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NOTES AND COMMENTS

JURISDICTION UNDER THE BANKRUPTCY AMENDMENTS OF 1984: SUMMING UP THE FACTORS

I. INTRODUCTION

Thirteen years after Congress first addressed the reformation of United States bankruptcy laws, uncertainty still exists over the scope of the jurisdiction of the bankruptcy courts.¹ The apparent need to expand that jurisdiction was a major impetus leading to the Bankruptcy Reform Act of 1978.² However, the entire bankruptcy system began to unravel in 1982, when the Supreme Court ruled in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* that the Bankruptcy Reform Act of 1978 unconstitutionally conferred Article III judicial powers upon bankruptcy judges without giving them the Article III-mandated protections of life tenure and a guaranteed salary.³ The bankruptcy courts were in legal limbo while Congress argued over whether to remove the Article III judicial power from the bankruptcy judges or to grant them the life tenure and protection from salary diminution required by Article III.⁴

1. See, e.g., 130 *Cong. Rec.* H7490 (daily ed. June 29, 1984) (statement of Rep. Edwards expressing doubt about the constitutionality of jurisdictional powers granted to bankruptcy judges under H.R. 5174, Bankruptcy Amendments of 1984); see *infra* notes 4, 34, and accompanying text for a history of congressional debate over bankruptcy reform.

2. See generally *Report of the Commission on the Bankruptcy Laws of the United States*, H.R. Doc. No. 137, Pt. 1, 93d Cong., 1st Sess. 6, 85 (1973); see also *infra* note 35.

3. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), discussed in further detail, *infra*. The Constitution, in Article III § 1, states: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The Clause further stipulates: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1. Thus, if Congress creates an inferior court and vests in it the "judicial power of the United States," then the judges of that court must have life tenure during good behavior and protection from salary diminution as guarantees of the court's independence from the other branches of government.

4. See generally H.R. REP. NO. 9, 98th Cong., 1st Sess. 2 (1983); S. REP. NO. 55, 98th Cong., 1st Sess. 7 (1983); see also R. DEMASCIO, WM. NORTON & R. LIEB, *FOURTEEN YEARS OR LIFE: THE BANKRUPTCY COURT DILEMMA* 22 (1983). The House, as it had before the 1978 Act, pro-

After two years of debate, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984, which did not give Article III status to bankruptcy judges, but rather attempted to make the bankruptcy judges constitutionally valid adjuncts of the Article III district courts.⁵

When Congress drafted the 1984 Amendments it had to identify, in accordance with *Marathon*, which rights the Constitution requires to be adjudicated in an Article III forum. *Marathon* established guidelines for two categories of rights. On one hand, the Supreme Court suggested that Congress had some latitude in establishing tribunals other than Article III courts to adjudicate rights which Congress had created.⁶ Because the Constitution gives Congress the right to establish "uniform laws on the subject of Bankruptcies,"⁷ some bankruptcy proceedings obviously involve only congressionally created rights and do not require a full Article III forum. On the other hand, the Supreme Court declared that Article III tribunals must always retain the essential attributes of judicial power if the adjudication involved a right not created by Congress.⁸ Thus, when bankruptcy proceedings only involve rights created by the Constitution, by state law, or even by common law, jurisdiction must be placed in an Article III court.

Marathon, however, does not address the requirements for a right that does not fit neatly into either of the categories: the congressionally created rights or non-congressionally created rights. What is required if the proceeding before the court involves both basic bankruptcy rights and rights created by the state, Constitution, or common law? The 1984 Amendments establish a new bankruptcy court system which stands as Congress' answer to this constitutional question.

The bankruptcy system under the 1984 Amendments has several important new jurisdictional features:

- a. Bankruptcy judges are appointed by the courts of appeals to fourteen year terms and each bankruptcy judge constitutes a unit of the

posed to extend Article III safeguards to bankruptcy judges while allowing them to retain broad jurisdiction. The Senate voiced strong opposition to life-tenured bankruptcy judges, maintaining that the unconstitutionally broad grant of jurisdiction could be reduced without disrupting the day-to-day administration of the bankruptcy courts.

5. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified in scattered sections of 11 U.S.C. and 28 U.S.C. (1984)) [hereinafter "1984 Amendments"].

6. See *Marathon*, 458 U.S. at 80 & n.32.

7. U. S. CONST. art. I, § 8, cl. 4.

8. *Marathon*, 458 U.S. at 81.

district court.⁹

b. The district courts have original and exclusive jurisdiction over all cases and proceedings arising under title 11.¹⁰

c. The district courts have discretionary power to refer cases and proceedings within the bankruptcy jurisdiction of the district courts to the bankruptcy judges.¹¹

d. In cases and proceedings referred to them, bankruptcy judges must distinguish between core and non-core proceedings. In core proceedings, bankruptcy judges may enter dispositive orders and judgments, but in non-core proceedings bankruptcy judges may only submit proposed findings of fact and conclusions of law to the district court.¹²

e. District courts may withdraw cases or proceedings from the bankruptcy judge at any time, for cause.¹³

The history of bankruptcy jurisdiction builds a foundation for the Supreme Court's decision in *Marathon*. The constitutionality of the Bankruptcy Amendments and Federal Judgeship Act of 1984 depends upon the analysis of the plurality and concurring opinions in *Marathon*. As each of the jurisdictional provisions of the 1984 Amendments is explained, specific potential constitutional defects are presented. Finally, a rationale is suggested which supports the constitutional validity of the 1984 Amendments. Lower court opinions are especially pertinent to the development of this rationale.

II. A BRIEF HISTORY OF BANKRUPTCY JURISDICTION

A. Legislative Review

The United States Constitution gives Congress the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States."¹⁴ Pursuant to this authority, Congress enacted three short-lived federal bankruptcy laws before 1898 — all in direct response to economic depression.¹⁵ In the first law, the Bankruptcy Act of 1800,¹⁶ though there was no specific grant of jurisdiction, the federal district courts were authorized to appoint commissioners to assist in the adminis-

9. 28 U.S.C. §§ 151, 152 (Supp. II 1984).

10. *Id.* § 1334.

11. *Id.* § 157(a).

12. *Id.* § 157(b)(1), (c)(1).

13. *Id.* § 157(d).

14. U. S. CONST. art. I, § 8, cl. 4.

15. S. REP. NO. 55, *supra* note 4 at 5.

16. Bankruptcy Act of 1800, ch. 19, 2 Stat. 19 (1800). The 1800 law provided only for involuntary bankruptcy, was applicable only to traders, prescribed limited exemptions for the debtor, and allowed a discharge of debts for honest debtors on consent of two-thirds of the creditors.

trative functions of the bankruptcy proceedings.¹⁷ This Act was repealed by Congress in 1803.¹⁸

The second law, the Bankruptcy Act of 1841, continued the office of the commissioners, but added a jurisdictional provision. It gave the federal district courts exclusive jurisdiction over matters and proceedings in bankruptcy. In addition, it gave district courts original jurisdiction concurrent with state forums over "cases and controversies" or "suits at law and in equity" between the assignee and adverse third parties.¹⁹ Thus, at an early stage, a distinction was made between proceedings on one hand, and cases or controversies on the other. Although the Act of 1841 was repealed by Congress in 1843,²⁰ the words—proceedings and cases and controversies—have become terms of art.²¹

During the depression following the civil war, Congress enacted the third law, the Bankruptcy Act of 1867.²² This act changed the title of the commissioners to registers but retained their administrative function.²³ A provision of the 1867 Act conferred all bankruptcy jurisdiction on the federal district courts.²⁴ This Act was repealed in 1878.²⁵

Twenty years later, the Bankruptcy Act of 1898 was enacted.²⁶ This

17. *Id.* §§ 2-3, 2 Stat. 21-22 (1800). A commissioner, upon due examination, declared a party bankrupt. Thereafter the commissioner had several powers including the power to cause the bankrupt to be arrested, the power to take possession of the bankrupt's property, books, and papers, the power to admit proof of debts by the creditors, the power to assign the bankrupt's property, the power to summon witnesses regarding concealed property, the power to void fraudulent conveyances, the power to order the proportional distribution of the assets of the estate to the creditors, and the power to certify a discharge to the district judge. *Id.* §§ 4-16, 29-30, 36, 2 Stat. 22-26, 29-30, 31 (1800).

18. Act of Dec. 19, 1803, ch. 6, 2 Stat. 248 (1803).

19. Bankruptcy Act of 1841, ch. 9, § 8, 5 Stat. 440, 446 (1841). The 1841 Act provided for voluntary bankruptcy for individuals, involuntary bankruptcy for traders, prescribed limited exemptions for the debtor, and allowed a discharge to honest debtors unless a majority of creditors filed written objections.

20. Act of March 3, 1843, ch. 82, 5 Stat. 614 (1843).

21. R. DEMASCIO, WM. NORTON & R. LIEB, *FOURTEEN YEARS OR LIFE: THE BANKRUPTCY COURT DILEMMA* 1, 1 (1983). If a bankruptcy petition is uncontested, there are no "questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Id.* (citing *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980)). Therefore, "proceedings" which arise in bankruptcy are matters which are uncontested by third parties, and which are largely administrative. "Cases" and "controversies," on the other hand, involve a "controversy between parties having adverse legal interests." *Id.* (citing *Babbitt v. United Farm Workers*, 442 U.S. 289, 298 (1979)).

22. Bankruptcy Act of 1867, ch. 176, 14 Stat. 517 (1867). The 1867 Act provided for voluntary and involuntary bankruptcy for traders and non-traders and included corporations for the first time.

23. *Id.* §§ 3-4, 14 Stat. 518-19. The register was authorized to take possession of the bankrupt's property, take proof of debts, and order distribution of the estate, but he could not adjudicate any matter in which an issue of fact or of law was raised and contested by any party.

24. *Id.* §§ 1-2, 14 Stat. 517-518.

25. Act of June 7, 1878, ch. 160, 20 Stat. 99 (1878).

26. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (1898). The 1898 Act provided liquidation

was the first bankruptcy statute which was not enacted as a response to a depression, and it served as the law of bankruptcy for over 40 years. The Act and its subsequent amendments represented a major change in the concept of bankruptcy jurisdiction. The Act created the position of bankruptcy referee. The referees were appointed for two year terms. They were not salaried officers of the United States, but were paid on a commission basis.²⁷ Originally the referees performed mainly administrative functions.²⁸ A referee's jurisdiction was limited to: (1) matters relating to property over which he had direct control (summary jurisdiction); (2) matters referred to him as a special master by the district judge;²⁹ or (3) matters submitted by consent of the parties.³⁰ While retaining the exclusive jurisdiction of the federal district courts over bankruptcy proceedings, the 1898 Act limited the jurisdiction of the district courts over controversies. A federal judge would have jurisdiction only if a bankruptcy controversy satisfied the traditional diversity or federal question criterion for federal jurisdiction.³¹

Initiating a major revision of the 1898 Act, the Chandler Act of 1938 began a trend toward making the referee into a judicial officer by placing many of his former administrative duties in the trustee and the clerk.³² In 1946, referees were made salaried officers of the district courts and their terms of office were extended to six years.³³ In 1973, the Supreme Court issued the Rules of Bankruptcy Procedure which removed more administrative duties from the referee and changed his title to bankruptcy judge.³⁴ In the meantime, Congress established the Commission on the Bankruptcy Laws of the United States to study, evaluate, and recommend changes in the bankruptcy laws.³⁵ In response to the

proceedings for all individuals and all corporations except municipalities, railroads, insurance companies, banks, and building and loan associations.

27. *See id.* §§ 33-43, 30 Stat. 555-57.

28. *Id.* § 39, 30 Stat. 555. A referee was empowered to declare dividends, examine, amend and record all schedules of property and lists of creditors, maintain all records of the bankruptcy in conjunction with the court clerk, and record any evidence regarding contested matters for the judge.

29. *Id.* § 38, 30 Stat. 555.

30. *Id.* § 18(g), 30 Stat. 551.

31. *Id.* § 23, 30 Stat. 552.

32. Chandler Act of 1938, ch. 575, 52 Stat. 840 (1938).

33. Act of June 28, 1946, ch. 512, §§ 2-7, 60 Stat. 323, 324-29 (1946).

34. *See generally* W. LAUBE & A. HERZOG, *BANKRUPTCY ACT AND RULES* (1975). The Rules also conferred finality on findings of the bankruptcy judges unless the findings were "clearly erroneous." *Id.* at A-585. The rules were promulgated pursuant to 28 U.S.C. § 2075 (1964).

35. In 1968, the Senate Judiciary Committee conducted hearings to discuss forming such a commission. *See Hearings on S.J. Res. 100 Before the Subcomm. on Bankruptcy of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. (1968). The Commission was then formed in 1970. Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468 (1970). Then, in 1973, the Commission

report of the Commission, Congress decided that an independent bankruptcy court, which could decide the entire range of bankruptcy issues in a single forum, would be advantageous.³⁶

The Bankruptcy Reform Act of 1978, signed into law by the President on November 6, 1978,³⁷ established bankruptcy courts and made them adjuncts of the district court in each judicial district.³⁸ Congress conferred original jurisdiction on the federal district courts over all cases and all civil proceedings arising under or related to Title 11 cases.³⁹ However, Congress also provided that the newly established adjunct bankruptcy courts were to exercise all such jurisdiction conferred on the district courts.⁴⁰ The bankruptcy judges were given fourteen-year terms⁴¹ and their salaries were provided for by the Federal Salaries Act.⁴²

B. Marathon

In *Marathon*, the Supreme Court declared the jurisdictional grant in section 241(a) of the 1978 Act unconstitutional.⁴³ Northern Pipeline Construction Co. (Northern) had filed a petition for reorganization

submitted its report to Congress. *Commission Report, supra* note 2. Congress began debating the issue of bankruptcy reform that year, but no conclusive action was taken until the enactment of the 1978 Act.

36. See S. REP. NO. 989, 95th Cong., 2d Sess. 15-18, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5787, 5802-04; H.R. REP. NO. 595, 95th Cong., 2d Sess. 7, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5963, 5968. Congress was particularly concerned with eliminating the "wasteful litigation" caused by the summary/plenary jurisdiction distinction. The jurisdiction of the bankruptcy judge was always considered in rem jurisdiction. See B. BERNSTEIN, BANKRUPTCY PRACTICE AFTER THE AMENDMENTS ACT OF 1984 19-20 (1984). Originally under the 1898 Act, bankruptcy referees had exclusive jurisdiction only of property in the actual possession of the debtor. *Id.* at 20. The jurisdiction was then extended to include property in the constructive possession of the debtor. *Id.* at 20. Later, the jurisdiction was further extended to include property in the possession of a third party in which the debtor had an interest, if the third party's claims were merely colorable. *Id.* at 20. Adverse claims regarding any other property related to the bankruptcy, such as accounts receivable of the debtor, were determined in the district or state courts. *Id.* at 21. This summary/plenary distinction caused many bankruptcy matters to be mired in jurisdictional disputes rather than being decided in a timely manner on the merits.

37. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended in scattered sections of 11 U.S.C. and 28 U.S.C.) [hereinafter cited as 1978 Act].

38. 28 U.S.C. § 151(a) (1978) (repealed by the 1984 Amendments, *supra* note 5).

39. *Id.* § 1471(a) (repealed by the 1984 Amendments, *supra* note 5).

40. *Id.* § 1471(c) (repealed by the 1984 Amendments, *supra* note 5).

41. *Id.* § 153(a) (repealed by the 1984 Amendments, *supra* note 5). The fourteen year term was an attempt to give the equivalent of lifetime tenure to bankruptcy judges, based on the fact that the average actual term of a lifetime tenured federal judge is fourteen years. See R. DEMASCIO, WM. NORTON & R. LIEB, *supra* note 20, at 23 n.25.

42. 28 U.S.C. § 154 (1978) (repealed by the 1984 Amendments, *supra* note 5). See also Federal Salaries Act of 1967, 2 U.S.C. §§ 351-361 (1982 ed. & Supp. III).

43. *Marathon*, 458 U.S. at 50.

under Chapter 11 in a bankruptcy court. Subsequently, Northern filed a suit in that same court against Marathon Pipe Line Co. (Marathon) for breach of contract and warranty and for misrepresentation, coercion, and duress.⁴⁴ Marathon responded by moving to dismiss on the ground that the 1978 Act unconstitutionally conferred Article III judicial power upon judges who lacked life tenure and protection against salary diminution. The bankruptcy court denied the motion to dismiss,⁴⁵ but on appeal, the district court overturned the decision and granted the motion.⁴⁶ A majority of the Supreme Court sustained the decision of the district court.⁴⁷ The decision, however, remains controversial. Of the nine Supreme Court Justices, four wrote separate opinions in the case.

Because there is no majority opinion in *Marathon*, the scope of the ruling is a matter of widespread disagreement. The crux of the disagreement lies in the applicability of the reasoning of the plurality opinion in light of the very limited concurring opinion. In the plurality opinion, written by Justice Brennan and joined by Justices Marshall, Blackmun, and Stevens, the justices address the broad issue of judicial independence. The Justices of the plurality concluded that the 1978 Act violates the Constitution's "clear institutional protections" of judicial autonomy by providing that the newly created, non-Article III bankruptcy courts must exercise all of the bankruptcy jurisdiction of the Article III district courts.⁴⁸ Justices Rehnquist and O'Connor, in their concurring opinion, limited their analysis to the facts of the case — a matter involving rights which arose entirely under state law.⁴⁹ Rehnquist and O'Connor nonetheless, concurred in the holding that the delegation of authority which allowed the bankruptcy courts to adjudicate matters consisting entirely of state rights was unconstitutional.⁵⁰ The dissent of Justice White was joined by the Chief Justice and Justice Powell. However, Chief Justice Burger wrote a separate dissenting opinion to emphasize the limits of the plurality and concurring opinions.⁵¹

44. *Id.* at 56.

45. 6 Bankr. 928 (1980).

46. 12 Bankr. 946 (D. Minn. 1981).

47. *Marathon*, 458 U.S. at 88, 92. Six Justices sustained the judgment of the district court, four in the plurality opinion and two in the concurring opinion.

48. *Id.* at 60, 87.

49. *Id.* at 89-90. The lawsuit arose entirely under state law because there was no basis for federal jurisdiction of the traditional common law claims other than the bankruptcy petition of the plaintiff. In addition, the defendant was not a party in the bankruptcy action. *Id.* at 90. The plurality defined a right arising entirely under state law as a state law right independent of and antecedent to the reorganization petition. *Id.* at 84.

50. *Id.* at 91.

51. *Id.* at 92.

Stressing the constitutional right to have claims decided by judges who are free from potential domination by other branches of government, the plurality opinion stated that Article III both defines the power and protects the independence of the judicial branch.⁵² Therefore, the plurality framed the issue as being "whether the Bankruptcy Act of 1978 violates the command of Article III that the judicial power of the United States must be vested in courts whose judges enjoy the protections and safeguards specified in that Article."⁵³

The appellants presented two arguments in an attempt to show that the bankruptcy courts had not been given the judicial power of the United States. The appellants contended first that because Congress is empowered to establish Article I legislative courts whose judges need not have life tenure, the analogous adjunct system did not encroach upon the Article III judicial power.⁵⁴ The plurality interpreted the precedents as allowing only three narrow Article I exceptions to the constitutional command that the judicial power of the United States must be vested in Article III courts. These exceptions are: (1) territorial courts; (2) courts martial; and (3) legislative courts and administrative agencies adjudicating public rights.⁵⁵ The plurality rejected a fourth possible exception sufficiently broad to sustain the 1978 Amendments. Based on *Palmore v. United States*,⁵⁶ the appellants asserted that Congress could establish Article I courts to adjudicate cases involving a "specialized area having particularized needs and warranting distinctive treatment."⁵⁷ Dismissing the applicability to bankruptcy cases, the plurality stated that *Palmore* related only to a geographic and not a subject matter area.⁵⁸

Secondly, the appellants asserted that because the bankruptcy courts were adjuncts of the Article III district courts and because appeals from the bankruptcy courts were to Article III courts, the bankruptcy cases

52. *Id.* at 58 (citing *United States v. Will*, 449 U.S. 200, 217-18 (1980)).

53. *Id.* at 62.

54. *Id.* at 63.

55. *Id.* at 63-72. Of these three exceptions, only the "public rights" doctrine was applicable to bankruptcy matters. Stating that public rights must at a minimum arise "between the government and others," the plurality recognized similarities between public rights such as the allocation of radio frequencies or the granting of licenses or certificates and the granting of a discharge in bankruptcy. *Id.* at 69, 71. However, the plurality distinguished this arguably public right of restructuring debtor-creditor relations from the adjudication of state-created private rights such as the breach of contract claim of Northern. *Id.* at 71.

56. See *Palmore v. United States*, 411 U.S. 389 (1973).

57. 458 U.S. at 72-76.

58. *Id.* at 76. *Palmore* concerned the courts of the District of Columbia and the unique powers of Congress over them. The "area" referred to therein was the geographic area of the District of Columbia or territories outside the States of the Federal Union. *Id.*

were, in essence, being adjudicated by Article III courts.⁵⁹ The plurality agreed that administrative agencies and magistrates could serve as adjuncts to Article III courts, but emphasized that, in every instance, the essential attributes of judicial power must be retained in the Article III courts.⁶⁰ Stating that Congress indeed had substantial discretion in establishing adjuncts of Article III courts to deal with matters of congressionally created substantive federal rights, the plurality stipulated that an adjunct dealing with rights which were not congressionally created federal rights must be subject to sufficient control by an Article III court.⁶¹ Specifically, the ultimate decision-making authority must remain in the Article III court.⁶²

The plurality concluded that the grant of jurisdiction in the 1978 Amendments did not reserve the ultimate decision-making authority in the district courts for three primary reasons. First, the bankruptcy courts exercised all of the jurisdiction granted to the district courts.⁶³ This involved jurisdiction over "all civil proceedings arising under title 11 or arising in or related to cases under title 11" including matters regarding non-congressionally created rights.⁶⁴ Second, the bankruptcy courts exercised the ultimate decision-making authority granted to the district courts regarding judgments, orders, writs, and the power to preside over jury trials.⁶⁵ Finally, on appeal, the bankruptcy court judgments were subject only to the extremely deferential clearly erroneous standard of review, and the final judgments of the bankruptcy courts were binding and enforceable even without an appeal to an Article III court.⁶⁶ The plurality examined these factors and determined that the grant of jurisdiction to the district courts was merely a facade.⁶⁷ The ultimate repository of the entire grant of bankruptcy jurisdiction to the district court was the bankruptcy court. In effect, the jurisdiction passed through the district courts without leaving any visible tracks.

59. *Id.* at 76, 77.

60. *Id.* at 77-81 (citing language from *Crowell v. Benson*, 285 U.S. 22, 51 (1932)).

61. *Id.* at 80, 81.

62. *Id.* at 81 (language quoted from *United States v. Raddatz*, 447 U.S. 667, 683 (1980)).

63. *Id.* at 85 (referring to 28 U.S.C. § 1471(c) (1976 & Supp. 1978)).

64. *Id.* at 85 (referring to 28 U.S.C. § 1471(b) (1976 & Supp. 1978)).

65. *Id.* at 85 (referring to 28 U.S.C. §§ 2201, 2256, 1480 and 11 U.S.C. § 105(a) (1976 & Supp. 1978)). This comment does not attempt to construe the 1984 Amendments regarding the power of a bankruptcy judge to hold jury trials. For an opinion stating that a bankruptcy judge may conduct jury trials, but jury trials would lack effectiveness in non-core proceedings, see *Morse Elec. Co. v. Logicon, Inc.* (*In re Morse Elec. Co.*), 47 Bankr. 234 (N.D. Ind. 1985).

66. 458 U.S. at 85-86, & nn.5, 38.

67. *Id.* at 86 & n.39.

The plurality refused to sever the unconstitutional grant of jurisdiction to the bankruptcy courts from the presumably constitutional grant of jurisdiction to the district court, stating that it would leave to Congress the task of determining "the proper manner of restructuring" the 1978 Act.⁶⁸ In order to allow Congress time to do so, the plurality stayed its decision until October 4, 1982.⁶⁹ The Supreme Court subsequently extended the stay until December 24, 1982,⁷⁰ but refused to extend it further.⁷¹

The concurring Justices rejected the broad language of the plurality opinion and limited their ruling to the precise claims of Northern against Marathon. These claims would have been tried in either a state or an Article III court in the absence of the bankruptcy proceeding.⁷² The concurring opinion did not accept the plurality's concept of the three narrow situations in which Congress could establish Article I courts, but focused instead on the fact that Marathon did not consent to the non-Article III forum.⁷³ The concurring Justices, therefore, invalidated only "so much of the Bankruptcy Act of 1978 as enables a Bankruptcy Court to entertain and decide Northern's lawsuit over Marathon's objection."⁷⁴ The fact that Marathon had a right to an appeal in an Article III court did not save the overly broad grant of authority to the bankruptcy court.⁷⁵ The concurring Justices, however, joined with the plurality because they agreed that the portion of the 1978 Act which they found invalid was not severable from the general grant of authority to the bankruptcy courts.⁷⁶

Chief Justice Burger, in his short dissenting opinion, posited that the

68. *Id.* at 87-88 & n.40. Noting that one of the express purposes of the 1978 Act was to ensure adjudication of all claims in a single forum, the Justices of the plurality indicated that Congress might want to change the entire system, including the grant of bankruptcy jurisdiction to the district courts. *Id.* at n.40. The implication is that Congress would be free to establish an Article III bankruptcy court.

69. *Id.* at 88.

70. 459 U.S. 813 (1982).

71. 459 U.S. 1094 (1982).

72. See *supra* note 49 and accompanying text.

73. *Id.* at 91. The concurring Justices implied without explanation that Marathon could consent to the non-Article III forum by stating, "Marathon *may* object to proceeding further with this lawsuit on the grounds that if it is to be resolved by an agency of the United States, it may be resolved only by an agency which exercises '[t]he judicial power of the United States' . . ." *Id.* at 89 (emphasis added). The clear implication of this statement is that the failure of Marathon to object to the forum would be interpreted as Marathon's consent to the non-Article III forum. Perhaps the implication is an indirect reference to a similar consent provision in the Federal Magistrates Act. See *infra* notes 216-20 and accompanying text.

74. *Id.* at 91.

75. *Id.*

76. *Id.* at 91-92.

Court's holding was limited to the proposition that "a 'traditional' state common-law action, not made subject to a federal rule of decision, and related only peripherally to an adjudication of bankruptcy under federal law must, absent the consent of the litigants, be heard by an 'Article III court.'" ⁷⁷ The Chief Justice maintained that the 1978 Act could satisfy the *Marathon* standard simply by adding a provision routing ancillary common law actions to the district courts.⁷⁸

C. *The Emergency Rule*

As the deadline set out in *Marathon* approached and Congress failed to reach a consensus, a controversy arose. If Congress did not enact new legislation before December 24, 1982, the vesting of bankruptcy jurisdiction in any court would be in question. After all, *Marathon* seemed to indicate that the entire grant of bankruptcy jurisdiction — to district courts and bankruptcy courts alike — had been struck down.⁷⁹ The Judicial Conference of the United States⁸⁰ adopted the view that only the delegation of jurisdiction from the district courts to the bankruptcy judges was invalidated by *Marathon*.⁸¹ Late in 1982, the Judicial Conference requested the Director of the Administrative Office of United States Courts to prepare a proposed emergency rule, to take effect if Congress failed to pass any bankruptcy legislation before the *Marathon* deadline.⁸²

The Emergency Rule was a model rule sent to the district courts,

77. *Id.* at 92 (Burger, C.J., dissenting). Chief Justice Burger did not find any of the jurisdictional provisions of the 1978 Act unconstitutional, but he wanted to clarify that the majority had only invalidated bankruptcy court jurisdiction over rights arising *entirely under state law*. See *supra* note 49 and accompanying text.

78. *Id.* This is, in essence, what the 1984 Amendments accomplish.

79. *Id.* at 87-88 & n.40 (Brennan, J., plurality) and at 92 (Rehnquist, J., concurring). The plurality and the concurrence both indicated that the only reason for holding the entire grant of all bankruptcy jurisdiction invalid (28 U.S.C. § 1471 (1976 & Supp. 1978)) was to provide Congress with a *tabula rasa* so it could restructure the bankruptcy jurisdiction in any of several constitutionally valid ways.

80. For a discussion of the powers and duties of the Judicial Conference, see 28 U.S.C. § 331 (1982). The Judicial Conference of the United States is an administrative body which at the time was made up of the chief judge and a district judge from each judicial circuit and presided over by the Chief Justice. *Id.* Thus, all its members were Article III judges. The Conference meets annually and during special sessions called by the Chief Justice to study and recommend changes and additions to the general court rules of practice and procedure. *Id.* The Conference submits administrative "suggestions and recommendations" to "promote uniformity of management procedures" to the various courts including the Supreme Court. *Id.*

81. Apparently, the position of the Judicial Conference was that only subsection (c) of § 1471 was invalidated, leaving subsections (a) and (b) intact. W. Phillips, *Bankruptcy Jurisdiction Under the 1984 Amendments* 6 (Nov. 8, 1985) (unpublished manuscript). In other words, the Judicial Conference presumed that the jurisdictional grant to the district courts was still in effect. See R. DEMASCIO, WM. NORTON & R. LIEB, *supra* note 4, at 19.

82. Phillips, *supra* note 81, at 5. This procedure took place in spite of the fact that the Confer-

and each locality had the option to ignore, amend, or adopt the rule.⁸³ The Emergency Rule gave the district courts power to refer jurisdiction to the bankruptcy courts, allowing bankruptcy judges the authority to adjudicate traditional matters of bankruptcy administration. The authority of a bankruptcy judge was limited, however, in *Marathon* type actions, which the Emergency Rule called "related proceedings."⁸⁴ In related proceedings, absent consent of the parties, a bankruptcy judge could only prepare proposed findings of fact and conclusions of law which were to be reviewed by the district judge.⁸⁵

The Emergency Rule was intended only as a stopgap mechanism. A sunset provision stated that the Rule would be in effect only until Congress acted or through March 31, 1984.⁸⁶ Though slightly changed in some localities, the Emergency Rule was applicable throughout the United States. When confronted with the issue, some lower courts held the Emergency Rule unconstitutional.⁸⁷ However, using *Marathon* as a guide, all of the courts of appeals which considered the constitutionality of the Emergency Rule held it to be valid.⁸⁸

ence had no authority for rulemaking in the bankruptcy arena and the Administrative Office had no authority to promulgate bankruptcy rules above the simple administrative strata. *Id.* at 6.

83. The text of the Emergency Rule is reprinted in 1 COLLIER ON BANKR. (MB) ¶ 3.01[1][b][vi] (15th ed. 1986). The Emergency Rule is also referred to as the Model Rule or the Local Rule.

84. *Id.* at ¶ 3.01[1][b][vi](d)(3)(A). The text reads:

Related proceedings are those civil proceedings that, in the absence of a petition in bankruptcy, could have been brought in a district court or a state court. Related proceedings include, but are not limited to, claims brought by the estate against parties who have not filed claims against the estate. Related proceedings do not include: contested and uncontested matters concerning the administration of the estate; allowance of and objection to claims against the estate; counterclaims by the estate in whatever amount against persons filing claims against the estate; orders in respect to obtaining credit; orders to turn over property of the estate; proceedings in respect to lifting of the automatic stay; proceedings to set aside preferences and fraudulent conveyances; proceedings to determine the dischargeability of particular debts; proceedings to object to the discharge; proceedings in respect to the confirmation of plans; orders approving the sale of property where not arising from proceedings resulting from claims brought by the estate against parties who have not filed claims against the estate; and similar matters. A proceeding is not a related proceeding merely because the outcome will be affected by state law.

Id.

85. *Id.* at ¶ 3.01[1][b][vi](d)(3)(B).

86. *Id.* at ¶ 3.01[1][b][vi](h). See Phillips, *supra* note 81, at 6.

87. See, e.g., *In re Wildman*, 10 BANKR. CT. DEC. (CRR) 668 (N.D. Ill. 1983); *In re Johnson County Gas Co.*, 10 BANKR. CT. DEC. (CRR) 885 (E.D. Ky. 1983); *Heller & Co. v. Matlock Trailer Corp.* (*In re Matlock Trailer Corp.*), 27 Bankr. 311 (M.D. Tenn. 1983).

88. See North Cent. Dev. Co. v. Landmark Capital Co. (*In re Landmark Capital Co.*), 742 F.2d 1166 (9th Cir.), *vacated*, 745 F.2d 1266 (1984); National Acceptance Co. v. Price (*In re Colorado Energy Supply, Inc.*), 728 F.2d 1283 (10th Cir. 1984); *Salomon v. Kaiser* (*In re Kaiser*), 722 F.2d 1574 (2d Cir. 1983); *Coastal Steel v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190 (3d Cir.), *cert. denied*, 464 U.S. 938 (1983); *White Motor Corp. v. Citibank*, 704 F.2d 254 (6th Cir. 1983); *First Nat'l. Bank v. Hansen* (*In re Hansen*), 702 F.2d 728 (8th Cir.), *cert. denied*, 463 U.S. 1208 (1983);

D. *The 1984 Amendments*

While the Emergency Rule was in effect, Congress continued to debate the proper way to restructure the bankruptcy system.⁸⁹ *Marathon* seemed to point to two possible but disparate courses: either the bankruptcy court could be converted to an Article III court, whose judges enjoyed life tenure and salary guarantees; or it could be made into a bifurcated system, in which the district courts retained the judicial power while the bankruptcy courts functioned without involving the judicial power of the United States. The Judicial Conference and the Senate preferred a bifurcated system which would preserve the district courts as the only "independent trial courts of general jurisdiction."⁹⁰ This latter view eventually prevailed in Congress, and the Bankruptcy Amendments of 1984 were enacted on July 10, 1984.⁹¹

Braniff Airways, Inc. v. Civil Aeronautics Board (In re Braniff Airways, Inc.), 700 F.2d 214 (5th Cir.), cert. denied, 461 U.S. 944 (1983).

89. See *supra*, note 4.

90. 1982 REPORT TO CONGRESS OF JUDICIAL CONFERENCE OF THE UNITED STATES ON NORTHERN PIPELINE CONSTR. CO. V. MARATHON PIPE LINE CO.: PROPOSALS FOR REMEDIAL CONGRESSIONAL ACTION, at 25. It is interesting to note that the 1984 Amendments draw heavily from both the Chief Justice's dissent limiting the scope of *Marathon* and the Emergency Rule promulgated by the Judicial Conference under the Chief Justice's leadership. See *Marathon*, 458 U.S. at 92; COLLIER, *supra* note 83 at ¶ 3.01[1][b][vi]. It has been suggested that the Chief Justice was primarily opposed to the establishment of Article III bankruptcy courts because of his concern over the dilution of the prestige of the district court. See R. DEMASCIO, WM. NORTON & R. LIEB, *supra* note 4, at 29-30, 34.

It has also been suggested that Congress was motivated by political interests. If the bankruptcy courts had been given Article III status, the next president would have appointed over 200 new life-tenured federal judges. See Vihon, *More on the "Bankruptcy Amendments and Federal Judgeship Act of 1984,"* 8 NORTON BANKR. LAW ADVISER, 1, 1-2 (1984).

91. See Taggart, *The New Bankruptcy Court System*, 59 BANKR. L. J. 231, n.33 (1985). The legislative history of the 1984 Amendments is summarized below:

April 27, 1983 Senate passes S. 1013 providing for an Article I court. 98th Cong., 1st Sess., 129 CONG. REC. S5364 (daily ed. April 27, 1983). See S. REP. NO. 55, *supra* note 4.

March 21, 1984 House Judiciary Committee brings H. R. S174 to the floor. Title I providing for an Article III court is deleted and the Kastenmeir-Kindness Article I substitute is passed. 130 CONG. REC. H1853-54 (daily ed. March 21, 1984).

May 21, 1984 Senate first takes up H. R. 5174 and substantial amendments are proposed by Senators Thurmond and Heflin. 130 CONG. REC. S6081, S6107 (daily ed. May 21, 1984).

June 19, 1984 Senate passes H. R. 5174 as amended. 130 CONG. REC. S7625 (daily ed. June 19, 1984). Bill as passed reprinted 130 CONG. REC. S8111 (daily ed. June 22, 1984).

June 29, 1984 House and Senate consider the Conference Report and pass H. R. 5174 as amended by the Conference. 130 CONG. REC. 7471 (daily ed. June 29, 1984).

July 10, 1984 President signs H. R. 5174 and it becomes Pub. L. No. 98-353, 98 Stat. 333 (1984).

By failing to act before the deadline of the last extended transition period provided for in the 1978 Act, Congress created a constitutional problem. The terms of office of the bankruptcy judges were held to expire on June 27, 1984, when the bankruptcy courts as construed under the 1978 Act went out of existence. *In re Thomas Carter Enter., Inc.*, 12 BANKR. CT. DEC. (CRR) 536, 537 (C.D. Cal. 1984).

In the 1984 Amendments, Congress retroactively continued those bankruptcy judges in office.

III. POTENTIAL DEFECTS IN THE 1984 AMENDMENTS

The constitutional question remaining under the current statutes is whether the 1984 Amendments remedy the jurisdictional problems raised in *Marathon*: has Congress merely constructed a more elaborate facade of district court jurisdiction, or do the 1984 Amendments actually replace form with substance? An understanding of the content of the new jurisdictional provisions is essential before an analysis can be made of their constitutionality. The grant of bankruptcy jurisdiction is contained in several key sections.

A. *Jurisdiction of the District Courts*

Under the new section 1334, the basic jurisdiction of all bankruptcy matters is vested in the district courts.⁹² This jurisdiction includes all cases under title 11, as well as all civil proceedings arising under title 11 or arising in or related to cases under title 11.⁹³ The term "cases" is used in its broadest sense, referring to the bankruptcy case which is commenced when a petition for relief under title 11 is filed, encompassing all the controversies as well as all matters of administration involved in liquidation or reorganization under title 11.⁹⁴ The term "proceedings" is also used in a broad sense, referring to "[a]nything that occurs within a case," including contested and uncontested matters.⁹⁵ The jurisdiction of cases under title 11 in the district court is both original and exclusive.⁹⁶

Bankruptcy Amendments and Federal Judgeship Act of 1984, § 121, Pub. L. No. 98-353, 98 Stat. 333 (codified in scattered sections of 11 U.S.C. and 28 U.S.C. (1984)). But William Foley, the director of the Administrative Office of U.S. Courts, took the position that such retroactive continuation was an appointment of judges by Congress which violated the Appointments Clause of the Constitution, and refused to approve payment to sitting bankruptcy judges. Memorandum from William Foley to all U.S. Court of Appeals Judges, U.S. District Court Judges, and former Bankruptcy Judges (July 11, 1984) (unpublished manuscript). The Administrative Office authorized the retention of the judges as consultants and the Judicial Conference took steps to permit the expedited appointment of the sitting bankruptcy judges as magistrates. Taggart, *supra*, at 237. Some courts appointed consultants and others started the process of appointing magistrates. *Id.* After nine days of confusion and consternation on the part of district and bankruptcy judges, Foley rescinded his decision not to pay the bankruptcy judges, apparently upon directions from the Judicial Conference. Memorandum of William Foley to All Judges of the United States (July 20, 1984) (unpublished manuscript); Richard Bohannon, Bankruptcy Amendments and Federal Judgeship Act of 1984, 5 (September 1984) (unpublished manuscript). At least one case has been commenced to seek a determination of this issue. *Lundin v. Foley*, No. 84-2237 (D.D.C. filed July 20, 1985). However, the bankruptcy judges now sitting have been appointed by the circuit courts of appeals. *See* 28 U.S.C. § 152 (1984).

92. 28 U.S.C. § 1334(a) (1984).

93. *Id.* at § 1334(b), (d).

94. COLLIER, *supra* note 83, at ¶ 3.01[1][c][i].

95. *Id.* at ¶ 3.01[1][c][iii].

96. 28 U.S.C. § 1334(a) (1984).

The district court jurisdiction of civil proceedings, however, is original but not exclusive.⁹⁷

The language of section 1334 divides civil proceedings into three categories: (1) those arising under title 11; (2) those related to cases under title 11; and (3) those arising in cases under title 11.⁹⁸ Proceedings arising under title 11 include any claims made under a provision of title 11. Examples include claims of exemptions under title 11, claims of discrimination under title 11, or even a dispute between the debtor and the trustee which will be settled by interpreting a provision of title 11.⁹⁹ In short, proceedings arising under title 11 are any proceedings involving rights created by the Bankruptcy Code.¹⁰⁰

The second category is the category of proceedings related to cases under title 11. These so-called related proceedings involve suits between the debtor or the estate and an adverse third party which will affect the administration of the title 11 case.¹⁰¹ The breach of contract claim of Northern against Marathon is one example of a related proceeding. It is a suit by the debtor against someone not otherwise involved in the bankruptcy proceeding. As one court put it, related proceedings are "those civil proceedings, that, in the absence of bankruptcy, could have been brought in a district or state court."¹⁰²

The third category, proceedings arising in title 11 cases, seems to include every other bankruptcy matter.¹⁰³ If a bankruptcy proceeding

97. *Id.* § 1334(b). District court jurisdiction of civil proceedings is now concurrent with state forums. This marks a distinction from the former section 1334 which gave district courts original jurisdiction exclusive of state courts over all "matters and proceedings in bankruptcy." See 62 Stat. 931 (1948). The non-exclusive jurisdiction sets the stage for the abstention provisions found in subsection (C) of section 1334. See *infra* notes 108-11 and accompanying text.

98. 28 U.S.C. § 1334(c)(1) (1984).

99. See H.R. REP. NO. 595, *supra* note 36, at 445.

100. COLLIER, *supra* note 83, at ¶ 3.01[1][c][iii]. Two tests are proposed for determining whether a proceeding arises "under" title 11. First, a case arises under title 11 if the "title or right set up by the party may be defeated by one construction [of title 11] or sustained by the opposite construction". See 1 MOORE'S FEDERAL PRACTICE 0.62[2.-2](2d ed. 1984). A second test is that "[a] suit arises under a law that creates the cause of action." See *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916).

101. *Id.* at ¶ 3.01[1][c][iv]. Examples of cases involving suits between third parties are: *Helena Chemical Co. v. Manley*, 12 COLLIER BANKR. CAS. 2d (MB) 721 (N.D. Miss. 1985) (suits by creditors against guarantors); *John P. Maguire & Co. v. David Rosenthal Assoc., Inc.*, 15 Bankr. 172 (N.D. Ga. 1981) (a suit by a factor to recover upon an account receivable); and *Mazur v. United States Air Duct Corp.*, 8 Bankr. 848 (N.D.N.Y. 1981) (a suit by the director of an employees' benefit fund to hold a corporate debtor's officers liable for corporate obligations). These suits were all considered related proceedings under either the 1984 Amendments or the Emergency Rule.

102. See *National Acceptance Co. v. Price (In re Colo. Energy Supply, Inc.)*, 728 F.2d 1283, 1286 (10th Cir. 1984).

103. COLLIER, *supra* note 83, at ¶ 3.01[1][c][v].

neither arises under title 11, nor is related to a case under title 11, then it must arise in a title 11 case.¹⁰⁴ Otherwise, the proceeding would not affect the bankruptcy estate, and it would be outside the realm of title 11 jurisdiction.¹⁰⁵

It is important to note that the district court has original jurisdiction over all three categories of proceedings.¹⁰⁶ The distinctions between types of proceedings become important, however, because only related proceedings based on state law are subject to mandatory abstention by the district court.¹⁰⁷

Subsection (c) of section 1334 allows a district court to abstain from considering matters of state law and provides certain circumstances in which it must abstain.¹⁰⁸ A district court may abstain from hearing a particular proceeding over which it has jurisdiction "in the interest of justice, or in the interest of comity with State courts or respect for State law."¹⁰⁹ The district courts are required to abstain from hearing any related proceeding "based upon a State law claim or State law cause of action" if federal court jurisdiction would not have otherwise extended to the proceeding and "if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction."¹¹⁰ A decision to abstain under the mandatory abstention clause "is not reviewable by appeal or otherwise."¹¹¹

In subsection (d) of section 1334,¹¹² the district courts are also given exclusive jurisdiction over all property of the debtor. This exclusive jurisdiction applies to all property of the debtor as of the date the debtor files under title 11 and to all property which the estate may acquire after the filing of the petition.¹¹³ It also applies to all cases under title 11, whether

104. *Id.*

105. *Id.* at § 3.01[1][c][vi].

106. 28 U.S.C. § 1334(a) (1984).

107. *Id.* Also see *infra* notes 110-11 and accompanying text. The distinctions are also important in discerning the difference between core and non-core proceedings. See *infra* notes 132-40, 185-99 and accompanying text.

108. *Id.* § 1334(c).

109. *Id.* § 1334(c)(1).

110. *Id.* § 1334(c)(2). This provision was inserted to ensure that Article III district judges do not assert jurisdiction of purely state-created causes unless diversity jurisdiction exists. See *Analysis of Proposed Amendments to the Bankruptcy Act of 1978*, 1984 U.S. CODE CONG. & AD. NEWS 601, 603.

111. 28 U.S.C. § 1334(c)(2) (1984).

112. *Id.* § 1334(d).

113. *Id.* This is significant because it is the first *statutory* reference to including after-acquired property under bankruptcy jurisdiction. Compare 28 U.S.C. § 1471(e) (1978) (repealed by the 1984 Amendments, *supra* note 5).

they are petitions for liquidation or for reorganization.¹¹⁴

The jurisdiction granted to the district courts in section 1334 closely follows the jurisdiction granted to the district courts in former section 1471, with one major distinction. Unlike former section 1471, the new provision omits any reference to the bankruptcy courts exercising the jurisdiction of the district courts.¹¹⁵ In fact, the section omits any reference to the bankruptcy courts at all. Standing alone, section 1334 clearly vests all bankruptcy jurisdiction in Article III courts, pursuant to the mandate of *Marathon*. However, section 1334 must be read in conjunction with other sections of the 1984 Amendments in order to assess the constitutionality of the jurisdiction now exercised by the bankruptcy judges.¹¹⁶

B. *Establishment and Authority of Bankruptcy Courts*

1. Establishment

The 1984 Amendments provide in section 151 that the bankruptcy judges are to be known as the bankruptcy court.¹¹⁷ The bankruptcy court is a unit of the district court and the bankruptcy judge is a judicial officer of the district court.¹¹⁸ Section 152 provides that the bankruptcy judge is appointed by the United States circuit courts of appeals for a fourteen year term.¹¹⁹ Section 153 provides that the salary of a bankruptcy judge will be determined by the Federal Salary Act of 1967.¹²⁰

District courts have the discretionary power under section 157 to refer any or all bankruptcy cases or proceedings to the bankruptcy courts, but the powers of the bankruptcy judges are limited.¹²¹ If a reference has been made by a district court, a bankruptcy judge may hear and make final determination in all cases under title 11, in all core proceedings arising under title 11, and in all matters "arising in a case under title

114. COLLIER, *supra* note 83, at ¶ 3.01[1][c][vii].

115. Compare 28 U.S.C. § 1334 (1984) with 28 U.S.C. § 1471 (1978) (repealed by 1984 Amendments, *supra* note 5).

116. See, e.g., 28 U.S.C. §§ 151-53, 157, 158 (1984) (discussed *infra*). As each of the pertinent sections are explained, relevant Constitutional problems are examined. However, these problems are rebutted in the final section of the comment.

117. *Id.* § 151. Members of Congress seemed to confuse the concept of an Article I court with the concept of an adjunct to an Article III court. See *infra* note 170. However, the language of section 151 does not establish the bankruptcy court as a court at all. "Court" is merely the term by which the bankruptcy judge (a judicial officer of the district court) is to be known. *Id.*

118. *Id.*

119. *Id.* § 152(a)(1).

120. *Id.* § 153.

121. *Id.* § 157(a). It is interesting to note this section is titled "Procedures" rather than "Bankruptcy Court Jurisdiction." Also see *infra* notes 179-82 and accompanying text.

11," subject only to appeal.¹²² In any non-core proceeding, however, the bankruptcy judge may only submit proposed findings of fact and conclusions of law to the district judge who must enter any final order or judgment.¹²³ The section further provides that the bankruptcy judge is the one who must determine whether the matter before him is a core or a non-core proceeding; the involvement of state law is not, by itself, determinative.¹²⁴ There is one exception to a bankruptcy judge's limited authority in non-core proceedings. If all the parties consent, a bankruptcy judge can make final determinations even in non-core proceedings.¹²⁵

2. Problems with Referral

These provisions raise a number of constitutional questions. It is obvious from the salary and tenure provisions that a bankruptcy judge, though a unit of the district court, is not an Article III judge because the judge has neither the life tenure nor salary guarantees required by the Constitution.¹²⁶ Yet, the district courts have the option to refer all bankruptcy cases and proceedings to the bankruptcy judge. The major difference between this discretionary referral and the automatic referral created by Congress in the invalidated section 1471(c) is merely technical. Instead of Congress granting blanket bankruptcy jurisdiction to non-Article III courts, the judicial branch is granting some authority to non-Article III judges to hear bankruptcy cases and proceedings. However, all district courts have issued a general reference of all title 11 cases and proceedings to the bankruptcy judges.¹²⁷ The effect is that bankruptcy matters still pass *through* the district courts, although they now leave tracks of the express written consent of the district courts.

Beyond the discretion to refer bankruptcy matters to the bankruptcy judges, two other safeguards were given to the district courts to protect the judicial power of the district judges. A bankruptcy judge cannot make final determination in non-core proceedings without consent of the parties,¹²⁸ and the district judge may withdraw, in whole or in part, any

122. *Id.* § 157(b)(1).

123. *Id.* § 157(c)(1). This language mirrors the authority of a United States Magistrate under the Federal Magistrates Act of 1979, 28 U.S.C. §§ 631-39 (Supp. 1986). See *infra* notes 216-21, 230-31, and accompanying text.

124. 28 U.S.C. § 157(b)(3) (1984).

125. *Id.* § 157(c)(2).

126. U.S. CONST. art. III, § 1.

127. COLLIER, *supra* note 83, at ¶ 3.01[2][a]. The general reference of all bankruptcy cases and proceedings is made automatic by rule, because the ability to withdraw the reference is available, and because referral is revocable.

128. 28 U.S.C. § 157(c) (Supp. III 1985).

referred matter from the bankruptcy judge.¹²⁹ Each of these safeguards, however, raises its own set of problems.

3. Problems with the Core and Non-Core Distinction

Because a bankruptcy judge cannot make final determination in non-core proceedings, at a minimum the standard of the concurring opinion in *Marathon* seems to be satisfied.¹³⁰ The ultimate decision-making authority for *Marathon* type cases is placed only in the Article III district courts. However, an initial conceptual problem arises with a bankruptcy judge's determination of the status of a proceeding as either core or non-core. The potential constitutional infirmity is that a non-Article III judge determines which proceedings constitutionally require an Article III forum. As long as there is any room for interpretation in the distinction between core and non-core proceedings, the bankruptcy judge will be making a decision of constitutional import. It is possible that the Supreme Court will interpret such decision-making as part of the essential attributes of judicial power that must be reserved in an Article III judge.¹³¹

Beyond the initial conceptual problem, perhaps the most important constitutional question raised is the distinction between core and non-core proceedings. It is clear that if the 1984 Amendments are to withstand constitutional scrutiny under the *Marathon* standard, the distinction between core and non-core proceedings must allow the bankruptcy judges to determine only traditionally administrative matters and adjudicate only matters involving rights which Congress has created. In all other matters — at the very least, in matters similar to the breach of contract claim in *Marathon* — the district courts must retain the judicial power. The implication is that all *Marathon* type cases must fall into the non-core proceedings category.

Section 157(b) draws the distinction between core and non-core pro-

129. *Id.* § 157(d).

130. 458 U.S. at 89. The concurring justices stated only that rights arising entirely under state law could not be heard by a non-Article III judge. *Id.* Because non-core proceedings presumably include all rights arising entirely under state law, and because a bankruptcy judge cannot make final determination in non-core proceedings, the mandate seems to be satisfied.

131. 458 U.S. at 77-81. The Supreme Court has not addressed this issue, however, based on the reasoning *supra*, it is conceivable that the Supreme Court would consider the act of classifying a proceeding as core or non-core a judicial rather than an administrative act. *Contra* *Interconnect Tel. Serv., Inc. v. Farren*, 59 Bankr. 397, 401, n.2 (S.D.N.Y. 1986) (the district judge held that the act of classifying a proceeding as core or non-core was in itself a core bankruptcy proceeding and therefore validly within the powers of a bankruptcy judge).

ceedings by giving a non-exclusive list of core proceedings.¹³² The language of section 157(b)(1) implies that core proceedings are those proceedings arising under title 11 and arising in a case under title 11; section 157(c)(1) indicates that non-core proceedings are related proceedings.¹³³ The *Marathon* suit, as an action between the debtor and an adverse third party, is a related proceeding. It should therefore be a non-core proceeding.

However, related proceedings, such as the *Marathon* cause of action, could be included in the laundry list of core proceedings.¹³⁴ In addition to the fact that the list is non-exclusive, the list contains at least two catch-all phrases. Subsection (A) lists matters concerning the administration of the estate as being core proceedings¹³⁵ and subsection (O) adds proceedings affecting the liquidation of the assets of the estate and proceedings affecting the adjustment of the debtor-creditor relationship.¹³⁶ A broad interpretation of these two clauses would include every conceivable bankruptcy matter, and would give the bankruptcy courts the pervasive jurisdiction granted in the invalidated section 1471(c). It can be argued that even the *Marathon* breach of contract claim was an asset of the estate, a chose in action, which had to be liquidated and which would therefore fall under subsection (O) as a core proceeding.¹³⁷

132. 28 U.S.C. § 157(b)(2) (Supp. III 1985). The text reads:

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

(A) matters concerning the administration of the estate; (B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interest for the purposes of confirming a plan under chapter 11 or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11; (C) counterclaims by the estate against persons filing claims against the estate; (D) orders in respect to obtaining credit; (E) orders to turn over property of the estate; (F) proceedings to determine, avoid, or recover preferences; (G) motions to terminate, annul or modify the automatic stay; (H) proceedings to determine, avoid, or recover fraudulent conveyances; (I) determinations as to the dischargeability of particular debts; (J) objections to discharges; (K) determinations of the validity, extent, or priority of liens; (L) confirmations of plans; (M) orders approving the use or lease of property, including the use of cash collateral; (N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and (O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

Id.

133. See Carlson, *Distinguishing Core From Non-Core Proceedings*, 1 NORTON BANKR. LAW ADVISER 1, 2 (1985).

134. King, *Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984*, 38 VAND. L. REV. 675, 687-89 (1985).

135. 28 U.S.C. § 157(b)(2)(A) (Supp. III 1985). See also *supra* note 132.

136. *Id.* § 157(b)(2)(O).

137. King, *supra* note 134, at 689.

A potential "*Marathon II*" case illustrates the possible overbreadth of the specific list of core proceedings. In the hypothetical *Marathon II*, assume the facts are the same as in the original case, except that *Marathon II* has filed a claim as a creditor in Northern's bankruptcy case. Subsection (C) of section 157(b)(2) lists a counterclaim by the estate against persons who have filed claims against the estate as a core proceeding.¹³⁸ The rights involved in a counterclaim are not limited by any language in the section. The breach of contract action of Northern would no longer be a non-core related proceeding, but would be a counterclaim falling under subsection (C) as a core proceeding. Thus, issues identical to those in *Marathon* would be heard and determined by the bankruptcy judge.¹³⁹ As long as the debtor is counterclaiming against a creditor of the estate, the *Marathon II* bankruptcy judge could make a final determination in a case involving rights which Congress did not create. This type of determination seems clearly inconsistent with the *Marathon* holding.¹⁴⁰

Even if a *Marathon* type case is determined to be non-core, the provisions for review of non-core findings and conclusions of the bankruptcy judge raise questions about the essential attributes of judicial power actually remaining with the district court. A bankruptcy judge has only the power to submit findings of fact and conclusions of law to the district courts regarding non-core proceedings.¹⁴¹ It has been suggested, however, that the district judge will be greatly tempted to "rubber stamp the findings and conclusions of the bankruptcy judge" leaving the true decision-making power in the bankruptcy judge.¹⁴² There is no definition in section 157 of the words "consider" and "review." It is presumably up to the district judge to determine how much time and effort must go into considering or reviewing the bankruptcy judge's proposed findings of fact and conclusions of law in any given proceeding.¹⁴³ The busy district court dockets and the requirement that the district courts must give pri-

138. 28 U.S.C. § 157(b)(2)(C) (Supp. III 1985).

139. King, *supra* note 134, at 690-91.

140. *Cf. Schor v. Commodity Futures Trading Comm'n.*, 740 F.2d 1262, 1268-69 (D.C. Cir.), *cert. denied*, 106 S. Ct. 853 (1986) (administrative law judge could not constitutionally adjudicate state-law based counterclaim).

141. 28 U.S.C. § 157(c)(1) (Supp. III 1985).

142. King, *supra* note 134, at 681.

143. *Id.* at 681. However, under a similar de novo review provision of the Emergency Rule it was held that a new trial was not mandatory. The district court need only examine the record of the bankruptcy court without giving deference to proposed findings. *Id.* at n.20 (citing *Moody v. Amoco Oil Co.*, 734 F.2d 1200 (7th Cir.), *cert. denied*, 105 S. Ct. 386 (1984)).

ority to criminal cases¹⁴⁴ are two factors suggesting that the district judges may give a very low priority to review of bankruptcy decisions.¹⁴⁵ If this occurs, it appears that the differences between the limited powers given the bankruptcy courts in the 1984 Amendments and the unconstitutionally broad powers given the bankruptcy courts in the 1978 Act are merely cosmetic.¹⁴⁶

The consent aspect of section 157 of the 1984 Amendments¹⁴⁷ also raises constitutional problems. It is hornbook law that parties cannot affect consensual jurisdiction where a court would not otherwise have jurisdiction.¹⁴⁸ Yet section 157 implies that the constitutional guarantee of Article III jurisdiction is one that can be waived by the parties' consent.¹⁴⁹ Further, it is not clear in the language of the section whether the consent must be express or may be merely implied.¹⁵⁰ Even if the Supreme Court were to sustain the concept of waiving a right to an Article III forum by consent, there is a possibility that it would not allow such an important right to be waived by implied consent.¹⁵¹

4. Problems of Withdrawal

As a measure of additional supervision of the non-Article III bankruptcy courts by the Article III district courts, section 157(d) provides that all matters referred to the bankruptcy court are subject to withdrawal.¹⁵² The withdrawal of a case or proceeding from the bankruptcy court back to the district court may be affected by a motion of the district court or a timely motion of any party for cause shown.¹⁵³ The district court must withdraw a proceeding if its resolution requires consideration of both title 11 and other federal laws "regulating organizations or activi-

144. See Speedy Trial Act, 18 U.S.C. §§ 3161-74 (1982 & Supp. III 1985).

145. See *Brief of the Solicitor General, Marathon*, 458 U.S. 50, reprinted in 56 AMER. BANKR. L.J. 97, 108 (1982).

146. King, *supra* note 134, at 682.

147. 28 U.S.C. § 157(c)(2) (Supp. III 1985).

148. See A. EHRENZWEIG, D. LOUISELL & G. HAZARD, JURISDICTION IN A NUTSHELL, STATE & FEDERAL 20 (1980).

149. 28 U.S.C. § 157 (c)(2) (1984). See also *infra* notes 217-20 and accompanying text.

150. King, *supra* note 134, at 682-83 (citing *Lombard-Wall Inc. v. NYC Housing Dev. Corp.* (*In re Lombard-Wall Inc.*) No. 82 B 11556, slip. op. (S.D.N.Y. 1985) as an example of a district court finding consent by implication).

151. See *Commodity Futures Trading Comm'n. v. Schor*, 106 S. Ct. 3245 (1986). The court states that Congress may make available a "quasi-judicial mechanism" for *willing parties* if the non-Article III tribunals have sufficient Article III supervision (emphasis added). *Id.* at 21. It would seem that *willing parties* could only be identified by express consent. See also *infra* notes 218-21 and accompanying text.

152. 28 U.S.C. § 157(d) (1984).

153. *Id.*

ties affecting interstate commerce."¹⁵⁴

This subsection raises a question of procedure rather than a specific constitutional question. Nothing in the legislation or congressional debates indicates specifically what may constitute cause.¹⁵⁵ However, the language implies that the district judge or moving party must specify a sound reason for withdrawal.¹⁵⁶ One court has even held that it is improper for a district judge *sua sponte* to withdraw the reference and lift the automatic stay when no party had requested such to be done.¹⁵⁷ It is also unclear whether the motion to withdraw should be made in the bankruptcy court or the district court. The entire bankruptcy case is already in the bankruptcy court by referral, so it seems logical that any motions involving the case would be filed in the bankruptcy court. However, it is unlikely that Congress meant for the bankruptcy court to withdraw a proceeding from itself. Because the purpose of including a withdrawal provision in the 1984 Amendments was to shore up the district courts' power over the bankruptcy courts, it is more likely that Congress intended that motions to withdraw be presented to the district judge.¹⁵⁸

The language of the mandatory withdrawal clause is extremely broad,¹⁵⁹ however, the legislative history of the 1984 Amendments gives an indication that Congress intended the provision to be construed narrowly.¹⁶⁰ In *In re White Motor Corp.*,¹⁶¹ the district court applied the provision by balancing the degree to which the Employee Retirement Income Security Act¹⁶² and the Bankruptcy Code were involved in the

154. *Id.*

155. King, *supra* note 134, at 696.

156. *Id.*

157. See *NLT Computer Servs. Corp. v. Capital Computer Servs. Inc.*, 755 F.2d 1253, 1258 (6th Cir. 1985) (case decided under Emergency Rule, but applicable to 28 U.S.C. § 157(d) (Supp. III 1985)).

Perhaps this can best be explained as an extension of the consent rationale: if the parties consent to determination of their case in the bankruptcy forum, the district court must have a sound reason to intervene. *But see infra* note 228 and accompanying text.

158. Because it is the district court which makes the referral, it is presumed that only the district court may withdraw a case. It may be that in some instances the district court may find it useful to obtain the bankruptcy judge's view as to whether the proceeding is core or non-core. See, e.g., *In re Morse Elec. Co.*, 12 BANKR. CT. DEC. (CRR) 957 (N.D. Ind. 1985); *In re Pied Piper Casuals, Inc.*, 12 BANKR. CT. DEC. (CRR) 1047 (S.D.N.Y. 1985).

159. 28 U.S.C. § 157(d) (Supp. III 1985) (second sentence). See also *supra* note 154 and accompanying text.

160. See 130 CONG. REC. 1850 (daily ed. Mar. 21, 1984) (Rep. Kastenmeier specifically stated that the language is to be construed narrowly).

161. *In re White Motor Corp.*, 11 COLLIER BANKR. CAS. 2D (MB) 993 (N.D. Ohio 1984).

162. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1000-1461 (1982 & Supp. III 1985) ("ERISA"). ERISA sets minimum standards for employee benefit plans.

resolution of the dispute.¹⁶³ Concluding that the Bankruptcy Code was the primary consideration, the court held that section 157(d) does not require mandatory withdrawal unless resolution of the dispute requires substantial and material consideration of federal law other than the Bankruptcy Code.¹⁶⁴ It is clear that this subsection is not to be construed as an escape hatch for moving bankruptcy disputes which have been referred to the bankruptcy judge back to the district courts.¹⁶⁵

IV. THE CONSTITUTIONALITY OF THE 1984 AMENDMENTS

A. *Bankruptcy Judges as Adjuncts*

The preliminary puzzle in analyzing the 1984 Amendments is the status of the bankruptcy courts. The *Marathon* plurality opinion distinguished the constitutional authority of an Article I court from the permissible authority of an adjunct to an Article III court.¹⁶⁶ The rationale supporting Article I court authority is that controversies submitted to these courts are not inherently or traditionally part of the judicial power of the United States — Article I judges are not performing traditional judicial functions.¹⁶⁷ To the contrary, the Supreme Court has allowed adjunct judicial officers to perform some adjudicative functions.¹⁶⁸ The court reasoned that adjuncts do not exercise the judicial power of the United States because they are subject to close control by Article III judges.¹⁶⁹ Therefore, the constitutionality of an Article I court depends primarily on the subject matter before it, while the constitutional validity of an adjunct to an Article III court depends primarily upon the sufficiency of the Article III court's control.

163. *In re White*, 11 COLLIER BANKR. CAS. 2D at 1007. A creditor in White's bankruptcy proceeding had argued that because the resolution of his dispute required both consideration of title 11 and another federal law "regulating organizations or activities affecting interstate commerce" (i.e., ERISA), the district court was required to withdraw the matter from the bankruptcy judge. *Id.* at 1002-03. The court stated that *consideration* of a non-Code federal statute would not trigger the mandatory withdrawal unless such consideration were necessary for the *resolution* of a proceeding. *Id.* at 1007.

164. *Id.* at 1007.

165. See 130 CONG. REC. 1850, *supra* note 160.

166. See 458 U.S. at 80-82.

167. See *Den ex. dem. Murray v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1856). The Supreme Court stated that controversies which have traditionally been adjudicated in the courts of common law, equity, or admiralty may not be removed from Article III courts to Article I courts.

168. 458 U.S. at 80. The plurality opinion states that "when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated — including the assignment to an adjunct of some functions historically performed by judges." *Id.* (emphasis added).

169. *Id.* at 77-81.

Despite some confusion in the use of terminology during the congressional hearings,¹⁷⁰ it is clear from the language of the 1984 Amendments that Congress was creating an Article III adjunct bankruptcy system rather than an Article I bankruptcy court system.¹⁷¹ Congress specifically called the bankruptcy judge a unit of the district court.¹⁷² The bankruptcy court is not established as a separate Article I court or as an entity at all. It no longer makes sense to refer to the bankruptcy court as a judicial forum capable of having Article I status.¹⁷³ "Bankruptcy court" is now merely a convenient term for referring to the bankruptcy judge who is called a judicial officer of the Article III district court.¹⁷⁴ Thus, the concept of an adjunct system is the only reasonable explanation for such language.

Because the new bankruptcy judges are adjuncts, the technical difference between the congressional grant of jurisdiction to the bankruptcy courts in the 1978 Act and the district courts' discretionary referral of bankruptcy matters to the bankruptcy judges under the 1984 Amendments is significant. Although Congress has the power to grant jurisdiction to Article I courts, it does not have the power to grant authority to Article III adjuncts. Article III courts must have the ultimate authority over matters which are adjudicated by their adjuncts. The attempt by Congress to grant jurisdiction to Article III adjuncts in the 1978 Act was unconstitutional.¹⁷⁵ However, under the 1984 Amendments, Congress has not violated the separation of powers doctrine. Congress has statutorily established the office of bankruptcy judges, but the district courts alone give these adjuncts matters to adjudicate.¹⁷⁶ The United States

170. See, e.g., 1984 U.S. CODE CONG. & AD. NEWS 587 (comments of Sen. Dole claiming the 1984 Amendments establish an Article I court) and 590 (remarks of Sen. Hatch that under the 1984 Amendments bankruptcy judges will act as Article I adjuncts).

171. Carlson, *Are the Jurisdictional Provisions of the Bankruptcy Amendments of 1984 Constitutional?* 9 NORTON BANKR. LAW ADVISER 1, 2 (1984). The 1978 Act was also an attempt to create an adjunct system, which failed because of the overly broad statutory grant of jurisdiction to the adjuncts. The 1984 Amendments do not incorporate the word "adjuncts" referring instead to the bankruptcy judges as "units" of the district courts. See 28 U.S.C. § 151 (Supp. III 1985).

172. 28 U.S.C. § 151 (Supp. III 1985).

173. Lundin, *The 1984 Bankruptcy Amendments: Holes in the Matrix?* 11 NORTON BANKR. LAW ADVISER 1, 2 (1984).

174. 28 U.S.C. § 151 (1984).

175. See *Thomas v. Union Carbide Agri. Prod. Co.*, 105 S. Ct. 3325, 3334-35 (1985). Speaking for the majority, Justice O'Connor states:

The Court's holding in [*Marathon*] establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review.

Id. (emphasis added).

176. 28 U.S.C. § 157(a) (Supp. III 1985).

courts of appeals appoint and remove bankruptcy judges¹⁷⁷ and district courts control which, if any, matters are referred to those judges.¹⁷⁸ Therefore, Article III courts have the ultimate authority over bankruptcy adjuncts.

The jurisdictional provisions of the 1984 Amendments further support the constitutionality of the new bankruptcy adjunct system. It is significant that Congress makes no specific jurisdictional grant to the bankruptcy courts.¹⁷⁹ Bankruptcy jurisdiction is granted only to the district courts, and the mechanism for bringing bankruptcy matters before bankruptcy judges is a purely procedural section.¹⁸⁰ The section uses no traditional jurisdictional terms, but rather introduces the concept of judicial referral and then limits the functions of a bankruptcy judge within specific types of referred cases or proceedings.¹⁸¹ It is important to remember that if the district court makes no referrals, the bankruptcy judge will have no authority. Even if the district court makes a general referral of bankruptcy matters to the bankruptcy judge, bankruptcy jurisdiction remains in the district court at all times; no bankruptcy court has a statutory jurisdictional grant.¹⁸²

B. *Core v. Non-Core Proceedings*

The major constitutional controversy is focused upon whether Congress has subjected the adjunct authority of bankruptcy judges to sufficient district court supervision so that district courts retain the essential attributes of judicial power. The question, more specifically, is whether the 1984 Amendments properly distinguish the broad powers of an adjunct over congressionally created rights from the limited powers of an adjunct over non-congressionally created rights. In making this distinction of powers, Congress introduced the concepts of core and non-core proceedings and limited the authority of a bankruptcy judge in non-core proceedings.

177. *Id.* § 152.

178. *Id.* § 157(a).

179. Lundin, *supra* note 173, at 2.

180. 28 U.S.C. § 157 (Supp. III 1985). *See also supra* notes 121-25 and accompanying text.

181. *Id.*

182. *Id.* *See also* Firestone v. Dale Beggs & Assoc. (*In re* Northwest Cinema Corp.), 49 Bankr. 479 (D. Minn. 1985). The bankruptcy judge explains:

The term 'bankruptcy court' is solely a phrase that is applied to the bankruptcy judges for a district insofar as those judges together are a unit of the district court. Thus while functionally there may appear to be a separate bankruptcy court, for jurisdictional purposes there is only one court, i.e., the district court.

Id. at 480 (citations omitted).

The 1984 Amendments use five terms of art which differentiate between the kinds of proceedings which can be adjudicated by bankruptcy judges and the matters which must be reserved to the district courts' exercise of judicial power. The terms are: proceedings arising under title 11; proceedings arising in a case under title 11; proceedings related to a case under title 11; core proceedings; and non-core proceedings.¹⁸³ The language of section 157 implies that all bankruptcy proceedings either arise under title 11, arise in a case under title 11, or are related to a case under title 11.¹⁸⁴ Section 157 further implies that all bankruptcy proceedings are either core or non-core,¹⁸⁵ and lists both general and specific descriptions of core proceedings.¹⁸⁶ The language suggests that all core proceedings either arise under title 11 or arise in a case under title 11.¹⁸⁷ Non-core proceedings are those proceedings which are only related to a case under title 11.¹⁸⁸ Bankruptcy judges can hear and determine core cases, but only submit findings and conclusions to the district courts in non-core proceedings.¹⁸⁹

Congress clearly intended for core proceedings, arising under title 11 or arising in a case under title 11, to include only congressionally-created rights and non-core, related, proceedings to include all non-congressionally created rights. This is evidenced by the fact that the 1984 Amendments allow a bankruptcy judge broad powers over core proceedings, but limited authority over non-core proceedings. However, the *Marathon II* example shows that the list of core proceedings may include some state law rights.¹⁹⁰ How do the 1984 Amendments recon-

183. Lundin, *supra* note 173, at 2-4. Cf. Taggart, *The New Bankruptcy Court System*, 59 BANKR. L.J. 231, 247-48 (1985). Judge Lundin suggests that there are problems with the interpretation of these five terms which create gaps in a bankruptcy judge's authority. Taggart suggests that these problems disappear if the first three categories of proceedings, arising under, arising in, and related to, are not considered mutually exclusive, and the last two categories, core and non-core, are interpreted to include all bankruptcy matters. See also *infra* notes 191-99 and accompanying text for a third possibility: a specific controversy may be a related proceeding at one time and a core proceeding based upon its nexus to the basic bankruptcy function at another time.

184. See 28 U.S.C. § 157 (1984). This language follows the distinctions drawn in the grant of bankruptcy jurisdiction to the district courts. Compare *id.* § 1334; see also *supra* notes 92-105 and accompanying text.

185. See *id.* § 157(a), § 157(b)(1) and § 157(c)(1). This implication is drawn from the fact that district judges may refer all bankruptcy matters to the bankruptcy courts and the powers of the bankruptcy judges to attend those matters are only defined in terms of core and non-core proceedings.

186. *Id.* § 157(b)(2).

187. *Id.* § 157(b)(1). See also Carlson, *Distinguishing Core From Non-core Proceedings*, NORTON BANKR. LAW ADVISOR 1, 2 (1985).

188. 28 U.S.C. § 157(c)(1). See also Carlson, *supra* note 187, at 2.

189. 28 U.S.C. § 157(b-c). See also *supra* notes 121-25 and accompanying text.

190. See *supra* notes 138-140 and accompanying text.

cile a proceeding which is integral to the core bankruptcy function of restructuring debtor-creditor rights but which also involves questions of state law?

Based on language in *Marathon*, the 1984 Amendments define state law rights arising in core proceedings as congressionally-created rights.¹⁹¹ *Marathon* does not allow an adjunct to adjudicate a state law proceeding not integral to the restructuring of debtor-creditor rights.¹⁹² But even in *Marathon*, it was noted that "bankruptcy adjudications themselves, as well as the manner in which the rights of debtors and creditors are adjusted, are matters of federal law."¹⁹³ The federal character of a core bankruptcy proceeding is not changed by the fact that the substantive rights being adjusted are often created by state law. Congress made this clear by providing that "a determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by state law."¹⁹⁴

The express purpose of bankruptcy is to modify the rights of debtors and creditors; this involves modifying many state-created rights. Because Congress has the power to make substantive bankruptcy laws, it also has the power to modify contractual obligations and other state-created rights through the bankruptcy clause.¹⁹⁵ When state law rights conflict with the basic rights created by the bankruptcy code, the state law rights are subordinate.

The Supreme Court has sustained this federalizing of state created rights when they are adjudicated in core bankruptcy proceedings. In *Katchen v. Landy*, though the Court did not use the term core proceeding, it held that what would otherwise be a state action at law is transformed into a federal equitable proceeding when brought as a claim in a bankruptcy case.¹⁹⁶ Chief Justice Burger indicated this federalizing of state law rights in *Marathon* by stating that bankruptcy judges could not determine state law rights "related only *peripherally* to an adjudication of bankruptcy."¹⁹⁷ Impliedly, if the state law right is *integrally* related to

191. Carlson, *supra* note 187, at 4.

192. See *supra* notes 72-74 and accompanying text.

193. 458 U.S. at 84 & n.36.

194. 28 U.S.C. § 157(3) (1984) (second sentence).

195. See *United States v. Security Indus. Bank*, 459 U.S. 70, 75-76 (1982); *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 188 (1902).

196. See *Katchen v. Landy*, 382 U.S. 323, 336 (1966) (stating that "the bankruptcy Act, passed pursuant to the powers given to Congress by Art. I, § 8, of the Constitution to establish uniform laws on the subject of bankruptcy, converts the creditor's *legal claim* into an *equitable claim to a pro rate* [sic] *share of the res. . .*)." *Id.* (emphasis added).

197. 458 U.S. at 92 (Burger, C.J., dissenting) (emphasis added).

the bankruptcy, a different standard applies. Thus, the same issue presented as purely a state law issue takes on a different character when it is the focus of a dispute between a debtor and a creditor in a bankruptcy case.

The hypothetical *Marathon II* breach of contract counterclaim,¹⁹⁸ as a suit between the debtor and a creditor, is subject to the fundamental power of Congress to modify debtor-creditor relationships through the Bankruptcy Code. The basic rights of bankruptcy are congressionally-created rights even if they affect state law rights. As one court stated, "core bankruptcy proceedings are matters of federal right which are uniquely susceptible to adjudication by an adjunct."¹⁹⁹

Lower court decisions have bolstered the constitutionality of the concept of core proceedings as federal rights by narrowing the broad language of the two catch-all descriptions of core proceedings found in section 157(b)(2).²⁰⁰ Specifically, state law contract claims that arguably fall within the broad and general language of subsections (A) and (O) of section 157(b)(2) have been held to be non-core related proceedings.²⁰¹ It is neither unusual nor inappropriate for a court to resolve a perceived internal inconsistency in a statute by giving effect to the more specific provision when that construction is consistent with legislative intent.²⁰² Recognizing that judicial interpretation of statutes should avoid constitutional problems,²⁰³ the Ninth Circuit has held that state law contract claims which do not specifically fall within the categories of core proceedings enumerated in 28 U.S.C. section 157(b)(2)(B) through (N) are related proceedings even if they fit within the general wording of the two catch-all provisions.²⁰⁴

The fact that the constitutionality of the Emergency Rule has been

198. See *supra* notes 138-140 and accompanying text.

199. See *Danning v. Lummis (In re Tom Carter Enter., Inc.)*, 11 COLLIER BANKR. CAS. 2D (MB) 1216, 1221 (C.D. Cal. 1985).

200. 28 U.S.C. § 157(b)(2) (1984). See also *supra* notes 132-140 and accompanying text.

201. See *K-Rom Constr. Corp. v. Behling (In re K-Rom Constr. Corp.)*, 46 Bankr. 745, 749 (S.D.N.Y. 1985); *Mohawk Indus., Inc. v. Robinson Indus., Inc.*, 46 Bankr. 464, 465-66 (D. Mass. 1985); *Cameron v. Anderson (In re American Energy Inc.)*, 50 Bankr. 175, 178-79 (D.N.D. 1985); *Morse Elec. Co. v. Logicon, Inc. (In re Morse Elec. Co.)*, 47 Bankr. 234 (N.D. Ind. 1985).

202. Taggart, *supra* note 183, at 248.

203. See *Crowell v. Benson*, 285 U.S. 22, 62 (1932). It is a cardinal principle that in construing a statute a court should first ascertain whether a construction by which the constitutional question may be avoided is fairly possible. *Id.*

204. See *Piombo Corp. v. Castlerock Prop. (In re Castlerock Prop.)*, 781 F.2d 159, 162 (9th Cir. 1986). But see *Harry C. Partridge, Jr. & Sons, Inc. v. M&R Constr. Corp. (In re Harry C. Partridge, Jr. & Sons, Inc.)*, 48 Bankr. 1006, 1010 (S.D.N.Y. 1985) (state law contract claim characterized as core proceeding where it fits the description of § 157(b)(2)(E) (1984), one of the specific provisions).

sustained by every circuit court of appeals which has addressed the issue is further support for the validity of both the core and non-core distinction and of the power of a bankruptcy judge in core proceedings.²⁰⁵ The distinction between core and non-core, related, proceedings in the 1984 Amendments is a codification of the identical distinction drawn in the Emergency Rule.²⁰⁶ The only significant difference in the two systems is a different standard of review in core matters. While the Emergency Rule provided that in core matters a district court could hold its own hearing and receive additional evidence,²⁰⁷ the 1984 Amendments give the district courts only appellate authority over referred core matters, using a clearly erroneous standard of review.²⁰⁸ However, this difference is merely technical due to the power of the district court to withdraw any proceeding at any time prior to the final decision by the bankruptcy judge.²⁰⁹

Once the authority of a bankruptcy judge in core proceedings is understood as power regarding federal rights, little doubt remains about the validity of the powers of the bankruptcy judges regarding non-core proceedings.²¹⁰ The identical authority of United States Magistrates to hear and submit findings and conclusions to the district court was upheld in *United States v. Raddatz*.²¹¹ In *Raddatz*, the district court had referred a criminal case to the magistrate for the purpose of conducting a suppression hearing.²¹² The district court then made a de novo determination of the case without a further hearing.²¹³ When the defendant challenged the constitutionality of the Federal Magistrates Act, the Supreme Court held that the Act suffered no Article III problems and that it struck a proper balance between the demands of due process and the constraints of Article III.²¹⁴ The Court found great significance in its conclusion that the entire process, including the decision to refer a matter to the magistrate, "takes place under the district court's total control

205. See *supra* note 88 and accompanying text.

206. See 130 CONG. REC. H1846 (daily ed. March 21, 1984) (statements of Rep. Kastenmeier that enactment of the Model Rule was the purpose of his amendment and that this was all that was necessary to create a constitutional system). See also COLLIER ON BANK. ¶ 3.01[1][b][vi] (15th ed. 1986).

207. COLLIER, *supra* note 206, at ¶ 3.01[1][b][vi](e)(2)(b).

208. See Danning, 11 COLLIER BANKR. CAS. 2D (MB) at 1222.

209. *Id.*

210. Carlson, *supra* note 187, at 2.

211. *United States v. Raddatz*, 447 U.S. 667, 683 (1980).

212. *Id.* at 669.

213. *Id.* at 672.

214. *Id.* at 683-84.

and jurisdiction."²¹⁵

The powers of a magistrate are very similar to those of a bankruptcy judge.²¹⁶ Under the 1984 Amendments, as under the Magistrates Act, the district court has the power to recall a referred proceeding at any time.²¹⁷ Further, the provision that a bankruptcy judge may make final determination in non-core proceedings if the parties consent is similar to the consent provision in the Magistrates Act.²¹⁸ The Supreme Court has yet to address the constitutional validity of the Magistrates Act's consent provision, but each court of appeals to address the issue has upheld it.²¹⁹

There are two rationales for sustaining a consent provision under the Magistrates Act or the 1984 Amendments. First, allowing parties to consent to trial before an adjunct does not undermine the separation of powers if the adjunct is part of the district court.²²⁰ Second, the district judges have the power to refuse to permit the adjunct to try a particular case, even if the parties consent.²²¹ These two aspects of the consent provision assure that the district court retains the ultimate authority.

The question of whether consent must be express or may be implied is really framed in the question of whether the failure to file a timely motion of objection to a bankruptcy judge's determination of a matter as a core proceeding is a procedural default which precludes a party from raising the issue on appeal.²²² It should be noted that even in the criminal arena, many substantive rights, including the constitutional right to a jury trial, are lost when a litigant fails to follow procedural requirements.²²³ Furthermore, it is possible that such a procedural default does not preclude the issue from being raised on appeal. The consent feature will likely only be clarified as the issues arise in controversy.²²⁴ However, it appears that even if implied consent precludes raising an objec-

215. *Id.* at 681.

216. Compare 28 U.S.C. § 157 (Supp. 1984) with 28 U.S.C. § 636 (Supp. 1981).

217. Compare 28 U.S.C. § 157(b) (Supp. 1984) with 28 U.S.C. § 636(c)(6) (Supp. 1981).

218. Carlson, *supra* note 187, at 3. Compare 28 U.S.C. § 157(c)(2) (Supp. 1984) with 28 U.S.C. § 636(c)(1) (Supp. 1981).

219. See Collins v. Foreman, 729 F.2d 108 (2d Cir. 1984); Pacemaker Diagnostic Clinic v. Instromedix, 725 F.2d 537 (9th Cir.) (en banc), cert. denied, 105 S. Ct. 100 (1984); Wharton-Thomas v. United States, 721 F.2d 922 (3d Cir. 1983).

220. Carlson, *supra* note 187, at 3.

221. *Id.*

222. Taggart, *supra* note 183, at 243-244.

223. See FED. R. CIV. P. 38.

224. See Norton & Lieb, *Jurisdiction and Procedure Under the 1984 Bankruptcy Amendments*, 1985 ANN. SURVEY BANKR. L. 53, 144 (1985); Interconnect Tel. Serv., Inc. v. Farren, 59 Bankr. 397 (N.D.N.Y. 1986). Noting the lack of case law on the consent issue, the district court relied on Norton & Lieb in concluding that "section 157(c)(2) should be construed to apply only if express consent is given." *Id.* But see *Piombo*, 781 F.2d at 164, where the Ninth Circuit adopted the concept

tion on appeal, such a procedural default is consistent with approaches in the law generally and in appellate practice.²²⁵

C. *Withdrawal*

The withdrawal authority given to the district courts²²⁶ over referred bankruptcy matters is the final safeguard which assures the direct control and authority of the district courts over all bankruptcy proceedings. The withdrawal authority is limited only in that it must be for cause.²²⁷ There is every reason to expect that the showing of cause will be satisfied any time a bankruptcy judge's authority over the matter in question raises constitutional concerns.²²⁸ The withdrawal provision also protects parties from potential abuse of discretion by the bankruptcy judge in the making of the initial core/non-core determination.²²⁹ Once again, the Magistrates Act has been sustained on similar grounds.²³⁰ In addition to the extensive Article III administrative control over the management, composition and operation of the magistrate system, the Ninth Circuit, sitting en banc, found the district courts' power to recall cases on their own initiative to be significant proof of district court control.²³¹ It must also be remembered that the reference of any and all cases and proceedings is revocable at any time by the district court. Furthermore, the correctness of any ruling of the bankruptcy judge may also be challenged on appeal.²³²

V. CONCLUSION

At first blush, the 1984 Amendments seem to create a jurisdictional

of implied consent and held that implied consent is a question of law to be reviewed de novo upon appeal.

225. Taggart, *supra* note 183, at 244. Procedural default mechanisms are common in law. They are based on the idea that failure to take action within a reasonable time indicates an intention not to take that action. Two examples of procedural default mechanisms are statutes of limitations and rules requiring appeals to be filed within specified time limits. In addition, it is a general rule that objections not raised at the trial level are precluded from consideration on appeal.

226. 28 U.S.C. § 157(d) (1984).

227. *Id.*

228. Because the district court retains jurisdiction over bankruptcy matters and the bankruptcy judge is only an adjunct to the district court, it seems likely that a district judge's concern over a bankruptcy judge's unconstitutional usurpation of judicial power would be grounds for withdrawal of a matter back to the district court.

229. See *Danning v. Lummis (In re Tom Carter Enter.)*, 11 COLLIER BANKR. CAS. 2d (MB) 1216, 1221 (C.D. Cal. 1985).

230. *Pacemaker Diagnostic Clinic v. Instromedix*, 725 F.2d 537 (9th Cir. 1984) (en banc), *cert. denied*, 105 S. Ct. 100 (1984).

231. *Id.* at 544.

232. The appeal procedures for bankruptcy matters are found in 28 U.S.C. § 158 (1984).

quagmire. They appear to establish the same type of confusing bifurcated bankruptcy system Congress was trying to avoid by giving the bankruptcy court pervasive jurisdiction in the 1978 Act. As many critics of the 1984 Amendments argue, establishing bankruptcy judges as Article III judges may have been a far simpler cure for the constitutional infirmities of the bankruptcy system under the 1978 Act.²³³ However, Congress chose not to give the bankruptcy judges Article III powers and protections, and to say that this would have been a simpler solution does not imply that a more complex solution is unconstitutional.

The fact that the Supreme Court has declined to hear any controversies regarding the constitutionality of the bankruptcy system since *Marathon* may be an indication that a majority of the Supreme Court Justices are satisfied with the constitutionality of the current bankruptcy system. It should be remembered that the concurring opinion defines and limits the scope of the *Marathon* decision.

However, because the short concurring opinion was expressly limited to the narrow facts of the case, it is impossible to predict how much of the plurality's reasoning the concurring Justices would accept. The 1984 Amendments should be declared constitutional by the Supreme Court *if* the following conditions are met. First, the concurring Justices must agree with the plurality opinion that the purely state law issue was the only constitutional defect in the 1978 Act. Second, the concurring Justices must agree with the plurality opinion that bankruptcy adjudications and the adjustment of debtor-creditor relations are matters of federal law. Finally, the concurring Justices must agree with the plurality opinion that adjuncts to Article III courts have wide latitude to adjudicate federal law matters.

Much of the jurisdictional confusion disappears once it is clear that the 1984 Amendments establish bankruptcy judges as adjuncts to the Article III district courts. The structure of the new bankruptcy system follows an adjunct rationale supported by both the *Marathon* decision and the Magistrates Act. Although it has not been reviewed by the Supreme Court, the constitutionality of the new system has been upheld in principle by several circuits when the identical concept was first introduced under the Emergency Rule.

Pursuant to the *Marathon* plurality mandate, the new system distinguishes between the broad authority of an adjunct regarding congressio-

233. For detailed arguments both supporting and refuting this proposition, see R. DEMASCIO, WM. NORTON & R. LIEB, *supra* note 4.

nally created rights and the very limited powers of an adjunct regarding non-congressionally created rights. The definitions of core and non-core proceedings follow traditional Supreme Court logic concerning what is and what is not a federal right.

Some of the language in the procedures section of the 1984 Amendments is admittedly broad. However, in the years since the Emergency Rule was first introduced, bankruptcy decisions have narrowed and further defined many of the terms of art used in the 1984 Amendments. This judicial narrowing of statutory language, specifically, of what is a core proceeding, has helped clarify congressional intent. As in many other areas of law, judicial interpretation has also strengthened the constitutionality of the statutes. Judges have defined core proceedings in such a way to ensure that the 1984 Amendments fall within the requirements of *Marathon* and of the Constitution. Therefore, the adjunct system created by the 1984 Amendments should be upheld.

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