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Jeffrey H. Bush

University of Nebraska College of Law, galfridusbosk@yahoo.com

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Comment


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I. STATEMENT OF THE PROBLEM

Article III of the Constitution provides that the "judicial Power of the United States" shall be vested in courts whose judges enjoy life tenure and protection against reduction in salary. The literal language of article III unambiguously requires that any exercise of federal judicial power be confined to courts whose judges possess the guarantees of independence and impartiality granted by article III. Despite article III's clear language the Supreme Court, on a number of occasions, has upheld the creation of non-article III courts by Congress.

2. U.S. CONST. art. III, § 1, cl. 2.
3. Article III provides:
   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, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.
Id. art. III, § 1. Justice White has remarked that
[any reader could easily take this provision to mean that although Congress was free to establish such lower courts as it saw fit, any court that it did establish would be an "inferior" court exercising "judicial power of the United States" and so must be manned by judges possessing both life tenure and a guaranteed minimal income.
under the enumerated powers of article I of the Constitution.\textsuperscript{4} The Supreme Court also has permitted Congress to create administrative agencies under the enumerated powers of article I, even though the functions of such agencies are quasi-judicial and they preside over disputes arising under the laws or Constitution of the United States which ordinarily would be within the federal subject matter jurisdiction of article III courts.\textsuperscript{5}

Despite a 150-year history of article I tribunals, in 1982 the Supreme Court held that the jurisdiction granted to the United States bankruptcy courts through the Bankruptcy Reform Act of 1978 was unconstitutional.\textsuperscript{6} The Reform Act created non-article III bankruptcy courts with pervasive jurisdiction to settle disputes related to proceedings in bankruptcy.\textsuperscript{7} However, a plurality of the Court in \textit{Northern Pipeline Construction Co. v. Marathon Pipe Line Co.}\textsuperscript{8} held such a grant conflicted with the separation of powers mandated by article III. \textit{Northern Pipeline}'s literal reading of article III\textsuperscript{9} had the potential for undermining the structure of the administrative state.\textsuperscript{10} However, the Court has confined \textit{Northern Pipeline} to its facts and has upheld the constitutionality of non-article III tribunals.\textsuperscript{11}

In response to \textit{Northern Pipeline}, Congress amended the Bank-

\begin{itemize}
\item \textsuperscript{4} U.S. Const. art. I, § 8. Examples of legislative courts are the territorial courts of Guam, the Virgin Islands, the Mariana Islands and American Samoa, the military courts, the courts of the District of Columbia, and the Tax Court.
\item \textsuperscript{5} See id. art. III, § 2.
\item \textsuperscript{6} Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).
\item \textsuperscript{8} 458 U.S. 50 (1982).
\item \textsuperscript{9} Justice White remarked that the plurality's reading in \textit{Northern Pipeline} was "fine rhetoric," but that "analytically it serves only to put a distracting and superficial gloss on a difficult question." \textit{Id.} at 93 (White, J., dissenting). While most commentators have agreed with Justice White, the notion that article III must be read literally is not without its supporters. See, e.g., Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U.L. Rev. 205 (1985); Amar, Taking Article III Seriously: A Reply to Professor Friedman, 85 Nw. U.L. Rev. 442, 445 (1991).
\item \textsuperscript{10} See Redish, Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision, 1983 Duke L.J. 197, 200 (the result of the plurality opinion "should lead to the conclusion that much of the work of most federal administrative agencies is unconstitutional").
\item \textsuperscript{11} See Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986)(upholding the power of the Commodity Futures Trading Commission to hear counterclaims based on state law); Thomas v. Union Carbide Agric'l Prods. Co., 473 U.S. 568, 569 (1985) (characterizing \textit{Northern Pipeline} as holding that Congress cannot give article I courts authority to finally determine state law contract actions where the parties have not consented and where review is by traditional appeal). For a discussion of \textit{Northern Pipeline} and subsequent cases, see Part III below.
Although the Court has abandoned a literal reading of article III, there are still valid jurisprudential and practical concerns about the constitutionality of the Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA). Because the Court has vacillated between a formalistic and functional approach to protecting article III values, there is uncertainty among the lower federal courts concerning the jurisdiction of the bankruptcy courts, and therefore today the bankruptcy courts function in a system whose validity is subject to the tension created by the Court's formalistic and functional approaches to article III.

The purpose of this Comment is to examine the Court's article III jurisprudence and to suggest a constitutional analysis of the jurisdiction of the bankruptcy courts granted by the 1984 amendments. Part II describes the historical background of the present jurisdiction of the bankruptcy courts. Part III presents a critical discussion of the Supreme Court's recent cases. Part IV suggests that a consistent analytical framework for the application of article III depends primarily on a clear theory of public rights (i.e., rights that can be adjudicated without the participation of article III courts). Part V suggests an application of the analysis to unresolved issues under BAFJA.

II. CRISIS IN THE BANKRUPTCY COURTS

Part II describes the history of BAFJA. First, this Part provides a sketch of the prior regime under the Bankruptcy Act of 1898. Second, this Part describes the goals of the Bankruptcy Reform Act of 1978. The invalidation of the Reform Act by Northern Pipeline is then discussed in considerable detail. Finally, the current jurisdiction of the bankruptcy courts under BAFJA is described.

A. The Bankruptcy Act of 1898

A proper understanding of the Bankruptcy Act is essential because the Act controlled the law until quite recently and its effects continue. Under the Bankruptcy Act of 1898 the district courts were vested with original jurisdiction over all bankruptcy matters, but the district

14. See Gibson, Jury Trials and Core Proceedings: The Bankruptcy Judge's Uncertain Authority, 65 AM. BANKR. L.J. 143, 174 (1991)("the Court's analysis appears to remain in a state of flux").
court referred certain bankruptcy cases to officials who were appropriately called "referees." The cases so referred included all administrative proceedings. Controversies that were not administrative proceedings (i.e., those arising between the trustee and third parties during administration of the estate) could be disposed of under the referee’s "summary jurisdiction." The term "summary jurisdiction" was used to describe the expedited procedure available under the bankruptcy rules. Alternatively, a case could be tried under the "plenary jurisdiction" exercised by the district court and state courts, acting under their usual rules of procedure.

The bankruptcy courts' summary jurisdiction was equitable in nature and their summary jurisdiction over property in their possession was in rem. Although there was no personal jurisdiction, summary jurisdiction could be exercised in controversies not involving property in their possession if the case had been commenced by the trustee in bankruptcy with the consent of the defendant.

If the property in dispute was not in the actual or constructive possession of the bankruptcy court, or if the defendant had not consented to summary jurisdiction, the action had to be heard by the district court or by a state court under its plenary jurisdiction. The concept that possession of the debtor's property granted in rem jurisdiction was a creature of caselaw. Jurisdiction by consent, on the other hand, was conferred by statute. Section 23b of the Act provided that suits other than those within the summary jurisdiction of the court must "be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under [the 1898] Act had not been instituted, unless by consent of the defendant." Further, the defendant in a suit prosecuted by the trustee was

\[\text{References:}\]
20. See, e.g., Thompson v. Magnolia Petroleum Co., 309 U.S. 478, 481 (1940)(property in possession of debtor when petition filed); Harrison v. Chamberlin, 271 U.S. 191, 194 (1926)(property in possession of third party who asserted a frivolous claim that was merely colorable); Chicago Bd. of Trade v. Johnson, 264 U.S. 1, 13 (1924)(intangible property in possession of debtor); Babbitt v. Dutcher, 216 U.S. 102, 113 (1910)(property in the possession of third party who asserted no adverse claim over it).
deemed to have consented to bankruptcy court jurisdiction merely by filing a proof of claim. Section 2a(7) as amended in 1952, as well as Rule 915, allowed the bankruptcy court summary jurisdiction if the defendant had not raised the jurisdictional objection at the first opportunity. This was known as "jurisdiction by ambush."

The referee system impeded the effective functioning of the courts since, before any matter collateral to administration of the estate could be resolved, it was necessary for the court to decide whether the matter was within the summary jurisdiction of the bankruptcy court. Because protracted litigation of jurisdictional issues reduced the resources of estates to the detriment of creditors, Congress enacted the Reform Act of 1978 to avoid procedural battles by unifying both plenary and summary jurisdiction in a single proceeding.

B. The Bankruptcy Reform Act of 1978

Unification of jurisdiction over all proceedings in bankruptcy was accomplished by granting the bankruptcy courts both in personam and in rem jurisdiction. This unification had been suggested by a ten-year study begun in 1968 by the Senate Judiciary Committee.


24. See id.

25. This intention is clear from Representative Butler's remark that the new pervasive jurisdiction given the bankruptcy courts would eliminate "[w]asteful litigation over jurisdiction that occurs under the Bankruptcy Act." 124 CONG. REC. 32,419 (1978).


Enactment of the law was delayed both by the Watergate Affair and by disagreement over what status the bankruptcy judges should be given. See H.R. 8200, 95th Cong., 1st Sess. (1977); Klee, supra, at 953.
In the House version of the Act passed on February 1, 1978, bankruptcy judges were to be independent article III judges, and supervision of the administration of cases was entrusted to United States trustees monitored by the Department of Justice. The idea motivating the House was that tenure and salary protections of article III would attract a higher caliber of judges. The Senate amended the law on September 7, 1978. Under the Senate’s version the judges of the bankruptcy courts would be adjuncts to the United States district courts and the trustees were eliminated. On September 28, 1978, Congressman Don Edwards proposed a compromise which provided for nontenured bankruptcy judges to serve on independent bankruptcy courts as adjuncts to the courts of appeals, with a pilot program of United States trustees in eighteen judicial districts. In response to perceived constitutional defects in this expanded jurisdiction, Congress gave the courts jurisdiction dependent on that of the district courts.

As originally conceived, the bankruptcy courts were “adjuncts” to the district courts. Adjunct status conferred on the bankruptcy courts the full range of powers exercised by the district courts, including the powers to conduct jury trials and to issue contempt citations. By conferring this expanded jurisdiction, Congress attempted to abolish the distinction between summary and plenary jurisdiction. In its place Congress substituted the concepts of the title 11 bankruptcy case and the civil proceedings which either arose under, arose in, or were related to the title 11 case. This adjunct status was granted by 28 U.S.C. § 1471, which vested original jurisdiction over all proceedings in bankruptcy in the district courts and allowed the bankruptcy court for the district to exercise the district court’s jurisdiction. The statute’s

29. See id. at 1785.
30. See id. at 28,257.
31. Klee, supra note 27, at 954.
   (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
   (b) Notwithstanding any act of Congress that confers exclusive jurisdiction on a court or courts, other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.
   (c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.
grant of jurisdiction had three steps. First, section 1471(a) gave the district courts original and exclusive jurisdiction over all cases under title 11. The title 11 case came into being when the petition was filed; it was confined solely to matters concerning administration of the estate.

Second, civil proceedings commenced by the trustee against third parties were governed by section 1471(b). This section gave the district courts original but not exclusive jurisdiction over "all civil proceedings arising under title 11 or arising in or related to cases under title 11." Since the district court's jurisdiction was not exclusive, it could exercise jurisdiction concurrent with the state courts.

Finally, section 1471(c) vested in the bankruptcy courts the exercise of all of the jurisdiction granted to the district courts by sections 1471(a) and (b). Section 1471 thus gave to the bankruptcy courts all of the powers formerly exercised by the district courts under the 1898 Act, including the power to conduct jury trials, and to issue contempt citations. Since a bankruptcy court could preside over all civil proceedings related to cases under title 11, the court could hear litigation based solely on the fact that the debtor had filed bankruptcy. Such litigation would include enforcement of choses in action owned by the debtor at the filing of the petition.

Although the Reform Act was signed into law on November 6, 1978, it was not to take effect until April 1, 1984. In the interim, the judges of the old bankruptcy courts were to remain in office until they had been replaced or reappointed. However, section 241(a) of the law, which included 28 U.S.C. § 1471, was made to apply to the old bankruptcy courts, even though Congress did not intend it to become fully effective until 1984.

C. Northern Pipeline

Three years after enactment of the Reform Act the Court in Northern Pipeline Construction Co. v. Marathon Pipe Line Co. invalidated all of 28 U.S.C. § 1471. The case began inauspiciously when Northern Pipeline Construction Co. (Northern Pipeline) sued Marathon Pipe Line Co. (Marathon) in March of 1979 in the United States District

Court for the Western District of Kentucky. The complaint contained common law claims for breach of contract, breach of warranty, misrepresentation, and duress.

In 1980 Northern Pipeline filed for reorganization under chapter 11 in the United States Bankruptcy Court for the District of Minnesota. As a proceeding related to its title 11 case Northern Pipeline commenced an adversary proceeding against Marathon, alleging the same cause of action it had alleged in district court. Marathon moved to dismiss the adversary proceeding and challenged the jurisdiction of the bankruptcy court to hear the related proceeding on the grounds that the Bankruptcy Reform Act unconstitutionally conferred article III jurisdiction.

The bankruptcy court denied Marathon’s motion to dismiss and Marathon appealed to the district court. The district court reversed, holding that the Bankruptcy Reform Act’s delegation of judicial power to non-article III judges was unconstitutional. Both Northern Pipeline and the United States as intervenor filed direct appeals from the district court’s decision with the Supreme Court.

In a plurality opinion written by Justice Brennan, the Court affirmed the district court, holding that the Reform Act attempted to confer jurisdiction in violation of the separation of powers mandated by the Constitution. Only three justices concurred in Justice Brennan’s opinion. The plurality opinion had two bases: (1) the bankruptcy courts did not fall within any of the traditional legislative court exceptions to article III and (2) the Reform Act vested more power in the bankruptcy courts than could be sustained under Congress’ power to create adjuncts to article III courts.

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47. Justices Marshall, Blackmun and Stevens concurred in the plurality opinion. Justice Rehnquist filed a concurring opinion in which he and Justice O’Connor concurred in the judgment only. Chief Justice Burger dissented and filed a separate opinion to emphasize that the judgment was narrowly confined to the facts in the case. Justice White also filed a dissenting opinion which was joined by the Chief Justice and Justice Powell.
49. Id. at 87.
The plurality opinion noted that the Court has recognized only three exceptions to article III: the territorial courts, the courts-martial, and the legislative courts created by Congress to adjudicate public rights. Clearly bankruptcy courts are not territorial courts or courts-martial. Arguably, they are legislative courts, and this exception commanded the greatest attention in the plurality opinion.

The Court's analysis of the legislative court exception depended on the public rights doctrine. This is the doctrine that Congress may assign public rights to article I legislative courts since public rights need not be adjudicated in article III courts.

The public rights doctrine had been first articulated by Justice Curtis in Murray's Lessee v. Hoboken Land & Improvement Co. As found there, the doctrine concerned the government's waiver of sovereign immunity. Murray's Lessee concerned the validity of a sale by a United States marshall under a warrant issued by a Treasury Department official. The sale was challenged on fifth amendment due process grounds and on the grounds that the sale was a violation of article III's requirement of adjudication by an article III court. Justice Curtis stated that the judicial remedy for those claiming unlawful conduct by the executive had been granted by Congress through waiver of the government's sovereign immunity. In granting judicial remedy under the public rights doctrine Congress may do so "to such extent, and with such restrictions, as may be thought fit." Since the doctrine as found in Murray's Lessee was based on the government's consent to be sued, Justice Brennan declared that a necessary condition for finding the existence of a public right is the involvement of the government as a party. Disputes in bankruptcy do not involve public rights under this criterion since most collateral proceedings in bankruptcy arise between private parties.

Further, bankruptcy courts do not adjudicate only public rights under Congress' enumerated article I powers. Although the bankruptcy courts are created pursuant to an article I power, they are

50. Id. at 64 (citing American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828)).
51. Id. at 66 (citing Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1857)).
52. Id. at 67 (citing Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1855)).
53. 59 U.S. (18 How.) 272, 284 (1855).
54. Id.
55. Id.
56. Id.
57. Justice Brennan concluded that "a matter of public rights must at a minimum arise 'between the government and others.'" Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 69 (1982)(quoting Ex parte Bakelite Corp., 279 U.S. 438, 451 (1929)). However, he did not say that it was a sufficient condition: "[T]he presence of the United States as a proper party to the proceeding is ... not [a] sufficient means of distinguishing 'private rights' from 'public rights.'" Id. at 69 n.23.
58. See U.S. Const. art. I, § 8, cl. 4.
also fora for many proceedings based solely on state law. Article III of the Constitution reserves adjudication of common law proceedings to article III courts.58 The Court was therefore justified in holding that private rights based on state common law, such as the contract dispute in *Northern Pipeline*, must be adjudicated in article III courts.59 Justice Brennan declined to say whether the statutory rights assigned by Congress for adjudication in the bankruptcy courts were public rights, but merely stated that "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, . . . may well be a public right."60

Although Justice Brennan failed to find that the bankruptcy courts were legitimate article I courts, he conceded that they might be "adjuncts" to article III courts, in which case judicial power would in reality be exercised by article III courts.61 Justice Brennan applied an analysis based on *Crowell v. Benson*62 to determine whether bankruptcy courts were adjuncts to the district courts. Justice Brennan's application of *Crowell* will be further criticized below.63

*Crowell* involved a challenge to the Longshoremen's and Habor Workers' Compensation Act under which the United States Employees' Compensation Commission had the power to determine compensation claims. Crowell, Deputy Commissioner of the agency, had made an award against Benson and in favor of Knudsen, his alleged employee. Benson brought suit in federal district court and the district court conducted *de novo* review of all the facts on the theory that article III required such rehearing. The Supreme Court affirmed but found that the statute required an article III court to rehear only "jurisdictional" and "constitutional" facts.64 The Court held that administrative findings of nonconstitutional and nonjurisdictional fact become conclusive on the courts if the findings are without error of law.65 The *Crowell* Court held that Congress may assign factfinding to article I tribunals so long as the "essential attributes" of judicial power

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58. *Id.* art. III, § 2.
60. *Id.* at 71.
61. *See supra* note 33 and accompanying text.
63. *See infra* section III.A. It should be noted here that *Crowell* does not require a legislative court to be an adjunct; it only requires that when private rights are adjudicated in an article I court, the "essential attributes" of judicial power be retained in an article III court.
64. Jurisdictional facts are those upon which the jurisdiction of an agency depends, such as whether there was an employment relation. Constitutional facts are those facts necessary to enforce fundamental constitutional rights. *See Ng Fung Ho v. White*, 259 U.S. 276, 284-85 (1922).
are retained in an article III court.66

Justice Brennan observed that the administrative agency in Crowell was limited to making factual findings that were enforceable only in a district court after review of the law and the record. Justice Brennan also noted that the Court in United States v. Raddatz67 had upheld the determination of constitutional facts made by federal magistrates under the 1978 Federal Magistrates Act. From these cases he derived two principles: (1) Congress may assign a federal right to an adjunct for adjudication; (2) notwithstanding such assignment, the essential attributes of judicial power must be retained by an article III court.68

The question in Northern Pipeline accordingly was whether the Act "retained 'the essential attributes of the judicial power' in Art. III tribunals."69 Justice Brennan, first, found that Crowell and Raddatz would not support assigning to adjuncts rights not created by Congress, such as the state law contract dispute in Northern Pipeline. Tellingly, however, Justice Brennan conceded that the cases never distinguished between rights created by Congress and other rights.70 Justice Brennan asserted that "such a distinction underlies in part Crowell's and Raddatz' recognition of a critical difference between rights created by federal statute and rights recognized by the Constitution."71 He further asserted that the distinction was required by the separation-of-powers doctrine. Therefore, he concluded that Congress' assignment of a right it had not created to an article I court would be an encroachment on the article III courts.

Second, Justice Brennan noted that the Act did not retain the essential attributes of judicial power in an article III court. He contrasted the bankruptcy courts with the agency in Crowell. The Employees' Compensation Commission in Crowell could not compensate victims, but only made factual determinations, which could be enforced by the district courts only after review under a "weight of the evidence" standard.72 By contrast, the bankruptcy courts not only exercised subject matter jurisdiction that encompassed all civil proceed-

66. Id. at 51-55.
69. Id. at 77 (quoting Crowell v. Benson, 285 U.S. 22, 51 (1932)).
70. See infra section III.A.
72. Id. at 85. This aspect of the Court's holding is not supported by Crowell. One commentator has remarked that "[n]either in Northern Pipeline nor in Schor did the Court cite any authority for its conclusion that the Crowell standard provides more thorough review of fact-finding." Young, Public Rights and the Federal Judicial Power: From Murray's Lessee Through Crowell to Schor, 35 BUFFALO L. REV. 765, 861 (1986).
ings arising under title 11 or arising in cases related to cases under title 11, but also all jurisdiction of the district courts. Furthermore, the bankruptcy courts could issue any orders issuable by the district courts; the judgments of the bankruptcy courts were subject only to a deferential clearly erroneous standard of review; and the bankruptcy courts could issue final judgments that were binding even absent an appeal. For these reasons, Justice Brennan concluded that the Reform Act unconstitutionally encroached on the powers reserved to the article III courts.

Two bases of the Brennan opinion were adopted by the concurrence and therefore represent the holding of the case:73 (1) Northern Pipeline's state law claim was not a public right that may be adjudicated by a non-article III court; and (2) the bankruptcy court was not an adjunct of an article III court merely because it was subject to traditional appellate review by an article III court.74 Although the Court confined its holding to find that the state law claim was not a public right that could be adjudicated by a non-article III bankruptcy court, the plurality opinion invalidated all of the jurisdiction granted by 28 U.S.C. § 1471 on the theory that section 1471(b), giving the courts authority to adjudicate related proceedings, was nonseverable.75

The Court stayed its judgment until October 4, 1982, to give Congress time to remedy the defects in its legislation. By October Congress had done nothing and the stay was extended until December 23, 1982.76 Further extension of the stay was denied on December 24, 1982.77

D. The Emergency Rule

Since Congress' inaction in the face of the Northern Pipeline decision would have left the dockets of the district courts filled with bankruptcy cases, the Judicial Conference78 promulgated an "Emergency Rule" which the district courts universally adopted as a local rule.79 The Emergency Rule referred "[a]ll cases under Title 11 and all civil proceedings arising under Title 11 or arising in or related to cases

75. Id. at 87 n.40.
78. The Judicial Conference is created by 28 U.S.C. § 331 (1988). At the time of the Northern Pipeline decision the Conference consisted of the Chief Justice of the Supreme Court, the chief judge of each federal judicial circuit, a district judge from each circuit and the chief judges of the Courts of Claims and of the Courts of Customs and Patent Appeals. See Countryman, supra note 23, at 8 n.45.
under Title 11" to the bankruptcy courts. The reference of the district court could be withdrawn upon motion of the district court or by motion of a party.

The Emergency Rule was based on the assumption that *Northern Pipeline* had invalidated only 28 U.S.C. § 1471(c), while leaving subsections 1471(a) and (b) intact. Thus the Emergency Rule preserved the jurisdictional scheme of the 1978 Act except that the bankruptcy courts could no longer enter final judgments in civil proceedings related to the bankruptcy case. The Rule singled out related proceedings on the theory that these were not part of "the restructuring of debtor-creditor relations" which, in the words of Justice Brennan, "is at the core of the federal bankruptcy power." Thus the Rule defined related proceedings as "those civil proceedings that, in the absence of a petition in bankruptcy, could have been brought in a district court or a state court." Related proceedings were defined to include, but were not limited to, "claims brought by the estate against parties who [had] not filed claims against the estate." The Rule provided that the bankruptcy judges could not enter judgments or dispositive orders in related proceedings, but were required to submit findings of fact, conclusions of law and a proposed order to the district judge. However, the bankruptcy judge could enter final judgments in related proceedings if the parties consented.

The Rule also specifically listed certain "nonrelated" proceedings, such as those that frequently arise as collateral proceedings during a bankruptcy case. The bankruptcy judges could perform "all acts and

80. *Id.* § (c)(1), reprinted in 1 COLLIER 15th ed., *supra* note 16, ¶ 3.01[1][b][vi], at 3-16.
81. *Id.* § (c)(2), reprinted in 1 COLLIER 15th ed., *supra* note 16, ¶ 3.01[1][b][vi], at 3-16.
85. *Id.* § (d)(3)(B), reprinted in 1 COLLIER 15th ed., *supra* note 16, ¶ 3.01[1][b][vi], at 3-17.
86. *Id.* § (d)(3)(A), reprinted in 1 COLLIER 15th ed., *supra* note 16, ¶ 3.01[1][b][vi], at 3-17. Significantly, these proceedings included the following actions which were later termed "core proceedings" under 28 U.S.C. § 157 (1988) of BAFJA:

[C]ontested and uncontested matters concerning the administration of the estate; allowance of and objection to claims against the estate; counterclaims by the estate in whatever amount against persons filing claims against the estate; orders in respect to obtaining credit; orders to turn over property of the estate; proceedings in respect to lifting of the automatic stay; proceedings to set aside preferences and fraudulent conveyances; proceedings to determine the dischargeability of particular debts; proceedings to object to the discharge; proceedings in respect to the confirmation of plans; orders approving the sale of property where not arising from proceedings resulting from claims brought by the estate against parties who have not filed claims against the estate; and similar matters.
duties necessary for the handling" of a nonrelated proceeding.87

However, the Rule stripped the bankruptcy courts of authority given by the 1978 Act to hold jury trials.88 The judges were also prohibited from granting injunctions to court proceedings, punishing for criminal contempt not committed in their presence, and could not conduct appeals of bankruptcy cases.89 In all these respects, the Emergency Rule provided a framework for congressional action.

E. The Bankruptcy Amendments and Federal Judgeship Act of 1984

Congress considered a number of responses to Northern Pipeline, including a return to referees and article III status. After extended hearings over whether article III status should be conferred on the judges of the bankruptcy courts,90 Congress sent a bill to the President for signature on June 29, 1984.91 Under the bill, the judges of the bankruptcy courts would remain article I judges without life tenure.

In order to comply with the constraints of Northern Pipeline Congress amended 28 U.S.C. § 1471 to give the district courts the power to abstain from deciding cases arising under state law.92 Under the 1984 amendments the bankruptcy courts are adjuncts to the district courts, although more precisely they are "units" of the district courts.93 The

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87. Emergency Rule § (d)(1), reprinted in 1 COLLIER 15th ed., supra note 16, ¶ 3.01[1][b][vi], at 3-16.
88. Id. § (d)(1)(D), reprinted in 1 COLLIER 15th ed., supra note 16, ¶ 3.01[1][b][vi], at 3-17.
89. Id. § (d)(1)(A) (B), (C), reprinted in 1 COLLIER 15th ed., supra note 16, ¶ 3.01[1][b][vi], at 3-16.
92. 28 U.S.C. § 1334 (1988) provides in pertinent part as follows:
   (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
   (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.
   (c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.
93. Id. § 151.
district courts use a local rule to refer cases to the bankruptcy courts, as they did under the Emergency Rule.94 BAFJA differs from the 1978 Act inasmuch as the referral under BAFJA is not automatic and may be withdrawn.95

The statute also provides that certain proceedings are "core," deriving its terminology from the language of Northern Pipeline. Subsection 157(b)(1) gives the bankruptcy courts jurisdiction to enter final orders in core proceedings. Subsection 157(b)(2) proceeds to list fifteen categories of core proceedings, closely following the list of nonrelated proceedings from the Emergency Rule. Subsection 157(b)(3) provides that a bankruptcy court is to make the determination whether a proceeding is core either upon its own motion or upon the motion of a party. It also provides that the determination is not to be made solely on the basis that its resolution may be affected by state law.

If a bankruptcy court determines that the noncore proceeding is related, it may send the related proceeding to the district court with instructions that the district court abstain under 28 U.S.C. § 1334(c). This section allows the district court to exercise either mandatory96 or permissive abstention.97 Abstention is mandatory in noncore, related proceedings based on state law. A decision to abstain under the mandatory abstention clause "is not reviewable by appeal or otherwise."98 Alternatively, the bankruptcy court may hear a noncore, related proceeding, and submit proposed findings of fact and conclusions of law to the district court for de novo review by the district court under section 157(c)(1). Finally, the bankruptcy court may hear a case and enter a final judgment with consent of the parties under section 157(c)(2).99

Congress left many issues unresolved in BAFJA. These issues in-

94. Id. § 157(a) provides that "[e]ach district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district."
95. Id. § 157(d).
96. Id. § 1334(c)(2) provides that "in a proceeding based upon a State law claim ... related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding."
97. Id. § 1334(c)(1).
98. Id. § 1334(c)(2).
99. Proper exercise of jurisdiction under section 1334 relies on distinguishing between cases (1) arising in, (2) arising under and (3) related to a bankruptcy case. For a discussion of the courts' difficulty in construing these distinctions, see Note, Jurisdictional Uncertainties Under the 1984 Bankruptcy Amendments, 75 KY. L.J. 129 (1986-87); Note, Jurisdiction Under the Bankruptcy Amendments of 1984: Summing Up the Factors, 22 TULSA L.J. 167 (1986). See also Gibson, Re-
clude the scope of core proceedings, related proceedings and proceed-
ings arising under title 11. They also include the question of how a
party may consent to bankruptcy jurisdiction in noncore, related pro-
ceedings. Essentially, Congress in BAFJA left it to the courts to find a
solution to the constitutional infirmities of the Reform Act of 1978.
The following Parts of the Comment elaborate a theory to guide this
process.

III. ARTICLE III JURISPRUDENCE

This Part provides a critical discussion of the recent Supreme
Court cases on article III, and discusses the Court’s recent application
of the public rights doctrine. A threshold analysis demonstrates that
the Court has failed to provide any consistency in its formulation of
the public rights doctrine and that although the cases on article III
provide no firm rules, they do provide an analytical framework ade-
quate to sustain BAFJA.

A. Northern Pipeline’s Formalism

The key to the plurality’s formalism in Northern Pipeline is to un-
derstand that Justice Brennan’s analysis of the public rights doctrine

moval of Claims Related to Bankruptcy Cases: What is a “Claim or Cause of

According to one authority “arising in” “may act as the residual category of
civil proceedings, including those which do not arise under title 11, and those
which are not related to title 11 cases.” 1 COLLIER 15th ed., supra note 16, ¶
3.01[c][v], at 3-29.

It is clear from Northern Pipeline that ‘related proceedings’ are those that
(1) involve causes of action owned by the debtor that become property of the
estate under section 541, and (2) concern suits between third parties which in one
way or another affect the administration of the title 11 case.” Id. ¶ 3.01[c][iv], at 3-26.

BAFJA, unlike the Emergency Rule, never defines “related proceedings.” See supra note 84 and accompanying text (the Emergency Rule’s definition of
related proceedings).

“Arising under” means a cause of action “which either is created by title 11 or
which is concerned with what are called ‘matters concerning the administration
of the estate’ in 28 U.S.C. § 157(b)(2)(A), in the sense that no adverse third party
is involved.” 1 COLLIER 15th ed., supra note 16, ¶ 3.01[c][iii], at 3-24. See also Norton & Lieb, Jurisdiction and Procedure Under the 1984 Bankruptcy Amend-
1985)(analyzing the distinction between cases arising in and related cases on the
basis of whether a case may constitutionally be heard by a bankruptcy judge).

In Pacor, Inc. v. Higgins, 743 F.2d 984 (3d Cir. 1984), the Third Circuit devised
a widely adopted test under which a civil proceeding is related “if the outcome
could alter the debtor’s rights, liabilities, options or freedom of action (either pos-
itively or negatively) and which in any way impacts upon the handling and ad-
ministration of the bankruptcy estate.” Id. at 994. See also In re Fietz, 852 F.2d
455 (9th Cir. 1988)(adopting Pacor rationale); National City Bank v. Coopers &
Lybrand, 802 F.2d 990, 994 (8th Cir. 1986)(adopting Pacor rationale).
is based on a mistaken reading of *Crowell v. Benson.* There are three further grounds for criticizing the plurality opinion.

First, the text of the Constitution contains no support for the *Crowell* version of the public rights doctrine. The doctrine as first articulated in *Murray's Lessee* apparently referred to one of two things: (1) the doctrine that those disputes between a private individual and the government which Congress could dispose of were established by English institutions existing contemporaneously with the framing of the Constitution, or (2) the doctrine that Congress can itself decide any civil controversy between a private individual and the government or can assign such decision to a delegate. *Crowell* is the first case to articulate the public rights doctrine in terms of a distinction between congressionally created rights and those vested by other law. However, the *Crowell* public rights doctrine has no support in article III of the Constitution or in *Murray's Lessee.* It is therefore difficult to fathom the historical basis of Justice Brennan's purportedly literal interpretation of article III.

Second, *Northern Pipeline's* restriction of the article I courts to the three historical paradigms of territorial courts, courts-martial, and the legislative courts is artificial. To justify such restriction Justice Brennan asserted that if Congress were allowed to create tribunals under every one of the enumerated powers in article I, there would be no limiting principle to prevent Congress from invoking the necessary and proper clause and supplanting the independent article III courts with a system of specialized legislative courts. However, Justice Brennan failed to provide any theory to explain how Congress has created the territorial courts or the courts-martial; his theory of Congress' power to create legislative courts is based on the doctrine of public rights in *Crowell.* As has been stated, the *Crowell* doctrine has no basis in the Constitution.

Finally, Justice Brennan conceded that *Crowell* makes no distinction between congressionally created rights and state law rights. Nevertheless, the decisive factor in *Northern Pipeline* was that the bankruptcy court was adjudicating a state law contract claim. If separation-of-powers concerns were motivating the policy of *Crowell,* these concerns seem less important in the context of bankruptcy. Bankruptcy is a specialized area of law in which political meddling by Congress is unlikely to occur. Further, the state law cause of action ordinarily involved in proceedings incidental to bankruptcy adminis-

100. See supra text accompanying notes 61-72.
101. See Young, supra note 72, at 793-94.
102. See id. at 794.
104. Id. at 83.
tration is not the type of action that would lead to political encroach-
ment.\textsuperscript{105} It is more likely that politics would motivate Congress to withdraw a congressionally created federal cause of action from the article III courts.

The later cases make clear that Justice Brennan’s theory is unac-
ceptable. The later cases have accepted a balancing approach similar to that suggested by Justice White’s dissent in \textit{Northern Pipeline}. Justice White concluded that the Court’s cases on article III lacked any articulable rule that could support the plurality’s exceptions.\textsuperscript{106} His alternative to Justice Brennan’s formalism is to balance Congress’ in-
terests in creating administrative tribunals against the values of arti-
cle III.\textsuperscript{107} However, Justice White’s ad hoc balancing approach is also unacceptable because Congress can always create legislative interests to outweigh article III.\textsuperscript{108} The next section will show that the Court has not in fact adopted the “legal realism” suggested by Justice White’s approach,\textsuperscript{109} but rather has chosen to employ a functional ap-
proach to article III.

B. Since \textit{Northern Pipeline}: Thomas and Schor—A Functional Approach

The later Supreme Court decisions to interpret article III laid to rest concerns that the Court would invalidate all administrative agen-
cies. These cases are marked by a functional approach to article III. An important element in this new approach is its flexible conception of the public rights doctrine. The public rights doctrine is extensively discussed in the following sections.

1. Thomas

The first case to consider the public rights doctrine after \textit{Northern Pipeline} was \textit{Thomas v. Union Carbide Agricultural Products Co.}\textsuperscript{110} \textit{Thomas} concerned the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).\textsuperscript{111} FIFRA requires that manufacturers of pesticides submit research data to the Environmental Protection Agency on the pesticides’ health, safety and environmental effects as a precondition of registration and provides that follow-on registrants can use the ma-

\begin{itemize}
  \item \textsuperscript{105} \textit{Id.} at 98 (White, J., dissenting).
  \item \textsuperscript{106} In fact, he concluded his examination of the cases with the remark that the “Court has implicitly concluded [in these cases] that the legislative interest in creating an adjudicative institution of temporary duration outweighed the values furthered by a strict adherence to Art. III.” \textit{Id.} at 114.
  \item \textsuperscript{107} \textit{Id.} at 115.
  \item \textsuperscript{108} \textit{See Redish, supra note 10, at 223-24.}
  \item \textsuperscript{109} As is suggested by Fallon, \textit{Of Legislative Courts, Administrative Agencies, and Article III}, 101 HARV. L. REV. 915, 929 (1988).
  \item \textsuperscript{110} 473 U.S. 568 (1985).
  \item \textsuperscript{111} 7 U.S.C. §§ 136 to 136y (1988).
\end{itemize}
material submitted by former applicants if they compensate the former applicants for use of the documentation. Such data have trade secret status under state law until made public. The Act provides for binding arbitration if the parties cannot reach agreement on adequate compensation. An arbitrator's decision is subject to judicial review only for fraud, misrepresentation, or other misconduct.

In *Thomas* Union Carbide and thirteen other large chemical firms challenged FIFRA on the grounds that it substituted an inadequate federal right for trade secret rights under state law and forced them to submit to arbitration of the rights by an arbitrator whose decision was unreviewable by a tenured judge.112

Writing for the majority, Justice O'Connor, first, narrowly confined *Northern Pipeline* to its facts by stating that "[t]he Court's holding in that case 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."113

Second, the *Thomas* Court rejected Union Carbide's contention that the right implicated in FIFRA was a matter of state law or that it was a private right that must be adjudicated in an article III court. In interpreting the private-public distinction, Justice O'Connor emphasized that the brightline reading of the distinction in *Northern Pipeline* had failed to command a majority of votes.114 Justice O'Connor quoted Chief Justice Hughes' remark in the *Crowell* opinion that the public rights inquiry must not be confined to "mere matters of form" but also must include inquiry into "the substance of what is required."115 She added that "practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III."116 Accordingly, Justice O'Connor eschewed application of the formal categories of *Northern Pipeline* to FIFRA.

Looking to the substance of FIFRA, Justice O'Connor employed a two-step test that examined (1) the nature of the right, and (2) the concerns motivating the legislature. She noted that the right created by FIFRA was not purely private in nature, but had the characteristics of a public right since use of the the data by the follow-on registrant

113. Id. at 584.
114. Id. at 585-86:

This theory that the public rights/private rights dichotomy . . . provides a bright-line test for determining the requirements of Article III did not command a majority of the Court in *Northern Pipeline*. . . . Nor did a majority of the Court endorse the implication of the private right/public right dichotomy that Article III has no force simply because a dispute is between the government and an individual.

115. Id. at 586 (quoting *Crowell v. Benson*, 285 U.S. 22, 53 (1932)).
116. Id. at 587.
was an integral part of a congressionally created scheme to protect the public health.\textsuperscript{117} Next she stated that by allocating the costs of valuation of the data to private parties, Congress intended to free the agency from this task; therefore, Congress' intention was not to diminish the likelihood of impartial decisionmaking which article III protects.

Justice O'Connor's analysis of the public rights doctrine is in striking contrast with \textit{Northern Pipeline}. On the issue of state law causes of action, she noted that since the workers' compensation act at issue in \textit{Crowell} displaced a traditional cause of action, it would be a matter reserved to the article III courts under the \textit{Northern Pipeline} approach.\textsuperscript{118} She also rejected Justice Brennan's notion that the government's presence as a party would be determinative.\textsuperscript{119} The result in \textit{Thomas} was that private rights under state trade secret law were not implicated in FIFRA; Congress had created a legislative scheme that did not displace state law rights, but created public rights. The Court concluded that its holding was "limited to the proposition that Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution."\textsuperscript{120}

2. Schor

The public rights doctrine underwent further refinement in \textit{Commodity Futures Trading Commission v. Schor}.\textsuperscript{121} \textit{Schor} concerned a regulation promulgated by the Commodity Futures Trading Commission (CFTC) under authority granted by the Commodity Exchange Act (CEA).\textsuperscript{122} The regulation provided for adjudication of counter-claims "arising out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint" in a reparation action brought before the CFTC.\textsuperscript{123} Schor filed a claim against ContiCommodity Services, Inc. (Conti), a commodity broker, before the CFTC, alleging that Schor's account with Conti contained a debit balance because of Conti's violation of federal law.\textsuperscript{124} Conti filed a diversity action in district court to recover the debit balance from Schor before Conti received notice of Schor's action. Conti voluntarily withdrew this action from district court and the CFTC decided both

\begin{multicols}{2}
\begin{itemize}
  \item \textsuperscript{117} \textit{Id.} at 589.
  \item \textsuperscript{118} \textit{Id.} at 597.
  \item \textsuperscript{119} \textit{Id.}.
  \item \textsuperscript{120} \textit{Id.} at 593-94.
  \item \textsuperscript{121} \textit{478 U.S.} 833 (1986).
  \item \textsuperscript{122} 7 U.S.C. §§ 1 to 26 (1988).
  \item \textsuperscript{123} 17 C.F.R. § 12.23(b)(2)(1991).
  \item \textsuperscript{124} \textit{Commodity Futures Trading Comm'n v. Schor}, 478 U.S. 833, 837 (1986).
\end{itemize}
\end{multicols}
Schor's claim under federal law and Conti's state law counterclaim in Conti's favor. Schor challenged the authority of the CFTC to hear the counterclaim only after the adverse judgment.

The Court of Appeals for the District of Columbia Circuit held that the CFTC had no authority to hear Conti's state law counterclaim. The court of appeals adopted a reading of the CEA that allowed the court to avoid the constitutional problem, holding the CEA authorized the CFTC to hear only those counterclaims arising from violations of the CEA or agency regulations.

The Court overturned this decision. The Court's opinion represented a departure from *Northern Pipeline* in that it identified two interests protected by article III. Rather than emphasizing only the separation-of-powers values of *Northern Pipeline*, the Court in *Schor* stressed that the framers intended article III primarily to protect the litigant's personal right to an independent and impartial adjudication by a federal court. Of secondary importance to the framers were the structural interests of protecting the federal judiciary from encroachments by the other branches. The Court emphasized that the personal right to adjudication by an article III court is subject to waiver, as is the right to a jury trial guaranteed by the seventh amendment. In this case the Court found that Schor had waived his right to an article III court by consenting to CFTC jurisdiction.

The second step in the Court's analysis was to inquire whether the regulation encroached on the structural interest protected by article III. In *Schor* the Court made clear that the fact that a counterclaim is a private right based on state law does not per se require that it must be tried in an article III court. The Court likened the inquiry into the state law character of a claim to the distinction between private and public rights which *Thomas* had characterized as "pragmatic." *Schor* made clear that the inquiry into the state law character of the claim is an initial inquiry that recognizes there is a greater "risk that Congress may improperly have encroached on the federal judiciary... when Congress 'withdraw[s] from judicial cognizance any matter

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125. Id. at 848. See also THE FEDERALIST No. 78 379 (C. Rossiter ed. 1961)(A. Hamilton):
   This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

See also United States v. Will, 449 U.S. 200, 218 (1980).


127. Id. at 849.

which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty' and which therefore has traditionally been tried in Article III courts."\(^{129}\)

After a court has determined that a claim is based on state law, the inquiry must proceed to decide whether there is "the encroachment or aggrandizement of one branch at the expense of the other."\(^{130}\) The factors used to determine whether there is an encroachment should be the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origin and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.\(^{131}\)

In upholding the CEA, the Court in Schor compared the CFTC to the bankruptcy courts which it had invalidated in Northern Pipeline. This analysis is significant because it indicates the direction the Court may take in examining the jurisdictional provisions of BAFJA.\(^{132}\)

3. Result of Thomas and Schor

_Thomas_ and _Schor_ present a significantly revised version of the public rights doctrine and, correspondingly, a pragmatic revision of article III values. Harking back to Justice White's dissent in _Northern Pipeline_, the Court in these cases recognized that article III's values were not inconsistent with Congress' interest in creating non-article III tribunals. Congress has a legitimate interest in administrative efficiency and in preserving the article III courts from inundation by administrative actions.

Moreover, when the primary article III value is conceived of as the parties' interest in an independent and impartial adjudication, there is no inconsistency between article III and adjudication of state law claims by a legislative court. The conception of the public rights doctrine in these cases is pragmatic and allows agency determination of state law claims that would be based on private rights under the _Northern Pipeline_ analysis. Part of the analysis is whether Congress has impaired the tenure and salary protections of article III by withdrawing the matter from the judiciary and giving it to nontenured bureaucrats. However, it is assumed in _Schor_ and _Thomas_ that Congress may integrate a private right within an administrative scheme so that the private right becomes public in nature. It is clear that the salary

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130. Id. at 850 (quoting Buckley v. Valeo, 424 U.S. 1, 122 (1976)(per curiam)).

131. Id. at 851 (quoting Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 84 (1982)(plurality opinion)).

132. See infra subsection IV.B.3.a.
and tenure protections of article III are not required in the adjudication of public rights by article I tribunals; however, the Court in these cases did not indicate to what extent the "essential attributes of judicial power" must be retained by an article III court in such adjudications.\textsuperscript{133}

C. \textit{Granfinanciera}—Questioning the Validity of the Core Proceeding

In \textit{Granfinanciera v. Nordberg}\textsuperscript{134} the Court returned to the constitutional limits of bankruptcy jurisdiction. In \textit{Granfinanciera} the Court held that Congress cannot change the nature of a state common law right by denoting it a core proceeding in bankruptcy. \textit{Granfinanciera} concerned proceedings for fraudulent conveyances which are among those Congress enumerated as core in BAFJA.\textsuperscript{135}

In \textit{Granfinanciera} the trustee for the debtor, Chase & Sanborn, pursuant to 11 U.S.C. §§ 548(a)(1) and (2), and 550(a)(1), attempted to avoid allegedly fraudulent transfers by Chase & Sanborn's corporate predecessor to the Columbian bank Granfinanciera. The defendant, Granfinanciera, contended that it was entitled to a jury trial of the fraudulent conveyance action under the seventh amendment. The Court agreed and found that Congress could not deprive a litigant of the right to a jury trial by reclassifying a preexisting common law cause of action and granting exclusive jurisdiction over it to a non-article III tribunal.\textsuperscript{136}

Although the case has much to say about the seventh amendment right to a jury trial in the context of bankruptcy proceedings, its implications for BAFJA are equally important.\textsuperscript{137} The majority opinion, written by Justice Brennan, returns to a formalistic analysis reminiscent of \textit{Northern Pipeline}. The opinion analyzes the seventh amendment requirement under a two-part analysis based on \textit{Crowell v. Benson}.\textsuperscript{138} First, Justice Brennan applied a seventh amendment in-

\textsuperscript{133} For example, \textit{Thomas} explicitly leaves the question open: "In this case Congress has provided for review of arbitrators' decisions to ensure against 'fraud, misrepresentation, or other misconduct.' The Court therefore need not reach the difficult question whether Congress is always free to cut off all judicial review of decisions respecting such exercises of Art. I authority." \textit{Thomas v. Union Carbide Agric'l Prods. Co.}, 473 U.S. 568, 601 (1985).

\textsuperscript{134} 492 U.S. 33 (1989).


\textsuperscript{136} "[P]urely taxonomic change cannot alter our Seventh Amendment analysis. Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity." \textit{Granfinanciera v. Nordberg}, 492 U.S. 33, 61 (1989).

\textsuperscript{137} See Schwartzberg, \textit{The Retreat From Pervasive Jurisdiction in Bankruptcy Court}, 7 BANKR. DEV. J. 1 (1990).

\textsuperscript{138} The \textit{Granfinanciera} analysis requires that the court look to whether the statutory cause of action is a public right which Congress may assign and has assigned
quiry to determine whether the case was of a kind triable at law or in equity at the time the seventh amendment was ratified. After Justice Brennan determined that the fraudulent conveyance action was legal in nature, he applied the article III public rights test to determine whether Congress may assign the legal right to a non-article III tribunal that does not use a jury as a factfinder.

Because the Court in *Granfinanciera* again relied on *Crowell*, two concepts recur in its application of the public rights doctrine: (1) that of the congressionally created scheme of public rights; (2) the idea that a private right may be triable in a non-article III tribunal if it is necessary to a congressionally created scheme. The Court held that the fraudulent conveyance action was noncore by finding that the defend-

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140. The Court in *Granfinanciera* employed the public rights analysis of *Thomas*. As stated by Justice Brennan, where the statutory cause of action does not concern governmental waiver of sovereign immunity, the crucial question is whether "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, [has] creat[ed] a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involve-

ment by the Article III judiciary."


The Court declined to state whether the congressionally created scheme of restructuring debtor-creditor relations is a public right, noting that that thesis had received "substantial scholarly criticism." *Granfinanciera v. Nordberg*, 492 U.S. 33, 56 n.11 (1989). However, the Court did find that the statutory right created by the fraudulent conveyance provision of 11 U.S.C. § 548(a)(2) was noncore. The Court stated that

[there can be little doubt that fraudulent conveyance actions by bankruptcy trustees—suits which, . . . "constitute no part of the proceedings in bankruptcy but concern controversies arising out of it"—are quintessentially suits at common law that more nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res. . . . They therefore appear matters of private rather than public right.

*Id.* at 56 (citation omitted)(quoting *Schoenthal v. Irving Trust Co.*, 287 U.S. 92, 94-95 (1932)(citation omitted)).
The Court concluded that if the creditor had consented by filing a claim, the fraudulent conveyance action would become core.

Justice Brennan stated two bases in support of this conclusion:

Because petitioners here . . . have not filed claims against the estate, respondent's fraudulent conveyance action does not arise "as part of the process of allowance and disallowance of claims." Nor is that action integral to the restructuring of debtor-creditor relations. Congress therefore cannot divest petitioners of their Seventh Amendment right to a trial by jury.\(^{142}\)

One basis stated in the passage quoted is the traditional concept of the actual or constructive possession of the bankruptcy court under the 1898 Act (i.e., the property had not entered the process of allowance and disallowance of claims). The second basis stated is that the action itself was not integral to the congressional scheme. Although two bases are stated, the second, functional basis would be sufficient to support the conclusion.

The first basis, that is, the concept of consent to the court's equitable jurisdiction, can be no more than a means for finding that the private right was triable in a non-article III tribunal that functions without a jury as factfinder. The equitable jurisdiction of the bankruptcy court is instrumental in the seventh amendment inquiry but cannot by itself answer the public rights question. Therefore, the issue of the core status of a proceeding must still be resolved on the second basis stated in the quoted passage, namely, whether the proceeding affects the restructuring of debtor-creditor relations.

Although the Granfinanciera Court confined its result narrowly to the seventh amendment issue, the combined result of Granfinanciera and Schor suggests that the concept of consent has further constitutional implications. Both cases suggest that consent of a party may bring a private right into a congressional scheme where it

\(^{141}\) The Court declined to overrule Katchen v. Landy, 382 U.S. 323 (1965), in which it held that voidable preferences are an essential part of the court's power to allow or disallow claims. The Granfinanciera Court distinguished Katchen by noting that Katchen was based on the equitable concept of the actual and constructive possession of the court. In Katchen there was no right to a jury trial in the preference action because the defendant had filed claims against the estate, thereby consenting to the summary jurisdiction of the referee to disallow them. If the defendant had not submitted a claim, then he would have been entitled to a jury trial in a plenary proceeding in district court. Granfinanciera v. Nordberg, 492 U.S. 33, 57-58 (1989). It can be assumed that Katchen will maintain an important place post-Granfinanciera. See Langencamp v. Culp, 111 S. Ct. 330 (1990)(per curiam). Indeed, one may go so far as to say that implicit in the Granfinanciera holding is an assimilation of core and summary jurisdiction under the 1898 Act. See Stober v. Steelinter USA (In re Industrial Supply Corp.), 106 Bankr. 799, 801 (Bankr. M.D. Fla. 1989). But cf. infra note 187.

may be adjudicated by an article I tribunal.\textsuperscript{143}

The next Part suggests that Granfinanciera's formalistic use of the private-public distinction\textsuperscript{144} might be interpreted pragmatically in light of Schor. In the words of Schor, the fraudulent conveyance action in Granfinanciera was not "a necessary incident of [the] congressional scheme," but merely a peripheral state law action. If the defendant had consented by filing a claim, the private right would have become a necessary incident of the federal scheme of restructuring debtor-creditor relations. The Court in Granfinanciera resisted this interpretation of its precedents because under federal bankruptcy law in most instances the creditor, who is often a third-party defendant, cannot be said to consent to bankruptcy jurisdiction.\textsuperscript{145} In fact, the creditor generally has no alternative to bankruptcy court since prepetition state court actions are automatically stayed pending administration of the bankruptcy estate.\textsuperscript{146}

In summary, the Court's cases on article III do not represent a settled body of law, but create the possibility of case-by-case adjudication based on a self-conscious pragmatism. These cases do not even indicate the extent to which the essential attributes of judicial power must be retained in an article III court. Nevertheless, the broad principles articulated in these decisions are supported by a theory of public rights based on article III values, such as a party's personal interest in the independent and impartial functioning of the federal system and the structural interest of the separation of powers. The next Part argues that there is consistency in this approach which may suggest a coherent vision of public rights.\textsuperscript{147}

IV. A PROPOSED THEORY OF PUBLIC RIGHTS

This Part presents a critical evaluation of recent suggestions for shaping article III jurisprudence and then presents an analytical framework for viewing the jurisdictional provisions of BAFJA. The first section criticizes recent theories of article III. These theories do not give proper weight to both the structural and personal interests embraced by article III. This Part argues that an adequate theory must take into consideration the initial characterization of what con-

\textsuperscript{143} This is not to suggest that the concepts of waiver from Schor and consent from Granfinanciera are the same. The Court clearly distinguished the rationales of the two cases. See Granfinanciera v. Nordberg, 492 U.S. 33, 59 n.14 (1989). The two concepts are functionally similar, however, inasmuch as the Court appears to use both in the analysis of public rights. The concept of consent is discussed further in subsection IV.B.2 below.

\textsuperscript{144} See supra note 140.


\textsuperscript{147} Even the coherence of the Court's position has been questioned. See Fallon, supra note 109, at 392 n.114.
stitutes a public right. Examination of the Court’s recent cases in the preceding Part demonstrated that the Court’s concept of public rights is pragmatic and that such rights cannot be examined apart from the nature of the tribunal adjudicating them. Recent theories of article III are based on preserving either the personal interests of the litigants or the structural interests of separation of powers. A pragmatic theory of public rights can recognize both interests. This Part suggests a theory of the public rights doctrine that may be used to develop an analytical framework for selected constitutional issues in the use of state law in bankruptcy.

A. A Critique of Recent Article III Jurisprudence

1. The Appellate Review Theory

Commentators troubled by the Court’s pragmatism in Schor have suggested that the values of article III would be better protected if all decisions of article III tribunals were subject to appellate review. This suggestion is motivated by legitimate concerns that the Court’s abandonment of article III literalism has left no rule capable of consistent application.

In the most comprehensive treatment of the theory Professor Fallon has suggested that appellate review should not only be a sufficient condition for satisfying article III (i.e., a tribunal’s jurisdiction is constitutional if its decisions are subject to appellate review), but that it also should be a necessary and sufficient condition (i.e., a tribunal’s jurisdiction is constitutional if and only if its decisions are subject to appellate review). While the theory that appellate review is a suffi-

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149. See Fallon, supra note 109, at 918: “[A]dequately searching appellate review of the judgments of legislative courts and administrative agencies is both necessary and sufficient to satisfy the requirements of article III.” See also Redish, supra note 10, at 226-29; Saphire & Solimine, supra note 148, at 139 (“the mandate of article III is only satisfied when Congress, in creating a non-article III tribunal, makes available article III review of that tribunal’s factual and legal determinations”). This Comment uses the term “necessary and sufficient condition” in the sense of the following definition:

A necessary condition is a circumstance in whose absence a given event could not occur or a given thing could not exist. A sufficient condition is a circumstance such that whenever it exists a given event occurs or a given thing exists. A necessary and sufficient condition for the occurrence of a given event or the existence of a given thing is therefore a circumstance in whose absence the event could not occur or the thing could not exist and which is also such that whenever it exists the event occurs or the thing exists.

Brody, A Glossary of Logical Terms, in 5 ENCYCLOPEDIA OF PHILOSOPHY 60 (P.
sufficient condition has some historical support in Crowell, the theory that it should be a necessary and sufficient condition does not. Fallon's theory is subject to the obvious objection that it contravenes both the Court's holding in Northern Pipeline and federal statutes that remove the decisions of administrative agencies from review. Under this theory most administrative decisions of legal questions would lack finality. Administrative bodies are efficient to the extent they possess both rulemaking and enforcement authority. Conditioning their power of enforcement on appellate review would defeat one of their purposes.

Other objections to Fallon's theory may be made. Besides whatever review article III requires, there are also independent due process restraints on the government's administration of public rights. Public rights under the modern view involve "disputes arising from the Federal Government's administration of its laws or programs." They therefore represent a grant to the individual which the government may retract. However, within the limits of due process, the government has sovereign authority for determining the forum and the

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150. See Fallon, supra note 109, at 946-47.
152. See, e.g., Administrative Procedures Act, 5 U.S.C. § 701(a)(1) & (2)(1988)(providing that agency decisions are unreviewable when a statute expressly excludes review and when a decision is "committed to agency discretion by law"). Cf. Fallon, supra note 109, at 979-80.
153. It should be noted that Fallon's theory requires differing levels of reviewability for constitutional issues, issues of law, and issues of fact. Fallon, supra note 109, at 974-91. However, Fallon states that Northern Pipeline was wrongly decided because the scheme allowed appellate review, while Thomas was wrongly decided because it allowed only review for fraud, misrepresentation, or misconduct. Id. at 991. The weakness of Fallon's theory is that it does not take into account that the bankruptcy courts were adjudicating private rights based on state common law and exercising all powers of the district courts. The arbitrator in Thomas was enforcing public rights based on federal statutory law. A basic premise of Fallon's theory is that rights based on state law have fewer implications for article III. See id. at 939. However, there is no basis in the Constitution or in the caselaw for distinguishing levels of finality on the basis that state law provides the rule of decision.
154. Efficiency as a justification of administrative agencies is dismissed by R. Posner, Economic Analysis of Law § 23.1, at 571-72 (1986). Judge Posner suggests that the true justification for the dual functioning of administrative agencies is that Congress is seeking to reduce nullification of legislation by judicial nonenforcement. Transfer of the factfinding to the agency removes the risk of judicial non-enforcement. Id. § 23.1, at 572.
procedures governing administration of its programs. The conception of public rights articulated by Professor Fallon is correct insofar as it gives the government absolute discretion to determine who shall be the party, when the case arises and what the remedy shall be. Necessarily, however, if the government possesses this sovereign power over the forum, the addition of appellate review will protect the fairness of the proceeding only to the extent fairness is secured by the legislation creating the public right.

Furthermore, there are separation-of-powers objections to Fallon's theory. Since the paradigmatic case of public rights depends on a governmental grant, creation of a public right is not a usurpation of judicial power. Instead, it is the creation of a new right that could only exist by congressional action and enforcement by a department of the executive. Judicial decisionmaking in this regard would be interference with the legislative or executive branches. Granting judicial oversight through appellate review in every case decided by an administrative agency would lead to encroachment by the judicial branch on

156. Recent Supreme Court cases require the state to terminate a benefit under the due process clause. See O'Bannon v. Town Court Nursing Center, 447 U.S. 773 (1980)(nursing home). Fallon supports his argument with entitlement cases such as Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985), and Goldberg v. Kelly, 397 U.S. 254, 262 (1970). See Fallon, supra note 109, at 964 & n.287. As Fallon notes, however, in cases such as Loudermill and Board of Regents v. Roth, 408 U.S. 564 (1972), the Court has taken a positivist approach to entitlements. See Fallon, supra note 109, at 964 n.269. Under the Court's positivist approach the government's legislation creates the property interest and determines procedures for its termination.

157. Fallon's theory assumes that the paradigmatic case of public rights is the coercive payment of custom's duties; here the government can engage in coercive activity without prior judicial authorization. See Fallon, supra note 109, at 954. The government can then delegate the interpretation of the laws to an administrative agency, authorize the officials to coerce payment and then use sovereign immunity to deny redress. The government has absolute discretion to determine against whom the suit can be brought—the government or the official—to determine when a case emerges, and to limit the extent to which an individual has a remedy in damages. Id. at 962-63.

158. Fallon argues that fairness is the primary value protected by article III. See id. at 941-42. Fallon uses the term to describe the independence and impartiality guaranteed by life tenure. The term will be used throughout the remainder of this Comment in that sense, although independence and impartiality will also be referred to as the "personal interests" of article III.

159. See O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 796 (1980); Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

An implication of the doctrine of separation-of-powers is that independent review of legislative court decisions is necessary only if Congress has committed private rights to an article I tribunal for adjudication. If a right derives from a congressional grant, the procedural aspects of administration of the program must be reviewed under the due process clause, but not the individual cases.162

Even if there is review to ensure that administrative procedure complies with due process, appellate review of cases deciding private rights will only preserve the article III value of fairness. It will not preserve the structural interests of article III any more than does appellate review under current practice. In the case of private rights, such as those in *Thomas*, appellate review will not even preserve fairness unless as a threshold matter the private rights adjudicated in an article I tribunal are properly characterized as public rights. Therefore, the fundamental inquiry should be whether a private right is capable of being characterized as public.


Professor Strauss has recently proposed a functional approach to the separation-of-powers doctrine.163 He suggests that rather than looking at whether an article I adjudicative body is exercising the power of the executive or judicial branch, the inquiry should focus on the quality of the relationships the article I body bears to the several branches. Strauss' view recognizes that administrative agencies may exercise the functions of all three branches of government: they have authority to shape policy through the decisionmaking power of the executive; legislative authority to adopt rules that resemble statutes; and judicial authority to determine the rights of private parties. The analysis must, therefore, examine the relationships of article I bodies "with each of the three named heads of government, to see whether those relationships undermine the intended distribution of authority


among those three."164 In other words, do the relationships the body bears to the branches create a functioning of powers that would tend to concentrate power in one branch, thereby depriving the others of their authority?

Strauss' theory is sound and appears to explain current Supreme Court practice; it is, however, limited to explaining how the structural interests of article III are preserved. Preventing encroachment on the functions of the judiciary will preserve the fairness of the process only to the extent that power is retained by the courts against Congress. Strauss' theory only explains how the balance of power is maintained between the three branches of government. It does not purport to explain the relations between the administrative agencies and the article III courts.

Thus, on Strauss' theory, the balance of power may be maintained at one level because Congress creates public rights that have not traditionally been heard in the courts. But the administrative process employed by Congress may leave enforcement only in the hands of an agency directly under the executive and deny the courts the power of enforcement.165 Agencies that are dependent on the legislature for funding are more apt to political influence that denies parties the personal interests of independent and impartial adjudication.

A theory of public rights should address both the fairness issue and the separation-of-powers issue. Additionally, any theory must recognize that due process requires that independent, appellate review be made available. The Supreme Court has not stated whether appellate review is a sufficient condition for the validity of a congressional scheme that contains private rights as an integral part.166 Under the Schor inquiry review is guaranteed if private rights are adjudicated by an adjunct that preserves the essential attributes of judicial power in an article III court. The Schor inquiry does not imply that appellate review is a sufficient condition, however; more is required of a theory to explain the concept of consent present in the later cases. Appellate review would be merely symbolic unless a party consents to an administrative procedure that substitutes only review for an individual's rights under state law.

This section has conceded that access to an article III court is nec-

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166. The Court in Thomas v. Union Carbide Agric'l Prods. Co., 473 U.S. 568, 592-93 (1985)(footnote omitted), stated:

We need not identify the extent to which due process may require review of determinations by the arbitrator because the parties stipulated below to abandon any due process claims. . . . For purposes of our analysis, it is sufficient to note that FIFRA does provide for limited Article III review, including whatever review is independently required by due process considerations.
necessary when a private right is implicated in an administrative scheme and that review of administrative proceedings for constitutional error is required by due process.\textsuperscript{167} It has also argued that appellate review is never a necessary and sufficient condition for preservation of the personal and structural values of article III. The Court has held that appellate review is not a sufficient condition. It remains to explain why it is not also a necessary condition. The following section elaborates a theory of public rights to explain why appellate review is not a necessary and sufficient condition for satisfying article III when public rights are adjudicated in an administrative proceeding.

B. A Theory of Public Rights

As suggested in the preceding section, an adequate theory of public rights must explain how the public rights doctrine protects both the personal and structural interests of article III. This section presents a theory of public rights that recognizes both values by proceeding with a hypothetical deductive method: it first hypothesizes a normative theory of public rights and then proceeds to test this hypothesis against the caselaw. To the extent the hypothesis preserves the intuitions of the caselaw, it is an adequate theory.\textsuperscript{168}

\begin{itemize}
  \item \textsuperscript{168} The discussion sets forth a normative theory of the public rights doctrine (i.e., one that matches those intuitions that are central to democratic society), rather than a descriptive theory. The discussion assumes that the theory should be modified by principles derived from the caselaw. In this regard the method is that of "reflective equilibrium" in which theory and moral intuitions are compared with one another with neither given a preferred value in the production of the final "construct." See J. Rawls, A THEORY OF JUSTICE 48-51 (1971). See also Fallon, A Constructivist Coherence Theory of Constitutional Interpretation, 100 Harv. L. Rev. 1189 (1987).

To define adequacy by virtue of a theory's power to "explain" the caselaw is not to say that the intuitions found in the caselaw are correct \textit{a priori}. Indeed, several ethical theorists claim that, since at least the mid-nineteenth century, western society has possessed no agreed norms to form the basis of common intuitions. See A. MacIntyre, After Virtue: A Study in Moral Theory (2d ed. 1984); R. Rorty, Contingency, Irony and Solidarity (1989). But cf. Rawls, Justice as Fairness: Political Not Metaphysical, 14 Philosophy & Pub. Affairs 223, 225 (1985)(since the Reformation and War of Religions the goal of western European society has been accommodation of divergent world-views). Nevertheless, the institutional constraint of precedent must be balanced against a theoretical construct. See R. Dworkin, Law's Empire 247-48 (1986)(legal constructivism is not inconsistent with precedent).  
\end{itemize}
1. The Theoretical Construct

The following theory states normative principles derived from the cases. Although constitutional law evolves incrementally, a theory purporting to organize the insights of the caselaw into a small number of generalizations will serve as an aid to analysis. The following discussion states three interrelated principles concerning the public rights doctrine and states what conclusions should be consistently derived from them. It then examines whether current law is consistent with those principles.\textsuperscript{169}

a. Efficiency

One of the most general principles of the public rights doctrine is that administrative agencies and legislative courts are designed to further the efficiency of the process of adjudication. There is nothing that is inherently administrative about administrative bodies, just as there is nothing inherently judicial about judicial bodies.\textsuperscript{170} Cases that may be tried before one may be tried before the other. However, adjudication of a case may be expedited by entrusting it to a tribunal which specializes in a certain area of law. Moreover, entrusting adjudication of a limited class of claims to specialized tribunals frees the article III courts for adjudicating other cases. Specialization also has the value of reducing the transactional costs of the private parties.\textsuperscript{171}

A further principle of efficiency is that the right adjudicated need not be of congressional making to warrant specialized treatment. In other words, the right may be private. However, to warrant special-

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\textsuperscript{169} The Court's self-professed pragmatism would seem to argue against an attempt to create a coherent theory in this area. See R. Dworkin, supra note 168, at 159-60 (criticizing pragmatism as a philosophy of adjudication content to exist without theory-building). However, even pragmatism requires that one posit principles from which conclusions will consistently follow. Pragmatism is simply another form of practical reasoning. See Stick, Can Nihilism Be Pragmatic?, 100 Harv. L. Rev. 332, 350 & n.67 (1986).

\textsuperscript{170} "There is no difference in principle between the work that Congress may assign to an Art. I court and that which the Constitution assigns to Art. III courts." Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 113 (1982)(White, J., dissenting).

ized treatment a private right must be such that complete relief in the administrative hearing cannot be granted absent jurisdiction over the private right.\textsuperscript{172} Otherwise, article III requires adjudication in an article III court.\textsuperscript{173} If the private right becomes involved in a scheme of public rights created by Congress, it assumes the character of a public right since administrative efficiency would be lost if the private right were adjudicated outside the congressionally created scheme.\textsuperscript{174}

These principles do not in themselves explain why efficiency is a justification for assignment of a private right to a non-article III tribunal. That justification must be based on the notion that complete determination of the right can be had in a tribunal of limited jurisdiction. This justification is implicit in Crowell's conception of public rights as a grant from the government circumscribed by a truncated proceeding of the government's choosing.\textsuperscript{175} This traditional notion of the limited character of the public right is consistent with basic notions of fairness: the individual loses nothing in fairness on account of the truncated proceeding, but gains much in terms of efficient adjudication. Therefore, an implication of the caselaw is that one will choose adjudication before a legislative tribunal when one would gain more in terms of efficiency from that choice than one would lose in terms of fairness.


\textsuperscript{173} See Bowsher v. Synar, 478 U.S. 714, 736 (1986)(quoting INS v. Chadha, 462 U.S. 919, 944 (1983)):'[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.'


[In cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judically defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.]


b. Fairness

A second, related principle follows from the first: to warrant specialized treatment, rights must be fairly adjudicable in article I tribunals (i.e., such adjudication must not deprive the parties of an impartial hearing). In *Crowell* the Court attempted to preserve fairness by distinguishing between questions of fact and questions of law. In *Crowell* the United States Employees' Compensation Commission adjudicated private rights implicated in a congressional scheme. The Court's holding that the article III courts were bound by the Commission's factual findings but not by its legal findings preserved impartiality by requiring that the scheme retain the essential attributes of judicial power in an article III court.176

One may infer from *Crowell* that fairness is preserved if the congressional scheme of public rights provides some recourse to an article III court. In *Northern Pipeline* Justice Brennan incorrectly inferred from *Crowell* that Congress may either create an adjunct to an article III court or create an article I court that adjudicates public rights.177 Later cases rejected this categorial formalism and inferred from *Crowell* the open-ended principle that article I tribunals may adjudicate private rights if the essential attributes of judicial power are retained in an article III court.178

A further principle that may be drawn from the cases is that adjudication in an article I tribunal is fair if it is voluntarily chosen.179 If the scheme of public rights preserves an alternative to the article I tribunal, the choice is voluntary. Fairness and separation of powers are related since preservation of the article III court will satisfy both interests.

177. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 77 n.29 (1982). "The use of administrative agencies as adjuncts was first upheld in *Crowell* . . . . *Crowell* involved the adjudication of congressionally created rights." *Id.* at 78. However, Chief Justice Hughes in *Crowell* stated that "[t]he present case . . . is one of private right, that is of the liability of one individual under the law as defined." *Crowell v. Benson*, 285 U.S. 22, 51 (1932). Moreover, *Crowell* never called the agency an "adjunct." *But cf.* Strauss, *supra* note 161, at 509.
178. See *Crowell v. Benson*, 285 U.S. 22, 51 (1932)(in cases involving private rights "there is no requirement that, in order to maintain the essential attributes of judicial power, all determinations of fact in constitutional courts shall be made by judges"). See also Strauss, *supra* note 161, at 509-10.
179. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 849 (1986); *Thomas v. Union Carbide Agric'l Prods. Co.*, 473 U.S. 568, 591 (1985): "The danger of Congress or the Executive encroaching on the Article III judicial powers is at a minimum when no unwilling defendant is subjected to judicial enforcement power as a result of the agency 'adjudication.'"
c. Congressional Power

A third principle is that Congress’ power to create public rights must be legitimate. The cases are clear that Congress may not create a public right adjudicable in an article I tribunal simply because the right is related to Congress’ article I power to legislate.\textsuperscript{180} However, the Court has stated that there are special circumstances where the requirements of article III must “give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment.”\textsuperscript{181} The Court requires that the area of law be specialized and that it be within Congress’ article I powers. If both conditions are satisfied, the independence of the judiciary required by article III will be maintained.

\textit{Schor} makes clear that the legitimacy of congressional action may be determined by a pragmatic inquiry into the intent of Congress or by an examination of the area of expertise.\textsuperscript{182} If the area of expertise is one peculiarly related to a statutory scheme, such as tariff regulation, then it is not an encroachment to entrust some portion of the adjudicatory function to an article I tribunal. Further, if Congress’ intent is simply to create a means of determining public rights that cannot be completely adjudicated without the consideration of private rights, the adjudication of private rights does not constitute an encroachment on the functions of the judicial branch. \textit{Schor} also makes clear that the Court’s pragmatic inquiry is functional.

In summary, the theory elaborated in the preceding section has two premises: First, public rights are rights of congressional creation limited to a particular regulatory scheme such that they may be fully and fairly adjudicated in a truncated proceeding. Intervention of the article III courts in the legal and factual determination of such rights would add nothing in terms of fairness and would in fact impede efficiency.

Second, private rights may be treated as public rights if one of two conditions is fulfilled: (a) if public rights cannot be fully determined without determination of private rights or (b) if the scheme of public rights preserves the essential attributes of judicial power in an article III court. Preservation of the article III courts in the last alternative


ensures that the scheme does not violate the doctrine of separation of powers; access to the article III courts also preserves the personal interests of article III.

This theory explains why appellate review is not a necessary and sufficient condition for satisfying article III. It is not sufficient because Congress may not assign common law claims to article I courts merely on the condition that appellate review is preserved; more is required of a scheme, namely that assignment of the common law claim be necessary for effectuation of the scheme. Further, appellate review is not a necessary condition because one may forgo appellate review of an article I adjudication if the conditions underlying such adjudication are fair (i.e., if it preserves judicial independence and impartiality). The following discussion tests this theory against the caselaw.

2. The Personal Interests of Article III—Jurisdiction by Consent

The previous section hypothesized that one might choose adjudication in a non-article III court if the proceeding were fair and if an alternative forum were available. The concept of consent to a non-article III proceeding played a role in Schor and Granfinanciera, but the cases do not present a consistent rule. In Schor the Court stated that the right to adjudication by an article III tribunal was a personal right that could be waived by the litigant.183 Schor made clear that article III's protection extends primarily to the personal interests of independence and impartiality rather than to the structural interests represented by separation of powers.184 This suggests that parties may consent to jurisdiction by the bankruptcy courts even in proceedings based on state law.

However, in Granfinanciera the Court distinguished Schor. Schor was based on the ground that Congress did not require investors to avail themselves of the remedial scheme over which the Commission presided. The investors could have pursued their claims, albeit less expeditiously, in federal court. By electing to use the speedier, alternative procedures Congress had created, the Court said, the investors waived their right to have the state law counterclaims against them adjudicated by an Article III court. Parallel reasoning is unavailable in the context of bankruptcy proceedings, because creditors lack an alternative forum to the bankruptcy court in which to pursue their claims.185

The passage indicates that consent is not per se an element in a proper theory of public rights. The quoted passage presumably refers to the automatic stay to nonbankruptcy proceedings, although no explicit

184. Id. at 848.
reference to the automatic stay is made. The passage therefore states that creditors in bankruptcy cannot be said to waive their right to a jury trial because they have already been denied that right by the automatic stay to state court proceedings.

By contrast, in Schor the personal right to a trial in an article III court could be waived. The right to a trial in an article III court was preserved in Schor; therefore there was no need for an inquiry into the sufficiency of consent alone. The passage from Granfinanciera suggests that consent to an article I tribunal is adequate only when recourse to an article III court is preserved. The passage is not inconsistent with the theory discussed in the preceding sections since that theory did not state that consent alone was sufficient to confer jurisdiction but also required that the proceeding consented to be fair (i.e., preserve judicial impartiality and independence).

It will be argued below that consent to article I adjudication implies that the state law right is a public right. The cases suggest that consent to adjudication of private rights in an article I tribunal is always conditioned on the preservation of access to an article III court. However, this requirement may be rephrased by saying that one cannot consent to jurisdiction of an article I tribunal unless the rights adjudicated are determined to be public rights. Public rights, in

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186. Filing of the petition in bankruptcy by the debtor acts as an "automatic stay" of all prepetition state and federal court proceedings by creditors against the debtor. 11 U.S.C. § 362(a)(1988). The creditors must petition for relief from the automatic stay to pursue their rights in court.

187. The consent found by the Court in Granfinanciera appears analogous to the concept of consent under the Act of 1898, whereby a creditor could consent to the equitable, summary jurisdiction of the bankruptcy referee. See notes 18-23 and accompanying text above for a discussion of consent under the 1898 Act.

A return to the old distinction as a solution to the constitutional infirmities of BAFJA has been suggested with reservations by Marrion, Core Proceedings and the "New" Bankruptcy Jurisdiction, 35 DE PAUL L. REV. 675, 695 (1986) ("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.").

The Court's use of the concept of consent in Granfinanciera cannot be treated as a return to the concept of consent to the equitable, summary jurisdiction of the bankruptcy court under old bankruptcy practice. The Reform Act of 1978 did away with the distinction between plenary and summary jurisdiction. The controlling concept in Granfinanciera is the public right, not the summary, equitable jurisdiction of the courts, since, even if the right entitles the party to a jury trial, Congress may assign the right to an article I tribunal if it is a public right. Moreover, since Congress has done away with summary jurisdiction, see H.R. REP. NO. 595, 95th Cong., 1st Sess. 48-49 (1977), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6009-11, there is no bar to jury trials in bankruptcy court independent of the public rights doctrine. See infra subsection V.B.3.

188. See supra subsection IV.B.1.c.

189. See infra subsection IV.B.3.c.
turn, only exist in a regulatory scheme within Congress' legitimate powers. Simply put, a party can waive article III trial of private rights only if the party receives public rights in return. The "fairness" of the exchange, however, depends on the legitimacy of the scheme of public rights (i.e., it must not violate the separation-of-powers doctrine).

3. The Structural Interests of Article III

The preceding section essentially concluded with the observation that the parties cannot cure the structural infirmity of an article I court's exercise of article III judicial power by consent. Schor suggested a three-part inquiry to determine whether an article I tribunal is exercising article III power. No one element is to be determinative; however, this does not entail increased uncertainty, since the elements must be applied in tandem. This subsection shows that the elements are consistent with a coherent theory of public rights since the theory protects the fairness of the adjudication through a separation-of-powers inquiry. The later cases differ from Northern Pipeline in the respect that they apply the separation-of-powers inquiry in a functional rather than a formalistic manner.

a. The Essential Attributes of Judicial Power

Schor lists five instances in which the jurisdictional provisions of the Reform Act of 1978 departed from the agency model suggested by Crowell v. Benson. These may be called "the essential attributes of judicial power" and are generally as follows: (1) the tribunal deals with a general rather than a specialized area of law; (2) the tribunal's orders are enforceable without review; (3) the tribunal's orders are given deference on review; (4) the tribunal's legal rulings are not subject to de novo review; and (5) the tribunal exercises the powers of a traditional court. If a tribunal exercises these judicial functions, it departs from the agency model of Crowell.

In Northern Pipeline this inquiry was applied to the question

190. See Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850-51 (1985): "To the extent that [the] structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, § 2."


192. The specific factors used by the Court were that: (1) the bankruptcy courts did not deal with a particularized area of law; (2) orders of the bankruptcy courts were enforceable without the order of the district court; (3) orders of the bankruptcy court were reviewed under the deferential clearly erroneous standard rather than the more exacting weight of the evidence standard of Crowell v. Benson; (4) legal rulings of the bankruptcy court were not reviewable under the de novo standard; (5) the bankruptcy courts exercised all of the power of the district courts. Id. at 852-53.
whether the bankruptcy courts were adjuncts of an article III court.¹⁹³ Later cases do not require the tribunal adjudicating common law rights to be an adjunct, but require only that if a tribunal departs from the agency model by adjudicating common law claims, the scheme must retain the essential attributes of judicial power in an article III court.

The inquiry is functional since it asks whether the regulatory scheme reallocates judicial power to the agency and would threaten the tenure protections of article III. Standing alone, the test has shortcomings: it is not helpful in distinguishing between public and private rights; nor does it directly further the personal interests or the fairness value of article III. It only broadly delimits the functions an article I tribunal may not exercise. It may be too broad, especially in the case of the last, sweeping category; the powers of a traditional court apparently include the powers of a federal district court.¹⁹⁴ It is not clear from the cases whether an article I tribunal would be acting unconstitutionally if it were exercising all of these powers or only a subset of them.

b. State Law Causes of Action Arising Under Federal Law

The later cases state that the state law nature of a claim adjudicated by an article I tribunal is not determinative, but that special danger arises when such claims are assigned to non-article III tribunals.¹⁹⁵ The threshold inquiry in such cases is whether Congress has withdrawn the matter from the cognizance of an article III court. Although the test looks in the first instance at the nature of the claim rather than the nature of the power the tribunal is exercising, the test is still explicable in terms of Strauss' quality of relation theory because it looks pragmatically to Congress' allocation of functions. The common law action may be a private right that was triable traditionally in an article III court, but the test is whether Congress has withdrawn the matter from judicial cognizance (i.e., has deprived the courts of their traditional functions).¹⁹⁶ The test assumes that danger

¹⁹⁵ See, e.g., Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 853 (1986)("[T]here is no reason inherent in separation of powers principles to accord the state law character of a claim talismanic power in Article III inquiries.").
¹⁹⁶ See supra text accompanying note 128. The functional approach of Schor has been most recently applied in Morrison v. Olson, 487 U.S. 654 (1988), involving the appointment by the judiciary of an independent counsel to investigate and prosecute high-ranking officials under the Ethics in Government Act, 28 U.S.C. §§ 591 to 599 (1988). The inquiry was whether the independent counsel violated the principle of separation-of-powers by interfering with the role of the execu-
is greatest when the state law claim arises as an initial matter in a federal regulatory scheme. However, the cases also state that there is no encroachment when the parties have a choice of fora for the initial adjudication. Separation-of-powers is violated only when the common law claim has been entirely withdrawn from article III adjudication and the parties cannot consent.

Fairness to the litigants is not the primary issue under this test and its focus is on the structural interests of separations-of-powers. Nevertheless, fairness may be preserved because the regulatory scheme vests jurisdiction in an article I tribunal only over a small class of specialized claims. Even this functional inquiry preserves fairness because determination of a broad area of law is left in the district court.\textsuperscript{197}

c. \textit{State Law Claims as a Necessary Incident of the Congressional Scheme}

The inquiry into the necessity of the state law claims to the regulatory scheme goes farthest in protecting the fairness of the article I adjudication. \textit{Ex parte Bakelite} stated that Congress may provide for the manner in which congressionally created rights are adjudicated when the government is a party.\textsuperscript{198} When the government is not a

\textsuperscript{197} The \textit{Schor} Court adopted this test from \textit{Murray's Lessee}. See Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 854 (1988)(risk of encroachment greatest when Congress ‘‘withdraw[s] from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.’’)(quoting \textit{Murray's Lessee v. Hoboken Land & Improvement Co.}, 59 U.S. (18 How.) 272, 284 (1855)). The ‘‘withdrawal’’ test might appear unnecessary since consent is in any case conditioned on a valid exercise of congressional power. Therefore, if a litigant may consent to an article I tribunal, \textit{a fortiori} the scheme has not withdrawn the cause of action from the judiciary. But the withdrawal test is only one element in a three-part inquiry and a particular scheme may be valid even in the absence of consent.

Since the Court's concept of consent depends fundamentally on the claim's occurring as a ‘‘necessary incident’’ of a regulatory scheme Congress may enact, the concept of consent in the Court's cases appears to have no real value apart from the separation-of-powers value. The ‘‘withdrawal’’ test may be applied even where the parties have no choice of fora for initial adjudication as in the case of putatively public rights, such as those found in \textit{Thomas}. The argument in the text states throughout that consent is conditioned on a valid exercise of congressional power. This proposition is not stated as a biconditional since it goes without saying that congressional power does not depend on the litigant's consent.

\textsuperscript{198} \textit{Ex parte Bakelite Corp.}, 275 U.S. 438, 450 (1929). Justice Van Devanter upheld the right of the Patent Office to determine disputes with the following:
party, the government may exercise sovereign power only if the right
is a necessary incident of a federal scheme Congress may enact. The test has two parts, the first of which is whether Congress has a
legitimate power to create the right under article I.

Once it is determined that Congress possesses such power, the next
question is whether the congressional scheme would be possible with-
out the state law claim as an incident. Schor allows a limited class of
cases to be heard by an article I body if such adjudication is a necessary
incident of a congressionally mandated scheme.

The Court's purpose in requiring that the right be necessary is to
prevent Congress from illegitimately usurping the powers of the judi-
ciary, and the Court therefore requires that the private right "arise in
the context of a federal regulatory scheme that virtually occupies the
field." In such cases the action of the agency exercising a quasi-
judicial function will be strictly limited by rules of congressional mak-
ing since Congress may determine "the method for the protection of
the 'right' which it created." The role of the judiciary in such a

The government cannot be sued, except with its own consent. It can de-
clare in what court it may be sued, and prescribe the forms of pleading
and the rules of practice to be observed in such suits. It may restrict the
jurisdiction of the court to consideration of only certain classes of claims
against the United States.

Id. at 453 (quoting McElrath v. United States, 102 U.S. (12 Otto) 426, 440 (1880)).
The Court has noted that the original theory has been eroded by "entitlement"
cases and by the doctrine of unconstitutional conditions. Thomas v. Union Carbide Agric'l
judgment). But the erosion of the traditional theory does not "mandate the con-
clusion that disputes arising in the administration of federal regulatory programs
may not be resolved through Art. I adjudication." Id.

concurring in judgment).
Switchmen's Union v. National Mediation Bd., 320 U.S. 297 (1943)).

It is notable that earlier cases, such as Switchmen's Union, in which the Court
found no right of review of law of a board's decision in a private right case, turn to
common law concepts of the writ of mandamus. The Court in Switchmen's
Union reasoned that Congress intended that there be no review because Con-
gress had committed a purely discretionary act to the administrative board.
At common law the writ of mandamus did not lie to compel discretionary or quasi-
judicial acts. It only lay to compel an administrative body exercising the func-
tions of the executive to perform ministerial acts. Since administrative agencies
perform quasi-judicial acts, the writ of mandamus only "lay to correct violations
of the law committed by officials outside the scope of matters committed to their
discretion." Young, supra note 72, at 896. See also Butte, Anaconda & Pac. Ry.
Co. v. United States, 290 U.S. 127, 142 (1933)(opinion by Brandeis, J.); Interstate
Commerce Comm'n v. United States ex rel. Arcata & Mad River R.R. Co., 65 F.2d
180, 181 (D.C. Cir. 1933).

The Court relied on Switchmen's Union in Thomas to uphold the regulatory
scheme of FIFRA in which, somewhat as under writ practice, the arbitrator's de-
scheme is not to review application of law to facts, but to review the agency's regulatory actions to determine that the agency is following congressional intent. If Congress has limited the agency's enforcement power to a narrow class of claims, generally the agency cannot act in an arbitrary manner that would require judicial oversight of every decision.

If the article I tribunal cannot act arbitrarily, article III's fairness value is satisfied, and nothing prevents a party from consenting to article I adjudication other than article III's structural interests. In Schor and Granfinanciera the Court stated that consent might play a role in determining whether a claim is based on a public right. However, consent may play a role only if the state law right is a necessary incident of the federal regulatory scheme. The justification for the last assertion must be that in adjudicating a private right an article I tribunal may refer to state law, but only to determine the federal right. The parties may consent to such treatment only if they receive the benefits of the federal scheme; otherwise they should not be subjected to the loss of private rights. If a party consents, he may lose private rights, but article III is still satisfied because the claim is not entirely withdrawn from the cognizance of the article III courts.

Here it may be seen that the two tests work in tandem and the structural inquiry preserves the fairness value. If the claim is a necessary incident, one may consent; but even if there is no consent, there is

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203. See Thomas v. Union Carbide Agric'l Prods. Co., 473 U.S. 568, 588 (1985)(plurality opinion). Cf. Fallon, supra note 109, at 977 n.334 (stating that Switchmen's Union was "weakly reasoned" and that the Court in Thomas departed from the "prescribed standard").

204. That justification might be given as follows: If a state law cause of action arises under federal law for the sole purpose that rights under federal law may be determined, Congress has created a federal right that may not be determined without the determination of state law rights. Since the federal scheme "occupies the field," the state law rights may not be adjudicated independently of the federal scheme and there is no danger of arbitrary enforcement of common law rights by federal bureaucrats.
still recourse to an article III tribunal if the matter is not entirely withdrawn from the cognizance of the article III courts.

A further implication may be drawn from the Court’s use of all three tests; so long as the last two are met (i.e., the “withdrawal” and the “necessary incident” tests), there is no need for adjudication by an article III tribunal and the appellate role of the judiciary will satisfy due process; the judiciary is only necessary to ensure that the article I tribunal is following Congress’ intent in its application of state law. If the two tests are met, appellate review is only required by the due process clause of the fifth amendment.205

Finally, the “necessary incident” inquiry is not merely an ad hoc balancing approach206 since the Court is constrained to examine whether the purpose of the congressional scheme can be accomplished without the state law claim. Thomas demonstrates that the Court requires more than mere inconvenience to the agency; in Thomas the Court established that the EPA could not conduct the registration unless there was a provision for arbitration of the cost of data. The EPA lacks the expertise to fix the value of such data.207 Case-by-case determination would not only inconvenience the EPA; it would make the scheme as conceived impossible. This is not a mere balancing of interests because the inquiry is to examine whether the intent of Congress was to bypass the article III courts. Therefore, while Congress may have an interest in efficient adjudication, this interest would not overcome the parties’ interest in fairness.

In summary, these three tests applied together provide sufficient protection for the personal interests of article III, while preserving

205. The argument advanced is similar to that spelled out by Justice Brandeis in his dissent to Crowell v. Benson. There Justice Brandeis stated:

The jurisdiction of [article III] courts is subject to the control of Congress. Matters which may be placed within their jurisdiction may instead be committed to the state courts. If there be any controversy to which the judicial power extends that may not be subjected to the conclusive determination of administrative bodies or federal legislative courts, it is not because of any prohibition against the diminution of the jurisdiction of the federal district courts as such, but because, under certain circumstances, the constitutional requirement of due process is a requirement of judicial process.


206. Contra Fallon, supra note 109, at 917: “The Court now has endorsed an ad hoc balancing test that is almost wholly open-ended and amorphous.” See also id. at 932 & n.114.

207. The Court noted: “Congress viewed data-sharing as essential to the registration scheme, but concluded EPA must be relieved of the task of valuation because disputes regarding the compensation scheme had ‘for all practical purposes, tied up their registration process’ and ‘EPA lacked the expertise necessary to establish the proper amount of compensation.’” Thomas v. Union Carbide Agric’l Prods. Co., 473 U.S. 568, 573 (1985)(quoting 123 CONG. REC. 25,709 (1977)).
flexibility for Congress to act. The tests insure that the agency will not apply state law, which is reserved for the article III courts, because the private right arises only in the regulatory scheme. Furthermore, fairness to the litigants is preserved if they enter the scheme voluntarily by accepting its benefits.

V. AN ANALYSIS OF BANKRUPTCY JURISDICTION

This Part applies the foregoing analysis to the bankruptcy courts. The Court is reluctant to say that restructuring of debtor-creditor relations is a public right, although it continues to apply the distinction of public and private rights to the bankruptcy courts. According to *Granfinanciera*, by consent a creditor's claim may arise "as part of the process of allowance and disallowance of claims." Consent, therefore, only brings the claim into the possession of the bankruptcy court where the seventh amendment right to trial by jury may be lost. Nevertheless, *Granfinanciera* is consistent with the proposition that a right to recovery in bankruptcy may be a public right because it is a necessary incident of a congressionally mandated scheme.

This Part considers proceedings Congress categorized as core at 28 U.S.C. § 157(b)(2). It is generally recognized that listing of a proceeding in section 157(b)(2) is not conclusive concerning the core status of the proceeding and that the inquiry into the core status of the proceeding is whether it may be constitutionally heard by a bankruptcy court.

A. Turnover Proceedings

Section 157(b)(2)(E) provides that proceedings for the turnover of estate property are core. In turnover proceedings the estate sues under 11 U.S.C. § 542 to recover property of the estate from third parties. These proceedings usually involve initial determination of ownership of property under state law. If the analysis suggested above

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210. *Id.* at 54. As Gibson notes, the Court has said that the private right must be integrated into a "public regulatory scheme" and the bankruptcy laws do not constitute a regulatory scheme. Gibson, *supra* note 14, at 170-71. Nevertheless, Gibson asserts that the bankruptcy laws may not violate the separation-of-powers doctrine. *Id.* at 171-72.
211. See Plombo Corp. v. Castlerock Properties (*In re Castlerock Properties*), 781 F.2d 159, 162 (9th Cir. 1986).
212. *Id.*
214. The National Bankruptcy Conference took the position that turnover proceedings, especially actions to collect prepetition account receivables, were not core because of their similarity to the state law contract dispute in *Northern Pipeline*. See Greenfield, *The National Bankruptcy Conference's Position on the Court Sys*
is correct, the constitutional question concerning core status should be whether the state law claim may be treated as a public right.

*Bayless v. Crabtree Through Adams*\(^{215}\) presents an interesting discussion of the constitutionality of the use of state law in a turnover proceeding. It is also a good illustration of how application of *Granfinanciera*'s formalism may result in unfairness to defendants. The case is unusual because, although most of the cases on section 542 consider the constitutionality of actions to recover accounts receivable under section 542(b), *Bayless v. Crabtree* concerned the constitutionality of an action to recover tangible property under section 542(a).

In *Bayless v. Crabtree* the trustee in a chapter 11 case, Bayless, sought an injunction ordering turnover of property conveyed to the debtors' children. Specifically, debtors had purported to convey property in Rhode Island and Oklahoma City to the Crabtree children. The trustee attacked these inter vivos gifts as invalid under state law and sought turnover of the property. On appeal to the district court the Crabtree children challenged the jurisdiction of the bankruptcy court to adjudicate the validity of the gifts because (1) the jurisdictional provisions of BAFJA were unconstitutional and (2) the turnover proceeding was noncore because resolution of ownership hinged solely on state law.

The district court addressed the constitutional challenge by noting that the key element in determining constitutionality post-*Northern Pipeline* is not the state law character of the right, but rather (1) the relation of the proceeding to the "basic function of the bankruptcy court" and (2) the congressional intent in using state law in turnover proceedings under section 542.\(^{216}\) The district court held that turnover proceedings are core because of their importance to administration of the estate.\(^{217}\)

The district court's analysis of the constitutional challenge correctly recognized the structural interest protected by article III. The court might have used the words of *Schor* to say that Congress' intent was clearly not to aggrandize itself by withdrawing an action based on state law from the courts, but to expedite administration of the bankruptcy estate.\(^{218}\)

However, the court in *Bayless v. Crabtree* failed to apply the correct analysis to the challenge of the turnover proceeding as noncore.

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\(^{216}\) *Id.* at 302 n.1 (quoting Arnold Print Works, Inc. v. Apkin (*In re Arnold Print Works, Inc.*), 815 F.2d 165, 169 (1st Cir. 1987)).

\(^{217}\) *Id.* at 304 (citing *In re Jacobs*, 48 Bankr. 570 (Bankr. S.D. Cal. 1985)).

\(^{218}\) *See also In re Lion Capital Group*, 46 Bankr. 850 (Bankr. 1985)(analyzing constitutionality of jurisdiction according to nexus of state law proceeding with bankruptcy estate).
The court should have employed the public-private right distinction to this issue instead of basing its decision solely on the importance of the action for administration of the estate. More specifically, the court failed to ask whether the defendants had consented to adjudication by an article I tribunal. The court did consider the issue of consent in its denial of the Crabtree children's request for a jury trial, as required by Granfinanciera. Nevertheless, the court improperly denied the Crabtree children access to state court since the court wrongly characterized them as consenting merely because they filed counterclaims against the estate. In this case the turnover proceeding was at most a related proceeding.

One might argue that the scheme of section 542 itself impermissibly removes initial adjudication of ownership issues from state court. Under the practice of the 1898 Act turnover proceedings could be entertained in bankruptcy court only over property in the actual or constructive possession of the bankruptcy court. Section 1334(d) of the 1984 amendments gives the district court exclusive jurisdiction over “all of the property, wherever located, of the debtor as of the commencement of [the] case, and of the estate.” BAFJA, therefore, grants much broader jurisdiction than that under the 1898 Act. However, since the bankruptcy courts are adjuncts, state law claims are not withdrawn entirely from the cognizance of the article III courts and the question under the 1984 amendments accordingly ought to be whether the bankruptcy court has related or core jurisdiction over a turnover proceeding. Unless the defendant has consented to jurisdiction by filing a proof of claim against the estate or is scheduled as a creditor, the claim is at most a related proceeding since it is not integral to the restructuring of debtor-creditor relations. This is the second thread in the Granfinanciera standard for core treatment.

The fact that the defendants filed counterclaims against the estate

219. Bayless v. Crabtree Through Adams, 108 Bankr. 299, 304-05 (W.D. Okla. 1989), aff'd, 930 F.2d 32 (10th Cir. 1991). Id. at 304-05. The court's analysis of the issue of consent is in any case flawed. The court asserted that the children's counterclaim in the turnover proceeding was equivalent to a proof of claim. Id. at 305.

220. See Ferriell, Core Proceedings in Bankruptcy Court, 56 UMKC L. Rev. 47, 81-91 (1987).


223. See supra note 138. See also Gibson, supra note 14, at 168 (when "a fraudulent conveyance action involves only private rights—at least when the defendant has not filed a claim against the estate—according to Granfinanciera Congress may not assign its adjudication to the non-article III bankruptcy court").
in *Bayless v. Crabtree* was not enough to give the bankruptcy court jurisdiction. The defendants' counterclaims apparently came only after the trustee had named them as defendants in the turnover proceeding. Had they been scheduled as creditors of the estate or had they actually filed claims against the estate, they would have been subject to the bankruptcy court's jurisdiction to determine debtor-creditor relations. The claim against them would have then been core. As it was, the claims against the defendants in *Bayless v. Crabtree* were at most related proceedings and the district court should have abstained.

The analysis suggested for *Bayless v. Crabtree*, which involved tangible property, can be applied to actions to recover intangible property based on prepetition contract claims under section 542(b), although the courts have used a different analysis. The caselaw on this issue is much more developed and in general is based on the distinction between summary and plenary jurisdiction (i.e., constructive possession of property). If the defendant contests the prepetition contract, the court lacks constructive possession and the proceeding is related. If

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224. Reasoning similar to that criticized in the text was employed in *In re National Equip. & Mold Corp.*, 60 Bankr. 133, 136 (Bankr. N.D. Ohio 1986)(counterclaim to turnover proceeding based on defendant's setoff rights core as proceeding to allow or disallow claim under section 157(b)(2)(B)). The court in *National Equipment & Mold* cited no authority for its reasoning.

225. The district court's opinion does not indicate the exact procedural sequence.

226. See *Plombo Corp. v. Castlerock Properties* (*In re Castlerock Properties*), 781 F.2d 159, 162 (9th Cir. 1986); *In re Marine Iron & Shipbuilding Co.*, 104 Bankr. 976 (D. Minn. 1989). In *Castlerock* the court held that consent of the defendant was insufficient to make the state law contract action a core proceeding when the defendant filed a claim against the estate only after the debtor had filed suit. See also *In re Century Brass Prods., Inc.*, 58 Bankr. 838 (Bankr. D. Conn. 1986)(no consent inferable from defendant's filing of compulsory counterclaim in debtor in possession's action on accounts receivable); *Hughes-Bechtol, Inc. v. Air Enters.* (*In re Hughes-Bechtol, Inc.*), 107 Bankr. 552 (Bankr. S.D. Ohio 1989)(court did not base its conclusion on consent but rather on whether the claim would determine the pro rata distribution among the different classes of defendants).

227. See 28 U.S.C. § 1334(b)(1988). *Collier on Bankruptcy* states that turnover proceedings may be claims that are neither related nor arise under title 11, but rather may be within the residual category of claims that arise in title 11. 1 *Collier* 15th ed., *supra* note 16, ¶ 3.01[1][c][v], at 3-29. If the analysis suggested in the text is correct, turnover proceedings arise in a title 11 case only when the defendant has consented to bankruptcy jurisdiction. Absent consent, the proceeding is related. This assumes that the distinction between proceedings arising in and related to the title 11 case should be analyzed in terms of whether a proceeding may constitutionally be heard by a bankruptcy judge. See *Norton & Lieb*, *supra* note 99, at 58-59.


the claim has matured or is liquidated so that the defendant cannot contest the contract claim, the action arises in the title 11 case and the bankruptcy court has jurisdiction over the proceeding as core.\textsuperscript{230} However, if there is no bona fide dispute and the property is in the constructive possession of the bankruptcy court, then there is implied consent.\textsuperscript{231}

B. \textit{In re Ben Cooper, Inc.}

The issue of jury trials in the bankruptcy courts, a possibility left open by \textit{Granfinanciera}, has caused a conflict among the lower courts. Jury trials in bankruptcy court were originally provided for by 28 U.S.C. \textsection{} 1480, enacted as part of the 1978 Reform Act.\textsuperscript{232} Federal Rule of Bankruptcy Procedure 9015 provided procedures for jury trials in bankruptcy courts where the right to such trials existed under section 1480.\textsuperscript{233}

In the wake of \textit{Northern Pipeline} jury trials in bankruptcy court were prohibited by the Emergency Rule and BAFJA has been found to contain the same prohibition. Section 113 of the 1984 amendments provided that 28 U.S.C. \textsection{} 1480 would not become effective.\textsuperscript{234} BAFJA

\begin{itemize}
\item \textsuperscript{234} Among the oodities of the 1984 amendments was the inconsistency between sections 113 and 121 of the Act. Section 121 of BAFJA provided that 28 U.S.C. \textsection{} 1480 would become effective. \textit{See Bankruptcy Amendments and Federal Judgeship Act of 1984}, Pub. L. No. 98-353, \textsection{} 121(a), 1984 U.S. Code Cong. & Admin. News (98 Stat.) 333, 345. This inconsistency was further exacerbated by an interview of Senators Dole and DeConcini published in the American Bankruptcy Institute Newsletter in which Senator DeConcini stated that the 1984 amendments were not intended to alter the jury trial rights under the 1978 Reform Act. \textit{See Dole/DeConcini Interviewed, AM. BANKR. INST. NEWSL., Winter 1984-85, at 3:}
\end{itemize}
replaced section 1480 with 28 U.S.C. § 1411 which preserves the right to a jury trial only in personal injury and wrongful death tort cases.\textsuperscript{235} In 1987 the Advisory Committee on Bankruptcy Rules of the Judicial Conference abrogated Rule 9015 in reaction to Congress' replacement of section 1480 by section 1411.\textsuperscript{236} The courts of appeals are now split on the issue of jury trials in bankruptcy court.\textsuperscript{237} The most compelling opinion in favor of jury trials is \textit{Insurance Co. of Pennsylvania v. Ben Cooper, Inc. (In re Ben Cooper, Inc.)}.\textsuperscript{238} In this case the Second Circuit Court of Appeals held that a bankruptcy court may conduct jury trials if a proceeding is legal—rather than equitable—and within the core jurisdiction of the bankruptcy courts.

In \textit{Ben Cooper} the debtor, Ben Cooper, Inc. (Cooper), had filed a plan in a chapter 11 reorganization in which Cooper covenanted that it would adequately insure its commercial property against casualty. It obtained insurance through two insurance brokers from the Insurance Company of the State of Pennsylvania (ICSP).

One of Cooper's facilities was involved in a fire, and ICSP disclaimed liability on the grounds of misrepresentation in Cooper's policy of insurance. ICSP claimed that Cooper listed the insured property as a warehouse when in fact it was used as a manufacturing plant.

ICSP cancelled its policy with Cooper and brought suit in state court for rescission of its contract with Cooper. Cooper sought and


\textsuperscript{236} FED. R. BANKR. P. 9015 advisory note (1987).

\textsuperscript{237} The Second and Ninth Circuits have come down in favor of jury trials in bankruptcy court. \textit{See Insurance Co. of Pa. v. Ben Cooper, Inc. (In re Ben Cooper, Inc.)}, 896 F.2d 1394 (2d Cir. 1990), \textit{cert. denied}, 111 S. Ct. 2041 (1991); Taxel v. Electronic Sports Research (\textit{In re Cinematronics, Inc.}), 916 F.2d 1444, 1451 (9th Cir. 1990)(bankruptcy judges may hold jury trials in core proceedings). The Eighth and Tenth Circuits have come down against them. \textit{See In re United Mo. Bank of Kansas City, 901 F.2d 1449 (8th Cir. 1990)}(deciding issue as matter of statutory construction and failing to reach the constitutional question); Kaiser Steel Corp. v. Frates (\textit{In re Kaiser Steel Corp.}), 911 F.2d 380 (10th Cir. 1990)(following Eighth Circuit's reasoning).

obtained a stay of the state court litigation from the bankruptcy court. Cooper then commenced an adversary proceeding against ICSP in bankruptcy court for a declaration of liability under state contract law and for punitive damages. The insurance brokers were joined as defendants in the suit on grounds of malpractice.

The defendants appealed to the district court to withdraw its reference to the bankruptcy court and to lift the stay on the state court litigation. The district court eventually abstained and lifted the stay. Cooper then appealed to the Second Circuit.

A panel of the Second Circuit reversed the district court. The court's holding was in three parts: (1) a postpetition contract claim is core; (2) the parties were entitled to a jury trial of the matter in the bankruptcy court; and (3) jury trials in bankruptcy court do not violate article III. In light of the discussion in the preceding sections, the Second Circuit's analysis in reaching these conclusions is inadequate.

1. Postpetition Contracts

First, the court concluded that a proceeding based on a contract entered into after the filing of the bankruptcy petition is core, basing its analysis on 28 U.S.C. § 157(b)(2)(A). That section states that “matters concerning administration of the estate” are core. The court's

239. 28 U.S.C. § 157(a)(2)(A)(1988). Courts have divided over how broadly subsection (A) is to be applied. Some courts have used subsection (A) to declare actions arising postpetition to be core. E.g., In re Balboa Improvements, Ltd., 99 Bankr. 966 (Bankr. 9th Cir. 1989)(suit for maladministration of bankruptcy estate core to extent of determination of attorneys' fees, but related to extent it deals with damages under state law); Valley Forge Plaza Assocs. v. Fireman's Fund Ins. Cos., 107 Bankr. 514 (E.D. Pa. 1989)(action against insurance company for cancellation of policy core proceeding since preservation of insurance contract is crucial to administration of estate); In re Levine, 100 Bankr. 537 (Bankr. D. Colo. 1989)(actions premised on debtor's postpetition misconduct core proceedings); In re Sarasota Casual, Inc., 90 Bankr. 496 (Bankr. M.D. Fla. 1988)(breach of postpetition contract); In re Sonnycor Coal, 89 Bankr. 658 (Bankr. S.D. Ohio); In re Will Rogers Jockey & Polo Club, Inc., 111 Bankr. 948 (Bankr. N.D. Okla. 1990)(violation of antidiscrimination provision by denial of license to race track owner is core proceeding); In re Railroad Dynamics, 97 Bankr. 239 (Bankr. E.D. Pa. 1989)(action against trust company for failure to sell declining stocks owned postpetition by debtor as core proceeding); In re Texas Sheet Metals, 90 Bankr. 260 (Bankr. S.D. Tex. 1988)(rejection of collective bargaining agreement).

Other courts have held that the mere fact that a cause of action arises during administration of the estate does not make that cause of action a core proceeding. Piombo Corp. v. Castlerock Properties (In re Castlerock Properties), 781 F.2d 159, 162 (9th Cir. 1986)(state law contract claims not specifically listed in section 157(b)(2)(B) to (N) noncore even if they arguably fall within subsections (A) and (O)); In re Marine Iron & Shipbuilding Co., 104 Bankr. 976 (D. Minn. 1989)(non-transactional claim by debtor against party who had not filed a claim against estate held noncore but bankruptcy court could hear it as related proceeding). But cf. Hughes-Bechtol, Inc. v. Air Enters. (In re Hughes-Bechtol, Inc.), 107 Bankr. 552 (Bankr. S.D. Ohio 1989)(state law claim by debtor against two creditors core
reasoning was based on two premises: the petition "adjusts the rights of others connected with the proceeding"; further, the contract of insurance was necessary for administration of the bankruptcy estate because it protected assets of the estate, it was required by the bankruptcy plan, and it was issued by an insurance company that knew it was dealing with a debtor-in-possession.

The court rejected a better line of authority that asserts that a postpetition claim must be brought against a creditor who has filed a claim in the bankruptcy proceeding (i.e., must be "transactional") to be necessary to the administration of the estate and core under section 157(b)(2)(A). This approach is consistent with the requirement under the caselaw that the state law claim be a necessary incident of a congressionally mandated scheme. Since a private right may become a public right when a party consents to adjudication in an article I tribunal, a postpetition claim is core under section 157(b)(2)(A) only when the defendant has consented to suit in bankruptcy court. A third-party defendant who was not scheduled as a creditor or claimant of the estate but who has been haled into bankruptcy court by the estate's trustee cannot be said to have consented to the court's jurisdiction. Absent consent, the private right at issue in Ben Cooper was not a necessary incident of the legislative scheme since the action under state contract law was not necessary to determine rights under federal law.

The weakness in the court's reasoning can be discerned in its con-
clusion that since the state law claim in *Northern Pipeline* concerned a contract entered into prepetition, a contract entered into postpetition is immune from attack under article III.\textsuperscript{244} Merely applying a temporal test is insufficient since the Supreme Court has not entirely abandoned the public rights analysis. The court in *Ben Cooper*, however, does apply this analysis when it raises the seventh amendment issue.

2. **Jury Trials in Bankruptcy Court**

When the court in *Ben Cooper* applied the public rights analysis from *Granfinanciera* to the issue of jury trials in bankruptcy court, it made a simple mistake of logic. The court interpreted *Granfinanciera* to mean that core proceedings that are legal rather than equitable in nature must be tried before a jury. It then improperly concluded that the bankruptcy court had the authority to conduct jury trials in proceedings that are core and legal. The court’s syllogism is “faulty” in that it inferred the authority from the right.\textsuperscript{245}

But there is a more fundamental mistake underlying the fallacy. The court’s conclusion is based on the assumption that merely because a claim is core and legal it is entitled to a jury trial. However, the analysis in *Granfinanciera* has two prongs: first, it asks whether the claim was a legal claim at the time the seventh amendment was ratified; it then asks whether it is a public right Congress has assigned and may assign to an article I tribunal.\textsuperscript{246}

The court in *Ben Cooper* neglected the second step in the *Granfinanciera* analysis. The second step is a key element of the analysis because, if a court determines that a right is legal rather than equitable in nature, it may then determine that the claim is nevertheless a public right and therefore triable in a tribunal that lacks the essential elements of judicial power.\textsuperscript{247} The *Ben Cooper* court as-

\textsuperscript{244} “We read *Marathon* to apply to claims arising pre-petition, and decline to apply that ruling to claims involving contracts entered into post-petition.” Insurance Co. of Pa. v. Ben Cooper, Inc. (*In re* Ben Cooper, Inc.), 896 F.2d 1394, 1400 (2d Cir. 1990)(emphasis in original), cert. denied, 111 S. Ct. 2041 (1991).


\textsuperscript{247} The *Ben Cooper* court’s confusion is evident from the following:

If, therefore, the Supreme Court held that all adversary proceedings sounding in law are private rights of action, a determination that the instant action is legal would compel us to hold that the proceeding is not core.

Fortunately, we need not read *Granfinanciera* so broadly. That opinion also contains several passages indicating the Court’s contemplation that its holding may result in jury trials in the bankruptcy court.
sumed that because the claim was legal, the parties were entitled to a jury trial; it also assumed that if a claim is core under section 157(b), a bankruptcy court has jurisdiction over it under 28 U.S.C. § 151.248

The court concluded that the proceeding was core. Granted that the court’s construction of the statutes is possible, still the court should have reasoned that core proceedings are matters of public—rather than private—right. *Granfinanciera* stated that a public right may be tried without a jury because a public right may be tried in an article I court. Therefore the second step of the inquiry in *Granfinanciera* is to determine whether Congress may assign the legal right to a non-article III tribunal that does not use a jury as a fact-finder. However, the court failed to apply an inquiry into the public right status of the core proceeding.

3. Article III and Jury Trials in Article I Tribunals

The court concluded that article III imposes no constitutional barrier to jury trials in bankruptcy courts. But the court’s analysis did not address the inquiry mandated by *Schor* and *Thomas*.249 To apply this analysis requires an inquiry into whether the scheme protects the personal and structural interests of article III.

The inquiry into whether personal interests are protected involves the issue of consent: has the defendant consented to adjudication of the private right in an article I tribunal? If not, then the matter must

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248. 28 U.S.C. § 151 (1988)(stating that the bankruptcy judges “may exercise the authority conferred under this chapter with respect to any action, suit or proceeding”).

249. The court based its decision on the assumption that the scheme of section 157 was constitutional: “The essential predicate question, even more fundamental [than the jury issue], is whether the statutory authority of the bankruptcy judges to enter final judgments in core proceedings runs afoul of Article III.” Insurance Co. of Pa. v. Ben Cooper, Inc. (*In re Ben Cooper, Inc.*), 896 F.2d 1394, 1401 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2041 (1991). By assuming that the statutory scheme of section 157 did not violate article III, it was inevitable that the court would conclude: “If bankruptcy courts have the power to enter final judgments without violating Article III, it follows that jury verdicts in bankruptcy courts do not violate Article III.” Id. The conclusion, even though warranted, bypasses the analysis necessary to solve the constitutional question. The court therefore did not consider that the Supreme Court’s analysis is functional: the nature of the claim that may legitimately be adjudicated is closely connected with the functions the tribunal may validly exercise.
be adjudicated in an article III, or state, court. Even if the parties consent to jury trial in bankruptcy court, such practice may still be unconstitutional as violating the separation-of-powers values of article III.

The inquiry into the structural interests asks (1) whether the essential attributes of judicial power are retained in an article III court; (2) whether Congress has withdrawn the matter from the cognizance of the courts; and (3) whether the private right is a necessary incident of the congressional scheme (i.e., whether the scheme would be possible without the private right as an incident).

Arguably, the practice of jury trials in the bankruptcy courts would violate each of these structural tests. Trial by jury is quintessentially a traditional attribute of judicial power. The cases allow United States magistrates and the judges of the courts of the District of Columbia to conduct jury trials in article I tribunals, but these courts may be distinguished from the bankruptcy courts. Specifically, in the case of the United States magistrates, Congress has enacted legislation allowing full-time magistrates to conduct jury trials with the consent of the parties. Significantly, Congress has acquiesced to abrogation of Federal Rule of Bankruptcy Procedure 9015 which governed jury trials under the 1978 Act. Furthermore, 28 U.S.C. § 1411, which is the only statute to address jury trials in related proceedings, provides only for jury trials in cases of personal injury or wrongful death tort claims, which must be tried in district court.

Functionally, allowing jury trials in related proceedings would

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250. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 853 (1986)(pointing with favor to the fact that the Commission "unlike the bankruptcy courts under the 1978 Act, does not exercise 'all ordinary powers of district courts,' and thus may not, for instance, preside over jury trials") (quoting Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 85 (1982)). See also *Crowell v. Benson*, 285 U.S. 22, 61 (1932)("In a trial by jury in a Federal court the judge is 'not a mere moderator' but 'is the governor of the trial' for the purpose of assuring its proper conduct as well as of determining questions of law.") (quoting Herndon v. Southern Pac. Co., 283 U.S. 91, 95 (1931)). *Cf.* text accompanying note 194.


254. 28 U.S.C. § 1411 (1988). Section 1411(a) provides: "Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by
"withdraw the matter from the cognizance" of an article III court. The court in Hughes-Bechtol, Inc. v. Air Enterprises (In re Hughes-Bechtol, Inc.)255 has reached a similar conclusion on the basis of the seventh amendment which provides that "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."256 The quoted language prevents a subsequent jury trial on any issue already tried to a jury. However, if a bankruptcy court conducted a jury trial in a related proceeding without consent of the parties, it would be required to submit proposed findings of fact and conclusions of law to the district court.257 If the district court is prevented by the seventh amendment from conducting a jury trial in its de novo review of the bankruptcy proceeding under section 157(c)(1), it will not be able to perform its article III functions.258

Moreover, even with consent of the parties, jury trials in bankruptcy courts of core proceedings based on private rights would violate the structural interests protected by article III. Allowing full jury trials of private rights in bankruptcy courts would deprive the private litigants of initial adjudication before a court with the protections of article III. Under the caselaw the congressional scheme must not withdraw a claim from the cognizance of the article III courts. However, on the reasoning of Ben Cooper, the issues tried to a jury might be withdrawn since initial adjudication in bankruptcy court would be allowed whenever a claim is both core and legal.

Finally, jury trials are not a necessary incident of the legislative scheme created by BAFJA.259 In fact, Congress appears to have purposely omitted jury trials, following the example of the Judicial Conference in promulgating the Emergency Rule.260 The legislative

256. U.S. CONST. amend. VII.
257. See 28 U.S.C. § 157(c)(1)(1988). Of course the bankruptcy court may enter final judgment in such related proceedings with the consent of the parties. See id. § 157(c)(2).
259. See In re United Mo. Bank of Kansas City, 901 F.2d 1449, 1456 (8th Cir. 1990)(power to conduct jury trials not indispensable power to carry out the authority granted by section 157).
260. See 130 CONG. REC. H6242 (daily ed. Mar. 21, 1984), where Representative Kindness stated that his amendment to create non-article III bankruptcy judges was "essentially a legislative enactment of the emergency bankruptcy rule, the model rule that has been in effect, under which the bankruptcy courts have been operat-
scheme of BAFJA would be possible even without jury trials since, on a proper application of the analysis in Granfinanciera, only noncore, private right claims are entitled to jury trials.

VI. CONCLUSION

The analysis presented in the preceding Part may be applied to other issues arising under 28 U.S.C. § 157(b). Such analysis is beyond the scope of the present study,261 but would be similar to that set forth above. Accordingly, inquiry into both the personal and structural interests of article III is required.

This Comment has argued that the concept of consent plays a significant role in the analysis of bankruptcy jurisdiction since a defendant is brought into the process of “allowance and disallowance of claims” either by being scheduled as a creditor of—or by filing a claim against—the bankruptcy estate. Depending on the nature of the proceeding, the creditor’s claim may then become subject to the equitable power of the bankruptcy court and the creditor’s privileges under state law may be lost.262

However, when a case involves a third-party defendant who has not consented to the equitable jurisdiction of the bankruptcy court, the courts should not treat the state law claim as lost. The significant constitutional question is not whether a particular type of claim enumerated under section 157(b) is core, but whether a party has become subject to the jurisdiction of the bankruptcy court.263 A creditor may become subject to the jurisdiction of the bankruptcy court in two ways: by being scheduled as a creditor of the estate or by filing a claim against the estate. When a party is not an estate claimant, but has a claim based on rights independent of the pro rata distribution of estate proceeds, estate administration would not be impeded by treating the party’s claim as related rather than core. Such treatment preserves the party’s right to object to the court’s jurisdiction over the proceeding and preserves the constitutionality of the bankruptcy proceeding.

It bears repeating that courts should inquire into the party’s consent. Consent to the jurisdiction of the bankruptcy court will not necessarily make a dispute core but, as long as recourse to a state court or

261. It has been attempted by Ferriell, supra note 13, at 134-60. Ferriell’s approach may be faulted because of his reliance on state law in a manner reminiscent of Northern Pipeline; to some extent this is due to the fact that his article antedates Granfinanciera.
262. This is consistent with the Court’s subsequent application of Granfinanciera in Langencamp v. Culp, 111 S. Ct. 330, 331 (1990)(per curiam).
263. See Gibson, supra note 14, at 168-69.
district court is available, consent will bring the claim into the restructur- 
ing of debtor-creditor relations. As was stated above, the adversary 
proceeding in *Ben Cooper* was at most a related proceeding 
commenced in state court as an action for rescission of an insurance con- 
tact. Although the bankruptcy court did not have jurisdiction to hear 
this state court action, the congressional scheme was not invalid be- 
cause an alternative forum was available. If the *Ben Cooper* court had 
employed the analysis suggested here, it might have simply held that 
the bankruptcy court lacked jurisdiction over the related proceeding. 
This would have avoided the need for the seventh amendment 
inquiry.264

This Comment has suggested that many jurisdictional issues 
presented before bankruptcy courts may be solved by analysis of the 
policies underlying article III. Admittedly, the Supreme Court has 
not been consistent in its application of article III to the bankruptcy 
courts. However, the Court has developed a test that, though prag- 
matic, is consistent with general principles of article III. If the courts 
 adhere to the underlying constitutional principles, the application of 
the Court's analysis will seldom be doubtful and will preserve the val- 
ues of article III.

*Jeffrey H. Bush '91*

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264. Before denying certiorari in *Ben Cooper*, the Supreme Court vacated the Second 
Circuit's judgment and remanded for a reconsideration of the Second Circuit's 
appellate jurisdiction. Insurance Co. of Pa. v. Ben Cooper, Inc. (*In re* Ben Cooper, 
Inc.), 111 S. Ct. 425 (1990). On remand a three judge panel of the Second Circuit 
reinstated its previous judgment. It held that the district court's withdrawal of its 
reference from the bankruptcy court and abstention from asserting its jurisdic- 
tion constituted an appealable final order. Ben Cooper, Inc. v. Insurance Co. of 
Pa. (*In re* Ben Cooper, Inc.), 924 F.2d 36, 38 (2d Cir. 1991). The district court's 
order was oral and did not indicate its grounds for abstention. If on remand the 
Second Circuit had found that the district court's abstention was mandatory 
under 28 U.S.C.A. § 1334(c)(2)(West Supp. 1991), then the order would have been 
unappealable. However, the Second Circuit found that the district court's absten- 
tion was permissive under section 1334(c)(1), which allows appeal of the 
determination.

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