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Breaking the "Unbreakable Rule": Federal Courts, Article I, and the Problem of "Related To" Bankruptcy Jurisdiction

"Related to" bankruptcy jurisdiction endows federal courts with the power to adjudicate cases that involve only state-law claims, even when the parties are not of diverse citizenship. The Supreme Court appears to have accepted the validity of "related to" bankruptcy jurisdiction, but it has never specifically identified the constitutional basis for such jurisdiction. Most scholars agree that Article III authorizes the exercise of federal "related to" bankruptcy jurisdiction, but they offer competing theories to support their common conclusion. The central thesis of this Article is that attempts to find an Article III basis for all "related to" bankruptcy cases are unavailing. As such, it is necessary to reconsider the "unbreakable rule" that the subject matter jurisdiction of Article III courts is strictly limited by Article III itself. It is necessary to consider whether Congress can utilize its Article I powers to enable Article III courts to adjudicate cases that fall outside the traditional limits of their adjudicative authority.

Federal courts routinely hear lawsuits comprised of entirely state-law claims, even when the parties are not diverse, because the lawsuit is held to be "related to" a bankruptcy case.[1] According to virtually all federal courts, a lawsuit is "related to" a bankruptcy if:

> [T]he outcome of that proceeding could conceivably have any

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[1] 28 U.S.C. § 1334(b) (2000) endows federal courts with the power to adjudicate any "civil proceeding" that is "related to" a bankruptcy case.

> effect on the estate being administered in bankruptcy. . . . [For example, an] action is related to [a] bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.[2]

This broad grant of jurisdiction encompasses not only suits in which the debtor is a party,[3] but also suits between third parties,

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[2] Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984), *abrogated in part by* Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 129 (1995) (holding that the court lacks jurisdiction to review an order remanding a case to state court on the grounds of procedurally improper removal or lack of subject matter jurisdiction) (citations omitted). The Supreme Court has cited but not explicitly adopted the *Pacor* test. Celotex Corp. v. Edwards, 514 U.S. 300, 308 & n.6 (1995). Eight circuits have explicitly adopted the *Pacor* test for "related to" bankruptcy jurisdiction. EOP-Colonnade of Dallas, LP v. Faulkner (*In re* Stonebridge Techs., Inc.), 430 F.3d 260, 266 (5th Cir. 2005); New Horizon of N.Y., L.L.C. v. Jacobs, 231 F.3d 143, 151 (4th Cir. 2000); Cont'l Nat'l Bank of Miami v. Sanchez (*In re* Toledo), 170 F.3d 1340, 1345 (11th Cir. 1999); *In re* G.S.F. Corp., 938 F.2d 1467, 1475 (1st Cir. 1991); Gardner v. United States (*In re* Gardner), 913 F.2d 1515, 1518 (10th Cir. 1990); Fietz v. Great W. Sav. (*In re* Fietz), 852 F.2d 455, 457 (9th Cir. 1988); *see* Integrated Health Servs. of Cliff Manor, Inc. v. THCI Co., 417 F.3d 953, 957-58 (8th Cir. 2005); Browning v. Levy, 283 F.3d 761, 773 (6th Cir. 2002). The Second Circuit appeared to initially adopt a different test, *see* Turner v. Ermiger (*In re* Turner), 724 F.2d 338, 341 (2d Cir. 1983) (focusing on whether the case has a "significant connection" to the bankruptcy case), but it later clarified that its test for "related to" jurisdiction is essentially the same as the *Pacor* test. *See* Publicker Indus., Inc. v. United States (*In re* Cuyahoga Equip. Corp.), 980 F.2d 110, 114 (2d Cir. 1992) (holding that "related to" bankruptcy jurisdiction exists when the "litigation has a significant connection with a pending bankruptcy proceeding," and "[t]he test for . . . [this] is whether [the litigation's] outcome might have any 'conceivable effect' on the bankrupt estate"). The Seventh Circuit test is "more limited" than the *Pacor* test. *In re* FedPack Sys., Inc., 80 F.3d 207, 213-14 (7th Cir. 1996) (holding that "[a] case is 'related' to a bankruptcy when the dispute 'affects the amount of property for distribution [i.e., the debtor's estate] or the allocation of property among creditors.'") (brackets in original).

[3] *See, e.g.*, Newby v. Enron Corp. (*In re* Enron Corp. Sec., Derivative & "ERISA" Litig.), No. MDL 1446, 2003 WL 22472155, at *2 (S.D. Tex. Oct. 14, 2003) (holding that an action by a representative of debtor Enron against former officers, directors, and employees for state-law tort claims is "related to" Enron's bankruptcy); Charter Behavioral Health Sys., L.L.C. v. Managed Health Network, Inc. (*In re* Charter Behavioral Health Sys., L.L.C.), 277 B.R. 54, 57 (Bankr. D. Del. 2002) (holding that an action by the debtor to recover money due for services rendered before filing for relief in bankruptcy and pursuant to the terms of a pre-petition contract does not "arise under" federal bankruptcy law, but is nonetheless within the court's subject matter jurisdiction); Trans World Airlines, Inc. v. Icahn (*In re* Trans World Airlines, Inc.), 278 B.R. 42, 49-50 (Bankr. D. Del. 2002) (holding that "related to" jurisdiction exists over an action by the debtor seeking a declaration that third parties had not tortiously interfered with a pre-petition contract between the debtor and the defendant, and seeking an injunction against the defendant's commencement of litigation against the third parties). "Related to" cases in which the debtor is a party will

neither of which has sought any federal bankruptcy protection.[4]

An example illustrates the broad scope of "related to" jurisdiction. When Enron filed for bankruptcy protection, then-existing state court lawsuits against Enron were, of course, affected by the bankruptcy.[5] State court lawsuits against parties other than Enron (e.g., Citigroup for alleged participation in Enron's fraud), however, were also removed to federal court, even though these third parties had not sought bankruptcy protection.[6] Because the third parties *might* seek indemnification or contribution from Enron, the suits against them were held to be "related to" Enron's bankruptcy.[7]

The United States Supreme Court appears to have accepted the constitutionality of "related to" bankruptcy jurisdiction, but it has never explicitly articulated the constitutional basis for such jurisdiction.[8] Scholars have sought to fill this void. While most agree that the federal courts' current exercise of "related to" bankruptcy jurisdiction is authorized by Article III, they have advanced competing theories to support their common conclusion.[9]

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involve causes of action that arose before the bankruptcy petition was filed. 1 COLLIER ON BANKRUPTCY ¶ 3.01[4][c][ii][A] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2006) (describing "cases involving causes of action owned by the debtor when the [bankruptcy petition] was filed" as constituting one category of "related to" cases).

[4] *E.g.*, Belcufine v. Aloe, 112 F.3d 633, 634 (3d Cir. 1997); Lindsey v. O'Brien, Tanski, Tanzer and Young Health Care Providers of Conn. (*In re* Dow Corning Corp.), 86 F.3d 482, 494 (6th Cir. 1996); *In re G.S.F.*, 938 F.2d at 1469; Parrett v. Bank One, N.A. (*In re* Nat'l Century Fin. Enters., Inc., Inv. Litig.), 323 F. Supp. 2d 861, 871 (S.D. Ohio 2004); Beightol v. UBS Painewebber (*In re* Global Crossing, Ltd. Sec. Litig.), 311 B.R. 345, 346-47 (S.D.N.Y. 2003); New York City Employees' Ret. Sys. v. Ebbers (*In re* WorldCom, Inc. Sec. Litig.), 293 B.R. 308, 311 (S.D.N.Y. 2003).

[5] *E.g.*, Newby v. Enron Corp. (*In re* Enron Corp. Sec., Derivative & "ERISA" Litig.), 314 B.R. 354, 355 (S.D. Tex. 2004).

[6] *Id.*

[7] *Id.* at 357 (holding that an action against parties other than the debtor is within the federal court's "related to" bankruptcy jurisdiction).

[8] *See infra* Part II (discussing Supreme Court cases that appear to accept the constitutionality of "related to" jurisdiction); *see also* Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory*, 41 WM. & MARY L. REV. 743, 801 (2000) ("The Supreme Court has affirmed unwaveringly the constitutionality of federal bankruptcy jurisdiction over nondiverse state-law claims; it has not, however, clearly or consistently articulated the basis for this conclusion.").

[9] *See generally* John T. Cross, *Congressional Power to Extend Federal Jurisdiction to Disputes Outside Article III: A Critical Analysis from the Perspective of Bankruptcy*, 87 NW. U. L. REV. 1188 (1993) (contending that "related to" jurisdiction falls within Article III's bounds because it is a species of ancillary jurisdiction); Thomas

The central thesis of this Article is that attempts to find an Article III basis for all "related to" bankruptcy cases are unavailing and, perhaps more importantly, detract attention from a more fundamental question: under what circumstances, if any, can Congress utilize its Article I powers to confer power on Article III courts to hear cases that fall outside the bounds of Article III?[10] At present, there is a flourishing debate regarding the constitutional legitimacy of Article I tribunals and the extent to

Galligan, Jr., *Article III and the "Related To" Bankruptcy Jurisdiction: A Case Study in Protective Jurisdiction*, 11 U. PUGET SOUND L. REV. 1 (1987) (contending that "related to" jurisdiction is a species of protective jurisdiction and that protective jurisdiction falls within the bounds of Article III and rejecting the position that "related to" jurisdiction is authorized as a species of supplemental jurisdiction); Carole E. Goldberg-Ambrose, *The Protective Jurisdiction of the Federal Courts*, 30 UCLA L. REV. 542, 553 & n.67 (1983) (arguing that some "related to" cases satisfy the traditional "arising under" test and that the remainder can be justified by the notion of protective jurisdiction and that protective jurisdiction falls within the bounds of Article III); Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 189-90, 194-95 (1953) (suggesting that federal jurisdiction over state-law suits brought by trustees is justified by protective jurisdiction); Duane Loft, Note, *Jurisdictional Line-Drawing in a Time When So Much Litigation Is "Related To" Bankruptcy: A Practical and Constitutional Solution*, 72 FORDHAM L. REV. 1091, 1092 (2004) (concluding that "related to" bankruptcy jurisdiction can be justified as a species of ancillary jurisdiction as long as one party has filed a proof of claim in the bankruptcy).

[10] A handful of scholars have previously argued that the federal courts' current exercise of "related to" bankruptcy jurisdiction sometimes exceeds the grant of jurisdiction embodied in Article III. These scholars, however, uniformly conclude that federal courts should therefore modify their definition of "related to" jurisdiction so as to avoid the unconstitutional exercise of federal jurisdiction. For example, Professor Ralph Brubaker proposes a reimagination of the three categories of jurisdiction contained in § 1334(a) and (b), whereby all claims by and against the estate are considered claims "arising in" the bankruptcy case and "related to" bankruptcy jurisdiction is reserved for third-party disputes that share "a conventional supplemental relationship with a claim 'arising under' the Bankruptcy Code or a claim to which the bankruptcy estate is party." Brubaker, *supra* note 8, at 853, 859-69. Professor Brubaker criticizes the *Pacor* opinion as being "both unconstitutionally overinclusive and, at the same time, decidedly underinclusive in terms of the intended function of federal bankruptcy jurisdiction." *Id.* at 753, 869. Professor Scott Fruehwald argues that some "related to" cases do not satisfy Article III because the majority's interpretation of 28 U.S.C. § 1334(b) is too broad. E. Scott Fruehwald, *The Related To Subject Matter Jurisdiction of Bankruptcy Courts*, 44 DRAKE L. REV. 1, 3 (1995). He suggests that "bankruptcy court jurisdiction should be limited to proceedings that involve bankruptcy functions. These proceedings bind the estate or directly affect the administration of the estate." *Id.* at 32. Professor Fruehwald contends that this limitation on "related to" bankruptcy jurisdiction is required by Article III, Section 2, *id.* at 29-32, and he also suggests that such a limitation is consistent with protections of due process because a court exercising "related to" bankruptcy jurisdiction has at its disposal nationwide service of process and can assert personal jurisdiction over parties that lack "minimum contacts" with the forum state, *id.* at 33-37. R

which Congress should be permitted to create such legislative courts. In particular, scholars and courts have recognized that a literal interpretation of Article III would impose strict limits on Congress' authority to create Article I courts, and yet many have sought to justify past and future departures from such limits.[11] Using "related to" bankruptcy jurisdiction as an illustration, this Article contends that a similar debate is warranted when evaluating the scope of Article III courts' jurisdiction. To what extent, if at all, should it be permissible to depart from a literal interpretation of Article III as the exclusive limit on federal jurisdiction?

Part I, Section A outlines the current statutory scheme of federal bankruptcy law, while Section B provides an overview of federal bankruptcy jurisdiction. As explained therein, Congress has endowed federal courts with original and exclusive jurisdiction over bankruptcy petitions as well as original but not exclusive jurisdiction over causes of action that are dependent upon the filing of a bankruptcy petition for their existence.[12] Congress has also endowed federal courts with original but not exclusive jurisdiction over cases that are "related to" a bankruptcy case.[13] These "related to" cases would exist even if a bankruptcy petition had never been filed. The filing of the bankruptcy petition, however, makes these cases eligible for review in federal court.[14]

Part II surveys relevant Supreme Court cases that acknowl-

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[11] *See, e.g.*, James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 646-47 (2004) ("Nearly everyone agrees that Article III defies literal application. . . . After an ill-fated and relatively short-lived attempt to establish categorical limits to non-Article III adjudication in the *Northern Pipeline* case, the Court has seemingly retreated to a multifactored balancing test that includes judicial independence as one factor and often results in the validation of Article I tribunals. Scholars have searched, with mixed success, for an organizing and limiting principle in the somewhat muddled jurisprudence that governs the relationship between Article III courts and Article I tribunals. While some scholars have reacted to the confusion by supporting a return to principled Article III literalism, others have been unwilling to accept the wholesale uprooting of the administrative state that such an approach would apparently entail." (footnotes omitted)).

[12] 28 U.S.C. § 1334(a)-(b) (2000).

[13] *Id.* § 1334(b).

[14] If a case falls within the scope of Article III, Section 2, it is constitutional for a federal court to hear the case. CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 8, at 32-33 (6th ed. 2002). There must also exist some congressional authorization (i.e., a statutory basis) for a lower federal court to exercise subject matter jurisdiction. *Id.* A case might be both "related to" a bankruptcy case and also have some other basis of federal jurisdiction. This Article is concerned with cases that use "related to" jurisdiction as the sole basis of federal jurisdiction.

edge the validity of "related to" jurisdiction but do not identify the constitutional basis for such jurisdiction. These cases implicitly presume that "related to" bankruptcy jurisdiction is constitutional, but they never ground that assumption in specific Article III precedent.

Part III addresses the arguments of various scholars who attempt to justify the exercise of "related to" bankruptcy jurisdiction on Article III grounds. This Part argues that Article III provides an inadequate constitutional "hook" for "related to" jurisdiction. Part III, Section A explains that "related to" cases do not all "arise under" federal law. Some "related to" bankruptcy cases neither have a "federal ingredient"[15] nor rely on or require reference to federal law.[16] As such, those "related to" bankruptcy cases cannot be said to "arise under" federal law. Section B maintains that supplemental (pendent or ancillary) jurisdiction also fails to provide a satisfactory constitutional basis for "related to" bankruptcy jurisdiction. Section C rejects the notion of protective jurisdiction as an Article III basis for "related to" bankruptcy jurisdiction.

Part IV contends that "related to" cases are most accurately viewed as an exercise of Congress' Article I power. As a practical matter, "related to" bankruptcy cases are heard in federal court because it is "necessary and proper" to do so in view of the comprehensive federal bankruptcy scheme. In light of virtually universal acceptance by courts of an extremely encompassing construction of the term "related to," it appears that most courts

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[15] In *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 823-25 (1824), the Supreme Court held that Congress could constitutionally grant federal subject-matter jurisdiction over any case involving the Bank of the United States as a party; because the Bank's every action derived from its charter, a federal statute, every such case would contain at least one "federal ingredient." *Osborn* has been cited with approval in other Supreme Court cases holding that federal courts may constitutionally exercise subject matter jurisdiction over cases involving federally created entities. Am. Nat'l Red Cross v. S.G., 505 U.S. 247, 264 (1992) (stating that "Article III's 'arising under' jurisdiction is broad enough to authorize Congress to confer federal-court jurisdiction over actions involving federally chartered corporations"); Pac. R.R. Removal Cases, 115 U.S. 1, 14 (1885) (holding that subject matter jurisdiction was constitutional because the defendants were federally created corporations), *superseded by statute*, Judiciary Act of 1925, ch. 229, § 12, Pub. L. No. 68-415, 43 Stat. 936, 941 (1925).

[16] In *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491-94 (1983), the Court drew upon *Osborn* to conclude that Congress was permitted by Article III to open the federal courts to a case involving a foreign plaintiff, a foreign defendant, and state-law claims because the case required the district court to interpret and apply a federal statute in order to decide whether the lawsuit could move forward.

view the exercise of federal jurisdiction in these cases as constitutionally appropriate. At the same time, however, Supreme Court precedent appears to preclude reliance on Article I as a basis for federal subject-matter jurisdiction over those "related to" bankruptcy cases that do not fall within the bounds of Article III. Perhaps for this reason, the focus of most scholars has been to develop theories about Article III to justify this exercise of jurisdiction with insufficient regard for the text and structure of Article III itself. Only by acknowledging the insufficiency of an Article III basis for "related to" bankruptcy jurisdiction can there be an open and meaningful debate regarding whether, and under what circumstances, Congress may utilize its Article I powers to allow Article III courts to adjudicate cases that do not fit within their traditional, limited subject matter jurisdiction.

I

AN OVERVIEW OF FEDERAL BANKRUPTCY LAW AND JURISDICTION

Federal bankruptcy law provides a formal organizing structure for creditors to collectively satisfy debts owed to them and for debtors to seek relief from an often-debilitating debt burden.[17] Debtors agree to put their available assets in the hands of the legal system, in the hope that they (the debtors) can put their financial difficulties behind them.[18] Creditors' mandatory participation[19] is premised on the expectation that they will recover more than they would have if they had engaged in self-help, which carries a higher risk of failure than a cooperative, collective process to recover debt.[20]

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[17] CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY 1 (1997) ("The goals of a bankruptcy case are twofold: resolving the competing claims of multiple creditors, *and* freeing the debtor from its financial past.").

[18] In liquidation cases, debtors literally put their assets in the hands of the legal system in the hopes that they will receive a discharge. *Id.* at 2. In reorganization cases, debtors remain in possession of their assets, but the legal system nonetheless maintains some level of control over the debtors.

[19] Once a bankruptcy petition has been filed, the mandatory stay prohibits creditors from attempting to collect from the debtor. 11 U.S.C. § 362(a) (2000); *see also infra* note 39. As a result, the creditor must participate in a bankruptcy in order to have any hope of recovery.

[20] *Id.* at 4-5 (describing the difficulty involved with individual recourse under state collection law).

A. The Federal Bankruptcy Statutory Scheme

Title 11 of the United States Code, referred to as the Bankruptcy Code, contains the body of substantive law governing the federal bankruptcy regime.[21] An individual or entity that wishes to seek the protection afforded by federal bankruptcy law must file a bankruptcy petition under Chapter 7, Chapter 9, Chapter 11, Chapter 12, or Chapter 13 of Title 11.[22] Creditors may also

[21] DOUGLAS G. BAIRD, THE ELEMENTS OF BANKRUPTCY 4 (3d ed. 2001) ("Since 1978 the Bankruptcy Code has been embodied in Title 11 of the United States Code."); TABB, *supra* note 17, at 51 ("The substantive law of bankruptcy is found in title 11 of the United States Code, commonly referred to as the 'Bankruptcy Code.'"). The Bankruptcy Code, in referring to Title 11, does not capitalize the word "title." This Article will capitalize the word "Title" unless directly quoting from the Bankruptcy Code or another source that does not capitalize the word. R

[22] 11 U.S.C. §§ 109 (describing the requirements to file under various chapters), 301(a) (stating that an individual bankruptcy case is commenced upon the filing of the petition under the appropriate chapter), 302 (2000) (stating the same for joint cases); 1 COLLIER ON BANKRUPTCY, *supra* note 3, ¶ 1.03[1] & n.1; TABB, *supra* note 17, at 52. Chapters 1, 3, and 5 of Title 11 apply to all types of bankruptcy cases. BAIRD, *supra* note 21, at 5; DAVID G. EPSTEIN, BANKRUPTCY AND RELATED LAW IN A NUTSHELL 124 (7th ed. 2005); TABB, *supra* note 17, at 52. Chapters 7, 9, 11, 12, and 13 each pertain to different kinds of bankruptcy cases. TABB, *supra* note 17, at 52; *see* BAIRD, *supra* note 21, at 15. Chapters 7, 11, and 13 are the commonly known chapters: Chapter 7 offers liquidation for both individuals and commercial entities, Chapter 11 offers reorganization for commercial entities (though individuals can take advantage of it as well), and Chapter 13 offers rehabilitation for individuals. BAIRD, *supra* note 21, at 15-17; 1 COLLIER ON BANKRUPTCY, *supra* note 3, ¶¶ 1.03[2][a], 1.03[4], 1.03[6]. Chapter 9 pertains to municipalities. BAIRD, *supra* note 21, at 15; 1 COLLIER ON BANKRUPTCY, *supra* note 3, ¶ 1.03[3]. Chapter 12 provides relief for family farmers. 1 COLLIER ON BANKRUPTCY, *supra* note 3, ¶ 1.03[5]. The sections within Chapters 7, 9, 11, 12, and 13 apply only to the chapter within which the section is found. TABB, *supra* note 17, at 52; *see* BAIRD, *supra* note 21, at 5. The Bankruptcy Amendments of 2005 added Chapter 15, which is intended to "incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency." 11 U.S.C. § 1501(a); *see* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 801, 119 Stat. 23, 134-46 (2005); *see generally* 1 COLLIER ON BANKRUPTCY, *supra* note 3, ¶ 1.03[7] (describing Chapter 15). Chapter 15 permits a "foreign representative" to commence a Chapter 15 case by filing a "petition for recognition." 11 U.S.C. §§ 1504, 1515. The petition for recognition permits the foreign representative to seek the assistance of U.S. courts to facilitate a foreign bankruptcy. *See id.* § 1521 (listing the relief available to a foreign representative that files a petition for recognition); Michael P. Richman & Craig E. Reimer, *Bankruptcy Update: Congress Overhauls the Nation's Bankruptcy Laws—Impact on Commercial Cases*, 59 CONSUMER FIN. L.Q. REP. 388, 396-97 (2005). Chapter 15 is similar to former section 304 of the Bankruptcy Code, which was repealed by the Bankruptcy Amendments of 2005, and dealt with cases ancillary to foreign proceedings. Richman & Reimer, *supra*, at 397. R R R R R R

take advantage of federal bankruptcy law by filing an involuntary petition.[23]

The petition may seek liquidation or rehabilitation (reorganization), depending on the chapter under which the debtor proceeds.[24] Chapter 7 provides for liquidation and Chapters 9, 11, 12, and 13 offer rehabilitation of one kind or another, rather than liquidation.[25] In a liquidation case, the court will appoint a bankruptcy trustee to act as the representative of the estate.[26] The trustee will gather all of the debtor's assets, evaluate all of the claims submitted by the various creditors, sell the assets, and distribute the income to the creditors.[27] The debtor generally is discharged from the obligations he or she incurred before filing for bankruptcy protection.[28] In a reorganization case, a trustee may or may not be appointed. In a Chapter 11 case, it is rare to appoint a trustee.[29] Instead, the "debtor in possession" serves as the representative of the estate.[30] A reorganization case proceeds differently than a liquidation case because the objective is to preserve the debtor (commonly a business) as a going concern.

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[23] 11 U.S.C. § 303; TABB, *supra* note 17, at 68, 74. R

[24] EPSTEIN, *supra* note 22, at 124 ("There are two general forms of bankruptcy relief: (1) liquidation and (2) rehabilitation or reorganization. The Bankruptcy Code provides for these two forms of relief in five separate kinds of bankruptcy cases: (1) Chapter 7 cases, (2) Chapter 9 cases, (3) Chapter 11 cases, (4) Chapter 12 cases, and (5) Chapter 13 cases."). R

[25] Chapter 7 is entitled "Liquidation" and Chapter 11 is entitled "Reorganization." *See also* EPSTEIN, *supra* note 22, at 124-26 (discussing the basic differences between Chapter 7 and Chapters 11 and 13); TABB, *supra* note 17, at 52 (explaining that Chapters 9, 11, 12, and 13 "provide for some form of rehabilitation of the debtor, as opposed to a straight liquidation"). R R

[26] 11 U.S.C. § 323; *see* BAIRD, *supra* note 21, at 10. ("The principal officer in a Chapter 7 case is the bankruptcy trustee."). R

[27] TABB, *supra* note 17, at 63, 69-71; *see* 11 U.S.C. § 704 (describing the duties of a trustee); BAIRD, *supra* note 21, at 10; EPSTEIN, *supra* note 22, at 124-26. Professor Baird points out that "[m]any individuals filing Chapter 7 have no assets. The issue to litigate in these cases is the scope of bankruptcy's fresh start policy, not the division of spoils among the creditors." BAIRD, *supra* note 21, at 16. R R R

[28] 11 U.S.C. § 727; BAIRD, *supra* note 21, at 15-16 ("An individual who is hopelessly in debt can file a Chapter 7 bankruptcy petition, give up all nonexempt assets, and walk away from nearly all pre[-]bankruptcy obligations."); EPSTEIN, *supra* note 22, at 124-25. A corporation cannot be discharged from its pre-bankruptcy obligations. *See* 11 U.S.C. § 727(a)(1) (a debtor that is not an individual may not be discharged); BAIRD, *supra* note 21, at 16. R R R

[29] EPSTEIN, *supra* note 22, at 131; TABB, *supra* note 17, at 63, 74. R

[30] 11 U.S.C. § 1101 (defining "debtor in possession"); BAIRD, *supra* note 21, at 10; TABB, *supra* note 17, at 63, 74-76; *see also* 11 U.S.C. §§ 1104 (describing the conditions under which a trustee is appointed in a Chapter 11 case), 1107 (describing the "[r]ights, powers, and duties of debtor in possession"). R R R

Nonetheless, the assets of the debtor must be collected. Rather than selling the assets to satisfy the debts owed to creditors, however, a reorganization case requires a plan to be created for repayment over time.[31]

Regardless of whether a bankruptcy petition seeks liquidation or rehabilitation, the Bankruptcy Code provides the trustee or debtor in possession with various tools to collect the full assets of the estate.[32] Furthermore, the Bankruptcy Code creates a process for determining which debts are valid and hence must be satisfied.[33] The Bankruptcy Code also provides the order by which the debts will be satisfied,[34] and it provides that entities that assist the bankruptcy process will be compensated for their work.[35]

In both a voluntary and involuntary case, the filing of the petition commences the bankruptcy case.[36] "Commencement" of the case "creates an estate,"[37] which, "[w]ith only minor exceptions, . . . includes all property of the debtor as of the time of the filing of the bankruptcy petition."[38] Filing the petition in a voluntary case also immediately imposes an automatic stay upon any efforts to collect debts from the debtor.[39] Finally, the filing of the voluntary petition itself operates as an order for relief.[40]

B. Federal Bankruptcy Jurisdiction

Bankruptcy cases are heard in federal court. The federal bank-

[31] BAIRD, *supra* note 21, at 16 ("Chapter 13 allows an individual to keep all assets, but in return the debtor must create a plan under which creditors receive as much out of the debtor's future income as they would have received had the debtor filed under Chapter 7."); EPSTEIN, *supra* note 22, at 126; TABB, *supra* note 17, at 73 ("The ultimate goal of chapter 11 is to confirm a plan for working out the debtor's financial obligations."). R R

[32] *E.g.*, 11 U.S.C. §§ 544(b) (avoidance of fraudulent conveyances, as defined by state law), 547 (avoidance of preferential transfers), 548 (avoidance of fraudulent conveyances, as defined by § 548 itself).

[33] *See, e.g.*, *id.* §§ 501, 502.

[34] *See, e.g.*, *id.* §§ 507, 725, 726.

[35] *See, e.g.*, *id.* §§ 327, 330, 503, 1103.

[36] *Id.* §§ 301(a), 303(b) (voluntary and involuntary case respectively).

[37] *Id.* § 541(a); TABB, *supra* note 17, at 69. R

[38] EPSTEIN, *supra* note 22, at 167; *see also* 11 U.S.C. § 541 (describing "[p]roperty of the estate"). R

[39] 11 U.S.C. § 362(a); BAIRD, *supra* note 21, at 11 ("[The automatic stay] requires creditors to cease all debt collection efforts the moment a petition is filed."); TABB, *supra* note 17, at 146 ("[The stay] arises automatically upon the filing of a bankruptcy petition."). R R

[40] 11 U.S.C. § 301(b); TABB, *supra* note 17, at 68. R

ruptcy jurisdiction statute, 28 U.S.C. § 1334, confers subject matter jurisdiction on the federal district courts and the federal district courts "refer" bankruptcy cases to the bankruptcy courts.[41] Bankruptcy courts, which are Article I rather than Article III courts, serve as adjuncts to the district courts.[42] Much has been written about the proper allocation of responsibility between the bankruptcy courts and the federal district courts, but this Article is primarily concerned with the proper scope of the district court's subject matter jurisdiction, so it is unnecessary to focus on the reference process or the division of power between the bankruptcy courts and district courts.

The bankruptcy statute authorizes the federal courts to hear four types of cases: "cases under title 11," "civil proceedings arising under title 11," "civil proceedings . . . arising in . . . cases under title 11," and "civil proceedings . . . related to cases under title 11."[43] These four categories can be understood as follows:

First, federal district courts have original and exclusive jurisdiction over "all cases under title 11."[44] Title 11 is the section of the United States Code that contains all substantive federal bankruptcy law.[45] A "case[ ] under title 11" is comprised of the bankruptcy petition itself.[46] The federal district court in which

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41 28 U.S.C. § 157(a) ("Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district."); BAIRD, *supra* note 21, at 25; Lawrence P. King, *Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984*, 38 VAND. L. REV. 675, 678 (1985) ("Each district court may refer all, some, or no cases and proceedings or parts thereof to the bankruptcy judges of the district. The authority to refer cases and proceedings under section 157(a) has been exercised by local rule or order in all federal judicial districts. Accordingly, bankruptcy judges continue to handle most, if not all, bankruptcy cases."). R

42 King, *supra* note 41, at 677 ("[B]ankruptcy courts were and are nonarticle III courts."); *see* BAIRD, *supra* note 21, at 23; *cf.* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 60-61 (1982) (describing attributes of bankruptcy judges under the 1978 Act; these attributes were retained in the 1984 Bankruptcy Act and still apply today). R R

43 28 U.S.C. § 1334(a)-(b).

44 *Id.* § 1334(a).

45 TABB, *supra* note 17, at 51. R

46 *In re* Marcus Hook Dev. Park, Inc., 943 F.2d 261, 264 (3d Cir. 1991) ("[C]ases under Title 11, 'refer[] merely to the bankruptcy petition itself.'"); Wood v. Wood (*In re* Wood), 825 F.2d 90, 92 (5th Cir. 1987); 9 AM. JUR. 2D *Bankruptcy* § 560 (1999) ("'A case under Title 11' means the original bankruptcy petition itself from which all other bankruptcy proceedings spring. In other words, a 'case' is the bankruptcy case per se upon which all of the postpetition proceedings are predicated." (footnotes omitted)); 1 COLLIER ON BANKRUPTCY, *supra* note 3, ¶ 3.01[3]. R

the bankruptcy petition is pending also has "exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of [the title 11] case, and of property of the estate."[47] Finally, the federal district court in which the petition is pending has exclusive jurisdiction "over all claims or causes of action that involve construction" of the statutory section that pertains to the retention of professionals by the trustee and to "rules relating to disclosure requirements under" that section.[48]

Second, federal district courts have original and nonexclusive jurisdiction over "all civil proceedings arising under title 11. . . ."[49] A civil proceeding "arising under" Title 11 asserts a cause of action created by Title 11.[50] For example, the Bankruptcy Code permits the bankruptcy trustee to void a transfer of the debtor's property if the transfer was made "to or for the benefit of a creditor," as payment for "an antecedent debt," "while the debtor was insolvent," within a specified period of time before the filing of the bankruptcy petition, and if the transfer permits the creditor to receive more than his or her fair share (i.e., more than he or she would have received if the debt were recorded and paid as part of the administration of the bankruptcy case).[51] The Bankruptcy Code also provides that the trustee can avoid conveyances that are either actually fraudulent[52] or constructively fraudulent.[53] Further, the Bankruptcy Code incorporates state fraudulent conveyance law and allows the trustee to avoid a transfer that state law would permit a creditor to avoid.[54] Where

[47] 28 U.S.C. § 1334(e)(1); 9 AM. JUR. 2D, *supra* note 46, § 570.

[48] 28 U.S.C. § 1334(e)(2). The section that pertains to retention of professionals is 11 U.S.C. § 327.

[49] 28 U.S.C. § 1334(b).

[50] *Wood*, 825 F.2d at 96 (citing 1 COLLIER ON BANKRUPTCY ¶ 3.01 (1987)); 9 AM. JUR. 2D, *supra* note 46, § 563; 1 COLLIER ON BANKRUPTCY, *supra* note 3, ¶ 3.01[4][c][i]. R

[51] 11 U.S.C. § 547(b) (setting out the circumstances under which a trustee can void a preferential transfer).

[52] *Id.* § 548(a)(1)(A) (stating that a transfer may be avoided if it was both made within a specified period of time preceding the filing of the bankruptcy petition and if it was made "with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation occurred, indebted"); EPSTEIN, *supra* note 22, at 223 (distinguishing between an actually fraudulent transfer and a constructively fraudulent transfer). R

[53] 11 U.S.C. § 548(a)(1)(B); EPSTEIN, *supra* note 22, at 223 ("Establishing a constructively fraudulent conveyance turns on the adequacy of consideration for the transfer and the financial position of the debtor, rather than the intention of the debtor."). R

[54] 11 U.S.C. § 544(b)(1); *see also* King, *supra* note 41, at 693 ("If there is any R

a trustee has not been appointed, a debtor in possession may pursue nearly all of the causes of action created by the Bankruptcy Code.[55] The "arising under" category of federal bankruptcy jurisdiction is quite similar to the archetypal example of federal question jurisdiction: a federal statute creates a cause of action and, thus, federal courts have jurisdiction to adjudicate that cause of action.

In addition to their jurisdiction over "civil proceedings arising under title 11," federal district courts also have original and nonexclusive jurisdiction over "civil proceedings . . . arising in . . . cases under title 11."[56] A civil proceeding "arising in" a case under Title 11 is one "that [is] not based on any right expressly created by title 11, but nevertheless, would have no existence outside of the bankruptcy."[57] A simple example is the allowance or disallowance of claims filed by creditors against the debtor.[58] "'Arising in' acts as the residual category of civil proceedings."[59]

Finally, federal courts have original jurisdiction over proceedings that are "related to" the bankruptcy case. It is widely recognized that "related to" jurisdiction "is the most extensive in our history, and indeed, was designed to be as broad as the Constitution permits."[60] The Third Circuit has articulated the most commonly cited test of whether a proceeding is "related to" a bankruptcy case. A lawsuit is "related to" a bankruptcy when:

> [T]he outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy. . . . An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.[61]

This broad grant of jurisdiction includes actions that the debtor

creditor who can, under state law, contest a prebankruptcy transfer as fraudulent, the trustee may assert that right and bring the action.").

[55] 11 U.S.C. § 1107 (describing the "[r]ights, powers, and duties of debtor in possession").

[56] 28 U.S.C. § 1334(b).

[57] Wood v. Wood (*In re* Wood), 825 F.2d 90, 97 (5th Cir. 1987); 9 AM. JUR. 2D, *supra* note 46, § 564; 1 COLLIER ON BANKRUPTCY, *supra* note 3, ¶ 3.01[4][c][iv]. **R**

[58] EPSTEIN, *supra* note 22, at 461. **R**

[59] 1 COLLIER ON BANKRUPTCY, *supra* note 3, ¶ 3.01[4][c][iv]. **R**

[60] Brubaker, *supra* note 8, at 748. **R**

[61] Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984), *abrogated in part by* Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 129 (1995) (citations omitted). Most circuits have adopted the language of the *Pacor* test. *See supra* note 2. **R**

could have commenced in the absence of the bankruptcy case.[62] Any cause of action that could have been asserted by the debtor when he or she was not yet a debtor will become property of the estate upon the filing of the bankruptcy petition[63] and the lawsuit that asserts such a cause of action will be "related to" the bankruptcy case.[64]

"Related to" jurisdiction also encompasses actions between third parties. For example, when news of the Enron corporate scandal reached the public, plaintiffs initiated state court lawsuits against parties such as Citibank, Salomon Smith Barney, and J.P. Morgan that alleged that these parties had participated in Enron's fraud.[65] When Enron filed for bankruptcy protection, the suits against the third parties were removed to federal court on the ground that they were "related to" Enron's bankruptcy case.[66] The court reasoned that these defendants might seek indemnification or contribution from Enron and thus that the outcome of these lawsuits might conceivably have an effect on the

[62] *See, e.g.*, Celotex Corp. v. Edwards, 514 U.S. 300, 308 n.5 (1995) (recognizing that the case in *Northern Pipeline* would be considered a "related to" case); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 56 (1982) (action by debtor Northern Pipeline against defendant for breach of contract, breach of warranty, misrepresentation, coercion, and duress); Newby v. Enron Corp. (*In re* Enron Corp. Sec., Derivative & "ERISA" Litig.) (*Enron I*), No. MDL 1446, 2003 WL 22472155 at *2 (S.D. Tex. Oct. 14, 2003) (action by representative of debtor for state-law tort claims against former officers, directors, and employees of debtor); Charter Behavioral Health Sys., L.L.C. v. Managed Health Network, Inc. (*In re* Charter Behavioral Health Sys., L.L.C.), 277 B.R. 54, 57 (Bankr. D. Del. 2002) (action by the debtor to recover money due for services rendered before filing for bankruptcy relief); Trans World Airlines, Inc. v. Icahn (*In re* Trans World Airlines, Inc.), 278 B.R. 42, 49-50 (Bankr. D. Del. 2002) (action by the debtor that sought a declaration that third parties had not tortiously interfered with a pre-petition contract between the debtor and the defendant and an injunction against the defendant's commencement of litigation against third parties); 1 COLLIER ON BANKRUPTCY, *supra* note 3, ¶ 3.01[4][c][ii][A] (describing "cases involving causes of action owned by the debtor when the [bankruptcy petition] was filed" as constituting one category of "related to" cases). R

[63] 11 U.S.C. § 541(a); 1 COLLIER ON BANKRUPTCY, *supra* note 3, ¶ 3.01[4][c][ii] (explaining that "related to" cases include cases asserting "causes of action owned by the debtor that become property of a title 11 estate under section 541"). R

[64] *Enron I*, 2003 WL 22472155, at *2; *Trans World Airlines,* 278 B.R. at 49-50; *cf. Charter*, 277 B.R. at 57 (holding that an action by the debtor to recover money due for services rendered before filing for relief in bankruptcy and pursuant to the terms of a pre-petition contract is within the subject matter jurisdiction conferred by 28 U.S.C. § 1334).

[65] Newby v. Enron Corp. (*In re* Enron Corp. Sec., Derivative & "ERISA" Litig.), 314 B.R. 354, 354 (S.D. Tex. 2004).

[66] *Id.* at 357.

bankruptcy estate.[67] Similarly, when WorldCom filed for bankruptcy, cases against parties other than WorldCom were held to be "related to" WorldCom's bankruptcy case.[68] Global Crossing's bankruptcy similarly precipitated removal of state-law claims against parties other than the debtor.[69]

Removal of state-law actions against nondebtors is not limited to the recent spate of corporate scandals. Mass torts also create a situation in which one corporation's bankruptcy is used to remove a myriad of tort suits to federal court. When Dow Corning was sued by thousands of plaintiffs injured by silicon gel breast implants, it filed for bankruptcy and sought a federal forum for all suits pending against it.[70] However, manufacturers other than Dow Corning also removed cases pending against them.[71] The court confirmed that these suits were properly the subject of federal "related to" bankruptcy jurisdiction because the nondebtors might seek contribution or indemnification from Dow Corning.[72] In light of the Chapter 11 filings of the Archdiocese of Portland, the Diocese of Tucson, and the Diocese of Spokane,[73] one could

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[67] *Id.* (holding that an action against parties other than the debtor is within the federal court's "related to" jurisdiction).

[68] New York City Employees' Ret. Sys. v. Ebbers (*In re* WorldCom, Inc. Sec. Litig.), 293 B.R. 308, 322-23 (S.D.N.Y. 2003) (suit against former officers, directors, underwriters, and accountants was "related to" WorldCom's bankruptcy case). *But see* Ret. Sys. of Ala. v. J.P. Morgan Chase & Co., 285 B.R. 519, 529 (M.D. Ala. 2002) (rejecting the argument that a lawsuit against underwriters was "related to" WorldCom's bankruptcy case merely because the parties might pursue indemnification or contribution claims against WorldCom in the future).

[69] Breightol v. UBS Painewebber (*In re* Global Crossing, Ltd. Sec. Litig.), 311 B.R. 345, 347 (S.D.N.Y. 2003).

[70] Lindsey v. O'Brien, Tanski, Tanzer and Young Health Care Providers of Conn. (*In re* Dow Corning Corp.), 86 F.3d 482, 485-86 (6th Cir. 1996).

[71] *Id.* at 486-87.

[72] *Id.* at 493-94 ("The potential for Dow Corning's being held liable to the nondebtors in claims for contribution and indemnification, or vice versa, suffices to establish a conceivable impact on the estate in bankruptcy. Claims for indemnification and contribution, whether asserted against or by Dow Corning, obviously would affect the size of the estate and the length of time the bankruptcy proceedings will be pending, as well as Dow Corning's ability to resolve its liabilities and proceed with reorganization.").

[73] Allison Walsh Smith, *Chapter 11 Bankruptcy: A New Battleground in the Ongoing Conflict Between Catholic Dioceses and Sex-Abuse Claimants*, 84 N.C. L. REV. 282, 283-85 (2005); *Catholic Diocese Gets Out of Bankruptcy*, KANSAS CITY STAR (Mo.), Sept. 21, 2005, at A6 (reporting that the Diocese of Tucson had "emerged from bankruptcy," but that the Archdiocese of Portland and the Diocese of Spokane "remained mired in litigation"). *See generally* Open letter from John G. Vlazny, Archbishop of Portland, Archdiocese of Portland in Or. (July 6, 2004), *available at*

imagine similar examples occurring in state court litigation involving the Catholic Church.

Even though federal courts have subject matter jurisdiction over all "related to" cases, the courts may abstain from hearing certain kinds of "related to" bankruptcy cases. Federal courts *must* abstain from hearing "related to" bankruptcy cases that satisfy the following conditions: (1) there has been a timely motion for the court to abstain, (2) the case derives its federal subject matter jurisdiction only from the fact that it is related to a bankruptcy case, (3) the case "is commenced,"[74] and (4) the case "can be timely adjudicated" in state court.[75] Federal courts also retain the discretion to abstain "in the interest of justice, or in the interest of comity with State courts or respect for State law" from a case that "arises under," "arises in," or "relates to" a bankruptcy case.[76]

Whether or not these abstention provisions are invoked, they do not deprive the federal district court of subject matter jurisdiction over the "related to" bankruptcy case.[77] Moreover, the conditions that trigger a "mandatory" duty to abstain are suffi-

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http://www.archdpdx.org/bankruptcy/bankruptcy-letter.html (last visited Aug. 14, 2006) (explaining the basis for the Portland Archdiocese bankruptcy filing).

[74] Courts disagree about whether this condition requires the presence of an ongoing state court action. New York City Employees' Ret. Sys. v. Ebbers (*In re* WorldCom, Inc. Sec. Litig.), 293 B.R. 308, 331 n.36 (S.D.N.Y. 2003) (discussing the potential ambiguity in the statute).

[75] 28 U.S.C.S. § 1334(c)(2) (LexisNexis 2003 & Supp. 2006) ("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.").

[76] *Id.* § 1334(c)(1) ("Except with respect to a case under chapter 15 of title 11, 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."); *see also Ebbers*, 293 B.R. at 332, 334 (articulating the factors used by courts in the Second Circuit to decide whether discretionary abstention is appropriate and recognizing that equitable remand is governed by the same principles as discretionary abstention); Ret. Sys. of Ala. v. J.P. Morgan Chase & Co., 285 B.R. 519, 530-31 (M.D. Ala. 2002) (describing factors that should inform the discretionary abstention decision); *cf.* 28 U.S.C. § 1452(b) (2000) (allowing remand on any equitable ground).

[77] *Cf.* King, *supra* note 41, at 700-01 ("[M]andatory abstention does not involve a jurisdictional issue."). Of course, such a fact may not be particularly important as a matter of bankruptcy practice. It is, however, significant for the purpose of constitutional analysis. R

ciently subjective as to make the decision largely discretionary.[78] Further, the mandatory abstention provision does not apply to personal injury tort or wrongful death claims against the debtor.[79]

II

Acceptance of "Related To" Jurisdiction by the Supreme Court

Scholarly literature recognizes that although the Supreme Court has acknowledged the validity of "related to" bankruptcy jurisdiction, it has never explained the constitutional basis for such jurisdiction.[80] Implicit in several (but not all) relevant Supreme Court decisions is the presumption that there is an Article III basis for "related to" bankruptcy jurisdiction.

This Part will describe relevant bankruptcy cases decided by the United States Supreme Court, each of which strongly supports the conclusion that the Court believes "related to" jurisdiction is constitutional. Only some of these cases actually involve a "related to" bankruptcy lawsuit. None of these cases squarely present the issue of whether "related to" bankruptcy jurisdiction falls within the bounds of Article III. Nonetheless, the Court has dropped hints, some subtle and some not-so-subtle, that it believes "related to" jurisdiction fits safely within constitutional bounds.

In *Lathrop v. Drake*,[81] the Court stated that a federal court may hear any case in which an assignee in bankruptcy is a party and the suit "touch[es] any property, or rights of property" of the

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[78] *Cf. id.* at 700 ("The requirements [of mandatory absention] are of such a nature, however, as to limit considerably the occasions for use of subsection (c)(2). Rarely will they all be present.").

[79] 1 Collier on Bankruptcy, *supra* note 3, ¶ 3.06[2]; King, *supra* note 41, at 693-95 (explaining that personal injury actions against the estate must be heard in a federal district court and cannot be heard in a state court); *see* 28 U.S.C. §§ 157(b)(2)(B) (core proceedings do not include "the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate"), 157(b)(4) ("Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2)."). R

[80] Galligan, *supra* note 9, at 20 ("In a series of cases the United States Supreme Court has recognized Congress' power to grant the federal courts broad jurisdiction over cases related to bankruptcy. Unfortunately, these decisions fail to posit a persuasive analytical justification for the jurisdiction."). R

[81] Lathrop v. Drake, 91 U.S. 516 (1875).

debtor.[82] The modern equivalent of an assignee in bankruptcy is the bankruptcy trustee.[83] Interestingly, the Court in *Lathrop* appeared to rely on Article I, rather than Article III, to justify its conclusion. Its discussion is not extensive enough to conclude that the Court intended Article I to be the sole basis of federal jurisdiction over a suit involving an assignee, but the decision leaves no doubt that the Court believed *some* constitutional basis existed for the exercise of federal jurisdiction.

In *Lathrop*, the creditors of a debtor had obtained a judgment against the debtor and sold his property at a sheriff's sale to satisfy the judgment.[84] Less than four months after the adverse judgment was obtained, the debtor filed for bankruptcy in federal court in the Western District of Pennsylvania.[85] As a result, the debtor's assignee in bankruptcy (Lathrop) sued the creditors to recover the value of the debtor's property.[86] Lathrop sued the creditors in the circuit court for the Eastern District of Pennsylvania.[87]

The Supreme Court upheld the exercise of jurisdiction by the federal court in the Eastern District. The Supreme Court was concerned primarily with whether a suit by the assignee to recover the debtor's assets could be brought in a circuit court in a

[82] *Id.* at 519-20. The quoted language comes from the language of the Bankruptcy Act of 1867, which conferred upon the circuit courts jurisdiction to hear suits "'brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property, or rights of property, of said bankrupt, transferable to or vested in such assignee.'" *Id.* at 518. There is an argument that the Court believed the federal courts would have jurisdiction over *any* suit where the assignee was a party, regardless of whether the suit was connected to any property of the debtor. *See id.* at 520 (suggesting that no meaningful limit on jurisdiction is imposed by the words, "touching any property, or rights of property, of said bankrupt"). Because the instant suit was certainly about the property of the debtor, the Court did not have to consider whether the "property" language imposed any significant restriction on federal jurisdiction. *Id.* ("In this case, however, the suit does concern and have reference to property transferable to the assignee.").

[83] The Bankruptcy Act of 1898 replaced assignees in bankruptcy with bankruptcy trustees. Bardes v. Hawarden Bank, 178 U.S. 524, 526 (1900).

[84] The summary of facts of this case is available online at Westlaw. Lathrop v. Drake, 14 F. Cas. 1178 (C.C.E.D. Pa. 1873) (opinion of lower court).

[85] *Id.* It is not clear whether the debtor filed for bankruptcy in the district court or in the circuit court of the Western District.

[86] *Id.*

[87] *Id.* At the time, federal circuit courts had both original and appellate jurisdiction. RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 29 (5th ed. 2003); WRIGHT & KANE, *supra* note 14, §1, at 5.

district other than the one in which the bankruptcy petition was filed.[88] The Court concluded that federal courts other than the one where the bankruptcy proceedings were pending did have jurisdiction over suits such as Lathrop's.[89] Lathrop's cause of action was created by the bankruptcy statute,[90] so it is not surprising that the Court was not troubled by the exercise of federal subject-matter jurisdiction in this particular case.

The Court did not confine itself, however, to the relatively simple question of whether a federal court can adjudicate an assignee's suit that asserts a cause of action created by federal bankruptcy law. Instead, the Court stated more broadly that a federal court can adjudicate *any* suit "brought by or against the assignee in reference to alleged property of the bankrupt, or to claims alleged to be due from him or to him."[91] The Court did not distinguish between suits that alleged causes of action created by federal law and suits that alleged only causes of action created by state law. The Court explained that suits initiated by the assignee to recover assets owed to the bankruptcy estate were necessary to aid the bankruptcy.[92] The Court seemed to draw upon Congress' Article I powers to justify federal jurisdiction. After noting that state courts could certainly provide a forum for such suits, the Court stated that "a uniform system of bankruptcy, national in its character, ought to be capable of execution in the national tribunals, without dependence of the States in which it is possible that embarrassments might arise."[93] Article I, Section 8, Clause 4 confers upon Congress the authority "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the

[88] Lathrop v. Drake, 91 U.S. 516, 516 (1876) ("The question in this case is, whether, under the Bankrupt Act as passed in 1867, an assignee in bankruptcy, without regard to the citizenship of the parties, could maintain a suit for the recovery of assets in a circuit court of the United States in any district other than that in which the decree of bankruptcy was made . . . .").

[89] *Id.* at 518-19 (concluding that the district court would have jurisdiction over the suit and that the circuit court has the same jurisdiction as the district court would have).

[90] *Id.* at 520 ("[This case] is brought to compel the defendants to restore to the bankrupt's estate the value of property sold by them under a judgment alleged to have been confessed in fraud of the Bankrupt Act, and within four months of the commencement of proceedings in bankruptcy.").

[91] *Id.* at 517.

[92] *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.").

[93] *Id.* at 518.

United States."[94] The Court's mention of a "uniform system of bankruptcy" is a clear reference to Article I. The Court did not state that the suits involving trustees as parties were suits "arising under . . . the Laws of the United States." Indeed, the Court did not mention Article III at all. While *Lathrop* does not necessarily support the conclusion that the Court believed suits involving assignees were constitutional under Article I, it certainly does support the conclusion that the Court believed that some constitutional basis existed for federal adjudication of such suits.

In *Bardes v. Hawarden Bank*,[95] the Supreme Court decided against the exercise of federal jurisdiction, but its conclusion rested on statutory grounds. The opinion demonstrates that the Court believed that a federal court can constitutionally exercise jurisdiction over any suit by a trustee to recover assets of the bankruptcy estate, regardless of whether the suit, if it had been brought by the debtor before filing for bankruptcy, could have been brought in a federal court.

In *Bardes*, the trustee (Bardes) of the bankruptcy estate sued the First National Bank of Hawarden, Iowa to recover the value of goods transferred by the debtor to the bank within four months of the filing of the bankruptcy petition.[96] Bardes sued in federal court in Iowa.[97] The Bankruptcy Act of 1898 provided that "[s]uits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."[98] The Court found that the suit could not have been filed by the debtor in district court because district courts at the time did not have "jurisdiction of suits at law or in equity between private parties,"[99] and there was no suggestion that the defendant consented to be sued in district court. As a result, the district court lacked jurisdiction.[100]

The most important aspect of the Court's analysis is that the

[94] U.S. CONST. art. I, § 8, cl. 4 ("[The Congress shall have Power to] establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States[.]").

[95] Bardes v. Hawarden Bank, 178 U.S. 524 (1900).

[96] *Id.* at 525.

[97] *Id.*

[98] Bankruptcy Act of 1898, ch. 541, § 23(b), 30 Stat. 544, 552 (1898); *Bardes*, 178 U.S. at 529 (quoting statute).

[99] *Bardes*, 178 U.S. at 537.

[100] *Id.* at 537-39.

Court was entirely unconcerned about whether the hypothetical suit by the debtor would have enjoyed diversity jurisdiction or would have arisen under the Constitution, laws, or treaties of the United States. The Court cared only that the defendant failed to consent because the absence of consent meant that there was no statutory authorization for the district court to exercise jurisdiction. The Court was clear that, if the defendant were to consent, a federal district court *could* entertain jurisdiction over suits that, if brought before bankruptcy proceedings had been initiated, could not have been asserted in federal court.[101]

In *Schumacher v. Beeler*, the Court confronted an argument regarding the statutory scope of the federal court's subject matter jurisdiction.[102] In resolving the statutory question, the Court again expressed its view that Congress could constitutionally grant federal subject-matter jurisdiction over any case initiated by a bankruptcy trustee against an adverse party, regardless of the lack of diversity and the allegation of only state-law claims.[103]

Ralph K. Beeler was the bankruptcy trustee for the debtor, Long & Allstatter Company.[104] Some time before filing for bankruptcy, Long & Allstatter had lost a suit in Ohio state court and the sheriff had executed on the judgment by levying the debtor's property.[105] The execution occurred more than four months before the debtor filed for bankruptcy, but the property had not been sold by the time of the filing.[106] Consequently, Beeler initiated suit against the sheriff to enjoin the sale of the property. The suit alleged causes of action created by state law, not federal bankruptcy law.[107]

The sheriff contended that the court lacked subject matter jurisdiction over the case.[108] The relevant jurisdictional statute—section 23(b) of the Bankruptcy Act of 1898 as it existed in 1934—provided that a federal court would have jurisdiction over non-bankruptcy proceedings between a bankruptcy trustee and an adverse claimant, but only with the consent of the adverse

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101 *See id.*

102 Schumacher v. Beeler, 293 U.S. 367 (1934).

103 *See id.* at 374.

104 *See id.* at 367. Some of these facts are available only online in the Westlaw summary of the case.

105 *See id.* at 368-69.

106 *Id.*

107 *Id.* at 369.

108 *Id.* at 369-70.

claimant.[109] In other words, Congress provided that in an action between a trustee and another party, where there was no diversity of citizenship, and the action contained only causes of action created by state law, the federal court could nonetheless exercise subject matter jurisdiction as long as the other party consented.[110] The sheriff's position was that he had not consented, but the Court rejected that contention and held that the federal court had jurisdiction over the suit.[111]

The Court made clear that federal courts could permissibly exercise jurisdiction over suits such as this one.[112] In a brief discussion, the Court explained that, while Congress' intent in section 23 was to leave most suits between trustees and adverse parties to the state courts, there was "no reason" why a federal court could not hear such a case if the adverse party consented.[113] As it is a well-settled principle that parties cannot overcome a constitutional deficiency in subject matter jurisdiction by consent,[114] the Court's opinion must be read to indicate that there is nothing in the Constitution that bars federal jurisdiction over a state-law action between a trustee and a third party. Moreover, as support for that proposition, the Court stated: "The Congress, by virtue of its constitutional authority over bankruptcies [under Article I, Section 8], could confer or withhold jurisdiction to entertain such suits and could prescribe the conditions upon which the federal courts should have jurisdiction."[115]

In *Williams v. Austrian*, the Court again upheld the exercise of

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109 11 U.S.C. § 46(a) (1926); *Schumacher*, 293 U.S. at 368 n.1 (quoting statute).

110 The statute excepted from this consent requirement suits that were "brought by the trustee in bankruptcy to recover property transferred by the bankrupt in effecting preferences made voidable by the Act, and suits to recover property conveyed by the bankrupt in fraud of creditors within four months prior to the filing of the petition in bankruptcy." *Schumacher*, 293 U.S. at 376.

111 *Id.* at 370-71 ("The sheriff contends that he had no authority to give the consent; but he was the defendant in the suit and his consent was actually given. We find no ground for concluding that the consent was invalid.").

112 *Id.* at 371 (stating that it is "correct" that "Congress had power to permit suits by trustees in bankruptcy in the federal courts against adverse claimants, regardless of diversity of citizenship").

113 *Id.* at 374.

114 Arbaugh v. Y & H Corp., 126 S. Ct. 1235, 1244 (2006); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986); United States v. Griffin, 303 U.S. 226, 229 (1938); ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.1, at 261-62 (4th ed. 2003); WRIGHT & KANE, *supra* note 14, at 28 ("The rule is that the parties cannot confer on a federal court jurisdiction that has not been vested in the court by the Constitution and Congress."). R

115 *Schumacher*, 293 U.S. at 374.

federal jurisdiction over a suit brought by a bankruptcy trustee that alleged only state-law causes of action, even though there was no diversity of citizenship.[116] In *Williams*, the trustees of the debtor, Central States Electric Corporation, sued the debtor's current and former officers and directors. The suit alleged that the defendants had misappropriated corporate assets through fraud and mismanagement.[117] The causes of action were created by state law, and the federal court did not have diversity jurisdiction over the suit.[118] The Court was largely concerned with whether the federal statute conferred jurisdiction, and Justice Frankfurter, joined by Justice Jackson, penned a long dissent on that issue.[119] The fight between the majority and the dissent is illuminating because neither group doubted Congress' power to grant federal jurisdiction over such a suit.[120] Their disagreement was entirely about whether Congress chose in the particular statute before them to confer federal jurisdiction.[121]

In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co*., a "related to" case, the Court confronted a deeply significant issue of jurisdiction, yet it never questioned the constitutionality of "related to" jurisdiction.[122] Even though the Court in *Marathon* was concerned with a question other than whether "related to" jurisdiction falls within the scope of Article III, it is difficult to read the *Marathon* opinion without concluding that all of the justices believed that "related to" jurisdiction *does* fall within the bounds of Article III.

In *Marathon,* Northern Pipeline Construction Company filed a petition for reorganization and subsequently filed a suit in bank-

116 Williams v. Austrian, 331 U.S. 642, 657-58, 662 (1947).

117 *Id.* at 645 (majority opinion); *id.* at 664 (Frankfurter, J., dissenting).

118 *Id.* at 645 (majority opinion) (noting that there was no diversity jurisdiction and that the case rested solely on jurisdiction conferred by the bankruptcy statutes); *id.* at 664 (Frankfurter, J., dissenting) ("[N]either diversity of citizenship nor other ground of federal jurisdiction exists [over the trustee's suit].").

119 *Id.* at 662-82 (Frankfurter, J., dissenting).

120 *Id.* at 664 (expressing "[n]o doubt [that] Congress could authorize" federal jurisdiction over a suit brought by a bankruptcy trustee where there is no diversity of citizenship or other basis of federal jurisdiction).

121 *Compare id.* at 657-58 (majority opinion) ("Congress intended . . . to establish the jurisdiction of federal courts to hear plenary suits brought by a reorganization trustee, even though diversity or other usual ground for federal jurisdiction is lacking."), *with id.* at 664 (Frankfurter, J., dissenting) ("[There is no] doubt that Congress has not conferred upon the district courts the power to entertain . . . a suit by an ordinary bankruptcy trustee [where diversity of citizenship is lacking and no other ground of federal jurisdiction exists].").

122 N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

ruptcy court against Marathon Pipe Line Company that alleged only state-law causes of action.[123] Federal bankruptcy law at the time provided that such a suit could be filed in federal bankruptcy court.[124] Federal bankruptcy judges were not, and are still not, Article III judges.[125] Marathon argued that Northern's suit could not constitutionally be heard by a non-Article III judge.[126]

There was no majority opinion, but a majority of the Court agreed that bankruptcy judges could not hear "related to" cases. Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, concluded that bankruptcy did not fall within the same category as any of the previously recognized situations in which the Court had concluded that Congress was empowered by Article I, and not prohibited by Article III, to create legislative courts.[127] Justices Rehnquist and O'Connor did not join Justice Brennan's opinion, but they agreed that there was no authority for a non-Article III judge to adjudicate Northern's state-law cause of action against Marathon.[128]

However, all nine justices appeared to believe that it would be proper for a federal court to exercise jurisdiction over Northern's action. In a footnote in his plurality opinion, Justice Brennan stated that the debtor's breach of contract claim against Marathon was properly heard in federal court because of its "relationship to the petition for reorganization."[129] He did not explain

123 *Id.* at 56 ("Northern . . . filed a petition for reorganization in January 1980. In March 1980[,] Northern, pursuant to the Act, filed in [bankruptcy court] a suit against . . . Marathon Pipe Line Co. . . . [Northern] sought damages for alleged breaches of contract and warranty, as well as for alleged misrepresentation, coercion and duress."). There was presumably no trustee in this reorganization case.

124 *See id.* at 54 ("The bankruptcy courts can hear claims based on state law as well as those based on federal law."). The Bankruptcy Act of 1978 was the first recognition of a civil proceeding "related to" a case under Title 11. *Id.* (describing the 1978 Act's elimination of the distinction between summary and plenary jurisdiction in favor of the categories that exist today). The 1978 Act conferred upon the bankruptcy courts the power to hear "related to" cases. *Id.* at 54 & n.3 (noting that "the ultimate repository of the Act's broad jurisdictional grant is the bankruptcy courts"); *see* 28 U.S.C. § 1471(b) (1982).

125 *See Marathon*, 458 U.S. at 60-61 ("It is undisputed that the bankruptcy judges whose offices were created by the Bankruptcy Act of 1978 do not enjoy the protections constitutionally afforded to Art. III judges.").

126 *Id.* at 56-57 ("Marathon sought dismissal of the suit, on the ground that the Act unconstitutionally conferred Art. III judicial power upon judges who lacked life tenure and protection against salary diminution.").

127 *Id.* at 76 (plurality opinion).

128 *Id.* at 91 (Rehnquist, J., concurring).

129 *Id.* at 72 n.26 (plurality opinion).

the basis for this conclusion, but his citations indicate that he would have lodged "related to" jurisdiction within the "arising under" clause of Article III.[130] Justice Rehnquist concurred in the judgment and recognized that Northern's suit was in bankruptcy court only because Northern had filed a bankruptcy petition. Justice Rehnquist was not troubled by the idea of an Article III court adjudicating the action; he indicated only that he agreed that a non-Article III court could not hear the case.[131] Chief Justice Burger, in his dissent, stated that Congress would be free to comply with the Court's holding by providing that actions such as Northern's would be heard in federal district court, rather than bankruptcy court.[132] Justice White in his dissent also explicitly stated that actions such as Northern's suit against Marathon could be heard in Article III courts.[133]

In *Celotex Corp. v. Edwards*, the Supreme Court approved the exercise of federal jurisdiction over a proceeding that did not involve a trustee or a debtor.[134] Bennie and Joann Edwards had filed a tort suit against Celotex in the Northern District of Texas.[135] The Edwardses prevailed, Celotex posted a supersedeas bond, and Northbrook Property and Casualty Insurance Company served as the surety on the bond.[136] When the Fifth Circuit affirmed the judgment, Celotex filed for bankruptcy protection in the Middle District of Florida.[137]

Five days after Celotex filed its bankruptcy petition, the Florida bankruptcy court issued an injunction to prohibit the Edwardses from proceeding against Northbrook (Celotex's surety) to enforce the bond.[138] In response, the Edwardses filed a motion in the district court where they had sued Celotex (Northern District of Texas) to obtain permission to execute on the bond.[139]

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130 *See id.* (citing Textile Workers Union v. Lincoln Mills of Ala., 353 U.S. 448, 472 (1957) (Frankfurter, J., dissenting); Nat'l Ins. Co. v. Tidewater, 337 U.S. 582, 611-13 (1949) (Rutledge, J., concurring); Williams v. Austrian, 331 U.S. 642 (1947); Schumacher v. Beeler, 293 U.S. 367 (1934); Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738 (1824)).

131 *Id.* at 90-91 (Rehnquist, J., concurring).

132 *Id.* at 92 (Burger, C.J., dissenting).

133 *Id.* at 95 (White, J., dissenting).

134 *See* Celotex Corp. v. Edwards, 514 U.S. 300, 309 (1995).

135 *Id.* at 302.

136 *Id.*

137 *Id.*

138 *Id.* at 303.

139 *Id.*

The Texas district court granted the motion,[140] and the Fifth Circuit affirmed.[141] The Supreme Court granted certiorari to review the Fifth Circuit's decision to allow the Edwardses to enforce the bond against Northbrook.[142]

The Edwardses urged the Supreme Court to affirm the Fifth Circuit on the ground that the Florida bankruptcy court had lacked jurisdiction to enjoin them from suing Northbrook to execute on the bond.[143] The Supreme Court concluded that the bankruptcy court had jurisdiction to issue such an injunction because the Edwardses' suit against Northbrook was "related to" Celotex's bankruptcy.[144] The Court did not have to confront whether such "related to" jurisdiction was constitutional. It acknowledged, however, "that a bankruptcy court's 'related to' jurisdiction cannot be limitless."[145] The fact that the Court expressed no uncertainty about the propriety of the case before it strongly suggests that the Court would not seriously entertain a constitutional challenge to the exercise of "related to" jurisdiction in a suit between parties that have not sought bankruptcy protection and that involves causes of action created entirely by state law.

III

THE LACK OF AN ARTICLE III BASIS FOR "RELATED TO" JURISDICTION

The Supreme Court has not explicitly stated that the Constitution supports the exercise of "related to" bankruptcy jurisdiction, but scholars have attempted to fill the conceptual gaps left by the Court's jurisprudence. In identifying the constitutional basis of "related to" bankruptcy jurisdiction, scholars have primarily relied upon Article III, which separately enumerates nine bases of federal subject-matter jurisdiction and includes a tenth basis as well.[146] Two of those bases offer possible shelter for "related to"

140 *Id.* at 303-04.

141 *Id.* at 305-06.

142 Celotex Corp. v. Edwards, 511 U.S. 1105, 1105 (1994) (granting in part the petition for writ of certiorari).

143 *Celotex*, 514 U.S. at 307.

144 *Id.* at 309 ("We believe that the issue whether respondents are entitled to immediate execution on the bond against Northbrook is at least a question 'related to' Celotex's bankruptcy.").

145 *Id.* at 308.

146 "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

bankruptcy jurisdiction. The first is federal question jurisdiction, a federal court's jurisdiction over claims or causes of action[147] that "arise under [the U.S.] Constitution, the Laws of the United States, [or] Treaties."[148] The second is supplemental jurisdiction (or pendent or ancillary jurisdiction), a federal court's jurisdic-

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 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, *amended by* U.S. CONST. amend. XI. The provision specifically enumerates nine bases of federal jurisdiction, which are commonly divided into two categories: "jurisdiction based primarily on subject matter," which includes the first three enumerated bases; and "jurisdiction based on party status," which includes the remaining six bases. FALLON ET AL., *supra* note 87, at 13. The tenth basis of federal jurisdiction is supplemental jurisdiction, which is authorized by the words "cases" and "controversies" in Article III, Section 2. *See* UMW v. Gibbs, 383 U.S. 715, 725 (1966) (explaining that Article III, Section 2 permits jurisdiction over an entire "case," which can include one claim that falls within one of the nine enumerated categories and another that does not).

147 Article III does not refer to "causes of action" or "claims," but rather to "cases" and "controversies." Because this Article focuses on the text of Article III and urges that the text should be taken literally in determining whether "related to" bankruptcy jurisdiction falls within the language of Article III, perhaps it is inappropriate to speak of jurisdiction over claims or causes of action because the relevant constitutional provisions do not do so. However, the current understanding by the courts and scholars of federal subject-matter jurisdiction appears to rely on a claim-by-claim analysis of subject matter jurisdiction. *E.g.*, John B. Oakley, *Federal Jurisdiction and the Problem of the Litigative Unit: When Does What "Arise Under" Federal Law?*, 76 TEX. L. REV. 1829, 1832 (1998); John B. Oakley, *Integrating Supplemental Jurisdiction and Diversity Jurisdiction: A Progress Report on the Work of the American Law Institute*, 74 IND. L.J. 25, 26 (1998). If it did not, there would appear to be no purpose for supplemental jurisdiction. Supplemental jurisdiction recognizes that some causes of action in a lawsuit could not be heard in federal court if they were alone, but their presence in a lawsuit with other causes of action that could be heard in federal court if asserted alone *might* be enough to allow the "deficient" claims to be heard in federal court as well. However, the doctrine of supplemental jurisdiction requires a particular relationship between the deficient and sufficient claims. It is not the case that any lawsuit asserting both sufficient and deficient claims will enjoy federal subject-matter jurisdiction; only in those lawsuits in which the sufficient and deficient claims bear a particular relationship to one another will the federal courts be empowered to adjudicate the entire suit. *Cf. Gibbs*, 383 U.S. at 725; FALLON ET AL., *supra* note 87, at 924 n.2 (discussing Professor Oakley's argument that subject matter jurisdiction "attaches to" claims rather than to entire actions).

148 U.S. CONST. art. III, § 2, cl. 2. Article III provides that federal courts have subject matter jurisdiction over "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." *Id.*

tion to adjudicate not only claims or causes of action that fall within the scope of Article III, Section 2, but rather an entire "case" or "controversy," which might include some claims that do not fall within the bounds of Article III and thus could not be heard by a federal court if they were not accompanied by at least one claim that does fall within the bounds of Article III, Section 2.[149] Scholars have also attempted to utilize the theory of "protective jurisdiction" to justify "related to" bankruptcy jurisdiction as an exercise of Article III judicial power.

This Part will explore the flaws in these three primary arguments to ground "related to" bankruptcy jurisdiction in Article III. It will first consider the difficulties involved with justifying "related to" bankruptcy jurisdiction as an exercise of "arising under" jurisdiction. It will next analyze the problems with viewing "related to" jurisdiction as a species of "supplemental" jurisdiction. Finally, it will engage the limitations of the theory of "protective jurisdiction" as a justification grounded in Article III.

A. "Arising Under" Jurisdiction

Perhaps the most common basis for Article III jurisdiction is what is known as federal question jurisdiction.[150] Federal question jurisdiction exists when the claim in question "arises under" federal law.[151] A claim will "arise under" federal law within the meaning of Article III, Section 2 as long as the claim contains a "federal ingredient."[152] Of particular relevance in determining whether "related to" bankruptcy jurisdiction arises under federal law, a claim contains a federal ingredient for one of the following two reasons: (i) the claim may involve a federal entity or (ii) the claim may require the interpretation or application of federal law. Although many cases that are "related to" a bankruptcy do involve one or both of these elements, this Part demonstrates

[149] *See Gibbs*, 383 U.S. at 725.

[150] CHEMERINSKY, *supra* note 114, § 5.2.1, at 265 ("The core of modern federal court jurisdiction is cases arising under the Constitution and laws of the United States. Termed *federal question jurisdiction*, these cases comprise the largest component of the federal courts' docket and are widely viewed as the most important component of the federal courts' workload."). R

[151] *See supra* note 148. R

[152] Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 823 (1824) ("We think, then, 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 [C]ongress to give the [C]ircuit [C]ourts jurisdiction of that cause . . . ."); CHEMERINSKY, *supra* note 114, § 5.2.2, at 271-72. R

that there are undoubtedly some cases that are "related to" a bankruptcy that do not involve a federal entity and do not require application or interpretation of federal law. These cases, therefore, cannot be said to "arise under" federal law.

1. The Federal Entity Argument

The Supreme Court has repeatedly declared that a case may "arise under" federal law if a party to the case is an entity created by federal law.[153] "Related to" bankruptcy cases may involve a federally created entity and may "arise under" federal law for this reason. However, even if some "related to" cases do involve a federally created entity and the presence of such an entity is considered sufficient to cause them to "arise under" federal law within the meaning of Article III, there are some "related to" cases in which no federally created entity is present, and thus, the federal entity argument fails to bring all "related to" cases within the purview of Article III's "arising under" language. This Section will first briefly describe the federal entity line of cases. It will next analyze whether such precedent might sweep some "related to" cases within the "arising under" language of Article III. It will then conclude that the federal entity argument, even if accepted, cannot identify an Article III basis for all "related to" cases.

In the seminal case of *Osborn v. Bank of the United States*[154] and its companion case, *Bank of the United States v. Planters' Bank of Georgia*,[155] the United States Supreme Court introduced the principle that a case may "arise under" federal law if a party to the case is an entity created by federal law. In *Osborn*, the Bank of the United States (Bank) sued Ralph Osborn, Auditor of the State of Ohio, in federal court to enjoin the collection of state taxes from the Bank on the grounds that the taxes were unconstitutional.[156] The tax was forcibly collected from the Bank, so the Bank amended its complaint to name additional state officials as defendants and to demand that the money be returned to the Bank.[157] In *Planters' Bank*, the Bank of the

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153 *See, e.g.*, Am. Nat'l Red Cross v. S.G., 505 U.S. 247, 251 (1992); Pac. R.R. Removal Cases, 115 U.S. 1, 11 (1885), *superseded by statute*, Judiciary Act of 1925, ch. 229, § 12, Pub. L. No. 68-415, 43 Stat. 936, 941 (1925).

154 Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738 (1824).

155 Bank of the U.S. v. Planters' Bank of Ga., 22 U.S. (9 Wheat.) 904 (1824).

156 *Osborn*, 22 U.S. (9 Wheat.) at 739-40.

157 *Id.* at 741-42.

United States sued Planters' Bank in federal court, but alleged only breach of contract under state law.[158] In *Osborn*, the Court explained why federal jurisdiction in both cases was constitutional. The Court noted that the Bank's every action derived from its charter of incorporation, the federal statute that created it and gave it "every faculty which it possesses."[159] As a result, "[t]o use the language of the constitution, every act of the Bank arises out of [the federal charter of incorporation.]"[160] *Osborn* has been used to confer federal jurisdiction on cases involving federally chartered corporations, even when (i) the parties are not diverse, (ii) no federally created cause of action is at issue, and (iii) no other enumerated basis for federal subject-matter jurisdiction exists.

In the *Pacific Railroad Removal Cases*,[161] the Supreme Court considered whether removal was proper in seven cases against two federally incorporated railroads.[162] The sole basis for removal to federal court in each case was the fact that a federally chartered corporation was a party to the suit.[163] The Supreme Court's opinion was largely concerned with the statutory basis for removal, but the Court made clear that the exercise of jurisdiction was constitutional under the "arising under" clause of Article III because the defendants were entities created by a federal statute.[164] Though the Court's holding as to the statutory basis of jurisdiction has been superseded by statute,[165] it is still good law

158 *See Planters' Bank*, 22 U.S. (9 Wheat.) at 904-05.

159 *Osborn*, 22 U.S. (9 Wheat.) at 823.

160 *Id.* at 827.

161 Pac. R.R. Removal Cases, 115 U.S. 1 (1885), *superseded by statute*, Judiciary Act of 1925, ch. 229, § 12, Pub. L. No. 68-415, 43 Stat. 936, 941 (1925) (current version at 28 U.S.C. § 1349 (2000)) ("The district courts shall not have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, unless the United States is the owner of more than one-half of its capital stock.").

162 *Id.* at 3.

163 *Id.* at 3-10 (describing the seven cases).

164 *Id.* at 14 ("If the case of *Osborn v. The Bank of the United States*, is to be adhered to as a sound exposition of the constitution, there is no escape from the conclusion that these suits against the plaintiffs in error, considering the said plaintiffs as corporations created by and organized under the acts of Congress referred to in the several petitions for removal in these cases, were and are suits arising under the laws of the United States.").

165 Judiciary Act of 1925, ch. 229, § 12, Pub. L. No. 68-415, 43 Stat. 936, 941 (1925) (current version at 28 U.S.C. § 1349 (2000)); *see also* Am. Nat'l Red Cross v. S.G., 505 U.S. 247, 251 (1992) (recognizing that Congress had passed a statute restricting the holding in the *Pacific Railroad Removal Cases* that the general federal question

that any case involving a federally created entity falls within the bounds of Article III.

In *American National Red Cross v. S.G.*, the Court reaffirmed the principle that cases involving federally created entities "arise under" federal law.[166] In that case, the plaintiffs sued the Red Cross, a federally chartered corporation, in state court for state-law tort claims and alleged that the Red Cross was the source of HIV-contaminated blood supplied to one of the plaintiffs.[167] The Court permitted the Red Cross to remove the case, explaining that the exercise of federal jurisdiction would be "well within Article III's limits" because it was a "longstanding and settled rule" that "Article III's 'arising under' jurisdiction is broad enough to authorize Congress to confer federal-court jurisdiction over actions involving federally chartered corporations."[168] Again, most of the opinion was devoted to an analysis of whether federal jurisdiction was statutorily authorized, but the Court's constitutional discussion is significant.

This "federal entity" line of cases suggests that at least one category of "related to" bankruptcy cases does "arise under" federal law: those "related to" bankruptcy cases where the bankruptcy trustee is a party. The Bankruptcy Code provides for the existence of a bankruptcy trustee and endows that trustee with certain rights and obligations. The Bankruptcy Code designates the trustee as a representative of the estate and gives the trustee the capacity to sue or be sued.[169] As a result, scholars have argued that, where the bankruptcy trustee is a party in a "related to" case, the trustee represents the requisite "federal ingredient" and the case "arises under" federal law.[170]

The validity of this argument depends, however, on the reach of the Court's holding in *Osborn*. In *Osborn*, the Court explained that the Bank's capacity to sue and be sued depended on

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statute conferred federal jurisdiction over any case involving a federally created chartered corporation).

166 *Red Cross*, 505 U.S. at 264-65.

167 *Id.* at 249.

168 *Id.* at 264-65.

169 11 U.S.C. § 323 (2000).

170 Cross, *supra* note 9, at 1232; Goldberg-Ambrose, *supra* note 9, at 553 ("In bankruptcy litigation, federal law establishes a new class of plaintiffs able to assert a claim that originates completely under state law. In the absence of this federal law, the new class of persons could not have brought the same claims in state court." (footnote omitted)). **R**

the Bank's federal charter,[171] but that this question, "decided once, is decided for ever."[172] The Court noted that other questions, such as the Bank's "right to make a particular contract, or to acquire a particular property, or to sue on account of a particular injury, belongs to every particular case, and may be renewed in every case."[173] It is unclear whether the Court intended to communicate that the question of capacity to sue would form an "original ingredient" in every case, regardless of whether it was raised. The Court was clear that questions such as the right to make a contract, even if not challenged by any party, would nonetheless be a "part of" the case, such that they would form an "ingredient," regardless of whether the opposing side chose to assert a defense based on them.[174] But it is not clear that the Court believed that the existence of just one question—the Bank's capacity to sue or be sued—would be enough to cause any case involving the Bank to "arise under" federal law. The Court *did* declare that Congress' grant of jurisdiction occurred before the first court confirmed the Bank's capacity to sue or be sued and stated that "if [the grant of subject matter jurisdiction] was constitutional then, it cannot cease to be so, because the particular question is decided."[175] The Court also pointed out that the question of the Bank's capacity to sue or be sued could "be revived at the will of the party, and most probably would be renewed, were the tribunal to be changed."[176] Nonetheless, the Court did not have to grapple with a situation in which the *only* question that requires reference to federal law is the entity's capacity to sue or be sued.

"Related to" bankruptcy cases present just such a situation. The role of the trustee in a "related to" case is different than the

171 Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 823-24 (1824) ("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 States.").

172 *Id.* at 824 ("The right to sue, if decided once, is decided for ever . . . .").

173 *Id.*

174 *Id.* ("The question [of the right to make a particular contract, or acquire a particular property, or to sue on account of a particular injury] forms an original ingredient in every cause. Whether it be in fact relied on or not, in the defence, it is still part of the cause, and may be relied on. . . . The questions which the case involves, then, must determine its character, whether those questions be made in the cause or not.").

175 *Id.*

176 *Id.*

role of the Bank, the national railroads, or the American Red Cross in any of the cases in which those entities were parties. Even though the bankruptcy trustee can be said to derive all of its faculties from a federal statute, a "related to" case does not involve any questions, even hypothetically, about the trustee's faculties. A "related to" case where the trustee is a party will pertain to conduct of the debtor. For example, the suit might involve money or property that the debtor is owed on account of the behavior of the debtor or someone or something with which the debtor was involved. A "related to" case will not involve any contract that the trustee entered into or wrongful conduct that the trustee committed. Such a lawsuit would "arise under" or "arise in" the bankruptcy case because such a lawsuit would necessarily involve federal bankruptcy law, which governs the trustee's duties. A "related to" case involves only one question about the trustee: does the trustee have the capacity to sue or be sued as a representative of the debtor? That question is answered by reference to federal law, but, arguably, that question, "decided once, is decided for ever."[177] All other questions in the lawsuit will pertain to the debtor, not the trustee, and these questions do not necessarily require reference to federal bankruptcy law. As a result, the existence of a trustee in a "related to" case may be insufficient to cause the case to "arise under" federal law.

Even if the federal entity argument is persuasive with respect to "related to" cases involving the trustee, however, it is inapplicable to "related to" cases in which the trustee is not a party. It is rare to appoint a trustee in a Chapter 11 case.[178] Instead, the debtor performs the functions that a trustee would ordinarily perform.[179] In such instances, the debtor is referred to as the "debtor in possession."[180]

The "federal entity" line of cases might suggest that the debtor in possession represents a "federal ingredient" in the same man-

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177 *Id.*

178 EPSTEIN, *supra* note 22, at 131; TABB, *supra* note 17, at 63, 74. Indeed, a special showing is required before a trustee will be appointed in a Chapter 11 case. 11 U.S.C. § 1104(a) (2000); *see also* TABB, *supra* note 17, at 74-75 ("In practice the courts have been extremely reluctant to appoint trustees, thus giving considerable power and control to debtor management."). **R** **R**

179 11 U.S.C. § 1107(a); TABB, *supra* note 17, at 61; *see* EPSTEIN, *supra* note 22, at 131. **R**

180 11 U.S.C. § 1101(1) ("'[D]ebtor in possession' means debtor except when a person that has qualified under section 322 of this title is serving as trustee in the case[.]").

ner as the bankruptcy trustee. The debtor in possession, however, is not a creature of federal law like the bankruptcy trustee.[181] For example, the debtor is not given the right to sue and be sued by the Bankruptcy Code. The debtor in possession already possesses that capacity. One could argue that, where the debtor's right to sue is created by federal law, the case "arises under" federal law and this is certainly right. But if the debtor is pursuing a cause of action created by the Bankruptcy Code, the case will "arise under" Title 11 because the cause of action will have been created by the Bankruptcy Code and there will be no need to rely on "related to" jurisdiction. For example, just as a trustee may initiate a proceeding to recover a preferential transfer, so, too, may the debtor in possession.[182] Whether the trustee or the debtor initiates such an action, the federal court undoubtedly has "arising under" jurisdiction because federal law provides the right to recover a preferential transfer.[183] Thus, one could argue that any "related to" case in which the bankruptcy trustee is a party "arises under" federal law because the Bankruptcy Code bestows upon the trustee the capacity to sue and be sued. It is not clear, however, that the same argument can apply to "related to" cases in which the debtor in possession is a party.

Professor Ralph Brubaker has argued that any suit brought on behalf of the bankruptcy estate, whether by the trustee or the debtor in possession, necessarily "arises under" federal law because the bankruptcy estate is the real party in interest and is a federally created entity.[184] While this is an intuitively appealing argument, it is not clear that the bankruptcy estate should be viewed as a party in suits involving the trustee or debtor in possession, even when the suit is intended to enlarge or shrink the bankruptcy estate. While the Bankruptcy Code is undoubtedly centrally focused on the bankruptcy estate (the Code ascertains

181 *See* Galligan, *supra* note 9, at 34 ("[Debtor in possession] is merely a technical name for a debtor that continues in possession of his or her assets during the reorganization. There is no appointment involved and no change in the debtor's identity."). R

182 *See* 11 U.S.C. §§ 547(b) (creating the right for the trustee to recover a preferential transfer), 1107(a) ("[A] debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter."); *see also infra* Part I.B.

183 28 U.S.C. § 1334(b).

184 Brubaker, *supra* note 8, at 813-31. R

the extent of the estate and then distributes the estate as appropriate), the Code does not appear to envision the estate as the formal actor in all bankruptcy proceedings. Moreover, even if a "related to" suit is brought on behalf of the bankruptcy estate, the suit does not raise any questions about the bankruptcy estate and thus no reference to federal law is required. Focusing on the bankruptcy estate, therefore, does not bring all "related to" cases within the federal entity line of cases.

Finally, even if one were persuaded that cases involving the debtor in possession do "arise under" federal law, the federal entity line of cases does not provide a satisfactory explanation of the constitutional basis of "related to" cases that do not involve the bankruptcy trustee or the debtor in possession.[185] Where the lawsuit is between third parties, none of which is a federally created entity, there is no federal ingredient in the case. At least one scholar has recognized that wholly state-law claims that are not brought by the trustee "cannot satisfy any conventional test for arising under jurisdiction because they do not contain even the minimal federal element present in the trustees' suits."[186]

2. The "Interpretation of Federal Law" Argument

The Supreme Court has announced that any case that requires the interpretation or application of federal law will "arise under" federal law within the meaning of Article III.[187] Thus, federal jurisdiction over "related to" cases can be rooted in the "arising under" language of Article III if "related to" cases all require reference to federal law. This Section will refute the argument that, even though "related to" cases largely assert state-law causes of action that could have been asserted in the absence of bankruptcy proceedings, the existence of a bankruptcy case in-

[185] *See* Cross, *supra* note 9, at 1232 (ultimately rejecting the argument that all "related to" cases "arise under" federal law); Galligan, *supra* note 9, at 34-36 (asserting that the "original ingredient" theory does not satisfactorily explain situations in which the debtor in possession brings suit); Goldberg-Ambrose, *supra* note 9, at 553 n.67. R R R

[186] Goldberg-Ambrose, *supra* note 9, at 553 n.67; *see also* Brubaker, *supra* note 8, at 842-43 (acknowledging that suits between third parties are not covered by his federal entity argument). R

[187] *See* Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 493-94 (1983) (holding that an action that requires a federal court to apply "substantive federal law at the very outset" "arises under" federal law within the meaning of Article III); Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 822-23 (1824) (holding that Article III permits the exercise of federal jurisdiction in any case that depends upon the "construction" of federal law).

troduces the need for every court adjudicating a "related to" case to interpret or apply federal law. Specifically, this Section explores the argument that the automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362, will have relevance in every "related to" case and that all "related to" cases thus "arise under" federal law within the meaning of Article III. This Section concludes that such an argument is ultimately unpersuasive.

When a bankruptcy petition is filed in federal court, the Bankruptcy Code provides that any action against the debtor, as well as any action against the property of the bankruptcy estate, is automatically stayed.[188] The property of the bankruptcy estate includes "all of the debtor's interests, legal and equitable, in property wherever located and by whomever held."[189] The court that is adjudicating the action against the debtor or the property of the estate can determine the applicability of the automatic stay only with reference to federal bankruptcy law.

A further examination of *Osborn* reveals the significance of the automatic stay to the jurisdictional inquiry of this Article. The Court in *Osborn* established not only that cases involving federally created entities "arise under" federal law, but more broadly that any case "arises under" federal law if the court adjudicating the case must necessarily consider the applicability of federal law.[190] The Court in *Osborn* concluded that the presence of the Bank, a federally chartered corporation, as a party in a lawsuit would confer federal jurisdiction because in any such suit, the court would be required to consult the Bank's charter, a federal statute, in order to confirm that the Bank possessed the requisite faculty to engage in the conduct at issue in the case.[191] In any case involving the Bank, the court would have to satisfy itself that the Bank had the capacity to sue or be sued, which would depend on federal law.[192] The court would also have to satisfy itself of the Bank's capacity to make a contract, or perhaps to own property or assert a particular kind of injury, and these

[188] 11 U.S.C. § 362(a)(1)-(2); 1 COLLIER ON BANKRUPTCY, *supra* note 3, § 1.03[2][b][iii] ("The automatic stay bars anyone from taking action to recover a debt then owing by the debtor or acting to affect property of the debtor or the estate or in the possession of the estate."). R

[189] 1 COLLIER ON BANKRUPTCY, *supra* note 3, § 1.03[2][c][i]; *see* 11 U.S.C. § 541 (defining property of the estate). R

[190] *Osborn*, 22 U.S. (9 Wheat.) at 822.

[191] *Id.* at 823.

[192] *Id.* at 823-24.

questions also all depend on federal law.[193] The Court declared the general principle that in any case involving the application or interpretation of federal law, the "arising under" clause of Article III authorizes federal jurisdiction.[194]

The Court applied that principle again in *Verlinden B.V. v. Central Bank of Nigeria*.[195] Verlinden, a Dutch corporation, sued the country of Nigeria in federal district court in New York, but alleged state-law causes of action.[196] The Supreme Court recognized that the diversity clause of Article III did not authorize federal jurisdiction over a suit brought by a foreign plaintiff against a foreign nation.[197] However, the Court held that federal jurisdiction was authorized by the "arising under" clause of Article III because the suit required the district court to interpret and apply a federal statute, the Foreign Sovereign Immunities Act (FSIA), before it could proceed to adjudicate the state-law causes of action against Nigeria.[198]

The FSIA expresses the general principle that foreign nations enjoy sovereign immunity from suit in the United States.[199] The FSIA further provides, however, that a country may be sued in either state or federal court in the United States if one of several exceptions to immunity applies, such as an explicit or implicit waiver of immunity.[200] Thus, any court adjudicating a case against a foreign nation is required to consult the FSIA to determine whether one of the enumerated exceptions to sovereign immunity applies, such that the suit is not barred by sovereign immunity.[201] As a result, because every suit against a foreign na-

193 *Id.* at 824.

194 *Id.* at 822 ("If it be a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction.").

195 Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480 (1983).

196 *Id.* at 482-83. Verlinden sued the Central Bank of Nigeria, which the Court identified as "an instrumentality of Nigeria." *Id.* at 482.

197 *Id.* at 491-92.

198 *Id.* at 493-94.

199 Foreign Sovereign Immunities Act of 1976 §4, 28 U.S.C. § 1604 ("Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter."); *Verlinden*, 461 U.S. at 488.

200 *See* 28 U.S.C. §§ 1604-1605, 1607 (providing that foreign states have sovereign immunity but are subject to certain exceptions); *see also Verlinden*, 461 U.S. at 488.

201 *Verlinden*, 461 U.S. at 493-94. The Court in *Verlinden* focused on the fact that

tion "necessarily raises questions of substantive federal law at the very outset," the Court concluded that the exercise of federal jurisdiction over such suits was authorized by the "arising under" language in Article III.[202]

Osborn and *Verlinden* demonstrate that any "related to" case that requires the court to consult federal bankruptcy law will "arise under" federal law. In a case in which the court must determine whether the automatic stay applies, the court will make its decision with reference to the federal Bankruptcy Code and to the decisions interpreting the automatic stay provision. Under *Verlinden,* such a case "arises under" federal law within the meaning of Article III. In sum, any "related to" case brought against the debtor or against the property of the debtor "arises under" federal law because the court that is adjudicating the "related to" case must apply the federal law governing the automatic stay provision.

However, this argument does not bring "related to" cases that are not against the debtor or property of the estate within the "arising under" language of Article III.[203] The automatic stay does not apply to "related to" cases in which the debtor is a plaintiff. These "related to" cases, therefore, do not require the interpretation or application of federal law and cannot be said to "arise under" federal law on that basis. The automatic stay also does not apply on its face to proceedings against persons other than the debtor even though these third parties "are in some way connected with the [debtor], such as joint tortfeasors, insurers, sureties, co-obligor[s], guarantors, officers of the debtor, and related companies."[204]

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a federal court's subject matter jurisdiction turned on whether one of the exceptions to immunity applied. *Id.*

[202] *Id.* at 493-94 ("At the threshold of every action in a district court against a foreign state, therefore, the court must satisfy itself that one of the exceptions applies—and in doing so it must apply the detailed federal law standards set forth in the Act. Accordingly, an action against a foreign sovereign arises under federal law, for purposes of Art. III jurisdiction.").

[203] Cases against the debtor or against the property of the debtor are unlikely to be "related to" cases. Rather, they are likely to be "arising under" or "arising in" cases. If the case against the debtor or the debtor's property is based on liability incurred before the debtor filed for bankruptcy, then the plaintiff is a creditor, who must file a proof of claim in the bankruptcy and submit to the bankruptcy court's resolution of the proof of claim. If the case against the debtor or the debtor's property is based on post-petition conduct, then the case will assert causes of action created by the Bankruptcy Code.

[204] Glinka v. Dartmouth Banking Co. (*In re* Kelton Motors, Inc.), 121 B.R. 166,

Some courts, however, have applied the automatic stay in cases in which the debtor is not a party.[205] Courts have held that, where a third party is a guarantor of the debtor, the automatic stay provision should apply to suits against the third party.[206] These courts reason that a judgment against the guarantor can bind the debtor.[207] Courts have also held that a suit between third parties may nonetheless be a suit against the property of the debtor, such that the automatic stay should apply.[208] This position is of course consistent with the language of the statute, which provides that an automatic stay does in fact apply to any suit against the property of the estate.[209] The courts that have used this reasoning to impose the automatic stay upon suits between third parties, however, have construed the term "property of the estate" so broadly as to call into question the limit of the automatic stay. In *A.H. Robins*, the Fourth Circuit stated that, since a products liability insurance policy is property of the estate, "actions 'related to' the bankruptcy proceedings against the insurer or against officers or employees of the debtor who may be entitled to indemnification under such policy or who qualify as additional insureds under the policy are to be stayed under section 362(a)(3)."[210] Perhaps the courts that have extended the automatic stay to suits between third parties make it possible to argue that, because a party in *any* "related to" case can attempt

192-93 (Bankr. D. Vt. 1990) (citing cases); G.H. Ishii-Chang, *Litigation and Bankruptcy: The Dilemma of the Codefendant Stay*, 63 AM. BANKR. L.J. 257, 257 (1989); *see* Lori J. Forlano, Note, *Why Bankruptcy "Related To" Jurisdiction Should Not Reach Mass Tort Nondebtor Codefendants*, 73 N.Y.U. L. REV. 1627, 1627 & n.4 (1998).

[205] *See, e.g.*, A.H. Robins Co. v. Piccinin, 788 F.2d 994, 999-1001 (4th Cir. 1986) (explaining that the automatic stay should apply "when there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor"); *Glinka*, 121 B.R. at 193-94 ("Recent cases, however, show that Courts have been willing to extend § 362 to include certain types of actions by or against non-debtors when such actions have a significant impact on the bankrupt, its ability to reorganize, or involves property of the estate."); Seybolt v. Bio-Energy of Lincoln, Inc., 38 B.R. 123, 127-28 (Bankr. D. Mass. 1984) (staying an action against the sole general partner of debtor, a limited partnership, and staying an action against individual guarantors of the debtor); Ishii-Chang, *supra* note 204, at 257; Forlano, *supra* note 204, at 1627 n.4. **R**

[206] *E.g.*, *Seybolt*, 38 B.R. at 127-28.

[207] *E.g.*, *A.H. Robins*, 788 F.2d at 999-1001 (discussing cases); *Seybolt*, 38 B.R. at 128 (staying an action against a guarantor).

[208] *A.H. Robins*, 788 F.2d at 1001-02.

[209] 11 U.S.C. § 362(a)(2)-(5) (2000).

[210] *A.H. Robins,* 788 F.2d at 1001-02.

to invoke the automatic stay, *all* "related to" bankruptcy cases involve the interpretation or application of the automatic stay provision and thus *all* "related to" cases "arise under" federal law.

As the Court noted in *Verlinden*, the mere possibility that federal law will apply might be sufficient to bring a case within the scope of *Osborn*: "It has been observed that, taken at its broadest, *Osborn* might be read as permitting assertion of original federal jurisdiction on the remotest possibility of presentation of a federal question."[211] As such, one might argue that a "related to" case "arises under" federal law any time there is a *possibility* that the automatic stay provision applies. If the case is one that is "related to" a bankruptcy, it "could conceivably have [an] effect on" the bankruptcy estate.[212] If the case could conceivably have an effect on the bankruptcy estate, perhaps a colorable argument could be made that the suit is essentially against the property of the estate, such that the automatic stay should apply. If a colorable argument for application of the automatic stay can be made in *any* "related to" bankruptcy case, then, so the argument goes, it is possible that *all* "related to" cases "arise under" federal law. In truth, such an argument lacks any real persuasive force because it is not feasible to draw the line between a colorable argument for application of the automatic stay and a frivolous argument for application of the automatic stay.

In sum, although some "related to" bankruptcy cases do "arise under" federal law, some clearly do not because they do not require any interpretation or application of federal bankruptcy law. Some "related to" cases will be subject to the automatic stay,

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[211] Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 492 (1983) (internal quotations omitted). Although the *Verlinden* court flagged the concern, it did not address it. *Id.* at 493 ("We need not now resolve that issue or decide the precise boundaries of Art. III jurisdiction, however, since the present case does not involve a mere speculative possibility that a federal question may arise at some point in the proceeding. Rather, a suit against a foreign state under this Act necessarily raises questions of substantive federal law at the very outset, and hence clearly 'arises under' federal law, as that term is used in Art. III."); *see also* Textile Workers Union v. Lincoln Mills of Ala., 353 U.S. 448, 471 (1957) (Frankfurter, J., dissenting) (characterizing *Osborn* as arguably standing for the proposition that "Congress may confer [federal jurisdiction under the 'arising under' clause of the Constitution] whenever there exists in the background some federal proposition that might be challenged, despite the remoteness of the likelihood of actual presentation of such a federal question").

[212] Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984), *abrogated in part by* Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 129 (1995).

which means that the adjudicating court will have to consult federal law (i.e., the Bankruptcy Code). These cases fit neatly within the "arising under" language of Article III, Section 2. However, some "related to" cases will not be subject to the automatic stay, and only a frivolous legal argument would introduce the federal law that governs the automatic stay. One could take literally the language of the opinion in *Osborn* and argue that, because it is conceivable that a party will ask the court to stay the proceedings, the case "arises under" federal law because the court will have to consult federal law. This reading of *Osborn* and Article III, however, would make every single case—even one that is not "related to" a bankruptcy—"arise under" federal law. As a result, the argument is unpersuasive, and it remains necessary to find an Article III justification for federal jurisdiction over "related to" cases in which the automatic stay is a nonissue and where no federally created entity is a party.

B. Supplemental Jurisdiction

Some scholars have suggested that "related to" jurisdiction falls within the bounds of Article III because it is a species of supplemental jurisdiction.[213] This Article uses the term "supplemental" jurisdiction to include both ancillary and pendent jurisdiction.[214] All of these terms refer to the long-recognized power

[213] *See* Brubaker, *supra* note 8, at 835-52 (contending that "related to" cases between third parties can be justified as an exercise of supplemental jurisdiction as long as the disputes involving the third parties are related to a claim by or against the bankruptcy estate); Cross, *supra* note 9, at 1233-50 (arguing that "related to" bankruptcy jurisdiction is a species of ancillary jurisdiction); Loft, *supra* note 9, at 1118-24 (suggesting that the exercise of federal jurisdiction over "related to" cases in which at least one party has filed a proof of claim against the debtor can be justified as a constitutional species of supplemental jurisdiction); *cf.* David P. Currie, *Bankruptcy Judges and the Independent Judiciary*, 16 CREIGHTON L. REV. 441, 443 (1983) (briefly mentioning that the "related to" case at issue in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), was "arguably . . . so related to the bankruptcy petition as to be . . . part of a case arising under federal law"). **R** **R** **R**

[214] Though the distinction between ancillary and pendent jurisdiction was never perfectly clear, ancillary jurisdiction was generally used to refer to the power of a federal court to adjudicate claims asserted by parties other than the plaintiff and pendent jurisdiction was generally used to refer to the assertion of claims by a plaintiff in its complaint. WRIGHT & KANE, *supra* note 14, at 122 n.41. The use of the term "supplemental" in this Article is not intended to evoke the supplemental jurisdiction statute, 28 U.S.C. § 1367, because the statute (in subsection b) limits the exercise of federal jurisdiction more than the Constitution requires. Instead, the term "supplemental jurisdiction" is intended to refer to the power of federal courts to adjudicate "cases" and "controversies," as those terms are used in Article III, Section 2. **R**

of a federal court to hear a claim that does not fall within any of the enumerated categories of Article III, as long as the claim forms part of the same "case" or "controversy" as a claim that *does* explicitly fall within one of the enumerated categories.[215] Scholars such as Professor John T. Cross contend that, even if "related to" cases do not themselves "arise under" federal law, these cases are part of the same constitutional "case" or "controversy" as a bankruptcy case, which clearly arises under federal law.[216] Professor Ralph Brubaker suggests that disputes between third parties can fall within the federal court's supplemental jurisdiction as long as they are related to a claim by or against the bankruptcy estate, because claims by or against the bankruptcy estate involve a federal entity and hence "arise under" federal law. Thus, Professor Brubaker contends that the civil proceedings, rather than the bankruptcy petition, should be the focus.[217] However, both scholars agree that Article III authorizes federal court adjudication of "related to" cases, even when they are between non-diverse parties and involve only state-law claims. This Part will briefly describe the concept of supplemental jurisdiction and explain why it fails to sweep all "related to" cases within the scope of Article III, Section 2.

The concept of supplemental jurisdiction can be traced to *Osborn*,[218] but the Supreme Court case most commonly associated with the doctrine is *United Mine Workers v. Gibbs*. In that case, Paul Gibbs sued the international arm of the United Mine Workers in federal district court.[219] His suit alleged violations of both federal law (section 303 of the Labor Management Relations Act) and state law (unlawful conspiracy to interfere with two contracts).[220] The Court identified as a threshold question the issue of whether the federal court had jurisdiction over the state-law claim.[221] The Court explained that the Constitution permits a federal court to hear an entire "case," not merely individual claims within a case.[222] According to the Court, a case, within

[215] UMW v. Gibbs, 383 U.S. 715, 725 (1966); WRIGHT & KANE, *supra* note 14, at 34, 116. R

[216] *See* Cross, *supra* note 9, at 1233-48; *cf.* Loft, *supra* note 9, at 1119-21 (identifying the proof of claim as the "arising under" federal question). R

[217] Brubaker, *supra* note 8, at 848-51. R

[218] *See* WRIGHT & KANE, *supra* note 14, at 116; Cross, *supra* note 9, at 1233-34. R

[219] *Gibbs*, 383 U.S. at 720.

[220] *Id.*

[221] *Id.* at 721.

[222] *Id.* at 725 ("But if, considered without regard to their federal or state charac-

the meaning of Article III, Section 2, is comprised of all the claims that "derive from a common nucleus of operative fact," such that a plaintiff "would ordinarily be expected to try them all in one judicial proceeding."[223] If a case has one claim that "arises under" the Constitution, laws, or treaties of the United States, the federal court may also adjudicate claims that do not "arise under" federal law, as long as those claims form part of the same case as at least one claim that does "arise under" federal law.[224]

The Court's reasoning in *Gibbs* can be employed to justify the exercise of federal jurisdiction over all "related to" cases, but it is necessary to accept the proposition that there is no meaningful distinction between one federal court's adjudication of two (or more) claims asserted in the same lawsuit and two (or more) federal courts' adjudication of two (or more) claims asserted in two (or more) separate lawsuits. That is, application of *Gibbs* to the "related to" bankruptcy context requires the following steps: first, a bankruptcy petition is a case "arising under" federal law.[225] Second, a "related to" case based on the same set of facts that gave rise to the bankruptcy petition is part of the same Article III case as the bankruptcy petition itself. Third, a federal court, even one that is not actually adjudicating the bankruptcy petition, can hear a case that is "related to" the bankruptcy petition. An example illustrates the argument: suppose that a person purchased stock in a corporation and the corporation soon thereafter files for bankruptcy protection. The value of the stock decreases dramatically, so the injured person sues his or her broker in a court other than the court where the corporation filed its bankruptcy petition. The injured person's suit against the broker is based on the bankruptcy petition itself, so the suit and the bankruptcy petition derive from a common nucleus of operative

ter, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.").

223 *Id.*

224 *Id.* ("[J]udicial *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.'" (alteration in original) (citation omitted)).

225 This step is clearly right. Federal law creates the entire scheme of bankruptcy relief, so the petition, which seeks that special form of relief, requires the application of federal law.

facts and hence are considered part of the same Article III case. As a result, a federal court may adjudicate the injured person's suit against the broker, even if the suit asserts only state-law causes of action and the two parties are citizens of the same state.[226]

The same logic could apply to a "related to" case that derives from a common nucleus of operative facts as a proceeding "arising under" or "arising in" a bankruptcy case. For example, if an injured person files a proof of claim that alleges that the debtor is liable in tort to the injured person, the person's suit against the debtor's co-tortfeasor will also be subject to federal jurisdiction because the suit between the injured person and non-debtor tortfeasor derives from the same facts that gave rise to the injured person's claim against the debtor.[227] Alternatively, if the injured person has not filed a proof of claim against the debtor, but the co-tortfeasor has filed a proof of claim based on contribution or indemnification, the injured person's suit against the co-tortfeasor appears to derive from the same nucleus of operative facts as the proof of claim.[228]

One problem with applying the logic of *Gibbs* to all "related

[226] Supporters of supplemental jurisdiction as an explanatory theory might object that this hypothetical would not qualify as a "related to" case under the *Pacor* test because the suit between the injured person and the broker will not have an effect on the administration of the bankruptcy estate. The addition of some facts that could give rise to a possible right of contribution would address such a concern, however. The broker may well find a way to label the debtor a co-tortfeasor.

[227] This is a paradigmatic "related to" case because the argument can successfully be made under the *Pacor* test that the co-tortfeasor might seek contribution from the debtor, which will affect the size of the estate. Alternatively, if the co-tortfeasor wins the suit, one could argue that the debtor might be able to invoke offensive collateral estoppel to preclude the injured party from pursuing the claim against the debtor.

[228] Loft describes the WorldCom situation as a real-life example of this hypothetical. According to Loft, the "related to" case against former officers, directors, underwriters, and accountants derived from the same nucleus of operative facts as the defendants' indemnity and contribution claims against the debtor because the plaintiffs would not have sued WorldCom had its agents not acted fraudulently and the defendants in the "related to" suit would not have filed claims against WorldCom for indemnity and contribution had the plaintiffs not sued them. Thus, concludes Loft, "the factual basis—the securities fraud—in effect gave rise to the claims both of the third-party plaintiff against the defendant, and the third-party defendant against the estate." Loft, *supra* note 9, at 1118. *See also* New York City Employees' Ret. Sys. v. Ebbers (*In re* WorldCom, Inc. Sec. Litig.), 293 B.R. 308, 321 (S.D.N.Y. 2003) ("Here, but for WorldCom's bankruptcy, it would have been named as a defendant in the . . . action, and despite its absence as a party, its conduct will remain at the heart of the . . . litigation."). R

to" cases is that some "related to" cases *do not* derive from the same nucleus of operative facts as the bankruptcy petition or any "arising under" or "arising in" proceeding. Instead, many "related to" cases arise out of events that are separate and distinct from the events that led to the filing of the bankruptcy petition and are also separate and distinct from the events that led to the filing of the proceedings "arising under" and "arising in" the bankruptcy case. Scholars have already recognized that "[g]enerally, the facts that give rise to the state-law claims in bankruptcy will not overlap to any significant extent with [the debtor's] petition for relief."[229]

Professor Cross has conceded that "related to" jurisdiction cannot be sustained under the theory of supplemental jurisdiction that was articulated by the Court in *Gibbs*.[230] He suggests, however, that when the "common nucleus of operative fact" standard is rejected in favor of a "logical relationship" standard, "related to" jurisdiction can be understood as a species of supplemental jurisdiction.[231] Professor Cross contends that a constitutional "case" is comprised of all claims that bear a "logical relationship" to one another.[232] In particular, he suggests that federal courts should have jurisdiction over all cases where "the state claims are logically related to the federal cause of action and [where] this relationship is strong enough to warrant presenting the claims before a court at the same time."[233] In "related to" bankruptcy cases, "[t]he logical relationship . . . is the interdependence of the federal and state claims."[234] Professor Cross asserts that "resolving the state claims is a condition precedent to the grant of a bankruptcy remedy. A federal court can-

[229] Cross, *supra* note 9, at 1236; *see also* Galligan, *supra* note 9, at 37. **R**

[230] As Professor Cross explained:

> Bankruptcy jurisdiction fails the *Gibbs* factual overlap test. A bankruptcy court often adjudicates claims that occurred months, or even years, apart. The underlying events giving rise to these claims may be totally unrelated. Indeed, it is not even necessary that the parties to the claims be the same. The only thread that ties these claims together is that all may affect the debtor's estate. Outside of bankruptcy, however, this thread would hardly be strong enough to support ancillary jurisdiction. Therefore, critics of ancillary jurisdiction have correctly concluded that bankruptcy jurisdiction fails the test established by the Court in *Gibbs*.

Cross, *supra* note 9, at 1240-41. **R**

[231] *Id.* at 1243-48.

[232] *Id.* at 1243.

[233] *Id.* (footnote omitted).

[234] *Id.*

not decide how much property to distribute to creditors without first wrapping up all of the state-law litigation affecting the debtor's rights and obligations."[235] As a result, "the scope of bankruptcy relief is intimately tied to the outcome of the state-law claims."[236] In this way, the state-law claims form part of the same Article III "case." Moreover, allowing a federal court to adjudicate both the bankruptcy petition and all "related to" cases "will expedite the process of administering that estate."[237]

Even if the logical relationship test were an appropriate way to determine whether claims form part of the same Article III "case," Professor Cross's theory fails to convincingly locate an Article III basis for all "related to" cases. "Related to" cases in which the debtor is the plaintiff fit nicely within Professor Cross's theory because the debtor's causes of action are all property of the estate, and it is necessary to know the size of the estate before allocating it among various creditors. Causes of action owned by the debtor might increase the size of the estate because any damages awarded to the debtor will be property of the estate and will hence be available to distribute to creditors. The outcomes of lawsuits between third parties, however, which are not directly binding on the estate, are not necessary prerequisites for administration of the estate. The bankruptcy court can distribute the assets and grant or deny a discharge even before the lawsuit between third parties is resolved and even when the losing party of the lawsuit might pursue a right of indemnification or contribution against the debtor. Even if one of the parties has filed a proof of claim against the debtor, it is not absolutely necessary to complete the suit prior to administration of the estate. The claim can be treated as contingent and estimated appropriately. Thus, the interdependence on which Professor Cross appears to rely does not truly exist.

There is another problem with locating "related to" jurisdiction within Article III's grant of supplemental jurisdiction. Whether one employs a common nucleus of operative fact definition or a logical relationship definition of "case," the use of supplemental jurisdiction to locate an Article III basis for all "related to" cases requires one to accept that two separate suits, pending in two different courts, can be part of the same constitu-

235 *Id.* at 1242.
236 *Id.* at 1243.
237 *Id.* at 1244.

tional case. Such an interpretation is contrary to the word's ordinary meaning and is troubling. It is too much of a stretch to imagine that a dispute that derives from the same (or similar) fact pattern as a bankruptcy petition, or a civil proceeding that arises under title 11 or arises in the bankruptcy case and that is adjudicated in a different federal court than the one where the bankruptcy petition and associated civil proceedings are pending, is part of the same "case" as the bankruptcy proceedings. As a result, supplemental (pendent or ancillary) jurisdiction fails to provide a satisfactory constitutional basis for all instances of "related to" bankruptcy jurisdiction.

C. Protective Jurisdiction

Acknowledging the lack of a traditional Article III basis for all "related to" cases, scholars and at least one Supreme Court Justice have sought to justify the constitutionality of "related to" bankruptcy jurisdiction with a theory known as "protective jurisdiction."[238] The notion of protective jurisdiction has been advanced by many scholars and takes many forms. At its core, however, protective jurisdiction can be summarized as follows: where Congress could have passed a substantive federal law, it should be permitted to simply grant federal jurisdiction and rely on state law to provide the rule of decision.[239] Most scholars who advocate protective jurisdiction maintain that protective jurisdiction is rooted in Article III of the Constitution and is thus authorized by the "arising under" clause of Article III.[240]

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[238] Galligan, *supra* note 9, at 47-49 (contending that "related to" jurisdiction is a species of protective jurisdiction); Goldberg-Ambrose, *supra* note 9, at 553 & n.67 (explaining that some, but not all, "related to" bankruptcy cases require a theory of protective jurisdiction to come within the bounds of Article III); *see* Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 594 (1949) (opinion of Jackson, J.); Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 21, 22 n.83 (1957) (suggesting in a short footnote that bankruptcy jurisdiction is a species of protective jurisdiction); Mishkin, *supra* note 9, at 189-90, 194-95 (attributing federal jurisdiction over state-law trustee suits against third parties to protective jurisdiction). For a discussion of Justice Jackson's opinion in *Tidewater*, see *infra* Part IV.B. R R R

[239] Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 473-74 (1957) (Frankfurter, J., dissenting); *see* Bickel & Wellington, *supra* note 238, at 19-20; Galligan, *supra* note 9, at 47-48; Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 224-25 (1948); *cf.* WRIGHT & KANE, *supra* note 14, § 20; Ray Forrester, *The Jurisdiction of Federal Courts in Labor Disputes*, 13 LAW & CONTEMP. PROBS. 114, 120 (1948); Mishkin, *supra* note 9, at 192.

[240] Galligan, *supra* note 9, at 71-72; Goldberg-Ambrose, *supra* note 9, at 587; Mishkin, *supra* note 9, at 196. *But see Tidewater*, 337 U.S. at 588-601 (Justice Jack- R R

Professor Thomas Galligan, Jr. has carefully applied the theory of protective jurisdiction to explain "related to" bankruptcy jurisdiction.[241] Professor Galligan contends that Congress may constitutionally confer federal jurisdiction "whenever Congress acted pursuant to a valid [A]rticle I power and there was a rational reason to believe that Congress felt federal jurisdiction was a 'necessary and proper' way to effectuate that [A]rticle I power."[242] Professor Galligan argues that "related to" jurisdiction falls squarely within his theory of protective jurisdiction because "[f]ederal jurisdiction over 'related to' cases is a 'necessary and proper' means to effectuate the federal interest in an efficient bankruptcy system."[243] Professor Galligan explains that federal jurisdiction is important to cure "potential bias against debtors," i.e., "[a]ny bias that adversely affects the plaintiff's ability to recover."[244] Professor Galligan also points out that a federal court can avoid delays that might occur in state court adjudication of the debtor's "related to" cases against third parties.[245] Any bias or delay, according to Professor Galligan, "might hamper reorganization or lessen creditor recoveries in a liquidation."[246] Professor Galligan's observations about the practical benefits associated with federal adjudication of "related to" jurisdiction are persuasive,[247] but his claim that protective jurisdiction is a species of "arising under" jurisdiction is less convincing. In order to understand why protective jurisdiction fails as a theory rooted in Article III, it is necessary to examine the scholars upon whose work Professor Galligan relies.

Professor Herbert Wechsler was an early and important proponent of protective jurisdiction.[248] Professor Wechsler argued that a case should "arise under" federal law within the meaning of Article III any time "Congress has authority to make the rule to

son articulating a theory of protective jurisdiction but rooting it in Article I); Goldberg-Ambrose, *supra* note 9, at 583 (recognizing that Justice Jackson "located the source of [protective jurisdiction] in [A]rticle I"); *infra* Part IV.B-C (discussing Justice Jackson's opinion and the criticisms of it). R

241 *See* Galligan, *supra* note 9, at 41-54. R

242 *Id.* at 47-48 (footnote omitted).

243 *Id.* at 48.

244 *Id.* at 49.

245 *Id.* at 49-50.

246 *Id.* at 49.

247 *See infra* Part IV.A (agreeing that "related to" bankruptcy jurisdiction may well facilitate optimal resolution of the bankruptcy case).

248 Professor Galligan's theory of protective jurisdiction is a "variant" of Professor Wechsler's theory. Galligan, *supra* note 9, at 47-48.

govern disposition of the controversy but is content instead to let the states provide the rule so long as jurisdiction to enforce it has been vested in a federal court."[249] In other words, Professor Wechsler proposed that Congress could "assert its regulatory powers" in at least two ways: (i) by creating a federal substantive rule of decision or (ii) by granting access to the federal courts.[250] This must be so, he argued, because if Congress has been granted the authority to make substantive law, "it must be free to take the lesser step" of granting federal jurisdiction.[251]

Professors Alexander Bickel and Harry Wellington subsequently lent support to Professor Wechsler's broad view of protective jurisdiction by contending that Congress should be free to grant access to federal court in any area in which it could permissibly enact substantive federal law.[252] In their view, such a grant of federal jurisdiction was permitted by the "arising under" language of Article III.[253] Such an interpretation of the "arising under" language would not render it meaningless because the "arising under" language would "be read in conjunction with the definition in [A]rticle I of an area of federal authority."[254] Moreover, such a view of Congress' authority would permit Congress to take advantage of the "genius of a federal system" because it would permit Congress to "hand the conductor's baton to the federal courts rather than giving them a set of cymbals with which to drown out all other sounds."[255] Congress could draw upon the states' diverse approaches to the problem, but federal courts' consistent applications of state law would lead to some level of uniformity.[256]

The formulation of protective jurisdiction articulated by

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[249] Wechsler, *supra* note 239, at 224-25 (explaining that where Congress can enact substantive law, it "must be free to take the lesser step of drawing suits . . . to the district courts without displacement of the states as sources of the operative, substantive law"); *see also* Galligan, *supra* note 9, at 44-45 (describing Wechsler's theory); Goldberg-Ambrose, *supra* note 9, at 586 (same). R R

[250] Wechsler, *supra* note 239, at 224-25.

[251] *Id.*

[252] Bickel & Wellington, *supra* note 238, at 19-20; *see also* Goldberg-Ambrose, *supra* note 9, at 589 (describing Professors Bickel and Wellington as proposing that "cases should be deemed to arise under federal law whenever Congress has the power to enact substantive rules to govern them, but chooses instead to confer jurisdiction on the federal courts and rely on state-made rules"). R R

[253] Bickel & Wellington, *supra* note 238, at 21 & n.80. R

[254] *Id.* at 21 n.80.

[255] *Id.* at 20.

[256] *Id.* at 19-21.

Professors Wechsler, Bickel, and Wellington has been criticized, first, on the basis that Congress does not necessarily always have the "lesser" power included within the grant of a "greater" power.[257] Second, it is arbitrary to label the enactment of a jurisdictional statute as the "lesser" power and the enactment of substantive law as the "greater" power that encompasses the lesser. Rather, the relevant "power" appears to be Congress' power to enact legislation.[258] A specific statute cannot be defended on the grounds that enacting a specific statute is a lesser-included power within Congress' broader power to enact statutes generally. Instead, the validity of any given statute is measured against the relevant constitutional authority. For many statutes, it is sufficient to consult Article I to determine whether the statute is a valid exercise of Congress' power.[259] For statutes that purport to confer jurisdiction on the federal courts, however, the Constitution requires reference to both Article I and Article III. To label the enactment of a jurisdictional statute a "lesser" power is to beg the question of whether the jurisdictional statute is valid as measured by the appropriate constitutional provisions.

A third criticism of Professors Wechsler, Bickel, and Wellington's argument is that their formulation of protective jurisdiction would not survive Supreme Court scrutiny. Their theory of protective jurisdiction would permit the exercise of federal jurisdiction where the only "Law" that the case "arises under" is the jurisdictional statute itself. The Supreme Court has stated that mere jurisdictional statutes are insufficient to confer federal jurisdiction. The Court in *Verlinden* took pains to explain that the Foreign Sovereign Immunities Act was not merely a jurisdictional statute.[260] The Court was even more clear in *Mesa v. Cali-*

[257] Goldberg-Ambrose, *supra* note 9, at 590 ("[T]he law recognizes numerous situations in which the greater power does not encompass the lesser."). R

[258] *See* U.S. CONST. art. I, § 1 (conferring the legislative power upon Congress).

[259] Of course, it is often necessary to refer to constitutional provisions other than Article I (e.g., the Fourteenth Amendment) to ensure that Congress has not overstepped its authority.

[260] As the *Verlinden* Court explained:

> The [Foreign Sovereign Immunities Act] does not merely concern access to the federal courts. Rather, it governs the type of actions for which foreign sovereigns may be held liable in a court in the United States, federal or state. The Act codifies the standards governing foreign sovereign immunity as an aspect of substantive federal law, and applying those standards will generally require interpretation of numerous points of federal law. Finally, if a court determines that none of the exceptions to sovereign immu-

fornia,[261] where it rejected the argument that a case can be removed under the federal officer removal statute even when the defendant is not asserting a federal defense. The Court stated that, in the absence of an alleged federal defense, there would be "serious doubt" as to whether a federal court could constitutionally exercise jurisdiction over a state-law case against a federal officer.[262] The Court explicitly rejected the argument that a case can "arise under" a statute that is purely jurisdictional: "Section 1442(a), in our view, is a pure jurisdictional statute, seeking to do nothing more than grant district court jurisdiction over cases in which a federal officer is a defendant. Section 1442(a), therefore, cannot independently support Art. III 'arising under' jurisdiction."[263]

There is reason to believe that the Supreme Court was right to conclude that a case cannot "arise under" only a jurisdictional statute. In such an instance, federal jurisdiction would not be protective of any federal "Law" other than the jurisdictional statute itself. The use of the word "Laws" in Article III suggests that, if federal jurisdiction is indeed intended to be "protective" (a dubious proposition), it should be protective of "Laws," i.e., statutes enacted by Congress, not merely federal interests or policies. However, Professor Wechsler's formulation of protective jurisdiction would permit an end run around that idea; specifically, federal courts could "protect" federal interests or policies reflected only in one jurisdictional statute.

Professor Ray Forrester forwarded a different variant of protective jurisdiction in the very same year as Professor Wechsler. Professor Forrester suggested that the Framers intended federal jurisdiction to be "coextensive" with federal legislative authority, "limited only by the extent of the delegated powers given to the legislature."[264] The Framers, Professor Forrester explained, intended "to insure that federal laws should be construed by federal judges with federal sympathies" and attempted to insure

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> nity applies, the plaintiff will be barred from raising his claim in any court in the United States . . . .

Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 497 (1983) (citation omitted).

[261] Mesa v. California, 489 U.S. 121 (1989).

[262] *Id.* at 137.

[263] *Id.* at 136. "Rather, it is the raising of a federal question in the officer's removal petition that constitutes the federal law under which the action against the federal officer arises for Art. III purposes." *Id.*

[264] Forrester, *supra* note 239, at 118.

"uniformity in the interpretation and application of federal laws."[265] Thus, Professor Forrester concluded:

> In matters where Congress has set up a broad legislative program and policy, within one of the legislative powers delegated in the Constitution, it may be argued that Congress is acting within the constitutional intent in granting jurisdiction to the federal courts over all litigation connected with and forming a part of such a program [even] though the jurisdiction includes cases connected with the program which would otherwise be within the jurisdiction of the state courts only.[266]

Professor Paul Mishkin subsequently articulated a similar theory of protective jurisdiction. Professor Mishkin suggested that "where there is an articulated and active federal policy regulating a field, the 'arising under' clause of Article III apparently permits the conferring of jurisdiction on the national courts of all cases in the area—including those substantively governed by state law."[267] The versions of protective jurisdiction forwarded by Professors Forrester and Mishkin ensure that, if protective jurisdiction is exercised, it will be exercised only when the federal judiciary is indeed "protecting" actual substantive legislation enacted by Congress. The problem, however, is that there is no principled limitation to protective jurisdiction as articulated by Professors Forrester and Mishkin. How tenuous may the connection between the jurisdictional statute and the federal program be before the jurisdictional statute is considered invalid? According to Professor Galligan, a remote connection is sufficient; he suggests that Congress can enact a jurisdictional statute as long as there is a "rational relationship" between the grant of federal jurisdiction and "some valid national interest within Congress' [A]rticle I power."[268] If the "necessary and proper" test is to be employed, it would appear that Congress could widely confer federal jurisdiction over state-law claims. However, it is not clear that Article III can be understood as authorizing such a

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[265] *Id.* at 119-20.

[266] *Id.* at 120; *see also* Goldberg-Ambrose, *supra* note 9, at 592 (describing Professor Forrester as forwarding "The Partial Occupation Theory," which "justifies protective jurisdiction through the arising under clause of [A]rticle III," but "would limit protective jurisdiction to subject areas in which Congress has already undertaken some degree of substantive regulation"). R

[267] Mishkin, *supra* note 9, at 192; *see also* Goldberg-Ambrose, *supra* note 9, at 592 (classifying Professor Mishkin's argument as a "variation on [Professor Forrester's] Partial Occupation Theory"). R

[268] Galligan, *supra* note 9, at 47-48. R

broad grant of jurisdiction over state-law claims. Ultimately, the theory of protective jurisdiction articulated by Professors Forrester and Mishkin does not convincingly fit within the bounds of Article III.

Thus, no theory can satisfactorily identify an Article III basis for the entire scope of "related to" jurisdiction. The federal entity argument accounts only for those cases in which a trustee is a party and, even there, the explanation relies on an arguably overbroad interpretation of the term "arising under." Only those cases in which the debtor is a defendant or the action is against the property of the estate require interpretation or application of federal law (the automatic stay provision), but these cases are unlikely to be "related to" cases. Perhaps all "related to" cases derive from the same nucleus of operative facts as the bankruptcy petition or a proceeding "arising under" or "arising in" the bankruptcy case, or perhaps all "related to" cases bear a logical relationship to the bankruptcy case. However, when the "related to" case is pending in a different court, it cannot be considered part of the same "case" as the bankruptcy case. Thus, where the debtor is a plaintiff or the lawsuit is between third parties, none of which has sought bankruptcy protection, and the "related to" case has not been filed in the same court as the bankruptcy case, there does not appear to be an Article III basis for jurisdiction. The next Part of this Article will show that it is time to explore Article I as a viable source of federal jurisdiction in general and "related to" bankruptcy jurisdiction in particular.

IV

Article I as a Possible Basis for "Related To" Jurisdiction

Despite the absence of an Article III "hook" for "related to" jurisdiction, federal adjudication of "related to" cases may nonetheless foster more efficient administration of bankruptcy cases. As Professor Galligan has noted, "[f]ederal jurisdiction over 'related to' cases is a 'necessary and proper' means to effectuate the federal interest in an efficient bankruptcy system because it can avoid potential state court bias as well as any potential delays that may occur in state court."[269] Even though such an argument is insufficient to cause all "related to" cases to "arise under" fed-

[269] *Id.* at 48.

eral law, it reveals the true motivation for "related to" jurisdiction; namely, it was enacted to further the legislative bankruptcy scheme. As such, it is worth considering whether Article I, rather than Article III, provides the constitutional basis for "related to" jurisdiction. This argument has been made before, but it was rejected, and it has become hornbook law that Article III is the sole source of federal subject-matter jurisdiction. In other words, it has become widely accepted that Article III must be taken literally to preclude federal courts from hearing cases that fall outside its bounds. Yet this view is puzzling in light of the fact that, in an analogous context, courts and scholars regularly challenge the notion that Article III must be read literally. In the context of Article I tribunals, a debate flourishes as to the scope of Congress' ability to create non-Article III courts. While some urge that Article III should be read literally to seriously limit Congress' ability to create non-Article III courts, others seek to articulate a theory that will impose principled limits on departures from Article III. It is the contention of this Article that a similar debate should occur in the context of federal subject-matter jurisdiction. Attempts to cram "related to" bankruptcy jurisdiction within Article III's bounds distract from the more fundamental question of whether federal courts should be permitted to hear "related to" cases even when those cases do not fall within the bounds of Article III.

A. The Motive for "Related To" Jurisdiction

As courts have recognized, federal "related to" bankruptcy jurisdiction facilitates optimal resolution of the bankruptcy case.[270] Where the debtor is a plaintiff and is pursuing a pre-petition cause of action, any recovery is property of the estate and thus increases the amount of money that is available to distribute to creditors. As such, prompt resolution of the debtor's action is helpful, and any delay in the resolution of the debtor's suit will

[270] *E.g.*, New York City Employees' Ret. Sys. v. Ebbers (*In re* WorldCom, Inc. Sec. Litig.), 293 B.R. 308, 329 (S.D.N.Y. 2003) ("Broadly construing the federal courts' bankruptcy jurisdiction is essential to their ability to preserve assets and reorganize the estate, particularly where there is a 'complex factual scenario, involving multiple claims, policies and insurers.'") (quoting *In re* U.S. Lines, Inc., 197 F.3d 631, 641 (2d Cir. 1999)); Wood v. Wood (*In re* Wood), 825 F.2d 90, 92 (5th Cir. 1987) ("Congress was concerned with the inefficiencies of piecemeal adjudication of matters affecting the administration of bankruptcies and intended to give federal courts the power to adjudicate all matters having an effect on the bankruptcy.").

slow down the distribution of assets to the creditors. Further, even though it is not absolutely necessary to resolve a lawsuit between third parties in order to resolve the bankruptcy case, it may nonetheless be better for the suit to be resolved before the bankruptcy estate is either liquidated or reorganized. If one of the parties has filed a proof of claim, e.g., for indemnification or contribution, its distribution will ultimately depend on the outcome of the "related to" case. If none of the parties has filed a proof of claim, they may find themselves unable to collect from the debtor once the bankruptcy case has been resolved. This is not an optimal result from the perspective of bankruptcy law because the system seeks to compensate all possible creditors. As such, it is suboptimal for a slow-moving suit to thwart a potential creditor's recovery. Federal adjudication of "related to" cases can avoid such a negative outcome.

B. Article I as a Possible Basis for "Related To" Jurisdiction

Congress can make "all Laws which shall be necessary and proper for carrying into execution"[271] the enumerated powers in Article I, including the power to "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."[272] As a result, perhaps Congress *can* authorize the exercise of "related to" bankruptcy jurisdiction over cases that do not "arise under" federal law as that term has traditionally been understood. In other words, because it can plausibly be argued that federal jurisdiction over "related to" cases is necessary in order for Congress to create an effective federal bankruptcy system, perhaps Congress *can* enact jurisdictional statutes, such as 28 U.S.C. § 1334(b), that confer federal subject-matter jurisdiction over cases that do not involve a federally created entity, require any interpretation or application of federal law, or form part of the same "case" as a claim that "arises under" federal law.

This argument, that federal jurisdiction over "related to" cases is constitutional because it is necessary and proper to administer the federal bankruptcy regime, should sound familiar. It is nearly identical to the argument made by proponents of protec-

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271 U.S. CONST. art. I, § 8, cl. 18 (the "necessary and proper" clause).

272 *Id.* § 8, cl. 4 ("[The Congress shall have Power to] establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States[.]").

tive jurisdiction.[273] Indeed, the argument was articulated long ago by Justice Jackson in *National Mutual Insurance Co. v. Tidewater Transfer Co.*[274] Justice Jackson's argument, however, is different from the argument advanced by protective jurisdiction advocates in its identification of the constitutional provision that permits "related to" bankruptcy jurisdiction: it is Article I, not Article III.

In *Tidewater*, the Court considered whether Congress could amend the diversity statute to include controversies between citizens of the states and citizens of the District of Columbia. In *Tidewater*, a citizen of the District of Columbia (a corporation) sued a citizen of Virginia (also a corporation).[275] Congress had amended the diversity statute to permit suits between citizens of the District of Columbia and other states.[276] The Supreme Court had previously ruled in *Hepburn v. Ellzey*[277] that citizens of the District of Columbia were not citizens of a "State" within the meaning of the Judiciary Act of 1789.[278] The Court arrived at that result, however, by concluding that the District of Columbia was not a "State" for the purposes of Article III.[279] Thus, *Tidewater* squarely presented the question of whether Article III permitted Congress to confer federal jurisdiction on suits between citizens of the states and citizens of the District of Columbia.

Justice Jackson, joined by Justices Black and Burton, considered themselves bound by the reasoning of *Hepburn* and held

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[273] *See* Galligan, *supra* note 9, at 47-48, 71-72 (applying protective jurisdiction to "related to" jurisdiction); *supra* Part III.C (discussing theories of protective jurisdiction). **R**

[274] Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949). Goldberg-Ambrose describes Justice Jackson's version of protective jurisdiction as "the Effectuation Theory":

> The Effectuation Theory views federal jurisdiction over appropriate state law claims as a necessary and proper means of furthering the objects of federal legislative power identified in Article I. Under this theory, if Congress has a proper legislative interest in a subject, then it is constitutional for Congress to effectuate that interest solely by providing a federal forum for adjudication of claims affecting that interest.

Goldberg-Ambrose, *supra* note 9, at 583. **R**

[275] *Tidewater*, 337 U.S. at 583.

[276] *Id.* at 584-85.

[277] Hepburn v. Ellzey, 6 U.S. (2 Cranch) 445 (1805).

[278] *Tidewater*, 337 U.S. at 584 (citing *Hepburn*); *Hepburn*, 6 U.S. (2 Cranch) at 452.

[279] *Hepburn*, 6 U.S. (2 Cranch) at 452 (concluding that the term "state" in the Constitution included only "members of the American confederacy" and not the District of Columbia).

that the District of Columbia was not a state within the meaning of Article III.[280] They concluded, therefore, that cases between citizens of the District of Columbia and citizens of the states of the United States "were not included in the catalogue of controversies over which the Congress could give jurisdiction to the federal courts by virtue of Art. III."[281]

Despite this conclusion, Justices Jackson, Black, and Burton held that Congress *was* empowered to confer federal jurisdiction over cases between citizens of states and citizens of the District of Columbia.[282] They pointed to Congress' Article I power to legislate for the District and explained that Congress' "exclusive responsibility . . . for the welfare of the District" included "both [the] power and duty to provide its inhabitants and citizens with courts adequate to adjudge not only controversies among themselves but also their claims against, as well as suits brought by, citizens of the various states."[283] This power permitted Congress to create courts for the District, to confer upon them "not only . . . the jurisdiction and powers of the federal courts in the several states but [also] such authority as a state may confer on her courts,"[284] and also to confer on other federal courts jurisdiction over cases involving District citizens.[285] Justice Jackson's opinion rejected the "objection" that Article III courts cannot exercise subject matter jurisdiction over cases that fall outside the bounds of Article III.[286]

Justice Jackson drew upon bankruptcy law to support his conclusion. He asserted that it was "obvious" that Article I, not Article III, "is the source of our system of reorganizations and bankruptcy."[287] He pointed out that district courts were empowered to hear cases between trustees and third parties that, "but for the bankruptcy powers, would be beyond their jurisdiction

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[280] *Tidewater*, 337 U.S. at 586-88.

[281] *Id.* at 588.

[282] *Id.* at 600 ("We conclude that where Congress in the exercise of its powers under Art. I finds it necessary to provide those on whom its power is exerted with access to some kind of court or tribunal for determination of controversies that are within the traditional concept of the justiciable, it may open the regular federal courts to them regardless of lack of diversity of citizenship.").

[283] *Id.* at 590.

[284] *Id*.

[285] *Id.* at 590-91.

[286] *Id.*

[287] *Id.* at 594.

because of lack of diversity required under Art. III."[288] Even though the present scope of "related to" bankruptcy jurisdiction did not exist when *Tidewater* was decided, there can be no doubt that Justice Jackson would support Article I as the basis for "related to" jurisdiction: "Under Art. I the Congress has given the district courts not only jurisdiction over cases arising under the bankruptcy law but also judicial power over nondiversity cases which do not arise under that or any other federal law."[289]

Justice Jackson's argument lines up with Professor Galligan's justification of "related to" jurisdiction: Professor Galligan contends that federal jurisdiction should be proper "whenever Congress acted pursuant to a valid [A]rticle I power and there was a rational reason to believe that Congress felt federal jurisdiction was a 'necessary and proper' way to effectuate that [A]rticle I power."[290] The critical difference between Justice Jackson's argument and that of most protective jurisdiction scholars, including Professor Galligan, is that Justice Jackson did not attempt to fit his theory within the bounds of Article III; rather, he asserted that Congress, as long as it was acting within its Article I powers, could grant federal jurisdiction over cases that are not enumerated in Article III.[291]

C. The "Unbreakable Rule": Article III Courts Cannot Hear Cases that Fall Outside the Bounds of Article III

In the very same case in which Justice Jackson articulated his Article I theory of federal jurisdiction, six justices, in three separate opinions, flatly rejected this argument and stated that it would not be permissible for the federal courts to exercise jurisdiction outside the bounds of Article III. These opinions articulate the argument in favor of "the unbreakable rule" and are therefore worth exploring briefly.

The first relevant opinion was written by Justices Rutledge and Murphy. They dismissed the possibility that Congress can use Article I to grant subject matter jurisdiction to a federal court over a case that falls outside the bounds of Article III. They did not agree that Article III courts could "be vested, by virtue of other provisions of the Constitution, with powers specifically de-

[288] *Id.*
[289] *Id.* at 599.
[290] Galligan, *supra* note 9, at 47-48 (footnote omitted). R
[291] *Tidewater*, 337 U.S. at 594.

nied them by the terms of Article III."[292] They stated, neither "we [nor] Congress can override [Article III] limits through invocation of Article I without making the Constitution a self-contradicting instrument."[293] They also rejected Justice Jackson's description of bankruptcy jurisdiction as flowing from Article I rather than Article III.[294]

Justices Rutledge and Murphy concurred in the outcome of *Tidewater*, however, because they believed that the existing precedent holding that the District of Columbia was not a "state" should be overruled.[295] They contended that neither the language nor the "historic purposes" of the diversity clause required the District of Columbia to be excluded as a "state" within the meaning of Article III.[296] Under this view, a case between a citizen of the District of Columbia and a citizen of one of the states of the United States was a case "between citizens of different states," and thus not troubling at all from an Article III perspective.[297]

Justices Frankfurter and Reed also rejected Justice Jackson's argument in their dissent from the Court's holding. The basis of their dissent was that the Framers of the Constitution intended the word "States" to mean "the political organizations that form the Union and alone have power to amend the Constitution."[298] The Framers did not intend the word "States" to include the District of Columbia.[299] As a result, Congress could not confer federal subject-matter jurisdiction over cases involving citizens of the District of Columbia on Article III courts.[300] Justices Frankfurter and Reed agreed with Justices Rutledge and Murphy that Article III represents the sole constitutional basis for federal

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[292] *Id.* at 607 (Rutledge, J., concurring).

[293] *Id.* at 607.

[294] *Id.* at 611 ("Nor is there any merit in the view that the bankruptcy jurisdiction of district courts does not stem from Article III. . . . [F]ederal court adjudication of disputes arising pursuant to bankruptcy and other legislation is conventional federal-question jurisdiction.").

[295] *Id.* at 618-26.

[296] *Id.* at 621-26.

[297] *Cf. id.* at 622-23 (recognizing that the Court's holding would allow a federal district court to entertain a suit by a citizen of the District of Columbia against a citizen of the several states and vice versa).

[298] *Id.* at 653 (Frankfurter, J., dissenting).

[299] *Id.* at 653-54.

[300] *Id.* at 655 ("But when the Constitution defined the ultimate limits of judicial power exercisable by courts which derive their sole authority from Article III, it is beyond the power of Congress to extend those limits.").

court jurisdiction. They focused on the principles of federalism underlying Article III[301] and pointed out that expansion of Article III courts' jurisdiction beyond the enumerated limits in Article III would "disregard the distribution of powers made by the Constitution."[302] They warned that there would be no principled distinction between ignoring the word "States" and any of the other words in Article III.[303] They were similarly unpersuaded that bankruptcy jurisdiction provided an example of Article III courts exercising jurisdiction beyond the bounds of Article III. They attributed federal jurisdiction over state-law claims for and against the debtor to the "arising under" clause of Article III.[304]

Finally, Chief Justice Vinson, joined by Justice Douglas, authored a dissent in which they agreed that the word "States" did not include the District of Columbia.[305] More importantly, they agreed with a majority of their colleagues that Article III represents the sole constitutional basis for federal court jurisdiction.[306] They agreed with Justice Frankfurter that treating the enumerated categories as a non-exhaustive list would also justify departing from the established principle that courts may adjudicate only "cases" and "controversies."[307] They also agreed that extending federal jurisdiction beyond the limits of Article III would encroach on the power of the states.[308]

In sum, six justices disagreed with Justice Jackson's argument that a federal court can hear a case that does not fall within the bounds of Article III. At least one scholar, Professor Cross, has already recognized that the opinions in *Tidewater* present a serious obstacle to using Article I as the constitutional "hook" for "related to" bankruptcy jurisdiction.[309] Even though no majority opinion emerged from *Tidewater*, it has become hornbook law

[301] *Id.* at 647 ("There was deep distrust of a federal judicial system, as against the State judiciaries, in the Constitutional Convention. This distrust was reflected in the evolution of Article III.").

[302] *Id.* at 652.

[303] *See id.* at 648-50.

[304] *Id.* at 653 n.3.

[305] *See id.* at 626-27 (Vinson, C.J., dissenting).

[306] *Id.* at 628-29.

[307] *Id.* at 628.

[308] *Id.* at 628-29, 631-35.

[309] *See* Cross, *supra* note 9, at 1211-12 (rejecting the availability of Article I as a valid basis of federal subject-matter jurisdiction). Even though Professor Cross carefully examined *Tidewater* and "related to" bankruptcy jurisdiction, he ultimately concluded that "related to" jurisdiction *does* represent the exercise of Article III jurisdiction. *Id.* at 1233-48. Nonetheless, he devoted some time to justifying the **R**

that Article III courts cannot exercise jurisdiction beyond the limits imposed by Article III.[310] Indeed, one scholar calls Justice Jackson's suggestion "close to outright jurisdictional apostasy."[311] This is not surprising: Article III, Section 1 proclaims that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[312] The very next section describes the categories of cases and controversies to which "[t]he judicial Power shall extend."[313] It is logical to conclude that the text mandates that the courts described in Section 1 of Article III should not be permitted to hear cases that are omitted from Section 2 of the same article.

D. The "Unbreakable Rule" Has Been Broken Elsewhere

Of course, the text of Article III seems also to command that the federal judicial power must be lodged in judges that enjoy life tenure and a steady salary. Article III, Section 1 provides that "[t]he judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall . . . receive . . . a Compensation, which shall not be diminished during their Continuance in Office."[314] It is possible to argue that the text of Article III prohibits Congress from vesting any adjudicative authority in judges that lack these protections.[315] Despite this,

position that Article III courts should not be permitted to exercise jurisdiction over cases that fall outside the bounds of Article III. *Id.* at 1211-24.

310 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3521, at 52 (2d ed. 1987) ("The traditional learning has been that Congress has no constitutional power to vest any jurisdiction in the federal courts that is not listed in Article III."); WRIGHT & KANE, *supra* note 14, § 8, at 32 (citing *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809), as support for the proposition that Article III, Section 2 is "the primary, if not the exclusive, source of power for the federal courts"). R

311 James E. Pfander, *The* Tidewater *Problem: Article III and Constitutional Change*, 79 NOTRE DAME L. REV. 1925, 1926 (2004).

312 U.S. CONST. art. III, § 1.

313 *Id.* § 2, cl. 1, *amended by* U.S. CONST. amend. XI.

314 *Id.* § 1.

315 CHEMERINSKY, *supra* note 114, § 4.1, at 217 (recognizing that it is "tempting" to conclude that "under the text of Article III Congress is never permitted to create judges who lack life tenure and salary assurances" because the provisions of Article III "seem unambiguously to require that the judicial power be vested only in courts where the judges have life tenure and salary protection"); Pfander, *supra* note 11, at 645-46 (noting that "[t]he literal terms of Article III appear to rule out reliance upon Article I tribunals altogether" but rejecting such a "literal application" of Article III). R R

Congress has long permitted non-Article III courts to exercise federal judicial power.[316] The Court has upheld the validity of territorial courts,[317] including courts for the District of Columbia,[318] courts-martial,[319] courts that adjudicate "public rights," such as "the Court of Federal Claims, the Tax Court, and the Court of Veterans Appeals,"[320] and adjudication by administrative agencies.[321] As a result, while some participants in the debate regarding Article I courts urge a "return to principled Article III literalism,"[322] many others explore the permissible boundaries of non-Article III adjudication.[323] By recognizing that the existing scheme of legislative courts is inconsistent with a literal reading of Article III, scholars have been able to engage in an energetic and productive discussion of whether such an inconsistency is appropriate. They have also been able to consider whether there should be future departures from the literal lan-

316 CHEMERINSKY, *supra* note 114, § 4.1, at 217 ("Yet, despite the apparent clarity of the text [of Article III], it no longer is realistic to argue that it is always unconstitutional for Congress to create legislative courts to decide Article III judicial business. For 200 years, legislative courts have been permitted."). R

317 Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511, 512 (1828) (holding that a court created for the territory of Florida is constitutional); FALLON ET AL., *supra* note 87, at 377-78.

318 Palmore v. United States, 411 U.S. 389, 390 (1973) (holding that an Article I court for the District of Columbia is constitutional).

319 Dynes v. Hoover, 61 U.S. (20 How.) 65, 72 (1858) (holding that Article I courts for the military are constitutional); FALLON ET AL., *supra* note 87, at 378.

320 FALLON ET AL., *supra* note 87, at 378-79; *see* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 285 (1856) (holding that Article I courts for "public rights" matters are constitutional).

321 *E.g.*, Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 841 (1986) (allowing state-law counterclaim to be adjudicated by the Commodity Futures Trading Commission); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 569 (1985) (permitting the Environmental Protection Agency to employ a system of negotiation and binding arbitration, subject to only limited judicial review, to determine the compensation owed to corporations whose mandatorily collected data is used in the pesticide registration process); Crowell v. Benson, 285 U.S. 22, 47 n.11, (1932) (citing cases in which administrative adjudication was permitted and rejecting a challenge to the workers' compensation scheme established by the Longshoremen's and Harbor Workers' Compensation Act).

322 Currie, *supra* note 213, at 443-59 (recommending a restrictive reading of Article III); Pfander, *supra* note 11, at 647 & n.8 (citing scholars that have argued in favor of taking Article III literally to preclude Article I courts); Martin H. Redish, *Legislative Courts, Administrative Agencies, and the* Northern Pipeline *Decision*, 1983 DUKE L.J. 197, 201 (criticizing the *Northern Pipeline* opinions' approaches to non-Article III courts and suggesting that Article III may prohibit all non-Article III courts). R R

323 *See, e.g.*, Pfander, *supra* note 11, at 647 (briefly outlining the debate and identifying scholars). R

guage of Article III, and, if so, what those departures should look like. A similar discussion should take place in the context of Article III courts' jurisdiction. That is, the "unbreakable rule," which provides that Article III courts' jurisdiction is limited by Article III, should be reexamined.

Conclusion

It is the contention of this Article that, contrary to the suggestion of most scholars, "related to" bankruptcy jurisdiction provides an instance in which Article III courts *are* adjudicating cases that fall outside the bounds of Article III.[324] Perhaps "related to" jurisdiction should be restricted to comply with traditional Article III limits.[325] On the other hand, perhaps the exercise of federal jurisdiction over "related to" bankruptcy cases facilitates optimal resolution of bankruptcy cases, such that the federalism concerns that animate traditional Article III limits are not offended by the exercise of federal jurisdiction in the "related to" bankruptcy context.[326] That is, perhaps a departure from Article III is warranted in light of the particular interests that attend the federal bankruptcy scheme. Confronting this narrow question should encourage a broader dialogue regarding whether and when departures from Article III are warranted in other arenas. It is beyond the scope of this Article to provide answers to these questions, but it is the contention of this author that, in light of the reality of "related to" bankruptcy jurisdiction, it is necessary to consider whether Article III truly is the exclusive source of subject matter jurisdiction for Article III courts.

[324] *See supra* Part III (arguing that "related to" bankruptcy jurisdiction does not fall within the bounds of Article III).

[325] *See supra* note 10. R

[326] *Cf.* Goldberg-Ambrose, *supra* note 9, at 609-14 (proposing that the Tenth Amendment be used to mitigate federalism concerns when federal courts adjudicate state-law claims).