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Constitutional Law - Article III: A Clear Test for the Constitutionality of Non-Article III Courts - Northern Pipeline Construction Co. v. Marathon Pipe Line Co.

Thomas E. Atkinson, II

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CASE NOTES

CONSTITUTIONAL LAW—Article III: A Clear Test for the Constitutionality of Non-Article III Courts. Northern Pipeline Construction Co. v. Marathon Pipe Line Co., _____ U.S. _____, 102 S.Ct. 2858 (1982).

Northern Pipeline Construction Company (Northern) filed suit against Marathon Pipe Line Company (Marathon) on March 8, 1979 in the United States District Court for the Western District of Kentucky.¹ Northern sought damages for alleged breach of contract, breach of warranty, misrepresentation, coercion, and duress.² In January 1980, Northern filed a petition for reorganization under chapter 11 in the United States Bankruptcy Court for the District of Minnesota and in March 1980, pursuant to the Bankruptcy Reform Act of 1978,³ Northern filed suit against Marathon in that court, claiming the same damages as in the prior action.⁴ Marathon moved for dismissal of the suit on the grounds that the Bankruptcy Reform Act was unconstitutional because it granted article III judicial powers to judges who do not have life tenure and protection against salary diminution.⁵ At this point, the United States inter-

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1. Brief for Appellee at 2, Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., _____ U.S. _____, 102 S.Ct. 2858 (1982).
2. *Id.*
3. 28 U.S.C. § 1471 (Supp. IV 1980). This section reads as follows:
 - (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
 - (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.
 - (c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.
 - (d) Subsection (b) or (c) of this section does not prevent a district court or a bankruptcy court, in the interest of justice, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11. Such abstention, or a decision not to abstain, is not reviewable by appeal or otherwise.
 - (e) The bankruptcy court in which a case under title 11 is commenced shall have exclusive jurisdiction of all of the property, wherever located, of the debtor, as of the commencement of such case.
4. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 102 S.Ct. at 2864 (1982).
5. *Id.* at 2864. Article III, section 1 of the Constitution reads:

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

vened to defend the statute's validity.⁶ The bankruptcy court denied the motion to dismiss, whereupon Marathon appealed to the District Court.⁷ The District Court granted the motion, reasoning that the grant of power in the Bankruptcy Reform Act to bankruptcy judges is unconstitutional because they are not article III judges.⁸ Northern appealed to the United States Supreme Court. The Court noted probable jurisdiction⁹ and handed down its decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* on June 28, 1982.¹⁰

The Court found that, as a general proposition, all matters requiring the exercise of the judicial power of the United States must be adjudicated by an independent judiciary as established by the article III requirements of life tenure and protection against salary diminution.¹¹ The Court identified three exceptions to this general proposition: territorial courts, courts-martial, and legislative courts and administrative agencies created by Congress to adjudicate cases involving public rights.¹²

HISTORICAL BACKGROUND—DEVELOPMENT OF THE NON-ARTICLE III COURT DOCTRINE

The historical development of the doctrine by which article III courts are distinguished from non-article III courts is best traced by looking to those decisions in which the Court has held that the requirements of article III need not be met. A basic proposition of constitutional law, accepted by the *Northern Pipeline* Court, is that an independent judiciary, established as such by the protections of article III, must be the only body to exercise the judicial power of the United States in the absence of exceptional circumstances.¹³ These "exceptional circumstances" consist of three basic categories. First, in *American Insurance Co. v. Can-*

6. 102 S.Ct. at 2864.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 2858.

11. *Id.* at 2879-80.

12. *Id.* at 2868-71.

13. *Id.* at 2865.

ter,¹⁴ the Court recognized that Congress may establish courts which do not conform to article III in territories not within the States comprising the United States.¹⁵ Second, the Court in *Dynes v. Hoover*¹⁶ held that Congress may constitute courts-martial to try military and naval offences without adherence to the requirements of article III.¹⁷ Finally, in *Murray's Lessee v. Hoboken Land & Improvement Co.*,¹⁸ the Court formulated the doctrine which states that public rights matters, while capable of judicial review, may be removed from the cognizance of the courts of the United States as Congress sees fit.¹⁹ The bases and ambit of these exceptions will be more fully discussed in the portion of this note describing the Court's decision in *Northern Pipeline*.

One further case deserves explanation: *Palmore v. United States*.²⁰ This recent decision was perhaps the leading case in the area of article III court requirements prior to *Northern Pipeline*. Furthermore, seven of the justices who decided *Northern Pipeline* also participated in deciding *Palmore*.²¹ The Court in *Palmore* held that Congress may establish non-article III courts in the District of Columbia to try felony cases under the provisions of the District of Columbia Code.²² The basis for the *Palmore* decision is in dispute. The plurality in *Northern Pipeline* read the case as standing for the proposition that Congress may create non-article III courts to adjudicate matters arising in the District of Columbia, pursuant to its power to govern territories of the United States not within any State.²³ In the dissent, Justice White contended that the decision did not rest on the theory of territorial control, but "on an evaluation

14. 26 U.S. (1 Pet.) 511 (1828).

15. *Id.* at 546.

16. 61 U.S. (20 How.) 65 (1858).

17. *Id.* at 79.

18. 59 U.S. (18 How.) 272 (1856).

19. *Id.* at 284.

20. 411 U.S. 389 (1973).

21. *Id.* The Justices participating in the decision were White, Burger, Stewart, Marshall, Blackmun, Powell, Rehnquist, and Douglas. All except Stewart and Douglas participated in the *Northern Pipeline* decision.

22. 411 U.S. at 408-10.

23. 102 S.Ct. at 2868.

of the strength of the legislative interest in pursuing . . . one of its constitutionally assigned responsibilities."²⁴

The state of the law in this area after the *Palmore* decision can only be described as one of confusion. When considering passage of the Bankruptcy Reform Act, the House of Representatives requested analysis of the very question involved in this case from some of the country's leading constitutional law scholars.²⁵ The positions taken by these scholars on the question were by no means consistent and several mentioned the uncertainty of this area of the law.²⁶

The Bankruptcy Reform Act of 1978

The Bankruptcy Reform Act of 1978 was enacted by Congress after extensive consideration.²⁷ The Act made sweeping changes in both the procedural and substantive law of bankruptcy.²⁸ Those changes included elimination of the well-known referee system in favor of United States Bankruptcy Courts created as adjuncts of each district court.²⁹ Of particular significance to the issues involved in this case, the Act provided that the judges of the courts would be appointed by the President to 14-year terms.³⁰ The new judges were to be paid salaries set by statute, subject to adjustment.³¹

Also of significance to this case, the Court noted that, under the act, the powers of the bankruptcy judges are very

24. *Id.* at 2894 (White, J., dissenting). See generally Krattenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional*, 70 GEO. L.J. 297 (discussing six factors identified by the Court in *Palmore* which the author believed could help in predicting whether the bankruptcy courts would eventually be held constitutional).

25. H.R. REP. NO. 595, 95th Cong., 2d Sess. 63-87 (1978), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5963, 6023-49. Among those who responded to the request were Thomas G. Krattenmaker, Georgetown University Law Center; Jo Desha Lucas, University of Chicago Law School; Paul J. Mishkin, University of California; David L. Shapiro, Harvard Law School; and Charles Alan Wright, University of Texas at Austin.

26. *Id.*

27. Klee, *Legislative History of the New Bankruptcy Law*, 28 DE PAUL L. REV. 941, 942-57 (1979).

28. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 102 S.Ct. at 2862 (1982).

29. 28 U.S.C. § 151(a) (Supp. IV 1980).

30. 28 U.S.C. §§ 152, 153(a) (Supp. IV 1980).

31. 28 U.S.C. § 154 (Supp. IV 1980).

broad.³² They are given all of the "powers of a court of equity, law and admiralty."³³ The only exceptions to these powers are that the bankruptcy judges "may not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment."³⁴ The Court also stated³⁵ that Congress has allowed bankruptcy judges to conduct jury trials,³⁶ issue declaratory judgments,³⁷ issue writs of habeas corpus in certain circumstances,³⁸ issue any other writs necessary,³⁹ and issue any other order, process or judgment necessary or appropriate to carry out the provisions of title 11.⁴⁰

As noted by Justice White in the dissent, however, these powers are arguably not much broader than those exercised by bankruptcy referees.⁴¹ Under the previous bankruptcy provisions, the bankruptcy referees had the authority to adjudicate all petitions referred to them, rule on discharges and determine the dischargeability of debts.⁴² They also decided on the allowance and disallowance of claims.⁴³

In addition to the Act's broad grant of power, it also gives much broader jurisdiction to the bankruptcy courts than was exercised by the referee system.⁴⁴ The district courts are given original jurisdiction over "all civil proceedings arising under title 11 or arising in or related to cases under title 11."⁴⁵ The bankruptcy courts are granted all of the jurisdiction conferred on the district courts over title 11 matters.⁴⁶ The jurisdiction thus given to the bankruptcy courts includes matters not traditionally associated with bankruptcy proceedings and includes the power to decide

32. 102 S.Ct. at 2863.

33. 28 U.S.C. § 1481 (Supp. IV 1980).

34. 28 U.S.C. § 1481 (Supp. IV 1980).

35. 102 S.Ct. at 2863.

36. 28 U.S.C. § 1480 (Supp. IV 1980).

37. 28 U.S.C. § 2201 (Supp. IV 1980).

38. 28 U.S.C. § 2256 (Supp. IV 1980).

39. 28 U.S.C. § 1651 (1976).

40. 11 U.S.C. § 105 (Supp. IV 1980).

41. 102 S.Ct. at 2885-86 (White, J., dissenting).

42. 11 U.S.C. § 66 (1976).

43. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 102 S.Ct. at 2885-86 (1982) (White, J., dissenting).

44. *Id.* at 2862-63.

45. 28 U.S.C. § 1471(b) (Supp. IV 1980).

46. 28 U.S.C. § 1471(c) (Supp. IV 1980).

suits to recover accounts, actions concerning exempt property, attempts to avoid transfers and payments as preferences or fraudulent conveyances, and causes of action owned by the debtor at the time of the petition for bankruptcy.⁴⁷ Claims based on state law are also included in the Act's grant of jurisdiction.⁴⁸

The inclusion of state law questions is accomplished by allowing the courts to consider "related" claims based on state law. This great expansion of jurisdiction was certainly not without justification. Under the former system, certain disputes which were determinative of the bankrupt's ability to start anew were outside the referee's jurisdiction and thus not under his control.⁴⁹ Clearly, outstanding claims of creditors against the bankrupt or claims of the bankrupt against third parties have a direct impact on the financial position of the bankrupt. If left unresolved, the discharge granted by the bankruptcy court in some cases would have little meaning.

Appeals from orders of the bankruptcy court were also affected by the Act. Three avenues of appeal now exist.⁵⁰ The first possible route is to a panel of three bankruptcy judges, provided such a panel is created by the circuit council.⁵¹ Second, the appeal may be taken to the United States district courts in the absence of these panels.⁵² Finally, the parties may, by agreement, take the appeal directly to the court of appeals.⁵³

47. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 102 S.Ct. at 2862-63 (1982).

48. *Id.* at 2863. See also 1 COLLIER ON BANKRUPTCY ¶ 3.01(e)(2), at 3-48 (15th ed. 1981) [hereinafter cited as COLLIER]. The Court also noted that, while the Act does not explicitly indicate the extent to which personal jurisdiction may be exercised by bankruptcy judges, it has been construed to be the maximum extent constitutionally allowable. 102 S.Ct. at 2863 n. 4.

49. 1 COLLIER, *supra* note 48, at ¶ 3.01(e)(2), at 3-48.

50. *Id.* at ¶ 3.03(b)(ii), at 3-226.

51. 28 U.S.C. § 160 (Supp. IV 1980).

52. 28 U.S.C. § 1334 (Supp. IV 1980).

53. 28 U.S.C. § 1293(b) (Supp. IV 1980). The Court noted that the Act does not specify the standard of appellate review and reiterated the position of the parties in this case that the appropriate standard is the "clearly erroneous" one without commenting on the validity of this position. 102 S.Ct. at 2863 n.5. See also 1 COLLIER, *supra* note 48, at ¶3.03, at 3-315.

THE COURT'S ANALYSIS

The impact of this case does not lie in the specific holding that the "Bankruptcy Act of 1978 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."⁵⁴ Congress will eventually pass legislation to remedy the defects identified by the Court.⁵⁵ The case's import is rather in the clear analysis developed by the Court for determining whether a given court must possess all the attributes required by article III.

When considering the Court's analysis, it must be noted that it was developed by a plurality rather than a majority. Justice Rehnquist and Justice O'Connor concurred in the result of the case but did not subscribe to the analysis used either by the plurality or by the dissent.⁵⁶ They instead refused to address the broad question defined as the issue by the plurality.⁵⁷ The concurring Justices would have held unconstitutional only so much of the Act as was required to confer jurisdiction on the Bankruptcy Court over Northern's state law-based claim.⁵⁸ Because they found that this part of the jurisdictional grant was "not readily severable" from the remainder, they concurred in the judgment of the plurality.⁵⁹

54. 102 S.Ct. at 2879-80.

55. *Id.* at 2882 (Burger, C.J., dissenting). After deciding the grant of jurisdiction was unconstitutional, the Court considered whether the decision should be applied retroactively. Because the issue in the case presented an unprecedented question of interpretation of article III, and because retroactive application would not further the operation of the holding and would cause substantial hardships on litigants who relied on the grant of jurisdiction, the Court held that the decision should apply only prospectively. The Court then stayed its judgment until October 4, 1982, to give Congress the opportunity to remedy the defects. *Id.* at 2880. The Court later extended the stay of judgment until December 24, 1982, on motion of the Solicitor General. Order Extending Stay of Judgment, 51 U.S.L.W. 3259 (U.S. Oct. 15, 1982) (No. 81-546). On December 23, 1982, the Court refused to further extend the stay. The *Northern Pipeline* judgment took effect as of December 25, 1982. Order Denying Extension of Stay of Judgment, 51 U.S.L.W. 3475 (U.S. Jan. 4, 1983) (No. 81-150, No. 81-546).

56. 102 S.Ct. at 2880 (Rehnquist, J., concurring).

57. *Id.* at 2882 (Rehnquist, J., concurring).

58. *Id.*

59. *Id.*

Basis of Analysis: Separation of Powers

The Court began its analysis in *Northern Pipeline* by noting the overriding historical importance of the separation of powers doctrine. The plurality saw article III as an essential ingredient in the constitutional formula for a system of checks and balances whereby judicial impartiality is guaranteed, judicial power is defined, and the independence of the Judicial Branch is protected.⁶⁰ In *United States v. Will*,⁶¹ the Court stressed the importance of a judiciary free from control by the other branches of government.⁶² The "inexorable command" of article III is that only courts possessing the attributes prescribed by article III may exercise the judicial power of the United States.⁶³

Article III requires that judges of courts exercising the judicial power of the United States be given life tenure, subject only to impeachment,⁶⁴ and that they receive a fixed compensation for their services.⁶⁵ These requirements have as their aim the creation of a judiciary not subject to the control of the Executive and Legislative Branches. The inclusion of these requirements may be traced to one of the factors leading to the Revolutionary War. The Declaration of Independence stated that one of the wrongs committed by the King of Great Britain was making the "judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries."⁶⁶ The *Northern Pipeline* Court concluded that the Constitution "unambiguously" requires exercise of the judicial power by an independent judiciary and that "[i]t commands that the independence of the Judiciary be jealously guarded."⁶⁷

The Exceptions

Considering only the rather narrow question of whether the bankruptcy courts were constitutionally created as non-

60. *Id.* at 2865.

61. 449 U.S. 200 (1980).

62. *Id.* at 217-18.

63. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 102 S.Ct. at 2865 (1982).

64. *Toth v. Quarles*, 350 U.S. 11, 16 (1955).

65. *United States v. Will*, 449 U.S. at 218-21 (1980).

66. *O'Donoghue v. United States*, 289 U.S. 516, 531 (1933) (quoting DECLARATION OF INDEPENDENCE, In Congress, July 4, 1776).

67. 102 S.Ct. at 2866.

article III courts, the Court embarked on a broad analysis of the acceptable categories of non-article III courts. The three categories recognized by the Court as exceptions to the general rule are territorial courts, military courts-martial, and Congressionally-created legislative courts and administrative bodies empowered to adjudicate "public rights issues."

1) *Territorial Courts*. Courts constituted to exercise judicial power in the territories of the United States were required from the formation of the country. Congress was held to have the authority to create courts independent of the requirements of article III as a result of the "general powers of government" given to it by article IV.⁶⁸

2) *Courts-Martial*. The second category of courts not required to adhere to article III are those courts created by the Executive and Legislative Branches pursuant to their power to establish and administer military courts-martial.⁶⁹ This power is derived from article I, section eight, clauses 13 and 14 of the Constitution and has never been seriously questioned.⁷⁰ Regarding the establishment of these courts, the Court has held that Congress has both the power to establish

68. *Id.* at 2868. The seminal case in this area was *American Ins. Co. v. Canter*, which held that the Florida territorial courts were constitutional, even though the judges were appointed for only four years. 26 U.S. (1 Pet.) at 546. The Court observed that "[w]hichever may be the source whence the power (of Congress to govern a territory) is derived, the possession of it is unquestioned." *Id.* at 542. This proposition was reaffirmed in *Palmore v. United States*, wherein the Court stated that Congress may, in all cases, exercise exclusive jurisdiction over the District of Columbia. 411 U.S. at 397. The Court thus implicitly recognized that Congress' power to govern the District of Columbia is derived from article IV as well as from article I.

Article I, section 8, clause 17 of the Constitution gives Congress the power:

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.

Article IV, section 3, clause 2 of the Constitution reads:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

69. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 102 S. Ct. at 2868-69 (1982).

70. *Id.* at 2869. Article I, section 8, clauses 13 and 14 give Congress the power "(13) To provide and maintain a Navy; (14) To make Rules for the Government and Regulation of the land and naval Forces."

these courts to provide for the punishment of military offences and the power to establish them without any regard for article III.⁷¹

3) *Adjudication of "Public Rights" Matters.* The final category of permissible non-article III courts includes legislative courts and administrative agencies created by Congress to adjudicate cases involving so-called "public rights."⁷² Obviously, this category is the only one among the three exceptions that provides for the possible inclusion of bankruptcy courts.

The first mention of the public rights doctrine was made in *Murray's Lessee v. Hoboken Land & Improvement Co.*, wherein the Court stated that matters involving public rights, even though susceptible to judicial determination, may be kept from the cognizance of the courts of the United States if Congress so desires.⁷³ This category stands apart from the general rule that Congress cannot "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination."⁷⁴

The *Northern Pipeline* Court explained the doctrine as arising from the principles of sovereign immunity and separation of powers.⁷⁵ The principle of sovereign immunity recognizes that the government may attach certain conditions to its consent to be sued.⁷⁶ Because of this principle, the public rights doctrine extends only to matters which arise between the government and persons subject to the constitutional exercise of authority by the executive and legislative branches.⁷⁷ In other words, the presence of the government as a

71. *Dynes v. Hoover*, 61 U.S. (20 How.) at 79 (1857).

72. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 102 S.Ct. at 2869 (1982).

73. 59 U.S. (18 How.) at 284.

74. *Id.*

75. 102 S.Ct. at 2869.

76. *Id.*

77. *Id.* at 2869-70.

party to the action is necessary for application of the public rights exception.

Adding to the requirement of the government as a party to the action, the principle of separation of powers recognizes that certain prerogatives are reserved to the executive and legislative branches and certain powers are given exclusively to the judicial branch.⁷⁸ Under the public rights doctrine, therefore, the issue must be one over which the "political branches" have historically exercised exclusive powers of resolution.⁷⁹ Further, if the matter is one which has historically been judicially determined, Congress may not remove it from consideration by article III courts.⁸⁰

Unfortunately, the Court, in an opinion otherwise very free with comment on peripheral issues, did not see fit to provide a definition of "public rights" or an exhaustive list of the matters which properly fall within the public rights exception. Examples cited by the Court are of some help, however. In *Atlas Roofing Co. v. Occupational Safety and Health Commission*,⁸¹ the Court held that situations involving public rights were those in which "the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights."⁸² The *Northern Pipeline* Court cited with approval⁸³ a list of matters that fall within the public rights doctrine set out by the Court in *Crowell v. Benson*.⁸⁴ In that case, the Court stated that "administrative agencies created for the determination of . . . [public rights] matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans."⁸⁵ In *Ex Parte Bakelite Corp.*⁸⁶ the Court held that the Court of Claims was properly constituted as a

78. *Id.*

79. *Id.* at 2870.

80. *Id.*

81. 430 U.S. 442 (1977).

82. *Id.* at 458.

83. 102 S.Ct. at 2870 n.22.

84. 235 U.S. 22 (1932).

85. *Id.* at 51.

86. 279 U.S. 438 (1929).

legislative court in that it handled matters arising between the government and others and concerning issues which may be handled exclusively by executive officers.⁸⁷ This holding was reaffirmed in *Williams v. United States*⁸⁸ where the Court again held that the Court of Claims was a legislative court and that Congress could therefore reduce the salary of a judge of that court.⁸⁹ These examples provide at least some guidance in determining what issues involve public rights.

The final requirement outlined by the Court was that the dispute must not involve private rights.⁹⁰ Private rights disputes involve "the liability of one individual to another under the law as defined"⁹¹ and may not be removed from the cognizance of article III courts.⁹² These disputes, according to the *Northern Pipeline* Court, "lie at the core of the historically recognized judicial power."⁹³ Examples of private rights include cases between individuals concerning torts, contracts, and property disputes.⁹⁴

In summary, the public rights exception extends to matters which (1) arise between the government and persons subject to the constitutional exercise of its legislative or executive authority, (2) historically have been determined by the executive and legislative branches of the government, and (3) are not private rights disputes. While the analysis provided by the *Northern Pipeline* Court is somewhat unclear, it does give better guidance than was available prior to this case.

Rejected Exceptions

1) *Inherent Power of Congress.* An argument advanced by appellants was that because Congress has the constitu-

87. *Id.* at 458.

88. 289 U.S. 553 (1933).

89. *Id.* at 581.

90. 102 S.Ct. at 2870-71.

91. *Crowell v. Benson*, 285 U.S. at 51.

92. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 102 S.Ct. at 2871 (1982).

93. *Id.*

94. *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. at 458.

tional authority to establish uniform bankruptcy laws,⁹⁵ it therefore has the inherent power to establish courts with jurisdiction over controversies related to bankruptcy.⁹⁶ The Court did not accept this category as an additional exception. The main objection expressed by the Court was that this exception would allow Congress to side-step the article III limitations in any circumstance where it decided that non-article III courts would enhance the application of its specific article I powers.⁹⁷ In the Court's language, such an exception "could effectviely eviscerate the constitutional guarantee of an independent Judicial Branch of the Federal Government."⁹⁸

2) *Adjunct Courts*. Another argument advanced by appellants was that the bankruptcy courts were properly constituted as adjuncts to the district courts, analogizing them to administrative agencies and magistrates.⁹⁹ This argument was premised on the theory that Congress possesses the authority to assign certain fact-finding functions to adjunct adjudicative bodies even in the absence of the power to establish legislative courts.¹⁰⁰ The Court has looked favorably on this theory in the past¹⁰¹ and, in *Northern Pipeline*, stated that such adjuncts do not represent an exception to article III because the "essential attributes of judicial power" are retained in the article III court.¹⁰²

The two major precedents in this area are *Crowell v. Benson*,¹⁰³ a case involving fact-finding by an administrative agency, and *United States v. Raddatz*,¹⁰⁴ which upheld the

95. U.S. CONST. art. 1, § 8, cl. 4. This clause provides that Congress shall have the power "[t]o establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States."

96. Brief for the United States at 14, *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, _____ U.S. _____, 102 S.Ct. 2858 (1982).

97. 102 S.Ct. at 2872-73.

98. *Id.* at 2873.

99. Brief for the United States, *supra* note 96, at 11-13, 37-45.

100. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 102 S.Ct. at 2875 (1982).

101. *United States v. Raddatz*, 447 U.S. 667 (1980) (upholding the 1978 Federal Magistrates Act); *See also Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977); *Crowell v. Benson*, 285 U.S. 22 (1932).

102. 102 S.Ct. at 2875.

103. 285 U.S. 22 (1932).

104. 447 U.S. 667 (1980).

1978 Federal Magistrates Act. The *Northern Pipeline* Court distilled two propositions from these cases to use as bases for determining the extent to which non-article III bodies may be given traditionally judicial functions. The first principle is that Congress has "substantial discretion" to dictate how an issue will be adjudicated when the issue is based on substantive federal rights created by Congress.¹⁰⁵ Second, the discretion of Congress under the first principle is limited in that the adjudicatory scheme created by Congress must leave the "essential attributes of judicial power" with the article III court.¹⁰⁶ The test of whether these essential attributes are left with the article III court is to determine which body has the power to make the final or ultimate decision in the matter.¹⁰⁷

By applying these two propositions to the Bankruptcy Courts the *Northern Pipeline* Court reached the conclusion that they are not proper district court adjuncts. The Court stated that the first principle allows Congress to assign fact-finding functions to non-article III adjuncts only when the adjuncts are considering federal substantive rights created by Congress. The Bankruptcy Courts' jurisdiction fails this test in two respects. First, the Bankruptcy Reform Act was passed pursuant to the constitutional power of Congress to create uniform bankruptcy laws. It therefore has some characteristics of a constitutionally created right.¹⁰⁸ This argument probably proves too much in that all acts of Congress are in furtherance of constitutional grants of power. More pertinent to this case, by giving the bankruptcy courts jurisdiction over all matters "related to" proceedings under title 11, Congress has allowed non-article III court determinations of purely state-created rights.¹⁰⁹

The Court's analysis under the second principle also led to its conclusion that the grant of jurisdiction to the bankruptcy courts was unconstitutional. Five factors identified

105. 102 S.Ct. at 2876.

106. *Id.* at 2876-77.

107. *Id.* at 2877.

108. *Id.*

109. *Id.* at 2878.

by the Court show that the essential attributes of judicial power have been vested in a non-article III court. First, the Court again noted the broad jurisdiction granted over all proceedings related to cases arising under title 11. Second, all of the jurisdiction granted to the district courts under the Act is transferred to the bankruptcy courts. Third, the bankruptcy courts exercise all ordinary powers of the district courts. Fourth, the judgments of the bankruptcy courts may be set aside by the district courts only if they are clearly erroneous. Finally, bankruptcy courts may issue final judgments which are binding and enforceable.¹¹⁰

Application of the Approved Exceptions to the Bankruptcy Courts

The Court had no difficulty disposing of the first two exceptions, territorial courts and military courts-martial. Clearly, the bankruptcy courts do not resemble either of these exceptions.¹¹¹ While the question of whether bankruptcy courts fit within the public rights doctrine is a closer one, the Court had little more difficulty disposing of that exception. The Court stated that the right to recover contract damages is unquestionably in the nature of a private right or "the liability of one individual to another under the law as defined."¹¹² Finally, the *Northern Pipeline* Court held that "[i]n sum, Art. III bars Congress from establishing courts to exercise jurisdiction over all matters related to those arising under the bankruptcy laws."¹¹³

THE DISSENT

Because a majority of the members of the Court could not agree on either the issue to be decided or the analysis to be used, the dissent takes on added importance. Justice White provided an extensive historical analysis of the development of the law in the area of article III courts versus non-article III courts, as the foundation for his proposed test.¹¹⁴

110. *Id.* at 2878-79.

111. *Id.* at 2871.

112. *Id.* at 2870-71 (quoting *Crowell v. Benson*, 285 U.S. at 51 (1932)).

113. *Id.* at 2874.

114. *Id.* at 2889-93 (White, J., dissenting).

He analyzed the same cases relied upon by the plurality, but reached different conclusions. Of particular significance is his reading of *Crowell v. Benson*, cited by the plurality in support of the contention that private rights may not be adjudicated in a non-article III court.¹¹⁵ In that case, he argued, the Court approved the non-article III administrative scheme for determination of maritime compensation claims even though it recognized the right involved was "the liability of one individual to another under the law as defined."¹¹⁶ As noted earlier, this is the classic definition of a private right.

Following his detailed historical analysis, Justice White contended that Chief Justice Vinson, dissenting in *National Mutual Insurance Co. v. Tidewater Transfer Co.*,¹¹⁷ and Justice Harlan, writing for the plurality in *Glidden Co. v. Zdanok*,¹¹⁸ pointed the way to the correct conclusion, which was that there is no difference between the subject matter jurisdiction that Congress may assign to article I courts and that assigned to article III courts by the Constitution.¹¹⁹ Based on this conclusion, Justice White went on to propose that the proper way in which to determine whether Congress may assign a given issue to a non-article III court is to balance the values expressed by article III against "competing constitutional values and legislative responsibilities."¹²⁰ The Court, he said, should weigh the strength of the legislative interest in establishing the non-article III body against the extent to which the legislative scheme undermines article III.¹²¹

Applying that test, Justice White stated that where appellate review by an article III court is available and where

115. 102 S.Ct. at 2878-79.

116. *Id.* at 2891 (quoting *Crowell v. Benson*, 285 U.S. at 51 (1932)).

117. 337 U.S. 582 (1949). The Court in this case held that federal courts may be given jurisdiction over suits between citizens of the District of Columbia and citizens of a State. The plurality's position that Congress could assign article I powers to article III courts outside the District of Columbia was rejected by a majority. Chief Justice Vinson's dissent considered whether article I courts could be given article III powers. *Id.* at 626 (Vinson, C.J., dissenting).

118. 370 U.S. 530 (1962). Here the Court held that the Court of Claims and the Court of Customs and Patent Appeals were article III courts.

119. 102 S.Ct. at 2892-93 (White, J., dissenting).

120. *Id.* at 2893 (White, J., dissenting).

121. *Id.* at 2894 (White, J., dissenting).

the proposed article I courts deal with issues of little political interest, the requirements of separation of powers are substantially met.¹²² The system of bankruptcy courts created by the Bankruptcy Reform Act of 1978 satisfied these criteria, according to Justice White.¹²³ Finally, he contended that the ends Congress sought to accomplish were at least as compelling as the ends found to be compelling in *Palmore v. United States*.¹²⁴ The dissenters read *Palmore* as standing for the proposition that article I courts may be created if justified by a strong legislative interest in furthering one of Congress's constitutionally assigned responsibilities.¹²⁵ Because in their view the creation of article I bankruptcy courts survives this balancing test, the dissent would "defer to the congressional judgment" and uphold the challenged statute.¹²⁶

CRITIQUE

There are both positive and negative aspects of the analysis and effects of *Northern Pipeline*. The most outstanding negative effect of the decision, of course, was the confusion resulting from its holding that the bankruptcy courts had been given an unconstitutional grant of jurisdiction. Attorneys handling bankruptcy cases were faced with difficult decisions on whether to file new actions in the bankruptcy courts, in the district courts, or not at all. This confusion was largely eliminated, however, by the interim rules proposed by the Judicial Conference of the United States on September 23, 1982.¹²⁷ Congress must cure the defects pres-

122. *Id.*

123. *Id.*

124. *Id.* at 2895 (White, J., dissenting).

125. *Id.* at 2894 (White, J., dissenting).

126. *Id.* at 2896 (White, J., dissenting).

127. Letter from William E. Foley, Director of the Administrative Office of the United States Courts, to all Judges of the United States Courts of Appeal, United States District Courts, and United States Bankruptcy Courts (Sept. 27, 1982), reprinted in West's Bankruptcy Newsletter, 22 B.R. No. 3, Adv. Sh. 21 (1982). The rules were formulated on the premise that *Northern Pipeline* did not invalidate sections 1471(a) and 1471(b). The purpose of the rules is to provide a "measure by which district courts may delegate many of their bankruptcy powers to bankruptcy judges" during the period of time between the expiration of the stay of judgment and passage of new legislation by Congress. *Id.* at 22. Mr. Foley describes the procedure established by the rules as follows:

Under the Rule, all bankruptcy matters are initially referred to a bankruptcy judge. In proceedings not involving a final judgment in a *Marathon* claim, the bankruptcy judge may enter orders and judgments that become effective immediately, subject to district

ent in section 1471. It is hard to predict the solution Congress will choose. As pointed out in Chief Justice Burger's dissent, Congress need not completely restructure the system of bankruptcy adjudication but can effect a cure of the defects by simply removing ancillary common law actions from the purview of the bankruptcy courts.¹²⁸ It appears that reconstituting the courts as article III courts would be an equally permissible solution, however. The choice of cure will obviously have a great impact on whether cases filed in the bankruptcy courts but not yet considered will have to be refiled in other courts.

A critique of the opinion itself must begin with a discussion of the issue decided by the Court. The plurality opinion stated the issue before it as "whether the Bankruptcy Act of 1978 violates the command of Art. III, that the judicial power of the United States must be vested in courts whose judges enjoy the protections and safeguards specified in that Article."¹²⁹ Read without reference to the underlying facts of the case, the plurality's statement of the issue could lead to two possible conclusions. The first is that the grant of jurisdiction to the bankruptcy courts is extremely narrow and the pertinent case requires the exercise of all of that grant. The second possibility is that the issues of the case are so broad and varied that they require the exercise of all aspects of a broad grant of jurisdiction. Clearly, neither of these possible conclusions is correct. This case is one in which the jurisdictional challenge is narrow:

court review if requested by a party. With respect to final judgments in *Marathon* claims, the bankruptcy judge prepares recommended findings and conclusions and a proposed judgment. A district judge then reviews the recommendation and enters a judgment. Where the bankruptcy judge certifies that circumstances require, an order or judgment entered by a bankruptcy judge will be confirmed by a district judge even if no objection is filed.

The district court will provide expedited review or confirmation of any order, judgment, or proposed judgment where the bankruptcy judge certifies prompt review is necessary.

Id. (citations omitted).

The United States District Court for the District of Wyoming has adopted the proposed rules in their entirety. Telephone interview with Joyce Harris, Clerk, United States Bankruptcy Court for the District of Wyoming (Jan. 19, 1983).

128. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 102 S.Ct. at 2882 (1982) (Burger, C.J., dissenting).

129. *Id.* at 2867.

whether a non-article III court may decide a claim based on state law.¹³⁰ The statutory grant of jurisdiction to the bankruptcy courts, on the other hand, is very broad. Both the concurring and dissenting Justices concluded that the plurality had engaged in an impermissibly broad analysis and had reached an impermissibly broad holding.¹³¹

That the Court did address such a broad issue provided some very definite benefits, however. Without such a wide-ranging analysis, the issue of article III courts versus non-article III courts would be as confusing and unpredictable as it was before the decision. The decision has great significance because of the very fact that the Court did render such a broad opinion when a narrow one would have sufficed. The plurality wished to provide broad guidelines for non-article III courts; it used the narrow issues of *Northern Pipeline* to accomplish that goal. Combining this factor with the use of the doctrine of separation of powers as the basis of decision leads to the conclusion that *Northern Pipeline* is a very significant case.

The opinion's most important feature is the "checklist" provided for analyzing the constitutionality of non-article III courts. As the concurring opinion pointed out, the plurality has stated a general proposition and "three tidy exceptions."¹³² The general proposition is that matters requiring the exercise of the judicial power of the United States must normally be submitted to an article III court for adjudication. The three exceptions to this proposition are instances in which the Court has recognized "exceptional" powers belonging to Congress as granted by either the Constitution or historical consensus.¹³³ The categories embraced by the three exceptions are territorial courts, courts-martial and other exercises of Congress' plenary powers, and public rights issues.¹³⁴ If the jurisdictional grant to a non-article III adjudicatory body includes cases outside of these three

130. *Id.* at 2881 (Rehnquist, J., concurring).

131. *Id.* at 2881 (Rehnquist, J., concurring), at 2882 (Burger, C.J., dissenting),

132. *Id.* at 2881 (Rehnquist, J., concurring).

133. *Id.* at 2868.

134. *Id.* at 2868-69.

areas, the grant is necessarily unconstitutional. The simplicity of this test is especially appealing in light of the utter confusion previously existing in this area.

One hesitates to criticize a decision which simplifies a difficult legal issue, but the dissent raised some serious questions as to the validity of the plurality's analysis leading to its new "test" which must be discussed. First, the dissent relied heavily on the argument that the Bankruptcy Reform Act did not expand the jurisdiction of the bankruptcy courts nearly as much as the plurality believed.¹³⁵ The dissent argued that the new courts must be constitutional since the bankruptcy referees exercised much the same jurisdiction under the Bankruptcy Act of 1898. Assuming that the dissent's premise is valid, a questionable assumption at best, the plurality pointed out that the Court has never explicitly held that the power exercised by the bankruptcy referees was constitutional.¹³⁶ As a basis for its contention that the Bankruptcy Court's jurisdiction was no greater than that previously exercised by the referees, the dissent relied on *Katchen v. Landy*,¹³⁷ wherein the Court held that a bankruptcy referee had the authority to allow or disallow claims.¹³⁸ The plurality argued, however, that this case did not address the article III issue and, more significantly, was decided before adoption of the 1973 bankruptcy rules which greatly changed the standard by which the district courts reviewed the findings of the referees.¹³⁹

The dissent also contended that bankruptcy cases have always involved questions of state law which must necessarily be resolved in order to decide the existence and validity of claims against the bankrupt and that therefore, the Act's grant of jurisdiction allowing the courts to decide state law questions was constitutional.¹⁴⁰ Further, the only effect of extending jurisdiction to state law claims involving third parties is to grant *in personam* rather than *in rem* jurisdic-

135. *Id.* at 2884-86 (White, J., dissenting).

136. *Id.* at 2876, n.31.

137. 382 U.S. 323 (1966).

138. *Id.* at 336.

139. 102 S.Ct. at 2876, n.31.

140. *Id.* at 2884-85 (White, J., dissenting).

tion according to the dissent.¹⁴¹ This argument has great logical appeal and is probably a more accurate statement of the situation than that given by the plurality. The problem with the argument is that it is not dispositive of the issues presented in *Northern Pipeline*. Even if the plurality conceded that a non-article III court could properly decide matters based on state law, the bankruptcy courts would still not fit into any of the recognized exceptions. The dissent erred in basing its criticism of the plurality opinion in this area on its own definition of the issue rather than the issue addressed by the plurality. Any argument against a position taken by another party is fatally flawed if it changes the premise used by that party in arriving at its position. The dissent could have properly attacked the premise, which it later did, or, without changing the premise, the conclusion arrived at by the plurality.

Another argument of the dissent was that the plurality had misapplied the doctrine of separation of powers.¹⁴² Simply stated, the contention was that state law claims, if left to the state courts, would be heard by state judges; therefore, there would be little intrusion upon the domain of the article III courts should this type of claim be assigned to non-article III courts.¹⁴³ While the dissent was correct in stating that the plurality did not address this question, it overstated the importance of the issue in determining the outcome of the case. First, the plurality defined the issue of the case in broader terms than did the dissent. Also, that a particular claim is based on state law does not diminish the importance of separation of powers. The party making a state law claim in federal court should have the assurance that his claim is being decided free from legislative or executive influence and pressure to the same extent as a party making a constitutional claim. Neither claim is based on a Congressionally created right, therefore neither claim is properly subject to the substantive or procedural influence of Congress.

141. *Id.* at 2885 (White, J., dissenting).

142. *Id.*

143. *Id.*

CONCLUSION

Northern Pipeline represents an attempt by four Justices to bring order to a confusing area of the law by formulating definite categories of exceptions to the general rule that the judicial power of the United States may only be exercised by article III courts. By identifying the categories of territorial courts, courts-martial, and public rights adjudication as the only true exceptions to the dictates of article III, the plurality provides counsel and Congress with a tool with which to measure the constitutionality of a given legislative scheme. While the historical precedents may not have been applied perfectly, one has to question whether their perfect application would be desirable, given the state of the law in this area prior to this case.

The test proposed by the dissent, on the other hand, appears to be very unpredictable in its application and does nothing to clarify the issues. When weighing the strength of the legislative interest in establishing a non-article III adjudicative body against the values expressed by article III, almost any conclusion could be reached. The test does not provide an objective way to measure the strength of the legislative interest, as indeed it could not.

The concurrence, finally, went no further than to hold that the grant of jurisdiction giving the Bankruptcy Court the power to decide *Northern's* state law-based claims was unconstitutional. Whether the Court will apply the analysis of the plurality in future cases is, of course, not certain. One only hopes that either Justice Rehnquist or Justice O'Connor, or both, would recognize the overriding positive aspects of the analysis and vote with the plurality.

THOMAS E. ATKINSON, II