

# Ending the Marathon: It Is Time To Overrule *Northern Pipeline*

by

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Almost a decade has passed since the United States Supreme Court decided *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*<sup>1</sup> and invalidated the jurisdictional provisions of the Bankruptcy Act of 1978. Courts continue to struggle with the after effects of the ruling, drawing ever finer lines as to the proper role of bankruptcy courts under the Bankruptcy Amendments and Federal Judgeship Act of 1984.<sup>2</sup> The Supreme Court's recent ruling in *Granfinanciera, S.A. v. Nordberg*<sup>3</sup> is likely just the beginning of a series of decisions clarifying the availability of jury trials in bankruptcy courts. Countless other issues remain concerning the power of bankruptcy judges and the authority of bankruptcy courts.<sup>4</sup>

An enormous amount of time—by parties, litigators, and courts—will be spent in resolving innumerable questions concerning the proper status and jurisdiction of Article I<sup>5</sup> bankruptcy courts. In this article, I contend that the inquiry is unnecessary and should be ended. It is time for the Supreme Court to recognize that *Northern Pipeline* was a mistake and to allow bankruptcy courts the authority accorded them under the 1978 Act.

Specifically, in arguing for the overruling of *Northern Pipeline*, I make three points. First, the decision's reasoning is fatally flawed; the Constitution should not be interpreted as forbidding Article I bankruptcy courts from hearing state law claims. Second, Supreme Court rulings since *Northern Pipeline* have undermined the basis for that decision. The Court properly has recognized that Article I courts are impermissible only when they are incompatible with due process or separation of powers. Bankruptcy courts are neither. Finally, as evi-

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<sup>1</sup>458 U.S. 50 (1982).

<sup>2</sup>Pub. L. No. 98-353, 98 Stat. 333.

<sup>3</sup>492 U.S. 33 (1989).

<sup>4</sup>See, e.g., *Plastiras v. Idell (In re Sequoia Auto Brokers, Ltd.)*, 827 F.2d 1281 (9th Cir. 1987) (power of bankruptcy judges to impose civil contempt orders); *Duck v. Munn (In re Mankin)*, 823 F.2d 1296 (9th Cir. 1987), cert. denied, 485 U.S. 1006 (1988) (authority of bankruptcy courts to hear an action by a Chapter 7 debtor to avoid an allegedly fraudulent conveyance).

<sup>5</sup>As used throughout this paper, Article III courts are those where judges have life tenure, unless impeached, and salaries that cannot be decreased during their terms of office. Article I courts, in contrast, have judges without such life tenure or salary protection. See E. Chemerinsky, *Federal Jurisdiction* 181-82 (1989).

denced by *Granfinanciera*, the courts will have to draw ever more technical distinctions—such as between core and noncore proceedings, between public and private rights, and between types of remedies requested—in defining the role of the bankruptcy courts. These distinctions exalt form over substance largely because *Northern Pipeline* itself drew arbitrary distinctions that cannot be explained by the underlying policies of Article III of the Constitution.

Certainly, bankruptcy court judges would prefer the prestige of Article III status and the life tenure which accompanies it. Perhaps, too, Congress should convert these courts into Article III tribunals in light of the range of issues decided in bankruptcy courts and the volume of litigation there. But my point is only that the Constitution is not offended by broad jurisdiction in Article I bankruptcy courts. There is no reason to believe that the decisions by bankruptcy court judges are adversely affected by their limited terms on the bench. Nor is there any cause for concern that Congress chose to make them Article I courts so as to exert influence over their decisions or compromise their independence. Therefore, my conclusion is that the Supreme Court should overrule *Northern Pipeline* and let Congress decide the status and jurisdiction of the bankruptcy courts.

#### I. NORTHERN PIPELINE IN HINDSIGHT: A FLAWED DECISION

The issue and holding in *Northern Pipeline* are familiar. In 1978, Congress created the United States Bankruptcy Courts, with judges appointed by the president and confirmed by the Senate.<sup>6</sup> Bankruptcy court judges were to sit for fourteen-year terms and were removable by the judicial council of a circuit on account of “incompetency, misconduct, negligence, neglect of duty, or physical or mental disability.”<sup>7</sup> The salaries of bankruptcy judges were set by statute<sup>8</sup> and subject to adjustment under the Federal Salary Act.<sup>9</sup>

The 1978 Act gave bankruptcy courts broad jurisdiction. Previously, a distinction was drawn between summary and plenary jurisdiction. Summary jurisdiction applied to property within the bankrupt’s possession or within the court’s jurisdiction.<sup>10</sup> Plenary jurisdiction applied to claims regarding other property.<sup>11</sup> The 1978 Act eliminated this distinction and gave the courts jurisdiction over “all civil proceedings arising under [the Bankruptcy Act] or arising in or related to cases arising under [it].”<sup>12</sup> Bankruptcy courts were given virtually all of the “powers of a court of equity, law, or admiralty.”<sup>13</sup> This included the ability

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<sup>6</sup>This history is summarized in *Northern Pipeline*, *supra* note 1, at 53–54.

<sup>7</sup>28 U.S.C.A. § 152 (West Supp. 1990).

<sup>8</sup>28 U.S.C.A. § 153 (West Supp. 1990).

<sup>9</sup>Federal Salary Act of 1967, 2 U.S.C.A. §§ 351–361 (West 1985 & Supp. 1990).

<sup>10</sup>458 U.S. at 53.

<sup>11</sup>*Id.*

<sup>12</sup>*Id.* at 54.

<sup>13</sup>*Id.* at 55.

to issue declaratory judgments, to hold jury trials, to issue writs of habeas corpus under certain circumstances, and to issue any orders to carry out its duties.<sup>14</sup>

*Northern Pipeline* involved the constitutionality of a bankruptcy court's hearing a state law claim for breach of contract. After Northern Pipeline Company filed for bankruptcy it brought an action for breach of contract against Marathon Pipe Line Company. The Supreme Court ruled 6-3 that for bankruptcy courts to exercise jurisdiction to hear such a claim was unconstitutional. The Court, however, was splintered and did not produce a majority opinion.

Justice Brennan, writing for a plurality including Justices Marshall, Blackmun, and Stevens, argued that bankruptcy courts did not fit into any of the existing categories of permissible Article I courts and that their jurisdiction violated Article III of the Constitution.<sup>15</sup> Justices Rehnquist and O'Connor concurred in the judgment. Their position was that it was unconstitutional for Congress to vest in the bankruptcy courts broad authority to adjudicate state law matters that were only tangentially related to the adjudication of bankruptcy under federal law.<sup>16</sup> Justice White wrote a lengthy dissent, joined by Chief Justice Burger and Justice Powell. The dissent emphasized a functional approach to analyzing the constitutionality of legislative courts, focusing on whether the particular court undermines separation of powers and checks and balances.<sup>17</sup>

Many commentators have thoroughly criticized the Court's reasoning in *Northern Pipeline*.<sup>18</sup> Rather than review these familiar arguments, I want to focus on several flaws in the Court's reasoning that have engendered the post-*Northern Pipeline* confusion as to the proper role of the bankruptcy courts. The arbitrary and unjustified distinctions drawn in *Northern Pipeline* necessitate further arbitrary and unjustified distinctions in defining the permissible scope of bankruptcy court jurisdiction.

The core problem with Justice Brennan's plurality opinion in *Northern Pipeline* is that it drew distinctions that seem unsupported by any underlying constitutional theory. Justice Brennan's opinion stressed that legislative courts were permitted only in a few instances—for territories, for the military, and for public rights disputes—and that bankruptcy does not fit into any of these categories.<sup>19</sup> Justice Brennan, however, did not conceptually explain what makes these categories permissible for Article I courts, but invalidates Article I bankruptcy

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<sup>14</sup>*Id.*

<sup>15</sup>*Id.* at 87.

<sup>16</sup>*Id.* at 86.

<sup>17</sup>*Id.* at 116.

<sup>18</sup>See, e.g., Brown, *Article III as a Fundamental Value: The Demise of Northern Pipeline and its Implications for Congressional Power*, 49 OHIO ST. L.J. 55 (1988); Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988); Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197 (1983).

<sup>19</sup>458 U.S. at 63-76.

judges. The text of Article III does not expressly authorize any judges without life tenure. Article III, section I says that the judicial power of the United States shall be vested in the Supreme Court and inferior courts created by Congress and that all judges on these tribunals shall have tenure for life, assuming good behavior, and salaries that shall not be decreased during their terms of office. The Supreme Court, however, never took an absolute position and prohibited all Article I courts. In 1828 the Court approved Article I courts for the territories in *American Insurance Co. v. Canter*,<sup>20</sup> and in 1858 the Court approved Article I courts for the military in *Dynes v. Hoover*.<sup>21</sup> The crucial question for Justice Brennan is what justifies Article I courts for territories and the military, but not for bankruptcy matters? Congress has express authority under the Constitution over all three areas. Justice Brennan's plurality opinion is unsatisfactory because it offers no reason why legislative courts should be tolerated in two of these areas, but not the third.

The other pre-*Northern Pipeline* use of Article I courts was for public rights matters—especially disputes between the government and private individuals. In *Northern Pipeline* the Court defined public rights matters as litigation between the government and others, excluding criminal matters.<sup>22</sup> The use of Article I courts for public rights matters stems from the Court's declaration in *Murray's Lessee v. Hoboken Land & Improvement Co.*<sup>23</sup> that "there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the Courts of the United States."<sup>24</sup>

Under the public rights doctrine, many disputes between the government and private citizens are decided, at least initially, in administrative agencies, rather than in Article III courts.<sup>25</sup> Justice Brennan explained that the bankruptcy courts were deciding private law matters and thus did not fit within this category of permissible legislative courts.<sup>26</sup>

This result seems quite odd: Article I courts are allowed where the independence of federal judges is perhaps most needed, in disputes between individuals and the federal government; but Article I courts are not allowed where the independence of federal judges is least important, in routine disputes between private litigants. A strong argument can be made that an independent judiciary is most essential in a dispute between the government and a private

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<sup>20</sup>26 U.S. (1 Pet.) 511 (1828).

<sup>21</sup>61 U.S. (20 How.) 65 (1858).

<sup>22</sup>458 U.S. at 69–70 n.24.

<sup>23</sup>59 U.S. (18 How.) 272 (1856).

<sup>24</sup>*Id.*, at 284. *Murray's Lessee* did not actually involve a legislative court. The holding was that Congress could authorize summary distraint of property to satisfy debts owed to the United States.

<sup>25</sup>Fallon, *supra* note 18, at 963–67.

<sup>26</sup>458 U.S. at 69–70.

citizen. A primary purpose of the Constitution is to protect people from the arbitrary exercise of power by the federal government. Judges with life tenure and salary protection are more likely to perform this checking function than are those answerable to the legislative and executive branches.<sup>27</sup>

In contrast, the political insulation of the judge is likely to be much less important in litigation between private parties. In fact, most private litigation occurs in state courts where judges lack life tenure. Therefore, it is difficult to understand why the Constitution permits public law matters, which might most demand judicial independence to be in Article I courts, but not private law matters, which usually are not litigated in Article III courts anyway.<sup>28</sup>

Justice Brennan explained that the use of legislative courts for public rights disputes is partially justified by the doctrine of sovereign immunity.<sup>29</sup> Because the United States has sovereign immunity it may be sued only if Congress authorizes such suit. Also, the federal government has the power to sue only if Congress grants it such authority. The argument is that because Congress has discretion whether to permit such litigation, it can choose to authorize such suits on the condition that they be brought in a particular tribunal, such as a legislative court. Justice Brennan stated: "The doctrine may be explained in part by reference to the traditional principle of sovereign immunity, which recognizes that the Government may attach conditions to its consent to be sued."<sup>30</sup>

This argument, however, would allow Congress to transfer all constitutional challenges to federal laws and federal government actions out of Article III courts. Congress could enact blatantly unconstitutional laws and provide review only in legislative courts designed to assure virtual certain approval of the enactments. This view would render a nullity Chief Justice John Marshall's famous statement in *Marbury v. Madison* that "[i]t is emphatically the province and duty of the judicial department to say what the law is."<sup>31</sup>

A better view is that, although Congress has discretion whether to allow the United States to be sued for money damages, judicial review of the constitutionality of enactments is essential and cannot be precluded by Congress.

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<sup>27</sup>Fullerton, *No Light at the End of the Pipeline: Confusion Surrounds Legislative Courts*, 49 BROOKLYN L. REV. 207, 230-31 (1983). For a discussion of the merits of federal judges over state judges because of the life tenure of the former, see Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

<sup>28</sup>See also Redish, *supra* note 18, at 210:

The public-private right dichotomy effectively frustrates the purpose of judicial independence. The danger of both potential federal government domination of the federal judiciary and potential government displeasure with judicial decisions is at a minimum in suits between private individuals involving state created common law rights. In contrast, the types of cases in which the dangers are greatest, those involving a dispute between private individuals and the federal government, are the very cases that Justice Brennan permits Article I courts to adjudicate.

<sup>29</sup>458 U.S. at 67.

<sup>30</sup>*Id.*

<sup>31</sup>5 U.S. (1 Cranch) 137, 177 (1803).

Moreover, it can be argued that, even if Congress has discretion whether to permit the United States to sue or be sued, once such suits are authorized, it would be an "unconstitutional condition" to require the litigation to be brought in courts that are otherwise unconstitutional.<sup>32</sup> Congress, therefore, can choose only whether the suit will be permitted; once it is allowed it must be in an Article III court.

Finally, Justice Brennan's plurality opinion recognized that Article I courts had been allowed as "adjuncts" of federal district courts.<sup>33</sup> Justice Brennan, however, rejected the argument that appellate review in an Article III court is sufficient to save the constitutionality of the bankruptcy courts.<sup>34</sup> Justice Brennan wrote:

Appellants suggest that *Crowell* and *Raddatz* stand for the proposition that Article III is satisfied so long as some degree of appellate review is provided. But that suggestion is directly contrary to the text of our Constitution. . . . *Our precedents make it clear that the constitutional requirements for the exercise of the judicial power must be met at all stages of the adjudication.*<sup>35</sup>

If this statement is taken literally, no degree of appellate review could save legislative courts.

Furthermore, Justice Brennan's view would invalidate not only bankruptcy courts, but most administrative agencies as well. As Professor Brown explained, "Administrative agencies . . . do considerably more than handle public rights disputes, and it is very hard to think of them as mere adjuncts of article III courts."<sup>36</sup> Justice Brennan's opinion creates insoluble line drawing problems: at what point is a legislative court's powers sufficiently restricted that it can be viewed as an adjunct of an Article III court?

My central point is that Justice Brennan's plurality opinion rested on distinctions that seem to make little difference. True, bankruptcy courts are not courts for territories, the military, or public law disputes. But that only describes their caseload; it does not normatively explain why Article I bankruptcy courts are impermissible, but Article I courts are allowed for the other subject matters.

Moreover, Justice Rehnquist's opinion concurring in the judgment found unconstitutional the use of bankruptcy courts to decide state law matters.<sup>37</sup>

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<sup>32</sup>Redish, *supra* note 18, at 214.

<sup>33</sup>458 U.S. at 80.

<sup>34</sup>For an excellent argument that the Constitution is satisfied by such appellate review, see Fallon, *supra* note 18.

<sup>35</sup>*Northern Pipeline*, 458 U.S. at 86 n.39 (emphasis added).

<sup>36</sup>Brown, *supra* note 18, at 65; see also Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

<sup>37</sup>*Northern Pipeline*, 458 U.S. at 90 (Rehnquist, J., concurring).

But as described above, this leads to the anomalous result that independent federal judges must exist for diversity jurisdiction cases which otherwise would be tried before electorally accountable state judges. However, independent federal judges are not required for federal question jurisdiction cases against the federal government.<sup>38</sup>

This criticism of *Northern Pipeline* is meant to establish two points. First, the Court's reasoning is sufficiently flawed to justify overruling the decision. Second, the Court's opinion relies heavily on a series of distinctions that are arbitrary and without justification. As explained in Part III, this continues to haunt the courts attempting to define the jurisdiction of bankruptcy courts as lines are drawn that are without basis in any coherent policy or constitutional principle.

## II. THE SUPREME COURT'S ABANDONMENT OF *NORTHERN PIPELINE*

Since *Northern Pipeline*, there have been two Supreme Court decisions concerning the constitutionality of legislative courts. In both instances the Court distinguished *Northern Pipeline* and upheld the constitutionality of the tribunal. Most dramatically, the Court appears to have adopted the approach that Justice White advocated in his dissent in *Northern Pipeline*: balancing the adverse impact on Article III values with the justifications for use of a legislative court.<sup>39</sup>

In dissent, Justice White, argued: "The inquiry should, rather, focus equally on those Article III values and ask whether and to what extent the legislative scheme accommodates them or, conversely, substantially undermines them. The burden on Article III values should then be measured against the values that Congress hopes to serve through the use of Article I courts."<sup>40</sup> By this functional view, Article I bankruptcy courts are permissible because they are not intended for, nor are they likely to have the effect of undermining impartial adjudication or increasing Congressional control over decision-making.

Because Justice White's approach appears to have triumphed on the Court it appears that *Northern Pipeline* would be decided differently under current law. To eliminate this tension and uncertainty in the law, *Northern Pipeline* should be overruled under existing, controlling principles.

The first post-*Northern Pipeline* decision was *Thomas v. Union Carbide Agricultural Products Co.*<sup>41</sup> In *Thomas* the Supreme Court upheld the constitu-

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<sup>38</sup>See Bruff, *Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs*, 67 TEXAS L. REV. 441, 469 (1989).

<sup>39</sup>Fallon, *supra* note 18, at 917; Saphire & Solimine, *Shoring Up Article III: Legislative Courts in the Post CTFC v. Schor Era*, 68 BU. L. REV. 85 (1988).

<sup>40</sup>*Northern Pipeline*, 458 U.S. at 115 (White, J., dissenting).

<sup>41</sup>473 U.S. 568 (1985). My discussion of these cases is drawn, in part, from E. Chemerinsky, *supra* note 5, at 208-212.

tionality of an arbitration system designed to resolve valuation disputes among participants in a pesticide registration program. Federal law required that manufacturers submit research data regarding the health, safety and environmental effects of all pesticides. The law permitted the data submitted by one company to be used by another that sought to register the same or a similar product, but a company using another's data had to pay for the costs of the data generation. The Environmental Protection Agency (EPA) was entrusted with determining the appropriate amount of compensation owed and resolving disputes. To relieve the EPA of this burden, Congress shifted the task of valuation for compensation purposes to a system of negotiations and binding arbitrations. Judicial review was limited to instances of "fraud, misrepresentation, or other misconduct."<sup>42</sup>

The issue in *Thomas* was whether Congress could assign this private law dispute to a non-Article III court. In upholding the constitutionality of the arbitration system, the Court narrowly stated what it understood to be the holding of *Northern Pipeline*. Justice O'Connor, writing for the majority, said that the earlier decision established 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."<sup>43</sup>

The Court said that legislative courts were permissible for private disputes that were closely related to government regulatory activities. In perhaps the most important language of the majority opinion, Justice O'Connor stated: "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under article I, may create a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution."<sup>44</sup>

At minimum, *Thomas* recognized a new category of cases where legislative courts could be constitutionally employed: private law disputes closely related to government regulatory programs. Professor Resnick has termed this category "agency adjudication of private rights that the public cares about."<sup>45</sup> But *Thomas* potentially has even greater importance in representing a new approach to judicial analysis of legislative courts. In the *Northern Pipeline* decision the plurality opinion indicated that there were four and only four situations in which legislative courts could be used: for territories, the military, public rights matters, and as adjuncts to Article III courts. In *Thomas* the Court rejected the claim that these categories are exhaustive of the situations in which

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<sup>42</sup>7 U.S.C.A. § 136a(c)(1)(D)(ii) (West 1980 & Supp. 1990).

<sup>43</sup>473 U.S. at 584.

<sup>44</sup>*Id.* at 593-94.

<sup>45</sup>Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581, 598 (1985).



legislative courts are constitutional.<sup>46</sup> Instead, the Court adopted a functional approach, considering the desirability of a non-Article III tribunal and the degree of encroachment on the federal judiciary. In this way the Court's approach seemed similar to the balancing test endorsed by Justice White in *Northern Pipeline*.

The Court's most recent decision concerning legislative courts is *Commodity Futures Trading Commission v. Schor*.<sup>47</sup> The Commodity Futures Trading Commission has the statutory authority to provide reparations to individuals who are injured by fraudulent or illegally manipulative conduct by brokers. The Commission also promulgated regulations which enabled it to hear all counter-claims arising out of the same allegedly impermissible transactions.

The Court separately considered these two aspects of the Commission's jurisdiction: the authority to provide reparations and the power to adjudicate counterclaims. As to the former, the Court found that the Commission's jurisdiction to order reparations to injured consumers was "of unquestioned constitutional validity."<sup>48</sup> Because the Commission could not enforce its own orders, which instead required federal court action, the Court concluded that the Commission served as a permissible adjunct to the federal court.<sup>49</sup> The more difficult question was whether the Commission could hear state law counterclaims. In *Northern Pipeline* both the plurality and the concurrence found objectionable the bankruptcy courts' authority to decide state law matters.<sup>50</sup> However, in *Schor* the Court approved the Commission's authority to rule on the state law counterclaims. The Court expressly endorsed a balancing test in appraising the constitutionality of legislative courts.<sup>51</sup>

The Court identified the benefits of an administrative alternative to federal court litigation in terms of efficiency and expertise.<sup>52</sup> At the same time, the Court said that these interests had to be balanced against "the purposes underlying the requirements of Article III."<sup>53</sup> The Court considered two goals of Article III: insuring fairness to litigants by providing an independent judiciary and maintaining the "structural" role of the judiciary in the scheme of separation of powers. As to fairness, the Court said that the defendant had consented to the administrative proceedings as an alternative to federal court litigation and hence could not claim that the Commission adjudication was inherently unfair.<sup>54</sup>

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<sup>46</sup>73 U.S. at 585-86.

<sup>47</sup>78 U.S. 833 (1986).

<sup>48</sup>*Id.* at 856.

<sup>49</sup>*Id.* at 859.

<sup>50</sup>458 U.S. at 84 and 90.

<sup>51</sup>78 U.S. at 851.

<sup>52</sup>*Id.* at 856.

<sup>53</sup>*Id.* at 847.

<sup>54</sup>*Id.* at 849-50.

As to separation of powers, the Court declared: "In determining the extent to which a given congressional decision to authorize the adjudication of article III business in a non-article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch, the Court has declined to adopt formalistic and unbending rules."<sup>55</sup> Justice O'Connor, writing for the majority, said that instead the Court focuses on several factors including:

the extent to which the "essential attributes of judicial power" are reserved to article III courts, and conversely, the extent to which the non-article III forum exercises the range of jurisdiction and powers normally vested only in article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of article III.<sup>56</sup>

Justice O'Connor emphasized that no single factor is likely to be determinative of constitutionality. The Court concluded that "the magnitude of any intrusion on the Judicial Branch can only be termed *de minimis*."<sup>57</sup>

Not surprisingly, Justices Brennan and Marshall dissented. The test used in *Schor* cannot sustain the result in *Northern Pipeline*. In fact, the test seems identical to the approach urged by Justice White in dissent. The Court in *Schor* said that in evaluating Article I courts it looks to fairness to the litigants and the degree of intrusion into separation of powers. However, there were no allegations before the Court in *Northern Pipeline* that bankruptcy courts under the 1978 amendments were unfair to litigants. Nor was there any indication that Congress used Article I bankruptcy courts to gain any institutional advantage at the expense of the judiciary. In short, in assessing the effects of Article I bankruptcy courts, "the magnitude of any intrusion on the Judicial Branch can only be termed *de minimis*."

Therefore, if *Northern Pipeline* were decided today, there is every reason to believe that it would be resolved differently. The approach endorsed in *Schor* indicates a strong likelihood that Justice White's opinion might attract a majority of the Court.<sup>58</sup> Additionally, it should be noted that the Court's composition has changed substantially since *Northern Pipeline*, and even since *Schor*. It is unclear how Justices Scalia, Kennedy, and Souter will vote on these questions.

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<sup>55</sup>*Id.* at 851.

<sup>56</sup>*Id.*

<sup>57</sup>*Id.* at 856.

<sup>58</sup>*Id.* There is, however, an unpredictability to the Court's balancing approach, since it is not clear what weight the Court will give to what factors in the balancing. Fallon, *supra* note 18, at 917. As such, there is no certainty that *Northern Pipeline* would be decided differently, even under the *Schor* test.

### III. THE MARATHON CONTINUES: LINE DRAWING AFTER NORTHERN PIPELINE

The previous sections have argued that *Northern Pipeline* should be overruled because of flaws in its analysis and because of subsequent Supreme Court decisions. These justifications are especially compelling because *Northern Pipeline* continues to engender constant litigation concerning the permissible scope of bankruptcy courts. Overruling the decision could spare parties, litigators, and courts a tremendous amount of needless time and money.

The Court's recent decision in *Granfinanciera, S.A. v. Nordberg*<sup>59</sup> gives an indication of much litigation yet to come. The specific question presented in *Granfinanciera* was whether a person who has not submitted a claim against a bankruptcy estate has a right to a jury trial when sued by the trustee in bankruptcy to recover an allegedly fraudulent monetary transfer. The Court concluded that the suit was properly classified as an action at law based on its historical treatment and because it was a claim for money.<sup>60</sup> The Court held that there thus was a seventh amendment right to a jury trial, notwithstanding Congress' designation of fraudulent conveyances as "core proceedings" in the Bankruptcy Code.<sup>61</sup> Furthermore, the Court ruled that the issue presented was not a "public right" because it neither involved government as a party nor was so closely related to a public regulatory scheme as to warrant treatment in an Article I court.<sup>62</sup>

The Court thus held only that a jury trial must be provided when the relief sought is for money damages and the matter involves private rights. The *Granfinanciera* Court said that it was not confronted with the question of whether it violates Article III for Congress to authorize Article I bankruptcy courts to preside over jury trials subject to review in the district courts.<sup>63</sup>

*Granfinanciera* thus left open for a future decision to draw more lines as to when jury trials are required and whether bankruptcy courts can provide them. A bankruptcy judge aptly described this in a recent opinion:

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<sup>59</sup>492 U.S. 33, 109 S. Ct. 2782 (1989).

<sup>60</sup>109 S. Ct. at 2793.

<sup>61</sup>*Id.* at 2790.

<sup>62</sup>*Id.* at 2797. Justice Scalia, in a concurring opinion, expressed his view that "public rights" involve only cases with the United States government as a party. *Id.* at 2802-2805 (Scalia, J., concurring). He thus expressed his disagreement with the holding in *Thomas v. Union Carbide Agricultural Products Co.*

<sup>63</sup>109 S. Ct. at 2794-2795 ("[f]or need we decide whether, if Congress has authorized bankruptcy courts to hold jury trials in such actions, that authorization comports with Article III when non-Article III judges preside over them subject to review in or withdrawal by the district courts.") For a discussion of this issue, see Gibson, *Jury Trials and Core Proceedings: The Bankruptcy Judge's Uncertain Authority*, 65 AM. BANKR. L.J. 143 (1991); Baird, *Jury Trials After Granfinanciera*, 65 AM. BANKR. L.J. 1 (1991); Matthews, *The Right to Jury Trial in Bankruptcy Courts: Constitutional Implications in the Wake of Granfinanciera, S.A. v. Nordberg*, 65 AM. BANKR. L.J. 43 (1991); Gibson, *Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment*, 72 MINN. L. REV. 967 (1988).

Like Freddy Kruger or Jason, the issue of whether a Bankruptcy Judge can conduct a jury trial refuses to die. In *Halloween* and *Nightmare on Elm Street*, these movie monsters manage to reincarnate themselves through various bizarre events. We hesitate to predict how many sequels of Jurisdictional Nightmare in Bankruptcy Court the Supreme Court will produce! In *Granfinanciera* the Supreme Court breathed new life into the jurisdictional monster, yet declined to assist in dealing with the havoc it wreaks.<sup>64</sup>

Countless issues of a line drawing sort are unresolved. For example, many questions exist as to the distinction between core and non-core proceedings in defining bankruptcy court jurisdiction. Courts are split, for instance, as to whether bankruptcy courts can adjudicate state law contract actions by the estate against non-creditor defendants.<sup>65</sup> Lower courts have split since *Granfinanciera* as to whether a voluntary debtor has the right to demand a jury trial.<sup>66</sup> Other issues concern the power of bankruptcy judges, for example, to impose civil contempt orders.<sup>67</sup> And for each issue, there are questions of whether it matters whether the case is core or non-core; public rights or private rights; reviewable by Article III courts or not.

Because *Northern Pipeline* offers relatively little justification for the lines it draws, it provides minimal guidance as to how lines should be drawn in these cases. Distinctions will be drawn, but for what end? It is not worth the time or expense to continue the effort at line drawing. The time has come to overrule *Northern Pipeline*.

#### IV. CONCLUSION

I have carefully avoided taking any position as to whether normatively it would be desirable for bankruptcy judges to be accorded Article III status. Certainly one way to solve many of the problems in defining the jurisdiction of bankruptcy courts would be to accord these judges life tenure and protection against reduction in salary. But there are obvious costs to expanding dramatically the size of the Article III judiciary.

My conclusion is that whether bankruptcy court judges should have Article III status is a political issue, not a constitutional question. *Northern Pipe-*

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<sup>64</sup>*Wilkey v. Intertrade, Inc. (In re Owensboro Distilling Co.)*, 108 B.R. 572, 575 (Bankr. W.D. Ky. 1989).

<sup>65</sup>For a listing of at least a dozen cases on each side of this question, see *Satelco, Inc. v. North American Publishers, Inc. (In re Satelco, Inc.)*, 58 B.R. 781, 783 (Bankr. N.D. Tex. 1986).

<sup>66</sup>See, e.g., *Germain v. Connecticut Nat'l Bank (In re O'Sullivan's Fuel Oil Co.)*, 103 B.R. 388 (Bankr. D. Conn. 1989) (filing of voluntary bankruptcy does not waive jury trial); *Haden v. Edwards (In re Edwards)*, 104 B.R. 890 (Bankr. E.D. Tenn. 1989) (voluntary filing of bankruptcy is a waiver of the right to a jury trial).

<sup>67</sup>See *Plastiras v. Idell (In re Sequoia Auto Brokers Ltd.)*, 827 F.2d 1281 (9th Cir. 1987) (bankruptcy judges do not have the power to impose civil contempt).

*line* is unsupported by constitutional text, history, or policy considerations; it is even inconsistent with the current test for determining the permissibility of Article I courts. The decision should be overruled and Congress should again have the authority to decide the nature and appropriate jurisdiction of bankruptcy courts.

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