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BANKRUPTCY JUDGES AND THE INDEPENDENT JUDICIARY*

DAVID P. CURRIE**

Among the powers conferred upon Congress by article I of the United States Constitution is the authority to "establish . . . uniform Laws on the subject of Bankruptcies,"¹ and ever since 1898 there has been a federal bankruptcy law authorizing federal tribunals on petition either of a distressed debtor or of his creditors to distribute his assets and to discharge him from further liability.²

Since the bankruptcy law is federal, bankruptcy cases are "Cases . . . arising under . . . the Laws of the United States" and therefore fall within the "judicial Power of the United States" as defined by article III. This judicial power, the same article prescribes, is to be vested in courts whose judges "hold their Offices during good Behavior" and "receive for their Services a Compensation, which shall not be diminished during their Continuance in Office."³

Until very recently, exclusive jurisdiction over bankruptcy cases was vested by statute in the United States District Courts,⁴ whose judges are appointed under article III and satisfy its requirements of tenure and irreducible compensation.⁵ Pursuant to Congressional authorization, however, the district courts appointed bankruptcy referees—later called bankruptcy judges—to whom they voluntarily referred bankruptcy cases for initial decision subject to their own review.⁶ The authority and self-sufficiency of the bankruptcy referees were extended gradually over the years, most notably by the Supreme Court's 1973 Bankruptcy Rules; but the constitutionality of this arrangement was never determined.

In 1978 Congress scrapped the entire referee system, requiring that "all of the jurisdiction conferred . . . on the district courts"

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5. Id. at § 134(a).
6. See notes 98-103 and accompanying text infra.

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with respect to bankruptcy be exercised by a new "bankruptcy court"7 whose judges were to be appointed by the President and Senate "for a term of 14 years."8 The bankruptcy court was to have, with two minor exceptions, all "the powers of a court of equity, law, and admiralty,"9 including the power to enforce its judgments by writs of execution and by civil contempt orders; and the jurisdiction was extended to "all civil proceedings . . . arising or related to" bankruptcy cases10—including ordinary tort and contract actions against debtors of the bankrupt. Review by the district court, by a panel of bankruptcy judges, or by a court of appeals was to be available,11 but the context makes clear that this review was to be appellate, not de novo.12 In other words, Congress had entrusted the trial and decision of all civil controversies affecting a bankrupt to a set of judges enjoying neither life tenure nor irreducible salary.

In 1980 Northern Pipeline Construction Co. filed a reorganiza-

8. Id. at § 153(a). Their salary was to be $50,000 per year subject to the same adjustment formulas that apply to district judges. Id. at §§ 154, 155. Unlike district judges, they were to be removable by the judicial council of their circuit for "incompetency, misconduct, neglect of duty, or physical or mental disability." Id. at § 153(b). The new provisions were to take full effect only in 1984, but during the transition period substantially similar powers were to be exercised by the existing bankruptcy judges (formerly trustees in bankruptcy), who likewise lacked article III tenure. See Pub. L. 95-598 [Bankruptcy Reform Act of 1978], §§ 405, 409, 92 Stat. 2549, 2685, 2687 (1978) (not codified), note preceding 28 U.S.C. § 1471 (Supp. III 1979) (Jurisdiction and Procedure During Transition; Transition to New Court System); see also 11 U.S.C. § 62 (1976) (repealed by Bankruptcy Reform Act of 1978, Pub. L. 95-598, 92 Stat. 2549 (1978)).
10. Id. at § 1471(b).
11. Id. at §§ 1293, 1334, 1482.
12. The statutory language itself refutes any suggestion that Congress meant to subject the decisions to bankruptcy judges to de novo reexamination by article III judges; the term "appeal" suggests the normal appellate practice of limited fact review. This inference is unmistakably confirmed by the legislative history. The expressly declared purpose of the statute was "to eliminate both the real and apparent dependency and subservience of the bankruptcy court" and to create a "functionally independent" bankruptcy court, S. Rep. No. 989, 95th Cong., 2d Sess. 16, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5802; this purpose would be defeated by de novo review. There is no need, however, to rely on implication, for the Senate Report explicitly stated that "the district court will function only as an appellate judge in bankruptcy matters . . . ." Id. at 154, 1978 U.S. CODE CONG. & AD. News at 5940.

Thus the statute assimilates the position of the district court on appeal from a bankruptcy judge to that of a court of appeals reviewing a district court; and in that situation the trial judge's findings of fact must be accepted unless clearly erroneous. Fed. R. Civ. P. 52(a). Indeed the 1978 Act specifically continued in effect the Supreme Court's Bankruptcy Rules, Bankruptcy Reform Act of 1978, Pub. L. 95-598, § 405(d), 92 Stat. 2549, 2685 (1978); and Rule 801 imposes the clearly-erroneous standard for review of bankruptcy judges themselves, Fed. R. Bankr. P. 801.
petition under the bankruptcy laws in the District Court for the District of Minnesota. Northern then filed a claim against Marathon Pipe Line Co. in the reorganization proceeding, seeking damages for breach of contract and related wrongs. Over three dissents, the Supreme Court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* held the provision for decision of Northern's claim by a nontenured bankruptcy judge was contrary to article III.13

Having participated in the drafting of an amicus brief arguing that the bankruptcy-judge provisions were unconstitutional, I cannot pretend to be an impartial observer. Nevertheless, the importance of the underlying principle leads me to explain why I think the Court was right.

I

If one consults the text of article III, the provision for bankruptcy judges looks flatly unconstitutional. Northern's claim was a "Controvers[y] . . . between Citizens of different States . . . ;"14 arguably it was so related to the bankruptcy petition as to be also part of a case arising under federal law. In either case it fell within the federal judicial power and must therefore be decided by a judge with tenure and protected salary.

This conclusion is just as clearly confirmed by the purpose of the tenure and salary provisions. "That inflexible and uniform adherence to the rights of the constitution and of individuals, which we perceive to be indispensable in the courts of justice," wrote Hamilton in explaining these provisions, "can certainly not be expected from judges who hold their offices by a temporary commission."15 Moreover, he added, "[n]ext to permanency in office, nothing can contribute more to the independence of the judges, than a fixed provision of their support."16 Hamilton went on to say why this was so: "If the power of making [periodic appointments] was committed either to the executive or legislative, there would be danger of an improper complaisance to the branch which pos-

16. *Id.* No. 79, at 583.
sessed it..." and "a power over a man’s subsistence amounts to a power over his will." The Justices of the Supreme Court, who owe their independence to the tenure and salary provisions of article III, have recognized this purpose from the beginning, and so have the commentators. No Justice argued otherwise in Northern Pipeline.

As Justice White conceded in dissent, if the Court was to respect the words and purpose of the Constitution, the provision for nontenured bankruptcy judges was invalid.

17. Id. No. 78, at 581.
18. Id. No. 79, at 583.
19. As early as 1792, sitting on circuit, Justices Wilson and Blair refused to carry out an Act of Congress because its provision subjecting court decisions to executive revision was "radically inconsistent with the independence of th[e] judicial power..." which in their view it was the function of the tenure and salary provisions to assure. Hayburn's Case, 2 U.S. (2 Dall.) 409, 411 n. (a) (C.D. Pa. 1792). In O'Donoghue v. United States, 289 U.S. 516 (1933), quoting from the Declaration of Independence and from Hamilton, the Court reaffirmed that "the power to diminish the compensation of the federal judges was explicitly denied, in order, inter alia, that their judgment or action might never be swayed in the slightest degree by the temptation to cultivate the favor or avoid the displeasure of that department which, as master of the purse, would otherwise hold the power to reduce their means of support." Id. at 531. In Toth v. Quarles, 350 U.S. 11 (1956), speaking for the Court, Justice Black wrote that "[t]he provisions of Article III were designed to give judges maximum freedom from possible coercion or influence by the executive or legislative branches of the Government." Id. at 16. In United States v. Will, 101 S. Ct. 471 (1980), the Chief Justice reviewed for the Court the history and purposes of the tenure and compensation provisions as sketched above and declared:

The Compensation Clause has its roots in the long-standing Anglo-American tradition of an independent judiciary. A judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government.

Id. at 482. "Our Constitution," the Chief Justice added, "promotes that independence specifically by providing" for tenure and irreducible salary. Id.

20. See, e.g., 1 TUCKER'S BLACKSTONE APP. 268 (1803), condemning the former British practice of appointing temporary judges dependent on the King for their security ("[W]hilst the frailties of human nature remain, can such a tribunal be deemed impartial?") and declaring that "most wisely was it provided [in our Constitution] that the judges of those courts... should depend only on their good behavior for their continuance in office, and be placed at once beyond the reach of hope or fear, where they might hold the balance of justice steadily in their hands." Id. See also 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 457-97 (1833). "Can it be supposed for a moment, that men holding their offices for the short period of two, or four, or even six years, will be generally found firm enough to resist the will of those who appoint them, and may remove them?... To have made the judges...removable at the pleasure of the president and Congress...would have been placing the keys of the citadel in the possession of those against whose assaults the people were most strenuously endeavoring to guard themselves." Id. at 426-27, 436.
21. 102 S. Ct. at 2882-83.
In my opinion, independent judges are a good institution; our unfortunate experience with arbiters subject to royal control during the colonial period\(^22\) confirms the intuitive force of Hamilton’s theory. Respect for the rule of law leads me to the further conclusion that constitutional provisions ought to be adhered to even if they are misguided: The price paid in the long run for ignoring the law, as Washington reminded us, seems likely to outweigh the immediate gain.\(^23\) Justice White did not argue that the tenure and salary provisions were misguided. His position was that it was “too late to return to the simplicity of the principle pronounced in Article III and defended so vigorously and persuasively by Hamilton . . . ;”\(^24\) it was too late to do what the Constitution required.

Justice White, that is to say, invoked precedent. Even square authority, of course, can be overruled if it conflicts plainly enough with important constitutional principles, as the Court so graphically demonstrated in the racial-segregation cases.\(^25\) Nevertheless precedent too has strong claims; predictability requires some assurance that settled propositions not come unglued every time a new Justice disagrees with them. If, therefore, the Court in previous decisions had essentially read the tenure and salary provisions out of the Constitution, it might arguably have been, as the dissenters contended, “too late” to put them back in. In my opinion, though the Court had rendered a number of highly questionable decisions impairing the protections afforded by article III, it had never upheld anything comparable in terms of its own opinions to the provisions for bankruptcy judges; and reluctance to overrule precedent does not require that bad decisions be extended to a situation distinguishable on the basis of their own reasoning.

In the first place, the Court has by no means consistently allowed Congress to ignore the salary and tenure provisions; in fact it has repeatedly enforced them. When President Lincoln subjected civilians to trial by military commissions during the Civil War, the Court held that wartime necessity was no justification:

\(^{22}\) One of the grounds for complaint against George III in the Declaration of Independence was that he had “made judges dependent on his will alone for the tenure of their offices, and the amount and payment of their salaries.” The Declaration of Independence para. 11 (U.S. 1776).


\(^{24}\) 102 S. Ct. at 2893.

"One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good Behaviour."\(^{26}\) When Congress attempted to reduce the salaries of judges of the Court of Appeals and the Supreme Court of the District of Columbia during the Depression, the Court found our most severe economic crisis an insufficient excuse: "[T]he judges of these courts hold their offices during good Behaviour, and . . . their compensation cannot, under the Constitution, be diminished during their continuance in office."\(^{27}\) When litigants complained that judges of the Court of Customs and Patent Appeals could not constitutionally be assigned to hear cases in article III courts, the Court rejected the argument only after concluding that those judges enjoyed tenure and irreducible salary, and Justice Harlan wrote expressly that the litigants had a right to an article III judge: "Article III, \(\S\) 1 . . . is explicit and gives the petitioners a basis for complaint . . ."\(^{28}\) Less than two years before \textit{Northern Pipeline}, moreover, the Court refused to allow Congress to deprive federal judges of salary increases that had already gone into effect.\(^{29}\)

It is against the background of these decisions that one should evaluate Justice White's contention that it is "too late" to pay attention to the words and purpose of article III.

IV

As early as 1820, Justice Bushrod Washington declared in \textit{Houston v. Moore}\(^{30}\) that article III did not forbid state courts to determine cases within the federal judicial power.\(^{31}\) In a separate opinion in 1932, Justice Brandeis used the availability of a state

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\(^{26}\) \textit{Ex parte} Milligan, 71 U.S. (4 Wall.) 2, 122 (1867) (alternative holding). The Court also held that Milligan's right to jury trial had been denied. \textit{Id.}

\(^{27}\) \textit{O'Donoghue v. United States}, 289 U.S. 516, 552 (1933) (Hughes, C.J., Van Deventer & Cardozo, JJ., dissenting).

\(^{28}\) \textit{Glidden Co. v. Zdanok}, 370 U.S. 530, 533 (1962). Justice Harlan spoke only for three Justices, but it seems clear that the entire court agreed on this point. \textit{See note 86 and accompanying text infra.}

\(^{29}\) \textit{United States v. Will}, 449 U.S. 200, 224-26 (1980). \textit{See also} \textit{Hayburn's Case}, 2 U.S. (2 Dall.) 409 (C.C.D.N.C. 1792), where Justice Iredell held a statute unconstitutional on the ground that it conferred judicial power on the Secretary of War: "[F]or, though Congress may certainly establish . . . courts of appellate jurisdiction, yet such courts must consist of judges appointed in the manner the Constitution requires, and holding their offices by no other tenure than that of their good behaviour, by which tenure the office of Secretary of War is not held." \textit{Id.} at 413 n.4.

\(^{30}\) 18 U.S. (5 Wheat) 1 (1820).

\(^{31}\) \textit{Id.} at 25-27. It is not clear that Washington spoke for a majority of the Court, but the principle he enunciated has endured. \textit{See, e.g.}, \textit{Charles Dowd Box Co. v. Courtney}, 368 U.S. 502, 508 (1962); \textit{The Federalist} No. 82 (A. Hamilton).
forum as an argument that article III cases could be entrusted to nontenured federal officials as well: "[n]othing [in article III] . . . requires any controversy to be determined as of first instance in the federal district courts."32

The analogy is unconvincing. In the first place, there are plausible justifications for allowing state judges to decide article III cases while insisting that federal judges have tenure. On the one hand, state-court jurisdiction is supported by countervailing considerations of federalism that are absent in the case of federal judges; on the other, whatever the institutional weaknesses of state-court judges, they can hardly be thought to be unduly dependent upon either Congress or the President, whose influence the tenure and salary provisions were principally designed to prevent.33 Even if there were no persuasive reason for the distinction, the more fundamental objection would remain: Notwithstanding the fact that state courts may decide article III cases, the Constitution is quite clear that federal judges must hold office during good behavior.

V

In American Insurance Co. v. Canter34 and in Palmore v. United States35 the Court held that cases within article III could be entrusted to courts not meeting the requisites of article III in the Territories and in the District of Columbia. Whether right or wrong, neither decision supports the constitutionality of nontenured bankruptcy courts in Minnesota; for both were expressly based upon the peculiar status of the District and of the Territories.

Chief Justice Marshall was quite explicit in Canter in limiting his conclusion to the territories:

32. Crowell v. Benson, 285 U.S. 22, 86 (1932) (Brandeis, J., dissenting). Justice White echoed the suggestion in Palmore v. United States, 411 U.S. 389 (1973): "[B]oth Congress and th[is] Court have recognized that state courts are appropriate forums in which federal questions and federal crimes may at times be tried . . . ." Id. at 407. He retreated from the full implication of the argument in Northern Pipeline: "I do not suggest that the analogy means that Congress may establish an Article I court whenever it could have chosen to rely upon the state courts." 102 S. Ct. at 2894-95.

33. See United States v. Raddatz, 100 S. Ct. 2406, 2428 n.6 (1980) (Marshall, J., dissenting); 102 S. Ct. at 2867-68 n.15; Krattenmaker, Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional, 70 Geo. L.J. 297 (1981): "Because untenured state court judges are not appointed, confirmed, paid or removed by Congress, no separation of powers principle is violated by permitting Congress to leave application of its statutes to these judges." Id. at 304.

34. 26 U.S. (1 Pet.) 511, 546 (1828).

Although admiralty jurisdiction can be exercised in the states in those Courts, only, which are established in pursuance of the 3d article of the Constitution; the same limitation does not extend to the territories. In legislating for them, Congress exercises the combined powers of the general, and of a state government.\textsuperscript{36}

Far from supporting Justice White's position, \textit{Canter} argues squarely against the creation of nontenured bankruptcy judges, or of any other nontenured federal judges, within the states. In fact the bankruptcy statute did precisely what \textit{Canter} said could not be done: It empowered nontenured judges to exercise "admiralty jurisdiction . . . in the states . . . ."\textsuperscript{37}

Similarly, in \textit{Palmore}, invoking the territorial analogy and stressing that in the District of Columbia as well "Congress may . . . exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes,"\textsuperscript{38} Justice White observed that both the court and the law under which the defendant was tried were entirely local and analogized the District of Columbia to a state: "Palmore was no more disadvantaged and no more entitled to an Art. III judge than any other citizen of any of the 50 States who is tried for a strictly local crime."\textsuperscript{39} Moreover, the Court echoed Marshall in declaring that \textit{Canter} had allowed territorial courts to hear cases "that ordinarily could be heard only by Art. III judges;"\textsuperscript{40} and it added that the power of Congress over the District of Columbia "permits it to legislate for the District . . . with respect to subjects that would exceed its powers . . . in the context of national legislation enacted under other powers . . . ."\textsuperscript{41} Thus the thrust of \textit{Palmore} was that the District of Columbia, like the Territories, was outside the normal limits of article III because of its special status; \textit{Palmore}, like \textit{Canter}, is no authority for the creation of nontenured federal judges within the States.\textsuperscript{42}

\textsuperscript{36.} 26 U.S. (1 Pet.) at 546.
\textsuperscript{37.} 28 U.S.C. § 1481 (Supp. III 1979). United States v. Coe, 155 U.S. 76, 80 (1894), sustained a territorial court on the authority of \textit{Canter}. \textit{In re Ross}, 140 U.S. 453, 464 (1891), involved a consular court outside the United States and was based in part on the Court's conclusion that the Constitution was inapplicable abroad.
\textsuperscript{38.} 411 U.S. at 397.
\textsuperscript{39.} Id. at 410.
\textsuperscript{40.} Id. at 403.
\textsuperscript{41.} Id. at 398.
\textsuperscript{42.} Justice White, wrenching out of context his remark that article III tribunals are unnecessary in "specialized areas having particularized needs and warranting distinctive treatment," 411 U.S. at 408, would find in \textit{Palmore} support for a broader use of legislative courts than was at stake in \textit{Palmore} itself. 102 S. Ct. at 2894. What the Court actually said was "that the requirements of Art. III, which are applicable where laws of national applicability and affairs of national concern are at stake,"
Ever since the beginning, soldiers and sailors have been tried by ad hoc courts-martial for service-related offenses, even though the governing law was federal. This scheme was upheld in dictum in *Dynes v. Hoover* in 1858: “Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations; . . . the power to do so is given without any connection between it and the 3d article of the Constitution . . . .” The Court reaffirmed this conclusion as recently as 1971. Yet the quotation from *Dynes* itself suggests that the court-martial exception is based upon the historically special and separate position of military justice; a similar dictum in *Ex parte Milligan* also recognizing the military exception implied that it may be derived (however debatably) from the fifth amendment’s provision that grand juries are not required in certain military cases; and later decisions including *Milligan* itself have shown the limited nature of the military exception by holding the court-martial of civilians—and even sometimes of servicemen—to be unconstitutional. Thus the military cases are sui generis; they do not support the creation of nontenured judges for bankruptcy cases.

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44. 61 U.S. (20 How.) 65 (1858).

45. *Id.* at 79.


47. 71 U.S. (4 Wall.) 2 (1867).

48. *Id.* at 123: “[T]he framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth.” *Id.*


51. In these later cases the Court once again stressed the tenure and salary provisions as guarantees of judicial independence, holding that the military powers granted Congress by article I should not be construed to authorize military trials under the circumstances in order not to impair the rights of an independent tribunal and of a trial by jury. See, e.g., Toth v. Quarles, 350 U.S. 11 (1955): “The provisions of Article III were designed to give judges maximum freedom from possible coercion or influence by the executive or legislative branches of the Government . . . . [T]he Constitution does not provide life tenure of those performing judicial functions in military trials.” *Id.* at 16-17.

52. See also 102 S. Ct. at 2868-69.
The 1856 decision in *Murray's Lessee v. Hoboken Land & Improvement Co.* has played a significant role in the expansion of the categories of cases that can be entrusted to nontenured tribunals. The critical passage is as follows:

> [T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.

On its face this statement does not purport to say that Congress may entrust the decision of such matters to courts whose judges lack tenure; it says Congress may choose not to entrust them to a court at all. The facts of the *Murray* case confirm this interpretation.

The case arose out of the affairs of one Samuel Swartwout, who was already familiar to the Supreme Court through his association with Aaron Burr's shady western adventures. In 1833 Swartwout was customs collector for the port of New York, and his account of moneys received on behalf of the Government was $1,374,119.65 in arrears. Pursuant to statute, the Solicitor of the Treasury issued a distress warrant, under which Swartwout's property was sold to satisfy the debt. The validity of the distress warrant was challenged on various grounds, one of which was that the collection of debts was judicial matter that could be entrusted only to article III judges. Invoking a long history of summary remedies, the Court disagreed: While debts could be collected in a judicial manner, they need not be; it was permissible to collect by simple seizure of the debtor's property. Thus *Murray's Lessee* held only that the Government could collect debts owed by its revenue officer without suing at all, not that it could sue for the debt before judges lacking the protections of article III.

*VIII*

*Murray's Lessee* was relied on for a much more troublesome conclusion in *Ex parte Bakelite Corp.* in 1929, which held that the

53. 59 U.S. (18 How.) 272 (1856).
54. Id. at 284.
56. 59 U.S. at 284-86.
57. 279 U.S. 438 (1929).
Court of Customs Appeals, unlike an article III court, could give advisory opinions because it had been established pursuant to article I.⁵⁸ Customs duties, like the debts in Murray's Lessee, could be collected summarily;⁵⁹ thus, the Court said, they too fell within the class of "matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it."⁶⁰ In such cases, wrote Justice Van Devanter, "Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals"—and it may vest it in "legislative courts" not subject to the restrictions of article III.⁶¹ Murray's Lessee was cited as authority, but Bakelite went far beyond that precedent; for while the distraint procedure had bypassed the judicial process entirely, Congress had created a judicial tribunal to decide customs disputes. Article III may not require that courts be used at all, but it leaves no doubt as to how courts are to be constituted if they are created.

Yet Bakelite contains two limiting principles that serve to distinguish it from the case of the bankruptcy judges. First, Bakelite was expressly limited to matters "arising between the government and others,"⁶² that is, to controversies to which the United States is a party. This limitation had already been emphasized in Murray's Lessee, on which Bakelite relied, where the Court upheld seizure of a customs collector's property to satisfy his obligations to the United States:

[T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.⁶³

The same distinction was invoked as recently as 1977 in the context of the seventh amendment right of trial by jury:

Our prior cases support administrative factfinding in only those situations involving 'public rights,' e.g., where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights. Wholly private tort, contract, and property cases, as well

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⁵⁸. Id. at 454, 459-61.
⁵⁹. Id. at 458.
⁶⁰. Id. at 451.
⁶¹. Id.
⁶². Id.
⁶³. 59 U.S. at 284 (emphasis added). See also notes 52-54 and accompanying text supra.
as a vast range of other cases as well are not at all implicated.64

Bankruptcy cases are not controversies “between the government and others” but rather involve essentially private litigation between private parties. The rights involved are private, not “public;” even when the Government is one of the claimants against the bankrupt estate, it does not necessarily appear “in its sovereign capacity,” but on the same basis as any other creditor. In contrast to the case just quoted, which was a proceeding seeking penalties for the violation of a federal statute, in an ordinary bankruptcy case “[w]holy private tort, contract, and property cases, as well as a vast range of other cases as well” are indeed implicated. As the government conceded in its brief in Northern Pipeline, “[b]ankruptcy proceedings primarily concern the relationship between an insolvent debtor and his creditors.”65

Second, the Court was careful in Bakelite to limit legislative courts within the states to the decision of “matters . . . [which] do not require judicial determination,”66 and it emphasized that the business of the Court of Customs and Patent Appeals included “nothing which inherently or necessarily requires judicial determination, but only matters the determination of which may be, and at times has been, committed exclusively to executive officers.”67 This distinction makes eminent sense in terms of the purposes of article III, for the claim of a right to a decision uninfluenced by Congress or the Executive is obviously less compelling when those branches could have made the decision in the first place. Thus the basis of Bakelite was that Congress could give the customs business to a nontenured court because it could have sidestepped the courts altogether; it follows that Bakelite does not support the cre-

65. Brief for Appellant at 33-34, Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858 (1982). The Government attempted to avoid this unmistakable distinction by arguing that “bankruptcy proceedings involve the conferral of a public benefit and implicate the public interest in a way that ordinary suits between private litigants do not.” Id. at 34. The “public benefit” to which the government referred was “[t]he discharge in bankruptcy of a debtor’s obligations.” Id. But the effort to assimilate this “benefit” to the “public rights” involved in Bakelite, Murray, and Atlas was nothing but a play upon words. In this sense every private adjudication results in a “public benefit . . . conferred by the government”—a judgment that fixes the rights of the parties. Id. If the entry of judgment in a bankruptcy case is enough to transform a purely private litigation into one involving “public rights,” the Court’s carefully repeated distinction is entirely without substance. The “public benefit” of a judgment is not what the Court had in mind when it equated cases involving “public rights” with those in which “the Government is involved in its sovereign capacity.” Id.
66. 279 U.S. at 451.
67. Id. at 458.
ation of legislative courts for any matters that could not be disposed of by purely legislative or executive action.\footnote{68} 

In concluding that customs cases were not "inherently . . . judicial," \textit{Bakelite} expressly noted the historical practice of collecting customs by the purely executive device of "requiring duties to be paid . . . without awaiting disposal of protests . . ."\footnote{69} and stressed the fact that the "final determination" of later protests had been "at times confided to the Secretary of the Treasury, with no recourse to judicial proceedings."\footnote{70} The Court relied further on the example of the Court of Claims, which had jurisdiction to determine claims \textit{against} the United States. As the Court emphasized, Congress had long paid claimants by private bill or delegated final authority to the executive to do so, since the government could not be sued at all without its consent, the determination of such claims could not be said to require judicial action.\footnote{71} Nothing of the sort can be said of private bankruptcy litigation, as to which there is neither sovereign immunity nor a sufficient tradition of nonjudicial decision.\footnote{72} Bankruptcy cases were among those listed by the leading contemporary comment on \textit{Bakelite} as "inherently . . . judicial." "[I]t would seem that bankruptcy matters and patent infringement suits could not be committed to legislative courts, since these matters have never been considered as susceptible of final determination by executive officers."\footnote{73} In short, because \textit{Bakelite} was expressly limited to government cases that were not inherently judicial, it is not authority for the creation of nontenured bankruptcy judges.\footnote{74} 

\footnote{68. See Katz, \textit{Federal Legislative Courts}, 43 Harv. L. Rev. 894 (1930): "The only matters which the \textit{Bakelite} doctrine permits to be taken from the constitutional courts and vested in legislative courts are those which Congress could, apart from that decision, commit to the final determination of executive officers." \textit{Id.} at 916-17. \textit{See also} Murray's Lessee, 59 U.S. (18 How.) 272 (1856). "[W]e do not consider congress can . . . withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty . . . ." \textit{Id.} at 284.}
\footnote{69. 279 U.S. at 458.}
\footnote{70. \textit{Id.}}
\footnote{71. \textit{Id.} at 452-53.}
\footnote{72. There is a history of state legislative acts relieving individual debtors of their obligations. \textit{See} Nadelman, \textit{On the Origin of the Bankruptcy Clause}, 1 Am. J. Legal Hist. 215, 221-23 (1957). The power of Congress, however, is expressly limited to enacting "uniform" bankruptcy laws. U.S. Const. art. I, § 8, cl. 4. In any event, the old individual insolvency acts did not purport to resolve ordinary contract and tort actions involving the bankrupt estate, as the new bankruptcy judges were authorized to do.}
\footnote{73. Katz, \textit{Federal Legislative Courts}, 43 Harv. L. Rev. 894, 916 (1930).}
\footnote{74. \textit{See also} 102 S. Ct. at 2869-71 (1982). Williams v. United States, 289 U.S. 553 (1933), held that the salary of a judge of the Court of Claims could constitutionally be reduced during his term because, as the Court had said in dictum in \textit{Bakelite},
IX

The 1932 decision in *Crowell v. Benson*\(^75\) contains statements that go even beyond *Bakelite* in undercutting the requirements of article III. The Longshoremen's and Harborworkers' Compensation Act had set up a federal administrative agency to determine claims for workmen's compensation, and the district court had construed the statute to require a trial de novo in order to avoid holding it unconstitutional. The Supreme Court acknowledged that *Bakelite* did not support the vesting of personal-injury jurisdiction in a nontenured tribunal: "[T]he distinction is at once apparent between cases of private right and those which arise between the Government and persons subject to its authority in the Court of Claims was a legislative court not created under article III. *Williams* is often mentioned in the same breath with *Bakelite* as authority for Congress' power to create courts not subject to the restrictions of article III. But the reasoning of *Williams* was at the opposite pole from that of *Bakelite*. For while *Bakelite* held that Congress had a choice whether to vest jurisdiction over certain matters in a constitutional or in a legislative court, *Williams* firmly declared to the contrary. The argument that suits against the United States fell within article III, wrote Justice Sutherland,

cannot be reconciled with the limitation fundamentally implicit in the constitutional separation of the powers, namely, that a power definitely assigned by the Constitution to one department can neither be surrendered nor delegated by that department, nor vested by statute in another department or agency... And since Congress... undoubtedly may... confer upon an executive officer or administrative board... or retain for itself, the power to hear and determine controversies respecting claims against the United States, it follows indubitably that such power, in whatever guise or by whatever agency exercised, is no part of the judicial power vested in the constitutional courts by the third article.

289 U.S. at 580-81 (emphasis original). Thus *Williams* stands for the proposition that powers within article III can be exercised only by tenured judges, and it calls into question the earlier decisions in both *Bakelite* and *Crowell*, which had said that in some cases Congress had a choice between tenured and nontenured tribunals.

*Glidden v. Zdanok*, which I have already discussed, see note 27 and accompanying text supra, departs from *Williams* specific holding that the Court of Claims was not an article III court, and it may reject by implication *Williams* surprising conclusion that suits against the United States are outside article III. But nothing in *Glidden* purports to disturb the *Williams* principle that only an article III court can exercise article III powers within the states; Justice Harlan merely "assumed" without deciding that Congress had a choice whether to entrust the business there in issue to either a legislative or a constitutional court. 370 U.S. at 534, 541. Indeed, the same opinion's unequivocal acknowledgment that article III gave the parties in federal court a right to a tenured judge makes it seem highly questionable that Justice Harlan would really have allowed the right to be circumvented by transferring jurisdiction to an article I tribunal.

In any event, as explained at notes 84-87 and accompanying text infra, the bankruptcy case falls on the wrong side of any distinction that might be drawn between the two situations.

75. 285 U.S. 22 (1932).
BANKRUPTCY JUDGES

. . .” Murray and Bakelite, the Court conceded, had both involved government litigation, while Crowell was a case “of private right, that is, of the liability of one individual to another under the law as defined.” Nevertheless, even in private cases, “there is no requirement that . . . all determinations of fact in constitutional courts shall be made by judges.”* Juries and masters traditionally made such determinations, so it was all right for an administrative agency to do so—because the court was given power to redetermine all questions of law.

This is getting serious. In Crowell the Court flatly said that even in cases that did not meet the Murray standard—even in those inherently judicial—it was acceptable to commit the determination of facts to nontenured officials so long as article III judges reviewed the law. In effect that seems to mean that the constitutional guarantees of tenure and irreducible salary apply only to the judges of the highest court with jurisdiction to review the case, although the Constitution expressly states that they apply to “inferior” courts as well. However, this entire passage was dictum, since the result in Crowell was to affirm the order setting aside the administrator’s award, on the ground that the trial court had properly held a trial de novo on the factual question whether a master-servant relationship existed between the parties. In reaching the latter conclusion, moreover, the Court essentially demolished the basis for its troublesome dictum that administrators could be entrusted in private cases with the final determination of facts: To allow Congress to “substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency . . . for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend,” wrote Chief Justice Hughes, “would be to sap the ju-

76. Id. at 50.
77. Id. at 51. As Justice Brandeis observed in dissent, this formulation itself appeared to broaden the Bakelite category, for neither Murray nor Bakelite had suggested that all Government business could be transacted outside the article III courts. Id. at 87 n.23. Yet Crowell’s obiter restatement was repeated in the context of substituting administrators for civil juries in Atlas Roofing Co. v. OSHRC, 430 U.S. 442 (1977): “Our prior cases support administrative factfinding in only those situations involving ‘public rights,’ e.g., where the Government is involved in its sovereign capacity . . .. Wholly private tort, contract, and property cases as well as a vast range of other cases as well are not at all implicated.” Id. at 458. In terms of the purposes underlying the constitutional provisions this distinction seems quite backwards with respect both to independent judges and to the jury: the greatest need to keep the power of decision out of the hands of ordinary government officials arises in cases to which the Government itself is a party.
78. 285 U.S. at 51.
79. Id. at 49, 51-54.
80. Id. at 65.
dicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, whenever fundamental rights depend, as not infrequently they do depend, upon the facts . . . .”

Even if the Crowell dictum is accepted as precedent, it does not sustain the provision for nontenured bankruptcy judges. The fundamental difference between the bankruptcy case and Crowell is that in the Longshoremen’s case Congress did not simply vest jurisdiction in an ordinary court and deny its judges tenure; it created a separate administrative agency with distinctive nonjudicial procedures and without the power to enforce its own decisions. The administrator was to make his own investigation of the facts, and at the hearing he was bound neither by traditional procedures nor by the rules of evidence. Conversely, the agency in Crowell, like other administrative bodies, had no power to enforce subpoenas, to execute its orders, or to enforce other legal process without recourse to a constitutional court; it had no contempt powers; it could not issue writs of habeas corpus. Significantly, in upholding the statute against a due process objection, the Court stressed Congress’ purpose “to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task.” In other words, the Crowell dictum allows Congress, under certain circumstances, in response to the demonstrated inadequacy of judicial processes, to enlist the aid of nonjudicial agencies without the power to enforce their own orders. It is not authority for allowing nontenured judges to exercise the jurisdiction vested by statute in article III courts themselves.

81. Id. at 56-57. In the obiter section of its opinion the Court had attempted to justify leaving certain factual determinations to the administrator by analogy to the functions of juries and special masters. Id. at 49, 51-54. In holding a de novo review required on the issue of employment, however, the Court demonstrated that the analogy was not persuasive: both juries and masters, unlike the administrator, acted under judicial supervision, and a master's report was “essentially advisory, a distinction of controlling importance when questions of a fundamental character are in issue.” Id. at 61. The Court might have added that juries, unlike administrative agencies, were required by the seventh amendment and thus could hardly have been held unconstitutional.

82. Id. at 43.

83. Id. at 45-48.

84. Id. at 46.

85. See Krattenmaker, Article III and Judicial Independence: Why the New Bankruptcy Courts Are Unconstitutional, 70 Geo. L.J. 297 (1981): “[O]nly a virtually willful inattention to detail could cause one to miss the difference between officers who are and officers who are not empowered to issue final judgments, to enforce their own monetary awards, to conduct all manner of civil proceedings that
Indeed, the bankruptcy provision runs squarely counter to the flat statement of Justice Harlan in Glidden Co. v. Zdanok that a litigant in an article III court has a right to be tried by an article III judge.\textsuperscript{86} The petitioners in Glidden had been litigants in article III cases in the federal courts, and their cases had been heard by judges of the Court of Claims and the Court of Customs and Patent Appeals. They argued that their rights had been infringed because these judges did not enjoy life tenure. The Court rejected the claim on the merits because it concluded that the judges in question were protected by article III. But the Harlan opinion made perfectly clear the result would have been otherwise had they not been so protected: “Article III, § 1 . . . is explicit and gives the petitioners a basis of complaint. . . .”\textsuperscript{87} Thus while the Crowell dictum intimates that Congress may transfer even some private cases to administrative agencies subject to judicial review of questions of law, Glidden reaffirms the plain command of the Constitution that the litigant in an article III court has a right to an article III judge, and that means the bankruptcy provision is unconstitutional.

Moreover, the special factors relied on in Crowell to support federal district courts may conduct, including jury trials.” \textit{Id.} at 308-09. This distinction was also suggested by the 1977 decision in Atlas Roofing Co. v. OSHRC, 430 U.S. 442 (1977), where the Court, in holding the seventh amendment did not require a jury in administrative proceedings to collect a money penalty, assumed that a jury would be required if the same proceeding were conducted in a federal court, as an earlier decision had indicated. \textit{Id.} at 449 n.6, citing Hepner v. United States, 213 U.S. 103 (1909) (dictum). In Atlas, the Court stated: “[E]ven if the Seventh Amendment would have required a jury where the adjudication . . . is assigned instead to a federal court of law . . . ,” Congress is “not . . . prevented from committing some new types of litigation to administrative agencies with special competence in the relevant field.” 430 U.S. at 455. Quoting a prior statement that “the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication,” \textit{id.} at 454, quoting Pernell v. Southall Realty, 416 U.S. 363, 383 (1974) (dictum), the Court in Atlas, as in Crowell, stressed that Congress had rejected traditional judicial remedies as inadequate, and stated flatly that “the right to a jury trial turns not solely on the nature of the issue to be resolved, but also on the forum in which it is to be resolved,” and concluded that “[t]he Seventh Amendment is no bar to the creation of new rights or to their enforcement outside the regular courts of law.” 430 U.S. at 461 (emphasis added).

\textsuperscript{86} 370 U.S. at 533.

\textsuperscript{87} \textit{Id.} Justice Harlan spoke for only three Justices in Glidden, but it seems clear that the entire Court agreed with him on this point. The concurring Justices also resolved on the merits the issue of the article III status of the Courts of Claims and of Customs and Patent Appeals, which they would not have had to do if there had been no right to an article III judge. \textit{Id.} at 585-89 (Warren, C.J., Clark, J., concurring). The two dissenters, who with Harlan and those joining him made a majority, concluded that the assignment of those judges was unconstitutional—necessarily implying that the litigants had a right to be tried by an article III judge. \textit{Id.} at 589-606 (Douglas, Black, JJ., dissenting).
the creation of even an administrative agency are not present in the bankruptcy case. Congress expressed no dissatisfaction with the established practice of resolving bankruptcy matters by ordinary judicial processes; it did not confer nonjudicial authority on the bankruptcy judges; it did not relax traditional adversary procedures or suspend the rules of evidence. The caseload problems and the need for expedition and expertise, which the Government stressed in its brief in Northern Pipeline, could have been satisfied just as well by creating a specialized court under article III.88

X

In United States v. Raddatz89 in 1980 the Court did uphold a provision of the Federal Magistrates Act authorizing the use of nontenured personnel in an article III court itself.90 Yet there are two critical distinctions between that case and the bankruptcy situation that deprive Raddatz of any governing force. First, the statute in Raddatz merely gave the judge himself discretion to refer issues to a magistrate,91 while the bankruptcy law of its own force transfers jurisdiction to a bankruptcy judge. The constitutionality of the Supreme Court’s power to deny certiorari92 is no precedent for the power of Congress to deprive the Court of jurisdiction over the same cases. Similarly, since the principal purpose of the tenure and salary clauses was to assure judicial independence from the legislative and executive branches, giving a judge power to invoke the aid of another is not the same for constitutional purposes as requiring someone else to decide the case.

The second difference between the bankruptcy case and Raddatz is equally compelling. The Magistrates Act expressly directed the district judge to “make a de novo determination” of any decision “to which objection is made.”93 The Court emphasized that under the Magistrates Act “the district court judge alone acts as the ultimate decisionmaker”94 and that “the entire process takes place under the district court’s total control and jurisdiction.”95 Only because the statute provided that the magistrate’s proposed findings and recommendations were to be subject to de novo redetermination by the judge, “who . . . then exercise[s] the

88. See 102 S. Ct. at 2873 n.28.
89. 447 U.S. 667, reh’g denied, 448 U.S. 916 (1980).
90. Id. at 683.
91. Id. at 669.
94. 447 U.S. at 680.
95. Id. at 681.
ultimate authority to issue an appropriate order,"96 did the Supreme Court conclude that such a limited delegation did not violate article III. The Court added specifically that "[w]e need not decide whether, as suggested by the Government, Congress could constitutionally have delegated the task of rendering a final decision on a suppression motion to a non-Art. III officer."97 Thus the powers upheld in Raddatz were, as the Court had said of masters in Crowell v. Benson, "essentially advisory;" and Raddatz is no authority for the creation of nontenured bankruptcy judges whose decisions are subject only to normal (and limited) appellate review.98

XI

The Government argued in Northern Pipeline that the 1978 bankruptcy judge provisions should be upheld because they were not substantially different from the prior practice of bankruptcy referees "that had operated for many years without constitutional challenge."99

The first answer to this contention is that the old referee system was never held to be constitutional.100 The second is that the system as it stood in 1978 was the result of gradual changes over time: it did not represent long settled practice. The third is that even in its final form the referee practice differed from the 1978 provisions in several constitutionally significant respects.

Under the 1938 statute the judge retained power to determine whether or not to refer a case to a referee, for the statute authorized reference by the clerk "unless the judge or judges direct otherwise."101 Moreover, the act then provided, as it had since 1898, that a referee's actions were "subject always to a review by the judge;"102 and although a 1939 General Order adopted by the Supreme Court provided in general that the judge "shall accept his

96. Id. at 682.
97. Id. at 681.
98. See also 102 S. Ct. at 2875-77.
100. Katchen v. Landy, 382 U.S. 323 (1966), invoked by dissenting Justice White in Northern Pipeline, 102 S. Ct. at 2886, did not address the question. As early as 1805 Chief Justice Marshall made clear that even jurisdictional issues could not be taken as settled by decisions in cases in which they were not raised: "No question was made, in that case, as to the jurisdiction. It passed sub silentio, and the court does not consider itself as bound by that case." United States v. More, 7 U.S. (3 Cranch) 159, 172 (1805).
102. Id. at § 68.
findings of fact unless clearly erroneous," the same order gave the judge authority both to provide "otherwise . . . in the order of reference" and to "receive further evidence" on his own.

While the Bankruptcy Rules adopted by the Court in 1973 made the reference automatic and eliminated the judge's power to take new evidence after receiving a referee's report, they gave the judge authority to "withdraw a case in whole or in part" after it had been referred. As in the case of the magistrates in Raddatz, any limitation of the judge's authority to determine any issue in a bankruptcy case was entirely voluntary on the part of the judge. Under the 1978 Bankruptcy Act, however, this authority was limited by Congress. Moreover, as illustrated by the Northern Pipeline case, the 1978 act dramatically extended the jurisdiction of the bankruptcy judges. The claim in question was an ordinary contract and tort claim on behalf of the bankrupt estate against a third party; it could not have been tried in the bankruptcy proceeding before 1978 without the parties' consent. Any such claim could be so tried under the 1978 statute. The enormous range of this new authority eliminated any legitimate basis for contending that the bankruptcy judges exercised only a narrow and specialized portion of district court business. If the bankruptcy provision had been sustained, it is difficult to see that there would have been any significant limit to Congress's power to destroy the independence of federal judges.

103. Gen. Order in Bankr. no. 47, 305 U.S. 677, 702 (1939); and 102 S. Ct. at 2876 n.31.
104. Id.
105. FED. R. BANKR. P. 102(a).
106. Id. at 810.
107. Id. at 102(b).
108. See 102 S. Ct. at 2885 (White, J., dissenting). The government argued that the removal of the consent requirements was irrelevant because "subject matter jurisdiction could not have been waived by the parties." Brief for Appellant at 13, Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858 (1982). The term "subject matter jurisdiction," which embraces a variety of disparate limitations, serves only to obscure the real issue. The reason certain subject matter limitations cannot be waived is that they serve interests the parties cannot be expected to protect, such as noninterference with matters reserved to the state courts. Subject matter limitations designed for the protection of the parties, in contrast, can be waived. In Clark v. Barnard, 108 U.S. 436 (1883), where the objection was made that the suit had effectively been "brought against a State by citizens of another State," the Court upheld jurisdiction despite its assumption that the suit was forbidden by the eleventh amendment: "The immunity from suit belonging to a State, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure. . . ." Id. at 447. This analysis applies equally to the tenure and salary provisions of article III, which, as the authorities quoted above demonstrate, was designed as a protection for the parties from the risk of legislative or executive pressure on judicial decision.
For all these reasons the earlier system of bankruptcy referees was no precedent for sustaining the authority of the new bankruptcy judges.109

XII

Speaking for four Justices in Northern Pipeline, Justice Brennan distinguished the precedents much as I have done, concluding that "legislative courts"—those not satisfying article III—were permissible only in three distinct situations: in geographical areas such as the Territories and the District of Columbia where the Court had found ordinary separation-of-powers principles inapplicable; in historically separate military proceedings influenced by the exception in the fifth amendment; and in cases involving "public rights" historically subject to nonjudicial determination, as in Bakelite.110 To his treatment of Crowell and Raddatz I shall return in a later section.111

Terming Justice Brennan’s distinctions unsatisfactory, the dissenters argued that the precedents required article III to be read "as expressing one value that must be balanced against competing constitutional values and legislative responsibilities."112 The availability of appellate review of a bankruptcy judge’s decisions "provides a firm check on the ability of the political institutions of government to ignore or transgress constitutional limits on their own authority;"113 there was no serious argument that the statute "represents an attempt by the political branches of government to aggrandize themselves at the expense of the third branch," since "[b]ankruptcy matters are, for the most part, private adjudications of little political significance;"114 and the enormous number of bankruptcy cases was a strong justification for the creation of a tribunal outside article III.115

If I were to agree with Justice White’s criteria for evaluating the constitutionality of nontenured arbiters, I would still reject his conclusions respecting bankruptcy judges; any need for additional or expert arbiters could as easily have been met without compromising values underlying article III.116 But my more fundamental

109. 102 S. Ct. at 2876 n.31.
110. Id. at 2868-71.
111. See notes 116-26 and accompanying text infra.
112. 102 S. Ct. at 2893 (White, J., dissenting).
113. Id. at 2894.
114. Id. at 2895.
115. Id. at 2895-96.
116. See note 87 and accompanying text supra. Justice White argued to the contrary that "[t]he addition of several hundred specialists may substantially change,
objection is to his reading of the precedents. The distinctions Justice Brennan and I have drawn are not our own invention: they are in most cases those drawn by the Court itself in the very precedents Justice White invokes. Whether or not those distinctions make sense as an original matter, it seems questionable to argue that prior decisions require the abandonment of the very reasoning on which they were based.

XIII

The most difficult precedent for Justice Brennan, as for me, was the workmen’s-compensation case of Crowell v. Benson. In dealing with this precedent, Justice Brennan and I part company; and in his treatment of Crowell I perceive the risk of further encroachments on the principles of article III.

First, Justice Brennan attempts to assimilate Crowell to Radatz as a case in which the administrator acted not as an independent “legislative court” but as an “adjunct” to the district court and subject to its control. Not only, as I have argued, was the administrator in Crowell required to go to court to enforce his orders; while his orders “were to be set aside if ‘not supported by the evidence,’ the judgments of the bankruptcy courts are apparently subject to review only under the more deferential ‘clearly erroneous’ standard.” Unfortunately Justice Brennan’s implication that the district judge in Crowell was required to review the administrator’s order de novo is refuted by the very passages in Crowell that he was attempting to distinguish; the Court there

whether for good or bad, the character of the federal bench,” 102 S. Ct. at 2895, but he did not explain why that was relevant to the constitutional question. He added that a possible future reduction in the number of bankruptcies might leave the courts with “the prospect of large numbers of idle federal judges.” Id. at 2896. A similar argument was once used to explain why nontenured judges could hear cases in the Territories, see Glidden v. Zdanok, 370 U.S. at 546-47, but it was abandoned when the territorial precedents were extended to the District of Columbia, which is not transitory. See notes 37-41 and accompanying text supra. More fundamentally, the suggestion that the bankruptcy judges are “transitory” goes much too far, for every grant of federal jurisdiction is subject to the contingency of later repeal. There have been repeated efforts to abolish the diversity jurisdiction, but that does not mean Congress could have vested that jurisdiction in nontenured judges. Indeed the repeal of the federal question jurisdiction conferred by the Judiciary Act of 1801 did render superfluous the services of sixteen new judges, but that did not mean their jurisdiction could have been given to a legislative court. The framers deliberately took the risk of a temporary surfeit of judges when they provided for tenure while giving Congress authority to establish courts “from time to time.” U.S. Const. art. III, § 1. The risk of surplus judges is the price of judicial independence, not an excuse for its destruction.

118. 102 S. Ct. at 2879.
said expressly that with the exception of two narrow categories of "jurisdictional" facts, de novo review was not constitutionally re-

119. Possibly Justice Brennan's reformulation may be taken to have modified the Crowell dictum, and for that I should be grateful. I fear, however, that it may rather be disregarded as an accidental mistake unnecessary to the result in Northern Pipeline, for Justice Brennan had a second and more disturbing basis of distinction.

Crowell, wrote Justice Brennan, sustained Congress's author-

120. Why this mattered was suggested by the following quotation:

[W]hen Congress creates a statutory right, it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies; it may also provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right. Such provisions do, in a sense, affect the exercise of judicial power, but they are also incidental to Congress' power to define the right it has created. No comparable justification exists, however, when the right being ad-

121. If by this passage Justice Brennan meant to say that Congress may establish nontenured trial courts for all congressionally cre-

122. Moreover, Justice Brennan's distinction does not have the advantage of being derived from precedent; it is essentially new. He does point out that Crowell held certain constitutional questions were required to be reexamined by the court de novo, but he is forced to admit that that holding "has been undermined by later cases." 123.

More im-

123. More important, a special position for constitutional questions, however difficult to square with article III, would not help Justice Brennan's
conclusion in *Northern Pipeline*, where the issue was one of state law. Nothing in *Crowell* even faintly suggests the improbable conclusion that the separation of powers doctrine requires greater judicial independence in dealing with questions of state rather than of federal law.\(^{124}\)

Justice Brennan's argument is basically that the greater includes the less: Because Congress did not have to create a right of action at all, it could entrust the adjudication of claims it did create to anyone it pleased. This is an extension of the argument in *Bakelite*; that Congress may create legislative courts when it need not create courts at all.\(^{125}\) Because it is an extension, it is not compelled by *Bakelite*; and it is no more convincing than was the argument in *Bakelite* itself. The Constitution does not require Congress to create any federal right of action; but it leaves no doubt who is to decide "Cases ... arising under ... the Laws of the United States ..."\(^{126}\) In deciding an analogous question under the due process clause, Justice Brennan was with the majority in reaching a conclusion inconsistent with this dictum in *Northern Pipeline*: While a state is free to determine whether or not to create a property interest, once it has done so, the Constitution prescribes that that interest may not be taken away without due process of law.\(^{127}\)

XIV

Since Northern's claim against Marathon was a state-created one, and the district court's control over the proceeding was narrowly limited, Justice Brennan concluded that the bankruptcy judge could not constitutionally exercise jurisdiction over it; and because he was unable to conclude that Congress would have passed the other jurisdictional provisions if it had known of this conclusion, he decided that the entire provision for bankruptcy judges must fall.\(^{128}\) He did not, however, say that Congress was without power to correct the situation by simply excising from the bankruptcy judges' authority the adjudication of claims arising under state law. His stress on the fact that *Crowell* involved a federal claim suggests that such a solution might pass muster, as does the concession that "the restructuring of debtor-creditor relations ... may well be a 'public right.'"\(^{129}\) Moreover, Justices Rehnquist

\(^{124}\) See 102 S. Ct. at 2885 (White, J., dissenting).

\(^{125}\) See notes 56-60 and accompanying text *supra*.

\(^{126}\) U.S. CONST. art. III, § 2.


\(^{128}\) 102 S. Ct. at 2878-80 & n.40.

\(^{129}\) Id. at 2871.
and O'Connor wrote separately to stress that there was no occasion to decide anything more than the unconstitutionality of having the bankruptcy judge determine Northern's state-law claim. Unfortunately, the concurring Justices did not say whether they agreed with Justice Brennan's reasons for holding that article III forbade the bankruptcy judge to decide this claim; they said only that "[n]one of the cases has gone so far . . ." Chief Justice Burger, who joined Justice White's dissent, added that he thought the Court had left it open to Congress to solve the problem "simply by providing that ancillary common-law actions, such as the one involved in this case, be routed to the United States district court . . . ." Justice Brennan's discussion of the scope of judicial review suggests that the Chief Justice may have overstated his case. Yet in any event, the unfortunate distinction of Crowell and the narrow concurrence of Justices Rehnquist and O'Connor indicate that the Court may yet be willing to allow at least some extension of the powers of nontenured arbiters beyond those previously upheld.

CONCLUSION

In short, although I welcome the Northern Pipeline decision as calling a long overdue halt to the erosion of judicial independence, it is a far cry from the ringing endorsement of article III that I had hoped for. Indeed Justice Brennan's near concession that article III trial courts are not needed for any cases arising under federal statutes, while dictum, may foreshadow a major step in the wrong direction.

I would have stopped the decline of the tenure and salary requirements more decisively. Even if it was "too late" to overrule the unfortunate precedents, it was not necessary to extend them. There is still hope in Justice Brennan's effort to demonstrate that Crowell was after all a case subject to intensive judicial review, and in the fact that two members of the majority declined to express an opinion on cases not before them.

At the very least, Northern Pipeline is a refreshing reminder that the tenure and salary requirements cannot always be evaded by congressional whim. Not only do I believe that all constitutional provisions should be respected until altered by the prescribed process of amendment, I view the tenure and salary provisions as among those most central to the maintenance of our

130. Id. at 2880-82.
131. Id. at 2881.
132. Id. at 2882.
liberty. As William Rawle wrote in one of our earliest commentaries on the Constitution, if the people "value and wish to preserve their Constitution, they ought never to surrender the independence of their judges." 133