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Article III and the United States Court of Federal Claims: An Uneasy Partnership

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I. Introduction

The doctrine of legislative courts is an apt introduction to the study of the separation of powers in the American constitutional system. To the extent that we accept the existence of legislative courts, *i.e.*, courts created and staffed without adherence to the strictures of Article III, we approve the legislative branch's sidestepping of the life-tenured federal judiciary. Legislative courts are in part a practical necessity in today's administrative state: the federal government could not function at all if every person possessed of adjudicative responsibility had to enjoy life tenure and salary protection. But like any practical necessity, abuse is possible, and there is no reason to think that the legislative branch would not take advantage of this apparent breach in the separation of powers.

From nearly the beginning of the Republic, this question of whether—and if so, to what extent—the adjudicatory power of the United States may be exercised without observance of the strictures of Article III has impressed itself upon the minds of judges and legal scholars alike. And also very nearly from the beginning, the attempt to strike an appropriate balance between Article III “fundamentalism” and the practical necessities of government has proved to be less than successful. This failure may be due in part to an error in first principles: perhaps anything that looks like a court, at the federal level, must be constituted as an Article III tribunal. It may also be due, as Professor Bator so aptly recognized, to the impossibility of conceptually distinguishing between the law-to-fact application carried out by judges and the law-to-fact application carried out by executive officers. If a coherent theory of legislative courts is
possible, it must reconcile this tension between text and practice.

The study of legislative courts is also, inevitably, a research into precedents, some well over a century old, of the Supreme Court. The student is both blessed and cursed with this abundance of authority: blessed, because he can find a high court pronouncement pertinent to almost any aspect of legislative courts doctrine; cursed, because these pronouncements frequently conflict and contradict one another. To understand well legislative courts thus requires the lawyer's finest skill: harmonization of case law.

In this Article I argue that legislative courts do not offend the constitutional postulate of separation of powers, and I propose a criterion—what might be termed a legislative courts constitutional continuum—as a means whereby the constitutionality of any given legislative court may be determined. I develop this criterion through a critical review and sifting of the relevant case law, and use as an occasional empirical reference point what is the oldest and perhaps best known legislative court: the United States Court of Federal Claims (CFC).

I acknowledge that there are some dangers in using the CFC as my empirical reference point. First, it adds to the discussion the question of sovereign immunity, and whether that doctrine, so often discussed in connection with legislative courts but not essentially related to it, unnecessarily complicates the analysis. Second, assuming that the validity of any theory is better validated the more often it can be shown to produce sound results in practice, by focusing solely upon the CFC my analysis runs the risk of insufficient scope.

But these possible deficiencies are amply made up for by other considerations. To begin with, the CFC is the oldest—and likely the most important—legislative court. Second, several of the important Supreme Court cases expounding legislative courts doctrine use the CFC either as the focus of the analysis or as an ancillary help. Third, as a former clerk on the CFC, my
knowledge of the CFC and its history surpasses my competence with that of any other legislative court. And fourth, and maybe most important, to attempt to analyze every legislative court using the constitutional continuum theory would, I fear, require far more space than is appropriate for an article. In any event, I invite my colleagues either to support or rebut my musings using examples drawn from other prominent legislative courts, such as the United States Tax Court\(^1\) or the courts of the District of Columbia\(^2\) or the United States Court of Appeals for the Armed Forces\(^3\) and inferior courts martial.

Recognizing that no theorizer in this field writes on a blank slate, due deference must be given to the substantial body of case law treating legislative courts doctrine. Of course, any constitutional theory, however well-crafted and internally consistent, that ignored centuries of precedent would be out-of-place in our common law framework of precedent and *stare decisis*. Thus, even though the cases in this field of constitutional law cannot be harmonized, they must be dealt with, explained, understood, distinguished or repudiated, if we are to be faithful to our legal system. Before turning to the cases, however, I shall briefly review the history of the CFC so as to give the reader a jurisprudential *mise en scene*.\(^4\)

Prior to 1855, claims for money against the federal government were made in the form of petitions for private bills to Congress. In 1855, Congress sought to regularize the process by referring these petitions in the first instance to a three-judge committee, which then would recommend action to Congress.\(^5\) The Court of Claims, as it was then known, was given the power to issue its own judgments in 1863\(^6\); and in 1866, litigants were given the right of appeal to the Supreme Court.\(^7\) From that date to the 1930s it was perhaps commonly thought that the
Court of Claims was an Article III court. Thus the legal community was somewhat surprised when the Supreme Court held in Williams v. United States, discussed infra, that the Court of Claims was constituted under Article I. In 1953, Congress declared that the Court of Claims was an Article III court, and that view held sway until the Federal Courts Improvement Act, which vested the appellate jurisdiction of the Court of Claims in the new Federal Circuit (an Article III court), and left trial jurisdiction in the old Court of Claims, which was renamed the United States Claims Court. The name was changed in 1992 to the United States Court of Federal Claims (CFC).

Jurisdiction for most of the cases heard by the CFC is provided by the Tucker Act, which invests the court with jurisdiction to hear claims against the federal government for money damages. The CFC also has other smaller and less important bases of jurisdiction grounded upon particular statutory grants.

With this history in mind, we now turn to a review of the case law pertaining to legislative courts in general and the CFC in particular.

II. Cases

A. American Insurance Co. v. Canter

The plaintiff was the successor in interest to the owner of several hundred of bales of cotton carried on the vessel Point a Petre from New Orleans to La Havre, France. The ship foundered off the coast of Florida. A salvage crew retrieved some three hundred bales, and these were auctioned off under the authority of a Florida territorial court to the defendant. The plaintiff argued that the territorial court proceeding was invalid because the court was not staffed
by life-tenured judges with protected salaries.

In an opinion by Chief Justice Marshall the Court established the constitutional doctrine of the legislative tribunal. Although the Florida court was a federal court, it did not exercise the "judicial Power" of Article III. The Chief Justice explained:

These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress.15

Thus early on a literalist reading of Article III—i.e., a reading that would preclude the federal government from exercising any judicial power except through tribunals constituted in accordance with the life tenure provisions of Article III—was rejected.16

Canter forms the basis of all subsequent Supreme Court jurisprudence expounding legislative court theory.17 Canter has not escaped criticism.18 The opinion runs into intellectual obstacles when it posits that legislative courts do not exercise judicial power. If they do not, what power are they exercising? Subsequent cases would conclude that legislative courts exercise a judicial power, but not the "judicial Power of the United States."19 This Canter -apology seems, however, to circumvent the policy of separation of powers; if Congress can create tribunals that adjudicate controversies between private litigants or between a citizen and the government without having to constitute an Article III court and staff it with life-tenured judges earning a salary protected from diminution, then it would appear that the legislative branch has effectively coopted the judicial branch. Although this result does not follow ineluctably from Canter, that such a result may follow is reason enough to be wary of the
proliferation of legislative courts.

Yet Canter's reasoning can be cabined. First, Congress exercises “plenary” and perhaps even extraordinary power over the territories of the United States under the Article IV, section 3 “Rules and Regulations” Clause. This authority permits Congress to legislate for the territories both in Congress's federal capacity and in its role as sovereign over the property of the United States. In acting as a sovereign, rather than as the federal government, Congress may constitute territorial courts without observing the strictures of Article III. Second, American Insurance's action against Mr. Canter arose in admiralty; and at that time in American jurisprudence, admiralty, like the common law, was thought of as existing independent of any legislature or nation. Third, territorial courts' jurisdiction cannot overlap with that of the fifty united States; thus the existence of federal legislative tribunals does not implicate any federalism component of Article III. Given these limitations, Canter perhaps could have been read to endorse only a limited use of non-Article III courts. As will be seen below, it was not so read.

B. Murray's Lessee v. Hoboken Land & Improvement Co. 23

Both the plaintiff and the defendant claimed title to the land in question, formerly owned by one Samuel Swartwout, a United States customs collector whose accounts, when audited, revealed a debt owing to the government of over $1 million. The defendant secured the property by means of a warrant of extent that the Secretary of the Treasury had issued pursuant to statute. The plaintiff contended that the statute was invalid because it permitted the exercise of judicial power by non- Article III tribunals.

The Court confirmed that only an Article III tribunal can exercise the federal judicial power. But not every application of law to fact, or every resolution of disputed rights, is
necessarily an exercise of the judicial power. Controversies “involving public rights... may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.”24 Cases in which the United States is a party-plaintiff are cases involving public rights, wherein Congress may choose to have the pertinent adjudication take place in a non-Article III forum, because the dispute can be resolved through legislative or executive means.

_Murray’s Lessee_ is famous for instituting the important public rights–private rights distinction in legislative courts theory. Later cases would use the distinction to justify Congressional departures from the Article III adjudicative norm in disputes to which the United States was either a party-plaintiff or -defendant, whether or not the government was a real party in interest. Commentators have criticized the public rights–private rights analysis for giving Congress an easy way to circumvent Article III altogether.25

_Murray’s Lessee’s_ rationale is relevant to the CFC (which is my empirical test case) because its subject matter jurisdiction—claims against the government—is the quintessence of public rights, even more so than _Murray’s Lessee_ because in that case the government was placed as a party-plaintiff. Subsequent Supreme Court cases have reduced the importance the distinction plays in the constitutional calculus. Nevertheless, it remains a factor that supports the constitutionality of the CFC as an Article I tribunal.

C. _Gordon v. United States_26

The plaintiff had taken an appeal to the Supreme Court from the Court of Claims. The act establishing the Court of Claims provided that the Secretary of the Treasury had first to
estimate the appropriation necessary to pay the judgment before any money could be dispersed from the Treasury.

The unissued opinion of Chief Justice Taney, his last judicial utterance, dismissed the appeal for lack of jurisdiction because the action did not present a case or controversy to which the Supreme Court's appellate jurisdiction could attach. Along the way to that conclusion the Chief Justice conceded that Congress had full power to constitute a tribunal, either as an adjunct to itself or within the Executive, to review in the first instance claims against the United States. No constitutional difference existed between these legislative or executive agencies and the Court of Claims. Because the Secretary of the Treasury retained authority not to pay out the Court of Claim's judgments, Supreme Court review of those judgments would be tantamount to an advisory opinion.

Shortly after the Court decided Gordon Congress repealed the offending provision, thus making the Court of Claims's judgments reviewable in the Supreme Court.\(^{27}\)

D.  \textit{Ex Parte Bakelite Corp.}\(^{28}\)

The plaintiff sought a writ of prohibition to prevent the Court of Customs Appeals from hearing an appeal taken from the Tariff Commission. The plaintiff argued that the Tariff Commission proceeding was not a constitutional case or controversy; hence the Court of Customs Appeals, as an Article III court, could not hear it.

In a unanimous opinion delivered by Mr. Justice Van Devanter, the Court denied the petition because the Court of Customs Appeals was an Article I court not bound by the Article III case or controversy rule. Van Devanter began his analysis affirming that Congress has the unquestioned power to constitute federal tribunals staffed by judges who have neither life tenure
nor protected salaries. Such legislative courts “may be created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination yet are susceptible of it.” 29 In extended dicta Van Devanter likened the Court of Customs Appeals to the Court of Claims; the latter he proffered as a legislative court (a position theretofore disfavored in Supreme Court dicta and in the law journals). The justice described the Court of Claims's jurisdiction as extending to “matters which are susceptible of legislative or executive determination and can have no other save under and in conformity with permissive legislation by Congress.” 30 Sovereign immunity also directed the Court's analysis of the Court of Claims and, mutatis mutandis, the Court of Customs Appeals. Van Devanter quoted precedent granting Congress a wide swath of discretion in shaping the forum in which the government may be sued and the conditions that the litigant must meet to come before that forum. Turning to the Court of Customs Appeals, Justice Van Devanter labeled its functions “quasi-judicial” and “susceptible of performance by executive officers.” 31 Apparently the parties in the briefs made a good deal about the fact that the Court of Customs Appeals's judges enjoyed statutory life tenure, which fact permitted the inference that the tribunal was constituted under Article III. Terming the argument “fallacious,” Van Devanter replied that it “mistakenly assumes that whether a court is of one class or the other depends on the intention of Congress, whereas the true test lies in the power under which the court was created and in the jurisdiction conferred.” 32 Thus he concluded that the Court of Customs Appeals, although very plainly a “court of the United States,” was nonetheless a legislative court.
The commentators have sharply criticized *Ex parte Bakelite*\(^{34}\). Criticisms focus on several points. (1) Justice Van Devanter grossly overestimated the percentage of the Custom Court's jurisdiction that was advisory in nature. This error clearly swayed the Court in finding the Custom Court to be a legislative tribunal. (2) To determine whether a federal tribunal be legislative or constitutional the Court provided a standard—for want of a better name the “inherently judicial” test—that is unsatisfactory because it merely begs the question of how much adjudicatory power Congress can vest in non-Article III tribunals without offending the principle of the separation of powers. (3) The Court failed to recognize that the risk of government over-reaching and unfairness is at its greatest, and so too the need for an impartial arbitrator, when the government is a defendant.

*Bakelite* confirmed that jurisdiction is more important than tenure, although tenure is not irrelevant, to classify a court as either Article I or Article III. A federal judge may have life tenure and salary protection as a matter of legislative grace; but one can be certain whether he exercises Article III judicial power by analyzing the cases he decides. If he issues in the main advisory opinions, he is likely not protected by Article III; on the other hand, if his docket closely resembles that of a district court, then odds are that he sits on an Article III tribunal. Another crucial insight of *Bakelite* is its tacit differentiation between Article III judicial power and the adjudicatory aspects of non-Article III power. Legislative courts, although acting under Congress's Article I power, nevertheless exercise a judicial function; they weigh evidence; they construe statutes; they apply law to facts. All of these functions are judicial. But it is a separate question, in *Bakelite*'s view, whether the judicial power those courts exercise is the “judicial Power” of Article III.
E. *Crowell v. Benson*\textsuperscript{35}

The United States Employees’ Compensation Commission (“USECC”) awarded Knudsen compensation under the Longshoremen's and Harbor Workers' Compensation Act. The obligor Benson sought to enjoin the enforcement of the decree on several grounds, among them that the USECC unconstitutionally exercised the judicial power of the United States in adjudicating Knudsen's claim.

The Court first addressed and then dismissed the plaintiff’s argument that the administrative proceedings violated due process. The Court then moved on to the Act's judicial review provision. Congress had given the district courts authority to review the USECC awards under an arbitrary-and-capricious-like standard. The Court drew upon the distinction, first developed in *Murray's Lessee*, between public and private rights. In cases involving public rights, Congress has substantial authority to prescribe the mode and means of adjudication. Although the matter at issue was best characterized as a private right, *Crowell* concluded that Congress still has substantial freedom to determine how that right, wholly created by Congress, will be adjudicated *in the first instance*.\textsuperscript{36} Mr. Chief Justice Hughes explained:

> It is rather a question of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions. It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency — in this instance a single deputy commissioner — for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as
to facts becomes in effect finality in law.\textsuperscript{37}

In essence the Court permitted Congress to delegate power that otherwise would be exercised by
the Article III judiciary to non-Article III tribunals, so long as a sufficiently searching review
could be had in an Article III court. Findings of “constitutional fact” and questions of law could
and should be reviewed in the Article III judiciary, but the Court could find no constitutional
requirement that such matters be brought first in an Article III tribunal.\textsuperscript{38}

\textit{Crowell} broke upon new ground when it concluded that private litigants do not have an
absolute right to adjudication in an Article III tribunal whenever a private right be at issue. Such
private right cases may be adjudicated at least partly in legislative courts and administrative
bodies. \textit{Crowell}'s key development was in its permitting Congress to delegate at least initial
adjudicatory responsibility to non-Article III tribunals; but the Court still left open the question
of whether total delegation to legislative courts or administrative bodies would be constitutional.
\textsuperscript{39}

The CFC passes the \textit{Crowell} test because its judgments are subject to review (and always
have been) in Article III courts.\textsuperscript{40}

F. \textit{Williams v. United States}\textsuperscript{41}

The plaintiff was a judge of the Court of Claims who contested the Comptroller General's
reduction of his salary during his continuance in office. Congress had passed an Act reducing
the salary of all judges “except judges whose compensation may not, under the Constitution, be
diminished during their continuance in office.” The Comptroller interpreted the statute to apply
to judges of the Court of Claims because he deemed that tribunal to be a legislative court.
Mr. Justice Sutherland delivered the opinion for a unanimous Court. Sutherland began with high praise for the Court of Claims and its duty:

[T]he Court of Claims . . . is a court of great importance, dealing with claims against the United States, which, in the aggregate, amount to a vast sum every year. The questions which it considers call for the exercise of a high order of intelligence, learning and ability.

Eschewing any nice distinctions between adjudicatory and judicial power, Sutherland flatly declared that the Court of Claims does in fact exercise a judicial power; the Court's inquiry therefore focused on the source of that power. Sutherland affirmed Canter's legislative-constitutional court dichotomy. He then inferred from history and precedent that the Court of Claims must exercise a type of judicial power, otherwise its judgments the Supreme Court and other Article III tribunals could not review. He conceded that Supreme Court dicta had given the impression that the mind of the Court was on the side of the Court of Claims exercising Article III judicial power. But that proposition could not be accepted for several reasons, not the least of which being that the Court of Claims was entirely under the sway of Congress and therefore incapable of maintaining the requisite degree of Article III judicial independence, notwithstanding the Claims Court judges' statutorily assured life tenure.

Following the Bakelite dicta, and to support his position, Sutherland also drew attention to the text of Article III. That article extends the judicial power of the United States to "all cases affecting ambassadors, ministers and consuls, as well as to cases falling within the admiralty and maritime jurisdiction. The "all" is absent, however, from the clause granting jurisdiction for cases to which the United States shall be a party. Inferring a drafting purpose from this textual lacuna, Sutherland argued that the controversy surrounding Chisholm v. Georgia, the Eleventh Amendment and sovereign immunity prove that the aforementioned clause applies only to cases
where the United States is a party-plaintiff. Put another way, the Williams Court decided that the judicial power of Article III does not extend to the United States when it is a party-defendant.45

Sutherland also followed the Bakelite "inherently judicial" test to support his analysis. As in Bakelite, where the Court determined that the adjudication of customs disputes could just as easily be resolved by the executive as by the judiciary, so too could the same be said of claims brought against the United States; as we know, such claims were dealt with prior to 1855 in a purely legislative manner in the form of petitions for private bills.46 Because the matters brought before the Court of Claims are "equally susceptible of legislative or executive determination," they need not be brought before an Article III tribunal.47 Sutherland ended his opinion with a neat doctrinal flourish that anticipated to some degree his line of argument in Humphrey’s Executor v. United States48:

[A] power which may devolved, at the will of Congress, upon any of the three departments plainly is not within the doctrine of the separation and independent exercise of governmental powers contemplated by the tripartite distribution of such powers.49

Sutherland’s opinion presents more than one intellectual conundrum. First, he does not explain how the district courts can exercise jurisdiction over Little Tucker Act cases if the judicial power of Article III does not extend to cases to which the United States is a party-defendant.50 One answer to the riddle might be that these cases “arise under” the laws of the United States, so that the district courts can take jurisdiction. But Sutherland does not seem to have entertained that possibility seriously. Furthermore, one might argue that, because the Tucker Act does not create any rights of action but serves only to waive for limited purposes the government’s immunity from suit,52 a suit made possible by the Tucker Act does not “arise
under" the laws of the United States. If the cause of action arose under a federal right, presumably that action could be characterized as falling within federal question jurisdiction. Still, that explanation does not justify the typical contract or tort case against the government which might arise under state law.53

Second, the Court's affirmation of the proposition that Article III does not exhaust the judicial power of the United States creates obvious difficulties in separation of powers analysis. 54 In the wake of Bakelite and Williams one commentator argued that the Court's affording Congress a “necessary and proper" power to create legislative tribunals staffed by judges serving without life tenure to execute any of the Article I, section 8 enumerated powers, renders Article III “a mere declaration in the air."55

Third, Sutherland does not address the problem of the Supreme Court's appellate jurisdiction, which presumably only applies to cases or controversies heard by inferior Article III courts. For many decades, however, the Supreme Court heard direct appeals from the Court of Claims, an assertion of jurisdiction that had not been thought possible if the Court of Claims does not exercise Article III judicial power.56

Fourth, the inference the Court draws from the absence of “all" in the U.S.-party jurisdictional grant may be unwarranted, given that the Framers and Ratifiers were familiar with sovereign immunity and could very easily have limited the United-States-as-party Clause to those cases in which the the government is a party-plaintiff.57

Fifth, Williams neglects the “indicia" of Article III judicial power that surround legislative courts. Generally speaking these tribunals may hold in contempt; they may pass upon constitutional questions without there being in theory a review in an Article III court; their
decisions are accorded res judicata effect. These hallmarks of judicial power are arguably probative of their Article III status.

G.  *O Donoghue v. United States*[^59]

The plaintiff, a District of Columbia Superior Court Judge, sought to recover part of his salary which the Comptroller General had withheld, based upon the latter's decision that the plaintiff did not enjoy constitutional salary protection because his court was not created under Article III.

In a 6-3 decision given the same day as *Williams v. United States*, Justice Sutherland held for the Court that the District's Superior and Appeals Courts were Article III tribunals whose judges' salaries were protected against diminution. Sutherland first distinguished the *Canter* line of cases on the basis of the territorial courts' presumed transiency, in contradistinction to the permanent quality of the District's courts. He also placed considerable stock in the origins of the District's territory: because it had been created out of land once possessed by states of the Union, whose citizens would have had rights to adjudication of certain matters in an Article III tribunal, it would be unreasonable to conclude that upon the federal government's acquisition of the territory the inhabitants had lost those rights. The most serious argument against the Court's conclusion, which Sutherland addressed directly, was the non-Article III jurisdiction of the District's courts. Conceding that these courts heard matters that could not be presented before any other inferior Article III tribunal, Sutherland still concluded that they remained Article III courts. His analysis drew upon Congress's Article I, section 8 “exclusive legislation" power over the District, and Congress's resulting dual role as quasi-state and federal sovereign over the District. Because the Legislative Branch exercises plenary power over the seat of the national
government, it may invest the national courts of the District with a jurisdiction analogous to that of state courts. Only because Article III courts sit in the District may they exercise non-Article III jurisdiction without violating the separation of powers. Hence, according to Sutherland's view, Congress created the courts of the District as Article III tribunals and staffed them with life-tenured judges, but nevertheless “clothed” them, by virtue of Congress's other enumerated powers, with authority to hear non-Article III cases. He emphasized that life-tenure itself was not determinative; but in this case, the combination of tenure, precedent, and Congress's unique power over the District all confirmed the Court's conclusion.

Justice Van Devanter, joined by Chief Justice Hughes and Justice Cardozo, dissented on the grounds that Congress's power to create courts in the District was derived wholly from its “exclusive legislation” power and was in no way connected to Article III. Van Devanter argued that Article III courts are constitutionally (shall we also say ontologically?) incapable of exercising any judicial power beyond that granted in Article III; and because the District's courts do exercise jurisdiction over non-Article III matters, they cannot be Article III courts.

*O Donoghue* is a landmark case in the jurisprudence of the federal government's power over the District of Columbia. It is relevant to legislative courts doctrine because it permits Congress to ignore the boundaries of Article III when delimiting the scope of Article III courts' jurisdiction, at least when legislating for Article III courts sitting within the District. Much of the criticism leveled against *Williams* is also directed against *O Donoghue*. Whereas the former followed the *Bakelite* dicta discussing the Court of Claims, the latter rejected the same authority's dicta pertaining to the courts of the District. And note that Justice Van Devanter, dissenting in *O Donoghue*, had joined Sutherland's majority opinion in *Williams* and had authored the Court's unanimous opinion in *Bakelite*. What caused the defection of three votes in *O Donoghue* was the
majority's rejection of the jurisdiction factor as the litmus test for characterizing a federal tribunal's constitutional status. In both Bakelite and Williams, the Court found significant that the jurisdiction of the Court of Customs Appeals and the Court of Claims included non-Article III matters; clearly that factor was essential to the three O'Donoghue dissenters because the District courts, which the O'Donoghue majority found to be Article III tribunals, exercised extra-Article III jurisdiction. Of course, Sutherland tried to rationalize the result and maintain the jurisdiction factor by emphasizing Congress's plenary and peculiar power vis à vis the District, a power that the majority thought constitutionally sufficient to support a dichotomous court, a tertium quid—neither strictly an Article I nor Article III court. Although Sutherland did not address the Supreme Court's appellate jurisdiction over cases from the District's courts, presumably in his view a case falling outside Article III would not be subject to the Supreme Court's review.

The commentators' opinions of O'Donoghue are unfavorable. Most of the criticism focuses on its central premise, that under certain circumstances an Article III court can exercise non-Article III power, a proposition consistently denied since the earliest days of the Republic. To Sutherland's credit, he did not propose entirely to eradicate the boundaries of Article III. Instead, he sought to harmonize a dual power limited to a discrete and small territory. The O'Donoghue rationale could be applied only to Article III courts sitting in places over which the Congress exercised “exclusive legislation.” Those places are quite few in number. Therefore, to read O'Donoghue as an unwarranted eroding of the separation of powers is to misread its scope.

H. National Mutual Insurance Co. v. Tidewater Transfer Co.63

The plaintiff was incorporated under the laws of the District of Columbia. It sued the
defendant in federal district court in Maryland on a state law claim. The lower court dismissed for want of jurisdiction, concluding that, because the plaintiff was not a “citizen of a state” within the meaning of the Diversity Jurisdiction Clause, a federal court sitting outside of the District could not hear the suit.

The Court reversed without producing an opinion garnering a majority. Three justices—Jackson, Black and Burton—affirmed jurisdiction not on diversity grounds but, following the O’Donoghue rationale, on the basis of Congress's unique “exclusive legislation" power over the District. Reading that power broadly, Justice Jackson for the plurality concluded that Congress could invest Article III courts sitting outside the District with jurisdiction to hear actions brought by District residents even where no other jurisdictionally sufficient justification were present.

Justice Rutledge, joined by Justice Murphy, concurred in the judgment but sharply disagreed with Justice Jackson's argument that Congress could vest extra-Article III jurisdiction in Article III courts sitting outside the District. Instead, Justice Rutledge would have overruled the hoary precedent of Hepburn & Dundas v. Ellzey, which held that the Diversity Clause does not apply to the District's residents. Chief Justice Vinson, joined by Justice Douglas, dissented. The Chief Justice agreed with Justice Jackson that Hepburn & Dundas should not be overruled, but disagreed with the plurality's theory of Article III courts' jurisdiction. He believed that Congress had no power to expand the jurisdiction of Article III courts beyond that delimited by Article III; for O'Donoghue's holding was restricted to the District's territory. Justice Frankfurter, dissenting with Justice Reed, also was of the opinion that Hepburn & Dundas was rightly decided and that Congress has no authority to increase the jurisdiction of Article III courts.

National Mutual is an important point in the development of legislative courts doctrine because it hints at what Professor Bator would term the categorical approach, i.e., analyzing the
distinction between Article III and non-Article III federal tribunals not by recourse to particular determinative factors but by reference to categories of courts, legislative in origin, that have passed constitutional muster. For example, the categorical approach would isolate territorial courts as one “exception” to Article III, military courts-martial as a second, the CFC as a third. The advantage to this exegesis is that it permits an easy cabining of the scope of Congress’s power to create non-Article III courts without having to fashion any rationale connecting the categories except case law and historical practice.

The musings of Justice Jackson need not detain us, for they did not garner a majority, and they are relevant mainly to the elucidation of Congress’s “exclusive legislation” power over the District, which has nothing to do with the CFC. Chief Justice Vinson’s position, that Congress may not expand the jurisdiction of Article III courts, conflicts with Williams, insofar as the latter held that the district courts do not exercise judicial power under Article III when they hear Tucker Act claims.65

I. Glidden Co. v. Zdanook66

The respondents sought damages from the petitioner’s alleged breach of a collective bargaining agreement. The case was appealed to the Second Circuit and was heard before a panel, one of whose judges was from the Court of Claims, sitting by designation. The petitioner appealed the decision, arguing that the Court of Claims judge was not an Article III judge and therefore the Court of Appeals’s judgement was invalid.

No opinion garnered a majority of the Court. Justice Harlan, joined by Justices Brennan and Stewart, argued for an overhaul of legislative courts doctrine. Harlan read Canter for the proposition that territorial courts may hear cases otherwise falling within Article III jurisdiction.
Lauding the great Chief Justice, Harlan lavished praise in justifying the *Canter* Court's result: it is hardly surprising that Chief Justice Marshall decided as he did. It would have been doctrinaire in the extreme to deny the right of Congress to invest judges of its creation with authority to dispose of the judicial business of the territories. It would have been at least as dogmatic, having recognized the right, to fasten on those judges a guarantee of tenure that Congress could not put to use and that the exigencies of the territories did not require. Marshall chose neither course; conscious as ever of his responsibility to see the Constitution work, he recognized a greater flexibility in Congress to deal with problems arising outside the normal context of a federal system.

Harlan then offered a test that might link all legislative courts and place them under a rule that would be both judicially manageable and that would produce predictable results: the "confluence of practical considerations." Chief among these practical considerations is the transience of Article I tribunals like territorial courts.

After enunciating the test, Harlan moved quickly to his main target: the *Bakelite* and *Williams* opinions.

But because Congress may employ such [non-Article III] tribunals assuredly does not mean that it must. This is the crucial *non sequitur* of the *Bakelite* and *Williams* opinions. Each assumed that because Congress might have assigned specific jurisdiction to an administrative agency, it must be deemed to have done so even though it assigned that jurisdiction to a tribunal having every appearance of a court and composed of judges enjoying assurances of life tenure and undiminished compensation.

Harlan excoriated both cases for misreading the public rights-private rights distinction from *Murray's Lessee*. Whereas Sutherland and Van Devanter had interpreted public rights to mean those rights that are not susceptible to Article III determination, Harlan concluded that such rights could be so submitted. Harlan was careful to distinguish between Congress's power to deprive the Article III judiciary of jurisdiction by giving the matters to the states, and Congress's putative power to deprive the judiciary of jurisdiction by giving the matters to non-Article III
Summing up his various criticisms and turning them into a rule, Harlan declared:

[W]hether a tribunal is to be recognized as one created under Article III depends basically upon whether its establishing legislation complies with the limitations of that article; whether, in other words, its business is the federal business there specified and its judges and judgments are allowed the independence there expressly or impliedly made requisite.  

After extensive review of the pre-Williams history of the Court of Claims, Harlan returned to his juristic barrage against the Sutherland opinion, especially that part which defined Article III jurisdiction as extending to cases where the United States was a party-plaintiff but not a party-defendant:

The [Williams] opinion dwelt in part upon the omission of the word ‘all’ before ‘Controversies’ in the clause referred to. To derive controlling significance from this semantic circumstance seems hardly to be faithful to John Marshall’s admonition that ‘it is a constitution we are expounding.

Harlan then offered his own theory of Article III's United-States-as-party clause. Sovereign immunity acted as a bar to suit against the United States, and in “this sense, and only this sense, is Article III's extension of judicial competence over controversies to which the United States is a party ineffective to confer jurisdiction over suits to which it is a defendant. For ‘behind the words of the constitutional provisions are postulates which limit and control.’ But once the consent is given, the postulate is satisfied, and there remains no barrier to justiciability.”

Harlan did agree with Sutherland in the proposition that the Court of Claims exercises judicial power when it “transmutes a moral obligation into a legal one" through a waiver of sovereign immunity. But as for the objection to the Court of Claims having Article III status, that its judgments were not enforceable because Congress could refuse to appropriate the
necessary funds to liquidate the judgment, Harlan dismissed it as presenting a hypothetical and not a historical eventuality. Giving a nod, however, to Justice McReynold's "inherently judicial" test, Harlan posited that all the Court of Claims's business could be disposed of judicially, which observation supported the plurality's conclusion that the Court of Claims had been ab initio an Article III tribunal. Harlan would have preferred to discard both Bakelite and Williams.

Justice Clark, joined by Chief Justice Warren, concurred in the result. For Clark, the plurality had unnecessarily and perhaps even irreverently attempted to consign Bakelite and Williams to the judicial dust-heap. Both cases were decided in "unanimous opinions by most distinguished courts" and deserved better treatment. What enabled Justice Clark to resuscitate these precedents and still reach the same result as the plurality was Congress's 1953 "declaration" that the Court of Claims was established under Article III. Although stressing that the declaration was not by itself determinative of the question, Justice Clark argued that the declaration filled the gap in Congressional intent, which had led both the Bakelite and the Williams courts to go the other way. He acknowledged forthrightly the constitutional difficulty of the Court of Claims having Congressional reference jurisdiction; but he, unlike Harlan, stated plainly that, because such jurisdiction was inconsistent with the Article III status of the Court of Claims, the latter should, "if and when such a reference occurs . . . with due deference advise the Congress, as this Court advised the President 169 years ago, that it cannot render advisory opinions."

Another potential difficulty with Justice Clark's take was that the judges who staffed the
Court of Claims prior to 1953 were the same judges who staffed that court after 1953; that is to say, they were presumably appointed as Article I judges, but Congress by legislative fiat made them Article III judges. Would that process contravene the Appointments Clause? Justice Clark did not think so. For him, the 1953 declaration meant that “Congress was merely renouncing its power to terminate the functions or reduce the tenure or salary of the judges of the courts.”

After all, the judges of the Court of Claims were appointed by the President with the advice and consent of the Senate.

The importance of the concurrence lies not so much in its substance but instead in its preventing the overruling of Bakelite and Williams; for Justice Clark concurred in the result only because of the 1953 declaration; therefore the reasoning of the two precedents remained valid.

Justice Douglas, joined by Justice Black, dissented. In opposition to the plurality's conception of the legislative courts doctrine as “highly theoretical” and arcane, Justice Douglas thought the doctrine to be “intensely practical, for it deals with the powers of judges over the life and liberty of defendants in criminal cases and over vast property interests in complicated trials customarily involving the right to trial by jury.” Although he presumably agreed with the result reached in Bakelite and Williams, Douglas explained legislative courts' functions in a fundamentally different manner. Whereas Sutherland was perfectly willing to concede that such courts exercise judicial power, Douglas would not; for him the legislative tribunal was “an administrative court, performing essentially an executive task.” The distinction is key, and we shall see it developed in subsequent cases; but for now it is enough to underscore Douglas's insight: that adjudication is inseparable from execution, and simply because a government actor applies law to fact is not sufficient reason to conclude that he performs a judicial as opposed to
an executive function.

Douglas made much of the statutory basis of the Court of Claims's tenure and salary protection. That status could never be equivalent to what Article III judges enjoy: tenure during "good behavior."^{89}

The dissent also rejected the plurality's "appearance of justiciability" test. Hewing closely to Sutherland's exegesis in *Williams* and criticizing *sub silentio* the plurality in *National Mutual Insurance Co.*, Douglas argued that the jurisdiction of Article III can be expanded only by constitutional amendment; that the disability in suing the United States in Article III courts could not deliquesce simply with a waiver of sovereign immunity. Again returning to the text of Article III, Douglas noted that the courts of the United States "are law courts, equity courts, and admiralty courts," and therefore cannot sit as advisory tribunals, a function which the Court of Claims has had from the beginning.^{90} Along the same line, merely characterizing the importance or nature of the right at issue as public or private or "vital" cannot be determinative, for bodies admittedly administrative in nature adjudicate claims based on such rights all the time; no one gives a moment's thought to questioning their constitutionality or utility.^{91}

Douglas also addressed directly the concurrence's position that the 1953 declaration effected an ontological change in the Court of Claims. For him, Congress's intent, as expressed through the declaration, was beside the point:

The declarations by Congress that these legislative tribunals are Article III courts would be determinative only if Congress had the power to modify or alter the concepts that radiate throughout Article III and throughout those provisions of the Bill of Rights that specify how the judicial power granted by Article III shall be exercised.^{92}

This conclusion Douglas argued followed from the important practical consideration of the
President's nominating power: “No one knows whether a President would have appointed to an Article III court a man named to an Article I court.”

Douglas concluded in a stirring if not convincing peroration:

Judges who sit on Article I courts are chosen for administrative or allied skills, not for their qualifications to sit in cases involving the vast interests of life, liberty, or property for whose protection the Bill of Rights and the other guarantees in the main body of the Constitution . . . were designed. Judges who might be confirmed for an Article I court might never pass muster for the onerous and life-or-death duties of Article III judges.

Although *Glidden Co.* may have cast aspersions upon *Bakelite* and *Williams*, the Van Devanter and Sutherland opinions survived the Harlan onslaught with the aid of Justice Clark's feint and supporting action on the flank. The plurality's “confluence of practical considerations" test has resurfaced repeatedly in subsequent Supreme Court cases, not necessarily because of any judicial gold that lies within its inscrutable depths which the Justices are eager to mine, but more likely because the test permits the sort of ad hoc judgment that especially appeals to the Court when it must harmonize 180 years of conflicting precedent. The plurality contends that the common thread connecting the important precedents is the transience of Article I courts; Congress does not invest the judges with life tenure because the courts on which they sit may cease to exist in the near future. The rationalization cannot justify the District's courts, or for that matter the Court of Claims, for both have been fixtures in the federal judicial system for over a century. Undoubtedly there is some allure to a test that accounts for practical considerations, but the danger in such a test is its invitation to uphold every use of legislative tribunals, so long as Congress can articulate a reasonable purpose. Under these circumstances the separation of the legislative from the judicial power would be a nullity.

J. *Palmore v. United States*
The petitioner Palmore was convicted of a felony in the District of Columbia Superior Court. The District's Court of Appeals affirmed. In the Supreme Court the petitioner contended that his conviction was invalid because not before a judge enjoying life tenure and salary protection. Thus the Court was asked to determine whether Congress, pursuant to its Article I, section 8, clause 17 power over of the District of Columbia, could create non-Article III tribunals to hear criminal prosecutions of local crimes.

The Court per Justice White began by emphasizing the peculiar and comprehensive power of Congress over the District; and there was no doubt that Congress exercised its clause 17 power in creating the District's courts. The petitioner proceeded upon a theory—an Article III judge must preside over all proceedings in which a federal right, charge or defense is at issue—that the Court considered to be fundamentally erroneous, deracinated from all historical practice, and inconsistent with good policy. Congress is not constitutionally required to create any inferior federal courts; that being the case, the Framers had no objection to the adjudication of federal rights in state courts, in which there was no guarantee that the judges would have life tenure and salary protection. This proposition had been affirmed in the early days of the Republic by Chief Justice Marshall in *Canter*. Another supporting example of historical practice was courts martial.

The petitioner, anticipating the Court's historicism, proffered *O'Donoghue* and argued that the case was controlling: Congress intended that there be a "complete parallelism" between the courts of the District and the Article III tribunals sitting outside the District. The Court distinguished *O'Donoghue* by emphasizing the broad jurisdiction that the District's courts at that time had; whereas under the 1970 Reorganization Act Congress created a two-tiered system,
providing the District's Superior Court with jurisdiction over local matters. The courts at issue here were clearly different from those in *O Donoghue*.101

The Court thus squarely rejected the Simple Model102 of legislative courts doctrine (only Article III courts may exercise federal judicial power) and held that Congress's powers under Article I permitted it to staff the District's courts with judges who do not enjoy the same protections as Article III judges.

Writing in vigorous dissent, Justice Douglas argued that Palmore presented a classic separations of power contest—whether the legislature should be given free reign over criminal prosecutions—and that the Court had shirked its role as inter-branch umpire out of a misconceived deference to a phantom-like Article I power over the District.

Douglas was careful; he did not argue against the concept of legislative courts; his ire was directed at their use in particular circumstances where the threat to individual liberty posed by government overreaching made the presence of a neutral arbitrator imperative. Criminal prosecutions fell within such circumstances. From the 1970 Act's legislative history Justice Douglas divined a clear Congressional intent to maintain greater control over the District's judiciary.103 Inconsistent with that control were the protections of Article III, but the “ideals of Art. III and the Bill of Rights provide the mucilage which holds majorities and minorities together in the federal segment of our Nation, and make tolerable the existence of nonconformists who do not walk to the measure of the beat of the Chief Drummer.”104 The Court's approval of Congress's machinations boded ill for freedom. Manipulated judiciaries are common across the world, especially in communist and fascist nations. The faith in freedom which we profess and which is opposed to those ideologies assumes today an ominous cast. It is ominous because it indirectly associates the causes of crime with the Bill of Rights rather than with
the sociological factors of poverty caused by unemployment and disemployment, the abrasive political tactics used against minorities, the blight of narcotics and the like. Those who hold the gun at the heads of the Superior Court judges can retaliate against those who respect the spirit of the Fourth Amendment and the Fifth Amendment and who stand firmly against the ancient practice of using the third degree to get confessions and who fervently believe that the end does not justify the means.  

Although Justice White was careful to distinguish *O'Donoghue*, the Court's opinion in *Palmore* falls into line with the earlier case and the juristic matrix that it established for delimiting Congress's power over the District. Just as Sutherland concluded that Congress could invest the District's courts with Article III and Article I adjudicatory power, so White concluded that Congress could grant Article III jurisdiction to one set of the District's courts and Article I duties to another set. The heart of the dispute devolved on the permissible extent of Article I jurisdiction that non- Article III courts within the District could exercise. The majority was content with allowing Congress to create a system of courts parallel not to the Article III courts sitting outside the District but parallel to the state courts, where tenure during good behavior admittedly is rare. The dissent diverged most sharply from the majority on the desirability of that new parallelism. Douglas considered the majority's result to be an unjustified erosion of both the federal judiciary's independence and the individual safeguards against government tyranny contained within the Article III tenure provisions. 

Douglas's opinion is consistent with his dissent in *National Mutual Insurance Co.* In evincing a desire to protect individual liberties through Article III safeguards, Douglas established a theme that Justice Brennan would pick up in the next series of legislative court decisions.

K.   *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*

The petitioner Northern Pipeline filed for bankruptcy under the 1978 Bankruptcy Act,
which established a system of Article I bankruptcy courts. As part of the bankruptcy proceedings, the petitioner also filed for breach of contract damages against Marathon Pipe Line, the respondent, which moved to dismiss on the grounds that the 1978 Act was unconstitutional in that it invested Article III judicial power in judges not provided life tenure and salary protection.

Justice Brennan wrote a plurality opinion in which Justices Marshall, Blackmun and Stevens joined. Brennan began his opinion with an extended paean to the virtues of separated powers and an independent federal judiciary. Brennan then proceeded to a tour d'horizon of legislative courts doctrine as articulated in the cases. First, contributing to the resuscitation of Bakelite, Brennan emphasized the rule that Congress may not delegate to legislative courts work that is inherently or necessarily judicial. Second, he affirmed the dicta in Murray's Lessee which would preclude Congress from delegating to non-Article III tribunals any matter which essentially is one at common law, in equity, or in admiralty. Third, seeking support for his “categorical” approach, Brennan underscored the “unifying principle” of the cases that linked the existing legislative court exceptions: a plenary and exceptional Article I power, e.g., Congress's control of the military and repository of the government's immunity from suit as sovereign. This last point was crucial, for in the case of the 1978 Bankruptcy Act, the Court could divine no “exceptional” grant of power that would justify the circumvention of Article III tribunals. Responding to the dissent's position that Article I represented but one value to be weighed in the separation of powers calculus, Brennan argued that merely assuring some Article III appellate review is not sufficient to immunize the scheme from constitutional infirmity. Summarizing the plurality's farrago of case law, prudential consideration and ad hoc judicial resolution, Brennan declared:
Art. III bars Congress from establishing legislative courts to exercise jurisdiction over all matters related to those arising under the bankruptcy laws. The establishment of such courts does not fall within any of the historically recognized situations in which the general principle of independent adjudication commanded by Art. III does not apply. Nor can we discern any persuasive reason, in logic, history, or the Constitution, why the bankruptcy courts here established lie beyond the reach of Art. III. 115

Because, under the Bankruptcy Act, Article I courts were given the “essential attributes of judicial power,” the Act violated the separation of powers. 116

The plurality also rejected the “adjunct” rationale, viz., a non-Article III tribunal may perform some work traditionally done by Article III tribunals so long as the latter retain sufficient control over the entire proceeding. Magistrates are a good example. 117 Brennan conceded that when Congress has created a federal right, it may prescribe the mode and forum for the right's vindication. 118 But if Congress chooses to invest Article III adjuncts with some responsibility for adjudicating the federal right, it may not delegate to them any of the essential attributes of the “judicial Power of the United States.” 119 It was in this respect that the plurality thought the 1978 Act to run afoul of Article III, because the Act permitted a breach of contract action to be tried in a non-Article III tribunal. 120 Thus, Brennan concluded that Article III appellate review must be more than a mere facade hiding the real locus of judicial power in Article I courts. 121

Justice Rehnquist, joined by Justice O'Connor, concurred in the judgment but was unwilling to accept wholesale the categorical approach which Justice Brennan had set forth. Rehnquist feared that such a rule-bound prescription would create unwanted and unforeseen havoc in an area of the Court's jurisprudence already “arcane” and saddled with “confusing
Rehnquist's chief concern with the 1978 Act was the matter presented before the Court—that a breach of contract action, part of “the stuff of the traditional actions at common law tried by the courts at Westminster in 1789,” could be brought before a non-Article III tribunal and decided with only minimal Article III review. Chief Justice Burger jumped upon this limitation in his dissent, arguing that the case stood only for the proposition that a traditional common law action subject to a state rule of decision formed part of the core of Article III judicial power which cannot be delegated to non-Article III tribunals.

Justice White wrote an extended dissent with which the Chief Justice and Justice Powell joined. White agreed with the Chief Justice's narrow construction of the plurality-plus-concurrence's holding. White saw no objection to non-Article III tribunals making the initial determinations of state-law questions. He criticized the plurality for crafting a test “divorced from the realities of modern practice.” White then castigated the plurality's categorical approach, concluding that a pigeon-holing exegesis of the cases was inapt, but also arguing that the plurality's test failed to attain its ostensible goal of limiting Congressional power to create Article I tribunals. White took especial aim at obliterating the usefulness of the public right-private right distinction, noting that territorial and courts of the District of Columbia—both of which are Article I tribunals and both of which are categorical exceptions to the plurality's rule—adjudicate private rights disputes all the time. Finally, White confessed to being able to make neither head nor tail of the plurality's assertion that Congress has “extraordinary” power over the District or the territories or the military, but not over bankruptcy or any other field of legislative competence.
Supporting his contention that legislative courts doctrine is truly a “darkling plain,” as Justice Rehnquist described it, Justice White summarized the Court's work in this area. Recognizing that there is frequently no way to distinguish between Art. I and Art. III courts on the basis of the work they do, Justice Harlan suggested [in *Glidden Co. v. Zdanok*] that the only way to tell them apart is to examine the 'establishing legislation' to see if it complies with the requirements of Art. III. This, however, comes dangerously close to saying that Art. III courts are those with Art. III judges; Art. I courts are those without such judges. One hundred and fifty years of constitutional history, in other words, had led to a simple tautology.131

But all was not lost; there was still a balancing test available. White explained:

To say that the Court has failed to articulate a principle by which we can test the constitutionality of a putative Art. I court, or that there is no such abstract principle, is not to say that this Court must always defer to the legislative decision to create Art. I, rather than Art. III, courts. Article III is not to be read out of the Constitution; rather, it should be read as expressing one value that must be balanced against competing constitutional values and legislative responsibilities. This Court retains the final word on how that balance is to be struck.132

The plurality's opinion has received no little criticism from the commentators.133

None of the opinions in the case offers an attractive solution, except perhaps for the Chief Justice's short remarks in which he limits the reach of the plurality. With Justice Brennan one is forced to accept a general rule whereby Congress must vest judicial power if at all in Article III courts. The exceptions to the general rule are few in number and justifiable mainly on historical grounds. Unfortunately, the supposed attractiveness of this approach—limiting Congressional discretion to create non-Article III tribunals—the general rule's exceptions subvert, because almost any administrative adjudication can be construed as a public right matter, and therefore one which a non-Article III court may conduct.

Justice Rehnquist's concurrence is worthwhile only in that it limits the plurality opinion's scope; it of itself offers no solution except by suggesting that Congress cannot wholesale transfer
the federal judicial business to non-Article III courts. The problem with Rehnquist's reasoning is that a state law contract action is hardly an essential part of the federal judiciary's business, yet that was the very matter before *Northern Pipeline* and which led to the Bankruptcy Act’s invalidation.

Lastly, Justice White's dissent does little more than offer a useless balancing test by which one of the three great powers of government—the judicial—is reduced to yet another mere factor, to be weighed against other factors of equally inconsequential import, such as administrative convenience and the comprehensiveness of legislative schemes.

It is not surprising, then, that two cases after *Northern Pipeline* the Court would still be unable to articulate an acceptable test.

L. *Thomas v. Union Carbide Agricultural Products*¹³⁴

The respondent Union Carbide was a data registrant under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). The Act required pesticide chemical makers to submit data to a central registry for recording. Certain data that could be characterized as trade secrets were compensable, but Congress required that the registrants litigate that issue in binding arbitration. Union Carbide contested the constitutionality of the binding arbitration provision, arguing that Congress impermissibly attempted to vest Article III judicial power in non-Article III forums.

The Court per Justice O'Connor held that the FIFRA arbitration provision did not violate Article III. Her opinion spoke for four other justices. She began the main part of her analysis by characterizing Article III as establishing “a broad policy that federal judicial power shall be vested in courts whose judges enjoy life tenure and fixed compensation.”¹³⁵ O'Connor next
refuted Union Carbide's contention that its right to compensation arose under state law and therefore covered by *Northern Pipeline*. The majority deemed the compensatory right at issue to be of federal provenance, thus confirming obliquely the principle that a non-transferable element of Article III core power is, strangely enough, the adjudication of state law claims by an Article III court sitting in diversity.

O'Connor proceeded in due course to eviscerate Justice Brennan's *Northern Pipeline* plurality opinion, first by holding that even where the government is not a party a private litigant does not have an absolute right to an Article III forum; second, by holding that a litigant may have a right to an Article III forum even though the government is a party. Taking deadly aim at the *Northern Pipeline* plurality, O'Connor delivered the verbal *coup de grâce* in declaring that "practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III."

Addressing the statutory provision at issue, O'Connor first noted that the FIFRA compensation right has both public and private right aspects to it. Second, she emphasized that fears of legislative or executive overreaching are at an ebb when both parties are willing participants to a non-Article III proceeding. Third, O'Connor reminded her readers that FIFRA provides for some Article III review. O'Connor summarized: "Our holding is limited to the proposition that Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary."
Undoubtedly, *Union Carbide* represents a retreat from the *Northern Pipeline* plurality and a tacit endorsement of Justice White's dissent in that case. Justice O'Connor's majority opinion gave the Court's imprimatur to Justice White's *Northern Pipeline* dissent's Article III-as-mere-factor-to-be-balanced test. At the same time, a majority of the Court did not seem willing to accept the proposition that Congress may at any time wholly deprive the inferior Article III courts of their business in favor of non-Article III tribunals. But the Court appeared to inch closer to endorsing some expanded version of the *Crowell* test, whereby an Article I court adjudication is constitutional if a certain (as yet undetermined) degree of review can be had in Article III courts.

M. *Commodity Futures Trading Commission [“CFTC”] v. Schor*

The Commodity Exchange Act ("CEA") established the Commodity Futures Trading Commission ("CFTC") to adjudicate reparations claims between injured persons and CEA-violating brokers. In an administrative law proceeding the defendant brought a common law counterclaim, which the judge denied. On appeal the defendant contended that the adjudication of its common law claim was unconstitutional because not before an Article III judge.

Justice O'Connor wrote for a six-member majority. She divided Article III into individual and structural right components, noting in the process that the defendant had waived the former. Whatever life may have been left in Justice Brennan's *Northern Pipeline* analysis, O'Connor quickly snuffed out, declaring that in the field of legislative courts doctrine “the Court has declined to adopt formalistic and unbending rules.” Fully resuscitating the *Crowell* test, the *Schor* majority noted with obvious delight and satisfaction that the CFTC
exercised but a small part of the essential attributes of Article III judicial power.\textsuperscript{150} Yet, casting aside any doubt that the Court might adopt a well-delineated if not well-crafted rule, O'Connor dismissed the defendant's contention that merely because a state-law right was at issue an Article III adjudication was required: "there is no reason inherent in separation of powers principles to accord the state law character of a claim talismanic power in Article III inquiries."\textsuperscript{151} Thus, when common law rights are at issue the Court's review is "searching" but not fatal to the legislative court's constitutionality.\textsuperscript{152} O'Connor again emphasized that the parties willingly invoked the non-Article III tribunal, when they could just as easily have selected an Article III tribunal if they had so desired.\textsuperscript{153} Accordingly, fears of legislative usurpation of judicial power are unfounded where Article III courts retain a measure of control, the congressional purpose is legitimate, there exists a need for non-Article III adjudication, and the scope of that adjudication is limited.\textsuperscript{154} The CFTC's incursion upon Article III was "de minimis" and constitutional.\textsuperscript{155}

At one level there is satisfaction with the Schor Court's decision, in that it refused to accord a "talismanic" status to state law claims in Article III courts; for, if any part of Article III jurisdiction is dispensable, at least for the purpose of maintaining the separation of powers, diversity jurisdiction is it. But at a deeper level perhaps the "talismanic" attitude which the Court eschews may have been exactly what was needed, given the absence of any lodestar in legislative courts doctrine. Unfortunately, the Schor Court adopted a version of Justice White's Article-III-as-value-to-be- balanced test for determining whether Congress, in vesting Article III-like jurisdiction in non-Article III tribunals, has violated the separation of powers. The Schor test by its nature is probably incapable of principled application, for the test seems to invite an ad hoc judgment which simply cannot be anticipated.\textsuperscript{156}
N. Freytag v. Commissioner 157

In the Tax Court the petitioner challenged the government's tax assessment based on the finding that the petitioner had participated in an illegal tax shelter. The Chief Judge of the Tax Court assigned the case to a “special trial judge,” whom the Chief Judge had appointed, and adopted as the Court's opinion the special trial judge's recommendation against the petitioner. The petitioner argued before the Fifth Circuit and then before the Supreme Court that the special trial judge is an “inferior officer” within the meaning of the Appointments Clause, 158 therefore requiring appointment by the President, a head of department, or one of the “Courts of Law.” And because the Chief Judge of the Tax Court cannot be considered any of these, the petitioner concluded that the Chief Judge's appointment of the special trial judge was unconstitutional.

The Court Justice Blackmun held (1) the special trial judge is an inferior officer within the meaning of the Appointments Clause, 158 therefore requiring appointment by the President, a head of department, or one of the “Courts of Law.” And because the Chief Judge of the Tax Court cannot be considered any of these, the petitioner concluded that the Chief Judge's appointment of the special trial judge was unconstitutional.

The Court cited to Canter and Williams for the proposition that an Article I court exercises judicial power; and if the Tax Court exercises the judicial power of the United States, it must be a court of law within the meaning of the Appointments Clause. The Court noted the similarity between the Tax Court's functions and those of Article III district courts, e.g., both have authority to punish contempt, to grant injunctive relief, to order the Secretary of the Treasury to make a refund, to subpoena and order the production of documents, and to administer oaths. 161
Concurring with three others, Justice Scalia disagreed with the Court's holding that the Tax Court is a court of law within the meaning of the Appointments Clause. He concluded that the Tax Court is in fact a department whose Chief Judge is a head of department within the meaning of the Appointments Clause. The concurrence argued that the judicial power of the United States can be exercised only by Article III courts staffed by Article III judges; an executive agency that has adjudicatory functions remains an executive agency, not an Article III body. Put another way, the power of adjudication is a necessary but not sufficient condition to the exercise of Article III judicial power. What the Tax Court's chief judge lacks but is crucially present in Article III judges is life tenure and a permanent salary. The key to determining whether the governmental entity exercises the judicial power of the United States is the identity of its officers. The concurrence ends, after some sharp criticism of Justice Sutherland's opinions in *Williams* and *Humphrey's Executor*, asserting that the Tax Court's Chief Judge is a head of department within the meaning of the Appointments Clause and therefore empowered to appoint inferior officers under the relevant statute.

III. RULES

In the following section I set forth six theories, gleaned from the foregoing exposition of case law, and show how each is deficient in some important respect.

A. The Absolutist Theory

This position holds that if a federal body is to exercise judicial power at all, its jurisdiction must conform to Article III, section 2, and it must be staffed by judges who enjoy the protections of Article III. Although this view has been frequently expressed in legislative court doctrine, it has never been accepted wholesale. Indeed, Chief Justice Marshall rejected it in
Canter, when he wrote for a unanimous Court that Congress was not limited by Article III in creating federal courts for the territories. There is no doubt a certain allure to the simplicity of the absolutist approach. But the unbroken line of precedents rejecting that approach should give one pause before uncritically adopting it.

How would the absolutist rule apply to the CFC? Before that question can be answered, a preliminary issue must be addressed, viz., whether the CFC is a tribunal that exercises judicial power, whether it is a legislative adjunct, or whether it is an executive agency disbursing federal funds to qualified applicants. Without doubt the function that the CFC serves was met, prior to 1855, by a committee of Congress reviewing the merits of private bills. If the CFC is thus considered a direct heir to the status quo ante 1855, then it ought in fairness to be considered a legislative adjunct, not a court. Clearly, such was the reasoning of Chief Justice Taney, adopted in Gordon v. United States, when the Supreme Court declared that the CFC's judgments were advisory opinions not subject to review in an Article III court. On the other hand, the CFC may just as well be described as an executive agency, once one isolates the essence of executive action:

The President's duty is faithfully to execute the law. To do this, the President must both interpret the law (to know what to do when confronted with a given situation) and find facts (to know what situation is at hand). Faithful execution is the application of law to facts. So the core executive task is little different in principle from the core judicial task.

To complicate the question further, we have definite utterances from the Supreme Court that the CFC does exercise judicial power, although not the judicial power of Article III. Justice Sutherland's position might be rationalized if one were to understand him as holding only that the CFC acts like a judicial tribunal and performs adjudicatory functions—a conclusion that
does not necessarily mean that the CFC exercises judicial power.\textsuperscript{167} On the other hand, Sutherland's pronouncement might just as easily be placed in the line of precedents beginning with \textit{Canter} which quite clearly state that non-Article III tribunals \textit{are} courts, indeed, they are \textit{federal} courts, but they do not exercise the judicial power of Article III.\textsuperscript{168}

Perhaps then the line between executive-adjudicatory action and pure judicial power can be drawn with the aid of an “inherently judicial,” or “essential attributes,” or “stuff of actions at the courts of Westminster in 1789” test. Each has been proposed by the Supreme Court, and each has been ignored when necessary. According to \textit{Williams}, the United-States-as-party Clause invests Article III courts with the power to hear cases wherein the U.S. is a party-plaintiff but not a party-defendant. It was this conclusion that supported the Court's holding in \textit{Williams}, that the CFC is not an Article III tribunal because its work consists entirely of actions wherein the U.S. is a party-defendant. If, therefore, suits against the government are not within the "normal" Article III jurisdiction, then the conclusion follows naturally that the hearing of these cases is not an “inherently judicial” function, but rather one that could be just as easily accomplished by executive action or by legislation (in the form of a private bill). But it would seem that any suit, regardless of the defendant, is \textit{a hypothesi} subject to judicial determination and is inherently judicial; that the doctrine of sovereign immunity does not transform suits against the government into something non-judicial, but instead provides the government within an absolute defense—within the judicial context—to a suit brought against it.

The “essential attributes” test runs into similar problems. The Court has held that the adjudication of common law contract claims among diverse parties is an essential attribute of Article III judicial power; but the adjudication of qualitatively indistinguishable claims in the...
territories, or of military prosecutions, or of contract claims against the government, is not an essential attribute. What the Court apparently means by “essential attribute” is not that certain types of disputes can be resolved only in a judicial manner, but rather that the federal judiciary must preserve its role in the separation of powers, and some denial of jurisdiction can be accepted even while maintaining the balance of powers. So it would do little for our present inquiry if we were confidently to conclude that the adjudication of claims against the government is not an essential attribute of Article III judicial power, because if Congress were to give such jurisdiction to Article III courts but were to give all other federal jurisdiction to non-Article III courts, the Supreme Court would undoubtedly find that Congress had violated the separation of powers, not because of an improper transfer of essential judicial attributes but because of an imbalance in the separation of powers.

Justice Rehnquist's "stuff of Westminster" test produces curious results, not the least reason because it protects Article III courts' diversity jurisdiction, which was given not for the protection of the judiciary against the other branches' encroachment but for the protection of out-of-state defendants. And many of the actions against the government tried in the CFC proceed upon common-law like arguments and theories; but these actions need not be heard before an Article III judge. It is true that actions against the Crown were not part of the "stuff of Westminster," but it is interesting to note that petitions of right were decided by rules that would have applied had the defendant been anyone but the king.\textsuperscript{169} In other words, actions against the sovereign, although permitted strictly as a matter of grace, were decided \textit{just like common law actions} against private individuals. It may therefore be harder to conclude that suits against the sovereign were not part of the stuff of Westminster when such suits were adjudged according to the Westminster courts' legal rules.
Lastly, there remains that now moribund test which Justice Curtis in *Murray's Lessee* shaped out of the formless judicial clay and into which he breathed a life of not more than one hundred thirty years—the public rights-private rights distinction.

To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper. 170

A fair reading of Justice Curtis’s position would take him as meaning that a claim classifiable as at law, in equity, or in admiralty must be at the federal level presented before an Article III court. But he then gives in the same paragraph an example of an equitable land claim brought by the inhabitants of newly acquired territories that may be presented before a non-Article III because the claim arises from a public right. 171 Curtis also declares in the following paragraph that the executive may constitutionally adjudicate a private right claim when the adjudication is “committed to its determination by the constitution and the laws.” 172 In other words, a private right claim may sometimes be adjudicated by non-Article III officers and sometimes not; a public right claim may sometimes be adjudicated in a non-Article III tribunal and sometimes not. There is no interpretive value to the distinction. So the seeds of the destruction of the public right-private right doctrine were sown in the same opinion that created it.

The four tests that the Court has employed to determine whether a matter has been delegated to non-Article III courts that is susceptible to adjudication, at the federal level, only in Article III courts, produce, when applied to the CFC, equivocal results. The easy answer to the
original question posed, \textit{i.e.}, whether an absolutist approach to Article III makes the CFC unconstitutional, is that it depends: if the CFC’s jurisdiction requires it to exercise the “judicial Power of the United States,” then it must be constituted as an Article III court to function; if instead the CFC’s jurisdiction does not require it to exercise Article III power, then it need not (and in fact must not\textsuperscript{173}) be constituted as an Article III court.\textsuperscript{174} The CFC hears claims against the federal government; but so do the district courts; and the Supreme Court had heard appeals from judgments of the CFC’s predecessor courts. Could it be that when the CFC hears cases it exercises executive fact-finding and law-applying power, but that when the district courts hear the same case, or when the Federal Circuit hears the CFC case on appeal and the Supreme Court on certiorari, the CFC’s exertion of executive power is transformed by constitutional thaumaturgy into an Article III judgment? This seems to be the result required by the cases if the CFC is constitutional and if one hews to the absolutist approach.\textsuperscript{175} But other doctrines may prove more apt.

B. The \textit{Crowell} Appellate Review Theory

Taking its name and its reasoning from Chief Justice Hughes’s opinion, the appellate review theory concedes to Congress a much greater discretion than the absolutist theory to create legislative courts and adjudicatory administrative agencies, so long as Article III courts retain a certain minimum degree of control over the “judgments” of non-Article III tribunals. In \textit{Crowell} the degree of constitutionally sufficient control was the statutory right of Article III review of law and jurisdictional facts. In \textit{Northern Pipeline} the requisite degree of review, not provided in the statute, was presumably \textit{de novo} for all findings of fact and law, because the subject matter included an essential attribute of judicial power. \textit{Union Carbide} concluded that some Article III
review (but not *de novo*) was constitutionally adequate; and *Schor* intimated that a deferential appellate standard of review may generally pass constitutional muster. 176

The commentators have been especially favorable to this approach. 177 There are several reasons for this cheery scholarly reception. First, the appellate review theory preserves most if not all of the administrative state, which the absolutist theory would scotch. Second, the theory does a tolerably good job of rationalizing (if only *post hoc*) the unruly case law in this field. Third, it preserves both the individual- and structural-rights components of Article III, the former because litigants are assured an impartial adjudicator at some stage of the proceeding, the latter because Congress cannot transfer any of the federal courts' business wholly out of the latters' hands. Fourth, the theory avoids the ontological controversies into which the judiciary upon occasion has so unhappily fallen. 178

For as long as the CFC has issued judgments, a right of review has existed in an Article III tribunal. Presently, the right of review in the Federal Circuit fulfills the requirements of the appellate review theory.

C. The "confluence of practical considerations" theory

Stemming from Justice Harlan's plurality opinion in *Glidden Co.*, the "confluence" theory has the virtue of all such balancing tests: it permits the Court to fashion a result that it at least believes to be good policy. The obvious downside is that predictability is sacrificed on the altar of utility; and of course there is never a guarantee that the Court's balancing will produce a desirable result. One factor on which Harlan placed great stress in adducing his confluence theory was the transience of legislative courts. Given the remarkable *permanence* of the CFC, having served "the Republic and the citizens" 179 for one and one-half centuries, the transience
factor does little to support the CFC's constitutionality.\textsuperscript{180}

Other factors upon which Harlan relied are the tribunal's organic legislation, the federal business with which it is concerned, and the independence of its judges.\textsuperscript{181} As Justice White trenchantly observed in his *Northern Pipeline* dissent, these factors come dangerously close to reducing legislative courts doctrine to tautology, in that one knows one has an Article III court if it is staffed by Article III judges; and one knows one has Article III judges if they serve on an Article III court.\textsuperscript{182} Although analysis of a tribunal's jurisdiction would provide insight into its constitutional status, the case law makes painfully clear that jurisdiction is not determinative and likely not very probative. For example, the Court of Customs Appeals was deemed an Article I court in large part because its jurisdiction included matters beyond the Article III case or controversy limit, even though such matters made up an infinitesimally small portion of the court's jurisdiction.\textsuperscript{183} But that tribunal and the CFC were later deemed to be Article III courts, even though the CFC's jurisdiction required it upon occasion to issue advisory opinions.\textsuperscript{184} Of course in *Canter* the Florida territorial courts were exercising admiralty jurisdiction, but were deemed non-Article III tribunals; whereas in *O'Donoghue* the courts of the District of Columbia, which in 1933 exercised both Article I and Article III jurisdiction, were deemed Article III courts. The jurisdiction of the tribunal at issue thus provides little if any help in determining the tribunal's constitutional status.

If none of Justice Harlan's factors can lay any claim to our attention in analyzing legislative courts doctrine, the “confluence” test becomes nothing but a policy balancing tool. If the Court believes that the strictures of Article III would hamper too deeply Congress's legislative scheme, then an Article I tribunal will pass muster; but if the Court believes that
Article III courts would be preferable, then Congress will not be permitted to avoid the life-tenure and salary protection provisions of the Constitution. Putting history aside, then, Justice Harlan's test would seem to require that the CFC be constituted as an Article III not a legislative court. Unsurprisingly, that was the decision Harlan reached in *Glidden Co.* Whether he would still come to that conclusion today in light of the 1982 Federal Court Improvement Act's explicit reconstitution of the CFC as an Article I court, is debatable.

D. Article III balancing theory

This test originates from Justice White's dissent in *Northern Pipeline.* In defending the constitutionality of the 1978 Bankruptcy Act, White argued that Article III "should be read as expressing one value that must be balanced against competing constitutional values and legislative responsibilities."185 Explicitly rejecting absolutist theory, White's test resembles in some respects the appellate review and confluence theories in its willingness to concede some judicial power to non-Article III courts. The White balancing theory differs from its cousins in two important respects. First, it places no decisive value on the availability of Article III appellate review; such review may be necessary but is by no means always so. Second, the balancing theory does not derive its vitality from the cases, although because it is so broad it can harmonize them; rather, the cases merely prove that no dispositive factor can guide the Court's determination, and that Article III cannot be read to prescribe any rule, or rule with limited exceptions, let alone an absolutist rule. In effect the Court using the confluence theory will probably produce the same result as the Court using the balancing theory, but at least in the latter case the Court will be more honest about what it is doing and less compelled to justify its results through the precedents.186
The commentators' opinions have been mixed. One would think that an area of constitutional law marked by doctrinal chaos would be an apt spot for a balancing test; but a balancing test does not lend itself easily to the separation of powers milieu, and it is in that context in which legislative court disputes normally occur. Needless to say, the CFC would pass muster according to the balancing test, given the CFC's history, the doctrine of sovereign immunity, and Congress's legitimate desire to have claims against the United States adjudicated before tribunals well-versed in the subject, to give both the government and the citizens a fair shake. As discussed in another section, Justice White's balancing theory the Court has for all practical purposes adopted in Union Carbide and Schor, although Freytag may portend a return to a more dogmatic approach.

E. The Rehnquist-O'Connor “essential core” theory

First expounded in Justice Rehnquist's Northern Pipeline concurrence, and further developed in Justice O'Connor's Union Carbide and Schor majority opinions, the “essential core” theory simply posits that there exists a core of federal judicial power that only Article III courts may exercise. Although the extent of that core has never been fully explored, it encompasses state law claims brought in diversity but not federal claims that adopt state law standards. Such at least is the import of Northern Pipeline, Union Carbide and Schor. In some sense the essential core theory resembles Justice Curtis's public rights-private rights distinction; but the two theories differ in that the latter makes the distinction in some cases determinative, whereas for the essential core theory the public rights-private rights classification merely guides the Court's decision but does not dictate it. The theory is perhaps an agnatic ancestor of the absolutist theory, in that the essential core theory precludes some federal judicial power from being exercised by non-Article III courts; the absolute theory accomplishes a result different in degree.
And to the extent that the essential core is not transferable, the theory rejects the balancing approaches of Justices White and Harlan.

Unfortunately, exactly what constitutes the essential core of Article III judicial power is anybody's guess. The Court's most recent cases give some guidance, but only to define specific instances of core jurisdiction and peripheral jurisdiction; we are not given any rule for determining what qualifies as core or peripheral, except some lip service to the precedents and to Justice Curtis's hoary distinction, and perhaps some review of Congress's purpose in establishing the legislative court at issue.

The business of the CFC, if Williams is still good law, falls outside the judicial power of the United States, and therefore must fall outside any core of that judicial power. If, however, Williams no longer is the law, and the CFC exercises what otherwise would be federal question jurisdiction, the Court could quite plausibly conclude that this component of federal question jurisdiction does not fall within the core of Article III because Congress could have avoided Article III adjudication of claims against the U.S. anyway on account of its sovereign immunity. But that response could be made to any federal question, in that Congress could have deprived the Article III courts of their adjudicatory power by never creating the law from which the claim arises. And it would seem anomalous to conclude that some diversity cases fall within the core of Article III but some federal questions cases do not. In which situation would the need for an independent federal arbiter be greater? Presumably when a citizen brings a claim against his government. Just because the defendant might otherwise be immune from suit surely is insufficient reason to conclude that the government will not seek to influence, perhaps in ways too subtle to be noticed at once, the adjudication of claims brought as a matter of legislative grace. Viewed in this respect, the CFC's role as arbiter between citizen and government may
mean that the federal question jurisdiction it exercises, and upon which basis the Federal Circuit and the Supreme Court review its judgments, forms part of the essential core of Article III and therefore is not exercisable by non-Article III courts.

F. The Scalia adjudicatory-not-judicial theory

In his Freytag dissent Justice Scalia argued that the Tax Court is not a court of law within the meaning of the Inferior Officer Appointments Clause. He argued that the majority erred by mistaking the Tax Court's adjudicatory functions for judicial functions, and thereby wrongly concluding that the Tax Court was a court of law rather than an executive department.

It is no doubt true that all such [legislative courts] 'adjudicate,' i.e., they determine facts, apply a rule of law to those facts, and thus arrive at a decision. But there is nothing 'inherently judicial' about 'adjudication.' To be a federal officer and to adjudicate are necessary but not sufficient conditions for the exercise of federal judicial power, as we recognized almost a century and a half ago [in Murray’s Lessee].

Recalling the test advanced in Bakelite by Justice Van Devanter, Scalia concluded that adjudication “is no more an ‘inherently' judicial function than the promulgation of rules governing primary conduct is an ‘inherently' legislative one." The exegetical key to legislative courts analysis is therefore the constitutional status of the adjudicating federal officer: where “adjudicative decisionmakers do not possess life tenure and a permanent salary, they are ‘incapable of exercising any portion of the judicial power.'”

Before critiquing Justice Scalia's test, I should make clear that Freytag was not, strictly speaking, a legislative courts case, although the central issue concerned the constitutional status of the Chief Judge of the Tax Court. Scalia crafted his test in light of the constitutional needs and circumstances pertinent to inferior officer appointments and not the balance of “adjudicatory power between legislative and constitutional courts. Nevertheless, Scalia based his analysis on
both the nature of Article III judicial power and his position that Article III judicial power may
be exercised only by Article III courts, so he has left himself open to some criticism on the
legislative court front.

First, the Scalia test ignores Supreme Court precedents holding that the tenure and salary
protections of the federal judge do not of themselves determine his constitutional status; in other
words, a federal judge might have both life tenure and salary protection and still be an Article I
judge. Such is the clear implication of Bakelite and Williams, for the judges of the Court of
Customs Appeals and the Court of Claims had statutory assurances of life tenure and presumably
salary protection. If the Bakelite–Williams principle is still valid, then the identity of the
federal officer cannot, contrary to what Scalia posits, determine the source of the power he
exercises.

Second, Scalia assumes (correctly, I believe) that nothing inherent to the exercise of
Article III judicial power can distinguish it from the adjudicatory functions that go hand in hand
with the faithful execution of the laws. But if characterization of the tribunal's actions is not
determinative of or even helpful in deciding the tribunal's constitutional status, then the only way
to distinguish constitutional from legislative courts and to avoid the Harlan tautology is to
analyze the tribunal's jurisdiction. Simply with the analysis of jurisdiction, however, the Harlan
tautology rears its ugly head, because it has long been established that the jurisdiction of
legislative courts may overlap with that of constitutional courts, and that certain Article III courts
exercise jurisdiction beyond Article III. Hence, jurisdiction cannot be the hallmark of either
type of court; and so we are left with a rule that declares an Article III court to be one whose
jurisdiction comports with Article III and whose judges enjoy the protections of Article III;
whereas a legislative court is a court that is not an Article III court. We have said everything and defined nothing.

**IV. A proposed answer**

Our task requires that we identify the nature of the power that the CFC exercises. At first glance the CFC might fairly be characterized as an executive agency proceeding according to judicial norms. If, after all, the payment of claims against the United States by one of its citizens is an executive function, then the CFC is merely deciding an executive issue in the guise of a court. But what the CFC does is hardly different in kind from what the Federal Circuit or the Supreme Court does with the same case on appeal. The CFC’s actions are clearly distinguishable from what the Tax Court, the General Services Board of Contract Appeals\(^{195}\) or the United States Court of Appeals for Veterans Claims\(^{196}\) does, because in each of the latter the tribunal is executing the laws inasmuch as it decides how much tax the citizen must pay, or what rights he has under a contract, or what benefits he is owed. In contrast, the CFC is “called upon to pronounce the law in order to resolve a dispute between contestants.”\(^{197}\) In other words, the citizen and the government “stand before the [CFC] much as do the parties to a civil action. The court authoritatively speaks the law, not to guide the executive, but to resolve a dispute between parties at equal distance from itself.”\(^{198}\) Thus the CFC exercises the quintessence of the judicial function, and by any fair standard that function should form part of the core of the Article III judicial power, unless some “exception” applies.

Now, one might disagree with the premise above—that the CFC exercises an executive function—and instead hold that the CFC exercises a *legislative* function, because in our system appropriations from the Treasury must first be authorized by an Act of Congress, and, prior to
1855, claims against the United States were decided by private bill, a legislative act. Hence, the CFC could be characterized as an adjunct to Congress, as a quasi-legislative committee. That answer seems satisfying at first; but then we recall that Congress cannot delegate its appropriations power to anyone else, yet by Congress's making the CFC's decisions “final,” it would appear that it has impermissibly delegated that power. If that power has not been delegated, and the Congress retains power not to appropriate money to pay judgments, then any judgment by the CFC or an Article III court on review would appear to be advisory, although the Supreme Court has not since Gordon declined to review CFC decisions. One must conclude then that the CFC issues final judgments that an Article III court may review, notwithstanding Congress's ultimate authority to refuse to pay them.

I think it has been well shown that an interpretation of Article III that presents itself as purely textualist but also pretends to harmonize the Court's 150 years of precedent is impossible. What can be done, however, to make legislative courts doctrine at least susceptible of principled application to future cases, is to conceive of the adjudicatory–judicial distinction as one of degree, not of kind, represented as a continuum. At one end is the “pure” judicial act, i.e., a third-party neutral's judgment ascertaining the law's meaning as applied between disputants. At the other end is the “pure” executive act, i.e., the government's prosecution of the law against or for a subject, without any extended law-to-fact determination. In between these extremes fall the judicial and executive arms of our government.

Hence, Article III courts are far to the judicial pole of the continuum, whereas administrative agencies are far to the executive pole of the same continuum. Administrative tribunals are obviously nearer the median point, but still on the executive side; the Article III courts of the District of Columbia are also near the median point, but still on the judicial side.
We may posit that the separation of powers is not violated unless a governmental body belonging on one side of the spectrum exercises power on the other side of the median. So long as the body exercises only adjudicatory power on the adjudicatory side of the continuum, then the separation of powers remains intact; similarly, so long as the body exercises only judicial power on the judicial side of the continuum, no constitutional violation occurs.

Where do we place the CFC on this spectrum? Based solely on the accouterments of the CFC, its jurisdiction, its history, and the Article III court review of its decisions, as a governmental body it should occupy a place on the judicial side of the continuum. Article III requires that any governmental body sitting on that side of the spectrum must be staffed by judges enjoying life tenure and salary protection. CFC judges are not so protected. The syllogism thus deems the CFC to be unconstitutional.

Yet the analysis cannot ignore sovereign immunity. It is unclear whether sovereign immunity renders the cases which the CFC hears non-judicial, or not requiring judicial determination, or outside Article III jurisdiction. The Supreme Court has not spoken consistently on this subject; the commentators are conflicted. But the effect of sovereign immunity on the constitutional continuum described above is to move, for the CFC, the median further to the judicial side. The effect of this shift is to permit a non-Article III body to exercise what otherwise would be Article III powers were it not for sovereign immunity. The shift in the constitutional continuum is largely due to the practical consideration that Congress could decide to have the question decided entirely by a legislative committee or administrative body, as the Court of Claims was in its inception, or by private bill, as was the case prior to 1855. If Congress can remove the matter entirely from the jurisdiction of a court, then it seems reasonable
that included within that power is the capacity to establish judicial tribunals that have many of the hallmarks of Article III courts without observing all the strictures of that Article.

Admittedly, the upshot of this analysis may be simply a *sui generis* answer to the constitutional question. The constitutional continuum is not, however, dependent upon sovereign immunity. Instead, sovereign immunity merely dictates that the continuum be adjusted to accommodate the varying functions of the tribunal. The utility of the constitutional continuum as an analytical tool is independent of sovereign immunity. Subsumed within it are the insights of the *Crowell* public-private rights distinction, the command of the Simple Theory, the “confluence of practical considerations,” and the “stuff of Westminster” test, yet it thankfully avoids the tautology of the Harlan and Scalia theories. The constitutional continuum is necessarily a test of degree. That conclusion is inevitable given the impossibility of making conceptual distinctions between the judicial and executive functions. The only distinction possible, and thus the only means by which to distinguish an Article I from an Article III court, must be based upon degree not kind. The extent to which the proceedings of the tribunal, the attitudes of its officers, the use of precedent, the rules of procedure and evidence, the adversity of its proceedings—all these aspects, far from being mere accidents or incidental trappings, are frankly far more important to the constitutional analysis than tenure or jurisdiction or Congressional intent.

Is this a satisfying answer? Perhaps not. But the paths of law have been well laid in the field of legislative courts. The constitutional continuum at least provides an analytically honest mode of resolving legislative courts disputes.
ABSTRACT

The study of legislative courts has long engrossed yet perplexed both the courts and lawyers. From the Republic's beginning, Congress has authorized the creation of federal courts whose judges do not enjoy life tenure and whose salaries are not protected against diminution during tenure in office. Today, with the great expansion of the administrative state, legislative courts have become a commonplace; and indeed it would be a great burden if every federal adjudicator had to be an Article III judge. Yet neither the courts nor the commentators have produced a satisfying reconciliation between the seemingly uncompromising absolutism of the Article III—that all judicial power is vested in federal officers enjoying life tenure and salary protection—and the realities of modern governance. This article offers a solution.

The article's conclusion is that legislative courts do not offend Article III. That proposition is supported by reference to a criterion, a constitutional continuum, according to which the constitutionality of any given legislative court may be determined. The article develops this criterion through a critical review and sifting of the relevant case law, and uses as an occasional empirical reference point what is the oldest and perhaps best known legislative court: the United States Court of Federal Claims. Although the constitutional continuum does not provide a perfect reconciliation of the case law and practice, it goes a long way toward bringing clarity and coherence to a rather opaque doctrine.
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I.</td>
<td>Introduction</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>A Court of Federal Claims <em>apéritif</em></td>
<td>4</td>
</tr>
<tr>
<td>II.</td>
<td>Cases</td>
<td>5</td>
</tr>
<tr>
<td>A.</td>
<td>American Insurance Co. v. Canter</td>
<td>5</td>
</tr>
<tr>
<td>B.</td>
<td><em>Murray's Lessee</em> v. Hoboken Land &amp; Improvement Co.*</td>
<td>8</td>
</tr>
<tr>
<td>C.</td>
<td>Gordon v. United States</td>
<td>10</td>
</tr>
<tr>
<td>D.</td>
<td><em>Ex Parte Bakelite Corp</em></td>
<td>11</td>
</tr>
<tr>
<td>E.</td>
<td>Crowell v. Benson</td>
<td>14</td>
</tr>
<tr>
<td>F.</td>
<td>Williams v. United States</td>
<td>16</td>
</tr>
<tr>
<td>G.</td>
<td>O'Donoghue v. United States</td>
<td>21</td>
</tr>
<tr>
<td>H.</td>
<td>National Mutual Insurance Co. v. Tidewater Transfer Co.</td>
<td>24</td>
</tr>
<tr>
<td>I.</td>
<td>Glidden Co. v. Zdanok</td>
<td>26</td>
</tr>
<tr>
<td>J.</td>
<td>Palmore v. United States</td>
<td>34</td>
</tr>
<tr>
<td>K.</td>
<td>Northern Pipeline Construction Co. v. Marathon Pipe Line Co.</td>
<td>38</td>
</tr>
<tr>
<td>L.</td>
<td>Thomas v. Union Carbide Agricultural Products</td>
<td>44</td>
</tr>
<tr>
<td>M.</td>
<td>Commodity Futures Trading Commission [“CFTC”] v. Schor</td>
<td>47</td>
</tr>
<tr>
<td>N.</td>
<td>Freytag v. Commissioner</td>
<td>50</td>
</tr>
<tr>
<td>III.</td>
<td>Rules</td>
<td>52</td>
</tr>
<tr>
<td>A.</td>
<td>The Absolutist Theory</td>
<td>52</td>
</tr>
<tr>
<td>B.</td>
<td>The <em>Crowell</em> Appellate Review Theory</td>
<td>60</td>
</tr>
<tr>
<td>C.</td>
<td>The “confluence of practical considerations&quot; theory</td>
<td>62</td>
</tr>
</tbody>
</table>
D. Article III balancing theory  

E. The Rehnquist-O'Connor "essential core" theory  

F. The Scalia adjudicatory-not-judicial theory  

IV. A proposed answer


2 Discussed infra.

3 See 10 U.S.C. § 867.

4 For a review of the early history and practice of the Court of Claims, see William A. Richardson, History, Jurisdiction, and Practice of the Court of Claims of the United States, 7 So. L. Rev. (n.s.) 781 (1882); O.R. McGuire, Controversies with the United States: II, 16 Geo. L.J. 454, 454-58 (1927-28).

5 See 10 Stat. 612 (1855).


7 See Richardson, supra note 1, at 789.

8 289 U.S. 553 (1933).


12 28 U.S.C. § 1491(a)(1). The Tucker Act invests the CFC with original jurisdiction to
hear claims for money damages in excess of $10,000 not sounding in tort. The so-called Little Tucker Act, id. § 1346(a)(2), invests both the CFC and the district courts with jurisdiction to hear claims for money damages not exceeding $10,000 and not sounding in tort. (There is also an “Indian Tucker Act,” id. § 1505, which permits Indian Tribes to sue the federal government as if they were private claimants). Under the Federal Tort Claims Act, the district courts have exclusive original jurisdiction to hear claims against the federal government sounding in tort. Id. § 1346(b)(1). Both the CFC and the district courts have concurrent original jurisdiction to hear all claims for tax refunds. Id. § 1346(a)(1). The Federal Circuit has exclusive appellate jurisdiction over Tucker Act and Little Tucker Act cases. See id. § 1295(a)(2), (3).

13 See, e.g., id.§ 1495 (damages for unjust conviction and imprisonment); § 1497 (oyster growers’ damages); § 1498 (patent and copyright infringements by federal government).

14 26 U.S. (1 Pet.) 511 (1828).

15 Id. at 546.

16 Cf. Craig A. Stern, What’s a Constitution Among Friends? — Unbalancing Article III, 146 U. Pa. L. Rev. 1043 (1998) (arguing that Canter is consistent with a textualist reading of Article III and that the so-called “exceptions” to Article III are nothing of the sort but rather are instances where the text of Article III does not apply).

18 See, e.g., Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 Ind. L.J. 233, 240-43 (1990) (referring to Marshall’s argument as “perfectly circular” and concluding that the Court’s opinion fails to provide a “coherent account” of legislative courts’ activities).

19 See Williams v. United States, 289 U.S. 553, 565 (1933). In *Ex Parte Randolph*, 20 F. Cas. 242 (C.C.D. Va. 1833) (No. 11,558), Chief Justice Marshall, sitting on circuit with Judge Barbour, had an opportunity to explain further what the “judicial Power” of Article III entailed. The case concerned one Robert Randolph, acting purser of the U.S.S. Constitution. The Secretary of the Treasury, pursuant to recently granted statutory authority, had issued against Randolph a warrant of distress requiring him to account for the monies he had received in the government’s name during his tenure as purser. Randolph challenged his detention on habeas, arguing that the Secretary’s issuance of the writ was an unlawful exercise of the judicial power of the United States. Marshall entertained the theory and conceded that, were the statute applicable to Randolph, the issuance of the writ would have to be characterized as a ministerial and not a judicial act. *Id.* at 255. Given that the statute applied only to regular pursers, and that Randolph was a temporary purser, the statute did not apply and the constitutional question was avoided.

20 These courts’ supposed ephemerality forms part of the “confluence of practical considerations” that justifies their complete domination by Congress. See Glidden Co. v. Zdanok, 370 U.S. 530, 547 (1962) (plurality opinion).

21 See Swift v. Tyson, 41 U.S. 1 (1842).

22 “A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases are as old as navigation itself; and the law, admiralty and maritime, as it has

23 59 U.S. (18 How.) 272 (1856).

24 *Id.* at 284.


26 117 U.S. 697 (1865).

27 *See* Richardson, *supra* note 1, at X.

28 279 U.S. 438 (1929).

29 *Id.* at 451 (emphasis added).

30 *Id.* at 453.
31 *Id.* at 458.

32 *Id.* at 459.

33 See *id.* at 460.

34 See, e.g., Note, 46 Harv. L. Rev. 677, 685-87 (1933) (highlighting the difficulty in the theory that the Court of Claims does not exercise Article III judicial power, because the Supreme Court had routinely reviewed appeals from the Court of Claims, even though the Supreme Court's federal appellate jurisdiction extends only to judgments issued from Article III tribunals); Note, *The Distinction Between Legislative and Constitutional Courts*, 43 Yale L.J. 316, 319-21 (1933) (making the same point); Note, 47 Harv. L. Rev. 133, 133 (1933) (referring to the “elaborate opinion rendered by Mr. Justice Van Devanter”); George Stewart Brown, *The Rent In Our Judicial Armor*, 10 Geo. Wash. L. Rev. 127, 135 (1941) (arguing that the Court made a “serious historical error”)(Cf. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1367-68 (1953)); Note, *The Distinction Between Legislative and Constitutional Courts and Its Effect on Judicial Assignment*, 62 Colum. L. Rev. 133, 158-60 (1962) (questioning the *Bakelite* Court's rejection of Congressional intent, its characterization of what is inherently judicial, and its interpretation of customs law history). Cf. George H. Watson, *The Concept of the Legislative Court — A Constitutional Fiction*, 10 Geo. Wash. L. Rev. 799, 801 (1942) (defending *Bakelite*). *Bakelite* also received short shrift from the second Justice Harlan in his *Glidden Co. v. Zdanok* plurality opinion, discussed *infra*.

36 See *id.* at 51.

37 *Id.* at 56-57.
38 It would be difficult to justify the CFC's constitutionality under a Crowell-adjunct theory, if the role of an adjunct is conceived as a helper to the judge but not himself capable of rendering judgment; for the CFC's raison d'être is to render judgment on claims between a citizen and the Republic. See Stern, supra note X, at 1074.

39 See Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1365-66 (1953). Professor Hart concluded that the state courts were the ultimate safeguard to the protection of constitutional rights. See Hart, supra note 4, at 1401. If that premise be true, how would it apply in the context of legislative courts? I believe it would fail to achieve the purpose that Professor Hart had intended. Even if one were to assume that Congress under certain circumstances must waive its sovereign immunity, that waiver could be required only at the federal level because a state court cannot in our system of dual sovereignties, following McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), command the federal government to be subject to suit in a state forum. Perhaps one could colorably argue that the majority in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), got it right and that the federal government does not enjoy sovereign immunity, in which case no legal impediment would prevent the federal government from being subject to suit in state court. And if that be true, then the CFC's existence is not a constitutional necessity; in fact, any federal court jurisdiction—Article III or non-Article III—over cases to which the U.S. is a party-defendant is unnecessary. Thus can the legislative courts enigma be resolved, at least for the CFC, but at what cost!

40 For law review commentary on Crowell, see Bator, supra, at 266-68; Fallon, supra, at 923-26. Cf. Mark Tushnet, Invitation to a Wedding: Some Thoughts on Article III and a
Problem of Statutory Interpretation, 60 Iowa L. Rev. 937, 950-54 (1975) (criticizing the case for producing a test that approves of legislative courts whenever Congress, in creating the tribunals, “acts in a generally reasonable way”).

41 289 U.S. 553 (1933).

42 A most distinguished assemblage: in addition to Sutherland, Chief Justice Hughes and Associate Justices Van Devanter, McReynolds, Brandeis, Stone, Roberts and Cardozo.

43 Id. at 561-62.

44 2 U.S. (2 Dall.) 419 (1793).

45 Id. at 577. See Hart, supra at 1370 (positing that in some instances the government would be constitutionally required to waive sovereign immunity).

46 See supra note 1.

47 See Williams, 289 U.S. at 579.

48 295 U.S. 602 (1935) (upholding creation of quasi-legislative and quasi-judicial agencies as consistent with separation of powers).

49 Id. at 581.

50 28 U.S.C. § 1346(b)(2). See supra note 1[?].

51 See Brown, supra at 129 (criticizing the opinion's conclusion as having “no logic, reason or common sense to support it”).


53 But see Note, The Constitutional Status of the Court of Claims, 68 Harv. L. Rev. 527,
528-30 (1955) (arguing that suits against the United States fall within the Article III jurisdictional grant notwithstanding *Williams*); Note, *Distinction, supra* at 155 (same). *Cf.* Bator, *supra* at 242 n.30 (calling the Court's reasoning “erroneous”).

54 See Freytag v. Comm'r, 501 U.S. 868, 914 n.5 (Scalia, J., concurring in the judgment) ("Sadly, the Court also relies on dicta in *Williams v. United States*, . . . an opinion whose understanding of the principles of separation of powers ought not inspire confidence, much less prompt emulation."); Note, 47 Harv. L. Rev. 133, 134 (1933) (concluding that the “far-reaching implications of this doctrine . . . seem only further to unsettle a body of doctrine already very obscure"); Note, *Distinction, supra* at 321 (recognizing the opinion's creation of a “conceptual anomaly"); *but see* Note, 22 Geo. L.J. 91, 95-96 (1933-34) (defending the position that Congress may bestow non-Article III adjudicatory power on an administrative or judicial body without offending the separation of powers).

55 Brown, *supra* at 131.

56 See Note, *Judicial Power of Federal Tribunals Not Organized Under Article III*, 34 Colum. L. Rev. 746, 748 n.6 (1934) (interpreting *Williams* as holding that the Supreme Court does not exercise Article III judicial power when it hears a direct appeal from the Court of Claims).

57 See Note, *Distinction, supra* at 155 n.157.

58 See Note, *Distinction, supra* at 161-62.

59 289 U.S. 516 (1933).

60 See *id.* at 548.
See Note, 22 Geo. L.J. 91, 94 (1933-34); Watson, supra at 820-21; Note, The Constitutional Status of the Court of Claims, supra at 533-34; Note, Distinction, supra at 322-23 (referring to “another long opinion” of Justice Sutherland and admonishing the Court that “too much logic leads only to confusion of issues”); Note, Distinction Between, supra at 141-42.

See Hayburn’s Case, 2 U.S. (2 Dall.) 409 (1792).

337 U.S. 582 (1948).


The difficulty can be avoided if one accepts that Tucker Act cases are federal questions. Sutherland did not make the point.


Id. at 544-45.

Id. at 546-47.

Id. at 547.

Id. at 549-50.

See id. at 551.

Id. at 552. How this test differs from the “inherently judicial” rule of Bakelite, elaborated in Williams, is not immediately evident.

See id. at 552-58.

Id. at 562. It seems more than a little presumptuous not to attribute meaning to the omission of one word when it has been included in the same section in a parallel clause. The
Court surely is expounding a constitution; it ought not create one.

75 *Id.* at 564 (quoting Monaco v. Mississippi, 292 U.S. 313, 322 (1934)).

76 *Glidden Co.*, 370 U.S. at 567.

77 Although even Harlan conceded that Congress had more than once refused to pay a judgment of the Court of Claims. *See id.* at 570.

78 Harlan did not account for the Court's Congressional reference jurisdiction, which is of a purely advisory nature. *See* 28 U.S.C. §§ 1492, 2509.

79 *Id.* at 572.

80 *Id.* at 585 (Clark, J., concurring in the judgment).

81 It is a fair question whether either of the precedents may be read to hinge on Congressional intent, given that Justice Van Devanter in *Bakelite* expressly disavowed Congressional intent as having any weight in the legislative court-constitutional court calculus. *See* Ex parte Bakelite Corp., 279 U.S. 438, 459 (1929).

82 Under 28 U.S.C. § 1492, either House of Congress may refer a private petition to the chief judge of the CFC, who then refers the petition to one of the CFC's judges acting as a hearing officer. The latter's decision is reviewed by a three-judge panel of the CFC, which submits its report via the chief judge to the appropriate House. *See id.* § 2509.

83 *Glidden*, 370 U.S. at 587.

84 *Id.* at 589.

85 Justice Douglas argued in dissent that the President might well have nominated a
different person had he known that the position was life-tenured. *Id.* at 604 (Douglas, J., dissenting).

86 I therefore must disagree with the position, maintained by some commentators, that *Glidden Co.* overruled *Bakelite* and *Williams*. See Note (Lucinda M. Finley), *Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act*, 80 Colum L. Rev. 560, 575 n.109 (1980); Note (Joseph S. Sano), *A Literal Interpretation of Article III Ignores 150 Years of Article I Court History: Northern Pipeline Construction Co. v. Marathon Oil Pipeline Co*, 19 New Eng. L. Rev. 207, 214 n.65 (1983) (declaring *Bakelite* to have been reversed). Cf. Martin H. Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 Duke L.J. 197, 207 (arguing that *Bakelite* “has been seriously eroded [but not overturned] by subsequent Supreme Court opinions”); Ralph U. Whitten, *Consent, Caseload, and Other Justifications for Non-Article III Courts and Judges: A Comment on Commodities Futures Trading Commission v. Schor*, 20 Creighton L. Rev. 11, 13 (1986) (stating that only the plurality opinion considered *Bakelite* and *Williams* to have been erroneously decided).

87 *Glidden*, 370 U.S. at 590 (Douglas, J., dissenting).

88 *Id.* at 591.

89 *Id.* at 593.

90 See *id.* at 598.

91 See *id.* at 599.

92 *Id.* at 602-03.
Such indeed is the position that one commentator advocates. See Mark Tushnet, Invitation to a Wedding: Some Thoughts on Article III and a Problem of Statutory Interpretation, 60 Iowa L. Rev. 937, 947 (1975) (“Congress must show, not simply that it found the use of article I courts convenient, but that it found that article I courts were especially appropriate”); Sano, supra note X, at 234.


See id. at 398.

See id. at 401-02.

Id. at 404.

See id. at 406.