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The North Carolina Supreme Court Threatens Federalism in Eways v. Governor's Island

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Our nation's founders, seeking an "equilibrium between the general and the State governments,"[1] framed a constitution based on principles of federalism:

> the proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects. It is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide is to be established under the general government. But this does not change the principle of the case. The decision is to be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality.[2]

Federal court abstention is a natural outgrowth of these federalist ideals. The doctrine of abstention permits a federal court to relinquish jurisdiction to a state court to avoid conflict with a state's interpretation of its own laws or administration of its own affairs.[3] In *Eways v. Governor's Island*[4] the North Carolina Supreme Court denied its responsibility to decide a case brought to it through federal court abstention. The court's decision in *Eways* subverts the federalist goals of abstention doctrine and sets forth a new rule restricting the effective exercise of jurisdiction by both North Carolina courts and federal courts sitting in North Carolina.

In *Eways*, the North Carolina Supreme Court confronted the question whether state courts must dismiss actions already pending in a federal court within the state, even though the federal court has abstained from ruling precisely in order to permit the state court to decide state-law issues in the case. Taking a less precise view of the issue, the supreme court stated that *Eways* presented the question whether North Carolina considers a prior action pending in a federal court located within the state to be grounds for abating[5] a subsequent action between the same parties on the same grounds in a North Carolina court.[6] Without taking note of the case's abstention context, the court answered

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1. THE FEDERALIST No. 31, at 197 (A. Hamilton) (C. Rossiter ed. 1961).

2. *Id.* No. 39, at 245-46 (J. Madison).

3. *See* BLACK'S LAW DICTIONARY 9 (5th ed. 1979).

4. 326 N.C. 552, 391 S.E.2d 182 (1990).

5. Abatement is an overthrow or destruction of a suit so that it is quashed and ended. BLACK'S LAW DICTIONARY 4 (5th ed. 1979). Under the North Carolina Rules of Civil Procedure, a motion to dismiss serves essentially the same function as the former plea in abatement. *Compare* N.C.R. CIV. PRO. 7(c) ("[P]leas . . . shall not be used.") *with* N.C.R. CIV. PRO. 8(e) ("No technical forms of pleading or motions are required.") *and* N.C.R. CIV. PRO. 12 (motions to dismiss). *See* Lehrer v. Edgecombe Mfg. Co., 13 N.C. App. 412, 414, 185 S.E.2d 727, 729 (1972) ("[T]he dismissal presents essentially the same questions as did the old plea of abatement."); *see also* Gardner v. Gardner, 294 N.C. 172, 175 n.5, 240 S.E.2d 399, 403 n.5 (1978) (noting that the Supreme Court of Alaska has held that a motion to abate is the equivalent of a motion to dismiss). *See generally* 1 C.J.S. *Abatement and Revival* § 53 (1985) (discussing law of abatement); 1 STRONG'S NORTH CAROLINA INDEX, *Abatement, Survival, and Revival of Actions*, §§ 3-14 (4th ed. 1990) (same).

6. *Eways*, 326 N.C. at 560, 391 S.E.2d at 186.

this question affirmatively, holding that a prior action pending in a federal court in North Carolina constitutes grounds for abating a subsequent state action on substantially similar grounds between the same parties.[7]

This Note recounts the tangled facts of *Eways* and explains the development and purposes of abstention doctrine. The Note concludes that the North Carolina Supreme Court's failure to recognize the importance of abstention doctrine renders the *Eways* rule fundamentally flawed. The Note concedes that the court's new rule of abatement for a prior pending action may be appropriate in situations not involving federal-court abstention; it recommends, however, that the supreme court reannounce the rule in a suitable context to avoid undermining abstention doctrine.[8]

The *Eways* litigation began with bankruptcy proceedings involving the ownership of North Carolina coastal property by two partnerships: Governor's Island, a North Carolina limited partnership, filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the Eastern District of North Carolina; the Allen Dukes-Jones Island Partnership filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the Middle District of Georgia.[9] At a public sale of the debtors' island property, Joseph M. Eways was the high bidder, and the parties entered into a sales contract.[10] Following a series of misunderstandings on both sides concerning, among other things, the quality of title to the property, no closing took place.[11] As a result, the debtors held a second auction, whereupon another purchaser bought the island for a price significantly less than plaintiff's earlier bid.[12]

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7. *Id.* at 561, 391 S.E.2d at 187. In so holding, the supreme court adopted the minority rule. *Id.* at 560, 391 S.E.2d at 187.

8. Almost any context not involving abstention would be suitable for abatement of a prior pending federal action. For example, in Barringer v. Zgoda, 91 A.D.2d 811, 458 N.Y.S.2d 42 (1982), the state court properly dismissed the defendant's counterclaim because she had a separate action pending in the United States District Court against the plaintiffs and the district court had not abstained. *Id.* at 811, 458 N.Y.S.2d at 43.

9. *Eways*, 326 N.C. at 554, 391 S.E.2d at 183. The two debtor partnerships share an ownership interest in an island known as Governor's Island or Jones Island, located in Pamlico County, North Carolina. *Id.*

10. *Id.* at 555, 391 S.E.2d at 183.

11. *Id.* Eways, a resident of Florida, had learned of the sale from newspaper advertisements. *Id.* On the morning of the sale, Eways arrived late; he had not visited the island, nor had he searched the property's title. *Id.* Just before the sale, the auctioneer announced that the island was being sold subject to the rights of third parties owning fifty percent of certain mineral rights, that a large part of the island was nontransferable marshland, and that a third party owned approximately fifteen acres of the island not included in the sale. Id. at 554, 391 S.E.2d at 183. Eways claimed never to have heard these announcements. *See In re* Governor's Island, 45 Bankr. 247, 251 (Bankr. E.D.N.C. 1984). Relying solely on the representations in the newspaper advertisements, Eways offered a bid of $1,960,000 for the entire island. *Eways*, 326 N.C. at 555, 391 S.E.2d at 184. The terms of the sale required Eways to deposit fifteen percent of the purchase price, or $294,000, with the auction company pending closing. *Id.* In fact, Eways deposited only $184,000 with the court; he deposited that amount only after his bank returned his first checks unpaid to the auction company. *Id.* Eways subsequently told the debtors that, because the marshland and mineral rights restrictions impaired title to the land, he could not obtain financing for the purchase and would not be able to close on the property. *Id.*

12. *Eways*, 326 N.C. at 555-56, 391 S.E.2d at 184. The eventual purchase price for the island was $1,100,000, or $860,000 less than the amount plaintiff had bid at the first auction. *Id.* at 556, 391 S.E.2d at 184.

Following the second sale, the debtors instituted an adversary proceeding against Eways in the bankruptcy court, seeking reimbursement of the shortfall in purchase price.[13] The bankruptcy court then conducted a hearing on the matter and entered judgment in the debtors' favor in the amount of $294,000, representing the fifteen percent of Eways' bid required as a security deposit.[14] The parties appealed the bankruptcy court's decision to the United States District Court for the Eastern District of North Carolina.[15]

The district court elected to abstain from resolving the issues regarding the state of the property's title and related matters.[16] That court reserved the right to decide the issues presented in the adversary proceeding, should the parties be unable to obtain relief in state court.[17] Pursuant to the district court's abstention order, Eways filed an action in the Superior Court of Pamlico County requesting the return of his security deposit.[18]

The debtors, defendants in the state court action, moved to dismiss.[19]

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13. *Id.* at 556, 391 S.E.2d at 184. When Eways first told the debtors that he would not be able to close the sale, Governor's Island applied to the bankruptcy court to order forfeiture of his security deposit. *Id.* The bankruptcy court concluded that Eways had breached his obligation to purchase the property, but nonetheless allowed him additional time to close; Eways missed the second deadline as well. *Id.* The debtor held the second public auction after the second deadline had passed. *Id.*

14. *Id.* The bankruptcy court made extensive findings of fact at this hearing and applied principles of both federal and North Carolina law. *See In re* Governor's Island, 45 Bankr. 247, 254-58 (Bankr. E.D.N.C. 1984). The bankruptcy court found that "Eways had every opportunity to inquire into any of the sellers' representations, but neglected to do so. He entered into the contract at his own risk." *Id.* at 254. The court also stated the general rule that, when a bidder at a bankruptcy sale fails to close on the property, the purchaser "may be ordered to pay the deficiency resulting from a resale." *Id.* at 256. The bankruptcy court noted, however, that this principle may not apply when, as here, the sale contract contains a liquidated damages clause. *Id.* at 256-57. The parties' agreement stated in clear, unambiguous language that " '[i]f the balance is not paid when due, deposit *shall* be retained by seller as liquidated damages.' " *Id.* at 257 (emphasis added by the court). The bankruptcy court concluded that this clause was not unconscionable to either party and assessed damages equal to the amount of the security deposit. *Id.* at 258.

15. *Eways*, 326 N.C. at 556, 391 S.E.2d at 184. Title 28 of the United States Code authorizes district court judges to hear appeals from the bankruptcy court's final decisions. 28 U.S.C. § 158(a) (1988).

16. *Eways*, 326 N.C. at 556, 391 S.E.2d at 184. In its August 1985 abstention order, the district court explained its reasons for abstaining as follows:

> Eways has raised issues, apparently in good faith, as to the quality of [the] title to the property which was the subject of their contract. Such issues of title conceivably could involve hundreds of thousands of acres of land in Eastern North Carolina, to-wit, the classification of real property as "marshland," and validity of title to land beyond the high water mark of the tides but which is non-navigable in fact due to tidal swamp, marsh growth, etc. These issues are of grave importance and are of the largest magnitude and it is the view of this Court that in the interest of justice, and in the interest of comity with the courts of the State of North Carolina, and out of respect for its law, this Court should abstain from deciding the issues presented in the Adversary Proceeding.

Memorandum in Support of Order at 12, *In re* Governor's Island, 45 Bankr. 247 (Bankr. E.D.N.C. 1984) (No. 85-344-CIV-5).

17. *Eways*, 326 N.C. at 556, 391 S.E.2d at 184.

18. *See id.* Eways' complaint alleged two grounds for relief: Breach of contract, on the theory that the debtor failed to convey good and marketable title as the parties' sale contract had required, and fraud, on the theory that the debtors misrepresented their ownership interest in the island and failed to disclose title defects. *Id.*

19. *Id.* Defendants' four grounds for dismissal were as follows: 1) lack of subject matter jurisdiction, 2) lack of personal jurisdiction, 3) failure to state a claim upon which relief could be granted, and 4) abatement due to a prior pending action. *Id.*

More than two years later,[20] the trial court granted defendants' motion, concluding that it lacked subject matter jurisdiction over the controversy.[21] Plaintiff appealed to the North Carolina Court of Appeals, which affirmed the trial court's dismissal of the suit on the same ground.[22]

The North Carolina Supreme Court affirmed in a unanimous opinion by Justice Martin, basing its holding not on lack of subject matter jurisdiction, but on the doctrine of prior action pending.[23] Noting that jurisdictions differ over the question of whether a prior action pending in a federal court sitting in the same state will abate a subsequent state court action,[24] the court adopted the minority rule, stating:

> Where a prior action is pending in a federal court within the boundaries of North Carolina which raises substantially the same issues between substantially the same parties as a subsequent action within the state court system having concurrent jurisdiction, the subsequent action is wholly unnecessary and, in the interests of judicial economy, should be subject to a plea in abatement.[25]

The supreme court, like the court of appeals, based its holding in *Eways* on the 1930 case of *Gilliam v. Sanders*.[26] In *Gilliam*, a court-appointed bankruptcy trustee sued a defaulting buyer of estate property in state court for failing to comply with his bid at a judicial sale.[27] The North Carolina Supreme Court affirmed the dismissal of plaintiff's suit, reasoning that

> "[in] a proceeding to sell land for assets the court of equity has all the powers necessary to accomplish its purpose, and when relief can be

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20. The J.L. Todd Auction Company, the firm that had conducted the 1984 judicial sale, intervened as an additional defendant in the state court action in January 1988. *Id.* at 558-59, 391 S.E.2d at 186. "As the selling agent . . . [the auction company] may be entitled to some or all of the deposit money in controversy." *Id.* at 558-59, 391 S.E.2d at 186.

21. *Id.* at 557, 391 S.E.2d at 185. This was the first of the four grounds for dismissal set forth in defendants' February 1986 motion to dismiss. *Id.* at 556, 391 S.E.2d at 184. The trial court did not address defendants' assertion that the prior pending federal action should abate the state court suit. *Id.* at 557, 391 S.E.2d at 185.

22. Eways v. Governor's Island, 95 N.C. App. 201, 202, 382 S.E.2d 219, 219 (1989), *aff'd*, 326 N.C. 552, 391 S.E.2d 182 (1990). The court of appeals, relying heavily on Gilliam v. Sanders, 198 N.C. 635, 152 S.E. 888 (1930), held that "a federal court cannot confer subject matter jurisdiction upon a state court where the highest court of this State has ruled that no such state court jurisdiction exists." *Eways*, 95 N.C. App. at 203, 382 S.E.2d at 220; *see infra* text accompanying note 29. Like the trial court, the court of appeals ignored defendants' contention that the prior pending federal action should abate the subsequent state action. *Eways*, 326 N.C. at 557, 391 S.E.2d at 185.

23. *Eways*, 326 N.C. at 553-54, 391 S.E.2d at 183. During the previous year, the supreme court reached a result similar to that in *Eways*, stating that "[i]f the correct result has been reached, the judgment will not be disturbed even though the trial court may not have assigned the correct reason for the judgment entered." Shore v. Brown, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989). The *Eways* court quoted this language to support its own decision. *Eways*, 326 N.C. at 553-54, 391 S.E.2d at 183. In *Shore*, the trial court had erred in granting summary judgment based on res judicata, and the court of appeals had failed to consider the doctrine of prior action pending. *Shore*, 324 N.C. at 428, 378 S.E.2d at 779. Nevertheless, the supreme court noted that "the record and [defendant's] motion clearly support the doctrine of prior action pending as a basis for summary judgment." *Id.* at 428-29, 378 S.E.2d at 779. Justice Martin also authored the *Shore* decision. *Shore*, 324 N.C. at 427, 378 S.E.2d at 779.

24. *Eways*, 326 N.C. at 559-60, 391 S.E.2d at 186-87.

25. *Id.* at 560-61, 391 S.E.2d at 187.

26. 198 N.C. 635, 152 S.E. 888 (1930). *See Eways*, 326 N.C. at 557, 391 S.E.2d at 185.

27. *Gilliam*, 198 N.C. at 636, 152 S.E. at 889.

given in the pending action, it must be done by a motion in the cause and not by an independent action. The latter is allowed only when the matter has been closed by a final judgment."[28]

The court of appeals relied on *Gilliam* to affirm the trial court's dismissal of the complaint, noting that *Gilliam*'s policy "of keeping all proceedings related to the bankrupt's property within the equity jurisdiction of the District Court to avoid multiplicious suits, costs, and needless delay" supported dismissal for lack of subject matter jurisdiction.[29] The supreme court stated that it agreed with this analysis of the underlying rationale for the *Gilliam* holding, and specifically found that the language and intent of the *Gilliam* decision were consistent with the legal theory of abatement due to a prior action pending in federal court.[30] Thus, nearly five years after the district court had directed the parties to seek a resolution of their dispute in state court, the supreme court ended their quest for relief. Well into 1991, the parties continued to pursue relief in the federal system.[31] *Eways* is a striking example of a case in which "the two possible forums available to [the parties] have each indefinitely denied them any relief in hopes that the other forum will take up their cause."[32]

On its face, the North Carolina Supreme Court's analysis of *Eways* seems complete. The court portrayed its decision to dismiss the action because of a prior pending action as an inevitable result of *Gilliam*. A further examination of *Eways*' legal background, however, reveals fundamental errors in the court's reasoning—errors stemming from the court's failure to consider *Eways*' abstention posture. This background indicates that the *Eways* rule is a threat to the federalist ideal of maintaining an "equilibrium"[33] between state and federal courts, as expressed in abstention doctrine.

Abstention doctrine presumes that the federal court has jurisdiction over the matter, but chooses either not to exercise its jurisdiction or to postpone its exercise until the state courts have interpreted state-law issues in the case.[34] Upon abstaining, the federal court sends the parties to state court for relief.[35] There is no single rule of abstention; the doctrine is a collection of policies based

28. *Id.* at 637, 152 S.E. at 889-90 (quoting Marsh v. Nimmocks, 122 N.C. 478, 479, 29 S.E. 840, 840 (1898)).

29. Eways v. Governor's Island, 95 N.C. App. 201, 204, 382 S.E.2d 219, 220 (1989), *aff'd*, 326 N.C. 552, 391 S.E.2d 182 (1990); *see supra* note 22.

30. *Eways*, 326 N.C. at 558, 391 S.E.2d at 185.

31. Telephone interview with Douglas Q. Wickham, counsel for defendant Allen Dukes-Jones Island Partnership (Apr. 18, 1991); telephone interview with B. Hunt Baxter, Jr., counsel for plaintiff (Jan. 29, 1991).

32. Trapnell v. Hunter, 785 S.W.2d 426, 429 (Tex. Ct. App. 1990).

33. THE FEDERALIST NO. 31, at 197 (A. Hamilton) (C. Rossiter ed. 1961); *see also supra* text accompanying notes 1-2 (discussing federalism).

34. H. FINK & M. TUSHNET, FEDERAL JURISDICTION: POLICY AND PRACTICE 690 (2d ed. 1987); *see also* Galligan, *Article III and The "Related To" Bankruptcy Jurisdiction: A Case Study in Protective Jurisdiction*, 11 U. PUGET SOUND L. REV. 1, 15 n.54 (1987) (Abstention is a doctrine a federal court "invokes when it has jurisdiction but for any number of compelling reasons decides not to exercise that jurisdiction.").

35. *See generally* C. WRIGHT, THE LAW OF FEDERAL COURTS § 52, at 302-19 (4th ed. 1983) (discussing abstention doctrine).

on principles of comity and federalism.[36] Abstention doctrine may embrace nearly any case in which concerns of federalism prompt a federal court to yield jurisdiction to a state court.[37] A federal court, however, does not have unlimited discretion to abstain: abstention is an exception to the well-known rule of *Cohens v. Virginia*,[38] in which Chief Justice Marshall stated that a federal court must not decline to exercise its jurisdiction if it can properly hear the case.[39]

The United States Supreme Court clearly defined the doctrine of abstention half a century ago in *Railroad Commission v. Pullman Co.*[40] In *Pullman* the Court held that when a federal constitutional claim rests on an unsettled question of state law, the federal court should stay its hand in order to allow the state courts to settle the underlying state-law question.[41] The Court recognized that any ruling by the federal court would involve a mere prediction of the state's interpretation of its own laws, and that it would be better to allow the state court to construe the state statute.[42] After *Pullman*, abstention became appropriate for any case that could be disposed of on a narrow, but unsettled, question of state law rather than on a federal constitutional question.[43]

In addition to *Pullman* abstention, federal courts today recognize several other forms of judicially-created abstention doctrine.[44] All but one of these forms of abstention are based on "considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous exercise of concurrent jurisdictions, either by federal

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36. H. FINK & M. TUSHNET, *supra* note 34, at 690. "Comity" describes the principle by which the courts of one jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect. BLACK'S LAW DICTIONARY 242 (5th ed. 1979).

37. *See* Mullenix, *A Branch Too Far: Pruning the Abstention Doctrine*, 75 GEO. L.J. 99, 102 (1986).

38. 19 U.S. (6 Wheat.) 264 (1821).

39. *Id.* at 404. In *Cohens*, Chief Justice Marshall stated:

> It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. 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. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.

Id.

40. 312 U.S. 496 (1941).

41. *See id.* at 501; *see also* Harris County Comm'rs Court v. Moore, 420 U.S. 77, 83 (1975) (summarizing *Pullman* doctrine) (discussed *infra* notes 48-53 and accompanying text).

42. *See Pullman*, 312 U.S. at 500.

43. *See* Mullenix, *supra* note 37, at 102.

44. *See, e.g.*, C. WRIGHT, *supra* note 35, § 52, at 303 (discussing four types of abstention). In addition to a *Pullman* situation involving both the federal Constitution and a state statute, federal abstention may be appropriate to avoid a needless conflict with a state's administration of its own affairs, *see* Burford v. Sun Oil Co., 319 U.S. 315, 327 (1943); to leave to the states the resolution of unsettled questions of state law, *see* Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 27-30 (1959); or to foster judicial economy, *see* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976). Abstention also may be appropriate when federal adjudication would interfere with a pending state criminal proceeding. *See* Younger v. Harris, 401 U.S. 37, 44 (1971). *See also* Mullenix, *supra* note 37, at 102 & n.14 (discussing the several types of abstention).

courts or by state and federal courts."[45] Abstention is most likely to occur, therefore, when a federal court wishes to avoid error in interpreting state law.[46]

Ordinarily, a federal court retains jurisdiction after abstaining.[47] The importance of deferring to state-court interpretation of state law, however, led the United States Supreme Court to outline an abstention procedure requiring dismissal of a federal action in order to permit the unfettered exercise of state-court jurisdiction. In *Harris County Commissioners Court v. Moore*,[48] the Court noted that the nature of the federal constitutional claim before it depended upon "the unsettled relationship between the state constitution and a [state] statute."[49] The "difficult state-law questions" involved in *Moore* made federal abstention especially appropriate.[50] Concluding that "the District Court should have abstained,"[51] the Supreme Court took the strongest possible stand in favor of state court jurisdiction and ordered dismissal of the case:

> In order to remove any possible obstacles to state-court jurisdiction, we direct the District Court to dismiss the complaint. The dismissal should be without prejudice so that any remaining federal claim may be raised in a federal forum after the Texas courts have been given the opportunity to address the state-law questions in this case.[52]

Thus, the Supreme Court in *Moore* articulated the following standard: When abstention is proper, but the parties would confront "obstacles to state-court jurisdiction" if the action remained in federal court, the federal court should dismiss the action. Because of this standard, any "obstacles" created by state courts will compel a federal court to dismiss a case, rather than retain it on its docket, following a decision to abstain.[53]

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45. *Colorado River*, 424 U.S. at 817. The sole type of abstention not involving such principles is the type the Court announced in *Colorado River* itself. *Colorado River* abstention is rooted in principles of "judicial economy and sound judicial administration." Mullenix, *supra* note 37, at 102-03. Professor Mullenix has criticized this type of abstention as an "unprincipled means of serving the convenience of the federal courts," and as "nothing more than a doctrine of convenience." *Id.* at 103, 105.

46. Field, *The Abstention Doctrine Today*, 125 U. PA. L. REV. 590, 590 (1977).

47. American Trial Lawyers' Ass'n v. New Jersey Supreme Court, 409 U.S. 467, 469 (1973).

48. 420 U.S. 77 (1975).

49. *Id.* at 84.

50. *See id.* at 87-88. The Court observed that "the federal claim in this case is 'entangled in a skein of state law that must be untangled before the federal case can proceed.' " *Id.* at 88 (quoting McNeese v. Board of Educ., 373 U.S. 668, 674 (1963)).

51. *Id.* at 82.

52. *Id.* at 88-89 (footnote omitted). The Supreme Court explained its reasons for ordering dismissal as follows:

> Ordinarily the proper course in ordering "*Pullman* abstention" is to remand with instructions to retain jurisdiction but to stay the federal suit pending determination of the state-law questions in state court. . . . The Texas Supreme Court has ruled, however, that it cannot grant declaratory relief under state law if a federal court retains jurisdiction over the federal claim.

Id. at 88 n.14 (citations omitted).

53. Federal courts continue to analyze the need for abstention in the same way by asking whether the case presents narrow, unsettled questions of state law. *See* Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500 (1941). In the face of obstacles to state-court jurisdiction, however, federal courts deciding to abstain will dismiss a case without prejudice, rather than retain it on their docket. *See Moore*, 420 U.S. at 88-89. Like the Texas rule discussed in *Moore* prohibiting declaratory relief when a federal court retains jurisdiction, the *Eways* rule requiring dismissal when an

Even before *Pullman*, the Supreme Court recognized that, in bankruptcy cases, particular deference to state courts might be appropriate. For example, in *Thompson v. Magnolia Petroleum Co.*[54] the Court balanced the bankruptcy court's interest in comprehensive management of a case against the state court's interest in determining questions of state law:

> A court of bankruptcy has an exclusive and nondelegable control over the administration of an estate in its possession. But the proper exercise of that control may, where the interests of the estate and the parties will best be served, lead the bankruptcy court to consent to submission to state courts of particular controversies involving unsettled questions of state property law and arising in the course of bankruptcy administration.[55]

In *Thompson*, a question of real estate title arose in the bankruptcy proceeding and the governing state law was not clear on the issue.[56] While the Court did not doubt the bankruptcy court's authority to determine the state law question, the "difficulties of determining just what should be the decision under the law of [the] State"[57] led the Court to conclude as follows:

> Unless the matter is referred to the state courts, upon subsequent decision by the Supreme Court of Illinois it may appear that rights in local property of parties to this proceeding have—by the accident of federal jurisdiction—been determined contrary to the law of the State, which in such matters is supreme.[58]

Bolstering the Court's special view of abstention in bankruptcy cases, Congress in 1984 amended the Bankruptcy Act to provide specifically for abstention in bankruptcy.[59] Congress' codification of abstention with respect to bankruptcy is the only statutory enunciation of this doctrine; abstention remains in all other respects a judicially created doctrine. Although Congress' statutory authorization of abstention in bankruptcy confirms the district court's authority to abstain, statutory abstention, like judicially created abstention, is rooted in the concern for the sensitive relationship between state and federal courts. The 1984 amendments grew out of Congress' recognition of the constitutional difficulties with bankruptcy jurisdiction that the Supreme Court previously had ex-

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action is pending in federal court is an "obstacle[] to state-court jurisdiction." *Id.* at 88. Thus, the *Eways* rule affects not only the decisions of North Carolina courts but those of federal courts sitting in North Carolina.

54. 309 U.S. 478 (1940).

55. *Id.* at 479 (footnote omitted).

56. *Id.* at 483.

57. *Id.* at 484.

58. *Id.* (footnote omitted). The *Thompson* Court's great deference to state law may have flowed directly from its then-recent holding in Erie R.R. v. Tompkins, 304 U.S. 64 (1938); the Court cited *Erie* for the proposition that state law was supreme. *See Thompson*, 309 U.S. at 484 n.11; *see also Erie*, 304 U.S. at 78 ("[T]he law to be applied in any case is the law of the State."). Following the *Thompson* decision, some observers criticized it as an extreme application of the *Erie* doctrine. *See* Hill, *The Erie Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013, 1033-34 & n.87 (1953).

59. *See generally* 11 U.S.C. § 305(a) (1988) ("The court . . . may suspend all proceedings in a case under this title . . . ."); 28 U.S.C. § 157(b)(4) (1988) ("Non-core proceedings . . . shall not be subject to the mandatory abstention provisions . . . ."); *id.* § 1334(c) (1988) (abstention provisions).

pressed in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*.[60] Because of these concerns, Congress amended the Bankruptcy Act to make the bankruptcy court a subsidiary of the federal district court,[61] to divide judicial power in bankruptcy between the district court and the bankruptcy court,[62] and to confer jurisdiction in bankruptcy on the district court.[63]

The third of these three amendments, section 1334, contains an affirmative grant of jurisdiction over bankruptcy cases to the federal district courts.[64] Section 1334 also contains the following provision permitting federal courts to relinquish jurisdiction in cases where they confront questions of state law better left to state courts: "Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11."[65] The district court in *Eways* abstained under this discretionary provision.[66]

The *Thompson* precedent seems to provide an adequate foundation for the district court's decision to abstain in *Eways*.[67] A second look, however, reveals that the district court erred. The parties' adversary proceeding in bankruptcy court did not involve "issues . . . as to the quality of . . . title . . . involv[ing] hundreds of thousands of acres of land in Eastern North Carolina," nor "the classification of real property as 'marshland,' and validity of title to land beyond the high water mark of the tides but which is non-navigable due to tidal swamp [or] marsh growth," nor other "issues . . . of grave importance and . . . of the largest magnitude."[68] By the time of the adversary proceeding, the debtors had resold the island at a second auction; the only remaining issue was money damages.[69] Because the *Eways* dispute presented no complicated, unsettled question

60. 458 U.S. 50 (1982). The constitutional problem with bankruptcy jurisdiction was that federal judicial power was vested in courts whose judges did not enjoy the protections and safeguards of Article III of the United States Constitution. *See id.* at 62; *see also* U.S. CONST. art. III, § 1 (To exercise the judicial power of the United States, judges must "hold their Offices during good Behavior, and shall . . . receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."). *See generally* Eisenberg, *Bankruptcy Law in Perspective*, 28 UCLA L. REV. 953, 953 (1981) (criticizing existing bankruptcy law as a "failure").

61. 28 U.S.C. § 151 (1988).

62. *Id.* § 157.

63. *Id.* § 1334.

64. *Id.* § 1334(b). "Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." *Id.*

65. *Id.* § 1334(c)(1).

66. *See* Memorandum in Support of Order at 14, *In re* Governor's Island, 45 Bankr. 247 (Bankr. E.D.N.C. 1984) (No. 85-344-CIV-5) (discussed *supra* note 16).

67. *See* Thompson v. Magnolia Petroleum Co., 309 U.S. 478, 483 (1940). *Thompson* proclaims that it is proper to submit "unsettled questions of state property law" to state court. *Id.*; *see also supra* note 16 (district court's abstention order) & notes 54-58 and accompanying text (discussing *Thompson* holding).

68. Memorandum in Support of Order at 12, *Governor's Island*, (No. 85-344-CIV-5) (discussed *supra* note 16).

69. *See Eways*, 326 N.C. at 555-56, 391 S.E.2d at 184; *see also supra* notes 10-14 and accompanying text (discussing facts of case).

of state law, abstention was improper.[70] The district court, however, faced the decision of whether to abstain in 1985, in an atmosphere of great uncertainty following the Supreme Court's 1982 *Marathon* decision and Congress' 1984 amendments to the Bankruptcy Act.[71] At that time, the district court would have been influenced by binding authority requiring abstention whenever "important matters of state policy" are involved.[72] In the following years, however, the law aligned itself against ordering abstention in bankruptcy proceedings.[73]

Nonetheless, the district court in *Eways* did abstain, and the parties thus came before the courts of North Carolina. In considering the dispute in *Eways*, however, the North Carolina Supreme Court appeared unaware of the case's abstention context, as the court did not discuss abstention.[74] Instead, it based its decision solely upon an analysis of the law of prior action pending.

The supreme court set forth the following general rule regarding the law of prior action pending: "Under the law of this state, where a prior action is pending between the same parties for the same subject matter in a court within the state having like jurisdiction, the prior action serves to abate the subsequent action."[75] Traditionally, North Carolina courts have confronted the question whether to dismiss a case because of a prior pending action through three recurring fact patterns.

The first of the traditional situations involves two suits within the same state system; both of the cases that the *Eways* court cited as representing the general rule involved two such suits.[76] In this situation, the policy underlying

70. *See, e.g., In re* Aristera Co., 65 Bankr. 928, 931 (Bankr. N.D. Tex. 1986). "The matters of state law alleged in the Complaint are neither novel nor complicated and, thus, neither the interest of comity with state courts nor respect for state law require that this Court abstain." *Id.*

71. *See generally* Ferriell, *Actions to Collect Unpaid Accounts in Bankruptcy Court*, 26 HOUS. L. REV. 603, 605-06 (1989) (The *Marathon* decision "threw the bankruptcy court system into a crisis from which it has not completely recovered.").

72. Aluminum Co. of America v. Utilities Comm'n, 713 F.2d 1024, 1029 (4th Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984). In *Aluminum Co.*, the United States Court of Appeals for the Fourth Circuit held that *Burford* abstention was proper "to avoid needless obstruction of North Carolina's domestic policy" when interpretation of a North Carolina Utilities Commission order was necessary. *Id.*; *see supra* note 44.

73. *See, e.g., In re* Earla Indus., Inc., 72 Bankr. 131, 134 (Bankr. E.D. Pa. 1987) (abstention inappropriate when state law is settled).

74. The court acknowledged the existence of the bankruptcy abstention statutes, but did not explain their operation or their possible effect on the case. *See Eways*, 326 N.C. at 557, 391 S.E.2d at 185.

75. *Id.* at 558, 391 S.E.2d at 185. The court pointed to its earlier decisions in McDowell v. Blythe Bros. Co., 236 N.C. 396, 72 S.E.2d 860 (1952), and Cameron v. Cameron, 235 N.C. 82, 68 S.E.2d 796 (1952), as examples of this long-standing rule. *Eways*, 326 N.C. at 558, 391 S.E.2d at 185. The *Cameron* court had set forth the rule as follows: "The pendency of a prior action between the same parties for the same cause in a State court of competent jurisdiction works in [sic] abatement of a subsequent action either in the same court or in another court of the State having like jurisdiction." *Cameron*, 235 N.C. at 84, 68 S.E.2d at 798.

76. *Cf.* Gardner v. Gardner, 294 N.C. 172, 173, 176, 240 S.E.2d 399, 401, 403 (1978) (husband should have filed claim in second divorce action in Johnston County as a counterclaim to first divorce action in Wayne County). *Compare McDowell*, 236 N.C. at 396-97, 72 S.E.2d at 861 (prior action pending in the superior court of Randolph County is grounds for abatement of subsequent action in the superior court of Mecklenburg County) *with Cameron*, 235 N.C. at 84, 88, 68 S.E.2d at 798, 800 (prior action pending in the superior court of Sampson County is grounds for abatement of subsequent action in the superior court of New Hanover County).

the doctrine is understandable; as the court had stated earlier, "the second action is abated by the action which is first in point of time because the court can dispose of the entire controversy in the prior action and in consequence the subsequent action is wholly unnecessary."[77] In *Eways*, the supreme court concluded that a policy of judicial economy is consistent with the policy of *Gilliam v. Sanders*,[78] because the " 'policy expressed in *Gilliam* is that of keeping all proceedings related to the bankrupt's property within the equity jurisdiction of the District Court to avoid multiplicitous suits, costs, and needless delay.' "[79]

North Carolina courts also have faced the question whether to dismiss a case because of a prior pending action when a case comes before a state court predated by an action in another state.[80] Here, the rule requiring dismissal does not apply.[81] Indeed, in addressing this situation, the North Carolina Supreme Court has laid down a contrary rule explicitly prohibiting abatement:

> A plea in abatement seeking dismissal of an action, because another action is pending between the same parties on the same right of action, should be sustained when, and only when, the actions are pending in different courts of the same sovereign. If the actions are brought in courts of different states, the plea should be overruled.[82]

This rule, in effect, states the necessary inverse of the rule of the first situation: if the pendency of an action within the state requires abatement of a second action within the same state,[83] then "a similar action pending in the courts of any other jurisdiction will not abate an action between the same parties in the North Carolina courts."[84]

In a third situation, a dispute comes before a North Carolina court following the commencement of an action in a federal court located in another state.[85]

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77. *McDowell*, 236 N.C. at 398, 72 S.E.2d at 862.

78. 198 N.C. 635, 152 S.E. 888 (1930). For a discussion of *Gilliam* and the *Eways* court's reliance on it, see *supra* notes 26-30 and accompanying text.

79. *Eways*, 326 N.C. at 558, 391 S.E.2d at 185 (quoting Eways v. Governor's Island, 95 N.C. App. 201, 204, 382 S.E.2d 219, 220 (1989), *aff'd*, 326 N.C. 552, 391 S.E.2d 182 (1990)). Applying these policies to the dispute before it, the *Eways* court observed that "if these suits both had been filed in state court, the prior pending action would serve to abate the subsequent action." *Id.* at 559, 391 S.E.2d at 186.

80. *See, e.g.*, Cushing v. Cushing, 263 N.C. 181, 182-82, 139 S.E.2d 217, 219 (1964) (prior action pending in South Carolina court); *In re* Skipper, 261 N.C. 592, 593, 135 S.E.2d 671, 671 (1964) (same).

81. *See, e.g.*, *Cushing*, 263 N.C. at 186-87, 139 S.E.2d at 222 ("Where another action pending between the same parties for the same cause is made the basis of a plea in abatement, the former action must be pending . . . *within this State*, in order to bar the second action. . . . [T]herefore . . . defendant's plea in abatement cannot be sustained.") (citations omitted).

82. *Skipper*, 261 N.C. at 594, 135 S.E.2d at 672.

83. *See* McDowell v. Blythe Bros. Co., 236 N.C. 396, 398, 72 S.E.2d 860, 862 (1952); Cameron v. Cameron, 235 N.C. 82, 84, 68 S.E.2d 796, 798 (1952).

84. Lehrer v. Edgecombe Mfg. Co., 13 N.C. App. 412, 415, 185 S.E.2d 727, 730 (1972). *But cf.* Motor Inn Management, Inc. v. Irwin-Fuller Dev. Co., 46 N.C. App. 707, 712, 266 S.E.2d 368, 371, *disc. rev. denied*, 301 N.C. 93, 275 S.E.2d 299 (1980) (state courts should avoid hearing "imported lawsuits having little or no connection with the forum" and so should employ doctrine of forum non conveniens to restrict litigants to the state court of origin).

85. *See, e.g.*, A. M. Sloan Co. v. McDowell, 75 N.C. 37, 37-38 (1876) (prior action pending in federal court located in Georgia); *Lehrer*, 13 N.C. App. at 412, 185 S.E.2d at 728 (prior action pending in federal court located in New York).

As with an action involving the courts of two different states, abatement of the second suit is improper here.[86] More than a century ago, the North Carolina Supreme Court expressed the following rationale for a rule prohibiting abatement in this situation:

> The provision . . . allowing as cause for demurrer that there is another action pending between the same parties for the same cause, must be confined to the courts of the State, where the remedies are precisely the same; the object being to protect parties from vexation and the courts from multiplicity of suits. But in different states or governments the remedies are not the same, and there may be reasons why our courts should not take notice of proceedings outside of the State which would be applicable to our courts.[87]

In reaching its decision, the *Eways* court relied upon the rationale of the three traditional situations when confronted with a fourth situation: A prior action remains pending in a federal court that sits in the same state where the parties are engaged in a subsequent state action.[88] In this situation, the jurisdictions are split over the question whether the prior pending federal action will abate the subsequent state action under those circumstances.[89] The *Eways* court adopted the minority rule, declaring that the second action must be abated or dismissed.[90]

The Supreme Court's 1938 holding in *Erie Railroad Co. v. Tompkins*[91] provides the necessary foundation for the adoption of the minority rule. Since *Erie*, federal courts sitting in diversity have, with a few limited exceptions,[92] applied

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86. *Lehrer*, 13 N.C. App. at 414, 185 S.E.2d at 729. The court of appeals in *Lehrer* indicated the following general rule:

> "The pendency of a prior action between the same parties for the same cause of action in a state court of competent jurisdiction works an abatement of a subsequent action either in the same court or in another court of this state having jurisdiction. The prior action must be pending in a court of this state . . . ."

Id. (quoting 1 STRONG'S NORTH CAROLINA INDEX, *Abatement and Revival*, § 3 (2d ed. 1967)). The *Lehrer* court looked to the North Carolina Supreme Court's opinion in Kesterson v. Southern Ry., 146 N.C. 276, 59 S.E. 871 (1907), which embraced the rule that an action pending in a federal court cannot be pleaded in abatement of a similar suit in a state court. *Lehrer*, 13 N.C. App. at 415, 185 S.E.2d at 729 (citing *Kesterson*, 146 N.C. at 277, 59 S.E. at 871).

87. *A.M. Sloan*, 75 N.C. at 40. Such a rationale also may undergird the rule applicable to a situation involving a prior action from a different state.

88. *Eways*, 326 N.C. at 559, 391 S.E.2d at 186.

89. *Id.* at 560, 391 S.E.2d at 186; *see, e.g.*, Interstate Chem. Corp. v. Home Guano Co., 199 Ala. 583, 586, 75 So. 166, 168 (1917) (minority rule); Hubbs v. Nichols, 201 Tenn. 304, 309, 298 S.W.2d 801, 803 (1956) (majority rule).

90. *Eways*, 326 N.C. at 560, 391 S.E.2d at 187.

91. 304 U.S. 64 (1938). The *Erie* Court held the following:

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. . . . There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

Id. at 78.

92. For example, under the "choice of law" exception, a federal court may apply the laws of a state other than the state in which it sits. This is so because a federal court is to apply the laws that the courts of the state in which it sits would apply, even if that state is applying, under conflict of

the laws of the states in which they sit. Thus, when the minority rule restricts a state-court litigant to a federal forum, state law nonetheless applies to resolve the dispute, and the parties' rights and available remedies will be the same, regardless of the judicial forum. Because of *Erie*, the rule requiring dismissal is an appropriate reaction of a state court to the pendency of a duplicative federal action, even a bankruptcy case, since federal courts, even bankruptcy courts, routinely apply state law.[93]

Scarcely any of the cases to which the *Eways* court looked as authority, however, were decided since *Erie*, since the development of federal abstention doctrine, or since Congress enacted the bankruptcy abstention provisions in 1984.[94] The court's overwhelming reliance on outdated cases to guide its adjudication of *Eways* underscores its failure to recognize the importance of *Eways*' abstention context.

The most obvious example of the North Carolina Supreme Court's misplaced reliance on obsolete cases is the emphasis the court placed on its 1930 decision in *Gilliam v. Sanders*.[95] Both the supreme court and the North Carolina Court of Appeals relied on *Gilliam* in affirming dismissal of plaintiff's complaint.[96] Indeed, the court of appeals considered itself "bound by *Gilliam* because it is indistinguishable from the present case."[97] Like *Eways*, *Gilliam* involved a suit against a defaulting purchaser at a bankruptcy sale.[98] *Gilliam*, however, is not "indistinguishable" from *Eways*. Several significant Supreme Court decisions and acts of Congress have changed the law since the North Carolina Supreme Court decided *Gilliam*, rendering *Gilliam*'s rule powerless in a case such as *Eways*.

The dispute in *Gilliam* had its roots in a bankruptcy proceeding in the District Court of the United States for the Middle District of North Carolina.[99]

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laws principles, the laws of another state. *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941).

93. *See, e.g.*, General Instrument Corp. v. Financial & Business Servs., Inc. (*In re* Finley), 62 Bankr. 361, 368 (Bankr. N.D. Ga. 1986) (bankruptcy court constantly called upon to apply state law); *see also* Hill, *supra* note 58, at 1020 (federal bankruptcy system is "little more than a system of equitable distribution superimposed upon legal relationships having their origin for the most part in state law").

94. The *Eways* court relied upon two very recent cases for principles unrelated to abstention: Clark v. Craven Regional Medical Auth., 326 N.C. 15, 21, 387 S.E.2d 168, 172 (1990), and Shore v. Brown, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989). *See Eways*, 326 N.C. at 554, 558, 391 S.E.2d at 183, 185. No other case upon which the *Eways* court relies is more recent than 1958. *See Eways*, 326 N.C. at 554, 391 S.E.2d at 183 (citing State *ex rel.* East Lenoir Sanitary Dist. v. City of Lenoir, 249 N.C. 96, 105 S.E.2d 411 (1958)).

95. 198 N.C. 635, 152 S.E. 888 (1930).

96. *See Eways*, 326 N.C. at 558, 391 S.E.2d at 185; Eways v. Governor's Island, 95 N.C. App. 201, 203, 382 S.E.2d 219, 220 (1989), *aff'd*, 326 N.C. 552, 391 S.E.2d 182 (1990).

97. *Eways*, 95 N.C. App. at 204, 382 S.E.2d at 221.

98. *Gilliam*, 198 N.C. at 636, 152 S.E. at 889.

99. *Id.* at 635, 152 S.E. at 889. The plaintiff in *Gilliam* was the court-appointed trustee in the bankruptcy proceeding. *Id.* In *Eways*, a debtor-in-possession, rather than a court-appointed trustee, was managing the bankruptcy sale proceedings. *See Eways*, 326 N.C. at 554, 391 S.E.2d at 183. This difference, however, is unimportant as a debtor-in-possession selling its own property at a bankruptcy auction is, like a trustee, not a private party but a fiduciary operating under court control. *See* 11 U.S.C. § 1107(a) (1988) ("[A] debtor in possession shall . . . perform all the functions and duties . . . of a trustee serving in a case under this chapter.").

Defendant had bid on property of the bankrupt estate at a court-ordered auction, but had failed to comply with his bid; as in *Eways*, the price the property fetched at a second sale was much lower than defendant's bid.[100] In *Gilliam* the plaintiff, the court-appointed trustee in bankruptcy, sued the defaulting purchaser of estate property in state court instead of seeking relief in the federal bankruptcy proceeding.[101] In *Eways*, by contrast, the defendant in federal court brought suit in state court for his tort and contract actions only when the district court chose to abstain.[102] Thus, policy concerns such as preventing a "multiplicity of suits" and preventing a defendant from "being unnecessarily harassed and subjected to additional costs by two proceedings,"[103] which were important to the court's decision in *Gilliam*, were not relevant in *Eways*.

The North Carolina Supreme Court decided *Gilliam* in 1930,[104] before three essential developments in the law: the United States Supreme Court's 1938 *Erie* decision,[105] the Supreme Court's formulation of abstention doctrine,[106] and, more recently, congressional enactment of the bankruptcy abstention provisions in 1984.[107] An understanding of each of these three developments is crucial to a correct resolution of the issues in *Eways*; thus, a decision such as *Gilliam*, coming from the pre-*Erie*, pre-*Pullman*, pre-statutory-abstention era, is of very limited value for deciding *Eways*.

The same problem—relying on cases rendered irrelevant by changes in the law—is evident in the *Eways* court's selection of cases from other jurisdictions setting forth the minority rule. In adopting the rule requiring abatement of a subsequent state action,[108] the North Carolina Supreme Court looked to three decisions from other states as persuasive authority: *Interstate Chemical Corp. v. Home Guano Co.*,[109] *Wilson v. Milliken*,[110] and *Smith v. Atlantic Mutual Fire Insurance Co.*[111] These three cases are very old: *Smith* was decided in 1850,[112] *Wilson* in 1898,[113] and *Interstate Chemical* in 1917.[114] Thus, like *Gilliam*, each

100. *Gilliam*, 198 N.C. at 636, 152 S.E. at 889. In *Gilliam*, the bankruptcy court concluded that the seller's damages were equal to this shortfall in purchase price. *Id.* In *Eways*, however, the bankruptcy court limited the seller's damage to the security deposit specified in the sale contract as liquidated damages. *In re* Governor's Island, 45 Bankr. 247, 258 (Bankr. E.D.N.C. 1984). The *Gilliam* opinion does not reveal whether the sale contract contained a liquidated damages provision.

101. *Gilliam*, 198 N.C. at 636, 152 S.E. at 889.

102. *Eways*, 326 N.C. at 556, 391 S.E.2d at 184.

103. Wilson v. Milliken, 103 Ky. 165, 172, 174, 44 S.W. 660, 662, 663 (1898). The *Eways* court relied on *Wilson* as an example of the minority rule it adopted. *See Eways*, 326 N.C. at 560, 391 S.E.2d at 187.

104. *See Gilliam*, 198 N.C. at 635, 152 S.E. at 888.

105. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

106. *See, e.g.*, Railroad Comm'n v. Pullman Co., 312 U.S. 496, 501 (1941); *see also supra* notes 40-43 and accompanying text (discussing *Pullman* abstention).

107. *See* Bankruptcy Amendments and Federal Judgeship Act, Pub. L. No. 98-353, 98 Stat. 333 (1984) (codified as amended at 28 U.S.C. § 1334 (1988)).

108. *Eways*, 326 N.C. at 560, 391 S.E.2d at 187.

109. 199 Ala. 583, 75 So. 166 (1917).

110. 103 Ky. 165, 44 S.W. 660 (1898).

111. 22 N.H. 21 (1850).

112. *See Smith*, 22 N.H. at 21.

113. *See Wilson*, 103 Ky. at 165, 44 S.W. at 660.

114. *See Interstate Chemical*, 199 Ala. at 583, 75 So. at 166.

of these cases was decided before the rise to prominence of judicial abstention, the *Erie* doctrine, and statutory abstention.[115] Because these three developments bear significantly on *Eways*, decisions from an era when they were unknown are unpersuasive. The *Eways* court would have done better to examine some of the more recent cases from other jurisdictions following either the minority or the majority rule.[116] The North Carolina Supreme Court's misplaced reliance on outmoded cases in *Eways* is symptomatic of the opinion's central defect: the court's complete failure to consider the relationship between its decision and federal court abstention. Because of this failure, the rule announced in *Eways* undermines federal abstention policy in two different, yet equally troubling ways. One result of *Eways* will prove problematic for the courts of this state; the other result will be troubling to federal courts sitting in North Carolina. Having erroneously proclaimed the rule requiring dismissal for prior action pending, the court created an "all-or-nothing" situation in which state courts will not be able to consider cases significant to the laws of this state, and in which federal courts sitting in North Carolina will not be able to retain jurisdiction over cases properly brought before them.

First, the *Eways* rule eviscerates the basic abstention doctrine set forth in *Pullman*,[117] *Burford*,[118] and *Thibodaux*.[119] The Supreme Court created abstention doctrine primarily out of respect for the states' own interests;[120] an opinion such as *Eways* is, in effect, a reply of "No, thank you!" to the Supreme Court's solicitude. The day undoubtedly will come when an issue of some importance to North Carolina law arises in the context of a federal proceeding; if the federal court then abstains (as it should) to allow North Carolina courts to pass on the question, the state court, because of the *Eways* rule, will be forced to dismiss the resulting state action. Thus, the *Eways* rule will backfire in a situation where it is in North Carolina's interest for state courts to apply state law to a particular dispute.

The North Carolina Supreme Court's 1989 decision in *Madison Cablevision, Inc. v. City of Morganton*[121] presents a startling example of a case in which the *Eways* rule will hamper North Carolina courts' ability to decide critical state-law issues. Until *Eways*, *Madison* was the most recent reported North Carolina case involving federal abstention. In *Madison*, the North Carolina

115. *See* Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941); Erie R.R. v. Tompkins, 304 U.S. 64 (1938); 28 U.S.C. § 1334(c) (1988).

116. *See, e.g.*, Fludd v. Tiller, 184 Ga. App. 93, 93, 360 S.E.2d 647, 647 (1987) ("[T]he pendency of a prior federal action generally is not a bar to a state action by the same plaintiff against the same defendant for the same cause of action.") (majority rule); Barringer v. Zgoda, 91 A.D.2d 811, 811, 458 N.Y.S.2d 42, 43 (1982) (affirming dismissal of state court action when prior action was pending between the same parties in federal court) (minority rule).

117. *Pullman*, 312 U.S. at 499-501; *see also supra* notes 40-43 and accompanying text (discussing *Pullman* abstention).

118. Burford v. Sun Oil Co., 319 U.S. 315, 327 (1943); *see supra* note 44.

119. Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 27-30 (1959); *see also supra* note 44 (discussing *Thibodaux* abstention).

120. *See, e.g.*, *Thibodaux*, 360 U.S. at 27-30 (abstention appropriate when case presented difficult questions of state law bearing on important policy issues).

121. 325 N.C. 634, 386 S.E.2d 200 (1989).

Supreme Court construed several clauses of the state constitution to determine whether it should permit a North Carolina town to own and operate a cable television system.[122] Madison Cablevision's complaint in the United States District Court for the Western District of North Carolina alleged violations of the North Carolina Constitution as well as of federal statutes and of the United States Constitution;[123] the federal court concluded that the claims based on the public purpose and antimonopoly provisions of the North Carolina Constitution should go before a state court.[124] The federal judge retained jurisdiction of the dispute but abstained from deciding the federal claims pending submission of the state claims to the state court.[125] The North Carolina Supreme Court resolved Madison Cablevision's claims by concluding, *inter alia*, that the town's actions did not violate the North Carolina Constitution.[126] The court decided *Madison* in December, 1989;[127] if a North Carolina court had confronted *Madison* a mere six months later—following the *Eways* decision—it would have had to dismiss Madison Cable's state court complaint because of the pending action in federal court. A rule requiring a North Carolina court to dismiss a state action when construction of the North Carolina Constitution is necessary is obviously flawed. The North Carolina Supreme Court, in trying to further "judicial economy,"[128] has hamstrung itself in its ability to serve as the final arbiter of the laws of its state.[129]

The *Eways* decision also undermines federal abstention policy by circum-

122. *Id.* at 636, 386 S.E.2d at 201; *see generally* Note, *Municipal Ownership of Cable Television Systems: Madison Cablevision, Inc. v. City of Morganton*, 68 N.C.L. REV. 1295 (1990) (analyzing the supreme court's decision to allow the town to operate the cable system as a "public service").

123. *Madison*, 325 N.C. 637, 386 S.E.2d at 201-02.

124. *Id.* at 641, 655, 382 S.E.2d at 204, 212; *see also* N.C. CONST. art. V, § 2(1) ("The power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away."); *id.* art. I, § 34 ("[M]onopolies are contrary to the genius of a free state and shall not be allowed."). *See generally* Note, *supra* note 122, at 1298 (discussing federal court's decision to abstain in *Madison*).

125. *Madison*, 325 N.C. at 638, 386 S.E.2d at 202.

126. *Id.* at 636, 386 S.E.2d at 201.

127. *See id.* at 634, 386 S.E.2d at 200.

128. *Eways*, 326 N.C. at 561, 391 S.E.2d at 187.

129. Yet another situation in which the *Eways* rule would hinder North Carolina courts' ability to apply state law arose in Ratcliff v. County of Buncombe, 759 F.2d 1183 (4th Cir. 1985). In *Ratcliff*, the United States Court of Appeals for the Fourth Circuit held that *Pullman* abstention was applicable to a dispute involving the meaning of a North Carolina statute. *Id.* at 1186-87. Accordingly, the federal-court plaintiff filed an action in state court seeking construction of the statute, *see* Ratcliff v. County of Buncombe, 81 N.C. App. 153, 154, 343 S.E.2d 601, 602, *appeal dismissed*, 318 N.C. 417, 349 S.E.2d 599 (1986), while the first suit remained pending in federal court. *Ratcliff*, 759 F.2d at 1184. The North Carolina Court of Appeals affirmed the state trial court's dismissal of plaintiff's complaint on the ground that plaintiff, having claimed benefits under the statute, could not then question its constitutionality. *Ratcliff*, 81 N.C. App. at 155, 343 S.E.2d at 602-03. Under the rigid procedural rule of *Eways*, however, the state court would not have been able to apply this principle of North Carolina law to reach its conclusion, but would have been required to dismiss the state-court suit on the ground of prior action pending. The federal court in *Ratcliff* abstained under the *Pullman* doctrine, see Ratcliff, 759 F.2d at 1186-87, whereas the federal court in *Eways* abstained pursuant to federal statutory authority, see *Eways*, 326 N.C. at 556, 391 S.E.2d at 185; *see also* Railroad Comm'n v. Pullman, 312 U.S. 496, 500 (1941) (discussing the importance of avoiding "needless friction with state policies"); 28 U.S.C. § 1334(c) (1988) (authorizing abstention). The procedural presentation to a state court resulting from either of these types of abstention is identical from the standpoint of the doctrine of prior action pending.

scribing the abstention decisions of federal courts sitting in North Carolina. Faced with the *Eways* rule, federal courts sitting in North Carolina will have no choice but to dismiss cases before them if they wish to assure that litigants' state court claims will receive a state court hearing.[130] As in *Harris County Commissioners Court v. Moore*,[131] federal courts in North Carolina will face "obstacles to state-court jurisdiction" calling for dismissal by the federal court, rather than abstention with a retention of jurisdiction.[132] *Eways*' rule of abatement is a total obstacle because under *Eways*, whenever a prior action is pending in federal court, even following an abstention, North Carolina courts must dismiss the action. Indeed, because the supreme court announced the rule requiring dismissal in the context of an abstention, state courts may conclude in the future that the requirement of dismissal is particularly applicable when a federal court has abstained.[133] The *Eways* rule thus presents a direct challenge to federal abstention doctrine.

Following *Eways*, a federal court sitting in North Carolina may assure state-court determination of complex state-law issues in only one manner: by dismissing the federal suit. The United States Supreme Court, however, has termed retention of jurisdiction following abstention the "proper course."[134] Federal-court dismissal may defeat a litigant's legitimate invocation of federal jurisdiction.[135] Total dismissal of the federal suit may result in injustice; for example, parties returning to federal court at the conclusion of state court proceedings may be barred by the statute of limitations[136] or find certain relief unavailable to them.[137] In addition, in a bankruptcy case, the federal court may not close the case until the estate has been "fully administered."[138] Thus, a United States Bankruptcy Court sitting in North Carolina wishing to ensure state-court determination of state-law issues will find itself impaled upon the horns of a dilemma: it cannot dismiss the bankruptcy case prematurely, nor can it abstain while retaining jurisdiction because the state court, under the *Eways* rule, will dismiss the resulting state-court action. If a federal court concludes that it cannot dismiss the action, it will retain all claims and, in clear contradic-

130. *See generally* C. WRIGHT, *supra* note 35, § 52, at 17 (describing federal court's dismissal of cases in which retention of jurisdiction would interfere with obtaining a state court decision).

131. 420 U.S. 77 (1975). For a discussion of *Harris*, see *supra* notes 48-53 and accompanying text.

132. *Harris*, 420 U.S. at 88.

133. In other words, because of its context, the *Eways* rule carries a stronger mandate—rather than seeming to require dismissal *even when* a federal court has abstained, *Eways* seems to require dismissal *particularly when* a federal court has abstained.

134. American Trial Lawyers' Ass'n v. New Jersey Supreme Court, 409 U.S. 467, 469 (1973).

135. *See generally* Mullenix, *supra* note 37, at 117 (describing how abstention maneuvers may work to "bar an opponent from a legitimately invoked federal forum").

136. *E.g.*, Houston v. Trans Union Credit Information Co., 154 A.D.2d 312, 313, 546 N.Y.S.2d 600, 601 (1989) ("[A]ny State claims which are still actionable at the conclusion of the Federal matter may be vulnerable to Statute of Limitations challenges.").

137. *See, e.g.*, Lister v. Lucey, 575 F.2d 1325, 1332 (7th Cir.) (federal court dismissed action returned to it from state court, as plaintiffs were bound by procedural error in state law), *cert. denied*, 439 U.S. 865 (1978). For a party wishing to return to federal court following the conclusion of state proceedings, dismissal of the first federal suit also would produce delay, as well as the additional filing fees and legal costs needed for a second, separate federal suit.

138. 11 U.S.C. § 350(a) (1988).

tion of the Supreme Court's expressed policy, determine difficult, unsettled questions of state law.[139] *Eways'* "all-or-nothing" rule will prove troublesome as long as federal abstention doctrine remains the law of the land; the *Eways* rule will force federal district courts in North Carolina to disregard the Supreme Court's clearly-expressed policy.

The *Eways* court's failure to recognize the importance of abstention doctrine and its underlying federalist principles renders the rule it announced fundamentally flawed. A rule requiring dismissal of a state court action when a prior action is pending in federal court, announced in the context of a federal court abstention, has no vitality. *Erie*'s assurance that a federal court will apply the law of the state in which it sits provides the necessary foundation for the minority rule,[140] but the North Carolina Supreme Court should not have used *Eways* as its vehicle for adopting the minority rule. If North Carolina needs a rule requiring dismissal, the court should readopt it in an appropriate context: for example, in a case in which the federal judge has not abstained. The court also should state specifically that the rule is inapplicable in the context of an abstention, and should make clear the policy reasons underlying such a rule.[141] In their "ordinary administration of civil and criminal justice," the courts of North Carolina, like those of all other states, are doing nothing less than mixing the "great cement of society."[142] State courts, therefore, must take care what rules they announce, lest these rules threaten basic federalist principles.

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139. *See* Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25, 27 (1959); *see also* Zbaraz v. Quern, 572 F.2d 582, 587 (7th Cir. 1978) (federal court reversed abstention order because federal-court plaintiffs might not have been able to raise same claims in same manner in state court), *cert. denied*, 448 U.S. 907 (1980).

140. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938) (federal courts sitting in diversity are to apply the law of the state in which they sit); *see also supra* notes 91-93 and accompanying text (discussing the *Erie* rule's relevance to a state court's decision whether to dismiss an action when a prior action is pending in federal court within the same state).

141. Such policy goals might include that of "reliev[ing] litigants of the burden of defending two separate actions." F. & F. Laboratories, Inc., v. Chocolate Spraying Co., 6 Ill. App. 2d 299, 302, 127 N.E.2d 682, 683 (1955). This goal clearly is unimportant in *Eways*, as the federal-court defendant initiated the state-court action pursuant to the district court's abstention order.

142. THE FEDERALIST No. 17, at 120 (A. Hamilton) (C. Rossiter ed. 1961).