
Core Proceedings and the "New" Bankruptcy Jurisdiction

Thomas S. Marrion

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

Recommended Citation

Thomas S. Marrion, *Core Proceedings and the "New" Bankruptcy Jurisdiction*, 35 DePaul L. Rev. 675 (1986)

Available at: <https://via.library.depaul.edu/law-review/vol35/iss3/4>

This Article is brought to you for free and open access by the College of Law at Digital Commons@DePaul. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Digital Commons@DePaul. For more information, please contact digitalservices@depaul.edu.

CORE PROCEEDINGS AND THE "NEW" BANKRUPTCY JURISDICTION

Thomas S. Marrion*

INTRODUCTION

In 1978, bankruptcy jurisdiction underwent its most extensive revision in eighty years. The product of nearly ten years of study, the Bankruptcy Reform Act of 1978 ("Reform Act")¹ was intended as a solution to problems that could no longer be adequately addressed by the Bankruptcy Act of 1898 ("Act of 1898").² Less than four years later, however, the Supreme Court ruled that a central jurisdictional provision of the Reform Act violated article III of the United States Constitution.³ In response, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("Act of 1984"),⁴ which attempts to accommodate both the Constitution and the need for efficient bankruptcy administration.

Although the terminology of the Act of 1984 is new, the structure of the court system is markedly similar to that of the Act of 1898. Despite this similarity, most courts and commentators have not given close attention to case law developed under the Act of 1898 when discussing jurisdiction under the new law. While there are differences between the systems, they are similar enough that the case law developed under the Act of 1898 deserves a second look. In fact, several of the "core proceedings"⁵ that courts now find

* Thomas S. Marrion, A.B., College of the Holy Cross; J.D., University of Connecticut. Mr. Marrion is Law Clerk to the Honorable Robert L. Krechevsky, Chief Judge, U.S. Bankruptcy Court for the District of Connecticut. The author wishes to thank Professor Nathan Levy, Jr. and Judge Krechevsky for their helpful comments on earlier drafts.

1. The Bankruptcy Reform Act of 1978, Pub. L. 95-598, 92 Stat. 2549 (1978). Title II of the Reform Act contained the jurisdictional provisions.

2. The Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (1898).

3. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). In *Northern Pipeline*, the Supreme Court struck down portions of the Bankruptcy Reform Act of 1978 concerning the jurisdiction of bankruptcy courts. The Act of 1984 was in part a response to the *Northern Pipeline* decision.

Article III, § 1, of the U.S. Constitution provides that:

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 Judges . . . 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 continuance in office.

4. The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, Title I, § 101(a), 98 Stat. 333 (1984).

5. 28 U.S.C. § 157(b)(2) (1984). Core proceedings are matters in which bankruptcy judges can enter orders and judgments, subject only to appeal to the district court. See *infra* notes 45-54 and accompanying text.

troublesome under the Act of 1984 have direct analogs in earlier case law.

Familiarity with prior law is necessary for full appreciation of the present system. Accordingly, this Article outlines jurisdiction under the Act of 1898, the Reform Act, and the Act of 1984. It then reviews several provisions of the Act of 1984 included under the heading of "core proceedings" and suggests interpretations of each of these provisions.

I. THE BANKRUPTCY ACT OF 1898

The Bankruptcy Act of 1898 vested original jurisdiction over all bankruptcy matters in the United States District Courts.⁶ In turn, the district judges referred certain matters to bankruptcy referees.⁷ There were two main types of bankruptcy matters under the Act of 1898: "proceedings" and "controversies."⁸ "Proceedings" generally involved the administration of the bankrupt's estate and were solely within the province of the bankruptcy court. "Controversies" were collateral disputes arising out of bankruptcy proceedings. These matters involved the trustee and third parties and could be heard by either the bankruptcy court or by a non-bankruptcy court that had jurisdiction.⁹ While proceedings fell within the "summary jurisdiction" of the bankruptcy court, controversies sometimes required district courts to exercise "plenary jurisdiction." The two types of jurisdiction differed in the following manner. Matters within the summary jurisdiction of the bankruptcy court could be adjudicated through the use of more expeditious modes of procedure, with the court sitting in equity. The district court *qua* bankruptcy court could hear these matters; however, a bankruptcy referee usually rendered final judgment on such matters, subject only to "review" by the district court.¹⁰ In contrast, plenary jurisdiction was exercised only by the

6. 28 U.S.C. § 1334 (repealed 1978). Section 1334 states, "The district courts shall have original jurisdiction, exclusive of the courts of the States, of all matters and proceedings in bankruptcy."

7. In 1973, the title of "bankruptcy referee" was changed to "bankruptcy judge" with the enactment of the Federal Rules of Bankruptcy Procedure. See Bankr. R. 901(7), 411 U.S. 995, 1092 (1973).

8. Under the law in effect since 1978, "proceedings" has a meaning quite different from this one. See *infra* note 16.

9. Some controversies were, in fact, altogether outside the scope of federal jurisdiction, because those not within summary jurisdiction required independent federal jurisdictional grounds.

10. In fact, § 22a(1) of the Act of 1898 provided for automatic reference to the referee of most bankruptcy matters. Section 22a and former Bankruptcy Rule 102(b), 411 U.S. 995, 1003 (1973), contained provisions allowing district judges to retain such matters, but in practice, this was the exception rather than the rule. A district court sitting in "review" of a referee's decision sat as an appellate court. Bankruptcy Rule 810, 411 U.S. 995, 1090 (1973), provided that the district court sitting in review "shall accept the referee's findings of fact unless they are clearly erroneous," while reviewing *de novo* the referee's conclusions of law. *Id.* (In 1970, "review" was changed to "appeal.") Rule 810 replaced General Order 47, 305 U.S. 679, 702 (1938), which authorized the receipt of further evidence by a district judge in connection with review of the referee's orders or findings. *Id.*

district court or state courts, following their general rules of procedure. According to some estimates, as much as fifty percent of all litigation under the Act of 1898 concerned whether a matter was within the bankruptcy court's summary jurisdiction.¹¹

Incident to this litigation, courts developed an elaborate system of rules to determine whether a matter was within the summary jurisdiction of the bankruptcy court. The Act of 1898 contained express grants of summary jurisdiction, but most of these concerned proceedings in bankruptcy, over which such jurisdiction already existed.¹² Beyond this, the bankruptcy court had summary jurisdiction over matters concerning property within the actual or constructive possession of the bankruptcy court,¹³ and over controversies in which the parties had expressly or impliedly consented to summary jurisdiction.¹⁴ Cases decided under the Act of 1898 that developed theories

11. See Countryman, *Scrambling to Define Bankruptcy Jurisdiction*, 22 HARV. J. LEGIS. 1, 6-7 (1985); Note, *Scope of the Summary Jurisdiction of the Bankruptcy Court*, 40 COLUM. L. REV. 489 (1940); S. REP. No. 989, 95th Cong., 2d Sess. 17 (1978), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5787, 5803. The reasons for this were several: (1) the prospect of appearing in a court created for the purpose of administering the bankruptcy law may have been intimidating to a lawyer not experienced in the field; (2) the right to trial by jury of most matters within the summary jurisdiction of the bankruptcy court did not exist, because the bankruptcy court sat as a court of equity; (3) if a matter required a plenary suit, and no other ground for federal jurisdiction existed, parties were required to litigate that matter in state court; (4) matters within summary jurisdiction incorporated Bankruptcy Rule 704(c), which provided for nationwide service of process, while district court service of process was (and is) governed by Rule 4(c)(2)(C) of the Federal Rules of Civil Procedure, which incorporates state law limits on service of process; and (5) in matters within summary jurisdiction, final judgment could be rendered by a bankruptcy referee, a non-article III officer, subject only to appeal.

12. These grants included § 2a(21) (with Bankr. Rules 604 and 914), accounting by superseded custodians; § 41b (with Rule 904), summary punishment for contempt before the referee; § 50n (with Rule 925), breach of a condition of a bond under the Act; § 571 (with Rule 701), recovery of an excessive dividend from a creditor; § 60d (with Rule 220), reexamination of attorney's and professional fees; § 67a(4), determining rights under § 67a (dealing with liens and fraudulent transfers); § 67f(4), determining rights under § 67f (dealing with investment companies); and § 70a(8), concerning property held by an assignee of the bankrupt when the assignment constituted an act of bankruptcy. For acts of bankruptcy, see § 3 of the Act of 1898.

13. Note that the possession theory was created by the court rather than by statute. This theory was an expression of the concept of *in rem* jurisdiction. The line of cases developing this theory will be discussed below in the text accompanying notes 146-61.

14. The Bankruptcy Act of 1898, § 2a (repealed 1978), states:

The . . . courts of bankruptcy . . . are hereby invested, within their respective territorial limits . . . with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings . . . [to]

. . . .
(7) cause estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in property of any estate whenever, under applicable laws of a state, creditors are empowered to compel such spouse to accept a money satisfaction for such interest; and where in a controversy . . . an adverse party does not interpose an objection

of implied consent and constructive possession are discussed below in connection with the Act of 1984.

II. THE BANKRUPTCY REFORM ACT OF 1978

Congress sought to centralize bankruptcy jurisdiction and expedite the administration of bankruptcy cases through the Reform Act. The Reform Act conferred on district courts original and exclusive jurisdiction over all "cases" under title 11.¹⁵ It also gave district courts original and concurrent jurisdiction of all civil proceedings arising from or related to cases under title 11.¹⁶ In turn, the Reform Act gave the bankruptcy courts "all of the jurisdiction conferred by [the Reform Act] on the district courts."¹⁷ This comprised jurisdiction over any action involving the debtor, including many actions that would have required a plenary suit under the Act of 1898.¹⁸ Eighty years of litigation over the summary-plenary distinction were abandoned in favor of a simplified bankruptcy court system.

Cases that involve claimant creditors and counterclaiming bankruptcy trustees illustrate this change. For example, under the Act of 1898, if a creditor filed for allowance of a claim¹⁹ in a bankruptcy case, and the trustee counterclaimed on a completely unrelated set of facts, the counterclaim would usually have required an action outside the bankruptcy court,²⁰ absent consent of the parties.²¹ Under the Reform Act, however, the bankruptcy court could hear this counterclaim, whether compulsory or permissive,²² even without implied consent and even if the property were not within the possession of the bankruptcy court. Regardless of the nature of the coun-

to summary jurisdiction . . . he shall be deemed to have consented to such jurisdiction.

(Emphasis added.) For an analog to § 2a(7) in current law, see 28 U.S.C. § 157(c)(2) (1984).

The Bankruptcy Act of 1898, § 23b (repealed 1978), stated, "Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, . . . might have brought or prosecuted them if proceedings in bankruptcy had not been instituted unless by consent of the proposed defendant."

15. 28 U.S.C. § 1471(a) (repealed 1984). "Case" is not defined in title 11 or title 28, but it is the basic action by which an estate in bankruptcy is administered.

16. 28 U.S.C. § 1471(b) (repealed 1984). The "civil proceeding" (or "proceeding") is an action arising during and having some connection with a bankruptcy case.

17. 28 U.S.C. § 1471(c) (repealed 1984).

18. See *supra* notes 11-14 and accompanying text.

19. In the context of bankruptcy, a "claim" is a provable obligation. See 11 U.S.C. § 101(4) (1984).

20. The exceptions are certain counterclaims constituting objections under § 57g. See *infra* notes 108-10 and accompanying text. See also *supra* notes 8-11 and accompanying text.

21. See *supra* notes 6-8 and accompanying text.

22. For the distinction between permissive and compulsory counterclaims, see *infra* notes 130-32.

terclaim, the bankruptcy court could render final judgment on the issue.²³

The jurisdictional system established by the Reform Act was much more efficient than that which existed under the Act of 1898.²⁴ However, the Supreme Court declared the system unconstitutional in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,²⁵ holding the Reform Act to be an excessive grant of jurisdiction to an article I court.

In January, 1980, Northern Pipeline Co. filed a reorganization petition in the United States Bankruptcy Court for the District of Minnesota.²⁶ In March of that year, Northern filed an action in the bankruptcy court against Marathon Pipe Line Co. alleging, *inter alia*, breaches of contract and warranty. Marathon filed a motion to dismiss, claiming that the Reform Act unconstitutionally conferred article III judicial power on non-article III judges. The bankruptcy court denied the motion;²⁷ the district court reversed.²⁸ On appeal, the Supreme Court affirmed the district court and purported to invalidate the jurisdictional scheme of the Reform Act in its entirety.

In discussing the requirements of article III, the plurality recognized only three exceptions to the general rule that "the judicial power of the U.S. must be vested in Article III courts"²⁹: territorial courts, courts martial, and courts and agencies created to adjudicate "public rights."³⁰ The plurality held that the judicial power conferred by the Reform Act fell under none of these exceptions.

The Court next distinguished its earlier decisions in *Crowell v. Benson*³¹

23. This was subject only to appeal to the district court. 28 U.S.C. § 1334 (repealed 1984). Appeals were available, upon consent of the parties, to bankruptcy appellate panels in circuits that had appointed such panels. As of this date, only the first and ninth circuits have appointed appellate panels; their existence was not affected by the 1984 amendments. *But see* Commonwealth of Mass. v. Dartmouth House Nursing Home, Inc., 726 F.2d 26 (1st Cir. 1984) (*Northern Pipeline* raises serious questions regarding the constitutionality of bankruptcy appellate panels); *cf.* Briney v. Burley (*In re Burley*), 738 F.2d 981 (9th Cir. 1984) (reaching the opposite conclusion). Under the Act of 1984, appeals are taken to bankruptcy appellate panels only upon the consent of all the parties. 28 U.S.C. § 158(b)(1) (1984).

24. *But see* 130 CONG. REC. S8893, 92 (daily ed. June 29, 1984) (remarks of Sen. Orrin Hatch to the effect that this would be less efficient).

25. 458 U.S. 50 (1982).

26. *Id.* at 56 (plurality opinion).

27. 6 Bankr. 928 (Bankr. D. Minn. 1980).

28. 12 Bankr. 946 (Bankr. D. Minn. 1981).

29. *Northern Pipeline*, 458 U.S. at 70-71 n.25 (plurality opinion).

30. *Id.*

31. 285 U.S. 22 (1932). In *Crowell*, the Court upheld a Congressional scheme empowering the U.S. Employees' Compensation Commission to make initial factual determinations pursuant to a federal statute requiring employers to compensate employees for work-related injuries on the high seas. The injured employees were compensated irrespective of fault, according to a fixed and mandatory schedule of compensation. The agency was thus left with the limited role of determining questions of fact as to the circumstances and nature of the injury.

and *United States v. Raddatz*,³² explaining that these cases did not support the validity of the Reform Act's jurisdictional system. According to the Court, *Crowell* and *Raddatz* supplied two principles: first, when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated; and second, the functions of a tribunal set up in the exercise of that discretion must be limited in such a way that the "essential attributes of judicial power are retained in an Article III judge."³³ The jurisdictional scheme of the Reform Act failed both parts of the *Crowell-Raddatz* test. The action involving Northern and Marathon was concerned solely with a state-created cause of action, not a federally-created right. Also, the Reform Act impermissibly vested "most, if not all," of the essential attributes of the judicial power of the United States in a non-article III court.³⁴

Justice Rehnquist, concurring in the judgment, wrote separately that the Court's holding should be limited to the issues presented by Northern and Marathon: specifically, that the portion of section 1471 that allowed the bankruptcy court to decide Northern's state law cause of action over Marathon's objection violated article III of the United States Constitution.³⁵ Rehnquist's opinion was cited in Chief Justice Burger's dissent as the true holding of *Northern Pipeline*³⁶ and significantly influenced Congress in amending the bankruptcy court system in 1984, more so than did the plurality opinion.³⁷

III. THE BANKRUPTCY AMENDMENTS AND FEDERAL JUDGESHIP ACT OF 1984

Nearly two years after *Northern Pipeline*, Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984. Although the Act of 1984

32. 447 U.S. 667 (1980). *Raddatz* concerned the constitutionality of 28 U.S.C. § 636(b)(1) (1979), which permits the district court to refer to a magistrate, without consent, a motion to suppress evidence in a criminal case. Under that provision, the district court conducts a *de novo* determination of the magistrate's findings of fact and conclusions of law, if timely objection is made by a party.

33. *Northern Pipeline*, 458 U.S. at 80-81 (plurality opinion).

34. *Id.* at 84-85.

35. *Id.* at 89-92 (Rehnquist, J., concurring).

36. *Id.* at 92 (Burger, C.J., dissenting). In fact, Chief Justice Burger had his own ideas about what the concurrence actually said, injecting the concept of "peripherality," nowhere mentioned in the concurrence. Several courts under the Act of 1984 have followed Chief Justice Burger's example. See, e.g., *Lesser v. A-Z Assoc. (In re Lion Capital Group)*, 46 Bankr. 850, 859 (Bankr. S.D.N.Y. 1985).

37. See *infra* notes 39-49 and accompanying text. See also *Thomas v. Union Carbide Agric. Prods. Co.*, ___ U.S. ___, 105 S. Ct. 3325, 3335 (1985), in which Justice O'Connor wrote for the majority, "The court's holding in [*Northern Pipeline*] 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."

contains important substantive amendments to title 11,³⁸ the most significant changes concern the structure of the bankruptcy court system.³⁹ As in the Reform Act, the district courts are vested with original and exclusive jurisdiction over all cases under title 11, and original and concurrent jurisdiction over all proceedings arising under or related to title 11.⁴⁰ The critical difference between the Reform Act and the Act of 1984 is that under the latter, bankruptcy courts do not exercise all jurisdiction vested in the district courts.⁴¹ Instead, the bankruptcy court is established as a unit of the district court to which the district court may refer any or all cases and proceedings.⁴² The district court may revoke this reference on its own motion or on timely motion of any party, for cause shown.⁴³ Thus, the district court, in form, has complete control over what actions the bankruptcy court hears. Under the Reform Act, the district court had no such power.⁴⁴

The Act of 1984 contains additional limitations on the bankruptcy court's jurisdiction. Proceedings⁴⁵ are divided into "core proceedings" and "proceedings that are not core proceedings" ("non-core proceedings"). Bankruptcy judges may hear and finally determine all cases under title 11 and all core proceedings,⁴⁶ subject to appeal to the district court.⁴⁷ The bankruptcy judge may also hear non-core proceedings. However, if the parties do not consent to final judgment in a non-core proceeding in the bankruptcy court, the bankruptcy judge merely submits proposed findings of fact and conclu-

38. See, e.g., 11 U.S.C. § 365 (1984) (executory contracts) & § 1113 (1984) (rejection of collective bargaining agreements).

39. 28 U.S.C. §§ 151, 158 & 1334 (1984). See *infra* notes 44-53 and accompanying text.

40. 28 U.S.C. § 1334(a)-(b) (1984). See *supra* notes 19-21 and accompanying text.

41. See 28 U.S.C. § 1471(c) (repealed 1984); see *supra* note 21.

42. 28 U.S.C. § 157(a) (1984). Section 151 provides that "the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district."

43. 28 U.S.C. § 157(d) (1984).

44. See *supra* notes 15-18 and accompanying text. But see King, *Jurisdiction and Procedure under the Bankruptcy Amendments of 1984*, 38 VAND. L. REV. 675, 682 (1985) ("'[C]onsider' and 'review' will disintegrate into rubber-stamped acceptances of the bankruptcy court's findings and conclusions. The constitutional protection for Article III judges to adjudicate non-core proceedings has been accomplished semantically and cosmetically. But actually little or no change will occur.>").

45. For the definition of proceeding, see *supra* note 16.

46. 28 U.S.C. § 157(b)(1) (1984). For a non-exclusive list of core proceedings, see § 157(b)(2).

47. 28 U.S.C. § 158(a) (1984) states:

The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

sions of law to the district judge.⁴⁸ If a party objects to a particular matter, the district judge must conduct a *de novo* review of that matter.⁴⁹

The court structure established by the Act of 1984 bears a striking similarity to the jurisdictional system developed under the Act of 1898.⁵⁰ The identification of a proceeding as "core" under the present law is similar to a determination under the Act of 1898 that the bankruptcy court had summary jurisdiction over a particular matter. In each case, the bankruptcy judge may enter final orders and judgments, subject only to appellate review.⁵¹

While non-core proceedings under the Act of 1984 may be analogized to plenary jurisdiction under the Act of 1898, this analogy is not perfect. Under the Act of 1898, a bankruptcy court could not hear matters over which it did not have summary jurisdiction without consent of the parties.⁵² In contrast, the Act of 1984 allows a bankruptcy court to hear non-core proceedings. In non-core proceedings, however, a party who makes a timely and specific objection to any issue will obtain *de novo* review by the district court,⁵³ despite the fact that the issue was originally tried before a bankruptcy judge. Thus, notwithstanding this important difference, the analogy is worthwhile. In both core proceedings and summary matters, the bankruptcy judge enters final judgments, subject only to appeal. In non-core proceedings and plenary matters, parties have the right of ultimate access to an article III court or a state court.⁵⁴ The summary-plenary issue has been described as

48. 28 U.S.C. § 157(c)(1) (1984). *See also* § 157(c)(2) (parties may consent to final judgment by bankruptcy judges in non-core proceedings).

49. *Id.* § 157(c)(1). Even if the parties do not object, the district judge must "consider" the bankruptcy judge's proposed findings and conclusions. *Id.* Professor Walter Taggart suggests that if no objection is made, the district judge need only satisfy himself that no clear error was committed below. *See* Taggart, *The New Bankruptcy Court System*, 59 AM. BANKR. L.J. 231, 245 (1985). Professor Taggart makes the additional suggestion that although there is no specific provision empowering the district judge to receive new evidence, the judge should be allowed to do so. *Id.*; *see infra* note 64.

50. *See supra* notes 10-11 and accompanying text.

51. 28 U.S.C. § 157(b)(1) (1984) (Act of 1984); 11 U.S.C. §§ 11a(7), 46b (repealed 1978) (Act of 1898).

52. A possible exception is if the referee were sitting as a special master in a plenary suit.

53. 28 U.S.C. § 157(c)(1) (1984). It is uncertain exactly what constitutes *de novo* review. In *United States v. Raddatz*, 447 U.S. 667, 673-76 (1980), the Supreme Court held that *de novo* determination is not synonymous with a *de novo* hearing. "Review" does not imply a hearing any more than "determination" does, especially if Congress had in mind the *Raddatz* decision when using that language. Even if a *de novo* hearing were required, the practical significance of this distinction could be great, since the district judge will always give some consideration to the findings and conclusions that have been submitted by the bankruptcy judge. In any event, the analogy stands up enough to make case law under the Act of 1898 meaningful to this discussion.

54. *Northern Pipeline*, 458 U.S. at 92 (Burger, C.J., dissenting) (matters outside the core of bankruptcy administration "must, absent consent of the litigants, be heard by an 'Article III court' if it is to be heard by any court or agency of the United States" (emphasis added)). As a practical matter, there are great differences between the summary-plenary distinction and

one concerning modes of procedure,⁵⁵ but at its heart it concerned *who* would render final judgment on an issue rather than *how* that issue would be tried.⁵⁶ The scope of summary jurisdiction under the Act of 1898 serves as a helpful guideline to determine what matters can be considered at the "core" of bankruptcy administration, making possible an exercise of full judicial power by a non-article III officer.

To place the bankruptcy court's authority in core proceedings in context, a discussion of non-core proceedings under the present law is necessary. This requires a more thorough examination of the Supreme Court's decision in *United States v. Raddatz*.⁵⁷

Raddatz arose under the Federal Magistrates Act ("Magistrates Act"),⁵⁸ which authorizes delegation of judicial duties to United States magistrates in much the same way as non-core proceedings are now referred to bankruptcy judges. Under the Magistrates Act, a district judge can refer certain matters to a magistrate without consent of the parties.⁵⁹ The Magistrates Act, with certain exceptions, permits the judge to refer any pending pretrial matter to a magistrate for hearing and determination.⁶⁰ The judge may also refer excepted matters, and certain other criminal matters, to the magistrate.

the core-noncore distinction. Under the Act of 1984, only rarely is there litigation over the issue of who will hear a proceeding. *See* 28 U.S.C. § 157(d) (1984). Most disputes will concern what power the bankruptcy judge can exercise with respect to a proceeding. Generally, since there is no dispute over who will be the initial trier, parties may make the pragmatic choice to consent to final judgment in the bankruptcy court, thereby avoiding the expense of a second trial. This was not possible under the Act of 1898, because the dispute over summary or plenary jurisdiction went to the issue of who heard the matter, not what power the initial trier could exercise. While these are important differences, the analogy between the Acts of 1898 and 1984 remains useful. *But see* King, *supra* note 44, at 682.

Unlike the Act of 1898, bankruptcy jurisdiction under the Act of 1984 does not depend on possession. However, that does not affect the relevance of prior law to a determination of the scope of the bankruptcy judge's powers under present law. *Cf.* Ross v. General Plastic & Chem. Corp. (*In re* Auto-Pak, Inc.), 52 Bankr. 3, 5 n.2 (Bankr. D.D.C. 1985). Under the Act of 1898, bankruptcy jurisdiction was co-extensive with the ability of a non-tenured judicial officer to render final orders and judgments. Congress chose to let matters outside the core of bankruptcy administration rest on independent jurisdictional grounds, with limited exceptions. The fact that in 1984 Congress chose to vest jurisdiction over matters outside the core of bankruptcy administration in the district courts does not affect the correspondence of the 1898 and 1984 Acts with regard to the ability of a non-article III officer to enter final orders and judgments. In light of this correspondence, the scope of summary jurisdiction under the Act of 1898 serves as a useful guideline in determining whether a matter is at the "core" of bankruptcy administration and therefore within the scope of decision-making by a non-article III bankruptcy judge.

55. *See, e.g.*, D. COWANS, BANKRUPTCY LAW AND PRACTICE § 576 (2d ed. 1978).

56. This is so because matters within summary jurisdiction were rarely heard in the first instance by anyone other than the referee. *See supra* note 9 and accompanying text.

57. 447 U.S. 667 (1980).

58. 28 U.S.C. § 636(b)(1) (1976).

59. *Id.*

60. *Id.* § 636(b)(1)(A).

In such cases, however, the magistrate files proposed findings of fact and recommendations with the district court.⁶¹ The Magistrates Act further provides that, for matters referred under subsection (b)(1)(B), the district court conducts a *de novo* determination of the portions of the magistrate's report to which objection is made. The district court has the power to receive further evidence, and to accept, reject, or modify, in whole or in part, the magistrate's findings and recommendations.⁶² Presumably, even if no objection is made, the district judge must still consider the magistrate's proposed findings and conclusions, rather than accepting them without consideration.⁶³

In *Raddatz*, a district court refused to rehear evidence on a suppression motion in a criminal case. The court had referred the motion to the magistrate under section 636(b)(1)(B). The magistrate found the defendant's testimony less credible than the prosecution's evidence, and the district court accepted those findings. The defendant claimed that the judge was required to rehear the evidence on the suppression motion according to (1) the language of the Federal Magistrates Act, (2) article III of the United States Constitution, and (3) the due process clause of the United States Constitution.⁶⁴ In an opinion joined at least in part by six justices,⁶⁵ the Court rejected all three of the defendant's arguments. The majority held that a *de novo* determination is not synonymous with a *de novo* hearing. While a rehearing by the district judge is permissible, it is not required. Citing the legislative history of the Magistrates Act, the Court concluded that Congress intended to permit "whatever reliance a district judge, in . . . [his or her] discretion, chose to place on [the magistrate's report]."⁶⁶

The Court then held that the district court's refusal to rehear the evidence did not violate article III, because the final determination on matters referred under section 636(b)(1)(B) of the Magistrates Act was made by an article III judge.⁶⁷ The Court emphasized the difference between findings of fact by administrative agencies and by magistrates. Under the provisions in question, the district court (1) appoints the magistrate,⁶⁸ (2) has the power of reference to the magistrate,⁶⁹ (3) can reject the magistrate's recommendations in whole or in part,⁷⁰ and (4) has an affirmative duty to review all determinations of the magistrate.⁷¹ The Court therefore concluded that magistrates are more

61. *Id.* § 636(b)(1).

62. *Id.*

63. *See supra* note 49.

64. U.S. CONST. amend. V.

65. Justices Blackmun and Powell wrote separate opinions, but both concurred in the majority's statutory construction and article III determinations. This Article does not address the due process issue, on which Blackmun concurred separately and Powell dissented.

66. *Raddatz*, 447 U.S. at 676.

67. *Id.*

68. 28 U.S.C. § 631 (1976).

69. *Id.* § 636(b)(1).

70. *Id.*

71. *Id.*

analogous to special masters than to an administrative agency under such a scheme, because they are under the district court's "total control and jurisdiction."⁷²

According to the *Northern Pipeline* plurality, *Raddatz* and *Crowell v. Benson*⁷³ contain two principles. First, Congress possesses substantial discretion to prescribe the manner in which a right may be adjudicated when Congress itself has created that right. Second, the functions of an adjunct set up in the exercise of that discretion must be limited in such a way that the "essential attributes of judicial power are retained in an Article III judge."⁷⁴ *Northern Pipeline* literally suggests that these two principles are conjunctive: Congress can set up an adjunct to perform article III duties only for adjudication of congressionally-created substantive rights, and the adjunct's functions must be properly limited. If these requirements are conjunctive, then non-core proceedings could be safely referred to a bankruptcy judge only when congressionally-created substantive rights are involved. As the *Northern Pipeline* plurality noted, however, the magistrate in *Raddatz* determined constitutional rights, not congressionally-created rights. It follows that whatever principles *Crowell* and *Raddatz* provide, they must embrace reference to an adjunct of more than just congressionally-created substantive rights.

The scheme upheld in *Raddatz* is virtually indistinguishable from the treatment of non-core proceedings under the Act of 1984.⁷⁵ For article III purposes, there are only three differences. First, while magistrates are appointed by district courts, bankruptcy judges are appointed by courts of appeals.⁷⁶ Second, under the Act of 1984, district courts have the power to withdraw any reference to bankruptcy judges, while there was no such provision in *Raddatz*.⁷⁷ Third, the magistrate in *Raddatz* determined a federal constitutional claim, while non-core proceedings will in most instances consist of questions of state law.

It is not constitutionally significant that bankruptcy judges are appointed by courts of appeals rather than district courts. Appointment by the district court was not central to *Raddatz's* conclusion that magistrates are "constantly subject to the court's control." The immediate relation of the district judge to the magistrate in each case was more significant. The Act of 1984

72. *Raddatz*, 447 U.S. at 681.

73. 285 U.S. 22 (1932).

74. *Northern Pipeline*, 458 U.S. at 80-81 (plurality opinion). See *supra* notes 31-34 and accompanying text.

75. Both permit reference to an adjunct without consent of the parties. 28 U.S.C. §§ 157(a) & 636(b)(1) (1984). Both place the power of reference in the district court. *Id.* In addition, both require *de novo* consideration of the adjunct's report and allow the district court to accept, reject, or modify any part of the report. 28 U.S.C. §§ 157(a), 157(c)(1) & 636(b)(1) (1984). As a result, final determination of all matters heard by the adjunct is made by the district court.

76. 28 U.S.C. §§ 152(a)(1), 631 (1984).

77. 28 U.S.C. § 157(d) (1984). See *infra* note 79.

gives district courts the same power as the Magistrates Act to exercise control over bankruptcy judges in individual cases.⁷⁸ In fact, the new law places bankruptcy judges under stricter district court control by giving district judges the power to withdraw reference at any time.⁷⁹ Accordingly, appointment of bankruptcy judges by courts of appeals should not be a problem.

The nature of the issues decided by the adjunct is more significant. The underlying issue in *Raddatz* was constitutional—whether the defendant's confession was freely and voluntarily given.⁸⁰ The *Raddatz* Court appeared unconcerned with this fact. In fact, the Court made no attempt to exclude other matters referable to magistrates under section 636(b)(1)(B) from its decision, many of which could involve questions of state law.⁸¹ The Court made no mention of the nature of the legal issue considered by the magistrate:

Thus, although the statute permits the district court to give to the magistrate's proposed findings of fact and recommendations "such weight as [their] merit commands and the sound discretion of the judge warrants," . . . that delegation does not violate Article III so long as the ultimate decision is made by the district court.⁸²

It would be easy to limit *Raddatz* to its facts, and thereby distinguish reference of a non-core proceeding involving a question of state law. However, the tone of the majority opinion in *Raddatz*, joined by six of the Justices, suggests that the structure of the adjunct system was the paramount consideration. Thus, as long as the "ultimate decision" is made by an article III tribunal, Congress can delegate federal judicial power to non-article III officers.⁸³ The treatment of non-core proceedings under the new law satisfies the requirements of article III as set forth in *Raddatz*.

IV. CORE PROCEEDINGS

As noted above, bankruptcy judges can enter orders and judgments in core proceedings, subject only to appellate review.⁸⁴ Section 157 of the Act contains a non-exclusive list of matters that constitute core proceedings. Most of these matters directly concern the administration of the debtor's

78. See *supra* notes 41-49.

79. Section 636(c) deals with consensual reference to magistrates; § 636(b) governs non-consensual reference. While § 636(c) has a similar provision for withdrawal of reference, § 636(b) has no such provision.

80. *Raddatz*, 447 U.S. at 671.

81. Among those matters are motions for injunctive relief, judgment on the pleadings, summary judgment, dismissal for failure to state a claim upon which relief can be granted, and involuntary dismissal. In a diversity case, any of these could raise issues of state law.

82. *Raddatz*, 447 U.S. at 683.

83. *Id.*

84. 28 U.S.C. § 157(b)(1) (1984).

estate⁸⁵ and, as a result, raise few questions of constitutionality or statutory construction.⁸⁶ These matters are similar to “proceedings in bankruptcy” under the Act of 1898, summary jurisdiction over which was never seriously questioned. While that does not of itself validate the designation of such matters as core proceedings, they all concern congressionally-created substantive rights. The *Northern Pipeline* plurality noted that “[Congress] possesses substantial discretion to prescribe the manner in which [such rights] may be adjudicated.”⁸⁷ The plurality strongly suggested that a non-article III federal officer can exercise full judicial power over matters at the heart of bankruptcy administration. However, some other matters listed as core proceedings raise interesting questions.

A. Counterclaims by the Estate

The Act of 1984, in section 157(b)(2)(C) of title 28, provides that “counterclaims by the estate against persons filing claims against the estate” are core proceedings.⁸⁸ However, the treatment of all counterclaims by the estate as core proceedings could give rise to constitutional problems. A counterclaim by the estate creates a scenario distinguishable from that of *Northern Pipeline*, in which Marathon had not filed a claim in Northern’s reorganization. However, a creditor’s filing of a claim in a bankruptcy case does not suffice to allow issuance of final judgments by a bankruptcy judge over all counterclaims against that creditor. *Northern Pipeline* emphasized the fact that Northern’s claim involved a “right created by state law, a right independent

85. Core proceedings are enumerated at 28 U.S.C. § 157(b)(2)(A)-(O) (1984). They include matters concerning the administration of the estate (subsection (A)); allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests 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 (subsection (B)); orders in respect to obtaining credit (subsection (D)); motions to terminate, annul or modify the automatic stay (subsection (G)); determinations as to the dischargeability of particular debts (subsection (I)); objections to discharges (subsection (J)); determinations of the validity, extent, or priority of liens (subsection (K)); confirmations of plans (subsection (L)); orders approving the use or lease of property, including the use of cash collateral (subsection (M)); 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 (subsection (N)); and 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 (subsection (O)).

86. Some have argued that all state law-based claims, even by creditors against bankruptcy debtors, should be adjudicated in state courts, not by the bankruptcy system. *See, e.g.*, 130 CONG. REC. S8891, 92 (daily ed. June 29, 1984) (remarks of Senator Hatch). No federal court has yet endorsed this view, which is inconsistent with the very concept of a federal bankruptcy system.

87. *Northern Pipeline*, 458 U.S. at 80 (plurality opinion).

88. 28 U.S.C. § 157(b)(2)(C) (1984).

of and antecedent to the reorganization petition that conferred jurisdiction on the bankruptcy court.”⁸⁹ This was at least as important as the fact that Marathon had not filed a claim against Northern.

Of course, core treatment of counterclaims by the estate would not be constitutionally deficient in every case. Section 157(c)(2) provides that “the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.”⁹⁰ In other words, parties can consent to entry of final orders and judgments by the bankruptcy judge in non-core proceedings. This corresponds to provisions under the Act of 1898 whereby parties could consent to the summary jurisdiction of the bankruptcy court.⁹¹ Litigation under the Act of 1898 on the issue of implied consent is particularly helpful to an understanding of when a creditor filing a claim under the Act of 1984 may be deemed to have consented to “core treatment” over a counterclaim against him by the estate.⁹²

Early case law reflected the Supreme Court’s reluctance to extend summary jurisdiction by implied consent. In *Louisville Trust Co. v. Comingor*,⁹³ the adverse claimant came into bankruptcy court in obedience to a pre-emptory order.⁹⁴ The claimant in *Comingor* made formal protest to the exercise of summary jurisdiction, even though he participated in proceedings before the referee. Summary jurisdiction was denied on the ground that the claimant did not come voluntarily into court and did not consent to jurisdiction

89. 458 U.S. at 84 (plurality opinion). See also *Commodity Futures Trading Comm’n v. Schor*, 106 S. Ct. 3245, 3259 (1986) (“Of course, the nature of the claim has significance in our Article III analysis quite apart from the method prescribed for its adjudication”).

90. 28 U.S.C. § 157(c)(2) (1984).

91. 28 U.S.C. §§ 2a(7), 23b (repealed 1978); see *supra* notes 6-14 and accompanying text. As noted, this correspondence is not perfect. See *supra* notes 52-54 and accompanying text.

92. Professor Walter Taggart has noted that in a proceeding in which a party has failed to object to core treatment, it is unnecessary to consider the question of implied consent; instead, the court can treat this as a waiver of the party’s right to non-core treatment. See Taggart, *supra* note 49, at 243. In some cases, however, parties will file timely objections. In those situations, a finding of implied consent may nonetheless be warranted. Both *Katchen v. Landy*, 382 U.S. 323 (1966), and *Inter-State Nat’l Bank of Kansas City v. Luther*, 221 F.2d 382 (10th Cir. 1955), illustrate this point. In the discussion of implied consent that follows, this Article assumes that all parties have filed all possible timely objections to core treatment of their claims.

Proposed Bankruptcy Rules 7008 and 7012 apparently require express consent of the parties in non-core matters. Even if that rule is enacted, however, the following discussion is relevant to whether counterclaims can be considered within the “core” of bankruptcy jurisdiction. See *infra* note 145. Consent was not the only basis for summary jurisdiction. For a discussion of actual or constructive possession as a basis for jurisdiction, see *infra* text accompanying notes 150-57.

93. 184 U.S. 18 (1902).

94. A pre-emptory order is a demand to a party to appear in court. In contrast, a party filing a proof of claim appears voluntarily.

merely by participating in proceedings before the referee.⁹⁵ In *Daniel v. Guaranty Trust*,⁹⁶ the claimant appeared in court voluntarily, by filing a petition for reclamation of specific property held by the trustee in bankruptcy. The Supreme Court held, however, that the bankruptcy court did not acquire summary jurisdiction to enter a turnover order concerning matters having no immediate relation to the claim it had presented.⁹⁷

*Alexander v. Hillman*⁹⁸ helped set the stage for granting summary jurisdiction to afford affirmative relief on a trustee's counterclaim, though it was a receivership case, not a bankruptcy case. In *Hillman*, the adverse claimants filed claims against a part of the receivership estate. The Supreme Court sustained the equity jurisdiction of the receivership court over the receiver's counterclaims against the claimants. The Supreme Court determined that the receivership court was empowered to decide all matters in dispute and decree complete relief between the parties, because the claimants had voluntarily invoked the court's equity jurisdiction.⁹⁹

Federal courts soon began applying the *Hillman* rationale to bankruptcy cases.¹⁰⁰ A claimant creditor now risked "all of the disadvantages which may flow to him as a consequence, as well as gaining all the benefits"¹⁰¹ by invoking the jurisdiction of the bankruptcy court. *Inter-State National Bank of Kansas City v. Luther*¹⁰² is the most significant decision of the lower federal courts in this area. Before *Luther*, the bankruptcy court's summary jurisdiction was limited to certain compulsory counterclaims by the bankruptcy trustee¹⁰³ and counterclaims in the nature of recoupment.¹⁰⁴ *Luther*

95. *Comingor*, 184 U.S. at 26. In *Cline v. Kaplan*, 323 U.S. 97 (1944), the Supreme Court elaborated on the *Comingor* rule, stating that the requisite consent to summary jurisdiction depended on the facts of each case, and that participation in the summary proceedings in obedience to a pre-emptory order (in *Cline*, an order to show cause) did not amount to consent if formal objection was made before the final order. *Id.* at 99. An amendment of Bankruptcy Act § 2a(7) was interpreted as a codification of this rule by negative inference, see *Inter-State Nat'l Bank of Kansas City v. Luther*, 221 F.2d 382, 387-88 (10th Cir. 1955), though the language of the statute itself apparently is not limited to situations involving pre-emptory orders. For the amended § 2a(7), see *supra* note 14.

96. 285 U.S. 154 (1932).

97. *Id.* at 162-64.

98. 296 U.S. 222 (1935).

99. *Id.* at 241 ("[b]y presenting their claims respondents subjected themselves to all the consequences that attach to an appearance"). Cf. *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245, 3257 (1986) (by availing himself of the quicker and less expensive procedure, "Schor effectively agreed to an adjudication by the CFTC of the entire controversy").

100. *Chase Nat'l Bank of City of New York v. Lyford*, 147 F.2d 273, 277 (2d Cir. 1945); *Florance v. Kresge*, 93 F.2d 784, 786 (4th Cir. 1938); *In re Nathan*, 98 F. Supp. 686, 691 (S.D. Cal. 1951).

101. *Case v. Los Angeles Lumber Co.*, 308 U.S. 106, 127 (1939).

102. 221 F.2d 382 (10th Cir. 1955).

103. A compulsory counterclaim arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. FED. R. CIV. P. 13(a).

104. See 4 J. MOORE, R. OGLEBAY & L. KING, *COLLIER ON BANKRUPTCY* 68.20 (14th ed.

used the *Hillman* rationale to extend summary jurisdiction to afford affirmative relief on a permissive counterclaim by the trustee.¹⁰⁵

In *Luther*, Inter-State National Bank filed a proof of claim in the bankruptcy proceedings based on a \$50,000 secured promissory note of the bankrupt. The trustee filed a permissive counterclaim, alleging that the bank had obtained a \$150,000 voidable preference from the bankrupt, and that the bank should be required to disgorge the entire preference before its initial claim would be allowed. In response, the bank objected to the bankruptcy court's summary jurisdiction over the counterclaim, claiming the right to a plenary suit on the issues raised in the counterclaim. The bankruptcy referee chose an intermediate position, offsetting the bank's claim against the alleged preference and directing that the trustee recover the difference from the bank.¹⁰⁶ The district court and court of appeals adopted the trustee's argument, however, granting summary jurisdiction over the bank's claim and disallowing the claim until it surrendered the entire preference.¹⁰⁷

Two ideas are essential to an understanding of the Tenth Circuit's decision in *Luther*. First, the trustee's counterclaim alleged a voidable preference and thus came within the scope of section 57g of the Act of 1898.¹⁰⁸ Both *Luther* and the later Supreme Court case of *Katchen v. Landy*¹⁰⁹ considered section 57g to be an integral part of the process of allowance and disallowance of claims in bankruptcy. As a result, objections under section 57g, whether in the form of permissive or compulsory counterclaims, were subject to the summary jurisdiction of the bankruptcy court.¹¹⁰ Second, the *Luther* court not only allowed the exercise of summary jurisdiction over the trustee's counterclaims, it also required surrender of the bank's preference in full before allowing its claim in the bankruptcy proceedings. Some courts had set off claims and counterclaims against each other,¹¹¹ as did the referee in *Luther*. Other courts allowed the referee to hear a counterclaim, enter an

1976), which states:

Frequently, a claimant may institute some sort of proceeding in the bankruptcy court, whereupon the trustee may seek to assert a set-off, counterclaim or recoupment in that proceeding. So long as such claim is asserted only to reduce or extinguish the plaintiff's claim, there is no question that the bankruptcy court has jurisdiction to entertain it.

105. A permissive counterclaim is any claim against an opposing party not arising out of the transaction that is the subject matter of the opposing party's claim. FED. R. Civ. P. 13(b).

106. *Luther*, 221 F.2d at 386.

107. *Id.* at 389-90.

108. "The claims of creditors who have received or acquired preferences, liens, conveyances, transfers, assignments or encumbrances, void or voidable under this Act, shall not be allowed unless such creditors shall surrender such preferences, liens, conveyances, transfers, assignments, or encumbrances." 11 U.S.C. § 93g (repealed 1978).

109. 382 U.S. 323 (1966).

110. *Id.* at 330-31; *Luther*, 221 F.2d at 389.

111. *Metz v. Knobel*, 21 F.2d 317 (2d Cir. 1927); *Fitch v. Richardson*, 147 F. 197 (1st Cir. 1906).

order on the merits, and then require the trustee to institute a plenary suit to obtain affirmative relief on the counterclaim. The referee's order then constituted *res judicata* on the merits.¹¹² The *Luther* court adopted the logical position that the bankruptcy court should be allowed to grant affirmative relief on counterclaims if it had summary jurisdiction to adjudicate them.¹¹³

The Supreme Court finally addressed the issue of summary jurisdiction to grant affirmative relief on trustee's counterclaims in *Katchen v. Landy*.¹¹⁴ Katchen, an officer of the bankrupt corporation, was an accommodation maker on two notes for the bankrupt's indebtedness. The bankrupt suffered a fire, and its funds and collections were placed in a trust account under Katchen's sole control. Katchen made payments from the account on each of the two notes, and bankruptcy ensued within four months.¹¹⁵ Katchen filed two claims in the bankruptcy proceedings, one for rent due to him from the bankrupt, the other for payment he made on one of the notes from his own funds. By way of counterclaim, the trustee asserted that the payments from the trust account were voidable preferences, because they reduced Katchen's indebtedness as an accommodation maker on the notes.¹¹⁶ Katchen claimed that he was guaranteed a jury trial on the issues raised in the trustee's counterclaim by the seventh amendment¹¹⁷ and the rule of *Beacon Theatres v. Westover*¹¹⁸ and *Dairy Queen v. Wood*.¹¹⁹ He argued that those issues required adjudication in a plenary suit, because matters over which

112. *Giffin v. Vought*, 175 F.2d 186 (2d Cir. 1949).

113. *Luther*, 221 F.2d at 389. The claiming creditor gained nothing by requiring the trustee to institute a plenary suit, since all important issues would be *res judicata*. On the other hand, by allowing the bankruptcy court to grant affirmative relief on issues over which it had summary jurisdiction, both parties would be saved the time-consuming task of instituting another lawsuit that was in essence a formality.

114. 382 U.S. 323 (1966).

115. *Id.* at 325.

116. Act of 1898, § 60a(1), 11 U.S.C. § 96(a)(1) (repealed 1978), states:

A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.

For treatment of preferences under current law, see 11 U.S.C. § 547 (1984).

117. U.S. CONST. amend. VII, states, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

118. 359 U.S. 500 (1959).

119. 369 U.S. 469 (1962). The rule of the two cases is essentially that "only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules [of Civil Procedure] we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims." *Beacon Theatres*, 359 U.S. at 510-11.

the bankruptcy court had summary jurisdiction were not heard by juries.

The bankruptcy court overruled Katchen's objections to summary jurisdiction over the counterclaims and held that Katchen's claims would be allowed only when and if the judgment on the preference was satisfied.¹²⁰ The district court and court of appeals affirmed.¹²¹ The Supreme Court also affirmed, basing its decision on the "important Congressional directive" of section 57g. The Court observed that the language of section 57g "is concerned with creditors rather than claims and thus contemplates that allowance of a claim may be conditioned on surrender of preferences received with respect to transactions unrelated to the claims."¹²²

The Court then addressed the trial by jury issue. The Court pointed out that "when [an] issue arises as part of the process of allowance and disallowance of claims [in bankruptcy], it is triable in equity,"¹²³ and "the right of trial by jury . . . does not extend to cases of equity jurisdiction."¹²⁴ The Court noted that the *Beacon Theatres-Dairy Queen* rule did not apply because "in neither [of those two cases] was there involved a specific statutory scheme contemplating the prompt trial of a disputed claim without the intervention of a jury."¹²⁵ Apparently, the statutory scheme prescribed by Congress constituted a circumstance "imperative" enough to warrant an exception to the *Beacon Theatres-Dairy Queen* rule.

Katchen v. Landy and *Inter-State National Bank of Kansas City v. Luther* both placed emphasis on the congressional directive for expedient bankruptcy administration expressed in section 57g.¹²⁶ The drafters of the Reform Act derived section 502(d) of the Bankruptcy Code¹²⁷ from section 57g of the Act of 1898. In fact, the scope of section 502(d) is somewhat broader than that of its predecessor.¹²⁸ As a result, section 502(d) should at least inherit

120. *Katchen*, 382 U.S. at 325.

121. Although the Tenth Circuit reversed a judgment for the trustee on a stock subscription, it affirmed the judgment for the amount of the voidable preferences. The stock subscription issue was not appealed to the Supreme Court. *Katchen v. Landy*, 336 F.2d 533 (10th Cir. 1964).

122. *Katchen*, 382 U.S. at 330 n.5. *But see* *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245, 3258 (1986) (considering *Katchen* to have concerned only compulsory counterclaims).

123. *Katchen*, 382 U.S. at 336.

124. *Id.* at 337 (quoting *Barton v. Barbour*, 104 U.S. 126, 133-34 (1881)). This, of course, ignores the rule of *Beacon Theatres* and *Dairy Queen*, which the Court distinguished on a different basis.

125. *Katchen*, 382 U.S. at 339.

126. *Id.* at 330-31; *Luther*, 221 F.2d at 389-90.

127. This non-jurisdictional provision of the Reform Act of 1978 figures prominently in making use of the implied consent cases discussed above.

128. 11 U.S.C. § 93g (repealed 1978) states, "The claims of creditors who have received or acquired preferences, liens, conveyances, transfers, assignments or encumbrances, void or voidable under this Act shall not be allowed unless such creditors shall surrender such preferences, liens, conveyances, transfers, assignments, or encumbrances."

11 U.S.C. § 502(d) (1984) states:

Notwithstanding subsections (a) and (b) of this section, the court shall disallow any

Katchen's interpretation of section 57g and thereby provide core treatment to all counterclaims characterized as section 502(d) objections, regardless of whether such objection constitutes a compulsory or permissive counterclaim.¹²⁹

Katchen, however, leaves open the question of how compulsory or permissive counterclaims outside the scope of section 502(d) should be treated. Nevertheless, additional sources are helpful. Bankruptcy Rule 7013, with exceptions not relevant here, provides that Rule 13 of the Federal Rules of Civil Procedure applies in adversary proceedings.¹³⁰ Rule 13 provides for compulsory and permissive counterclaims.¹³¹ While counterclaims arising out

claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.

129. As one court has noted, *Katchen* was decided before Bankruptcy Rule 810 replaced General Order 47, 305 U.S. 679 (1935). General Order 47 authorized receipt of further evidence by the district judge in connection with review of a referee's orders or findings. 1616 Reminc Ltd. Pshp. v. Atchison & Keller, 704 F.2d 1313, 1316 (4th Cir. 1983). Rule 810 provided, as does current Bankruptcy Rule 8013, that on appeal to the district court, findings of fact by the bankruptcy judge shall not be set aside unless "clearly erroneous." However, *Katchen* made no mention whatsoever of General Order 47, and the denial of a trial by jury is premised on the very assumption that a district judge's jurisdiction in matters within summary jurisdiction, heard by the referee, is that of an ordinary appellate court. *But see infra* note 167.

The plurality opinion in *Northern Pipeline* pointed out that *Katchen* did not discuss article III. *Northern Pipeline*, 458 U.S. at 79 n.31 (plurality opinion). However, the principles endorsed in that case by the concurring justices show no indication that the scheme approved on seventh amendment grounds in *Katchen* would run afoul of article III requirements. *See supra* notes 35-37 and accompanying text. In addition, the seven-justice majority in *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245, 3258 (1986), cited *Katchen* as precedent for upholding the CFTC's jurisdiction over common-law counterclaims on article III grounds, certainly a stronger indication of *Katchen's* precedential value than a footnote contained in a four-member plurality opinion.

130. Bankruptcy Rule 7013, 11 U.S.C., states:

Rule 13 F.R.Civ.P. applies in adversary proceedings, except that a party sued by a trustee or debtor-in-possession need not state as a counterclaim any claim which he has against the debtor, his property, or the estate, unless the claim arose after the entry of an order for relief. A trustee or debtor-in-possession who fails to plead a counterclaim through oversight, inadvertence, or excusable neglect, or when justice so requires, may by leave of court amend the pleading, or commence a new adversary proceeding or separate action.

For what constitutes an "adversary proceeding," see Bankr. R. 7001, 11 U.S.C. Adversary proceedings are governed by Part VII of the Bankruptcy Rules, which incorporate certain of the Federal Rules of Civil Procedure.

131. FED. R. CIV. P. 13 states:

(a) *Compulsory Counterclaims.* A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim

(b) *Permissive Counterclaims.* A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

of the same transaction as an opposing party's claim *must* be raised in a federal lawsuit, a counterclaim that does not arise out of the same transaction must rest upon independent grounds of jurisdiction.¹³²

The argument for core treatment of all compulsory counterclaims requires only a straightforward reading of Rule 7013. However, reading Rule 7013 in this way can deprive a claiming creditor of a jury trial for a legal issue. It also overlooks the possibility that an issue raised in a counterclaim "must be heard by an 'Article III court' if it is to be heard by any court or agency of the United States."¹³³

Bankruptcy judges preside in courts of equity, where parties may not have the right to trial by jury.¹³⁴ To go no further than this, however, begs the question of whether claiming creditors should be forced to defend a compulsory counterclaim as a core proceeding, thus depriving them of an otherwise constitutionally-guaranteed trial by jury.¹³⁵ Although *Katchen* noted the significance of section 57g, it also stressed the equitable purposes of the Bankruptcy Act and the specific statutory scheme enacted by Congress. The

132. C. WRIGHT, LAW OF FEDERAL COURTS § 79 (4th ed. 1983). See also *Federman v. Empire Fire & Marine Ins. Co.*, 597 F.2d 798, 812-13 (2d Cir. 1979). The one exception to this rule is that no independent jurisdictional basis is required for a permissive counterclaim if it is in the nature of a set-off and is used only to reduce the plaintiff's judgment, not as a basis for affirmative relief. See *Curtis v. J.E. Caldwell & Co.*, 86 F.R.D. 454 (E.D. Pa. 1980); 4 J. MOORE, R. OGLEBAY & L. KING, COLLIER ON BANKRUPTCY 68.20 (14th ed. 1976). Permissive counterclaims should not be considered within the scope of § 157(b)(2)(C). In addition to the fact that they require an independent jurisdictional basis, their resolution is not at the core of bankruptcy administration. The justifications given below for core treatment of compulsory counterclaims do not support such treatment of permissive counterclaims. To treat permissive counterclaims as core proceedings would vest bankruptcy judges with too broad a range of powers to satisfy the holding of *Northern Pipeline*.

133. *Northern Pipeline*, 458 U.S. at 92 (Burger, C.J., dissenting).

134. U.S. CONST. amend. VII. Courts and commentators are divided on the issue of whether bankruptcy courts can conduct jury trials. See, e.g., *In re Morse Elec. Co.*, 12 Bankr. Ct. Dec. 957 (Bankr. N.D. Ind. 1985); *Bokum Resources Corp. v. LILCO (In re Bokum Resources Corp.)*, 13 Bankr. Ct. Dec. 11 (Bankr. D.N.M. 1985). See also 28 U.S.C. § 1411 (1984) (guarantees jury trial in connection with bankruptcy case only for individuals with personal injury or wrongful death claims). Section 1411 is a limitation of the former 28 U.S.C. § 1480 (repealed 1978). Cf. King, *supra* note 44, at 703-04. If bankruptcy courts were allowed to conduct jury trials, the jury trial objection would be moot in many cases. See generally Levy, *Trial by Jury Under the Bankruptcy Reform Act of 1978*, 12 CONN. L. REV. 1 (1979).

135. In its treatment of *Beacon Theatres* and *Dairy Queen*, *Katchen* observed:

Thus petitioner's argument would require that in every case where a section 57g objection is interposed and a jury trial is demanded the proceedings on allowance of claims must be suspended and a plenary suit initiated, with all the delay and expense that course would entail. Such a result is not consistent with the equitable purposes of the Bankruptcy Act nor with the rule of *Beacon Theatres* and *Dairy Queen*, which is itself an equitable doctrine In neither *Beacon Theatres* nor *Dairy Queen* was there a specific statutory scheme contemplating the prompt trial of a disputed claim without the intervention of a jury.

Katchen, 382 U.S. at 339.

Act of 1984 contains both of these: the equitable purposes, described elsewhere in the *Katchen* opinion as "prompt and effectual administration" of bankrupt estates,¹³⁶ and a statutory scheme providing for entry of orders and judgments by bankruptcy judges in "core proceedings." The language of *Katchen* suggests that the congressionally-expressed¹³⁷ need for prompt and effectual bankruptcy administration is a circumstance imperative enough to justify an exception to the *Beacon Theatres-Dairy Queen* rule for all compulsory counterclaims.

The article III question is more difficult. In view of *Katchen's* emphasis on expediency and efficiency in bankruptcy administration, one approach would be to extend the consent theory of *Katchen* to all compulsory counterclaims.¹³⁸ Section 57g's "Congressional directive" can also be inferred from the jurisdictional provisions of the Act of 1984. Expedient bankruptcy administration is as desirable now as it was at the time of *Katchen*. In addition, treating all compulsory counterclaims as core proceedings could help avoid time-consuming litigation over the nature of the compulsory counterclaim without overstepping constitutional limits.

Under the Act of 1898, the bounds of implied consent were determined independently of actual acquiescence by claimants. A finding of implied consent represented an expression of perceived congressional policy, provided that policy was consistent with the Constitution. Thus, if Congress intended core proceedings under the Act of 1984 to include all compulsory counterclaims by the estate, a creditor filing a claim in bankruptcy should be deemed to have consented to core treatment of all such counterclaims. It would do violence neither to the spirit of *Katchen* nor to congressional intent¹³⁹ to apply the consent theory under the Act of 1984 and to extend it to all compulsory counterclaims by the estate.¹⁴⁰

Although extension of the consent theory may provide a solution to the article III problem, the sounder approach is to determine whether the Act of 1984 has retained "the essential attributes" of judicial power in an article III court, notwithstanding core treatment for all compulsory counterclaims.¹⁴¹ It is generally accepted that bankruptcy courts may hear and determine

136. *Id.* at 328.

137. This need is expressed by the enactment of federal bankruptcy laws, not by any legislative history. See *infra* notes 195-96.

138. Parties do not "waive" article III jurisdictional requirements. It is important to note that jurisdiction in bankruptcy is given to the district court, independent of consent of the parties. The parties merely "consent" to the particular mode of trial—something that *can* be waived by consent. See, e.g., FED. R. CIV. P. 38 (waiver of right to trial by jury if no timely request made). See also *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245, 3256 (1986) ("Article III's guarantee of an impartial and independent federal adjudication is subject to waiver").

139. See *supra* note 137.

140. But see *supra* note 92 (discussion of proposed Bankr. R. 7008 & 7012).

141. *Northern Pipeline*, 458 U.S. at 81 (plurality opinion).

claims against the estate, whether the claim is based upon state or federal law. If a creditor files a proof of claim that is based on a state law-based cause of action, the bankruptcy court can hear and determine that claim. This is the type of determination that lies at the heart of the federal bankruptcy power: the gathering into one forum of all claims against the debtor's estate and the "prompt and effectual administration and settlement of [that] estate."¹⁴² Nothing in *Northern Pipeline* calls into question the constitutionality of non-article III bankruptcy judges hearing and determining state law-based proofs of claim. *Northern Pipeline* concerned a breach of contract claim brought by the debtor against a third party. Because bankruptcy judges can hear and determine claims against the estate, they should be able to do the same with respect to compulsory counterclaims by the estate against a creditor filing a claim. For example, the ability to hear and determine a claim against the estate based upon a contract would be nugatory if it did not entail the ability to hear and determine the estate's counterclaims based upon the same contract.¹⁴³ By allowing bankruptcy judges to hear and determine compulsory counterclaims against creditors, section 157(b)(2)(C)¹⁴⁴ merely gives bankruptcy judges the power to grant complete relief between parties on matters that are at the heart of bankruptcy administration.¹⁴⁵

B. Orders to Turn Over Property of the Estate

Core proceedings also include "orders to turn over property of the estate."¹⁴⁶ Again, a broad interpretation of this section could raise constitu-

142. *Katchen*, 382 U.S. at 328.

143. See *Commodity Futures Trading Comm'n v. Schor*, 106 S.Ct. 3245, 3260 (1986) ("absent the CFTC's [jurisdiction over counterclaims], the purposes of the reparations procedure would have been confounded").

144. 28 U.S.C. § 157(b)(2)(C) (1984).

145. Therefore, such counterclaims could be treated as core proceedings without reference to the consent issue. See also *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245 (1986) (upholding the CFTC's jurisdiction over counterclaims arising out of the same transaction or occurrence as the complaint's allegations of Commodities Exchange Act violations).

One more problem remains under the heading of counterclaims. Under 11 U.S.C. § 1111(a), a claim of a creditor listed by a chapter 11 debtor on its schedule of debts is deemed to have been filed by that creditor, unless the claim is scheduled as disputed, contingent or unliquidated. 11 U.S.C. § 1111(a) provides, "A proof of claim or interest is deemed filed under section 501 of this title for any claim or interest that appears in the schedules filed under section 521(1) or 1106(a)(2) of this title, except a claim or interest that is scheduled as disputed, contingent, or unliquidated."

If a chapter 11 debtor lists a creditor's claim on its schedule of debts, can it then file a counterclaim against that creditor and have the counterclaims adjudicated as core proceedings? A reasonable solution is to give the creditor in such circumstances a choice of whether to make an affirmative filing in the chapter 11 case, thereby giving the chapter 11 creditor the same choice as a creditor in chapters 7, 9 and 13. If the creditor chooses to file a claim, he or she will be subject to the same rules as any other claiming creditor; if the creditor chooses not to file a claim, he or she will not be subject to counterclaims by the estate, but will have the same problems as any creditor wondering whether to file the claim in a bankruptcy case.

146. 28 U.S.C. § 157(b)(2)(E) (1984).

tional problems. Creditors who have not filed claims and who choose not to consent to the jurisdiction of the "bankruptcy court"¹⁴⁷ may, under certain circumstances, demand a determination of the turnover issue in an article III court.¹⁴⁸ An enormous variety of issues can arise in turnover actions. Many will have no connection with bankruptcy except that a bankruptcy trustee is raising them.¹⁴⁹ This raises constitutional issues because bankruptcy judges can exercise full judicial power only within the limited jurisdiction granted by article I. In *Northern Pipeline*, the Supreme Court struck down a system in which it perceived that bankruptcy judges exercised full judicial power outside the limits of article I jurisdiction. Treating all turnover actions as core proceedings would create the same problem. Accordingly, the ability of bankruptcy judges to treat turnover actions as core

147. This term is in quotation marks because under the Act of 1984, there are no independent bankruptcy courts per se; rather, the bankruptcy judges constitute a unit of the district court known as the bankruptcy court. 28 U.S.C. § 151 (1984). The use of the term "jurisdiction of the bankruptcy court" is a convenient and accurate way of expressing the idea of jurisdiction sufficient for a bankruptcy judge to enter orders and judgments in a proceeding, subject only to appellate review.

148. 11 U.S.C. § 542 (1984) provides, in pertinent part:

(a) Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

(b) Except as provided in subsection (c) or (d) of this section, an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to, or on the order of, the trustee, except to the extent that such debt may be offset under section 553 of this title against a claim against the debtor.

Section 543 provides in a similar way for turnover with respect to custodians. Sections 542 and 543 give the bankruptcy trustee the power, under certain circumstances, to compel third parties to deliver property to the estate. In addition, § 502(d) requires the court to disallow the claims of any creditor from which property is recoverable under § 542 or § 543 until the creditor has turned over that property. 11 U.S.C. § 502(d) (1984). The turnover power has a much broader scope than the estate's other federally-created powers. *See, e.g.*, 11 U.S.C. §§ 547, 548 (1984); *see infra* note 149.

149. For example, a turnover order based on an inheritance of certain property may raise the issue of the validity of a will; a turnover order based on a transfer of property by deed may require litigation on the validity of the deed; a third party served with a turnover order could raise the issue of whether he holds the subject property by bailment or gift. Each of these examples raises issues outside the core of bankruptcy administration. In addition, some courts have interpreted turnover orders to include contract actions and other suits for damages. *See, e.g.*, *Fisher v. Insurance Co. of State of Pa.* (*In re Pied Piper Casuals, Inc.*), 13 Bankr. Ct. Dec. 290 (Bankr. S.D.N.Y. 1985); *In re Sunrise Equip. & Dev. Corp.*, 24 Bankr. 26 (Bankr. D. Ariz. 1982); *In re Franklin Computer Corp.*, 12 Collier Bank. Cas. 2d 1447 (Bankr. E.D. Pa. 1985). The better view is to the contrary. *See Century Brass Prod. v. Millard Metals Serv. Center* (*In re Century Brass Prod., Inc.*), 58 Bankr. 838, 840-43 (Bankr. D. Conn. 1986). Even so, proceedings will often involve issues outside the core of bankruptcy administration.

proceedings should be limited. When a turnover action raises issues outside the heart of bankruptcy administration, it should not be treated as a core proceeding unless the court determines that the subject property is within its actual or constructive possession.

With the exception of express statutory grants or absent consent of the parties, the bankruptcy courts had summary jurisdiction under the Act of 1898 only to adjudicate controversies concerning property over which the court had actual or constructive possession.¹⁵⁰ The possession rule was not the product of statute. Rather, it rested upon principles concerning the power and competence of courts in general.¹⁵¹ Third parties served with an order to show cause why they should not turn over property to the trustee had three options: (1) turn the property over; (2) appear without objecting to summary disposition of the order and defend on the merits; or (3) appear for a preliminary hearing on the issue of whether the bankruptcy court had constructive possession of the property in question.¹⁵² There was no substantial question as to the bankruptcy court's jurisdiction to conduct such a

150. See *Harris v. Avery Brundage Co.*, 305 U.S. 160, 163 (1938) (test of jurisdiction is not title in, but possession by, the bankrupt at the time of the filing of the petition in bankruptcy). The constructive possession cases provide only an implication of constitutionality; the practice was never challenged as unconstitutional. However, it rests upon such fundamental principles of *in rem* jurisdiction that if the practice were found unconstitutional, the very idea of a federal bankruptcy court system would be called into question. See *infra* note 151. In light of the similarity of the court systems under the Acts of 1898 and 1984, see *supra* notes 50-54 and accompanying text, the scope of summary jurisdiction under the Act of 1898 serves as a guideline in determining whether Congress intended a matter to be treated as a core proceeding under the Act of 1984.

151. In *Mueller v. Nugent*, 184 U.S. 1 (1902), the Supreme Court illustrated this point: [T]he question reduces itself to this: Has the bankruptcy court the power to compel the bankrupt, or his agent, to deliver up money or other assets of the bankrupt, in his possession or that of someone for him, on petition and rule to show cause? Does a mere refusal by the bankrupt or his agent so to deliver up oblige the trustee to resort to a plenary suit in the Circuit Court or a state court, as the case may be?

If it be so, the grant of jurisdiction to cause the estates of bankrupts to be collected, and to determine controversies relating thereto, would be seriously impaired, and, in many respects, rendered practically inefficient.

The bankruptcy court would be helpless indeed if the bare refusal to turn over could conclusively operate to drive the trustee to an action to recover as for an indebtedness, or a conversion, or to proceedings in chancery, at the risk of the accompaniments of delay, complication, and expense, intended to be avoided by the simpler methods of the bankrupt law.

Id. at 14. See also *Chandler v. Perry*, 74 F.2d 371 (5th Cir. 1934), in which the court states: The jurisdiction to dispose of property . . . in the court's actual or constructive possession, and as ancillary thereto to deal with all claims of title to or interest in or liens upon it . . . is not peculiar to courts of bankruptcy, but appertains to all courts having possession of property for disposition, and rests largely upon necessity, inasmuch as by a settled principle [that] no other court is allowed to interfere with property thus in custodia legis.

Id. at 372.

152. J. MACLACHLAN, *HANDBOOK OF THE LAW OF BANKRUPTCY* § 194 (1956).

preliminary hearing.¹⁵³ The mere assertion of a claim adverse to the estate would not require resort to a plenary suit.¹⁵⁴ To the contrary, the court had both the power and the duty to examine the adverse claim to ascertain whether it was ingenuous and substantial.¹⁵⁵ The Supreme Court identified specific fact patterns as raising a presumption that property was within the constructive possession of the bankruptcy court.¹⁵⁶ However, these instances were quite limited. Beyond this, courts deemed property to be within their constructive possession if the adverse claimant did not assert a sufficiently substantial claim to the contrary.¹⁵⁷

The possession rule was derived not from the Act of 1898 itself, but from the simple concept of *in rem* jurisdiction. Therefore, the rule can successfully be employed by courts under the Act of 1984 as a device for keeping the scope of core turnover proceedings within constitutional bounds. The bankruptcy judge should initially determine whether a third party holding property has a real and substantial claim to that property, asserted in good faith. This preliminary hearing should be classified as a non-core proceeding in which the district judge reviews any findings of fact *de novo*.¹⁵⁸ If the bankruptcy judge finds that the property is within the constructive possession of the bankruptcy court,¹⁵⁹ and that finding is not reversed by a higher court, the action to turn over the property should be litigated as a core proceeding.

153. *Id.*

154. *Harrison v. Chamberlin*, 271 U.S. 191, 194 (1926).

155. *Louisville Trust Co. v. Comingor*, 184 U.S. 18, 25-26 (1902).

156. These fact patterns included (1) when property was in the physical possession of the bankrupt at the time of the petition, but was not delivered to the bankruptcy trustee, *Page v. Edmunds*, 187 U.S. 596, 601-05 (1903); (2) when property was delivered to the trustee, but was thereafter wrongfully withdrawn from his custody, *White v. Schloerb*, 178 U.S. 542, 545-48 (1900); (3) when property was in the hands of the bankrupt's agent or bailee, *Mueller v. Nugent*, 184 U.S. 1, 14-15 (1902); or (4) when property was held by one who made no claim to it, *Babbitt v. Dutcher*, 216 U.S. 102, 105 (1910).

157. No hard-and-fast test was developed for determining what constituted a sufficiently substantial claim. Supreme Court formulations of what would enable a third party to avoid summary jurisdiction included a "good faith claim adverse to the estate," *Galbraith v. Valley*, 256 U.S. 46, 50 (1921); a claim that is "not frivolous," *Cline v. Kaplan*, 323 U.S. 97, 99 (1944); and a claim that is not "merely colorable," *Taubel-Scott-Kitzmiller Co. v. Fox*, 264 U.S. 426, 433 (1924). The late Professor MacLachlan suggested that a convenient test might be whether there is "substantial doubt about either the facts or the law controlling the defendant's claim"; at the same time, however, he advised against any reliance on this test. J. MACLACHLAN, *supra* note 152.

158. Alternatively, the district court could conduct the preliminary hearing itself and refer the matter to the bankruptcy court if it finds that the third party is asserting no more than a "colorable claim." While there is no provision for such a preliminary hearing in the Act of 1984, neither was there a provision under the Act of 1898 that called for courts to employ the idea of constructive possession. If the district court exercised *de novo* review of the initial determination or made the initial determination itself, ultimate access to an article III court on the issue of possession would be preserved.

159. *See supra* note 147. This phrase is used to mean possession of property sufficient so that litigation over it may justifiably be treated as a core proceeding.

If the bankruptcy judge, or a higher court on review, determines that the property is not within the constructive possession of the bankruptcy court, the turnover action should be litigated as a non-core proceeding, with the district court reviewing all findings of fact made by the bankruptcy judge *de novo*.¹⁶⁰

This interpretation is justified by reading section 157 as including *some* "orders to turn over property of the estate," rather than *all* "orders to turn over property of the estate," as core proceedings. When two interpretations of a statute are reasonable, one constitutional and the other unconstitutional, courts must give the statute a constitutional interpretation rather than invalidate it.¹⁶¹ Applying the possession doctrine to the Act of 1898 will ensure that the scope of core turnover proceedings does not exceed the bounds of article I power.

C. *Preferences and Fraudulent Conveyances; The Standard of Review*

Section 157 includes "proceedings to determine, avoid, or recover preferences" and "proceedings to determine, avoid, or recover fraudulent conveyances" as core proceedings.¹⁶² These two provisions cover four different types of actions. While sections 547 and 548 of the Bankruptcy Code govern preferences and fraudulent transfers, respectively, section 544 allows a trustee or debtor-in-possession to resort to provisions of state law in attempting to avoid transfers to creditors.¹⁶³ State fraudulent conveyance and preference statutes are thus available under certain circumstances to the trustee.

When a trustee attempts to avoid a transfer under the bankruptcy code's preference and fraudulent transfer provisions, there is no substantial problem in treating the matter as a core proceeding. The trustee's claim arises under congressionally-created substantive rights. Congress "possesses substantial discretion to prescribe the manner in which [such rights] may be adjudicated—including the assignment of some functions historically performed by judges."¹⁶⁴ *Northern Pipeline's* primary concern was the adjudi-

160. See 28 U.S.C. § 157(c)(1) (1984).

161. "[I]t is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62 (1932); see also *Pernell v. Southall Realty*, 416 U.S. 363, 365 (1974). This doctrine has been applied in the context of bankruptcy as well. See *United States v. Security Indus. Bank*, 459 U.S. 70 (1982) (11 U.S.C. § 522(f)(2) does not apply to security interests acquired before the effective date of its enactment; to interpret the statute otherwise would give rise to serious constitutional problems).

162. 28 U.S.C. § 157(b)(2)(F) & (H) (1984).

163. See, e.g., *ARIZ. REV. STAT. ANN.* § 44-1043 (1984) (preferential transfers); *CONN. GEN. STAT.* § 52-552 (1984) (fraudulent conveyances).

164. *Northern Pipeline*, 458 U.S. at 80 (plurality opinion). While the Act of 1898 contained provisions for plenary suits in its preference and fraudulent transfer provisions, the language of *Northern Pipeline* strongly suggests that Code-based preferences and fraudulent transfer actions would be within the scope of issues finally decidable by a non-article III bankruptcy judge.

cation of rights *not* created by Congress.¹⁶⁵ Constitutional problems arise when a trustee bases a claim not on sections 547 or 548, but on section 544, incorporating the law of the state where the bankruptcy court is located.¹⁶⁶ A trustee might choose to rely on state law provisions either because they contain terms more favorable than their bankruptcy code counterparts or because the statute of limitations in the bankruptcy code provision has expired.¹⁶⁷

165. *Id.* at 89-92 (Rehnquist, J., concurring). This was suggested in the plurality opinion, and the concurring Justices who would be required to form a majority of the Court expressly limited their concurrence to an invalidation of bankruptcy jurisdiction over purely state law causes of action. Of course, obedience to *Northern Pipeline* requires more than merely characterizing causes of action as based on state or federal law. The concurrence did not suggest that non-tenured officers could hear and determine all federally-based causes of action. However, the source of the underlying law has significance in its effect on the scope of the powers given a non-article III bankruptcy judge. By narrowly drawing a cause of action for recovering property "wrongfully" transferred by the debtor, Congress has created a right integral to the bankruptcy policy of equal distribution to equally situated creditors. Claims based on these narrowly drawn federal rights are much closer to the core of bankruptcy administration than the blank check given the trustee under § 544 to resort to whatever state statutes may be available. See *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct 3245, 3259 (1986) ("the state law character of a claim is significant for purposes of determining the effect that an initial adjudication of those claims by a non-article III tribunal will have on the separation of powers for the simple reason that [such] rights were historically the types of matters subject to resolution by Article III courts").

166. 11 U.S.C. § 544 (1984) states:

- (a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by—
- (1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;
 - (2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or
 - (3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.
- (b) The trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

167. For example, a trustee cannot recover under § 548 a fraudulent transfer that occurred more than one year before the filing of the bankruptcy petition. Thus, the trustee must resort to state fraudulent conveyance provisions. A trustee who asserts the fraudulent transfer in a counterclaim may receive the protection of § 502(d). However, if the alleged fraudulent transferee has not previously filed a claim, the problem arises whether such a state law-based cause of

One of the central problems in treating a state law-based claim as a core proceeding is the standard of review for such matters. Section 157(b)(1) provides that "[b]ankruptcy judges may hear and determine . . . all core proceedings . . . and may enter appropriate orders and judgments, subject to review under section 158 of this title."¹⁶⁸ Section 158(a) grants the district courts appellate jurisdiction over final orders and judgments entered by bankruptcy judges.¹⁶⁹ Bankruptcy Rule 8013 provides that on appeal, "[f]indings of fact shall not be set aside unless clearly erroneous." The clearly erroneous standard replaced the *de novo* standard of the Emergency Rule, which was adopted as a local rule by the district courts following *Northern Pipeline*.¹⁷⁰ While the Emergency Rule established *de novo* review for findings of fact in all proceedings,¹⁷¹ Rule 8013 and the Act of 1984 now provide that review of findings of fact in core proceedings should be by the clearly erroneous standard, while review of non-core proceedings should be *de novo*. This is the only material difference between the jurisdictional provisions of the Act of 1984 and the Emergency Rule, which was upheld by all courts of appeals that considered its constitutionality.¹⁷² The constitutional question is whether applying such a standard to findings of fact by a bankruptcy judge in a state law-based cause of action vests too much judicial power in a non-article III officer.

The standard of review in core proceedings was considered in *Bank of New Richmond v. Production Credit Association of River Falls, Wisconsin* (In re *Osborne*).¹⁷³ *Osborne* upheld the clearly erroneous standard against the challenge that the standard conflicted with *Northern Pipeline*. The court pointed out that the standard of review in the Reform Act was merely one of the factors that impermissibly vested the essential attributes of an article III court in a non-article III officer. According to *Osborne*, *Northern Pipeline* strongly suggested that none of the fatal characteristics of the Reform Act, taken alone, would have sufficed to render that Act's jurisdictional provisions unconstitutional, with the exception of jurisdiction over "related" matters

action can be adjudicated as a core proceeding. Whether the Congressional directive contained in § 502(d) saves the constitutionality of treating a state law-based preference or fraudulent conveyance claims as a core proceeding is uncertain.

168. 28 U.S.C. § 157(b)(1) (1984).

169. *Id.* § 158(a).

170. EMERGENCY RULE § (e)(2)(B) (Admin. Office of the United States Courts (1982)).

171. The Emergency Rule divided proceedings into "related proceedings," corresponding for the most part to non-core proceedings, and "non-related proceedings," corresponding to core proceedings.

172. *In re Colorado Energy Supply, Inc.*, 728 F.2d 1283 (10th Cir. 1984); *In re UNR Indus., Inc.*, 725 F.2d 1111 (7th Cir. 1984); *Gold v. Johns-Manville Sales Corp.*, 723 F.2d 1068 (3d Cir. 1983); *In re Kaiser*, 722 F.2d 1574 (2d Cir. 1983); *White Motor Corp. v. Citibank, N.A.*, 704 F.2d 254 (6th Cir. 1983); *In re Hansen*, 702 F.2d 728 (8th Cir. 1983), *cert. denied*, 103 S. Ct. 3589 (1983); *In re Braniff Airways Inc.*, 700 F.2d 214 (5th Cir. 1983), *cert. denied*, 103 S. Ct. 2122 (1983).

173. 42 Bankr. 988 (Bankr. W.D. Wis. 1984).

and the total grant of bankruptcy jurisdiction to the bankruptcy courts.¹⁷⁴ The court also noted that the Act of 1984 places considerably greater limitations on the jurisdiction of bankruptcy courts.¹⁷⁵ Additionally, the application of the clearly erroneous standard is limited to core proceedings, while *Northern Pipeline's* primary concern was with the extension of bankruptcy jurisdiction to matters outside the "core" of bankruptcy power.¹⁷⁶ The court concluded that the Act of 1984 reserves most, if not all, of the essential attributes of judicial power in the district court.

Osborne provides persuasive support for the argument that the treatment of congressionally-created substantive rights in the Act of 1984 meets the requirements of *Northern Pipeline*. Congress has substantial discretion to prescribe how such rights may be adjudicated, but it must exercise that discretion in such a way that the "essential attributes of judicial power are retained in an Article III judge."¹⁷⁷ Even if *Osborne* is correct, however, it neither considered nor upheld the adjudication of state law-based causes of action as a core proceedings.¹⁷⁸

Although there has been no other significant litigation over the standard of review incorporated in the Act of 1984, several courts of appeals have recently considered the constitutionality of provisions of the Magistrates Act of 1979 that contain similar standards of review. The Magistrates Act allows magistrates to conduct civil trials and order entry of judgments with the consent of the parties.¹⁷⁹ Appeal to the court of appeals is made in the same manner as appeal from a district court.¹⁸⁰ By consent of the parties, appeal can also be made to the district court.¹⁸¹ In either case, the reviewing court applies the clearly erroneous standard to the magistrate's findings of fact. The district judge has the power to vacate any consensual reference to a magistrate on his own motion or on the motion of a party.¹⁸²

All courts of appeals that have considered section 636(c) of the Magistrates Act have upheld its constitutionality.¹⁸³ These courts have found two aspects

174. *Id.* at 993.

175. 28 U.S.C. § 1334(c)(2) (1984) limits district court jurisdiction by requiring abstention in some situations; § 157(b)(5) gives jurisdiction over wrongful death cases to the district court; §§ 157(a) & (d) place jurisdiction entirely in the district courts, by permitting district judges not only to refer cases to bankruptcy judges, but also to withdraw reference at any time.

176. *Osborne*, 42 Bankr. at 994. *See also* *Briden v. Foley*, 776 F.2d 379 (1st Cir. 1985) (upholding constitutionality of clearly erroneous standard in § 547 preference action).

177. *Northern Pipeline*, 458 U.S. at 84-85 (plurality opinion).

178. The matter adjudicated as a core proceeding in *Osborne* was an application of equitable subordination of a creditor's claim for allegedly inequitable conduct, a matter arising solely under federal bankruptcy law. *See* 11 U.S.C. § 510(c) (1984); *Pepper v. Litton*, 308 U.S. 295 (1939).

179. 28 U.S.C. § 636(c)(1) (1982).

180. *Id.* § 636(c)(3).

181. *Id.* § 636(c)(4).

182. *Id.* § 636(c)(6).

183. *Fields v. Washington Metro. Area Transit Auth.*, 743 F.2d 890 (D.C.Cir. 1984); *Lehman*

of the Magistrates Act particularly important. First, and most significant, is the requirement of consent, which the courts have seen as an important element of *Northern Pipeline*.¹⁸⁴ While parties cannot consent to subject matter jurisdiction, jurisdiction under the Magistrates Act resides in the district courts. The parties merely consent to the particular mode of trial, clearly something to which consent can be given.¹⁸⁵ The second aspect of the Magistrates Act is the relationship between the district court and the non-article III officer. Magistrates are appointed by the district court, and parties must consent to reference. Additionally, the reference can be withdrawn at any time on motion of either the district court or a party.

The fact that the courts of appeal have unanimously upheld section 636(c) informs the general analysis of the Act of 1984, but it does not guarantee the constitutionality of adjudicating a state law-based cause of action as a core proceeding. Consent, or lack thereof, appears to be the most significant factor to courts that have considered section 636(c). Therefore, a lack of consent may be fatal.

Osborne and the section 636(c) litigation do not definitely determine whether a trustee's cause of action that incorporates state fraudulent conveyance law can be constitutionally adjudicated as a core proceeding if the defendant has not filed a claim in the bankruptcy case. Once again, the best source of comparison is *Northern Pipeline*. Northern sought to sue Marathon on a breach of contract claim in the bankruptcy court at a time when Marathon was a stranger to Northern's bankruptcy case. Six members of the Supreme Court agreed that Northern's claim arose entirely under state law. Accordingly, the Court held that a non-article III bankruptcy judge could not render a final judgment on such an issue, which would bind a party who was otherwise uninvolved in the bankruptcy case. In contrast to *Northern Pipeline*, a trustee in our example could rely on section 544 to provide access to state fraudulent conveyance law. This would not, however, negate the trustee's dependence on state law. Mere reliance on section 544

Bros. Kuhn Loeb, Inc. v. Clark Oil & Refining Corp., 739 F.2d 1313 (8th Cir. 1984); Puryear v. EDE's, Ltd., 731 F.2d 1153 (5th Cir. 1984); Collins v. Foreman, 729 F.2d 108 (2d Cir. 1984); Goldstein v. Kelleher, 728 F.2d 32 (1st Cir. 1984); Pacemaker Diag. Clinic of America, Inc. v. Instromedix, Inc., 725 F.2d 537 (9th Cir. 1984); Wharton-Thomas v. United States, 721 F.2d 922 (3d Cir. 1983).

184. Weber v. Mathews, 423 U.S. 261 (1976). *Raddatz* and *Northern Pipeline* are read by the courts as establishing that the decision-making power must remain in an article III court when parties have not consented to determination by a non-article III officer; they cannot be read as controlling in cases involving consensual reference.

185. See, e.g., FED. R. CIV. P. 38(d) (waiver of trial by jury if no timely request made). In discussing the consent issue, the courts have relied on *Heckers v. Fowler*, 69 U.S. (2 Wall.) 123 (1864), a case upholding the constitutionality of a system by which litigants could consent to have a case assigned to a referee for trial, with the referee to enter final judgment. Apparently, no more recent case exists that could be used as authority for this point. *But see* *Commodity Futures Trading Comm'n v. Schor*, 106 S. Ct. 3245, 3256 (1986) ("Article III's guarantee of an impartial and independent federal adjudication is subject to waiver").

would not create a cause of action arising under congressionally-created substantive law. If this were so, then any cause of action brought by a bankruptcy trustee would be based on congressionally-created substantive law, because the trustee is a creature of federal law and cannot bring suit without specific authorization under federal law. Although the trustee gains access to state fraudulent conveyance law through section 544(a), the cause of action depends on the existence of relevant state law. This is analogous to *Northern Pipeline*, in which the debtor-in-possession was empowered to sue by provisions of federal law,¹⁸⁶ but its suit depended on the existence of a state law cause of action. As Mr. Justice Holmes stated in a related context, "a suit arises under the law that creates the cause of action."¹⁸⁷ The debtor-in-possession in *Northern Pipeline* could have prevailed only under state contract law. Likewise, the trustee in the above-mentioned hypothetical could recover only under state fraudulent conveyance law. This involves a cause of action based no less on state law than that of the debtor-in-possession in *Northern Pipeline*.

The jurisdictional provisions in the Act of 1984 may be an improvement over the previous system, but the improvements do not remedy the constitutional problems created by allowing a bankruptcy judge to enter final judgments in actions such as the one discussed above. In fact, the disposition of the state law-based fraudulent conveyance claim is the same under the Reform Act and the Act of 1984. If treated as a core proceeding, the bankruptcy judge would render a final judgment, with appeal to the district court. The district court would not reverse as to findings of fact unless those findings were "clearly erroneous." Under the Act of 1984, the district court can withdraw its reference to the bankruptcy judge at any time, but this is not enough to save an otherwise unconstitutional delegation of power to a non-article III judge.

186. 11 U.S.C. § 1107 (1984) states:

- (a) Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor-in-possession shall have all the rights, . . . and powers, and shall perform all the functions and duties, . . . of a trustee serving in a case under this chapter.

11 U.S.C. § 323 (1984) states:

- (a) The trustee in a case under this title is the representative of the estate.
(b) The trustee in a case under this title has the capacity to sue and be sued.

There is no material difference for the discussion in the text accompanying this note between a chapter 11 debtor-in-possession and a bankruptcy trustee, since they have the same powers and duties, with certain exceptions not relevant here.

187. *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (landmark case on issue of what constitutes a cause of action "arising under" the laws of the United States over which federal courts have federal question jurisdiction). *See also* *Havee v. Belk*, 775 F.2d 1209, 1218 (4th Cir. 1985) ("while it is the federal law [§ 544] which provides the trustee with his 'strong-arm' power, his exercise of such power and its extent are governed entirely by the applicable state law").

One court has suggested a possible saving provision. It proposes that the district judge can withdraw its reference and review all findings *de novo* even after a bankruptcy judge has entered a final judgment in a core proceeding.¹⁸⁸ This interpretation, however, is unwarranted by the statutory language. The Emergency Rule provided for *de novo* review of all findings of bankruptcy judges in all proceedings by the district court, whether related (non-core) or non-related (core).¹⁸⁹ The Act of 1984 was essentially a codification of the Emergency Rule, *except* that the standard of review of findings of fact in core proceedings was changed from the *de novo* standard to an appellate standard,¹⁹⁰ which Bankruptcy Rule 8013 tells us is a "clearly erroneous" standard. *De novo* review following a final judgment in a core proceeding is irreconcilable with the language of the Act of 1984.

However, there is room in the new Act to allow for a constitutionally permissible interpretation. Subsections (F) and (H) of section 157(b)(2) can be interpreted to allow jurisdiction over some, rather than all, proceedings to determine, avoid or recover preferences and fraudulent conveyances. By reading these subsections to include all such proceedings *except* those based on section 544(a) or state law, brought by a trustee or debtor-in-possession against a defendant who has not filed a claim in the bankruptcy case,¹⁹¹ constitutional violations could be avoided without the heavy hand employed by the *Northern Pipeline* plurality.¹⁹²

CONCLUSION

Case law suggests that some of the jurisdictional provisions of the Act of 1984, if construed broadly, could lead to unconstitutional results. Therefore, courts should interpret these provisions in a manner consistent with available

188. *Danning v. Lummis* (*In re Tom Carter Enterprises*), 44 Bankr. 605 (Bankr. C.D. Cal. 1984). On February 20, 1985, the same court issued a second memorandum and order in *Danning v. Lummis*, 5 Bankr. L. Ed. Current Awareness Alert, Part II, 84 (Bankr. C.D. Cal. August, 1985), deleting this dictum from its opinion.

189. EMERGENCY RULE § (e)(2)(B) (Admin. Office of the United States Courts (1982)).

190. *See* 28 U.S.C. § 157(b)(1) (1984). This important difference has been ignored by some courts that have undertaken to compare the Emergency Rule and the Act of 1984. *See Firestone v. Dale Beggs & Assoc.* (*In re Northwest Cinema Corp.*), 49 Bankr. 479, 482-83 (Bankr. D. Minn. 1985); *Baldwin-United Corp. v. Thompson* (*In re Baldwin-United Corp.*), 48 Bankr. 49, 54 (Bankr. S.D. Ohio 1985).

191. *See supra* note 167 (to the effect that perhaps the reading of subsections (F) and (H) should also exclude such claims even if they constitute counterclaims).

192. Courts have already begun reading portions of the Act as broadly as possible, and have found constitutional violations. *See, e.g., Associated Grocers of Nebr. Coop., Inc. v. Nabisco Bakers* (*In re Associated Grocers of Nebr. Coop., Inc.*), 46 Bankr. 173 (Bankr. D. Neb. 1985) (conferring jurisdiction on bankruptcy courts to determine whether to avoid or recover preference is constitutional); *Addison v. O'Leary* (*In re TWI, Inc.*), 13 Bankr. Ct. Dec. 287 (Bankr. E.D. Va. 1985) (fraudulent and voluntary conveyances outside bankruptcy court jurisdiction).

constitutional guidelines to avoid such a result.¹⁹³ Nothing in the language of section 157 compels the broadest possible reading. When two constructions of a statute are reasonable, one constitutional and the other unconstitutional, it is well-established that courts should prefer the constitutional reading.¹⁹⁴

Whether Congress intended these provisions to be read broadly or narrowly cannot be determined. There is no "legislative history" accompanying the Act,¹⁹⁵ only conflicting statements of individual legislators.¹⁹⁶ What is apparent, however, is that Congress intended to create a constitutionally valid jurisdictional system substantially similar to that of the Bankruptcy Act of 1898, under which federal courts operated for eighty years. During those years, courts spent a great deal of time determining the limits of bankruptcy jurisdiction. Now that the courts face similar issues, it would be foolish not to take advantage of the product of that work: a body of caselaw with different terminology, but analogous concepts. Use of that caselaw, read with *Northern Pipeline*, may enable courts to avoid constitutional problems without straining for unnatural readings of the new law.

193. "[T]he Supreme Court has made such a mess of this phase of the law that medieval theologians could be as reliable a source of guidance on it as modern professors." Letter from Charles Alan Wright to Hon. Peter W. Rodino (June 4, 1976), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5963, 6049. Several courts have exercised restraint in their readings of the Act of 1984. See *Pierce v. Airport Dev. Co.* (*In re Pierce*), 44 Bankr. 601 (D. Colo. 1984); *Bokum Resources Corp. v. Long Island Lighting Co.* (*In re Bokum Resources Corp.*), 13 Bankr. Ct. Dec. 11 (Bankr. D.N.M. 1985); *Allis-Chalmers Corp. v. Borg-Warner Acceptance Corp.* (*In re Dr. C. Huff Co.*), 44 Bankr. 129 (Bankr. W.D. Ky. 1984).

194. See *supra* note 165.

195. The Conference Report of the Act of 1984 contains only the text of the Act itself.

196. "[I]solated statements by individual Members of Congress or its committees, all made after the enactment of the statute under consideration, cannot substitute for a clear expression of legislative intent at the time of enactment [None of these comments] represents the will of Congress as a whole." *Southeastern Community College v. Davis*, 442 U.S. 397, 411 n.11 (1979) (citations omitted). See also *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980) ("ordinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history").

