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LIMITING LEGISLATIVE COURTS: PROTECTING ARTICLE III FROM ARTICLE I EVISCERATION

Kenneth G. Coffin

INTRODUCTION

Article III of the U.S. Constitution states, “[t]he 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.”¹ Article III judges “shall hold their Offices during good Behaviour”² and serve at the will of neither the executive nor the populace. The Constitution even protects the Article III judiciary from Congressional diminution of salary, lest the legislature seek to subvert judicial independence indirectly.³ The powerful, unitary federal judiciary of the 1787 Constitution sprung directly from the founding generation’s pre-revolutionary experiences, which led them to charge King George III with making “judges dependent on his Will alone for the tenure of their office, and the amount and payment of their salaries.”⁴ Following independence from the Crown, Alexander Hamilton eloquently emphasized the importance of an independent judiciary to a nation still debating acceptance of the Constitution.⁵

Founding sentiment aside, as with the notion of a unitary executive⁶ or a limited commerce clause,⁷ hope for a single federal judiciary has fallen by the

1. U.S. CONST. art. III, § 1.

2. *Id.*

3. *Id.* (stating judges “shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in Office.”).

4. THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

5. THE FEDERALIST No. 78 (Alexander Hamilton) (“The complete independence of the courts of justice is peculiarly essential in a limited Constitution.”).

6. Article II of the Constitution, mirroring Article III, states that “[t]he executive power of the United States shall be vested in a President of the United States of America.” U.S. CONST. art. II, §1, cl. 1. The unitary executive theory argues that this specific grant of the executive power entails that the President necessarily has complete and sole control over all agencies or individuals executing the laws. This theory has been firmly rejected by the Supreme Court. *See e.g.* Morrison v. Olsen, 487 U.S. 654, 691-93 (1988) (upholding the Ethics in Government Act, which forbid the President or his Attorney General from removing an Independent Counsel save for “good cause”). *But see id.* at 705 (Scalia, J., dissenting) (“To repeat, Article II, § 1, cl. 1, of the Constitution provides: ‘The executive power shall be vested in a President of the United States of America.’ As I described at the outset of this opinion, this does not mean *some of* the executive power, but *all of* the executive power.”) (emphasis in original).

7. *See e.g.* Wickard v. Filburn, 317 U.S. 111, 127-29 (1942) (holding that the power to regulate interstate commerce extends to intrastate activities impacting interstate commerce and explicitly adopting the aggregation principle); U.S. v. Darby, 312 U.S. 100, 116-17 (1941) (overturning Hammer v. Dagenhart, 247 U.S. 251 (1918), and refusing to invalidate the Fair Labor Standards Act on the basis that Congress was using its commerce clause power in a field covered by the police power of the states). These opinions effectively ended the Court’s decades long effort to limit Congress’s commerce power. *But see* U.S. v. Lopez, 514 U.S. 549, 558-59 (1995) (identifying only “three broad categories of activity that Congress may regulate under its commerce power” and holding the Gun-Free School Zones Act unconstitutional).

wayside. Since 1828, the Supreme Court has recognized a separate class of “legislative courts.”⁸ Judges of these legislative, or Article I, courts fall outside the guarantees of Article III. Congress may therefore provide for limited terms of office, disparate methods of appointment and reduction of salaries. Currently, there are over 2,000 Article I judges, including Bankruptcy, Magistrate,⁹ and Administrative Law judges,¹⁰ just to name a few. In contrast, only 829 United States judges can claim Article III protection.¹¹ In a nation partially founded on a belief in judicial independence, the vast majority of federal judges operate without constitutional protection. Of equal importance, it is quite likely that the vast amount of Americans’ only contact with the federal judiciary will come before an Article I tribunal.

If we are to take the writings of the Framers seriously; if we believe there exists an important relationship between Article III and judicial independence; what limits should be placed on the creation and proliferation of Article I courts? Over the past century, with the rapid expansion of the administrative state and concomitant increase in administrative law judges, the Supreme Court has struggled to articulate a limiting principle. As noted above, this is not the only field where such a principle has proved illusory. It seems once the Court recognizes a Congressional power, that power defies control.¹²

Justice Brennan’s plurality opinion in *Northern Pipeline v. Marathon Oil* represents an important attempt to articulate a uniform theory for limiting Congress’ power to create Article I courts.¹³ The *Northern Pipeline* plurality sought to clearly enunciate when the Constitution requires a court to meet Article III’s requirements, setting out three discrete exceptions to the presumption of Article III applicability.¹⁴ In dissent, Justice White attacked Justice Brennan’s neat

8. *American Ins. Co. v. 356 Bales of Cotton (Carter)*, 26 U.S. (1 Pet.) 511 (1828) (holding territorial courts constitutional even though they did not comply with Article III).

9. As of 2006, there were 352 bankruptcy judges and 496 full-time magistrate judges. See DANIEL J. MEADOR, THOMAS E. BAKER & JOAN E. STEINMAN, *APPELLATE COURTS* 3 (2d. ed. 2006).

10. In 1984 there were 1,121 administrative law judges. See Judith Resnick, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581, 582–83 (1985). Rather than adjusting this number, probably upward, to reflect the continued expansion of the administrative state, I left it unchanged. As such, the number 2,000 represents an extremely conservative estimate of the current number of Article I judges.

11. The breakdown is as follows: 9 Supreme Court Justices, 179 judges of the Courts of Appeal, 632 District Court judges. See MEADOR, *supra* note 9, at 3. There are also 9 judges on the Court of International Trade. United States Court of International Trade, <http://www.cit.uscourts.gov> (click the “About the Court” hyperlink followed by the “Composition of the Court” hyperlink) (last visited Apr. 13, 2010).

12. See *supra* notes 6-7 and accompanying text. This does not mean that the Court has given Congress carte blanche. Quite to the contrary, the Court’s oft-conflicting struggle with this issue has helped produce the current confusion in this area of the law. Compare *O’Donoghue v. United States*, 289 U.S. 516 (1933) (holding the courts of the District of Columbia constitutional courts created under Article III and thus exempted from any Congressional diminution of salary) with *Palmore v. United States*, 411 U.S. 389 (1973) (reversing *O’Donoghue* and holding that judges of the District of Columbia fall outside Article III).

13. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 52-89 (1982) (plurality opinion).

14. *Id.* at 63-64 (holding that there exist three exceptions to the presumption that all federal courts must accord with Article III).

exceptions, eschewing the search for a workable bright line rule and arguing instead for a balancing test.¹⁵

Justice Brennan's opinion calls upon the judiciary to articulate a workable theory to limit Congressional use of legislative courts. As such, this paper will analyze possible limitations on Congress' Article I power, concluding that separation of powers jurisprudence offers a practical and appropriate manner in which to check Congressional overreach. Part I traces the development of Congress' power to create Article I courts. Part II critically evaluates the *Northern Pipeline* opinions, ultimately finding neither Justice Brennan's nor Justice White's conflicting opinions satisfactory. Part III briefly discusses several possible limiting principles on Article I courts before concluding that separation of powers jurisprudence offers a meaningful and pragmatic solution to the problem. Part IV tests the practicality of this new separation of powers test, applying it to both trial level bankruptcy courts and Bankruptcy Appellate Panels to illustrate both its accommodative and limiting capacity. This paper concludes by emphasizing the importance of protecting the integrity of judges individually and the judiciary writ-large from Congressional evisceration.

I. THE DEVELOPMENT OF LEGISLATIVE COURTS

The incremental growth of this area of the law has led to a mass of conflicting precedents, which makes studying the development of this constitutional debate particularly important. This history continues to shape modern doctrine and defined both Justice Brennan and Justice White's opinions in *Northern Pipeline*.

A. The Beginning: *Canter* and *Murray's Lessee*

The terse Article III holdings of *Canter* and *Murray's Lessee* continue to hold disproportionate sway over modern case law. Importantly, these cases deal only tangentially with the issue of Article III courts. These veritable asides either ignore or fail to comprehend the complexities they entail.

In *Canter*, the Supreme Court confronted for the first time the constitutionality of federal courts that fail to comply with Article III. *Canter* deals with the validity of the Superior Court of the territory of Florida.¹⁶ The Superior Court had assented to the sale of salvaged goods and Canter claimed the sale violated Article III of the Constitution because the judges lacked the protections of Article III.¹⁷ Chief Justice Marshall's opinion only ancillaryly deals with the Article III issue. He predominantly focuses on justifying the power of the federal government to deal with inhabitants of Florida as it sees fit.¹⁸ Chief Justice Marshall cursorily states,

15. *Id.* at 115 (White, J., dissenting) ("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.")

16. *American Ins. Co. v. 356 Bales of Cotton (Canter)*, 26 U.S. (1 Pet.) 511, 541-46 (1828).

17. *Id.* at 541-42.

18. *Id.* at 546.

“[t]he Judges of the Superior Courts of Florida hold their offices for four years. These Courts, then, are not Constitutional Courts.”¹⁹ Such courts are “incapable” of receiving the “judicial powers conferred by the Constitution.”²⁰ Rather than rule them unconstitutional, however, Chief Justice Marshall creates a new category of “Legislative Courts” justified by “the general right of sovereignty, which exists in the government.”²¹

Chief Justice Marshall distinguished between the “judicial power” vested by the Constitution in Article III courts and the powers conferred by Congress on legislative courts. In this deceptively simple way, Marshall avoided the strictures of Article III and allowed Congress greater flexibility in dealing with the territories. Problematically, Marshall’s simplicity begs two important questions. First, what is the difference between the “judicial power” of constitutional courts and the power of the legislative courts? Second, what is the limit on this non-constitutionally derived judicial power? Marshall responds that while Article III restricts Congressional creation of legislative courts in the states, “the same limitation does not extend to the territories. In legislating for them Congress exercises the combined powers of the general and state governments.”²² By its own terms, *Canter* applies only to the territories. Problematically, by simultaneously failing to define the judicial power of the United States and granting Congress the power to create non-Article III federal courts, Marshall left open the question of when else Congress need not comply with Article III.

In *Murray’s Lessee*, the Plaintiff, a customs collector in New York, challenged the assessment of a lien on his property by the Treasury Department as a violation of Article III and the due process clause of the Fifth Amendment.²³ He argued that the decision to issue a distress warrant against his property constituted a judicial act, requiring use of the judicial power of the United States.²⁴ As such, only an Article III court had the power to assess the lien, rendering the assessment by the Treasury Department invalid.²⁵ Justice Curtis, writing for the court, combines the two arguments and focuses primarily upon the due process claim. Citing summary proceedings in England following the Magna Carta, the Court states that while “‘due process of law’ generally implies . . . trial according to some settled course of judicial proceedings . . . this is not universally true.”²⁶ Based on this English precedent, the Court holds that Treasury procedures lacking the trappings of a typical court proceeding do not violate the Fifth Amendment.

The Court then passed to the second question presented, “whether those provisions of the constitution which relate to the judicial power are incompatible with these proceedings?”²⁷ While “auditing the accounts of a receiver of public

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Murray v. The Hoboken Land and Improvement Co. (Murray’s Lessee)*, 59 U.S. (18 How.) 272 (1856).

24. *Id.* at 274.

25. *Id.* at 274-75.

26. *Id.* at 280.

27. *Id.*

moneys may be, in an enlarged sense, a judicial act,” the mere “exercise of judgment upon law and fact” does not “bring such matters under the judicial power.”²⁸ Rather, it must be shown that the “subject matter is necessarily, *and without regard to the consent of congress*, a judicial controversy.”²⁹ The Court answers the first question in the affirmative. As to the second question, Justice Curtis argues that while “there can be no doubt that the mere question, whether a collector of the customs is indebted to the United States, may be one of judicial cognizance,” the federal government’s sovereign immunity means they must consent to such a suit.³⁰ Thus, there exists a class of “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.”³¹

Murray’s Lessee created the so-called “public rights doctrine,” which states that since the federal government need not open itself up to suit, if it chooses to do so, it need not select a traditional Article III forum. Despite carving out this exception to Article III, the majority attempts to limit the extent of its holding, stating that Congress cannot “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.”³² Moreover, the Court explicitly relies upon the doctrine of sovereign immunity, which only includes cases involving the federal government. Read without proper context, however, the term public rights may seem to lack definition. This has allowed for the expansion of the doctrine and opened the door for a far more extensive erosion of Article III.³³

These two nineteenth century cases continue to shape modern law and form the cornerstones of Justice Brennan’s opinion in *Northern Pipeline*. However, despite their prominence, both cases admit of multiple interpretations. This has resulted in over a hundred years of confused interpretation and an expansion of the doctrine of legislative courts.

28. *Id.*

29. *Id.* at 281 (emphasis added).

30. *Id.* at 283-84.

31. *Id.* at 283-84 (emphasis added).

32. *Id.*

33. *See e.g.* *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 585-90 (1985) (citing *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962)). “In essence the public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that ‘could be conclusively decided by the Executive and Legislative Branches,’ the danger of encroaching on the judicial powers is reduced.” *Thomas*, 473 U.S. at 589 (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 68 (1982) (plurality opinion)).

B. Pre-Northern Pipeline Twentieth Century Case Law

Interestingly, aside from forming the basis for the creation of legislative courts, *Canter* and *Murray's Lessee* also begat two intertwined,³⁴ but separate, lines of case law. Synthesis, however, remains elusive.

1. *Canter* and the District of Columbia

In two twentieth century cases the Supreme Court dealt with whether the courts of the District of Columbia fall under Article III. In these cases the Court used two opposing interpretations of *Canter*.

In 1933, the Supreme Court confronted an Article III challenge to congressional diminution of the salaries of the judges of the Court of Appeals and the Supreme Court of the District of Columbia.³⁵ The President appointed the judges of these courts with the advice and consent of the Senate.³⁶ In 1932, Congress passed the Legislative Appropriation Act of June 30, 1932, which provided for the reduction in salary of all retired or active judges, "except judges whose compensation may not, under the Constitution, be diminished."³⁷ The Department of Justice reduced the salaries of the judges of the District of Columbia, prompting the judges to sue.

The judges argued that they were Article III judges exempted from salary diminution by the express wording of both the statute and the Constitution.³⁸ Justice Sutherland discussed at length the important link between Article III and judicial independence, stating, "it is not extravagant to say that there rests upon every federal judge affected nothing less than a duty to withstand any attempt, directly or indirectly in contravention of the Constitution, to diminish this compensation."³⁹ Turning to *Canter* and its progeny,⁴⁰ the Court states, "[a] sufficient foundation for these decisions in respect of territorial courts is to be found in the *transitory character* of the territorial governments."⁴¹ In that view, *Canter* relied primarily upon the "impermanent character"⁴² of the territorial governments which were "destined for admission"⁴³ into the Union.

Having characterized *Canter* as allowing Congress to regulate only for transitory governments, Justice Sutherland contrasts such governments with the

34. Court discussion of the interplay between the military and Article III stands in marked contrast to this general trend and has remained largely distinct. See e.g., *United States v. Quarles*, 350 U.S. 11 (1955) (holding that Congress' Article II power over the military would not support military tribunal jurisdiction over soldiers following their discharge from the military).

35. *O'Donoghue v. United States*, 289 U.S. 516 (1933).

36. *Id.* at 525.

37. Act of June 30, 1932, Pub. L. No. 72-212, §§ 105-07, 47 Stat. 382, 401-02 (1932).

38. *O'Donoghue*, 289 U.S. at 527-28.

39. *Id.* at 533.

40. *Id.* at 535-36 (collecting early nineteenth century cases in accord with *Canter*).

41. *Id.* at 536 (emphasis added).

42. *Id.* at 538.

43. *Id.* at 537. The holding of territory permanently, without plan for admission into the Union, presumably did not occur to Justice Sutherland.

District of Columbia. He concludes that the courts of the permanent seat of the national government cannot fall under Chief Justice Marshall's exception to Article III.⁴⁴ The Constitution makes "an unqualified grant of permanent legislative power" to Congress, making the grant of power over "local affairs . . . subordinate and incidental."⁴⁵ On the other hand, "Congress possesses 'the combined powers of a general and of a state government,'"⁴⁶ echoing the "general right of sovereignty"⁴⁷ mentioned by Marshall in *Canter*. The Court avoids this striking similarity, however, arguing that it was the "purely provisional"⁴⁸ nature of territorial courts that rendered them "incapable of receiving" the judicial power of the United States.⁴⁹ *O'Donoghue* redefined *Canter*, focusing upon the transitory nature of the territorial governments, rather than the extent of Congressional power. I term this the "transitory interpretation" of *Canter*.

In contrast, in *Palmore v. United States* the Supreme Court held the newly created Superior Court for the District of Columbia a legislative court not subject to Article III.⁵⁰ The District of Columbia Court Reform and Criminal Procedure Act of 1970 removed the judicial structure at issue in *O'Donoghue*, replacing it with courts of more limited and local jurisdiction.⁵¹ Under Justice Sutherland's opinion, the powers and jurisdiction of the court meant little. As illustrated above,⁵² Justice Sutherland focused exclusively upon the permanency of the District as the seat of the federal government. Nonetheless, the *Palmore* court declined to follow *O'Donoghue*. Ignoring the *ratio* underpinning Justice Sutherland's opinion, the court distinguished *Palmore* on the basis of the Superior Court's decreased jurisdiction; quoting Justice Sutherland's statement that the D.C. Courts, "were 'of equal rank and power with those of the other inferior courts of the federal system.'"⁵³ Eschewing context, the *Palmore* court argued that *O'Donoghue* rested upon the powers of the old District of Columbia Courts.⁵⁴

Having distinguished seemingly contradictory precedent, Justice White analogized the power Congress held over the District of Columbia to the power they held over the territories and concluded that Congress had plenary power to create legislative courts in D.C. The Court goes through painstaking historical detail noting, without need or disagreement, that an Article III judge need not preside over every case involving an Act of Congress.⁵⁵ In the end, the Court's

44. *Id.* at 538. Indeed, he does so with marked fervor: "How different are the status and characteristics of the District of Columbia!" *Id.*

45. *Id.* at 538-39.

46. *Id.* at 539 (quoting *Stoutenburgh v. Hennick*, 129 U.S. 141, 147 (1889)).

47. *American Ins. Co. v. 356 Bales of Cotton (Canter)*, 26 U.S. (1 Pet.) 511, 546 (1828).

48. *O'Donoghue*, 289 U.S. at 544.

49. *Id.* (quoting *American Ins. Co. v. 356 Bales of Cotton (Canter)*, 26 U.S. (1 Pet.) 511, 546 (1828)).

50. 411 U.S. 389, 410 (1973).

51. *Id.* at 392; see also *id.* at 392 n.2 (describing the changes in the court structure brought about by the 1970 Act).

52. See *supra* notes 35-47 and accompanying text.

53. *Palmore*, 411 U.S. at 405-06.

54. *Id.* at 406.

55. *Id.* at 400-01. "It is apparent that neither this Court nor Congress has read the Constitution as requiring every federal question arising under the federal law . . . be tried in an Article III court before a judge enjoying lifetime tenure and protection against salary reduction." *Id.* at 407.

decision turns upon the similarity between Congress' power over the district and their power over the territories. In essence, the *Palmore* court held that Congress possessed the full police power with respect to the District of Columbia. This falls directly in line with Chief Justice Marshall's opinion in *Canter* and rejects the importance of the relative permanence of courts or governments. I term this the "sovereignty interpretation" of *Canter*.

These two cases, both involving the D.C. courts, illustrate the profound dissonance and confusion plaguing this area of the law. While the *Palmore* court adhered more closely to the holding of *Canter*, it also failed to grasp (or intentionally misstated) the holding of *O'Donoghue*. Either way, this points to a serious doctrinal problem plaguing the *Canter* strand of pre-*Northern Pipeline* doctrine.

2. Development of the Public Rights Doctrine⁵⁶

As discussed above, based upon the doctrine of sovereign immunity *Murray's Lessee* held that where the government voluntarily waives its sovereign immunity and consents to suit, Congress may provide an Article I forum for the suit.⁵⁷

In *Williams v. United States* (decided on the same day and written by the same Justice as *O'Donoghue*), the Supreme Court began the process of unhinging the public rights doctrine from the theory of sovereign immunity.⁵⁸ In *Williams*, a judge of the Court of Claims sued for the same reason as the two judges in *O'Donoghue*—diminution of salary in contravention of the Constitution.⁵⁹ Justice Sutherland first traces the history of the Court of Claims which, "from nothing more than an administrative or advisory body, was converted into a court."⁶⁰ He then holds the Court of Claims a legislative court.⁶¹

The *Williams* majority seems to rely on two justifications, prior case law determining the Court of Customs Appeals a legislative court in *Ex Parte Bakelite* and the sovereign immunity of the United States.⁶² This, however, is judicial sleight of hand. *Bakelite* relied heavily upon the Court of Customs Appeals' mandate to "examine and determine claims for money against the United States."⁶³ As such, "none of the matters made cognizable by the court inherently or necessarily requires judicial determination," because Congress was not required to allow citizens to sue the government for debts owed.⁶⁴

56. A full exposition of the Public Rights doctrine is well outside the scope of this paper, nonetheless its importance requires a brief overview of the doctrine as it stood prior to *Northern Pipeline*.

57. See *supra* notes 25-33 and accompanying text.

58. 289 U.S. 553 (1933). The Court heard oral arguments in *Williams* and *O'Donoghue* on April 12, 1933 and handed down the decisions on May 29, 1933.

59. *Id.* at 559.

60. *Id.* at 565.

61. *Id.* at 570.

62. *Id.* at 568-72 (citing *Ex Parte Bakelite Corp.*, 279 U.S. 438 (1929)).

63. *Id.* at 568-69 (citing *Ex Parte Bakelite Corp.*, 279 U.S. 438, 452 (1929)).

64. *Id.* at 569.

Justice Sutherland then moves on to discuss sovereign immunity, holding that “since Congress [may] confer upon an executive officer or administrative board, or an existing specially constituted court, or retain for itself, the power to hear and determine controversies respecting claims against the United States, it follows indubitably that such power” is not part of the Article III judicial power of the United States.⁶⁵ This succinct statement accords precisely with *Murray’s Lessee*. Problematically, the court also includes language open to a more expansive reading, stating that for matters “equally susceptible of legislative or executive determination . . . the authority to inquire into and decide them may constitutionally be conferred on a non-judicial officer or body.”⁶⁶ This ambivalence in *Williams*, which subtly expanded the possible reach of the public rights doctrine, has continued to this day. Indeed, in *Northern Pipeline* Justice Brennan declines to give a precise definition of a “public right,” though he argues “a matter of public rights must, at a minimum, arise ‘between the government and others.’”⁶⁷

The foregoing case law illustrates the state of flux, if not outright discord, confronting Justice Brennan as he attempted to create a workable limit on Congress’ power to create Article I courts.

II. THE *NORTHERN PIPELINE* DECISION

In *Northern Pipeline*, the Court tangentially confronted Congress’ power to create legislative courts, and both the plurality and the dissent took the chance to articulate their visions of Article III’s limiting power.⁶⁸ The facts, however, probably called for a more limited ruling. The case arose out of Northern Pipeline’s (“Northern”) petition for reorganization under the Bankruptcy Act of 1978.⁶⁹ After filing for reorganization, Northern filed suit against Marathon Oil (“Marathon”) for “alleged breaches of contract and warranty, as well as for alleged misrepresentation, coercion and duress.”⁷⁰ Marathon moved to dismiss on the grounds that the Bankruptcy Act of 1978 “unconstitutionally conferred Article III judicial power upon judges who lacked . . . tenure and protections against salary diminution.”⁷¹

The Bankruptcy Act of 1978 greatly altered the structure of bankruptcy proceedings in the United States.⁷² In pertinent part, the Act establishes

65. *Id.* at 580-81.

66. *Id.* at 579-80.

67. *N. Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. at 50, 69 (1984) (quoting *Ex Parte Bakelite Corp.*, 279 U.S. 438, 451 (1929)).

68. *Id.* at 50-118.

69. *Id.* at 56. I will draw upon the plurality opinion for the facts of the case, as the facts are not in dispute.

70. *Id.*

71. *Id.* at 56-57.

72. Justice Brennan outlines these expansive changes in depth. See *id.* at 52-57. For the entire Act, see Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 *declared unconstitutional by N. Pipeline Constr. Co.*, 458 U.S. at 87. The jurisdictional sections of the Act at issue in *Northern Pipeline* are also available. See *id.* at §241(a).

bankruptcy judges as “adjuncts” to the District Court.⁷³ Bankruptcy judges served for 14-year terms and could be removed from office for incompetency, misconduct, neglect of duty, or physical or mental disability by their circuit’s judicial counsel. Along with these changes in name and rank came changes in power.⁷⁴ The Act greatly broadened bankruptcy court jurisdiction, which now included “all civil proceedings arising under title 11 [the Bankruptcy title] or arising in or *related to* cases under title 11.”⁷⁵ At least theoretically, this new grant of power also included state law claims. Marathon specifically attacked the bankruptcy court’s exercise of jurisdiction over the state contract claim. The bankruptcy judge denied the motion,⁷⁶ but the District Court granted it,⁷⁷ prompting the United States to intervene and appeal to the Supreme Court. Northern proposed two arguments supporting the constitutionality of the Act. They claimed that the Bankruptcy Act was a proper exercise of Congress’ Article I power to create legislative courts or, in the alternative, that bankruptcy judges were adjuncts of the District Court and therefore not subject to Article III.

A. The Plurality Opinion: Justice Brennan’s Grand Vision

According to Justice Brennan, “[t]he question presented is whether the assignment by Congress to bankruptcy judges of the jurisdiction granted in 28 U.S.C. § 1471 violates Article III of the Constitution.”⁷⁸ Before answering this question, Justice Brennan lays out two fundamental premises: first, the Framers expressly structured the Constitution to avoid the accumulation of power in the hands of the few;⁷⁹ second, the judiciary must remain independent of the Executive and Legislative branches to ensure balance in our constitutional system.⁸⁰ Article III ensures judicial independence by defining the power of the judiciary and protecting judges from the political or economic influence of the coordinate branches. “In sum, our Constitution unambiguously enunciates a fundamental principle—that the ‘judicial power of the United States’ must be reposed in an independent Judiciary.”⁸¹

In response to Marathon’s argument that the 1978 Act created properly constituted legislative courts, Justice Brennan lays out his unified theory of Article

73. 28 U.S.C. § 151(a) (1976 ed. Supp. IV) *declared unconstitutional by N. Pipeline Constr. Co.*, 458 U.S. at 87.

74. 28 U.S.C. §§ 152, 153(a)–(b) (1976 ed. Supp. IV) *declared unconstitutional by N. Pipeline Constr. Co.*, 458 U.S. at 87.

75. 28 U.S.C. § 1471(b) (1976) *declared unconstitutional by N. Pipeline Constr. Co.*, 458 U.S. at 87.

76. *N. Pipeline Constr. Co.*, 458 U.S. at 57 (citing *In re N. Pipeline Constr. Co.*, 6 B.R. 928, 931 (Bankr. Minn. 1980)).

77. *Id.* (citing *In re N. Pipeline Constr. Co.*, 12 B.R. 946 (D. Minn. 1981)).

78. *Id.* at 52.

79. *Id.* at 57 (quoting THE FEDERALIST NO. 47, at 300 (James Madison) (H. Lodge ed., 1888)).

80. *Id.* at 58 (“The Federal Judiciary was therefore designed by the Framers to stand independent of the Executive and Legislature”) (citing THE FEDERALIST NO. 78, at 489 (Alexander Hamilton) (H. Lodge ed., 1888)).

81. *Id.* at 60 (quoting U.S. CONST. art. III § 1).

III.⁸² He states that the case law illuminates “three narrow situations not subject to [Article III], each recognizing a circumstance in which the grant of power to the Legislative and Executive branches was historically and constitutionally *so exceptional*” that the creation of the legislative courts did not endanger “the constitutional mandate of separation of power.”⁸³ Those three exceptions are: the sovereignty interpretation of *Canter*; courts-martial; and the public rights exception.⁸⁴

Justice Brennan explicitly adopts what I term the “sovereignty” reading of *Canter*.⁸⁵ He notes that in the territories “Congress was to exercise the general powers of government.”⁸⁶ Having adopted the sovereignty reading, Justice Brennan approvingly cites *Palmore*, noting, “[t]he Court followed the same reasoning [as it did in *Canter*] when it reviewed Congress’ creation of non-Article III courts in the District of Columbia.”⁸⁷ The Court underscored that there exists “no division of powers between the general and state governments” in the District of Columbia.⁸⁸ Next, Justice Brennan briefly discusses courts-martial. As stated above, these particular cases largely developed under a separate body of military case law.⁸⁹ The Constitution grants Congress the express power to provide for “cases arising in the land or naval forces.”⁹⁰ Lastly, Justice Brennan carefully defines the public rights doctrine, linking it both to separation of powers law and the doctrine of sovereign immunity. While the distinction between public and private rights “has not been definitively explained in [Supreme Court] precedents,” the distinction between the two relies upon both the federal government’s sovereign immunity and either executive or legislative competence on the matter in issue.⁹¹

Having laid down these three narrow exceptions to Article III, Justice Brennan holds, “[w]e discern no such exceptional grant of power applicable in the cases before us.”⁹² The bankruptcy courts neither “lie exclusively outside the States of

82. *Id.* at 62 (“Appellants suggest two grounds for upholding the Act’s conferral of broad adjudicative powers upon judges unprotected by Article III.”). Marathon first argued that “pursuant to its enumerated Article I powers, Congress may establish legislative courts that have jurisdiction to decide cases to which Article III judicial power of the United States extends.” *Id.* (quoting Brief for United States at 9). In the alternative, they argued that even if the Constitution required matters arising in relation to bankruptcy to be decided in an Article III court, “Bankruptcy jurisdiction was vested in the district court” and the exercise of jurisdiction by the “adjunct bankruptcy court was made subject to appeal as of right to an Article III court.” *Id.* at 62-63 (quoting Brief for United States at 12).

83. *Id.* at 64 (emphasis added).

84. *Id.* at 64-70.

85. See *supra* notes 49–56 and accompanying text.

86. *N. Pipeline Constr. Co.*, 458 U.S. at 64. “This exception from the general prescription of Article III dates from the earliest day of the Republic, when it was perceived that the Framers intended that as to certain geographical areas, in which no State operated as *sovereign*, Congress was to exercise the general powers of government.” *Id.* (emphasis added).

87. *Id.* at 65 (citing *Palmore v. United States*, 411 U.S. 389, 397 (1973)).

88. *Id.* (quoting *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 619 (1838)).

89. *Id.* at 66; see also *supra* note 34.

90. *Id.* (quoting U.S. CONST. art I, § 8, cl. 14) (“The Congress shall have Power . . . To make rules for the Government and regulation of the land and naval Forces.”).

91. *N. Pipeline Constr. Co.*, 458 U.S. at 67-70.

92. *Id.* at 71.

the Federal Union, like those in the District of Columbia and the Territories. Nor do the bankruptcy courts bear any resemblance to courts-martial”⁹³ Moreover, “the substantive legal rights at issue in the present action cannot be deemed ‘public rights.’”⁹⁴ Justice Brennan’s first two conclusions require no explanation. He then explains that “the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights,” such as the state law contract claim at issue in *Northern Pipeline*.⁹⁵ Recognizing the expansion of the public rights doctrine, Justice Brennan states that issues of purely federal bankruptcy law, “may well be a ‘public right.’”⁹⁶ Despite the fact that the government need not be a party and therefore would not be foregoing sovereign immunity, Justice Brennan concedes the possibility that under modern law, bankruptcy could be construed as a public right.⁹⁷ Nonetheless, he firmly concludes that “*Northern*’s right to recover contract damages to augment its estate is ‘one of private rights, that is, of the liability of one individual to another under the law so defined.’”⁹⁸

Justice Brennan next rejects the contention that a bankruptcy judge’s status as an “adjunct” of the District Court could salvage the system from unconstitutionality.⁹⁹ Reviewing prior case law, Justice Brennan establishes “two principles that aid us in determining the extent to which Congress may constitutionally vest traditionally judicial functions in non-Article III officers.”¹⁰⁰ First, “when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated—including the assignment to an adjunct of some functions historically performed by judges.”¹⁰¹ Secondly, the “functions of the adjunct must be limited in such a way that ‘the essential attributes’ of judicial power are retained in the Article III court.”¹⁰² Thus, “when Congress creates a statutory right, it clearly has discretion” to provide for specific venues for the vindication of that right.¹⁰³ They do not have such power, however, when the “right being adjudicated is not of congressional creation.”¹⁰⁴ In those situations, use of a non-Article III adjudicative body raises the possibility of “unwarranted encroachment upon the judicial power.”¹⁰⁵ As

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* Just three years after *Northern Pipeline*, the court vindicated Justice Brennan’s hesitancy and vitiated his neat conception of the public rights doctrine. See *Thomas v. Union Carbide*, 473 U.S. 568 (1985). In *Union Carbide*, the Court held that “practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III” and that therefore “identity of parties” should not determine the requirements of Article III. *Id.* at 587 (citing *Glidden Co. v. Zdanok*, 370 U.S. 530, 547-48 (1962)).

98. *N. Pipeline Constr. Co.*, 458 U.S. at 71-72 (quoting *Crowell v. Benson*, 285 U.S. 22, 51 (1932)).

99. *Id.* at 76-77.

100. *Id.* at 80.

101. *Id.* at 80-81 (citing *Crowell v. Benson*, 285 U.S. 22, 51 (1932)) (“Thus *Crowell* recognized Art. III does not require ‘all determinations of fact to be made by judges.’”).

102. *Id.* at 81.

103. *Id.* at 83.

104. *Id.* at 83-84.

105. *Id.* at 84.

illustrated by the *Northern Pipeline* case itself, the Bankruptcy Act's broad grant of jurisdiction "carries the possibility of such an unwarranted encroachment."¹⁰⁶

Justice Brennan's opinion suffers from three main flaws: reliance upon incoherent past precedent; the incorporation of the public rights doctrine; and a failure to justify the entire superstructure of limitations. As illustrated by Justice White's dissent, precedent provides a thicket of variegated rules. Of equal import, Justice Brennan fails to justify adoption of his schema. The cataloguing of prior decisional law does not justify limiting Congressional power. Importantly, "the precedential value of at least two [decisions relied upon in *Northern Pipeline*] ha[ve] been seriously eroded by subsequent Supreme Court decisions."¹⁰⁷ Justice Brennan not only fails to justify the use of the three exceptions he divines from past precedent, but he similarly fails to explain why those cases should form the universe of Article I courts. This is what Justice White means when he attacks Justice Brennan's lack of a "unifying principle."¹⁰⁸ Lastly, "the language and logic of Article III does not justify the public-private right dichotomy."¹⁰⁹ While the doctrine finds ample support in precedent, the dichotomy is unique in its creation of "bizarre" consequences,¹¹⁰ and failure to meaningfully limit Congressional discretion.¹¹¹

B. Justice White's Dissent: Abandoning the Defenses¹¹²

Justice White ably dissects Justice Brennan's simplification of prior case law; however, his suggestion to use a balancing test when deciding Article III cases amounts to an abdication of the judicial role. After taking issue with the plurality's decision to find the Bankruptcy Reform Act facially unconstitutional,¹¹³ Justice White attacks the plurality's limitation on the power of Article I adjuncts. Justice White asks why Justice Brennan's two principles, drawn from prior case law, "define the outer limits of constitutional authority."¹¹⁴ In light of the "practice in bankruptcy prior to 1978" and "the practice in today's administrative agencies," Justice Brennan's guidelines amount to "unsupportable abstractions."¹¹⁵

106. *Id.*

107. Martin H. Redish, *Legislative Courts, Administrative Agencies and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 207-08.

108. *Northern Pipeline*, 458 U.S. at 93-94 (White, J., dissenting).

109. *Id.* at 205.

110. Redish, *supra* note 107, at 208 ("But what makes the approval of the exercise of Article I court authority over such cases so bizarre is the contrast to the type of cases that the dichotomy dictates must be heard in article III courts: suits between private individuals involving state-created common law rights.").

111. See *infra* notes 121-26 and accompanying text (discussing Justice White's dissent in *Northern Pipeline*).

112. This paper foregoes discussion of Chief Justice Rehnquist's concurrence since, by its own terms, the concurrence seeks to avoid the broad constitutional debate dividing the plurality and the dissent. *Northern Pipeline*, 458 U.S. at 89 (Rehnquist, C.J., concurring) (arguing that if "the question presented [is the assignment of broad jurisdiction by the Bankruptcy Act] I would with considerable reluctance embark on the duty of deciding this broad question" but that since "Marathon Pipe Line Co. has not been subjected to the full range of authority granted bankruptcy courts" by the 1978 Act the question presented is far more limited).

113. *Id.* at 94-95 (White, J., dissenting).

114. *Id.* at 101.

115. *Id.*

Ultimately, Justice White probes the plurality's reliance upon *Crowell v. Benson*, concluding that reliance on such an old case overlooked the massive changes in the administrative state (and bankruptcy proceedings) since 1932.¹¹⁶ *Crowell* occurred before decades of revolutionary administrative law cases and the expansion of the administrative state following the New Deal and World War II. As such, in actual practice, "the additions to the jurisdiction of the bankruptcy judges were of marginal significance."¹¹⁷ While fifty years of practice hardly justifies a continued failure to enforce Article III, Justice White perceptively undercut Justice Brennan's reliance upon *Crowell*.

Justice White then attacks the plurality's neat categorization of existing case law, questioning both its rationale and coherence.¹¹⁸ Justice Brennan's first exception to Article III is geographical. As Justice White notes, "[t]he problem, of course, is that both of the other exceptions recognize that Article I courts can indeed operate within the States."¹¹⁹ His second exception, for courts-martial, relies upon the "extraordinary control over the precise subject matter" granted to Congress in Article I.¹²⁰ However, "[t]here is nothing in those Clauses that creates congressional authority different in kind from the authority granted to legislate with respect to bankruptcy."¹²¹ Thus, while the first exception seems hollow, the second relies upon a seemingly random differentiation of Congress' Article I powers. Most problematically for Justice Brennan, in the third exception, "the plurality itself recognizes that Congress can create Article I courts in virtually all the areas in which Congress is authorized to act."¹²² As such, "[t]he plurality opinion has the appearance of limiting Article I courts only because it fails to add together the sum of its parts."¹²³ These issues illustrate the problem of relying upon current precedent to cabin Congressional action.

Justice White then raises a more sweeping point, illustrating the problems associated with Article III case law since Chief Justice Marshall's invocation of the "judicial power" of the United States in *Canter*. As mentioned above, Marshall's *Canter* opinion leaves many questions unanswered.¹²⁴ Justice White illustrates how these problems affected the court in *Murray's Lessee*. Having accepted *Canter's* premise that "if the auditing of this account . . . was an exercise of the judicial power of the United States, the proceeding was void," the Court was forced to define certain areas of law that are "judicial by nature."¹²⁵ At the same time, the Court had already conceded that auditing was a "judicial act."¹²⁶ These internal

116. *Id.* at 100-03.

117. *Id.* at 101.

118. *N. Pipeline Constr. Co.*, 458 U.S. at 103-13 (discussing and attacking Justice Brennan's analysis of past Article III case law).

119. *Id.* at 104.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 105.

124. *See supra* notes 18-24 and accompanying text.

125. *N. Pipeline Constr. Co.*, 458 U.S. at 107-08 (citing *Murray v. The Hoboken Land and Improvement Co. (Murray's Lessee)*, 59 U.S. (18 How.) 272 (1855)).

126. *Id.* at 108.

conflicts continue to plague Article III case law, as judges must boldly pronounce the province of the courts while defining myriad judicial acts as having no part of the “judicial power” of the United States.

In closing, Justice White argues for reading Article III as expressing a “value that must be balanced against competing constitutional values and legislative responsibilities.”¹²⁷ Noting the “complicated and contradictory history of the issue,” Justice White states, “[t]here 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.”¹²⁸ While this conclusion is “inevitable” it does not entail “that this Court must always defer to the legislative decision” to create Article I courts.¹²⁹ Rather, Justice White argues that despite the principled incantation of Alexander Hamilton in prior Article III case law, “such a balancing approach stands behind many of the decisions upholding Article I courts.”¹³⁰ For example, according to Justice White, *Palmore* actually relied upon “legislative interest” rather than “any theory of territorial or geographic control.”¹³¹

Justice White articulates two concrete ways for courts to ensure proper protection of the judiciary: appellate review of legislative courts in Article III tribunals; and by ensuring that, “Article I courts are designed to deal with issues likely to be of little interest to the political branches.”¹³² While Article III appellate review offers a clear practical method of controlling agencies and legislative courts, Justice White’s second point certainly stands at odds with the many important issues dealt with by the administrative state. Indeed, from the environment to workplace safety, Congress often leaves the most politically charged issues to the care of agencies. The balancing test offered by Justice White provides even less guidance and coherence than Justice Brennan’s plurality opinion. His test lacks any unifying principle and concludes by suggesting “concrete” guidelines that reflect Justice White’s personal views on the correct balance between the legislature and judiciary. Despite his protestations to the contrary, Justice White essentially advocates abandoning the strictures of Article III. A balancing test, which both heavily weights Article III appellate review and legislative need, will invariably result in a virtual judicial rubber stamp. While, as many judges and commentators have noted, an absolutist interpretation of Article III may be lost to the mists of time, that does not entitle the Court to simply walk away from the problem.

III. FINDING THE UNIFYING PRINCIPLE

While I disagree with Justice White’s conclusion, he did get one thing inescapably correct, the “Court has failed to articulate a principle” for limiting

127. *Id.* at 113.

128. *Id.*

129. *Id.*

130. *Id.* at 113-14.

131. *N. Pipeline Constr. Co.*, 458 U.S. at 114 (citing *Palmore v. United States*, 411 U.S. 389, 393 (1973)).

132. *Id.* at 115.

Congress' power to create legislative courts. This section briefly considers several such principles before arguing that separation of powers law represents a practical, logically consistent manner for judging the constitutionality of legislative courts.

A. Popular Alternatives to *Northern Pipeline*

Most obviously, one could simply choose to interpret the Constitution literally. Fidelity to the constitutional text dictates that when Congress creates courts "inferior" to the Supreme Court, those courts must be staffed with Article III judges. While theoretically sound and logically consistent, this approach suffers from one overwhelming issue: it would render any adjudication in our vast federal administrative apparatus unconstitutional.¹³³ Unsurprisingly, no Justice in *Northern Pipeline* adopted the literalist approach.¹³⁴ This literal interpretation, it seems, died in 1828.

Considering the practical effect of congressional creation of an Article I court—diversion of power from the Article III judiciary—a judicial non-delegation doctrine might serve as a useful check on Congressional power. The non-delegation doctrine forms a set of "standards for determining when Congress has crossed the constitutional line between delegating legislative authority and simply allotting executive and judicial actors to carry out their constitutionally prescribed functions."¹³⁵ Adopting such a schema in the judicial realm would prevent Congress from crossing the line and delegating the "judicial power" of the United States to legislative or executive quasi-judicial actors. This potential principle suffers from two main issues: first, the fall of the non-delegation doctrine;¹³⁶ second, the test would probably still imperil too great a percentage of Article I courts. The non-delegation doctrine would likely face the same hurdles, broad-based unpopularity and fate in the judicial realm as it did in the legislative arena.

In *CFTC v. Schor*, decided only four years after *Northern Pipeline*, Justice O'Connor used an amalgam of both Justice Brennan and Justice White's opinions in *Northern Pipeline* to create her own balancing test.¹³⁷ In *Schor*, the Court dealt with the constitutionality under Article III of the Commodity Futures Trading

133. Redish, *supra* note 107, at 228 ("The restrictions on the work of administrative agencies resulting from an absolute interpretation of article III would not only impose significant new burdens on the federal court but might significantly disrupt the work of the modern administrative system."). *But see id.* at 226-28 (discussing a possible "escape route" from declaring the work of the administrative state unconstitutional under a literal interpretation of Article III).

134. *See e.g. N. Pipeline Constr. Co.*, 458 U.S. at 93 (White, J., dissenting) ("If this simple reading were correct and we were free to disregard 150 years of history, these would be easy cases . . ."); *see also id.* at 94 ("[A]t this point in the history of constitutional law [this] question can no longer be answered by looking only to the constitutional text.").

135. GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 54 (5th ed. 2009).

136. Only twice in the nation's history, both in 1935, has the Supreme Court invalidated a statute on nondelegation grounds. *See A.L.A. Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935) (holding that part of the National Industrial Recovery Act which gave the President power to sign industry-created codes of competition into law, unconstitutional on nondelegation grounds); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (holding that part of the National Industrial Recovery Act which allowed the President to prohibit interstate trade in oil produced in excess of state quotas, unconstitutional on nondelegation grounds).

137. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986).

Commission, which provided reparations to individuals harmed by fraudulent broker conduct.¹³⁸ The Commission also had jurisdiction over all counter-claims, including state law counter-claims.¹³⁹ In upholding the validity of the Commission under Article III, Justice O'Connor references separation of powers concerns,¹⁴⁰ but ultimately articulates a multi-factor balancing test.¹⁴¹ She uses four factors,¹⁴² including Justice Brennan's adjunct-related "essential attributes of judicial power" language. These factors represent an amalgam of public rights doctrine law,¹⁴³ separation of powers law,¹⁴⁴ and the *Northern Pipeline* plurality.¹⁴⁵ Justice O'Connor fails to buttress these four factors with any precedential support, save an a-contextual citation to *Northern Pipeline*. Ultimately, Justice O'Connor's balancing test fails to create an internally consistent, workable rule. Interestingly, however, her combination and use of past precedent further illustrates the rampant confusion and discord in the current case law.

B. Separation of Powers Law

Separation of powers jurisprudence lurks beneath, and helps explain, the vast majority of Article III cases over the past 200 years. Aside from providing a (slightly) firmer base of judicial precedent, separation of powers law can operate as a true check on Congressional overreach without endangering the administrative state. It can both unify (to the extent possible) prior case law and provide a pragmatic answer to modern Article III issues.

First, separation of powers law fits conceptually. The Congress, in delegating judicial power to a legislative court, is arrogating to one of its creatures (or to an executive agency, in some instances) judicial power. The proper question, therefore, is not "what power is inherent in the judiciary" but "what delegation of power away from Article III tribunals violates the separation of powers doctrine." A separation of powers rubric would relieve the Court of parsing the meaning of "judicial power," resting precedent on firmer and more logical ground.

Second, separation of powers doctrine can explain the vast majority of extant case law, particularly *Murray's Lessee* and its progeny. While *Canter* never specifically mentioned structural concerns, Chief Justice Marshall nonetheless

138. *Id.* at 836.

139. *Id.* at 837.

140. *See e.g. id.* at 850 (citing the importance of the "institutional integrity of the Judicial Branch").

141. *Id.* at 851.

142. *Id.* Justice O'Connor's four factors are: first, "the extent to which 'the essential attributes of judicial power' are reserved to Article III courts;" second, "the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts;" third, "the origins and importance of the right to be adjudicated;" and fourth, the "concerns that drove Congress to depart from the requirements of Article III." *Commodity Futures Trading Comm'n*, 478 U.S. at 851.

143. The "origins and importance of the right" factor, constitutes a reference to public rights doctrine law as articulated by Justice O'Connor's opinion in *Thomas v. Union Carbide*. *Id.* (citing *Thomas v. Union Carbide*, 473 U.S. 568, 587 (1985)).

144. Specifically the first factor relates to separation of powers concerns. *Id.*

145. Interestingly, Justice O'Connor cites to the portion of the *Northern Pipeline* plurality discussing whether the bankruptcy judges' status as adjuncts could salvage the constitutionality of the Bankruptcy Reform Act of 1978. *Id.*; *see also supra* notes 100-07 and accompanying text.

implicitly argues that the Congress, as sole sovereign of the territories, properly exercises the full panoply of governmental powers therein.¹⁴⁶ Specifically, Marshall emphasizes that Congress may create territorial courts, “in the execution of those general powers which that body possesses over the territories of the United States.”¹⁴⁷ As illustrated above, later case law has focused either on Congressional sovereignty or the transitory nature of the territorial courts at issue in *Canter*. A different interpretation focuses on Marshall’s acknowledgement that territorial courts were executing a mandate incident to Congress’ plenary power over the territories. While not perfect, separation of powers doctrine would leave the realm of the territories to congressional oversight in accord with *Canter*.

In *Murray’s Lessee*, the reliance upon institutional competence and constitutional structure is far more obvious.¹⁴⁸ Before Justice Sutherland, towards the very end of his opinion, lays the groundwork for the public rights doctrine, he discusses at length the nature of the Treasury Department. Specifically, Congress’ “power to collect and disburse revenue . . . includes all known and appropriate means of effectually collecting and disbursing that revenue.”¹⁴⁹ In essence, Congress’ power to order summary proceedings to collect revenues from Treasury officials is incident to their power to collect revenue. While perhaps, as Justice Sutherland states, this constitutes a “judicial act” in an “enlarged sense,” this judicial act inheres in legislative and executive prerogative to collect revenue and control the Treasury Department. Only after this discourse, in response to a specific argument of counsel that Congress had not in fact provided for such summary proceedings by statute, did Justice Sutherland discuss public and private rights. At their base, both *Canter* and *Murray’s Lessee* admit of clear separation of powers rulings, where obviously judicial acts inhere in either legislative or executive powers.

Even more strikingly, modern case law consistently references structural and separation of powers arguments, even if they are not explicitly relied upon. While Justice Brennan focuses his considerable legal acumen on synthesizing the extant case law, he nonetheless begins his opinion with a lengthy discussion on the importance of judicial independence and maintaining “the constitutional structure.”¹⁵⁰ After discussing his three exceptions to Article III, Justice Brennan rejects the creation of “specialized legislative courts” because of “[t]he potential for encroachment upon power reserved to the Judicial Branch.”¹⁵¹ These arguments strike at the heart of separation of powers jurisprudence.

Similarly, in dissent, Justice White uses separation of powers analysis to attack the plurality,¹⁵² but concludes by abandoning it without comment in favor of a

146. American Ins. Co. v. 356 Bales of Cotton (*Canter*), 26 U.S. (1 Pet.) 511, 546 (1828).

147. *Id.*

148. *Murray v. The Hoboken Land and Improvement Co.* (*Murray’s Lessee*), 59 U.S. (18 How.) 272, 280-81 (1855).

149. *Id.* at 281.

150. *N. Pipeline Constr. Co.*, 458 U.S. at 58 (plurality opinion); *see also id.* at 57-58.

151. *Id.* at 73-74.

152. *Id.* at 97-98 (White, J., dissenting) (“Initially, however, the majority’s proposal seems to turn the separation-of-powers doctrine, upon which the majority relies, on its head.”). Importantly, even Justice White

balancing test.¹⁵³ Indeed, in defending one of his “concrete” ways to protect Article III independence despite adherence to a balancing test, Justice White states, “the presence of appellate review by an Article III court will go a long way toward insuring a proper separation of powers.”¹⁵⁴ Justice O’Connor in *Schor*, as noted above, similarly references separation of powers arguments before opting for a balancing test.¹⁵⁵ This discussion of past case law, however, does not purport to be anything more than a rough fit. As both Justices White and O’Connor noted, the cases do not admit of synthesis. They do, however, bespeak a single underlying rationale: to protect the independence of the judiciary. Separation of powers law underlies many of these decisions, not the “legislative interest” referenced by Justice White. The Court must acknowledge this fact and move separation of powers arguments to the center of Article III law, rather than sequestering them to mere asides and flowery references to Hamilton and Madison.

Despite its power as a unifying principle for this confused area of case law, separation of powers law suffers from a veritable two-face of judicial precedent, alternately supporting formalist and functionalist interpretations.¹⁵⁶ This Achilles’ heel must be faced head on. The functionalist methodology accords best with the extant case law, while the harsher formalist method provides a more robust protection of judicial independence. While either methodology builds upon and improves the current body of case law, the formalist model would more forcefully ensure judicial independence. A hopeful compromise would be what I term Justice Scalia’s “modified formalist” methodology in *Mistretta v. United States*.¹⁵⁷ Briefly, in *Mistretta*, the Court dealt with the Article III constitutionality of the U.S. Sentencing Commission.¹⁵⁸ The majority of the court, on non-delegation grounds, found that Congress provided a sufficient intelligible principle to the Commission and allowed the delegation.¹⁵⁹

Justice Scalia, in dissent, focuses on the separation of powers issue evident in creating, essentially, a “junior-varsity Congress.”¹⁶⁰ Unlike most administrative agencies, the Commission exercised “no governmental power other than the making of laws.”¹⁶¹ “[T]he power to make law cannot be exercised by anyone other than Congress, except in conjunction with the lawful exercise of executive or judicial power.”¹⁶² Applying this to the Article III context, the judicial power can only be exercised when it is incident to or in conjunction with the exercise of the

divined the separation of powers language running through the plurality opinion, even if he disagreed with the Justice Brennan’s application. *Id.*

153. *Id.* at 113.

154. *Id.* at 115.

155. *See supra* notes 137-45 and accompanying text.

156. *See e.g.* LAWSON, *supra* note 135 at 50-52 (collecting various Supreme Court cases over the last three decades to illustrate the Court’s predilection for flip-flopping between formalism and functionalism).

157. 488 U.S. 361, 413 (1989) (Scalia, J., dissenting).

158. *Id.* at 365.

159. *Id.* at 412.

160. *Id.* at 427 (Scalia, J., dissenting).

161. *Id.* at 413.

162. *Id.* at 417.

executive or legislative power of the United States. As such, administrative agencies executing the law and legislating clearly fall within this ambit.

IV. BAPS & BANKRUPTCY COURTS

Any schema for limiting Congressional power requires more than internal logical consistency and the theoretic capability to limit. It requires actual teeth. Separation of powers law may seem like an appropriate manner in which to limit Congressional creation of Article I courts, but its adoption requires a test of both its accommodative and limiting capacity. The former requires an illustration that, unlike a literalist interpretation of Article III, separation of powers law need not result in the wholesale invalidation of the current adjudicative administrative law structure. The latter entails illustrating precisely when separation of powers law could step in and prevent creation of legislative courts. In keeping with the subject matter at issue in *Northern Pipeline*, this section will consider two different components of the modern bankruptcy system: trial courts and Bankruptcy Appellate Panels (“BAPs”).

A. Bankruptcy Courts

In the aftermath of *Northern Pipeline*,¹⁶³ Congress faced the unenviable task of completely remaking the system of bankruptcy courts in the United States.¹⁶⁴ Two years after *Northern Pipeline*, Congress finally passed the Bankruptcy Amendments and Federal Judgeship Act of 1984 (“1984 Act”) to remedy the unconstitutionality of the 1978 Bankruptcy Reform Act.¹⁶⁵ The 1984 Act made several significant changes to prevent a second *Northern Pipeline*. To begin with, the terminology changed. Bankruptcy courts now constituted “units” of the district court, while bankruptcy judges were “judicial officer[s] of the district court.”¹⁶⁶ More importantly, Congress imposed a complicated limitation on the jurisdiction of bankruptcy judges. Rather than having jurisdiction over all issues relating to Title 11 (as they did under the 1978 Act), bankruptcy judges can only adjudicate “core” bankruptcy proceedings.¹⁶⁷ While a bankruptcy judge may “hear a

163. *N. Pipeline Constr. Co.*, 458 U.S. at 87; see also *id.* at 91 (“Because I agree with the plurality that this grant of authority is not readily severable from the remaining grant of authority to bankruptcy courts . . . I concur in the judgment.”) (Rehnquist, J., concurring).

164. Despite holding the Bankruptcy Reform Act of 1978 unconstitutional in its entirety due to the lack severability of the jurisdiction-granting sections of the Act, *id.* at 87, 91, the Court nonetheless stayed the holding for several months to allow Congress the chance to salvage the 1978 Act. *Id.* at 87. Congress failed to meet the Court’s October deadline.

165. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984).

166. 28 U.S.C. § 151.

167. 28 U.S.C. § 157(b)(1) (“Bankruptcy judges may hear and determine all cases under Title 11 and all core proceedings arising under Title 11, or arising in a case under Title 11 . . .”). While a cataloguing of such “core” proceedings and their analysis falls outside the scope of this Article, for illustration, they include: “matters concerning the administration of the estate,” *id.* at § 157(b)(2)(A); “counterclaims by the estate against persons filing claims against the estate,” *id.* at § 157(b)(2)(C); “proceedings to determine, avoid, or recover fraudulent conveyances,” *id.* at § 157(b)(2)(H); and, “determinations of the validity, extent, or priority of liens,” *id.* at § 157(b)(2)(K).

proceeding that is not a core proceeding” if it arises in relation to Title 11, the bankruptcy judge may not enter a final determination. Rather, the judge must “submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge” after *de novo* review.¹⁶⁸ This system attempts to limit the jurisdiction, and therefore the power, of bankruptcy judges in order to satisfy the Court’s admonitions in *Northern Pipeline*.

1. Bankruptcy Courts under *Northern Pipeline*¹⁶⁹

Problematically for Congress, the *Northern Pipeline* exceptions to Article III do not rest upon the breadth of power granted to an Article I court, but upon the type of power.¹⁷⁰ Justice Brennan demanded that Congress conform to a specific list of exceptions. As such, the 1984 Act begs the question of whether Congress succeeded in curing the unconstitutionality of the bankruptcy system. Since bankruptcy courts clearly fall within the territorial boundaries of state governments, they cannot be upheld under Justice Brennan’s territoriality exception. Likewise, bankruptcy courts do not deal with military matters.

To fit Justice Brennan’s schema, therefore, bankruptcy courts must adjudicate public rights. If not, then while the bankruptcy system set up by the 1984 Act might avoid the adjudication of state law claims by Article I courts, the system would still not pass constitutional muster under *Northern Pipeline*. Justice Brennan briefly dealt with this question in *Northern Pipeline*, noting that bankruptcy “may well be a public right.”¹⁷¹ On the other hand, Justice Brennan earlier quotes *Crowell*’s definition of public rights with approval, stating “[t]he doctrine extends only to matters arising ‘between the Government and a person subject to its authority.’”¹⁷² Under this rubric, bankruptcy would fall outside the scope of the public rights exception since it would not necessarily entail the government as a party. In contrast, in *Thomas v. Union Carbide*, Justice O’Connor articulated a substantially looser definition of a public right.¹⁷³

Solving this question requires firmer definitions of both the scope of the public rights doctrine and the precise nature of bankruptcy proceedings. This query illustrates the vagueness and difficulty of applying Justice Brennan’s seemingly rigid exceptions. Even the seemingly clear territorial exception actually admits of two conflicting lines of Supreme Court interpretation, justifying Justice White’s

168. *Id.* at § 157(c)(1).

169. While not dealt with directly herein, it is at least debatable that 1984 Act Bankruptcy Judges would fall under Justice Brennan’s definition of an “adjunct” of the district court. Justice Brennan articulated two principles for determining whether a government officer constituted an independent judge as opposed to merely an “adjunct” of the district court. See *supra* note 100 and accompanying text. First, Congress has broad discretion to provide forums for the disposition of congressionally created statutory schemes. *Id.* Second, the Article III judge must retain “the essential attributes of the judicial power” in order for the Article I officer to constitute an adjunct. *Id.*

170. See *supra* Part II.B.

171. *N. Pipeline Constr. Co.*, 458 U.S. at 70.

172. *Id.* at 67-68 (quoting *Crowell v. Benson*, 285 U.S. 22, 50 (1932)).

173. See *supra* notes 34, 98, 143 and accompanying text.

argument that the *Northern Pipeline* plurality's neat exceptions belie their often-conflicting underpinnings.

2. Bankruptcy Courts under the Separation of Powers Test

A separation of powers test, in contrast, would not attempt to fit bankruptcy courts into abstract exceptions to Article III. Rather, constitutionality would turn on whether or not bankruptcy courts exercised their judicial power incident to, or in conjunction with, their exercise of executive or legislative power.¹⁷⁴ This Article argues that under this rubric, bankruptcy judges closely approximate executive agencies, as they decide facts and make initial legal findings. In discovering the facts and applying the law as they see it, bankruptcy judges execute bankruptcy law. The exercise of the judicial power, therefore, inheres in this execution of the bankruptcy system. Though in the garb of judges to ensure procedural fairness, the bankruptcy courts administer the bankruptcy law on behalf of Congress and the Executive. This administrative role does not diminish their robust legal duties, or the importance of those officers holding the rank of bankruptcy judge. In contrast, viewing bankruptcy courts in this way clarifies their role in a nation where the talismanic term “judge” often portends reference to the Declaration of Independence.¹⁷⁵

Initial legal determinations in bankruptcy proceedings inhere in the administration of the bankruptcy code entrusted to the bankruptcy courts by Congress. Rather than searching for the precise definition of “public right” or, indeed, the precise nature of a bankruptcy proceeding, a separation of powers test goes to the heart of Article III. An Article I court may act judicially, so long as that power inheres (as it so often must) in the execution of the law. Such a judicial act by a non-Article III actor does not offend the Constitution. In contrast, when an Article I court predominantly or solely, rather than incidentally possesses judicial power, that grant of judicial power violates Article III. Bankruptcy judges, as administrators of the bankruptcy laws must incidentally make judicial rulings. Article III allows them that latitude.

B. Bankruptcy Appellate Panels

Along with overhauling the jurisdiction of trial level bankruptcy judges, the Bankruptcy Reform Act of 1978 (“1978 Act”) also introduced several new bankruptcy appellate procedures in addition to traditional appeals to the district court.¹⁷⁶ Most importantly, for our purposes, the 1978 Act introduced the Bankruptcy Appellate Panel for the first time. A BAP represents an alternate

174. See *supra* Part III.B.

175. As this Article itself illustrates, see *supra* note 4 and accompanying text.

176. Donald A. Brittenham, Jr., *The Pros and Cons Behind the First Circuit's Decision to Establish Bankruptcy Appellate Panels and the Growing Question of Whether the Panels Will Last*, 32 NEW ENGL. L. REV. 215, 218-20 (1997) (discussing the establishment of BAPs and the changes in the appeal process wrought by the 1978 Reform Act).

appellate structure to traditional appeals to the district court, where a panel of three bankruptcy judges sits to decide the appeal. In order to comply with the perceived deficiencies in the BAP legislation under *Northern Pipeline*, the 1984 Act made minor alterations to the existing BAP structure.¹⁷⁷ Up to that point, only the Ninth Circuit maintained a BAP. The Bankruptcy Reform Act of 1994 (“1994 Act”) marked a major shift in the history of BAPs and governs their current structure.¹⁷⁸ The Act provides that the “judicial council of a circuit *shall* establish a bankruptcy appellate panel,”¹⁷⁹ making BAPs mandatory for the first time. BAPs will consist of three bankruptcy judges of a circuit “except that a member of such service may not hear an appeal originating in the district for which such member is appointed.”¹⁸⁰ The 1994 Act thus mandates BAPs, seeming to express a strong congressional preference for re-routing appeals from the district court.

Despite this seemingly absolute command, the 1994 Act provides several methods for refusing to employ a BAP in a given circuit. First, a judicial council need not establish a BAP if it finds that “there are insufficient judicial resources available in the circuit; or establishment of such service would result in undue delay or increased cost to parties in cases under title 11.”¹⁸¹ A judicial council can make these findings at any time, even after the creation of a BAP.¹⁸² Moreover, even if the judicial council fails to make one of the above findings, district judges must ratify the use of the BAP for cases originating in their district by majority vote.¹⁸³ Lastly, the 1994 Act provides an opt-out provision for litigants.¹⁸⁴ Nonetheless, the 1994 Act still provides a clear congressional preference for routing bankruptcy appeals away from district courts to a three person panel of bankruptcy judges unless practicality or judicial resistance counsel otherwise.¹⁸⁵

The question of whether BAPs comply with *Northern Pipeline*, poses the same problems confronted in the previous section, when discussing trial level bankruptcy courts.¹⁸⁶ Justice Brennan’s schema does not involve the type of power exercised by a given Article I judge.¹⁸⁷ Rather, he focuses upon the type of matter cognizable in the court.¹⁸⁸ The extent of a court’s jurisdiction only becomes important insofar as it indicates the category of cases the court may act upon. Under *Northern Pipeline*, BAPs pass constitutional muster so long as bankruptcy

177. *Id.*

178. Bankruptcy Reform Act of 1994, Pub L. No. 103-394, 108 Stat. 4106 (1994).

179. 28 U.S.C. § 158(b)(1) (emphasis added).

180. *Id.* at § 158(b)(5).

181. *Id.* at § 158(b)(1)(A)-(B).

182. *Id.* at § 158(b)(2)(A)-(D).

183. *Id.* at § 158(b)(6).

184. *Id.* at § 158(c)(1) (stating that upon timely election the appeal may be heard by the district court).

185. *But see* Thomas A. Wiseman, Jr., *The Case Against Bankruptcy Appellate Panels*, 4 GEO. MASON L. REV. 1, 2 (1995) (“The fact that Congress provided for these exceptions [to the mandatory establishment of a BAP] indicates its realization that BAPs may not be suitable because they could not be sustained economically.”).

186. *See supra* Part II.B (analyzing the plurality opinion in *Northern Pipeline*); *see also supra* Part IV.A.1 (discussing the constitutionality of current trial level bankruptcy judges under *Northern Pipeline*).

187. *See supra* Part IV.A.1.

188. *Id.*

constitutes a public right.¹⁸⁹ As noted above, this question comes fraught with complexity.¹⁹⁰ The fact that the *Northern Pipeline* schema would treat bankruptcy courts and BAPs as functionally equivalent seriously undermines the efficacy and value of the case.

Unlike bankruptcy courts, which apply law to fact in the process of administering the bankruptcy code, BAPs primarily decide issues of legal interpretation. While BAP decisions have only debatable precedential value,¹⁹¹ they at minimum bind the parties subject to their judgment. While parties may then appeal to the court of appeal,¹⁹² many cases may be the subject of trial and appellate review in solely Article I courts.¹⁹³ The dearth of binding precedential value in BAP decisions does not assist their constitutionality. Whatever the fate of a given decision after the end of litigation, in the case before them, a BAP interprets and declares the law. To quote Chief Justice Marshall's famous incantation from *Marbury v. Madison*, BAPs "say what the law is," a quintessentially judicial function.¹⁹⁴

Unlike trial level bankruptcy courts, BAPs fail to pass constitutional muster under the separation of powers test. Rather than primarily aiding in the direct administration of the bankruptcy code, BAPs focus upon legal interpretation. Like most appellate courts, BAPs give deference on factual issues to the trial court, while reviewing questions of law *de novo*. BAPs turn the roles of bankruptcy courts on their heads. Their executive power, their direct administration of the bankruptcy code, inheres in their overriding law-declaration and clarification duties. This definitely tilts the balance under the "modified functionalist" separation of powers test discussed above. BAPs represent a junior varsity appellate court. While of limited jurisdiction relative to the courts of appeal, extent of jurisdiction does not cure the constitutional deficiency. Creation of a solely judicial body, with minimal executive, administrative or legislative duties, unconstitutionally circumvents the strictures of Article III and the Constitution.

189. One difference between trial level bankruptcy courts and BAPs, as institutions, is that BAPs almost certainly cannot avail themselves of "adjunct" to the district court arguments, see *supra* notes 100-07 (discussing Justice Brennan's adjunct analysis); see also *In re Dartmouth House Nursing Home, Inc.*, 30 B.R. 56, 62 (Bankr. 1st Cir. 1983) (holding the First Circuit's BAP unconstitutional under *Northern Pipeline*) *vacated sub nom. Massachusetts v. Dartmouth House Nursing Home, Inc.*, 726 F.2d 26 (1st Cir. 1984) (declining to reach the constitutional issue decided by the BAP, but noting that *Northern Pipeline* "suggests a serious question regarding the constitutionality of bankruptcy appellate panels"). *But see, In re Burley*, 738 F.2d 981, 985-87 (9th Cir. 1984) (holding the Ninth Circuit's BAP constitutional under *Northern Pipeline*'s "adjunct" analysis).

190. See *supra* notes 170-73 and accompanying text.

191. See e.g., *Wiseman, supra* note 185, at 10 (discussing the Ninth Circuit's method of dealing with the precedential value of BAP decisions).

192. 28 U.S.C. § 158(d)(1) ("The courts of appeal shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.")

193. *Wiseman, supra* note 185, at 11 (noting that "decisions of the BAP from which no appeal is taken to the circuit court escape[s] any Article III review").

194. 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Interestingly, Chief Justice Marshall then notes that "[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule." *Id.* This statement helps to illustrate the difference between the administration of the bankruptcy code by trial level bankruptcy judges and the purely interpretive role of the BAPs.

The difference between BAPs and trial level bankruptcy courts illustrates the potential of separation of powers doctrine to protect the integrity of Article III, while allowing Congress leeway to efficiently and effectively administer the vast federal apparatus.

CONCLUSION

Separation of powers doctrine presents a workable manner for deciding when a court must comport with the strictures of Article III. When a court actuates an executive or legislative function, the courts need not comply with Article III. If, however, a court simply adjudicates without any executive or legislative function, that court is solely exercising the judicial power of the United States and Article III governs. This line creates a relatively definitive test for Congress, without either endangering the current administrative state or preventing Congressional flexibility. Moreover, despite its flexibility, separation of powers law does create a true limit on Congress' power to create Article I courts, helping to ensure the continued potency and independence of the Article III judiciary.