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When I arrived at the University of Chicago Law School to begin teaching in the fall of 1986, I hardly knew Paul Bator. He was still at Harvard when I was a law student at Chicago, and while I had worked with him on a few cases during a summer stint at the Solicitor General's office, our conversations had been brief. I was, of course, aware of the publicity accompanying Paul's move to Chicago, which underscored his status as a leading figure in legal academia. Naturally, then, I was somewhat apprehensive when, soon after my arrival, Paul gave me a copy of his Harris Lecture and asked for comments. Commenting on the work of colleagues was something I had anticipated. But now that the task was upon me, I doubted that I was up to it. What if I had nothing to say? What if what I had to say was stupid? I imagined Paul reading my letter and wondering why on earth the faculty offered me a job.

Paul quickly allayed these fears—not by complimenting me on my comments, but by coming to my office to talk about them and by inviting me to his home for a small group discussion. Being taken seriously by so senior and distinguished a colleague did wonders for my confidence. But then, one of Paul's strengths was that he treated everyone as if they had something interesting to say. Talking to Paul was always challenging and always fun.

Some of Paul's other strengths are revealed in this lecture: his instinctual *feel* for law and his matchless ability to explain his instincts with power and eloquence. My colleagues sometimes refer to Paul's "aesthetic" sensibility; but more than that, Paul had a keen sense of the law's possibilities. Perhaps balance is the word I want. Paul was able to balance the importance of immediate social consequences with the need to preserve law's internal order and beauty. His sensible and sensitive voice will be missed.

In the spirit of reasoned dialogue that Paul cherished, I offer this more polished version of the letter that I sent Paul in the fall of 1986. Unfortunately, Paul never had a chance to respond, and I do not know for sure whether he would have accepted or rejected these points. I offer them for whatever additional light, if any, they shed on the problem addressed in *The Constitution as Architecture.*[1]

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1. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III,* 65 IND. L.J. 233 (1990).

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First, I agree with Paul that the "categorical" approach to interpreting article III is a failure. I also agree that the "public rights" exception, as articulated in *Northern Pipeline Co. v. Marathon Pipe Line Co.*,[2] cannot be confined in a way that prevents it from swallowing the rule embodied in Paul's "Simple Model." But I do not think that Paul has succeeded in proving this latter point. He has demonstrated that the public rights exception *has not* been confined, but the fact that the Court has failed to define this exception does not prove that it cannot be done.

The reason the public rights exception cannot be confined is that its rationale directly contradicts the premises of the Simple Model. The Simple Model requires life tenure and salary protection to limit the extent to which Congress and the President can control judges. Under the categorical approach, the Court recognizes narrow exceptions to these requirements when additional considerations, not accounted for by this model, justify removal from the basic framework. But no such considerations justify the public rights exception. Rather, the public rights exception is justified on the ground that the greater power not to create a right includes the lesser power to control the process by which that right is adjudicated—including the pay and tenure of the adjudicator. It thus repudiates the fundamental principle of the Simple Model without substituting any other limiting principle in its place.

Second, I think that Paul overstates his case when he claims that adopting the Simple Model would constitute "a cataclysm in our institutional history."[3] To make the case as strong as possible, assume that the Simple Model really would require extending article III protection to every federal official with significant adjudicatory responsibilities. So what? Paul suggests that this would make administering federal law too cumbersome, formal and expensive—a claim that would have merit if article III required all the trappings presently associated with adjudication in the federal courts. But black robes and an austere courtroom are not required to satisfy article III; nor are formal pleadings, discovery or the elaborate, adversarial procedures of modern litigation. Article III requires only that the adjudicator have life tenure and salary protection. Questions respecting the *kind* of hearing this adjudicator must provide fall under the due process clause, which provides a great deal of flexibility. Hence, Paul's "worst case" scenario does not require any change in existing adjudicatory practices other than to give presiding officials life tenure and salary protection.

Paul acknowledges the possibility of informal adjudication before officials with article III protection, but observes that "it would not be unmixedly

2. 458 U.S. 50 (1982).
3. Bator, *supra* note 1, at 261.

wonderful"[4] to have thousands of tenured bureaucrats. The objection could be that we do not want to be stuck paying these bureaucrats if there is no work for them to do. But a significant drop in the federal workload is not likely. Moreover, even if the federal workload did decrease dramatically, this would present only a short-term transition problem since Congress need not appoint new judges to replace those who die or retire.

In fact, Paul's chief objection is that extending article III protection to every adjudicator in the federal bureaucracy might affect "the institutional perspectives and psychology"[5] of the "small group of revered, elite generalists"[6] who currently have such protection. Paul does not explain the nature of this effect. I assume that he means a loss of prestige—something many commentators predict would accompany expanding the number of judges with article III protection. But while decreasing the prestige of federal judges is not desirable, it hardly constitutes "a cataclysm in our institutional history." More important, there is no reason to fear this consequence. Being a federal judge is prestigious principally because of the power these judges wield. That power will not be diminished by giving life tenure to other adjudicators with less responsibility. The same small cadre of judges would remain at the apex of the judicial pyramid, empowered to review all the others.

Paul might be referring to something other than a loss of prestige. For example, since independence lessens fears of political manipulation, the district courts and courts of appeals might begin reviewing agency determinations with greater deference. Yet to the extent that independence does insulate judges, such deference is not a bad thing. Other than this, I cannot imagine what Paul could mean. Certainly the mere fact that a decision was rendered by someone with life tenure creates no psychological or institutional barrier to vigorous review. Courts of appeals routinely review decisions by district judges with life tenure.

Third, I nonetheless agree with Paul that article III does not require giving life tenure and salary protection to every adjudicator in the federal bureaucracy. As Paul points out, executing a law requires decisions that are indistinguishable from adjudication in that someone must interpret the law and make a determination about its application in a particular case.[7] Surely the form in which these decisions are made cannot determine whether they constitute "execution" or "adjudication." It hardly makes sense to say that deciding to prosecute under a criminal law is executive if made informally, but that this same decision becomes adjudication if it is made

4. *Id.*
5. *Id.*
6. *Id.*
7. The Supreme Court made the same point in Bowsher v. Synar, 478 U.S. 714, 733 (1986).

after a hearing. The Simple Model thus cannot remain simple, for we must still define what "the judicial Power" is and when it is being exercised.

Fourth, Paul ultimately concludes that the Supreme Court stated the proper test in *Crowell v. Benson:*[8] a judge with life tenure and salary protection must have "ultimate judicial control"[9] through the power to review "whether the law was correctly applied and whether the findings of fact had reasonable support in the evidence."[10] While I agree that appellate review is constitutionally sufficient, some of the arguments on which Paul relies are unpersuasive. For instance, I give little weight to the argument that we have a long history of creating special tribunals "not cast in the rigid article III mold."[11] Widespread reliance on administrative agencies and article I courts is, in fact, a relatively recent phenomenon. Non-traditional adjudication was rare (though not unheard-of) prior to the New Deal, and even the New Deal established few agencies with significant adjudicatory responsibilities. The real proliferation of administrative tribunals came in the 1960's and 1970's. More important, "in for a penny, in for a pound" is not an especially compelling principle of constitutional interpretation, particularly if (as suggested above) the consequence of changing courses would not be drastic.

Similarly, I would not rely on the fact that the Constitution permits state courts to adjudicate cases enumerated in article III. Drafting the Constitution required compromise on many issues. One such compromise concerned the distribution of power between the state and federal governments and made the creation of federal trial courts optional.[12] But the concerns resolved by this compromise were distinct from the concerns underlying the separation of powers, which is designed to prevent concentrations of power within the national government. Adjudication in state courts is consistent with this design, as these courts are not subject to control by the political branches of the federal government. Federal agencies, by contrast, are invariably controlled by Congress or the President or both.[13] Consequently, the fact that Congress may leave the adjudication of cases within article III to state courts does not imply that Congress may also create a federal tribunal to hear these cases without providing the tenure and salary protections required by article III.

Fifth, Paul further supports the claim that the Constitution is satisfied by appellate review before an article III judge by arguing that it is impossible

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8. 285 U.S. 22 (1932).
9. Bator, *supra* note 1, at 267.
10. *Id.*
11. *Id.* at 239.
12. *See* 4 P. KURLAND & R. LERNER, THE FOUNDERS' CONSTITUTION 135-39 (1987); THE FEDERALIST No. 81 (A. Hamilton).
13. *See* Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch,* 84 COLUM. L. REV. 573 (1984).

to classify every step of the lawmaking process as "legislative," "executive" or "judicial" in a way that is not arbitrary. The point is correct,[14] but it proves too much. It suggests that *any* stopping place is implausible, that any fixed definition of separation of powers is impossible. It thus supports the more radical conclusion that Congress is free to establish any institutional arrangement that "reasonably" serves legitimate government purposes.

What Paul's analysis lacks, in other words, is an affirmative theory of separation of powers to explain why the Constitution is *not* satisfied by less than appellate review in an article III court. This is not the place to elaborate such a theory in detail, but it seems useful to sketch the framework of an understanding of separation of powers that supports Paul's conclusion.

Lawmaking is a complicated, often drawn-out process that begins with the enactment of a general policy and ends with the translation of this policy into final determinations of consequences for particular individuals. The ability to monopolize this process—to decide policy and to control its implementation in particular cases—would seriously threaten individual rights and liberty. The separation of powers lessens this threat by dispersing governmental authority: it divides the lawmaking process into three distinct phases and requires affirmation from a separate entity in each phase. No single government body can gather too much power if successful completion of the process requires the participation of two other, independent bodies.[15]

At a minimum, then, the separation of powers requires the preservation of three distinct phases in the lawmaking process. In my view, moreover, this is the most that separation of powers requires. The historical evidence suggests that the Framers' idea of separation of powers was unformed and tentative, and that they had few fixed institutional arrangements in mind beyond the basic principle that there should be a separation.[16] Moreover, as Paul suggests, any detailed schedule of "legislative," "executive" and "judicial" functions is necessarily arbitrary. Finally, since this minimalist approach satisfies the essential purpose of separation of powers, imposing more elaborate restrictions makes governing more difficult for no good reason.

On this view, defining separation of powers requires only that we articulate an irreducible minimum necessary for each branch to maintain a meaningful

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14. For example, the discussion above suggests that the only difference between "execution" and "adjudication" is that adjudication comes after and reviews the decisions of those charged with execution. Similar difficulties in distinguishing functions were encountered in trying to draw a line between legislation and execution. *See, e.g.*, Mistretta v. United States, 109 S. Ct. 647 (1989); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).

15. An additional benefit of separation of powers is that it proliferates the points of access for citizen participation in politics.

16. *See* Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211 (1989).

role in the lawmaking process. Beyond this minimum, institutional arrangements may develop over time in light of experience and expediency.

Support for this approach may be found in the Supreme Court's non-delegation decisions. These cases, which hold that Congress must establish an "intelligible principle" from which standards can be derived to guide executive discretion,[17] define the minimum necessary to preserve Congress' distinctive role. Congress can do more; Congress can, if it wants, spell out what a law requires with great particularity. At a minimum, however, separation of powers *requires* Congress to make a meaningful initial policy choice: anything less removes Congress from the lawmaking process and turns a tripartite system of lawmaking into a bipartite one.[18]

These non-delegation cases—and the understanding of separation of powers that they implicitly endorse—provide strong support for Paul's interpretation of article III. For parallel reasoning suggests that a similar, minimum threshold satisfies the constitutional requirement of separation of powers at the other end of the lawmaking spectrum. At some point, someone must make a final decision about the consequences of a law for particular individuals. Separation of powers requires that this decision not be rendered without meaningful participation by an official with article III protection (unless it is by a state court). Under the traditional model, this means a full trial, with *de novo* determinations of both fact and law. *Crowell* simply recognizes that departures from this model are constitutionally permissible because courts exercising *appellate* review retain significant power to oversee and restrain administrative officials.[19]

Sixth, this understanding of separation of powers has implications that require fuller exploration than the present occasion allows. One of these implications should be mentioned, however. The framework described above casts doubt on current law respecting Congress' power to vest executive officials with unreviewable discretion. Separation of powers contemplates a three-phase lawmaking process. Just as Congress cannot make this into a two-phase process by delegating its part to the Executive, so it cannot make it into a two-phase process by excluding the courts. The greater power not

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17. *See Mistretta,* 109 S. Ct. at 654-58; Yakus v. United States, 321 U.S. 414 (1944); *Schechter Poultry Corp.,* 295 U.S. at 495; *Panama Ref. Co.,* 293 U.S. at 388; J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928).

18. The Court has similarly preserved a minimal role for the executive. Thus, while Congress may spell out its policy in great detail, Congress' power ends with passage of a law. Implementation must be left to officials who are not subject to direct congressional control. *Bowsher,* 478 U.S. at 714; INS v. Chadha, 462 U.S. 919 (1983).

19. 285 U.S. at 22. There is little doubt that federal courts of appeals have considerable influence over district courts. Similarly, federal district courts, exercising the equivalent of appellate review through habeas corpus procedures, have imposed substantial controls on state court criminal proceedings. I see no reason to believe that appellate review of agency determinations is less adequate.

to pass a law at all does not include the lesser power to pass it subject to non-participation by article III courts in its implementation.

This does not necessarily mean that every government decision must be reviewed by article III judges. Like other constitutional doctrines, separation of powers is not absolute and may yield to a sufficiently compelling governmental interest. Similarly, there may be certain exceptions that are either *de minimis* or that find an historical justification. But the analysis above does suggest that the circumstances in which Congress can avoid article III review are narrower than present law permits.

The consequences of requiring judicial review on a wider scope are not radical. As noted above, someone must make a final decision about what a law means for particular individuals in a particular case. I am simply arguing that this final decisionmaker must ordinarily be free of direct control by the political branches of the federal government. The Constitution contemplates two ways to do this. Congress may leave the final review to state courts, an option that probably seemed more acceptable in 1789 than it often does today. Alternatively, Congress can delegate the final decision to a federal official with life tenure and salary protection. Separation of powers does not require a traditional trial in a traditional courtroom. Congress retains broad power to structure the process of implementing federal law, subject to the strictures of due process and the seventh amendment.[20] All that article III requires is that the official designated to perform the final review—in whatever proceeding Congress devises that satisfies these other constitutional restrictions—not be subject to control by Congress or the President in terms of salary or tenure. By the same token, however, article III ordinarily *requires* that Congress and the Executive surrender control at least to this extent.

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20. *See, e.g.*, Granfinanciera, S.A. v. Nordberg, 109 S. Ct. 2782 (1989).