



DIGITAL ACCESS TO SCHOLARSHIP AT HARVARD

Legislative Courts, Legislative Power, and the Constitution

The Harvard community has made this article openly available.
[Please share](#) how this access benefits you. Your story matters.

Citation	Daniel J. Meltzer, Legislative Courts, Legislative Power, and the Constitution, 65 Ind. L.J. 291 (1990).
Published Version	http://www.repository.law.indiana.edu/ilj/vol65/iss2/5/
Accessed	February 16, 2015 6:09:34 PM EST
Citable Link	http://nrs.harvard.edu/urn-3:HUL.InstRepos:12965067
Terms of Use	This article was downloaded from Harvard University's DASH repository, and is made available under the terms and conditions applicable to Other Posted Material, as set forth at http://nrs.harvard.edu/urn-3:HUL.InstRepos:dash.current.terms-of-use#LAA


(Article begins on next page)

4-1-1990

Legislative Courts, Legislative Power, and the Constitution

Daniel J. Meltzer
Harvard Law School

Follow this and additional works at: <http://www.repository.law.indiana.edu/ilj>

 Part of the [Administrative Law Commons](#), [Constitutional Law Commons](#), and the [Legislation Commons](#)

Recommended Citation

Meltzer, Daniel J. (1990) "Legislative Courts, Legislative Power, and the Constitution," *Indiana Law Journal*: Vol. 65: Iss. 2, Article 5.
Available at: <http://www.repository.law.indiana.edu/ilj/vol65/iss2/5>

This Symposium is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in *Indiana Law Journal* by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.

Legislative Courts, Legislative Power, and the Constitution

DANIEL J. MELTZER*

Over fifteen years ago, Paul Bator taught me federal courts, but he did so much more than that; he kindled a fascination in that subject that I've never lost. Paul's teaching, his writing, his whole person displayed an enviable set of gifts: analytical power mixed with broad vision; a search for principle informed by worldly realities; and a masterful use of language, blending informality, pungency, and elegance, that gave pleasure as it reinforced his argument. His approach to a problem always commanded respect, even when one did not fully agree. I shall deeply miss him and the distinctive voice he possessed.

The Constitution as Architecture is an apt title not only for this lecture, but also for much of Paul's work. His consistent concern was with institutional structures: with their grace, their practicality, their sense of proportion, and their fit with broader aspects of the legal environment.

With characteristic force and polish, this lecture steers us away from dead ends, while offering a prescription—that article III review of the decisions of non-article III federal tribunals is a constitutionally adequate vesting of the judicial power—with which I substantially agree. But there remain some difficult questions about the meaning and implications of his position, four of which I would like to discuss.

I.

The first question concerns the reach of congressional power. Paul notes that early on, courts martial and territorial courts, staffed by untenured judges,

developed in response to special institutional needs, under circumstances where it was the considered judgment of the legislature that it was inappropriate and inexpedient to have to choose between leaving a matter to the state courts on the one hand, or, on the other, to commit it to a regular federal tribunal.¹

* Professor of Law, Harvard Law School. J.D., 1975, A.B., 1972, Harvard University. Dick Fallon and David Shapiro gave me useful comments on a draft, and, more generally, have helped clarify my thinking about this subject—though neither fully agrees with what I have to say here. Mike Dorf provided helpful research assistance.

1. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 *IND. L.J.* 233, 236 (1990).

I am less persuaded than he that there exist strong instrumental justifications for the full range of jurisdiction exercised by courts martial or territorial courts.²

I raise the point not to quibble about the *raisons d'être* of particular tribunals that must today be taken as established, but rather to open up a question about the limits of legislative authority. Congress may constitutionally create non-article III tribunals, Paul argues, so long as "it can be demonstrated that there is a reasoned basis for the judgment that dispensing with article III restrictions has an appropriate and valid purpose connected with the achievement of a valid legislative program."³ He adds that it is a "huge intellectual and political mistake" to think of that formulation as meaningless, for it would prohibit "[w]holesale transfers of jurisdiction"⁴ whose sole purpose is to destroy the protections of article III. Beyond that, article III constitutes an important psychological constraint, as evidenced, he says, by Congress' never having tried to subvert the independence of the judiciary.

I suspect that judicial independence is less likely to be subverted by "wholesale transfers of jurisdiction" or by a Congress with destructive intent than by the accretion of measures, each of which creates a significant jurisdiction in a non-article III tribunal.⁵ This last prospect is not "chimerical,"⁶ in my view, in light of continuing concern about the workload of article III courts, as well as the possibility, in an era of powerful interest groups, that particular matters might be assigned to non-article III tribunals for the purpose of advancing a specific agenda.⁷

2. See, e.g., E. CHEMERINSKY, *FEDERAL JURISDICTION* §§ 4.2-4.3 (1989); M. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF POWER* 36-40 (1980).

3. Bator, *supra* note 1, at 258.

4. *Id.*

5. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 866 (1986) (Brennan, J., dissenting). See generally *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 593-94 (1952) (Frankfurter, J., concurring). It is a fair, though not complete, answer to note that the Constitution's capacity to accommodate gradual governmental change can be viewed as a strength, rather than a weakness, of our political system. Compare Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 *CORNELL L. REV.* 488, 523 (1987) (so arguing) with Bator, *supra* note 1, at 233 (noting the problematic nature of "the neo-Darwinian concept that whatever wins is right").

6. See Bator, *supra* note 1, at 258.

7. Paul recognizes that such a purpose underlay creation of the National Labor Relations Board. Bator, *supra* note 1, at 238.

As recent debates over judicial appointments suggest, the political branches may also try to staff article III courts to further a particular ideology. But a large shift in the attitudes of the article III judiciary, with more than 700 members enjoying life tenure, see 28 U.S.C. §§ 44, 133 (1982), requires a combination of political continuity, executive determination, lack of strong resistance in the Senate, and a large number of vacancies. "Stacking" a commission with a small number of members who enjoy limited terms is considerably easier, especially at its creation, when all seats are vacant.

Of course, specialized article III courts can more easily be stacked, particularly at their

Suppose that over time Congress vastly increased the number of magistrates and the scope of their duties. The purpose would hardly be to destroy article III courts, but rather to provide them with assistance needed to exercise their traditional jurisdiction without increasing the corps of tenured judges—a prospect to be avoided either (a) because it would dilute the quality and prestige of the article III judiciary, or (b) because the increase in workload may be temporary.⁸

Plainly one could not find that measure to be irrational or ill-motivated, but I would find it a troubling one. Magistrates offer only the advantage of workload reduction, rather than expert, efficient, and consistent adjudication⁹ or the ability to combine rulemaking and adjudication in service of a regulatory agenda.¹⁰ I tend to agree with others¹¹ that workload reduction is not reason enough, particularly since Congress always retains the option of reducing federal court dockets by transferring matters to the state courts.¹²

To be sure, the decisions of the magistrates would presumably be subject to judicial review by article III judges; we can assume that legal conclusions

inception, but also thereafter. Specialized courts have fewer judges than the generalist district courts and courts of appeals, and it is easier to identify a nominee's likely predisposition as to a narrow set of issues. See R. POSNER, *THE FEDERAL COURTS* 153-54 (1985). Still, article III poses a serious obstacle to efforts to stack even a specialized court, by restricting political power over existing appointees while simultaneously (by virtue of life tenure) limiting the opportunities for new appointments.

8. See Note, *Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View*, 88 *YALE L.J.* 1023, 1048-49 (1979) [hereinafter Note, *Constraints*].

9. See *Crowell v. Benson*, 285 U.S. 22, 46-47 (1932) (highlighting the distinctive advantages of administrative rather than judicial determination of compensation awards).

10. See Breyer, *Judicial Review of Questions of Law and Policy*, 38 *ADMIN. L. REV.* 363, 368 (1986); Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 *HARV. L. REV.* 915, 935 (1988); Sunstein, *Constitutionalism After the New Deal*, 101 *HARV. L. REV.* 421 (1987).

11. See, e.g., Whitten, *Consent, Caseload, and Other Justifications for Non-Article III Courts and Judges: A Comment on Commodity Futures Trading Commission v. Schor*, 20 *CREIGHTON L. REV.* 1, 18, 34-37 (1986-87); Note, *Constraints*, *supra* note 8, at 1055-56 n.181.

12. This suggestion may sound doctrinaire and divorced from reality if, as may be true in some locales, most litigants would prefer federal magistrates to state court judges. But I don't believe that article III makes Congress' power to deploy non-article III tribunals dependent on whether they would prevail, in a popularity poll, over the clearly constitutional alternative of state court adjudication. Moreover, as I suggest below, nothing should prevent Congress from permitting the use of magistrates or other non-article III bodies with the actual consent of the litigants. See *infra* text accompanying notes 21-23.

One might also question how great is the risk of interference by the political branches with decisions by federal magistrates, who are appointed by and under the supervision of the judicial branches. Yet I think Justice Brennan's opinion in *Northern Pipeline*, despite its manifold difficulties, was correct when it described the tenure and salary protections as designed in part to promote public confidence, attract high quality lawyers to the bench, and shield against pressures originating within as well as outside of the judicial branch. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59 n.10 (1982). See generally Note, *Constraints*, *supra* note 8.

would be reviewed *de novo*, and fact-findings at least for substantial evidence. But neither Paul nor other commentators¹³ have suggested that factual questions resolved by non-article III decisionmakers must generally be reviewed for more than substantial evidence.¹⁴ The assumption that article III judges would always conscientiously review magistrates' decisions (particularly when magistrates are deployed to lighten the judges' workload) may be a heroic one. And even on that assumption, magistrates would have acquired broad power to resolve finally many important factual disputes. We must remember that litigators, unlike most academics, tend to view factual issues as decisive,¹⁵ and that many discretionary aspects of a trial judge's duties are effectively immune from appellate review.¹⁶

To take a different example, suppose Congress, over time, created a large number of specialized article I courts. If the purpose were to preserve article III judges as generalists while reaping the advantages of specialization in particular areas, again Congress could hardly be said to have acted irrationally. But even with provision for broad review in article III courts, the prospect is quite a troubling one, for similar reasons.

Justice White's dissent in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* offered a different view: "the very fact of extreme specialization may be enough . . . to justify the creation of a legislative court."¹⁷ Noting that the federal judiciary is, "on the whole, a body of generalists," he argued that "[t]he addition of several hundred specialists may substantially change, whether for good or bad, the character of the federal bench."¹⁸ The argument does not strike me as a powerful one. Though both specialized and generalist judges would inhabit the world of article III, by definition they would be assigned different responsibilities, and it is not clear how the presence of specialists on one court would change the character of generalists on another. Various kinds of provisions might establish a desirable separation between the two groups—for example, differential salaries, or rules that specialists and generalists may not sit by designation on each other's courts. Uncertainty about the workload of specialized courts can be dealt with, at least in part, by provisions that vacancies need not be automatically

13. See, e.g., L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 595-623 (1965); Fallon, *supra* note 10, at 986-91; Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 29 & n.173 (1983).

14. I put to one side much-criticized suggestions that broader review is required of "constitutional" and "jurisdictional" factfindings. See generally Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985).

15. See *Speiser v. Randall*, 357 U.S. 513, 520 (1958); L. JAFFE, *supra* note 13, at 89; Monaghan, *supra* note 14, at 255 n.141; see also J. FRANK, *LAW AND THE MODERN MIND* (6th printing 1970).

16. See, e.g., *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1049 (7th Cir. 1984) (Posner, J., dissenting).

17. 458 U.S. 50, 118 (1982) (White, J., dissenting).

18. *Id.*

filled. There are many ways to establish article III courts staffed by judges with tenure and salary protection,¹⁹ and the justifications for departing from article III must be measured against the plausible options within it. There are, of course, reasons to question the desirability of specialized article III courts, not the least of which is the fear that specialized courts are more subject to political influence, particularly over judicial appointments.²⁰ Concern about political influence, however, must be greater still in the case of specialized tribunals whose judges lack tenure and salary protection.

Thus, I fear that acceptance of Paul's standard—under which broad use of both magistrates and specialized non-article III courts would pass muster—would give Congress too much power to legislate around article III. I suggest, instead, that it is appropriate for courts considering the constitutionality of congressional action to consider the strength of the legislative purpose in creating a tribunal outside of article III. Such an approach is not unlike that advocated by Justice Harlan in *Glidden Co. v. Zdanok*,²¹ where he called for judicial scrutiny of the “particular local setting, the practical necessities, and the possible alternatives.”²² Paul criticizes that kind of approach as involving balancing that is “open-ended and necessarily subjective.”²³ Since this is not the place to try to respond fully to characteristic criticisms of balancing, I will simply note my own view that intelligent and candid decisionmaking often demands some kind of balancing, which (like most any approach to the adjudication of challenging questions) admittedly leaves considerable room for differing judgments.²⁴

19. See *Bankruptcy Act Revision: Hearings Before the Subcomm. on Civil and Const. Rights of the Comm. on the Judiciary, House of Representatives, on H.R. 31 and H.R. 32, 94th Cong., 2d Sess. 2697 (1976) (letter of Paul J. Mishkin).*

20. See R. POSNER, *supra* note 7, at 153-54.

21. 370 U.S. 530 (1962) (plurality opinion).

22. *Id.* at 547-48. Justice Harlan's statement was made in the context of courts exercising jurisdiction for a transitory period, but the standard he suggested strikes me as just as applicable to more permanent tribunals.

23. Bator, *supra* note 1, at 257.

24. For a thorough discussion of the standard objections to balancing, see Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987). For a thoughtful response to general criticisms of balancing that is sensitive to its potential pitfalls, see Coffin, *Judicial Balancing: The Protean Scales of Justice*, 63 N.Y.U. L. REV. 16 (1988).

I should add that my endorsement of judges' evaluating the force of the legislative justification for assigning matters to an article I tribunal does not extend to the multi-factored balancing approach found in the Court's recent legislative courts decisions. Those decisions attend to a far larger number of ill-defined and often irrelevant variables, including: (1) whether the right originates in state or federal law, see *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986); (2) whether the right displaces a pre-existing common law right, see *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 587 (1985); (3) whether the matter involves “public rights,” see *id.* at 588-89 (a term whose emptiness, as used by the Court, Paul amply demonstrates); and (4) whether the tribunal possesses certain “judicial powers” such as the authority to issue declaratory judgments, see *Northern Pipeline*, 458 U.S. at 85 (opinion of Brennan, J.).

Paul offers a different objection to balancing: if Congress is required to use constitutional courts, the Court cannot balance that requirement away, but if Congress has power to use non-article III tribunals, then the exercise of that power can be invalidated only if Congress' judgment was arbitrary.²⁵ In favoring the second view, he reminds me of Justice Frankfurter's position in the *Dennis* case—that the Court was not justified in substituting its judgment for that of Congress in weighing the competing concerns of free speech and national security.²⁶ By contrast, I think it is no less appropriate here than in free speech cases for courts to protect enduring constitutional values likely to be given inadequate weight by the political branches.²⁷ Indeed, in my view the hard question is not whether the courts will second-guess Congress too much, as Paul seems to fear, but rather too little.²⁸ Nonetheless, I believe the kind of judicial scrutiny that Justice Harlan described would provide a needed limitation on the admittedly broad power of Congress to assign matters in the first instance to non-article III tribunals.

II.

I turn next to the relationship of the due process clause and article III as sources of a right to judicial review. Dissenting in *Crowell v. Benson*,²⁹ Justice Brandeis argued that due process was the exclusive source of a right to judicial review.³⁰ Paul comes close to endorsing that position, suggesting that article III does not add anything to the right of review provided by the due process clause.³¹ He also says that he does “not think that the distinction [between article III and due process] is substantive.”³² My own view is that the distinction does matter in one important respect, for the constitutional requirement of due process applies to the states as well as to the federal government, while article III (and, more generally, the Constitution's scheme of separation of powers) does not govern the organization of state judiciaries or state governments.³³

25. Bator, *supra* note 1, at 257-58.

26. *Dennis v. United States*, 341 U.S. 494, 525-26 (1951) (Frankfurter, J., concurring in the judgment); see also Aleinikoff, *supra* note 24, at 984.

27. See, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH* 23-28 (1962).

28. See *Schor*, 478 U.S. at 863-65 (Brennan, J., dissenting); see also Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 221-22 (1983). For similar concerns in the free speech area, see, e.g., J. ELY, *DEMOCRACY AND DISTRUST* 106-16 (1980).

29. 285 U.S. 22 (1932).

30. *Id.* at 86-88 (Brandeis, J., dissenting); accord Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1372-73 (1953).

31. Bator, *supra* note 1, at 269-70.

32. *Id.*

33. *Crowell*, 285 U.S. at 57; *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902). Professor Monaghan

To explain more concretely why the question is important, assume that a state agency hearing workers' compensation claims against employers recognizes every conceivable attribute of procedural fairness. Suppose, moreover, that judicial review of agency decisions is precluded, but the agency itself provides an internal appeal to an administrative review body composed of three lawyers serving ten-year terms. For purposes of due process—of ensuring procedural fairness before a competent and impartial adjudicator—it is hard to distinguish review by lawyers whose institutional title is “state court of appeals” from review by lawyers titled “administrative appeals board.” It is true that the state political branches might in theory exercise pressure over the appeals board. But had the state provided judicial instead of administrative review, the political branches might have exercised pressure over state court judges, who are not required by the due process clause to have tenure and salary protection.³⁴ Thus, Brandeis' famous statement in *Crowell* that “under certain circumstances, the constitutional requirement of due process is a requirement of judicial process”³⁵ seems to me unpersuasive in this context.³⁶

has noted that several federal constitutional provisions applicable to the states—the bill of attainder clause (whose applicability does not depend upon the emergence of “incorporation”), the sixth amendment's jury trial right, and the right to be free from (some) searches absent a judicial determination of probable cause—presuppose the existence of a state judiciary. Monaghan, *First Amendment “Due Process,”* 83 HARV. L. REV. 518, 524 n.23 (1970). But that presupposition, in my view, should not cast doubt upon the validity of state institutional arrangements which, though unfamiliar in 1789, provide a fair and unbiased hearing before a competent administrative tribunal rather than a court.

34. *Palmore v. United States*, 411 U.S. 389, 410 (1973). *But cf.* Redish & Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 498 (1986) (contending that where state is a party to a case involving a liberty or property interest, use of untenured state judges violates due process).

35. *Crowell*, 285 U.S. at 87 (Brandeis, J., dissenting).

36. I do not wish to be understood as doubting the existing strong presumption in favor of state judicial review of state administrative action, at least in light of current institutional arrangements and traditions. To say that state agencies might be as competent and disinterested as state courts does not mean that they are. Nor do I dispute that there is authority beyond that in Justice Brandeis' dissent in *Crowell* suggesting that due process requires judicial process. Perhaps the leading decision so holding is *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920), where the Court, over the dissents of Brandeis, Holmes, and Clarke, ruled that the due process clause entitled a utility that had challenged a state rate order as confiscatory to the “independent judgment as to both law and facts” of a judicial tribunal. *Id.* at 289; *see also infra* note 40; L. JAFFE, *supra* note 13, at 376-89.

Ben Avon is most celebrated, or notorious, for having required *de novo* review of “constitutional facts”—a requirement that has not stood the test of time. *See generally* Hart, *supra* note 30, at 1376-77; Monaghan, *supra* note 14, at 247-54. *Ben Avon* is weakly reasoned in other respects. As Henry Monaghan has noted, it appears to rest on the following syllogism: (a) regulation of rates by legislatures must be subject to judicial review; (b) the rate order in question is “legislative” in nature; (c) therefore, the order must be subject to judicial review. *Id.* at 252 n.126. Paul's lecture demolishes the notion that simple labels like “legislative” and “judicial” can decide cases; indeed, as Monaghan notes, we might today consider the administrative rate order to have been an “adjudication.” Moreover, it may be that the agency

Now suppose that the *initial* administrative decisionmaker were a board of three lawyers appointed to ten-year terms, that the board's orders were self-enforcing, and that no administrative or judicial review were available. Such a scheme would be unusual.³⁷ But even in criminal cases, a litigant whose case has been fairly decided by an initial tribunal has no right to an appeal.³⁸ Notwithstanding what Louis Jaffe calls "the ubiquity of the judicial imprimatur before the exercise of official force,"³⁹ it seems hard to contend that a scheme providing a single, but entirely fair, administrative determination necessarily denies due process.⁴⁰ Nor, in view of powerful questions that have been raised about the desirability of individualized judicial review in mass benefit programs,⁴¹ should we be too quick to constitutionalize judicial review in all of the states—a point that Paul echoes.⁴²

in *Ben Avon* did not provide a fair hearing, so that due process required judicial process as the only way to provide any fair hearing on the facts of the case. *Cf.* 253 U.S. at 291 ("Plaintiff in error has not had proper opportunity for an adequate judicial hearing as to confiscation.").

37. See L. JAFFE, *supra* note 13, at 320-94.

38. See *McKane v. Durston*, 153 U.S. 684, 687 (1894). Though decided nearly one hundred years ago, *McKane* has been reaffirmed by recent Supreme Court decisions. See, e.g., *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Ross v. Moffitt*, 417 U.S. 600, 606 (1974).

39. L. JAFFE, *supra* note 13, at 262.

40. When one adds to my simple example the prospect of the agency's acting as a party as well as the adjudicator, and its possession of rulemaking as well as adjudicatory authority, concerns about impartiality mount. *But cf.* Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 470 (1986) (suggesting that courts and agencies decided issues "in roughly the same way," and questioning the "idealistic belief in very good judges who do not confuse their own policy preferences with those of Congress or with the self-evident good"). The Supreme Court, however, has never held that such a combination of functions violates due process, much less intimated that appropriate insulation cannot avoid any constitutional concerns. See *Withrow v. Larkin*, 421 U.S. 35, 46-55 (1975).

A different example is raised by Justice Scalia's dissent in *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987). There, an alien was convicted in federal court for entering the United States after having been deported. The Supreme Court held that the statutory scheme, under which criminal defendants were precluded from attacking the underlying administrative order of deportation, denied due process, at least where defects in the administrative proceeding had prevented judicial review of the original deportation order.

In dissent, Justice Scalia posited a state administrative agency that, after full judicial-type administrative hearings, published a list of unethical businesses, and a state law that made it a felony for a listed business to bribe agency investigators. He argued that it would not deny due process if a listed business were precluded from collaterally attacking, in a bribery prosecution, the validity of the administrative listing, even if no judicial review of that initial order had been available. *Id.* at 848 (Scalia, J., dissenting).

I believe Justice Scalia may have won the argument about his hypothetical, but should have lost the war about how to decide *Mendoza-Lopez*. The majority's position in *Mendoza-Lopez* would have been stronger had it rested on one of two positions. The first is that in imposing criminal punishment, a federal court may not, consistently with article III, be required to accept as valid a legal determination made by a federal non-article III tribunal. See Hart, *supra* note 30, at 1379-83. The second—premised on the Supreme Court's acceptance of the lower courts' ruling that the original deportation hearing violated due process—is that no court may constitutionally impose a sanction on a defendant who was not afforded a fair hearing by some tribunal as to one element of liability.

41. See J. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* (1983).

42. Bator, *supra* note 1, at 262.

Indeed, the conclusion that due process does not necessarily require judicial process is related to one of Paul's key insights—that the judicial and executive realms overlap and cannot be distinguished *a priori*.⁴³ It is similarly difficult, in determining whether a state adjudicatory tribunal provides due process, to make the inquiry turn on whether the label “judicial” or “administrative” is a better fit—particularly since the federal constitution does not set forth characteristics (like article III's tenure and salary protection or its limitation of the federal judicial function to deciding cases and controversies) that define the state judiciary. In determining whether a state has provided due process, what matters is not abstract categorizing, but rather whether the tribunal provides a fair hearing. That is not always an easy question to resolve, but it is, I think, the right question to ask.

The same due process analysis should govern federal institutions. If a federal workers' compensation scheme provides a fair hearing before a competent and impartial tribunal—for example, before law-trained judges serving ten-year terms and free from any conflict of interest—it does not deny due process. Thus, I part company with Paul when he suggests that article III does not add to the due process clause in requiring review in a constitutional court of a federal executive or administrative determination.⁴⁴ Rather, even when a federal tribunal provides due process, article III may require the availability of at least some judicial review in an article III tribunal.

One objection to my emphasis on article III deserves attention. The objection arises from the possibility of state court review of federal non-article III tribunals. Congress has, in general, broad power to decide whether to assign cases to federal or state courts. When judicial review of the decision of a federal non-article III tribunal is required, Congress may give state courts the reviewing jurisdiction;⁴⁵ though state courts lack tenure and

43. *Id.* at 264.

44. *Id.* at 269-70.

45. Paul does not discuss this possibility, which he might have viewed as implausible, not only because of likely resistance from the federal government, but also because it would exacerbate the existing lack of uniformity in the interpretation of federal law. See Bator, *What is Wrong With the Supreme Court?*, 51 U. PITT. L. REV. ____ (1990); Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093 (1987). But I suspect he would not have doubted the constitutionality of such an approach, especially given his high opinion of state courts and his recognition that article III review is a scarce commodity.

One might ask, in light of my earlier suggestion of the difficulties of sharply distinguishing state agencies from state courts, whether it follows that review of a federal administrative decision could constitutionally be assigned to a state administrative agency rather than to a state court. The question may be a bit “unreal and contrived,” Bator, *supra* note 1, at 270, but in principle I believe that such a scheme could satisfy the Constitution. A contrary answer would require establishing some federal constitutional standard to differentiate state courts from other state adjudicatory tribunals—a standard that, as just noted, does not (as yet) exist. Moreover, the cardinal value protected by article III's tenure and salary protections—

salary protection, they share with article III courts a freedom from control by the federal political branches.⁴⁶ This much is broadly accepted.⁴⁷ But, the objection goes, it is difficult to find that article III's requirements governing *federal* judges' salary and tenure protection can be satisfied by *state* court review. Wouldn't it be far easier to find due process to be the source of the constitutional right to judicial review, with article III requiring only that if the reviewing forum is a federal tribunal, it must be a federal constitutional court?

This objection has some force, but there are, I believe, two responses to it. The first focuses on article III as a whole rather than on the tenure and salary language alone. Article III is the source of the following two propositions: federal (but not state) judges must have tenure and salary protections, and Congress need not create (at least inferior) federal courts. The value most consistent with those two propositions is adjudication by tribunals free from the control of the federal political branches. That value is threatened by adjudication in article I tribunals that is final, but not by adjudication subject to adequate review by federal constitutional or state courts, both of which are insulated from direct control by Congress or the President.

The second response to the objection highlights one last oddity of the suggestion that due process is the source of a constitutional right to judicial review. Consider again a hypothetical federal workers' compensation agency. It is accepted that an employer subject to an order to pay compensation has a constitutional right to judicial review, at least as to questions of law,⁴⁸

adjudicatory independence from federal political control—does not call for any distinction between state courts and state agencies. In a particular case, a state agency's procedures might not satisfy due process, but nothing precludes designing and staffing a state agency so that it provides an entirely fair hearing.

46. See Krattenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional*, 70 GEO. L.J. 297, 304 (1981).

47. See generally P. BATOR, D. MELTZER, P. MISHKIN & D. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 382 (3d ed. 1988) [hereinafter HART & WECHSLER]. Even revisionist arguments that the Constitution *does* require the establishment of either original or appellate federal court jurisdiction over some subset of cases within the federal judicial power concede (albeit at times grudgingly) the constitutionality of assigning those cases to the state courts, so long as their decisions are subject to Supreme Court review via *certiorari*. See, e.g., Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. REV. 205, 218-19 (1985); Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 44, 52-57 (1981). Thus, acceptance of these arguments would not cast doubt on the constitutionality of Congress' making the decisions of federal non-article III tribunals reviewable in state rather than federal courts.

48. See, e.g., Hart, *supra* note 30:

Q. The *Crowell* case also has a dictum that questions of law . . . must be open to judicial consideration. [Has that] statement[] stood up?

A. If I can speak broadly and loosely, I'll say yes . . . Shutting off the courts from questions of law determinative of enforceable duties was one of the things

and as just noted, such review might come in a state court. If this right to review were based on the due process clause, then one would have to assert that (1) an adjudication before untenured federal adjudicators denies due process, no matter how fair the hearing and the tribunal may be, but (2) an adjudication before untenured state judges, even if they are no more competent or impartial⁴⁹ and afford no fairer an opportunity to present evidence and argument, complies with due process. This oddity disappears if the right to review is premised on article III, for its tenure and salary provisions clearly treat untenured federal and state adjudicators differently.⁵⁰ And thus understood, constitutional doctrine requiring judicial review of federal administrative agencies will not needlessly restrict the ability of the states to experiment with approaches to administrative adjudication in which courts play a less central role.

III.

The third point I would like to address is the relevance of the argument just made—that due process is not the appropriate doctrine on which to base a right to review of decisions by non-article III tribunals—to the question whether consent of all parties to federal non-article III adjudication should be honored. Paul does not devote much attention to that question, but consent has been invoked by the Supreme Court in its two most recent legislative courts decisions as one reason for upholding the tribunals there at issue,⁵¹ and by the courts of appeals in their consistent validation of the assignment of civil cases to federal magistrates with the consent of the parties.⁵²

Some commentators have suggested that due process protects the rights of individual litigants, and hence they can waive that protection, while article III protects the independent status of the judiciary, a protection that litigants lack standing to yield.⁵³ The opinion in *Commodity Futures Trading*

Yakus [v. United States, 321 U.S. 414 (1944)] assumed that Congress could *not* do.

Id. at 1377.

49. State court judges, though insulated from the federal political branches (unlike untenured federal adjudicators), are, of course, not insulated from state political influence. The threat to ideals of impartiality from possible political influence thus seems, in a gross way, to be equivalent. Indeed, one might suggest that the smaller scale of state government increases the visibility of, and likelihood of efforts to exert political influence over, any particular adjudication.

50. For consideration of one additional objection to my argument, see *infra* note 68.

51. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848-50 (1986); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 584 (1985).

52. See HART & WECHSLER, *supra* note 42, at 472 and cases cited therein.

53. See Note, *Federal Magistrates and the Principles of Article III*, 97 HARV. L. REV. 1947, 1952-54 (1984); Note, *Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act*, 80 COLUM. L. REV. 560, 592-96 (1980) [hereinafter Note, *Article III Limits*].

*Commission v. Schor*⁵⁴ presented a variation on this theme: article III protects both the structural role of the independent judiciary and the rights of litigants to impartial adjudication.

To the extent that [the] structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by article III [Those] limitations serve institutional interests that the parties cannot be expected to protect.⁵⁵

Paul argues that article III sets forth structural and political ideals rather than private rights, though without specifically indicating the implications of that argument for the validity of consensual non-article III adjudication.⁵⁶

To me, trying to separate these two interests is a bit like asking whether antibiotics are administered in order to eliminate bacteria or reduce pain. Clearly, both purposes are at work, and achieving the first leads to achievement of the second. Article III protects the rights of litigants precisely *through* its creation of judicial independence,⁵⁷ just as more generally a system of separated powers is thought to promote individual liberty.⁵⁸ Nor is it odd that a constitutional provision furthering a structural interest might be protected (or left unprotected) by the actions of a litigant. The litigation of separation of powers and federalism issues is ordinarily undertaken by private litigants.⁵⁹ To take just one example, Presidents for years had taken the position that the legislative veto was unconstitutional, but that device was incorporated in nearly 200 statutes until *Immigration and Naturalization Service v. Chadha*,⁶⁰ where a private litigant came along to press and win a separation of powers challenge.

The argument about consent can be put differently. There is no barrier to requiring litigants to exhaust remedies before an administrative tribunal, so long as an article III court retains full power to adjudicate *de novo* all issues of fact and law. But we do not require a litigant to appeal from an

54. 478 U.S. 833 (1986).

55. *Id.* at 850-51.

56. Bator, *supra* note 1, at 259.

57. The point is made quite clearly by Hamilton in THE FEDERALIST No. 78. See also Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665, 698 (1969).

In his dissent in *Schor*, Justice Brennan similarly argued that the two interests are difficult to disentangle. From that starting point, he reached a conclusion—that the validity of non-article III adjudication is unaffected by litigant consent—diametrically opposed to the view I sketch here. See 478 U.S. at 867.

58. See *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting); THE FEDERALIST No. 47 (J. Madison).

59. See HART & WECHSLER, *supra* note 47, at 175; J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 209-10 (1980); Hart, *Book Review*, 67 HARV. L. REV. 1439, 1461 (1954).

60. 462 U.S. 919 (1983); see *id.* at 977 (White, J., dissenting).

administrative determination, whether or not it has any binding effect.⁶¹ It is hard to see why the consent of the litigants to be bound by the determination of a non-article III tribunal should be valid after, but can never be valid before, the adjudication. In either case, that consent provides, if not complete, at least very considerable reason to doubt that the tribunal poses a serious threat to the ideal of federal adjudicatory independence.⁶²

There remains the argument that just as consent cannot permit article III courts to hear cases outside their subject matter jurisdiction, so consent cannot validate adjudication by non-article III tribunals.⁶³ But subject matter jurisdiction is not a self-defining term,⁶⁴ and the tradition that defects cannot be waived is not an unshakable axiom but a purposive doctrine.⁶⁵

61. I do not assign great significance to the question whether an agency's orders become binding absent judicial enforcement, or more generally to a distinction between administrative agencies and legislative courts for purposes of article III. *Accord* Katz, *Legislative Courts*, 43 HARV. L. REV. 894, 920 (1930); Redish, *supra* note 28, at 214-19; Fallon, *supra* note 10, at 928. *Cf.* Karst, *Federal Jurisdiction Haiku*, 32 STAN. L. REV. 229, 230 (1979). Professors Currie and Krattenmaker disagree, arguing that the inability of an administrative agency to enforce its own orders makes its adjudication more justifiable than adjudication by legislative courts with the power to enter judgment. *See* Currie, *Bankruptcy Judges and the Independent Judiciary*, 16 CREIGHTON L. REV. 441, 456 & n.85 (1983); Krattenmaker, *supra* note 46, at 308-09. In fact, however, orders of some agencies—for example, the Federal Trade Commission and the Interstate Commerce Commission—are self-enforcing. *See* 15 U.S.C. § 45(g) (1982); 49 U.S.C. § 10322(e) (1982). To be sure, parties aggrieved by those orders have the right to judicial review. But so long as review is available in any event, the question whether orders are self-enforcing reduces, in practical terms, to the question of which party has the burden of seeking judicial review. That is admittedly a difference, but not one that seems to me significant in considering whether and to what extent the Constitution permits initial adjudication in a non-article III tribunal. *See generally* Redish, *supra* note 28, at 217-18.

Indeed, the argument that delegation to non-article III tribunals is more easily justified when they lack power to enter binding orders is not unrelated to the conception of administrative agencies as adjuncts of article III courts. Paul's criticism of that conception is, in my view, unanswerable. *See* Bator, *supra* note 1, at 252-53.

62. To be sure, in some instances we may doubt the validity of the consent given before the non-article III adjudication occurs, as in that situation the unwillingness to consent may carry a price. *See* *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1042 (7th Cir. 1984) ("If a litigant were required to wait ten years for a trial before an Article III judge in lieu of a prompt trial before a magistrate, we would have little difficulty finding that the constitutional grant of jurisdiction had been frustrated."). *Compare* 28 U.S.C. § 636(c)(2) (1982) (including provisions designed to provide some assurance that a litigant's consent to having a federal magistrate preside over a civil trial is voluntary). And there is some basis for fear of excessive judicial willingness to treat consent as valid. *See, e.g.,* *Geldermann, Inc. v. C.F.T.C.*, 836 F.2d 310 (7th Cir. 1987) (broker required to participate in arbitration proceedings as condition of doing business; court upholds his "consent" to waive article III adjudication), *cert. denied*, 109 S. Ct. 54 (1988). Thus, courts will have to wrestle with the vexing question whether a particular expression of consent should be deemed voluntary. *See generally* Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

63. *See, e.g.,* *Schor*, 478 U.S. at 851; Note, *Article III Limits*, *supra* note 53, at 595-96.

64. *See* Currie, *supra* note 61, at 460 n.108; Note, *Article III Limits*, *supra* note 53, at 595 n.221.

65. *See* AMERICAN LAW INSTITUTE, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* § 1386 (1969) (proposing that neither the parties nor the court may raise jurisdictional defects, including lack of subject matter jurisdiction, after the beginning of trial except in limited circumstances).

Two Massachusetts residents cannot agree to federal court adjudication of their state law contract action because the states have an interest in federal non-interference that the litigants are unlikely to protect. In the present context, however, the strategic interests of litigants substantially coincide with institutional interests protected by article III.⁶⁶ If there were a significant threat to a tribunal's adjudicatory independence, it is unlikely that *both* sides would consent to adjudication before it.

Thus, I conclude that there is no inconsistency between an emphasis on article III as the source of a right to judicial review of federal non-article III tribunals and a willingness to validate non-article III adjudication to which the litigants have consented. Given Paul's desire to construe article III so that it does not stand in the way of institutional flexibility and, more specifically, alternative methods of dispute resolution,⁶⁷ I would like to think that he would have agreed.

IV.

My final comment raises the question of exactly what adoption of Paul's approach would entail. Though I am persuaded by the thrust of Paul's position that Congress has broad power to avail itself of article I tribunals so long as there is adequate judicial review, considerably more detail is needed to turn that position into a workable set of legal propositions. Most fundamentally, Paul leaves open large questions about the necessity and scope of judicial review. To take just one example, must all cases decided by non-article III tribunals—even, for example, agency denials of benefits—be subject to judicial review? As to all issues of law and fact? Paul brilliantly exposes the lack of coherence to the "public rights" category as set forth in recent Supreme Court decisions, but leaves us without a clear sense of whether he would require article III review of all cases that have been thought to fall within it—and if so, as to what issues.⁶⁸

66. See Currie, *supra* note 61, at 460 n.108.

67. Bator, *supra* note 1, at 262.

68. I infer from his discussion of *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856), see Bator, *supra* note 1, at 246-48, that in his view some determinations by the executive or other non-article III tribunals need not be judicially reviewed. Paul's suggestion that judicial review must satisfy the requirements of due process, see Bator, *supra* note 1, at 267-68, merely re-locates the scope of review issue under a different constitutional provision.

The suggestion does raise one last question about whether the right to review should be understood as based on due process or article III. Henry Hart's famous dialogue distinguished between the right to review in enforcement cases—in which the government seeks to hurt someone—and benefit cases—in which the government fails to confer a benefit upon someone. Hart, *supra* note 30, at 1386-87. A right to judicial review that depends on whether the government is helping or hurting an individual might seem to emerge more comfortably from the due process clause, under which the nature of the process required traditionally depends

Formulating a persuasive account of the constitutional necessity of review, and its required scope, over a range of different kinds of government actions and as to varying kinds of issues is a task of consummate difficulty. Among the knotty problems is the need to accommodate the doctrine of sovereign immunity, a history accepting limited or precluded review in many areas, and the longstanding rhetoric about public rights. It is not clear to me that one can provide an account that satisfactorily reconciles the traditions just noted to an organizing constitutional principle requiring judicial review.⁶⁹ Paul's lecture does not offer a solution to that problem in all of its complexity. The great virtue of his lecture, however, is not only that it clears away a mass of debris, but also that, with great illumination and style, it points us in the right direction.

on the kind of interest affected.

I think there is considerable but not decisive force to that argument, and I offer two responses. First, Hart's distinction has been forcefully criticized as difficult to square with a range of related modern developments—the vast increase in the scope and importance of government benefits; the recognition of “new property” and the decline of right/privilege distinction; and the expansion of judicial review of administrative action as a means of trying to control the power of federal agencies operating under broad legislative delegations. See generally Fallon, *supra* note 10, at 963-67; Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1440 n.34, 1447 (1988). These developments are reflected in continuing suggestions by the Supreme Court that complete preclusion of review in benefit cases would raise serious constitutional questions. See, e.g., *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986); *Johnson v. Robison*, 415 U.S. 361, 366-67 (1974); see also *Bartlett v. Bowen*, 816 F.2d 695, 697 (D.C. Cir. 1987) (2-1 decision) (holding that complete preclusion of constitutional challenge to the act under which benefits are authorized would constitute “a clear violation of due process”).

Second, one who accepted the distinction might think control of executive action by an independent judiciary (a value easily located in article III) to be most important when the government threatens pre-existing liberty or property interests. On this view, individual and structural interests are intertwined, much as I suggested was true in discussing the validity of consent.

69. For a comprehensive and insightful recent discussion see Fallon, *supra* note 10.

