

1-1-1985

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Recommended Citation

Charles S. Custer, *Bankruptcy Judges: Article III Beckons*, 16 PAC. L. J. 957 (1985).

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Bankruptcy Judges: Article III Beckons

After a ten year study of the bankruptcy court system in the United States,¹ Congress enacted reform legislation entitled the Bankruptcy Reform Act of 1978² (hereinafter referred to as the 1978 Act), which was designed to reflect modern societal and economic changes.³ Congress recognized that an important requirement for fair and efficient adjudication of bankruptcy cases was that bankruptcy judges possess broad powers to hear and adjudicate all claims arising in or related to bankruptcy cases.⁴ Witnesses at the House Subcommittee hearings on the bankruptcy system told subcommittee members that the United States Constitution requires bankruptcy judges to have article III status to exercise the broad jurisdiction necessary for fair and efficient handling of bankruptcy cases.⁵ Article III status means that a federal judge has the protection of life tenure and a guarantee against salary diminution.⁶ Congress ultimately gave broad jurisdiction to bankruptcy judges, but did not grant them article III status.⁷

In 1982 the Supreme Court, in *Northern Pipeline Co. v. Marathon Pipe Line Co.*,⁸ struck down the jurisdictional grant of the 1978 Act.⁹ The bankruptcy and district court judges suddenly faced a situation

1. King, *The Unmaking of a Bankruptcy Court: The Aftermath of Northern Pipeline v. Marathon*, 40 WASH. & LEE L. REV. 99, 100 (1983).

2. Pub. L. No. 95-598, 92 Stat. 2549 (1978).

3. *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 52-53 (1982).

4. King, *supra* note 1, at 100.

5. *Id.* at 101. The House Judiciary Committee and the Subcommittee on Civil and Constitutional Rights gave lengthy consideration to the constitutional issues surrounding the conferral of broad powers upon the bankruptcy courts. H.R. 8200, 95th Cong., 1st Sess. (1977); *Hearings on H.R. 31 and H.R. 32 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 94th Cong., 2d Sess., 2081-84 (1976); *id.*, at 2682-2706; H.R. Rep. No. 95-595, 39 (1977). The Committee, the Subcommittee, and the entire House of Representatives initially concluded that article III courts were constitutionally required for bankruptcy adjudications. *Id.*

6. U.S. CONST. art. III, §1.

7. The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, §241(a), 92 Stat. 2549, 2668 (1978) (amended 1984). The decision under the 1978 Act to deny article III status for bankruptcy judges was due to a political compromise and a strong lobbying effort by the Judicial Conference of the United States. King, *supra* note 1, at 101-02.

8. 458 U.S. 50 (1982).

9. *Id.* at 87; see *infra* notes 48-50, 86-88 and accompanying text.

in which bankruptcy court jurisdiction was questionable and federal bankruptcy procedures were nonexistent.¹⁰ The Supreme Court found that the section of the 1978 Act that granted jurisdiction to the bankruptcy judges was not severable.¹¹ A great debate ensued regarding what power, if any, the bankruptcy judges could exert.¹² After the *Marathon* decision, an emergency rule was developed by the Judicial Conference of the United States which allowed the bankruptcy courts to function until Congress acted.¹³ In 1984, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984 (hereinafter referred to as the 1984 Act).¹⁴ Under the 1984 Act, bankruptcy judges again were not granted article III status.¹⁵ Moreover, the grant of jurisdiction to the bankruptcy court was limited.¹⁶ The bankruptcy judgeships established under the 1984 Act bear the label "judicial officers of the district court", and bankruptcy judges constitute a "unit" of the district court to be known as the bankruptcy court.¹⁷ Under the 1978 Act the bankruptcy court was an independent

10. King, *supra* note 1, at 115.

11. *Marathon*, 458 U.S. at 91-92.

12. See *infra* notes 13-14 and accompanying text.

13. See [1981-1982 Transfer Binder] Bankr. L. Rep. (CCH) ¶68,908 (effective December 25, 1982). The court in *Marathon*, recognizing that the decision would work substantial hardship on bankruptcy litigants, held that the decision would apply prospectively and stayed the effect of the decision until October 4, 1982, to give Congress the time to enact remedial legislation. *Marathon*, 458 U.S. at 88. When Congress failed to meet the October deadline, the Court once again stayed the judgment until December 24, 1982. *Id.* Meanwhile, anticipating that Congress might fail to act during the stay period, the Judicial Conference distributed a proposed rule to all bankruptcy, district, and appeals court judges. Judicial Conference Resolution (Sept. 23, 1982); see *White Motor Corp. v. Citibank, N.A.*, 704 F.2d 254, 256 (6th Cir. 1983). Each circuit council ordered the district courts to adopt the rule. *Id.* When the Supreme Court refused to grant another stay, the proposed emergency rule went into effect in each of the 11 judicial circuits. Administrative Order No. 28 (effective December 25, 1982).

14. Pub. L. No. 98-353, 98 Stat. 333 (1984). The Emergency Rule and the 1984 Act have many similar provisions. Compare *id.* with [1981-1982 Transfer Binder] Bankr. L. Rep. (CCH) ¶68,908 (effective December 25, 1982). Many commentators questioned the constitutionality of the Emergency Rule and one found that the rule "only has two flaws: it is invalid (illegal) and, it is unworkable." King, *supra* note 1, at 116; *In re South Portland Shipyard & Marine Rys.*, 10 Bankr. Ct. Dec. 1012, 1016-17 (Bankr. D. Me. 1983); *In re Seven Springs Apartments*, 10 Bankr. Ct. Dec. 634, 655-64 (Bankr. N.D. Ga. 1983); Countryman, *Emergency Rule Compounds Emergency*, 57 Bankr. L.J. 1, 9-12 (1983). But see *White Motor Corp. v. Citibank, N.A.*, 704 F.2d 254, 263-64 (6th Cir. 1983) (upholding validity of Emergency Rule); *Moody v. Martin*, 27 Bankr. Rep. 991, 1000 (W.D. Wis. 1983) (rule conforms to the *Marathon* standards). The Supreme Court has not passed on the validity of the Emergency Rule. See, e.g., *American Airlines Inc. v. Braniff Airways, Inc.*, 700 F.2d 214, 215 (5th Cir.), *cert. denied*, 103 S. Ct. 2122 (1983); *In re Int'l Harvester Co.*, No. 82-1385, slip op. (N.D. Ill.), *mand. denied*, 103 S. Ct. 1804 (1983).

15. 28 U.S.C. §§151-53 (bankruptcy judges serve 14 year terms and are subject to salary reduction).

16. Mayne, *Jurisdiction and Appointment Issues Cloud Future of Bankruptcy Act of 1984*, 10 Litigation News 5 (1985).

17. 28 U.S.C. §151.

federal court with broad jurisdictional powers.¹⁸ The constitutionality of the 1984 Act has been questioned by commentators as well as by members of Congress.¹⁹ Many of these questions will be addressed in the following sections.

The author of this comment will demonstrate the importance of an independent federal judiciary to the doctrine of separation of powers.²⁰ That independence only can be maintained by establishing federal judgeships that include the protections of salary guarantees and life tenure granted by article III of the United States Constitution.²¹ After establishing the importance of an independent judiciary, this author will review the judicial structure of the bankruptcy system under the 1984 Act and characterize the bankruptcy court as a dependent unit of the federal district court rather than an independent legislative court.²² Independent legislative courts sometimes are referred to as article I courts because the presiding judges do not have article III protections. A discussion of the constitutional requirement that the "judicial power of the United States" must vest in an article III court will follow.²³ This author will focus specifically on the vesting of the judicial power under the 1984 Act.²⁴ An analysis of the jurisdictional grant and procedures of the 1984 Act will reveal three constitutional concerns. The first is whether *any* federal court has jurisdiction over a state law claim related to a bankruptcy case.²⁵ The second is whether a possibility exists, under the 1984 Act, for a claim based entirely upon state common law to be finally adjudicated by an article I bankruptcy judge, which is a clear violation of *Marathon*.²⁶ Finally, the constitutionality of the consensual reference provision of the 1984 Act will be explored.²⁷ This author will conclude that *even if* the 1984 Act is constitutional, the Act does not meet the goals Congress sought to attain for the bankruptcy system, namely, fair and efficient adjudication of bankruptcy matters. These goals may be attained by granting bankruptcy judges article III status. Before any solution can be offered, however, the relationship between article III protections

18. Under the 1978 Act, bankruptcy courts were allowed to exercise "all the jurisdiction conferred by this section to the district courts." Pub. L. 95-598, §241(a), 92 Stat. 2549, 2668.

19. Mayne, *supra* note 16, at 5 (1985); McCormick, 9 Litigation News 1 (1984).

20. See *infra* notes 28-41 and accompanying text.

21. *Id.*

22. See *infra* notes 42-75 and accompanying text.

23. See *infra* notes 75-86 and accompanying text.

24. See *infra* notes 87-195 and accompanying text.

25. See *infra* notes 131-41 and accompanying text.

26. See *infra* notes 142-58 and accompanying text.

27. See *infra* notes 159-95 and accompanying text.

for federal judges and the importance of an independent federal judiciary must be analyzed.

THE STRUCTURAL IMPORTANCE OF AN INDEPENDENT FEDERAL JUDICIARY

An independent federal judiciary represents a critical component of the doctrine of separation of powers.²⁸ The framers of the United States Constitution did not establish clear lines separating the branches of government. Instead, they provided three independent governmental bodies to prevent the accumulation of tyrannical power in any one branch through a system of checks and balances.²⁹ An independent federal judiciary was considered necessary to ensure that the power to make law was severed from the ability to apply the enacted law.³⁰ Article III of the Constitution incorporates the independent federal judiciary into the fundamental principles of American government.³¹ The provisions for life tenure and salary guarantees were incorporated into article III to ensure the independence of the judiciary from control by the executive and legislative branches.³² Insulation of the judiciary from domination by the executive and legislative branches results in judicial impartiality.³³ Life tenure and the prohibition on salary diminution are integral to this insulation.³⁴

In addition to the general advantage of impartial adjudication, more specific purposes are served by judicial independence. To protect adequately the rights of individuals from infringement by the government, judges must be free from the political influence of the executive

28. J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 136 (2d ed. 1983).

29. *Buckley v. Valeo*, 424 U.S. 1, 121 (1976)(per curiam); J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 136 (2d ed. 1983).

30. *Immigration & Naturalization Service v. Chadha*, 103 S. Ct. 2764, 2790 (1983) (Powell, J., concurring). The separation of powers doctrine reflects "the framer's concern that trial by legislature lacks the safeguards necessary to prevent the abuse of power." *Id.*

31. J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 135-37 (2d ed. 1983); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 15-19, 49-50 (1978).

32. *Marathon*, 458 U.S. at 59; U.S. CONST. art. III, §1. "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuation in Office." *Id.*

33. See *The Federalist* No. 78, at 490 (A. Hamilton) (Wright ed. 1961) (security of tenure designed to "secure a steady, upright, and impartial administration of the laws"); see also *Marathon*, 459 U.S. at 58.

34. The life tenure provision dates back at least as far as the Act of Settlement in 1701. *United States v. Will*, 449 U.S. 200, 218 (1980). Discussing the salary guarantee in article III, the Court said: "The compensation clause has its roots in the long standing Anglo-American tradition of an independent judiciary." *Id.* at 217. "The power over a man's subsistence amounts to a power over his will." *The Federalist* No. 79, at 497 (A. Hamilton) (Wright ed. 1961).

and legislative branches.³⁵ Equally important is the fact that an independent federal judiciary preserves the balance of power between the national government and the states.³⁶ The principles of federalism are advanced by an independent federal judiciary that can balance federal interests and policies against legitimate operations of state judicial systems to ensure that encroachment on the sovereignty of the states is avoided.³⁷ Furthermore, life tenure and salary guarantees promote the integrity of the federal judiciary as an institution and facilitate accurate decision making.³⁸ Finally, the tenure and salary requirements of article III attract highly qualified persons to the bench and enhance public confidence in the federal courts.³⁹

Life tenure and salary guarantees are integral to the preservation of judicial independence, a critical aspect of the doctrine of separation of powers.⁴⁰ These article III provisions are accorded great deference by the Supreme Court.⁴¹ If the constitutional policies of judicial independence and separation of powers are violated by Congressional action creating nonarticle III bankruptcy judges, that Congressional action is unconstitutional. The following sections examining recent Congressional action regarding bankruptcy laws will help determine whether important constitutional policies are violated.

LEGISLATIVE COURTS: SORTING OUT THE CONFUSION

In 1828, Chief Justice Marshall introduced the concept of legislative courts in *American Insurance Co. v. Canter*.⁴² The Chief Justice recognized that Congressional power, stemming from article I, permits the establishment of tribunals.⁴³ Following *American Insurance Co.*, the labyrinth of Court decisions relating to legislative courts demonstrates that a continuing confusion exists regarding the extent

35. See The Federalist No. 78, at 494 (A. Hamilton) (Wright ed. 1961). "The independence of judges is equally requisite to guard the Constitution and the rights of individuals. . . ." *Id.*; see also Note, *Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act*, 80 COLUM. L. REV. 560, 582 (1980) (freeing judges from political influence protects individual rights).

36. Note, *supra* note 35, at 582-83.

37. The Federalist No. 78, at 494 (A. Hamilton) (Wright ed. 1961) (federal courts are the "bulwarks of a limited Constitution against legislative encroachments" on both rights reserved to states and individuals' rights); Note, *supra* note 35, at 583.

38. Note, *supra* note 35, at 583.

39. *Id.* at 583-85.

40. See *supra* notes 28-39 and accompanying text.

41. See generally *Marathon*, 458 U.S. at 57-62 (discussing importance of article III protections).

42. 26 U.S. (1 Pet.) 511, 546 (1828).

43. *Id.*

of Congressional power to create legislative courts.⁴⁴ The decisions of the Supreme Court of the United States reflect the position that the Constitution gives Congress the power to establish federal courts with judges who do not possess article III protections.⁴⁵ The Supreme Court addressed the constitutional issues raised by Congressional creation of legislative courts in *Marathon*.⁴⁶

The confusion surrounding legislative courts was not eliminated by the *Marathon* opinion. *Marathon* consisted of a plurality opinion written by Justice Brennan and joined by three justices,⁴⁷ a concurrence by Justice Rehnquist, joined by Justice O'Connor, and two dissenting opinions.⁴⁸ The opinions demonstrate the disagreement among the present justices regarding the limits of Congressional power to create legislative courts. A majority of the justices held that section 241(a) of the 1978 Act, providing for the jurisdiction and procedure of the bankruptcy system, violated article III of the Constitution,⁴⁹ at least to the extent that the grant of jurisdiction in the 1978 Act permitted bankruptcy judges to rule on claims based entirely upon state law.⁵⁰ A majority of justices, however, could not agree on what constitutes a valid legislative court.

In his plurality opinion, Justice Brennan distinguished three traditional areas for which Congress could establish tribunals under article I, notwithstanding article III.⁵¹ The three traditionally recognized legislative courts, according to the plurality, are territorial courts,⁵² military courts-martial,⁵³ and courts established to resolve issues of public rights.⁵⁴ The *Marathon* plurality held that the bankruptcy court,

44. See generally Comment, *Limits on Legislative Court Judicial Power: The Need For Balancing Competing Interests*, 59 CHI. KENT L. REV. 873 (1983) (overview of confusion in case law prior to and including *Marathon*).

45. See *American Insurance v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828) (territorial courts established as legislative courts). The Supreme Court has found article I courts valid under the necessary and proper clause. See *Swain v. Pressley*, 430 U.S. 372, 382-83 (1977); *Palmore v. United States*, 411 U.S. 389, 410 (1973); *Glidden v. Zdanok*, 370 U.S. 530, 543-44 (1962); *Ex Parte Bakelite Corp.*, 279 U.S. 438, 449 (1929).

46. *Marathon*, 458 U.S. at 61-76, 89-100.

47. Justice Brennan's opinion was joined by Justices Marshall, Blackmun, and Stevens. *Id.* at 52.

48. Chief Justice Burger filed a dissenting opinion. *Id.* Justice White filed a dissenting opinion also, which was joined by Chief Justice Burger and Justice Powell. *Id.*

49. *Id.* at 87.

50. *Id.* at 91 (Rehnquist, J., concurring).

51. *Id.* at 63-70.

52. *Id.* at 64-65.

53. *Id.* at 66.

54. *Id.* at 67-70. The plurality recognized that for the present case public rights must arise between the government and an individual, and that private rights matters arise between one individual and another. *Id.*

as established by the 1978 Act, did not fall within one of the traditional areas and, therefore, Congress did not have the power under article I to establish bankruptcy courts with the broad jurisdictional powers granted under the 1978 Act.⁵⁵ In his concurrence, Justice Rehnquist did not adopt the plurality view limiting article I courts to the three traditional areas.⁵⁶ Justice Rehnquist stated that the legislative court issue need not be decided, since the case should be decided on another ground, namely, that the critical claim in *Marathon* arose entirely under state law and adjudication of that state law claim by the bankruptcy court would violate article III of the Constitution.⁵⁷

Justice White, dissenting, found no way to distinguish article III and article I courts on the basis of the work performed by each court.⁵⁸ He labeled the statement that article III courts are those in which article III judges sit and article I courts those without article III judges a "simple tautology."⁵⁹ In conclusion, Justice White stated that a balance must be struck between competing constitutional values and legislative responsibilities.⁶⁰ With respect to the 1978 Act, Justice White believed that the legislative interests outweighed the constitutional values.⁶¹ The divergent views regarding legislative courts must be considered in characterizing the judicial structure created under the 1984 Act regarding bankruptcy judges to determine whether the jurisdictional provisions of the new act violate article III. The 1984 Act will be examined in light of the divergent opinions expressed in *Marathon*. This author will conclude that Congress has avoided the legislative court confusion by creating a bankruptcy court unit within the existing structure of the district court system.

Under the 1984 Act, bankruptcy judges are designated as "judicial officers of the district court."⁶² These judges do not have article III status.⁶³ Although the bankruptcy judges can be labeled article I judges because they lack article III status, Congress has not created an independent legislative court; rather, Congress has established "units" of existing district courts.⁶⁴ The significance of characterizing bankruptcy

55. *Id.* at 71.

56. *Id.* at 91.

57. *Id.*

58. *Id.* at 113.

59. *Id.*

60. *Id.*

61. *Id.*

62. 28 U.S.C. §151.

63. The new bankruptcy judges do not enjoy life tenure but are appointed to 14 year terms. 28 U.S.C. §152(a)(1). The salary of the new bankruptcy judges is determined under section 225 of the Federal Salary Act of 1967. *Id.* §153.

64. *Id.* §151.

courts as units of the existing district courts is apparent if contrasted with the label Congress attached to bankruptcy courts under the 1978 Act: "The United States Bankruptcy Court for the District."⁶⁵ The legislative history of the 1984 Act is devoid of any reason for the altered description of bankruptcy courts, but in light of *Marathon*, the change indicates a desire by Congress to limit the jurisdictional grant to the new bankruptcy courts.⁶⁶ Accordingly, Congress significantly increased the control district courts may exert over bankruptcy judges.⁶⁷ The domination by the district court over the bankruptcy judges bolsters the argument that bankruptcy judges do not have final decision making authority, but rather, that authority remains with the district court. Enactment of the 1984 Act indicates an attempt by Congress to avoid the confusion⁶⁸ associated with the creation of an independent legislative court⁶⁹ by establishing article I judges who sit as judicial officers in existing article III district courts.

Bankruptcy judges now resemble United States Magistrates established under the Federal Magistrates Act of 1979.⁷⁰ U.S. Magistrates also are officers of the district court, and the magistrate system in the federal district court has been held constitutional in two appellate court decisions.⁷¹ The similarity between the bankruptcy system and the magistrate system may indicate a trend by Congress to avoid the challenge that independent legislative courts are being created.

The designation of the new bankruptcy system as units of the district court rather than independent legislative courts is significant because many of the troublesome issues that the *Marathon* Court labored over regarding legislative courts are eliminated.⁷² Although Congress may have avoided the issue regarding whether or not a new legislative court

65. Compare *id.* with Pub. L. No. 95-598, 92 Stat. 2549 (1978). The *Marathon* plurality found that Congress did not attempt to create a legislative court by enacting the 1978 Act. *Marathon*, 458 U.S. at 63.

66. Lavien, *Highlights of the Bankruptcy Amendments and Federal Judgeship Act of 1984*, West Publishing Co., Bankruptcy Code, Rules and Forms, at VII (1984).

67. Bankruptcy judges, who hear only matters referred to them by district courts, are appointed by the U.S. Court of Appeals for the circuit, and may be removed under the proper circumstances by the judicial council for the circuit. 28 U.S.C. §157(a),(e). This district court has the power to withdraw a referred case. *Id.* §157(d). The district court also has appellate jurisdiction over final judgments, orders, and decrees of the bankruptcy judges. *Id.* §158(a).

68. See *supra* note 44 and accompanying text.

69. See *supra* notes 41-67 and accompanying text.

70. Compare 28 U.S.C. §§151-58 with *id.* §§631-39 (1982) (control by district court and referral provisions are similar).

71. *Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 547 (9th Cir. 1984) (en banc); *Wharton-Thomas v. United States*, 721 F.2d 922, 929-30 (3d Cir. 1983).

72. The first argument presented by the appellant, *Marathon Pipe Line Co.*, was that Congress had created a valid, independent legislative court. *Marathon*, 458 U.S. at 63.

has been created, other constitutional issues remain unresolved.⁷³ The discussion of the constitutional issues will begin with a review of the requirement for vesting of the judicial power of the United States in an article III court. The *Marathon* Court, to some extent, was able to agree upon the court in which the "Judicial Power of the United States" must vest.⁷⁴

VESTING THE JUDICIAL POWER OF THE UNITED STATES IN AN ARTICLE III COURT

A discussion of vesting requirements for federal judicial power logically must begin with the United States Constitution. Article III of the United States Constitution requires that "[t]he judicial power of the United States be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time establish."⁷⁵ In the plurality opinion in *Marathon*, Justice Brennan addressed this portion of article III in relation to the 1978 Act.⁷⁶ He concluded that while Congress possessed the authority to assign certain fact finding functions to fact finding tribunals, the power to adjudicate the private rights of litigants must vest in an article III court.⁷⁷ Citing *Crowell v. Benson*,⁷⁸ Justice Brennan stated that Congressional power to create fact finding tribunals is not an exception to article III, but is consistent with article III provided "the essential attributes of the judicial power" remain vested in an article III court.⁷⁹ The term "essential attributes" was not defined by Justice Brennan. An analysis of Supreme Court decisions reveals no express definition, but the retention of procedural control and final decision making authority by the district court has been identified as significant for an understanding of essential attributes.⁸⁰

The Supreme Court has sustained the use of adjunct fact finders in the adjudication of both congressionally created rights⁸¹ and constitutionally created rights,⁸² but only if sufficient control was maintained by an article III court.⁸³ Sufficient control includes the retention

73. See *infra* notes 131-95 and accompanying text.

74. See *infra* notes 75-86 and accompanying text.

75. U.S. CONST. art. III, §1.

76. *Marathon*, 458 U.S. at 77.

77. *Id.*

78. 285 U.S. 22 (1932).

79. *Id.* at 51; *Marathon*, 458 U.S. at 77.

80. Note, *Magistrate Trials: The New Hierarchy of Class 2 Adjuncts and Article III Judges*, 58 ST. JOHN'S L. REV. 559, 569-72 (1984)(explanation of essential attributes).

81. *Crowell v. Benson*, 285 U.S. 22, 50 (1932).

82. *United States v. Raddatz*, 447 U.S. 667, 682-83 (1980).

83. *Marathon*, 458 U.S. at 78-83. Justice Brennan observed that the Court upheld the

of final decision making authority by the article III court.⁸⁴ Analogizing to bankruptcy courts, Justice Brennan may have meant that in order to retain the "essential attributes" of judicial power, the article III court must exert great control over the adjunct courts and retain the final decision making authority.⁸⁵ A reconciliation between Justice Brennan's plurality opinion and Justice Rehnquist's concurrence may be possible.

Justice Rehnquist limited his concurrence because of the historical restraint by the Supreme Court to avoid constitutional questions if the claim may be adjudicated on alternative grounds.⁸⁶ Both dissenting opinions contended that the *Marathon* holding was limited to Justice Rehnquist's concurrence.⁸⁷ The holding that emerges, limited by the Rehnquist concurrence, is that a state law cause of action, if heard at all within the federal court system, must be heard by an article III court.⁸⁸ Moreover, if federal court adjudication of a state law cause of action is labeled a portion of "the judicial power of the United States," the holding of *Marathon* must stand for the proposition that the judicial power must vest in an article III court and necessarily must be heard by an article III judge. This holding is significant in evaluating where the judicial power has been vested by Congress in the 1984 Act. Following an overview of the vesting of the judicial power under the 1984 Act, constitutional issues specifically relating to the requirements of article III will be raised.

CONSTITUTIONAL RAMIFICATIONS OF THE BANKRUPTCY AMENDMENTS AND FEDERAL JUDGESHIP ACT OF 1984

Since the *Marathon* ruling in 1982, Congress expended great effort to reach a compromise culminating in the new bankruptcy

1978 Federal Magistrates Act, which also permitted referral of certain functions to adjunct magistrates, because the ultimate decision making authority remained with the district court judge. *Id.*

84. *Id.* at 79. Justice Brennan considered prior Supreme Court decisions and concluded that the ultimate decision making authority in the magistrate context included reference and withdrawal provisions, and that magistrates were appointed, and subject to removal by the district court. *Id.*

85. See *supra* notes 76-84 and accompanying text.

86. *Marathon*, 458 U.S. at 90. Justice Rehnquist found that cases raising issues relating to powers of article III courts and the confusion surrounding those issues particularly are suitable for adherence to the principle of judicial restraint. *Id.* See *United States v. Raines*, 362 U.S. 17, 21 (1960) (rules regarding judicial restraint in the area of constitutional issues).

87. See *Marathon*, 458 U.S. at 92 (Burger, C.J., dissenting); see also *id.* at 94 (White, J., dissenting).

88. *Id.* at 90-91; see *id.* at 92 (Burger, C.J., dissenting); see also *The Analysis of Proposed Amendments to The Bankruptcy Act of 1978*, reprinted in 1984 U.S. CODE CONG. & AD. NEWS 601, 603. The court found the jurisdictional provisions of the 1978 Act nonseverable and declared all of section 241(a) unconstitutional. *Marathon*, 458 U.S. at 91-92.

amendments.⁸⁹ Many concerns were raised by members of Congress regarding the constitutionality of the grant of jurisdiction under the 1984 Act.⁹⁰ Since enactment of the 1984 Act, further constitutional questions have been raised by commentators.⁹¹ A thorough review of the pertinent provisions of the 1984 Act is necessary to facilitate the analysis of the constitutional ramifications. Initially, the jurisdictional grant will be examined, including the important abstention provisions.⁹² Next, consideration will be given to the procedural requirements under the 1984 Act.⁹³ Finally, the constitutional ramifications of the 1984 Act will be analyzed in detail.

A. Jurisdiction

Under the 1984 Act, the grant of jurisdiction over bankruptcy matters is given to the district courts in 28 U.S.C. section 1334. This section replaces 28 U.S.C. section 1471, which was the jurisdictional grant under the 1978 Act found overly broad and unconstitutional in *Marathon*.⁹⁴ For purposes of this comment, bankruptcy cases can be analyzed as falling into two groups. The first group includes all cases under Title 11 or proceedings arising in a case under Title 11.⁹⁵ Included therein are most of those proceedings unique to bankruptcy actions, commonly known as core proceedings.⁹⁶ Generally, these proceedings are governed by federal bankruptcy law, which are laws of the United States, and have their constitutional basis in article III, section 2.⁹⁷ The second group of bankruptcy cases includes civil proceedings *arising in or related to* cases under Title 11.⁹⁸ This group of claims is much more difficult to delimitate. Although Title 11 does not provide a defini-

89. 1984 U.S. CODE CONG. & AD. NEWS 584; see Pub. L. No. 98-353, 98 Stat. 333 (effective July 10, 1984).

90. *Id.* at 584-85; see *id.* at 591. 1984 U.S. CODE CONG. & AD. NEWS 584, 585.

91. Mayne, *supra* note 16, at 5.

92. See 28 U.S.C. §1334(c)(1) (permissive abstention); see also *id.* §1334(c)(2) (mandatory abstention).

93. See *id.* §157.

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

95. 28 U.S.C. §1334(a)-(b).

96. Core proceedings include, but are not limited to:

(A) matters concerning the administration of the estate.

* * *

(C) counterclaims by the estate against persons filing claims against the estate.

* * *

(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. §157(a)(2).

97. U.S. CONST. art. III, §2, cl. 1.

98. 28 U.S.C. §1334(b).

tion, the emergency interim rule instituted in federal district courts after *Marathon* included an attempt to define *related* proceedings.⁹⁹ The state law claim in *Marathon* was found to be a related claim to the bankruptcy case.¹⁰⁰ If no diversity of citizenship exists, the constitutional basis for federal jurisdiction over independent, related claims must be found either under the pre-1978 Act "summary" jurisdiction theory¹⁰¹ or the doctrine of pendent jurisdiction. Prior to the enactment of the 1978 Act, "summary" jurisdiction existed in bankruptcy courts over matters involving the estate subject to the bankruptcy proceeding and third persons under two scenarios.¹⁰² First, the bankruptcy court had subject matter jurisdiction if the *res*¹⁰³ involved in the proceeding was in the actual or constructive possession of the court.¹⁰⁴ Second, summary jurisdiction existed if a third party with a claim against the bankrupt estate expressly or impliedly consented to bankruptcy court jurisdiction.¹⁰⁵ To exercise pendent jurisdiction, the related claim must have a common nucleus of facts with the federal bankruptcy claim.¹⁰⁶ Under the 1984 Act, the district court has original and exclusive jurisdiction of all cases under Title 11,¹⁰⁷ and original, but not exclusive, jurisdiction of all claims arising in or related to cases under Title 11.¹⁰⁸ Once subject matter jurisdiction is established in the district court, that court must determine whether the abstention provisions apply.

The 1984 Act provides both permissive and "mandatory" abstention.¹⁰⁹ In the interest of justice, or in the interest of comity or respect for state law, a district court *may* abstain from hearing a particular proceeding arising under Title 11 or arising in or related

99. See *supra* note 13.

100. *Marathon*, 458 U.S. at 90 (Rehnquist, J., concurring). No federal rule is provided for the claims held by Northern that arise entirely under state law. *Id.* The claim is only in the federal court system because Northern filed for reorganization. *Id.*

101. See WHITE, BANKRUPTCY AND CREDITORS RIGHTS 36-37 (1985) (review of summary jurisdiction); see *Tamasha Town & Country Club v. McAlester Const. Fin. Corp.*, 252 F. Supp. 80, 85 (S.D. Cal. 1966) (explanation of summary jurisdiction). The constitutional basis for summary jurisdiction was not expressed explicitly by the Supreme Court although the basis may exist under Congress' constitutional authority over bankruptcies in article I. See *Schumaker v. Beeler*, 293 U.S. 367, 374 (1934). The *Marathon* plurality found that Congress had eliminated summary jurisdiction by enacting the 1978 Act. *Marathon*, 458 U.S. at 54.

102. *Tamasha*, 252 F. Supp. at 85.

103. *Res* includes property that is in the possession of the debtor at the time the bankruptcy was filed. WHITE, *supra* note 101, at 37.

104. *Id.* at 36-37.

105. King, *supra* note 1, at 100 n. 11.

106. *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725 (1966).

107. 28 U.S.C. §1334(a).

108. *Id.* §1334(b).

109. *Id.* §1334(c); See WHITE, *supra* note 101, at 60-62. Some question remains regarding whether "mandatory" abstention is truly mandatory. See *infra* notes 111-15 and accompanying text.

to a case under Title 11.¹¹⁰ To trigger the mandatory abstention provision the proceeding must be based on a state law claim related to a case under Title 11.¹¹¹ In addition, the claim must be an action that, standing alone, could not have been commenced in a federal court.¹¹² If the claim is one that prompts mandatory abstention, the district court must abstain only if: (1) a timely motion is made; (2) an action is commenced in a proper state court; and (3) state court adjudication of the claim can be made in a timely manner.¹¹³ The abstention procedure can be described as follows: unless these three statutory requirements are satisfied, subject matter jurisdiction is conferred upon the district court.¹¹⁴ Since the district court has *some* discretion in determining whether or not the third requirement is met, the court, in essence, has discretion to claim subject matter jurisdiction over a related state law claim. If federal court adjudication of a state law claim that could not otherwise have been brought in a federal court is permitted, the district court has powers beyond the scope of article III.¹¹⁵ This conclusion necessarily follows from the constitutional requirements of article III limiting federal court jurisdiction.¹¹⁶ Due to the fact that the 1984 Act has only recently gone into effect, certain procedural aspects will need further analysis as courts begin to interpret the new Act.¹¹⁷ This author will review pertinent bankruptcy procedures based upon past court decisions addressing prior bankruptcy law.

B. Procedures Under the 1984 Act

The 1984 Act provides new procedures for bankruptcy actions.¹¹⁸ Initially, the district court may refer to the bankruptcy judges all

110. 28 U.S.C. §1334(c)(1); see Lundin, *The 1984 Bankruptcy Amendments; Holes in the Matrix*, Norton Bankr. Law Advisor 1, 1-4 (1984) (explanation and chart of bankruptcy claims).

111. 28 U.S.C. §1334(c)(2).

112. Mandatory abstention is designed to allow federal courts to adjudicate state law claims "that could not otherwise have been brought in federal court." See *The Analysis of Proposed Amendments to The Bankruptcy Act of 1978*, reprinted in 1984 U.S. CODE CONG. & AD. NEWS 601, 603.

113. 28 U.S.C. §1334(c)(2).

114. See *id.*

115. See *The Analysis of Proposed Amendments to the Bankruptcy Act of 1978*, reprinted in 1984 U.S. CODE CONG. & AD. NEWS 601.

116. See U.S. CONST. art. III, cl. 2 (jurisdiction only over cases arising under the laws of the United States).

117. See e.g., *In re S.E. Hornsby & Sons Sand and Gravel Co.*, 12 Bankr. Court Decisions, at A2 (Feb. 21, 1985) (abstention from turnover proceeding not proper); *In re Larry Austin Criswell*, 12 Bankr. Court Decisions, at A2 (Feb. 7, 1985) (claim for punitive damages held to be a core proceeding).

118. See 28 U.S.C. §157 (procedures).

bankruptcy matters, including related claims.¹¹⁹ District courts have adopted rules for automatic referral due to their propensity towards avoidance of bankruptcy matters.¹²⁰ Upon referral, a bankruptcy judge will determine whether a proceeding is core or non-core.¹²¹ While core proceedings are enumerated under section 157(b)(2), no definition is given for non-core proceedings. Arguably, a non-core proceeding is a proceeding that is otherwise related to a case under Title 11 since section 157(b)(3) distinguishes between otherwise related proceedings and core proceedings. The 1984 Act further provides that personal injury tort and wrongful death claims must be tried in the district court.¹²² If these claims are severed from other bankruptcy proceedings, piecemeal litigation will result. If a bankruptcy judge determines that a proceeding is a core proceeding as defined in section 157(b)(2), the matter will be heard and determined by the bankruptcy judge.¹²³ If a determination is made that the matter is a non-core proceeding, the actions of the bankruptcy judge will be guided by whether all the parties to the action consent.¹²⁴ Based upon the consent of all parties, a bankruptcy judge may hear, determine, and enter appropriate orders and judgments with respect to the related, non-core proceeding.¹²⁵ If the parties do not consent, a bankruptcy judge only may hear the related claim and submit proposed findings of fact and conclusions of law to the district court.¹²⁶ After *de novo* review, the district court will issue appropriate final orders and judgments.¹²⁷

The district court retains the power to withdraw a referred case or proceeding from the bankruptcy court.¹²⁸ Withdrawal is mandatory if the district court determines that the resolution of the proceeding requires consideration of both Title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.¹²⁹ Otherwise, withdrawal is permissive.¹³⁰ The 1984 Act provides that the district courts have jurisdiction over appeals from final judgments, orders, and decrees of bankruptcy judges.¹³¹ Viewed

119. *Id.* §157(a).

120. Thomas, *Highlights of the Bankruptcy Amendments and Federal Judgeship Act of 1984*, 8 BUS. LAW NEWS 3, 4 (1984).

121. 28 U.S.C. §157(b)(3).

122. *Id.* §157(b)(5).

123. *Id.* §157(b)(1).

124. *Id.* §157(c)(2).

125. *Id.*

126. *Id.* §157(c)(1).

127. *Id.*

128. *Id.* §157(d).

129. *Id.*

130. *Id.*

131. *Id.* § 158(a).

in light of the *Marathon* holding, the procedural requirements of the 1984 Act raise various constitutional questions.

Three possible constitutional concerns must be examined. A preliminary issue relating to the application of the 1984 Act is whether the district court has subject matter jurisdiction over a state law claim related to a bankruptcy proceeding.¹³² If no federal court can adjudicate a state law claim related to a bankruptcy proceeding, the case for article III status for bankruptcy judges will not be as strong.¹³³ A second issue is whether a bankruptcy judge, under the 1984 Act, may adjudicate a state law claim without the consent of the parties. Finally, the 1984 Act and related court decisions must be examined to determine whether an article I bankruptcy judge may hear and determine a *Marathon* claim with the consent of the parties and whether consent is sufficient to overcome article III concerns.¹³⁴

C. Constitutional Issues Raised by the 1984 Act

1. Constitutional Basis for Jurisdiction in Federal Courts

The first constitutional concern raised in this comment is whether a federal district court has subject matter jurisdiction over a state law claim related to a bankruptcy case. This threshold issue is significant because if *no* federal court can exercise jurisdiction over state law claims related to a case under Title 11, article III status for bankruptcy judges may not provide a desirable solution for creating a fair and efficient bankruptcy system. Since an article I bankruptcy judge, as an officer of the district court, might have sufficient power under the Constitution to adjudicate claims other than *Marathon* type state-based claims, article III status would be unnecessary.¹³⁵

In examining *Marathon*, what *was* decided by the Court must be distinguished from what was *not* decided. A majority of justices decided in *Marathon* that a nonarticle III judge *could not* adjudicate a state law claim under the 1978 Act.¹³⁶ The *Marathon* Court did not hold that a district court *could* hear the claim;¹³⁷ therefore, the

132. See The Analysis of Proposed Amendments to The Bankruptcy Act of 1978, reprinted in 1984 U.S. CODE CONG. & AD. NEWS 601, 603.

133. See *infra* note 193 and accompanying text.

134. The basis for upholding the Federal Magistrates Act of 1979 was that all parties to the action consent to adjudication by article I magistrates. *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 542-57 (9th Cir. 1984).

135. A narrow reading of *Marathon* results in the conclusion that article I judges may hear claims other than state law claims. See *Marathon*, 458 U.S. at 90-91.

136. See *supra* notes 48-50, 86-88 and accompanying text.

137. See The Analysis of Proposed Amendments to The Bankruptcy Act of 1978, reprinted in 1984 U.S. CODE CONG. & AD. NEWS 601, 602.

district court must find a constitutional source of authority for subject matter jurisdiction.¹³⁸ If the parties are not of diverse citizenship and a related claim arises that is based entirely upon state law, and, therefore, is not a federal question, two possible constitutional bases for jurisdiction exist. First, a district court may have a constitutional basis for jurisdiction over state law claims if the court recognizes summary jurisdiction.¹³⁹ A second justification might exist if the district court chooses to exercise pendent jurisdiction.¹⁴⁰

Whether the district courts will extend the old doctrine of summary jurisdiction used prior to the 1978 Act to justify their jurisdiction over state law claims related to a bankruptcy action must await future federal court decisions.¹⁴¹ Pendent jurisdiction, on the other hand, would not apply unless a successful argument is advanced in favor of extending the doctrine. The proponent of an argument for extending pendent jurisdiction might assert that the claims held by the debtor in a bankruptcy action are assets or property owned by the bankrupt estate.¹⁴² The district court may find that all property owned by the bankrupt estate has a common nucleus of fact to the bankruptcy case.¹⁴³ The justification for the application of pendent jurisdiction is judicial economy, convenience, and fairness to litigants.¹⁴⁴ While the federal courts have broadened the application of pendent jurisdiction since 1966,¹⁴⁵ the federal claim and the related state claim still must comprise one "case" to find a constitutional basis for district court jurisdiction under article III.¹⁴⁶ Unless the doctrine of pendent jurisdiction is extended to cover related state law claims, the article III court, whether a district court or a bankruptcy court granted article III status, would have to rely on the doctrine of summary jurisdiction for the constitutional justification for federal jurisdiction over the related state law claim. The federal court must assert some con-

138. *Owen Equipment and Erection Co. v. Kroger*, 437 U.S. 365, 372 (1978). "Constitutional power is merely the first hurdle that must be overcome in determining that a federal court has jurisdiction over a particular controversy. For the jurisdiction of the federal courts is limited not only by the provisions of Art. III of the Constitution, but also by Acts of Congress." *Id.*

139. See *supra* notes 101-07 and accompanying text.

140. See *The Analysis of Proposed Amendments to The Bankruptcy Act of 1978*, reprinted in 1984 U.S. CODE CONG. & AD. NEWS 601, 603.

141. See *supra* notes 101-07 and accompanying text.

142. *Katchen v. Landy*, 382 U.S. 323, 329-30 (1965).

143. 28 U.S.C. §504.

144. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966); see Shakman, *The New Pendent Jurisdiction of the Federal Courts*, 20 STAN. L. REV. 262, 265-68 (1968) (criticizing the justifications).

145. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

146. Shakman, *supra* note 144, at 265.

stitutional basis for subject matter jurisdiction.¹⁴⁷ Once a constitutional basis for subject matter jurisdiction is established, the initial constitutional issue is resolved and the second issue relating to the constitutionality of bankruptcy procedures must be examined.

2. State Law Claims as Core Matters

Under the 1984 Act, if a state law claim or cause of action is determined by a bankruptcy judge to be a core proceeding, the claim could be heard and determined by an article I bankruptcy judge *without* the consent of the parties.¹⁴⁸ If the 1984 Act allows an article I bankruptcy judge to adjudicate a state law claim without the consent of the parties, the 1984 Act may violate *Marathon*.¹⁴⁹ This author will attempt to determine whether the 1984 Act permits an article I judge to hear and decide a claim based entirely upon state common law in the following two examples.¹⁵⁰

The first example arises under section 157(b)(2)(C) of the 1984 Act, which provides that counterclaims held by the estate against adverse claimants are core proceedings.¹⁵¹ Under the Federal Rules of Civil Procedure, a counterclaim is compulsory if "it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. . . ."¹⁵² If a bankrupt estate has a state law based counterclaim that is compulsory under the Federal Rules of Civil Procedure, this claim would be designated a core proceeding¹⁵³ and heard and determined by an article I bankruptcy judge¹⁵⁴ *without* the consent of the parties;¹⁵⁵ a violation of *Marathon*.¹⁵⁶ Although an argument can be made that the bankrupt party impliedly consented to the jurisdiction of the bankruptcy court by petitioning for bankruptcy, no implied jurisdiction exists in the case of an involuntary bankruptcy.¹⁵⁷ Thus, the rationale that a litigant consents to jurisdiction over counterclaims by filing an action against the counterclaimant does not apply.

147. U.S. CONST. art. III, §2.

148. 28 U.S.C. §157(b)(1).

149. See *Marathon*, 458 U.S. at 90-91.

150. The two hypotheticals are advanced because of the absence of case law regarding the 1984 Act. Recent bankruptcy and district court decisions have addressed the 1984 Act. See *infra* note 202.

151. 28 U.S.C. §157(b)(2)(C).

152. FED. R. CIV. P. 13(a).

153. 28 U.S.C. §157(b)(2)(C).

154. *Id.* §157(b)(3).

155. *Id.* §157(b)(1).

156. *Marathon*, 458 U.S. at 91.

157. See 11 U.S.C. §301 (voluntary cases commenced by the debtor); see also 11 U.S.C. §303 (involuntary cases commenced by holders of claims against debtor).

Another example of a possible *Marathon* violation might arise under section 157(b)(2)(O) if an outstanding contract claim based upon state law was found to affect the liquidation of assets of the estate. Under section 157(b)(2)(O), a core proceeding includes proceedings affecting the liquidation of assets of the estate or adjustment of the debtor-creditor relationship.¹⁵⁸ An exception exists for personal injury tort or wrongful death claims.¹⁵⁹ In the state law claim of Northern Pipeline against Marathon Pipe Line, the bankrupt party, Northern, sought damages for alleged breaches of contract and warranty, misrepresentation, coercion, and duress.¹⁶⁰ A state law based contract claim, similar to the one held by Northern,¹⁶¹ may be designated a proceeding that affects the liquidation of assets of the estate. An argument could be advanced that to liquidate an estate all valuable claims held by the estate must be settled or determined. Moreover, the claim then would be a core proceeding¹⁶² and could be heard and determined by an article I bankruptcy judge without the consent of the parties. Again, the holding of the Supreme Court in *Marathon* would be violated.¹⁶³ Under either the counterclaim or the liquidation of assets examples, a party who does not wish to have the state law claim determined by an article I judge may seek withdrawal of the claim from the bankruptcy court to the district court.¹⁶⁴ If the resolution of a claim does not require consideration of laws regulating organizations or activities affecting interstate commerce, withdrawal is permissive.¹⁶⁵ If a district court refuses to withdraw the state law claim, the article I bankruptcy judge would hear and determine the claim. This *Marathon* violation threatens the constitutionality of the 1984 Act. An additional constitutional issue relating to jurisdiction by consent of the parties to a bankruptcy proceeding will be analyzed in the following section.

3. Jurisdiction by Consent of the Parties

The most significant potential constitutional challenge relates to adjudication by an article I bankruptcy judge based upon consent of all parties to the claim. Under the 1984 Act, a bankruptcy judge may

158. 28 U.S.C. §157(b)(2)(O).

159. *Id.*

160. *See Marathon*, 458 U.S. at 56.

161. *Id.* at 90 (Rehnquist, J., concurring).

162. 28 U.S.C. §157(b)(2)(O).

163. *See Marathon*, 458 U.S. at 90-91.

164. 28 U.S.C. §157(d).

165. *Id.*

issue final orders and judgments on a claim related to a case under Title 11 if all the parties consent.¹⁶⁶ Adjudication by a bankruptcy judge based upon consent of the parties is significant because a state law claim may be heard and determined by a nonarticle III judge, an event that, without the consent stipulation, would violate *Marathon*.¹⁶⁷ The three dissenting justices in *Marathon* agreed that any constitutional defects in the 1978 Act could be cured by consent to adjudication of the related state law claim by an article I bankruptcy judge.¹⁶⁸ Chief Justice Burger stated that, notwithstanding the plurality opinion, the *Marathon* holding must be limited to the concurrence of Justice Rehnquist.¹⁶⁹ Chief Justice Burger interpreted the concurrence of Justice Rehnquist to mean that the consent by the parties would have satisfied any constitutional deficiencies.¹⁷⁰ Justice Rehnquist stated that “[n]one of the cases has gone so far as to sanction the type of adjudication to which *Marathon* will be subjected against its will under the provisions of the 1978 Act.”¹⁷¹ While Justice Rehnquist did intimate that consent may be a cure,¹⁷² Chief Justice Burger’s interpretation is not the only possible interpretation. The concurrence does not establish that a majority of justices would approve the consent theory. Justice Rehnquist’s “subjected against its will” language indicates *Marathon Pipeline* was being coerced. That language, however, does not establish clearly Justice Rehnquist’s adherence to the theory that consent cures the constitutional defect. Recent decisions regarding the constitutionality of the Federal Magistrates Act of 1979¹⁷³ (hereinafter the Magistrates Act) address the issue of jurisdiction by consent.¹⁷⁴

The new bankruptcy judges bear a resemblance to United States Magistrates established under the Magistrates Act.¹⁷⁵ The Magistrates Act was upheld by the Ninth Circuit Court of Appeals in *Pacemaker Diagnostic Clinic of America v. Instromedix*.¹⁷⁶ The majority opinion

166. *Id.* §157(c)(2).

167. *See Marathon*, 458 U.S. at 90-91.

168. In Chief Justice Burger’s characterization of the holding of the case, he said that “absent the consent of the litigants,” a traditional state common law action must be heard by an “Article III court.” *Marathon*, 458 U.S. at 92 (Burger, C.J., dissenting); *see also id.* at 95 (White, J., dissenting) (similar language indicating consent is a cure).

169. *Id.* at 92.

170. *Id.*

171. *Id.* at 91 (Rehnquist, J., concurring).

172. *Id.*

173. Pub. L. No. 96-82, 93 Stat. 643 (1979).

174. *See, e.g., Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 547 (9th Cir. 1984) (en banc); *Wharton-Thomas v. United States*, 721 F.2d 922, 929-30 (3d. Cir. 1983).

175. *See supra* note 70 and accompanying text.

176. 725 F.2d 537 (1984).

distinguished two components of the separation of powers protections.¹⁷⁷ One component reaches to the rights of parties; another pertains to the relations between the separate branches of the government.¹⁷⁸ Within the second portion of the separation of powers protections, a potential compromise to the essential independence of the judiciary exists.¹⁷⁹ Although the personal right of a federal litigant to demand article III adjudication of a civil suit may be waived,¹⁸⁰ the court in *Pacemaker* held that the protection of the second component may not be waived.¹⁸¹ An integral factor in holding that the personal right to article III adjudication is waivable is that the litigant voluntarily must relinquish the right.¹⁸² If a federal litigant is coerced or manipulated by the imposition of "serious burdens and costs" into a court in which an article I judge sits, the right to article III adjudication would not be relinquished voluntarily.¹⁸³ The integral factor of voluntary consent to article I jurisdiction must be examined in the context of the 1984 Act.

Dissenting in *Marathon*, Justice White admitted to Congressional recognition of a lack of judicial interest in bankruptcy matters and that this realization led to the establishment of bankruptcy courts.¹⁸⁴ Accordingly, the district courts have adopted rules of automatic referral for all bankruptcy and related matters to bankruptcy judges.¹⁸⁵ Under the procedural requirements of the 1984 Act, once an action of a party is referred to a bankruptcy judge, the party may seek withdrawal of their claim to the district court.¹⁸⁶ A party may be deterred from seeking withdrawal due to lack of interest on the part of district court judges for bankruptcy matters and overly crowded dockets.¹⁸⁷ Practically speaking, a party will be dissuaded from refusing to consent to bankruptcy judge adjudication of all their claims because of potential prejudice. Thus, the rationale for litigant consent to waiver in the magistrate system is invalid if applied to bankruptcy courts.

177. *Id.* at 541.

178. *Id.*

179. *Id.*

180. *Id.* at 542.

181. *Id.* at 543-44.

182. *Id.* at 543.

183. *Id.*

184. Congress was concerned that lack of judicial interest in bankruptcy matters would lead to a "failure by the federal courts to deal with bankruptcy matters in an expeditious manner." *Marathon*, 458 U.S. at 116 (White, J., dissenting).

185. Thomas, *Highlights of the Bankruptcy Amendments and Federal Judgeship Act of 1984*, 8 BUS. LAW NEWS 3, 4 (1984).

186. 28 U.S.C. §157(d).

187. See *supra* note 184 and accompanying text; see also *Pacemaker*, 725 F.2d at 547 (indicating concern over the ever mounting volume of cases in federal courts).

Although magistrates handle a general docket of referred cases,¹⁸⁸ bankruptcy judges are very specialized.¹⁸⁹ A litigant recognizing bankruptcy judge specialization may not want to have a state common law claim adjudicated by a bankruptcy judge, but may experience the coercion that concerned the *Pacemaker* court. For example, a party might be dissuaded from seeking withdrawal to the district court because of time delays and added litigation expense. In addition, the judicial system may coerce a litigant into involuntary consent.¹⁹⁰ The dissent in *Pacemaker* expressed this concern regarding consensual reference under the Magistrates Act.¹⁹¹ The dissent questioned whether consent truly is voluntary when the express purpose of the Magistrate Act provisions relating to consensual reference was to encourage certain classes of litigants to give up their right to article III adjudication because overburdened district judges could not hear all cases promptly.¹⁹² The same concerns apply to the Bankruptcy Amendments and Federal Judgeship Act of 1984, since in both the bankruptcy and magistrate systems withdrawal is back to the same overburdened district court judges.

The problems raised by the consensual reference section of the 1984 Act are significant. For the most part, these problems could be eliminated if bankruptcy judges were granted article III status.¹⁹³ If article III status were granted, the referral and withdrawal provisions could be eliminated because the need for final adjudication by the article III district court no longer would exist.¹⁹⁴ Furthermore, the requirement of *Marathon* that an article III judge must hear a state law claim would be satisfied. In light of the problems raised by the 1984 Act, this author proposes that article III status for bankruptcy judges would result in a more fair and efficient bankruptcy system.

PROPOSAL: ARTICLE III STATUS FOR BANKRUPTCY JUDGES

Many of the goals of an efficient bankruptcy system can be attained and many problems solved by conferring article III status on bank-

188. Under 28 U.S.C. §636(c), Magistrates are authorized, when specially designated by the district court, to exercise jurisdiction over civil matters and enter final judgments in civil cases within the district court, provided the parties consent to the district court reference. *Pacemaker*, 725 F.2d at 540.

189. *Marathon*, 458 U.S. at 118 (White, J., dissenting).

190. See *Pacemaker*, 725 F.2d at 553-54 (Schroeder, C.J., dissenting). Although this concern is expressed with respect to the magistrate system, the coercion, which may develop in the bankruptcy court system under the 1984 Act, is analogous.

191. *Id.*

192. *Id.*

193. See *infra* note 197 and accompanying text.

194. See *infra* notes 197-98 and accompanying text.

ruptcy judges.¹⁹⁵ Initially, a determination must be made that federal court jurisdiction may exist over a state law claim related to a bankruptcy case.¹⁹⁶ This threshold issue is a prerequisite for the broad jurisdiction necessary for efficient handling of bankruptcy matters. If no federal court may hear a state law claim related to a bankruptcy proceeding, delays would arise in the final settlement of a bankrupt estate. Severance of the state law claim from the bankruptcy case would conflict with the goal of providing a single court for all proceedings related to a bankruptcy case. Although this concern is not solved by granting bankruptcy judges article III status, federal courts may have jurisdiction over state law claims by extending the doctrine of pendent jurisdiction or use of summary jurisdiction.¹⁹⁷ Other constitutional issues can be solved by establishing article III bankruptcy judgeships.

The constitutional concern that a related state law claim might be designated a core proceeding and adjudicated by an article I bankruptcy judge would be solved by granting article III status. Article III bankruptcy judges would have the broad jurisdictional powers of district court judges. Therefore, the *Marathon* prohibition against adjudication of state law claims by an article I judge would be satisfied. Moreover, state law core proceedings no longer would be subject to constitutional attack. In addition, bankruptcy judges with article III protections could work independently of the district court and the control provisions of the 1984 Act could be eliminated.¹⁹⁸ This independence was sought by Congress for bankruptcy judges under the 1978 Act that was held invalid in *Marathon*.¹⁹⁹ Finally, neither the referral and withdrawal sections of the 1984 Act, nor reluctance of the district courts to hear bankruptcy matters, work against a litigant seeking adjudication of a state law claim related to a bankruptcy case by an article III court. Consensual reference would be unnecessary since the bankruptcy judges would be sitting in article III courts. Therefore, since many of the concerns analyzed could be solved, article III status for bankruptcy judges would provide not only a court system free of constitutional doubts, but also a fair and efficient bankruptcy system.

195. King, *supra* note 1, at 100.

196. See *supra* notes 94-104 and accompanying text.

197. See *id.*

198. See *supra* notes 118-33 and accompanying text.

199. See *supra* notes 48-50, 86-88 and accompanying text.

CONCLUSION

Prior to the Bankruptcy Reform Act of 1978, the bankruptcy system was in great need of reform to reflect changing social and economic conditions in this country.²⁰⁰ Congress determined that an integral factor for this reform was the need for federal judges hearing bankruptcy cases to possess broad jurisdictional powers.²⁰¹ An independent federal judiciary staffed with federal judges who possess the important article III protections of life tenure and salary guarantees is as important as the need for an efficient and competent bankruptcy system. The Bankruptcy Amendments and Federal Judgeship Act of 1984 raises a series of significant constitutional problems that may result in much litigation²⁰² and ultimately may cause the jurisdictional provisions of the Act to be declared unconstitutional. The bankruptcy system might be placed back to the position experienced after the *Marathon* decision. Even if the 1984 Act is upheld as constitutional, the Act does not meet the important demands of an efficient system for the quick and fair adjudication of bankruptcy matters. To ensure that bankruptcy judges have the broad jurisdiction they require without violating the letter or structure of the Constitution, bankruptcy judges should be granted article III status.

Charles S. Custer

200. King, *supra* note 1, at 100.

201. *Id.*

202. Recent bankruptcy and district courts have addressed issues raised by the 1984 Act. *In re Charles Hamilton Lorren*, 12 Bankr. Court Decisions, at A1 (Jan. 24, 1985) (jurisdiction of district courts includes bankruptcy judges); *In re Caralee Jean Pierce*, 12 Bankr. Court Decisions, at A2 (Jan. 24, 1985) (no bankruptcy court jurisdiction over breach of lease dispute); *In re Shearn Moody, Jr.*, No. M-84-90, 12 Bankr. Court Decisions, at A1 (Feb 7, 1985) (constitutionality of 1984 Act upheld); *In re Associated Grocers of Nebraska Co-op*, 12 Bankr. Court Decisions, at A1 (Feb. 21, 1985) (section 157(b)(2)(F) held unconstitutional).

