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THE NEW FORUM SHOPPING PROBLEM IN BANKRUPTCY

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The New Forum Shopping Problem in Bankruptcy

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Abstract

The American bankruptcy system is a hybrid of state law and federal bankruptcy law. Under the *Butner* principle, federal bankruptcy courts preserve non-bankruptcy law substantive entitlements in bankruptcy unless bankruptcy policies compel a contrary result.

This hybrid system, however, gives rise to the threat of forum-shopping if parties attempt to invoke bankruptcy jurisdiction for improper purposes, namely to rearrange non-bankruptcy entitlements to advance no coherent bankruptcy policy. Modern developments in bankruptcy law, as exemplified in the case of *Marshall v. Marshall* raise a novel threat of bankruptcy forum-shopping. *Marshall* involved the bankruptcy of tabloid starlet Anna Nicole Smith and her efforts to recover from the estate of deceased billionaire oilman J. Howard Marshall. Rather than deferring to the processes of the Texas probate court, Smith raced into bankruptcy court in California to capture a large share of Marshall's estate. The technical issue in the case concerns whether the dispute constituted a "core" matter under federal bankruptcy law and thus the timing of the entry of a final judgment by the bankruptcy court. If the Marshall Bankruptcy Court's decision is allowed to stand, it could set a precedent for rampant forum-shopping by dissatisfied parties seeking a more favorable resolution of claims in federal bankruptcy court than that to which they would be entitled under state law.

INTRODUCTION

In the United States, relations between debtors and their creditors are governed by two distinct legal regimes. For the overwhelming majority of credit relationships, state law of contract, property, tort, and consumer protection establish the framework within which the debtor-creditor relationship is established, functions, and in the end, is dissolved. In a smaller but significant number of these relationships, a different forum orchestrates the end of these relationships, namely, federal bankruptcy court. These two distinct forums for debtor-creditor relations exist side-by-side, with some relationships moving over time from one forum to the other. As with any system where dual regimes for dispute resolution exist, parties seeking resolution of debtor-creditor disputes can and will, under the right conditions, engage in "forum shopping."

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In his seminal work, *The Logic and Limits of Bankruptcy Law*,¹ Thomas Jackson describes the central dilemma with which bankruptcy law has struggled throughout its history as “the forum shopping problem.”² How can a bankruptcy regime function efficiently while preventing parties disaffected by adverse legal outcomes outside of bankruptcy from seeking better and different outcomes inside of it? The “nightmare” forum-shopping scenario is the situation in which one dispute between two parties receives dramatically different treatment depending upon which forum was used to adjudicate the dispute.

The solution to the forum-shopping problem, recognized long before Jackson formally framed the question, has been to craft a bankruptcy regime that treats creditors and debtors substantively the same inside the bankruptcy forum as they would be treated outside of it and to merely change the procedures by which those substantive rights are vindicated. In other words, bankruptcy has long served as a place with special procedures, but not, for the most part, with special substantive law.

This principle of equilibrium between bankruptcy and non-bankruptcy treatment of claims and defenses has come to be known as the *Butner* principle, because of the Supreme Court articulation of it in that case.³ The principle long predates that case, however, since it was the crucial lynchpin of the great compromise of 1898 that gave the United States its first lasting bankruptcy law.⁴ The principle is also embodied in bankruptcy law’s most important and famous rule, the “absolute priority” rule, which states that priorities between creditors inside of bankruptcy must reflect the ordering of those priorities outside of bankruptcy.⁵ The *Butner* Principle has been re-articulated by courts on numerous occasions, most importantly by the Supreme Court in *Granfinanciera v. Nordberg*.⁶

According to *Butner*, courts sitting in bankruptcy are to employ bankruptcy procedure to administer rights and obligations established under non-bankruptcy law.⁷ The *Butner* court explicitly identified the forum shopping problem that would arise from permitting a party to receive “a windfall merely by reason of the happenstance of bankruptcy.”⁸

¹ THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 21-22 (1984). See also Douglas G. Baird and Thomas H. Jackson, *Cases, Problems, and Materials on Bankruptcy* 50-52 (2nd ed. 1990)(analogizing the relationship between bankruptcy courts and state courts to as similar to that of having two different courts in two different cities, with litigants having the ability to bring litigation in either).

² *Id.* at 22.

³ *Butner v. United States*, 440 U.S. 48 (1979).

⁴ For a complete explication of the history of the Bankruptcy Act of 1898, see David Skeel, *DEBT’S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA*, 169 (2001).

⁵ The Absolute Priority Rule is embodied in 11 U.S.C. § 1129(2)(b)(ii).

⁶ 492 U.S. 300 (1989).

⁷ *Butner*, 440 U.S. at 54; see also *Travelers Casualty and Surety Co. of America v. Pacific Gas and Electric Co.*, 549 U.S. ___ (2007).

⁸ *Butner*, 440 U.S. at 55.

This separation of substantive and procedural law, which long served as the guiding principle of American bankruptcy, is threatened by a new type of forum shopping. In order to achieve outcomes unavailable outside of bankruptcy, some litigants have identified a nuance of bankruptcy jurisdiction that, if interpreted in a particular way, has the ability to overturn the substantive law of their cases.

The new forum shopping problem in bankruptcy is rooted in the interpretation of a statutory provision. Whatever the policy or principles underlying bankruptcy, it remains an equity regime created by statute, namely, the Bankruptcy Code of 1978 (“the Code”). As a fundamental component of that regime, bankruptcy jurisdiction is likewise a creature of statute. Section 157(b)(1) of Title 28 of the United States Code authorizes bankruptcy courts to enter final judgments in “all core proceedings arising under title 11, or arising in a case under title 11.”⁹ If an Article I bankruptcy court has the power to enter final orders and judgments in “all core proceedings,” as some litigants have suggested, then these bankruptcy courts become rivals of state and federal non-bankruptcy courts, with the potential to reverse outcomes achieved under or determined by non-bankruptcy law. On the other hand, if section 157(b)(1) is interpreted in a manner consistent with the *Butner* Principle, as well as the Supreme Court’s recognition of constitutional limits on the scope of bankruptcy jurisdiction in *Northern Pipeline v. Marathon Pipeline*,¹⁰ then this new conduit for forum shopping is foreclosed.

More precisely, in order for there to be final order jurisdiction under section 157(b)(1), the matter must be a “core” matter that also either “arises in” or “arises under” a case under title 11.¹¹ To render a final judgment it is never sufficient to be simply a core matter. It is the “arises in” and “arises under” requirements that vindicate relevant constitutional principles by limiting the reach of the bankruptcy court’s final order jurisdiction.

This Article proceeds in three parts. Part I describes the “core” and “non-core” distinction in bankruptcy jurisdiction, and the significance of that distinction for final orders in bankruptcy. This section also describes the new forum shopping problem, and how bankruptcy courts and litigants might interpret section 157, to achieve outcomes dramatically different from what might occur outside of bankruptcy. The best example of this new forum-shopping problem is provided by *Marshall v. Marshall*, the famous “Anna Nicole Smith” case, in which a bankruptcy court in California set a Texas probate court judgment on its head.¹² The “nightmare” forum-shopping case has been realized.

The key question confronting the *Marshall* Court is “when can an Article I bankruptcy court enter a final order?” If section 157 is interpreted expansively, so as to characterize a matter of private rights arising under state law to be subject to an Article I bankruptcy court’s final order jurisdiction, then a party may, as in *Marshall v. Marshall*, seek a different result by filing bankruptcy—the very forum-shopping nightmare that

⁹ 11 U.S.C. §157(b)(1).

¹⁰ 458 U.S. 50 (1982).

¹¹ 28 U.S.C. § 157(b)(1).

¹² *In re Marshall*, 253 B.R. 550 (Bankr. C.D. Cal. 2000).

basic bankruptcy principles seek to avoid. The “core versus non-core” distinction is critical in *Marshall* because it determines the proper application of preclusion principles. If the probate matter was not a core proceeding, and the bankruptcy court’s decision was thus not a final judgment, the Texas probate court’s subsequent judgment would have been the first final judgment in the matter and should have been preclusive on the district court, effectively defeating forum shopping. Because bankruptcy law has no insolvency requirement and few other legal limitations on the assertion of bankruptcy jurisdiction, and judges generally hold often-asserted broad equitable authority to administer claims, *Marshall* fundamentally threatens the integrity of the rule of law and fair administration of justice. Indeed, for these reasons, the forum-shopping concern between federal Bankruptcy Court and other courts as exemplified in *Marshall* is fundamentally identical to the forum-shopping concern between state and federal courts addressed by the Supreme Court in the canonical case of *Erie Railroad v. Tompkins* itself.¹³

Part II explains the constitutional history and structure of modern bankruptcy jurisdiction. This Part then employs that history and structure to explain why interpretations of section 157 which might promote forum shopping, while linguistically plausible, are nevertheless inconsistent with Supreme Court proclamations about the constitutional constraints upon bankruptcy jurisdiction.

Part III explores the policy justifications for a limited bankruptcy jurisdiction, rooted both in the *Butner* principle as well as Congress’s response to the Supreme Court’s ruling in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, in which the Court held the jurisdictional scheme provided by the Bankruptcy Code of 1978 to be unconstitutional.¹⁴ Given the history and application of standard canons of statutory construction, Article I bankruptcy courts are not granted sweeping authority to enter final orders in all “core proceedings.” Instead, a bankruptcy court’s final order jurisdiction is limited to the more narrow set of cases “arising under title 11” and “arising in a case under title 11.”

Part IV concludes.

I. Bankruptcy Jurisdiction and The New Forum Shopping Problem

A. The Structure of Bankruptcy Jurisdiction

The subject matter jurisdiction of bankruptcy courts has long been a matter of controversy. Two types of concerns have always haunted it. First, as a system for resolving the relationships between a debtor and the debtor’s creditors, bankruptcy necessarily must contemplate exercising jurisdiction over third parties and the interests of third parties, to the extent that those interests intertwine with the property and interests of the debtor. Second, to the extent that bankruptcy operates as a universe parallel to state legal systems for the resolution of creditors’ claims on debtors, it unavoidably “competes” with these state legal systems as a forum for the resolution of disputes.

¹³ *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938).

¹⁴ 458 U.S. 50 (1982).

The bankruptcy jurisdiction system could have been constructed in any number of ways. First, it is possible to have no federal bankruptcy system at all, and to simply rely on state law debt-collection systems to determine who gets what from a bankrupt debtor. State law is typically a “race of diligence” those creditors who are most diligent and aggressive at enforcing their rights are protected first and those who are more passive run the risk of non-payment. Alternatively, it would be conceivable to have a debt-collection system that is entirely federal and for which the collection of even the most mundane credit card debt even from a solvent debtor required elaborate collective processes like the federal bankruptcy system. In this system, the federal bankruptcy court administers a collective proceeding that looks out for the interests of all creditors, not just the diligent, even where the debtor is likely solvent and thus such protections are unnecessary.

In contrast to both of these extremes, the architects of the American bankruptcy laws constructed a hybrid system that combines state and federal law systems. The system is grounded as an initial matter on the foundation of state laws that set the substantive background rules of tort, contracts, property, and trusts and estates, and establishes the substantive entitlements for debtors and creditors. Because of this longstanding premise of grounding substantive entitlements in state law, combined with the cost and delay of the collective proceeding associated with the federal bankruptcy laws—and more importantly, precisely to address concerns about improper forum-shopping—the operative principle for bankruptcy law is that bankruptcy jurisdiction must be earned, not merely presumed. Cases are moved from state courts into bankruptcy court only if some bankruptcy policy is furthered. For instance, bankruptcy jurisdiction is inappropriate for trusts that have no operating assets or otherwise do not function as an operating business¹⁵ or for entities that have alternative mechanisms for resolving financial distress, such as banks and insurance companies.¹⁶ In the case of non-operating trusts, insolvency raises no coherent bankruptcy issues such as collective action problems or preservation of going-concern value, and thus they can be processed under standard state debtor-creditor law. The insolvency of banks or insurance companies does raise bankruptcy-type problems, but those bodies of law provide specific rules for the resolution of insolvency, thus bankruptcy is again unnecessary. Most fundamentally, there is nothing in the history or policy of bankruptcy law that suggests that it is an appropriate use of bankruptcy law to simply get a second bite at the apple to simply rewrite or trump substantive state law when it is not necessary to further any coherent bankruptcy policy.

Adopting either of the two polar systems of a purely state or purely federal system would eliminate the potential confusion and forum-shopping concerns of establishing whether borderline cases should proceed in bankruptcy court. Despite these dangers, the two systems generally coexist peacefully, at least where judges are vigilant about protecting the boundary lines between them. But the danger in the system is evident—the temptation to trigger bankruptcy jurisdiction to achieve some improper goal rather than to further bankruptcy policies. As a conceptual matter, the dividing line between the bankruptcy and non-bankruptcy worlds is insolvency; but requiring insolvency as a

¹⁵ See 11 U.S.C. § 101(9).

¹⁶ See 11 U.S.C. § 109.

bright-line rule proved elusive as an administrative matter, so under the modern Bankruptcy Code it is not a formal requirement.¹⁷

This compromise also has deep historical roots. It was the source of deep disagreements between proponents of federal bankruptcy legislation throughout the nineteenth century, and is one reason why no lasting bankruptcy law was passed in the United States until 1898.¹⁸ Indeed, the tension between state and federal approaches to debtor-creditor relations served as the point of compromise that allowed passage of the Bankruptcy Act of 1898.¹⁹ This first, lasting bankruptcy law was only possible once proponents of a federal system agreed to reduce it to a procedural mechanism which would incorporate and apply state substantive law, particularly with regard to state exemption regimes.²⁰ Whether the result of reasoning from first principles or continued political compromise, this initial structure continues today.

Despite the equilibrium that was achieved through the compromise of 1898, forum shopping in bankruptcy became problematic with amendments to the Act throughout the twentieth century.²¹ Even strategic forum-shopping within the Act became a familiar practice, with corporate debtors often trying to manipulate jurisdictional requirements to become eligible to use the more flexible and management-friendly restructuring provisions of chapters XI over the more rigid formalities of chapter X in order to avoid the oversight of the Securities and Exchange Commission and the delays caused by it.²²

These forum-shopping difficulties were part of the problem that eventually led Congress to seek a complete overhaul of the Bankruptcy Act. With the passage of the Bankruptcy Code of 1978, Congress sought to create a forum for the resolution of the collective action problem presented by insolvency, while preserving respect for state debtor-creditor law. Nowhere is this intention more evident in the Code than with its preservation of the “substance versus procedure” distinction originally adopted in the 1898 Act.²³ Congress could not foresee, however, that the preservation of the Acts forum shopping solution would be incapable of stemming the problem of forum shopping entirely. The limited reach of the “substance versus procedure” solution became particularly clear after the Supreme Court’s decision in *Northern Pipeline Company v. Marathon Pipeline* made an overhaul of the Code’s jurisdictional scheme necessary.²⁴

¹⁷ At least one commentator has argued that insolvency should be a jurisdictional requirement for bankruptcy and suggested that the absence of an insolvency requirement raises bankruptcy forum-shopping concerns. See Thomas E. Plank, *Why Bankruptcy Judges Need Not and Should Not Be Article III Judges*, 72 AM. BANKR. L.J. 567, 620-29 (1998).

¹⁸ See G. Marcus Cole, *Limiting Liability Through Bankruptcy*, 70 Univ. of Cincinnati L. Rev. 1245-1295 (2002).

¹⁹ See SKEEL, *DEBT’S DOMINION*, *supra* note 4, at 169.

²⁰ See G. Marcus Cole, *The Federalist Cost of Bankruptcy Exemption Reform*, 74 Am. Bankr. L. J. 227 (2000).

²¹ See Skeel, *Debt’s Dominion*, *supra* note 4, at 169.

²² *Id.*

²³ 5 Stat. 440.

²⁴ 458 U.S. 50 (1982) (holding the Bankruptcy Code of 1978 unconstitutional because it extended the judicial power of the United States to judges without life tenure during good behavior).

B. “Core” vs. “Non-Core” Jurisdiction in Bankruptcy

28 U. S. C. § 157, enacted as part of the 1984 Bankruptcy Amendments and in response to the Supreme Court’s decision in *Marathon Pipeline*, created a new jurisdictional structure, one that distinguished between “core” bankruptcy jurisdiction and “non-core” bankruptcy jurisdiction.²⁵ The extent of a bankruptcy court’s jurisdiction, and in turn, its power, is determined by whether the subject matter of the proceeding at issue is a core matter or a non-core matter.²⁶

1. 28 U.S.C. § 157

The statute does not define “core” proceedings, but section 157(b)(2) does provide a list of examples.²⁷ The list of examples, however, provides only partial guidance. The non-exclusive list of examples of core proceedings listed in 28 U.S.C. 157(b)(2) includes amorphous language that includes:

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship²⁸

As the Second Circuit has observed, “The language of that sub-section [§157(b)(2)] could be construed to include almost any matter related to bankruptcy, but the structure of the statute as a whole does not permit such a construction. Matters that merely concern the administration of the bankrupt estate tangentially are related, non-core proceedings.”²⁹ Courts have occasionally struggled to define the contours of Section 157(b)(2) when a matter does not fall within the precise terms of one of the examples.

One court has defined a matter as core “if it invokes a substantive right provided by title 11 or if it . . . , by its nature, could arise only in the context of a bankruptcy case.”³⁰ Core proceedings, therefore, are those actions arising from “public rights” created by Congress’s enactment of the Bankruptcy Code.³¹ Because those rights are defined solely by Congress in creating the statute, Congress also may define the mechanisms for the adjudication of those rights, such as allocating disputes over their resolution to bankruptcy courts.

A non-core matter, by contrast, is predicated on the vindication of rights that arise *outside* bankruptcy, under either state law or federal non-bankruptcy law. Thus, a matter

²⁵ 28 U.S.C. §157.

²⁶ 28 U.S.C. 157(b)(2).

²⁷ 28 U.S.C. §157(b)(2).

²⁸ *Id.*

²⁹ *In re Ben Cooper, Inc.*, 896 F.2d 1394, 1398 (2d Cir. 1990).

³⁰ *In re Wood*, 825 F.2d 90, 97 (5th Cir. 1987).

³¹ *See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (Minn. 1982).

that could have been brought in a state court is necessarily a non-core proceeding, for which bankruptcy judges exercise their more limited powers.

Bankruptcy judges may hear both core and non-core proceedings. Non-core proceedings may also fall within the jurisdiction of a federal court sitting in bankruptcy. A non-core matter may be heard by an Article I bankruptcy judge as long as “the outcome of that proceeding could *conceivably* have any effect on the estate being administered in bankruptcy.”³² This means that even matters for which the rule of decision is state law or federal non-bankruptcy federal law can be heard by an Article I bankruptcy judge.³³

The critical importance of the determination that a matter is a core proceeding is thus not one of jurisdiction but rather power: Article I bankruptcy judges may enter final judgments and orders *only* in a core proceeding. If a matter is non-core, by contrast, a bankruptcy judge may only submit “proposed findings of fact and conclusions of law to the district court, subject to de novo review.”³⁴

2. *Marathon*

The distinction between core and non-core matters is crucial, albeit elusive. The Supreme Court addressed the question in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*³⁵ In that case, commonly referred to as *Marathon*, Northern Pipeline was reorganizing under chapter 11 of the then new Bankruptcy Code. Within the bankruptcy case, the debtor Northern Pipeline filed a breach of contract action against Marathon Pipeline. There was no disagreement about whether the bankruptcy court had jurisdiction over the lawsuit; everyone agreed that it did. Defendant Marathon Pipeline did, however, challenge the bankruptcy court’s authority to exercise Article III judicial power over the case. Marathon argued that an exercise of Article III judicial power by a court established by Congress under Article I violated the Constitution’s separation of powers doctrine.

The Supreme Court, in a holding joined by six justices, agreed with Marathon Pipeline. The Court held that the Code, as enacted in 1978, conferred upon bankruptcy judges the power to hear a state-based breach of contract claim, like that asserted by Northern Pipeline, but that as a non-Article III court, a bankruptcy court could not constitutionally be vested with jurisdiction to decide such state law claims.³⁶ As Justice Brennan wrote in his opinion, the state law contract claim:

[M]ay be adjudicated in federal court on the basis of its relationship to the petition for reorganization. But this relationship does not transform the state created right into a matter between the Government and the petitioner for reorganization. Even

³² *In re Wood*, 825 F.2d at 93 (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)).

³³ *Id.* at 95.

³⁴ *Id.*

³⁵ *Marathon*, 458 U.S. at 50.

³⁶ *Id.*

in the absence of the federal scheme, the plaintiff would be able to proceed against the defendant on the state-law contractual claims.³⁷

The test, then, for whether a matter is a non-core matter, subject to a bankruptcy judge's more limited power to merely submit proposed findings of fact and conclusions of law, is whether the case could have been brought in the absence of a bankruptcy proceeding. As the Supreme Court reasoned in *Marathon*, if Congress can create particular rights, then Congress can also establish courts—even non-Article III courts—to adjudicate those rights.³⁸ As one Bankruptcy Court has commented, “[C]ore proceedings represent those disputes so intertwined with the bankruptcy process that Congress has the power under Article I of the Constitution to direct a non-tenured judicial officer to render a final determination of its merits.”³⁹ Non-core matters, by contrast, are those that are related in some way to a bankruptcy case but are not within the “exclusive province” of the bankruptcy courts.⁴⁰

The new forum-shopping problem arises when core jurisdiction is viewed expansively, so as to effectively place bankruptcy judges on an equal footing with state courts and Article III federal courts when resolving disputes wholly independent of the existence of a bankruptcy proceeding, disputes rooted in private, non-bankruptcy rights and obligations. Since an insolvency requirement has long proven an infeasible and elusive specter throughout bankruptcy history, nearly anyone, even a perfectly solvent individual or corporate entity, may file for bankruptcy protection.⁴¹ Thus, if a litigant has concerns about how a state court or federal district court might resolve her dispute, the statute arguably authorizes her to file a petition in bankruptcy. On the other hand, even if Congress places no express limits on the statutory language (although properly read, it does place some express limits), *Marathon* and foundational principles of bankruptcy law impose implicit limits.

C. Forum Shopping through Bankruptcy Jurisdiction

1. The New Forum Shopping Problem

The old forum-shopping problem may have been largely abated by the structure of the Bankruptcy Code and the Supreme Court's interpretation of it in *Butner*. The new forum-shopping problem is largely a creature of statute, or, more accurately, the vagaries of the statute. A confusing deployment of terms within Title 28 have permitted bankruptcy courts to assume jurisdiction and power that flaunts the bright constitutional line drawn by the Court in *Marathon*, as well as the longstanding respect for state law in a federalist system.

³⁷ *Marathon*, 458 U.S. at 72.

³⁸ *Id.* at 80.

³⁹ *In re Foundation for New Era Philanthropy*, 201 B.R. 382 (Bankr. E.D. Pa. 1996).

⁴⁰ 1 NORTON BANKR. L. & PRAC. §4:65 (William J. Norton, ed., 2008).

⁴¹ See Cole, *Limiting Liability Through Bankruptcy*, supra note 18, at 1253.

In the hands of an activist bankruptcy judge this development threatens to undo the careful balance between federal and state law crafted over the past 110 years of American bankruptcy law and to spawn a race to the courthouse that could upset long-established principles of tort, property, and contract law that underlie our legal system. There is no evidence that Congress intended the stability of the American legal system and the law of testamentary succession to turn on the whim of Article I bankruptcy judges and a naked hope that judges would use this proffered power responsibly. Instead, although bankruptcy judges' authority is broad, it is not unlimited. There are clear constitutional and statutory limits to rein-in Bankruptcy judges who exceed their authority and it is essential that those restraints be enforced. Otherwise *every* probate court case could be subject to a race to the courthouse as disgruntled claimants seek a rehearing of their state law rights before a bankruptcy judge. Moreover, strategic forum-shopping might not be limited only to debtors, but might also include opportunities for creditors to trigger involuntary bankruptcy proceedings if they believe that the bankruptcy court will provide a more favorable forum.

The dangers of the new forum-shopping problem are dramatically demonstrated than in the recent tabloid-fodder case of *Marshall v. Marshall*.⁴²

2. Forum shopping in *Marshall v. Marshall*

If pulp-fiction novelists or Hollywood screenwriters were engaged to craft an example of pernicious forum shopping from scratch, they would be hard-pressed to envision a more troubling story than *Marshall v. Marshall*. The case is famous, not because of its legal complexities or nuances, but rather for its celebrity litigant. It revolved around the financial affairs of the widow of the late J. Howard Marshall II, namely, Vickie Lynn Marshall, popularly known as Anna Nicole Smith.⁴³

The case, which is more accurately characterized as “cases,” began shortly before the death of J. Howard Marshall II. Marshall had been a successful law professor, lawyer, public servant, and oil company executive over a long and distinguished career.⁴⁴ Marshall met Smith shortly after the second of his two 30-year marriages ended with the death of his second wife.⁴⁵ Smith, an exotic dancer, actress, and 1993 Playboy Magazine Playmate of the Year, met Marshall in 1991 in the Houston club where she performed.⁴⁶ The two married in June 1994, and the sixty-three year difference in their ages gave rise to public speculation that Smith had married Marshall for his money.⁴⁷ The marriage was short-lived. Just thirteen months after marrying Smith, Marshall died, leaving an estate valued by some estimates at over a billion dollars.⁴⁸

⁴² 392 F. 3d 1118 (9th Cir. 2005), reversed and remanded, 547 U.S. 293.

⁴³ *Marshall v. Marshall*, 547 U.S. 293 (2006).

⁴⁴ Respondents Brief, *Marshall v. Marshall*, S.Ct. case no. 04-1544, at

⁴⁵ *Marshall v. Marshall*, 275 B.R. 5, 21-22 (C.D. Cal. 2002).

⁴⁶ *Id.*

⁴⁷ *Marshall v. Marshall*, 547 U.S. at 300.

⁴⁸ *Id.*

The litigation over Marshall's estate actually began before his passing and has lasted almost ten times longer than the star-crossed marriage that spawned it. Four months before his death, Smith filed an action in Texas Probate Court seeking to invalidate Marshall's estate plan.⁴⁹ Marshall, a former Professor at Yale Law School, had crafted in 1982 an estate plan consisting of a "pour-over" will and a living trust which provided for the disposition of Marshall's property.⁵⁰ Marshall gave Smith millions of dollars worth of gifts while he was living, but he never designated her as a beneficiary of the trust.⁵¹ Smith brought the Texas probate action in an attempt to invalidate the trust.⁵²

Three days after Marshall's death, Smith contested the validity of the will and the entire estate plan.⁵³ She further claimed that Marshall had orally promised to give her much more of his estate, and had instructed his attorneys to construct a "catch-all" trust for her benefit, but that this plan was thwarted by Marshall's son, E. Pierce Marshall, leading Smith to subsequently file a charge of tortious interference with an *inter vivos* gift.⁵⁴

The Texas probate case was pending when Smith's activities in another forum interrupted the proceedings. Maria Antonia Cerrato, a former housekeeper and nanny to Smith's child from a prior marriage, filed suit against Smith for sexual harassment and received a default judgment for \$850,000. In January 1996, in response to the judgment, Smith filed for bankruptcy in the U.S. Bankruptcy Court for the Central District of California.⁵⁵ Smith then filed suit in the bankruptcy case against E. Pierce Marshall, again alleging, as she had in her Texas Probate Court action, that he had tortiously interfered with the fulfillment of his father's promise to her.⁵⁶

Smith's bankruptcy filing demonstrates the ease by which a strategic forum-shopper can trump-up jurisdiction in a bankruptcy court and thereby engage into a race to the courthouse to try to get a bankruptcy judge to second-guess a state court judge. The initial judgment for alleged sexual harassment was entered as a default judgment; Smith and the purported victim later settled the suit for an amount that was small enough to relieve her of any further need of bankruptcy to satisfy her creditors.⁵⁷ In fact, the combination of the initial default judgment and the subsequent settlement has raised concerns that the initial suit was manufactured collusively just to create bankruptcy court jurisdiction. And even if not actually a collusive bankruptcy filing here, the facts

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Marshall v. MacIntyre (In re Estate of Marshall)*, prob. juris. noted, no. 276,815-402.

⁵³ *Marshall v. Marshall*, 547 U.S. at 300.

⁵⁴ *Id.* at 300-01.

⁵⁵ *In re Marshall*, 275 B.R. 5, 8 (Bankr. C.D. Cal. 2002).

⁵⁶ *Id.*, see App. 23-25.

⁵⁷ Ronald A. Cass, *Marshall v. Marshall and the Probate Exception to Federal Court Jurisdiction*, http://www.fed-soc.org/doclib/20070322_MarshallvMarshall.pdf.

illustrate the ease by which bankruptcy potentially could be manufactured through collusion.

In early March of 1999, the Bankruptcy Court confirmed Smith's chapter 11 restructuring plan, effectively ending the bankruptcy case.⁵⁸ Nevertheless, even though the Chapter 11 case was concluded and the Texas case was about to commence, the Bankruptcy Court proceeded to adjudicate Smith's tortious interference suit against E. Pierce Marshall. In October 1999, the Bankruptcy Court determined that Pierce Marshall had engaged in discovery abuse and as a sanction barred him from introducing evidence at trial to contradict Smith's assertions. After conducting a five day summary trial and waiting almost a year to issue its decision in September 2000, the Bankruptcy Court held in favor of Smith, concluding that E. Pierce Marshall had fraudulently altered his father's trust, and that as a result Smith "would have received half of the community property but for [his] actions in making . . . the Trust irrevocable."⁵⁹ The Bankruptcy Court reasoned that under its interpretation of Texas law, Marshall's failure to include Smith in his will entitled her to a "widow's election," comprised of "half of the community property that passes through the estate."⁶⁰ Meanwhile, jury selection was about to begin in the Texas Probate Court case.

One month after its initial judgment, the Bankruptcy Court issued a revised opinion, again resting upon the discovery sanction.⁶¹ Contrary to the court's initial determination, it now found that Marshall had intended to transfer a substantial portion of his wealth to Smith, but that, as a discovery sanction, E. Pierce Marshall had tortiously interfered with that plan by firing the lawyer hired to draft the "catch-all" trust for Smith.⁶² With this new ruling, the Bankruptcy Court awarded Smith \$449,754,134 on her Texas law-based tortious interference claim, relying, in part, on the Court's own estimates as to increases in the price of oil.⁶³

E. Pierce Marshall appealed these determinations to the U.S. District Court for the Central District of California.⁶⁴ The District Court vacated the Bankruptcy Court's judgment, agreeing that the Texas law tortious interference lawsuit did not fall within the Bankruptcy Court's "core" bankruptcy jurisdiction under 28 U.S.C. §157.⁶⁵ The District Court rejected E. Pierce Marshall's argument that it lacked jurisdiction under the "probate exception" to federal jurisdiction, and proceeded to adjudicate the Texas law claims *de novo*.⁶⁶

⁵⁸ *In re Marshall*, 253 B.R. 550, 558-59 (Bankr. C.D. Cal. 2000).

⁵⁹ *Id.* at 561.

⁶⁰ *Id.*

⁶¹ *In re Marshall*, 257 B.R. 35 (C.D. Cal. 2000).

⁶² *Id.* at 40.

⁶³ *Id.*

⁶⁴ *In re Marshall*, 275 B.R. 5 (C.D. Cal. 2002).

⁶⁵ *Id.* at 10.

⁶⁶ *Id.* at 50.

Meanwhile, in Texas, the Probate Court proceeded to adjudicate the dispute regarding Marshall's will, including Smith's tortious interference claim against E. Pierce Marshall.⁶⁷ After five months of testimony from over 40 witnesses, including witnesses that E. Pierce Marshall was precluded by sanctions from introducing in the Bankruptcy Court hearings, a Texas jury returned a verdict upholding the validity of Marshall's estate plan, trust and will.⁶⁸ The jury rejected all allegations of impropriety, including Smith's tortious interference claim against E. Pierce Marshall.⁶⁹ In December 2001, the Texas Probate Court entered its final judgment, admitting Marshall's will to probate, finding the trust valid, and dismissing Smith's counterclaims against E. Pierce Marshall.⁷⁰

Shortly after the Texas Probate Court entered its judgment, E. Pierce Marshall filed a motion in the U.S. District Court for the Central District of California to dismiss the Texas-law-based probate claims prior to the start of the trial in Santa Ana.⁷¹ The District Court in California denied the motion, holding that even though the Texas state court proceedings had concluded with a judgment resting upon Texas law, that judgment was not entitled to any preclusive effect on the same claims in federal court.⁷²

Three months after the Texas Probate Court entered its judgment, the U.S. District Court entered its own decision on Smith's Texas-law-based tortious interference claim.⁷³ Although the District Court acknowledged that Texas courts had never recognized a claim for tortious interference with an "expectancy of an *inter vivos* gift," the District Court in Santa Ana nevertheless determined that it would be the first court to so find under Texas law.⁷⁴ The District Court found that Marshall had intended to create a "catch-all" trust for Smith, and that E. Pierce Marshall had tortiously interfered with that plan.⁷⁵ With these findings, directly contradicting the findings of the Texas Probate court jury on the same issues, the District Court awarded Smith \$88,585,534.66 in compensatory and punitive damages.

E. Pierce Marshall appealed the District Court judgment, arguing that probate cases were excepted from federal jurisdiction, and that the Full Faith and Credit Act required the District Court to give preclusive effect to the Texas Probate Court judgment.⁷⁶ The U.S. Court of Appeals for the Ninth Circuit reversed the District Court judgment.⁷⁷ Smith then appealed the case to the Supreme Court.⁷⁸

⁶⁷ *In re* Marshall, 392 F.3d 1118, 1124-25 (9th Cir. 2004).

⁶⁸ *Marshall v. Marshall*, 547 U.S. 293, 294 (2006).

⁶⁹ *In re* Marshall, 392 F. 3d at 1129.

⁷⁰ *Id.*

⁷¹ *Marshall v. Marshall*, 547 U.S. at 294.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 295.

⁷⁵ *Id.* at 304.

⁷⁶ *In re* Marshall, 392 F.3d 1118, 1121 (9th Cir. 2004).

⁷⁷ *Id.* at 1137.

The Court reversed the Ninth Circuit’s dismissal of Smith’s Texas law claim, holding that the “probate exception” did not permit a state court to grant itself exclusive jurisdiction over a state-law-based claim.⁷⁹ The Court remanded the case on the question as to whether the Bankruptcy Court had core jurisdiction over the state law claim, and, in turn, whether it had the power to issue final orders in the case.⁸⁰

In short, *Marshall v. Marshall* is the prototype of a new forum-shopping problem in bankruptcy. As a state court proceeding was underway, one of the parties to that proceeding filed a bankruptcy petition 1,500 miles away. After the bankruptcy case had ended, the bankruptcy court then exercised jurisdiction over the state-law-based claims, and reached a judgment diametrically opposed to that entered by the state court applying its own law. The ruling was unnecessary both as a matter of administration of the bankruptcy estate or as an expedient to avoid undue delay. The case is particularly strange in that the result in the bankruptcy court case was determined by the imposition of sanctions for the failure to cooperate in an action that the Bankruptcy Court should not have heard in the first place. As a result of hearing the case under these terms, the Bankruptcy Court reached a result that was almost certainly incorrect on both the law and the facts, as demonstrated by the contrary result in the fully-litigated state case.

Marshall v. Marshall can accurately be characterized as one dispute between two parties, in two different courts, purportedly applying the same state law but having dramatically different outcomes.⁸¹

This result is possible, perhaps even likely, if the bankruptcy court jurisdiction over the claim is rendered equal to that of the state court, or an Article III federal court. The conclusive and dispositive effect of final orders governing discovery and sanctions produce a potential, as in *Marshall*, for dramatically different outcomes with respect to the same dispute. This “final order” question gives rise to the new forum shopping problem in bankruptcy, and a new question: “when can a bankruptcy court enter final orders?”

II. The Limits of Bankruptcy Jurisdiction

The question of forum shopping now turns on whether the Bankruptcy Court had the power to issue final judgments and orders, such as those sanctioning E. Pierce Marshall and precluding the presentation of evidence. If the Bankruptcy Court has such a power, then it becomes a parallel universe to that existing in state courts under state law, asserting state law, even when state courts have themselves entered final judgments on the same issues. On the other hand, does determination of a state-law-based claim require either state court or an Article III federal court?

⁷⁸ *Marshall v. Marshall*, 545 U.S. 1165 (2005).

⁷⁹ *Marshall v. Marshall*, 547 U.S. 293, 313-14 (2006).

⁸⁰ *Id.* at 315.

⁸¹ *Cf. Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

The answer to this question depends upon statutory construction. Under 28 U.S.C. §157, bankruptcy judges and courts have final order jurisdiction over matters arising from the “public rights” established by Congress pursuant to its authority under Article I, section 8 of the Constitution, and its “bankruptcy clause.” As noted earlier, while the statute bifurcates bankruptcy jurisdiction into core and non-core proceedings, it does not define either category. Instead, it provides a non-exhaustive list of the types of proceedings included in the meaning of “core” proceedings. But his list also includes “other proceedings affecting the liquidation of assets . . . or the adjustment of the debtor-creditor . . . relationship.” In short, it is conceivable that a bankruptcy court, in making the determination as to whether a matter is a “core” proceeding, might rely on this language and sweep into its final order jurisdiction a case wholly reliant upon state law and rights created by it, thereby elevating its powers to those of an Article III federal court.

But even if a court determined that a matter was a “core” matter under §157(b)(1), that determination would not be enough to confer final order jurisdiction on a bankruptcy court. In order to have final order jurisdiction, the bankruptcy court must have before it a “core” matter that also either “arises in” or “arises under” a case under title 11.⁸² The distinction may appear to be a subtle one, but it is one of enormous consequence. To read section 157 as conferring final order jurisdiction upon a bankruptcy court over any core matter, without more, is to expand bankruptcy jurisdiction beyond its constitutional constraints. It is the “arising in” and “arising under” qualifications on final order jurisdiction that bring bankruptcy courts within the bounds of the constitutional limits of their powers.

To understand why an expansive reading of section 157, without imposing the “arising in” or “arising under” qualifications might create the new forum shopping problem, we need to understand how and why the Constitution limits the final order powers of Article I bankruptcy judges.

What makes this core versus non-core determination important for purposes of a discussion of forum-shopping is the potential for a litigant to take advantage of the special circumstances surrounding a bankruptcy case that might alter or dramatically change the outcome that might inhere had the case been litigated in a state court or Article III federal court. The possibility of forum shopping has, for this very reason, long been a concern of legislators and courts confronted with the task of crafting and shaping bankruptcy law. Bankruptcy jurisdiction, and any statutory provision governing it, can only be understood in light of its history. Modern bankruptcy jurisdiction has its roots in title 28 of the U.S. Code, Title 11 (the Bankruptcy Code), and the Supreme Court’s ruling in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*⁸³

A. The Origins of Modern Bankruptcy Jurisdiction

1. Jurisdiction under the Bankruptcy Act of 1898

⁸² 28 U.S.C.A. § 157.

⁸³ *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

The first lasting bankruptcy law ever enacted by Congress was the Bankruptcy Act of 1898 (“the Act”).⁸⁴ The Act was a product of compromise between the interests of agrarian debtors who feared centralized control over debtor-creditor relations, and Northeastern urban bankers, who feared the chaos that persisted when pursuing debt obligations across state lines.⁸⁵ The compromise of the Act was to create a national set of procedures into which the substantive law of the states would be incorporated.⁸⁶ This compromise not only ended the factional log-jam that prevented the passage of a bankruptcy bill; it recognized and solved the forum shopping problem for the very first time.

Although the distinction between procedure and substance under the Act was relatively clear, the jurisdictional scheme was less so. Bankruptcy jurisdiction under the Act was referred to as “summary jurisdiction.”⁸⁷ This type of jurisdiction was to be distinguished from non-bankruptcy federal or state courts, which enjoyed “plenary jurisdiction.”⁸⁸ Summary jurisdiction gave bankruptcy courts subject-matter jurisdiction with respect to proceedings that were central to the administration of the bankruptcy estate, but only some disputes involving rights or property interests affecting the bankruptcy estate.⁸⁹ The determination as to whether a matter fell within a bankruptcy court’s summary jurisdiction rested upon whether the property in question was in the actual or constructive possession of the bankrupt at the time of filing, or whether the relevant third party actually or impliedly consented to the court’s jurisdiction.⁹⁰ If the matter did not fall within the bankruptcy court’s summary jurisdiction then the litigant was required to assert the claim by a “plenary action” in a non-bankruptcy federal or state court.⁹¹

The frequent litigation that arose from this nebulously defined jurisdiction was among the many forces that led Congress to scrap the entire system with the passage of the Bankruptcy Code of 1978.⁹²

2. Jurisdiction under the Bankruptcy Code of 1978

The passage of the Bankruptcy Code brought sweeping change to the bankruptcy system. Congress replaced the office of bankruptcy referee with that of Bankruptcy Judge. For political reasons, however, Congress declined to make the new bankruptcy

⁸⁴ For a history of the short-lived bankruptcy enactments leading up to the Bankruptcy Act of 1898, see Charles Tabb, *A History of Bankruptcy in the United States*, U Illinois Law & Economics Research Paper No. LE05-032 (2005).

⁸⁵ See David Skeel, *Debt’s Dominion: A History of Bankruptcy Law in America* (2001).

⁸⁶ See G. Marcus Cole, *The Federalist Cost of Bankruptcy Exemption Reform*, *supra* note 20.

⁸⁷ See *Katchen v. Landy*, 382 U.S. 323 (1966); 1 NORTON BANKR. L. & PRAC. 3d §4:7 (William L. Norton, Jr., ed., 2008).

⁸⁸ 1 NORTON, §4:7, *supra* note 87.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² 1 HOWARD J. STEINBERG, BANKR. LITIGATION §1:7 (2008) (noting that it has been estimated that as much as 50% of all litigation under the 1898 Act concerned whether a matter was within the bankruptcy court’s summary jurisdiction (citing Marion, *Core Proceedings and “New” Bankruptcy Jurisdiction*, 35 DEPAUL L. REV. 675, 677 (1986)).

judges Article III judges, with all of the protections that portion of the Constitution affords.⁹³ Instead, Congress created the new office of bankruptcy judge and concomitant courts under the powers conferred upon it by Article I, section 8 of the Constitution.⁹⁴ These Article I judges enjoyed responsibilities far exceeding those of the former bankruptcy referees. These new judges exercised plenary jurisdiction to hear any and all cases associated with bankruptcy proceedings.⁹⁵

Despite their sweeping jurisdictional range, these new, Article I bankruptcy judges were not appointed by the President, upon the advice and consent of the Senate, nor were they to serve for life during good behavior.⁹⁶ Unlike their Article III brethren, bankruptcy judges were appointed by the United States Court of Appeals for the Circuit in which they sat, and then only for a term of fourteen years.⁹⁷ Nevertheless, under the system established by the 1978 Code, the new Article I bankruptcy judges could hear and decide a virtually unlimited spectrum of cases.⁹⁸

3. The Unconstitutional Bankruptcy Code: *Marathon* and the Emergency Rule

This long arm of bankruptcy jurisdiction was exercised after passage of the Bankruptcy Code until it was sharply slapped into restraint in 1982. As noted above, in *Marathon*, the Supreme Court struck down the Bankruptcy Code of 1978 and its jurisdictional scheme as unconstitutional because as a non-Article III court, a bankruptcy court could not constitutionally be vested with jurisdiction to decide the state law contract claim raised in the case.⁹⁹ Since there was no way to excise the unconstitutional grant of authority to bankruptcy courts from the rest of the Bankruptcy Code without rewriting it, the Court struck down the entire code as unconstitutional.

The Court's ruling in *Marathon* plunged the entire bankruptcy system into chaos. Bankruptcy cases already in the system had to be administered, but could not be administered under unconstitutional legislation. To address the backlog of pending bankruptcy cases, as well as those likely to be filed while awaiting Congressional action to enact a new Code, the Judicial Conference of the United States met to craft an interim solution.

The federal judiciary adopted an "emergency rule," to operate as a rule of court, to administer bankruptcy cases.¹⁰⁰ Under the Emergency Rule, adopted by the all of the

⁹³ The Article III federal judiciary vehemently opposed the dramatic expansion of its ranks, as would have been the case had the new bankruptcy judges been afforded Article II status. See Skeel, *supra* note 85, at 157-59.

⁹⁴ Article I of the Constitution details the powers of Congress, and Article 8 lists those powers, including the power to establish "uniform laws concerning Bankruptcies."

⁹⁵ 28 U.S.C. § 152 (1992).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ 1 NORTON BANKR. L. & PRAC. 3d §1:8 (William L. Norton, Jr., ed., 2008).

⁹⁹ Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 87 (1982).

¹⁰⁰ See In the Matter of Emergency Bankruptcy Rule 1 (S.D. N.Y. 1982).

U.S. District Courts after the 1982 *Marathon* decision, all bankruptcy cases were to be filed in the district court, an Article III court. The Article III district court could then refer the matter to a bankruptcy judge operating as a type of special master to the district court. As a special master, the bankruptcy court could not make final determinations about the types of matters over which Article III reserves the judicial power of the United States.¹⁰¹ Instead, the Article I special master could only make proposed findings of fact and determinations of law.¹⁰² These proposed findings must then be considered by the district court, which then must review these findings and determinations *de novo*.¹⁰³ Only district courts, courts of appeals, and Supreme Court, as Article III courts, are vested with the authority to enter final orders with respect to matters reserved for the judicial power under the Constitution.¹⁰⁴

The bankruptcy system operated under the Emergency Rule and its special master reference system for two years while Congress mulled the *Marathon* decision and its implications. One possible solution was to make all bankruptcy judges Article III judges. Congress flatly rejected that proposal.¹⁰⁵ Instead, Congress noted that the Emergency Rule adopted by the federal district courts appeared to operate quite well, despite its awkward jurisdictional arrangement. In 1984, Congress enacted the present jurisdictional scheme for bankruptcy by adopting the Emergency Rule as a permanent solution to the constitutional questions surrounding bankruptcy jurisdiction.¹⁰⁶

4. Modern Bankruptcy Jurisdiction

The present structure of bankruptcy jurisdiction cannot be understood without understanding the three statutory provisions that give it life. Title 28 of the U.S. Code governs jurisdictional matters, and the three provisions allocating judicial power under it are sections 151, 1334, and 157. These three provisions establish a jurisdictional structure under which bankruptcy courts are a unit of the district court, supervised and administered by the district court. Bankruptcy judges, however, are not Article III district court judges, but are instead designated by the district court to hear cases referred to them by the district court. All U.S. district courts, by operation of local rules, automatically refer bankruptcy petitions filed with their respective clerks of courts office to the district's bankruptcy court.¹⁰⁷ This "automatic reference" system is loosely supervised by

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 88 (1982).

¹⁰⁵ Vern Countryman, *Scrambling to Define Bankruptcy Court Jurisdiction: The Chief Justice, The Judicial Conference and the Legislative Process*, 22 HARV. J. ON LEGIS. 1, 29-45 (1985).

¹⁰⁶ *Id.*

¹⁰⁷ On two noteworthy occasions, the U.S. District Court for the District of Delaware withdrew the automatic reference to its bankruptcy court, in order to stem the explosion of corporate filings in Delaware, and in response to criticism that the Delaware bankruptcy judges were encouraging forum-shopping by corporate debtors. See G. Marcus Cole, "'Delaware is Not a State': Are We Witnessing Jurisdictional Competition in Bankruptcy?," 55 Vand. L. Rev. 1845 (2002)(examining the explanations offered by lawyers and judges for the rise in Delaware bankruptcy cases).

the judges of the district court, and complies with the constitutional requirement that the Article III district courts be the courts of original jurisdiction.¹⁰⁸

With the automatic reference system, the bankruptcy judge today is similar to the “special master” under the emergency rule. In fact, the Supreme Court suggested in *Marathon* that to the extent that the bankruptcy judge was acting as something more than a special master—such as by making final orders rather than findings of fact to be reviewed on appeal—this would be constitutionally infirm.¹⁰⁹ For this reason, a withdrawal of the automatic reference renders the core versus non-core distinction irrelevant, because an Article III judge can hear and issue final orders in any case.¹¹⁰ Moreover, because the automatic reference is rarely withdrawn, the distinction between core proceedings and non-core proceedings is critically important. This is because, under 28 U.S.C. §157(b)(1), Article I bankruptcy judges have the power to issue final orders only in core proceedings.¹¹¹

The determination as to whether a matter is a core or non-core proceeding also affects the standard of review exercised by the district court. Under 28 U.S.C. §158(a), district courts exercise ordinary appellate jurisdiction over final orders entered by a bankruptcy court with respect to core proceedings.¹¹² Ordinary appellate jurisdiction for core matters carries with it deference to the findings of the court below.¹¹³ For non-core matters, by contrast, the appellate courts apply *de novo* review. Thus, the determination of whether a matter is core or non-core is essential to the determination of the scrutiny that Article III judges apply on appeal as well as the finality of the Bankruptcy Court’s ruling.

5. *In re Wood* and Constitutional Core Jurisdiction

Whether a matter is a core proceeding and therefore worthy of deference upon review, is perhaps the most important question confronting any court concerned about the new forum-shopping problem. In the case of *In re Wood*, the Fifth Circuit explored the limits *Marathon* places on the broad grant of bankruptcy jurisdiction implied by the statutory framework.¹¹⁴

Wood involved a dispute between the stockholders of a closely held medical clinic. When married directors filed for bankruptcy, another stockholder disputed distributions made to one of the debtors.¹¹⁵ The bankruptcy court ruled that the matter was a core matter, falling within the bankruptcy court’s jurisdiction, which the defendants

¹⁰⁸ *Id.*

¹⁰⁹ Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 78 (1982).

¹¹⁰ *Id.* at 86.

¹¹¹ 28 U.S.C. §157(b)(1).

¹¹² 28 U.S.C. §158(a).

¹¹³ *Id.*

¹¹⁴ *In re Wood*, 825 F.2d 90 (5th Cir. 1987).

¹¹⁵ *Id.* at 91.

appealed. The district court ruled that the bankruptcy court lacked subject matter jurisdiction over the dispute and thus had neither core nor non-core jurisdiction over the state-law-based dispute, from which the plaintiffs appealed to the court of appeals. The Fifth Circuit ruled that both lower courts erred.¹¹⁶

The *Wood* court explained that bankruptcy jurisdiction under 28 U.S.C. §157 was neither as broad as the bankruptcy court had hoped, nor as narrow as the district court had envisioned. Instead, it was somewhere in between.

To understand the jurisdiction of bankruptcy courts, we need to understand the statutory provisions from which that jurisdiction draws life. As the *Wood* court explained, 28 U.S.C. §1334(b) lists four types of matters over which bankruptcy courts have jurisdiction:

1. “cases under title 11,”
2. “proceedings arising under title 11,”
3. proceedings “arising in” a case under title 11, and
4. proceedings “related to” a case under title 11.¹¹⁷

The *Wood* court noted that “[t]he first category refers merely to the bankruptcy petition itself.”¹¹⁸ The difficulty stems from the meaning of the other types of matters listed. Since there is very little legislative history of the Bankruptcy Amendments of 1984 from which an interpretation might be gleaned, the *Wood* court turned to the legislative history of the prior jurisdictional structure. That made sense, since the language of §1334(b) “was taken verbatim from section 1471 of the 1978 Act.”¹¹⁹ That history revealed that Congress was concerned with the inefficiencies of piecemeal adjudication of matters affecting the administration of bankruptcy cases, and wanted to marshal all related matters into one forum.¹²⁰ Accordingly, the *Wood* court held that bankruptcy jurisdiction, under section 157, is necessarily broad, encompassing any proceedings having any “conceivable effect on the estate.”¹²¹ This meant that the district court erred when it held that the state-based contract claim was outside the jurisdiction of the bankruptcy court.¹²²

This holding, however, did not affirm the bankruptcy court’s jurisdictional determination either. Although bankruptcy jurisdiction is necessarily broad, it does not follow that the powers of the bankruptcy court are likewise broad. The *Wood* court

¹¹⁶ *Id.* at 98.

¹¹⁷ *Id.* at 92.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 93.

¹²² *Id.*

explained that the *Marathon* decision that prompted the 1984 amendments to the bankruptcy code meant nothing if not that an Article I bankruptcy judge does not have powers co-extensive with those enjoyed by Article III judges. To hold otherwise would be “a result contrary to the ostensible purpose of the 1984 Act.”¹²³

To read the 1984 amendments in a way that conformed to the holding of *Marathon*, the *Wood* court articulated a more modest vision of bankruptcy jurisdiction. Bankruptcy judges, as Article I judges, could hear non-core proceedings. They could not, however, issue final orders or judgments in those proceedings. Instead, their power in such matters was limited to submitting “proposed findings of fact and conclusions of law to the district court.”¹²⁴

By holding that bankruptcy courts had more limited powers when hearing cases related to but independent of bankruptcy created rights, the *Wood* court refused to read 28 U.S.C. §157(b)(2)(O) unduly expansively, as the language might imply. That subsection offers, as one example within the non-exclusive list of examples of core proceedings, that core proceedings include “other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship”¹²⁵ To read this subsection expansively, according to the court in *Wood*, would cause “the entire range of proceedings under bankruptcy jurisdiction [to] fall within the scope of core proceedings.”¹²⁶ Such a result would ignore the constitutional limits recognized by *Marathon*, and Congress’s responsibility to bring bankruptcy legislation in line with its holding.

III. The Logical Limits of Bankruptcy Jurisdiction

Strong policy considerations, reflected in the plain language of the jurisdictional statutes governing bankruptcy courts, support the Supreme Court’s concern in *Marathon* that certain matters are properly heard by an Article III judge (or the state equivalent) rather than by a Bankruptcy Judge. The Framers showed great care in designing the Article III federal judiciary and particularly the structural protections for individual rights and the effective administration of justice embedded therein, including life tenure and undiminishable remuneration. Article I bankruptcy judges, by contrast, lack both of these protections. This distinction is not trivial—the Framers plainly understood that the protections of judicial independence and competence were essential to the proper and unbiased administration of justice.

A. The Plain Meaning of Sections 157(b)(1) and (2)

¹²³ *Id.* at 95.

¹²⁴ *Id.*

¹²⁵ 28 U.S.C. §157(b)(2)(O).

¹²⁶ *In re Wood*, 825 F.2d 90, 95 (5th Cir. 1987).

The natural reading of Section 157(b), in fact, both vindicates the plain meaning of the statute while also addressing and resolving forum shopping concerns. Section 157(b)(1) can be interpreted as meaning something it very plainly says: that in order for a bankruptcy court to exercise final order jurisdiction over a matter (i.e., enter a final order subject only to ordinary appellate review versus recommended findings of fact and conclusions of law), the matter must be a “core proceeding[] arising under title 11, or arising in a case under title 11.” Thus, under section 157(b)(1), the matter must be either (1) a core proceeding that arises under title 11, or (2) a core proceeding that arises in a case under title 11.

In other words, it is not sufficient for purposes of section 157(b)(1) that a matter is a core proceeding as defined under section 157(b)(2). It must be a core proceeding that *also either arises under title 11 or arises in a case under title 11*. In short, the party asserting bankruptcy jurisdiction must demonstrate not only that the matter is “core” within the meaning of section 157(b)(2), but must also demonstrate that it “arises under” or “arises in” a case under title 11. Such a reading limits the breadth of the definition of “core” matters in 157(b)(2) to proper constitutional dimensions by requiring that the matter must also “arise under” or “arise in” within the meaning of section 157(b)(1).

This reading is also supported by at least two canons of statutory construction. First, it is supported by the canon of not treating words of a statute as superfluous.¹²⁷ Section 157(b)(1) does not grant jurisdiction over matters that are core. It grants jurisdiction over core proceedings that “arise under” or “arise in” Title 11. Limiting the analysis to whether a matter is core reads the “arise under” or “arise in” text out of the statute. Section 157(b)(2) defines core proceedings. It does not define the terms arising under or arising in. But these terms have established meanings as the *Wood* case describes.

Second, this reading is supported by the canon that where possible statutes should be interpreted to avoid constitutional conflicts.¹²⁸ An expansive reading of section 157(b)(1) as conferring jurisdiction broadly over all core matters runs smack into the *Marathon* problem of giving bankruptcy judges authority to render final judgments on private right controversies such as the state law claims in *Marshall*. A more restrictive reading of section 157(b)(1) as limited to core matters that either “arise under” or “arise in” avoids the constitutional problem by denying the bankruptcy courts authority to enter final judgments in such cases.

In *Marshall*, a plain reading of the statute would have prevented the attempted forum shopping, or dramatically mitigated its effects. Because the bankruptcy court lacked jurisdiction to enter a final judgment, its \$474 million judgment would not have been enforceable as a final judgment otherwise would have been. At most, the bankruptcy court's opinion was properly an unenforceable recommended ruling. Because the \$474 million judgment could not be enforced, there would have been no

¹²⁷ *Lamie v. United States Tr.*, 540 U.S. 526 (2004); *Negonsott v. Samuels*, 507 U.S. 99 (1993).

¹²⁸ *See United States v. Security Indus. Bank*, 459 U.S. 70 (1982); *see also Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988); *Andrus v. Glover Constr. Co.*, 446 U.S. 608 (1980).

need to bond it over to prevent enforcement.¹²⁹ But even though the Bankruptcy Judge’s opinion was only a recommendation, the bond itself was so large in *Marshall* that the bankruptcy court’s ruling effectively amounted to a final judgment because it would have been economically unfeasible to appeal the ruling. In such a situation, the party against whom it is entered has to capitulate simply because of the sheer magnitude of the liability and the inability to bond it over.

Ultimately, if the bankruptcy court in *Marshall* lacks the power to enter final orders, the district court bears that responsibility. Again, this would have made an enormous difference in *Marshall*. The fact that the district judge entered a final judgment almost \$400 million lower than the bankruptcy judge’s award dramatically illustrates this point.

The Bankruptcy Court in *Marshall* believed that it could avoid the constitutional and statutory issues because Pierce Marshall filed a proof of claim in the case.¹³⁰ But the happenstance that Smith’s suit technically arose as a counterclaim to a proof of claim cannot convert that lawsuit into a core proceeding. Were *Marshall* to have initiated a tortious interference with contract claim against Pierce Marshall, that plainly would fall outside of the bankruptcy court’s “core” jurisdiction. That it instead arose as a permissive counterclaim—unrelated to the validity of the underlying proof of claim—cannot change its essential nature as a non-core proceeding. Were the claim a compulsory counterclaim then an argument could be made (although we would have doubts) that it was sufficiently intertwined with the resolution of the proof of claim that it could be a core proceeding. But the claim in *Marshall* was not a compulsory counterclaim because it did not involve adjudication of the same essential facts at the proof of claim.¹³¹ The definition of a core versus non-core proceeding is a question of judicial power that parties cannot create by private action, any more than they can create federal subject-matter jurisdiction by private action. Nor is “core” status an affirmative defense that can be waived by filing a proof of claim.¹³² Thus, the mere happenstance that Smith’s claim arose as an unrelated counterclaim to a filed proof of claim cannot convert the proceeding into a core proceeding when the underlying claim itself could not have been core in the first instance.¹³³

Similarly, because the bankruptcy court lacked jurisdiction to enter a final judgment, its judgment was not entitled to *res judicata* or collateral estoppel effect. This permits any intervening non-bankruptcy court final judgment (such as the Texas probate court) to take precedence. In *Marshall*, this would have meant that the judgment of the Texas Probate court would have had preclusive effect on the bankruptcy proceedings in California.

¹²⁹ *Marshall v. Marshall*, 547 U.S. 293, 315 (2006).

¹³⁰ **cite**

¹³¹ *Marshall*, 264 B.R. at 630-31.

¹³² **Cite supreme court case on section 106 waiver (seminole tribe maybe?)**

¹³³ *Dunmore v. United States*, 358 F.3d 1101 (9th Cir. 2004).

Under the federal full faith and credit statute, state judicial proceedings “shall have the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such State ... from which they are taken.”¹³⁴ In turn, the preclusive effect of a state law judgment is established by the state’s law governing preclusion.¹³⁵ It is well-established that issue preclusion principles apply in bankruptcy proceedings.¹³⁶ In this case, the denial of Smith’s claim by the Texas court plainly would have had preclusive effect in Texas state court, and hence, in bankruptcy court as well.¹³⁷ Under Texas law, Smith’s tort claims arising from the will contest would be precluded.¹³⁸

Providing deference to Texas courts in interpreting and applying their own laws is also good sense. The need for swiftness and finality in bankruptcy court proceedings often necessitates compromise of other judicial values, such as thoroughness and accuracy. Yet, these are compromises to be tolerated where necessary, not glorified as a matter of course. Where such compromises are unnecessary, they should be avoided in favor of superior processes. Texas courts have an obvious comparative expertise in adjudicating disputes that arise under Texas law. The Texas case was already underway and permitting that proceeding to proceed to resolution would have minimally delayed the resolution of Smith’s bankruptcy case. Moreover, rather than deferring to the superior expertise of Texas courts the Los Angeles bankruptcy judge in *Marshall* engaged in free-lance legal interpretation of Texas law, making path-breaking, unprecedented determinations of Texas law. The Texas probate court conducted a five month jury trial with dozens of witnesses (including 6 days of testimony from Ms. Smith) before concluding that the millions of dollars in gifts Marshall bestowed upon his bride were the full extent of his intended generosity and dismissed Smith’s charge that she had been defrauded out of a larger share of Marshall’s estate. By contrast, the federal bankruptcy judge awarded her a total of \$474 million (after a five day court hearing), which was later reduced to \$88 million on appeal (after a still more summary hearing).

In short, it is cases such as *Marshall* that underlay the logic of *Marathon*. Bankruptcy judges unquestionably are highly competent, skilled professionals, as are administrative judges, immigration judges, Magistrate judges, and other non-Article III judges. Nonetheless, these judges may lack the broader perspective and independence that Article III guarantees, including recognition of the important values of comity between the state and federal judicial systems. *Marathon* requires that the cumbersome process and formal protections of Article III be followed even where this seems to be unnecessary, as will appear the case in many situations. Nonetheless Article III oversight

¹³⁴ 28 U.S.C. §1738.

¹³⁵ *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985).

¹³⁶ *Grogan v. Garner*, 498 U.S. 278, 284.

¹³⁷ See *Ingersoll-Rand Co. v. Valero Energy Corp.*, 997 S.W.2d 203 (Tex. 1999); see also *In re Garner*, 56 F.3d 677 (5th Cir. 1995) (citing *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816 (Tex. 1984)), *abrogated on other grounds*, *In re Caton*, 157 F.3d 1030.

¹³⁸ See *Thompson v. Deloitte & Touche, L.L.P.*, 902 S.W.2d 13, 16 (Tex. App. 1995); *Neill v. Yett*, 746 S.W.2d 32, 35-36 (Tex. App. 1988). The District Court in *Marshall v. Marshall* held that Smith’s claims were not precluded by Texas law, but this was premised on the idea that the Texas judgment was not final at the time the bankruptcy court’s judgment was entered. *Marshall*, 271 B.R. at 864-66. Had the probate court’s judgment been final before the bankruptcy court acted, there seems to be little doubt that it would have had preclusive effect over her claims.

is required precisely for situations such as *Marshall* when judicial self-restraint breaks down. The guarantee of Article III review before such matters becomes final is a sort of “backstop” when Article I courts go awry as a result of parochialism or otherwise. Congress is entitled to create rights under the Bankruptcy Code and have them enforced by Bankruptcy Judges; Congress may not, however, do so with rights that arise outside the Bankruptcy Code. Section 157 strikes this balance by treating Bankruptcy Court decisions as non-final recommendations when pertaining to non-core matters. While this balance may seem over-inclusive in many situations, that is what both the statute and the Constitution requires.

B. Policies Underlying Article III and the Constitutional Limitations of the Bankruptcy Bench

Article III establishes a particular, albeit an admittedly imperfect, incentive structure for judges exercising the judicial power. In Federalist 78, Alexander Hamilton referred to the judiciary as the “least dangerous” branch of government, because it held the least capacity to infringe upon individual constitutional rights.¹³⁹ He reasoned that its power to do harm was limited to the authority of its judgments.¹⁴⁰ This characterization of the judiciary turned, in part, upon Hamilton’s vision of an independent judiciary. By independence, Hamilton insisted that it was necessary that judges serve during good behavior, and as explained in Federalist 79, without risk to their fiscal support.¹⁴¹ According to Hamilton, “the power over a man’s subsistence amounts to a power over his will.”¹⁴²

Article III prevents certain considerations from influencing the judgment of judges. Judges and courts created pursuant to Congress’s authority under Article I, by contrast, lack these protections. And even when parties consent to jurisdiction, some courts have recently limited the decision-making authority of Article I courts under the Constitution.¹⁴³ There are several notable differences between Article I and Article III judges.

First, bankruptcy cases are often more abbreviated than non-bankruptcy proceedings. Bankruptcy judges are often more sensitive to the typically limited resources at issue in bankruptcy, which may give rise to more streamlined, summary processes. As noted, this is an accommodation to the needs of speedy and final resolution in bankruptcy, but it is not ideal when no such haste and informality is necessary. There is no reason to substitute the summary proceedings of bankruptcy courts when a more thorough and accurate process is available with minimal delay.

¹³⁹ The Federalist, No. 78 (Alexander Hamilton).

¹⁴⁰ *Id.*

¹⁴¹ The Federalist, No. 79 (Alexander Hamilton).

¹⁴² *Id.*

¹⁴³ See *United States v. Johnson*, 258 F.3d 361 (5th Cir. 2001)(limiting the authority of Article I magistrate judges to review district court determinations in criminal proceedings under 28 U.S.C. §2255 as unconstitutional).

Second, bankruptcy judges are appointed by the United States Court of Appeals for the circuit in which they sit, and not by the President upon the advice and consent of the Senate. Bankruptcy judges serve for a limited term of 14 years, to which they may be reappointed, but is limited nevertheless.¹⁴⁴ Moreover, the process for reappointment of Bankruptcy Judges is highly opaque and depends on currying favor with the local bankruptcy bar. In general, of course, local bankruptcy lawyers are going to prefer judges who assert their jurisdiction authority broadly, thereby bringing major high-profile—and large-fee generating—cases (such as *Marshall*) to their district.¹⁴⁵ And unlike Article III judges who serve for life subject to their “good Behaviour” and cannot have their salary reduced during their time in office, bankruptcy judges may be removed for “incompetence, misconduct, neglect of duty, or physical or mental disability.”¹⁴⁶ This principle of the heightened independence of Article III judges relative to Article I judges was a cornerstone of the Supreme Court’s decision in *Marathon*.¹⁴⁷

All of these characteristics could, conceivably, cause the incentive structure of bankruptcy judges to differ in unfavorable ways from that of Article III judges. Term judges could be seeking reappointment, promotion to an Article III judgeship, fame for purposes of post judicial employment, or other goals unrelated to an unbiased judgment of the cases before them.¹⁴⁸ Scholars have argued that bankruptcy judges have an incentive to compete to hear high-profile cases even when those cases and the justice system would benefit from having those cases heard elsewhere.¹⁴⁹

And while Bankruptcy Judges possess the expertise essential to the efficient operation of the bankruptcy system, their narrow focus and specialized jurisdiction may blind them to the larger social and legal context in which they operate, causing them to overweigh bankruptcy concerns and policies relative to other social, economic, and judicial values. Supervision by Article III judges of general jurisdiction provides a broader perspective on such issues, thereby counterbalancing a tendency toward a parochial “bankruptcy-centric” perspective that can arise and lead bankruptcy judges to undervalue other important systemic and substantive values of the legal system. The accommodation of comity for state courts, for instance, is reflected in a variety of limits on the power of federal courts to resolve disputes grounded in state law, such as limitations on diversity jurisdiction and the highly-circumscribed grounds for pendent

¹⁴⁴ One study estimates that approximately 8% of bankruptcy judges were formally denied reappointment for a second term, but that the percentage may be as high as 26% when considering those who appear to have had reappointment denied informally or were induced to retire. See Judith Resnik, “*Uncle Sam Modernizes His Justice*”: *Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L. J. 607, 675 (citing Stan Bernstein, *The Reappointment of Bankruptcy Judges: A Preliminary Analysis of the Present Process* (unpublished manuscript)).

¹⁴⁵ See Todd J. Zywicki, *Is Forum-Shopping Corrupting America’s Bankruptcy Courts?*, 94 GEO. L. J. 1141, 1180-85 (2006).

¹⁴⁶ 28 U.S.C. §152(e).

¹⁴⁷ *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 60-61 (1982). Some commentators have argued that the Supreme Court’s concern about the independence of Bankruptcy Judges is overstated. See Plank, *supra* note 17, at 620-29.

¹⁴⁸ Resnik, *supra* note 144, at 672-73 Resnik notes that it has become increasingly common for Article I Bankruptcy and Magistrate judges subsequently to be promoted to district and appellate judgeships.

¹⁴⁹ See LYNN M. LOPUCKI, *COURTING FAILURE: HOW COMPETITION OF BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS* 20 (2005).

jurisdiction over state law claims. Various abstention doctrines further illustrate this principle of deference to state courts in matters of state law.

Bankruptcy jurisdiction, by contrast, is very broad as a matter of statutory grant. And, as the Supreme Court held in the *Marshall* appeal in narrowly-construing the probate exception to the bankruptcy laws, as a matter of plenary power bankruptcy courts must have broad power to resolve matters affecting the administration of the estate. But that a broad grant of jurisdiction may be necessary does not mean that bankruptcy judges *should* interfere in every dispute that could conceivably affect the administration of an estate. Rather it highlights the fundamental question raised by the bankruptcy judge's actions in *Marshall*—the crucial need for self-restraint by bankruptcy judges to respect other values in the American legal system, such as comity for other actors and the prevention of improper forum-shopping. Where self-restraint is lacking and bankruptcy judges overreach to address issues that fundamentally relate to the private rights of individuals rather than the timely administration of the bankruptcy estate and unduly infringes on state court interpretations of their own laws, the constitutional and statutory scheme renders these judgments advisory only, not final orders. Indeed, the Constitution itself compels this.

More fundamentally, it is crucial to enforce the boundary between the authority of Article I and Article III judges to prevent Congress from circumventing the structural protections created by the Constitution by assigning authority to Article I judges to resolve issues properly reserved to Article III judges. Similarly, appellate courts must enforce this boundary to prevent circumvention by Congress or judges such as essentially interpreting private rights by recharacterizing them as public rights or inherent judicial powers.¹⁵⁰

Whatever the rationales, both the Framers and the Supreme Court have recognized the importance of the Article III framework for reliably unbiased and authoritative adjudication of disputes. The outcome of *Marshall v. Marshall* provides an instructive example of the ways in which the incentive structure associated with Article I might dramatically affect the outcome of a dispute rooted in state law. For instance, the bankruptcy judge in the case held what has been characterized as a press conference in open court, fielding questions from the media.¹⁵¹ Of course, the media attention was largely a product of the celebrity status of the debtor, Anna Nicole Smith. It may not be unusual for a bankruptcy judge to field questions from the press in open court—although the authors have never heard of it— but it would be naïve to suggest that such behavior was unrelated to the celebrity of the debtor. Many cases, both in district as well as bankruptcy court, receive substantial media attention, but the judge's behavior in catering to and apparently seeking this attention is nonetheless unusual.

Second, the court in *Marshall* issued discovery sanctions upon the less celebrated party in the case, sanctions that were ultimately overturned on appeal, but were

¹⁵⁰ See, e.g., Resnik, *supra* note 144, at 668-69.

¹⁵¹ *Marshall v. Marshall*, S.Ct. No. 04-1544, Brief for Repondent at 6 (noting that at one point, a reporter from *Newsweek* magazine took the podium and posed questions regarding the case). *Id.* at 6, n. 7.

nevertheless dispositive in establishing the factual predicate upon which legal determinations in favor of the celebrity debtor were reached. While sanctions are occasionally overturned, their severity and conclusory nature, when coupled with other questionable judicial conduct, undermine the authority underlying the exercise of judicial power in the case.

A third example of behavior uncharacteristic of Article III judges is less obvious, but telling. In *Marshall*, the Texas Probate jury had handed down its findings after five months of deliberations, based upon determinations of Texas law made by a Texas court.¹⁵² Nevertheless, the bankruptcy court in *Marshall*, refused to abstain and refused to give deference to the state court adjudication already concluded. Instead, the bankruptcy court thought it an appropriate use of judicial and debtor resources to adjudicate the dispute anew, with limited evidence, all while making path-breaking, unprecedented determinations of Texas law. While the court arguably was under no obligation to abstain from the matter, it *unarguably* was under no obligation to decide the matter either, and the arguments for refusing to abstain well after the close of the underlying bankruptcy case are unpersuasive, at best. At worst, they appear to stem from the court's dissatisfaction with the outcome of the state court proceedings.

There is no reason to believe that Congress or the Court in *Marathon* intended the perverse incentives created by the bankruptcy judge's actions in *Marshall*. Under *Marshall* every probate dispute could be swept into warring judicial processes to be manipulated by savvy bankruptcy filers. There is no reason to believe that, in establishing the jurisdiction of the federal bankruptcy courts, Congress intended for the resolution of multi-billion dollar probate disputes to turn on the relative speed by which they are resolved, rather than the thoroughness, accuracy, and expertise of the court hearing it. In fact, upon learning of the determination of the California Bankruptcy Court to rush forward with its trial, Judge Mike Wood who presided over the probate trial in Texas state court told the attorneys, "If this were a bankruptcy court in Texas that judge would send you back to probate court and say, 'Let me know when you are finished.'"¹⁵³ Such deference is typical in such situations, which explains why the Bankruptcy Judge's behavior in this case can be seen as so unusual.

Rather than relying on Texas courts to administer Texas law in a forum with Texas witnesses and judges, a federal bankruptcy judge over a thousand miles away issued an order after a summary hearing and a series of questionable interpretations of Texas probate law. *Marshall* potentially raises the specter of such a race to the courthouse in every probate case—and the principle potentially extends beyond probate to all issues of traditional state law including tort, contracts, and property. Bankruptcy law and state probate law have peacefully coexisted for over a century and it is difficult

¹⁵² *Id.* at 294.

¹⁵³ Jill Smolowe, *Estate of the Union: Bereaved by Unbowed, Model Anna Nicole Smith Wages Battle to Claim a Portion of the Millions Left by Her Ninetysomething Oil-Tycoon Husband*, 52 PEOPLE No. 19 (Nov. 15, 1999), available in <http://www.people.com/people/archive/article/0,,20129774,00.html>

to believe that Congress intended such a radical departure from this harmony, especially when doing so would create such perverse policy results for little obvious advantage.¹⁵⁴

Professor Troy McKenzie recently has pointed to many of these same factors and concluded that Bankruptcy Judges increasingly act with a degree of authority and discretion more fitting of Article III judges.¹⁵⁵ He notes, for instance, the vast powers carried out by Bankruptcy Judges and their relative immunity to review by superior Article III courts.¹⁵⁶ He also argues that because Bankruptcy Judges are chosen by a merit-selection process rather than a political process, Bankruptcy Judges may be even more insulated from political pressures.¹⁵⁷ McKenzie argues that the Supreme Court should retreat from its efforts to police the boundaries of *Marathon* (and implicitly, the core versus non-core distinction).

We agree with McKenzie's observation that Bankruptcy Courts today exercise a scope of authority in practice that exceeds that contemplated by *Marathon*. But we disagree with his sanguinity toward this development. We instead support a greater degree of self-restraint by bankruptcy judges about the exercise of their powers and tighter oversight by Article III judges. For instance, MacKenzie argues that bankruptcy judges are subject to an appointments process that may be less political in nature than that for Article III judges. This is not obvious—research indicates, for instance, that so-called “merit selection” of state judges does not remove political pressures on appointments but simply redistributes it to other venues (such as bar politics) that may be political as well, just in different ways.¹⁵⁸

Even if true, it does not address the concern about the political issues involved in *reappointment* of bankruptcy judges or the potential for bankruptcy judges to leave the bench at the end of their term and enter private practice. McKenzie acknowledges that these pressures might lead to the capture of bankruptcy judges by the bankruptcy bar.¹⁵⁹ Scholars who have studied other specialized courts, such as the Federal Circuit, have found a tendency for those courts to succumb to capture by repeat-players that appear before them.¹⁶⁰ Once an Article III is appointed—even if the initial process is highly-politicized—the judge is immune from future political pressure. Bankruptcy Judges, by

¹⁵⁴ Cf. *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 542 (1994) (noting that courts should be reluctant to infer Congressional intent to disrupt the “ancient harmony” between state debtor-creditor law and federal bankruptcy law).

¹⁵⁵ Troy McKenzie, *Judicial Independence, Autonomy, and The Bankruptcy Courts*, working paper.

¹⁵⁶ *Id.* at 29.

¹⁵⁷ *Id.* at 45.

¹⁵⁸ See Todd J. Zywicki, *Public Choice and Tort Reform* (working paper, George Mason University School of Law) (2000) (discussing state judicial “merit selection” programs).

¹⁵⁹ McKenzie, *supra* note, at 50.

¹⁶⁰ Stuart Minor Benjamin & Arti K. Rai, *Fixing Innovation Policy: A Structural Perspective*, 77 GEO. WASH. L. REV. 1, 17-18 (2008); Arti K. Rai, *Engaging Facts and Policy: A Multi-Institutional Approach to Patent System Reform*, 103 COLUM. L. REV. 1035, 1110 (2003); John R. Thomas, *Formalism at the Federal Circuit*, 52 AM. U. L. REV. 771, 792-94 (2003) (discussing how the Federal Circuit’s “jurisprudence increasingly reflects a trend towards adjudicative rule formalism,” which is explained in part as a response to the “lawyers [who] draft the exclusionary rules that are patent claims”).

contrast, know that they will be held accountable one way or the other at the end of their term and this fear casts a shadow over their behavior.

IV. Conclusion: A Modest Approach to Bankruptcy Jurisdiction

The federal courts today are now confronted with a new form of forum shopping in bankruptcy. Litigants concerned with the likelihood of success in state or federal non-bankruptcy courts can race to the courthouse, file a bankruptcy petition, and take their chances in a more streamlined, less thorough, and often resource constrained bankruptcy process, administered by Article I bankruptcy judges. The statutory grant of bankruptcy court jurisdiction can be construed broadly, and as *Marshall's* facts suggest, can be easily manipulated. Once jurisdiction is established, the primary restraint on strategic forum-shopping is the self-restraint of the bankruptcy judge. Where the bankruptcy judge fails to exercise proper restraint, however, it is the duty of Article III judges to intervene to enforce those limitations. The Supreme Court has long ago determined that the powers of a bankruptcy court are not co-extensive with those of Article III federal courts, or state courts with plenary jurisdiction over private rights conferred by state law. Congress acknowledged these constitutional limitations on bankruptcy jurisdiction by enacting the 1984 amendments to the Bankruptcy Code of 1978. As the Framers implicitly understood, there are sound reasons for vesting the federal judicial power in the hands of Article III judges. And as the Supreme Court implicitly understood in *Marathon*, it is precisely for these reasons that Article III judges serve as “backstops” to the rulings of Article I judges on matters involving private rights, treating such rulings as non-core matters to be treated as something less than the final judgment of a case.

Nevertheless, a new form of pernicious forum shopping has evolved, drawing life from the unsettled nature of the statute conferring bankruptcy jurisdiction, namely, 28 U.S.C. §157. This statute gives bankruptcy judges and courts final order jurisdiction over matters arising from the “public rights” established by Congress pursuant to its authority under the Bankruptcy Clause of Article I, section 8 of the Constitution. Unfortunately, the statute is vaguely worded, and some courts have interpreted expansively, giving bankruptcy courts final order jurisdiction indistinguishable from that enjoyed by Article III federal judges.

The plain language of 28 U.S.C. §157(b)(1), however, when construed in light of standard but important canons of statutory construction, reveals that bankruptcy court jurisdiction is circumscribed by constitutional limitations. This plain language reading, which coheres with the constitutional limitations, This plain reading, consistent with constitutional constraints upon bankruptcy jurisdiction, permits a bankruptcy court to issue final orders only in those “core” matters “arising in” a case title 11, or “arising under” title 11.

An interpretation of 28 U.S.C. §157(b)(1) which confers expansive jurisdictional powers on bankruptcy courts, by granting final order jurisdiction on all “core” matters or proceedings, is one that renders the “arising in” and “arising under” language of

§157(b)(2) superfluous. It also confers such broad jurisdiction upon bankruptcy courts as was already found unconstitutional in *Marathon*. Perhaps even more alarming than rendering statutory language meaningless, or conferring unconstitutional jurisdiction, such an interpretation creates the new forum shopping problem in bankruptcy.