One Hundred Years of Federal Bankruptcy Law and Still Clinging to an In Rem Model of Bankruptcy Jurisdiction

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One Hundred Years of Federal Bankruptcy Law and Still Clinging to an In Rem Model of Bankruptcy Jurisdiction

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ONE HUNDRED YEARS OF FEDERAL BANKRUPTCY LAW AND STILL CLINGING TO AN IN REM MODEL OF BANKRUPTCY JURISDICTION

Ralph Brubaker*

I. INTRODUCTION

In commemorating the 100th anniversary of the Bankruptcy Act of 18981 and what has since been continuous federal bankruptcy law, the impulse to reflect can wander in many different directions. No historical inventory of the progression of our bankruptcy law would be complete, though, without some focus on the bankruptcy jurisdiction of the federal courts. Perhaps no other aspect of bankruptcy law remains as steeped in historical esoterica as does jurisdiction. Historical concepts retain a very heavy influence on bankruptcy jurisdiction, and of course, the jurisdictional scheme of the 1898 Act occupies the bulk of our historical experience. Understanding the jurisdictional influences at work in the 1898 Act, therefore, is an enterprise with much contemporary value.

The forward-looking by-products of a jurisdictional retrospective are also noteworthy. Federal bankruptcy jurisdiction is rapidly assuming great significance in the larger scheme of federal jurisdiction and dispute resolution in general, especially in confronting the challenges of complex litigation such as mass torts. Federal bank-

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* Associate Professor of Law, Emory University School of Law. This paper is an amplified and annotated version of the author's remarks at a symposium, 100 Years of Bankruptcy Law: Looking Forward by Looking Back, held at the annual meeting of the Creditors' and Debtors' Rights Section of the Association of American Law Schools on January 9, 1999, in New Orleans, Louisiana. The author thanks Bruce Markell for the invitation to participate in this symposium and Tom Arthur, David Bederman, Bill Carney, Rich Freer, Charles Shanor, and Robert Schapiro for helpful comments on an earlier draft of this piece. The observations made in this essay have evolved out of a larger project, entitled On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory, 41 WM. & MARY L. REV. (forthcoming 2000).

Bankruptcy proceedings contain unique consolidating features that simply are not available in any other forum, state or federal. That fact is already pushing at the edges of the jurisdiction of the federal bankruptcy court. Moreover, at some point, bankruptcy’s unique jurisdictional and procedural advantages may well force us to reconsider what “the subject of Bankruptcies” really is and when, for example, it is appropriate to resort to federal bankruptcy proceedings as a means of managing massive litigation—even for what we would normally regard as an eminently “solvent” debtor. Those are questions beyond the modest ambitions of this essay, but they highlight, nonetheless, the ongoing importance of federal bankruptcy jurisdiction. And federal bankruptcy jurisdiction is, very much, a product of its history. In fact, for most purposes the only meaningful way to explain bankruptcy jurisdiction is to explain the history of bankruptcy jurisdiction.

This essay sketches the historical development of bankruptcy jurisdiction as a means of assessing the prevailing contemporary model of the outer limits of federal bankruptcy jurisdiction, as embodied primarily in the so-called Pacor test. This historical lens reveals an anomalous in rem slant that persists in federal bankruptcy jurisdiction, despite both clear congressional intent to rid bankruptcy jurisdiction of in rem strictures and significant deleterious consequences for the efficacy of federal bankruptcy litigation.

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3 See, e.g., Lindsey v. O’Brien, Tansi, Tanzi & Young Health Care Providers (In re Dow Corning Corp.), 86 F.3d 482, 485-95 (6th Cir. 1996) (finding federal bankruptcy jurisdiction over all plaintiffs’ claims against the co-defendants of debtor Dow Corning in breast-implant litigation).

4 U.S. CONST. art. I, § 8, cl. 4.

5 Professor Plank believes that some indication of debtor insolvency should be considered a constitutional prerequisite to federal bankruptcy relief, as an appropriate limitation on both the Article I federal bankruptcy power and the Article III federal judicial power. See Thomas E. Plank, Why Bankruptcy Judges Need Not and Should Not Be Article III Judges, 72 Am. Bankr. L.J. 567, 629-38 (1998) [hereinafter Plank, Article III Bankruptcy Judges]; Thomas E. Plank, The Constitutional Limits of Bankruptcy, 63 Tenn. L. Rev. 487, 527-59 (1996).

6 So-called for the opinion that produced it, Pacor, Inc. v. Higgins, 743 F.2d 984 (3rd Cir. 1984), discussed infra Part V.A.
II. THE ENGLISH IN REM MODEL OF BANKRUPTCY JURISDICTION

American bankruptcy jurisdiction, of course, developed from an English system, which itself had quite a history. The English model of a jurisdiction in bankruptcy was, very explicitly, an in rem, property-based jurisdiction—centered around the construct of a bankrupt’s “estate.” The English bankruptcy commissioners, who exercised bankruptcy jurisdiction under the supervision of the Lord Chancellor in Equity, had jurisdiction over administration of the bankrupt’s estate, for ultimate distribution to the bankrupt’s creditors. As part of the administration of the estate, the commissioners could, inter alia, pass on the validity of creditors’ claims.7

This English version of bankruptcy jurisdiction, however, was limited to jurisdiction over a debtor’s property that actually found its way into the hands of the commissioners and the estate’s representative, the assignee in bankruptcy (who would now be known as the bankruptcy trustee). Thus, if a determination was required to ascertain whether property belonged in the bankrupt’s estate, there was no “bankruptcy” jurisdiction, as such, over the matter. For example, if an assignee sought to recover money or property from a third party, contending that the money or property was owing to or owned by the bankrupt and, therefore, should be included in the bankrupt’s estate for the benefit of the bankrupt’s creditors, bankruptcy jurisdiction did not extend to the assignee’s action. The assignee could pursue such an action only through a formal complaint in a court of law or by a formal bill in equity, depending on the character of the action itself as either legal or equitable in nature.8

Vice-Chancellor Shadwell concisely summarized the reach of English bankruptcy jurisdiction this way:

[T]he jurisdiction in bankruptcy has authority to deal only with that which is the bankrupt’s estate; but has no power to determine what is the bankrupt’s estate. If the question be a legal one it must be tried at law; and if it be an equitable one, it must be decided in this Court.

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8 See McCoid, supra note 7, at 29-31; Plank, Article III Bankruptcy Judges, supra note 5, at 577, 583, 585 & n.110, 586-87, 591, 595, 611, 613.
But when you have determined what is the property of the bankrupt, the whole administration of it falls under the jurisdiction of the Court in bankruptcy.\(^9\)

So we see in the English model a bifurcation of jurisdiction. There was in rem jurisdiction over property rightfully in the possession of the estate, and bankruptcy jurisdiction extended to administration of that property for the benefit of the bankrupt’s creditors. If an assignee were required to sue someone to recover money or property for the estate, however, there was no “bankruptcy” jurisdiction at all; such an action required an ordinary formal suit in the appropriate court.

### III. THE EARLY AMERICAN MODEL OF A GENERAL FEDERAL BANKRUPTCY JURISDICTION

In establishing federal bankruptcy law, early American bankruptcy statutes (prior to the 1898 Act) also conferred bankruptcy jurisdiction on the federal courts. Operative language in both the Bankruptcy Act of 1841\(^10\) and the Bankruptcy Act of 1867\(^11\) contained nearly identical grants of federal jurisdiction over “all matters and proceedings in bankruptcy.”\(^12\) Of course, if that statutory reference to “bankruptcy proceedings” were limited to the English notion of “bankruptcy proceedings,” it would exclude an assignee’s suits to recover money or property for the estate. But determining the scope of federal bankruptcy jurisdiction (vis-à-vis the jurisdiction of the state courts) implicates an issue of judicial federalism that was unknown to the English system.\(^13\) And Justice Story placed a

\(^9\) Halford v. Gallow, 60 Eng. Rep. 18, 20 (Ch. 1842).
\(^10\) Ch. 9, 5 Stat. 440 (repealed 1843) [hereinafter 1841 Act], reprinted in 10 COLIER ON BANKRUPTCY 1738-45 (James Wm. Moore et al. eds., 14th ed. 1978) [hereinafter COLIER (14th ed. 1978)].
\(^11\) Ch. 176, 14 Stat. 517 (amended 1868, 1870, 1872, 1873, 1874, 1876, and repealed 1878) [hereinafter 1867 Act], reprinted in 10 COLIER (14th ed. 1978), supra note 10, at 1746-82.
\(^12\) 1841 Act § 6; 1867 Act § 1. The jurisdictional provisions of the very first U.S. bankruptcy statute, the Bankruptcy Act of 1800, ch. 19, 2 Stat. 19 (repealed 1803), were more cryptic and did not receive any meaningful judicial illumination. See generally Ralph Brubaker, ON THE NATURE OF FEDERAL BANKRUPTCY JURISDICTION: A GENERAL STATUTORY AND CONSTITUTIONAL THEORY, 41 WM. & MARY L. REV. (forthcoming 2000) (manuscript at 9-10, on file with author) [hereinafter Brubaker, Bankruptcy Jurisdiction Theory].
\(^13\) See Minnesota Co. v. St. Paul Co., 69 U.S. (2 Wall.) 609, 633 (1864) (noting that practice in the English courts is not determinative "in the sense which this Court has sanctioned
uniquely American spin on the idea of a *federal* jurisdiction over "bankruptcy proceedings" in a couple of early opinions construing the 1841 Act—one while riding circuit in his capacity as a Circuit Justice," and the second in the Supreme Court case of *Ex parte Christy*."

For Justice Story, the construct of the bankrupt's "estate" remained central to bankruptcy jurisdiction, just as it had in England. But Story's concept of *federal* bankruptcy jurisdiction was not the equivalent of English bankruptcy jurisdiction. Noting that "the assignee is vested with all the rights, titles, powers, and authorities, to sell, manage, and dispose of the estate and property of the bankrupt" and "to sue for and defend the same . . . as fully as the bankrupt might before his bankruptcy," Justice Story construed *federal* jurisdiction over "proceedings in bankruptcy" to encompass "all cases where the rights, claims, and property of the bankrupt, or those of his assignee, are concerned, since they are matters arising under the act, and are necessarily involved in the due administration and settlement of the bankrupt's estate." According to Justice Story, then, *federal* jurisdiction over "bankruptcy proceedings" extends to "the ascertainment and adjustment of all claims and rights in favor of or against the bankrupt's estate.""
Thus, in our federal system of dual sovereigns with both state and federal courts, the American model of "bankruptcy" jurisdiction was established, through the early American bankruptcy statutes, as that of a general federal bankruptcy jurisdiction over any claim to which a bankruptcy estate is a party, whether that claim is made by or against the estate.

IV. THE 1898 ACT'S REVIVAL OF THE IN REM MODEL OF BANKRUPTCY JURISDICTION

The more expansive model of a general federal bankruptcy jurisdiction over all claims by and against a bankruptcy estate, under the 1841 and 1867 Acts, was seen as a concomitant to effectual and efficient administration of bankruptcy estates. This jurisdictional scheme, however, produced a persistent tension between the federal interest in estate administration and the localized interests of particular litigants, witnesses, and attorneys, who often found the federal forum inconvenient as compared with state courts. In fact, each of the three early "temporary" bankruptcy statutes was repealed, in large part, because of the relative inconvenience of the federal courts. And in the making of the first bankruptcy statute in the era of "permanent" bankruptcy law, the 1898 Act, there were widely-held "states' rights" misgivings about conferring too much power on the federal courts, especially amongst Southerners, who deeply disdained the "carpetbagging" federal judges. The 1898 Act, therefore, responded to this animosity toward a general federal jurisdiction over "all matters and proceedings in bankruptcy" by narrowing the compass of federal bankruptcy jurisdiction.

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22 See 31 Cong. Rec. 1785 (1898) (statement of Rep. Henderson, Chairman, House Judiciary Committee); Williams v. Austrian, 331 U.S. 642, 648-49 & n.15 (1947); id. at 662-67 (Frankfurter, J., dissenting); Schumacher v. Beeler, 293 U.S. 367, 374 (1934); Toledo Fence &
The 1898 Act reduced the sweep of federal bankruptcy jurisdiction essentially through a return to the English *in rem* model of bankruptcy jurisdiction, in the now-infamous summary/plenary jurisdictional dichotomy erected by the 1898 Act.\(^{23}\) Under the 1898 Act, there was summary *in rem* jurisdiction in the federal courts to adjudicate all disputes incident to administration of property in the actual or constructive possession of the court (through its officer, the bankruptcy trustee),\(^{24}\) and this summary *in rem* jurisdiction included adjudication of all creditors' claims against the estate.\(^{25}\) There was no summary *in rem* jurisdiction, however, over trustees' suits to recover money or property for the estate—so-called plenary suits against "adverse claimants"—and that is the means by which the 1898 Act curtailed federal bankruptcy jurisdiction. The 1898 Act restricted federal jurisdiction over a trustee’s plenary *in personam* suits.\(^{26}\)

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Post Co. v. Lyons, 290 F. 637, 645 (6th Cir. 1923). Even with its measures to abate federal bankruptcy jurisdiction, a principal objection to the 1898 Act was "with the extensive powers it confers on the Federal courts." H.R. REP. NO. 55-65, pt. 2, at 149 (1898) (entitled "Views of the Minority"); see also 31 CONG. REC. 1793 (1898) (statement of Rep. Underwood); id. at 1803-04 (statement of Rep. Henry).

\(^{23}\) Thus, while section 2a(7) of the 1898 Act gave federal courts jurisdiction to "[c]ause the estates of bankrupts to be collected ... and determine controversies in relation thereto," the scope of this jurisdiction was restricted by the proviso "except as herein otherwise provided." 1898 Act § 2a(7). Section 25 of the Act provided otherwise with respect to plenary suits, giving the federal courts jurisdiction only "in the same manner and to the same extent as though such [bankruptcy] proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants." 1898 Act § 23a. See generally 2 COLIER (14th ed. 1976), supra note 10, ¶ 23.12.

\(^{24}\) See 2 COLIER (14th ed. 1976), supra note 10, ¶ 23.03, at 443.

\(^{25}\) See Katchen v. Landy, 382 U.S. 323, 329-30 (1966) ("The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a res,' and thus falls within the principle ... that bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property within their possession." (citation omitted) (quoting *Gardner v. New Jersey*, 329 U.S. 565, 574 (1947)).

\(^{26}\) See Taubel-Scott-Kitzmiller Co. v. Fox (In re Cohen Hosiery Co.), 264 U.S. 426, 430-34 (1924); 2 COLIER (14th ed. 1976), supra note 10, ¶¶ 23.05[1], at 471-72; 23.05[3]-[4], 23.06[1]. The summary/plenary dichotomy also implicated differing procedural modes. "Summary" jurisdiction accurately connoted the more informal procedures used in summary matters, whereas a plenary suit was an ordinary civil action conducted according to the normal rules of civil procedure. See 2 COLIER (14th ed. 1976), supra note 10, ¶ 23.02. Summary process in bankruptcy proceedings was a tradition imported from England. See Ex parte Matthews, 26 Eng. Rep. 1266, 1267 (Ch. 1754); THOMAS COOPER, THE BANKRUPT LAW OF AMERICA COMPARED WITH THE BANKRUPTLAW OF ENGLAND 117 (1801). An assignee suit against an adverse claimant, though, was not encompassed within English "bankruptcy" jurisdiction and, thus, required a plenary action in a court of law or equity. See supra Part II.
In our federal system, then, absence of federal jurisdiction over a trustee’s plenary *in personam* suits meant, for the most part, that the trustee had to bring such suits in state court. That was not universally true, though, because in limited instances the 1898 Act expressly granted the federal courts bankruptcy jurisdiction over a trustee’s plenary *in personam* suits. For example, a trustee’s avoidance actions could be brought in federal court. And in corporate reorganization proceedings, any plenary suit—even on a debtor’s state-law cause of action to which the trustee merely succeeded as property of the estate—could be pursued in federal court as part of the “bankruptcy proceedings.” In fact, it was in that very context, a corporate reorganization case, that the Supreme Court, in the momentous decision in *Williams v. Austrian*, reaffirmed Justice Story’s broad view of the concept of federal “bankruptcy proceedings.” The concept of a federal jurisdiction in “bankruptcy proceedings” endured as a general federal jurisdiction over all claims by and against the bankruptcy estate, including a trustee’s

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27 The primary exceptions were federal jurisdiction by consent and federal plenary jurisdiction over suits to avoid liens and recover preferences and fraudulent conveyances. See generally 2 COLLIER (14th ed. 1976), supra note 10, ¶ 23.08, 23.14, 23.15. In addition, section 25 did not apply to restrict plenary jurisdiction in corporate reorganization proceedings under Chapter X. See generally 6 COLLIER (14th ed. 1978), supra note 10, ¶ 3.18.


29 Section 2 of the 1898 Act vested the federal courts with “such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings.” Pub. L. No. 55-171, ch. 541, 30 Stat. 544, 545 (emphasis added); see also 1 COLLIER (14th ed. 1974), supra note 10, ¶ 2.02[1] (reprinting original text of 1898 Act § 2). When Congress enacted the corporate reorganization provisions of Chapter X in 1938, this provision was amended to a “jurisdiction in *proceedings under this [1898] Act*” Chandler Act of 1938, Pub. L. No. 75-696, ch. 575, 52 Stat. 840, 842 (emphasis added); see also 1 COLLIER (14th ed. 1974), supra note 10, ¶ 2.02[2] (marking text of 1898 Act § 2 to reflect 1938 amendments). Those amendments also expressly made section 23’s limitations on federal jurisdiction over plenary suits inapplicable in Chapter X reorganization proceedings. See 1898 Act § 102. Thus, the full breadth of section 2’s general federal jurisdiction of “bankruptcy proceedings” to “cause the estates of bankrupts to be collected” was then operative in corporate reorganization proceedings. 1898 Act § 2a(7).

30 381 U.S. 642 (1947).

31 See id. at 646-48, 661 (citing with approval *Babbitt v. Dutcher*, 216 U.S. 102, 106-08 (1910) (tracing 1898 Act § 2 to 1867 Act § 1 to 1841 Act § 6)).
plenary suit to recover money or property from an adverse claimant—even though such a suit would not be a part of the more limited English in rem concept of bankruptcy jurisdiction and "bankruptcy proceedings."

The legacy of the 1898 Act's jurisdictional scheme, therefore, is a rather complicated amalgam of both the English in rem model of bankruptcy jurisdiction and Justice Story's conception of a general federal bankruptcy jurisdiction over all claims by and against a bankruptcy estate. The 1898 Act is probably most well-known for its in rem jurisdiction, but the 1898 Act clearly contained elements of a broader in personam rationale for federal bankruptcy jurisdiction.

V. OUR CURRENT SYSTEM: PERVERSIVE FEDERAL BANKRUPTCY JURISDICTION?

One of the primary targets of the bankruptcy reform efforts of the 1970s, of course, was the 1898 Act's in rem jurisdictional scheme. The federalism concerns that motivated the 1898 Act's restrictive federal bankruptcy jurisdiction had subsided considerably and, consequently, were dwarfed by the manifest inefficiencies and inequities produced by the summary/plenary dichotomy and its splintering of bankruptcy jurisdiction. The jurisdictional provi-

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52 See Williams v. Austrian, 331 U.S. at 646-62. Resuscitation of Justice Story's notion of federal "bankruptcy proceedings" was in order, because section 23 misleadingly spoke in terms of "controversies at law and in equity as distinguished from proceedings in bankruptcy." 1898 Act § 23a (emphasis added). This language, in conjunction with the 1898 Act's return to the English model of bankruptcy jurisdiction, brought a perhaps inevitable conceptual struggle between the English and early American visions of the nature of "bankruptcy proceedings." See generally Brubaker, Bankruptcy Jurisdiction Theory, supra note 12, at 14-20.

53 The in personam strands of the 1898 Act with respect to supplemental bankruptcy jurisdiction, discussed infra Part V.B-C, can be seen in cases such as Bryan v. Bernheimer, 181 U.S. 188 (1901), and Katehen v. Landy, 382 U.S. 323 (1966). See Brubaker, Bankruptcy Jurisdiction Theory, supra note 12, at 22-27, 58-62.

sions of the resulting Bankruptcy Reform Act of 1978\textsuperscript{55} were variously characterized in Congress as: "pervasive,"\textsuperscript{56} "complete,"\textsuperscript{57} "comprehensive,"\textsuperscript{58} "as broad [a] jurisdiction as possible,"\textsuperscript{59} and "as broad as can be conceived."\textsuperscript{60} This pervasive federal bankruptcy jurisdiction was explicitly designed to eliminate the summary/plenary dichotomy and its in rem confines, permitting the federal courts to "exercise in personam as well as in rem jurisdiction in order that they may handle everything that arises in a bankruptcy case."\textsuperscript{61}

Unfortunately, however, we are yet to fully realize this vision of complete, unrestricted in personam federal bankruptcy jurisdiction. A significant stumbling block standing in the way of full in personam bankruptcy jurisdiction is Congress's decision to not make the bankruptcy courts Article III courts. After the Marathon case\textsuperscript{42} and the ensuing Bankruptcy Amendments and Federal Judgeship Act (BAFJA) of 1984,\textsuperscript{43} we are left with federal bankruptcy jurisdiction that is divided between the non-Article III bankruptcy courts and
the federal district courts, and that division predominately follows the lines of the 1898 Act's summary/plenary dichotomy which, of course, itself originated in the English in rem model of bankruptcy jurisdiction. That is an in rem aspect of bankruptcy jurisdiction with which we must suffer, however, at least until it becomes politically feasible to elevate the bankruptcy courts to Article III status. The objective of this essay, though, is to explore a less obvious realm of bankruptcy jurisdiction that remains haunted by in rem ghosts: the outermost limits of federal bankruptcy jurisdiction.

Marathon and the 1984 BAFJA amendments were concerned with an issue of separation of powers, and Marathon's proscription, at its most basic level, was that the entirety of the 1978 Reform Act's pervasive federal bankruptcy jurisdiction cannot be assigned to non-Article III bankruptcy courts. That separation-of-powers holding speaks solely to the proper allocation of federal bankruptcy jurisdiction as between Article III and non-article III federal tribunals. Marathon and BAFJA, however, say nothing about the issue traced in this essay's historical overview, which pertains to the scope of

\[\text{See supra Parts II & IV.}\]


\[\text{See Marathon, 458 U.S. at 87 n.40 (Brennan, J., plurality opinion) (“It is clear that, at the least, the new bankruptcy judges cannot constitutionally be vested with jurisdiction to decide this state-law contract claim against [defendant] Marathon.”).}\]
federal bankruptcy jurisdiction.” Irrespective of the type of federal judicial officer that will exercise it (Article III or non-Article III), what is the full extent of federal bankruptcy jurisdiction?

The scope of federal bankruptcy jurisdiction is, of course, a judicial federalism issue going to the allocation of judicial power as between the federal courts and the state courts. What disputes can we essentially take from the state courts and place before the federal courts through our pervasive federal bankruptcy jurisdiction? This essay will suggest that the scope of federal bankruptcy jurisdiction has been unnecessarily constricted by lingering in rem jurisdictional notions.

A. Pacor’s In Rem Model of “Related To” Bankruptcy Jurisdiction

The scope of federal bankruptcy jurisdiction is still defined by the same statutory grant as that of the 1978 Reform Act: federal bankruptcy jurisdiction over “all civil proceedings arising under [the Bankruptcy Code], or arising in or related to [bankruptcy] cases.” The “related to” jurisdictional nexus is the most expansive portion of this grant and extends federal bankruptcy jurisdiction further than any of the prior bankruptcy statutes. Thus, “related
to” bankruptcy jurisdiction goes beyond even Justice Story’s image of a general federal bankruptcy jurisdiction over all claims by and against the bankruptcy estate. “Related to” bankruptcy jurisdiction creates federal jurisdiction over third-party disputes to which the bankruptcy estate is not a party, but that are nonetheless “related to” a bankruptcy case in some manner.\(^5\)

The dominant test that the courts have adopted to determine whether a third-party dispute is within “related to” bankruptcy jurisdiction is from the Third Circuit’s opinion in *Pacor, Inc. v. Higgins.*

The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being

\(^2\) See *Celotex Corp. v. Edwards*, 514 U.S. 300, 307-08 n.5 (1995). In the legislative process for the 1978 Reform Act, there was explicit recognition that “related to” bankruptcy jurisdiction went beyond claims by and against the estate and would embrace disputes between third parties having some relationship to the bankruptcy case. The Chairman of the legislative Commission on the Bankruptcy Laws of the United States, in comparing the jurisdictional provisions of the Commission’s bill, testified that “related to” jurisdiction “does not even require, for example, that the trustee be a party to the litigation, as long as it can be determined to be ‘related to’ the bankruptcy proceeding.” *H.R. 8200 Hearings, supra* note 40, at 73 (statement of Harold Marsh); see also id. at 114 (statement of Judge Wesley E. Brown, Chairman, Judicial Conference Ad Hoc Committee on Bankruptcy Legislation); id. at 213 (statement of Herbert Minkel, Esq.); id. at 213-14 (statement of Arthur Moller, Esq.); S. 2266* Hearings, supra* note 39, at 484 (statement of Harold Marsh).
administered in bankruptcy. . . . An action is related to bankruptcy if the outcome could alter the debtor’s rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate. 53

Under the Pacor test, then, there is “related to” bankruptcy jurisdiction over a third-party dispute whose outcome could conceivably affect the bankruptcy estate, even though the bankruptcy estate itself is not party to the dispute. Pacor’s “any conceivable effect” test is obviously a very broad test and in many respects is overly broad, to the point of permitting patently unconstitutional exercises of federal jurisdiction over non-diverse state-law claims. 54 At the same time that the Pacor test is too broad, though, it is also excessively narrow—in a manner that betrays it as an in rem anachronism.

As an illustration of how Pacor is too narrow, take the example of a Marathon-like action: debtor with a state-law breach of contract cause against a defendant files a chapter 11 petition, becoming a chapter 11 debtor-in-possession whose bankruptcy estate succeeds to the breach of contract action. Debtor then brings suit against the defendant in federal court pursuant to federal bankruptcy jurisdiction. 55 Federal jurisdiction over that suit on behalf of the debtor’s

53 743 F.2d 984, 994 (3rd Cir. 1984). In Celotex, without adopting any particular test, the Supreme Court noted that the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits have adopted the Pacor test for “related to” jurisdiction, and that the Second and Seventh Circuits have slightly different tests. See Celotex, 514 U.S. at 308-09 n.6. Nonetheless, the Court agreed with so much of the Pacor opinion as stated that “Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate.” Id. at 308 (quoting Pacor, 743 F.2d at 994). The fact that most circuits have nominally adopted the Pacor test masks great disparities in their views as to its proper application. See Brubaker, Bankruptcy Jurisdiction Theory, supra note 12, at 5.

54 See Brubaker, Bankruptcy Jurisdiction Theory, supra note 12, at 74-75. For example, if I have invested heavily (or maybe even not-so-heavily) in a particular public corporation, under the Pacor test my bankruptcy filing will confer federal bankruptcy jurisdiction over any state-law dispute involving the public corporation that could have a “conceivable effect” on the value of my shares. Cf. 8300 Newburgh Road Partnership v. Time Constr., Inc. (In re Time Constr., Inc.), 43 F.3d 1041, 1045 & n.7 (6th Cir. 1995) (finding “related to” jurisdiction over litigation involving a corporation wholly-owned by an individual who had filed bankruptcy proceedings, because “[r]esolution of the state court action would have a substantial effect on the monetary value of [the corporation’s] shares, and thus would have a substantial effect on the value of [the individual shareholder’s] bankruptcy estate”).

55 See Marathon, 458 U.S. at 54.
bankruptcy estate, of course, fits comfortably within Justice Story's idea of a general federal bankruptcy jurisdiction over all claims by and against the estate, and the Marathon opinions presumed the propriety of federal jurisdiction over such a state-law claim as part of the 1978 Reform Act's pervasive federal bankruptcy jurisdiction.\[^{56}\]

Now, imagine that the debtor's state-law suit in federal court is against two defendants—against defendant-1 for breach of contract and against defendant-2 for tortious interference with debtor's contractual relations with defendant-1—and both defendants in that suit make state-law cross-claims against each other for contribution and indemnification, seeking reimbursement for any amounts they might be required to pay the debtor's estate in the suit. The Bankruptcy Rules expressly permit joinder of the debtor's claims against the two defendants\[^{57}\] and the defendants' cross-claims against each other in one action,\[^{58}\] and it makes perfect sense for the defendants' cross-claims to be heard in federal court in conjunction with the debtor's claims against the defendants that give rise to those cross-claims.

Indeed, the efficiency, fairness, and convenience of bundling such logically and factually related claims in one suit is the impetus for the doctrine of federal courts' supplemental jurisdiction (which now subsumes the subsidiary concepts of what were once known as ancillary and pendent jurisdiction).\[^{59}\] Supplemental jurisdiction permits a federal court to hear state-law claims that have no independent basis for federal jurisdiction, but that are nonetheless transactionally related to claims over which the federal court does have independent jurisdiction, and the federal courts routinely em-

\[^{56}\] See supra note 49.

\[^{57}\] "All persons . . . may be joined in one action as defendants if there is asserted against them . . . any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action." FED. R. CIV. P. 20(a), incorporated by reference in FED. R. BANKR. P. 20.

\[^{58}\] "A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter . . . of the original action . . . ." FED. R. CIV. P. 13(g), incorporated by reference in FED. R. BANKR. P. 7013.

\[^{59}\] See generally AMERICAN L. INST., FEDERAL JUDICIAL CODE REVISION PROJECT 11-16 (Tent. Draft No. 2, 1998). As Professor Freer has succinctly observed, "the broad construction of supplemental jurisdiction, when combined with the joinder rules, promotes efficient packaging of disputes and avoids duplicative litigation and the risk of inconsistent results." Richard D. Freer, A Principled Approach to Supplemental Jurisdiction, 1987 DUKE L.J. 34, 36; see also Richard D. Freer, Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit, 50 U. PITT. L. REV. 809, 813-17 (1989).
ploy supplemental jurisdiction to entertain state-law cross-claims such as those in our hypothetical suit.60

Using the Pacor test for "related to" bankruptcy jurisdiction of a third-party dispute, however, the courts have concluded that there is no jurisdiction over cross-claims such as those asserted in the suit by our chapter 11 debtor-in-possession.61 According to the Pacor test, the outcome of those cross-claims could have no effect on the debtor's chapter 11 estate, because the cross-claims will have no impact on the estate's recovery from the defendants. In fact, such a cross-claim presupposes that the bankruptcy estate has already successfully recovered from a particular defendant, and the cross-claim merely reallocates ultimate responsibility for that recovery between the defendants. Therefore, the cross-claims for contribution and indemnification are not "related to" the debtor's bankruptcy case under the Pacor test.62

As this author argues elsewhere at length, such a result evidences an extremely myopic view of the intended function of "related to" bankruptcy jurisdiction.63 In fact, the 1978 Reform Act's

60 See Edward F. Sherman, Counterclaim and Cross-Claim, in 3 James Wm. Moore, Moore's Federal Practice § 13.110[1][c] (3rd ed. 1999). Another common context for the invocation of supplemental jurisdiction is a defendant's impleader, as a third-party plaintiff, of a third-party defendant "who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff." Fed. R. Civ. P. 14(a); see Richard D. Freer, Third-Party Practice, in 3 Moore, supra, § 14.41[3]-[4][a]. The Bankruptcy Rules governing adversary proceedings also permit joinder of such a third-party impleader claim. See Fed. R. Bankr. P. 14 (incorporating by reference Fed. R. Civ. P. 14).

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


63 See Brubaker, Bankruptcy Jurisdiction Theory, supra note 12, at 71-101.
all-encompassing jurisdictional scheme was justified, as a policy matter, on precisely the same grounds of procedural convenience, fairness, and judicial economy that would commend an exercise of supplemental jurisdiction over such cross-claims. 64

Rather ironically, Pacor’s untoward repression of “related to” jurisdiction can largely be attributed to an in rem bias inherent in the Pacor test. Pacor essentially regards the bankruptcy estate as a jurisdictional res. A particular claim is within federal bankruptcy jurisdiction, according to Pacor, if the claim has a sufficient outcome-oriented, functional relationship to the jurisdictional res—Pacor’s “effect on the estate” test. 65 Pacor, then, embraces the old English in rem model of bankruptcy jurisdiction and simply adopts a more expansive in rem nexus.

Pacor does not effectuate the shift from an in rem to an in personam model of bankruptcy jurisdiction envisioned by Congress in abandoning the 1898 Act’s jurisdictional regime; it merely extends the in rem model.

B. Constructing an In Personam Model of “Related To” Bankruptcy Jurisdiction

A true in personam approach to bankruptcy jurisdiction would comprehend the bankruptcy estate as more than a mere jurisdictional res; such an in personam model would view the bankruptcy estate as a jurisdictional person, in the same manner that a corporation is considered a jurisdictional person. Personification of property is one of the hallmarks of such a fictional legal entity, and it is, in fact, common to regard “the bankruptcy ‘estate’ [as] a separate and distinct legal entity.” 66 Constructing the juridical person simpli-

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65 Cf. Richard H. Gibson, Home Court, Outpost Court: Reconciling Bankruptcy Case Control With Venue Flexibility in Proceedings, 62 AM. BANKR. L.J. 37, 62-64 (1988) (arguing that the fundamental nature of bankruptcy jurisdiction is more in rem than in personam, relying on the Pacor test). The Third Circuit itself acknowledged this, in Torkelson v. Maggio (In re Guild & Gallery Plus, Inc.), 72 F.3d 1171, 1182 (3rd Cir. 1996) (“Proceedings affecting the res are within the court’s jurisdiction; proceedings not affecting the res are not.” (quoting Gibson, supra, at 64)); see also Feld v. Zale Corp. (In re Zale Corp.), 62 F.3d 746, 733 (5th Cir. 1995) (“Those cases in which courts have upheld ‘related to’ jurisdiction over third-party actions do so because the subject of the third-party dispute is property of the estate, or because the dispute over the asset would have an effect on the estate.” (footnotes omitted)).

66 CHARLES J. TABB, THE LAW OF BANKRUPTCY § 11.6, at 778-79 (1997). “When a bankruptcy petition is filed, a new entity is created—the bankruptcy estate.” ELIZABETH WARREN,
fies Byzantine relationships, including jurisdictional and joinder complexities, and to that end, the Bankruptcy Code expressly authorizes the bankruptcy estate to sue and be sued as an entity.

If we regard the bankruptcy estate as a federally created legal entity, rather than a jurisdictional res, then Justice Story's conception of a general federal bankruptcy jurisdiction over all claims by and against a bankruptcy estate is not an in rem jurisdiction over claims connected to the res; general federal bankruptcy jurisdiction is in personam jurisdiction over all claims by and against our jurisdictional person—the "bankruptcy estate." When we think about federal bankruptcy jurisdiction in those terms, "related to" jurisdiction over third-party claims is simply a grant of conventional supplemental jurisdiction.

So if we return to our hypothetical lawsuit by the chapter 11 debtor-in-possession, the defendants' cross-claims in that suit are not "related to" the debtor's bankruptcy case because their outcome will or will not affect the jurisdictional res (per Pacor's in rem formulation); those cross-claims are "related to" the debtor's bankruptcy case because they are "related to" the claims of our jurisdictional person—the debtor's bankruptcy estate. The cross-claims are "related to" the bankruptcy estate's claims against the defendants because all of the claims share a close factual, logical, and transactional origin—which, of course, is the rationale for the procedural rules permitting their joinder in one suit and for a conventional exercise of supplemental jurisdiction over state-law cross-claims with no independent basis for federal jurisdiction.

An in personam model of third-party "related to" bankruptcy jurisdiction requires abnegation of Pacor's in rem "effect on the estate" test in favor of a conventional supplemental jurisdiction test. A third-party claim to which the bankruptcy estate is not party should be considered "related to" the debtor's bankruptcy case if it shares a supplemental nexus with a claim by or against the debtor's bankruptcy estate.

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C. *Defending the Constitutionality of an In Personam Model of Federal Bankruptcy Jurisdiction*

The *Pacor* test for “related to” bankruptcy jurisdiction is not the only vestige of the *in rem* model at the outer limits of the scope of federal bankruptcy jurisdiction. The *in rem* model also pervades popular theory of the constitutionality of federal bankruptcy jurisdiction. An *in personam* model of federal bankruptcy jurisdiction, however, finds support in the most orthodox and established of constitutional theories of federal jurisdiction.

Returning to our hypothetical lawsuit by the chapter 11 debtor, finding statutory authority for jurisdiction over the defendants’ cross-claims is only the first step; federal jurisdiction must be a product of both congressional and constitutional sanction. Statutory authority might come from “related to” bankruptcy jurisdiction, as posited herein, or perhaps from the Judicial Code’s general supplemental jurisdiction statute, enacted in 1990.69 Yet, some have suggested that even if there is statutory authority for federal jurisdiction over the defendants’ cross-claims, such an exercise of federal jurisdiction would be an unconstitutional usurpation of judicial power from the state courts.70 That contention, though, is premised on the same sort of *in rem* thinking embedded in the *Pacor* test.

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69 See 28 U.S.C. § 1367 (1994). If those cross-claims are not “related to” the debtor’s bankruptcy case, there are a number of difficulties in employing the supplemental jurisdiction statute as a grant of “supplemental” bankruptcy jurisdiction over such cross-claims. See Susan Block-Lieb, The Case Against Supplemental Bankruptcy Jurisdiction: A Constitutional, Statutory, and Policy Analysis, 62 FORDHAM L. REV. 721, 799-811 (1994). If such cross-claims are “related to” the debtor’s bankruptcy case, as this author asserts, then the supplemental jurisdiction statute is simply redundant and, therefore, irrelevant. See Brubaker, Bankruptcy Jurisdiction Theory, supra note 12, at 101-08.

70 See Block-Lieb, supra note 69, at 784-91. Indeed, *Pacor* itself seemed wary of an unconstitutionally broad interpretation of “related to” bankruptcy jurisdiction. See *Pacor*, Inc. v. Higgins, 743 F.2d 984, 996 n.16 (3rd Cir. 1984); see also Home Ins. Co. v. Cooper & Cooper, Ltd., 889 F.2d 746, 749 (7th Cir. 1989) (Easterbrook, J.) (“We have read [‘related to’ bankruptcy jurisdiction] narrowly not only out of respect for Article III, but also to preserve the jurisdiction of state courts over questions of state law involving persons not party to the bankruptcy.”). The scope of pervasive “related to” bankruptcy jurisdiction, though, was designed to be as broad as the Constitution permits. See Brubaker, Bankruptcy Jurisdiction Theory, supra note 12, at 33-36. A proper interpretation of the exterior perimeter of “related to” jurisdiction, then, requires an active search for those constitutional limits, rather than a rule of construction that attempts to sidestep constitutional complications. See id. at 108-12. And as we’ve seen, the *Pacor* test does not avert constitutional imbroglios. Quite to the contrary, *Pacor*’s literal breadth perpetuates the constitutional quandary inherent in pervasive “related to” bankruptcy jurisdiction. See supra note 54 and accompanying text.
The constitutional basis for federal jurisdiction over those third-party claims becomes clear only when one fully adopts an in personam model of federal bankruptcy jurisdiction.

The argument that federal jurisdiction over the defendants' cross-claims is unconstitutional proceeds from the assumption that there is no independent basis for federal jurisdiction over the debtor-in-possession's state-law claims against the defendants. In the absence of diversity of citizenship, according to this view, the chapter 11 estate's claims against the defendants can be constitutionally maintained in federal court only because they themselves are supplemental claims. Under this theory, state law claims, such as the estate's claims against our defendants, can be entertained in federal court because they are supplemental to ("related to") the debtor's federal petition for bankruptcy relief, with all such state-law claims by and against the bankruptcy estate forming one constitutional federal bankruptcy "case," within the meaning of Article III. This theory, then, portrays jurisdiction over the defendants' cross-claims as unconstitutional, because those claims are merely "related to" the estate's "related to" claims against the defendants—what is cast as an unconstitutionally attenuated related-to related-to relationship, twice removed from the core federal element of the debtor's bankruptcy case, and inviting a potentially limitless number of links in a "related to" chain.

There are a number of flaws in this constitutional theory as applied to federal bankruptcy jurisdiction. Most noteworthy for purposes of this essay, however, is the fact that this theory, developed in

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71 See Block-Lieb, supra note 69, at 779-84.


74 See Brubaker, Bankruptcy Jurisdiction Theory, supra note 12, at 51-63, 108-12.
the context of the common-law precursor to statutory bankruptcy reorganizations—federal equity receivership proceedings—is an in rem theory of supplemental jurisdiction. Indeed, what is regarded as the earliest form of ancillary jurisdiction posited that when a federal court, in the course of a suit with a proper federal jurisdictional basis, obtained possession and control of property, that court could entertain all conflicting claims to the property, regardless of their state or federal character or the citizenship of the parties, through the court’s ancillary jurisdiction.

The jurisdictional basis for receivership proceedings in federal court was by way of an equitable creditor’s bill, seeking an application of a debtor’s assets toward satisfaction of creditors’ claims, founded upon diversity of citizenship as between a plaintiff judgment creditor and the defendant debtor. Once this diversity jurisdiction attached, then, the in rem brand of ancillary jurisdiction provided authority to entertain all creditors’ claims (regardless of citizenship) to the res thus created, and the Supreme Court ex-

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75 See Richard A. Matasar, Rediscovering “One Constitutional Case”: Procedural Rules and the Rejection of the Gibbs Test for Supplemental Jurisdiction, 71 CAL. L. REV. 1399, 1470 (1983) (analogizing bankruptcy jurisdiction to equity receivership jurisdiction); Paul J. Mishkin, The Federal “Question” in the District Courts, 53 COLUM. L. REV. 157, 194 n.161 (1953) (same). The converse also seems to be true. In its receivership cases, the Supreme Court was prone to analogize to general federal bankruptcy jurisdiction. See, e.g., Riehle v. Margolies, 279 U.S. 218, 223 (1929) (citing the bankruptcy case of Kelley v. Gill, 245 U.S. 116 (1917)); White v. Ewing, 159 U.S. 36, 40 (1895) (“In this particular, the jurisdiction of the [federal receivership] court does not materially differ from that of the district court in bankruptcy, the right of which to collect the assets of a bankrupt estate we do not understand ever to have been doubted.”).


77 See generally Thomas K. Finletter, The Law of Bankruptcy Reorganization 3-10 (1939); 1 James Wm. Moore & Robert S. Oglebay, Moore & Oglebay on Corporate Reorganization ¶ 0.04, at 30-33 (1948); Garrard Glenn, The Basis of the Federal Receivership, 25 COLUM. L. REV. 434, 438 (1925). Intervention of equity, premised upon inadequacy of legal remedies, required the plaintiff to have an execution returned unsatisfied. Consent by the defendant to the receivership petition, however, removed this requisite. See generally Stanley L. Sabel, Equity Jurisdiction in the United States Courts with Reference to Consent Receiverships, 20 IOWA L. REV. 83 (1934).


79 See Rouse v. Letcher, 156 U.S. 47, 49-50 (1895) (citing Stewart v. Dunham); People’s
tended the in rem rationale to also include the receiver's suits to enhance the res by pursuing the debtor's causes of action in federal court (in much the same way, of course, as Pacor has expanded the reach of the in rem model of federal bankruptcy jurisdiction). All claims by and against the receivership res, thus, were considered part of the same constitutional "case," commenced by the creditor's bill.

This constitutional theory plainly labors under the same in rem foible as does Pacor. When we envisage the bankruptcy estate as a federally created entity, rather than a mere jurisdictional res, a very different constitutional theory of federal bankruptcy jurisdiction emerges. Mr. Chief Justice Marshall's venerable opinion in Osborn v. Bank of the United States teaches that federal law is an "original ingredient" in any claim by or against a juridical person created by federal law. Consequently, any such claim by or against a federally created entity is one "arising under... the Laws of the United States" within the meaning of Article III and, therefore, has an independent constitutional basis for federal jurisdiction as a constitutional federal question.


See White v. Ewing, 159 U.S. at 39 (citing Freeman v. Howe, Krippendorf v. Hyde, and Rouse v. Letcher); cf. Dewey v. West Fairmont Gas Coal Co., 123 U.S. 329, 331-33 (1887) (in diversity suit for breach of contract, there was ancillary jurisdiction to seek recovery of fraudulent conveyance made by insolvent defendant, without regard to citizenship of recipient of transfer); Stewart v. Dunham, 115 U.S. at 64 (nondiverse claimants could join creditors' bill against fraudulent conveyance defendants, because "it would be merely matter of form whether the new parties should come in as co-complainants, or before a master, under a decree ordering a reference to prove the claims of all persons entitled to benefit" from any assets recovered). As Justice Brandeis stated, the "appointment of a receiver of a debtor's property by a federal court confers upon it, regardless of citizenship and of the amount in controversy, federal jurisdiction to decide all questions incident to the preservation, collection, and distribution of the assets." Riehle v. Margolies, 279 U.S. at 223.

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

Id. at 823-24.

U.S. CONST. art. III, § 2, cl. 1.

See Matasar, supra note 75, at 1445 n.206; Mishkin, supra note 75, at 187 ("At the very least, [Osborn] establishes that the judicial power under the federal question clause of Article III may be brought to bear upon any litigation to which a congressionally chartered corporation is a party, though the substantive rule for decision be state-made."). In American National Red Cross v. S.G. & A.E., 505 U.S. 247 (1992), the Court construed a provision in the Red Cross's federal charter statute as conferring "original jurisdiction on federal courts over all cases to which the Red Cross is a party," id. at 248, and summarily affirmed the constitutionality of the grant on the strength of Osborn, see id. at 264-65.
General federal bankruptcy jurisdiction, then, as originally articulated by Justice Story—a power to hear all claims by and against the bankruptcy estate—is nothing more than an Osborn federal entity approach to bankruptcy jurisdiction. In fact, although not mentioning Osborn, Justice Story nonetheless expressly linked his construction of a general federal bankruptcy jurisdiction to Osborn’s constitutional federal question jurisprudence. Indeed, in Claflin v. Houseman, Justice Bradley described federal bankruptcy jurisdiction over an assignee’s suit in precisely those terms: “exactly the same as that of the Bank of the United States” pursuing “a right arising under a law of the United States, as much so as can be affirmed of a case of an assignee in bankruptcy.”

If we return to our hypothetical suit by the chapter 11 debtor-in-possession, equipped with this in personam constitutional theory of federal bankruptcy jurisdiction, the constitutional basis for federal jurisdiction over the defendants’ cross-claims materializes in precisely the same form as did our in personam version of third-party “related to” bankruptcy jurisdiction—as conventional supplemental jurisdiction. As per the familiar supplemental jurisdiction formula of United Mine Workers v. Gibbs, because the bankruptcy

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85 In response to an argument that a statutory provision preserving state law rights in bankruptcy precluded federal adjudication of such rights, Justice Story responded that “[s]uch a conclusion would be at war with the whole theory and practice under the judicial power given by the Constitution and laws of the United States.” Ex parte Christy, 44 U.S. (3 How.) 292, 316 (1845) (Story, J.). And in reading the statutory grant of “jurisdiction in all matters and proceedings in bankruptcy arising under this act,” 1841 Act § 6, to encompass all claims by and against the estate, he opined that “[i]n this respect the language of the act seems to have been borrowed from the language of the Constitution, in which the judicial power is declared to extend to cases arising under the... laws... of the United States.” Christy, 44 U.S. (3 How.) at 313. “[I]t seems perfectly clear, that congress possess [sic] a complete constitutional authority to enact such a law for such an object; for the judicial power, by the constitution, extends to all cases... arising under... the laws... made under their authority.” Mitchell v. Great Works Milling & Mfg. Co., 17 F. Cas. 496, 499 (C.C.D. Me. 1843) (No. 9,662) (Story, Circuit Justice).

86 93 U.S. (3 Otto) 130 (1876).

87 Id. at 135. Some have questioned whether the claims of a chapter 11 debtor-in-possession, as opposed to those of a bankruptcy trustee, contain an “original federal ingredient” within the meaning of Osborn. See Cross, supra note 72, at 1229-31 & n.158; Thomas C. Galligan, Jr., Article III and the “Related To” Bankruptcy Jurisdiction: A Case Study in Protective Jurisdiction, 11 U. PUGET SOUND L. REV. 1, 23-35 (1987); Carole E. Goldberg-Ambrose, The Protective Jurisdiction of the Federal Courts, 30 UCLA L. REV. 542, 552-54 & n.67 (1983). This focus on the estate’s representative, rather than the estate itself, however, fails to fully personify the bankruptcy estate and, as a result, misperceives the nature of debtor-in-possession suits. See Brubaker, Bankruptcy Jurisdiction Theory, supra note 12, at 41-51.

estate's claims against the defendants have an independent constitutional basis for federal jurisdiction in the federal question category of Article III, the defendants' transactionally related state-law cross-claims can also be heard in federal court, because "the relationship between [the estate's constitutional federal question] claim[s] and the [defendants'] state claim[s] permits the conclusion that the entire action before the court comprises but one constitutional case." 89

An in personam model of federal bankruptcy jurisdiction, thus, demarcates the constitutional bounds of federal bankruptcy jurisdiction by attributing a general federal bankruptcy jurisdiction over all claims by and against a bankruptcy estate to Article III's federal question category. This general federal bankruptcy jurisdiction then sustains federal jurisdiction over any third-party claim "related to" a claim by or against the estate—with that relationship measured by a conventional supplemental jurisdictional nexus.

VI. CONCLUSION

History provides us with two models of bankruptcy jurisdiction—an in rem model and an in personam model—and much of the history of federal bankruptcy jurisdiction can be understood as vacillation between those two models. 90 If we now truly lived in a world of full in personam bankruptcy jurisdiction, as Congress evidently intended in granting the federal courts pervasive bankruptcy jurisdiction, then our third-party "related to" bankruptcy jurisdiction would be considered a grant of conventional supplemental jurisdiction. Such an approach would rationally restrain federal bankruptcy jurisdiction, in sharp contrast to the conceptually limitless, functional Pacor test. 91 At the same time, construing third-party "related to" bankruptcy jurisdiction as supplemental jurisdiction would fully effectuate Congress's design for a fair and efficient, pervasive federal bankruptcy jurisdiction.

89 Id. at 725.
90 The struggle with these competing metaphors has not been limited to the jurisdictional arena. See Stephen McJohn, Person or Property? On the Legal Nature of the Bankruptcy Estate, 10 BANKR. DEV. J. 465 (1994).
91 See Gerald T. Dunne, The Bottomless Pit of Bankruptcy Jurisdiction, 112 BANKING L.J. 957, 957 (1995) (noting "the soaring jurisdiction afforded . . . in a universe where everything is related to everything else").