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## Article

# Reconceptualizing Non-Article III Tribunals

Jaime Dodge<sup>†</sup>

### INTRODUCTION

Article III is so fundamental to our system of government that no body—not Congress or the Executive, nor even the judiciary itself—has the constitutional authority to consent to the removal of the judicial power to another branch.<sup>1</sup> Even the “mildest . . . intrusion” could “compromise the integrity of the system of separated powers and the role of the Judiciary in that system, even with respect to challenges that may seem innocuous at first blush.”<sup>2</sup> Yet, the modern Article III doctrine facially contradicts this guarantee. Rather than prohibiting any incursion,<sup>3</sup> the existing doctrine instructs courts to weigh the en-

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<sup>†</sup> Assistant Professor of Law, University of Georgia. I am greatly appreciative for the selection of this paper for presentation at the Federal Courts Junior Scholars Workshop, to the many participants at the Emory-UGA Faculty Research Workshop, and to the faculty colloquium at Notre Dame Law School for their generous feedback and comments. I am indebted to Amy Conney Barrett, AJ Bellia, Bob Bone, Dan Coenen, Matt Hall, Richard Fallon, Randy Kozel, Bo Rutledge, Matthew Stephenson, Jay Tidmarsh, Sasha Volokh, Rory Weeks, Mike Wells, and Sonja West for their excellent counsel in the development of this draft. I am also grateful to my superb research assistants, Maggy Randels, Jen Williams, and Koleen Sullivan. Copyright © 2015 by Jaime Dodge.

1. *Stern v. Marshall*, 131 S. Ct. 2594, 2608 (2011).
2. *Id.* at 2620; *accord* *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 848 (1986) (describing the crucial role of Article III in protecting “the role of the independent judiciary within the constitutional scheme of tripartite government’ and [further safeguarding] litigants’ ‘right to have claims decided before judges who are free from potential domination by other branches of government’” (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583 (1985))).
3. *Schor*, 478 U.S. at 856–57; *accord* *Union Carbide*, 473 U.S. at 590–91 (“[T]he requirements of Art. III must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to

croachment on Article III values by non-Article III tribunals.<sup>4</sup> What could prompt this acquiescence, given the importance the Court has attached to strict preservation of Article III?

The Supreme Court expressly rooted its doctrine in a pragmatic accommodation of the modern administrative state.<sup>5</sup> The Court identified the added value of specialized adjudicators,<sup>6</sup> incorporation of appropriate dispute resolution (ADR)<sup>7</sup> mechanisms,<sup>8</sup> and streamlined procedure<sup>9</sup> as unique benefits of non-Article III tribunals.<sup>10</sup> Recognizing the connection between substance and procedure, the Court held that non-Article III tribunals thus aided Congress in attaining the substantive goals of its regulatory regime.<sup>11</sup> Unable to accommodate these

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specialized areas.” (citing *Palmore v. United States*, 411 U.S. 389, 407–08 (1973))).

4. See *Union Carbide*, 473 U.S. at 587–88, 593–94; see also *Schor*, 478 U.S. at 856–57.

5. *Schor*, 478 U.S. at 851 (“In determining [whether] . . . a non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch, the Court has declined to adopt formalistic and unbending rules. . . . [Such rules] might . . . unduly constrict Congress’ ability to take needed and innovative action pursuant to its Article I powers.”); *Union Carbide*, 473 U.S. at 589 (describing Article III doctrine as reflecting “a pragmatic understanding” of the separation of powers).

6. See *Schor*, 478 U.S. at 845–46.

7. Here, the term “appropriate dispute resolution” is used instead of “alternative dispute resolution” in keeping with the modern scholarly consensus that the focus of ADR is upon selecting the right mechanism for resolving disputes, and the recognition that almost all disputes are ultimately resolved not through dispositive motion practice or trial but through the “alternative” methods of mediation and negotiation—inverting the traditional conception of which mechanism is the alternative and which is the general rule. See, e.g., Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 672 (1986) (introducing “appropriate dispute resolution” terminology); Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1871 (1997) (acknowledging the transition from the use of the term “alternative” to “appropriate dispute resolution”).

8. *Union Carbide*, 473 U.S. at 594 (“To hold otherwise would be to erect a rigid and formalistic restraint on the ability of Congress to adopt innovative measures such as negotiation and arbitration with respect to rights created by a regulatory scheme.”).

9. *Crowell v. Benson*, 285 U.S. 22, 46 (1932) (“To hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task.”).

10. *Schor*, 478 U.S. at 856–57.

11. See *id.*, at 847–48; *Union Carbide*, 473 U.S. at 589–90.

structures within the traditional, categorical approach,<sup>12</sup> the Supreme Court created a new balancing test in which the incursion on Article III values is weighed against the benefits of non-Article III adjudication in aiding Congress in attaining its substantive regulatory aims.<sup>13</sup>

But Congress, by definition, did not create the causes of action that arise under state or common law.<sup>14</sup> As a result, it is more difficult to utilize this regulatory design rationale to justify non-Article III adjudication of these claims. Moreover, the Court had long identified state and common law claims as the most fundamental claims at the heart of the irremovable jurisdiction of the Article III courts,<sup>15</sup> making the burden in this area a heightened one.<sup>16</sup> Another basis would need to be utilized if these claims were to be heard in non-Article III federal tribunals. As to these claims, the Court relied on private consent.<sup>17</sup> If the private parties expressly or impliedly consented to the non-Article III tribunal's jurisdiction, then the tribunal could hear not only federally-created claims but also any "intertwined" state or common law claim.<sup>18</sup> Under this doctrine, Congress may now authorize the removal of any claim—regulatory, state, or common law—from the Article III courts.<sup>19</sup> In short, no claim is irrevocably guaranteed the protections of Article III.

With the sanction of the modern doctrine, Congress has turned to non-Article III tribunals to resolve an increasingly broad swath of claims. Today, tribunals do not merely process small-value entitlements like Social Security checks or taxes, but instead are Congress's preferred mechanism for addressing

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12. *Union Carbide*, 473 U.S. at 587 (noting that under the old test "the constitutionality of many quasi-adjudicative activities carried on by administrative agencies . . . would be thrown into doubt").

13. *Schor*, 478 U.S. at 856–57; see *Union Carbide*, 473 U.S. at 592.

14. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855).

15. See, e.g., *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 449–50 (1977); *Crowell v. Benson*, 285 U.S. 22, 51 (1932); *Ex parte Bakelite Corp.*, 279 U.S. 438, 450 (1929); *Murray's Lessee*, 59 U.S. (18 How.) at 284.

16. See *Schor*, 478 U.S. at 850–51, 856–57.

17. *Id.* at 848–49; *Stern v. Marshall*, 131 S. Ct. 2594, 2608 (2011).

18. *Schor*, 478 U.S. at 843–44; see also *infra* Part II.

19. *Stern*, 131 S. Ct. at 2608, 2613–14; *Schor*, 478 U.S. at 844 ("[T]o require a bifurcated examination of the single dispute 'would be to emasculate if not destroy the purposes of the [Act] to provide an efficient and relatively inexpensive forum for the resolution of disputes in futures trading.'").

some of our nation's greatest challenges and crises.<sup>20</sup> This invocation of customized dispute resolution processes comports with the widely held scholarly view that customization provides superior remedies in a more timely and efficient manner than the default rules of civil litigation.<sup>21</sup> Even more importantly, like private ADR mechanisms, publicly created dispute resolution systems can achieve goals transcending the mere adjudication of rights. For example, creation of the September 11 Fund provided a national expression of empathy, unity, and patriotism.<sup>22</sup> The concurrent modification of rights and remedies insulated likely defendants from liability risks that Congress ostensibly deemed incompatible with the public interest.<sup>23</sup> Moreover, because consent is typically a feature of these systems, they hold not only the promise of increased legitimacy but must also appear superior ex ante to traditional litigation to every participating plaintiff and defendant.<sup>24</sup>

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20. See, e.g., Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001) (codified as amended at 49 U.S.C. § 40101 note (2012)). For similar programs, see Smallpox Emergency Personnel Protection Act of 2003, Pub. L. No. 108-20, 117 Stat. 638 (codified at 42 U.S.C. § 239-39h (2012)); Radiation Exposure Compensation Act, Pub. L. No. 101-426, 104 Stat. 920 (1990) (codified as amended at 42 U.S.C. § 2210 note (2012)); Public Safety Officers' Death Benefits Act of 1976, Pub. L. No. 94-430, 90 Stat. 1346 (codified as amended at 42 U.S.C. § 3796 (2012)); Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (codified as amended at 50 U.S.C. app. § 1989 (2012)) (providing restitution for Japanese-Americans interned during WWII); Countermeasures Injury Compensation Program, 42 C.F.R. § 110 (2013); see also *infra* Part II.

21. See, e.g., Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723, 744-46 (2011); Gary Lawson, *Stipulating the Law*, 109 MICH. L. REV. 1191, 1203-04 (2011); Robert J. Rhee, *Toward Procedural Optionality: Private Ordering of Public Adjudication*, 84 N.Y.U. L. REV. 514, 516-17 (2009); Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 856 (2006).

22. See Kenneth R. Feinberg, *Response to Robert L. Rabin*, September 11 Through the Prism of Victim Compensation, 106 COLUM. L. REV. 483, 485-86 (2006).

23. See Robert L. Rabin, *September 11 Through the Prism of Victim Compensation*, 106 COLUM. L. REV. 464, 464-65 (2006) (reviewing KENNETH R. FEINBERG, *WHAT IS LIFE WORTH?: THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11* (2005)) (noting that Congress was predominantly concerned with protecting airlines from liability).

24. See generally Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992, 2032-33 (2012) (describing questions and test cases about fairness of compensation and procedure raised prior to claimants' agreement to participate in the September 11 and BP oil spill funds).

But to describe these benefits is not to draw any conclusion about their coherence with the constitutional limits imposed upon Congress's creation of these non-Article III tribunals.<sup>25</sup> The rise of these new tribunal structures raises pressing questions about the content of constitutional limitations imposed by Article III. Indeed, at times Congress has stated that it undertook the creation of a non-Article III tribunal not to further a regulatory aim, but for the express purpose of avoiding disfavored outcomes in the Article III courts.<sup>26</sup> Troublingly, the application of the existing doctrine to these new tribunals suggests that these criteria not only do not attain the intended objectives but also affirmatively incentivize the precise exertions of congressional power that Article III's drafters sought to preclude.

Against this backdrop, the modern doctrine has been heavily criticized as irreconcilable with the text of the Constitution for chipping away at the separation of powers and checks and balances of the Constitution, undermining the ability of the constitutional courts to check the political branches.<sup>27</sup> The

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25. Like the Supreme Court opinions described above, this Article utilizes the term "non-Article III tribunal" capaciously to refer to all non-Article III adjudicative tribunals, including both agency adjudication and legislative courts. In addition, this Article incorporates the Court's contrasting discussion of non-Article III personnel within the Article III system—most notably special masters and magistrate judges—acting as adjuncts to the Article III judges.

26. See KENNETH R. FEINBERG, WHO GETS WHAT: FAIR COMPENSATION AFTER TRAGEDY AND FINANCIAL UPHEAVAL 41–42 (2012); see also *infra* Parts II, III.

27. Many have remarked that almost every federal courts scholar has tackled the constitutionality and limits of legislative courts and non-Article III adjudication; for a mere sampling of approaches, see, for example, Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1500–01 (1990); Paul M. Bator, *The Constitution As Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 234–35 (1990); Jesse Choper & John Yoo, *Wartime Process: A Dialogue on Congressional Power To Remove Issues from the Federal Courts*, 95 CALIF. L. REV. 1243, 1246–47 (2007); David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 54–55 (1975); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 917–18 (1988); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1246–48 (1994); Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 944–46 (2011); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 234 (1985); Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 563–65 (2007); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United*

Court has itself recognized that the existing doctrine is replete with “frequently arcane distinctions and confusing precedents,”<sup>28</sup> which “do not admit of easy synthesis,”<sup>29</sup> and thus “fails to provide concrete guidance” as to the legality of certain tribunal schemes.<sup>30</sup> Yet, despite granting certiorari on numerous Article III cases in recent terms,<sup>31</sup> the Court has been unable to articulate a revised balancing test that resolves these concerns with the modern doctrine without undermining the Court’s stated desire to promote legislative innovation and litigant autonomy.

But what if the twin ideals of innovation and autonomy that justified the encroachment upon Article III and the burdens of an unpredictable doctrine were entirely misplaced?

This Article makes precisely that claim: both the modern doctrine and its substantial body of scholarly literature are based on fundamental misperceptions about the institutional design of the Article III courts. The “unique” procedural innovation possible in non-Article III tribunals is not only also possible in Article III courts, but already in common use.<sup>32</sup> Moreo-

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*States*, 118 HARV. L. REV. 643, 648 (2004); Martin H. Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 201 (1983); Richard B. Saphire & Michael E. Solimine, *Shoring Up Article III: Legislative Court Doctrine in the Post CFTC v. Schor Era*, 68 B.U. L. REV. 85, 87–88 (1988).

28. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583 (1985) (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring) (plurality opinion)).

29. *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 847 (1986).

30. *Stern v. Marshall*, 131 S. Ct. 2594, 2615 (2011); *accord Schor*, 478 U.S. at 847.

31. *See, e.g.*, *Clapper v. Amnesty Int’l U.S.A.*, 133 S. Ct. 1138, 1146 (2013) (addressing the cases and controversies requirement and standing); *Elgin v. Dep’t of Treasury*, 132 S. Ct. 2126, 2140 (2012) (holding that a statutory review regime precluded Article III district court jurisdiction); *Stern*, 131 S. Ct. at 2620 (holding that bankruptcy court review of a state law counterclaim in a bankruptcy case violated Article III); *United States v. Denedo*, 556 U.S. 904, 917 (2009) (finding that Article I military appellate courts have jurisdiction to hear claims for post-conviction relief); *Boumediene v. Bush*, 553 U.S. 723, 795, 798 (2008) (holding that military tribunals did not provide an adequate substitute for the writ of habeas corpus); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 120–21 (2007) (analyzing limitations upon Article III review of executive branch’s patent decisions); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 202 (1994) (addressing whether a statutory review scheme precludes a district court from exercising subject matter jurisdiction over a pre-enforcement challenge to the statute).

32. *See Stern*, 131 S. Ct. at 2615 (stating that courts have broad jurisdiction and are experts in common law); *cf. Lawson, supra* note 21, at 1203–04,

ver, far from acting as a bulwark of autonomy,<sup>33</sup> the use of consent as a basis for non-Article III adjudication has repeatedly resulted in Congress utilizing its power as systems designer to coercively obtain consent to modifications that would otherwise be unconstitutional.<sup>34</sup> This Article sets forth a case that the foundational assumptions on which the two pillars of current doctrine are built—the unique power of innovation outside Article III and consent—are not merely under-theorized, but instead are simply wrong. This claim rests not only upon the assumptions' contravention of modern procedural theory but also on existing and incontrovertible structural features of our judicial system.

Recognizing that the judicial system has the capacity to meet every one of the needs identified as justifying non-Article III tribunals raises substantial questions about the validity of the existing doctrine's accommodation toward those tribunals. But it does not mean that we must prohibit non-Article III tribunals entirely nor that they have no unique value. Instead, it raises a set of second-generation questions that are far deeper and more complex than those currently addressed by the courts or scholars in assessing the rationale for, and resulting limits upon, the use of these tribunal structures.

Part I provides an overview of the origins of the problem posed by Article III through the lens of the Supreme Court's evolving doctrine. This discussion explores the Court's rejection of the formalism of the early doctrine's categorical test based upon an increased appreciation of the interaction of substance and procedure.

Part II argues that the Court's stated rationale of furthering procedural innovation cannot stand; indeed, every type of innovation identified by the Court is already available within the Article III courts. This Part then analyzes the doctrinal test's outcomes, revealing that it is not consistent with the

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1210 (describing how parties have some control in Article III courts through the use of stipulations).

33. See, e.g., *Schor*, 478 U.S. at 855 (noting that separation of powers concerns are diminished where the non-Article III tribunal is selected with party consent).

34. See Rabin, *supra* note 23, at 464–65 (noting that Congress was predominantly concerned with protecting airlines from liability). See generally Sant'Ambrogio & Zimmerman, *supra* note 24, at 1995, 2032–33 (describing how agencies often lack the ability to create aggregate claims and thus experiment with informal aggregation, which raises questions about transparency and fairness of compensation and procedure).



goals identified by the Court. This Part concludes by identifying the normative goals the existing doctrine is actually furthering and then exploring the extent to which these goals are consistent with the Court's interpretation of the structural role of Article III.

Part III then turns to the individual protections of Article III. The Court and commentators have consistently assumed that allowing individuals to waive their Article III rights furthers autonomy interests, while posing no threat to the structural role of the constitutional courts.<sup>35</sup> This Part argues that these assumptions overlook the power of pairing substantive and procedural terms, such that individuals that refuse to consent to a waiver of their Article III rights are subjected to diminished substantive rights or procedural barriers, in an attempt to coerce consent to non-Article III tribunal determinations that would otherwise be unconstitutional. This Part demonstrates that, far from being hypothetical, these provisions are already included in a number of enabling statutes that create non-Article III tribunals.

#### I. THE PROBLEM OF ARTICLE III DOCTRINE IN A WORLD OF NON-ARTICLE III ADJUDICATION

Why can we not simply enforce Article III as written? The language seems clear<sup>36</sup>: "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 Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office."<sup>37</sup>

The simple answer is that from the earliest days of our nation, Congress has created tribunals that decide disputes but which lack the mandated salary and tenure protections.<sup>38</sup> The courts readily accepted these early tribunals,<sup>39</sup> whether as a reflection of early constitutional understandings or mere pragma-

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35. See *Schor*, 478 U.S. at 843–44; *Stern*, 131 S. Ct. at 2608.

36. See, e.g., Fallon, *supra* note 27, at 916 ("By nearly universal consensus, the most plausible construction of this language would hold that if Congress creates any adjudicative bodies . . . it must grant them the protections of judicial independence that are contemplated by [A]rticle III.").

37. U.S. CONST. art. III, § 1 (emphasis added).

38. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 222–23 (5th ed. 2007).

39. See, e.g., *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 522 (1828).

tism—or, more likely, a degree of both. Thus, for two centuries, the challenge of Article III has been to articulate a test for understanding in which circumstances these tribunals are consistent with the Constitution. Of course, with the passage of time, both the roles of the judiciary and the other branches have developed in ways that arguably depart from the vision of the Founders, adding further complexity.<sup>40</sup> Each line of scholarship and interpretation has added richness to the debate, yet none have proven able to obtain the decisive endorsement of the Supreme Court.<sup>41</sup>

This Part provides a brief roadmap of the shifting Article III doctrine. Section A focuses upon the initial, categorical approach to analyzing the use of non-Article III tribunals. Section B explores the motivations for the transition to a balancing approach and the criticism this approach has engendered from scholars and the Court alike. Underlying this historical discussion, the Part focuses upon identifying the assumptions about the nature of the judicial form and institutional structure that led to the development of the doctrine, as a foundation for the analysis that follows in Part II and III of the fit between these normative aims and the resulting doctrine.

#### A. THE CATEGORICAL, PUBLIC-PRIVATE RIGHTS APPROACH

As early as the first session of the First Congress, non-Article III tribunals and officers were granted the authority to decide a number of issues and disputes that were seemingly within the ambit of the judicial power.<sup>42</sup> One set of these early claims involved the administrative determination of amounts due to or from the government; for example, customs duties<sup>43</sup> and veterans benefits.<sup>44</sup> But other disputes involved matters that appeared much more judicial in nature, as with the au-

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40. See, e.g., *infra* Part II.E (describing Congress's expanded role in the modern administrative state).

41. See, e.g., *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583 (1985) (“An absolute construction of Article III is not possible in this area of ‘frequently arcane distinctions and confusing precedents.’” (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring) (plurality opinion))).

42. Fallon, *supra* note 27, at 919–20.

43. See Act of July 31, 1789, ch. 5, I Stat. 29; Act of Sept. 1, 1789, ch. 11, I Stat. 55.

44. See Act of Sept. 29, 1789, ch. 24, I Stat. 95.

thorization for military courts martial<sup>45</sup> and territorial courts,<sup>46</sup> neither of which utilized Article III judges although they indisputably functioned as courts.

In *Murray's Lessee*, the constitutionality of these non-Article III structures came before the Court in the form of a challenge to the Treasury Department's determination of a deficiency owed by a customs collector and resulting property sale.<sup>47</sup> Explaining the constitutionality of the non-Article III determination, the Court articulated the "public rights" doctrine.<sup>48</sup> This approach identified three categories of disputes, which each received different constitutional protections. First, there are those disputes that are not susceptible to Article III determination, and thus Congress cannot subject them to Article III judicial determination. Second, there are those disputes that are wholly within the judicial power, and which Congress cannot withdraw from the Article III courts. These disputes were defined as "any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty."<sup>49</sup> Third, there exists a category of disputes that could be subject to judicial determination but which are equally susceptible to legislative or executive determination.<sup>50</sup> As to this final category of claims, denominated as matters involving "public rights," Congress "may or may not bring within the cognizance of the courts of the United States, as it may deem proper."<sup>51</sup>

Over time, the public rights exception was further clarified (or, some would say, expanded) to include any matter "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments."<sup>52</sup> In contrast, matters of "private right, that is, of the liability of one individual to another," remained exclusively within the judicial power.<sup>53</sup> By 1932, Congress had delegated its power to executive officers for non-Article III determination of a variety of matters related "to in-

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45. See David M. Schlueter, *The Court-Martial: An Historical Survey*, 87 MIL. L. REV. 129, 150 (1980).

46. See *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 512 (1828).

47. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 274-76 (1855).

48. *Id.* at 284.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Crowell v. Benson*, 285 U.S. 22, 50 (1932).

53. *Id.* at 51.

terstate and foreign commerce, taxation, immigration, the public lands, public health, . . . pensions,” and benefits payments, among others.<sup>54</sup> Yet, as Congress relied upon non-Article III adjudicators in an increasingly broad swath of claims, it began to test the boundaries of the categorical approach by transferring cases involving disputes between private parties to agency adjudicators. How would the Court respond to these new regimes?

#### B. THE MODERN BALANCING APPROACH

After more than a century of use, the Court abandoned the categorical, public-private rights approach in favor of the balancing test, holding that substance must predominate over formal categorization.<sup>55</sup> The doctrinal shift to the balancing test expressly recognized the role of Congress as systems designer as part and parcel of Congress’s Article I powers to enact public regulatory schemes.<sup>56</sup> In making this shift, the Court expressly articulated its fear that continued perpetration of a categorical test would “erect a rigid and formalistic restraint on the ability of Congress to adopt innovative measures such as negotiation and arbitration with respect to rights created by a regulatory scheme.”<sup>57</sup> It was thus a fear of encroaching upon Congress’s role as systems designer, in an era of burgeoning use of ADR that led to the adoption of the current balancing test.

In *Stern v. Marshall*, Chief Justice Roberts clarified the new doctrine that Justice O’Connor had announced in *Thomas v. Union Carbide* by explaining “what makes a right ‘public’ rather than private is that the right is integrally related to particular federal government action.”<sup>58</sup> With this restatement, cases “in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency’s authority” are public rights cases, which may be adjudicated before a non-Article III tribunal at Congress’s election.<sup>59</sup> Initially this power was applied to cases in which “[a]ny right to compensation . . . results from [federal

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54. *Id.*

55. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 587 (1985).

56. *Id.* at 593–94.

57. *Id.* at 594.

58. *Stern v. Marshall*, 131 S. Ct. 2594, 2598 (2011); *accord* *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2323 (2011); *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 844, 856 (1986).

59. *Stern*, 131 S. Ct. at 2613.

statute] . . . and does not depend upon or replace a right to such compensation under state law.”<sup>60</sup> But just a year later, the Supreme Court clarified that state and common law claims that were intertwined with the statutory claim could be properly adjudicated by a non-Article III tribunal with the consent of the parties, in order to prevent frustrating Congress’s legislative aims.<sup>61</sup>

It may therefore be unsurprising that, as Justice Scalia noted in his recent concurrence in *Stern v. Marshall*, in less than three decades of use, the balancing test has been variously comprised of over a half-dozen different factors—suggesting the unworkability of the test.<sup>62</sup> The majority opinion in *Stern* similarly conceded the necessity of clarifying the doctrine, as the balancing test “fails to provide concrete guidance” to parties about the ambit of public and private rights, and in turn the constitutionality of particular non-Article III adjudications.<sup>63</sup> Scholars have likewise described the Court’s Article III doctrine as “troubled, arcane, confused and [as] confusing as could be imagined.”<sup>64</sup>

Despite narrowly deciding the issue and reserving clarification of the doctrine for another day, the Roberts Court hinted at its view of the doctrine. The majority suggested a concern with ending the slippery slope of the past in which the permissible scope of non-Article III adjudication broadened, seemingly as a pragmatic response to the realities of the administrative state rather than a principled consideration of the Constitution’s requirements and law.<sup>65</sup> In closing, Chief Justice Roberts provided a warning:

A statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely. ‘Slight encroachments create new boundaries from which legions of power can seek new territory to capture.’ Although ‘[i]t may be that it is the obnoxious thing in its mildest and least repulsive form,’ we cannot overlook the intrusion: ‘illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.’<sup>66</sup>

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60. *Union Carbide*, 473 U.S. at 584.

61. *Schor*, 478 U.S. at 856.

62. *Stern*, 131 S. Ct. at 2621 (Scalia, J., concurring).

63. *Id.* at 2615 (majority opinion).

64. Bator, *supra* note 27, at 239.

65. *See Stern*, 131 S. Ct. at 2614, 2620.

66. *Id.* at 2620 (citations omitted).

While the Roberts Court has shown its willingness to rethink the doctrine,<sup>67</sup> any revision may lead simply to another round of doctrinal critique and revision if we do not have an accurate understanding of the magnitude of the problem. Indeed, the Court has already been called upon to clarify how the courts are to respond to the limits upon non-Article III adjudication articulated in *Stern*.<sup>68</sup> Myriad constitutional critiques have been offered by the Court and constitutional scholars, which this Article does not seek to recapitulate. Instead, this Article turns to the more fundamental question of whether the pragmatic justifications identified by the Court for upholding non-Article III tribunals can bear the weight the current doctrine places upon them.

## II. THE STRUCTURAL ROLES OF ARTICLE III

As detailed in Part I, the Supreme Court abandoned the categorical test out of a pragmatic concern with allowing innovation in dispute resolution, in the form of both ADR and specialized tribunals. Yet, as detailed in Section A, the Article III courts already have the capacity to incorporate all of these purportedly unique features of tribunals. This capacity is not merely theoretical, but already in place throughout the Article III judiciary. The value of non-Article III adjudication should then not rest upon the fallacy of innovation. Moreover, as explored in Section B, the emerging reliance upon non-Article III tribunals risks not only disturbing the balance of powers but also undermining the fulfillment of those powers.

This is not to say that there is no value in non-Article III adjudication. Rather, the value of tribunals has simply been miscategorized over time. Section C explores the unique values provided by the non-Article III courts within our constitutional system, given the definitional roles of the competing branches. Section D then identifies the consequences that the error in defining the role of non-Article III tribunals has had for the narrowness test<sup>69</sup> and intertwining doctrine.<sup>70</sup> Finally, Section E concludes by demonstrating that the approach suggested by modern procedure and ADR comports precisely with the initial

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67. *See, e.g., id.* at 2594 (recognizing that the jurisprudence of the public rights doctrine lacks clarity, but finding that the present case is so distinct that no opinion on the doctrine's application in other contexts is required).

68. *See Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165 (2014).

69. *See supra* text accompanying note 60.

70. *See supra* text accompanying note 61.

articulation of the doctrine in the earliest Article III cases—suggesting the robustness of the approach, even as the roles of government have developed over time.

#### A. DISPELLING THE MYTH OF UNIQUE, NON-ARTICLE III INNOVATION

The Supreme Court's expansion of agency adjudication expressly derived from an understanding that agencies had superior factual expertise relating to particular disputes and were granted deference with respect to their legal interpretations of the implementing statute.<sup>71</sup> As the Court recognized, district court judges are generalists, whereas agencies are specialized bodies.<sup>72</sup> It therefore followed that the agency had greater expertise with respect to the particular subject matter.<sup>73</sup>

Under this current doctrine, the same test is applied to both non-agency legislative courts, which exist solely or primarily for the purpose of adjudication, and agencies.<sup>74</sup> Yet, many have noted that the Court has routinely approved of agency adjudication, while frequently striking down legislative courts.<sup>75</sup> The amorphous notion shared by the doctrine and commentators is that legislative courts are somehow more troubling than agency adjudication.<sup>76</sup> This intuition, captured in commentary

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71. See, e.g., *Crowell v. Benson*, 285 U.S. 22, 49–50 (1932) (stating that Congress may employ an administrative system to resolve maritime issues, but the Article III courts must retain the power to deny administrative findings that are contrary to the evidence).

72. See *id.* at 51–52 (explaining that Congress has authority to create non-Article III tribunals that serve as special tribunals over particular matters).

73. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 852, 856 (1986).

74. See, e.g., *Stern v. Marshall*, 131 S. Ct. 2594, 2611–15 (2011) (recounting the application of the public rights doctrine to cases involving the Treasury Department, Commodity Futures Trading Commission, and bankruptcy courts); CHEMERINSKY, *supra* note 38, at 222–25 (explaining that both non-agency legislative courts and agencies have been permitted to hear disputes involving United States possessions and territories, military issues, civil disputes between private citizens and the United States, and criminal matters or disputes among citizens where the non-Article III court serves as an adjunct to an Article III court).

75. See, e.g., Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 622 (1984) (asserting that a decision-maker in an agency is perceived as better insulated from political pressures and organizational responsibilities than a decision-maker in a legislative court).

76. See, e.g., Fallon, *supra* note 27, at 923–29 (discussing the tensions and similarities between agency adjudication and legislative courts with respect to

and case outcomes—yet not directly reflected in the existing Article III test—suggests a need to revisit the doctrine and its underlying assumptions. If one can identify the source of this intuition, then it may be possible to develop an alternative test more consistent with these underlying ideals and understandings.

This Section argues that the Supreme Court either identified the wrong point of comparison or that its thinking about judicial procedure prematurely ossified. The question should not have been whether the agency offered benefits relative to the district court.<sup>77</sup> Rather, the question should have been whether non-judicial adjudication offered benefits relative to judicial proceedings. This distinction is not merely semantic. By expanding the point of comparison from a generalist district court judge to the full panoply of judicial options—from magistrate judges and special masters, to multi-district litigations (MDLs) and specialized courts—the “benefit” of non-judicial tribunals is greatly reduced.

In its doctrine, the Supreme Court has frequently identified factual expertise as a key benefit of agency adjudication.<sup>78</sup> But Congress has the ability to obtain the same specialization through Article III courts as it can through Article I adjudication. First, it may generate specialization within the Article III system through the use of jurisdictional provisions, as occurs with certain federal claims, patent law, tax law, and administrative law issues.<sup>79</sup> Second, as the Court has recognized,<sup>80</sup> the court may appoint a special master or magistrate within Article

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pragmatic function and encroachment upon Article III).

77. *But see Crowell*, 285 U.S. at 50–65 (comparing the procedures used by the deputy commissioner and those used by the district courts).

78. *See, e.g., Schor*, 478 U.S. at 855–56 (noting that the Supreme Court has identified agency adjudication as expeditious, inexpensive, and expert).

79. *See* Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1111–15 (1990) (analyzing both full-time specialized courts in the Federal Circuit and the Court of International Trade and part-time Article III courts including the Temporary Emergency Court of Appeals, the Foreign Intelligence Surveillance Court, and the Court of Veterans); *cf. In re September 11 Litig.*, 600 F. Supp. 2d 549, 551 (S.D.N.Y. 2009) (upholding statutory provision granting exclusive jurisdiction for claims for damages arising out of September 11 terrorist attacks to the Southern District of New York).

80. *See, e.g., Crowell*, 285 U.S. at 51 (describing the frequent historical practice of utilizing factual experts, special masters, and commissioners to aid the Article III courts).



III to attain the same factual specialization.<sup>81</sup> Third, Congress can expressly authorize the utilization of special masters, where temporary factual specialization is desired and where it believes that the ex post selection of a special master by the court, in light of the particular nature of the dispute at issue, will provide a benefit.<sup>82</sup> Fourth, Congress may create hybrid courts that operate as adjuncts to the Article III courts. This type of arrangement is exemplified by the post-*Stern* bankruptcy courts: they serve as Article I courts as to rights arising under the Bankruptcy Code, but as adjuncts acting upon a referral from the district court as to determinations of state and common law.<sup>83</sup> Fifth, Congress can create structures that allow for the selection of particular Article III judges to develop factual specialization in a particular case or legal specialization in a particular type of case. Multi-district litigation exemplifies this type of procedural innovation. Rather than randomly assigning cases, the MDL Panel specifically selects the best-qualified Article III judge based upon expertise in complex litigation and/or the particular factual or substantive law issues raised by the litigation. All of the cases raising that issue are then referred to that single judge for consolidated pre-trial case management and motion practice—a procedural consolidation known as MDL.<sup>84</sup>

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81. See Revesz, *supra* note 79, at 1119–20 (explaining that specialized Article III courts may be an effective method for resolving routine, high-volume cases); Linda Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131, 2132–33 (1989) (discussing factual and procedural expertise these adjuncts can bring to bear upon a case, with a focus upon special masters).

82. See D. Theodore Rave, *Politicians As Fiduciaries*, 126 HARV. L. REV. 671, 684 n.60 (2013) (noting that court-appointed special masters created far more neutral processes than political officials, in the context of voter districts and gerrymandering, and arguing this had beneficial effects with respect to legitimacy); cf. Louis Kaplow, *Multistage Adjudication*, 126 HARV. L. REV. 1179, 1283 n.250 (2013) (noting that courts have the authority to appoint special masters under the Federal Rules); Brian Walker, *Lessons That Wrongful Death Tort Law Can Learn from the September 11th Victim Compensation Fund*, 28 REV. LITIG. 595, 602–03 (2009) (discussing how Feinberg's selection as Special Master influenced the Fund).

83. This approach has been adopted by a number of courts post-*Stern*. For commentary by practitioners on the impact, see *Update: Defanging Stern v. Marshall: The United States District Court for the Southern District of New York Modifies the Reference of Bankruptcy Matters To Address Issues Resulting from the Supreme Court's Ruling*, WINSTON & STRAWN LLP (Mar. 2012), <http://d4qxztsgsn706.cloudfront.net/images/content/1/1/v2/1100.pdf>.

84. See Robin J. Effron, *The Shadow Rules of Joinder*, 100 GEO. L.J. 759, 761 (2012); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court*,

As these examples illustrate, Article III structures can be customized along a number of dimensions, depending upon the particular substantive needs or preferences of Congress. First, they may be long-term appointments, as with bankruptcy judges and magistrate judges, or ad hoc, case-specific appointments as with special masters and MDL. Second, they may be appointed in advance of the dispute or may be selected post-dispute. Although this pre-/post-dispute dimension is often correlated with whether there is a desire for a standing body or instead a tailored selection of the adjudicator, there is no reason these two dimensions must be paired. Indeed, there are currently systems in which panels of potential neutrals are maintained in which case-specific selection is made simply on a rotating basis, as well as systems in which selection is made based upon relative qualification. Third, selection can focus upon factual or legal expertise, or even upon procedural or dispute resolution expertise. Fourth, one could also consider the mechanism for selection of the neutral. The Supreme Court has said it does not matter for constitutional purposes whether a non-Article III adjudicator is selected by the Article III courts.<sup>85</sup> If this is true, then we might envision not only systems in which the adjudicator is selected by the presiding district court judge, the Article III judiciary, or even with the participation of the parties, but also the potential for selection by the executive or legislative branches. These are, of course, not the only four dimensions along which institutional design and resulting normative preferences may operate, but they are instructive in illuminating the extent to which systems design allows Congress to tailor the Article III processes to meet its substantive objectives.

Given the breadth of this mere sampling of structural and procedural innovations, it is difficult to envision any Article I fact-specialization structure that could not be incorporated into the Article III system. Indeed, last term in *Arkison*, the Supreme Court expressly upheld the ability of non-Article III adjudicators to make preliminary determinations of both law and fact as entirely consistent with Article III, where those deter-

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*and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 292–93 (2013).

85. For example, the Supreme Court has allowed non-Article III adjudication by magistrate judges selected by Article III judges, *United States v. Raddatz*, 447 U.S. 667, 681–84 (1980), as well as adjudication by courts martial, where the adjudicators are not selected by Article III judges, *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 74 (1857).

minations were reviewed *de novo* by the Article III court.<sup>86</sup> Congress is not only the body responsible for the creation of the non-Article III tribunals but is also entrusted with the creation and operation of the Article III courts.<sup>87</sup> As a result, the same design principles that Congress applies to yield any superior results could frequently be incorporated within the Article III system—a point entirely overlooked in the existing doctrine.

The availability of innovation within Article III raises fundamental second-generation questions about whether the Constitution prefers non-Article III adjudicators situated in Article III over those situated in Article I or II. Yet these questions have not been considered in either the theory or doctrine because of the (erroneous) assumed unique capacities of non-Article III adjudicators. Having removed these “unique” capacities from the equation, a far more difficult constitutional question is presented. No longer can accommodation rest upon the pragmatic necessity of procedural innovation in adjudication.

But before turning to this normative question, one must also ask two threshold questions. First, what are the structural costs of permitting Congress broad powers to elect to utilize non-Article III tribunals? Second, when do non-Article III adjudicators potentially fulfill a role that may not be replicated by an Article III court. The next Sections turn to these threshold cost-benefit questions in turn.

#### B. THE STRUCTURAL COSTS OF NON-ARTICLE III TRIBUNALS

The Constitution guarantees the protections of Article III as a bulwark for the individual and the balance of powers alike. Building upon this constitutional foundation, scholars have long articulated the normative basis for this guarantee. This Section does not seek to recapitulate the familiar doctrine and existing scholarship surrounding the necessity of Article III in the balance of powers. Rather, this Section seeks to supplement these arguments, asking whether there are any additional dangers that are emerging from the perspective of modern procedure and legislation.

It has traditionally been assumed that Congress creates non-Article III tribunals to pair adjudication with an executive

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86. *Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2175 (2014).

87. *See, e.g., Livingston v. Story*, 34 U.S. (9 Pet.) 632, 656 (1835) (“[Congress’s] power to ordain and establish, carries with it the power to prescribe and regulate the modes of proceeding in such courts, admits of as little doubt.”).

or legislative function, resulting in superior outcomes.<sup>88</sup> But in recent years, Congress has created tribunals for the inverse reason: dissatisfaction with the cost and delay of the Article III court system. To the extent that Congress can side-step problems in the Article III system by using non-Article III courts, it decreases the systemic pressure toward reform, as the handful of incidents most likely to drive political pressure toward reform are treated instead through one-off legislative solutions.

The September 11 Fund is a prominent example of this phenomenon, as congressional intervention was driven not by a desire to assist victims but instead, an expressly stated desire to insulate the airline industry from anticipated expensive, protracted, non-meritorious litigation.<sup>89</sup> The concern for Congress was not the substantive worry that the airlines would be found guilty but, instead that the due process available in the constitutional courts would itself be too delayed and expensive, harming defendants' bottom lines.<sup>90</sup>

The capacity of Congress to remedy systemic problems within the Article III courts through the ad hoc removal of cases from the constitutional courts to tribunals—rather than through improved funding, or jurisdictional or procedural provisions aimed at correcting structural problems in the Article III courts—may pose a risk of impairing the development of the judiciary. Thus, allowing innovation to occur through non-Article III courts risks undermining Congress's faithful execution of its constitutionally designated role as the designer of the Article III courts.

### C. RECONCEPTUALIZING THE INSTITUTIONAL ROLE OF NON-ARTICLE III ADJUDICATION

Although the benefits of innovation and specialization are not as unique as presupposed, this does not preclude non-Article III adjudication from having other unique value relative to Article III adjudication. Returning to first principles, one might ask what essential characteristics distinguish Article III courts from other tribunals. Viewed through this lens, the dis-

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88. *See, e.g.,* *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 855–56 (1986) (explaining that Congress granted an agency jurisdiction over common law counterclaims only to ensure that the agency was able to efficiently resolve all matters within its area of expertise).

89. *See* FEINBERG, *supra* note 26, at 41–43 (describing Congress's efforts to limit lawsuits against airlines following the September 11 terrorist attacks).

90. *See id.* at 41–42.

tinct value of the constitutional courts stems from these unique, core traits: judicial processes are characterized by an independent judiciary, insulated by the structural protections of Article III, exercising decision-making authority over a case or controversy, consistent with the procedural protections granted by the Constitution, statutes, and the Federal Rules.

The first threshold area of non-Article III superiority thus stems from the requirements of Article III itself: the cases and controversies requirement.<sup>91</sup> Some disputes are inherently not suitable for reframing as a judicial lawsuit, or reframing may diminish the value of the adjudication. Advisory opinions are a common example of this dynamic, in which Congress or the President desires the courts' opinion but is unwilling to agree to be bound by the decision. Likewise, the constitutional requirement of standing, and the prudential doctrines of ripeness and mootness, may result in the Article III courts declining to hear a case. Thus, the modern interpretation of Article III creates a set of requirements which themselves may impede judicial intervention to such an extent that a non-Article III process is not just preferable, but the only constitutional option available to Congress.<sup>92</sup>

But there are also adjudicative matters as to which the non-Article III adjudicators fulfill a different role than Article III judges. Making this observation is not itself a normative judgment about which of the two types of adjudicator is superior—rather, it is to say that before we can decide which arbiter is normatively better, we must first know in which domains differences exist.

First, to the extent that a claim involves a highly routinized payment of government funds, even the most minimal level of process available within our judicial system may be more than Congress prefers. From this perspective, it is not that Article III shirks its duties to hear “mundane,” as well as

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91. U.S. CONST. art. III, § 2, cl. 1.

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The [Article III] issue has historically been posed as if Congress was a *predator*, taking jurisdiction and remedial power away from the Article III judiciary. Yet recent doctrinal answers from the Supreme Court have rejected statutes in which Congress has been a *conveyer*, giving authority to the federal courts. . . . In other words, the recent case law suggests that Article III judges have asserted the structural authority of Article III *against* congressional decisions authorizing decisionmaking by life-tenured judges.

Judith Resnik, *The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations*, 86 GEO. L.J. 2589, 2592–93 (1998).

glamorous, disputes.<sup>93</sup> Rather, it is the recognition that these payments are well within the spending power assigned to Congress; indeed, for the first few decades, Congress exerted this power itself as to a number of benefits.<sup>94</sup>

Congress may elect to retain the power to make these specific payment determinations or delegate it to the other branches. Congress has long delegated the routinized processing of these claims to the executive branch.<sup>95</sup> In making this delegation, Congress's power to delegate inherently contains the lesser power to delegate these powers to the executive, but subject them to a greater level of appellate review than would otherwise exist.<sup>96</sup>

Alternatively, Congress may convert these payments into cognizable judicial claims in the first instance—but it is not required to do so.<sup>97</sup> Indeed, from the perspective of Article III, there are strong normative reasons not to do so, given that administrative calculations have often not included the same level of process associated with the constitutional courts. Congress could of course create a federal small-claims process within the Court of Federal Claims for processing these payments.<sup>98</sup> But to do so may risk diluting due process, and in turn the legitimacy of the Article III courts. Indeed, it was these fears of diluting the special role of the Article III courts that generated the strong backlash against the proposal to make bankruptcy judges Article III judges.<sup>99</sup>

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93. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 86 n.39 (1982).

94. See Fallon, *supra* note 27, at 919–20.

95. See Nelson, *supra* note 27, at 582–83 (reviewing the origins of non-Article III adjudication and concluding that early courts relied upon Congress's power to make or delegate spending decisions, rather than relying upon sovereign immunity).

96. See Kent Barnett, *Codifying Chevmore*, 89 N.Y.U. L. REV. \_\_, \*62–\*63 (forthcoming 2015), most recent draft available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2405016](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2405016) (“[B]ecause Congress generally has the greater power to preclude judicial review of administrative action (at least for public-rights cases), it should have the lesser power of establishing the intensity of judicial review that it grants . . .”).

97. See *Stern v. Marshall*, 131 S. Ct. 2594, 2612 (2011) (noting that Congress has the power to bring public rights into or out of the judicial sphere).

98. For such a proposal, see Anthony Ciolli, *Lowering the Stakes: Toward a Model of Effective Copyright Dispute Resolution*, 110 W. VA. L. REV. 999, 1023–29 (2008).

99. See Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 760–61 (2010) (discussing fears that

Second, a class of statutory claims exists whose determination is not merely of the particular liability at stake, but instead aids an agency in fulfilling its rulemaking function. For example, adjudication may be useful to the agency in identifying areas in which clarification is needed or in experimenting with the consequences of particular policies. Far more often, adjudication becomes a component of informal rulemaking.<sup>100</sup> In this case, agency adjudication is a mechanism for fulfilling the delegation of legislative authority to the agency.

This suggests a different approach to agency adjudication, somewhat distinct from legislative courts. In Congress's fulfillment of its legislative role and its necessary and proper powers, it may directly legislate to create or abolish certain claims, or it may delegate this power to an agency tasked with filling the interstices of the statutory framework.<sup>101</sup> In contrast, legislative courts cannot claim this quasi-legislative rulemaking function. The legislative courts' power is therefore derivative only of the doctrinal tenet that congressionally created rights may be assigned to a non-Article III tribunal, as they exist at the largesse of Congress (or so the doctrine says).<sup>102</sup>

To be clear, this observation is not one of constitutional interpretation. Rather, it is an observation of institutional design, stemming from asking the question of in what circumstances non-Article III tribunals obtain ends that cannot be achieved through the constitutional courts. With these threshold observations about the nature of these competing institutions set forth, one can then turn to the normative questions they implicate and, finally, to the assessment of constitutional theory.<sup>103</sup>

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elevating bankruptcy judges would "dilute the significance, and prestige, of district judgeships").

100. For an excellent summary of adjudicative rulemaking and its interaction with informal rulemaking, see Russell L. Weaver, *Chenery II: A Forty-Year Retrospective*, 40 ADMIN. L. REV. 161, 166–70 (1988), and, more recently, Alan B. Morrison, *Administrative Agencies Are Just Like Legislatures and Courts—Except When They're Not*, 59 ADMIN. L. REV. 79, 98–118 (2007).

101. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (describing the non-delegation doctrine).

102. Many scholars have argued that agency adjudication avoids a problem of uniformity among the circuits that could promote forum-shopping. But, this concern could be remedied by specialized Article III jurisdiction, as has occurred in many areas—and thus is not an argument for agencies over courts, but simply specialization over general adjudication. For a summary of this debate, see Currie & Goodman, *supra* note 27, at 5–75.

103. Some scholars have argued that administrative agencies should not be permitted to combine rulemaking, adjudicatory, and enforcement functions. For discussion of this scholarship, see Revesz, *supra* note 79, at 1115.

Viewed in this manner, there is a second set of fundamental constitutional and normative questions that have been excluded entirely from the existing Article III doctrine. The delegation of both rulemaking and adjudicative authority to the same agency raises substantial questions of institutional design. On the one hand, one might argue that this allows a laboratory for innovation in which agencies have a far freer hand in determining how to elaborate and promulgate policy.<sup>104</sup> On the other hand, the investiture of executive, legislative, and quasi-judicial powers in the same body is contrary to the separation of powers ideal of our tri-partite system of government.<sup>105</sup> Yet, because of the doctrine's current framing, these questions have not heretofore been explored fully.

#### D. AGAINST THE DOCTRINE'S NARROWNESS LIMITATION

The existing doctrine now permits the transfer of claims between private parties to non-Article III tribunals only where that claim is created by federal statute or intertwined with a federal statutory right. Some constitutional scholars have argued that the early categorical approach became marked by generalizations rather than clear tests—and thus, that the narrowness test is simply an extension of this underlying error. Others have argued that it follows clearly from the Constitution that Congress should be able to except these cases from the Article III courts.

Recognizing the ongoing debate among federal courts scholars about the impact of the current doctrine, this Section asks what insights can be drawn from civil procedure. The analysis suggests that the existing doctrine is not consistent with the normative goals identified by the Court, but instead is too broad in certain areas and too narrow, in permitting the use of non-Article III adjudicators, in others.

##### 1. The Assignment of Intertwined Claims to Tribunals

The Court's application of a balancing test in assessing the constitutionality of non-Article III courts makes the establishment of any clear guidance somewhat tentative, as the Court

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104. See, e.g., Merrill, *supra* note 27 (arguing for the appellate review model).

105. See, e.g., William T. Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking*, 1980 DUKE L.J. 103, 104 (1980); Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 NW. U. L. REV. 1569, 1574–75 (2013).



itself has recognized.<sup>106</sup> However, some general principles can be drawn from the Court's past decisions: if Congress authorizes a tribunal to adjudicate disputes related to a particular federal regulatory framework, courts should uphold this authorization as sufficiently narrow.<sup>107</sup> In addition, "intertwined" legal claims—typically state or common-law claims whose elements are entirely resolved by the necessarily-resolved elements of the statutory claim—can also be delegated to this non-Article III body.<sup>108</sup> Put another way, Congress is no longer limited to only removing jurisdiction for public funds and statutory claims, but instead can reach essentially all private law claims if it does so through the vehicle of an intertwined statutory regime. But, if instead Congress creates non-Article III courts to allow a specialist in a particular factual area to decide disputes involving a variety of legal claims, this delegation will be struck down.<sup>109</sup>

This bifurcation along the fact/law line may hold some appeal. But this result is particularly perplexing in the wake of *Stern's* directive that neither Congress nor the judiciary can move matters of general law<sup>110</sup>—for example, ordinary state and common-law claims—outside of Article III courts because those tribunals have no more expertise in these questions of law than the Article III courts do.<sup>111</sup> Yet, the intertwining doctrine permits precisely that outcome: the removal of a claim entitled to Article III determination. This occurs as a result not of the legislature's enactment of a superseding right but instead through the enactment of a merely related statutory right or regime. In justifying this encroachment upon Article III, the Court noted that bifurcation could lead to inconsistent out-

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106. See, e.g., *Stern v. Marshall*, 131 S. Ct. 2594, 2615 (2011) (recognizing that recent Supreme Court cases have failed to provide clear guidance on the balancing test); see also Fallon, *supra* note 27, at 932 & n.114 (observing that not only does the balancing test "lack[] definition" but "[e]ven its coherence is questionable").

107. See *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 593 (1985).

108. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 54 (1989).

109. See *Stern*, 131 S. Ct. at 2615.

110. See *id.* at 2619 (reasoning that Congress, the President, and the Article III judiciary lack the power to authorize non-Article III adjudication of Article III matters).

111. See *id.* at 2614 (holding that state and common-law claims intertwined with federal rights can permissibly be adjudicated in non-Article III forums).

comes, thereby undermining the regulatory regime.<sup>112</sup> But this argument rests upon the proposition that the agency may well reach a decision contrary to the law, yet not subject to appeal to the Article III courts absent a constitutional violation.

Given the Court's oft-repeated statement that the courts are meant to decide the law, but that delegation of fact-finding to a non-Article III actor typically does not create any constitutional difficulty, what observations would civil procedure and systems design offer about the potential structure of these cases in which Article III and non-Article III claims are intertwined?

With respect to fact-finding, permitting initial fact-finding to occur in the non-Article III tribunal is not problematic—given both the tribunal's specialization and core competency and lack of Article III concern with non-constitutional facts. To the contrary, this comports with the existing structure of the courts, which frequently rely with a high degree of deference upon the recommendations of special masters, magistrate judges, and other factfinders.<sup>113</sup>

But what about allowing the agency to make legal determinations? If an agency has rulemaking power over the claim, it is easier to see that the adjudication is intertwined with the agency's executive and legislative roles. In these cases, the agency may have superior information as to its own intent in promulgating the rule in question. Moreover, it may utilize individual cases to either clarify the interstices of these rules or to resolve cases on an ad hoc basis until it becomes clear what rules should be promulgated. In these situations, the rulemaking and judicial processes may work hand-in-hand.<sup>114</sup> In these cases, the resolution of particular claims is traditionally viewed as intertwined with the legislative function, allowing the famil-

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112. *See id.* at 2615.

113. As a formal matter, the decisions of special masters and magistrates are reviewed de novo, under Federal Rules of Civil Procedure 53 and 72. However, notwithstanding the existence of de novo review, as a practical matter, the courts have rarely disturbed these findings. *See, e.g.,* *Crowell v. Benson*, 285 U.S. 22, 51–52 (1932) (“While the reports of masters and commissioners in such cases [equity and admiralty] are essentially of an advisory nature, it has not been the practice to disturb their findings when they are properly based upon evidence, in the absence of errors of law, and the parties have no right to demand that the court shall redetermine the facts thus found.” (footnote omitted)); *accord* *Exec. Benefits Ins. Agency v. Arkison*, 133 S. Ct. 2880 (2014).

114. *See Morrison, supra* note 100, at 98.

iar deference to agency interpretations of their organic statutes.

## 2. Institutional Design Considerations

However, such a deferential structure does raise a different institutional design concern. To the extent that the separation of powers exists to ensure that the executive, legislative, and judicial functions are left to separate officials, there is structural value in allowing mere deference to agency adjudication on the law. Indeed, such a separation encourages clear *ex ante* rulemaking and thus clarifies the parties' obligations, while a blending of these functions does not.<sup>115</sup> Thus, from an institutional design standpoint, some degree of oversight may be preferable. This oversight may take many forms, ranging from statutory authorization for direct review, to the availability of a constitutional challenge to a final order.

But to the extent that the tribunal is either devoid of rulemaking authority or is interpreting general law rather than its own organic statute, the case is far weaker.<sup>116</sup> The knowledge of institutional history or special knowledge of the law is then developed as a specialized outside adjudicator. As such, it is the specialization, rather than the agency or branch in which one is placed, that is providing the identified benefits. Thus, to the extent that merely a specialized tribunal is sought, these can be created within Article III through jurisdictional provisions.<sup>117</sup>

From an institutional design standpoint, the existing doctrine is thus too deferential in recognizing the superiority of any tribunal tailored to a particular federal statutory regime. But is it also too narrow? Is there a case for permitting Congress to utilize non-Article III tribunals for common fact patterns, rather than merely for common legal questions? Recent innovations in procedure suggest a number of reasons one might answer yes.

In the years since the Court developed the narrowly-tailored question-of-law test, experience has shown the value of not just consolidating similar legal claims but factual ones. The observation that factual expertise adds value even across dramatically-varying legal regimes is now incorporated into the existing litigation system. Consider multi-district litigation. For

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115. See Revesz, *supra* note 79, at 1115.

116. See *Stern*, 131 S. Ct. at 2615.

117. See, e.g., Strauss, *supra* note 75.

years class actions moved forward based upon a common legal question, but MDL is not so constrained. Instead, claims with a similar factual basis are joined even if the legal claims are very different,<sup>118</sup> permitting a single judge to become an expert in the intertwined facts of the cases, streamlining discovery and avoiding the duplication of judicial and legal resources.<sup>119</sup>

To the extent that the Supreme Court seeks to facilitate Congress's innovation through assigning factual determinations to a specialized tribunal,<sup>120</sup> the existing doctrine over-emphasizes the importance of tying this tribunal to a narrow statutory regime. The presence of a public regulatory regime in modern doctrine opens the door not only to deference on rights emanating from that statute but also to any intertwined private rights arising under the common law or state law. In contrast, the lack of a narrowly defined set of legal claims precludes Congress from utilizing the specialized tribunal as anything more than an adjunct, even if the divergent legal claims are tied to the same factual core.

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Permitting a non-Article III entity to make legal determinations pendent to factual specialization is paradoxical: Why should expertise in an area outside the concern of Article III (fact-finding)<sup>121</sup> drive acquiescence by the constitutional courts as to their primary function (legal determinations)?<sup>122</sup> Indeed, the *Stern* Court seemingly recognized as much, stating that the

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118. For an introduction to MDL, see Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 110–11 (2010).

119. See, e.g., *In re Oil Spill*, 910 F. Supp. 2d 891 (E.D. La. 2012) (defining the class broadly and indicating a complex combination of legal and factual issues for resolution by the MDL); cf. Order and Reasons: Granting Final Approval of the Medical Benefits Class Action Settlement, *In re Oil Spill*, 910 F. Supp. 2d 891 (MDL NO. 2179); Order and Judgment Granting Final Approval of Economic and Property Damages Settlement and Confirming Certification of the Economic and Property Damages Settlement Class, *In re Oil Spill*, 910 F. Supp. 2d 891 (E.D. La. 2012) (MDL NO. 2179).

120. See, e.g., *Stern*, 131 S. Ct. at 2615; *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 855–56 (1986); *Crowell v. Benson*, 285 U.S. 22, 46 (1932).

121. See, e.g., *Crowell*, 285 U.S. at 51 (noting that fact specialists are frequently employed within Article III and that their findings are typically disturbed only where there is an error of law).

122. See *id.* at 56, 64 (discussing the courts' core role in determining questions of law).

rationale for authorizing a non-Article III court to hear claims laid in the existence of a “class of questions of fact”—not law—“which are particularly suited to [the tribunal’s determination].”<sup>123</sup> In the wake of *Stern*, the courts have adapted to the limits placed upon the jurisdiction of the bankruptcy courts. Rather than withdrawing the referrals of Article III matters to the bankruptcy courts, the district courts have incorporated the bankruptcy judges as adjuncts.<sup>124</sup> Consistent with the constitutional requirements of *Stern*, Article I bankruptcy courts now cast their opinions on Article III matters as proposed orders for approval by the district courts.<sup>125</sup> Just as in the days of *Murray’s Lessee*, the courts have given great practical deference to these opinions but still retain the authority to act as the final arbiter of what the law is in the rare cases in which this check is needed.

The Court’s willingness to permit narrow delegations of adjudicative authority suggests an alternative basis for upholding these features of the administrative state. The Court is not deferring to a delegation of judicial authority; rather, it is recognizing that the method of rights enforcement for a particular federal statutory regime is a decision for Congress to make in its creation of the new right—and that it may keep this authority, vest the execution in the executive branch or an agency, or structure the right as one susceptible to judicial enforcement. From this perspective, then, Congress can properly vest adjudicative authority in the executive branch—but cannot bestow upon these non-Article III courts the ability to adjudicate even “intertwined” judicial cases and controversies. Quite simply, it cannot delegate judicial authority, but it remains free to exercise or delegate its own powers, including deciding in what form to structure the enforcement of new public rights.<sup>126</sup> This observation comports precisely with the original guidance of the Supreme Court, offered more than a century ago.<sup>127</sup>

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123. *Stern*, 131 S. Ct. at 2615.

124. See generally *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014) (upholding practice of permitting bankruptcy judges to adjudicate matters in the first instance, so long as the district court then reviewed the opinion de novo, and holding that this is not inconsistent with *Stern*).

125. See, e.g., *In re City of Detroit*, 504 B.R. 97, 135 (Bankr. E.D. Mich. 2013) (holding that *Stern* did not preclude jurisdiction).

126. See Nathan S. Chapman & Michael W. McConnell, *Due Process As Separation of Powers*, 121 YALE L.J. 1672, 1782 (2012).

127. See *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 274–76 (1855).

## E. REVISITING THE INITIAL DOCTRINAL INTUITIONS

Until the peak of the administrative state, Article III doctrine reflected a consistent intuition about the nature of non-Article III tribunals' structure and limits. As early as *Murray's Lessee*, the Supreme Court held that adjudications by non-Article III officers were constitutional where they effectuated a power granted to the executive or legislative branch,<sup>128</sup> as these were by definition not granted to the Article III courts as part of the judicial power.<sup>129</sup> While Congress could choose to delegate its own power to the judicial branch instead of the executive, its decision to do so remained entirely discretionary—and indeed would only be constitutional if framed as part of the judicial power.<sup>130</sup> Conversely, the judicial power could not be withdrawn from the Article III courts in favor of the political branches; thus, no matter that was the “subject of a suit at the common law, or in equity, or admiralty” could be removed to a non-Article III tribunal.<sup>131</sup>

This theme continued through *Ex Parte Bakelite Corp.*, with the recognition that where an adjudication is “merely in aid of legislative or executive action . . . Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.”<sup>132</sup> Thus, non-Article III tribunals could permissibly adjudicate all matters “susceptible of legislative or executive determination . . . .”<sup>133</sup> But, Congress could not remove any cases from the constitutional courts.<sup>134</sup> Thus “the true test [of whether non-Article III adjudication is constitutional] lies in the power under which the court was created . . . .”<sup>135</sup>

In *Crowell v. Benson*, the Court began to recognize the role of Congress as systems designer<sup>136</sup> and the value of utilizing non-Article III tribunals to “furnish a prompt, continuous, ex-

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128. *Id.* at 280–82 (cataloguing the various enumerated powers that cannot be exercised by the political branches without ascertaining facts and applying law).

129. *Id.* at 282.

130. *Id.* at 284.

131. *Id.*

132. 279 U.S. 438, 450–51 (1929).

133. *Id.* at 453.

134. *Id.* at 457–60.

135. *Id.* at 459.

136. 285 U.S. 22, 49 (1932) (“Congress was at liberty to draw upon another system of procedure to equip the court with suitable and adequate means for enforcing the [substantive] law . . .”).

pert and inexpensive method” of dispute resolution.<sup>137</sup> Yet, it continued to tie congressional innovation in procedure to the exertion of the legislative power, such that the scope of this power was only as broad as the legislative power.<sup>138</sup> As a result, non-Article III adjudication was only permissible “in connection with the performance of the constitutional functions of the executive or legislative departments.”<sup>139</sup> These themes continued to resonate through *Atlas Roofing*<sup>140</sup> and *Northern Pipeline*.<sup>141</sup>

Even as these conceptions were abandoned as too formalistic to promote innovation in the modern administrative state,<sup>142</sup> the Court has continued to draw upon these animating conceptions.<sup>143</sup> Most recently, in *Stern v. Marshall*, the Supreme Court analyzed the constitutionality of the delegation to the non-Article III bankruptcy courts by exploring whether the powers they exerted were within the enumerated powers granted to the political branches, or instead were merely general judicial powers.<sup>144</sup>

The modern doctrine broadened the definition of the legislative power to include not merely federally created regulatory rights but also intertwined state or common law claims. This recasting of the test was undertaken in order to permit a broader array of non-Article III adjudications. But this vague directive is widely recognized as having created confusion and uncertainty because the courts are now expressly directed to find the “right” outcome through subjective balancing of an amorphous and ever-growing set of factors.<sup>145</sup> This Part has argued that, far from its promise, the new test is less congruent

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137. *Id.* at 46.

138. *See id.* at 50–51.

139. *Id.* at 50.

140. *See Atlas Roofing Co. v. Occupational Safety & Health Review Comm’n*, 430 U.S. 442, 452–453, 462 (1977).

141. *See N. Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 64, 67–76, 78–86 (1982).

142. *See Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 594 (1985) (permitting non-Article III tribunals to adjudicate private rights claims, since “[t]o hold otherwise would be to erect a rigid and formalistic restraint on the ability of Congress to adopt innovative measures . . .”).

143. *See, e.g., Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 54–55 (1989) (focusing upon whether the claim is closely related to a valid legislative action under Article I); *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 845–46 (1986) (recognizing the adjudicative scheme as tied to the legislative power); *Union Carbide*, 473 U.S. at 584.

144. *Stern v. Marshall*, 131 S. Ct. 2594, 2612–13 (2011).

145. *Id.* at 2621 (Scalia, J., concurring).

with a functionalist or purposivist approach than its predecessor. The balancing test is both over- and under-inclusive as against the normative goals identified by the Court. In contrast, analysis of the areas in which tribunals offer potential value, reveals precise congruence with the earlier intuitions.

At a fundamental level, this Part suggests that the observations of modern systems design and procedure are consonant with the original intuitions of the First Congress and early Supreme Court doctrine. The notion that this single principle is robust enough to withstand the radical innovations in adjudication over the centuries—most recently the procedural revolutions, creation of aggregative processes, and embrace of ADR—suggests that it is worth considering whether this delegation approach may have continued force even as our modern state and conceptions of procedure continue to evolve.

Correcting the erroneous assumption about the limits of procedural innovation in the Article III courts not only undermines the basis of the modern doctrine but also suggests that the abandonment of the early doctrine's intuitions was not justified—at least when measured against the rationale provided by the Court. First, modern procedural and systems design theory comport with the original understandings and intuitions of the Supreme Court about the nature of non-Article III adjudication and the constitutional powers from which it arose—not the current doctrine. Second, that delegation approach allows the preservation of the modern administrative state but sets important limitations on its expansion. These lines cohere precisely with the insights of procedure and systems design about the cases in which non-Article III adjudication offers a benefit over Article III adjudication. Third, it reinforces, rather than weakens, the separation of powers and checks and balances inherent in the system. It provides an inviolable core of Article III jurisdiction, while simultaneously affording the political branches the ability to operate non-Article III courts. Fourth, it provides a constitutional basis for the appellate review that many scholars have opined is necessary to the preservation of our constitutional system but for which, until now, it was difficult to provide a constitutional basis that was not so over-inclusive as to invalidate broad swaths of the administrative state.

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This Part has argued that the assumptions underlying the Court's modern doctrine are inconsistent with the operation of the existing Article III judicial system. If correct, it undermines the entire foundation of the balancing test, which expressly premised the necessity of permitting encroachment upon Article III on these competing constitutional considerations. Equally important, the basis for the abandonment of the initial intuitions and conceptualization of non-Article III courts was without merit.

These insights may lead to a new round of scholarly debate. Some scholars will likely argue that these insights do not preclude the existence of other constitutional, structural, or normative reasons to abandon categorical Article III tests. Other scholars will likely argue that with these new insights it may well be the case that we can draw upon modern theory to construct a system robust enough to withstand future changes and innovation in procedure and dispute resolution while preserving the core constitutional values. But, as these debates begin, it seems clear that we must shift our analysis to these second-generation questions, given the demonstrated contradiction of the existing doctrine's fundamental assumptions with existing judicial structures and capacity.

### III. THE INDIVIDUAL'S ARTICLE III PROTECTIONS

Our legal system has long adhered to the notion that the parties to whom rights are granted are the best custodians of those rights. Thus, in keeping with broad notions of individual autonomy, parties may strategically deploy or waive the default tools of litigation consistent with their own self-interest.<sup>146</sup> The doctrine's reliance upon consent to the waiver of the individual's rights and protections under Article III is thus consistent with other waivers of procedural rights and due process protections, as well as the power of parties to opt-out of the public adjudication system and into arbitration.<sup>147</sup>

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146. See Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 510–11 (2011); Judith Resnik, *Procedure As Contract*, 80 NOTRE DAME L. REV. 593, 597 (2005); Rhee, *supra* note 21, at 516. But see Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329, 1354, 1368 (2012) (arguing arbitration often unfairly benefits one party); David A. Hoffman, *Whither Bespoke Procedure?*, 2014 U. ILL. L. REV. 389, 393–95 (2014) (suggesting scholars promised too much when they argued in favor of arbitration).

147. Cf. Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV.

In the context of private ordering, waivers of procedural rights have unquestionably enabled parties to obtain more advantageous arrangements tailored to their particular dispute than the default litigation system would otherwise provide.<sup>148</sup> But set against these benefits of private ordering are substantial difficulties based upon the inability of individuals to properly assess the impact of waivers,<sup>149</sup> particularly those embedded in standardized consumer and employment agreements.<sup>150</sup> The merits of these competing conceptions of optimal deterrence and enforcement are well-documented and beyond the scope of this Article. But, in light of these ongoing questions about the ability of individuals to meaningfully consent to procedural modifications, one could plausibly question the viability of consent as a component of the Article III balancing test.

In contrast to purely private ordering, public dispute systems design inherently involves Congress. To the extent that procedural modification has been critiqued for allowing parties to evade or under-enforce non-waivable substantive rights,<sup>151</sup>

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1420, 1422 (2008) (discussing the Supreme Court's acceptance of arbitration agreements and the difficulties in nullifying them).

148. See generally Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 308–09 (1994) (recognizing that heightened accuracy is typically obtained only at a cost and arguing that the balance between efficiency and accuracy, with its resulting impact upon deterrence, is best made on a case-by-case basis); Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 462 (2007) (arguing “for a fundamentally different conception of the rules governing litigation . . . as default rules, rather than as nonnegotiable parameters”); Scott & Triantis, *supra* note 21, at 856–78.

149. The failures are not merely the result of underinvestment or heuristic biases, but instead reflect information asymmetries compounded by unique barriers to effective consumer education present with respect to procedural terms. Many scholars have argued that individuals are inadequate protectors of their procedural rights, prompting calls for prohibitions on pre-dispute procedural waivers. Although historically private rights of action simultaneously served dual public and private purposes, effectuating both the interests in deterrence and compensation, recent procedural modifications have placed these purposes in tension. Companies have begun offering super-compensation to the individual in exchange for terms that will diminish overall deterrence, raising questions about the viability of individuals serving as de facto private attorneys general.

150. See, e.g., Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants As a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 427–30 (2006); Ronald J. Mann & Travis Siebeneicher, *Just One Click: The Reality of Internet Retail Contracting*, 108 COLUM. L. REV. 984, 990 (2008); David Marcus, *Some Realism About Mass Torts*, 75 U. CHI. L. REV. 1949, 1980–81 (2008).

151. See Dodge, *supra* note 21, at 773; Estlund, *supra* note 150, at 427–29.

these criticisms are ameliorated by congressional involvement because the determination of the optimal level of enforcement is inherently within the province of the legislative branch. Moreover, while information cost asymmetries can often prevent meaningful consideration of the choice to consent,<sup>152</sup> the public nature of these processes substantially reduces the asymmetry and permits the development of generic information assets and specialized counsel. And finally, to the extent that many regimes provide for consent to the non-Article III tribunals to occur post-dispute, concerns with ex ante undervaluation of procedural rights and lack of counsel may also be reduced.<sup>153</sup>

This is not to say that there is no concern with the viability of consent in the public dispute systems context. To the contrary, the involvement of Congress that ameliorates the concerns emerging from private ordering simultaneously gives rise to a new, unique set of concerns which has not been systemically explored in the dispute resolution and civil procedure literature.

Section A questions the traditional wisdom that the existing doctrine's preference for consent-based regimes enhances individual autonomy and outcomes. Indeed, the conventional analysis suggests that this creates competition, such that Congress must create non-Article III tribunals that are superior to the baseline provided by the courts in order to obtain participation. But, as consent has become a mechanism for Congress to obtain non-Article III adjudication of matters otherwise reserved to the constitutional courts, the opposite dynamic has occurred in some cases: Congress has diminished the substantive or procedural rights of the parties in court. Thus, rather than competing to offer a better resolution mechanism, Congress has handicapped the courts. Consent then cannot be said to establish that parties are obtaining better outcomes or process than in the constitutional courts.

Section B then turns to the conventional wisdom that while public non-Article III tribunals are a potential threat, private arbitrators do not pose any threat to Article III. This section

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152. See Dodge, *supra* note 21, at 791–92; Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1541–47 (1998).

153. See Jaime Dodge, *Disaggregative Mechanisms*, 62 EMORY L.J. 1253, 1258–62 (2014); Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Walmart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 164 (2011).

argues that although this wisdom is generally true, it is not wholly precise—a distinction that is taking on increasing importance with the rise of non-Article III adjudication, both public and private. Transfers of the judicial power to competing branches not only deprive the constitutional courts of their power but also aggrandize the receiving branch—creating a stronger tip in the balance of powers. But, removing cases from the Article III courts and pairing this with the very limited review available to an arbitral decision can impede the judicial function as well—particularly where it effectively insulates the underlying statute from constitutional review. This Section explores the rationale for a more careful consideration of the contours of Congress’s power to enable all forms of non-Article III tribunals and to impair the constitutional courts’ review. Section C then offers some concluding observations about the risks of the existing Article III doctrine to the individual’s rights and a mechanism for reconceptualizing consent in the Article III context.

#### A. ARTICLE III WAIVERS: BULWARK OR LOOPHOLE IN INDIVIDUAL PROTECTIONS?

The power of Congress as lawmaker to modify the expected value of a claim—even an existing claim—can be utilized to obtain consent to regimes that have projected values inferior to those expected values in the default regime. Congress may retroactively modify parties’ substantive rights and obligations, so long as the power is constitutionally exercised. Recognizing the uncertainty surrounding the ability of Congress to impair or eliminate a claim without running afoul of the prohibition on takings or equal protection, Congress may utilize procedural mechanisms to obtain the same diminution in the expected value of the plaintiff’s claim.

By pairing an alteration of rights with the option of participation in the legislative court, Congress can modify the ex post valuation of expected outcomes and obtain consent to an ex ante inferior regime.<sup>154</sup> In order to maximally exercise this pow-

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154. The observations of this Part are sympathetic with previous Supreme Court cases and literature addressing the imposition of unconstitutional conditions, in which although the condition is burdensome and potentially unconstitutional, the citizen nevertheless expressly or impliedly consents because even with the unfair term the overall bargain is still favorable. *See generally* *Am. Express, Inc. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1140 (2011); Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 BYU L. REV. 1.

er, Congress can consolidate claims in a district with a reputation for smaller verdicts, reducing the expected value of the claim—or in a district known for large verdicts, if it seeks to increase the value of the claim.<sup>155</sup> Equally important, forum selection can dramatically impact the likelihood of success on the merits—in some cases decreasing the likelihood of a favorable verdict by half.<sup>156</sup> These dual impacts of forum shifting can thereby generate a substantial decrease (or increase) in the plaintiff's expected recovery.<sup>157</sup>

But Congress's power is not limited to forum selection. Congress also has the power to modify procedure. It may therefore also elect to include changes to procedural mechanisms followed by the court—such as changing the statute of limitations or limiting discovery—so long as the alterations do not drop below the minimums required by due process. As party consent is not required for these modifications to become effective, the plaintiff's new baseline expected recovery is not the original expected recovery, but this new dramatically different level of expected recovery—which I refer to as the ex post expected value.

In addition to the direct value of the substantive or procedural modifications, the very act of consolidation may further alter the ex post expected value. For example, consolidating claims in a single court, seeking to process hundreds or thousands of complex mass-tort claims, may lead to a backlog.<sup>158</sup> For many plaintiffs in these mass-tort cases, time is of the essence, as the recovery is necessary to pay for ongoing medical expenses or to replace lost income.<sup>159</sup> Financing mechanisms may be available, but these various instruments all require a premium to be paid to the financier in one way or another. The diminished present value of the claims then further decreases the

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155. Cf. Debra Lyn Bassett, *The Defendant's Obligation To Ensure Adequate Representation in Class Actions*, 74 UMKC L. REV. 511, 529 & n.111 (2006) (describing corporate lobbying for CAFA as prompted by the sentiment that federal courts are "less receptive" to class actions than state courts); Geoffrey C. Hazard, Jr., *Has the Erie Doctrine Been Repealed by Congress?*, 156 U. PA. L. REV. 1629, 1629 (2008) (analyzing the legislative effect of widening the jurisdiction of federal courts through CAFA).

156. Christian N. Elloie, *Are Pre-Dispute Jury Trial Waivers a Bargain for Employers over Arbitration? It Depends on the Employee*, 76 DEF. COUNS. J. 91, 96 (2009).

157. For discussion, see Dodge, *supra* note 21, at 740–41.

158. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617–18 (1997); Silver & Miller, *supra* note 118, at 176.

159. See David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 833 (2002).

expected value at trial and, in turn, the settlement value for the plaintiff.

Congress's power to alter the applicable law can thus be used to substantially shift the plaintiff's expected outcome, creating a new reality in which the party will consent to a regime even if it is significantly inferior to the original expected value of the claim. For the plaintiff, the original expected value is no longer an option; the choice is merely between the expected value in litigation (as modified by the congressional modifications) and the alternative expected value before the tribunal. Thus, if the *ex post* legislative modifications have diminished the value of the claim by half—as a mere forum selection clause could do, even absent other substantive or procedural alterations—then the individual will rationally select the tribunal, even if the expected value is only sixty percent of the original expected value.<sup>160</sup> By combining a variety of procedural modifications, the value of the claim can be reduced to approach that of a nuisance value claim—even if no substantive law modifications are made.<sup>161</sup> And, to the extent that the uncertainty in the law is clarified to permit Congress to retroactively reduce liability without triggering a takings claim, an even more direct approach to devaluing the Article III claim is available.<sup>162</sup>

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160. For discussion of these pressures in the private context, see Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 *LA. L. REV.* 397, 401–03 (2014).

161. *Cf.* *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013) (holding that an arbitration clause rendering a claim at negative value did not preclude its enforcement).

162. While the “courts read laws as prospective in application unless Congress has unambiguously instructed retroactivity,” this is a rule of statutory interpretation and does not bar the enactment of subsequent changes in law that affect already pending but not yet final cases. *Vartelas v. Holder*, 132 S. Ct. 1479, 1486 (2012); *see also* *Golan v. Holder*, 132 S. Ct. 873, 894 (2012) (upholding conversion of copyright status from unprotected to protected, for a number of works already in the public domain and in existence prior to the statute's enactment); *AT&T Corp. v. Hulteen*, 556 U.S. 701, 712–13 (2009) (rejecting a retroactive application of the Pregnancy Discrimination Act for lack of an express statement of retroactivity, noting that Congress must be the one to balance “potential unfairness of retroactive application and determine that it is an acceptable price to pay for the countervailing benefits” (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 272–73 (1994))); *Landgraf*, 511 U.S. at 263, 270 (articulating non-retroactivity rule in light of “considerations of fair notice, reasonable reliance, and settled expectations”); *cf.* *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1853 (2012) (Kennedy, J., dissenting) (“Having worked no change in the law, and instead having interpreted a statutory provision without an established meaning, the Department's regulation does not have an impermissible retroactive effect.” (citing

Recognizing that ex post Congress can decrease or eliminate the value of the plaintiff's claim, it then becomes obvious that its control over the plaintiff's BATNA is substantial enough to overwhelm any meaningful choice.<sup>163</sup> Indeed, while the plaintiff retains the autonomy to consent or not, the choice is not a reflection of preference for the proposed regime over the original default rights, rather, it is the better of two inferior options. As a result, in contrast to the usual role of consent in signaling legitimacy, the individual is more likely to perceive the consent as having been the result of force.<sup>164</sup> As such, it is substantially less likely to trigger the psychological buy-in necessary to either improve satisfaction with outcomes or legitimacy traditionally associated with consent in an ADR framework.

But is this pairing of modification of litigation processes with creation of the legislative court mere speculation? No. The September 11 Fund exemplifies this precise concurrent modification: all claims were consolidated in the Southern District of New York and damages capped at the value of the defendants' available insurance coverage.<sup>165</sup> Plaintiffs were then given the option of participating in the Fund, conditional upon waiver of their litigation rights—including those against the airlines, whom Congress expressly noted it was seeking to bailout through the Act. For those who participated in the Fund, relief came within months.<sup>166</sup> In contrast, for the few that remained in the litigation system, justice was long-delayed: the final lawsuit was only recently settled, having not reached trial a decade after the tragedy.<sup>167</sup>

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Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 741, 744, n.3 (1996); Manhattan Gen. Equip. Co. v. Comm'r, 297 U.S. 129, 136 (1936)).

163. BATNA refers to the "Best Alternative to a Negotiated Agreement." For any party, whether to accept the offer in question is based in substantial part on what the next best option to accepting the terms would be. ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 96–107 (Bruce Patton ed., 2d ed. 1991) (coining the term "BATNA"); see also Jean R. Sternlight, *Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia*, 80 NOTRE DAME L. REV. 681, 698 (2005) (exploring the concept of BATNA in the litigation process).

164. This theme again resounds in the literature on private parties. See, e.g., Issacharoff & Rave, *supra* note 160, at 401–03; Resnik, *supra* note 146, at 632.

165. *In re September 11 Litig.*, 600 F. Supp. 2d 549, 551 (S.D.N.Y. 2009).

166. *Id.* at 551–52.

167. Order Granting Joint Motion To Approve Settlement Agreement, Cantor Fitzgerald & Co. v. Am. Airlines Inc., No. 21 MC 101 (AKH), 2014 WL 250255 (S.D.N.Y. Jan. 15, 2014).

Congress's authority to legislate wields a similar, albeit distinct, formal power over defendants; it may modify expected outcomes through both procedural and substantive modifications, so long as it does not run afoul of constitutional constraints. But corporations are also uniquely susceptible to informal mechanisms, as Congress may raise the specter of disadvantageous prospective modifications to the law in the form of increased regulation, increased liability, or decreases in favorable treatment such as subsidies or liability caps. This threat is particularly persuasive where the liability is industry-wide, as some mass-torts cases have been. While this threat may seem far-fetched and amorphous, history demonstrates its power: Consider BP's response to the Gulf Oil Spill. Facing public outcry as well as concerted pressure from the President and Congress, BP agreed to create a fund that was 266 times the size of its anticipated liability under existing law.<sup>168</sup> While the BP process was structured as a private response, insiders widely acknowledged that it was, in part, a response to political pressure that could equally have been deployed to obtain consent to a public process.<sup>169</sup>

Congress's power to legislate provides an inherently asymmetric power, which it may use in some circumstances to obtain consent from parties to a non-Article III regime. This is not to suggest that Congress will always exert this power.<sup>170</sup> Rather, the contention is simply that to the extent that Congress has this inherent power, it diminishes the value of consent as a check upon Congress. Indeed, given Congress's ability to modify one's substantive and procedural rights, it can create structures in which the parties are substantially incentivized to

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168. Liability under the Oil Pollution Act of 1990 (OPA) is limited to all cleanup costs plus \$75 million in damages. 33 U.S.C. § 2704(a) (2012). The Oil Spill Liability Trust Fund then pays out up to \$1 billion per incident. 26 § U.S.C. 9509(c)(2) (2012). By contrast, BP has authorized up to \$20 billion to be paid through its claims fund, although only \$11 billion has been paid on claims thus far. *Compensating the People and Communities Affected*, BP, <http://www.bp.com/en/global/corporate/gulf-of-mexico-restoration/deepwater-horizon-accident-and-response/compensating-the-people-and-communities-affected.html> (last visited Dec. 10, 2014).

169. See Jackie Calmes, *Obama Plans First Oval Office Speech To Put Pressure on BP*, N.Y. TIMES (Jun. 13, 2012), <http://www.nytimes.com/2010/06/14/us/14spill.html>.

170. See Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 885–86 (2011) (noting that the Article I requirements of bicameralism and presentment check the power of Congress to enact jurisdiction-stripping legislation).



waive their Article III rights. As exemplified by the September 11 Fund, even where the parties ultimately consent, these choices neither enhance legitimacy nor reflect a preference for the non-Article III system. Rather, they represent a preference for the tribunal over the Article III courts *ex post* of the legislative modifications of either substantive or procedural rights.

While consent is thus not serving the function of protecting the individual in the way that has been commonly assumed, it also creates risks for the structural role of Article III. The next Section explores the structural consequences that result from the doctrinal safe-harbor the Supreme Court has created around consent.

#### B. THE STRUCTURAL THREAT OF CONSENT

The Supreme Court has broadly held that arbitration authorized by the Federal Arbitration Act and other, narrower schemes providing for private arbitration do not pose a threat to the separation of powers.<sup>171</sup> Given the ability of individuals to contract to remove most claims from the courts, whether by settlement or selection of a private dispute resolution mechanism, most scholars do not even consider these structures in analyzing threats to Article III.<sup>172</sup> Rather, the Court and scholars have assumed that Article III is not undermined because the shift in power is to a private entity at the behest of private parties. This Section argues that this is not necessarily correct; Article III can be threatened by some public authorizations of private, as well as public, adjudicators. Indeed, when this assumption is explored in more depth, it becomes clear that the checks and balances of the Constitution can be undermined not only by competing public tribunals but also in limited circumstances by private tribunals. This Section posits that a more considered and nuanced approach to analyzing the constitutionality of these regimes is necessary to preserve Article III values.

Where Congress utilizes structural or procedural provisions, or a combination thereof, to incentivize the selection of private arbitrators, it can have the power to undermine or pre-

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171. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 854–55 (1986).

172. Indeed, the discussion of arbitration provisions is notably absent from the leading federal courts literature. *See supra* note 27. In contrast, some procedural scholars have suggested constitutional complications from arbitration, but these have generally not obtained traction with the courts. *See, e.g.*, Bruhl, *supra* note 147, at 1421–22.

clude obtainment of the core structural functions of Article III. Because systems design does not claim to define the constitutional functions of the courts, it can consider some of the more common functions typically attributed to the courts and the consequence of private adjudication upon the courts.

One potential structural role is to invalidate unconstitutional laws. If this is a structural role of the constitutional courts, then effectuation of Article III must provide a mechanism for either direct review or collateral attack upon the statute. If this constitutional power is one that cannot be impaired by Congress, then the further limitation must be imposed that the legislation cannot mandate deference to a non-Article III court on this issue that is any greater than that ordinarily applied to legislative or executive actions.

Another potential structural role is to clarify the law through the development of precedent. Through the development of precedent, the obligations of parties are clarified and Congress is able to act to modify the statute to the extent that the interpretation given by the courts either reveals problems with the statute or is contrary to its policy preferences. The one-off agreement of parties typically does not meaningfully interfere with this process, as other cases remain available to develop precedent. However, in disparate areas of law, it can be observed that certain issues typically evade appellate review as a result of the interplay between substantive and procedural provisions, such that parties either perceive the risk of appeal as too great<sup>173</sup> or meaningless.<sup>174</sup> The widespread use of private arbitrators can yield the same effect because arbitration decisions are typically binding only upon the immediate parties and are not required to state their reasoning or provide analysis, unless requested by the parties. It is for this reason that permitting parties to select from a large or even unlimited body of private arbitrators is not comparable to simply allowing the matter to be litigated in state court, as state court decisions can provide precedent within the state as well as typically providing a written basis for the decision that can act as persuasive authority in other courts' analyses.

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173. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.").

174. For example, the Bankruptcy Code is structured to reduce the incentive to appeal. See *McKenzie*, *supra* note 99, at 772.

For some scholars this may be substantially untroubling—if Congress chooses not to have a unified body of precedent against which to draft future legislation, this is entirely within the function of the legislature and thus within the discretion of Congress. Moreover, if a pool of experienced arbitrators develops within a specified area, those arbitrators may form informal networks, rely upon each other's views as persuasive, and ultimately begin to develop a body of arbitral law.<sup>175</sup>

For other scholars, this may prove more troubling. For these scholars, the value of precedent is not simply a benefit to Congress but also to the public in understanding their obligations under the law.<sup>176</sup> Equally important, these scholars argue that it is only through public adjudication that the public can become informed about problems in the law necessary not only to shaping their own interactions with the parties but also to be informed civic participants capable of advocating for legislative change. For these scholars, settlement and arbitration undermine the public function of adjudication.<sup>177</sup> Given these insights, the next Section turns to considering how these critiques shape and can be incorporated into the existing doctrine and theory.

### C. RETHINKING THE ROLE AND LIMITS OF CONSENT

In the past few years, procedural scholars have vigorously debated the origins of consent and waiver in an attempt to discern the extent to which private ordering can customize the public adjudicative process. As proceduralists frame the debate, the question is whether (1) the default rule permits waiver in the absence of a legislative prohibition or conflict with other law, or (2) the individual merely has the power to contract away his own right to take certain actions, which are enforceable only with legislative imprimatur or at the discretion of the judiciary. For our purposes, we can conceive of this as asking whether the individual's autonomy over his claim includes only the limited power to waive his own rights or instead whether

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175. For an interesting discussion of these views, see Michael A. Scodro, Note, *Arbitrating Novel Legal Questions: A Recommendation for Reform*, 105 YALE L.J. 1927, 1951–52 (1996).

176. *Id.* at 1942–46.

177. See, e.g., Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2633 (1995).

this waiver is preclusive as to both individual and public rights absent a conflict with existing law.

But these same questions emerge with respect to Article III: When an individual waives his Article III rights and consents to a non-Article III forum, is he waiving only his own personal right? If the individual is merely waiving his own right, then the court retains the jurisdiction to assess any structural challenge to the non-Article III tribunal. But if one takes the view that his waiver is not so limited, then his waiver has the capacity to impair or eliminate the court's jurisdiction entirely. From this perspective, the debate among constitutional law and federal courts scholars has failed to grapple with many of the concerns about the nature and role of adjudication raised by the systems design and civil procedure commentators.

To the extent that Article III attempted to promote the legitimacy of government by providing a fair forum to the individual, systems design provides two observations. First, to the extent that political control or pandering may impact upon the fairness of adjudication, the availability of opt-out provides a ready check—if the non-Article III tribunal is known to be corrupt or otherwise not impartial and parties have the capacity to select a private arbitrator, they will do so. A high rate of opt-out will then reduce the number of cases before the corrupt body and, in turn, its power in obtaining the preferred outcome. The high opt-out rate may also serve as a signal to legislatures, and potentially media, of the problem. Thus, there may be less concern from an individual rights perspective with non-Article III forums if the parties are permitted to engage in private ordering.

But this observation is limited in two key ways. One limitation is the need for both parties to consent to the alternative tribunal; thus, if the parties are able to identify the direction of the bias *ex ante*, before they agree on a forum or perhaps even contract, the party favored by the bias will not accede—leaving in place the default forum selected by Congress. The other limitation exists where the tribunal is one focused upon frequent, quick public funds adjudications, where allowing for a private tribunal is largely impractical. It is for this reason that some form of direct or indirect Article III review is necessary to ensure that no illegal or unconstitutional bias is influencing the non-Article III public tribunal.

Second, the analysis reveals that consent is an inferior predictor of a legislative court's burden upon the structural and

individual purposes of Article III. Because of the unique ability of Congress to control both the substantive and procedural rules that will govern the adjudicative process, it can create structures in which parties are incentivized to surrender the protections of Article III in order to obtain better individual outcomes. Although the parties may each make a rational choice to waive their rights, this can create an impediment to the effectuation of the structural purposes of Article III with respect to both the checks it imposes on the other branches and the balance of power between branches.

To this point, this Article has focused upon identifying the points at which civil procedure's insights suggest a conflict between the Supreme Court's stated normative goals and the doctrine articulated to reach those ends. The next Part turns to the impact these observations have for the competing constitutional theories offered by scholars.

#### IV. CONSEQUENCES FOR ARTICLE III DOCTRINE AND THEORY

Each of the dominant modes of scholarly analysis has, like the doctrine, proven to have shortcomings or pitfalls. Many scholars regard the pursuit of original intent as an elusive goal, while arguing that any literal interpretation of the text would be impossible to implement without invalidating large swaths of the administrative state.<sup>178</sup> Some scholars view such an end as impractical and normatively undesirable, while others argue that the agency adjudicators could simply be converted to Article III judges—notwithstanding the uproar that occurred when the far smaller cadre of bankruptcy judges were considered for Article III status.<sup>179</sup> Others argue that the key functions of Article III can be attained through appellate review or the broader set of checks permitted under the inferior tribunals account. But appellate review has been criticized as invalidating too many entrenched government structures, while the inferior tribunals account has struggled to establish a broad base of support.

The current academic literature cries out for a synthesis of the textualist and originalist insights with those of the more functionalist scholars. The goal of this Part is not to bury the

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178. See, e.g., CHEMERINSKY, *supra* note 38, at 223–24.

179. See Resnik, *supra* note 92, at, 2594–95 (1998) (“[The] judiciary has also sought to preserve itself as a small cadre of life-tenured judges, to be distinguished from an expanding federal non life-tenured judiciary.”).

existing theories. To the contrary, each offers an important part of the constitutional picture, buttressed by persuasive historical evidence and considered normative claims. The solution to the problem of Article III is then not to jettison these observations, but to weave these strands of scholarship into a coherent narrative that draws its strength, in turn, from the strengths of each of these—heretofore, competing—theories.

While the insights of civil procedure do not support every constitutional theory—and indeed, explicitly contradict some theories—they take steps to create common ground among a number of influential approaches. This Part explores the insights of certain of these accounts, demonstrating how correcting the erroneous assumptions of the past could be used by federal courts and constitutional scholars to recast each of these theories. For many theorists, the analysis of this Article may serve to fill gaps within their existing approaches or provide new analytic foundations.

As a procedural scholar, my goal in this Part is not to advance any one constitutional theory nor any one particular way in which the insights of procedure should be fitted to these theories. Rather, it is to begin to demonstrate some of the many ways that constitutional scholars could employ civil procedure to expand and defend their existing scholarly approaches. The ways in which this can be done are myriad, the insights that can be drawn nearly unlimited—those here are but one set, offered not as the sole answer or even the right answer but as an illustration of what is possible and as a call to this new line of scholarship.

Yet, with these caveats, the analysis yields an intriguing feature: as these theories are modified in light of civil procedure, previously disparate theories of Article III begin to converge on a common set of understandings. The theory of this Article then becomes not only consonant with each of these modes of analysis, but may provide a heretofore unarticulated common foundation that future doctrine may be built upon.

#### A. IMPLICATIONS FOR PUBLIC/PRIVATE RIGHTS APPROACH

Although early Article III doctrine spoke in terms of public and private rights, for a long period scholars rejected the rights distinction as an indeterminate test that could not function within our modern administrative state. But in recent years, Caleb Nelson and others have persuasively argued that the distinction between public and private rights is not only a histori-

cally robust phenomenon, incorporated into both the state and federal systems, but also remains predictive to this day.<sup>180</sup> Under this approach, public rights are those exercised on behalf of, or for the benefit of, the people and are susceptible to non-Article III determination.<sup>181</sup> Core private rights, in contrast, are those natural rights to security, liberty, and private property, which cannot be abridged except through due process.<sup>182</sup> This central tenet of our constitutional system provides the impetus for the allocation of powers within the Constitution.<sup>183</sup> Indeed, as Nelson notes, courts and commentators have agreed that these core private rights cannot be adjudicated by the executive or legislature, but instead are reserved to the Article III courts.<sup>184</sup> Finally, private privileges—those rights granted by public authorities to further public policy, rather than rights emanating from the Lockean state of nature—could be structured by Congress to operate as either public rights or as core private rights.<sup>185</sup> Under this approach, the central role of the Article III judiciary is the adjudication of these core private rights.<sup>186</sup> The other, public rights were the province of the political branches, which could chose to assert or waive these rights categorically or individually, or delegate their determination to an official or tribunal.<sup>187</sup>

For adherents of the public/private framework, this Article could provide one potential bridge to operationalizing the public/private rights insight within the structure of the Constitution. First, the conception of assigning the judiciary the role of protecting private rights, while granting the political branches the control over public and quasi-public rights, fits precisely with the unique capacities of non-Article III federal tribunals—as distinct from Article III judges, state court judges, and private arbitrators. Second, this analysis lends support to the treatment of federal statutory rights as inherently under the aegis of Congress, which can design these private privileges existing at the largesse of the government to be exercised either like public rights (through the political branches and, most

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180. Nelson, *supra* note 2795, at 559.

181. *Id.* at 566.

182. *Id.* at 566–67; accord John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 GEO. L.J. 2513, 2516 (1998).

183. Nelson, *supra* note 27, at 567.

184. *Id.* at 569.

185. *Id.* at 567.

186. *Id.* at 569–70.

187. *Id.* at 570–71.

commonly, an administrative agency) or as private rights (designated for judicial determination). This approach then comports precisely with the notion of mandatory judicial jurisdiction in core areas of private rights and constitutional law, but an initial allocation of authority to the political branches for public rights and quasi-private privileges—as posited by public/private rights theorists. Moreover, it is consistent with early doctrine, which attributed non-Article III adjudication to executive and legislative functions, including federal statutorily created rights, which were said to exist only by the largesse of government.

Despite widespread critiques of public/private rights theory as not able to meaningfully define a modern doctrine,<sup>188</sup> the insights of this Article suggest that the theory can be operationalized into a workable modern doctrine. Using these insights, public/private rights theorists can demonstrate that not only did the public/private distinction drive the allocation of the separation of powers and early Article III doctrine, but that these intuitions align with our most modern doctrine. Under this approach, we can return to the sanctity of Article III extolled by the Roberts Court, without invalidating the modern administrative state. This becomes possible by recognizing that public rights and quasi-public rights are commended not to the judiciary in the first instance but to the political branches.

From this perspective, there is no “removal” of the judicial power to non-Article III tribunals. Instead, the claims are initially assigned to the political branches, which may determine these claims. If Congress chooses to do so, it may, of course, delegate these claims to the judiciary—so long as it does so in a manner consistent with the judicial form (e.g., making the claim a case or controversy, not an advisory opinion, and so forth). In these cases, the claims are placed within the judicial power—expanding the power in essence to a new set of claims that would not otherwise have been within the judicial power. In contrast, private rights claims lay at the core of the guarantees of Article III. These claims cannot be removed from the Article III courts in favor of a non-Article III tribunal.

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188. See, e.g., Redish, *supra* note 27, at 204–05; Saphire & Solimine, *supra* note 27, at 111–20. Converting one’s mode of constitutional analysis is a project far broader than the scope of this paper. Rather, the point here is simply to illustrate the consonance between the main modes of analysis and the conclusions offered here.



## B. IMPLICATIONS FOR CONSTITUTIONAL STRUCTURES AND ROLES

While public/private rights theorists focus upon the underlying nature of the right, one could argue that this distinction drove the allocation of powers between the branches, but now that those allocations have been made, the constitutional allocation should drive our Article III doctrine. For theorists focused upon the separation of powers, the insights of this Article provide a powerful, pragmatic, and functionalist rejoinder to critics. Indeed, while a separation of powers approach is closely tied to the constitutional text and typically more formalist in its approach, this Article's insights could be used by these scholars to demonstrate that it has no less functional power than more subjective or expressly pragmatic theories.

### 1. Reconceptualizing Separation of Powers

As catalogued in *Murray's Lessee*, many of the most essential functions assigned to the executive and legislative branches—from collecting public taxes to determining when to call out the militia—involve the application of law to fact.<sup>189</sup> As to these functions, it clearly cannot be said that they are therefore the sole province of the judicial branch, as they have been explicitly assigned to the other branches by the Constitution. With the evolution of the doctrine, these came to be viewed as areas of overlapping powers in which Congress had the authority to decide which of the competing potential holders of the power should be assigned the power.<sup>190</sup> This conception has become the foundational assumption upon which much of the Article III doctrine and theory is built.

But, if carried to its logical conclusion, the result is substantially troubling. If basic executive tasks, like calling out the militia, are deemed susceptible to either the adjudicative or executive power at the option of Congress, then Congress would hold the power to remove essential components of the executive branch's expressly granted authority—in contravention of the Constitution.

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189. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 280–81 (1855).

190. See, e.g., *Stern v. Marshall*, 131 S. Ct. 2594, 2609, 2612 (2011) (finding “that the three branches are not hermetically sealed from one another” and cataloguing the areas in which Congress may utilize non-Article III adjudication).

This suggests a second insight, specifically in the way to conceive of these areas of overlap: in the formation of these tribunals, Congress is not permitted to remove powers of the other branches, as this would affect the balance of powers.<sup>191</sup> Instead, Article III courts have certain core functions and related powers, which cannot be removed by the other branches—just as the other branches each have their own enumerated powers and roles.<sup>192</sup> But the other branches may delegate their powers to the Article III courts, granting the courts additional powers.<sup>193</sup> To do so, the matter must be structured as one susceptible to the judicial power.<sup>194</sup> From this perspective, then, Congress is not removing authority from the courts; rather, it is deciding whether to supplement the courts' core jurisdiction with additional cases within the permissive jurisdiction set forth in Article III.<sup>195</sup>

The constitutional basis for the authority of these tribunals comes neither from an amorphous balancing of the intrusion upon Article III<sup>196</sup> nor from the inferior nature of the tribunal,<sup>197</sup> but from the tribunals' exercise of a power granted by the Constitution to the executive or legislative branch. Conceived in this manner, the historical exceptions that have long defied categorization are not one-off oddities<sup>198</sup> nor do they require a capacious conception of inferiority.<sup>199</sup> Instead, each of these tribunals serves an enumerated executive or legislative power, fitting neatly within the delegation approach, and thus do not need to be conceived as special historical exceptions.

The approach resonates not only with the Court's early intuitions but also with the powers granted in the Constitution. As to those powers commended to Congress by Article I, the

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191. This theme has remained within the background of Article III doctrine from the first cases to the most recent, although the faithfulness to its execution has varied and its form shifted. *See, e.g., Stern*, 131 S. Ct. at 2609; *Murray's Lessee*, 59 U.S. (18 How.) at 283–85.

192. *See, e.g., Stern*, 131 S. Ct. at 2609; *Murray's Lessee*, 59 U.S. (18 How.) at 283–85.

193. *See, e.g., Stern*, 131 S. Ct. at 2609; *Murray's Lessee*, 59 U.S. (18 How.) at 283–85.

194. *See, e.g., Stern*, 131 S. Ct. at 2609; *Murray's Lessee*, 59 U.S. (18 How.) at 283–85.

195. *See, e.g., Stern*, 131 S. Ct. at 2609; *Murray's Lessee*, 59 U.S. (18 How.) at 283–85.

196. *Stern*, 131 S. Ct. at 2621 (Scalia, J., concurring).

197. Fallon, *supra* note 27, at 938–39.

198. *Contra Stern*, 131 S. Ct. at 2621 (Scalia, J., concurring).

199. *Contra Pfander*, *supra* note 27.

Constitution concurrently granted the ability “[t]o make all laws . . . necessary and proper for carrying into [e]xecution” those powers.<sup>200</sup> The ability of Congress to permit the appointment of officers to carry out the determinations necessary to its Article I powers has not been questioned and, indeed, followed from the English tradition.<sup>201</sup> With the expansion of the nation and complexity of the modern age, Congress increasingly delegated authority to executive branch officials.<sup>202</sup> These delegations to administrative agencies or legislative courts must be “directed to the execution of one or more of [Congress’s assigned] powers.”<sup>203</sup> Thus conceived, these are not delegations of judicial authority reserved by Article III but instead of the legislative branch’s authority pursuant to Article I. The Court has long held that “Congress may reserve to itself” the powers granted by Article I, but if it chooses to delegate its powers, “[t]he mode of determining matters of this class is completely within congressional control . . . [and it] may delegate that power to executive officers, or may commit it to judicial tribunals.”<sup>204</sup>

In addition to legislative functions, non-Article III courts may hear properly delegated executive matters.<sup>205</sup> Courts martial have long been recognized as derivative of the President’s power as the Commander in Chief.<sup>206</sup> So, too, the ability to make and ratify treaties that provide for international tribunals or courts has been acknowledged by the Supreme Court as an extension of the foreign affairs powers commended to the President, with the consent of the Senate—and thus not a violation of Article III.<sup>207</sup>

Considering non-Article III courts as an executive or legislative delegation, rather than a superior adjudicative forum, is also consistent with the comparative advantage of these tribu-

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200. U.S. CONST. art. I, § 8, cl. 18.

201. *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 281–82 (1855).

202. *Ex parte Bakelite Corp.*, 279 U.S. 438, 452 (1929) (discussing Congress’s practice of initially retaining the power to decide claims against the government and later determination that this was “a heavy burden,” resulting in Congress granting the power to hear these claims to the Court of Claims).

203. *Id.*

204. *Id.* at 451; *accord Murray’s Lessee*, 59 U.S. (18 How.) at 281–82.

205. *Murray’s Lessee*, 59 U.S. (18 How.) at 281–82.

206. *Id.*

207. For an excellent discussion, see generally RICHARD H. FALLON, JR. ET AL., *HART AND WESCHLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 363–67 (6th ed. 2009).

nals. Modern procedural innovations have demonstrated that the Article III courts can serve each of the adjudicative aims identified by the court as justifying the burden upon Article III worked by non-Article III courts: negotiation, arbitration, fact specialization, and legal specialization. It is instead in those instances where the fact-finding and application to law is serving either an executive function or a legislative function that the Article I court can provide a systemic benefit not available within the Article III courts.

From a structural perspective, this inversion of the traditional conception has some appeal. It permits theories that insulate a core of Article III that cannot be intruded upon by the other branches, in contrast with the current doctrine's acceptance of intrusions upon even the formerly sacrosanct area of private rights.<sup>208</sup> At the same time, it cabins the use of non-Article III courts to those areas in which they provide an identifiable systemic benefit as opposed to Article III courts.<sup>209</sup>

## 2. Creating a Sacrosanct Core to the Judicial Power

As the Supreme Court explained in *Murray's Lessee*, non-Article III courts are only permitted to accept jurisdiction over matters that are derivative of either an executive or legislative function.<sup>210</sup> These courts are not capable of receiving a delegation of the judicial functions constitutionally assigned to Article III—even if Congress or the courts consent to this delegation.<sup>211</sup> Thus conceived, these non-Article III courts are repositories of delegation of executive or legislative authority and operate only within areas not already constitutionally granted to the judiciary.<sup>212</sup> This creates a sacrosanct core of Article III, in which Congress cannot strip the power of the constitutional courts in favor of a competing federal tribunal.

Although this conception shields Article III from a power-grab by the other branches—as the Constitution intended—it does not upend the existing administrative state. Legislative

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208. Chapman & McConnell, *supra* note 126, at 1704–05.

209. This conclusion from the perspective of dispute systems design buttresses the recent assertions of leading constitutional and federal courts scholars, who argue that the original conception of Article III was consistent not only with the text of the Constitution, but also with the needs of the administrative state, and it remains—although buried—within today's jurisprudence because of their inherent appeal. *See, e.g.*, Nelson, *supra* note 27, at 564–65.

210. *Murray's Lessee*, 59 U.S. (18 How.) at 280–81.

211. *Ex parte Bakelite Corp.*, 279 U.S. 438, 450–51 (1929).

212. Chapman & McConnell, *supra* note 126, at 1785–88.

courts, officers, and agencies can continue to apply law to fact as part of their executive or legislative functions, including with respect to newly created statutory rights.<sup>213</sup>

Many non-Article III courts neatly fit within these contours. But what about the existing doctrine's willingness to allow any legislatively created right or any claim intertwined with a federal regulatory structure to be placed into one of these tribunals?<sup>214</sup> In contrast to existing doctrine, this approach would require Congress to expressly preempt any competing state or common law right and replace it with a federal right, if Congress sought to have these claims adjudicated before the tribunal. If Congress failed to do so, the claim would remain within the courts. Thus, to the extent that Congress seeks to make this forum an exclusive one, it must expressly state that the new federal regime displaces any existing rights at state or common law. This approach not only removes the often complex question of ascertaining which claims are truly intertwined with a federal regulatory structure but it also provides greater transparency with respect to the degree to which Congress intends to displace pre-existing rights, its perception of whether dual forums are compatible with its substantive intent, and allows public discourse on the matter.

This perspective completely inverts the traditional constitutional conception. No longer would Article III's core functions be subject to removal by Congress, as exists under the current doctrine. Under this approach, the Article III courts are able to retain their constitutionally granted functions and check the decisions of the legislative and executive branches—including those of legislative courts and agency adjudicators—unmolested by Congress. While Congress has the Constitutional authority to make exceptions to the courts' jurisdiction, leaving matters in the state courts or providing limited federal courts, Congress is incapable of withdrawing this core jurisdiction in favor of its own system of courts that lack Article III protections.

As a result, this approach provides far greater protection against encroachment upon the Article III courts and their functions. Indeed, because certain claims must reside in the Article III courts if they are brought within the federal courts at all, the delegation approach encourages innovation not only in

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213. *Id.*

214. *Stern v. Marshall*, 131 S. Ct. 2594, 2612–15 (2011) (reviewing the cases comprising the doctrine).

Article I courts but also Article III courts. From this perspective, legislative courts and agency proceedings may actually come to serve as a laboratory for innovation, a proving ground for new procedural innovations to be tested in a narrow area before incorporating them into the full panoply of Article III courts.

Finally, this approach neatly provides for a basis for collateral review of the cases, without requiring direct appeal—and thus avoids the problem of either invalidating a substantial number of existing administrative structures or allowing encroachment upon the structural role of the Article III courts. The other branches continue to retain their full authority to delegate their own functions, to the extent already permitted by the doctrine. At the same time, because the delegation approach protects the core role of the Article III courts and provides for constitutional oversight of the Article I courts through the existing system of checks and balances, there is no need for a subjective balancing test. This approach then substantially frees Congress to craft innovative dispute resolution procedures as part of the legislative and executive functions—but not to innovate away the individual’s right to judicial determination of core private disputes, nor to constitutionally challenge the actions of the legislative or executive tribunals.

### C. IMPLICATIONS FOR JURISDICTION-STRIPPING DOCTRINE AND SCHOLARSHIP

It is well established that non-Article III courts operate “merely in aid of legislative or executive action” and are “incapable” of receiving the power of the Article III courts.<sup>215</sup> It is thus in this sphere, in which a matter could be determined exclusively by Congress pursuant to its powers under Article I or the Executive pursuant to its powers under Article II, that non-Article III courts can constitutionally operate.<sup>216</sup> To the extent that decision-making authority is delegated to an executive officer or legislative court, the role of the judiciary is not to question the necessity of the delegation or the wisdom of investing

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215. *Ex parte Bakelite Corp.*, 279 U.S. at 450–51.

216. *Id.* at 453 (“The matters made cognizable [in non-Article III tribunals] include nothing which inherently or necessarily requires judicial determination. On the contrary, all are matters which are susceptible of legislative or executive determination and can have no other save under and in conformity with permissive legislation by Congress.”).

the power in another branch rather than the judiciary.<sup>217</sup> Instead, the role of the judiciary is solely to determine whether the delegation was lawfully made.<sup>218</sup> If the delegation is lawful, the determination made becomes an executive or legislative act—not a judicial one. The decision is binding even in a private rights case, as “the action of the executive power, upon a matter committed to its determination by the constitution and laws is conclusive.”<sup>219</sup>

To this point, the doctrine and the insights of this Article agree. But here the agreement ends.

In recent decades, the Supreme Court has gone further, permitting a non-Article III tribunal to hear core private rights matters that are “intertwined” with the public rights or private privileges being adjudicated by the tribunal.<sup>220</sup> This doctrine permits Congress to remove jurisdiction of not only public rights but also intertwined claims within the core ambit of Article III—common law and equitable claims—in favor of non-Article III tribunals.

This expansion follows from the Court’s approach to Article III: the doctrine is structured as permitting Congress to remove claims at its will to further an identified substantive aim, so long as the claim involves a right “integrally related to a particular federal government action”—whether because the claim is derived from a federal regulatory scheme or merely because resolution by an agency is “deemed essential to a limited regulatory objective within the agency’s authority.”<sup>221</sup> Having accepted the ability of Congress to assign matters to a non-Article III court in the furtherance of its legislative scheme, the Court reasoned that retaining jurisdiction over intertwined common law claims would “emasculate if not destroy” the regime, as bifurcation would “realistically mean that the courts, not the agency” would become the sole forum for the entire dispute.<sup>222</sup>

The Court justified its extension of de facto “supplemental” jurisdiction to these agency adjudications and legislative court proceedings in purely pragmatic terms. But the Court’s doc-

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217. *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 283–85 (1855).

218. *Id.*

219. *Id.* at 284–85.

220. *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 856 (1986).

221. *Stern v. Marshall*, 131 S. Ct. 2594, 2613–14 (2011).

222. *Schor*, 478 U.S. at 844 (citations omitted).

trine also suggests a broader animating theme, which parallels the traditional concepts of comity and abstention. The initial impetus of the doctrine is one analogous to comity—there are areas in which claims can be formulated as alternatively amenable to judicial, legislative, or executive determination. Within this area of overlap, the Court defers to the decision of Congress as to which branch is most suitable to make the determination, as a mechanism for permitting furtherance of the legislature’s substantive policy goals, absent any indicia of constitutional violation (namely encroachment or aggrandizement at the expense of the structural role of Article III).<sup>223</sup>

To the extent that a particular substantive regime is intertwined with a particular state or common law claim, if the parties consent, the Court functionally abstains from resolving the intertwined claim that would otherwise be within its jurisdiction, in favor of permitting the non-Article III court to resolve the entire dispute. This abstention is necessary given that “realistically . . . the courts, not the agency, will end up” deciding the claims, which would undermine Congress’s purpose in creating the non-Article III forum.<sup>224</sup> In embracing abstention in favor of competing federal courts, the Court readily recognized that “wholesale importation of concepts of pendent or ancillary jurisdiction into the agency context may create greater constitutional difficulties, [but] we decline to endorse an absolute prohibition on such jurisdiction out of fear of where some hypothetical ‘slippery slope’ may deposit us.”<sup>225</sup>

But is abstention by the Article III courts in favor of other federal tribunals permitted by the Constitution?

The answer seems to clearly be no. Indeed, to admit of this power to abstain in favor of non-Article III courts creates a queer constitutional notion: Article III judges cannot delegate the power to issue final judgments in core Article III matters to non-Article III judges.<sup>226</sup> Nor can Congress remove jurisdiction

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223. See, e.g., *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 589 (1985) (noting the “pragmatic understanding” that “the danger of encroaching on the judicial powers is reduced” where the matter could also have been conclusively determined by the executive or legislative branches).

224. *Schor*, 478 U.S. at 844.

225. *Id.* at 852.

226. *Stern*, 131 S. Ct. at 2619 (rejecting the argument that the appointment of bankruptcy judges by the Article III courts makes the arrangement constitutional, “it does not matter who appointed the bankruptcy judge or authorized the judge to render final judgments . . . [t]he constitutional bar remains”).



over these core matters in favor of a non-Article III court.<sup>227</sup> Yet, Article III judges can functionally abstain from hearing these precise matters in favor of non-Article III judges, if the tribunal is already hearing an intertwined matter.<sup>228</sup> From where does this authority constitutionally flow, if neither Congress nor the courts have this power?

This distinction has powerful real world consequences. As the Roberts Court noted, if an “exercise of judicial power may . . . be taken from the Article III Judiciary simply by deeming it part of some amorphous ‘public right,’ then Article III would be transformed from the guardian of individual liberty and separation of powers we have long recognized into mere wishful thinking.”<sup>229</sup> Indeed, to the extent that the current doctrine defines a public right as one which fulfills a public purpose—and this is, in turn, defined as a matter about which Congress cares enough to devise a particularized substantive regime<sup>230</sup>—Article III’s structural purposes collapse: the very matters about which Congress is most concerned become those as to which the structural checks imposed are at their minimum. For many, it may be no answer that the statute must be narrowly tailored. Indeed, it may be that a narrow statute is even more troubling, as it reveals an intent to remove a particular type of dispute from the Article III courts, suggesting a desire to shield a particular type of dispute from the constitutional protections of Article III.

But more fundamentally, there is no textual basis within the Constitution for this distinction: “Article III of the Constitution provides that the judicial power of the United States may be vested only in courts whose judges enjoy the protections set forth in that Article.”<sup>231</sup> Indeed, the Roberts Court itself acknowledged that “[a] statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely. ‘Slight encroachments create new boundaries from which legions of power can seek new territory to capture.’”<sup>232</sup> If this is the case, a doctrine that permits the other branches to

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227. *Id.* at 2614–15.

228. *Id.* at 2618 (discussing the constitutionality of congressional statutes permitting non-Article III courts to decide even core Article III matters that would “necessarily be resolved” in the adjudication of statutory claims).

229. *Id.* at 2615.

230. *Id.* at 2611–15.

231. *Id.* at 2620.

232. *Id.* (quoting *Reid v. Covert*, 354 U.S. 1, 39 (1957) (plurality opinion)).

narrowly transfer core Article III jurisdiction over common law matters cannot stand.

Does this consign litigants unlucky enough to have both state or common law claims and federal statutory claims to endless and potentially contradictory proceedings? No. Decades ago, with the explosion of arbitration, a similar problem arose.<sup>233</sup> Parties discovered their arbitration clauses covered certain disputes, while others were not covered and thus would be subject to litigation.<sup>234</sup> The Supreme Court unsympathetically responded that the problem lay with the drafters and that it would enforce the bifurcated proceedings.<sup>235</sup> As a practical matter, this was quickly resolved as parties began drafting provisions broad enough to place all the claims in the preferred forum.

This lesson applies equally to Congress. The current doctrine imputes a legislative preference for depriving the individual of his right to a judicial forum and the capacity to remove a core private right from the structural limits otherwise imposed upon this removal. In so doing, Congress is then able to engage in implied jurisdiction-stripping, through the mere passage of the related statutory right and designation of non-Article III adjudication. In many cases, this may impair the ordinary democratic checks imposed upon jurisdiction-stripping, which have generally proven quite powerful, because the loss of jurisdiction appears nowhere on the face of the statute.

The insights of this Article suggest support for the argument that this slippery slope is unnecessary: Congress is not prohibited from expressly removing these cases, but if Congress wants to remove the right to a judicial forum, its determination must be subject to the front-end democratic checks created by the Constitution by requiring an express, rather than implied, removal of this sacrosanct right.<sup>236</sup>

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233. See *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985).

234. See *id.* at 214–15.

235. See *id.* at 217 (“[T]he Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums.”).

236. Congress may choose to do this by expressly preempting state or common law causes of action, in favor of the federal statutory right. The federal compensation and damages may be calculated in the same manner for all claimants, creating nationwide harmonization—rather than having pockets of higher or lower relative compensation based upon variation in state law. But the compensation structure could also be set as a formula that incorporates any damages that would otherwise have been available at state law. Or the

## D. INHERENT APPELLATE REVIEW

Many of the nation's leading federal courts scholars have chafed at the ability of Congress to remove cases from the Article III courts and simultaneously limit or even entirely preclude Article III appeal.<sup>237</sup> It is from this troubling notion that both the appellate review and inferior tribunals models stemmed.<sup>238</sup> Yet, the Court has not yet adopted either of these models, perhaps out of a concern with the extent to which these theories would invalidate existing structures or reshape the role of the constitutional courts.

Returning to the areas in which non-Article III courts offer systemic benefits and the derivative observation as to the appropriate scope of these tribunals, an alternative conception emerges—a conception consistent with the Court's intuition about the role of the constitutional courts, but one that invalidates no tribunal.

Non-Article III courts operate “merely in aid of legislative or executive action” and are “incapable” of receiving the power of the Article III courts.<sup>239</sup> It is thus in this sphere in which a matter could be determined exclusively by Congress pursuant to its powers under Article I or the executive pursuant to its powers under Article II that non-Article III courts can constitutionally operate.<sup>240</sup> To the extent that decision-making authority is delegated to an executive officer or legislative court, the role of the judiciary is not to question the necessity of the delegation or the wisdom of investing the power in another branch rather than the judiciary.<sup>241</sup> Instead the role of the judiciary is

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remedies could be a hybrid of the various approaches, incorporate a minimum penalty, or otherwise be modified to obtain the precise levels of compensation and deterrence Congress prefers. The very degree of variation possible in creating these remedies suggests that this is a decision best suited to the political branches and that our Article III structure should encourage the legislature to undertake these considerations.

237. See, e.g., Amar, *supra* note 27, at 1500–01 (“[T]he issues implicated by the jurisdiction-stripping debate go to the very heart of the role of the federal courts in our constitutional order.”).

238. See *supra* text accompanying note 27.

239. *Ex parte Bakelite Corp.*, 279 U.S. 438, 450–51 (1929).

240. *Id.* at 453 (“The matters made cognizable [in non-Article III tribunals] include nothing which inherently or necessarily requires judicial determination. On the contrary, all are matters which are susceptible of legislative or executive determination and can have no other save under and in conformity with permissive legislation by Congress.”).

241. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 283–85 (1855).

solely to determine whether the delegation was lawfully made.<sup>242</sup>

If the delegation is lawful, one might posit that the determination made becomes an executive or legislative act—not a judicial one. The decision is binding even in a private rights case, as “the action of the executive power, upon a matter committed to its determination by the constitution and laws is conclusive.”<sup>243</sup> However, as a legislative or executive action, one could argue that, to the extent that the decision is unconstitutional, it is subject to collateral attack within the Article III courts—even if the statute makes no such express statement—as is any other governmental act. Application of this standard allows for the executive and legislative branches to exercise their full powers as designated within the Constitution, without any greater or lesser review than applies to other actions.

Recognizing this principle avoids the strategic incentive to delegate authority as a mechanism for avoiding constitutional scrutiny, by preventing Congress from insulating its decisions through a delegation to a non-Article III tribunal paired with a provision barring direct appellate review. So too, it prevents Congress from impeding the courts through a mandate of extreme deference, including precluding the courts from reviewing any factual determinations or limiting a challenge to legal errors, manifest disregard, or instances of bribery, for example. Rather, the underlying right of access to the courts to challenge an unconstitutional determination would remain, regardless of the direct appellate review permissively granted by Congress. This approach thus creates a baseline level of constitutional protection, which cannot be subverted by Congress—in contrast with the substantial questions raised by the treatment of appellate review under the existing doctrine.

By enshrining the Article III courts as the constitutional guarantors and eschewing the right of the other branches to remove the judiciary’s power, this approach is consistent with the checks and balances that the Constitution sought to structurally guarantee. But it also restricts the aggrandizement of the courts, preventing Article III judges from exercising greater review over the other branches’ exercise of their assigned enu-

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242. *Id.*

243. *Id.* at 284–85.

merated powers simply because they incorporate some degree of application of fact to law.

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The embrace of alternative dispute resolution and procedural design animated the current generation of Article III doctrine. The result has been self-admittedly chaotic and unpredictable, risking incursion upon the remaining remnants of Article III's core. It may thus be fitting that returning to these foundations offers a new set of insights that has the potential to set us on the path to resolving the intractable paradox of Article III. This Part has simply taken the first step, identifying some of the potential insights and implications of this Article for some of the leading theories of Article III.

It remains for the Court and scholars to decide which of the competing theories is the best fit. But with the new insights of this Article, many of the leading theories begin to coalesce around a common view of Article III. A few hard cases in which reasonable minds may differ about whether a particular determination is an act that can only be taken by the judiciary, do of course remain. The insights of this Article do not claim to resolve this debate; rather, they lower the stakes, returning vitality to the constitutional checks and balances such that an erroneous approval of a non-Article III tribunal does far less violence to the constitutional role and protections of Article III.

### CONCLUSION

Far from their modest foundations, today's non-Article III tribunals adjudicate far more cases than our constitutional courts. Congress has readily turned to these tribunals to handle some of our nation's most important and complex disputes—at times, removing the cases from the constitutional courts to avoid the outcomes that Congress expressly expected would be reached in an Article III court. Such actions stand in sharp juxtaposition to the common conception of the role of Article III in ensuring an independent judiciary, free from political influence.

The premise upon which this expansion rested is, this Article has argued, contravened by the structure of the courts themselves. This insight fundamentally reshapes the debate over Article III: the procedural design reasons for which we abandoned the early doctrine—and have since criticized the

myriad of categorical tests—were incorrect. And, the procedural reasons supporting the new balancing test were equally erroneous.

But, if the modern doctrine's assumptions are wrong, this provides us with an opportunity to revisit the questions of Article III anew. This Article has argued that the original intuition of a sacrosanct core of Article III is not—in contrast to existing doctrine and substantial scholarship—inherently in conflict with our modern administrative state from the perspective of procedural systems design. For categorical-approach proponents, this insight provides a strong argument in support of workability—but also necessitates revisiting which of the many Article III theories best vindicates Article III and the broader constitutional system. For scholars that support the balancing approach, this insight is not a death knell, but instead a call for retrenchment, seeking new, valid bases for the test.

This Article takes an important first step in this reconceptualization by dispelling the myth of the paradox of Article III. No longer must the constitutional protections secured by Article III remain at risk in order to permit legislative innovation or accurate substantive law enforcement. We can have both a modern administrative state and a set of core Article III protections, insulated once again from political encroachment. In short, the impossible may not be so impossible after all.