of its jurisdiction."). Recognition of "the appropriateness of suspension or declination of jurisdiction" would permit "litigation in another court [that] has proceeded to a point where it would be wasteful of judicial resources and inequitable to one or more of the parties to require reintroduction of evidence and reargument of issues in the bankruptcy court." \textit{Id.} at 142; \textit{see supra} notes 442-44 and accompanying text (comparing permissive bankruptcy abstention and discretion to decline an exercise of supplemental jurisdiction). The Reform Act's simplified pervasive jurisdiction was designed to subsume "all items listed by the Bankruptcy Commission in its proposed bill . . . as well as all items that the bankruptcy courts are now able to bear [sic] under \textit{[1898] Act} \S\ 2a," including "determination of dischargeability of debts [and] liquidation of non-dischargeable debts." \textit{H.R. REP. NO. 95-595, at 446, 49 (1977) (emphasis added) (footnote referencing 1898 Act \S\ 17c omitted), reprinted in 1978 U.S.C.C.A.N. 5963, 6401, 6010; see also id. at 363 (noting that "the comprehensive grant of jurisdiction prescribed in proposed [statute] . . . is adequate to cover the full jurisdiction that the bankruptcy courts have today over dischargeability and related issues under Bankruptcy Act \S\ 17c"), reprinted in 1978 U.S.C.C.A.N. at 6319; S. REP. NO. 95-989, at 77 (1978) (same), reprinted in 1978 U.S.C.C.A.N. 5787, 5863.}
of nondischargeability. Thus, if the claim on the underlying debt is within federal bankruptcy jurisdiction at all, it is because it is "related to" the debtor's bankruptcy case. Utilizing the *Pacor* test, however, because the only effect of any money judgment against the debtor would be to enhance the creditor's future ability to collect the debt from the debtor's postbankruptcy income and assets and with no effect at all on property of the bankruptcy estate or creditors' claims against the estate, we

against the defendant on the state-law contractual claims." *Id.* at 72 n.26 (Brennan, J., plurality opinion). Thus, a core "arising in" proceeding has come to be considered one "that, by its nature, could arise only in the context of a bankruptcy case" or that "would have no existence outside of bankruptcy." *Wood v. Wood (In re Wood)*, 825 F.2d 90, 97 (5th Cir. 1987); see 1 *COLLIER* (15th ed.), supra note 66, ¶ 3.01[4][c][iv]; 1 *NORTON*, supra note 16, § 4:38, at 4-231.

600. Because the estate is not a party to the dischargeability proceeding, *Pacor* teaches us that the estate has no interest in the outcome of the creditor's claim against the debtor, since the estate would not be bound by any money judgment against the debtor and could fully relitigate the creditor's claim against the estate in claims objection proceedings. *See generally* James N. Duca & Cori Ann C. Yokota, *The Role of Res Judicata in Bankruptcy Claim Allowance Proceedings*, 17 U. HAW. L. REV. 1 (1995); Jeffrey Thomas Ferriell, *The Preclusive Effect of State Court Decisions in Bankruptcy* (pt. 2), 59 AM. BANKR. L.J. 55, 80-86 (1985); Moore, *supra* note 151, at 28-29, 39-50. The immense judicial economy from adjudication of the creditor's claim against both the debtor and the estate in one proceeding is, of course, meaningless according to *Pacor*. The only conceivable outcome-oriented effect on the estate from the creditor's claim against the debtor would be if the creditor is able to collect from the debtor personally before any bankruptcy distribution. This would reduce the creditor's claim against the estate to the benefit of all other creditors. *See* Bass v. Denney, No. 3:97-CV-2043-P, 1998 WL 59486, at *2 & n.4 (N.D. Tex. Feb. 9, 1998), *rev'd*, 171 F.3d 1016, 1022 (5th Cir. 1999). The relationship among these claims can be represented graphically as follows:

Yet even this *Pacor*-like rationale for jurisdiction will usually be unavailable because the vast majority of individual Chapter 7 filings are "no asset" cases, in which the
would conclude that the claim is not "related to" the bankruptcy case. Indeed, the few courts that actually have confronted the jurisdictional issue with the announced standards have come to the same conclusion—there is no federal bankruptcy jurisdiction to enter a money judgment against an individual debtor on a nondischargeable debt.\footnote{601}

Yet, the vast majority of bankruptcy courts routinely entertain creditor requests for money judgments on nondischargeable debts.\footnote{602} Moreover, every circuit to address the issue has held filing and adjudication of creditors' claims against the estate is futile. See Wisconsin Dept' of Indus., Labor & Human Relations v. Marine Bank Monroe (In re Kubly), 818 F.2d 643, 644-45 (7th Cir. 1987) (finding no "related to" jurisdiction over a third-party dispute in a no-asset case, even if it could affect the amount of a creditor's unsecured claim); Fed. R. Bankr. P. 2002(e) (making provision for no-asset cases, in that "[i]n a chapter 7 liquidation case, if it appears from the schedules that there are no assets from which a dividend can be paid, the notice of the meeting of creditors may include a statement to that effect [and] that it is unnecessary to file claims"); OFFICIAL BANKR. FORM B9A (Sept. 1997) (Chapter 7 Individual or Joint Debtor No Asset Case: Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines). Moreover, even in asset cases, the remote contingency of collecting from a co-liable entity, thereby reducing a creditor's claim against the bankruptcy estate, does not perforce establish "related to" bankruptcy jurisdiction over the creditor's action against the codebtor under Pacor. Compare Quattrone Accountants, Inc. v. IRS, 895 F.2d 921, 926-27 & n.4 (3d Cir. 1990) (concluding that the possibility of collection from a third party reducing a creditor's claim against the bankruptcy estate was insufficient to establish "related to" jurisdiction over the creditor's claim against the third party), with Halper v. Halper, 164 F.3d 830, 837-38 (3d Cir. 1999) (reaching precisely the opposite conclusion), and Owens-Illinois, Inc. v. Rapid Am. Corp. (In re Celotex Corp.), 124 F.3d 619, 626-27 (4th Cir. 1997) (same).


\footnote{602} Thus, for example, the Supreme Court's recent decision in Cohen v. De La Cruz, addressing only a dischargeability issue, nonetheless affirmed a bankruptcy court's entry of a money judgment against an individual debtor on debts determined
that there is federal bankruptcy jurisdiction to liquidate and enter a judgment on a nondischargeable debt—\textit{not} because of any effect on the bankruptcy estate à la \textit{Pacor}, but because of

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603. \textit{See} Cowen \textit{v.} Kennedy (\textit{In re Kennedy}), 108 F.3d 1015, 1017-18 (9th Cir. 1997); Hall \textit{v.} Davenport, 76 F.3d 372, No. 95-1359, 1996 WL 34674, at *1-*3 (4th Cir. Jan. 30, 1996) (unpublished table decision); Longo \textit{v.} McLaren (\textit{In re McLaren}), 3 F.3d 958, 965-66 (6th Cir. 1993); Abramowitz v. Palmer, 999 F.2d 1274, 1275-77 (8th Cir. 1993); Atassi v. McLaren (\textit{In re McLaren}), 590 F.2d 850, 853-54 (6th Cir. 1979); Samuel \textit{v.} Edd, 961 F.2d 220, No. 91-6184, 1992 WL 86698, at *1-*2 (10th Cir. Apr. 24, 1992) (unpublished table decision); N.I.S. Corp. \textit{v.} Hallahan (\textit{In re Hallahan}), 936 F.2d 1496, 1508 (7th Cir. 1991); \textit{cf.} Forges v. Gruntal & Co. (\textit{In re Forges}), 44 F.3d 159, 163-65 & n.7 (2d Cir. 1995) (holding that in adjudicating a creditor's claim against a Chapter 13 bankruptcy estate, there is bankruptcy jurisdiction to enter a money judgment against the debtor personally after dismissal of the debtor's bankruptcy case, analogizing to the aforecited cases); Lucas \textit{v.} Thomas (\textit{In re Thomas}), 765 F.2d 926, 927-30 & n.3 (9th Cir. 1985) (finding that an action to collect on the bankruptcy court's money judgment on a nondischargeable debt from the California Real Estate Recovery Fund was "related to" the debtor's bankruptcy case). The Fifth Circuit's self-contradictory reasoning in \textit{Bass v. Denney (In re Bass)}, 171 F.3d 1016 (5th Cir. 1999), illustrates the stark inconsistencies between these cases and the \textit{Pacor} test. The \textit{Bass} court held that the creditors' garnishment action to collect a personal judgment on a nondischargeable debt entered by a bankruptcy court was "related to" the debtor's bankruptcy case, because "it could not have any effect whatsoever on his estate in bankruptcy or its administration." \textit{Id.} at 1022. Nevertheless, the court assumed that "the litigation between the Debtor and the [creditors] that resulted in their judgment was related to the Debtor's bankruptcy estate and bankruptcy proceeding." \textit{Id.} at 1023 (emphasis added); \textit{see also} A.M.S. Printing Corp. \textit{v.} Wernick (\textit{In re Wernick}), 242 B.R. 194, 197 (Bankr. S.D. Fla. 1999) ("Although the litigation between the Plaintiff and the Debtors that resulted in the non-dischargeable judgment \textit{was} related to the Debtors' bankruptcy estate, the dispute over collection of the debt is \textit{not} related to the bankruptcy estate." (emphasis added)).
\end{quote}

The circuit court cases cited above actually concluded that the jurisdictional relationship at issue is not merely a noncore "related to" one; all of these cases held that bankruptcy courts have "core" jurisdiction to entertain an action on the underlying debt and enter a final judgment against the debtor. Like the inexplicable "related to" jurisdiction, and as stated in the text, this result also defies the beguiling formulae for core "arising under" and "arising in" proceedings. \textit{See} Estate of Eckel \textit{v.} Narciso (\textit{In re Narciso}), 146 B.R. 792, 793 (Bankr. E.D. Ark. 1992). Core jurisdiction to enter a money judgment on a nondischargeable debt is best explained as consistent with the historical summary jurisdiction of bankruptcy referees, who were specifically given jurisdiction under the 1970 discharge amendments to "determine the dischargeability of debts, \textit{and render judgments thereon}." Bankruptcy Act of 1898, \textit{supra} note 65, § 38(4) (emphasis added); \textit{see supra} note 111.
the close factual and logical relationship between the dischargeability proceeding and any proceeding on the underlying debt.\textsuperscript{604} This is, of course, quite conspicuously, a transactional, in personam, supplemental approach to federal bankruptcy jurisdiction. In fact, the courts' opinions contain many veiled references to principles of supplemental jurisdiction,\textsuperscript{605} including reliance on \textit{Alexander v. Hillman}\textsuperscript{606} and the accompanying equitable maxim in which principles of supplemental jurisdiction are rooted: complete disposition of an entire controversy.\textsuperscript{607} In other words, the rationale for federal jurisdiction is the same as that precipitating the 1970 dischargeability amendments. It would be inconvenient and inefficient to require a separate action in state court to obtain a money judgment on a debt declared nondischargeable, so the federal bankruptcy court has \textit{supplemental} jurisdiction to entertain the action on the underlying debt, as an incident to its \textit{independent} federal question jurisdiction over the

\textsuperscript{604} "[I]t is impossible to separate the determination of dischargeability function from the function of fixing the amount of the non-dischargeable debt." \textit{Kennedy}, 108 F.3d at 1018 (emphasis added) (quoting \textit{In re Devitt}, 126 B.R. 212, 215 (Bankr. D. Md. 1991)); \textit{see also McLaren}, 3 F.3d at 966 (same). Such a separation, of course, is possible, as evidenced by the state of affairs extant before the 1970 dischargeability amendments. But as those 1970 amendments recognized, entertaining dischargeability actions in federal court without any authority to render a money judgment on a nondischargeable debt, while possible, is nonetheless manifestly cumbersome and wasteful. \textit{See supra} notes 592-97 and accompanying text; \textit{cf.} \textit{Porges}, 44 F.3d at 164 ("[I]t is illogical to separate the function of determining the validity of a claim from the function of fixing the claim's monetary value." (emphasis added) (citing \textit{Deuitt})).


\textsuperscript{606} 296 U.S. 222 (1935), discussed \textit{supra} notes 148-56, 388-92 and accompanying text.

\textsuperscript{607} \textit{See Porges}, 44 F.3d at 164-65; \textit{McLaren}, 3 F.3d at 966; \textit{Hallahan}, 936 F.2d at 1508. As the ever-popular \textit{Deuitt} opinion noted, "the well-known maxim that once equitable jurisdiction has been properly invoked it will proceed to render a full and complete disposition of the controversy," like supplemental jurisdiction, is grounded in notions of judicial economy and procedural convenience, "prevent[ing] a duplication of effort and a multiplicity of suits." \textit{Devitt}, 126 B.R. at 215.
dischargeability action.\textsuperscript{608} The action on the underlying debt is not “related to” the debtor’s bankruptcy case by virtue of any in rem effect on the debtor’s bankruptcy estate; the action on the debt is “related to” the dischargeability proceeding through an in personam, transactional supplemental nexus.

The courts, thus, have already accepted this particular form of in personam supplemental jurisdiction as an element of the statutory grant of federal bankruptcy jurisdiction. Yet, they refuse to acknowledge that any other supplemental state-law claims can be considered “related to” a dischargeability proceeding\textsuperscript{609} or an individual debtor’s bankruptcy cause of ac-

\textsuperscript{608} See Kinney v. Higher Educ. Assistance Found. (\textit{In re Kinney}), 114 B.R. 670, 671-72, 671 (Bankr. D. Neb. 1990) (holding that “federal courts have jurisdiction over cases and controversies in their entirety,” and “[t]he court has jurisdiction to decide [the dischargeability] controversy and as an incident thereto has jurisdiction to enter judgment in favor of [the creditor] on the underlying debt”); Aerni v. Columbus Fed. Sav. (\textit{In re Aerni}), 86 B.R. 203, 205-06, 207-08 (Bankr. D. Neb. 1988) (opining that the bankruptcy jurisdiction statute contains a grant of ancillary and pendent jurisdiction and, thus, permits a federal judgment on a nondischargeable debt as part of the dischargeability proceedings); Plumb, \textit{supra} note 109, at 1397 & n.203 (noting that “jurisdiction to render personal judgment on the claim is only ancillary to the issue of discharge” and is not an “independent power to render personal judgments on debts apart from a determination of the issue of nondischargeability”).

\textsuperscript{609} See, \textit{e.g.}, Community Bank v. Boone (\textit{In re Boone}), 52 F.3d 958, 959-61 (11th Cir. 1995) (finding no “related to” jurisdiction of individual debtors’ postpetition state-law tort claims against the creditor asserted in connection with dischargeability and extent-of-lien proceedings, notwithstanding the common factual issues and logical interrelatedness); Liddle & Robinson, L.L.P. v. Daley (\textit{In re Daley}), 224 B.R. 307, 309 & n.1 (Bankr. S.D.N.Y. 1998) (stating that even though a creditor’s state-law claims against a third party were properly joined in the dischargeability action under a transactional joinder standard, subject matter jurisdiction must be established independently); Wilcox v. Houghton (\textit{In re Houghton}), 164 B.R. 146, 147-48 (Bankr. W.D. Wash. 1994) (finding no “related to” jurisdiction of fraud claims against codefendants joined with a nondischargeability claim against the debtor); Haden v. Haug (\textit{In re Haug}), 19 B.R. 223, 224-25 (Bankr. D. Or. 1982) (same). Of course, precisely the opposite result can obtain under the “joint conduct” and “intertwined parties” departures from the \textit{Pacor} test. See Abramowitz v. Palmer, 999 F.2d 1274, 1275-76, 1278-79, 1279 n.3 (8th Cir. 1993) (finding “related to” jurisdiction over fraud claims against a codefendant joined with a nondischargeability claim against the debtor, because the debtor and codefendant “acted jointly” and “the legal and factual issues involved in resolving the claims are interrelated”); Haden v. Edwards (\textit{In re Edwards}), 100 B.R. 973, 974-75, 976, 981 (Bankr. E.D. Tenn. 1989) (same); \textit{supra} Part III.C.1, notes 562-82 and accompanying text. Again, these alternative tests appear to be nothing more than a crude and imperfect approximation of transactional, in personam supplemental jurisdiction. \textit{See} Massachusetts Cas. Ins. Co. v. Green (\textit{In re Green}), 241 B.R. 550, 558-61, 559, 561 (Bankr. N.D. Ill. 1999) (determining that bankruptcy jurisdiction over
tion,610 with an ironic invocation of Pacor's platitude: "Judicial economy itself does not justify federal jurisdiction."611 Of course, the manifest incongruity in both rationale and result, like the Pacor test itself, finds no support in the jurisdictional statute, which is a uniform grant of federal jurisdiction over all proceedings "related to" a bankruptcy case.612 The only reconciliation consistent with the terms of the statute and the legislative history regarding its purposes simply is to recognize that Pacor was wrong; third-party "related to" bankruptcy jurisdiction is supplemental jurisdiction, and there is "related to" bankruptcy jurisdiction over any third-party dispute sharing an in rem or an in personam supplemental relationship with a claim before the

an insurer's nondischargeability action alleging fraud also extended (1) to the insurer's state-law claim for rescission of the individual debtor's insurance policies, because "rescission is a proper remedy for fraud in the formation of a contract," and (2) to state-law compulsory counterclaims against the insurer for breach of contract that the bankruptcy trustee had abandoned and the debtor was asserting personally, with the court noting "that the relationship between supplemental jurisdiction . . . and 'related to' proceedings in bankruptcy is 'functionally identical';" Diego v. Zamost (In re Zamost), 7 B.R. 859, 860-62, 862 (Bankr. S.D. Cal. 1980) (ruling that fraud claims against codefendants joined with a nondischargeability claim against the debtor were "related to" the debtor's bankruptcy case, irrespective of a lack of effect on the estate, because "pursuit of this action in the Bankruptcy Court will promote judicial economy, and will prevent what otherwise would be an unnecessary multiplicity of actions"); cf. Midwest Mut. Ins. Co. v. Shapiro (In re Shapiro), 22 B.R. 685, 686-88 (Bankr. E.D. Pa. 1982) (in a nondischargeability action under the 1898 Act, finding that the bankruptcy court had jurisdiction over the individual debtor's compulsory counterclaims asserted in a personal capacity and not on behalf of the estate).


611. Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984), discussed supra notes 486-87 and accompanying text.

612. The embarrassment of the dischargeability cases for extant "related to" jurisdiction doctrine is evident in the inconsonant reasoning of one court that "[a]bsent 'related to' jurisdiction, it is doubtful that this Court has general ancillary jurisdiction under United Mine Workers v. Gibbs and its progeny, except to enter a dollar judgment in actions to bar dischargeability." Official Creditors' Comm. of Prods. Liab. & Personal Injury Claimants v. International Ins. Co. (In re Pettibone Corp.), 135 B.R. 847, 852 (Bankr. N.D. Ill. 1992) (emphasis added) (citation omitted).
court (1) "arising under" the Bankruptcy Code, or (2) to which the federal bankruptcy estate is a party.

D. Erasing the Line Between "Related to" and "Supplemental" Bankruptcy Jurisdiction

Subsequent case law has tacitly refused to follow Pacor’s disavowal of third-party “related to” bankruptcy jurisdiction as a grant of supplemental jurisdiction. The migration of third-party “related to” bankruptcy jurisdiction toward both in rem and in personam versions of supplemental jurisdiction seems clear. Nonetheless, the courts’ failure to challenge the Pacor opinion outright, and indeed their unthinking repetition of Pacor’s platitudes, has produced a third-party “related to” bankruptcy jurisdiction that is, at best, only a crude and incomplete form of supplemental jurisdiction. The jurisdictional frictions lying in Pacor’s wake have also manifested in what is now cast as a distinct doctrine of “supplemental” bankruptcy jurisdiction, which has stirred quite a controversy with considerable aid from Professor Block-Lieb’s critical commentary.

So-called supplemental bankruptcy jurisdiction is a direct outgrowth of Pacor’s declaration that third-party “related to” bankruptcy jurisdiction is not supplemental jurisdiction. That conclusion, of course, leads to the further inquiry as to whether bankruptcy courts nonetheless can exercise supplemental jurisdiction as an incident to their statutory bankruptcy jurisdiction. Thus, when confronted with third-party disputes to

613. For example, one lower court correctly “reads Salem Mortgage as supporting a finding that proceedings are ‘related to’ bankruptcy cases not only where the outcome of the proceeding may conceivably have an effect upon the estate being administered, but also where parties are sufficiently intertwined with the debtor,” Ameritrust Co. v. Opti-Gage, Inc. (In re Opti-Gage, Inc.), 128 B.R. 189, 195 (Bankr. S.D. Ohio 1991), but notes that “[u]nfortunately, it is impossible to precisely define when parties are sufficiently intertwined with the debtor to find bankruptcy jurisdiction,” id. at 196.

614. See Block-Lieb, supra note 20. Professor Block-Lieb’s arguments have been acknowledged in both of the major court of appeals cases questioning the validity of “supplemental” bankruptcy jurisdiction. See Chapman v. Currie Motors, Inc., 65 F.3d 78, 81 (7th Cir. 1995); Walker v. Cadle Co. (In re Walker), 51 F.3d 562, 570 (5th Cir. 1995).

615. “In the event that the [third-party claims] are not ‘related to’ [debtor’s] bankruptcy, then it would be appropriate to explore the subjects of ancillary or pendent jurisdiction.” Opti-Gage, 128 B.R. at 193.
which Pacor affords no "related to" bankruptcy jurisdiction, but
that arise in contexts in which federal courts have routinely
resorted to supplemental jurisdiction, many bankruptcy courts
have done the same.

Take, for example, a suit commenced in bankruptcy court by a
bankruptcy trustee or debtor-in-possession against several code-
fendants. Conduct of that suit, known as an "adversary proceed-
ing," is governed by bankruptcy procedural rules that largely
incorporate, with some modifications, the entirety of the Federal
Rules of Civil Procedure, including all of the joinder rules.616 The
bankruptcy estate, therefore, could join its claims against mul-
tiple codefendants in one action pursuant to the transactional
joinder standard of Rule 20(a).617 The propriety of federal bank-
rruptcy jurisdiction over the estate's claims against the defen-
dants is, of course, beyond doubt. Claims under bankruptcy
causes of action would come within the bankruptcy court's "arising
under" bankruptcy jurisdiction, and state-law claims could be
entertained through either "arising in" or "related to" bankruptcy
jurisdiction.618

If a defendant in the estate's adversary proceeding were to
make a state-law cross-claim against a codefendant for contribu-
tion or indemnification, joinder of such a cross-claim in the
same action would be permissible under the transactional join-
der standard of Rule 13(g).619 Unlike the estate's claims against

616. See FED. R. BANKR. P. 7001-7071.
617. Rule 20(a) provides:
All persons . . . may be joined in one action as defendants if there is
asserted against them . . . any right to relief in respect of or arising out
of the same transaction, occurrence, or series of transactions or occurren-
ces and if any question of law or fact common to all defendants will
arise in the action.
FED. R. CIV. P. 20(a), incorporated by reference in FED. R. BANKR. P. 7020.
618. See supra Part III.A, notes 411-54 and accompanying text. Existing doctrine
categorizes Marathon claims—prepetition state-law claims that become property of the
bankruptcy estate when the bankruptcy case is commenced—as noncore "related to"
claims. Postpetition state-law claims accruing to the estate after the bankruptcy case
is commenced, however, are often characterized as core "arising in" claims. See 1 COLLI-
ER (15th ed.), supra note 66, ¶ 3.02[5]; Susan Block-Lieb, The Costs of a Non-
Article III Bankruptcy Court System, 72 AM. BANKR. L.J. 529, 548 & nn.72, 75-76
619. "A pleading may state as a cross-claim any claim by one party against a co-
party arising out of the transaction or occurrence that is the subject matter . . . of
the defendants, however, this cross-claim would be a third-party dispute that is not within "related to" bankruptcy jurisdiction under the Pacor test.620

Consider also a defendant's third-party impleader of a state-law contribution or indemnification claim against a new third-party defendant under Rule 14(a).621 Nearly one hundred years ago, in Bryan v. Bernheimer,622 the Supreme Court intimated that there ought to be room for federal bankruptcy jurisdiction over such a third-party impleader claim, even under the 1898 Act's more restrictive third-party "related to" jurisdiction, as a matter of simple fairness to the defendant haled into federal court.623 Nevertheless, according to the Pacor test, such a third-party impleader claim finds itself outside the bounds of the current statute's unqualified third-party "related to" bankruptcy jurisdiction, because the possibility of a defendant recouping sums paid to the estate from a codefendant or a third party has no bearing at all on the estate's anterior claim against the defendant.624 In fact, such a third-party claim for contribution or

the original action . . . ." FED. R. CIV. P. 13(g), incorporated by reference in FED. R. BANKR. P. 7013.

620. See, e.g., Official Creditors' Comm. of Prods. Liab. & Personal Injury Claimants v. International Ins. Co. (In re Pettibone Corp.), 135 B.R. 847, 849-51 (Bankr. N.D. Ill. 1992); cf. Munford v. Munford, Inc. (In re Munford, Inc.), 97 F.3d 449, 454 (11th Cir. 1996) (acknowledging in dictum that "we do not dispute the . . . contention that non-debtors in an adversary proceeding cannot assert state cross-claims of contribution and indemnity because such claims standing alone . . . 'could not conceivably' have an effect on the debtor's estate").

621. Rule 14(a) provides:

At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff.

FED. R. CIV. P. 14(a), incorporated by reference in FED. R. BANKR. P. 7014.

622. 181 U.S. 188 (1901), discussed supra Part I.B.2.b, notes 124-42 and accompanying text.

623. See Bryan, 181 U.S. at 198.

indemnification presupposes that the bankruptcy estate has already successfully recovered from the defendant, and the third-party claim merely reallocates ultimate responsibility for that recovery.\footnote{625}

Rule 13 cross-claims and Rule 14 impleader claims, though, are a common context for the invocation of supplemental jurisdiction, because the federal courts have tended to equate the \textit{Gibbs} "common nucleus of operative fact" supplemental nexus with the Federal Rules' "same transaction or occurrence" joinder standard.\footnote{626} Thus, there is considerable authority holding that federal bankruptcy courts, likewise, can exercise supplemental jurisdiction over properly joined third-party claims in such an adversary proceeding, as an incident to their federal bankruptcy jurisdiction over the claims asserted by the bankruptcy estate.\footnote{627}

\footnote{625. A defendant's Rule 13 cross-claim and Rule 14 impleader claim in the estate's suit can be represented graphically as follows:}


\footnote{627. For cases finding supplemental jurisdiction over Rule 20 coplaintiffs' claims against a defendant sued by the bankruptcy estate, see Klein v. Civale & Trovato, Inc. (\textit{In re Lionel Corp.}), 29 F.3d 88, 90, 92 (2d Cir. 1994); National Westminster Bancorp N.J. v. ICS Cybernetics, Inc. (\textit{In re ICS Cybernetics, Inc.}), 123 B.R. 467, 471-72 (Bankr. N.D.N.Y. 1989), \textit{aff'd mem.}, 123 B.R. 480 (N.D.N.Y. 1990); Petrolia Corp.}
As stated by one court, “[w]e can perceive no reason why a bankruptcy court cannot exercise pendent jurisdiction and hear non-federal claims raised in a proceeding before it, in the same fashion as any other federal court.”

*Aldinger*, 629 *Finley*, 630 and the subsequent 1990 supplemental jurisdiction statute, 631 however, point up the need to find statutory approbation for supplemental jurisdiction over such third-party claims, 632 and as explored in this Part III.D, a host of both statutory and constitutional objections to this “supplemental” bankruptcy jurisdiction have now appeared. 633 The tussle over so-called supplemental bankruptcy jurisdiction, however, actually reinforces the true supplemental nature of third-party “re-

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632. *See supra* Part III.B.3, notes 484-96 and accompanying text.
633. *See infra* Part III.D.1-2, notes 634-84 and accompanying text.
lated to" bankruptcy jurisdiction and punctuates the remarkably misguided ferment of Pacor's reign. When the illusive divide between "related to" and "supplemental" bankruptcy jurisdiction is destroyed, statutory and constitutional clouds over supplemental bankruptcy jurisdiction vanish, revealing a self-contained bankruptcy jurisdiction statute, for which resort to any auxiliary source of "supplemental" bankruptcy jurisdiction is entirely unnecessary and counterproductive.

1. The Irrelevance of the Supplemental Jurisdiction Statute

Relying upon the supplemental jurisdiction statute for "supplemental" bankruptcy jurisdiction is troublesome, because that statute gives no jurisdictional authority to the non-Article III bankruptcy courts in which all bankruptcy litigation originates.\(^6\)\(^3\)\(^4\) It is not necessary, however, to resort to the supplemental jurisdiction statute, because the bankruptcy courts' third-party "related to" bankruptcy jurisdiction is itself a grant of supplemental jurisdiction. Moreover, those who object to "supplemental" bankruptcy jurisdiction, in an unknowing indictment of Pacor, actually advance that proposition very forcefully.

If third-party "related to" bankruptcy jurisdiction is not supplemental jurisdiction, as Pacor propounds, then the only alternative statutory receptacle for supplemental bankruptcy jurisdiction is the 1990 supplemental jurisdiction statute, which provides the federal district courts with supplemental jurisdiction "in any civil action of which the district courts have original jurisdiction."\(^6\)\(^3\)\(^5\) Federal bankruptcy jurisdiction is a source of original jurisdiction for the district courts.\(^6\)\(^3\)\(^6\) Thus, the bankruptcy jurisdiction statute and the supplemental jurisdiction statute, in combination, would appear to give the federal district courts supplemental bankruptcy jurisdiction. Indeed, several courts have so held.\(^6\)\(^3\)\(^7\)

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635. Id.
636. See id. § 1334(a)-(b).
Original bankruptcy jurisdiction, though, is seldom exercised by the district courts. The Judicial Code permits a district court to refer all of its bankruptcy jurisdiction to the non-Article III bankruptcy court for the district, and the district courts have done so through standing orders of reference in effect in every district. Thus, despite the fact that the district courts are the statutory conduit for original federal bankruptcy jurisdiction, bankruptcy litigation, as an initial matter, begins in bankruptcy court. This is true even in noncore “related to” proceedings, in which the bankruptcy courts have jurisdiction to “hear” the proceedings and “submit proposed findings of fact and conclusions of law to the district court” for entry of any final order or judgment by the district judge.

Given the fact that bankruptcy litigation, as a practical matter, occurs in the bankruptcy courts and not in the district courts, supplemental bankruptcy jurisdiction will be an effective jurisdictional medium only to the extent that it can be employed in the bankruptcy courts. Moreover, it is in the bankruptcy courts, not the district courts, where “supplemental” bankruptcy jurisdiction has encountered the strongest resistance.


638. “Each district court may provide that any or all cases under [the Bankruptcy Code] and any or all proceedings arising under [the Bankruptcy Code] or arising in or related to a case under [the Bankruptcy Code] shall be referred to the bankruptcy judges for the district.” 28 U.S.C. § 157(a).

639. With one exception, every judicial district, by local rule, provides that all bankruptcy cases and proceedings are referred automatically to the bankruptcy court. See 1 COLLIER (15th ed.), supra note 66, ¶ 3.02[1], at 3-38; 1 NORTON, supra note 16, ¶ 4:18, at 4-93. The one exception is the District of Delaware, which revoked its standing orders of reference with respect to Chapter 11 cases. In Delaware, the judge for a Chapter 11 filing is now drawn from a pool composed of both bankruptcy judges and district judges. See Delaware District Court Withdraws the Reference in Chapter 11 Cases, 30 Bankr. Ct. Dec. Wkly. News & Comment (LRP) No. 3, at A1 (Feb. 4, 1997); Delaware’s Withdrawal of the Reference: What It Means, 30 Bankr. Ct. Dec. Wkly. News & Comment (LRP) No. 4, at A1 (Feb. 11, 1997).


641. Compare supra note 637 and accompanying text, with infra note 643 and accompanying text.
The derivative jurisdiction of the bankruptcy courts is defined and limited by the statute authorizing referral of federal bankruptcy jurisdiction to the bankruptcy courts and the district courts' standing orders of reference. The premise of "supplemental" bankruptcy jurisdiction as a distinct doctrine, of course, is that it permits joinder in one action of both (1) claims founded on statutory bankruptcy jurisdiction and (2) transactionally related third-party claims that are outside the scope of statutory bankruptcy jurisdiction. There is no statutory sanction, however, for bankruptcy courts to hear any claims other than those within the district courts' statutory bankruptcy jurisdiction over "arising under," "arising in," and "related to" bankruptcy proceedings.642

Thus, even if the supplemental jurisdiction statute enhances the bankruptcy jurisdiction of the district courts, by appending "supplemental" jurisdiction to the district courts' statutory bankruptcy jurisdiction, nothing in the Judicial Code seems to permit the district courts to refer this "supplemental" bankruptcy jurisdiction to the bankruptcy courts. Consequently, many courts have concluded more recently that bankruptcy courts have no "supplemental" bankruptcy jurisdiction whatsoever, not even for purposes of entry of proposed findings and conclusions with respect to "supplemental" third-party claims.643 Furthermore, the

district courts do not seem eager to fill the void by exercising their "supplemental" bankruptcy jurisdiction.\(^{644}\)

The statutory gap identified by these courts, of course, is wholly dependent upon the assumption that third-party "related to" bankruptcy jurisdiction—unquestionably within the province of the bankruptcy courts—is not a grant of supplemental jurisdiction. As this Article maintains, though, this is a wholly unwarranted assumption, carelessly asserted in \textit{Pacor} and never openly or critically questioned since.\(^{645}\) When third-party "related to" bankruptcy jurisdiction is properly recognized as a grant of supplemental bankruptcy jurisdiction, in its own right, the interaction between the bankruptcy jurisdiction statute, the supplemental jurisdiction statute, and the bankruptcy referral statute is simply immaterial. The bankruptcy courts derive their supplemental jurisdiction from the bankruptcy jurisdiction statute, not the supplemental jurisdiction statute; the noncore third-party "related to" jurisdiction of the bankruptcy courts is supplemental jurisdiction. Moreover, the irony in the attacks on "supplemental" bankruptcy jurisdiction is that they actually acknowledge that "related to" bankruptcy jurisdiction is, indeed, a grant of supplemental bankruptcy jurisdiction.

Those who question the validity of "supplemental" bankruptcy jurisdiction not only challenge supplemental bankruptcy jurisdiction in the bankruptcy courts, they also cast doubt on the legitimacy of supplemental bankruptcy jurisdiction in general, even in the district courts. The skeptics surmise that "supplemental" bankruptcy jurisdiction is fundamentally inconsistent with the jurisdictional scheme of federal bankruptcy law.\(^{646}\) For this pur-


\(^{645}\) \textit{See supra} Part III.B.3, notes 484-96 and accompanying text.

\(^{646}\) Professor Block-Lieb notes that the supplemental jurisdiction statute, by its terms, applies only "in any \textit{civil action} of which the district courts have original jurisdiction," 28 U.S.C. § 1367(a) (emphasis added), whereas bankruptcy jurisdiction, by contrast, is over bankruptcy "proceedings," \textit{id.} § 1334(b). \textit{See Block-Lieb, supra} note 20, at 804. As discussed above, though, the American concept of a bankruptcy "pro-
pose, they invoke the argument that "related to" bankruptcy jurisdiction is itself a form of supplemental jurisdiction. Thus, any construction of the supplemental jurisdiction statute that would give the federal courts *even more* supplemental bankruptcy jurisdiction supposedly would undermine any intended limits on supplemental bankruptcy jurisdiction implicit in the bankruptcy jurisdiction statute.\(^6\)\(^4\)\(^7\) As the most widely quoted expression of this thesis put it, "related to" bankruptcy jurisdiction "already allow[s] bankruptcy courts to hear, to the extent Congress intended, all supplementary claims that have a logical relationship to an underlying bankruptcy proceeding,\(^6\)\(^4\)\(^8\) and so-called supplemental bankruptcy jurisdiction, therefore, "would step on the toes of the bankruptcy statute conferring 'related to' jurisdiction,"\(^6\)\(^4\)\(^9\) which "would be rendered substantially, if not entirely, superfluous."\(^6\)\(^5\)\(^0\) "Thus, it would be somewhat incongruous to gut this careful system by allowing bankruptcy courts to exercise supplemental jurisdiction to pull into bankruptcy courts matters Congress excluded in its specific jurisdictional grants."\(^6\)\(^5\)\(^1\)

Of course, this view is entirely accurate insofar as it correctly recognizes that third-party "related to" bankruptcy jurisdiction is a grant of supplemental jurisdiction, and as a result, the supplemental jurisdiction statute should simply be inoperative and irrelevant in the bankruptcy context. It is misleading, though, to the extent that it overrides its obvious inconsistency with *Pacor* and portrays extant third-party "related to" doctrine as implementing supposed limitations that Congress intended for supplemental bankruptcy jurisdiction. There is absolutely no evidence of any such congressional intent, and third-party "related to"
doctrine has limited supplemental bankruptcy jurisdiction only because Pacor erroneously assumed that "related to" bankruptcy jurisdiction is not supplemental jurisdiction.652

Supplemental bankruptcy jurisdiction, therefore, finds itself in the proverbial "Catch 22" of blind adherence to mutually inconsistent rules. Efforts to imbue third-party "related to" bankruptcy jurisdiction with principles of supplemental jurisdiction are met with the edict of Pacor that third-party "related to" bankruptcy jurisdiction is not supplemental jurisdiction, while those who resort to the supplemental jurisdiction statute are told they must look to "related to" bankruptcy jurisdiction for such principles. The absurdity of this jurisdictional predicament is visible in courts' frequent expressions of regret and exasperation when jurisdiction is found lacking on third-party claims that beg for an exercise of supplemental jurisdiction.653 This jurisdictional

652. See supra Part III.B.3, notes 484-96 and accompanying text. The analytical construct devised in the Aldinger case permitted the federal courts to assume the propriety of supplemental jurisdiction, unless the jurisdictional statute at issue "expressly or by implication negated its existence." Aldinger v. Howard, 427 U.S. 1, 18 (1976); see Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373 (1978). Under the 1898 Act, one could certainly fashion a credible "implied negation" argument against general supplemental bankruptcy jurisdiction that would skirt section 23's affirmative restrictions on federal bankruptcy jurisdiction over the estate's state-law causes of action and section 2a(6)'s affirmative limitation of bankruptcy jurisdiction over third-party claims to cases of administrative necessity. See supra Part I.B.2.b-d, notes 124-61 and accompanying text. The unqualified "related to" bankruptcy jurisdiction of the 1978 Reform Act, however, would no longer permit such an "implied negation" argument, and that was the uniform conclusion of those "supplemental" bankruptcy jurisdiction cases that conducted Aldinger's "implied negation" analysis. See Wieboldt Stores, Inc. v. Schottenstein, 111 B.R. 162, 168-67 (N.D. Ill. 1990); Petrolia Corp. v. Elam (In re Petrolia Corp.), 79 B.R. 686, 689-93 (Bankr. E.D. Mich. 1987); Total Petroleum, Inc. v. Coral Petroleum, Inc. (In re Coral Petroleum), 62 B.R. 699, 705-07 (Bankr. S.D. Tex. 1986); In re Wood, 52 B.R. 513, 523-24 (Bankr. N.D. Ala. 1985). Pacor, of course, did not even bother with the "implied negation" analysis and simply took from Aldinger a dullard hostility toward supplemental jurisdiction. See supra notes 486-88 and accompanying text. After the Finley case changed the calculus from a search for "implied negation" to "express authorization" of supplemental jurisdiction, one can conclude that there is no express authorization for supplemental bankruptcy jurisdiction only by relying upon Pacor's thoughtless assumption that "related to" bankruptcy jurisdiction is not supplemental jurisdiction. See, e.g., Marine Iron & Shipbuilding Co. v. Duluth (In re Marine Iron & Shipbuilding Co.), 104 B.R. 976, 980-81, 983-87 (D. Minn. 1989); Royal Bank v. Selig (In re Selig), 135 B.R. 241, 243-44, 245-46 (Bankr. E.D. Pa. 1992).

653. See, e.g., Congress Credit Corp. v. AJC Int'l, Inc., 42 F.3d 686, 687-91 (1st Cir.
farce is directly attributable to Pacor, and in fact, the courts’ widespread tendency to recognize some form of “supplemental” bankruptcy jurisdiction\textsuperscript{654} is simply another indication of the conspicuous inadequacy of Pacor. As one court plainly expressed: “The absence of ancillary jurisdiction would make it virtually impossible for bankruptcy courts to implement a modern system of procedural rules.”\textsuperscript{655}

Perhaps the most confounding aspect of the “supplemental” bankruptcy jurisdiction cases comes from the deceptive label that has been affixed to them. The courts that have been described as adopting “supplemental” bankruptcy jurisdiction have not created an illicit extrastatutory jurisdiction, as alleged by their critics. Careful examination reveals that these courts merely recognize what Pacor did not: The bankruptcy courts have unrestricted supplemental jurisdiction as part of their “related to” bankruptcy jurisdiction.\textsuperscript{656} In fact, the earliest of the so-called supplemental bankruptcy jurisdiction cases were simply constru-
ing the scope of "related to" bankruptcy jurisdiction, without the "benefit" of the Pacor test.\textsuperscript{657}

The supplemental jurisdiction statute, therefore, is inapplicable in the bankruptcy context, but not because of the negative implication of a more limited statutory bankruptcy jurisdiction that could be rendered superfluous by the supplemental jurisdiction statute. When third-party "related to" bankruptcy jurisdiction is properly construed as an unqualified grant of supplemental jurisdiction, the supplemental jurisdiction statute simply becomes redundant.\textsuperscript{658}

2. \textit{Braving the Chill of Indeterminate Constitutional Theory}

Constitutional anxiety abounds in the resistance to supplemental bankruptcy jurisdiction over third-party disputes. Constitutional concerns about supplemental bankruptcy jurisdiction, though, are rooted in the inapposite separation of powers influence of \textit{Marathon} and an antiquated in rem constitutional theory of federal bankruptcy jurisdiction that must not be permitted to impose such a substantial burden upon Congress's design of an all-encompassing in personam federal bankruptcy jurisdiction.

The advantageous features of in personam transactional supplemental jurisdiction will not be fully available in bankruptcy litigation until the uncertainties surrounding third-party "related

\textsuperscript{657} See \textit{In re Palazzo}, 19 B.R. 229, 230 (Bankr. M.D. Fla. 1982) (opining that "related to" bankruptcy jurisdiction over Rule 20 claims of the debtor's coplaintiffs depends upon principles of pendent jurisdiction); Diego v. Zamost (\textit{In re Zamost}), 7 B.R. 859, 860-62, 861 (Bankr. S.D. Cal. 1980) (finding bankruptcy jurisdiction over Rule 20 claims against the debtors and codefendants, in order to "promote judicial economy, and [to] prevent what otherwise would be an unnecessary multiplicity of actions," and affirmatively rejecting the proposed test of "impact upon the administration of the debtors' estates" as an unduly "narrow view of [the] jurisdictional grant from Congress"); Griffith v. Realty Executives, Inc. (\textit{In re Griffith}), 6 B.R. 753, 755-56 (Bankr. D.N.M. 1980) (finding "related to" bankruptcy jurisdiction over Rule 13 cross-claims, relying upon principles of ancillary jurisdiction and Kennedy, \textit{supra} note 446); Young v. Sultan Ltd. (\textit{In re Lucasa Intl Ltd.}), 6 B.R. 717, 719-20, 720 (Bankr. S.D.N.Y. 1980) (exercising bankruptcy jurisdiction over Rule 14 impleader claims, because "Rule 14 fosters judicial economy and simplifies procedures for it is a tool which allows two actions to be tried together, thus saving time and cumulative expense").

\textsuperscript{658} Cf. Goger v. Merchants Bank (\textit{In re Feifer Indus.}), 141 B.R. 450, 452 (Bankr. N.D. Ga. 1991) (noting that "there is nothing in \textsection 1367 that suggests bankruptcy courts lack supplemental jurisdiction").
to” bankruptcy jurisdiction and the validity of “supplemental” bankruptcy jurisdiction are resolved. The unfairness of subjecting parties to suit without an ability to assert third-party mitigating claims, the risks of inconsistent adjudications and preclusion pratfalls when multiple courts address common occurrences, and the duplication of effort and delay occasioned by fracturing of disputes are all as prevalent in the bankruptcy context as in nonbankruptcy litigation. Even more importantly, though, bankruptcy can amplify the most pernicious aspects of incomplete joinder—multiplicative litigation and dilution of the federal forum.

To the extent that the automatic stay and discharge injunction effectively prevent assertion of claims against the bankruptcy estate in any forum other than the bankruptcy court, if logically related claims cannot be joined in the bankruptcy court for lack of supplemental jurisdiction, fragmented litigation or abandonment of claims will perforce result. Of course, the claims most readily abandoned will be those for which the federal bankruptcy forum is intended—creditors’ reduced-payment claims against the bankruptcy estate. Alternatively, when supplemental bankruptcy jurisdiction is unavailable, the desire to prevent unseemly splintering of claims can lead a bankruptcy court to simply abstain from hearing claims by or against the bankruptcy estate—remitting the parties to a state forum in which all transactionally related claims can be joined. By doing so,

659. See Freer, supra note 143, at 813-17; Matasar, supra note 7, at 1404 n.6; Matasar, supra note 382, at 110-14; McLaughlin, supra note 366, at 861-65.

660. With respect to the importance of supplemental jurisdiction in removing disincentives to federal court litigation relative to the state courts, see Sidney Schenker, Ensuring Access to Federal Courts: A Revised Rationale for Pendent Jurisdiction, 75 NW. U. L. REV. 245 (1980).

661. See supra notes 480, 505 and accompanying text.

662. In Marine Iron & Shipbuilding Co. v. City of Duluth (In re Marine Iron & Shipbuilding Co.), 104 B.R. 976 (D. Minn. 1989), the Chapter 11 debtor and a coplaintiff sued a single defendant for damages arising from the defendant’s alleged breach of contract. See id. at 977-80. After concluding that there was neither “related to” nor “supplemental” bankruptcy jurisdiction to entertain the coplaintiff’s claim against the defendant, the court determined that the “interest of justice” compelled abstention from hearing the debtor’s claim, citing all of the standard justifications for supplemental jurisdiction in federal court:

The two claims involve numerous common factual issues, and sequential

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The two claims involve numerous common factual issues, and sequential
though, the court has denied the bankruptcy estate a federal forum, in contravention of the underlying premise of the 1978 Reform Act's pervasive jurisdictional scheme, that, to the greatest degree possible, all litigation concerning a debtor's estate should be centralized in federal bankruptcy court.663

The vision and benefits of a complete, pervasive federal bankruptcy jurisdiction cannot be realized without universal acceptance of unrestricted supplemental bankruptcy jurisdiction in third-party disputes. The possibilities for cultivating enhanced settlement opportunities,664 alone, are reason enough for serious concern about attitudes that appear resigned to the prospect that supplemental jurisdiction is simply unavailable in bankruptcy litigation. It seems strangely incongruous that the only context in which the federal courts would be confined to a more cumbersome and inefficient jurisdictional scheme is bankruptcy—where efficient dispute resolution is the overriding function of the federal forum.

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legal issues. Thus, they should be heard and decided by the same court in the same lawsuit. . . . At the very least, a renewed joinder of the claims under a single state-court complaint would avoid the prospect of complex collateral estoppel issues, and the possibility of inconsistent adjudications, which would otherwise result were the claims separately litigated in state and federal courts. To be sure, the central importance of Debtor's claim to the interests of its creditors is one factor auguring against abstention in and [sic] favor of retaining federal jurisdiction. However, the factual intertwining and derivative relationship of the two claims suggest that abstaining from Debtor's claim is the only appropriate result, given the inability of the federal courts to entertain [the coplaintiff's] claim.

Lastly, judicial economy supports abstention. . . . There is no reason why two courts should have to preside over separate jury trials, where the claims to be tried thereby have the relationship which is present here. A single litigation in a single court with the participation of all involved parties will conserve the courts' and the parties' resources, which is yet another appropriate reason why the federal courts should abstain.


663. See supra Part I.C, notes 162-211 and accompanying text; see also S. REP. No. 98-55, at 41 (1983) (noting "the important interests promoted by the 1978 Act in consolidating as much jurisdiction as possible in a single decision-making body").

664. See supra notes 571-72 and accompanying text.
The most intimidating obstacle for supplemental bankruptcy jurisdiction is constitutional diffidence. Indeed, the most visible critic, Professor Block-Lieb, acknowledges the many advantages supplemental jurisdiction holds for bankruptcy litigation, yet concludes that “[s]till, constitutional concerns may cause courts to question the wisdom of such an exercise.”\(^6\) Moreover, the \textit{Pacor} court’s disfavor of supplemental jurisdiction precepts also seemed to be an outgrowth of constitutional trepidations.\(^6\) The scope of pervasive “related to” bankruptcy jurisdiction, though, was designed to be as broad as the Constitution permits. A proper interpretation of the exterior perimeter of third-party “related to” jurisdiction, then, requires an active search for those constitutional limits, rather than a rule of construction that attempts to sidestep constitutional complications. And as we’ve seen, the \textit{Pacor} test does not successfully avert constitutional imbroglios; quite to the contrary, \textit{Pacor}’s literal breadth perpetuates the constitutional quandary inherent in pervasive “related to” bankruptcy jurisdiction.\(^6\) Of course, this Article’s proposed alternative to the \textit{Pacor} test—that third-party “related to” jurisdiction should be interpreted as a grant of conventional supplemental jurisdiction—will elude that same criticism only if grounded in sound constitutional theory, and therein lies the significance of the comprehensive constitutional theory developed in Part II of this Article.

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\(^6\) Block-Lieb, \textit{supra} note 20, at 825; see Fruehwald, \textit{supra} note 20, at 33. Professor Block-Lieb also expresses the concern that in many instances an exercise of supplemental bankruptcy jurisdiction may frustrate the goal of efficient administration of the bankruptcy estate and emphasizes the heightened importance of comity considerations in the bankruptcy context. See Block-Lieb, \textit{supra} note 20, at 811-29. As Block-Lieb recognizes, though, “[w]hether an exercise of supplemental bankruptcy jurisdiction is consistent with, or contradicts, Congress’ goal to facilitate an expeditious resolution of an estate differs depending on the circumstances, and thus generally should be left to a case by case consideration.” \textit{Id.} at 826. The necessary judicial flexibility needed for case-by-case balancing of efficiency and comity considerations, however, is already fully accommodated through bankruptcy’s permissive and mandatory abstention statutes. See \textit{supra} notes 202-06, 442-44 and accompanying text. These concerns, then, do not seem to support arguments that would restrict the scope of supplemental bankruptcy jurisdiction and, indeed, seem particularly well-suited to reasoned judicial discretion. See Shapiro, \textit{supra} note 444, at 580-85, 587-88.

\(^6\) See \textit{supra} notes 461, 472, 510 and accompanying text.

\(^6\) See \textit{supra} Part III.B.1, notes 461-73 and accompanying text.
To illustrate the constitutional apprehensions surrounding supplemental bankruptcy jurisdiction, return to our example of a Marathon state-law action in which a trustee or debtor-in-possession sues multiple codefendants in an adversary proceeding in the bankruptcy court, and one of the defendants wishes to assert both a transactionally related state-law (1) cross-claim against another defendant and (2) an impleader claim against a new third-party defendant. It is the thesis of this Article that the defendant's third-party claims are properly entertained in the bankruptcy court as "related to" proceedings. Those third-party claims are "related to" the bankruptcy case within the meaning of the bankruptcy jurisdiction statute, because they share a transactional, in personam supplemental relationship with the bankruptcy estate's claims against the defendants.668

The constitutional challenge to supplemental bankruptcy jurisdiction over the defendant's third-party claims, like the statutory challenge (and again, somewhat ironically), also proceeds from the assumption that "related to" bankruptcy jurisdiction is itself a grant of supplemental jurisdiction.669 Of course, the Marathon actions against the defendants are now regarded as "related to" proceedings.670 If the defendant's third-party supplemental claims are also "related to" claims, as this Article asserts, then it is because they are "related to" the estate's "related to" claims.671

668. See supra Part III.A, notes 411-54 and accompanying text.
669. See Block-Lieb, supra note 20, at 779-84.
670. See supra Part III.A.1, notes 418-30 and accompanying text.
671. Those claims can be represented graphically as follows:

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Third-Party Defendant

"related to"

Defendant 1

"related to"

Bankruptcy Estate

"related to"

Defendant 2
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Detractors cast this as an unconstitutionally attenuated related-to related-to relationship, twice removed from the core federal element of the debtor's bankruptcy case and inviting a potentially limitless number of links in a "related to" chain. 672

We now discover the damage wrought by the hapless pigeonholing of Marathon actions as "related to" proceedings and an indiscriminate mixing of statutory and constitutional apples, oranges, and bananas. The content of "related to" bankruptcy jurisdiction has been defined more by separation of powers concerns surrounding our non-Article III bankruptcy judges than it has by principles of supplemental jurisdiction, and inclusion of Marathon actions as "related to" proceedings is attributable to the former rather than the latter. 673 With Marathon claims now permanently ensconced in the "related to" category, though, the afterthought that "related to" bankruptcy jurisdiction may, indeed, be a grant of supplemental jurisdiction leads to a reflexive adoption of the misplaced in rem receivership model of supplemental bankruptcy jurisdiction, 674 which fallaciously characterizes a Marathon action as a supplemental claim. 675 The related-to related-to argument, then, is founded upon an anachronistic, beguiling in rem constitutional theory.

If Justice Story believed that he was freeing the scope of federal bankruptcy jurisdiction and American principles of judicial federalism from the English notion of bankruptcy jurisdiction in Ex parte Christy, 676 he was mistaken. Of course, the struggle with the idea of federal "bankruptcy proceedings" under the


673. See supra Part III.A.1, notes 418-30 and accompanying text.

674. See sources cited supra note 449.

675. See supra notes 448-50 and accompanying text.

676. 44 U.S. (3 How.) 292 (1845), discussed supra Part I.A.2, notes 45-57 and accompanying text.
1898 Act, traced above, ultimately vindicated Justice Story. Nevertheless, now we see that another subtle influence of the more limited English concept of bankruptcy jurisdiction continues to linger. The bifurcated English, in rem model of bankruptcy jurisdiction, revived in the 1898 Act, also became the separation of powers model for Marathon. English ideas of bankruptcy jurisdiction, thus, obliquely encumber the scope of federal bankruptcy jurisdiction once more, through Marathon's seepage into "related to" bankruptcy jurisdiction and the resulting insinuation of an in rem constitutional theory of federal bankruptcy jurisdiction.

Of course, it is not at all surprising that such an in rem constitutional theory will not sustain federal jurisdiction over the defendant's third-party claims in our example. The constitutional theory developed in this Article has already revealed the inadequacy of such an in rem theory for third-party state-law claims, just as Pacor's in rem approach to "related to" bankruptcy jurisdiction cannot reach these third-party claims. Federal jurisdiction of the defendant's third-party claims simply is not based upon a functional, in rem relationship to a jurisdictional res; it is dependent upon an in personam, transactional nexus to the estate's claims against the defendants.

An in personam approach to supplemental bankruptcy jurisdiction requires an in personam model of federal bankruptcy jurisdiction—as a matter of both statutory and constitutional theory. An in personam model of statutory federal bankruptcy jurisdiction leads us to abandon the Pacor test for third-party "related to" bankruptcy jurisdiction, and in our example, the constitutional basis for federal jurisdiction over the defendant's third-party claims becomes clear only when one adopts an in personam constitutional theory of federal bankruptcy jurisdiction.

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677. See supra Part I.B.1, notes 74-111 and accompanying text.
678. See supra note 111.
679. See supra notes 379-80 and accompanying text.
680. See supra notes 619-25 and accompanying text.
681. See supra Part III.C, notes 561-612 and accompanying text.
682. See supra Part II.C.3, notes 370-95 and accompanying text.
An in personam model of federal bankruptcy jurisdiction comprehends the bankruptcy estate as more than a mere jurisdictional res; such an in personam model views the bankruptcy estate as a jurisdictional person. If we regard the bankruptcy estate as a federally created legal entity, rather than a jurisdictional res, then Justice Story's original conception of a general federal bankruptcy jurisdiction over all claims by and against a bankruptcy estate is not an in rem jurisdiction over all claims connected to the res; general federal bankruptcy jurisdiction becomes in personam jurisdiction over all claims by and against our jurisdictional person—the bankruptcy "estate." The constitutional theory fortifying this in personam model of general federal bankruptcy jurisdiction is, of course, Osborn's federal entity theory, which teaches that any claim by or against the federally created bankruptcy estate has an independent constitutional basis for federal jurisdiction as a constitutional federal question. This in personam constitutional theory, in turn, informs our construction of third-party "related to" bankruptcy jurisdiction.683

In our example, then, the defendant's third-party claims are not "related to" the debtor's bankruptcy case because their outcome will or will not affect the jurisdictional res (per Pacor's in rem formulation). Rather, those third-party claims are "related to" the debtor's bankruptcy case because they are "related to" the claims of our jurisdictional person—the debtor's bankruptcy estate. The defendant's third-party claims are "related to" the estate's claims because all of the claims share a close factual, logical, and transactional origin—which, of course, is the rationale for the procedural rules permitting their joinder in one action and for an exercise of in personam supplemental jurisdiction. Because the bankruptcy estate's claims against the defendants have an independent, freestanding constitutional basis for federal jurisdiction in the federal question category of Article III, the defendant's transactionally related third-party claims can also be heard in federal court, as the relationship between the claims "permits the conclusion that the entire action before the court comprises but one constitutional 'case.'"684

683. See supra Part III.A.2, notes 431-54 and accompanying text.
CONCLUSION

Widespread confusion among scholars and the courts has made federal bankruptcy jurisdiction one of the most mysterious and perplexing facets of federal jurisdiction. Consequently, the development of the scope of federal bankruptcy jurisdiction has been retarded and remains shackled to outmoded ideas of in rem jurisdiction. Thus, as we stand on the cusp of a new millennium, federal bankruptcy jurisdiction seems hopelessly mired in the nineteenth century. This Article, though, has constructed a comprehensive, unifying theory that can not only rationalize both the constitutional and statutory nature and extent of federal bankruptcy jurisdiction, but greatly simplify and modernize federal bankruptcy jurisdiction. We need not modify our accumulated understanding of federal jurisdiction to accommodate bankruptcy. Indeed, just the opposite is true. We must alter the prevailing conception of bankruptcy in order to assimilate the wisdom of accepted principles of federal jurisdiction.

685. Professor Oakley recently described federal bankruptcy jurisdiction as “a body of law practiced and analyzed almost exclusively by specialists, founded on statutes that are as confused as they are confusing, and beset by an identity crisis.” John B. Oakley, Prospectus for the American Law Institute’s Federal Judicial Code Revision Project, 31 U.C. DAVIS L. REV. 855, 888 (1998).