COMMENTS

On the Need to Conduct Abstention Analysis in Bankruptcy-Related Cases Removed to Federal Court

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Federal courts have jurisdiction over any case involving a party in bankruptcy.1 Absent this basis for federal jurisdiction, many bankruptcy-related cases, such as those involving contract disputes between two parties from the same state, would be triable only in a state court. Because federal jurisdiction over bankruptcy-related cases is concurrent rather than exclusive,2 the jurisdictional provision of the Bankruptcy Code offers an opportunity for debtors (and those suing debtors) to shop between federal and state forums.

While the Bankruptcy Code gives a federal forum with one hand, it limits this grant with the other. The Code provides guidelines for a federal court to determine when it should abstain from hearing certain such claims and instead allow the state courts to hear them.3 When a case originates in the federal system, all courts agree that such an abstention analysis is required. The courts disagree, however, about whether such an analysis is required when a case began in state court and was then removed to federal court,1 because the removal provision of the Bankruptcy Code provides for its own method of returning cases to state court.4

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1 See 28 USC § 1334(b) (2000) (establishing that federal courts have jurisdiction over proceedings related to bankruptcy cases). Claims made by or against parties in bankruptcy are related to the bankruptcy proceeding. See note 10.

2 28 USC § 1334(a)-(b).

3 See 28 USC § 1334(c) (providing for discretionary and mandatory abstention). The statute does not tell a court what to do with a case when it decides to abstain from hearing it. However, courts that have determined abstention to be appropriate in a removed case have generally remanded it. See In re Federal-Mogul Global, Inc, 300 F3d 368, 376 (3d Cir 2002). Courts that have determined abstention to be appropriate in a case that was not removed (that is, one that started out in the federal system) have dismissed the case. See, for example, In re Trans World Airlines, Inc, 278 BR 42, 50–53 (Bankr D Del 2002).


5 See 28 USC § 1452 (establishing that removed cases can be remanded to state court "on any equitable ground").
A hypothetical case demonstrates how the issue can arise: Suppose a plaintiff sues a defendant in state court for breach of contract. Shortly thereafter, the plaintiff's business collapses, and she is forced to file for bankruptcy protection. The defendant, wishing to litigate in a federal forum, removes the case to the federal court under 28 USC § 1452, noting that the case is related to the plaintiff's bankruptcy. The plaintiff, who prefers the state forum, then asks the court to send the case back to state court. The question this Comment addresses is, what grounds can the plaintiff point to in making her request? The removal statute says that a court may remand a removed case back to state court "on any equitable ground," and some courts hold that this is the only test to apply. This Comment argues that she should also be able to direct the court's attention to the abstention provisions of section 1334; if the abstention requirements are met, the court should consider them to provide an "equitable ground" that may justify remand.

The most important consequence of the circuit split is that, in those courts holding that abstention analysis need not be performed, there is no recourse to a court of appeals if the district court refuses to send a case back to state court. This is because the Bankruptcy Code prohibits appeals of decisions granting or refusing remand, while decisions denying abstention in a case where abstention would be mandatory can be appealed. A secondary consequence of the split is that courts that refuse to perform abstention analysis may use different considerations in deciding whether to hear a case or to send it back to state court.

The majority of courts hold that abstention analysis should be performed in all bankruptcy-related cases, whether removed or not. In this Comment, I argue that the majority position reaches the right result, but not for the reasons courts usually give. In Part I, I review the statutory law governing bankruptcy jurisdiction, abstention, removal, and remand, and the cases on both sides of the issue. In Part II, I criticize the reasoning that courts have used to reach the majority result, and then make a structural argument that the minority approach's re-

\[\text{References:}\]

\[6\] 28 USC § 1452(b).
\[7\] Id.
\[8\] 28 USC § 1334(d). It should be noted that the determination of whether to abstain or remand is made by the district court to which jurisdiction was given, although it may do so in the context of a review of a recommendation by the bankruptcy court. Thus, there may be something that appears in practice to be review, even if it is not review by a court of appeals.
\[9\] Compare 28 USC § 1452(b) (stating that a case may be remanded on any equitable ground), with 28 USC § 1334(c) (providing criteria for a decision whether to abstain). Whether there is any difference between these two provisions in practice is outside the scope of this Comment, although some courts have said that there is not. See, for example, AUSA Life Insurance Co v Citigroup, Inc, 293 BR 471, 478 (ND Iowa 2003). But see LJM2 Co-Investment, LP v LJM2 Capital Management, LP, 2003 US Dist LEXIS 2581, *13–15 (D Del) (applying different tests for equitable remand and discretionary abstention).
suit is wrong because it effectively renders the mandatory abstention provisions of section 1334 a nullity. In Part III, I consider various objections to this structural argument, and then argue that it is supported by policy considerations generally, as well as the specific policies embodied in the Bankruptcy Code. I also briefly examine other abstention doctrines to show that this understanding of the bankruptcy abstention provisions is consistent with those other abstention doctrines.

I. STATUTORY AND CASELAW BACKGROUND

The disagreement over whether abstention analysis must be performed in removed cases stems from the fact that abstention and remand are treated in two separate Code sections, 28 USC § 1334 and § 1452, respectively, and the Code does not indicate explicitly how the two sections work together.

Under section 1334, federal courts have jurisdiction over cases related to bankruptcies. The same section also gives federal courts the power to decline jurisdiction over such cases through the doctrines of mandatory and discretionary abstention. Since state courts have concurrent jurisdiction in these bankruptcy-related cases, if the federal court does abstain, a state court can proceed to hear the case. Mandatory abstention is governed by section 1334(c)(2), which provides that, in those cases where there is no basis for federal jurisdiction aside from the broad bankruptcy jurisdictional grant of section 1334, “upon timely motion of a party in a proceeding based upon a State law claim... the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.” That is, mandatory abstention is appropriate when a party requests it, and when a commenced action can be litigated in a timely manner in a state court. Section 1334(c)(1) describes the criteria a court should use in deciding whether it should exercise discretionary abstention. It grants the district court the ability to abstain from hearing a proceeding “in the in-

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10 28 USC § 1334(b). A state-law claim, such as a breach of contract claim, is “related” to the Title 11 bankruptcy case. See, for example, In the Matter of Wood, 825 F2d 90, 93 (5th Cir 1987) (adopting the rule with the “most support” among the circuits, that a case is “related” to a bankruptcy if “the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy”), quoting Pacor, Inc v Higgins, 743 F2d 984, 994 (3d Cir 1984) (emphasis added in Wood).

11 28 USC § 1334(c).

12 See, for example, AUSA Life Insurance Co v Citigroup, Inc, 293 BR 471, 476–77 (ND Iowa 2003) (finding that because the state court’s guidelines required disposition within eighteen months, the action could be “timely adjudicated in the state court system,” and therefore section 1334(c)(2) required the court to abstain).
terest of justice, or in the interest of comity with State courts or re-

While section 1334 covers the jurisdiction of the district courts
over bankruptcy cases, it does not provide a mechanism for cases to
move from the state system to the federal system. Section 1452 pro-
vides such a mechanism by permitting removal of a case from a state
court to the federal system when the federal courts have jurisdiction
under section 1334. Section 1452 also allows a district court to re-
mind on "any equitable ground" a case that has been removed to it.
The two provisions present the following question: whether a removed
case is subject only to remand through the provisions of section 1452,
or whether a removed case is subject both to remand under section
1452 as well as abstention analysis under section 1334. Put another
way, the question is whether the abstention provisions of section
1334(c) are applicable to cases removed under section 1452.

In this Comment, I consider the appropriateness of conducting
both mandatory and discretionary abstention in removed cases, but I
do so by concentrating on the interaction of the mandatory abstention
provisions of section 1334(c)(2) and the removal and remand provi-
sions of section 1452. Of course, if mandatory abstention analysis
must be performed in removed cases, then discretionary abstention
analysis must be as well, since there is no reason that the two doc-
trines should not be applied together.

A. The Minority Approach: If What the Party Seeks Is Remand, the
Court Should Use the Remand Standard

In the Ninth Circuit, a case that has been properly removed un-
der section 1452 may be returned only through the remand provisions

13 See, for example, In re NTL, Inc. 295 BR 706, 716–17 (Bankr SD NY 2003) (exercising
discretionary abstention upon finding that all these interests would be served).
14 28 USC § 1452(a) specifies that it allows for removal if section 1334 provides the sole
grounds for federal jurisdiction. If a federal court has jurisdiction over the case on any other ba-
sis (such as diversity of citizenship under 28 USC § 1332), then removal can be accomplished un-
der the general removal provisions of 28 USC § 1441.
15 28 USC § 1452(b).
16 A court adopting such a policy might use the considerations of section 1334 in helping to
determine whether remand is necessary. See note 24. In practice, courts perform a balancing test
in deciding whether to remand under section 1452. See, for example, In re Briarpatch Film Corp,
281 BR 820, 828–33 (Bankr SD NY 2002). In this Comment, I conclude that remand should be
granted if the traditional tests would recommend it and must be granted when the abstention
provisions require it.
17 Since courts of appeals may review neither discretionary abstention decisions, see 28
USC § 1334(d), nor decisions to remand, see 28 USC § 1452(b), a decision to abstain or not to
abstain under discretionary abstention is functionally the same as a decision to remand or not to
remand. Thus, my goal is to show that mandatory abstention must be performed in removed
cases.
of the same section, and the abstention doctrines play no role in that determination. That court first addressed the question in *Security Farms v International Brotherhood of Teamsters.* In that case, several growers sued a union for alleged state-law violations in connection with the union’s picketing activities. After the union declared bankruptcy, it removed the case to federal court. The growers moved for abstention, which the district court denied.

On appeal, the Ninth Circuit said that abstention provisions of section 1334 were not applicable in a case that had been removed from a state court. The court reasoned that inherent in the concept of abstention is the notion that there exists a pendent action in favor of which the court would abstain. That is, there is no concept of “abstention” that is distinct from abstention in favor of adjudication elsewhere; a court does not simply abstain, but abstains in favor of having the controversy decided elsewhere.

The court noted, however, that when a case is removed from state court, the state court proceeding is “extinguished.” At that point, there is no other lawsuit in favor of which to abstain. The court approvingly quoted a Texas bankruptcy judge who, facing a similar case, noted that if the court abstained, “nothing would happen” because the state lawsuit no longer existed, and what the party seeking abstention “really seeks is remand... back to State Court.”

This insight—that what such a party really wants is, functionally speaking, a remand—provides the basis for the court’s view that requiring a pendent (non-removed) action for abstention eliminates confusion between the remand provisions and the abstention provisions. The Ninth Circuit’s approach is appealingly straightforward: the doctrines of abstention and remand employ different standards, and each applies to a distinct set of cases.

Several district courts in the Second Circuit, as well as a few in other circuits, have also considered the question and have come to

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18 124 F3d 999 (9th Cir 1997). In *Security Farms,* whether the case would be heard in state or in federal court also determined which of two different standards of proof would apply. Id at 1007.

19 Id at 1006.

20 Id at 1009.

21 Id at 1010.

22 Id at 1010 n 10, quoting *In re Duval County Ranch Co,* 167 BR 848, 849 (Bankr SD Tex 1994).

23 *Security Farms,* 124 F3d at 1010. The court is not clear on why reading the two provisions together creates confusion; in this Comment, I argue just the opposite—that the two provisions can be read together sensibly.

24 See, for example, *Renaissance Cosmetics, Inc v Development Specialists Inc,* 277 BR 5, 12–13 (SD NY 2002) (collecting cases); *Neuman v Goldberg,* 159 BR 681, 687–88 (SD NY 1993) (“[T]he statutory scheme of § 1334 precludes the application of the mandatory abstention provision in § 1334(c)(2) to removed actions absent a parallel state case.”); *In re Kolinsky,* 100 BR 695,
the same conclusion as the Ninth Circuit, holding that abstention analysis should not be performed in removed cases. These courts have adopted the Ninth Circuit's reasoning: abstention requires a pending state action, and removal ends the state action.

In addition, some courts have argued that remand decisions should not be informed by abstention analysis because section 1452's remand provisions do not mention section 1334's criteria. These courts reason that we know that removals are subject to the jurisdictional grant of section 1334 because the section providing for removal, 1452(a), tells us so. On the other hand, since section 1452(b) does not mention any standard other than "any equitable ground," that standard is the only one that should be applied in deciding whether to remand a case.

B. The Majority Rule: A Removed Case Is Still a Commenced Case

The rule in most circuits is in conflict with the rule of the Ninth Circuit and the common practice in the Second Circuit. Indeed, the "vast majority of courts" hold that abstention analysis does apply to removed cases.

704 (Bankr SD NY 1989) ("The prerequisite for mandatory abstention under 28 U.S.C. § 1334(c)(2) is a pending state court case.").

The court of appeals for the Second Circuit has not itself addressed the question directly. In a recent case, however, the court seemed to indicate that the question was one of remand, but was ambiguous as to whether the reasons provided in the abstention provisions might provide sufficient reason for remand. See Covanta Onondaga Ltd v Onondaga County Resource Recovery Agency, 318 F3d 392, 398-99 (2d Cir 2003) (noting that the district court had determined that mandatory abstention applied to the removed case under consideration, but that "we assume that the District Court's remand order was grounded on 28 USC § 1452(b)"). Though the court was not clear, the implication seems to be that remand is at least the correct tool, and possibly the correct analysis. Since both a remand decision and a decision to abstain are unreviewable, there was no need for the Second Circuit to give a more complete explanation to the district court, but one reading of the case is that the Second Circuit was telling the district courts that section 1334, while perhaps not irrelevant, is not a sufficient reason for a case to be sent back to state court. The question is whether, when the court said "grounded on," it meant "justified by analysis under" or "an exercise of power granted under." While the former seems a more natural reading (why else would they mention the issue?), the Second Circuit does have room to adopt the latter interpretation. Doing so would clarify that section 1452 grants the power to remand, and section 1334 can compel its exercise.

25 See, for example, In the Matter of Micro Mart, Inc, 72 BR 63, 64 (Bankr ND Ga 1987) (concurring with a peer court that section 1334(c) and mandatory abstention do not apply to removed cases).

26 See Renaissance Cosmetics, 277 BR at 12-13, citing In re Montague Pipeline Technologies Corp, 209 BR 295, 304 (Bankr ED NY 1997). See also In re 666 Associates, 57 BR 8, 12 (Bankr SD NY 1985) (noting that it is striking that section 1452(a) would refer explicitly to section 1334 but that section 1452(b) did not, and that such an omission suggests that remand analysis is different from abstention).

27 In the Matter of Southmark Corp, 163 F3d 925, 929 (5th Cir 1999). This empirical claim may have overstated the actual state of affairs at the time it was written. The practice in most courts may be consistent with this approach, but most circuits had not announced rules at the
The majority rule received its most extended articulation in a decision by the Eleventh Circuit, which said that requiring abstention analysis in removed cases "better comports with the plain language of § 1334(c)(2)." The court stated that a removed case is a "commenced" case for the purposes of abstention. That is, a case need not still be actively pending for it to meet the requirement of being commenced; a case can be "commenced" in the sense of being "already begun" without it being "in progress" at the same time. Indeed, though the Eleventh Circuit did not point to it, elsewhere, section 1334 itself refers to courts where a bankruptcy proceeding "is commenced or is pending," implying that the two concepts are distinct.

The Eleventh Circuit also explained that performing abstention analysis in removed cases served "Congress's intent that mandatory abstention strike a balance between the competing interests of bankruptcy and state courts." The court appears to have felt that skipping abstention analysis in a removed case circumvents the balancing process that Congress intended to occur.

Other circuits have addressed the question in a briefer fashion. The Sixth Circuit disposed of the issue in a footnote, simply announcing that the abstention provisions applied to removed cases, though it observed a conflict among bankruptcy courts on the question. The Fifth Circuit noted the question, "only to reject out of hand" the idea that abstention analysis might not be required in removed cases. The Fifth Circuit, finding "no textual support in the statute" for such a position, followed the majority rule.

II. ANALYSIS OF THE COMPETING APPROACHES

Despite the initial appeal of the minority approach's clean analytical framework discussed above, the approach adopted by the Fifth,
Sixth, and Eleventh Circuits, requiring abstention analysis in removed cases, is the better alternative. The arguments offered by courts adopting the majority approach, however, have not won over skeptics, and the issue remains open. This Comment is intended to provide a solid grounding for the majority approach for those courts that have yet to consider the question.

In this Part, I first analyze the arguments offered by the courts adopting the majority approach to understand why those arguments may not convince courts endorsing the minority approach. Next, I present a structural criticism of the minority approach. I examine the implications from a practical standpoint of both the majority and minority approaches and show why the minority view precludes the possibility that mandatory abstention would ever occur. This implies that the majority approach, rather than being simply a better interpretation, is compelled if the statutes are to be read to function together meaningfully.

A. Criticism of the Textual and Legislative Intent Arguments for the Majority Approach

As discussed above, courts have generally given two kinds of arguments for adopting the majority position: a textual argument and an argument based on legislative intent. The textual argument is that a removed case is still a "commenced" case, and a commenced case is all that is required under section 1334(c)(2) for mandatory abstention. The problem with the textual argument is that it rests on a circularity: it assumes that conducting abstention analysis is required, shows that it is possible to read the statute in such a way that this would be possible, and then concludes that abstention analysis is therefore required. What the textual argument proves is that abstention would be possible (by the vehicle of remand), if abstention were the appropriate analysis to conduct. That is, accepting that it is true that a removed case is a commenced case, and that a commenced case could be brought back to life after abstention, we still do not know which of the two analy-
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ses, remand or abstention, is the appropriate one to perform. If remand, and not abstention, is the appropriate analysis to undertake, it is irrelevant that it might be possible to conduct abstention analysis as well.

This textual argument, however, does do some work for the majority position. It demonstrates that at least part of the Ninth Circuit's reasoning is flawed. By showing that there is a distinction between a pending case and a commenced case, and that only the latter is required for mandatory abstention, it refutes the claim that mandatory abstention requires a pending case, a claim the Ninth Circuit made in *Security Farms.* This might explain the Fifth Circuit's statement that the Ninth Circuit's position has no textual support; nothing in the statutory language compels the conclusion that abstention analysis is inappropriate in removed cases. The Ninth Circuit's position must rest on the presumption that a party that seeks remand through the vehicle of abstention truly desires remand, and therefore remand analysis is appropriate.

The Eleventh Circuit also asserted that its approach better comported with congressional intent. The court pointed to Senator Dole's comments that the abstention provisions, as enacted, would preserve the integrity of the bankruptcy courts' jurisdiction but would also allow for abstention for personal injury claims. The court did not offer more explanation of how this statement supported conducting abstention analysis in removed cases; it seems, however, that by distinguishing those claims for which abstention is proper according to type (that is, personal injury) and not mentioning procedural concerns such as removal, Senator Dole might have been suggesting that all personal injury claims, whether removed or not, would be subject to abstention.

Unfortunately, though understandably, Senator Dole was not more explicit about what he intended for removed claims. While he might have been in favor of abstention analysis for all cases, his comments also indicate that he was concerned about keeping bankruptcy jurisdiction broad. His concern over personal injury claims, however, was fairly particular, and it is at least questionable whether he meant for his particular concern with personal injury claims to outweigh his desire to keep the jurisdiction broad for other kinds of claims. Furthermore, and perhaps more damaging to the court's suggested reading of Senator Dole's comments, another statutory provision, enacted along with the abstention provisions, specifically excepts personal in-

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38 124 F3d at 1009.
39 *In the Matter of Southmark Corp*, 163 F3d 925, 929 (5th Cir 1999).
40 *Christo*, 223 F3d at 1331, citing Remarks of Senator Dole, 98th Cong, 2d Sess, in 130 Cong Rec S 20083 (June 29, 1984).
jury claims from being subject to mandatory abstention analysis. Thus, it is an open question as to whether Senator Dole’s comments about “abstention” were specifically about the abstention doctrines of section 1334(c), or were about the jurisdictional changes in the Act in general.

At least one senator’s statement, however, seems to imply that he thought abstention analysis would be conducted in removed cases. The abstention provisions were added in 1984 as part of a set of changes to the Bankruptcy Code, triggered by *Northern Pipeline Co v Marathon Pipe Line Co*, in which the Supreme Court had declared the existing Code to be unconstitutional. The 1984 amendments addressed this by granting jurisdiction in bankruptcy cases to federal district courts, rather than bankruptcy courts. However, there was some concern that even making this change would not go far enough to save the Code. Senator Hatch, one of the Senate managers of the bill, claimed that the Constitution also compelled the addition of the mandatory abstention provisions. Senator Hatch was con-
vinced that the “related to” jurisdiction of the bankruptcy courts, even if exercised by a district court, would likely be unconstitutional. Thus, there was a need to restrict the courts from exercising jurisdiction over such related claims unless a need for a federal forum could be shown, and the mandatory abstention provisions would provide such a restriction.

Regardless of the validity of Senator Hatch’s constitutional concerns,49 his statement might imply that abstention analysis should be applied to every case. That is, if the 1984 provisions were intended to address concerns of unconstitutionality, it would make little sense for abstention to apply only in certain (non-removed) cases. On the other hand, his comments are also consistent with a conclusion that abstention need not be conducted in removed cases, since a removed case would be subject to remand as improperly removed if the district court felt it could not constitutionally exercise jurisdiction over it. Thus, the implications of Senator Hatch’s arguments are somewhat ambiguous. Nonetheless, they do indicate that he, at least, felt that abstention would significantly curtail jurisdiction over “related to” cases. This might suggest that as between two interpretations, one of which requires many “related to” cases to be sent back to state court while the other does not, the former should be preferred.

It seems, then, that the legislative history of the abstention provisions lends marginal additional insight to the question of whether abstention analysis should be conducted in removed cases. The best argument for the majority approach from legislative intent seems to be the argument imputed to Senator Dole above, even if it seems unlikely that he intended to make it: there is no reason to treat removed cases any differently from non-removed cases, because the abstention provisions have to do with answering the question of what kinds of cases should be heard in state court, and whether a case was removed or not does not affect what “kind” of case it is at all.

48 Id at 20086.

49 Consider, for example, In the Matter of Wood, 825 F2d 90, 93 (5th Cir 1987):

The holding in Marathon suggests no concern over the constitutionality of the scope of bankruptcy jurisdiction defined by Congress; its concern is with the placement of that jurisdiction in non-Article III courts. In response to Marathon, Congress altered the placement of bankruptcy jurisdiction by creating a statutory distinction between core and non-core proceedings and restricting the power of bankruptcy courts to adjudicate the latter. Because Marathon did not compel Congress to reduce the scope of bankruptcy jurisdiction, it seems plain that Congress intended no change in the scope of jurisdiction set forth in the 1978 Act when it later enacted section 1334 of the 1984 Act.

While Senator Hatch’s comments on abstention imply that Congress may have intended to restrict the scope of jurisdiction, the Wood court clearly did not believe a constitutional concern such as Senator Hatch’s was necessarily warranted.
The majority approach, resting on the text and on the legislative intent, is thus open to attack on both grounds that courts have offered to support it. The textual argument offered by most courts shows that the statutory language itself is simply unclear. Furthermore, the legislative history argument is uncertain, and there are various policies in the Bankruptcy Code that argue for hearing cases in the federal system as a default in order to promote efficiency of process. These attacks, however, do not show that the majority approach is wrong, but rather just that the support offered for it thus far is questionable. Nonetheless, as I show in the next Part, the minority approach is vulnerable to a more serious charge: it renders the mandatory abstention provision a nullity, implying that the majority result must be correct.

B. Criticism of the Minority Approach: A Structural Analysis

It is a canon of statutory construction that, when possible, statutes should be read so as to avoid conflicts between their provisions. This Part illustrates that, in practical effect, the minority approach ensures that abstention analysis will never be conducted, while the majority approach allows all the provisions of the Code to work together. While each approach requires some compromise with the statutory text, the majority approach at least gives meaning to each of the provisions, and thus should be preferred.

First, to reiterate, under the mandatory abstention doctrine, a district court must abstain from hearing a case if an action is commenced and capable of timely adjudication in a state court, and if that action could not have been commenced in the federal system except under the bankruptcy jurisdiction provisions. If the only way a case can be heard in the federal system is through the bankruptcy jurisdictional grant, the federal court has no choice but to abstain from hearing it if it is commenced and can be adjudicated in a timely fashion in the state forum.

To see why mandatory abstention should never be possible under the minority view, it is helpful to consider how a case could end up in the federal system, and then to consider how mandatory abstention might apply. Since section 1334 provides for the federal and state courts to have concurrent jurisdiction over cases related to bankrupt-

50 See text accompanying notes 72–74.
51 See J.E.M. AG Supply, Inc v Pioneer Hi-Bred International, Inc, 534 US 124, 143–44 (2001) ("[W]hen 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.").
52 See Part III.B.
53 See 28 USC § 1334(c)(2).
cies, there is no requirement that the case be initiated anywhere in particular, and, furthermore, a case initiated in the state court will never be heard in the federal system unless it is removed. At the same time, though, there is no reason a "commenced" case should exist in state court if one takes the view that a commenced case ceases to exist once it has been removed. Some hypothetical examples will make this clearer:

If the plaintiff would like to be in state court, she will file her claim there. If the defendant also prefers a state forum, he will not remove, and the federal system will not have any occasion to assert jurisdiction over the case. On the other hand, if the defendant prefers to be in federal court, he will remove the case, and, under the minority view, the case would not be subject to abstention analysis because there would be no commenced case in favor of which to abstain.

If the plaintiff prefers to be in federal court, however, she will file her case in the federal system to begin with, assuming the debtor is already in bankruptcy. If she does so, mandatory abstention is impossible, because there is no "commenced" state action in favor of which to abstain.

A plaintiff who prefers to be in federal court may still be required to sue in state court if she is suing a defendant who is not in bankruptcy. If the defendant later files for bankruptcy protection, the plaintiff is not out of luck, but may instead simply remove the case herself to the federal court. Since the statute grants "a party" the right to remove the action, nothing stops the plaintiff from removing once one of the parties enters bankruptcy, which provides the necessary jurisdictional hook. This contrasts with removal in, for example, a diversity case, where only the defendant may remove.

54 28 USC § 1334(b).
55 Saying a case no longer qualifies as "commenced" in the state court once it has been removed prevents mandatory abstention in a removed case, since a "commenced" case is a requirement for mandatory abstention. See 28 USC § 1334(c)(2).
56 A defendant cannot effectively create a state court action by filing an action seeking a declaratory judgment, because a plaintiff could simply remove that action to federal court. See note 58 and accompanying text.
57 28 USC § 1452(a) ("A party may remove any claim or cause of action in a civil action ... to the district court ... 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.").
58 A plaintiff removing to federal court is a rare occurrence, but it can happen. See, for example, *Pacor, Inc v Higgins*, 743 F2d 984, 992 (3d Cir 1984); *In re Aztec Industries, Inc*, 84 BR 464, 467 (Bankr ND Ohio 1987). That a plaintiff should be able to remove makes sense if one considers a potentially likely scenario: A plaintiff sues in state court against a defendant who then declares bankruptcy. Once the automatic stay is lifted, the plaintiff wants to get into the bankruptcy court so that the bankruptcy judge can ensure that the action is concluded, and judgment rendered, before the debtor's assets have been distributed.
If, as the minority position holds, a removed case is not a "commenced" case, an action could only exist in both the state court and the federal court if the plaintiff brought the action in both systems (or if the plaintiff sued in one forum and the defendant brought a declaratory judgment suit in the other), and both parties refrained from removing the state court action. However, because the plaintiff can either start in the federal system or can remove to it, there is no reason to commence in both (or to seek declaratory relief). Also, since any party can remove, whichever party wishes to be in federal court will be able to force the case there by removing. Under the minority approach, there would then be no occasion to conduct mandatory abstention analysis.

III. CRITICISM OF AND SUPPORT FOR THE STRUCTURAL APPROACH

If the approach outlined in Part II is correct, and the minority approach renders the abstention provisions essentially a dead letter, then the majority approach would seem to be the better option. In this Part, I address some objections to this argument. I then argue that this approach is in harmony with the underlying policies of the Bankruptcy Code as well as with our understanding of how other abstention doctrines function.

A. Objections to the Structural Analysis

At least two different responses can be made to the argument above that the minority approach precludes abstention analysis from ever taking place. First, judges might rule that removal requests made midway through state trials, even though timely under the bankruptcy rule, should be refused as a matter of equity and comity, forcing the party that seeks the federal forum to file a separate action in federal court, which would then mean that the federal court could conduct abstention analysis. Second, while my criticism may show that the minority approach renders abstention impossible, the majority approach makes abstention almost a certainty, which renders the bankruptcy removal provisions a dead letter.

1. Abstention analysis would be possible if removal were not allowed for cases that had been ongoing for significant time in state court.

One possible response to my structural argument is based on the broad discretion granted to the federal courts to remand bankruptcy-related cases that have been removed. That is, considerations of trial

60 See 28 USC § 1457 (stating that a federal court may remand on any equitable ground).
efficiency and comity with state courts suggest that attempts to remove a case when that case is in the middle of trial (or at least has already been going on for quite a while) should be refused. If such removals were not allowed, then the party seeking removal would instead file an action in federal court, and the other party could then ask for abstention in favor of the already-proceeding state case.

Such a response points to a way that abstention analysis might be possible under the minority's approach, which would weaken my argument for the majority view, but it leads to an anomaly in abstention analysis. Cases that were immediately removed would not be subject to abstention, because they would not be remanded under this efficiency and comity justification; thus there would be no way to create the two parallel proceedings necessary for abstention under the minority approach. Only cases that had been ongoing for some time in the state court (enough to trigger these equitable considerations preventing removal) would be subject to abstention analysis.

This anomaly, though, cannot be justified. It is true, of course, that cases that have been going on in state court for a long time might present special comity concerns, but the discretionary abstention provision itself explicitly refers to comity as a ground for abstention. Indeed, comity is better served by the majority approach in any event. If abstention analysis is conducted in removed cases, then comity will always be considered as a ground for having the state court decide the issue. If, on the other hand, abstention analysis is not conducted in removed cases, then it is only in cases that have been long ongoing where comity will be allowed to prevent the case from being removed. It is better for a court to be able to abstain on the basis of comity when comity is actually an issue than to remand on the basis of comity, force a second proceeding to be instituted, and then to abstain on the basis of comity, but to be powerless to recognize comity concerns when they appear in cases where removal is sought right away.

2. The consequences of the majority approach.

A different sort of objection goes to the effect of following the majority rule. If abstention analysis is performed in removed cases, then it appears that the removal provisions of section 1452(a) will actually move far fewer cases than one might think into the federal sys-

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61 Consider Things Remembered, Inc v Petrarca, 516 US 124, 134 (1995) (Ginsburg concurring) (noting that it is appropriate to remand bankruptcy cases when, despite the fact that the removal attempt meets the technical deadlines of the Bankruptcy Rules, the judge feels that the attempt was not promptly made). If lack of promptness is sufficient to make remand appropriate, then it might be equally appropriate to say that pulling a case from a state court that has already invested significant effort into adjudicating it should be avoided.

62 28 USC § 1334(c)(1).
tem. That is, the abstention provisions seem to swallow the removal provisions. This is essentially the converse of the structural discussion in Part II.B, which asked what the consequences of following the minority rule would be.\(^6\)

Removal under section 1452(a) occurs when the only basis for federal jurisdiction is through the bankruptcy jurisdictional provisions of section 1334. If there is an alternative basis for jurisdiction, removal can be accomplished under the normal removal provisions of section 1441. Thus, the primary function of removal under section 1452(a) seems to be to remove cases that are related to bankruptcies; at the very least, most of the cases subject to removal under it should be such “related” cases.

Yet, if abstention is appropriate in removed cases, few such removed cases will survive mandatory abstention analysis. Mandatory abstention requires (1) a timely motion by a party, (2) that the claim in question be a state-law claim or cause of action, (3) in a case related to but not arising under title 11,\(^*\) (4) the sole federal jurisdictional basis of which is section 1334, and (5) that an action is commenced, and capable of timely adjudication, in a state court.\(^6\) If the case is a state-law claim where one party seeks the federal forum and the other prefers the state forum—in other words, in virtually every case that would have been removed under section 1452(a)—the only requirement even open to question is the last, that the state action be capable of timely adjudication.

The argument then is that it would be unreasonable for Congress to have provided for a removal mechanism that removed cases only to send them all back to state court after a time- and resource-consuming detour through the federal court system. Such a pointless exercise would be the antithesis of the purpose of the bankruptcy system, to provide quick and efficient adjudication.

Thus, given the structural argument for the majority position made above, there are seemingly two interpretations of the statutes, each of which renders a significant part of the statutory scheme ineffective. Either abstention analysis is not performed in removed cases, meaning that abstention is virtually never triggered, or abstention analysis is performed in removed cases, meaning that the bankruptcy

\(^6\) The most significant practical consequence, as mentioned in the Introduction, is that, under the majority rule, decisions not to abstain under mandatory abstention are subject to appeal. By contrast, under the minority approach, considering only remand analysis, there is no appeal. This Part discusses the doctrinal effect.

\(^*\) That is, a case related to a bankruptcy but not an actual bankruptcy case, such as any normal state-law claim that happens to involve a party in bankruptcy.

\(^6\) See 28 USC § 1334(c)(2). See also Renaissance Cosmetics, Inc v Development Specialists Inc, 277 BR 5, 12 (SD NY 2002) (describing the same set of prerequisites as six distinct requirements).
removal provisions have virtually no effect. This reading suggests that Congress, by fashioning these two provisions separately, has left the courts with the task of deciding which reading best captures the intent expressed in the Bankruptcy Code. Those who are opposed to conducting abstention analysis in removed cases would suggest that avoiding a detour through federal courts is the better approach, especially when such a detour could involve an appeal to the court of appeals in the event of a denial of motion for mandatory abstention.

This line of objection clarifies what is at issue here, and what the relevant considerations are in understanding why the majority approach is better. Concededly, both the minority and the majority approaches imply that a provision will have significantly less impact than might otherwise be assumed; yet, the objection proceeds too quickly from this insight to a conclusion that the proper rule is the one that prefers federal adjudication.

First, it is important to note that not all removed cases will necessarily be sent back to the state courts under mandatory abstention. For a case to be subject to mandatory abstention, it must be capable of timely adjudication in a state court. There is no guarantee that all state court proceedings will finish in such a timely fashion; indeed, one might expect that many such actions would not be resolved in a timely fashion. Of course, this question only comes into play if a case is not about to go to trial, but in such cases, we might expect that the federal district court would want to assure itself that the action would be completed within a time period that would not interfere with the bankruptcy adjudication. Under this analysis, cases that are likely to be adjudicated quickly enough so as to not interfere with the bankruptcy case will be sent back to state court, while other cases, where the federal court is unconvinced that they can be adjudicated quickly, will stay in the federal system.

The sensible approach is the one taken by the court in *In re Georgou.* In that case, the court took note of the backlog facing the state court system and required the party seeking abstention to show that the case could be timely adjudicated in the state court. When it could not do so, the federal court decided that mandatory abstention was unwarranted. If such an approach is taken, then the majority approach will likely mean that fewer cases stay removed than one might first think, but it will not mean that all cases will be remanded.

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66. 28 USC § 1334(c)(2).
67. See, for example, *In re Georgou,* 157 BR 847, 850-51 (ND Ill 1993) (determining that the plaintiff did not show that the case was capable of timely adjudication in a state court).
68. 157 BR 847 (ND Ill 1993).
69. Id at 850-51.
70. Id at 851.
B. Policy Considerations

We must still ask whether the foregoing analysis is consistent with the policies of the bankruptcy system. In this Part, I argue that the majority approach's emphasis on timely adjudication serves the important policies of the bankruptcy system, while at the same time showing deference to other important policies of our legal system, including federalism and respect for the rights of plaintiffs to control their own cases.

The Bankruptcy Code is intended to preserve going concerns by allowing them to reorganize and to maximize property available to creditors.71 In support of these goals, the bankruptcy system was designed to provide for quick, efficient adjudication.72 These policies are so compelling that they can, in certain cases, justify departure from the commands of other statutes when they come into conflict.73

Nevertheless, simply invoking the words "speed" and "efficiency" should not end the discussion. When efficiency concerns can be met in the state court as well, it is harder to justify a determination that federal adjudication is necessary. For example, discretionary abstention allows courts to abstain from hearing cases when they find that abstaining would serve the interests of justice or of comity with state courts.4 Indeed, discretionary abstention was intended to "insure that the jurisdiction of the bankruptcy court is exercised only when appropriate to the expeditious disposition of bankruptcy cases."75 A federal court would be unlikely to exercise its discretion to abstain if it felt that a state court action could not be timely adjudicated, since the policy of efficiency would outweigh the interests of comity (and no doubt the interests of justice would be better served by an efficient adjudication, wherever that might be). This, though, simply points to the importance of the possibility of timely state court adjudication in a decision of whether to abstain in a discretionary abstention situation.

72 NLRB v Bildisco & Bildisco, 465 US 513, 517 n 1 (1984). See also Robinson v Michigan Consolidated Gas Co, 918 F2d 579, 583 n 2 (6th Cir 1990) ("Congress passed the Bankruptcy Reform Act in 1978, with the goal of creating more efficient procedures for administering estates in bankruptcy.") (internal citation omitted).
73 See, for example, In re Gandy, 299 F3d 489, 499 (5th Cir 2002), citing In the Matter of National Gypsum Co, 118 F3d 1056, 1069 n 21 (5th Cir 1997) (finding that a bankruptcy court's interests in efficiency and control over its case could in some cases trump the general federal policy favoring arbitration).
74 28 USC § 1334(c)(1).
Mandatory abstention similarly requires that a state court action can be timely adjudicated, though by specific requirement rather than by implication. This requirement thus satisfies the bankruptcy system's embodied concern with speed and efficiency. When a case cannot be adjudicated in a timely fashion in state court, it will not be subject to abstention. When it can be timely adjudicated, it is subject to abstention. This distinction captures the essential purpose of the broad grant of jurisdiction: bankruptcy jurisdiction is broad in order to ensure that all claims by and against the debtor can be calculated efficiently. Once federal efficiency concerns are satisfied, a federal court has no compelling reason to exercise jurisdiction over a state-law cause of action that would be subject to mandatory abstention. Indeed, even if adjudication in state court were not quite as efficient as adjudication in the federal system, we should not necessarily think that a given case should not be sent to the state system. As long as the timely adjudication requirement is met, the requirement for mandatory abstention is met, and that is sufficient. Because Congress made denials of mandatory abstention subject to appeal, a somewhat costly process, we know that the principles advanced by mandatory abstention are not necessarily overcome by all efficiency concerns. Thus, performing abstention analysis in removed cases, which will turn on questions of timeliness, is consistent with the policy of efficient adjudication of bankruptcy cases.

While the policies of the Bankruptcy Code do not clearly favor one approach over the other, concerns of federalism and for the rights of plaintiffs to control their own actions both suggest the majority approach of requiring abstention analysis in removed cases is preferable.

Federalism principles support a reading that allows state courts to interpret state law when not inconsistent with an overriding federal policy. Indeed, the abstention provisions strike a balance between the interests of state courts and the federal courts. They should not be avoided; they should be used to effectuate that balance in removed as well as non-removed cases. We should thus prefer the majority approach, which pays due respect to bankruptcy concerns of efficiency while at the same time reserving more cases for state adjudication.

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76 See 28 USC § 1334(c)(2) ("[T]he district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a state forum of appropriate jurisdiction.").
77 28 USC § 1334(d).
78 See Remarks of Senator Hatch, 98th Cong, 2d Sess, in 130 Cong Rec S 20087 (June 29, 1984).
79 Christo v Padgett, 223 F3d 1324, 1331 (11th Cir 2000) (holding that allowing abstention even in cases that have been removed to federal court "comports" well with "Congress's intent that mandatory abstention strike a balance between the competing interests of bankruptcy and state courts").
Likewise, the majority view gives state-law claimants a better opportunity to have their cases heard in state courts. As Senator Hatch observed, this is an issue of litigation leverage. Even without his constitutional argument, it seems odd that a state-law claimant should lose this leverage simply because she happens to be suing someone who is financially distressed. Those who seek a state court forum should not be disadvantaged unnecessarily; when timeliness is at issue, there is a justification for federal adjudication, but when it is not at issue, the state court should hear the case.

C. Abstention in Other Contexts

A consideration of abstention doctrines in general lends some further support to the majority approach of performing abstention analysis in both removed and non-removed cases. The minority approach relies on the notion that abstention implies a pending state court action in favor of which to abstain. Since removal eliminates that pending state court action, the minority argument goes, abstention is not appropriate in removed cases.

Admittedly, mandatory abstention requires a “commenced” case. Nonetheless, that language, as discussed in Part II.A, is ambiguous, in that requiring a commenced case may not necessarily be the same thing as requiring a pending case. Furthermore, other kinds of abstention doctrines do not support the notion that abstention itself implies a pending (or even a commenced) action. For example, the Burford abstention doctrine requires federal courts to refrain from hearing certain issues of state law, even when they have jurisdiction to do so, and even when there is no pending state court action. Similarly, Huffman abstention requires a federal court to abstain from hearing

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80 Remarks of Senator Hatch, 98th Cong, 2d Sess, in 130 Cong Rec S 20087 (June 29, 1984). Leverage comes in many forms, but one example of significant leverage in this context was evidenced in Security Farms, 124 F3d at 1007, where the court noted that the federal and state courts would each require a different burden of proof to be met.

81 If the plaintiff is the one in bankruptcy, the argument is the same in reverse. Assuming the bankruptcy system does not need control over the action (because a state court can adjudicate it in a timely manner), there is no reason a plaintiff should have more leverage in litigation just because she happens to be in financial distress.

82 See Security Farms, 124 F3d at 1009. See also text accompanying notes 20–22.

83 28 USC § 1334(c)(2).

84 See Burford v Sun Oil Co, 319 US 315, 332 (1943) (requiring federal courts to adhere to a “doctrine of abstention” when dealing with state regulation of an industry that “clearly” involves “basic problems of [state] policy,” such as Texas’s oil and gas industry in Burford).

85 Id at 316–17. See also USLIFE Corp v US Life Insurance Co, 560 F Supp 1302, 1308 (ND Tex 1983) (applying the Burford abstention doctrine analysis in a case with no pending state action). By implication, discretionary abstention might be appropriate even in a non-removed case where there is neither a state court action nor a federal action subject to removal. In such a case, the district court might abstain, forcing a litigant to file a separate action in state court.

86 Great Lakes Dredge & Dock Co v Huffman, 319 US 293 (1943).
a declaratory judgment action challenging the constitutionality of a state tax, even if there is no pending state court action. Abstention doctrines, then, are about avoiding "needless friction with state policies" and do not rest on technicalities about pendency."

Thus, there is no reason to suspect that bankruptcy abstention requires a pending state case except for the specific statutory requirement of a "commenced" case. If the word "commenced" is not the equivalent of "pending," there is no such requirement. "Commenced" could be read naturally to embrace any case that was begun in state court, even if it was subsequently removed. Reading the word "commenced" in that way is consistent with the federalism and comity principles embodied in other abstention doctrines; reading the word "commenced" to be synonymous with "pending" would run counter to these principles.

While it might be a natural reading of the word "abstention" to presume a pending state action in favor of which to abstain, this is not how most courts use the term. Instead, abstention merely requires the possibility of a state court decision. When abstention is appropriate, a federal court abstains to allow a state court to address the issue, either in an action that is already pending, or in a new action.

CONCLUSION

The structural analysis outlined in this Comment shows that the minority approach of not conducting abstention analysis in removed bankruptcy cases renders the abstention provisions ineffectual. The majority approach of performing such an analysis in removed cases produces a situation where many cases that are merely related to bankruptcy proceedings will be returned to the state court if they can be timely adjudicated. However, not all cases will be sent back; only those that can be adjudicated quickly enough to satisfy the Bankruptcy Code's overarching need for efficiency will be subject to mandatory abstention. This latter approach satisfies the Code's need for efficiency, while precluding litigants from obtaining unfair leverage simply on the basis of their financial distress.

Under this analysis, application of the rule is straightforward. Sections 1334 and 1452 should be read to work together. A reason to ab-

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88 Younger abstention, from Younger v Harris, 401 US 37 (1971) (holding that a federal court should not interfere with a state criminal prosecution absent bad faith, harassment, flagrant unconstitutionality, or other extraordinary circumstances), does require a pending state action, but this is because of the nature of the particular justification for abstaining (that is, that it is a case involving a state's interest in prosecuting criminals without federal interference), rather than a rule about abstention in general.
stain should be considered a separate ground justifying remand. In other words, the equitable balancing that courts conduct under section 1452 in deciding whether to remand should be only part of the question. If abstention is warranted, balancing should not be necessary; a decision to abstain, either mandatory or discretionary, itself should be sufficient to provide an equitable ground for remand. Only when abstention is not warranted should a court turn to consider whether there is "any [other] equitable ground" that compels it to remand. Where neither equitable considerations nor the abstention sections indicate that a case should be heard in state court rather than federal court, the federal courts should proceed to hear it.

However, where mandatory abstention is appropriate, it should be seen as a right, and one enforceable by a court of appeals. Congress has indicated that the court is to have no discretion whatsoever to deny a motion to abstain in an appropriate case and has provided for review of such a denial. That the mechanism is remand, for which review is not available, should not stop the appeals court from reviewing the underlying decision not to abstain.

Litigants should not be subject to a federal forum that they do not want simply because their opponents are in financial distress, unless the needs of the bankruptcy system require speed that a state court cannot provide. If, however, a federal court rejects a litigant's request for abstention under the mandatory terms of section 1334(c)(2), a court of appeals should have the power to make sure that this decision was warranted, whether the case had been removed or not. The court of appeals, of course, should not review the decision of whether equitable factors favor remand, nor should it review the decision of whether the interests of justice or comity with state courts would have justified discretionary abstention, but should instead look only at whether abstention may have been required. If it finds mandatory abstention to have been warranted, it should reverse that determination and send the case back to the district court. Since a determination that abstention is mandatory should be seen as a completely sufficient reason for remand, the district court should then send such a case back to state court.

\[89\] See, for example, In re Briarpatch Film Corp, 281 BR 820, 828–33 (Bankr SD NY 2002) (outlining several factors and then performing analysis of remand determination under section 1452).

\[90\] "Any other equitable ground" would simply mean the balancing analysis that courts currently do.

\[91\] See 28 USC § 1452(b) (stating that decisions not to remand are not reviewable).

\[92\] See 28 USC § 1334(c)(1), (d) (stating that decisions not to exercise discretion to abstain are not reviewable).