



10-1981

## Northern Pipeline Construction Co. v. Marathon Pipe Line Co.

Lewis F. Powell Jr.

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PRELIMINARY MEMORANDUM

November 6, 1981 Conference  
List 1, Sheet 1

No. 81-546 ADX

Appeal From D Minn (Lord)

UNITED STATES

v.

MARATHON PIPE LINE CO.      Federal/Civil      Timely (with ext.)

Please see attached memo in No. 81-150.



Grant

Portion of new Bankruptcy  
Act (Art I judges given) invalid

PRELIMINARY MEMORANDUM

November 6, 1981 Conference  
List 1, Sheet 1

No. 81-150 ADX

Appeal from D Minn (Lord)

OK NORTHERN PIPELINE CONSTRUCTION CO.

v.

OK MARATHON PIPE LINE CO.

Federal/Civil

Timely

No. 81-546 ADX

Appeal from D Minn (Lord)

UNITED STATES

v.

MARATHON PIPE LINE CO.

Federal/Civil

Timely (with ext.)

The district court held that Congress could not give Article III  
powers to Article I judges and invalidated the New Bankruptcy Act's  
Scheme of Bankruptcy judges. This is a classic and difficult question  
of federal jurisdiction. I recommend NOTE  
SL

SUMMARY: Appts argue that the Bankruptcy Act of 1978 does not unconstitutionally convey Article III powers to bankruptcy judges.

FACTS and DECISIONS BELOW: Before 1978, federal DCs served as bankruptcy courts. 11 U.S.C. §1(10). Most bankruptcy proceedings were held before bankruptcy referees, however, unless the DC chose to withdraw the case from the referee. The referees had so-called "summary jurisdiction," which extended to disputes involving property in the actual or constructive possession of the court, but not to "plenary matters" involving property in the possession of third parties. The referee's judgment was final unless appealed to the DC within 10 days.

The 1978 Bankruptcy Act made sweeping changes in the structure of the bankruptcy courts. The Act eliminates the referee system and establishes a bankruptcy court in each judicial district; while the bankruptcy courts are technically established as "adjuncts" of the DCs, 28 U.S.C. §152, they are in fact directed to "exercise all of the jurisdiction conferred by this section on the district courts." 28 U.S.C. §1471(d). This grant of authority is broad: the Act eliminates the distinction between summary and plenary jurisdiction, and gives bankruptcy courts power to determine "all civil proceedings arising under title 11 or arising in or related to cases under title 11." 28 U.S.C. §1471(c). In such cases, bankruptcy courts, with minor exceptions, have all "the powers of a court of equity, law, and admiralty." 28 U.S.C. §1481. Appeals from the decisions of bankruptcy judges go either to a panel of three bankruptcy

Exercise  
jurisdiction  
of  
DCs

Broad  
powers



constitutional, concluding that Congress had properly established BCs as Article I courts.

On appeal, the DC reversed. It agreed that BCs are Article I courts. But Congress has only a limited authority to vest Article III powers in Article I tribunals. O'Donoghue v. United States, 289 U.S. 516 (1933); Crowell v. Benson, 285 U.S. 22, 56-57 (1932). Article I courts are proper only if they consider specialized subject matters, Crowell; Ex Parte Bakelite Corp., 279 U.S. 438 (1929), or have a limited geographical jurisdiction. Palmore v. United States, 411 U.S. 389 (1973); American Insurance Co. v. Canter, 26 U.S. 511 (1828). The BCs, in contrast, are given plenary authority over suits traditionally heard by the DCs, which run the gamut of federal statutory and constitutional law: "[t]he affairs of insolvent men are no less diverse than the affairs of men of more substantial means." A wholesale transfer of Article III power to the BCs cannot be sanctioned simply because they have particular responsibility for one area of the law. Doing so will deny access to an Article III forum to every litigant who is even tangentially connected to a bankruptcy proceeding, and will threaten the independence of the judiciary.

CONTENTIONS: The SG has appealed. He maintains that the question is substantial; the DC invalidated a crucial portion of the new Bankruptcy Act, and cast doubt on the validity of "countless pending bankruptcy proceedings." What's more, continues the SG, the DC's decision is incorrect. The BCs are not Article I courts; they were created as adjuncts to the DCs, and their decisions are reviewable as of right in the DC, the CA, or

both. This arrangement satisfies the requirements of Article III. Crowell v. Benson, 285 U.S. at 48-54.

Even if the BCs cannot be supported under Article III, the SG maintains, they can be viewed as properly created Article I courts. This Court has repeatedly sustained Congress' exercise of its Article I powers to create specialized courts. Palmore (District of Columbia local courts); Reconstruction Finance Corp. v. Bankers Trust Co., 318 U.S. 163, 168-71 (1943); Williams v. United States, 289 U.S. 553 (1933) (Court of Claims); Crowell (workers' compensation proceedings); Bakelite (customs courts); In re Ross, 140 U.S. 453, 464-65 (1891) (consular courts); Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (military courts). Indeed, the SG is aware of no decision by this Court holding that Congress acted unconstitutionally in creating a non-Article III tribunal to adjudicate legal claims. In any event, it is clear that Article III "must in proper circumstances give way to accomodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment." Palmore, 411 U.S. at 407-408. Here, pursuant to its Article I power over bankruptcy, Congress concluded that BCs were necessary for a proper operation of the bankruptcy system.

Northern has also appealed, arguing that this case is controlled by Palmore and United States v. Raddatz, 447 U.S. 667 (1980), which upheld the constitutionality of the Federal Magistrates Act, 28 U.S.C. §636(b)(1)(B).



Marathon has filed a motion to affirm, which largely repeats the analysis of the DC. While the BCs are termed "adjuncts" of the DCs, they in fact operate independently. The availability of review by Article III judges does not satisfy Article III's requirements. Glidden Co. v. Zdanok, 370 U.S. 530, 534 (1962). That was settled by Raddatz, which stated that a delegation of Article III functions is proper only where "the entire process takes place under the District Court's total control and jurisdiction." Article I courts have been upheld only when they exercise jurisdiction over a limited subject matter, when they have limited geographical jurisdiction, or when they adjudicate matters arising between the government and third parties which, if Congress chose, would be amenable to legislative or executive determination. Williams; Bakelite; Dynes.

DISCUSSION: The BCs would probably not be supportable as Article III courts. While Crowell suggested that review by Article III appellate courts might validate factual decisions by made by non-judges, that opinion also declared that Congress cannot "completely oust the [Article III] courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities." 285 U.S. at 57. Similarly, Raddatz validated the use of magistrates only because "the magistrate acts subsidiary to and only in aid of the district court. Thereafter, the entire process takes place under the district court's control . . . ." 447 U.S. at 681.

Whether the BCs can be sustained as Article I courts is a much closer question, for this area of the law is not an entirely

straightforward one. Most of the Article I courts validated by this Court have had a limited geographical jurisdiction, e.g., Palmore; Ross; Canter; have exercised authority over extremely limited subject matter, e.g. Dynes; have adjudicated matters which the Court believed could have been settled by legislative or executive fiat, e.g. Williams; Bakelite; or have been closely supervised by Article III courts, e.g. Raddatz. The BCs, which have complete authority over all matters "related to" an underlying bankruptcy proceeding, do not seem to fall into one of those categories. On the other hand, there is language in some of this Court's opinions that would support Congress' power to create the BCs. E.g. Palmore, 411 U.S. at 407-408; Glidden v. Zdanok, 370 U.S. 530, 549 (1962) (plurality opinion); Crowell, 285 U.S. at 51. And the Court has certainly been reluctant to disturb tribunals created under Congress' Article I powers-- particularly where, as here, Congress claims that its action is necessary to support the exercise of one of its plenary powers.

Examples  
of  
Art I  
Courts

The question is difficult and important enough to warrant review. That is particularly true in this case, where a central provision of a significant federal statute has been invalidated by a DC.

I recommend a note.

There is a motion to affirm.

10/28/81

Rothfeld

Opn in petn



*Voted on....., 19...*

Assigned . . . . ., 19...

No. 81-150

*Announced* . . . . ., 19...

**VS.**

Note  
~~Grant~~  
& consolidate  
with 81-546

[illegible]

Memo:

MARSHALL, J.

O'CONNOR, J.

WHITE, J.

STEVENS, J.

BRENNAN, J.

REHNQUIST, J.

CHIEF JUSTICE

POWELL, J.





November 6, 1961

CHIEF JUSTICE

POWELL, J.

BRENNAN, J.

REHNQUIST, J.

WHITE, J.

STEVENS, J.

MARSHALL, J.

O'CONNOR, J.

MEMO:

Argued 4/27/82

DC invalidated that part of Bankruptcy Act of 1978 that created Bankruptcy Court with plenary authority at law & equity over bankruptcy matters.

DC found the vesting of their judicial power - including power to construe statutes & determine constitutionality - in non-Art III courts violated Const.

Also "Threatens independence of judiciary  
as B/Judges are not appointed for life &  
~~some say it~~ pay may be reduced.

SG answers: Not Art I courts. Rather, they are "adjuncts" to DC. Their ~~decisions~~ are renewable by DC, ~~CAS~~ or both.

Also, 56 says, even if not viewed  
as adjuncts to Court Art III counts,  
they are valid as Art I counts

Court were created to further the exercise of Congress' express authority over ~~the~~ bankruptcies



Lee (SG)

Creation of specialized court must meet the requirements of Palmox v. U.S. 411 U.S. 389, 408

The Bk/Act does broadly authorize these cts to act on matters related only indirectly - at least not necessarily - to bankruptcy. The SG acknowledges this is a problem.

Distinction bet. "summary" & "plenary" juror is handicapped the Referee. They could not prosecute claims or litigate certain issues. Where a bankrupt had claim vs another the Referee could not enter a binding judg.

Responding to JPS, SG agreed that under ~~the~~ new Act the judge must try & resolve claims even ~~under~~ applying state law.

~~The~~ Agree no square precedent for departing this far from Art. III

56 (cont.)

Some subject areas require special courts under Art I

Bankruptcy always has been treated separately & apart from the judicial system generally

Bankruptcy of necessity involves resolution of private & conflicting claims.

See Art I Sec 8 - bankruptcy requires judicial action - & is one of few Art I provisions requiring this.

No one has identified harm that can result from this Act. (Does not agree with Justice Jackson's view).  
Deveny (also for Rebr)

Cite Mil. Ct/appeals & Tax Ct

The Magistrate system is proper model.

Bankruptcy Ct's under new Act may empanel juries.

BRW asked about Adm. Agencies - e.g. NLRB. If there is sub. ev. supporting a Bd's decision, a CA must enforce its order.

The label "adjunct" court does not conceal the nature of the functions & authority conferred on these Courts.

FPL  
FTL  
1LL  
EP

Territorial  
Judges  
not  
new



The Chief Justice

Not finally at rest. passed.

Justice Brennan Aff in

This Act is different from Paramount & Territorial Courts. There are local courts

This Act allows Bankruptcy judges to exercise Art III jurisdiction on a national basis.

Act is clearly invalid, but would not make it retroactive.

Justice White Rev.

Feels strongly we should sustain Act. Bankruptcy is a special area

Major issues decided all over country by non-Art courts & otherwise State Courts decide every issue that Art III courts decide

No thing to WJB's distinction based on "local" courts

Palmone is persuasive.

Justice Marshall

Aff in

Agree with WJB

Justice Blackmun

Aff in

Rex Lee over-argued her case.

The "adjudicatory" argument ~~is~~  
does not "ring true."

Appellate review is not enough to  
save it.

Justice Powell

Reverse

specialized

Art I, §8 expressly authorizes Congress to  
enact bankruptcy laws. Most bankruptcy is very

This Act goes farther than I like. But  
we have had Administrative Agencies  
with national jurisdiction. Also special  
courts.

We owe a high degree of ~~deference~~  
deference to Congress.

There are appeals to Art III courts

Agree with much of what Byron said.



Justice Rehnquist *Pass*

Torn bet. need to defer to Congress & WTR's  
views ~~affirm~~ as to Art. III & importance  
of preserving difference bet Art III courts.

Adm. ~~Agencies~~ can't punish for  
contempt until enforced by Ct Appellate

Next there ~~will~~ will be special  
anti-trust courts.

Justice Stevens ~~Rehnquist~~ *Affirm*

Most imp. case since JRS came to Court  
Purpose of Art III will go down the  
drain.

Congress ~~has~~ would have power to  
abolish life tenure & could lower salaries.

Could establish special courts  
to regulate any area described by  
Congress.

Justice O'Connor *Affirm (tentative)*

Bkruptcy Cts given wide range  
of juriv. Will take business  
from state courts.



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST



May 3, 1982

Re: Nos. 81-150 & 81-546 Northern Pipeline Construction  
Co. v. Marathon Pipeline Co., et al.

Dear Chief:

I passed at Friday's Conference on this case. I have by no means resolved my doubts, but realize that for purposes of assignment, etc., I must give some indication of my vote. Therefore, I tentatively (with great emphasis on the "tentatively") vote to affirm.

Sincerely,

The Chief Justice

Copies to the Conference

jsw 06/01/82

John - I'll await  
dissent,

Memorandum to Justice Powell

Re: Northern Pipeline

To my surprise, I think this is a very persuasive draft -- up to page 30. As you know, my inclinations have been that the Bankruptcy Act is constitutional. Yet WJB has me nodding for the bulk of his opinion.

On page 30-31, however, WJB engages in some peculiar reasoning. He distinguishes -- rightly, in my view -- between rights created by federal legislation and constitutional rights. Regarding the former, he argues that Congress has considerably more leeway in prescribing the nature of the judicial remedy. This is sound. But then he says the Bankruptcy Act is similar to the latter category because it involves rights not created by Congress, viz., state law rights. But state rights adjudicated in state court receive no Art. III protection. This is not unconstitutional. See draft opinion at 29 n.28. It is difficult to see why Congress' creation of a similar non-Art. III adjudication body concerned with similar rights is unconstitutional, as long as it is subject to Art. III review at some point. Indeed, Congress could replace much state contract law with a preempting federal code. The result -- seemingly under WJB's

2.

own distinction -- properly could be fought out in "adjunct" non-Art. III courts, subject to Art. III review. These problems undermine my satisfaction with this portion of WJB's opinion.

I recommend awaiting BRW's dissent, but with some openness to the possibility of joining WJB. If you agree with this view, you may wish to send a note in this regard. Indeed, it might be wise to voice your thoughts at this stage to try and affect the objectionable portion of WJB's opinion before he gets a Court.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

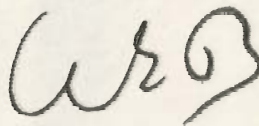
May 4, 1982

Re: (81-150 - Northern Pipeline Construction Company v.  
( Marathon  
(81-546 - United States v. Marathon

Dear Byron:

Will you take on a dissent in this case? I'd like to  
discuss on your return.

Regards,



Justice White

Copy to Justice Powell



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

✓

May 3, 1982

Re: (81-150 - No. Pipeline Construction Co. v. Marathon Pipe  
( Line Co.  
(  
(81-546 - U.S. v. Marathon Pipe Line Co.

MEMORANDUM TO THE CONFERENCE:

My weekend review of this case leads me to reverse.  
I have asked Bill Brennan to take care of assigning.

Regards,

WHD

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 1, 1982

Re: 81-150 - Northern Pipeline Construction  
Co. v. Marathon Pipe Line Co.

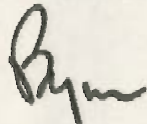
81-546 - U. S. v. Marathon Pipe Line Co.

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Dear Bill,

I shall be filing a dissent in these  
cases.

Sincerely yours,



Justice Brennan

Copies to the Conference

cpm

June 1, 1982

81-150 Northern Pipeline v. Marathon Pipe Line  
81-546 United States v. Marathon Pipe Line

Dear Bill:

I will await the dissent.

Sincerely,

Justice Brennan

lfp/ss

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

June 2, 1982

Re: 81-150 & 81-546 - Northern Pipeline v.  
Marathon Pipe Line

Dear Bill:

Please join me. My join is unconditional but I would be open to further consideration of the nonretroactivity problem and the timing of the entry of our judgment. Since the opinion will be handed down toward the end of the Term, perhaps it would be reasonable to provide that the judgment will be stayed until the first Monday in October.

Respectfully,

/m

Justice Brennan

Copies to the Conference



To: The Chief Justice  
Justice Brennan  
Justice Marshall  
Justice Blackmun  
✓ Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

*L.F.P.*

From: **Justice White**  
14 JUN 1982

Circulated: \_\_\_\_\_

Recirculated: \_\_\_\_\_

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

*Reviewed*

Nos. 81-150 AND 81-546

*Join*

NORTHERN PIPELINE CONSTRUCTION CO.,  
APPELLANT

81-150

*v.*

MARATHON PIPE LINE COMPANY AND  
UNITED STATES

UNITED STATES, APPELLANT

81-546

*v.*

MARATHON PIPE LINE CO., ET AL.

*a strong  
opinion*

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF MINNESOTA

[June —, 1982]

JUSTICE WHITE, dissenting.

Article III, § 1 of the Constitution is straightforward and  
uncomplicated on its face:

"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 Continu-  
ance in Office."

Any reader could easily take this provision to mean that al-  
though Congress was free to establish such lower courts as it  
saw fit, any court that it did establish would be an "inferior"

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court exercising “judicial power of the United States” and so must be manned by judges possessing both life-tenure and a guaranteed minimal income. This would be an eminently sensible reading and one that, as the majority shows, is well-founded in both the documentary sources and the political doctrine of separation of powers that stands behind much of our constitutional structure. *Ante*, at 6–9.

If this simple reading were correct and we were free to disregard 150 years of history, this would be an easy case and the majority opinion could end with its observation that “[i]t is undisputed that the bankruptcy judges whose offices were created by the Bankruptcy Reform Act of 1978 do not enjoy the protections constitutionally afforded to Art. III judges.” *Ante*, at 9. The fact that the majority must go on to deal with what has been characterized as one of the most confusing and controversial areas of constitutional law<sup>1</sup> itself indicates the gross oversimplification implicit in the majority’s claim that “our Constitution unambiguously enunciates a fundamental principle—that the ‘judicial Power of the United States’ must be reposed in an independent Judiciary [and] provides clear institutional protections for that independence.” *Ante*, at 9. While this is fine rhetoric, analytically it serves only to put a distracting and superficial gloss on a difficult question.

That question is what limits does Article III place on Congress’ ability to create adjudicative institutions designed to carry out federal policy established pursuant to the substantive authority given Congress elsewhere in the Constitution. Whether fortunate or unfortunate, at this point in the history of constitutional law that question can no longer be answered by looking only to the constitutional text. This Court’s cases construing that text must also be considered. In its attempt to pigeon-hole these cases, the majority does violence to their

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<sup>1</sup> *Glidden Co. v. Zdanok*, 370 U. S. 530, 534 (1962) (Harlan, J., plurality opinion)



meaning and creates an artificial structure that itself lacks coherence.

# I

There are, I believe, two separate grounds for the majority's conclusion. First, non-Article III judges, regardless of whether they are labelled "adjuncts" to Article III courts or "Article I judges," may only consider controversies arising out of federal law. Because the immediate controversy in this case—Northern Pipeline's claim against Marathon—arises out of state law, it may only be adjudicated, within the federal system, by an Article III court. Second, regardless of the source of law that governs the controversy, Congress is prohibited by Article III from establishing Article I courts, with three narrow exceptions. Adjudication of bankruptcy proceedings does not fall within any of these exceptions. I shall deal with the first of these contentions in this section.

The Court concedes that Congress may provide for initial adjudications by non-Article III judges of all rights and duties arising under otherwise valid federal laws. *Ante*, at 27. There is no apparent reason why this principle should not extend to matters arising in federal bankruptcy proceedings. The Court attempts to escape the reach of prior decisions by contending that the bankrupt's claim against Marathon arose under state law. Non-Article III judges, in its view, cannot be vested with authority to adjudicate such issues. It then proceeds to strike down § 241(a) on this ground. For several reasons, the Court's judgment is unsupportable.

First, clearly this ground alone cannot support the Court's invalidation of § 241(a) on its face. The Court concedes that in adjudications and discharges in bankruptcy, "the restructuring of debtor-creditor relations, which lies at the core of the federal bankruptcy power," *ante*, at 20, and "the manner in which the rights of debtors and creditors are adjusted," *ante*, at 31, n. 31, are matters of federal law. Under the Court's own interpretation of the cases, therefore, these mat-

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ters could be heard and decided by Article I judges. But because the bankruptcy judge is also given authority to hear a case like that of petitioner against Marathon, which the Court says is founded on state law, the Court holds that the section must be stricken down on its face. This is a grossly unwarranted emasculation of the scheme Congress has adopted. Even if the Court is correct that such a state law claim cannot be heard by a bankruptcy judge, there is no basis for doing more than declaring the section unconstitutional as applied to the claim against Marathon, leaving the section otherwise intact. In that event, cases such as this one would have to be heard by Article III judges or by state courts—unless the defendant consents to suit before the bankruptcy judge—just as they were before the 1978 Act was adopted. But this would remove from the jurisdiction of the bankruptcy judges only a tiny fraction of the cases he is now empowered to adjudicate and would not otherwise limit his jurisdiction.

Second, the distinction between claims based on state law and those based on federal law disregards the real character of bankruptcy proceedings. The routine in ordinary bankruptcy cases now, as it was before 1978, is to stay actions against the bankrupt, collect the bankrupt's assets, require creditors to file claims or be forever barred, allow or disallow claims that are filed, adjudicate preferences and fraudulent transfers, and make pro rata distributions to creditors, who will be barred by the discharge from taking further actions against the bankrupt. The crucial point to be made is that in the ordinary bankruptcy proceeding the great bulk of creditor claims are claims that have accrued under state law prior to bankruptcy—claims for goods sold, wages, rent, utilities and the like. "[T]he word debt as used by the Act is not confined to the technical common law meaning but . . . extends to liabilities arising out of breach of contract . . . to torts . . . and to taxes owing to the United States or state or local governments." 1 Collier on Bankruptcy, 14th ed, 88. Every



such claim must be filed and its validity is subject to adjudication by the bankruptcy court. The existence and validity of such claims recurringly depends on state law. Hence, the bankruptcy judge is constantly enmeshed in state law issues.

The new aspect of the Bankruptcy Act of 1978, in this regard, therefore, is not the extension of federal jurisdiction to state law claims, but its extension to particular kinds of state law claims, such as contract cases against third parties or disputes involving property in the possession of a third person.<sup>2</sup> Prior to 1978, a claim of a bankrupt against a third party, such as the claim against Marathon in this case, was not within the jurisdiction of the bankruptcy judge. The old limits were based, of course, on the restrictions implicit within the concept of *in rem* jurisdiction; the new extension is based on the concept of *in personam* jurisdiction. "The bankruptcy courts is given in personam jurisdiction as well as in rem jurisdiction to handle everything that arises in a bankruptcy case." H.R. Rep. No. 595, 95th Cong., 1st Sess. 445 (1977). The difference between the new and old Act, therefore, is not to be found in a distinction between state law and federal law matters; rather, it is in a distinction between *in rem* and *in personam* jurisdiction. The majority at no place explains why this distinction should have constitutional implications.

Third, all that can be left of the majority's argument in this regard is that state law claims adjudicated within the federal system must be heard in the first instance by Article III judges. I shall argue below that any such attempt to distinguish Article I from Article III courts by the character of the

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<sup>2</sup> Even this is not entirely new. Under the old Act, in certain circumstances, the referee could actually adjudicate and order the payment of a claim of the bankrupt estate against another. In *Katchen v. Landy*, 382 U. S. 323 (1966), for example, we recognized that when a creditor files a claim, the referee is empowered to hear and decide a counter-claim against that creditor arising out of the same transaction. A similar situation could arise in adjudicating setoffs under former § 68 of the Bankruptcy Act.

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controversies they may adjudicate fundamentally misunderstands the historical and constitutional significance of Article I courts. Initially, however, the majority's proposal seems to turn the separation of powers doctrine, upon which the majority relies, on its head: Since state law claims would ordinarily not be heard by Article III judges—*i. e.*, they would be heard by state judges—one would think that there is little danger of a diminution of, or intrusion upon, the power of Article III courts, when such claims are assigned to a non-Article III court. The majority misses this obvious point because it concentrates on explaining how it is that federally created rights can ever be adjudicated in Article I courts: A far more difficult problem under the separation of powers doctrine. The majority fumbles when it assumes that the rationale it develops to deal with the latter problem must also govern the former problem. In fact, the two are simply unrelated and the majority never really explains the separation of powers problem that would be created by assigning state law questions to legislative courts or to adjuncts of Article III courts.

One need not contemplate the intricacies of the separation of powers doctrine, however, to realize that majority's position on adjudication of state law claims is based on an abstract theory that has little to do with the reality of bankruptcy proceedings. Even prior to the present Act, bankruptcy cases were generally referred to bankruptcy judges, previously called referees. Bankruptcy Rule 102(a). Section 66 of Title 11 described the jurisdiction of the referees. Their powers included the authority to

“consider all petitions referred to them and make the adjudications or dismiss the petition . . . grant, deny or revoke discharges, determine the dischargeability of debts, and render judgments thereon [and] perform such of the duties as are by this Title conferred on courts of bankruptcy, including those incidental to ancillary jurisdiction, and as shall be prescribed by rules or orders of



courts of bankruptcy of their respective districts, except as herein otherwise provided.”

The bankruptcy judge possessed “complete jurisdiction of the proceedings.” 1 Collier on Bankruptcy, 14th ed. 65. The referee would initially hear and decide practically all matters arising in the proceedings, including the allowance and disallowance of the claims of creditors.<sup>3</sup> If a claim was disallowed by the bankruptcy judge and the decision was not reversed on appeal, the creditor was forever barred from further action against the bankrupt. As pointed out above, all of these matters could and usually did involve state law issues. Initial adjudication of state law issues by non-Article III judges is, then, hardly a new aspect of 1978 Act.

Furthermore, I take it that the Court does not condemn as inconsistent with Article III the assignment of these functions—i. e., those within the summary jurisdiction of the old bankruptcy courts—to a non-Article III judge, since, as the Court says, they lie at the core of the federal bankruptcy power. *Ante*, at 20. They also happen to be functions that have been performed by referees or bankruptcy judges for a very long time and without constitutional objection. Indeed, we approved the authority of the referee to allow or disallow claims in *Katchen v. Landy*, 382 U. S. 323 (1966). There, the referee held that a creditor had received a preference and that his claim could therefore not be allowed. We agreed that the referee had the authority not only to adjudicate the existence of the preference, but also to order that the preference be disgorged. We also recognized that the referee could adjudicate counterclaims against a creditor who files his claim against the estate. The 1973 Bankruptcy Rules make similar provision. Rule 306(c), Rule 701, and Advisory Committee Note to Rule 701. Hence, if Marathon had filed a claim against the bankrupt in this case, the trustee could

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<sup>3</sup> “The judicial act of allowance is one, of course, that is performed by the referee where the proceedings have been generally referred.” 3 Collier on Bankruptcy, 14th ed. 229 n. 3.

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have filed and the bankruptcy judge could have adjudicated a counterclaim seeking the relief that is involved in this case.

Of course, all such adjudications by a bankruptcy judge or referee were subject to review in the District Court, on the record. See 11 U. S. C. § 67(c) (1976). Bankruptcy Rule 810, transmitted to Congress by this Court, provided that the District Court "shall accept the referee's findings of fact unless they are clearly erroneous." As the majority recognizes, *ante*, at 4, the 1978 Act provides for appellate review in Article III courts and presumably under the same "clearly erroneous standard." In other words, under both the old and new act, initial determinations of state law questions were to be made by non-Article III judges, subject to review by Article III judges. Why the differences in the provisions for appeal in the two Acts are of unconstitutional dimension remains entirely unclear.

In theory and fact, therefore, I can find no basis for that part of the majority's argument that rests on the state-law character of the claim involved here. Even if prior to 1978, the referee could not generally participate in cases aimed at collecting the assets of a bankrupt estate, he nevertheless repeatedly adjudicated issues controlled by state law. There is very little reason to strike down § 241(a) on its face on the ground that it extends, in a comparatively minimal way, the referees authority to deal with state law questions. To do so is to lose all sense of proportion.

## II

The majority unpersuasively attempts to bolster its case for facial invalidity by asserting that the bankruptcy courts are now "exercising powers far greater than those lodged in the adjuncts approved in either *Crowell* or *Raddatz*." In support of this proposition it makes five arguments in addition to the "state-law" issue. Preliminarily, I see no basis for according standing to Marathon to raise any of these addi-



tional points. The state-law objection applies to the Marathon case. Only that objection should now be adjudicated.

I also believe that the major premise of the Court's argument is wholly unsupported: There is no explanation of why *Crowell* and *Raddatz* define the outer limits of constitutional authority. Much more relevant to today's ~~are~~ *dispute* are first the practice in bankruptcy prior to 1978, which neither the majority nor any authoritative case has questioned, and second the practice of today's administrative agencies. Considered, from this perspective, all of the majority's arguments are unsupportable abstractions, divorced from the realities of modern practice.

The first three arguments offered by the majority, *ante*, at 31-32, focus on the narrowly defined task and authority of the agency considered in *Crowell*: The agency made only "specialized, narrowly confined factual determinations," and could issue only a narrow class of orders. Regardless of whether this was true of the Compensation Board at issue in *Crowell*, it certainly was not true of the old bankruptcy courts, nor does it even vaguely resemble current administrative practice. As I have already said, general references to bankruptcy judges, which was the usual practice prior to 1978, permitted the bankruptcy judge to perform almost all of the functions of a bankruptcy court. Referees or bankruptcy judges not only exercised summary jurisdiction but could also conduct adversary proceedings to:

"(1) recover money or property . . . (2) determine the validity, priority, or extent of a lien or other interest in property, (3) sell property free of a lien or other interest for which the holder can be compelled to make a money satisfaction, (4) object to or revoke a discharge, (5) obtain an injunction, (6) obtain relief from a stay . . . (7) determine the dischargeability of a debt." Bankruptcy Rule 701.

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Although there were some exceptions to the referees authority, which have been removed by the 1978 Act, the additions to the jurisdiction of the bankruptcy judges were of marginal significance when examined in the light of the overall functions of those judges before and after 1978. In my view, those changes are not sufficient to work a qualitative change in the character of the bankruptcy judge.

The majority's fourth argument fails to point to any difference between the new and old bankruptcy acts. While the administrative orders in *Crowell* may have been set aside by a court if "not supported by the evidence," under both the new and old acts at issue here, orders of the bankruptcy judge are reviewed under the "clearly erroneous standard." See Bankruptcy Rule 810. Indeed, judicial review of the orders of bankruptcy judges is more stringent than that of many modern administrative agencies. Generally courts are not free to set aside the findings of administrative agencies, if supported by substantial evidence. But more importantly, courts are also admonished to give substantial deference to the agencies' interpretation of the statute it is enforcing. No such deference is required with respect to decision on the law made by bankruptcy judges.

Finally, the Court suggests that, unlike the agency considered in *Crowell*, the orders of a post-1978 bankruptcy judge are final and binding even though not appealed. To attribute any constitutional significance to this, unless the majority intends to throw into question a large body of administrative law, is strange. More directly, this simply does not represent any change in bankruptcy practice. It was hornbook law prior to 1978 that the authorized judgments and order of referees, including turnover orders, were final and binding and *res judicata* unless appealed and overturned:

"The practice before the referee should not differ from that before the judge of the court of bankruptcy and, apart from direct review within the limitation of § 89(c),



the orders of the referee are entitled to the same presumption of validity, conclusiveness and recognition in the court of bankruptcy or other courts." 1 Collier on Bankruptcy, 14th ed. 65.

Even if there are specific powers now vested in bankruptcy judges that should be performed by Article III judges, the great bulk of their functions are unexceptionable and should be left intact. Whatever is invalid should be declared to be such; the rest of the 1978 Act should be left alone. I can only account for the majority's inexplicably heavy hand in this case, by assuming that the Court has once again lost its conceptual bearings when confronted with the difficult difficult problem of the nature and role of Article I courts. To that question I now turn.

### III

#### A

The majority contends that the precedents upholding Article I courts can be reduced to three categories. First, there are territorial courts, which need not satisfy Article III constraints because "the doctrine of separation of powers [is] applicable only within the States comprised by the Federal Union."<sup>4</sup> Second, there are courts martial, which are exempt from Article III limits because of "a constitutional grant to Congress of plenary substantive authority over the precise subject matter at issue." *Ante*, at 15. Finally, there are those legislative courts and administrative agencies that adjudicate cases involving public rights—controversies

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<sup>4</sup>This a bizarre suggestion. It would follow from this, for example, that Congress could create laws for the territories without submitting them to the President. Although the separation of powers doctrine was meant to further federalism concerns by imposing internal limits on the growth of federal power, it was equally adopted as a theory of the proper form of government with respect to the preservation of individual rights. After all, the theory was largely adopted from Montesquieu who certainly had no federalism concerns in mind.



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between the government and private parties—which are not covered by Article III because the controversy could have been resolved by the executive alone without judicial review. Despite the majority's attempt to cabin the domain of Article I courts, it is quite unrealistic to consider them to be only three "narrow," *ante*, at 13, limitations on or exceptions to the reach of Article III. In fact, the majority itself breaks the mold in its discussion of "adjuncts" in Part IV, when it announces that "when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated." Adjudications of federal rights may, according to the majority, be committed to administrative agencies, as long as provision is made for judicial review.

Passing over the peculiar statement that the separation of powers doctrine is inapplicable in the territories (and presumably in the District of Columbia), the first principle introduced by the Court is geographical: Article I courts presumably are not permitted within the states.<sup>5</sup> The problem, of course, is that both of the other exceptions recognize that Article I courts can indeed operate within the States. The second category relies upon a new principle: Article I courts are permissible in areas in which the Constitution grants Congress "plenary substantive authority." *Ante*, at 15. Preliminarily, I do not know how we are to distinguish those areas in which Congress' authority is "plenary" from those in which it is not. Congress' power over the armed forces is established in Art. I, § 8, cls. 13, 14. There is nothing in those clauses that creates congressional authority different in kind from the authority granted to legislate with respect to

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<sup>5</sup> Had the majority cited only the territorial courts, the principle relied on perhaps could have been the fact that power over the territories is provided Congress in Article IV. However, Congress' power over the District of Columbia is an Article I power. As such, it does not seem to have any greater status than any of the other powers enumerated in Art. I, § 8.

bankruptcy. But more importantly, in its third category, and in its treatment of "adjuncts", the majority itself recognizes that Congress can create Article I courts in virtually all the areas in which Congress is authorized to act, regardless of the quality of the constitutional grant of authority. At the same time, territorial courts or the courts of the District of Columbia, which are Article I courts, adjudicate private, just as much as public or federal rights.

Instead of telling us what it is Article I courts can and cannot do, the majority presents us with a list of Article I courts. When we try to distinguish those Courts from their Article III counterparts, we find—apart from the obvious lack of Article III judges—a series of non-distinctions. By the majority's own admission Article I courts can operate throughout the country, they can adjudicate both private and public rights, and they can adjudicate matters arising from congressional actions based upon "plenary" powers. I cannot distinguish this last category from the general "arising under" jurisdiction of Article III courts.

The majority opinion only has the appearance of limiting Article I courts because it fails to add together the sum of its parts. Rather than limiting each other, the principles relied upon complement each other; together they cover virtually the whole domain of possible areas of adjudication. Without a unifying principle, the majority's argument reduces to the proposition that because bankruptcy courts are not sufficiently like any of these three exceptions, they may not be either Article I courts or adjuncts to Article III courts. But we need to know why bankruptcy courts can not qualify as Article I courts in their own right.

## B

The majority opinion is not the first unsuccessful attempt to articulate a principled ground by which to distinguish Article I from Article III courts. The concept of a legislative, or Article I, court was introduced by an opinion authored by



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Chief Justice Marshall. Not only did he create the concept, but at the same time he started the theoretical controversy that has ever since surrounded the concept:

"The Judges of the Superior Courts of Florida hold their offices for four years. 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, in the execution of those general powers which that body possesses over the territories of the United States." *American Insurance Co. v. Canter*, 1 Pet. 511, 546 (1828).

The proposition was simple enough: Constitutional courts exercise the judicial power described in Article III of the Constitution; legislative courts do not and cannot.

There were only two problems with this proposition. First, *Canter* itself involved a case in admiralty jurisdiction, which is specifically included within the "judicial power of the United States" delineated in Article III. How, then, could the territorial court not be exercising Article III judicial power? Second, and no less troubling, if the territorial courts could not exercise Article III power, how could their decisions be subject to appellate review in Article III courts, including this one, that can exercise only Article III "judicial" power? Yet from early on this Court has exercised such appellate jurisdiction. *Benner v. Porter*, 9 How. 235, 243 (1850); *Clinton v. Englebrecht*, 13 Wall. 434 (1872); *Reynolds v. United States*, 98 U.S. 145, 154 (1878); *United States v.*



*Coe*, 155 U. S. 76, 86 (1894); *Balzac v. Porto Rico*, 258 U. S. 298, 312-313 (1922). The attempt to understand the seemingly unexplainable was bound to generate "confusion and controversy." This analytic framework, however—the search for a principled distinction—has continued to burden the Court.

The first major elaboration on the *Canter* principle was in *Murray's Lessee v. Hoboken Land & Improvement Co*, 18 How. 272 (1856). The plaintiff in that case argued that a proceeding against a customs collector for the collection of moneys claimed to be due to the United States was an exercise of "judicial power" and therefore had to be carried out by Article III judges. The Court accepted this premise: "It must be admitted that, if the auditing of this account, and the ascertainment of its balance, and the issuing of this process, was an exercise of the judicial power of the United States, the proceeding was void; for the officers who performed these acts could exercise no part of that judicial power." *Id.*, at 275. Having accepted this premise, the Court went on to delineate those matters which could be determined only by an Article III court, *i. e.*, those matters that fall within the nondelegable "judicial power" of the United States. The Court's response to this was twofold. First, it suggested that there are certain matters which are inherently "judicial": "[W]e 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." *Id.*, at 284. Second, it suggested that there is another class of issues that, depending upon the form in which Congress structures the decisionmaking process, may or may not fall within "the cognizance of the courts of the United States." *Ibid.* This latter category consisted of the so-called "public rights." Apparently, the idea was that Congress was free to structure the adjudication of "public rights" without regard to Article III.

Having accepted the plaintiff's premise, it is hard to see

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how the Court could take too seriously its first contention. The Court presented no examples of such issues that are judicial "by nature" and simply failed to acknowledge that Article I courts already sanctioned by the Court—*e. g.*, territorial courts—were deciding such issues all the time. The second point, however, contains implicitly a critical insight; one that if openly acknowledged would have undermined the entire structure. That insight follows from the Court's earlier recognition that the term "judicial act" is broad enough to encompass all administrative action involving inquiry into facts and the application of law to those facts. *Id.*, at 280. If administrative action can be characterized as "judicial" in nature, then obviously the Court's subsequent attempt to distinguish administrative from judicial action on the basis of the manner in which Congress structures the decision cannot succeed. There need be no Article III court involvement in any adjudication of a "public right", which the majority now interprets as any civil matter arising between the Federal Government and a citizen. In that area, whether an issue is to be decided by an Article III court depends, finally, on congressional intent.

Although *Murray's Lessee* implicitly undermined Chief Justice Marshall's suggestion that there is a difference in kind between the work of Article I and that of Article III courts, it did not contend that the Court must always defer to congressional desire in this regard. The Court considered the plaintiff's contention that removal of the issue from an Article III court must be justified by "necessity." Although not entirely clear, the Court seems to have accepted this proposition: "[I]t seems to us that the just inference from the entire law is, that there was such a necessity for the warrant." *Id.*, at 285.<sup>6</sup>

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<sup>6</sup>By stating that "of this necessity congress alone is the judge." 18 How., at 285, the Court added some serious ambiguity to the standard it applied. Because this statement ends the Court's analysis of the merits of



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The Court in *Murray's Lessee* was precisely right: Whether an issue can be decided by a non-Article III court does not depend upon the judicial or nonjudicial character of the issue, but on the will of Congress and the reasons Congress offers for not using an Article III court. This insight, however, was completely disavowed in the next major case to consider the distinction between Article I and Article III courts, *Ex Parte Bakelite, Corp.*, 279 U. S. 438 (1929), in which the Court concluded that the Court of Customs Appeals was a legislative court. The Court there directly embraced the principle also articulated in *Murray's Lessee* that Article I courts may not consider any matter "which inherently or necessarily requires judicial determination," but only such matters as are "susceptible of legislative or executive determination." 279 U. S., at 453. It then went on effectively to bury the critical insight of *Murray's Lessee*, labelling as "fallacious" any argument that "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." *Id.*, at 459.<sup>7</sup>

The distinction between public and private rights as the principle delineating the proper domains of legislative and constitutional courts respectively received its death blow, I had believed, in *Crowell v. Benson*, 285 U. S. 22 (1932). In that case, the Court approved an administrative scheme for the determination, in the first instance, of maritime employee compensation claims. Although acknowledging the frame-

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the claim, it does not seem to mean that the Court will simply defer to congressional judgment. Rather, it appears to mean that the Court will review the legislative record to determine whether there appeared to Congress to be compelling reasons for not establishing an Article III court.

<sup>7</sup>The Court did not, however, entirely follow this principle, for it stated elsewhere that "there is propriety in mentioning the fact that Congress always has treated [the Court of Claims as an Article I court]." 279 U. S., at 454.



work set out in *Murray's Lessee* and *Ex Parte Bakelite*, the Court specifically distinguished this case: "The present case does not fall within the categories just described but is one of private right, that is, of the liability of one individual to another under the law as defined."<sup>8</sup> *Id.*, at 51. Nevertheless, the Court approved of the use of an Article I adjudication mechanism on the new theory that "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." *Ibid.* Article I courts could deal not only with public rights but also, to an extent, with private rights. The Court now established a distinction between questions of fact and law: "The reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases."<sup>9</sup> *Id.*, at 54.

Whatever sense *Crowell* may have seemed to give to this subject was exceedingly shortlived. One year later, the Court returned to this subject, abandoning both the public/private and the fact/law distinction and replacing both with a simple literalism. In *O'Donoghue v. United States*, 289 U. S. 516 (1933), considering the courts of the District of Columbia, and in *Williams v. United States*, 289 U. S. 553 (1933), considering the Court of Claims, the Court adopted the principle that if a federal court exercises jurisdiction over cases of the type listed in Art. III, § 2 as falling within the

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<sup>8</sup>The majority is clearly wrong in citing *Crowell* in support of the proposition that matters involving private, as opposed to public, rights may not be considered in a non-Article III court." *Ante*, at 19.

<sup>9</sup>*Crowell* also suggests that certain facts—constitutional or jurisdiction—must also be subject to *de novo* review in an Article III court. I agree with the majority that this aspect of *Crowell* has been "undermined by later cases," *ante*, at 29. As a matter of historical interest, however, I would contend that *Crowell's* holding with respect to these "facts" turned more on the questions of law that were inseparably tied to them, than on some notion of the inadequacy of a non Article III factfinder.

"judicial power of the United States," then that court must be an Article III court:

"The provision of this section of the article is that the 'judicial power shall extend' to the cases enumerated, and it logically follows that where jurisdiction over these cases is conferred upon the courts of the District, the judicial power, since they are capable of receiving it, is *ipso facto*, vested in such courts as inferior courts of the United States." *O'Donoghue, supra*, at 545.<sup>10</sup>

In order to apply this same principle and yet hold the Court of Claims to be a legislative court, the Court found it necessary in *Williams, supra*, to conclude that the phrase "controversies to which the United States shall be a party" in Article III must be read as if it said "controversies to which the United States shall be a party plaintiff or petitioner."<sup>11</sup>

By the time of the *Williams* decision, this area of the law was mystifying to say the least. What followed helped very little, if at all. In the next two major cases the Court could not agree internally on a majority position. In *National Insurance Co. v. Tidewater Co.*, 337 U. S. 582 (1949), the Court upheld a statute giving federal district courts jurisdiction over suits between citizens of the District of Columbia and citizens of a State. A majority of the Court, however, rejected the plurality position that Congress had the authority to assign Article I powers to Article III courts, at least outside of the District of Columbia. Only Chief Justice Vinson in dissent reflected on the other side of this problem:

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"*O'Donoghue* does not apply this principle wholly consistently: It still recognizes a territorial court exception to Article III's requirements. It now bases this exception, however, not on any theoretical difference in principle, but simply on the "transitory character of the territorial governments." 289 U. S., at 536.

"See Hart & Wechsler, *The Federal Courts and The Federal System* 399 (reviewing the problems of the *Williams* case and characterizing it as an "intellectual disaster").



whether Article I courts could be assigned Article III powers. He entirely disagreed with the conceptual basis for *Williams* and *O'Donoghue*, noting that to the extent that Article I courts consider non-Article III matters, appellate review by an Article III court would be precluded. Or conversely, since appellate review is exercised by this Court over Article I courts, Article I courts must "exercise federal question jurisdiction." *Id.*, at 643. Having gone this far, the Chief Justice was confronted with the obvious question of whether in fact "the distinction between constitutional and legislative courts is meaningless." *Id.*, at 644. Although suggesting that outside of the territories or the District of Columbia there may be some limits on assignment to Article I courts of matters that fall within Article III jurisdiction—apart from federal question jurisdiction—for the most part the Chief Justice ends up relying on the good will of Congress: "[W]e cannot impute to Congress an intent now or in the future to transfer jurisdiction from constitutional to legislative courts for the purpose of emasculating the former." *Ibid.*

Another chapter in this somewhat dense history of a constitutional quandry was provided by Justice Harlan's plurality opinion in *Glidden Company v. Zdanok*, 370 U. S. 530 (1962), in which the Court, despite *Bakelite* and *Williams*—and relying on an Act of Congress enacted since those decisions—held the Court of Claims and the Court of Customs and Patent Appeals to be Article III courts. Justice Harlan continued the process of intellectual repudiation begun by Chief Justice Vinson in *Tidewater*. First, it was clear to him that Chief Justice Marshall could not have meant what he said in *Canter* on the inability of Article I courts to consider issues within the jurisdiction of Article III courts: "Far from being 'incapable of receiving' federal-question jurisdiction, the territorial courts have long exercised a jurisdiction commensurate in this regard with that of the regular federal courts



and have been subjected to the appellate jurisdiction of this Court precisely because they do so." *Id.*, at 545 n. 13. Second, exceptions to the requirements of Article III, he thought, have not been founded on any principled distinction between Article I issues and Article III issues; rather, a "confluence of practical considerations", *id.*, at 547, account for this Court's sanctioning of Article I courts:

"The touchstone of decision in all these cases has been the need to exercise the jurisdiction then and there and for a transitory period. Whether constitutional limitations on the exercise of judicial power have been held inapplicable has depended on the particular local setting, the practical necessities, and the possible alternatives." *Id.*, at 547-548.

Finally, recognizing that there is frequently no way to distinguish between Article I and Article III courts on the basis of the work they do, Justice Harlan suggested that the only way to tell them apart is to examine the "establishing legislation" to see if it complies with the requirements of Article III. This, however, comes dangerously close to saying that Article III courts are those with Article III judges; Article I courts are those without such judges. One hundred and fifty years of constitutional history, in other words, had led to a simple tautology.

#### IV

The complicated and contradictory history of the issue before us leads me to conclude that Chief Justice Vinson and Justice Harlan reached the correct conclusion: 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. Unless we want to overrule a large number of our precedents upholding a variety of Article I courts—not to speak of those Article I courts that go by the

contemporary name of "administrative agencies"—this conclusion is inevitable. It is too late to go back that far; too late to return to the simplicity of the principle pronounced in Article III and defended so vigorously and persuasively by Hamilton in *The Federalist* Nos. 78-82.

To say that the Court has failed to articulate a principle by which we can test the constitutionality of a putative Article 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 Article I, rather than Article 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.

Despite the principled, although largely mistaken, rhetoric expanded by the Court in this area over the years, such a balancing approach stands behind many of the decisions upholding Article I courts. Justice Harlan suggested as much in *Glidden*, although he needlessly limited his consideration to the "temporary" courts that Congress has had to set up on a variety of occasions. In each of these instances, this Court has implicitly concluded that the legislative interest in creating an adjudicative institution of temporary duration outweighed the values furthered by a strict adherence to Article III. Besides the territorial courts approved in *Canter*, *supra*, these courts have included the Court of Private Land Claims, *United States v. Coe*, 155 U. S. 76 (1894), the Choctaw and Chickasaw Citizenship Court, *Stephens v. Cherokee Nation*, 174 U. S. 445 (1899); and consular courts established in foreign countries, *In re Ross*, 140 U. S. 453 (1891). This same sort of "practical" judgment was voiced, even if not relied upon, in *Crowell*, *supra*, with respect to the Employees' Compensation Claims Commission, which was not meant to be of limited duration: "[W]e are unable to find any constitutional obstacle to the action of the Congress in availing itself



of a method shown by experience to be essential in order to apply its standards to the thousands of cases involved." 285 U. S., at 54. And even in *Murray's Lessee*, there was a discussion of the "necessity" of Congress' adopting an approach that avoided adjudication in an Article III court. *Supra*, at 9.

This was precisely the approach taken to this problem in *Palmore v. United States*, 411 U. S. 389 (1973), which, contrary to the suggestion of the majority, did not rest on any theory of territorial or geographical control, *ante*, at 24. Rather, it rested on an evaluation of the strength of the legislative interest in pursuing in this manner one of its constitutionally assigned responsibilities—a responsibility not different in kind from numerous other legislative responsibilities. Thus, *Palmore* referred to the wide variety of Article I courts, not just territorial courts. It is in this light that the critical statement of the case must be understood:

"[T]he requirements of Article III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment." *Id.*, at 407-408.

I do not suggest that the Court should simply look to the strength of the legislative interest and ask itself if that interest is more compelling than the values furthered by Article III. The inquiry should, rather, focus equally on those Article III values and ask whether and to what extent the legislative scheme accommodates them or, conversely, substantially undermines them. The burden on Article III values should then be measured against the values Congress hopes to serve through the use of Article I courts.

To be more concrete: *Crowell*, *supra*, suggests that the presence of appellate review by an Article III court will go a



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long way toward insuring a proper separation of powers. Appellate review of the decisions of legislative court, 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. Obviously, therefore, a scheme of Article I courts that provides for appellate review by Article III courts should be substantially less controversial than a legislative attempt entirely to avoid judicial review in a constitutional court.

Similarly, as long as the proposed Article I courts are designed to deal with issues likely to be of little interest to the political branches, there is less reason to fear that such courts represent a dangerous accumulation of power in one of the political branches of government. Chief Justice Vinson suggested as much when he stated that the Court should guard against any congressional attempt "to transfer jurisdiction for the purpose of emasculating" constitutional courts, 337 U. S., at 644.

## V

I believe that the new bankruptcy courts established by the Bankruptcy Reform Act of 1978, 28 U. S. C. § 1471 (1976 ed., supp. III) satisfy this standard.

First, ample provision is made for appellate review by Article III courts. Appeals may in some circumstances be brought directly to the district courts. 28 U. S. C. § 1334. Decisions of the district courts are further appealable to the court of appeals. § 1293. In other circumstances, appeals go first to a panel of bankruptcy judges, § 1482, and then to the court of appeals. § 1293. In still other circumstances — when the parties agree — appeals may go directly to the court of appeals. In sum, there is in every instance a right of appeal to at least one Article III court. Had Congress decided to assign all bankruptcy matters to the state courts, a power it clearly possesses, no greater review in an Article III court would exist. Although I do not suggest that this analogy

means that Congress may establish an Article I court wherever it could have chosen to rely upon the state courts, it does suggest that the critical function of judicial review is being met in a manner that the Constitution suggests is sufficient.

Second, no one seriously argues that the Bankruptcy Reform Act represents an attempt by the political branches of government to aggrandize themselves at the expense of the third branch or an attempt to undermine the authority of constitutional courts in general. Indeed, the congressional perception of a lack of judicial interest in bankruptcy matters was one of the factors that led to the establishment of the bankruptcy courts: Congress feared that this lack of interest would lead to a failure by federal district courts to deal with bankruptcy matters in an expeditious manner. H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 14 (1977). Bankruptcy matters are, for the most part, private adjudications of little political significance. Although some bankruptcies may indeed present politically controversial circumstances or issues, Congress has far more direct ways to involve itself in such matters that through some sort of subtle, or not so subtle, influence on bankruptcy judges. Furthermore, were such circumstances to arise, the Due Process Clause might very well require that the matter be considered by an Article III judge: Bankruptcy proceedings remain, after all, subject to all of the strictures of that constitutional provision.<sup>12</sup>

Finally, I have no doubt that the ends that Congress sought to accomplish by creating a system of non Article III bankruptcy courts were at least as compelling as the ends

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<sup>12</sup> See *Crowell v. Benson* 285 U. S. 22, 87 (Brandeis, J. dissenting) ("If there be any controversy to which the judicial power extends that may not be subjected to the conclusive determination of administrative bodies or federal legislative courts, it is not because of any prohibition against the diminution of the jurisdiction of the federal district courts as such, but because, under the circumstances, the constitutional requirement of due process is a requirement of judicial process.")



found to be satisfactory in *Palmore, supra*, or the ends that have traditionally justified the creation of legislative courts. The stresses placed upon the old bankruptcy system by the tremendous increase in bankruptcy cases were well documented and were clearly a matter to which Congress could respond.<sup>13</sup> I don't believe it is possible to challenge Congress' further determination that it was necessary to create a specialized court to deal with bankruptcy matters. This was the nearly uniform conclusion of all those that testified before Congress on the question of reform of the bankruptcy system, as well as the conclusion of the Commission on Bankruptcy Laws established by Congress in 1970 to explore possible improvements in the system.<sup>14</sup>

The real question is not whether Congress was justified in establishing a specialized bankruptcy court, but rather whether it was justified in failing to create a specialized, Article III bankruptcy court. My own view, is that the very fact of extreme specialization may be enough, and certainly has been enough in the past,<sup>15</sup> to justify the creation of a legislative court. Congress may legitimately consider the effect on the federal judiciary of the addition of several hundred specialized judges: We are, on the whole, a body of generalists.<sup>16</sup> The addition of several hundred specialists may substantially change, whether for good or bad, the character of the federal bench. Moreover, Congress may have desired to maintain some flexibility in its possible future responses to the general problem of bankruptcy. There is no question

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<sup>13</sup> "During the past 30 years, the number of bankruptcy cases filed annually has increased steadily from 10,000 to over 254,000." H.R. Rep. No. 95-595, at 21.

<sup>14</sup> See H.R. Doc. No. 98-137 (Pt1), 98d Cong., 1st Sess. 85-96 (1978).

<sup>15</sup> Consider, for example, the Court of Customs and Patent Appeals considered in *Ex Parte Bakelite, supra*, or the variety of specialized administrative agencies that engage in some form of adjudication.

<sup>16</sup> In 1977, there were approximately 190 full-time and 30 part-time bankruptcy judges throughout the country. H.R. Rep. 95-595, at 9.



that the existence of several hundred bankruptcy judges with life-tenure would have severely limited Congress' future option. Furthermore, the number of bankruptcies may fluctuate producing a substantially reduced need for bankruptcy judges. Congress may have thought that, in that event, a bankruptcy specialist should not as a general matter serve as a judge in the countless nonspecialized cases that come before the federal district courts. It would then face the prospect of large numbers of idle federal judges. Finally, Congress may have believed that the change from bankruptcy referees to Article I judges was far less dramatic, and so less disruptive of the existing bankruptcy and constitutional court systems, than would be a change to Article III judges.

For all of these reasons, I would defer to the congressional judgment. Accordingly, I dissent.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

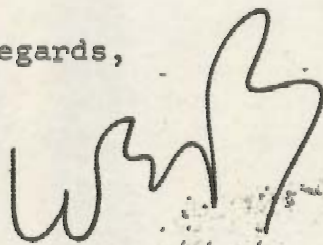
June 17, 1982

Re: No. 81-150 - Northern Pipeline Constr. v. Marathon  
Pipeline  
No. 81-546 - United States v. Marathon Pipeline

Dear Byron:

I join.

Regards,



Justice White

Copies to the Conference

June 18, 1982

81-150 Northern Pipeline v. Marathon

Dear Byron:

Please join me in your dissent.

Sincerely,

Justice White

lfp/ss

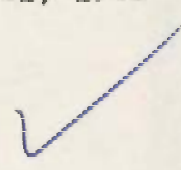
cc: The Conference



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 21, 1982

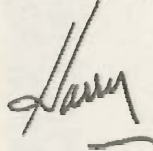


Re: No. 81-150 - Northern Pipeline Construction Co.  
v. Marathon Pipe Line Co.  
No. 81-546 - United States v. Marathon Pipe Line Co.

Dear Bill:

Please join me.

Sincerely,



Justice Brennan

cc: The Conference

THE C. J.	W. J. B.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.	S. D. OC.
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