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## Case Against Supplemental Bankruptcy Jurisdiction: A Constitutional, Statutory, and Policy Analysis

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### Cover Page Footnote

Associate Professor, Seton Hall University School of Law; B.A. and J.D., University of Michigan. Many thanks to John Gibbons, Gene Gressman, Ed Hartnett, Dick Lieb, Denis McLaughlin, and Charlie Sullivan for their helpful comments on prior drafts. Thanks are also due to Mollie O'Brien, who provided tireless research assistance.

# ARTICLES

## THE CASE AGAINST SUPPLEMENTAL BANKRUPTCY JURISDICTION: A CONSTITUTIONAL, STATUTORY, AND POLICY ANALYSIS

SUSAN BLOCK-LIEB\*

*In this Article Professor Block-Lieb critically examines the power of a federal district or bankruptcy court to adjudicate jurisdictionally insufficient claims which arise out of a common nucleus of operative fact with a proceeding which "arises under" the Bankruptcy Code, or "arises in" or "relates to" a bankruptcy case. After considering Article III of the United States Constitution, relevant statutory provisions—including the newly enacted supplemental jurisdictional provision (28 U.S.C. § 1367)—and the conflicting policy objectives of these statutory provisions, the Article concludes that a district court's adjudication of supplemental claims related to a "related to" proceeding may be unconstitutional, unauthorized by statute, and inconsistent with the primary purpose of bankruptcy jurisdiction—the efficient administration of a bankruptcy estate. As to a district court's exercise of jurisdiction over supplemental claims related to an "arising under" or "arising in" proceeding, it proposes that a balancing approach be adopted. It also contends that additional constitutional concerns are raised when a non-Article III bankruptcy court exercises any form of supplemental bankruptcy jurisdiction, and advocates limiting the power of bankruptcy courts accordingly.*

### TABLE OF CONTENTS

Introduction .....	723
I. Overview .....	731
A. <i>Bankruptcy Jurisdiction</i> .....	731
1. Bankruptcy Amendments and Federal Judgeship Act of 1984 .....	731
2. Bankruptcy Reform Act of 1978 .....	737
B. <i>Supplemental Jurisdiction</i> .....	739
1. Ancillary Jurisdiction .....	739
2. Pendent-Claim Jurisdiction .....	740
3. Pendent-Party or Ancillary Jurisdiction for Claims by Plaintiffs .....	741
4. The Judicial Improvements Act of 1990 .....	743
II. The Exercise of Supplemental Bankruptcy Jurisdiction Under the Bankruptcy Code .....	744

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A.	<i>A Review of the Case Law Supporting Supplemental Bankruptcy Jurisdiction</i> .....	744
1.	Courts of Appeals .....	744
2.	District Courts .....	746
3.	Bankruptcy Courts.....	746
a.	<i>Ancillary Jurisdiction</i> .....	747
b.	<i>Pendent-Party Jurisdiction</i> .....	752
B.	<i>A Review of the Case Law Rejecting Supplemental Bankruptcy Jurisdiction</i> .....	754
III.	The Case Against Supplemental Bankruptcy Jurisdiction ...	757
A.	<i>The Constitutional Questions</i> .....	758
1.	Constitutional Questions Surrounding the Exercise of Supplemental Bankruptcy Jurisdiction by a District Court .....	758
a.	<i>Supplemental Jurisdiction, Rather Than Pendent Jurisdiction</i> .....	759
b.	<i>Bankruptcy Jurisdiction, Rather Than Federal Question Jurisdiction</i> .....	761
(i)	Substantiality .....	763
(a)	<i>Bankruptcy Jurisdiction as "Arising Under" Jurisdiction</i> .....	769
(b)	<i>Bankruptcy Jurisdiction as Supplemental Jurisdiction</i> .....	779
(ii)	Relatedness .....	784
2.	Constitutional Questions Surrounding the Exercise of Supplemental Bankruptcy Jurisdiction by Non-Article III Bankruptcy Courts.....	791
a.	<i>Non-Article III Bankruptcy Courts</i> .....	791
(i)	Bankruptcy Act of 1898 .....	791
(ii)	Bankruptcy Reform Act of 1978 .....	792
(iii)	1984 Amendments.....	795
b.	<i>Supplemental Jurisdiction as an Essential Attribute of Judicial Authority</i> .....	797
B.	<i>Did Congress Expressly Intend To Confer Supplemental Bankruptcy Jurisdiction?</i> .....	799
1.	"Except . . . as Expressly Provided Otherwise by Federal Statute" .....	800
2.	"In Any Civil Action of Which the District Courts Have Original Jurisdiction, the District Courts Shall Have Supplemental Jurisdiction" .....	804
3.	"Related to Claims in the Action Within Such Original Jurisdiction" .....	804
a.	<i>Section 1367(a)'s Use of the Phrase "Original Jurisdiction" May Refer to Statutory Grants of "Original Jurisdiction"</i> .....	805
b.	<i>Section 1367(a)'s Use of the Phrase "Original</i>	



*Jurisdiction” May Refer to the Categories of Cases and Controversies Enumerated in Article III of the United States Constitution* ..... 807

c. *Section 1367(a)’s Use of the Phrase “Original Jurisdiction” May Refer to “Non-Supplemental Jurisdiction” of District Courts* ..... 808

4. “The District Courts Shall Have Supplemental Jurisdiction” ..... 809

IV. Policy Considerations Favoring a Limitation of Supplemental Bankruptcy Jurisdiction ..... 811

A. *A Principal Purpose of Bankruptcy Jurisdiction is to Facilitate the Resolution of an Estate* ..... 811

B. *Policy Justifications Generally Favoring an Exercise of Supplemental Jurisdiction Are Subject to Countervailing Policy Concerns in the Context of a Bankruptcy Case* .... 826

C. *Congress Should Amend § 1367(c)’s Factors to Reflect Concerns Unique to Bankruptcy* ..... 829

1. An Exclusive List..... 829

2. The List is Peculiarly Applicable to the Nonbankruptcy Context..... 830

Conclusion ..... 831

INTRODUCTION

COMPLEX bankruptcy cases<sup>1</sup> breed complex litigation—proceedings<sup>2</sup> involving multiple claims<sup>3</sup> among multiple parties. As to each

1. The terminology used to refer to litigation that occurs in the context of bankruptcy differs from that used to refer to general civil litigation. This inconsistency of defined terms can be quite confusing. In a bankruptcy context, for example, a “[c]ase” comprises the entire Chapter 7, 9, 11, [12], or 13 case that is commenced pursuant to section 301, 302, or 303 . . . by the filing of a ‘petition.’ ” Lawrence P. King, *Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984*, 38 Vand. L. Rev. 675, 676-77 (1985). On the other hand, a constitutional “case or controversy” refers to the litigation unit over which Congress is constitutionally empowered to confer jurisdiction upon the federal courts. See U.S. Const. art. III, § 2. Article III, Section 2, Clause 1 of the Constitution states:

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

2. “Disputes often arise during the pendency of a . . . case that require judicial resolution. Section 1334(b) refers to these disputes as ‘proceedings.’ There may, therefore, be numerous proceedings within a case.” King, *supra* note 1, at 676-77 & n.8 (citing Fed. R. Bankr. P. 1002 for the distinction between “case” and “proceeding”).

3. The term “claim” has different meanings in the bankruptcy and non-bankruptcy

claim and party, subject matter jurisdiction must exist for a court to have the power to adjudicate the proceeding. Although the scope of bankruptcy jurisdiction<sup>4</sup> is broad, it is not without limits. A creature of statute,<sup>5</sup> bankruptcy jurisdiction is defined to include<sup>6</sup> civil proceedings

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contexts. Moreover, the term "claim" appears to have two meanings in bankruptcy, depending upon whether the reference is intended as substantive or procedural.

Outside of bankruptcy, the term "claim" refers to a "claim for relief" and includes "an original claim, counterclaim, cross-claim, or third-party claim." Fed. R. Civ. P. 8(a). Together, the Federal Rules of Civil Procedure refer to factually related claims permitted to be, and actually, joined together as a "civil action." See Fed. R. Civ. P. 2 ("There shall be one form of action to be known as 'civil action.'"); Fed. R. Civ. P. 3 ("A civil action is commenced by filing a complaint with the court.").

By contrast, the Bankruptcy Code defines "claim" to mean "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5) (Supp. IV 1992). The term "claim" appears to have a second meaning when used in a procedural context in bankruptcy, however. The Federal Rules of Bankruptcy Procedure refer generally to "adversary proceedings" and "contested matters" as the litigation units which occur in the context of a title 11 case. See Fed. R. Bankr. P. 7001 (defining adversary proceeding); Fed. R. Bankr. P. 9014 (defining contested matters). Although the bankruptcy procedural rules do not explicitly state whether "adversary proceedings" or "contested matters" are intended to parallel the terms "civil action" or "claim" used in a non-bankruptcy context, they impliedly correlate bankruptcy "proceedings"—whether "adversary proceedings" or "contested matters"—with non-bankruptcy "civil actions." First, they do not incorporate Fed. R. Civ. P. 2 to bankruptcy procedure. See Fed. R. Bankr. P. 7002 (containing no reference to Fed. R. Civ. P. 2, although other rules in Part VII incorporate civil procedural rules having same number as last digit of bankruptcy procedural rule). Second, they do incorporate Fed. R. Civ. P. 8 to bankruptcy procedure, including the distinction drawn between an "[original] complaint, counterclaim, cross-claim, or third-party complaint." Fed. R. Bankr. P. 7008 (incorporating Rule 8 with additions not relevant here).

To avoid confusion, this Article uses "claim" in its procedural context to refer to units of litigation existing within a "civil action" (in a non-bankruptcy context) or "proceeding" (in a bankruptcy context). When referring to "a right of payment," this Article either uses the phrase "proof of claim," see *infra* note 19 (defining "proof of claim"), or characterizes the "claim" as being either unsecured or secured.

4. See 28 U.S.C. § 1334 (1988 & Supp. IV 1992). Throughout this Article, "bankruptcy jurisdiction" is referred to as the jurisdiction over bankruptcy cases and the litigation they involve which Congress has granted by statute to the federal courts. See 28 U.S.C. § 1334 (1988 & Supp. IV 1992) (conferring bankruptcy jurisdiction in district courts). Intertwined with, but distinct from, any discussion of the scope of bankruptcy jurisdiction, is the issue of which federal court is empowered to exercise this jurisdiction—most recently, whether bankruptcy jurisdiction is to be exercised by Article III district courts or non-Article III bankruptcy courts. See 28 U.S.C. § 157 (1988); see also *infra* part III.A.2 (describing allocation of jurisdiction between non-Article III bankruptcy courts and Article III district courts under § 157).

5. Like all federal jurisdiction, bankruptcy jurisdiction is limited by its statutory grant, found in 28 U.S.C. § 1334. See, e.g., *FDIC v. Majestic Energy Corp.* (*In re Majestic Energy Corp.*), 835 F.2d 87, 89 (5th Cir. 1988) ("Bankruptcy courts are courts of limited jurisdiction, with their scope defined by statute.").

6. In addition to the grant of bankruptcy jurisdiction over proceedings "arising under title 11," and "arising in and related to cases under title 11," found in 28 U.S.C. § 1334(b), § 1334(a) also grants "exclusive jurisdiction of all cases under title 11," and § 1334(d) grants "exclusive jurisdiction of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate." 28 U.S.C. § 1334(a), (b), (d) (1988 & Supp. IV 1992).

which either "arise under" title 11,<sup>7</sup> or "arise in"<sup>8</sup> or are "related to" a title 11 case.<sup>9</sup>

What of proceedings which neither "arise under title 11" nor "arise in" or "relate to" a title 11 case, but which arise out of the same nucleus of facts as a proceeding over which bankruptcy jurisdiction clearly exists? Do either district courts or bankruptcy courts have the power to adjudicate a jurisdictionally insufficient proceeding which is factually related to an "arising under," "arising in," or "related to" proceeding?<sup>10</sup> If so, under what circumstances should this power be exercised?

As an example,<sup>11</sup> consider first an avoidance action brought by the trustee in bankruptcy<sup>12</sup> against several defendants alleged to have received fraudulent<sup>13</sup> and preferential transfers.<sup>14</sup> The trustee's suit "arises

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7. For a proceeding to "arise under" title 11, the proceeding must derive from a provision of the Bankruptcy Code, which comprises title 11 of the United States Code. See *infra* notes 66-74 and accompanying text.

8. A proceeding "arises in" a title 11 case if it could not have been brought had the liquidation or reorganization case not been commenced. See *infra* notes 75-84 and accompanying text.

9. A proceeding is sufficiently "related to" a title 11 case for purposes of satisfying the bankruptcy jurisdictional requirements if it "affects the amount of property available for distribution or the allocation of property among creditors." *Elscont, Inc. v. First Wis. Fin. Corp. (In re Xonics, Inc.)*, 813 F.2d 127, 131 (7th Cir. 1987). See *infra* notes 85-98 and accompanying text.

10. 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 *infra* notes 102-38 and accompanying text (discussing historical development of ancillary, pendent-claim, and pendent-party jurisdiction, and codification of these doctrines by supplemental jurisdictional provision—28 U.S.C. § 1367).

11. For a case involving similar allegations, see *Wieboldt Stores, Inc. v. Schottenstein*, 111 B.R. 162 (N.D. Ill. 1990); see also *infra* notes 149-51 and accompanying text (discussing *Wieboldt* in detail); *Spaulding & Co. v. Buchanan (In re Spaulding & Co.)*, 131 B.R. 84 (N.D. Ill. 1990) (with similar facts, district court held that third-party action did not "relate to" chapter 11 case, but did not address possibility of exercise of supplemental jurisdiction).

12. A bankruptcy trustee is appointed in each chapter 7, 12, and 13 case. See 11 U.S.C. §§ 701, 702, 703, 1202(a), 1302(a) (1988). A trustee may be appointed in a chapter 11 case, but only "for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management," or "if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate." 11 U.S.C. § 1104(a)(1), (2) (1988). The duties of a trustee include an "investigat[ion of] the financial affairs of the debtor." 11 U.S.C. § 704(4) (1988). See also 11 U.S.C. § 1106(a)(3) (1988) (incorporating similar duties of investigation "except to the extent that the court orders otherwise"); § 1202(b)(2) (1988) (incorporating similar duties of investigation but only if, after requested by a party in interest, the court so orders "for cause"); § 1302(b)(1) (1988) (generally incorporating duty of investigation).

13. See 11 U.S.C. § 548 (a) (1988) (permitting trustee to avoid transfer made, or obligation incurred, by debtor within year before date of filing of petition if (1) transfer was made, or obligation incurred, "with actual intent to hinder, delay, or defraud any entity to which the debtor was or became . . . indebted" or (2)(A) debtor "received less than a reasonably equivalent value in exchange for such transfer or obligation" and (B) was insolvent, insufficiently capitalized or intended to incur debts beyond its ability to repay either at the time of the transfer or as a result of the transfer).

under" 11 U.S.C. §§ 548 and 547, and thus bankruptcy jurisdiction clearly exists.<sup>15</sup> Assume further that the defendants bring a third-party complaint in which they seek contribution from their former lawyers and accountants. They claim that if their transaction with the debtor is avoidable as a preference or fraudulent transfer, then these professionals committed malpractice and are liable to the defendants to the extent of the defendant's liability to the trustee. Because the third-party action is predicated solely on state law, it does not "arise under title 11."<sup>16</sup> Nor is it likely that the defendants' malpractice action "arose in" the debtor's bankruptcy case.<sup>17</sup> Finally, resolution of the third-party suit may not be "related to" the bankruptcy case as it may have no conceivable effect on distributions to creditors in, or the administration of, the debtor's bankruptcy estate. Thus, if there is jurisdiction over the third-party action it must exist only because it shares "a common nucleus of operative fact"<sup>18</sup> with the trustee's avoidance action sufficient to create supplemental bankruptcy jurisdiction.

Consider a different scenario in which a creditor files a proof of claim<sup>19</sup> against the debtor's bankruptcy estate.<sup>20</sup> In the claim, the creditor seeks a distribution from the estate based on an alleged loan agreement with the debtor. The debtor timely objects to the claim and defends<sup>21</sup> against contractual liability on the grounds that the loan agreement violated

14. See 11 U.S.C. § 547(b) (1988) (permitting trustee to avoid transfers of "an interest of the debtor in property" made "to or for the benefit of a creditor" and "on account of an antecedent debt;" debtor must have been insolvent at time of transfer, and transfer must have occurred within 90 days before filing of bankruptcy petition, unless transferee is an insider, in which case, a one year reach back period applies; transfer must enable creditor to receive more than it would have if the "case were a case under chapter 7 of this title," transfer had not been made and "creditor [had] received payment of such debt to the extent provided by the provisions of this title").

15. The question of which court—the district or bankruptcy court—will hear and determine the proceeding is a distinct one, governed by 28 U.S.C. § 157 (1988). See *supra* note 4; *infra* notes 416-24 and accompanying text. Under this statute, the trustee's avoidance action clearly constitutes a "core proceeding," 28 U.S.C. § 157(b)(2)(F) and 157(b)(2)(H), which the non-Article III bankruptcy judge can "hear and determine." 28 U.S.C. § 157(b)(1) (1988).

16. See *infra* notes 66-74 and accompanying text.

17. See *infra* notes 75-84 and accompanying text.

18. See *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966); see also *infra* notes 116-18 and accompanying text (discussing *Gibbs*'s common nucleus of fact standard).

19. See 11 U.S.C. § 501(a) (1988) (enabling creditor or indenture trustee to file proof of claim); see also Fed. R. Bankr. P. 3001(a) (defining proof of claim as "written statement setting forth a creditor's claim"); Official Forms No. 19 (general proof of claim); Official Forms No. 20 (proof of claim for wages, salary, or commissions); Official Forms No. 21 (proof of multiple claims for wages, salary, or commissions); see generally, 11 U.S.C. § 101(5) (Supp. IV 1992) (defining "claim" as "right to payment," irrespective of form or nature).

20. See 11 U.S.C. § 541(a) (1988) (providing that commencement of a case creates an estate comprised of all "legal or equitable interests of debtor in property as of" such commencement).

21. See Fed. R. Bankr. P. 3007 (setting forth procedure for objections to a claim and providing that "[i]f an objection to a claim is joined with a demand for relief of the kind specified in Rule 7001, it becomes an adversary proceeding").

state usury law.<sup>22</sup> Although the merits of the creditor's claim will be determined solely with respect to state contract and usury laws, the litigation between the debtor and creditor on the proof of claim is a proceeding that "arises in the title 11 case," and thus bankruptcy jurisdiction exists to resolve the dispute in federal court.<sup>23</sup> Assume further that the creditor brings a third-party complaint against its attorneys, alleging that if the debtor's usury objections to its claim are upheld then its attorneys are liable to it in an equal amount in malpractice. The malpractice action neither "arises under title 11,"<sup>24</sup> nor "arises in"<sup>25</sup> or "relates to" the title 11 case.<sup>26</sup> Thus, federal jurisdiction exists, if it exists at all, because the malpractice action arises out of "a common nucleus of operative fact"<sup>27</sup> with the proof of claim litigation.

Consider a final example involving litigation between two creditors—Bank A and Bank B—who both claim a first priority security in the same collateral.<sup>28</sup> Because the collateral is not valuable enough to repay both creditors and leave something for the holders of unsecured creditors or the debtor, the trustee in bankruptcy has abandoned it.<sup>29</sup> As a result of the abandonment, the property is no longer property of the estate.<sup>30</sup> Despite this seeming lack of connection between the estate and the creditors' litigation, bankruptcy jurisdiction exists over this proceeding if one of the creditors is undersecured on the theory that it is "related to" the

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22. See 11 U.S.C. § 502(b)(1) (1988) (providing that a claim shall be disallowed to the extent that the claim is unenforceable under "applicable law for a reason other than because such claim is contingent or unmaturing").

23. Even if the debtor's usury contentions are structured as a counterclaim to the proof of claim, the debtor's counterclaim will likely be viewed as "arising in" the title 11 case. See 28 U.S.C. § 157(b)(2)(C) (1988) (defining "core proceedings" as including "counterclaims by the estate against persons filing claims against the estate"); see also *infra* notes 75-84 and accompanying text (discussing "arising in" jurisdiction in greater detail).

24. The malpractice action does not "arise under" title 11 because it derives from state law, rather than federal bankruptcy law. See *infra* notes 66-74 and accompanying text.

25. The malpractice action does not "arise in" the bankruptcy case because the lender might have brought a malpractice action outside the context of the debtor's bankruptcy case. See *infra* notes 75-84 and accompanying text.

26. The malpractice action does not "relate to" the debtor's bankruptcy case because it will have no conceivable effect on distributions to creditors or the administration of the bankruptcy estate. See *infra* notes 85-98 and accompanying text. Whether the creditor's attorneys committed malpractice or not, the estate's liability to the creditor will turn solely on the validity of the lending agreement in light of state usury laws.

27. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966); see also *infra* notes 116-18 and accompanying text (discussing *Gibbs's* common nucleus of fact standard).

28. This hypothetical is loosely based on the facts of *Elscint, Inc. v. First Wis. Fin. Corp. (In re Xonics, Inc.)*, 813 F.2d 127 (7th Cir. 1987). In *Xonics*, however, neither lender brought a third-party malpractice action.

29. See 11 U.S.C. § 554 (1988) (permitting trustee to "abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate").

30. See, e.g., *Killebrew v. Brewer (In re Killebrew)*, 888 F.2d 1516, 1520 (5th Cir. 1989) (defining abandonment as "irrevocable removal of property from the estate").

bankruptcy case.<sup>31</sup> Where either Bank A or Bank B is undersecured, the result of the litigation between them will "affect[ ] the amount of property available for distribution or the allocation of property among creditors"<sup>32</sup> because a determination that the undersecured creditor holds a first priority security interest in the collateral will reduce the unsecured portion of its claim against the estate and, as a result, increase distributions to other creditors of the debtor.<sup>33</sup> Assume further that Bank A brings a third-party complaint against its attorneys, alleging that if it is found not to hold a first priority security interest in the collateral then its attorneys have committed malpractice in documenting and recording the financing transaction. This malpractice action neither "arises under title 11,"<sup>34</sup> nor "arises in"<sup>35</sup> or "relates to"<sup>36</sup> the debtor's bankruptcy case. Federal jurisdiction exists over the malpractice action, if it exists at all, because the creditors' priority dispute and the malpractice action arise out of "a common nucleus of operative fact."<sup>37</sup>

There exists ample precedent for the assertion of jurisdiction supplemental to other grants of federal jurisdiction in general non-bankruptcy civil litigation.<sup>38</sup> Further, with its enactment of the Judicial Improvements Act of 1990, Congress expressly provided in 28 U.S.C. § 1367(a) for a broad grant of 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."<sup>39</sup> But did Congress intend that § 1367(a)

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31. The term "undersecured" is used to refer to a claim secured by collateral insufficient in value to repay the claim in full. See 11 U.S.C. § 506(a) (1988) (defining "claim of a creditor secured by a lien on property in which the estate has an interest" as secured "to the extent of the value of such creditor's interest in the estate's interest in such property" and unsecured "to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim").

32. *Elscont, Inc. v. First Wis. Fin. Corp. (In re Xonics), Inc.*, 813 F.2d 127, 131 (7th Cir. 1987).

33. See *id.*

34. See *infra* notes 66-74 and accompanying text.

35. See *infra* notes 75-84 and accompanying text.

36. See *infra* notes 85-98 and accompanying text.

37. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966); see also *infra* notes 116-18 and accompanying text (discussing *Gibbs*'s common nucleus of fact standard).

38. See *infra* notes 102-38 and accompanying text.

39. 28 U.S.C. § 1367(a) (Supp. IV. 1992). Section 1367 provides in its entirety as follows:

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against

would apply in the bankruptcy context and support an assertion of jurisdiction supplemental to a proceeding "arising under" title 11, or "arising in" or "related to" a title 11 case?

Courts of appeal,<sup>40</sup> district courts,<sup>41</sup> and bankruptcy courts<sup>42</sup> have nearly uniformly<sup>43</sup> concluded that there exists jurisdiction supplemental to bankruptcy jurisdiction. This uniformity of decision exists whether the decision involved former Bankruptcy Acts<sup>44</sup> or the current Bankruptcy Code,<sup>45</sup> and whether or not the decision pre-dated enactment of 28 U.S.C. § 1367, the supplemental jurisdiction provision enacted with the Judicial Improvements Act of 1990.<sup>46</sup>

This Article contends that neither 28 U.S.C. § 1367 nor Article III of the United States Constitution authorize the exercise of jurisdiction supplemental to the grant of bankruptcy jurisdiction granted by 28 U.S.C. § 1334(b).<sup>47</sup> It also argues that because courts have exceeded these limi-

persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) 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.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

40. See *infra* notes 141-48, 346-47 and accompanying text.

41. See *infra* notes 149-51 and accompanying text; see also *Ram Const. Co. v. Port Authority*, 49 B.R. 363, 365-66 (W.D. Pa. 1985) (analogy to pendent jurisdiction drawn in upholding constitutionality of assertion of bankruptcy jurisdiction over state law claim).

42. See *infra* part II.A.3; see also *Sonnyco Coal, Inc. v. Bartley (In re Sonnyco Coal, Inc.)*, 89 B.R. 658, 665-68 (Bankr. S.D. Ohio 1988) (supporting constitutionality of exercise of "related to" jurisdiction by non-Article III bankruptcy court with analogy to doctrines of supplemental jurisdiction).

43. See *infra* notes 217-31 and accompanying text.

44. See *infra* notes 346-47 and accompanying text.

45. See *infra* part II.A.

46. See *infra* note 234 and accompanying text.

47. See *infra* note 240 and accompanying text (noting that Supreme Court has long required two things "to create [federal] jurisdiction . . . The Constitution must have given to the court the capacity to take it, and an act of Congress must have supplied it. . . .") (quoting *Finley v. United States*, 490 U.S. 545, 548 (1989)).

tations, Congress should enact express limitations to the exercise of supplemental bankruptcy jurisdiction.

Part I of this Article begins with general discussions of the historical development of both bankruptcy jurisdiction and supplemental jurisdiction. Part II analyzes the decisions in which courts have found supplemental bankruptcy jurisdiction under the current Bankruptcy Code.<sup>48</sup>

Part III criticizes this case law, presenting constitutional and statutory arguments against the exercise of supplemental bankruptcy jurisdiction by federal district courts. This section concludes, first, that where jurisdictionally deficient proceedings have "a common nucleus of operative fact"<sup>49</sup> with state law proceedings<sup>50</sup> between non-diverse citizens<sup>51</sup> that merely "arise in" or "relate to" a title 11 case,<sup>52</sup> an exercise of supplemental jurisdiction may exceed the limits of Article III of the United States Constitution.<sup>53</sup> Moreover, irrespective of the nature of the primary claim,<sup>54</sup> where a non-Article III bankruptcy judge exercises supplemental bankruptcy jurisdiction, additional constitutional concerns exist.<sup>55</sup> Second, § 1367(a) is ambiguous as to its application to bankruptcy proceedings. Ambiguities in the bankruptcy<sup>56</sup> and supplemental<sup>57</sup> jurisdictional provisions should be resolved, if at all possible, to avoid reaching these constitutional questions.<sup>58</sup>

Even assuming that supplemental bankruptcy jurisdiction is both constitutionally and statutorily authorized, part IV argues on policy grounds that Congress should amend either 28 U.S.C. § 1334 (the bankruptcy jurisdictional provision), or 28 U.S.C. § 1367 (the supplemental jurisdic-

48. For cases in which courts have exercised supplemental bankruptcy jurisdiction under the former Bankruptcy Acts, see *infra* notes 346-47.

49. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966); see also *infra* notes 116-18 and accompanying text (discussing *Gibbs*'s common nucleus of fact standard).

50. By "state law proceedings," this Article means proceedings which are predicated on state law and which do not "arise under" any federal law sufficient to satisfy the requirements of 28 U.S.C. § 1331 (1988 & Supp. IV 1992).

51. The citizenship of the parties determines whether the requirements of diversity jurisdiction have been fulfilled. See 28 U.S.C. § 1332 (1988 & Supp. IV 1992) (diversity jurisdiction provision).

52. See 28 U.S.C. § 1334(b) (1988 & Supp. IV 1992).

53. U.S. Const. art. III. See *infra* part III.A (constitutional analysis of supplemental bankruptcy jurisdiction).

54. The phrase "primary claim" is used throughout this Article to refer to the non-supplemental claim in a civil action. In *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), the Court referred to the primary claim as the "federal claim," probably because 28 U.S.C. § 1331 (statutory grant of federal question jurisdiction) provided the jurisdiction for the primary claim.

55. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982) (holding bankruptcy jurisdictional provision enacted with Bankruptcy Reform Act of 1978 unconstitutional because it delegated "essential attributes of the judicial power" to bankruptcy judges who did not enjoy life-tenure as required by Article III, § 1); see also *infra* notes 398-415 and accompanying text (extensive discussion of *Marathon*).

56. 28 U.S.C. § 1334(b) (1988 & Supp. IV 1992).

57. 28 U.S.C. § 1367(a) (Supp. IV. 1992).

58. See *infra* note 239 (discussing this rule of statutory construction).



tional provision), or both, to preclude the exercise of supplemental bankruptcy jurisdiction except when necessary to expedite resolution of a bankruptcy case.<sup>59</sup>

## I. OVERVIEW

### A. Bankruptcy Jurisdiction

The scope of bankruptcy jurisdiction was expanded with the enactment of the current bankruptcy jurisdictional provisions first enacted in 1978<sup>60</sup> and reenacted in 1984.<sup>61</sup> This section discusses the breadth of these bankruptcy jurisdictional provisions.

#### 1. Bankruptcy Amendments and Federal Judgeship Act of 1984

Currently, 28 U.S.C. § 1334 provides three distinct grants of bankruptcy jurisdiction.<sup>62</sup> First, "district courts . . . have original and exclu-

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59. See *infra* part IV.

60. See 28 U.S.C. § 1471(b) (repealed). For quotation of former § 1471 in its entirety, see *infra* note 100.

61. See 28 U.S.C. § 1334(b) (1988 & Supp. IV 1992). In its entirety, 28 U.S.C. § 1334 provides as follows:

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, 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.

(c)(1) 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.

(2) 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 jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain or not to abstain made under this subsection is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 is commenced or is pending shall have 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.

28 U.S.C. § 1334 (1988 & Supp. IV 1992).

62. Which court exercises bankruptcy jurisdiction is a question distinct from the scope of bankruptcy jurisdiction, and is governed by a separate statute. Compare 28 U.S.C. § 1334 (1988 & Supp. IV 1992) (granting bankruptcy jurisdiction to district courts) with 28 U.S.C. § 157 (1988) (authorizing referral of bankruptcy jurisdiction from district courts to bankruptcy courts); see also *infra* notes 416-24 and accompanying text.

sive jurisdiction of all cases under title 11.”<sup>63</sup> It also provides that district courts have “exclusive jurisdiction” over all of the debtor’s property, “wherever located . . . and . . . of the estate.”<sup>64</sup> Finally, it provides that “district courts . . . 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>65</sup>

“Arising under” jurisdiction<sup>66</sup> is the narrowest form of bankruptcy jurisdiction.<sup>67</sup> Legislative history defines “arising under” bankruptcy jurisdiction as extending to

any matter under which a claim is made under a provision of title 11. For example, a claim of exemptions under 11 U.S.C. 522 would be cognizable by the bankruptcy court, as would a claim of discrimination in violation of 11 U.S.C. 525. Any action by the trustee under an avoiding power would be a proceeding arising under title 11, because the trustee would be claiming based on a right given by one of the sections in . . . title 11.<sup>68</sup>

Courts have interpreted “arising under” jurisdiction as extending to matters based solely on rights created under title 11.<sup>69</sup> Examples of “arising under” jurisdiction include proceedings to avoid transfers pursuant to the federal preference or fraudulent transfer provisions,<sup>70</sup> to enforce or request relief from the automatic stay,<sup>71</sup> to object to the grant of a dis-

63. 28 U.S.C. § 1334(a) (1988 & Supp. IV 1992). For a definition of a “title 11 case,” see *supra* note 1.

64. 28 U.S.C. § 1334(d) (1988 & Supp. IV 1992).

65. 28 U.S.C. § 1334(b) (1988 & Supp. IV 1992). For a definition of “proceedings,” see *supra* note 2.

66. The concept of “arising under” bankruptcy jurisdiction is derived from “arising under” Constitutional, statutory, and treaty jurisdiction. Compare 28 U.S.C. § 1334(b) (1988 & Supp. IV 1992) with 28 U.S.C. § 1331 (1988 & Supp. IV. 1992) (28 U.S.C. 1334(b) refers to jurisdiction under title 11, and 28 U.S.C. 1331 refers to jurisdiction under the Constitution, laws, and treaties of the United States). Indeed, legislative history indicates Congress’ understanding that “arising under” bankruptcy jurisdiction would be easy to identify because “[t]he phrase ‘arising under’ has a well defined and broad meaning in the jurisdictional context.” H.R. Rep. No. 595, 95th Cong., 1st Sess. 445 (1977).

67. See *Wood v. Wood (In re Wood)*, 825 F.2d 90, 96, 97 (5th Cir. 1987) (narrowly defining “arising under” jurisdiction, and comparing it to other broader grants of bankruptcy jurisdiction).

68. H.R. Rep. No. 595, 95th Cong., 1st Sess. 445 (1977).

69. See *In re Wood*, 825 F.2d at 96-97 (stating that, for example, a suit to avoid a preferential transfer “arises under” title 11 because the suit is based solely on 11 U.S.C. § 547).

70. See 11 U.S.C. §§ 547, 548 (1988); see also *supra* notes 13, 14 (defining preference and fraudulent transfers).

71. See 11 U.S.C. § 362 (1988 & Supp. IV 1992). Courts have found that motions, under 11 U.S.C. §§ 105 or 362, for injunctive relief are “core” proceedings within the meaning of subsections (A) and (O). See, e.g., *National Union Fire Ins. Co. v. Titan Energy, Inc. (In re Titan Energy, Inc.)*, 837 F.2d 325, 328-29 (8th Cir. 1988) (proceeding by debtor’s insurer to enjoin, pursuant to §§ 105 and 362, state court action is “core” proceeding because product liability insurance policy between insurer and debtor is property of estate); *Manville Corp. v. Equity Security Holders Comm., A.F. (In re Johns-*

charge to the debtor or to the dischargeability of a particular debt,<sup>72</sup> to resolve the scope of property of the estate,<sup>73</sup> or to request authority to reject or assume an executory contract or unexpired lease.<sup>74</sup>

Courts have defined "arising in" bankruptcy jurisdiction by applying a "but for" test.<sup>75</sup> According to this test, proceedings are said to "arise in" a title 11 case "if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case[,]"<sup>76</sup> even though it is not based on any right expressly created under title 11.<sup>77</sup> Some examples of "arising in" proceedings include administrative matters,<sup>78</sup> determinations as to the validity and amount of claims asserted against the estate,<sup>79</sup> "counter-

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Manville Corp.), 801 F.2d 60, 63-64 (2d Cir. 1986) (proceeding brought by debtor-in-possession to enjoin Equity Committee and its members from pursuing state court action to compel meeting of debtor's shareholders was "core" proceeding because meeting might interfere with debtor's reorganization).

72. See 11 U.S.C. §§ 523 (1988 & Supp. IV 1992), 727 (1988) (objections to dischargeability of certain debts and objections to discharge respectively).

73. See 11 U.S.C. § 541 (1988 & Supp. IV 1992); see also, e.g., Plaza at Latham Assocs. v. Citicorp N.A., 150 B.R. 507, 513-14 (N.D.N.Y. 1993) (characterizing order as resolving claims to proceeds of debtor's insurance policy which constituted property of estate and concluding that order approving settlement providing that debtor's insurer be released from liability to any entity relating to claims arising out of fire at debtor's premises was "core proceeding").

74. See 11 U.S.C. § 365 (1988 & Supp. IV 1992).

75. A leading treatise defines "arising in" jurisdiction as "the residual category of civil proceedings, including those which do not arise under title 11, and those which are not related to title 11 cases." 1 *Collier on Bankruptcy* § 3.01[1][c][v], at 3-32 (Lawrence P. King ed., 15th ed. 1993).

76. Wood v. Wood (*In re Wood*), 825 F.2d 90, 97 (5th Cir. 1987). *Accord* Silverman v. General Ry. Signal Co. (*In re Leco Enters., Inc.*), 144 B.R. 244, 248-49 (S.D.N.Y. 1992); Acolyte Elect. Corp. v. City of New York, 69 B.R. 155, 173 (Bankr. E.D.N.Y. 1986) ("To be a core proceeding, an action must have as its foundation the creation, recognition, or adjudication of rights which would not exist independent of a bankruptcy environment . . .").

77. See *In re Wood*, 825 F.2d at 97 (noting that litigation surrounding creditor's proof of claim filed in bankruptcy case as example of "arising in" jurisdiction, although claim based on state law).

78. See 28 U.S.C. § 157(b)(2)(A), (O) (1988) (including, among definition of "core proceedings," those "matters concerning the administration of the estate" and "other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship"). Courts have held a wide variety of proceedings to be "core" proceedings within the scope of § 157(b)(2)(A) and (O). See generally *Bankruptcy Litigation Manual* 83-84 (Michael L. Cook ed., 1992-93) (describing the following as "core" proceedings within scope of catch-all provisions: proceedings to establish administrative priority; motions for substantive consolidation; motions for change of venue, remand, or abstention; proceedings for violation of § 362 automatic stay; motions to disqualify counsel for debtor; estimations of personal injury claims in order to confirm chapter 11 plan; counterclaims for bad faith filing of creditor's petition; fixing attorneys' fees under § 506(b); and appointment of additional creditors' committees); 10 Norton Bankruptcy Law and Practice 2d § 5.16, at 108 (1993) (describing disputes concerning employment of attorneys and award of professional compensation out of estate as "core" within meaning of subsection (A), as well as questions concerning eligibility and qualification of bankruptcy trustee and compensation of trustees).

79. See 28 U.S.C. § 157(b)(2)(B) (1988) (defining "core proceedings" as including

claims by the estate against persons filing claims against the estate,"<sup>80</sup> "orders to turn over property of the estate,"<sup>81</sup> "determinations of the validity, extent, or priority of liens,"<sup>82</sup> proceedings to enforce prior orders of the bankruptcy court,<sup>83</sup> and proceedings involving the post-peti-

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"allowance or disallowance of claims against the estate"); *see also* Canal Corp. v. Finnman (*In re Johnson*), 960 F.2d 396, 401 (4th Cir. 1992)(adversary proceeding seeking distribution of funds held by debtor in constructive trust held "core" as either involving turnover of property of estate, validity and priority of liens, or sale, use or lease of property); *In re Parque Forestal, Inc.*, 949 F.2d 504, 510 (1st Cir. 1991)(estoppel claim brought by residents in debtor's housing development held "core" because district court affirmed bankruptcy court's decision based on 11 U.S.C. § 506(c), thus, action "arose under" title 11 or "arose in" title 11 case); Southeastern Sprinkler Co. v. Meyertech Corp. (*In re Meyertech Corp.*), 831 F.2d 410, 418 (3d Cir. 1987)(creditor's breach of warranty action against debtor was "core" proceeding because it fell within Code definition of "claim").

Not all actions against the debtor are "core proceedings." At least one court has held that, in order to constitute a "core" determination on a claim, the proceeding must involve the question of allowance or disallowance of the claim and not merely the existence of the right to payment under state law. *See Christensen v. Tucson Estates, Inc.* (*In re Tucson Estates, Inc.*), 912 F.2d 1162, 1168 (9th Cir. 1990).

Expressly excepted from this definition of "core," however, are proceedings for "the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11." 28 U.S.C. § 157(b)(2)(B) (1988). This exception has been narrowly construed. *See, e.g., In re UNR Industries, Inc.*, 45 B.R. 322, 326 (N.D. Ill. 1984) (subsection (B) "does not exclude from the definition of core proceedings estimation of personal injury and wrongful death claims for all purposes, but only 'for purposes of distribution.' Estimation of such claims for other purposes, such as 'confirming a plan' . . . apparently remains a core proceeding for the bankruptcy judge.").

80. *See* 28 U.S.C. § 157(b)(2)(C) (1988) (including within definition of "core proceedings" those "counterclaims by the estate against persons filing claims against the estate"); *see also infra* note 526 (discussing division among courts in interpreting breadth of this provision).

81. *See* 28 U.S.C. § 157(b)(2)(E) (1988) (defining "core proceedings" as including "orders to turn over property of the estate"). Courts differ as to whether actions by a trustee or debtor-in-possession to enforce disputed obligations are "core" proceedings or not, such as an action to collect on an account owed to the debtor, although these actions are framed as proceedings to turn over property of the estate. *Compare* *Craig v. McCarty Ranch Trust* (*In re Cassidy Land & Cattle Co.*), 836 F.2d 1130, 1132-33 (8th Cir. 1988) (proceeding to foreclose on note secured by mortgage, constituting sole asset of estate, was "core" proceeding because proceeding amounted to action to turn over matured debt that was property of estate), *cert. denied*, 436 U.S. 1033 (1988) *with* *F&L Plumbing & Heating Co. v. New York University* (*In re F&L Plumbing & Heating Co.*), 114 B.R. 370, 376-77 (E.D.N.Y. 1990) (proceeding merely "related to" the debtor's bankruptcy case) *and* *Howison v. Country Hills Assocs. (In re W.G.M.C., Inc.)*, 96 B.R. 5, 6 (Bankr. D. Me. 1989) (same); *see also* 1 *Collier on Bankruptcy* § 3.01[2][b][iv], at 3-51 (Lawrence P. King ed., 15th ed. 1993) ("[A]ctions to collect pre-petition accounts receivable are straightforward *Marathon*-type contract actions, and are thus not core proceedings."); *but see* *Galucci v. Grant* (*In re Galucci*), 931 F.2d 738, 744 (11th Cir. 1991) (trustee's action for turnover of property which had never belonged to debtor but which third party had quitclaimed to trustee to compromise trustee's concededly baseless claim against him was non-core, unrelated matter over which no bankruptcy jurisdiction existed).

82. *See* 28 U.S.C. § 157(b)(2)(K) (11th Cir. 1988) (defining "core proceedings" as including "determinations of the validity, extent, or priority of liens").

83. *See, e.g., In re Memorial Estates, Inc.*, 950 F.2d 1364, 1369-70 (7th Cir. 1991) (order sanctioning attorney and client under bankruptcy equivalent of Rule 11 is "core

tion operation of the estate.<sup>84</sup>

"Related to" jurisdiction is the broadest of the three types granted by 28 U.S.C. § 1334(b),<sup>85</sup> yet appellate courts disagree as to the breadth of the test for determining whether a proceeding is "related to" the bankruptcy case. The First,<sup>86</sup> Second,<sup>87</sup> Third,<sup>88</sup> Seventh,<sup>89</sup> and Tenth<sup>90</sup> Cir-

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proceeding," even though sanctions relate to actions in hearing on proceeding as to which bankruptcy court enjoyed only "related to" jurisdiction and even though bankruptcy case had already been dismissed), *cert. denied*, 112 S. Ct 2969 (1992); *Mountain Am. Credit Union v. Skinner (In re Skinner)*, 917 F.2d 444, 448 (10th Cir. 1990) (civil contempt proceedings arising out of core matters are themselves core matters); *Budget Serv. Co. v. Better Homes of Virginia, Inc.*, 804 F.2d 289, 292 (4th Cir. 1986) (sanction of punitive damages for violation of automatic stay under § 362(h) is core proceeding); *TCL Investors v. Brookside Sav. & Loan Ass'n (In re TCL Investors)*, 775 F.2d 1516, 1517 (11th Cir. 1985) (proceeding by purchaser of property of estate to compel debtor to comply with sale agreement that had been approved and authorized by bankruptcy court held "core"); *but see Gower v. Farmers Home Administration (In re Davis)*, 899 F.2d 1136, 1138-40 (1990) (trustee's request for attorney's fees under the EAJA not a "core" proceeding); *I.R.S. v. Brickell Inv. Corp. (In re Brickell Inv. Corp.)*, 922 F.2d 696, 701 (11th Cir. 1991) (debtor's motion to assess costs and attorney's fees against IRS pursuant to 26 U.S.C. § 7430 is not "core," even if action arises out of core proceeding to determine debtor's tax liability); *Plastiras v. Idell (In re Sequoia Auto Brokers, Ltd.)*, 827 F.2d 1281, 1289 (9th Cir. 1987) (civil contempt action not core even if it arises out of core proceeding).

84. The Eleventh, Second, and First Circuits expansively define "core" jurisdiction to exist whenever the state law claim arises out of a contract entered into after the petition has been filed. *See, e.g., Olympia & York Fla. Equity Corp. v. Bank of N.Y. (In re Holywell Corp.)*, 913 F.2d 873, 881 (11th Cir. 1990) ("[T]his is a 'core proceeding' under 28 U.S.C. § 157(b), as it is a 'matter concerning the administration of the estate.'") (citing 28 U.S.C. § 157(b)(2)(A) (1988)); *In re Ben Cooper*, 896 F.2d 1394, 1400 (2d Cir.), *vacated and remanded*, 111 S. Ct. 425 (1990) (holding that bankruptcy court has core jurisdiction over state law contract claims when contract was entered into post-petition, as adjudication of such claims is essential part of administering estate), *reinstated*, 924 F.2d 36 (2d Cir. 1991), *cert. denied*, 111 S. Ct. 2041 (1992); *Arnold Print Works, Inc. v. Apkin (In re Arnold Print Works, Inc.)*, 815 F.2d 165, 166 (1st Cir. 1987) (action by debtor-in-possession to collect account receivable arising out of a post-petition contract is "core proceeding"); *but see Wood v. Wood (In re Wood)* 825 F.2d 90, 97 (5th Cir. 1987) (cause of action under state law is not core although it arose out of post-petition dispute).

85. *See, e.g., Michigan Employment Sec. Comm'n v. Wolverine Radio Co. (In re Wolverine Radio Co.)*, 930 F.2d 1132, 1141 (6th Cir. 1991) ("related to" jurisdiction is broadest grant of bankruptcy jurisdiction); *In re Wood*, 825 F.2d at 93 (same); *F.D.I.C. v. Majestic Energy Corp. (In re Majestic Oil Corp.)*, 835 F.2d 87, 90 (5th Cir. 1988) (same).

86. *See In re G.S.F. Corp.*, 938 F.2d 1467, 1475 (1st Cir. 1991) (adopting narrow standard of "related to" bankruptcy jurisdiction); *Austin v. Unarco Indus., Inc.*, 705 F.2d 1, 4-5 (1st Cir. 1983) (implying that it would narrowly construe "related to" jurisdiction over non-debtor third parties), *cert. dismissed*, 463 U.S. 1247 (1983).

87. *See Turner v. Ermiger (In re Turner)*, 724 F.2d 338, 341 (2d Cir. 1983) (requiring "significant connection" to debtor's bankruptcy).

88. *See Pacor, Inc. v. Higgins*, 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 deleted).

89. *See Elscint, Inc. v. First Wis. Fin. Corp. (In re Xonics, Inc.)*, 813 F.2d 127, 131 (7th Cir. 1987) (holding that "related to" jurisdiction encompasses only disputes that

cuits limit "related to" jurisdiction to those proceedings having a direct legal effect upon administration of the bankruptcy estate.<sup>91</sup> Alternatively, the Fifth,<sup>92</sup> Sixth,<sup>93</sup> Ninth,<sup>94</sup> and Eleventh<sup>95</sup> Circuits have adopted

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affect the payments to the bankrupt's other creditors or the administration of the bankrupt's estate; it exists only when the outcome of the proceeding "affects the amount of property available for distribution or the allocation of property among creditors"; see also *Home Ins. Co. v. Cooper & Cooper, Ltd.*, 889 F.2d 746, 749 (7th Cir. 1989) ("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).").

90. See *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 the debtor or his property unless the court cannot complete administrative duties without resolving the controversy") (citation omitted).

91. Some courts have expanded upon the statement that bankruptcy jurisdiction exists where the proceeding would affect the administration of the estate, to conclude that "related to" jurisdiction exists where the proceeding would "affect the estate." See, e.g., *Otero Mills, Inc. v. Security Bank & Trust (In re Otero Mills, Inc.)*, 21 B.R. 777, 778 (Bankr. D. N.M.) (test for "related to" jurisdiction is whether "failure to enjoin would affect the bankruptcy estate"), *aff'd*, 25 B.R. 1018 (D. N.M. 1982); *In re Sondra, Inc.*, 44 B.R. 205, 207 (Bankr. E.D. Pa. 1984) (same); *Crown Cent. Petroleum Corp. v. Wechter (In re General Oil Distribs., Inc.)*, 21 B.R. 888, 892 n.13 (Bankr. E.D.N.Y. 1982) (same). The latter standard is clearly much broader than the former, and possibly exceeds the statutory mandates of 28 U.S.C. § 1334(b). See, e.g., *Holland Indus., Inc. v. United States (In re Holland Indus., Inc.)*, 103 B.R. 461, 466 (Bankr. S.D.N.Y. 1989) ("The desires of every Chapter 11 debtor are affected by a myriad of external indirect effects created by the circumstances in which it operates. Whether they arise from the ebbs and flows of commerce, the effects of governmental action or the acts of third parties with respect to property of non-debtors, their impact on a debtor's attempt to reorganize does not afford the bankruptcy courts with jurisdiction to determine the dispute merely because of that impact."); see also Howard C. Buschman III & Sean P. Madden, *The Power and Propriety of Bankruptcy Court Intervention in Actions Between Nondebtors*, 47 Bus. Law. 913, 944 (1992) ("*Otero Mills* and its progeny, for example, would conclude that jurisdiction exists over actions that merely could 'pressure' the debtor. Any number of actions, however, may have the effect of pressuring or distracting the individuals that manage the debtor. Consequently, courts should require debtors to make a strong showing that the effect upon the estate from such actions is potentially devastating.").

92. 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") (citation omitted).

93. Compare *In re Salem Mortgage Co.*, 783 F.2d 626, 634-35 (6th Cir. 1986) (criticizing *Pacor* test as too strict in that it may be read to limit "related to" jurisdiction to circumstances in which debtor would be bound by res judicata or collateral estoppel) with *Robinson v. Michigan Consol. Gas Co.*, 918 F.2d 579, 583-84 (6th Cir. 1990) (embracing *Pacor*, without rejecting standard articulated in *Salem Mortgage*, because it read *Pacor* as adopting a more liberal test than the *Salem Mortgage* court thought *Pacor* had done); see also *Michigan Employment Sec. Comm'n v. Wolverine Radio Co. (In re Wolverine Radio Co.)*, 930 F.2d 1132, 1143 (6th Cir. 1991) (distinguishing *Pacor* on grounds that Wolverine was contractually obligated to indemnify non-debtor third party, whereas in *Pacor* Manville would not have been automatically liable).

94. See *American Hardwoods, Inc. v. Deutsche Credit Corp. (In re American Hard-*

a broader standard of "related to" jurisdiction<sup>96</sup>—a standard that requires only "that the activity have some conceivable impact on the bankruptcy reorganization or estate"<sup>97</sup> and does not require that this impact be either direct or legal.<sup>98</sup>

"Related to," "arising under," and "arising in" jurisdiction are three distinct bases for bankruptcy jurisdiction. These jurisdictional bases overlap and are not mutually exclusive.<sup>99</sup> If any one test is satisfied, bankruptcy jurisdiction exists.

## 2. Bankruptcy Reform Act of 1978

The jurisdictional provisions enacted in 1984 are substantially identical with those of the Bankruptcy Reform Act of 1978, differing only as to

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woods, Inc.), 885 F.2d 621, 623 (9th Cir. 1989) (adopting *Pacor's* "any conceivable effect" language without *Pacor's* subsequent reference to alteration of debtor's options or to impact upon administration of bankruptcy estate); *In re Fietz*, 852 F.2d 455, 457 (9th Cir. 1988) (same).

95. See *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*).

96. See also 1 *Collier on Bankruptcy* § 3.01[1][c][iv] (Lawrence P. King ed., 15th ed. 1993) (noting that some courts interpret the "related to" standard as "whether the outcome of the proceeding could conceivably have any effect on the bankruptcy estate").

97. *Cardinal Indus., Inc. v. Buckeye Fed. Sav. & Loan Ass'n (In re Cardinal Indus., Inc.)*, 109 B.R. 743, 746 (Bankr. S.D. Ohio 1989) (citation omitted).

98. See *Buschman & Madden, supra* note 91, at 946-47 (criticizing "some courts' virtually limitless standards for defining the scope of the bankruptcy court's jurisdiction" as creating "potential for abuse"). *Buschman and Madden* argue that "related to" jurisdiction should be determined to exist only when the proceeding could:

- (1) increase or decrease the debtor's liabilities or distributable assets, (2) impair the integrity of the automatic stay, (3) affect the debtor's options or freedom of action (e.g., through the effect of collateral estoppel), or (4) interfere with the bankruptcy court's 'handling and administration of the estate.' This latter factor includes substantial threats to estate administration posed by diverting the debtor's principals from reorganization efforts and can justify only limited injunctive relief, carefully tailored to account for both the perceived threat to the estate and the court's jurisdictional limitations. Issuing an injunction or exercising related jurisdiction simply to enhance or preserve the value of an estate asset is an illegitimate exercise of the bankruptcy court's power.

*Id.* at 947. For an example of a case in which bankruptcy jurisdiction was held to permit the injunction of non-debtor third parties from taking actions to control property of estate in violation of 11 U.S.C. § 362(a)(3), see *Old Orchard Inv. Co. v. A.D.I. Distrib., Inc. (In re Old Orchard Inv. Co.)*, 31 B.R. 599, 602-03 (W.D. Mich. 1983). For broader examples of bankruptcy jurisdiction to enjoin third party nondebtors, see *Menard-Sanford v. Mabey (In re A.H. Robins Co.)*, 880 F.2d 694, 701-02 (4th Cir.), *cert. denied*, 110 S. Ct. 376 (1989) (explaining that bankruptcy jurisdiction exists to approve plan of reorganization permanently enjoining nondebtors from bringing actions against debtor's insurers as a part of settlement between debtor and insurers by which insurers agreed to contribute fund for distribution to debtor's tort claimants); *MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 837 F.2d 89, 94 (2d Cir.), *cert. denied*, 109 S. Ct. 176 (1988) (same).

99. See H.R. Rep. No. 595, 95th Cong. 1st Sess. 445 (1977) ("[B]ecause title 11, the bankruptcy code, only applies once a bankruptcy case is commenced, any proceeding arising under title 11 will be in some way 'related to' a case under title 11.").

the scope of bankruptcy jurisdiction that the non-Article III bankruptcy courts can exercise.<sup>100</sup> With the enactment of the jurisdictional provisions of the Bankruptcy Reform Act, Congress hoped to create a single forum for the resolution of all matters and proceedings related to a bankruptcy case, and to avoid the endless jurisdictional disputes that had characterized litigation under the former Bankruptcy Act.<sup>101</sup>

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100. See *infra* notes 397-415 and accompanying text. Former 28 U.S.C. § 1471, which governed bankruptcy jurisdiction until the Supreme Court held in *Northern Pipeline Constr. Co., v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982), that its broad delegation of jurisdiction to non-Article III bankruptcy courts violated Article III of the Constitution, defined bankruptcy jurisdiction as follows:

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, 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.

(c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.

(d) Subsection (b) or (c) of this section 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.

(e) The bankruptcy court in which a case under title 11 is commenced shall have exclusive jurisdiction of all of the property, wherever located, of the debtor, as of the commencement of such case.

28 U.S.C. § 1471 (repealed).

101. For a discussion of this legislative history, see *infra* notes 496-503 and accompanying text. Prior to enactment of the Bankruptcy Reform Act in 1978, parties often squandered scarce estate assets litigating jurisdictional issues because the Bankruptcy Act of 1898 divided bankruptcy jurisdiction among state and federal courts.

Section 2a of the former Act broadly granted district courts "with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act." 1898 Act, § 2a. The Act appeared to limit this broad grant of federal bankruptcy jurisdiction by listing specific proceedings over which this jurisdiction existed. See *id.* Some of these enumerated proceedings were narrow, while others were broad. The broadest permitted district courts to "[c]ause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided." *Id.* § 2a(7). The proviso in this section referred to § 23 of the 1898 Act, which severely qualified this broad grant of bankruptcy jurisdiction to district courts. It limited the plenary jurisdiction that they could exercise by providing in the clause governing the district courts that generally, absent the consent of the defendant, "suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted." *Id.* § 23. This section was amended to permit plenary suits under §§ 67e, 60b, and 70e to be brought in district courts without regard to the defendant's consent or other ground for federal jurisdiction. See *Williams v. Austrian*, 331 U.S. 642, 649 (1947). This provision, even as amended, severely limited the plenary bankruptcy jurisdiction that district courts could exercise, and, except in the context of a Chapter X reorganization, directed most of these suits to the state courts. See *id.*



## B. Supplemental Jurisdiction

Supplemental jurisdiction is the phrase currently used to describe the doctrines of ancillary and pendent jurisdiction.<sup>102</sup> These doctrines are relied upon by federal courts, for reasons of federalism, judicial economy and fairness, to adjudicate jurisdictionally insufficient state law claims related to claims over which federal jurisdiction exists.

### 1. Ancillary Jurisdiction

Ancillary jurisdiction finds its origins in the notion that, once property comes within the jurisdiction of a court of equity, the court has jurisdiction to resolve all claims related to the property. "Under the doctrine of ancillary jurisdiction, defendants, intervenors as of right and, under certain limited circumstances, plaintiffs [are] allowed to assert related claims in an ongoing lawsuit, even though no independent basis for federal subject matter jurisdiction existed as to these claims."<sup>103</sup> Early Supreme Court decisions limited the exercise of ancillary jurisdiction to instances in which the federal court was in possession of property.<sup>104</sup> Ancillary jurisdiction has since been expanded to apply to compulsory counterclaims,<sup>105</sup> cross-claims, claims against additional parties joined to a com-

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102. See 28 U.S.C. § 1367 (Supp. IV. 1992) (entitled "supplemental jurisdiction"); see also Richard D. Freer, *A Principled Statutory Approach to Supplemental Jurisdiction*, 1987 Duke L.J. 34, 34 [hereinafter Freer, *Principled Statutory Approach*]; Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute*, 40 Emory L.J. 445, 447 (1991) [hereinafter Freer, *Life After Finley*]; Richard A. Matasar, *A Pendent and Ancillary Jurisdiction Primer: The Scope and Limits of Supplemental Jurisdiction*, 17 U.C. Davis L. Rev. 103, 104 (1983) [hereinafter Matasar, *Jurisdiction Primer*]; Richard A. Matasar, *Rediscovering "One Constitutional Case": Procedural Rules and the Rejection of the Gibbs Test for Supplemental Jurisdiction*, 71 Cal. L. Rev. 1399, 1401 (1983) [hereinafter Matasar, *One Constitutional Case*]; Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 Ariz. St. L.J. 849, 852 (1992); Thomas M. Mengler, *The Demise of Pendent and Ancillary Jurisdiction*, 1990 B.Y.U. L. Rev. 247, 247 n.3; David D. Siegel, *Changes in Federal Jurisdiction and Practice Under the New (Dec. 1, 1990) Judicial Improvements Act*, 133 F.R.D. 61, 61 (1991); Arthur D. Wolf, *Codification of Supplemental Jurisdiction: Anatomy of a Legislative Proposal*, 14 W. New Eng. L. Rev. 1, 3 (1992).

103. McLaughlin, *supra* note 102, at 874.

104. See *Fulton Nat'l Bank v. Hozier*, 267 U.S. 276, 280 (1925) ("The general rule is that when a federal court has properly acquired jurisdiction over a cause it may entertain, by intervention, dependent or ancillary controversies; but no controversy can be regarded as dependent or ancillary unless it has direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit.") (citation omitted); *Freeman v. Howe*, 65 U.S. 450, 460 (1860) ("[A] bill filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice, or an inequitable advantage under mesne or final process, is not an original suit, but ancillary and dependent, supplementary merely to the original suit, out of which it had arisen, and is maintained without reference to the citizenship or residence of the parties.").

105. See *Moore v. New York Cotton Exch.*, 270 U.S. 593, 609-10 (1926) (relying on Equity Rule 30, a predecessor to Fed. R. Civ. P. 13(a), which now governs compulsory counterclaims).

pulsory counterclaim or cross-claim, third party impleader claims and claims by intervenors as of right,<sup>106</sup> that arose out of the same transaction as the plaintiff's primary claim.<sup>107</sup> In addition, "transaction" was defined flexibly to "comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship."<sup>108</sup> Under this "same transaction" test, the doctrine of ancillary jurisdiction was broad, applying not only to a defendant's jurisdictionally deficient claims against the plaintiff (or co-defendants) but also to jurisdictionally deficient claims against additional parties joined by a defendant or intervenor of right.<sup>109</sup>

## 2. Pendent-Claim Jurisdiction

The doctrine of pendent jurisdiction similarly derives from notions of judicial economy, those peculiar to our federal system. "Under the doctrine of pendent-claim jurisdiction, a plaintiff asserting a 'federal law' or 'federal question' claim could join with it a related state law claim against the same defendant, even though the state law claim was itself jurisdictionally insufficient."<sup>110</sup>

The first Supreme Court decision to embrace the doctrine of pendent jurisdiction, *Osborn v. Bank of United States*,<sup>111</sup> rejected the argument that the presence of issues of state law destroyed federal question jurisdiction since "[t]here is scarcely any case, every part of which depends on the constitution, laws or treaties of the United States."<sup>112</sup> In *Siler v. Louisville & Nashville R.R.*,<sup>113</sup> the Court held that whenever the assertion of federal question jurisdiction was "colorable" a court had the "right to decide all the questions in the case, even [where] it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only."<sup>114</sup>

Neither *Osborn* nor *Siler*, however, determined the extent to which the

106. See McLaughlin, *supra* note 102, at 876; see also *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 375 (1978) (stating in dictum "that the exercise of ancillary jurisdiction over non-federal claims has often been upheld in situations involving impleader, cross-claims or counterclaims").

107. Unlike the doctrine of pendent jurisdiction, for purposes of ancillary jurisdiction, the primary claim can rely on any grant of federal jurisdiction. See *infra* notes 110-36 and accompanying text (discussing pendent-claim and pendent-party jurisdiction).

108. *Moore v. New York Cotton Exch.*, 270 U.S. 593, 610 (1926).

109. *Cf. Moor v. County of Alameda*, 411 U.S. 693, 714-15 (1973) (acknowledging in dictum the "well established doctrine of ancillary jurisdiction" permitting defendants to join additional parties to ongoing lawsuits pursuant to Fed. R. Civ. P. 13(a), 13(h), and 14(a), despite lack of independent basis for subject matter jurisdiction over additional parties).

110. McLaughlin, *supra* note 102, at 868-69.

111. See 22 U.S. 738 (1824) (Marshall, C.J.); see also *infra* notes 280-334 and accompanying text (discussing *Osborn* in greater detail).

112. *Osborn*, 22 U.S. at 820.

113. 213 U.S. 175 (1909).

114. *Id.* at 191.

state and federal claims were required to be related. Initially, the Supreme Court adopted a "single cause of action" test,<sup>115</sup> but in *United Mine Workers v. Gibbs*<sup>116</sup> the Court rejected this "unnecessarily grudging" standard in favor of a three-part test for pendent-claim jurisdiction.<sup>117</sup> It held that

[p]endent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .," and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." 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 will ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, their is *power* in federal courts to hear the whole.<sup>118</sup>

### 3. Pendent-Party or Ancillary Jurisdiction for Claims by Plaintiffs

In a trilogy of opinions, the Supreme Court declined to find that plaintiffs were authorized to join jurisdictionally deficient parties under either the doctrines of ancillary or pendent jurisdiction.<sup>119</sup>

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115. See *Hurn v. Oursler*, 289 U.S. 238, 242-45 (1933).

116. 383 U.S. 715 (1966).

117. See *id.* at 725-27.

118. *Id.* at 725 (alterations in original) (emphasis in original) (citations omitted). According to Denis F. McLaughlin:

The first requirement of *Gibbs*, that the federal law claims be of sufficient substance to confer subject matter jurisdiction, is the same jurisdictional requirement that applies generally to all federal question claims. The substantiality doctrine requires that the federal court dismiss a federal law claim for lack of subject matter jurisdiction if the claim is "obviously without merit or if 'previous decisions of this court . . . foreclose the subject or leave no room for the inference that the question sought to be raised can be the subject of controversy . . .'" The second requirement of *Gibbs*, that the federal law claims and state law claims "derive from a common nucleus of operative fact," is the heart of the *Gibbs* test . . . .

. . . [C]ourts have generally held that the "common nucleus of operative fact" test is satisfied if the federal and state law claims bear a "loose factual connection" to one another. The final requirement of *Gibbs* is that the plaintiff's federal and state law claims "are such that [the plaintiff] would ordinarily be expected to try them all in one judicial proceeding." . . . Although some commentators have viewed this final requirement as an independent test linked to the rules of *res judicata*, most courts tend to treat this requirement as a restatement of the "common nucleus of operative fact" test.

McLaughlin, *supra* note 102, at 871-73 (citations omitted).

119. See *Finley v. United States*, 490 U.S. 545 (1989); *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978); *Aldinger v. Howard*, 427 U.S. 1 (1976).

In *Owen Equipment & Erection Co. v. Kroger*,<sup>120</sup> the Court rejected a plaintiff's attempt to assert a claim against a non-diverse third-party defendant. Although the doctrine of ancillary jurisdiction clearly would permit the defendant to implead a third-party defendant whose residence is not diverse from that of the plaintiff and defendant,<sup>121</sup> the Court declined to extend this doctrine to permit a similar joinder by the plaintiff, reasoning that the statute rather than the Constitution prohibited the extension. The Court concluded that the diversity jurisdiction provision, 28 U.S.C. § 1332, requires complete diversity between the parties and that the doctrine of ancillary jurisdiction should not permit a plaintiff to evade the requirement "by the simple expedient of suing only those defendants who were of diverse citizenship and waiting for them to implead non-diverse defendants."<sup>122</sup>

In *Aldinger v. Howard*,<sup>123</sup> the Court rejected a similar request to extend the doctrine of pendent jurisdiction to permit a plaintiff to assert non-federal claims against a party as to whom federal jurisdiction did not otherwise exist, again concluding, for statutory rather than constitutional reasons, that the doctrine should not be extended. In this case, the plaintiff brought a § 1983 civil rights action<sup>124</sup> against several individual defendants. Despite having no right to bring a federal civil rights action against a municipal corporation,<sup>125</sup> the plaintiff sought to join a related state law claim against the County of Alameda. The Court noted that the federal question jurisdiction<sup>126</sup> derived from 42 U.S.C. § 1983(b), and that § 1983 prohibited direct suit against the County. As a result, it concluded that the plaintiff should not be able "indirectly" to reach the same result through the use of the doctrine of pendent jurisdiction. Yet, the Court expressly limited its holding to the peculiar facts of the case, noting that "[o]ther statutory grants and other alignments of parties and claims might call for a different result."<sup>127</sup> The Court noted, for example, that a grant of exclusive federal subject matter jurisdiction, "as in the prosecution of tort claims against the United States under 28 U.S.C. § 1346,"<sup>128</sup> might produce a different result because claims related to the grant of exclusive jurisdiction must either be tried together in a federal court or divided between the state and federal courts.<sup>129</sup>

Despite this invitation to find pendent-party jurisdiction in certain cir-

120. 437 U.S. 365 (1978).

121. See *supra* notes 103-09 and accompanying text.

122. *Owen Equip.*, 437 U.S. at 374.

123. 427 U.S. 1 (1976).

124. See 42 U.S.C. § 1983 (1988) (Civil Rights Act of 1871).

125. At the time *Aldinger* was decided, municipal entities such as the County of Alameda were not viewed as "persons" for purposes of the Civil Rights Act. See *Monroe v. Pape*, 365 U.S. 167, 187-91 (1961). This precedent was overruled, two years after *Aldinger*, by *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690-95 (1978).

126. 28 U.S.C. § 1331 (1988 & Supp. IV 1992).

127. *Aldinger v. Howard*, 427 U.S. 1, 18 (1976).

128. *Id.*

129. See *McLaughlin*, *supra* note 102, at 863-64.

cumstances, which many courts of appeals accepted after *Aldinger* by permitting the joinder of jurisdictionally deficient parties,<sup>130</sup> the Supreme Court in *Finley v. United States*<sup>131</sup> held that an assertion of pendent-party jurisdiction is inappropriate absent express congressional authorization. In *Finley*, the plaintiff filed a complaint under the Federal Torts Claims Act, claiming that the Federal Aviation Administration had been negligent in its "operation and maintenance of the runway lights and performance of air traffic control functions."<sup>132</sup> The complaint under the FTCA was later amended to include state law negligence claims against the city of San Diego and the San Diego Gas and Electric Company.<sup>133</sup> There existed no independent basis for federal jurisdiction as to the claims added with the amendment. The Court declined to extend *Gibbs* to permit the assertion of pendent-party jurisdiction absent explicit congressional direction.<sup>134</sup> The Court noted that the FTCA permits the federal government to be sued *only* in a federal court. Further, the court acknowledged that its holding that private parties to claims related to a claim under the FTCA could not be joined to the federal action absent an independent basis for federal jurisdiction "means that the efficiency and convenience of a consolidated action will sometimes have to be foregone in favor of separate actions in state and federal courts."<sup>135</sup> Nonetheless, the Court found this hardship and circuitry "of no consequence since 'neither the convenience of the litigants nor considerations of judicial economy can suffice to justify extension of the doctrine[s] of ancillary [and pendent] jurisdiction.'" <sup>136</sup>

#### 4. The Judicial Improvements Act of 1990

With its enactment of the Judicial Improvements Act of 1990, Congress fulfilled the directive in *Finley* that Congress expressly permit an assertion of pendent-party jurisdiction and, more generally, codified the judicially-created doctrines of ancillary and pendent jurisdiction, which together it referred to as "supplemental jurisdiction." 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."<sup>137</sup> In neither the statute nor its legislative history does Congress attempt to define the constitutional limits of this grant of

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130. See Wendy C. Perdue, *Finley v. United States: Unstringing Pendent Jurisdiction*, 76 U. Va. L. Rev. 539, 550 nn.76-77 (1990) (citing circuit decisions construing *Aldinger*; all but the Ninth Circuit permit pendent-party jurisdiction in some form); see also McLaughlin, *supra* note 102, at 884 (same).

131. 490 U.S. 545 (1989).

132. *Id.* at 546.

133. *Id.*

134. See *id.* at 549-51.

135. *Id.* at 555.

136. *Id.* at 552.

137. 28 U.S.C. § 1367(a) (Supp. IV. 1992).

supplemental jurisdiction—a task that Congress felt the courts were better able to fulfill. The legislative history indicates that Congress' reference in § 1367(a) 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>138</sup>

## II. THE EXERCISE OF SUPPLEMENTAL BANKRUPTCY JURISDICTION UNDER THE BANKRUPTCY CODE

Although 28 U.S.C. § 1334(b) limits bankruptcy jurisdiction to proceedings “arising under title 11, or arising in or related to cases under title 11,”<sup>139</sup> numerous courts have found that they also have jurisdiction either ancillary, pendent, or, since enactment of the Judicial Improvements Act, supplemental to this grant of bankruptcy jurisdiction.<sup>140</sup>

### A. *A Review of the Case Law Supporting Supplemental Bankruptcy Jurisdiction*

#### 1. Courts of Appeals

In *Publicker Industries v. United States (In re Cuyahoga Equip. Corp.)*,<sup>141</sup> the Second Circuit held that a federal district court<sup>142</sup> had jurisdiction supplemental to its bankruptcy jurisdiction. The court was therefore able to approve an agreement dividing among several claimants<sup>143</sup> the proceeds received in a sale of real property by the consolidated chapter 11 estate and agreeing to hold harmless a lender<sup>144</sup> from

138. H.R. Rep. No. 734, 101st Cong., 2d Sess. at 28-29 & n.15 (1990); see *supra* notes 116-18 and accompanying text (discussing *Gibbs*'s three-part test).

139. 28 U.S.C. § 1334(b) (1988 & Supp. IV 1992). The bankruptcy jurisdictional provision enacted in 1978 under 28 U.S.C. § 1471(b) contained a nearly identical grant of bankruptcy jurisdiction. See *supra* notes 100-01 and accompanying text.

140. See *infra* part II.A (discussing this case law in detail).

141. 980 F.2d 110 (2d Cir. 1992).

142. *Cuyahoga* addresses the bankruptcy jurisdiction of the district court because, in that case, the district court had withdrawn the reference of the proceeding from the bankruptcy court. See *id.* at 113; see also 28 U.S.C. § 157(d) (1988) (permitting district court to withdraw reference “for cause”).

143. These claimants included: the United States on behalf of the Environmental Protection Agency, the debtor's lender, Freedom Savings & Loan Association, the Pennsylvania Department of Environmental Resources, the National Oceanographic and Atmospheric Administration, the Department of the Interior, and the trustee in bankruptcy. See *Cuyahoga*, 980 F.2d at 112-13. The basis for these claims differed. The EPA had claimed an entitlement to the proceeds of the sale under CERCLA § 9607(a)(2) and 11 U.S.C. § 506(c). See *id.* Freedom Savings' claim to the proceeds of the sale followed from its mortgage against the real property and security interest in the personal property sold in the debtors' bankruptcy case. See *id.* at 113. The PDEP's claim related to costs it incurred by cleaning up the site. See *id.* The claim of the Department of Interior and the National Oceanographic and Atmospheric Administration arose out of liability for natural resource damage. See *id.* NOAA and the Interior also agreed to release Freedom Savings from liabilities under these laws. See *id.* The trustee claimed a portion of the proceeds of the sale pursuant to 11 U.S.C. § 506(c). See *id.*

144. In the settlement agreement, the EPA, the Department of the Interior, the National Oceanographic and Atmospheric Administration, and the Pennsylvania Depart-

further environmental liability related to the property. The debtor's predecessor in ownership appealed from the order approving the settlement on the grounds that the district court did not have subject matter jurisdiction, and that the terms of the settlement were neither fair nor reasonable.<sup>145</sup>

The Second Circuit stated that the district court had "related to" jurisdiction over the respective claims of the EPA, the debtors' lender, and the bankruptcy trustee to the proceeds of the sale.<sup>146</sup> It then stated that the environmental claims asserted against the debtors and their lender were supplemental to these "related to" proceedings.<sup>147</sup> The court had

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ment of Environmental Protection agreed to release not only Freedom Savings from further environmental liability related to the site, but also Freedom Savings' receiver and its related federal banking regulatory agencies. *See id.*

145. As a practical matter, Publicker objected to the settlement because it was left as the only remaining responsible party for clean-up costs. *See id.* at 118.

146. *See id.* at 114. The court of appeals stated that the district court had "related to" jurisdiction, but the implication of its decision was that the district court had "arising in" jurisdiction over the settlement agreement. *See id.* Although the court did not explicitly assert that these proceedings arose under title 11 or arose in a title 11 case, the court did state that "[b]eyond merely having any 'conceivable effect,' or 'any significant connection' with the bankrupt estate—either of which would establish § 1334(b) jurisdiction—these claims bring into question the very distribution of the estate's property and its allocation between a party asserting the status of constructive trustee and a first priority secured creditor." *Id.* (citations omitted). Moreover, the court cited *In re Parque Forestal, Inc.*, 949 F.2d 504, 510 (1st Cir. 1991), in support of its conclusion that there existed "related to" jurisdiction over the claims against the sale proceeds. *See Cuyahoga*, 980 F.2d at 114. But the court in *Parque Forestal* held that an action to enforce 11 U.S.C. § 506(c) "arises under" title 11, leaving undecided the difficult question of whether a state law estoppel claim would constitute a "core proceeding." 949 F.2d at 510.

The court's holding in *Cuyahoga* that these claims were "related to" proceedings is not technically wrong, however, in that "related to" jurisdiction is broader than "arising under" or "arising in" jurisdiction; any proceeding "arising under" title 11 or "arising in" a title 11 case usually is also "related to" the title 11 case. *See supra* note 99 and accompanying text. In addition, the distinction between these grants of jurisdiction may have seemed to be only of academic interest to the court of appeals, since courts have referred to the differences among the several grants of bankruptcy jurisdiction as relevant only when a non-Article III bankruptcy court is asserting subject matter jurisdiction over the proceeding. Here, the Article III district court had withdrawn the reference and entered the order approving the settlement agreement as an exercise of its original jurisdiction. But where a district court is also asserting supplemental bankruptcy jurisdiction over claims related to the proceeding, the propriety of this assertion may well depend upon whether the supplemental jurisdiction is related to an "arising under" or "arising in" proceeding on one hand or related to a "related to" proceeding on the other. *See infra* parts III-IV (discussing constitutional, statutory, and policy based arguments relating to this distinction).

147. *See Cuyahoga*, 980 F.2d at 115. The court's statement that supplemental bankruptcy jurisdiction existed sufficient to enable the district court to order the release of liability between non-debtor third parties was dictum, however, in that the court of appeals went on to note that "[t]he district court did not need to rely solely on its supplemental jurisdiction to approve the settlement, because additional authority arises from CERCLA's jurisdictional grant vesting the power in all district courts to approve agreements compromising potential CERCLA claims asserted by the government." *Id.* See 42 U.S.C. § 9613(b) (1988) ("[T]he United States district courts shall have exclusive original jurisdiction over all controversies arising under [CERCLA].").

little difficulty in concluding that 28 U.S.C. § 1367, the supplemental jurisdictional provision, applied to proceedings "related to" a title 11 case, and that there existed a sufficient nexus between the bankruptcy claims and the environmental claims to support an exercise of supplemental jurisdiction.<sup>148</sup>

## 2. District Courts

A recent district court decision, *Wieboldt Stores, Inc. v. Schottenstein*,<sup>149</sup> found ancillary jurisdiction over a third-party complaint brought by the defendants in a fraudulent transfer suit which had been commenced by the trustee in bankruptcy.<sup>150</sup> In *Wieboldt*, the court stated that it need not determine whether the claims against the third-party defendants were "related to" the debtor's chapter 11 case because the negligent misrepresentation and breach of contract claims asserted in the third-party complaint were sufficiently related to the bankruptcy trustee's fraudulent transfer claims in the primary complaint. The court, however, did not otherwise address the third-party defendants' contention that § 1334(b) "provides the sole basis for this court's ancillary jurisdiction and does not confer jurisdiction here."<sup>151</sup>

## 3. Bankruptcy Courts

Numerous bankruptcy courts also have found jurisdiction supplemental to their bankruptcy jurisdiction.<sup>152</sup>

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148. See *Cuyahoga*, 980 F.2d at 115 ("In the case at hand, the environmental causes form part of the same case with the bankruptcy claims because all of them, resolved in the settlement agreement, concern the government's attempts to remedy hazardous substance releases at the Publicker site and they remain intertwined in the competing parties' efforts to secure a share of the proceeds of the option sale.").

149. 111 B.R. 162, 164 (N.D. Ill. 1990) (district court sat as trial court, rather than as appellate tribunal). See also 28 U.S.C. § 157(d) (1988) (permitting district court to withdraw a reference of jurisdiction in non-Article III bankruptcy cases "for cause"); see also *infra* note 424 (discussing withdrawal of reference provision).

150. See *Wieboldt*, 111 B.R. at 164. The fraudulent transfer suit arose out of a leveraged-buyout ("LBO") through which WSI Acquisition Corporation acquired Wieboldt Stores, Inc. See *id.* For a detailed discussion of the facts of the *Wieboldt LBO*, see *Wieboldt Stores, Inc. v. Schottenstein*, 94 B.R. 488, 493-496 (N.D. Ill. 1988). See also *Laganella v. Braen (In re Braen)*, Case No. 86-06421 DV, Adv. No. 86-0286, 1991 WL 7701 at \*8 (D. N.J., Jan. 23, 1991) (upholding dismissal of counterclaim and third-party complaint on grounds that bankruptcy court had not abused discretion in declining to exercise pendent jurisdiction over these claims: "This Court concurs with Judge Tuohy's analysis of the lack of factual overlap of the fraudulent conveyance action on the one hand and [counterclaim and third-party complaint alleging] . . . [p]laintiffs' wrongful and malicious actions in the course of obtaining the execution levies.").

151. See *Wieboldt*, 111 B.R. at 166.

152. See, e.g., *Official Creditors' Comm. of Prods. Liab. & Personal Injury Claimants v. International Ins. Co. (In re Pettibone Corp.)*, 135 B.R. 847, 849-50 (Bankr. N.D. Ill. 1992) (factual connection between cross claims and underlying adversary proceeding insufficient to create supplemental jurisdiction). Whether § 1367—which on its face governs the supplemental jurisdiction of district courts—should govern the exercise of supplemental jurisdiction by bankruptcy courts at all is subject to question. See *infra* part III.B.4 (discussing statutory construction issues). Moreover, the exercise of supple-



a. *Ancillary Jurisdiction*

Several bankruptcy courts have found ancillary bankruptcy jurisdiction. In *Hawkins v. Eads (In re Eads)*,<sup>153</sup> the bankruptcy court held, in the alternative, that it had supplemental jurisdiction<sup>154</sup> to consider third-party malpractice actions<sup>155</sup> brought by the non-debtor defendants<sup>156</sup> against their counsel and financial planner because they arose out of the same "common nucleus of operative facts" as the trustee's avoidance action<sup>157</sup> against the debtor and non-debtor defendants.<sup>158</sup> Similarly, in *Jones v. Woody (In re W.J. Services, Inc.)*,<sup>159</sup> the court found supplemental jurisdiction over a legal malpractice action brought by former chapter 11 debtors against their former attorneys in state court and removed to the bankruptcy court.<sup>160</sup> The court reasoned that the removed action arose out of a common nucleus of operative facts with an interim fee application that had been granted by the bankruptcy court prior to the dismissal of the debtors' chapter 11 cases.<sup>161</sup> The bankruptcy court went

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mental jurisdiction by a non-Article III bankruptcy court raises distinct constitutional concerns. See *infra* part III.A.2 (discussing these constitutional issues).

153. 135 B.R. 387 (Bankr. E.D. Cal. 1991).

154. The court also found that it had "related to" bankruptcy jurisdiction over the third-party claims because, "the possibility of recovery on the third-party complaint enhances the collectability of any judgment against the [non-debtor] defendants." *Id.* at 393. It went on to note, however, that its assertion of "related to" jurisdiction over "[i]ndemnity claims between nondebtors, one of whom is indebted to the estate," was a conclusion as to which courts have disagreed. See *id.* at 393 n.9 (citing *Scott v. Equitable Fed. Sav. & Loan Assoc. (In re German)*, 97 B.R. 373, 375 (Bankr. S.D. Ohio 1989), to the contrary); *accord Spaulding & Co. v. Buchanan (In re Spaulding & Co.)* 131 B.R. 84, 88-89 (N.D. Ill. 1990) (holding that "related to" jurisdiction does not exist over a claim which has only a remote possibility of effecting the allocation of the estate).

155. The third-party complaint alleged not only malpractice, but also indemnification, breach of contract and fraud. See *Hawkins*, 135 B.R. at 391 & n.6.

156. The non-debtor defendants were purchasers of assets from the debtors' chapter 11 estate in a scheme alleged to have been fraudulent. See *id.* at 390-91.

157. The primary complaint brought by the trustee in bankruptcy against the debtor and third parties alleged "an age-old fraud—that defendants siphoned a secret profit by selling property of the bankruptcy estate through a strawman at a fictitiously low price." *Id.* at 390 (footnote omitted).

158. The court held that it had "arising under" bankruptcy jurisdiction over the trustee's avoidance action. See *id.* at 392 ("proceedings based on causes of action created by sections 363(n), 549, and 550 'arise under' title 11").

159. 139 B.R. 824 (Bankr. S.D. Tex. 1992).

160. See *id.* at 826.

161. See *id.* Peculiarly, in *W.J. Services*, the malpractice action was found to have been ancillary to the fee application although the malpractice action was *not* brought as a counterclaim to the fee application and indeed was not even commenced until after the fee application had been granted and the chapter 11 cases dismissed. See *id.* "As a general rule, the dismissal of a bankruptcy case should result in the dismissal of 'related proceedings' because the court's jurisdiction of the latter depends, in the first instance, upon the nexus between the underlying bankruptcy case and the related proceedings." *Smith v. Commercial Banking Corp. (In re Smith)*, 866 F.2d 576, 580 (3d Cir. 1989); see also, *American Hardwoods, Inc. v. Deutsche Credit Corp. (In re American Hardwoods, Inc.)*, 885 F.2d 621, 624-27 (9th Cir. 1989) (bankruptcy court lacked power to enjoin enforcement of guarantee after confirmation of reorganization plan); *Tsafaroff v. Taylor (In re Taylor)*, 884 F.2d 478 (9th Cir. 1989) (bankruptcy court lacked jurisdiction to

on to conclude, however, that the malpractice action was barred by res judicata because the fee award implicitly included a finding that malpractice had not occurred. The award was also rendered final by dismissal of the case.<sup>162</sup>

Bankruptcy courts' findings of ancillary jurisdiction have not been limited to malpractice actions. *National Westminster Bancorp N.J. v. ICS Cybernetics, Inc. (In re ICS Cybernetics, Inc.)*<sup>163</sup> involved compulsory counterclaims and cross-claims brought in an interpleader action.<sup>164</sup> The court held that the interpleader action was a core proceeding<sup>165</sup> that "arose under" title 11 because the action invoked various provisions of title 11 for a declaration as to whether escrowed proceeds were property of the estate,<sup>166</sup> and thus, involved "causes of action created and determined by Title 11's statutory provisions."<sup>167</sup> The court also held that the lender's compulsory counterclaims and cross-claims, which alleged a perfected security interest in the rental proceeds, and, alternatively, entitlement to the proceeds pursuant to a "hell or high water" clause, were

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grant request for relief from automatic stay after entry of order dismissing petition); *Cimo v. Petty (In re Petty)*, 848 F.2d 655 (5th Cir. 1988) (after dismissal of petition, bankruptcy court lacked jurisdiction over motion under § 365(d)(4)). Although three courts of appeals have held that a bankruptcy court may in its discretion retain jurisdiction over related proceedings after termination of the bankruptcy case, they all held that jurisdiction was only proper if retention would further judicial economy, would be fair and convenient to the litigants, and was merited by the degree of difficulty of the related legal issues involved. See *Carraher v. Morgan Elects., Inc. (In re Carraher)*, 971 F.2d 327, 328 (9th Cir. 1992); *Fidelity & Deposit Co. v. Morris (In re Morris)*, 950 F.2d 1531, 1535 (11th Cir. 1992); *Smith v. Commercial Banking Corp. (In re Smith)*, 866 F.2d 576, 580 (3d Cir. 1989). The court in *W.J. Services* made no such determination. Moreover, *W.J. Services* ancillary jurisdiction holding would be strange even if the chapter 11 cases had been pending at the time the malpractice action was brought because the fee application and malpractice action were independently commenced causes of action. Under the *W.J. Services* test for ancillary jurisdiction, the bankruptcy court would be free to peruse the entirety of the docket in a given title 11 case in the hopes of finding an action that involves the same factual nexus. Of course, if a chapter 11 case had not been dismissed, and possibly even after the dismissal of the case, the malpractice action probably could have been viewed as "arising in" the title 11 case because but for the debtors' chapter 11 case their attorneys would not have committed malpractice.

162. See *In re W.J. Servs., Inc.*, 139 B.R. at 826-27.

163. 123 B.R. 467 (Bankr. N.D.N.Y. 1989).

164. The debtor-lessor had assigned its interests in the equipment schedules to a master lease to two separate lenders, both of whom claimed rental proceeds which accrued post-petition. After placing the rental proceeds in escrow, the lessee of the debtor-equipment lessor brought the interpleader action and named the debtor, the creditors' committee, and the two lenders as defendants. 123 B.R. at 469-470.

165. The phrase "core proceeding" is a term of art to bankruptcy jurisdiction that refers to jurisdiction that the non-Article III bankruptcy judge is authorized both to "hear and determine." See 28 U.S.C. § 157(b)(1) (1988) ("Bankruptcy judges may hear and determine all case under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.").

166. The provisions invoked are 11 U.S.C. §§ 362, 541, 542, 544, 547, 548, 549, and 550. See *ICS Cybernetics*, 123 B.R. at 471.

167. *Id.* at 471.

themselves core.<sup>168</sup> The court reasoned that "under the doctrine of ancillary jurisdiction . . . [these claims were] logically dependent on the original complaint."<sup>169</sup>

In *Aerni v. Columbus Federal Savings (In re Aerni)*,<sup>170</sup> the court found that a lender's counterclaim for determination of the non-dischargeability of a debt<sup>171</sup> and entry of a judgment as to the amount of the loans was, in the case of the non-dischargeability action, a core proceeding,<sup>172</sup> and, in the case of the request for a judgment, a proceeding ancillary<sup>173</sup> to the debtor's adversary proceeding for a declaration to determine the dischargeability of her student loans. In rejecting the debtor's contention that the doctrine of ancillary jurisdiction ought not apply to adversary proceedings in bankruptcy, the court noted that the Advisory Committee Note to Federal Rules of Bankruptcy Procedure 7014 explicitly leaves this question open.<sup>174</sup> It concluded that it had ancillary jurisdiction on policy grounds:

The absence of ancillary jurisdiction would make it virtually impossible for bankruptcy courts to implement a modern system of procedural rules. Absent ancillary jurisdiction, the court could not adjudicate compulsory counterclaims, cross-claims, third party claims, and other claims permitted to be asserted under the Federal Rules of Civil Procedure, unless each claim independently qualified for adjudication in federal court. The interest of judicial economy and principles of res

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168. *See id.* By calling a proceeding core because it satisfies the test for ancillary jurisdiction, the court seems to mix metaphors. If the court is relying on the doctrine of ancillary jurisdiction, by definition it admits there exists no statutory grant of original jurisdiction. If there exists no grant of original jurisdiction, then the proceeding cannot be a "core proceeding."

169. *Id.* at 472. The court's reference to ancillary jurisdiction seems unnecessary here. The lender's counterclaims and cross-claims amounted, in effect, to a request for a declaration of the perfection and validity of its security interest, an action which either "arises under" 11 U.S.C. § 506, or "arises in" a bankruptcy case as "but for" the case the lender would not be seeking such a determination. Moreover, the lenders had previously filed proofs of claim in the case asserting claims substantially similar to those presented by the counterclaims and cross-claims. *See id.* at 473 n.4. Litigation involving a proof of claim also "arises in" a bankruptcy case. *See also supra* notes 75-84 and accompanying text (discussing "arising in" jurisdiction in greater detail).

170. 86 B.R. 203 (Bankr. D. Neb. 1988).

171. *See* 11 U.S.C. § 523(c) (1988) (permitting party in interest to object to discharge of particular debt on grounds listed therein).

172. The non-dischargeability action was a core proceeding because it "arose under" 11 U.S.C. § 523. *See Aerni*, 86 B.R. at 206. Moreover, 28 U.S.C. § 157(b)(2)(B) and (I) explicitly refer to proceedings involving the "allowance or disallowance of claims against the estate" and "determinations as to the dischargeability of particular debts" as core proceedings. 28 U.S.C. § 157(b)(2)(B), (I) (1988).

173. The counterclaim that sought a declaration as to the enforceability of the underlying debt would not have been "related to" the debtor's bankruptcy case if the debt were non-dischargeable and if the creditor sought to collect the obligation only against property that is not property of the estate. Under this limited circumstance, the result of the declaratory judgment action would have no conceivable effect on the estate. *See supra* notes 85-98 (discussing definition of "related to" jurisdiction).

174. *See Aerni*, 86 B.R. at 207.

judicata and collateral estoppel mandate that the bankruptcy and district courts have ancillary and pendent jurisdiction . . . .<sup>175</sup>

*Aerni* was decided before the Supreme Court's decision in *Finley v. United States*<sup>176</sup> and thus did not benefit from the Court's remarks that hardship and circuitry were "of no consequence" to a determination of the scope of statutory authority to exercise supplemental jurisdiction.<sup>177</sup> According to the Court, "'neither the convenience of the litigants nor considerations of judicial economy can suffice to justify extension of the doctrine[s] of ancillary [and pendent] jurisdiction.'"<sup>178</sup> Interests of judicial economy alone are not determinative as to the scope of a federal court's power to adjudicate otherwise jurisdictionally insufficient state law claims.

The bankruptcy court in *Cook v. United States (In re Earl Roggenbuck Farms, Inc.)*<sup>179</sup> found supplemental jurisdiction over both a cross-claim for tortious misrepresentation brought by the Commodity Credit Corporation ("CCC") against the debtor's principal shareholder and a counter-claim which attempted to establish a constructive trust over collateral used by the debtor's principal shareholder to secure its loan from the CCC.<sup>180</sup> The court determined that both the cross-claim and counter-claim involved the same common nucleus of facts as the trustee's avoidance action against the CCC.<sup>181</sup> Furthermore, the court concluded that it was empowered to exercise ancillary jurisdiction on several grounds.<sup>182</sup> First, it noted that in the order of reference<sup>183</sup> the district court referred "all of its jurisdiction but for that which it explicitly withheld and that which it may not constitutionally delegate."<sup>184</sup> Since the reference order did not specifically exclude ancillary jurisdiction, the court concluded that ancillary jurisdiction had been referred.<sup>185</sup> Moreover, the court considered whether its exercise of ancillary jurisdiction was constitutional.

175. *Id.*

176. 490 U.S. 545 (1989).

177. *Id.* at 552.

178. *Id.* (quoting *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 376-77).

179. 51 B.R. 913 (Bankr. E.D. Mich. 1985).

180. *See id.* at 925-26.

181. *See id.*

182. The court's discussion of its authority to exercise ancillary jurisdiction is probably dicta since it found an independent ground for subject matter jurisdiction:

The district courts of the United States have "exclusive original jurisdiction, without regard to the amount in controversy, of all suits brought by or against the Corporation [CCC] . . ." 15 U.S.C. § 714(b). Thus the federal district court for this district clearly has subject matter jurisdiction over the cross-claim. As stated earlier, the mere delegation of that authority to the bankruptcy court pursuant to 28 U.S.C. § 157(c) is proper, and therefore, the motion to dismiss for lack of subject matter jurisdiction would have been denied had summary judgment not been granted to the plaintiff.

*Earl Roggenbuck Farms*, 51 B.R. at 926.

183. *See id.* at 925.

184. *Id.*

185. *See id.*

It opined that 28 U.S.C. § 157(c) "is, in effect, a statutory grant of ancillary jurisdiction,"<sup>186</sup> which extends to all controversies having "some reasonable nexus" to the title 11 case.<sup>187</sup> It then asserted that a sufficient nexus existed between the cross-claim and the bankruptcy case.<sup>188</sup>

In *In re Wood*,<sup>189</sup> the Alabama Surface Mining Commission filed a proof of claim for a civil penalty that had been assessed against the various coal companies in which the debtor was part owner. The trustee in bankruptcy objected to the Commission's proof of claim and asserted a counterclaim to it.<sup>190</sup> Partners in the coal companies in which the debtor was part owner intervened in the trustee's action, seeking a declaration that the debtor's share of certain partnership tax indebtedness was non-dischargeable.<sup>191</sup> The bankruptcy court found core jurisdiction over the Commission's proof of claim and the trustee's objection and counterclaim. The court also found that the intervenors' actions were not "core" proceedings,<sup>192</sup> but were non-core "related to" proceedings because "the claims of the Intervenor[s] [were] so intertwined [sic] with those of the Trustee and because the Intervenor[s] propose[d] to use the collateral fund, when released, to pay a partnership tax indebtedness."<sup>193</sup> In the alternative, the court held that it had ancillary jurisdiction over the intervenors' claims because of the factual nexus between those claims and the trustee's actions.<sup>194</sup> It found support for its assertion of ancillary jurisdiction in legislative history. The court noted that during congressional debate of the current jurisdictional provisions, Senator Dole generally expressed doubts as to the constitutionality of a non-Article III court hearing state law claims, but qualified his remarks as follows:

Ancillary jurisdiction questions are unrelated to this issue. Federal courts certainly retain authority to adjudicate a State claim arising out of the same facts giving rise to the Federal claim.<sup>195</sup>

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186. *Id.* at 926.

187. *See id.*

188. *See id.* The court's conclusion that there existed a sufficient nexus between the title 11 case and the cross-claim is confusing because that nexus should have been sufficient to find that the cross-claim constituted a "related to" proceeding, making the discussion of supplemental jurisdiction irrelevant.

189. 52 B.R. 513 (Bankr. N.D. Ala. 1985).

190. *See id.* at 514. In this counterclaim, the trustee requested that the bankruptcy court "order the Commission to discharge the sureties of certain reclamation bonds so that these sureties will in turn release an escrow fund of approximately \$100,000.00 which they hold to secure their obligations under the reclamation bonds." *Id.* He claimed that a portion of the escrow constituted property of the estate. *See id.*

191. *See id.*

192. *See id.* at 522.

193. *Id.* Presumably, the court found that the intervenors' actions were "related to" the debtor's chapter 7 case because their effect upon the debtor's partnership tax indebtedness would affect the administration of the estate and possibly distributions from the estate as well.

194. *See id.* at 523 ("Because of the partnership context of this dispute, the same aggregate of operative facts serves as the basis of both the claims of the Intervenor[s] and of the Trustee.")

195. *Id.* at 524 (quoting Bankruptcy Court Reform Conference Report, 98th Cong. 2d

Despite the court's reference in *Wood* to Senator Dole's remarks, they were probably not persuasive.<sup>196</sup> Although such references are not unprecedented, courts generally have given little credence to remarks made by a single legislator.<sup>197</sup>

### b. *Pendent-Party Jurisdiction*

Although bankruptcy courts have relied most frequently on the doctrine of ancillary jurisdiction to permit defendants to assert jurisdictionally insufficient claims against the plaintiff or third-parties, at times they also have permitted the plaintiff or defendant to assert jurisdictionally insufficient claims under the doctrine of pendent jurisdiction. In *Goger v. Merchants Bank of Atlanta (In re Feifer Industries)*,<sup>198</sup> the bankruptcy court assumed that it was empowered to exercise supplemental jurisdiction in appropriate circumstances pursuant to 28 U.S.C. § 1367.<sup>199</sup> In this case, however, the court declined to exercise pendent-party jurisdiction over the third-party complaint,<sup>200</sup> not because it thought it did not have the power, but rather because it found that the third-party complaint did not arise out of the same factual nexus as the primary action which "arose under" title 11.<sup>201</sup>

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Sess., 130 Cong. Rec. S8887 (June 29, 1984)(statement of Sen. Dole)). Senator Dole, however was probably referring to pendent, and not ancillary, jurisdiction.

196. Courts of appeals, at times, have relied upon the remarks of individual members of Congress to determine congressional intent. *See, e.g., Citibank, N.A. v. White Motor Corp. (In re White Motor Corp.)*, 761 F.2d 270, 271-73 (6th Cir. 1985) (relying on remarks of Sen. Dole to support conclusion that Congress impliedly incorporated discretionary abstention provision—29 U.S.C. § 133(c)(1)—as exception to requirement in 28 U.S.C. § 157(b)(5) that "personal injury tort and wrongful death claims [in pending bankruptcy case] shall be tried in the district court in which the bankruptcy case is pending, or in the district court in which the claim arose"). Most courts, however, have found the remarks of individual legislators unhelpful in construing a statute. *See infra* note 197 (reviewing this case law).

197. *See, e.g., Garcia v. United States*, 469 U.S. 70, 76 (1984); *see also Susan Block-Lieb, Using Legislative History to Interpret Bankruptcy Statutes, in Bankruptcy Practice and Strategy 2-1, ¶ 2.02[6], [7]* (A. Resnick ed., 1987).

198. 141 B.R. 450 (Bankr. N.D. Ga. 1991).

199. *See id.* at 452. Because resolution of the third-party complaint would have had no conceivable effect on the administration of the estate, and thus was not "related to" the chapter 11 case, the court found that bankruptcy jurisdiction did not exist. *See id.* at 453.

200. *See id.* In *Feifer Industries*, the debtor granted Standard Chartered and First Georgia Bank a joint security interest in substantially all its assets. *See id.* at 451. The banks jointly filed a UCC-1 financing statement. Nearly a year later, First Union (First Georgia's successor in interest) filed a UCC-3 termination statement relating to this transaction. *See id.* The debtor's trustee brought a declaratory action in the bankruptcy court seeking a determination that Standard Chartered's security interest was terminated by First Union's filing. *See id.* In response, Standard Chartered not only answered the trustee's complaint, but also filed a third-party complaint against First Union alleging that First Union intentionally or negligently terminated the financing statement to its detriment. *See id.*

201. *See id.* at 453. The court stated that

[t]he termination of the financing statement and its affect upon Standard Chartered's security interest are issues of fact common to the Trustee's adversary proceeding and Standard Chartered's third-party claim. However, the

By contrast, in *Dechert Price & Rhoads v. Direct Satellite Communications, Inc. (In re Direct Satellite Communications, Inc.)*,<sup>202</sup> the bankruptcy court exercised pendent-party jurisdiction over a third-party claim.<sup>203</sup> After stating that it could “perceive no reason why a bankruptcy court can not exercise pendent jurisdiction and hear non-federal claims raised in a proceeding before it, in the same fashion as any other federal court[,]” the court adopted the *Gibbs* three-part test.<sup>204</sup> It first found that the “substantiality test” was satisfied in this instance because “the federal claim is a core proceeding over which we unquestionably have jurisdiction.”<sup>205</sup> It next found that the core proceeding and third-party action “‘derive from a common nucleus of operative fact,’ and [are] of the sort normally triable in the same proceeding as the federal claim.”<sup>206</sup> The court cited Federal Rules of Bankruptcy Procedure 7014<sup>207</sup> in support of this conclusion, although the Advisory Committee Note to the rule explicitly “does not purport to deal with questions of jurisdiction.”<sup>208</sup> Finally, the court concluded that the exercise of its jurisdiction over the pendent-party claim would be appropriate in light of “judicial economy, convenience, and fairness to litigants.”<sup>209</sup>

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crux of Standard Chartered’s claim is First Union’s alleged liability for negligently or intentionally releasing Standard Chartered’s security interest. Resolution of this issue will require consideration of evidence concerning the basis for First Union’s actions, agreements between these parties, and applicable state law. The bulk of such evidence and applicable state law would not be relevant to the Trustee’s adversary claims.

*Id.*

202. 91 B.R. 5 (Bankr. E.D. Pa. 1988).

203. *See id.* at 6-7. The decision provides no factual discussion. The only indication of the circumstances of the suit is a reference to the “primary claim in this proceeding [as] core, pursuant to 28 U.S.C. § 157(b)(2)(C).” *See id.* at 6. Title 28 U.S.C. § 157(b)(2)(C) provides that “counterclaims by the estate against persons filing claims against the estate” are “core proceedings.” 28 U.S.C. § 157(b)(2)(C) (1988).

204. *See Direct Satellite*, 91 B.R. at 6.

205. *Id.* (quoting *United Mineworkers v. Gibbs*, 383 U.S. 715, 725 (1966)).

206. *Id.* at 7 (quoting *Gibbs*, 383 U.S. at 725).

207. *See id.*; Fed. R. Bankr. P. 7014 (“Rule 14 F[ed]. R. Civ. P. applies in adversary proceedings.”); *see also* Fed. R. Civ. P. 14 (prescribing circumstances under which defendant and plaintiff may bring in third party).

208. Fed. R. Bankr. P. 7014 Advisory Committee’s Note (“This rule does not purport to deal with questions of jurisdiction. The scope of the jurisdictional grant under 28 U.S.C. § [1334] and whether the doctrines of pendent or ancillary jurisdiction are applicable to adversary proceedings will be determined by the courts.”).

209. *Direct Satellite*, 91 B.R. 5, 7 (Bankr. E.D. Pa. 1988) (citations omitted). The court found this exercise of discretion was appropriate because

[t]he third-party defendants would be compelled to appear as witnesses and claims against them . . . would be an aspect of Decher’s [sic] defense irrespective of whether they are joined as parties to this proceeding. Carpenter would be here as a party in any event, as he has not moved for dismissal. It appears grossly unfair to Dechert and to Carpenter to make them engage in litigation in a different forum which would be identical to that here if they do not wish to do so.

*Id.*

In *Petrolia Corp. v. Elam (In re Petrolia Corp.)*,<sup>210</sup> the bankruptcy court found supplemental jurisdiction over claims brought by the debtor's principal and the corporation with which the debtor was to have merged because the debtor's identical causes of action were "related to" its reorganization case.<sup>211</sup> In *Total Petroleum, Inc. v. Coral Petroleum, Inc. (In re Coral Petroleum, Inc.)*,<sup>212</sup> the bankruptcy court held that settlement of claims against the debtor-defendants did not mandate dismissal of the remaining claims against the non-debtor-defendant.<sup>213</sup> Although the court held that the claims against the non-debtor-defendant would not "necessarily" affect the administration of the estate or distributions to creditors,<sup>214</sup> it found pendent-party jurisdiction over the claims that may have been time-barred if dismissed.<sup>215</sup> The court went on to conclude that judicial economy did not require it to retain jurisdiction; it recommended that the reference of this proceeding be withdrawn, with consideration of the proper venue to be determined after withdrawal.<sup>216</sup>

### B. *A Review of the Case Law Rejecting Supplemental Bankruptcy Jurisdiction*

Not all courts that have considered the issue have concluded that sup-

210. 79 B.R. 686 (Bankr. E.D. Mich. 1987).

211. *See id.* at 692-95. The claims of the debtor's principal and the corporation with which the debtor was to have merged were probably not "related to" the debtor's chapter 11 case because recovery from these nondebtors' suits would not have been property of the estate, but rather property of the principal and corporation. It is hard to conceive of any other relationship which these claims might have had upon administration of the debtor's estate.

212. 62 B.R. 699 (Bankr. S.D. Tex. 1986).

213. *See id.* at 707-08. In this case, the plaintiff, an oil producer, commenced an action seeking an injunction against one debtor-defendant from shipping oil to another debtor-defendant which it had purchased from a third debtor-defendant. *See id.* at 700. It later amended its complaint to add a non-debtor-defendant and seek either possession of the oil or payment for it. *See id.* The producer then settled its claims against the debtor-defendants. *See id.* at 701. Although the plaintiff originally brought the action in federal court on diversity grounds, the debtor-defendants' chapter 11 filings meant that bankruptcy jurisdiction also existed at least as to the claims against the debtor-defendants. *See id.* at 700.

214. *See id.* at 702-03.

215. *See id.* at 708. Decided in 1986, the bankruptcy court applied *Aldinger v. Howard*, 427 U.S. 1 (1976), as *Finley v. United States*, 490 U.S. 545 (1989), had not yet been decided. *See* 62 B.R. at 705-07.

216. *See id.* at 708; *see also* *Berg v. TM Carlton House Partners, Ltd. (In re TM Carlton House Partners, Ltd.)*, Adv. No. 89-1088S, 1990 WL 179737 at \*3 (Bankr. E.D. Pa. 1990) (declining to exercise supplemental jurisdiction over "controversy between two non-debtors which promises to have negligible, if any, impact upon the Debtor[.]" although acknowledging "the presence of the concept of pendent jurisdiction which allows a federal bankruptcy court to hear non-federal claims raised in a proceeding before it[ ]"; the court supported this exercise of discretion by noting that it is a court of limited jurisdiction "confined to adjudication of matters arising under the Bankruptcy Code or pertaining to the affairs of the debtors").



plemental bankruptcy jurisdiction exists. The following cases reject the exercise of supplemental bankruptcy jurisdiction for a variety of reasons.

In *Southtrust Bank of Dothan v. Alpha Steel Co. (In re Alpha Steel Co.)*,<sup>217</sup> a district court declined to find that the bankruptcy court below was entitled to exercise either ancillary or pendent jurisdiction over a creditor's state law counterclaims to another creditor's declaratory action filed in the bankruptcy court. Noting that "[j]udicial economy itself does not justify federal jurisdiction[,]"<sup>218</sup> the court contended in dicta<sup>219</sup> that the breadth of the bankruptcy jurisdictional provision limits application of the supplemental jurisdiction doctrine to bankruptcy courts.

First, the exercise of ancillary and pendent jurisdiction by bankruptcy courts could subsume the more restrictive "relate to" and "arising in" jurisdiction, such that the latter would be rendered substantially, if not entirely, superfluous. Second, to the extent that ancillary and pendent jurisdiction could be viewed as supplementing rather than supplanting "related to" and "arising in" jurisdiction, a bankruptcy court exercising the former could hear claims which, in effect, merely relate to claims which themselves have only a relate-to connection with the primary case. Finally, the recent Congressional amendments codifying and merging the doctrines of ancillary and pendent jurisdiction expressly apply only to district courts.<sup>220</sup>

*Alpha Steel* did not explicitly limit statutory analysis of 28 U.S.C. § 1334(b) to the power of a non-Article III bankruptcy court to exercise supplemental bankruptcy jurisdiction, and thus is equally applicable to Article III district courts.<sup>221</sup>

In *Marine Iron & Shipbuilding Co. v. City of Duluth (In re Marine Iron & Shipbuilding Co.)*,<sup>222</sup> a district court declined to exercise pendent-party jurisdiction over a state law breach of contract action brought by the holder of a right of first refusal granted by the debtor against an alleged contracting party.<sup>223</sup> That the debtor was co-plaintiff in the suit was not persuasive to the court because the non-debtor's claim was, in practical effect, the main claim.<sup>224</sup> Because this case predated the effective date of the Judicial Improvements Act, the court turned to *Finley v. United*

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217. 142 B.R. 465 (M.D. Ala. 1992).

218. *See id.* at 470-71 (quoting *Matter of Lemco Gypsum, Inc.*, 910 F.2d 784, 789 (11th Cir. 1990)).

219. The district court specifically stated it "need not address these difficult arguments because, assuming that bankruptcy courts have the supplemental authority to exercise ancillary and pendent jurisdiction, the bankruptcy court here still properly refused to exercise such jurisdiction over [the] two fraud claims." *Id.* at 471.

220. *Id.* (citations omitted).

221. The *Alpha Steel* analysis of 28 U.S.C. § 1367(a), however, applies only to an assertion of supplemental jurisdiction in a non-Article III bankruptcy court. *Id.*

222. 104 B.R. 976 (D. Minn. 1989).

223. *See id.* at 988.

224. *See id.* at 986 ("For the purposes of pendent jurisdiction, this is definitely a case of 'the tail wagging the dog.'").

*States*<sup>225</sup> as the governing law, noting that the Supreme Court cautioned district courts that they should "not assume that the full constitutional power has been congressionally authorized [in the case of pendent-party jurisdiction], and [should] not read jurisdictional statutes broadly."<sup>226</sup> Thus, the *Marine Iron* court reviewed the bankruptcy jurisdictional provision and concluded that it neither explicitly nor implicitly suggested Congress' intent to confer pendent-party jurisdiction in the context of a bankruptcy case.<sup>227</sup>

The bankruptcy court in *Official Creditors' Committee of Products Liability & Personal Injury Claimants v. International Insurance Co. (In re Pettibone Corp.)*<sup>228</sup> found the factual connection between the cross-claims and the underlying adversary proceeding insufficient to create supplemental jurisdiction.<sup>229</sup> Moreover, the court stated in dicta that, "except to enter a dollar judgment in actions to bar dischargeability,"<sup>230</sup> it doubted that it had "general ancillary jurisdiction under *United Mine Workers v. Gibbs*, and its progeny."<sup>231</sup>

In sum, the majority of courts that have addressed the issue have concluded that both district courts and non-Article III bankruptcy courts are empowered to exercise supplemental bankruptcy jurisdiction. In these decisions, courts have not addressed the substantial constitutional issues surrounding the exercise of federal jurisdiction over state law supplemental claims sharing a factual nexus with state law "arising in" or "related to" proceedings<sup>232</sup> or the distinct constitutional concern raised by the exercise of such jurisdiction by a non-Article III bankruptcy court.<sup>233</sup> In addition, very few of these decisions post-date the enactment of 28 U.S.C. § 1367 and none addresses the language of that statute in any detail.<sup>234</sup> Moreover, much of the language in the case law discussing the power of a district or bankruptcy court to exercise supplemental

225. 490 U.S. 545 (1989) (first alteration in original).

226. *Marine Iron*, 104 B.R. at 986 (quoting *Finley*, 490 U.S. at 549).

227. See *Marine Iron*, 104 B.R. at 986-87.

228. 135 B.R. 847 (Bankr. N.D. Ind. 1991).

229. See *id.* at 852. The adversary proceedings at issue in *Pettibone* had been brought by the Official Creditors' Committee of Products Liability and Personal Injury Claimants, claiming that several of the debtor's insurers violated the debtor's confirmed plan of reorganization by paying \$3 million directly to personal injury claimants rather than to the estate for pro rata distribution to all personal injury claimants pursuant to the plan. See *id.* at 848. The excess insurer cross-claimed against the secondary insurer for failure to defend or settle personal injury litigation in good faith, breach of contract, reimbursement, and equitable contribution. See *id.* at 849.

230. See *id.* at 852. For a case that found jurisdiction supplemental to a dischargeability action, see *Aerni v. Columbus Fed. Sav. (In re Aerni)*, 86 B.R. 203 (Bankr. D. Neb. 1988) and also *supra* notes 170-78 and accompanying text (discussing *Aerni*).

231. *Pettibone*, 135 B.R. at 852 (citation omitted).

232. See *infra* part III.A.1 (discussing these constitutional issues).

233. See *infra* part III.A.2 (discussing these distinct constitutional issues).

234. See, e.g., *Publicker Indus., Inc. v. United States (In re Cuyahoga Equip. Corp.)*, 980 F.2d 110, 115 (2d Cir. 1992) (asserting, without discussion, that district court had power to adjudicate jurisdictionally insufficient state law claims factually related to "related to" proceeding pursuant to 28 U.S.C. § 1367); *Goger v. Merchants Bank (In re*

bankruptcy jurisdiction is dicta—the conclusion that supplemental bankruptcy jurisdiction exists is often an alternative ground upon which the court justifies an exercise of federal jurisdiction.<sup>235</sup> And in several of these statements of dicta, the court would not have needed to address the issue of supplemental jurisdiction if it had applied more expansively the “related to” jurisdictional standard.<sup>236</sup>

### III. THE CASE AGAINST SUPPLEMENTAL BANKRUPTCY JURISDICTION

This part considers the interplay of §§ 1334(b) and 1367(a) from constitutional and statutory perspectives. It first contends that the exercise of supplemental jurisdiction by a federal district court over claims related to<sup>237</sup> an “arising in” or a “related to” proceeding<sup>238</sup> may exceed Article III of the Constitution. It next argues that any exercise of supplemental bankruptcy jurisdiction by a non-Article III bankruptcy court also may exceed constitutional limitations.

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Feifer Indus.), 141 B.R. 450, 451 (Bankr. N.D. Ga. 1991) (same); *Hawkins v. Eads* (*In re Eads*), 135 B.R. 387 (Bankr. E.D. Cal. 1991) (same).

235. See, e.g., *Publicker Indus.*, 980 F.2d at 115 (concluding that exercise of supplemental bankruptcy jurisdiction was justified was dicta in that court went on to find alternate basis for federal jurisdiction over same claims under CERCLA); *Wieboldt Stores, Inc. v. Schottenstein*, 111 B.R. 162, 166-67 (N.D. Ill. 1990) (concluding that exercise of supplemental bankruptcy jurisdiction was justified was dicta in that court stated that it need not determine whether third-party claims were “related to” chapter 11 case); *Hawkins*, 135 B.R. at 393 (finding in the alternative that it had supplemental jurisdiction over third-party claims, and that it had “related to” jurisdiction over third-party claims because they “enhance[ ] the collectability of any judgment against the [non-debtor] defendants”); *Jones v. Woody* (*In re W.J. Servs., Inc.*), 139 B.R. 824, 826-27 (Bankr. S.D. Tex. 1992) (concluding first that it had supplemental bankruptcy jurisdiction over state law malpractice action brought by former chapter 11 debtors against former counsel; the bankruptcy court then held the action barred by res judicata without any discussion as to why action involving post-petition actions of professionals, hired by and compensated out of estate, did not “arise in” or “relate to” chapter 11 case); *National Westminster Bancorp N.J. v. ICS Cybernetics, Inc.* (*In re ICS Cybernetics, Inc.*), 123 B.R. 467, 472 (Bankr. N.D.N.Y. 1989) (inexplicably holding that cross-claims and counterclaims were core proceedings “under the doctrine of ancillary jurisdiction” without discussion of whether these cross-claims and counterclaims “related to” debtor’s bankruptcy case, which they probably did); *Cook v. United State* (*In re Earl Roggenbuck Farms, Inc.*), 51 B.R. 913, 926 (Bankr. E.D. Mich. 1985) (concluding in the alternative that it had jurisdiction over state law cross-claim brought by Commodity Credit Corporation against debtor’s principal pursuant to 15 U.S.C. § 714(b), which provides to district courts exclusive federal jurisdiction over “all suits brought by or against the [CCC]”); *In re Wood*, 52 B.R. 513, 522 (Bankr. N.D. Ala. 1985) (concluding in the alternative that state law claims raised by non-debtor intervenors were “related to” proceedings).

236. For example, in *Hawkins* the court held that third-party claims were “related to” the bankruptcy case, but noted that other courts had reached contrary conclusions. See *Hawkins*, 135 B.R. at 393 & n.9. It then went on to conclude in dicta that, even if it did not have “related to” jurisdiction over the third party claims, it had supplemental bankruptcy jurisdiction over them. See *id.* at 397; see also *supra* notes 153-58 and accompanying text (discussing *Hawkins*).

237. See 28 U.S.C. § 1367(a) (Supp. IV. 1992).

238. See 28 U.S.C. § 1334(b) (1988 & Supp. IV 1992).

As a result of these substantial constitutional concerns, this part contends that these statutes should not be read together to authorize the exercise of supplemental bankruptcy jurisdiction by either district or bankruptcy courts.<sup>239</sup>

### A. *The Constitutional Questions*

The Supreme Court has long held that "two things are necessary to create [federal] jurisdiction . . . . The Constitution must have given to the court the capacity to take it, and an act of Congress must have supplied it . . . ." <sup>240</sup> If 28 U.S.C. §§ 1334 and 1367 are construed to grant supplemental bankruptcy jurisdiction, they may contravene Article III of the Constitution. The exercise of jurisdiction over claims related to an "arising in" or a "related to" bankruptcy proceeding by a federal district court may be inconsistent with the requirement that it hear only an Article III "case or controversy." Further, any exercise of supplemental bankruptcy jurisdiction by a bankruptcy court may violate Article III's requirement that such a case be heard by a life-tenured federal judge.

#### 1. Constitutional Questions Surrounding the Exercise of Supplemental Bankruptcy Jurisdiction by a District Court

Perhaps the best place to start a constitutional analysis of an exercise of supplemental bankruptcy jurisdiction by a district court is, as suggested by the legislative history of § 1367,<sup>241</sup> the three-part test set forth in *United Mine Workers v. Gibbs*:<sup>242</sup> (i) the federal claim must be sufficiently substantial as to confer subject matter jurisdiction; (ii) the federal and state law claims must "derive from a common nucleus of operative fact,"<sup>243</sup> and (iii) the plaintiff's federal and state law claims must be such that the plaintiff "would ordinarily be expected to try them all in one judicial proceeding."<sup>244</sup> Nevertheless, application of a *Gibbs*-type analysis to an exercise of supplemental bankruptcy jurisdiction does not provide a district court with any clear guidance.<sup>245</sup>

239. Implicit in this analysis is the notion that statutory ambiguity should be resolved to avoid a finding of constitutional infirmity. See, e.g., *United States v. Security Indus. Bank*, 459 U.S. 70, 78 (1982) (referring to "cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided") (quoting *Lorillard v. Pons*, 434 U.S. 575, 577 (1978); *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

240. *Finley v. United States*, 490 U.S. 545, 548 (1989) (emphasis omitted) (citing *The Mayor v. Cooper*, 6 Wall. 247, 252 (1868)). Prior to *Finley*, this test applied to original jurisdiction. *Finley* extended the test to supplemental jurisdiction. See *id.* at 549-50.

241. See H.R. Rep. No. 734, 101st Cong., 2d Sess. 29 n.15 (1990) (explaining that § 1367 "codifies the scope of supplemental jurisdiction first articulated by the Supreme Court in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966)").

242. *Gibbs*, 383 U.S. at 725. See *supra* notes 116-18 and accompanying text (discussing *Gibbs*).

243. *Gibbs*, 383 U.S. at 725.

244. *Id.*

245. For a discussion of the inapplicability of a *Gibbs*-type analysis to an "atypical

a. *Supplemental Jurisdiction, Rather Than Pendent Jurisdiction*

While, *Gibbs* involved an assessment of the constitutionality of an exercise of pendent jurisdiction, § 1367 applies to pendent-claim, pendent-party and ancillary jurisdiction.<sup>246</sup> Assertions of supplemental bankruptcy jurisdiction may be any of these three types of supplemental jurisdiction, depending upon the circumstances of the assertion, and are least likely to be an assertion of pendent-claim jurisdiction.<sup>247</sup> Where pendent-claim jurisdiction is not involved, a question remains as to how related the primary claim<sup>248</sup> must be to the supplemental claim.<sup>249</sup>

Extension of *Gibbs*'s constitutional analysis from its pendent-claim context to other types of supplemental jurisdiction is not an issue peculiar to bankruptcy, however, and commentators have wrestled with this issue outside the bankruptcy context. These commentators note that case law had developed distinct standards for the proper scope of pendent-claim and ancillary jurisdiction.<sup>250</sup> With respect to ancillary jurisdiction, the Supreme Court, in *Moore v. New York Cotton Exchange*,<sup>251</sup> did not consider whether claims arose out of "a common nucleus of operative fact."<sup>252</sup> Instead, it validated an assertion of ancillary jurisdiction where the jurisdictionally deficient claims arose out of the same transaction or occurrence<sup>253</sup> as the primary claim,<sup>254</sup> although it did not make clear whether the source of this standard was constitutionally based.<sup>255</sup>

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federal case[] such as bankruptcy," 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, 1242 (1993) ("Although the *Gibbs* test works quite well when the elements of a cause of action are facts, it is of little use when the elements are not facts. Therefore, an analysis that applies the *Gibbs* test to bankruptcy [jurisdiction] is doomed to failure.").

246. See 28 U.S.C. § 1367 (Supp. IV. 1992). For a discussion of the doctrine of pendent-claim jurisdiction, see *supra* notes 110-18 and accompanying text. For a discussion of the doctrine of pendent-party jurisdiction, see *supra* notes 119-36 and accompanying text. For a discussion of the doctrine of ancillary jurisdiction, see *supra* notes 103-09 and accompanying text.

247. See *supra* part II.A.

248. For a definition of the phrase "primary claim," see *supra* note 54.

249. The phrase "supplemental claims" is used to refer to those claims for which, but for some doctrine of supplemental jurisdiction, there exists no relevant grant of federal jurisdiction.

250. See *supra* notes 103-18 and accompanying text (discussing the standards for ancillary and pendent-claim jurisdiction).

251. 270 U.S. 593, 609-10 (1926).

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

253. See 270 U.S. at 609-610.

254. The Federal Courts Study Committee had initially recommended that the supplemental jurisdiction provision codify *Moore*'s "transaction or occurrence" test as the standard. See Federal Courts Study Committee, Report of the Federal Courts Study Committee 47 (1990). Congress ultimately determined to equate the statutory standard with Article III more explicitly. Legislative history, thus, refers to *Gibbs* as the controlling standard because it is the only Supreme Court precedent explicitly considering the constitutional dimensions of supplemental jurisdiction. See H.R. Rep. 734, 101st Cong., 2nd Sess. at 29 n.15 (1990).

255. See 270 U.S. at 609-610; see also McLaughlin, *supra* note 102, at 896 ("In estab-

Despite the semantic differences in these standards, courts<sup>256</sup> and commentators<sup>257</sup> have suggested that § 1367(a) should be interpreted as applying a single standard for the assertion of supplemental jurisdiction, for there would appear to be no constitutional basis for applying distinct standards to the various forms of supplemental jurisdiction. These commentators disagree as to what that standard ought to be, however.

Denis McLaughlin argues in this context that the Court should "hold that a constitutional 'case or controversy' under Article III consists of all claims that bear some 'logical relationship' to the original jurisdiction claim sufficient to justify joinder of the claims in a single action, irrespective of the precise nature of the nexus that establishes the logical relationship."<sup>258</sup> He criticizes a broader constitutional test proposed prior to the

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lishing the transaction standard, however, the *Moore* court never indicated whether this standard was constitutionally based, and expressed no opinion whether the standard was intended to define the constitutional limit of ancillary jurisdiction.").

256. See *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 370 n.8 (1978) (declining to decide whether there exist "any 'principled' differences between pendent and ancillary jurisdiction; or, if there are, what effect *Gibbs* had on such differences"); *Aldinger v. Howard*, 427 U.S. 1, 13 (1976) (same); see also *infra* notes 261-62 and accompanying text (discussing cases interpreting "relatedness" standard applicable to § 1367).

257. See *Freer, Life After Finley*, *supra* note 102, at 473 (1991) ("The drafters properly did not attempt to define the reach of the statute in section 1367(a) by anything other than reference to the Constitution. Although that limit has been defined in *Gibbs* to involve claims sharing a 'common nucleus of operative fact' with the jurisdiction-invoking claim, it probably was wise to eschew a statement of the constitutional limit, because that limit may evolve over time. The statute thus may avoid imposing an artificial restriction on the reach of supplemental jurisdiction.") (footnotes omitted); McLaughlin, *supra* note 102, at 897-98 ("Whatever distinctions were thought to exist between the 'transaction or occurrence' test of ancillary jurisdiction and the 'common nucleus of operative fact' test of pendent jurisdiction, however, should now be discarded. The statute's extension of supplemental jurisdiction to the full constitutional 'case' limit leaves but one relevant inquiry—whether the Constitution distinguishes among the various forms of supplemental jurisdiction and requires a different test of relatedness for the various claims. Certainly, the Constitution does not."); Siegel, *supra* note 102, at 65 ("By using the 'case or controversy' standard found in the Constitution's own statement of the outer limits of federal jurisdiction, Congress also indicates that it wants supplemental jurisdiction . . . to go the constitutional limit, to which it appeared to be carried in the *Gibbs* case."); Wolf, *supra* note 102, at 23 ("[Section 1367(a)] eliminates any gap that may exist between 'the same transaction or occurrence' formulation and the constitutional limits of Article III."); Ellen S. Mouchawar, Note, *The Congressional Resurrection of the Supplemental Jurisdiction in the Post-Finley Era*, 42 *Hastings L. J.* 1611, 1613 (1991) ("Thus, section 1367 establishes a uniform standard that allows a federal court to determine when it may adjudicate a nonfederal claim as an adjunct to its jurisdiction over the federal claim, regardless of whether the nonfederal claim comes within the doctrine of pendent or ancillary jurisdiction."). Prior to enactment of § 1367(a), commentators had argued there existed a single constitutional standard for the exercise of ancillary and pendent jurisdiction. See, e.g., Matasar, *Jurisdiction Primer*, *supra* note 102, at 155 (1983) ("No justification exists for separate tests for ancillary and pendent jurisdiction at the constitutional level.") (footnote omitted).

258. McLaughlin, *supra* note 102, at 910; see also Matasar, *Jurisdiction Primer*, *supra* note 102, at 155-56 ("Since *Gibbs*, the trend in pendent cases has been toward a transactional test similar to that in ancillary jurisdiction. Both doctrines have edged toward a logical relationship test."); Mouchawar, *supra* note 257, at 1656 (stating that "[t]o alleviate confusion, the 'transaction or occurrence' language in the Federal Rules should be

enactment of § 1367 by Richard Matasar.<sup>259</sup> Matasar had argued that supplemental jurisdiction fulfills Article III of the Constitution "whenever the rules governing federal procedure permit the joinder in one action of jurisdictionally insufficient nonfederal claims or parties with a jurisdictionally sufficient federal claim."<sup>260</sup>

Notwithstanding this academic debate, courts have interpreted § 1367(a) to require application of *Gibbs's* "common nucleus of operative fact" test when deciding whether supplemental bankruptcy jurisdiction exists and should be exercised, irrespective of whether, prior to the enactment of § 1367, the supplemental claim would have been viewed as an assertion of ancillary or pendent jurisdiction.<sup>261</sup> Outside the context of bankruptcy, courts have similarly interpreted § 1367(a) and applied a *Gibbs* test.<sup>262</sup>

#### b. *Bankruptcy Jurisdiction, Rather Than Federal Question Jurisdiction*

Reference to *Gibbs* may not resolve the constitutionality of an exercise of supplemental bankruptcy jurisdiction by a district court for another reason. In *Gibbs*, the "primary claim" was a "federal claim" which "arose under" federal labor law.<sup>263</sup> The primary claim in a bankruptcy context may be either a "federal claim" or a "state law claim," depending upon whether the proceeding "arises under" title 11, or "arises in" or

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interpreted consistently with the 'logical relationship' approach") (footnotes omitted); cf. Cross, *supra* note 245, at 1233-50 (justifying "related to" bankruptcy jurisdiction as constitutional because it satisfies expanded view of ancillary jurisdiction; his expanded view of ancillary jurisdiction adopts a logical relationship, rather than factual relationship, test to define scope of ancillary jurisdiction).

259. McLaughlin, *supra* note 102, at 912 n.358 ("Although well-reasoned and presented within an historical framework, I do not share Professor Matasar's view. At any particular point in time, the Federal Rules can be either over or underinclusive in terms of the joinder of constitutionally permissible claims . . . . Further, because Congress has the ultimate power to enact the Federal Rules, . . . equating the constitutional 'case' limit of supplemental jurisdiction with the Federal Rules makes Congress the final arbiter of this constitutional limitation. Although Congress has the recognized right to establish the statutory limit of federal subject matter jurisdiction, . . . the determination of the constitutional limit is properly reserved for the Supreme Court."). For Professor Matasar's position, see Matasar, *One Constitutional Case*, *supra* note 102, at 1478.

260. Matasar, *One Constitutional Case*, *supra* note 102, at 1479.

261. See *supra* part II.A (discussing cases exercising supplemental bankruptcy jurisdiction).

262. See Wolf, *supra* note 102, at 46. In surveying case law applying § 1367, Wolf notes that "district judges have typically relied on section 1367, with little or no analysis," and that those judges who have articulated their basis for exercising supplemental jurisdiction vary in that "[s]ome courts apply a three-factor *Gibbs* test[, while o]ther judges apply a two-factor [*Gibbs*] test. *Id.* Further, Wolf points out that

[i]n one case, the court referred to these two *Gibbs* factors in interpreting section 1367, but applied only the common nucleus test to determine whether supplemental jurisdiction in fact existed. Finally, in another case, the court made reference only to the "common nucleus" factor to determine whether it had the power to entertain the supplemental claims.

*Id.* (citations omitted).

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

"relates to" a title 11 case. Only "arising under" proceedings can unequivocally be termed "federal claims" in the sense used in *Gibbs*.<sup>264</sup> Where the primary claim involves either an "arising in" or a "related to" proceeding, however, the primary claim may not be a "federal claim," in the sense that the cause of action may derive from state law.<sup>265</sup> These distinctions create uncertainty as to the constitutionality of an exercise of jurisdiction supplemental to a "related to" or "arising in" proceeding. This uncertainty pertains to both the "substantiality" and "relatedness" tests set forth in *Gibbs*.<sup>266</sup>

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264. The "federal claim" at issue in *Gibbs* involved an assertion of statutory federal question jurisdiction. See *id.* at 725; see also 28 U.S.C. § 1331 (1988 & Supp. IV 1992) (granting federal question jurisdiction). The grant of original jurisdiction over proceedings "arising under title 11" amounts to no more than a statutory grant of specialized federal question jurisdiction, 28 U.S.C. § 1334(b) (1988 & Supp. IV 1992), not dissimilar to other statutory grants of specialized federal question jurisdiction. See, e.g., 28 U.S.C. § 1337 (commerce and antitrust regulations), 1338(a) (patent, plant variety protection, copyright, mask works, trademarks, and unfair competition); § 1339 (postal matters); § 1340 (1988) (internal revenue; custom duties). The grant of original jurisdiction over proceedings "arising in" and "related to" a title 11 case is distinct from the other statutory grants of bankruptcy jurisdiction.

265. "Arising in" or "related to" proceedings derive, not from federal bankruptcy law, but from federal non-bankruptcy or state law. Cf., e.g., *Butner v. U.S.*, 440 U.S. 48, 54-55 (1979) (looking to state law to determine rights of mortgagee claiming lien against rental income; decided under 1898 Bankruptcy Act, but proceeding would have been characterized as "arising in" title 11 case if decided under current Bankruptcy Code). Where the "arising in" or "related to" proceeding derives from non-bankruptcy federal law, 28 U.S.C. § 1331 may provide an alternative statutory grant of federal jurisdiction. Cf. *National City Bank v. Coopers & Lybrand*, 802 F.2d 990, 993-94 (8th Cir. 1986) (concluding that no bankruptcy jurisdiction existed over malpractice action removed to federal district court; the court of appeals declined to rule on whether federal question jurisdiction existed since review of remand order precluded by relevant statute).

266. Courts and commentators nearly uniformly agree that the third prong of the *Gibbs* test, the so-called "common expectations of trial test," not only is not a constitutional requirement, but also does not add anything to the other two prongs of the standard. See *Matasar, One Constitutional Case*, *supra* note 102, at 1455-56 and nn. 263-65 ("A review of the court decisions interpreting *Gibbs* does not resolve these problems [of interpretation of the 'ordinary expectation' test], since most cases ignore the 'ordinarily be expected to try' phrase, cite it without analysis, or subsume it under the more easily applied 'common nucleus' phrase.") (citations omitted); see also *id.* at 1455-56 (arguing that the "ordinarily expected to try" prong of *Gibbs* test is not constitutionally required); *McLaughlin, supra* note 102, at 914-18 (same); see also *Joan Baker, Toward a Relaxed View of Federal Ancillary and Pendant Jurisdiction*, 33 U. Pitt. L. Rev. 759, 765 (1972) (broadly interpreting *Gibbs*'s "expected to try" standard: "[I]n general, *Gibbs* says that a court has jurisdiction (power) to hear a whole 'case'—a 'case' within the ordinary expectations of litigants as measured by the Federal Rules of Civil Procedure."); but see 13B C. Wright, et al. *Federal Practice & Procedure* § 3567.1, at 116 (1982) (contending that "ordinary expectation" test refers "to what res judicata would require if the claims were all federally created or all state created"); *Matasar, One Constitutional Case, supra* note 102, at 1455 & n.261 ("A few courts and influential commentators have suggested that the 'ordinarily be expected to try' test is an independent barrier to assertion of supplemental jurisdiction.") (citations omitted); *id.* at 1457 (criticizing *Wright & Miller's* contention as likely to "emasculate *Gibbs* and reinstate the *Hurn* test") (citation omitted).



## (i) Substantiality

Outside the context of bankruptcy, commentators have argued that the first prong of *Gibbs*, the so-called "substantiality test," does not state an independent standard for determining the constitutionality of an assertion of supplemental jurisdiction, but rather involves no more than a re-statement of the requirement that the court indeed must have subject matter jurisdiction over the primary claim, a determination that involves a statutory analysis.<sup>267</sup> Courts that have considered the issue appear to have concluded that this insight is equally applicable to the bankruptcy context. For example, one court applied the "substantiality" test to an assertion of supplemental bankruptcy jurisdiction, and concluded that the test was satisfied because "the federal claim [was] a core proceeding over which [it] unquestionably ha[d] jurisdiction."<sup>268</sup>

Application of this first prong of *Gibbs* to an exercise by a district court of jurisdiction supplemental to an "arising in" or "related to" proceeding is more complex, however. Does it require a determination that the "arising in" or "related to" proceeding is itself substantial?<sup>269</sup> Or does it require a determination that the federal element, the whole title 11 case, is substantial?<sup>270</sup> Or, finally, does it require a determination that the nexus between the "related to" proceeding and the title 11 filing is substantial? And, if the latter construction is to be favored, how substantial must this relationship be? Is this requirement distinct from the requirement that the primary claim and the supplemental claim enjoy either "a common nucleus of operative fact" or a "logical relationship"?<sup>271</sup>

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267. See Matasar, *One Constitutional Case*, *supra* note 102, at 1417-1446 (arguing that "substantiality" test is not grounded in Constitution); McLaughlin, *supra* note 102, at 913-14 (same).

268. *Dechert Price & Rhodes v. Direct Satellite Communications*, (*In re Direct Satellite Communications*, Inc.), 91 B.R. 5, 6 (Bankr. E.D. Pa. 1988). This application of *Gibbs*'s "substantiality test" to an assertion of supplemental bankruptcy jurisdiction was garbled somewhat by the district court in *Laganella v. Braen* (*In re Braen*), 1991 WL 7701 at \*6 (D. N.J. 1991), when it stated that the *Direct Satellite* court would find that the "substantiality test" was satisfied "because it was a core proceeding[.]" implying that assertions of supplemental jurisdiction related to a "related to" proceeding can never satisfy this prong of *Gibbs*.

269. Does it require a determination that, for example, the proof of claim brought by a creditor is "substantial" so that analysis of the constitutionality of an assertion of jurisdiction supplemental to this "arising in" proceeding can next determine whether there exists a common nucleus of fact between the proof of claim and the supplemental claim? *Cf.* 28 U.S.C. § 1338(b) (1988) (limiting grant of supplemental jurisdiction to those claims of unfair competition "joined with a *substantial* and related claim under the copyright, patent, plant variety protection or trade-mark laws") (emphasis added).

270. For example, this type of "substantiality" analysis might consider whether the debtor is eligible for relief under title 11, 11 U.S.C. § 109 (1988), and whether the filing was made in good faith by the debtor, *see, e.g.*, *Elmwood Dev. Co. v. General Elect. Pension Trust* (*In re Elmwood Dev. Co.*), 964 F.2d 508, 513 (5th Cir. 1992) (dismissing chapter 11 petition as having been filed in bad faith), in determining whether the title 11 case is "substantial."

271. See Matasar, *One Constitutional Case*, *supra* note 102, at 1417-47 (articulating, on

Application of the "substantiality" test to an assertion of jurisdiction supplemental to an "arising in" or "related to" proceeding is complicated because the federal interest in these proceedings is indirect. With a primary claim involving federal question jurisdiction, the substantiality of the federal ingredient in the primary claim follows naturally. Even with a primary claim involving diversity or alienage jurisdiction, the federal ingredient follows easily from its inclusion among the categories of "cases or controversies" enumerated in Article III of the Constitution. With a primary claim involving bankruptcy jurisdiction, however, the substantiality of the federal ingredient is less clear because the sources of bankruptcy jurisdiction are less clear.

Except in dicta, the Supreme Court has had little occasion to explain why Article III empowers Congress to confer to district courts bankruptcy jurisdiction over "arising in"<sup>272</sup> and "related to"<sup>273</sup> proceedings,

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similar grounds, general criticism of characterization of first-prong of *Gibbs* test as constitutional).

272. In *Schumacher v. Beeler*, the Supreme Court opined in dicta that § 23(b) of the Bankruptcy Act of 1898 was constitutional stating that "[t]he Congress, by virtue of its constitutional authority over bankruptcies, could confer or withhold jurisdiction to entertain such suits and could prescribe the conditions upon which the federal courts should have jurisdiction." 293 U.S. 367, 374 (1934) (citing *Shearman v. Bingham*, 21 F. 1270 (C.C.D. Mass. 1872) (No. 12,762)). This language is confusing, however, for it appears to justify § 23(b) as constitutionally authorized by the Bankruptcy Clause of Article I of the United States Constitution, art. I, § 8, rather than Article III of the Constitution. Similarly, in *Taubel-Scott-Kitzmilller Co., Inc. v. Fox*, the Court indicated, again in dicta, that Congress had broad power to grant federal jurisdiction in "matters relating to bankruptcy," but went on to conclude that Congress had not enacted a provision to "confer generally such broad jurisdiction over claims by a trustee against third persons." 264 U.S. 426, 430-31 (1924) (footnote omitted). According to the court:

Congress has, of course, power to confer upon the bankruptcy court jurisdiction to adjudicate the rights of trustees to property adversely claimed. In matters relating to bankruptcy its power is paramount. Hence, even if the property is not within the possession of the bankruptcy court, Congress can confer upon it, as upon any other lower federal court, jurisdiction of the controversy, by conferring jurisdiction over the person in whose possession the property is.

*Id.* at 430. As in *Beeler*, the Court in *Taubel-Scott* was vague as to the source of this constitutional power, citing cases which had interpreted the scope of the jurisdictional provisions of the 1898 Bankruptcy Act (without reference to their constitutionality). See *Robertson v. Howard*, 229 U.S. 254 (1913); *In re Watts & Sachs*, 190 U.S. 1, 27 (1903).

Although in *National Mutual Insurance Co. v. Tidewater Transfer Co.*, Justice Jackson, in his plurality opinion, described *Beeler* as a case "raising only questions of Ohio law concerning the validity under that law of a sheriff's levy and execution[.]" the trustee in *Beeler* sought to avoid an execution lien under §§ 60(b), 67(e), or 70(e) of the 1898 Act. See 337 U.S. 582, 595 (1949). Under the current bankruptcy jurisdictional provisions, the trustee's avoidance actions in *Beeler* would either "arise under" successor provisions of title 11, or "arise in" the title 11 case. *Accord* Cross, *supra* note 245, at 1207 (describing *Beeler* as involving federal question); but see Thomas Galligan, Jr., *Article III and The "Related To" Bankruptcy Jurisdiction: A Case Study in Protective Jurisdiction*, 11 U. Puget Sound L. Rev. 1, 23-24 (1987) (concluding that, if raised today, facts of *Beeler* would involve "related to" jurisdiction). The trustee in *Taubel-Scott* sought to avoid a lien under § 67(f) of the Bankruptcy Act of 1898. That section permitted the avoidance of certain liens "obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy[.]" 1898 Act,

or similarly broad grants of jurisdiction, although it clearly views the

ch. 541 § 67(f), 30 Stat. 544, 565 (1988). Thus, the avoidance action in *Taubel-Scott*, if pursued under the current Bankruptcy Code, also would have either "arisen under" successor provisions of title 11 or "arisen in" the title 11 case. *But see* Galligan, *supra*, at 25 n.83 (concluding that *Taubel-Scott* "would be a 'related to' case in today's vernacular").

273. In dicta, the Supreme Court has indicated on several occasions that a grant of jurisdiction as broad as the grant of "related to" jurisdiction in 28 U.S.C. § 1334(b) would pass constitutional muster, although it has been unclear on the source of this authority. In *Williams v. Austrian*, the Court interpreted § 102 of the Bankruptcy Act of 1898, as amended by the Chandler Act of 1938, to render § 23 of the Act inapplicable in Chapter X reorganization proceedings and, thus, to permit a Chapter X trustee to bring a plenary suit in a district court, even though the defendants did not consent to the exercise of jurisdiction and there existed no other basis for federal jurisdiction. *See* 331 U.S. 642, 657-58 (1947). The trustee's suit in *Williams*, if brought under the current bankruptcy jurisdictional provisions, would constitute a "related to" proceeding. *See id.* at 645 (suit against past and present officers and directors of debtor-corporation, and other affiliated person, alleging "a conspiracy to misappropriate corporate assets and asking an accounting and other relief"); *see also* Galligan, *supra* note 272, at 24. Notwithstanding Justice Frankfurter's dissent on the issue of statutory interpretation before the Court, 331 U.S. at 662-682, he had "[n]o doubt [that] Congress could authorize such a suit[.]" *id.* at 664, but merely cited *Schumacher v. Beeler*, 293 U.S. 367, 374 (1934), as the source of this authority. *See* Cross, *supra* note 245, at 1207 n.72 ("[*Williams v. Austrian* therefore adds nothing to the constitutional debate.>").

In *National Mutual Insurance Co. v. Tidewater Transfer Co.*, three Justices of the Supreme Court, again in dicta, assumed the grant of federal jurisdiction over suits brought by or against a trustee was constitutional, but on varying grounds. *See* 337 U.S. 582, 594-99 (1949). Justice Jackson concluded that, although these suits did not "arise under" federal law, Congress had the power to enact uniform bankruptcy laws in Article I of the Constitution and, thus, the power to confer jurisdiction over such cases irrespective of the limitations of Article III. *See id.* at 594-99; *but see* Galligan, *supra* note 272, at 26-27 (criticizing Jackson's analysis as confusing scope of statutory "arising under" with constitutional "arising under" jurisdiction). Justice Rutledge concluded that the grant fit within the scope of constitutional "arising under" jurisdiction, although clearly broader than statutory "arising under" jurisdiction. *See Tidewater*, 337 U.S. at 611-17. *Accord* Galligan, *supra* note 272, at 26-27. Finally, Justice Frankfurter, in his dissent in *Tidewater*, also recognized as constitutional Congress' broad grant of bankruptcy jurisdiction under the 1898 Act. He supported this conclusion with a melding of the arguments favored by Justice Jackson and Justice Rutledge. According to Frankfurter:

Congress may deem it desirable that the federal courts be utilized for all the claims that pertain to the bankrupt estate . . . . The congeries of controversies thus brought into being by reason of bankruptcy may be lodged in the federal courts because they arise under "the Laws of the United States," to wit, laws concerning the "subject of bankruptcies."

337 U.S. at 652 n.3; *see also* Galligan, *supra* note 272, at 27-28 (pointing out inconsistencies in Frankfurter's position regarding bankruptcy jurisdiction, and his basis for dissent regarding jurisdiction over controversies between citizens of District of Columbia and citizen of one of the states).

In his dissent in *Textile Workers Union v. Lincoln Mills*, Frankfurter elaborated on this vision of bankruptcy jurisdiction by reference to ancillary and pendent jurisdiction. He stated that

the bankruptcy decisions may be justified by the scope of the bankruptcy power, which may be deemed to sweep within its scope interests analytically outside the "federal question" category, but sufficiently related to the main purpose of bankruptcy to call for comprehensive treatment. Also, although a particular suit may be brought by a trustee in a district other than the one in which the principal proceedings are pending, if all the suits by the trustee, even though in many federal courts, are regarded as one litigation for the collection and appor-

grant as constitutional. A number of district and bankruptcy courts have upheld the constitutionality of § 1334(b)'s grant of federal jurisdiction over proceedings "related to a title 11 case" on the grounds that "related to" proceedings constitute valid exercises of supplemental jurisdiction.<sup>274</sup> Some bankruptcy courts have alternatively upheld the grant as authorized by the section in Article III empowering Congress to confer federal jurisdiction over cases or controversies "arising under" federal law.<sup>275</sup>

Commentators have more explicitly debated these sources of jurisdiction, but have not agreed. Thomas Galligan, Jr. contends that "related to" bankruptcy jurisdiction, "when considered in connection with the discretionary and mandatory abstention provisions of the 1984 Bankruptcy Amendments and Federal Judgeship Act, appears to be a constitutional effort to protect the federal interest in efficient bankruptcy administration, and at the same time preserve the states' interests in interpreting, applying, and developing state law."<sup>276</sup> He would character-

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tionment of the bankrupt's property, a particular suit by the trustee under state law to recover a specific piece of property might be analogized to the ancillary or pendent jurisdiction cases in which, in the disposition of a cause of action, federal courts may pass on state grounds for recovery that are joined to federal grounds.

353 U.S. 448, 483 (1957) (citations omitted); see also Galligan, *supra* note 272, at 30; Cross, *supra* note 245, at 1208.

By the time the Court was asked to consider the constitutionality of the grant of "related to" bankruptcy jurisdiction under the Bankruptcy Reform Act of 1978, in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, Justice Brennan, for the plurality, assumed 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." See 458 U.S. 50, 72 n.26 (1982) (citing *Beeler, Austrian, Tidewater, Lincoln Mills, and Osborn*); see also Galligan, *supra* note 272, at 30.

274. See, e.g., *Sonnyco Coal, Inc. v. Bartley (In re Sonnyco Coal, Inc.)*, 89 B.R. 658, 665-668 (Bankr. S.D. Ohio 1988) (supporting constitutionality of exercise of "related to" jurisdiction by non-Article III bankruptcy with reference to doctrines of supplemental jurisdiction by analogy); *In re Tidewater Group, Inc.*, 63 B.R. 670, 673-74 (Bankr. N.D. Ga. 1986) (relying on doctrine of ancillary jurisdiction to uphold constitutionality of grant of "related to" jurisdiction); *Ram Construction Co. v. Port Authority*, 49 B.R. 363, 366 (W.D. Pa. 1985) (drawing analogy to pendent jurisdiction to uphold constitutionality of assertion of bankruptcy jurisdiction over state law "related to" proceeding); *Eisenberg v. Resource Dynamics, Inc. (In re Environmental Research & Dev., Inc.)*, 46 B.R. 774, 778 (S.D.N.Y. 1985) (relied on concept of pendent jurisdiction to uphold constitutionality of 28 U.S.C. § 1334(b)); *Chemical Bank v. Grisby's World of Carpet, Inc. (In re WWG Indus., Inc.)*, 44 B.R. 287, 290 (N.D. Ga. 1984) (concluding that ancillary jurisdiction constituted "the only constitutional basis on which to explain Congress' grant of subject matter jurisdiction to this Court"); *Michelman v. Minor (In re Bible Voice, Inc.)*, 34 B.R. 733, 736 (C.D. Cal. 1983) (relying on Supreme Court precedent decided under 1898 Act to uphold constitutionality of § 1334(b)).

275. See *State Bank v. Chart House, Inc.*, 46 B.R. 468, 471-72 (Bankr. N.D. Ill. 1985); *In re O.P.M. Leasing Servs., Inc.*, 28 B.R. 740, 748 n.3 (Bankr. S.D.N.Y. 1983) (dictum).

276. Galligan, *supra* note 272, at 5; see also John T. Cross, *Viewing Federal Jurisdiction Through the Looking Glass of Bankruptcy*, 23 Seton Hall L. Rev. 530, 541 & n.46 (1993) [hereinafter *Viewing Federal Jurisdiction*](same); Cross, *supra* note 245, at 1204-29 (contending that "related to" jurisdiction fulfills requirements of Article III, but not because it constitutes valid grant of "protective jurisdiction").

ize "related to" jurisdiction as a form of protective jurisdiction.<sup>277</sup>

John Cross instead contends that "related to" bankruptcy jurisdiction is best explained as ancillary jurisdiction. He claims that once an expanded definition of ancillary jurisdiction is accepted—one which employs a logical relationship, rather than a factual nexus, standard for "relatedness"—jurisdiction over "related to" proceedings is best characterized as a grant of ancillary jurisdiction; the "related to" proceedings share a logical relationship with the title 11 case and together constitute a "case" within the meaning of Article III.<sup>278</sup> Both Galligan and Cross reject the characterization of "related to" bankruptcy jurisdiction as a

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277. Protective jurisdiction has been defined as federal jurisdiction over suits "where there is no diversity of citizenship and state law governs the decision of the case in that it not only creates plaintiff's cause of action but also governs any and all defenses that may be raised." Galligan, *supra* note 272, at 41 n.151. See Martin H. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* 90-91 (2d ed. 1990) (concluding that there exist two distinct arguments justifying "protective jurisdiction": (i) Wechsler's notion that "if Congress could . . . pass substantive legislation on a particular matter, then this 'greater' power logically includes within it the 'lesser' power to provide the federal courts with jurisdiction over cases in the area;" (ii) Mishkin's contention that "where there is an articulated and active federal policy regulating a field" there exists the power to provide jurisdiction protective of it) (citing Henry M. Hart, Jr. & Herbert Wechsler, *The Federal Courts and the Federal System* 744-47 (1953); Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 *Colum. L. Rev.* 157, 190-92 (1953); Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 *Law & Contemp. Probs.* 216, 224-25 (1948)). For additional distinctions among the various protective jurisdiction theories, see Carole E. Goldberg-Ambrose, *The Protective Jurisdiction of the Federal Courts*, 30 *UCLA L. Rev.* 542 (1983); Cross, *supra* note 245, at 1210-14; Galligan, *supra* note 272, at 43-54; Note, *The Theory of Protective Jurisdiction*, 57 *N.Y.U. L. Rev.* 933 (1982). The constitutionality of a grant of protective jurisdiction remains an open question in light of conflicting Supreme Court dicta. Compare *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 460 (1957) (Harlan, J. and Burton, J., concurring in the result) (rejecting view that § 301 of the Taft-Hartley Act, which grants jurisdiction of suits for violation of labor-management contracts in industries affecting interstate commerce, but does not otherwise establish federal law governing such suits, evinced congressional intent to create federal common law of labor-management contracts; concurring in judgment upholding § 301 on "protective jurisdiction" theory) with *id.* at 474-75 (Frankfurter, J., dissenting) (contending that theory of protective jurisdiction "cannot be justified under any view of the allowable scope to be given to Article III"); see also *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491 n.17 (1983) ("[W]e need not consider petitioner's . . . argument that the Act is constitutional as an aspect of so-called 'protective jurisdiction.'"); *Mesa v. California*, 489 U.S. 121, 137 (1989) ("We have, in the past, not found the need to adopt a theory of 'protective jurisdiction' to support Art. III 'arising under' jurisdiction, and we do not see any need for doing so here because we do not recognize any federal interests that are not protected by limiting removal to situations in which a federal defense is alleged.") (citation omitted).

278. See Cross, *supra* note 245, 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."); Cross, *Viewing Federal Jurisdiction*, *supra* note 276, at 541 n.46 (same); but see Galligan, *supra* note 272, at 36-41 (contending that supplemental jurisdiction fails to justify the constitutional exercise of "related to" jurisdiction, largely because he would apply a "common nucleus of operative fact" test as controlling the scope of supplemental jurisdiction).

type of "arising under" jurisdiction, but their conclusion in this regard depends upon a narrower reading of Supreme Court precedent than is proposed below.<sup>279</sup>

The distinction is relevant to more than academic debate. If "related to" jurisdiction is a species of "arising under" jurisdiction, then it may satisfy the *Gibbs* "substantiality" test because the federal ingredient in the primary claim (the "related to" proceeding) is sufficiently substantial to support the supplemental claim. Yet, if "related to" jurisdiction is best described as either supplemental or protective jurisdiction, then *Gibbs*'s "substantiality" test may not be satisfied because the federal in-

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279. In adopting a theory which justifies "related to" bankruptcy jurisdiction as constitutional because it is a variant of ancillary jurisdiction, Cross rejects any argument that "related to" jurisdiction is constitutional because (i) "[a]ll [c]laims in a [b]ankruptcy [c]ase [may] '[a]rise [u]nder' [f]ederal [l]aw," (ii) "[b]ankruptcy [may be] a [f]ederal [i]n [r]em [p]roceeding," and (iii) claims in which the trustee in bankruptcy is a party may fit Article III's "arising under" jurisdiction in that the trustee constitutes a "federal party" or the trustee's capacity to sue and be sued constitutes an "original federal ingredient." See Cross, *supra* note 245, at 1225-33.

As for all claims in a bankruptcy case "arising under" federal law, Cross suggests for purposes of this argument that "[e]ven though the prebankruptcy debtor-creditor relationship is established and defined by state law, federal law may supplant this state law once the debtor seeks bankruptcy relief." *Id.* at 1225. The federal law Cross has in mind is the sort of federal common law in which federal courts incorporate state law as federal law. See *id.* He rejects this characterization of bankruptcy jurisdiction, however, because "[t]here is nothing about the fact of bankruptcy that warrants the application of federal common law." *Id.* at 1226. Cross concludes that application of federal common law requires a finding of either constitutional or statutory authorization. See *id.* at 1226-27. Constitutional authorization is lacking because much of bankruptcy involves resolution of purely private disputes rather than disputes in which the "outcome of the dispute may affect some federal interest." See *id.* at 1226. Statutory authorization is lacking in both the plain language of the Bankruptcy Code and its legislative history. See *id.*

Cross also considers whether "bankruptcy jurisdiction could be sustained as a form of in rem subject matter jurisdiction, under which a federal court could adjudicate all claims affecting the debtor's estate simply by taking control of that estate." *Id.* at 1228-29 (citing *Baggs v. Martin*, 179 U.S. 206, 209 (1900), for this proposition). However, he finds in rem jurisdiction an insufficient basis for characterizing "related to" jurisdiction as consistent with the limits of Article III. See *id.* at 1229 ("Baggs, however, is too thin a reed to support the entire system of subject matter jurisdiction in bankruptcy. *Baggs* was decided in 1900, and the Court has not seen fit to use its rationale since."). *Baggs* is a case about ancillary, not simply in rem, jurisdiction. Not coincidentally ancillary jurisdiction finds its origins in the notion that a court of equity, having possession of a res, is entitled to adjudicate all claims "ancillary" to that property. See *supra* notes 103-09 and accompanying text (discussing origins of doctrine of ancillary jurisdiction).

Finally, Cross contends that neither an "original ingredient" nor "federal party" theory can justify "related to" jurisdiction as constitutional. See Cross, *supra* note 245, at 1229-33. The notion that bankruptcy jurisdiction may be supported by an "original ingredient" theory of the scope of Article III jurisdiction is addressed *infra* notes 321-34 and accompanying text.

Like Cross, Galligan rejects the "original ingredient" theory as the basis for "related to" bankruptcy jurisdiction. Galligan, *supra* note 272, at 32-36; see also *infra* notes 321-34 and accompanying text. In addition, Galligan contends that "justifying the federal court's 'related to' bankruptcy jurisdiction on grounds of pendent or ancillary jurisdiction strains those concepts as we know them." Galligan, *supra* note 272, at 5.

redient in the primary claim is indirect, and therefore arguably insufficient to support the supplemental claim.

(a) *Bankruptcy Jurisdiction as "Arising Under" Jurisdiction*

Can bankruptcy jurisdiction over "arising in" and "related to" proceedings be characterized as "arising under" jurisdiction? The answer depends upon how narrowly or broadly one reads *Osborn v. Bank of the United States*,<sup>280</sup> an early Supreme Court decision interpreting the contours of Congress' power under Article III of the Constitution to confer to federal courts jurisdiction of cases "arising under" federal law.

In *Osborn*, the Bank of the United States sought an injunction against enforcement by Ralph Osborn, Auditor of the State of Ohio,<sup>281</sup> of an Ohio statute assessing an annual tax upon the Bank.<sup>282</sup> The Court ruled, as a threshold matter,<sup>283</sup> on the constitutionality of a federal statute that gave federal courts jurisdiction over actions by or against the Bank of the United States, a federally chartered corporation.<sup>284</sup> The Bank of the United States commenced the action in a federal court pursuant to this grant of authority.<sup>285</sup>

Referring to the "arising under" jurisdictional provision of Article III, the Court concluded that the grant of federal jurisdiction in the Bank's

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280. 22 U.S. 738 (1824).

281. The injunction was also sought against John L. Harper, J.M. Curry, and S. Sullivan. See *id.* at 741-42. According to the Bank, Harper "was employed by Osborn to collect the tax, and well knew that an injunction had been allowed, proceeded by violence to the office of the bank, at Chillicothe, and took therefrom \$100,000, in specie and banknotes, belonging to, or on deposit with" the Bank of the United States. *Id.* at 741. Curry was the Treasurer of the State of Ohio at the time Harper seized assets of the Bank of the United States. See *id.* at 742. Sullivan succeeded Curry as Treasurer. See *id.*

282. See *id.* at 739-40. The Ohio statute recited that "the Bank of the United States pursued its operations contrary to a law of th[is] state." See *id.* at 740.

283. The Supreme Court raised the jurisdictional issue only after the initial oral argument had occurred, asking the parties to address the jurisdictional issue in a separate round of briefs. See *id.* at 816.

284. See 22 U.S. at 828. The statute at issue limited this grant of original jurisdiction to Circuit Courts. In 1911, Congress abolished the Circuit Courts. Judicial Code of 1911, ch. 231, § 289, 36 Stat. 1167, 1167 (1911). That same Act included a savings clause which conferred upon the district courts any power or duty of the circuit courts not otherwise expressly transferred within the Judicial Code. See *id.* at § 291.

285. See *id.* Moreover, in *Bank of the United States v. Deveaux*, the Supreme Court held that a prior federal statute chartering the Bank of the United States did not bestow federal jurisdiction but merely noted generally the Bank's capacity to sue and be sued. See 5 Cranch 61, 71, 85-86 (1809). Congressional action followed *Deveaux*, and the Bank of the United States was re-chartered. In this second charter, the language authorizing the Bank to sue and be sued differed from the language in the statute at issue in *Deveaux*. In *Osborn*, the Court considered this second federal charter and concluded that Congress' intent to confer federal jurisdiction in any suit brought by or against the Bank of the United States was clearer in the statute at issue in *Osborn* than in the more general language at issue in *Deveaux*. See *Osborn*, 22 U.S. at 817-18. For a more recent reconciliation of *Deveaux* and *Osborn*, see *American Nat'l Red Cross v. S.G.*, 112 S. Ct. 2465, 2469-70 (1992).

charter<sup>286</sup> was constitutional even though "several questions may arise in [the bank's suit], which depend on the general principles of the law, not on any act of Congress."<sup>287</sup> In often quoted language, Chief Justice Marshall, writing for the Court, rejected the argument that only purely federal questions are constitutionally within the jurisdiction of federal courts, because "[t]here is scarcely any case, every part of which depends on the constitution, laws or treaties of the United States."<sup>288</sup> The Court surmised that such a construction of the Constitution would reduce the grant of "arising under" jurisdiction in Article III "to almost nothing."<sup>289</sup>

What is most interesting about *Osborn* in this context is not its textbook statement that an actions's combination of federal and state law issues does not render unconstitutional an assertion of federal question jurisdiction. What is enlightening about *Osborn* is the breadth of its language in this regard, especially in light of its factual context. The Court in *Osborn* considered the circumstances under which an exercise of "arising under" jurisdiction would be rendered unconstitutional by the presence of questions depending on general principles of state law.<sup>290</sup> It concluded "that when a question to which the judicial power of the Union is extended by the constitution, forms an *ingredient* of the original cause, it is in the power of congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it."<sup>291</sup>

The Court's application of the standard it established in *Osborn* to the facts of that case is perhaps most telling of all:

The case of the Bank is, we think, a very strong case of this description. The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not author-

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286. At the time *Osborn* was decided (in 1824), Congress had not yet enacted a statutory grant of federal question jurisdiction. Congress did not enact a statutory grant of federal question jurisdiction until 1879. Both Cross and Galligan view the *Osborn* Court's discussion of constitutionality of the jurisdiction granted in the charter of the Bank of the United States as dicta "[b]ecause the claim in *Osborn* was an Article III federal question." Cross, *supra* note 245, at 1231; *accord* Galligan, *supra* note 272, at 32. But their contention that the discussion of the scope of Article III "arising under" jurisdiction in *Osborn* is dicta is questionable. It depends upon the troubling notion that, because the constitutional objections raised in *Osborn* would have constituted a federal question within the meaning of the statutory grant of federal question jurisdiction enacted 55 years *after* that case was decided, the Court's Article III "arising under" discussion was unnecessary to its holding.

287. *Osborn*, 22 U.S. at 819.

288. *Id.* at 820.

289. *Id.*

290. *See id.* at 821-22.

291. *Id.* at 823 (emphasis added).



ized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependant on the same law. Can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the law?

Take the case of contract, which is put as the strongest against the Bank. When a Bank sues, the first question which presents itself, and which lies at the foundation of the cause, is, has this legal entity a right to sue? Has it a right to come, not into this Court particularly, but into any Court? This depends on a law of the United State. [sic] The next question is, has this being a right to make this particular contract? If this question be decided in the negative, the cause is determined against the plaintiff; and this question, too, depends entirely on a law of the United States. These are important questions, and they exist in every possible case.<sup>292</sup>

The breadth of the standard in *Osborn* is evident from its facts, as *Osborn* and the other defendants in the action did not question the Bank's power to act, only the constitutionality of the grant of federal jurisdiction.<sup>293</sup> The court found the mere possibility of this federal issue sufficient for jurisdiction, however, for "[w]hether [the federal question of the Bank's power to act] be, in fact, relied on or not, in the defen[s]e, it is still a part of the cause, and may be relied on."<sup>294</sup> Moreover, the true breadth of

292. *Id.* at 823-24.

293. *See id.* at 824-25. The propriety of the injunction at issue involved important federal questions concerning whether the Bank of the United States was subject to the taxing power of the State of Ohio and, thus, whether the Ohio statute was constitutional. *See id.* at 867-68. Nonetheless, because Congress had not enacted a statutory grant of federal question jurisdiction, the federal issues involving the preemption of the Ohio statute could not have formed the basis for jurisdiction in the Circuit Court. *See id.* at 851-59. Moreover, it is unclear from the litigants' statement of the case whether the question of the constitutionality of Ohio statute was raised only in reply to the auditor's defense to the injunction. *See Osborn*, 22 U.S. at 900 (Johnson, J., dissenting). As Justice Johnson noted:

It [is] well [known], that it was a case emphatically arising out of an act of the state of Ohio, operating upon the domicil of the Bank, which, although purchased in right of an existence metaphysically given it by congress, was acquired and held according to the laws of Ohio, acting upon its own territory.

*Id.* In statutory federal question cases, the presence of federal questions in a defense is irrelevant to the satisfaction of the requirements of § 1331. For example, as the Court stated in *Louisville & Nashville R.R. v. Mottley*

[i]t is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of the Constitution of the United States. Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution.

211 U.S. 149, 152 (1908). The "well-pleaded complaint" rule applies only to statutory "arising under" cases, however. *See, e.g., American Nat'l Red Cross v. S.G.*, 112 S. Ct. 2465, 2473 (1992); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 494 (1983).

294. *Osborn*, 22 U.S. at 824. According to the Court,

[t]he right of the plaintiff to sue, cannot depend on the defence which the defendant may choose to set up. His right to sue is anterior to that defence, and must depend on the state of things when the action is brought. The question

*Osborn* is apparent in the subsequent cases brought by or against the Bank; once resolved by the Supreme Court, similar objections to the Bank's power to act could not be raised.<sup>295</sup> The dissent in *Osborn* took issue with the broad constitutional standard set forth by the majority,<sup>296</sup> complaining that Article III did not sanction the assertion of jurisdiction "merely on the ground that a question might possibly be raised in it, involving the constitution, or constitutionality of a law of the United States."<sup>297</sup> Nonetheless, *Osborn* continues to be cited by the Supreme

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which the case involves, then, must determine its character, whether those questions be made in the cause or not.

*Id.*; see also *American Nat'l Red Cross v. S.G.*, 112 S. Ct. 2465, 2475-76 (1992) (concluding that constitutionality of grant of jurisdiction over actions involving federally chartered entities such as the Red Cross was long ago resolved by *Osborn* and its progeny).

295. See *Bank of the United States v. Planters' Bank*, 22 U.S. 904, 904 (1824) (federal courts have jurisdiction over suit by Bank of United States as endorsee or bearer of promissory note). Further, according to Justice Johnson dissenting in *Osborn v. Bank of the United States*

[b]y possibility, a constitutional question may be raised, in any conceivable suit that may be instituted; but that would be a very insufficient ground for assuming universal jurisdiction; and yet, that a question has been made, as that, for instance, on the bank charter, and may again be made, seems still worse, as a ground for extending jurisdiction. For, the folly of raising it again in every suit instituted by the bank, is too great, to suppose it possible. Yet this supposition, and this alone, would seem to justify vesting the bank with an unlimited right to sue in the federal courts. Indeed, I cannot perceive how, with ordinary correctness, a question can be said to be involved in a cause, which only may possibly be made, but which, in fact, is the very last question that there is any probability will be made; or rather, how that can any longer be denominated a question, which has been put out of existence by a solemn decision.

22 U.S. at 886-87 (Johnson, J., dissenting).

296. The dissent intimates that the majority is motivated by political considerations in reaching its decision. See 22 U.S. at 871-73. Additionally, Henry Shulman and Edward C. Jaegerman note:

Marshall was apparently anxious to establish the validity of a grant of federal jurisdiction in *any* suits by or against the Bank on ordinary commercial transactions. This concern is easily understandable. The Government was interested as an owner of the Bank and the Bank was performing governmental service. Moreover, the Bank was the object of great popular hatred and of measures of reprisal by many state legislatures. It was sadly in need of a federal haven for its litigation. The doctrinal channel leading to that haven was quite obvious, once discovered. Whatever the claim it made, a suit by the Bank raised a federal question.

Henry Shulman & Edward C. Jaegerman, *Some Jurisdictional Limitations on Federal Procedure*, 45 Yale L.J. 393, 404-05 (1936) (emphasis in original).

297. 22 U.S. at 874. According to the Dissent:

[w]hy then should [federal courts] be vested with jurisdiction, in a thousand causes, on a mere possibility of a question arising, which question, at last, does not occur in one of them? Indeed, I cannot perceive how such a reach of jurisdiction can be asserted, without changing the reading of the constitution on this subject altogether. The judicial power extends only to "cases arising," that is, actual, not potential, cases. The framers of the constitution knew better, than to trust such a *quo minus* fiction in the hands of any government.

See *id.* at 886.

Court as good law.<sup>298</sup>

Cross reads *Osborn* broadly enough to support the contention that § 1334(a)'s grant of jurisdiction over title 11 cases constitutes a permissible grant of "arising under" jurisdiction.<sup>299</sup> Under this construction, the "title 11 case" is a constitutional "case" within the meaning of Article III because its commencement is authorized by federal law<sup>300</sup> and because certain federal rights, such as the automatic stay, flow from this commencement.<sup>301</sup>

Applying *Osborn*, "arising in" proceedings can also be said to fit within constitutional "arising under" jurisdiction on several grounds.

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298. See, e.g., *American Nat'l Red Cross v. S.G.*, 112 S. Ct. 2465, 2476 (1992) (citing *Osborn* and referring to it as "long-standing and settled rule, on which Congress has surely been entitled to rely"); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 492 (1983) (relying on *Osborn* to uphold jurisdictional grant in Foreign Sovereign Immunities Act).

299. See Cross, *supra* note 245, at 1242.

300. See 11 U.S.C. § 301.

301. An intuitive difficulty with this construction is that the federal ingredient involved in the filing of a bankruptcy petition may never be disputed. See Judge Robert E. DeMascio, et al., National Legal Center for the Public Interest, *Fourteen Years or Life: The Bankruptcy Court Dilemma 1-2* (1983) (Judge DeMascio questions whether bankruptcy courts could be made Article III courts because a bankruptcy case may not be a "case or controversy" within the meaning of Article III); see also Galligan, *supra* note 272, at 39 & n.145 ("the bankruptcy proceeding itself is arguably not a case or controversy, and federal courts may only take jurisdiction over cases or controversies"). But whether a "title 11" case is sufficiently federal to allow the "case" to fulfill constitutional "arising under" jurisdiction is a question distinct from the justiciability of an undisputed bankruptcy case.

Most title 11 cases *are* undisputed. Although 11 U.S.C. § 301 enables an eligible debtor to file a bankruptcy petition commencing a "case," this authorization alone creates no "controversy." See Douglas G. Baird & Thomas H. Jackson, *Cases, Problems, and Materials On Bankruptcy 1* (Little, Brown 2d ed. 1990) ("The legal proceeding [in a bankruptcy case] of the typical individual who asks for a discharge is an uncontested affair. Frequently, there are no nonexempt assets to turn over to the general creditors. There is nothing to fight over."). Section 301 provides that the commencement of a voluntary bankruptcy case by the filing of a petition "constitutes an order for relief," thus, the filing of a bankruptcy petition in all instances automatically commences a bankruptcy case. Objections to the filing must be made in a separate proceeding. For example, a party in interest could object to a bankruptcy petition on the grounds that the debtor is ineligible for relief under title 11, but such a proceeding would "arise under" 11 U.S.C. § 109, the provision of the Bankruptcy Code governing eligibility requirements. Moreover, the federal rights which flow from the commencement of a title 11 case also may never be controverted. See 11 U.S.C. §§ 523, 524, 727 (providing that debtor entitled to discharge under prescribed circumstances, but entitling individual debtor to discharge unless objection raised by party in interest). Thus, it should not be surprising to note that there is no case law interpreting the scope of the grant of exclusive federal jurisdiction over "cases under title 11" found in 28 U.S.C. § 1334(a).

The lack of an actual controversy in any given bankruptcy case should not alone render unconstitutional the grant of federal jurisdiction over bankruptcy cases, however. See *Tutun v. United States*, 270 U.S. 568, 577 (1926) (holding that grant of federal jurisdiction over naturalization cases fulfills requirements of Article III of Constitution although request for naturalization may never be controverted); see also Galligan, *supra* note 272, at 39 n.145 ("It is hard to imagine how a naturalization proceeding could be a case or controversy and a bankruptcy would not.").

First, by definition, "arising in" proceedings would not exist in the absence of the federal bankruptcy case. Courts have defined "arising in" jurisdiction to exist "if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case."<sup>302</sup> Consequently, in a broad sense, "arising in" proceedings can be said to "arise under" the federal statutes and procedural rules which authorize the filing of a bankruptcy petition.<sup>303</sup> Second, most "arising in" proceedings involve either litigation on a disputed proof of claim or a claim arising out of the post-petition administration of the bankruptcy estate.<sup>304</sup> In the first class of cases, the proceeding can broadly be viewed as "arising under" 11 U.S.C. § 501(a), which authorizes the filing of a proof of claim.<sup>305</sup> In the second class of cases, the proceeding can be said to "arise under" 11 U.S.C. §§ 721 and 1108,<sup>306</sup> which authorize the trustee or debtor-in-possession<sup>307</sup> to operate the business of the debtor following the filing of a bankruptcy petition, and 28 U.S.C. § 959(a), which provides that trustees and other enumerated representatives of the bankruptcy estate may be sued "with respect to any of their acts or transactions in carrying on business connected with such property [of the estate]."<sup>308</sup> Finally, where the bankruptcy trustee, debtor-in-possession, or possibly even an official committee of creditors or equity security holders,<sup>309</sup> is a party to an "arising in" proceeding, as often is the case, there also inevitably lurk

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302. *In re Wood*, 825 F.2d 90, 97 (5th Cir. 1987); see also *supra* notes 75-84 and accompanying text (discussing definition of "arising in" bankruptcy jurisdiction).

303. See, e.g., 11 U.S.C. § 301 (permitting "entity that may be a debtor under such chapter" to commence bankruptcy case under a chapter of title 11 by filing a bankruptcy petition); Fed. R. Bankr. P., Official Form 1 (form for voluntary petition).

304. See *supra* notes 75-84 and accompanying text (discussing scope of "arising in" jurisdiction).

305. See 11 U.S.C. § 501(a) ("A creditor or an indenture trustee may file a proof of claim. An equity security holder may file a proof of interest."); see also Fed. R. Bankr. P., Official Form 10 (form for proof of claim).

306. See 11 U.S.C. § 721 ("The court may authorize the trustee to operate the business of the debtor for a limited period, if such operation is in the best interest of the estate and consistent with the orderly liquidation of the estate."); § 1108 ("Unless the court, on request of a party in interest and after notice and a hearing, orders otherwise, the trustee may operate the debtor's business.").

307. See 11 U.S.C. § 1107 (authorizing debtor-in-possession to exercise most powers of trustee in chapter 11 case, including power to operate business).

308. See 28 U.S.C. § 959(a) ("Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury.").

309. For a definition of an official creditors' or equity security holders' committee, see 11 U.S.C. § 1102. Section 1102 requires the United States Trustee to "appoint a committee of creditors holding unsecured claims" and permits the U.S. Trustee to appoint "additional committees of creditors or of equity security holders" as it deems appropriate. See 11 U.S.C. § 1102(a)(1)-(2). The statute goes on to provide that these committees "shall ordinarily consist of the persons, willing to serve, that hold the seven largest claims against the debtor" or equity securities of the debtor, as relevant. See 11 U.S.C. § 1102(b)(1)-(2).

federal-law issues relating to the authority of these actors to sue or be sued, to enter into contracts, and otherwise to administer the estate.<sup>310</sup>

The factual circumstances in *Osborn* are distinguishable from most "arising in" proceedings, but none of these factual distinctions seem sufficient to alter the constitutional analysis. First, unlike the federal statute at issue in *Osborn*, neither the Bankruptcy Code nor its companion jurisdictional provisions explicitly enable the trustee and others to sue and be sued in federal courts.<sup>311</sup> Although there is a statute which expressly provides that a trustee in bankruptcy may "sue and be sued," that statute does not specifically mention the federal courts and, moreover, expressly limits this authority to suits relating to post-petition operations.<sup>312</sup> Still, § 1334(b)'s jurisdictional grant is clearly broader than that at issue in *Osborn*. Thus, § 1334(b)'s failure to provide explicitly that a trustee and other representatives of the estate can sue and be sued in federal courts would not seem to carry constitutional significance.

Second, the suits which could be brought by or against the federally chartered bank at issue in *Osborn* necessarily would involve the actions or inactions of the federally chartered bank. Suits brought by or against a trustee might involve the actions or inactions of the trustee in his capacity as representative of the estate.<sup>313</sup> By contrast, however, suits might just as easily involve the actions or inactions of the debtor prior to the filing of the bankruptcy petition and creation of the estate, which the trustee asserts or raises as a defense in his capacity as representative of the debtor.<sup>314</sup> Thus, "arising in" proceedings involving pre-petition conduct are distinct from the conduct at issue in *Osborn*. Suits involving post-petition conduct of the estate arguably involve two distinct federal ingredients, however—the estate's power to enter into the transaction and its capacity to sue or be sued. Suits involving pre-petition events involve at least the latter issue of capacity.

Finally, the threshold federal issues referred to in *Osborn* involved the power of Congress to charter the Bank under federal law and the scope of this federal charter. The federal issues in an "arising in" proceeding will differ depending on the circumstances of the suit. Where the suit arises out of the post-petition operation of the estate, such as with a suit to enforce a post-petition contract made by the estate, there inevitably

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310. See, e.g., *American Nat'l Red Cross v. S.G.*, 112 S. Ct. 2465, 2476 (1992) (construing charter of American National Red Cross); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983) (construing Foreign Sovereign Immunities Act); *Osborn v. Bank of United States*, 22 U.S. 738 (1824) (construing charter of Bank of United States).

311. See *American Nat'l Red Cross v. S.G.*, 112 S. Ct. 2465, 2469-72 (1992) (holding that a congressional charter's "sue and be sued" provision may be read to confer federal court jurisdiction if, but only if, it specifically mentions the federal courts).

312. See 28 U.S.C. § 959(a).

313. See *id.*

314. See 11 U.S.C. § 558 (enabling estate to raise any defense "available to the debtor as against any entity other than the estate, including statutes of limitation, statutes of frauds, usury, and other personal defenses").

exist threshold issues relating to the power of Congress to create a bankruptcy estate authorized to carry on the business of the debtor. Where the "arising in" proceeding involves litigation on a pre-petition claim against the estate, such as with a claim on a pre-petition contract with the debtor, the underlying federal issue instead involves the power of Congress to create a bankruptcy estate against which recovery on pre-petition claims is limited. In some instances, however, the federal issues involved in an "arising in" proceeding will involve nothing more than standing issues—determinations as to whether the trustee is a proper party to the action. For example, where the trustee is authorized to bring a suit against the debtor's shareholders seeking recovery on the theory that the shareholders acted as mere alter egos of the debtor-corporation, courts have viewed the cause of action as "arising in" the title 11 case, because, but for the filing of the bankruptcy petition and the appointment of the bankruptcy trustee, the alter ego action would have been commenced by some party other than the trustee.<sup>315</sup> The only implicit federal issue in such an action is the standing of the trustee. Because there is no express provision in the Bankruptcy Code authorizing the trustee to bring alter ego actions, the trustee's standing to bring the suit turns on an issue of state law: If, under state law, the debtor-corporation could have commenced the alter ego action, then, as representative of the estate, the trustee has the exclusive right to bring such an action on behalf of the estate; alternatively, if state law defines creditors of the debtor as the proper parties to commence an alter ego action, then the trustee may not have standing to bring the action because the trustee is not empowered to act on behalf of individual creditors.<sup>316</sup> An alternative way to view this issue, however, is that the trustee's ability to bring suit turns on whether the proceeds of recovery would constitute property of the debtor's estate, a federal question informed by state law concepts.<sup>317</sup>

Under a broad reading of *Osborn*, even "related to" proceedings can be said to "arise under" federal law within the meaning of Article III, although here the scope of constitutionally permissible grants of "arising under" jurisdiction would be strained to its limits. Where the "related to" proceeding is brought by or against the trustee, debtor-in-possession, or other representative of the estate, there exists an implicit federal issue

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315. Compare *Koch Refining v. Farmers Union Cent. Exch., Inc.*, 831 F.2d 1339, 1344-46 (7th Cir. 1987) (by virtue of appellate procedure followed in case, court presumed alter ego action to "arise in" title 11 case), *cert. denied*, 485 U.S. 906 (1988) with *In re Ozark Restaurant Equip. Co.*, 816 F.2d 1222, 1226 (8th Cir.) (trustee had no standing under Bankruptcy Code to bring an alter ego action on behalf of debtor's creditors), *cert. denied*, 484 U.S. 848 (1987).

316. Compare *Koch Refining*, 831 F.2d at 1344-46 (construing Illinois and Indiana law) with *In re Ozark*, 816 F.2d at 1226 n.7 (construing Arkansas law); but see *Williams v. California 1st Bank*, 859 F.2d 664, 666 (9th Cir. 1988) (relying solely on *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416 (1972), court held that trustee is never entitled to assert general causes of action, such as an alter ego claim; irrelevant that 111 creditors had assigned their rights to trustee).

317. See 11 U.S.C. § 541(a) (1988 & Supp. IV 1992).

involving the authority of such entity to sue or be sued.<sup>318</sup> In addition, the federal issue underlying every proceeding "related to" a title 11 case is Congress' power to create the federal remedy of bankruptcy and permit the commencement of a bankruptcy case, for if Congress does not have this power there can be no title 11 case for the proceeding to affect.<sup>319</sup> This is especially true where "related to" jurisdiction is narrowly defined to include only those proceedings affecting distributions from the estate or administration of the estate.<sup>320</sup>

The contention that all "arising in" and "related to" proceedings are a form of constitutional "arising under" jurisdiction is a controversial one. Galligan and Cross agree that *Osborn* validates the constitutionality of "arising in" and "related to" proceedings<sup>321</sup> that are brought by or against a trustee in bankruptcy,<sup>322</sup> but contend that *Osborn* extends no further.<sup>323</sup> They describe this argument as the "original ingredient" the-

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318. For an example of a "related to" proceeding brought by a debtor-in-possession, see *infra* text accompanying notes 550-52 (discussing *Marathon*-type cause of action). For an example of a "related to" proceeding involving only non-debtor third parties, see *supra* notes 28-37 and accompanying text (stating hypothetical reminiscent of *Xonics*).

319. *Osborn* has been very broadly construed by courts and commentators. See American Nat'l Red Cross v. S.G., 112 S. Ct. 2465, 2476 (1992) (upholding grant of federal jurisdiction in charter of Red Cross as constitutional); Matasar, *One Constitutional Case*, *supra* note 102, at 1445 n.206 (contending that "[a]t the very least, *Osborn* . . . indicate[s] that Congress ought to have the flexibility to protect an instrumentality of the United States from potential discrimination at the hands of hostile state judiciaries by providing for federal jurisdiction in cases involving those instrumentalities . . . . Moreover, as a corollary to the principle of protecting federal entities, federal jurisdiction would also extend to cases involving pure state law issues that have a federal question lurking in the background.").

320. See *supra* notes 85-98 and accompanying text (discussing case law interpreting scope of "related to" jurisdiction).

321. Galligan does not explicitly consider whether *Osborn* validates the grant of jurisdiction over "arising in" proceedings. See Galligan, *supra* note 272, at 1 n.2 ("For analysis, this article focuses on a 'related to' case in which the bankruptcy debtor or his estate is the plaintiff."). Cross seems to cover both "arising in" and "related to" proceedings in his analysis, although he focuses on "related to" jurisdiction when he criticizes the "original ingredient" theory is an insufficient ground for bankruptcy jurisdiction. See Cross, *supra* note 245, at 1233 (rejecting various theories, other than ancillary jurisdiction, as "neither broad nor flexible enough to support the full range of bankruptcy jurisdiction, especially the district courts' 'related to' jurisdiction over claims that do not involve the debtor").

322. See Galligan, *supra* note 272, at 33 ("One could argue that all litigation involving the trustee could be constitutionally based in federal court because questions concerning the propriety of the trustee's appointment or his capacity to sue or be sued might arise in any case."); Cross, *supra* note 245, at 1230-31 ("The trustee's status as a federal official arguably brings even state-law claims involving the trustee under Article III federal question jurisdiction through the judicially developed 'original ingredient' theory.").

323. See Galligan, *supra* note 272, at 34 ("However, the original ingredient theory does not go far enough, because a trustee is not the only 'entity' that might want to sue in federal court on a 'related to' claim."). Cross agrees that the original ingredient theory is insufficient to justify the constitutionality of bankruptcy jurisdiction because some "related to" proceedings exist between third parties. See Cross, *supra* note 245, at 1232 ("These third-party suits accordingly lack even the minimal federal ingredient required to

ory of constitutional "arising under" jurisdiction,<sup>324</sup> a reference to Justice Marshall's statement in *Osborn* that Article III extends to Congress the power to confer federal jurisdiction whenever "a question to which the judicial power of the Union . . . forms an ingredient of the original cause."<sup>325</sup> Galligan and Cross reject the notion that proceedings involving a debtor-in-possession satisfy *Osborn* because "[i]f all Congress has to do to grant federal jurisdiction, without providing a rule of decision, is to 'create' a federal juridical entity, then whenever it wanted a federal court to hear a case Congress could so legislate by engaging in semantics."<sup>326</sup> This narrow reading of *Osborn* has been refuted by more recent Supreme Court precedent, however. In *American Red Cross v. S.G.*,<sup>327</sup> the Court viewed the constitutionality of a federal statute empowering the Red Cross to "sue or be sued" in federal courts as long resolved,<sup>328</sup> citing *Osborn*.

Moreover, both Galligan and Cross narrowly read *Osborn* to uphold a grant of federal jurisdiction whenever there exists a "federal party" to a suit, such as a trustee in bankruptcy,<sup>329</sup> although they admit that others have construed the case more broadly to validate jurisdictional grants in which a federal question is an "original ingredient" of the case.<sup>330</sup> Galligan defines an "original ingredient" for these purposes as "one that the court must resolve, either implicitly or explicitly, in plaintiff's favor for plaintiff to win its case."<sup>331</sup> Thus, an "original ingredient" in every "arising in" and "related to" proceeding, irrespective of whether a trustee, debtor-in-possession, or other representative of the estate is a party to the

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fit within Article III."). Cross also contends that "there is considerable doubt whether the theory retains any validity." *Id.* According to Cross:

*Osborn* and *Planter's Bank* were in many ways children of necessity. The Court faced an important issue—namely, the relationship between the national bank and the states. In order to deal with this issue expeditiously, the Court had to find a basis for federal jurisdiction over the actions rather than wait for the cases to come to it on appeal from a state court. Some have accordingly argued that the broad language of *Osborn* was an attempt to deal with a crises and as such overstated the true reach of Article III federal question jurisdiction.

*Id.* Nonetheless, the Supreme Court cited *Osborn* with approval as recently as 1992. See *American Nat'l Red Cross v. S.G.*, 112 S. Ct. 2465 (1992).

324. See Galligan, *supra* note 272, at 33; Cross, *supra* note 245, at 1233.

325. *Osborn v. Bank of the United States*, 22 U.S. 738, 823 (1824).

326. Galligan, *supra* note 272, at 35; see Cross, *supra* note 245, at 1230 n.158.

327. 112 S. Ct. 2465 (1992).

328. See *id.* at 2475-76.

329. Cross distinguishes between an "original ingredient" and a "federal party" theory of Article III jurisdiction, but then views only the trustee's status as a federal official as the only relevant "original ingredient." See Cross, *supra* note 245, at 1231 n.161.

330. See, e.g., Alan D. Hornstein, *Federalism, Judicial Power and the 'Arising Under' Jurisdiction of the Federal Courts: A Hierarchical Analysis*, 56 Ind. L.J. 563, 575-90 (1981) (examining the "federal ingredient" test that Chief Justice Marshall used to justify federal jurisdiction in *Osborn*); Note, *The Theory of Protective Jurisdiction*, 57 N.Y.U. L. Rev. 933, 968-74 (1982) (defining Chief Justice Marshall's "original ingredient" analysis in *Osborn* as a federal issue comprising a logical component of plaintiff's cause of action, and discussing the difficulties of using this analysis to invoke federal jurisdiction).

331. Galligan, *supra* note 272, at 33.



proceeding, is the power of Congress to authorize the remedy of bankruptcy, including the debtor's eligibility to seek that remedy.

Put so broadly, however, an "original ingredient" theory of Article III may be difficult to distinguish from the theory of protective jurisdiction.<sup>332</sup> But even the narrowest definition of protective jurisdiction requires only that Congress grant federal jurisdiction pursuant to "an articulated and active federal policy regulating a field."<sup>333</sup> Once it is shown that the state law claim relates to an articulated and active federal policy, this definition of protective jurisdiction would permit a federal court to hear the state law claim standing alone. Bankruptcy jurisdiction over "arising in" and "related to" proceedings does not work independently from the grant of jurisdiction over title 11 cases. "Arising in" and "related to" proceedings exist only in the context of the title 11 case, and thus 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.<sup>334</sup>

### (b) *Bankruptcy Jurisdiction as Supplemental Jurisdiction*

"Related to" proceedings can also be viewed as a form of supplemental jurisdiction.<sup>335</sup> Cross contends that, under the doctrine of ancillary jurisdiction, "related to" jurisdiction involving purely state law claims be-

332. As Matasar notes, at some point a broad reading of *Osborn* leads to the conclusion that constitutional "arising under" jurisdiction permits Congress to grant to federal courts protective jurisdiction. See Matasar, *One Constitutional Case*, *supra* note 102, at 1445 n.206.

333. See Mishkin, *supra* note 277, at 192.

334. Cf. Cross, *supra* note 245, at 1243-51. According to Cross:

[In bankruptcy cases] the federal remedy is contingent upon resolution of the related state-law claims. The logical relationship in these cases is the interdependence of the federal and state claims. Because the scope of bankruptcy relief is intimately tied to the outcome of the state-law claims, it certainly makes sense to try the state claims along with the federal.

*Id.* at 1243. Cross further notes that

Federal [bankruptcy] jurisdiction is [thus] limited to those state claims that must be resolved in order to define the shape of the eventual bankruptcy relief. 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.

*Id.* at 1251.

335. Cross seems to view "related to" jurisdiction as consistent with the precepts of Article III, but *only* because "[t]he theory of ancillary jurisdiction . . . provide[s] a means of sustaining bankruptcy jurisdiction." Cross, *supra* 245, at 1233. As Cross notes:

[t]he theory of protective jurisdiction, although facially appealing, cannot be reconciled with Article III. Conversely, although the other theories are consistent with Article III, they are neither broad nor flexible enough to support the full range of bankruptcy jurisdiction, especially the district courts' "related to" jurisdiction over claims that do not involve the debtor.

Perhaps my difficulty with this conception of the constitutional sources of bankruptcy jurisdiction is merely semantic, but I am troubled by the argument that "related to" jurisdiction, standing alone, is inconsistent with Article III because it does not "arise under" federal bankruptcy law but that, considered in the context of a bankruptcy case,

tween non-diverse parties satisfies Article III.<sup>336</sup> Defining "related to" jurisdiction as "limited to those state claims that must be resolved in order to define the shape of the eventual bankruptcy relief," Cross describes all these "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."<sup>337</sup>

Characterization of § 1334(b)'s grant of jurisdiction over "related to" proceedings as a form of supplemental jurisdiction is also supported by the statute's plain language, especially when that language is taken in its historical context.<sup>338</sup> The phrase "related to" consistently indicates a

"related to" jurisdiction fits within the limitations of Article III because it can be described as a form of ancillary jurisdiction.

First, "related to" jurisdiction never stands alone and always only exists in the context of a bankruptcy case. *Cf. id.* at 1243 (describing "scope of bankruptcy relief [as] intimately tied to the outcome of the state-law claims" that presumably constitute "arising in" and "related to" proceedings within the bankruptcy case). Viewed from this perspective, "related to" proceedings "arise under" federal bankruptcy law precisely because they are so "logically related" to the case. *See supra* notes 318-34 and accompanying text (describing "related to" jurisdiction as "arising under" jurisdiction).

Second, the doctrine of supplemental jurisdiction exists because Congress has never utilized the full extent of power granted to it in Article III. *See infra* notes 378-85 and accompanying text (describing supplemental jurisdiction as closing the gap between the constitutional grant and the statutory exercise of federal court jurisdiction). Supplemental jurisdiction, thus, exists within, rather than expands upon, the limits of Article III jurisdiction. *See infra* note 386 and accompanying text (arguing that there is but one "case or controversy" within the meaning of Article III); *but see* *Texas Employers Ins. Ass'n v. Felt*, 150 F.2d 227, 234 & n.26 (5th Cir. 1945) (suggesting that Congress can give federal courts jurisdiction beyond scope of Article III when "a necessary incident to an effectual exercise of jurisdiction over the enumerated cases and controversies"). Cross's argument seems to make inferences to the contrary.

336. *See* Cross, *supra* note 245, at 1251.

337. *Id.*

338. *See* *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979) ("As is true in every case involving the construction of a statute, our starting point must be the language employed by Congress.").

Distinct from "related to" jurisdiction, jurisdiction over "arising under" proceedings resembles a grant of federal question jurisdiction. Section 1334(b)'s phrase proceedings "arising under title 11" closely resembles the general grant of federal question jurisdiction in 28 U.S.C. § 1331. *See* 28 U.S.C. § 1331 (1988 & Supp. IV 1992) ("The district courts shall have original jurisdiction of all civil actions *arising under* the Constitution, laws, or treaties of the United States.") (emphasis added). More specific grants of federal question jurisdiction are found in other federal statutes. *See* 28 U.S.C. § 1337(a) (1988) ("*arising under* any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies") (emphasis added); 28 U.S.C. § 1338(a) (1988) ("*arising under* any Act of Congress relating to patents, plant variety protection, copyrights and trade-marks") (emphasis added); 28 U.S.C. § 1339 (1988) ("*arising under* any Act of Congress relating to the postal service") (emphasis added); 28 U.S.C. § 1340 (1988) ("*arising under* any Act of Congress providing for internal revenue, or revenue from imports or tonnage") (emphasis added).

Section 1334(b) also grants original jurisdiction over civil proceedings "arising in . . . cases under title 11." 28 U.S.C. § 1334(b) (1988 & Supp. IV 1992). The phrase "arising in" does not appear in any other grant of federal jurisdiction. Courts have defined "arising in" proceedings as those civil proceedings which arise under non-bankruptcy law but which occur only in the context of a bankruptcy case. A review of case law indicates that

grant of supplemental jurisdiction in other federal statutes. In 28 U.S.C. § 1338(b), district courts are empowered to hear "any civil action asserting a claim of unfair competition when joined with a substantial and *related* claim under the copyright, patent, plant variety protection or trademark laws."<sup>339</sup> Courts have described § 1338(b)'s grant of jurisdiction as "supplemental" to the patent, copyright and trademark federal question jurisdiction granted in § 1338(a).<sup>340</sup> Similarly, 28 U.S.C. § 1367(a), which expressly grants supplemental jurisdiction to the district courts, defines that jurisdiction as extending to all claims "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."<sup>341</sup> Thus, reading the statutory grants of federal jurisdiction *in pari materia*,<sup>342</sup> the grant of jurisdiction over proceedings "related to" a title 11 case constitutes a grant of supplemental jurisdiction.

Moreover, courts historically have recognized exercises of supplemental bankruptcy jurisdiction. Congress can be assumed to have been aware of this practice and to have intended to codify it,<sup>343</sup> when, in 1978, and again in 1984, it enacted a bankruptcy jurisdictional provision conferring on district courts jurisdiction over civil proceedings "arising under title 11, or arising in or related to cases under title 11."<sup>344</sup>

In this instance, legislative history<sup>345</sup> does not specifically refer to decisions under the Bankruptcy Act of 1898 in which ancillary<sup>346</sup> and pen-

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"arising in" proceedings nearly always involve suits brought by or against the estate or a representative of the estate, and as such resemble the grants of federal jurisdiction over civil actions involving the United States as a plaintiff or defendant. *See, e.g.*, 28 U.S.C. § 1345 (1988) (United States as plaintiff); § 1346 (United States as defendant); § 1347 (partition action where United States is joint tenant); § 1348 (banking association as party); § 1349 (corporation organized under federal law as party). Alternatively, "arising in" proceedings can be said to be supplemental to the title 11 case in that, by definition, they arise only as a result of the title 11 case.

339. 28 U.S.C. § 1338(b) (1988) (emphasis added).

340. *See, e.g.*, *Finley v. United States*, 490 U.S. 545, 555 (1988) (referring to 28 U.S.C. § 1338(b) having been "accomplished by wording that could not be mistaken").

341. 28 U.S.C. § 1367(a) (Supp. IV 1992) (emphasis added).

342. *See, e.g.*, *Dewsnup v. Timm*, 112 S. Ct. 773, 780 (1992) (Scalia, J., dissenting) ("identical words used in different parts of the same act are intended to have the same meaning") (quoting *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990)); *see also, e.g.*, *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992) ("[A] statute must, if possible, be construed in such fashion that every word has some operative effect.").

343. Generally, the Supreme Court has applied case law decided under prior bankruptcy acts when interpreting the Bankruptcy Code unless, by explicit language in either the statute or legislative history, Congress articulated an intent to alter the longstanding practice. *See, e.g.*, *Dewsnup v. Timm*, 112 S. Ct. 773, 778 (1992); *Kelly v. Robinson*, 479 U.S. 36, 46-47 (1986); *Midlantic Nat'l Bank v. New Jersey Dep't. of Env'tl. Protection*, 474 U.S. 494, 501 (1986).

344. 28 U.S.C. § 1334(b) (1988 & Supp. IV 1992); 28 U.S.C. § 1471(b) (repealed).

345. *See* H.R. Rep. 595, 95th Cong., 1st Sess. at 47 (1977) ("The jurisdictional grants to the court of bankruptcy by the Acts of 1841 and 1867 were almost as extensive [as that in H.R. 8200], and the Supreme Court gave the provisions of those Acts a generous construction and approval of their constitutionality.").

346. Section 2a(20) of the 1898 Act explicitly granted to district courts "ancillary juris-

diction over persons or property within [the] respective territorial limits [of a district court sitting in bankruptcy] in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other [district court]." This provision was added to the 1898 Act in 1910, Amendment of June 25, 1910, ch. 412, 36 Stat. 838, 839; see *Lazarus, Michel & Lazarus v. Prentice*, 234 U.S. 263, 267 (1914) (interpreting 1910 amendment to § 2a(20) of the 1898 Act), to codify the result reached in *Babbitt v. Dutcher*, 216 U.S. 102 (1910) (concluding that where original court of bankruptcy is entitled to act summarily, another court of bankruptcy, sitting in another district, can also act in aid of court of original jurisdiction). *Accord* *Elkus v. Madson Steele Co. (In re Madson Steele Co.)*, 216 U.S. 115 (1910) (same); *In re Benedict*, 140 F. 55 (E.D. Wis. 1905) (same); *In re Peiser*, 115 F. 199 (E.D. Pa. 1902) (same). In *Babbitt v. Dutcher*, the Court reviewed case law decided under the 1841 and 1867 Acts, such as *Lathrop v. Drake*, 91 U.S. 516 (1875), which had authorized a district court, other than that in which the bankruptcy petition had been filed, to issue injunctions and maintain suits in aid of the district court in which the petition had been filed. See *Babbitt*, 216 U.S. at 106-11 (1910). The Court concluded that the jurisdictional provisions of the 1898 Act did not alter this long-standing rule. See *id.* at 111-14. *Babbitt* thus rejected those decisions which had reached a contrary result under the 1898 Act, such as *In re Von Hartz*, 142 F. 726 (2d Cir. 1905); *In re Williams*, 123 F. 321 (W.D. Tenn. 1903); *In re Williams*, 120 F. 38 (E.D. Ark. 1903).

Section 2a(20)'s grant of ancillary jurisdiction was a limited one, however, and did not extend beyond "preserving such property and, where necessary, conducting the business of the bankrupt, and reducing the property to money, paying therefrom such liens as the court shall find valid and the expenses of ancillary administration, and transmitting the property or its proceeds to the court of primary jurisdiction." This limitation probably referred to the principle established in *Freeman v. Howe*, 65 U.S. 450 (1860), that ancillary jurisdiction exists to permit a court of equity to resolve claims against property in its possession. After enactment of § 2a(20), courts similarly interpreted the scope of ancillary jurisdiction. See *supra* notes 103-09 and accompanying text (discussing development of ancillary jurisdiction). Courts, thus, narrowly construed § 2a(20)'s statutory grant of ancillary jurisdiction. See, e.g., *Lazarus, Michel & Lazarus v. Prentice*, 234 U.S. 263, 269 (1914) (noting that because seizure of property of debtor by ancillary receiver appointed pursuant to 1898 Act § 2a(20) is a summary proceeding, intervenor's claim for attorney's fees, which is a plenary action, must be brought in the district court in which bankruptcy petition was filed); *Butler v. Ellis (In re Waldeck-Deal Dredging Co.)*, 45 F.2d 951, 952-53, 956 (4th Cir. 1930) (district court exercising ancillary jurisdiction entitled to resolve validity of liens asserted against property in its custody and order sale in satisfaction of valid liens; ancillary court erred in permitting sale of property without compliance with provisions relating to notice and allowances); *Fidelity Trust Co. v. Gaskell*, 195 F. 865, 868-69 (8th Cir. 1912) (district court exercising ancillary jurisdiction under 1898 Act § 2a(20) obligated to determine validity of adverse claims asserted against property in custody of ancillary receiver, and depending upon result of that determination to send property to court of primary jurisdiction or apply proceeds in satisfaction of adverse claims); *In re Rodgers & Garrett Timber Co.*, 22 F.2d 571, 574 (D. Md. 1927) (district court exercising ancillary jurisdiction entitled to resolve priority and lien claims asserted against property in its custody; distinguishes *Lazarus, Michel & Lazarus v. Prentice*, 234 U.S. 263 (1914), as precluding ancillary court from resolving claim against such property where claims arose after not before filing of bankruptcy petition); *In re Meyer & Judd*, 1 F.2d 513, 526 (W.D. Tenn. 1924) (district court exercising ancillary jurisdiction under § 2a(20) has jurisdiction to determine whether property seized by ancillary receiver is property of debtor); *In re Einstein*, 245 F. 189, 191 (N.D.N.Y. 1917) (district court exercising ancillary jurisdiction under § 2a(20) has jurisdiction to determine whether fund collected by ancillary receiver belongs to debtor or to adverse claimant, and to determine validity of liens asserted against such fund); *In re Lipman*, 201 F. 169, 172-73 (D.N.J. 1912) (where ancillary receiver obtained possession of goods alleged to have been fraudulently transferred by the debtor, district court exercising ancillary jurisdiction under § 2a(20) acquired jurisdiction to determine rights of debtor's transferee and grant complete relief relating to such property); *In re Sutter Bros.*, 131 F. 654, 654 (S.D.N.Y. 1904)

dent<sup>347</sup> bankruptcy jurisdiction were exercised, but does, in general, indicate Congress' intent to replicate and possibly exceed the grants of jurisdiction under the Bankruptcy Acts of 1841<sup>348</sup> and 1867,<sup>349</sup> and specifically cites *Lathrop v. Drake*,<sup>350</sup> a case validating an exercise of ancil-

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(district court exercising ancillary jurisdiction under § 2a(20) entitled to grant creditor's application for examination of witnesses). Courts also narrowly construed assertions of ancillary jurisdiction outside the scope of § 2a(20). See, e.g., *In re Converse-Hough & Co.*, 27 F.2d 368, 370 (W.D.N.Y. 1928) (ancillary bankruptcy jurisdiction did not exist after confirmation of composition because confirmation divests court of possession of property of estate). Where the court no longer had possession of the property, ancillary jurisdiction was said not to exist.

347. Before the Supreme Court's expansion of the doctrine of pendent jurisdiction in *Hurn v. Oursler*, 289 U.S. 238 (1933), and *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), courts had uniformly declined to find pendent jurisdiction over state law claims joined with federal claims in a plenary bankruptcy action commenced by a trustee. See *State Trust & Sav. Bank v. Dunn*, 278 U.S. 582 (1929) (per curiam) (reversing assertion of federal pendent-claim jurisdiction over state law claims asserted in plenary avoidance action); *Lowenstein v. Reikes*, 60 F.2d 933 (2d Cir. 1932), cert. denied, 287 U.S. 669 (1933) (pendent jurisdiction denied, in part, due to insufficient relationship between claims); *Kaigler v. Gibson*, 264 F. 240, 241 (N.D. Ga. 1920) (same). As the Court expanded the doctrine of pendent jurisdiction in the context of general civil litigation with its decisions in *Hurn* and *Gibbs*, however, courts divided on whether pendent bankruptcy jurisdiction was authorized under the 1898 Act.

In *Bartle v. Markson*, the Second Circuit held that the district court was empowered to assert pendent jurisdiction over state law claims joined by a trustee in bankruptcy with claims under § 70e of the 1898 Act. See 357 F.2d 517, 522-23 (2d Cir. 1966) (Friendly, J.). Because § 70e of the 1898 Act permitted a trustee to avoid transactions that would have been avoidable by actual unsecured creditors of the bankrupt under state law, the trustee's § 70e claims in *Bartle* actually derived from state law; federal bankruptcy jurisdiction existed as to the trustee's § 70e claim although the defendants had not consented to jurisdiction because § 23 explicitly excepts from the general rule that defendants must consent to federal bankruptcy jurisdiction actions brought under, among other things, § 70e. See *id.* at 522-23. Although decided in 1966, *Bartle* pre-dates *Gibbs* by several months and thus relied on *Hurn*. Nonetheless, the court found that the state law claims were but "the second act" to the § 70e claims. *Id.* at 523. Relying on *Bartle*, the Sixth Circuit, in *Melamed v. Lake County Nat'l Bank*, 727 F.2d 1399 (6th Cir. 1984), similarly affirmed the district court's assertion of pendent jurisdiction over the trustee's claim that the defendant had tortiously interfered with the debtor's business because it arose out of the same nucleus of facts as the trustee's fraudulent transfer action. See *id.* at 1403. Because it was decided in 1984, *Melamed* looked to *Gibbs* for the governing standard. See *id.* It also applied *Zahn* and *Aldinger*, but predated *Finley*. See *id.*

The court in *Melamed* distinguished an earlier district court decision, *Creel v. Lawler*, 462 F. Supp. 118, 122-23 (N.D. Tex. 1978), in which pendent jurisdiction was declined. See *Melamed*, 727 F.2d at 1403. In *Creel*, the court declined to exercise pendent jurisdiction over the trustee's alter ego action, although it admittedly arose out of a common nucleus of facts with the trustee's preference and fraudulent transfer suit, because it thought the state claims predominated over the federal ones and, thus, were likely to confuse the jury. See *Creel*, 462 F. Supp. at 122. In dicta, the court cast doubt upon the power of a district court to assert jurisdiction pendent to plenary actions brought pursuant to § 23 of the 1898 Act. See *id.* at 120. It noted that § 23's grant of federal bankruptcy jurisdiction was narrowly crafted by Congress, and that the doctrine of pendent jurisdiction, vastly expanded by courts since enactment of this section, could eviscerate these limitations. See *id.* at 121-22.

348. See *infra* note 499 (discussing jurisdictional provisions of 1841 Act in detail).

349. See *infra* note 500 (discussing jurisdictional provisions of 1867 Act in detail).

350. 91 U.S. 516 (1875).

lary jurisdiction under the 1867 Bankruptcy Act.<sup>351</sup> Congress can be presumed to have been familiar with courts' reliance on the doctrines of ancillary and pendent jurisdiction in the bankruptcy context, at least under the 1867 Bankruptcy Act.<sup>352</sup>

Thus, there may be more to the "substantiality" test than courts or commentators have previously concluded. The "substantiality" test may indeed impose a test of constitutional significance only apparent when applied to an exercise of supplemental bankruptcy jurisdiction, rather than an exercise of jurisdiction supplemental to federal question or diversity jurisdiction. It may require that the federal ingredient in the primary claim be "substantial." And where the primary claim is an "arising in" or a "related to" proceeding this requirement may not be satisfied, depending upon the constitutional sources of this jurisdiction. If it is a form of "arising under" jurisdiction, its federal ingredient may be viewed as sufficiently "substantial" to serve as the basis of an exercise of supplemental jurisdiction. If it is a form of supplemental jurisdiction, however, the "substantiality" requirement may not be met.

#### (ii) Relatedness

*Gibbs* also provides that an exercise of pendent jurisdiction is constitutionally authorized when "the relationship between [a claim arising under the Laws of the United States] and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.'"<sup>353</sup> As applied to an assertion of supplemental bankruptcy jurisdiction, this language does not clearly describe the focus of this "relatedness" test. To what must the supplemental claim relate? Is it sufficient that the supplemental claim shares a logical or factual relationship with the primary claim, if the primary claim derives from state law?

Some commentators restate the *Gibbs* "relatedness" test slightly differ-

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351. In *Lathrop*, relying on the doctrine of ancillary jurisdiction, the Supreme Court held that an assignee in bankruptcy was entitled to bring a suit in a federal circuit court for the recovery of assets in a district other than that in which the bankruptcy petition had been filed although the citizenship of the parties was not diverse. See *id.* at 517-18. In reaching this conclusion, the Court relied on a combination of statutory construction and policy arguments. See *id.* at 518 ("Proceedings ancillary to and in aid of the proceedings in bankruptcy may be necessary in other districts where the principal court cannot exercise jurisdiction; and it may be necessary for the assignee to institute suits in other districts for the recovery of assets of the bankrupt . . . . The State courts may undoubtedly be resorted to in cases of ordinary suits for the possession of property or the collection of debts; and it is not to be presumed that embarrassments would be encountered in those courts in the way of a prompt and fair administration of justice. But a uniform system of bankruptcy, national in its character, ought to be capable of execution in the national tribunals, without dependence upon those of the States in which it is possible that embarrassments might arise.").

352. See *infra* notes 496-503 and accompanying text (discussing reference in legislative history to *Lathrop v. Drake*).

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

ently.<sup>354</sup> They contend that the dictates of Article III are satisfied only if the constitutional "category" or "case" tests are satisfied with respect to both the primary and supplemental claims.<sup>355</sup>

According to this analysis, an assertion of jurisdiction over a primary claim complies with the constitutional "category" test if it falls within one of the nine categories of "cases or controversies" enumerated in Article III, Section 2.<sup>356</sup> For example, in *Gibbs*, the primary claim involved a federal question "arising under" the National Labor Relations Act. Thus, because Article III, Section 2, includes among its categories "Cases . . . arising under . . . the Laws of the United States," the assertion of primary jurisdiction in *Gibbs* satisfies the constitutional "category" test.<sup>357</sup>

By definition, therefore, an assertion of supplemental jurisdiction, standing alone, cannot comply with the constitutional "category" test.<sup>358</sup> For example, in *Gibbs*, the state law pendent-claim at issue did not fit within the categories listed in Article III because it neither arose under federal law nor involved litigants of diverse citizenship. Instead, under this analysis, an assertion of supplemental jurisdiction is constitutional if it satisfies the constitutional "case" test<sup>359</sup>—that is, if the supplemental claim is so related to the primary claim as to form a single "case or controversy." And in *Gibbs*, the Court found the constitutional "case" test satisfied only where the primary claim and the supplemental claim arose out of a common nucleus of fact.<sup>360</sup>

This two-part test for the constitutionality of an assertion of supplemental jurisdiction sharpens the focus of the "relatedness" test as applied to the bankruptcy context, but, depending upon the breadth of the constitutional "category" test, may lead to the conclusion that the Constitution can support assertions of supplemental bankruptcy jurisdiction only where the primary claim "arises under" title 11.

Under a narrow application of the constitutional "category" test,

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354. See, e.g. McLaughlin, *supra* note 102, at 890-93.

355. See *id.* at 892.

356. See *supra* note 1 (quoting U.S. Const. art. III, § 2, cl. 1).

357. Because the constitutional "category" test focuses on the primary claim, it resembles the first prong of *Gibbs*—the "substantiality" test. For a discussion of the *Gibbs* "substantiality" test, see *supra* notes 267-79 and accompanying text.

358. McLaughlin notes that it is irrelevant under § 1367 that a supplemental claim satisfies constitutional "category" test. The example he provides is of a counterclaim between two diverse citizens (which satisfies constitutional "category" test) but for less than \$50,000 (thus failing statutory requirements of 28 U.S.C. § 1332). Unless the primary claim and counterclaim "derive from a common nucleus of operative fact," the assertion of supplemental jurisdiction is not supported by 28 U.S.C. § 1367. See McLaughlin, *supra* note 102, at 904-07.

359. See McLaughlin, *supra* note 102, at 892.

360. Because the constitutional "case" test focuses on the supplemental claim, and especially the relationship between the primary and supplemental claims, it resembles the second prong of the *Gibbs* test—the "common nucleus of operative fact" test. For a discussion of the "common nucleus of operative fact" test, see *supra* notes 116-18, 246-62 and accompanying text.

"arising under" bankruptcy proceedings clearly comply with this requirement. Proceedings that "arise under" title 11 satisfy the constitutional "category" test because they are "arising under . . . the Laws of the United States,"<sup>361</sup> one of the categories listed in Article III. Thus, an assertion of jurisdiction supplemental to an "arising under" proceeding would satisfy this two-step analysis if the supplemental claim is sufficiently related<sup>362</sup> to the "arising under" proceeding to satisfy the constitutional "case" test.

Whether proceedings that "arise in" or "relate to" a title 11 case satisfy the constitutional "category" test is much more complicated, however. Article III<sup>363</sup> does not expressly enumerate these sorts of cases or controversies within its list of categories.<sup>364</sup> Supreme Court precedent is unclear as to the constitutional sources of this jurisdiction.<sup>365</sup> Courts and commentators agree that an assertion of jurisdiction over proceedings that "arise in" or "relate to" a title 11 case is constitutional, but disagree as to whether this is because these proceedings independently fulfill the constitutional "category" test ("arising under" jurisdiction) or because they fulfill the constitutional "case" test (supplemental jurisdiction).<sup>366</sup>

But if jurisdiction over "arising in" and "related to" proceedings is constitutional only under the constitutional "case" test, then an assertion of jurisdiction over a claim supplemental to such a proceeding is constitutionally suspect. Under this construction, neither the primary nor the supplemental claim satisfies the constitutional "category" test, for the federal element—the title 11 case—is not once, but twice, removed from the supplemental claim: the supplemental claim is so related to the "arising in" or "related to" proceeding as to form a single "case or controversy" with that proceeding, and the "arising in" or "related to" proceeding is so related to the title 11 case as to form a single "case or controversy" with the title 11 case. This separation between satisfaction of the constitutional "category" and "case" test may be too great. Thus, the requirements of Article III of the Constitution may not be satisfied

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361. U.S. Const. art. III, § 2.

362. For a discussion of just how related the primary claim must be to the supplemental claim to satisfy the constitutional "case," see *supra* notes 246-62 and accompanying text.

363. The Bankruptcy Clause of the United States Constitution, Article I, Section 8, Clause 4, like the Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, constitutes merely an authorization for Congress to pass "Laws of the United States" on the subject of bankruptcy or commerce, but not a constitutional grant of power to Congress to confer federal jurisdiction. See U.S. Const. art. I, § 8, cl. 3-4.

364. See U.S. Const. art. III, § 2, cl. 1 (nine categories enumerated). Assertions of "related to" jurisdiction clearly satisfy the constitutional "category" test if between "[c]itizens of different States," or if it "arose under" some federal law other than the Bankruptcy Code. U.S. Const. art. III, § 2.

365. See *supra* notes 272-73 and accompanying text (discussing Supreme Court precedent).

366. See *supra* notes 267-352 and accompanying text (contending that "related to" jurisdiction can be characterized either as "arising under" jurisdiction or supplemental jurisdiction).



where the assertion of supplemental jurisdiction involves a proceeding which is related to a proceeding "arising in" or "related to" a title 11 case.

It is far from clear, however, that the "category" of "Cases arising under . . . the Laws of the United States" set forth in Article III, Section 2, should be construed so narrowly.<sup>367</sup> As discussed above, *Osborn* may be read to characterize all of § 1334(b)'s jurisdictional grants as within the grant of authority in Article III, Section 2, to vest district courts with original jurisdiction over cases that "arise under" federal law.<sup>368</sup> Once *Osborn* facilitates a broad construction of the constitutional "category" test, one could argue that § 1367(a)'s grant of jurisdiction supplemental even to "related to" proceedings satisfies the constitutional "case" test so long as the supplemental claim is sufficiently "related to" the primary claim.

If the statutory grants of "arising in" and "related to" jurisdiction are viewed as satisfying the constitutional "category" test because *Osborn* permits so broad an interpretation of constitutional "arising under" jurisdiction, the analysis returns to the scope of the constitutional "case" test. *Osborn* says nothing about the constitutionality of a grant of jurisdiction that is supplemental to a federal question because, although it defines the limits of constitutional "arising under" jurisdiction, it assumes the existence of a constitutional "case."<sup>369</sup> And the only precedent purporting to define the limits of the constitutional "case" in this context is *Gibbs*.

In the abstract, the argument that *Gibbs*'s constitutional "case" test is satisfied whenever the primary claim is logically or factually related to

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367. Because the Supreme Court has long recognized that constitutional federal question jurisdiction, see *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 8-9 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"), and constitutional diversity jurisdiction, see *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 530-31 (1967) (although Article III requires only minimal diversity, 28 U.S.C. § 1332 requires complete diversity of citizenship), exceeds that granted by statute, the Court's jurisdictional decisions are often limited to a discussion of the statute at issue. If the Court does explicitly discuss the scope of Article III, its discussion is all too often dicta. More frequently, however, the Court's jurisdictional decisions have been unclear as to whether they turn on an analysis of the statute or the Constitution.

368. See *supra* notes 280-334 and accompanying text. Under this interpretation, § 1334's grant of jurisdiction would be viewed as broader than § 1331's grant of jurisdiction, but both statutes would be viewed as a specie of "arising under" jurisdiction. At least two commentators have rejected a characterization of "related to" jurisdiction as a specie of constitutional "arising under" jurisdiction. See Cross, *supra* note 245, at 1251 ("[F]ederal bankruptcy jurisdiction does not fit readily within any of the Article III categories . . . . This does not mean that federal bankruptcy jurisdiction is invalid. Under the doctrine of ancillary jurisdiction, bankruptcy jurisdiction clearly falls within Article III."); Galligan, *supra* note 272, at 5 (agreeing that "related to" jurisdiction does not satisfy "arising under" jurisdiction, but concluding that it is a constitutional grant of protective jurisdiction).

369. See 22 U.S. 738, 819 ("The suit of *The Bank of the United States v. Osborn and others*, is a case, and the question is, whether it arises under a law of the United States?") (emphasis in original).

the supplemental claim is an appealingly simple one. The contention becomes more suspect when related to facts, however. Recall the hypothetical involving an assertion of jurisdiction supplemental to a "related to" proceeding—the malpractice action supplemental to the priority dispute between two secured creditors of the debtor.<sup>370</sup> In this scenario, a broad reading of *Osborn* permits the conclusion that the constitutional "category" test is satisfied because the secured creditors' priority dispute (a "related to" proceeding based solely on questions of state law) "aris[es] under . . . the Laws of the United States" within the meaning of the Constitution.<sup>371</sup> Application of *Gibbs* permits the conclusion that the constitutional "case" test is satisfied because the priority dispute and the malpractice action enjoy a "common nucleus of operative fact."<sup>372</sup>

But step back and consider that this analysis has led us to conclude that the title 11 case, the proceeding "related to" the title 11 case, and the claim related to the "related to" proceeding are one constitutional "case."<sup>373</sup> No court<sup>374</sup> and no commentator<sup>375</sup> has expressly advocated so broad a definition of a constitutional "case."<sup>376</sup>

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370. See *supra* notes 28-37 and accompanying text (setting forth hypothetical "related to" proceeding and supplemental claim).

371. U.S. Const. art. III, § 2.

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

373. Quite clearly, all three cannot enjoy a "common nucleus of operative fact." Although *Gibbs* applied a narrower standard of relatedness—"common nucleus of operative fact"—commentators have argued that the broader "logical relationship" test may be all that the constitution requires. See *supra* notes 246-62 and accompanying text. If the requirements of Article III are fulfilled only when the constitutional case shares a "common nucleus of operative fact," however, then "related to" bankruptcy jurisdiction cannot be characterized as a form of supplemental jurisdiction and assertions of jurisdiction over claims related to a "related to" proceeding are clearly unconstitutional. Cf. Galligan, *supra* note 272, at 37; Cross, *supra* note 245, at 1235-37.

374. Of course, this is the implication of all those cases that exercise jurisdiction supplemental to a "related to" proceeding without discussion. See *supra* part II.A.

375. Galligan questions whether the title 11 case and all proceedings "arising under" title 11, and "arising in" or "related to" the title 11 case, constitute a single constitutional "case," thus, rejecting the analogy of bankruptcy jurisdiction to supplemental jurisdiction. See Galligan, *supra* note 272, at 36-41. Although Cross argues that a title 11 case and all proceedings "related to" the title 11 case constitute a single constitutional "case," he would not agree that the constitutional "case" also includes all supplemental claims related to the "related to" proceedings. See Cross, *supra* note 245, at 1233-50.

376. Matasar contends that the Federal Rules of Civil Procedure define the limits of a constitutional "case" in the context of an assertion of jurisdiction supplemental to a non-bankruptcy federal claim. See Matasar, *One Constitutional Case*, *supra* note 102, at 1477-90. His argument boils down to the notion that a constitutional case is the largest potential litigation unit, which historically varies depending upon the breadth of the Federal Rules of Civil Procedure. His contention is controversial among commentators analyzing the scope of supplemental jurisdiction in ordinary civil litigation, see McLaughlin, *supra* note 102, at 912-13 n.358 (criticizing Matasar's proposal), but appealing in that context from historical and practical perspectives. Outside the bankruptcy context, "case," even a constitutional "case," is defined in the practical context of a "transaction or occurrence." Matasar, *Jurisdiction Primer*, *supra* note 102, at 155-56 ("Since *Gibbs*, the trend in pending cases has been toward a transactional test similar to that in ancillary jurisdiction."). Nonetheless, Matasar's proposition that a constitutional "case" be defined by federal procedural rules falls apart when considered in the context of bank-

This reconciliation of *Gibbs* and *Osborn* is troubling in its acceptance of an indirect relationship between the supplemental claim and the federal ingredient as constitutionally sufficient. Once it is agreed that this relationship can be satisfied even indirectly, there is little to limit the standard. Under this broad a construction of Article III, what constitutional principle would preclude the assertion of jurisdiction supplemental to the supplemental claim related to the "related to" proceeding? Under this analysis, so long as a claim can trace a chain of logical relationships to the commencement of a title 11 case, no matter how long the chain and how attenuated the relationship between the ultimately supplemental claim and the federal ingredient, the entire chain of claims would constitute a "single case or controversy under Article III of the United States Constitution" and, thus, the exercise of jurisdiction over this chain of claims would be viewed as constitutionally permissible.<sup>377</sup>

A constitutional analysis which rejects exercises of jurisdiction that are supplemental to "related to" bankruptcy proceedings is also supported by the realization that supplemental jurisdiction exists as a result of the distinctions between statutory and constitutional jurisdiction.<sup>378</sup> Supplemental jurisdiction exists to resolve the tension between constitutional authority for, and congressional grants of, federal jurisdiction. The Supreme Court has historically found that Congress has not conferred by statute the full extent of federal jurisdiction authorized by Article III of the Constitution.<sup>379</sup> For example, the Court has defined constitutional

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ruptcy. A bankruptcy case does not exist to resolve a single "transaction or occurrence" between parties; instead it exists to resolve the debtor's estate.

While most of the Federal Rules of Civil Procedure are adopted wholesale by the Federal Rules of Bankruptcy Procedure, Fed. R. Bankr. P. 7001-7071, this broad cooption of the Federal Rules of Civil Procedure is limited to "adversary proceedings." See *supra* note 3 (defining "adversary proceedings"). A more limited reference of the Federal Rules of Civil Procedure applies to "contested matters." See *supra* note 3 (defining "contested matters"). Moreover, nothing in the Federal Rules of Bankruptcy Procedure make the Rules of Civil Procedure generally applicable in a "title 11 case," and indeed many of the procedural rules applicable generally to the administration of a "title 11 case" bear no resemblance to the Federal Rules of Civil Procedure. See, e.g., Fed. R. Bankr. P. 2004. In the context of bankruptcy appeals, moreover, the relevant "litigation unit" is substantially smaller than either the adversary proceeding or contested matter. See 6 Norton Bankruptcy Law and Practice § 148.28 at 148-100 (2d ed. 1993) ("[S]plits among the circuits [relating to the definition of a 'final order' of a bankruptcy court that is appealable, first to a district court, bankruptcy appellate panel and then, to a court of appeals] can be explained by courts' readiness to measure finality against smaller and smaller 'judicial units.'").

377. Cf. John Guare, *Six Degrees of Separation* 81 (Random House 1990) ("I read somewhere that everybody on this planet is separated by only six other people. Six degrees of separation. Between us and everybody else on this planet.").

378. See *Matasar, Jurisdiction Primer*, *supra* note 102, at 106-18 (arguing that limited federal jurisdiction justifies exercise of supplemental jurisdiction).

379. See, e.g., *Yakus v. United States*, 321 U.S. 414, 429-30 (1944) (holding that since Article III authorizes Congress to create or not to create lower federal courts, it also entitles Congress to restrict jurisdiction of lower federal courts); *Lockerty v. Phillips*, 319 U.S. 182, 187-88 (1943) (same); *Sheldon v. Sill*, 49 U.S. 453, 461, 8 How. 441, 448 (1850) (same); see also, e.g., *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 513 (1869) (upholding

“arising under” jurisdiction much more broadly than its statutory counterpart.<sup>380</sup> Once this schism exists, however, as a practical matter, it may be impossible for a federal court to resolve questions involving only an interpretation of federal law.<sup>381</sup> Thus, as early as 1824, the Supreme Court has held that the presence of issues of state law do not prevent a federal court from exercising a statutory grant of jurisdiction,<sup>382</sup> concluding that to hold otherwise would “reduce[ ] to almost nothing”<sup>383</sup> the authority to confer federal jurisdiction over “cases . . . arising under . . . the Laws of the United States,”<sup>384</sup> for “[t]here is scarcely any case, every part of which depends on the constitution, laws or treaties of the United States.”<sup>385</sup> If Congress were to enact a statute conferring original federal jurisdiction to the full extent permitted by Article III—to the full extent permitted by *Osborn*—then there would be no need for supplemental jurisdiction. Supplemental jurisdiction exists only because Congress has not granted original federal jurisdiction to the full extent permitted by Article III.

Courts appear tempted to conclude that for every statutory grant of non-supplemental jurisdiction, § 1367 provides an additional grant of supplemental jurisdiction. But this conclusion views Article III as an ever-expanding reservoir of jurisdiction, with supplemental jurisdiction

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congressional regulation of appellate jurisdiction of Supreme Court); *see generally, e.g.,* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953) (discussing congressional control of federal jurisdiction); Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitation on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17 (1981) (same); Wright, *supra* note 266, § 3561 (same).

380. Compare *Osborn v. Bank of United States*, 22 U.S. 738, 823 (1824) (construing scope of constitutional “arising under” jurisdiction, Chief Justice Marshall upheld constitutionality of grant of federal jurisdiction of suits by and against federally chartered bank irrespective of source of law, or subject matter, of suit) *with, e.g.,* *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (holding that § 1331 did not confer jurisdiction over suit for damages to business for defendant’s statements that plaintiff was infringing defendant’s patents; Justice Holmes stated that, for purposes of this statute, “[a] suit arises under the law that creates the cause of action”); *see generally* Wright, *supra* note 266, § 3562 (discussing efforts by courts and commentators to explicate distinction between constitutional “arising under” jurisdiction and its statutory counterpart in 28 U.S.C. § 1331); *see also supra* notes 280-334 and accompanying text (discussing breadth of holding in *Osborn* as to scope of constitutional “arising under” jurisdiction).

381. Moreover, this practical problem may exist even though the statutory grant of federal jurisdiction is not 28 U.S.C. § 1331. In *Osborn v. Bank of United States*, the Supreme Court reached similar conclusions although it reconciled constitutional “arising under” jurisdiction with a statutory grant which pre-dated and far exceeded the scope of statutory “arising under” jurisdiction. *See* 22 U.S. at 823-28 (interpreting federal charter granting Bank of United States power to sue and be sued in federal courts as a grant of federal jurisdiction, and concluding that this statutory grant of jurisdiction fits within scope of constitutional “arising under” jurisdiction); *see also supra* notes 280-334 and accompanying text (discussing *Osborn*).

382. *See Osborn v. Bank of United States*, 22 U.S. 738 (1824).

383. *Id.* at 820.

384. *See* U.S. Const. art. III, § 2, cl. 1.

385. 22 U.S. at 820.

expanding at the same rate as statutory grants of original jurisdiction.<sup>386</sup> This limitless vision of Article III is surely flawed. *Gibbs* tells us that supplemental jurisdiction may not exceed the notion of a constitutional "case." Surely, the Constitution refers to but one constitutional "case," not to two distinct definitions of "case" depending upon whether the reference is to original or supplemental jurisdiction.

## 2. Constitutional Questions Surrounding the Exercise of Supplemental Bankruptcy Jurisdiction by Non-Article III Bankruptcy Courts

Except during the four-year period between enactment of the 1978 bankruptcy jurisdictional provisions and the ruling of the Supreme Court that this broad delegation of the "essential attributes" of the judicial power of the United States" exceeded the limits of Article III,<sup>387</sup> the exercise of bankruptcy jurisdiction has been divided between district courts and bankruptcy courts. Under Article III of the Constitution, only a life-tenured judge may exercise the "essential attributes" of judicial power," except as to controversies falling within three narrow historical exceptions.<sup>388</sup> The exercise of supplemental jurisdiction may be among these "essential attributes" of judicial power."<sup>389</sup> For this reason, any exercise of supplemental bankruptcy jurisdiction by non-Article III bankruptcy courts may be unconstitutional.<sup>390</sup>

### a. *Non-Article III Bankruptcy Courts*

#### (i) Bankruptcy Act of 1898

Under the former Bankruptcy Act of 1898, bankruptcy judges (who prior to 1972 were called "referees") were entitled to exercise only lim-

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386. This view of the relationship between Article III of the Constitution and the statutory grants of federal jurisdiction could be illustrated as that of concentric balloons: one balloon (statutory grants of primary and supplemental jurisdiction) inside of another (constitutional authorization for grants of federal jurisdiction). An alternative view that I find more compelling, would analogize this relationship to a cup and its filling. Under this view, the reservoir of federal jurisdiction would be illustrated as a balloon (statutory grants of primary and supplemental jurisdiction) inside of a rigid sphere (constitutional authorization for such grants in Article III).

387. See *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982).

388. See *infra* notes 398-415 and accompanying text (discussing these narrow exceptions).

389. *Marathon*, 458 U.S. at 84-85.

390. Cross raises a distinct constitutional issue related to bankruptcy courts' non-Article III status. He notes that "[t]he Supreme Court has held on a number of occasions that two of Article III's other restrictions—the judicial power and case or controversy requirements—do not apply to certain non-Article III courts. These cases suggest that Congress similarly should not be bound by the other main restriction of Article III—the nine categories—when assigning cases to the non-Article III courts." Cross, *supra* note 245, at 1202. He ultimately rejects this argument, "although appealing," as "not persuasive." *Id.*

ited bankruptcy jurisdiction.<sup>391</sup> Under the 1898 Act, they had only summary jurisdiction over (i) matters involving the administration of the bankruptcy case, (ii) disputes involving property in the actual or constructive possession of the bankruptcy court, (iii) proceedings in which the parties had consented to bankruptcy court jurisdiction (expressly, impliedly by failing to object in time, or impliedly by filing a proof of claim or otherwise participating in the bankruptcy case), and (iv) a few limited matters over which the statute expressly granted jurisdiction to bankruptcy courts.<sup>392</sup> In all other instances, only a state court or federal district court was said to have plenary jurisdiction over the dispute.<sup>393</sup>

The division of summary and plenary jurisdiction over bankruptcy matters was severely criticized because, in some cases, litigants were able to dispute the bankruptcy court's jurisdiction for years before any court ever reached the merits of the suit.<sup>394</sup> This undesirable jurisdictional litigation and the attendant cost and delay caused Congress in 1978 to increase substantially the grant of bankruptcy jurisdiction which bankruptcy courts were entitled to exercise.<sup>395</sup>

### (ii) Bankruptcy Reform Act of 1978

The 1978 bankruptcy jurisdictional provision did not directly confer its pervasive jurisdiction on bankruptcy courts, but instead vested federal district courts with broad-ranging jurisdiction and at the same time authorized bankruptcy courts to exercise nearly all of that jurisdiction.<sup>396</sup> Legislative history confirmed Congress' intent to confer broad jurisdictional authority to the bankruptcy courts.<sup>397</sup>

391. See Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, § 2a(20) in App. 1 Collier on Bankruptcy 1 (Lawrence P. King ed., 15th ed. 1993), *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C. § 101 et seq. and scattered provisions of 28 U.S.C.); 1 Collier on Bankruptcy ¶ 3.01[1][b][iv] (Lawrence P. King ed., 15th ed. 1993).

392. See 1 Collier on Bankruptcy ¶¶ 1.02-1.03[2] (Lawrence P. King ed., 15th ed. 1993).

393. See 1 Collier on Bankruptcy ¶ 3.01[1][b][iv] (Lawrence P. King ed., 15th ed. 1993).

394. See, generally, 1 Collier on Bankruptcy § 3.01, (Lawrence P. King ed., 15th ed. 1993) ("Summary" versus "plenary" actions, resulted in the primary battleground between trustees and defendants often being one of jurisdiction rather than the merits.').

395. For a discussion of this legislative history, see *infra* notes 496-503 and accompanying text.

396. See 28 U.S.C. § 1471 (a), (b) and (c) (repealed). For a complete quotation of § 1471, see *supra* note 100 and accompanying text; see also 28 U.S.C. §§ 1480, 1481 (repealed) (reserving in district court power to enjoin another court, sanction certain criminal contempt and render appeals from bankruptcy court decisions).

397. See S. Rep. No. 989, 95th Cong., 2d Sess. 153 (1978) ("This broad grant of jurisdiction will enable the bankruptcy courts, which are created as adjuncts of the district court for the purpose of exercising the jurisdiction, to dispose of controversies that arise in bankruptcy cases or under the bankruptcy code. Actions that formerly had to be tried in the State court or in the Federal district court, at great cost and delay to the estate, may now be tried in the bankruptcy court."); 124 Cong. Rec. 32,410 (1978) (statement of Rep. Edwards) (referring to bankruptcy jurisdiction as "pervasive jurisdiction over all

In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,<sup>398</sup> the Supreme Court held that "the broad grant of jurisdiction to the bankruptcy courts contained in 28 U.S.C. § 1471 [violates Article III of the Constitution]."<sup>399</sup> It held constitutionally invalid Congress' 1978 grant of power which gave bankruptcy courts jurisdiction to make final determinations in matters involving purely private state law disputes—that is, matters merely "related to" the bankruptcy case.

Under the jurisdictional provisions enacted in 1978, Congress had "vest[ed] all 'essential attributes' of the judicial power of the United States in the . . . bankruptcy court."<sup>400</sup> The Court held that such judicial power could not constitutionally be exercised by a court whose judges lacked the attributes of life tenure and salary protection set forth in Article III. The plurality<sup>401</sup> concluded that the bankruptcy jurisdictional provision at issue violated Article III because it did not fit within any of the three exceptions previously crafted by the Court to the general rule that federal judicial power is to be exercised only by Article III judges.<sup>402</sup> The plurality described the two most relevant exceptions as those involving the adjudication of "public rights" and those in which the non-Article III decision-maker acted as an "adjunct" to an Article III court.<sup>403</sup>

The public rights doctrine finds its origin in a group of cases in which

proceedings arising in or relating to bankruptcy cases"); 124 Cong. Rec. 34,010 (1978) (statement of Sen. DeConcini) (same).

398. 458 U.S. 50 (1982).

399. 458 U.S. at 87. Article III of the Constitution provides that judges of courts vested with "judicial power of the United States" shall hold their offices "during good behavior and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office." Article III, § 1.

400. 458 U.S. at 84-85.

401. *Marathon* involved no single opinion of the Court. The plurality opinion was endorsed by four Justices; then Associate Justices Rehnquist and O'Connor concurred only in the judgment, but provided only a terse paragraph to explain their distinct position; Chief Justice Burger and Justice White each filed their own dissenting opinions. See *Marathon*, 45 U.S. 50 (1982).

402. Despite the broad language of the plurality decision in *Marathon*, the Court subsequently limited the *Marathon* holding:

The Court's holding in [*Marathon*] establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review.

*Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 584 (1985); see also *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986); but see *Granfinanciera, S.A. v. Nordberg (In re Chase & Sanborn Corp.)*, 492 U.S. 33, 53 (1989) (holding that trustee's avoidance action against entity that had not filed proof of claim against chapter 11 estate did not involve "public rights" and, thus, defendant in such action was not precluded by that doctrine from asserting right to trial by jury before non-Article III bankruptcy court; Court stated that question "requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal").

403. See *Marathon*, 458 U.S. at 63-87. The concurring opinion did not fully join in the plurality's adjunct court and public rights analysis. A majority of the justices could only agree that the particular claim before it could not be adjudicated by the bankruptcy court as then constituted. See *id.* at 88.

the Supreme Court had upheld the constitutionality of legislative and administrative courts. The plurality in *Marathon* described the public rights doctrine as limited to matters arising "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments" and which "historically could have been determined exclusively by those departments."<sup>404</sup> The *Marathon* plurality declined to uphold the jurisdictional statute at issue under the public rights doctrine because the suit there involved two private parties litigating liability under state law.<sup>405</sup> However, the plurality noted that some bankruptcy proceedings might fall within the public rights exception:

[T]he restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case. The former may well be a "public right," but the latter obviously is not.<sup>406</sup>

The *Marathon* plurality derived the adjunct court exception to Article III from two cases, *Crowell v. Benson*<sup>407</sup> and *United States v. Raddatz*.<sup>408</sup> *Crowell* validated the statutory grant of authority to a federal administrative agency to make initial factual determinations pursuant to a federal statute requiring employers to compensate their employees for work-related injuries occurring upon the navigable waters of the United States.<sup>409</sup> In *Raddatz* the Supreme Court upheld the practice, authorized by the 1978 Federal Magistrates Act, of referring certain pre-trial motions in criminal cases to a magistrate for initial determination.<sup>410</sup> From these cases, the plurality derived two principles relevant in determining the extent to which Congress constitutionally may vest judicial power in adjuncts to Article III courts. First, it suggested that Congress, when it creates a substantive federal right, possesses substantial discretion to prescribe the manner in which that right may be adjudicated—including the right to delegate judicial functions to the non-Article III adjunct. The second principle that the plurality inferred from these cases is that the adjunct must be limited in such a way that the "essential attributes" of judicial power are retained in the Article III court.

In applying this analysis, the *Marathon* plurality found that the first principle—Congress' discretion to prescribe the manner in which federally created rights are adjudicated—was of no assistance to the plaintiff, because its suit was predicated on state, not federal, law.<sup>411</sup>

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404. 458 U.S. at 67-68.

405. *See id.* at 71-72.

406. 458 U.S. at 71.

407. 285 U.S. 22 (1932).

408. 447 U.S. 667 (1980).

409. *See Crowell*, 285 U.S. at 47-48.

410. *See Raddatz*, 447 U.S. at 683-84.

411. *See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83-84 (1982).



The *Marathon* plurality also determined that the delegation of jurisdiction to bankruptcy judges under the 1978 legislation was far greater than that approved of in either *Crowell* or *Raddatz*.<sup>412</sup> In reaching this conclusion, the plurality noted that under the 1978 jurisdictional provision, bankruptcy courts exercised all ordinary powers of federal district courts, including the powers to preside over jury trials, issue declaratory judgments, issue writs of habeas corpus, and issue any other order necessary or appropriate to enforce the provisions of the Code.<sup>413</sup> Additionally, bankruptcy courts exercised the power to make conclusive findings of fact and conclusions of law, subject to review by Article III courts only under ordinary appellate review, which upholds findings of fact made by bankruptcy courts unless clearly erroneous.<sup>414</sup>

The Supreme Court declined in its decision in *Marathon* to rework the jurisdictional provisions of the 1978 Bankruptcy Reform Act so as to separate the functions that constitutionally could be allocated to the bankruptcy court from those that could only be exercised by Article III district courts.<sup>415</sup> It left that task for Congress. In July 1984, Congress enacted the current bankruptcy jurisdictional provisions.

### (iii) 1984 Amendments

In the current bankruptcy jurisdictional provisions, Congress has divided bankruptcy jurisdiction between that which can be “heard and determined” by non-Article III bankruptcy courts, and that which can only be “heard” by bankruptcy courts but must be finally determined by district courts. Under 28 U.S.C. § 157(a), district courts “may provide that any or all cases . . . and . . . proceedings . . . shall be referred to the bankruptcy judges.”<sup>416</sup> Once a proceeding is referred, the power of the bankruptcy judge will depend upon whether the proceeding “arises under” title 11 or “arises in” a title 11 case—that is, whether it is a “core” proceeding or whether the proceeding is merely related to the title 11 case. Although the language of § 157(a) merely authorizes this reference, district courts uniformly have adopted local rules referring jurisdiction to bankruptcy courts.

“Core” proceedings are defined in 28 U.S.C. § 157(b) to include the following types of proceedings: administrative; claim allowances; counterclaims by the estate against claimants; financing orders; turnovers; preference; stays; fraudulent transfers; discharge and dischargeability;

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412. *See id.* at 86.

413. *See id.* at 84-86.

414. *See id.* at 85.

415. Both the plurality and concurrence agreed that, because the grant of jurisdiction to bankruptcy courts over matters related to bankruptcy cases was made in the same statutory provision as the remaining grant of jurisdiction to bankruptcy courts, the Court could not simply remove jurisdiction of the bankruptcy court over state common law actions. *See* 458 U.S. at 71. Thus, the Supreme Court invalidated the jurisdiction granted to non-Article III bankruptcy courts in its entirety.

416. 28 U.S.C. § 157(a) (1988).

lien priority and validity; confirmation of plans; leases and property sales; and "other proceedings affecting . . . the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims."<sup>417</sup> That a claim involves state law is not determinative of whether a proceeding is "core" or not.<sup>418</sup> And it is the bankruptcy court, not the district court, which initially determines whether a proceeding is "core" or not.<sup>419</sup>

A bankruptcy judge may, subject to ordinary appellate review, hear, determine, and enter judgment in all proceedings "arising under" title 11 or "arising in" a title 11 case.<sup>420</sup> Bankruptcy courts are not authorized to determine proceedings that are merely "related to" a title 11 case, however.<sup>421</sup> Moreover, personal injury and wrongful death tort claims are not triable in the bankruptcy courts.<sup>422</sup>

"Non-core" proceedings include proceedings against persons who have not filed claims against the estate. As to these "non-core" proceedings, a bankruptcy court may hear, but may not enter a final order, without the parties' consent.<sup>423</sup> And, upon timely and specific objection, the district judge is required to review *de novo* proposed findings of fact and conclusions of law made by the bankruptcy judge in these "related to" proceedings.<sup>424</sup>

417. 28 U.S.C. § 157(b)(2) (1988).

418. See 28 U.S.C. § 157(b)(3) (1988).

419. See *id.*

420. See 28 U.S.C. § 157(b)(1) (1988).

421. See 28 U.S.C. § 157(c)(1) (1988).

422. See 28 U.S.C. § 157(b)(5) (1988).

423. See 28 U.S.C. § 157(c)(1)-(2) (1988). With the parties' consent, however, the bankruptcy court is entitled to hear and determine even matters only "related to" the bankruptcy case, subject only to ordinary appellate review. See 28 U.S.C. § 157(c)(2) (1988). See, e.g., *Mann v. Alexander Dawson, Inc.* (*In re Mann*), 907 F.2d 923, 926 (9th Cir. 1990). Courts are divided as to whether consent to the bankruptcy court's exercise of "related to" jurisdiction may be implied. Compare *Canal Corp. v. Finnman* (*In re Johnson*), 960 F.2d 397, 400 (4th Cir. 1992) (implied consent sufficient to bind parties) and *Cain Partnership, Ltd. v. Pioneer Inv. Servs. Co.* (*In re Pioneer Investment Services Co.*), 946 F.2d 445, 450 (6th Cir. 1991) (same) and *In re G.S.F. Corp.*, 938 F.2d 1467, 1477 (1st Cir. 1991) (same) and *In re Mann*, 907 F.2d 923, 926 (9th Cir. 1990) (same) and *In re Rath Packing Co.*, 75 B.R. 137, 138 (N.D. Iowa 1987), *aff'd sub nom.* *Rath Packing Co. v. United Food*, 860 F.2d 1086 (8th Cir. 1988) (same) and *Men's Sportswear, Inc. v. Sasson Jeans, Inc.* (*In re Men's Sportswear, Inc.*), 834 F.2d 1134 (2d Cir. 1987) (same) and *In re Daniels-Head & Assoc.*, 819 F.2d 914, 919 (9th Cir. 1987) (same) and *In re Southern Ind. Banking Corp.*, 809 F.2d 329, 331 (6th Cir. 1987) (same) with *In re Marill Alarm Sys. Inc.*, 81 B.R. 119, 122 (S.D. Fla. 1987), *aff'd sub nom.* *Marill Alarm Sys., Inc. v. Equity Funding*, 861 F.2d 725 (11th Cir. 1988) (bankruptcy court's entry of order invalidated by failure to make core/non-core determination under § 157(b)(3); parties' failure to raise issue does not constitute waiver).

424. See 28 U.S.C. § 157(c)(1) (1988). Despite § 157(a)'s authorization of a general reference of proceedings and cases to bankruptcy courts, § 157 also authorizes district courts to withdraw the reference of case or proceeding on its own motion or on timely motion by party, "for cause shown." 28 U.S.C. § 157(d) (1988). See *Parklane Hosiery Co., Inc. v. Parklane/Atlanta Venture* (*In re Parklane/Atlanta Joint Venture*), 927 F.2d 532, 536 (11th Cir. 1991) ("Even though Congress provided no statutory definition of the word 'cause,' the courts have made it plain that this is not an empty requirement."); *Oaks*

b. *Supplemental Jurisdiction as an Essential Attribute of Judicial Authority*

Many courts have construed the judicial power of non-Article III bankruptcy courts narrowly in order to avoid the conclusion that the power delegated to them involves the "essential attributes of judicial authority" and exceeds the limits of Article III of the Constitution.<sup>425</sup> For example, courts of appeals, although divided, generally have concluded that non-Article III bankruptcy courts are not authorized by statute to conduct jury trials in core proceedings; in reaching this conclusion, these courts were influenced by concerns that any statute that conferred such power on bankruptcy courts would be unconstitutional.<sup>426</sup> In analogous cases courts of appeal are divided on whether the Bankruptcy Code vests bankruptcy courts with contempt power and, if so, whether the exercise of such power by these non-Article III courts would be unconstitutional.<sup>427</sup> Similarly, courts of appeal have held that non-Article III bank-

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of *Woodlake Phase III, Ltd. v. Hall Bayoutree Assocs., Ltd.* (*In re Hall Bayoutree Assocs., Ltd.*), 939 F.2d 802, 805 (9th Cir. 1991) ("It is clear that, under § 157(d), a district court may withdraw reference at any time, for cause shown . . . "); *Appeal of Landmark Sav. Ass'n (In re Priutt)*, 910 F.2d 1160 (3d Cir. 1990) ("Although '[n]othing in the legislation or otherwise indicates what may constitute cause,' . . . one court of appeals has listed the following considerations: [']The district court should consider the goals of promoting uniformity in bankruptcy administration, reducing forum shopping and confusion, fostering the economical use of the debtors' and creditor's resources, and expediting the bankruptcy process.[']") (citations omitted). Moreover, a district court must withdraw reference of proceeding, on timely motion of party in interest, if resolution of proceeding requires consideration of "both" bankruptcy and other federal law "affecting interstate commerce." See 28 U.S.C. § 157(d) (1988). Compare *In re White Motor Corp.*, 42 B.R. 693, 703-04 (N.D. Ohio 1984) (withdrawal required only when bankruptcy court litigation "cannot be resolved without substantial and material consideration" of non-bankruptcy federal law affecting interstate commerce) with *City of New York v. Exxon Corp.*, 932 F.2d 1020, 1026 (2d Cir. 1991) (withdrawal required "of cases or issues that would otherwise require a bankruptcy court judge to engage in significant interpretation, as opposed to simple application, of federal laws apart from the bankruptcy statutes") and *Shugrue v. Pension Benefit Guar. Corp.* (*In re Ionosphere Clubs, Inc.*), 142 B.R. 645, 647 (S.D.N.Y. 1992) (same).

425. See *infra* notes 426-33 and accompanying text.

426. See, e.g., *In re Stansbury Poplar Place, Inc.*, 62 U.S.L.W. 2449 (4th Cir. 1993) (bankruptcy court not authorized to conduct jury trials); *In re Grabill, Corp.*, 967 F.2d 1152, 1158, *reh'g denied*, 976 F.2d 1126 (7th Cir. 1992) (same); *Rafoth v. National Union Fire Ins. Co.* (*In re Baker & Getty Fin. Servs., Inc.*), 954 F.2d 1169, 1172-74 (6th Cir. 1992) (explicitly avoiding constitutional issue); *In re United Missouri Bank, N.A.*, 901 F.2d 1449, 1450 (8th Cir. 1990) (same); *Kaiser Steel Corp. v. Frates (In re Kaiser Steel Corp.)*, 911 F.2d 380, 389-92 (10th Cir. 1990) (same). The Second Circuit and a number of district courts have held that bankruptcy courts can conduct jury trials in core proceedings, however. See, e.g., *Ben Cooper, Inc. v. Insurance Co. of Pennsylvania (In re Ben Cooper, Inc.)*, 896 F.2d 1394, 1404 (2d Cir.) *cert. granted*, 110 S. Ct. 3269, *vacated and remanded*, 111 S. Ct. 425 (1990), *reinstated*, 924 F.2d 36, 38 (2d Cir.), *cert. denied*, 111 S. Ct. 2041 (1991) (bankruptcy court has statutory and constitutional power to conduct jury trials); *Walsh v. California Commerce Bank (In re Interbank Mortgage Corp.)*, 128 B.R. 269 (N.D. Cal. 1991) (same); *Leonard v. Wessel (In re Jackson)*, 118 B.R. 243, 251 (E.D. Pa. 1990) (same).

427. Compare *Mountain Am. Credit Union v. Skinner (In re Skinner)*, 917 F.2d 444, 447-50 (10th Cir. 1990) (bankruptcy courts vested with civil contempt power and exercise

ruptcy courts are not empowered to enter an unreviewable order under 11 U.S.C. § 305 to dismiss or abstain from jurisdiction over an entire bankruptcy case.<sup>428</sup>

Related to the question of whether bankruptcy courts enjoy broad judicial power, courts of appeal are also divided on whether bankruptcy courts are entitled to sanction the government pursuant to certain non-bankruptcy provisions although they are not Article III "courts of the United States."<sup>429</sup> In addition, courts have construed statutes referring to a power of the "district courts" as exclusive of the power of non-Article III bankruptcy courts.<sup>430</sup>

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is constitutional) and *Burd v. Walters* (*In re Walters*), 868 F.2d 665, 669-70 (4th Cir. 1989) (same) with *Griffith v. Oles* (*In re Hipp, Inc.*), 895 F.2d 1503, 1511 (5th Cir. 1990) (bankruptcy courts do not have criminal contempt power) and *Plastiras v. Idell* (*In re Sequoia Auto Brokers, Ltd.*), 827 F.2d 1281, 1284 (9th Cir. 1987) (bankruptcy courts not vested with inherent civil contempt power by Constitution; must be explicitly authorized by statute); cf. *Budget Serv. Co. v. Better Homes, Inc.*, 804 F.2d 289, 291 (4th Cir. 1986) (avoiding entirely issue of contempt powers of bankruptcy courts in case involving bankruptcy court power under § 362(h)).

428. See *Parklane Hosiery Co. v. Parklane/Atlanta Venture* (*In re Parklane/Atlanta Joint Venture*), 927 F.2d 532, 538 (11th Cir. 1991); *Goerg v. Parungao* (*In re Goerg*), 930 F.2d 1563 (11th Cir. 1991). Section 305 has since been amended to provide that an order under that "section . . . is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 or this title or by the Supreme Court of the United States under section 1254 of this title." Judicial Improvements Act of 1990, Pub. L. No. 101-650, title III, § 309(a), 104 Stat. 5113 (codified as amended at 11 U.S.C. § 305(c) (Supp. IV 1992)) ("JIA"). And courts have interpreted this amendment to render a bankruptcy court's decision under this section reviewable by a district court, but the district court's review of the bankruptcy court decision not appealable to a court of appeals or the Supreme Court. See *Chemical Bank v. Togut* (*In re Axona Int'l Credit & Commerce Ltd.*), 924 F.2d 31, 34-35 (2d Cir. 1991) (appeal from § 305 abstention order dismissed; 1990 amendment to this provision pursuant to JIA discussed).

429. Compare *IRS v. Brickell Inv. Corp.* (*In re Brickell Inv. Corp.*), 922 F.2d 696, 701 (11th Cir. 1991) (bankruptcy court not "court of United States" entitled to rule on debtor's motion to assess costs and attorney's fees against IRS pursuant to 26 U.S.C. § 7430) and *Gower v. Farmers Home Admin.* (*In re Davis*), 899 F.2d 1136, 1138-39 (11th Cir. 1990) (bankruptcy court not court of United States entitled to rule on trustee's request for attorney's fees under EAJA) with *O'Connor v. United States Dep't of Energy*, 942 F.2d 771, 774 (10th Cir. 1991) (bankruptcy court empowered to award attorneys' fees pursuant to EAJA because plain language of that statute does not limit that provision to adjudication by "courts of the United States").

430. For example, courts are divided as to whether bankruptcy courts can entertain a motion to change venue although the express language of 28 U.S.C. § 1412 refers to "a district court." Compare *Hunt v. Bankers Trust Co.*, 799 F.2d 1060, 1070 (5th Cir. 1986) (determination whether to transfer venue of case "to be decided, at least in first instance, by the bankruptcy court") and *Wells Fargo Credit Corp. v. Owens* (*In re Owens*), 96 B.R. 215, 218 n.3 (Bankr. W.D. Mo. 1988) (motion to transfer venue case is core proceeding over which bankruptcy courts have jurisdiction) and *Mann v. Michael Indus., Inc.* (*In re Island Shoe Mfg. Co.*), 90 B.R. 981, 933 (Bankr. E.D. Mo. 1988) (same) and *In re Texaco Inc.*, 89 B.R. 382, 387 (Bankr. S.D.N.Y. 1988) (same) and *NBA Int'l Banking Corp. v. Kersting* (*In re Kersting*), 85 B.R. 61, 63 (Bankr. S.D. Ohio 1988) (same) and *In re Toxic Control Technologies, Inc.*, 84 B.R. 140, 142-43 (Bankr. N.D. Ind. 1988) (same) and *In re Waits*, 70 B.R. 591, 594 (Bankr. S.D.N.Y. 1987) (same) and *F/S Airlease II, Inc. v. Aerothrust Corp.* (*In re F/S Airlease II, Inc.*), 67 B.R. 428, 431-32 (Bankr. W.D. Pa. 1986) (same) and *Burlingame v. Whilden* (*In re Whilden*), 67 B.R. 40,

Like the power to conduct a jury trial, exercise contempt power, and render decisions subject only to ordinary appellate review or, in limited instances set forth by statute, subject to no review, the power to exercise supplemental jurisdiction clearly should be counted among the " 'essential attributes' of judicial authority."<sup>431</sup> Although the Supreme Court has cautioned that the scope of Article III involves practical considerations and a complex balancing of competing interests,<sup>432</sup> it seems clear that the grant of supplemental jurisdiction to non-Article III bankruptcy courts creates questions of constitutional dimension.<sup>433</sup>

### B. *Did Congress Expressly Intend To Confer Supplemental Bankruptcy Jurisdiction?*

*Finley* requires Congress to authorize expressly the exercise of pendent-party jurisdiction.<sup>434</sup> Some courts interpreted *Finley* to require Congress to authorize expressly other types of supplemental jurisdiction as well.<sup>435</sup> In 28 U.S.C. § 1367(a), Congress explicitly and broadly

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41-42 (Bankr. M.D. Fla. 1986) (same) and *McLemore v. Thomasson* (*In re Thomasson*), 60 B.R. 629, 630-32 (Bankr. M.D. Tenn. 1986) (same) and *In re Oceanquest Feeder Serv., Inc.* 56 B.R. 715, 718-19 (Bankr. D. Conn. 1986) (same) and *In re Leonard*, 55 B.R. 106, 109 (Bankr. D.D.C. 1985) (same) with *In re HME Records, Inc.*, 62 B.R. 611, 612 (Bankr. M.D. Tenn. 1986) (original motion to transfer venue denied for lack of jurisdiction; second motion made in district court which referred back to bankruptcy court) and *Moody v. Empire Life Ins. Co.* (*In re Moody*), 46 B.R. 231, 234, (M.D.N.C. 1985) (in dicta, court assumed only district court empowered to rule on motion to transfer venue) and *Armstrong v. Ranier Fin. Serv., Inc.* (*In re Greinier*), 45 B.R. 715, 716 (Bankr. D.N.D. 1985); see also *Williams v. Shaw* (*In re Roberts*), 91 B.R. 71, 72 n.2 (Bankr. W.D. Mo. 1988) (court stated that motion to transfer venue of proceeding is itself a core proceeding only if proceeding sought to be transferred also is core); *In re Retirement Inn at Forest Lane, Ltd.*, 83 B.R. 796, 796-800 (D. Utah 1988) (en banc) (adopting a middle-ground procedure for resolving venue transfer motions whereby motion treated as non-core proceeding as to which bankruptcy court makes recommendations of fact and law, subject to *de novo* review by district court); see also, generally, R. Lieb & J. Lewittes, *Correspondence: Some Thoughts on Jurisdiction and Venue*, Norton Bankr. L. Adv., Nov. 1985, at 7-11 (arguing for and against exercise of power by bankruptcy court to transfer venue).

431. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 84-85 (1982); *Aerni v. Columbus Fed. Savs.* (*In re Aerni*), 86 B.R. 203, 207 (Bankr. D. Neb. 1988) ("The absence of ancillary jurisdiction would make it virtually impossible for bankruptcy courts to implement a modern system of procedural rules.").

432. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 853 (1986).

433. See *Southtrust Bank v. Alpha Steel Co.* (*In re Alpha Steel Co.*), 142 B.R. 465, 471 (M.D. Ala. 1992) ("[T]he recent Congressional amendments codifying and merging the doctrines of ancillary and pendent jurisdiction expressly apply only to district courts.").

434. See *Finley v. United States*, 490 U.S. 545, 553 (1989).

435. See, e.g., *Community Coffee Co. v. M/S Kriti Amethyst*, 715 F. Supp. 772, 773 (E.D. La. 1989) (holding that *Finley* undercuts viability of assertion of ancillary jurisdiction); accord *Wright*, *supra* note 266, § 1436, at 276 (same); but see, e.g., *Associated Dry Goods Corp. v. Towers Fin. Corp.*, 920 F.2d 1121, 1125-26 (2d Cir. 1990) (concluding that *Finley* did not undercut power of district court to exercise ancillary jurisdiction over compulsory counterclaim against third party); see generally *Aetna Casualty & Surety Co. v. Spartan Mechanical Corp.*, 738 F.Supp. 664, 673-77 (E.D.N.Y. 1990) (reviewing conflicting district court decisions); see also H.R. 734, 101st Cong., 2d Sess. 28 (1990).

grants supplemental jurisdiction to district courts exercising original jurisdiction in a civil action.<sup>436</sup> "Except . . . as expressly provided otherwise by Federal statute,"<sup>437</sup> § 1367(a)'s grant of supplemental jurisdiction extends to "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."<sup>438</sup> Thus, § 1367 confers supplemental bankruptcy jurisdiction (i) unless "expressly provided otherwise by Federal statute," (ii) unless the grant of original jurisdiction to the district court does not involve a "civil action," or (iii) unless the assertion of supplemental jurisdiction exceeds the limitations of Article III of the United States Constitution.<sup>439</sup> Moreover, § 1367's grant of supplemental jurisdiction is limited to "the district courts."

### 1. "Except . . . as Expressly Provided Otherwise by Federal Statute"

One commentator opines that the "[e]xcept . . . as expressly provided otherwise" language was intended to mark "the statute's departure from the former *Aldinger* test of 'expressed or implied negation.'"<sup>440</sup> Under this commentator's analysis, a statute must expressly, rather than merely impliedly, "provide otherwise" in order for it to preclude a district court from exercising supplemental jurisdiction.

Section 1367(a)'s language, however, fails to identify the quality of the express statement which will suffice to negate supplemental jurisdiction. One interpretation is to conclude that, by a federal statute other than § 1367, Congress must expressly provide that the supplemental jurisdiction granted by § 1367(a) may not be exercised. For example, if a federal statute contained language similar to the express prohibition in § 1367(b)—which provides that, where jurisdiction over the original claim is based on the diversity of the litigants' citizenship, district courts

436. See 28 U.S.C. § 1367(a) (Supp. IV 1992). For a complete quotation of 28 U.S.C. § 1367, see *supra* note 39.

437. 28 U.S.C. § 1367(a) (Supp. IV 1992) ("Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute . . ."). Section 1367(b) is irrelevant to an assertion of supplemental bankruptcy jurisdiction. See *supra* note 39 (quoting 28 U.S.C. § 1367(b)). Section 1367(c) authorizes a district court to decline to exercise supplemental jurisdiction under limited circumstances. See *supra* note 39 (quoting 28 U.S.C. § 1367(c)). The circumstances under which a court, applying this subsection (c), would decline to exercise supplemental bankruptcy jurisdiction are discussed *infra* in the text accompanying notes 568-78.

438. 28 U.S.C. § 1367(a) (Supp. IV 1992).

439. 28 U.S.C. § 1367(a) (Supp. IV 1992).

440. McLaughlin, *supra* note 102, at 934; see also *supra* notes 123-29 and accompanying text (discussing *Aldinger*). In *Aldinger*, the Supreme Court had held that supplemental jurisdiction could not be exercised if the exercise of supplemental jurisdiction was "expressly or by implication negated" by the jurisdictional statute. See *Aldinger v. Howard*, 427 U.S. 1, 18 (1976) (emphasis added) (concluding that "a fair reading of the language in [28 U.S.C.] § 1343, together with the scope of [42 U.S.C.] § 1983" impliedly precludes assertion of pendent-party jurisdiction).

shall not have pendent-party supplemental jurisdiction<sup>441</sup>—such a provision would clearly satisfy the language of § 1367(a). Further, a federal statute limiting supplemental jurisdiction in a manner similar to § 1367(c)—which permits district courts to decline to exercise supplemental jurisdiction after considering statutorily specified factors—would constitute an express statement that limits, rather than prohibits, the exercise of supplemental jurisdiction and would also seem to satisfy the proviso found in § 1367(a).<sup>442</sup>

Another interpretation of the language of § 1367(a) is that the other federal statute need not expressly prohibit or limit supplemental jurisdiction, but merely “provide otherwise” than § 1367(a) for an exercise of supplemental jurisdiction. There are two federal statutes—28 U.S.C. §§ 1338(b) and 1334(b)—which arguably fall into this category.

First, 28 U.S.C. § 1338(a) grants to district courts original jurisdiction over civil actions “arising under any Act of Congress relating to patents, plant variety protection, copyrights and trade-marks.”<sup>443</sup> Subsection (b) of § 1338 also grants to district courts original jurisdiction over “any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection or trade-mark laws.”<sup>444</sup> The § 1338(b) express grant of supplemental jurisdiction only extends to claims of unfair competition, and thus can be viewed as “providing otherwise” than § 1367 by conferring a narrower grant of supplemental jurisdiction than the much broader grant in § 1367.<sup>445</sup>

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441. See *supra* note 39 (quoting 28 U.S.C. § 1367(b)).

442. See *supra* note 39 (quoting 28 U.S.C. § 1367(c)).

443. 28 U.S.C. § 1338(a) (1988). Section 1338(a) provides in its entirety:

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trade-marks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases.

28 U.S.C. § 1338(a) (1988).

444. 28 U.S.C. § 1338(b) (1988) (“The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection or trade-mark laws.”); see also 28 U.S.C. § 1338(c) (“Subsections (a) and (b) apply to exclusive rights in mask works under chapter 9 of title 17 to the same extent as such subsections apply to copyrights.”).

445. Legislative history is ambiguous as to congressional intent in this regard. In testimony during hearings before the Senate Judiciary Committee on S. 2648, the bill which ultimately was enacted as the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, it was suggested that 28 U.S.C. § 1338(b) be repealed in the context of enactment of 28 U.S.C. § 1367. See *Federal Courts Study Committee Implementation Act and Civil Reform Act: Hearing on H.R. 5381 and 3898* Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the Comm. on the Judiciary House of Representatives, 101st Cong., 2d Sess. 720 (1990) (letter dated Aug. 31, 1990 from Arthur D. Wolf, Professor of Law, Western New England College School of Law). Congress did not follow this advice and has not repealed § 1338(b), but its inaction does not provide an unequivocal indication of its intention. On one hand, Congress' failure to repeal § 1338(b) may be viewed as an indication of its understanding that it “provides otherwise” than the more generalized grant of supplemental jurisdiction found in

A similar argument can be constructed with respect to 28 U.S.C. § 1334(b). Section 1334(b) grants to district courts original jurisdiction over "civil proceedings arising under title 11, or arising in or related to cases under title 11."<sup>446</sup> The grant of jurisdiction over civil proceedings "related to" a title 11 case has been described as a grant of supplemental jurisdiction.<sup>447</sup> If that characterization is accurate, then § 1334(b)—like § 1338(b)—contains an express grant of supplemental jurisdiction which is narrower than that in § 1367. Thus, § 1334(b) also can be viewed as a federal statute which "provides otherwise" than, and thus overrides, the broad general grant found in § 1367.

The limited case law that exists on the issue does not support this alternative interpretation, however. As noted above, courts have nearly uniformly concluded that § 1367 authorizes the exercise of supplemental bankruptcy jurisdiction.<sup>448</sup> In addition, courts also have viewed §§ 1338(b) and 1367(a) as separate, rather than mutually exclusive, grants of supplemental jurisdiction.<sup>449</sup> Courts have not, however, explicitly considered the "expressly provided otherwise" language in § 1367(a).

The statutory argument against an exercise of jurisdiction supplemental to a proceeding "related to" a title 11 case is even stronger than that against the exercise of supplemental patent, copyright, and trademark

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§ 1367(a). On the other hand, Congress' silence on the interrelationship between these two statutes might just as easily be construed as an indication of its intent that they act as alternative, rather than mutually exclusive, grants of supplemental jurisdiction.

446. 28 U.S.C. § 1334(b) (1988 & Supp. IV 1992). For a complete quotation of § 1334(b), see *supra* note 61.

447. See Cross, *supra* note 245, at 1233-50; *supra* notes 335-52 and accompanying text.

448. See *supra* part II.

449. See *Gemco Ware Inc. v. E. Mishan & Sons, Inc.*, No. Civ. 5885, 1992 WL 281389 (S.D.N.Y. 1992) (district court reserved decision on whether to exercise supplemental jurisdiction, under 28 U.S.C. § 1367(a), over claim for tortious interference with business relations that was related to patent infringement action because interference action might not share common nucleus of fact with patent action; requirements of 28 U.S.C. § 1338(b) clearly not fulfilled); *Relational Design & Technology, Inc. v. Data Team Corp.*, 1992 Copyright L. Dec. (CCH) ¶ 26,932 (D. Kan. 1992) (denying motion to dismiss various state law claims for misappropriation of trade secret, fraud and breach of contract, court exercised supplemental jurisdiction over these claims under § 1367(a) rather than § 1338(b)); *Friedman v. Stacey Data Processing Services Inc.*, 22 U.S.P.Q.2d (BNA) 1528 at n.2 (N.D. Ill. 1991) (denying motion to dismiss unfair competition counterclaim, district court found supplemental jurisdiction under § 1338(b) and declined to reach "theoretical thicket" involving interplay of *Finley*, § 1367(a), and pendent-party jurisdiction); see also, e.g., *Lone Ranger Television, Inc. v. Program Radio Corp.*, 740 F.2d 718, 724 (9th Cir. 1984) (decided before enactment of 28 U.S.C. § 1367) (holding that district court entitled to exercise pendent jurisdiction over state law conversion claim related to copyright infringement action, although § 1338(b) mentions only claims of unfair competition joined with "substantial and related claim under the copyright" laws; "[w]e do not read [§ 1338(b)] to limit pendent jurisdiction in appropriate cases over other types of claims."); *Schulman v. Huck Finn, Inc.*, 472 F.2d 864, 866 (8th Cir. 1973) (decided before enactment of 28 U.S.C. § 1367) ("[E]ven if plaintiff's second cause of action against the two moving defendants does not state a claim of 'unfair competition' and thus does not fall within § 1338(b), the Court nevertheless has the power to exercise jurisdiction over these State law claims by virtue of the more general doctrine of pendent jurisdiction.").



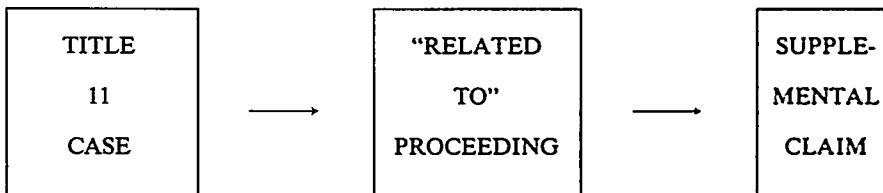
jurisdiction. In decisions that seek to reconcile §§ 1338(b) and 1367(a), a claim arising under a patent, copyright, or trademark statute had been joined with a claim arising under state law but not involving a claim of unfair competition; in these decisions, the courts viewed §§ 1338(b) and 1367(a) as distinct and alternative grants of supplemental jurisdiction. Decisions reconciling §§ 1334(b) and 1367(a) are very different, however, involving a much more expansive assertion of supplemental jurisdiction.<sup>450</sup> In many of these decisions the complaint had joined a civil proceeding "related to" a title 11 case with one related to the "related to" civil proceeding. Thus, in upholding these assertions of supplemental bankruptcy jurisdiction, the courts viewed §§ 1334 and 1367 as *cumulative* grants of jurisdiction; they viewed § 1334(b)'s grant of original jurisdiction as primary and § 1367(a)'s grant of jurisdiction as supplemental to it.<sup>451</sup> If supplemental trademark jurisdiction were construed as broadly as supplemental bankruptcy jurisdiction has been, courts would have sanctioned an exercise of jurisdiction over jurisdictionally insufficient state law claims factually related to a state law unfair competition claim that is, in turn, related to the federal trademark claim.<sup>452</sup> Court have not construed § 1338(b) this broadly. Nor should they.

Additional evidence can be found elsewhere in § 1367(a) that Congress understood § 1334(b)'s grant of bankruptcy jurisdiction to "expressly provid[e] otherwise" than the supplemental jurisdiction provision. Thus, § 1367(a) is inapplicable to bankruptcy jurisdiction.

450. See *supra* part II.A (discussing, in detail, cases exercising supplemental bankruptcy jurisdiction).

451. See *Publiker Indus., Inc. v. United States (In re Cuyahoga Equip. Corp.)*, 980 F.2d 110 (2d Cir. 1992) (although the court of appeals referred to primary claims as "related to" proceedings, they probably constituted "arising under" or "arising in" proceedings); *Petrolia Corp. v. Elam (In re Petrolia Corp.)*, 79 B.R. 686 (Bankr. E.D. Mich. 1987) (bankruptcy court found supplemental jurisdiction over claims of debtor's principal and corporation with which debtor was to have merged since they arose out of "common nucleus of operative fact" with debtor's identical "related to" proceeding); *Total Petroleum, Inc. v. Coral Petroleum, Inc. (In re Coral Petroleum, Inc.)*, 62 B.R. 699 (Bankr. S.D. Tex. 1986) (bankruptcy court exercised supplemental jurisdiction over claims against non-debtor-codefendant, despite settlement of "related to" proceeding against debtor-codefendant).

452. Pictorially, supplemental bankruptcy jurisdiction over claims related to a "related to" proceeding can be drawn as follows:



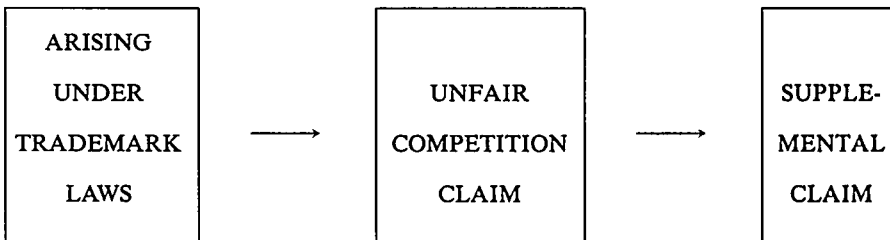
Thus, if courts were to construe supplemental trademark jurisdiction equally as broad, it would exercise jurisdiction over claims related to unfair competition claims related to a trademark action. This broad exercise could be drawn as follows:

2. "In Any Civil Action of Which the District Courts Have Original Jurisdiction, the District Courts Shall Have Supplemental Jurisdiction"

Bankruptcy litigation does not involve the commencement of "civil actions," unlike litigation commenced in the non-bankruptcy context. Rule 2 of the Federal Rules of Civil Procedure—which provides that "[t]here shall be one form of action to be known as 'civil action'"—is inapplicable in bankruptcy.<sup>453</sup> Instead, the units of litigation that occur in the context of a bankruptcy "case"<sup>454</sup> are defined either as an "adversary proceeding"<sup>455</sup> or a "contested matter."<sup>456</sup> And while an adversary proceeding is commenced by the filing of a complaint,<sup>457</sup> a contested matter is not. Contested matters are instead commenced by the filing of a motion.<sup>458</sup> Thus, the premise of § 1367(a)—original jurisdiction over a "civil action"—is unfulfilled in the bankruptcy context.

3. "Related to Claims in the Action Within Such Original Jurisdiction"

Section 1367(a) appears to divide the universe of permissible assertions of jurisdiction between claims within the "original jurisdiction" of the district court and claims within its "supplemental jurisdiction"<sup>459</sup>—requiring that the supplemental claim be sufficiently related to "claims in the action within such original jurisdiction."<sup>460</sup> Three definitions of the phrase "original jurisdiction" in § 1367(a) are plausible: (i) a claim may



453. See Fed. R. Bankr. P. 7002 (failing to incorporate Fed. R. Civ. P. 2 to bankruptcy procedure); see also *supra* note 3 (discussing irrelevance of term "civil action" to bankruptcy procedure).

454. For a definition of "title 11 case," see *supra* note 1.

455. For a definition of "adversary proceeding," see *supra* note 3.

456. For a definition of "contested matter," see *supra* note 3.

457. See Fed. R. Bankr. P. 7003 (incorporating Fed. R. Civ. P. to adversary proceedings; Rule 3 provides that "[a] civil action is commenced by filing a complaint with the court").

458. See Fed. R. Bankr. P. 9014 ("In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion . . .").

459. See 28 U.S.C. § 1367(a) (Supp. IV 1992) ("Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have *original jurisdiction*, the district courts shall have *supplemental jurisdiction* over all other claims that are so related to claims in the action within such *original jurisdiction* that they form part of the same case or controversy under Article III of the United States Constitution.") (emphasis added).

460. 28 U.S.C. § 1367(a) (Supp. IV 1992).

be within the "original jurisdiction" of the district courts for this purpose if there exists a statutory grant of federal jurisdiction explicitly referred to as "original;" (ii) a claim may be within the "original jurisdiction" of the district courts for purposes of § 1367(a) if it is among the enumerated categories of cases and controversies found in Article III of the Constitution; or (iii) a claim may fulfill this requirement of § 1367(a) if it constitutes a permissible exercise of "non-supplemental jurisdiction." Surprisingly, the first construction permits the broadest interpretation of the scope of supplemental bankruptcy jurisdiction permitted by § 1367(a).

In virtually all of the other provisions of title 28 that use the term "original jurisdiction," it is used to distinguish original jurisdiction from appellate jurisdiction.<sup>461</sup> An interpretation of § 1367(a) that defines the phrase "original jurisdiction" as used in that provision to refer to the "non-supplemental jurisdiction" of the district courts would thus be anomalous. Moreover, the dichotomy between "original" or "non-appellate" jurisdiction on one hand and "appellate" jurisdiction on the other finds support not only in the statutory grants of jurisdiction found in title 28, but also in Article III of the Constitution.<sup>462</sup>

a. *Section 1367(a)'s Use of the Phrase "Original Jurisdiction" May Refer to Statutory Grants of "Original Jurisdiction"*

Numerous provisions of title 28 grant federal jurisdiction to district courts.<sup>463</sup> Many of these provisions are phrased in terms of grants of

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461. Compare, e.g., 28 U.S.C. § 1334(b) (1988 & Supp. IV 1992) ("[T]he 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.") (emphasis added) with, e.g., 28 U.S.C. § 158(a) (1988) ("The district courts of the United States shall have *jurisdiction to hear appeals* from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges . . . under section 157 of this title.") (emphasis added).

462. See U.S. Const. art. III, § 2, cl. 2 ("In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have *original Jurisdiction*. In all the other Cases before mentioned, the supreme Court shall have *appellate Jurisdiction*, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.") (emphasis added).

463. See 28 U.S.C. §§ 1330-1340, 1343-1358, 1361-1365 (1988 & Supp. IV 1992); but see 28 U.S.C. §§ 1341, 1342, 1359 (1988) (limiting the exercise of federal jurisdiction rather than granting it). Section 1349 appears merely to limit federal jurisdiction, but by implication may be viewed as a grant of jurisdiction. See 28 U.S.C. § 1349 (1988) (providing that district courts do not have jurisdiction of civil actions by or against federally chartered corporations unless United States is owner of more than one-half of stock); Charles A. Wright, Handbook on the Law of Federal Courts § 17, at 65 & n.13 (3d ed. 1976) (explaining that Congress enacted 28 U.S.C. § 1349 in response to the Pacific Railroad Removal Cases, 115 U.S. 1, 11 (1885), which had held that there existed statutory "arising under" jurisdiction over state law tort actions against federally chartered railroad companies, and that this statutory grant of federal jurisdiction complied with the requirements of Article III of the Constitution); see also American Nat'l Red Cross v. S.G., 112 S. Ct. 2465, 2476 (1992) (relying on *Pacific Railroad Removal Cases* and others, to conclude that "Article III's 'arising under' jurisdiction is broad enough to authorize

"original jurisdiction" to the district courts.<sup>464</sup> In the limited instances in which a provision of title 28 grants "appellate jurisdiction" to the district courts, the phrase "original jurisdiction" is absent.<sup>465</sup> Section

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Congress to confer federal court jurisdiction over actions involving federally chartered corporations" like the Red Cross). By contrast, 28 U.S.C. § 1360(a) (1988) grants jurisdiction but not to the district courts, instead enumerating which States have jurisdiction over certain "civil causes of action between Indians or to which Indians are parties."

464. See, e.g., 28 U.S.C. § 1330(a) (granting to district courts "original jurisdiction" of "any nonjury civil action against a foreign state . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity"); § 1331 (granting to district courts "original jurisdiction" of "all civil actions arising under the Constitution, laws, or treaties of the United States"); § 1332(a) (granting to district courts "original jurisdiction" of "all civil actions where the matter in controversy exceeds the sum or value of \$50,000 . . . and is between—(1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state . . . as plaintiff and citizens of a State or of different States"); § 1333 (granting to district courts "original jurisdiction" of "[a]ny civil case of admiralty or maritime jurisdiction"); § 1335(a) (granting to district courts "original jurisdiction" of "any civil action of interpleader or in the nature of interpleader" relating to "money or property of the value of \$500 or more" if "[t]wo or more adverse claimants, of diverse citizenship . . . are claiming or may claim to be entitled to such money or property" and if "the plaintiff has deposited such money or property . . . into the registry of the court"); § 1337(a) (granting to district courts "original jurisdiction" of "any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies"); § 1338(a) (granting to district courts "original jurisdiction" of "any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trade-marks"); § 1339 (granting to district courts "original jurisdiction" of "any civil action arising under any Act of Congress relating to the postal service"); § 1340 (granting to district courts "original jurisdiction" of "any civil action arising under any Act of Congress providing for internal revenue"); § 1343(a) (granting to district courts "original jurisdiction" of "any civil action authorized by law to be commenced by any person" to recover damages or redress deprivation of various civil rights specified in federal statutes and the United States Constitution); § 1344 (granting to district courts "original jurisdiction" of "any civil action to recover possession of any office, . . . [with specified exceptions], authorized by law to be commenced, where in it appears that the sole question touching the title to office arises out of denial of the right to vote, to any citizen offering to vote, on account of race, color or previous condition of servitude"); § 1345 (granting to district court "original jurisdiction" of "all civil actions, suits or proceedings commenced by the United States"); § 1346(a) (granting to district courts "original jurisdiction" of specified civil actions against the United States); § 1347 (granting to district courts "original jurisdiction" of "any civil action commenced by any tenant in common or joint tenant for the partition of lands where the United States is one of the tenants in common or joint tenants"); § 1348 (granting to district courts "original jurisdiction" of "any civil action commenced by the United States . . . against any national banking association"); § 1349 (denying district courts jurisdiction of "any civil action by or against any corporation" simply because it was "incorporated by or under an Act of Congress, unless the United States is the owner" of greater than half of the capital stock); § 1351 (granting "original jurisdiction" to district courts in "all civil actions" against "consuls or vice consuls of foreign states," or members of a diplomatic "mission or members of their families"); § 1352 (granting original jurisdiction to the district courts, "concurrent with State courts, of any action on a bond executed under any law of the United States," excepting those matter which fall to the Court of International Trade).

465. See 28 U.S.C. § 158(a) (1988) (granting to district courts "jurisdiction to hear appeals from final judgments, orders, and decrees" of bankruptcy courts); § 636(c)(4) (1988) (granting to district courts appellate jurisdiction over judgment of magistrate

1367(a)'s requirement that supplemental claims be sufficiently related to "claims in the action within such original jurisdiction of the district courts" may, thus, require that the jurisdiction of the primary claim derive from some statutory grant of "non-appellate jurisdiction" other than § 1367. Under this construction of § 1367(a), assertions of supplemental bankruptcy jurisdiction are statutorily authorized without regard to whether the primary claim "arises under" title 11, or "arises in" or "relates to" a title 11 case, because 28 U.S.C. § 1334(b) grants district courts "original but not exclusive jurisdiction" of all three types of proceedings.<sup>466</sup>

b. *Section 1367(a)'s Use of the Phrase "Original Jurisdiction" May Refer to the Categories of Cases and Controversies Enumerated in Article III of the United States Constitution*

Section 1367(a)'s use of the phrase "original jurisdiction" may refer to the nine categories of cases and controversies enumerated in Article III, Section 2, Clause 1 of the Constitution.<sup>467</sup> Courts have interpreted these categories of cases and controversies as referring to the "original jurisdiction"—that is, the "non-appellate jurisdiction"—of the "inferior" federal courts.<sup>468</sup>

Under this construction, § 1367 clearly would authorize an assertion of supplemental jurisdiction where bankruptcy jurisdiction under § 1334(b) exists over the primary claim because it involves a proceeding "arising under" title 11. Article III, Section 2 enumerates "Cases . . . arising under . . . the Laws of the United States" as within the original jurisdiction of the district courts.<sup>469</sup> Whether, under this construction,

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courts under limited specified circumstances); § 1336(a) (1988) (granting to district courts "jurisdiction of any civil action to enforce, in whole or in part, any order of the Interstate Commerce Commission, and to enjoin or suspend, in whole or in part, any order of the Interstate Commerce Commission for the payment of money or the collection of fines, penalties, and forfeitures").

466. See 28 U.S.C. § 1334(b) (1988 & Supp. IV 1992); *but see* 28 U.S.C. § 1334(a) (conferring "original and exclusive jurisdiction of all cases under title 11") (emphasis added).

467. See *supra* note 1 (quoting Article III, § 2, cl. 1). Article III, Section 2, Clause 1 of the Constitution does not itself refer to the nine categories as grants of "original jurisdiction," but Clause 2 of this section of the Constitution does refer to some of these categories as within the "original jurisdiction" of the Supreme Court and to others as within the Supreme Court's "appellate jurisdiction." See U.S. Const. art. III, § 2, cl. 2.

468. See U.S. Const. art. III, § 1 ("The 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."); *see also, e.g.,* *Osborn v. Bank of the United States*, 22 U.S. 738, 820-21 (1824) (concluding that Article III's authorization to grant "appellate jurisdiction" and "original jurisdiction" to Supreme Court of the United States is co-extensive with authorization to grant "original jurisdiction" to inferior federal courts, and defining "original jurisdiction" as "non-appellate jurisdiction" in this context).

469. See *supra* notes 361-62 and accompanying text (discussing application of constitutional "category" test to "arising under" proceedings).

§ 1367 also would sanction an assertion of supplemental jurisdiction when the primary claim is subject to § 1334(b) bankruptcy jurisdiction as a proceeding "arising in" or "related to" a title 11 case depends on the breadth of Article III, Section 2.<sup>470</sup>

c. *Section 1367(a)'s Use of the Phrase "Original Jurisdiction" May Refer to "Non-Supplemental Jurisdiction" of District Courts*

Alternatively, § 1367(a)'s use of the phrase "original jurisdiction" may be *sui generis*. This language may indicate Congress' intent to describe a dichotomy different from the "appellate/non-appellate" distinction found in the Constitution and in statutory grants of federal jurisdiction other than that in § 1367(a).<sup>471</sup> It may indicate an intent to describe a dichotomy between supplemental and "non-supplemental" jurisdiction. A definition of the term "original jurisdiction" as "non-supplemental jurisdiction" works backward from a definition of "supplemental jurisdiction."<sup>472</sup>

Under this construction of § 1367(a), it is unclear whether Congress intended to confer supplemental bankruptcy jurisdiction to the extent courts have exercised this jurisdiction.<sup>473</sup> One could argue that the "non-supplemental" jurisdiction granted in a bankruptcy context is limited to that of "cases under title 11"<sup>474</sup> and "proceedings arising under title 11."<sup>475</sup> It may also be possible to view "arising in" jurisdiction as "non-supplemental jurisdiction."<sup>476</sup> Characterization of "related to" jurisdiction as "non-supplemental jurisdiction" in this sense may be much more difficult, however.<sup>477</sup>

One difficulty with this construction is that it may permit too broad a reading of § 1367(a). For example, if § 1367(a) defines "original jurisdiction" to mean "non-supplemental jurisdiction" then it may codify the judicially created doctrine of pendent appellate jurisdiction,<sup>478</sup> although there is no indication in legislative history that Congress intended to cast

470. For a discussion of the constitutionality of such an assertion of supplemental jurisdiction, see *supra* part III.A.

471. See *supra* notes 463-70 and accompanying text (discussing definition of "original jurisdiction" with reference to statutory and constitutional sources).

472. Supplemental jurisdiction can only be defined in the context of an assessment of its purposes. For a fuller discussion of the purposes of supplemental jurisdiction, see *supra* notes 378-85, *infra* notes 553-56 and accompanying text (discussing inapplicability of policies generally supporting exercise of supplemental jurisdiction when applied to bankruptcy context).

473. See *supra* part II (discussing this case law in detail).

474. 28 U.S.C. § 1334(a) (1988 & Supp. IV 1992).

475. 28 U.S.C. § 1334(b) (1988 & Supp. IV 1992).

476. See *supra* notes 302-17, 338 and accompanying text (discussing whether "arising in" jurisdiction constitutes grant of supplemental or non-supplemental jurisdiction).

477. See *supra* notes 318-34 and accompanying text (arguing that "related to" jurisdiction may constitute grant of "arising under" jurisdiction and noting difficulties with this contention).

478. See, e.g., *Akers v. Caperton*, 998 F.2d 220 (4th Cir. 1993) (exercising pendent appellate jurisdiction).

so broad a net.<sup>479</sup> Another difficulty is that it requires the awkward conclusion that Congress meant “non-appellate jurisdiction” when it refers to the “original jurisdiction” of district courts in most of title 28, but meant “non-supplemental jurisdiction” when it refers to the “original jurisdiction” of district courts in 28 U.S.C. § 1367(a).<sup>480</sup> This construction is most awkward as applied to 28 U.S.C. § 1338(b), which grants supplemental jurisdiction over “a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection or trade-mark laws” but which refers to this grant as “original jurisdiction.”<sup>481</sup>

#### 4. “The District Courts Shall Have Supplemental Jurisdiction”

The plain language of § 1367(a) refers only to the authority of the district courts to exercise supplemental jurisdiction.<sup>482</sup> It does not expressly grant this power to the bankruptcy courts.<sup>483</sup>

The plain language of 28 U.S.C. § 157(a) also supports a construction which disallows bankruptcy courts from exercising supplemental jurisdiction.<sup>484</sup> That section permits district courts to “provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.”<sup>485</sup> Although extremely broad, this reference of jurisdiction to bankruptcy courts does not expressly include jurisdiction supplemental to proceedings “arising under” title 11, or “arising in” or “related to” a title 11 case. Thus, read together with 28 U.S.C. § 157(a), the reference to “the district courts” in § 1367(a) should be viewed as intentionally exclusive of the bankruptcy courts.<sup>486</sup>

In addition, 28 U.S.C. § 157(c) supports this conclusion. Section 157(c)(1) permits a bankruptcy judge to “hear a proceeding that is not a

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479. See generally H.R. Rep. No. 734, 101st Cong., 2d Sess. (1990).

480. This is not to say that the Supreme Court has not construed the plain language of a statute to mean one thing in one provision and the very same plain language to mean something quite different in another related provision. See, e.g., *Dewsnup v. Timm*, 112 S. Ct. 773, 778-79 (1992) (term “allowed secured claim” defined to mean different things in 11 U.S.C. § 506(a) and (d)).

481. See 28 U.S.C. § 1338(b) (1988).

482. See 28 U.S.C. § 1367(a) (Supp. IV 1992) (“in any civil action of which the *district courts* have original jurisdiction, the *district courts* shall have supplemental jurisdiction [as provided therein]”) (emphasis added).

483. See *supra* part III.A.2 (discussing constitutional issues by exercise of supplemental jurisdiction by non-Article III bankruptcy courts).

484. *But see* *Cook v. United States (In re Earl Roggenbuck Farms, Inc.)*, 51 B.R. 913, 925 (Bankr. E.D. Mich. 1985) (explaining that § 157(a) supports finding that non-Article III bankruptcy courts empowered to exercise supplemental bankruptcy jurisdiction because nothing in that statute excludes reference of such jurisdiction).

485. 28 U.S.C. § 157(a) (1988).

486. Moreover, nothing in the legislative history of the Judicial Improvements Act of 1990 indicates an intent to empower bankruptcy courts to exercise the supplemental jurisdiction granted in § 1367(a).

core proceeding but that is otherwise related to a case under title 11."<sup>487</sup> Absent the consent of the parties, the bankruptcy judge's power in "related to" proceedings is severely limited.<sup>488</sup> Legislative history and case law both indicate that constitutional concerns explain the limited power of a bankruptcy court to "hear" a "related to" proceeding but not enter the final order in the proceeding.<sup>489</sup> Given that there exist similar constitutional issues relating to the exercise of supplemental jurisdiction by a non-Article III bankruptcy court,<sup>490</sup> it seems likely that Congress would have similarly limited the power of bankruptcy courts to "hear" and not "determine" supplemental claims, and yet § 157(c)(1) speaks only of "a proceeding that is not a core proceeding but that is otherwise related to a case under title 11."<sup>491</sup> It is silent with regard to the power of a bankruptcy court to "hear" or "determine" a supplemental claim—a proceeding that is neither core nor related to the title 11 case. A proceeding requiring supplemental jurisdiction for the court to have the power to act would not be "related to" the title 11 case; if it were, resort to supplemental jurisdiction would not be necessary. Since § 157(c) grants to bankruptcy courts the more limited power to "hear" proceedings "related to" a title 11 case, without mention of their power to act in instances where this relationship is absent, it should not be expanded to include the power to exercise supplemental jurisdiction.

Did Congress intend, in § 1367, to grant to district courts jurisdiction supplemental to the bankruptcy jurisdiction conferred by § 1334(b)? Did it intend to grant supplemental jurisdiction to bankruptcy courts? Section 1367 is ambiguous. If Congress did intend to confer supplemental bankruptcy jurisdiction on these courts, it may have exceeded the limitations which Article III of the Constitution places upon Congress' power to bestow jurisdiction upon federal courts. Given the substantial consti-

487. 28 U.S.C. § 157(c)(1) (1988).

488. *See id.* (providing that the bankruptcy court may "hear" such matters, but that the district court shall enter any final orders or judgments and conduct a *de novo* review of any findings of fact or law to which any party has specifically objected).

489. *See* 130 Cong. Rec. S8891 (daily ed. June 29, 1984) (remarks of Sen. Hatch), reprinted in 1984 U.S.C.C.A.N. 590, 591 (voicing concern that bankruptcy jurisdictional provisions may exceed limitations of Article III of the Constitution in permitting "purely State law claims which do not arise under the Bankruptcy Code . . . to be tried in [federal] courts."). Because of these and other constitutional concerns, courts have often said that they "should avoid characterizing a proceeding as 'core' if to do so would raise constitutional problems." *In re Castlerock Properties*, 781 F.2d 159, 162 (9th Cir. 1986); *see also* *Pettibone Corp. v. Easley*, 935 F.2d 120, 123 (7th Cir. 1991) (precluding bankruptcy court judges from resolving state law tort claims based on § 157); *IRS v. Bricknell Inv. Corp.* (*In re Bricknell Inv. Corp.*), 922 F.2d 696, 701 (11th Cir. 1991) (application for attorney's fees under 26 U.S.C. § 7430 is a "non-core" proceeding); *Taxel v. Electronic Sports Research* (*In re Cinematronics, Inc.*), 916 F.2d 1444, 1449-50 (9th Cir. 1990) (supporting limited power of bankruptcy court to hear "core" claims where constitutional problems would result); *Gower v. Farmers Home Admin.* (*In re Davis*), 899 F.2d 1136, 1140-42 (11th Cir.) (application for attorney's fees under 28 U.S.C. § 2412(d)(1)(A) is not a "core" proceeding), *cert. denied*, 111 S. Ct. 510 (1990).

490. *See supra* part III.A.2 (discussing these constitutional issues).

491. 28 U.S.C. § 157(c)(1) (1988).



tutional questions surrounding such an exercise of jurisdiction, these ambiguities should be resolved to avoid a finding of unconstitutionality. Section 1367 should be construed to preclude the exercise of jurisdiction supplemental to "arising in" and "related to" proceedings by a district court. It also should be construed as inapplicable to bankruptcy courts, conferring no supplemental jurisdiction on these non-Article III courts.

#### IV. POLICY CONSIDERATIONS FAVORING A LIMITATION OF SUPPLEMENTAL BANKRUPTCY JURISDICTION

This part argues that, even if authorized by the Constitution and by statute, supplemental bankruptcy jurisdiction should be limited by Congress to include only supplemental claims related to an "arising under" or "arising in" proceeding, and possibly to include supplemental claims related to a "related to" proceeding that involves property of the estate. It concludes that the policies and purposes of supplemental jurisdiction are best reconciled with the purposes of the bankruptcy jurisdictional provision when district courts are precluded from exercising supplemental bankruptcy jurisdiction over claims related to "related to" proceedings, and statutorily permitted to decline other assertions of supplemental bankruptcy jurisdiction when the exercise would contravene important bankruptcy policies.

Bankruptcy jurisdiction exists to facilitate the efficient resolution of a debtor's estate, including litigation that "affects the amount of property available for distribution or the allocation of property among creditors,"<sup>492</sup> but does not exist to facilitate the resolution of litigation unrelated to the estate.<sup>493</sup> An assertion of jurisdiction supplemental to a "related to" proceeding may be consistent with the efficient resolution of complex litigation, a single claim of which "might have a conceivable effect" on the estate, and yet actually hinder resolution of the bankruptcy case.<sup>494</sup> Moreover, the policies generally favoring an exercise of supplemental jurisdiction in ordinary civil litigation are not wholly applicable in the context of bankruptcy.<sup>495</sup>

##### A. *A Principal Purpose of Bankruptcy Jurisdiction Is to Facilitate the Resolution of an Estate*

Congress should prohibit the exercise of supplemental bankruptcy jurisdiction when the exercise would be inconsistent with the fundamental purpose of a broad grant of bankruptcy jurisdiction: the efficient resolution of claims against and distributions from a bankruptcy estate. The

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492. *Elscont, Inc. v. First Wis. Fin. Corp. (In re Xonics, Inc.)*, 813 F.2d 127, 131 (7th Cir. 1987) (defining scope of "related to" jurisdiction).

493. *See infra* part IV.A.

494. *See id.*

495. *See infra* part IV.B.

exercise of supplemental bankruptcy jurisdiction could hinder closure of a given bankruptcy case depending upon the factual circumstances.

When Congress determined to expand bankruptcy jurisdiction with the enactment of the Bankruptcy Reform Act of 1978, it indicated that it was motivated by a desire to facilitate the resolution of an estate:

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>496</sup>

It understood that its broad grant of jurisdiction was not without limits, in that questions regarding the scope of any statutory grant of federal jurisdiction are inescapable.<sup>497</sup> When discussing the parameters of those limitations, Congress repeatedly referred to them as relating to the resolution of a bankruptcy case.<sup>498</sup>

Congress justified this expansive grant of jurisdiction by reference to the jurisdictional provisions of the Bankruptcy Acts of 1841<sup>499</sup> and

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496. H.R. Rep. No. 595, 95th Cong., 1st Sess. 46 (1977); *see also id.* at 48-49 ("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.").

497. *See id.* at 46 n.29 ("Litigation of jurisdictional issues would not be eliminated since the existence of jurisdiction is always questionable in a federal tribunal. As part of the federal government the bankruptcy courts would be courts of limited jurisdiction, and it would always be open to a party haled into such a court to object that there was not sufficient connection between the litigation and any legitimate federal concern to warrant the assumption of jurisdiction.").

498. *See id.* at 46 ("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. It would foster the development of a more uniform, cohesive body of substantive and procedural law which would be applicable to the administration of estates under the Bankruptcy Act."); at 47-48 ("There appears to be no reason why congress cannot in the exercise of its power under the Bankruptcy Clause of the Constitution confer jurisdiction over all litigation having a significant connection with bankruptcy."); at 48 ("Congress may be said to have given comprehensive jurisdiction to the bankruptcy courts under the Act with respect to all litigation arising from the administration of the estate of any eligible or amenable debtor . . . ."); at 48 ("H.R. 8200 grants the bankruptcy courts broad and complete jurisdiction over all matters and proceedings that arise in connection with bankruptcy cases.") (emphasis added).

499. The 1841 Act broadly conferred upon district courts "jurisdiction in all matters and proceedings in bankruptcy arising under this act . . . the said jurisdiction to be exercised summarily, in the nature of summary proceedings in equity." Bankruptcy Act of 1841, ch. 9, sec. 6., 5 Stat. 440, 445 (repealed). It further provided that this jurisdiction extended "to all cases and controversies in bankruptcy" involving the estate. *Id.* Section 6 of the 1841 Act provided that

the jurisdiction hereby conferred on the district court shall extend to all cases

1867,<sup>500</sup> which were "almost as extensive"<sup>501</sup> and upheld by the Supreme

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

*Id.*; see also *Ex parte Christy*, 44 U.S. (3 How.) 292, 311-12 (1845) (Story, J.) (construing jurisdictional provisions of 1841 Bankruptcy Act to hold that federal district court, when sitting in bankruptcy, had jurisdiction to determine validity and extent of liens and mortgages against debtor's property, whether or not lienor or mortgagee had filed proof of claim against estate).

500. The jurisdictional provisions of the 1867 Act closely resembled those in the 1841 Act. It provided that the district courts are "courts of bankruptcy, and they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy," and that this grant extended to enumerated "cases and controversies" involving the bankruptcy estate. Bankruptcy Act of 1867, ch. 176, sec. 1, 14 Stat. 517, 517 (repealed). The 1867 Act specifically provided:

the jurisdiction hereby conferred shall extend to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all parties; and to the marshalling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors; and to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy.

*Id.*; see also *Phelps v. Sellick*, 19 F. Cas. 463, 464 (C.C.E.D. Mich. 1873) (No. 11,079) (court had little difficulty in concluding "[t]hat all the creditors of the bankrupt, secured as well as unsecured, become and are at once, by virtue of the bankruptcy, parties to the proceedings, and they and their debts are thereby brought under and subject to the sole and exclusive jurisdiction and control of the bankruptcy court; and that such jurisdiction and control exist and may be enforced as well before as after proof of debt").

501. H.R. Rep. 595, 95th Cong., 1st Sess. 47 (1977). According to House Reports:

The constitutionality of a grant of a jurisdiction in such comprehensive terms should not be subject to any serious doubt. The jurisdictional grants to the court of bankruptcy by the Acts of 1841 and 1867 were almost as extensive, and the Supreme Court gave the provisions of those Acts a generous construction and approval of their constitutionality. There appears to be no reason why Congress cannot in the exercise of its power under the Bankruptcy Clause of the Constitution confer jurisdiction *over all litigation having a significant connection with bankruptcy*. Indeed, it could not be contended otherwise without challenging the jurisdictional provisions of the present Bankruptcy Act [of 1898]. Section 2a(7) of the [1898] Act confers jurisdiction on the courts of bankruptcy over the determination of controversies "in relation to" the estates of bankrupts "except as herein otherwise provided." By clear implication § 23b [of the 1898 Act] recognizes that courts of bankruptcy have jurisdiction of any action brought there by a receiver or trustee "by consent of the defendant." Since consent of the parties cannot create jurisdiction of the subject matter in a court which has not been vested with it by a valid legislative act, Congress may be said to have given comprehensive jurisdiction to the bankruptcy courts under the Act with respect to all litigation arising from the administration of the estate of any eligible or amenable debtor, while in certain situations limiting the exercise of this jurisdiction to accommodate the convenience of adversaries of a receiver or trustee.

Court as constitutional.<sup>502</sup> Further, in upholding the broad grants of jurisdiction under the Bankruptcy Acts of 1841 and 1867, the Supreme Court noted that the "manifest object" of these jurisdictional provisions

was to provide speedy proceedings, and the ascertainment and adjustment of all claims and rights in favor of or against the bankrupt's estate, in the most expeditious manner.<sup>503</sup>

Nonetheless, policy arguments favoring an expansive grant of bankruptcy jurisdiction apply only to those proceedings "arising under title 11, or arising in or related to cases under title 11."<sup>504</sup> The exercise of jurisdiction over these proceedings facilitates the goal of expeditious administration of bankruptcy cases.<sup>505</sup> Yet, these strong policy arguments may not be present for an assertion of jurisdiction over a supplemental claim which relates only to the "arising under," "arising in" or "related to" proceeding, and not to the title 11 case itself. An assertion of such supplemental bankruptcy jurisdiction may hinder rather than facilitate resolution of the title 11 case because, by definition, the supplemental proceeding has no conceivable effect on distributions from the estate or the administration of the estate.<sup>506</sup> Resolution of the supplemental claim may delay closure of the case<sup>507</sup> if it distracts the court, trustee, debtor-

*Id.* at 47-48 (emphasis added) (citations omitted).

502. See *Ex parte* Christy, 44 U.S. (3 How.) 292, 311-12 (1845) (1841 Act); *Lathrop v. Drake*, 91 U.S. 516, 518 (1875) (1867 Act); see also *supra* notes 272-73 (discussing cases in which the Supreme Court, in dicta, opined that broad grants of bankruptcy jurisdiction under 1898 Bankruptcy Act and 1978 Bankruptcy Reform Act were constitutional).

503. *Ex parte* Christy, 44 U.S. (3 How.) 292, 314-15 (1845). In reaching this conclusion the Court noted that a broad grant of federal jurisdiction was "indispensable" to the realization of this goal. See *id.* at 311-12 ("For this purpose it was indispensable that an entire system adequate to that end should be provided by Congress, capable of being worked out through the instrumentality of its own courts, independently of all aid and assistance from any other tribunals over which it could exercise no effectual control. . . . [I]t is manifest that the purposes so essential to the just operation of the bankrupt system, could scarcely be accomplished except by clothing the courts of the United States sitting in bankruptcy with the most ample powers and jurisdiction to accomplish them; and it would be a matter of extreme surprise if, when Congress had thus required the end, they should at the same time have withheld the means by which alone it could be successfully reached."); see also *Lathrop*, 91 U.S. at 518 ("But a uniform system of bankruptcy, national in its character, ought to be capable of execution in the national tribunals, without dependence upon those of the States in which it is possible that embarrassments might arise."); *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 346 (1874) ("It is obviously one of the purposes of the Bankrupt law [of 1867], that there should be a speedy disposition of the bankrupt's assets.").

504. 28 U.S.C. § 1334(b) (1988 & Supp. IV 1992).

505. See *supra* notes 496-503 and accompanying text (discussing policy of bankruptcy jurisdiction).

506. See *supra* notes 85-98 and accompanying text (discussing various definitions of "related to" jurisdiction).

507. Resolution of a supplemental claim, standing alone, is not likely to delay distributions to creditors, for if it were to have this effect it would constitute a "related to" proceeding. See *supra* notes 85-98 and accompanying text (defining "related to" jurisdiction). Nonetheless, the supplemental claim would be joined to an "arising under," "arising in" or "related to" proceeding which, by definition, will need to be resolved before distributions to creditors can be completed. Moreover, even though distributions to cred-

in-possession, creditors' committee or other interested parties from completing necessary tasks in a timely fashion.

This is not to say that judicial economies never flow from an exercise of supplemental bankruptcy jurisdiction. They do. Because the supplemental proceeding involves a common factual nexus with the primary proceeding, litigation in a single forum would be more efficient than requiring the parties to litigate the primary claim in federal court and the supplemental claim in state court. The efficiencies, however, relate to the resolution of the proceedings between the litigants rather than to the resolution of the bankruptcy case as a whole. The economies to the litigants may be offset by diseconomies to the bankruptcy case as a whole. Whether an exercise of supplemental bankruptcy jurisdiction presents an impediment to the completion of a bankruptcy case differs depending upon the factual circumstances.

This argument against exercise of supplemental bankruptcy jurisdiction, which follows from the purposes of bankruptcy jurisdiction, is strongest as applied to an assertion of jurisdiction of a claim supplemental to a "related to" proceeding between non-debtor third parties. Recall the hypothetical involving the priority dispute between secured creditors of the debtor and the related third-party malpractice action brought by one of the lenders against its attorneys.<sup>508</sup> Because the priority dispute might conceivably affect distributions to creditors from the estate, it is sufficiently "related to" the title 11 case to justify an assertion of bankruptcy jurisdiction, even though the property in dispute is no longer property of the estate. Thus, an exercise of jurisdiction over the priority dispute is consistent with the bankruptcy policy favoring an expeditious resolution of the debtor's bankruptcy case.<sup>509</sup> In contrast, an exercise of supplemental bankruptcy jurisdiction over the malpractice action sharing a "common nucleus of operative fact" with the "related to" proceeding is inconsistent with this bankruptcy policy because it can only slow down resolution of the debtor's estate.

By contrast, when an assertion of jurisdiction supplemental to an "arising under" or "arising in" proceeding is considered in light of the bankruptcy policy favoring speedy resolution of the case, the result dif-

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itors are not directly held up pending resolution of the supplemental claim, they may be held up indirectly. The time which district and bankruptcy judges have is limited, and time spent resolving a supplemental claim likely means that some other proceeding will be delayed.

508. See *supra* notes 28-37 and accompanying text (detailing this hypothetical).

509. Because of the expansive definition of "related to" jurisdiction, the bankruptcy policies are, in some proceedings, only weakly furthered by the assertion of jurisdiction. See *Elscont, Inc. v. First Wis. Fin. Corp. (In re Xonics, Inc.)*, 813 F.2d 127, 131 (7th Cir. 1987) ("There is jurisdiction under § 157(c)(1) only when the dispute is 'related to' the bankruptcy—meaning that it affects the amount of property available for distribution or the allocation of property among creditors . . . . The bankruptcy jurisdiction is designed to provide a single forum for dealing with all claims to the bankrupt's assets. It extends no farther than its purpose.").

fers depending on the circumstances. For example, courts<sup>510</sup> otherwise uncertain as to the propriety of an exercise of supplemental bankruptcy jurisdiction have indicated in dicta that they would exercise jurisdiction over a request for a declaratory judgment establishing the validity and amount of a debt which is supplemental to an objection to the debtor's discharge<sup>511</sup> or the dischargeability of the debt at issue.<sup>512</sup>

A proceeding objecting to discharge or the dischargeability of an obligation clearly "arises under" title 11, as the bases for these claims<sup>513</sup> derive from 11 U.S.C. §§ 727 or 523. A claim seeking a declaration as to the validity and amount of the debt at issue in this "arising under" proceeding will undoubtedly involve "a common nucleus of operative fact" between the supplemental and primary claims. Moreover, resolution of this sort of supplemental claim may be viewed as consistent with expeditious resolution of the bankruptcy case, even though arguably outside the scope of "related to" jurisdiction. In a case in which there will be distributions to creditors,<sup>514</sup> the declaratory action can be viewed as assisting in the resolution of the case because the Bankruptcy Code generally has not been interpreted to prevent non-dischargeable claims from receiving distributions from the estate.<sup>515</sup> Thus, the declaratory action can be

510. See Official Creditors' Comm. of Prods. Liab. & Personal Injury Claimants v. International Ins. Co. (*In re Pettibone Corp.*), 135 B.R. 847, 852 (Bankr. N.D. Ill. 1992) (stating in dicta that "except to enter a dollar judgment in actions to bar dischargeability," it doubted it had general ancillary jurisdiction); see also Aerni v. Columbus Fed. Sav. (*In re Aerni*), 86 B.R. 203, 206 (Bankr. D. Neb. 1988) (exercising supplemental jurisdiction over claim "related to" objection to debtor's discharge).

511. See 11 U.S.C. § 727 (1988) (describing grounds on which chapter 7 debtor may be denied bankruptcy discharge).

512. See 11 U.S.C. § 523 (1988 & Supp. IV 1992) (describing specific debts from which individual debtor may not receive bankruptcy discharge).

513. The term "claim" is used here in the procedural sense to refer to a unit of litigation within an adversary proceeding. See *supra* note 3 (discussion definition of "claim" in greater detail).

514. In cases in which there is unencumbered, nonexempt property of the estate, there will be property available for distributions to creditors. See 11 U.S.C. §§ 725, 726 (1988) (establishing priority of distributions to creditors in chapter 7 liquidation).

515. In the chapter 13 context, courts are divided on whether non-dischargeable claims are entitled to distributions pursuant to the repayment plan. Some courts have held that chapter 13 plans proposing to pay non-dischargeable child support payments on a deferred basis are not proposed in good faith as required by 11 U.S.C. § 1325(a)(3) (1988). See e.g., Pacana v. Pacana (*In re Pacana*), 125 B.R. 19, 25 (Bankr. 9th Cir. 1991) (absent written consent of recipient, bad faith to propose chapter 13 plan proposing deferred payment of back child support payments); *In re Harris*, 132 B.R. 166, 170 (Bankr. S.D. Iowa 1989) (same); *In re Santa Maria*, 128 B.R. 32, 37 (Bankr. N.D.N.Y. 1991) (same). In a distinct line of cases, other courts have not only permitted the holders of non-dischargeable claims to receive distributions pursuant to a chapter 13 plan, but have permitted the debtor to separately classify non-dischargeable claims from his or her other claims, notwithstanding the direction in 11 U.S.C. § 1322(b)(1) (1988) that a chapter 13 plan "may not discriminate unfairly against any class" of unsecured claims. See, e.g., Mickelson v. Leser (*In re Leser*), 939 F.2d 669, 672 (8th Cir. 1991) (separate classification and disparate treatment justified because child support claims non-dischargeable in chapter 13 anyway); *In re Saulter*, 133 B.R. 148, 150 (Bankr. W.D. Mo. 1991) (separate classification justified because, after 1990 amendment to Code, student loan liability will

viewed as tantamount to a proof of claim.<sup>516</sup>

Even in a "no-asset" case<sup>517</sup> the declaratory action might be viewed as consistent with efficient resolution of the case, because the Code provides for the possibility that the trustee discovers assets after the case is closed.<sup>518</sup> In this event, the debtor's bankruptcy case would be reopened<sup>519</sup> and creditors notified of the need to file proofs of claim against the estate.<sup>520</sup> Even the creditor whose claim was held to be non-dischargeable would be entitled to file a proof of claim and receive distributions from the reopened estate. Judgment on the declaratory action could be viewed as streamlining this process, although only marginally.<sup>521</sup>

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typically survive discharge). Yet other decisions have held that the separate classification of non-dischargeable claims, other than non-dischargeable child support claims, is unauthorized by the Code. See, e.g., *In re Schieber*, 129 B.R. 604, 607 (Bankr. D. Minn. 1991) (separate classification of student loans not justified, notwithstanding 1990 amendment rendering most student loans non-dischargeable; court distinguished case in same district permitting separate classification of child support payments since basis for separate classification in that case was policy importance of ensuring support of children not non-dischargeability of support payments); *In re Lawson*, 93 B.R. 979, 982 (Bankr. N.D. Ill. 1988) (same, critical of four-factor test).

516. Litigation surrounding a proof of claim "arises in" a title 11 case for purposes of § 1334(b). See *supra* notes 75-84 and accompanying text (discussing "arising in" jurisdiction in greater detail). With this characterization, jurisdiction over the declaratory action may not be merely supplemental jurisdiction.

517. See Fed. R. Bankr. P. 2002(e) (defining a "no-asset" case as a "chapter 7 liquidation case [in which] . . . it appears from the schedules that there are no assets from which a dividend can be paid"). In "no-asset" cases, Rule 2002(e) permits the trustee to notify creditors of this fact and that it is unnecessary to file claims until further notice. See Fed. R. Bankr. P. 2002(e). As a result, the relationship between the creditors' declaratory action and resolution of the bankruptcy estate is much more attenuated.

518. See 11 U.S.C. § 727(d)(2), (e) (1988) (permitting trustee to request revocation of discharge, within later of close of case or one year after discharge, if "debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee").

519. See 11 U.S.C. § 350(b) (1988) ("A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause."); see also Fed. R. Bankr. P. 5010 (setting forth procedure for reopening case).

520. See Fed. R. Bankr. P. 2002(e) ("In a chapter 7 liquidation case, if it appears from the schedules that there are no assets from which a dividend can be paid, the notice of the meeting of creditors may include a statement to that effect; that is unnecessary to file claims; and that if sufficient assets become available for the payment of a dividend, further notice will be given for the filing of claims."); Fed. R. Bankr. P. 3002 (c)(5) (extending time for filing proofs of claim against chapter 7 estate "[i]f notice of insufficient assets to pay a dividend was given to creditors pursuant to Rule 2002(e), and subsequently the trustee notifies the court that payment of a dividend appears possible").

521. To some extent, characterization of the declaratory action as a proof of claim contingent upon a later reopening of the debtor's bankruptcy case may support the conclusion that jurisdiction over the declaratory action is "related to," not supplemental, jurisdiction in that the claim could have a "conceivable effect" on administration of the estate. See *supra* notes 85-98 and accompanying text (discussing "related to" jurisdiction in greater detail). Courts, however, have not uniformly defined "related to" jurisdiction this broadly.

Nothing, however, requires a creditor holding a non-dischargeable claim to file a proof of claim against the estate and seek distributions from the estate.<sup>522</sup> Indeed, tactical considerations may lead the creditor to waive this right.<sup>523</sup> Under these circumstances, the exercise of supplemental bankruptcy jurisdiction over the declaratory action may hinder rather than assist the resolution of the bankruptcy case.<sup>524</sup> The only economy that judgment in the declaratory action would provide is to the creditor collecting on the obligation in a non-bankruptcy context.

If the trustee, debtor-in-possession, or other representative of the estate is a party to the action, the exercise of supplemental bankruptcy jurisdiction might be justified as fostering an efficient resolution of the administration of the bankruptcy estate. Consider a series of hypotheticals. First, imagine that in response to an action brought by the trustee to avoid a transaction as preferential or fraudulent the defendant raises counterclaims alleging breach of contract. These counterclaims are likely to be viewed as "related to" the title 11 case, even if, for tactical reasons,<sup>525</sup> the defendant has not filed a proof of claim against the

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522. See 11 U.S.C. § 501 (1988) (providing that creditors "may" file proof of claim).

523. The filing of a proof of claim may be viewed as consent to the exercise of jurisdiction by a non-Article III bankruptcy judge for purposes of 28 U.S.C. § 157(c)(2) (1988) (permitting bankruptcy judge to "hear and determine" even "related to" proceedings if litigants consent to such exercise). Although courts disagree as to whether this consent can be implied, *see supra* note 423, it is clear that the filing of a proof of claim constitutes consent to the exercise of bankruptcy court jurisdiction over related counterclaims. See 28 U.S.C. § 157(b)(2)(C) (1988) (defining "core proceedings" as including "counterclaims by the estate against persons filing claims against the estate"); *but see* *Piombo Corp. v. Castlerock Properties (In re Castlerock Properties)*, 781 F.2d 159, 162-63 (9th Cir. 1986) (court of appeals declined to find that creditor consented to exercise of bankruptcy jurisdiction over counterclaims asserted by debtor to creditor's request for relief from automatic stay, notwithstanding creditor's subsequent filing of proof of claim); *Northwestern Mut. Life Ins. Co. v. Axton (In re Axton)*, 641 F.2d 1262, 1268 (9th Cir. 1981) (decided under Bankruptcy Act of 1898) (court of appeals declined to find that lessor had consented to exercise of bankruptcy court jurisdiction although lessor had asserted entitlement to administrative expense for debtor's use and occupancy of premises). Determination by the bankruptcy court of a proof of claim filed against the estate may preclude subsequent claims under the doctrine of *res judicata*. See *Bank of Lafayette v. Baudoin (In re Baudoin)*, 981 F.2d 736, 737 (5th Cir. 1993) (court of appeals dismissed lender liability action as barred by doctrine of *res judicata*; bankruptcy court previously had allowed proof of claim filed by defendant). Moreover, the filing of a proof of claim forecloses the exercise of important procedural rights by the claimant. See *Langenkamp v. Culp*, 498 U.S. 42, 44-45 (1990) (*per curiam*) (filing of proof of claim against estate precludes exercise of right to trial by jury by such claimant).

524. The debtor, rather than the bankruptcy trustee, is the proper defendant to both the objection to discharge and the related declaratory action. Therefore, one cannot argue that supplemental jurisdiction over the declaratory action assists in resolution of the bankruptcy case because it frees the trustee from the responsibility to litigate the declaratory action in a nonbankruptcy forum.

525. See *supra* note 524 (discussing these tactical considerations); *see also* 11 U.S.C. § 502(d) (1988) (disallowing claim of transferee in avoidable transfer unless transferee has disgorged benefit received from such transfer). Because in this hypothetical the defendant has not filed a proof of claim, it is not entitled to receive a dividend from the estate. See Fed. R. Bankr. P. 3002(a) (1988) (generally requiring holder of claim to file proof of claim to receive dividend in bankruptcy case) and Fed. R. Bankr. P. 3003(c)(2) (requiring



estate.<sup>526</sup>

If, on the other hand, the state law counterclaims are raised in an avoidance action brought by the debtor, rather than the trustee,<sup>527</sup> they may not be viewed as "related to" the title 11 case.<sup>528</sup> The case for exercise of supplemental bankruptcy jurisdiction is concomitantly weak. The debtor's estate can be administered without resolution of the supplemental counterclaim, thus, it seems likely that an exercise of supplemental jurisdiction over the counterclaim will stall that resolution.<sup>529</sup>

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holder of disputed claim to file proof of claim to receive dividend from chapter 11 estate). The counterclaim could affect the administration of the debtor's estate in another way; if the counterclaim is successful but the defense against the debtor's primary action is not, the defendant's liability to the estate will be reduced by the recovery in the counterclaim. In addition, failure to file a proof of claim will preclude the defendant from recovering any amount from the estate, even if recovery on the counterclaim exceeds recovery on the debtor's action.

526. See *supra* notes 85-98 (discussing "related to" jurisdiction); see also 28 U.S.C. § 157(b)(2)(C) (1988) (defining "core proceedings" to include "counterclaims by the estate against persons filing claims against the estate"). Courts differ as to the breadth of this provision. Some hold that a counterclaim based on a state law cause of action is not "core," even though a proof of claim was filed by the party against whom the claim was asserted, unless the state law claim itself constitutionally can be heard by the bankruptcy court. See, e.g., *Nanodata Computer Corp. v. Kollmorgen Corp.* (*In re Nanodata Computer Corp.*), 52 B.R. 334, 338-43 (Bankr. W.D.N.Y. 1985) (holding that state law issues are not "core" matters, and merit only "related to" jurisdiction as governed by § 157(c)); see also *Piombo Corp. v. Castlerock Properties* (*In re Castlerock Properties*), 781 F.2d 159, 162-63 (9th Cir. 1986) (debtor filed state law counterclaims to motion for relief from automatic stay to continue pending state court action; after bankruptcy court denied motion to dismiss counterclaims, state court plaintiff filed proof of claim; court of appeals held that bankruptcy court did not have jurisdiction over counterclaim when proof of claim was filed after court had asserted jurisdiction over counterclaims). Other courts read subsection (C) literally to find "core" status for counterclaims based on state law whenever the counterclaims are against a party who filed a proof of claim. Some, however, would limit this definition to counterclaims arising out of the same transaction as that which gave rise to the proof of claim. See, e.g., *Macon Prestressed Concrete Co. v. Duke*, 46 B.R. 727, 731 (Bankr. M.D. Ga. 1985) (finding jurisdiction for debtor's counterclaim because it was "intimately connected" with debtor's petition for reorganization).

527. See 11 U.S.C. § 522(f) (1988) (permitting debtor to avoid certain judicial liens, or non-possessory, non-purchase-money security interests, which impair an exemption to which debtor otherwise would have been entitled); § 522(h) (permitting debtor to bring avoidance actions if property to be recovered in such action otherwise could have been claimed as exempt by debtor under 11 U.S.C. § 522(g)(1) and trustee does not attempt to avoid such transfer).

528. Cf. *Turner v. Ermiger* (*In re Turner*), 724 F.2d 338, 341 (2d Cir. 1983) (cause of action, which was allocated to debtor as exempt property, was not "related to" bankruptcy case because suit was no longer property of estate, proceeds from recovery on suit would not enhance estate, and there was no other significant connection to bankruptcy case).

529. One might argue that the exercise of supplemental bankruptcy jurisdiction would assist the trustee in a speedy resolution of the estate because it provides the debtor the convenience of a single forum for resolution of both the avoidance action and the counterclaims. But this argument seems unconvincing because, if supplemental bankruptcy jurisdiction were not exercised, the defendant would be forced to choose between filing a proof of claim on grounds of breach of contract, requesting relief from the automatic stay in order to pursue the breach of contract action (to judgment) in a nonbankruptcy forum, or abandoning the claim. Only if there were a substantial likelihood that the defendant's

The notion that an exercise of supplemental bankruptcy jurisdiction may assist in, rather than hamper, the administration of an estate, however, is heightened when the counterclaims occur in an action involving the bankruptcy trustee. Assume in this instance that a suit is brought against the trustee, alleging that the trustee should be held personally liable for some malfeasance which occurred during her representation of the estate.<sup>530</sup> For example, the plaintiffs, attorneys to the trustee during the pendency of the bankruptcy case, may allege that the trustee should be held personally liable for their attorneys' fees, which previously were disallowed by the bankruptcy court on the grounds that the plaintiffs were not "disinterested,"<sup>531</sup> because the trustee fraudulently misrepresented to them the factual circumstances leading to their conclusion that they were sufficiently "disinterested." In response, the trustee defends against the attorneys' claim, arguing that even if she had misrepresented the facts to the attorneys, she should not be held liable because the plaintiffs had themselves committed malpractice. Here, the plaintiffs' suit against the trustee should be viewed as "arising in" the title 11 case since, but for the bankruptcy filing, the trustee would not have been appointed, the plaintiffs would not have been employed by the trustee and the entire situation would not have occurred. The trustee's counterclaim to the "arising in" proceeding may not "relate to" the title 11 case in that resolution of the counterclaim will have no conceivable effect on distributions to creditors or the administration of the estate.<sup>532</sup> The only effect of success in her counterclaim would be to reduce the trustee's personal liability to the plaintiffs. Still, an exercise of supplemental bankruptcy jurisdiction might assist the trustee in a speedy resolution of the estate because it may provide her the convenience of a single forum for resolution of both the personal liability action and the counterclaim. If supple-

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request for relief from the automatic stay would be granted would this judicial economy argument hold any water, however, and courts are most reluctant, absent special comity concerns not likely to exist in a garden-variety contract action, to grant such a request and permit the litigation of unsecured claims in a nonbankruptcy forum. There would seem to be no judicial economy if the debtor's objections to the contract action are litigated in the context of the avoidance suit rather than as an objection to a proof of claim.

530. See, e.g., *Lopez-Stubbe v. Rodriguez-Estrada (In re San Juan Hotel Corp.)*, 847 F.2d 931, 937 (1st Cir. 1988) (upholding assessment of personal liability against former trustee of chapter 7 estate).

531. See 11 U.S.C. § 327(a) (1988) (permitting trustee, with court's approval, to employ attorneys "that do not hold or represent an interest adverse to the estate, and that are disinterested persons"); § 328(a) (permitting trustee to employ professional persons "on any reasonable terms and conditions of employment"); § 328(c) (permitting court to deny allowance of compensation for services rendered by such professional persons if "such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed"); see also 11 U.S.C. § 101(13) (defining "disinterested person").

532. One could argue that the trustee's counterclaims "arise in" the title 11 case if the alleged malpractice occurred post-petition because, but for the commencement of the bankruptcy case, the post-petition malpractice may not have occurred. See *supra* notes 75-84 (discussing scope of "arising in" jurisdiction as inclusive of most claims arising out of post-petition transactions).

mental bankruptcy jurisdiction were not exercised, the trustee would face the choice of abandoning her claim or bringing it against the debtor's former attorneys in a nonbankruptcy forum. Forcing the trustee to sue the attorneys outside the bankruptcy court would distract her from administering the estate and possibly delay its resolution. Moreover, the court may decline to close the bankruptcy case until the supplemental claim is resolved because cessation of the case may alter the capacity of the trustee to assert the counterclaim.<sup>533</sup>

Finally, an assertion of supplemental jurisdiction against non-parties is difficult, but not impossible, to reconcile with the bankruptcy policy favoring expeditious resolution of an estate.<sup>534</sup> Recall the hypothetical involving the preference and fraudulent transfer actions brought by the trustee against various defendants, but in this instance, assume that the defendants also bring a third-party complaint against their attorneys and accountants for malpractice.<sup>535</sup> Because the trustee is not a party to the third-party action, it is more difficult to justify the exercise of supplemental jurisdiction out of a concern for the convenience to the trustee, because it does not seem as though it would be inconvenient for the trustee if the avoidance action (to which the trustee is a party) were resolved in a bankruptcy forum and the malpractice action (to which the trustee is not

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533. See 11 U.S.C. § 558 (1988) (permitting "estate" to raise defenses available to debtor as against any entity other than the estate).

534. Assertions of supplemental jurisdiction "involv[ing] the joinder or intervention of additional parties," 28 U.S.C. § 1367(a) (Supp. IV 1992), were, prior to enactment of the supplemental jurisdictional provision, referred to as exercises of ancillary jurisdiction when the supplemental claim against a third party was brought by the defendant, see *supra* notes 103-09 and accompanying text (discussing ancillary jurisdiction), or as exercises of pendent-party jurisdiction when the supplemental claim against a third party was brought by the plaintiff, see *supra* notes 119-36 and accompanying text (discussing pendent-party jurisdiction). The distinction between supplemental jurisdiction "involv[ing] the joinder or intervention of additional parties" generally, and supplemental jurisdiction "involv[ing] the joinder or intervention of additional parties" which is asserted by plaintiffs, continues under the supplemental jurisdiction provision. See 28 U.S.C. § 1367(b) (Supp. IV 1992) (prohibiting the latter where "original jurisdiction founded solely on section 1332 of [title 28]").

535. See *supra* notes 12-18 and accompanying text (setting forth hypothetical in detail). Because the third-party action is brought by the defendants, it would be viewed as an assertion of ancillary jurisdiction, see *supra* notes 103-09 and accompanying text, rather than an assertion of pendent-party jurisdiction, see *supra* notes 119-36 and accompanying text. The distinction may have been rendered irrelevant by 28 U.S.C. § 1367 (Supp. IV 1992). That statute generally permits an exercise of supplemental jurisdiction even as to "claims that involve the joinder or intervention of additional parties." See 28 U.S.C. § 1367(a) (Supp. IV 1992). The only exception that § 1367 provides to an assertion of pendent-party jurisdiction is where the sole basis for jurisdiction over the primary claim is 28 U.S.C. § 1332 (diversity and alienage jurisdiction). See 28 U.S.C. § 1367(b) (Supp. IV 1992). Where jurisdiction of the primary claim is instead founded on 28 U.S.C. § 1334(b) (1988 & Supp. IV 1992), the bankruptcy jurisdictional provision, an exercise of pendent-party jurisdiction would seem to be authorized. *But see infra* note 570 (arguing, on policy grounds, that Congress should reconsider grant of supplemental bankruptcy jurisdiction involving joinder or intervention of additional parties by plaintiffs).

a party) were resolved in a nonbankruptcy forum.<sup>536</sup> Where there is a

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536. There undoubtedly exists substantial overlap between proceedings "related to" the title 11 case, and supplemental claims sufficiently related to an "arising under" or "arising in" proceeding. For example, reconsider the hypothetical involving the avoidance action and third-party malpractice suit. See *supra* notes 12-18 and accompanying text (setting forth this hypothetical). One could argue that the third-party action is a proceeding "related to" the title 11 case—one which might conceivably affect distributions from the estate or administration of the estate—in that the third-party plaintiff's success in this suit renders the trustee's action against him more collectable. Courts are divided as to whether such an extensive interpretation of the grant of "related to" jurisdiction is supportable, however. Compare *Hawkins v. Eads (In re Eads)*, 135 B.R. 387, 393 (Bankr. E.D. Cal. 1991) (concluding that it had "related to" jurisdiction over third-party claims because "possibility of recovery on the third-party complaint enhances the collectability of any judgment against the [non-debtor] defendants") with *Scott v. Equitable Fed. Savs. & Loan Ass'n (In re German)*, 97 B.R. 373, 375 (Bankr. S.D. Ohio 1989) (concluding that "related to" jurisdiction did not extend to third-party claims). In part this disagreement may be explained by the more general disagreement as to whether any "conceivable" relationship between the proceeding and the estate satisfies the standard of "related to" jurisdiction, or whether a direct, legal relationship is required. See *supra* notes 85-98 and accompanying text (discussing disagreement about standard of "related to" jurisdiction).

Courts generally have held that suits between third party non-debtors do not involve "related to" jurisdiction unless resolution of the action would (1) result in automatic liability against the debtor; (2) bar the debtor from relitigating any issue determined by the suit under principles of *res judicata* or collateral estoppel; or (3) otherwise affect the debtor's rights, liabilities, options or freedom of action in any way that impacts upon the handling and administration of the bankruptcy estate. Compare *Quattrone Accountants, Inc. v. IRS*, 895 F.2d 921, 926-27 (3d Cir. 1990) (holding bankruptcy court has no "related to" jurisdiction over suit to determine non-debtor's liability as "responsible person" for failure to pay trust fund taxes) and *Home Ins. Co. v. Cooper & Cooper, Ltd.*, 889 F.2d 746, 749-51 (7th Cir. 1989) (court of appeals remanded for determination as to whether action brought by debtor/law firm's insurer seeking declaration that "claims made" malpractice policy was invalid because of misrepresentations on application form, both as to misrepresenting sole shareholder of debtor and innocent associates of firm, was "related to" debtor's bankruptcy case) and *Fietz v. Great Western Savings (In re Fietz)*, 852 F.2d 455, 458 (9th Cir. 1988) (cross-claim by debtor's former wife against mortgagee dismissed for lack of subject matter jurisdiction; "related to" jurisdiction did not exist over cross-claim because, even if cross-claim was community property and thus property of debtor's estate, resolution of cross-claim would have no conceivable effect on estate when debtor's plan had been confirmed and could not be modified by creditors, absent proof of fraud) and *National City Bank v. Coopers & Lybrand*, 802 F.2d 990, 993-94 (8th Cir. 1986) (holding no bankruptcy jurisdiction over post-confirmation suit by class of note holders who had received less than full payment under debtors' reorganization plan against debtors' pre-petition accountants asserting that negligence, breach of contract and fraud by accountants caused devaluation of their claims and reduced dividends under plan) and *Pacor, Inc. v. Higgins*, 743 F.2d 984, 995 (3d Cir. 1984) (finding no bankruptcy jurisdiction over personal injury tort claim brought by Higgins (consumer), against Pacor, Inc. (supplier), although Pacor had filed third-party complaint against Manville (manufacturer), and third-party claim was stayed by Manville's chapter 11 filing; Higgins' claim was described as "a mere precursor to the potential third party claim for indemnification" by Pacor against Manville because Manville would not be barred by *res judicata* or collateral estoppel from relitigating any issue decided in suit between Higgins and Pacor, nor did Higgins' action create automatic liability against Manville) with *Michigan Employment Sec. Comm'n v. Wolverine Radio Co. (In re Wolverine Radio Co.)*, 930 F.2d 1132, 1143 (6th Cir. 1991) (distinguishing *Pacor* as involving merely common-law rather than contractual claim for indemnification, the court of appeals found "related to" jurisdiction over determination of tax liability of debtor's assignee because contrac-

substantial overlap between the factual basis for the avoidance action and that of the third-party malpractice action,<sup>537</sup> however, the resolution of both the primary and supplemental claims in the same bankruptcy forum may make discovery and other procedural developments in the related cases easier for the trustee.<sup>538</sup> In addition, the exercise of supplemental bankruptcy jurisdiction over the malpractice action may work to the advantage of the trustee in negotiating a settlement of the avoidance action. These judicial economies may outweigh any possible delay in administration of the estate.

Where the trustee or other representative of the estate is a third-party defendant, these convenience arguments are substantially weakened. Consider, in this instance, a suit brought by an individual against a drug manufacturer.<sup>539</sup> The plaintiff alleges that the defendant is liable to her under state tort law. Federal jurisdiction is based on the diversity of

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tual indemnification provision might render debtor liable to assignee in event assignee held liable to debtor's former employees) *and* *Robinson v. Michigan Consolidated Gas Co.*, 918 F.2d 579, 584 (6th Cir. 1990) (finding "related to" jurisdiction existed over tenants' suit against utility and bankruptcy trustee for wrongful termination of service since tenants sued trustee in his official capacity and thus sought recovery from debtor's estate) *and* *Dogpatch Properties, Inc. v. Dogpatch U.S.A., Inc.* (*In re* *Dogpatch U.S.A., Inc.*), 810 F.2d 782, 786 (8th Cir. 1987) (finding "related to" jurisdiction over counterclaim and third party claim in action brought by purchaser of property against debtor, mortgagee and Arkansas Real Estate Commission, because outcome of counterclaim brought by mortgagee against purchaser to foreclose and third party claim brought by mortgagee against alleged guarantors to collect on guarantee would affect estate in that purchaser's inability to pay mortgages would render debtor responsible to repay mortgaged amount) *and* *DuVoisin v. Foster* (*In re* *Southern Indus. Banking Corp.*), 809 F.2d 329, 331 (6th Cir. 1987) (holding action between assignee of note given to debtor and maker of note was "related to" debtor's bankruptcy case because suit arose as result of debtor's bankruptcy, single substantive claim concerning maker's setoff rights against assignee was based on bankruptcy law, and debt to be set off was debt owed to maker, not by assignee, but debtor) *and* *Su-Ra Enterprises, Inc. v. Barnett Bank, N.A.*, 142 B.R. 502, 505 (S.D. Fla. 1992) (finding "related to" jurisdiction to exist over equitable action under Florida law brought by non-debtor/lessee against purchaser of leasehold from estate because defendant raised Bankruptcy Code as affirmative defense and both plaintiff and defendant had claimed that they would bring action against estate if unsuccessful in this suit).

537. The extent to which the primary and supplemental claims are related will affect whether the exercise of jurisdiction over the supplemental claim is consistent or inconsistent with an expeditious resolution of the bankruptcy case. Courts and commentators are not in complete agreement as to what this standard ought to be. See *supra* notes 246-62 and accompanying text (discussing application of *Gibbs's* "relatedness" test to supplemental bankruptcy jurisdiction).

538. See *Dechert Price & Rhoads v. Direct Satellite Communications, Inc.* (*In re* *Direct Satellite Communications, Inc.*), 91 B.R. 5, 7 (Bankr. E.D. Pa. 1988) ("The third-party defendants would be compelled to appear as witnesses and claims against them . . . would be an aspect of Decher's [sic] defense irrespective of whether they are joined as parties to this proceeding. Carpenter would be here as a party in any event, as he has not moved for dismissal. It appears grossly unfair to Dechert and to Carpenter to make them engage in litigation in a different forum which would be identical to that here if they do not wish to do so.").

539. The facts of this hypothetical resemble *Pacor, Inc. v. Higgins*, 743 F.2d 984, 986, 994 (3d Cir. 1984).

citizenship of the parties.<sup>540</sup> The defendant brings a third-party contribution and indemnification action against another drug manufacturer. The third-party defendant files a bankruptcy petition, and as a result, the third-party action is stayed.<sup>541</sup> Because the automatic stay only relates to proceedings against the debtor, however, the primary claim is not stayed.<sup>542</sup> The third-party plaintiff then seeks to remove<sup>543</sup> the entire action to the district court for the district in which the third-party defendant's bankruptcy case is pending, claiming that the third-party action constitutes a "related to" proceeding and that the diversity action between the plaintiff and defendant derives from "a common nucleus of operative fact."

In this instance, resolution of the debtor's estate may well be hampered by an exercise of supplemental bankruptcy jurisdiction over the removed action.<sup>544</sup> If the court were to decline to exercise supplemental jurisdiction, litigation of the primary claim would continue in bankruptcy court while litigation of the third-party action in the nonbankruptcy forum would be stayed. The third-party plaintiff could file a proof of claim against the debtor's estate based on the same allegations of reimbursement or contribution made in the third-party action, but unless the primary claim is resolved in the nonbankruptcy forum before the conclusion of the debtor's bankruptcy case that contingent proof of claim is likely to be disallowed.<sup>545</sup>

When supplemental jurisdiction is asserted by the plaintiff against an additional party,<sup>546</sup> convenience arguments may be plausible, so long as a

540. See 28 U.S.C. § 1332 (1988 & Supp. IV 1992).

541. See 11 U.S.C. § 362(a)(1) (1988).

542. See, e.g., *Wedgeworth v. Fibreboard Corp.*, 706 F.2d 541, 544 (5th Cir. 1983) (automatic stay inapplicable to action against co-defendant of debtor); *Pitts v. Unarco Indus., Inc.*, 698 F.2d 313, 314 (7th Cir. 1983) (same).

543. See 28 U.S.C. § 1452(a) (1988 & Supp. IV 1992) ("A party may remove any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.").

544. Procedurally this hypothetical is confusing because, in the nonbankruptcy forum, the suit between the plaintiff and the defendant is the primary claim and the third-party action is the supplemental claim. In the bankruptcy forum, however, the third-party action is the primary claim, in that it is "related to" the debtor's bankruptcy case, and the suit between the plaintiff and the defendant becomes the supplemental claim, in that it derives from "a common nucleus of operative fact" with the "related to" proceeding.

545. See 11 U.S.C. § 502(e)(1)(B) ("the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that . . . such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution"); § 502(e)(2) ("A claim for reimbursement or contribution of such an entity that becomes fixed after the commencement of the case shall be determined, and shall be allowed . . . or disallowed . . . the same as if such claim had become fixed before the date of the filing of the petition.").

546. Here, the reference is to what used to be referred to as "pendent-party jurisdiction." See *supra* notes 119-36 and accompanying text (generally discussing pendent-party jurisdiction); see also *supra* notes 534-35 (discussing continuing relevance of pendent-party jurisdiction to supplemental bankruptcy jurisdiction).

trustee, debtor-in-possession, or other representative of the estate is a party to the primary proceeding. For example, consider a proof of claim asserting breach of a pre-petition contract to sell property of the estate. Assume also that the trustee defends against the claim on the grounds that the buyer's former chief executive officer misrepresented material facts to the debtor, thus entitling the debtor to rescind the contract.<sup>547</sup> The plaintiff-buyer then amends its complaint to join the former CEO as a defendant. As noted above, the proof of claim "arises in" the title 11 case.<sup>548</sup> The action between the buyer and the debtor's principal may not "relate to" the title 11 case, however, in that any recovery in this suit would not be from property of the estate. If the estate and former CEO are found to be severally liable, then the CEO's liability to the buyer may not affect the estate's liability to the buyer. Nonetheless, the two actions clearly arise out of a "common nucleus of operative fact." Moreover, the trustee has every interest in the two claims being determined in a single forum. Trials in separate forums may lead to inconsistent results, and there may be additional practical benefits to a single forum.<sup>549</sup>

Notice, however, that arguments favoring an exercise of supplemental bankruptcy jurisdiction because it would provide legal and practical benefits to the estate are equally applicable to a "related to" proceeding brought by or against a trustee or other representative of the estate. Consider a "related to" proceeding brought by a trustee or debtor-in-possession against an entity that has not filed a proof of claim against the estate, alleging, for example, breach of contract and other state law claims.<sup>550</sup> The proceeding "relates to" the title 11 case in that any proceeds from its recovery constitute property of the estate.<sup>551</sup> Assume further that the defendant asserts a third-party action for indemnification or contribution of some sort. As in the previous hypotheticals, the third-party action probably does not "relate to" the title 11 case because the proceeds from recovery on the third-party complaint belong to the defendant and not the estate. Still, as in the other hypotheticals, the exercise of supplemental bankruptcy jurisdiction may assist the trustee in administering the estate because of the practical and other considerations raised above. The policy arguments seem indistinguishable. Still, constitutional concerns may cause courts to question the wisdom of such an exercise, and

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547. See Restatement (Second) of Contracts § 164 (1981).

548. See *supra* notes 75-84 and accompanying text.

549. See *supra* notes 530-45 and accompanying text (discussing these practical benefits).

550. Cf. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 56, 84 (1982) (involving suit by Northern Pipeline Co., chapter 11 debtor-in-possession, against Marathon Pipe Line Co., alleging breach of contract, warranty, misrepresentation, coercion and duress; Marathon had not filed a proof of claim against the estate; recovery in suit would have constituted property of estate under 11 U.S.C. § 541). For a more detailed discussion of *Marathon*, see *supra* notes 398-415 and accompanying text.

551. See 11 U.S.C. § 541(a)(1) (1988).

stimulate Congress to enact clear statutory limitations.<sup>552</sup>

In sum, the policies favoring a broad grant of bankruptcy jurisdiction also support a limited grant of supplemental jurisdiction because, in many circumstances, such an exercise delays the administration of the bankruptcy estate. Whether an exercise of supplemental bankruptcy jurisdiction is consistent with, or contradicts, Congress' goal to facilitate an expeditious resolution of an estate differs depending on the circumstances, and thus generally should be left to a case by case consideration. Bankruptcy policies are not the only policies at work, however. Policies generally supporting an exercise of supplemental jurisdiction also require examination.

*B. Policy Justifications Generally Favoring an Exercise of Supplemental Jurisdiction are Subject to Countervailing Policy Concerns in the Context of a Bankruptcy Case*

Doctrines of supplemental jurisdiction traditionally have been justified by considerations of federalism,<sup>553</sup> fairness, and judicial economy.<sup>554</sup> Absent an ability to assert supplemental jurisdiction, a plaintiff having a jurisdictionally sufficient claim and a related jurisdictionally insufficient claim would face undesirable choices.

First, a plaintiff could split the claims, bringing the primary claim in federal court and the supplemental claim in state court. By splitting the claims, the plaintiff would cause inconvenience and waste the time of both the litigants and the federal and nonfederal judicial systems, as well as create the possibility that *res judicata* and collateral estoppel issues would arise in the later-concluded action. Second, the plaintiff could proceed only on the federal claim in federal court, and abandon the supplemental claim—an unfair result in the event the supplemental claim is substantial. Finally, the plaintiff could join the primary and supplemental claims in a state-court action, if permitted under the state's procedural rules, but this would undercut Congress' fundamental purpose in creating a federal court system—the provision of a federal forum for the resolution of the “cases or controversies” enumerated within Article III of the Constitution.<sup>555</sup>

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552. See *supra* part III.A.2 and accompanying text (discussing these constitutional concerns in detail).

553. Considerations of federalism both support and temper exercises of supplemental jurisdiction. Support is found in the notion that an exercise of supplemental jurisdiction may, as a practical matter, be necessary to effectuate a congressional grant of federal jurisdiction. See *supra* notes 378-85 and accompanying text. Limitation follows from the fact that, by definition, the supplemental claim derives from the state law claim, and that all exercises of supplemental jurisdiction encroach on the general jurisdiction of state courts. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

554. See *McLaughlin supra* note 102, at 863 (“Based on notions of fairness and judicial economy, the doctrines of pendent and ancillary jurisdiction served an important function by allowing the court and litigants to effectively resolve all aspects of an entire controversy in a single proceeding.”).

555. See U.S. Const. art. III.



Similar interests are protected when defendants seek to exercise supplemental jurisdiction. Absent the doctrine of supplemental jurisdiction, a defendant to a federal claim would be required to either abandon or seek redress in a separate state-court action for counterclaims, cross-claims and third-party claims having no independent basis for federal jurisdiction. Abandonment of the defendant's supplemental claims is unfair because a separate action involving the supplemental claims raises the specter of inconsistent verdicts.

The doctrine of supplemental jurisdiction is consistent with, and necessary to an effectuation of, one of the primary purposes of the Federal Rules of Civil Procedure: the elimination of technical, procedural barriers to the joinder of related claims.<sup>556</sup>

The important policy purposes favoring an assertion of supplemental jurisdiction in an ordinary civil action find substantial counter-arguments, however, when the exercise of supplemental jurisdiction occurs in the context of a bankruptcy case. First, and probably most important, the judicial economies of an assertion of supplemental bankruptcy jurisdiction are often doubtful. On one hand, the litigants to the supplemental proceeding may claim that federal adjudication of the jurisdictionally deficient claim promotes fairness and efficiencies to the parties to the litigation who are not thereby required to split the action or abandon the nonfederal claim. In the context of bankruptcy, however, the judicial economies the parties to the litigation may derive from an exercise of supplemental jurisdiction must be balanced against the inefficiencies the exercise may exact upon resolution of the bankruptcy case. By definition, the supplemental proceeding will have no conceivable effect on distributions from the estate or administration of the estate and could delay final resolution of the estate.<sup>557</sup>

Second, distinct from Congress' goal to provide a federal forum for the resolution of federal claims—with its enactment of the jurisdictional provisions of the 1984 Amendments to the Bankruptcy Code—Congress equivocated as to the need to provide a federal forum for the resolution

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556. See McLaughlin, *supra* note 102, at 864. As McLaughlin noted:

In addition to these considerations of judicial economy and fairness, the doctrines of pendent and ancillary jurisdiction also complemented the liberal joinder policies of the Federal Rules of Civil Procedure and facilitated the avowed purpose of the Rules—to eliminate procedural barriers to the joinder of claims so that all claims related to a legal controversy could be adjudicated in a single lawsuit.

*Id.*

557. The supplemental claim will delay resolution of the estate because the relationship between the original proceeding and the supplemental proceeding is required only to have a common nexus of fact, not a perfect interrelationship of fact. The factual nexus will, by definition, be imperfect enough to preclude a finding that the supplemental proceeding is "related to" the title 11 case whereas the original proceeding is so related. This schism would widen if a logical relationship standard were preferred over a "common nucleus of operative fact" test.

of all claims relating to a title 11 case.<sup>558</sup> Legislative history is replete with support for the proposition that in 1984 Congress was concerned not only with the constitutionality of an exercise of the essential judicial powers by non-Article III bankruptcy courts, but also with comity with state courts.<sup>559</sup> It added a provision in 1984 that directs district courts to abstain from hearing a "related to" proceeding which was pending in a state court at the time of the filing of the bankruptcy petition, which could not have been heard in a federal court but for the filing, and which can be timely adjudicated in the state court.<sup>560</sup> Congress also retained a provision permitting district courts to abstain from hearing a proceeding "arising under" title 11, or "arising in" or "related to" a title 11 case, "in the interest of justice, or in the interest of comity with State courts or respect for State law."<sup>561</sup> Explicit concern for comity in the exercise of federal bankruptcy jurisdiction stands in contrast to the discretion allowed to courts in the exercise of other grants of federal jurisdiction.<sup>562</sup> To be sure, a concern for comity is not unique to federal bankruptcy jurisdiction. What is distinct about Congress' concern for comity in the context of an assertion of federal bankruptcy jurisdiction is that it has been made explicit in the grant of jurisdiction, rather than left to judicial determination.<sup>563</sup>

Moreover, many of the arguments focusing on the unfairness of a failure to exercise supplemental jurisdiction may be inapplicable in a bankruptcy context. The broad grant of bankruptcy jurisdiction in 28 U.S.C. § 1334(b) is original and not exclusive.<sup>564</sup> Thus, nothing precludes litigants from enjoying the economies which follow from joint litigation of the primary and supplemental proceedings in a nonbankruptcy forum.<sup>565</sup> Additionally, although the doctrine of collateral estoppel clearly applies

558. See *infra* notes 559-63 and accompanying text.

559. See, e.g., 130 Cong. Rec. S8891 (June 29, 1984) (statement of Sen. Hatch) ("I have only one regret as I reflect upon this conference product. . . . [With] the deletion of the Senate-passed mandatory abstention provision, . . . purely State law claims which do not arise under the Bankruptcy Code are allowed to be tried in State courts. This presents an important constitutional concern.").

560. See 28 U.S.C. § 1334(c)(2) (1988 & Supp. IV 1992). For a quotation of this provision, see *supra* note 61.

561. 28 U.S.C. § 1334(c)(1) (1988 & Supp. IV 1992). For a more complete quotation of this provision, see *supra* note 61.

562. *But see* 28 U.S.C. § 1367(c)(1) (Supp. IV 1992) (permitting district court to decline to exercise supplemental jurisdiction if "claim raises a novel or complex issue of State law").

563. The differences between abstention doctrines that have developed outside a bankruptcy context, and the abstention doctrines applied in bankruptcy, is a fascinating topic which far exceeds the scope of this article.

564. See 28 U.S.C. 1334(b) (1988 & Supp. IV 1992).

565. *But see* *Finley v. United States*, 490 U.S. 545, 557-58 (1989) (Blackmun, J., dissenting) (noting that the *Aldinger* court suggested that "the appropriateness of pendent-party jurisdiction might turn on the 'alignmen[t] of parties and claims,' and that one significant factor is whether 'the grant of jurisdiction to [the] federal court is exclusive,'" but that the *Finley* court rejected the factor as irrelevant).

in a bankruptcy context,<sup>566</sup> principles of res judicata may not attach in "related to" proceedings.<sup>567</sup> Thus, concerns about the fundamental unfairness of requiring litigants to separately litigate the supplemental claim and the "related to" proceeding may not exist.

### C. Congress Should Amend § 1367(c)'s Factors to Reflect Concerns Unique to Bankruptcy

Section 1367(c) provides that, in limited circumstances, district courts may decline to exercise supplemental jurisdiction, despite the grant of such jurisdiction by § 1367(a).<sup>568</sup> It permits courts to decline to exercise supplemental jurisdiction 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>569</sup>

The discretionary factors listed in § 1367(c) appear to be exclusive and do not reflect factors unique to bankruptcy. If § 1367(a) is interpreted to confer supplemental bankruptcy jurisdiction, § 1367(c) should be amended so that it clearly covers the bankruptcy context.<sup>570</sup>

#### 1. An Exclusive List

After *Finley*<sup>571</sup> and § 1367, it would be difficult to describe the doctrine of supplemental jurisdiction as a doctrine of judicial discretion.

566. See, e.g., *Grogan v. Garner*, 111 S. Ct. 654, 658 (1991) (principles of collateral estoppel apply to bankruptcy non-dischargeability proceedings).

567. Courts are divided as to whether the doctrine of res judicata bars litigation of previously unasserted claims merely "related to" the title 11 case. Compare *Barnett v. Stern*, 909 F.2d 973, 980-82 (7th Cir. 1990) (holding that previously unasserted claims could be barred by res judicata only if these claims would have been core proceedings in the bankruptcy court) and *Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183, 189-90 (5th Cir. 1990) (same) and *I.A. Durbin, Inc. v. Jefferson Nat'l Bank*, 793 F.2d 1541, 1548 n.8 (11th Cir. 1986) (same) with *Sanders Confectionery Prods., Inc. v. Heller Fin., Inc.*, 973 F.2d 474, 482-83 (6th Cir. 1992) (claim preclusion may in certain circumstances attach to non-core proceedings), *cert. denied*, 113 S. Ct. 1046 (1993) and *Sure-Snap Corp. v. State Street Bank & Trust Co.*, 948 F.2d 869 (2d Cir. 1991) (same). But see *In re Kroner*, 953 F.2d 317 (7th Cir. 1992) (claim preclusion applicable to subsequent non-core proceedings as to which parties had consented to exercise of bankruptcy court jurisdiction).

568. See *supra* note 39 (quoting 28 U.S.C. § 1367 in its entirety).

569. 28 U.S.C. § 1367(c) (Supp. IV 1992).

570. In addition, Congress should give thought to whether it intended § 1367(b)'s limitation on pendent-party jurisdiction in diversity cases to apply in the bankruptcy context. The same arguments that support a limitation of pendent-party jurisdiction in diversity cases also support a limitation of jurisdiction over pendent-party claims related to a "related to" proceeding, since "related to" proceedings derive from state not federal law.

571. *Finley v. United States*, 490 U.S. 545 (1989).

Supplemental jurisdiction has become a creature of statute.<sup>572</sup> One could argue that if Congress did not intend to codify all of supplemental jurisdiction, it would not have specified in § 1367(c) the discretionary factors to be considered in declining to exercise supplemental jurisdiction. It would have left these equitable considerations to judicial discretion.

After viewing the source of supplemental jurisdiction as statutory, it is not difficult to conclude that the factors enumerated in § 1367(c) are exclusive. Moreover, this view is supported by the grammatical construction of § 1367(c) itself, in that it does not use the term "including" when describing the circumstances under which supplemental jurisdiction can be declined.<sup>573</sup>

## 2. The List Is Peculiarly Applicable to the Nonbankruptcy Context

Most of the factors set forth in § 1367(c) can be restated to establish more general factors to be balanced against the policy objectives of an exercise of supplemental jurisdiction. As a result of the absence of bankruptcy terms used in § 1367(c), however, the factors set forth in this section are of little assistance to a district court seeking to determine whether to exercise an assertion of supplemental bankruptcy jurisdiction.<sup>574</sup>

For example, § 1367(c)(2) permits a district court to decline to exer-

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572. See Mengler, *supra* note 102, at 248 (describing *Finley* as having "undermined the viability of pendent claim and ancillary jurisdiction"). Mengler then identifies three options available to Congress prior to its enactment of § 1367:

First, Congress could abolish any vestiges of pendent and ancillary jurisdiction remaining after *Finley*. Second, Congress instead could take the position that the doctrines of pendent claim, pendent party, and ancillary jurisdiction are a beneficial feature of the federal procedural system. Believing that *Finley* really only eliminates pendent party jurisdiction, Congress could overrule the most obvious implication of *Finley* by codifying pendent party jurisdiction. Third, Congress could take the same favorable position on supplemental jurisdiction. Believing, however, that *Finley* seriously undermines all of supplemental jurisdiction, Congress could overrule *Finley* by codifying pendent claim, pendent party, and ancillary jurisdiction.

*Id.* at 267. Although courts were divided as to the implications of *Finley* on pendent claim and ancillary jurisdiction, see *supra* note 435, Congress followed Mengler's third option, either because it agreed with Mengler or more likely, simply out of an abundance of caution. Thus, a court could still conclude that § 1367 does not completely regulate supplemental jurisdiction—that courts continue to hold inherent equitable authority to decline to exercise supplemental jurisdiction—but this conclusion is made much more difficult by *Finley* and Congress' enactment of § 1367 in reaction to *Finley*.

573. Compare 28 U.S.C. § 1367(a) (Supp. IV 1992) ("supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties") (emphasis added) with § 1367(c) (Supp. IV 1992) ("The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . ."). Cf. 11 U.S.C. § 102(3) (1988) (as applied to title 11, the terms "includes" and "including" are not limiting").

574. Section 1367(c)(1) ("the claim raises a novel or complex issue of State law"), by contrast, is generally phrased. With this discretionary factor, there remains an issue as to its interrelationship to 28 U.S.C. § 1334(c)(1) and (c)(2) (1988 & Supp. IV 1992). See *supra* note 61 (quoting 28 U.S.C. § 1334 in its entirety). It seems anomalous that district courts are required to abstain from certain "related to" proceedings, but are left discre-

cise supplemental jurisdiction where "the claim substantially predominates over the claim or claims over which the district court has original jurisdiction."<sup>575</sup> More generally stated, this factor permits the court to balance the judicial economy of an exercise of supplemental jurisdiction as compared to a refusal to exercise the assertion of such jurisdiction. If § 1367(c)(2) were restated to comport with a balance of similar interests involved in a bankruptcy context, it would permit the court to weigh the effect of an exercise of supplemental jurisdiction on the efficient administration of the bankruptcy estate, as well as its effect on an efficient resolution of the litigation between the parties.

Section 1367(c)(3) is similarly directed to a nonbankruptcy balancing of equities. It permits a district court to decline to exercise supplemental jurisdiction when "the district court has dismissed all claims over which it has original jurisdiction,"<sup>576</sup> but appears not to permit the district court to consider the affect of a dismissal, close, or conversion of a title 11 case.<sup>577</sup> A simple restatement of § 1367(c)(3) would clarify this consideration.

Section 1367(c)(4) purports to provide to district courts generalized authority to decline to exercise supplemental jurisdiction. It, however, exacts a heightened standard for consideration of factors other than those identified in § 1367(c)(1) through (3), only permitting consideration of other factors "in exceptional circumstances," and then limiting the factors that may be considered to those which constitute "compelling reasons for declining jurisdiction."<sup>578</sup> If § 1367(a) is applicable in the bankruptcy context, Congress should amend § 1367(c)(1) through (3) to reflect this decision, rather than leave district courts with § 1367(c)(4) as the exclusive basis for declining to exercise supplemental bankruptcy jurisdiction.

### CONCLUSION

Courts of appeals, district courts, and bankruptcy courts have too readily accepted assertions of supplemental bankruptcy jurisdiction as proper without recognizing that both the constitutional and statutory authority for such assertions are uncertain. By raising these statutory and constitutional questions, this Article seeks to create judicial dialogue. In addition, it concludes that the exercise of supplemental bankruptcy jurisdiction should be curtailed, if not by courts for reasons of constitutional or statutory infirmity, then by Congress for policy reasons. Most exer-

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tion to exercise supplemental jurisdiction over claims sufficiently related to such a "related to" proceeding.

575. 28 U.S.C. § 1367(c)(2) (Supp. IV 1992).

576. 28 U.S.C. § 1367(c)(3) (Supp. IV 1992).

577. Cf. 11 U.S.C. § 362(c)(2) (1988) (providing that automatic stay continues until earliest of closing or dismissal of title 11 case, or grant or denial of discharge to certain debtors).

578. See 28 U.S.C. § 1367(c)(4) (Supp. IV 1992).

cises of supplemental bankruptcy jurisdiction conflict with Congress' primary objectives for enactment of the current bankruptcy jurisdictional provision.

Congress should resolve this conflict by prohibiting district courts from exercising jurisdiction supplemental to proceedings merely "related to" a bankruptcy case, and by clarifying the circumstances under which district courts should decline to exercise jurisdiction over claims related to proceedings "arising under" the Bankruptcy Code or "arising in" a bankruptcy case. In addition, Congress should prohibit bankruptcy courts from exercising any supplemental jurisdiction at all.