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# Permissive Bankruptcy Abstention

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## ARTICLES

### PERMISSIVE BANKRUPTCY ABSTENTION\*

SUSAN BLOCK-LIEB\*\*

If a federal court has bankruptcy jurisdiction over proceedings<sup>1</sup> that instead could be heard in a state court, when should the federal court abstain from exercising that jurisdiction? Bankruptcy jurisdiction is federal jurisdiction. Therefore, one would expect that the standard governing abstention from bankruptcy jurisdiction would closely resemble nonbankruptcy abstention doctrines. Nonetheless, federal courts abstain from exercising bankruptcy jurisdiction<sup>2</sup> far more frequently than they abstain

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1. In bankruptcy practice, proceedings are the litigated disputes that begin with the filing of either a complaint or a motion. See FED. R. BANKR. P. 7001-7003, 9014 (defining “adversary proceedings” and “contested matters”). The procedure followed in litigation of these bankruptcy proceedings generally resembles the *Federal Rules of Civil Procedure*. See FED. R. BANKR. P. 7001-7087 (adopting most *Federal Rules of Civil Procedure* to adversary proceedings) and 9014 (incorporating some but not all of *Federal Rules of Civil Procedure* to contested matters). Numerous proceedings may occur in the context of a bankruptcy “case.” Distinct from a proceeding, a case is not itself a litigated matter. It is an umbrella term that covers all matters of administration and adjudication that occur between the filing of a bankruptcy petition and the conclusion of the case. See FED. R. BANKR. P. 1002.

2. Bankruptcy jurisdiction is conferred in 28 U.S.C. § 1334, which provides that district courts “shall have original and exclusive jurisdiction of all [bankruptcy] cases under title 11” of the *United States Code*, 28 U.S.C. § 1334(a) (1994), “exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate,” *id.* § 1334(e), and “original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.” *Id.* § 1334(b). The exercise of bankruptcy jurisdiction is divided between federal district courts and federal bankruptcy courts. See 28 U.S.C. § 157(a)

from other grants of federal jurisdiction.<sup>3</sup>

Outside of bankruptcy, federal courts consider abstention “the exception, not the rule.”<sup>4</sup> The Supreme Court has identified limited circumstances under which federal district courts should refrain from exercising the jurisdiction granted to them by Congress. Generally, these judicially created nonbankruptcy abstention doctrines involve “exceptional circumstances”<sup>5</sup> in which concerns for proper constitutional adjudication,<sup>6</sup> regard for federal-state relations<sup>7</sup> or wise judicial management<sup>8</sup> are said to outweigh federal jurisdictional interests. In balancing these competing interests, the Supreme Court has held that a state’s interest in having unsettled issues of state law resolved in a state court is alone insufficient grounds for abstention from federal jurisdiction.<sup>9</sup>

Abstention is more frequently permitted in the bankruptcy context.<sup>10</sup>

(permitting district courts to refer “any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11” to bankruptcy judges in district); *id.* § 157(b) (permitting bankruptcy judge to “hear and determine all cases under title 11, and all core proceedings arising under title 11, or arising in case under title 11,” subject only to ordinary appellate review); *id.* § 157(c) (permitting bankruptcy judge to “hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11,” and to “submit proposed findings of fact and conclusions of law” for de novo review by district court, unless affected parties consent to greater exercise of jurisdiction by bankruptcy judge).

3. *See, e.g.*, 28 U.S.C. § 1331 (federal question jurisdiction); *id.* § 1332 (diversity jurisdiction).

4. *Colorado River Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976).

5. *See County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-90 (1959) (“The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest.”).

6. *See Railroad Comm’n v. Pullman Co.*, 312 U.S. 496, 500 (1941) (ordering district court to defer decision on federal constitutional question until resolution of unsettled issues of state law by state court).

7. *See Burford v. Sun Oil Co.*, 319 U.S. 315, 332-34 (1943) (concluding that district court should abstain from interfering in state efforts to resolve “basic problems of Texas policy” through “unified method for the formation of policy”); *see also Frank Mashuda Co.*, 360 U.S. at 190 (reversing district court’s decision to abstain from hearing eminent domain case over which it had diversity jurisdiction, because case “present[s] no hazard of disrupting federal-state relations”).

8. *See Colorado River Conservation Dist.*, 424 U.S. at 817-18 (stating that, in exceptional circumstances, considerations of wise judicial administration may warrant abstention without regard to concerns for comity with state courts).

9. *See, e.g.*, *Meredith v. City of Winter Haven*, 320 U.S. 228, 234-35 (1943).

10. District courts are also required to abstain from exercising bankruptcy jurisdiction whenever “related to” proceedings, pending in state court prior to the filing of a bankruptcy petition, can be expeditiously resolved in that state forum. *See* 28 U.S.C. § 1334(c)(2) (1994). The statute requires:

Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent [bankruptcy] jurisdiction under this section, the district court shall abstain from hearing

District courts are permitted by statute to abstain "in the interest of justice, or in the interest of comity with State courts or respect for State law."<sup>11</sup> Courts are divided as to whether this standard incorporates the judicially created abstention doctrines referred to above. Several courts of appeal have concluded that it does not, and have upheld abstention from bankruptcy jurisdiction where the state law at issue is not unsettled. One has gone so far as to construe this provision to permit abstention from a proceeding involving questions of federal nonbankruptcy law "in the interest of justice," although comity interests were absent,<sup>12</sup> a conclusion that would constitute reversible error outside the bankruptcy context.<sup>13</sup> In some of these decisions, abstention is viewed as a matter within the discretion of the district court, whereas generally district courts are "obligated not to decide state law claims (or to stay their adjudication) where one of the abstention doctrines articulated by the [Supreme] Court applies."<sup>14</sup> Moreover, courts are often influenced by arguments that abstention would expedite litigation in a bankruptcy case, although outside of bankruptcy, a court may grant a movant's request for abstention without considering the delay or expense created for parties who chose to litigate in federal forums.<sup>15</sup> Courts are divided as to whether these efficiency concerns trump an interest in comity with state courts, most notably in the context of requests to abstain from

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such a proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

*Id.*

11. 28 U.S.C. § 1334(c)(1). Section 1334(c)(1) provides in full:

Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

*Id.*

12. *See Mathiasen's Tanker Indus. v. Apex Oil Co. (In re Apex Oil Co.)*, 980 F.2d 1150 (8th Cir. 1992).

13. *See New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 362 (1989) (declining to find that *Burford* abstention was warranted when electric utility brought action in federal district court seeking injunctive and declaratory relief on the grounds that actions of state rate-making authority involved federal, not state, law).

14. *City of Chicago v. International College of Surgeons*, 118 S. Ct. 523, 534 (1997).

15. *See, e.g., CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS* § 52, at 325 (5th ed. 1994) (discussing Pullman abstention and noting that in more than one instance "it has led to delays of many years before the case was finally decided on its merits or limped to an inconclusive end"). The Supreme Court has not been completely insensitive to the potential for delay and enhanced costliness that abstention may create. In some instances, for example, it has suggested that certification of the unsettled issue of state law might be a preferable procedure since certification "does of course in the long run save time, energy, and resources and helps build a cooperative judicial federalism." *Lehman Bros. v. Schien*, 416 U.S. 386, 390-91 (1974). Nonetheless, outside the bankruptcy context, the delay and expense of abstention is not explicitly balanced against comity interests that might be furthered by a decision to abstain, as often is done in bankruptcy.

exercising bankruptcy jurisdiction over mass tort litigation pending against a debtor.

Should a distinct abstention doctrine govern in bankruptcy? Bankruptcy jurisdiction differs significantly from other grants of federal jurisdiction in at least two ways.<sup>16</sup> First, non-Article III bankruptcy judges exercise most bankruptcy jurisdiction. Because bankruptcy judges do not enjoy life tenure, their ability to enter final orders in litigation occurring in a bankruptcy context is substantially limited both by statute<sup>17</sup> and by Article III of the United States Constitution.<sup>18</sup> Second, bankruptcy jurisdiction differs qualitatively from the federal question and diversity jurisdiction conferred on federal district courts. In one sense, bankruptcy jurisdiction is broader than

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16. There is another important distinction between the jurisdiction of federal bankruptcy and district courts: Bankruptcy cases are procedurally distinct from the civil cases filed in district courts because bankruptcy cases may or may not involve disputed matters. Moreover, when litigation occurs in a bankruptcy case, it may or may not differ from other forms of civil litigation before district courts. Litigation in bankruptcy cases can take one of two forms: adversary proceedings or contested matters. Adversary proceedings in bankruptcy courts closely resemble civil cases in district courts; both are commenced with a complaint, followed by an answer and discovery, and may result in a trial in which the *Federal Rules of Evidence* apply. In other instances, bankruptcy litigation involves contested matters which are defined in the *Federal Rules of Bankruptcy Procedure* to be commenced by motion, followed by abbreviated discovery and which result in a summary hearing.

This pragmatic distinction between bankruptcy and district courts is left to the footnotes because it does not assist us in distinguishing between bankruptcy and nonbankruptcy abstention. Throughout this Article, I analyze the statutory provisions and judicial doctrines governing the abstention from litigated proceedings that arise in or are related to a bankruptcy case. See 28 U.S.C. § 1471(d) (repealed 1984); 28 U.S.C. § 1334(c)(1) (1994). A separate statutory provision governs abstention from an entire bankruptcy case—namely 11 U.S.C. § 305. This provision is entitled “Abstention” but permits a district court to “dismiss a [title 11] case” or “suspend all proceedings in [such] a case” if “the interests of creditors and the debtor would be better served by such dismissal or suspension.” 11 U.S.C. § 305(a)(1) (1994). Section 305 raises the pragmatic distinction between bankruptcy courts and district courts, in that it permits abstention from a bankruptcy case and not just the litigated proceedings within the case, but discussion of this provision exceeds the scope of this Article.

17. The limited authority of non-Article III bankruptcy courts is set forth in 28 U.S.C. § 157. As to “core” proceedings, defined only with a nonexclusive list of examples in section 157(b)(2), and “noncore” proceedings as to which affected parties have consented to bankruptcy court jurisdiction, bankruptcy courts are authorized to enter final orders subject only to ordinary appellate review. See 28 U.S.C. §§ 157(b)(1), (c)(2) (1994). Where the parties to a noncore proceeding have not consented to the authority of the bankruptcy court, the court is authorized only to “hear” the matter, but not to “determine” it. See 28 U.S.C. § 157(c)(1). In these noncore proceedings, the bankruptcy court makes factual and legal recommendations to the district court, who enters the final order in the proceeding after reviewing these recommendations de novo. See *id.* For a more detailed discussion of the limited jurisdiction of non-Article III bankruptcy courts, see Susan Block-Lieb, *The Cost of a Non-Article III Bankruptcy Court System*, 72 AM. BANKR. L.J. 498 (1998).

18. See U.S. CONST. art. III, § 1 (requiring that “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish”); *id.* § 1, cl. 1 (requiring that judges of federal courts vested by Congress with “judicial Power of the United States” shall hold their offices “during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office”).

federal question jurisdiction, encompassing not only all proceedings “arising under” the Bankruptcy Code but also those “arising in” or “related to” a federal bankruptcy case.<sup>19</sup> Often, these arising in and related to proceedings look solely to state law for their resolution. Because it is difficult to characterize arising in and related to bankruptcy jurisdiction as a variant of federal question jurisdiction, many think of this jurisdiction as a type of supplemental jurisdiction<sup>20</sup>—jurisdiction supplementary to the federal questions at the core of a bankruptcy case.<sup>21</sup> On the other hand, bankruptcy jurisdiction is narrower than either diversity or federal question jurisdiction because it is defined according to a limited functional purpose—the expeditious resolution of bankruptcy cases. To some extent, the institutional and qualitative differences between bankruptcy jurisdiction and other grants of federal jurisdiction justify distinct abstention doctrines. When the differences among the federal grants of jurisdiction do not support distinct rules for abstention, however, there is good reason to wonder whether the distinctions should continue.

Parts I and II of this Article provide background discussions. Part I discusses the abstention doctrines applied outside the bankruptcy context. Part II describes the doctrines governing abstention from bankruptcy jurisdiction. Because the development of the bankruptcy abstention doctrines is complicated, Part II proceeds chronologically, beginning with the Supreme Court’s decision in *Thompson v. Magnolia Petroleum Co.*,<sup>22</sup> and concluding with a discussion of case law interpreting the current permissive bankruptcy abstention provision, 28 U.S.C. § 1334(c)(1), which was enacted with the 1984 amendments to the Bankruptcy Code. Relying on this background material, Part III contends that section 1334(c)(1) should be construed to incorporate both the bankruptcy and nonbankruptcy abstention doctrines. Parts IV, V and VI consider the contours of bankruptcy abstention in light of

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19. Compare 28 U.S.C. § 1334(b) (1994) (bankruptcy jurisdiction), with 28 U.S.C. § 1331 (federal question jurisdiction).

20. The power to adjudicate jurisdictionally insufficient state law claims or proceedings factually related to jurisdictionally sufficient claims or proceedings refers to the doctrine of supplemental jurisdiction. Supplemental jurisdiction is the term currently used to describe the doctrines of ancillary and pendent jurisdiction. See, e.g., Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 ARIZ. ST. L.J. 849, 852 (1992).

21. See John T. Cross, *Congressional Power to Extend Federal Jurisdiction to Disputes Outside Article III: A Critical Analysis from the Perspective of Bankruptcy*, 87 N.W. U. L. REV. 1188, 1251 (1993) (describing related to proceedings as “logically related to the federal cause of action in bankruptcy,” thus, forming “part of a single federal bankruptcy ‘case’ for purposes of Article III”); Susan Block-Lieb, *The Case Against Supplemental Bankruptcy Jurisdiction: A Constitutional, Statutory, and Policy Analysis*, 62 FORDHAM L. REV. 721, 779-84 (1994) (agreeing that “[r]elated to” proceedings can also be viewed as a form of supplemental jurisdiction”).

22. 309 U.S. 478, 481 (1940).

the institutional and qualitative differences between bankruptcy jurisdiction and other grants of federal jurisdiction. Part IV focuses on the constitutional distinctions between the judicial authority of non-Article III bankruptcy courts and Article III district courts, and concludes that there is no constitutional basis for the substantially distinct grounds for abstention from bankruptcy jurisdiction and from other grants of federal jurisdiction. Part V considers whether the scope of the permissive bankruptcy abstention provision should differ depending upon whether arising in and related to proceedings are best characterized as a form of federal question or supplemental jurisdiction. It contends that, no matter how bankruptcy jurisdiction over proceedings arising under state law is categorized, questions regarding the scope of section 1334(c)(1) are questions of statutory construction. Read as such, the permissive bankruptcy abstention provision should not be construed to adopt distinct standards for abstention from different sorts of bankruptcy proceedings. Part VI turns to the functional purposes of the broad grant of bankruptcy jurisdiction—the expeditious resolution of bankruptcy cases. Although Congress generally understood the consolidation of all bankruptcy jurisdiction in a single federal forum as the best means of accomplishing this bankruptcy goal of expeditiousness, there may be circumstances in which efficiency in administration is better accomplished through a delegation of judicial duties. Only in these limited circumstances, however, should the functional distinction between bankruptcy and district courts justify a broader abstention doctrine.

### I. NONBANKRUPTCY ABSTENTION

The Supreme Court recognizes three circumstances in which it is appropriate for district courts to abstain from exercising federal jurisdiction:<sup>23</sup>

(1) abstention under the *Pullman* doctrine to avoid reaching a federal constitutional question when the cause of action may be decided through resolution of unsettled issues of state law; (2) abstention under *Burford* and

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23. Courts and commentators differ on how to count the number of abstention doctrines. See WRIGHT, *supra* note 15, at 323 n.3 (“The Supreme Court, the lower courts, and the commentators differ on how many abstention doctrines there are. Respectable support can be found for classifying the cases into two, three, four, or five categories. The number is of little significance, since the division is mere organizational convenience.”). To a large extent, this difference of opinion exists because there exists a great deal of overlap in these abstention doctrines. See *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 n.9 (1987) (“The various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes.”). *But see* *New Orleans Public Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 358 (1989) (noting that “the policy considerations supporting *Burford* and *Younger* are sufficiently distinct to justify independent analyses”).

related doctrines to avoid unnecessary conflict with the administration by a state of its local affairs; (3) abstention under the *Colorado River* doctrine to avoid duplicative litigation in state and federal courts. Absent these “exceptional circumstances,” the Court has not sanctioned abstention solely to permit state courts to resolve questions of unsettled state law. Abstention is distinct from the discretion of a federal district court to decline to exercise supplemental jurisdiction over state law claims related to claims over which the court has diversity or federal question jurisdiction. Concerning the latter, district courts have far greater discretion to defer to state court resolution of unsettled issues of state law.

#### A. Pullman Abstention

In *Railroad Commission v. Pullman Co.*,<sup>24</sup> the Supreme Court held that abstention is permitted when a claim that state action violates the United States Constitution is made in a federal district court, but the federal constitutional issue may be avoided through resolution of issues of unsettled state law.<sup>25</sup> There, Pullman Company sought to enjoin enforcement of an order of the Texas Railroad Commission on both federal and state law grounds. It asserted that the order violated the Fourteenth Amendment, and, in the alternative, that the Commission was not authorized under Texas law to issue the order in question. The district court had federal question jurisdiction to decide the constitutional issue,<sup>26</sup> and supplemental jurisdiction to decide the issue of state law.<sup>27</sup> Nonetheless, a unanimous Court stated,

In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication. . . . The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication.<sup>28</sup>

*Pullman* abstention is only appropriate when resolution of the state law issue might require considering whether the state action violates the Constitution.<sup>29</sup> It should only be invoked where the state law is “fairly subject

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24. 312 U.S. 496, 500 (1941).

25. See WRIGHT, *supra* note 15, at 324.

26. See 28 U.S.C. § 1331 (1994) (granting federal question jurisdiction).

27. See *Siler v. Louisville & Nashville R.R.*, 213 U.S. 175 (1909). Thus, the Court in *Pullman* both abstained from the federal question jurisdiction and declined to exercise its supplemental jurisdiction over the state law claim.

28. *Pullman*, 312 U.S. at 500.

29. See WRIGHT, *supra* note 15, at 325 (noting that *Pullman* abstention is inappropriate “if the



to an interpretation which will render unnecessary or substantially modify the federal constitutional question."<sup>30</sup> Moreover, *Pullman* abstention should not be ordered if the state statute is unambiguous, or if state courts have already authoritatively construed its provisions.<sup>31</sup> In *Pullman*, the Supreme Court characterized the state law at issue as "far from clear."<sup>32</sup>

The Supreme Court in *Pullman* did not authorize the dismissal of the federal action. Instead, it ordered the district court to abstain from deciding the federal constitutional question but to retain jurisdiction until the question of state law was resolved.<sup>33</sup> As a result, *Pullman* abstention is often criticized as a time consuming and expensive means of preserving comity with state courts.<sup>34</sup> In one case, the Supreme Court indicated that it would not ignore the fact that *Pullman* "abstention operates to require piecemeal adjudication in many courts . . . thereby delaying ultimate adjudication on the merits for an undue length of time," and held that, as a result, "special circumstances" are required to justify an application of the *Pullman* doctrine.<sup>35</sup>

### B. *Burford Abstention*

*Burford v. Sun Oil Co.*<sup>36</sup> is generally cited for the proposition that abstention is appropriate "to avoid needless conflict with the administration by a state of its own affairs."<sup>37</sup> In *Burford*, the Supreme Court held that a

constitutional issue would not be avoided or changed no matter now the [state] statute is construed").

30. *Harman v. Forsenius*, 380 U.S. 528, 534-35 (1965), *quoted in* *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 306 (1979).

31. *See* WRIGHT, *supra* note 15, at 325 (noting that *Pullman* abstention will not be ordered "if the state law is clear on its face, or if its meaning has already been authoritatively decided by the state courts").

32. *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 499 (1941).

33. *See id.* at 500.

34. *See* WRIGHT, *supra* note 15, at 325-26 ("The price of *Pullman*-type abstention is not cheap. In a number of well-known cases it has led to delays of many years before the case was finally decided on its merits or limped to an inconclusive end. This delay and expense can only be justified as the price that must be paid to satisfy the exigent demands of federalism and the vital policy of judicial review that dictates against unnecessary resolution of a federal constitutional issue.").

35. *Baggett v. Bullitt*, 377 U.S. 360, 378-79 (1964); *see also* *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 140 & n.3 (1970) (upholding decision not to abstain from resolving constitutionality of narrow and specific—although ambiguous—state statute because any delay in settling issue would have resulted in substantial economic losses).

36. 319 U.S. 315 (1943).

37. WRIGHT, *supra* note 15, at 328 (but noting that "neither this nor any other attempt at defining the class of cases in which this type of abstention is proper is very precise"); *see also* *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 361 (1989) (summarizing *Burford* abstention doctrine as applying "when there are 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar'" or "where the 'exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public

federal district court should have dismissed a suit attacking the validity of an order of the Texas Railroad Commission granting Burford permission “to drill four wells on a small plot of land in the East Texas oil field.”<sup>38</sup> The court deemed abstention appropriate because it found the proration of gas and oil and the regulation of the gas and oil industry to involve “basic problems of Texas policy,” such that “equitable discretion should be exercised to give the Texas courts the first opportunity to consider them.”<sup>39</sup> Because it found state procedures “expeditious and adequate,” and federal intervention potentially “dangerous” to the success of the state’s regulatory scheme, the Court concluded that “a sound respect for the independence of state action requires the federal equity court to stay its hand.”<sup>40</sup>

The Supreme Court has applied the *Burford* doctrine to permit abstention when the state law at issue did not involve the state regulation of an industry or practice. For example, in *Louisiana Power & Light Co. v. City of Thibodaux*,<sup>41</sup> the Court upheld a district court’s abstention in a diversity case that questioned the propriety of condemnation under an unclear state statute.<sup>42</sup> Similarly, the Court in *Kaiser Steel Corp. v. W.S. Ranch Co.*,<sup>43</sup> ordered the district court to abstain so that a state court could decide a question of state water law that was both novel and of vital concern to New Mexico.

In other instances, the Court has authorized *Burford*-type abstention to permit state courts to resolve issues viewed as peculiarly local in their effect, although the state law at issue was not unsettled. For example, in *Ankenbrandt v. Richards*,<sup>44</sup> the Court affirmed in dicta the so-called

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concern”); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1975) (same).

38. *Burford*, 319 U.S. at 316-17. Jurisdiction over the cause of action was based both on diversity of citizenship and an allegation that the order denied Sun Oil Company due process of law. *See id.* at 317.

39. *Id.* at 332.

40. *Id.* at 333-34. The Court stated:

The State provides a unified method for the formation of policy and determination of cases by the Commission and by the state courts. The judicial review of the Commission’s decisions in the state courts is expeditious and adequate. Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts. On the other hand, if the state procedure is followed from the Commission to the State Supreme Court, ultimate review of the federal questions is fully preserved here.

*Id.*

41. 360 U.S. 25 (1959).

42. *See id.* at 30-31. *But see* *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185 (1959) (reversing the district court’s abstention in a diversity action questioning the propriety of condemnation under a state statute regarded by Supreme Court as clear).

43. 391 U.S. 593 (1968).

44. 504 U.S. 689 (1992).

“domestic relations exception” to federal jurisdiction, agreeing that district courts should not interfere with the jurisdiction of a state court to grant a divorce, set and enforce awards of alimony or child support, and determine paternity.<sup>45</sup> The Court has also protected the jurisdiction of state courts over local matters such as nuisance,<sup>46</sup> state and local taxation,<sup>47</sup> and criminal actions brought by state or local officials.<sup>48</sup>

Whether application of the *Burford* doctrine authorizes the district court to dismiss or remand, or merely to stay, the federal action depends, in part, on the nature of the relief sought in the federal action. Where equitable relief is requested, the district court can, in exceptional circumstances, abstain from exercising its jurisdiction by either staying the federal action, by remanding the federal action to the state courts or by dismissing the federal action in favor of a pending state suit. Where purely legal damages are requested, however, the abstaining federal court can only “enter a stay order that postpones adjudication of the dispute, not . . . dismiss the federal suit altogether.”<sup>49</sup>

### C. Colorado River *Abstention*

In *Colorado River Water Conservation District v. United States*,<sup>50</sup> the Supreme Court upheld the dismissal of a federal action in favor of a pending action in state court. In reaching this conclusion, the Court recognized that district courts generally should not stay or dismiss federal actions merely because a similar action is pending before a state court.<sup>51</sup> It, nonetheless, conceded that dismissal in favor of a pending state action is appropriate in

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45. *See id.* at 694-95.

46. *See Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) (permitting abstention from federal jurisdiction attacking state nuisance proceedings that sought closure of place exhibiting obscene films; nuisance action found antecedent to criminal prosecution).

47. *See Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943) (permitting abstention from federal action questioning collection of state tax receipts); *Stratton v. St. Louis Southwestern Ry.*, 284 U.S. 530 (1932) (holding that district court did not have jurisdiction as court of equity because legal remedy was available under state law); *Mathews v. Rodgers*, 284 U.S. 521, 526 (1932) (stating that the remedy is in the state court unless a federal question is involved or the essential elements of federal jurisdiction exist).

48. *See Younger v. Harris*, 401 U.S. 37 (1971) (requiring abstention where federal jurisdiction invoked to restrain continuance of state criminal proceeding, absent showing of bad faith, harassment or patently invalid state statute); *Douglas v. City of Jeannette*, 319 U.S. 157 (1943).

49. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 719 (1996).

50. 424 U.S. 800 (1976).

51. *See id.* at 818 (stating that “the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention”).

“exceptional cases.”<sup>52</sup> The Court viewed the case before it as one of those exceptional cases, finding a clearly evinced federal interest in avoiding “piecemeal adjudication of water rights”<sup>53</sup>—a policy that it viewed as closely related to the policy of deferring to the court that first acquires possession of disputed property.<sup>54</sup> Moreover, it viewed this interest in a unified proceeding to determine the allocation of water rights as overriding federal jurisdictional interests, particularly in light of a federal statute permitting concurrent jurisdiction in state and federal courts over controversies involving federal water rights.<sup>55</sup> These, and other factors, were found to favor dismissal of the federal action.<sup>56</sup>

In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,<sup>57</sup> the Court reiterated and clarified<sup>58</sup> its statement that abstention in deference of concurrent state court proceedings should occur only in exceptional circumstances. The hospital commenced an action in state court seeking a declaration that it owed nothing to Mercury Construction and that, by failing timely to demand arbitration, Mercury had waived its contractual right to seek arbitration of the dispute. Within weeks, Mercury commenced an action in federal court to compel arbitration under section 4 of the United States Arbitration Act. Affirming the Fourth Circuit’s reversal of the district court’s stay of the federal proceeding pending resolution of the suit before the state court, the Supreme Court concluded that, unlike *Colorado River*, there were

52. *Id.* In describing these exceptional circumstances, the Court identified several important factors:

It has been held, for example, that the court first assuming jurisdiction over property may exercise that jurisdiction to the exclusion of other courts. . . . In assessing the appropriateness of dismissal in the event of an exercise of concurrent jurisdiction, a federal court may also consider such factors as the inconvenience of the federal forum; the desirability of avoiding piecemeal litigation; and the order in which jurisdiction was obtained by the concurrent forums.

*Id.* (citations omitted). The court continued, noting that no single factor is determinative and that “[o]nly the clearest of justifications will warrant dismissal.” *Id.* at 819.

53. *Id.* at 819; see also 43 U.S.C. § 666 (1994) (granting “consent to join the United States as defendant in . . . suit[s],” inter alia, to “adjudicat[e] rights to use the water of a river system,” where the United States owns or “is in the process of acquiring [such] water rights”).

54. See *Colorado River*, 424 U.S. at 819.

55. See *id.*

56. See *id.* at 820 (also finding significant that federal action had not progressed beyond filing of complaint, that state water rights were also involved in the dispute, that 300 miles separated the federal and state courts with concurrent jurisdiction and that the federal government was a party to the state court proceeding).

57. 460 U.S. 1 (1983).

58. *But see* *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978) (reversing writ of mandamus, in a divided opinion, and ordering district court to proceed immediately with concurrent federal action); WRIGHT, *supra* note 15, at 337 (describing *Will* as “mudd[ying]” the exceptional circumstances standard set forth in *Colorado River*).

no exceptional circumstances to justify abstention in this case.<sup>59</sup> Most importantly, the Court noted that federal law would govern whether Mercury had waived its right to arbitration or not, and stated that “the presence of federal-law issues must always be a major consideration weighing against surrender.”<sup>60</sup> It also viewed “the probable inadequacy of the state-court proceeding to protect Mercury’s rights” as militating against abstention in this instance.<sup>61</sup>

The Supreme Court recently held that the exceptional circumstances standard, first articulated in *Colorado River* and later applied in *Moses H. Cone Memorial Hospital*, did not govern a district court’s decision to stay a federal declaratory judgment action during the pendency of a parallel state court action. Instead, in *Wilton v. Seven Falls Co.*,<sup>62</sup> the Court held that this determination was within the discretion of the federal district court.<sup>63</sup> In reaching this decision, the Court relied on its earlier holding in *Brillhart v. Excess Insurance Co.*,<sup>64</sup> and the language of the Federal Declaratory Judgments Act.<sup>65</sup> The Court concluded that “[i]n the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration.”<sup>66</sup>

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59. See *Moses H. Cone Memorial Hosp.*, 460 U.S. at 14.

60. *Id.* at 26.

61. *Id.*

62. 515 U.S. 277 (1995).

63. See *id.* at 286.

64. 316 U.S. 491 (1942). The Court in *Wilton* felt the need to reaffirm its prior holding in *Brillhart* because the validity and scope of this earlier decision had been confused and questioned by dicta in the Court’s decisions in *Colorado River*, *Will* and *Moses H. Cone Memorial Hospital*. See *Wilton*, 515 U.S. at 283-86 (discussing this confusion).

65. 28 U.S.C. § 2201(a) (1988). The Court in *Wilton* stated:

Since its inception, the Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants. On its face, the statute provides that a court “may declare the rights and other legal relations of any interested party seeking such a declaration.” . . . 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.

*Wilton*, 515 U.S. at 286-87 (citations omitted).

66. *Wilton*, 515 U.S. at 288. But see *Youell v. Exxon Corp.*, 74 F.3d 373 (2d Cir. 1996) (applying *Wilton*, on remand from Supreme Court, and reaffirming its conclusion that district court had abused its discretion in staying this federal declaratory judgment action pending resolution of parallel state court proceeding because, distinct from *Wilton*, this declaratory judgment action raised “novel issues of federal admiralty law” better resolved in federal forum); *NYLife Distrib., Inc. v. The Adherence Group, Inc.*, 72 F.3d 371 (3d Cir. 1995) (extending *Wilton*’s discretionary standard to district court’s decision to dismiss federal interpleader action in favor of parallel interpleader action pending in state court).

#### D. Unsettled Issues of State Law

Unsettled issues of state law in a diversity action are not, by themselves, a sufficient justification for abstention, because the grant of diversity jurisdiction obligates the federal district court to decide issues of state law as though it were a state court.<sup>67</sup> The Supreme Court first articulated this general rule in *Meredith v. City of Winter Haven*<sup>68</sup> and has cited it with approval numerous times since.<sup>69</sup> Notwithstanding this general rule, the Supreme Court has regularly endorsed the use of certification procedures that many states have established by statute.<sup>70</sup> For example, in *Lehman Bros. v. Schein*,<sup>71</sup> the Court vacated a decision of the Second Circuit so that the court of appeals might certify an unsettled issue of Florida law to the Florida Supreme Court.<sup>72</sup>

Where federal jurisdiction derives, not from the parties' diverse citizenship, but instead from a federal question, the existence of unsettled issues of state law in the federal action is, on its own, insufficient grounds for abstention. However, if resolution of these unsettled issues of state law

67. See *Angel v. Bullington*, 330 U.S. 183, 187 (1947) ("For purposes of diversity jurisdiction, a federal court is 'in effect, only another court of the State.'").

68. 320 U.S. 228 (1943). In *Meredith*, Chief Justice Stone broadly announced:

In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its nonexercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment. When such exceptional circumstances are not present, denial of that opportunity by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act.

*Id.* at 234-35 (citations omitted). The Court in *Meredith* indicated that only upon a showing of exceptional circumstances would abstention in favor of state court resolution of unsettled issues of state law be warranted in a diversity action. It found no exceptional circumstances justifying abstention where unsettled issues of state law were raised in a diversity action. See *id.* at 235-38.

69. See, e.g., *McNeese v. Board of Educ.*, 373 U.S. 668, 673 n.5 (1963) (citing *Meredith*, and stating that "where Congress creates a head of federal jurisdiction which entails a responsibility to adjudicate the claim on the basis of state law, viz., diversity of citizenship, . . . we hold that difficulties and perplexities of state law are no reason for referral of the problem to the state court"); *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 816 (1976) (citing *Meredith* for the proposition that "the mere potential for conflict in the results of adjudications, does not, without more, warrant staying exercise of federal jurisdiction").

70. For a discussion of these statutes, see 17A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4248 nn.30-33 (2d ed. 1988).

71. 416 U.S. 386 (1974).

72. See *id.* at 389-92. The Court in *Lehman Bros.* stated:

We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory. It does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism. Its use in a given case rests in the sound discretion of the federal court.

*Id.* at 390-91 (footnote omitted).

would preclude reaching a federal constitutional question, *Pullman* abstention may be appropriate. Moreover, where federal bankruptcy jurisdiction extends to claims involving unsettled issues of state law, the Supreme Court has held in *Thompson v. Magnolia Petroleum Co.*<sup>73</sup> that a bankruptcy court should, in exceptional circumstances, abstain in favor of state court resolution of these issues.<sup>74</sup> The Supreme Court's decisions on abstention from bankruptcy jurisdiction are complex and somewhat enigmatic; their discussion is left for Part II. Nonetheless, although the Supreme Court has not clearly defined the contours of its bankruptcy abstention doctrine, it also has not indicated in this case law an intention to deviate from the general rule that the mere presence of unsettled issues of state law does not alone justify an abdication of federal jurisdiction.

#### *E. Discretion to Decline Supplemental Jurisdiction*

Federal courts defer to state courts for the resolution of issues of state law on grounds other than abstention. Where the federal district court has neither federal question nor diversity jurisdiction of state law claims, but where the state law claims arise out of a "common nucleus of operative fact" with those over which it does have federal question or diversity jurisdiction,<sup>75</sup> then the district court may in its discretion exercise supplemental jurisdiction over these otherwise jurisdictionally insufficient claims.<sup>76</sup> But because supplemental jurisdiction has traditionally been viewed as discretionary with the federal court, it is also generally accepted that the district court may decline to exercise this discretionary supplemental jurisdiction over the state law claims.

For example, in *United Mine Workers v. Gibbs*,<sup>77</sup> the Supreme Court noted that the power to exercise supplemental jurisdiction over related state law claims "need not be exercised in every case in which it is found to exist."<sup>78</sup>

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73. 309 U.S. 478 (1940).

74. *See id.* at 483.

75. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

76. *See id.* The Court in *Gibbs* stated:

The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. . . . The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole.

*Id.* (citation omitted).

77. 383 U.S. 715 (1966).

78. *Id.* at 726. The Court stated:

[I]f the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well. Similarly, if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals. There may, on the other hand, be situations in which the state claim is so closely tied to questions of federal policy that the argument for exercise of pendent jurisdiction is particularly strong. . . . Finally, there may be reasons independent of jurisdictional considerations, such as the likelihood of jury confusion in treating divergent legal theories of relief, that would justify separating state and federal claims for trial. If so, jurisdiction should ordinarily be refused.<sup>79</sup>

With its enactment of the Judicial Improvements Act of 1990, Congress codified the judicially-created doctrines of ancillary and pendent jurisdiction, which together it referred to as "supplemental jurisdiction."<sup>80</sup> Section 1367(a) provides for "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," and legislative history indicates that this reference to the constitutional limits of the doctrine was intended to codify "the scope of supplemental jurisdiction first articulated by the Supreme Court in *United Mine Workers v. Gibbs*."<sup>81</sup> Section 1367(c) goes on to codify, consistent with

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It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them. Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.

*Id.*

79. *Id.* at 726-27 (citations omitted); accord *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988). In *Carnegie-Mellon University*, the Court stated:

Under *Gibbs*, a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving pendent state law claims. . . . As articulated by *Gibbs*, the doctrine of pendent jurisdiction thus is a doctrine of flexibility, designed to allow courts to deal with cases involving pendent claims in the manner that most sensibly accommodates a range of concerns and values.

*Id.*

80. 28 U.S.C. § 1367 (Supp. IV. 1992).

81. H.R. Rep. No. 101-734, at 28-29 & n.15 (1990), reprinted in 1990 U.S.C.A.N. 6860, 6874-

75.



*Gibbs*, the discretionary nature of an exercise of supplemental jurisdiction. This section permits district courts to “decline to exercise supplemental jurisdiction over a claim”<sup>82</sup> if:

- (1) the claim raises a novel or complex issue of State law,
- (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
- (3) the district court has dismissed all claims over which it has original jurisdiction, or
- (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.<sup>83</sup>

Section 1367(c) has been interpreted broadly, consistent with the principles set forth in *Gibbs*.<sup>84</sup>

The ability of a district court to decline to exercise its supplemental jurisdiction is distinct from the abstention doctrines discussed above. A determination whether to exercise supplemental jurisdiction is purely a matter for the discretion of the court, whereas “district courts may be obligated not to decide state law claims (or to stay their adjudication) where one of the abstention doctrines . . . applies.”<sup>85</sup>

## II. ABSTENTION FROM BANKRUPTCY JURISDICTION

### A. Bankruptcy Abstention Under the Former Bankruptcy Act of 1898

Any discussion of the doctrine governing abstention from bankruptcy jurisdiction under the Bankruptcy Act of 1898 must begin with the Supreme Court’s decision in *Thompson v. Magnolia Petroleum Co.*<sup>86</sup> It would be deceptive to end the discussion with a study of this decision because bankruptcy courts more often deferred to their state court brethren under the 1898 Bankruptcy Act than just in the narrow circumstances identified in *Thompson*.

#### 1. *Thompson v. Magnolia Petroleum Co.*

The Supreme Court’s decision in *Thompson* is readily distinguishable

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82. 28 U.S.C. § 1367(c).

83. 28 U.S.C. § 1367(c).

84. See, e.g., *City of Chicago v. Int’l College of Surgeons*, 118 S.Ct. 523, 533 (1997) (noting that section 1367(c) “codifies” principles initially articulated in cases such as *Gibbs* and *Cohill*).

85. *Id.*

86. 309 U.S. 478 (1940).

from the Supreme Court abstention decisions discussed above on two grounds: First, *Thompson* is one of the few Supreme Court decisions to address the propriety of abstaining from an exercise of federal *bankruptcy* jurisdiction.<sup>87</sup> Second, although *Railroad Commission v. Pullman* generally is accepted as having initiated the doctrine of abstention, *Thompson* actually predates *Pullman*.

In *Thompson*, a rich oil field was discovered in an area bisected by a right of way granted to the Missouri-Illinois Railroad Company. Guy A. Thompson, the trustee for the reorganizing railroad, claimed the oil as property of the estate, arguing that the right of way granted to the railroad a fee simple in the narrow strip of land beneath the tracks.<sup>88</sup> Magnolia Petroleum and others claimed the oil, contending that the right of way had granted a mere easement to the railroad.<sup>89</sup> Illinois intermediate appellate courts had divided on the issue of whether a right of way conveyed to a railroad a fee simple or easement in the land beneath the tracks.<sup>90</sup>

The Supreme Court held that the district court sitting in bankruptcy had “summary” bankruptcy jurisdiction over the oil,<sup>91</sup> reasoning that this jurisdiction depended not on ownership, but on the trustee’s possession of the oil as of the commencement of the case.<sup>92</sup> Because the trustee was in possession of the right of way under a claim of fee ownership, he was held to

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87. Only a few other Supreme Court decisions address abstention from bankruptcy jurisdiction. See *Nathanson v. NLRB*, 344 U.S. 25 (1952) (upholding bankruptcy court’s deference to federal administrative agency); *Order of Ry. Conductors v. Pitney*, 326 U.S. 561 (1946) (applying *Burford* abstention doctrine to bankruptcy context); *Mangus v. Miller*, 317 U.S. 178, 185 (1942) (indicating in dicta that administration of interest of one of two joint tenants in land contract in farm reorganization proceeding was not “insurmountable” because bankruptcy court might defer to state court resolution of difficult issues of land finance law).

88. See *Thompson*, 309 U.S. at 479.

89. See *id.*

90. See *id.* at 484.

91. Under the former Bankruptcy Act of 1898, bankruptcy referees (or bankruptcy courts, as they were called after 1972) exercised limited summary jurisdiction of bankruptcy litigation. At bottom, summary jurisdiction was a form of in rem jurisdiction—jurisdiction over the res that constituted property of the debtor’s estate in bankruptcy. See, e.g., *Ex Parte Baldwin*, 291 U.S. 610 (1934). Courts construed the 1898 Act to grant to bankruptcy courts summary jurisdiction over (1) matters involving the administration of the bankruptcy case, (2) disputes involving property in the actual or constructive possession of the bankruptcy court, (3) proceedings in which the parties had consented to bankruptcy court jurisdiction (express, or impliedly by failing to object in time, or impliedly by filing a proof of claim or otherwise similarly participating in the bankruptcy case) and (4) a few limited matters over which the statute expressly granted jurisdiction to the bankruptcy courts. See, e.g., 1 COLLIER ON BANKRUPTCY §§ 2.01-2.03[2] (Lawrence P. King ed., 15th ed. 1998). In all other instances, bankruptcy-related disputes were litigated in federal court, if there was federal jurisdiction, or state court, if there was not. See *id.* § 3.01[1][b][iv].

92. See *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 482 (1940) (“[P]ossession of those lands under claim of fee simple ownership by the railroad and later by the trustee was an adequate basis for the District Court’s summary jurisdiction.”).

have been in possession of the oil. Although the Supreme Court found summary bankruptcy jurisdiction, it concluded that the lower court had abused its discretion by exercising this jurisdiction.<sup>93</sup> Rather than attempt to resolve this unsettled issue of state law, the Court held that the district court should have abstained in favor of a state court resolution of the issue:

A court of bankruptcy has exclusive and nondelegable control over [the] administration of an estate in its possession. 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 involving unsettled questions of state property law and arising in the course of bankruptcy administration.<sup>94</sup>

*Thompson*, although a bankruptcy decision, can be understood as a forerunner of the *Pullman* abstention doctrine.<sup>95</sup> *Thompson* holds that district courts should abstain from exercising their federal bankruptcy jurisdiction where resolution of an unsettled question of state property law would obviate that jurisdiction. Resolution of the unsettled state property law at issue in *Thompson* would have rendered the exercise of federal bankruptcy jurisdiction over the disputed oil unnecessary because summary bankruptcy jurisdiction was a form of in rem jurisdiction. If, under state law, the trustee in *Thompson* had no right to possess the oil, then there also was no summary

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93. Contemporary commentary was most critical of this aspect of the Court's holding in *Thompson*, since in earlier cases courts had viewed any surrender of summary jurisdiction as discretionary with the bankruptcy court upon petition for leave to institute suit in another court. See Recent Cases, *Federal Jurisdiction—Effect of Undetermined State Law*, 7 U. CHI. L. REV. 727, 728 (1940) ("That the instant case marks a departure from a former bankruptcy practice can hardly be doubted. The holding that the bankruptcy court, without ever having been petitioned by one of the parties for leave to institute suit in another court, must relinquish a discretionary jurisdiction in order to permit the controversy to be governed by an as yet undetermined state law, is without precedent."); Recent Cases, *Federal Courts—Questions of State Law—Bankruptcy Court Ordered to Direct Trustee to Proceed in State Court for Determination of Unsettled Question of State Law*, 53 HARV. L. REV. 1394, 1395 (1940) [hereinafter *Federal Courts*] ("By compelling the bankruptcy court to take the initiative in divesting itself of jurisdiction to determine this controversy, the Court seems to have outrun even the most far-reaching implications of its previous decisions.").

94. *Thompson*, 309 U.S. at 483. The Court concluded that abstention was appropriate:

Unless the matter is referred to the State courts, upon subsequent decision by the Supreme Court of Illinois it may appear that rights in local property of parties to the proceeding have—by the accident of federal jurisdiction—been determined contrary to the law of the State, which in such matters is supreme.

*Id.* at 484.

95. See *M/V Tungus v. Skovgaard*, 358 U.S. 588, 596 (1959) (describing *Thompson* as variation of *Pullman* abstention); *Propper v. Clark*, 337 U.S. 472, 489-92 (1949) (comparing *Pullman* abstention to *Thompson* abstention doctrines).

jurisdiction over the disputed oil.<sup>96</sup> The *Pullman* doctrine similarly provides that district courts should abstain from exercising their federal question jurisdiction where resolution of an unsettled question of state law would avoid the need to determine whether a state practice or procedure violates the Constitution of the United States.

Whether *Thompson* should be construed this narrowly is an open question. The Supreme Court has relied on *Thompson* in only a handful of cases, and in none of these decisions did it elaborate on the contours of the judicially-created permissive bankruptcy abstention doctrine. *Mangus v. Miller*<sup>97</sup> is the only one of these decisions that even arguably involves bankruptcy abstention.<sup>98</sup>

In *Mangus*, the debtor and his wife purchased a farm as joint tenants under a land contract. In default several years later, the husband alone (as he alone appeared to be an eligible farmer) filed a petition for farm reorganization under section 75 of the former Bankruptcy Act of 1898. The effect of this petition was to stay the forfeiture action pending against the debtor's interest in the joint tenancy, but not to stay it as to the interest of the nondebtor wife. Following the forfeiture of the nondebtor wife's joint interest in the land contract, the lender-seller brought an action challenging the jurisdiction of the bankruptcy court to administer the affected land as property of the debtor's estate in bankruptcy. The court of appeals agreed, dismissing the petition because it viewed the difficulties of administering the debtor's interest in farm reorganization proceedings as "insurmountable." The Supreme Court reversed.<sup>99</sup>

We perceive no insurmountable obstacle, if the bankruptcy court is so

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96. That the unsettled question of state law should pertain to state property law follows from the nature of the grant of bankruptcy jurisdiction in the Bankruptcy Act of 1898—the debtor's property interests determined the scope of summary bankruptcy jurisdiction. Federal courts were said to have summary jurisdiction over all property in the actual or constructive possession of the trustee in bankruptcy. If the trustee was in possession of the property, the court had summary jurisdiction to determine whether the property was property of the bankruptcy estate. Ownership was important to this exercise of bankruptcy jurisdiction in that a determination that the debtor's only interest in the property was possessory meant that the property was not property of the estate—because it could not be distributed to creditors, the trustee would abandon it to the true owner.

97. 317 U.S. 178 (1942).

98. Twice the Supreme Court has applied the *Burford* abstention doctrine to the bankruptcy context, citing both *Burford* and *Thompson* in support, but providing no other explanation of its citations. See *supra* note 87. Moreover, on several occasions, the Court cited *Thompson* (along with *Pullman*) to distinguish it from *Meredith*—describing both *Thompson* and *Pullman* as constituting exceptional circumstances justifying abstention in favor of state court resolution of unsettled issues of state law. See, e.g., *Propper v. Clark*, 337 U.S. 472, 489-90 (1949) (discussing Supreme Court precedent distinguishing *Meredith* in dicta).

99. See *Mangus*, 317 U.S. at 184.

advised, to the exercise of its jurisdiction so as to permit the parties to ascertain their respective rights by an appropriate proceeding in the state courts. See *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478. While such practice is to be regarded as exceptional, the circumstances which here suggest it appear to be exceptional.<sup>100</sup>

This discussion is probably best viewed as dictum, in that the Court was not stating that the bankruptcy court was required to defer resolution of these difficult issues of state-land-finance law to the state court. It is telling dictum, however. Decided only two years after *Thompson*, *Mangus* describes the practice of abstaining from an exercise of bankruptcy jurisdiction as requiring "exceptional" justification.<sup>101</sup> The Court in *Mangus* also describes the facts involved in that case as "appear[ing] to be exceptional" on factual grounds similar to those present in *Thompson*.<sup>102</sup> In both cases, state law was substantially unclear on how to define an interest in property; in both cases, clarification of the property interest would have resolved questions regarding the propriety of the bankruptcy court's jurisdiction over the asset.

Supreme Court decisions which generally discuss the appropriateness of abstention to avoid federal court resolution of unsettled issues of state law provide additional support for a narrow construction of *Thompson*. In *Meredith v. City of Winter Park*,<sup>103</sup> the Court rejected the notion that the presence of unresolved state law should form the basis of abstention from an exercise of diversity jurisdiction. Moreover, in subsequent cases, the Supreme Court also generally declined to find that a lower federal court had abused its discretion by deciding theretofore unresolved issues of state law.<sup>104</sup> In upholding these federal court resolutions of state law, the Supreme Court distinguished both *Pullman* and *Thompson* as involving "special circumstances."<sup>105</sup> For example, in *Propper v. Clark*,<sup>106</sup> the Court described

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100. *Id.* at 186.

101. *Id.*

102. *Id.*

103. 320 U.S. 228 (1943).

104. See *M/V Tungus v. Skovgaard*, 358 U.S. 588, 595-96 (1959) (rejection similar suggestion, but dealing with the New Jersey Wrongful Death Act); *Propper v. Clark*, 337 U.S. 472, 489-92 (1949) (rejecting suggestion that judgments should be vacated and case remanded to, and held by, district court, until parties can secure decision from state courts on issue of state law important to resolution of federal action under Trading With Enemies Act).

105. *Propper*, 337 U.S. at 492 (rejecting the suggestion that "a decision in this case in the federal courts should be delayed until the courts of New York have settled the issue of state law" and noting that "submission of special issues [of unresolved state law] is a useful device in judicial administration . . . but in the absence of special circumstances . . . it is not to be used to impede the normal course of action where federal courts have been granted jurisdiction of the controversy" (citations to *Pullman*, *Thompson* and other similar decisions omitted)).

106. 337 U.S. 472 (1949).

the special circumstances involved in these cases, as follows:

[*Thompson v. Magnolia Petroleum Co. and Railroad Commission v. Pullman Co.*] where this Court required submission of single issues, excised from the controversy, to state courts were cases in equity. The discretion of equity as to the terms upon which it would grant its remedies, in the light of our rule to avoid an interpretation of the Federal Constitution unless necessary, was relied upon to justify a departure from normal procedure. In the [*Thompson*] case, we directed the trustee [to] file plenary proceedings to determine title in a state court litigation necessarily complete in itself. . . . Otherwise in sending a fragment of the litigation to a state court, the federal court might find itself blocked by *res judicata*, with the result that the entire federal controversy would be ousted from the federal courts, where it was placed by Congress.<sup>107</sup>

Although *Propper* does not expressly limit abstention under *Thompson* to circumstances under which the resolution of unsettled issues of state law determines the presence or absence of summary bankruptcy jurisdiction, it does limit abstention under this doctrine to circumstances under which state court resolution of unsettled issues would not preclude the bankruptcy court from reaching interrelated federal law issues present in the proceeding. Moreover, *Propper* clearly does not suggest that *Thompson* generally requires abstention from bankruptcy court resolution of unresolved issues of state law.

Under the former Act of 1898, courts of appeals understood the *Thompson* doctrine to be narrow. In general, these courts upheld decisions to abstain from resolving unsettled issues of state property law in bankruptcy where resolution of the state law issue would have obviated the need to exercise summary bankruptcy jurisdiction over the disputed property.<sup>108</sup>

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107. *Id.* at 491-92. Similarly, the Court in *M/V Tungus v. Skovgaard*, 358 U.S. 588, 596 (1959), rejected the argument that

the judgment should be vacated, and the case remanded to the District Court to be held until the parties can secure from the courts of New Jersey a decision upon the controlling and seriously doubtful question of state law, and reasoned that under traditional principles of equitable abstention this Court has often followed such a course for the limited and obviously wise purpose of avoiding unnecessary resolution of constitutional issues. *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496; . . . *Cf. Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478.

*Id.*

108. See *First Nat'l Bank v. Reed*, 306 F.2d 481 (2d Cir. 1962) (concluding that it had "no real idea what [the] Supreme Court of Vermont . . . would hold," reversing district court's conclusions of state property and public utilities law and remanding with instructions to abstain in favor of Vermont state court); *Gramil Weaving Corp. v. Raindeer Fabrics*, 185 F.2d 537 (2d Cir. 1950) (finding

Similarly, courts of appeals affirmed decisions declining to abstain where the state law at issue was not sufficiently unsettled.<sup>109</sup>

## 2. Deference to State Courts Under the 1898 Act

The decisions that cite and discuss *Thompson* do not fully describe the extent to which federal district and bankruptcy courts deferred to state courts in adjudicating bankruptcy cases under the former 1898 Act. Although *Thompson* was viewed as a narrow grounds for abstaining from summary bankruptcy jurisdiction, this does not mean that bankruptcy-related matters were rarely litigated in state courts under the former Bankruptcy Act. On the contrary, under the Act, “[a] bankruptcy court commonly sen[t] its trustee into state courts to have complex questions of local law adjudicated.”<sup>110</sup> However, this deference to state courts did not always involve abstention.

Bankruptcy courts often sent their trustees to state court because summary jurisdiction often did not extend to permit resolution of the state law

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summary jurisdiction over action to determine whether chattel mortgage had attached under Massachusetts law, but concluding that bankruptcy court should decline to exercise this jurisdiction on remand because issue of unsettled state property law was better resolved in pending state court action that would bind all affected parties); see also *Scroggins v. Goldstein, Frazier & Murphy (In re Kaleidoscope, Inc.)*, 25 B.R. 729 (N.D. Ga. 1982) (reversing bankruptcy court’s order to turnover legal files amassed by debtor’s former law firm in the course of its prepetition representation of debtor and related individuals and entities and holding that abstention from summary jurisdiction over files was appropriate because, in pending law suit state court had previously ruled that files merited protection as work product, state court was in best position to resolve unsettled questions under state law as to whether former client or former attorneys held property interest in such files).

109. See *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 654 F.2d 1218 (7th Cir. 1981) (distinguishing *Thompson* on grounds that issue on appeal merely raised problems of factual complexity, and not unsettled questions of state property law); *In re Boston and Maine Corp.*, 596 F.2d 2 (1st Cir. 1979) (concluding that issue of whether track materials were realty or personalty was not such an unsettled question of property law in New Hampshire as to have required federal reorganization court to abstain from determining it); *Kiedan v. Universal C.I.T. Credit Corp. (In re Mohammed)*, 327 F.2d 616 (6th Cir. 1964) (declining to hold that district court should have abstained in favor of state court ruling on issue of perfection of chattel mortgage on grounds that absence of case on point did not render state law unsettled); *White v. Schwartz*, 302 F.2d 916 (D.C. Cir. 1962) (holding that bankruptcy court did not abuse its discretion in determining title to liquor store, although liquor store was in probate, where probate court would not have had jurisdiction to determine title to assets in probate); *Marian Corp. v. Bray*, 235 F.2d 318 (4th Cir. 1956) (concluding that bankruptcy court did not abuse its discretion in denying leave to sue trustee in state court to recover tract of land because there existed no unsettled questions of state law); see also *United Auto., Aircraft & Agric. Implement Workers v. Davis (In re Muskegon Motor Specialties Co.)*, 313 F.2d 841 (6th Cir. 1973), cert. denied, 375 U.S. 832 (1963) (concluding that district court did not abuse its discretion in declining to surrender jurisdiction of employees’ claims for vacation pay although under collective bargaining agreement such claims would have been subject to arbitration agreement).

110. *England v. Louisiana State Bd. of Med. Exam’r*, 375 U.S. 411, 423 (1964) (Douglas, J., concurring).

issues.<sup>111</sup> Summary jurisdiction was a far narrower grant of jurisdiction than that conferred by the current bankruptcy jurisdictional provisions. Under the former Act, if the bankruptcy court did not have summary jurisdiction over an action, the trustee was required to commence a plenary action, either in a federal district court or a state court.<sup>112</sup> And, like all other litigants, the trustee was required to establish federal jurisdiction to commence a plenary action in federal district court.<sup>113</sup> If the action was not between citizens of different states and did not present a federal question, the trustee would have been required to bring the plenary action in state court.<sup>114</sup>

Where the bankruptcy court's summary jurisdiction was questionable, it was said that the court could permissibly decline to exercise that jurisdiction.<sup>115</sup> Where the bankruptcy court's summary jurisdiction would not have permitted it to resolve all the claims between the parties, again, the court had discretion to decline to exercise this jurisdiction over some of the

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111. *See, e.g., Texas v. Donoghue*, 302 U.S. 284 (1937) (concluding that Texas should be permitted to bring suit in state court to obtain confiscation order pertaining to oil that allegedly had been produced or transported unlawfully prepetition, because unlawful production or transportation effected forfeiture of oil under state law and bankruptcy court could not have had summary jurisdiction of forfeited oil). One contemporary commentator noted:

It has been repeatedly affirmed that a bankruptcy court has exclusive jurisdiction to adjudicate all controversies relating to property rightfully in its custody, including questions of title. Assertion of this jurisdiction, however, is discretionary with the lower court which may properly countenance or initiate proceedings in state tribunals to decide rights dependent on local law. And, where such proceedings would not embarrass administration of the bankrupt's estate, refusal to permit them has been condemned as an abuse of discretion.

*Federal Courts, supra* note 93, at 1395 (citations omitted).

112. *See supra* note 91 (defining distinction between summary and plenary bankruptcy jurisdiction).

113. *See id.*

114. *See id.*

115. *See, e.g., Wikle v. Country Life Ins. Co.*, 423 F.2d 151, 154 (9th Cir. 1970) (affirming decision of bankruptcy referee who had declined jurisdiction of action commenced by trustee to quiet title to certain realty when, prior to commencement of bankruptcy case, state court receiver had been appointed for purposes of collecting rents, because receivership constituted sufficient act of control to oust debtor from possession and control of rent and preclude attachment of summary jurisdiction; in alternative, noting that even if referee had summary jurisdiction over rents it was not an abuse of its discretion to decline to exercise this jurisdiction "[w]here the jurisdictional issue is close or where complete relief could not have been awarded among the interested parties"). *See also, for example, In re Maidman*, 466 F.Supp. 278, 284 (S.D.N.Y. 1979), where the court affirmed that portion of bankruptcy court's order deferring to state court construction of lease terms because bankruptcy court did not have summary jurisdiction to dispossess lessee. The court noted, alternatively:

Even if [lessee's] motion for a certificate of contempt were deemed to be a sufficient invocation of the bankruptcy court's jurisdiction to constitute consent to the exercise of summary jurisdiction, the bankruptcy court "may, in the exercise of a proper discretion, decline to exercise (such jurisdiction) if the best interests of the estate and of all interested parties would be better served by permitting an issue to be litigated in a state court."

*Id.* (citations omitted).



parties or some of the claims.<sup>116</sup> Moreover, where the debtor enjoyed no equity in property, it was often said that the court might exercise its discretion and decline to exercise summary jurisdiction over the property because retaining jurisdiction provided no advantage for the bankruptcy estate.<sup>117</sup>

## *B. Bankruptcy Abstention Under the 1978 Bankruptcy Code*

### *1. Legislative History*

In 1978, Congress enacted former 28 U.S.C. § 1471(d), which permitted a “district court or a bankruptcy court” to abstain “in the interest of justice.”<sup>118</sup> Former section 1471(d) was enacted in 1978 as a small part of a larger reform project: the expansion of the jurisdiction of the bankruptcy courts. The 1978 provisions broadly conferred on federal district courts bankruptcy jurisdiction over all civil proceedings arising under the Bankruptcy Code, or arising in or related to a bankruptcy case.<sup>119</sup> The provisions eliminated the summary/plenary distinction that previously governed the limited jurisdiction of bankruptcy courts<sup>120</sup> and permitted untenured bankruptcy courts to exercise the entirety of this broad grant of bankruptcy jurisdiction.<sup>121</sup>

Legislative history<sup>122</sup> indicates that Congress was motivated, both in

116. See, e.g., *United Merchants & Mfr., Inc. v. Union Bank* (*In re United Merchants & Mfr., Inc.*), 3 B.R. 286 (Bankr. S.D.N.Y. 1980) (holding that, although two of six defendants had consented to exercise of summary jurisdiction by bankruptcy court, bankruptcy court should surrender jurisdiction to California state court which would have jurisdiction over all claims against all defendants).

117. See, e.g., *In re Shulte United*, 49 F.2d 264 (2d Cir. 1931) (upholding grant of petitioner’s request for leave to institute foreclosure proceedings in state court on grounds that debtor lacked equity in property on which mortgage was to be foreclosed); *In re Johnson*, 127 F. 618 (D. Nev. 1904) (viewing fact that there was no prospect of an equity for bankruptcy estate as controlling factor in declining to exercise summary jurisdiction over foreclosure action).

118. See 28 U.S.C. § 1471(d) (repealed 1984). Section 1471(d) provided in full:

Subsection (b) or (c)[conferring broad grant of 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 title 11 or arising in or related to a case under title 11. Such abstention, or a decision not to abstain, is not reviewable by appeal or otherwise.

*Id.*

119. 28 U.S.C. § 1471 (b) (repealed 1984).

120. See H.R. REP. NO. 95-595, at 46-49 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6007-10.

121. See 28 U.S.C. § 1471 (c) (repealed 1984).

122. By this reference to legislative history, I reveal that I do not count myself among the “New Textualists.” See William Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990). I count myself in good company. See, e.g., Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992); William D. Popkin, *An “Internal” Critique of Justice Scalia’s Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133 (1992); Nicholas S. Zeppos, *Justice Scalia’s Textualism: The “New” New Legal Process*, 12 CARDOZO L. REV. 1597 (1991);

expansively defining bankruptcy jurisdiction and in broadly delegating this jurisdiction to bankruptcy courts, by an interest in expediting the administration and resolution of bankruptcy cases:

A comprehensive grant of jurisdiction to the bankruptcy courts over all controversies arising out of any bankruptcy or rehabilitation case would greatly diminish the basis for litigation of jurisdictional issues which consumes so much time, money, and energy of the bankruptcy system and of those involved in the administration of debtors' affairs.<sup>123</sup>

By consolidating jurisdiction over all bankruptcy-related litigation in a single bankruptcy forum, Congress evinced an understanding that the division of jurisdiction among state courts and federal district and bankruptcy courts slowed down the administration of bankruptcy cases and made the bankruptcy process more expensive than necessary. In reducing these adjudicative costs, Congress sought to enhance distributions to creditors from bankruptcy estates.

In the midst of this broad expansion of bankruptcy jurisdiction, Congress also enacted former section 1471(d), which authorized "a district court or a bankruptcy court, in the interest of justice" to abstain "from hearing a particular proceeding."<sup>124</sup> The legislative history of former section 1471(d) identifies two purposes for the provision. The House Report explains the

Eskridge, *supra*; Patricia Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277 (1990); George A. Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L.J. 39; Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380. *But see, e.g.*, W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383 (1992); Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231; Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371. Although Justice Antonin Scalia is probably the most famous of these "New Textualists," the Supreme Court has rejected Justice Scalia's position that legislative history is wholly irrelevant to statutory construction. *See Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 610 n.4 (1991). Notwithstanding this rejection, the Court may be less likely to rely on legislative history to support its holding than it was a decade ago. *See, e.g.*, Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH U. L.Q. 351 (1994).

123. H.R. REP. NO. 95-595, at 46 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6007. The House Report states:

H.R. 8200 grants the bankruptcy courts broad and complete jurisdiction over all matters and proceedings that arise in connection with bankruptcy cases... The forum shopping and jurisdictional litigation that have plagued the bankruptcy system, the unfairness to defendants from 'jurisdiction by ambush,' and the dissipation of assets and the expense associated with bifurcated jurisdiction will be eliminated by the jurisdiction proposed by this bill.

H.R. REP. NO. 95-595, at 48-49 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6010.

124. 28 U.S.C. § 1471(d) (repealed 1984).

discretionary bankruptcy abstention provision as follows: “[I]n 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.”<sup>125</sup> It went on to refer to this pre-Code case law in the following terms: “The [discretionary abstention] subsection recognizes the exigencies that arise in such cases as *Thompson v. Magnolia Petroleum*, 309 U.S. 478 (1940), in which it is more appropriate to have a State court hear a particular matter of State law.”<sup>126</sup> The legislative history of former section 1471(d), thus, articulates two distinct purposes for the discretionary bankruptcy abstention provision. First, “to insure that the jurisdiction of the bankruptcy court is exercised only when appropriate to the expeditious disposition of bankruptcy cases”; and, second, to “codif[y] . . . case law relating to the power of abstention,” citing *Thompson v. Magnolia Petroleum Co.* in particular.<sup>127</sup>

## 2. Case Law Interpreting Former Section 1471(d)

Because decisions under former section 1471(d) were not reviewable on appeal,<sup>128</sup> there are no circuit or district court decisions interpreting this provision. Bankruptcy courts generally construed this provision to codify the Supreme Court’s decision in *Thompson v. Magnolia Petroleum Co.*<sup>129</sup>

125. H.R. REP. NO. 95-595, at 51 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6012.

126. H.R. REP. NO. 95-595, at 446 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6401.

127. 309 U.S. 478 (1940). Even if legislative history were ignored, it would be appropriate to consider this pre-Code case law in construing the permissive bankruptcy abstention provision. The Supreme Court has held that the Bankruptcy Code should be construed in a way that is consistent with case law developed under the Bankruptcy Act of 1898 unless the statute on its face indicates an intent to override this longstanding precedent. *See, e.g., United States v. Noland*, 517 U.S. 535, 537-38 (1996) (adopting principle of statutory construction that Congress is generally presumed, in bankruptcy context, to have intended to codify pre-Code judicial doctrine, absent clear language to the contrary in the statute); *Midlantic Nat’l Bank v. New Jersey Dept. of Env’tl. Protection*, 474 U.S. 494, 501 (1986) (“The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. The Court has followed this rule with particular care in construing the scope of bankruptcy codifications.”). Nothing in the plain language of former section 1471(d) demonstrates an intent to override judicially-developed abstention doctrines under the Bankruptcy Act of 1898.

128. *See* U.S.C. § 1471(d) (repealed 1984) (providing that decisions to abstain or not to abstain under this provision are not appealable).

129. *See, e.g., Ridgefield, Inc. v. Unity Foods, Inc. (In re Unity Foods, Inc.)*, 35 B.R. 876, 879 (Bankr. N.D. Ga. 1983) (“Section 1471(d) codifies *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940), in which case the Supreme Court held that it is appropriate for a Bankruptcy Court to defer to a state court where the issue involves an unsettled question of state law.”); *In re Desmarais*, 33 B.R. 27, 28-29 (Bankr. D. Me. 1983) (same); *Sugarman v. Rouse Construction, Inc. (In re Technical Indus., Inc.)*, 21 B.R. 863, 866 (Bankr. M.D. Tenn. 1982) (same); *Chrysler v. Hesler (In re Hesler)*, 16 B.R. 329, 332 (Bankr. W.D. Mich. 1981) (same); *Kimrey v. Dorsett (In re Kimrey)*, 10 B.R. 466, 468

Following *Thompson*, bankruptcy courts abstained under former section 1471(d) where the state law at issue was unsettled.<sup>130</sup> Also, they generally declined to abstain from exercising their bankruptcy jurisdiction where the state law at issue was not unsettled,<sup>131</sup> although notable exceptions to this broad rule of thumb existed. For example, where the state law involved peculiarly local interests, such as the state law governing real property,<sup>132</sup> or divorce and other domestic relations,<sup>133</sup> bankruptcy courts abstained under former section 1471(d), although the state law was settled. Moreover, notwithstanding the unsettled or local character of the state law at issue in a proceeding, bankruptcy courts also considered whether abstention would promote or hinder their administration and resolution of the bankruptcy case.<sup>134</sup> Further, after the Supreme Court found section 1471 to violate

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(Bankr. M.D.N.C.) (same); *In re Lafayette Radio Elec. Corp.*, 8 B.R. 973, 975-76 (Bankr. E.D.N.Y. 1981) (same); *Diego v. Zamost (In re Zamost)*, 7 B.R. 859, 862-63 (Bankr. S.D. Cal. 1980) (same); *Young v. Sultan Ltd. (In re Lucas Int'l Ltd.)*, 6 B.R. 717, 720 (Bankr. S.D.N.Y. 1980) (same); *Jewel Terrace Corp. v. Kew Gardens Tenants League (In re Jewel Terrace Corp.)*, 3 B.R. 36, 38-39 (Bankr. E.D.N.Y. 1980) (same).

130. *See, e.g., In re Kimrey*, 10 B.R. at 468 (abstaining from proceeding brought by chapter 13 debtor against executor of debtor's father's estate to recover portion of funds in certificate of deposit held by father at his death because rights of ownership in joint bank account with rights of survivorship was unsettled issue of North Carolina law involving interpretation of ambiguous state statute).

131. *See, e.g., In re Unity Foods, Inc.*, 35 B.R. at 879 (declining to abstain under former section 1471(d) and noting that "this case simply requires the Bankruptcy Court to interpret the bargain between the parties and to assess the damages for any breach thereof as is determined by the application of well-settled state law"); *In re Lafayette Radio Elec. Corp.*, 8 B.R. at 977 (declining to abstain under former section 1471(d) because state law at issue in that proceeding was not sufficiently unsettled); *In re Zamost*, 7 B.R. at 864 (declining to abstain under former section 1471(d) because "the state law questions do not appear to be so complicated, unclear, unsettled, or uniquely within the province of the state courts in terms of state policy").

132. *See, e.g., In re Desmarais*, 33 B.R. 27, 29 (Bankr. D. Me. 1983) ("Real property rights are an area of recognized state court expertise."); *In re Jewel Terrace Corp.*, 3 B.R. at 39 (indicating that where there are "issues involving state court expertise such as the landlord-tenant area, it is proper to defer to the state court").

133. *See, e.g., In re Kaplan*, 18 B.R. 1018 (Bankr. E.D.N.Y. 1982) (abstaining from pending divorce action in which nondebtor spouse had been awarded temporary maintenance and support, custody of the children, exclusive occupancy of marital residence, and exclusive possession of family automobile); *In re Heslar*, 16 B.R. 329, 332 (Bankr. W.D. Mich. 1981) ("Divorce and domestic relations are areas which have traditionally been left to the states.").

134. *See, e.g., In re Unity Foods, Inc.*, 35 B.R. at 880 (noting that "there are no unusual or exceptional circumstances, such as a pending action in state court"); *In re Desmarais*, 33 B.R. at 29 (in deciding to abstain and permit Maine court to rule on nature of debtor's interest in property, court emphasized that state court "already has the foreclosure proceeding and the issue of the 'order of priority' of the parties before it"); *In re Zamost*, 7 B.R. at 863-64 (noting that abstention would foster interests in judicial economy and avoidance of multiplicity of suits in that court had exclusive jurisdiction to decide whether this contract claim should be excepted from discharge); *In re Lafayette Radio Elec. Corp.*, 8 B.R. at 977 (noting that pending state court action had been dormant for three years and had not progressed beyond discovery stage); *Hawaii Mini-Storage Sys., Inc. v. McClellan (In re Hawaii Mini-Storage Sys., Inc.)*, 4 B.R. 489 (Bankr. D. Haw. 1980) (noting pendency of parallel

Article III in 1982, but before congressional enactment of the 1984 jurisdictional provisions, some bankruptcy courts abstained under section 1471(d) from hearing state law “related to” proceedings, fearing that the exercise of such jurisdiction might have been unconstitutional.<sup>135</sup>

### *C. Bankruptcy Abstention Under the 1984 Amendments*

#### *1. Legislative History*

Four years after enactment of the 1978 jurisdictional provisions, the Supreme Court, in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,<sup>136</sup> held that the delegation of the broad grant of jurisdiction to bankruptcy courts, whose judges enjoyed neither life tenure nor salary protection, violated Article III of the Constitution. This decision caused Congress to reconfigure the bankruptcy jurisdictional and procedural provisions in 1984, including the permissive bankruptcy abstention provision.

Unlike much of the 1984 legislation, which substantially altered the 1978 jurisdictional and procedural provisions to comply with the Supreme Court’s *Northern Pipeline* constitutional ruling, Congress largely restated the permissive abstention provision from the former section 1471(d).<sup>137</sup> Because few changes were made to the permissive abstention provision, and because the 1984 provisions were rushed through Congress in a last-minute deal, there is virtually no legislative history to assist in discerning the meaning of section 1334(c)(1).<sup>138</sup>

A Report of the Senate Judiciary Committee included the following remarks on the permissive abstention provision:

Yet another significant change in the 1978 law—one which again operates to give parties greater authority over the forum in which their claims are to be litigated—may be found in the abstention provisions in

state court action); *In re Jewel Terrace*, 3 B.R. at 40 (noting that if issue had been presented “without the involvement of a court of original and competent jurisdiction, this court would have no hesitancy in presiding over and deciding the issue giving due consideration to the applicable state and municipal law”).

135. See, e.g., *In re Desmarais*, 33 B.R. at 29 (abstaining under former section 1471(d), in part, due to court’s “uncertain jurisdiction over proceedings involving purely state law issues after *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982)”).

136. 458 U.S. 50 (1982).

137. Compare 28 U.S.C. § 1471(d) (repealed 1984), with 28 U.S.C. § 1334(c)(1) (1994).

138. For a discussion of the legislative history of the 1984 Amendments, see Susan Block-Lieb, *Using Legislative History to Interpret Bankruptcy Statutes*, in *BANKRUPTCY PRACTICE AND STRATEGY* (Alan Resnick ed. 1987).

subsection 1471(h). Abstention by Federal courts in the bankruptcy area is not a new concept. Subsection 1471(d) of existing law provides for a district court or a bankruptcy court, in the “interests of justice,” to abstain from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11. . . . S.1013 builds on this existing abstention provision but gives it greater effect by amending it to allow the district court to abstain, not only in the “interest of justice,” but also in the “interest of comity with state courts and respect for state law.”<sup>139</sup>

Several individual senators also discussed the permissive abstention provision on the floor of the Senate, but these remarks are not especially illuminating. As Senator Thurmond, then Chair of the Senate Judiciary Committee, described the proposal: “Paragraph (1) of this section would direct the district judge to abstain from hearing any claim or cause of action, where this is in ‘the interest of justice’—which is present law—or in ‘the interest or [sic] comity with State courts and respect for State law.’”<sup>140</sup> Senator Heflin, a member of the Senate Judiciary Committee, commented on the permissive abstention provision in a similar vein:

Greater authority over the choice of forum is also given to the parties by the abstention provisions of this legislation which amends the existing abstention provision to allow the district court to abstain, not only in the interest of justice, but also in the interest of comity with State courts or respect for State law.<sup>141</sup>

These comments indicate that construction of section 1334(c)(1), thus, should be guided, in large part, by the legislative history of former section 1471(d). It also indicates that the standard for abstention under section

139. S. REP. NO. 98-55, at 17-18 (1983).

140. 130 CONG. REC. 9921 (1983) (statement of Sen. Thurmond). He also remarked:

[T]he abstention provisions of the 1978 act have been strengthened to allow a party who wishes to have a related proceeding based purely on State law heard in State court to have access to that forum.

*Id.* But in making the latter remarks he probably was referring to the mandatory abstention provision, rather than the permissive one, since he naturally discussed both provisions together.

141. 130 CONG. REC. 9924 (1983) (statement of Sen. Heflin). Senator Heflin also stated:

The 1978 act significantly expanded the scope of Federal jurisdiction by empowering Federal courts to exercise jurisdiction over claims governed solely by State law, such as contract claims or divorce, which do not meet the traditional requirements for Federal jurisdiction. This bill 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.* However, the above remarks probably were made in reference to the mandatory, and not the permissive, abstention proposal.

1334(c)(1) was understood to be broader than that under former section 1471(d).

There is, on the other hand, much discussion of the mandatory abstention provision, section 1334(c)(2), in the legislative history of the 1984 Amendments.<sup>142</sup> Because they are related provisions, the legislative history of section 1334(c)(2) is useful in discerning congressional understanding of section 1334(c)(1).

The House and Senate had, at the start, very different ideas of how the bankruptcy court system should be restructured following the Supreme Court's decision in *Northern Pipeline*.<sup>143</sup> During the 97th and much of the 98th congressional sessions, the House Judiciary Committee backed an Article III approach—that is, they would have reconfigured the bankruptcy court system as “courts of the United States” with life tenure and salary protection.<sup>144</sup> The Senate did not support the proposition of life-tenured bankruptcy judges. Instead, the Senate Judiciary Committee reported Senate Bill 1013,<sup>145</sup> legislation that would have permitted non-Article III bankruptcy courts “to exercise all of the” bankruptcy jurisdiction conferred on federal district courts only if the proceeding was not “recalled” by the district court.<sup>146</sup> Under the Senate proposal, a recall of “any proceeding” would have been permitted “in the discretion of the district court,” but, if requested by “any party,” recall of a related proceeding would have been required.<sup>147</sup>

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142. Section 1334(c)(2) requires district courts to abstain from their “related to” bankruptcy jurisdiction over a state law claim if there is no independent ground for federal jurisdiction and a parallel state court action can be timely adjudicated. For the complete text of 28 U.S.C. § 1334(c)(2), see *supra* note 10.

143. 458 U.S. 50 (1982). Resolution of the constitutional crisis created by the *Northern Pipeline* decision was also stalled by an intense lobbying campaign mounted by special interest groups who pressured Congress to combine a bankruptcy court bill with numerous other proposals, unrelated to the constitutional problem. See H.R. REP. NO. 98-9, at 3 (1983) (“Legislation to cure the constitutional problem in the bankruptcy courts, however, became bogged down in the lameduck session of the 97th Congress when various interest groups attempted to use it as a vehicle for changes in the substantive bankruptcy law, unrelated to the constitutional problem at hand.”); S. REP. NO. 98-55, at 13 (1983) (“Due to a variety of factors, including a lack of consensus on how best to resolve the *Marathon* issue, controversy over whether legislation should also address substantive bankruptcy reforms, and the press of other major legislative items on the Senate floor, no action was taken to restructure the bankruptcy courts during the 97th Congress.”); see also Block-Lieb, *supra* note 138, at 2-11.

144. See H.R. REP. NO. 98-9 (1983) (reporting favorably on House Bill 3, providing for the appointment of United States bankruptcy judges under Article III of the Constitution); H.R. REP. NO. 97-807 (1982) (reporting favorably on House Bill 6978, providing for the appointment of United States bankruptcy judges under Article III of the Constitution).

145. See S. REP. NO. 98-55 (1983).

146. S. 1013, 98th Cong. § 102 (1983) (defining proposed 28 U.S.C. § 1471(c)).

147. In addition, the proceeding would have mandated recall “where the district court determines that resolution of the proceeding requires consideration of both [the Bankruptcy Code] and other laws of the United States regulating organizations or activities affecting interstate commerce.” S. 1013, § 102 (defining proposed 28 U.S.C. § 1471(e)(2)(B)).

The Senate proposal also would have established broad grounds for abstention from bankruptcy jurisdiction. In one proposed provision, district courts would have been permitted to abstain “in the interest of justice, or in the interest of comity with State courts or respect for State law.”<sup>148</sup> Another would have required district courts to abstain from hearing “a proceeding involving the debtor which is based upon a State law claim or cause of action not arising under [the Bankruptcy Code] or arising in a [bankruptcy] case” if it “could not otherwise have been brought in Federal court” absent the grant of bankruptcy jurisdiction, and if “an action to adjudicate such claim has been or will be timely instituted and prosecuted in a State forum of appropriate jurisdiction.”<sup>149</sup>

This impasse was broken as a result of the Supreme Court’s decision in *NLRB v. Bildisco & Bildisco*.<sup>150</sup> Within hours after that decision had been issued, Representative Rodino, Chairman of the House Judiciary Committee, introduced legislation in reaction to *Bildisco*.<sup>151</sup> A month later, Chairman Rodino and other members of the House Judiciary Committee introduced an omnibus bill (House Bill 5174) containing provisions relating to the rejection of collective bargaining agreements in bankruptcy cases in reaction to *Bildisco*, as well as provisions relating to bankruptcy jurisdiction and procedure, consumer bankruptcies, and grain elevator facility bankruptcies.<sup>152</sup> Within days of its introduction, the House debated and passed this bill under a modified closed rule that allowed consideration of one designated amendment—an amendment striking out the proposed Article III bankruptcy court provisions, and substituting the non-Article III bankruptcy court provisions that had been introduced by Representatives Kastenmeir and Kindness.<sup>153</sup> Following lengthy debate on the propriety of the closed rule, House Bill 5174, amended to include the Kindness-

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148. *Id.* (defining proposed 28 U.S.C. § 1471(h)(1)).

149. *Id.* (defining proposed 28 U.S.C. § 1471(h)(2)). The proposed mandatory bankruptcy abstention provision also provided “[t]hat this paragraph shall be construed to limit the applicability of the stay provided for by [11 U.S.C. § 362] only to the extent necessary to permit adjudication but not the execution of such claim by the State forum.” *Id.* It also would have required that a motion to abstain “be filed within ten days of the granting of a petition to recall.” *Id.*

150. 465 U.S. 513 (1984). In *Bildisco*, the Supreme Court held that bankruptcy courts could authorize the rejection of a collective bargaining agreement upon the showing by a reorganizing debtor-in-possession or chapter 11 trustee that the agreement burdened the estate and that a balance of the equities favored rejection of the contract. Organized labor viewed the overrule of the *Bildisco* decision as an important priority in the 98th Congress.

151. See 130 CONG. REC. 2989, 3020 (1984) (introducing House Bill 4908); see also Block-Lieb, *supra* note 138, at 2-23.

152. See 130 CONG. REC. 5857-59, 5860 (1984); see also Block-Lieb, *supra* note 138, at 2-23.

153. See Block-Lieb, *supra* note 138, at 2-24.



Kastenmeier proposal, passed the House by a wide margin.<sup>154</sup> Two months later, the Senate adopted an amended version of House Bill 5174, thus, readying the Senate and House versions of the bill for conference.<sup>155</sup>

In debating enactment of the amended House Bill 5174, Senator Thurmond, Chair of the Senate Judiciary Committee, explained that “title I of this substitute amendment contains basically the provisions of the Kastenmeier-Kindness amendment, with several changes.”<sup>156</sup> One of the “more significant changes” that the Senate made to House Bill 5174 was its “retention of the Senate provision regarding mandatory abstention,” on the grounds that the House version was rejected as “somewhat more limited than the Senate provision.”<sup>157</sup> Several important senators had grave misgivings as to the breadth of the Senate mandatory abstention provision, viewing it as needlessly disruptive of the expeditious administration of a bankruptcy estate.<sup>158</sup> However, rather than seek a separate vote in the Senate on the issue, they agreed to await debate in the Conference Committee.<sup>159</sup>

In the conference, the Senate acceded to the House’s narrower mandatory abstention provision.<sup>160</sup> Senator Dole described the compromise on the mandatory abstention provision:

As most of my colleagues are aware, the Senate conferees differed over whether to retain the abstention language found in the original

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154. For debates during consideration and passage of House Bill 5174, as amended, see 130 CONG. REC. 6237-49 (1984).

155. See 130 CONG. REC. 17,158 (1984); see also Block-Lieb, *supra* note 138, 2-24 to 2-28.

156. 130 CONG. REC. 13,059 (1984) (statement of Sen. Thurmond).

157. *Id.* For the remarks of other Senators in support of a broader mandatory abstention provision, see 130 CONG. REC. 13,065-71 (1984) (statement of Sen. Hatch); 130 CONG. REC. 17,152 (1984) (statement of Sen. Heflin); 130 CONG. REC. 17,156-57 (1984) (statement of Sen. Hatch).

158. See 130 CONG. REC. 13,076 (1984) (statement of Sen. DeConcini) (commenting that, under broad mandatory abstention provision, “creditors and debtors alike would be deprived of the speedy resolution of disputes that is essential to the operation of bankruptcy”); 130 CONG. REC. 17,153 (1984) (statement of Sen. DeConcini) (suggesting that broad mandatory abstention provision “would add expense and delay to a process that requires speed and limits on needless expenditures”); 130 CONG. REC. 17,157 (1984) (statement of Sen. Dole) (opining that broad mandatory abstention provision “would, I believe, have the effect of fragmenting jurisdiction of the bankruptcy courts to an extent that would seriously impair the efficiency of those courts and dramatically harm the interests of creditors in need of quick adjudication of their claims”).

159. See 130 CONG. REC. 13,075-77 (1984) (statement of Sen. DeConcini) (considering proposing amendment to Senate version of House Bill 5174 that, among other things, would have narrowed grounds for mandatory abstention); 130 CONG. REC. 17,153 (1984) (statement of Sen. DeConcini) (deciding against offering amendment, despite support of Sen. Dole, in order to expedite passage and consideration by conference committee); 130 CONG. REC. 17,157 (1984) (statement of Sen. Dole) (indicating support for DeConcini amendment, and willingness to accede to passage of bill without consideration of amendment to facilitate its consideration by conferees).

160. See 130 CONG. REC. 20,081 (1984) (statement of Sen. Thurmond) (“The mandatory abstention provisions of the House bill are included in the bill.”).

Senate bill. The majority of Senate conferees—this Senator included—felt that the Senate language was too broad, in that it prohibited the bankruptcy courts or district courts from considering any case that was based upon a State law claim. Mandatory abstention in favor of State courts in those cases was required. The House provision on abstention was, however, limited to Marathon type proceedings and the party seeking abstention would have been required to show that the cause could be timely adjudicated in the State courts before abstention would have been required.

The Senate conferees reached a fair compromise on this issue. The result of the conference discussion was a provision that preserves the integrity of bankruptcy jurisdiction while allowing abstention for personal injury cases where they can be timely adjudicated in State courts. In addition, where abstention does not occur, those cases will be handled by the district court . . . or, if that court finds it appropriate, where the claim arose.<sup>161</sup>

Representative Kastenmeier similarly remarked on the terms of this compromise:

I am pleased that we were able to fashion a constitutional, workable bankruptcy court system. . . .

The House-passed bill provided that there should be mandatory abstention in a narrow range of cases involving Marathon-type litigation. The House abstention provisions also have been retained. . . . The change in the definition in the Senate-passed bill would have contradicted the basic purposes of the consolidated jurisdiction we adopted in 1978 in response to the recommendations of the Commission on Bankruptcy Laws. Finally, it would have dissipated the assets of the estate by creating a multiplicity of forums for the adjudication of parts of a bankruptcy case.

The conference report largely rejects the Senate limitations on the tasks which are to be performed by a bankruptcy judge.<sup>162</sup>

Thus, when Congress adopted the mandatory bankruptcy abstention provision in 1984, it generally intended to reconstitute the bankruptcy court system as both constitutional and capable of fulfilling the efficient resolution of bankruptcy cases.<sup>163</sup> The fragmentation of bankruptcy jurisdiction among

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161. 130 CONG. REC. 20,083 (1984) (statement of Sen. Dole).

162. 130 CONG. REC. 20,227-28 (1984) (statement of Rep. Kastenmeier).

163. In describing Congress's intentions regarding the mandatory abstention provision, and more

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. This general purpose should also govern interpretation of the companion permissive bankruptcy abstention provision.

## 2. Case Law Construing Section 1334(c)(1)

Courts of appeals are divided in their construction of 28 U.S.C. § 1334(c)(1). Some conclude it codifies judicially-created abstention doctrines.<sup>164</sup> For example, in *Coker v. Pan American World Airways*, the Second Circuit construed section 1334(c)(1) as “intended to codify the judicial abstention doctrines.”<sup>165</sup> However, several courts of appeals have explicitly rejected this approach, viewing section 1334(c)(1) as statutorily overriding these judge-made doctrines.<sup>166</sup> For example, the Ninth Circuit, in

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generally its purposes in reconstituting the bankruptcy jurisdictional provision, legislative history does not conflict with the language of the statute. Although the circumstances leave only the remarks of individual legislators to rely on, it is the confluence of four or five important members who have been quoted above. Moreover, even in the absence of these legislative remarks, it would be appropriate to infer that the statutory scheme sought constitutional consistency with the bankruptcy goal of expeditiousness.

164. See, e.g., *Lindsey v. Dow Chem. Corp. (In re Dow Corning Corp.)*, 113 F.3d 565 (6th Cir. 1997) (citing *Pan American* with approval); *In re United States Brass Corp.*, 110 F.3d 1261 (7th Cir. 1997) (citing *Pan American* with approval); *In re Joint E. and S. Dist. Asbestos Litg.*, 78 F.3d 764, 775 (2d Cir. 1996) (noting that district court has “little or no discretion to abstain in a [bankruptcy-related] case which does not meet traditional abstention requirements”); *In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 6 F.3d 1184, 1189 (7th Cir. 1993) (concluding that “discretionary abstention under section 1334(c)(1) is ‘informed by principles developed under the judicial abstention doctrines, and courts have usually looked to these well-developed notions of judicial abstention when applying section 1334(c)(1)’”) (citing and quoting *Pan American*); *Coker v. Pan Am. World Airways (In re Pan Am. Corp.)*, 950 F.2d 839, 846 (2d Cir. 1991) (stating that Congress “intended that section 1334(c)(1) be informed by principles developed under the judicial abstention doctrines”). Without discussing section 1334(c)(1) at length, several other courts of appeals have relied on judicially-created abstention doctrines to affirm district court decisions to abstain. See *Duell v. Utah (In re Duell)*, No. 95-16672, 1996 WL 32142 (9th Cir. Jan. 26, 1996) (relying on domestic relations exception and *Ankenbrandt v. Richards*, 504 U.S. 689 (1992), to affirm district court’s abstention from making paternity determination in context of dischargeability hearing); *Wilson v. Valley Elec. Membership Corp.*, 8 F.3d 311 (5th Cir. 1993) (relying on *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), to uphold district court’s decision to abstain from determining retroactive application of decision of Louisiana Supreme Court regarding constitutionality of exemption of rural electric cooperative from regulation by state public service commission); *Carver v. Carver*, 954 F.2d 1573 (11th Cir. 1992) (applying domestic relations exception to bankruptcy jurisdiction in affirming district court’s decision to abstain from determining whether contempt proceeding before domestic relations court was violative of automatic stay).

165. *In re Pan Am. Corp.*, 950 F.2d at 845.

166. See *Eastport Assoc. v. City of Los Angeles (In re Eastport Assoc.)*, 935 F.2d 1071, 1079 & n.7 (9th Cir. 1991). There, the Ninth Circuit rejected an argument that the district court should have abstained under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), or *Louisiana Power & Light Co. v. City*

*Eastport Associates v. City of Los Angeles*, rejected arguments made under the *Burford* and *Thibodeaux* abstention doctrines, concluding that “[s]ection 1334(c)(1) encompasses the bases for all the judicially-created abstention doctrines.”<sup>167</sup> Moreover, the Eighth Circuit, in *Mathiasen’s Tanker Industries, Inc. v. Apex Oil Co.*, reasoned that it was “obliged to take the statute at its word,”<sup>168</sup> and read the statute to create two separate grounds for abstention stated in the disjunctive.<sup>169</sup> The Eighth Circuit interpreted section 1334(c)(1) literally to permit abstention “in the interest of justice,” regardless of the source of law, and thus affirmed a decision of the district court to abstain from hearing personal injury tort claims brought, not under state law, but under the Jones Act and federal maritime law.

In numerous other decisions, courts of appeals implicitly reject the view that section 1334(c)(1) codifies pre-Code abstention doctrines by applying a multifactor test for discretionary bankruptcy abstention—a test in which few of its many factors find parallel in nonbankruptcy abstention case law.<sup>170</sup> The

of *Thibodeaux*, 360 U.S. 25 (1959), because section 1334(c)(1) overrides these judicial abstention doctrines:

Section 1334(c)(1) encompasses the bases for all the judicially created abstention doctrines: an interest in justice or comity or respect for state law. If the district court did not abuse its discretion in declining to abstain under the statute, it must not have abused its discretion in declining to abstain under the narrower *Burford* and *Louisiana Power* doctrines.

*In re Eastport Assoc.*, 935 F.2d at 1079 n.7; see also *Mathiasen’s Tanker Indus., Inc. v. Apex Oil Co.* (*In re Apex Oil Co.*), 980 F.2d 1150 (8th Cir. 1992) (explicitly declining to follow *Pan American*, reasoning that only the portion of section 1334(c)(1) that permits district courts to abstain “in the interest of comity with State courts or respect for State law” codifies pre-Code abstention doctrines).

167. *In re Eastport Assoc.*, 935 F.2d at 1079 n.7.

168. 980 F.2d at 1153.

169. See 28 U.S.C. § 1334(c)(1) (permitting abstention “in the interest of justice, or in the interest of comity with State courts or respect for State law” (emphasis added)).

170. See, e.g., *In re Tucson Estates, Inc.*, 912 F.2d 1162, 1167 (9th Cir. 1990) (setting forth twelve-factor test for discretionary bankruptcy abstention from *In re Republic Reader’s Service, Inc.*, 81 B.R. 422, 429 (Bankr. S.D. Tex. 1987)); *Siragusa v. Siragusa* (*In re Siragusa*), 27 F.3d 406 (9th Cir. 1994) (applying twelve-factor test set forth in *Tucson Estates* and upholding bankruptcy court decision to abstain from complaint alleging that modification by Nevada domestic relations court of debtor’s alimony obligations violated postdischarge injunction under 11 U.S.C. § 524); *In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 6 F.3d 1184, 1189 (7th Cir. 1993) (applying *Tucson Estates* in reversing determination to abstain, and stating that “[c]ourts should apply these factors flexibly, for their relevance and importance will vary with the particular circumstances of each case, and no one factor is necessarily determinative”); *In re L & S Indus., Inc.*, 989 F.2d 929, 935 (7th Cir. 1993) (citing *Tucson Estates* with approval in affirming bankruptcy court decision to abstain from enjoining defendants’ pursuit of their defenses and counterclaims in pending state court action that had been initiated by the debtor prepetition); *In re Eastport Assoc.*, 935 F.2d at 1075-78 (applying *Tucson Estates* in affirming district court’s denial of request to abstain from declaratory judgment action brought in bankruptcy court by debtor-in-possession). Without citing *Tucson Estates*, other courts of appeals have also applied a multifactor policy approach to discretionary bankruptcy abstention. See, e.g., *National Union Fire Ins. Co. v. Titan Energy, Inc.* (*In re Titan Energy, Inc.*), 837 F.2d 325 (8th Cir. 1988) (upholding bankruptcy court abstention from declaratory action by applying multifactor test that emphasized, among other things, that state law issues would predominate in the declaratory action,

most influential of these is the Ninth Circuit's decision in *In re Tucson Estates*.<sup>171</sup> There, the court set forth twelve factors to be balanced when deciding whether to abstain from an exercise of bankruptcy jurisdiction:

(1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable law, (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) the substance rather than form of an asserted 'core' proceeding, (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court, (9) the burden of [the bankruptcy court's] docket, (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties, (11) the existence of a right to a jury trial, and (12) the presence in the proceeding of nondebtor parties.<sup>172</sup>

Only the third factor—"the difficulty or unsettled nature of the applicable law"—bears resemblance to factors considered in abstention determinations made outside the context of bankruptcy. Moreover, because this balancing approach views unsettled issues of state law as only one of many relevant factors for a court to consider in determining whether to abstain from bankruptcy jurisdiction, this approach leaves open the possibility of abstention from state law issues whose resolution is straightforward.<sup>173</sup> In this

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that the dispute could be timely adjudicated in state court, and that the declaratory action was only peripherally related to the debtor's chapter 7 case); *Citibank, N.A. v. White Motor Corp. (In re White Motor Credit)*, 761 F.2d 270 (6th Cir. 1985) (adopting policy-oriented factor approach to review district court's decision to abstain from exercising bankruptcy jurisdiction over hundreds of tort actions pending in state court against debtor-in-possession).

171. 912 F.2d 1162, 1167 (9th Cir 1990).

172. *Id.* The court in *Tucson Estates* relied on an earlier decision of a Texas bankruptcy court for this twelve-factor test. See *Republic Reader's Serv., Inc. v. Maspazhe Serv. Bureau, Inc. (In re Republic Reader's Serv., Inc.)*, 81 B.R. 422, 429 (Bankr. S.D. Tex. 1987).

173. See *In re Williams*, 144 F.3d 544, 550 n.4 (7th Cir. 1998) (upholding bankruptcy court's modification of automatic stay to permit housing authority to continue forcible entry action against debtor, and indicating in dicta that court might have abstained from determination of right to possession although not describing state landlord/tenant law as unsettled); *In re Siragusa*, 27 F.3d 406, 408 (9th Cir. 1994) (affirming abstention order although state law concerning modification of alimony awards was neither unusually difficult nor unsettled); *In re L & S Indus., Inc.*, 989 F.2d 929, 935 (7th Cir. 1993) (affirming abstention from request to enjoin pursuit of state contract defenses and counterclaims in pending state court action although state law was not unsettled); *In re White Motor Credit*, 761 F.2d 270, 274 (6th Cir. 1985) (affirming abstention from bankruptcy court resolution of

regard, the *Tucson Estates* twelve-factor test deviates from most nonbankruptcy abstention doctrines.<sup>174</sup>

Despite this substantial disagreement on the construction of section 1334(c)(1), there are important issues on which courts of appeals agree. They agree that bankruptcy courts are frequently justified in abstaining from domestic relations issues, such as divorce, alimony, child support and the like.<sup>175</sup> Without discussion of the Supreme Court's recent decision in *Wilton v. Seven Falls Co.*,<sup>176</sup> they have deferred to the discretion of the lower court when reviewing requests to stay declaratory judgment actions brought in the bankruptcy court pending resolution of parallel state court actions.<sup>177</sup> With the exception of *Apex Oil*,<sup>178</sup> courts of appeals agree that section 1334(c)(1) does not justify abstention from proceedings involving only federal questions.<sup>179</sup> Most importantly, they agree that the presence of unsettled

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personal injury and wrongful death tort claims that were also pending in parallel state court actions without discussion of unsettled nature of state tort law). *But see* *Lindsey v. Dow Chem. Co. (In re Dow Coming Corp.)*, 113 F.3d 565 (6th Cir. 1997) (reversing district court's "global" abstention order because district court failed to articulate what issues of unsettled state law existed in each pending tort action).

174. Unsettled issues of state law are not requisite to a nonbankruptcy abstention determination. For example, *Burford* abstention may be appropriate where state law involves peculiarly local issues, such as domestic relations, state taxation or criminal law. Moreover, *Colorado River* abstention also does not depend upon a showing of unsettled state law issues. Nonetheless, unsettled issues of state law are commonly present in federal abstention decisions, such as where the *Pullman* and *Burford* abstention doctrines apply.

175. *See, e.g.*, *Duell v. Utah (In re Duell)*, No. 95-16672, 1996 WL 32142 (9th Cir. Jan. 29, 1996) (affirming district court's abstention from making paternity determination in related dischargeability hearing); *Siragusa v. Siragusa (In re Siragusa)*, 27 F.3d 406 (9th Cir. 1994) (affirming decision to abstain in favor of state domestic relations court determination as to whether modification of alimony award was violative of postdischarge injunction); *Carver v. Carver*, 954 F.2d 1573 (11th Cir. 1992) (affirming district court's decision holding that bankruptcy court should have abstained from domestic relations decision.).

176. 515 U.S. 277 (1995) (adopting broad abstention standard to affirm district court's decision to stay federal declaratory judgment action during pendency of parallel state court action).

177. *See, e.g.*, *In re United States Brass Corp.*, 110 F.3d 1261 (7th Cir. 1997) (affirming lower court's decision to abstain from declaratory judgment actions removed to bankruptcy court); *Eastport Assoc. v. City of Los Angeles (In re Eastport Assoc.)*, 935 F.2d 1071 (9th Cir. 1991) (affirming district court's denial of request to abstain from declaratory judgment action brought in bankruptcy court); *National Union Fire Ins. Co. v. Titan Energy, Inc. (In re Titan Energy, Inc.)*, 837 F.2d 325 (8th Cir. 1988) (affirming district court's decision to stay declaratory judgment action in bankruptcy court pending resolution of direct action on related issues brought in state court).

178. 980 F.2d 1150, 1153 (8th Cir. 1992).

179. *See In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 6 F.3d 1184, 1190-91 (7th Cir. 1993) (reversing determination to abstain because it disagreed that resolution of issue of state law was necessary to bankruptcy determination before district court); *Coker v. Pan Am. World Airways (In re Pan Am. Corp.)*, 950 F.2d 839 (2d Cir. 1991) (concluding that bankruptcy abstention was not warranted where determinative issue involved federal law regarding "whether the Warsaw Convention preempts the Coker plaintiffs' state law causes of action" since "supremacy clause questions are 'essentially one of federal policy'").

issues of state law is not determinative of a request for discretionary bankruptcy abstention.<sup>180</sup>

### III. CODIFICATION OF ABSTENTION DOCTRINES IN BANKRUPTCY

Courts of appeals are divided as to whether the permissive bankruptcy abstention provision should be construed to incorporate or to override the judicially created abstention doctrines. Neither construction is unambiguously supported by the language of these statutory provisions.

From one perspective, the breadth of the statutory standard for discretionary bankruptcy abstention, triggered by a balance of interests in “justice” and “comity,” refers to the judge-made standards for abstention. Although the statutory language of both former section 1471(d) and current section 1334(c)(1) is broad, the case law defining the nonbankruptcy abstention doctrines also defies simple paraphrase. Moreover, it is generally assumed that “[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.”<sup>181</sup>

The primary difficulty with this construction is that it assumes that Congress did not expand upon the discretionary bankruptcy abstention provision in 1984. During the short life of former section 1471(d), courts understood this provision to codify pre-Code case law governing abstention from bankruptcy jurisdiction, rather than a blank check to abstain from bankruptcy jurisdiction whenever they pleased.<sup>182</sup> Thus, if Congress intended to codify abstention decisions when it permitted abstention “in the interest of justice” under former section 1471(d), it is difficult to argue that Congress meant to codify the same thing when it enacted section 1334(c)(1) permitting abstention “in the interest of justice, or in the interest of comity with State courts or respect for State law.” Generally, every word in a statute is assumed to have meaning.<sup>183</sup> However, if Congress intended to codify judicially-created abstention doctrines with its enactment of former section 1471(d)—

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180. See *In re L & S Indus., Inc.*, 989 F.2d 929, 935 (7th Cir. 1993) (indicating that “the presence of a state law issue is not enough to warrant permissive abstention,” but nonetheless characterizing this factor as “a significant consideration,” particularly when coupled with a finding that the plaintiff was forum shopping); *In re Eastport Assoc.*, 935 F.2d at 1078 (noting that “[w]hile the presence of state law issues is not dispositive, it should weigh heavily in the balance”).

181. *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1991), quoted in *Field v. Mans*, 516 U.S. 59, 69 (1995).

182. For a discussion of this case law, see *supra* text accompanying notes 128-35.

183. See, e.g., *United States v. Nordic Village, Inc.*, 503 U.S. 30, 35 (1992) (“[A] statute must, if possible, be construed in such a fashion that every word has some operative effect.”).

doctrines which justify abstention from federal jurisdiction on comity grounds—then it is hard to imagine that Congress intended section 1334(c)(1) to recodify the former bankruptcy abstention provision but with an added emphasis on interests in “comity with State courts or respect for State law.”

Although the language of these abstention provisions may be ambiguous, legislative history also supports a construction that views these statutes as incorporating the judicially-created abstention doctrines. The legislative history of former section 1471(d) indicates that Congress understood it to “codif[y] present case law relating to the power of abstention in particular proceedings by the bankruptcy court.”<sup>184</sup> Similarly, the legislative history of current section 1334(c)(1) generally views this provision as restating the “present law.”<sup>185</sup> But which of the case law discussed above did Congress understand section 1334(c)(1) to codify?

#### *A. Nonbankruptcy Abstention Doctrines*

When legislative history explains that the permissive bankruptcy abstention provision “codifies present case law,”<sup>186</sup> it could be understood to incorporate the abstention doctrines applied generally in federal district courts, the *Pullman*, *Burford* and *Colorado River* abstention doctrines discussed above. Courts of appeals are divided on whether the discretionary bankruptcy abstention provision codifies or overrides these nonbankruptcy abstention doctrines, however.<sup>187</sup> The Second Circuit views section 1334(c)(1) as a codification of the nonbankruptcy abstention doctrines, leaving a district court “little or no discretion to abstain in a [bankruptcy-related] case which does not meet traditional abstention requirements.”<sup>188</sup> The Ninth Circuit instead interprets section 1334(c)(1) to override the nonbankruptcy abstention doctrines because it “encompasses the bases for all the judicially created abstention doctrines.”<sup>189</sup> Both lines of decision may read this statute too narrowly.

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184. H.R. REP. NO. 95-595, at 51 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6012.

185. 130 CONG. REC. 9922 (1983) (statement of Sen. Thurmond).

186. See *supra* notes 184-85.

187. Compare, e.g., *Coker v. Pan Am. World Airways* (*In re Pan Am. Corp.*), 950 F.2d 839, 845 (2d Cir. 1991) (holding that section 1334(c)(1) “was intended to codify judicial abstention doctrines”), with, e.g., *Eastport Assoc. v. City of Los Angeles* (*In re Eastport Assoc.*), 935 F.2d 1071, 1079 & n.7 (9th Cir. 1991) (rejecting argument that district court should have abstained under *Burford* or *Thibodaux* since it viewed section 1334(c)(1) as overriding these judicial abstention doctrines).

188. *In re Joint E. and S. Dist. Asbestos Litig.*, 78 F.3d 764, 775 (2d Cir. 1996) (quoting *Bethpage Lutheran Serv., Inc. v. Weicker*, 965 F.2d 1239, 1244-45 (2d Cir. 1992)).

189. *In re Eastport Assoc.*, 935 F.2d at 1079 n.7.



Contrary to the suggestion of the Ninth Circuit, section 1334(c)(1) should not be read as a refusal to incorporate these nonbankruptcy abstention doctrines into bankruptcy practice. Nothing on the face of this statute indicates an intent to supplant the nonbankruptcy abstention doctrines. If anything, the language of section 1334(c)(1) appears to incorporate this case law with its reference to interests in comity and judicial economy. Moreover, under the former Bankruptcy Act of 1898, courts applied these doctrines to permit abstention from bankruptcy jurisdiction.<sup>190</sup> In the absence of clear statutory language to the contrary, the Bankruptcy Code is generally construed to incorporate pre-Code case law.<sup>191</sup> Also, both the statutory language of this provision and its legislative history support, rather than refute, incorporation of these judicial abstention doctrines with enactment of the permissive bankruptcy abstention provision.

Reference to other statutory provisions, such as 28 U.S.C. § 1334(c)(2), the mandatory bankruptcy abstention provision,<sup>192</sup> and 11 U.S.C. § 362(b)(1), (2), (4), the “criminal,”<sup>193</sup> “domestic relations,”<sup>194</sup> and “police and regulatory” enforcement proceeding<sup>195</sup> exceptions to the automatic stay,

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190. See, e.g., *Callaway v. Benton*, 336 U.S. 132, 142 n.11 (1949) (dictum); *Order of Ry. Conductors v. Pitney*, 326 U.S. 561, 567 (1946) (same); *Keidan v. Universal C.I.T. Credit Corp. (In re Mohammed)*, 327 F.2d 616 (6th Cir. 1964) (declining to abstain); *California Oil Co. v. Huffstutler*, 322 F.2d 596 (5th Cir. 1963) (applying *Burford* abstention); *In re Central Ry.*, 163 F.2d 44 (3d Cir. 1947) (same).

191. See *supra* note 127.

192. See *supra* note 10 (citing and quoting section 1334(c)(2)).

193. Section 362 (b)(1) of title 11 excepts from the reach of the automatic stay all criminal proceedings against the debtor, thus, limiting the need to consider whether *Younger v. Harris* prevents a federal bankruptcy court from enjoining a state criminal proceeding. But see, e.g., *Brinkman v. City of Edina (In re Brinkman)*, 123 B.R. 318, 322 (Bankr. D. Minn. 1991) (applying “principal motivation test” to attempt to determine whether prosecution was intended to “vindicate public good” or “to collect the debt for one of its residents” in deciding whether *Younger v. Harris* precluded it from entering discretionary stay of criminal action seeking restitution of debtor’s bounced check).

194. Subsection (b)(2) excepts from the stay prosecution of certain domestic relations actions, and the collection of certain marital claims against property that is not property of the estate, again limiting the need to consider whether the domestic relations exception limits bankruptcy jurisdiction to the same extent as it does other grants of federal jurisdiction. The domestic relations exception to the automatic stay was substantially expanded with a 1994 amendment to this provision. See Pub. L. No. 103-394, 108 Stat. 4106, § 304 (expanding protections for child support and alimony claims in bankruptcy). Prior to this amendment, nondebtor spouses frequently sought and obtained relief from the automatic stay in order to commence or continue domestic relations actions against the debtor in state court that exceeded the scope of this exception. See, e.g., *Chunn v. Chunn (In re Chunn)*, 106 F.3d 1239 (5th Cir. 1997) (affirming bankruptcy court’s determination to lift automatic stay to permit enforcement of temporary support award); *White v. White (In re White)*, 851 F.2d 170 (6th Cir. 1988) (affirming decision to lift automatic stay to permit state court divorce action to continue against debtor); *MacDonald v. MacDonald (In re MacDonald)*, 755 F.2d 715 (9th Cir. 1985) (upholding decision to lift automatic stay to permit nondebtor spouse to seek modification of spousal support order in state court).

195. Section 362(b)(4) excepts from the automatic stay proceedings brought by a governmental

also support the view that the nonbankruptcy abstention doctrines apply in a bankruptcy context. The mandatory bankruptcy abstention provision, section 1334(c)(2), substantially overlaps with the *Colorado River* abstention doctrine,<sup>196</sup> but has not been read to preclude discretionary abstention where some but not all of its elements exist. Several courts have construed section 1334(c)(1) to permit abstention when some but not all of the elements of the mandatory abstention provision have been established.<sup>197</sup> Perhaps this result is best understood as an application of the *Colorado River* doctrine in a bankruptcy context. Similarly, the criminal, domestic relations and police and regulatory enforcement proceeding exceptions to the automatic stay may incorporate both *Younger v. Harris* and *Burford* abstention,<sup>198</sup> but have not been interpreted to preclude either stay relief or abstention on these grounds where the exemption has not been satisfied.<sup>199</sup>

The Second Circuit contends that section 1334(c)(1) does no more than codify the nonbankruptcy abstention doctrines, but surely it also reads this statute too narrowly. Although the broad language of this statute contains

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unit against the debtor to enforce its "police or regulatory power," streamlining *Burford* analysis in the bankruptcy context. *See, e.g., Penn Terra Ltd. v. Department of Envtl. Resources*, 733 F.2d 267 (3d Cir. 1984) (concluding that state environmental regulatory actions were excepted from scope of automatic stay under (b)(4) and (b)(5)).

196. A balance of the factors identified in *Colorado River* often would tip against an abstention from bankruptcy jurisdiction. First, subject to constitutional limitations, there is an important federal interest in the expeditious adjudication of all bankruptcy-related litigation in a single, bankruptcy forum, regardless of whether state or federal law is implicated in this litigation. In addition, due to the automatic stay of virtually all litigation pending in state courts at the time of the filing of a petition in bankruptcy, there is little possibility of conflicts in the concurrent exercise of state and federal bankruptcy jurisdiction. Where the parallel state and federal bankruptcy-related litigation involving only issues of state law are pending between nondebtor third parties, and the state court action is close to trial, abstention under the *Colorado River* doctrine may be appropriate, but section 1334(c)(2) may require abstention anyway.

197. *See, e.g., Balcor/Morrisstown Ltd. Partnership v. Vector Whippany Assoc.*, 181 B.R. 781 (D.N.J. 1995).

198. Where resolution of unsettled issues of state law would obviate the need to reach federal constitutional questions raised in a bankruptcy context, *Pullman* should justify abstention from these proceedings under the discretionary bankruptcy abstention provision. *Pullman* abstention has occurred in only a handful of bankruptcy cases, and for good reason. Not only are constitutional issues raised infrequently in a commercial setting, but, when they are raised, bankruptcy jurisdiction may not extend to their resolution. This is because arising under jurisdiction in bankruptcy, although a form of federal question jurisdiction, is far narrower than the federal question jurisdiction set forth in 28 U.S.C. § 1331—arising under jurisdiction extends only to proceedings determined by reference to the federal Bankruptcy Code, and does not extend to proceedings arising under the Constitution or under other sources of federal law. If bankruptcy jurisdiction covers these constitutional questions, then, it is because they relate to the federal bankruptcy case; given the limited authority of a bankruptcy judge to determine a related to proceeding, however, the plaintiff might instead ask the district court to withdraw its reference of such a proceeding "for cause." *See* 28 U.S.C. § 157(d) (1994).

199. *See supra* notes 193-95 (discussing instances in which relief from automatic stay was granted, although exception from stay inapplicable).

apparent references to these nonbankruptcy abstention doctrines, it does not appear to override pre-Code case law, such as *Thompson v. Magnolia Petroleum Co.*,<sup>200</sup> which previously developed distinct grounds for abstention from bankruptcy jurisdiction. Indeed, the legislative history explicitly refers to *Thompson* in describing the breadth of former section 1471(d).<sup>201</sup> Most importantly, a construction of section 1334(c)(1) that equates the standard for discretionary bankruptcy abstention with that found in the nonbankruptcy abstention doctrines ignores the distinctions between bankruptcy jurisdiction and other grants of federal jurisdiction.

### *B. Pre-Code Bankruptcy Abstention Doctrines*

The legislative history expressly refers to *Thompson v. Magnolia Petroleum Co.*<sup>202</sup> in its brief discussion of the permissive bankruptcy abstention provision.<sup>203</sup> But does this reference generally indicate congressional understanding that abstention from bankruptcy jurisdiction triggers policy considerations distinct from those supporting abstention from other grants of federal jurisdiction? Or does it more pointedly indicate congressional understanding that the bankruptcy abstention statute would codify *Thompson*? Although the Bankruptcy Code often has been interpreted to incorporate pre-Code case law absent clear indicia to the contrary,<sup>204</sup> the permissive bankruptcy abstention provision should not be viewed as limited to the holding of *Thompson*. Even if it were appropriate to presume that Congress was familiar with *Thompson*, and its narrow interpretation—a proposition with which reasonable people might easily disagree<sup>205</sup>—it may

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200. 309 U.S. 478 (1940).

201. See H.R. REP. NO. 95-595, at 446 (1977), reprinted in 1978 U.S.C.C.A.N. 5962, 6401.

202. 309 U.S. 478 (1940).

203. See H.R. REP. NO. 95-595, at 446 (1977), reprinted in 1978 U.S.C.C.A.N. 5962, 6401.

204. See *supra* note 127.

205. Justice Scalia, in his concurrence in *Blanchard v. Bergeron*, 489 U.S. 87, 97 (1989), decried a process of statutory construction that views references to case law in legislative history as indicative of Congress's intended meaning of that statute:

Congress is elected to enact statutes rather than point to cases, and its Members have better uses for their time than poring over District Court opinions. That the Court should refer to the citation of three District court cases in a document issued by a single committee of a single house as the action of Congress displays the level of unreality that our unrestrained use of legislative history has attained. I am confident that only a small proportion of the Members of Congress read either one of the Committee Reports in question, even if (as is not always the case) the Reports happened to have been published before the vote; that very few of those who did read them set off for the nearest law library to check out what was actually said in the four cases at issue (or in the more than 50 other cases cited by the House and Senate Reports); and that no Member of Congress came to the judgment that the District Court cases would trump *Johnson* on the point at issue here because the latter was dictum. As anyone familiar with modern-day drafting of congressional

be particularly inappropriate to infer anything like that here. Not only was the scope of *Thompson* unclear under the former Bankruptcy Act of 1898, but the abolition of summary bankruptcy jurisdiction may substantially limit *Thompson's* significance.<sup>206</sup>

At its narrowest, *Thompson* would permit federal courts to abstain only if state court resolution of unsettled issues of state law would obviate the exercise of summary bankruptcy jurisdiction. But because bankruptcy jurisdiction has expanded beyond its in rem roots, this would hardly ever happen under the current law. Bankruptcy jurisdiction is now defined expansively to include all proceedings "arising under" the Bankruptcy Code, or "arising in" or "related to" a bankruptcy case.<sup>207</sup> Only rarely would the resolution of unsettled state law issues render an exercise of bankruptcy jurisdiction unnecessary, because "related to" jurisdiction extends to proceedings that do not involve property of the estate but that otherwise might affect administration of the bankruptcy estate.<sup>208</sup> Alternatively, *Thompson* can be construed, as it was in *Mangus v. Miller*,<sup>209</sup> to permit abstention from bankruptcy jurisdiction where resolution of unsettled state property law would clarify (rather than obviate) the jurisdiction of bankruptcy court over the disputed property. *Thompson* also has been construed even more broadly, albeit in dicta in the Supreme Court's decision in *Propper v. Clark*,<sup>210</sup> to permit abstention from bankruptcy jurisdiction in

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committee reports is well aware, the references to the cases were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant (for that end *Johnson* would not merely have been cited, but its 12 factors would have been described, which they were not), but rather to influence judicial construction. What a heady feeling it must be for a young staffer, to know that his or her citation of obscure district court cases can transform them into the law of the land, thereafter dutifully to be observed by the Supreme Court itself.

*Id.* at 98-99 (emphasis in original).

206. As discussed earlier, Congress intended to abolish the distinction between summary and plenary jurisdiction with its enactment in 1978 of a broad grant of bankruptcy jurisdiction, and did not in 1984 intend to resurrect the summary/plenary dichotomy. See *supra* text accompanying note 120. As a result, there would seem to be no need to codify the precedent permitting deference to state courts when summary jurisdiction did not allow for the expeditious bankruptcy administration since Congress instead sought to effectuate the goal of efficient resolution of bankruptcy cases by expanding the scope of bankruptcy jurisdiction. Nor would it be likely to codify precedent authorizing bankruptcy courts to defer to state court resolution because summary jurisdiction was either questionable or insufficient to permit it to provide complete relief to litigants. For a discussion of this pre-Code case law, see *supra* text accompanying notes 111-17.

207. 28 U.S.C. § 1334(b) (1994).

208. See, e.g., *Elscint, Inc. v. First Wis. Fin. Corp. (In re Xonics, Inc.)*, 813 F.2d 127, 131 (7th Cir. 1987).

209. 317 U.S. 178 (1942).

210. 337 U.S. 472 (1949).

exceptional circumstances where unsettled issues of state law arise in proceedings discrete from the remainder of the bankruptcy case, sufficiently discrete that their resolution before the state forum would not impinge on the jurisdiction of the bankruptcy court over other proceedings.<sup>211</sup>

If Congress intended section 1334(c)(1) and former section 1471(d) to codify *Thompson*, then many decisions to abstain under this provision are wrong.<sup>212</sup> No matter how broadly *Thompson* is construed, it cannot be read to permit abstention merely because unsettled issues of state law are present in the bankruptcy-related litigation. The Supreme Court has not indicated that the mere happenstance of bankruptcy jurisdiction, standing alone, constitutes “exceptional circumstances” justifying abstention from unsettled issues of state law. Nor should it be construed to permit abstention where the state law at issue is not unsettled, or where federal law is dispositive of the proceeding.<sup>213</sup> Nonetheless, courts are divided as to whether abstention from bankruptcy jurisdiction is justified where the legal doctrine is settled but application of these rules of state law to the factual circumstances of the proceeding is complicated,<sup>214</sup> although outside the bankruptcy context federal

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211. Moreover, this possibility is unique to the bankruptcy setting. Under *Pullman*, the possibility that a judgment in the state court action will foreclose the federal district court from reaching the constitutional question posed in the stayed federal action is entirely consonant with principle that unnecessary resolution of constitutional disputes should be avoided. Under both the *Burford* and *Colorado River* abstention doctrines, the federal action is dismissed outright, rather than stayed, thus, eliminating the possibility that the judgment in the state court action would infringe upon an exercise of federal jurisdiction. Abstention from bankruptcy jurisdiction may or may not result in conflicts between state and federal jurisdictional grants. Conflicts may not occur because bankruptcy litigation differs from other sorts of civil litigation—it involves numerous adversary proceedings and contested matters arising within a single bankruptcy case. As a result of this procedural distinction, it may well be possible to “spin off” discrete portions of the bankruptcy case for resolution in a state court without prejudicing the bankruptcy court’s determination of the remaining portions of the case. Alternatively, the state law issues raised in proceedings invoking abstention may be interwoven with federal issues that remain. Whether conflicts in jurisdiction would result, should be determined on a case by case basis before a court abstains from exercising bankruptcy jurisdiction.

212. Decisions affirming a district court’s refusal to abstain, or reversing a district court’s decision to abstain, would not suffer from a broader abstention doctrine. Thus, the results in *In re Pan Am Corp.*, 950 F.2d 839 (2d Cir. 1991) (affirming district court’s refusal to abstain), and *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 6 F.3d 1184 (7th Cir. 1993) (reversing district court’s abstention decision as abuse of discretion), would be the same even under the narrow construction of *Thompson* proposed above.

213. See, e.g., *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 362 (1989) (reversing abstention determination where federal law governed dispute).

214. Compare *In re Joint E. and S. Dist. Asbestos Litg.*, 78 F.3d 764, 776 (2d Cir. 1996) (“If mere difficulty of decision is not a ground for abstention where the district court’s subject matter jurisdiction is based solely on diversity of citizenship, far less can it be a ground for abstention where, as here, jurisdiction is also based on the bankruptcy laws.”), with *In re Williams*, 144 F.3d 544, 550 n.4 (7th Cir. 1998) (no mention that state landlord/tenant law was unsettled), and *In re Tucson Estates, Inc.*, 912 F.2d 1162 (9th Cir. 1990) (characterizing state law at issue as unsettled), and *Citibank, N.A. v. White Motor Corp.* (*In re White Motor Credit*), 761 F.2d 270 (6th Cir. 1985) (affirming decision to

courts would not abstain from these sorts of difficult decisions. And one court has held that section 1334(c)(1) permits abstention "in the interest of justice" from resolution of issues of purely federal law,<sup>215</sup> although, as mentioned earlier, district courts would not abstain from other grants of federal jurisdiction on this ground.

Moreover, depending upon how narrowly *Thompson* is read, the decision to abstain in *Tucson Estates* may have been improper.<sup>216</sup> Like *Thompson*, the state law at issue in *Tucson Estates* involved real property. In *Thompson*, resolution of the unsettled issues of state property law would have resolved whether that property was properly included as property of the debtor's estate in bankruptcy. In *Tucson Estates*, by contrast, resolution of the issue of property law merely resolved the scope of the implied restrictive covenant claimed by the homeowners in that case. But resolution of this issue could not have resulted in exclusion of the covenanted property from property of the estate; nor would it have clarified the jurisdiction of the bankruptcy court over that property. It merely affected the value of the covenanted property. Thus, if *Thompson* is viewed as a variant of *Pullman* abstention, or if *Thompson* should be read no broader than the dictum in *Mangus*, *Tucson Estates* is not supported by *Thompson*.

Given this confusion regarding the effect of *Thompson*, it may be more appropriate not to read the reference to it in legislative history as an indication of Congress's intent to codify that decision. It may only indicate, more generally, that Congress understood bankruptcy abstention to be distinguishable from nonbankruptcy abstention, just as bankruptcy jurisdiction is distinguishable from other grants of federal jurisdiction. Unlike other grants of federal jurisdiction, bankruptcy jurisdiction is exercised by non-Article III bankruptcy judges whose judicial authority is substantially limited. Bankruptcy jurisdiction is best characterized as a blend of specialized federal question and supplemental jurisdiction, and its breadth is defined by reference to its functional purpose: the expeditious resolution of federal bankruptcy cases. The remaining sections of this Article consider the implications of these distinct interests upon bankruptcy abstention.

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abstain from numerous personal injury tort actions pending against debtor "in the interest of justice," without mention as to whether state tort law was unsettled), and *Republic Reader's Serv., Inc. v. Magazine Serv. Bureau, Inc.* (*In re Republic Reader's Serv., Inc.*), 81 B.R. 422, 426 n.4 (Bankr. S.D. Tex. 1987) (construing *Thompson* to hold "abstention appropriate solely on the basis that the case presented difficult questions of state law").

215. See *Mathiasen's Tanker Indus., Inc. v. Apex Oil Co.* (*In re Apex Oil Co.*), 980 F.2d 1150 (8th Cir. 1992).

216. See *In re Tucson Estates*, 912 F.2d 1162 (9th Cir. 1990).

#### IV. CONSTITUTIONAL REQUIREMENTS TO ABSTAIN FROM BANKRUPTCY JURISDICTION

Several courts have justified their broad reading of the permissive bankruptcy abstention provision on constitutional grounds.<sup>217</sup> For example, the court in *Titan Energy* observed that “[w]here a state court proceeding sounds in state law and bears a limited connection to [a] debtor’s bankruptcy case, abstention is particularly compelling.”<sup>218</sup> Comparing the proceeding before it as involving precisely the same sorts of state law contract doctrines at issue in *Northern Pipeline*, the court in *Titan Energy* read the Supreme Court’s decision as suggesting that federal courts should abstain from exercising their bankruptcy jurisdiction over these sorts of suits as they are “best left to state courts to resolve.”<sup>219</sup> Similarly, the bankruptcy court in *Republic Reader’s Service, Inc. v. Magazine Service Bureau, Inc.*<sup>220</sup>—which the court in *Tucson Estates* relied on to develop its twelve-factor test for permissive bankruptcy abstention<sup>221</sup>—thought that Congress intended, and the Constitution required, the bankruptcy court to defer from exercising its bankruptcy jurisdiction more often than with other grants of federal jurisdiction.<sup>222</sup> It viewed this expansive reading of the permissive bankruptcy abstention provision as following logically from the Supreme Court’s

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217. If abstention from these related to proceedings is truly discretionary with the district court, then it is difficult to imagine that section 1334(c)(1) saves the jurisdictional provision from constitutional infirmity. If, on the other hand, it would be an abuse of the court’s discretion not to abstain from hearing related to proceedings, then the scope of the permissive abstention provision overlaps substantially with that of the mandatory abstention provision. And, in this event, both sorts of nondiscretionary abstention, in practical effect, more closely resemble a limitation on bankruptcy jurisdiction than an abstention provision.

218. *In re Titan Energy, Inc.*, 837 F.2d 325, 332 (8th Cir. 1988).

219. *Id.* (“These claims require interpretation of the insurance contract in accordance with state law contract doctrines. This determination involves precisely the type of issues which the Supreme Court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), deemed best left to state courts to resolve.”).

220. (*In re Republic Reader’s Serv., Inc.*), 81 B.R. 422, 425 (Bankr. S.D. Tex. 1987) (“The intent of Congress is that [bankruptcy] abstention must play a far more significant role in limiting those matters, which although properly brought within the reach of jurisdiction under Title 11, are nonetheless best left for resolution to a state or other nonbankruptcy forum.”).

221. See *In re Tucson Estates*, 912 F.2d at 1166-67. Although the court in *Tucson Estates* did not explicitly include constitutional concerns among the twelve factors relevant to a discretionary abstention determination, several of these factors indirectly relate to constitutional concerns:

(2) the extent to which state law issues predominate over bankruptcy issues, . . . (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) the substance rather than form of an asserted ‘core’ proceeding.

*In re Tucson Estates*, 912 F.2d at 1167.

222. See *In re Republic Reader’s Serv., Inc.*, 81 B.R. at 425.

decision in *Northern Pipeline*.<sup>223</sup> The court in *Republic Reader's Service* noted that courts of appeals had broadly construed the grant of bankruptcy jurisdiction to extend to proceedings that might "conceivably have any effect on the estate being administered in bankruptcy,"<sup>224</sup> and that these same courts of appeals had also calmed concerns about the exercise of this broad grant of jurisdiction to a non-Article III bankruptcy court by construing section 1334(c)(1) as conferring a similarly broad power to abstain.<sup>225</sup> Moreover, after the Supreme Court's decision in *Northern Pipeline* but before Congress enacted the 1984 jurisdictional provisions, many bankruptcy courts and district courts abstained under former section 1471(d) from hearing claims arising solely under state law, avoiding a determination on the constitutionality of their exercise of jurisdiction over "related to" proceedings arising solely under state law.<sup>226</sup>

If inclined to do so, these courts could have supported their constitutional argument with reference to legislative history. The Report of the Senate Judiciary Committee on Senate Bill 1013 indicates that, in recommending the enactment of a broad mandatory abstention provision, it was influenced

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223. See *id.* ("This extension of the abstention doctrine logically resulted from the Supreme Court's decision that a non-Article III bankruptcy court could not constitutionally determine a contract claim based on state law brought by the debtor against a third party.")

224. *Id.* (emphasis omitted) (quoting *Wood v. Wood* (*In re Wood*), 825 F.2d 90, 93 (5th Cir. 1987), and *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984)).

225. See *In re Republic Reader's Serv., Inc.*, 81 B.R. at 425 (quoting *Wood*, 825 F.2d at 93). In *Wood*, the Fifth Circuit expressed concern that an expansive interpretation of section 1334(b) would bring proceedings into a federal court that were best litigated in a state court. Nonetheless, it suggested a broad permissive bankruptcy abstention doctrine as the solution to this quandary:

There is no necessary reason why that concern must be met by restrictive interpretations of the statutory grant of jurisdiction under section 1334. The Act grants the district court broad power to abstain whenever appropriate "in the interest of justice, or in the interest of comity with State courts or respect for State law." 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 . . . .

*In re Wood*, 825 F.2d at 93; see also *Kelley v. Salem Mortgage Co.* (*In re Salem Mortgage Co.*), 783 F.2d 626, 635 (6th Cir. 1986); *In re Reeves*, 65 F.3d 670, 675 (8th Cir. 1995) (quoting *Salem Mortgage* with approval). In *Salem Mortgage*, the Sixth Circuit discussed the breadth of the grant of bankruptcy jurisdiction in 28 U.S.C. § 1334(b):

We note that this jurisdictional grant was simultaneously qualified by the abstention provision of 28 U.S.C. § 1471(d) in the 1978 Act, now 28 U.S.C. § 1334(c) . . . . [T]he limitations in section 1334(c)(1) are 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. The degree to which the related proceeding is related to the bankruptcy case, as a practical matter, will doubtless be an important factor in the decision whether to abstain.

*Salem Mortgage*, 783 F.2d at 635 (citations omitted).

226. For a discussion of this case law, see *supra* text accompanying note 135.



by constitutional concerns:

(a) The Bankruptcy Act of 1978 significantly expanded the scope of Federal jurisdiction far beyond that which existed prior to the Act. [citing *Northern Pipeline*]; (b) As a result of this Act, Federal courts have been empowered to exercise jurisdiction over claims that are governed solely by state law; (c) As a result of this Act, Federal courts have been empowered to exercise Federal jurisdiction in cases that do not arise under bankruptcy, and which are not based upon Federal diversity jurisdiction, not based upon the existence of Federal question jurisdiction, and not based in any proper sense upon Federal pendant jurisdiction; “they are outside of the” judicial power provided for in the Constitution . . . .<sup>227</sup>

Moreover, when Congress enacted the 1984 jurisdictional provisions, several influential members of the Senate expressed their concern at various stages in the legislative process that the mandatory bankruptcy abstention statute did not go far enough to delegate bankruptcy jurisdiction over state law claims to state court resolution.<sup>228</sup> At the time that the Senate first adopted its jurisdictional proposals, Senators Hatch and Heflin, both members of the Senate Judiciary Committee, contended that inclusion of the mandatory discretionary abstention provisions was important on constitutional grounds.<sup>229</sup> When several months later the Senate adopted the House bill with changes, “[o]ne of the more significant changes [was the] retention of the Senate provision regarding mandatory abstention.”<sup>230</sup> At this time, Senators Hatch and Heflin again justified this amendment on constitutional

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227. S. REP. NO. 98-55, at 18-19 (1983).

228. Normally, the comments of an individual legislator are not indicative of congressional intent. But since there is very little other legislative history for the 1984 Amendments, courts often refer to the comments made by various Representatives and Senators.

229. See 130 CONG. REC. 9924 (1983) (statement of Sen. Heflin); *id.* at 9937-39 (statement of Sen. Hatch). However, this same legislative history also indicates that other senators believed that the broad mandatory abstention provision was unnecessary and unwise. See *id.* at 9923 (statement of Sen. Dole) (suggesting that constitutional questions surrounding bankruptcy jurisdiction are better resolved by assigning bankruptcy cases to existing district courts, but deferring to judgment of Senate Judiciary Committee on this issue); *id.* at 9975 (statement of Sen. Gorton) (contending that life-tenured bankruptcy court is certain to both survive constitutional scrutiny and preserve administrative gains resulting from consolidation of bankruptcy jurisdiction). The House version of the bill instead contained a narrower mandatory abstention provision, a provision that is nearly identical to that which was later enacted with the 1984 Amendments. See H.R. 5174, 98th Cong., 2d Sess. (March 21, 1983). But because the House was preoccupied with debating whether bankruptcy judges should receive life tenure and guaranteed salaries, there was no direct mention of the mandatory abstention provision during the passage of House Bill 5174. See 130 CONG. REC. 6189-6249 (1984).

230. 130 CONG. REC. 13,059 (1984) (statement of Sen. Thurmond).

grounds.<sup>231</sup> When the narrower House version of the mandatory abstention provision was ultimately adopted following a conference to resolve the differences between the Senate and House versions of House Bill 5174,<sup>232</sup> Senator Hatch voiced his concern that the compromise was unconstitutional because it did not more expansively require federal district courts to abstain from determining issues of state law under their bankruptcy jurisdiction.<sup>233</sup>

Senators Heflin and Hatch raised distinct constitutional questions—questions that can be viewed as raising issues under Article III of the United States Constitution regarding both the “vertical” and “horizontal” authority to adjudicate bankruptcy-related disputes.<sup>234</sup> Senator Heflin raised the vertical question under section 1 of Article III. He understood the broad discretionary and mandatory abstention provisions as direct responses to the separation of powers issues implicated by *Northern Pipeline*.

This proposal addresses the constitutional flaws noted in *Marathon* by enacting two substantial changes in the administration of the bankruptcy system. First, the parties in *Marathon*-type litigation would be given more control to determine the forum, including article III courts, in which their cases will be heard. Second, the district court judges would be given more control to determine the forum, including the district court, in which *Marathon*-type cases will be heard.

Greater authority over the choice of forum is also given to the parties by the abstention provisions of this legislation which amends the existing abstention provision to allow the district court to abstain [as provided in current § 1334(c)(1)]. It also requires the court to

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231. See 130 CONG. REC. 13,063-65 (1984) (statement of Sen. Heflin); *id.* at 13,065-70 (statement of Sen. Hatch). Senator DeConcini remarked, at the same time, however, that the Senate’s broad mandatory abstention provision “could endanger the operation of the entire Federal bankruptcy system.” *Id.* at 13,075-76 (statement of Sen. DeConcini) (describing this procedure as “troublesome” and likely to enable “those who favor delay . . . limitless opportunities to create endless delays,” and stating intention to later seek amendment to bill).

232. See 130 CONG. REC. 20,225-27 (1984) (statement of Rep. Fish); *id.* at 20,227-28 (statement of Sen. Kastenmeier); *id.* at 20,083-84 (statement of Sen. Dole).

233. See *id.* at 20,085 (statement of Sen. Hatch).

234. By “vertical,” I refer to separation of powers questions regarding the allocation of judicial authority between life-tenured federal district judges and untenured bankruptcy judges. By “horizontal,” I refer to federalism questions regarding the exercise of federal bankruptcy jurisdiction over proceedings arising under state law but arising in or related to the federal bankruptcy case. Both are questions to be resolved under Article III of the United States Constitution; issues of vertical constitutionality are governed by section 1 of Article III, while horizontal questions are governed by section 2. For the text of sections 1 and 2 of Article III, see *supra* note 18 and *infra* note 244. I use these references at the risk of confusing some proceduralists, who refer to horizontal questions as pertaining to those among different state courts and vertical issues as arising between state and federal courts. See, e.g., Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945, 946 (1998).

abstain [as provided in current § 1334(c)(2)].<sup>235</sup>

In *Northern Pipeline*, the Supreme Court construed section 1 of Article III to permit only life-tenured federal judges to exercise the “essential attributes” of judicial power when deciding disputes involving “private rights.”<sup>236</sup> *Northern Pipeline* found unconstitutional the broad delegation of bankruptcy jurisdiction to bankruptcy judges who enjoyed neither life tenure nor guarantees against salary reduction. This issue can be viewed as vertical, in that it considers the circumstances under which an untenured judge constitutionally can exercise judicial authority as an “adjunct” of a tenured federal district judge. Section 157, governing the reference of jurisdiction to non-Article III bankruptcy judges, was enacted by Congress in 1984 to resolve these vertical constitutional issues.

But there is little connection between the permissive bankruptcy abstention provision and any argument that the jurisdictional scheme enacted with the 1984 Amendments unconstitutionally delegates to bankruptcy judges too many of the essential attributes of judicial authority. *Northern Pipeline* questioned the vertical allocation of bankruptcy jurisdiction between federal district courts and federal bankruptcy courts; it did not suggest that the horizontal allocation of bankruptcy jurisdiction among state and federal courts was constitutionally suspect. Although both the plurality<sup>237</sup> and concurring<sup>238</sup> opinions in *Northern Pipeline* emphasize the significance of the purely private, state law claims at issue in that decision, *Northern Pipeline* does not question the allocation of jurisdiction over state law claims related to the bankruptcy case among state and federal courts. Instead, it viewed the state law origin of the cause of action at issue in *Northern Pipeline* as important to vertical concerns because principles of separation of powers is least likely to be encroached when Congress assigns jurisdiction over claims created by it under federal law. Section 1334(c)(1) does not address the allocation of jurisdiction between untenured bankruptcy courts and tenured district courts.<sup>239</sup> Rather, it addresses the proper allocation of jurisdiction between federal and state courts. In this regard, the discretionary bankruptcy abstention provision addresses horizontal, not vertical,

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235. 130 CONG. REC. 9924 (1983) (statement of Sen Heflin).

236. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83-86 (1982).

237. Only four Justices joined in the *Northern Pipeline* plurality decision. *See id.*

238. The two Justices who concurred in the judgment in *Northern Pipeline* did so based only on a terse explanation of the holding. *See id.* at 89-92.

239. These same arguments relate to the mandatory bankruptcy abstention provision. Like the discretionary provision, section 1334(c)(2) addresses only the proper allocation of bankruptcy jurisdiction between federal and state courts. As such, it does not implicate these vertical constitutional issues.

constitutional concerns.<sup>240</sup> These horizontal issues concern the constitutionality of the breadth of the grant of bankruptcy jurisdiction to district courts, and *Northern Pipeline* simply did not address these issues.

Senator Hatch raised the horizontal Article III question,<sup>241</sup> indicating that he viewed the bankruptcy abstention provisions as constitutionally necessary because “bankruptcy judges [impermissibly] have taken jurisdiction over State law issues that are vaguely related to bankruptcy proceedings but which have no basis in Federal law at all.”<sup>242</sup> In making this constitutional argument, Senator Hatch relied primarily on a student Note published in the *Harvard Law Review* before the Supreme Court had issued its decision in *Northern Pipeline*.<sup>243</sup>

The *Harvard* Note questioned the propriety of the breadth of the grant of federal bankruptcy jurisdiction over related to proceedings governed solely by state law. Rejecting the suggestion that, under Article I of the Constitution, Congress could both create a trustee in bankruptcy and confer on the federal courts jurisdiction over all controversies to which the trustee is a party, the Note understood Article III as the exclusive source of federal jurisdiction and as requiring identification of a “federal interest” at stake in the litigation of the state law bankruptcy proceeding. Section 2 of Article III permits Congress to confer on federal courts, among other things, jurisdiction of cases “arising under” federal law.<sup>244</sup> Although the Supreme Court has

240. The bankruptcy court in *Republic Reader's Service* appears to have understood this distinction, although it discounted the significance of it:

It is true that placement of bankruptcy jurisdiction with the district court effected a cure of the *Marathon* constitutional problem, and reference may be withdrawn as to any matter; however, the dual forums available for hearing bankruptcy issues do not mandate that a district court exercise jurisdiction. A state court or other nonbankruptcy forum still provides an appropriate alternative where warranted under the abstention principles.

*Republic Reader's Serv. v. Magazine Serv. Bureau, Inc. (In re Republic Reader's Ser., Inc.)*, 81 B.R. 422, 425 n.3 (Bankr. S.D. Tex. 1987).

241. See 130 CONG. REC. 9928 (1983) (statement of Sen. Hatch) (raising “[a]n alternative article III consideration, [which] tacitly influenced the [*Northern Pipeline*] decision, and under slightly different circumstances might have become the primary basis for decision”).

242. *Id.* Senator Hatch explained:

This alternative article III argument recognizes that bankruptcy courts have used the practically limitless language of [former § 1471(b)] to assert Federal question jurisdiction over non-Federal questions. Although bankruptcy is clearly a Federal question, State law claims do not automatically become subject to litigation in a Federal court, perhaps even a Federal court in a distant State, simply because it is tangentially related to a bankruptcy claim.

*Id.*

243. See Note, *Bankruptcy and the Limits of Federal Jurisdiction*, 95 HARV. L. REV. 703 (1982). The Senate Report also cited the *Harvard* Note. See S. REP. NO. 98-55, at 18 n.53a (1983).

244. Congress is constitutionally empowered to confer jurisdiction upon the federal courts as follows:

The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the

construed constitutional arising under jurisdiction far more broadly than statutory arising under jurisdiction,<sup>245</sup> questions remain as to whether the grant of bankruptcy jurisdiction over proceedings arising in and related to a title 11 case constitute a form of constitutional arising under jurisdiction.<sup>246</sup> The Note suggested that, under a broad construction of these federal interests, Congress could grant federal jurisdiction over state law claims in order to protect federal legislation “expressing a national policy in the area concerned” or “when ‘discrimination against federal instrumentalities’ may obstruct federal objectives,” but rejected “protective jurisdiction” as supporting the broad grant of related to bankruptcy jurisdiction because “[w]hen state courts are viewed as the partners of federal courts, ‘protective jurisdiction’ becomes an overbroad justification for federal jurisdiction over state law claims, the resolution of which is not necessary to promote federal objectives.”<sup>247</sup> The Note then concluded that a narrow Article III approach “would limit federal jurisdiction in bankruptcy to litigation within the federal core” and identified this “core” bankruptcy jurisdiction as existing only to conserve and equitably distribute the debtor’s estate.<sup>248</sup> It, therefore, “would not find a federal interest implicated in a suit against a defendant who stood outside the debtor-creditor relationships surrounding the bankruptcy.”<sup>249</sup>

The *Harvard* Note is right to describe the grant of related to jurisdiction as broad, and to question how best to characterize this broad grant of jurisdiction. Other commentators have debated whether related to jurisdiction is better characterized as a form of protective jurisdiction,<sup>250</sup> supplemental

Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of Different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2, cl. 1.

245. See, e.g., *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 8 n.8 (1983) (constitutional federal question jurisdiction under Article III “has long been recognized . . . [as] broader than federal-question jurisdiction under [28 U.S.C.] § 1331”).

246. Compare Block-Lieb, *supra* note 21, at 764-84 (arguing that arising in and related to bankruptcy jurisdiction might be characterized either as a form of constitutional arising under jurisdiction or as jurisdiction ancillary to such a grant), with Cross, *supra* note 21, at 1251 (contending that related to jurisdiction is best understood as supplemental jurisdiction), and Thomas Galligan, Jr., *Article III and the “Related To” Bankruptcy Jurisdiction: A Case Study in Protective Jurisdiction*, 11 U. PUGET SOUND L. REV. 1, 5 (1987) (describing related to jurisdiction as protective jurisdiction).

247. Note, *supra* note 243, at 710-11; see also Cross, *supra* note 21, at 1204-29 (contending that related to jurisdiction is constitutional, but not as a grant of protective jurisdiction).

248. Note, *supra* note 243, at 711.

249. *Id.*

250. For an argument that related to jurisdiction is best characterized as a form of protective

jurisdiction,<sup>251</sup> or arising under jurisdiction.<sup>252</sup> Much of this confusion is justified because the Supreme Court has not clearly articulated why Article III empowers Congress to confer bankruptcy jurisdiction broadly.<sup>253</sup>

But it is quite a leap to conclude from this dearth of precedent that the broad grant of jurisdiction over state law claims related to a bankruptcy case is unconstitutional because it exceeds the horizontal limits set forth in Article III. The Supreme Court has repeatedly indicated in dicta that it views the breadth of the current grant, as well as other similarly broad grants, as fitting well within this constitutional mandate.<sup>254</sup> Indeed, the plurality in *Northern Pipeline* assumed the constitutionality of the broad grant of bankruptcy jurisdiction over state law claims to federal district courts.<sup>255</sup> Because the Supreme Court has not suggested that the grant of bankruptcy jurisdiction over state law claims is unconstitutionally broad, it is unlikely that courts are constitutionally required to construe the permissive bankruptcy abstention provision to enable federal courts to abstain more readily from their bankruptcy jurisdiction than from other grants of federal jurisdiction.<sup>256</sup> Although abstention doctrines may be rooted in constitutional requirements,<sup>257</sup> nothing in the Constitution requires federal courts to abstain

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jurisdiction, see Galligan, *supra* note 246, at 5.

251. See Cross, *supra* note 21, at 1251 (“Because all the state claims are logically related to the federal cause of action in bankruptcy, they form part of a single federal bankruptcy ‘case’ for purposes of Article III. The doctrine of ancillary jurisdiction accordingly allows the entire case to be heard in a federal court—a result fully in keeping with the limits of Article III.”); Block-Lieb, *supra* note 21, at 721, 779-84 (concluding that related to jurisdiction can be characterized as supplemental jurisdiction, and relying both on language of statutory provision and its legislative history).

252. See Block-Lieb, *supra* note 21, at 769-79 (arguing that related to proceedings might be characterized as federal questions, not under 28 U.S.C. § 1331, but rather as a matter of constitutional law, because they “exist only in the context of the title 11 case” and the title 11 case “forms an ‘original ingredient’ of any form of bankruptcy relief, including ‘arising in’ and ‘related to’ proceedings occurring in the case”).

253. For discussions of this case law, see Block-Lieb, *supra* note 21, at 764-66 nn.272-73; Cross, *supra* note 21, at 1207-08; Galligan, *supra* note 246, at 23-30.

254. See Cross, *supra* note 21, at 1207-08.

255. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 72 n.26 (1982) (asserting without much discussion that “[t]his [related to] claim may be adjudicated in federal court on the basis of its relationship to the petition for reorganization”).

256. This same argument applies to the mandatory bankruptcy provision. If bankruptcy jurisdiction is constitutionally conferred on district courts, then the Constitution does not require district courts to abstain from its exercise.

257. Commentators debate whether the Constitution requires district courts to abstain from exercising federal grants of jurisdiction when this exercise would encroach upon state sovereignty. Compare Calvin R. Massey, *Abstention and the Constitutional Limits of the Judicial Power of the United States*, 1991 B.Y.U. L. REV. 811 (arguing that many abstention doctrines are constitutionally required), with MARTIN H. REDISH, *THE FEDERAL COURTS IN THE POLITICAL ORDER* 47-74 (1991) (arguing that judge-made abstention doctrines are illegitimate usurpation of congressional authority to define federal jurisdiction). If the Constitution requires federal courts to abstain in order to avoid treading on important state interests, it probably requires them to abstain only sparingly. See *infra* text

from exercising their bankruptcy jurisdiction more often than with other grants of federal jurisdiction.

#### V. IS ABSTENTION FROM BANKRUPTCY JURISDICTION ANALAGOUS TO DECLINING TO EXERCISE SUPPLEMENTAL JURISDICTION?

As noted above, several courts of appeals consider “the degree of relatedness or remoteness of the proceeding to the main bankruptcy case” in determining whether to permit abstention under section 1334(c)(1).<sup>258</sup> If constitutional concerns do not justify this focus, might there be some other explanation?

Although nowhere made explicit, these courts might be contrasting a determination to abstain from exercising bankruptcy jurisdiction over federal proceedings that arise under the Bankruptcy Code from a decision to decline jurisdiction over state law proceedings that arise in or are related to a bankruptcy case.<sup>259</sup> While arising under proceedings present federal questions for which federal jurisdiction would exist even absent the grant of bankruptcy jurisdiction in section 1334(b), arising in and related to proceedings certainly would not fit within the scope of section 1331, the statute conferring federal question jurisdiction. Arising in and related to proceedings also are difficult to characterize as “arising under . . . the laws of the United States” within the meaning of section 2 of Article III, although this section of the Constitution has been construed more broadly than the federal question jurisdiction statute.<sup>260</sup> If bankruptcy jurisdiction over

accompanying notes 267-69 (discussing separation of powers reasons for construing abstention doctrines narrowly).

258. *In re Tucson Estates, Inc.*, 912 F.2d 1162, 1167 (9th Cir. 1990) (quoting the sixth factor from *In re Republic Reader's Serv., Inc.*, 81 B.R. at 429). For other decisions emphasizing the “relatedness” of the proceeding to a determination to abstain from an exercise of bankruptcy jurisdiction, see *supra* text accompanying notes 217-26.

259. Indeed, the twelve-factor test employed by the court in *Tucson Estates* at times resembles the four-factor test for declining supplemental jurisdiction. *Tucson Estates* test provides, in part:

(2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable law, (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case.

*In re Tucson Estates, Inc.*, 912 F.2d at 1167. Similarly, section 1376(c) provides:

(1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c) (1994).

260. A distinction exists between statutory and constitutional federal question jurisdiction because the Supreme Court has long held that congressional power under Article III to confer federal question

proceedings arising in or related to a bankruptcy case cannot be characterized as a species of arising under jurisdiction,<sup>261</sup> then it is probably best characterized as supplemental jurisdiction—jurisdiction supplemental to the federal bankruptcy case.<sup>262</sup> But if jurisdiction over proceedings arising in or related to a bankruptcy case is supplemental jurisdiction, then requests to defer to state court resolution of these proceedings may find closer analogy in common law doctrine vesting in federal courts the discretion to decline to exercise supplemental jurisdiction than that empowering federal courts to abstain from the exercise of federal jurisdiction.<sup>263</sup>

Despite the logic of this position, the plain language of the affected statutes does not support it. Most significantly, section 1334(c)(1) sets forth but one standard for abstention from any sort of bankruptcy jurisdiction. If Congress had intended to distinguish between abstaining from proceedings arising under federal bankruptcy law and declining to exercise supplemental jurisdiction over proceedings arising in or related to a federal bankruptcy case it would have more clearly delineated this distinction. Instead, section 1334(c)(1) permits district courts to “abstain[] from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11” when “in the interest of justice, or in the interest of comity with State courts or respect for State law,” without distinguishing between proceedings arising under the Bankruptcy Code and proceedings arising in or related to a bankruptcy case.<sup>264</sup>

When Congress wants to grant to federal courts broad and expansive statutory discretion to decline jurisdiction, it does so with unambiguous language. As noted above, 28 U.S.C. § 1367(c) permits district courts to decline to exercise supplemental jurisdiction on the broadly permissive grounds set forth in that statute.<sup>265</sup> The language in section 1334(c)(1) differs dramatically from this more expansive authorization to decline to exercise jurisdiction in section 1367(c). Section 1334(c)(1) speaks in terms of an “abstention” from bankruptcy jurisdiction, unlike section 1367(c), which

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jurisdiction is far broader than that conferred by statute under 28 U.S.C. § 1331. *See, e.g.*, *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 8 n.8 (1983).

261. For an argument that arising in and related to bankruptcy jurisdiction constitutes a type of federal question jurisdiction within the meaning of Article III, see Block-Lieb, *supra* note 21, at 769-79.

262. *See* Cross, *supra* note 21, at 1251; Block-Lieb, *supra* note 21, at 721, 779-84.

263. For a discussion of the case law governing federal courts' discretion to decline to exercise supplemental jurisdiction, see *supra* text accompanying notes 75-85. For a discussion of the case law governing their ability to abstain from exercising original federal jurisdiction, see *supra* text accompanying notes 24-74.

264. 28 U.S.C. § 1334(c)(1) (1994).

265. For the text of 28 U.S.C. § 1367(c), see *supra* text accompanying note 83.



authorizes district courts to “decline to exercise” their supplemental jurisdiction. In addition, section 1367(c) more clearly describes this as a determination within the discretion of the district courts, providing that they “may decline to exercise supplemental jurisdiction;” section 1334(c)(1), by contrast, only indirectly permits district courts to abstain from exercising their bankruptcy jurisdiction by providing that “[n]othing in this section prevents a district court . . . from abstaining from hearing a particular proceeding.” Finally, section 1367(c) permits district courts to decline to exercise supplemental jurisdiction on four grounds, with the broadest of these expansively authorizing the court to decline this jurisdiction “in exceptional circumstances, [whenever] there are other compelling reasons.” This standard finds no counterpart in the statutory language of the Judicial Code, but legislative history indicates that Congress intended to codify *Gibbs*.<sup>266</sup> The language of section 1334(c)(1), permitting abstention “in the interest of justice, or in the interest of comity with State courts or respect for State law,” is reminiscent of common law abstention doctrines, and legislative history supports this reference.

Nor is justification for this position found in the policies supporting distinct rules for a determination to abstain from an exercise of federal jurisdiction and one to decline to exercise supplemental jurisdiction. Abstention doctrines 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. The Supreme Court has admonished that limits on the power to abstain derives from “the undisputed constitutional principle that Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds.”<sup>267</sup> By contrast, the discretion of a federal court to decline to exercise supplemental jurisdiction is broadly defined because, as initially conceived, separation of powers concerns were absent from this

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266. See H.R. Rep. No. 101-734, at 28-29 & n.15 (1990), reprinted in 1990 U.S.C.A.N. 6860, 6874-75.

267. *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 358-59 (1989); see also *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.) (Courts “have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.”). The Court in *New Orleans Pub. Serv.* indicated:

That principle does not eliminate, however, and the categorical assertions based upon it do not call into question, the federal courts’ discretion in determining whether to grant certain types of relief—a discretion that was part of the common-law background against which the statutes conferring jurisdiction were enacted.

*New Orleans Pub. Serv., Inc.*, 491 U.S. at 359 (citing David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 570-77 (1985)).

determination to contract the scope of supplemental jurisdiction. If anything, separation of powers concerns ran the other direction—questioning the authority of courts to expand upon statutory grants of jurisdiction without direction from the legislature.<sup>268</sup> Before enactment of 28 U.S.C. § 1367, supplemental jurisdiction was not jurisdiction that had been conferred on federal courts by statute. Since supplemental jurisdiction was, by definition, judicially-crafted jurisdiction, it was jurisdiction that federal courts were not obligated by statute to exercise. The exercise of supplemental jurisdiction was understood to be discretionary with the federal court. Moreover, the determination to decline to exercise that jurisdiction was also understood to be defined by common-law principles of equity and fairness. Section 1367, the supplemental jurisdiction provision, merely codifies this case law.<sup>269</sup>

Federal jurisdiction over proceedings arising in and related to a bankruptcy case did not develop in the same way as the supplemental jurisdiction conferred on district courts by section 1367. Section 1367 codified *United Mine Workers v. Gibbs*.<sup>270</sup> The bankruptcy jurisdictional provision, section 1334(b), did not codify judicially-created jurisdictional doctrines. Instead, it overrode and substantially extended pre-Code jurisdictional statutes.<sup>271</sup> And although, under the former Act of 1898, bankruptcy courts could have declined to exercise their summary bankruptcy jurisdiction if its scope was unclear, or insufficient to resolve a complex dispute,<sup>272</sup> with its enactment of the 1978 Bankruptcy Code, Congress clearly sought to abolish the distinction between summary and plenary bankruptcy jurisdiction precisely because it viewed this fractionalization of jurisdiction among federal and state courts as inconsistent with efficient bankruptcy administration. Nor is there any indication on the face of the statute conferring bankruptcy jurisdiction that Congress viewed this grant of jurisdiction as “discretionary” with the district court.

Where Congress confers discretionary federal jurisdiction, courts have more broadly defined the grounds for abstaining from the exercise of this jurisdiction. For example, distinct standards govern abstention from federal

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268. See *Finley v. United States*, 490 U.S. 545 (1989). The Court’s decision in *Finley* explains Congress’s decision to codify the doctrines of ancillary and pendant jurisdiction in 28 U.S.C. § 1367.

269. Since 1990, supplemental jurisdiction has been conferred by statute. At the same time, and in the same statute, Congress codified the standard governing a decision to decline supplemental jurisdiction in section 1367(c). Nonetheless, courts have construed section 1367(c) consistent with this earlier case law, concluding that the decision to decline supplemental jurisdiction is discretionary with the district court and permitting numerous factors to justify such an abdication of jurisdiction.

270. See *supra* note 84.

271. See *supra* text accompanying notes 118-27 (discussing legislative history of bankruptcy jurisdictional provision enacted with 1978 Bankruptcy Code).

272. For a discussion of this pre-Code case law, see *supra* text accompanying notes 110-17.

declaratory judgment actions because the Supreme Court has characterized jurisdiction over declaratory judgment actions as “nonobligatory” and “discretionary.”<sup>273</sup> A district court may, in its discretion, abstain from the declaratory judgment action in favor of a parallel state court action, even in the absence of exceptional circumstances.<sup>274</sup> It would be difficult to argue, along the same lines, that section 1334(b) confers discretionary bankruptcy jurisdiction. The bankruptcy jurisdictional provision does not speak in similarly discretionary terms, instead providing that “the district courts *shall* have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.”<sup>275</sup> Moreover, had Congress understood the broad grant of bankruptcy jurisdiction to be discretionary, enactment of the mandatory abstention provision would have been viewed as unnecessary.

## VI. THE BANKRUPTCY GOAL OF EXPEDITED ADMINISTRATION

Several courts of appeals have construed the permissive bankruptcy abstention provision broadly in order to foster expeditious resolution of litigation before bankruptcy courts.<sup>276</sup> This reading of section 1334(c)(1)

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273. The Court in *Wilton* distinguished the distinct standards applied in *Brillhart v. Excess Insurance Co.*, 316 U.S. 491 (1942), and *Colorado River Conservation District v. United States*, 424 U.S. 800 (1976), as justified by the broadly discretionary language of the Federal Declaratory Judgment Act:

By the Declaratory Judgment Act, Congress sought to place a remedial arrow in the district court's quiver; it created an opportunity, rather than a duty, to grant a new form of relief to qualifying litigants. Consistent with the nonobligatory nature of the remedy, a district court is authorized, in the sound exercise of its discretion, to stay or dismiss an action seeking a declaratory judgment before trial or after all arguments have drawn to a close [in a state court action].

*Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995).

274. See *Wilton*, 515 U.S. at 286; *Brillhart v. Excess Ins. Co.*, 316 U.S. 491 (1942).

275. 28 U.S.C. § 1334(b) (1994) (emphasis added).

276. See, e.g., *In re Tucson Estates, Inc.*, 912 F.2d 1162, 1167 (9th Cir. 1990) (considering “the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention”).

In large bankruptcy cases with hundreds or even thousands of tort litigants beating on the door of one federal judge, judicial health and survival, or at least judicial economy and expeditiousness, may depend on the court's authority to refer cases to other courts. Since the 1984 Bankruptcy Act prevents reference of these tort cases to bankruptcy courts, as in the past, it makes good sense to give the district courts wide latitude in referring the cases through abstention to other courts.

*Citibank, N.A. v. White Motor Corp.* (*In re White Motor Corp.*), 761 F.2d 270, 274 (6th Cir. 1985); see also *Arnold Print Works, Inc. v. Apkin* (*In re Arnold Print Works, Inc.*), 815 F.2d 165, 171 (1st Cir. 1987) (implying that bankruptcy court should rarely abstain from hearing and determining core proceeding); *A.H. Robins, Co. v. Piccinin* (*In re A.H. Robins Co.*), 788 F.2d 994, 1016 (4th Cir. 1986) (indicating in dicta that, in subsequently determining whether thousands of pending tort actions should be transferred to a district court, the court should balance the benefits of a single forum for resolution of all claims against the debtor with the hardships that such a transfer would impose on the individual plaintiffs); *Kelley v. Nodine* (*In re Salem Mortgage Co.*), 783 F.2d 626, 635 (6th Cir. 1986) (noting

differs from the practice followed outside the bankruptcy context. With the exception of the *Colorado River* abstention doctrine, the nonbankruptcy abstention doctrines generally ignore principles of judicial economy.<sup>277</sup>

The language of the permissive abstention provision provides limited support for this construction. When these provisions permit abstention “in the interest of justice,” they employ the language also found in 28 U.S.C. § 1404—the federal venue transfer provision.<sup>278</sup> Section 1404 permits district courts to consider whether venue transfer would suit, not just the “convenience of the parties and witnesses,” but also judicial convenience. For example, courts have considered their own crowded dockets in determining whether to grant a motion for change of venue.<sup>279</sup>

The legislative history of the permissive bankruptcy abstention provision also lends some support to this position. It provides that the statute is necessary “to insure that the jurisdiction of the bankruptcy court is exercised only when appropriate to the expeditious disposition of bankruptcy cases.”<sup>280</sup>

Only in exceptional circumstances will abstention from the exercise of bankruptcy jurisdiction expedite resolution of an entire bankruptcy case, however. Abstention necessarily divides the exercise of the broad grant of bankruptcy jurisdiction among federal and state courts. This division of

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that Congress was wise to choose a broad jurisdictional grant and a broad abstention doctrine so that district courts would be able to determine whether hearing a particular case would promote or impair efficient and fair adjudication” of bankruptcy case. Moreover, “[t]he degree to which the related proceeding is related to the bankruptcy case, as a practical matter, will doubtless be an important factor in the decision whether to abstain.”); *In re Med General, Inc.*, 672 F.2d 716, 719 (8th Cir. 1982) (“Much of the jurisdiction now conferred on the bankruptcy courts is new, a creature of the reform of 1978. Section 1471(d) was intended by Congress to give those courts the flexibility to handle their new powers judiciously.”).

277. Indeed, one of the principles criticisms of the abstention doctrines is that abstention protects harmonious relations between federal and state courts at the cost of litigants’ convenience. See *supra* notes 34-35. Under *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), and also *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940), a pending federal action is stayed, and the parties are directed to commence an action before the state courts. Only after the resolution of the state action, is the stay of the federal action lifted and the parties permitted to continue litigation of their federal claims before a federal tribunal. Principles of judicial economy dictate that the federal court having jurisdiction over both the state and federal claims resolve both claims if the federal court was chosen by the litigants. However, interests in comity with state courts instead direct that the federal court abstain from exercising this jurisdiction, in favor of state court resolution.

278. This provision permits district courts to “transfer any civil action to any other district or division where it might have been brought” where transfer is “[f]or the convenience of parties and witnesses, [or] in the interest of justice.” 28 U.S.C. § 1404(a) (1994) (emphasis added).

279. See, e.g., *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824 (5th Cir. 1993); *Mercier v. Sheraton Int’l, Inc.*, 935 F.2d 419 (1st Cir. 1991).

280. H.R. REP. NO. 95-595, at 51 (1977), reprinted in 1978 U.S.C.C.A.N. 5962, 6012. It also provides that abstention should not occur, in the interest of justice, where there exists no court other than the bankruptcy court with jurisdiction to adjudicate the entire proceeding at issue. See H.R. REP. NO. 95-595, at 51 (1977), reprinted in 1978 U.S.C.C.A.N. 5962, 6013.

jurisdiction creates incentives for delay and, therefore, contradicts the bankruptcy policy favoring expedited bankruptcy administration for two reasons. First, the division gives parties an additional layer of jurisdictional and procedural issues for litigation. Because the standard for permissive bankruptcy abstention is broad and somewhat amorphous, division of jurisdiction provides a party with deep pockets and an incentive for delay with a basis for dragging out the litigation on this threshold procedural issue. Second, even if courts could formulate brightline rules governing abstention, the division of bankruptcy jurisdiction would still postpone expeditious resolution of bankruptcy cases because litigation conducted in multiple fora is generally more time consuming and expensive for the debtor than litigation conducted in a single bankruptcy forum.

A student Note published in the *Texas Law Review* (and relied upon by Senator Hatch to support the broad mandatory abstention provision he favored) first argued that former section 1471(d) should be construed expansively to permit abstention in order to expedite administration of bankruptcy cases.<sup>281</sup> The Note contended that former section 1471(d)'s reference to an "interest in justice" should be interpreted to "include[] an interest in efficient, fair distribution of judicial resources."<sup>282</sup> Where resolution of bankruptcy-related proceedings in state court would not "significantly impair the administration of the estate to which the proceeding relates," the Note recommended that courts should abstain from exercising their bankruptcy jurisdiction over the proceedings.<sup>283</sup>

The *Texas* Note exaggerates the likelihood that an exercise of bankruptcy jurisdiction would delay administration of bankruptcy cases, however, for it was written before the courts of appeals had an opportunity to construe the breadth of the provisions broadly conferring bankruptcy jurisdiction on district and bankruptcy courts. It relies on a quote from the leading treatise to the effect that the grant of bankruptcy jurisdiction "has no conceptual limit"<sup>284</sup> and should extend to any proceeding if it "could conceivably have

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281. See David L. Bryant, Note, *Selective Exercise of Jurisdiction in Bankruptcy-Related Civil Proceedings*, 59 TEX. L. REV. 325 (1981). Arguing in favor of a broader mandatory abstention provision, Senator Hatch relied, not only on the *Harvard* Note, discussed *supra* text accompanying notes 243-49, but also on this *Texas* Note.

282. Note, *supra* note 281, at 326.

283. *Id.* The *Texas* Note also argues:

[A] court should hear and decide a bankruptcy-related civil proceeding only if its resolution in a nonbankruptcy forum would significantly impair administration of the estate to which the proceeding relates, or if the bankruptcy court could hear the proceeding as part of a title 11 case with little additional use of the court's resources.

*Id.* at 333.

284. *Id.* at 329 (quoting 1 COLLIER ON BANKRUPTCY, § 3.01[1][e], at 3-48 to -49 (15th ed. 1979)).

any effect upon the estate being administered.”<sup>285</sup> Based on this broad language, and a baker’s dozen bankruptcy court decisions issued within several years after enactment of the newly expanded bankruptcy jurisdictional provision, the Note questions whether bankruptcy cases will be expeditiously administered if bankruptcy courts exercise the full breadth of this grant of jurisdiction.<sup>286</sup> But courts of appeals have not construed the bankruptcy jurisdictional provision as broadly as might have been predicted in 1981.

The broadest grant of bankruptcy jurisdiction, jurisdiction over proceedings related to a bankruptcy case, has since been construed by several circuits to cover only those proceedings with a direct, legal effect upon the bankruptcy estate—proceedings that could affect distributions from, or administration of, the estate.<sup>287</sup> True, some circuits have adopted a standard of related to jurisdiction that, at first blush, sounds far broader—a standard that requires only that the activity have some conceivable impact on the bankruptcy reorganization or estate, and does not require that this impact be either direct or legal.<sup>288</sup> However, the Supreme Court recently characterized

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285. Note, *supra* note 281, at 329-30.

286. *See id.* “Although this expanded jurisdiction will cause bankruptcy courts to hear more lawsuits, whether it will achieve Congress’ goal—an efficient, convenient, and fair bankruptcy judicial system—is uncertain. Instead, it may create new delays and waste limited judicial resources by increasing the congestion of bankruptcy court dockets.” *Id.* at 331.

287. *See Home Ins. Co. v. Cooper & Cooper, Ltd.*, 889 F.2d 746, 749 (7th Cir. 1989), stating:

Overlap between the bankrupt’s affairs and another dispute is insufficient unless its resolution also affects the bankrupt’s estate or the allocation of its assets among creditors. Although the [proceeding at issue on appeal] has a nexus with the bankruptcy—in the sense that it would be convenient, and promote consistency, to resolve all questions concerning the [insurance] policy at one go—it does not necessarily have a financial effect on the estate (or the apportionment among its creditors).

*Id.*; *see also Pacor, Inc. v. Higgins (In re Pacor, Inc.)*, 743 F.2d 984, 994 (3d Cir. 1984) (initially defining related to jurisdiction as existing over bankruptcy proceeding if “the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy” and later qualifying this standard by stating that related to jurisdiction exists “if the outcome [of the proceeding] 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” (emphasis omitted)); *Gardner v. United States (In re Gardner)*, 913 F.2d 1515, 1518 (10th Cir. 1990) (holding that “bankruptcy court lacks related jurisdiction to resolve controversies between third party creditors which do not involve debtor or his property unless the court cannot complete administrative duties without resolving the controversy” (citation omitted)).

288. *See, e.g., Wood v. Wood (In re Wood)*, 825 F.2d 90, 93 (5th Cir. 1987) (determining that related to jurisdiction turns on “whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy” (citing *Pacor, Inc. v. Higgins (In re Pacor)*, 743 F.2d 984, 994 (3d Cir. 1984)) (emphasis omitted)); *Miller v. Kemira, Inc. (In re Lemco Gypsum, Inc.)*, 910 F.2d 784, 788 & n. 19 (11th Cir. 1990) (adopting *Pacor* court’s “conceivable effect” standard as definitive of related to jurisdiction without reference to qualifying language that appears in next sentence of *Pacor*).

this distinction among circuit courts' definitions of this jurisdictional grant as "slight."<sup>289</sup> Moreover, even under the broader conception of related to bankruptcy jurisdiction, courts of appeals regularly have found bankruptcy jurisdiction to be wanting.<sup>290</sup> 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.

More importantly, it is not at all clear that the *Texas Note* was correct in asserting that a broad standard of bankruptcy jurisdiction creates overburdened dockets in bankruptcy courts. Due to the financial exigencies inherent in bankruptcy litigation, many of the law suits occurring in bankruptcy are settled by the parties. If anything, adding the possibility of abstention under an amorphous and discretionary standard would delay bankruptcy because it provides parties with another layer of procedural issues to litigate.

In limited circumstances, abstention from a proceeding may speed up the closure of the case, but these circumstances are limited. Where litigation was pending in state court before commencement of the bankruptcy case, state court resolution of the litigation may be quicker than repeating the process in front of the bankruptcy court. Abstention in favor of a pending state court action is most likely to expedite resolution of the bankruptcy case where the state litigation is close to trial.<sup>291</sup>

For example, in *Tucson Estates*, the court of appeals emphasized that the

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289. *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 n.6 (1995) (discussing "slight differences" between circuit courts' definitions of related to jurisdiction, and concluding only that "these cases make clear that bankruptcy courts have no jurisdiction over proceedings that have no effect on the debtor").

290. *See, e.g., In re Pacor, Inc.*, 743 F.2d 984 (finding no related to bankruptcy jurisdiction over a personal injury tort claim brought by a consumer against a supplier, although the supplier had filed a third party complaint against the manufacturer and the third party claim was stayed by the manufacturer's chapter 11 filing; the consumer's claim was described as "mere precursor to potential third party claim for indemnification" by the supplier against the manufacturer because the manufacturer would not be barred by *res judicata* or collateral estoppel from relitigating any issue decided in the suit between the consumer and the supplier, nor would the consumer's action create automatic liability against the manufacturer).

291. Following the entry of a judgment in the state court action, interests in judicial economy may prompt the bankruptcy court to abstain in favor of the state appellate process. The *Rooker-Feldman* doctrine would preclude the bankruptcy court any relitigation on the merits. *See, e.g., Baldino v. Wilson (In re Wilson)*, 116 F.3d 87 (3d Cir. 1997) (reversing denial of relief from automatic stay sought by judgment debtor in order to pursue appeal of prepetition state court judgment against debtor and holding that bankruptcy court abused its discretion under section 362(d)(1) because *Rooker-Feldman* doctrine would have precluded it from reconsidering merits of state court judgment).

debtor had filed its bankruptcy petition more than six years after the commencement of the state action pending against it, filing only after losing an important summary judgement motion.<sup>292</sup> It viewed this delay in filing as “forum shopping to avoid imminent defeat in state court,”<sup>293</sup> because the plaintiff-homeowners in that action were ready for jury trial in state court. Similarly, in *Siragusa v. Siragusa*, the circuit court emphasized that the debtor, Mr. Siragusa, had waited until after the Nevada state court had entered an order modifying the alimony award before bringing this complaint before the bankruptcy court—a sequence of events the court characterized as forum shopping.<sup>294</sup>

The fact that a parallel action is pending before a state court should not, standing alone, establish that abstention would speed resolution of the bankruptcy case. In making the determination that abstention fosters expeditious bankruptcy administration, it is important to distinguish between the parties’ interests in expeditiously resolving the litigated proceeding pending in the state court and the interests of all affected parties in expeditiously resolving the bankruptcy case in its entirety. Courts of appeals have, in some instances, focused on this distinction. For example, in *Tucson Estates*, the court of appeals concluded that abstention would facilitate the expeditious resolution of the debtor’s bankruptcy estate “by liquidating 1,600 - 2,300 class action plaintiff claims.”<sup>295</sup> By contrast, in declining to abstain from a bankruptcy court action involving resolution of unsettled issues of state law, the court of appeals in *Eastport Associates* emphasized that timely resolution of the declaratory judgment action was essential to an expeditious resolution of the debtor’s reorganization case.<sup>296</sup> The court concluded that abstention would slow down the reorganization process because Eastport would have to start all over again in state court if the bankruptcy court were

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292. See *Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.)*, 912 F.2d 1162, 1169 (9th Cir. 1990).

293. *Id.* at 1169.

294. See *In re Siragusa*, 27 F.3d 406, 409 (9th Cir. 1994) (“Fourth, the bankruptcy judge called Dr. Siragusa’s belated federal action an attempt at ‘an end run over the state court jurisdiction,’ which was tantamount to a finding that the proceeding in bankruptcy court involved forum shopping.”).

295. *In re Tucson Estates, Inc.*, 912 F.2d at 1169. The court’s abstention decision may have been influenced by a disagreement among circuit courts as to whether class proofs of claim are permissible in bankruptcy. Compare *Sheftelman v. Standard Metals Corp. (In re Standard Metals Corp.)*, 817 F.2d 625 (10th Cir. 1987) (impermissible), with *Reid v. White Motor Corp.*, 886 F.2d 1462 (6th Cir. 1989) (permissible), and *Certified Class in the Charter Sec. Litig. v. The Charter Co. (In re The Charter Co.)*, 876 F.2d 866 (11th Cir. 1989) (permissible).

296. See *Eastport Assoc. v. City of Los Angeles (In re Eastport Assoc.)*, 935 F.2d 1071, 1078 (9th Cir. 1991) (“The resolution of the entitlement issue will substantially affect the administration of the estate. The land in question is Eastport’s sole asset. Whether it can be developed will determine the most sensible plan for Eastport’s reorganization as well as the value of the property.”).



ordered to abstain.<sup>297</sup> The court distinguished *Tucson Estates* on this ground, contending that “the state law issues here determine not only the value of the property [as was involved in *Tucson Estates*] but the entire nature of the business undergoing reorganization.”<sup>298</sup>

Abstention may expedite the litigation but delay administration of the bankruptcy case when multiple abstention requests are made in a single case. The starkest example of this exists in the mass tort<sup>299</sup> bankruptcy cases<sup>300</sup> in which hundreds, even thousands, of tort actions may be pending against the debtor in state and federal courts across the nation. Some or all of these plaintiffs may request that the bankruptcy court abstain in favor of state court resolution of their claim, and, if considered on an individual basis, the court may conclude that abstention is justified for the convenience of the parties or witnesses in at least those state court actions that have made significant progress toward trial. If considered in the aggregate, the court still may conclude that abstention is justified “in the interest of justice.” This is logical because it is hard to fathom how all of the pending tort actions could be resolved in a single bankruptcy forum. The non-Article III bankruptcy court is precluded by statute from entering a final judgment resolving these personal injury tort or wrongful death actions.<sup>301</sup> The district court has the statutory power to conduct the hundreds or thousands of jury trials on these tort claims,<sup>302</sup> but this exercise stretches the concept of life tenure. Notwithstanding the convenience to litigants, witnesses and the court, however, where abstention would delay administration of the mass tort bankruptcy case, it should not be ordered under the permissive bankruptcy abstention provision.

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297. See *id.* at 1079. Although there was no pending state court action in *Eastport Assoc.*, forum shopping most definitely occurred in that case. After losing a motion for summary judgment and before trial in the declaratory judgment action, Eastport lobbied for and obtained an amendment to state zoning law so that the circumstances confronting Eastport would be covered. The court also distinguished *Tucson Estates* in that no state court action was pending in this instance. See *id.* Nonetheless, this forum shopping was not viewed as determinative.

298. *Id.*

299. For a definition of the term “mass tort,” see Richard A. Nagareda, *In the Aftermath of the Mass Tort Class Action*, 85 GEO. L.J. 295, 296 n.1 (1996) [hereinafter Nagareda, *In the Aftermath*] (defining term “to refer to tortious conduct that affects large numbers of geographically dispersed persons and that gives rise to latent disease”). See also Richard A. Nagareda, *Outrageous Fortune and the Criminalization of Mass Torts*, 96 MICH. L. REV. 1121, 1121 n.1 (1998) [hereinafter Nagareda, *Outrageous Fortune*] (same); Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899, 905-08 (1996) [hereinafter Nagareda, *Turning from Tort*] (same).

300. See Lynn M. LoPucki, *Virtual Judgment Proofing: A Rejoinder*, 107 YALE L.J. 1413 (1998) (describing the Johns-Manville and A.H. Robins reorganizations as probably the most famous of these mass tort bankruptcy cases).

301. See 28 U.S.C. § 157(b)(2)(B) (1994).

302. See *id.* § 157(b)(5).

Courts are divided as to whether abstention from personal injury tort and wrongful death actions pending against the debtor in a mass tort bankruptcy case is appropriate under the permissive bankruptcy abstention provision.<sup>303</sup> In *Citibank, N.A. v. White Motor Corp.*,<sup>304</sup> the Sixth Circuit adopted a policy-oriented factor approach when the court reviewed the district court's decision to abstain from exercising related to bankruptcy jurisdiction<sup>305</sup> over hundreds of tort actions pending in state court against the debtor-in-possession.<sup>306</sup> In concluding, among other things,<sup>307</sup> that the district court was authorized by section 1334(c)(1) to leave these tort actions in the state courts in which they had been pending on the filing date, the court of appeals found that abstention would be in the interest of justice.<sup>308</sup> The court of appeals reasoned that if these actions were tried against the debtor in the district court, they would unfairly be tried a second time against the debtors' codefendants because only the state courts had jurisdiction over these nondebtor parties.<sup>309</sup> The court also found that abstention was consistent with notions of judicial economy, since it thought that the district court would be deluged if it were required to hear and determine all tort actions pending

303. For two other decisions construing section 1334(c)(1) to preclude abstention from mass tort claims, see *Coker v. Pan Am. World Airways (In re Pan Am. Corp.)*, 950 F.2d 839 (2d Cir. 1991); *In re Joint E. and S. Dist. Asbestos Litg.*, 78 F.3d 764 (2d Cir. 1996).

304. (*In re White Motor Credit*), 761 F.2d 270 (6th Cir. 1985).

305. Because they seek recovery from the property of the estate of the debtor-in-possession, the plaintiffs in these pending tort actions likely would file proofs of claim against the estate. See 11 U.S.C. § 501(a) (1994). Even if they did not, a proof could be filed on their behalf. See *id.* § 501(c). Ordinarily, core proceedings include the "allowance or disallowance of claims against the estate," but, by statute, core proceedings are defined to exclude "the liquidation [and] estimation of contingent [and] unliquidated personal injury tort [and] wrongful death claims against the estate for purposes of distribution in a case under title 11." *Id.* § 157(b)(2)(B).

306. See *In re White Motor Credit*, 761 F.2d at 271 (noting that "approximately 160 separate, unliquidated and contingent products liability personal injury cases have been filed in various state and federal courts against the debtor, White Motor Corp., a truck manufacturer").

307. The court of appeals in *In re White Motor Credit* also held that 28 U.S.C. § 157(b)(5) did not preclude the district court from exercising its powers of discretionary abstention. Section 157(b)(5) provides, in full:

The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

28 U.S.C. § 157(b)(5) (1994). Despite the unambiguous language of this provision that personal injury tort and wrongful death actions be heard "in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose," the Sixth Circuit held that it did not preclude the district court from abstaining from the exercise of the jurisdiction under section 1334(c)(1). See *In re White Motor Credit*, 761 F.2d at 273.

308. See *In re White Motor Credit*, 761 F.2d at 273.

309. The court of appeals also hinted that, even if it had supplemental jurisdiction over these actions pending against the codefendants, abstention would be appropriate since issues of state law would predominate over issues of federal law. See *id.* at 274.

against the debtor.<sup>310</sup> It viewed the prospect of “hundreds or even thousands of tort litigants beating on the door of one federal judge” as threatening to the “judicial health and survival” of that court.<sup>311</sup>

However, the Sixth Circuit appears to have reconsidered the wisdom of broad grants of abstention in mass tort bankruptcy cases. In *In re Dow Corning Corp.*,<sup>312</sup> the district court had entered a “global” abstention order, concluding that the bankruptcy court should defer in favor of state court resolution of the numerous personal injury tort actions pending against the debtor. Citing the Second Circuit’s decision in *Pan American* with approval, the court of appeals in *Dow Corning* reversed and remanded, concluding that the district court had failed to articulate what issues of unsettled state law existed in each pending tort action.<sup>313</sup> It nowhere discussed the practical difficulty of resolving these numerous state court actions in a single federal forum, but instead emphasized that “[f]ailing to transfer the claims against the shareholders will likely affect the size of the estate and the length of time the bankruptcy proceedings will be pending, as well as Dow Corning’s ability to resolve its liabilities and proceed with reorganization.”<sup>314</sup>

*Dow Corning* is difficult to reconcile with *White Motor*. With its reference to the Second Circuit’s decision in *Pan American*, the court in *Dow Corning* appears to reject the multifaceted balancing approach to permissive

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310. *See id.* at 274.

311. *Id.* In concluding that abstention was necessary in order protect the “judicial health and survival” of the district court, the Sixth Circuit was constrained somewhat by 28 U.S.C. § 157(b)(2)(B), which characterizes the liquidation of personal injury tort or wrongful death claims as noncore proceedings that could not be finally determined by the bankruptcy court, absent the consent of the parties under 28 U.S.C. § 157(c). “Since the 1984 Bankruptcy Act prevents reference of these tort cases to bankruptcy courts, as in the past, it makes good sense to give the district courts wide latitude in referring the cases through abstention to other courts.” *In re White Motor Credit*, 761 F.2d at 274.

312. *Lindsey v. Dow Chem. Co. (In re Dow Corning Corp.)*, 113 F.3d 565 (6th Cir.), *cert. denied*, 118 S. Ct. 435 (1997).

313. The court of appeals described the district court’s “legal rationale [as] wholly inadequate.” *Id.* at 570.

The district court did not examine a single tort claim to determine whether discretionary abstention was appropriate in the interests of justice and comity. The district court briefly mentioned principles of federalism and comity, as well as the state law nature of the claims, as bases for discretionary abstention. Although the cases are premised on state law, the district court did not indicate why the state law nature of the claims justified discretionary abstention; indeed, it appears that it does not. The district court ignored the fact that at least some of the claims have an independent basis for jurisdiction in federal court. Moreover, there is no suggestion that the state law issues in these case are unique, unsettled, or difficult. Thus, the principles of federalism and comity would not be violated by the district court’s assumption of jurisdiction over these cases. The breast-implant litigation truly is a nationwide issue, and no state has a paramount interest in the litigation.

*Id.* at 570-71 (citations omitted).

314. *Id.* at 571.

bankruptcy abstention used in *White Motor* in favor of the view that section 1334(c)(1) incorporates pre-Code abstention doctrines. *White Motor* and *Dow Corning* are probably better explained by reference to the debate surrounding mass tort litigation.<sup>315</sup>

Although mass tort litigation has evolved substantially in the years that separate these two decisions,<sup>316</sup> there is still substantial disagreement as to whether mass tort claims are best resolved on an individuated or consolidated basis.<sup>317</sup> Nonbankruptcy methods of aggregation—i.e., consolidation,<sup>318</sup>

315. *In re White Motor Credit* can also be explained as a decision written in the shadow of *Northern Pipeline*, with an earlier appellate decision affirming the constitutionality of the district court's exercise of jurisdiction over these products liability actions under the interim rule. See *White Motor Corp. v. Citibank, N.A. (In re White Motor Corp.)*, 704 F.2d 254 (6th Cir. 1983). Affirmance of the district court's later abstention decision must be viewed in the context of this substantial constitutional uncertainty. Indeed, some courts continue to think that a broad permissive abstention doctrine is mandated on constitutional grounds. See *supra* text accompanying notes 217-26.

316. See Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 944 (1995) (developing institutional evolutionist perspective to assess developments in mass tort litigation). "If today's mass tort litigation truly differs from earlier versions, what factors produced these changes? Have these changes been for the better? How does the current mass tort regime compare with other possible approaches?" *Id.*

317. John Coffee argues:

Class action developments have given rise to a new legal technology that threatens to strip tort victims of their legal claims, sometimes decades before they even mature. . . . If fully exploited, these techniques—particularly the use of mandatory classes, settlement classes and future claimant classes—could create a new, even more protective form of limited liability for corporations.

John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1461 (1995).

Peter H. Schuck records a similar skeptical view of the courts.

Torts scholars charge that mass tort litigation often produces arbitrary results; that it fails to deliver the right compensation to the right victims when it is most needed; that it misallocates risk among consumers, corporations, and governments; that it generates unconscionable waste; and that it does not achieve corrective justice. They argue that the legal actors in the mass tort drama—self-serving, entrepreneurial plaintiff's lawyers; foot-dragging defense counsel; and overwhelmed, desperately improvising judges—have subordinated important public goals and the needs of individual claimants to their own interests.

Schuck, *supra* note 316, at 942.

In contrast, Eric D. Green notes:

The objections of my academic colleagues are serious and well intentioned, but they unfortunately reflect a cloistered, unduly conservative, and unrealistic view of mass torts and the federal courts. . . .

Applying classwide remedies—including the benefits of classwide settlements—to disputes arising out of classwide mass harms inflicted by producers of mass products distributed in such a way so as to affect millions of individuals, may be necessary to achieve fairness broadly, rather than on a hit-or-miss basis. Otherwise, in the whole channel from manufacturing through distribution, installation, exposure, impact, injury, and redress, the institutions responsible for redress will be the only ones operating on a unit-by-unit basis.

Eric D. Green, *What Will We Do When Adjudication Ends? We'll Settle in Bunches: Bringing Rule 23 Into the Twenty-First Century*, 44 UCLA L. REV. 1773, 1788-98 (1997).

318. See FED. R. CIV. P. 42 (permitting consolidation of "actions involving a common question of law or fact pending before the court"). There are two recent proposals to expand upon this principle of

joinder,<sup>319</sup> multidistrict litigation,<sup>320</sup> and class actions<sup>321</sup>—have enjoyed only sporadic successes. Bankruptcy may provide the best means available under current law for the consolidated handling of mass tort claims pending against a debtor.<sup>322</sup> Bankruptcy ensures that unsecured creditors, including tort

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consolidation. The American Law Institute's Complex Litigation Project would allow "intersystem consolidation"—consolidation "involving transfer from state court to federal court, from federal court to state court, or from one state to another." Erichson, *supra* note 234, at 947 n.14; see AMERICAN LAW INSTITUTE, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS WITH REPORTER'S STUDY (1994); see also Linda Mullenix, *Unfinished Symphony: The Complex Litigation Project Rests*, 54 LA. L. REV. 977 (1994) ("[T]he Complex Litigation Project seems destined to represent a massive, engaging intellectual exercise rather than a pragmatic blueprint that Congress will enact for the conduct of complex litigation."); William W. Schwartz, et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689, 1699 (1992) (Congress "is not likely to enact [the Complex Litigation Project proposals] in the foreseeable future."). The Uniform Transfer of Litigation Act ("UTLA") would instead allow consolidation of related cases pending in multiple state courts. UTLA has been adopted by the National Conference of Commissioners on Uniform State Laws, but has been enacted only in South Dakota. It is under consideration in Kansas, Nebraska, Virginia and West Virginia. See Erichson, *supra* note 234, at 947 n.14; Mark C. Weber, *Complex Litigation and the State Courts: Constitutional and Practical Advantages of the State Forum Over the Federal Forum in Mass Tort Cases*, 21 HASTINGS CONST. L.Q. 215, 268 & n.287 (1994).

319. See FED. R. CIV. P. 19, 20 (providing for mandatory and permissive joinder); see also, e.g., Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779 (1985) (discussing the desirability and permissibility of alternatives to joinder in mass tort cases).

320. See 28 U.S.C. § 1407(a) (1994) (permitting, for example, the Judicial Panel on Multidistrict Litigation to consolidate pending federal lawsuits into a single judicial district for purposes of discovery).

321. The *Federal Rules of Civil Procedure* permits the filing of a class action if (1) the class is "so numerous that joinder of all members is impracticable," (2) there are "questions of law or fact common to the class," (3) "the [common] questions of law or fact . . . predominate over any questions affecting only individual members," (4) "the claims or defenses of the representative parties are typical of the claims or defenses of the class," (5) "the representative parties will fairly and adequately protect the interests of the class," and (6) "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." FED. R. CIV. P. 23. Recent circuit court decisions "sharply undercut the legal support for the class action as a vehicle for pathbreaking litigation." Nagareda, *In the Aftermath*, *supra* note 299, at 302 (discussing this case law). Moreover, the Supreme Court's recent decision in *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997), *aff'g*, *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996), questions the viability of settlement class actions. In *Amchem Products*, the Court upheld the legitimate role of settlement as a factor in class action certification decisions. But because it still required satisfaction of the "commonality" and "adequacy" elements of the rule, many view the decision as sounding "the death knell for nationwide mass tort class action (whether settled or litigated) under the current version of Rule 23." Green, *supra* note 317, at 1775. And although "a current proposed amendment strives to make settlement clauses [sic] possible in appropriate cases," *id.*, "the proposed Rule 23 has encountered substantial opposition from segments of the academic community." Nagareda, *In the Aftermath*, *supra* note 299, at 310.

322. Several commentators share this view. Barbara J. Houser described chapter 11 as an "important tool to assist companies in bringing closure" to mass tort claims. Barbara J. Houser, *Chapter 11 as a Mass Tort Solution*, 31 LOY. L.A. L. REV. 451, 451 (1998). Ralph R. Mabey and Peter A. Zissner contended that "the bankruptcy court is the best forum for [resolution of mass tort] cases since the Code allows one court to assert jurisdiction over all state and federal lawsuits against a manufacturer." Ralph R. Mabey & Peter A. Zissner, *Improving Treatment of Future Claims: The Unfinished Business Left by the Manville Amendments*, 69 AM. BANKR. L.J. 487, 488 (1995). John A.

claimants, are paid in full before the shareholders of a corporate tortfeasor recover on their equity;<sup>323</sup> within constitutional limits, it requires that existing tort claimants share equally with future claimants.<sup>324</sup> It also provides important procedural protections, such a voting<sup>325</sup> and disclosure rights,<sup>326</sup> largely absent in nonbankruptcy methods of mass tort claim aggregation.

Bankruptcy may not provide a perfect forum for the resolution of mass tort claims,<sup>327</sup> but a construction of section 1334(c)(1) that encourages widespread abstention from these personal injury and wrongful death mass tort claims threatens to obviate bankruptcy as a means for aggregated resolution of these claims. Abstention amounts to a procedural opt out from the bankruptcy case, although outside of bankruptcy claimants cannot opt out of "limited fund" class actions.<sup>328</sup> Abstention from mass tort claims delays

Siliciano stated:

Congress has already defined a comprehensive scheme for the mandatory reorganization of liabilities. If this legislative device is functioning poorly, then legislative amendment is the appropriate solution, not ad hoc common law substitutes. To the extent that mass tort litigation is truly 'akin to public litigations,' that public law is to be found in the Bankruptcy Code.

John A. Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 CORNELL L. REV. 990, 1005 (1995). Additionally, John Coffee stated, "Both substantively and procedurally, bankruptcy reorganization has comparative advantages over a mass tort class action as a means of achieving an equitable resolution of mass tort liabilities that is fair to tort creditors." Coffee, *Class Wars*, *supra* note 317, at 1457-61. Finally, Mark J. Roe contended that "when future claims are large in relation to firm value there should be an early reorganization that resolves those claims" and proposed amendments to the Bankruptcy Code to deal with "practical problems of management, uncertainties of claim valuation and the impossibility of identifying future claimants [which] seem to pose significant obstacles to the effective implementation of these principles in a reorganization in which future as well as present claimants are fairly compensated." Mark J. Roe, *Bankruptcy and Mass Tort*, 84 COLUM. L. REV. 846, 848-49 (1984).

On the other hand, some commentators caution that bankruptcy is not meant to be a solution to the mass tort problem. *See, e.g.*, Nagareda, *Outrageous Fortune*, *supra* note 299, at 1145-50 (condemning resolution of mass torts in bankruptcy context "where the merits of the underlying tort claims are open to doubt"); Green, *supra* note 317, at 1797 ("Experience in mass torts teaches that bankruptcy is not an effective approach to these problems."); Nagareda, *In the Aftermath*, *supra* note 299, at 344 ("One should hesitate, however, before regarding Chapter 11 as a panacea in this area.").

323. *See* 11 U.S.C. § 1129(b)(2) (1994) (absolute priority rule).

324. *See id.* § 1122 (classification of claims).

325. *See id.* § 1126 (acceptance of plan of reorganization).

326. *See id.* § 1125 (postpetition disclosure and solicitation).

327. *See supra* articles cited in note 322. The National Bankruptcy Review Commission recently included, in its report to Congress, proposals to improve bankruptcy treatment of mass tort claims. *See* National Bankruptcy Review Commission, *Bankruptcy: THE NEXT TWENTY YEARS* 315-50 (1997), available in *National Bankruptcy Commission* (last modified Nov. 26, 1997) <<http://www.nbrc.gov/reporttitlepg.html>>. For criticism of these proposals, see Edith H. Jones, *Rough Justice in Mass Future Claims: Should Bankruptcy Courts Direct Tort Reform?*, 76 TEX. L. REV. 1695 (1998).

328. *See* FED. R. CIV. P. 23(b)(1)(B) (providing that where prerequisites of Rule 23(a) are met, a class action can be maintained if "prosecution of separate actions by or against individual members of the class would create a risk of . . . adjudications with respect to individual members of the class which would as a practical matter . . . impair or impede [other claimants'] ability to protect their interests");

the administration of the debtor-defendant's bankruptcy case because piecemeal adjudication of these claims generally takes longer than if handled on an aggregated basis, particularly where this individualized resolution would occur in multiple fora.<sup>329</sup>

## V. CONCLUSION

This Article contends that federal courts should abstain from exercising their bankruptcy jurisdiction in the same circumstances that they abstain from their exercise of diversity or federal question jurisdiction, unless institutional or qualitative differences in these grants of federal jurisdiction compel application of distinct abstention doctrines. Moreover, it finds little basis for distinguishing bankruptcy from nonbankruptcy abstention doctrines on these grounds.

The limited authority of non-Article III bankruptcy courts to "hear and determine" proceedings that are merely related to a title 11 bankruptcy case does not create a constitutional mandate for broadly construing the scope of the discretionary bankruptcy abstention provision. Questions regarding the constitutionality of an exercise of jurisdiction by an untenured bankruptcy judge pertain to the proper allocation of judicial authority between Article III federal district courts and non-Article III bankruptcy courts, and not to the breadth of bankruptcy jurisdiction exercised by either of these federal courts

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*see also, e.g.,* Flanagan v. Ahearn (*In re Asbestos Litig.*), 90 F.3d 963, 982-86 (5th Cir. 1996) (concluding that decision to certify limited fund class action did not circumvent Bankruptcy Code).

329. Despite disagreement on how best to accomplish this goal, there is broad consensus that aggregated resolution of mass tort claims is preferred. *See, e.g.,* Nagareda, *Turning From Tort, supra* note 299, at 900 (proposing "to replace traditional tort litigation with a private administrative framework"); JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* (1995) (proposing broad compensatory framework that would reduce mass tort victims' need to bring tort suits); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849 (1984) (proposing egalitarian vision of "bureaucratic justice" under which the class action would be rationalized by legal rules that standardize damages and adjudicate all claims in one mandatory class action). Even John Coffee, the most vocal critic of the use of class actions to resolve mass tort claims, concedes that claims aggregation has substantial benefits. He describes the preference for class action format as "rational" because

(1) it economizes on transaction costs or permits greater financial or other resources to be assembled to counteract the typically greater resources of the defendants, (2) it threatens risk averse defendants with greater liability and so deters them from going to trial, and (3) it avoids a 'race to judgment' among competing plaintiffs who fear either the impact of precedents in other related cases or that defendants' assets may be insufficient to fund the aggregate recoveries.

John C. Coffee, *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 883 and 904 (1987). He criticizes "the dynamics of class action litigation because they create high agency costs, asymmetric stakes, and cost differentials." *Id.*

over issues arising solely under state law.

Nor should abstention from state law proceedings related to a federal bankruptcy case be viewed as a purely discretionary determination to decline to exercise supplemental jurisdiction. Even if some bankruptcy jurisdiction is best characterized as a form of supplemental jurisdiction, the significance of this analogy as applied to the permissive bankruptcy abstention provision is overpowered by principles of statutory interpretation. The plain language of section 1334(c)(1) does not permit a construction which applies narrow standards of abstention to proceedings that arise under the Bankruptcy Code, but broad standards for declining to exercise supplemental jurisdiction to proceedings that arise in or relate to the federal bankruptcy case. Nor does section 1367, the supplemental jurisdiction statute, including section 1367(c), broadly vesting district courts with the discretion to decline an exercise of supplemental jurisdiction, purport to govern in bankruptcy.

Finally, a broad permissive bankruptcy abstention doctrine generally contradicts the bankruptcy goal favoring expeditious administration and resolution of bankruptcy cases because, more often than not, the fragmentation of bankruptcy jurisdiction among federal and state courts complicates and stalls the bankruptcy process. The bankruptcy goal of expeditiousness justifies abstention when a delegation of jurisdiction is the most efficient course of action, but these circumstances are exceptional; generally, efficient bankruptcy administration is fostered by resolution of all bankruptcy related litigation in a single bankruptcy forum.



