

Northern Pipeline Construction Co.

v.

Marathon Pipe Line Co.

1982

BANKRUPTCY REFORM ACT OF 1978

HEARINGS

BEFORE THE

SUBCOMMITTEE ON

IMPROVEMENTS IN JUDICIAL MACHINERY

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-FIFTH CONGRESS

FIRST SESSION

ON

S. 2266 and H.R. 8200

NOVEMBER 28, 29 AND DECEMBER 1, 1977

Printed for the use of the Committee on the Judiciary

**Federal Judicial Center
2020**

Central Question

DID THE BANKRUPTCY REFORM ACT OF 1978 VIOLATE THE CONSTITUTION BY GRANTING TOO MUCH JUDICIAL POWER TO BANKRUPTCY JUDGES?

Historical Context

Bankruptcy is a legal process that provides remedies to debtors who cannot pay all that they owe, as well as to their creditors. Typically, a trustee facilitates the collection of a debtor's property (other than property exempted by law), the liquidation, or conversion to money, of that property, and the distribution to creditors of the proceeds. In this way, creditors are made as whole as possible, while the debtor is released from further financial obligations to those creditors. Bankruptcy proceedings are overseen by courts, which resolve any disputes that arise with respect to the rights and obligations of the parties.

Article I, section 8 of the U.S. Constitution provided Congress with the authority to establish "uniform Laws on the subject of Bankruptcies throughout the United States." Bankruptcy was not discussed in detail at the Constitutional Convention, but James Madison described its purpose in *Federalist* no. 42 as follows: "The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question." Proponents of a federal bankruptcy scheme agreed with Madison that there could be no national economy based on interstate commerce without one; state laws on the subject would be insufficient because of their limited jurisdictional reach. Agrarian interests in the south and west generally opposed federal bankruptcy laws, arguing that they would be unduly oriented toward creditors, favoring commercial interests in the northeast. Periodic financial panics led to the passage of federal bankruptcy laws in 1800, 1841, and 1867, but political conflict caused all of these statutes to be short-lived. It was not until 1898, when a pro-bankruptcy Republican Party controlled Congress and the presidency, that a long-lasting statutory scheme was established.

Under the 1898 law, officials known as referees in bankruptcy had jurisdiction only over disputes having to do directly with the bankruptcy itself, while any related matters generally could be heard only by a U.S. district court or a state court. The referees were appointed and removable by the U.S. district court and were subject to a significant degree of control by the district judges. The judges of the district court could withdraw a bankruptcy case from a referee at any time, modify or reject any portion of a referee's findings, call for the submission of additional evidence, or send the case back to the referee with instructions for further proceedings.

The 1898 bankruptcy statute remained in place, without major modifications, for eighty years. The next substantial change came via the Bankruptcy Reform Act of 1978, which created U.S. bankruptcy courts for each district, with judges who were to be appointed by the President, with Senate confirmation, to fourteen-year terms. The Act gave the bankruptcy judges dramatically expanded powers compared with those held by their predecessors, the referees in bankruptcy. The new judges were granted exclusive jurisdiction over all cases arising under the bankruptcy laws as well as original, but not exclusive, jurisdiction over “all civil proceedings arising under” the bankruptcy laws or “arising in or related to” a bankruptcy case. It was this substantial grant of jurisdiction—to bankruptcy judges lacking the Article III attributes of “tenure during good behavior” and a salary that could not be diminished, both of which were meant to foster judicial independence—that was at the center of the dispute in *Northern Pipeline*.

Legal Debates Before *Northern Pipeline*

The Supreme Court first recognized an exception to the Article III mandate that federal judges be endowed with certain tenure and salary protections when it decided *American Insurance Company v. Canter* in 1828. In holding that the requirements of Article III did not apply in U.S. territories, Chief Justice John Marshall drew a distinction between “constitutional courts,” established under Article III to exercise the judicial power of the United States, and “legislative courts,” which were created to carry out functions delegated to them by Congress. The Article IV grant to Congress of plenary power over the territories, wrote Marshall, necessarily included the authority to create legislative courts, the jurisdiction of which did not stem from Article III. It remained to be seen, however, under what other circumstances Congress could delegate adjudicative tasks to non-Article III judges or officials.

In 1856, the Court decided *Murray’s Lessee v. Hoboken Land & Improvement Company*, which established what came to be called the “public rights” exception to Article III. The public rights doctrine recognized that certain issues, arising between the government and other parties, could be resolved by the executive or legislative branches without judicial intervention. In *Murray’s Lessee*, the Court upheld the action of the Treasury Department in issuing a warrant of distress to seize money, without a judicial procedure, from a customs collector who had embezzled it. “[T]here are matters,” the Court noted, “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.” This case, and others following it, helped to lay the foundation for

the modern administrative state, in which many different types of issues are adjudicated by executive branch officials rather than by Article III judges.

Another series of cases gave rise to the “adjunct” exception, which allowed certain matters to be decided by non-Article III officers who were supervised by Article III judges. In *Crowell v. Benson*, decided in 1932, the Supreme Court approved the role of the U.S. Employees’ Compensation Commission, an administrative agency, in making factual findings regarding workmen’s compensation claims. Because the Commission had no enforcement power, and its factual findings were subject to review and approval by a U.S. district court, the Court found the practice not to be an unconstitutional delegation of the Article III judicial power. Similarly, in the 1978 case of *United States v. Raddatz*, the Court upheld the Federal Magistrates Act, which permitted non-Article III magistrates (now called magistrate judges) to make initial determinations of various pretrial motions. The magistrates were subject to a high degree of control by the judges of the U.S. district court: the district judges appointed the magistrates and could remove them, the magistrates only reviewed motions the district judges referred to them, and the district judges maintained the ultimate decisional authority. Once again, therefore, the delegation of some functions to adjuncts lacking the tenure and salary protections of Article III was deemed constitutional.

The Case

Northern Pipeline Construction Company filed for bankruptcy in the District of Minnesota in 1980. Shortly thereafter, Northern Pipeline filed suit against Marathon Pipe Line Company for breach of contract and misrepresentation. Because the suit was a civil case related to a bankruptcy proceeding—in that it would affect the assets of the bankrupt company—the U.S. bankruptcy court had jurisdiction under the Bankruptcy Reform Act of 1978. Marathon moved to dismiss the suit on the grounds that the 1978 Act had unconstitutionally delegated the Article III judicial power to bankruptcy judges lacking the tenure and salary protections of Article III. The bankruptcy court denied the motion to dismiss, but on appeal, the U.S. district court dismissed the case, agreeing with Marathon’s position that the Act was unconstitutional. Both Northern Pipeline and the United States (which had intervened in the action to defend the validity of the statute) appealed to the Supreme Court of the United States. (A statute, since repealed, permitted a direct appeal from a U.S. district court to the Supreme Court when the United States was a party and a decision held an act of Congress to be unconstitutional.)

The Supreme Court’s Ruling

The Supreme Court ruled 6–3 that the 1978 Act’s broad grant of jurisdiction to bankruptcy judges not possessing the tenure and salary protections of Article III violated the

Constitution. The Act had delegated matters squarely within the judicial power of the United States to judges lacking the attributes designed to ensure their independence from the other branches of government. Four justices joined a plurality opinion (an opinion receiving the most votes from the justices, while falling short of a majority) written by Justice William Brennan, while two others concurred in the judgment in a separate opinion. Brennan's opinion identified three recognized exceptions to the general rule that the judicial power of the United States must be vested in Article III courts: territorial courts, military courts-martial, and courts adjudicating "public rights"—matters arising between the government and others, as opposed to cases involving the liability of one private party to another. The bankruptcy courts created by the 1978 Act, Brennan noted, did not fit within any of these exceptions; they operated within the states, could not be analogized to courts-martial, which arose from the Constitution's grant to the executive and legislative branches of authority over the military, and were clearly adjudicating private rights, such as Northern Pipeline's right to recover contract damages from Marathon.

Brennan's opinion also rejected the idea that the Constitution's grant to Congress of the power to make uniform bankruptcy laws throughout the United States included the right to create legislative courts to adjudicate bankruptcy-related controversies. Otherwise, wrote Brennan, Congress could create an Article I court corresponding to each specific grant of legislative authority in the Constitution. A system of specialized legislative courts would "threaten to supplant completely our system of adjudication in independent Art. III tribunals."

Lastly, the plurality dispensed with the appellants' argument that because the 1978 Act defined the bankruptcy court as an "adjunct" to the district court, the Act complied with the constitutional mandate that the judicial power be vested in Article III courts. Brennan pointed out that the Court had permitted adjuncts to engage in fact-finding in certain situations as long as "the essential attributes" of judicial power were retained by an Article III court. The Bankruptcy Reform Act, however, had given the bankruptcy judges all of the ordinary powers of U.S. district courts, thereby vesting them with the essential attributes of the judicial power. "In short," wrote Brennan, "the 'adjunct' bankruptcy courts created by the Act exercise jurisdiction behind the façade of a grant to the district courts, and are exercising powers far greater than those lodged in the adjuncts approved in either *Crowell* or *Raddatz*."

Justice William Rehnquist, in a concurring opinion, articulated narrower grounds for his vote to strike down the 1978 Act. None of the Court's previous opinions, he noted, had sanctioned the creation of an Article I court to hear a lawsuit such as Northern Pipeline's: "a traditional action[] at common law," with "no federal rule of decision" because "the claims ... arise entirely under state law." Rehnquist found it unnecessary to engage in

a longer analysis of the circumstances under which non-Article III adjudication would be permissible.

Justice Byron White wrote a dissenting opinion that was joined by two other justices. White rejected the plurality's notion of a clear rule, with three discrete exceptions, requiring judicial power to be vested in Article III courts. "There is no difference in principle," he wrote, "between the work that Congress may assign to an Art. I court and that which the Constitution assigns to Art. III courts." Article III, he asserted, "should be read as expressing one value that must be balanced against competing constitutional values and legislative responsibilities." In striking such a balance, White found it particularly significant that the decisions of the U.S. bankruptcy courts were subject to appellate review by Article III courts, and that bankruptcy matters were "for the most part, private adjudications of little political significance." The heavy demands bankruptcy placed on the judicial system, combined with the need for "extreme specialization," provided ample justification, in White's view, for the expanded jurisdiction of bankruptcy judges.

Aftermath and Legacy

The Court did not make its ruling retroactive, and stayed its judgment until October 1982 to allow Congress time to make necessary adjustments. Although the stay was later extended until late December, it expired before Congress was able to enact a new statutory scheme. In the interim, the courts operated under emergency bankruptcy rules proposed by the Judicial Conference of the United States (the group of judges serving as the national policy-making body for the federal courts) and adopted by the judicial councils of the circuits. Although the emergency rules were controversial, having been criticized by some as unworkable and contrary to the Supreme Court's holding in *Northern Pipeline*, they remained in effect until Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984.

The *Northern Pipeline* decision did not address the constitutionality of non-Article III judges' adjudication of traditional bankruptcy matters, as that issue was not presented in the case. While many policy makers advocated for the creation of Article III bankruptcy courts, the 1984 statute took a different approach. The Act declared each bankruptcy judge to be "a judicial officer of the district court" and gave those judges jurisdiction over bankruptcy matters as well as certain "core proceedings"—defined in detail by the statute—arising from those matters. In noncore proceedings, the bankruptcy judges were empowered to submit proposed findings of fact and conclusions of law to be considered by the district court before it entered a final judgment. Going forward, bankruptcy judges would be appointed by the U.S. courts of appeals rather than by the President and the Senate.

In 2011, the Supreme Court struck down as unconstitutional part of the “core” jurisdiction the 1984 Act granted to the bankruptcy judges. In *Stern v. Marshall*, the Court held that a bankruptcy judge lacked constitutional authority to enter final judgment on a counterclaim filed by an estate. The exercise of such a power, the Court noted, exceeded the limitations of Article III and was essentially the same jurisdiction the Court had found unconstitutional in *Northern Pipeline* with respect to the 1978 Act.

Discussion Questions

- Why did the framers of the Constitution provide tenure and salary protections for federal judges in Article III?
- Do you think the Supreme Court’s holding would have been the same if the dispute had been about a bankruptcy itself rather than a related matter? Why or why not?
- What factors does the Supreme Court consider in determining what issues may be adjudicated by non-Article III judges?
- Was it fair that the Supreme Court did not make its ruling in *Northern Pipeline* retroactive? Why or why not?

Documents

House Judiciary Committee, Report on Bankruptcy Reform Bill, September 8, 1977

During the legislative debates that ultimately led to the Bankruptcy Reform Act of 1978, the House Judiciary Committee issued a report advocating that the new bankruptcy courts be established pursuant to Article III. Although the Supreme Court had found the non-Article III courts of the District of Columbia to be constitutional in 1973, the committee believed that an exception made for a limited geographical area would not apply to a legislative area of national concern such as bankruptcy. The Court's ruling in Northern Pipeline proved the committee's warning to be correct.

In establishing an independent bankruptcy court, Congress must determine the constitutional status conferred upon the court, and the jurisdiction and powers of the court. Specifically, Congress must determine whether the judges of the court will hold office for a term of years or “during good behaviour.” H.R. 8200 proposes the establishment of Article III courts, with the proper constitutional safeguards, including the grant of tenure “during good behaviour.” There are both policy considerations and constitutional issues surrounding the question of tenure of the new bankruptcy bench....

[A] principal reason for the establishment of an independent court is to attract highly qualified judges. Life-tenure will contribute toward that goal. An attorney with a successful practice would be less likely to seek appointment to a fifteen year term, when the likelihood of reappointment at the expiration of the term is small....

The Supreme Court has made clear “that the requirements of Article III ... are applicable where laws of national applicability and affairs of national concern are at stake....” The Court went on to note, however, that those requirements “must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment.” ...

Professors [Herbert] Wechsler and [Paul] Mishkin appear to read the phrase “specialized areas” in *Palmore v. United States* as referring to legislative areas, rather than geographical areas. While the phrase is not free from ambiguity, the context in which it appears, and the case in which it was used, concerned laws of local application only: criminal laws that applied only to the District of Columbia and were without national applicability....

Professor [Thomas] Krattenmaker agrees with this limitation on the scope of *Palmore*:

The territories and the District of Columbia have been treated specially because they are special. In those cases Congress is not legislating (and its judges are not judging) against a background of state law and in an area where the Constitution was designed to limit federal power. Instead, in both situations, congressional powers are more analogous to those of [a] state legislature and there is less reason to read into Article III a requirement that all federal laws passed pursuant to such powers be committed for their application only to judges with tenure.

In conclusion,

When Congress decides to commit federal issues to a tribunal for judicial resolution, it must ordinarily tenure that tribunal. Any other reading of (Article III, section 1) simply reduces it to (1) a guarantee of tenure for Supreme Court justices and (2) a suggestion that Congress consider tenuring judges when any other federal court is established....

In sum, the Constitution suggests that an independent bankruptcy court must be created under Article III. Article III is the constitutional norm, and the limited circumstances in which the courts have permitted departure from the requirements of Article III are not present in the bankruptcy context. Even if they were present, the text of the Constitution and the case law indicate that a court created without regard to Article III most likely could not exercise the power needed by a bankruptcy court to carry out its proper functions. In view of Congress' independent obligation, and the congressional oath, to support the Constitution, the decision on this issue should not simply be thrown to the courts. Congress should establish the proposed bankruptcy court under Article III, with all of the protection that the framers intended for an independent judiciary.

Document Source: U.S. House of Representatives, Committee on the Judiciary, *Bankruptcy Reform Act of 1978*, H.R. Rep. 95-595, 95th Cong., 1st sess., September 8, 1977, at 21–22, 24, 26–27, 39.

Attorney General Griffin B. Bell, Testimony before the Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, November 29, 1977

The Department of Justice opposed granting bankruptcy judges the tenure and salary protections of Article III, agreeing with many judges that such a move would diminish the prestige of the U.S. district courts. As Attorney General Griffin Bell explained, the department's preferred solution was a bankruptcy court that would possess expanded jurisdiction but operate as an adjunct

of the district court rather than independently. This was the approach that Congress took in the 1978 Bankruptcy Reform Act, and of which the Supreme Court soon after disapproved, asserting that the adjunct bankruptcy courts exercised essential attributes of the judicial power “behind the facade” of a jurisdictional grant to the district courts.

I must emphasize at this point that the Department of Justice remains firmly opposed to the creation of Article III bankruptcy courts, courts which would not only parallel our U.S. district courts, but would, under some proposals, actually have more jurisdiction than our district courts. To create a second nation-wide system of tenured judges to parallel the existing district court system would, in our opinion, be the most fundamental change to our Federal court system since it was created in 1789. The judicial power of the United States under Article III of the Constitution should be exercised by a unitary system of courts of general jurisdiction—we have that system, the U.S. district courts. The price of bankruptcy reform should not be the diminution of the prestige and influence of our district courts.

Although the Department of Justice believes that a nontenured or Article I court raises constitutional questions, and, although we cannot support an independent tenured or Article III court for what I regard as sound policy reasons, we can support a bankruptcy court with new and expanded powers and resources that will, however, continue to operate as an adjunct of the district court.

Title II of your bill, S. 2266, does just that. The district courts would continue to have jurisdiction over bankruptcy matters, and the bankruptcy statute would continue to use the word “court” for reference to either the district court or the bankruptcy judge, the term “referee” being abandoned. But the bankruptcy judge would be upgraded and the appointing-reviewing authorities separated by proposed section 771 to title 28, U.S.C., which would authorize the judicial council of each circuit to appoint bankruptcy judges to twelve year terms to serve in each district of the circuit in numbers and at such locations as the Judicial Conference of the United States determines. Although the bankruptcy judges would not have the power to enjoin a court and contempts would constitute contempt of the district court, the bankruptcy judge would be empowered to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of the new title 11.

Document Source: U.S. Senate, Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, *Hearings on S. 2266 and H.R. 8200, Bankruptcy Reform Act of 1978*, 95th Cong., 1st sess., 1977, at 544.

Justice William J. Brennan, Plurality Opinion in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, June 28, 1982

Justice William Brennan wrote a plurality opinion in Northern Pipeline, which was joined by three other justices, while two others concurred separately. Brennan's opinion found that the 1978 bankruptcy courts were not covered by any of the three recognized exceptions to Article III's mandate of tenure during good behavior for federal judges. He also found that the bankruptcy judges exercised too much authority, and were subject to insufficient control by the district judges, for the "adjunct" exception to Article III to apply.

[T]his Court has identified three situations in which Art. III does not bar the creation of legislative courts. In each of these situations, the Court has recognized certain exceptional powers bestowed upon Congress by the Constitution or by historical consensus. Only in the face of such an exceptional grant of power has the Court declined to hold the authority of Congress subject to the general prescriptions of Art. III.

We discern no such exceptional grant of power applicable in the cases before us. The courts created by the Bankruptcy Act of 1978 do not lie exclusively outside the States of the Federal Union, like those in the District of Columbia and the Territories. Nor do the bankruptcy courts bear any resemblance to courts-martial, which are founded upon the Constitution's grant of plenary authority over the Nation's military forces to the Legislative and Executive Branches. Finally, the substantive legal rights at issue in the present action cannot be deemed "public rights." ... Appellant Northern's right to recover contract damages to augment its estate is "one of private right, that is, of the liability of one individual to another under the law as defined." ...

Recognizing that the present cases may not fall within the scope of any of our prior cases permitting the establishment of legislative courts, appellants argue that we should recognize an additional situation beyond the command of Art. III, sufficiently broad to sustain the Act. Appellants contend that Congress' constitutional authority to establish "uniform Laws on the subject of Bankruptcies throughout the United States," Art. I, § 8, cl. 4, carries with it an inherent power to establish legislative courts capable of adjudicating "bankruptcy-related controversies." ...

Appellants' contention, in essence, is that pursuant to any of its Art. I powers, Congress may create courts free of Art. III's requirements whenever it finds that course expedient. This contention has been rejected in previous cases...

The flaw in appellants' analysis is that it provides no limiting principle. It thus threatens to supplant completely our system of adjudication in independent Art. III tribunals and replace it with a system of "specialized" legislative courts...

Appellants advance a second argument for upholding the constitutionality of the Act: that “viewed within the entire judicial framework set up by Congress,” the bankruptcy court is merely an “adjunct” to the district court, and that the delegation of certain adjudicative functions to the bankruptcy court is accordingly consistent with the principle that the judicial power of the United States must be vested in Art. III courts....

First, it is clear that when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated—including the assignment to an adjunct of some functions historically performed by judges.... Second, the functions of the adjunct must be limited in such a way that “the essential attributes” of judicial power are retained in the Art. III court....

Many of the rights subject to adjudication by the Act’s bankruptcy courts ... are not of Congress’ creation.... Accordingly, Congress’ authority to control the manner in which that right is adjudicated, through assignment of historically judicial functions to a non-Art. III “adjunct,” plainly must be deemed at a minimum. Yet is equally plain that Congress has vested the “adjunct” bankruptcy judges with powers over Northern’s state-created right that far exceed the powers that it has vested in administrative agencies that adjudicate only rights of Congress’ own creation....

[T]he Act vests “all essential attributes” of the judicial power of the United States in the “adjunct” bankruptcy court.... [T]he subject-matter jurisdiction of the bankruptcy courts encompasses not only traditional matters of bankruptcy, but also “all civil proceedings arising under title 11 or arising in or *related to* cases under title 11.” ... [T]he bankruptcy courts exercise “*all of the jurisdiction*” conferred by the Act on the district courts ... exercise all ordinary powers of district courts ... [and] issue final judgments, which are binding and enforceable even in the absence of an appeal. In short, the “adjunct” bankruptcy courts created by the Act exercise jurisdiction behind the façade of a grant to the district courts....

We conclude that [the Act] has impermissibly removed most, if not all, of “the essential attributes of the judicial power” from the Art. III district court, and has vested those attributes in a non-Art. III adjunct. Such a grant of jurisdiction cannot be sustained as an exercise of Congress’ power to create adjuncts to Art. III courts.

Document Source: *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70–73, 76–77, 80–81, 84–87 (1982).

U.S. Representative Peter Rodino, Remarks on *Northern Pipeline* Decision, December 8, 1982

After Northern Pipeline, some members of Congress spoke out again in favor of Article III bankruptcy courts. As Representative Peter Rodino pointed out on the floor of the House, the Department of Justice had also come to believe that granting bankruptcy judges Article III status was the safest course of action. When Congress passed new reform legislation in 1984, however, it declared the bankruptcy judges to be judicial officers of the U.S. district courts while continuing to provide for a limited term of office.

Mr. Speaker, at a time of 10.8 percent national unemployment and business bankruptcies running at the highest rate since the depression, the Nation's bankruptcy court structure is in danger of collapsing, unless Congress acts to correct the constitutional defect in the court by December 24.

This is not a partisan issue. The impending constitutional crisis in the judicial system may have serious economic ramifications. The responsibility rests clearly with the Congress as the Supreme Court has now twice afforded Congress the opportunity to solve what the Court itself recognized as a critical economic problem....

The Judiciary Committee has spent many hours examining this problem, consulting constitutional scholars and bankruptcy experts, and reviewing possible alternatives. In light of the reasoning and holding of the *Northern Pipeline* decision, the importance of expedition in bankruptcy cases, and the present workload of the Federal district courts, an article III bankruptcy court is the only clearly constitutional and workable solution to the problem created by the Supreme Court's ruling.

The Justice Department has also conducted a detailed examination of the available options. In testimony before the Senate Judiciary Subcommittee on Courts on November 10, 1982, Jonathan C. Rose, Assistant Attorney General, Department of Justice, stated: ...

The Judicial Conference has argued that the decision in *Northern Pipeline* should be read to require only that actions at common law arising under state law must be decided by an Article III tribunal. It is apparently the view of the Judicial Conference that matters "arising under" bankruptcy law do not entail issues of state common law and, accordingly, may be constitutionally considered by an Article I tribunal.

The analysis and proposal offered by the Judicial Conference present a number of problems. First, we would not advise Congress to base its legislative solution to this problem on the speculation that the more narrow construction of *Northern Pipeline* advanced by the Judicial Conference will ultimately prevail in the Supreme Court. Second, even under the construction of *Northern Pipeline*

advanced by the Judicial Conference, there may be significant constitutional problems in attempting to adjudicate a large proportion of the matters arising under bankruptcy law in an Article I tribunal. Cases arising under bankruptcy law frequently entail consideration of state law or traditional common law issues in many different contexts....

Finally, the Judicial Conference proposal would reduce the efficiency of the bankruptcy system established in 1978 by bifurcating proceedings between an Article I and an Article III tribunal. One of the most important purposes of the 1978 reforms was the consolidation of bankruptcy proceedings before a single forum with jurisdiction over all relevant matters. This put an end to costly delays and jurisdictional litigation which had plagued bankruptcy adjudication prior to 1978. The bifurcated system proposed by the Judicial Conference would resurrect some of these same problems. Moreover, it would place an additional caseload of uncertain dimensions on already overcrowded district court calendars.

For these reasons, the Department has concluded that only an Article III approach will provide the workable and constitutional solution that is essential to assure the continued integrity of the bankruptcy system.

Document Source: *Congressional Record*, 97th Cong., 2nd sess., 1982, 128, pt. 21:29512-29515.

Supreme Court of the United States, Opinion in *Stern v. Marshall*, June 23, 2011

In the 1984 bankruptcy act, Congress distinguished between “core” proceedings, sufficiently related to bankruptcy cases to be resolved by bankruptcy judges, and “noncore” matters, for which bankruptcy judges could only propose findings of fact and conclusions of law to the district court. In 2011, the Supreme Court found the definition of core matters to be unconstitutionally broad. When exercising jurisdiction over a counterclaim against a bankrupt estate, to which state common law applied, the bankruptcy court was carrying out “the judicial power of the United States” to same extent it had under the invalid 1978 act.

After our decision in *Northern Pipeline*, Congress revised the statutes governing bankruptcy jurisdiction and bankruptcy judges. In the 1984 Act, Congress provided that the judges of the new bankruptcy courts would be appointed by the courts of appeals for the circuits in which their districts are located.... And, as we have explained, Congress

permitted the newly constituted bankruptcy courts to enter final judgments only in “core” proceedings....

With respect to such “core” matters, however, the bankruptcy courts under the 1984 Act exercise the same powers they wielded under the Bankruptcy Act of 1978[.] ... As in *Northern Pipeline*, for example, the newly constituted bankruptcy courts are charged ... with resolving “[a]ll matters of fact and law in whatever domains of the law to which” a counterclaim may lead.... As in *Northern Pipeline*, the new courts in core proceedings “issue final judgments, which are binding and enforceable even in the absence of an appeal.” ... And, as in *Northern Pipeline*, the district courts review the judgments of the bankruptcy courts in core proceedings only under the usual limited appellate standards. That requires marked deference to, among other things, the bankruptcy judges’ findings of fact....

Vickie and the dissent argue that the Bankruptcy Court’s entry of final judgement on her state common law counterclaim was constitutional, despite the similarities between the bankruptcy courts under the 1978 Act and those exercising core jurisdiction under the 1984 Act. We disagree. It is clear that the Bankruptcy Court in this case exercised the “judicial Power of the United States” in purporting to resolve and enter final judgment on a state common law claim, just as the court did in *Northern Pipeline*. No “public right” exception excuses the failure to comply with Article III in doing so, any more than in *Northern Pipeline*....

Nor can the bankruptcy courts under the 1984 Act be dismissed as mere adjuncts of Article III courts, any more than could the bankruptcy courts under the 1978 Act. The judicial powers the courts exercise in cases such as this remain the same, and a court exercising such broad powers is no mere adjunct of anyone....

Shortly after *Northern Pipeline*, the Court rejected the limitation of the public rights exception to actions involving the Government as a party. The Court has continued, however, to limit the exception to cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert Government agency is deemed essential to a limited regulatory objective within the agency’s authority. In other words, it is still the case that what makes a right “public” rather than private is that the right is integrally related to particular Federal Government action....

The dissent reads our cases differently, and in particular contends that more recent cases view *Northern Pipeline* as “establish[ing] only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review.” ... Just so: Substitute “tort” for “contract,” and that statement directly covers this case.

We recognize that there may be instances in which the distinction between public and private rights—at least as framed by some of our recent cases—fails to provide concrete guidance as to whether, for example, a particular agency can adjudicate legal issues under a substantive regulatory scheme. Given the extent to which this case is so markedly distinct from the agency cases discussing the public rights exception in the context of such a regime, however, we do not in this opinion express any view on how the doctrine might apply in that different context.

What is plain here is that this case involves the most prototypical exercise of judicial power: the entry of a final, binding judgment *by a court* with broad substantive jurisdiction, on a common law cause of action, when the action neither derives from nor depends upon any agency regulatory regime. If such an exercise of judicial power may nonetheless be taken from the Article III Judiciary simply by deeming it part of some amorphous “public right,” then Article III would be transformed from the guardian of individual liberty and separation of powers we have long recognized into mere wishful thinking.

Document Source: *Stern v. Marshall*, 564 U.S. 462, 486–88, 490–91, 494–95 (2011).

Kenneth G. Coffin, *Barry Law Review*, 2011

In a 2011 article, attorney Kenneth Coffin asserted that the Supreme Court had encountered difficulty in trying to establish a clear distinction between Article III and Article I courts. The existing case law could not be synthesized into a coherent whole, he argued. Coffin suggested that the separation of powers, and not a precise definition of “the judicial power,” was at the heart of any inquiry into whether Congress could create a non-Article III tribunal. In his view, the primary focus should be on whether a particular delegation of authority away from the judicial branch would encroach upon the judiciary’s domain.

If we are to take the writings of the Framers seriously; if we believe there exists an important relationship between Article III and judicial independence; what limits should be placed on the creation and proliferation of Article I courts? Over the past century, with the rapid expansion of the administrative state and concomitant increase in administrative law judges, the Supreme Court has struggled to articulate a limiting principle...

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

Justice Brennan's neat exceptions, eschewing the search for a workable bright line rule and arguing instead for a balancing test.

Justice Brennan's opinion calls upon the judiciary to articulate a workable theory to limit Congressional use of legislative courts. As such, this paper will analyze possible limitations on Congress' Article I power, concluding that separation of powers jurisprudence offers a practical and appropriate manner in which to check Congressional overreach.... Separation of powers jurisprudence lurks beneath, and helps explain, the vast majority of Article III cases over the past 200 years. Aside from providing a (slightly) firmer base of judicial precedent, separation of powers law can operate as a true check on Congressional overreach without endangering the administrative state. It can both unify (to the extent possible) prior case law and provide a pragmatic answer to modern Article III issues.

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

Second, separation of powers doctrine can explain the vast majority of extant case law, particularly *Murray's Lessee* and its progeny. While *Canter* never specifically mentioned structural concerns, Chief Justice Marshall nonetheless implicitly argues that the Congress, as sole sovereign of the territories, properly exercises the full panoply of governmental powers therein.... While not perfect, separation of powers doctrine would leave the realm of the territories to congressional oversight in accord with *Canter*.

In *Murray's Lessee*, the reliance upon institutional competence and constitutional structure is far more obvious.... In essence, Congress' power to order summary proceedings to collect revenues from Treasury officials is incident to their power to collect revenue.... At their base, both *Canter* and *Murray's Lessee* admit of clear separation of powers rulings, where obviously judicial acts inhere in either legislative or executive powers.

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

This discussion of past case law, however, does not purport to be anything more than a rough fit. . . . [T]he cases do not admit of synthesis. They do, however, bespeak a single underlying rationale: to protect the independence of the judiciary. Separation of powers law underlies many of these decisions, not the “legislative interest” referenced by Justice White. The Court must acknowledge this fact and move separation of powers arguments to the center of Article III law, rather than sequestering them to mere asides and flowery references to Hamilton and Madison.

Document Source: Kenneth G. Coffin, “Limiting Legislative Courts: Protecting Article III from Article I Evisceration,” *Barry Law Review* 16, no. 1 (Spring 2011): 2–3, 17–19 (footnotes omitted).

Cases that Shaped the Federal Courts

This series includes case summaries, discussion questions, and excerpted documents related to cases that had a major institutional impact on the federal courts. The cases address a range of political and legal issues including the types of controversies federal courts could hear, judicial independence, the scope and meaning of “the judicial power,” remedies, judicial review, the relationship between federal judicial power and states’ rights, and the ability of federal judges to perform work outside of the courtroom.

- *Hayburn’s Case* (1792). Could Congress require the federal courts to perform non-judicial duties?
- *Chisholm v. Georgia* (1793). Could states be sued in federal court by individual citizens of another state?
- *Marbury v. Madison* (1803). Could federal courts invalidate laws made by Congress that violated the Constitution?
- *Fletcher v. Peck* (1810). Could federal courts strike down state laws that violated the Constitution?
- *United States v. Hudson and Goodwin* (1812). Did the federal courts have jurisdiction over crimes not defined by Congress?
- *Martin v. Hunter’s Lessee* (1816). Were state courts bound to follow decisions issued by the Supreme Court of the United States?
- *Osborn v. Bank of the United States* (1824). Could Congress grant the Bank of the United States the right to sue and be sued in the federal courts?
- *American Insurance Co. v. Canter* (1828). Did the Constitution require Congress to give judges of territorial courts the same tenure and salary protections afforded to judges of federal courts located in the states?
- *Louisville, Cincinnati, and Charleston Rail-road Co. v. Letson* (1844). Should a corporation be considered a citizen of a state for purposes of federal jurisdiction?
- *Ableman v. Booth* (1859). Could state courts issue writs of habeas corpus against federal authorities?
- *Gordon v. United States* (1865). Could the Supreme Court hear an appeal from a federal court whose judgments were subject to revision by the executive branch?
- *Ex parte McCardle* (1869). Could Congress remove a pending appeal from the Supreme Court’s jurisdiction?
- *Ex parte Young* (1908). Could a federal court stop a state official from enforcing an allegedly unconstitutional state law?
- *Moore v. Dempsey* (1923). How closely should federal courts review the fairness of state criminal trials on petitions for writs of habeas corpus?

- *Frothingham v. Mellon* (1923). Was being a taxpayer sufficient to give a plaintiff the right to challenge the constitutionality of a federal statute?
- *Crowell v. Benson* (1932). What standard should courts apply when reviewing the decisions of executive agencies?
- *Erie Railroad Co. v. Tompkins* (1938). What source of law were federal courts to use in cases where no statute applied and the parties were from different states?
- *Railroad Commission of Texas v. Pullman Co.* (1941). When should a federal court abstain from deciding a legal issue in order to allow a state court to resolve it?
- *Brown v. Allen* (1953). What procedures should federal courts use to evaluate the fairness of state trials in habeas corpus cases?
- *Monroe v. Pape* (1961). Did the Ku Klux Klan Act of 1871 permit lawsuits in federal court against police officers who violated the constitutional rights of suspects without authorization from the state?
- *Baker v. Carr* (1962). Could a federal court hear a constitutional challenge to a state's apportionment plan for the election of state legislators?
- *Glidden Co. v. Zdanok* (1962). Were the Court of Claims and the Court of Customs Appeals "constitutional courts" exercising judicial power, or "legislative courts" exercising powers of Congress?
- *United States v. Allocco* (1962). Were presidential recess appointments to the federal courts constitutional?
- *Walker v. City of Birmingham* (1967). Could civil rights protestors challenge the constitutionality of a state court injunction, having already been charged with contempt of court for violating the injunction?
- *Bivens v. Six Unknown Named Agents* (1971). Did the Fourth Amendment create an implied right to sue officials who conducted illegal searches and seizures?
- *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* (1982). Did the Bankruptcy Reform Act of 1978 violate the Constitution by granting too much judicial power to bankruptcy judges?
- *Morrison v. Olson* (1988). Could Congress empower federal judges to appoint independent counsel investigating executive branch officials?
- *Mistretta v. United States* (1989). Could Congress create an independent judicial agency to guide courts in setting criminal sentences?
- *Lujan v. Defenders of Wildlife* (1992). Could an environmental organization sue the federal government to challenge a regulation regarding protected species?
- *City of Boerne v. Flores* (1997). Could Congress reverse the Supreme Court's interpretation of the Constitution through a statute purportedly enforcing the Fourteenth Amendment?