REAWAKENING SECTION 1334: RESOLVING THE CONFLICT BETWEEN BANKRUPTCY AND ARBITRATION THROUGH AN ABSTENTION ANALYSIS

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I. INTRODUCTION

Since the Supreme Court's holding in *Shearson/American Express, Inc. v. McMahon*,[1] U.S. Circuit Courts of Appeal decisions[2] have elevated the enforcement

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[1] 482 U.S. 220 (1987) (holding Arbitration Act provides federal enforcement of arbitration agreements mandating courts to enforce arbitration agreements for claims under Securities Exchange Act and RICO, and Congress did not intend to require judicial forums in these cases).

of private arbitration agreements above the authority of bankruptcy courts to enter necessary and appropriate orders to carry out the provisions of title 11 of the United States Code (the "Bankruptcy Code"). This elevation has substantially, or in some instances, completely divested bankruptcy courts of the decision-making authority to deny enforcement of an arbitration agreement in the context of a pending bankruptcy case in favor, in certain circumstances, of retaining the dispute for adjudication by the court.

The rationale underlying these decisions is based upon the judicial expansion of the Federal Arbitration Act (the "FAA"), causing it to trump, in most instances, the purpose and policy considerations of certain elements of the Bankruptcy Code and the federal bankruptcy jurisdictional scheme.[3] Under this framework, arbitration clauses are deemed enforceable in the context of bankruptcy proceedings, notwithstanding the usual ability of bankruptcy law to trump federal law,[4] state law,[5] and of particular relevance here, contract provisions.[6]

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[2] *E.g.*, MBNA Am. Bank, N.A. v. Hill, 436 F.3d 104, 109 (2d Cir. 2006) (finding arbitration was acceptable even though proceeding was considered core to bankruptcy, because allowing arbitration "would not seriously jeopardize the objectives of the Bankruptcy Code"); Mintze v. Am. Gen. Fin. Servs., Inc. (*In re* Mintze), 434 F.3d 222, 231 (3d Cir. 2006) (determining "seriously jeopardizing" test in *Hays* applies to both core and non-core proceedings); U.S. Lines, Inc. v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n (*In re* U.S. Lines), 197 F.3d 631, 640 (2d Cir. 1999) (positing determining core proceedings does "not automatically give the bankruptcy court discretion to stay arbitration"); Hays & Co. v. Merrill Lynch, Pierce, Fenner, & Smith, Inc., 885 F.2d 1149, 1161 (3d Cir. 1989) (describing where one party seeks to enforce debtor-derivative pre-petition contract claim, court cannot deny enforcement of otherwise applicable arbitration clause unless its "effect would seriously jeopardize the objectives of" Bankruptcy Code).

[3] *See Hill*, 436 F.3d at 108 ("[T]he presumption in favor of arbitration usually trumps the lesser interest of bankruptcy courts in adjudicating non-core proceedings."); Crysen/Montenay Energy Co. v. Shell Oil Co. (*In re* Crysen/Montenay Energy Co.), 226 F.3d 160, 166 (2d Cir. 2000) ("The Third Circuit's *Hays* decision—holding that district courts *must* stay non-core proceedings in favor of arbitration—is generally accepted."); *U.S. Lines*, 197 F.3d at 640 (noting presumption in favor of arbitration).

[4] For example, the Supreme Court in *N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 516 (1984), held that a debtor's ability to reject a collective bargaining agreement under section 365(a) of the Bankruptcy Code trumped the provisions of the National Labor Relations Act, 29 U.S.C. § 158, which would prohibit that action. *Id*. at 532 ("Consequently, Board enforcement of a claimed violation of [the NLRB] under these circumstances would run directly counter to the express provisions of the Bankruptcy Code and to the Code's overall effort to give a debtor-in-possession some flexibility and breathing space.") (citation omitted). More recently, the Supreme Court in *FCC v. NextWave Pers. Commc'ns, Inc.*, 537 U.S. 293 (2003), held that the Federal Communication Commission's statutory right to cancel spectrum licenses under the Communications Act of 1934, 47 U.S.C. § 309, did not trump the provisions of section 525 of the Bankruptcy Code. *See* Cal. Pub. Employees' Ret. Sys. v. WorldCom, Inc., 368 F.3d 86, 100–01 (2d. Cir. 2004) (dictating debtors have sufficiently plead removal of securities-fraud action from state court to bankruptcy court since individual actions are related to bankruptcy case); United States v. Sims (*In re* Feiler), 218 F.3d 948, 950 (9th Cir. 2000) ("We hold that a bankruptcy trustee's § 548 avoidance powers take precedence over the otherwise irrevocable nature [of an Internal Revenue Code Section] 172 election, and therefore, that a trustee may avoid such a tax election as a fraudulent transfer.").

[5] *See, e.g.*, Stanley v. Trinchard, 500 F.3d 411, 425 (5th Cir. 2007) ("Stanley counters that federal bankruptcy law-specifically—placing the trustee in the shoes of the debtor—trumps state laws prohibiting the assignment of legal malpractice claims. We agree."); Fitzgerald v. First Sec. Bank of Idaho (*In re* Walker), 77 F.3d 322, 323 (9th Cir. 1996) ("The Code gives 10 days, not 30, in which to perfect a transfer. In bankruptcy, the Code trumps the law of the state. The Bank's lien was not perfected in 10 days. The state's relation-back provision cannot save it."); *In re* Quezada, 368 B.R. 44, 49 (Bankr. S.D. Fla. 2007) ("Section 522(c)(1) grants [domestic support obligation] creditors a federal right of action against exempt property.

In holding that bankruptcy courts possess little or no authority in proceedings of various types to deny enforcement of arbitration clauses, many post-*McMahon* decisions[7] rely on the nature of the underlying claim—i.e. whether or not the claim was created by the Bankruptcy Code,[8] and whether the claim was core or non-core.[9]

This federal right trumps state law which may otherwise shield the asset from execution."); *In re* Greater Se. Cmty. Hosp. Corp. I, 365 B.R. 293, 301–02 (Bankr. D.D.C. 2006)

> Section 544(b) of the Bankruptcy Code permits a trustee (or other representative of the estate) to "use [the] statutes of limitations available to any creditor whose shoes he stands in bringing the action." In the case of government creditors, the statute of limitations provided by federal law to the specific creditor in question trumps any statute of limitations set forth in the applicable state fraudulent transfer law under the Supreme Court's ruling in *United States v. Sumerlin* . . . .

(citations omitted).

[6] Section 362(a)(3) of the Bankruptcy Code is a prime example of the Bankruptcy Code trumping contract law. Section 362(a)(3) provides that the filing of a bankruptcy petition operates as a stay of "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate . . . ." 11 U.S.C. § 362(a)(3) (2006). This provision has been interpreted to prevent an insurance carrier from exercising its contractual right to "cancel [an insurance policy] at any time upon thirty days' notice." Minoco Group of Cos., Ltd. v. First State Underwriter Agency of New Eng. Reinsurance Corp. (*In re* Minoco Group of Cos., Ltd.), 799 F.2d 517, 518 (9th Cir. 1986). Similarly, section 365(e)(1) provides that an executory contract or unexpired lease may not be terminated under an *ipso facto* clause (a clause by which a contract is terminated as a result solely of the debtor's insolvency or bankruptcy). *See* 11 U.S.C. § 365(e)(1) (2006); *In re* Pak, 252 B.R. 215, 216–17, n.1 (Bankr. M.D. Fla. 2000) (noting "creditor cannot force default upon debtor under ipso facto clause of contract solely based on filing bankruptcy"); *In re* Daugherty Constr., Inc., 188 B.R. 607, 613–14 (Bankr. D. Neb. 1995) (declining to enforce anti-ipso facto clause in executory contract because it is contrary to provisions of Bankruptcy Code); *see also* Note, *Jurisdiction in Bankruptcy Proceedings: A Test Case for Implied Repeal of the Federal Arbitration Act*, 117 HARV. L. REV. 2296, 2297 (2004) ("[M]odern wisdom suggests that arbitration clauses often prevail even in the context of bankruptcy proceedings, notwithstanding the usual ability of bankruptcy law to trump contract provisions in order to produce a workable system of reorganizing or disposing of defunct entities.") (citation omitted).

[7] In so doing, these courts have expanded *Shearson/Am. Express, Inc. v. McMahon,* 482 U.S. 220 (1987), by uniformly compelling arbitration unless the objectives of the Bankruptcy Code were "necessarily jeopardized." *See U.S. Lines*, 197 F.3d at 640 (stating arbitration clauses should be enforced "'unless [doing so] would seriously jeopardize the objectives of the Code'" (quoting *Hays*, 885 F.2d at 1161)); Ins. Co. of N. Am. v. NGC Settlement Trust & Asbestos Claims Mgmt. Corp. (*In re* Nat'l Gypsum Co.), 118 F.3d 1056, 1067 (5th Cir. 1997) (noting "[c]ertainly not all core bankruptcy proceedings are premised on provisions of the Code that 'inherently conflict' with the Federal Arbitration Act; nor would arbitration of such proceedings necessarily jeoparidize the objectives of the Bankruptcy Code").

[8] *E.g.*, Mintze v. Am. Gen. Fin. Servs., Inc. (*In re* Mintze) 434 F.3d 222, 231 (3d Cir. 2006) (evaluating strength of argument for arbitration enforcement against bankruptcy court interest: "The statutory claims that Mintze has raised are based on TILA and several federal and state consumer protection laws. Mintze has failed to raise any statutory claims that were created by the Bankruptcy Code"); Air Line Pilots Ass'n v. Cont'l Airlines (*In re* Cont'l Airlines), 125 F.3d 120, 124 (3d Cir. 1997) (discussing whether claims constituted "claims" under the Bankruptcy Code and whether arbitration was appropriate); *In re* Daisytek, Inc., 323 B.R. 180, 187 (Bankr. N.D. Tex. 2005) (determing cause of action which does not arise exclusively from Bankruptcy Code can be brought in alternative forum from bankruptcy court).

[9] *E.g.*, MBNA Am. Bank, N.A. v. Hill, 436 F.3d 104, 108 (2d Cir. 2006) (finding "presumption in favor of arbitration usually trumps the lesser interests of bankruptcy courts in adjudicating non-core proceedings" but "[b]ankruptcy courts are more likely to have discretion to refuse to compel arbitration of core bankruptcy matters") (citation omitted); U.S. Lines, Inc. v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n (*In re* U.S. Lines), 197 F.3d 631, 640 (2d Cir. 1999) (noting "even a determination that a proceeding is core will not

This exclusive focus on the nature of the claim is wrong. Instead, the starting point must be an acknowledgement that Congress under the statutory scheme in title 28 confers upon the bankruptcy courts centralized jurisdiction over disputes regarding a debtor's assets and legal obligations and litigation "arising under" or "arising in" the Bankruptcy Code, or "related to" a case under the Bankruptcy Code.[10] Next, in exercising this Congressional mandate favoring centralization, bankruptcy courts must be cognizant of the "inherent conflict"[11] between the FAA, as expanded by modern Supreme Court decisions and the bankruptcy jurisdictional and statutory scheme.[12] Indeed, "[w]hen arbitration law meets bankruptcy law head on, clashes inevitably develop"[13] and a dispute involving both may "present a conflict of near polar extremes."[14] In order properly to address this "inherent conflict," the bankruptcy court must be called upon to analyze the enforceability of an agreement to arbitrate guided by the policy underpinnings of the bankruptcy jurisdictional scheme, the context of a particular bankruptcy case and the subject matter of the particular claim.

In turn, the most appropriate analytical framework for conducting this objective analysis is found in section 1334(c)(1) of title 28,[15] the statutory provision that

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automatically give the bankruptcy court discretion to stay arbitration"); Hays & Co. v. Merrill Lynch, Pierce, Fenner, & Smith, Inc., 885 F.2d 1149, 1159 (3d Cir. 1989) (discussing allowance for arbitration enforcement in non-core proceedings).

[10] *See* 28 U.S.C. § 1334(b) (2006) ("[D]istrict courts should have original but not exclusive jurisdiction of all civil proceedings arising under title 11."); 28 U.S.C. § 157(b)(1) (2006) ("Bankruptcy judges may hear and determine all cases under title 11 . . . ."); *see also* 28 U.S.C. § 1334(e) (2006) (vesting district court in which bankruptcy proceeding is commenced or is pending with "exclusive jurisdiction of all of property, wherever located, of the debtor as of the commencement of such case").

[11] *McMahon*, 482 U.S. at 227 ("The burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue.").

[12] *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991) (evaluating similar tension between age discrimination statutory claims and arbitration and finding claims arbitrable); *McMahon*, 482 U.S. at 238 (holding statutory claims under Securities Exchange Act arbitrable); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 640 (1985) (weighing judicial interest against arbitration in antitrust cases and concluding they are arbitrable).

[13] *In re* Hagerstown Fiber Ltd. P'ship, 277 B.R. 181, 199 (Bankr. S.D.N.Y. 2002). *See Hays*, 885 F.2d at 1161 (stating courts must evaluate whether underlying purposes of bankruptcy would be undermined in determining whether to enforce arbitration clauses). *But see* Ins. Co. of N. Am. v. NGC Settlement Trust & Asbestos Claims Mgmt. Corp. (*In re* National Gypsum Co.), 118 F.3d 1056, 1067 (5th Cir. 1997) (positing not all core bankruptcy proceedings are always incompatible with FAA, nor is arbitration always structured to run afoul goals of Bankruptcy Code).

[14] *U.S. Lines*, 197 F.3d at 640 (noting bankruptcy policy involves centralizing disputes while arbitration advocates decentralization in dispute resolution) (citation omitted). *See In re* Brown, 354 B.R. 591, 594 (D.R.I. 2006) (finding court must weigh "competing statutory directives" of FAA and Bankruptcy Code); Societe Nationale Algerienne Pour La Recherche v. Distrigas Corp., 80 B.R. 606, 610 (D. Mass. 1987) (noting need to balance conflicts between bankruptcy and arbitration statutory schemes on case-by-case basis by engaging in cost-benefit analysis applications to each statute).

[15] 28 U.S.C. § 1334(c)(1) (2006). Section 1334 of title 28 expressly vests with the district courts exclusive jurisdiction of cases under the Bankruptcy Code and non-exclusive jurisdiction over proceedings arising in, arising under, or related to a case under the Bankruptcy Code. *Id. See* Eubanks v. Esenjay Petroleum Corp., 152 B.R. 459, 461–62 (E.D. La. 1993) (acknowledging "exclusive and original jurisdiction" of district courts granted by section 1334); *In re* Dayton Title Agency, Inc., 304 B.R. 323, 327 (Bankr. S.D. Ohio 2004) (discussing section 1334's jurisdictional grant: "[t]hus, this court has jurisdiction over any matter that is, at a

expressly permits a limitation on the exercise of bankruptcy-related subject matter jurisdiction of the bankruptcy court, and certain permissive abstention factors[16] developed specifically for implementing section 1334(c)(1). Of course, these abstention factors will be constrained within the contours and policy considerations of the jurisdictional and substantive provisions of the bankruptcy statutory scheme[17] and the FAA. Only after these considerations and analysis should the bankruptcy court enforce an arbitration agreement in the context of a pending bankruptcy case, or conversely, retain the dispute for adjudication by the court.

Part I of this Thesis discusses the genesis and evolution of arbitration and the inclusion of arbitration provisions in private contracts. Part II charts the history of the FAA, from the events leading up to its passage through the holding in *McMahon*. Part III sets forth the evolution of the enforceability of arbitration clauses in bankruptcy leading up to and after *Marathon*.[18] Part IV identifies the

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minimum, 'related to' the bankruptcy") (citation omitted). In turn, section 151 of title 28 establishes bankruptcy judges as a unit of the district courts. *See* 28 U.S.C. § 151 (2006) ("In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district."); *In re* Beeline Eng'g & Constr., Inc., 154 B.R. 790, 791 (S.D. Fla. 1993) (noting constitutional basis for Congressional creation of bankruptcy courts in Article I, section 8, cl. 4 "'[t]o establish . . . uniform Laws on the subject of Bankruptcies'") (citation omitted); *In re* Volpert, 177 B.R. 81, 88 (Bankr. N.D. Ill. 1995) (noting "'bankruptcy court'" refers to bankruptcy judges serving as "'unit'" within district courts). Section 157(a) of title 28 refers cases under the Bankruptcy Code and proceedings "arising under . . . arising in or related to a case under . . . [the Bankruptcy Code] to the bankruptcy judges . . . ." 28 U.S.C. § 157(a) (2006). *See* Vieira v. AGM, II, LLC, 363 B.R. 746, 749 (D.S.C. 2007) (noting section 157(a)'s procedural rules for district courts' referring bankruptcy cases to bankruptcy courts); *In re* Shortsleeve, 349 B.R. 297, 300 (Bankr. M.D. Ala. 2006) (establishing "bankruptcy court's subject matter jurisdiction is limited to title 11 cases and proceedings arising under, arising in, or related to a title 11 case"). Reference in this Thesis to "bankruptcy courts" shall mean the jurisdiction that has been conferred initially to district courts and referred to the bankruptcy judges through this scheme.

[16] *See* Bricker v. Martin, 348 B.R. 28, 33 (W.D. Pa. 2006) (stating two types of abstention under 1334(c) are mandatory and permissive); *In re* Schlotzsky's, Inc., 351 B.R. 430, 434 (Bankr. W.D. Tex., 2006) ("[A]bstention as set out in section 1334(c) serves the special function of acting as a salutary curb on the otherwise boundless scope of jurisdiction conferred by section 1334(b)." (citing Wood v. Wood (*In re* Wood), 825 F.2d 90, 93 (5th Cir. 1987))). *See generally infra* Section V (giving more comprehensive abstention analysis under Section 1334(c)(1) of title 28).

[17] *See* 28 U.S.C. §§ 157, 1334 (2006) (describing exclusive and concurrent bankruptcy jurisdictional grants); Raleigh v. Ill. Dep't of Revenue, 530 U.S. 15, 24–25 (2000) (finding bankruptcy courts can exercise equitable powers only within limits of the Code; they cannot "make wholesale substitution of underlying law" (citing United States v. Reorganized CF & I Fabricators of Utah, Inc., 518 U.S. 213 228–29 (1996))); Unsecured Creditors' Comm. of Highland Superstores, Inc. v. Strobeck Real Estate, Inc. (*In re* Highland Superstores, Inc.), 154 F.3d 573, 578–79 (6th Cir. 1998) ("Bankruptcy courts simply do not have free rein to ignore a statute in the exercise of their equitable powers pursuant to 11 U.S.C. § 105. Whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code.") (internal citations and quotations omitted).

[18] N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). The bankruptcy statutory scheme granted bankruptcy courts omnibus and comprehensive jurisdiction over all controversies involving property of the debtor. *See* 28 U.S.C. § 1334(e)(1) (2006) (granting bankruptcy courts exclusive jurisdiction over debtor's property); Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 447 (2004) ("Bankruptcy courts have exclusive jurisdiction over a debtor's property, wherever located, and over the estate."); *In re* Duval County Ranch Co., 167 B.R. 848, 849 (Bankr. S.D. Tex. 1994) ("Whenever there is a dispute regarding whether property is property of the bankruptcy estate, exclusive jurisdiction is in the bankruptcy court.") (citation omitted). In 1982, the court in *Marathon* invalidated on constitutional grounds this

inherent conflict between the bankruptcy statutory scheme and enforcement of agreements to arbitrate under the FAA. Part V discusses the contours of bankruptcy court jurisdiction and abstention. Finally, the Thesis proposes the formulation of discretionary factors that bankruptcy courts should utilize to determine if an arbitration clause should be enforced in a bankruptcy proceeding, while remaining faithful to the policy and purposes of both the bankruptcy statutory scheme and the FAA.

II. ARBITRATION: A HISTORY LEADING UP TO THE FAA AND BEYOND[19]

A. The World Before the Federal Arbitration Act

Historical references to the utilization of binding arbitration as a means of alternative dispute resolution[20] date back to the wilderness area east of Egypt around 1250 B.C.[21] After leading the Jewish exodus from Egypt, Moses assumed

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pervasive grant of jurisdiction. 458 U.S. at 87. *See* Resolution Trust Corp. v. Best Prod. Co., Inc. (*In re* Best Prods. Co., Inc.), 68 F.3d 26, 31 (2d Cir. 1995) (referencing *Marathon*, the court stated: "[b]ecause these 'non-core,' private rights must be adjudicated by an Article III judge, the Court invalidated the broad grant of jurisdiction to bankruptcy courts provided for in the Bankruptcy Act of 1978, 28 U.S.C. § 1471") (citations omitted); Moody v. Martin, 27 B.R. 991, 996–97 (W.D. Wis. 1983) (finding "'broad grant of jurisdiction *to the bankruptcy courts*" in section 241(a) of Bankruptcy Act of 1978 unconstitutional) (citation omitted); *In re* L.T. Ruth Coal Co., Inc., 66 B.R. 753, 758–59 (Bankr. E.D. Ky. 1986) (declaring section 157(b)'s power to permit non-Article III bankruptcy judges to hear and determine all title 11 cases is unconstitutional, yet stating "this court would so hold if it were not precluded from doing so by" precedent within its jurisdiction holding otherwise).

[19] *See* Mette H. Kurth, *An Unstoppable and Immovable Policy: The Arbitration Act and the Bankruptcy Code Collide*, 43 UCLA L. REV. 999, 1004–06 (1996) (discussing early history of arbitration and enactment of FAA); *see also* Gabriel Herrmann, Note, *Discovering Policy Under the Federal Arbitration Act*, 88 CORNELL L. REV. 779, 784–85 (2003) (discussing early common law approaches to arbitration and changes made by FAA); Henry C. Strickland, *The Federal Arbitration Act's Interstate Commerce Requirement: What's Left for State Arbitration Law?*, 21 HOFSTRA L. REV. 385, 388–90 (1992) (highlighting early arbitration law in America and "[s]tatutory [r]esponse" in enactment of Federal Arbitration Act).

[20] The term "alternative dispute resolution" denotes a process that is an alternative to the primary forum where disputes are adjudicated, such as a court system. *See* Kenneth F. Dunham, *Binding Arbitration and Specific Performance under the FAA: Will This Marriage of Convenience Survive?*, 3 J. AM. ARB. 187, 189 (2004) [hereinafter *Binding Arbitration*] ("The word 'alternative' connotes that the processes are used as alternatives to the public dispute resolution forum known as the court system."); Peter Finkle & David Cohen, *Consumer Redress Through Alternative Dispute Resolution and Small Claims Court: Theory and Practice*, 13 WINDSOR Y.B. ACCESS TO JUST. 81, 87 (1993) (defining "alternate dispute resolution" to mean method for resolving disputes other than a formal legal system and naming "church, family hierarchy, and informal community sanctions" as examples); Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 166 (2003) (noting although alternative dispute resolution has not "displaced traditional litigation" completely, it has changed "business and legal decision-makers' views of how best to resolve legal disputes").

[21] *See* Dunham, *Binding Arbitration, supra* note 20, at 196 (discussing conversation between Moses and his father-in-law Jethro that "gave rise to the first recorded use of the binding arbitration process" (citing chapter 18 of Exodus, Master Bible)); Kenneth F. Dunham, *Binding Predispute Arbitration Clauses in Alabama: A Checkered Past but a Solid Future*, 11 JONES L. REV. 1, 2 (2006) [hereinafter *Binding Predispute*] (noting first mention of arbitration found in Moses' discussion with Jethro, chapter 18, Exodus,

many roles, including that of sole arbiter of the many disputes arising among his people.[22] Eventually overworked, Moses began appointing private judges to adjudicate routine business disputes as a means of decreasing his own workload.[23] These private arbitrators allowed Moses to focus his efforts on deciding the complex disputes.[24] The book[25] containing the reference to this alternative dispute resolution process was written approximately 30 centuries ago and, by some accounts, is the first and oldest known reference to the use of binding arbitration.[26]

Although an innovator, Moses was not alone in the use of binding arbitration as a means of alternatively resolving disputes. Other historic references to arbitration include its use by warring Greek city-states and by Romans in civil matters.[27] As the

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Bible); Seth E. Lipner, *Methods of Dispute Resolution: Torah to Talmud to Today*, 16 AM. REV. INT'L ARB. 315, 315–16 (2005) (discussing Moses' speech to Nation of Israel regarding dispute resolution).

[22] *See* Dunham, *Binding Arbitration*, *supra* note 20, at 196 (discussing history of Moses's work as arbitrator); *see also* Anthony R. Benedetto, *The Impact on "The Vanishing Trial" if People of Faith Were Faithful to Religious Principles of Settling Disputes Without Litigation*, 6 PEPP. DISP. RESOL. L.J. 253, 257 (2006) ("Moses became overwhelmed by the many tasks for which he was responsible, including dispute resolution."); Dunham, *Binding Predispute, supra* note 21, at 2 (explaining Moses' appointment of other, private, judges to resolve disputes).

[23] *E.g.*, *Exodus* 18: 13–26 (New American Bible) ("[Moses] picked out able men from all Israel and put them in charge of the people as officers over groups of thousands, of hundreds, of fifties, and of tens. They rendered decisions for the people in all ordinary cases. The more difficult cases they referred to Moses, but all the lesser cases they settled themselves."). *See* Shawn P. Davisson, *Privatization and Self-Determination in the Circuits: Utilizing the Private Sector Within the Evolving Framework of Federal Appellate Mediation*, 21 OHIO ST. J. ON DISP. RESOL. 953, 953 (2006) ("[T]he use of mediation or arbitration to settle disputes dates back to the Old Testament where the Bible recounts the story Moses' recruitment of 'capable men' to assist in adjudicating the various claims brought by the people of Israel.").

[24] *See* Dunham, *Binding Arbitration*, *supra* note 20, at 197 ("The arbitrators freed Moses to decide the tough cases, which could not be arbitrated and allowed him to conduct other important business.").

[25] The conversation giving rise to the first recorded use of the binding arbitration process is recorded in the Bible in the eighteenth chapter of the book of Exodus. The quoted words of Jethro are taken from The Message. *See* Dunham, *Binding Arbitration, supra* note 20, at 196 (discussing it is unclear whether "Jethro invented the idea of binding arbitration or if it was a familiar process used in the ancient Middle Eastern world"); *see also* Dunham, *Binding Predispute, supra* note 21, at 2 (acknowledging Moses' recognition, more than thirty-two centuries ago, of the need to delegate responsibilities of dispute resolution to private judges).

[26] *See* Caryn Litt Wolfe, *Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and their Interaction with Secular Courts*, 75 FORDHAM L. REV. 427, 437–38 (2006) (noting Judaism's old adjudication system is based on Bible and Talmud); *Job* 9: 33 (New American Bible) ("Would that there were an arbiter between us, who could lay his hand upon us both . . . .").

[27] *See* Global Arbitration Mediation Association, Inc., *History of Alternative Dispute Resolution*, http://www.gama.com/HTML/history.html [last visited Oct. 15, 2008] (describing arbitration as form of dispute resolution used throughout history by Greek city states in conflict and by Catholic Popes in the Renaissance period) [hereinafter *Global Arbitration Mediation*]; *see also* John R. Allison, *Arbitration Agreements and Antitrust Claims: The Need for Enhanced Accommodation of Conflicting Public Policies*, 64 N.C. L. REV 219, 223 (1986) [hereinafter *Arbitration Agreements*].

> Arbitration enjoyed some popularity in the settlement of political disputes in the first millennium B.C. Controversies between Athens and Megara over possession of the island of Salamis in about 600 B.C., between Corinth and Corcyra over possession of Leucas in 480 B.C., and between Genoa and the Viturians over a common boundary in 117 B.C. were all settled by arbitration.

Romans conquered Europe, arbitration spread before the middle ages. It is believed that Catholic Popes acted as arbitrators in resolving conflicts between European countries during the Renaissance.[28]

Arbitration came to early America from Europe.[29] Because American common law was not yet well developed, American courts generally followed the English common law.[30] The English common law was hostile towards arbitrations.[31] In the 17th Century, English courts treated arbitration as a non-binding process.[32] "The English courts became concerned that arbitration had the potential to displace the court's role in society."[33] The view of the courts, as reiterated in arbitration treatises, was that "an agreement to submit to arbitration was executory, and revocable, until executed by an award."[34] "Arbitrators were deemed to be the agents of the parties

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Id. Sabra A. Jones, *Historical Development of Commercial Arbitration in the United States*, 12 MINN. L. REV. 240, 243 (1928) (noting signs of arbitration within Roman's law of Twelve Tables).

[28] *E.g.*, *Global Arbitration Mediation, supra* note 27 ("Additionally, there are numerous examples of the historic resolution of international conflicts by arbitration such as its use . . . by various Catholic Popes who acted as arbitrators of conflicts between European countries during the Renaissance."); *see* Henry Billings Brown, *International Courts*, 20 YALE L.J. 1, 2 (1910) (explaining importance of Church's role as arbiters in Middle Ages with Popes advocating peace through dispute resolution on local levels and sometimes for international treaties among European powers).

[29] *E.g.*, Dunham, *Binding Arbitration, supra* note 20, at 198 ("Arbitration came to the United States as a result of its use in Europe."); *see* Kenneth F. Dunham, *Sailing Around* Erie*: The Emergence of a Federal General Common Law of Arbitration*, 6 PEPP. DISP. RESOL. L.J. 197, 202 (2006) [hereinafter *Sailing Around* Erie] (tracing common law development in early English history, arriving in colonies from English influence and later incorporated into United States law); Jones, *supra* note 27, at 240 (noting Colonial America's acceptance of English common law commercial arbitration rules).

[30] *See* WILLIAM FORSYTH, M.A., HISTORY OF TRIAL BY JURY, 289 (James Appleton Morgan 2d ed., Burt Franklin 1971) (1878) (noting enactment of trial by jury in criminal cases in Constitution when U.S. "broke off from" England); Jones, *supra* note 27, at 246 (stressing English arbitration law, which "forces British subjects to abide by their arbitration agreements, has been instrumental in bringing about the passage of the New York law of 1920 and [U.S. Federal Act of 1925] which make arbitration agreements in those jurisdictions irrevocable").

[31] *E.g.*, Long Branch Sewerage Auth. v. Molnar Elec. Contractors, Inc., 363 A.2d 917, 919 (N.J. 1976) ("The English common law at the time of American Revolution was undoubtedly hostile to arbitrations.") (citation omitted); *see* Equal Employment Opportunity Comm'n v. Waffle House, Inc., 534 U.S. 279, 289 (2002) (noting persistent hostility by English courts towards arbitration agreements and later transitioned to American case law) (citation omitted).

[32] *E.g.*, Dunham, *Binding Arbitration, supra* note 20, at 198 (documenting English common law did not view arbitration as "an ironclad binding process"); Jones, *supra* note 27, at 245 ("The courts of law in England held that the parties were at liberty to revoke authority given to arbiter . . . at any time before an award was made."); *see* Leon Sarpy, *Arbitration as a Means of Reducing Court Congestion*, 41 NOTRE DAME L. REV. 182, 184 (1965) (explaining "arbitration was practiced in early common law [in America] as a voluntary method of settling disputes . . . but until 1920 courts would not compel performance of an agreement to arbitrate future differences").

[33] Dunham, *Sailing Around* Erie*, supra* note 29, at 203; s*ee* Allison, *Arbitration Agreements supra* note 27, at 224 (stating English judges' dependency on fees from cases as possible reason for "common-law bias against arbitration").

[34] Buyer's First Realty, Inc. v. Cleveland Area Bd. of Realtors, 745 N.E.2d 1069, 1074 n.2 (Ohio Ct. App. 2000) (tracing history of revocability doctrine in common-law arbitration, contrasting with non-revocability of statutory arbitration (quoting Carey v. Comm'rs of Montgomery County, 19 Ohio 245, 247 (1850))); *see* 15 GRACE MCLANE GIESEL, CORBIN ON CONTRACTS § 83.5, at 276 (Joseph M. Perillo, ed., rev. ed. 2003) (discussing historic trend at common law to find arbitration agreements unenforceable); 21 RICHARD A. LORD, WILLISTON ON CONTRACTS § 57:2, at 21 (4th ed. 2001) (summarizing treatment and history of

and, under the common law, an agency could be revoked at any time."[35] Thus, either party to an arbitration of an existing dispute was permitted "to withdraw at any time prior to the actual award."[36] "Beyond that, [the English common law] declared that an agreement to arbitrate future disputes was against public policy and not enforceable."[37] This became known as the doctrine of revocability:[38]

> The doctrine of revocability seems to have had origin in an offhand remark of Lord Coke that arbitration agreements were of their own

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arbitration agreements at common law, that "arbitrator's power to render a valid award was dependant upon" continuous consent of parties); Oregon & W. Mortgage Sav. Bank v. Am. Mortgage Co., 35 F. 22, 23 (C.C.D. Or. 1888) ("Either party may revoke a submission to arbitration at any time before an award where the submission is not made a rule of court, or otherwise regulated by statute."); Lewiston-Auburn Shoeworkers Protective Ass'n v. Fed. Shoe, Inc., 114 A.2d 248, 252 (Me. 1955) ("In ordinary commercial arbitration the common law has long recognized and upheld the right to revoke agreements to arbitrate at any time before final award.").

[35] Dunham, *Binding Arbitration, supra* note 20, at 199; *see* Local Union 560, Int'l Bhd. Of Teamsters v. Anchor Motor Freight, Inc., 415 F.2d 220, 225 (3d Cir. 1969) (arguing common-law commercial arbitration principal of arbitrator as agent of parties should not be brought into labor arbitrations); *cf.* Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 598–600 (1928) (explaining and then rejecting agency rationale for revocability of submission to arbitration); *see also* Baxter Int'l, Inc. v. Abbott Labs., 315 F.3d 829, 834 (7th Cir. 2003) ("In fact, the arbitrators function almost as agents of the parties to extend their deal to cover unforeseen circumstances.").

[36] Long Branch Sewerage Auth. v. Molnar Elec. Contractors, Inc., 363 A.2d 917, 919 (N.J. 1976) (quoting LaStella v. Garcia Estates, 331 A.2d 1, 2 (N.J. 1975)) (attempting to discern role of third party defendants in arbitration court examines history of revocability of arbitration agreements at common-law); *see, e.g.*, Webb v. R. Rowland & Co., Inc, 800 F.2d 803, 806 (8th Cir. 1986) ("Before the enactment of the Federal Arbitration Act, many states adhered to the rule that agreements to arbitrate were revocable at will any time before issuance of an award."); *see* Johnson Controls, Inc. v. City of Cedar Rapids, Iowa, 713 F.2d 370, 376 (8th Cir. 1983) (indicating Arbitration Act aimed to provide uniform system of rules that would override outdated state laws allowing arbitration agreements to be revocable before award is issued).

[37] LaStella v. Garcia Estates, 331 A.2d 1, 2 (N.J. 1975) (postulating ouster from jurisdiction as one possible policy rationale for rule of unilateral revocability of arbitration agreements); *see, e.g.*, United States Asphalt Ref. Co. v. Trinidad Lake Petroleum Co., 222 F. 1006, 1007–08 (S.D.N.Y. 1915) (listing reasons for refusing to compel arbitration contract to be "[s]uch contracts [] against public policy," and "[a]ny contract tending to wholly oust the courts of jurisdiction violates the spirit of the laws creating the courts"); Hurst v. Litchfield, 39 N.Y. 377, 379 (N.Y. 1868) (stating arbitration clauses violate public policy by their "tendency to exclude" courts' jurisdiction); *see* Greason v. Keteltas, 17 N.Y. 491, 496 (N.Y. 1858)

> It is well settled that courts of equity will never entertain a suit to compel parties specifically to perform an agreement to submit to arbitration. . . . To do so, would bring such courts in conflict with that policy of the common law which permits parties in all cases to revoke a submission to arbitration already made.

[38] *See, e.g.*, Dunham, *Binding Arbitration, supra* note 20, at 199 (defining revocability doctrine as ability to remove arbitration agreements); *see* Wold Architects and Eng'rs v. Strat, 713 N.W.2d 750, 762–63 & n.4 (Mich. 2006) (noting old "revocability" doctrine that would "preclude[] specific enforcement of pre-dispute agreements to arbitrate"); Bd. of Educ. of County of Berkeley v. W. Harley Miller, Inc., 236 S.E.2d 439, 442 (W. Va. 1977) (explaining rationale for revocability doctrine: "arbitration agreements, it seemed, ousted courts of their jurisdiction").

> nature revocable. Coke's great prestige gave rise to acceptance of his dictum which soon flourished as legal doctrine.[39]

The hostility of English-speaking courts towards arbitration contracts was based on the belief that the courts could not be deprived of jurisdiction as a result of a private agreement between contracting parties.[40] Thus, agreements that effectively divested courts of subject matter jurisdiction were deemed void as a matter of public policy.[41] Both federal and state courts in the United States adopted this doctrine and generally refused to enforce arbitration agreements.[42] Indeed, "arbitration agreements were an anathema to the courts and they resorted to a great variety of devices and formulas to destroy this encroachment on their monopoly of the administration of justice."[43]

The practical implication of the doctrine of revocability was that parties *could* refer existing disputes to arbitration, and arbitration awards were enforceable at law

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[39] Lewiston–Auburn Shoeworkers Protective Ass'n v. Federal Shoe, Inc., 114 A.2d 248, 252 (Me. 1955); s*ee* Sverdrup Corp. v. WHC Constructors, Inc., 989 F.2d 148, 152 (4th Cir. 1993) (tracing revocability doctrine back to Lord Coke's dicta); S. Energy Homes, Inc. v. Lee, 732 So. 2d 994, 1001 (Ala. 1999) ("The origin of this hostility toward the enforcement of arbitration agreements is normally attributed to dictum by Lord Coke in *Vynior's Case* . . . ." (citing Vynior's Case, 77 Eng. Rep. 595, 599–600 (K.B. 1609))).

[40] *E.g.*, Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 210 (1956) (reporting opposition of arbitration agreements as due to such agreements' ousting of courts' jurisdiction); *see* Tejas Dev. Co. v. McGough Bros., 165 F.2d 276, 279–80 (5th Cir. 1948) (stressing arbitration agreements cannot remove jurisdiction of courts); *Greason*, 17 N.Y. at 496 (naming, in addition to ousting courts of jurisdiction, another reason for hostility towards private arbitration agreements was fear original party was hiding some other interest, bias, or prejudice).

[41] *E.g.*, *Tejas Dev.* at 280 ("The true rule seems to be that such [an arbitration] clause cannot oust the courts of jurisdiction, and, when invoked for that purpose, will be held void."); *see* Meacham v. Jamestown, 211 N.Y. 346, 353 (N.Y. 1914) (Cardozo, J., concurring) (arguing even if courts should enforce contracts that remove cases to other sovereignties, courts should not enforce contracts that remove jurisdiction from courts altogether and thereby grant jurisdiction to private arbitrators); *U.S. Asphalt*, 222 F. at 1007–08 (finding contracts removing court jurisdiction were in violation of public policy); *Hurst*, 39 N.Y. at 379 (stating removal of court jurisdiction is against common law policy goals).

[42] *E.g.*, *U.S. Asphalt*, 222 F. at 1007–08 (compiling U.S. cases which follow doctrine of revocability); *see* Hedley v. Aetna, 80 So. 466, 467 (Ala. 1918) ("A covenant in a contract . . . to submit every matter of dispute . . . to arbitration or to a board of appraisers, to the end of defeating the jurisdiction of courts as to the subject-matter, are universally held to be void, as against public policy."); *Meacham*, 211 N.Y. at 353 (Cardozo, J., concurring) ("If any exceptions to the general rule are to be admitted, we ought not to extend them to a contract where the exclusive jurisdiction has been bestowed, not on the regular courts of another sovereignty, but on private arbitrators.").

[43] *See, e.g.*, Robert Lawrence Co., Inc. v. Devonshire Fabrics, Inc., 271 F.2d 402, 406 (2d Cir. 1959) (calling period of hostility towards arbitration agreements "one of the dark chapters in legal history," and noting these agreements were "beneficial and salutary" to all those affected but stating "the courts resorted to a great variety of devices and formulas to destroy this encroachment on their monopoly of the administration of justice"); *see* Kulukundis Shipping Co., S/A v. Amtorg Trading Corp., 126 F.2d 978, 982 (2d Cir. 1942) (noting despite allowance, Parliament granted courts to enforce arbitration agreements more forcefully, but courts narrowly construed the allowance, in effect deeming it "of little help"); Cal. Prune & Apricot Growers' Ass'n v. Catz Am. Co., 60 F.2d 788, 789–90 (9th Cir. 1932) (refusing to enforce matter that was "purely remedial or procedural state law").

as long as both parties continued to seek enforcement of the arbitration provision.[44] Because arbitration provisions were deemed executory, however, if either of the two parties refused to arbitrate—effectively revoking the arbitration provision—the other party's arbitration rights were terminated.[45] The non-breaching party could seek damages flowing from the resulting breach, but could not seek specific performance by way of a court order compelling arbitration.[46] Under pre-FAA law, "[t]he federal courts—like those of the States and of England—have, both in equity and at law, denied, in large measure, the aid of their processes to those seeking [affirmatively] to enforce executory agreements to arbitrate disputes."[47] In response, during "the nineteenth century, most states passed statutes [codifying] this negative [judicial] attitude towards arbitration."[48] American courts adhered to the common law doctrine of revocability until the enactment of the FAA in 1925.[49]

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[44] *See* Hamilton v. Home Ins. Co. of N.Y., 137 U.S. 370, 385 (1890) (endorsing position that arbitration awards are valid as to what was agreed to be arbitrated originally); *see also* Red Cross Line v. Atl. Fruit Co., 264 U.S. 109, 121 (1924) (stating arbitration awards will be given effect at "any appropriate proceeding at law or in equity"); Kurth, *supra* note 19, at 1004 (indicating refusal of party to arbitrate despite a prior agreement is actionable claim for damages, even if not, at time, for specific performance) (citation omitted).

[45] *E.g.*, *Johnson Controls, Inc v. City of Cedar Rapids, Iowa*, 713 F.2d 370, 380 (8th Cir. 1983) (noting executory arbitration agreements could be revoked by either party); *Tejas Dev.*, 165 F.2d at 280 (stating so long as arbitration agreement is executory and no awards were granted yet, agreement "is voidable at will by either party"); *see* Kurth, *supra* note 19, at 1004 (noting because of executory nature, arbitration agreements could be revoked by either party).

[46] *See* Hall St. Assocs., L.L.C. v. Mattel, Inc., 128 S. Ct. 1396, 1408 n.2 (2008) (Stevens, J., dissenting) ("Although agreements to arbitrate were not specifically enforceable, courts did award nominal damages for the breach of such contracts."); Dunham, *Binding Arbitration, supra* note 20, at 191 (recognizing prior to enactment of FAA, specific performance was not available as remedy for breach of arbitration agreement); Kurth, *supra* note 19, at 1004 (noting inadequacy of damage awards where specific performance was generally not available for breach of arbitration contract).

[47] *Red Cross Line*, 264 U.S. at 120–21. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) (stating FAA was enacted "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts") (citation omitted); Spann v. Am. Express Travel Related Servs. Co., Inc., 224 S.W.3d 698, 709–10 (Tenn. Ct. App. 2006) (explaining prior to FAA enactment, centuries of common law denied specific enforcement of arbitration agreements) (citation omitted).

[48] Steven R. Swanson, *Antisuit Injunctions in Support of International Arbitration*, 81 TUL. L. REV. 395, 408 (2006) (explaining actions by many states to reflect pejorative views toward arbitration in state laws). *See* Kulukundis Shipping Co., S/A v. Amtorg Trading Corp., 126 F.2d 978, 984 (2d Cir. 1942) (suggesting English attitude towards arbitration was adopted by most American courts during nineteenth century); John R. Allison, *Arbitration of Private Antitrust Claims in International Trade: A Study in the Subordination of National Interests to the Demands of a World Market*, 18 N.Y.U. J. INT'L L. & POL. 361, 370–71 (1986) [hereinafter *Arbitration of Private Antitrust Claims*] (explaining most states' arbitration legislation was mere codification of "common law attitude") (citation omitted).

[49] *E.g.*, Webb v. R. Rowland & Co., Inc., 800 F.2d 803, 806 (8th Cir. 1986) ("Before the enactment of the Federal Arbitration Act, many states adhered to the rule that agreements to arbitrate were revocable at will any time before issuance of an award."); Dunham, *Binding Arbitration, supra* note 20, at 198–99 (stating arbitration was seen as "revocable process" under common law until FAA was enacted) (citations omitted); *see* Tobey v. County of Bristol, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845) (No. 14,065) (showing application of English common law doctrine of revocability in American courts before FAA adoption).

B. The Federal Arbitration Act of 1925

From colonial times through the enactment of the FAA, most courts in the United States were hostile to pre-dispute arbitration provisions,[50] considered them not specifically enforceable,[51] and refused to order specific enforcement of the provisions.[52] New York was the first state to depart from this approach by passing the New York Arbitration Act of 1920 ("NYAA").[53] In 1924, the United States Supreme Court held in *Red Cross Line v. Atlantic Fruit Co.*,[54] that the NYAA could be used to obtain specific performance of a contract to arbitrate, but it could not be used as a complete bar to litigation.[55] Concurrently, the American Bar Association began drafting the United States Arbitration Act (the "USAA"), which was submitted to Congress for consideration in 1923.[56] The language of the USAA was patterned after the language of the NYAA.[57] The centerpiece of the ABA's proposed

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[50] *See, e.g.*, *Hall St.*, 128 S. Ct. at 1408 (Stevens, J., dissenting) (noting hostility of courts towards arbitration agreements prior to enactment of FAA); *Gilmer*, 500 U.S. at 24 (stating purpose for FAA enactment "was to reverse the longstanding judicial hostility to arbitration agreements"); Dunham, *Binding Arbitration, supra* note 20, at 199 (noting "judicial hostility" against arbitration was "pervasive" in U.S. courts prior to FAA enactment).

[51] *See* Commercial Metals Co. v. Balfour, Guthrie, & Co., Ltd., 577 F.2d 264 (5th Cir. 1978) (noting arbitration agreements were not specifically enforced at common law); Allison, *Arbitration of Private Antitrust Claims, supra* note 48, at 369 ("[A]greements to submit future disputes to arbitration were unenforceable.") (citation omitted); Dunham, *Binding Arbitration*, *supra* note 20, at 189–90 (noting common law treatment of arbitration agreements as revocable at any time up until actual arbitration hearing) (citation omitted).

[52] *See Hall St.*, 128 S. Ct. at 1408 (Stevens, J., dissenting) (noting courts generally refused to order specific enforcement of arbitration agreements); *Red Cross Line*, 264 U.S. at 120–21 (stating courts have declined to order specific performance for those seeking to enforce arbitration agreements) (citation omitted); Dunham, *Binding Arbitration, supra* note 20, at 189–90 (noting oddity in phrase, "'binding arbitration'" under common law as "binding pre-dispute arbitration was unenforceable").

[53] *See* Allison, *Arbitration of Private Antitrust Claims*, *supra* note 48, at 371 ("New York, in 1920, was the first state to enact a modern arbitration statute providing for the enforcement of agreements to arbitrate future disputes . . . .") (citation omitted); Julius Henry Cohen, *The Law of Commercial Arbitration and the New York Statute*, 31 YALE L.J. 147, 148 (1921) (highlighting committee which created New York Arbitration Act in 1920 intended to eliminate common law practice of revocability); *see also* Dunham, *Binding Arbitration, supra* note 20, at 200 ("New York became the first state to pass a statutory arbitration law in 1920.").

[54] 264 U.S. 109 (1924).

[55] *See id.* at 123 (noting executory agreement "will not be given effect as a bar" to judicial process on "original cause of action"). The Supreme Court noted that the utilization of arbitration could not divest courts of jurisdiction to enforce certain rights or to redress certain injuries, including remedies *in pais*, remedies "conferred by statute," remedies in equity or at common law. *Id.* at 123–24.

[56] *See* Siegel v. Prudential Ins. Co. of Am., 79 Cal.Rptr.2d 726, 738 (Cal. Dist. Ct. App. 1998) ("What would ultimately become the USAA was first introduced in the 68th Congress in the House of Representatives on December 5, 1923 . . . ."); Kurth, *supra* note 19, at 1005 (noting American Bar Association submitted draft of USAA to Congress in 1923); Paul Turner, *Preemption: The United States Arbitration Act, the Manifest Disregard of the Law Test for Vacating an Arbitration Award, and State Courts*, 26 PEPP. L. REV. 519, 538 (1999) (tracking history of proposal which would become USAA, submitted to Congress in 1923).

[57] *See, e.g.*, Hall St. Assocs., L.L.C. v. Mattel, Inc., 128 S. Ct. 1396, 1406 n.7 (2008) (noting text of FAA was based on New York arbitration statute); *see* Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99,

legislation placed arbitration provisions on a *pari passu* basis with other contractual provisions by creating an adequate remedy for breach of an agreement to arbitrate a commercial agreement.[58] The proposed legislation made arbitration clauses "irrevocable" by ensuring that courts would enforce such provisions in the same manner as other contractual provisions and by creating an adequate remedy for their breach.[59] Reducing congestion in federal courts and the costliness and delays of litigation were the policies underlying this concept of irrevocability.[60] Congress passed the USAA in 1925 under its Article I[61] and commerce clause powers[62]

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102 (2006) ("The original Federal Arbitration Act was drafted, principally by Julius Cohen, on the model of the New York statute."); Turner, *supra* note 56, at 537 ("The historical basis of the USAA was the adoption of the New York state arbitration law.").

[58] *See, e.g.*, Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974) (noting USAA "place[d] arbitration agreements 'upon the same footing as other contracts . . . .'" (quoting H.R. REP. NO. 96, 68th Cong., 1st Sess., 1, 2 (1924))); *see* Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985) (observing FAA as requiring courts to "rigorously enforce" arbitration provisions); Kurth, *supra* note 19, at 1005–06 (observing proposed legislation sought to ensure enforceability of arbitration agreements).

[59] *See* 9 U.S.C. § 2 (2006) (providing arbitration clause in commercial transaction "shall be valid, irrevocable, and enforceable"); Kurth, *supra* note 19, at 1005 (noting ABA-proposed legislation would ensure enforceability by creating adequate remedies for breaches); *see also* Stout v. J.D. Byrider, 228 F.3d 709, 714 (6th Cir. 2000) ("FAA was designed to override judicial reluctance to enforce arbitration agreements . . . .").

[60] *See* Kurth, *supra* note 19, at 1005 (observing legislative purposes of reducing litigation and enabling settlement of business disputes "'expeditiously and economically'") (citation omitted); *see also Scherk*, 417 U.S. at 510–11 (finding legislative purpose included "avoid[ance of] 'the costliness and delays of litigation' . . . ." (quoting H.R. REP. NO. 96, 68th Cong.)); *Stout*, 228 F.3d at 714 (noting legislation sought to "relieve court congestion, and to provide parties with a speedier and less costly alternative to litigation").

[61] *See* Moses, *supra* note 57, at 120 ("Julius Cohen's brief, which was incorporated in the record of the Joint Hearings of House and Senate Subcommittees . . . [stated that] Congress' power to adopt the [FAA] 'rests upon the constitutional provision by which Congress is authorized to establish and control inferior Federal courts.'"); *see also* Southland Corp. v. Keating, 465 U.S. 1, 25 (1984) (O'Connor, J., dissenting) (suggesting power to enact FAA "derived . . . largely from the federal power to control the jurisdiction of the federal courts"); Gov't of the Virgin Is. v. United Indus. Workers, N.A., 169 F.3d 172, 175 (3d Cir. 1999) ("Congress enacted the FAA pursuant to its power to define the jurisdiction of the federal courts . . . ."). Some, however, believed that Congress passed the FAA exclusively under its Commerce Clause Powers. *See, e.g.*, Alexandra Anne Hui, *Equitable Estoppel and the Compulsion of Arbitration*, 60 VAND. L. REV. 711, 716 (2007) ("[T]he constitutional foundation of the FAA has now shifted from congressional power to control federal courts to congressional power to regulate commerce . . . ."); *see* Prima Paint Corp. v. Flood and Conkling Mfg. Co., 388 U.S. 395, 405 (1967) (noting FAA is "based upon and confined to" federal control over interstate commerce) (citation omitted); Dean Witter Reynolds, Inc. v. Sanchez Espada, 959 F. Supp. 73, 77 n.4 (D.P.R. 1997) (indicating FAA was promulgated under Congress' Commerce Clause power) (citation omitted); Corey D. Hinshaw & Lindsay G. Watts, *A Review of Mississippi Law Regarding Arbitration*, 76 MISS. L.J. 1007, 1007–08 (2007) (discussing Congress' exercise of Commerce Power in enacting FAA); Michael J. Yelnosky, *Ten Years (or so) After* Gilmer*: Arbitration of Employment Law Claims Under the Federal Arbitration Act and the Role of Rhode Island Law*, 9 ROGER WILLIAMS U. L. REV. 499, 505 (2004) ("The Supreme Court has held that Congress intended in the FAA to exercise its commerce power . . . .").

[62] *See, e.g.*, *Prima Paint*, 388 U.S. at 405 (observing "federal arbitration statute is based upon" congressional control over interstate commerce) (citation omitted); *see* Stephen K. Huber, *The Arbitration Jurisprudence of The Fifth Circuit*, 35 TEX. TECH L. REV. 497, 501 (2004) ("It has long been clear that the constitutional basis for the FAA is found in the Commerce Clause."); Hui, *supra* note 61, at 716 ("[T]he constitutional foundation of the FAA has now shifted from congressional power to control federal courts to congressional power to regulate commerce . . . .").

"essentially rubber-stamping the ABA's proposed legislation."[63] The USAA became the "FAA", title 9 of the United States Code, on July 30, 1947.

The concept of "irrevocability" is found in three provisions of the FAA: sections 2, 3, and 4. Section 2, which is the "centerpiece" of the FAA,[64] provides that written agreements to arbitrate any existing or future disputes arising out of a commercial contract or transaction are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[65] Section 4 requires federal district courts, upon petition by either party, to order the parties to proceed to arbitration.[66] Section 3, however, provides that federal courts shall, on application of either party, stay proceedings upon "any issue referable to arbitration" unless the applicant is "in default" in proceeding with arbitration.[67]

C. The Evolution of the FAA

As discussed above, the primary purposes of the FAA were to make arbitration agreements enforceable in courts and provide procedures that would make the enforcement process simple and expeditious. In effectuating this purpose, Julius Cohen, the architect and leading proponent of the FAA, stated that the FAA was intended to be of "limited scope": procedural in nature, only relevant "to disputes involving facts and simple questions of law, not statutory or constitutional issues," and only applicable in federal courts.[68] Indeed, Cohen believed that Congress'

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[63] Kurth, *supra* note 19, at 1005–06 (describing events leading up to Congressional adoption of ABA proposals). *See* Stephen L. Hayford, *Unification of the Law of Labor Arbitration and Commercial Arbitration: An Idea Whose Time Has Come*, 52 BAYLOR L. REV. 781, 829 (2000) ("[B]oth houses effectively rubber-stamped the ABA's proposed draft of the statute."); *see also* Christine L. Davitz, *U.S. Supreme Court Subordinates Enforcement of Regulatory Statutes to Enforcement of Arbitration Agreements: From the Bremen's License to the Sky Reefers Edict*, 30 VAND. J. TRANSNAT'L L. 59, 63 (1997) ("A committee of the American Bar Association drafted the United States Arbitration Act . . . .").

[64] *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985) (noting section 2's grant to make arbitration agreements "'valid, irrevocable, and enforceable'" is "centerpiece provision" of Act) (citation omitted); Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 795 F.2d 1393, 1395 (8th Cir. 1986) (discussing section 2 as "[t]he centerpiece provision of the Federal Arbitration Act"); Alamria v. Telcor Int'l, Inc., 920 F. Supp. 658, 662 (D. Md. 1996) (describing section 2 as core provision of FAA).

[65] 9 U.S.C. § 2 (2006) (providing federal jurisdiction for contracts "evidencing a transaction involving commerce . . . .").

[66] *See* 9 U.S.C. § 4 (2006) ("[T]he court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.").

[67] 9 U.S.C. § 3 (2006) (providing for stay of arbitrable issues in court at time, upon application of party, unless applicant is "in default in proceeding with such arbitration"); Equal Employment Opportunity Comm'n v. Waffle House, Inc., 534 U.S. 279, 289 (2002) ("The FAA provides for stays of proceedings in federal district courts when an issue in the proceeding is referable to arbitration . . . .").

[68] Moses, *supra* note 57, at 111–12 (referencing Cohen's theory that arbitration was improper method for deciding major points of law); Maureen A. Weston, *Preserving the Federal Arbitration Act by Reining in Judicial Expansion and Mandatory Use*, 8 NEV. L.J. 385, 395 (2007) (arguing for amendment to FAA in order to clarify its scope).

power to adopt the FAA was primarily based upon its constitutionally authorized ability "'to establish and control inferior Federal courts.'"[69]

The evolution of the FAA from a procedural statute, as Cohen envisioned and believed Congress intended, to a body of federal substantive law can be traced to the Second Circuit's 1959 decision in *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*[70] In *Robert Lawrence* the district court sitting in diversity was called upon to determine if an arbitration clause was broad enough to encompass a charge of fraud in the inducement.[71] Since the holding in *Erie Railroad Co. v. Tompkins*,[72] a court sitting in diversity would generally look to the substantive law of the state in which it was sitting to determine if an arbitration clause was severable from a claim of fraud in the inducement.[73] Where state law regards such a clause as inseparable, a claim of fraud in the inducement must be decided by the court. [74] The *Robert Lawrence* court, however, ruled the claim arbitrable based on a "new body of federal substantive law affecting the validity and interpretation of arbitration agreements" which was born from congressional reliance on its admiralty and commerce clause powers.[75]

The *Robert Lawrence* decision was followed by the U.S. Supreme Court's decision in *Prima Paint*.[76] *Prima Paint* also involved whether claims for fraud in

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[69] Moses, *supra* note 57, at 120 ("Congress' power to adopt the statute 'rests upon the constitutional provisions by which Congress is authorized to establish and control inferior Federal courts.'") (citation omitted). *See id*. at n.141 ("Cohen also asserted that in enacting the FAA, 'Congress rests solely upon its power to prescribe the jurisdiction and duties of the Federal courts.'") (citation omitted).

[70] 271 F.2d 402, 411 (2d Cir. 1959).

[71] *Id.* at 412.

[72] 304 U.S. 64, 78 (1938) (ruling federal district courts in diversity cases must apply law of states in which they sit).

[73] *E.g.*, Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 202–203 (1956) (finding state law must govern whether to allow for arbitration); Lummus Co. v. Commonwealth Oil Ref. Co., 280 F.2d 915, 923–24 (1st Cir. 1960) (deferring to New York law when deciding whether fraud on contract including arbitration agreement should preclude arbitration); *see Erie*, 304 U.S. 64, 78 (going as far as saying: "[t]here is no federal general common law").

[74] *See Lummus*, 280 F.2d at 923–24 (explaining if agreement to arbitrate is "separate" from underlying contract, claim of fraud in inducement will not preclude enforcement of separate arbitration agreement); *see also Bernhardt*, 350 U.S. at 203 (implying state law should be ultimate determinant on severing arbitration clauses).

[75] The court set forth that:

> We think it is reasonably clear that the Congress intended by the Arbitration Act to create a new body of federal substantive law affecting the validity and interpretation of arbitration agreements. In the first place Section 2 of the Arbitration Act specifically limits its applicability to "any maritime transaction or a contract evidencing a transaction involving commerce." This indicates a congressional intention to rely on the admiralty power implied from Article III, Section 2, Clause 3 and the commerce power, Article I, Section 8, Clause 3. Such intention is confirmed by the legislative history.

Robert Lawrence Co. v. Devonshire Fabrics Inc., 271 F.2d 402, 406 (2d Cir. 1959) (citing H.R. REP. NO. 96, at 1 (1924)).

[76] Prima Paint Corp. v. Flood & Conklin Mfg., 388 U.S. 395, 418 (1967) (affirming Arbitration Act was applicable in diversity cases and "Congress in passing the [FAA] relied primarily on its power to create general federal rules to govern federal courts").

the inducement should be determined by the court or an arbitrator.[77] Tracing the conclusions reached in *Robert Lawrence*, the Supreme Court[78] held that the FAA mandated that a broad arbitration clause must encompass the arbitration of claims that the contract itself was induced by fraud.[79] That is, the federal court could only consider issues relating to the making and performance of the agreement to arbitrate and as long as the arbitration clause itself was not induced by fraud, the FAA compelled the arbitration of the fraud in the inducement claim.[80] The Supreme Court based its holding on the premise that Congress may prescribe how federal courts are to exercise their jurisdiction in areas that affect interstate commerce and admiralty.[81]

Sixteen years later, the Supreme Court decided *Moses H. Cone Memorial Hospital v. Mercury Construction Corp*.[82] In *Moses H. Cone*, a contract dispute arose between a construction contractor and a hospital, and the contractor demanded additional payments for construction work performed.[83] The hospital, however, won the race to the courthouse. It sought a declaratory judgment in state court that it had no liability to the contractor, and that, alternatively, it would be entitled to

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[77] *Id.* at 396–97.

[78] The lower courts in *Prima Paint*, in fact, relied on the *Robert Lawrence* decision. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 360 F.2d 315, 318 (2d Cir. 1966) (quoting *Robert Lawrence* in its holding that FAA created "'national substantive law'") (citation omitted); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 262 F. Supp. 605, 607 (S.D.N.Y. 1966) (referencing *Robert Lawrence* decision as "leading case").

[79] *See Prima Paint*, 388 U.S. at 403–05 (reasoning arbitration clauses are "'separable'" from bigger contracts and broad arbitration clauses encompass arbitration of fraud in inducement of general contract) (citation omitted); Sphere Drake Ins. Ltd. v. Clarendon Nat'l Ins. Co., 263 F.3d 26, 31 (2d Cir. 2001) (differentiating between claim for fraud in inducement of arbitration clause, which federal court may adjudicate, and claims for fraud in inducement of general contract, which broad arbitration clause would encompass, and therefore should not be adjudicated by federal court) (citations omitted); *see also* Jack Wilson, *"No-Class-Action Arbitration Clauses," State-Law Unconscionability, and the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action*, 23 QUINNIPIAC L. REV 737, 781–91 (2004) (discussing similarity between claim of fraud in inducement of contract and claim of unconscionability of contract and similar treatment in determining whether courts or arbitrators are to decide those issues).

[80] *See Prima Paint*, 388 U.S. at 403–04 (stating federal court may only consider making of agreements to arbitrate; if there is no fraud in inducement of *that* agreement, all other claims must be decided in arbitration in accordance with FAA); Liz Kramer, *The Short Shelf-Life of* Onvoy, Inc. v. Shal, LLC*: What Remains of the Minnesota Supreme Court Ruling After Buckeye Check Cashing, Inc. v. Cardegna?*, 33 WM. MITCHELL L. REV. 1279, 1281 (2007) ("Only if the arbitration clause itself can be attacked . . . may a court entertain the issue of arbitrability . . . ."); *see also* Margaret M. Harding, *The Redefinition of Arbitration By Those With Superior Bargaining Power*, 1999 UTAH L. REV. 857, 921 (1999) (noting Supreme Court's observation that courts should only consider making and performance of agreements to arbitrate (citing *Prima Paint*, 388 U.S at 403–04)).

[81] *See, e.g.*, *Prima Paint*, 388 U.S. at 405 (discussing "Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate"); *see* Tenn. River Pulp & Paper Co. v. Eichleay Corp., 637 S.W.2d 853, 856–57 (Tenn. 1982) (reasoning since federal arbitration statute is based on control of interstate commerce which Congress undeniably has, courts are to conduct themselves according to congressional mandate); Henry C. Strickland, *The Federal Arbitration Act's Interstate Commerce Requirement: What's Left for State Arbitration Law?*, 21 HOFSTRA L. REV. 385, 395 (1992) (discussing extent of FAA's reach over issues involving interstate commerce).

[82] 460 U.S. 1 (1983).

[83] *Id.* at 4–7.

indemnity from the contractor's architect if the contractor won.[84] The contractor then moved in federal district court for an order compelling arbitration of its contract dispute with the hospital, pursuant to the arbitration clause in the contract.[85]

The hospital argued that it had two substantive disputes, one with the contractor and the other with the architect, and that the second dispute could not be ordered deferred to arbitration because there was no arbitration clause in its contract with the architect.[86] Thus, if the court ordered arbitration of the first dispute, the hospital would be forced to resolve these two related disputes in different forums.[87]

In holding that the claim between the hospital and the contractor was subject to arbitration, the Supreme Court for the first time, in *dicta* and without citation, announced that section 2 of the FAA was a "congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act."[88]

The evolution was nearly complete: from *Prima Paint* to *Moses Cone*, the Supreme Court restructured the FAA from a procedural statute that applied exclusively in federal court—adopted to address the doctrine of revocability and the historic judicial hostility toward arbitration[89]—to a body of substantive law that applied equally in federal and state court, preempted state law and extended to reach the ever-expanding limits[90] of Congress' commerce clause power.[91] In 1995, Justice

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[84] *Id.* at 7.

[85] *Id.*

[86] *Id.* (summarizing hospital's arguments that it had cause of action against both contractor, Mercury, and architect, and that "Mercury had lost any right to arbitration . . . due to waiver, laches, estoppel, and failure to make a timely demand for arbitration").

[87] *Id.* at 20.

[88] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). In its next term, the Supreme Court decided *Southland Corp. v. Keating*, which further built upon the *dicta* in *Moses H. Cone* by holding that the FAA also applied in state courts and preempted state law. 465 U.S. 1, 12–13 (1984) (rationalizing Congress wanted to grant general assurance that all arbitration agreements involving interstate commerce would be enforced regardless of jurisdiction and state legislature); *see* Moses, *supra* note 57, at 122 (noting *Moses H. Cone* dicta that FAA created "federal substantive law of arbitrability" and FAA would govern in both federal and state courts).

[89] *See Moses H. Cone*, 460 U.S. at 24 (concluding section 2 of title 9 is liberal federal policy favoring arbitration; therefore section's effect is to create body of federal substantive law applicable to any arbitration agreement, and all questions of arbitrability must be considered with regard to federal policy that favors arbitration); Dunham, *Binding Arbitration, supra* note 20, at 206 (discussing "'liberal federal policy that favors arbitration'" and that courts have been disavowing state argument that claims arising in state courts, involving state laws, are not subject to FAA's federal preemption) (citation omitted); Andre V. Egle, *Back to* Prima Paint Corp. v. Flood & Conklin Manufacturing Co*.: To Challenge an Arbitration Agreement You Must Challenge The Arbitration Agreement*, 78 WASH. L. REV. 199, 205 (2003) (discussing FAA's goal to move parties into arbitration as quickly as possible, that "any doubts as to the scope of . . . arbitration should be resolved in favor of arbitration" and that "lower federal courts have followed [this] pro-arbitration policy").

[90] In the post-depression era, the Supreme Court greatly expanded the previously defined authority of Congress under its Commerce Clause powers, which powers were conferred by Article I, Section 8 of the U.S Constitution. *See* United States v. Lopez, 514 U.S. 549, 556 (1995) (describing development of law, stating it "ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined

Breyer summed up the FAA's evolution in *Dobson*: "It is not unusual for this Court in similar circumstances to ask whether the scope of a statute should expand along with the expansion of the Commerce Clause power itself, and to answer the question affirmatively . . . ."[92] The unintended impact of this expansion favoring arbitration on proceedings arising within the bankruptcy statutory scheme, however, could not be fully appreciated until the Supreme Court's decisions in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[93] and *Shearson/American Express, Inc. v. McMahon*.[94]

D. Arbitrating Statutory Claims under the FAA

Mitsubishi marked the first time the Supreme Court held that the FAA mandated the arbitration of statutory claims.[95] In *Mitsubishi*, a distributorship

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authority of Congress under that Clause"). This expansion was a consequence of judicial recognition that business in the post-depression era had a national scope and an understanding that earlier Supreme Court precedent in the area of the Commerce Clause "artificially . . . constrained the authority of Congress to regulate interstate commerce." *Id. See* Wickard v. Filburn, 317 U.S. 111, 128–29 (1942) (holding Congress can regulate activity and consider aggregate effect of wheat consumed on farm in purporting to stimulate trade).

[91] *See* Allied-Bruce Terminex Cos. v. Dobson, 513 U.S. 265, 265 (1995) (holding FAA section 2 language "'involving commerce'" is equivalent to Article I section 3 clause 8 of Commerce Clause language "'affecting commerce,'" and FAA should be "read broadly to" reach "limits of Congress' Commerce Clause power"); Baer v. Terminix Int'l Co., 975 F. Supp. 1272, 1278 (D. Kan. 1997) (explaining interstate commerce element of FAA is satisfied when transaction has nexus to interstate commerce). *But cf.* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 117–18 (2001) (construing "'engaged in commerce'" language of FAA section 1 more narrowly, not interpreting as congressional regulation to full extent of commerce power).

[92] *Dobson*, 513 U.S. at 275. *See, e.g.*, McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 241–42 (1980) (stating jurisdictional requirement of Sherman Act is satisfied regardless of whether action is "'in commerce'" or has "'effect on commerce,'" as broad reach under Sherman Act corresponds to that of the commerce clause) (citations omitted); Jonathan H. Adler, *Is Morrison Dead? Assessing a Supreme Drug (Law) Overdose*, 9 LEWIS & CLARK L. REV. 751, 762, 764 (2005) (explaining holding in *Gonzales v. Raich* creates commerce power limited only "by Congress' desire for expansive legislation. . . . [t]hus, so long as a statute largely regulates economic or commercial activity . . . there is no limit to the amount of non-commercial, intrastate activity that may also succumb to federal power so long as Congress enacts a sufficiently expansive regulatory regime").

[93] 473 U.S. 614 (1985).

[94] 482 U.S. 220, 226 (1987).

[95] *Mitsubishi*, 473 U.S. 614. Prior to the holding in *Mitsubishi*, the Supreme Court had consistently held that statutory claims should not be arbitrated. *E.g.*, McDonald v. City of W. Branch, Mich., 466 U.S. 284, 290 (1984) (remarking arbitration cannot provide acceptable substitute for judicial proceeding protecting federal statutory and constitutional rights, although can resolve contractual disputes); Barrentine v. Ark.-Best Freight Sys., Inc., 450 U.S. 728, 744 (1981) (reasoning claim should not be arbitrable because arbitrator's power is from collective-bargaining agreement, and in this matter, arbitor's main objective will be to effectuate intent of parties, rather than enforce statues, and this leads to ruling "inimical" to public policies) (citation omitted); Alexander v. Gardner-Denver Co., 415 U.S. 36, 49 (1974) (observing suggestion statutory private cause of action not forfeited even if grievance first pursued to final arbitration under collective-bargaining agreement's nondiscrimination clause); Wilko v Swan, 346 U.S. 427, 440 (1953) (refusing to hold valid arbitration agreement where statutory securities issue was involved); *see* Ronald M. Green, Evan J. Spelfogel & Barry Asen, *Circuit City Stores Inc. v. Adams: The End of the Long and Winding Road to a National Policy Favoring the Arbitration of Employment Disputes*, 1 J. AM. ARB. 179, 191–92 (2002)

agreement between an automobile dealer and an automobile manufacturer contained a provision requiring the arbitration of disputes arising under the agreement.[96] Having failed to meet certain automobile sales quotas, the automobile dealership began shipping its inventory to other manufacturer's dealers for sale over the manufacturer's objection and in an alleged breach of their agreement. Thereafter, the manufacturer commenced an action in federal district court in Puerto Rico for the limited purpose of seeking an order compelling arbitration.[97] The dealer counterclaimed, alleging that the manufacturer had violated the Sherman Anti-Trust Act as well as other state and federal laws.[98] The district court compelled arbitration of certain claims, including the Sherman Anti-Trust Act claim. However, the First Circuit reversed, determining that the Second Circuit's decision in *American Safety Equipment Corp. v. J.P. Maguire & Co.*[99] supported the preclusion of the arbitration of antitrust claims.[100]

After granting *certiorari*, the Supreme Court held that disputes under the Sherman Anti-Trust Act were subject to arbitration under the FAA.[101] The majority, relying on the *dicta* in *Moses Cone*,[102] stated that the "'liberal federal policy favoring arbitration agreements'" compelled the need to rigorously enforce arbitration agreements, even in the context of statutory rights.[103] "[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."[104]

The Court in *Mitsubishi* then set forth a two-pronged test to determine whether a statutory claim is arbitrable pursuant to the FAA: first, whether the statutory claim

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(discussing Supreme Court's sudden acceptance of statutory claim arbitration in *Mitsubishi* and its two-pronged test determining whether statutory claims are arbitrable pursuant to FAA).

[96] 473 U.S. at 617.

[97] *Id.* at 617–18 & n.1.

[98] *Id.* at 619–20 (alleging breaches of sales agreement, raising defamation claims, and asserting causes of action under Sherman Antitrust Act).

[99] 391 F.2d 821 (2d Cir. 1968).

[100] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 623 (1985) (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 723 F.2d 155, 164–68 (1983)).

[101] *Mitsubishi*, 473 U.S. at 628–29 (accepting circuit court's determination that claims were within scope of arbitration agreement, court found agreement to arbitrate should be enforced for international comity and predictability reasons).

[102] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) ("Section 2 [of the FAA, 9 U.S.C.] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.").

[103] *Mitsubishi*, 473 U.S. at 625–26 (citing Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213,221 (1985)). *See* Lozano v. AT & T Wireless Servs., 504 F.3d 718, 725 (9th Cir. 2007) (noting FAA's "liberal federal policy favoring arbitration" including statutory claims) (citation omitted); Kitts v. Menards, Inc., 519 F. Supp. 2d 837, 839 (N.D. Ind. 2007) (noting FAA's liberal policy in favor of arbitration, including statutory claims such as Age Discrimination in Employment Act).

[104] *Mitsubishi*, 473 U.S. at 626–27. *See* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006) ("Section 2 [of FAA] embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts . . . ."); Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 131–32 (2001) (describing how Supreme Court cases have "pushed the pendulum far beyond a neutral attitude and endorsed a policy that strongly favors private arbitration").

comes within the ambit of the parties' agreement to arbitrate, and second, whether any legal constraints outside the arbitration agreement would foreclose arbitration, such as legislative history noting that arbitration was inappropriate.[105]

On the heels of *Mitsubishi*, the Supreme Court sustained the arbitrability of statutory claims under the Racketeer Influenced and Corrupt Organizations ("RICO") Act and the Securities Exchange Act of 1934 in *McMahon*.[106] In *McMahon*, two customers sued a brokerage firm in the Southern District of New York, alleging fraudulent and excessive trading, misrepresentation, and omission of material facts when providing advice.[107] The brokerage firm moved to compel arbitration pursuant to the FAA and the parties' arbitration agreement.[108] The district court determined that the Securities Exchange Act claim was arbitrable but that the RICO claim was not.[109] On appeal, the Second Circuit concluded that neither statutory claim was arbitrable.[110] Reversing the Second Circuit, the Supreme Court held that both claims were arbitrable and stated that an arbitration agreement must be enforced unless the party opposed to the arbitration carries the burden that Congress did not intend the statutory right at issue to be adjudicated by a court to be waivable:[111]

> The burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. . . . If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent will be deducible from the statute's text or legislative history, . . . or from an inherent conflict between arbitration and the statute's underlying purposes.[112]

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[105] *Mitsubishi*, 473 U.S. at 628; *see* Breletic v. CACI, Inc., 413 F. Supp. 2d 1329, 1334 (N.D. Ga. 2006) (detailing first step of inquiry to include determining whether valid written agreement exists, agreement applies to relevant claims, and non-moving party has refused arbitration). *But see* Webb v. Investacorp., 89 F.3d 252, 258 n.3 (5th Cir. 1996) (noting sometimes additional inquiry will be needed, such as determining whether issues regarding actual agreement to arbitrate are to be arbitrated or to be settled by court).

[106] Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 242 (1987).

[107] *Id.* at 223.

[108] *Id.*

[109] *Id.* at 223–24 (citing McMahon v. Shearson/Am. Express, Inc., 618 F. Supp. 384 (S.D.N.Y. 1985)).

[110] *Id.* at 224–25 (citing McMahon v. Shearson/Am. Express, Inc., 788 F.2d 94 (2d Cir. 1986)).

[111] *Id.* at 226–27; *see* Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90 (2000) (stating one of inquiries in deciding arbitrability of statutory issue is "whether Congress has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue"); Rodriguez de Quijas v. Shearman/Am. Express, Inc. 490 U.S. 477, 483 (1989) ("[T]he party opposing arbitration carries the burden of showing that Congress intended in a separate statute to preclude a waiver of judicial remedies, or that such a waiver of judicial remedies inherently conflicts with the underlying purposes of that other statute.") (citation omitted).

[112] Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 227 (1987) (internal quotations and citations omitted). *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 483 (1989) (stating how this burden can be met by showing congressional intent, in separate statute, to preclude waiver of judicial remedies, or by showing that such waiver inherently conflicts with underlying purposes of other statute); *In re* Hagerstown Fiber Ltd. P'ship, 277 B.R. 181, 198–99 (Bankr. S.D.N.Y. 2002) (stating burden required and discussing how it can be met (quoting *McMahon*, 482 U.S. at 227, and *Rodriguez de Quijas*, 490 U.S. at 483)).

The Court promulgated a three-pronged test to identify the existence of the contrary congressional command. The test provided that Congressional intent "to limit or prohibit waiver of a judicial forum for a particular claim" may be gathered (1) by examining the text of the statute in controversy, (2) by reviewing the legislative history of the statute, or (3) by finding "an inherent conflict between arbitration and the statute's underlying purposes."[113]

Thus, *McMahon's* analytical framework regarding the enforceability of arbitration agreements in bankruptcy seemingly established,[114] clearly the framework was without regard for Congress's decision to confer upon the bankruptcy courts centralized jurisdiction over disputes regarding a debtor's assets and legal obligations and litigation "arising under" or "arising in" the Bankruptcy Code, or "related to" a case under the Bankruptcy Code.[115] Nevertheless, the

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[113] *McMahon*, 482 U.S. at 227. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. 473 U.S. 614, 628 (1985) ("We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history."); *Rodriguez de Quijas*, 490 U.S. at 483 (stating party opposing arbitration can show congressional intent to preclude waiver or such waiver inherently conflicts with underlying purposes of other statute).

[114] *McMahon*, 482 U.S. at 227; *see Rodriguez de Quijas*, 490 U.S. at 483 (noting *McMahon* test, requiring party opposing arbitration to carry burden of showing opposing congressional intent to preclude waiving judicial remedies or showing conflict with underlying purpose of statute); *see also* Cunningham v. Fleetwood Homes of Ga., Inc. 253 F.3d 611, 614 (11th Cir. 2001) (citing *McMahon* framework). In a line of cases, the Supreme Court further expanded the reach of the FAA to state judicial and administrative proceedings. In *Southland Corp. v. Keating*, the Court held that the FAA applied equally by barring litigation before federal and state court proceedings and was intended to foreclose "[S]tate legislative attempts to undercut the enforceability of arbitration agreements." 465 U.S. 1, 16 (1984). In 2006, the Court held that a claim that a contract was void for illegality was to be determined by an arbitrator pursuant to a contractual arbitration provision, and not a state court, where the case was pending. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 447–49 (2006). The Court in *Preston v. Ferrer* held that the FAA superseded a California statute that vested primary adjudicative jurisdiction of a dispute in an administrative agency and stated an arbitration panel instead of the state agencies should adjudicate the dispute. 128 S. Ct. 978, 987 (2008); *see* Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996) ("By enacting § 2 [of the FAA], we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'") (citation omitted). This evolution has been tempered in the area of judicial review of arbitration agreements, however. The Supreme Court in *Hall Street Associates, LLC v. Mattel, Inc.*, determined that the FAA's provisions regarding vacatur and modification of awards were exclusive, and that parties could not incorporate provisions into their arbitration agreements, which modified or altered a court's standard of review of an arbitrator's ultimate award. 128 S. Ct. 1396, 1403, 1404–05 (2008); *see* Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 998 (9th Cir. 2003) ("[Sections 10 and 11 of the FAA] afford an extremely limited review authority, a limitation that is designed to preserve due process but not to permit unnecessary public intrusion into private arbitration procedures."). *See generally* 9 U.S.C. § 10 (2006) (enumerating four conditions under which United States court in district where arbitration award was made may order vacation of award).

[115] *See* 28 U.S.C. § 1334(b) (2006) (granting district courts original, but not exclusive, jurisdiction of all civil proceedings related to cases under title 11); *see also id.* at § 1334(e) (2006) (vesting the district court in which a case under the Bankruptcy Code is commenced or is pending with "exclusive jurisdiction of all of property, wherever located, of the debtor as of the commencement of such case"); Ram Const. Co. v. Port Auth. of Allegheny County, 49 B.R. 363, 365 (W.D. Pa. 1985) (discussing Congress's broad jurisdictional grant under 28 U.S.C. section 1334(b)).

McMahon test is applied in bankruptcy cases,[116] despite the fact that bankruptcy jurisdiction is different from federal district court jurisdiction and is conferred specifically for the application and enforcement of the statutory rights conferred by the Bankruptcy Code. Indeed, the purpose of the grant of broad bankruptcy jurisdiction contained in sections 1334(a), (b) and (e), combined with the unique abstention provisions contained in section 1334(c)(1), call for a different result.

III. ENFORCEABILITY OF ARBITRATION AGREEMENTS IN BANKRUPTCY

A. The Establishment of Uniform Laws on the Subject of Bankruptcy

The decision to enforce an arbitration agreement in bankruptcy must be made against the back-drop of the bankruptcy-related jurisdictional authority conferred on the bankruptcy courts under section 1334 of title 28, and its unique provision for abstention. Thus, before delving into the enforceability of arbitration agreements in bankruptcy, a brief primer on the jurisdictional authority of the bankruptcy courts is necessary. This will be critical to an understanding of the analytical framework—contained in section 1334(c)(1) of title 28—that a bankruptcy court utilizes when deciding whether to abstain from exercising this jurisdiction. In turn, this abstention analysis must guide a bankruptcy court in determining whether an arbitration agreement is in fact enforceable after bankruptcy ensues.

As part of the enactment of the National Bankruptcy Act of 1898 (the "Bankruptcy Act"), Congress established "courts of bankruptcy"[117] to effectuate a national uniform bankruptcy law.[118] "Bankruptcy referees"[119] were charged with the

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[116] *E.g.*, MBNA Am. Bank, N.A. v. Hill, 436 F.3d 104, 108 (2d Cir. 2006) (noting *McMahon* test to analyze conflict between Bankruptcy Code and FAA); Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 885 F.2d 1149, 1156–57 & n.10 (3d Cir. 1989) (using *McMahon* test, requiring party opposing arbitration to provide congressional intent in order to make exception to Arbitration Act by showing such intent in text, history or purposes of other statute—in this case, Bankruptcy Code).

[117] Alan N. Resnick, *The Enforceability of Arbitration Clauses in Bankruptcy*, 15 AM. BANKR. INST. L. REV. 183, 190 (2007) (describing National Bankruptcy Act of 1898's vesting jurisdiction over bankruptcy cases in "'courts of bankruptcy,'" which included United States' district courts); *see* Plymouth Cordage Co. v. Smith, 194 U.S. 311, 314–15 (1904) (observing bankruptcy laws "making the district courts of the territories courts of bankruptcy"); Rodgers v. Ramseur (*In re* Whitener), 105 F. 180, 186 (5th Cir. 1900) (noting district court's jurisdiction is not general jurisdiction, but "unquestionably bankruptcy jurisdiction . . . .").

[118] *See* Resnick, *supra* note 117, at 183 ("In general, the administration of the American bankruptcy system benefits from the centralization of dispute resolution in a single forum with uniform rules."); *see also* Erwin Chemerinsky, *Decision-Makers: In Defense of Courts*, 71 AM. BANKR. L.J. 109, 115 (1997) (noting specialization of bankruptcy courts affords "two major advantages: expertise and uniformity"); Sarang Vijay Damle, Note, *Specialize the Judge, Not the Court: A Lesson from the German Constitutional Court*, 91 VA. L. REV. 1267, 1275–78 (2005) (noting specialized courts create three benefits: easing pressure from general jurisdiction courts, fulfilling growing need for expertise in complex areas of law, and creating uniformity in federal law).

[119] *See* Resnick, *supra* note 117, at 190 (discussing district courts' appointment of "'referees'" who would preside over bankruptcy proceedings); *see also* FED. R. BANKR. P. 901(7) (1973) (designating bankruptcy referees as "bankruptcy judges"); N. Pipeline Constr. v. Marathon Pipe Line Co., 458 U.S. 50, 53 (1982)

day-to-day administration of those bankruptcy cases under the Bankruptcy Act.[120] These bankruptcy referees, however, possessed limited "summary jurisdiction"[121] over the property that was in the bankrupt's control (either actual or constructive control) and to those persons who consented to the jurisdiction of the courts of bankruptcy.[122] The bankruptcy court's limited "'summary jurisdiction'" extended only to the adjudication of disputes involving matters: (i) related to the administration of the bankruptcy case; (ii) involving the debtor's property; (iii) where the parties consented to the bankruptcy referee's jurisdiction; and (iv) as allowed under the Bankruptcy Act.[123] Disputes falling outside the bankruptcy court's summary jurisdiction—known as plenary bankruptcy disputes—were litigated in the state courts or, if there was an independent basis for jurisdiction (e.g. diversity, admiralty or federal question jurisdiction), the district courts.[124]

The adjudication of bankruptcy disputes requiring plenary jurisdiction for some and allowing summary jurisdiction for others required the trustee or debtor to use

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("Before [the Bankruptcy Act of 1978], federal district courts served as bankruptcy courts and employed a 'referee' system.").

[120] *See Marathon*, 458 U.S. at 53 ("Bankruptcy proceedings were generally conducted before referees . . . ."); Phar-Mor, Inc. v. Coppers & Lybrand, 22 F.3d 1228, 1234 (3d Cir. 1994) (explaining district courts would automatically refer bankruptcy cases to referees who would issue final orders that can be appealed to district court); Resnick, *supra* note 117, at 190 (discussing district courts' appointment of "'referees'" who would preside over bankruptcy proceedings).

[121] Resnick, *supra* note 117, at 190 (explaining bankruptcy judges' limited "'summary jurisdiction'" that extended only to property in actual or constructive possession of debtor at time bankruptcy petition was filed). *See* Cline v. Kaplan, 323 U.S. 97, 98 (1944) ("A bankruptcy court has the power to adjudicate summarily rights and claims to property which is in the actual or constructive possession of the court." (citing Thompson v. Magnolia Petroleum Co., 309 U.S. 478, 481 (1940))); Harris v. Avery Brudnage Co., 305 U.S. 160, 163 (1938) (stressing bankruptcy court jurisdiction "extends to determination of controversies relating to all property in the debtor's physical possession *or* in the hands of the debtor's agent at the time of filing of a petition in bankruptcy").

[122] Resnick, *supra* note 117, at 190–91 ("The bankruptcy judge also had jurisdiction over persons who had consented to bankruptcy court jurisdiction."); *see* Katchen v. Landy, 382 U.S. 323, 335 (1966) (noting presumption of consent where respondents present claims, they therefore subject themselves "'to all the consequences that attach to an appearance'") (citation omitted). *But cf.* Wall v. Cox, 181 U.S. 244, 247 (1901) (refusing to recognize consent to jurisdiction where defendants specifically appeared for purpose of protesting district court jurisdiction).

[123] *See* 1 COLLIER ON BANKRUPTCY ¶ 1.06[1][b], at 1-64–1-65 (Alan N. Resnick et al. eds., 15th ed. rev. 2008) (outlining categories of jurisdiction granted to bankruptcy courts (citing Report of Commission on Bankruptcy Laws of United States, Part I at 88–89)); *see also* Susan Block-Lieb, *Permissive Bankruptcy Abstention*, 76 WASH. U. L.Q. 781, 797 n.91 (1998) [hereinafter *Permissive Bankruptcy*] (discussing four areas where bankruptcy courts had summary jurisdiction under Bankruptcy Act of 1898); Susan Block-Lieb, *The Costs of Non-Article III Bankruptcy Court System*, 72 AM. BANKR. L. J. 529, 531–32 (1998) [hereinafter *The Costs of Non-Article III*] (listing four categories of subject matter over which bankruptcy has summary jurisdiction).

[124] *See* Block-Lieb, *Permissive Bankruptcy*, *supra* note 123, at 803 (noting if bankruptcy court did not have summary jurisdiction, trustee must commence plenary action in either state or federal district court); Block-Lieb, *The Costs of Non-Article III*, *supra* note 123, at 532 ("In all other instances, 'plenary' bankruptcy-related disputes were litigated in a district court if there was diversity or federal question jurisdiction, or in a state court if there was not.").

two or more court systems for the same bankruptcy case.[125] Adjudication of bankruptcy disputes that required plenary jurisdiction for some and allowed summary jurisdiction for others was both inefficient and costly.[126] Indeed, "'[a] major impetus underlying [the 1978 Bankruptcy Reform Act was] the need to enlarge the jurisdiction of the bankruptcy court in order to eliminate the serious delays, expense and duplications associated with the current dichotomy between summary and plenary jurisdiction . . . .'"[127]

The basic jurisdictional grant for bankruptcy courts under the 1978 Bankruptcy Reform Act was contained in former section 1471 of title 28.[128] Section 1471 vested in the new bankruptcy court jurisdiction of all civil proceedings "arising under" title 11 or "arising in" or "related to" cases under title 11. The new bankruptcy court jurisdictional scheme was summarized as follows:

> Subsection (b) of [section 1471] is a significant change from current law. It grants the bankruptcy court original (trial), but not exclusive, jurisdiction of all civil proceedings arising under Title 11 or arising under or related to cases under Title 11. This is the broadest grant of jurisdiction to dispose of proceedings that arise in bankruptcy cases or under the bankruptcy code. Actions that

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[125] *See* 1 COLLIER ON BANKRUPTCY ¶ 1.06[1][b], at 1-66 (Alan N. Resnick et al. eds., 15th ed. rev. 2008) (remarking part of trustee's litigation to recover assets must have been commenced in courts outside of bankruptcy; in addition some plaintiffs would have option of suing trustee in other courts) (citation omitted); *see also* Block-Lieb, *Permissive Bankruptcy*, *supra* note 123, at 803 (noting under former Bankruptcy Act, "trustee was required to commence plenary action, either in federal district court or a state court") (citation omitted); John C. McCoid, II, *Bankruptcy, Preferences, and Efficiency: An Expression of Doubt*, 67 VA. L. REV. 249, 262 (1981) (recognizing under former law, recovering preferentially transferred property often required trustee to file separate suit in nonbankrutpcy court).

[126] *See* 1 COLLIER ON BANKRUPTCY ¶ 1.06[1][b], at 1-67 (Alan N. Resnick et al. eds., 15th ed. rev. 2008) (noting "extra expense" to "estate in litigating outside the bankruptcy court") (citation omitted); *see also* Block-Lieb, *The Costs of a Non-Article III*, *supra* note 123, at 532 (discussing severe criticism on division between summary and plenary jurisdiction over bankruptcy matters as "litigants were able to dispute . . . jurisdiction for years before any court" would address "merits of the suit"); Janine C. Ciallella, *Should Bankruptcy Judges Be Permitted to Conduct Jury Trials?*, 8 AM. BANKR. INST. L. REV. 175, 177–78 (2000) (noting unnecessary litigation over jurisdiction due to division between summary and plenary jurisdiction).

[127] Zimmerman v. Cont'l Airlines, Inc., 712 F.2d 55, 58 (3d Cir. 1983) (citation omitted), *superseded by statute*, 9 U.S.C. § 1019 (2006), *recognized in* Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 885 F.2d 1149 (3d Cir. 1989) (quoting S. REP NO. 95-989 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5803); *see* 1 COLLIER ON BANKRUPTCY ¶ 1.06[1][b], at 1-67 (Alan N. Resnick et al. eds., 15th ed. rev. 2008) ("The most serious objection to the division of jurisdiction is the frequent, time-consuming, and expensive litigation of the question whether the bankruptcy court has jurisdiction of a particular proceeding.") (citation omitted); Block-Lieb, *Permissive Bankruptcy*, *supra* note 123, at 804–05 ("Legislative history indicates that Congress was motivated, both in expansively defining bankruptcy jurisdiction and in broadly delegating this jurisdiction to bankruptcy courts, by an interest in expediting the administration and resolution of bankruptcy cases . . . .").

[128] *See* 28 U.S.C. § 1471 (1978), *invalidated by* N. Pipeline Constr. Co. v. Marathon Pipe Line, Co., 458 U.S. 50 (1982); *Zimmerman*, 712 F.2d at 58; 1 COLLIER ON BANKRUPTCY ¶ 3.01[2][b], at 3-6 (Alan N. Resnick et al. eds., 15th ed. rev. 2008) ("The jurisdictional provisions of the 1978 legislation were contained in sections 1471-1482 of title 28 . . . ."); *In re* Coleman American Cos., 8 B.R. 384, 387 (Bankr. D. Kan. 1981) (mentioning section 1471 provides "general jurisdictional grant to the bankruptcy courts").

> 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 idea of possession or consent as the sole basis for jurisdiction is eliminated. The bankruptcy court is given in personam jurisdiction as well as in rem jurisdiction to handle everything that arises in a bankruptcy case.[129]

Congress sought to shore up its "exclusive and pervasive"[130] jurisdictional grant under section 1471 by allowing the venue of "various proceedings, disputes, actions, arising under or related to [the bankruptcy cases]" to be directly with the bankruptcy courts[131] and by allowing the removal of pending civil proceedings from the state courts to the bankruptcy courts.[132] Indeed section 1452(a)—the removal provision—was enacted to promote federal court jurisdiction over specified bankruptcy-related claims.[133] "Interpreting Section 1452 to allow removal for all actions over which there is bankruptcy jurisdiction . . . is consistent with the purpose of the Bankruptcy Code."[134] More particularly:

> Congress, when it added § 1452 to the Judicial Code chapter on removal of cases from state courts . . . meant to enlarge, not rein in, federal trial court removal/remand authority for claims related to

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[129] *In re* Bros. Coal, Co., 6 B.R. 567, 570 (Bankr. W.D. Va. 1980) (internal quotations and citation omitted). *See* Auburn Med. Realty v. Bonardi (*In re* Auburn Med. Realty), 19 B.R. 113, 115 (B.A.P. 1st Cir. 1982) (discussing subsection (b) as "'significant change'" from prior law by granting bankruptcy court trial jurisdiction for actions formerly designated to state and federal district courts) (citation omitted); *In re* Hartley, 16 B.R. 777, 778 (Bankr. N.D. Ohio 1982) (stating, according to section 1471, district court "'shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11'") (citation omitted).

[130] 1 COLLIER ON BANKRUPTCY ¶ 1.06[4], at 1-100 (Alan N. Resnick et al. eds., 15th ed. rev. 2008) ("In keeping with all versions of legislation wherein exclusive and pervasive jurisdiction was given the bankruptcy courts . . . .").

[131] 1 COLLIER ON BANKRUPTCY ¶ 1.06[4], at 1-100 (Alan N. Resnick et al. eds., 15th ed. rev. 2008). *See Zimmerman*, 712 F.2d at 58 (noting "'all matters and proceedings that arose in connection with bankruptcy cases' may now be tried in one action before the bankruptcy court") (citation omitted); *see also* 28 U.S.C. §§ 1472–1475 (1978), *invalidated by Marathon*, 458 U.S. 50 (outlining various venues and proceedings that are under jurisdiction of bankruptcy courts).

[132] *See* 28 U.S.C. § 1478 (1978), *invalidated by Marathon*, 458 U.S. 50 (allowing removal of any claim to bankruptcy court where bankruptcy court has jurisdiction); *see also Zimmerman*, 712 F.2d at 58 (discussing congressional grant for removal under section 1478).

[133] *See, e.g.*, 28 U.S.C. § 1452(a) (2006) (allowing for removal of claims, with some exceptions, to districts where civil actions are pending); Cal. Pub. Employees' Ret. Sys. v. WorldCom, Inc., 368 F.3d 86, 103 (2d Cir. 2004) (noting "[s]ection 1452 is designed to further Congress's purpose of centralizing bankruptcy litigation in a federal forum"); *In re* Global Crossing, Ltd. Sec. Litig., No. 02 Civ.910 GEL, 02 Civ.10199 GEL, 2003 WL 21659360, at * 3 (S.D.N.Y. July 15, 2003) (stating purpose of section 1452 "was to broaden, not narrow, federal jurisdiction"); *In re* WorldCom, Inc. Sec. Litig., 293 B.R. 308, 328 (S.D.N.Y. 2003) (finding section 1452 was "enacted in 1984 and promotes federal court jurisdiction over specified bankruptcy-related claims").

[134] *In re WorldCom*, 293 B.R. at 328; *see* Edge Petroleum Operating Co. v. GPR Holdings, L.L.C. (*In re* TXNB Internal Case), 483 F.3d 292, 298 (5th Cir. 2007) (explaining section 1452 "allows removal of claims where federal jurisdiction arises"); *In re* Allnutt, 220 B.R. 871, 886 (Bankr. D. Md. 1998) (holding claims in subject matter of bankruptcy court removable).

> bankruptcy cases. . . . Congress realized that the bankruptcy court's jurisdictional reach was essential to the efficient administration of bankruptcy proceedings . . . [Since then, both the Second Circuit and the Supreme Court] have broadly construed the jurisdictional grant in the 1984 Bankruptcy Amendments.[135]

In short, so long as a bankruptcy court has jurisdiction over an action "[t]he efficiency and reorganization goals of the Bankruptcy Code require interpreting Section 1452 in favor of federal jurisdiction and removal except in the limited cases it expressly excepts."[136]

To further effectuate the new jurisdictional provisions, Congress also gave bankruptcy courts the power to issue any order, process, or judgment necessary or appropriate to carry out the provisions of the Bankruptcy Code with the statutes.[137]

By combining jurisdiction over all bankruptcy-related proceedings into a single court, the 1978 Bankruptcy Reform Act sought to solve an 80-year old dilemma caused by the "sprawling judicial landscape"—including state courts, federal district courts, and federal bankruptcy courts—where such proceedings were resolved. The 1978 legislation was designed to expedite the administration of bankruptcy proceedings and reduce the cost for litigants and the system.[138] "In reducing these adjudicative costs, Congress sought to enhance distributions to creditors from bankruptcy estates."[139]

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[135] *In re WorldCom*, 293 B.R. at 328–29 (quoting Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 131–32 (1995) (Ginsberg, J., concurring) and quoting S.G. Phillips Constructors v. City of Burlington (*In re* S.G. Phillips Constructors), 45 F.3d 702, 705 (2d Cir. 1995)) (internal quotations omitted).

[136] *In re WorldCom*, 293 B.R. at 329.

[137] *See* 11 U.S.C. § 105(a) (2006); NLRB v. Superior Forwarding, Inc., 762 F.2d 695, 698 (8th Cir. 1985) (holding bankruptcy court can "enjoin federal regulatory proceedings" because section 105(a) allows bankruptcy court to "'issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title'") (citation omitted); Carlos J. Cuevas, *Bankruptcy Code Section 105(a) Injunctions and State and Local Administrative and Civil Enforcement Proceedings*, 4 AM. BANKR. INST. L. REV. 365, 371 (1996) ("Code section 105(a) authorizes a bankruptcy court to issue any order, process, or judgment that is necessary to enforce the provisions of the Code.").

[138] *See* Block-Lieb, *The Costs of a Non-Article III*, *supra* note 123, at 533 (1998) (positing Congress sought to expedite bankruptcy proceedings and reduce costs for litigants and system in general); *see also* H.R. REP. NO. 95-595, at 48–49 (1977)

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

[139] Block-Lieb, *The Costs of Non-Article III*, *supra* note 123, at 533.

B. Marathon *and the 1984 Amendments to the Bankruptcy Code*

The 1978 Bankruptcy Act did not confer Article III status on the bankruptcy judges because they were not accorded life tenure.[140] This set the stage for *Northern Pipeline Construction v. Marathon Pipeline Co*. ("*Marathon*"),[141] which held that non-Article III courts could not adjudicate state created rights and thus invalidated the 1978 Bankruptcy Reform Act's broad grant of jurisdiction to non-Article III bankruptcy judges.[142]

Congress responded to *Marathon* by passing the Bankruptcy Amendments and Federal Judgeship Act of 1984 (the "1984 Amendments").[143] Section 1334 of title 28 is the centerpiece of the 1984 Amendments. Section 1334 conferred on the Article III district courts both original and exclusive jurisdiction over all bankruptcy cases and all property of the debtor and the estate.[144] Specifically, section 1334(a) confers original and exclusive jurisdiction over all cases under title 11.[145] The reference to a "case" is the "umbrella under which all of the proceedings that follow the filing of a bankruptcy petition take[s] place."[146] Once a bankruptcy case is

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[140] *See* N. Pipeline Constr. Co. v. Marathon Pipe Line, Co., 458 U.S. 50, 60–61 (1982) (noting how bankruptcy judges differ from Article III judges by not having "'good Behaviour'" tenure, but instead hold fourteen-year terms which are subject to removal under certain terms); Parklane Hosiery Co. v. Parklane/Atlanta Venture (*In re* Parklane/Atlanta Joint Venture), 927 F.2d 532, 538 (11th Cir. 1991) ("[B]ankruptcy courts are not Article III courts and therefore may not exercise the judicial power of the United States."); Melodie Freeman-Burney, Note, *Jurisdiction Under the Bankruptcy Amendments of 1984: Summing up the Factors*, 22 TULSA L.J. 167, 167–68 (1986) (outlining legal issues behind decision whether to grant Article III powers to bankruptcy judges).

[141] 458 U.S. 50 (1982).

[142] *Marathon*, 458 U.S. at 87 (finding grant by 28 U.S.C. § 1471 of Article III jurisdiction to bankruptcy judges without other Article III attributes to be unconstitutional and therefore bankruptcy judges could not adjudicate state created rights); Jeffrey T. Ferriell, *Core Proceedings in Bankruptcy Court*, 56 UMKC L. REV. 47, 47–48 (1987) (explaining *Marathon* "invalidated the broad grant of jurisdiction given to bankruptcy courts" because bankruptcy courts are not Article III courts); Kurth, *supra* note 19, at 1008 (explaining how "non-Article III courts [cannot] adjudicate state-created rights" (citing *Marathon*, 458 U.S. at 50)).

[143] *See* Celotex Corp. v. Edwards, 514 U.S. 300, 321 (1995) (Stevens, J., dissenting) ("In response to *Northern Pipeline*, Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984 (1984 amendments).") (citation omitted); Ferriell, *supra* note 142, at 57–59 (explaining Bankruptcy Amendments and Federal Judgeship Act of 1984 codified "the emergency rule" set in place to help courts cope with the *Marathon* problem). *See generally* Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984) (including laws passed in response to *Marathon*).

[144] *See* 28 U.S.C. § 1334(a), (e) (2006); Cournoyer v. Town of Lincoln, 790 F.2d 971, 974 (1st Cir. 1986) (noting district court "has exclusive jurisdiction of all of the property of the debtor wherever located") (citation omitted); *In re* 245 Associates, LLC, 188 B.R. 743, 749 n.6 (Bankr. S.D.N.Y. 1995) (noting district court has original and exclusive jurisdiction over debtor's property).

[145] 28 U.S.C. § 1334(a) (2006) ("Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.").

[146] 1 COLLIER ON BANKRUPTCY, ¶ 3.01[3], at 3-11 (Alan N. Resnick et al. eds., 15th ed. rev. 2008) (citing *In re* Blevins Elec. Inc., 185 B.R. 250 (Bankr. E.D. Tenn. 1995)). *See In re* Cline, 282 B.R. 686, 691 (W.D. Wash. 2002) (proscribing "'case'" is an "umbrella" for all proceedings following from filing) (citation omitted); *In re* G.T.L. Corp., 211 B.R. 241, 244–45 (Bankr. N.D. Ohio 1997) (citing 1 COLLIER ON BANKRUPTCY, ¶ 3.01[3], at 3-12 (Alan N. Resnick et al. eds., 15th ed. rev. 1997)) ("A case is the umbrella under which all of the proceedings occur.").

commenced, section 541 of the Bankruptcy Code provides for the creation of an estate expansively including all "legal or equitable interests of the debtor," including causes of action of the debtor.

Section 1334(b) also vests the Article III district courts with original, but not exclusive jurisdiction, over all civil proceedings "arising under [T]itle 11,[147] or arising in[148] or related to[149] cases under [T]itle 11."[150] The primary distinction between the jurisdictional grants of section 1334(a) and 1334(b) is that the latter grants original, but not exclusive, jurisdiction.[151]

In turn, under this new jurisdictional scheme, the Article III district courts were given authority to delegate all of their jurisdiction to bankruptcy judges, whose exercise of jurisdiction was limited in "core" proceedings unless the parties

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[147] *See* 28 U.S.C. § 1334(b) (2006); *In re* Tate, 253 B.R. 653, 661–62 (Bankr. W.D.N.C. 2000) (citing Wood v. Wood (*In re* Wood), 825 F.2d 90, 97 (5th Cir. 1987)) ("A proceeding is one 'arising under' Title 11 when it invokes a 'substantive right created by the Bankruptcy Code.'"); *see also* 1 COLLIER ON BANKRUPTCY, ¶ 3.01[4][c][i], at 3-19 (Alan N. Resnick et al. eds., 15th ed. rev. 2008) (noting "'phrase "arising under" has a well defined and broad meaning in the jurisdictional context. By a grant of jurisdiction over all proceedings arising under title 11, the bankruptcy courts will be able to hear any matter under which a claim is made under a provision of title 11'" and that, "'[f]or example, a claim of exemption under 11 U.S.C. § 522 would be cognizable by the bankruptcy court'") (citation omitted); Hopkins v. Plant Insulation Co., 349 B.R. 805, 811 (N.D. Cal. 2006) (noting section 1334(b) gives federal courts "authority to adjudicate bankruptcy-related claims which otherwise could only be heard in state court").

[148] *See* 28 U.S.C. § 1334(b); *In re Wood*, 825 F.2d at 97 ("'[A]rising in' proceedings are those that are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of the bankruptcy."); *see also* 1 COLLIER ON BANKRUPTCY, ¶ 3.01[4][c][iv], at 3-27 (Alan N. Resnick et al. eds., 15th ed. rev. 2008) ("'Arising in' acts as the residual category of civil proceedings, and includes such things as administrative matters, 'orders to turn over property of the estate' and 'determinations of the validity, extent, or priority of liens.'") (citations omitted); *see also In re* Boulders on the River, Inc., 218 B.R. 528, 542 (D. Or. 1997) (finding although claim for fees did not "'arise under' title 11" it nevertheless arose in this title 11 case and bankruptcy court therefore had jurisdiction).

[149] *See* 28 U.S.C. § 1334(b); *In re Tate*, 253 B.R. at 662 ("'[R]elated to' proceedings are determined by the *Pacor* test, which asks whether 'the outcome of the proceeding could conceivably have any effect on the estate being administered in bankruptcy.'" (citing to "Pacor Test," Pacor, Inc., v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984))); *In re Boulders on the River, Inc.*, 218 B.R. at 542 n.18 ("The distinction between 'arising in' and 'related to' jurisdiction appears to turn on whether the matter could exist outside the bankruptcy."); *see also* 1 COLLIER ON BANKRUPTCY, ¶ 3.01[4][c][ii], at 3-21 (Alan N. Resnick et al. eds., 15th ed. rev. 2008)

> [S]ection 1334(b)'s "related proceedings" are those whose outcome could conceivably have an effect on the bankruptcy estate and that (1) involve causes of action owned by the debtor that became property of a title 11 estate under section 541 . . . or (2) are suits between third parties that "in the absence of bankruptcy, could have been brought in a district court or a state court.

(citations omitted).

[150] 28 U.S.C. § 1334(b).

[151] *See* 28 U.S.C. § 1334(a), (b) (2006); Menk v. Lapaglia (*In re* Menk), 241 B.R. 896, 904 (B.A.P. 9th Cir. 1999) ("[Section] 1334(b) grants concurrent jurisdiction over civil proceedings, separate and distinct from exclusive jurisdiction over bankruptcy cases under § 1334(a)."); *In re* Marine Iron & Shipbuilding Co., 104 B.R. 976, 980 (D. Minn. 1989) (noting differences in jurisdictional grants between section 1334(a) and section 1334(b)); *see also* 1 COLLIER ON BANKRUPTCY, ¶ 3.01[3], at 3-11 (Alan N. Resnick et al. eds., 15th ed. rev. 2008) (noting "introductory phrase '[e]xcept as provided in subsection (b) of this section' in reinforces" this concept of difference in exclusivity).

consented to their exercise of full jurisdiction.[152] Thus, the jurisdictional scheme created under the 1984 Amendments distinguishes between civil proceedings arising under the Bankruptcy Code, which are deemed "core" matters, and civil proceedings related to a bankruptcy case which are deemed "non-core" matters.[153] Section 157 of title 28 makes the consequence of the core/non-core dichotomy clear: bankruptcy courts are authorized to enter appropriate judgments and orders in core proceedings.[154] Bankruptcy courts may hear non-core proceedings related to bankruptcy cases but cannot enter final judgments and orders without consent of all parties to the proceeding.[155] If the parties fail to consent, a district judge must make final determinations after considering the findings and conclusions of the bankruptcy judge and after conducting *de novo* review of matters to which any party has timely objected.[156]

An analysis of core/non-core matters is also particularly relevant to arbitration because the approach courts take when analyzing whether an arbitration agreement is enforceable generally has been based on the core/non-core dichotomy set forth by the courts.[157] Core proceedings are defined in a non-exclusive list set forth in

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[152] *See* 28 U.S.C. § 157(b) (2006) (listing instances whereby bankruptcy judges may hear and determine cases and proceedings); *In re* Am. Cmty. Serv. Inc., 86 B.R. 681, 684 (D. Utah 1988) (mentioning *Marathon* Court's position that "non-Article III bankruptcy judges do not have the authority to enter final decisions in matters outside the core of federal bankruptcy power"); *In re* Nell, 71 B.R. 305, 307 (D. Utah 1987) (stating bankruptcy courts can enter only proposed findings, and not final judgments, in non-core proceedings absent parties' consent).

[153] *See* 28 U.S.C. § 157(b)(2) (2006) (defining core proceedings and providing nonexclusive list of typical ones); *In re* Am. Cmty. Serv. Inc., 86 B.R. 681, 684 (D. Utah 1988) ("[T]he 1984 Amendments divided civil proceedings into 'core proceedings' and 'non-core proceedings.'") (citation omitted); *see also In re* STN Enterprises, Inc., 73 B.R. 470, 478–79 (Bankr. D. Vt. 1987) (stating judge determines whether issue is "core" when uncertainty exists) (citation omitted).

[154] 28 U.S.C. § 157(b)(1) (2006) ("Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11 . . . and may enter appropriate orders and judgments . . . .").

[155] 28 U.S.C. § 157(c)(1)–(2)

> (1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such a proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.
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> (2) Notwithstanding the [above] . . . the district court, with consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments . . . .

[156] *Id*. at § (c)(1).

[157] *See, e.g.*, MBNA Am. Bank, N.A. v. Hill, 436 F.3d 104, 108–09 (2d Cir. 2006) (making core/non-core proceedings involving automatic stay center issue in deciding whether to enforce arbitration); U.S. Lines, Inc. v. Am. S.S. Owners Mutual Protection and Indem. Assoc., Inc. (*In re* U.S. Lines, Inc.), 197 F.3d 631, 636 (2d Cir. 1999) (stating court had jurisdiction to hear arbitration clause claim as well as determine core and non-core bankruptcy proceedings); Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 885 F.2d 1149, 1150 (3d Cir. 1989) ("Bankruptcy code, as amended, does not conflict with the Arbitration Act so as

section 157(b)(2) of title 28 and either raise a substantive right created by the Bankruptcy Code or one which could not exist outside of the bankruptcy case.[158] Conversely, a non-core related proceeding does not raise substantive rights created by the Bankruptcy Code and could exist outside of the pending bankruptcy case, even though the proceeding is related to (i.e., has some impact on) a bankruptcy case.[159]

*C. Enforceability of Arbitration Clauses in the Post-*Marathon*/Pre-*McMahon *1978-1984 Era*

The pre-*McMahon* reasoned approach to the treatment of arbitration agreements under the 1978 Act requires a brief discussion and can be best summarized through the prism of *Zimmerman v. Continental Airlines, Inc.*,[160] a pre-1984 Amendments decision from the Third Circuit.[161] In *Zimmerman* the trustee of a debtor manufacturing company commenced an adversary proceeding against Continental Airlines in the bankruptcy court.[162] The trustee claimed that Continental improperly withheld $200,000 that it owed to the debtor prior to the commencement of the bankruptcy case.[163] Continental moved to compel arbitration of the dispute, pursuant to an arbitration clause in its contract with the debtor.[164]

Without citing to the express provisions of the Bankruptcy Code or the pre-*Marathon* jurisdictional scheme, the bankruptcy court first concluded that it was vested with discretion regarding the "decision to compel or deny arbitration"[165] because "the determination in such a proceeding would affect the amount, existence, and priority of claims to be paid out of the [debtor's] general funds and

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to permit a district court to deny enforcement of an arbitration clause in a non-core adversary proceeding . . . .").

[158] 28 U.S.C. § 157(b) (2006); *see* Sanders Confectionary Prods., Inc., v. Heller Fin., Inc., 973 F.2d 474, 483 (6th Cir. 1992) (restating core proceeding as claim which arises from right created by Bankruptcy Code) (citation omitted); Eglinton v. Loyer (*In re* G.A.D.), 340 F.3d 331, 336 (6th Cir. 2003) (describing nature of rights that may constitute core bankruptcy proceeding as either created by bankruptcy law or could not exist outside of bankruptcy) (citing *Sanders*, 973 F.2d at 483) .

[159] *See* Craig v. McCarty Ranch Trust (*In re* Cassidy Land and Cattle Co., Inc.), 836 F.2d 1130, 1132 (8th Cir. 1988) (discussing how broadly or narrowly section 157(b) provisions should be read, refusing to accept general clear cut rule for deciding core/non-core); Wood v. Wood (*In re* Wood), 825 F.2d 90, 97 (5th Cir. 1987) ("If the proceeding does not invoke a substantive right created by the federal bankruptcy law and is one that could exist outside of bankruptcy it is not a core proceeding . . . ."); *see also* Specialty Mills, Inc. v. Citizens State Bank, 51 F.3d 770, 773–74 (8th Cir. 1995) ("Non-core, related proceedings are those which do not invoke a substantive right created by federal bankruptcy law and could exist outside of a bankruptcy, although they may be related to a bankruptcy.") (citation omitted).

[160] 712 F.2d 55 (3d Cir. 1983).

[161] Notably, the *Zimmerman* decision came after *Prima Paint Corp. v. Flood & Conklin Mfg. Co*., 388 U.S. 395 (1967), and during the same term that *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*., 460 U.S. 1 (1983), decision was issued.

[162] *Zimmerman*, 712 F.2d at 56.

[163] *Id*.

[164] *Id*.

[165] *In re* Ludwig Honold Mfg. Co., 22 B.R. 436, 437 (Bankr. E.D. Pa. 1982) (proposing "[t]he decision to compel or deny arbitration is discretionary with the bankruptcy judge").

thus, involve the interests of creditors . . . ."[166] Once it concluded that it had discretion, the bankruptcy court set forth that:

> [T]he effective and prompt resolution and administration of issues relating to and arising out of a bankruptcy proceeding [are] the controlling factors in our decision [denying arbitration]. Congress enacted [section 1471 of title 28] with the intention of ensuring prompt administration of the bankrupt estate and with at least the minimum requirement of judicial review of the possible prejudice arbitration can have to the bankrupt estate.[167]

On appeal, the Third Circuit acknowledged that the FAA ordinarily would apply to the contract between the debtor and Continental, but would not apply if the newly constituted bankruptcy court was somehow excepted from the FAA's mandate.[168] The court first analyzed *Wilko v. Swan*,[169] a pre-*Mitsubishi* Supreme Court decision, which exempted from arbitration claims made under the 1933 Securities Act from the FAA.[170] The Third Circuit then inferred from Congress's broad grant of jurisdiction to the bankruptcy courts that the 1978 bankruptcy jurisdictional legislation "impliedly modified"[171] the FAA, notwithstanding its "strong federal policy favoring arbitration as an alternative dispute resolution process."[172] This implied modification was based, in part, on the "broad jurisdictional provisions of the Bankruptcy Reform Act of 1978."[173] The Third Circuit cited an excerpt from the Senate Report on the Bankruptcy Reform Act in support of its conclusion:

> "A major impetus underlying this reform legislation has been the need to enlarge the jurisdiction of the bankruptcy court in order to eliminate the serious delays, expense and duplications associated with the current dichotomy between summary and plenary jurisdiction . . . ."[174]

The Third Circuit further noted that:

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[166] *Id.*

[167] *Id.* at 438.

[168] Zimmerman v. Cont'l Airlines, 712 F.2d 55, 59 (3d Cir. 1983) (noting Arbitration Act is not controlling in certain areas of law where there are "competing policies" and finding bankruptcy is such area).

[169] 346 U.S. 427 (1953).

[170] *Zimmerman*, 712 F.2d at 59 (discussing Supreme Court's prior holding stating enforcement of arbitration is not mandatory in cases brought under Securities Act because investor's rights outweighed efficient resolution of disputes in arbitration (citing Wilko v. Swan, 346 U.S. 427 (1953))) .

[171] *Zimmerman*, 712 F.2d at 57 (observing conclusion of lower court).

[172] *Id.* (recognizing strong federal policy in favor of arbitration especially where parties explicitly agreed to resolve disputes in arbitration proceedings) (citations omitted).

[173] *Id.* at 58.

[174] Zimmerman v. Cont'l Airlines, 712 F.2d 55, 58 (3d Cir. 1983) (citation omitted). The Third Circuit also cited to the House Report, which stated that "'all matters and proceedings that arose in connection with bankruptcy cases' may now be tried in one action before the bankruptcy court." *Id.* (citation omitted).

> While the reduction of unnecessary delays, expenses, and duplications of effort are important in all judicial proceedings, they are especially important in bankruptcy cases. The economic fragility of the bankrupt's estate, the excess of creditors' demands over debtor's assets, and the goal of rehabilitating the debtor all argue for expeditious resolution of the bankruptcy proceeding.[175]

> [In turn, t]he dictates of the [FAA] requiring stays of proceedings pending arbitration, could result in delays, expenses, and duplications similar to those previously experienced in bankruptcy proceedings . . . [and] since issues relating to the relationship between debtor and creditor might well be the subject of both the bankruptcy and the arbitration proceedings, duplication of adversarial effort, with a resulting increase in expense, would likely occur.[176]

Because of the implied modification of the FAA by the 1978 bankruptcy jurisdictional legislation, the Third Circuit concluded that "the granting of a stay pending arbitration, even when the arbitration clause is contractual, is a matter left to the sound discretion of the bankruptcy judge."[177]

A commentator has provided the following succinct summary of *Zimmerman*:

> The *Zimmerman* court relied on the consolidation in one forum [by the jurisdictional legislation in title 28 accompanying] the Bankruptcy Reform Act of 1978 of actions that had been jurisdictionally dispersed under the prior Bankruptcy Act of 1898. The court believed that the operation of the Arbitration Act would result in delay, expense, and duplication, the very evils the 1978 bankruptcy jurisdictional scheme intended to avoid. It therefore saw an irreconcilable conflict between the two laws. The court said that the bankruptcy laws were more important than the arbitration system to the smooth functioning of the nation's commercial activities. It held that "the intentions of Congress will be better realized if the [1978 jurisdictional legislation] is read to impliedly modify the Arbitration Act. Thus . . . the power to stay bankruptcy

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[175] *Id.*

[176] *Id*. at 58–59.

[177] *Id.* at 56. Notably, the Third Circuit's *Zimmerman* decision was made after the Supreme Court's *Marathon* decision, and in full view of the Constitutional issues raised by the *Marathon* decision. *See id.* at 56–57 n.1 (citing acceptance of appeal guided by *Marathon's* holding that deemed certain jurisdictional grants non-operational). *See generally* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (finding broad granting of jurisdiction to non-Article III bankruptcy courts was unconstitutional).

> proceedings pending arbitration . . . is left to the sound discretion of the bankruptcy court."[178]

Thus, even without the guidance of the *McMahon* decision,[179] the *Zimmerman* court found an "inherent conflict" between the FAA and Bankruptcy jurisdiction, and resolved it in favor of the latter. This conflict authorized the policies and purpose of the 1978 Bankruptcy Act and jurisdictional legislation—and the discretion of the bankruptcy courts[180]—to override the legislative mandate of the FAA.

Ultimately, however, *Zimmerman* was short-lived, as *Marathon*—and its subsequent core/non-core jurisdictional scheme predicated thereon—and *McMahon*—which set forth the "inherent conflict" framework for analyzing the enforceability of arbitration agreements in general—caused the Third Circuit, for the first time, to reanalyze the authority of bankruptcy courts to deny the enforcement of arbitration agreements in the context of proceedings related to bankruptcy cases in *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*[181]

In *Hays*, the Third Circuit, analyzing facts virtually identical to the *Zimmerman* record, overruled the holding in *Zimmerman*. *Hays* involved a trustee of a chapter 11 debtor, who brought suit in the district court against the debtor's brokerage firm.[182] The trustee alleged that the broker mishandled the debtor's brokerage accounts and, as a result, violated federal and state securities laws.[183] The trustee also alleged that the broker fraudulently conveyed certain of the debtor's property.[184]

In response, the broker sought to stay the proceedings and force the trustee to arbitrate its claims under the arbitration clause in the agreement between the broker and the debtor.[185] Relying on the discretionary standard employed by the court in *Zimmerman*, the district court denied enforcement of the arbitration clause.[186] More particularly, the district court concluded that, because neither the trustee nor the creditor body on whose behalf he was seeking a recovery actually signed the

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[178] Fred Neufeld, *Enforcement of Contractual Arbitration Agreements under the Bankruptcy Code*, 65 AM. BANKR. L.J. 525, 531 (1991) (citations omitted).

[179] Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987). The *McMahon* decision was rendered 4 years after the *Zimmerman* case and, thus, the Third Circuit in *Zimmerman* did not employ the "irreconcilable conflict" test outlined by Justice O'Connor in *McMahon*. *See Zimmerman*, 712 F.2d 55 (finding no abuse of discretion by bankruptcy court). *But see In re* Herrington, 374 B.R. 133, 139 (Bankr. E.D. Pa. 2007) (observing possible flaws in application of Arbitration Act) (citation omitted).

[180] *See Zimmerman*, 712 F.2d at 59–60 (stating granting of stay pending arbitration is matter left to discretion of bankruptcy judge).

[181] Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 885 F.2d 1149, 1156 (3d Cir. 1989) (citing *McMahon* as dictating analysis of arbitrability, ultimately finding lower court did not have discretion to deny enforcement of arbitration clause).

[182] *Hays*, 885 F.2d at 1150.

[183] *Id*.

[184] *Id*.

[185] *Id.* at 1150–51.

[186] *Id.* at 1151.

arbitration agreement, it was appropriate for the court to refuse to enforce the arbitration agreement.[187]

On appeal, the Third Circuit concluded that the district court's reliance on *Zimmerman* was inapposite because *McMahon* and the 1984 Amendments overruled *Zimmerman*.[188] The *Hays* Court held that the bankruptcy court could not stay the arbitration of a non-core proceeding. Following *McMahon*, *Hays* concluded that a party seeking to avoid arbitration has the burden of establishing an "inherent conflict" between the FAA and the Bankruptcy Code, stating:

> [T]he district court lacked the authority and discretion to deny enforcement of the arbitration clause unless . . . the text, legislative history, or purpose of the Bankruptcy Code conflicts with the enforcement of an arbitration clause in . . . a non-core proceeding . . . [showing] "that Congress intended to make an exception to the Arbitration Act for claims" [involving a bankrupt debtor].[189]

In the court's opinion, because the jurisdictional framework after *Marathon* and the 1984 Amendments did not restrict the adjudication of non-core proceedings to the bankruptcy court, and because the Bankruptcy Code did not express a clear intent to preclude enforcement of arbitration agreements, the Bankruptcy Code and its related jurisdictional procedures themselves could not be viewed as inherently in conflict with the FAA.[190] Thus, the *Hays* court set forth a rule with regard to the enforceability of arbitration agreements in non-core matters: the bankruptcy court lacked authority to deny the enforceability of agreements to arbitrate. Other courts have since followed suit.[191]

The *Hays* decision was wrongly decided, based, in part, on the misguided premise that bankruptcy courts could "no longer subscribe to a hierarchy of congressional concerns that places the bankruptcy law in a position of superiority

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[187] Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 885 F.2d 1149, 1151 (3d Cir. 1989).

[188] *Id*. at 1157–59 (stating "[the district court in] Hays invokes our decision in *Zimmerman*, 712 F.2d at 58, 59. It cannot persuasively do so, however . . . [because] *Zimmerman's* reasoning is founded on the statutory scheme of the bankruptcy Reform Act of 1978 before the 1984 Amendments, and it was decided before *McMahon* and other recent Supreme Court arbitration cases" (citing *Zimmerman*, 712 F.2d at 58, 59)).

[189] *Id.* at 1156 (citations omitted).

[190] *Id.* at 1157 (denying arbitration avoidance because no textual evidence, legislative history, or purpose within Bankruptcy Code conflicted with enforcement of arbitration clause).

[191] *See, e.g.*, Gandy v. Gandy (*In re* Gandy), 299 F.3d 489, 495 (5th Cir. 2002) ("[I]t is generally accepted that a bankruptcy court has no discretion to refuse to compel the arbitration of matters not involving 'core' bankruptcy proceedings under 28 U.S.C. § 157(b) . . . ."); U.S. Lines, Inc. v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n, Inc. (*In re* U.S. Lines, Inc.), 197 F.3d 631, 640 (2d Cir. 1999) ("Such a conflict is lessened in non-core proceedings which are unlikely to present a conflict sufficient to override by implication the presumption in favor of arbitration."); *In re* Winstar Commc'ns., Inc., 335 B.R. 556, 564 (Bankr. D. Del. 2005) ("'While it is clear that bankruptcy courts do not possess discretion with respect to enforcement of an arbitration clause in a non-core adversary proceeding, it does appear manifest that such discretion exists with respect to core adversary proceedings.'" (quoting *In re* Oakwood Homes Corp., No. 02-13396PJW, 2005 WL 670310, at *3 (Bankr. D. Del. Mar. 18, 2005))).

over [the FAA]" in view of *Marathon* and the 1984 Amendments.[192] In its view, because the 1984 Amendments provided that "various state-law claims, 28 U.S.C.A. §1334(c)(2), and personal injury and wrongful death claims, 28 U.S.C.A. § 157(b)(5), [must] be litigated in a state court or a district court [and] permit[ted] a *de novo* review in the district court of various non-core proceedings in the bankruptcy court," Congress did not intend to have *all* proceedings adjudicated in the bankruptcy court.[193] Consequently, according to the Third Circuit, bankruptcy courts *must* be divested of authority to determine whether arbitration agreements are enforceable in non-core matters. There is no discretion; arbitration agreements must be strictly enforced.

The Third Circuit was not done, however. In 2006, the *Mintze*[194] decision further enlarged the FAA's judicially expanded effect on the bankruptcy jurisdictional and statutory scheme by continuing to incorrectly focus on the substance of the dispute rather than the Congressional mandate to centralize disputes regarding a debtor's assets and liabilities in the bankruptcy courts. Specifically, the Mintze court ruled that there was no basis to distinguish between core and non-core issues when determining whether such issues are arbitrable—at least where the claim in suit did not turn on a bankruptcy law issue. In *Mintze*, a consumer debtor, who defaulted on her loan obligations, alleged that her secured lender violated the Federal Truth in Lending Act ("TILA") and other federal and state consumer protection laws.[195] After the debtor filed an adversary proceeding, the secured lender moved to compel arbitration.[196] The bankruptcy court determined, and the district court affirmed, that the debtor's claims were core and consequently denied the secured lender's motion.[197] The Third Circuit reversed. It noted that although the bankruptcy court had authority to enter final orders and judgments regarding core proceedings, but not the same authority over non-core proceedings, the core/non-core distinction did not affect whether a bankruptcy court had any authority to deny enforcement of an arbitration agreement.[198] According to the Third Circuit, because the bankruptcy court was not being called upon to adjudicate bankruptcy issues in the *Mintze* adversary proceeding, it could find no inherent conflict[199] between arbitration of the debtor's claims and the underlying purposes of the Bankruptcy Code.[200]

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[192] *Hays*, 885 F.2d at 1161 (basing decision on premise that precedent dictated abandoning placing bankruptcy over FAA in hierarchy).

[193] *See* Hays & Co. v. Merrill Lynch, Pierce, Fenner, & Smith, Inc., 885 F.2d 1149, 1159–60 (3d Cir. 1989).

[194] Mintze v. Am. Gen. Fin. Servs., Inc. (*In re Mintze*), 434 F.3d 222 (3d. Cir. 2006).

[195] *Id.* at 226.

[196] *Id.* at 227.

[197] *Id.*

[198] *Id.* at 228–29.

[199] *Id.* at 231–32. The *Mintze* court also found no evidence of a "congressional intent to preclude waiver of judicial remedies . . . in either the statutory text or the legislative history of the Bankruptcy Code." *Id.* at 231.

[200] Mintze v. Am. Gen. Fin. Servs., Inc. (*In re Mintze*), 434 F.3d 222, 231–32 (3d. Cir. 2006).

Shortly thereafter, the Second Circuit in *MBNA America Bank v. Hill*[201] followed suit. In *Hill*, a consumer chapter 7 debtor filed a class action against her credit card company alleging violations of the automatic stay provisions of the Bankruptcy Code after she received her chapter 7 discharge.[202] MBNA sought to enforce the arbitration provision contained in the consumer credit agreement between it and the debtor.[203] Identifying the debtor's claim as "core," the bankruptcy court denied MBNA's motion, determining that the bankruptcy court was the most appropriate forum for adjudicating the allegations in the suit.[204] The district court affirmed, concluding the objectives of the Bankruptcy Code would be "'seriously jeopardize[d]'" if MBNA was allowed to compel the arbitration of a core claim.[205] The Second Circuit reversed, however, holding that because the debtor had received her discharge and her case was fully administered, the resolution of the debtor's "claim would have no effect on her bankruptcy estate."[206] Relying on its previous decision in *United States Lines, Inc. v. American Steamship Owners Mutual Protection & Indemnity Association*,[207] the Second Circuit stated that the bankruptcy court had no discretion to deny enforcement of the arbitration agreement under the circumstances of the *Hill* case:

> Bankruptcy courts are more likely to have discretion to refuse to compel arbitration of core bankruptcy matters.[208] However, even as to core proceedings, the bankruptcy court will not have discretion to override an arbitration agreement unless it finds that the proceedings are based on provisions of the Bankruptcy Code that "inherently conflict" with the Arbitration Act or that arbitration of the claim would necessarily jeopardize" the objectives of the Bankruptcy Code.[209]

The movement toward partially divesting bankruptcy courts of authority in the context of enforcing arbitration agreements, both in core and non-core proceedings, has effectively divested the courts of their ability under section 1334(c)(1) to

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[201] 436 F.3d 104 (2d Cir. 2006).
[202] *Id.* at 106.
[203] *Id.* at 106–07.
[204] *Id.* at 107.
[205] *Id.*
[206] *Id.* at 109.
[207] 197 F.3d 631, 640 (2d Cir. 1999).
[208] MBNA Am. Bank, N.A. v. Hill, 436 F.3d 104, 108 (2d Cir. 2006) (citation omitted).
[209] *Id.* (quoting U.S. Lines, Inc. v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n, Inc. (*In re* U.S. Lines, Inc.), 197 F.3d 631, 640 (2d Cir. 1999)). *See, e.g.*, *In re* Shores of Pan., Inc., 387 B.R. 864, 865 (Bankr. N.D. Fla. 2008) (discussing lifting automatic stay to allow arbitration after determining that arbitration agreement would not "'inherent[ly] conflict with the underlying purposes of the Bankruptcy Code'" (quoting *In re Elec. Mach., Inc.*, 479 F.3d at 796)); *see* Whiting-Turner Contracting Co. v. Elec. Mach. Enters., Inc. (*In re* Elec. Mach. Enters., Inc.), 479 F.3d 791, 796 (11th Cir. 2007) (concluding bankruptcy court facing core proceeding must determine whether arbitration agreement "inherently conflicts with the underlying purposes of the Bankruptcy Code").

determine whether they should abstain from exercising jurisdiction. This movement is fundamentally flawed because it conflicts with and casts aside the statutory scheme that was intended by Congress to confer upon bankruptcy courts centralized jurisdiction over disputes regarding a debtor's assets and legal obligations.[210]

The 1984 Amendments were enacted more than 60 years after the FAA was enacted and before the Supreme Court decided *Mitsubishi* and *McMahon*. Thus, Congress enacted the 1984 Amendments with full knowledge of the FAA and the judicial interpretations of the FAA at the time.[211] Reference to *Mitsubishi* and *McMahon* underscores the conclusion that it was the federal courts—and not Congress—that substantially expanded the FAA[212] from a procedural statute to a powerful and seemingly unrestrained body of substantive law that extended beyond

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[210] *Cf. In re* Dana Corp., No. 06-10354 (BRL), 2007 WL 3376882, at *4 (Bankr. S.D.N.Y. Nov. 6, 2007) ("A primary purpose of the Bankruptcy Code is to deal with all of the liabilities of a debtor in one collective proceeding."); *In re* Alston, 297 B.R. 410, 417 (Bankr. E.D. Pa. 2003) (positing primary "purpose of the Bankruptcy Code is to provide a procedure by which the . . . debtor can reorder his affairs"). *See generally In re* Iridium Operating LLC, 285 B.R. 822, 837 (S.D.N.Y. 2002) (citing numerous cases which stand for strong public policy in favor of "centralizing core matters in the bankruptcy court"). This movement also abandons long-standing principles regarding abstention in federal courts. *See* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 717–18 (1996) (observing "'doctrine of abstention'" through federal courts' history as courts of equity); *In re* Butterfield, 339 B.R. 366, 373 (Bankr. E.D. Va. 2004) (acknowledging federal courts' ability to abstain when exercising federal jurisdiction would be "'disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern'" (quoting New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 361 (1989))); *see also infra* Section V (presenting bankruptcy courts' abstention policies).

[211] General rules of construction suggest that section 1334 was enacted with full knowledge of the FAA even though legislative history is silent regarding the FAA and the analytical approach bankruptcy courts are required to take regarding the enforceability of arbitration agreements. *See* South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 351 (1998) ("'[W]e assume that Congress is aware of existing law when it passes legislation . . . .'" (quoting Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990))); Leo Fedus & Sons Constr. Co. v. Zoning Bd. of Appeals, 623 A.2d 1007, 1011 (Conn. 1993) ("It is . . . a tenet of statutory construction that the legislature is presumed to be aware of existing statutes" when enacting statutes) (citation omitted); *see also* 82 C.J.S., *Statutes* § 310, at 394 (1999) ("When ascertaining legislative intent, a court assumes not only that a legislature knew the laws in effect at the time, but also that it knew the judicial interpretation of those laws . . . .") (citations omitted). Had Congress intended that the FAA trump the jurisdictional scheme it modified through the 1984 Amendments, it would have expressly done so in section 1334. However, section 1334 is silent in this regard. *See* 28 U.S.C. § 1334(c) (2000). Indeed, in both *Prima Paint* and *Moses H. Cone*, the Supreme Court pronounced its recognition of Congress favoring arbitration agreements. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) ("Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements . . . ."); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967) (noting "unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts").

[212] *See Moses H. Cone*, 460 U.S. at 24–25 ("Courts of Appeals have . . . consistently concluded that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."); Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 332–33 (1996) (arguing Supreme Court expanded FAA, "transforming a dispute-resolving process . . . into a process more nearly resembling that of a court of law"); *cf. supra* note 59 and accompanying text (finding proposed language of USAA would make arbitration clauses irrevocable).

the limits[213] of Congress' commerce clause power.[214] To be sure, Congress in either the FAA or the 1984 Amendments, could have easily and expressly divested the bankruptcy courts of jurisdiction and discretion to adjudicate the enforceability of arbitration agreements in bankruptcy, much like Congress did in the context of certain state court proceedings under the mandatory abstention provisions in section 1334(c)(2) of title 28.[215] Congress, however, included no language mandating that bankruptcy courts in proceedings "arising in" or "arising under" the Bankruptcy Code, or "related to" to a case filed under the Bankruptcy Code, abstain from adjudicating proceedings that were subject to arbitration under the FAA.

Because Congress presumptively enacted the 1984 Amendments with complete knowledge of the FAA[216] and case law interpreting the FAA, the bankruptcy jurisdictional statutory scheme should not be interpreted to oust bankruptcy courts of their jurisdiction and authority to determine whether to enforce arbitration provisions in both core and non-core proceedings in bankruptcy.[217]

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[213] In the post-depression era, the Supreme Court greatly expanded Congress's Commerce Clause powers. U.S. CONST. art. I, § 8, cl. 3 (granting Congress power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"); *see* United States v. Lopez, 514 U.S. 549, 556 (1995) (recognizing Congress' increased authority under Commerce Clause due to broadening of standard from direct effect on interstate commerce to substantial effect on interstate commerce (quoting Wickard v. Filburn, 317 U.S. 111, 128–29 (1942))); United States v. Bailey, 115 F.3d 1222, 1225 (5th Cir. 1997) ("Since the earlier part of this century, the Court . . . has greatly expanded Congress's authority under this Clause."); *see also* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 614 (1997) (Thomas, J., dissenting) (highlighting improper expansion of Congressional authority under Commerce Clause). This expansion was a consequence of judicial recognition that business in the post-depression era had a national scope and an understanding that earlier Supreme Court precedent in the area of the Commerce Clause "artificially . . . constrained the authority of Congress to regulate interstate commerce." *Lopez*, 514 U.S. at 556.

[214] *See supra* note 213 (noting increase of Congressional authority under Commerce Clause); *cf.* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 269–70 (1995) (citing conflicting interpretations of scope of FAA and concluding broader reading is proper).

[215] For example, under section 1334(c)(2), the bankruptcy court is compelled to abstain from hearing a "related to" proceeding if, absent district court jurisdiction conferred by section 1334(b) of title 28, the cause of action could not have been commenced in the first instance in federal court (e.g., commenced with federal question jurisdiction under section 1331 of title 28 or diversity jurisdiction under section 1332 of title 28). *See* 28 U.S.C. § 1334(c)(2) (2006) (requiring federal courts to abstain from state law claims related to cases under title 11 which could have been brought in state court); 1 COLLIER ON BANKRUPTCY, ¶ 3.05[2], at 3-61–3-62 (Alan N. Resnick et al. eds., 15th ed. rev. 2006) ("The criteria . . . [meriting] mandatory abstention under section 1334(c)(2) are . . . (4) absent section 1334(b), the cause of action (one 'related to' [] bankruptcy case) could not have been commenced in a federal court; and (5) the proceeding is commenced and . . . [is] timely adjudicated in [] state forum.") (citation omitted); *see also* Abadie v. Poppin, 154 B.R. 86, 89 (N.D. Cal. 1993) (demonstrating bankruptcy court's mandatory abstention policy with related proceeding that could have been adjudicated in state court).

[216] *See* Rush Truck Ctrs. of Tex. L.P. v. Bouchie (*In re* Bouchie), 324 F.3d 780, 784 (5th Cir. 2003) (stating legislature enacts statutes "'with complete knowledge of the existing law and with reference to it'" (citations omitted); *In re* Vills. at Castle Rock Metro. Dist. No. 4, 145 B.R. 76, 83 (Bankr. D. Colo. 1990) (acknowledging rule of statutory construction that "legislature is presumed to have knowledge of existing laws at the time it enacts a statute") (citation omitted); *supra* note 211 (suggesting legislature was aware of previously enacted statutes before enacting section 1334).

[217] *See* 28 U.S.C. § 1334(c) (2006) (codifying federal court's ability to abstain in interest of comity or justice); Mintze v. Am. Gen. Fin. Servs., Inc. (*In re* Mintze), 434 F.3d 222, 231 (3d Cir. 2006) (upholding bankruptcy court's discretion to deny arbitration clause in certain limited circumstances). *But see In re*

IV. THE INHERENT CONFLICT BETWEEN THE FAA AND THE FEDERAL BANKRUPTCY STATUTORY SCHEME

The federal bankruptcy statutory scheme permits the modification of the rights of debtors and creditors,[218] and one purpose of its structure is to centralize disputes regarding a debtor's assets and liabilities in the bankruptcy courts.[219] The FAA had a different purpose. As enacted by Congress in 1925, the FAA was intended to be of limited scope: procedural in nature and only relevant "to disputes involving facts and simple questions of law, not statutory or constitutional issues."[220] As the Supreme Court gradually expanded the reach of the FAA, it is not surprising that "[w]hen arbitration law meets bankruptcy law head on, clashes inevitably develop"[221] and a dispute involving both may "'present[] a conflict of near polar extremes.'"[222] These "inevitable clashes" cause an "inherent conflict" between the FAA and the bankruptcy statutory scheme.

This "inherent conflict" must be resolved by first recognizing that bankruptcy courts have jurisdiction and authority in all instances to determine if an arbitration agreement is enforceable in a particular proceeding. In turn, when called upon to

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Herrington, 374 B.R. 133, 141 (Bankr. E.D. Pa. 2007) (deciding bankruptcy court has no discretionary power to decline to enforce valid arbitration agreements).

[218] *See* Grogan v. Garner, 498 U.S. 279, 286 (1991) ("[A] central purpose of the Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors . . . ."); Phillips v. Congelton, L.L.C. (*In re* White Mountain Mining Co.), 403 F.3d 164, 169 (4th Cir. 2005) ("'[T]he very purpose of bankruptcy is to modify the rights of debtors and creditors.'" (quoting 1 COLLIER ON BANKRUPTCY, ¶ 3.02[2] (Alan N. Resnick et al. eds., 15th ed. rev. 2005))); Grady v. A.H. Robins Co., Inc., 839 F.2d 198, 202 (4th Cir. 1988) (highlighting bankruptcy purpose of giving debtor forum to address all their legal obligations "no matter how remote").

[219] *See In re* Iridium Operating LLC, 285 B.R. 822, 837 (S.D.N.Y. 2002) (examining another decision noting "strong public interest in centralizing all core matters in the bankruptcy court") (citation omitted); *In re* Dana Corp., No. 06-10354 (BRL), 2007 WL 3376882, at *4 (Bankr. S.D.N.Y. Nov. 6, 2007) ("A primary purpose of the Bankruptcy Code is to deal with all of the liabilities of a debtor in one collective proceeding."); *In re* Alston, 297 B.R. 410, 417 (Bankr. E.D. Pa. 2003) (positing primary "purpose of the Bankruptcy Code is to provide a procedure by which the . . . debtor can reorder his affairs").

[220] Moses, *supra* note 57, at 111–12 (stressing FAA was not intended to "affect state law or state courts in any way"); *cf.* McKnight v. Chi. Title Ins. Co., Inc., 358 F.3d 854, 857 (11th Cir. 2004) (noting exception to FAA where enforcing arbitration clause would "would invalidate, impair, or supersede" state law by its application (citing Standard Sec. Life Ins. Co. of N.Y. v. West, 267 F.3d 821, 823 (8th Cir. 2001))). *But cf.* Southland Corp. v. Keating, 465 U.S. 1, 16 (1984) ("In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.") (citations omitted).

[221] *In re* Hagerstown Fiber Ltd. P'ship, 277 B.R. 181, 199 (Bankr. S.D.N.Y. 2002).

[222] U.S. Lines. Inc. v. Am. S.S. Owners Mut. Prot. & Indem. Assoc. (*In re* U.S. Lines, Inc.), 197 F.3d 631, 640 (2d Cir. 1999) (positing section 362(a)(1) of Bankruptcy Code gives bankruptcy court power to stay all proceedings, including arbitration, which clashes with its lack of "exclusive jurisdiction over non-core matters") (citation omitted). *See* Vesta Fire Ins. Corp. v. New Cap Reinsurance Corp., Ltd., 244 B.R. 209, 216 (S.D.N.Y. 2000) (distinguishing policy of bankruptcy being efficient centralization of all disputes in specified forum and policy of arbitration being "'decentralized approach towards dispute resolution'" (citing *In re U.S. Lines*, 197 F.3d at 640)). *But see* Ins. Co. of N. Am. v. NGC Settlement Trust & Asbestos Clams Mgmt. Corp. (*In re* Nat'l Gypsum Co.), 118 F.3d 1056, 1067 (5th Cir. 1997) (noting core claims are not automatically exempt from arbitration enforcement based on "'inherent[] conflict'" concept).

enforce an arbitration agreement, bankruptcy courts must analyze the subject matter of a particular claim under the rubric of section 1334(c)(1) of title 28 and in the context of the particular bankruptcy case. Only after such analysis should the bankruptcy court determine whether to enforce the arbitration agreement or, conversely, require the parties to adjudicate the dispute as an adversary proceeding in a pending bankruptcy case.

The "inherent conflict" between the federal bankruptcy statutory scheme and the FAA has its genesis in the United States Constitution, which expressly confers on Congress the powers to establish uniform laws on bankruptcy throughout the nation,[223] create an inferior federal court system,[224] and regulate interstate commerce.[225] The Supreme Court acknowledged this authorization in 1936—10 years after the enactment of the FAA—when it stated in *Ashton v. Cameron County Water Improvement District No. One*,[226] a non-FAA case, that the Bankruptcy Act was clearly intended to interfere with the contractual relations between the parties and "to change, modify or impair the obligation of their contracts."[227] There should be parity between arbitration clauses and other contract clauses and the power of bankruptcy courts to interfere with the contractual relations between the parties and to change, modify or impair contractual obligations of their contracts apply equally to arbitration clauses. It bears noting that *Ashton* was decided under the Bankruptcy Act of 1938, which conferred limited "summary jurisdiction"[228] over the debtor's property and to those persons who had consented to the jurisdiction of the courts of

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[223] U.S. CONST. art. I, § 8, cl. 4 ("Congress shall have Power . . . [t]o establish . . . uniform [l]aws on the subject of Bankruptcies throughout the United States."). *Cf.* Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 172 (1946) ("The Constitutional requirement of uniformity [under Art. I, § 8, cl. 4] is a requirement of geographic uniformity."); Randolph J. Haines, *The Uniformity Power: Why Bankruptcy is Different*, 77 AM. BANKR. L.J. 129, 165–66 (2003) (indicating, according to past holding, purpose of bankruptcy clause was to prevent enactment of "private bankruptcy laws" and "state opt outs" (citing Ry. Labor Executives' Assn. v. Gibbons, 455 U.S. 457, 472 (1982))).

[224] U.S. CONST. art. III, § 1 ("The judicial Power . . . shall be vested in . . . such inferior Courts as the Congress may from time to time ordain and establish."). *See* Ins. Corp. of Ir., Ltd. v. Compagnie Des Bauxites De Guinee, 456 U.S. 694, 701 (1982) ("Federal courts are courts of limited jurisdiction."); *In re* Livingston, 379 B.R. 711, 725 (Bankr. W.D. Mich. 2007) (defining bankruptcy court "as an inferior court within the federal judicial system").

[225] U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States . . . ."). *See* United States v. Lopez, 514 U.S. 549, 561 (1995) (highlighting Congress's commerce power extends even to interstate activity that "substantially affects interstate commerce"); *In re* Dehon, 327 B.R. 38, 55–56 n.33 (Bankr. D. Mass. 2005) (stressing bankruptcy falls within commerce clause because it is "indissolubly linked to commerce and credit").

[226] 298 U.S. 513 (1936).

[227] *Id.* at 530.

[228] *See* Alan N. Resnick, *The Enforceability of Arbitration Clauses in Bankruptcy*, 15 AM. BANKR. INST. L. REV. 183, 190 (2007) (defining "'summary jurisdiction'" as jurisdiction "over property that was in the actual or constructive possession of the debtor when the bankruptcy petition was filed") (citation omitted); *cf.* Katchen v. Landy, 382 U.S. 323, 328–29 (1966) (highlighting summary jurisdiction as means of effectuating bankruptcy policy of cost and time efficiency) (citations omitted); Ralph Brubaker, *One Hundred years of Federal Bankruptcy Law and Still Clinging to an* In Rem *Model of Bankruptcy Jurisdiction*, 15 BANKR. DEV. J. 261, 267 n.26 (1999) (discussing differences between summary and plenary jurisdictions; former "connote[s] the more informal procedures" while latter is governed by "normal rules of civil procedure").

bankruptcy.[229] Congress' enactment of the 1978 Bankruptcy Reform Act and the 1984 Amendments greatly expanded the jurisdiction, power and authority of bankruptcy courts[230] from the time when the Bankruptcy Act of 1938 governed bankruptcy cases.

Ashton, however, is not the only case recognizing that Congress has authority under its Article I[231] powers to alter, impair or modify contractual obligations.[232]

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[229] *See* Resnick, *supra* note 228, at 190–91 (indicating consent as another way for bankruptcy court to exercise jurisdiction) (citation omitted); Note, *Implied Consent to Summary Jurisdiction in Bankruptcy Proceedings*, 54 YALE L.J. 461, 461 (1945) (noting possible situations where summary jurisdiction applies to include: statute prescription, actual or constructive possession by bankruptcy court, possession by person asserting "colorable claim," or consent by "bona fide adverse holder") (citations omitted).

[230] *See* Benny v. England (*In re* Benny), 812 F.2d 1133, 1138 (9th Cir. 1987) ("The 1978 Act gave bankruptcy courts broader jurisdiction than the previously established bankruptcy referees and bankruptcy courts had exercised.") (citation omitted); Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 34 (1995) (referring to 1978 Act as "substantial enlargement of bankruptcy court jurisdiction [through] enabling bankruptcy judges to hear virtually any matter arising in, or related to the bankruptcy case") (citation omitted); *cf. In re* Tom Carter Enters., Inc., 44 B.R. 605, 608 (D. Cal. 1984) (observing 1984 amendments, which "retroactive[ly] exten[ded] . . . office of bankruptcy judge", do not "encroach upon the separation of powers principles embodied in said Appointments Clause"). Congress' authority to enact the 1978 Bankruptcy Reform Act and the 1984 Amendments came from Article I, § 8, Cl. 4 and Article III of the U.S. Constitution. U.S. CONST. art. I, § 8, cl. 4; U.S. CONST. art. III, § 1. *See* Finley v. United States., 490 U.S. 545, 548 (1989) ("[T]wo things are necessary to create jurisdiction . . . . The Constitution must have given to the court the capacity to take it, *and an act of Congress must have supplied it* . . . .") (citation omitted); David Weil, *Charting a Course Through Dangerous Waters: A Landlubber's Introduction to the Rules of Maritime Indebtedness in the Context of Maritime Bankruptcy*, 9 U.S.F. MAR. L.J. 195, 199 n.17 (1996) ("Constitutional authority for establishment of the bankruptcy court system is through Congress's article III power to 'create such inferior courts as [they] may from time to time ordain.'" (quoting U.S. CONST. art III, § 1)).

[231] U.S. CONST. art. I, § 8, cl. 4. The *Bond* court, Bond St. Assocs., Ltd. v. Ames Dep't Stores, Inc., 174 B.R. 28 (S.D.N.Y. 1994), explains:

> The legislative history makes it clear that § 1334(b), taken as a whole, constitutes an extraordinarily broad grant of jurisdiction to the Article III District Court. Said grant covers virtually all litigation in which a debtor or the estate could be expected to have an interest, and vests the court with a complete or pervasive jurisdiction over all matters having a relationship with or a significant bearing on the bankruptcy case.

Id. at 32–33 (quoting *In re* Funding Sys. Asset Mgmt. Corp., 72 B.R. 595, 597 (Bankr. W.D. Pa. 1987)) (internal quotations omitted). *See supra* notes 223, 225 and accompanying text (discussing Congress' Article I powers).

[232] The Court has explained:

> The Constitution, as it many times has been pointed out, does not in terms prohibit Congress from impairing the obligation of contracts as it does the states. . . . Speaking generally, it may be said that Congress, while without power to impair the obligation of contracts by laws acting directly and independently to that end, undeniably, has authority to pass legislation pertinent to any of the powers conferred by the Constitution, ... And under the express power to pass uniform laws on the subject of bankruptcies, the legislation is valid though drawn with the direct aim and effect of relieving insolvent persons in whole or in part from the payment of their debts.

Cont'l Ill. Nat'l Bank & Trust Co. of Chi. v. Chi., Rock Island & Pac. Ry. Co., 294 U.S. 648, 680 (1935) (citations omitted). *See In re* Garcia, 396 F. Supp. 518, 525 (C.D. Cal. 1974) ("[W]hen contracts are entered

The recent history, as gleaned from the Bankruptcy Code and substantial case law interpreting the same, evidences the following: (1) congressional intent to temporarily or permanently enjoin a party's right to enforce its contractual rights and security interests;[233] (2) the reshuffling of creditors' believed priorities and the consequential fair and equitable distribution of a debtor's property to those creditors;[234] (3) the potential subordination of a party's claim against a debtor;[235] (4) the assumption or rejection of a party's executory contract;[236] (5) the negation of *ipso facto* clauses;[237] and (6) the impairment or, in some instances, the outright stripping of a lien holder's security interest in the debtor's property interest.[238]

Similarly, relying on its Article I powers, Congress under section 1334 of title 28 conferred upon the district courts—who had authority to refer bankruptcy-related cases and proceedings to bankruptcy courts[239]—centralized jurisdiction over

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into, the parties are deemed to know that the Bankruptcy Act may override some provision in the contract."); *see also* Wright v. Union Cent. Life Ins. Co., 311 U.S. 273, 275–77 (1940) (addressing narrow issue of whether "debtor must be accorded an opportunity, on his request, to redeem the property at the reappraised value or at a value fixed by the court before the court may order a public sale"). Writing for the Court in *Union Central*, Justice Douglas concluded that "the denial of an opportunity for the debtor to redeem at the value fixed by the court before ordering a public sale was error." *Id*. at 277.

[233] 11 U.S.C. § 362 (2006) (stating application of automatic stay); 11 U.S.C. § 524(a) (2006) (describing discharge as creating permanent injunction against creditor collection efforts); *see In re* Latanowich, 207 B.R. 326, 334 (Bankr. D. Mass. 1997) (acknowledging Congressional intent to afford debtor fresh financial start through permanent injunction under section 524(a)(2)) (citation omitted).

[234] 11 U.S.C. § 507(a) (2006) (providing priority of claims and expenses); 11 U.S.C. § 724(b) (2006) (reporting order of property distribution); *see In re* TSIC, Inc., 393 B.R. 71, 75 (Bankr. D. Del. 2008) (highlighting "hierarchy of claims" under Bankruptcy Code's "'absolute priority rule'").

[235] 11 U.S.C. § 510 (2006) (stating subordination standards); *see In re* Enron Corp., 333 B.R. 205, 217 (Bankr. S.D.N.Y. 2005) (establishing subordination of "allowed claim based on the equitable doctrine" and court's discretion); *In re* Kreisler, 331 B.R. 364, 380 (Bankr. N.D. Ill. 2005) (discussing Congressional intent of "equitable subordination" applicability determined on "'case-by-case basis'") (citations omitted).

[236] 11 U.S.C. § 365 (2006) (regulating assumption and rejection of executory contracts); *see* Cinicola v. Scharffenberger, 248 F.3d 110, 119 (3d Cir. 2001) (acknowledging Bankruptcy Code's grant of authority to trustee to reject or assume executory contracts (citing L.R.S.C. Co. v. Rickel Home Ctrs., Inc. (*In re* Rickel Home), 209 F.3d 291, 298 (3d Cir. 2000))); *In re* Williams, No. 07-30414, 2007 WL 1875652, at *2 (Bankr. W.D. Ky. June 25, 2007) (concluding with court approval debtor can reject or assume executory contract under section 365 (citing 11 U.S.C. § 365(a))).

[237] 11 U.S.C. § 365(e) (2006) (invalidating bankruptcy or *ipso facto* clauses in executory contracts); *see In re* Kennesaw Dairy Queen Braizier, 28 B.R. 535, 536 (Bankr. N.D. Ga. 1983) (using negation of *ipso facto* clause to exemplify ability to modify executory contract or unexpired lease under Bankruptcy Code); *cf.* Summit Inv. & Dev. Corp. v. Leroux, 69 F.3d 608, 611 (1st Cir. 1995) (rejecting argument that Congress intended section 365(e)(1) to invalidate only private contractual *ipso facto* clauses).

[238] 11 U.S.C. § 506 (2006) (determining value of secured status); 11 U.S.C. § 545 (2006) (governing statutory liens and trustee's ability to avoid such liens); *see In re* Barnes, 207 B.R. 588, 590 (Bankr. N.D. Ill 1997) (differentiating between "'strip-down'" and "'strip-off'" of secured claims) (citation omitted).

[239] 28 U.S.C. § 157 (2006) (providing district courts can refer cases related to title 11 to bankruptcy judges); *see* Fed. Ins. Co. v. Sheldon, 167 B.R. 15, 21 (S.D.N.Y. 1994) (granting motion for court order "referring this action to the bankruptcy court"); Travelers Ins. Co. v. Goldberg, 135 B.R. 788, 791 (D. Md. 1992) (stating "key factor" for district courts determining "whether to refer a case to the Bankruptcy Court is the extent to which the Bankruptcy Court would be able to function independently").

disputes regarding a debtor's assets and legal obligations.[240] Of significant relevance is section 1334(b), which provides:

> [N]otwithstanding 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.[241]

A point of the introductory language in 1334(b) is that unless the bankruptcy court chooses to abstain from exercising its section 1334(b) jurisdiction[242] or must abstain from exercising its section 1334(b) jurisdiction,[243] matters or proceedings that could be heard in other fora must instead be heard in the district court.[244] That is, section 1334(b) gives non-exclusive jurisdiction to the district courts and "evidences the intent of Congress to bring [] bankruptcy-related litigation within the purview of the [bankruptcy] court, at least as an initial matter, irrespective of congressional statements to the contrary in the context of"[245] other federal legislation,[246] including the FAA.

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[240] 28 U.S.C. § 1334(a)–(b) (2006) (giving original jurisdiction of title 11 cases to district courts); *see In re* Chateaugay Corp., 109 B.R. 613, 621 (S.D.N.Y. 1990) (stating section 1334 grants "centralized jurisdiction and administration of the debtor, its estate" in the reorganization in the Bankruptcy Court); *In re* Friedman's Inc., 372 B.R. 530, 541 (Bankr. S.D. Ga. 2007) (discussing whether Bankruptcy Code granted centralized jurisdiction to district courts (citing Hays & Co. v. Merrill Lynch, 885 F.2d 1149, 1157–58 (3d. Cir. 1989))).

[241] 28 U.S.C. § 1334(b) (2006).

[242] *See* 28 U.S.C. § 1334(c)(1) (stating district courts may choose to abstain from hearing cases arising under title 11, other than those implicating chapter 15, in interest of justice or as courtesy to state courts); Gober v. Terra + Corp. (*In re* Gober), 100 F.3d 1195, 1206 (5th Cir. 1995) (noting under section 1334(c)(1) "courts have broad discretion to abstain from hearing state law claims whenever appropriate"); Howe v. Vaughan (*In re* Howe), 913 F.2d 1138, 1143 (5th Cir. 1990) (discussing "decision to grant permissive abstention . . . lies within the discretion of the district court and [Courts of Appeals] will not reverse that decision unless the district court clearly abused its discretion") (citations omitted).

[243] 28 U.S.C. § 1334(c)(2) (2006) (stating district court must abstain from hearing proceeding based on state claims, related to but not arising from title 11, when federal court could not hear proceeding absent section 1334 jurisdiction, upon timely motion of party and action can be "timely adjudicated" in state forum).

[244] 28 U.S.C. § 1334(b) ("[T]he district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11."). *See* 1 COLLIER ON BANKRUPTCY, ¶ 3.01[4], at 3-12–3-13 (Alan N. Resnick et al. eds., 15th ed. rev. 2006) (explaining introductory language of section 1334(b) to mean "that, unless the district court chooses to or must abstain, civil proceedings that would otherwise be heard in the Court of Federal Claims will instead be heard in the district court") (citation omitted); *see also* Browning v. Levy, 283 F.3d 761, 772–73 (6th Cir. 2002) ("Bankruptcy courts have original jurisdiction over all claims arising under the Bankruptcy Code.") (citation omitted); *In re* Casey Corp., 46 B.R. 473, 475–76 (S.D. Ind. 1985) (stating "district court has jurisdiction over [] claim" against United States stemming from title 11 notwithstanding other statutes granting exclusive jurisdiction over such cases to other courts).

[245] 1 COLLIER ON BANKRUPTCY, ¶ 3.01[4], at 3-13 (Alan N. Resnick et al. eds., 15th ed. rev. 2006) (citation omitted). *See* Quality Tooling, Inc. v. United States, 47 F.3d 1569, 1573 (Fed. Cir. 1995) (recognizing Congress intended "to give the district court sitting in bankruptcy plenary authority over the bankrupt's estate and all claims by or against it, expressly provided that the district court would have concurrent jurisdiction over all claims, even those which by statute were within the exclusive jurisdiction of

Additional support for this concept of centralization can be found in other provisions of title 28. Section 1409(a) allows for a proceeding arising under the Bankruptcy Code or arising in or related to cases under the Bankruptcy Code to be commenced in the district court where the bankruptcy case is pending.[247] Section 1452(a) permits the removal to federal court of any claim over which the district court has jurisdiction pursuant to section 1334 of title 28.[248] In enacting these two provisions Congress understood that the bankruptcy court's jurisdictional reach was critical "'to the efficient administration of bankruptcy proceedings'"[249] and that the district court's jurisdictional reach expanded beyond traditional federal question, admiralty, or diversity jurisdiction.

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other federal courts"); *In re* Horizon Air, Inc., 156 B.R. 369, 378 (N.D.N.Y. 1993) (mentioning purpose of granting original and concurrent jurisdiction of bankruptcy disputes is to facilitate expeditious resolution of bankruptcy proceedings without necessity to wait on conclusion of other state or federal trials).

[246] *See* 1 COLLIER ON BANKRUPTCY, ¶ 3.01[4], at 3-13 (Alan N. Resnick et al. eds., 15th ed. rev. 2006) (explaining how section 1334(b) supersedes other federal legislation) (citation omitted); *see also* Sullivan v. Town & Country Home Nursing Servs., Inc. (*In re* Town & Country Home Nursing Servs., Inc.), 963 F.2d 1146, 1154–55 (9th Cir. 1991) (concluding section 1334(b) grants exclusive and concurrent jurisdiction over all cases involving bankruptcy proceedings including matters dealing with Medicare Act); Brock v. Morysville Body Works, Inc., 829 F.2d 383, 385–86 (3d Cir. 1987) (noting district court has "concurrent original jurisdiction" over claims implicating Occupational Safety and Health Act).

[247] 28 U.S.C. § 1409(a) (2006) (stating district court where bankruptcy proceeding is pending is also correct venue for any claim that implicates title 11).

[248] Section 1452(a) provides:

> A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

28 U.S.C. § 1452(a). Recently, in the WorldCom bankruptcy, the court succinctly stated that "'Congress, when it added § 1452 to the Judicial Code chapter on removal of cases from state courts . . . meant to enlarge, not rein in, federal trial court removal/remand authority for claims related to bankruptcy cases.'" *In re* WorldCom, Inc. Sec. Litig., 293 B.R. 308, 328 (S.D.N.Y. 2003) (quoting Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 131–32 (1995) (Ginsburg, J., concurring)). *See* U.S. Lines, Inc. v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n, Inc. (*In re* U.S. Lines, Inc.), 197 F.3d 631, 641 (2d Cir. 1999) (setting forth that broadly construing federal courts' bankruptcy jurisdiction is essential to federal courts' ability to preserve assets and reorganize estate, particularly in "complex factual scenario[s], involving multiple claims, policies and insurers"); S.G. Phillips Constructors, Inc. v. City of Burlington (*In re* S.G. Phillips Constructors, Inc.), 45 F.3d 702, 705 (2d Cir. 1995) (illustrating "Congress realized that the bankruptcy court's jurisdictional reach was essential to the efficient administration of bankruptcy proceedings" and that "both the Supreme Court and this court have . . . broadly construed the jurisdictional grant in the 1984 Bankruptcy Amendments") (citations omitted).

[249] *In re WorldCom*, 293 B.R. at 329 (quoting *In re S.G. Phillips Constructors, Inc.*, 45 F.3d at 705). *See In re* Navin, 382 B.R. 6, 13–14 (E.D.N.Y. 2007) (recognizing courts have expressed belief that Congress intended broad "jurisdictional reach" for bankruptcy courts dealing with core title 11 proceedings) (citations omitted); *In re* Iridium Operating LLC, 285 B.R. 822, 829 (S.D.N.Y. 2002) (noting bankruptcy courts possess "authority to 'hear and determine . . . all core proceedings arising under title 11'" (quoting 28 U.S.C. § 157(b)(1) (2000))).

Indeed, expansive post-*Marathon* "related to" jurisdiction exists purposefully "to serve the goals of speed and efficiency so integral to the bankruptcy system."[250] The centralization of disputes concerning a debtor's legal obligations in a chapter 11 was a policy consideration identified by the Fourth Circuit in *White Mountain*, in refusing to compel arbitration: "To protect reorganizing debtors and their creditors from piecemeal litigation, the bankruptcy laws 'centralize all disputes concerning [a debtor's legal obligations] so that reorganization can proceed efficiently, unimpeded by uncoordinated proceedings in other arenas.'"[251]

On the other hand, we find that the Supreme Court views the FAA as "a national policy favoring arbitration of claims that parties contract to settle in that matter."[252] For example, arbitration is thought to be less costly than standard litigation[253] because of the application of "[s]treamlined procedural and evidentiary rules."[254] Arbitration is also thought to be faster. "The national average for cases administered by the AAA, from the time the action is filed until the case is closed, is a little less than four months."[255] Other important perceived advantages are the

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[250] Duane Loft, *Jurisdictional Line-Drawing in a Time When so Much Litigation is "Related To" Bankruptcy: A Practical and Constitutional Solution*, 72 FORDHAM L. REV. 1091, 1093 (2004). *See In re* Tvorik, 83 B.R. 450, 455 (Bankr. W.D. Mich. 1988) (recognizing "'related to'" language must be construed broadly) (citation omitted); *In re* Haddad, 68 B.R. 944, 953 (Bankr. D. Mass. 1987) (acknowledging Congress wanted and envisioned fast and efficient bankruptcy court system when it enacted Bankruptcy Code) (citation omitted).

[251] Phillips v. Congelton, L.L.C. (*In re* White Mountain Mining Co., L.L.C.), 403 F.3d 164, 170 (4th Cir. 2005) (quoting Shugrue v. Air Line Pilots Ass'n, Int'l (*In re* Ionosphere Clubs, Inc., 922 F.2d 984, 989 (2d Cir. 1990)). *See In re* Brown, 354 B.R. 591, 603 (D.R.I. 2006) (agreeing with lower court holding, which found "compelling arbitration [can] be inconsistent with the purpose of the bankruptcy laws to centralize disputes about a debtor's legal obligations so that reorganization can proceed efficiently"); *In re* Chateaugay Corp., 109 B.R. 613, 621 (S.D.N.Y. 1990) (noting "power of the Bankruptcy Court to issue an injunction in order to preserve the integrity of the reorganization process is well established" and "is premised upon . . . centralized jurisdiction").

[252] Preston v. Ferrer, 128 S.Ct. 978, 983 (2008) (quoting Southland Corp. v. Keating, 465 U.S. 1, 10 (1984)) (internal quotations omitted). *See* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006) ("To overcome judicial resistance to arbitration, Congress enacted the Federal Arbitration Act . . . [which] embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts . . . ."); Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24 (1983) ("The effect of [the FAA] is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.").

[253] *See* Folkways Music Publishers, Inc. v. Weiss, 989 F.2d 108, 111 (2d. Cir. 1993) (noting avoidance of expensive litigation as arbitration's goal) (citation omitted); United Steel Workers of Am. v. USX Corp., 966 F.2d 1394, 1404 (11th Cir. 1992) (stating arbitration is "considerably less expensive" than litigation); Alan Bloom et al., *Alternative Dispute Resolution in Health Care*, 16 WHITTIER L. REV. 61, 72 (1995) (highlighting cost as "[t]he biggest reason that parties would look to [] arbitration").

[254] Joseph P. McMonigle & Thomas Weathers, *A New Way to Go: Arbitration of Legal Malpractice Claims*, 64 DEF. COUNS. J. 409, 409 (1997). *See In re* Knepp, 229 B.R. 821, 840 (Bankr. N.D. Ala. 1999) (explaining reasons behind arbitration's "'reputed informality and relative speediness'" to include limited discovery and few evidentiary rules, as stated by different court) (quoting Allstar Homes Inc. v. Waters, 711 So. 2d 924, 929 n.1 (Ala. 1997)); Madden v. Kaiser Found. Hosp., 552 P.2d 1178, 1186 (Cal. 1976) ("[T]he simplified procedures and relaxed rules of evidence in arbitration may aid an injured plaintiff in presenting his case.").

[255] Bloom, *supra* note 253, at 72. *See* Halliburton Energy Servs. v. NL Indus., Nos. H-05-4160, H-06-3504, 2008 WL 2697345, at *9 (S.D. Tex. July. 2, 2008) ("Arbitration is intended to be faster than

ability of the parties to select neutral arbitrators,[256] or a particular panel because if its specialized knowledge.[257]

With these perceived advantages in mind, this Supreme Court-created national policy[258] has established much more than a policy favoring arbitration. Rather, this policy has effectively established an irrebuttable presumption that all arbitration agreements are enforceable all the time.[259] Therein lies the "inherent conflict": this irrebutable presumption effectively causes the wholesale elevation of arbitration agreements above the bankruptcy jurisdictional and statutory scheme and, consequently, ignores the broad grant of bankruptcy jurisdiction to the district courts under section 1334(b) of title 28, which should be exercised unless the court

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litigation.") (citation omitted); *In re* Consolidated Rail Corp., 867 F. Supp. 25, 31 (D.D.C. 1994) (enumerating among FAA's purposes availability of expedited resolutions).

[256] *See* Bloom, *supra* note 253, at 72 (commenting "ability to select the neutral" arbitrator is most important advantage of alternative dispute resolution); *cf.* Reel v. Anderson Fin. Servs., LLC, No. 5:07 CV 00080, 2008 WL 53222, at *6 (W.D. Va. Jan. 2, 2008) (noting plaintiff's ability to select arbitrator from "rosters of neutrals"); Yardis Corp. v. Silver, No. CIV.A. 88-7211, 2000 WL 1763667, at *1 (E.D. Pa. Nov. 30, 2000) (describing selection process of neutral arbitrator).

[257] *See* Bowen v. Amoco Pipeline Co., 254 F.3d 925, 936 (10th Cir. 2001) ("Arbitrators are chosen for their specialized experience and knowledge, which enable them to fashion creative remedies and solutions that courts may be less likely to endorse."); Bd. of Trs., Sheet Metal Workers' Nat. Pension Fund v. Courtad Constr. Sys., Inc., 439 F. Supp. 2d 574, 578 n.6 (E.D. Va. 2006) (highlighting importance of arbitrators' specialized knowledge) (citation omitted); Lake Plumbing Inc. v. Seabreeze Constr. Corp., 493 So. 2d 1100, 1102 (Fla. Dist. Ct. App. 1986) ("Arbitration is especially appropriate in situations involving issues that are unique to certain industries and which require specialized knowledge for their resolution.").

[258] *See* Preston v. Ferrer, 128 S. Ct. 978, 981 (2008) ("As this Court [has] recognized . . . , the [FAA] establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution.") (internal citation omitted); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006) (noting FAA "embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts"); Southland Corp. v. Keating, 465 U.S. 1, 10 (1984) ("In enacting § 2 of the [FAA], Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."); Jonathan D. Grossberg, *The Magnuson-Moss Warranty Act, The Federal Arbitration Act, and the Future of Consumer Protection*, 93 CORNELL L. REV. 659, 660 (2008) (discussing origins of "federal policy favoring arbitration"); Jeffrey W. Stempel, *Keeping Arbitrations from Becoming Kangaroo Courts*, 8 NEV. L.J. 251, 252 (2007) ("The dramatic expansion of arbitration has been one of the most significant developments of modern law. . . . In the 1980s, legal constraints confining arbitration . . . were substantially retracted by the U.S. Supreme Court, which announced a strong national policy in favor of enforcing arbitration agreements.") (citation omitted); Maureen A. Weston, *Preserving the Federal Arbitration Act by Reining Judicial Expansion and Mandatory Use*, 8 NEV. L.J. 385, 386 (2007) ("One problem with the FAA has resulted largely from the common law; that is, how courts, led by the Supreme Court since the early 1980's, have broadly interpreted, and, arguably, *misinterpreted* the FAA as constituting a national policy favoring arbitration . . . .").

[259] *See* Doctor's Assoc., Inc. v. Casarotto, 517 U.S. 681, 687 (1996) (stressing arbitration agreements' enforceability absent standard contractual defenses such as duress, fraud, or unconscionability) (citation omitted); Dale v. Comcast Corp., 498 F.3d 1216, 1219 (11th Cir. 2007) (quoting language of FAA in support of view that arbitration agreements are enforceable absent grounds for normal contract revocation (quoting 9 U.S.C. § 2 (2006))); Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1371 (11th Cir. 2005) ("[A]rbitration agreements under the FAA are enforceable absent fraud, duress, or some other misconduct or wrongful act recognized by the law of contracts for revocation of a contract.").

properly abstains under the permissive abstention provisions of section 1334(c)(1).[260]

Although this conflict initially seemed tempered by the holdings in *Hays* and *U.S Lines*—which drew distinctions between core and non-core matters—the recent holdings in *Mintze* and *Hill*, along with the Supreme Court's continuous expansion of the FAA,[261] establishes a trend that bankruptcy courts ultimately may be judicially divested of all authority regarding whether an arbitration agreement should be enforced or whether the subject of the dispute should be adjudicated before the bankruptcy court. Divesting the bankruptcy court of authority to make this decision is wrong, as it displaces the statutory mechanisms that foster the centralized jurisdiction over all disputes regarding a debtor's assets and legal obligations in exclusive favor of the FAA, and elevates arbitration agreements above other contractual provisions. Without bankruptcy court authority to adjudicate the enforceability issue of arbitration agreements in bankruptcy, there is a stronger likelihood that the protection of the reorganizing debtor and its creditors "from piecemeal litigation" and the benefits of the centralization of "'all disputes concerning [a debtor's legal obligations]'"[262] cannot be effectuated and, in fact, may be undermined. In turn, this may have an adverse effect on the debtor's "reorganization [proceeding] efficiently, unimpeded by uncoordinated proceedings in other arenas."[263]

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[260] 28 U.S.C. § 1334(b) (2006) ("[T]he district courts *shall* have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.") (emphasis added); 28 U.S.C. § 1334(c)(1) (2006) (permitting district court to abstain "in the interest of justice, or in the interest of comity with State courts or respect for State law"); *see In re* Spectrum Info. Techs., 183 B.R. 360, 363 (Bankr. E.D.N.Y. 1995) (recognizing trend favoring arbitration while noting that historically such trend was discouraged from encroaching upon specific jurisdiction of bankruptcy courts) (footnote omitted). *But see* Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc. 885 F.2d 1149, 1161 (3d Cir. 1989) (finding "no significant conflict between" bankruptcy law foundations and "enforcement of a forum selection agreement").

[261] *See* Hall St. Assocs., L.L.C. v. Mattel, Inc., 128 S. Ct. 1396, 1405 (2008) (interpreting certain statutory provisions as "substantiating" established "national policy favoring arbitration"); *Preston*, 128 S. Ct. at 987 (holding FAA "supersedes state laws lodging primary jurisdiction in another forum"); *Buckeye Check Cashing*, 546 U.S. at 446 (holding arbitration agreement enforceability does not depend on state contract law or public policy) (citation omitted); *Doctor's Assocs*., 517 U.S. at 688 (noting discriminatory state law which limited arbitration agreements' validity was preempted by federal law).

[262] Phillips v. Congelton, L.L.C. (*In re* White Mountain Mining Co., L.L.C.), 403 F.3d 164, 170 (4th Cir. 2005) (quoting Shugrue v. Air Line Pilots Assoc., Int'l (*In re* Ionosphere Clubs, Inc.), 922 F.2d 984, 989 (2d Cir. 1990)). *Cf.* Crysen/Montenay Energy Co. v. Shell Oil Co. (*In re* Crysen/Montenay Energy Co.), 226 F.3d 160, 165 (2d Cir. 2000) (noting Bankruptcy Code "favors centralization of disputes concerning a debtor's estate"); *In re* Wheeling-Pittsburgh Steel Corp., 108 B.R. 82, 85 (Bankr. W.D. Pa. 1989) (stating "[p]ublic policy favors centralization of bankruptcy proceedings").

[263] *In re White Mountain*, 403 F.3d at 170 (quoting *In re Ionosphere*, 922 F.2d at 989) (internal quotations omitted). *Cf.* Nat'l Gypsum Co. v. NGC Settlement Trust & Asbestos Claims Mgmt. Corp. (*In re* Nat'l Gypsum Co.), 118 F.3d 1056, 1069 (5th Cir. 1997) (affirming bankruptcy court's right to assess arbitration in light of Code's goal of centralized resolution and creditor protection); Societe Nationle Algerienne Pour La Recherche v. Distrigas Corp., 80 B.R. 606, 610 (D. Mass. 1987) (identifying conflict between approaches of bankruptcy and arbitration in context of centralization).

To be sure, at the very foundation of the bankruptcy statutory scheme are those policies allowing the modification of the rights of debtors and creditors and the centralization of disputes regarding a debtor's assets and liabilities in the bankruptcy courts. Arbitrators retained for their purported expertise in a particular discipline are surely not equipped in all instances to address the "practicalities and peculiarities" that are present during the pendency of a bankruptcy case, especially a reorganization case.[264] Bankruptcy courts, however, possess both jurisdiction and, in the absence of a rule of decision, discretion to administer all aspects of a bankruptcy case and, because of their jurisdiction and discretion, are most uniquely positioned to appreciate the impact that enforcing an arbitration agreement will have on the underlying bankruptcy case in view of the policies underlying both the FAA and the bankruptcy jurisdictional and statutory scheme.

Arbitration agreements are nothing other than privately negotiated agreements.[265] Theoretically, then, if a party to an agreement seeks bankruptcy protection, arbitration agreements should operate with no more force than any other privately agreed-upon contractual provision in bankruptcy.[266] Bankruptcy law, after

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[264] *See* Fid. & Deposit Co. of Md. v. Morris (*In re* Morris), 950 F.2d 1531, 1535 (11th Cir. 1992) ("'[D]uring the pendency of a bankruptcy case, especially a reorganization case, the court enters orders that alter the rights of parties and the parties themselves enter into agreements that alter their rights; all because of the peculiarities of bankruptcy.'" (quoting Un-Common Carrier Corp. v. Oglesby, 98 B.R. 751, 753 (S.D. Miss. 1989))); *cf. In re* Redmond, 380 B.R. 179, 186 (Bankr. N.D. Ill. 2007) ("It is well established that bankruptcy courts retain jurisdiction to interpret or enforce their own orders even after a case is closed."); *In re* Stardust Inn, 70 B.R. 888, 890 (Bankr. E.D. Pa. 1987) (deciding bankruptcy courts could retain subject matter jurisdiction over pending cases even after issues initially invoking bankruptcy courts' jurisdiction were dismissed, showing contrast to arbitration proceedings) (citation omitted).

[265] *In re* Brown, 354 B.R. 591, 600 (D.R.I. 2006) ("Arbitration agreements are 'privately negotiated agreements' . . . ." (quoting Volt Info. Scis. v. Bd. of Trs., 489 U.S. 468, 478 (1989))). *See* Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219 (1985) (interpreting Arbitration Act as requiring courts to enforce arbitration agreements as it would "privately negotiated arbitration agreements"); Cont'l Airlines, Inc. v. E. Pilots Merger Comm. (*In re* Cont'l Airlines, Inc.), 484 F.3d 173, 182 (3d Cir. 2007) ("[A] party cannot be required to submit to arbitration unless he has 'agreed so to submit.'" (quoting AT & T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 648 (1986))).

[266] *See In re Brown*, 354 B.R. at 600 (describing arbitration agreements as "no different in form than other freely negotiated contractual provisions that circumscribe rights to be enforced by their terms") (citation omitted); *see also* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12 (1967) (describing congressional purpose of FAA "to make arbitration agreements as enforceable as other contracts, but not more so"); Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 885 F.2d 1149, 1162 (3d Cir. 1989) (enforcing contract's arbitration clauses as it would enforce contract's forum selection clauses). For example, the trustee or debtor can generally assume or reject an executory contract. *See* 11 U.S.C. § 365(a) (2006); *In re* Lionel Corp., 29 B.R. 694, 696 (Bankr. S.D.N.Y. 1983) (explaining, in chapter 11 contexts, courts' general approval of debtors' decision to assume or reject a lease "if the assumption or rejection appears to be in the best interests of the debtor"); *see also In re* Kong, 162 B.R. 86, 96 (Bankr. E.D.N.Y. 1993) (requiring, using business judgment standard, debtors to demonstrate "'that rejection of the executory contract or unexpired lease will benefit the estate'") (citation omitted). Notwithstanding this plain language, there are a line of cases that hold that a party can be compelled to arbitrate a dispute notwithstanding a rejection of the underlying executory agreement. *See, e.g.*, Se. Pa. Transp. Auth. v. AWS Remediation, Inc., No. Civ. A. 03-695, 2003 WL 21994811, at *3 (E.D. Pa. Aug. 18, 2003) (determining arbitration clause survived debtor's rejection of contract); *Societe Nationale Algerienne Pour La Recherche*, 80 B.R. at 609 (finding arbitration provision is separate undertaking which survives debtor's rejection of underlying agreement); *In re* Monge Oil Corp., 83 B.R. 305, 308 (Bankr. E.D. Pa. 1988) ("Rejection [of an executory

all, accomplishes equitable distribution through a collective proceeding. The Ninth Circuit in *Sherwood Partners Inc. v. Lycos, Inc.*,[267] discussed the benefit of the collective proceeding concept:

> This is a unique contribution of the Bankruptcy Code that makes bankruptcy different from a collection of actions by individual creditors. In a world of individual actions, each creditor knows that if he waits too long, the debtor's assets will have been exhausted by the demands of the quicker creditors and he will recover nothing. . . . Federal bankruptcy law seeks to avoid this scenario by "creat[ing] a whole system under federal control which is designed to bring together and adjust all of the rights and duties of creditors and embarrassed debtors alike."[268]

The collective proceeding is best exemplified by the two-fold purpose of the automatic stay provisions of section 362 of the Bankruptcy Code: (1) to give the debtor a "breathing spell" from collection efforts and permit a repayment or reorganization plan; and, (2) to provide creditors protection against other creditors' actions or collection attempts.[269] "Because the automatic stay serves the interests of both debtors and creditors," debtors generally cannot waive or limit its scope in pre- or post-petition contracts.[270] The stay can only be terminated, annulled or modified

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contract] does not make the contract null and void ab initio; it simply protects the estate from assuming contractual obligations on a priority, administrative basis.") (citation omitted). This line of cases seems contrary to a widely held interpretation of section 365 of the Bankruptcy Code, which requires a debtor to either assume an executory contract in its entirety or completely reject it. *See* Thompkins v. Lil' Joe Records, Inc., 476 F.3d 1294, 1306 (11th Cir. 2007) ("[A] debtor must either assume an executory contract in its entirety or completely reject it.") (citation omitted); Schlumberger Res. Mgmt. Servs., Inc. v. CellNet Data Sys., Inc. (*In re* CellNet Data Sys., Inc.), 327 F.3d 242, 249 (3d Cir. 2003) ("Under the Bankruptcy Code, a trustee may elect to reject or assume its obligations under an executory contract. This election is an all-or-nothing proposition—either the whole contract is assumed or the entire contract is rejected.") (citation omitted); *Societe Nationale Algerienne Pour La Recherche*, 80 B.R. at 609 ("[A]n executory contract must either be accepted or rejected in its entirety . . . ."). These divergent views may be attributable to "congressional declaration of a liberal federal policy favoring arbitration agreements." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985) ("[A]s with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability."); Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 721 (9th Cir. 1999) (interpreting arbitration clause's language broadly).

[267] 394 F.3d 1198 (9th Cir. 2005).

[268] *Id.* at 1203–04 (quoting MSR Exploration, Ltd. v. Meridian Oil, Inc., 74 F.3d 910, 914 (9th Cir. 1996)).

[269] *See* Indep. Union of Flight Attendants v. Pan Am. World Airways, 966 F.2d 457, 459 (9th Cir. 1992) (discussing both purposes of section 362(a) (citing H.R. REP. NO. 595, at 340 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6296–97)); *see also* Taylor v. Slick, 178 F.3d 698, 702 (3d Cir. 1999) ("[P]ostponement of a [collection] proceeding . . . effectuates the purposes of § 362(a)(1) by preserving the status quo until the bankruptcy process is completed or until the creditor obtains relief from the automatic stay.") (citation omitted); Benedor Corp. v. Conejo Enters. (*In re* Conejo Enters.), 96 F.3d 346, 351 (9th Cir. 1996) ("The purpose of § 362(a)'s automatic stay is to protect both the debtor and his creditors.").

[270] *See* Acands, Inc. v. Travelers Cas. & Sur. Co., 435 F.3d 252, 259 (3d Cir. 2006) (stating automatic stay "'may not be waived and its scope may not be limited by a debtor'" (quoting Maritime Elec. Co. v. United Jersey Bank, 959 F.2d 1194, 1204 (3d Cir. 1992))). *But see In re* Deb-Lyn, Inc., No. 03-00655-GVL1, 2004

by an order from a bankruptcy court and only after it finds that a party has met its burden under section 362(d) of the Bankruptcy Code.

Similarly, the adjudication of a dispute arising in, arising under, or related to a bankruptcy case should not be automatically extricated from the bankruptcy court simply because the subject agreement contains an arbitration agreement, notwithstanding the FAA. The decision to extricate the dispute should depend on whether abstention is warranted under the carefully crafted broad language of section 1334(c)(1).

Indeed, the permissive abstention provisions of section 1334(c)(1) and the policy underpinnings of the bankruptcy jurisdiction and statutory scheme establish that bankruptcy courts should adjudicate whether to enforce an arbitration agreement, or conversely, require the parties to litigate the subject dispute in the bankruptcy court.[271] This adjudication should occur, in view of, among other things, the policy underpinnings of the FAA to facilitate a less costly, faster, and streamlined out-of-court adjudication of a dispute and the bankruptcy jurisdiction and statutory scheme, which are intended to centralize disputes regarding a debtor's assets and legal obligations in the bankruptcy courts. Otherwise, both the FAA and bankruptcy scheme will be severely undermined.

As will be discussed in the succeeding sections, bankruptcy courts are vested with jurisdiction and authority to determine whether to enforce an arbitration agreement or require the matter to be litigated in bankruptcy court, regardless of the nature of the claim, in all instances.

V. ABSTENTION UNDER SECTION 1334(C)(1) OF TITLE 28

As discussed in the previous section, there is an inherent conflict between the FAA and the bankruptcy statutory scheme given the policy underpinnings of both. In view of this inherent conflict, the FAA and FAA jurisprudence cannot be the exclusive body of law that controls whether or not an arbitration agreement is enforceable in the context of a proceeding in bankruptcy. Rather, the bankruptcy courts must analyze the issue of the enforceability of an arbitration agreement, and whether to abstain from adjudicating a dispute that is the subject matter of an

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WL 452560, at *1 (N.D. Fla. Mar. 11, 2004) ("This Court has previously recognized the enforceability and validity of a pre-petition waiver of the automatic stay."); *In re* McBride Estates, Ltd., 154 B.R. 339, 341 (Bankr. N.D. Fla. 1993) ("[T]he settlement agreement provided explicitly that should [the debtor] file a petition for bankruptcy, it would consent immediately to the lifting of the automatic stay in such case.").

[271] *See In re* Brown, 354 B.R. 591, 600–03 (D.R.I. 2006) (stating bankruptcy court has "discretion to decide whether and when to compel arbitration" when Bankruptcy Code and FAA conflict) (citation omitted); *cf. In re* Bennett Funding Group, Inc., 259 B.R. 243, 252 (Bankr. N.D.N.Y. 2001) (noting "the strong public policy interest in centralizing all core matters in the bankruptcy court.") (citations omitted); *In re* N. Parent, Inc., 221 B.R. 609, 622 (Bankr. D. Mass. 1998) ("Retaining core proceedings in this Court, in spite of a valid forum selection clause, promotes the well-defined policy goals of centralizing all bankruptcy matters in a specialized forum to ensure the expeditious reorganization of debtors.") (citation omitted).

arbitration agreement pursuant to section 1334 of title 28,[272] the statutory provision that vests the courts with jurisdiction over cases "arising in" and "arising under" the Bankruptcy Code and "related to" cases filed under the Bankruptcy Code.

Section 1334(b) of title 28 vests the bankruptcy courts with original and concurrent jurisdiction over all civil proceedings "arising under title 11, or arising in or related to cases under title 11."[273] "[T]he purpose of § 1334(b) is 'to allow [bankruptcy] courts in which the bankruptcy case is filed to adjudicate bankruptcy-related actions.'"[274]

The Ninth Circuit recently discussed the importance of this jurisdictional grant in *In re Crown Vantage, Inc.*: "The requirement of uniform application of bankruptcy law dictates that all legal proceedings that affect the administration of the bankruptcy estate be brought either in bankruptcy court or with leave of the bankruptcy court."[275]

In turn, section 1334(c) operates to permit a limitation on the exercise of bankruptcy-related subject matter jurisdiction of the bankruptcy court conferred by section 1334(b).[276] Under section 1334(c)(1), a bankruptcy court may, "in the

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[272] 28 U.S.C. § 1334 (2006); *see In re* Pan Am Corp., No. M 47 (CSH), 1993 WL 59381, at *3 (S.D.N.Y. Mar. 3, 1993) (explaining section 1334(c)(1) "was intended to codify already existing judicial abstention doctrines") (citation omitted); *cf.* Mt. McKinley Ins. Co. v. Corning Inc., 399 F.3d 436, 447 (2d Cir. 2005) ("The first step in a Section 1334(c)(2) abstention analysis is resolution of whether the proceeding is 'core,' . . . ." (quoting U.S. Lines, Inc. v. Am. S.S. Owners Mut. Prot. & Indem. Assoc., Inc. (*In re* U.S. Lines), 197 F.3d 631, 636 (2d Cir.1999))); *In re* Weldon F. Stump & Co., 373 B.R. 823, 828 (Bankr. N.D. Ohio 2007) (describing purpose behind abstention under section 1334(c)(1) as "ensur[ing] that the jurisdiction of the bankruptcy court is exercised only when appropriate to the expeditious disposition of bankruptcy cases") (citations omitted).

[273] 28 U.S.C. § 1334(b) (2006).

[274] Sterling Consulting Corp. v. United States, 245 F.3d 1161, 1166 (10th Cir. 2001) (citing Gruntz v. County of L.A. (*In re* Gruntz), 202 F.3d 1074, 1083 (9th Cir. 2000)) (internal quotations omitted). *See* Atkinson v. Kestell, 954 F. Supp. 14, 16 (D.D.C. 1997) (denying jurisdiction to hear claim seeking to attach defendant's wages as defendant's petition for discharge had been dismissed and thus no estate in bankruptcy existed). *But see In re* Siskin, 258 B.R. 554, 563 (Bankr. E.D.N.Y. 2001) ("[The *Gruntz*] view is diametrically opposed to the traditional view, which is that the only aspect of a bankruptcy proceeding over which district courts and their bankruptcy units have exclusive jurisdiction is the bankruptcy petition itself . . . .") (citation omitted).

[275] Beck v. Fort James Corp. (*In re* Crown Vantage, Inc.), 421 F.3d 963, 971 (9th Cir. 2005). *See In re* Ridley Owen, Inc., 391 B.R. 867, 871 (Bankr. N. D. Fla. 2008) (explaining "*Barton* doctrine" which requires a party to get permission of bankruptcy court for "suit to proceed in another court against [the] estate" and "prevents creditors from bringing lawsuits against the trustee in more favorable forums to overturn or compensate themselves for losses incurred in the bankruptcy proceeding") (citations omitted); *First Impressions*, 2 SETON HALL CIRCUIT REV. 175, 220 (2005) ("'The requirement of uniform application of bankruptcy law dictates that all legal proceedings that affect the administration of the bankruptcy estate be brought either in bankruptcy court or with leave of the bankruptcy court.'") (citation omitted).

[276] *See* Hatcher v. Lloyd's of London, 204 B.R. 227, 232–33 (M.D. Ala. 1997) (stating, under section 1334(c), "'absent countervailing circumstance[s], the trial of state law created issues and rights should be allowed to proceed in state court, at least where there is no basis for federal jurisdiction independent of section 1334(b) and the litigation can be timely completed in state court'") (citation omitted); *cf. In re* Simmons, 205 B.R. 834, 847 (Bankr. W.D. Tex. 1997) (observing "that abstention undercuts the practical exercise of otherwise properly invoked federal jurisdiction by depriving the party opposing it of its choice of forum and imposing duplication of effort and delay on all parties"); *In re* Branded Products, 154 B.R. 936, 943 (Bankr. W.D. Tex. 1993) (demonstrating "section 1334(c)(2) operates as a limitation on the subject

interest of justice, or in the interest of comity with State courts or respect for State law," abstain from hearing "a particular proceeding arising under title 11 or arising in or related to" a debtor's bankruptcy case.[277] The task of understanding the basic meaning of section 1334(c)(1), as distinguished from the test for when a court should abstain under section 1334(c)(2), begins and ends with the language of the statute itself, inasmuch as its language is plain in this regard.[278] When a statute's language is plain, "'the sole function of the courts is to enforce it according to its terms.'"[279]

The plain language of section 1334(c)(1) indicates that the bankruptcy court may permissively abstain from adjudicating *any* proceeding in which it has jurisdiction under section 1334(b), given that the enumerated conditions for abstention contained in (c)(1) are stated in the disjunctive.[280] Thus, the bankruptcy courts' decision to decide to enforce an arbitration agreement, or rather, to require the parties to adjudicate the dispute in the bankruptcy court, should be exclusively analyzed through the framework contained in section 1334(c)(1), and not by treating the FAA as preempting bankruptcy jurisdiction.

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matter jurisdiction of federal courts—a limitation which is internally inconsistent with both section 1334(b) and the intentions of Congress") (citation omitted), *abrogated by* Southmark Corp. v. Coopers & Lybrand (*In re* Southmark Corp.), 163 F.3d 925 (5th Cir. 1999).

[277] 28 U.S.C. § 1334(c)(1) (2006). Section 1334(c)(2) is inapposite to the issue of enforceability of arbitration agreements in bankruptcy. 28 U.S.C. § 1334(c)(2) (dictating when "the district court shall abstain"). "For mandatory abstention to apply, a proceeding must: (1) be based on a state law claim or cause of action; (2) lack a federal jurisdictional basis absent the bankruptcy; (3) be commenced in a state forum of appropriate jurisdiction; (4) be capable of timely adjudication [in the court]; and (5) be a non-core proceeding." Lindsey v. O'Brien (*In re* Dow Corning Corp.), 86 F.3d 482, 497 (6th Cir. 1996).

[278] *See* United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989) ("The task of resolving the dispute over the meaning of [a section of code] begins where all such inquires must begin: with the language of the statute itself." (quoting Landreth Timber Co. v. Landreth, 471 U.S. 681, 685 (1985))); Block-Lieb, *supra* note 123, at 786 (stating "no matter how bankruptcy jurisdiction over proceedings arising under state law is categorized, questions regarding the scope of section 1334(c)(1) are questions of statutory construction"); *cf.* Sara E. Apel, *In Too Deep: Why the Federal Courts Should Not Recognize Deepening Insolvency as a Cause of Action*, 24 EMORY BANKR. DEV. J. 85, 116 (2008) (labeling section 1334(c)(1) "permissive bankruptcy abstention provision" based on text of statute) (citation omitted).

[279] *Ron Pair Enters.*, 489 U.S. at 241 (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917)). *See* Hartford Underwriters, Ins. Co. v. Union Planters Bank, 530 U.S. 1, 6 (2000) (stating when "'statute's language is plain'," then it needs to be enforced "'according to its terms'") (citations omitted); Citibank v. Emery (*In re* Emery), 132 F.3d 892, 895 (2d Cir. 1998) ("The Supreme Court has stated that 'as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute.'" (quoting *Ron Pair Enters*., 489 U.S. at 240–41)).

[280] *See* Asbestosis Claimants v. Apex Oil Co. (*In re* Apex Oil Co.), 980 F.2d 1150, 1152–53 (8th Cir. 1992) (noting language of section 1334(c)(1) "is not limited to state-law cases, since the possible conditions for abstention are stated in the disjunctive"); *In re* Repurchase Corp., 329 B.R. 832, 835 (Bankr. N.D. Ill. 2005) (explaining because section 1334(c)(1) is "[s]tated in the disjunctive, the plain language of the statute permits a district court, and a bankruptcy court if so delegated under 28 U.S.C. § 157(a), to abstain from exercising its jurisdiction to adjudicate a core or noncore matter 'in the interest of justice' if abstention lies in favor of another federal court") (citations omitted); Alisa Loretta Pittman et al., *Survey: Has Congress Really Solved the Controversy Surrounding the Jurisdiction of Bankruptcy Courts?*, 5 J. BANKR. L. & PRAC. 481, 497 (1996) (explaining "that by stating the conditions for discretionary abstention in the disjunctive, the statute is not limited to state law claims when abstention would serve the interest of justice") (citation omitted).

An analysis of section 1334(c)(1) must also be made against the back-drop of federal jurisdictional jurisprudence. Specifically, "federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress."[281] Indeed, the Supreme Court has held "that federal courts may decline to exercise their jurisdiction, in otherwise "'exceptional circumstances,"' where denying a federal forum would clearly serve an important countervailing interest."[282] The application of this doctrine reflects the background against which the statutes conferring jurisdiction were enacted: "[A] federal court has the authority to decline to exercise its jurisdiction when it is asked to employ its historic powers as a court of equity. . . . This tradition informs our understanding of the jurisdiction Congress has conferred upon the federal courts, and explains the development of our abstention doctrines."[283]

Thus, once jurisdiction is vested in the federal court, it is well established that it should abstain only reluctantly.[284] As stated in *Colorado River Water Conservation*

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[281] Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716 (1996) (citation omitted). *See* Ohio v. Wyandotte Chem. Corp., 401 U.S. 493, 496–97 (1971) ("[I]t is a time-honored maxim of the Anglo-American common-law tradition that a court possessed of jurisdiction generally must exercise it.") (citation omitted); Laura I. Asbury, *A Practical Guide to Fraudulent Joinder in the Eighth Circuit*, 57 ARK. L. REV. 913, 928 (2005) (indicating "federal court has a 'strict duty to exercise the jurisdiction' given to it by Congress") (citation omitted).

[282] *Quackenbush*, 517 U.S. at 716 (quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976)) (citation omitted). *See* H&R Block Tax Servs., Inc. v. Rivera-Alicea, 570 F. Supp. 2d 255, 262 n.3 (D.P.R. 2008) ("The purpose behind the *Colorado River* doctrine is to determine whether exceptional circumstances exist in a case, which favor an exception in the exercise of federal jurisdiction.") (citation omitted).

[283] *Quackenbush*, 517 U.S. at 717 (quoting Fair Assessment in Real Estate Ass'n, Inc. v. McNary, 454 U.S. 100, 120 (1981) (Brennan, J., concurring)) (internal quotations omitted). *See* Carroll v. City of Mount Clemens, 139 F.3d 1072, 1079 (6th Cir. 1998) (declaring "'[u]nder our precedents, federal courts have the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or otherwise discretionary'") (citation omitted); *cf.* Arizona v. New Mexico, 425 U.S. 794, 797 (1976)

> We have observed that the broad statement that a court having jurisdiction must exercise it . . . is not universally true but has been qualified in certain cases where the federal courts may, in their discretion, properly withhold the exercise of the jurisdiction conferred upon them where there is no want of another suitable forum.

(internal quotations and citation omitted).

[284] *See Colo. River*, 424 U.S. at 813 (finding error in district court's dismissal under doctrine of abstention). *Colorado River* abstention addresses the discretion of a federal court to defer in limited circumstances to duplicative, ongoing state court litigation. *Id*. at 817. *See* Finity E. Jernigan, Note, *Forum Non Conveniens: Whose Convenience and Justice?*, 86 TEX. L. REV. 1079, 1112 n.226 (2008) (noting Supreme Court in *Colorado River* identified four factors federal court should consider "when determining whether 'exceptional' circumstances justify a federal court's decision to dismiss a case out of deference to pending state court proceedings"). *Colorado River* abstention is but one abstention doctrine articulated by the Supreme Court. Other abstention doctrines include *Pullman* abstention, derived from the Court's decision in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 643 (1941). *Pullman* abstention is required where decision of a federal constitutional issue can be avoided by deferring to a state court's resolution of an unsettled state law issue. *Id.* at 500–01. *Burford* abstention was developed in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). *Burford* abstention is required where the exercise of concurrent federal jurisdiction would disrupt a complex state regulatory regime. *Id.* at 334 (Douglas, J., concurring). *Thibodaux* abstention was

District v. United States,[285] "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule. . . . [because of] the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them."[286]

Section 1334(c)(1) "was intended to codify already existing judicial abstention doctrines."[287] As recently noted by one bankruptcy court, the reluctance to abstain from the exercise of jurisdiction is particularly important in bankruptcy:

> An important and beneficial attribute of bankruptcy is its inclusiveness. It gathers all assets of, and claims against, a debtor within one tribunal for administration, liquidation and adjustment. . . . To maintain this inclusiveness, a bankruptcy court has a duty to exercise jurisdiction in matters arising under the Code or arising in a bankruptcy case, unless the court finds abstention is in the best interest of the parties and the estate, and will not jeopardize the rights, remedies, safeguards and legitimate expectations provided under the Code to the parties in interest. In short, a bankruptcy court should be reluctant to relinquish its jurisdiction over core proceedings, unless there is a specific showing abstention will better serve the parties in interest and the estate.[288]

The Ninth Circuit in *Tucson Estates*,[289] has laid out twelve factors a bankruptcy court should consider in deciding whether to exercise permissive abstention under

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developed in *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959). *Thibodaux* abstention is permissible where a state law issue is unsettled and politically sensitive. *Id.* at 28. Finally, *Younger* abstention is required where the federal defendant has commenced criminal or civil enforcement proceedings in state court against the federal plaintiff. Younger v. Harris, 401 U.S. 37, 41 (1971).

[285] 424 U.S. 800 (1976).

[286] *Id.* at 813, 817 (citation omitted). *See* Cohens v. Virginia, 19 U.S. 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.").

[287] *In re* Pan Am Corp., No. M47 (CSH), 1993 WL 59381, at *3 (S.D.N.Y. Mar. 3, 1993) (citation omitted). *Cf.* Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 11 (1987) (emphasizing need for abstention to avoid federal interpretation of state statutes which are essentially not binding on state courts) (citation omitted); Moore v. Sims, 442 U.S. 415, 425–426 (1979) (finding "abstention is appropriate unless state law clearly bars the interposition of the constitutional claims").

[288] *In re* Cook, 384 B.R. 282, 296 (Bankr. N.D. Ala. 2008). Notably, the Supreme Court in *Colorado River* employed four factors to determine whether abstention was appropriate. These factors were intended to balance the court's exercise of jurisdiction with the interests of wise judicial administration and the comprehensive disposition of litigation. *Colo. River*, 424 U.S. at 818–19 (concluding "[n]o one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required") (citation omitted). *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 13.3 (5th ed. 2007) (examining expansion of abstention doctrine and noting case where abstention was found should apply "even though the proceeding was wholly civil"); *see also Younger*, 401 U.S. at 53 (limiting federal power in providing "the availability of injunctive relief against state criminal prosecutions" only in extraordinary circumstances); *cf.* Trainor v. Hernandez, 431 U.S. 434, 444 (1977) ("[T]he principles of *Younger* . . . are broad enough to apply to interference by a federal court with an ongoing civil enforcement action.") (citation omitted).

[289] Christensen v. Tuscon Estates, Inc. (*In re* Tucson Estates, Inc.), 912 F.2d 1162 (9th Cir. 1990).

section 1334(c)(1). The following factors are intended to ensure that the jurisdiction of the bankruptcy court is exercised when appropriate to the expeditious disposition of the bankruptcy case[290] and in furtherance of the policies underlying the statutory bankruptcy scheme:[291]

> (1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention,
> (2) the extent to which state law issues predominate over bankruptcy issues,
> (3) the difficulty or unsettled nature of the applicable law,
> (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court,
> (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334,
> (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case,
> (7) the substance rather than form of an asserted "core" proceeding,
> (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court,
> (9) the burden of [the bankruptcy court's] docket,
> (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties,
> (11) the existence of a right to a jury trial, and
> (12) the presence in the proceeding of nondebtor parties.[292]

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[290] *See In re* Luis Elec. Contracting Co., 165 B.R. 358, 367 (Bankr. E.D.N.Y. 1992) (citing legislative history of predecessor of section 1334(c)(1) as requiring jurisdiction be "'exercised only when appropriate to the expeditious disposition of bankruptcy cases'" (quoting Coker v. Pan Am. World Air, Inc. (*In re* Pan Am. Corp.), 950 F.2d 839, 846 (2d Cir. 1991))); *cf. In re* U.S. Lines, Inc., No. 97 CIV.6727 (MBM), 1998 WL 382023, at *5 (S.D.N.Y July 9, 1998) (finding "abstention is appropriate only when a claimant has already filed an action in state court and transfer of that case would violate principles of federal comity") (citation omitted); *In re* Kaleidoscope, Inc., 25 B.R. 729, 741–742 (Bankr. N.D. Ga. 1982) (observing delegating bankruptcy court's "'exclusive and nondelegable control . . . where the interests of the estate and the parties will best be served, [by] the bankruptcy court['s] consent to submission to State courts of particular controversies involving unsettled questions of State property law and arising in the course of bankruptcy administration'") (citation omitted).

[291] *See* Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817–19 (1976) (balancing abstention decision against "wise judicial administration," "comprehensive disposition of litigation," and "avoidance of piecemeal" litigation) (internal quotations and citations omitted); *In re Pan Am. Corp.*, 950 F.2d at 846 (noting "abstention doctrines [] manifest federal respect for State law and policy" and observing holding which found abstention ought to be exercised only in exceptional circumstances); Skinner v. Janus, No. 99-CV-0887E(M), 2000 WL 432806, at *3 (W.D.N.Y. Apr. 13, 2000) (codifying three equitable factors set out in section 1334(c)(1) "which must be considered when deciding whether discretionary abstention is proper—*viz.*, the interests of justice, comity with state courts and respect for state law").

[292] *Tucson Estates*, 912 F.2d at 1167 (quoting *In re* Republic Reader's Service, Inc., 81 B.R. 422, 429 (Bankr. S.D. Tex. 1987)).

Evaluating these factors should not be "'a mathematical formula.'"[293] In other words, permissive abstention as mandated by section 1334(c)(1) is only proper when the bankruptcy court determines that after analyzing these factors, abstention is appropriate.[294] As will be discussed below, in order to properly address the inherent conflict between the policies underlying the FAA and the federal jurisdictional and statutory scheme, this Thesis proposes modifying the *Tuscon* factors to account for and consider the "strong federal policy favoring arbitration."

VI. REVESTING BANKRUPTCY COURTS WITH DISCRETION TO ADJUDICATE THE ENFORCEABILITY OF ARBITRATION AGREEMENTS IN BANKRUPTCY PROCEEDINGS

In view of the statutory mandates of sections 1334(b) and (c)(1) of title 28 and the policy underpinnings of the bankruptcy jurisdictional and statutory scheme, bankruptcy courts are clearly vested with authority to ultimately adjudicate the enforceability of arbitration agreements in bankruptcy in all instances. And notwithstanding the *McMahon*-mandated finding of an "inherent conflict" between the FAA and the federal statutory bankruptcy scheme,[295] "'when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'"[296]

Thus, in an effort to effectively police the exercise of the bankruptcy courts' jurisdiction and authority, and to account for the plain language and policy underpinnings of both the FAA and the bankruptcy jurisdictional and statutory scheme, this Thesis proposes the modification of the twelve *Tuscon* factors so as to add the following additional ones to effectively address the enforceability of arbitration agreements in bankruptcy:

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[293] *In re* Loewen Group Int'l, Inc., 344 B.R. 727, 730 (Bankr. D. Del. 2006) (quoting *In re* Sun Healthcare Group, 267 B.R. 673, 679 (Bankr. D. Del. 2000)). *See In re* Chi., Milwaukee, St. Paul & Pac. R.R. Co., 6 F.3d 1184, 1189 (7th Cir. 1993) (concluding "[c]ourts should apply these factors flexibly, for their relevance and importance will vary with the particular circumstances of each case, and no one factor is necessarily determinative"); Trans World Airlines, Inc. v. Karabu Corp., 196 B.R. 711, 715 (Bankr. D. Del. 1996) (holding while analysis of factors is not "mathematical exercise," where "*all* the significant factors favoring abstention" are met, moving party has met its burden and court shall abstain from hearing case).

[294] *See* Thompson v. Magnolia Petroleum Co., 309 U.S. 478, 483 (1940) (recognizing "where the interests of the estate and the parties will best be served," bankruptcy court may "consent to submission to state courts of particular controversies") (citation omitted); *In re* Texaco Inc., 77 B.R. 433, 438 (Bankr. S.D.N.Y. 1987) ("The concept of discretionary abstention involves a determination by the bankruptcy court as to whether or not issues raised in the pending state court action implicate bankruptcy principles which might have a material bearing on the debtor's reorganizational efforts."); *cf. In re Pan Am. Corp*., 950 F.2d at 846 (noting several distinct Supreme Court doctrines on abstention and concluding that "abstention doctrines thus manifest federal respect for State law and policy").

[295] *See supra* Section IV (discussing conflict between FAA and statutory bankruptcy scheme).

[296] J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc., 534 U.S. 124, 143–44 (2001) (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974)). *See* Radzanower v. Touche Ross & Co., 426 U.S. 148, 155 (1976) (holding "[i]t is not enough to show that the two statutes produce differing results when applied to the same factual situation" but rather capability of each co-existing together).

> (1) if an arbitration agreement is enforced, and arbitration compelled, the effect or lack thereof on the efficient administration of the estate;
> (2) if an arbitration agreement is not enforced, and arbitration not compelled, the identification of one or more findings of fact supporting the retention of bankruptcy court jurisdiction over arbitration;
> (3) the extent to which arbitration is favored because the adjudication of the dispute will be more timely or less costly to the estate, or because a specialized tribunal with a well-developed understanding of the particular industrial or business context in which a given dispute arose is needed;[297]
> (4) the difficulty or unsettled nature of the applicable law;
> (5) the existence of a constituted arbitration panel and ongoing arbitration regarding the case in controversy;
> (6) the degree of relatedness or remoteness between the issues subject to the arbitration and the main bankruptcy case;
> (7) the substance rather than form of whether the issues subject to arbitration are "core" proceedings or "non-core" proceedings;
> (8) the feasibility, if an arbitration agreement is enforced and arbitration compelled, to separate the arbitration proceeding from core bankruptcy matters to allow arbitration awards to be entered with the subsequent enforcement left to the bankruptcy court;
> (9) if an arbitration agreement is not enforced, or arbitration not compelled, the burden on the bankruptcy court's docket;
> (10) the likelihood that the motion to compel arbitration in bankruptcy court involves forum shopping by one of the parties;
> (11) the presence in the proceeding of nondebtor parties;[298] and
> (12) in a chapter 11 case, the impact of the outcome of the proceeding on the debtor's ability to reorganize.

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[297] *See* Quality Tooling, Inc. v. United States, 47 F.3d 1569, 1580 (Fed. Cir. 1995) ("'[A] bankruptcy court should defer a complicated, technical dispute to a specialized forum.' . . . 'The bankruptcy court normally supervises the liquidation of claims. But the rule is not inexorable. A sound discretion may indicate that a particular controversy should be remitted to another tribunal for litigation.'") (citations omitted); Herrmann, *supra* note 19, at 788 (noting different perspectives of advocates and finding "[a]rbitration could provide specialized relief through an impartial tribunal with a well-developed understanding of the particular industrial or business context in which a given dispute arose") (citation omitted); *see also* United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960) (highlighting specialization of labor arbitrator as furthering "common goal of uninterrupted production" and stating "[t]he ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed").

[298] Christensen v. Tuscon Estates, Inc. (*In re* Tuscon Estates, Inc.), 912 F.3d 1162, 1167 (9th Cir. 1990) (quoting *In re* Republic Reader's Serv., Inc., 81 B.R. 422, 429 (Bankr. S.D. Tex. 1987)).

None of these factors should be dispositive and their significance may vary depending upon circumstances of each bankruptcy case and the particular arbitration proceeding.[299] Similarly, in order for this analytical framework to be effective, the utilization of these factors, and the bankruptcy courts' section 1334(c)(1) authority, must be exercised with the policy underpinnings of both the FAA and the federal statutory bankruptcy scheme in mind. Otherwise, neither can be furthered.

VII. CONCLUSION

Without as much as a passing glance, the Third Circuit in *Hays* began a trend toward effectively divesting bankruptcy courts of section 1334(b) jurisdiction in total disregard of Supreme Court precedent regarding abstention and the plain language and purpose of section 1334(c)(1). The *Hays* decision was wrongly decided. The FAA was neither expressly nor implicitly enacted to divest such jurisdiction. Indeed, the substantive provisions of the FAA that form the foundation of the *McMahon* decision were enacted in 1925, 80 years before our most recent amendments to the federal bankruptcy statutory scheme and 60 years before the 1984 Amendments.

The policy underpinnings of the FAA (before being judicially expanded by the Supreme Court) and the federal statutory bankruptcy scheme are intended to coexist and surely can with an understanding that Congress has already empowered the bankruptcy courts to exercise its authority in the context of determining whether an arbitration agreement shall be enforced in applying the broad permissive abstention standard contained in section 1334(c)(1). It is urged that the bankruptcy courts should be guided by the above-suggested factors in view of the policies underlying both the FAA and the bankruptcy jurisdictional and statutory scheme and to account for the particular and peculiar complications that arise under most bankruptcy cases.[300]

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[299] *See* David S. Kupetz, *Basic Issues and Alternatives Facing Litigators When Bankruptcy Interrupts the Litigation Process*, 99 COM. L.J. 401, 431–432 (1994) (citing *Tuscon* factors and finding courts "viewed [them] flexibly. Their relevance and importance varies depending on the circumstances of the case and no one factor is determinative") (citation omitted); *cf.* Fairchild Dornier GMHB v. Official Comm. of Unsecured Creditors (*In re* Official Comm. of Unsecured Creditors for Dornier Aviation, Inc.), 453 F.3d 225, 233–34 (4th Cir. 2006) (developing recharacterization test and cautioning "test is a highly fact-dependent inquiry that will vary in application from case to case"); Cohen v. KB Mezzanine Fund II, LP (*In re* SubMicron Sys. Corp.), 432 F.3d 448, 456 (3d Cir. 2006) (agreeing "[n]o mechanistic scoreboard suffices" in application of recharacterization test).

[300] *See* Douglas G. Baird, *Bankruptcy's Uncontested Axioms*, 108 YALE L.J. 573, 594–595 (1998) (discussing merits of granting discretion to bankruptcy judges; while traditionalists view such grant as "empower[ing] the judge to assess competing claims on a case-by-case basis," the proceduralist views "that vagueness in the rules [as] merely giv[ing] the parties more cause for litigation and hence increase[ing] the cost of the reorganization without providing any offsetting benefit"); *see also* Nat'l Union Fire Ins. Co. of Pittsburgh v. Titan Energy, Inc. (*In re* Titan Energy, Inc.), 837 F.2d 325, 333 n.14 (8th Cir. 1988) ("Where most of the criteria that Congress established for mandatory abstention have been met, 'bankruptcy courts should give careful consideration whether it would be appropriate to exercise their discretion to abstain

under section 1334(c)(1).'") (citation omitted); Salem Mortgage Co. v. Nodine (*In re* Salem Mortgage. Co.), 783 F.2d 626, 635 (6th Cir. 1986) ("The degree to which the related proceeding is related to the bankruptcy case, as a practical matter, will doubtless be an important factor in the decision whether to abstain.").