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ARTICLES

Consenting to Adjudication Outside the Article III Courts

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Article III confers the judicial power on the federal courts, and it provides the judges of those courts with life tenure and salary guarantees to ensure that they decide disputes according to law instead of popular pressure. Despite this careful arrangement, the Supreme Court has not restricted the judicial power to the Article III courts. Instead, it has held that Article I tribunals—whose judges do not enjoy the salary and tenure guarantees provided by Article III—may adjudicate disputes if the parties consent to the tribunals' jurisdiction. This consent exception provides the basis for thousands of adjudications by Article I judges each year. This Article challenges the consent exception. It argues that the consent of the parties should not be a basis for adjudication before an Article I tribunal. As it explains, permitting Article I tribunals to adjudicate based on the parties' consent is inconsistent with the text of the Constitution and historical practice, and it undermines both the separation of powers and federalism.

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INTRODUCTION

Federal judges are supposed to be independent. Their independence allows them to decide disputes according to the rule of law instead of based on popular pressure.[1] Article III of the Constitution protects judicial independence by entitling judges to compensation that cannot be reduced and to hold their offices so long as they maintain good behavior.[2]

But most federal adjudication occurs outside the Article III courts. Despite Article III's clear directive "vest[ing]" the "judicial power" in the federal courts, the Supreme Court has concluded that

1. *See* John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 972 (2002) (stating that the "purpose of making judges independent is to increase the likelihood that cases are decided" according to "permissible legal arguments").

2. U.S. CONST. art. III, § 1 ("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.").

Article III courts are not the only ones that can exercise the judicial power.[3] To the contrary, the Court has recognized several exceptions to Article III's exclusive grant of the judicial power to the federal courts,[4] concluding that Congress may create other tribunals, commonly referred to as "Article I tribunals," that can adjudicate claims outside Article III.[5] For example, Congress may create Article I tribunals to adjudicate claims in the territories, to serve as military tribunals, and to resolve disputes involving so-called "public rights."[6] These Article I judges do not enjoy the same salary and tenure guarantees given to Article III judges. They accordingly do not have the same independence as Article III judges.

One of the exceptions to Article III depends on the parties' consent.[7] Under this exception, an Article I tribunal can adjudicate a claim that otherwise would be heard by an Article III court if the parties consent to the Article I tribunal's jurisdiction. Two recent decisions have developed this exception. In the first, *Commodity Futures Trading Commission v. Schor*,[8] the Court upheld the ability of the Commodity Futures Trading Commission ("CFTC") to make findings of fact and law based in part on the consent of the parties. In the second, *Wellness International Network, Ltd. v. Sharif*, the Court expanded the role of

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3. *See, e.g.*, N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 64–70 (1982) (plurality opinion) (describing various exceptions permitting adjudication in non-Article III courts).

4. These exceptions have generated substantial scholarship. *See, e.g.*, Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233 (1990) (offering various theories to justify non-Article III tribunals); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1186–90 (1992) (suggesting that Article III allows no exceptions); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 917–18 (1988) (developing a theory of appellate review to accommodate the Court's exceptions to Article III); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643 (2004) (proposing a distinction between inferior courts and inferior tribunals to justify the Court's exceptions).

5. Most non-Article III tribunals are created pursuant to Congress's various powers under Article I, but some are the product of other powers. For example, Congress may create inferior tribunals in the territories under its Article IV plenary power over the territories. *See* U.S. CONST. art. IV, § 3. Because the vast majority of inferior tribunals are created under Article I and because the phrase "non-Article III tribunals" is awkward, this Article refers to all non-Article III tribunals as Article I tribunals.

6. Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1951 (2015) (Roberts, C.J., dissenting) (noting the "exceptions" that "permit Congress to establish non-Article III courts to exercise general jurisdiction in the territories and the District of Columbia, to serve as military tribunals, and to adjudicate disputes over 'public rights' ").

7. Comparatively little scholarship has been devoted to whether consent can authorize Article I adjudications. For example, see Pfander, *supra* note 4, at 773, which suggests that consent can justify Article I adjudication. *Accord* Fallon, *supra* note 4, at 991–92; Daniel J. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291, 301 (1990).

8. 478 U.S. 833, 848–50 (1986).

consent by concluding that the parties' consent authorizes an Article I tribunal not only to make factual and legal findings but also to enter an enforceable judgment,[9] the core of the "judicial power."[10]

Today, the consent exception confers vast power on Article I tribunals. It provides the basis for tens of thousands of civil and criminal adjudications conducted every year by bankruptcy judges and federal magistrate judges.[11] And it authorizes an Article I tribunal to hear potentially any type of claim that arises anywhere in the United States.

This Article argues that the Supreme Court made a wrong turn in recognizing the consent exception. Article III assigns the judicial power to the federal courts, and nothing in the Constitution allows the parties to reallocate that power. The exception is also historically unwarranted. Early American courts followed the rule that the consent of the parties could not confer the judicial power on a tribunal; only the law could confer the judicial power. That rule has ancient roots tracing back through at least the seventeenth century.[12]

Moreover, the consent of the parties does not eliminate separation-of-powers concerns. Although protecting the parties' interests in an impartial adjudicator is one reason for the Article III judiciary, it is not the only reason. An independent judiciary also promotes larger interests held by the public. These interests include not only protecting individuals who are indirectly affected by judicial rulings but also society's broader interests in living under a government that adjudicates based on the rule of law instead of political considerations, maintaining a system of adjudication that provides

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9. *Wellness*, 135 S. Ct. at 1940. In each case in which the Court has considered whether party consent authorizes Article I jurisdiction, the Article III courts had some degree of supervision over the Article I tribunal, and the Court has said that the consent together with this supervision avoids violating Article III. *Id.* at 1944–46. But the Court has strongly suggested that this supervision is unnecessary. *See infra* notes 78–82 and accompanying text.

10. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219 (1995) (quoting Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1990)) (" '[J]udicial Power' is one to render dispositive judgments."). These judgments not only dispositively resolve disputes but also can be enforced without any further order. *See, e.g.*, *In re* Omine, 485 F.3d 1305, 1321 (11th Cir. 2007) (noting authority of bankruptcy courts to enforce their judgments), *withdrawn pursuant to settlement*, No. 06-11655-II, 2007 WL 6813797 (11th Cir. June 26, 2007).

11. *See, e.g.*, *Matters Disposed of by U.S. Magistrate Judges During the 12-Month Periods Ending September 30, 2007 Through 2016*, U.S. CTS., http://www.uscourts.gov/sites/default/files/data_tables/jb_s17_0930.2016.pdf (last visited Feb. 5, 2018) [https://perma.cc/R237-THTF] (recounting that for the year beginning September 30, 2016, magistrate judges adjudicated 16,656 civil cases and 86,786 misdemeanors and petty offenses on consent of the parties).

12. *See* EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWES OF ENGLAND (1644), *reprinted in* 2 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 1169 (Steve Sheppard ed., Liberty Fund 2003).

adequate remedies for violations of rights, and preventing imprudent government actions by requiring various government institutions with different interests to evaluate those actions. Allowing the parties to choose to litigate before Article I tribunals that need not have similar guarantees of independence undermines these public values.

This Article contends that the parties' consent should not be a basis for adjudication before Article I tribunals. The greatest impact of this conclusion is on federal magistrate judges and bankruptcy judges, who regularly decide many cases based on the parties' consent. But it also affects other Article I tribunals that rely on consent for jurisdiction.[13] These tribunals should be able to hear disputes and issue advisory rulings, but Article III courts should not be bound by those determinations.

The Article proceeds in five parts. Part I describes the judicial power and demonstrates that Article III allocates the judicial power solely to the federal judiciary. Part II describes the development of the consent exception. It explains that over the years, the Court has increasingly looked to consent as a reason to allow Article I adjudication of suits that otherwise must be adjudicated before Article III courts. Part III makes the case against the consent exception. It demonstrates that nothing in the Constitution authorizes Article I tribunals to adjudicate based on the consent of the parties. It also explains that historically the parties' consent could not authorize exercising the judicial power. It then turns to more theoretical arguments, explaining that the consent exception runs afoul of both separation of powers and federalism. Part IV addresses other potential bases for the consent exception and concludes that none justifies the exception. And finally, Part V considers whether the elimination of the consent exception as inconsistent with Article III likewise requires the abolition of the other exceptions to Article III.

I. THE ARTICLE III JUDICIAL POWER

A. Defining the Article III Judicial Power

Article III provides that the "judicial Power . . . shall be vested in one supreme Court, and in such inferior Courts" that Congress creates.[14] Neither Article III nor any other portion of the Constitution defines the "judicial Power." Moreover, as Justice Samuel Miller noted in his 1891 lectures, although there was a general understanding of the

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13. *See, e.g.*, *Schor*, 478 U.S. at 849 (citing consent to permit CFTC to hear dispute).

14. U.S. CONST. art. III, § 1.

rough outlines of the judicial power, "any exact definition" cannot be found in "the old treatises, or any of the old English authorities."[15]

Still, some aspects of what constitutes the judicial power are clear. To start, the role of the courts is to provide remedies for legal wrongs. As Alexander Hamilton said in Federalist 78, one function of courts is "to guard the Constitution and the rights of individuals."[16] The same sentiment underlay Chief Justice Marshall's statement in *Marbury v. Madison* that "where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded."[17] Blackstone expressed a similar view. He stated that the "judicial power" includes the power, "if any injury appears to have been done, to ascertain and . . . to apply the remedy,"[18] and that individuals had a *right* to apply to the courts for redress of violations of their rights, because rights would be "in vain" if the "constitution had provided no other method to secure their actual enjoyment."[19] This role of vindicating rights is not limited to individual rights. Courts also provide remedies for legal wrongs to the community, such as violations of the criminal law.[20]

Second, the judicial power includes the ability "to render dispositive judgments."[21] That understanding also traces to the founding.[22] For example, John Jay stated in Federalist 64 that courts had the power to issue "judgments . . . [that] are as valid and as binding on all persons whom they concern, as the laws passed by our legislature."[23] The Supreme Court expressed a similar view in its 1792

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15. SAMUEL FREEMAN MILLER, LECTURES ON THE CONSTITUTION OF THE UNITED STATES 313 (New York and Albany, Banks & Bros. 1891).

16. THE FEDERALIST NO. 78, at 383 (Alexander Hamilton) (Lawrence Goldman ed., 2008).

17. 5 U.S. (1 Cranch) 137, 163 (1803).

18. 3 WILLIAM BLACKSTONE, COMMENTARIES *25.

19. 1 BLACKSTONE, *supra* note 18, at *136–37.

20. *See* F. Andrew Hessick, *The Separation-of-Powers Theory of Standing*, 95 N.C. L. REV. 673, 687 (2017) (describing the judicial remedies for violations of public rights held by the community).

21. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219 (1995) (quoting Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1990)) (" '[J]udicial Power' is one to render dispositive judgments.").

22. *See* William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1815 (2008) ("[T]he judicial power has traditionally been the power to issue binding judgments . . . .").

23. THE FEDERALIST NO. 64, *supra* note 16, at 318 (John Jay); *see* THE FEDERALIST NO. 81, *supra* note 16, at 396 (Alexander Hamilton) ("A legislature . . . cannot reverse a determination once made, in a particular case . . . ."). Other writers from the eighteenth and early nineteenth centuries similarly described the judicial power as the power to issue binding judgments. *See* ST. GEORGE TUCKER, VIEW OF THE CONSTITUTION OF THE UNITED STATES 290 (Clyde N. Wilson ed., Liberty Fund 1999) (1803) (describing the power of courts under Article III as rendering "judgment[s] of the court" that did not merely "advise the executive" but were binding themselves); JAMES WILSON, OF GOVERNMENT (1790), *reprinted in* 1 THE WORKS OF JAMES WILSON 363 (James

decision in *Hayburn's Case*.[24] That case involved a statutory pension scheme for disabled Revolutionary War veterans. Under the statute, federal courts were to determine whether veterans were entitled to benefits, but instead of ordering benefits itself, the courts were to transmit their conclusions to the Secretary of War, who made the final decision whether to award benefits. Sitting on circuit, Chief Justice Jay and Justices Iredell, Cushing, Wilson, and Blair concluded that the scheme was unconstitutional. They explained that Article III authorizes the courts to exercise only the judicial power, but because the Secretary could overturn the courts' decisions, those decisions did not constitute judgments that were the product of the judicial power.[25] Subsequent decisions over the next century relied on similar understandings of the judicial power, prompting Justice Miller to state in his 1891 lectures that federal courts have consistently defined the "judicial power" to be "the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision."[26]

A third aspect of the judicial power is the ability to make factual and legal findings.[27] Courts can enter judgment only to the extent

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DeWitt Andrews ed., 1896) ("When the decisions of courts of justice are made, they must, it is true, be executed . . . .").

24. 2 U.S. (2 Dall.) 409, 410 (1792).

25. *See id.* at 410 n.* (Wilson and Blair, Justices; Peters, District Judge):

> It forms no part of the power vested by the constitution in the courts of the United States; the circuit court must, consequently, have proceeded without constitutional authority. 2d. Because, if, upon that business, the court had proceeded, its judgments (for its opinions are its judgments) might, under the same act, have been revised and controlled by the legislature . . . ;

see also id. (Jay and Cushing, Justices; Duane, District Judge) ("[N]either the secretary at war, nor any other executive officer, nor even the legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court."); *id.* (Iredell, Justice; Sitgreaves, District Judge) (concluding the scheme was not of a "judicial nature"). A year later, the Justices relied on a similar definition of the judicial power when they refused to answer President Washington's questions about France's rights under various treaties. They explained to the President that to offer their opinion outside the context of adjudicating a case would be to act "extra-judicially." Letter from Chief Justice Jay and Associate Justices to President Washington (Aug. 8, 1793), *reprinted in* 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 1782–1793, at 488 (New York, G.P. Putnam's Sons 1891).

26. MILLER, *supra* note 15, at 314; *accord* Muskrat v. United States, 219 U.S. 346, 356 (1911). By the same token, one reason given for why determinations by nonjudicial bodies did not involve the judicial power was that those determinations did not result in binding judgments. Barker v. Jackson, 2 F. Cas. 811, 813 (C.C.D.N.Y. 1826) (No. 989):

> Nor does the act . . . vest in the commissioners, the usual and ordinary powers of a judicial tribunal. . . . The decision of the commissioners is called an award, or determination; and not a judgment or decree. No power is given to the commissioners to enforce their award or determination, by execution or otherwise.

27. *See* Robert J. Pushaw, Jr., *A Neo-Federalist Analysis of Federal Question Jurisdiction*, 95 CALIF. L. REV. 1515, 1542 (2007) ("By 1787, 'judicial power' had acquired a core meaning that has

authorized by an application of the law to fact.[28] For this reason, Blackstone said that the "judicial power" included the power "to examine the truth of the fact [and] to determine the law arising upon that fact."[29] Similarly, the debates at the Constitutional Convention described courts as making determinations of "law and fact in rendering judgment."[30] Chief Justice Marshall later espoused a similar view in *Marbury*, explaining that the role of the courts was to "apply" the law to the facts of the "particular cases," and in doing so "expound and interpret that" law.[31]

B. The Article III Courts

A literal reading of Article III establishes that only Article III courts may exercise the federal judicial power.[32] Article III vests "the" judicial power in those courts.[33] The use of the definite article signifies that Article III vests all, as opposed to part, of the federal government's

lasted to this day: rendering a binding judgment after impartially interpreting and applying the law in light of the facts presented in litigation.").

28. *See, e.g.*, M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 350 (2d ed. 1998) (defining "judging" as "applying the law to a particular instance"); John Harrison, *Legislative Power and Judicial Power*, 31 CONST. COMMENT. 295, 298 (2016) ("[Courts] conclusively resolve disputed questions of law and fact."). The Constitution implicitly recognizes the power of the courts to make factual and legal findings by authorizing the Supreme Court to review lower court findings of "law and fact." U.S. CONST. art. III, § 2.

29. 3 BLACKSTONE, *supra* note 18, at *25; *see also* 1 MATHEW BACON, A NEW ABRIDGMENT OF THE LAW 555 (London, J. Worrall & Co. 3d ed. 1768) ("The judges are bound by oath to determine according to the known [l]aws . . . and not their own arbitrary [w]ill or [p]leasure, or that of their Prince's.").

30. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 243 (Max Farrand ed., 1911) [hereinafter FARRAND] (Madison's Notes); *see also* THE FEDERALIST NO. 81, *supra* note 16, at 400–01 (Alexander Hamilton) (noting the judiciary's power to make findings of "fact and law"); WILSON, *supra* note 23, at 363 ("The judicial authority consists in applying . . . the constitution and laws to facts and transactions in cases . . . .").

31. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). Some sources suggest that courts were expected to resolve legal questions without deference to others. *See* 5 BACON, *supra* note 29, at 221 ("It is the Provinces of the Justices to determine, what the Meaning of a Word or Sentence in an Act of Parliament is."); THE FEDERALIST NO. 78, *supra* note 16, at 381 (Alexander Hamilton) ("The interpretation of the laws is the proper and peculiar province of the courts."); 1 FARRAND, *supra* note 30, at 98 (statement of Rufus King) ("Judges ought to be able to expound the law as it should come before them . . . ."); *see also* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 507, 508 (2008) (arguing that courts historically exercised independent judgment in interpretation).

32. Pfander, *supra* note 4, at 668 ("Under the literal interpretation of Article III, Congress can create inferior tribunals only in accordance with the requirements of Article III.").

33. U.S. CONST. art. III, § 1, cl. 1.

judicial power in the courts.[34] Accordingly, no other entity can exercise the federal judicial power.[35]

Further supporting this conclusion is that the Constitution expressly creates a single exception to the assignment of the power to adjudicate to the courts. Article I assigns to the Senate the power to adjudicate cases of impeachment.[36] The explicit identification of that single exception suggests that, outside of impeachments, only the Article III courts can adjudicate cases.[37]

The parallel allocations of powers to Congress and the president also indicate that only the judiciary can exercise the judicial power. Article I "vest[s]" "all" legislative power in Congress,[38] and Article II "vest[s]" "[t]he" executive power in the president.[39] The specific allocation of these powers to the various branches suggests that only those branches may exercise those powers.[40]

The institutional design in the Constitution of the judicial branches further suggests that only the Article III judiciary can exercise the judicial power. Under the Constitution, the two branches that have the power to make and execute policies—Congress and the president—are accountable to the public through periodic elections to make it more likely that their decisions reflect the will of the people.[41] By contrast, the Constitution insulates the judiciary from popular opinion through life tenure and salary guarantees.[42] These protections make the courts ill suited to enact policy, but they allow the courts to interpret and

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34. *See* Freytag v. Comm'r, 501 U.S. 868, 908 (1991) (Scalia, J., concurring in part and concurring in the judgment) (noting that "Article III" confers " '[*t*]*he* judicial Power of the United States'—not '[*s*]*ome of* the judicial Power of the United States' ").

35. Article III does not prohibit state-court adjudication. State courts exercise state, as opposed to federal, judicial power. *See* Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511, 521 (1898) (holding that Article III does not bear on state judicial power).

36. U.S. CONST. art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all impeachments."). Impeachments are a type of criminal proceeding to "inflict pain and penalties[] beyond or contrary to the common law . . . ." 4 BLACKSTONE, *supra* note 18, at *256.

37. *See* TUCKER, *supra* note 23, at 290 (noting that the Constitution assigns to the courts the adjudication of all cases aside from impeachment).

38. U.S. CONST. art. I, § 1, cl. 1.

39. *Id.* art. II, § 1, cl. 2.

40. *See* TUCKER, *supra* note 23, at 149 (pointing to the parallel language to argue that the policy of the Constitution is to keep those powers "separate and distinct"); *accord* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 329–30 (1816).

41. *See* U.S. CONST. art. I, §§ 2–3 (requiring elections every two years for representatives and every six years for senators); *Id.* art. II, § 1 (requiring elections every four years for president).

42. *Id.* art. III, § 1 ("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.").

implement the laws in particular cases without fear of popular reprisal.[43]

Early commentary on Article III confirms that only the Article III courts may exercise the judicial power.[44] It relates that Article III's assignment of the judicial power to an independent judiciary was to prevent both the executive and the legislative branch from exercising the judicial power. James Madison wrote that Article III conferred the judicial power on the courts to avoid the tyranny that would result if "the sole executive magistrate, had possessed . . . the supreme administration of justice"[45] or if the legislature "decided rights which should have been left to judiciary controversy."[46] St. George Tucker expressed a similar view in his commentaries on the Constitution. He wrote that, unlike in other countries in which the executive may exercise the judicial power, "in the United States of America, the judicial power is a distinct, separate, independent, and *co-ordinate* branch of the government."[47]

43. THE FEDERALIST NO. 78, *supra* note 16, at 379–80 (Alexander Hamilton) ("The standard of good behavior for the continuance in office of the judicial magistracy is . . . the best expedient that can be devised in any government to secure a steady, upright, and impartial administration of the laws."); *see* Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 240 (2002) ("While the Supreme Court's independence from the electorate is ideal to preserve individual rights against majority sentiment, that same detachment renders the Court a poor factfinder and policymaker as compared to Congress and the Executive.").

44. For an overview of the history, see A. Benjamin Spencer, *The Judicial Power and the Inferior Federal Courts: Exploring the Constitutional Vesting Thesis*, 46 GA. L. REV. 1, 6–24 (2011).

45. THE FEDERALIST NO. 47, *supra* note 16, at 241 (James Madison).

46. THE FEDERALIST NO. 48, *supra* note 16, at 248 (James Madison) (emphasis omitted); *see also* Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 320 (1999) ("[F]or Madison and Hamilton at least, judicial independence was an essential aspect of the separation of powers . . . .").

47. TUCKER, *supra* note 23, at 290; *see also* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 299 (1996) (noting that the Framers had "a substantive conception of the judiciary as the third branch of government"). This is not to say that only *judges* may exercise the judicial power under Article III; Article III confers the judicial power on the "judiciary," and jurors are also members of the judiciary. JAMES WILSON, OF JURIES (1790), *reprinted in* 2 THE WORKS OF JAMES WILSON, *supra* note 23, at 162 ("Juries form . . . another constituent part of the courts . . ."); *see also* U.S. CONST. art. III, § 2, cl. 3 ("The trial of all crimes . . . shall be by jury . . . ."). Although juries today make only factual findings, they also had the power at the founding to resolve questions of law. *See* CLAY S. CONRAD, JURY NULLIFICATION 65 (1998) (noting that juries had the right to decide legal questions until United States v. Battiste, 24 F. Cas. 1042 (C.C.D. Mass. 1835) (No. 14,545), which was "the first major American court opinion limiting the role of juries"). At no point could juries enter judgments; instead, their power has always been limited to entering verdicts upon which judgment is based. Hills v. Ross, 3 U.S. (3 Dall.) 184, 186–87 (1796) (distinguishing between "the trial . . . by jury" and "the judgment" of the court); 3 BLACKSTONE, *supra* note 18, at *386–87 (explaining that judgment was to be entered following the verdict).

II. THE CONSENT EXCEPTION

Although the text and structure of Article III establish that only the Article III courts may exercise the judicial power,[48] most federal adjudication does not occur in Article III courts. Instead, the bulk of federal litigation occurs before federal magistrate and bankruptcy judges and in various other Article I tribunals, such as the U.S. Tax Court, military tribunals, and administrative agencies. The scope of power varies from tribunal to tribunal. Some Article I tribunals have the power merely to make initial recommendations to the courts based on factual and legal findings;[49] others have the power not only to make factual and legal findings but also to enter enforceable judgments based on those findings.[50] But one thing all these Article I tribunals have in common is that none of their judges enjoy the salary and tenure protections guaranteed by Article III.

The Court has recognized a handful of exceptions to Article III to justify these Article I tribunals. The three traditional exceptions are that Congress may create tribunals to adjudicate disputes in the territories of the United States; to serve as military tribunals; and to resolve disputes involving so-called "public rights."[51]

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48. 1 JOHN BOUVIER, BOUVIER'S LAW DICTIONARY 471 (William Edward Baldwin ed., 1928) (defining "vest" as conferring "an immediate fixed right").

49. *See, e.g.*, 29 U.S.C. § 160 (2012) (authorizing the NLRB to make findings but requiring it to petition a court to enforce its orders); 7 U.S.C. § 18(f) (2012) (same for CFTC).

50. *See, e.g.*, 28 U.S.C. § 636(c) (2012) (authorizing magistrate judges to "order the entry of judgment" in civil cases where the parties consent); 28 U.S.C. § 174 (authorizing the U.S. Court of Claims to enter judgment); Wibler Katz, *Federal Legislative Courts*, 43 HARV. L. REV. 894, 907–08 (1930) (describing judgment power of now-abolished courts of private land claims and of customs and patent appeals).

51. *See* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1951 (2015) (Roberts, C.J., dissenting) (describing these exceptions). These are not the only exceptions to Article III. Another exception is that Article I bankruptcy courts can adjudicate claims that are essential to the bankruptcy. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 71–72 (1982) (plurality opinion). In concluding in *Wellness* that the consent of the parties authorized the bankruptcy court's jurisdiction, the Court assumed that the issues in the case did not fall within this bankruptcy exception. *See* 135 S. Ct. at 1942 n.7.

Some have suggested that suits that were heard by ecclesiastical courts constitute another exception to Article III. James E. Pfander & Emily K. Damrau, *A Non-contentious Account of Article III's Domestic Relations Exception*, 92 NOTRE DAME L. REV. 117, 124 (2016). But that is not clear. Ecclesiastical courts had jurisdiction over religious matters such as heresy and excommunication, as well as over less overtly religious matters such as marriage and divorce, probate, and defamation when the defamatory remark related to the commission of a sin. *See* R.B. OUTHWAITE, THE RISE AND FALL OF THE ENGLISH ECCLESIASTICAL COURTS, 1500–1860, at 40 (2006). Many of these claims, such as defamation, plainly involve private rights. 1 BLACKSTONE, *supra* note 18, at *130 (describing reputation as a private right). To the extent that Article III courts could not hear some claims that were heard by ecclesiastical courts, the claims involved religious matters, which the First Amendment prohibits the government from addressing. *See* Watson v. Jones, 80 U.S. (13 Wall.) 679, 728–29 (1871). The limitations on jurisdiction over probate and other nonreligious matters heard by the ecclesiastical courts derive from statute. *See*

A fourth exception depends on the consent of the parties. Under this exception, an Article I tribunal may adjudicate a dispute it otherwise could not if the parties consent to that adjudication.

A. The Development of the Consent Exception

Two recent Supreme Court decisions have developed the consent exception. The first is *Commodity Futures Trading Commission v. Schor*.[52] Federal law authorized the CFTC, a non-Article III tribunal, to hear customer complaints against commodities brokers and related state-law counterclaims brought by the brokers.[53] William Schor filed a complaint with the CFTC against his broker, and the broker filed a counterclaim in the CFTC proceeding. Although acknowledging that ordinarily only an Article III court could adjudicate the counterclaim,[54] the Supreme Court held that the CFTC could hear the claim.[55]

One reason the Court gave was that the parties chose to invoke the Article I forum.[56] The Court explained that Article III confers both an individual right to an impartial adjudicator and a structural protection of an independent judiciary in our system of government.[57]

Ankenbrandt v. Richards, 504 U.S. 689, 696 (1992) (grounding the exception "on narrower statutory, rather than broader constitutional, grounds").

52. 478 U.S. 833 (1986). *Schor* is not the first decision to discuss the role of consent. Courts long ago recognized that parties can contract to arbitrate. Arbitration, however, was not an exercise of the judicial power, because it did not implicate the coercive power of the government; instead, it was a means for privately resolving a dispute without the judicial power. *See infra* notes 169–172 and accompanying text. Whether courts deferred to those findings depended on whether the parties agreed to be bound by those findings. *See* Tobey v. County of Bristol, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845) (No. 14,065). In *Kimberly v. Arms*, 129 U.S. 512, 524 (1889), the Court extended that reasoning to special masters. Like arbitrators, special masters could not enter coercive judgments. *See id.* They could, however, issue reports making findings of fact and law in suits at equity, but the findings in those reports were "merely advisory." *Id.* at 523. *Kimberly* held that those findings should be treated as presumptively correct if the parties consented to the special master's authority. *Id.* at 524 ("[W]hen the parties consent to the reference of a case to a master . . . his determinations are not subject to be set aside and disregarded at the mere discretion of the court."); *see* Davis v. Schwartz, 155 U.S. 631, 637 (1895) (stating that the degree of judicial deference depends on the scope of consent).

53. 7 U.S.C. § 18.

54. *Schor*, 478 U.S. at 853 ("[The] claim [is] of the kind assumed to be at the 'core' of matters normally reserved to Article III courts.").

55. *Id.* at 858.

56. *Id.* at 848, 855.

57. *Id.* at 850 ("Article III, § 1, not only preserves to litigants their interest in an impartial and independent federal adjudication of claims within the judicial power of the United States, but also serves as 'an inseparable element of the constitutional system of checks and balances.' ").

According to the Court, although parties can waive the individual right,[58] they cannot waive the structural interest.[59]

Nevertheless, the Court said, the parties' consent was relevant to whether a structural violation had occurred. It explained that whether a violation of Article III occurred depended on a balance of the reasons that Congress had authorized the CFTC to hear the claims against the degree of intrusion on the Article III courts.[60] According to the Court, that the parties chose to litigate in the CFTC "diminished" the intrusion on Article III.[61] The Court also pointed to restrictions on the CFTC's jurisdiction, the ability of the Article III courts to review the CFTC's legal determinations de novo, and the inability of the CFTC to enter judgments.[62]

The second, more significant, decision on the role of consent is the Court's 2015 decision in *Wellness International Network, Ltd. v. Sharif*.[63] *Wellness* expanded the role of consent in two significant ways. First, it indicated that consent is not simply a factor to be considered in a balancing test to determine lawfulness of an Article I adjudication; instead, consent *alone* may authorize Article I adjudication.[64] Second, it held that consent authorizes an Article I tribunal not simply to make findings but to enter enforceable judgments as well.[65]

At issue in *Wellness* was whether a bankruptcy court could adjudicate Wellness's claim seeking to include certain assets in Sharif's

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58. *Id.* at 848 ("[A]s a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver . . . .").

59. *Id.* at 850–51 ("To the extent that this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty . . . .").

60. *Id.* at 851 (balancing the

> extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, [1] the extent to which the non-Article III forum exercises the [judicial power], [2] the origins and importance of the right to be adjudicated, and [3] the concerns that drove Congress to depart from the requirements of Article III).

61. *Id.* at 855.

62. *Id.* at 852–57.

63. 135 S. Ct. 1932 (2015). In the interim, the Court reiterated the importance of the parties' consent in two cases involving the power of Article I magistrate judges to preside at voir dire in felony trials. In the first, the Court held that magistrate judges could not conduct voir dire in those trials without the consent of the defendant. Gomez v. United States, 490 U.S. 858, 875–76 (1989). In the second case, the Court upheld the magistrate judges' power to conduct voir dire because the defendant had consented, stating that "the defendant's consent significantly changes the constitutional analysis." Peretz v. United States, 501 U.S. 923, 932 (1991).

64. *Wellness*, 135 S. Ct. at 1943 ("The option for parties to submit their disputes to a non-Article III adjudicator was at most a '*de minimis*' infringement on the prerogative of the federal courts." (citing *Schor*, 478 U.S. at 856)).

65. *Id.* at 1940. In *MacDonald v. Plymouth County Trust Co.*, 286 U.S. 263 (1932), the Court held that bankruptcy trustees could adjudicate based on the consent of the parties. But *MacDonald* addressed only whether the Bankruptcy Act authorized trustee adjudication on consent. It did not address Article III.

bankruptcy estate.[66] Bankruptcy courts are Article I tribunals; their judges do not have life tenure but are appointed by the circuit courts for fourteen-year terms and may be removed for cause.[67] Under federal law, bankruptcy judges can enter orders and judgments in so-called "non-core" bankruptcy proceedings—proceedings that are not directly related to bankruptcy—with the consent of the parties.[68] This consent provision authorizes bankruptcy courts to enter judgment on any kind of claim, including claims of the sort traditionally adjudicated by Article III courts.[69]

The *Wellness* Court held that the bankruptcy courts could adjudicate these non-core claims based on the parties' consent. The Court reiterated its statement in *Schor* that Article III does not simply confer a waivable individual right to an impartial adjudicator,[70] but establishes a structural protection of an independent judiciary that parties presumably cannot waive.[71] Nevertheless, the Court said, "litigants may validly consent to adjudication by bankruptcy courts."[72]

The Court gave two reasons for that conclusion. The first was that adjudication based on consent has a long historical pedigree, extending back to "the early years of the Republic."[73] The second was that the parties' consent minimized any infringement of the separation of powers because the decision to proceed to the bankruptcy court rests with the parties instead of with Congress.[74]

To be sure, the Court did not go so far as to hold that the parties' consent alone authorized the bankruptcy court to adjudicate any claims. It did not need to resolve that question because, under federal laws, the

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66. *Wellness*, 135 S. Ct. at 1940.

67. 28 U.S.C. § 152(a)(1), (e) (2012).

68. *Id.* § 157(b). In *Stern v. Marshall*, 564 U.S. 462, 493 (2011), the Court held that this provision violates Article III insofar as it authorizes bankruptcy courts to adjudicate state-law claims unrelated to the bankruptcy. *Wellness* created an exception to *Stern* by permitting bankruptcy courts to hear those claims if the parties consent. 135 S. Ct. at 1946–47 (distinguishing *Stern* based on the parties' consent).

69. Without the parties' consent, bankruptcy courts in non-core proceedings may "submit proposed findings of fact and conclusions of law," which district courts review de novo. 28 U.S.C. § 157(c).

70. *Wellness*, 135 S. Ct. at 1943 ("As a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver[.]" (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 849 (1986))).

71. *Id.* at 1942–43.

72. *Id.* at 1942 ("[L]itigants may validly consent to adjudication by bankruptcy courts.").

73. *Id.*; *see also id.* at 1947 ("Adjudication based on litigant consent has been a consistent feature of the federal court system since its inception.").

74. *Id.* at 1943 ("The option for parties to submit their disputes to a non-Article III adjudicator was at most a '*de minimis*' infringement on the prerogative of the federal courts." (citing *Schor*, 478 U.S. at 856)).

74. *Id.* at 1942–43.

Article III courts had "supervisory authority" over the bankruptcy court.[75] As the Court noted, the Article III courts have the power to appoint and remove bankruptcy judges, as well as the power to decide whether to send a case to a bankruptcy judge.[76] According to the Court, the parties' consent, together with these supervisory powers, sufficed to avoid infringing Article III.[77]

But the Court strongly suggested that consent alone would suffice. It stated that consent *by itself* renders adjudication by an Article I tribunal "at most a *de minimis* infringement on the prerogative of the federal courts."[78] Further, despite its earlier suggestion that parties cannot waive Article III, the Court explicitly left open the possibility that parties may waive the structural component of Article III.[79] The Court was also careful not to say that Article III supervision is necessary for Article I adjudication based on the parties' consent. It did not say that Article I tribunals may adjudicate by consent "*only*" so long as Article III courts retain supervisory authority; instead, it stated that there is no separation-of-powers concern "so long as" those tribunals "are subject to control by the Article III courts."[80] *Wellness* thus establishes only that supervision is sufficient, but not necessary, for Article I adjudication based on consent.[81] At the very least, even if some degree of Article III supervision is required when the parties consent, *Wellness* establishes that litigants may through their consent authorize an Article I tribunal to adjudicate a claim that it otherwise could not hear based solely on the Article III court's supervision.[82]

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75. *Id.* at 1944–46.

76. *Id.* at 1945 (citing 28 U.S.C. §§ 152, 157 (2012)). The Court also pointed to two other factors: the narrow range of claims that bankruptcy courts will usually hear and the absence of an indication that Congress meant to infringe on the Article III judiciary's power. *Id.* The former has no bearing on degree of supervision by the Article III courts; the latter is irrelevant to whether an infringement occurred.

77. *Id.* (pointing to these factors to conclude the intrusion was "*de minimis*").

78. *Id.* at 1943.

79. *Id.* at 1944 (stating that it was "assuming," but not deciding, "that a litigant may not waive structural protections provided by Article III"); *see also id.* at 1947 (refusing to hold "that a litigant who has the right to an Article III court may not waive that right through his consent").

80. *Id.* at 1946.

81. Some lower courts have pointed solely to consent as a basis for Article I adjudication. *E.g.*, Archie v. Christian, 808 F.2d 1132, 1134 (5th Cir. 1987) (holding based solely on consent that magistrate judges can adjudicate civil claims); Sharif v. Funk, No. 1:15-CV-10795, 2017 WL 902875, at *2 (N.D. Ill. Mar. 7, 2017) (pointing solely to consent to justify adjudication by federal magistrate judges).

82. *Wellness*, 135 S. Ct. at 1947 (distinguishing cases striking down Article I adjudication because they "involved an objecting defendant forced to litigate involuntarily before a non-Article III court"). *Wellness* also did not say how much supervision is necessary, if supervision is indeed required. It concluded only that there was adequate Article III supervision of the bankruptcy courts under the Bankruptcy Act. *Id.* at 1945–46.

B. The Breadth of the Consent Exception

The consent exception provides the basis for many Article I adjudications. One large set of cases comes from the bankruptcy courts. Bankruptcy courts adjudicate numerous non-core bankruptcy proceedings each year based on the consent of the parties.[83]

Another major category of federal litigation based on consent occurs before federal magistrate judges. Magistrate judges are appointed by the Article III courts for eight-year terms[84] and may be removed for cause.[85] Federal law authorizes federal magistrate judges to adjudicate all civil actions[86] and criminal prosecutions for misdemeanors based on the parties' consent.[87] Based on *Schor* and *Wellness*, courts of appeals have upheld both these grants of authority.[88] Magistrate judges adjudicate tens of thousands of cases per year based on party consent.[89]

And the exception extends much further. Party consent can potentially authorize any Article I tribunal to adjudicate claims that it otherwise could not hear—as *Schor*, which involved the CFTC, demonstrates. Moreover, there are no limits on the types of claims subject to the exception. Unlike the territorial exception, the consent exception is not restricted to particular geographic areas. And unlike

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83. Research does not reveal an exact number of non-core proceedings, but practitioners say that it is in the "thousands." Stephen Lerner & Colter Paulson, In re Bellingham Insurance Agency*: To "Protect" the Article III Jurisdiction of the District Courts, the Supreme Court May Radically Alter the Bankruptcy System (and Toss out the Federal Magistrate System to Boot)*, SQUIRE PATTON BOGGS, http://www.squirepattonboggs.com/~/media/files/insights/publications/2014/05/in-re-bellingham-insurance-agency-to-protect-the__/files/inrebellinghaminsuranceagency/fileattachment/inrebellinghaminsuranceagency.pdf (last visited Feb. 6, 2018) [https://perma.cc/8QR4-UXRW]; *see also U.S. Bankruptcy Courts—Bankruptcy Cases Commenced, Terminated, and Pending, Table F-8*, U.S. CTS., http://www.uscourts.gov/sites/default/files/data_tables/jb_na_bank_0930.2016.pdf (last visited Feb. 6, 2018) [https://perma.cc/K42W-BU9S] (reporting that for the year beginning September 30, 2016, bankruptcy courts resolved 33,281 adverse proceedings).

84. 28 U.S.C. § 631(a), (e) (2012).

85. *Id.* § 631(i).

86. *Id.* § 636(c)(1) ("Upon the consent of the parties, a . . . magistrate judge . . . may conduct any or all proceedings in a . . . civil matter and order the entry of judgment in the case . . . .").

87. 18 U.S.C. § 3401(b) (2012) (authorizing magistrate judges to adjudicate misdemeanors when defendant "expressly consents").

88. *See* A Constitutional Analysis of Magistrate Judge Auth., 150 F.R.D. 247, 252 n.3 (1993) (providing overview of cases upholding magistrate judges' authority in civil cases); United States v. Neville, 985 F.2d 992, 999 (9th Cir. 1993) (upholding magistrate judges' authority in misdemeanors). Courts have also held that consent authorizes magistrate judges to conduct voir dire in felony cases, Peretz v. United States, 501 U.S. 923, 931 (1991), and to accept guilty pleas in felony cases, *see, e.g.*, United States v. Benton, 523 F.3d 424, 431–32 (4th Cir. 2008).

89. For the year beginning September 30, 2016, magistrate judges fully adjudicated 16,656 civil cases and 86,786 misdemeanors on consent of the parties. *See Matters Disposed of by U.S. Magistrate Judges*, *supra* note 11.

the military and public rights exception, the consent exception does not face subject matter restrictions. It can authorize Article I tribunals located anywhere to hear potentially any type of claim. The only possible restriction is that it *might* be necessary for the Article III courts to have some degree of supervision over the Article I tribunal.[90]

III. AGAINST THE CONSENT EXCEPTION

The consent of the parties should not authorize Article I tribunals to adjudicate disputes that otherwise must be adjudicated by Article III courts. Permitting parties to authorize Article I adjudication through their consent has no basis in the constitutional text, historical practice, or the reasons underlying the creation of an independent judiciary.

A. Text

As explained above, the text and structure of the Constitution make clear that only the Article III courts may exercise the judicial power.[91] Nothing in the Constitution suggests that parties may change this allocation of power through their consent. There is no provision, for example, stating that an Article I tribunal may exercise the judicial power based on the parties' consent. The absence of such a provision implies that consent cannot authorize those tribunals to exercise the judicial power.[92]

Supporting this conclusion is that there are many other provisions in the Constitution that do authorize the exercise of powers based on another's consent. For example, the president may exercise his powers under Article II to enter into treaties and to appoint officers of the United States only with the "consent" of the Senate.[93] Similarly, under Article I, Section 10, the states may lay duties; keep troops or ships of war in time of peace; enter into any agreement with another state or a foreign power; or engage in war only with the "Consent of

90. *See supra* note 82 and accompanying text.

91. *See supra* notes 32–47 and accompanying text.

92. *See* Trustees of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 644 (1819) (refusing to find an extratextual exception to the contracts clause because, if it were intended, "the language would have been so varied, as to exclude it"); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 175 (1803) (applying *inclusio unius exclusio alterius* to interpret Article III).

93. U.S. CONST. art. II, § 2 ("He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all . . . Officers of the United States.").

Congress."[94] Likewise, the states may form new states by joining together only with "the Consent" of Congress and the legislatures of the merging states.[95] The Constitution also prohibits the people from amending the Constitution to reduce the number of senators from a state without that state's "Consent."[96]

In addition to these powers that explicitly condition their exercise on another's "consent," the Constitution contains other provisions that assign powers that can be exercised only with the acquiescence of another. For example, Article I provides that a bill may become a law only if passed by both houses of Congress. This bicameralism requirement is tantamount to conditioning the power of one house of Congress to enact a law on the consent of the other house. Indeed, the Federalist Papers described the power in this way, explaining that bicameralism established a requirement of "concurrence"—a word used interchangeably with "consent" in the Federalist papers[97]—between the two houses.[98]

The records of the Constitutional Convention reveal that these consent mechanisms were the product of intense debate and reflection.[99] These debates suggest that when the Constitution does not contain a provision authorizing an institution to exercise a power only with the consent of another, the absence of such a provision embodies a deliberate decision not to confer the power on that government institution.

Given that the Constitution enumerates these situations when consent can expand the power of a branch of government, the absence of a clause authorizing an Article I tribunal to adjudicate based on the consent of the parties suggests that the Framers meant not to allow consent to be a basis for authorizing Article I adjudication.[100]

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94. *Id.* art. I, § 10.

95. *Id.* art. IV, § 3.

96. *Id.* art. V.

97. *See, e.g.*, THE FEDERALIST NO. 38, *supra* note 16, at 185 (James Madison) (describing the Senate's consent power for treaties as requiring the "concurrence" of the executive and Senate).

98. THE FEDERALIST NO. 62, *supra* note 16, at 306 (James Madison).

99. *See, e.g.*, 1 FARRAND, *supra* note 30, at 120–21 (debating the Senate's consent power for treaties and the appointment of federal officials); *id.* at 254 (discussing bicameralism requirement); 2 FARRAND, *supra* note 30, at 625 (debating the power of the states to enter into treaties, lay tonnage, and wage war); *id.* at 629 (discussing state consent required for reduction of representation through amendment); *id.* at 441, 588 (debating whether to allow states to lay imposts with congressional consent); *id.* at 454, 461 (discussing consent required for merging of states); *see also* THE FEDERALIST NO. 64, *supra* note 16, at 315–20 (John Jay) (discussing the role of the Senate in approving treaties); THE FEDERALIST NO. 66, *supra* note 16, at 326–28 (Alexander Hamilton) (discussing the Senate's role in appointments); THE FEDERALIST NO. 22, *supra* note 16, at 105–13 (Alexander Hamilton) (bicameralism).

100. One might argue that these examples are inapposite because they involve consent between the branches of government as opposed to between private parties. But the absence of

One might argue that, when the parties consent to an Article I tribunal's jurisdiction, the tribunal exercises something other than the judicial power to resolve the claim.[101] But that is not accurate. The judicial power consists of the ability to enter dispositive judgments based on an application of the law to the facts.[102] Whenever a tribunal engages in this enterprise, it exercises the judicial power, irrespective of whether the parties consented to the tribunal entering that judgment. As the Court has said, "[i]t is . . . an exercise of the judicial power to render judgment on consent."[103] Indeed, if consent resulted in something other than the judicial power resolving disputes, Article III courts could not adjudicate suits when the parties consented to jurisdiction, because Article III courts may exercise only the judicial power; they cannot perform other functions.[104]

B. Historical Practice

History also establishes that parties cannot confer through their consent the judicial power on a tribunal that otherwise would not have that power. Under English law, the king held the power to adjudicate disputes. Courts could exercise the judicial power only because the king had delegated that power to them.[105]

Because the king's delegation was the basis for the exercise of judicial power, litigants could not confer through their consent the power to enter judgment on another body.[106] Even the king himself could not exercise the judicial power based on the parties' consent, because he had delegated that power to the courts. As Sir Edward Coke

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provisions authorizing government action based on the consent of individuals only highlights the fact that private individuals cannot in any circumstance confer sovereign powers through their consent.

101. *Cf.* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1968 (2015) (Thomas, J., dissenting) (raising the possibility that consent may obviate the need for the judicial power to resolve a dispute).

102. *See supra* notes 14–31 and accompanying text.

103. Pope v. United States, 323 U.S. 1, 12 (1944). "Consent" in this quotation refers to consent to personal jurisdiction. Although parties cannot establish subject matter jurisdiction through consent, they can authorize personal jurisdiction through consent. *See* Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 584 (1999).

104. *See* Letter from Chief Justice Jay and Associate Justices to President Washington, *supra* note 25 (refusing to provide advisory opinions because the power of the Court is solely to render judgments).

105. *See* 3 BLACKSTONE, *supra* note 18, at *23–24 ("[A]ll courts of justice, which are the medium by which he administers the laws, are derived from the power of the crown."); COKE, *supra* note 12, at 1169 ("[T]he King hath wholly left matters of judicature according to his lawes to his Judges."). The English system comprised a dizzying number of courts, each with different jurisdiction. *See* 3 BLACKSTONE, *supra* note 18, at *22–85 (enumerating these courts).

106. Rex v. Hartshorn [1759] 97 Eng. Rep. 545, 545 ("[C]onsent cannot give jurisdiction to a Court that has none . . . .").

explained in 1644, if "any [person] would render himselfe [sic] to the judgement of the King in such case where the King hath committed all his power judiciall [sic] to others, such a render should be to no effect."[107] The only way of changing who could resolve a dispute was through an Act of Parliament transferring the adjudication power of the king to another person.[108]

To be sure, parties could contract to send their disputes to arbitration instead of the courts.[109] But those contracts did not authorize the arbitrator to exercise the judicial power. Only the king could authorize a tribunal to exercise the judicial power.[110] Arbitrators thus could not produce enforceable judgments;[111] they could only enter an award to the extent authorized by contract.[112] Parties seeking to enforce arbitration awards had to resort to the courts.[113]

American law adopted these views. Early in the nineteenth century, the Supreme Court made clear that a court could exercise the judicial power only to the extent that the law conferred jurisdiction on the court,[114] and the consent of the litigants could not confer jurisdiction

107. COKE, *supra* note 12, at 1169.

108. 1 BLACKSTONE, *supra* note 18, at *141–42 ("[The] method of proceeding[ ] cannot be altered but by parliament.").

109. 1 BACON, *supra* note 29, at 133 ("The submission is the authority given by the parties in controversy to the arbitrators . . . and this being a contract . . . ."); *see also* JOHN T. MORSE, JR., THE LAW OF ARBITRATION AND AWARD 3 (Boston, Little, Brown & Co. 1872) ("A submission is a contract. . . . [The parties] must act freely and not under threats or duress."); *id.* at 342 ("The question [of the award's adherence to the submission] is properly the intention of the parties.").

110. 2 BLACKSTONE, *supra* note 18, at *24 (stating that courts are authorized to act only because of the delegation of "royal prerogative").

111. 4 FLETA bk. VI, ch. 6, *in* 99 THE PUBLICATIONS OF THE SELDEN SOCIETY 116, 117 (G.O. Sayles ed. & trans., 1983) ("[N]o one else shall have coercion . . . save the one to whom judicial authority is given, not by someone appointed by a judge but by the king.").

112. 1 BACON, *supra* note 29, at 133.

113. 3 BLACKSTONE, *supra* note 18, at *16–17 (stating that arbitration decisions were "awards" and that parties had to resort to the courts "to enforce their execution"). The precise procedure for judicial enforcement depended on whether the parties submitted the dispute to arbitration before or after suit was filed. If the parties submitted their claim to arbitration before suit was filed, some jurisdictions required a party seeking to enforce the arbitration award to bring a breach of contract action; others authorized parties to register the arbitration with the court, which would then enter an order directing that the arbitrator's subsequent award be entered as the court's own judgment. *See* Carli N. Conklin, *A Variety of State-Level Procedures, Practices, and Policies: Arbitration in Early America*, 2016 J. DISP. RESOL. 55, 64. By contrast, if the parties referred the dispute to a referee (an arbitrator designated after suit was filed) after suit had been brought, the court would enter an order directing that the report (an award in a referred case) be adopted as the judgment of the court. *See id.* at 61–63.

114. Rose v. Himely, 8 U.S. (4 Cranch) 241, 268–69 (1808) ("A sentence professing on its face to be the sentence of a judicial tribunal, if rendered by a self-constituted body, or by a body not empowered by its government to take cognizance of the subject it had decided, could have no legal effect whatever.").

otherwise lacking.[115] As the Court put it in *Walker v. Taylor*, only "the constitution and laws" can confer jurisdiction, and "[i]f they have not conferred jurisdiction, the consent of parties will not justify its assumption."[116] States adopted a similar view.[117] The Kentucky Court of Appeals in *Stark's Administrators v. Thompson's Administrators* is typical.[118] The court held that if no law authorized a tribunal to exercise the judicial power then that tribunal could not exercise the judicial power based on the parties' consent. As the court put it, "Consent could not give it jurisdiction or constitute it a court."[119]

Of course, parties could agree to have their disputes decided by arbitrators.[120] But those arbitrators were not judges. As in England, the consent of the parties could not confer the judicial power; only the law could confer that power.[121] Thus, in the federal system, courts held that only the courts could exercise the judicial power because Article III assigns the judicial power only to the courts.[122] Arbitrators thus could not enter judgments enforcing their awards.[123] Courts were obliged to

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115. Capron v. Van Noorden, 6 U.S. (2 Cranch) 126, 127 (1804) ("[I]t was the duty of the Court to see that they had jurisdiction, for the consent of parties could not give it.").

116. 46 U.S. (5 How.) 64, 67 (1847).

117. *See* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATION POWER OF THE STATES OF THE AMERICAN UNION 398 & n.2 (Boston, Little, Brown & Co. 1868) (gathering state court decisions holding that "consent will not confer jurisdiction").

118. 26 Ky. (3 J.J. Marsh.) 299 (1830).

119. *Id.* at 299.

120. Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1942 (2015) ("During the early years of the Republic, federal courts, with the consent of the litigants, regularly referred adjudication of entire disputes to non-Article III referees, masters, or arbitrators . . . ." (internal quotation marks omitted) (quoting Ralph Brubaker, *The Constitutionality of Litigant Consent to Non-Article III Bankruptcy Adjudications*, 32 Bankr. L. Letter (West) No. 12 (Dec. 2012))).

121. *See* Rose v. Himely, 8 U.S. (4 Cranch) 241, 268–69 (1808) ("[Judgment] by a body not empowered by its government . . . could have no legal effect whatever.").

122. United States v. Ames, 24 F. Cas. 784, 789 (C.C.D. Mass. 1845) (No. 14,441) (noting "the want of authority in any officer of the United States to enter into a submission in their behalf, which shall be binding," because "[a]ll judicial power is by the constitution vested in the supreme court, and . . . inferior courts"). None of the three cases cited by the Supreme Court in *Wellness* changes this analysis. All three cases involved disputes referred to referees, but none of those referees entered enforceable judgments. Newcomb v. Wood, 97 U.S. 581, 583 (1878) (noting that the referees made only a "report" and that "the court . . . confirmed" the report and "the judgment was entered"); Heckers v. Fowler, 69 U.S. (2 Wall.) 123, 130–31 (1864) (after a referee made an award, "the court overruled the objections, and rendered judgment for the plaintiff on the award for the amount of the money awarded"); Thornton v. Carson, 11 U.S. (7 Cranch) 596, 597 (1813) ("But the Court below over-ruled the exceptions and rendered judgment for the amount of the money mentioned in the award.").

123. Janvrin v. Smith, 13 F. Cas. 363, 363 (D. Mass. 1842) (No. 7220) ("A court, unlike arbitrators, [can] give to the prevailing party the fruits of his decree, by execution or other process."); *see* COOLEY, *supra* note 117, at 399 (explaining that "an award" of an arbitrator "could not be binding as a judgment").

defer to the findings of the arbitrators only to the extent required by the parties' contract.[124]

C. Separation of Powers

Separation-of-powers principles also establish that consent should not be a basis for adjudication in Article I tribunals. The primary reason that Article III assigns the judicial power to an independent judiciary is to protect the rule of law.[125] Both the executive and the legislature have strong incentives to adjudicate cases according to considerations other than the rule of law. Because the legislature is charged with creating policy, allowing the legislature (or someone beholden to the legislature) to decide cases raises the threat that cases will be decided in a way that furthers the legislature's policy goals rather than what the law requires.[126] Thus, for example, a legislature might interpret a statute based on the outcome it sought to achieve when it legislated instead of an honest interpretation of the law.[127] Similar concerns apply to the executive. Because it is charged with running the country day to day, the executive (or someone beholden to the executive) is more likely to decide cases based on what would make its job easier instead of what the law requires.[128] Further exacerbating these concerns is that, because the president and Congress are elected, they may decide cases according to what protects their jobs by catering to political or economic interests.[129]

Confining the judicial power to independent judges avoids these threats and accordingly promotes adjudication according to the rule of law. By assigning the judicial function and nothing else to the courts, Article III removes the possibility that the courts will use adjudication

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124. Tobey v. County of Bristol, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845) (No. 14,065) (describing deference based on contract language).

125. Harrison, *supra* note 28, at 492 ("Independent courts . . . facilitate the rule of law."); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 67 (2001) ("[T]he theoretical and practical justifications for judicial independence commonly emphasized the objective of promoting a government of laws.").

126. Manning, *supra* note 125, at 63–65 (describing the historical problem of legislatures using adjudication to achieve policy goals).

127. Indeed, legislators may be more likely to draft laws that are vague and open ended precisely so that they can more easily implement their will in future adjudications. *See* 1 BLACKSTONE, *supra* note 18, at *146 (where the lawmaker and adjudicator are separate, "the former will take care not to entrust the latter with so large a power, as may tend to the subversion of it's [sic] own independence").

128. Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. DAYTON L. REV. 565, 567–68 (1996) ("Arbitrariness is held back when independent judges stand between the executive and the application of legal sanctions such as seizure of property, fines, or imprisonment.").

129. *Id.* at 568 (legislators may act to please "political or economic interests").

as a tool to complement other responsibilities, such as developing policy through legislation (as by Congress) or administering the government (as by the executive). Moreover, because the Constitution insulates the judiciary from popular pressure through life tenure and salary guarantees, judges are more likely to decide disputes according to the rule of law instead of political or popular pressure.[130]

These benefits are not merely theoretical. Experience shows that Article I tribunals have exhibited bias because of external pressures. Recent prominent examples include reports of Administrative Law Judges ("ALJs") ruling in favor of the Securities and Exchange Commission in almost every case involving the Commission because of apparent political pressure[131] and of immigration judges in the 2000s ruling disproportionately against immigrants because of pressure from the Department of Justice.[132] More generally, commentators have described the effect of political pressures on ALJs.[133]

Permitting Article I tribunals to adjudicate disputes based on consent circumvents the protections of judicial independence. It allows judges who do not enjoy Article III's guarantees against legislative or executive influence to adjudicate disputes. Although statutes may protect the independence of those adjudicators, they need not be as comprehensive as those of Article III, and the political branches may remove them at any time.[134]

Nevertheless, the Supreme Court has concluded that separation-of-powers concerns are "de minimis" when the parties consent to adjudication by the Article I tribunal.[135] The Court has not provided any justification for that conclusion; it has said only that this

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130. Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L.J. 1, 75 (2015) ("[T]he purpose of judicial independence is to ensure that cases . . . are decided on their legal merits (however defined) rather than on considerations of naked political power.").

131. *See* Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1646 (2016).

132. Marcia Coyle, *Immigration Appeals Surge*, NAT'L L.J. (Oct. 27, 2003, 12:00 AM), https://www.law.com/nationallawjournal/almID/900005395655/immigration-appeals-surge/?slreturn=20180109145317 [https://perma.cc/NA9X-NY6R] (suggesting that immigration judges were removed if they were too pro-immigrant).

133. Donald S. Dobkin, *The Rise of the Administrative State: A Prescription for Lawlessness*, 17 KAN. J.L. & PUB. POL'Y 362, 381 (2008) ("Because agencies sometimes base hiring—and firing—practices on the outcomes they expect to receive from administrative judges, these judges are under enormous pressure to keep their employers happy.").

134. *See, e.g.*, 28 U.S.C. § 152(a)(1), (e) (2012) (authorizing fourteen-year appointments for bankruptcy judges and removal for "incompetence, misconduct, neglect of duty, or physical or mental disability"); *id.* §§ 172, 176 (providing for fifteen-year appointments for court-of-claims judges and similar grounds for removal); *id.* § 631(e) (providing for eight-year appointments for magistrate judges and similar grounds for removal).

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

conclusion is "self-evident."[136] The best explanation is that a central reason for the independent judiciary is to protect fairness to the parties, and that parties are unlikely to consent to an adjudication by an Article I tribunal unless they believe the tribunal will be fair.[137]

But this rationale does not mean that parties should be able to choose to proceed in an Article I tribunal instead of an Article III court. To start, parties may not be particularly good at assessing whether an Article I tribunal will be fair. Moreover, they might "accidentally" consent through their conduct.[138] And even if they believe an Article I tribunal may not be fair, parties may face pressures nevertheless to proceed in the Article I tribunal. Those pressures could come not only from politicians but also from district judges who make clear that they want the parties to acquiesce to magistrate jurisdiction.[139] Article III avoids these pitfalls by removing from parties the power to choose in which tribunal to proceed. Instead, it protects fairness for the parties by delegating the judicial power solely to the Article III judiciary.[140]

Although protecting the interests of the parties is a central reason for the Article III judiciary, it is not the only, or even the most important, reason. Adjudication can have broad repercussions beyond the parties.[141] Most obviously, a large award against a party can affect

136. *Id.* at 855.

137. *See* Meltzer, *supra* note 7, at 302 (arguing that the reason for an independent judiciary is to "protect[ ] the rights of litigants"); Fallon, *supra* note 4, at 992 ("[W]hen both parties are satisfied that the adjudicatory scheme treats them fairly, there is substantial assurance that the agency is not generally behaving arbitrarily. . . ."); David P. Currie, *Bankruptcy Judges and the Independent Judiciary*, 16 CREIGHTON L. REV. 441, 460 n.108 (1983) (stating that Article III, Section 1 "was designed as a protection for the parties from the risk of legislative or executive pressure on judicial decision").

138. *See, e.g.*, Depaola v. Sleepy's LLC (*In re* Prof'l Facilities Mgmt. Inc.), 61 Bankr. Ct. Dec. (LRP) 203, 2015 WL 6501231, at *4 (Bankr. M.D. Ala. Oct. 27, 2015) (finding, despite party's express refusal to consent, that party consented to bankruptcy jurisdiction by filing counterclaim).

139. George Everly, III & Michael L. Shenkman, *District Judges as Investments*, 53 HARV. J. ON LEGIS. 59, 72 n.48 (2016) ("[P]arties may feel undue pressure to consent to proceed before a magistrate judge . . . ."). The salary guarantee in Article III increases the risk that Article III judges will pressure parties to consent to Article I adjudication because they will be paid regardless of the amount of work they do. *Cf.* James E. Pfander, *Judicial Compensation and the Definition of Judicial Power in the Early Republic*, 107 MICH. L. REV. 1, 8 (2008) (noting that, historically, judicial compensation depended in part on fees in cases).

140. *See* THE FEDERALIST NO. 78, *supra* note 16, at 379–80 (Alexander Hamilton) (an impartial judiciary secures "steady, upright, and impartial administration of the laws"); Meltzer, *supra* note 7, at 302 ("Article III protects the rights of litigants precisely *through* its creation of judicial independence . . . .").

141. Article III is not the only provision that appears at first glance designed to benefit one person but actually more broadly protects society. Another example is Article II, Section 1, which confers a salary on the president. Although the person holding the presidency benefits most obviously from the salary, the first Congress concluded that Washington could not disclaim his salary because it also benefits the country by reducing the potential for corruption. DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 33 (1997).

that party's family, employees, and business associates; corporate share prices; and the markets more generally. Moreover, legal interpretations, even if they are not binding, can influence judges and litigants.[142]

Adjudication by an independent judiciary also protects more abstract societal values. One is the legitimacy of the government. Government legitimacy depends, in part, on societal acceptance.[143] People who believe in the rule of law may put less stock in an adjudicatory system that decides disputes based on something other than the rule of law.[144] This is so even if the parties consented to the adjudication before the tribunal that does not follow the rule of law.[145] That is one reason why we no longer have trial by ordeal, which turns on chance instead of reason and can be manipulated to produce desired results.[146] Although a far cry from conducting trial by ordeal, Article I tribunals are less likely to render decisions based solely on the rule of law, because they lack Article III's structural protections. Even if most Article I tribunals do render their decisions according to the rule of law, the perception of the mere possibility that external pressures affect decisions compromises the legitimacy of those adjudications.[147]

A related value protected by an independent judiciary is society's interest in recognizing rights and providing adequate remedies for

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142. *See, e.g.*, Ryan M. Seidemann, *Time for a Change? The Kennewick Man Case and Its Implications for the Future of the Native American Graves Protection and Repatriation Act*, 106 W. VA. L. REV. 149, 160 (2003) ("The well-reasoned decision of Magistrate Judge John Jelderks, though not binding on subsequent courts, creates important persuasive precedent . . . ."). Indeed, one reason for combining adjudicatory and rulemaking power in agency heads was to ensure that interpretations in adjudication aligned with political policy goals. *See* Michael Asimow, *The Administrative Judiciary: ALJ's in Historical Perspective*, 20 J. NAT'L ASS'N ADMIN. L. JUDGES 157, 163–64 (2000).

143. Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795 (2005) (stating that a governmental institution has legitimacy when "the relevant public regards it as justified, appropriate, or otherwise deserving of support").

144. Scholars have noted similar concerns while discussing elected judiciaries. *See* Erwin Chemerinsky, *Evaluating Judicial Candidates*, 61 S. CAL. L. REV. 1985, 1988 (1988) ("[T]he entire concept of the rule of law *requires* that judges decide cases based on their views of the legal merits, not based on what will please voters."). Elections do confer some legitimacy because they reflect majoritarian preferences, *see* David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 274–75 (2008), but that legitimacy does not extend to unelected Article I judges.

145. *See* Daniel Markovits, *Civility, Rule-Following, and the Authority of Law*, 116 COLUM. L. REV. SIDEBAR 32, 36 (2016) ("A legitimate state imposes the rule of law and not of men.").

146. Eugene Morgulis, *Juror Reactions to Scientific Testimony: Unique Challenges in Complex Mass Torts*, 15 B.U. J. SCI. & TECH. L. 252, 272 (2009) ("The open arbitrariness of the Ordeal belied its legitimacy . . . .").

147. Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1, 75 (2003) (discussing the effect of public perception on legitimacy).

violations of those rights.[148] Even when a tribunal adjudicates according to the rule of law, it often has substantial discretion in deciding whether a legal violation has occurred. For example, the tribunal can choose to interpret an ambiguous statute in a way that confers a right or in a way that does not confer a right.[149] Similarly, when a tribunal determines that a right has been violated, it often has discretion in fashioning the remedy. That discretion is explicit for equitable remedies such as injunctions.[150] But even when the remedy is damages, adjudicators have discretion in deciding which types of harms, such as physical or psychological injuries, merit damages and how much damages to award.[151]

Article I adjudicators may exercise their discretion differently than Article III judges because different interests drive Article I and Article III adjudicators. For example, because they are often charged with generating policy in a specific subject matter, some Article I tribunals may be more inclined to generate a broader body of law for that area than to remedy wrongs in particular cases.[152] Although the failure to recognize rights and provide adequate remedies most directly affects the litigants in a dispute, it also implicates the interests of those who are not parties to the dispute, as work by various interest groups attests.[153]

Another value underlying an independent judiciary is preventing imprudent government actions. Separating powers guards against ill-advised policies by requiring them to pass through multiple actors with different incentives and responsibilities.[154] For example, the

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148. *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 353 (7th ed. 2015) (suggesting that one of the values underlying Article III is providing adequate remedies for wrongs).

149. Carlos E. González, *Turning Unambiguous Statutory Materials into Ambiguous Statutes: Ordering Principles, Avoidance, and Transparent Justification in Cases of Interpretive Choice*, 61 DUKE L.J. 583, 607 (2011) ("[C]ourts often must exercise discretion in interpreting and applying inherently ambiguous legal materials.").

150. United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 495 (2001) ("[D]istrict courts whose equity powers have been properly invoked indeed have discretion in fashioning injunctive relief . . . .").

151. *See, e.g.*, Scott A. Moss & Peter H. Huang, *How the New Economics Can Improve Employment Discrimination Law, and How Economics Can Survive the Demise of the "Rational Actor*,*"* 51 WM. & MARY L. REV. 183, 222 (2009) ("[C]ourts already must make discretionary determinations of emotional distress damages . . . .").

152. *See* Aaron L. Nielson, *Beyond* Seminole Rock, 105 GEO. L.J. 943, 982–89 (2017) (discussing agency incentives to use adjudication to develop policies).

153. *See* Susan M. Olson, *Interest-Group Litigation in Federal District Court: Beyond the Political Disadvantage Theory*, 52 J. POL. 854, 855–58 (1990) (describing some motivations behind interest-group litigation).

154. *See* W.B. GWYN, THE MEANING OF THE SEPARATION OF POWERS 127–28 (1965) (arguing that separation of powers helps prevent unwise policies).

bicameralism requirement allows one house of Congress to check the other house from enacting unwise legislation.[155] Courts serve a similar function. When faced with a law that is against the common good, they may interpret that law in a way that minimizes its harm or, if it violates a constitutional provision, strike that law down as unconstitutional. Allowing Article I tribunals to adjudicate disputes on consent short circuits this process. Those tribunals are less likely than Article III courts to exercise independent judgment in evaluating how a law should be interpreted because they may be beholden to Congress or the executive.

To be sure, supervision of Article I tribunals by Article III courts of the sort identified in *Schor* and *Wellness* may reduce these separation-of-powers concerns. For example, Article III review of Article I determinations allows Article III judges to correct unjustified decisions. But this supervision does not eliminate the threat to separation of powers. Article III courts are imperfect monitors because they depend on the parties to bring errors to the attention of the court, yet parties may choose not to appeal.[156] Moreover, some forms of supervision create new problems by making Article I judges beholden to Article III.[157] Consider the Article III power to reappoint and remove bankruptcy and magistrate judges.[158] That power over those judges incentivizes them to render decisions aimed at pleasing their Article III employers instead of based on the law.[159]

One might argue that these separation-of-powers concerns are overblown given that parties may choose to litigate in state courts that do not have the same protections as Article III courts or may agree to resolve their dispute through arbitration.[160] But these analogies are inapt. Unlike with Article I tribunals, neither Congress nor the

155. U.S. CONST. art. I, § 7.

156. *Cf.* John C. Coffee, Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618, 1690–91 (1989) (noting that courts are imperfect monitors of corporate management because of, inter alia, the dependence on individuals to bring suit).

157. Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1053 (7th Cir. 1984) (Posner, J., dissenting) (identifying problems with "magistrates beholden to judges").

158. 28 U.S.C. § 631 (2012) (authorizing Article III appointment and removal of magistrate judges); *id.* § 152 (authorizing Article III appointment and removal of bankruptcy judges).

159. Circuit judges can exert some pressure on district judges through the threat of reversal or mandamus, but that pressure is insignificant compared with the threat of unemployment. *Cf.* Evans v. Gore, 253 U.S. 245, 253 (1920) (discussing importance of salary and tenure protections).

160. *See* Houston v. Moore, 18 U.S. (5 Wheat.) 1, 25–26 (1820) ("[I]in every case, in which the State tribunals should not be expressly excluded by the acts of the national legislature, they would, of course, take cognizance of the causes to which those acts might give birth.").

president has control over the tenure or salaries of state court judges.[161] State courts exercise state, not federal, judicial power,[162] and state law defines when state courts may exercise that power.[163] To be sure, many states subject their judges to elections or make them answerable to the state legislature or executive.[164] But those state schemes have no bearing on the exercise of the federal judicial power.

Private arbitrators also do not depend on the president or Congress for their salary or jobs. They are not federal employees. Instead, they are employed by the parties that hire them. To be sure, Congress could potentially outlaw or regulate arbitration.[165] Arbitrators accordingly may feel some political pressure when rendering decisions. But that pressure is likely to be rare simply because Congress does not have an easy way to efficiently monitor the resolution of disputes between private parties that are resolved outside of a government tribunal.[166]

More important, arbitrators do not exercise the judicial power, at least when arbitration derives exclusively from a contract between the parties. The judicial power is a sovereign power.[167] Individuals cannot delegate a sovereign power—only the sovereign can.[168] An agreement to arbitrate merely authorizes the arbitrator to act in the place of the parties—that is, to resolve the dispute to the same extent that the parties could resolve the dispute between themselves *without* the judicial power.[169] It is for this reason that arbitrators cannot enforce

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161. Fallon, *supra* note 4, at 939 ("[S]tate courts do not depend for their tenure on Congress or the President.").

162. *See* Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511, 521 (1898) (holding that Article III does not bear on state judicial power). *But cf.* James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191 (2007) (proposing that Congress may constitute state courts as inferior federal tribunals).

163. F. Andrew Hessick, *Cases, Controversies, and Diversity*, 109 NW. U. L. REV. 57, 94–95 (2014) (discussing variations in state justiciability doctrines).

164. *See Fact Sheet on Judicial Selection Methods in the States*, A.B.A. 1 (Sept. 4, 2002), http://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet.authcheckdam.pdf [https://perma.cc/RF2E-UE7C] (noting that thirty-eight states have judicial elections, and some of the remaining twelve have reappointment processes).

165. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 405 (1967) (upholding the Federal Arbitration Act under the Commerce Clause).

166. Congress has imposed various reporting obligations on agencies. *See* Catherine Y. Kim, *Presidential Control Across Policymaking Tools*, 43 FLA. ST. U. L. REV. 91, 104 (2015).

167. *See* Daryl J. Levinson, *Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 94 (2016) (noting the "judicial" power is a "government power" allocated by law).

168. *See id.*

169. Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960) (stating that an arbitrator "has no general charter to administer justice for a community which transcends the parties" but rather is "part of a system of self-government created by and confined to the parties"); *see also* 1 BACON, *supra* note 29, at 131 ("Arbitrators are in the Room of the Parties themselves,

their awards. Parties must rely on the courts to enforce an arbitrator's award because the enforcement power is a core aspect of the judicial power.[170]

To be sure, arbitrators can make factual findings and legal conclusions justifying their awards, and the parties may agree that those findings are binding on the court.[171] One might argue that this power to make findings implicates the judicial power because courts may enter judgment only to the extent authorized by the facts and law, and entering judgment would be an empty formality if courts were obliged to accept without question the factual and legal findings of another.[172] But the reason that an arbitrator's findings may be binding is that the parties have agreed that the findings will be binding; just as parties themselves may submit to the court stipulations of fact and law,[173] they may authorize an arbitrator to make those stipulated findings on their behalf.

Things are different, however, when the binding nature of an arbitrator's findings derives not from a contract but from a statute. Various statutes, such as the Federal Arbitration Act, require courts to defer to many of those findings.[174] In that situation, the arbitrator is

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and act in their Stead, as far as commissioned; whatever, therefore, the Parties can do, may be done by the Arbitrators[.]").

170. *See supra* notes 121–124 and accompanying text.

171. *See, e.g.*, Tobey v. County of Bristol, 23 F. Cas. 1313, 1320 (C.C.D. Mass. 1845) (No. 14,065) (noting the parties' ability to contract to be bound by arbitrator).

172. Some scholars have argued that the ability to enter judgment is irrelevant to the judicial power. *See* Meltzer, *supra* note 7, at 303 n.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."); Martin H. Redish, *Legislative Courts, Administrative Agencies, and the* Northern Pipeline *Decision*, 1983 DUKE L.J. 197, 214–19. In their view, placing any weight on the power to enter judgment is unduly formalistic, because Congress could avoid any benefits of an independent judiciary by directing that the judiciary enter judgment in accordance with the factual and legal conclusions of an Article I tribunal. Redish, *supra*, at 219. This argument persuasively establishes that the judgment is not the *only* aspect of the judicial power. But it does not mean the judgment power is irrelevant. Restricting judgments to Article III courts does have value—it means that individuals must go to courts to enforce decisions. The courts thus have an opportunity to ensure that the tribunal followed lawful procedures. If the tribunal's decision rested on unconstitutional considerations—such as one of the party's race—the court could refuse to enter judgment for the victor before the tribunal.

Moreover, allowing only the Article III courts to enter judgments helps to enforce whatever limitations Article III imposes on factual and legal findings. No decision can be enforced without the courts considering those issues. By contrast, if Article I tribunals can enter judgments, the Article III courts have an opportunity to intervene only if the law authorizes an appeal to an Article III court and the parties choose to appeal.

173. U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 448 (1993) (stating that there is no "impropriety" in accepting stipulations).

174. *See, e.g.*, S. E. Atl. Shipping Ltd. v. Garnac Grain Co., 356 F.2d 189, 192 (2d Cir. 1966) (noting that under the Federal Arbitration Act, courts are "bound by the arbitrator['s] factual findings and by their interpretation of the contract and of contract law").

exercising power conferred by Congress, not the parties. The parties do not set through their consent the scope of the arbitrator's power. They consent only to arbitration, and the law dictates the power afforded to the arbitrator because of that consent. Permitting Congress to dictate the consequences of consent to arbitration creates the possibility of Congress reallocating core features of the judicial function.[175]

D. Federalism

Prohibiting Article I adjudication by consent also promotes federalism. Federalism defines the distribution of power between the federal and state governments. Under the Constitution, the national government has only limited powers, and the states continue to be sovereign in many respects.[176]

One important aspect of federalism is that the Constitution does not establish inferior federal courts. Instead, Article III authorizes Congress to choose whether to establish those courts.[177] Under this arrangement, the state courts are the default tribunals for resolving disputes.[178] This scheme was a compromise among the Framers. Those in favor of inferior courts argued that the courts would be necessary to protect federal interests.[179] The primary objection of those opposed to the establishment of inferior courts was that inferior federal courts

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175. The Court has been inconsistent on what limits Article III imposes on the ability of Congress to require courts to defer to the findings of others. *Crowell v. Benson*, 285 U.S. 22, 56–58 (1932) suggested that Congress could require Article III courts to defer to an Article I tribunal's findings of fact except for those bearing on that tribunal's jurisdiction or on constitutional issues, but that Article III courts must be able to form legal conclusions de novo. But those limitations no longer apply. Although courts usually still review de novo constitutional facts, Martin H. Redish & William D. Gohl, *The Wandering Doctrine of Constitutional Fact*, 59 ARIZ. L. REV. 289, 299 (2017) (stressing that "de novo judicial review of . . . constitutional facts . . . has never been overruled"), they often defer to determinations of jurisdictional facts. Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 379 n.154 (2016) ("*Crowell*['s] exception for 'jurisdictional facts' . . . has not proved generative." (quoting *Crowell*, 285 U.S. at 62)). More important, the Court has abandoned the requirement that courts review legal determinations de novo, instead requiring courts to defer to many legal conclusions rendered by agencies. *See, e.g.*, Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984). However, several Justices have expressed doubts about this deference. *See* Michigan v. EPA, 135 S. Ct. 2699, 2713–14 (2015) (Thomas, J., concurring); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring).

176. *See* United States v. Morrison, 529 U.S. 598, 617–18 (2000) (differentiating between "what is truly national and what is truly local").

177. U.S. CONST. art. III, § 1, cl. 1.

178. Martin H. Redish & John E. Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311, 311 n.3 (1976) ("[T]he framers assumed that if Congress chose not to create lower federal courts, the state courts could serve as trial forums in federal cases.").

179. 1 FARRAND, *supra* note 30, at 124 (statement of James Madison) (defending the establishment of inferior tribunals under federal authority by cautioning the dangers of "oppressive" quantities of appeals and of "local prejudices").

would undermine state sovereignty and reduce the prestige of the state courts by allowing federal courts to resolve disputes involving state property or other interests.[180]

Allowing the consent of the parties to form the basis for authorizing adjudications by Article I tribunals undermines that compromise. One concern that drove the creation of federal courts was that states would discriminate against federal interests. The same concern applies in reverse. Federal adjudicators may discriminate against state interests, especially if the adjudicators are answerable to the public. For that reason, states have an interest in federal judges that are independent of the president and Congress.[181]

Permitting adjudication in Article I tribunals based on consent also undermines the compromise of Article III because those tribunals constitute a second category of federal tribunals that may displace the state courts. A party no longer has the option of filing only in either a state court or an Article III court; instead, it can choose to proceed before an Article I tribunal.[182] The Article I tribunal thus provides more options for proceeding in federal court and consequently may result in fewer cases being filed in state court.

That the parties would proceed to Article I tribunals only if they choose to do so does not ameliorate these problems. The objection of those opposed to the establishment of inferior federal courts was that

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180. *See id.* (statement of John Rutledge):

> [T]he State Tribunals might and ought to be left in all cases to decide in the first instance the right of appeal to the supreme national tribunal being sufficient to secure the national rights & uniformity of Judgmts [sic]: that it was making an unnecessary encroachment on the jurisdiction [of the States,] and creating unnecessary obstacles to their adoption of the new system.

(alteration in original). Others argued that inferior federal courts would create an unnecessary expense. *See id.* at 125 (statement of Roger Sherman).

181. Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1052 (7th Cir. 1984) (Posner, J., dissenting) ("[I]t would not be inconsistent for a state to want the laws . . . to be interpreted by judges who are dependent on the electoral branches of its own government, while not wanting the laws to be interpreted by judges dependent on the electoral branches of another sovereign."). One might argue that the ability of parties to proceed in state court is an argument in favor of Article I adjudication because state judges also do not enjoy the salary and tenure protections of Article III. But that analogy is inapt. Article III's independence guarantees are designed to protect federal judges from congressional and presidential pressure; unlike Article I judges, state judges are not subject to presidential and congressional pressures. *See supra* notes 161–164 and accompanying text.

182. Article I courts represent a greater potential threat to state courts than Article III courts because they have a broader potential jurisdiction than Article III courts. Under Article III, federal courts may hear only "cases" and "controversies." A dispute constitutes a case or controversy only if the plaintiff has standing, his claim is ripe, and the claim is not moot. *See* Hessick, *supra* note 163, at 62. These limitations do not apply to state courts. *See id.* at 94. Nor do they apply to Article I tribunals. *See* Pfander, *supra* note 4, at 704–05. Accordingly, Article I tribunals may hear a broader swath of claims that would otherwise be heard by state courts.

parties would *choose* to go to federal court instead of state court. Allowing parties to choose to go to Article I tribunals merely expands the scope of the problem by allowing parties to choose to go to either an Article I tribunal or an Article III court instead of to a state court.

One might argue that allowing parties to proceed before an Article I tribunal does not undercut the compromise because Congress could simply create more inferior Article III courts. The Supreme Court espoused that view in *Schor* when it said that adjudication by Article I does not raise federalism concerns.[183] But that argument overlooks the obstacles to creating inferior Article III courts.[184] One constraint on creating inferior courts is that they are expensive, both in terms of actual dollars and political capital, because of the salary and job protections afforded by Article III. Article I tribunals are less expensive because those Article III protections do not apply.[185] Allowing Article I tribunals to adjudicate claims thus makes it easier for Congress to encroach on state sovereignty.

The argument also ignores the differences between Article I tribunals and Article III courts. For example, litigating in Article I tribunals is perceived as less expensive than litigating in state or federal courts because Article I tribunals need not adhere to the procedures, such as discovery rules,[186] followed in those courts.[187] Moreover, because Article I judges do not have the Article III salary and tenure protections to minimize the effect of political pressures on decisions, Article I judges may decide disputes differently than Article

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183. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 858 (1986):

> The sole fact that Conti's counterclaim is resolved by a *federal* rather than a *state* tribunal could not be said to unduly impair state interests, for it is established that a federal court could, without constitutional hazard, decide a counterclaim such as the one asserted here under its ancillary jurisdiction, even if an independent jurisdictional basis for it were lacking.

184. Federalism informs other aspects of Article III. For example, one argument for the territorial court exception is that territorial courts do not displace the state courts. PETER S. DU PONCEAU, A DISSERTATION ON THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES 30 (Philadelphia, Abraham Small 1824) (stating that the limitations in Article III

> were expressly introduced for the purpose of guarding and protecting so much of the sovereignty of the States . . . ; but where the Constitution gives to the federal government an exclusive power over certain districts and territories, it could not mean to restrict their judiciary, where there was no sovereignty to protect but their own).

185. Bator, *supra* note 4, at 239 (arguing that "it would have been quite impossible, psychologically and politically, to create" agencies with tenured decisionmakers).

186. Justin Goetz, *Hold Fast the Keys to the Kingdom: Federal Administrative Agencies and the Need for* Brady *Disclosure*, 95 MINN. L. REV. 1424, 1431–32 (2011) (explaining that discovery rules do not apply to agencies, but that some agencies provide limited discovery).

187. Glen Staszewski, *The Federal Inaction Commission*, 59 EMORY L.J. 369, 403 n.137 (2009) ("While reliable empirical data is not readily available, it is widely believed that informal proceedings before administrative agencies are less expensive than adjudication in courts.").

III judges. Parties with political connections may go to an Article I tribunal precisely because they perceive that they will gain an advantage in that tribunal.

IV. Other Justifications for the Consent Exception

Although Article III authorizes only the Article III courts to exercise the judicial power, there may be other reasons to permit Article I tribunals to adjudicate claims based on the consent of the parties. One might argue that the consent of the parties results in the waiver of Article III, or that prohibiting parties from authorizing Article I adjudication by consent would unduly impair the freedom of contract. Or one might think that prohibiting Article I adjudication based on consent would overwhelm the federal courts with litigation and unduly undermine the federal government's ability to develop policy through expert adjudication. This Part considers those arguments.

A. Waiver

Although the Court has suggested that individuals cannot waive Article III's vesting clause,[188] one might argue that this is wrong: individuals can waive the vesting clause by consenting to adjudication before an Article I tribunal.[189] Leaving aside the concerns about whether these waivers are entirely voluntary,[190] this argument fails to distinguish between constitutional provisions that confer rights and structural provisions that allocate power.

Constitutional provisions that confer rights come in two forms.[191] The first type explicitly states that it is protecting rights. An example is the Sixth Amendment, which gives defendants in criminal cases "the right to a speedy and public trial, by an impartial jury."[192]

188. Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1943 (2015).

189. *See, e.g.*, Meltzer, *supra* note 7, at 304. The Court itself has left open the possibility of waiver. *See Wellness*, 135 S. Ct. at 1944 ("[A]ssuming that a litigant may not waive structural protections provided by Article III . . . ." (internal quotation marks omitted) (quoting Peretz v. United States, 501 U.S. 923, 937 (1991))).

190. To be valid, waivers must be intentional and voluntary. *See* United States v. Olano, 507 U.S. 725, 733 (1993). Litigants may face pressure to consent to Article I jurisdiction not only from members of Congress and the president, but also from district judges seeking to alleviate their dockets; moreover, overworked courts may be willing to infer consent when the parties do not mean to consent. *See supra* notes 138–140 and accompanying text.

191. David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 867–72 (1986).

192. U.S. CONST. amend. VI; *see id.* amend. II ("[T]he right of the people to keep and bear Arms, shall not be infringed."); *id.* amend. IV (recognizing "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures").

The second type imposes restrictions on government actions.[193] For example, the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech."[194] These limitations confer rights because rights by definition impose constraints on government actions.[195]

The rights conferred by these provisions belong to individuals.[196] Individuals accordingly can waive their rights by intentionally relinquishing them.[197] For example, a criminal defendant waives his constitutional right to a jury trial by pleading guilty. Because the defendant has intentionally relinquished his right to a jury trial, the conviction without a jury trial is not unconstitutional.[198]

In contrast to rights-conferring provisions, structural provisions are those that define the powers of the various branches of government.[199] Examples include the Commerce Clause, which authorizes Congress to regulate commerce among the states,[200] and the president's veto power.[201]

Unlike the protections created by rights-conferring provisions, the protections created by structural provisions are not held by individuals; instead, structural provisions allocate powers among the different bodies of government.[202] Moreover, structural provisions protect societal interests extending beyond any single individual; they regulate how the government functions.[203] Accordingly, individuals cannot waive structural provisions of the Constitution. Thus, for example, an individual cannot by his waiver authorize Congress to enact legislation that does not fall within one of the enumerated areas in which the Constitution authorizes Congress to legislate.

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193. DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 195 (1989) (finding that the Due Process Clause confers rights because it is "a limitation on the State's power to act").

194. U.S. CONST. amend. I.

195. Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1449 n.57 (2013) ("It is also a truism that rights impose constraints on government action . . . .").

196. Huntington v. Attrill, 146 U.S. 657, 668 (1892) ("[P]rivate or civil rights belong[ ] to individuals, considered as individuals . . . .").

197. United States v. Olano, 507 U.S. 725, 733 (1993).

198. "Because the right to trial is waivable, and because the defendant who enters a valid guilty plea waives that right, his conviction without a trial is not 'error.' " *Id.*

199. Huq, *supra* note 195, at 1448 (describing structural provisions as those that "speak in terms of the government's powers").

200. U.S. CONST. art. I, § 8, cl. 3.

201. *Id.* § 7, cl. 2.

202. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220–21 (1974) (describing structural provisions as "held in common by all members of the public").

203. Huq, *supra* note 195, at 1469–70 (contrasting rights, which involve "an individual's constitutional privilege against the aggregated interests of society," and structural provisions).

To be sure, although an individual cannot waive a structural provision, he can waive his right to raise that provision in court.[204] But unlike with a waiver of individual rights, the waiver of an argument does not cure the structural violation. Legislation exceeding Congress's power remains unconstitutional even if a litigant opts not to raise the constitutional challenge in court. Instead, the individual has merely relinquished the right to make that structural argument in court.[205] The waiver of a structural argument is simply a decision not to seek relief for that violation.[206]

Article III's vesting clause is a structural provision.[207] It establishes which branch of the government may exercise the judicial power. Contrary to the Court's contention, it does not also confer an individual right.[208] Article III does not state that individuals have a "right" to those Article III courts. Nor does it purport to restrict government actions. Instead, it positively allocates the judicial power to the judiciary.

Article III accordingly cannot be waived. Even if an individual consents to the exercise of the judicial power outside Article III, that consent does not authorize the adjudication. At best, it results only in the individual relinquishing his ability to challenge the legality of the adjudication in court.

To be sure, the main reason for assigning the judicial power to the Article III courts was to protect individual rights.[209] An independent judiciary was seen as essential to preventing unlawful government actions against individuals and to ensuring that individuals would receive the remedies to which they were entitled when their rights were

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204. *See, e.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 231 (1995) ("[T]he proposition that legal defenses based upon doctrines central to the courts' structural independence can never be waived simply does not accord with our cases.").

205. Courts "need not . . . accept[ ]" waivers of structural arguments. *Id.*

206. One might point to sovereign immunity as a counterexample. Sovereign immunity bars federal courts from exercising jurisdiction over the government unless it consents to suit. FDIC v. Meyer, 510 U.S. 471, 475 (1994). One might argue that because jurisdiction is a structural limit on the courts, the ability of the government to waive sovereign immunity establishes that structural limitations are waivable. But the Court has not described sovereign immunity as structural. Instead, the Court has said, sovereign immunity is a "personal privilege." Clark v. Barnard, 108 U.S. 436, 447 (1883). Thus, sovereign immunity is akin to other waivable rights. *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 682 (1999) (stating that, like rights, sovereign immunity can be waived by an "intentional relinquishment" (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1934))).

207. Bator, *supra* note 4, at 259 (arguing that Article III establishes a structural arrangement instead of an individual right).

208. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850 (1986).

209. *See* THE FEDERALIST NO. 78, *supra* note 16, at 383 (Alexander Hamilton).

violated.[210] But Article III itself does not confer a right to be free from unlawful government actions or to receive adequate remedies. It simply establishes a structure that has the consequence of protecting those rights.[211]

A different version of the waiver argument is that we often allow litigants to choose to be bound by the determinations of Article I tribunals and other nonjudicial officials. For example, the Internal Revenue Service ("IRS") can assess the amount of taxes a person owes, and that assessment becomes binding if that person opts not to challenge it in court. One might argue that since we allow litigants to consent to be bound by Article I determinations *after* those determinations have been made, we should likewise allow litigants to consent to an Article I tribunal's jurisdiction *before* it adjudicates.[212]

But this argument rests on a false premise. When a person acquiesces in a decision already made by an Article I tribunal, the reason that decision is binding is not that the litigant has retroactively conferred the judicial power on that tribunal. The tribunal does not gain new powers simply because the litigant does not appeal. Instead, the tribunal's determination is binding because the litigant has decided not to exercise his right to challenge the determination—just as a person loses the ability to enforce his rights by choosing to file suit after the expiration of the statute of limitations. For this reason, a taxpayer who chooses to challenge the IRS's determination but files after the deadline is equally bound by that determination as a taxpayer who acquiesces in it.[213]

The situation is different when a person seeks to imbue an Article I tribunal with the power to make enforceable determinations before it conducts the adjudication. In that circumstance, the person is not simply waiving his right to challenge the tribunal's determination in court; he is empowering the tribunal to act as the court itself by exercising the judicial power.

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210. *Id.* ("[The] independence of the judges . . . guard[s] . . . the rights of individuals from the effects of . . . designing men . . . .").

211. Meltzer, *supra* note 7, at 302 (arguing that the reason for an independent judiciary is to "protect[ ] the rights of litigants"). Provisions outside Article III, such as the Due Process Clause, may provide a right to an independent adjudicator. *Cf.* Crowell v. Benson, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting) (arguing that "under certain circumstances, the constitutional requirement of due process is a requirement of judicial process").

212. Meltzer, *supra* note 7, at 303 ("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.").

213. *See, e.g.*, 26 U.S.C. § 6532 (2012) ("No suit . . . for the recovery of any internal revenue tax . . . shall be begun . . . after the expiration of 2 years from . . . notice of the disallowance . . . .").

B. Freedom of Contract

A related argument is that parties should have the autonomy to choose the forum, including an Article I tribunal, to resolve their disputes. After all, the law recognizes that parties can enter into forum selection clauses or agree to have their disputes resolved by arbitrators, as well as select the law that governs their disputes.

But freedom of contract is limited. Contracts cannot contradict the law.[214] Article III confers the judicial power only on the Article III courts. Contracting parties accordingly cannot agree to confer the judicial power on a non-Article III tribunal.[215]

Moreover, contracts cannot be against public policy.[216] This limitation applies to all contractual provisions, including forum selection and choice of law clauses.[217] Allowing parties to agree to resolve their disputes privately by settlement or alternative dispute resolution is consistent with public policy. But permitting parties to confer the judicial power to resolve their disputes is a different matter. The judicial power entails the ability to make binding determinations that can be enforced through coercion such as imprisonment or fines. Needless to say, the potential consequences of abusing that power suggest that only the state should have the ability to employ it.[218]

Of course, parties can choose among the various courts that do have the judicial power. They accordingly can pick to proceed in a particular Article III court or in state court. Moreover, parties can agree to resolve their dispute without the judicial power. They can settle or go to mediation or arbitration. But the outcomes of those proceedings do not have the force of law because they are not the product of the

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214. *See* McMullen v. Hoffman, 174 U.S. 639, 669 (1899) (refusing to enforce a contract that would stifle competition in an illegal manner).

215. One might argue that consent can redefine the powers of the branches of government insofar as acquiescence to a longstanding practice by a branch of government may establish the legality of that practice. *See* Stuart v. Laird, 5 U.S. (1 Cranch) 299, 309 (1803) (concluding that "practice and acquiescence" to circuit riding established its constitutionality). But this acquiescence doctrine does not reallocate power. No one thinks, for example, that the president could eventually acquire the power to legislate if Congress acquiesced to his passing laws for any amount of time. Instead, the acquiescence doctrine is simply a tool of interpretation for resolving ambiguities in the Constitution. *See* NLRB v. Noel Canning, 134 S. Ct. 2550, 2560 (2014) ("[T]he longstanding 'practice of the government' can inform our determination of 'what the law is.' " (first quoting McCulloch v. Maryland, 17 U.S. (1 Wheat.) 316, 401 (1819); and then quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803))).

216. RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. LAW INST. 1981).

217. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (AM. LAW INST. 1971).

218. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT ¶ 88, at 52 (Richard H. Cox ed., Harlan Davidson, Inc. 1982) (1690) ("[E]very man who has entered into civil society . . . has thereby quitted his power to punish . . . .").

judicial power. A party seeking to enforce a settlement or award must proceed to court and bring a breach of contract action.

C. Pragmatic Concerns

A third argument is that, as a practical matter, Article I courts must be permitted to adjudicate based on consent.[219] Article I judges decide tens of thousands of cases based on consent each year.[220] If they could not do so, the argument goes, the Article III courts would be overwhelmed with cases.[221] It would also increase costs, because Article I tribunals often observe fewer procedures than the Article III courts. And it would undermine the government's ability to develop policy because some Article I tribunals, such as the bankruptcy court, have dockets limited to a narrow subject matter, allowing the judges to become experts and decide cases consistently over time.[222]

It is true that prohibiting Article I tribunals from exercising the judicial power based on the parties' consent would increase the workload of the Article III courts and interfere with expert policymaking through specialized tribunals. But allowing these practical considerations to trump the text of Article III is to turn constitutional law on its head. It is a basic principle of constitutional law that the government cannot ignore the Constitution when it hinders the government from accomplishing some goal.[223] The Constitution cabins the government regardless of its ultimate aim. Article III confers the judicial power on only the Article III courts. The practical benefits of assigning the judicial power to Article I tribunals therefore do not provide a basis for ignoring the limits of Article III.[224]

Moreover, to the extent the concern is increased workload, the Constitution itself provides mechanisms for reducing the Article III

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219. *See* Judith Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581, 586 (1985) (stating that restricting Article I jurisdiction is "defeated by an ultimately insurmountable response—reality").

220. *See supra* note 89 and accompanying text.

221. Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1938–39 (2015) ("[I]t is no exaggeration to say that without the distinguished service of these judicial colleagues, the work of the federal court system would grind nearly to a halt.").

222. *See, e.g.*, Crowell v. Benson, 285 U.S. 22, 46 (1932) ("To [prohibit agency adjudication] 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.").

223. *See* NLRB v. SW Gen., Inc., 137 S. Ct. 929, 948 (2017) ("We cannot cast aside the separation of powers and the Appointments Clause's important check on executive power for the sake of administrative convenience or efficiency.").

224. Much of administrative law reflects a preference for efficiency over separation of powers. *See* Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 531 (2015) (describing administrative incompatibility with traditional separation of powers).

workload. One is to establish more Article III courts.[225] Although creating and staffing these courts is politically and economically expensive,[226] it is the process that the Constitution prescribes. Moreover, to the extent creating more Article III courts is too costly, the Constitution provides another avenue to reduce Article III workload: leave to state courts cases that would otherwise be in federal court.[227]

It is also important not to overstate the costs of prohibiting Article I tribunals from exercising the judicial power. Although those tribunals could not formally adjudicate suits, they could still play a significant role. They could still hear nondispositive motions, manage discovery, conduct trials, and make recommendations to the courts, just as magistrate judges now make reports and recommendations to district courts in felony cases.[228] To be sure, parties would have to resort to the courts to enforce those determinations, and courts would have to make their own factual and legal determinations. But courts could still rely on the tribunals' work.[229]

Similarly, barring adjudication on consent would not eliminate the benefits of the expertise provided by specialized tribunals. Those tribunals could still issue findings to be considered in the courts. Even if the findings are not binding on the courts, those findings could significantly guide the courts' determinations. The U.S. Sentencing Commission illustrates this possibility. The Commission has no adjudicatory or rulemaking authority; it merely issues advisory sentencing guidelines.[230] Although federal courts are not bound by the guidelines, courts regularly defer to the guidelines in sentencing because of the Commission's expertise.[231]

True, proceeding in Article III courts would lose the benefits of efficient procedures in Article I tribunals. But Article III courts could

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225. *See* U.S. CONST. art. III, § 1 (recognizing Congress's power to establish inferior courts); *see also* Currie, *supra* note 137, at 458 (arguing that Congress could create more Article III courts to handle bankruptcies).

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

227. *See* Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 508 (1962) (noting state jurisdiction over federal cases, "where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case" (quoting Claflin v. Houseman, 93 U.S. 130, 136 (1876))).

228. United States v. Raddatz, 447 U.S. 667, 673–76 (1980) (holding that the district court could make an independent finding of credibility without rehearing testimony).

229. Even for issues reviewed de novo, appellate courts regularly recognize the value of lower court opinions. *See* United States v. Bestfoods, 524 U.S. 51, 73 (1998) (refusing out of "prudence" to pass on a question that the lower court did not address).

230. United States v. Booker, 543 U.S. 220, 245–46 (2005) (holding the federal sentencing guidelines to be advisory).

231. *See* Rita v. United States, 551 U.S. 338, 353 (2007) (endorsing presumption of reasonableness for sentences within sentencing guidelines); *see also* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (counseling judicial deference on matters falling within an agency's expertise).

take steps to streamline their procedures. They could, for example, adopt rules curbing excessive discovery. Of course, trimming the procedures too much could violate due process or other constitutional provisions. But the same provisions generally apply to Article I tribunals and limit the procedures they can adopt.

None of this is to say that limiting adjudication on consent would not increase workload or the cost of adjudication. Rather, the point is that those increases may be less than expected and the Constitution gives Congress ways of handling them.

V. CONSISTENCY WITH THE OTHER EXCEPTIONS TO ARTICLE III

A deeper objection to my argument against the consent exception is that it applies not only to the consent exception but also to the various other exceptions to Article III, such as the territorial, military, and public rights exceptions. After all, the argument goes, Article III assigns the judicial power to the Article III courts, and these exceptions permit an Article I court to exercise the judicial power.[232] Eliminating these exceptions would require significant restricting of the federal system of adjudication. There are three ways to handle the conflict between these exceptions and Article III. The first is to eradicate all the exceptions inconsistent with Article III. The second is to accept that the text of Article III is no longer constraining in light of the various exceptions. The third is to rely on stare decisis to maintain the deeply entrenched exceptions to Article III but refuse to recognize new exceptions in the future.

A. Other Exceptions to Article III

The consent exception is not the only exception to Article III. The Court has also recognized several other exceptions to Article III. These include the territorial exception, under which Article I tribunals may adjudicate claims in the territories; the military exception, under which courts-martial may adjudicate claims related to the military; and the public rights exception, an ill-defined category that roughly encompasses disputes involving federal statutory rights or in which the government is a party; and the bankruptcy exception, under which an Article I tribunal can resolve disputes involving core issues of

232. Pfander, *supra* note 4, at 648 (recounting the view that "the boundary lines between Article I tribunals and Article III courts have been marked neither by logic nor by constitutional text").

bankruptcy.[233] Each of these exceptions authorize Article I tribunals to enter judgments and exercise other aspects of the judicial power.

On their face, these exceptions appear to conflict with Article III. After all, Article III "vest[s]" all the "judicial power" in the Article III courts.[234] A few judges and scholars argued for some of the exceptions on the ground that they do not implicate the judicial power. For example, Justice Thomas has argued that at the founding the judicial power was unnecessary to dispose of suits in which the government asserted its public rights, rights held by the government on behalf of society; instead, the judicial power was required only for the disposition of private rights held by individuals.[235]

But the Court has not justified the exceptions on this ground. Instead, it has relied on two other types of arguments. First, for some exceptions, the Court has invoked other provisions of the Constitution. For example, the Court has justified the military exception on the ground that the Constitution authorizes Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces," designates the president as Commander in Chief, and creates an exception to the grand jury requirement for military offenses.[236] Likewise, it has justified the territorial exception on the ground that Article IV grants Congress plenary power to regulate the territories.[237]

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233. *See* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1951 (2015) (Roberts, C.J., dissenting) (noting these exceptions).

234. U.S. CONST. art. III, § 1.

235. *Wellness*, 135 S. Ct. at 1965 (Thomas, J., dissenting) ("[W]hile the legislative and executive branches may dispose of public rights at will—including through non-Article III adjudications—an exercise of the judicial power is required 'when the government want[s] to act authoritatively upon core private rights that had vested in a particular individual.' " (second alteration in original) (quoting Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 569 (2007))); *see also* Pfander, *supra* note 4, at 747 (arguing that court-martial proceedings, territorial matters, and certain kinds of public benefits claims did not involve the judicial power). Chief Justice Marshall argued that adjudication in the territories does not involve the federal judicial power of Article III. Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828). But he provided no support for that conclusion, and scholars have strongly criticized that argument. *See* MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 56 (2d ed. 1990) (criticizing *Canter* because "Congress is always limited by the terms of Article III"); *see also* David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801–1835*, 49 U. CHI. L. REV. 646, 719 (1982) (calling the discussion in *Canter* "poorly explained" and "difficult to reconcile with the purposes of article III"); Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 892 (1990) (calling *Canter*'s conclusion "fatuous").

236. Dynes v. Hoover, 61 U.S. (20 How.) 65, 78–79 (1857) (citing these powers from Article I, Article II, and the Eighth Amendment). Although the Court has grounded the exception on these provisions, it has not fully explained how these provisions actually support the exception. *See* Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L.J. 933, 961 (2015) (complaining that the "Court has never paused to actually explain" how the text of the Constitution supports the exception).

237. *Canter*, 26 U.S. at 546.

But these other provisions do not justify creating exceptions to Article III. Congress must exercise its powers consistent with the other provisions of the Constitution.[238] Article III allocates the federal judicial power to the Article III courts.[239] Congress accordingly cannot reallocate that power through any of its powers.[240]

Second, the Court has relied on expediency to justify the exceptions to Article III.[241] The Court has frequently allowed Article I adjudications if forbidding it would be impractical or would hamper the government's objectives. For example, the Court has justified the territorial exception on the ground that requiring Article III courts in the territories could result in the "practical problems" of a glut of expensive judges with life tenure as territories were admitted as states.[242] Similarly, the Court has justified the military exception on the ground that the "exigencies of military discipline require the existence of a special system of military courts."[243] The Court also relied on expediency in *Schor*.[244] There, the Court stated that, even when one of the traditional exceptions to Article III does not apply, an Article I tribunal may nevertheless adjudicate claims if the reasons that Congress assigned the adjudication to the Article I tribunal outweigh the degree of intrusion on the Article III courts.[245]

Using expediency to justify the exceptions to Article III raises the same objection noted earlier that practical considerations cannot trump the text of the Constitution. The Constitution constrains government action, even when that constraint is inconvenient.[246]

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238. Saenz v. Roe, 526 U.S. 489, 508 (1999) ("[Congress's] powers . . . may not be exercised in a way that violates other specific provisions of the Constitution.").

239. U.S. CONST. art. III, § 1.

240. *See* REDISH, *supra* note 235, at 56 (criticizing the territorial exception because "Congress is always limited by the terms of Article III"); Vladeck, *supra* note 236, at 961 (arguing that the Constitution's text does not support the military exception).

241. Bator, *supra* note 4, at 236–65 (demonstrating that the Court's decisions on Article I adjudication have inconsistently looked to history, custom, and expediency).

242. *See, e.g.*, Glidden Co. v. Zdanok, 370 U.S. 530, 543–47 (1962) (stating that the admission of territories as states "left the National Government with a significant number of territorial judges on its hands and no place to put them").

243. O'Callahan v. Parker, 395 U.S. 258, 261 (1969), *overruled by* Solorio v. United States, 483 U.S. 435 (1987).

244. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986).

245. *Id.* at 851 (balancing the

> extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the [judicial power], the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III).

246. *See* NLRB v. SW Gen., Inc., 137 S. Ct. 929, 948 (2017) ("We cannot cast aside the separation of powers and the Appointments Clause's important check on executive power for the sake of administrative convenience or efficiency.").

Further, permitting the government to ignore the Constitution when it is inconvenient will result in increased infringements on the power of the Article III judiciary.[247] As experience demonstrates, expediency will inevitably support more Article I adjudications as the volume of litigation increases and the administrative state expands.

Consider the public rights exception. Originally, that exception was limited to instances in which the government sought to enforce its so-called public rights—rights held by the government on behalf of society. For example, in *Murray's Lessee v. Hoboken Land & Improvement Co.*,[248] which first recognized the exception, the Court upheld the Treasury Department's seizure of a customs collector's property based on the Treasury's determination that the collector owed the Treasury $1 million.[249] The Court rejected the argument that only an Article III court could determine what the collector owed. It explained that the failure to remit the duties was a violation of the Treasury's "public right[ ],"[250] and just as a private individual could vindicate his private right to wrongfully taken property extrajudicially by reclaiming that property, the Treasury could vindicate its public right extrajudicially by determining what it was owed and seizing property to satisfy that debt.[251] The public rights exception simply treated the government as a private individual. It recognized that, just as a private person who has been hurt can assess the extent of his damage, a department of the government can likewise internally resolve its damages; and just as a private individual whose property has been taken can reclaim that property, the government could claim property to satisfy its rights.

The only difference between a private individual and the government was the susceptibility to suit after the seizure. The Court explained that a private individual who reclaims property can subsequently be sued in court, but the Treasury could choose not to be

247. *See* Stettinius v. United States, 22 F. Cas. 1322, 1329 (C.C.D.D.C. 1839) (No. 13,387) (noting that an exception to Article III "from the necessity of the times is continually increasing"); Currie, *supra* note 137, at 445 (discussing the dangers of relying on expediency to justify Article I tribunals). Although statistics relating to adjudication are not readily available, it is clear that Article I tribunals adjudicate over one million cases per year. *See* Adjudication Research Joint Project of ACUS & Stanford Law Sch., *Caseload Statistics*, STAN. U., http://acus.law.stanford.edu/reports/caseload-statistics (last visited Jan. 12, 2018) [https://perma.cc/KWW8-RYFD] (reporting over one million adjudications just in administrative agencies).

248. 59 U.S. (18 How.) 272, 284 (1855).

249. *Id.* at 274–75.

250. *Id.* at 284.

251. *Id.* at 283; *see* Pfander, *supra* note 4, at 760 (noting that *Murray's Lessee* authorized the initial determination by the Treasury, an Article I tribunal).

subject to suit for its seizure by withholding a waiver of sovereign immunity.[252]

In creating the public rights exception, the Court distinguished public rights from individual rights.[253] The Court explained that although the Treasury could vindicate its own public rights outside the Article III courts, Congress could not force individuals to vindicate their individual rights outside the Article III courts. [254]

But the Court subsequently abandoned that limitation on individual rights to facilitate the task of administrative agencies.[255] In *Thomas v. Union Carbide Agricultural Products Co.*,[256] the Court held that the public rights exception applied to suits between private parties alleging violations of individual rights, stating that an Article I agency could adjudicate the claims if doing so was important to the agency's mission.[257] At issue in *Thomas* was the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), which required pesticide manufacturers to submit to the Environmental Protection Agency ("EPA") research data on the pesticide's health effects.[258] FIFRA authorized others to obtain that data, but only if they compensated the manufacturer.[259] It also designated an Article I tribunal to resolve any dispute about the amount of compensation.[260] Although recognizing that the pesticide manufacturer's suit would be to enforce an individual

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252. *Murray's Lessee*, 59 U.S. at 284 (stating that "in case of a private person, every fact upon which the legality of the extra-judicial remedy depends may be drawn in question by a suit against him" but that suit would not lie against the government if it "withheld their consent").

253. Although it distinguished public and private rights, the Court did not define precisely what constitutes a public right. Presumably, the Court used the term in its historical sense to refer to rights held collectively by society. *See* 4 BLACKSTONE, *supra* note 18, at *5 (referring to "the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity").

254. *Murray's Lessee*, 59 U.S. at 284 ("[W]e do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty . . . ."). The Court further noted that although private individuals were susceptible to suit for vindicating their rights extrajudicially, the Treasury could not be sued because of sovereign immunity. *Id.*

255. *See* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568 (1985). *Thomas* was hardly the first expansion of the public rights exception. In *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929), the Court extended the exception to suits by private individuals seeking to enforce their individual rights against the government. That conclusion did not rest on *Murray's Lessee*'s theory that the government may enforce its own rights extrajudicially (since individual rights do not belong to the government). Instead, the Court explained that sovereign immunity barred suit against the government without its consent, and the government could limit its consent to being sued in an Article I tribunal. *Id.* at 452.

256. 473 U.S. at 587.

257. *See* Stern v. Marshall, 564 U.S. 462, 490 (2011) (describing expansion).

258. 7 U.S.C. § 136a(c) (2012).

259. § 136a(c)(1)(F).

260. § 136a(c)(1)(F)(iii).

right to compensation against a private individual,[261] the Court explained that the public rights exception applied because the claim was "closely integrated" with the EPA's regulatory scheme. In so concluding, the Court vastly expanded the public rights exception beyond instances in which the government sought to enforce its rights or claimed sovereign immunity. It extended the exception to disputes in which requiring Article III court adjudication could undermine an agency's regulatory mission.

The expansion of the public rights exception is not unique. The military exception has likewise expanded. Historically, court-martial jurisdiction extended only over active soldiers and others affiliated with the military,[262] and only for charges of violations of military rules, such as desertion or mutiny.[263] In recent times,[264] however, the Supreme Court has abandoned the rule limiting courts-martial to military offenses, explaining that it would avoid "confusion" to allow them to hear any claim, including alleged violations of civilian laws.[265]

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261. *Thomas*, 473 U.S. at 586.

262. *See* FREDERICK BERNAYS WIENER, CIVILIANS UNDER MILITARY JUSTICE: THE BRITISH PRACTICE SINCE 1689, ESPECIALLY IN NORTH AMERICA 6–31 (1967). Courts-martial were generally limited to hearing claims against soldiers, but a few statutes in seventeenth-century England authorized jurisdiction over camp followers. *Id.*

263. *See* Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1, 10–11 (1958). If a soldier was accused of violating civilian rules, the military was obliged to hand that soldier over to the civilian authorities. *Id.* ("[If] military personnel were accused of committing offenses 'punishable by the known laws of the land,' their commander was required, under pain of being cashiered, 'to use his utmost endeavors to deliver over such accused person or persons to the civil magistrate.' " (quoting American Articles of War of 1776, § 10, art. 1, *reprinted in* 2 WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 1489, 1494 (Boston, Little, Brown & Co. 1896))).

264. Some have treated the military exception as a species of the consent exception, arguing that courts-martial have jurisdiction over soldiers because the soldiers acquiesced to that jurisdiction when they enlisted. *See* A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 197 (Liberty Fund, Inc. 1982) (8th ed. 1915) ("Enlistment . . . constitutes the contract by which a person becomes subject to military law."). But that argument does not explain why conscripted soldiers are subject to courts-martial.

265. Solorio v. United States, 483 U.S. 435, 449 (1987). Expediency has also resulted in the expansion of the closely related exception authorizing military commissions to hear claims against enemy belligerents. Traditionally, these commissions could hear suits against enemy belligerents in foreign countries for violations of international law, based on the recognition that it would be virtually impossible to transport those belligerents to the United States for trial in an Article III court. *See* Vladeck, *supra* note 236, at 945 (recounting the origins of military commissions). But in recent times, courts have permitted Congress to create military commissions to hear suits against any alien belligerent, including belligerents imprisoned in the United States who could relatively easily be brought before an Article III court. *See* Bahlul v. United States, 840 F.3d 757, 758 (D.C. Cir. 2016) (en banc) (upholding the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, which establishes military commissions to try alien belligerents); *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 518–24 (2004) (permitting such commissions). For other possible expansions, see Vladeck, *supra* note 236, at 966–67.

Most illustrative of the effects of expediency is the balancing test from *Schor*,[266] under which a court weighs the reasons that Congress assigned the adjudication to the Article I tribunal against the degree of intrusion on the Article III courts.[267] That test confers open-ended power on Congress to create Article I tribunals whenever Congress deems it necessary.[268] Indeed, the Court itself recognized the breadth of the exception, stating that care must be taken to ensure that Congress does not rely on it to create "a phalanx of non-Article III tribunals."[269]

B. Reconciling the Other Exceptions with Article III

There are three general ways to handle the other exceptions to Article III. The first is to eliminate all exceptions that are inconsistent with Article III wholesale. Doing so would require eradicating most Article I tribunals, or at least reconstituting those tribunals as Article III courts. To be sure, as noted above, Article III might not prohibit all Article I adjudications; for example, it might permit Article I tribunals to adjudicate assertions of public rights by the government. Nevertheless, strictly following Article III would render many Article I tribunals unconstitutional and require significant revamping of the federal system of adjudication. Many may regard these costs as intolerably high.

The second option is to abandon the text of Article III and instead follow the doctrinal tests that the Court has developed to justify the various exceptions to Article III. This approach is inconsistent with the notion that the Constitution is the highest law of the land. Moreover, given that expediency has been the predominant justification for the exceptions to Article III, following the Court's doctrinal tests fails to impose any real limits on Congress's power to create Article I tribunals.

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266. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986).

267. *Id.* at 851.

268. 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, 120 (1988) (questioning the test's "capacity to impose any principled limitations on Congress's power to use non-article III adjudicat[ion]").

269. *Schor*, 478 U.S. at 855. Scholars have sought to provide a stronger footing for the decisions permitting Article I adjudication. The leading theory argues that a non-Article III tribunal may adjudicate a claim so long as its decision is subject to review by an Article III tribunal. *See, e.g.*, Fallon, *supra* note 4, at 933; Redish, *supra* note 172, at 226–28. This appellate review theory does not rest on the text of Article III but instead seeks to justify the current state of the law by looking to the reasons for Article III. *See id.* But it cannot account for significant portions of precedent. For example, it cannot account for the current practice of trying military offenses in courts-martial, which are not subject to Article III review. Fallon, *supra* note 4, at 973.

The third, most realistic option is to adhere to the text of Article III in future cases but to rely on stare decisis to maintain the deeply entrenched exceptions to Article III. This approach has the benefit of avoiding the costs of demolishing many Article I tribunals while at the same time maintaining fidelity to the text of the Constitution in future cases.

Although stare decisis is at its weakest in constitutional cases,[270] it may nonetheless justify maintaining some exceptions to Article III. The reasons underlying stare decisis are to avoid undermining the reliance interests society has placed on existing doctrines, to provide stability in the law, and to protect the legitimacy of the courts.[271] Those reasons apply strongly to the deeply entrenched exceptions to Article III, such as the military exception. That exception has been recognized for more than 150 years, and declaring courts-martial to be unconstitutional would severely disrupt the military. Moreover, for the courts to inject themselves into military matters would imperil their legitimacy, because military matters have long been seen as the province of the executive.

But stare decisis does not readily support maintaining other exceptions to Article III. The consent exception falls into this camp.[272] That exception is still nascent. It was only in 2015 that the Court squarely recognized it, and the Court has not yet worked out the contours of the exception. For example, despite its strong language in *Wellness* suggesting that consent cures all Article III objections,[273] the Court has not yet definitively resolved whether consent alone suffices for Article I adjudication. Instead, in each case in which the Court has pointed to the consent of the parties, it has also relied on the supervisory authority of the Article III courts.[274] Moreover, although many adjudications before Article I tribunals are based on the consent of the parties, the government did not establish those tribunals based on the Court's decisions. For example, the statutes conferring consent jurisdiction on the bankruptcy courts and federal magistrate judges

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270. Agostini v. Felton, 521 U.S. 203, 235 (1997) (stating that stare decisis is "at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions").

271. *See, e.g.*, RICHARD A. WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION 56–84 (1961) (identifying certainty, reliance, equality, efficiency, and restraint of individual judges as justifications for stare decisis).

272. Another exception that stare decisis may not support is the extension of the public rights exception to claims between private individuals. *See supra* notes 255–261 and accompanying text. That extension does not have a firm constitutional foundation and has not generated significant precedent.

273. *See supra* notes 78–82 and accompanying text.

274. *See supra* note 75 and accompanying text.

predate the establishment of the exception in *Schor* and *Wellness*.[275] Given the dubious provenance of the consent exception, its recent vintage, and the lack of reliance on the exception, overturning the exception would likely not significantly undermine judicial legitimacy. At the very least, stare decisis does not justify expanding the exception by converting from dicta into holding the Court's statements that the consent of the parties alone can support Article I adjudication.

Some might argue that applying stare decisis is inconsistent with my argument that the text and history of Article III prohibit the consent exception, based on the view that Article III requires courts to follow the text of the Constitution instead of following their own precedents that diverge from that text.[276] But that view is not universally accepted. Other scholars have argued that at the founding giving weight to precedent was seen as a legitimate aspect of judging.[277] Thoroughly assessing this debate is beyond the scope of this Article. My goal here is not to advocate for a particular position; it is simply to list the ways courts may handle the tension between the various exceptions to Article III and the text of Article III.

CONCLUSION

The consent of the parties should not provide a basis for Article I tribunals to adjudicate cases and controversies enumerated in Article III. Article III confers the judicial power on the federal courts, and no one has the authority to reallocate that power.

Prohibiting adjudication on consent would significantly affect the federal system of adjudication. Federal magistrate judges, bankruptcy judges, and various other agencies would no longer be able to resolve the tens of thousands of cases that they adjudicate annually

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275. *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 101(a), 98 Stat. 333, 333 (establishing bankruptcy consent jurisdiction); Federal Magistrate Act of 1979, Pub. L. No. 96-82, § 2, 93 Stat. 643, 643–44 (adding consent provisions for magistrate judges); A Constitutional Analysis of Magistrate Judge Auth., 150 F.R.D. 247, 252 (1993) ("[T]he Court has not decided whether the authority of magistrate judges to preside over civil trials with the consent of the parties pursuant to 28 U.S.C. § 636(c) is permissible under Article III of the Constitution.").

276. *See* Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635, 637 (2006) (arguing that a court "ought often to follow the text of the Constitution, as originally understood, rather than its own precedents").

277. JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 169 (2013) ("[G]iving weight to a series of precedents would have been seen as an aspect of judging, not simply as one of a multitude of rules judges happened to apply."); *see also* Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 577–78 (2001) (arguing that stare decisis is consistent with Article III).

based on consent.[278] The Constitution provides Congress with tools to address that restriction on Article I adjudication. It authorizes Congress to create more Article III judgeships or to allocate more disputes to state tribunals.

To be sure, these approaches may result in an imperfectly calibrated judiciary. For example, appointing more Article III judges with life tenure to handle today's caseload may result in a surfeit of judges who cannot be fired in the future if fewer cases are filed. But the risk of too many judges is simply the cost of an independent judiciary under Article III. And Congress can to some degree control these costs by creating new categories of Article III judges assigned to certain types of cases (such as misdemeanors) who receive a more modest salary, and periodically reassessing whether to change the number of judges in each category.

Some might argue that refashioning the federal system of adjudication to account for the abolition of the consent exception is unwarranted because Article I tribunals do not exhibit bias from external pressures. But that is not so. As noted earlier, ALJs have often adjusted their rulings because of external pressure.[279] There is no reason to think that similar pressures and biases do not affect other Article I judges. Moreover, the perception that Article I judges do not face external pressures may be attributable to an inability to detect those external pressures. And even if those tribunals are currently free from external pressures, there is no guarantee that they will always be so—Congress may alter tomorrow whatever protections it provides to Article I judges today.

278. Some claims heard through the consent exception may fall under other exceptions to Article III, though those exceptions themselves are suspect under Article III's text. Moreover, the Court may recognize new exceptions in the future. For example, historically, justices of the peace could hear civil claims that did not exceed forty shillings, Capital Traction Co. v. Hof, 174 U.S. 1, 16–17 (1899), and minor criminal cases, *see* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 25 (4th ed. 2002). That practice may justify an exception to Article III. *See* Stettinius v. United States, 22 F. Cas. 1322, 1329 (C.C.D.D.C. 1839) (No. 13,387) (assuming constitutionality of adjudication by federal justices of the peace).

279. *See supra* notes 131–133 and accompanying text.