

## STATE LAW CLAIMS AND ARTICLE III IN *Stern v. Marshall*, 131 S. CT. 2594 (2011)

Article III, Section 1 of the Constitution vests “the judicial Power of the United States” in courts whose judges “shall hold their Offices during good Behavior.”<sup>1</sup> Bankruptcy courts are presided over by judges who lack such life tenure<sup>2</sup> and so are unable to wield Article III judicial power. Almost three decades ago, in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,<sup>3</sup> a splintered Supreme Court held that this limitation prevented a bankruptcy court from deciding a state-law contract claim.<sup>4</sup> Over the course of subsequent cases, the Court struggled to define the limits of Article III’s prohibition, deploying an expanding set of factors to explain its rulings.<sup>5</sup> Last Term, in *Stern v. Marshall*,<sup>6</sup> the Supreme Court applied these factors to conclude that a bankruptcy court could not decide a state-law claim for tortious interference.<sup>7</sup> Although the Court insisted that the state-law origin of a claim lacked “talismanic power”<sup>8</sup> in the years between *Northern Pipeline* and *Stern*, the *Stern* majority rightly emphasized that factor in its analysis.

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1. U.S. CONST. art. III, § 1.

2. Since 1984, bankruptcy judges have been appointed to fourteen-year terms by the court of appeals for the district in which they are located. Bankruptcy Amendments and Federal Judgeship Act of 1984, 28 U.S.C. § 152(a)(1) (2006).

3. 458 U.S. 50 (1982) (plurality opinion).

4. *See id.* at 84–86.

5. *See, e.g., Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 54–55 (1989) (refusing to exempt from Article III the adjudication of a claim that is not “closely intertwined” with a federal regulatory program, and that “neither belongs to nor exists against the Federal Government”); *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 855–56 (1986) (exempting adjudication of claims “completely dependent upon” adjudication of a claim under federal law, where there is consent by both parties, and the agency adjudicating the claim has expertise over the narrow area of the law at issue); *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 584–85 (1985) (exempting adjudication of claims that flow from a federal regulatory scheme).

6. 131 S. Ct. 2594 (2011).

7. *See id.* at 2600–01.

8. *Schor*, 478 U.S. at 853.

As the Court observed, the length and complexity of the litigation at issue in *Stern* approached Dickensian proportions.<sup>9</sup> Vickie Lynn Marshall (Vickie), also known as Anna Nicole Smith, was the widow of J. Howard Marshall II (J. Howard).<sup>10</sup> E. Pierce Marshall (Pierce) was J. Howard Marshall's son by a previous marriage.<sup>11</sup> Vickie's lawyers alleged—in court and to the press—that J. Howard intended for her to receive the gift of a catchall trust and that Pierce fraudulently sought to defeat that intention.<sup>12</sup> Pierce contended that these statements amounted to tortious defamation.<sup>13</sup>

While litigation over the estate continued in Texas Probate Court, Vickie filed for bankruptcy.<sup>14</sup> To ensure that he would be able to collect damages on his claims of tortious defamation, Pierce joined the bankruptcy proceedings by filing a proof of claim against the bankruptcy estate.<sup>15</sup> Vickie asserted truth as a defense and filed a counterclaim against Pierce for tortious interference with J. Howard's gift to her.<sup>16</sup> The bankruptcy court granted Vickie summary judgment and awarded her damages.<sup>17</sup>

Pierce argued that the bankruptcy court lacked the authority to enter judgment on Vickie's counterclaim.<sup>18</sup> Bankruptcy courts have statutory authority to enter final judgments in "core proceedings arising under title 11, or arising in a case under title 11."<sup>19</sup> Core proceedings are not explicitly defined, but they in-

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9. See *Stern*, 131 S. Ct. at 2600 (citing CHARLES DICKENS, BLEAK HOUSE, reprinted in 1 WORKS OF CHARLES DICKENS 4–5 (1891)).

10. See *id.* at 2601. The Supreme Court did not set forth the salacious details of J. Howard's romantic history. The district court offered a more complete account, perhaps best summarized by the court's observation that "J. Howard's statement that 'men in love do stupid things and I was sure guilty' is accurate. In J. Howard's case, it was a consistent pattern." *In re Marshall*, 275 B.R. 5, 17 (C.D. Cal. 2002) [hereinafter *Marshall II*].

11. *Stern*, 131 S. Ct. at 2601.

12. See *id.*; see also *Marshall v. Marshall*, 547 U.S. 293, 300 (2006) (describing Vickie's claims about J. Howard's plans).

13. *Stern*, 131 S. Ct. at 2601.

14. *In re Marshall*, 253 B.R. 550, 553 (Bankr. C.D. Cal. 2000) [hereinafter *Marshall I*].

15. See *id.* at 556 n.16.

16. *Marshall II*, 275 B.R. at 9.

17. *Marshall I*, 253 B.R. at 561–62.

18. *Stern*, 131 S. Ct. at 2601.

19. 28 U.S.C. § 157(b)(1) (2006) (emphasis added).

clude “counterclaims by [a debtor’s] estate against persons filing claims against the estate . . . .”<sup>20</sup> By contrast, in *non-core proceedings*, bankruptcy courts simply make proposals to district courts; the Article III judges on the district courts then review the proposals and enter final judgment.<sup>21</sup> Pierce argued that Vickie’s counterclaim was a non-core proceeding.<sup>22</sup> The bankruptcy court concluded that Vickie’s counterclaim was a core proceeding, and that it thus had the power to enter judgment.<sup>23</sup>

The district court disagreed, concluding that Vickie’s counterclaim for tortious interference was not a core proceeding.<sup>24</sup> Although the counterclaim fell within the literal statutory language describing core proceedings, the district court was concerned that such an expansive reading would unconstitutionally give judicial power to non-Article III bankruptcy judges.<sup>25</sup> To avoid this conclusion, the district court took a narrow view of “core proceeding” and held that Vickie’s counterclaim was a non-core proceeding.<sup>26</sup> It thus regarded the bankruptcy court’s conclusions as mere proposals.<sup>27</sup>

By this time, the Texas state court already had conducted a jury trial and found for Pierce.<sup>28</sup> But the federal district court denied preclusive effect to the state court judgment, finding instead for Vickie, and awarding her compensatory and punitive damages.<sup>29</sup>

The Court of Appeals for the Ninth Circuit reversed, holding that the lower courts had lacked jurisdiction to hear the case because it fell within a “probate exception” to federal jurisdiction.<sup>30</sup> The Supreme Court rejected this conclusion and remanded.<sup>31</sup> On remand, the Ninth Circuit inferred an additional

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20. *Id.* § 157(b)(2)(C).

21. *See id.* § 157(c)(1).

22. *Stern*, 131 S. Ct. at 2601–02.

23. *Marshall II*, 275 B.R. at 10.

24. *See In re Marshall*, 264 B.R. 609, 633 (C.D. Cal. 2001).

25. *See id.* at 632.

26. *See id.* at 633.

27. *Id.*

28. *Marshall II*, 275 B.R. at 8.

29. *Id.* at 58.

30. *In re Marshall*, 392 F.3d 1118, 1137 (9th Cir. 2004).

31. *Marshall v. Marshall*, 547 U.S. 293, 315 (2006).

requirement for final judgment: Even when a counterclaim falls within the definition of a core proceeding, a bankruptcy judge can enter a final judgment on the counterclaim only if the counterclaim is “so closely related to [a creditor’s] proof of claim that the resolution of the counterclaim is necessary to resolve the allowance or disallowance of the claim itself.”<sup>32</sup> The Ninth Circuit held that Vickie’s counterclaim did not satisfy this added requirement.<sup>33</sup> As a result, the Ninth Circuit concluded that the Texas probate court had been first to enter a final judgment and that the district court should have recognized the preclusive effect of that judgment.<sup>34</sup>

The Supreme Court affirmed on different grounds.<sup>35</sup> Writing for the Court, Chief Justice Roberts<sup>36</sup> held that Vickie’s counterclaim against Pierce was a “core proceeding” within the meaning of the statute.<sup>37</sup> Moreover, the Court concluded that the statute authorized bankruptcy judges to enter final judgment in *all* core proceedings; it was not plausible that the otherwise detailed statute would demand additional threshold inquiries without providing any explanation of how those inquiries were to be conducted.<sup>38</sup>

But while the statute permitted the bankruptcy court to enter a final judgment on Vickie’s state law counterclaim, the Constitution did not. Article III, Section 1 vests “[t]he judicial Power of the United States” in the Supreme Court “and in such inferior Courts as the Congress may . . . establish.”<sup>39</sup> It also provides for life ten-

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32. *In re Marshall*, 600 F.3d 1037, 1058 (9th Cir. 2010) [hereinafter *Marshall III*] (citation omitted).

33. *Id.* at 1059.

34. *Id.* at 1061.

35. *Stern v. Marshall*, 131 S. Ct. 2594, 2620 (2011).

36. Chief Justice Roberts was joined by Justices Scalia, Kennedy, Thomas, and Alito. *Id.* at 2599.

37. *See id.* at 2605.

38. *See id.* at 2604–05. The Court also rejected Pierce’s argument that a statutory provision required that trials of “personal injury tort” claims must be conducted in district court and that his claim fell within this category. *See id.* at 2606–07. The Court held that the provision was not jurisdictional and therefore waivable. Moreover, Pierce waived it by consenting to conduct the suit in bankruptcy court. *See id.* at 2606–08.

39. U.S. CONST. art. III, § 1.

ure for the judges of these constitutional courts, declaring that they “shall hold their Offices during good Behavior . . . .”<sup>40</sup>

Bankruptcy judges are appointed for a limited fourteen-year term<sup>41</sup> and thus stand outside Article III. To the Court, this presented a problem. Article III’s life-tenure requirement enforces the separation of powers by protecting the judiciary from the other branches.<sup>42</sup> It also protects individual litigants by ensuring that judicial decisions will not be rendered “with an eye toward currying favor with Congress or the Executive . . . .”<sup>43</sup> But neither purpose would be served if Congress and the Executive “could confer the Government’s judicial Power on entities outside Article III.”<sup>44</sup>

The Court noted that this principle was well-established. In 1856, the Court declared in *Murray’s Lessee* that “Congress may not ‘withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.’”<sup>45</sup> More recently the Court applied the principle to invalidate portions of a statute that purported to allow non-Article III bankruptcy judges “‘to decide [a] state-law contract claim’ against an entity that was not otherwise part of the bankruptcy proceedings.”<sup>46</sup>

Chief Justice Roberts acknowledged that the principle had limits. A category of cases involving “public rights” could be assigned to non-Article III “‘legislative’ courts.”<sup>47</sup> *Murray’s Lessee* provided the initial prototype. The case, involving a challenge to the Treasury Department’s sale of a customs collector’s land, “fell within the ‘public rights’ category of cases, because it could only be brought if the Federal Government chose to allow it by waiving sovereign immunity.”<sup>48</sup> Because the suit in

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40. *Id.*

41. 28 U.S.C. § 152(a)(1) (2006).

42. *See Stern*, 131 S. Ct. at 2608.

43. *Id.* at 2609 (quoting 1 WORKS OF JAMES WILSON 363 (J. Andrews ed., 1896)).

44. *Id.* (quotation marks omitted).

45. *Id.* (quoting *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856)).

46. *Id.* at 2609–10 (quoting *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 53, 87 n.40 (1982) (plurality opinion)).

47. *Id.* at 2610.

48. *Id.* at 2612.

*Murray's Lessee* could proceed only with the government's consent, the Court concluded that the government could "set the terms" of its adjudication.<sup>49</sup>

The Court candidly admitted that its "discussion of the public rights exception since that time has not been entirely consistent . . ." <sup>50</sup> At one point, the Court suggested that the public rights exception extended only to cases in which the government was a party.<sup>51</sup> Subsequent cases took a more expansive view. In *Thomas v. Union Carbide Agricultural Products Co.*, the Court extended the exception to allow agency adjudication of a dispute between private parties over claims created entirely by a federal statute.<sup>52</sup> In *Commodity Futures Trading Commission v. Schor*,<sup>53</sup> the Court upheld an agency's jurisdiction over a state-law counterclaim whose resolution was "necessary" to effective resolution of claims under a federal statute.<sup>54</sup> Chief Justice Roberts, however, emphasized "[t]he most recent case" in which the Court had considered the public rights exception, *Granfinanciera, S.A. v. Nordberg*,<sup>55</sup> which limited the exception to claims that either were tightly bound to a federal regulatory scheme or were owned by or directed against the federal government.<sup>56</sup>

The Court briskly applied the factors from these cases to Vickie's counterclaim. Unlike claims held to fall within the

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49. *Id.*

50. *Id.* at 2611.

51. *Id.* at 2612–13 (citing *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 458 (1977)).

52. 473 U.S. 568, 593–94 (1985).

53. 478 U.S. 833 (1986). Before concluding that the Commodity Futures Trading Commission (CFTC) could adjudicate the counterclaim as described in the body text, the Court in *Schor* noted "that (1) the claim and the counterclaim concerned a 'single dispute' . . . ; (2) the CFTC's assertion of authority involved only 'a narrow class of common law claims' in a 'particularized area of law'; (3) the area of law in question was governed by 'a specific and limited federal regulatory scheme' as to which the agency had 'obvious expertise'; (4) the parties had freely elected to resolve their differences before the CFTC; and (5) CFTC orders were 'enforceable only by order of the district court.'" *Stern*, 131 S. Ct. at 2613 (quoting *Schor*, 478 U.S. at 844, 852–55).

54. *Stern*, 131 S. Ct. at 2614 (quoting *Schor*, 478 U.S. at 856).

55. Although the Court in *Stern* did not remark on it, the precise issue in *Granfinanciera* was not the applicability of Article III, but rather the Seventh Amendment right to a jury trial. 492 U.S. at 36.

56. See *Stern*, 131 S. Ct. at 2614.

public rights exception, “Vickie’s claim [wa]s a state law action independent of the federal bankruptcy law . . . .”<sup>57</sup> The claim also was not the result of a unanimous Congressional waiver of sovereign immunity; indeed, “Congress ha[d] nothing to do with it.”<sup>58</sup> It was simply a claim under “state common law between two private parties.”<sup>59</sup>

Pierce’s decision to file a proof of claim in bankruptcy court did not change this analysis. The decision could hardly be deemed voluntary consent to non-Article III adjudication of the counterclaim: Pierce had no alternative but to file in bankruptcy court “if he wished to recover from Vickie’s estate.”<sup>60</sup> More importantly, although the decision might have affected the nature of Pierce’s defamation claim against Vickie, it did not change the legal nature of Vickie’s counterclaim against Pierce.<sup>61</sup> Pierce’s filing *might* have converted his claim of private right against Vickie into a claim of public right against Vickie’s bankruptcy estate.<sup>62</sup> Its adjudication had become a mere “part of the process of allowance or disallowance of claims,” a process largely governed by federal law.<sup>63</sup> But adjudicating Vickie’s claim of tortious interference under Texas *state* law, however, would take a bankruptcy court beyond the legitimate bounds of that process; Vickie’s counterclaim involved issues that were not implicated by Pierce’s claim against her.<sup>64</sup> The Court concluded by noting that the constitutional defect was neither cured by the manner of appointment of

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57. *Id.* at 2611.

58. *Id.* at 2614.

59. *Id.*

60. *Id.*

61. *See id.* at 2616.

62. The Court explicitly reserved judgment on whether “the restructuring of debtor-creditor relations is in fact a public right.” *Id.* at 2614 n.7 (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 56 n.11 (1989)).

63. *Id.* at 2616 (quoting *Katchen v. Landy*, 382 U.S. 323, 336 (1966)).

64. To prevail, Vickie needed to prove not only that her statements were true, but also “(1) the existence of an expectancy of a gift; (2) a reasonable certainty that the expectancy would have been realized but for the interference; and (3) damages.” *Id.* at 2617.

bankruptcy judges<sup>65</sup> nor excused by concerns over administrative convenience.<sup>66</sup>

Justice Scalia joined the Court's opinion but wrote separately to emphasize his views on the public rights exception.<sup>67</sup> To Justice Scalia, the rule that an "Article III judge is required in *all* federal adjudications" admitted of only a few limited exceptions.<sup>68</sup> The factors the Court consulted were troubling to Justice Scalia not only for "their sheer numerosity," but also because many "ha[d] nothing to do with the text or tradition of Article III."<sup>69</sup> For example, "Article III gives no indication that state-law claims have preferential entitlement to an Article III judge."<sup>70</sup>

Justice Breyer dissented.<sup>71</sup> He agreed with the Court's statutory analysis<sup>72</sup> but disagreed with the Court's constitutional conclusions. Although Justice Breyer recognized that the nature of the claim cut in favor of requiring an Article III adjudicator, he noted that bankruptcy courts often were faced with such state law issues.<sup>73</sup> In *Thomas v. Union Carbide Agricultural Products*, the Court emphasized "*practical attention to substance* rather than doctrinaire reliance on formal categories" as it upheld a scheme for non-Article III binding arbitration of claims under a federal statute.<sup>74</sup> Applying this practical approach to the factors at work in *Stern* led Justice Breyer to conclude that there had been no violation of the Constitution.<sup>75</sup> Congress had reasonably concluded that bankruptcy courts needed jurisdiction over state-law counterclaims like Vickie's to be effective.<sup>76</sup>

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65. *Id.* at 2619 (dismissing suggestion that the scheme is not problematic because bankruptcy judges are appointed by Article III courts). At least implicitly, the Court apparently rejected the view that congressional innovations should be rejected only where they represent efforts at aggrandizement.

66. *See id.* at 2619–20.

67. *See id.* at 2620 (Scalia, J., concurring).

68. *Id.* at 2621.

69. *Id.*

70. *Id.*

71. Justice Breyer was joined by Justices Ginsburg, Sotomayor, and Kagan. *Id.* at 2621 (Breyer, J., dissenting).

72. *Id.* at 2622.

73. *Id.* at 2626.

74. *Id.* at 2624 (quoting *Thomas*, 473 U.S.568, at 587 (1985)).

75. *See id.* at 2622.

76. *See id.* at 2628–29.



Of all the positions taken on the weight of the state-law origin of Vickie's counterclaim, the position of Chief Justice Roberts is by far the most compelling. Justice Breyer side-stepped it even as he conceded its relevance,<sup>77</sup> and Justice Scalia's concurrence suggested that it had no relevance at all.<sup>78</sup> But Chief Justice Roberts rightly emphasized it in his opinion for the Court.<sup>79</sup>

State-law claims are particularly crucial to the constitutional scheme, and their fair adjudication is a central concern of constitutional provisions closely related to Article III. The limited grant of power that the Constitution makes to the federal judiciary further demonstrates skepticism of federal adjudication that only independent federal adjudicators could assuage.

Claims governed by state law were critical to the constitutional scheme because they could punish improper exercises of power by federal officials, thus preventing the federal government as a whole from exceeding its constitutional bounds. In a basic sense, common law claims define and defend a citizen's basic liberty interests.<sup>80</sup> The claims serve as a right to bear legal arms, a right to self-defense through the court system. Although suits against private individuals serve this defensive function, suits against government officials play the added role of enforcing constitutional limitations.<sup>81</sup> For example, the Fourth

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77. See *id.* at 2626, 2630.

78. See *id.* at 2621 (Scalia, J., concurring).

79. See *id.* at 2610, 2614, 2618 (majority opinion).

80. Property rights, for example, are essentially defined by an owner's ability to pursue claims for trespass or conversion against others. See John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 569–70 (2005); cf. *Stern*, 131 S. Ct. at 2616 (“[P]roperty interests are created and defined by state law.” (quoting *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 451 (2007))).

81. See RICHARD H. FALLON, JR. ET. AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 114 (6th ed. 2009) (“Even in suits raising constitutional questions, the complaint would generally allege that official action invaded a legal interest protected at common law; to the defense of official authority, the plaintiff would respond that any purported authorization was unconstitutional, thereby leaving the official liable, like a private tortfeasor, for invasion of the protected interest.”); see also Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 955–61 (1988) (noting importance to constitutional scheme of lawsuits against government officials and suggesting that this has implications for the appropriate scope of the public rights exception to Article III's requirement of a life-tenured judge for adjudications).

Amendment was arguably intended to be enforced through state-law tort suits for trespass and conversion against federal officials who conducted unreasonable searches and seizures.<sup>82</sup>

But if such suits were adjudicated by servants of the federal political branches, they could hardly provide an effective safeguard against violations ordered by the federal political branches. This concern led most directly to the Seventh Amendment, which, by enshrining a right to a jury “[i]n Suits at common law,”<sup>83</sup> controls federal adjudications by allocating decision-making power to local citizens.<sup>84</sup> State-law claims were at the center of this guarantee: “The two paradigmatic Seventh Amendment cases were state-law trespass suits against federal officers and diversity cases pitting creditor-state plaintiffs against debtor-state defendants.”<sup>85</sup>

Admittedly, the Court has taken only a muddled position on whether the Seventh Amendment and Article III are coextensive.<sup>86</sup> State-law claims might also be on a stronger textual footing under the Seventh Amendment than they would be under Article III, given the amendment’s emphasis on “preserv[ing]” a right that predated the federal Constitution.<sup>87</sup> But it is clear

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82. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 70–71 (1998). In the modern era, the Supreme Court has inverted this paradigm, filling in the gaps in state-law causes of action by inferring federal causes of action for violations of the Constitution. See *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 394–95 (1971) (holding that plaintiff can bring suit against officials for Fourth Amendment violation, even though officials did not engage in conduct that was tortious at state law).

83. U.S. CONST. amend. VII.

84. See AMAR, *supra* note 82, at 69.

85. *Id.* at 91.

86. Compare *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 n.4 (1989) (suggesting that they are coextensive), with *id.* at 64 (insisting that the question of whether claim could be heard before a non-Article III judge is unresolved, even though Seventh Amendment guarantees jury trial for the claim); see also FALLON ET AL., *supra* note 81, at 361 (noting this apparent inconsistency).

87. Article III’s text is quite limited. The complex body of law addressed in *Stern* is essentially the Supreme Court’s gloss on the words “judicial Power.” Although Justice Scalia has been one of the most fervent proponents of the view that there is no basis in the “text” of Article III for the state-law factor, see *Stern v. Marshall*, 131 S. Ct. 2594, 2621 (2011) (Scalia, J., concurring), he has previously read content into the term “judicial Power” by invoking the traditional role of courts. See, e.g., *Brown v. Plata*, 131 S. Ct. 1910, 1953 (2011) (Scalia, J., dissenting) (suggesting that structural injunctions go beyond the judicial power by requiring courts to usurp

that both constitutional provisions serve the same basic interest, ensuring that federal adjudications of important claims—those that defend liberty—are fair. It would be odd if claims at the very core of the Seventh Amendment’s protections fell outside the protection offered by Article III.

This argument for the importance of state-law claims does not carry over to claims created by federal statute.<sup>88</sup> State-law claims policed the boundaries of federal power by punishing officials who strayed beyond them. But a claim whose rule of decision is properly supplied by federal statute cannot serve this function.<sup>89</sup> By definition, the boundaries of federal power have not been exceeded in such cases.<sup>90</sup> Unsurprisingly, then, Congress enjoyed substantially more freedom to structure the adjudication of civil disputes involving rights created by federal statute: “[T]he [Seventh] [A]mendment had less bite in suits based on federal statutes; a Congress bent on evading

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the executive role). Resolving basic common law claims of the sort currently governed by state law was the traditional role of courts, *see* *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 854 (1986), and thus sits at the center of the “judicial Power.”

88. A different conclusion is required where a right under a federal statute merely displaces a right under state law. Congress cannot avoid the constitutional safeguards of fair adjudication of state-law claims simply by replacing those claims with federal causes of action. *See Granfinanciera*, 492 U.S. at 55–57 (noting that although fraudulent conveyance actions by bankruptcy trustees are governed by federal law, they are more akin to state-law contract claims and should be treated as such for Seventh Amendment purposes).

89. If a litigant argues that a federal statute is *improper*, as when it exceeds Congress’s constitutionally enumerated powers, the rule of decision is supplied by the Constitution, not by the statute. There is indeed a strong case for requiring an Article III judge to decide questions that bear on the Constitution, including questions of “constitutional fact.” The current vitality of any such requirement is disputed. *See* FALLON ET AL., *supra* note 81, at 335. *See generally* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985) (discussing well-established principle that judges must independently determine facts that bear on constitutional doctrine, but pointing out complications as to what that does—and should—entail).

90. Rather than relying in the first instance on fair adjudication to keep the legislative power in check, the Constitution simply limits its legitimate objects. *Cf.* THE FEDERALIST NO. 83, at 498 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing prior to the ratification of the Seventh Amendment that the limited reach of enumerated powers made the absence of a federal right to a civil jury irrelevant “in those controversies between individuals in which the great body of people are likely to be interested”).

civil juries could draft statutes sounding in equity, not law.”<sup>91</sup> In *Northern Pipeline*, a plurality of Justices saw similar flexibility in Article III, suggesting that when Congress supplied the rule of decision in a civil dispute, it was more likely that Congress had the authority to place the dispute in the hands of a non-Article III federal judge.<sup>92</sup> Although there is a strong case for requiring a life-tenured adjudicator to resolve state-law claims in a federal forum, the requirement serves less of a purpose when claims under federal statutes and regulations are at issue.

This result might seem ironic. State-law claims are normally heard by state court judges, most of whom lack life tenure. As a result, litigants asserting state-law claims are normally protected only by the elastic provisions of the Due Process Clause.<sup>93</sup> Why then would such claims be more likely to trigger the Article III life tenure requirement?<sup>94</sup>

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91. AMAR, *supra* note 82, at 91–92; *see also* *Atlas Roofing Co. v. Occupational Safety & Health Review Comm’n*, 430 U.S. 442, 455 (1977) (noting Congress’s substantial freedom to invent new causes of action and assign them to agency tribunals that operate without juries).

92. *See* 458 U.S. 50, 83 (1982) (Brennan, J., plurality opinion). As his critics noted, Justice Brennan offered little explanation for his assertion. *See, e.g.*, Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 *IND. L.J.* 233, 250–51 (1989) (“Why should substantive legislative power to make rules of decision to govern the case carry with it the structural power to decide that the adjudication of cases arising under these rules should proceed in a court that is not guaranteed independence?”). But it aligns well with the account given in the text and with the relatively relaxed view that the Court took of claims based on federal statutes in subsequent cases. *See, e.g.*, *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 584 (1985) (holding the right to compensation under federal statute that does not replace right under state law can be subject of binding arbitration under non-Article III official).

93. Compliance with the Due Process Clause is measured using a flexible balancing test. *See Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976). Its greater flexibility might make a larger domain reasonable: Innovative federal statutory claims can be protected by the Clause, while traditional common law claims enjoy the added protection of an Article III structure designed to accommodate them. *Cf. Stern v. Marshall*, 131 S. Ct. 2594, 2623 (2011) (Breyer, J., dissenting) (citing *Crowell v. Benson*, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting)) (arguing that the Due Process Clause offers the appropriate framework for these issues).

94. *See, e.g.*, Erwin Chemerinsky, *Ending the Marathon: It Is Time To Overrule Northern Pipeline*, 65 *AM. BANKR. L.J.* 311, 317 (1991). *Cf. N. Pipeline*, 458 U.S. at 116 (White, J., dissenting) (arguing that Congress’s power to assign matters to state courts lacking life tenured judges implies power to provide for adjudication by federal officials lacking life tenure); *Crowell*, 285 U.S. at 86–87 (Brandeis, J., dissenting) (same).

Understood correctly, however, this observation *reinforces* the centrality of state-law claims to Article III. Article III ensures that adjudications cannot be influenced by the federal political branches. State court judges are insulated from the federal political branches even absent guaranteed tenure, so there is little need to insist on the added protection that life tenure provides.<sup>95</sup> Article III is in this way tailored to a vision of government in which the States are the source of liberty and federal adjudications are a potential source of oppression.

This point bears emphasis. Article III helps guard against two potential forms of oppression: oppression of minorities by majorities<sup>96</sup> and oppression of the people by the federal government.<sup>97</sup> But Article III does not serve these two roles equally.<sup>98</sup> Congress can substantially limit the purview of the lower federal courts.<sup>99</sup> Although life-tenured federal judges

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95. See *N. Pipeline*, 458 U.S. at 64 n.15 (Brennan, J., plurality opinion); see also Daniel J. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291, 300 (1990) (arguing that “[t]he value most consistent” with the combination of life tenure for federal judges and congressional control over the structure of the judiciary is “adjudication by tribunals free from the control of the federal political branches,” and that this value is not threatened by state court adjudication); Fallon, *supra* note 81, at 939 (noting that state courts are insulated from the political branches and thus have a different constitutional status from non-Article III federal tribunals).

96. Fallon, *supra* note 81, at 941 (noting that Article III helps to ensure fairness to litigants asserting “unpopular position[s]”); see also THE FEDERALIST NO. 78, *supra* note 90, at 469 (Alexander Hamilton) (noting that life tenure promotes the independence required for judges to guard against “serious oppressions of the minor party in the community”).

97. Fallon, *supra* note 81, at 938 (noting importance of independence to checking other branches); see also THE FEDERALIST NO. 51, *supra* note 90, at 323 (James Madison) (noting separate interest in “guard[ing] the society against the oppression of its rulers”).

98. See Fallon, *supra* note 81, at 941–42 (using the argument set out in the body text to conclude, with some qualifications, that the Article III interest in fairness to litigants “may be less constitutionally weighty” than its interest in checking the other branches).

99. Under the terms of the “Madisonian Compromise” struck at the constitutional convention, Congress is essentially free to decide not to create lower federal courts and thus leave all factual judicial determinations to the state courts. See FALLON ET. AL., *supra* note 81, at 7–8. Under the traditional view of the Constitution, Congress also is free to decide what the federal courts’ jurisdiction will be. See, e.g., Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1569 (1990). This freedom extends not only to state-law claims but also to claims under federal law; indeed, Congress did not fully vest the courts with

could resist pressures from majorities in the states in which they sit, they can do so effectively only if they are empowered by Congress, a national majoritarian institution.<sup>100</sup> A group that represents a majority at both the state and national level can have jurisdiction over crucial claims assigned to state court judges who are amenable to its control. Article III is thus more directly targeted at the second form of oppression: It ensures that adjudicators will be insulated from the federal political branches, ensuring that the federal political branches will not overstep their proper bounds.

Admittedly, the Framers' skepticism of the federal political branches was not unmixed. Quite obviously, the Framers trusted Congress to make crucial decisions about the appropriate division of adjudicative labor between state and federal governments. But that faith is backed by the limits that the Framers imposed on the legislative process: To become law, a bill must survive bicameralism and presentment.<sup>101</sup> These procedural requirements are among the most ruthlessly policed

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"arising under" jurisdiction until 1914. *Id.* at 1586. As with any orthodoxy, the traditional view has its discontents and exceptions. *See, e.g.,* Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1507 (1989) (arguing that Congress must afford at least one federal court jurisdiction over cases dealing with a federal question or involving admiralty or public ambassadors); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 753, 793–94 (1984) (arguing that Congress must assign essentially any case within the federal judicial power to the jurisdiction of a federal court); *see also* *Boumediene v. Bush*, 553 U.S. 723, 786 (2008) (establishing that the Suspension Clause forbids the political branches from stripping lower federal courts of jurisdiction over habeas petitions from detainees at Guantanamo Bay); Lumen N. Mulligan, *Did the Madisonian Compromise Survive Detention at Guantánamo?*, 85 N.Y.U. L. REV. 535, 535 (2010) (noting that *Boumediene* demands the existence of a lower federal court capable of finding facts).

100. Even if Congress declined to create and empower lower federal courts, oppression of minorities could be checked by vigorous appellate review of state court decisions by life tenured justices of the Supreme Court. *See* Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 112–23 (1997). But the effectiveness of such review would be limited by appellate deference: a state trial court's factual findings may be difficult to contradict on appeal. Article III, § 2 cl. 2 of the Constitution also allows Congress to make "exceptions" to the Supreme Court's appellate jurisdiction.

101. U.S. CONST. art. I, § 7, cl. 2–3.

lines in the scheme of separation of powers,<sup>102</sup> and they ensure that a bill can only become law if it commands the support of bodies designed to represent the concerns of large and small states alike.<sup>103</sup>

A scheme that undermines the independence of adjudicators undermines the integrity of this process. When legislators exert political influence over judges, they shape adjudications—and manipulate the content of the law—while evading the constitutional requirements for creating law: bicameralism and presentment.<sup>104</sup> When Congress decides to assign a claim to a dependent non-Article III federal tribunal, it paves the way for such evasion. Once legislators have accomplished this, legislators need not pass a statute to alter the substantive rights protected by state common law; they simply can pressure the adjudicator.<sup>105</sup> If it is truly necessary to alter substantive rights,

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102. See, e.g., *Clinton v. City of New York*, 524 U.S. 417, 448–49 (1998) (striking down “line item veto”); *INS v. Chadha*, 462 U.S. 919, 957–59 (1983) (striking down “legislative veto”).

103. See *Chadha*, 462 U.S. at 950.

104. Similar arguments have been advanced regarding legislators’ efforts to shape adjudications by generating committee reports and other forms of legislative history. See, e.g., Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 29–37 (Amy Gutmann ed., 1997) (noting conflict between use of legislative history and the constitutional requirements for passing laws).

105. The Due Process Clause offers a limited shield. Crass congressional pressure on adjudicators handling a particular dispute could violate the due process rights of the parties to the proceedings. See *Pillsbury Co. v. FTC*, 354 F.2d 952, 963 (5th Cir. 1966). But more subtle pressures would go unchecked. For example, Congress could make its displeasure with an outcome known by making structural changes to an agency and eliminating the position of the adjudicator. The threat of such action could pressure adjudicators who lack the protection of life tenure. If the adjudicator’s position is dependent on regular reauthorization by Congress, the bicameralism requirement would be completely defeated: Either house of Congress, acting alone, could defeat the reauthorization simply by refusing to pass it. As a result, either house could pressure the adjudicator and thus shape the content of the law without the consent of the other body.

It is difficult to imagine a national politician being interested in the outcome of the dispute between Anna Nicole Smith and her stepson. But national politicians may well have an interest in the outcomes of certain bankruptcies. For example, the Obama Administration essentially determined how the United Auto Workers’ union would be treated in the reorganizations of GM and Chrysler. The resulting deals arguably offered significant advantages to the union, though they did not go farther than is justifiable under existing law. See Adam J. Levitin, *In Defense of*

Congress can do so by statute, even where the original rule of decision was provided by state law.<sup>106</sup> Applying Article III limits only Congress's ability to shape substantive outcomes without bothering to pass a statute. Given the importance of state-law claims to the constitutional scheme, it is not unreasonable to ask that Congress take the extra trouble.

State-law claims have a special function in protecting the rights of citizens and the prerogatives of state governments. But they can serve that function only when they are adjudicated by officials who are independent from the federal political branches. As a result, Chief Justice Roberts's opinion for the Court was on solid footing when it used the state-law origins of the claim in its Article III analysis.

*Aneil Kovvali*

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*Bailouts*, 99 GEO. L.J. 435, 486–87 (2011) (noting that union was given favored access to investment opportunities, resulting in greater than normal returns). See generally Stephen J. Lubben, *No Big Deal: The GM and Chrysler Cases in Context*, 83 AM. BANKR. L.J. 531 (2009) (rejecting arguments that the deals violated existing bankruptcy law).

106. Examples abound in bankruptcy law. Under 11 U.S.C. § 502(b)(6), for example, claims by landlords “for damages resulting from the termination of a lease of real property” are capped using a formula based on rent. The lease relationship and the damages that would normally apply under it are defined by state law. See, e.g., *United Airlines, Inc. v. HSBC Bank USA, N.A.*, 416 F.3d 609, 615 (7th Cir. 2005). But the federal statute provides an overlay that alters the substantive rule, and the Supreme Court has upheld this arrangement against constitutional challenge. See *Kuehner v. Irving Trust Co.*, 299 U.S. 445, 451 (1937).