Article III and The “Related To” Bankruptcy Jurisdiction: A Case Study in Protective Jurisdiction*

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I. INTRODUCTION

The two most significant and well-known types of cases to which the federal judicial power extends under article III are cases arising under the Constitution, laws, or treaties of the United States and cases between citizens of different states.¹ The federal bankruptcy jurisdiction statutes provide for federal district court jurisdiction over all civil proceedings “related to cases under title 11.”² The definition of a “related to” case apparently would include a state-created cause of action brought by the bankruptcy debtor against a non-diverse

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1. U.S. CONST. art. III, § 2. U.S. CONST. art III, § 2, cl. 2 extends the judicial power to cases arising under (1) the Constitution, (2) laws of the United States, and (3) treaties made or which shall be made; (4) cases affecting ambassadors, other public ministers and consuls; (5) cases of admiralty and maritime jurisdiction; and to controversies (6) to which the United States is a party; (7) between two or more states; (8) between a state and citizens of another state; (9) between citizens of different states; (10) between citizens of the same state claiming land under grants of different states; and (11) between a state or its citizens and foreign states.

2. See 28 U.S.C. § 1334(b), which provides in full:

   Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to a case under title 11.

For analysis, this article focuses on a “related to” case in which the bankruptcy debtor or his estate is the plaintiff. See infra notes 279-280 and accompanying text.
defendant. May a federal court take jurisdiction of such a case under the "related to" jurisdiction provision, or does article III deny the federal court the power to decide such a case? Put differently, as there is no diversity of citizenship between the parties in such a case, does it arise under the laws of the United States? An analysis of the "related to" jurisdiction shows that it is, in fact, a species of article III "arising under" jurisdiction that is referred to as protective jurisdiction.

Protective jurisdiction is present when in order to vindicate or protect federal interests or policies Congress decides to provide a federal forum but not a federal rule of decision for certain classes of cases. In bankruptcy proceedings, there is a clear federal interest in providing a forum for all claims against the bankrupt debtor and all the debtor's claims,
whether those claims are based on state law or federal law and whether or not the parties are diverse. This article contends that the most logically defensible explanation of protective jurisdiction relies upon articles I and III and upon the same political process that checks federal intrusion into state sovereignty in other areas. As long as Congress acts pursuant to a valid article I power and its means—a protective jurisdiction statute—are rationally related to its ends, then any case falling under the jurisdictional statute "arises under" federal law pursuant to article III. The controls on congressional usurpation of state power are article I, the case or controversy requirement of article III, and the political process.

This discussion has been raised in the wake of Northern Pipeline Construction Company v. Marathon Pipe Line Company, in which the United States Supreme Court held that a non-article III "federal" judge could not decide purely state law claims where only appellate review of those decisions was available. In Marathon, plaintiff Northern Pipeline had filed a

5. It is difficult to say precisely what the Court's "holding" in Marathon was. In the four judge (Brennan, Marshall, Blackmun, and Stevens) plurality opinion, Justice Brennan painted with a broad brush, attempting to generally categorize those instances where Congress may constitutionally employ legislative courts to resolve disputes. In his concurrence, then Justice Rehnquist (joined by Justice O'Connor) agreed that the Bankruptcy Act of 1978 as written was unconstitutional, but refused to consider the broader questions Justice Brennan addressed.

Chief Justice Burger dissented, as did Justice White (joined by Chief Justice Burger and Justice Powell). They believed that Congress' delegation of jurisdiction to the bankruptcy courts in the Bankruptcy Reform Act of 1978 was constitutional.

In the wake of Marathon, litigants contended that the Court's decision not only struck down former 11 U.S.C. § 1471(c), which essentially had given the bankruptcy courts jurisdiction over all civil proceedings arising under title 11 or arising in or related to cases under title 11, but also that the Court's decision struck down the Code's entire jurisdictional scheme, including the district court's bankruptcy jurisdiction. The courts that considered this issue resolved it in favor of continued district court jurisdiction, reasoning that Marathon only struck down § 1471(c). See, e.g., In re Casey Corp., 46 Bankr. 473 (S.D. Ind. 1985); In re Pine Associates, Inc., 733 F.2d 208 (2d Cir. 1984). Cf. infra notes 23-25 and accompanying text.

6. U.S. CONST. art. III, § 1 provides in part:

The Judges, both of the Supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

For a discussion of the differences between "constitutional" courts and "legislative" courts, see generally Glidden Co. v. Zdanok, 370 U.S. 530 (1962). In cases involving non-article III judges, the issue usually arises in the form of a claim by one of the parties that the case involves an exercise of the "judicial power" of the United States, and as such that an article III judge is constitutionally required. See, e.g., Palmore v. United States, 411 U.S. 389 (1973).
petition for reorganization under the federal bankruptcy laws.\(^7\) Subsequently Northern filed an adversary proceeding against Marathon in the bankruptcy court, alleging state law causes of action for breach of contract, breach of warranty, misrepresentation, coercion, and duress. This proceeding was included in the bankruptcy court's statutory jurisdiction over claims "related to" bankruptcy.\(^8\)

The defendant objected to the bankruptcy court's jurisdiction over the case. The defendant claimed that article III entitled it to a hearing before a federal judge with life tenure during good behavior and protection against salary diminutions.\(^9\) The bankruptcy judge was not such an "article III" judge, therefore the bankruptcy judge could not constitutionally decide the case. The appellate review provided by the Bankruptcy Act of 1978 was insufficient to constitutionalize the statutory procedure.\(^10\)

In holding that the bankruptcy court could not adjudicate the state law claims, the Court was not called upon to decide whether the federal district court itself could have constitutionally taken original jurisdiction of Northern's claim\(^11\) because it was "related to" bankruptcy. The parties were diverse, so there was an independent basis for federal jurisdiction.\(^12\) Thus, the Court did not decide whether an article III court would have constitutional competence to hear a case between a trustee, or debtor in possession, and a non-diverse third-party involving state law claims like those in Marathon.

In the wake of Marathon,\(^13\) Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984, which once again gave the district court jurisdiction over all civil proceedings "related to cases under title 11."\(^14\) The Act did

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8. 458 U.S. at 54.
11. But see Marathon, 458 U.S. at 73 n.26 ("This claim may be adjudicated in federal court on the basis of its relationship to the petition for reorganization.").
12. In re Northern Pipeline Const. Co., 6 Bankr. 928 (Bankr. Minn. 1980). In fact, Northern had filed a diversity action in Kentucky against Marathon before it filed its reorganization petition. Id. at 929.
14. See 28 U.S.C. § 1334(b) (Supp. III 1985), which provides in full:
attempt to rectify the Marathon problem; however, it did not resolve the question of the federal courts' constitutional competence.

The "related to" bankruptcy jurisdiction, when considered in connection with the discretionary and mandatory abstention provisions of the 1984 Bankruptcy Amendments and Federal Judgeship Act, appears to be a constitutional effort to protect the federal interest in efficient bankruptcy administration, and at the same time preserve the states' interests in interpreting, applying, and developing state law. This balance between state and federal interests reflects the viability of the political process as a meaningful control on congressional power.

Section II of this paper briefly sets out the jurisdictional scheme of the 1984 Act. Section III presents and describes the argument that the "related to" bankruptcy jurisdiction is unconstitutional. Statements in the legislative history indicate that some legislators believed it would be unconstitutional for a federal court to take jurisdiction in a non-diversity case with Marathon-type state law issues. Several cases have adopted this reasoning and have held that in order for a federal court to have "related to" bankruptcy jurisdiction there must be an independent basis for federal jurisdiction.

The Supreme Court cases supporting "related to" jurisdiction are set out in section IV. Section V examines the "original ingredient" theory of Osborn v. Bank of the United States and discusses pendent and ancillary jurisdiction as bases for the "related to" jurisdiction. Although courts that uphold "related to" jurisdiction reach the correct result, justifying the federal court's "related to" bankruptcy jurisdiction on grounds of pendent or ancillary jurisdiction strains those concepts as we know them.

Section VI discusses various theories of protective jurisdiction, articulates the most persuasive of those theories, and explains how the political process is the most acceptable check.

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Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

16. See infra text accompanying note 54.
17. See infra text accompanying notes 55-57.
19. See infra text accompanying notes 126-150.
on federal power when protective jurisdiction is involved. Section VII reexamines the "related to" bankruptcy jurisdiction in the context of the political process check on protective jurisdiction, concluding that the compromise Congress reached between federal and state interests in the 1984 Act shows that the political process can function as a meaningful check on federal intrusion into state judicial sovereignty. Section VIII contains some brief conclusory remarks.

II. THE "RELATED TO" BANKRUPTCY JURISDICTIONAL SCHEME

In 1978, Congress greatly expanded the jurisdiction of both the district courts and the bankruptcy "courts." Congress hoped to limit what it believed was unnecessary litigation over jurisdiction and also to streamline and reduce the costs of the bankruptcy process. Congress granted the bankruptcy court jurisdiction over "all civil proceedings arising under title 11 [the Bankruptcy title] or arising in or related to cases under

20. See, e.g., S. BERNSTEIN, BANKRUPTCY PRACTICE AFTER THE AMENDMENTS ACT OF 1984 21-23 (1984) [hereinafter BERNSTEIN]. Therein the author states:

One of the major achievements in the Reform Act of 1978 was the abolition of the summary/plenary distinctions and the limitations on property of the bankruptcy estate. The bankruptcy court and the court of bankruptcy were merged in a single bankruptcy court; the restructured court was granted an expanded, unitary, and pervasive jurisdiction. Practitioners were supposed to put away their tin soldiers and battlefields—to bury the overly refined distinctions between "merely colorable" and "materially adverse" claims, and to close the traps for jurisdiction by ambush. All claims and causes of action, whether existing as of the petition date or created by Congress, were to be tried in the bankruptcy court, and any appropriate judgment, whether in rem, quasi-in rem, or in personam, was to be entered by the bankruptcy court.

See also Comment, Jurisdiction Under the Bankruptcy Amendments of 1984: Summing Up the Factors, 22 TULSA L.J. 167, 172 n.36 (1986) [hereinafter Comment, Summing up the Factors]. Mechanically, the 1978 Act initially vested this jurisdiction in the district court, former 28 U.S.C. § 1471(a), but it subsequently decreed that the bankruptcy court should exercise all the jurisdiction the statute gave the district court. Former 28 U.S.C. § 1471(c). See Marathon, 458 U.S. at 54 n.3 ("Thus the ultimate repository of the Act's broad jurisdictional grant is the bankruptcy courts."). As another commentator has noted: "The ultimate repository of the entire grant of bankruptcy jurisdiction to the district court was the bankruptcy court. In effect, the jurisdiction passed through the district courts without leaving any visible tracks." Comment, Summing Up the Factors, at 175. See also Bankruptcy Court Revision: Hearings on H. R. 8200 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 18-27 (1977) (statement of J. Stanley Shaw), cited in Note, The Theory of Protective Jurisdiction, supra note 3, at 975 n.202 and Note, Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act, 80 COLUM. L. REV. 560, 564 n.28 (1980).
title 11." As the legislative history shows, this jurisdiction might include almost any type of lawsuit such as contract, tort, labor, and antitrust, as well as more common bankruptcy disputes.

As part of its decision that Congress had unconstitutionally delegated federal judicial power to non-article III judges in the 1978 Bankruptcy Act, the Marathon Court held the entire jurisdictional statute unconstitutional. In a footnote to his plurality opinion, Justice Brennan refused to hold that the Act was severable. He did not believe that Congress, in light of the Court's decision, would have preferred to route claims like those at issue in Marathon through the district court rather than the bankruptcy court. Brennan did not believe that Congress lacked the constitutional power to confer such jurisdiction on federal courts, but rather that Congress should bear the burden of restructuring the bankruptcy courts itself.

In response to Marathon, the House proposed to make all bankruptcy judges life-tenured article III judges. At the urging of the district judges, the Senate proposed greater district court supervision over "related to" bankruptcy matters without unduly swelling the ranks of the federal judiciary by making all bankruptcy judges article III judges. While Congress

22. This is the broadest grant of jurisdiction to dispose of proceedings that arise in bankruptcy cases or under the bankruptcy code. Actions that formerly had to be tried in state court or in federal district court, at great cost and delay to the estate, may now be tried in the bankruptcy courts . . . . The bankruptcy court is given in personam jurisdiction as well as in rem jurisdiction to handle everything that arises in a bankruptcy case.
23. 458 U.S. at 87 n.40.
24. He stated:
Nor can we assume, as the Chief Justice suggests . . . that Congress' choice would be to have this case "routed to the United States district court of which the bankruptcy court is an adjunct." We think that it is for Congress to determine the proper manner of restructuring the Bankruptcy Act of 1978 to conform to the requirements of Art. III in the way that will best effectuate the legislative purpose.
25. Id.
27. Id.
bantered these proposals about, it allowed two stays of the Supreme Court's *Marathon* decision to pass, and left itself in a curious position: failure to enact new bankruptcy legislation by December 24, 1982, would call all bankruptcy jurisdiction into question.\(^8\)

The logical response, curative legislation from Congress, was not forthcoming. Instead, the Director of the Administrative Office of United States Courts prepared and issued an emergency rule,\(^9\) which all the district courts adopted with minor local variations. Pursuant to the emergency rule, the district court could refer its bankruptcy jurisdiction to the bankruptcy court.\(^10\) However, the bankruptcy judge's power over "related" proceedings was, absent party consent, limited to preparing proposed findings of fact and conclusions of law for district court review.\(^11\) The emergency rule defined a related proceeding as one which absent bankruptcy could have been brought only in the district court or state court, including claims the estate brought against third parties who had not filed claims in bankruptcy against the estate.\(^12\)

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\(^8\) See, e.g., Bernstein, supra note 20; Comment, *Summing Up the Factors*, supra note 20, at 177.

\(^9\) The congressional and constitutional authority for the preservation of any bankruptcy jurisdiction at all lay in the position of the Judicial Conference of the United States that *Marathon* only struck down the delegation of jurisdiction from the district courts to the bankruptcy courts. See, e.g., Comment, *Summing Up the Factors*, supra note 20, at 177. As the author states in a footnote:

Apparently, the position of the Judicial Conference was that only subsection (c) of § 1471 was invalidated, leaving subsections (a) and (b) intact. In other words, the Judicial Conference presumed that the jurisdictional grant to the district courts was still in effect.

*Id.* at 177 n.81 (citation omitted). See DeMascio, Norton, & Lieb, *supra* note 26, at 19. See also *supra* note 5 and accompanying text.

\(^10\) See, e.g., Comment, *Summing up the Factors*, supra note 20, at 177-79.

\(^11\) Id.

\(^12\) Model Emergency Bankruptcy Rule § (d)(3)(A), reprinted in *West's Bankruptcy Code, Rules and Forms* xv (1983 ed.). See also Comment, *Summing up the Factors*, supra note 20, at 177-78; Bernstein, *supra* note 20, at 25-26. The definition of related proceedings provided in full:

Related proceedings are those civil proceedings that, in the absence of a petition in bankruptcy, could have been brought in a district court or a state court. Related proceedings include, but are not limited to, claims brought by the estate against parties who have not filed claims against the estate. Related proceedings do not include: contested and uncontested matters concerning the administration of the estate; allowance of and objection to claims against the estate; counterclaims by the estate in whatever amount against persons filing claims against the estate; orders in respect to obtaining credit; orders to turn over property of the estate; proceedings to set aside preferences and fraudulent conveyances; proceedings in respect to lifting of the automatic stay;
Finally, on July 10, 1984, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984, a compromise between the House and Senate proposals. Congress once again vested the district court with "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." None of these three jurisdictional headings is defined. Most courts have construed the term consistently with the definition in the emergency rule.

In another section of the Act, Congress provided that the non-article III bankruptcy judges shall be known as the bankruptcy court, and that the district court may refer all its proceedings to determine the dischargeability of particular debts; proceedings to object to the discharge; proceedings in respect to the confirmation of plans; orders approving the sale of property where not arising from proceedings resulting from claims brought by the estate against parties who have not filed claims against the estate; and similar matters. A proceeding is not a related proceeding merely because the outcome will be affected by state law. Emergency Rule § (d)(3)(A).

33. For a compendium of the legislative history of the Bankruptcy Amendments and Federal Judgeship Act of 1984, see Comment, Summing Up the Factors, supra note 20, at 179-80 n.91.

34. 28 U.S.C. § 1334(b) (Supp. III 1985) (emphasis added). The district courts also have original and exclusive jurisdiction over all cases under title 11. 28 U.S.C. § 1334(a). It is apparent that the term "case" in § 1334(a) is a term of art referring to the bankruptcy case itself, which begins with the filing of the petition for relief under title 11. See, e.g., King, Jurisdiction and Procedure Under the Bankruptcy Amendments Act of 1984, 38 Vand. L. Rev. 675 (1985); Comment, Summing up the Factors, supra note 20, at 180.

35. Comment, Summing up the Factors, supra note 20, at 181. The courts have taken various views of what constitutes a "related to" claim. See, e.g., State ex rel Roberts v. Mushroom King Inc., 77 Bankr. 813 (D. Or. 1987) (a case between two creditors that has only a speculative, rather than a direct or substantial, impact on the bankruptcy estate is not "related to" the bankruptcy); In re Consulting Actuarial Partners, Ltd. Partnership, 72 Bankr. 821, 828 (Bankr. S.D.N.Y. 1987) (an adversary proceeding is a "related to" case where the outcome will affect the bankruptcy estate, but the right to relief does not depend upon application by construction of the Bankruptcy Code); In re Turner, 724 F.2d 338, 340-41 (2d Cir. 1983) (court does not have "related to" jurisdiction of cause of action remitted to debtor as exempt property because the action could not have "significant connection" to the estate). See also In re World Financial Services Center, Inc., 64 Bankr. 980, 987-88 (Bankr. S.D. Cal. 1986); In re Coral Petroleum, Inc., 62 Bankr. 699, 703-04 (Bankr. S.D. Tex. 1986); In re Yagow, 53 Bankr. 737, 739-40 (Bankr. D.N.D. 1985) (in order to sustain "related to" jurisdiction there must be an independent basis of federal jurisdiction); In re Bowling Green Truss, Inc., 53 Bankr. 391 (Bankr. W.D. Ky. 1985) (cataloging some of the various definitions of "related to" but concluding that it means traditional state law claims triable only by a state court judge or an article III judge); In re Climate Control Engineers, Inc., 51 Bankr. 359 (Bankr. M.D. Fla. 1985) (peripherally related claim is not "related to" a case under title 11).

36. 28 U.S.C. § 151 (Supp. III 1985). The bankruptcy court is a unit of the district court, but the bankruptcy judges, whom the United States Courts of Appeals appoint,
bankruptcy jurisdiction to the bankruptcy court.³⁷ These provisions alone call forth the same constitutional questions at issue in Marathon; thus Congress attempted to "constitutionalize" the new jurisdictional scheme by limiting the bankruptcy court's power over certain matters and technically increasing the district court's role, as the emergency rule had done.

The Act, in section 157(b)(1), allows the bankruptcy judge to make final determinations in what the statute calls "core" proceedings. Core proceedings are defined in section 157(b)(2),³⁸ and for the most part include traditional bankruptcy matters such as the allowance of claims, decisions on turnover orders, determinations of dischargeability, and confirmations of plans.³⁹ The bankruptcy court's power over "related

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³⁹ The statute provides:

(2) Core proceedings include, but are not limited to —

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimations of claims or interest for the purpose of confirming a plan under chapter 11 or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort and wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turnover over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort and wrongful death claims.

to" cases is much more limited.

A "non-core" case, in which state rather than federal law provides the rule of decision, is a "related to" bankruptcy case. Thus a non-diversity Marathon-type case is a "related to" bankruptcy proceeding. In such a case, the bankruptcy judge may only enter proposed findings of fact and conclusions of law, which the district court must ostensibly review de novo. All of these provisions address the Marathon problem

40. Conceivably, civil rights cases, antitrust cases, securities cases, and others could be "related to" bankruptcy, but if federal law creates the cause of action there is an independent basis for federal jurisdiction other than § 1334(b). See supra note 14. There is some real confusion concerning what is and what is not a core proceeding. In particular, three of the subheadings of § 157(b)(2) present peculiar problems because of their potential breadth. Those are subheads (A), (E), and (O). Arguably, any matter can potentially affect the administration of the estate and thus be a core proceeding under § 157(b)(2)(A). Alternatively, if the concept of property is defined broadly under § 157(b)(2)(E) then arguably any lawsuit, including a Marathon-type claim, would involve the turnover of "property." Finally, the collection of a claim, like that at stake in Marathon, could arguably affect the debtor-creditor relationship under § 157(b)(2)(O). Thus, read broadly, subheads (A), (E), and (O) make almost any claim that is in any way related to bankruptcy a core proceeding. Several commentators have considered this problem. See, e.g., Comment, Summing up the Factors, supra note 20, at 185-86; King, Jurisdiction and Procedure Under the Bankruptcy Amendments Act of 1984, 38 VAND. L. REV. 675, 686-95 (1985). Many courts have also considered the problem. See, e.g., In re Allegheny, Inc., 68 Bankr. 183, 187-90 (Bankr. W.D. Pa. 1986) (account receivable action by debtor is a core proceeding under § 157(b)(2)(O)); In re Wood, 52 Bankr. 513 (Bankr. N.D. Ala. 1985); In re Lion Capital Group, 46 Bankr. 850 (Bankr. S.D.N.Y. 1985). For a general discussion arguing for a narrow interpretation of the § 157(b) definition of core proceeding, see L. KING, COLLIER ON BANKRUPTCY ¶ 3.01 [2][B][ii] (1985). See also In re Candelero Sand and Gravel, Inc., 66 Bankr. 903 (D.P.R. 1986) (debtor lessee's claims against lessor and third-party were non-core proceedings when claims arose from pre-bankruptcy termination of lease and involved common law action only related to bankruptcy); In re Sheafer and Miller Industries, 66 Bankr. 578 (Bankr. S.D. Fla. 1986) (core proceedings in 28 U.S.C. § 157 should not be construed broadly); In re The Arista Co., 65 Bankr. 928 (Bankr. N.D. Tex. 1986) (holding that attempts to collect accounts receivable are not core proceedings); In re Ross, 64 Bankr. 829 (Bankr. S.D.N.Y. 1986) (various entities allegedly controlled by the debtor sued several of the debtor's creditors, who had filed an involuntary petition against the debtor, for intentional and malicious interference with business relations; the court concluded that it was a core proceeding, reading § 157(b)(2)(A) and (O) broadly); In re Arnold Printworks, Inc., 61 Bankr. 520 (Bankr. D. Mass. 1986) (taking a more restricted view of core proceeding and concluding that a claim by a debtor in possession against a buyer for accounts due was a non-core matter); In re Sokol, 60 Bankr. 294 (Bankr. N.D. Ill. 1986) (holding that debtor's action for contract or fraud was not a core proceeding).

of providing a hearing before an article III judge.\textsuperscript{42} However, the key competency question, whether the federal court itself has constitutional power over a non-diverse "related to" case, remains unresolved.

The abstention provisions of the Act also bear reference. Pursuant to 28 U.S.C. \textsection 1334(c)(1), the court may exercise its discretion to abstain, in the interests of justice, comity, or respect for state law.\textsuperscript{43} This discretion extends to both core and non-core matters. Concomitantly, section 1334(c)(2) provides for mandatory abstention in a "related to" case based upon a state law claim or cause of action only if there is no independent basis of federal jurisdiction and if another pro-

\textsuperscript{42} 28 U.S.C. \textsection 157(c)(1). Obviously, this entire scheme raises the same types of questions involving judicial power at issue in \textit{Marathon}. An analysis of the new statutes' \textit{Marathon} problem is beyond the scope of this article; however, for an excellent discussion of the issue, see generally Comment, \textit{Summing up the Factors}, supra note 20. For a rather cynical, and perhaps realistic, view of the new jurisdictional statute's treatment of "related to" bankruptcy jurisdiction, see King, \textit{Jurisdiction and Procedure Under the Bankruptcy Amendments Act of 1984}, 38 VAND. L. REV. 675 (1985), wherein the author queries whether or not the district judge will merely "rubber-stamp the proposed findings and conclusions of the bankruptcy judge . . . ." \textit{Id.} at 690-91 n.134. But the cases that read \textsection\textsection 157(b)(1)(A),(E), and (O) narrowly reach the arguably correct result. If a \textit{Marathon}-type case is now "core," then the bankruptcy judge can decide the case without de novo review. Given this reasoning, the only real difference between the jurisdictional provisions struck down in \textit{Marathon} and those now set forth in the U.S. Code is the district court's power to withdraw the reference, which does little once the bankruptcy court has already decided a matter. But if \textit{Marathon} cases that are not core proceedings are then subject to de novo review, then the bankruptcy court cannot decide them finally, and there is a real difference between the 1978 scheme struck down in \textit{Marathon} and the new statute. For this reason, it is submitted that \textit{Marathon}-type state law claims are not core proceedings.

It should be noted that courts have also reached conflicting results about the categorization of claims unlike those involved in \textit{Marathon}. \textit{Compare In re Bowling Green Truss, Inc.}, 53 Bankr. 391 (Bankr. W.D. Ky. 1985) (seniority dispute between two creditors is a "related to" proceeding) \textit{with In re Douthit}, 47 Bankr. 428, 431 (M.D. Ga. 1985) (seniority dispute between two creditors is a "classic" core proceeding). \textit{Compare In re Nanodata Computer Corp.}, 52 Bankr. 334 (Bankr. W.D.N.Y. 1985) (in order for a counterclaim to be a "core" proceeding under 28 U.S.C. \textsection 157(b)(2)(C), a counterclaim first must arise under or arise in a case under title 11) \textit{with Macon Prestressed Concrete Co. v. Duke}, 46 Bankr. 727 (M.D. Ga. 1985) (discussed in \textit{Marathon}, 458 U.S. at 79 n.31). \textit{See also infra} note 55.

\textsuperscript{43} In full, the statute provides:

\textit{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.}

ceeding "is commenced and can be timely adjudicated" in state court.\textsuperscript{44} Interestingly, the abstention provisions do not expressly apply to personal injury or wrongful death actions, which are likewise excluded from the definition of core proceedings.\textsuperscript{45} Read literally, absent discretionary abstention, personal injury and wrongful death cases that are in any way related to a bankruptcy must be tried in the federal district court.\textsuperscript{46} Thus a purely state-created tort action between a

\textsuperscript{44} The statute provides in full:

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

28 U.S.C. § 1334(c)(2). \textit{See generally In re Futura Industries, 69 Bankr. 831 (Bankr. E.D. Pa. 1987)}. One commentator has asked whether or not the words "is commenced" mean "has been commenced prior to the commencement of the case" or "can be commenced after the commencement of the case." \textit{See, e.g., Bernstein, supra} note 20, at 30. The court may also abstain from hearing a "case" under title 11 pursuant to 11 U.S.C. § 305, but the reference to "case" in that statute is apparently to the entire case, which is commenced when the petition is filed.

\textsuperscript{45} 28 U.S.C. § 157(b)(2)(B). The statute excludes from the definition of core proceedings liquidation or estimation of contingent or unliquidated personal injury tort and wrongful death claims against the estate for purposes of distribution under title 11. 28 U.S.C. § 157(b)(4)-(5) provide:

(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).

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

Query whether § 157(b)(4) means that the federal court may still exercise discretionary abstention. The literal construction of § 157(b)(4) would indicate "yes"; the implication of § 157(b)(5) would be "no."

\textsuperscript{46} One commentator has noted that § § 157(b)(4)-(5) may not mean precisely what they say, but instead that trial of personal injury and wrongful death claims may occur in the bankruptcy court as opposed to the district court. Bernstein, supra note 20, at 64, says:

At least one of the conferees suggested that the trials of personal injury or wrongful death claims were to proceed before the bankruptcy judges as related proceedings. The conferee observed that the phrase "tried in the district court" was a drafting error which should be immediately corrected so that these proceedings would be deemed related proceedings to be tried before the bankruptcy court. The judgment, and de novo review on objections by the parties, would still be the responsibility of the district court acting upon the
bankruptcy debtor and a non-diverse defendant could be heard in federal court, just like a non-diversity Marathon-type case. In both cases, the question remains whether federal courts may constitutionally exercise subject matter jurisdiction.

III. THE NO JURISDICTION ARGUMENT

As noted, the two most common headings of constitutional federal court jurisdiction are jurisdiction over cases arising under the constitution, laws, or treaties of the United States and jurisdiction over disputes between citizens of different states. These constitutional jurisdictional provisions are not self-effectuating. Congress must legislatively create federal courts and vest them with jurisdiction over any or all of the matters defined in article III. But, as Dean Forrester noted: "If Congress passes a statute presuming to authorize the federal courts to handle cases which are not within the terms of article III the statute is unconstitutional."49

Pursuant to its article I, section 8, clause 9 power to "constitute Tribunals inferior to the Supreme Court," Congress has created lower federal courts and has vested them with both broad and narrow areas of jurisdiction. Two of the broadest statutory grants of jurisdiction effectuate the two broadest article III jurisdictional headings: the federal question jurisdiction statute, which unfortunately mirrors the "aris-

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47. U.S. CONST. art. III, § 2. As noted, there are nine other special categories of jurisdiction, but they are inapposite to the discussion herein.


ing under” language of article III, and the diversity jurisdiction statute. One of the “narrow” congressional grants of jurisdiction is 28 U.S.C. § 1334(b)—jurisdiction over all cases “related to” bankruptcy—which Congress enacted pursuant, at least in part, to its power to make uniform rules for bankruptcy.

A number of courts and some of the proponents of the Bankruptcy Amendments and Federal Judgeships Act of 1984 have contended that construing “related to” bankruptcy to include a non-diversity Marathon-type state law case would render the jurisdictional statute unconstitutional. They contend that because there is no diversity of citizenship and federal law does not govern the decision of the case, a “related to” case does not “arise under” federal law; therefore article III prohibits the exercise of federal jurisdiction. In Congress, Senator Hatch was the most vocal proponent of this position.

51. 28 U.S.C. § 1331 (Supp. III 1985); Wechsler, supra note 3, at 224 (“It is unfortunate that since the Act in 1875, the statute has adopted as a test of jurisdiction in the lower courts the very language that the Constitution gives to measure the authority of the Congress to vest such jurisdiction in a federal court: cases arising under the Constitution, laws, and treaties.”).


53. U.S. CONST. art. I, § 8, cl. 4 provides that Congress shall have the power: “To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States . . . .”

54. As he stated following the Act’s passage:

I have only one regret as I reflect upon this conference product. It involves the deletion of the Senate-passed mandatory abstention provision. With its deletion, purely State law claims which do not arise under the Bankruptcy Code are allowed to be tried in federal courts. This presents an important constitutional concern. State tort or contract cases in which one party happens to be bankrupt are still State law claims. They are not Federal questions. Thus, there is no Federal jurisdiction for these claims. The Constitution only grants Federal court jurisdiction to cases “arising under” Federal law and diversity cases. This is neither. The Senate abstention provision would have remedied this problem...


Senator Hatch’s references are somewhat vague; however, it seems apparent that he was concerned with the constitutionality, under article III, of the “related to” bankruptcy jurisdiction. Assuming that, there is a fundamental inconsistency in Senator Hatch’s statement, in addition to a constitutional error that is discussed below. Senator Hatch argues that “related to” jurisdiction is unconstitutional, and claims that the cure is a mandatory abstention provision. However, abstention is a doctrine or mechanism a court invokes when it has jurisdiction but for any number of compelling reasons decides not to exercise that jurisdiction. See Younger v. Harris, 401 U.S. 37 (1971); Thompson v. Magnolia Petroleum Co., 309 U.S. 478 (1940) (even though the federal bankruptcy court had jurisdiction of a case involving the trustee’s title to property, it was proper to abstain and direct the trustee to bring the proceeding in state court).
In *In re Yagow*,\(^{55}\) the court considered a case in which a credit association brought an adversary proceeding against a non-diverse debtor, alleging that its claim was non-dischargeable. By way of defense and counterclaim the debtor claimed that the credit association had breached a financing commitment, to the debtor's consequent damage. Subsequently, the credit association moved to dismiss the counterclaim, alleging that the bankruptcy court had no subject matter jurisdiction over it because there was no diversity and the counterclaim did not arise under federal law. In accepting the credit association's contention, the court held that such a case was not sufficiently related to the bankruptcy proceeding to confer jurisdiction on the bankruptcy court, absent an independent basis of federal jurisdiction.\(^{56}\)

Thus, the *Yagow* court would refuse to find jurisdiction in a non-diversity Marathon-type case.\(^{57}\) But this view of the

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Thus if Senator Hatch's basic premise is correct and "related to" jurisdiction is unconstitutional, abstention is an illogical response. No jurisdiction is the only answer if Senator Hatch's underlying premise is correct.

Despite the inconsistency between the allegedly unconstitutional subject matter jurisdiction problem and the abstention remedy, Senator Hatch's underlying arguments do have certain persuasive appeal. Clearly there is no diversity of citizenship in the hypothetical case. Moreover, federal law is not involved at any point in the decision of the case. See, e.g., American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257 (1916). *See also* Mishkin, *supra* note 3, at 186-87. Thus, such a case cannot "arise under" federal law. Senator Hatch not only argued against the constitutionality of the "related to" bankruptcy jurisdiction, but insisted upon having a written analysis of its unconstitutionality attached to the legislative history. Other legislators echoed Hatch's concerns. As Senator Heflin stated: "Not everyone is happy with all the provisions of this report, and I too fear that there may be serious constitutional ramifications." 130 CONG. REC. § 58887 (daily ed. June 29, 1984) (remarks of Sen. Heflin), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 581, 584-85. *See also* Palcor, Inc. v. Higgins, 743 F.2d 984, 996 n.16 (3d Cir. 1984).

56. Id. at 740.
57. It should be noted that the *Yagow* court, like Senator Hatch, confused abstention and lack of jurisdiction. Its confusion is evident in the following quotation from the opinion:

Accordingly, and for the reasons stated, this Court as a court of bankruptcy, believing that the Production Credit Association's Motion for Dismissal of Counterclaim is well-taken, elects to abstain in the interests of justice and for lack of jurisdiction.

*Id.* at 740.

Other cases espousing the *Yagow* view of federal court jurisdiction include: State Bank of Lombard v. Chart House, 46 Bankr. 468 (N.D. Ill. 1985) (the court abstained because giving a broad definition to the phrase "related to" would be a jurisdictionally infirm construction); *In re* Bobroff, 43 Bankr. 746 (E.D. Pa. 1984), aff'd 766 F.2d 797 (3rd Cir. 1985) (Bobroff was probably not a "related to" claim because it involved post-petition claims in a liquidation proceeding, but the district court's view of jurisdiction
“arising under” requirement confuses the constitutional and statutory phrases and ignores precedents that suggest that the federal court’s “related to” bankruptcy jurisdiction is constitutional.

Although article III and the federal question jurisdiction statute both use the same two words—“arising under”—and neither the cases nor the commentators are entirely clear on the matter, the constitutional “arising under” jurisdiction, as Justice Rutledge noted in National Insurance Co. v. Tidewater Transfer Co., 58 has a broader scope than the “arising under” jurisdiction provided for in the federal question jurisdiction statute. 59 It is generally said that a case “arises under” the fed-

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59. The seminal case dealing with the scope of the constitutional phrase “arising under” is Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824); see infra text accompanying notes 112-125. In reference to Osborn and the scope of the article III “arising under” jurisdiction, Professor Wechsler stated:

The power of the Congress to confer the federal judicial power must extend, as Marshall held, to every case that might involve an issue under federal law. . . .

Needless to say, Congress has not meant to grant the district courts a general jurisdiction in every case involving the jurisdictional amount in which it could confer judicial power under any of its sources of authority. . . . There is hardly any limit to the cases it would draw today. The courts have been obliged, therefore, to draw a line between the power and the purpose of the Congress, even though their verbal measure is the same. Though the decisions are not free from vacillation, their essential purpose is to hold the meaning of the statute limited to cases where the plaintiff’s cause of action, the rule of substance under which he claims the right to have a remedy, is the product of the federal law. This seems quite plainly the correct solution and one that would be happily adopted by the statute. The general clause should not be cast in constitutional language. Its scope should be expressly limited to cases where the plaintiff’s claim for relief is founded on the Constitution, laws, or treaties. This change would have the added virtue of dismissing the recurrent thought that jurisdiction should not hold, though the asserted right is federal, if the case does not involve construction of the law but only finding of the facts to which the law must be applied. The federal courts do not sit to give material for law review articles. Their business is the vindication of the rights conferred by federal law.

eral question statute when federal law creates the plaintiff's cause of action and that the applicability of federal law to


Chadbourn and Levin and Forrester find some support for the proposition that the two are coextensive in the legislative history of 28 U.S.C. § 1331, wherein Senator Carpenter, speaking of the bill as a whole rather than solely the federal question section, stated the following:

The Act of 1789 did not confer the whole power which the Constitution conferred; it did not do what the Supreme Court has said Congress ought to do; it did not perform what the Supreme Court has declared to be the duty of Congress. This bill does . . . This bill gives precisely the power which the Constitution confers—nothing more, nothing less.

Quoted in Hart & Wechsler (2d ed.), supra note 3, at 871. But this statement relied upon Story's view that Congress had the constitutional obligation to confer all of the constitutional jurisdiction on the lower federal court—a view subsequently rejected. See, e.g., Comment, Summing up the Factors, supra note 20, at 177-79. Likewise, as noted above, Senator Carpenter's statement was a reference to the bill as a whole, not solely to the federal question section. For further commentators questioning whether or not the scope of the constitutional and statutory "arising under" jurisdiction is or should be different, see generally Hornstein, Federalism, Judicial Power and the "Arising Under" Jurisdiction of the Federal Courts: A Hierarchical Analysis, 56 Ind. L.J. 563 (1980); Note, The Outer Limits of "Arising Under", 54 N.Y.U. L. Rev. 978 (1979).

Obviously, for the commentators to be in disagreement there must be some case law confusion on the matter, and there is. Osborn indicates the broad authority Congress has to confer constitutional "arising under" jurisdiction on the federal courts. See infra text accompanying notes 112-125. But the statute has been interpreted more narrowly. See, e.g., Mishkin, supra note 3, at 160-63. Unfortunately, it is not clear from some of the cases whether they are narrowly interpreting the statute or narrowly interpreting the constitutional phrase and thus limiting, if not expressly overruling, Osborn. An example of this confusion is Justice Cardozo's statement in Gully v. First National Bank:

How and when a case arises "under the Constitution or laws of the United States" has been much considered in the books . . .

Looking backward we can see that the early cases were less exacting than the recent ones in respect of some of these conditions [a reference to Osborn]. If a federal right was pleaded, the question was not always asked whether it was likely to be disputed. This is seen particularly in suits by or against a corporation deriving its charter from an act of Congress . . . "A suit to enforce a right which takes its origins in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends."

299 U.S. 109, 112-14 (1936) (quoting Shultis v. McDougual, 225 U.S. 561, 569 (1911)).

More recent Supreme Court cases have recognized and articulated that the constitutional "arising under" jurisdiction is broader than the statutory "arising under" jurisdiction. See, e.g., Romero v. International Terminal Operating Co., 358 U.S. 354, 379-80 (1959).
plaintiff's case must appear on the face of plaintiff's well-pleaded complaint. But the scope of "arising under" in article III is broader. For example, certain removal statutes allow removal of cases from state court to federal court where federal law is involved as a defense and not as part of the plaintiff's complaint. Moreover, since Justice Marshall's seminal opinion in Osborn, it has been clear that the article III "arising under" jurisdiction is broader than the articulated test for determining statutory federal question jurisdiction. Thus, the fact that federal law does not create plaintiff's cause of action is irrelevant to the constitutional competency question, and any suggestion to the contrary confuses the constitutional and statutory phrases.

But the no "related to" jurisdiction proponents may counter that in those cases where federal original jurisdiction exists and where the plaintiff's cause of action is based on state law there is at least some question of federal law involved, albeit perhaps as a defense. In a non-diversity "related to" bankruptcy case there is no question of federal law; therefore, there is no federal jurisdiction. In support of this proposition, a no jurisdiction supporter predictably might point to what the Supreme Court said in Shultis v. McDougal: "[A] suit does not so arise [under the laws of the United States] unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends." If this is the law, then a breach of contract case between a person in bankruptcy and a non-diverse defendant does not in any way arise under federal law. But the Shultis quote does not appear to be the law related to original jurisdiction as opposed to

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61. See, e.g., 28 U.S.C. § 1442(a) (providing for removal of civil or criminal prosecution from state court to federal court when an officer of the United States is the defendant); see also Tennessee v. Davis, 100 U.S. 257 (1879) (upholding a statute providing for the removal of state actions against officers acting under United States revenue laws); 28 U.S.C. § 1443 (providing for removal of certain civil rights cases).
63. 225 U.S. 561 (1912).
Supreme Court appellate jurisdiction. Professor Mishkin, in discussing the “arising under” statute, lamented the unfortunate language in the above-cited Shultis quote and its subsequent citation in original jurisdiction cases. According to Mishkin, the lower federal courts could have constitutional competence over cases where there is no dispute over the construction of federal law. Particularly, he noted that there may well be cases where federal law was clear, but that in order to vindicate a federal right, resolution of factual disputes in a federal forum would be critical. But does this competence extend beyond a case where the construction of federal law is agreed upon and only the facts are at issue to a case where the construction of federal law, other than a jurisdictional statute, is irrelevant? Osborn suggests that it might.

IV. Since At Least 1875 The Supreme Court Has Recognized Congress’ Power to Grant the Federal Courts Jurisdiction Over Cases “Related To” Bankruptcy

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.

65. The “requirement” [of a real and substantial controversy over the meaning of federal law] itself, not to mention the language in which it is often expressed, stems from an uncritical transference to the lower federal courts of a standard developed for the exercise of the Supreme Court’s appellate jurisdiction. What has been ignored in the process is the complete difference in the functions of the two types of jurisdiction: the Supreme Court is the ultimate judicial exponent of federal rights; the lower federal courts are their vindicators. Only cases involving actual disputes as to the import of national law can provide grist for the former’s mill of exposition, but enforcement may be necessary even where the governing rule is clear. Thus, the rules limiting the high Court’s appellate jurisdiction to issues turning on the construction of federal law, quite proper there, are not at all apposite for the inferior national tribunals. Indeed, the term “federal question,” precisely descriptive of the former type of jurisdiction is, as to the latter, a misnomer. Accuracy, at least, would be better served by some such term as federal claim. For the trial of an issue of fact may be as important a factor in the vindication of a federal right as the determination of the legal content of that right. Indeed, were it not for the necessity of resolving issues of fact, the jurisdiction of the inferior national courts over cases “arising under” the law of the United States might conceivably be dispensable.

Mishkin, supra note 3, at 170-71 (footnote omitted).
The Bankruptcy Act of 1867, as amended by the Act of 1874, gave the federal courts "jurisdiction, as an ordinary court, of suits at law or in equity brought by or against the assignee [of a bankrupt debtor] in reference to alleged property of the bankrupt, or to claims alleged to be due from or to him." The 1867 jurisdictional statute essentially included any suit by or against the trustee, including a non-diversity Marathon-type case.

The Supreme Court interpreted the quoted jurisdictional provisions in *Lathrop v. Drake*. The issue in *Lathrop* was whether the statutory jurisdiction extended to all federal courts or to only the one where the bankruptcy proceeding itself was pending. In concluding that the jurisdiction was nationwide Justice Bradley, speaking for the Court, expressly recognized Congress' power to provide for jurisdiction in any action by or against the assignee. He stated:

The state courts may undoubtedly be resorted to in cases of ordinary suits for the possession of property or the collection of debts; and it is not to be presumed that embarrassments would be encountered in those courts in the way of a prompt and fair administration of justice. But a uniform system of bankruptcy, national in its character, ought to be capable of execution in the national tribunals, without dependence upon those of the states in which it is possible that embarrassments might arise.

It is evident that Justice Bradley recognized Congress' power to provide a federal forum for certain state law cases. Arguably, he recognized congressional power to protect a bankrupt estate and its creditors from discrimination, or as he calls it "embarrassment," at the hands of the state courts. Embarrassments might occur if the state courts preferred their own citizens in cases against trustees. One might also read

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67. Id. at 518. The Court then went on and approvingly cited Shearman v. Bingham, 21 Fed. Cas. 1270 (C.C.D. Mass. 1872) (No. 12,762), which had expressly recognized and held that Congress had the power to provide for subject matter jurisdiction in all suits by and against the assignee. Shearman was a case written and decided by Justice Clifford while riding circuit.
68. Some courts apparently do not believe that *Lathrop* decided that Congress had power to confer the subject matter jurisdiction discussed therein. For instance in *In re Bobroff*, the court stated:

In the first Bankruptcy Act enacted in 1867, 14 Stat. 517, Congress gave broad authority to courts of the United States over "suits at law or in equity
embarrassments to mean the possibility of delay that might ensue if the trustee or assignee had to litigate certain claims in the state courts. This delay might inhibit efficient administration of the federal bankruptcy case. Embarrassments might also include state court decisions undermining or conflicting with, albeit implicitly, some federal bankruptcy goal or principle. For example, if a state court awarded a judgment against the bankrupt debtor on a state law claim, the successful plaintiff must then attempt to have his judgment satisfied from the same funds that the bankruptcy court is dispersing among creditors.

Unfortunately for present purposes, Bradley did not expressly articulate the source of Congress' power to prevent embarrassments. He took it for granted. Clearly it was and is related to Congress' power to make uniform bankruptcy laws,70 but Bradley did not clearly spell out that relationship. His lack of clarity is symptomatic of later Supreme Court opinions on this subject.

After Congress repealed the Act of 1867 in 1878, it next approached the subject of bankruptcy in the Bankruptcy Act of 1898.71 In that Act, Congress significantly cut back on the jurisdiction of the federal courts sitting in bankruptcy. Suits could only be brought "in the same manner and to the same extent as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt

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43 Bankr. at 749 n.6 (quoting Lathrop v. Drake, 91 U.S. 516, 517 (1875)). Apparently, the scope of the jurisdiction of article III courts under the 1867 Act to sweep up and decide claims not subject to any federal rule of decision was never addressed.

The Bobroff court must read Lathrop as only holding that all federal courts, not just the one where the bankruptcy was pending, could exercise the granted jurisdiction, whether constitutionally or not. Hart and Wechsler do not read Lathrop so narrowly. They characterize it as follows: "The jurisdiction [over claims brought by or against the assignee], the Court held, could be exercised, without regard to the citizenship of the parties . . . ." HART & WECHSLER, supra note 3, at 745-46; HART & WECHSLER (2d ed.), supra note 3, at 888. Before quoting the language set forth in the text, see supra text accompanying note 68, they state: "Without directly adverting to the question of the validity of this protective jurisdiction, the Court said . . . ." HART & WECHSLER, supra note 3, at 746 (emphasis added); HART & WECHSLER (2d ed.), supra note 3, at 888 (emphasis added). Whatever the precise holding in Lathrop, it is indicative of the Court's belief that the questioned jurisdiction existed.

70. U.S. CONST. art. I, § 8, cl. 4 provides that Congress shall have power: "To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States."

and such adverse claimants." 72 Another section of the statute provided that suits by or against the trustee had to be brought in the court where they could have been instituted absent bankruptcy "unless by consent of the proposed defendant. . . ." 73 Under these jurisdictional provisions alone a plaintiff debtor could not bring a non-diversity Marathon-type case in federal court, absent the defendant's consent. This was because, but for the bankruptcy, the parties could have litigated only in state court and Congress had chosen not to reallocate disputes among state and federal tribunals merely because one party filed a bankruptcy.

In Schumacher v. Beeler, 74 the Supreme Court construed the "consent" clause in an action involving an allegedly improper sheriff's sale of a bankruptcy debtor's property. 75 The Court held that the "consent" clause referred to jurisdiction, not merely to venue and stated:

But no reason appeared for a denial of jurisdiction to the federal court if the defendant, the adverse claimant, consented to be sued in that court. The Congress, by virtue of its constitutional authority over bankruptcies, could confer or withhold jurisdiction to entertain such suits and could prescribe the conditions upon which the federal courts should have jurisdiction. 76

Thus the Court again recognized Congress' power to grant federal courts broad jurisdiction in bankruptcy-related proceedings. Once again, the analytical basis for its holding was not clear.

Subsequently, the Court considered an amendment to the Bankruptcy Act of 1898 that declared the provisions of the bankruptcy act relating to suits brought by the trustee 77 inap-

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73. Act of May 27, 1926, 44 Stat. 664 (1926) (amending 11 U.S.C. § 346(b), originally enacted as Bankruptcy Act of 1898 § 23(b)).
74. 293 U.S. 367 (1934).
75. In National Mutual Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949), Justice Jackson's plurality opinion referred to Beeler as a case "raising only questions of Ohio law concerning the validity under that law of a sheriff's levy and execution." 337 U.S. at 595.
77. See supra text accompanying note 72.
plicable to reorganizations.\textsuperscript{78} In \textit{Williams v. Austrian},\textsuperscript{79} the trustee in a reorganization proceeding pending in the Eastern District of Virginia sued past and present officers and directors of the debtor in federal court in the Southern District of New York, alleging a conspiracy to misappropriate corporate assets. The trustee sought an accounting, among other things.\textsuperscript{80} State law created these causes of action, and it would govern their decision. Moreover, there were no allegations of diversity.\textsuperscript{81} (The suit would be a “related to” bankruptcy suit under the 1984 amendments.)

There was a bitter dissent on a matter of statutory construction,\textsuperscript{82} but both the majority and the dissent recognized

\textsuperscript{79} 331 U.S. 642 (1947). \textit{Cf.} Lovell v. Newman, 227 U.S. 412 (1913). Therein the Court took the position that the consent provision of the Bankruptcy Act of 1898 was not intended to enlarge the jurisdiction of the federal courts. Thus if there was no diversity and no other federal question, there was no § 23(b) jurisdiction. The case involved the right to possess certain cotton, and the Court concluded, relying on \textit{Shultis}, that such a case did not arise under a law of the United States. In \textit{Tidewater}, Justice Rutledge stated the following about \textit{Lovell} in his concurrence:

To be sure, although this Court indicated a contrary view in the early case of Lovell v. Newman, Chief Justice Hughes’ opinion in Schumacher v. Beeler made it perfectly clear that district courts can, with the consent of the proposed defendant, entertain trustee suits under § 23(b) which the bankrupt, but for the Bankruptcy Act, could not have prosecuted in a federal court absent diversity or some independent federal question “arising under . . . the Laws of the United States.”

\textsuperscript{80} 331 U.S. at 645.
\textsuperscript{81} \textit{Id.} at 645 (“There was no allegation of diversity and jurisdiction was rested upon ‘the Constitution of the United States (Article I, Section 8, Clause 4, and Article III, Section 2), the Act of Congress relating to Bankruptcies (U.S. Code Title 11), and . . . the provisions of Section 24(1), (19) of the Judicial Code . . .’”).
\textsuperscript{82} The point of statutory construction involved §§ 2 and 23(b) of the Bankruptcy Act of 1898. Section 23 provided in full:

(a) The United States district court shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustee, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and such adverse claimants.

(b) Suits by the trustee shall be brought or prosecuted only 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, \textit{unless by consent of the proposed defendant}, except suits for the recovery of property under § 60, subdivision (b); § 67, subdivision (e); and § 70, subdivision (e).

Former 11 U.S.C. § 46(a), (b) (emphasis added). In Bardes v. Hawarden Bank, 178 U.S. 524, 538 (1900), the Supreme Court held that § 23(b) was in effect a grant of jurisdiction subject to the defendant’s consent. That is, it was a grant of jurisdiction over any
Congress' power to authorize jurisdiction over a state law cause of action between non-diverse parties where one of the parties was in bankruptcy. Justice Frankfurter, in his dissent, emphatically stated: "No doubt Congress could authorize such a suit."83 Thus the Court recognized congressional power to confer jurisdiction, but once again it did not explicitly analyze the source of that power, or its limitations.

In *National Mutual Insurance Co. v. Tidewater Transfer Co.*,84 the Supreme Court addressed Congress' power to grant federal courts jurisdiction over a controversy between a citizen of the District of Columbia and a citizen of one of the states. The case resulted in a five to four decision recognizing Congress' constitutional power to grant the questioned jurisdiction; but as in *Marathon*, there were four opinions and no five mem-

and all suits brought by the trustee subject to the condition of consent. This would include summary and plenary jurisdiction, and would also include a non-diversity *Marathon* "related to" claim brought by a trustee. The proviso was, however, that this jurisdiction attached only if the defendant consented. The *Barde* statement regarding § 23(b) was dictum. But this dictum was adopted in Schumacher v. Beeler, 293 U.S. 367, 374 (1934) ("Section 23b was thus in effect a grant of jurisdiction subject to that condition.").

Then, in the Chandler Act of 1934, Congress stated that § 23(b) was not applicable to reorganizations. *See* Williams v. Austrian, 331 U.S. 642, 644-45 & n.3 (1947). In *Austrian*, the trustee sought to bring a plenary suit against non-diverse defendants on a state law claim. The trustee relied upon § 2(a) of the Bankruptcy Act, which conferred jurisdiction on all bankruptcy courts of cases at "law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act . . . to . . . (7) Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided . . . ." A majority of the Supreme Court, Chief Justice Vinson writing, concluded that § 2(a)(7) was a general jurisdictional grant sufficiently broad to encompass the case before it, and that § 23(b) was essentially a limitation of that general jurisdiction. Justice Frankfurter, in dissent, argued that *Barde, Beeler*, and other cases had construed § 2(a) as applying only to summary jurisdiction and that § 23(b), as interpreted, granted plenary jurisdiction subject to the defendant's consent. Thus, to Frankfurter, when Congress stated that § 23(b) did not apply to reorganization proceedings, that meant there was no plenary jurisdiction over the suit before the court. *See* *Austrian*, 331 U.S. at 662 (Frankfurter, J., dissenting).

83. *Id.* at 664 (Frankfurter, J., dissenting). Indeed, Justice Frankfurter contended that the amendment, when read with the Act as a whole, resulted in jurisdiction of all plenary lawsuits in the district court where the reorganization was pending, but not in other districts. *Id.* at 677-79.

For dicta in another case indicating that Congress has the power, although not yet exercised, to confer upon the bankruptcy court jurisdiction to adjudicate the rights of the trustee in property not in his or her possession and adversely held by the other person, see Taubel—Scott—Kitzmiller Co. v. Fox, 264 U.S. 425, 430 (1924). Once again, this type of case would be a "related to" case in today's vernacular. *Cf.* *In re Lion Capital Group*, 46 Bankr. 850, 856 (Bankr. S.D.N.Y. 1985). *See generally supra* note 20.

84. 337 U.S. 582 (1949).
bers of the Court could agree on any one holding.\textsuperscript{85} Despite their disagreement on reasoning and the result in the case before them, all three justices who discussed the bankruptcy jurisdiction over suits by or against the trustee found it constitutional.

Justice Jackson argued that \textit{Beeler} and \textit{Austrian} did not "arise under" the laws of the United States, but because Congress had the power to make uniform rules for bankruptcies under article I, an article III judge could decide such cases without regard to what article III said.\textsuperscript{86}

In concluding that the bankruptcy jurisdiction at issue in \textit{Beeler}\textsuperscript{87} arose under the laws of the United States,\textsuperscript{88} Justice Rutledge noted that Jackson's definition of "arising under" jurisdiction confused cases dealing with statutory and constitutional "arising under" jurisdiction.\textsuperscript{89} Rutledge stated that although the federal question jurisdiction statute required that federal law create the plaintiff's cause of action before he or she could litigate in federal court,\textsuperscript{90} that did not mean Congress could not expand "arising under" jurisdiction beyond that statute's limits, as long as it did not exceed constitutional

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85. As Justice Frankfurter said in concluding his dissent:
A substantial majority of the Court agrees that each of the two grounds urged in support of the attempt by Congress to extend diversity jurisdiction to cases involving citizens of the District of Columbia must be rejected—but not the same majority. And so, conflicting minorities in combination bring to pass a result—paradoxical as it may appear—which differing majorities of the Court find insupportable.
\textit{Id.} at 655 (Frankfurter, J., dissenting).
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86. \textit{Id.} at 594-99. Of course, the article I power Jackson relied upon was Congress' power to make uniform rules of bankruptcy. \textit{Id.} at 594; \textit{U.S. CONST.} art. I, § 8, cl. 4.
Jackson's claim that \textit{Austrian} and \textit{Beeler} did not arise under the laws of the United States was also based in part on the Court's failure to expressly say in those cases that they "arose under" federal law. \textit{Tidewater}, 337 U.S. at 596.
Although Jackson concluded that Congress could grant article I jurisdiction to an article III court, he felt that the Court should not reverse Chief Justice Marshall's opinion in Hepburn & Dundas v. Ellzey, 6 U.S. (2 Cranch.) 445 (1804), which held that a citizen of the District of Columbia did not have the standing of a citizen of one of the states for purposes of article III, § 2 diversity jurisdiction. \textit{Tidewater}, 337 U.S. at 587; \textit{see also} O'Donogue v. United States, 289 U.S. 516 (1933). Justices Black and Burton joined Jackson. Justice Rutledge, joined by Justice Murphy, disagreed with Jackson's article III/article I holding and would have overruled Hepburn. \textit{Id.} at 625 (Rutledge, J., concurring). Thus five justices affirmed the federal court's jurisdiction in the case before it.
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87. He did not discuss \textit{Austrian}.
88. \textit{Id.} at 611 (Rutledge, J., concurring).
89. \textit{Id.} at 611-17 (Rutledge, J., concurring).
90. \textit{Id.} at 613. \textit{See also} Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 8 (1983).
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limits on its power. In Rutledge's opinion, *Beeler* was a case in which Congress had expanded federal question jurisdiction beyond its general statutory bounds but still within constitutional limits. Rutledge's point is important because he expressly noted that the scope of the phrase "arising under" is broader in article III than it is in the federal question statute.

Justice Frankfurter,91 in a dissent in *Tidewater*, also recognized Congress' power to confer jurisdiction in the bankruptcy cases. In a footnote he stated, in part:

When a petition for bankruptcy is filed, there may be outstanding claims by the bankrupt against debtors and by creditors against the bankrupt. Of course, Congress has power to determine whether all such claims—those for, and those against, the bankrupt estate—should be enforced through the federal courts. That a particular claim dissociated from the fact of bankruptcy would have to be brought in a state court for want of any ground of federal jurisdiction is irrelevant. This is so because in the exercise of its power to "pass uniform laws on the subject of bankruptcies" Congress may deem it desirable that the federal courts be utilized for all the claims that pertain to the bankrupt estate whether in the federal court in which the bankruptcy proceeding is pending or in a more convenient federal court. The congeries of controversies thus brought into being by reason of bankruptcy may be lodged in the federal courts because they arise under "the Laws of the United States," to wit, laws concerning the "subject of bankruptcies." It is a matter of congressional policy whether there must be a course of all claims affecting the bankrupt's estate in the federal court in which the bankruptcy proceeding is pending or whether auxiliary suits must be pursued in other federal courts.92

Frankfurter did not clearly explain the source of Congress' power, but indicated that it involved "arising under" jurisdiction and was related to Congress' power to make uniform rules for bankruptcy.

Frankfurter also argued that Congress lacked the power to confer district court jurisdiction over the case before the Court because a citizen of the District of Columbia was not a citizen

91. Frankfurter would not have overruled *Hepburn*. *Tidewater*, 337 U.S. at 654 (Frankfurter, J., dissenting). Of all the *Tidewater* opinions only Chief Justice Vinson's opinion did not mention or discuss the bankruptcy cases.

92. 337 U.S. at 652 n.3 (Frankfurter, J., dissenting).
of a state, and thus there was no article III "diversity" and no congressional power to confer such jurisdiction.\textsuperscript{93} He felt that the "power of the federal courts to adjudicate merely because of the citizenship of the parties" was limited to the particular jurisdictional headings in article III and none of those included jurisdiction over a dispute between a citizen of the District of Columbia and a citizen of a state.\textsuperscript{94} Implicitly he rejected the notion that the jurisdictional statute itself provided a law the case could "arise under" when he said:

But if courts established under article III can exercise wider jurisdiction than that defined and confined by article III, and if they are available to effectuate the various substantive powers of Congress, such as the power to legislate for the District of Columbia, what justification is there for interpreting article III as imposing one restriction in the exercise of those other powers of the Congress—the restriction to the exercise of "judicial power"—yet not interpreting it as imposing the restrictions that are most explicit, namely, the particularization of the "cases" to which "the judicial Power shall extend?"\textsuperscript{95}

Frankfurter went on to ask why, if Congress can pass a statute conferring the jurisdiction at issue in \textit{Tidewater}, could it not pass a statute authorizing advisory opinions? In essence, Frankfurter's argument is a slippery slope argument. What Frankfurter did not address, or adequately explain, was the apparent conflict between his footnote and his arguments about the case before him. How could Congress have the power to provide for non-diversity jurisdiction over state law causes of action pursuant to its power to make uniform rules of bankruptcy but not have the power to provide jurisdiction over the \textit{Tidewater} case pursuant to its power to legislate for the District of Columbia?\textsuperscript{96} If article III limited jurisdiction in \textit{Tidewater}, why did it not limit it in \textit{Beeler} and \textit{Austrian}? Was there some meaningful difference between the two? Were \textit{Beeler} and \textit{Austrian} wrong? Was Frankfurter wrong in \textit{Tidewater}?

In his dissent in \textit{Textile Workers Union v. Lincoln Mills},\textsuperscript{97}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 652-55 (Frankfurter, J., dissenting).
\item \textit{Id.} at 650 (Frankfurter, J., dissenting).
\item \textit{Id.} at 648 (Frankfurter, J., dissenting).
\item U.S. CONST. art. I, § 8, cl. 17.
\item 353 U.S. 448, 460 (1957) (Frankfurter, J., dissenting).
\end{enumerate}
\end{footnotesize}
Frankfurter articulated an alternative basis for federal jurisdiction in Beeler and Austrian. He used this theory to explain Beeler and Austrian in the context of rejecting the notion of "protective jurisdiction" over labor disputes.98

"Protective jurisdiction," once the label is discarded, cannot be justified under any view of the allowable scope to be given to article III. "Protective jurisdiction" is a misused label for the statute we are here considering. That rubric is properly descriptive of safeguarding some of the indisputable staple business of the federal courts. It is a radiation of an existing jurisdiction. "Protective jurisdiction" cannot generate an independent source for adjudication outside of the article III sanctions and what Congress has defined. The theory must have as its sole justification a belief in the inadequacy of state tribunals in determining state law. The Constitution reflects such a belief in the specific situation within which the Diversity Clause was confined. The intention to remedy such supposed defects was exhausted in this provision of article III. That this "protective" theory was not adopted by Chief Justice Marshall [in Osborn] at a time when conditions might have presented more substantial justification strongly suggests its lack of constitutional merit. Moreover, Congress in its consideration of section 301 [of the Taft-Hartley Act] nowhere suggested dissatisfaction with the ability of state courts to administer state law properly. Its concern was to provide access to the federal courts for easier enforcement of state-created rights.99

Still the question remained as to how could there be jurisdiction in cases like Beeler or Austrian. Are they examples of

98. The question in Lincoln Mills was whether or not § 301 of the National Labor Relations Management Act (Taft-Hartley Act) conferred jurisdiction over labor disputes involving state law claims between management and unions. The case raised protective jurisdiction questions in a relatively pure form. Avoiding these questions, the majority of the court, Justice Douglas writing, concluded that § 301 was not merely a jurisdictional provision, but rather was a "substantive" grant of power, as well as a grant of jurisdiction to the federal courts, to develop a federal common law in certain labor matters. Id. at 456-57. Frankfurter dissented on this point, and also rejected Congress' constitutional power to confer "protective" jurisdiction. Id. at 469-84 (Frankfurter, J., dissenting). There have been a number of general discussions of the issues raised in Lincoln Mills. See, e.g., Hart & Wechsler (2d ed.), supra note 3, at 859-70; D. Currie, Federal Jurisdiction in a Nutshell, 100-03 (1981); Bickel & Wellington, Legislative Purpose in the Judicial Process: The Lincoln Mills Case, 71 Harv. L. Rev. 1 (1957); Forrester, The Jurisdiction of Federal Courts in Labor Disputes, 13 Law & Contemp. Probs. 114 (1948); Wollett & Wellington, Federalism and Breach of the Labor Agreement, 7 Stan. L. Rev. 445 (1955).

99. 353 U.S. at 474-75 (Frankfurter, J., dissenting).
"radiation(s) of an existing jurisdiction" and the Tidewater case is not?

To explain the bankruptcy cases, Frankfurter stated that an entire bankruptcy case may be viewed as one piece of litigation. Then he analogized all proceedings by and against the trustee to pendent or ancillary jurisdiction cases. He contended that all suits by or against the trustee, even though in several federal courts, are pendent or ancillary to the main bankruptcy proceeding. Although he did not expressly say so, pendent or ancillary jurisdiction is linguistically similar to the notion of a "radiation." Several recent cases have adopted the pendent jurisdiction theory; but before analyzing it further, this discussion of Supreme Court cases leads once again to Marathon.

In Marathon, Justice Brennan assumed that an article III court, rather than a "bankruptcy court," would have had jurisdiction over Marathon, even absent diversity. In a footnote he stated: "This claim may be adjudicated in federal court on the basis of its relationship to the petition for reorganization." But Justice Brennan did not articulate an analytical basis for his statement. Justice Burger, in his dissent, stated that all Congress needed to do to cure the supposed constitutional defect in Marathon was to refer cases like it to the district

100. In full, Frankfurter stated that:

[T]he bankruptcy decisions may be justified by the scope of the bankruptcy power, which may be deemed to sweep within its scope interests analytically outside the "federal question" category, but sufficiently related to the main purpose of bankruptcy to call for comprehensive treatment. See National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 652, n.3 (concurring in part, dissenting in part). Also, although a particular suit may be brought by a trustee in a district other than the one in which the principal proceedings are pending, if all the suits by the trustee, even though in many federal courts, are regarded as one litigation for the collection and apportionment of the bankrupt's property, a particular suit by the trustee under state law to recover a specific piece of property might be analogized to the ancillary or pendent jurisdiction cases in which, in the disposition of a cause of action, federal courts may pass on state grounds for recovery that are joined to federal grounds. See Hurm v. Oursler, 289 U.S. 238, 243 (1933); Siler v. Louisville & Nashville R. Co., 213 U.S. 175, 191 (1909); but see Mishkin, 53 COL. L. REV., at 194, n. 161.

353 U.S. at 483 (Frankfurter, J., dissenting).

In In re Bobroff, the court approvingly quoted Frankfurter, but then concluded that there was no jurisdiction because the case was not "related to" the bankruptcy. 43 Bankr. 746, 751 n.10 (E.D. Pa. 1984).

101. 458 U.S. at 72 n.26 (Brennan, J., plurality). In support of this statement, Brennan cited Austrian, Beeler, Tidewater, Lincoln Mills, and Osborn.
court for decision. His palliative clearly contemplates federal subject matter jurisdiction over such cases.

Since passage of the Bankruptcy Amendment and Federal Judgeships Act of 1984, several courts have considered the constitutionality of federal "related to" bankruptcy jurisdiction and have upheld it on various grounds.\textsuperscript{102} In \textit{In re WWG Industries},\textsuperscript{103} the court relied upon principles of ancillary jurisdiction to sustain the court's "related to" jurisdiction.\textsuperscript{104} The court stated that ancillary jurisdiction was "the only constitutional basis on which to explain Congress's grant of subject matter jurisdiction to this Court. . . ."\textsuperscript{105} In \textit{In re Environmental Research & Development},\textsuperscript{106} the court relied principally on concepts of pendent jurisdiction to sustain jurisdiction over a malpractice claim against attorneys allegedly involved in a fraudulent conveyance.\textsuperscript{107} Similarly, in \textit{In re Bible Voice},\textsuperscript{108} the court sustained subject matter jurisdiction over a debtor's legal malpractice action, relying upon Brennan's footnote in \textit{Marathon} and upon Beeler and Austrian.\textsuperscript{109} In a footnote, the court also mentioned the concept of protective jurisdiction; however, its analysis on the jurisdictional point was brief and conclusory. In \textit{In re Tidewater Group, Inc.},\textsuperscript{111} the court relied

\textsuperscript{102} As noted above, other courts have refused to recognize federal jurisdiction where a case is merely "related to" a case under title 11, absent an independent basis for federal jurisdiction. \textit{See supra} note 57 and text accompanying notes 55-57.

\textsuperscript{103} \textit{In re WWG} involved a claim by the debtor's assignee to collect an account receivable. There was diversity of citizenship. The precise question before the court was whether it was necessary to analyze the defendant's "minimum contacts" with the forum state to determine whether there was in personam jurisdiction, which is what a federal court in a diversity case must do, or whether the court's only concern was with the defendant's contacts with the United States, which is the standard for measuring in personam jurisdiction in federal question cases. The court concluded that the federal bankruptcy "related to" jurisdiction arose under the laws of the United States and thus national contacts was the appropriate standard.

\textsuperscript{104} \textit{Id.} at 290.

\textsuperscript{105} \textit{Id.} at 736.

\textsuperscript{106} \textit{Id.} at 736 n.1.

\textsuperscript{107} \textit{Environmental Research} is truly a pendent jurisdiction case in that the claim against the attorneys arose out of the same "common nucleus of operative facts" as the fraudulent conveyance claim. \textit{See United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966); see generally Miller, Ancillary and Pendent Jurisdiction, 26 S. Tex. L.J. 1 (1985) [hereinafter Miller]. Thus in \textit{Environmental Research} it was not necessary to strain the concepts of ancillary and pendent jurisdiction to find jurisdiction in the case before the court. Ultimately, the court deferred decision on the merits until after the underlying fraudulent transfer case was resolved. \textit{46 Bankr. at 780.}

\textsuperscript{108} \textit{Id.} at 733 (C.D. Cal. 1983).

\textsuperscript{109} \textit{Id.} at 736.

\textsuperscript{110} \textit{Id.} at 736 n.1.

\textsuperscript{111} \textit{Id.} at 670 (Bankr. N.D. Ga. 1986).
upon ancillary jurisdiction. But in all these cases the discussion is terse and analytically unsatisfactory. Critics no doubt contend that any analysis upholding jurisdiction has to be unsatisfactory because there is no constitutional subject matter jurisdiction over the case. But the cases described herein remain, and they suggest several theories justifying the "related to" bankruptcy jurisdiction: Justice Jackson's Tidewater argument, pendent and/or ancillary jurisdiction, and protective jurisdiction. Another theory, the original ingredient theory, has its genesis in Osborn.

V. THE ORIGINAL INGREDIENT THEORY AND PENDENT AND ANCILLARY JURISDICTION DO NOT ADEQUATELY EXPLAIN THE "RELATED TO" BANKRUPTCY JURISDICTION

A. Osborn's Original Ingredient Theory is Inadequate to Explain That Case or the "Related To" Bankruptcy Jurisdiction

In Osborn, the Supreme Court upheld a jurisdictional statute providing federal jurisdiction over any suit brought by or against the Bank of the United States.\(^{112}\) Osborn itself involved the state's power to tax the Bank of the United States, which was clearly a federal question.\(^{113}\) But in expansive dicta, Chief Justice Marshall said that Congress had power under the "arising under" clause to extend the federal judicial power to "every case that might involve an issue of federal law."\(^{114}\) Marshall relied heavily on the fact that the bank was federally incorporated and that all its powers to act depended upon its federal charter and upon federal law. In a companion case, United States v. Planter's Bank of Georgia,\(^{115}\) the Court tersely sustained jurisdiction where the bank had brought suit as the bearer of negotiable notes issued by a state bank and involving only state law claims.\(^{116}\) Planter's Bank was within the Osborn dicta.

One popular interpretation of Marshall's Osborn opinion would uphold original federal jurisdiction whenever a federal

\(^{113}\) See HART & WECHSLER (2d ed.), supra note 3, at 866.
\(^{114}\) Wechsler, supra note 3, at 224. Cf. Lincoln Mills, 353 U.S. at 481-82 (Frankfurter, J., dissenting) (limiting Osborn to its facts and historical settings).
\(^{115}\) 22 U.S. (9 Wheat.) 904 (1824).
question is an "original ingredient" of the plaintiff's case. An "original [federal] ingredient" is one that the court must resolve, either implicitly or explicitly, in plaintiff's favor for plaintiff to win its case. In *Osborn*, and more importantly in *Planter's Bank*, federal law was an original ingredient of the bank's claim because in both cases the bank had to establish its capacity to contract and/or its right to sue. This was so even if these issues were not raised because recovery logically required their resolution, even if implicitly. The parties need not necessarily raise a federal question in order for there to be an original ingredient. There must only be a potential for a federal question to be raised.

The "original ingredient" interpretation does explain Lathrop, Beeler, and Austrian, the bankruptcy trustee suits. In those cases the trustee received his or her authority to sue from a federal statute, like the bank's charter in *Osborn*. One could argue that all litigation involving the trustee could be constitutionally based in federal court because questions concerning the propriety of the trustee's appointment or his capacity to sue or be sued might arise in any case. Thus federal law

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119. See supra note 118.
120. 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. The next question is, has this being a right to make this particular contract? If this question be decided in the negative, the cause is determined against the plaintiff; and this question, too, depends entirely on a law of the United States. . . . [T]he question respecting the 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. The question forms an original ingredient in every cause. Whether it be in fact relied on or not, in the defence it is still a part of the cause, and may be relied on. The right of the plaintiff to sue, cannot depend on the defence which the defendant may choose to set up. His right to sue is anterior to that defence, and must depend on the state of things when the action is brought. The question, which the case involves, then, must determine its character, whether those questions be made in the cause or not.

. . . [T]he validity of the contract [in this case] depends on a law of the United States. . . . The act of Congress is its foundation. The contract could never have been made, but under the authority of that act. The act itself is the first ingredient in the case, is its origin, is that from which every other part arises.

22 U.S. at 823-25.
is an original ingredient in any suit brought by a trustee in bankruptcy. However, the original ingredient theory does not go far enough, because a trustee is not the only “entity” that might want to sue in federal court on a “related to” claim.

The question is whether a “debtor in possession” should have the same right to bring suits in federal courts as a federally appointed trustee. A “debtor in possession” is a debtor in a Chapter 11 reorganization case who has possession of his or her assets before, or in the absence of, the appointment of a trustee. It 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. The court may never appoint a trustee, in which case the debtor in possession continues to hold all his or her assets during the reorganization proceeding. The debtor in possession has all the powers of the reorganization trustee except the right to compensation. In the absence of a contrary court order, the debtor in possession has the right to operate the debtor’s business. Thus a debtor will frequently retain possession of assets and operate its business in a reorganization. The debtor in possession serves an important purpose in the reorganization context. The existence of the debtor in possession necessarily eliminates the unnecessary expense of appointing a trustee, prevents inefficient operation while a trustee learns the business, and facilitates reorganization as opposed to liquidation. Thus, the existence of the “debtor in possession” doctrine furthers the ends of efficient reorganization.

The provision for the “debtor in possession” also works hand-in-hand with the fresh start doctrine. It allows the debtor to stay involved and hopefully survive bankruptcy or re-emerge in a meaningful role. Given the beneficent ends the existence of the debtor in possession serves as well as the almost exact similarity between its powers and the trustee’s, it would be ironic and illogical if the Constitution required all non-diverse “related to” claims brought by a debtor in possession to be litigated in state court but allowed similar suits brought by a trustee to be litigated in federal court. But this is

122. 11 U.S.C. § 1107(a). See also 5 L. King, COLLIERS ON BANKRUPTCY ¶ 1101.01 (15th ed. 1985).
123. 11 U.S.C. § 1108. See also 5 L. King, COLLIERS ON BANKRUPTCY ¶ 1101.01 (15th ed. 1985).
exactly the result that the "original ingredient" theory yields because the debtor in possession is the debtor itself; it is not a federally created entity like the Bank of the United States or the bankruptcy trustee.

Of course, one could solve the problem by saying that the debtor in possession was a creation of federal law. But accepting that contention points out the intellectual hollowness of the original ingredient theory. If all Congress has to do to grant federal jurisdiction, without providing a rule of decision, is to "create" a federal juridical entity, then whenever it wanted a federal court to hear a case Congress could so legislate by engaging in semantics. For instance, if plaintiff A and defendant B are both residents of Alaska, Congress could provide federal jurisdiction for their disputes by enacting a statute calling A, "federal plaintiff A." Then, arguably, there is an original ingredient. But if Congress desired a federal forum for a whole class of litigation, it could not provide it without first creating a federal "juridical entity." Thus the original ingredient theory is either misleading and trivial, or it does not go far enough to protect federal interests.

Certainly Marshall believed that more was at stake in Osborn than the principle that an original ingredient of federal law provided constitutional "arising under" jurisdiction. As many have pointed out, Congress, in enacting the Osborn jurisdictional statute, and Marshall, in interpreting it, were no doubt concerned with providing the Bank of the United States with a federal forum for all its litigation.124 Commentators and judges have relied on Marshall's alleged concern with providing a federal forum and on his holding in Osborn for the proposition that Congress may "protect" certain litigants or interests by providing a federal forum, even in the absence of a federal

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124. As Shulman and Jaegerman noted:

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

rule of decision. In reference to the "protective jurisdiction" explanation of Osborn one may recall Frankfurter's Lincoln Mills dissent. Therein he contended that reading Osborn to provide for "protective jurisdiction" was improper, for if such a concept existed Marshall himself would have relied upon it and he did not. But Osborn is a difficult and long opinion. One must concentrate on its result, its political context, and its application to Planter's Bank, not just its language. Likewise, one often must look at a series of cases to discern a pattern before extrapolating a broad rule. Lining Osborn up with Lathrop, Beeler, and Austrian, a broad rule authorizing protective jurisdiction takes shape.

B. Pendent and Ancillary Jurisdiction Fail to Persuasively Explain "Related To" Bankruptcy Cases

Pendent and ancillary jurisdiction derive from Osborn, wherein Chief Justice Marshall highlighted the importance of a federal court's ability to decide the entire case before it. However, as the court pointed out in WWG, the use of ancillary and/or pendent jurisdiction to justify "related to" bankruptcy jurisdiction strains those concepts, especially where the "related to" action is pending in a court or district other than the one where the debtor filed its bankruptcy petition.

Pendent jurisdiction commonly arises when the plaintiff has a jurisdictionally sufficient claim to which it appends a jurisdictionally insufficient claim. According to the Supreme


126. 22 U.S. (9 Wheat.) 738 (1824).

127. In re WWG Industries, 44 Bankr. 287, 290 (N.D. Ga. 1984) ("The concept of ancillary jurisdiction is clearly extended in this non-core bankruptcy proceeding where the state law issues are contained in a separate action related to the federal statutory action rather than in the same action as ancillary claims."). See also Note, The Theory of Protective Jurisdiction, supra note 3, at 933. For a discussion of pendent and ancillary jurisdiction over a non-"related to" bankruptcy claim, see In re Coral Petroleum, Inc., 62 Bankr. 699 (Bankr. S.D. Tex. 1986).

128. See, e.g., Miller, supra note 107, at 2.
Court in United Mine Workers of America v. Gibbs,129 a pendant claim may be constitutionally appended to a jurisdictionally sufficient claim if both arise out of "a common nucleus of operative fact"130 and the claims are such that they would normally be litigated together. If those conditions are satisfied, the Gibbs court concluded that the sufficient claim and the pendant claim are part of one "constitutional case" and could be litigated together.131 Under the Gibbs test, it is difficult to see how a contract claim against a third-party can arise out of the debtor's bankruptcy. It arguably arises out of a more particular and different fact situation, and the parties normally would not litigate it with the bankruptcy, although this portion of the test seems incongruous here. If the defendant's breach of contract in some way caused the bankruptcy, perhaps one might argue that both cases arose out of a "common nucleus of operative fact." But even in that circumstance, it requires an expansive view of "common nucleus" to find jurisdiction.

At the time Frankfurter relied on pendant jurisdiction to justify jurisdiction in Lathrop, Beeler, and Austrian, the test for pendant jurisdiction was even narrower than the Gibbs "common nucleus of operative fact" test. At that time, the sufficient claim and the pendant claim had to be part of the same "cause of action."132 It is extremely difficult, if not impossible, to analytically conclude that a breach of contract claim against a third-party is part of the same cause of action as a bankruptcy petition.

These problems are exaggerated when one considers that the debtor might bring the breach of contract action in a court other than the one where the bankruptcy is pending. Considering a "related to" claim in one district as pendant to a bankruptcy case pending in another district would be a unique application of the pendant jurisdiction concept.

Additionally, the "related to" claim involves not only a pendant claim but a pendant party. It is a non-federal claim against a non-diverse defendant.133 In any non-diversity "related to" claim brought by the trustee or debtor in possession, the defendant will be a pendant party. Although the "common nucleus of operative fact" test nominally applies to

130. Id. at 725.
131. Id.
the joining of pendent parties, the Supreme Court has been especially strict in its application of the doctrine in that context.\(^{134}\) In refusing to find pendent party jurisdiction in *Aldinger v. Howard*,\(^{135}\) the Court stated: "If the new party sought to be joined is not otherwise subject to federal jurisdiction, there is a more serious obstacle to the exercise of pendent jurisdiction than if parties already before the court are required to litigate a state law claim."\(^{136}\) Thus *Aldinger* and other cases, whether decided rightly or wrongly,\(^{137}\) operate as a significant obstacle to a federal court's exercise of pendent party jurisdiction.

There are similar problems with using ancillary jurisdiction to justify "related to" jurisdiction. Courts have long recognized that a federal court has ancillary jurisdiction to protect or decide claims to property in its possession.\(^{138}\) It is hard to analogize a "related to" claim against a non-diverse third-party to an action deciding a claim to or protecting property within the court's jurisdiction.\(^{139}\)

Courts also use ancillary jurisdiction in reference to counterclaims,\(^{140}\) cross-claims, and third-party claims.\(^{141}\) Even in...

\(^{134}\) *Id.* at 766 ("Zahn is a bad apple.").

\(^{135}\) 427 U.S. 1 (1976). In its decision the Court relied principally upon congressional intent in enacting 42 U.S.C. § 1983. It found no pendent party jurisdiction over a county on a state law claim in a case involving § 1983 claims against county officials, even though the *Gibbs* criteria were satisfied. The decision, if not the reasoning, of *Aldinger* was overruled in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), which held that § 1983 actions may be brought against a county.

\(^{136}\) 427 U.S. at 18. See also *Zahn v. International Paper Co.*, 414 U.S. 291 (1973) (holding that in a class action where jurisdiction is based upon diversity of citizenship, class members whose claims are for less than $10,000 cannot be joined as pendent parties to the named representatives' jurisdictionally sufficient claims).

\(^{137}\) See *Currie, Pendent Parties*, 45 U. CHI. L. REV. 753 (1978). Recently, in a related context, the Court has held that in a case involving pendant claims removed to federal court, the federal court may, in its discretion, remand the case to state court after all federal issues are resolved or settled and only pendent state claims remain.


\(^{138}\) See, e.g., *Fulton National Bank v. Hozier*, 267 U.S. 276 (1925). Interpleader provides another example of "limited" diversity federal jurisdiction. Statutory interpleader only requires diversity jurisdiction between two of the claimants to the stake. Under Fed. R. Civ. P. 22 interpleader, diversity is only required between the stakeholder and one of the claimants.

\(^{139}\) Interestingly, in *Lathrop*, the Court did refer to the necessity of prosecuting "[p]roceedings ancillary" to the bankruptcy proceeding in districts other than where the bankruptcy itself was pending. 91 U.S. at 518.

\(^{140}\) See, e.g., *In re Earl Roggenbuck Farms Co.*, 51 Bankr. 913 (Bankr. E.D. Mich. 1985) (rejecting claim that bankruptcy courts do not have power to exercise ancillary jurisdiction and exercising jurisdiction over a cross-claim because 28 U.S.C. § 157(a) is
these cases the Supreme Court has not been willing to extend ancillary jurisdiction over a claim by the original plaintiff against a non-diverse third-party defendant.\textsuperscript{142} In such a case, the Court has reasoned that the outcome of the plaintiff's allegedly ancillary claim is independent of the result in the main case, and that in the plaintiff versus third-party defendant situation, the plaintiff has not been "hauled into court" against its will\textsuperscript{143} like other parties who can properly assert ancillary claims. In a Marathon-type "related to" case, the trustee or debtor in possession is in the position of the plaintiff in the plaintiff versus third-party defendant cases. The result in the "related to" case is independent of what happens in the bankruptcy proceeding itself, and the plaintiff, trustee, or debtor in possession is not hauled into court against its will.\textsuperscript{144}

At best, then, it is questionable whether a non-diversity Marathon-type "related to" case is truly "ancillary" to the bankruptcy proceeding itself.

There is also a potential problem with appending any claim to the bankruptcy proceeding in order to obtain jurisdiction over the "related to" claim. That problem arises because the bankruptcy proceeding itself is arguably not a case or controversy, and federal courts may only take jurisdiction over cases or controversies.\textsuperscript{145} If a bankruptcy proceeding is not a "case," then logically it is impossible to append a jurisdiction-


141. \textit{See generally} Miller, supra note 107.

142. \textit{See, e.g.,} Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365 (1978). In Kroger, the plaintiff, an Iowa resident, sued a Nebraska power company for the wrongful death of her husband, invoking diversity jurisdiction. The power company filed a third-party claim against Owen. After the district court granted the power company summary judgment, the plaintiff proceeded to trial against Owen. During trial it was learned for the first time that Owen's principal place of business was Iowa, not Nebraska, and thus there was no diversity. The trial court still proceeded with the trial, and the court of appeals affirmed a verdict for the plaintiff. On appeal, the United States Supreme Court reversed, finding no subject matter jurisdiction.

143. \textit{Id.} at 378 (White and Brennan, JJ., dissenting).

144. An exception would be if an involuntary petition were filed against the debtor, pursuant to 11 U.S.C. § 303. However, even then the case is not similar, because the defendant in the "related to" case will by definition not be one of those who filed a claim against the debtor, in which case the debtor's counterclaim would have been a core proceeding. 11 U.S.C. § 157(b)(2)(C).

145. U.S. \textit{Const.} art. III, § 1. \textit{See also} Correspondence of the Justices (1773), \textit{quoted in} HART & WECHSLER (2d ed.), supra note 3, at 64-66. For the proposition that the bankruptcy case itself may not be a case or controversy, see DEMASCIO, NORTON, \& LIEB, supra note 28, at 1-2. It is hard to imagine how a naturalization proceeding could
ally insufficient claim to that non-case and conclude that federal jurisdiction exists.

Although ancillary and pendent jurisdiction do not explain the "related to" bankruptcy jurisdiction, an examination of the justifications underlying those doctrines points to the notion of "protective jurisdiction."

Pendent jurisdiction is expressly justified on grounds of convenience and judicial economy. But economy hardly seems sufficient in and of itself to override the article III limitations on federal jurisdiction. Several commentators have suggested an alternative justification for pendent jurisdiction. They argue that a court may approve pendent jurisdiction to help vindicate federal rights. If a plaintiff had a federal claim and a state law claim against the same defendant and pendent jurisdiction were nonexistent, the plaintiff would be faced with a difficult choice. She could either prosecute both the state and federal claims in state court, or bring two separate actions, one in state court and one in federal court. This situation may present an economic as well as a practical dilemma for the plaintiff. Prosecuting two lawsuits means twice the cost, and as Professor Arthur Miller has pointed out, the risk of inconsistent results. Consequently, the plaintiff may decide to bring just one suit in state court alleging both federal and state claims. However, the jurisdictional scheme will have then deterred the plaintiff from asserting her federal claims in the forum that the Constitution and Congress have created to vindicate, enforce, and protect those rights. To avoid this dilemma and the effect it may have on the plaintiff's ability and willingness to assert her federal claims in federal court, a federal court may invoke pendent jurisdiction to allow the plaintiff to prosecute both her federal and state claims in federal court. Put differently, pendent jurisdiction protects the plaintiff's right to assert her federal claims in federal court.

This view of pendent and ancillary jurisdiction is consis-

be a case or controversy and a bankruptcy would not. See, e.g., Tutun v. United States, 270 U.S. 568 (1926).


147. See, e.g., HART & WECHSLER (2d ed.), supra note 3, at 922-23; Miller, supra note 107, at 4.

148. If the federal claim is one over which the federal courts have exclusive jurisdiction, then the plaintiff has no real choice but to bring two suits.

149. Miller, supra note 107, at 4.

150. See generally Mishkin, supra note 3.
tent with the allegedly primary justification for federal jurisdiction in Osborn, providing a "friendly" forum for all the Bank's litigation. In this way Congress hoped to protect the Bank from state court bias unrelated to the merits. It is also consistent with Justice Bradley's concerns in Lathrop that a uniform system of bankruptcy might entail federal jurisdiction over state law claims to prevent "embarrassments" in state court. The task remains to define and justify the concept of protective jurisdiction in a way that consistently explains the decided cases and the "related to" bankruptcy jurisdiction, and that meshes with accepted views of congressional power in other areas.

VI. PROTECTIVE JURISDICTION IS THE MOST PERSUASIVE JUSTIFICATION FOR THE "RELATED TO" BANKRUPTCY JURISDICTION

At this point, it would be helpful to restate a working definition of protective jurisdiction. Protective jurisdiction exists whenever Congress chooses to provide for original federal court jurisdiction in a case between non-diverse parties where state law governs the decision of the case. The "related to" bankruptcy jurisdiction over a non-diversity state law case fits within this definition. 151

As noted above, article III provides the power structure for the federal courts. If Congress grants a federal court jurisdiction over a class of litigation that does not fit within one of the eleven enumerated jurisdictional headings, there is no constitutional power and the court must refuse to hear the case. By definition, when a question of protective jurisdiction arises there is no diversity of citizenship; thus, that heading of consti-

151. See, e.g., Note, The Theory of Protective Jurisdiction, supra note 3. As noted, the statutory test for whether or not federal question jurisdiction exists depends upon whether or not the plaintiff's well-pled complaint reveals that his or her claim is based upon federal law. See supra text accompanying notes 58-64. That is, does federal law create the plaintiff's cause of action? Clearly, the statutory definition of arising under fits within the constitutional definition. But it is also clear that the constitutional definition is broader, and that it includes cases where a defense that may or may not be determinative is governed by federal law. See, e.g., Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 871 (1824) (Johnson, J., dissenting); see also Tennessee v. Davis, 100 U.S. 257 (1880). Cases where federal law provides a defense are excluded from the definition of protective jurisdiction. Protective jurisdiction is limited to the cases described in the text, that is, cases where there is no diversity of citizenship and state law governs the decision of the case in that it not only creates plaintiff's cause of action but also governs any and all defenses that may be raised.
tutional jurisdiction is ruled out. Likewise, nine of the remaining ten categories generally can be eliminated—the United States is not a party, there is no admiralty case, etc. The remaining article III heading is jurisdiction over cases "arising under the constitution, laws, or treaties of the United States." The appropriate question is then whether a grant of protective jurisdiction "arises under" the laws of the United States. If it does not, there is no constitutional jurisdiction. If it does, then Congress has pushed, but not exceeded, the limits of "arising under" in article III.

Commentators have posited several reasons to explain why Congress may want to provide jurisdiction without providing a rule of decision. Congress may feel that there are certain institutional advantages that the federal courts provide.\textsuperscript{152} Congress may believe that federal procedures are superior,\textsuperscript{153} or that state courts would discriminate against certain classes of litigants or litigation.\textsuperscript{154} Perhaps Congress might conclude that litigation in state courts would unduly hamper some federal program. Congress might also feel that federal jurisdiction is a less intrusive alternative to federal preemption. Congress may also believe that federal litigation would be quicker than state litigation in a certain area, and that delay may adversely affect some valid federal interest, such as an interest in the efficient operation of the bankruptcy system.

It has been said that a majority of the Supreme Court has never endorsed the concept of protective jurisdiction.\textsuperscript{155} At the same time, the Court as a whole has not rejected the theory.\textsuperscript{156}

\textsuperscript{152} See, e.g., Goldberg-Ambrose, \textit{supra} note 3, at 566-76; Note, \textit{The Theory of Protective Jurisdiction}, \textit{supra} note 3, at 949-50.

\textsuperscript{153} See \textit{supra} note 152.

\textsuperscript{154} See \textit{supra} note 152.

\textsuperscript{155} See, e.g., Note, \textit{The Theory of Protective Jurisdiction}, \textit{supra} note 3, at 937. In a footnote the author discusses the willingness of at least two members of the court to find protective jurisdiction over matters involving § 301(a) of the Taft-Hartley Act. He states:

At one time, however, Justices Burton and Harlan approved the concept of protective jurisdiction over the vigorous dissent of Justice Frankfurter. \textit{See} Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 460 (1957) (Burton & Harlan, JJ., concurring); \textit{id}. at 469-84 (Frankfurter, J., dissenting). The majority deftly avoided the need for protective jurisdiction, finding § 301(a) of the Taft-Hartley Act, 29 U.S.C. § 185(a) (1976), the source of federal common law for the enforcement of collective bargaining agreements. 353 U.S. at 456-57. Cases under § 301 thereafter arose under federal common law.

\textit{Id}. at 937-38 n.32.

Moreover, the theory meaningfully explains the results in Osborn, Lathrop, Beeler, and Schumacher without resort to the "original ingredient" notion outlined above and without unduly stretching pendent and ancillary jurisdiction beyond recognition.

A. Theories of Protective Jurisdiction

Others have examined the "protective jurisdiction" question and have articulated their theories of the jurisdiction. A short review and critique of those theories follows.

1. Justice Jackson's Article I Argument

In Tidewater, Justice Jackson articulated what Professor Goldberg-Ambrose has termed the "Effectuation Theory" of protective jurisdiction. In actuality Jackson's analysis does not involve protective jurisdiction at all because, unlike any other theory of protective jurisdiction, his analysis ignores article III's "arising under" requirement. He argued that as long as Congress acted pursuant to one of its article I powers and provided federal jurisdiction, a federal court could hear the case; article III would be irrelevant. Pointing to Lathrop, Beeler, and Austrian, he claimed that federal courts could take jurisdiction of non-diversity cases that did not "arise under" a law of the United States. To Jackson, those cases did not arise under federal law because state law created the cause of action. However, as Justice Rutledge noted, Jackson's definition of arising under only applies to the statutory language, not the constitutional phrase. Jackson confused the two standards and the authority he cited reveals this confusion. Therefore, it cannot be said that article III imposes no limits on Congress' article I power to create and oversee the lower federal courts. Although Jackson's arguments have gained little or no subsequent support and commentators have roundly criticized him, it should be noted that the "related to" jurisdiction passes muster under Jackson's Effectuation Theory. Congress has power, under article I, to enact uniform

157. See commentators cited supra note 3.
158. Goldberg-Ambrose, supra note 3, at 583.
159. 337 U.S. at 595-99.
160. See supra text accompanying notes 87-90.
161. 337 U.S. at 597-98.
rules in bankruptcies. Consequently, Jackson would have argued that the "related to" jurisdiction is constitutional, even though he would find that such cases do not "arise under" federal law.

2. Wechsler's Greater Power Theory

Professor Herbert Wechsler presented a variant of Jackson's arguments that respects article III's structural limitations on federal judicial power. Wechsler argued that if Congress acted pursuant to some article I power, then it could provide for federal jurisdiction without necessarily mandating a federal rule of decision. Accommodating article III, Wechsler posited that such a jurisdictional statute would "arise under" federal law. Precisely, he articulated his theory as follows:

The power of the Congress to confer the federal judicial power must extend, as Marshall held, to every case that might involve an issue under federal law. It should extend, I think, beyond this to all cases in which Congress has authority to make the rule to 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. Where, for example, Congress by the commerce power can declare as federal law that contracts of a given kind are valid and enforceable, it must be free to take the lesser step of drawing suits upon such contracts to the district courts without displacement of the states as sources of the operative, substantive law. A grant of jurisdiction is, in short, one mode by which the Congress may assert its regulatory powers. A case is one "arising under" federal law within the sense of article III whenever it is comprehended in a valid grant of jurisdiction as well as when its disposition must be governed by the national law.

There are several limits on Wechsler's definition of "arising under." Implicitly, there must be a "case or controversy," as article III mandates. Congress cannot ask a court to perform a non-judicial function. Explicitly, Congress must act pursuant to a valid article I power. Congress must have the

164. Wechsler, supra note 3, at 224-25; see also Note, The Theory of Protective Jurisdiction, supra note 3, at 959.
165. Wechsler, supra note 3, at 224-25.
166. Id.
power to prescribe a substantive rule of decision in the case. If so, Congress can take the "lesser step" of providing a federal forum without providing a federal rule of decision.

Commentators have objected to Wechsler's quoted justification of protective jurisdiction on several grounds. Professor Goldberg-Ambrose has noted that the greater power (to enact a rule of substantive law) does not always include the lesser (to provide a federal forum without displacing state decisional law).\(^1\) She points to the doctrine of unconstitutional conditions that "prohibits Congress from placing certain conditions on the enjoyment of government benefits that Congress could withhold altogether."\(^2\) Then Goldberg-Ambrose refers to \textit{Fontiero v. Richardson}\(^3\) for the proposition that "Congress may not unequally allocate benefits which it may withhold altogether."\(^4\) She also relies on Congress' alleged inability to withdraw federal jurisdiction in an attempt to deny an individual's constitutional rights, even though Congress has plenary control over federal jurisdiction.\(^5\) Finally, Goldberg-Ambrose points to \textit{United States v. Klein},\(^6\) arguing that Congress' inability to withdraw jurisdiction to dictate the result in a particular case, even though it could withdraw jurisdiction altogether, is another exception to the greater power theory.

Her first three examples involve areas where an independent individual constitutional right forecloses congressional conditions or withdrawal of jurisdiction. There are no independent constitutional "individual rights" at issue in the case of protective jurisdiction. Whether structural limits impose similar limits when the issue is the allocation of power between federal and state governments is the crux of the protective jurisdiction question, and will be discussed in more detail below.

\textit{Klein} should be read narrowly. Professor Goldberg-

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169. \textit{Id}.
172. Professor Goldberg-Ambrose cites Johnson \textit{v. Robison}, 415 U.S. 361, 366 (1974), for the proposition that Congress may not withdraw jurisdiction to deny individuals their constitutional rights. However, the statement in Johnson \textit{v. Robison} is dictum because the court resolved the jurisdictional question as a matter of statutory interpretation rather than constitutional power. Thus the proposition is still open to question. Goldberg-Ambrose, \textit{supra} note 3, at 590 n.263. See also \textit{Hart & Wechsler} (2d ed.), \textit{supra} note 3, at 318-21, 336-38.
173. 80 U.S. (13 Wall.) 128 (1871).
Ambrose cites it as a case limiting Congress’ power to withdraw jurisdiction when to do so would dictate a result in a particular case.\textsuperscript{174} But in \textit{Klein} the Court was faced with a situation where Congress attempted to prescribe how a court should decide a question of fact—the meaning of a pardon.\textsuperscript{175} Equally important, Congress’ intrusion on the judiciary also infringed upon the executive’s sphere by impairing the effect of a presidential pardon.\textsuperscript{176} Neither of these problems present themselves in the protective jurisdiction context, especially not in the “related to” bankruptcy context. The protective jurisdiction question involves the relationship between federal power and state power, not the relationships between state and citizen or between the coordinate branches of the federal government.

Others criticize Wechsler’s protective jurisdiction thesis because it is somewhat artificial. They contend that it is frequently difficult, if not impossible, to say which is the greater power and which is the lesser. One may argue that the power to infringe upon state control over the interpretation and development of state law is greater than the power to provide a mere substantive rule of decision.\textsuperscript{177}

Still others posit that Wechsler’s requirement that Congress have the power to enact a substantive rule of decision for a case before it can provide for federal jurisdiction unneces-sarily limits protective jurisdiction.\textsuperscript{178} That is, Wechsler did not go far enough. There may well be cases where Congress does not have the power to provide a substantive rule of decision but where federal jurisdiction would be desirable and constitutiona1. Mishkin questioned Congress’ power to provide a rule of decision for all cases involving the Bank of the United

\textsuperscript{174} 80 U.S. at 144-48.
\textsuperscript{175} Goldberg-Ambrose, \textit{supra} note 3, at 590.
\textsuperscript{176} HART \& WECHSLER (2d ed.), \textit{supra} note 3, at 315-16.
\textsuperscript{177} Goldberg-Ambrose, \textit{supra} note 3, at 590; Note, \textit{The Theory of Protective Jurisdiction}, \textit{supra} note 3, at 960, wherein the author states:

One’s initial reaction to the half-loaf argument [the greater power argument] might be to wonder whether it is entirely clear which is the greater step and which is the lesser. State law grows and evolves in the state courts, a process frozen when state rules are enforced by federal courts. Whether the imposition of a federal rule, a rule amenable to growth and interpretation in the federal courts, is a greater intrusion upon principles of federalism and legal evolution than the freezing of state rules seems a debatable question, certainly a question incapable of resolution in the abstract.

\textsuperscript{178} Note, \textit{The Theory of Protective Jurisdiction}, \textit{supra} note 3, at 961-62.
States as well as for Lathrop, Beeler, and Schumacher. But he argued that Congress should be able to provide for jurisdiction in such cases, even if it could not enact a substantive rule to govern the case. Given the broad powers that the Court has found Congress possesses under the commerce clause and other article I grants of power, it is doubtful that Mishkin's objection still has any meaningful relevance. Even Wechsler realized, in 1948, that the power to provide a federal rule of decision was necessarily broad. He stated: "Needless to say, Congress has not meant to grant the district courts a general jurisdiction in every case involving the jurisdictional amount in which it could confer judicial power under any of the sources of authority... There is hardly any limit to the cases it would draw today." Thus, Wechsler apparently did not believe that the requirement of "substantive" power should unduly hamper Congress. However, it is possible to slightly restate Wechsler's theory in a way that avoids the problems of "substantive" power and the greater/lesser power conundrum.

3. The Wechsler Variant

A variant of Wechsler's theory would allow protective jurisdiction whenever Congress acted pursuant to a valid article I power and there was a rational reason to believe that

179. Mishkin states:
   Though under current law it seems fairly clear that Congress might legislate as to most legal relations of an entity created and organized as the Bank was, it is far from certain even today that federal law could be made substantively to govern every one of the Bank's lawsuits. Similarly, while it is questionable whether Congress could provide the substantive rule to govern all obligations owed to a person who subsequently becomes bankrupt, it is nonetheless clear that suits by a bankruptcy trustee to recover on such obligations may be brought by Congress within the jurisdiction of any federal court....

Mishkin, supra note 3, at 189 (footnotes omitted).

180. See, e.g., Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (Congress acted within its constitutional powers when it applied the Civil Rights Act of 1964 to local businesses, such as motels).


182. Wechsler, supra note 3, at 225.

183. Mr. Rosenberg cites another objection to Wechsler's theory of protective jurisdiction. He distinguishes between substantive-based jurisdiction, in which Congress provides a rule for decision, and forum-based jurisdiction, in which Congress chooses a forum for reasons other than substance. He argues that Wechsler's focus on substantive power ignores Congress' power to provide forum-based jurisdiction. Note, The Theory of Protective Jurisdiction, supra note 3, at 960-61.

184. Id. at 963-64.
Congress felt federal jurisdiction was a “necessary and proper”\textsuperscript{185} way to effectuate that article I power. Put differently, protective jurisdiction is constitutional whenever there is a rational relationship between the means Congress chooses, protective jurisdiction, and some valid national interest within Congress’ article I power. Admittedly, this would not be an unduly strict standard of review; it is basically a “necessary and proper” standard of review.\textsuperscript{186} Nor should it be unduly strict for the same reasons that courts do not aggressively police congressional regulatory statutes enacted pursuant to the commerce clause.

The “related to” bankruptcy jurisdiction is constitutional under this variant statement of Wechsler’s protective jurisdiction theory. Under article I, section 8, clause 4 of the Constitution, Congress has power to create uniform rules of bankruptcy. Federal 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.

The main argument against the Wechsler variant, as Professor Goldberg-Ambrosoe has pointed out, relies on a negative inference that arises from the existence of constitutional diversity jurisdiction. The inference is that the diversity clause exhausts Congress’ power to protect certain domestic litigants from state forums.\textsuperscript{187} As Goldberg-Ambrosoe states: “If a case is similar to a diversity clause case, but does not qualify for diversity jurisdiction, then the Framers must have intended, as a negative purpose, that the case does not come into federal court through the backdoor of the arising under clause.”\textsuperscript{188} Frankfurter articulated precisely this argument in his Lincoln

\textsuperscript{185} U.S. Const. art. I, § 8, cl. 18; see, e.g., McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).
\textsuperscript{187} Goldberg-Ambrose, supra note 3, at 587. Therein the author states: The principal argument against interpreting article III to allow a case to arise under federal law when the only federal law in the plaintiff’s claim is the jurisdictional statute itself is that this interpretation would contravene negative implications of the diversity clause. If a case is similar to a diversity clause case, but does not qualify for diversity jurisdiction, then the Framers must have intended, as a negative purpose, that the case not come into the federal court through the backdoor of the arising under clause.
\textsuperscript{188} Id.
Mills dissent.\textsuperscript{189} Goldberg-Ambrose effectively refutes this argument by noting that protective jurisdiction may further an important federal policy and not just protect citizens from bias.\textsuperscript{190} Likewise, the negative purpose argument fails to give effect to the possibility that prejudice can take the form of bias against a federal program or status, not merely bias against residents of other states.

If article III limits Congress' power to take account of bias against a federal program by providing jurisdiction without also enacting a rule of decision, Congress' hands are unduly tied. The very existence of the article III diversity clause signals that our forefathers were aware of the possibility of state court prejudice. The diversity heading was an explicit attempt to deal with one type of prejudice or bias. It recognizes a potential problem in a single area, but it does not limit Congress' power to cure other biases. For instance, in the bankruptcy context one can easily imagine a potential bias against debtors; recall Justice Bradley's worry about "embarrassments" in state court. Any bias that adversely affects the plaintiff's ability to recover adversely affects federal bankruptcy policies because it might hamper reorganization or lessen creditor recoveries in a liquidation. If such bias might possibly exist, is Congress without power to provide a forum? As Mishkin argued, there may be institutional considerations that make the federal judges' and jurors' perspectives different from those of their state counterparts.\textsuperscript{191}

Some may view the last paragraph's bias discussion as far-fetched in modern day America. However, there are reasons other than state court bias against bankrupts or federal policy that might force Congress to provide for a federal forum in "related to" bankruptcy cases. A reorganization is often a ticklish proceeding with ongoing negotiations between the debtor and the various classes of creditors, as well as among the creditors themselves. In this context, speedy realization of other claims can only facilitate ultimate resolution of the entire proceeding. Settlements of claims, approval of plans, and other critical activity may be delayed pending state court determination of "related to" claims the debtor may have against third

\textsuperscript{189} 353 U.S. at 475 (Frankfurter, J., dissenting).
\textsuperscript{190} Goldberg-Ambrose, \textit{supra} note 3, at 587.
\textsuperscript{191} Mishkin, \textit{supra} note 3, at 157-60.
parties. However, a federal court, in setting its own calendar, might more successfully avoid this delay.

4. Mishkin’s Articulated and Active Policy Requirement

Although Professor Mishkin understood the desirability of protective jurisdiction statutes in certain contexts, he echoed some of the concerns noted above regarding article III limits on Congress’ power to create federal jurisdiction in non-diversity “state law” cases.\(^{192}\) Mishkin worried that Wechsler’s statement of the law (presumably the Wechsler variant as well) “would give Congress virtually limitless power to channel to the federal courts controversies between co-citizens governed wholly by state law on the basis of some remote connection with an unexpressed federal interest.”\(^ {193}\) Instead, he would uphold protective jurisdiction wherever Congress granted it pursuant to “an articulated and active federal policy regulating a field.”\(^ {194}\) He synthesizes the requirement from his reading of the cases, including Osborn, as well as his partial acceptance of the diversity jurisdiction/negative purpose position. His test is intellectually unsatisfactory for several independent reasons.

A student commentator, Scott Rosenberg, points out that requiring an “articulated and active” federal policy strains the language of both articles I and III.\(^ {195}\) Rosenberg also argues that Mishkin’s “plan” requirement is underinclusive.\(^ {196}\) He persuasively posits that Congress may desire a federal forum to capitalize on federal procedures or prevent local bias in areas where there is no federal plan\(^ {197}\) and that to require a plan unduly limits congressional choice.

Moreover, how does a court determine if a plan is “articulated and active,” and what test does it use? Is the existence of a plan a legislative fact on which Congress is entitled to great deference, or is it something the court should determine on its own? Although we are stuck with many tests that sound unworkable\(^ {199}\) there does not seem to be any reason to add

\(^{192}\) *Id.* at 190.

\(^{193}\) *HART & WECHSLER (2d ed.)*, *supra* note 3, at 417.

\(^{194}\) Mishkin, *supra* note 3, at 192.


\(^{196}\) *Id.*

\(^{197}\) *Id.* at 949-50.

\(^{198}\) *Id.* at 962-63.

\(^{199}\) *See, e.g.*, Jacobellius v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)
another, especially when to do so requires a court to determine if Congress has done enough to justify doing less. Mishkin's theory is an ironic twist on Wechsler's greater power/lesser power axiom. Mishkin's plan requirement is arguably unworkable, and unduly limits desirable congressional leeway in choosing among alternative means of regulation. Rosenberg notes, however, that the "related to" bankruptcy jurisdiction is constitutional under Mishkin's test. There is an "active and articulated" federal bankruptcy program. Thus, the jurisdictional statute is a reasonable part of that program and not a "naked grant of federal jurisdiction."200

But given the problems with Jackson's test and Mishkin's federal "plan" requirement, one still may wonder whether the Wechsler variant (as well as the quoted Wechsler justification) goes too far. As Professor Currie said: "To say that a case arises under federal law whenever a federal statute gives jurisdiction is to destroy all limitations on federal jurisdiction."201 In particular, the Wechsler variant might allow protective jurisdiction statutes that affect the state's ability to control the interpretation and development of state law. That erosion might arguably undermine the state's place in our federal system.

5. Protective Jurisdiction Justifications That Emphasize "States' Rights"

Two commentators have responded to the concern for states' rights with proposed limits on Congress' power to grant protective jurisdiction to federal courts. Rosenberg argues that "the structure of article III and a basic assumption about the distribution of federal and state judicial power require more exacting scrutiny of protective jurisdiction than a necessary and proper standard of deference."202 First, he would require what he calls an actual forum-based interest in jurisdiction, defined as an interest in federal procedures, uniform procedures, or avoidance of allegedly biased state tribunals.203 Second, he would require that the forum-based interest be substantial, and finally, that the protective jurisdiction Con-

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203. Id. at 949-50.
Professor Goldberg-Ambrose has expressed concerns with the states' ability to articulate and interpret state law in the light of protective jurisdiction statutes. She contends that any justification for protective jurisdiction must examine "the nature of the consequent encroachments on state autonomy." Relying in part on the tenth amendment, she prescribes an approach to protective jurisdiction that balances the states' interests "that bear on the state citizens' ability effectively to control and hold accountable the officers of state government" against the "federal government's interest ... in effectuating national policy by manipulating the states in some specified way, rather than acting directly on the populace." Goldberg-Ambrose sees the state's interest as preserving a relationship between itself and its citizens. State citizens should control state government through the state representative process, and Congress should not have the power to destroy that relationship, through protective jurisdiction or otherwise. As long as state citizens can hold state officers accountable through the election process, that relationship is preserved. But when federal law forces state officers to perform unpopular tasks, the electorate is often confused, and ousts state officers who were acting pursuant to federal edict rather than in their own stead. Ostensibly, this process undermines state autonomy and notions of political accountability.

Additionally, Professor Goldberg-Ambrose claims that when federal judges are ordered to interpret and apply state statutes, interpret state common law, and review state administrative agency decisions, federal judges deny state citizens the opportunity to influence such decisions through the direct or indirect selection of state court judges.

However true her concerns might be when federal actors

204. Id. at 959; see also id. at 954-59.
205. Goldberg-Ambrose, supra note 3, at 593-95.
206. The tenth amendment provides:
The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.
U.S. CONST. amend. X.
207. Goldberg-Ambrose, supra note 3, at 609.
208. Id.
209. Id. at 595-601.
210. Id. at 604.
force state agents to act, as in school desegregation cases or environmental matters, one must wonder how apt they are when protective jurisdiction is involved. In a school desegregation battle, federal judges (or administrators) may oversee local school board officials and force them to act in conformance with federal requirements that are contrary to local positions on the matter—and to act in ways different from what the school board members would do absent federal compulsion. However, in the protective jurisdiction context, a federal judge is ordered to interpret and follow state law. The compulsion exerted is not on local officials, but on other federal officials— the federal judges. It is very similar to what happens in a diversity case, when at congressional direction a federal judge follows and applies state law.

There is a distinction between requiring a state officer to somehow act and allowing a federal judge to interpret state law in a case where state decisions are binding. There seems to be little real risk that state judges will be held accountable for federal judges’ decisions in cases involving state law. The likelihood of confusion regarding state judicial accountability seems much greater when state judges hear cases involving federal law and must apply federal law no matter what their own views. In such cases state judges are making decisions that federal law mandates, and the potential for confusion among state voters seems great. Despite this potential, Professor Goldberg-Ambrose does not call for repeal of the supremacy clause.

Moreover, she admits that diversity jurisdiction and pendent and ancillary jurisdiction have not adversely affected state citizens’ rights to influence the development of state law, because diversity jurisdiction and pendent and ancillary jurisdiction do not entail the “systematic displacement of state courts.” But she argues that protective jurisdiction can lead to an alteration of the “texture of state policy,” jeopardizing “the participatory rights of state citizens in state government.” This could occur when protective jurisdiction is exclusive over a certain type of case, or when plaintiffs perceive a federal forum as so advantageous that its availability

211. Id. at 601-04.
212. Id. at 608.
213. Id. at 607.
214. Id. at 608.
will lead to plaintiffs filing all such cases in federal court. However, as will be discussed below, the political process makes the enactment of protective jurisdiction statutes that totally displace state courts highly unlikely.

Finally, what both commentators’ tests lack is the type of persuasive simplicity one strives for in interpreting documents like the Constitution. Rosenberg requires a substantial forum-based interest, but offers no guidance as to what is substantial. Likewise, he requires that the federal jurisdictional grant be no broader than absolutely necessary to further the forum-based interest, but does not explain how a court would adequately make that determination. Goldberg-Ambrose asks the court to engage in a balancing process, presumably after making sure it has isolated the relevant interests. However, she does not explain how the court should isolate those interests, nor does she say what weight the court should give to each interest in the balance. Although the authors of these tests may counter that courts deal with these questions in constitutional litigation all the time in areas such as equal protection, due process, and the first amendment, those cases all involve individual rights. Protective jurisdiction, however, involves the allocation of power between federal and state governments. In this area, the courts generally defer to Congress after minimal review and rely upon the political process as the primary check on congressional action. Is there any reason not to defer if protective jurisdiction is involved? Is there any justification for heightened scrutiny of a grant of protective jurisdiction as opposed to a congressional regulation of interstate commerce? Arguably not, and constitutional developments since these commentators wrote undermine the bases of their stricter scrutiny requirements.

B. Garcia Refutes States’ Rights Limits on Protective Jurisdiction

Both Rosenberg and Goldberg-Ambrose wrote after National League of Cities v. Usery and before Garcia v. San Antonio Metropolitan Transit Authority. In Usery, a majority of the Supreme Court held that Congress could not extend the minimum wage and maximum hour provisions of the Fair

215. Id.
Labor Standards Act\textsuperscript{218} to the states and their various subdivisions because to do so would exceed congressional power under the commerce clause. Justice Rehnquist, in his plurality opinion, was especially concerned with recognizing and protecting "the essential role of the States in our federal system of government."\textsuperscript{219} He looked to the tenth amendment as a shield for the states from federal power, reasoning that Congress went too far when its legislation affected the states \textit{qua} states in areas of traditional state competence. He said: "We hold that insofar as the challenged amendments [to the FLSA] operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3."\textsuperscript{220}

In dissent, Justice Brennan criticized Rehnquist's test as unworkable, and argued that Congress, pursuant to the commerce clause, did have the requisite power to pass the challenged legislation. He saw no restraint on that power "based on state sovereignty . . . expressed in the Constitution [or the Court's] . . . decisions over the last century and a half."\textsuperscript{221} Further, Brennan argued that any check on congressional power in this area must come from the political arena.\textsuperscript{222} As he noted, "Judicial restraint in this area merely recognizes that the political branches of our Government are structured to protect the interests of the States, as well as the Nation as a whole, and that the States are fully able to protect their own interests. . . ."\textsuperscript{223} How so? In reliance on Wechsler's seminal piece \textit{The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government},\textsuperscript{224} Brennan reasoned that the states elected both rep-


\textsuperscript{219} 426 U.S. at 844.

\textsuperscript{220} Id. at 852. There is some confusion in Justice Rehnquist's plurality opinion. The portion quoted in the text would indicate that Congress exceeded its power in enacting the statute. In two other instances, however, Rehnquist presents an alternative analysis which posits that the amendments to the Fair Labor Standards Act were within Congress' power under article I, but that the tenth amendment served as an affirmative limitation on that power. \textit{Id.} at 841, 845. This seems to be the appropriate analytic framework (even if one does disagree with it) and the quoted portion in the text should be viewed as merely a slight misstatement of that approach.

\textsuperscript{221} \textit{Id.} at 858 (Brennan, J., dissenting).

\textsuperscript{222} \textit{Id.} at 872 (Brennan, J., dissenting).

\textsuperscript{223} \textit{Id.} at 876 (Brennan, J., dissenting).

\textsuperscript{224} \textit{54 Colum. L. Rev.} 543 (1954); \textit{see also} Younger v. Harris, 401 U.S. 37 (1971).
resentatives and senators. Thus the decisions of the national legislature are the decisions of the states themselves. The polls serve as the check on any federal legislation that unduly obliterates state sovereignty. To Brennan, judicial intervention on grounds of protecting state sovereignty upset, rather than protected, the political system that defines "our Federalism." He noted: "Judicial redistribution of powers granted the National Government by the terms of the Constitution violates the fundamental tenet of our federalism that the extent of federal intervention into the States' affairs in the exercise of delegated powers shall be determined by the States' exercise of political power through their representatives in Congress." Despite his eloquence, Brennan wrote for a minority; however, less than ten years later, that minority became a majority in what may be called a rapid turn of events.

In Garcia, the Court reconsidered and overruled Usery in another Fair Labor Standards Act case. Justice Blackmun, who had concurred in the Usery result, wrote for a majority of five. The case involved the applicability of the FLSA to a municipally owned mass-transit system. The lower court had held that ownership of a mass transit system was a traditional governmental function, and thus under Usery was immune from regulation. Rather than dawdle over the definition of a traditional governmental function, the Court overruled Usery.

Blackmun first concluded that the Usery test of what was and what was not a traditional governmental function was unworkable. Then, examining the structure of our national government, he concluded that "the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself."

Echoing Wechsler's thesis on political power he continued: "State sovereignty interests, then, are more properly protected

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225. 426 U.S. at 877-78 (Brennan, J., dissenting).
226. Id.
227. 469 U.S. at 530.
228. Id. at 533-36. Actually, the district court originally concluded that ownership of a local mass transit system was an integral operation in an area of traditional governmental function under Usery. While the case was on appeal, the Supreme Court decided Transportation Union v. Long Island R.R. Co., 455 U.S. 678 (1982), in which it concluded that ownership of a commuter railway service was not a traditional governmental function. Therefore, the Court remanded Garcia. On remand, the district court adhered to its original view and another appeal ensued.
229. Id. at 546-47.
230. Id. at 550.
by procedural safeguards inherent in the structure of the federal government than by judicially created limitations on federal power."\textsuperscript{231} Thus the Supreme Court laid \textit{Usery} to rest.\textsuperscript{232}

It is not difficult to imagine how more stringent tests for judicial review of protective jurisdiction might appear during a period when \textit{Usery} was the law of the land. If the wages and hours that a state pays its employees is a forbidden subject for Congress to address, it is not a far leap to conclude that state development of state law is also a subject of traditional state competence. If that is so, then perhaps one might conclude that all protective jurisdiction statutes are an unconstitutional federal usurpation of state sovereignty.

But in light of \textit{Garcia}, protective jurisdiction tests that are stricter than those applied in other areas of federal regulation seem anomalous. It is certainly true that protective jurisdiction legislation affects state courts and that the regulatory legislation at issue in commerce clause cases generally affects state legislatures and executives. But frequently, commerce clause legislation provides substantive standards for the courts to apply, as do the antitrust laws and the civil rights laws. Moreover, statutes frequently provide for federal jurisdiction that partially or totally displaces state courts in certain areas.

More basically, why should judicial review of laws that affect the state judiciary be more exacting than those affecting state legislatures and executives? Political controls should work just as effectively in one area as in another. Is article III somehow a more meaningful control on Congress' power to act vis-a-vis the state judiciary than the tenth amendment is on Congress' power to act vis-a-vis state executives and legislators? Nothing is immediately apparent to support such a distinction. In both cases, the basic question is the allocation of power between state and federal governments in areas that do not adversely affect individual rights.

\textsuperscript{231} \textit{Id.} at 552.

\textsuperscript{232} Interestingly, the House has voted down a post-\textit{Garcia} recommendation from the A.B.A. Section of Urban, State, and Local Government Law for the three branches of the federal government to exercise "restraint and discretion" in adopting laws and regulations that affect state and local governments. 56 U.S.L.W. 2098 (Aug. 18, 1987).
1. The Political Process Is the Primary Check on Federal Jurisdiction Including Federal Protective Jurisdiction

Our forefathers intended that the federal courts should have co-extensive competence with the federal legislature.\(^{233}\) Given the breadth of that purpose and the breadth with which the Supreme Court has interpreted the necessary and proper clause,\(^{234}\) stricter scrutiny of protective jurisdiction legislation seems unduly narrow and inappropriate. But some may contend that certain of our forefathers were wary of federal courts, and certainly would have objected to protective jurisdiction as an undue impairment of state sovereignty. No doubt this is true, but there are always problems with determining the forefathers' intent. What should we look at—the drafters' writings, the debates at the constitutional convention, Madison's notes, the ratification debates, The Federalist Papers?\(^{235}\) Moreover, if we could interview all involved we could probably find a few who would not object to protective jurisdiction.

Another more basic problem exists—things change. If we wanted to shock our forefathers we could show them cases like Wickard v. Fillburn,\(^{236}\) Heart of Atlanta Motel,\(^{237}\) or even Garcia. Surely many of them had no conception that congressional power would grow to the extent that it has in particular cases. Does that mean that Congress lacks the power to deal with national emergencies, like race discrimination and depression, that never occurred to our forefathers? Congress should have the power to provide for federal jurisdiction but not a federal rule of decision if doing so reasonably furthers a national interest.

Some may object that the Wechsler variant of protective jurisdiction makes article III a dead letter, an unnecessary addendum.\(^{238}\) As Rosenberg states, reading "arising under" to

\(^{236}\) 317 U.S. 111 (1942).
\(^{237}\) 379 U.S. 241 (1964).
\(^{238}\) See Note, The Theory of Protective Jurisdiction, supra note 3, at 956 ("With a
include protective jurisdiction (under the Wechsler variant) makes the other ten headings unnecessary, which would be a disfavored interpretation. There are several responses. One is that article III can be read as providing a broad heading of jurisdiction—"arising under"—followed by ten more specific headings. More basically, canons of interpretation must not override the principal notion that, after all, it is a constitution we are interpreting.

Blind adherence to Rosenberg's canon would question the results in many leading cases on federal legislative power, especially commerce clause cases. Arguably, since the thirties, and at least since 1964, it seems apparent that given the Court's interpretation of the commerce clause (and the necessary and proper clause), there is probably no need for any other affirmative grant of power. Congress could justify a bankruptcy act under the commerce clause without resorting to congressional power to make uniform rules of bankruptcy. Congress could monitor the currency under its commerce power without resorting to its power to coin money. Does that make Wickard, Heart of Atlanta, and cases like them wrong? Likewise, is the same argument not applicable to the tenth amendment itself? Does Rosenberg's canon of interpretation not force us to overrule Garcia?

By looking at the federal court structure provided, one should determine whether the forefathers really meant for the political processes to control the federal judiciary and whether the political controls that Wechsler articulated, and that the

little imagination, therefore, the arising-under clause could be made to swallow the remaining jurisdictional grants. It is difficult to imagine, of course, why the Framers would have enumerated eleven jurisdictional clauses were the arising-under clause alone meant to be flexible enough to do the work of all.

239. Id.
240. Id.
243. In United States v. Fry, 421 U.S. 542, 547 n.7 (1975), the Court said the following about the tenth amendment:

While the tenth amendment has been characterized as a "truism," stating merely that "all is retained which has not been surrendered," United States v. Darby, 312 U.S. 100, 124 (1941), it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.

Garcia majority relied upon, really do control federal power. Our forefathers intended that the political process should serve as the principal check on the scope of the federal judicial power, just as they intended political controls to govern the exercise of federal legislative power in other areas.\(^{245}\) All of those present at the constitutional convention desired a national judiciary.\(^{246}\) No one questioned the need for a Supreme Court.\(^{247}\) But when the subject of lower federal courts arose, debate ensued both in the convention and later in the ratification process.\(^{248}\) The solution reached in the convention, and accepted during the ratification proceedings, was to give Congress the power to create lower federal courts but not to require their creation.\(^{249}\) As Madison noted: "there [is] a distinction between establishing such tribunals absolutely, and giving a discretion to the Legislature to establish or not establish them."\(^{250}\) Madison felt the convention was doing the latter. Hart and Wechsler interpret the compromise that created article III to mean that Congress not only has discretion to create or not create federal courts, but a discretion to give jurisdiction or take it away.\(^{251}\) They state: "And it seems to be a necessary inference from the express decision that the creation of inferior federal courts was to rest in the discretion of Congress that the scope of their jurisdiction, once created, was also to be discretionary."\(^{252}\) Congress could create lower federal

\(^{245}\) See supra text accompanying notes 216-31.

\(^{246}\) HART & WECHSLER (2d ed.), supra note 3, at 4.

\(^{247}\) Id. at 11.

\(^{248}\) Id.

\(^{249}\) Id.

\(^{250}\) Id. at 11-12.


\(^{252}\) HART & WECHSLER (2d ed.), supra note 3, at 12.

\[\text{[T]he plan of the Constitution for the courts—was quite simply that the Congress would decide from time to time how far the federal judicial institution should be used within the limits of the federal judicial power; or, stated differently, how far judicial jurisdiction should be left to the state courts, bound as they are by the Constitution as "the Supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."}

\text{Id. at 363 (quoting Wechsler, The Courts and the Constitution, 65 Colum. L. Rev. 1001, 1005-1006 (1965)). Accord Sheldon v. Sell, 49 U.S. (8 How.) 441 (1850) (Congress has a similar power to make exceptions to the Supreme Court's original and appellate jurisdiction). See, e.g., Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869); HART & WECHSLER (2d ed.), supra note 3, at 330-60, 363.}
courts or not create them. It could create them and then do away with them. It could give jurisdiction or not give it. It could give some jurisdiction but not other jurisdiction. It could give jurisdiction and then take it away. It was Congress that would control the lower federal courts and it was the political process that would control Congress. The primary check on congressional power over the lower federal courts is the political control the citizenry exercises over its federal representatives.\textsuperscript{253} That process, then, should be the ultimate check on protective jurisdiction statutes.

This discussion certainly does not establish explicit authority for the proposition that Congress may grant the federal courts protective jurisdiction over certain cases, but it does show that the Framers anticipated that the political process would be the primary check on Congress' decisions regarding the federal judiciary. That is the same political process that operates to check the federal legislature when it acts in other areas, as in \textit{Garcia}. Thus, why should we have two different tests? We are not dealing here with legislation affecting a group that is unable to protect itself in the political arena.\textsuperscript{254} Protective jurisdiction deals with the allocation of power among the federal and state governments. As long as Congress is validly exercising an article I power and its means are rationally related to its ends, the means are constitutional. Surely a protective jurisdiction statute that Congress enacts pursuant to a valid article I power could be a "necessary and proper" way to further a proper legislative end.

Moreover, congressional discretion over federal jurisdiction makes the existence of protective jurisdiction more palatable to those who fear for the states' autonomy. The discretion to create federal protective jurisdiction goes hand-in-hand with congressional power to take jurisdiction away or even to destroy the federal courts altogether. Thus, while one Congress may enact wide-ranging protective jurisdiction statutes and otherwise broaden federal jurisdiction, another may cut

\textsuperscript{253} Although Congress almost immediately created lower federal courts, it did not convey general original jurisdiction over federal question cases until 1875. HART & WECHSLER (2d ed.), supra note 3, at 32-33, 846-47. The fact that Congress did not exercise its power until then does not mean it did not exist. Congress simply chose not to exercise it. Moreover, Congress has frequently throughout our history granted federal courts jurisdiction over particular controversies. \textit{Id.} at 844-45. \textit{Osborn} is an example of such jurisdiction.

\textsuperscript{254} United States v. Carolene Products, 304 U.S. 144, 152-53 n.4 (1938).
back on federal jurisdiction and eliminate certain jurisdictional headings altogether. That neither event is likely to violently occur or even occur with regularity is testament to the fact that the political process may very well serve as a check on Congress' discretion to grant, deny, or remove federal jurisdiction. Likewise, as in any area, judicial deference minimizes undue interference with legislative programs.

Still, some may allege that protective jurisdiction is different from regulatory legislation because article III provides some kind of limit that is not present in the regulatory context. But what about the tenth amendment as a check on congressional authority in other regulatory matters? Why is it less of a shield from federal power than article III? Without getting into a comparison of what may well be apples and oranges, it is respectfully submitted that article III does, as Wechsler implicitly noted and as the variant statement of his theory recognizes, impose certain limits. First, Congress must be acting within the broad range of its article I powers. Second, jurisdiction must be a rational and/or necessary and proper means of furthering the article I federal interest that Congress is pursuing. And third, the jurisdiction must be over a case or controversy. That is, Congress cannot ask a federal court to do that which is not by nature judicial business. Although one may question just what it is that makes a case or controversy, few doubt that it is still a requirement, and neither the Wechsler justification for protective jurisdiction nor the Wechsler variant question the requirement.

Finally, article III serves as that portion of the federal constitution that provides for the existence of federal courts. As article I provides for the legislative branch and article II provides for the executive branch, article III provides for the judicial branch. In this light, one may view it as the airfield without which the congressional creation of lower courts or grants of jurisdiction could not land.

Greater intellects than mine have pondered the question of whether our political processes adequately monitor federal intrusions on state sovereignty. Precise answers underesti-

255. See generally supra note 3.
257. See the authorities discussed and cited in Goldberg-Ambrose, supra note 3, at 595-98.
mate the difficult nature of the question and any answers at all may be impossible at a level greater than conjecture or intuition. But it is the law of the land, as articulated in Garcia, that the political process is an adequate check on congressional power when states’ rights are involved and the history of protective jurisdiction shows that the political process has worked to check congressional discretion at least in that one area. Congress has never exercised all its power in this regard. It has never passed a statute providing for federal jurisdiction over all contract cases affecting interstate commerce. Would such a statute be constitutional? Under the arguments asserted herein, it probably would. It would be a valid exercise of Congress’ article I power over interstate commerce and no doubt would be rationally related to solving some national problem. But in two hundred years, Congress has never passed such an act.

Other wide ranging, as well as certain narrow, proposals for protective jurisdiction have also failed. Although congressional debate frequently centers around the constitutionality of such provisions, it is clear that the political process serves as a check on unbridled protective jurisdiction statutes. The “related to” bankruptcy jurisdiction contained in the Bankruptcy Amendments and Federal Judgeship Act of 1984 exemplifies just how those political processes can work to check federal expansion. It is a finely tailored accommodation of state and federal interests.

VII. THE “RELATED TO” BANKRUPTCY JURISDICTION EXEMPLIFIES THE EFFECTIVENESS OF THE POLITICAL PROCESS AS A CHECK ON CONGRESSIONAL INTRUSIONS ON AND USURPATION OF STATE SOVEREIGNTY THROUGH PROTECTIVE JURISDICTION STATUTES

Obviously, Congress saw a need for the “related to” bankruptcy jurisdiction. One of those needs, as articulated in the legislative history for the 1978 Act, was to do away with unnecessary litigation over bankruptcy court jurisdiction. Another need was to provide one court for all proceedings even tangentially related to bankruptcy in order to speed the bankruptcy

260. See generally supra note 3.
process. The first goal did not survive the post-\textit{Marathon} restructuring. With the core versus non-core distinctions, classification litigation promises to once again reach epidemic proportions. As for the second goal, under the 1984 Act all litigation "related to" bankruptcy will not be in one federal court. That is because the political process, solicitous of state courts and their place in the federal system, adopted a system that minimizes federal intrusions into state law matters between non-diverse parties yet preserves the federal interest in efficient bankruptcies.

This restructuring involved the use of the mandatory and discretionary abstention statutes discussed earlier in section II. Under the mandatory abstention statute, the federal courts must defer to a state court in a "related to" proceeding if a timely adjudication can occur in a matter where federal jurisdiction exists only because of the "related to" bankruptcy statute. The statute manifests an obvious congressional concern with the efficient administration of the federal bankruptcy system, but at the same time Congress has shown a willingness to defer to the state courts. Earlier it was noted that several reasons may justify protective jurisdiction, includ-

\begin{itemize}
\item The division of jurisdiction in the judicial business arising out of or related to cases commenced under the Bankruptcy Act has had deplorable effects on bankruptcy administration. The necessity of litigating some controversies that arise out of a bankruptcy case in a nonbankruptcy court is productive of delay. Dockets of nonbankruptcy courts are likely to be more crowded than those of bankruptcy courts, and the pace of nonbankruptcy litigation is likely to be slower than that of bankruptcy courts. Delay is likely to be particularly prejudicial in reorganization cases, but even in liquidation cases, delay is practically certain to aggravate the deterioration of asset values that is a concomitant of bankruptcy.
\item \textit{Id.} at 85.
\item 262. One need only look at the annotations to 28 U.S.C. § 157 to see the bulk of classification litigation that is occurring under that section.
\item 263. \textit{See supra} text accompanying notes 43-44. For a good discussion breaking down the mandatory abstention statute into a six-step test, see \textit{In re} Texaco, Inc., 77 Bankr. 433 (Bankr. S.D.N.Y. 1987); \textit{see also In re} David Turner, 70 Bankr. 486 (Bankr. D. Mont. 1987).
\item 264. \textit{See, e.g.,} National Acceptance Co. of California v. Levin, 75 Bankr. 457 (D. Ariz. 1987); \textit{In re} Consulting Actuarial Partners Ltd. Partnership, 72 Bankr. 821 (Bankr. S.D.N.Y. 1987); \textit{In re} P & P Oilfield Equipment, Inc., 71 Bankr. 621, 623-24 (D. Colo. 1987) ("Put simply, this matter should not be in this Court. It is not a 'core' proceeding; it concerns only questions of State law, and would have never come before me absent P & P's bankruptcy. As such, I abstain from hearing the instant case and hope that this opinion will send an unforgettable message to the bankruptcy bar of the district for future reference.").
\end{itemize}
ing preferable federal procedures, local bias, or early federal trial dates. Here there is no indication that federal procedures are preferable. Likewise, it seems clear from Congress' willingness to force abstention that local bias is not at the root of the "related to" bankruptcy jurisdiction. Although local bias could justify protective jurisdiction, it seems Congress' motivation in creating the "related to" bankruptcy jurisdiction was faster federal trials. Trial in the "quickest" forum would result in a more efficient bankruptcy system, including early reorganization resolution and faster liquidations. Achieving these ends can only help the national economy.

Moreover, one of the purposes of bankruptcy is to provide the bankruptcy debtor with a fresh start. Congress intended to free the debtor from most of his or her debts so he or she could start anew. Obviously, the quicker the bankruptcy proceeding is resolved, the sooner the debtor can begin again. All of these beneficial goals justify Congress' desire to resolve bankruptcies quickly. But if state trials of cases "related to" bankruptcy can further these ends just as well as federal trials, then the federal court must abstain. When the trial delays are equal, the states' interest in interpreting its own laws mandates a state forum.

The mandatory abstention provision protects the states' interests in interpreting and developing state law where those interests do not conflict with the federal interest in speedy bankruptcy proceedings. But Congress did not stop with the mandatory abstention provisions. There is also a discretionary abstention provision, which allows a federal district court to abstain in all types of bankruptcy cases in the interests of justice, comity, or respect for state law.

Thus, even when the statute does not require a federal court to abstain, it still may. Even when a state adjudication might delay a bankruptcy, the federal court may still abstain if the court feels that the state's interests in hearing the case outweigh the federal interest in timely resolution of all bankruptcy proceedings. In essence, the discretionary abstention

265. See supra text accompanying notes 152-54.
266. See supra text accompanying note 191. See also In re Gianakas, 75 Bankr. 272 (N.D. Ill. 1986).
267. 3 L. KING, COLLIER ON BANKRUPTCY ¶ 525.02 (15th ed. 1985).
268. See supra note 43.
269. As the court said in In re Allegheny, Inc.: "In exercising our discretion, we must look at what will most reasonably provide for economical and expeditious
provisions provide for a balancing of federal and state interests to determine what forum should decide a "related to" case. This balancing test is somewhat like the one Professor Goldberg-Ambrose suggests, but the most important difference is that it is a legislatively-enacted balancing test rather than a constitutional command. It is evidence that the political process does act as a check on Congress' willingness to enact protective jurisdiction statutes that allegedly usurp state judicial power.

When might the federal court exercise its discretion to abstain? Most basically, the court must balance the delay inherent in discretionary abstention against the state's inter-

administration of this estate." 68 Bankr. 183, 192 (Bankr. W.D. Pa. 1986). Or as the court said in In re Aristera:

The matters of state law alleged in the Complaint are neither novel nor complicated and, thus, neither the interest of comity with state courts nor respect for state law require that this Court abstain. This Court is aware of the backlog of cases on the El Paso state courts' dockets. If this matter were referred to the state courts, there would be at least a one-year delay — and perhaps as much as a three-year delay — before the matter could be heard. The Bankruptcy Court can take up the matter more quickly. It would be in the best interests of the parties and other creditors to have these matters resolved and, if Chaney is indebted to the Debtor, to have the obligation paid so that the Debtor may proceed with its reorganization without needless delay.

Likewise, the court noted that litigation in the bankruptcy court was just as convenient to the parties as litigation in the state courts. Id. See also In re Mike Burns Inn, Inc. 70 Bankr. 863, 865 (Bankr. D. Mass. 1987); In re Earla Industries, Inc., 72 Bankr. 131, 134 (Bankr. E.D. Pa. 1987) (court would not abstain where claim was small, state law was settled, and defendant was in another state); Medina-Figueroa v. Heylinger, 63 Bankr. 572, 575 (D.P.R. 1986) (district court would not abstain in malpractice suit where state court claim had been dismissed and abstention would require the filing of a new action or an attempt to reopen the old one, which had been closed for over three years); In re The Bible Speaks, 65 Bankr. 415, 431 (Bankr. D. Mass. 1986). Other courts have stated that abstention may be appropriate where the matter is only tangentially related to the case. Cf. In re Sunwest Distributors, 69 Bankr. 861, 866 (Bankr. S.D. Cal. 1987); see also In re J.F. Naylor and Co., Inc., 67 Bankr. 192, 194 (Bankr. M.D. La. 1986).

Alternatively, the court in In re Artic Enterprises, Inc., 68 Bankr. 71, 77-78 (D. Minn. 1986), said that discretionary abstention was proper where the moving party is not acting in good faith or where the state court is a more convenient and better suited forum for the case. It should also be noted that § 1334(c)(3) is not explicitly limited to "related to" cases, and thus a court might abstain in a "core proceeding." See, e.g., In re Elegant Concepts, Ltd., 61 Bankr. 723, 729 (Bankr. E.D.N.Y. 1986); In re Pankau, 65 Bankr. 204 (Bankr. N.D. Ill. 1986).

There is some question whether a state action must be pending to require abstention or whether a federal court must abstain if a state proceeding could be commenced and concluded before a federal proceeding could be concluded, even though a state action is not already filed. See supra note 44. If Congress were truly concerned with balancing state and federal interests, the latter interpretation would seem most logical.
ests in interpreting and developing state law. The greater the delay, and more specifically, the greater the likelihood that delay will have an adverse effect on the bankruptcy proceeding, the greater the state's interests must be. One can imagine that the federal interest in resolving reorganizations may mean that discretionary abstention is less appropriate in a reorganization case where plans must be approved and ongoing negotiations are common than it would be in a liquidation.270

Most prominently, cases where the state law on a given point is unsettled are likely candidates for discretionary abstention.271 For instance, where a claim involves a novel question or an issue on which state court decisions are split or are unduly confusing, abstention is justified.272 In these cases, the state courts are the appropriate courts to develop the state's laws, and abstention allows them to do that. In this regard abstention operates much like a state certification procedure, except that the federal court passes off the entire case and not just one issue.

Alternatively, abstention might be appropriate where the state recognizes the right to jury trial and a jury is demanded. Given that the right to jury trial in bankruptcy court is unsettled273 and that there may be institutional differences between

270. In abstaining in *In re* World Financial Services Center, Inc., 64 Bankr. 980, 990 (Bankr. S.D. Cal. 1986), the court noted the following: "Additionally, this case has been converted to a Chapter 7 case and there is not the administrative urgency typically found in a Chapter 11 case. There is no reorganization effort being contemplated and as such, no pending plan."


272. Cf. *In re* Texas Turn-Key Operators, Inc., 70 Bankr. 193 (Bankr. S.D. Tex. 1986) (where law was settled and abstention might result in two inconsistent state court determinations the court would not abstain).

273. In *In re* Wallrich Carpets, Inc., 66 Bankr. 420 (Bankr. S.D. Fla. 1986), defendant had requested a jury and the case was "wholly governed by state law." *Id.*
juries in state and federal court,274 abstention may be appropriate. Finally, the court might abstain where there are no prominent federal or state interests involved but the case is one which, absent the bankruptcy, would have usually been tried in a state court. That is, where it is a “coin toss” between state and federal interests, the state court should be allowed to try the case.275

In addition to the abstention provisions, Congress protected state sovereignty when it made the “related to” bankruptcy jurisdiction concurrent but not exclusive.276 Therefore, non-diverse debtor plaintiffs can for whatever reason always choose to sue in state court. Thus, as a result of the abstention provisions and the concurrent jurisdiction provision, not all cases “related to” bankruptcy will be litigated in federal court.277 Likewise, no one area of the law, for example, con-

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274. See, e.g., Mishkin, supra note 3, at 157-60.
277. See, e.g., Goldberg-Ambrose, supra note 3, at 595-608. Professor Goldberg-Ambrose is particularly concerned with the systematic displacement of state courts. Id. at 607. If state courts are systematically displaced in a given area of litigation, then the states will allegedly lose control over the interpretation and development of state law in those areas, and there are grave risks of confusion regarding accountability for decisions. There are several responses to Professor Goldberg-Ambrose's concerns. One is that since the forties we have relied (except when Usery was the law) upon the political process to gauge accountability when questions of state and federal power are involved. See supra text accompanying notes 202-258. Another is that Congress has never passed any statute systematically displacing state courts and leaving state law as the rule of decision. The closest was § 301 of the Taft-Hartley Act, and the Supreme Court interpreted that “jurisdictional” statute as authorizing the creation of federal common law rather than as an expansive category of protective jurisdiction. It is respectfully submitted that that interpretive approach is appropriate when and if Congress arguably removes a vast area of law from state courts but is not clear in doing so. It is clear that the bankruptcy cases do not systematically displace state courts. See supra text accompanying notes 269-273. More likely, the displacement is akin to that which occurs in diversity jurisdiction, although probably less, and
tracts, property, landlord-tenant, is being removed en masse to federal court. There will not be what Goldberg-Ambrose calls the "systematic displacement of state courts" in certain areas of the law. Only particular cases involving bankruptcy debtors will be heard in federal, rather than state, court. Thus, state courts will continue to control the development of state law and will remain accountable to the state citizenry. Moreover, state court decisions will be binding on the federal courts just as in diversity cases.

The "related to" bankruptcy jurisdiction also has another positive side effect. This discussion of "related to" jurisdiction has dealt with a case where the bankruptcy debtor is the plaintiff in the case. The reason for this is definitional and arises from the historic and statutory bankruptcy framework. Under the statute, if a creditor files or prosecutes a claim against the debtor, the claim is a core proceeding, even if it is a state law claim. The reason for this goes to the heart of our bankruptcy system. The system is based on the assumption that an orderly, centrally-controlled claims administration is best for maximization of creditor payoffs. If creditors could litigate their claims in state court, an inevitable race to the courthouse would ensue, and federal administration would be meaningless. Thus, creditor claims are core proceedings. No one has questioned the federal interest in having federal tribunals decide creditor claims, nor has anyone questioned the federal jurisdictional foundation for such cases. But if the creditor's claim is created by state law and there is no diversity, the same issues discussed herein must inevitably arise.

Moreover, if in a non-diversity creditor suit the debtor asserts a state law counterclaim, the bankruptcy jurisdictional statutes provide that the counterclaim is also a core proceed-

Professor Goldberg-Ambrose sees little or no problem with diversity jurisdiction vis-a-vis state power and accountability. Goldberg-Ambrose, supra note 3, at 606-08. Finally, Goldberg-Ambrose's hypothesis seems to be that federal courts will change state law. However, the actual effect of systematic displacement of state courts through protective jurisdiction is to freeze previous state law, which federal courts are then required to follow. The problem is like the flip side of what would occur if Congress removed a large branch of jurisdiction from the federal court. State judges then would be faced with the option of ignoring Supreme Court precedents or, as the sixth amendment counsels them, following those precedents, and thus freezing existing federal law. See HART & WECHSLER (2d ed.), supra note 3, at 363-64.

278. Goldberg-Ambrose, supra note 3, at 607.
280. See 11 U.S.C. § 362, which stays all such actions when a bankruptcy petition is filed.
Thus, without "related to" jurisdiction an anomalous situation would arise. If a creditor asserted a claim, the federal court would have jurisdiction; and, if the debtor asserted a counterclaim against a creditor filing a claim, the federal court would have jurisdiction of the counterclaim. But, absent protective jurisdiction, if the creditor did not assert a claim because he chose not to, or did not have one (in which case he would not be a creditor), the debtor could not sue the creditor in federal court on a state law claim, absent diversity. This situation would be anomalous because timely collection and liquidation of debtor claims can be just as advantageous to other creditors as preventing the creditors' race to the courthouse. Thus, the "related to" bankruptcy jurisdiction rationally closes the jurisdictional gap that might otherwise exist.

The question of personal injury cases related to bankruptcy presents an interesting aside. As noted earlier, the statute literally requires these cases to be tried in the district court, and the abstention provisions do not expressly apply to them. Under that reading, even if timely adjudication of a novel state tort question could occur in state court, the federal court could not abstain. Perhaps Congress felt federal procedures were preferable and that federal litigation would facilitate the bankruptcy court's ability to monitor pending litigation and total claims against debtors. But neither congressional concern with state court bias nor congressional preference for federal forums clearly appears. Under a "no abstention" reading, whole areas of personal injury litigation could conceivably be litigated in federal rather than state court if a bankruptcy debtor or debtors were the only defendant(s) in a certain class of cases. Given that potential risk and the lack of clear congressional intent or purpose, the courts have interpreted the statutes to allow discretionary abstention in such cases.

From this it can be seen that the political process has served as an adequate check on protective jurisdiction in the bankruptcy area. Protective jurisdiction over cases "related to" bankruptcy is not an undue expansion of federal judicial power at the states' expense for several reasons: concurrent jurisdiction over "related to" bankruptcy, the abstention provi-

282. See supra text accompanying notes 45-46.
283. See supra note 43.
sions, and the extent to which bankruptcy law already involves federal adjudication of state law matters. Bankruptcy is a prime example of Hart and Wechsler’s statement that federal law is interstitial in nature because it fills gaps left in the backdrop of state law. Bankruptcy law relies heavily on state law. The powers of the trustee (as well as the debtor in possession) to avoid certain transfers are derived from state law. State law also defines the “property rights” of the federal bankruptcy estate. Many other bankruptcy issues, including core matters, turn on issues of state property law, state security interest laws, and state fraudulent conveyance law. With federal judges and federal bankruptcy judges already deciding all these frequently determinative issues of state law, it does not seem an undue expansion of federal power to include some state law “related to” cases between non-diverse parties when to do so furthers vital national interests.

VIII. CONCLUSION

The “related to” bankruptcy jurisdiction over cases between non-diverse parties in which state law governs the decision of the case is constitutional under article III. This jurisdiction is an example of “protective jurisdiction,” which Congress may create for any of several reasons. If Congress acts pursuant to a valid article I power and the means it chooses, a protective jurisdiction statute, are rationally related to the ends, then a case within the grant of protective jurisdiction “arises under a . . . law of the United States” as article III says it must. Supreme Court cases like Osborn, Lathrop,

284. HART & WECHSLER (2d ed.), supra note 3, at 470-71. See also In re Finley, 62 Bankr. 361, 368 (Bankr. N.D. Ga. 1986) (federal court cannot abstain merely because state law is involved as bankruptcy court must constantly apply state law to exercise its specific jurisdiction over estate property); Countryman, The Uses of State Law in Bankruptcy Cases (Part I), 47 N.Y.U. L. REV. 407 (1972); Eisenberg, State Law in Bankruptcy, 28 UCLA L. REV. 953 (1980); Hill, The Erie Doctrine in Bankruptcy, 66 HARV. L. REV. 1013 (1953).
287. See, e.g., 28 U.S.C. § 157. Moreover, 28 U.S.C. § 157(b)(3), which provides that the bankruptcy judge shall determine whether a matter is a core or non-core proceeding, goes on to provide: “a determination that a matter is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State laws.” Thus Congress foresaw and warned that even core matters may be affected by and involved with state, rather than federal, law.
Beeler, and Austrian support the constitutionality of the protective jurisdiction doctrine.

Many commentators have suggested limits on protective jurisdiction that are mainly derived from the text of article III. These limits unnecessarily hamper congressional power over national interests. Although article III does serve as some check on the limits of congressional action, the primary checks are article I and, as in any case involving article I powers and state sovereignty, the political process. In this vein, Wechsler's articulation of the basis for protective jurisdiction and, more particularly, the Wechsler variant are the most persuasive statements of the theory of protective jurisdiction. They are consistent with precedent, attractively simple, and minimize judicial interference with legislative action.

Although there is some doubt that the political process is ever an adequate check on congressional action, the "related to" bankruptcy jurisdiction reveals that the political process can and does work in the protective jurisdiction context. Congress has protected state interests by providing for concurrent, but not exclusive, jurisdiction and by providing for both mandatory and discretionary abstention. In total, these measures protect the states' interest in interpreting and developing their own law and at the same time further the federal interest in an efficient bankruptcy system.