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Judith Resnik
Yale Law School

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THE MYTHIC MEANING OF ARTICLE III COURTS

JUDITH RESNIK*

I. INTRODUCTION

Judges and academic commentators debate, often with great vigor, what role to accord the federal judiciary—vis-a-vis state courts, Congress, and the executive. Central to the debate is some shared notion about the special qualities of federal courts. However much authority one might want federal courts to have, we have come to accept that federal judges possess enormous power, often attributed to their constitutionally-accorded qualities of life tenure and no diminution of salary. These extraordinary luxuries give federal judges unusual security. Exempt from the woes that beset other members of federal and state government, federal judges are empowered and in some sense ennobled by their constitutional status. Federal courts and their judges, as created by Article III, are special.

The constitutional grant of federal adjudicatory power to Article

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* Professor of Law, the University of Southern California Law Center. B.A. Bryn Mawr College, J.D., New York University School of Law. The research for this article was supported by the Faculty Research and Innovation Fund of the University of Southern California.

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1. Compare the controversy about the Supreme Court of the State of California, some of whose members face a retention election in 1986. See, e.g., Endicott, Bird Lovers, Haters Get Set for '86, L.A. Times, Jan. 27, 1985, IV at 1, col. 1 (California Governor Deukmejian affirmed his intention to speak against the retention of the state's Chief Justice, Rose Bird); Ingram, Prosecutor's Assn. Urges Defeat of Justice Bird, L.A. Times, March 1, 1985, I at 3, col. 6 (California District Attorneys' Association advocated Justice Bird's defeat for "failing to implement the death penalty").
III judges appears straightforward. However, the federal courts are not populated only by the remarkable Article III actors described in the constitutional text. There are many other individuals, whose numbers far outstrip those of the federal judges, who have the power to perform adjudicatory functions within the federal system but who possess neither life tenure nor salary guarantees. These individuals bear different titles, such as “administrative law judge,” “hearing officer,” “magistrate,” and “bankruptcy judge.” Some work in institutions labeled agencies, while others reside in so-called legislative or “Article I” courts, and still others find their niches within Article III courts themselves. It is quite clear that what these officials do is judge-like. They make factual findings about disputed matters and issue opinions in which legal rules are applied. Moreover, the decisions of these officials constitute a large proportion of the federal adjudicative process. While the Article III civil docket in 1984 had some 250,000 pending cases and 243,000 case dispositions were made, the Social Security Administration alone made 337,459 dispositions. In 1984, there were 515 Article III trial judges and 1121 administrative law judges. In

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3. SOCIAL SECURITY ADMINISTRATION (SSA) OPERATIONAL REPORT OF THE OFFICE OF HEARINGS AND APPEALS 26 (Sept. 1984). While recent statistical compilations of all federal agencies’ work are unavailable, a study conducted in 1983 by the Administrative Conference of the United States estimated that some 391,000 new cases were filed with administrative law judges during that year. The SSA accounted for the bulk (363,000) of the filings. The National Labor Relations Board reported 4,900 filings, while the Environmental Protection Agency reported only 340. Lubbers, Federal Agency Adjudication: Trying to See the Trees and the Forest, 31 FED. BAR NEWS & J. 383, 384 (1984).

4. 1984 ADMINISTRATIVE OFFICE REPORT, supra note 2, at 129.  
5. This is the number of administrative law judges employed in that year. Lubbers, supra note 3, at 383. Not all federal agency hearing examiners are administrative law judges; e.g., the hearing examiners of the United States Parole Commission, 18 U.S.C. § 4203 (1982) (repealed by the Sentencing
short, there are a large number of non-Article III federal adjudicatory personnel who decide a vast number of federal cases. Moreover, their ranks have recently swelled with the enactment of the 1984 amendments to the Bankruptcy Act and the creation of a new Claims Court.

Perhaps most striking of all is that the United States Supreme Court (an institution one might assume to be the quintessential guardian of Article III-ness) has, in a line of cases dating back almost to the inception of the country, endorsed congressional authority to imbue non-Article III decisionmakers with adjudicatory capacities. Moreover, despite a substantial body of case law devoted to the exegesis of Article III, firm statements about the limits of congressional authority are difficult to make. How are we to reconcile the portentous constitutional provisions empowering federal judges with the growth of an enormous auxiliary of federal judicial personnel? Should we be concerned that federal judicial power is being diminished by the number of federal decisionmakers who lack life tenure and are vulnerable to pressures from their employers? Should we be comforted by the ad-


6. I use the term “non-Article III” actors to encompass a diverse set of institutions and personnel, including so-called “Article I” or “legislative” courts, such as military courts that are virtually independent of Article III courts, administrative agency adjudication in which orders are typically enforceable and therefore reviewable by Article III courts, magistrates who work as assistants to Article III judges, and a variety of other groups, such as bankruptcy judges, arbitration boards and the like, all creatures of federal statutes, all not given life tenure, all functioning as adjudicators and all somewhat (and to varying degrees) connected to the Article III adjudication process.


9. E.g., American Ins. Co. v. Canter, 1 Pet. 511 (1828), discussed infra notes 28-41 and accompanying text. In addition to upholding congressional authority to create adjudicatory institutions staffed by judges without life tenure, the Supreme Court has been flexible in its enforcement of the non-diminution of compensation clause of Article III. See United States v. Will, 449 U.S. 200 (1980) (congressionally-authorized salary increases in effect may not be repealed but those not yet effective may be repealed); Atkins v. United States, 556 F.2d 1028 (Ct. Cl., 1978), cert. denied, 434 U.S. 1009 (1978) (rejection of suit by 140 district and circuit court judges who attacked congressional and executive failure to adjust judicial salaries to compensate for inflation).

dition of needed personnel and by the flexibility afforded when the employment commitment is less than life tenure? Should we care whether Congress or the executive creates, or the Court condones, the use of non-Article III personnel? These are the questions which this article addresses.

II. A HYPOTHEtical “COMMERCE COURT”

Exploration of the meaning of Article III often occurs in the context of whether and how that section constrains congressional behavior. The question typically arises when Congress creates an adjudicatory apparatus populated by decisionmakers lacking Article III protections of life tenure and salary guarantees. To ground this consideration of the meaning of Article III, I provide the following, hypothetical congressional proposal—for a new “Commerce Court.” Assume that Congress, acting pursuant to its powers to “regulate Commerce . . . among the several States” and to “constitute Tribunals . . . to hear and determine the same.”

12. My hypothetical “Commerce Court” should be distinguished from the real Commerce Court, created in 1910 and possessing jurisdiction over “all cases for the enforcement . . . of any order of the Interstate Commerce Commission.” See Pub. L. No. 36-218, ch. 309, 36 Stat. 359 (1910). The jurisdiction of that court was narrowly construed in Procter & Gamble Co. v. United States, 225 U.S. 282 (1912), and was abolished in 1913. See Urgent Deficiencies Act of Oct. 22, 1913, Pub. L. No. 38-32, 38 Stat. 208, 219 (1913). The Commerce Court’s limited jurisdiction, coupled with the fact that it sat in Washington, left the court vulnerable to impressions that “the railroads could exert greater influence on the Court . . . than isolated shippers.” 1 J. MOORE, J. LUCAS, H. FINK, D. WECKSTEIN, AND J. WICKER, MOORE’S FEDERAL PRACTICE para. 0.3 [6] (2d ed. 1985). See generally Robbins, The Commerce Court Scandal, 74 CENT. L.J. 356 (1912) (discussing impeachment proceedings against a Commerce Court judge); Baker, The Commerce Court—Its Origin, Its Powers and Its Judges, 20 YALE L.J. 555, 562 (1911) (the creation of the court “portends good results and . . . equality and expedition . . . ”); Dix, The Death of the Commerce Court: A Study in Institutional Weakness, 8 AM. J. LEGAL HIST. 238 (1964) (Commerce Court’s failure to attract support from influential interests and to achieve a general aura of legitimacy led to the court’s demise); F. FRANKFURTER AND J. LANDIS, THE BUSINESS OF THE SUPREME COURT 162-175 (1927) (Commerce Court had too many politically sensitive issues to determine, “probably no court has ever been called upon to adjudicate so large a volume of litigation of as far-reaching import in so brief a time.” Id. at 164).

nals inferior to the supreme Court,"14 declares that

all cases arising under federal law and related to interstate commerce shall be heard exclusively by the Commerce Court, to be staffed by judges appointed by the President for terms of twelve years and with a salary set yearly by the Judiciary Committee of the House of Representatives but not to be less than $60,000 yearly.

Does Congress have the power to create such an institution? One easy (and therefore attractive) answer is "decidedly not." Article III of the United States Constitution uses mandatory language: it states that 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."15 The Constitution requires that Article III judges "hold their Offices during good Behavior, and shall, . . . receive . . . a Compensation, which shall not be diminished during their Continuance in Office."16 Since the proposed statute purports to establish "courts" populated by judges who are not cloaked with such attributes, the statute plainly does not create a new set of Article III judges. Moreover, the statute gives those judges the task of deciding cases that fall squarely within the enumerated categories provided by the Constitution for Article III judges to decide.17 Therefore, the hypothetical Commerce Court, which attempts to entrust the work of Article III courts to non-Article III judges, appears to be beyond the powers of Congress, and the legislation fails.

Would that the world were so simple. Such a straightforward (albeit still interpretory18) reading of the Constitution offers the advantages of a "bright line" and easy consistency: Congress can make no "courts" whose judges are not garbed with Article III protections, especially if such "courts" are to decide cases "arising under the Constitution" or "laws of the United States." There are, however, two problems with this interpretation. First, since the Judiciary Act of 1789,19 it has been evident that not all of the categories of judicial power enumerated in Article III, section 2 must be decided by Article III judges. Rather, the Judiciary Act apparently assumed—and the practice soon emerged—that state courts could decide cases that fall

14. Id.
16. Id.
17. Specifically, Article III, § 2 provides that "[[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . ."
19. 1 Stat. 73.
within the grant of federal judicial power. Judges in state courts lack the Article III protections of life tenure and no diminution of salary. Given state court decisionmaking in this area, the proposition that Article III courts alone can decide Article III business is unfounded.

But perhaps the work of state courts on Article III matters does not so readily validate the hypothetical "Commerce Court" as might first appear. State courts are creatures of other governments; their judges are appointed by mechanisms removed from the reach of Congress. One of the most frequently presented justifications for Article III safeguards is that the Constitution wisely protected the federal judiciary from supervision by the legislative and executive branches. The independence obtained from life tenure and salary protections is supposed to enable federal judges to evaluate actions of the executive and legislative impartially and to be willing to do battle with them. State courts are, at least on paper, independent from Congress; thus their work on Article III matters does not undermine the constitutional purposes as evidenced by Article III. However, congressional creation of "courts" like the "Commerce Court" raises all the concerns about independence. After all, if the proposed "Commerce Court" judges were to issue decisions Congress disliked, Congress could repeal the enabling statute, abolish the courts and remove the judges from office. As long as Article III of the Constitution stands for the proposition that a federal judiciary independent from the Congress is required, then Congress is prohibited from establishing courts populated by judges without Article III status.

This line of reasoning is, however, defeated by an ultimately insurmountable response—reality. Congress has created institutions bearing the label "courts" and the Supreme Court has sanctioned those entities as constitutional. The line of cases is long and the proposition—contrary to a simple reading of Article III—is firmly established. According to the Supreme Court, the Constitution permits Congress to create adjudicatory institutions other than Article III courts. Some of these institutions are called "legislative" or "Article I" courts. Others are denominated "administrative agencies," and


some are in between. Further, Congress may populate Article III courts with non-Article III personnel, such as magistrates. In short, the Supreme Court has approved a wide range of non-Article III adjudicatory personnel.

Given this history, another position on the proposed "Commerce Court" might recommend itself. The statute could be read as constitutional, as have been many congressional decisions to create non-Article III courts. Given the breadth of powers accorded Congress under the Constitution, one could argue that the only unconstitutional efforts by Congress to create courts would be those which exceed Congress' authority under the Constitution. Since the proposed "Commerce Court" falls squarely within the Article I grant to Congress of the power "to regulate Commerce . . . among the several States," the statute easily survives this test. And, one might add, so would most other proposed courts, since the Constitution provides Congress with a broad mandate to govern the country. Given the extent of congressional powers, Congress would have plenary authority to deploy courts as needed to meet dispute resolution demands. This approach offers clarity and flexibility.

Reality, however, defeats this approach as well. The Supreme Court has consistently (and recently) refused to read Article III as providing Congress plenary authority to create non-Article III courts. Rather, the Court has insisted upon limits to congressional authority to create adjudicatory institutions outside Article III. In the Court's and in commentators' discussions, there are persistent assertions of the need for Article III courts and of concern that, were Congress permitted unchecked authority to create non-Article III adjudicatory institutions, then Congress would do so.

But these assertions assume an answer to the question: is there such a politically important role for Article III courts that we should claim a constitutionally-mandated arena and forbid some or all con-

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gressional incursions into Article III turf? Is there some way to make sense of the Supreme Court's efforts to preserve Article III courts and yet permit Congress to create non-Article III courts? Although the Supreme Court is clear that there are some limits to congressional power, that Article III imposes them, and that the Supreme Court will enforce them, the Court has great difficulty articulating what the limits are and why the lines have been drawn as they have. The task is to have an affirmative definition of situations which demand the qualities ascribed to Article III courts, and to be able to identify the harms, if any, which would flow from the creation of non-Article III courts. How, if at all, would the world be diminished if courts like my hypothetical Commerce Court came into being?

III. THE "COMMERCE COURT'S" FAILINGS

As noted, the hypothetical statute fails Article III requirements in two respects. Appointed for twelve-year terms, the judges are not given life tenure; indeed, if the statute is repealed, they could lose their jobs completely. Further, although provided with a base salary of $60,000, the new judges' compensation could be diminished from year to year by subsequent legislation. It is accepted wisdom that life tenure and salary guarantees are important to preserve judicial independence by freeing judges from fears of being fired. Numerous articles and opinions describe the centrality—both to the framers and to present day commentators—of two forms of judicial independence: the structuring of an independent branch of government empowered to check excesses of coordinate branches and the creation of a cadre of independent individual judges, free from threats of coercion and therefore assumed able to judge impartially.25 Whether life tenure actually begets impartiality is difficult to assess; a more straightforward assumption is that life tenure protects judges from making decisions to protect their own livelihoods.26

At an individual level, it is plain that, despite the Article III protections, some judges curry favor—in the hope of future appointment to positions of greater power or simply out of a desire to be liked by the powers that be. However, at a structural level, the Article III protections seem to have worked to imbue a group of individuals with a perceived freedom from courting popularity and to permit (for better

or worse) specific individuals to make "brave" or "foolhardy" (de-
pending upon one's views) decisions on some occasions. Article III
judges speak of themselves as the "checks" created by the Constitution
to "balance" the powers vested in the legislature and the executive.27
The hypothetical "Commerce Court" statute provides no such protec-
tions, but then neither do several other pieces of legislation approved
by the Supreme Court.

Given the Court's own descriptions of the import of Article III, it
is all the more puzzling why a majority of the Court has consistently
been willing to permit incursions into Article III and has allowed Con-
gress the power to create less than fully independent "courts." A brief
review of some of the major opinions condoning non-Article III courts
provides only a partial explanation.

The first major Article III opinion was American Insurance
Company v. Canter,28 decided in 1828 by Chief Justice Marshall and
involving a dispute about ownership of cotton. The question was the
enforceability of an order by a court that Congress had created for the
territory of Florida. David Canter claimed that he was a bona fide
purchaser of 356 bales which had been sold at a salvage auction pursu-
ant to an order of the Florida territorial court, an institution created
by what Chief Justice Marshall described as "the territorial legislature
of Florida"29—to wit, the United States Congress. If the order of that
territorial court was valid, then Canter was the rightful owner. How-
ever, American Insurance Company, which had insured the cargo,
claimed that the territorial court had no jurisdiction over the salvaged
cargo; American Insurance argued that, as underwriter, it was the
lawful owner. A United States district court agreed, and American
Insurance succeeded in obtaining restitution.30 Losing at the circuit
level, American Insurance argued to the Supreme Court that the Con-
stitution applied in full force to the territories, that Article
III vested
judicial power, and specifically power over all cases in admiralty and
maritime, in courts created under Article III, and therefore that the
territorial court lacked the power to order a salvage sale.31

27. See, e.g., Kaufman, supra note 20, at 689. See also Edwards, The Role of a Judge in Modern
28. 1 Pet. 511 (1828). As discussed infra notes 37-38 and accompanying text, the Article III issue
in Canter appears to be of secondary importance to the Court; only in retrospect did Canter become the
first "major" Article III opinion. This revisionist view of Canter is understandable; the entire issue of
Article I/Article III courts is largely a result of developments in adjudicative structures of the last sixty
years. The seminal history of the federal courts, the Frankfurter and Landis treatise, supra note 12,
makes no mention of the Canter case.
29. 1 Pet. at 541.
30. 1 F. Cas. 658 (D.S.C. 1892) (No. 302a).
31. 1 Pet. at 515.
Chief Justice Marshall used the *Canter* opinion as an occasion to pronounce on the power of the United States as a nation to acquire “territory, either by conquest or by treaty.” Since the “right to govern” was an “inevitable consequence” of the “right to acquire territory,” Congress had authority to create courts—as long as those courts did not violate the Constitution. Thereafter, the opinion becomes a bit circular. Marshall reasoned that, because the Florida judges served for limited terms, they did not sit in “constitutional courts” but rather in “legislative courts.” Marshall held such courts legitimate because they were created by Congress, exercising in the territories “the combined powers of the general, and of a state government.” Marshall’s view is premised upon the theory that, when governing the territories, Congress was not “Congress” but was the functional equivalent of a state legislature. Since Article III limited the freedom of Congress only when it acted as “Congress” to create United States courts, Article III did not constrain Congress when it acted as not-Congress.

A traditional explanation of the *Canter* opinion is that it is about efficiency—that it was sensible not to require life-tenured judges for the territories because these lands would eventually become states. The approval of “legislative courts” was viewed as Marshall’s clever finesse to avoid the problem of surplus judges. I beg to differ. Marshall’s opinion reads as a treatise on why Congress had the power, without constitutional amendment, to acquire land for the nation. That issue was the subject of contemporary debate, apparently quieted by Marshall’s ruling. The *Canter* opinion treats the issue of legisla-

32. *Id.* at 542.
33. *Id.* at 543.
34. *Id.* at 546.
35. *Id.*
36. Compare the view of Congress as having limited powers in the territories in *Dred Scott v. Sanford*, 19 How. 393 (1856). The dissent by Justice Curtis pointed out the inconsistency with *Canter*, 19 How. at 613. See also D. Fehrenbacher, *The Dred Scott Case* 293 (1978) (*Canter* often cited by Republicans during the debate over the Missouri Compromise as authority for congressional power to prohibit slavery in the territories).
38. Deutsch, *The Constitutionality of the Louisiana Purchase*, 53 A.B.A.J. 50 (1967) (Florida acquisition raised the same issue but was quieted by the *Canter* opinion. *Id.* at 52, 57). See E. Brown, *The Constitutional History of the Louisiana Purchase*, 15-35 (1920) (major contemporary debate about the constitutionality of acquiring territories); A. Kelly & W. Harbison, *The American Constitution, Its Origins and Development*, 207-210 (1976) (at the time of the Louisiana Purchase, there was considerable controversy about whether Congress had the constitutional authority to acquire land; art. IV, § 3 only speaks of Congress’ power to admit new “states”).
tive courts as secondary and devotes little discussion to the virtues of Article III. However, the opinion has come to serve as the cornerstone of the doctrine that Congress has the authority—at least sometimes—to create "legislative courts."

The Canter opinion is difficult to assimilate into the generally accepted theory of Article III that its purpose is to ensure a federal court system independent of Congress and the executive. Since, under Canter, it is permissible to have Article I judges decide Article III business in the territories, why not have Article I judges decide Article III business elsewhere? Indeed, why insist upon Article III judges at all? The response, not terribly persuasive, is that the need for checks and balances diminishes in the territories, because . . . . I suppose, because the "territories are the territories."39

When read this way, Canter may be insufficient to take us very far toward a definition of Article III courts that has much import today. The Canter opinion can be understood as circular but clear. The territorial courts were not subjected to Article III strictures because the judges did not have life tenure and the judges did not have to have life tenure because they were territorial (not federal) judges. Thus, under Canter it is relatively easy to uphold non-Article III judges deciding Article III cases in the District of Columbia and in other federal enclaves,40 but Canter is somewhat less vibrant as a basis for upholding non-Article III courts established for entities not physically delineated and accorded special status.

There is one thread in Canter, however, which does support a broader exercise of congressional court-making authority. Chief Justice Marshall concluded that the territorial courts were valid either because of the "general right of sovereignty which exists in the government" or because of "that clause [Article IV, section 3] which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States."41 While this section of the opinion might be read in context as only further support for congressional power to acquire territories, the opinion might also be understood as an endorsement of congressional authority to act, pursuant to its con-

39. Justice Harlan offered a version of this argument in Glidden v. Zdanok, 370 U.S. 530, 546 (1962) ("the realities of territorial government typically made it less urgent that judges there enjoy the independence from Congress and the President envisioned by [Article III]. For the territories were not ruled immediately from Washington; in a day of poor roads and slow mails, it was unthinkable that they should be").


41. 1 Pet. at 546.
stitutionally enumerated powers, to create courts in areas other than those related to the territories. Since there are also clauses which enable Congress to make rules and regulations respecting commerce, the coinage of money, the governance of the armed forces, and to carry out any of its or the executive's powers, why not a series of "legislative courts" to adjudicate a range of business? If a clause in Article IV can support territorial courts, why not rely on the clauses of Article I to support a variety of courts, such as military courts, bankruptcy courts, and commerce courts?

As is familiar, the Supreme Court has expressly upheld congressional authority to establish military courts, although jurisdiction of those courts is bounded. In those cases, the Court has underscored the distinctiveness of the subject matter. The analysis is that the military is the military. But in both the territorial and military court discussions, the subject matter does itself lend some basis for delineating congressional authority. The cases heard by these courts are understood (somehow) as not at the core of the business of the United States courts. The institutions—the army, navy, and territories—are discrete almost quasi-distinct entities, all of which have some tradition of separate governance. The Supreme Court opinions upholding separate courts for the military, however, also rely upon a broader justification: the enumerated grants of power to Congress in Article I. The Court seems ambivalent as it both assumes limits and affirms the substantial powers of Congress to create courts. Given the broad language of these opinions, the hypothetical "Commerce Court" could be constitutional.

There are two other kinds of cases which provide the most complicated and relevant precedents for current understandings of the meaning of Article III. One group of opinions is often denominated the "public rights" cases. The title emerges because the litigation is between an individual and the United States government. The classic example, an 1856 case, Murray's Lessee v. Hoboken Land and Improvement Company, was a dispute about the collection of debts owed by a federal customs officer. The Solicitor of the Treasury ordered the customs officer's property sold, the sale was contested, and one argument advanced was that an Article III judge, rather than an executive branch official, should have ordered the sale. At the time (long before the "due process revolution"), debts could be satisfied by

44. Ex Parte Reed, 100 U.S. 13, 21 (1879).
45. 18 How. 272 (1856).
seizure. The Supreme Court, upholding the sale, reasoned that no infringement of Article III values had occurred because the entire issue could have been determined without any judicial intervention. Since the problem could have been handled without courts, Congress or the executive was free to create institutions or to vest individuals with power to order the sale of debtors' property.

The underlying assumption of the old "public rights" cases was that (despite the term "rights") the citizens possessed no "rights" cognizable in court. To the extent that disputes occurred between citizen and government, those disputes were enabled by a generous sovereign, waiving immunity. In that world, with "privileges" and "gratuities" instead of "entitlements," there was no judicial turf to invade. As the Supreme Court explained in Murray's Lessee, the disputes were not "necessarily . . . [a] judicial controversy." The "public rights" cases emerged in a world with assumptions quite at odds with those of today. However, the opinion continues to be cited as evidence of the existence of an ill-defined but extant category of cases, involving controversies between the federal government and its citizens, often related to statutory rights, and appropriately decided (at least in the first instance) by non-Article III courts.

The second group of precedents is represented by Crowell v. Benson. This 1932 opinion takes the "public rights" category a step further. In Crowell, the dispute was between two private citizens, an employer and an employee, and the question was whether the employer (Benson) had to pay worker compensation benefits to the employee (Knudson), who had suffered injuries while working on a derrick barge moored in the Mobile River in Alabama. Knudson sought recovery under the Longshoremen's and Harbor Workers' Compensation Act. Deputy Commissioner Crowell, of the United States Employees' Compensation Commission, found for employee Knudson over Benson's objection that Knudsen had not been his employee performing "service upon the navigable waters of the United

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47. 18 How. at 284.
48. As we have come to understand them by reading Charles Reich, The New Property, 73 YALE L.J. 733 (1964).
49. 18 How. at 281.
50. See, e.g., Northern Pipeline Constr. Co. v. Marathon Oil, 458 U.S. at 67 (plurality opinion); Currie, supra note 46, at 449-58, 463-65.
52. Crowell v. Benson, 45 F.2d 66 (5th Cir. 1930).
Benson challenged enforcement of the decision in federal district court. Benson claimed the statute unconstitutionally vested judicial authority in the deputy commissioner, and the trial court judge agreed. The judge then heard the case de novo and held for Benson on the grounds that the injury had not occurred in a manner covered by the Longshoremen’s Act.

Thus, the Supreme Court was presented with a challenge, grounded in Article III, that implicated the validity of worker compensation schemes and of administrative adjudication. In a Solomonic move, the Court “split the difference”; it upheld Congress’ decision to place adjudicatory power in a non-Article III institution and yet simultaneously permitted the Article III judge’s ruling to stand, and Benson, the employer, to prevail. While somewhat murky, the Court’s justifications rested upon the statute’s allocation of responsibilities between deputy commissioners and Article III judges. Under the Act, a deputy commissioner had no authority to enforce awards; rather, awards were to be enforced by a district court if made “in accordance with law,” or set aside, if “not in accordance with law.”

Chief Justice Hughes, for the majority, relied on that division of authority to conclude that the Act provided for “the reservation of legal questions” to Article III judges. In the Court’s view, since the federal district court was statutorily empowered to rule, the Act did not violate Article III.

Struggling to make sense of the legislation in the Article III context, the majority groped to develop its premises. Crowell was not the typical “public rights” agency case, for it was not a civil dispute between the United States and its citizens. As the Crowell Court acknowledged, the lawsuit involved a “private right, that is the liability of one individual to another under the law as defined.” As such, the case was “a subject for judicial determination.” Nevertheless, the Court held that delegation of decisionmaking was permissible, so long as the administrative adjudicator had some dependence upon Article III judges. The Court found solace in its interpretation of the Act which permitted the decision of a deputy commissioner to be trumped

55. 45 F.2d at 67.
56. Id.
59. 285 U.S. at 49.
60. Id.
61. Id. at 51.
62. Id. at 49 (quoting Murray’s Lessee, 18 How. at 284).
by the ruling of an Article III judge. That judge explicitly retained the authority to enforce awards and implicitly was accorded authority to review and to remake, de novo, the "legislative judge's" decision.

The majority's complex balancing act is evident in the problematic compromise made. The opinion is laced with language suggesting the majority's concerns for the pragmatics, the growing needs for inexpensive adjudicatory techniques. In language well-suited to contemporary opinions, the Court emphasized that the purpose of the Act was to "furnish a prompt, continuous, expert, and inexpensive method for dealing" with a class of cases. However, the majority's decision undercut those purposes by authorizing not only review of commissioners' decisions but also de novo decisionmaking in federal district court.

The *Crowell* majority justified de novo review by distinguishing between agency factfinding and something that the Court called "the essential attributes of judicial power." The opinion did not affirmatively define "the essential attributes of judicial power," which has become an important phrase. The Court did suggest that some species of factfinding fell within the boundaries of "essential attributes"; federal judges had to have the power to decide, de novo, "jurisdictional facts." In dramatic rhetoric, the Chief Justice spoke of the impermissible divestiture of all factfinding from Article III courts, which "would be to sap the judicial power as it exists under the federal Constitution, and to establish a government of a bureaucratic character alien to our system."

63. *Id.* at 46.

64. *Id.* at 51. Insofar as a Lexis search reveals, this phrase was introduced to Supreme Court opinions in *Crowell*.

65. 285 U.S. at 56-58. The Court rested its acceptance of a division of authority between agency decisionmaker and Article III judge, in part, on the model of the differing functions of the jury as factfinder and the judge as law maker. *Id.* at 61. The Court did not explore the differing political and ritualistic functions of the community-based jury system and of the bureaucratic agency adjudication.

Congress has also drawn the fact/law distinction in some of its debates about how to structure agency adjudication; occasionally, agency factfinding has been equated with jury factfinding. For example, Congress defeated proposals to require in the Federal Trade Commission Act that agency decisions be subjected to de novo judicial review. Instead, a "substantial evidence" standard was adopted. 51 Cong. Rec. 12993, 13045 (1914). It appears that members of Congress equated that standard of review with the standard used for jury verdicts and believed that agency factfinding was thus given the same degree of finality as was accorded jury factfinding. See E. Stason, "Substantial Evidence" in *Administrative Law*, 89 U. Pa. L. Rev. 1026, 1042-46 (1941). (My thanks to Ray Solomon for bringing this parallel to my attention.) See also K.C. Davis, *Administrative Law* § 29.02 at 527-30 (1972). For discussion of whether Article I tribunals unconstitutionally limit the right to a jury trial as guaranteed by the seventh amendment, see Luneberg and Nordenberg, *Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping with the Complexities of Modern Civil Litigation*, 67 Va. L. Rev. 887, 950-90 (1981).

66. 285 U.S. at 57.
Crowell is a complicated case, which appears to have been viewed at the time as sharply limiting the power of administrative agencies but whose formulations have today become the basis for the Court's approval of the widespread use of administrative adjudication. In some sense, the Crowell opinion provided a model for the administrative adjudication that followed. When establishing administrative agencies, Congress appeared to nod in Crowell's direction by splitting off enforcement functions and giving them to Article III courts. Congress also mimicked the Crowell dependency model (deputy commissioner as supervised by and reliant upon an Article III judge) when it authorized increased powers for magistrates.

The 1978 Bankruptcy Act, however, was an important exception to this general description of congressional allocation of authority between administrative agency or judicial surrogate and Article III judge. The Act created bankruptcy "judges," who were not quite

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67. E.g., Comment, Judicial Review of Administrative Findings—Crowell v. Benson, 41 YALE L.J. 1037 (1932) ("The consequence of an erroneous determination . . . by the administrative is limited to the payment by the employer . . . of . . . at the most $25 per week "during the . . . disability."); id. at 1053; the Court has rendered a decision that will "haunt" the country "for many years," id. at 1056); Note, Crowell v. Benson: Inquiries and Conjectures, 46 HARV. L. REV. 478, 490 (1932-33) (danger that Crowell will "seriously diminish the future effectiveness" of administrative decisions).

There is an interesting political dimension to Crowell, decided by the Supreme Court in the midst of the depression. The agency administrator in Crowell had found for the worker; the Article III judge had overturned the decision and found for the employer. Had the Court found the delegation of authority unconstitutional under Article III, then other federal administrative adjudication systems would have been placed in jeopardy. 285 U.S. at 70 (Brandeis, J., dissenting). Had the Court reached the broader grounds raised by the employer and found due process deficiencies in the agency decisionmaking, then state as well as federal programs would have been of questionable legality. Perhaps that is why Justice Brandeis, a justice much identified with progressive programs, raised the due process issue in dissent and was eager for the Court to approve agency decisionmaking on constitutional grounds. 285 U.S. at 77-80. Brandeis' enthusiasm for administrative agencies is mirrored in Frankfurter's writings on the subject. See, e.g., Frankfurter, Introduction, A Symposium on Administrative Law Based upon Legal Writings, 1931-33, 18 IOWA L. REV. 129 (1933); Frankfurter, The Task of Administrative Law, 75 U. PA. L. REV. 614 (1927); Frankfurter, Foreword. The Final Report of the Attorney General's Committee on Administrative Procedure, 41 COLUM. L. REV. 585 (1941), Frankfurter, Foreword, 47 YALE L.J. 515 (1938). The hoped-for salvation by administrative agencies has not materialized, see Frug, The Ideology of Bureaucracy in American Law, 97 HARV. L. REV. 1276, 1382 (1984) ("bureaucratic institutions as a form of domination").

68. There are numerous examples of statutes based upon the Crowell model, and many have been approved by courts. E.g., Board of Trustees of the W. Teamsters Pension Trust Fund v. Thompson Bldg. Materials, Inc., 749 F.2d 1396 (9th Cir. 1984), cert. denied, 105 S. Ct. 2116 (1985) (upholding Multiemployer Pension Plan Amendment Acts to ERISA, Pub. L. No. 96-364, 94 Stat. 1208 (1980), which require mandatory arbitration with de novo review by courts of legal issues and review of factual findings under a "clear preponderance of the evidence" standard); CAROZZA v. UNITED STATES STEEL CORP., 727 F.2d 74 (3rd Cir. 1984) (upholding Labor Department's Benefits Review Board, 33 U.S.C. § 921(b)(3) (1982)).

69. 28 U.S.C. § 636(b) (1982) (for specified kinds of decisions, magistrate file "proposed findings and recommendations," not final until the report is adopted by the district court judge).


71. See also 38 U.S.C. § 211(a) (1982) (decisions of Veterans Administration unreviewable), up-
like administrative hearing officers, not quite a part of a fully separated "legislative court" and not nearly as dependent upon Article III judges as are magistrates. Although the 1978 amendments described bankruptcy courts as "adjunct to the district court," the judges of the bankruptcy court had broad jurisdiction, extending to all "civil proceedings arising under" the Bankruptcy Act or "arising in or relating to cases" under the Bankruptcy Act. Moreover, bankruptcy judges were vested with all the "powers of a court of equity, law and admiralty"—save authority to enjoin other courts or impose criminal contempt. Bankruptcy judges could also hold jury trials and issue writs, orders, or process necessary to their jurisdiction. In short, bankruptcy judges appeared suspiciously powerful and strikingly similar to federal judges. Bankruptcy judges enjoyed jurisdiction over a range of cases and were quite free from needing others (such as Article III judges) to enforce the orders rendered. What bankruptcy judges lacked, however, were the protections of Article III. Bankruptcy judges were appointed by the President for terms of fourteen years but could be discharged by vote of a district court.

Congress' decision in the 1978 bankruptcy law amendments to break new ground in delineating the powers of bankruptcy judges set the stage for the most important contemporary discussion of the "essential attributes of judicial power"—the 1982 opinion, Northern Pipeline Construction Company v. Marathon Oil. Upon challenge from a litigant, the Supreme Court determined that the 1978 amendments

73. 28 U.S.C. § 1471(b) (1982).
77. 458 U.S. 50 (1982). The plurality opinion did not well define the contours of its holding, and concurrences argued that the unconstitutionality of the Bankruptcy Amendments was limited to the conference of jurisdiction upon bankruptcy judges over cases "related to bankruptcy proceedings," a category which could conceivably include cases that had no other right of entry into the federal system. 458 U.S. at 90 (Rehnquist, J., concurring). See also Strauss, supra note 5, at 631 (that justices could not agree on method of analysis of issues relating to constitutional structure was "astonishing").
78. The Court assumed that Marathon had standing to challenge the statute, although the Court
were unconstitutional, at least in some respects. Justice Brennan wrote for the plurality. He attempted, unsuccessfully in my judgment, to cabin all the Supreme Court precedents permitting non-Article III courts into three categories—territorial courts, military courts, and "public rights" courts. Justice Brennan argued that, apart from what he described as these three discrete areas, the Court had not permitted any incursions into Article III turf. Thus, Justice Brennan created a presumption that all congressional creation of judicial officers had to be in compliance with Article III—save in the "three narrow situations" delineated.

As Justice White in dissent fairly commented, the cases Justice Brennan cited do not lend themselves to such limitations. As described above, opinions like _Canter_ need not intrinsically be read so narrowly. More importantly, the third category, "public rights," does not really exist as a discrete grouping, at least insofar as Justice Brennan attempted to place _Crowell v. Benson_ within it. _Crowell_ involved litigation between two private citizens under a federal statute, and the _Crowell_ Court described itself as deciding a case of "private" rights. At best, _Crowell_ represents a fourth category: agency adjudication of private rights that the public cares about. Furthermore, categories three (public rights) and four (_Crowell_ plus) are not "narrow" at all; with the United States as a party in more than 40% of the cases on the federal civil docket, these categories encompass a vast amount of today's litigation. Even more devastating to the majority opinion is Justice White's central criticism: assuming that the precedents could be confined to categories subject to delineation, why do the precedents define the outer boundaries of what Congress can do outside the strictures of Article III? Justice Brennan's implicit answer was: "hold

97. 458 U.S. at 64-69.
98. Id. at 64.
99. Id. at 104.
100. Id. at 109. See also Currie, supra note 46, at 463-65; Monaghan, _Marbury and the Administrative State_, 83 COLUM. L. REV. 1, 18-20 (1983); Redish, _Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision_, 1983 DUKE L. J. 197, 206-14 (all commenting on the difficulties in Justice Brennan's analysis of "public rights" cases).
101. 285 U.S. at 51.
102. 1984 ADMINISTRATIVE OFFICE REPORT, supra note 2, at 131.
103. 458 U.S. at 101.
that line.” What has been permitted cannot now be undone but Congress will not be authorized to go beyond the current parameters.

Justice White offered a different approach. He proposed a balancing test; when reviewing congressional schemes creating non-Article III courts, Justice White urged that the Supreme Court weigh Article III values of independence against the need for the proposed placement of adjudication elsewhere. On that scale, the Justice believed that the Bankruptcy Act was constitutional because he thought the subject matter apolitical and the volume of cases astronomical.

But despite Justice White’s telling criticisms, Justice Brennan’s opinion requires more examination. Justice Brennan attempted (not wholly satisfactorily) to provide some affirmative statement of what domain belongs uniquely to Article III judges. First, Justice Brennan offered a familiar but detailed discussion of the virtues of judicial independence and of its centrality in the constitutional scheme. The Northern Pipeline opinion was written at a time when the debate about congressional control of federal court jurisdiction was intense. Bills had been introduced in Congress to divest both the Supreme Court and lower federal courts of jurisdiction over such issues as abortion and busing. Justice Brennan’s plurality opinion may have had purposes beyond the invalidation of the Bankruptcy Act, a piece of legislation that appeared less political than many others.

Second, Justice Brennan evoked the crucial, if mystical, phrase from Crowell v. Benson, “essential attributes of judicial power,” as he struggled to delineate a line that Congress cannot cross without encroaching upon the constitutional preserves of Article III courts. The sources for his discussion are history and tradition. Groping for some constitutional parameters for the definition of Article III courts or their cases, Justice Brennan described the quintessential judicial moment as the adjudication of a dispute between private parties.

86. Id. at 115.
87. Id. Justice White cited the 254,000 bankruptcy proceedings filed in 1977. Id. at 117 n.16.
88. Id. at 57-60.
89. E.g., S. 528, 97th Cong., 1st Sess. (1981) (to eliminate Supreme Court and lower court jurisdiction over assignment of students to public schools); S. 583, 97th Cong., 1st Sess. (1981) (to eliminate Supreme Court and lower court jurisdiction to review state abortion laws). The controversy over the constitutionality of these bills is outlined in Sager, supra note 24, and in Clinton, supra note 24. Similar bills have once again been introduced. See S. 37, 99th Cong., 1st Sess. (1985) (to eliminate the jurisdiction of the lower federal courts to order student school assignments on the basis of race); S. 47, 99th Cong., 1st Sess. (1985) (to prohibit lower federal courts from reviewing state laws permitting prayers in the public schools).
90. 458 U.S. at 78.
There is some irony here. To the extent that we care about having Article III judges make decisions, it would seem that the "private rights" cases have the least claim. First, those cases are traditionally the business of the state, not the federal, courts. If the efforts to eliminate federal diversity jurisdiction are successful, as many Article III judges urge, a substantial portion of "private rights" cases will no longer be before the federal courts. Second, the cases in which the independence of the federal court seems most essential are those in which a judge must adjudicate a claim of government mistake, overreaching or misconduct—that large block of cases on the federal docket in which the United States is a party. The historically-based "private rights" model provides an anachronistic justification to explain why the exercise of federal judicial authority under Article III is important and must be safeguarded.

But Justice Brennan offered more than decisionmaking in private cases to describe the "essentially" judicial power that Article III judges alone may possess. Justice Brennan argued that federal judges have essential roles because they are generalists, whose dockets include criminal as well as civil cases, and whose broad domain contrasts to the specialists who undertake adjudication in agencies.

This argument requires more explanation than the opinion furnishes. Why should broad jurisdictional grants, rather than narrow ones, define an Article III judge? One possibility is protection of that judge from bias or exhaustion. We know that administrative law judges are sometimes asked to be loyal to the statutory schemes that they, in some sense,


93. In 1984, diversity cases numbered 56,000 and thus comprised 21.5% of the federal civil docket. 1984 Administrative Office Report, supra note 2, at 131.

94. It might be argued that, when the United States is a party, public attention is focused upon a case and thus judicial behavior is constrained. However, with the United States a party to some 148,712 civil and criminal actions filed in 1984, public scrutiny is, at best, diffused over a mass of cases. 1984 Administrative Office Report, supra note 2, at 131, 166.


96. 458 U.S. at 78-80.
administer.\textsuperscript{97} If federal judges also became identified with a narrow jurisdictional grant, they might develop attitudes toward the scheme which would undermine the freshness that a generalist would bring to it. In addition, where there are specialty courts, there is also increased visibility of decisionmaking. The opinions rendered in a given area can more readily be quantified and the judges identified as for or against a particular side—thus undermining the legitimacy of supposedly neutral decisionmakers.\textsuperscript{98} Another concern is prestige. Narrow jurisdictional grants define less powerful actors who in turn hold less desirable positions. Federal judges gain power from being the elite and they are, functionally, to be distinguished from agency judges by the broad grant of jurisdiction from which Article III judges operate.\textsuperscript{99}

However well one might flesh out and make more meaningful this attribute of being a generalist, there remains one central flaw. There have been and are Article III courts, such as the Temporary Emergency Court of Appeals\textsuperscript{100} and the Court of Appeals for the Federal Circuit,\textsuperscript{101} with narrow jurisdictional grants. Furthermore most people, including Justice Brennan, assumed that one “cure” for the unconstitutionality of the 1978 Bankruptcy Act was to give bankruptcy judges Article III powers.\textsuperscript{102} Thus, while most Article III judges currently are generalists and while being generalists may enhance those judges’ power, all Article III judges are not and probably do not have to be generalists.\textsuperscript{103}


\textsuperscript{98} Apparently, this visibility and identification of court with case led to the demise of the real Commerce Court, abolished in 1913. See Moore’s Federal Practice, supra note 12; and Dix, supra note 12, at 254.

\textsuperscript{99} Tushnet, Invitation to a Wedding: Some Thoughts on Article III and a Problem of Statutory Interpretation, 60 Iowa L. Rev. 937, 952-53 (1975) (distinction between agencies and courts to be made on functional basis).


\textsuperscript{101} 28 U.S.C. § 1295 (1982) (exclusive jurisdiction over (inter alia) all appeals from the United States Claims Court, the Board of Patent Appeals, the Commissioner of Patents and Trademarks, the United States Court of International Trade, the Merit Systems Protection Board, and all final decisions of federal district courts involving patents).

\textsuperscript{102} 458 U.S. at 74-75, n.28.

\textsuperscript{103} There appears to be little written on the specific question of how or why Article III would bar Congress from creating a series of specialty Article III courts. As noted, most of the literature assumes that such courts are possible. Further, the Supreme Court has sanctioned non-Article III
But I have not exhausted Justice Brennan’s list of “essential attributes.” Justice Brennan shifted his emphasis from control over categories of cases (private cases and a wide range of them) to claims about the stages at which Article III judges must exercise control. For Justice Brennan, a third “essential attribute of judicial power” is that Article III judges have the authority to issue final judgments and the ability to enforce those judgments by an array of powers in general and contempt in particular. According to Justice Brennan, an Article III judge can compel individuals to behave in specific ways and that power distinguished the judge from non-Article III actors. And, in fact, most agency decisionmakers lacked such authority, while the bankruptcy judges created by the 1978 amendments did not.

In sum, the packet of judicial attributes that Justice Brennan relied upon to justify the importance of preserving the domain of Article III judges are 1) adjudication of private disputes, 2) control over a broad jurisdictional grant, including the criminal law, and 3) powers of finality and of contempt to enforce one’s decisions. Assume (for the moment) that Justice Brennan’s formulation is accurate. At least upon first appraisal, there is something unsatisfactory in this list. It looks rather skimpy to support the impressive rhetoric about the absolute need for an independent judiciary. Are Article III judges mandated by the Constitution only for this? to decide private cases? hear lots of different kinds of cases? and issue final decisions? If this is all that is the essential preserve of Article III, then one wonders whether the definition of “essential attributes of judicial power” will

courts with broad jurisdictional grants (albeit over a defined area), so that the general versus specific jurisdiction distinction does not have a compelling quality. E.g., Palmore v. United States, 413 U.S. 389, 409 (1973) (District of Columbia’s local non-Article III court system with jurisdiction over “the great mass of litigation, civil and criminal” upheld). See generally Katz, supra note 40.

104. 458 U.S. at 85.


106. Article III protections are rarely justified on the ground that they prevent judicial corruption. The absence of such an argument can probably be explained by the implicit criticism such a thesis would level at state courts. To claim that Article III inhibits corruption would be to suggest that state court judges, lacking Article III attributes, are more corrupt than their federal counterparts. On an empirical level, there appears to be no way to test such a proposition. Even if it were possible to control for numbers, the many variables (such as the different jurisdiction of the federal and state courts and hence the differing kinds of problems and potentially corrupt situations) and the fact that the federal government investigates allegations of judicial corruption in the state courts but the state governments do not inquire into alleged federal judicial corruption would undermine the probative value of such an endeavor.

107. For Justice Brennan’s more recent efforts to define “judicial proceedings” in a non-Article III context, see District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) (investigation, declaration, and enforcement of rights are judicial functions).
have any more analytic force than the much-maligned and recently disavowed phrase from National League of Cities—"traditional aspects of state sovereignty." Moreover, even if these attributes define the "judicial power," then presumably many forms of "adjuncts" to Article III courts would be constitutionally permissible as long as the adjuncts were not given too broad a grant of power or the ability to make and enforce final judgments.

IV. THE "COMMERCE COURT" AS ADJUNCT

One question in light of Northern Pipeline is whether my hypothetical Commerce Court would be saved by a simple addition to the statute:

All Commerce Court judges will be adjuncts to Article III judges, who shall issue final orders in all cases decided by Commerce Court judges.

Of course, the models here are several. The 1984 amendments to the Bankruptcy Act and the 1976 and 1979 amendments to the Magistrates Act all rely upon this adjunct quality. Under the most recent bankruptcy statute, for example, bankruptcy judges' decisions over "non-core" Article III business are not final but rather are "proposed findings of fact and recommendations" to be reconsidered by an Article III judge. Similarly, under recent amendments to the Magistrates Act, many magistrates' rulings are proposed findings, subjected to a "de novo determination" by the federal district court judge who is formally the author of the decisions. The question is whether such formalities suffice.

The Supreme Court has specifically upheld a broad grant of authority to magistrates under this adjunct model. In 1977, in a motion to the district court, criminal defendant Herman Raddatz asked that incriminating statements he had made be suppressed. He claimed the statements were made in conjunction with an agreement, subsequently breached by the government, to have charges against him dismissed. Pursuant to section 636(b) of the Magistrates Act and over Mr. Raddatz's objections, the district judge referred the suppression motion to a magistrate, who heard testimony from Raddatz and from


the two Bureau of Alcohol, Tobacco and Firearms agents who had questioned Raddatz. The magistrate found that Raddatz had "knowingly, intelligently, and voluntarily made inculpatory statements" and recommended that the suppression motion be denied. In support of his report, the magistrate stated that he had found the testimony of the federal agents "more credible" than that of Mr. Raddatz. Rad­datz objected to the report and recommendation of the magistrate—thereby requiring the district judge to perform the statutory obligation embodied in 28 U.S.C. section 636(b) of making a "de novo determination." The judge informed the parties that he had considered the transcript of the magistrate's hearing, the parties' written submissions and counsels' arguments, and that he "adopted" the magistrate's report and recommendation. The statements were not suppressed.

After being found guilty, Mr. Raddatz appealed to the Seventh Circuit, which reversed. The court concluded that, when the credibility of witnesses was in issue, the district judge was obliged as a matter of due process to hear the witnesses. The United States Supreme Court reversed the appellate court and upheld the trial judge's minimal review of the magistrate's findings as sufficient under the Magistrates Act, the due process clause and Article III. The majority opinion, written by Chief Justice Burger, first determined that the legislative choice of the words "de novo determination," rather than "de novo hearing," was a deliberate decision not to require repetitive hearings. Further, as a matter of due process, acceptance of magistrates' findings did not violate the right to be heard. Finally, Article III posed no barrier; in some measure, Crowell v. Benson had paved the way. But, while in Crowell "de novo" meant a new factfinding hearing at which new evidence could be submitted, in Raddatz, "de novo" required only that the trial judge review the papers. Such "delegation" did not "violate" Article III "so long as the ultimate decision" was made by the district court.

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112. Id. at 671.
113. United States v. Raddatz, 592 F.2d 976, 979 (7th Cir. 1979).
116. 592 F.2d at 986.
117. 447 U.S. at 680-81.
118. Id. at 676.
119. Id. at 680-81. The Court reasoned that, under the Mathews v. Eldridge, 424 U.S. 319, 335 (1976) three-part test, the private interests, public interests, and risk of error were fairly accommodated by permitting the magistrate to conduct the hearing. Id. at 677-81.
120. See 285 U.S. at 64. The Crowell Court approved a federal district judge's de novo decision-making which had included a new hearing.
121. 447 U.S. at 683.
Only Justice Blackmun's concurrence responded to Justice Marshall's argument in dissent that the Magistrates Act, as interpreted by the Supreme Court, violated Article III. Justice Blackmun emphasized that, under the statute, the Article III judge remained in control—to choose to hear facts again, to recommit the matter to the magistrate, or to accept the magistrate's decision. As a consequence, Justice Blackmun concluded that the only "conceivable danger of a 'threat' to the 'independence' of the magistrate comes from within, rather than without, the judicial department." In contrast, Justice Marshall characterized a judge, who approved a magistrate's report without holding a new hearing, as making a "blind guess." Justice Marshall argued that the majority authorized an impermissible delegation to non-Article III actors of the judicial power to make factfinding decisions in criminal cases.

The drafters of the post-Northern Pipeline amendments to the Bankruptcy Act worked under the umbrella of Raddatz when they revised the Bankruptcy Act. The new amendments require bankruptcy judges, when deciding "non-core" bankruptcy issues, to submit "proposed findings of fact and conclusions of law" to federal judges. The judges, in turn, "after considering the bankruptcy judge’s proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected," are to enter final judgments. Thus, the bankruptcy judge has become an adjunct to an Article III judge and the Raddatz test for Article III legitimacy—that the federal judge make the "ultimate" decision—appears to be satisfied.

But is it? How carefully will "reports and recommendations" (of magistrates) and "proposed findings" (of bankruptcy judges) be scrutinized? Given workload demands, the incentives to adopt magistrates' and bankruptcy judges' suggestions will be enormous. After all, what

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122. Id. at 685.
123. Id.
124. Id. at 703.
125. 28 U.S.C.A. § 157(c)(1) (West Supp. 1985). "Core" bankruptcy matters are defined as matters concerning the administration of estates, allowance or disallowance of claims against estates, decisions about creditor preferences, discharging debts, the sale of property, and the liquidation of assets. 28 U.S.C. § 157(b)(2) (West Supp. 1985). "Non-core" bankruptcy matters are not specifically enumerated by the 1984 amendments. The amendments do indicate that "non-core" matters include the liquidation of personal injury, tort, or wrongful death claims. Id.
126. For cases upholding the 1984 amendments against Article III challenges, see In re Production Steel, Inc., 48 B.R. 841 (M.D. Tenn. 1985) (in "core" matters, bankruptcy judges function as legislative courts, in "non-core" matters, bankruptcy judges are adjuncts like magistrates); In re Tom Carter Enterprises, 44 B.R. 605, 608 (C.D. Cal. 1984) (bankruptcy courts constitutional as adjuncts to district courts, which retain primary jurisdiction); In re Benny, 44 B.R. 581, 589 (N.D. Cal. 1984) ("Everything under the 1984 Act is within the constitutional power and right of Congress . . . .").
is the point of the delegation and of the creation of these auxiliary institutions if not to siphon off work? Assuming that parties would not request de novo review of all decisions of magistrates or bankruptcy judges, parties will object some of the time.\textsuperscript{127} If federal judges have to redetermine all cases in which objections are made, then the workload savings will evaporate. As a consequence, it is fair to assume\textsuperscript{128} that the fact pattern in \textit{Raddatz} will be repeated: that judges will adopt decisions without rehearing witnesses and that, in some instances, judges will adopt adjuncts' decisions with only the most cursory review.\textsuperscript{129} In some cases, the name on the opinion will be that of the Article III judge but the real author will be a non-Article III actor.

The Magistrates Act takes the adjunct notion one step further. The statute provides that, upon parties' "consent," magistrates may decide cases and enter final judgment, with review provided by appellate courts—as if the decisions had been authored in the first instance by federal district court judges.\textsuperscript{130} While the Supreme Court has not issued an opinion approving section 636(c), nine courts of appeals have ruled on this section.\textsuperscript{131} In all these cases, appellate courts up-

\begin{itemize}
\item \textsuperscript{127} Apparently, neither the Administrative Office of the United States Courts nor the Federal Judicial Center collect nationwide data on the rate of objections taken from magistrates' reports and recommendations. Telephone interview with C. Seron (June 1985). For a survey of the rates of objections filed in nine federal districts, see C. Seron, \textit{The Role of Magistrates: Nine Case Studies}, Tables 22, 23 (Federal Judicial Center, 1985) (in 878 dispositive motions studied, 220 challenges were made (25%). New hearings were held in only 18 of the 220 cases; in nondispositive decisions by magistrates, of 956 motions decided, only 4% were challenged).
\item \textsuperscript{128} See, e.g., Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1050 (7th Cir. 1984) (Posner, J., dissenting: "some judges may sometimes rubber-stamp the recommendations of their adjuncts"); C. Seron, supra note 127, at 99-100 (in the 220 cases in which challenges were made, judges sustained magistrates 79% of the time).
\item \textsuperscript{129} See C. Seron, supra note 127, at 100 (79% acceptance rate in cases studied). The \textit{Raddatz} opinion itself creates incentives to affirm magistrates' findings. The Court held expressly that, when accepting a magistrate's report, a district judge need not rehear witnesses. The Court reserved the question of whether, when refusing to accept a magistrate's ruling, a district judge had to hear witnesses again. 447 U.S. at 681 n.7. Justice Blackmun's concurrence underscored the unsettled nature of this question, 447 U.S. at 684-85, and some lower courts have concluded that \textit{Raddatz} is limited to the affirmation situation. See, e.g., Wotford v. Wainwright, 748 F.2d 1505, 1507 (11th Cir. 1984); Louis v. Blackburn, 630 F.2d 1105, 1109 (5th Cir. 1980).
\item \textsuperscript{130} 28 U.S.C. § 636(c) (1982). Appeal may be taken to a district court judge. 28 U.S.C. § 636(c)(4) (1982). Appeal thereafter to the circuit court is limited, see Ward v. Warren County, 759 F.2d 524 (6th Cir. 1985) (en banc) (interpreting 28 U.S.C. § 636(c)(5) to authorize appeals, after magistrate and district court have ruled, only when "substantial and important questions of law" are at issue). For statistical year 1982, magistrates received 2448 cases upon consent of the parties; most were disposed of without trial. C. Seron, \textit{The Roles of Magistrates in Federal District Courts} 5 (Federal Judicial Center 1983).
\item \textsuperscript{131} The 1984 amendments to the Bankruptcy Act also provide for the consensual referral to bankruptcy judges of proceedings "related to a case under title 11 . . . ." 28 U.S.C.A. § 157 (West Supp. 1985). Appeals may also be taken to the district court, 28 U.S.C.A. § 158(a) (West Supp. 1985), and access to the courts of appeals thereafter is similarly limited.
\item Wharton-Thomas v. United States, 721 F.2d 922 (3rd Cir. 1983); Pacemaker Diagnostic
held the statute against challenges that the grant of such authority to magistrates was a jurisdictional defect not waivable by the parties. The appellate courts found lawful the congressional decision to permit parties voluntarily to submit their disputes to non-Article III actors. The courts rejected claims that crowded district court dockets generated sufficient pressures so that the consents given were not truly “voluntary.” In addition, the majorities were unpersuaded by the concern that using magistrates diminished the pressure on Congress to create needed Article III judgeships.

All of these cases go beyond the rationale upon which Justice Blackmun grounded his defense of the magistrate system approved in *Raddatz*. Justice Blackmun had stressed that the statutory delegation to magistrates in section 636(b) of the Act was constitutional because Article III judges remained in control. An Article III judge could

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See generally Note, Federal Magistrates and the Principles of Article III, 97 HARV. L. REV. 1947 (1984) (adjudication by magistrates under 28 U.S.C. § 636(c) does not violate Article III because that article is to protect judiciary from intrusion by other branches). Cf. Posner, J., dissenting in Geras v. Lafayette Display Fixtures, Inc., 742 F.2d at 1045-54 (separation of powers is not merely tripartite; Article III to protect judicial independence from all, including other judges); Note, Is the Federal Magistrate Act Constitutional After Northern Pipeline, 1985 ARIZ. ST. L.J. 189.


There is some evidence of pressure imposed by district courts to consent to magistrate adjudication. See C. SERON, THE ROLE OF MAGISTRATES: NINE CASE STUDIES 61 (Federal Judicial Center 1985) (interviews with lawyers in one district indicated that all agreed that, once a judge raised the potential for consent to magistrate adjudication, "lawyers feel that they have little choice but to go along with the suggestion."). See also Ford v. Estelle, 740 F.2d 374 (5th Cir. 1984) (invalidation of assignment of prisoner case without prisoner’s consent to magistrate for trial).

133. E.g., Pacemaker, 725 F.2d at 549 (Schroeder, J., dissenting); Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1051-54 (7th Cir. 1984) (Posner, J., dissenting). The Seron study, supra note 127, at 59, suggests that the use of magistrates also diminishes pressure to fill vacant judgeships.

134. 447 U.S. at 685. Justice Blackmun overstated the case in one respect. Under 28 U.S.C. § 636(b), once delegation to magistrates is made and litigants do not object to the magistrates’ reports, then the report is often entered as the judgment of the court; close judicial supervision is somewhat dependent upon litigant objection. 28 U.S.C. § 636(b)(1)(C) (1982). Justice Blackmun is correct in that district courts do retain the authority to review magistrates’ decisions even without party objection (United States v. Flaherty, 668 F.2d 566, 585 (1st Cir. 1981); Webb v. Caliano, 468 F. Supp. 825, 828-29 (E.D. Cal. 1979), but that review may be more limited than that which would have occurred had objections been filed. Anderson v. South Carolina, 542 F. Supp. 725, 727 (D.S.C. 1982), aff’d on other grounds, 709 F.2d 887 (4th Cir. 1983). The reach of appellate review may also be limited by the failure
give work to or withhold work from a magistrate and could review as much or as little of a magistrate's decisionmaking as desired. In contrast, under the section 636(c) consensual provisions of the Magistrates Act, the litigants have all the control and the magistrates are the functional equivalents of federal district court judges whose work is reviewed under deferential standards of review by appellate courts—and only if a party appeals.135 Further, since the vast majority of all cases are settled, not tried, and since many judges assign pretrial management to magistrates, there are many activities of magistrates that are never documented, much less reviewed.

The case law emerging from the two versions of the adjunct model—that in which the adjunct does not formally issue the final opinion and that in which the parties authorize the adjunct to issue a final judgment—support the constitutionality of my hypothetical "Commerce Court," as modified to include adjunct provisions. Moreover, these cases suggest broad support for the employment of unprotected judicial officers, of individuals who can be fired by their superiors (federal judges) as well as "abolished" by Congress. The world of Article III adjuncts seems firmly established.136

Once again, we are left with some wonderment at what causes the fuss about Article III. If all these Article III judges137 who issue the...
opinions approving the Magistrates Act are prepared to endorse the existence of a variety of parajudicial non-Article III officers, and if these non-Article III judges are permitted to do so much of Article III judges' work, what harm would flow from turning most (all?) adjudication over to them? The ease with which the federal courts have approved adjuncts suggests possible future developments which may take the concept farther. Congress might proceed to enlarge the domain of non-Article III actors either by expanding the "adjunct" model or by relying more heavily upon parties' consent.

First, perhaps Congress might attempt to satisfy the "adjunct" criterion by assigning, without parties' consent, all trial-like adjudicatory functions to non-Article III actors and by providing appeal as of right in all cases to Article III judges. In Raddatz, the Supreme Court abandoned the "de novo" interpretation of Crowell v. Benson and said that, at least in some cases, new hearings were not required.138 Further, in the cases upholding consensual submission to magistrates, the parties' agreement coupled with the possibility of appeal suffice for Article III purposes.139 Congress could build on these case law distinctions between factfinding and lawmaking. The next step would be to give all trial court functions to non-Article III actors and to permit ordinary appellate procedures to provide the veneer of Article III. Justice Brennan's "essential attributes of judicial power" might be stretched but still met—by conceptualizing all non-Article III decisions as not "really" final and enforceable until after appellate rights have been exhausted or waived. The non-Article III actors could be confined to discrete subject matters—bankruptcy judges working on that part of the docket, magistrates having (as they already do in many districts) primary responsibility for prisoner litigation140 and the like.

demands on the trial bench are eased to some extent by delegation of cases to non-Article III actors. Perhaps the mixed motives wash out any predictions based upon place in the hierarchy about how judges will rule on Article III questions.

The one group that is a bit more puzzling is the appellate judges; it is more difficult to explain why the appellate courts have been willing to relax Article III strictures, as has occurred with appellate court approval of the magistrates' consensual jurisdiction. Appellate court judges have no direct workload gains (and in fact may have increased burdens as the number of first tier decisionmakers is increased) from Article III relaxation and would seem to need the protections afforded by the clause. Supportive of this thesis, some of the most eloquent defenses of Article III come from members of the courts of appeals. See, e.g., Kaufman, supra note 20; Schroeder, dissenting in Pacemaker, 725 F.2d at 547-55; Feinberg, supra note 20, at 273-76; Posner, dissenting in Geras, 742 F.2d 1037, 1045-54 (1984).

138. 447 U.S. at 676. As noted, supra note 129, new hearings are not required in cases in which judges accept magistrates' reports based upon witnesses' credibility.


140. 28 U.S.C. § 636(b)(1)(B) (1982) expressly provides for magistrates to hold evidentiary hearings in prisoners' habeas and conditions cases; that section's constitutionality was upheld in Hinman v. McCarthy, 676 F.2d 343 (9th Cir. 1982), cert. denied, 459 U.S. 1048 (1982). Local rules have delegated
Alternatively, if willing to abandon the "generalist" requirement, the entire docket could be turned over, in the first instance, to non-Article III judges.

Second, Congress could exploit the concept of parties' consent; Congress could constitute the bankruptcy court, the magistrates, and even my hypothetical "Commerce Court" simply as alternatives to Article III courts. The validity of all of these entities could rest entirely upon the parties' consent to jurisdiction. Thus, Congress could create an entire "alternative" court structure for which litigants could "volunteer." Of course, reliance upon such consensual provisions could eventually undermine the impetus for Congress to create new judgeships. If Congress can respond to the request for federal adjudicatory decisionmaking by the provision of non-Article III actors, then the Article III courts will lose many of their decisionmaking opportunities.

Would the Court permit such developments? And even if found "constitutional," should we be troubled by the growth of a non-Article III judiciary? Once again we come to the question of whether to care about the attributes of life tenure and no diminution of salary, placed in Article III as insulation for the judiciary. My guess is that at least some of the developments suggested above would be disapproved by the Supreme Court, which would once again assert a special domain for Article III judges. Yet, in light of how much of Article III the Court has already "given away," is there anything coherent which it might say in opposition to these possible developments?

What, after all, is the point of Article III—given the many Supreme Court and lower court decisions that have approved the creation of a non-Article III judiciary? 

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142. Cf. Judicial Conference Subcommittee Chairman Explains Process for Setting Judgeships, 17 Third Branch 1, 4-6 (Jan. 1985) (interview with Chief Judge Charles A. Moye, Jr., a member of the Judicial Conference Subcommittee on Judicial Statistics of the Judicial Conference, noting that the committee was beginning to factor in the number of magistrates as relevant to the number of judgeships requested from Congress; describing the desirability of "more effective, or greater, use of other [non-Article III] personnel within the judicial structure) (hereinafter Moye interview).
tion of non-Article III courts and decisionmaking within Article III courts by non-Article III actors? Even if the Supreme Court would decline to validate congressional creation of an alternative court, should we care? Haven't the many alternatives already in place viti­
ated the powers of Article III judges and shown us all that Article III attributes are not essential to federal judicial decisionmaking? that, in fact, we can live with a judiciary populated by individuals who can be fired?

V. THE MYTH

I do not think that either the federal courts' decisions or contem­
porary understandings have taken us quite this far. The Court, reflect­
ing what I believe are deeply-held feelings, has insisted that there be actors, with life tenure and salary protection, who can make decisions over a broad range of cases and who can render final decisions and enforce their orders by contempt. What motivates the Court's insis­
tence on "holding that line," its rejection of the broad grant of jurisdic­tion to bankruptcy judges under the 1978 amendments, and its insistence that, under the Magistrates Act, final judgment rests with the district judge?

I think that, the murkiness of its decisions aside, the Court's opin­ions reflect some strongly held convictions about Article III. I titled this discussion "The Mythic Meaning of Article III Courts" because I think the Court's interpretation of Article III is premised upon a deep­seated myth about the role of judges.143 The myth is captured in this society144 by the story of Lord Coke v. King James I, in which (in some versions) Lord Coke stands up to the King and defies the power of the executive to dictate the outcome of cases.145 King James orders the Judge to find on behalf of the claimant favored by the King. (Or, as the Judge reported it, "then the King said, that he thought the law was founded upon reason, and that he and others had reason, as well

143. Robert Cover calls narratives such as this one the "texts of jurisdiction." Cover, The Folk·

144. Other societies have had remarkably similar narratives; see, e.g., the Talmudic story of the confrontation between Judge Simeon v. Shetah (head of the Sanhedrin) and the King, as discussed in Cover, supra note 143 at 184. There is some irony that, despite cross-cultural pictorial representations of the judge as a female goddess, see Resnik, Appendix, The Iconography of Justice, Managerial Judges, 96 HARV. L. REV. 374, 446 (1982), the preeminent "texts" of justice have only male characters. To­
day, the judge who comes closest to acting out the text is Rose Bird, Chief Judge of the California Supreme Court, soon to face a retention election, and facing public hostility for ruling in unpopular ways. See Love and Clifford, Bird Hurt by Her Image as a Foe of Death Penalty, Los Angeles Times, June 16, 1985, at 1, col. 1.

as the Judges."146) The Judge, facing death or the Tower of London, said to the King:

that true it was, that God had endowed his Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it: and that the law was the golden met-wand and measure to try the causes of the subjects; and which protected his Majesty in safety and peace: with which the King was greatly offended and said, that then he should be under the law, which was treason to affirm, as he said; to which I said, that Bracton saith, quod Rex non debet esse sub homine, sed sub Deo et lege.147

That the King is beneath no man, but is beneath God and the law.

I think this image—of Judge v. King—animates the Court's work in Article III. The "essential attributes of judicial power" to which Chief Justice Hughes and Justice Brennan both referred but neither precisely defined are found in this paragraph from Lord Coke. Here are the quintessentially judicial "private rights" cases. Here are the broad jurisdiction grants—over "life, or inheritance, or goods, or fortunes." And here is the need for the powers of finality and contempt—to equip judges to do battle with the executive (and in this country, with the legislature). By insisting on the powers of finality, generality, and contempt, the Court provides Article III judges with the capacity to review executive and congressional action in a diverse set of arenas and to enforce decisions at odds with the "King." Article III judges stand ready, as "gladiators" of sorts, should the need arise—as it has recently in the Social Security nonacquiescence cases.148

Of course, our Article III judges may identify with Lord Coke

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146. Prohibitions Del Roy, supra note 145, at 1343.
147. Id.
148. See Lopez v. Heckler, 753 F.2d 1464 (9th Cir. 1985) (disapproving Social Security Administration policy not to alter agency's method of discontinuing social security benefits in light of court rulings; injunction ordering agency to alter its procedures). See also Lewis, Respect for Law?, New York Times, June 18, 1984, I at 19, col. 1 (Reagan administration's policy of nonacquiescence in disability cases shows "contempt for the rule of law"). Cf. Bator, Disability: No "Lawless" Government Stance, New York Times, June 28, 1984, I at 26, col. 3 (nonacquiescence is an "exceptional practice" which promotes the "sound development of legal doctrine . . . ").

See also Galtieri v. Wainwright, 582 F.2d 348, 375 (5th Cir. 1978) (Thornberry and Godbold dissenting) ("we are heirs to the most precious legacy of Lord Coke, the power to discharge from custody even one imprisoned by order of the king").

Strauss, supra note 5, argued that the separation of powers model is obsolete. 84 COLUM. L. REV.
but they enjoy luxuries which he did not. Our judges have protection from being fired (symbolically killed) because of the constitutional text. Given that our “gladiators” have such thick shields, bravery is not so necessary; the battle is far safer than that which Lord Coke faced. In that sense, Article III judges may be required less often to display moral courage. But moral courage may be a quality upon which we would rather not have to depend. The myth of Lord Coke is made complex by other versions of the story—that after Lord Coke had stood up to the King, James ordered him taken to the tower. The Judge then fell upon his knees and begged for forgiveness. James was at first loath to renege, but Lord Coke’s aunt’s husband intervened and pleaded on the Judge’s behalf, and the King permitted the Judge to live. Our Article III judges are not as vulnerable as was Lord Coke; their mythic battles are made safe by Article III.

Further, the judges still have a large arena over which they have some control. There is some risk of overstating the degree to which the Supreme Court has given away its Article III powers. The apparently gaping hole made by the Murray’s Lessee “public rights” and by the Crowell categories may be smaller than first assumed. We live in a world of post-Goldberg v. Kelly entitlements. In a sustained series of cases, the Supreme Court has read congressional and state statutes as vesting rights in individuals against the government. Although agency decisionmakers do a substantial amount of work at the first tier, many agency decisions are not immune from the scrutiny of Article III judges. Moreover, the Supreme Court has, under the due

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574-81, 603-34. Even if reconceptualization to incorporate a “fourth” branch is appropriate, the judiciary’s role remains as a countervailing presence to the others.

149. Or their displays of moral courage are less identifiable. Consider the tests of judges subject to discharge. See supra note 1, and H. Stern, Judgment in Berlin 94-101, 358-75 (1984) (Article III judge, acting in non-Article III capacity, must decide whether to disagree with his employer, the United States State Department, and permit criminal defendants, tried in the United States Court for Berlin, to have a jury trial).

150. As C.D. Bowen quotes the account of Sir Rafe Boswell to Dr. Milborne:

[The Lord Coke humbly prayed the king to have respect for the Common Lawes of his land. . . . After which his Majesty fell into that high indignation as the like was never knowne in him, . . . offering to strike . . . . Which the Lo. Coke perceaving fell flatt on all fower; humbly beseeching his Majestie to take compassion on him and to pardon him if he thought zeal had gone beyond his dutie and allegiance. His Majestie . . . continued his indignation. Whereupon the Lo. Treasurer the Lo. Cooke’s unclue by marriage, kneeled down before his Majestie and prayed him to be favourable. To whom his Majestie replied saying, What has thow to doe to intreate for him? He aswered, In regard he hath married my nearest kinswoman.”]

C. Drinker Bowen, supra note 145, at 305.


153. There is a presumption of review. Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); see
process clause, required federal and state agencies to cloak their decisionmaking with procedural safeguards, to act more like courts and thereby blur the line in both directions. In addition, there are other routes for challenging agency decisionmaking. It was for the Supreme Court to review and approve the standard of proof in Securities and Exchange Commission proceedings; it was for the Supreme Court to explain the legitimacy of the Occupational and Safety Hazards Act’s determination not to provide jury trials to those facing administrative fee sanctions. In 1984, the courts of appeals heard some 3000 appeals from agency rulings. In sum, most of the public rights arena is far from immune from Article III oversight. Article III courts retain a degree of control and perhaps, in terms of the volume of cases, all the control that they want.

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generally Currie and Goodman, Judicial Review of Federal Administrative Action: Quest for the Optimum Forum, 75 COLUM. L. REV. 1 (1975) (discussing division of review by district and appellate courts and suggesting a separate Article III appellate court to review certain kinds of agency decisions). The one major exception, as noted, is the Veterans Administration; see discussion supra note 71.


157. 1984 ADMINISTRATIVE OFFICE REPORT, supra note 2, at 110.

158. This is not to say that the Court has required that all agency decisions are reviewable. See, e.g., Heckler v. Chaney, 105 S. Ct. 1649 (1985) (Federal Drug Administration’s decision not to take enforcement action not subject to review under the Administrative Procedure Act); Southern Ry. Co. v. Seaboard Allied Mining Corp., 442 U.S. 444 (1979) (Interstate Commerce Commission’s decision not to exercise its authority to hold a hearing not reviewable). Cf. Lindahl v. Office of Personnel Management, 105 S. Ct. 1620 (1985) (interpreting Merit System Protection Board statute as precluding review only of agency’s factual determinations and reiterating presumption in favor of judicial review); Stark v. Wickard, 321 U.S. 288, 310 (1944) (“under Article III, Congress established courts to adjudicate . . . claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power”). How far Congress could constitutionally go in precluding judicial review of all agency decisions remains an open question. K.C. Davis, Administrative Law, § 28.09, 494-99 (Supp. 1982); Rabin, supra note 71.

159. Some argue that, if all federal adjudication needs had to be met by life-tenured judges, their ranks would have to be increased to a number that would intrinsically diminish the prestige of the federal bench. H. Friendly, Federal Jurisdiction 28-30 (1973). See also Moye Interview, supra note 142, at 5 (“for some time it has been the feeling . . . that problems will be encountered if the ranks of Article III district judges continue to increase at the present rate”); and King, The Unmaking of a Bankruptcy Court: Aftermath of Northern Pipeline v. Marathon, 40 WASH. & LEE L. REV. 99 (1983) (Article III judges lobbied in opposition to proposals to give Article III status to bankruptcy judges). Under this view, Article III judges retain their “gladiator” powers in part by the small size of their ranks; thus, Supreme Court decisions such as Raddatz could be read as wisely conserving Article III authority.
I believe that the potential battle—Lord Coke v. King James—animated the discussions of both Justices Brennan and White in *Northern Pipeline*. Justice White claimed that bankruptcy cases were not those in which a battle would occur. Justice Brennan must either have thought the opposite or been unsure. Hence, the “hold that line” stance, because we can never know when issues which appear apolitical will become charged with concern. If Justice Brennan did in fact make the implicit prediction that bankruptcy cases were potential battlegrounds, he has been proven correct. Bankruptcy courts today are where major social policy issues—compensation for victims of asbestosis, toxic waste cleanups, and labor relations—are being played out.

However, even with the recapture to some extent of the bankruptcy court, even with the narrowing of the “public rights”-plus exceptions, Article III courts may already have countenanced too great an incursion into Article III preserves. The question is whether the “gladiators” will know when the battle starts. Under the pressures of crowded dockets, the courts have permitted a substantial amount of delegation of decisionmaking to non-Article III judges. Administrative law judges and magistrates now rule on a great number of matters. In some districts, magistrates are perceived to be “additional judges.” In many districts, prisoners’ cases have been turned over to magistrates; empirical studies suggest that magistrates find fault with prior decisions of trial judges at somewhat lower rates than did

160. 458 U.S. at 103 (White, J., dissenting).
162. Under the 1984 amendments to the Bankruptcy Act, bankruptcy judges are under the supervision of district court judges when hearing “non-core” proceedings without parties’ consent. See supra note 125. In addition, district court judges may withdraw any case or proceeding from a magistrate, either on their own motion or on that of a party, “for good cause shown.” The district court is required to withdraw jurisdiction on a party’s motion if resolution of a case involves “consideration of both Title 11 and other laws . . . regulation organizations or activities affecting interstate commerce.” Pub. L. No. 98-353, § 104, 98 Stat. 341 (1984), 28 U.S.C.A. § 157 (West Supp. 1985).
163. See Lubbers, supra note 3, at 384.
164. C. SERON, supra note 127, at xii, 39.
165. The duties “most frequently assigned” to magistrates are prisoner civil rights and habeas cases and social security cases. C. SERON, THE ROLE OF MAGISTRATES IN FEDERAL DISTRICT COURTS IX (Federal Judicial Center, 1983).
Article III judges.\textsuperscript{166} While many of these decisions are largely subject to reconsideration by Article III judges, that review is dependent upon the record shaped below. In a substantial percentage of the cases in which delegation has occurred, the United States is a party. In \textit{Radatz}, after all, the question was the credibility of the testimony of two government officials as contrasted with that of a criminal defendant. The only adjudicator who heard the witnesses was a magistrate—an individual without life tenure and without salary guarantees. How could an Article III judge reviewing such a record know if the case presented a moment of unconscionable government overreaching which should have been bravely challenged by a judicial officer confirmed in his or her powers by constitutional status?

In short, we are left with a view of Article III that there is something essential there, and that it matters that final decisions are made by specially empowered actors. On the other hand, Article III judges have conceded (perhaps out of workload pressures, perhaps from conviction) that it does not matter that the underlying bases of those decisions are formed by actors who are not as independent—either from Congress or (in the case of magistrates) from Article III judges themselves. The ranks of the first tier of the federal judiciary are now filled with individuals who can be fired. These individuals will need the bravery of a Lord Coke (as described in his own version of the events), for they are not as protected as are the Article III judges who review the decisions made. As exemplified by the story of Lord Coke, and our own history, such moral courage is unusual.

I do not know if this compromise will work, but there are reasons to be concerned. First tier decisionmakers have enormous powers to shape records and to protect their own decisions.\textsuperscript{167} Unless Article III judges have and exercise the authority to undertake “de novo” consideration with gusto, then the real decisionmakers are those without Article III attributes.\textsuperscript{168} Appellate review of records made and facts found by non-Article III judges is a weak substitute for Article III

\textsuperscript{166} Allen, Schachtman, and Wilson, \textit{Federal Habeas Corpus and its Reform: An Empirical Analysis}, 13 \textit{Rutgers L.J.} 675, 727 (1982) (magistrates recommended that relief be denied to more than 90% of the petitions filed; district court judges denied relief to 85.4% of all petitioners).


\textsuperscript{168} Whether this is good or bad depends upon assessments of who populates the first tier. For example, in the years before \textit{Crowell v. Benson} was decided, the fledgling administrative adjudicatory system was seen as a needed balance to a conservative, unfriendly federal judicial apparatus. Albertsworth, \textit{Judicial Review of Administrative Action by the Federal Supreme Court}, 35 \textit{Harv. L. Rev.} 127, 153 (1921-22) (”with the increase in population and its concentration in large urban centers, involving of necessity a desire for more speedy justice, administered by men more conversant with the de facto social and economic communities, court review of administrative action must be limited more and more . . . if much of our social legislation is to succeed”).
judging. If the Court is correct that Article III attributes are important, that safety is essential to brave judgment, then the compromises made do not provide the protections intended. In order for Lord Coke to come face to face with the King, in order for Lord Coke to assert his independence from the King and to challenge the King, the Judge had to rule in a manner that displeased.

169. In this regard, the approval of the consensual provisions of the Magistrates Act, discussed supra notes 130-133 and accompanying text, is extremely troubling as are the consensual provisions of the 1984 Bankruptcy Amendments. Documentation of the difference in decisionmaking between non-Article III judge and Article III judge is very difficult. As noted, the Administrative Office of the United States Courts does not keep data on the number or kind of cases in which magistrates' or bankruptcy judges' decisions are overturned by district court judges. See supra note 127.