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Kenneth T Kristl



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LIMITS ON LEGISLATIVE COURT JUDICIAL POWER: THE NEED FOR BALANCING COMPETING INTERESTS

*Northern Pipeline Construction Company v.
Marathon Pipeline Company*
102 S. Ct. 2858 (1982)

KENNETH T. KRISTL, 1984*

Article III of the Constitution grants Congress the power to create inferior federal courts,¹ often called article III, or “constitutional,” courts.² They are staffed by judges with life tenure³ and guaranteed salaries.⁴ However, Congress also has the authority, based on other, non-article III grants of power, to create “legislative” courts—courts under Congressional control and not subject to article III’s limitations.⁵ Both constitutional and legislative courts have been said to exercise “judicial power,”⁶ and the relationship between the judicial powers vested in these two different kinds of courts has confused court and scholar alike.⁷ That confusion confounded Congress as it attempted to

* B.A., University of Notre Dame, 1981; Candidate for J.D., IIT/Chicago-Kent College of Law, 1984.

1. Section 1 of article III reads:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. CONST. art. III, § 1.

2. The terms “constitutional” and “legislative” courts were coined by Chief Justice Marshall in *American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828). Marshall apparently distinguished them by the source of their powers—constitutional courts deriving their powers from article III, and legislative courts from Congress’ ability to create the court as a necessary and proper means to carry out some power given it in the Constitution.

3. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955). Although article III, § 1, only states that the judges are to hold their office “during good behavior,” this clause has been taken to mean that the tenure of an article III judge is for life.

4. U.S. CONST. art. III, § 1. *See United States v. Will*, 449 U.S. 200 (1980). The salaries are guaranteed in the sense that a judge’s salary cannot be diminished during his or her term in office.

5. Comment, *The Distinction Between Legislative and Constitutional Courts and its Effect on Judicial Assignment*, 62 COLUM. L. REV. 133 (1962) [hereinafter cited as *Judicial Assignment*]. These non-article III grants of power are generally found in article I, § 8, which enumerates many of Congress’ legislative powers. However, other sections of the Constitution have been used to justify legislative courts. Article IV, § 3, for example, was used to justify the creation of territorial courts. *See infra* notes 26-29, and text accompanying.

6. *Judicial Assignment*, *supra* note 5, at 138.

7. In response to a request for his opinion of the case law on the subject, a law professor wrote: “[T]he Supreme Court has made such a mess of this phase of the law that medieval theologians would be as reliable a source of guidance on it as modern professors.” Letter of Professor

reform the bankruptcy laws,⁸ and the result of that reform effort—the Bankruptcy Reform Act of 1978⁹—created legislative courts with the judicial power proposed for a constitutional court.

*Northern Pipeline Construction Company v. Marathon Pipeline Company*¹⁰ was the Supreme Court's analysis of the constitutionality of the bankruptcy courts' broad powers. *Marathon Pipeline* effectively perpetuated the historical confusion surrounding legislative court judicial power by failing to enunciate one view of that power that could command a majority of the court. Nor could the Court agree on a methodology for defining that power; instead, two competing methods of analyzing the limits of legislative court judicial power were proposed. The Court ultimately rejected the judicial power of the bankruptcy courts on the basis of one method, which viewed article III policy concerns as limiting legislative court judicial power to three narrow situations.¹¹ The second method, which balanced the constitutional interests involved, was used by the dissent to conclude that the bankruptcy courts' judicial power is valid.¹²

This comment will examine the history of the doctrines concerning legislative court judicial power, and how those doctrines were applied in creating the bankruptcy courts. The *Marathon Pipeline* decision will be summarized, and each of its four opinions will be discussed. Finally, this comment will analyze *Marathon Pipeline* both from the viewpoint of the methodology used to reach the decision, and from the result itself. It will conclude that the only method capable of achieving adequate consideration of all issues involved in the decision to bestow legislative court judicial power is the balancing method of the dissent, and this method will be used to criticize the final result of the decision.

HISTORICAL BACKGROUND

The constitutional courts established under article III of the Constitution are subject to the salary and tenure provisions of section 1,¹³ and the subject matter jurisdiction provisions of section 2.¹⁴ These lim-

Charles A. Wright to Representative Peter Rodino, reprinted in H.R. REP. NO. 595, 95th Cong., 1st Sess. 87 (1977) [hereinafter cited as HOUSE REPORT].

8. See 1 COLLIER ON BANKRUPTCY ¶ 2.01 (15th ed. 1982) [hereinafter cited as COLLIER (15th)].

9. 11 U.S.C. § 101 *et seq.* (Supp. II 1978).

10. 102 S. Ct. 2858 (1982).

11. *Id.* at 2867-2874. See *infra* notes 121-125, and accompanying text.

12. *Id.* at 2893-2896.

13. See *supra* note 1.

14. § 2 extends the judicial power of the United States to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United

itations on the judicial power of the United States resulted from the keen desire of the Framers of the Constitution to separate the powers of the three branches of the federal government so as to avoid the tyranny of a concentration of power,¹⁵ while structuring the powers of each branch so that its operation would act to confine the other branches within their proper spheres.¹⁶ The salary and tenure provisions were included in article III to insure that the judiciary would be immune to pressure from the executive and legislative branches, so that “inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice”¹⁷ would be guaranteed.¹⁸ The most common examples of constitutional courts are the district courts and the Courts of Appeals.

Despite the apparent exclusivity of the article III grant of the judicial power, Congress has successfully established legislative courts that exercise judicial power under constitutional auspices other than article

States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls; —to all Cases of admiralty and maritime Jurisdiction; —to Controversies to which the United States shall be a Party; —to Controversies between two or more States; —between a State and Citizens of another State; —between Citizens of different States; —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2.

15. “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” THE FEDERALIST NO. 47 at 300 (J. Madison) (H. Lodge ed. 1888).

16. Note, *Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act*, 80 COLUM. L. REV. 560, 580 (1980) [hereinafter cited as *Article III Limits*]. See *Youngstown Co. v. Sawyer*, 343 U.S. 579, 593 (1952) (Frankfurter, J., concurring).

17. THE FEDERALIST NO. 78 at 489 (A. Hamilton) (H. Lodge ed. 1888).

18. With regard to the tenure provisions, Hamilton argued that judicial independence could never be maintained by a system that did not give its judges permanent commissions.

Periodic appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to [judges'] necessary independence. If the power of making them was committed either to the Executive or the legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.

Id. at 489.

With respect to the salary provision, Hamilton believed that

[N]ext to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support . . . In the general course of human nature, a power over a man's subsistence amounts to a power over his will. And we can never hope to see realized in practise, the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter.

THE FEDERALIST NO. 79 at 491 (A. Hamilton) (H. Lodge, ed. 1888) (emphasis in original). See *United States v. Will*, 449 U.S. 200, 218-221 (1980); *O'Donoghue v. United States*, 289 U.S. 516, 531 (1933). See generally *Article III Limits*, *supra* note 16, at 582-85.

III. For example, Congress' article IV powers over territories of the United States were sufficient constitutional justification for creating such legislative courts as the Court of Private Land Claims, which was established to hear disputes about lands ceded under a treaty with Mexico,¹⁹ and the Choctow and Chickesaw Citizenship Court, established to adjudicate claims of Indian citizenship on certain Indian lands.²⁰ The general federal power to make treaties with foreign countries was considered sufficient justification for the creation of consular courts, which adjudicated claims against American citizens in foreign countries.²¹ In general, the salary and tenure of the judges presiding over legislative courts are subject to Congressional control, and the subject matter jurisdiction of these tribunals may include legislative and administrative tasks that could not be performed by constitutional courts.²²

Given the Framers' concern for judicial independence and the separation of powers among the governmental branches, there must be some essential difference between constitutional courts, whose power is defined by article III and is thus immune from legislative interference, and legislative courts, whose power is defined by Congress and is thus continually exposed to legislative interference. Article III vests the "judicial power of the United States" in the constitutional courts; assuming that article III exclusively defines the repositories of that judicial power, the power of a legislative court to adjudicate must be some other kind of judicial power. Thus, the essential difference between constitutional and legislative courts is the difference in the power each can constitutionally wield.

Article III, section 2 limits the judicial power of constitutional courts to the "cases and controversies" outlined in that section,²³ and the Supreme Court has strictly applied this standard when confronted with the question of whether a case was properly before a constitutional court.²⁴ Given this relatively clear definition of the judicial

19. *See* *United States v. Coe*, 155 U.S. 76 (1894).

20. *See* *Stephens v. Cherokee Nation*, 174 U.S. 445 (1899).

21. *See In re Ross*, 140 U.S. 453 (1891).

22. *Judicial Assignment*, *supra* note 5, at 138. These courts are justified by the practical flexibility afforded the government when the article III tenure and salary provisions are not rigidly enforced. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 396 (2d ed. 1973). Some of the practical interests mentioned on the flexibility of legislative courts include the ability to disband a tribunal once it has outlived its usefulness; the ability to hear cases outside article III jurisdiction; and the ability to establish expert tribunals, with the power to change the judges so as to maintain the court's expertise (for example, the Tax Court). *See Article III Limits*, *supra* note 16, at 570-71.

23. *See supra* note 14.

24. *See, e.g.*, *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716 (1929) (article III court

power of constitutional courts, the difference between it and the power of legislative courts can best be seen by focusing on the historically different approaches taken by the Supreme Court toward defining the judicial power of legislative courts.²⁵

I. Historical Definitions of the Powers of Legislative Courts

The confusing history of the doctrine of legislative courts began in *American Insurance Company v. Canter*.²⁶ In 1823, Congress had established a territorial legislature in Florida which had the power to create inferior courts for the territory. The issue in *Canter* was whether a judicial sale, held pursuant to an admiralty judgment of a territorial court, was valid. Chief Justice Marshall, writing for the Court, determined that the territorial court was a legislative court,²⁷ created by virtue of Congress' enumerated power to make rules and regulations for the territories.²⁸ Because the court was created under a provision other than article III, it neither received its judicial power via that article nor was subject to its limitations. Yet the legislative court in *Canter* exercised jurisdiction that clearly fell within the subject matter jurisdiction of article III.²⁹ Thus, the policy considerations of judicial independence and separation of powers that are embodied in the salary and tenure provisions of article III can give way to Congress' power to create courts under other constitutional provisions.³⁰ The legislative

judgments cannot be subject to executive or legislative review; therefore case subject to such review could not be heard before article III courts); *Willing v. Chicago Auditorium Association*, 277 U.S. 274 (1928) (constitutional court cannot issue a declaratory judgment); *Keller v. Potomac Elec. Power Co.*, 261 U.S. 428 (1923) (constitutional court cannot be required to perform legislative or administrative functions).

25. This comment focuses on the judicial power of legislative courts. The cases to be discussed in this historical analysis focused on two issues: The definition of the type of court (whether the court in question was legislative or constitutional), and the powers that legislative and constitutional courts possess. Because the bankruptcy court involved in *Marathon Pipeline* was clearly not a constitutional court, the issue of type of court is not in dispute. Thus, the following historical analysis is limited to the issue of court power as discussed in previous cases.

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

27. 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.

Id. at 546.

28. *Id.* Congress' ability to make rules and regulations for the territories is enumerated in U.S. CONST. art. IV, § 3, cl. 2.

29. This was a case in admiralty which is specifically included in the article III § 2 list of cases and controversies. It was argued in *Canter* that the case could only be heard by a court wielding article III power (26 U.S. (1 Pet.) at 536-37). Marshall, however, was willing to allow Congress to include admiralty in the territorial court's jurisdiction.

30. The extent of the departure from the salary and tenure provisions allowed in *Canter* is

courts thus created could be as powerful as constitutional courts without being limited by the requirements of article III.³¹

Thirty years later, the Supreme Court limited legislative court judicial power to "public rights" cases in *Murray's Lessee v. Hoboken Land and Improvement Company*.³² At issue was the ability of a solicitor of the Treasury, a non-article III officer, to issue a warrant for distress³³ and seize the lands of a customs collector. The issuance of the warrant was considered a judicial act.³⁴ The question was whether that judicial act had to be carried out by a constitutional court. The Court recognized that there are some cases which Congress cannot remove from the jurisdiction of constitutional courts. Such cases are, by their nature, subject to article III judicial consideration³⁵—inherently judicial cases. However,

there are matters, involving public rights, which 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.³⁶

The power of the solicitor was upheld because Congress had chosen to remove this public rights case from the constitutional courts. The policies of article III can thus give way to congressional desire to remove a public rights case from constitutional courts and to place it within the jurisdiction of a legislative court. *Murray's Lessee* limited the broad legislative court judicial power approved of in *Canter* by recognizing the existence of cases reserved to the constitutional courts, while also

made clear by the fact that the court whose decision Marshall upheld consisted of a notary and five jurors. 26 U.S. (1 Pet.) at 541. The notary did not have life tenure in his position on this court—indeed, the tenure of the judges of the Superior Courts for the territory (the highest court created) was only for four years. *Id.* at 546.

31. This ability of legislative court judicial power to circumvent the limitations of article III has historically been limited to territorial courts, *McAllister v. United States*, 141 U.S. 174, 187-88 (1891), apparently on the theory that such disregard for article III was only temporary. See *Glidden Co. v. Zdanok*, 370 U.S. 530, 545-47 (1962); *O'Donoghue v. United States*, 289 U.S. 516, 536-38 (1933).

32. 59 U.S. (18 How.) 272 (1855).

33. A warrant for distress is a writ authorizing an officer to seize the property of a wrong-doer to procure a satisfaction for the wrong committed. BLACK'S LAW DICTIONARY 426 (5th Ed. 1979). The statute at issue in *Murray's Lessee* granted the solicitor of the Treasury the power to issue a warrant for distress allowing the seizure of lands of a customs collector if evidence indicated that the collector had not turned over to the Treasury all monies he had collected. 59 U.S. (18 How.) at 274-75.

34. 59 U.S. (18 How.) at 280.

35. "We think it proper to state that we do not consider congress can . . . withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at common law, or in equity, or admiralty . . ." *Id.* at 284.

36. *Id.*

realizing that article III's concerns can give way in cases involving public rights.

Legislative court judicial power over matters not inherently judicial was expanded in *Ex Parte Bakelite Corporation*.³⁷ The ability of the Court of Customs Appeals to hear appeals from the Tariff Commission was challenged by petitioners who argued that the court was a constitutional court, and so could not hear an appeal that was not a case or controversy.³⁸ The Supreme Court declared the Court of Customs Appeals a legislative court, created by virtue of Congress' enumerated power to lay and collect duties on imports.³⁹ Because the appeals at issue in *Bakelite* did not involve inherently judicial matters, but rather could have been committed to the final determination of an executive officer,⁴⁰ the legislative court could hear and decide the appeals. The policy concerns of article III gave way to the use of the Court of Customs Appeals not because of congressional desire to remove the appeals from article III judicial consideration,⁴¹ but because the nature of the subject matter in controversy justified the use of legislative court judicial power. This use of the legislative court was justified even though the jurisdiction conferred had formerly been exercised by the district court.⁴² *Bakelite* thus expanded the limits of legislative court judicial power to include all non-inherently judicial subject matter.⁴³

A different justification for legislative court judicial power arose in the context of appellate review in *Crowell v. Benson*.⁴⁴ At issue was the ability of an agency to make administrative findings of fact.⁴⁵ Relying on historical precedent, the Court held that determinations of fact did

37. 279 U.S. 438 (1929).

38. See Argument for the Petitioner, *id.* at 439-42.

39. *Id.* at 458.

40. *Id.* See Katz, *Federal Legislative Courts*, 43 HARV. L. REV. 894, 916-17 (1930) [hereinafter cited as Katz].

41. The Court rejected the congressional intent test of *Murray's Lessee*: "the argument is fallacious. 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." 279 U.S. at 459.

42. See Katz, *supra* note 40, at 896-97.

43. See *Judicial Assignment*, *supra* note 5, at 144.

44. 285 U.S. 22 (1932).

45. The statute involved was the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. §§ 901-950 (19th ed.)). The Act provided for compensation for disability or death provided the injury occurs on the "navigable waters of the United States." There must exist the relation of master and servant between the injured party and the employer from whom compensation is sought, and it must be impossible to recover such compensation through a state workman's compensation statute. The Act empowered the United States Employee Compensation Commission to determine whether the requirements of the Act (the facts outlined here) were present in each individual case.

not have to be made by article III judges.⁴⁶ The interesting question was whether the legislative court (the agency) could make determinations of "jurisdictional" facts.⁴⁷ Chief Justice Hughes believed that because the district court had the power to review the finding of fact, the "essential independence of the exercise of the judicial power of the United States"⁴⁸ could be maintained. Thus, article III considerations are satisfied when a legislative court's application of law to fact is subject to appellate review. If read broadly, this could expand the limits of legislative court judicial power.⁴⁹

Confusion in the distinction between constitutional and legislative court judicial power became apparent in *National Mutual Insurance Company v. Tidewater Transfer Company*.⁵⁰ A congressional act allowing citizens of the District of Columbia to sue in federal district court on the basis of diversity was upheld. Justice Jackson argued that while the definition of "state" in article III prevented citizens of the District from suing, Congress' article I power over the District was sufficient constitutional justification for the Act.⁵¹ Jackson attempted to show a compatibility between article I and article III by showing exam-

46. The Court cited the historical practice in cases of equity and admiralty of using masters, commissioners or assessors to make findings of specific facts, such as the amount of damages. 285 U.S. at 51-52. It concluded: "[I]n cases of [private right], there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges." *Id.* at 51.

47. The Court defined jurisdictional facts as those facts the existence of which is "a condition precedent to the operation of the statutory scheme." *Id.* at 54. They are facts "upon which the enforcement of the constitutional rights of the citizen depend." *Id.* at 56. Under the statute in controversy in *Crowell*, the jurisdictional facts were that the injury did in fact occur upon the navigable waters of the United States and that the relation of master and servant existed at the time of the injury. *Id.* at 54-55. Given this broad definition, it is apparent that whenever a deputy commissioner made a finding of fact under the Act, he was making a finding of jurisdictional fact as well.

48. *Id.* at 64. Because of the broad definition of jurisdictional facts adopted by the Court, appellate review of the findings of jurisdictional fact is really appellate review of the administrative fact-finding process itself. It thus appears that the court is saying that appellate review of a legislative court's findings, be they of jurisdictional facts or not, is sufficient protection of the article III policy concerns about the judicial power of the United States.

49. Such a broad interpretation of *Crowell* is not universally accepted. In his letter to Peter Rodino, Chairman of the House Judiciary Committee considering the bankruptcy laws, Terrance Sandalow wrote:

To read the [Crowell] decision that way, however, would seem to point toward the conclusion that the salary and tenure provisions of Article III are applicable only to appellate judges, a limitation that finds no support in the language of the Article . . . *Crowell* may be read more narrowly, as resting upon the ground that the agency was not authorized to exercise the full range of powers traditionally associated with "the judicial power." . . .

HOUSE REPORT, *supra* note 7, at 79. *But see* letter of David L. Shapiro, *Id.* at 83 (*Crowell* read to allow legislative courts if adequate appellate review exists).

50. 337 U.S. 582 (1949).

51. *Id.* at 600.

ples of article III courts that exercised article I powers, thus dragging in the legislative/constitutional court controversy.⁵² Six Justices rejected Jackson's analysis. Justices Rutledge and Murphy argued that constitutional courts cannot be vested with nonarticle III powers without making the Constitution a "self-contradicting instrument."⁵³ Chief Justice Vinson argued in dissent that the powers of legislative and constitutional courts are separate and cannot be intermixed,⁵⁴ although both kinds of courts may sometimes exercise concurrent jurisdiction. Vinson admitted that such concurrent jurisdiction may lead to the conclusion that the distinction between the two types of courts is "meaningless",⁵⁵ although he believed that the distinction was ultimately grounded in the different constitutional provisions under which each type of court was established. *National Mutual Insurance* effectively confused the definition of constitutional court power by leaving unclear the question of the source of its power. Likewise, Chief Justice Vinson's dissent raised the question of whether the distinction between the judicial power of legislative and constitutional courts was "meaningless".

Without much of an attempt to clarify the distinctions between the judicial powers, the Court made one further statement concerning the bounds of legislative court judicial power in *Palmore v. United States*.⁵⁶ A criminal conviction under the congressionally-created District of Co-

52. Justice Jackson provided two examples to bolster his claim of compatibility. The first was the Court of Claims, which exercises judicial power derived from the article I power of Congress to pay the debts of the United States. Citing to *Williams v. United States*, 289 U.S. 553 (1933), Jackson argued that district courts can hear cases involving claims against the United States, but can only exercise the same article I power as the Court of Claims. 337 U.S. at 592-93. The second example used was that of bankruptcy adjudication. Jackson believed that the article I power to make uniform laws for bankruptcy allowed Congress to "authorize an Art. III court [the district court] to entertain a non-Art. III suit because such judicial power was conferred under Art. I." *Id.* at 595. Jackson's argument thus supported two basic positions: first, that the judicial power of constitutional courts was not exclusively derived from article III, and second, that article I could be a source of judicial power independent of article III.

53. *Id.* at 607 (Rutledge, J., concurring). Justice Rutledge took specific exception to Justice Jackson's analogy to the bankruptcy laws, saying that while article I was the source of the congressional power to pass bankruptcy laws, the jurisdiction exercised by the federal district courts was conventional federal-question jurisdiction. *Id.* at 611-15.

54. *Id.* at 640 (Vinson, C. J., dissenting).

55. *Id.* at 644.

56. 411 U.S. 389 (1973). While this is the last case analyzed here, it is important to note that one other case was decided in this area of constitutional law. *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), involved the definition of legislative courts *vis-a-vis* constitutional courts, an issue not directly applicable here. However, it appeared the effect of the decision was to allow Congress to use constitutional courts to do non-article III work—the very position rejected by the six Justices in *National Mutual Insurance*. Thus, the confusion begun in *National Mutual Insurance* was continued by *Glidden*, further blurring the distinction between legislative and constitutional courts.

lumbia Code was challenged as violative of article III.⁵⁷ The Court noted four historical instances where article III controversies are not decided by an article III judge: enforcement of federal statutes in state courts;⁵⁸ territorial courts;⁵⁹ military courts;⁶⁰ and other courts using judges of limited tenure.⁶¹ Given this historical analysis, the Court held that there are situations when the requirements of article III must give way "to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment."⁶² Finding that the administration of the District of Columbia was one such specialized "area", the Court upheld *Palmore's* conviction. Thus, legislative court judicial power can extend to "specialized areas" in which Congress can legislate.

If summary is possible, the doctrine of legislative court judicial power has historically rested upon a recognition that the provisions of article III are safeguards of the constitutional separation of powers. While the policies underlying those provisions are important, they nevertheless have given way to legislative courts in a variety of situations. Given the confusion caused by the divided court in *National Mutual Insurance*, the limits of legislative court judicial power, as well as its distinction from constitutional court judicial power, have remained unclear. However, it was clear historically that the provisions of article III are not absolute regulations on all exercises of judicial power.

II. *Bankruptcy Courts and Legislative Court Judicial Power*

The Constitution grants Congress the power "to establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."⁶³ Pursuant to that power, Congress passed four bankruptcy acts prior to 1978.⁶⁴

57. 411 U.S. at 400. The basic thrust of *Palmore's* argument was that, because the crime he was convicted of arose under the laws of the United States, he was entitled to a hearing by an article III judge. *Id.*

58. *Id.* at 401-02.

59. *Id.* at 402-03.

60. *Id.* at 404.

61. *Id.* The Courts specifically mentioned were: The Court of Private Land Claims (*see United States v. Coe*, 155 U.S. 76 (1894)); The Choctaw and Chickasaw Citizenship Court (*see Stephens v. Cherokee Nation*, 174 U.S. 455 (1899)); courts created in unincorporated districts outside the mainland (*see Downes v. Bidwell*, 182 U.S. 244 (1901)); and the Consular Courts established in foreign countries (*see In re Ross*, 140 U.S. 453 (1891)).

62. 411 U.S. at 407-08.

63. U.S. CONST. art. 1, § 8, cl. 4.

64. Those laws were: The Bankruptcy Act of 1800, 2 Stat. 19, which was repealed in 1803, 2 Stat. 248; The Bankruptcy Act of 1841, 5 Stat. 440, which was repealed in 1843; The Bankruptcy Act of 1867, 14 Stat. 517, repealed in 1878; and The Bankruptcy Act of 1898, 30 Stat. 544, repealed in 1979. Because this comment focuses on the judicial power question of the bankruptcy courts,

The Bankruptcy Act of 1898 was the historical predecessor to the present bankruptcy laws. It declared the district courts to be courts of bankruptcy,⁶⁵ presided over by the district court judges and by bankruptcy referees. These referees exercised specific duties⁶⁶ subject always to review by a judge.⁶⁷ Although the 1898 Act placed the referee in this subordinate role, the courts viewed the referee as being in the position of the judge,⁶⁸ and "clothed with judicial authority."⁶⁹ The referee's broad powers⁷⁰ enabled him to decide issues in bankruptcy proceedings as the district court judge could, provided the parties consented to his adjudication.⁷¹

In 1938, the Chandler Act⁷² amended the 1898 Act and significantly increased the powers of the referee to act as the "judicial arm" of the bankruptcy courts.⁷³ The word "court" in the 1898 Act was amended to include the referee,⁷⁴ thus making it clear in the statute that "in general the functions of the bankruptcy court may be filled by either a judge or the referee."⁷⁵ Although still subject to review by the district court judge, the decisions and orders of referees, if not appealed within the time prescribed, had the same force and effect as orders of

the legislative history here is necessarily limited. For a complete history of the previous bankruptcy acts, as well as an extensive analysis of the legislative history of the 1878 Act, see COLLIER (15th), *supra* note 8 ¶¶ 1.01-1.03; Klee, *Legislative History of the New Bankruptcy Law*, 28 DE PAUL L. REV. 941 (1979).

65. 30 Stat. 544, § 1.

66. The office of referee was created by § 34 of the 1898 Act. § 38 listed the jurisdiction of the referees as including jurisdiction to 1) adjudicate petitions referred to them; 2) administer oaths and examine documents; 3) exercise the power of a judge to take and release possession of debtor's property; 4) perform duties conferred on the bankruptcy court; and 5) authorize stenographers to transcribe the proceedings. § 39 defined the duties of the referees as including 1) declaring dividends; 2) examining schedules of property for sufficiency; 3) furnishing requested information to parties; 4) giving notice to creditors; 5) making records of the proceedings; 6) filing schedules of property; 7) transmitting needed papers to the court; 8) preserve evidence; and 9) obtaining papers filed in court. *Id.*

67. *Id.* at § 38.

68. *In re Guaranty Trust Co.*, 25 F. Supp. 265 (D. Ore. 1938).

69. *In re McIntire*, 142 F. 593, 596 (N.D.W. Va. 1906). See *White v. Schloerb*, 178 U.S. 542 (1900) (referee "exercises much of the judicial authority of [the bankruptcy] court").

70. The referee is not the court of bankruptcy, but an officer of it. He has such powers as the act and the order of reference give him or as the judge specially delegates to him . . . these powers, however, are so broad that the act declares that in its provisions the word 'court' may include the referee.

Chandler v. Perry, 74 F.2d 371, 373 (5th Cir. 1934).

71. *MacDonald v. Plymouth County Trust Co.*, 286 U.S. 263 (1932); *Page v. Arkansas Natural Gas. Corp.*, 286 U.S. 269 (1932).

72. Act of June 22, 1938, 52 Stat. 840.

73. COLLIER (15th), *supra* note 8, ¶ 1.02(2).

74. Under the 1938 amendments, the definition of "court" was "the judge or the referee of the court of bankruptcy in which the proceedings are pending." Under the 1898 Act before the Chandler Act amendments, the referee "may" be included in the definition of "court", but did not have to be included. 1 COLLIER ON BANKRUPTCY ¶ 1.09, at 64 (14th ed. 1976).

75. *Id.*

the district court,⁷⁶ and were entitled to the same respect and credit as if rendered by any court of general jurisdiction.⁷⁷ It was thus evident that after a case was referred to the referee, he possessed "complete jurisdiction"⁷⁸ over the proceedings.

In 1973, the Supreme Court promulgated the Rules of Bankruptcy Procedure,⁷⁹ which further emphasized the role of the referee in bankruptcy court proceedings. The Rules gave the title of "bankruptcy judge" to the referee,⁸⁰ thus officially recognizing the judicial status of the referee as a "regular judicial officer that handles only bankruptcy cases."⁸¹ All bankruptcy petitions were to be referred to the referee/judge by the clerk of the court,⁸² thus making the referee/judge the conduit through which all bankruptcy litigation must pass. The increasing responsibility of the referee/judge was thus made apparent by the Supreme Court.

The net effect of both the 1938 amendments and the Bankruptcy Rules was to create a *de facto* independent bankruptcy judiciary⁸³ comprised of referee/judges that operated independently of the district court judges. As the number and complexity of bankruptcy cases increased, the specialization needed to deal with those cases became too great a burden for district court judges to handle.⁸⁴ Thus, "the district courts allowed and encouraged the bankruptcy court's evolution towards independence,"⁸⁵ while the district court judges "removed themselves further and further from the consideration of bankruptcy matters."⁸⁶ However, this independence of the referee/judges was not complete. The bankruptcy judges were subject to appointment and removal by the district court judges, and in that sense remained dependent upon the district court for their power.⁸⁷

76. 2A COLLIER ON BANKRUPTCY ¶ 38.02, at 1399 (14th ed. 1978).

77. *Id.* at 1402-03.

78. 1 COLLIER ON BANKRUPTCY ¶ 1.09, at 65 (14th ed. 1976).

79. 415 U.S. 1003 (1973).

80. Bankruptcy Rule 901(7).

81. HOUSE REPORT, *supra* note 7, at 9.

82. Bankruptcy Rule 102.

83. Eisen & Smrtnik, *The Bankruptcy Reform Act of 1978—An Elevated Judiciary*, 28 DEPAUL L. REV. 1007 (1979) [hereinafter cited as Eisen].

84. HOUSE REPORT, *supra* note 7, at 9.

85. Eisen, *supra* note 83, at 1009.

86. HOUSE REPORT, *supra* note 7, at 9.

87. § 34 of the 1898 Act empowered the district court to appoint and remove referees. 52 Stat. 840, § 34. The power to appoint and remove, to hear appeals of referee/judge's decisions, and the exercise of certain powers reserved to the district court by statute were the only powers that the district court retained as the bankruptcy system continued to evolve towards independence. HOUSE REPORT, *supra* note 7, at 9.

The Bankruptcy Reform Act of 1978⁸⁸ restructured the bankruptcy judicial system to handle the increased burden on the system caused by an increasing number of bankruptcy cases.⁸⁹ Despite the *de facto* independence that bankruptcy judges already enjoyed, the Act sought to establish truly independent bankruptcy courts so as to end the real and apparent dependence on the district courts.⁹⁰ To this end, the 1978 Act created United States Bankruptcy Courts in each judicial district as adjuncts to the district court.⁹¹ Jurisdiction was expanded to include all "civil proceedings arising under Title 11 [the new Bankruptcy Code] or arising in or related to cases under Title 11,"⁹² thus giving the bankruptcy courts the power to hear claims based on state as well as federal law.⁹³ The new bankruptcy judges were appointed to fourteen-year terms,⁹⁴ with salaries subject to adjustment.⁹⁵ These judges replaced the referee/judges, and exercised all the "powers of a court of equity, law and admiralty."⁹⁶ The judgments and orders of the court were subject to ultimate appellate review by the court of appeals.⁹⁷

The nature of the judicial power to be exercised by the new bankruptcy courts was an issue of contention throughout the legislative process that created them, indicating the confusion in the then current view of legislative court judicial power.⁹⁸ Three basic proposals evolved, all based on different interpretations of the Supreme Court precedents: the first, that the bankruptcy courts would exercise judicial power derived from article I, and thus be legislative courts (the legisla-

88. Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2549, 11 U.S.C. § 101 *et seq.* (1976, Supp. III).

89. COLLIER (15th), *supra* note 8 ¶ 1.03. See HOUSE REPORT, *supra* note 7, chapter I.

90. SEN. REP. NO. 95-989, 95th Congress, 2d Sess. 6 (1978) [hereinafter referred to as SENATE REPORT].

91. 28 U.S.C. § 151 (Supp. III 1979).

92. *Id.* § 1471(b). Although § 1471(a) initially vests this jurisdiction in the district court, § 1471(c) gives the bankruptcy court the ability to exercise all of the jurisdiction conferred on the district court.

93. See COLLIER (15th), *supra* note 8, ¶ 3.01 at 3-47 to 3-48.

94. 28 U.S.C. § 153 (Supp. III 1979).

95. *Id.* § 154.

96. *Id.* § 1481. The court could not, however, enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment. In addition, the bankruptcy judges could hold jury trials (28 U.S.C. § 1480); issue declaratory judgments (28 U.S.C. § 2201); issue writs of habeas corpus (28 U.S.C. § 2256); and issue any order, process or judgment that is necessary or appropriate to carry out the provisions of the Code (11 U.S.C. § 105(a)).

97. To handle appeals from orders of a bankruptcy court, the 1978 Act allows for panels of three bankruptcy judges (or if no panel is chosen by the Chief Justice of the Circuit council, then the district court) to hear the appeal. 28 U.S.C. § 1482. The court of appeals has jurisdiction over appeals from the panel or district court. 28 U.S.C. § 1293.

98. See *supra* note 7.

tive court position);⁹⁹ the second, that the bankruptcy courts would exercise article III judicial power, and thus be constitutional courts (the constitutional court position);¹⁰⁰ and lastly, that the bankruptcy courts would exercise district court judicial power as adjuncts to the district courts (the adjunct court position).¹⁰¹ The debate on these proposals was extensive,¹⁰² and the final bill passed by both houses of Congress was the ultimate in political compromise: it combined the limited-term judges of the legislative court position with the extensive powers advocated in the constitutional court position, and called the combination an adjunct to the district court.¹⁰³ The result was a legislative court exercising broad judicial power that included the power to hear article III cases and controversies.

The reactions to the Bankruptcy Reform Act of 1978 were mixed. Some legal commentators praised the new Act for the independence it

99. The Commission on the Bankruptcy Laws of the United States, formed by Congress to analyze the bankruptcy laws and recommend changes (Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468), issued its report in 1973 recommending that the bankruptcy courts be set up with judges appointed to fifteen-year terms. Although this in effect was a legislative court, the Commission did not give it such a designation, nor did it attempt to categorize the court as legislative or constitutional because the Commission believed that Congress' power to create the courts under article I's grant of authority to make laws of bankruptcy was clear. REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 137, 93rd Cong., 1st Sess. 91-92 (1973). The model for the proposed bankruptcy court was the Tax Court, which had long been viewed as a legislative court properly created under the article I power of Congress to lay and collect taxes. See *Burns, Stix Friedman & Co. v. Commissioner*, 57 T.C. 392 (1971).

Chairman Peter Rodino of the House Judiciary Committee drafted a letter that he sent to several attorneys and professors asking for their opinion on the constitutionality of the Commission's proposal. HOUSE REPORT, *supra* note 7, at 63-65. Three respondents believed that Congress could create the bankruptcy courts as legislative courts. See *id.* at 66-69 (letter of Erwin N. Griswold); at 78-82 (letter of Professor Terrance Sandalow); and at 82-85 (letter of David L. Shapiro). In particular, Erwin Griswold believed that the *Palmore* decision left "no real basis for a valid constitutional doubt" that the judicial power exercised by limited-tenure bankruptcy judges would be proper. Letter of Erwin N. Griswold, *id.* at 67.

100. This position was taken by the Staff of the House Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary. See STAFF OF THE SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE HOUSE COMMITTEE ON THE JUDICIARY, CONSTITUTIONAL BANKRUPTCY COURTS (Comm. Print No. 3, 1977). This was also the position taken in the House version of the 1978 Act. See HOUSE REPORT, *supra* note 7, which contains an extensive analysis of the case law concerning legislative court judicial power. Finally, three of the respondents to Chairman Rodino's letter took this position. *Id.* at 65-66 (letter of Brice M. Clagett); at 69-72 (letter of Professor Thomas G. Krattenmaker); and at 77-78 (letter of Professor Paul Mishkin).

101. This position was adopted in the Senate's version of the 1978 Act. See SENATE REPORT, *supra* note 90, at 16. One of the advantages of this approach specifically enumerated by the Senate Report was that "[c]ertain perceived constitutional impediments to the exercise of the judicial power of the United States by non-tenured judges are thus eliminated." *Id.*

102. See 123 CONG. REC. H 35,444 (Oct. 27, 1977).

103. Note the language of 28 U.S.C. § 1471 (Supp. III 1979). The full jurisdiction of the district court is vested in the bankruptcy court (§ 1471(c)), although the court itself is an "adjunct" to the district court under 28 U.S.C. § 151(a). But because the judges have limited tenure, the court must be a legislative court.

granted to the bankruptcy judges and the formal recognition it gave to the *de facto* independence that had existed for a long time.¹⁰⁴ Other commentators argued that the Act was unconstitutional because it violated the policy considerations embodied in the salary and tenure provisions of article III.¹⁰⁵ Likewise, the two courts that dealt with the constitutional issues of the 1978 Act split on the issue of the constitutional propriety of the bankruptcy courts' judicial power.

The bankruptcy court for the District of Puerto Rico upheld the constitutionality of the 1978 Act in *Segarra v. Banco Central Y Economias (In re Segarra)*.¹⁰⁶ Bankrupt debtors had brought suit against a bank, seeking damages for alleged improper acts by the bank. The bank argued that the bankruptcy court had no jurisdiction to hear the case because the judicial power granted the court under the 1978 Act could only be constitutionally exercised by a constitutional court subject to article III. The judge rejected the bank's argument, finding that "[w]hen Congress creates an Article I Court, it has no such [tenure] restriction on it, and the judges of an Art. I Court may be tenured or not as Congress deems appropriate."¹⁰⁷ Relying heavily on *Bakelite*, the judge argued that tenure does not "carry with it some magical property whereby the recipient is transfigured into a more perfect jurist,"¹⁰⁸ citing the historical facts that non-tenured territorial judges and non-tenured state court judges have been allowed to hear and determine cases involving federally-created rights,¹⁰⁹ the court upheld the constitutionality of the 1978 Act.¹¹⁰

The 1978 Act was declared unconstitutional by the bankruptcy court for the Eastern District of Tennessee in *In re Rivers*.¹¹¹ Finding that "the power of Congress to pass a statute on a particular subject does not mean it is constitutional for Congress to create non-Article III

104. See Eisen, *supra* note 83; Note, *Bankruptcy Reform: A New Judiciary*, 48 U. CIN. L. REV. 367 (1979).

105. See Krattenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional*, 70 GEO. L. J. 297 (1981) [hereinafter cited as Krattenmaker]; *Article III Limits*, *supra* note 16.

106. 14 B.R. 870 (Bankr. D. Puerto Rico 1981).

107. *Id.* at 877.

108. *Id.* at 876.

109. *Id.* at 877.

110. . . . Congress, in adopting the Bankruptcy Reform Act . . . deprived no litigant of any constitutionally guaranteed right, and when this legislation is considered in the light of Congress' concern and deep study of the problem of administering the bankruptcy system . . . we are of the opinion that the presumption of constitutionality of any Act of Congress is appropriate and sustained in this case.

Id.

111. 19 B. R. 438 (Bankr. E.D. Tenn. 1982).

courts to decide cases arising under the statute,"¹¹² the court viewed the tenure provisions of article III as limits on Congress' power to create courts. A court need not have tenured judges if the underlying policy concerns of article III—federalism and separation of powers—were not violated.¹¹³ Finding that the judicial power under the 1978 Act was a broad scale invasion of areas of the law generally subject to state control (thus violating the federalism concerns of article III),¹¹⁴ and that the 1978 Act impermissibly allowed the other branches of government to influence decisions of the court (thus violating the separation of power concerns of article III),¹¹⁵ the court found no constitutional justification for a non-article III bankruptcy court.¹¹⁶

It was clear that confusion about the constitutionality of the bankruptcy courts' judicial power reigned in the legislative process that created it, the legal literature that interpreted it, and the judicial process that attempted to exercise it. It was in this setting that *Marathon Pipeline* came to the Supreme Court.

*NORTHERN PIPELINE CONSTRUCTION CO. V.
MARATHON PIPELINE CO.*

The facts of the *Marathon Pipeline* case are quite simple.¹¹⁷ Northern Pipeline Construction Company ("Northern") filed a petition for reorganization in the Bankruptcy Court for the district of Minnesota. Pursuant to the 1978 Act, Northern brought an action in the bankruptcy court against Marathon Pipeline Company ("Marathon"), seeking damages for breach of contract and warranty, as well as for misrepresentation, coercion and duress. Marathon moved to dismiss the suit for lack of jurisdiction over the contract and tort claims, claiming that such jurisdiction involved an exercise of article III judicial power which the bankruptcy court did not possess. The motion was denied, but on appeal the District Court granted the motion, holding that "the delegation of authority in 28 U.S.C. § 1471 to the bankruptcy judges to try cases otherwise relegated under the Constitution to Article III judges" was unconstitutional. Appeal was had to the Supreme Court.

112. *Id.* at 447.

113. *Id.* at 442.

114. *Id.* at 450.

115. *Id.*

116. *Id.*

117. The lower court proceedings are unrecorded. These facts are a summary based on the Court's statement of facts. 102 S. Ct. 2864.

In the Supreme Court, appellants Northern and the United States defended the bankruptcy court's jurisdiction by arguing, first, that the bankruptcy courts were properly constituted legislative courts, created by virtue of Congress' article I power to make bankruptcy laws. The appellants believed that this power was a plenary grant of power to legislate in a "specialized area having particularized needs," thus justifying the broad jurisdiction given the bankruptcy courts. Second, the appellants argued that the bankruptcy courts were simply adjuncts to the district courts, and thus the policies of article III are protected both by this adjunct relationship and by the appellate review of article III courts.¹¹⁸

The Supreme Court's decision involved four separate opinions: the plurality opinion of the Court, written by Justice Brennan; a concurring opinion, written by Justice Rehnquist; a dissenting opinion, written by Chief Justice Burger; and Justice White's dissent. Each presented a different view of the judicial power of the bankruptcy courts, and different methodologies were employed in analyzing that power. The result was that no one view commanded a majority of the Court.

The Plurality Opinion

Justice Brennan¹¹⁹ began the plurality opinion by reiterating the policy justifications behind the tenure and salary provisions of article III, finding that the Constitution "unambiguously enunciates a fundamental principle—that the 'judicial power of the United States' must be reposed in an independent judiciary."¹²⁰ These considerations served as the constitutional cornerstone of the plurality's analysis of the issues in the *Marathon Pipeline* case.

The plurality responded to the appellants' claim that the bankruptcy courts were proper legislative courts by noting that the precedents advanced in support of the argument "when properly understood . . . represent no broad departure from the constitutional command that the judicial power of the United States must be vested in Art. III courts."¹²¹ Reading these cases restrictively, Brennan argued that these precedents merely established three narrow exceptions to the article III policies: territorial courts; military courts; and public rights cases.¹²²

118. *Id.* at 2867.

119. Justice Brennan was joined in his opinion by Justices Marshall, Blackmun, and Stevens.

120. 102 S. Ct. at 2866.

121. *Id.* at 2867.

122. *Id.* at 2868.

The territorial and military court exceptions were justified because both involved constitutional grants of power historically understood as giving the political branches of government "extraordinary control over the precise subject matter at issue."¹²³ Public rights cases were justified by the non-judicial nature of the subject matter involved. However, this last exception was limited to a "public" right; cases involving private rights lie at the "core of historically recognized judicial power."¹²⁴ Justice Brennan found none of these three exceptions applicable to the bankruptcy courts.¹²⁵

The plurality rejected the appellants' attempt to establish a fourth exception—specialized courts in "specialized areas having particularized needs." Finding the essence of the argument to be the contention that, in pursuit of its article I powers, Congress may create "courts free of Art. III's requirements whenever it finds that course expedient,"¹²⁶ Brennan rejected it on the grounds that it contained no limiting principle.¹²⁷ Without limits on its power to create legislative courts, Congress could supplant the system of independent article III courts with a system of specialized courts subject to congressional control. Such a rule of broad legislative discretion could "effectively eviscerate the constitutional guarantee of an independent Judicial Branch of the Federal Government."¹²⁸

The appellants' second argument—that the bankruptcy courts are adjuncts to the district courts—was rejected on article III grounds as

123. *Id.* at 2869.

124. *Id.* at 2871. The plurality adopts the definition of a "public" right first articulated in *Bakelite*: a matter arising between the government and others. 279 U.S. at 451. Private rights involve "the liability of one individual to another under the law as defined," quoting *Crowell v. Benson*, 285 U.S. at 51.

125. 102 S. Ct. at 2871-72.

126. *Id.* at 2872.

127. *Id.* The plurality concedes that the appellants' analysis limits Congress' court-making ability to specific article I powers, but finds that limit "wholly illusory." Justice Brennan apparently finds the "all matters related to" part of the bankruptcy court's jurisdiction troublesome, for his argument consists of offering the enumerated article I power to regulate interstate commerce and then noting "[o]n appellant's reasoning Congress could provide for the adjudication of these and 'related' matters by judges and court within Congress' exclusive control." *Id.* at 2873.

In a footnote, Justice Brennan made an interesting observation. Noting that the appellants had relied on *Canter* and *Crowell*, he pointed out: "This reliance underscores the fact that appellants offer no principled means of distinguishing between Congress' Art. I powers and any of Congress' other powers—including, for example, those conferred by the various amendments to the Constitution . . ." *Id.* at 2873 n.27. How the plurality can approve of each decision separately, but find no "principled means" of distinguishing constitutional powers, is puzzling.

128. *Id.* at 2873. The plurality finds the potential for encroachment upon the powers reserved to the judiciary "dramatically evidenced" in the "related to" jurisdiction granted to the bankruptcy courts. The 1978 Act is offered as proof that "appellants' analysis fails to provide any real protection against the erosion of Art. III jurisdiction by the unilateral action of the political branches." *Id.*

well. Justice Brennan proposed two principles with which to judge whether an adjunct was constitutionally permissible.¹²⁹ First, when Congress creates a substantive federal right, it has broad discretion to prescribe the manner of its adjudication. However, when Congress does not create the right, its discretion is much narrower. Because the rights involved in *Marathon Pipeline* were state-created, the plurality found that the congressional attempt to define the manner of their adjudication to be an “unwarranted encroachment” upon the judicial power of the United States.¹³⁰ The bankruptcy courts thus failed this first test for an adjunct. Second, the functions of an adjunct must be limited in such a way that the “essential attributes” of the judicial power are retained in the article III court. Because of the broad grant of power to the bankruptcy courts, the Bankruptcy Act removed most of the essential attributes from the article III district courts and vested them in non-article III bankruptcy courts,¹³¹ and this could not be cured by the right of appellate review by an article III court.¹³²

The plurality thus took a restrictive view of legislative court judicial power. Given the great importance of article III policies and principles, legislative courts are justified only in three narrow cases. The Bankruptcy Reform Act of 1978’s grant of judicial power was unconstitutional because it gave too much power to a legislative court that could neither fit those exceptions nor guarantee adherence to article III principles.

The Concurring Opinion

Justice Rehnquist,¹³³ in concurring with the plurality, made every effort to avoid the article III judicial power question. Noting that *Marathon* had simply been named as a defendant in a lawsuit about a con-

129. The plurality drew these principles from an analysis of *Crowell*, which upheld the use of administrative agencies as adjuncts, and *United States v. Raddazz*, 447 U.S. 667 (1980), which upheld the use of federal magistrates in certain initial trial situations. 102 S. Ct. at 2876-77.

130. *Id.* at 2878. Justice Brennan noted: “the case before us . . . involves a right created by state law . . . Accordingly, Congress’ authority to control the manner in which that right is adjudicated, through assignment of historically judicial functions to a non-Art. III “adjunct”, plainly must be deemed at a minimum.” *Id.*

131. *Id.* at 2879. Article III principles are violated when an adjunct, behind the ‘facade’ of a grant of jurisdiction to a constitutional court, can exercise traditional article III powers. *Id.*

132. The plurality’s view of the adequacy of appellate review is muted in the opinion. In a footnote, the dissent’s arguments about appellate review are simply dismissed as “incorrect”. *Id.* at 2873 n.28. In a second footnote, the plurality rejects the argument as contrary to the text of the Constitution, noting that “our precedents make it clear that the constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication, and not only on appeal . . .” *Id.* at 2879, n.39.

133. Justice O’Connor joined in the concurrence.

tract, and thus had “not [yet] been subjected to the full range of authority granted the Bankruptcy Courts,” Rehnquist believed that “any objections” Marathon may make as to the exercise of the bankruptcy courts “should await the exercise of such authority.”¹³⁴ Given the confusion in this particular area of constitutional law, avoidance of any decision on whether article III was violated was encouraged.¹³⁵

Nonetheless, Rehnquist offered some view of his theory of legislative court judicial power. Avoiding the “three tidy exceptions” view of the plurality and the expansive view of the dissent, Rehnquist found simply that “[n]one of the cases has gone so far as to sanction the type of adjudication to which Marathon will be subjected against its will,” and thus adjudication of Northern’s suit in the bankruptcy courts cannot be maintained.¹³⁶ Nor can appellate review save the 1978 Act.¹³⁷ Thus, while refusing to make a sweeping statement about legislative court judicial power, Rehnquist was at least willing to say that a state right claim is outside the scope of such judicial power.

Chief Justice Burger’s Dissenting Opinion

Chief Justice Burger wrote a separate dissenting opinion to place special emphasis on the fact that “notwithstanding the plurality opinion, the Court does *not* hold today that Congress’ broad grant of jurisdiction to the new bankruptcy courts is generally inconsistent with Article III of the Constitution.”¹³⁸ Burger limited the Court’s holding to Justice Rehnquist’s objection: the only impermissible part of the bankruptcy court’s power was its jurisdiction over “state common-law actions.”¹³⁹ Thus, the Chief Justice believed that article III’s policy concerns must give way to the judicial power granted the bankruptcy courts except in the adjudication of state-created rights.

134. 102 S. Ct. at 2882.

135. “Particularly in an area of constitutional law such as that of ‘Art. III Courts’ with its frequently arcane distinctions and confusing precedents, rigorous adherence to the principle that this Court should decide no more of a constitutional question than is absolutely necessary accords with both our decided cases and with sound judicial policy.” *Id.* at 2881. Earlier in the opinion, Rehnquist says that “I would with considerable reluctance embark on the duty of deciding this broad question.” *Id.*

136. *Id.* at 2881-82.

137. “I am likewise of the opinion that the extent of review by Art. III courts provided on appeal from a decision of the Bankruptcy Court in a case such as Northern’s does not save the grant of authority to the latter under the rule [in *Crowell*].” *Id.* at 2882.

138. *Id.*

139. *Id.*

Justice White's Dissenting Opinion

Justice White¹⁴⁰ began his dissent by attacking the cornerstone of the plurality's decision: the fundamental principle of an independent judiciary. Noting the historical confusion outlined above, White called the plurality's claim of an "unambiguous" principle a "gross oversimplification" which puts a "distracting and superficial gloss on a difficult question."¹⁴¹

White believed that the plurality's opinion rested on two grounds: first, legislative court judges can only hear cases arising out of federal law, and thus cannot hear a state-law claim; and second, whatever the source of a right, article III prevents the creation of legislative courts except in three situations.

The dissent rejected the first ground of the plurality's opinion because the distinction between federal and state rights ignores the true nature of the bankruptcy proceeding. Bankruptcy has always involved state claims.¹⁴² Because the referees had effectively assumed control of the bankruptcy proceedings under the old Act, Justice White believed that "[i]nitial adjudication of state law issues by non-Article III judges is . . . hardly a new aspect of the 1978 Act."¹⁴³ Given the provisions for appeal, the dissenters could not find any reason to declare the bankruptcy court's jurisdiction unconstitutional because of the state claim involved.¹⁴⁴

In objecting to the second ground of the plurality opinion, Justice White presented his view of legislative court judicial power. The three exception view of the plurality was rejected as a series of "non-distinctions."¹⁴⁵ After analyzing the historical precedents, White concluded: "There is no difference in principle between the work that Congress may assign to an Article I court and that which the Constitution assigns to Article III courts."¹⁴⁶ In short, the jurisdiction and judicial power of

140. The dissent was joined by Chief Justice Burger and Justice Powell.

141. 102 S. Ct. at 2883.

142. "The crucial point to be made is that in ordinary bankruptcy proceedings the great bulk of creditor claims are claims that have accrued under state law prior to bankruptcy The existence and validity of such claims recurringly depends on state law. Hence, the bankruptcy judge is constantly enmeshed in state law issues." *Id.* at 2884. *See* 1 COLLIER ON BANKRUPTCY 88 (14th ed. 1976).

143. 102 S. Ct. at 2886.

144. *Id.* Justice White believed that the provisions for appeal under the old and new bankruptcy laws were the same.

145. *Id.* at 2889.

146. *Id.* at 2893. Justice White viewed this as a historical result and not as a necessary consequence of constitutional theory: "It is too late . . . to return to the simplicity of the principle pronounced in Article III . . ." *Id.* He defended this position because of the demand for a coherent system of constitutional text and precedent.

legislative courts can be coextensive with that of constitutional courts. Such extensive legislative court judicial power can exist within the constitutional system because the fundamental policies of article III are not to be "read out of the Constitution;" rather, they express one value that must be balanced against competing article I values and the legislative ends sought in establishing the legislative court.¹⁴⁷ With the Supreme Court retaining the final word on how that balance is to be struck,¹⁴⁸ and appellate review by article III courts,¹⁴⁹ a proper separation of powers could be struck and the independence of the judiciary would thus be insured. Justice White therefore concluded that the broad judicial power granted the bankruptcy courts was constitutionally proper.

ANALYSIS

The inability of any of the four views of legislative court judicial power to command a majority of the court guarantees that *Marathon Pipeline* will add to the confusion already present in case law on the subject. That confusion, evident in *National Mutual Insurance*¹⁵⁰ as well as in the congressional debates on the Bankruptcy Reform Act of 1978, had left the definition of the limits of that judicial power in doubt, and possibly "meaningless." The fundamental split between the plurality and the dissent in *Marathon Pipeline*, both as to the definition of those limits and the methodology for defining those limits, leaves a difficult area of constitutional law that much more difficult.

When attention is focused on the definition of the limits on legislative court judicial power, the plurality correctly points out that the true issue underlying any such definition is the conflict between the policies of article III and the historical fact that Congress has been able to create courts not subject to article III.¹⁵¹ The true difference between the plurality opinion of the Court and Justice White's dissent is the amount of importance each is willing to attach to article III's policies.

The plurality finds the policies of article III to be highly important—"fundamental principles" against which the congressional activ-

147. *Id.*

148. Justice White does not believe that the Court must simply defer to Congress' decision to create a legislative court. Rather, the Court must be willing to balance the competing interests involved.

149. Finding that under the 1978 Act "there is in every instance a right of appeal to at least one Article III court," *id.* at 2894, the dissent believed that these provisions for review were sufficient to protect article III interests: "Appellate review of the decisions of legislative courts, like appellate review of state court decisions, provides a firm check on the ability of the political institutions of government to ignore or transgress constitutional limits on their own authority." *Id.*

150. 337 U.S. 582 (1949).

151. 102 S. Ct. at 2867.

ity creating a court must be measured. The position taken appears to be that article III policies are so important to the structure of government that any exercise of judicial power must be carried out by a constitutional court, unless it is in one of the three narrow areas where Congress has "extraordinary powers" which justify the creation of the legislative court.

Constitutional history belies such a simple assessment of article III's importance. In *American Insurance Company v. Canter*, Chief Justice Marshall did not carve out a small exception to article III for territorial courts; rather, he simply set article III aside in favor of Congress' enumerated power over the territories. It was later courts which ascribed to him a sensitivity to the underlying policy concerns of article III.¹⁵² *National Mutual Insurance Company v. Tidewater Transfer Company*, despite its confusion, had the result of setting aside the article III concerns of diversity jurisdiction in favor of Congress' article I power over the District of Columbia. And in *Palmore v. United States*, the Court said directly that article III must sometimes give way to accommodate plenary grants of power to Congress to legislate in "specialized areas."¹⁵³ It is apparent that important, non-article III considerations are involved in the creation of legislative courts. The dissent is thus correct in pointing out that calling article III a fundamental principle is an "oversimplification." Competing constitutional issues are involved, and article III considerations do not always win out.

Given that there are competing interests involved in the decision to create a legislative court, there must be some kind of methodology by which the competing interests can be compared with each other to resolve the conflict. The dissent correctly points out that what occurs, in effect, is a balancing test—a weighing of the relative value of article III policy considerations against the value of the competing, non-article III considerations. Despite its protests to the contrary,¹⁵⁴ this is precisely what the plurality does. It assigns great weight to article III policies so that there are only three considerations which could tilt the balance in favor of a legislative court. The dissent, on the other hand, views the article III considerations as simply one of several constitutional policy concerns, each of relatively equal weight, which are to be balanced.¹⁵⁵ Whatever the final value attached to article III, the impor-

152. See *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962); *O'Donoghue v. United States*, 289 U.S. 516 (1933).

153. 411 U.S. at 408.

154. See 102 S. Ct. at 2873 n.28.

155. *Id.* at 2893.

tance of the dissent is its recognition of the constitutional process which sets the limits of legislative court judicial power: the balancing of competing constitutional interests.

Applying this balancing process to the creation of the bankruptcy courts is difficult because of the broad scope of the judicial power that Congress gave these courts. The plurality is clearly concerned about the "related to" jurisdiction of the courts—the power to hear claims "related to" cases arising under the Bankruptcy Code.¹⁵⁶ Justice Rehnquist and Chief Justice Burger may be correct in limiting the judicial power problems to state-created rights, instead of focusing on the justification for the entire grant of judicial power, as the plurality and dissent do. However, it is important that the Court focuses on the broad question because that focus gives the Court an opportunity to deal with the issues underlying that judicial power.

The plurality clearly sets out the concerns behind the article III salary and tenure provisions. Separation of the powers of each branch of government is important to the operation of the checks and balances that prevent government from overstepping its constitutional bounds. The independence of the judiciary is vital to that delicate balance of power. These policy concerns justify the desire to vest as much judicial power as possible in judges outside the control of other governmental branches. In bankruptcy adjudication, this was historically done by vesting the power to hear such cases in the district court.¹⁵⁷

The inquiry cannot, however, stop there. Competing policy considerations exist which mitigate against the necessity of vesting bankruptcy court judicial power in an article III tribunal. The history of bankruptcy law, at least after the Chandler Act amendments, indicates that a shift in judicial power occurred from the article III district court judges to the non-article III referee/judges.¹⁵⁸ Those referees enjoyed a *de facto* independence from the district court judges, who willingly withdrew from bankruptcy litigation because of the increasing specialization needed for adjudicating bankruptcy claims.¹⁵⁹ The only controls grounded in article III that in fact existed over the referees were (1) the review of referee judgments by district court judges; (2) the appointment and removal of referees by district court judges; and (3) the *pro*

156. See *supra* note 92, and accompanying text.

157. The Bankruptcy Act of 1898, as amended by the Chandler Act of 1938, named the district court as the court of bankruptcy. 52 Stat. 840, § 1. Thus, bankruptcy adjudication took place (at least in a theoretical sense) within the district court.

158. See *supra* notes 72-86, and accompanying text.

159. See HOUSE REPORT, *supra* note 7, at 9.

forma reality that the bankruptcy proceeding took place in the district court.¹⁶⁰ In short, non-article III judicial officers had long been making the judicial decisions of bankruptcy adjudication. The fact that the Bankruptcy Reform Act of 1978 codified this historical fact indicates that the reform sought by the Act was less a derogation from article III principles than a recognition that those principles had already given way in practice to other concerns.

The ability of an independent, article III judge to review bankruptcy court decisions and correct deviations by the non-article III tribunal is another important consideration in the balancing process. The assumption of article III is that proper judicial decisions are insured when the judges making those decisions are free from political pressure and control. The resultant policy is the article III requirement for decisions by independent article III judges, with guaranteed salaries and tenures. Yet this policy is not exclusively served by these provisions. The lesson of *Crowell* is that there are judicial roles that can be filled by non-article III judges. Even in the determination of "jurisdictional facts", which require the application of law to fact,¹⁶¹ legislative court judges can make such determinations without violating article III provided the district court can review the decision on appeal.¹⁶² In attempting to argue that appellate review is an inadequate protection of article III, the plurality misreads *Crowell*¹⁶³ and thus rests its entire argument on the fact that the formal requirements of salary and tenure protection are not met.¹⁶⁴ But that is to exalt form over substance.¹⁶⁵

160. See 52 Stat. 840, § 34.

161. See *supra* notes 47-48. According to the Court's definition and analysis of "jurisdictional facts", whenever a deputy commissioner made a finding that damages were to be awarded, he in effect said that the relationship of master and servant existed and that the injury occurred on the navigable waters of the United States—which is applying these legal concepts (defined by statute) to the factual situation of the case before him.

162. See *supra* note 48 and accompanying text.

163. In its footnote analysis of the appellate review argument (102 S. Ct. at 2879 n.39), the plurality quotes a passage from *Crowell* as proof that the *Crowell* Court rejected the suggestion that article III is satisfied so long as some degree of appellate review is provided:

[to accept such a regime] 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 . . .

285 U.S. at 57. Yet that passage was addressed to the suggestion that an administrative agency's finding could be final and not reviewable. *Id.* *Crowell* in fact stands for the proposition that appellate review can maintain "the essential independence of the exercise of the judicial power of the United States." *Id.* at 64.

164. See 102 S. Ct. at 2873 n.28. See also Krattenmaker, *supra* note 105 at 306-307; *Article III Limits*, *supra* note 16.

165. While it is true that the salary and tenure provisions are a "structural protection provision" (Krattenmaker, *supra* note 105, at 306), it is also true that the values protected by these provisions are not absolute. They have given way to other policy considerations in territorial courts, military courts, the use of state courts for adjudication of federal rights—indeed, in all of

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As the dissent suggests, appellate review can insure that the policies of article III are served by allowing an article III tribunal to correct the mistakes wrought by the legislative court.¹⁶⁶ Unless the Court suddenly now requires that a litigant be given the right to an initial adjudication by an article III tribunal, a position expressly rejected by the Court,¹⁶⁷ the dissent is correct in concluding that appellate review serves to reduce the possible damage to article III policy considerations caused by granting the bankruptcy courts their judicial power.

In the balancing of these competing interests, the concerns of article III, while important, appear protected by appellate review. The historical fact that article III has given way to the considerations which prompted a shift in judicial power to the referees is further evidence that the legislative court policy concerns tend to outweigh article III concerns. Given these factors, the legislative court judicial power granted the bankruptcy courts is constitutionally justified because the policies in favor of that power outweigh the concerns of article III. The decision of the Court in *Marathon Pipeline* thus represents a mistake in judicial judgment.

Finally, *Marathon Pipeline* will have a serious impact on future congressional attempts to create legislative courts. The principal advantage that legislative courts offer to Congress is their practical flexibility¹⁶⁸—Congress need not create permanent judgeships or remain limited by the subject matter jurisdiction restrictions of article III. After *Marathon Pipeline*, Congress' choices will not include legislative courts unless the court that Congress wants to create falls within the three narrow situations outlined by the plurality. The legislative process of delegating judicial power essentially becomes a checklist procedure (does the court fall under one of the three permissible categories?) instead of the weighing of practical policy alternatives available when

the legislative courts upheld by the Court. It is surely possible to consider whether those protections will exist in a legislative court as one value in the balancing process, but to require adherence to the article III requirements when the values they protect are protected under the legislative court scheme is to ignore historical precedent and to emphasize the structural manifestation of those values over the values themselves.

166. . . . *Crowell* suggests that the presence of appellate review by an Article III court will go a long way toward insuring a proper separation of powers. Appellate review of the decisions of legislative courts, like appellate review of state court decisions, provides a firm check on the ability of the political institutions of government to ignore or transgress constitutional limits on their own authority.
102 S. Ct. at 2894.

167. *Palmore v. United States* directly rejected the claim that a criminal defendant tried under a law of the United States (and thus within article III jurisdiction) is guaranteed a right to a hearing before an article III judge. No such right existed "in either constitutional text or in constitutional history and practice." 411 U.S. at 400.

168. See *supra* note 22.

creating frameworks for adjudication. Given the narrowness of the three categories, Congress will not be able to create many new legislative courts. Delegation of new jurisdiction or judicial power will fall either on the already-burdened district courts, or on new article III tribunals which will be burdened by the costs of life-tenured judges who enjoy guaranteed salaries. By effectively stripping Congress of the legislative court option, *Marathon Pipeline* may well force new problems on the existing constitutional court judiciary.

CONCLUSION

The salary and tenure provisions of article III reflect an underlying policy of preserving the independence of the judiciary created under the Constitution, thus preserving proper separation of powers between the branches of government. However, these policies have historically given way to other constitutional or governmental concerns, thus permitting the creation of non-article III legislative courts. The Bankruptcy Reform Act of 1978 tested the limits on the judicial power of legislative courts when that power intrudes upon the policy concerns of article III. *Marathon Pipeline* declares the Bankruptcy Reform Act's intrusion unconstitutional, although it does so in a confusing way which guarantees to continue the confusion already existing in the current understanding of the limits of legislative court judicial power. The plurality opinion of the Court fails to recognize the competing interests and appellate review protections that tend to outweigh the policy considerations of article III. If *Marathon Pipeline* is to be relied upon as a precedent, it should be remembered for the recognition, in dissent, that the process of determining the limits of legislative court judicial power is a balancing of the competing interests involved. It is only in balancing relevant issues, such as the policy concerns of article III, the historical *de facto* independence of bankruptcy judges, and the protections provided by appellate review, that Congress and the courts can be assured that all such policy considerations are examined and a workable framework for adjudicating a legal problem is established. By ignoring this balancing process, the *Marathon Pipeline* court denied Congress an effective legislative alternative and limited Congress' flexibility when establishing new courts.