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# NO LIGHT AT THE END OF THE PIPELINE: CONFUSION SURROUNDS LEGISLATIVE COURTS

*Maryellen Fullerton**

In June 1982 the United States Supreme Court plunged into one of the more arcane, yet politically volatile, areas of constitutional law, and explored the limits on Congress' power to establish federal courts under article I of the United States Constitution.[1] In *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*,[2] the Court declared that the jurisdictional provisions[3] of the Bankruptcy Reform Act of 1978 (the Code)[4] consti-

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[1] U.S. CONST. art. 1. Article I, which specifies the powers of Congress, makes no reference to "legislative courts." "The power given Congress in Art. I § 8, cl. 9 'to constitute Tribunals inferior to the supreme Court', plainly relates to the 'inferior Courts' provided for in Art. III, § 1; it has never been relied on for establishment of any other tribunals." Glidden v. Zdanok, 370 U.S. 530, 543 (1962). Nevertheless, relying on its inherent power under article I, Congress has acted on a number of occasions to establish "legislative courts," which are not part of the judicial branch of the federal government.

The Supreme Court first recognized this power in American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828), which upheld the creation of territorial courts that were not part of the independent federal judiciary created by article I:

> 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.

26 U.S. at 546. *See generally* Glidden v. Zdanok, 370 U.S. 530 (1962).

The terms "article I court" and "legislative court" are generally used interchangeably. Some commentators identify two separate types of article I courts: legislative courts and administrative agencies. M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 36 (1980). In this article, the term "legislative courts" will be considered synonymous with "article I courts," and will refer to all systems of adjudication that Congress establishes, but does not endow with the guarantees of judicial independence specified in article III.

[2] 102 S. Ct. 2858 (1982).

[3] The federal bankruptcy courts were given jurisdiction over "all civil proceedings arising under title 11 [the Bankruptcy Title of the United States Code] or arising in or related to cases under title 11." 28 U.S.C. § 1471(b) (Supp. III 1979).

[4] The Bankruptcy Reform Act of 1978 (the Code), Pub. L. No. 95-598, tit. II, 92 Stat. 2549 (1978) (codified at 28 U.S.C. §§ 151-160, 771-775, 1471-1482 (Supp. III 1979)), established a United States bankruptcy court in each judicial district as an adjunct to the district court.

tute a delegation of judicial power[5] in violation of article III of the Constitution.[6] With this decision, the Court ventured into terrain aptly described as "a most difficult area of constitutional law," in which "the precedents are horribly murky, doctrinal confusion abounds, and the constitutional text is by no means clear."[7]

Although the *Marathon* decision was eagerly awaited and its potential importance well-recognized, many were hesitant to predict its outcome. The Supreme Court's contradictory pronouncements during the past 150 years[8] concerning the constitutionality of federal courts established under article I had left in disarray the theoretical justification for Congress' power to establish courts with judges of limited tenure. As a result, commentators, practitioners, and judges developed widely differing

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[5] 102 S. Ct. at 2879-80.

[6] Article III provides, in part:

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

U.S. CONST. art. III, § 1, cl. 1.

[7] H.R. REP. No. 595, 95th Cong., 1st Sess. 70-72, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 6030-32 (letter from Thomas G. Krattenmaker) [hereinafter cited as HOUSE REPORT with page citations to U.S. CODE CONG. & AD. NEWS].

[8] The early opinion by Chief Justice Marshall concerning territorial courts, American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828), adopted a clear-cut distinction: article III courts could only consider article III subject matter, and article I courts could not consider article III subject matter. *Id.* at 542-46. Although ignored by the *Canter* opinion, two major flaws in this reasoning are apparent. First, the article I territorial court in *Canter* exercised jurisdiction over an admiralty case, one of the categories of subject matter jurisdiction expressly listed in article III, *id.* at 545, and this exercise of jurisdiction was upheld by the Court, *id.* at 546. Second, in *Canter,* the Supreme Court, itself an article III court, reviewed the territorial court's decision. *Id.* at 541. As the subject matter jurisdiction of the Supreme Court is limited by article III, the controversy heard by the territorial court must have fallen within the boundaries set by article III. Thus, even the early approaches to this problem, though drawing clear dichotomies, were muddled.

The Supreme Court decided in *Ex Parte* Bakelite Corp., 279 U.S. 438 (1929), and in Williams v. United States, 289 U.S. 553 (1933), that the Court of Customs Appeals and the Court of Claims, respectively, were legislative rather than article III courts. In *Bakelite,* the Court assumed that there was an extensive overlap between the jurisdiction of article I and article III courts, 279 U.S. at 450-51, while four years later in *Williams* the Court indicated that no article I court could resolve any disputes falling within the article III subject-matter. 289 U.S. at 578-79. Both *Bakelite* and *Williams* were overturned by a plurality of the Court in Glidden v. Zdanok, 370 U.S. at 584 (1962). *See* note 15 *infra.*

views on the constitutionality of the new system of bankruptcy courts.[9] Asked whether legislative bankruptcy courts would be constitutional, Charles Alan Wright responded: "The metaphysics of what is the judicial power of the United States that, under Article III, can only be exercised by [courts guaranteed life tenure and irreducible salaries] are extremely complex and . . . no one can give an answer with any assurance until the Supreme Court has spoken."[10]

Unfortunately, *Marathon* did little to resolve this confusion. The Supreme Court produced four separate opinions: Justices Blackmun, Marshall, and Stevens joined Justice Brennan in the plurality opinion;[11] Justices Rehnquist and O'Connor filed a concurring opinion;[12] Justice White, joined by Chief Justice Burger and Justice Powell, wrote a lengthy and biting dissent;[13] and, Chief Justice Burger added a short dissent of his own.[14] These opinions are so contradictory that no one can safely predict the Court's ruling on future cases involving article I federal courts. Furthermore, the major opinions filed by Justices Brennan and White each so exposes inconsistencies and flaws in the other that neither approach appears satisfactory. Only one thing is clear: the Supreme Court has had — and continues to have — great difficulty in formulating a coherent analytic framework in this area. This is demonstrated by the frequency with which the Court has issued multiple and wildly varying opinions when examining the constitutionality of article I courts.[15] The *Marathon*

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[9] *See* HOUSE REPORT, *supra* note 7, at 6025-49 (letters addressed to Representative Peter W. Rodino, Jr., Chairman of House Judiciary Committee, commenting on constitutionality of pending bankruptcy legislation).

[10] *Id.* at 6048.

[11] 102 S. Ct. at 2862-80.

[12] *Id.* at 2880-82.

[13] *Id.* at 2882-96.

[14] *Id.* at 2882.

[15] For example, in National Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949), Justice Jackson, writing for a plurality of three, upheld the federal statute granting article III courts jurisdiction over disputes between citizens of a state and citizens of the District of Columbia. Acknowledging that such a suit did not fall within the diversity jurisdiction outlined by the Constitution, the plurality ruled that Congress could assign a non-article III matter to an article III court so long as the assignment was necessary to carry out its duties under article I. *See* 337 U.S. at 583-604. Justices Rutledge and Murphy concurred, but expressly rejected the plurality's analysis, concluding that the diversity grant included suits brought by citizens of the District against citizens of the states. *Id.* at 604-26. Two dissents were filed, one by Justices Vinson and Douglas, *id.* at 626-46, the other by Justices Frankfurter and Reed, *id.* at 646-55. Both dissenting opinions re-

decision, with no single analytical approach garnering majority support, falls squarely into this pattern.

This article reviews the constitutional principles involved, the statutory scheme that ran afoul of these principles, and the differing analyses advanced in the opinions. Focusing on the constitutional plan to ensure judicial independence, it then identifies the major shortcomings of these analyses. Finally, this article explores some of the political implications the *Marathon* opinions may have for proposed legislation to curtail the jurisdiction of the federal courts.[16]

## I. Judicial Independence and the Constitution

Article III, section 1 of the Constitution establishes the judicial branch of the national government.[17] It has long been interpreted to guarantee that members of the judicial branch enjoy life tenure,[18] and it expressly prohibits the reduction of judges' salaries during their terms of office.[19] These requirements were established to ensure the independence of federal judges from pressure from the electorate or from the legislative or executive branches.[20] As Alexander Hamilton explained in the *Federalist*

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jected the plurality's view that article III courts can adjudicate controversies falling beyond those listed in article III. *Id.* at 627-54. Justice Frankfurter, furthermore, disagreed with the concurrence's view that District of Columbia citizens are state citizens for purposes of the diversity grant. *Id.* at 654. Thus, although a majority of the Court agreed that article I subject matter was not assignable to an article III court, jurisdiction was nonetheless upheld.

In Glidden v. Zdanok, 370 U.S. 530 (1962), Justice Harlan, writing for a plurality of three, held that the Court of Claims and the Court of Customs and Patent Appeals were article III courts, 370 U.S. at 581-85, thus overruling the *Bakelite* and *Williams* cases, *see* note 8 *supra*. Justices Clark and Warren concurred, but found it unnecessary to overrule *Bakelite* or *Williams* because of intervening changes in the jurisdiction of the courts. *Id.* at 585-89. Justices Douglas and Black dissented, stressing that the judges who had been appointed to article I courts had not been selected with an eye to the skills and qualifications necessary for an article III court judge. *Id.* at 589-606.

[16] *See, e.g.,* H.R. 867, 97th Cong., 1st Sess. (1980) (limiting jurisdiction of Supreme Court and district courts in cases arising out of any state statute relating to abortion); H.R. 326, 97th Cong., 1st Sess. (1980) (limiting jurisdiction of federal courts in cases relating to school prayer); H.R. 2347, 97th Cong., 1st Sess. (1980) (same); H.R. 340, 97th Cong., 1st Sess. (1980) (limiting jurisdiction of federal courts in cases relating to school desegregation).

[17] *See* note 6 *supra*.

[18] *See* Toth v. Quarles, 350 U.S. 11, 16 (1955).

[19] *See* United States v. Will, 449 U.S. 200, 218-21 (1980); note 6 *supra*.

[20] *See Will,* 449 U.S. at 217-18.

*Papers:*

> Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to [the courts'] necessary independence. If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity to justify a reliance that nothing would be consulted but the Constitution and the Laws.[21]

In Hamilton's view, "[n]ext to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . . In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.*"[22]

What Hamilton does not explain, however, is why judicial independence is necessary. It appears that the framers sought to further two goals. First, judicial independence would benefit litigants in federal courts by providing them with an impartial decisionmaker.[23] Second, and more importantly, the framers sought to ensure that the national government would not degenerate into tyranny.[24] It was accepted political theory in the United States at the time of the constitutional convention that the concentration of power in one branch of government would lead to the tyrannical exercise of power by that branch.[25] Judicial independence was seen as a powerful restraint against such

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[21] THE FEDERALIST No. 78, at 471 (A. Hamilton) (C. Rossiter ed. 1961).

[22] THE FEDERALIST No. 79, at 472 (A. Hamilton) (C. Rossiter ed. 1961).

[23] *See Marathon*, 102 S. Ct. at 2864-65 ("The Federal Judiciary was therefore designed by the Framers to stand independent of the Executive and Legislature . . . to guarantee that the process of adjudication itself remained impartial. . . .").

[24] THE FEDERALIST No. 47, at 300-08 (J. Madison) (C. Rossiter ed. 1961).

[25] *See* Sharp, *The Classical American Doctrine of "The Separation of Powers"*, 2 U. CHI. L. REV. 385, 394-419 (1935). In fact, at the time of the constitutional convention, a majority of state constitutions embodied the separation of powers principle. *See id.* at 419. As Madison observed:

> No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty than that . . . [t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.

THE FEDERALIST No. 47, *supra* note 24, at 301.

concentration.[26]

### A. *The Doctrines of Separation of Powers and of Checks and Balances*

This function of judicial independence plays an important role in the overall constitutional structure. The framers incorporated two distinct, but complementary, structural devices to ensure that excessive power would not be exercised by any one branch of the proposed government. First, the framers divided the functions of the new government into three separate branches, and enumerated the powers of each branch.[27] This has become known as the separation of powers doctrine. Under this scheme, the judicial power was to be exercised only by courts established under article III.[28] Since experience with the state constitutions had taught that separation of powers alone would not prevent an unhealthy concentration of power if one branch were able to exert controlling influence over another,[29] the framers also provided each branch with mechanisms to deter encroachment by one branch upon the functions of another. The article III guarantees of life tenure and irreducible salary together provide one of the judiciary's protections against such encroachment.[30] By ensuring the independence of the courts the Constitution restricts the ability of the other branches to influence the judges and thus effectively exercise judicial power.

Second, in addition to the theory of separation of powers,[31] the framers incorporated the distinct but complementary theory of checks and balances between government departments into the constitutional structure.[32] The checks and balances proposal, which permitted the branches of the federal government to

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[26] *See* THE FEDERALIST No. 78, *supra* note 21.

[27] The Constitution defines the powers granted to each of the three branches of government. *See* U.S. CONST. art. I (legislative branch); *id.* art. II (executive branch); *id.* art. III (judicial branch).

[28] *See* THE FEDERALIST No. 47, *supra* note 24; J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 126-27 (1978).

[29] *See* THE FEDERALIST No. 47, *supra* note 24, at 303-08.

[30] *See* THE FEDERALIST No. 78, *supra* note 21, at 469-72.

[31] The separation of powers doctrine is of ancient lineage. It appears first in Aristotle's *The Politics*, but its modern development began with John Locke's observations on the struggles between the Stuart Kings and Commons. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 28, at 126; Sharp, *supra* note 25, at 387.

[32] *See* THE FEDERALIST No. 48, at 308 (J. Madison) (C. Rossiter ed. 1961).

check the activities of their sister branches, was controversial. Many believed that a government in which each branch was granted precisely delineated, compartmentalized powers—a government of separated powers—would suffice to prevent a dangerous consolidation of power in any one department.[33] Others advanced the view that there should be an overlapping of functions.[34] Those taking the latter position contended that a system that entrusted discrete powers to more than one branch of the government would enable each branch to check the excesses of the other. Accordingly, they advocated that the federal constitution contain a system of checks and balances as well as a structure of divided functions.[35] The latter view prevailed; the drafters of the Constitution devised a government of three separate, but interdependent, branches. Under this scheme, the judiciary is empowered to check the other branches by reviewing government action and determining whether such action violates the Constitution.[36] The power to invalidate governmental action provides the judiciary its second great protection against encroachment from coordinate branches, for if the political departments intrude into the judicial domain, courts can declare such action unconstitutional. Here again, the constitutional mechanisms guaranteeing judicial independence are necessary; it is unlikely that the checks and balances available to the judiciary would actually be exercised if the courts were dependent on the other branches.[37]

Thus, life tenure and irreducible salaries further both the separation of powers and the checks and balances policies. Without judicial independence, the influence of other branches on judicial decisions could result in the exercise of judicial power by a nonjudicial branch and in a judiciary unwilling to employ its check. For these reasons, the Constitution "unambiguously enunciates a fundamental principle—that the 'judicial Power of the United States' must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously

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[33] Madison authored THE FEDERALIST No. 47 in order to counter such a view.

[34] *See* Sharp, *supra* note 25, at 422-34.

[35] *See* THE FEDERALIST No. 48, *supra* note 32, at 308-13; Sharp, *supra* note 25, at 422-34.

[36] The power of the judiciary to review the actions of the other branches was made explicit in Marbury v. Madison, 5 U.S. (1 Cranch.) 137 (1803).

[37] *See* THE FEDERALIST No. 78, *supra* note 21, at 466.

guarded, and it provides clear institutional protections for that independence."[38]

Unfortunately, the concepts of separation of powers and of checks and balances are often regarded as synonymous.[39] This confusion is understandable, as both concepts arose out of struggles against tyranny[40] and constitute political solutions intended to prevent the consolidation of power in one branch of government. Nonetheless, as described above, the systems of separation of powers and of checks and balances perform quite different functions.

The distinction is of more than theoretical significance. Although applying both concepts to a set of facts often leads to the same result, it does not always do so. For example, under a separation of powers analysis, the salient inquiry is only whether one branch of government has performed a function assigned to another branch. Under a checks and balances analysis, the salient inquiry is whether a government action undermines a branch's ability to restrain its co-equal branches. Accordingly, the constitutionality of a particular governmental action may vary, depending upon whether it is evaluated from the point of view of separation of powers or of checks and balances.

### B. *Legislative Courts*

Generally, Congress has observed the need for judicial independence and has assigned judicial matters to article III courts. The first Congress, in the Judiciary Act of 1789,[41] established federal district and circuit courts under article III.[42] The judges of these courts then, as now, were guaranteed life tenure and

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[38] *Marathon*, 102 S. Ct. at 2866.

[39] *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 28, at 126-27.

[40] The modern development of the separation of powers doctrine began with John Locke's concern with the struggles for power between the Stuart Kings and Commons. In THE FEDERALIST Nos. 47 and 48, the principle of checks and balances was identified as a further attempt to protect against the consolidation of power in one organ of government. At the time of the constitutional convention, the possibility of tyranny by the legislative branch, in particular, was greatly feared. THE FEDERALIST No. 48, *supra* note 32.

[41] *See* Act of Sept. 24, 1789, 1 Stat. 73.

[42] Article I of the Constitution gives Congress the power to "constitute Tribunals inferior to the Supreme Court." U.S. CONST. art. I, § 1, cl. 9. Acting under this provision Congress has established the inferior courts referred to in article III. *See* Glidden v. Zdanok, 370 U.S. 530, 531-32 (1962).

irreducible salaries during their appointments.[43] But Congress has also established tribunals staffed by judges who serve without these article III protections.[44] These tribunals are commonly referred to as "article I" or "legislative" courts.[45]

Some legislative courts have been challenged as unconstitutional on the basis that they lack the guarantees of judicial independence, yet exercise judicial power. Although there is no textual support in the Constitution for the creation of legislative courts,[46] a number of Supreme Court decisions have recognized circumstances in which article I grants Congress this power.[47] In fact, the Court generally has upheld grants of jurisdiction to legislative courts, thus, in effect, ruling that the guarantees of judicial independence are not always necessary. Unfortunately, because the Court's reasoning in this area has been unclear and often contradictory,[48] it is nearly impossible to determine the limits upon Congress' power to dispense with the constitutional guarantees of life tenure and irreducible salaries.

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[43] *See* 28 U.S.C. § 44(b) (1976) (guaranteeing continued tenure for circuit judges during good behavior); *id.* § 134(a) (guaranteeing continued tenure for district judges during good behavior); *id.* §§ 44(d), 135, 461(b) (collectively guaranteeing irreducible salaries for district and circuit judges).

[44] Congress has established the following article I courts: territorial courts, *see* American Ins. Co. v. Canter, 26 U.S. 511 (1828); consular courts, *see In re* Ross, 140 U.S. 453 (1891); courts in unincorporated districts outside the United States, *see* Downes v. Bidwell, 182 U.S. 244 (1901); military courts, *see* Toth v. Quarles, 350 U.S. 11 (1955); private land claims courts, *see* United States v. Coe, 155 U.S. 76 (1894); Indian citizenship courts, *see* Stevens v. Cherokee Nation, 174 U.S. 445 (1899); the District of Columbia courts, *see* Palmore v. United States, 411 U.S. 389 (1973); the Tax Court, *see* Stix Friedman & Co., Inc. v. Coyle, 463 F.2d 434 (8th Cir. 1972); and the Court of Claims. Although the Court of Claims and the Court of Customs and Patent Appeals were initially established as article I courts, *see* Glidden v. Zdanok, 370 U.S. 530, 531 (1961), Congress later enacted legislation declaring them to be article III courts. *See* Act of Aug. 25, 1958, § 1, 72 Stat. 848 (Court of Customs and Patent Appeals); Act of July 28, 1953, § 1, 67 Stat. 226 (Court of Claims). However, in 1982, Congress reversed directions and established the Court of Claims as an article I court. *See* Act of Apr. 2, 1982, Pub. L. No. 97-164, tit. I, § 105(a). The same legislation replaced the article III Court of Customs and Patent Appeals with the article III Court of Appeals for the Federal Circuit. *See* 28 U.S.C. § 1295 (Supp. V 1982).

[45] Many distinguish between "legislative" and "constitutional" courts. *See* note 1 *supra.*

[46] The power given to Congress to "constitute tribunals inferior to the supreme Court," U.S. CONST. art. I, § 8, cl. 9, has been interpreted as referring solely to the congressional power to create article III courts. *See* note 1 *supra.*

[47] *See* note 44 *supra.*

[48] *See* note 15 and accompanying text *supra. See generally* M. REDISH, *supra* note 1, at 35-51.

The existence of legislative courts raises problems of great political significance. Absent limits on Congress' power to assign judicial matters to legislative courts, Congress can easily circumvent the constitutional design of a tripartite government. Moreover, unless there are limits on the creation of legislative courts, Congress can undermine the impartiality of federal adjudication by assigning controversial matters to judges who are not insulated from political pressure.

Since assigning matters to legislative courts rather than to article III courts in effect would curtail the jurisdiction of article III courts, the limits on legislative courts are of particular importance today. Although Congress generally has acted in a nonpartisan fashion in creating legislative courts,[49] modern efforts to limit the jurisdiction of article III courts, currently the subject of heated political debate,[50] cast doubt on Congress' impartiality. It is now plausible to envision partisan efforts to withdraw certain matters from article III courts and to assign them to courts staffed by judges whose salaries and terms of appointment can be changed at Congress' whim. Thus, the creation of federal courts lacking these guarantees raises fundamental questions about the balance of power in our constitutional structure of three independent, co-equal branches.

## II. The Bankruptcy Statute

In order to evaluate the *Marathon* opinions, the history of the bankruptcy courts must be viewed in the context of the constitutional framework. Existing bankruptcy law[51] was amended in 1938 by the Chandler Act, which significantly altered the adjudication of bankruptcy disputes.[52] Under the Chandler Act bankruptcy matters were heard either by federal district courts

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[49] None of the prior cases reviewing the constitutionality of article I courts suggests that Congress created these courts in an attempt to appease any political faction or group. *See, e.g.*, Glidden v. Zdanok, 370 U.S. 530 (1962); Williams v. United States, 289 U.S. 533 (1933); *Ex Parte* Bakelite Corp., 379 U.S. 438 (1929); American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828).

[50] *See* note 16 *supra*.

[51] In 1898, Congress prescribed substantive law for bankruptcies and established a judicial framework to resolve bankruptcy disputes. Act of July 1, 1898, ch. 541, 30 Stat. 544.

[52] *See* House Report, *supra* note 7, at 5970.

or by bankruptcy referees.[53] Bankruptcy referees were appointed by federal district judges for six-year terms,[54] and their decisions could be appealed to the district court.[55] In addition, the district court had the power to withdraw cases from the referees at any stage.[56] The referees were given jurisdiction over controversies involving property in the actual or constructive possession of the court.[57] Claims falling within this limited area, known as the summary bankruptcy jurisdiction, were resolved in the first instance by the referees.[58] Other bankruptcy-related disputes, such as controversies involving property in the possession of third parties, were deemed to fall within the plenary bankruptcy jurisdiction, and were heard by the district court unless the defendant consented to proceedings before the referee.[59]

During the 1970s there was extensive discussion and debate regarding proposals to revamp the bankruptcy system.[60] Many believed that the system of referees as well as the substantive bankrupcy law was inadequate, and there was near unanimity that the Bankruptcy Act needed to be overhauled.[61] Bankruptcy practitioners and judges described a system in crisis: while attempting to cope with the increasingly complex and wide-ranging litigation stemming from bankruptcy reorganizations of major corporations, the bankruptcy courts were plagued with time-consuming jurisdictional disputes and with delays due to crowded district court dockets.[62]

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[53] *See id.* at 5969.

[54] 11 U.S.C. § 62(a) (1976) (repealed 1978). Moreover, their salaries could be reduced. *Id.* § 68(a) (repealed 1978).

[55] *Id.* § 67(c) (repealed 1978).

[56] BANKR. R. 102, *reported in* 411 U.S. 1003-04 (1974).

[57] 11 U.S.C. § 11 (1976) (repealed 1978).

[58] *Id.* § 96(b) (actions to recover preferences); *id.* § 107(e) (actions to recover fraudulent conveyances); *id.* § 110(c)(3) (actions to recover other property of debtor).

[59] *Id.* § 46; *see* MacDonald v. Plymouth Cty. Trust Co., 286 U.S. 263, 265-67 (1932). Additionally, many bankruptcy-related disputes were heard by state courts, which had concurrent jurisdiction over certain plenary suits *see generally* COLLIER ON BANKRUPTCY ¶ 3.01, at 3-24 to 3-30 (15th ed. 1979).

[60] Congress studied the matter for ten years before it acted. Klee, *Legislative History of the New Bankruptcy Law*, 28 DE PAUL L. REV. 941, 942 (1979). During that time, Congress established a commission to study and recommend changes in the bankruptcy law. *See* HOUSE REPORT, *supra* note 7, at 5963. Congress held many hearings and prepared numerous reports on the issue of revamping the bankruptcy system. *See* Klee, *supra*, at 942-60.

[61] *See* HOUSE REPORT, *supra* note 7, at 5965, 6013-23, 6049-61.

[62] *See id.* at 5971-72. In his dissenting opinion in *Marathon*, Justice White noted

Proposals for a revised system of bankruptcy courts engendered debate as to whether Congress should establish the new courts as article III or as legislative courts.[63] Those who favored legislative bankruptcy courts argued that transforming the 200 bankruptcy judge positions into article III appointments would set an undesirable precedent toward judicial specialization, and would give bankruptcy matters undeserved priority over other types of federal litigation. They also contended that it would dramatically increase the cost of the federal courts, and would dilute the prestige and influence of federal judges.[64] Proponents of article III bankruptcy courts emphasized that bankruptcy litigation had become so complex and required so much expertise that it could not be left to generalist federal judges. They argued that increasing the scope of jurisdiction guaranteed that bankruptcy courts would face a wide variety of legal issues, and that bankruptcy courts would require a broad range of judicial powers in order to function effectively. In light of the need for independent federal bankruptcy courts with broad jurisdiction, they contended that the only constitutionally acceptable solution was to establish bankruptcy courts under article III.[65] The debate, while vigorous, neither split along political party lines[66] nor aroused significant public interest.[67]

Attentive to criticism of the summary/plenary distinction, Congress, in enacting the Code,[68] established bankruptcy courts with significantly broader jurisdictional[69] and judicial powers[70]

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that the annual volume of bankruptcy cases has increased over the past 30 years from 10,000 to 254,000 cases. 102 S. Ct. at 2895 n.16.

[63] *Compare* HOUSE REPORT, *supra* note 7, at 5983-6013 (favoring article III courts) *with id.* at 6425-35 (favoring article I courts).

[64] *See id.* at 6425-35 (separate views of Congressmen Railsback, Danielson, Mann, and Hyde).

[65] *See id.* at 5983-6013.

[66] Representatives Railsback and Hyde, two of the 11 Republicans on the House Judiciary Committee, joined Representatives Danielson and Mann, two of the Committee's 23 Democrats, to file a separate view opposing the Judiciary Committee's recommendation that Congress establish article III bankruptcy courts. *See id.* at 6425-35.

[67] Not surprisingly, the testimony at the hearings as well as the House Report itself indicates that the major groups demonstrating interest in this matter were the bankruptcy judges, the bankruptcy bar, and the article III federal judges. *See id.* at 6014-49 (opinions of various members of bar, bench and academia regarding proposed bankruptcy reform).

[68] *See* note 4 *supra;* notes 69-74 and accompanying text *infra.*

[69] Section 241(a) of the Code provides that the bankruptcy courts shall have subject matter jurisdiction over all civil actions arising under, in, or related to proceedings under

without giving them the status of article III courts. Although bankruptcy judges are nominated by the President and confirmed by the Senate, rather than selected by the district courts,[71] they are not granted life tenure. Instead, they are appointed for fourteen-year terms,[72] subject to removal by the judicial council of the circuit court for incompetence, misconduct, neglect of duty, or physical or mental disability.[73] Nor are bankruptcy judges guaranteed undiminished compensation; the Code establishes an annual salary of $50,000, but expressly provides that it is subject to adjustment.[74]

## III. THE *Marathon* DECISION

At issue in the *Marathon* litigation was a contract for the construction of a pipeline in Kentucky.[75] The Northern Pipeline Construction Company (Northern), undergoing reorganization in a Minnesota bankruptcy court, filed a breach of contract action there against Marathon Pipeline Company (Marathon).[76] Marathon moved to dismiss for lack of subject matter jurisdiction, alleging that the Code's delegation of such a dispute to untenured bankruptcy judges violated article III.[77] After allowing the United States to intervene to defend the statute, the bankruptcy court denied the motion.[78] The district court reversed, ruling that Congress had transgressed article III by delegating

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the bankruptcy laws. 28 U.S.C. § 1471(b) (Supp. III 1979).

[70] Bankruptcy judges may preside over jury trials, *id.* § 1480, issue declaratory judgments, *id.* § 2201, issue writs of habeas corpus, *id.* § 2256, and issue any order, process, or judgment necessary in aid of the court's jurisdiction, *id.* §§ 451, 1479. They may not, however, enjoin another court or punish certain instances of criminal contempt. *Id.* § 1481.

[71] *Id.* § 152.

[72] *Id.* § 153(a).

[73] *Id.* § 153(b). In contrast, article III judges serve during "good Behavior," U.S. CONST. art. III, § 1, and can only be removed by impeachment upon conviction of "Treason, Bribery, or other high Crimes and Misdemeanors." *Id.* art II, § 4.

[74] 28 U.S.C. § 154 (Supp. III 1979).

[75] Jurisdictional Statement at A-10, Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 102 S. Ct. 2588 (1982) [hereinafter cited as Jurisdictional Statement].

[76] 102 S. Ct. at 2864.

[77] *Id.* at 2864. The defendant also filed a motion requesting that the bankruptcy court abstain until the conclusion of an earlier suit filed by Marathon against Northern in a Kentucky state court, and an alternative motion seeking transfer of the Minnesota proceedings to the bankruptcy court for the Western District of Kentucky. Both motions were denied. *See* Jurisdictional Statement, *supra* note 75, at A3-A11.

[78] Jurisdictional Statement, *supra* note 75, at A3-A11.

jurisdiction over this case to the bankruptcy court.[79] The Supreme Court affirmed the judgment of the district court.[80]

Writing for the plurality, Justice Brennan determined that prior Court opinions sanctioned only three types of legislative courts:[81] territorial courts, military courts, and courts adjudicating "public rights."[82] With regard to territorial courts, Justice Brennan stated that the Constitution grants Congress the authority to exercise the "general powers of government"[83] in certain geographical[84] areas in which there is no state government.[85] In his view, so long as Congress exercises the "general powers of government" it can establish federal courts that do not satisfy the requirements of article III.[86] Military courts comprise the

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[79] *Id.* at A1-A2.

[80] 102 S. Ct. at 2880.

[81] Justice Brennan recognized that Congress established the bankruptcy courts in 1978 as "adjuncts" to the district courts rather than as independent legislative courts. *Id.* at 2867 n.13. Nonetheless, his opinion was aimed at refuting Northern's argument that Congress has the power to create legislative bankruptcy courts and, thus, had not impermissibly intruded into the judicial domain in enacting the Code in 1978. *See id.* at 2867.

[82] *Id.* at 2867-71.

[83] *Id.* at 2868.

[84] The plurality, in classifying the local District of Columbia courts with the territorial courts, interpreted the discussion in Palmore v. United States, 411 U.S. 389 (1973), of the congressional power to create courts in "specialized areas having particularized needs," *id.* at 408, as referring only to geographical areas, 102 S. Ct. at 2868. The concurrence did not join in this interpretation.

[85] The plurality noted that article IV gives Congress the complete power of government over United States territories, *see* U.S. CONST. art. IV, § 3, cl. 2, and that article I similarly gives Congress such power over the District of Columbia, 102 S. Ct. at 2868. *See* U.S. CONST. art. I, § 8, cl. 17.

[86] Although indicating that Congress has special powers over territories, *see* notes 81-85 and accompanying text *supra*, the plurality failed to explain why this power justifies the creation of legislative territorial courts. Some have argued that the transitory nature of federal control over territories necessitates that courts without life tenure be established. Otherwise, as territories become states and establish independent state court systems, the federal judiciary will have to absorb a surfeit of federal judges with life tenure. *See* Glidden Co. v. Zdanok, 370 U.S. 530, 545-46 (1962).

This reasoning is not persuasive. First, while the federal power over territories may have seemed fleeting in the nineteenth and early twentieth centuries, it does not seem so today. At present, the only area within the continental United States that is not a state is the District of Columbia. Moreover, "[t]he small number of remaining territories are not apt to become states in the near future and even if they did, their judges could easily be absorbed into the relatively large federal judiciary." Note, *Legislative and Constitutional Courts: What Lurks Ahead for Bifurcation*, 71 YALE L.J. 979, 982 (1962) (footnote omitted).

Second, while Congress may believe that a dual system of legislative and article III courts in the territories, *see, e.g.*, District of Columbia Court Reorganization Act of 1970, Pub. L. No. 91-358, tit. I, 84 Stat. 473 (codified at 28 U.S.C. § 1364 (Supp. IV 1980))

second category of legislative courts recognized by Justice Brennan. He stated that the article III requirements are inapplicable to courts martial because a specific constitutional grant empowers Congress to regulate the armed forces,[87] a grant "historically understood as giving the political branches of Government extraordinary control" over trials of military matters.[88]

The third category identified by Justice Brennan consists of both courts[89] and administrative agencies[90] that decide cases involving "public rights." Justice Brennan offered a twofold rationale for his view that Congress may delegate to legislative courts cases concerning public rights. First, he explained that disputes regarding certain executive or legislative functions can

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(creating system of legislative courts in District of Columbia to deal primarily with local matters); 28 U.S.C. §§ 48 & 133 (1976) (creating article III courts in District of Columbia to deal with traditional "federal" matters), would be constitutional, such an approach fails to address the issues raised by the article III requirement of an independent judiciary. Although a parallel article III and legislative court system affords the protections of an independent court system to more litigants than would a system guaranteeing litigants access only to legislative courts, the parallel system would still violate article III by establishing federal courts without life tenure and salary protection. As these requirements are designed to ensure that judicial power is lodged in the judiciary and not elsewhere, *see* notes 27-28 and accompanying text *supra*, any system that includes legislative courts raises constitutional problems.

Others have contended that the absence of federalism restraints permits Congress to establish legislative courts in the territories. Since the requirement of federalism that the federal government show restraint when federal action might impinge upon states' interests, *see* note 185 *infra*, does not apply in the territories because the territorial governments are established by Congress rather than the states, Congress can act to create legislative courts in the territories more freely than it can in the states. Note, *Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act*, 39 COLUM. L. REV. 560, 583 (1980).

[87] Article I provides that Congress may "make Rules for the Government and Regulation of the land and naval Forces." U.S. CONST. art. I, § 8, cl. 14.

[88] 102 S. Ct. at 2869. Justice Brennan did not explain why the constitutional grant to Congress of power over military affairs overrules the explicit requirement of article III or obviates the need for judicial independence in military courts. While the exigencies of combat would no doubt often inhibit the functioning of civilian tribunals established under article III, the argument that military courts can dispense with judicial independence is not compelling. Indeed, a concern for judicial independence has given rise to proposals that Congress remove military judges from the chain of command and establish a separate quasi-military unit of judges afforded the protections of article III. *See* M. REDISH, *supra* note 1, at 39-40.

[89] *E.g.*, 26 U.S.C. § 6213 (1976) (Tax Court).

[90] *E.g.*, 29 U.S.C. §§ 651(b)(3), 659(c), 661, 666(i) (1976) (Occupational Safety and Health Review Commission); 42 U.S.C. § 4321 (1976) (Environmental Protection Agency).

be committed wholly to nonjudicial determination.[91] Since a nonjudicial ruling would be constitutional, then a ruling by a court lacking the article III protections for judicial independence also would suffice.[92] Second, Justice Brennan asserted that because Congress has the power to create public rights, it also may limit the manner in which public rights are adjudicated.[93] Accordingly, he reasoned, Congress can provide that the only recourse for claims arising under federal statutes creating public rights is to a legislative court.[94] Justice Brennan, however, failed to define public rights precisely, stating only that a "matter of public rights must at a minimum arise 'between the government and others,' "[95] while a private right involves "the liability of one individual to another under the law as defined."[96]

Turning to Northern's contract claim, Justice Brennan noted that the exceptions for territorial and military courts were inapplicable. Accordingly, the bankruptcy court could adjudicate

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[91] 102 S. Ct. at 2869.

[92] *Id.* at 2879. In effect, the plurality contended that certain disputes regarding executive or legislative decisions are not "inherently judicial" matters, and that the article III policies only apply to tribunals considering judicial matters, as opposed to tribunals making determinations that could have been left to the legislative or executive branches in the first instance.

The plurality indicated that the claims that may be assigned wholly to nonjudicial resolution may include questions arising under the customs laws and certain immigration matters. *See id.* at 2870 n.19. In the early part of the twentieth century, the Court, relying on Congress' power to regulate foreign commerce and to control the admission of aliens, held that Congress could delegate to administrative officers the authority to value imported merchandise and to exclude certain aliens from the United States. *See* Oceanic Nav. Co. v. Stranahan, 214 U.S. 320 (1909) (power to fine steamship company for illegal transport of aliens with contagious diseases could be entrusted to executive officer); Passavant v. United States, 148 U.S. 214 (1893) (Congress can delegate to executive officers final authority to value imported goods and to impose fines for undervaluation).

While these cases have not been overruled, their authority has been eroded. A number of commentators have questioned the notion that the executive may collect and regulate customs without judicial process. *See, e.g.,* D. CURRIE, FEDERAL JURISDICTION IN A NUTSHELL 40 (1981). Similarly, a number of court decisions recognize a right to judicial review of immigration decisions made by the executive. Shaughnessy v. Mezei, 345 U.S. 206 (1953); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950).

[93] 102 S. Ct. at 2876.

[94] *Id.* at 2876-78.

[95] *Id.* at 2870 (quoting *Ex parte* Bakelite Corp., 279 U.S. 438, 451 (1929)).

[96] *Id.* at 2870-71 (quoting Crowell v. Benson, 285 U.S. 22, 51 (1932)). In apparent contradiction to this definition and with no attempt at explanation, Justice Brennan hastened to add that criminal cases, which clearly arise "between the government and others" and fundamentally implicate the public interest, do not fall within the public rights category. *See id.* at 2871 n.24.

the controversy only if the suit involved public rights. Justice Brennan declared that the fact that the plaintiff was involved in a bankruptcy proceeding did not transform a simple contract action between two private corporations into a matter of public rights.[97] Thus, because none of the recognized categories applied, Justice Brennan concluded that non-article III adjudication was improper.[98]

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[97] *Id.* at 2871-72.

[98] The plurality also rejected Marathon's arguments that the constitutional grant of power over bankruptcy matters to Congress authorizes the creation of specialized bankruptcy courts, and that the bankruptcy courts under the Code are adjuncts to the federal district courts. *See id.* at 2872-78. Acknowledging that article I contains an express grant of authority to Congress to establish uniform national bankruptcy laws, *see* U.S. CONST. art. I, § 8, cl. 4, the plurality nonetheless rejected the argument that this grant includes an inherent power to establish article I courts to adjudicate proceedings related to bankruptcies. 102 S. Ct. at 2872-73. If such power inheres in all constitutional grants of lawmaking authority, the plurality reasoned, then Congress could create article I courts to resolve all disputes related to actions arising under federal statutes. *Id.* at 2873. In Justice Brennan's view, such a broad interpretation of Congress' authority to establish article I courts would eviscerate the independence of the federal judiciary. *Id.* at 2878 & n.28.

In addition, the plurality rejected the argument that bankruptcy judges function, in a capacity analogous to that of federal magistrates, as adjuncts to the district courts. *Id.* at 2874-78. Noting that the Code transformed the bankruptcy courts by removing the power of appointment from the judiciary and placing it in the other branches of government, *compare* 11 U.S.C. § 62 (1976) (repealed 1978) (providing for appointment of bankruptcy referees by federal judges) *with* 28 U.S.C. § 152 (Supp. III 1979) (providing for presidential appointment of bankruptcy judges), by expanding the subject matter jurisdiction of the bankruptcy courts, *see, e.g., id.* § 1471(b)(c) (providing bankruptcy courts with jurisdiction over all cases arising under, in, or related to, bankruptcy proceedings), and by endowing bankruptcy courts with most of the powers of the district courts, *see* 102 S. Ct. at 2879, including the power to preside over jury trials, 28 U.S.C. § 1480 (Supp. III 1979), to issue writs of habeas corpus, *id.* § 2256, to punish contempt, *id.* §§ 105(a), 1481, and to enter binding and enforceable judgments, 11 U.S.C. § 105(a) (Supp. III 1979), the plurality determined that Congress had not established mere "adjuncts" but separate legislative courts that were independent of the district courts. cfi]See 102 S. Ct. at 2878-80.

Based on its analysis of the bankruptcy courts and of the facts in *Marathon*, the plurality concluded that article III prohibits a bankruptcy court from adjudicating the private state-created cause of action brought by Northern against Marathon, and affirmed the judgment entered by the district court dismissing the suit. *Id.* at 2880. The plurality also stated that because the Code's jurisdictional provision was nonseverable, the provision must fall in its entirety. *Id.* at 2879-80 & n.40. Accordingly, § 241(a) of the Code, 28 U.S.C. § 1471(a)-(e) (Supp. III 1979), was declared unconstitutional.

In deciding the severability issue the plurality stressed that Congress' purpose in restructuring the bankruptcy system was to "ensure adjudication of all claims in a single forum and to avoid the delay and expense of jurisdictional disputes." 102 S. Ct. at 2880 n.40. Because Congress vested broad jurisdiction in the bankruptcy courts pursuant to a single statutory grant, the plurality concluded that it could not predict whether, faced

Although the concurrence authored by Justice Rehnquist and joined by Justice O'Connor agreed with the plurality that article III had been violated,[99] it expressly rejected the plurality's historical synthesis.[100] Emphasizing that Northern's claims arose wholly under state law, Justice Rehnquist concluded that this type of dispute was judicial in nature and that its resolution would entail an exercise of judicial power. In his view, article III required that the case be assigned to the independent federal judiciary.[101]

Justice White's lengthy dissent, in which Chief Justice Burger[102] and Justice Powell joined, took exception to nearly every point raised by the plurality. Justice White was especially troubled by the assertion that legislative courts are permissible only in three narrow situations. Contending that the organizing principles used by the plurality in developing its synthesis were faulty,[103] Justice White observed that legislative courts have been permitted to function within states, as well as within territories,[104] to adjudicate disputes arising under the non-military, as well as military powers delegated by article I to Congress,[105]

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with the *Marathon* decision, Congress would simply reassign claims such as Northern's from the legislative bankruptcy courts to the district courts while directing related bankruptcy matters to the bankruptcy courts, or would establish article III bankruptcy courts that could adjudicate all bankruptcy-related claims in one forum.

The uncertainty of the likely congressional response, as well as the novelty of the constitutional issue, also led the plurality to rule that its decision should apply only prospectively, and to stay its judgment for three months in order to give Congress time to restructure the jurisdiction of the bankruptcy courts. *See id.* at 2880. When Congress did not act within three months, the Supreme Court granted a ten week extension of the stay. 51 U.S.L.W. 3259 (Oct. 5, 1982). However, when Congress still had not enacted legislation to restructure the bankruptcy courts at the end of the second stay, the Court refused a further extension. 51 U.S.L.W. 3475 (Jan. 4, 1983).

[99] *See* 102 S. Ct. at 2882.

[100] *Id.* at 2881.

[101] *Id.* The concurrence also determined that the bankruptcy courts could not be categorized as mere "adjuncts" to either the district courts or the courts of appeal. *Id.* at 2882.

[102] Chief Justice Burger also filed a separate dissenting opinion. However, it will not be discussed as it failed to address the policies underlying article III. Instead it focused on the issue of severability of the jurisdictional provisions and suggested a plan for a modest restructuring of the bankruptcy courts.

[103] 102 S. Ct. at 2882-96.

[104] *Id.* at 2888 & n.8. Administrative agencies, for example, adjudicate matters that arise within the states.

[105] For example, pursuant to the taxing power, *see* U.S. CONST. art. I, § 8, cl. 1, Congress established the Tax Court as a legislative court, *see* 26 U.S.C. § 7441 (1976).

and to decide matters of private, as well as public rights.[106] Thus, Justice White was convinced that legislative courts may "cover virtually the whole domain of possible areas of adjudication."[107] In his view, legislative courts can be explained only as the product of "a 'confluence of practical considerations.'"[108] These considerations include, among others, the political nature of the dispute,[109] the availability of article III appellate review,[110] and Congress' reason for not using an article III court.[111]

The dissent hastened to add that while "Article III is not to be read out of the Constitution . . . it should be read as expressing one value that must be balanced against competing constitutional values and legislative responsibilities."[112] Consequently, Justice White would test the constitutionality of legislative courts on a case-by-case basis, weighing the legislative interests advanced against the burdens imposed on article III values.[113]

Applying this test to the instant case, the dissent identified two factors—the fact that most bankruptcy cases are nonpolitical,[114] and the fact that litigants are guaranteed article III appellate review[115]—as important indicia that the bankruptcy courts accommodate rather than undermine article III values. As evidence of the legitimate legislative interest involved, Justice White stressed that the decision to expand significantly the bankruptcy court's jurisdiction was amply supported by the testimony and other evidence presented to Congress. Under these circumstances, Justice White concluded that the new bankruptcy courts did not violate article III.[116]

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[106] 102 S. Ct. at 2888-89. The obvious example is Crowell v. Benson, 285 U.S. 22 (1932), which upheld the power of the United States Employee's Compensation Commission to determine facts in cases involving private rights.

[107] 102 S. Ct. at 2889.

[108] *Id.* at 2893.

[109] *Id.* at 2895.

[110] *Id.* at 2894-95.

[111] *Id.* at 2895.

[112] *Id.* at 2893.

[113] *Id.* at 2894.

[114] *Id.* at 2895.

[115] *Id.* at 2894. Under some circumstances, appeal is to the district court, *see* 28 U.S.C. § 1334 (Supp. III 1979), with a further right of appeal to the court of appeals, *see id.* § 1293. In other cases, appeal is first made to a panel of bankruptcy judges, *see id.* § 1482, and then to the court of appeals, *see id.* § 1293.

[116] The dissent also rejected the plurality's conclusion as to severability, asserting that the remainder of the jurisdictional grant could have functioned even in the absence

## IV. SHEDDING DIM LIGHT

The *Marathon* decision provides little illumination to guide

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of the invalid portion. *See* 102 S. Ct. at 2884 n.3. In addition, the dissent criticized the plurality's attempt to distinguish the powers of the bankruptcy courts from those of administrative agencies and federal magistrates. *See id.* at 2885-88. In the plurality's view, neither federal magistrates nor administrative agencies exercised " 'the essential attributes' of judicial power," *id.* at 2876 (plurality opinion), because certain important functions were reserved to article III courts. With respect to the administrative adjudication upheld in Crowell v. Benson, 285 U.S. 22 (1932), the plurality stressed (1) that the agency made only narrow factual determinations; (2) that the agency had no enforcement powers of its own; and, (3) that agency fact-finding was reviewed under a strict legal standard. *Id.* at 2878-79. As for federal magistrates, the plurality emphasized that although they were given the authority to adjudicate certain pretrial motions, final authority for their decisions rested with the district courts. *Id.* at 2876.

The dissent disagreed with this characterization of the powers of agency tribunals. Moreover, the dissent regarded this comparison as inapt. In its view, a more useful comparison would have been between the powers of bankruptcy courts under the Code and the powers exercised by the pre-Code bankruptcy referees. *See id.* at 2887 (White, J., dissenting). The dissent noted that the powers granted bankruptcy judges under the Code were only slightly greater than those of the referees. *Id.* According to the dissent, any difference between the powers of the old and the new bankruptcy courts was constitutionally insignificant; the decisions of both courts were reviewed under the deferential "clearly erroneous" standard, and both had the power to render binding decisions. *Id.* As the old bankruptcy system had never been questioned on article III grounds, the dissent could see no reason why such a challenge was valid now.

The dissent's argument is flawed in two respects. First, the comparison with the pre-Code scheme is misleading. Unlike the bankruptcy judges under the Code, *see* note 71 and accompanying text *supra,* the referees were selected by the judicial branch, not the executive or legislative. *See* note 54 and accompanying text *supra.* Therefore, any threat to the independence of the bankruptcy referees would have come from within the judicial branch, whereas threats to the independence of the new bankruptcy court judges would emanate from the other branches. Moreover, the summary/plenary distinction meant that referees exercised jurisdiction only over a fairly narrow range of subjects; plenary matters, such as Northern's contract claim, were reserved for the district courts. *See* notes 57-59 and accompanying text *supra.* This distinction should not be overemphasized, however, because in practice most bankruptcy-related matters were routed back to the bankruptcy courts. Bankr. R. 102, *reported in* 411 U.S. 1003 (1974).

Additionally, the dissent's reliance on decisions upholding the constitutionality of the old bankruptcy system, *see* Katchen v. Landy, 382 U.S. 323 (1966) (upholding referee's right to disallow preference), is misplaced. Because the bankruptcy referees had accumulated substantial powers in the wake of the 1973 promulgation of the Bankruptcy Rules, *see* 102 S. Ct. at 2876 n.31 (plurality opinion), pre-1973 decisions are not persuasive. More importantly, Katchen v. Landy, 382 U.S. 323 (1966), on which the dissent relied, did not even address the article III issue. *See id.*

Second, the dissent's implication that bankruptcy courts exercise no greater powers than do administrative agencies is incorrect. Although their powers are similar in many respects, several distinctions should not be overlooked. For example, administrative agencies are not confronted with the breadth of subject matter faced by bankruptcy courts granted jurisdiction over "all civil proceedings arising under . . . in or *related to* cases arising under [the bankruptcy laws]." 28 U.S.C. § 1471 (Supp. III 1979). Unlike

future travelers out of the constitutional darkness surrounding legislative courts. Although the two major opinions identify the constitutional problems that arise when Congress establishes legislative courts, neither satisfactorily limits Congress' power in this area. The opinions take such conflicting approaches that *Marathon* provides no guidance for future efforts to fashion legislative courts that do not violate article III. Once again, Congress must await a Supreme Court ruling to determine whether it has strayed too far from the requirements of article III. Nevertheless, the *Marathon* opinions can be understood at least in part as failed attempts to reconcile the policies underlying judicial independence—impartial decisionmaking, separation of powers, and checks and balances—with the precedents concerning legislative courts and with the facts of *Marathon* itself.

### A. *Historical Fact Versus Political Theory*

The plurality began its analysis by setting forth the policies behind the framers' decision to create an independent federal judiciary. First, Justice Brennan noted that "[t]o ensure against [the accumulation of power in the same hands], the Framers provided that the Federal Government would consist of three distinct Branches, each to exercise one of the governmental powers recognized by the Framers as inherently distinct."[117] This statement, of course, refers to the concept of separation of powers. Second, the plurality noted that "[t]he Federal Judiciary was . . . designed by the Framers to stand independent of the Executive and Legislature—to maintain the checks and balances of the constitutional structure."[118] Thus, Justice Brennan acknowledged the relationship of judicial independence to the checks and balances doctrine. Third, Justice Brennan observed that the framers designed an independent judicial branch "to guarantee that the process of adjudication itself remained impartial."[119] Thus the plurality also recognized the value of judi-

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bankruptcy courts, administrative agencies cannot preside over jury trials or issue writs of habeas corpus or contempt citations. *See id.* § 1480 (jury trials); *id.* § 2256 (habeas corpus); *id.* § 1481 (contempt). Moreover, although administrative agencies may impose civil penalties, enforcement is only available through the district courts. *See* Atlas Roofing Co. v. OSHRC, 430 U.S. 442 (1977).

[117] 102 S. Ct. at 2864.

[118] *Id.*

[119] *Id.*

cial independence to the litigants.

But despite paying lip-service to these concerns, the plurality failed to incorporate them adequately into its analysis of the legality of bankruptcy courts. Instead, the plurality opted to rely only on the doctrine of separation of powers, bolstered by an analysis of "historical fact,"[120] in defending its rigid classification of the permissible types of legislative courts.[121] With regard to territorial and military courts, the plurality asserted that their existence was wholly consistent with both separation of powers and historical precedent.[122] Justice Brennan asserted that both types of courts addressed matters that had always been considered beyond judicial cognizance.[123] In his view, when the framers separated governmental functions, territorial and military affairs were assigned solely to the political branches,[124] and the existence of legislative territorial and military courts in the early decades following the constitutional convention evidenced this understanding.[125] Therefore, according to Justice Brennan, because territorial and military matters are not within the federal judicial power, a congressional decision to establish legislative territorial and military courts does not impinge on the constitutional requirement that all judicial power of the federal government be vested in an independent judiciary. Although Justice Brennan did not articulate the implications of this analysis for the system of checks and balances, he also may have regarded that principle as consonant with the existence of legislative territorial and military courts. Because he believed the judicial branch to be completely excluded from territorial and military affairs, it is likely that Justice Brennan would not perceive any need in these areas for the potential check that an article III court would provide.

The plurality's approach, in characterizing territorial and military courts as tribunals concerned with issues beyond the

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[120] *Id.* at 2870 n.20.

[121] *Id.* at 2868-71.

[122] *Id.* at 2868-69.

[123] *Id.*

[124] *Id.*

[125] *Id.* Therefore, in the plurality's view, the constitutional text (*see* art. IV, § 3, cl. 2; art. I § 8, cl. 17) bolsters the historical evidence that these matters are not within the federal judicial power. Consequently, the existence of legislative territorial and military courts does not raise the difficult question of when, if ever, federal judicial power may be assigned to a legislative court.

federal judicial power, has superficial appeal. But as Justice White notes, it is inconsistent to assert that adjudication by territorial courts lies beyond the scope of article III, while conceding that article III courts can review territorial court decisions.[126] Furthermore, the plurality's interpretation presumed that the framers were unconcerned that legislative and judicial power in the territories would be consolidated in the hands of Congress. As discussed earlier, the framers believed that a government structured to allow such consolidation would tend toward tyranny.[127] While it is possible the framers may have considered the exigencies of military command so compelling that they deemed autocratic power justifiable in the armed forces,[128] Justice Brennan pointed to no evidence indicating that the framers held similar views with respect to territorial government.

Similarly, the plurality failed to provide any evidence that the framers were unconcerned with the right of litigants in territorial courts to impartial decisionmaking. Here again, due to the arguably overwhelming need to exercise discipline, the framers may have accepted the possibility of institutional bias in military courts.[129] But it is doubtful that the framers believed that citizens residing in territories deserved anything less than fully independent judges.

The plurality took a dual approach to tribunals adjudicating public rights, characterizing some disputes between the governments and individuals as beyond judicial cognizance, and others as limited by the doctrine of sovereign immunity. With regard to the first category, the plurality stated that "the public-rights doctrine also draws upon the principle of separation of powers, and an historical understanding that certain prerogatives were reserved to the political branches of government."[130] These prerogatives barred judicial interference in "matters that historically could have been determined exclusively by [the legislative or executive] departments."[131] Although it provided no details concerning which matters could be delegated exclusively to the political branches, the plurality cited as an example an early

[126] *Id.* at 2889 (White, J., dissenting).
[127] *See* notes 24-38 and accompanying text *supra*.
[128] *See* M. REDISH, *supra* note 1, at 39-40.
[129] *Id.*
[130] 102 S. Ct. at 2869.
[131] *Id.* at 2869-70.

twentieth-century case concerning immigration,[132] an area in which Congress has plenary power and in which, due to the foreign relations overtones, the executive is often given a free hand.[133] Accordingly, the plurality concluded that where prerogatives historically reserved to the political branches are at stake, the decision to assign control over these matters to legislative courts does not implicate the federal judicial power and therefore does not violate the principle of separation of powers.

With regard to the second category of public rights cases, the plurality relied primarily on history to justify adjudication by legislative courts. Justice Brennan implied that cases that could not be heard by courts in 1789 are not within the federal judicial power. Because the United States had not waived its immunity to suit in 1789 and because at that time few public rights had been created, the plurality concluded that suits against the United States and suits based on public rights are not within the judicial power vested in article III courts and consequently could be assigned to legislative courts lacking the constitutional guarantees of judicial independence.[134]

It is here that the plurality's inattention to the policies behind judicial independence seriously undermines its analysis. Taken to its logical extreme, the plurality's view of the public rights doctrine would allow the government to require that all suits challenging governmental action be assigned to courts controlled by the executive or legislature.[135] The plurality asserted that its limitations on legislative courts protect the core of the article III judicial power, which, in its view, consists only of "all

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[132] *Id.* at 2870 n.19. In Oceanic Nav. Co. v. Stranahan, 214 U.S. 320 (1909), the Supreme Court held that the decision to impose a fine on a steamship company for violations of the immigration laws could be entrusted solely to an executive officer.

[133] *See* Kleindeinst v. Mandel, 408 U.S. 754, 766-67 (1972) (policies relating to aliens are set by political branches, and power to exclude aliens is necessary to maintain international relations); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) (Congress' power over foreign commerce and President's power over foreign affairs give political branches broad power to regulate admission of aliens).

[134] *See* 102 S. Ct. at 2869-70.

[135] To the extent that the plurality implied that actions taken by the executive or legislature within their sphere are completely insulated from judicial review, this is erroneous. For example, there exists a well developed body of law concerning the rights of government employees to judicial resolution of their disputes with the government. *See, e.g.,* Arnett v. Kennedy, 416 U.S. 134, 167, 177, 211 (1974) (government cannot eliminate federal employee's due process right to hearing by simply defining his statutory entitlement to not include such right).

private adjudications in federal courts within the States—matters from their nature subject to 'a suit at common law or in equity or admirality'—and all criminal matters, with the narrow exception of military crimes."[136] In light of the policies of checks and balances and separation of powers, however, a strong argument can be made that the core of judicial power includes public rights cases challenging the validity of legislative or executive actions. This broader description of the core of federal judicial power finds particular support in the checks and balances structure of the Constitution.[137] A major role of the federal judiciary is to declare unlawful congressional or executive actions that exceed their powers under the Constitution.[138] The article III guarantees protect the judiciary in its exercise of the power to invalidate legislative or executive action. In contrast, legislative courts may be less vigilant in this regard due to their economic dependence upon the political branches. Because the need to check unlawful acts by the executive or legislature is more likely to arise in suits challenging government actions rather than in litigation between private parties, allowing legislative courts to adjudicate public rights cases thwarts the policy of checks and balances.[139]

Furthermore, excluding public rights cases from the federal judicial power runs counter to the separation of powers doctrine. Under the plurality's definition, public rights litigation encompasses a broad range of controversies. By designating all suits "between the government and others" as outside the federal judicial power, the plurality implied that an enormous amount of litigation could be assigned to legislative courts, thus allowing Congress to perform both legislative and adjudicatory functions in a large number of situations. This approach severely undercuts the framers' attempt to assign separate functions to the three branches of government.

In addition, the public rights exception thwarts the framers' attempt to ensure impartial decisionmaking. There is a significant risk that judges of legislative courts, faced with constant challenges to actions taken by the governmental branches that

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[136] 102 S. Ct. at 2871 n.25.

[137] *See* notes 32-38 and accompanying text *supra*.

[138] *See* note 36 *supra*.

[139] 102 S. Ct. at 2885.

control their salary and reappointment, may develop an institutional bias toward the government's position.[140] Justice Brennan not only failed to address this concern in his analysis of public rights, but his expansive definition of public rights ensures that many litigants will have recourse only to a legislative tribunal.

The plurality's failure to accommodate the policies behind the article III requirements for judicial independence weakened its analysis. This failure is no oversight. Indeed, Justice Brennan explicitly rejected the importance of policy considerations in interpreting the express words of article III:

> Doubtless it could be argued that the need for independent judicial determination is greatest in cases arising between the government and an individual. But the rationale for the public-rights line of cases lies not in political theory, but rather in Congress' and this Court's understanding of what power was reserved to the Judiciary by the Constitution as a matter of historical fact.[141]

Yet history is an inadequate guide to the proper scope of the public rights doctrine, as Justice Brennan himself impliedly conceded.[142] Moreover, newly created rights by definition have no history. A court must look elsewhere in order to determine whether the new right creates circumstances under which legislative courts would be constitutional. Although Justice Brennan rejected "political theory," nothing else provides a basis for principled decisionmaking. Without a doubt, the policies behind judicial independence are difficult to reconcile with existing precedent.[143] But that is no reason to abandon these policies when Congress ventures to establish legislative courts in areas where

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[140] Because an article I judge does not have the article III protections of life tenure and an irreducible salary, he is beholden to the political branches for his continued livelihood. Despite this obvious dependence, his role in public rights cases constantly requires a choice between the government's contentions and those of an individual. In addition, the article I court, if it oversees a "specialized" area of the law as do most today, will hear the same government attorneys time and again, and will be constantly apprised of the government's position on all matters. This, too, may eventually result in the court's taking the government's view in resolving disputes.

[141] 102 S. Ct. at 2870 n.20.

[142] Justice Brennan's admission that the scope of the public rights exception to article III is difficult to define reveals that history does not provide ready answers to the constitutional questions raised by the creation of legislative courts. *Id.* at 2870.

[143] Under a strict separation of powers approach any adjudication outside the judicial branch is forbidden. *See* notes 27-31 and accompanying text *supra*. Yet such adjudication has been frequently upheld. *See* 102 S. Ct. at 2889-93.

they would not have been countenanced in 1789.[144]

In sum, the plurality approached the problem of legislative courts by studying the characteristics of those that had been approved in the past. To the extent that Justice Brennan looked beyond "historical fact" and relied on policy considerations,[145] he focused on separation of powers. He believed that legislative courts were permissible in three areas, the majority of which he defined as being completely within the political sphere.[146]

Based on its view of the limited categories of legislative courts, the plurality held that the new bankruptcy courts were unconstitutional.[147] Although article I expressly grants Congress the power to make laws concerning bankruptcy, the plurality found no historical understanding that all suits by a bankrupt implicate public rights to such an extent that they may be assigned to legislative courts wholly beyond the ken of the judicial branch.[148] Thus the plurality concluded that allowing Congress to assign bankruptcy-related state law claims to legislative courts would, in effect, permit the legislative branch to exercise judicial power in violation of the separation of powers doctrine.

### B. *A Narrower Approach*

As discussed previously, Justice Rehnquist's concurrence differed markedly from the plurality's approach. He limited his discussion solely to the issue presented by the suit: whether a breach of contract action filed by a corporation undergoing bankruptcy reorganization can be adjudicated by a legislative court.[149] Justice Rehnquist concluded that since state law breach of contract actions between private parties would have been adjudicated in a judicial forum in 1789, the framers would have considered Northern's claim to be within the judicial power.[150] As a consequence, in Justice Rehnquist's view, the Constitution

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[144] *See id.* at 2893 ("To say that the Court has failed to articulate a principle by which we can test the constitutionality of a putative Article I court. . . is not to say that this Court must always defer to the legislative decision to create Article I . . . courts.").

[145] 102 S. Ct. at 2870 n.20.

[146] *See* notes 81-96 and accompanying text *supra.*

[147] 102 S. Ct. at 2878-80.

[148] *Id.* at 2881-83.

[149] *Id.* at 2881.

[150] *Id.*

for other cases, so far as it goes, it is difficult to fault: if, in 1789, the matter would have been tried by common law courts, it is within the federal judicial power and may not be adjudicated by a legislative court.[152] While Justice Rehnquist does not articulate the article III policies behind judicial independence, his approach is consistent with them. First, the concept of separation of powers is advanced by ensuring that all matters deemed within the judicial power at common law may not be adjudicated by federal courts controlled by the political branches. Second, requiring article III adjudication of all matters historically recognized as "judicial" advances the checks and balances policy, as it ensures that the courts resolving those disputes are sufficiently independent to invalidate unlawful actions by the legislature or the executive.[153] Third, judicial impartiality is furthered because litigants are guaranteed trials before judges dependent on no one for their continued livelihood.

Under Justice Rehnquist's approach, only when history does not indicate whether a case would have been included within the framers' view of the federal judicial power must one consider whether the dispute can be assigned to a legislative court. Justice Rehnquist did not reach that issue, however, and he gave no indication as to how he would analyze such a case. In the face of the efforts by the plurality and the dissent to devise a coherent theory about legislative courts and to reconcile past cases, Justice Rehnquist's silence is unsatisfying. Though consonant with the policies behind judicial independence, his analysis fails even to attempt to reconcile prior Supreme Court precedent,[154] much less to address the central issues concerning legislative courts raised by the plurality and the dissent. Thus, Justice Rehnquist sheds dim light, at best, on the circumstances under which Congress can establish legislative courts.

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[152] Justice Rehnquist noted that Northern's claim was "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789." *Id.*

[153] Of course, where a private state law dispute is involved, as in *Marathon,* it is unlikely that the courts will exercise a check on the other branches. Indeed, with the possible exception of the underlying grant of federal jurisdiction, there may be no federal action to check.

[154] *See* 102 S. Ct. at 2881-82.

### C. *Policy, Not History*

In contrast to the approaches taken by Justices Brennan and Rehnquist, Justice White eschewed history in his analysis, because he concluded that the precedents revealed no coherent principles distinguishing between matters assignable to legislative courts and to article III courts.[155] He determined that article III adjudication is no different from that performed by legislative courts, and that both kinds of courts exercise the federal judicial power.[156] In fact, Justice White expressly rejected the idea that the Constitution prohibits Congress from granting judicial power to legislative courts, opting instead for an ad hoc balancing test.[157] In his test, Justice White proposed to balance the policies behind the article III guarantees of judicial independence against the policies that led Congress to delegate judicial power to a legislative court. Only if the former outweighed the latter would Justice White require an article III decisionmaker throughout the adjudication.[158] This analysis has two flaws. First, Justice White's failure to articulate satisfactorily the policies behind judicial independence distorts the balancing test suggested.[159] Second, Justice White's test would permit the wholesale assignment to legislative courts of adjudication traditionally reserved to article III forums.[160]

#### 1. *Policies Supporting Judicial Independence*

With regard to the first problem, Justice White failed to recognize the separation of powers policy incorporated into the Constitution by the framers. Although he referred to the separation of powers doctrine, Justice White used that term to mean

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[155] *See id.* at 2893 (White, J., dissenting).

[156] *See id.*

[157] *See id.*

[158] *See* 102 S. Ct. at 2894. Unfortunately, Justice White did not indicate how much weight should be assigned to the relevant factors. *See* 102 S. Ct. at 2894. Judges are thus, in effect, left to muddle through to a conclusion. Although balancing tests are not new to constitutional law, the test outlined by Justice White is particularly inchoate. This raises both the problem that Congress is deprived of clear guidelines for formulating legislative courts and that the specter of courts faced with a politically charged atmosphere may indulge in unprincipled manipulation.

[159] *See* notes 161-73 and accompanying text *infra*.

[160] *See* notes 174-81 and accompanying text *infra*.

the analytically distinct policy of checks and balances.[161] Justice White did not acknowledge that, in itself, the assignment of judicial power to the legislative branch violates the principle of separation of powers. Although it may be reasonable to understate the importance of separation of powers as a means of deterring tyranny so long as the courts retain their ability to check the actions of the other branches, Justice White's failure to distinguish between the two ideas weakened his analysis.

Justice White's confusion is manifest in his contention that because Congress constitutionally may assign adjudication to state courts, many of which are staffed by judges who lack life tenure and irreducible salaries, Congress can also assign adjudication of the same issues to federal legislative courts.[162] This argument ignores the framers' concern that excessive power concentrated in one branch of government might lead to tyranny. To assure that governmental power would not be consolidated in this way, the framers devised a structure of divided powers, and, accordingly, directed that the judicial power be vested exclusively in the judicial branch.[163] However, assigning the judicial power to state courts poses no separation of powers problem because it does not result in the consolidation of two or more functions in one branch of the *federal* government. But such a consolidation of functions is exactly what happens when Congress vests the judicial power in a legislative court.

Justice White's analysis does, on the other hand, incorporate the principle of checks and balances. Thus, Justice White stressed the importance of determining whether a system of legislative courts "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."[164] This checks and balances focus led Justice White to accord substantial weight to provisions for appellate review by article III courts.[165] Because appellate review

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[161] Justice White focused on the fact that bankruptcy litigation is not likely to involve political issues revolving around actions by the federal government (checks and balances), *see* 102 S. Ct. at 2895, rather than on whether the legislature is performing adjudicatory functions (separation of powers).

[162] *See id.*

[163] *See* note 6 *supra.*

[164] 102 S. Ct. at 2895.

[165] *Id.* at 2894-95.

ensures that the judiciary has the final say on the legality of congressional or executive action, in Justice White's view it enables the courts to discharge their role of checking the other branches.

In addition, Justice White recognized the third policy underlying the article III requirements, the need for judicial impartiality. Although he considered this need of little importance in the bankruptcy context,[166] Justice White indicated that it would be unconstitutional to assign to legislative courts matters that are likely to incur executive or legislative pressure on the decisionmaker.[167]

In order to evaluate the constitutionality of a legislative court, Justice White proposed to balance the article III policies, particularly the checks and balances principle, against the factors that led Congress to assign the matter to a tribunal outside the judicial branch.[168] Justice White also catalogued the legislative interests that, in his view, justified the creation of a legislative court system, listing the need to expedite judicial action, to relieve burdens on article III courts, and to maintain flexibility by staffing new courts with judges without life tenure.[169]

Although Justice White's test is both imprecise and open-ended, raising the possibility that it would be applied in an unprincipled fashion,[170] presumably the significant factors and their relative weights would be defined more clearly as courts applied the test.[171] More disturbing is the extent to which Justice White's test accords excessive deference to the government interests asserted by Congress on behalf of legislative courts. Although Justice White gives the final say on the legitimacy of the asserted justifications to the judiciary, interests that he identifies as valid[172] suggest that considerations of efficiency and administrative convenience merit great weight. Since legislative courts exist in derogation of the express constitutional command that the judicial power be exercised by an independent judiciary, the carte blanche given to Congress is troublesome. While prag-

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[166] *See* notes 114-16 and accompanying text *supra*.

[167] 102 S. Ct. at 2895.

[168] *Id.* at 2894.

[169] *Id.* at 2895-96.

[170] *See* note 158 *supra*.

[171] Balancing tests in other areas of constitutional law, such as the first amendment, have developed gradually.

[172] *See* notes 112-16 & 169 and accompanying text *supra*.

matic considerations may have influenced past Supreme Court decisions approving legislative courts,[173] this does not warrant jettisoning the policy considerations that led the framers to construct safeguards to ensure the judiciary's independence from executive and legislative control.

### 2. *Limits on Assigning Judicial Power to Legislative Courts*

A more fundamental problem with Justice White's test is that it would permit Congress to assign a major portion of the judicial power to legislative courts. Justice White's analysis itself reveals this possibility. He states that bankruptcy litigation in general, and the *Marathon* suit in particular, could be delegated to legislative courts so long as article III appellate review is retained and Congress articulates valid reasons for the delegation.[174] In reaching this conclusion, Justice White accommodated two of the policies underlying the article III guarantees. The checks and balances principle is not undermined because bankruptcy litigation largely involves private disputes arising under state law, which means that the need to check actions by the other branches of the federal government would not arise.[175] To the extent that a check is needed, appellate review by article III courts is available.[176] Justice White also acknowledged the importance of impartial decisionmaking, noting that it is unlikely that a bankruptcy judge would be influenced by the political branches or would be subject to an institutional bias in resolving the private disputes that comprise the majority of bankruptcy claims.[177] Because two of the article III policies are accommodated adequately in Justice White's view, concerns for efficiency and administrative convenience can override the language of article III and justify a legislative bankruptcy court.

Unfortunately, Justice White's approach, while acceptable in a limited context,[178] could result in a radical restructuring of the federal judicial power. For example, nothing in his analysis would prevent Congress from assigning all diversity and admi-

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[173] *See* 102 S. Ct. at 2893.
[174] *Id.* at 2894-95.
[175] *See id.* at 2895.
[176] *See id.* at 2894.
[177] *See id.* at 2895.
[178] *See* note 181 and accompanying text *infra*.

ralty suits to legislative courts. As these classes of cases typically involve private disputes over rights recognized at common law, it is unlikely federal governmental action will be implicated, and the need for an independent court equipped to check the political branches will be minimal. Similarly, the probability that the executive or legislature will try to influence the judge's resolution of these cases is low, thus lessening the need for judicial independence to assure impartial adjudication. While assigning all diversity, admiralty, and bankruptcy-related litigation to legislative courts may not actually give rise to the tyranny feared by the framers,[179] it is impossible to reconcile such a delegation of adjudication with the framers' understanding of the scope of the article III judicial power.[180] Justice White's scheme is oblivious to the framers' separation of powers design, as it would allow much of the judicial power to be exercised by courts controlled by the legislature or the executive. Justice White's approach thus ignores the concentration of power in one branch, so long as the congressional scheme accommodates the principle of checks and balances.

While it is seriously deficient as a general approach to the constitutionality of legislative courts, Justice White's balancing concept may be useful in a more limited context. For example, when it is unclear whether a dispute concerns matters within the article III judicial power, such as cases within Justice Brennan's "public rights" category that were not cognizable in 1789, Justice White's balancing scheme could provide a principled means of determining whether these matters are assignable to legislative courts. Rather than automatically validating legislative courts in the public rights area, Justice White's approach ex-

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[179] Many commentators have favored repealing the diversity grant, *see, e.g.*, Meador, *A New Approach to Limiting Diversity Jurisdiction*, 46 A.B.A. J. 383 (1960); Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928), and placing all such cases with state courts. Those who favor repeal often emphasize the mundane, nonpolitical character of most diversity cases. One might also argue that diversity cases could be adequately handled by legislative courts, as the government is not a party and the likelihood of an institutional bias is small.

[180] Moreover, Justice White's scheme flies squarely in the face of Supreme Court precedent that has upheld legislative courts only under very limited circumstances. *See, e.g.*, Glidden Co. v. Zdanok, 370 U.S. 530 (1962) (judges of Court of Claims and of Court of Customs and Patent Appeals are article III judges);Crowell v. Benson, 285 U.S. 22 (1932) (distinguishing between public and private rights cases); American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828) (upholding legislative territorial courts).

pressly requires a balancing of article III values against the government's interest in non-article III adjudication.[181]

### D. *Summary*

Each of the major *Marathon* opinions fails to articulate and apply the policy considerations that underlie the article III guarantees of judicial independence. Justice Brennan demonstrates an awareness of the separation of powers concept, but largely discounts the importance of checks and balances. Justice White, on the other hand, stresses the role of the federal courts as a check on the other branches of government, but is oblivious to the separation of powers theory. To the extent these approaches can be grafted together, they may compensate for each other's deficiencies. But since neither analysis articulates fully the policies behind the article III requirements of judicial independence, much less explores the ramifications of these policies, it seems unlikely that the Supreme Court will integrate the approaches to form a workable synthesis. Nevertheless, focusing on the distinct principles of separation of powers and checks and balances is necessary to develop a principled analysis that reconciles the existence of legislative courts with the constitutional requirement of an independent judiciary.

## V. Political Ramifications

Despite *Marathon's* failure to provide clear guidelines regarding the permissibility of article I courts, the opinions abound with political ramifications. Beneath the surface debate lie implications that extend beyond the bankruptcy field, and touch upon current proposals to restrict the jurisdiction of article III courts.

The initial "political" surprise of the *Marathon* case was the line-up of the Justices who concluded that the new bankruptcy courts were unconstitutional; those generally regarded as the Court's most liberal and most conservative members joined forces to strike down the jurisdictional provision of the Code.[182]

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[181] *See* notes 112-13 and accompanying text *supra*.

[182] Justices Brennan and Marshall, two of the three remaining members of the liberal Warren Court, were joined in the plurality opinion by Justice Blackmun, who has been a frequent visitor to the liberal camp. *See* N.Y. Times, Feb. 20, 1983, § 6, at 22-23, col. 1. Also joining in the plurality was Justice Stevens, who has been characterized as a

Since Justices Rehnquist and O'Connor are particularly sensitive to states' rights concerns,[183] and since their concurrence emphasized that Northern's claim arose solely under state law, their views can be regarded as a demonstration of solicitude for the prerogatives of states. In addition, Justice Rehnquist frequently has criticized Congress for ignoring the constitutional limits on the power of the federal government.[184] Thus, his conclusion that the bankruptcy courts were unconstitutional might be viewed as a negative response to a perceived general pattern of congressional overreaching into matters of state law.

The rationale of the concurrence was not that Congress must assign this type of action to the states for adjudication. Rather, the concurring justices insisted that a federal court hearing a claim such as Northern's must have all the protections of judicial independence required by article III. Thus, the concurrence considered it important to extend full federal protection to matters of state law. Perhaps this is the converse of the federalism doctrine stressed by Justices Rehnquist and O'Connor.[185] Whereas federalism dictates that federal courts defer to state courts in certain matters, the concurrence indicates that when state law claims are adjudicated by federal courts, they may only be litigated before those that are the most politically insulated. This treatment must be provided even though some federal claims can be assigned to federal courts not safeguarded by the article III guarantees.[186]

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gadfly who does not fall into either the liberal or the conservative group. On the other hand, Justices Rehnquist and O'Connor, who formed the concurrence, have often been described as politically conservative. *Id.* at 22, col. 2.

[183] *See, e.g.*, Rose v. Lundy, 102 S. Ct. 1198 (1982) (O'Connor, J.); National League of Cities v. Usery, 426 U.S. 833 (1976) (Rehnquist, J.).

[184] *See* National League of Cities v. Usery, 426 U.S. 833 (1976).

[185] "Our Federalism," as described by Justice Black in Younger v. Harris, 401 U.S. 37, 44 (1971), is "a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government . . . always endeavors to [act] in ways that will not unduly interfere with the legitimate activities of the States." *Id.* Justice Rehnquist has often stressed that federalism requires that federal courts defer to state courts where possible. *See, e.g.*, Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). *See* O'Connor, *State Courts and Federalism in the 1980's*, 22 WM. & MARY L. REV. 599 (1981).

[186] This is not to imply that the concurrence agreed with the plurality's explanation of the public rights exception. The concurrence reserved judgment on the extent of this exception, stating only that it did not apply to the dispute involved in *Marathon*. *See* 102 S. Ct. at 2881-82 (Rehnquist, J., concurring).

Intimations of federalism are missing from the plurality opinion. Yet, in light of contemporary politics, it is even more provocative. First, it is surprising that the plurality accorded more protection to private rights than to public rights, despite its explicit acknowledgement that threats to judicial independence are greater in cases involving public rights.[187] This position indicates that private disputes are more important than those between an individual and the government. It also indicates that an individual challenging the government is less in need of safeguards to ensure fair adjudication than an individual challenging a private party. Given the well-recognized power and resources of the federal government, the heightened protection for private rights is a surprising position for the liberal wing of the Court to embrace.

While the plurality appears at first glance to voice a traditional disapproval of a government scheme that fails to provide sufficient procedural safeguards to protect individual rights, the facts belie this view. *Marathon* arose in a commercial setting with the equities fairly evenly balanced between two corporations. Furthermore, future cases presenting the same issue are most likely to arise in a similar context. Thus, it is unlikely that the *Marathon* dispute elicited the traditional liberal solicitude for individual rights.

In light of *Marathon's* commercial setting, the recognized crisis in the old bankruptcy system,[188] the persistent lack of interest in bankruptcy matters displayed by the federal district courts,[189] and the absence of partisan debate over the establishment of the new bankruptcy courts,[190] the plurality's unwillingness to uphold the changes in bankruptcy jurisdiction is somewhat puzzling. It suggests that, in addition to surface considerations, the plurality may have been influenced by a desire to send Congress a political message. By narrowly defining the circumstances in which Congress may establish legislative courts, the plurality may have sought to remind Congress that the Court will be the ultimate arbiter of Congress' efforts to control federal court jurisdiction. Since Congress is considering sev-

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[187] *See id.* at 2870 n.20.

[188] *See id.* at 2895 & n.16.

[189] *See id.* at 2895.

[190] *See* note 66 and accompanying text *supra*.

eral bills that would curtail the jurisdiction of article III courts,[191] such a signal would be especially timely. Although there have been perennial attempts to limit the jurisdiction of the federal courts,[192] the proposals generally have been relegated to the backburner. This is no longer the case. Restrictions on federal court jurisdiction are a prominent part of the "New Right" social agenda; additionally, the main thrust of the "New Federalism," a major theme of contemporary political rhetoric, is that federal power should be restrained while the power of the states should be expanded. Facing this political climate, the *Marathon* plurality may well have intended its decision to be a signal to Congress that attempts to limit federal court jurisdiction will not be looked upon favorably.

If this interpretation of the plurality opinion is on the mark, a corresponding explanation of the dissenting opinion should be attempted. In contrast to the plurality approach, the dissenters expressly counseled deference to congressional judgments in this area,[193] emphasizing that Congress has legitimate interests in regulating the jurisdiction of the federal courts. They also stressed that Congress has the power to withdraw all bankruptcy matters from the jurisdiction of the federal courts.[194] While the dissenters did not discuss the source of and limitations on Congress' power to restrict the jurisdiction of the federal courts, their analysis indicates that Congress has unfettered power to remove the authority of the lower federal courts to adjudicate certain types of controversies.

This position finds ready support in article III, which grants Congress the power to create any federal courts inferior to the Supreme Court.[195] Based on this express constitutional grant, Congress arguably has complete authority not only to abolish the lower federal courts, but also to do so partially by limiting

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[191] *See* note 16 *supra*. The proposed legislation generally seeks to remove from the federal courts to the state courts the power to adjudicate controversies raising certain emotionally charged social issues. Because the legislation does not contemplate that jurisdiction will be vested in legislative courts, but in state courts, the relevance of *Marathon* to the Court's view on these matters is indirect.

[192] *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 309-65 (2d ed. 1973).

[193] *See* 102 S. Ct. at 2895-96.

[194] *See id.* at 2984.

[195] U.S. CONST. art. III, § 1, cl. 1.

their jurisdiction over certain types of disputes.[196] This reasoning does not extend to the Supreme Court's jurisdiction, however, because the consitutional grant of jurisdiction to the Supreme Court is self-executing.[197] Nevertheless, since the Constitution grants Congress power to make exceptions to the Court's appellate jurisdiction,[198] Congress may have significant authority to limit the scope of the Supreme Court's jurisdiction.[199] While the dissenters in *Marathon* did not attempt an exegesis of congressional power over federal court jurisdiction, by emphasizing that Congress may grant and withdraw the subject matter jurisdiction of the federal courts and that pragmatic factors properly may influence its decisions, the dissenters conveyed the message that the Constitution imposes only minimal restraints on Congress in this sphere.

## CONCLUSION

The immediate impact of *Marathon* was to derail Congress' efforts to revamp the bankruptcy system and to throw the world of bankruptcy litigation into turmoil, but its political ramifications may extend much further. Although the *Marathon* opinions fail to articulate an acceptable resolution of the constitutional problems surrounding legislative courts, the subtext of these opinions may greatly illuminate the views of the members of the Court regarding a variety of proposals to curtail the jurisdiction of the article III federal courts. *Marathon* thus may be a harbinger of important future decisions governing congressional control over federal court jurisdiction.

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[196] *See* Sheldon v. Sill, 49 U.S. (8 How.) 411 (1850). This view is supported by many scholars. M. REDISH, *supra* note 1, at 21-24.

[197] U.S. CONST. art. III, § 1, cl. 1 provides: "The judicial Power of the United States shall be vested in one supreme Court. . . ."

[198] U.S. CONST. art. III, § 2, cl. 2.

[199] *See Ex Parte* McCardle, 74 U.S. (7 Wall.) 506 (1869); M. REDISH, *supra* note 1, at 17-21.