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NOTES

Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act

In providing for the establishment of a federal judiciary, article III, section 1, of the Constitution¹ appears to require Congress to grant federal judges life tenure² and undiminishable salaries. In some circumstances, however, Congress has established federal tribunals that do not comply with the requirements of article III,³ relying on the doctrine of legislative, or article I, courts.⁴ Recently, in response to caseload pressures burdening the federal district courts, Congress has drawn upon this doctrine to create an article I bankruptcy court and to expand the judicial powers of magistrates.⁵ The Bankruptcy Reform Act of 1978⁶ establishes a bankruptcy

1. The section provides:

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

U.S. Const. art. III, § 1. Congress's power, set out in art. I, § 8, to create inferior federal courts has been construed to refer only to courts described in article III, and thus appears to be limited by the requirements of that article. See *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962); C. Wright, *Federal Courts* § 11, at 30-31 (3d ed. 1976); Katz, *Federal Legislative Courts*, 43 *Harv. L. Rev.* 894, 894 n.2 (1930).

2. "Good Behaviour" has always been taken to mean tenure for life, with removal only according to the impeachment standard set forth in article II, § 4. See, e.g., *O'Donoghue v. United States*, 289 U.S. 516, 529-30 (1933).

3. A federal court is considered an article I court if its judges do not have life tenure and constitutionally protected salaries. In addition, article I courts are not limited to hearing cases comprised within the article III grant of subject matter jurisdiction. See, e.g., *Ex Parte Bakelite Corp.*, 279 U.S. 438 (1929); C. Wright, *supra* note 1, § 11.

4. The term—and much of the doctrine—derives from Chief Justice Marshall's opinion in *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828), discussed at notes 88-92 and accompanying text *infra*, in which the Justice contrasted "constitutional" courts, established by Congress in accordance with article III, with "legislative" courts, which need not meet those requirements. Legislative courts are now primarily referred to as article I courts, because many of these tribunals are established as "necessary and proper" exercises of an article I, § 8, legislative power. See notes 118-29 and accompanying text *infra*.

For general discussions of the doctrine, see 1 *Moore's Federal Practice* ¶ 0.4 (2d ed. 1979); C. Wright, *supra* note 1, § 11.

5. The litigation explosion of recent years has severely taxed the resources of the federal judicial system at all levels, generating considerable comment and a variety of proposals for reform. Relief for overburdened district judges was a primary objective of the original Magistrate Act in 1968. See H.R. Rep. No. 1629, 90th Cong., 2d Sess. 12 (1968), reprinted in [1968] *U.S. Code Cong. & Ad. News* 4252, 4257. Caseload pressures have motivated the continued expansion of magistrates' powers. See Silberman, *Masters and Magistrates Part II: The American Analogue*, 50 *N.Y.U. L. Rev.* 1297, 1298 (1975); Note, *Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View*, 88 *Yale L.J.* 1023, 1027-28 & n.27 (1979) [hereinafter referred to as *Article III and Magistrates*]. The need to free bankruptcy cases from the overburdened dockets of the district courts was a major impetus for creating a new bankruptcy court. See Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 95th Cong., 2d Sess., *Constitutional Bankruptcy Courts* 8-9 (Comm. Print No. 3 1977) [hereinafter cited as *Comm. Print No. 3*].

6. Pub. L. No. 95-598, tit. II, 92 Stat. 2549 (1978) (codified at 28 U.S.C.A. §§ 151-160, 771-775, 1471-1482 (Supp. 1979)). The Act is further discussed at notes 14-34 and accompanying text *infra*.

court staffed by judges who will have fourteen-year terms⁷ and unprotected salaries,⁸ and who may be removed from office for a variety of nonimpeachable offenses.⁹ The Magistrate Act of 1979¹⁰ authorizes magistrates, who are appointed by district judges to serve eight-year terms,¹¹ to render final judgment in civil cases and criminal misdemeanor cases referred to them by district judges. Both of these enactments boldly expand existing limits on the doctrine of legislative courts,¹² and thus raise serious questions about the scope of congressional power to delegate article III judicial power to non-article-III tribunals.¹³

This Note analyzes the constitutionality of the new bankruptcy court and the Magistrate Act in light of the current rationales for article I courts, and concludes that neither can be justified under existing conceptions of the limits on congressional power to create tribunals that do not comply with the requirements of article III. The Note argues, however, that these conceptions do not resolve the constitutional question completely, because they do not satisfactorily suggest how far Congress may go beyond the existing limits of the doctrine. Moreover, these rationales are inadequate because they fail to give proper weight to the values underlying article III. Accordingly, the Note concludes that the constitutionality of any article I court must be evaluated in light of article III policies. The Note then applies an article III policy analysis to the bankruptcy and magistrate systems, and concludes that both are fundamentally at odds with the values article III was designed to protect.

To lay the foundation for this constitutional analysis, the first section of the Note examines the purposes, structure, and conceptual underpinnings of the new bankruptcy court and the expanded powers of magistrates.

I. THE BANKRUPTCY COURT AND THE MAGISTRATE SYSTEM AS ARTICLE I COURTS

Although somewhat different in purpose and conceptual basis, the new bankruptcy and magistrate systems employ similar mechanisms for the re-

7. 28 U.S.C.A. § 153(a) (Supp. 1979).

8. *Id.* § 154. See note 54 and accompanying text *infra*.

9. *Id.* § 153(b). See notes 57-59 and accompanying text *infra*.

10. Pub. L. No. 96-82, 93 Stat. 643 (1979) (codified at 28 U.S.C.A. §§ 631, 633, 636; 18 U.S.C.A. § 3401 (Supp. 1980)).

11. 28 U.S.C. § 631(a)-(h) (1976).

12. See notes 88-145 and accompanying text *infra*.

13. Many of these questions were raised and considered in congressional hearings on the bankruptcy and magistrate systems. See generally Bankruptcy Court Revision: Hearings on H.R. 8200 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 95th Cong., 1st Sess. (1977) [hereinafter cited as Bankruptcy Court Hearings]; Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 95th Cong., 2d Sess., Report on Hearings on the Court Administration Structure for Bankruptcy Cases (Comm. Print No. 13 1977) [hereinafter cited as Comm. Print. No. 13]; Comm. Print No. 3, *supra* note 5, at 18-33; Jurisdiction of United States Magistrates: Hearings on S. 1283 before the Subcomm. On Improvements in Judicial Machinery of the Sen. Comm. on the Judiciary, 94th Cong., 1st Sess. (1975); H.R. Rep. No. 1609, 94th Cong., 2d Sess. (1976); H.R. Rep. No. 1364, 95th Cong., 2d Sess. (1978).

form of judicial administration. Each system establishes a structure of judicial officers unprotected by article III's tenure and salary guarantees as auxiliaries to the district courts. These nontenured officers are empowered to enter binding judgments in a broad range of cases falling within the subject matter limits of article III.

A. *Purposes and Structure*

The new bankruptcy court is designed to correct two critical deficiencies of the old bankruptcy referee system. The first, and most pressing, problem was the narrow jurisdiction exercised by bankruptcy referees.¹⁴ Under the old system, referees could hear only cases involving the actual disposition of debtors' property, or "summary" suits.¹⁵ Other claims affecting the debtor's assets but not involving distribution to creditors were deemed "plenary" suits, and had to be filed and tried separately in federal district or state courts.¹⁶ Besides encouraging costly and time-consuming jurisdictional disputes,¹⁷ this bifurcated system often produced judgments in plenary suits that conflicted with or otherwise hampered the referee's determinations in liquidation or reorganization proceedings.¹⁸

The second principal deficiency of the referee system was its lack of independence from the district courts.¹⁹ Referees could only hear suits referred to them by district judges and were dependent on district judges to confirm their recommendations.²⁰ Consequently, bankruptcy proceedings

14. The need for expanded jurisdiction was the most frequently cited reason for reforming the system for adjudicating bankruptcy claims. See generally *Bankruptcy Court Hearings*, supra note 13; *Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 1st & 2nd Sess., pt. 4, at 2736-37 (1975-1976); *Report of the Commission on the Bankruptcy Laws of the United States*, H.R. Doc. No. 137, 93d Cong., 1st Sess. pt. 1, at 88-92, pt. 2, at 30-33 (1973); *Comm. Print No. 3*, supra note 5, at 7-8.

15. For a description of the jurisdiction of bankruptcy referees, see *Comm. Print No. 3*, supra note 5, at 2-5; *Comm. Print No. 13*, supra note 13, at 1-3. In "summary" suits, the court is deemed in possession of the debtor's property, and can only dispose of property in its possession. Summary suits thus include little more than creditors' claims against debtors. For a discussion of the limits of summary jurisdiction, see *Note, Scope of the Summary Jurisdiction of the Bankruptcy Court*, 40 *Colum. L. Rev.* 489 (1940). See also *Forum, Bankruptcy Reform: A New Judiciary*, 48 *U. Cinn. L. Rev.* 367, 369-71 (1979).

16. Plenary matters might include suits by the trustee against the bankrupt's debtors, or matters with potentially great impact on the bankrupt's assets, such as labor or contract disputes. The district judge or referee sitting in bankruptcy may hear a plenary suit only if the defendant to that suit consents. See, e.g., *Comm. Print No. 13*, supra note 13, at 2-3; *Comm. Print No. 3*, supra note 5, at 2-4. Consent, however, was often constructive, imputed from certain procedural lapses or actions by the adverse party. See *Broude, Jurisdiction and Venue Under the Bankruptcy Act of 1973*, 48 *Am. Bankr. L.J.* 231, 233 (1974); *Forum*, supra note 15, at 370.

17. See *Bankruptcy Court Hearings*, supra note 13, at 194 (statement of John W. Ingraham); *Comm. Print No. 13*, supra note 13, at 2.

18. See, e.g., *S. Rep. No. 989*, 95th Cong., 2d Sess. 17-18 (1978), reprinted in [1978] *U.S. Code Cong. & Ad. News* 5787, 5803-04; *Bankruptcy Court Hearings*, supra note 13, at 18-27 (statement of J. Stanley Shaw).

19. *Comm. Print No. 3*, supra note 5, at 9-12.

20. Under the system in effect until the *Bankruptcy Reform Act* is fully implemented on April 1, 1984, see *Pub. L. No. 95-598*, tit. IV, § 402(b), bankruptcy jurisdiction is first vested in the district courts. 11 *U.S.C. §§ 1(10), 11a* (1976). District judges refer nearly all bankruptcy proceedings to bankruptcy referees, although the judges may retain any case

were subject to the delays inherent in the district courts' overcrowded dockets.²¹ The subordinate position of referees also diminished the prestige of the office and reduced the respect accorded their decisions.²² Thus, by fostering delay and inharmonious adjudications, the limited jurisdiction and dependent status of referees frustrated the bankruptcy system's principal goal of swiftly rehabilitating debtors.²³

The Bankruptcy Reform Act of 1978 seeks to remedy these problems through two sweeping reforms. First, in order to provide a forum capable of quickly and uniformly resolving all disputes that affect a given debtor, it greatly expands the jurisdiction of federal bankruptcy tribunals by eliminating the summary/plenary distinction.²⁴ The new bankruptcy courts have jurisdiction of all civil proceedings arising under, or "related to" cases arising under, the substantive federal bankruptcy laws.²⁵ Although limited in principle to a narrow class of federal question cases,²⁶ the scope of the jurisdiction of the new bankruptcy courts, which encompasses claims based on both federal and state law,²⁷ will equal, and in some instances exceed,

for themselves. The referees are salaried court employees appointed by the judges of the court for six-year terms. 11 U.S.C. §§ 61, 62 (1976). Rule 901 of the Bankruptcy Rules, promulgated by the Supreme Court in 1974, 415 U.S. 1003 (1974), confers the title of "bankruptcy judge" on the referees. To distinguish these court officers from the new full-fledged bankruptcy judges, this Note will continue to use the designation "referee."

Referees perform some administrative duties, such as appointing trustees or supervising estate liquidation, but they primarily resolve disputes between creditors and debtors. The authority to enter final judgment in such disputes remains with the district judge. 11 U.S.C. § 66 (1976). See Comm. Print No. 3, *supra* note 5, at 2-6; Comm. Print No. 13, *supra* note 13, at 1-3.

21. See Comm. Print No. 3, *supra* note 5, at 8-11.

22. *Id.*

23. *Id.*

24. See, e.g., H.R. Rep. No. 595, 95th Cong., 1st Sess. 49 (1977), reprinted in [1978] U.S. Code Cong. & Ad. News 5963, 6010.

25. 28 U.S.C.A. § 1471(b) (1979 Supp.). This grant of jurisdiction became effective immediately, on Oct. 1, 1979.

If a case falling within this jurisdictional grant is not filed originally in the bankruptcy court, it may be removed to the bankruptcy court. 28 U.S.C.A. § 1478 (1979 Supp.).

26. Presumably the jurisdiction of the bankruptcy court would be limited to matters in bankruptcy falling within Congress's power to make uniform bankruptcy regulations, U.S. Const. art. I, § 8, cl. 4, since that clause is the source of Congress's power to establish the court.

27. The House report makes clear that "[a]ctions that formerly had to be tried in State court or in Federal district court, at great cost and delay to the estate, may now be tried in the bankruptcy courts." H.R. Rep. No. 595, *supra* note 24, at 445, [1978] U.S. Code Cong. & Ad. News at 6400.

Because so many of the disputes related to bankruptcy proceedings are grounded solely in state law and may now be tried in a congressionally created court regardless of diversity of citizenship, some have questioned whether bankruptcy cases "arise under" federal law for purposes of article III jurisdiction. See, e.g., Comm. Print No. 3, *supra* note 5, at 17-19. This question arises because the plurality opinion in *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949), concluded, in dictum, that bankruptcy cases were within article III jurisdiction only when federal law created the cause of action or when there was diversity of citizenship. *Id.* at 594-99. Six Justices strongly repudiated the plurality's reasoning and argued that bankruptcy cases are always within the scope of article III. Their position seems correct in view of the longstanding principle that article III jurisdiction must be coextensive with Congress's article I, § 8, legislative powers, because "the Constitution meant to provide ample means to accomplish its own ends by its own courts," *Mitchell v. Great Works Milling & Mfg. Co.*, 17 Fed. Cas. 496, 499 (1843). Therefore, if Congress pursuant to its article I, § 8, cl. 4, power to establish uniform bankruptcy laws, concludes

that of the district courts.²⁸ Indeed, the range of work of the article I bankruptcy judges will be virtually the same as the range of matters heard by article III district judges.²⁹ The only significant distinction is that a bankruptcy judge's cases will all be in some way related to an underlying bankruptcy proceeding.

The second major judicial reform instituted by the Bankruptcy Act strengthens the autonomy of the bankruptcy tribunals.³⁰ Although described in the Act as "adjuncts" of the district courts,³¹ the new bankruptcy courts will be substantially independent. As courts of original jurisdiction, they will control their own dockets.³² In addition, although they may not enjoin

that state law claims should be adjudicated in federal bankruptcy court, article III judicial power must necessarily apply to these suits. Otherwise, the congressional power to assure uniformity would lack substance. See Justice Frankfurter's dissenting opinion in *Tidewater*, 337 U.S. at 652 n.3; *Lathrop v. Drake*, 91 U.S. 516, 518 (1875).

This conclusion is supported by the Court's decisions in *Williams v. Austrian*, 331 U.S. 642 (1947), upholding federal jurisdiction over state-law-based plenary suits in reorganization proceedings, and *Schumacher v. Beeler*, 293 U.S. 367, 371-74 (1934), suggesting that economy and convenience, rather than article III impediments, were the reason most plenary suits were left to state courts. These decisions illustrate that where Congress confers jurisdiction to advance federal interests stemming from an article I legislative power, the cases "arise under" federal law, even though the substantive decision may rest on state law. P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 416-17, 868-69 (2d ed. 1973) [hereinafter cited as *Hart & Wechsler*]. State law claims related to a bankruptcy proceeding are thus within the scope of article III federal question jurisdiction, and may be committed to an article III court. See *Bondurant, The Bankruptcy Court as a Constitutional Court*, 45 *Am. Bankr. L.J.* 235, 237-39 (1971).

28. The potential breadth of this expanded jurisdiction is illustrated by the congressional testimony of an attorney who handled the bankruptcy reorganization of a major supermarket chain. *Bankruptcy Court Hearings*, supra note 13, at 18-27 (statement of J. Stanley Shaw). State law claims arising during the five-year reorganization included disputes over the validity of contracts, landlord-tenant relationships, reclamation of goods, foreclosures of security interests, and alleged torts. *Id.* At the same time the bankrupt was the defendant in an action to enforce collective bargaining agreements and a title VII employment discrimination action filed in response to massive layoffs. The trustee initiated an antitrust action against several of the supermarket's suppliers and a securities fraud action against the parent corporation. *Id.* Because each of these state and federal law disputes affected the bankrupt's assets, financial condition, and obligations, they were all "related to" the underlying reorganization proceeding, and thus would be within the expanded jurisdiction of the new bankruptcy court.

29. See *Bankruptcy Court Hearings*, supra note 13, at 113 (statement of Hon. Wesley Brown); *id.* at 57-58 (testimony of Hon. Simon H. Rifkind).

30. The House Judiciary Committee originally proposed an article III bankruptcy court entirely separate from the district courts, see H.R. 8200, 95th Cong., 2d Sess. (1977), because the subcommittee studying the problem, the full Judiciary Committee, the Attorney General, and his Office of Legal Counsel all concluded that the necessary expanded jurisdiction could be exercised constitutionally only by a court created in accordance with the requirements of article III. See *Comm. Print No. 3*, supra note 5, at 18-33 (subcommittee's position); H.R. Rep. No. 595, supra note 24, at 52 (1977) (Judiciary Committee view); *Bankruptcy Court Hearings*, supra note 13, at 216 (testimony of Att'y Gen. Griffin Bell); *Bankruptcy Reform Act of 1978: Hearings on S. 2266 & H.R. 8200 Before the Subcomm. on Improvements in Judicial Machinery of the Sen. Comm. on the Judiciary, 95th Cong., 1st Sess.* 548 (1977) (Office of Legal Counsel position) [hereinafter cited as *Senate Hearings*].

This proposal, though approved by the Judiciary Committee, encountered strong political opposition stemming from fears that a separate court of equal rank would diminish the prestige and influence of the district courts. The opponents were successful, and the original version of H.R. 8200 never passed the House. See *Comm. Print No. 13*, supra note 13, at 1, 5-9.

31. 28 U.S.C.A. § 151(a) (1979 Supp.).

32. 28 U.S.C.A. § 1471(c) (1979 Supp.) provides that "[t]he bankruptcy court for the district in which a case under title II is commenced shall exercise all of the jurisdiction conferred . . . on the district courts." (Emphasis added.)

This language implies that all bankruptcy claims must be heard by bankruptcy judges. District judges formerly had discretion to refer matters to referees. 11 U.S.C. § 66 (1976).

another court or punish certain kinds of criminal contempt, they will exercise the other inherent powers of an article III federal court, including the powers to enter final judgments and issue writs of execution.³³ Thus endowed with nearly the full array of judicial powers, the new bankruptcy courts will be able to resolve disputes expeditiously, without time-consuming references from, and recommendations to, the district courts. Despite these increased elements of independence, however, bankruptcy judges will still be subject to the disciplinary and removal power of the other federal judges in the circuit.³⁴

Unlike the Bankruptcy Act, the Magistrate Act of 1979 is not designed to remedy distinctive problems affecting the adjudication of particular disputes. Instead, it responds to problems—particularly overcrowded dockets and insufficient manpower—that have hampered all federal courts in recent years.³⁵ The Act continues the trend inaugurated by the Federal Magistrates Act of 1968,³⁶ which established magistrates as assistants to district judges,³⁷ by augmenting magistrates' judicial powers and thus expanding their role from assistants to *de facto* district judges.

The office of United States magistrate was intended to free district judges from various procedural and administrative tasks so that they might devote more time to the actual trial of cases.³⁸ Magistrates are officers of the district court, who, prior to the 1979 Act, were empowered to determine nondispositive pretrial motions;³⁹ conduct evidentiary hearings and recommend dispositions in summary civil proceedings,⁴⁰ including prisoner peti-

33. 28 U.S.C.A. § 1481 (1979 Supp.): "A bankruptcy court shall have the powers of a court of equity, law, and admiralty, but may not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment." The limit on the criminal contempt power stems from the view that federal criminal penalties may be imposed only by an article III court because of due process and the protections of the sixth amendment. See, e.g., *O'Callahan v. Parker*, 395 U.S. 258, 262-64 (1969); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17-18 (1955). Proponents of an article I bankruptcy court suggested limiting the criminal contempt power to overcome constitutional difficulties with the article I structure. See *Bankruptcy Court Hearings*, *supra* note 13, at 89 (testimony of Hon. Shirley Hufstedler), 137 (testimony of Hon. Ruggiero Aldisert), 217 (testimony of Att'y Gen. Griffin Bell).

34. 28 U.S.C.A. § 153(b) (1979 Supp.).

35. See note 5 *supra*.

36. Pub. L. No. 90-578, 82 Stat. 1107 (codified at 18 U.S.C. §§ 3401-3402; 28 U.S.C. §§ 604, 631-639 (1976)).

37. The 1979 Act is the second major expansion of magistrates' powers since the 1968 Act was passed. In 1976 Congress amended the 1968 Act to empower magistrates to hear potentially dispositive pretrial motions and to conduct evidentiary hearings on prisoners' habeas corpus petitions, Pub. L. No. 94-577, 90 Stat. 2729 (1976) (codified at 28 U.S.C. § 636(b)(1)(B) (1976)).

38. See, e.g., *Hearings on the Federal Magistrates Act Before the Subcomm. on Improvements in Judicial Machinery of the House Comm. on the Judiciary*, 90th Cong., 2d Sess. 66 (1968) (testimony of Committee Counsel Poff); H.R. Rep. No. 1609, 94th Cong., 2d Sess. 6, reprinted in [1976] U.S. Code Cong. & Ad. News 6162, 6166.

39. 28 U.S.C. § 636(b)(1)(A) (1976). Under this section, magistrates routinely resolve pretrial discovery disputes. For a description of magistrates' pretrial authority, see *Silberman*, *supra* note 5, at 1338-40.

40. 28 U.S.C. § 636(b)(1)(B) (1976).

The recommended disposition procedure is frequently used to have magistrates review administrative determinations regarding entitlement to benefits. See *Silberman*, *supra* note 5, at 1334-38. This procedure comports with article III only if authority and responsibility for

tions for post-conviction relief;⁴¹ and serve as special masters to assist the court with factfinding.⁴² These tasks did not entail the exercise of "judicial power"⁴³—ultimate adjudicatory authority always remained with the district judge.⁴⁴ Under the scheme of the 1968 Act, a magistrate's hearing report consisted of proposed findings of fact and conclusions of law, and was subject to the district judge's *de novo* review.⁴⁵ Indeed, courts reviewing the permissible scope of magistrates' duties have stressed that the district judge's retention of final decisionmaking authority is necessary to avoid article III infirmities.⁴⁶

rendering a final judgment remains with the district judge. *Mathews v. Weber*, 423 U.S. 261, 269 n.5, 271 (1976).

41. Authorization in § 636(b)(1)(B) for magistrates to hear applications for post-trial relief, or habeas corpus petitions, was added by the 1976 Amendments to the Magistrates Act, Pub. L. No. 94-577, 90 Stat. 2729 (1976). This amendment was designed to overrule the Supreme Court's decision in *Wingo v. Wedding*, 418 U.S. 461 (1974), which construed the Federal Habeas Corpus Act and the Magistrates Act to require an article III judge to hear habeas petitions. The Court feared that, despite review by district judges, habeas petitions would be adjudicated *de facto* by magistrates, resulting in abdication of the judicial function to the detriment of article III. Article III and Magistrates, *supra* note 5, at 1044. These constitutional doubts appear well founded. See notes 46 & 203-23 and accompanying text *infra*.

42. The use of magistrates as special masters is limited to the situations detailed in Fed. R. Civ. P. 53 unless the parties consent to a broader use of the magistrate as master. 28 U.S.C. § 636(b)(2) (1976). See Silberman, *supra* note 5, at 1321-32.

43. See notes 139-43 and accompanying text *infra*.

44. Under the 1968 Act, only a judge could order entry of final executory judgments, enjoin behavior, or issue contempt citations. To the extent local court rules seem to provide otherwise, courts of appeals have continued to insist on district judge participation. See notes 45 & 46 and accompanying text *infra*.

The only apparent exception to the rule of judicial participation is the statute authorizing magistrates to conduct trials of minor criminal offenses when the defendant consents. See 28 U.S.C. § 636(a)(3) (1976), which gives magistrates the jurisdiction described in 18 U.S.C. § 3401(a), to "try persons accused of, and sentence persons convicted of, minor offenses committed within that judicial district." The defendant may elect, however, to be tried by an article III judge. 18 U.S.C. § 3401(b) (1976). This provision sparked extensive constitutional debate in hearings on the 1968 Magistrates Act. Its supporters argued that petty offenses had long been considered an implied exception to article III and the right to a jury trial, and that the defendant's consent vitiated any constitutional difficulties. See generally Note, *The Validity of United States Magistrates' Criminal Jurisdiction*, 60 Va. L. Rev. 697 (1974) [hereinafter cited as *Magistrates' Criminal Jurisdiction*]. Justices Black and Douglas, on the other hand, concluded that minor offenses are not excepted from the sixth amendment or article III, and thus that this provision of the Magistrates Act was unconstitutional. Accordingly, they dissented from the adoption of Court rules based upon the Act, 51 F.R.D. 206, 209 (1971) (Black, J., dissenting). The Supreme Court has never passed on this issue directly.

45. Parties have the right under 28 U.S.C. § 636(b)(1) (1976) to object to a magistrate's findings. The judge must then determine the matter objected to *de novo*. Moreover, whether or not the parties object, "[a] judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions." *Id.*

46. See, e.g., *Mathews v. Weber*, 423 U.S. 261, 270-71 (1976) (although declining to reach constitutional issues, the Court intimated article III was satisfied because "[t]he authority—and the responsibility—to make an informed, final determination . . . remains with the judge"); *United States v. Raddatz*, 592 F.2d 976, 982 (7th Cir.) (Magistrates Act "clearly requires the Article III judge to make a *de novo* determination. Article III is therefore satisfied."); cert. granted, 100 S. Ct. 44 (1979) (No. 79-8); *Sick v. City of Buffalo*, 574 F.2d 689, 692-93 (2d Cir. 1978); *Noorlander v. Ciccone*, 489 F.2d 642, 648 (8th Cir. 1973); *TPO, Inc. v. McMillen*, 460 F.2d 348 (7th Cir. 1972). Courts of appeals have insisted on preserving the district judge's role by refusing to accept appeals from magistrate-conducted cases unless the judge has reviewed the case and entered final judgment. See *Horton v. State St. Bank & Trust Co.*, 590 F.2d 403 (1st Cir. 1979); *Taylor v. Oxford*, 575 F.2d 152 (7th Cir. 1978); *Sick v. City of Buffalo*, 574 F.2d 689 (2d Cir. 1978); *Reciprocal Exch. v. Noland*, 542 F.2d 462 (8th Cir. 1976).

The Magistrate Act of 1979, which parallels local court rules now in effect in some districts,⁴⁷ provides further relief for overburdened district courts by authorizing complete trial by magistrate, eliminating the requirement of de novo district court review. Under the Act, district judges may refer civil proceedings, including jury trials and criminal misdemeanor proceedings, to a magistrate for determination.⁴⁸ If the parties consent to such a reference,⁴⁹ the magistrate may then hear, determine, and enter a final judgment in the matter.⁵⁰ Thus, the Act essentially vests magistrates with full judicial power and makes them complete substitutes for article III district judges. Magistrates will potentially have jurisdiction of any civil case now within the cognizance of federal district courts, with no apparent limits on their coercive, executory authority.⁵¹

Despite the similarity of their power and jurisdiction to that of district judges, neither the new bankruptcy judges nor federal magistrates will be article III judges. Bankruptcy judges, appointed by the President subject to Senate confirmation,⁵² will serve fourteen-year terms,⁵³ and their salaries may be subject to adjustment.⁵⁴ Federal magistrates will continue to be

47. Local rules in some districts go beyond the statutorily delineated duties in the 1968 Act and permit magistrates to conduct civil trials, including jury trials, when the parties consent. See Hearings on Diversity of Citizenship Jurisdiction/Magistrates Reform Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 499 (1977) (memorandum on number of magistrate trials prepared by Administrative Office of the United States Courts and Department of Justice) [hereinafter cited as 1977 Hearings]. For an example of such a local rule and its application in a jury trial, see *Muhich v. Allen*, 603 F.2d 1247 (7th Cir. 1979).

Prior to the 1979 Act, statutory authorization for such rules authorizing magistrate trials was purportedly provided by 28 U.S.C. § 636(b)(3) (1976), which permits magistrates to perform "such additional duties as are not inconsistent with the Constitution and laws of the United States." The legislative history of this provision indicates, however, that Congress contemplated that these "additional duties" would largely be administrative or pretrial, leaving more time for trials to the judges. H.R. Rep. No. 1609, supra note 38, at 2, 4, 6-7, [1976] U.S. Code Cong. & Ad. News at 6162-66. See also *Muhich v. Allen*, 603 F.2d 1247, 1251 (7th Cir. 1979) (Swygert, J., dissenting); *Taylor v. Oxford*, 575 F.2d 152, 154 (7th Cir. 1978).

48. Pub. L. No. 96-82, § 2, 93 Stat. 643 (codified at 28 U.S.C.A. § 636(c)(1) (1980 Supp.)) (civil matters); id. §§ 7(a), (b) (codified at 18 U.S.C.A. § 3401(a) (1980 Supp.)) (misdemeanors).

49. 28 U.S.C.A. § 636(c)(1), (c)(2) (1980 Supp.). The statute's consent procedure is designed to shield litigants from judicial pressure to accept the reference and thereby to avoid "forced consent." Systemic pressures, however, may prove harder to avoid. See notes 218 & 219 and accompanying text infra; Article III and Magistrates, supra note 5, at 1051 & nn.150 & 151.

50. 28 U.S.C.A. § 636(c)(3) (1980 Supp.).

51. 28 U.S.C.A. § 636(c)(3) (1980 Supp.) is quite explicit in substituting a magistrate for a district judge. The 1979 Magistrate Act has no section limiting the powers of magistrates, whereas the Bankruptcy Reform Act does limit the coercive reach of bankruptcy judges, see note 33 and accompanying text supra.

52. 28 U.S.C.A. § 152 (1979 Supp.).

53. Id. § 153(a).

54. 28 U.S.C.A. § 154 (1979 Supp.). This section provides for cost-of-living adjustments. Congress recently refused to appropriate the full amount necessary to make these adjustments, *Wall St. J.*, Nov. 12, 1979, at 24, col. 4. In *Will v. United States*, 478 F. Supp. 621 (N.D. Ill. 1979), juris. postponed, 100 S. Ct. 1010, (1980) (No. 79-983), several article III judges challenged a similar congressional action. The district court held that article III guaranteed the judges the full salary increase, so that Congress's action amounted to an unconstitutional salary diminution. Article I judges would be subject to the salary reduction.

appointed by a majority vote of the district court judges of each district⁵⁵ to serve eight-year terms.

Although under current law an individual magistrate's salary cannot be reduced during his term of office, this statutory protection can, of course, be modified or abolished.⁵⁶ Both bankruptcy judges and magistrates can be removed from office for "incompetency, misconduct, neglect of duty, or physical or mental disability," the former by a majority vote of the judicial council of their circuit,⁵⁷ the latter by a similar vote of the district judges of their district.⁵⁸ Because these are not impeachable "high crimes and misdemeanors," the removal provisions also fail to comport with the life tenure guarantee in article III.⁵⁹

Because they do not enjoy life tenure and undiminishable salaries, the bankruptcy judges are article I judges; the bankruptcy court is thus an article I court.⁶⁰ The magistrate system is also appropriately analyzed under the doctrine of article I courts. Although prior to the 1979 Act, magistrates were deemed assistants to article III judges, or "parajudges," rather than actual article I judges,⁶¹ once they start exercising judicial power they will be, in effect, article I judges, even though they will not staff a separate court system.⁶²

Litigants appearing before bankruptcy judges and magistrates will not be, in effect, article I judges, even though they will not staff a separate court will remain available in article III tribunals. Under the Bankruptcy Act, final judgments entered by bankruptcy judges may be appealed either to panels of bankruptcy judges with subsequent recourse to the courts of appeals,⁶³ or to the district courts.⁶⁴ Alternatively, bankruptcy appeals

55. In addition, the 1979 Act requires the district courts to establish merit selection panels to assist the appointment process. 28 U.S.C.A. § 631(b)(5) (1980 Supp.).

56. Even if an article I judicial officer is granted life tenure and undiminishable salary by statute, Congress is free to change the statute. See *Glidden Co. v. Zdanok*, 370 U.S. 530, 593 (1962) (Douglas, J., dissenting).

57. 28 U.S.C.A. § 153(b) (1979 Supp.). Bankruptcy judges are entitled to a pre-removal hearing. See *In re the Investigation of the Administration of the Bankruptcy Court*, 610 F.2d 547 (8th Cir. 1979).

58. 28 U.S.C. § 631(h) (1976).

59. See note 1 *supra*; Kaufman, *Chilling Judicial Independence*, 88 *Yale L.J.* 681, 691-703 (1979).

60. See note 3 *supra*.

61. See *Mathews v. Weber*, 423 U.S. 261, 268 (1976); *Article III and Magistrates*, *supra* note 5, at 1047 n.132.

62. Professor Silberman argues that the legislative court model, although relevant to analyzing magistrates' authority, provides an "imperfect analogy." Silberman, *supra* note 5, at 1310. She reasons that while Congress establishes legislative courts pursuant to a specific article I, § 8, power, its sources of authority for creating magistrates are article III and article II, § 2 (Congress may vest power to appoint judicial officers in courts). No matter which article Congress's ultimate authority is grounded in, however, the "necessary and proper" clause is still the immediate vehicle, and article III concerns still set the overarching limit on the scope of what is "necessary and proper" in this context. Moreover, when Congress vests article III "judicial power" in a non-article-III decisionmaker, whether called an article I "judge" or a "magistrate," the effect on the principles of article III is the same, and the doctrine of article I courts therefore provides a useful analytical framework.

63. 28 U.S.C.A. §§ 160, 1293 (1979 Supp.).

64. *Id.* § 1334. The district courts will also have jurisdiction of appeals from interlocutory orders, but only by leave of the court. It is interesting to note that the district court

may be taken directly to the courts of appeals if all parties consent.⁶⁵ Magistrates' final judgments may be appealed directly to the courts of appeals just as if they were decisions by district judges.⁶⁶ Alternatively, the parties may choose to appeal to the district court, which would not conduct a *de novo* review, but would apply normal appellate standards.⁶⁷

B. *Constitutional Saving Devices*

Certain provisions of the new court systems incorporate safeguards that their proponents argued would ensure their constitutionality under article III.⁶⁸ For example, the contempt powers of bankruptcy judges are restricted,⁶⁹ and the power of magistrates to try criminal cases is limited to "misdemeanors" in keeping with the view that federal criminal penalties must ordinarily be imposed by an article III judge.⁷⁰ In addition, the provisions for appellate review ensure that litigants who appear before bankruptcy judges and magistrates may receive supervision from article III courts at some stage of the proceedings.⁷¹

Moreover, each Act employs a scheme of internal delegation of judicial power. Neither bankruptcy judges nor magistrates receive power to try article III cases directly from Congress. Instead, the jurisdiction contemplated by each Act is vested, in the first instance, in the district courts and then transferred to the auxiliary legislative courts. Under the Bankruptcy Act this transfer is apparently mandatory; the Act confers the expanded bankruptcy jurisdiction on the district courts, but then provides that the bankruptcy courts "shall exercise all of the jurisdiction [so] conferred."⁷² In contrast, the Magistrate Act authorizes district judges to designate a magistrate to exercise jurisdiction in any given case, provided the parties consent. Transfer of jurisdiction is thus discretionary with the court, rather than mandatory. Both systems of internal delegation are thought to cure possible constitutional defects, because Congress has not technically departed from the normal constitutional scheme of vesting jurisdiction in an article III court.⁷³ In addition, employing article III courts as jurisdictional

may not refer bankruptcy appeals to a magistrate. *Id.* § 1334(c). This perhaps reflects Congress's recognition that bankruptcy litigants may be entitled to an article III judge at some stage of the proceedings.

65. *Id.* § 1293(b).

66. *Id.* § 636(c)(3) (1980 Supp.).

67. *Id.* § 636(c)(4).

68. See notes 187-223 and accompanying text *infra*.

69. 28 U.S.C.A. § 1481 (1979 Supp.). See, e.g., Bankruptcy Court Hearings, *supra* note 13, at 137 (testimony of Hon. Ruggiero Aldisert). See note 173 *infra*.

70. 18 U.S.C.A. § 3401(a) (1980 Supp.). See generally Magistrates' Criminal Jurisdiction, *supra* note 44 (constitutional problems with authorizing magistrates to hear criminal cases).

71. See notes 197-202 and accompanying text *infra*.

72. 28 U.S.C.A. § 1471(c) (1979 Supp.).

73. See Bankruptcy Court Hearings, *supra* note 13, at 89 (testimony of Hon. Shirley Hufstедler), 137 (testimony of Hon. Ruggiero Aldisert), 217; Senate Hearings, *supra* note 30, at 548-50 (testimony of Att'y Gen. Griffin Bell).

intermediaries ensures that the article I tribunals will remain subordinate in power and status.⁷⁴

The Magistrate Act incorporates an additional safeguard against constitutional challenge by requiring that magistrates exercise their expanded powers only upon the consent of the parties.⁷⁵ Litigants who agree to trial before a magistrate will thereby waive whatever rights they possess to trial before an article III judge.⁷⁶ The consent feature is thought to be a safeguard on the theory that the requirement of an article III judge is no more than a due process right possessed by litigants, similar to other due process rights that have long been held to be waivable.⁷⁷ In addition, consensual reference of cases to magistrates has been compared to the submission of disputes to arbitration or to special masters, practices that do not violate article III.⁷⁸

Despite these precautions, the constitutionality of the new bankruptcy and magistrate systems remains problematic. By its terms, article III appears to require that all courts established by Congress comply with its requirements. Accordingly, congressional power to delegate article III cases to legislative courts has always been construed narrowly. The Bankruptcy Reform Act and the Magistrate Act, however, permit non-article-III officers to exercise the broad civil jurisdiction customarily reserved for the article III district courts. Consequently, the compatibility of the new court systems with the existing doctrine of article I courts and the arguments advanced for their constitutionality must be scrutinized with special care.

II. THE DOCTRINE OF ARTICLE I COURTS AND ITS APPLICATION TO THE BANKRUPTCY COURT AND MAGISTRATE SYSTEM

The doctrine of legislative, or article I, courts recognizes that rigid adherence to the article III tenure and salary provisions may impair important practical interests in governmental flexibility.⁷⁹ For example, by precluding the discharge of federal judges once confirmed in office, the tenure provision may effectively prevent Congress from disbanding a given tribunal once it has outlived its usefulness.⁸⁰ Similarly, the salary provision

74. See Bankruptcy Court Hearings, *supra* note 13, at 218 (statement of Att'y Gen. Griffin Bell); Forum, *supra* note 15, at 371-72.

75. 28 U.S.C.A. § 636(c)(1) (1980 Supp.).

76. See note 169 and accompanying text *infra*.

77. See note 202 and accompanying text *infra*.

78. See, e.g., *La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957) (upholding use of special masters in dictum); *DeCosta v. Columbia Broadcasting Sys., Inc.*, 520 F.2d 499, 504-05 (1st Cir. 1975), cert. denied, 423 U.S. 1073 (1976) (consensual reference analogized to arbitration).

79. See, e.g., *Hart & Wechsler*, *supra* note 27, at 396.

80. Territorial courts provide an illustrative case in point. The impermanence of territorial status makes congressional flexibility to restructure or dismantle territorial judicial systems especially important. But, if territorial judges were guaranteed life tenure, Congress would be forced to absorb them into the federal judicial system when the territory entered the federal system, whether or not they were needed or qualified to be federal judges. See *Glidden Co. v. Zdanok*, 370 U.S. 530, 545-47 (1962).

may prevent Congress from achieving needed economies.⁸¹ Both provisions thus restrict congressional flexibility to deal with changing circumstances. Moreover, because article III courts cannot hear cases outside the article III subject matter jurisdiction⁸² and cannot perform ministerial functions,⁸³ Congress may wish to establish legislative courts, which can adjudicate both article III cases⁸⁴ and non-article-III matters while performing an array of nonjudicial functions.⁸⁵ Finally, through article I courts Congress can establish expert tribunals for particular types of cases and change their personnel from time to time in order to preserve or enhance their expertise.⁸⁶ In short, by authorizing exceptions to the tenure and salary provisions, the doctrine of article I courts enables Congress to provide more flexible and effective mechanisms for resolving disputes than the article III requirements would permit.

Although the doctrine of article I courts is well established, the Supreme Court has never marked the limits on congressional authority to establish non-article-III judicial tribunals.⁸⁷ Taken as a whole, the Court's pronouncements in this area suggest Congress has broad power to create such courts in territories or special geographic areas such as federal enclaves, but much more limited authority within the United States itself.

A. Territorial Article I Courts

The Supreme Court first articulated the doctrine of legislative courts in the context of the territories in the 1828 case of *American Insurance Co.*

81. See, e.g., *Williams v. United States*, 289 U.S. 553 (1933); *O'Donoghue v. United States*, 289 U.S. 516 (1933) (congressional efforts to curtail judicial salaries during the Depression); *Will v. United States*, 478 F. Supp. 621 (N.D. Ill. 1979) (Congress must appropriate funds for cost-of-living increases for article III judges), *juris. postponed*, 100 S.Ct. 1010 (1980) (No. 79-983).

82. See, e.g., *Glidden Co. v. Zdanok*, 370 U.S. 530, 582 (1962); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937) (advisory opinions).

In only one case, *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949), has even a plurality of the Court ruled that article III courts can hear cases outside the article III subject matter jurisdiction. Six Justices, however, rejected this view, *id.* at 605, 607 (Rutledge, J., concurring); *id.* at 643-44 (Vinson, C.J., dissenting); *id.* at 646-49 (Frankfurter, J., dissenting), and it has not been asserted since.

83. See, e.g., *Glidden Co. v. Zdanok*, 370 U.S. 530, 579-82 (1962) (article III Court of Customs and Patent Appeals may not render advice to tariff commission on rates); *O'Donoghue v. United States*, 289 U.S. 516, 546 (1933).

84. Article I courts may hear cases falling within the scope of article III jurisdiction. *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), suggests that congressional allocation of article III judicial business to an article I court does not change the inherent nature of that business. Consequently, it is impossible to distinguish article III from article I courts on the ground that the former exercise the exclusive power to decide article III cases while the latter may only exercise judicial power in cases outside the scope of article III. See Hart & Wechsler, *supra* note 27, at 397 n.4.

85. See *Keller v. Potomac Elec. Power Co.*, 261 U.S. 428, 442-43 (1923) (article I local District of Columbia courts may set utility rates in the District); *C. Wright*, *supra* note 1, § 11, at 32.

86. The Tax Court is an example of such a legislative court. See *Burns, Stix Friedman & Co. v. Commissioner*, 57 T.C. 392 (1971).

87. The Court expressly declined the opportunity to do so in *Glidden Co. v. Zdanok*, 370 U.S. 530, 549 (1962).

v. Canter.⁸⁸ *Canter* upheld the validity of an admiralty judgment rendered by a Florida territorial court comprised of untenured judges.⁸⁹ Although one basis for the decision was that territorial courts are not constrained by article III because they do not exercise article III "judicial power,"⁹⁰ the Court's main premise was that article IV granted Congress the combined powers of a local and a general government over the territories.⁹¹ This plenary sovereign power included the right to establish courts, which, like state courts, did not have to conform to article III requirements but could nonetheless exercise some of the subject matter jurisdiction described in article III, which includes admiralty cases.⁹²

The Court has applied similar reasoning to sustain article I courts in other geographical areas subject to exclusive congressional control, such as the District of Columbia.⁹³ *Palmore v. United States*,⁹⁴ the Court's most recent pronouncement on article I courts, upheld the constitutionality of the article I court system in the District of Columbia⁹⁵ as a valid exercise of Congress's plenary sovereign power to legislate for that area. Responding to a claim that only a fully tenured article III judge could constitutionally try a criminal case arising under a District of Columbia law enacted by Congress, the Court emphasized that not all cases arising under federal law must be heard by article III judges.⁹⁶ Comparing the local District of

88. 26 U.S. (1 Pet.) 511 (1828).

89. The losing party before the territorial court argued that because article III grants admiralty jurisdiction to federal courts, it was unconstitutional for a non-article-III court to resolve admiralty disputes. *Id.*

90. *Id.* at 546. Chief Justice Marshall said that legislative courts were "incapable of receiving" article III judicial power. *Id.* In *Williams v. United States*, 289 U.S. 553, 578 (1933), the Court interpreted this statement to forbid article I tribunals from hearing any cases within the jurisdictional scope of article III. This interpretation is plainly erroneous, because it overlooks the territorial underpinnings of Marshall's formulation of legislative courts. Justice Marshall was discussing the source of the power that authorizes a court, not the nature of the cases adjudicated by that court. See note 84 *supra*. State courts, for example, derive their power from state constitutions, and thus even when they are deciding federal question cases they are not exercising and are incapable of receiving the judicial power of the United States. Similarly, territorial courts receive their power from the plenary authority of Congress to function as a state government in that territory. They do not derive their power from the Congress acting in its national, federal capacity. They too, therefore, are incapable of receiving article III judicial power, and are not exercising this power when they adjudicate federal question cases. See Note, *Masters and Magistrates in the Federal Courts*, 88 Harv. L. Rev. 779, 782 (1975) [hereinafter cited as *Masters and Magistrates*].

91. 26 U.S. at 546. U.S. Const. art. IV, § 3, cl. 2, provides: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . ."

92. 26 U.S. at 546.

93. Congress's power over the District derives from art. I, § 8, cl. 17, of the Constitution.

For cases upholding other "territorial" courts, see *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (courts in unincorporated territories outside the mainland United States); *Stephens v. Cherokee Nation*, 174 U.S. 445 (1899) (United States court in Indian territory); *United States v. Coe*, 155 U.S. 76 (1894) (court of private land claims in the western territories); *In re Ross*, 140 U.S. 453 (1891) (consular courts).

94. 411 U.S. 389 (1973).

95. In 1970 Congress passed the District of Columbia Court Reform and Criminal Procedure Act, Pub. L. No. 91-358, 84 Stat. 473, which established separate local and federal courts in the District. The local court judges are appointed for 15-year terms, and their jurisdiction is similar to that of state judges. The federal courts in the District remain article III courts. See 411 U.S. at 392-93 & n.2.

96. 411 U.S. at 401.

Columbia courts to state courts, it held that the defendant, who had violated a law of only local applicability, was no more entitled to an article III judge than any other criminal defendant in a state court.

The reasoning of *Canter* and *Palmore* suggests that the territorial rationale for article I courts is extremely limited⁹⁷ and cannot sustain non-article-III courts established in areas that are not subject to the plenary authority of Congress. Other Supreme Court decisions suggest that any article I court established within the United States to hear a broad range of article III cases of national applicability would be unconstitutional.⁹⁸ Under these precedents, the nationwide magistrate system is unconstitutional, because it vests a full range of civil article III subject matter jurisdiction in article I officers. The only possibilities for saving the system's constitutionality are the features of litigant consent and internal delegation.⁹⁹ Similarly, since the jurisdiction of the bankruptcy courts may encompass a great variety of article III cases, they too appear to be unconstitutional under these precedents.

B. *Subject Matter Article I Courts—the Limits of the Doctrine*

Because its jurisdiction is tied to a specific subject of congressional power under article I, section 8,¹⁰⁰ the bankruptcy court may be justified under a branch of the legislative court doctrine that permits the creation of non-article-III tribunals when "necessary and proper" to resolve cases arising under the substantive powers conferred by article I.¹⁰¹ Thus, proponents

97. Although the law violated in *Palmore* was passed by Congress, the case does not stand for the broad proposition that any case arising under federal law may be adjudicated by non-article-III officers. Cf. *Campbell v. United States Dist. Ct.*, 501 F.2d 196, 201 (9th Cir.), cert. denied, 419 U.S. 879 (1974) (apparently interpreting *Palmore* this broadly). This interpretation ignores the underlying territorial rationale for the decision in *Palmore*. See text accompanying notes 120-23 *infra*. Indeed, the Court stressed that the requirements of article III must apply "where laws of national applicability and affairs of national concern are at stake," 411 U.S. at 408.

98. 411 U.S. at 408. For example, in *O'Donoghue v. United States*, 289 U.S. 516, 539-45 (1933), the Court indicated that when Congress establishes a permanent court exercising jurisdiction coextensive with that of other article III courts, Congress must adhere to the requirements of article III.

99. For an analysis of the constitutional effect of these provisions, see notes 187-223 and accompanying text *infra*.

100. U.S. Const. art. I, § 8, cl. 4, empowers Congress "[t]o establish . . . uniform laws on the subject of Bankruptcies throughout the United States."

101. The source of congressional power to establish this type of legislative court is the "necessary and proper" clause, U.S. Const. art. I, § 8, cl. 18, in conjunction with specific article I, § 8, subject matter powers. See *Masters and Magistrates*, *supra* note 90, at 786, persuasively reasoning that since the jurisdiction of subject matter article I courts "necessarily encroaches upon that of article III tribunals which offer greater constitutional safeguards to litigants, the traditionally broad conception of 'necessary and proper' associated with *McCulloch v. Maryland* should be supplanted in this context by a much narrower view." Thus, Congress should be limited to "the least possible power adequate to the end proposed." *Id.* at 786-87 ((citing *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 23 (1955)).

When the functional needs supporting existing subject matter article I courts are examined, it is apparent that the conception of "necessary and proper" is indeed extremely narrow in this context. The "necessary and proper" rationale has been confined to subjects under exclusive executive or legislative control. See notes 118-26 and accompanying text *infra*.

of the bankruptcy court have likened it to the article I Tax Court¹⁰² and Court of Military Appeals,¹⁰³ both of which have been held to be constitutional. When the jurisdiction exercised by the bankruptcy court is examined, however, it is apparent that it does not satisfy the limiting principles of the major theoretical justifications for these subject matter article I courts.

1. *The "Inherently Judicial" Test.* Throughout the development of the doctrine of subject matter legislative courts, the Supreme Court's analysis has concentrated on the nature of the claims adjudicated by such tribunals. Thus, in *Murray's Lessee v. Hoboken Land & Improvement Co.*,¹⁰⁴ the Court held that disputes between citizens and the federal government, as opposed to suits involving only private parties, could be assigned to legislative courts. Similarly, in *Ex Parte Bakelite Corp.*,¹⁰⁵ it held that legislative courts may "examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it."¹⁰⁶ Although the "public rights" rationale of *Murray's Lessee* and *Bakelite* may have been undermined by subsequent decisions,¹⁰⁷ the concept set forth in *Bakelite* that Congress cannot relegate "inherently judicial" matters to a legislative court¹⁰⁸ remains

102. I.R.C. § 7441 (Tax Court an article I court). Although the Tax Court has upheld its own status, see *Burns, Stix Friedman & Co. v. Commissioner*, 57 T.C. 392 (1971), the Supreme Court has never ruled on its constitutionality. It has denied certiorari from circuit court decisions sustaining the constitutionality of the Board of Tax Appeals, the administrative predecessor of the United States Tax Court. See *Nash Miami Motors, Inc. v. Commissioner*, 358 F.2d 636 (5th Cir.), cert. denied, 385 U.S. 918 (1966); *Martin v. Commissioner*, 358 F.2d 63 (7th Cir.), cert. denied, 385 U.S. 920 (1966). However, an administrative tribunal within the Treasury Department, even one that performs a largely judicial function, does not present the same constitutional concerns as a full-fledged court, because "[t]he right of the United States to collect its internal revenue by summary administrative proceedings has long been settled." *Phillips v. Commissioner*, 283 U.S. 589, 595 (1931). See note 182 and accompanying text *infra*.

103. See, e.g., *Gosa v. Mayden*, 413 U.S. 665, 686 (1973) (Court of Military Appeals an article I court); *O'Callahan v. Parker*, 395 U.S. 258, 261 (1969); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14 (1955); *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 79 (1857).

104. 59 U.S. (18 How.) 272 (1856). The issue in *Murray's Lessee* was whether Treasury officials could audit accounts of customs officials. The auditing was judicial in nature, and thus, it was argued, could only be performed by article III officers. The Court held that article III presented no bar to this "necessary and proper" exercise of Congress's tax collection power because it was a matter that, although capable of presentation in a judicially cognizable form, did not require resolution in a court. Congress was authorized to choose the manner of resolution for these controversies, which were not "from [their] nature, . . . the subject of a suit at the common law, or in equity, or admiralty." *Id.* at 284.

105. 279 U.S. 438 (1929). *Bakelite* held that the Court of Customs Appeals was an article I court. The case arose on a petition for a writ of prohibition to bar this court from hearing an appeal from findings of the Tariff Commission. These findings were ultimately subject to presidential review, which meant that the court's decision would only be advisory, and thus beyond the jurisdiction of an article III court. Article I courts, however, may render advisory opinions, because they are not subject to the jurisdictional "case or controversy" requirement of article III.

106. *Id.* at 451.

107. See *Crowell v. Benson*, 285 U.S. 22, 51 (1932) (rejecting the *Bakelite* test and upholding the authority of an administrative tribunal to make factual determinations to resolve a dispute of private rights). See also *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977); *Masters and Magistrates*, *supra* note 90, at 788; *Magistrates' Criminal Jurisdiction*, *supra* note 44, at 713. The plurality opinion in *Glidden*, however, appears to reaffirm the *Bakelite* standard. See note 109 and accompanying text *infra*.

108. 279 U.S. at 458.

valid today.¹⁰⁹ This "inherently judicial" test apparently marks the limit of Congress's power to establish subject matter article I courts.

As elaborated by the Supreme Court, the "inherently judicial" test is primarily historical. If a particular type of controversy has traditionally been resolved by courts at common law or equity, rather than by the legislative or executive departments, then it is "inherently judicial" and must be heard in an article III court if heard in a federal court at all.¹¹⁰ Thus, for example, *Ex Parte Bakelite Corp.* held that suits concerning customs collections could be assigned to an article I court because such matters had previously been determined by Congress or by executive agencies,¹¹¹ and therefore were not inherently judicial. As a further example, under this historical rationale, criminal cases and any suit involving a right to a jury trial would be inherently judicial.¹¹²

Implicit in the "inherently judicial" test as applied by the Supreme Court is the notion that the subject matter jurisdiction of these article I courts will be precisely delineated.¹¹³ When the range of matters that a court may hear is unlimited, rather than confined to a narrow class of cases on a particular subject matter, it would be virtually impossible to conclude that all such matters had been or could be relegated to executive or legislative decisionmakers. Thus, it is apparent that neither the magistrate system nor the bankruptcy court can be sustained under the "inherently judicial" test.

The 1979 Magistrate Act contemplates no subject matter limits, other than article III's jurisdictional constraints, on the range of civil cases, including those requiring jury trial, that magistrates may resolve. Although magistrate trials have largely been confined in the past to particular types of habeas corpus and social security review cases,¹¹⁴ the Act's unlimited

109. In *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), the Court, although overruling the result in *Bakelite*, indicated its approval of the "inherently judicial" test. *Id.* at 549. The constitutional status of the Court of Claims and the Court of Customs and Patent Appeals was called into question in *Glidden* by the losing parties in federal district court proceedings over which judges of these courts had presided by designation. In holding these courts to be full-fledged article III courts, the Supreme Court concluded that the analytical error in *Bakelite* was the assumption that because Congress *could* have committed the matter to an article I court it *must* have created an article I court. *Id.* at 549-50.

110. In *Murray's Lessee* the Court indicated that only those controversies that had required judicial determination in England at the time the Constitution was adopted had to be adjudicated by an article III court. 59 U.S. at 284. See *Masters and Magistrates*, *supra* note 90, at 784.

111. 279 U.S. at 457-58. Justice Harlan echoed this conclusion in *Glidden*, 370 U.S. at 549.

112. See, e.g., Comment, *The Distinction Between Legislative and Constitutional Courts and Its Effect on Judicial Assignment*, 62 *Colum. L. Rev.* 133, 159 n.172 (1962).

113. The opinion in *Bakelite* stressed the limited subject matter jurisdiction of article I courts. See 279 U.S. at 452-59. Moreover, the Court justified the creation of the article I Court of Customs Appeals and Court of Claims as a legitimate exercise of the specific congressional powers to lay and collect import duties and to pay the debts of the United States. *Id.* at 452, 458. See *Glidden Co. v. Zdanok*, 370 U.S. at 548.

114. See, e.g., *Mathews v. Weber*, 423 U.S. 261 (1976) (review of administrative determination in Social Security benefit disputes). Discrimination cases are also frequently referred to magistrates. See, e.g., *Muhich v. Allen*, 603 F.2d 1247 (7th Cir. 1979) (sex-based employment discrimination challenged under 42 U.S.C. § 1983 and 14th amendment); *Horton v. State St. Bank & Trust Co.*, 590 F.2d 403 (1st Cir. 1979) (title VII sex dis-

delegation scheme creates a basis for significant expansion of the practice. Indeed, as district court caseloads continue to rise, systemic pressures are likely to lead to an increasing number and wider range of cases referred to magistrates,¹¹⁵ who will thus be hearing many "inherently judicial" matters heretofore decided only by judges.

Bankruptcy matters have historically been resolved by courts rather than administrative agencies, because both summary and related plenary suits involve contract, debt, and property claims rooted in common law. Consequently, there will be a right to a jury trial in many cases heard by the new bankruptcy court.¹¹⁶ Thus, the jurisdiction of the bankruptcy court will comprise "inherently judicial" matters.¹¹⁷ Moreover, both bankruptcy judges and magistrates will hear many disputes between private citizens, so these court systems do not satisfy the "public rights" aspect of the *Bakelite* "inherently judicial" standard.

2. *The "Functional Need" Test.* A second rationale for subject matter article I courts would permit Congress to create a legislative court whenever necessary to satisfy a special functional governmental need.¹¹⁸ According to this rationale, if it is "necessary" for the "proper" execution of a power committed to the legislative or executive branches that a matter be resolved outside the channels of the article III judiciary, Congress may constitutionally delegate the matter to an article I tribunal.¹¹⁹ Some commentators suggest that this test is derived from *Palmore v. United States*,¹²⁰ where the Court said that the tenure and salary provisions may be disregarded only in order to "accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment."¹²¹ When analyzed in its proper "territorial court" context, however, it seems clear that *Palmore* did not adopt or approve this test. The case upheld a legislative court system established by Congress in the District of Columbia pursuant to its article I, section 8, power to govern the Dis-

crimination case); *Sick v. City of Buffalo*, 574 F.2d 689 (2d Cir. 1978) (discriminatory educational practices).

These referral patterns indicate that magistrates are too often employed to judge the claims of the poor and other traditionally under-represented, politically impotent societal groups.

115. Institutional pressures for increased reliance on magistrates to alleviate overloaded dockets poses a risk of denial of article III judges to many federal litigants. See Article III and Magistrates, *supra* note 5, at 1049-50. This is a real risk, as evidenced by projections by the Administrative Office of the United States Courts. See 1977 Hearings, *supra* note 47, at 499.

116. The new bankruptcy court is empowered to conduct jury trials. 28 U.S.C.A. § 1480 (1979 Supp.).

117. Bankruptcy matters are therefore "inherently judicial" under the *Bakelite* standard, because they have never been deemed susceptible of executive determination. See Bondurant, *supra* note 27, at 236; Katz, *Federal Legislative Courts*, 43 *Harv. L. Rev.* 894, 916 (1930).

118. See Masters and Magistrates, *supra* note 90, at 786.

119. *Id.*

120. 411 U.S. 389 (1973). See, e.g., Comm. Print No. 3, *supra* note 5, at 66 (letter from Prof. T. Sandalow to Rep. Peter Rodino).

121. 411 U.S. at 408-09.

trict.¹²² The Court's remark about "specialized areas" seems directed solely at geographic areas, rather than particular subject matter areas.¹²³

A more appropriate precedential basis for this rationale are those Supreme Court decisions analyzing the military court system.¹²⁴ For example, the military courts have been justified on the basis of executive and congressional supremacy in military affairs and the special need for swift and flexible military discipline.¹²⁵ The Court decisions examining the permissible scope of the military courts' authority indicate, however, that the "specialized need" justification for article I courts must be construed narrowly to avoid circumventing article III.¹²⁶ The only "needs" justifying the bankruptcy and magistrate systems appear to be the imperatives to relieve district courts and resolve disputes more expeditiously.¹²⁷ Although valid, these concerns hardly rise to the level of functional needs approved in prior Court decisions.¹²⁸

3. *The "Necessary and Proper" Test and Administrative Agencies.*

Some commentators have advanced a third rationale for subject matter legislative courts, which suggests that Congress can create legislative courts whenever such tribunals are "necessary and proper" instruments for exercising any of the powers enumerated in article I, section 8.¹²⁹ In essence, the argument holds that Congress can create a legislative court whenever it can create an administrative agency.¹³⁰ The conceptual basis for this view is Congress's extensive power to select and limit remedies, which includes the power to select and shape the forum in which remedies may be ob-

122. U.S. Const. art. 1, § 8, cl. 17.

123. See Comm. Print No. 3, supra note 5, at 21.

124. See, e.g., *O'Callahan v. Parker*, 395 U.S. 258 (1969); *Reid v. Covert*, 354 U.S. 1 (1957); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).

125. *Masters and Magistrates*, supra note 90, at 786 & n.48.

126. The Court has held that civilians may not be court-martialed for crimes committed while soldiers, *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955); civilian dependents of soldiers must be tried in article III courts, *Reid v. Covert*, 354 U.S. 1 (1957); and that even soldiers are entitled to an article III court when charged with offenses that are not "service-connected." *O'Callahan v. Parker*, 395 U.S. 258 (1969).

In limiting court-martial jurisdiction to situations clearly implicating special concerns of military discipline, the Court was motivated by the need to protect the jurisdiction of article III courts from encroachment. Justice Black warned of this possibility in *United States ex rel. Toth v. Quarles*, 350 U.S. at 15.

127. See notes 15-22 & 35 and accompanying text supra.

128. *Palmore* provides scant support for an "efficiency rationale" for article I courts, despite arguments to the contrary, see Comm. Print No. 3, supra note 5, at 66. In *Palmore* the Court emphasized that Congress considered the creation of the local court system necessary to ensure efficiency and speed and to relieve the caseload burden on courts hearing national matters. Congress was responding to similar problems of inefficiency, delay, and overwhelmed district courts when it proposed the new bankruptcy court system and the extension of magistrate's authority. The efficiency rationale, however, does not rise to the level of constitutional principle. *Palmore* did not offer the efficiency rationale as a justification for depriving federal judges of article III tenure and salary protection. The efficiency arguments were advanced in *Palmore* to explain why the local courts had been separated from the national tribunals, rather than to justify nontenured local judges. Comm. Print No. 3, supra note 5, at 23. The local article I courts upheld in *Palmore* were constitutional not because they were more efficient, but because Congress possessed general sovereign authority over the District of Columbia.

129. See *Masters and Magistrates*, supra note 90, at 786.

130. See, e.g., *Katz*, supra note 117, at 916-17.

tained.¹³¹ Its precedential basis is *Crowell v. Benson*,¹³² which upheld the power of an administrative board of untenured federal commissioners to determine private rights arising under federal law, subject to appellate review on points of law in an article III court.¹³³ *Crowell* has been read to permit creation of legislative courts to hear any federal question case, provided appellate review is available in an article III court.¹³⁴

This argument is suspect on several grounds. First, Congress's power to select remedies does not automatically confer power to establish article I courts.¹³⁵ The language and purposes of article III require stringent limitations upon the latter power despite the general validity of the remedial power. Second, it mistakes the import of *Crowell*. The decision held that administrative agencies can constitutionally render binding determinations of fact.¹³⁶ Thus, the case stands only for the proposition that Congress can delegate factfinding to non-article-III officers under the necessary and proper clause, not that the clause permits broad delegation of article III decisionmaking power to non-article-III tribunals. In addition, the opinion emphasizes that factfinding is not an essential attribute of judicial power.¹³⁷ Thus, *Crowell* provides virtually no support for the view that Congress can freely delegate federal question cases to legislative courts.¹³⁸

Moreover, in relying on administrative agencies as precedents for article I courts, this argument gives inadequate weight to the functional differences between agencies and courts. In establishing administrative agencies pursuant to its power over remedies, Congress has not endowed them with judicial power, which may be defined as the ultimate decisionmaking core of the adjudicative function.¹³⁹ The exercise of judicial power encom-

131. Congressional authority to select and limit remedies has been sustained under Congress's general power to limit the jurisdiction of federal courts. See Hart & Wechsler, *supra* note 27, at 316-22, 332-34.

Professor Hart argues in his famous dialogue, however, that congressional power to regulate jurisdiction by defining remedies is necessarily limited by greater constitutional principles, such as due process. *Id.* at 332-35.

132. 285 U.S. 22 (1932).

133. *Crowell* arose under the Longshoreman and Harborworkers' Compensation Act. Prior to the Act the compensation claim adjudicated by the agency would have been brought as a common law tort action, in which liability would turn on legal determinations, such as whether a duty of care had been violated. Under the Act, liability turned solely on factual determinations, such as whether the seaman was in the employ of the shipowner and whether he was performing duties on navigable waters. *Crowell* therefore does not imply that common law legal disputes may be resolved by administrative agencies.

134. See, e.g., Silberman, *supra* note 5, at 1316-17.

135. See note 131 and accompanying text *supra*.

136. The Court emphasized that *de novo* review of all legal determinations would be available in an article III court. 285 U.S. at 56-57.

137. *Id.* at 51. In support of this conclusion the Court cited the use of juries and special masters to assist judges with factfinding. See *Reconstruction Fin. Corp. v. Bankers Trust Co.*, 318 U.S. 163 (1943).

138. Indeed, the Court itself later limited *Crowell* as merely "accept[ing] factfinding by an administrative agency . . . only as an adjunct to an Art. III court" similar to a jury or special master. *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 450 n.7 (1977).

139. Cases discussing the permissible scope of magistrates' authority have developed several formulations of the term "judicial power." See, e.g., *Mathews v. Weber*, 423 U.S. 261, 270 (1976) (magistrate's role not inconsistent with article III because authority for

passes far more than making factual determinations.¹⁴⁰ At its minimum it involves rendering binding decisions on points of law that affect or alter the rights and obligations of parties and establish precedents for future litigants. It also encompasses certain coercive powers, such as the power to render self-executing judgments or to cite for contempt. Administrative agencies possess neither of these attributes. Although they can adjudicate questions of law,¹⁴¹ their decisions are not final, but subject to review in article III courts.¹⁴² Similarly, although agencies can issue coercive orders, they can

making final decisions remains with district judge); *Wingo v. Wedding*, 418 U.S. 461, 485-86 (1974) (Burger, C.J., dissenting) (ultimate decisionmaking power is judicial function that cannot be delegated to magistrate); *Horton v. State St. Bank & Trust Co.*, 590 F.2d 403, 404 (1st Cir. 1979) (discretionary authority to enter final judgment is fundamentally an exclusive power of article III courts); *Sick v. City of Buffalo*, 574 F.2d 689, 692-93 (2d Cir. 1978) (retention of ultimate decisionmaking function in article III judges avoids constitutional infirmities with magistrates' role); *Reciprocal Exch. v. Noland*, 542 F.2d 462, 463 (8th Cir. 1976) (article III forbids judges from delegating final decisionmaking authority). See Article III and Magistrates, *supra* note 5, at 1032 n.50.

It has traditionally been asserted that administrative agencies may not pass on the constitutionality of statutes. See, e.g., *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975). One commentator, however, has suggested that agencies should be permitted to make constitutional determinations when several factors, such as a normal agency policymaking role and adequate record-developing procedures, are present. Note, *The Authority of Administrative Agencies to Consider the Constitutionality of Statutes*, 90 Harv. L. Rev. 1682 (1977). The author of the Note dismisses article III objections by arguing that judicial review is always available, permitting "the independent judiciary adequately to fill its assigned role." *Id.* at 1686. This argument shares the flaw of the broad reading of *Crowell v. Benson* discussed earlier, in that it wrongly construes article III's requirements as applicable only to appellate tribunals. More generally, it does not give sufficient consideration to the important policy reasons for the tenure and salary guarantees in article III. See notes 153-69 and accompanying text *infra*.

140. As the Court emphasized in *Crowell v. Benson*, 285 U.S. 22, 51 (1932), factfinding is not an essential attribute of the judicial power. Thus, juries, special masters, and administrative tribunals are constitutionally valid.

141. See, e.g., *O'Leary v. Brown-Pacific-Maxon, Inc.* 340 U.S. 504 (1951); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944); *Gray v. Powell*, 314 U.S. 402 (1941), in which administrative tribunals interpreted the meaning of statutory terms to determine whether they covered a particular situation.

142. See 1 K. Davis, *Administrative Law Treatise* § 3:10 (2d ed. 1978). Although in his 1978 *Treatise* Professor Davis writes that agencies exercise "judicial power," *id.*, he uses the term to mean the ability to find facts from evidence and apply the law to these facts. He does not use "judicial power" in the sense in which this Note uses the term—the ultimate coercive authority to render a binding legal judgment.

Some statutes preclude judicial review of certain agency actions completely or condition its availability on the exhaustion of administrative remedies. See, e.g., 4 K. Davis, *Administrative Law Treatise* §§ 28.01-.21 1958 ed. & 1980 Supp. The Supreme Court has sustained such provisions even in the selective service context, where lack of judicial review may result in unjust deprivation of liberty. See, e.g., *Estep v. United States*, 327 U.S. 114 (1946); *Falbo v. United States*, 320 U.S. 549 (1944) (draft registrants prosecuted for failure to report for induction may not challenge validity of their draft classification as defense unless administrative remedies exhausted). The courts were not totally deprived of their constitutional role by the selective service schemes in these cases, however. Habeas corpus was still available as a means for reviewing the agency action. See *Hart & Wechsler*, *supra* note 27, at 342-44.

When judicial review is precluded by a statute, it is usually in the area of discretionary agency actions. See 4 K. Davis, *supra*, at 104. Even if a statute purports to deny judicial review, however, there may still be recourse to the courts. The individual affected by the agency action may refuse to obey it, and may then assert his defenses in a subsequent judicial enforcement proceeding. See note 143 *infra*; *Hart & Wechsler*, *supra* note 27, at 320-21, 342-44. The courts thus exercise their essential role in assuring that the law remains supreme over agency discretion.

enforce them only with the aid of an article III court.¹⁴³ Administrative agencies do not, therefore, provide a precedent for broad-scale creation of legislative courts.

A final difficulty with the "necessary and proper" argument as a standard for the limit on congressional power to establish subject matter article I courts is that it is not actually a test, but merely an explanation of why the legislative court doctrine came into existence.¹⁴⁴ Indeed, a "limit" that would allow Congress to create a legislative court pursuant to any article I, section 8, power is no limit at all.¹⁴⁵ If all that was needed to justify an article I court was a congressional power to legislate for the subject matter area, Congress would be able to make a wholesale delegation of federal question jurisdiction to article I courts. Legislative authority over a subject matter should not render article III inoperative for cases involving that area. Otherwise, the principle of separation of powers embodied in the constitutional framework could be circumvented at the will of Congress.

C. *The Need for a New Approach to Article I Courts*

Although the magistrate system and the bankruptcy court exceed the limits on article I tribunals that can be gleaned from precedent, this does not necessarily resolve the issue of their constitutionality. The Supreme Court has never indicated the full scope of congressional authority in this area, and its pronouncements thus far offer unsatisfactory guidance.

For example, the "inherently judicial" test is largely unresponsive to the question of Congress's ultimate authority to establish legislative courts within the states. The test is primarily historical—it assumes that if a matter was once resolved by executive or legislative officers rather than the courts, Congress may disregard the apparently mandatory tenure and salary provisions once it delegates the matter to the federal courts. The inapplicability of the article III provisions in the absence of federal court jurisdiction, however, does not necessarily render them inapplicable once jurisdiction is conferred. Article III was not implicated when the matter was resolved within the executive branch, but it is implicated once the matter comes within the province of the federal judiciary. For example, the "public

143. The authority of administrative agencies to impose civil penalties was established in *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977). The Court held that when Congress created new "public rights" under regulatory statutes, the seventh amendment did not bar Congress from committing factfinding and enforcement of these rights to administrative agencies.

See also *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), in which the Court held that the seventh amendment did not prevent the NLRB from deciding whether unfair labor practices, as defined by statute, had occurred. Under the administrative adjudication schemes upheld in both *Atlas Roofing* and *Jones & Laughlin*, however, judicial review was available and the agencies had to institute collection or enforcement proceedings in court if the violator did not voluntarily comply with the administrative order.

144. See notes 79-86 and accompanying text *supra*.

145. See, e.g., *Comm. Print No. 3*, *supra* note 5, at 23-24. The jurisdiction of the new bankruptcy court is a pertinent example of the expansiveness of this "limit." See notes 27 & 28 and accompanying text *supra*.

rights” cases in which the test was first presented were traditionally resolved by the political branches because the doctrine of sovereign immunity prevented article III courts from hearing them.¹⁴⁶ But once sovereign immunity is lifted such cases fall within the article III subject matter jurisdiction. Accordingly, allocation of such cases to a legislative court raises the same constitutional questions as would any allocation of article III cases to a non-article-III federal tribunal. Thus, the “inherently judicial” test, which looks to past practice, offers little guidance concerning the future scope of congressional power to circumvent article III’s tenure and salary provisions.

The argument relying on administrative agencies as precedents similarly begs the question, because agencies do not implicate the policies of article III to the same extent as legislative courts. Administrative adjudication is essentially an extension of the legislative or executive function—the judicial branch has not yet been brought into play. The provisions and policies of article III are not invoked until a tribunal is actually endowed with “judicial power.”

Finally, although the “functional need” test properly recognizes the governmental interests underlying the doctrine of article I courts,¹⁴⁷ it provides no satisfactory criteria for determining when the needs of a particular subject area are sufficiently “special” to warrant overriding the requirements of article III. Presumably, a legislative finding of necessity would effectively bind the courts; yet if the legislature can define necessity in this sense, then very likely it could extend the “functional need” formulation almost as broadly as it could the “necessary and proper” argument, with a similar weakening of article III policies. Thus the test does not provide a satisfactory principle for limiting the doctrine of legislative courts.

These suggested limits are ultimately unsatisfactory for answering the question of how far Congress may go in ignoring article III’s requirements because they fail to consider the constitutional policies embodied in that article. Resolving a question of conflict with a constitutional provision, however, should properly begin with an analysis of the purposes of the provision involved. The next section examines the policies of article III in order to formulate a more satisfactory limit on congressional power to establish article I courts.

III. ARTICLE III LIMITS ON THE CREATION OF ARTICLE I COURTS

Congress has broad power to control federal court jurisdiction.¹⁴⁸ Indeed, it is not obliged to create any inferior federal courts,¹⁴⁹ and may

146. See *Williams v. United States*, 289 U.S. 553 (1933); *Masters and Magistrates*, *supra* note 90, at 785.

147. See notes 79-86 and accompanying text *supra*.

148. See, e.g., *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850); Hart & Wechsler, *supra* note 27, at 309-24.

149. See, e.g., *The Federalist* No. 81 (A. Hamilton); *Glidden Co. v. Zdanok*, 370 U.S. 530, 551 (1962).

abolish federal question jurisdiction altogether.¹⁵⁰ When it does establish a federal court, however, the terms of article III appear to be mandatory.¹⁵¹ At the very least, article III should be the norm for federal courts,¹⁵² and the scope of congressional power to delegate jurisdiction to non-article-III tribunals should be carefully limited to preserve the constitutional policies embodied in the norm.

A. *The Policies Underlying the Tenure and Salary Provisions in Article III*

Like most of the compromises that emerged from the Constitutional Convention, the tenure and salary provisions of article III serve a number of purposes in the constitutional scheme of government. Well aware of the evils that flow from excessive concentrations of power, the Framers sought to limit the total power of the national government by allocating distinct portions of the national power to separate governmental branches and by structuring relations among the branches so that the operations of each would confine the others to their proper spheres.¹⁵³ The tenure and salary provisions in article III are among the checks and balances that preserve this separation of powers. The provisions ensure that the legislative and executive branches will not be able to dominate the judiciary through coercive manipulation of judges' livelihood and continuance in office.¹⁵⁴ Moreover, by freeing judges from political influence, article III enables the judiciary to prevent the political branches from infringing individual rights or otherwise exceeding their powers.¹⁵⁵ Thus, by securing the independence of the judiciary the tenure and salary requirements help maintain the proper allocation of power among the branches of the national government.

Perhaps less obvious, but no less important, is the role of the tenure and salary provisions in preserving the balance of power between the national

150. See, e.g., *Palmore v. United States*, 411 U.S. 389, 401-02 (1973); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850).

151. See note 1 and accompanying text *supra*; *Magistrates' Criminal Jurisdiction*, *supra* note 44, at 711-12.

152. See Comm. Print No. 3, *supra* note 5, at 33, 49 (letter from Prof. Herbert Wechsler to Rep. Peter Rodino).

153. See, e.g., Hart & Wechsler, *supra* note 27, at 2-13 (summarizing the proceedings at the Constitutional Convention regarding the role of the judiciary).

154. See *The Federalist* No. 78 (A. Hamilton) (judicial function of checking other branches requires tenure and salary guarantees in article III); Hart & Wechsler, *supra* note 27, at 9-11.

The Framers' abhorrence of a servile judiciary was attested to in the Declaration of Independence, where one of the listed usurpations of the king was that he had "made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries."

155. See *The Federalist* No. 78 (A. Hamilton) ("The independence of judges is equally requisite to guard the Constitution and the rights of individuals . . .").

Judicial independence is all the more vital today, because the federal courts are increasingly called upon to resolve disputes over the basic structures of our society's institutions and its allocations of wealth and power. Kaufman, *supra* note 59, at 681-90. For example, judges have been asked to make decisions in the politically sensitive areas of abortion, affirmative action, school desegregation, prison reform, and public welfare. See, e.g., Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 *Colum. L. Rev.* 784, 788-89 (1978).

government and the states. The Framers envisioned a limited national government that would operate upon objects of national concern, but would not displace the legitimate functions of state governments.¹⁵⁶ Thus, although the Framers charged the federal judiciary with safeguarding federal interests and maintaining the supremacy of federal law,¹⁵⁷ they also sought to ensure that federal courts would not interfere with the legitimate operations of state judicial systems.¹⁵⁸ Implicit in the limited grant of federal subject matter jurisdiction, this concern for the interests of federalism also underlies the tenure and salary provisions of article III. An independent judiciary not only can confine the political branches to their respective spheres, but also can check those branches should they encroach upon the states' domains.¹⁵⁹ By assuring an impartial and independent forum for suits concerning the states, the tenure and salary provisions ensure that any limitation of state prerogatives will occur by proper operation of law, rather than through legislative or executive coercion. Similarly, by securing an impartial federal forum insulated from influence by the states, the provisions help retain the supremacy of federal interests in the federal scheme.¹⁶⁰ The tenure and salary provisions of article III therefore help advance the vital constitutional principle of federalism.

Furthermore, the provisions protect and promote the integrity of the federal judiciary as an institution. By insulating the judiciary from influence by the political branches, the provisions safeguard judicial impartiality.¹⁶¹ Thus they facilitate accurate decisionmaking, assure proper protection for individual rights,¹⁶² attract the most highly qualified persons to the bench,¹⁶³ and enhance public confidence in the federal courts.¹⁶⁴

In addition, by incorporating the strict impeachment standard of article II, section 4,¹⁶⁵ the tenure guarantee protects individual judges from the

156. For a recent articulation of the principle of federalism, see *National League of Cities v. Usery*, 426 U.S. 833 (1976). See also Justice Frankfurter's discussion of federalism and its effect on the structuring of the federal judiciary in *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646-48 (1949) (Frankfurter, J., dissenting).

157. See *The Federalist* No. 22 (A. Hamilton) (judiciary's primary task of providing for the effective enforcement of federal laws includes protecting federal interests against competing state claims).

158. Fear that state courts might be displaced by the federal judiciary was expressed when the Constitutional Convention considered proposals for the establishment of inferior federal courts. See Hart & Wechsler, *supra* note 27, at 11-12, 21-23.

This fear also led to the provision in art. III, § 2, limiting the subject matter jurisdiction of federal courts. See *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646-48 (Frankfurter, J., dissenting).

159. Cf. *The Federalist* No. 78 (A. Hamilton) (federal courts are the "bulwarks of a limited Constitution against legislative encroachments" on both states' and individuals' rights).

160. See Article III and Magistrates, *supra* note 5, at 1032 n.55.

161. *The Federalist* No. 78 (A. Hamilton) (security of tenure designed "to secure a steady, upright, and impartial administration of the laws").

162. *Id.* (independent judges necessary "to guard the Constitution and the rights of individuals").

163. *Id.*; Magistrates' Criminal Jurisdiction, *supra* note 44, at 701.

164. *Id.*; Senate Hearings, *supra* note 30, at 129 (testimony of Ass't Att'y Gen. F.M. Vinson, Jr.).

165. U.S. Const. art. II, § 4, provides that judges may only be removed for "high crimes and misdemeanors." See note 2 *supra*.

exertion of improper influences, disguised as disciplinary measures, by their colleagues, and thus ensures judicial individualism.¹⁶⁶ This is an important value to preserve, because it enables federal judges to criticize old doctrines and explore new principles, thereby facilitating the law's ability to develop in response to changing conditions.¹⁶⁷ Orthodoxy and consistency in the law are properly maintained not through disciplinary measures, but through orderly processes of precedential reasoning and appellate review.¹⁶⁸ By securing an able, impartial, and diverse bench, the article III provisions ensure that the federal judiciary will effectively perform its role in the constitutional scheme of government.

The tenure and salary guarantees also serve values of due process, because by preserving judicial independence and impartiality they protect federal litigants. Indeed, some commentators have argued that article III's requirements are no more than a matter of due process.¹⁶⁹ They base their suggestion on Justice Brandeis's dissent in *Crowell v. Benson*, where he argued that cases could be delegated freely to legislative courts except when "the constitutional requirement of due process is a requirement of judicial process."¹⁷⁰

However, the decision in *Glidden Co. v. Zdanok*¹⁷¹ strongly suggests that article III involves more than due process. *Glidden* involved judges

166. Kaufman, *supra* note 59, at 711-14.

167. The Supreme Court attested to this principle in *Chandler v. Judicial Council*, 398 U.S. 74 (1970), which involved a district judge's challenge to the judicial council's authority to regulate judicial business in the district. Although it avoided defining the scope of the council's power over district judges, the Court said it was an established principle that independence is required "in any phase of the decisional function." *Id.* at 84. The Court was referring to independence from influence by other judges, rather than independence from the other branches. See *Magistrates' Criminal Jurisdiction*, *supra* note 44, at 703. Justice Douglas dissented in *Chandler* because he thought the Court should reach the merits, but he did clarify the Court's concern with independence from other judges. A federal judge, he wrote, must be "independent of every other judge . . . [N]either one alone nor any number banded together can act as censor and place sanctions on him." 398 U.S. at 136 (Douglas, J., dissenting). See also Kaufman, *supra* note 59, at 714.

168. Kaufman, *supra* note 59, at 707.

169. See, e.g., Silberman, *supra* note 5, at 1340-60, 1366. Cf. Tushnet, *Invitation to a Wedding: Some Thoughts on Article III and a Problem of Statutory Interpretation*, 60 *Iowa L. Rev.* 937, 943-44 (1975) (suggesting that *Palmore* implies article III is merely a due process requirement).

170. 285 U.S. at 87 (Brandeis, J., dissenting). See, e.g., *TPO, Inc. v. McMillen*, 460 F.2d 348, 353 (7th Cir. 1972) (due process of law encompasses right of litigants to have "cases" or "controversies" determined by article III judges). Chief Justice Burger has also intimated that there is a due process right to an article III judge, which is satisfied so long as a judge retains final decisionmaking authority in cases handled by magistrates, *Wingo v. Wedding*, 418 U.S. 461, 486 (1974) (Burger, C.J., dissenting).

Justice Brandeis's view was echoed in hearings on the 1968 *Magistrates Act*, where the bill's sponsor argued that consent of the parties would vitiate any constitutional problems with magistrate trial of minor criminal offenses, because "[i]f any 'right' to trial by [an article III] judge exists, it is a due process right, which is waivable like other due process rights." Hearings on S. 945 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. 256 (1967) (testimony of Sen. Tydings).

It has been suggested that the due process right to an article III judge is linked to the seventh amendment guarantee to a trial by jury. See *TPO, Inc. v. McMillen*, 460 F.2d 348, 354-55 n.37 (7th Cir. 1972). Under Justice Brandeis's formulation in *Crowell*, for example, where there is a right to trial by jury there is arguably a "requirement of judicial process."

171. 370 U.S. 530 (1962).

of the Court of Claims and the Court of Customs and Patent Appeals, which previously had been held to be article I courts,¹⁷² who had presided by designation over trials in article III courts. The Supreme Court allowed the results of these trials to stand only because it held that the judges were indeed article III judges. In reaching this holding the Court indicated that article I judges may not bind litigants in article III courts, no matter how impeccably they conduct the proceedings.¹⁷³ Indeed, Justice Harlan, writing for the plurality, took pains to praise the qualifications, fairness, and impartiality of the judges involved.¹⁷⁴ Due process was obviously satisfied by the proceedings below; thus, if article III were nothing more than a due process requirement, Justice Harlan could have dismissed the case after noting the fair proceedings provided by the article I judges.

Although the tenure and salary provisions parallel the due process guarantee of fundamental fairness to a certain extent, article III chiefly protects larger structural concerns that due process addresses only incidentally. For example, due process might readily be satisfied in trials before a legislative court even though the existence of the court itself greatly jeopardized constitutional policies concerning the distribution of governmental power. Thus, the fundamental error with the argument that the provisions of article III only create due process rights in litigants is that it ignores the larger institutional concerns underlying the protections of judicial independence.

These concerns are intimately related to the preservation of judicial independence and thus of the distribution of power under our constitutional system. They cannot be lightly disregarded.¹⁷⁵ Consequently, if establishment of a particular legislative court would jeopardize constitutional policies of separation of powers, federalism, and judicial integrity, then article III should apply to render the court unconstitutional. If, however, the existence of the court has no bearing on these constitutional policies, then article III is irrelevant and the court should be upheld as a valid exercise of Congress's power to establish article I courts.

172. *Williams v. United States*, 289 U.S. 553 (1933) (Court of Claims); *Ex Parte Bakelite Corp.*, 279 U.S. 438 (1929) (Court of Customs Appeals).

173. Justice Harlan noted that although there had been no denial of "independent judicial hearings," article III "is explicit and gives the petitioners a basis for complaint without requiring them to point to particular instances of mistreatment." 370 U.S. at 533.

Justice Douglas, dissenting, expressed concern over the qualification of non-article-III judges to exercise judicial power:

Judges who sit on Article I courts are chosen for administrative or allied skills, not for their qualifications to sit in cases involving the vast interests of life, liberty, or property for whose protection the Bill of Rights and the other guarantees in the main body of the Constitution, including the ban on bills of attainder and *ex post facto* laws, were designed. Judges who might be confirmed for an Article I court might never pass muster for the onerous and life-or-death duties of Article III judges.

Id. at 606 (Douglas, J., dissenting).

174. *Id.* at 533.

175. The importance of the requirements in article III has led one commentator to suggest that the entire doctrine of article I courts is constitutionally dubious. See Comment, *supra* note 112, at 148-50. Although the concept of article I courts is probably too well entrenched to be discarded, its shaky constitutional underpinnings do require strict construction of the limits on the doctrine's scope.

This article III policy analysis is both manageable by courts and properly sensitive to legislative prerogatives. Discovery and analysis of legal policies is peculiarly within the judicial province, and courts can easily identify the policies of article III and determine their relevance in a given case. Moreover, by requiring courts to consider constitutional policies, rather than the validity of the "special need" advanced by the legislature to justify a particular tribunal, this analysis maintains proper judicial deference to legislative judgments. When Congress establishes a tribunal endowed with the essential attributes of judicial power to adjudicate article III cases, the courts must determine whether article III policies are contravened; if they are not, or if the tribunal lacks the essential characteristics of a federal court, the judicial inquiry should end unless other constitutional principles are involved. Thus, the proposed analysis enables both the judiciary and the political branches to perform their proper tasks.

Application of the article III policy analysis to existing legislative courts demonstrates its utility for resolving the question of their constitutionality. Under this analysis, legislative courts established in United States territories and other federal enclaves such as the District of Columbia appear to be constitutional. In such regions, the federal government must perform not only its usual functions as a national government, but also the varied and specialized functions undertaken within the states by state and local governments.¹⁷⁶ Thus, Congress must establish a judicial system that can exercise not only the article III subject matter jurisdiction of the federal courts, but also the broad general jurisdiction, not limited to article III cases, exercised by the state courts. Only through the device of legislative courts can Congress establish territorial tribunals with the necessary breadth of jurisdiction.¹⁷⁷

Moreover, unlike legislative courts within the states, territorial courts do not implicate the policies of the article III tenure and salary provisions. First, territorial judicial systems are not charged with preserving the separation of powers, because the Constitution explicitly commits the governance of territories and federal enclaves to the sole discretion of Congress.¹⁷⁸ With the legislature thus supreme, an article III judiciary is unnecessary to preserve the role of the other branches, and could actually impede the legislature in discharging its own role. Second, considerations of federalism are irrelevant in the territories, because Congress does not act against a background of state law in legislating for these regions. An article III judiciary is therefore unnecessary to prevent federal displacement of state legal systems.¹⁷⁹ Finally, because territorial courts play no part in preserving the structure of our

176. See notes 79, 88-92 and accompanying text *supra*.

177. See Comment, *supra* note 112, at 150 (arguing that territorial courts are constitutional because article III is inapplicable in the territories).

178. U.S. Const. art. IV, § 3, cl. 2.

179. See, e.g., Comm. Print No. 3, *supra* note 5, at 21.

limited constitutional government, they need not enjoy the extraordinary safeguards provided by the tenure and salary requirements.¹⁸⁰

The military court system can also be constitutionally justified under an article III policy analysis. Military courts hear only prosecutions of servicemen for service-connected violations of the special code of military law. Because the jurisdiction of these courts is sharply restricted to service-connected matters over which the political branches have primary control,¹⁸¹ they do not threaten the separation of powers; indeed, extensive judicial intervention in military affairs might itself endanger the legitimate prerogatives of the other branches. Similarly, because the states play no role in military matters, military courts do not offend policies of federalism. In fact, given the restriction of military jurisdiction to service-connected matters, military courts closely resemble courts in federal enclaves and thus pose little more threat to article III policies than do territorial courts.¹⁸²

B. *Article III Limits Applied to the Bankruptcy and Magistrate Systems*

Because the jurisdiction of the bankruptcy court and magistrates will encompass a broad range of article III cases, these systems inevitably threaten the framework of federalism and separation of powers guarded by article III.

With respect to the bankruptcy system, although Congress has the legislative authority to promulgate uniform bankruptcy rules of national applicability,¹⁸³ it has always been the province of the article III judiciary to in-

180. Professor Wright argues, however, that judicial independence is as vital in the territories as in the states. He points out that because territorial judges try federal criminal cases and resolve matters involving the United States, it is undesirable that they are dependent on the Department of Justice for continued tenure. Instances of nonreappointment as a reprisal for unpopular decisions are not unknown in the territories. C. Wright, *supra* note 1, at 37.

181. The Supreme Court has limited court-martial jurisdiction to service-connected violations committed by noncivilians on military bases. See note 126 and accompanying text *supra*.

182. It is a somewhat closer question whether the Tax Court comports with article III policies. See Dubroff, *Federal Taxation, in 1973-1974 Ann. Survey Am. L.* 265, 272-85. Because the Tax Court adjudicates suits for refunds of federal taxes it poses concrete threats to the separation of powers. By dominating a tribunal that so directly affects the public fisc either of the political branches might invade the province of the other. Similarly, because federal taxation affects state tax revenues, domination of the Tax Court might jeopardize federalism concerns. Furthermore, the absence of article III guarantees of judicial integrity seems particularly incongruous in a tribunal that adjudicates claims between citizens and government. In light of the "checking and balancing" purpose of the tenure and salary provisions, adherence to them would seem more—not less—necessary in such a tribunal. *Masters and Magistrates, supra* note 90, at 785.

On the other hand, however, the Tax Court does not exercise the full range of judicial power. The court cannot enter binding judgments, but simply declares the amount a taxpayer owes. It lacks the coercive powers of article III courts. See *Burns, Stix Friedman & Co. v. Commissioner*, 57 T.C. 392, 396 (1971). Thus, in function if not in name, it is little more than an administrative agency and poses no greater threat to article III policies than do those nonjudicial tribunals.

183. U.S. Const. art. 1, § 8, cl. 4.

This subject matter authority alone does not authorize Congress to create a non-article-III court, however. See notes 144 & 145 and accompanying text *supra*. Nor does the determination that this congressional power can be implemented most effectively in a court

interpret and apply these rules to assure uniformity. The judicial role in bankruptcy cases involves balancing competing legal rights of private citizens and reconciling the often conflicting statutory policies of rehabilitating debtors and satisfying creditors. If Congress can constitutionally create a bankruptcy tribunal whose judges are beholden to it for their salary and continuance in office, it is likely that Congress will be able to exert virtually unchecked control over bankruptcy policy, at the expense of individual property rights. Such a result would upset the delicate separation of powers framework, which looks to the judiciary to protect individual rights from congressional encroachment.

The federalism concerns underlying article III's requirements are threatened by the bankruptcy court because its jurisdiction will encompass many claims grounded solely in state law.¹⁸⁴ In bankruptcy proceedings, the role of federal law is merely to appoint an administrator of private assets and to provide a federal forum for such actions. The private assets themselves, however, include state causes of action.¹⁸⁵ The tenure and salary protections in article III are therefore important in the bankruptcy context, because by ensuring judicial independence they limit the extent to which the political branches of the federal government can use the judiciary to encroach upon state-created rights.

The Magistrate Act undermines the separation of powers principle by vesting judicial power of a scope equal to that of district judges in decisionmakers whose term of office and level of compensation are controlled by Congress. It is also incompatible with principles of federalism to the extent that it empowers article I officers to overturn state court judgments on habeas corpus petitions and resolve competing claims of state-created rights in diversity cases. When the states grudgingly relinquished some of their judicial prerogatives to the federal system, far from sanctioning or even envisioning decisionmaking power exercised by "parajudges" subject to congressional control, they insisted on the requirements and limitations in article III.¹⁸⁶

staffed by specialists and separate from the overburdened district courts amount to a "specialized functional need" justifying article I status. As Professor Wechsler has pointed out, the "particularized need" test in *Palmore* does not authorize an article I bankruptcy court, because

the fact that Article I delegates authority to Congress to "establish . . . uniform laws on the subject of bankruptcies . . ." does not *without more* permit the administration of such laws by federal courts unprotected by the tenure provisions of Article III. The bankruptcy power is no different in this respect than the power to regulate commerce or any other source of national legislation.

Comm. Print No. 3, *supra* note 5, at 25.

184. See note 27 and accompanying text *supra*.

185. See Plumb, *The Tax Recommendations of the Commission on the Bankruptcy Laws—Tax Procedures*, 88 Harv. L. Rev. 1360, 1468 (1975).

186. One commentator has noted that magistrates are sensitive to possible resentment by state judges who are overturned by a mere magistrate, and thus may be more reluctant than federal judges to grant post-conviction relief to state prisoners. Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 Harv. L. Rev. 321, 366-67 (1973). In light of these subtle pressures, a further expansion of magistrates' civil adjudicatory authority, which will inevitably encompass even more state prisoner habeas petitions and civil rights actions against

The general federal jurisdiction of the article I bankruptcy court and the magistrate system cannot be reconciled with article III, because it conflicts with the all-important values of federalism and the separation of powers. Consequently, unless their provisions for internal delegation of jurisdiction, appellate review in article III courts, and litigant consent to an article I judge actually mitigate the conflicts with these constitutional policies, the new bankruptcy court and the expanded civil jurisdiction of magistrates must be deemed unconstitutional. The following section examines the effect of these so-called saving devices.

IV. INTERNAL DELEGATION, APPELLATE REVIEW, AND LITIGANT CONSENT: DO THEY MAKE THE BANKRUPTCY COURT AND MAGISTRATE ACT CONSTITUTIONAL?

A. *Internal Delegation*

Some proponents of the bankruptcy court and the expanded adjudicatory role of magistrates have argued that no separation of powers problems exist because jurisdiction is still vested in article III courts, with magistrates and bankruptcy judges directly controlled by judges, rather than Congress.¹⁸⁷ This rationale collapses when applied to the new magistrate system, since under that system district judges no longer conduct a *de novo* review of a magistrate's recommendation, and a magistrate can enter a final, binding judgment. Jurisdiction thus remains vested in the district court in name only.¹⁸⁸ This defect is even more apparent in the bankruptcy scheme, where district judges do not even have discretion to retain a bankruptcy case.¹⁸⁹ To argue that the device of internal delegation satisfies constitutional concerns is to exalt form over substance.

state officials under 42 U.S.C. § 1983, may result in a dilution of individual constitutional rights.

187. See, e.g., H.R. Rep. No. 1629, 90th Cong., 2d Sess. 10 (1968); Bankruptcy Court Hearings, *supra* note 13, at 89 (testimony of Hon. Shirley Hufstedler), 216-18 (statement of Att'y Gen. Griffin Bell); Silberman, *supra* note 5, at 1305.

The Seventh Circuit recently summarized this argument while sanctioning a magistrate-conducted jury trial:

Article III commands that the judicial power of the United States be vested in article III courts. The reference procedure employed in this case did not constitute a divestiture of this power. Magistrates . . . are subject at all times to the direction, supervision, and control of the district courts. Thus, when a civil case properly within the jurisdiction of an article III court is tried before a magistrate pursuant to an order of reference by the district court, jurisdiction remains vested in the district court and is merely exercised through the medium of the magistrate.

Muhich v. Allen, 603 F.2d 1247, 1251 (7th Cir. 1979).

188. Indeed, the Seventh Circuit qualified its broad language in *Muhich*, see note 187 *supra*, by noting that *de novo* review ensured actual participation by an article III trial judge: "In this case, the district court retained its jurisdiction over the litigation by exercising its supervisory power in the form of *de novo* review, and by invoking its exclusive authority to order the entry of final judgment. The strictures of article III were therefore satisfied." 603 F.2d at 1251.

189. See note 72 and accompanying text *supra*.

Moreover, the internal delegation argument ignores the plain import of article III's language, which authorizes article III judges, and not their delegates, to exercise judicial power.¹⁹⁰ If article III could be construed to mean that jurisdiction need only be vested in the first instance in an article III court but could then be exercised by any assistant or adjunct body, the tenure and salary requirements would be a nullity. In this respect, the Supreme Court's reasoning in *Glidden Co. v. Zdanok* that participation on an article III court and exercise of article III decisionmaking powers by untenured judges would nullify the judgments of the article III courts should erase any doubt that all cases in article III courts must be decided by article III judges rather than by assistants or article I judges.¹⁹¹

Thus, the internal delegation argument saves neither the bankruptcy court nor the magistrate system, because the range of their jurisdiction implicates article III policies. It is the scope of the jurisdiction exercised by an article I court, rather than qualifications on its powers¹⁹² or placement as an adjunct to an article III court, that determines its constitutionality. Indeed, far from overcoming separation of powers problems, internal delegation of jurisdiction from an article III judge to an assistant violates a central precept of the separation of powers. The primary constitutional check on the judiciary is congressional control over federal court jurisdiction. Placing authority over the allocation of jurisdiction in judicial hands thus transgresses a basic functional division among the branches of government.¹⁹³ This constitutional defect is especially apparent in the Magistrate

190. See Comm. Print No. 3, supra note 5, at 57 (letter from Prof. Thomas Krattenmaker to Rep. Peter Rodino): "If the Constitution requires that a matter be heard by an Article III judge, I would simply assume that this means he, not his delegate, could hold jury trials or punish for contempt, or enter final judgments. Otherwise, such a constitutional rule would have no independent significance."

191. Both the plurality and the dissent were in agreement on this point. 370 U.S. at 533 (plurality opinion); id. at 605 (Douglas, J., dissenting). Professor Silberman argues, however, that *Glidden* is not entirely apposite to the magistrate question, because that case entailed a delegation of power to an alternative tribunal. Silberman, supra note 5, at 1305. But *Glidden* involved judges from an alternative tribunal participating in decisions of article III courts. Thus, the precise issue presented in *Glidden* is raised when magistrates exercise judicial power as part of an article III court. See Article III and Magistrates, supra note 5, at 1035.

192. See Comm. Print No. 3, supra note 5, at 49 (letter from Prof. Herbert Wechsler to Rep. Peter Rodino). Similarly, the article I structure cannot be validated simply because Congress did not grant the court power to punish certain types of criminal contempt or to enjoin another court's proceedings. Although these limits do eliminate serious separation of powers and federalism problems that would be raised if an article I court, which is technically within the legislative branch, could enjoin proceedings in federal or state courts or punish for criminal contempt, the bankruptcy court still retains other judicial powers that implicate article III policies. It can enforce its judgments independently of any other court, it can issue writs of execution, it can conduct jury trials, and it can resolve constitutional and state law claims. Finally, it is the nature of a court's jurisdiction, more than the full range of its power, that determines whether it need be an article III court. Cf. *Glidden Co. v. Zdanok*, 370 U.S. 530, 552-61, 572-79 (1962) (irrelevant to article III status that powers and jurisdiction of Court of Claims and Court of Customs and Patent Appeals are somewhat limited).

193. See Article III and Magistrates, supra note 5, at 1038-39 & nn.80-82 (internal jurisdictional delegation presents even more serious constitutional difficulties than jurisdictional transfer from article III to article I courts).

Act, which has no specific guidelines for delegating jurisdiction to magistrates.

The internal delegation scheme also threatens the second aspect of judicial independence protected by article III's provisions. As noted previously, the tenure and salary guarantees operate to protect judges from coercion or discipline by their colleagues.¹⁹⁴ Under the Bankruptcy Reform Act, however, bankruptcy judges are susceptible to control by other federal judges because they are adjuncts to the district courts, their judgments may in some instances be appealed to district judges, and they are subject to the disciplinary review of the circuit judicial council.¹⁹⁵ The Magistrate Act also poses a risk that judges may exercise subtle influence over magistrates' decisions by vesting authority in district judges to appoint magistrates, to choose cases for reference, and to discipline and remove magistrates for misconduct. A magistrate may be wary of rendering a ground-breaking or unpopular decision if he knows the consequences may be future references in only the most mundane or onerous cases, a curtailment of authority, or failure to be reappointed. Any scheme relying on internal collegial control of decisionmakers vested with judicial power may eventually undermine the integrity of the judicial process.¹⁹⁶

B. *Appellate Review*

Advocates of the magistrate and bankruptcy systems have also argued that delegation of initial decisionmaking power presents no article III difficulties because appellate review is available in an article III court.¹⁹⁷ Support for this argument is allegedly found in the constitutional scheme,¹⁹⁸ which actually assures only that an appellate-level article III tribunal will be available to any given litigant, because Congress is not required to establish any inferior federal courts.¹⁹⁹ This reasoning begs the question, how-

194. See notes 165-68 and accompanying text *supra*.

195. See note 34 and accompanying text *supra*.

196. See Kaufman, *supra* note 59, at 710-14. Widespread reference to magistrates may also impair the integrity of the judicial process in additional ways. If particular categories of cases are routinely handled by magistrates, development and exploration in those legal areas may become stultified, because magistrate opinions are currently unpublished, and they lack the precedential weight of district court decisions. See Article III and Magistrates, *supra* note 5, at 1053. In addition, public respect for the judiciary as a highly qualified, impartial defender of the Constitution and laws may be undermined by a perception that judges and lower-status magistrates are fungible. See *id.* at 1057.

197. See, e.g., H.R. Rep. No. 1364, 95th Cong., 2d. Sess. 11 (1978); Silberman, *supra* note 5, at 1316-17.

198. Those who contend that article III is satisfied by provision for appellate review also rely on *Crowell v. Benson*, reading that case as laying down the principle that no conclusion of fact or law ever need be determined in the first instance by an article III court. See, e.g., Silberman, *supra* note 5, at 1316. As discussed previously, however, *Crowell* is a much narrower decision, resting on a recognition of the distinction between administrative factfinding adjudication and the full range of judicial functions. See notes 136-38 and accompanying text *supra*.

199. For example, Professor Silberman argues that "[t]o the extent that article III does impose certain requirements on the judicial process, it would seem to be satisfied by appellate, not initial, determination by such constitutional tribunals. Indeed, the ori-

ever, because the policies and provisions of article III do not become controlling until Congress has created an inferior federal tribunal. Moreover, the appellate review argument implies that the tenure and salary provisions need apply only to appellate judges, a suggestion totally unwarranted by the language of article III, which encompasses any federal court established by Congress.²⁰⁰ In addition, because the threats to the separation of powers and judicial integrity envisioned by the Framers of article III flow largely from control of judges' subsistence and tenure, rather than from direct manipulation of the law, appellate review is an inadequate corrective. It reaches only errors of law, not the subtler corruptions, and, because only a certain proportion of cases actually go to trial, and even fewer are appealed, the limited corrective available at the appellate level will not affect the bulk of litigation.

Finally, the appellate review argument is without precedential foundation, and appears to be refuted by *Glidden Co. v. Zdanok*. In indicating that an article I judge's participation in a trial in an article III court would render the judgment void, the Supreme Court took no solace in the fact that appellate review in an article III tribunal was available.²⁰¹

At this point, it is apparent that the article I bankruptcy court does not satisfy the article III policy test, and thus is unconstitutional. Rather than eliminating conflicts with article III policies, the internal delegation and appellate review provisions of the Bankruptcy Reform Act create additional constitutional problems. The validity of the Magistrate Act is not so easily resolved, however, because its requirement that litigants consent to a reference arguably makes trial by magistrate constitutional.²⁰²

C. Litigant Consent

Relying on the venerable case of *Kimberly v. Arms*,²⁰³ courts have traditionally validated consensual references investing masters or magistrates with broad authority. In that case the Supreme Court held that upon the consent of the parties a master could hear the matter and report findings of fact and law to the judge. The judge was to treat these findings as presumptively

ginal constitutional scheme, absent any inferior federal judiciary, assured only *appeal* to an article III court." The virtually exclusive role once played by state courts in resolving federal question cases also "suggest[s] that the initial disposition of judicial matters may be made by other than an article III tribunal when appeal to such a tribunal is available." Silberman, *supra* note 5, at 1316-17.

200. See D. Currie, *Federal Courts* 120 (1968); Comm. Print No. 13, *supra* note 13, at 65 (letter from Prof. Sandalow to Rep. Rodino). See also note 1 and accompanying text *supra*.

201. Indeed, if appellate review were sufficient to remedy constitutional problems inherent in trial by a non-article-III officer, the Court could have resolved *Glidden* on the substantive merits, for its own imprimatur would then have eliminated the jurisdictional constitutional issue. Justice Harlan's conclusion that the article I/article III court issue could not be avoided, 370 U.S. at 534, is therefore instructive.

202. Several commentators have concluded that consent is the constitutional cure-all. See, e.g., Silberman, *supra* note 5, at 1350-54; Comment, *An Adjudicative Role for Federal Magistrates in Civil Cases*, 40 U. Chi. L. Rev. 584 (1973).

203. 129 U.S. 512 (1889). See also *DeCosta v. Columbia Broadcasting Sys., Inc.*, 520 F.2d 499 (1st Cir. 1975), cert. denied, 423 U.S. 1073 (1976).

correct unless clearly erroneous.²⁰⁴ In *Kimberly v. Arms* and subsequent cases that emphasize the importance of consent, however, ultimate adjudicatory authority remained with the district judge.²⁰⁵ "Judicial power" was not vested in the article I officer. This fundamental distinction between past cases and the Magistrate Act is illustrated by circuit courts' refusals, on constitutional grounds, to entertain direct appeals from magistrate trials, even when the reference was consensual.²⁰⁶

These difficulties may seem minimal if consensual reference is analogized to arbitration or other alternative methods of dispute settlement. According to this analogy, because the parties may agree to submit their controversy to an arbitrator or an alternative tribunal, bypassing the article III judiciary altogether, they may also authorize a magistrate to resolve their case.²⁰⁷ There is a crucial constitutional distinction, however, between arbitration and trial by magistrate. When parties select an alternative to judicial resolution, such as arbitration, they choose not to invoke the "judicial power of the United States" described in article III.²⁰⁸ Although arbitration awards are traditionally final and binding, supposedly exempt from judicial scrutiny on the merits,²⁰⁹ arbitrators may not issue writs of execution or contempt citations, nor do they enjoy other attributes of judicial power. On the other hand, when parties consent to trial by magistrate, they do not select an alternative tribunal—their controversy remains within the province of the

204. 129 U.S. at 524.

Similarly, absence of consent has been deemed fatal to case-dispositive references. See *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957); *TPO, Inc. v. McMillen*, 460 F.2d 348, 359-61 (7th Cir. 1972).

205. Even under the "clearly erroneous" standard of review for masters' and magistrates' findings, the court still retains broad powers. For example, if either party challenges the officer's report, the judge may adopt, modify, or reject the findings in whole or in part, or may seek further evidence. See 28 U.S.C. § 636(b)(1) (1976); Silberman, *supra* note 5, at 1330.

206. See authorities cited in note 46 *supra*.

207. See, e.g., *DeCosta v. Columbia Broadcasting Sys., Inc.*, 520 F.2d 499, 504-05 (1st Cir. 1975), cert. denied, 423 U.S. 1073 (1976); Comment, *supra* note 202, at 592-94.

This argument stems from the Court's statement in *Kimberly v. Arms* that "[a] reference by consent of parties, of an entire case for the determination of all its issues, though not strictly a submission of the controversy to arbitration—a proceeding which is governed by special rules—is a submission of the controversy to a tribunal of the parties' own selection." 129 U.S. at 524.

208. Parties commonly contract to submit disputes to arbitration, thereby agreeing not to seek judicial process. The binding effect of the arbitrators' award flows from the contractual agreement to abide by it, rather than from an exercise of judicial power.

The Justice Department has been exploring proposals for compulsory arbitration of certain disputes filed in court. See Address of Att'y Gen. Benjamin R. Civiletti Before the W. Va. Bar Ass'n and the W. Va. Chamber of Commerce 6-7 (Aug. 31, 1979). If these forced arbitrations are accorded the binding preclusive effect traditionally surrounding labor arbitrations, with no guarantee of de novo judicial review or entry of final judgment by the court, the system may amount to a denial of judicial process in violation of due process. This is not to suggest, however, that once a dispute has come under judicial auspices it may never be resolved in an alternative forum. Parties may agree to dismiss the court proceedings, removing the dispute from the province of the judiciary, and then to refer the matter to arbitration. Absent removal from the courts, however, the concerns underlying article III remain implicated.

209. See, e.g., *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

courts.²¹⁰ They have invoked judicial process, and the magistrate, as an officer of the court, enters a binding order in the name of the court. Thus, trial by magistrate implicates the judicial power of article III and its underlying policies, whereas arbitration does not.

The fundamental premise of the consent rationale is that the right to an article III judge is a due process right, inuring to the benefit of litigants, and waivable like any other due process right.²¹¹ For example, it has been argued that consensual magistrate jury trials are constitutionally proper because, if parties may waive the right to trial by jury altogether, they may consent to a lesser form of jury trial.²¹² Even with consent, however, jury trials presided over by magistrates may still present due process problems. Under Justice Brandeis's formulation in *Crowell v. Benson*,²¹³ the due process right to a jury trial in federal court is inextricably linked to a requirement of article III judicial process.²¹⁴ The seventh amendment has always been construed to contemplate jury trials supervised by article III judges.²¹⁵ The judge helps shape the outcome by instructing the jury on the law, making legal and evidentiary rulings, and weighing witness credibility. The judge also retains the power to direct a verdict or to set it aside. De novo review of the record by a district judge of a magistrate-conducted jury trial may not be sufficient to interject the judicial role that is constitutionally required, because the evidentiary rulings and instructions that fundamentally shape the verdict will have been rendered by the magistrate.²¹⁶ Thus, in

210. Judge Swygert, dissenting in *Muhich v. Allen*, 603 F.2d 1247, 1253 (7th Cir. 1979), notes that references to magistrates are readily distinguishable from alternative dispute resolution forums:

It is important initially to recognize what this case is not. It is not a situation where private parties have agreed between themselves to submit their differences to a private dispute resolution process such as arbitration. Nor is it a case where a party seeks federal court enforcement of the outcome of a private dispute arbitration. It is not even a case where certain matters have been separated out of a federal court action for initial reference to a specialized factfinder Rather, this is a case where an officer other than a constitutional judge performed one of the most traditional of judicial functions, that of presiding over a trial (with a jury) on the merits, not in a private capacity or as part of an isolated segment of an action but fully under the aegis of the formal judicial power of the United States as defined in Article III of the Constitution.

Some courts have not been so careful to discern these distinctions. See, e.g., *DeCosta v. Columbia Broadcasting Sys., Inc.*, 520 F.2d 499, 504-05 (1st Cir. 1975), cert. denied, 423 U.S. 1073 (1976); *Article III and Magistrates*, supra note 5, at 1047 n.132 (discussing *DeCosta's* error).

211. See, e.g., *DeCosta v. Columbia Broadcasting Sys., Inc.*, 520 F.2d 499 (1st Cir. 1975), cert. denied, 423 U.S. 1073 (1976); *Silberman*, supra note 5, at 1350-54.

212. See, e.g., *Sick v. City of Buffalo*, 574 F.2d 689, 690 & n.6 (2d Cir. 1978).

213. See note 170 and accompanying text supra.

214. For this reason the expanded criminal misdemeanor jurisdiction in the *Magistrate Act*, see note 44 supra, appears to be unconstitutional.

215. *Capital Traction Co. v. Hof*, 174 U.S. 1, 13-14 (1899).

216. Cf. *Wingo v. Wedding*, 418 U.S. 461 (1974) (magistrate habeas hearings present risk of de facto magistrate adjudication, because these petitions turn largely on evaluations of credibility); *United States v. Raddatz*, 592 F.2d 976 (7th Cir. 1979), cert. granted, 100 S. Ct. 44 (1979) (No. 79-8) (in suppression hearing, where resolution depends on weighing credibility of witnesses giving conflicting versions of events, due process right to meaningful hearing before ultimate decisionmaker requires that article III judge, rather than magistrate,

light of the "inherently judicial" function of presiding over a jury trial, a litigant's right to waive a jury trial does not necessarily include a right to waive having the trial guided by an article III judge.²¹⁷

Even in nonjury trials, litigant consent to a reference may not eliminate all due process concerns. As district court dockets become increasingly clogged, refusal to consent to trial by magistrate may come to carry a price of excessive delay, increased cost, and judicial annoyance at being saddled with a case originally designated for reference. Faced with the realities of these systemic pressures, the wise or less than wealthy litigant may feel forced to "consent" to a reference.²¹⁸ When this likelihood of forced consent is coupled with the previously noted danger of intrusion into a magistrate's substantive decisions,²¹⁹ it is apparent that the consensual reference procedure may not be a due process panacea after all.

Assuming, however, that due process is fully satisfied—consent is freely and intelligently given and the magistrate is free of any inhibiting oversight—the consensual feature of the Magistrate Act still is insufficient to cure article III difficulties. As noted previously, the requirements of article III are more than a matter of due process; they are a fundamental element of the structure and constitutional role of the judiciary.²²⁰ Thus, these requirements are "jurisdictional,"²²¹ protecting judges, the public, and the constitutional framework as well as litigants, and therefore cannot be waived

actually hear witnesses). See *Muhich v. Allen*, 603 F.2d 1247, 1255 (7th Cir. 1979) (Swygert, J., dissenting) (jury verdict shaped by rulings of presiding judicial officer; when magistrate conducts trial, "the situation is hardly conducive to" meaningful judicial review, which is "the saving feature in what appears . . . to be an abdication of the judicial function").

217. The argument that the right to waive an article III judge and consent to reference are indistinguishable fails to consider that when a litigant agrees to a magistrate-conducted jury trial, the right of waiver has not been exercised at all—the litigant is still receiving a jury.

218. The consensual character of references may disappear as burgeoning caseloads make reference a routine procedure perceived by litigants as an acceptable norm rather than an unusual device reserved for exceptional circumstances. Article III and Magistrates, *supra* note 5, at 1051 & n.152.

219. See note 196 and accompanying text *supra*.

220. See notes 153-75 and accompanying text *supra*.

221. In distinguishing between constitutional provisions that only create rights in litigants and those that are "jurisdictional," the Supreme Court has said the test is whether the Framers intended the provision to be "an integral and inseparable part of the court." *Patton v. United States*, 281 U.S. 276, 297 (1930). In *Patton*, the Court applied this test to the constitutional right to a trial by jury and concluded that it was designed merely for the protection of defendants, and thus could be waived.

In this context the term "jurisdictional" means more than "subject matter jurisdiction," which includes the matters courts may hear once they are established. The tenure and salary requirements, however, affect Congress's power to establish the courts in the first instance. Thus, they can be defined as "fundamental jurisdictional" requirements.

Professor Silberman argues that because the tenure and salary requirements in § 1 are distinct from the subject-matter requirements in § 2 of article III, they are not "jurisdictional," and thus magistrates may exercise article III judicial power when the parties consent. Silberman, *supra* note 5, at 1350. This argument does not, however, make the necessary distinction between the two types of "jurisdictional" requirements. It also suggests, unrealistically, that the court as an institution can be analytically distinguished from the judges of which it is composed.

by parties.²²² Litigants have no authority under the constitutional scheme to invest non-article-III officers with article III "judicial power."

The requirement of litigant consent therefore does not cure the constitutional defects of the 1979 Magistrate Act. The conflicts with the principles of separation of powers, federalism, judicial independence, and due process inherent in a system of trial by magistrate can be avoided only if the ultimate authority to exercise judicial power remains with the article III district judge.²²³ Absent the protective device of *de novo* judicial review, the 1979 Magistrate Act cannot be reconciled with article III.

CONCLUSION

The doctrine of legislative courts has traditionally been limited to tribunals in geographic areas controlled by Congress and to courts whose jurisdiction extended only to matters of "public right" that were not "inherently judicial." The Bankruptcy Reform Act of 1978 and 1979 Magistrate Act go significantly beyond these limits, creating adjudicative systems that violate the policies of separation of powers, federalism, and judicial independence embodied in article III of the Constitution. Both Acts are thus unconstitutional, because Congress's power to establish article I courts is limited to situations that do not threaten article III values.

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222. There can be no better illustration of a constitutional provision that is an inseparable part of the court than article III, which seeks to maintain the integrity of the judicial role in the constitutional system. Consequently, just as two adverse parties from the same state cannot waive the diversity of citizenship requirement in seeking to establish subject matter jurisdiction, litigants cannot waive the "fundamental jurisdictional" requirement of an article III court.

223. For this authority to be meaningful, however, the district judge must do more than search for gross errors, as in appellate review. The trial-level role of the article III district courts must be preserved. This can be accomplished only if the article III judge independently weighs the evidence and the law, relying on the magistrate's report to focus the issues and guide the court, rather than dictating the ultimate outcome. See *Sick v. City of Buffalo*, 574 F.2d 689, 692-93 (2d Cir. 1978); Article III and Magistrates, *supra* note 5, at 1043.