

Adjudication Outside Article III
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Abstract: Article III requires federal courts that exercise federal jurisdiction to be given life tenure and undiminished compensation, limiting Congress's ability to influence the judiciary. But from the beginning, we have accepted certain forms of adjudication outside Article III – state courts, most obviously, but also territorial courts, administrative adjudication of public rights, and military tribunals. The question is why.

This article attempts to provide an answer. It argues that it is a mistake to focus on the act of adjudication itself; adversary presentation about the application of law to fact is simply a procedure, and not a procedure uniquely limited to Article III courts. Instead, the constitutional question is one of government power. What kind of power has the tribunal been vested with and what it is trying to do with that power?

With this framework in view, the structure and scope of non-Article-III adjudication becomes clearer. Some courts exercise the judicial power of some other government. This is why territorial courts and state courts are constitutional. Some bodies exercise executive power, subject to the constraints reflected by the Due Process Clause. This is why administrative adjudication of public rights and military trials are constitutional. Some exercise no governmental power, and can proceed only as an adjunct to another entity, or on the basis of consent. This is the only basis on which magistrate judges and bankruptcy judges can proceed, and may render some of their current behavior unconstitutional.

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Introduction

It is not always necessary to return to first principles, but when one is lost, sometimes it can be helpful to consult the map. The text of Article III seems to provide a simple account of who can exercise federal judicial power. But longstanding practice, sometimes reaching all the way back to the founding, seems inconsistent with that account. And the internal logic of this longstanding practice is itself obscure and mysterious. The resulting confusion makes it hard to tell what forms of adjudication should be lawful, or how those adjudicative bodies should function. When it comes to the doctrine of so-called legislative courts, we are lost.

This article is a map back to civilization. Contrary to widespread assumption, Article III's vesting of the judicial power is not about the *process* of adjudication. Rather, it refers to the substance of judicial power (which is the power to bind parties and to authorize the deprivation of private rights) and more specifically to the judicial power "of the United States" (rather than that of other governments). With Article III's judicial power properly in view, we can see that the longest standing examples of adjudication outside Article III are generally consistent with the text and structure of the Constitution. It also allows us to tell what newer categories of non-Article III adjudication are permissible, and why. And it shows which of them are in fact "courts" in the constitutional sense and which ones are not, providing answers to many of the structural and procedural questions about how those so-called legislative courts should operate.

Part I discusses the apparent inconsistency between Article III's text and practice. Part II resolves the inconsistency, locating the traditional forms of non-Article-III adjudication in constitutional structure. Part III discusses the implications of this framework for the substance and structure of other forms of adjudication outside Article III.

I: The Puzzle of Adjudication Outside Article III

A. The Constitutional Provisions

Section One of Article III of the Constitution both vests the judicial power of the United States, and describes the kind of judges who will sit on the courts that exercise it:

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.¹

¹ U.S. Const. art. III, sec 1.

(The Appointments Clause of Article II also mandates that these judges be nominated by the President and confirmed by the Senate.)²

After Section One’s vesting of the judicial power, Section Two of Article III goes on to describe the kinds of cases that fall within that judicial power:

all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

Much of the field of federal courts is devoted to expounding these provisions, but a few features of the basic structure seem both obvious and important: adjudication of federal business will be by an independent judiciary, protected from reprisal by all-but-life-tenure³ and by guaranteed compensation.

Indeed, this judicial independence was canonically emphasized by Alexander Hamilton, who wrote that the “inflexible and uniform adherence to the rights of the constitution and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission,”⁴ and that good-behaviour tenure was “the best expedient which can be devised in any government, to secure a steady, upright and impartial administration of the laws.”⁵ It was also praised by St. George Tucker, who wrote that “most wisely was it provided” that federal judges would receive good-behaviour tenure “and be placed at once beyond the reach of hope or fear, where they might hold the balance of justice steadily in their hands.”⁶

These purposes might seem to be best fulfilled if Article III were interpreted in a categorical and exclusive fashion – if these tenured federal judges were the only people who could ever adjudicate claims falling in these categories. As David Currie

² U.S. Const. art. II, sec. 2, cl. 2. The Clause also allows Congress to provide for simpler appointment of “inferior officers,” *id.*, but the widespread assumption is that Article III judges are not inferior officers. See *Weiss v. United States*, 510 U.S. 163, 191 & n.7 (1994) (Souter, J., concurring).

³ For arguments about exactly when and how federal judges can be removed for misbehavior, see Saikrishna Prakash & Steven D. Smith, *How to Remove A Federal Judge*, 116 *Yale L.J.* 72 (2006); James E. Pfander, *Removing Federal Judges*, 74 *U. Chi. L. Rev.* 1227 (2007); Michael Stokes Paulsen, *Checking the Court*, 10 *NYU J.L. & Liberty* 18, 67-90 (2016).

⁴ *The Federalist* No. 78, at 529 (Alexander Hamilton) (Jacob E. Cooke, ed. 1961).

⁵ *Id.* at 522.

⁶ 1 Henry St. George Tucker, *Blackstone's Commentaries* app. at 268 (Phila., Birch & Small 1803).

has put it: “The tenure and salary provisions of article III can accomplish their evident purpose only if they are read to forbid the vesting of functions within its purview in persons not enjoying those protections.”⁷

B. The Historical “Exceptions”

Yet from the beginning of the Constitution, it has been accepted that not every case that *can* be decided by the federal courts must be decided *only* by the federal courts. Most obviously, Article III leaves in place the systems of state courts, which are constituted independently of the federal judiciary, and whose judges are appointed, tenured, and compensated outside of Article III’s rules. These courts generally have concurrent authority to hear cases arising under federal law, to hear cases between citizens of different states, and so on – even though state court judges are nowhere to be found in Article III.

Even putting aside state courts, there are several forms of *federal* adjudication that seem to violate Article III’s strict terms, and yet have been recognized and accepted for nearly two centuries or more. The most prominent of these are territorial courts, administrative proceedings such as land claims courts, and military tribunals.⁸

Each of these seems to exercise Article III power outside of Article III. Each of these institutions can adjudicate disputes that fall within the grants of Article III, such as cases arising under federal law. None of these institutions is staffed by life-tenured judges appointed by the President and confirmed by the Senate.

And yet it is hard to reject any of these three as unlawful. All three were widely accepted and judicially sanctioned in the nineteenth century.⁹ Their legal pedigree may go all the way back to the founding. And all three remain prominent and accepted as constitutional today. If they are unlawful, then much of what we accept today as the law of federal jurisdiction is unlawful. What to make of Article III, in light of these longstanding practical facts, is one of the hardest unsolved problems in federal courts.

C. The Puzzle

The basic problem for scholars and students of non-Article III adjudication is that the so-called historical “exceptions” seem to lack either textual justification or a

⁷ David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888*, at 121 (1985).

⁸ For samples of noting these three major exceptions, see Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 *Ind. L.J.* 233, 236-37 (1990) *Fallon*, *supra* note 13, at 970-74; *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1951 (2015) (Roberts, C.J., dissenting); etc.

⁹ *American Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511 (1828); *Foley v. Harrison*, 56 U.S. 433 (1854) (cited in *Murray’s Lessee v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 284 (1855)); *Dynes v. Hoover*, 61 U.S. 65, 79 (1857).

common logic. Article III's purpose of creating independent federal courts could be undermined if exceptions can be made without limit. But an interpretation of Article III faces a high burden if it cannot be squared with even the basic elements of longstanding practice.

Some scholars have attempted to solve the puzzle by adhering to text at the expense of practice. Some of them have argued that even non-Article III territorial courts, upheld by the Supreme Court 191 years ago, are unconstitutional.¹⁰ Even these scholars, however, do not necessarily reject state courts or military tribunals.¹¹ And in any event, there is good reason that longstanding practice and precedent are given substantial weight, even by many originalists.¹² If abandoning this practice and precedent were what the Constitution inexorably commanded, perhaps that is the price we would have to pay. But as we will see, it is not.

Others would adhere to practice at the expense of text. Rejecting "literalism,"¹³ they rely on history to justify some non-Article III exceptions. But because the exceptions lack textual explanation or common logic, there is little to keep them from spreading and multiplying.¹⁴ If territorial courts and claims courts need not comply with Article III, why must the District of Columbia courts or the bankruptcy courts?¹⁵ If these need not, what else need not? Without a limiting principle, Article III's promise of judicial independence becomes empty.¹⁶

But nobody has yet come up with a persuasive reconciliation of text and longstanding practice either. The Supreme Court has fallen short in both functionalist and formalist approaches.¹⁷ One infamous functionalist attempt was Justice

¹⁰ Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 Cal. L. Rev. 853 (1990); Currie, *supra* note 7, at 122; see also Martin H. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* 37, 39 (1980) (conceding that "the status of territorial courts as Article I institutions appears to be beyond question," but concluding that "none of the bases for distinguishing territorial courts provides adequate justification for the sweeping exclusion of territorial courts from the Article III judiciary.")

¹¹ Lawson, *supra* note 10, at 866 (state courts); David Currie, *Bankruptcy Judges and the Independent Judiciary*, 16 Creighton L. Rev. 441, 446-447 (1982) (state courts); *id.* at 449 (military tribunals); see also Redish, *supra* note 10, at 47-48 (state courts); *id.* at 40 (military tribunals).

¹² Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. Rev. 1745, 1763-76 (2015); William Baude, *Constitutional Liquidation*, 71 Stan. L. Rev. 1 (2019); see also William Baude, *Is Originalism Our Law?*, 115 Colum. L. Rev. 2349, 2357-61 (2015) (collecting sources).

¹³ See, e.g., Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 918 (1988); Bator, *supra* note 8, at 235.

¹⁴ See Fallon, *supra* note 13, at 917 ("But to reject the view that all federal adjudicative tribunals must be article III courts is to state the problem, not solve it."); Bator, *supra* note 8, at 244 ("Why are these exceptions, and no others, in fact to be allowed?").

¹⁵ See *Palmore v. United States*, 411 U.S. 389 (1973); *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

¹⁶ Fallon, *supra* note 13, at 917 ("[C]onstitutional principles must be derived to circumscribe the role of legislative courts, or else the functions of the article III judiciary could, at Congress's option, be all but obliterated.")

¹⁷ Bator, *supra* note 8, at 239 ("The Supreme Court opinions devoted to the subject of the validity of legislative and administrative tribunals are as troubled, arcane, confused and confusing as could be imagined."); Fallon, *supra* note 13, at 926 ("Unable to endorse article III literalism, the Supreme Court has struggled to develop an alternative framework.")

O'Connor's opinion for the Court in *Commodities Futures Trading Commission v. Schor*, which foreswore both "conclusory reference to the language of Article III"¹⁸ and "formalistic and unbending rules"¹⁹ to instead employ a "practical" multifactor test in which each factor was capacious and none was determinative.²⁰ Federal courts scholars have fairly said that *Schor's* approach "is almost wholly open-ended and amorphous"²¹ and "verges on the incoherent."²²

A more recent decision, *Stern v. Marshall*, adopted a sterner, more formalist tone but made little progress.²³ *Stern* continued to discuss the so-called "public rights exception" to the strict requirements of Article III. With understatement, the opinion acknowledged that "our discussion of the public rights exception ... has not been entirely consistent, and the exception has been the subject of some debate" but concluded that the bankruptcy adjudication at issue failed all formulations of the doctrine.²⁴ So the opinion did not "provide concrete guidance as to whether, for example, a particular agency can adjudicate legal issues under a substantive regulatory scheme."²⁵ Last term's decision in *Oil States v. Greene's Energy Group*, upholding "inter partes review" of the grant of a patent, claimed to simply apply the "various formulations" already provided by current doctrine.²⁶ And neither case discussed how traditional exceptions like military tribunals and territorial courts related to the public rights heading, if at all.

Scholars have attempted to find a more coherent unifying principle to explain the path of legislative courts doctrine. The most prominent family of principles is one that emphasizes Article III appellate review, or Supreme Court supervision. While this principle has been articulated in many different guises,²⁷ in each of them it would give Congress vast discretion to remove cases from the Article III *lower courts* and place them in so-called legislative courts – much vaster than it has ever dared to exercise – so long as there was sufficient review or control at the top of the hierarchy.

¹⁸ *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 847 (1986).

¹⁹ *Id.* at 851.

²⁰ *Id.*

²¹ Fallon, *supra* note 13, at 917.

²² Judith Resnik & Lane Dilg, *Responding to A Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. Pa. L. Rev. 1575, 1664 (2006) (citing Bator, *supra* note 8). See also Fallon, *supra* note 13, at 932.

²³ *Stern v. Marshall*, 564 U.S. 462 (2011).

²⁴ *Id.* at 488.

²⁵ *Id.* at 494.

²⁶ *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1373 (2018).

²⁷ E.g., Fallon, *supra* note 13; Bator, *supra* note 8, at 267-68. A distinct but related proposal emphasizes the words "inferior" and "Supreme" to posit a structural relationship in which all such tribunals must be inferior to the Supreme Court. James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 Harv. L. Rev. 643 (2004).

But this principle is not confined, or even particularly shaped, by the traditional categories of military courts, territorial courts, or public rights.²⁸ And it therefore either leaves Congress implausibly vast discretion over the trial of federal cases, or forces its proponents to create new sub-principles to explain why not. For instance, as Caleb Nelson has noted, “Few people believe that Congress could validly establish an administrative tribunal to conduct the initial adjudication of all prosecutions for federal crimes, with federal courts being obliged to enforce the resulting sentences as long as the agency’s decisions are supported by substantial evidence in the administrative record and are not tainted by errors of law.”²⁹ Moreover, as we will see, the availability and form of appellate review over non-Article III courts is itself the subject of disagreement and confusion.

After much wrangling, we still have not answered Justice Rehnquist’s question whether the established precedents and practice “support a general proposition and three tidy exceptions . . . or whether instead they are but landmarks on a judicial ‘darkling plain’ where ignorant armies have clashed by night.”³⁰ Nor do we know what any of this has to do with the Constitution.

D. A Return to Constitutional Powers

This article suggests that a return to both the constitutional text and classical principles of separation of powers can in fact provide the answers. The longstanding forms of non-Article-III adjudication do not represent an “exception” to Article III’s text, but rather a more careful reading of it than many have realized. And careful attention to where each form of non-Article-III adjudication falls in formal separation of powers terms will allow us to resolve much confusion about the structure and scope of their powers. A return to the constitutional text will not produce not just “literalism” but, at long last, clarity.

The key insight in this return to the constitutional text is to focus not on procedure but power.³¹ Adjudication and judicial power are very different things. Adjudication is procedure; it’s just a *method* of making decisions. Power is substance; it’s what gives someone the *authority* to decide. Much of the confusion of non-Article III adjudication comes from a lack of attention to power. Courts usually exercise their

²⁸ Stephen I. Vladeck, *Military Courts and Article III*, 103 *Geo. L.J.* 933, 984–85 (2015) (Under Fallon’s approach, “nothing specifically unites the three categories of cases in which non-Article III federal adjudication has been sustained other than what comes after such adjudication: appellate review by Article III courts, including ultimate supervision by the Supreme Court itself.”).

²⁹ Caleb Nelson, *Adjudication in the Political Branches*, 107 *Colum. L. Rev.* 559, 618 (2007); accord Fallon, *supra* note 13, at 952 n. 208 (noting that “criminal cases traditionally have been regarded as requiring judicial resolution”). Fallon’s theory also contains an exception from appellate review for territorial cases of “purely local law,” which he admits is “slightly arbitrary from the perspective of the constitutional text.” *Id.* at 972 n. 316.

³⁰ *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 91 (1982) (Rehnquist, J., concurring).

³¹ Thanks to Steve Sachs for emphasizing this point and helping me formulate this paragraph. See also John Harrison, *Public Rights, Private Privileges, and Article III*, *Ga. L. Rev.* (forthcoming), at 2 (making a similar point).

judicial power through adjudication, so when we see other entities adjudicating, we wonder if they are exercising judicial power. But adjudication need not signal judicial power. If Congress wanted to locate a new post office in one of two locations, and decided to hold a contested adversary hearing between champions of both, it would still be exercising its legislative power to establish post offices, not the judicial power. If the President wanted to hold a contested adversary hearing to decide whether to grant a pardon, he would still be exercising executive power, not the judicial power.³² The judicial power attaches special consequences to judicial adjudications, most especially legally binding judgments,³³ but there's nothing about adjudication that is exclusively judicial.

Instead of getting distracted by the widespread use of adjudicative *procedures*,³⁴ we should instead be asking what *power* is at issue. This also gives us a better way to approach Article III and its exceptions. Rather than asking about exceptions to the exclusivity of Article III we should start by recognizing that Article III is exclusive at what it does – which is to vest “the judicial power of the United States.” Because Article III vests this power in the federal courts, nobody else can have it. So when confronted with a non-Article-III tribunal, Article III prompts us to ask two questions about it. First, with what kind of power has this body been vested? Second, what does that power permit that body to do? The answers to these questions may require reading the rest of the Constitution, outside of Article III, but they will all be perfectly consistent with it.

As the next part will explain, non-Article-III tribunals can exercise one of three different kinds of power. Some exercise the judicial power, but not the judicial power of the United States. Rather, they exercise the judicial power of some other government. The obvious example is state courts, but the same logic explains adjudication by territorial courts, tribal courts, and foreign courts.

Some exercise executive power, not judicial power. The main constitutional constraint on this form of executive power is the longstanding principle, codified by the Due Process Clause, that requires judicial process before one can be deprived of life, liberty, or property. This power, and this proviso, explains the administrative adjudication of public rights. Executive power also explains military courts, although they have a historically different relationship to due process.

Finally, some adjudication is done in bodies that are vested with no governmental power at all. These bodies must derive their ability to adjudicate either from a non-governmental source, such as the consent of the parties, or from their close relationship as an “adjunct” of a true court vested with judicial power.

Locating non-Article III tribunals within these separation of powers principles shows us that we do not have a longstanding tradition of “exceptions” to Article III. Each of our longstanding traditions is in fact perfectly consistent with it. It also shows us how each of these tribunals relates to the rest of the government – who else can review its decisions, who else can supervise or remove its members. And it shows us

³² See Frank H. Easterbrook, “Success” and the Judicial Power, 65 Ind. L. J. 277, 280 (1990).

³³ See generally William Baude, The Judgment Power, 96 Geo. L.J. 1807 (2008).

³⁴ E.g., Bator, *supra* note 8, at 235, 242-43, 264.

which new forms of adjudication comply with these categories, and which ones would mark a departure from constitutional principles.

Many of the observations that follow owe debts to other scholars.³⁵ My contribution here is in assembling them to map the territory. As we will see, only understanding the relationship of these arguments will allow us to resolve a number of modern problems, such as the scope of appellate jurisdiction over such tribunals, or hybrid cases such as the use of a magistrate judge in a federal enclave.

II: The Powers of Non-Article III Tribunals

None of this needs to be so complicated. There are permissible forms of non-Article III tribunals, because Article III is not about the procedure of adjudication but rather about vesting and structuring one subset of one kind of power – the judicial power of the United States. To understand these tribunals, we must understand what kind of power they exercise, which will in turn tell us whether they need to be appointed under the strictures of Article III, and what constitutional principles outside of Article III constraint that power.

In particular, it is important both to differentiate different forms of judicial power, and to differentiate that judicial power from executive power. Both judicial and executive bodies can engage in the procedure of adjudication, but they do so pursuant to different kinds of power. (There are also forms of adjudication pursuant to legislative power, such as in the once-common now-rare situations where Congress deliberates about the proper disposition of a particular situation.)³⁶

While much has been written about the nature of judicial and executive power, a few broad outlines may be helpful. There is one general similarity between the two powers: The executive power is at its core the power to enforce or effectuate (to *execute*) existing law³⁷—perhaps including as well certain prerogative powers vested or enumerated in Article II³⁸—and the judicial power is the power to apply existing law to the parties before it. But there are also some important differences between the

³⁵ See especially Craig A. Stern, *What's A Constitution Among Friends?—Unbalancing Article III*, 146 U. Pa. L. Rev. 1043 (1998), Nelson, *supra* note 29, and Harrison, *supra* note 31.

³⁶ See *supra* text accompanying notes 31-32 (discussing hypothetical example involving the post office); *infra* note 177 and accompanying text (legislative adjudication of claims); Evan C. Zoldan, *Reviving Legislative Generality*, 98 Marquette L. Rev. 625, 660-69 (2014) (describing historical examples of special legislation).

³⁷ See, e.g., John C. Harrison, *Executive Power* (Jun. 15, 2019) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3398427; Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541 (1994).

³⁸ See generally Michael W. McConnell, *The President Who Would Not Be King* (forthcoming 2020); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 Yale L.J. 231, 253-54 (2001); but see Harrison, *supra* previous note; Julian Davis Mortensen, *Article II Vests Executive Power, Not the Royal Prerogative*, 119 Colum. L. Rev. 1169 (2019); Julian Davis Mortensen, *The Executive Power Clause*, 167 U. Pa. L. Rev. (forthcoming 2020) at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3406350. See also Ilan Wurman, *In Search of Prerogative* (draft on file with the author).

two powers. The judicial power includes the power to issue binding judgments, judgments that bind even if the judiciary has in fact *mistaken* the law, but that bind only so long as the court possesses jurisdiction.³⁹ It also includes the power to authorize deprivations of private rights, such as through a criminal conviction or a finding of liability.⁴⁰ By contrast, executive power is not limited to narrow jurisdiction over cases and controversies, but it usually cannot authorize such deprivations without judicial process.

With the distinction between executive and judicial power in view, we can see that there are three kinds of permissible non-Article III tribunals, each of which are natural inferences from the text and structure of the Constitution, and make much sense of our longstanding historical practices:

Those that exercise “judicial power.” These are permissible if they do not exercise “the judicial power of the United States” but rather the judicial power of some other government.

Those that exercise “executive power.” These are permissible if they do not deprive people of life, liberty, or property, or if they are a traditional exception to the traditional rule that due process means judicial process.

Those that exercise no power at all. These are permissible only if they are a true adjunct to one of the exercises of judicial or executive power above, or if they proceed on the basis of consent.

Locating non-Article III tribunals in these categories pays many dividends. It provides a sympathetic reconstruction of historical practice. It reunites doctrine with the Constitution. It allows us to tell when that doctrine has exceeded constitutional bounds, and how those tribunals interact with other constitutional principles. And most importantly, it finally tells us what all of this has to do with the Constitution.

A. The Judicial Power (of Some Other Government)

Article III deals with judicial power in two sequential sections. The first section vests it, by providing “The judicial power of the United States, shall be vested in ...” federal courts with various structural requirements. The second section both extends and limits it, by providing that that judicial power “shall extend to” a series of enumerated cases and controversies. The second section has been subjected to much careful textual analysis bearing on what kinds of cases the federal courts can and must hear. But the first section has important implications for non-Article III adjudication as well.

In particular, note that Article III vests only “the judicial power *of the United States*.” So other kinds of judicial power, the judicial power “of” other entities, can be vested elsewhere by other legal rules. Such entities exercise the “judicial power” of some other government, so they are courts, without being Article III courts. They are permitted by Article III’s literal terms.

³⁹ William Baude, *The Judgment Power*, 96 *Geo. L.J.* 1807 (2008).

⁴⁰ See *infra* Part II.B.1.

1. State Courts

The first and most obvious members of this category are state courts. State courts predate the Constitution, and states maintained those courts after the Constitution was adopted. Of course, the judges on those state courts are not appointed in conformance with Article III, and never have been. They are picked through the people or government of their respective state, whether by popular election, gubernatorial nomination, or something else.⁴¹ The judges on those state courts also do not generally have the life tenure or guaranteed salary of federal judges; many are subject to retention election, for instance.⁴² This is to belabor the obvious: state courts are not Article III courts.

And yet state courts have always been able to adjudicate claims arising under federal law, and other Article III business. This premise was at the heart of the famous “Madisonian compromise” in framing Article III. At the Philadelphia Convention, there were proposals to give state courts jurisdiction of federal claims (as in the New Jersey plan)⁴³ or alternatively to have the Constitution create lower federal courts (as in the original version of the Virginia plan).⁴⁴ The language that was defended by James Madison and ultimately adopted, a modified version of the Virginia plan, gave Congress the *option* to create lower courts and hence compromised between the two.⁴⁵ While this version of Article III did not mention state courts, it was widely understood that they would have at least some ability to hear federal claims, which they obviously must do if no lower courts were created.

Discussion and practice after the Framing has long confirmed the adjudicative power of state courts. In Federalist No. 82, Alexander Hamilton explained that state courts would have be presumed to have concurrent jurisdiction to decide cases under newly-enacted federal laws.⁴⁶ Supreme Court case law has long confirmed that assumption.⁴⁷ Similarly and perhaps more obviously, state courts can hear state-law cases between citizens of two different states, even though those cases could also fall within the federal judicial power.⁴⁸ And of course, those state court decisions can be

⁴¹ Brian T. Fitzpatrick, The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure, 98 Va. L. Rev. 839, 853 (2012).

⁴² See generally <http://www.judicialselectionmap.brennancenter.org>. That said, it has been argued that “at the time of the Founding, the vast majority of state judges were selected and tenured much like federal judges.” Fitzpatrick, *supra* note 41, at 853.

⁴³ 1 Farrand 125, 243; 2 Farrand 45-46.

⁴⁴ 1 Farrand 21, 95.

⁴⁵ 1 Farrand 125; 2 Farrand 133, 168, 315.

⁴⁶ The Federalist No. 82, at 555 (Alexander Hamilton) (Jacob E. Cooke, ed. 1961).

⁴⁷ *Houston v. Moore*, 18 U.S. 1, 25-26 (1820); *Tafflin v. Levitt*, 493 U.S. 455, 459 (1990).

⁴⁸ Patrick J. Borchers, The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and A Brave New World for Erie and Klaxon, 72 Tex. L. Rev. 79, 79 n.1 (1993) (“Like most kinds of federal jurisdiction, diversity jurisdiction is concurrent, not exclusive; cases involving fully diverse parties may be litigated in state courts if the parties so choose.”). Cf. The Federalist No. 82, *supra* note 46, at 554.

appealed directly to the Supreme Court, confirming that state courts and Article III courts are part of the same judicial network.⁴⁹

Hence, state courts are the foremost example of permissible adjudication of Article III matter outside of Article III courts. This point may seem obvious, but it has important implications. It suggests that even the purest vision of Article III should not imply that no other courts can hear the cases described in Article III. It suggests that sometimes non-Article III adjudication *must* be permissible. Indeed, the permissibility of state court adjudication is frequently invoked to uphold other kinds of non-Article III adjudication.⁵⁰

To know whether these analogies to state courts are justified, we need to know *why* state courts may exercise what seems to be Article III power. Once we know why state courts have such power, we might know what other kinds of courts could be permissible along similar lines. And it is not quite sufficient to simply point to the fact of the Madisonian compromise. The compromise was a compromise about how to draft Article III; so we need to know why Article III was thought to successfully embody that compromise.⁵¹ We need to *locate* this aspect of the Madisonian compromise in Article III.

And here is the answer: State courts may hear and decide these cases because they are courts, vested with “judicial power,” just as federal courts are. *Only rather than being vested with “the judicial power of the United States,”⁵² they are vested with “the judicial power” of their respective states.* Indeed, many early state constitutions made this vesting terminology explicit.⁵³ State courts exercise the judicial power of their respective states, and this is perfectly square with the text of Article III, which regulates only “the judicial power of *the United States*.”⁵⁴ The key is to understand that Article III regulates only one subset of the judicial power.

2. Territorial Courts

⁴⁹ *Martin v. Hunter’s Lessee*, 14 U.S. 304, 382 (1816).

⁵⁰ See, e.g., *Crowell v. Benson*, 285 U.S. 22, 86-87 (1932) (Brandeis, J., dissenting); *Palmore v. United States*, 411 U.S. 389, 401-401 (1973); Paul M. Bator, *supra* note 8, at 234; see also Fallon *supra* note 13, at 939 (describing the state court analogy as “initially beguiling” but erroneous).

⁵¹ Cf. Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 *Wis. L. Rev.* 39, 106 (1995) (observing that at the founding, interpretation would have “focused on such things as the text and structure of the Constitution,” etc. rather than the “deliberations of the Convention”).

⁵² U.S. Const. Art. III., sec. 1, cl. 1.

⁵³ E.g., Connecticut Const. Art. V, sec. 1 (“The judicial power of the state shall be vested ...”) Delaware Const. of 1792 Art. VI, sec. 1 (“The judicial power of this State shall be vested in ...”); Kentucky Const. of 1792, Art. V, sec. 1 (“The judicial power of this commonwealth, both as to matters of law and equity, shall be vested ...”); Ohio Const. of 1802, Art. III, sec. 1 (“The judicial power of this State, both as to matters of law and equity, shall be vested ...”); Pennsylvania Const. of 1790 (“The judicial power of this commonwealth shall be vested ...”); Tennessee Const. of 1796 (“The judicial power of the State shall be vested ...”).

⁵⁴ U.S. Const. Art. III., sec. 1, cl. 1.

Once we understand the basic logic of state courts, it is a clue to the other kinds of courts that Article III permits: courts that have been vested with judicial power, but not the judicial power of the United States. It turns out that this logic explains the otherwise puzzling persistence of non-Article III territorial courts.

Judicial recognition that such territorial courts are constitutional dates back to at least 1828 (though as we will see, Congress had created them for decades before that). In any event, in 1828 the Supreme Court upheld territorial court in an opinion by Chief Justice Marshall, *American Insurance Company v. 356 Bales of Cotton* (better known as *American Insurance Company v. Canter*).⁵⁵ The case concerned a salvage dispute over a shipwrecked load of cotton, which ultimately turned into a dispute about the jurisdiction of a Key West territorial court.⁵⁶ It is not at all clear that the parties' arguments actually required the Court to address the constitutional status vel non of territorial courts,⁵⁷ but Chief Justice Marshall did so nonetheless, in a passage that is now regarded as foundational precedent:

It has been contended, that by the Constitution the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction; and that the whole of this judicial power must be vested 'in one Supreme Court, and in such inferior Courts as Congress shall from time to time ordain and establish.' Hence it has been argued, that Congress cannot vest admiralty jurisdiction in Courts created by the territorial legislature.

We have only to pursue this subject one step further, to perceive that this provision of the Constitution does not apply to it. The next sentence declares, that 'the Judges both of the Supreme and inferior Courts, shall hold their offices during good behaviour.' The Judges of the Superior Courts of Florida hold their offices for four years. These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States. Although

⁵⁵ 26 U.S. (1 Pet.) 511 (1828). As Gary Lawson persuasively argues, the case should be known as *American Insurance Co. v. 356 Bales of Cotton*. See Lawson, *supra* note 10, at 875 n. 124 ("The captions in the record and in the United States Reports reflects this view, to which I will stubbornly cling with my expiring breath."). Unfortunately, many readers might not recognize it by that name, so I'll call it *Canter*.

⁵⁶ The facts are most helpfully summarized by Lawson, *supra* note 10, at 889-890.

⁵⁷ *Id.* at 891-92 & n.237.

admiralty jurisdiction can be exercised in the states in those Courts, only, which are established in pursuance of the 3d article of the Constitution; the same limitation does not extend to the territories. In legislating for them, Congress exercises the combined powers of the general, and of a state government.⁵⁸

While the constitutionality of territorial courts is now widely accepted,⁵⁹ commentators have found it difficult to discern exactly what theory can be used to sustain them. *Canter's* reasoning has been called “fatuous,”⁶⁰ an unjustified deviation from the text of Article III,⁶¹ and “the first small step down the road to perdition.”⁶² This has contributed heavily to the dilemma of non-Article III courts doctrine. If there is no textual or constitutional logic in favor of territorial courts, then we must either reject the longstanding practice and precedent sustaining them or dispense with the fiction that the text and structure of the Constitution meaningfully speak to the permissibility of non-Article III courts.

The skepticism of *Canter* is forgivable. Chief Justice Marshall’s opinion obscures one of the central points in favor of territorial courts and also contains several loose claims that have sowed much confusion. For instance, Marshall famously used the term “legislative courts,” when he described territorial courts as “legislative Courts, created in virtue of the general right of sovereignty, which exists in the government; or in virtue of that clause which enables Congress to make laws regulating the territories belonging to the United States.”⁶³

But in the context of the U.S. Constitution this term misleading and confusing. *All lower federal courts are legislative courts.* The only court actually guaranteed by the Constitution is the Supreme Court. All other federal courts exist only if Congress chooses to create them, pursuant to its Article I power “To constitute tribunals inferior to the Supreme Court.”⁶⁴ So to say that territorial courts are “legislative” is not to distinguish them from Article III lower courts.

The better argument on behalf of territorial courts is that they exercise judicial power – but not the judicial power of *the United States*. Portions of Marshall’s opinion

⁵⁸ *Canter*, 26 U.S. at 546 (1828).

⁵⁹ See, e.g., *Freytag v. C.I.R.*, 501 U.S. 868, 889 (1991) (relying on *Canter*) (same); *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 65 (1982) (same); *Clinton v. Englebrecht*, 80 U.S. (13 Wall.) 434, 447 (1872) (same).

⁶⁰ Lawson, *supra* note 10, at 892; see also Gary Lawson & Guy Seidman, *The Constitution of Empire* 139-150 (2004).

⁶¹ Redish, *supra* note 10, at 38-39.

⁶² Currie, *supra* note 7, at 122; see also *id.* (“the poorly explained *Canter* holding is difficult to reconcile with the purposes of article III”); see even Fallon *supra* note 13, at 972 (“*Canter's* reasoning . . . is problematic; if the issue arose today as one of first impression, a different outcome would be called for”).

⁶³ 26 U.S. (1 Pet.) at 545. There is one earlier reported opinion that uses the term “legislative court,” *Kamper v. Hawkins*, 3 Va. 20, 41 (Va. Gen. Ct. 1793) (Roane, J.), apparently to refer to judges whose tenure and appointment procedure are chosen by the legislature rather than in compliance with the Constitution, *id.* at 41-42. See also *id.* at 91-92 (Tucker, J., dissenting).

⁶⁴ U.S. Const. art. I, sec. 8, cl. 9.

can be read to recognize this. But more importantly, so can the underlying statutes constituting Florida's territorial courts. To quote the 1824 act structuring Florida's judiciary: "The judicial power of the Territory of Florida shall be vested in three Superior courts, and in such inferior courts, and justices of the peace as the Legislative Council of the Territory may from time to time establish."⁶⁵ The key is the act's reference to the "judicial power of the Territory of Florida," not "of the United States." (Earlier statutes governing the territory of Florida had the same structure with slightly different phrasing.)⁶⁶

Marshall referenced this statute in his opinion in *Canter*. And with the statute firmly in mind, some of the passages in his opinion take on a different implication. For instance, Marshall wrote that "the jurisdiction with which they are invested, is not a part of that judicial power which is defined in the third article of the Constitution," and that territorial courts were "incapable of receiving" that power.⁶⁷ Paul Bator has criticized this claim as "metaphysical," asking "whose judicial power is in play if not the judicial power of the United States?"⁶⁸ But again, Marshall's answer is quite right and consistent with Nineteenth-Century practice. "The third article of the Constitution" refers only to the judicial power of the United States. The Florida territorial courts could not be vested with that power, but could be vested with a different judicial power, that of the territory of Florida.

This understanding of territorial courts is borne out by many other Nineteenth Century statutes. To be sure, the result in *Canter* might not have been inevitable from the beginning. The very first territorial judges had good-behavior tenure. In 1787, before the Constitution was even adopted, the Northwest Ordinance provided for "a court to consist of three judges," whose "commissions shall continue in force during good behavior."⁶⁹ In 1790, Congress provided for the Southwest Territory (eventually, Tennessee) to be governed according to the same structural requirements

⁶⁵ An Act to amend an act, entitled "An act to amend an act for the establishment of a Territorial government in Florida, and for other purposes," sec. 1, 4 Stat. 45, 45 (Mar, 26, 1824).

⁶⁶ See generally, An act for the establishment of a territorial government in Florida, 3 Stat. 654 (Mar. 30, 1822) (constituting "the government" of "the Territory of Florida" and vesting its "legislative power," "executive power," and "judicial power"); An Act to amend "An act for the establishment of a Territorial government in Florida," and for other purposes, 3 Stat. 750 (Mar. 3, 1823) (similar).

⁶⁷ *Canter*, 26 U.S. at 512.

⁶⁸ Bator, *supra* note 8, at 241.

⁶⁹ An Ordinance for the Government of the Territory of the united States north-west of the river Ohio, reprinted in 1 Stat 50, 51 n.(a), section 4. In 1787, those judges were to be appointed by Congress, but after the Constitution was ratified, Congress amended the ordinance to "adapt the same to the present Constitution of the United States" and subjected them to presidential appointment and Senate confirmation. An Act to provide for the Government of the Territory Northwest of the river Ohio, 1 Stat. 50 (Aug. 7, 1789).

as the Northwest.⁷⁰ It did with the same with the 1798 Mississippi Territory.⁷¹ So too the 1800 Indiana Territory, carved out of the Northwest Territory.⁷²

There is a nice question whether these early life-tenured judges were supposed to be Article III judges. Their appointment process and tenure process made it possible to fit them into Article III. But when Congress organized the lower federal courts in the Judiciary Act of 1789, it made no mention of them;⁷³ and their compensation was not included in the judicial salaries bill Congress passed around the same time.⁷⁴ Indeed, when Congress had provided for the salaries of territorial judges in 1789 it was in a statute titled “An Act for establishing the Salaries of the Executive Officers of Government, with their Assistants and Clerks.”⁷⁵ This might give rise to the inference that they territorial judges thought to be part of the federal *executive* branch.⁷⁶ But territorial judges were a late insertion by amendment in the House after the bill had been drafted (and titled!) in the Senate,⁷⁷ so I think it is just as likely that they were included because the bill already covered the territorial governor and the judges needed to go somewhere.

But in any event, when Congress first freshly organized a territorial government without reference to the Northwest Ordinance, it is plain that it relied on non-Article III judges,⁷⁸ and began to follow the logic that we later observed in *Canter*. In

⁷⁰ An Act for the Government of the Territory of the United States, south of the river Ohio, 1 Stat. 123 (May 26, 1790). The Southwest Ordinance did not carry over the Northwest Ordinance’s ban on slavery, however. See *id.*, Sec. 2 (“the government of the said territory ... shall be similar to that which is now exercised in the territory northwest of the Ohio; except so far as is otherwise provided in [1 Stat. 106, 108 (Apr. 2, 1790)]”).

⁷¹ An Act for an amicable settlement of limits with the state of Georgia, and authorizing the establishment of a government in the Mississippi territory, sec. 3, 1 Stat. 549, 550 (April 7, 1798).

⁷² An act to divide the territory of the United States northwest of the Ohio, into two separate governments, 2 Stat. 58 (May 7, 1800). Later statutes further subdivided these territories into Michigan, 2 Stat. 309 (Jan. 11, 1805); Illinois, 2 Stat. 514 (Feb. 3, 1805); Alabama (3 Stat. 371 (March 3, 1817); and Wisconsin, 5 Stat. 10, 13 (April 20, 1836), and followed the Northwest Territory model. The later Iowa and Minnesota Territories, descended from the Wisconsin Territory, followed the Florida model. See *infra* nn. 86-88 and accompanying text. But much of the land in those territories was not originally part of the Northwest Territory, but rather the result of adding a large amount of unorganized land to Michigan in 1834. See An Act to attach the territory of the United States west of the Mississippi river, and north of the state of Missouri, to the territory of Michigan, 4 Stat. 701 (June 28, 1834).

⁷³ An Act to establish the Judicial Courts of the United States, 1 Stat. 73 (Sept. 24, 1789).

⁷⁴ An Act for allowing certain Compensation to the Judges of the Supreme and other Courts, and to the Attorney General of the United States, 1 Stat. 70 (Sep. 22, 1789).

⁷⁵ 1 Stat. 67 (Sept. 11, 1789).

⁷⁶ Gregory Ablavsky, *Administrative Constitutionalism in the Northwest Territory* (Jan. 21, 2019) at 2; see also Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 *Yale L.J.* 1256, 1288 (2006) (“Is this a conscious decision to establish Article I judges, or just the casual insertion of a provision for officers whose pay was not otherwise established, in a housekeeping statute whose title should not bear any significant interpretive weight?”).

⁷⁷ 6 *Documentary History of the First Federal Congress 1822 & n.7* (Charlene Bangs Bickford & Helen E. Veit, eds. 1986).

⁷⁸ Perhaps this fresh start marked a distinction between “lands to which the Constitution had once applied and lands that Congress had newly acquired from outside of the Constitution,” which some theories would distinguish. James Durling, *The District of Columbia and Article III*, 107 *Georgetown*

1804, Congress provided that the “judicial power” of “the government” of “the territory of Orleans” would be “vested in” a set of territorial courts whose judges held their offices for four-year terms.⁷⁹ The same Act also created an Article III district judge.⁸⁰ In 1805, Congress similarly provided the rest of the Louisiana Territory with judges who held four-year terms.⁸¹ In 1812, when Congress reorganized the territory as Missouri, it again provided that the territory’s “judicial power shall be vested” in a set of courts staffed by judges who held office “for the term of four years, unless sooner removed.”⁸² So too “Arkansaw” in 1819, where the “judicial power of the territory” was vested in courts whose judges held office for four years unless removed.⁸³ And in 1822, the Florida territory discussed above.⁸⁴

And the same pattern of separate territorial judicial power, outside of Article III, recurred in the antebellum territories established after *Canter* too.⁸⁵ In Iowa in 1838, “the judicial power of the said Territory” was vested in territorial courts, whose supreme court judges held four-year terms.⁸⁶ The same language and the same four-year terms were used in Oregon in 1848,⁸⁷ in Minnesota in 1849,⁸⁸ Utah and New

L. J. (forthcoming 2019) at 29, available at <https://ssrn.com/abstract=3171195>; see also *id.* at 20-22. But see, e.g., the example of Minnesota, *infra* note 88, which included some land from the Northwest Territory.

⁷⁹ An Act erecting Louisiana into two territories, and providing for the temporary government thereof, Sec. 1 & 5, 2 Stat. 283-284 (Mar. 26, 1804). Cf. *Sere v. Pitot*, 10 U.S. 332, 337 (1810) (“We find congress possessing and exercising the absolute and undisputed power of governing and legislating for the territory of Orleans. Congress has given them a legislative, an executive, and a judiciary, with such powers as it has been their will to assign to those departments respectively.”).

⁸⁰ Sec. 8, 2 Stat. 285-286.

⁸¹ An Act further providing for the government of the district of Louisiana, Sec. 4, 2 Stat. 331 (Mar. 3, 1805). Strangely, the law vested those judges with part of the *legislative* power, Sec. 3 (“The legislative power shall (be) vested in the governor and in three judges, or a majority of them, who shall have power to establish inferior courts in the said territory, and prescribe their jurisdiction,”) but never explicitly mentions the judicial power.

⁸² An Act providing for the government of the territory of Missouri, Sec. 10, 2 Stat. 743 (June 4, 1812).

⁸³ An Act establishing a separate territorial government in the southern part of the territory of Missouri, Sec. 7, 3 Stat. 493, 495 (March 2, 1819).

⁸⁴ An Act for the establishment of a territorial government in Florida, Sec. 8, 3 Stat. 654, 657 (March 30, 1822); see *supra* notes 65-67 and accompanying text.

⁸⁵ The Wisconsin Territory, created in 1836, continued to follow the Northwest Territory model.

⁸⁶ An Act to divide the Territory of Wisconsin and to establish the Territorial Government of Iowa, Sec. 9, 5 Stat. 235, 238 (June 12, 1838).

⁸⁷ An Act to establish the Territorial Government of Oregon, Sec. 9, 9 Stat. 323, 326 (Aug. 14, 1848) (“the judicial power of said Territory shall be vested”).

⁸⁸ An Act to establish the Territorial Government of Minnesota, Sec. 9, 9 Stat. 403, 406 (March 3, 1849) (“the judicial power of said Territory shall be vested”).

Mexico in 1850,⁸⁹ Washington in 1853,⁹⁰ in both Kansas and Nebraska in 1854,⁹¹ and in the 1861 territories of Colorado, Nevada, and Dakota.⁹²

In other words, the repeated practice of Congress throughout the Nineteenth Century confirmed a particular rationale for Chief Justice Marshall's opinion in *Canter*. As the Court recognized in 1898 when it reaffirmed *Canter*, that congressional practice, supported by precedent, reflected the view that "courts in the territories . . . are not courts of the United States created under [Article III]." ⁹³ They may have judicial power, but it is not "of the United States."

To be sure, the structural logic here is not as simple as the logic for state courts. State courts are created by their own state governments, which are generally seen as separate sovereigns. Territorial governments, by contrast, are authorized by the federal government itself. This means that the existence of a separate government does not always rely on the existence of a separate *sovereign*,⁹⁴ and it is why the legal character of territories has raised so many strange questions of constitutional law throughout history. While this structural logic is more peculiar, it is the best legal explanation for the path taken by history.

Indeed, this same rationale is also necessary to explain the constitutionality of organic territorial governance more generally. Elected territorial legislatures do not comply with the Constitution's method for selecting federal legislators or officers of the United States.⁹⁵ The same problem arises for any other territorial officials who are not appointed through Article II.⁹⁶ This territorial structure has long been thought consistent with the Constitution, however. This makes sense if the legislature exercises the legislative power of the territory, not of the United States; and the executive exercises the executive power of the territory, not of the United States.⁹⁷

⁸⁹ An Act to establish a Territorial Government for Utah, Sec. 9, 9 Stat. 453, 455 (Sept. 9, 1850) ("the judicial power of said Territory shall be vested"); An Act proposing to the State of Texas the Establishment of her Northern and Western Boundaries, the Relinquishment by the said State of all Territory claimed by her exterior to said Boundaries, and all of her Claims upon the United States, and to establish a territorial Government for New Mexico, Sec. 10, 9 Stat. 446, 449 (Sept. 9, 1850) (same).

⁹⁰ An Act to establish the Territorial Government of Washington, Sec. 9, 10 Stat. 172, 175 (March 2, 1853) ("the judicial power of said Territory shall be vested").

⁹¹ An Act to Organize the Territories of Nebraska and Kansas, Sec. 9, 27, 10 Stat. 277, 280, 286 (May 30, 1854) ("the judicial power of said Territory shall be vested").

⁹² An Act to provide a temporary Government for the Territory of Colorado, Sec. 9, 12 Stat. 172, 174 (Feb. 28, 1861) ("the judicial power of said Territory shall be vested"); An Act to organize the Territory of Nebraska, Sec. 9, 12 Stat. 209, 212 (March 2, 1861) (same); An Act to provide a temporary Government for the Territory of Dakota, and to create the Office of Surveyor General therein, Sec. 9, 12 Stat. 239, 241 (March 2, 1861) (same).

⁹³ *McAllister v. United States*, 141 U.S. 174, 184 (1891).

⁹⁴ See *infra* notes 146-149 and accompanying text.

⁹⁵ See Lawson, *supra* note 10, at 894-900. See also An Ordinance for the Government of the Territory of the United States north-west of the river Ohio, reprinted in 1 Stat. 50, 51 n.(a) (providing for authority to elect a territorial legislature once there were five thousand free adult male inhabitants).

⁹⁶ Lawson, *supra* note 10, at 900-905.

⁹⁷ *Accord Harrison*, *supra* note 31, at 6.

The “judicial power” of some other government was also discussed in an 1803 case about the District of Columbia, *United States v. More*.⁹⁸ Benjamin More was a District of Columbia justice of the peace, who challenged a federal law altering his compensation as a violation of Article III. Judge Cranch concluded for the circuit court that More was correct: that he had had cognizance of “causes arising under the laws of the United States, and therefore, the power of trying them is part of the judicial power mentioned in the 3d article of the constitution.”⁹⁹ That is, a D.C. court necessarily exercised “a part of the judicial power of the United States.”¹⁰⁰

But Judge Kilty dissented. He emphasized that “that the judicial power given to the traverser, as a justice of the peace, is not, in the sense of the constitution, the judicial power of the United States.”¹⁰¹ The nationwide system of federal courts exercised the judicial power “of the United States” under Article III.¹⁰² But he considered “this judicial power as being different in its object and nature from that which may be the effect of the legislative power given to congress over this territory.”¹⁰³

On appeal to the Supreme Court, the United States attorney reiterated this argument, emphasizing that the case involved “the judicial power exercised in the district of Columbia,” and “not the judicial power of the United States.”¹⁰⁴ The Supreme Court concluded that it had no appellate jurisdiction, leaving their dispute inconclusively unresolved for the time being.¹⁰⁵

The circuit court’s reasoning shows how the logic of *Canter* was far from inevitable,¹⁰⁶ but it does not mean that *Canter* was wrong, even as an original matter. Judge Cranch had a 2-1 majority for his position; but Chief Judge Kilty also had the executive and apparently even Congress on his side. There is some evidence that More was really brought as “a test case” to help challenge the repeal of the Judiciary Act of 1801.¹⁰⁷ Judge Cranch, who was John Adams’s nephew, was also “an active

⁹⁸ *United States v. More* (C.C.D.C., 1803) reported at 7 U.S. (3 Cranch) 159, 160 n. *. For other discussions, see James M. O’Fallon, *The Case of Benjamin More: A Lost Episode in the Struggle over Repeal of the 1801 Judiciary Act*, 11 *Law & History Rev.* 43 (1993); Lawson, *supra* note 10, at 880-85; Nelson, *supra* note 29, at 575-76.

⁹⁹ *United States v. More* (C.C.D.C., 1803) reported at 7 U.S. (3 Cranch) 159, 161 n. *. Yes, it is the same Cranch who was both the lower court judge and the Supreme Court reporter. “He publicized the opinions in *More* by setting them out in full in the margins of his report of the case in the Supreme Court.” O’Fallon, *supra* note 98, at 49.

¹⁰⁰ *More*, at 161 n. *.

¹⁰¹ *United States v. More* (C.C.D.C., 1803) (Kilty, J., dissenting) reported at *Id.* at 163 n. *.

¹⁰² *Id.*

¹⁰³ *Id.* at 164 n. *.

¹⁰⁴ *United States v. More* (1805), 7 U.S. (3 Cranch) 159, 168 (argument of counsel).

¹⁰⁵ The next year, in *Wise v. Withers*, 7 U.S. (3 Cranch) 331 (1806), the Court decided that D.C. justices of the peace were “officers of the government of the United States” under a militia exemption statute, which Lawson suggests provides further support for Judge Cranch’s view. Lawson, *supra* note 10, at 885-887.

¹⁰⁶ It is worth noting that the 1891 decision in *McAllister*, cited *supra* note 93, had three dissenters as well. See 141 U.S. at 201 (Field, J., dissenting, joined by Gray and Brown.)

¹⁰⁷ O’Fallon, *supra* note 98, at 52.

polemicist in the struggle over the repeal of the Judiciary Act” and may have been receptive to such a ploy.¹⁰⁸

Even accepting the circuit court’s opinion in *More*, one might plausibly distinguish the ordinary territories, whose governments were more organic and practically independent, from the situation in D.C., where Congress had not explicitly vested the judicial power “of the District of Columbia” as a separate government.¹⁰⁹ Indeed, many Nineteenth-Century constitutional interpreters insisted on distinguishing the constitutionality of the District of Columbia from that of the ordinary territories.¹¹⁰

But in any event, the point here is not so much to relitigate *Canter* as to explain its constitutional logic – to *locate* territorial adjudication within or without Article III. Once we do so, we can see that the longstanding existence of non-Article III territorial courts can be explained in terms of text and structure rather than treated as a historical anomaly or practical exigency.¹¹¹ Indeed, territorial courts fit tidily alongside the text of Article III: Territorial courts exercise the judicial power of their respective territories, and therefore fall outside of Article III for the same textual reason that state courts do.

3. Tribal Courts

States and territories are not the only government entities within the boundaries of the United States. Sovereign native tribes were here before the country was founded, and have continued to have their own governments since the creation and expansion of the United States. These tribal governments have their own courts, and these courts adjudicate a broad range of potentially federal business, but they are of

¹⁰⁸ Id. at 49. The other judge in the majority was James Marshall, Chief Justice John Marshall’s brother. Id.

¹⁰⁹ See generally An Act concerning the District of Columbia, 2 Stat. 103 (Feb. 27, 1801). See also 1 J.W. Smurr, *Territorial Jurisprudence* 170 (1970) (“The District had no legislature of its own at the time and all the executive and legislative actions taken in the area were those of the Federal government. It was for this reason that the Territories were not fully involved in the implications of his argument.”) Indeed, Congress had instead described the justices’ of the peace powers by reference to *state law*. See sec. 11., 2 Stat. at 107 (“such justices ... shall, in all matters, civil and criminal, and in whatever relates to the conservation of the peace, have all the powers vested in, and shall perform all the duties required of, justices of the peace, as individual magistrates, by the laws herein before continued in force in those parts of said district, for which they shall have been respectively appointed.”). See also An Act supplementary to the act intituled “An act concerning the District of Columbia,” 2 Stat. 115 (Mar. 3, 1801), sec. 4 (Maryland). But see Wise, 7 U.S. at 336 (“If he is an officer, he must be an officer under the government of the United States. Deriving all his authority from the legislature and president of the United States, he certainly is not the officer of any other government”).

¹¹⁰ See generally Durling, *supra* note 78, at 23-36.

¹¹¹ Thus, perhaps even those who think *Canter* wrong on originalist grounds could accept this paper as “a form of constitutional damage control.” Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1252 (1994) (quoting Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best* (October 20, 1993), later published at 80 Cornell L. Rev. 1 (1994)).

course not staffed by Presidential appointees with good-behavior tenure.¹¹² While tribal courts do not receive as much attention in the federal courts literature,¹¹³ they raise their own puzzles under Article III.

A few critics have specifically argued that expansions of tribal court jurisdiction raise grave constitutional difficulties, constituting “a delegation of federal judicial power to a non-Article III body” and arguably “making the judges of such courts ‘inferior Officers’ whose appointments must conform to the Appointments Clause of the Constitution.”¹¹⁴ And a few members of the Supreme Court have argued that the status of tribal courts requires constitutional limits on the scope of their jurisdiction.¹¹⁵ But most scholars and Justices have assumed or maintained that expansions of tribal court jurisdiction is constitutionally unproblematic.¹¹⁶

These debates also emphasize the possible connection of tribal courts to non-Article III jurisdiction such as territorial courts. One scholar has explicitly argued that Congress’s power to allocate jurisdiction to tribal courts is analogous to its power to allocate jurisdiction to territorial courts.¹¹⁷ Others would narrow the territorial precedents, arguing that the territorial precedents should “apply only when the polity involved is a ‘territory’ within the meaning of the Property Clause of Article IV.”¹¹⁸ Another would instead use tribal courts to justify *even more* non-Article III adjudication, advocating non-Article III “community-based courts for non-Indians.”¹¹⁹

Now that we understand how the Constitution permits territorial and state courts, we can see that tribal courts are indeed analogous. Tribes are “domestic dependent nations,” governmental entities that are neither part of the state nor federal

¹¹² Felix S. Cohen, *Handbook of Federal Indian Law* (1942) 126-33, 145-49.

¹¹³ Cf. Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. Chi. L. Rev. 671, 676 (1989) (“The bountiful literature of federal courts jurisprudence does not, however, consider problems of the relationship between Indian tribes, the federal government, and the states. ‘We’ who teach and write about the federal courts, who list ourselves as the definers of the domain, speak and write relatively rarely about the federal courts and their relationship to Indian tribes.”).

¹¹⁴ Brief of Amicus Curiae National Congress of American Indians at 26-29, *United States v. Lara*, 124 S. Ct. 1628 (2004) (No. 03-107); see also Steven J. Gunn, *Compacts, Confederacies, and Comity: Intertribal Enforcement of Tribal Court Orders*, 34 N.M. L. Rev. 297, 338 (2004); Paul J. Larkin, Jr. & Joseph Luppino-Esposito, *The Violence Against Women Act, Federal Criminal Jurisdiction, and Indian Tribal Courts*, 27 *BYU J. Pub. L.* 1, 8 (2012); Margaret H. Zhang, *Special Domestic Violence Criminal Jurisdiction for Indian Tribes: Inherent Tribal Sovereignty Versus Defendants’ Complete Constitutional Rights*, 164 U. Pa. L. Rev. 243, 267 n. 117 (2015) (describing issue as “not settled” and “difficult to predict”).

¹¹⁵ *United States v. Lara*, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring in judgment); see also *id.* at 228-29 (Souter, J., dissenting).

¹¹⁶ *United States v. Lara*, 541 U.S. 193, 200-210 (2004); Catherine T. Struve, *How Bad Law Made A Hard Case Easy: Nevada v. Hicks and the Subject Matter Jurisdiction of Tribal Courts*, 5 U. Pa. J. Const. L. 288, 316 n. 123 (2003).

¹¹⁷ Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 *Colum. L. Rev.* 657, 701-03 (2013)

¹¹⁸ Larkin & Luppino-Esposito, *supra* note 114, at 34; see also *id.* at 32 (complaining that the territorial precedents “give new meaning to the term *ipse dixit*”).

¹¹⁹ Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 *Fordham L. Rev.* 479, 483-84 (2000).

governments.¹²⁰ Thus, tribal courts permissibly exercise judicial power because they do not exercise the judicial power “of the United States.” They exercise the judicial power *of their tribe*, a distinct government entity with its distinct separation of powers. So tribal adjudication is not subject to Article III and does not need to be.

That only leaves the question of whether it is permissible for Congress to augment the jurisdiction of the tribes. Here, the answer is likely “yes,” and the reasons are at once slightly simpler and slightly more complicated than for territorial courts. They are slightly simpler because Congress does not create the tribal governments in the first place, so one need not stumble over the question of how Congress can create a government whose powers are not “of the United States.” They are slightly more complicated because any individual tribal jurisdiction statute must still find a source of Article I authority.¹²¹ The scope of this authority is debated: Some believe Congress to hold near-plenary authority over the tribes; others have suggested that Congress’s authority is more nuanced or circumscribed.¹²² But ultimately this is an Article I inquiry, not an Article III inquiry. So long as the subject matter is within Congress’s enumerated powers, Article III presents no obstacle to yielding jurisdiction to tribal courts.

4. International and Foreign Courts

The same logic also justifies adjudication of potentially federal cases by international and foreign bodies. International adjudication bears the substantial weight of historical practice, but its formal justification under Article III is obscure today.¹²³

Most famously, the 1794 Jay Treaty allowed mixed commissions of Americans and Brits to resolve debt claims by British creditors against Americans or the United States. Even though such claims generally arose under state law, they also fall within the scope of Article III, which includes “controversies to which the United States shall be a party” as well as those “between a state, or the citizens thereof, and foreign

¹²⁰ *Cherokee Nation v. State of Ga.*, 30 U.S. 1, 17 (1831).

¹²¹ Some of the courts cases have limited tribal jurisdiction as a matter of federal common law, see *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Duro*. But so long as there is Article I authority, those common law limits can be abrogated. Cf. William Baude, *Sovereign Immunity and the Constitutional Text*, 103 Va. L. Rev. 1 (2017).

¹²² Thomas. Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 *Denv. U. L. Rev.* 201, 241-44, 250 (2007); Saikrishna Prakash, *Against Tribal Fungibility*, 89 *Cornell L. Rev.* 1069, 1089 (2004); see also Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 *Yale L.J.* 1012 (2015).

¹²³ See Henry Paul Monaghan, *Article III and Supranational Judicial Review*, 107 *Colum. L. Rev.* 833, 841-42 (2007). See also Curtis A. Bradley & Jack L. Goldsmith, *Foreign Relations Law* 514-26 (4th ed. 2011) (surveying constitutional questions about delegation of authority to international institutions).

states, citizens or subjects.”¹²⁴ The Treaty was adopted and enforced despite this overlap with Article III.¹²⁵

Throughout the Nineteenth Century, the United States agreed to more than 50 other instances of international adjudication, despite their possible overlap with Article III.¹²⁶ One scholar reports that “So far as practice can settle meaning, it establishes that the United States can enter international agreements creating state-state arbitration panels to resolve the private law claims of its nationals against foreign governments.”¹²⁷ Meanwhile, other international tribunals confronted constitutional objections, such as a series of arguments during the Adams and Monroe administration rejecting the power to create international tribunals to try slavery cases.¹²⁸ Article III debates about international tribunals, from NAFTA¹²⁹ to the International Criminal Court,¹³⁰ continue to this day.¹³¹

What should be the terms of these debates? Some scholars have grounded international adjudication in the “public rights” doctrine.¹³² Maybe that is part of the story, but the scope of historical adjudication has ranged broadly and included seemingly private rights. As we will see, the so-called “public rights” doctrine really describes a set of adjudication that is permissible because it is a form of executive power and usually does not involve the deprivation of life, liberty, or property.¹³³ But that doctrine does not describe international tribunals, which are independent of the executive branch and can potentially authorize such deprivations.

Rather, an important argument for the accepted practice of international adjudication is that international tribunals do not exercise the judicial power “of the United States.” Indeed, David Currie once made precisely this defense of the Jay

¹²⁴ U.S. Const. art. III sec. 2.

¹²⁵ See generally David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075, 1157-93 (2000) for the controversy and specifically *id.* n. 272 & n. 278 for the mentions of Article III, which were among many unavailing constitutional objections to the Treaty.

¹²⁶ See *Survey of International Arbitrations, 1789-1989* (Alexander Marie Stuyt ed., 3d ed. 1990) at 5, 7, 13-16, 26-27, 29, 35, 39, 42, 47, 49, 51, 57, 61-62, 67, 70-73, 75-78, 82, 86, 89, 92-93, 95-96, 98-99, 111, 119, 132, 135, 141-42, 146, 155-56, 158, 168, 173-74, 178-79, 200, 210, 218, 225-27, 232.

¹²⁷ Monaghan, *supra* note 123, at 851-52.

¹²⁸ See Eugene Kontorovich, *The Constitutionality of International Courts: The Forgotten Precedent of Slave-Trade Tribunals*, 158 U. Pa. L. Rev. 39, 58-86 (2009); Jenny S. Martinez, *International Courts and the U.S. Constitution: Reexamining the History*, 159 U. Pa. L. Rev. 1069, 1111-25 (2011).

¹²⁹ Monaghan, *supra* note 123, at 839-42 (describing these challenges without endorsing them).

¹³⁰ Kontorovich, *supra* note 128, at 105-08.

¹³¹ For other discussion, see, e.g., Jim C. Chen, *Appointments with Disaster: The Unconstitutionality of Binational Arbitral Review Under the United States-Canada Free Trade Agreement*, 49 Wash. & Lee L. Rev. 1455, 1463-1479 (1992); Curtis A. Bradley, *The Federal Judicial Power and the International Legal Order*, 2006 Sup. Ct. Rev. 59, 86-90 (2006).

¹³² Monaghan, *supra* note 123, at 865-76; see also Chen, *supra* note 131, at 1466-67.

¹³³ See *Infra* Part II.B.

Treaty,¹³⁴ though some scholars have found it difficult to understand its logic.¹³⁵ As we have seen from the examples of state, territorial, and tribal courts, Article III permits other entities to adjudicate cases that could have been heard in federal court, so long as those other entities have their own source of judicial power. Those sources can include state law, territorial law, tribal law, and also international or foreign law. International tribunals can therefore exercise international or foreign judicial power, rather than the judicial power of the United States.

Understanding international tribunals in these terms helps us to understand both the acceptance and the debates about international adjudication. It explains why international tribunals need not be limited to public rights, and it explains why the central question for international tribunals is instead the source of their authority. As Jenny Martinez has persuasively argued, the Adams/Monroe-era opposition to slave-trade tribunals came not from “their supposedly criminal nature, but rather the source of their legal authority.”¹³⁶ At that time, international law did not ban the slave trade, so opponents did not think that international tribunals could be constituted to enforce the ban recognized only under domestic law.¹³⁷ To be sure, these arguments raise tricky questions about the scope of written and unwritten international law, but they confirm Martinez’s general conclusion that “[j]ust as Article III of the Constitution does not govern state courts because they do not exercise the judicial power of the United States, international courts charged with enforcing international law do not exercise the judicial power of the United States.”¹³⁸

Similarly, it is no coincidence that supporters of an international prize court at the dawn of the Twentieth Century defended it against Article III objections by analogy to consular courts, which had recently been upheld by the Supreme Court.¹³⁹ Both are potentially examples of non-U.S. judicial power. Whether one accepts their validity today or not,¹⁴⁰ they attempt to respond to the Article III problem in the same way. And purely foreign adjudication – for instance, when a Belgian court adjudicates a claim involving a U.S. citizen – is even easier to understand under this rationale.¹⁴¹

¹³⁴ David P. Currie, *The Constitution in Congress* 212 n.46 (1997) (“A better answer to the Article III objection might be that an international tribunal, like a state court, does not exercise the judicial power of the United States.”).

¹³⁵ Monaghan, *supra* note 123, at 867.

¹³⁶ Martinez, *supra* note 128, at 1088.

¹³⁷ *Id.* at 1122-23.

¹³⁸ *Id.* at 1126.

¹³⁹ See Eugene Kontorovich, *Three International Courts and Their Constitutional Problems*, 99 *Cornell L. Rev.* 1353, 1375 (2014) identifies as examples S. Doc. No. 60-444, at 49 (1908) and 1 James Brown Scott, *The Hague Peace Conferences of 1899 and 1907*, at 479-80 (1909), both of which cite *In re Ross*, 140 U.S. 453 (1891).

¹⁴⁰ See *infra* Part II.A.5 (“[r]easonable minds can disagree” about the consular courts upheld in *Ross*); Kontorovich, *supra* note 139, at 1375–76 (arguing that *Ross* was “finished ... off” by the Court’s decision in *Boumediene v. Bush*).

¹⁴¹ See, e.g., *Ingersoll Milling Machine Co. v. Granger*, 631 F. Supp. 314 (N.D. Ill. 1986), *aff’d*, 833 F.2d 680 (7th Cir. 1987) (federal employment discrimination case dismissed because the parties had received a “full and fair adjudication in Belgium”). For more examples, see James P. George, *Parallel Litigation*, 51 *Baylor L. Rev.* 769, 904–966 (1999).

The Belgian court does not comply with Article III, but of course it does not need to because its judicial power is Belgian.

To be sure, the fact that such foreign entities can exercise their own judicial power does not mean their decisions are necessarily *binding* upon the federal and state courts. That inquiry turns instead on questions of the recognition of foreign judgments, which are not automatically entitled to the same full faith and credit as domestic judgments.¹⁴² The point is simply that such courts raise no Article III problems, even if their subject matter could also come before an Article III court, and even if they authorize the deprivation of life, liberty, or property.

Finally, there might also be separate constitutional constraints on allowing any tribunal – foreign or otherwise – to directly review the judgments of the Supreme Court.¹⁴³ State and territorial courts have never been allowed to directly review the Supreme Court’s decisions, of course, only the other way around. Whether such a practice is permissible or not, and precisely what it means, would depend on the Constitution’s description of that court as “Supreme,” and the original understanding that no appeal would lie from its decisions. But it is not a problem of Article III’s grant of the “judicial power of the United States.”

5. Limiting Principles

This theory of judicial power does raise an important question about its limiting principles. If a territorial government may have its own “judicial power” vested separately from the “judicial power of the United States,” what other kinds of judicial power might there be?

It is tempting to say that the separate entity must be a separate “sovereign,” but it is ultimately unhelpful, because the word “sovereign” has such different meanings in these legal contexts. For instance, the Supreme Court has characterized Indian tribes as “separate sovereigns under the Double Jeopardy Clause,” even though it has said that “[a]fter the formation of the United States, the tribes became ‘domestic dependent nations,’ subject to plenary control by Congress—so hardly ‘sovereign’ in one common sense.”¹⁴⁴ On the other hand, territories like Puerto Rico, that have been allowed “to embark on the project of constitutional self-governance” have nonetheless been held non-sovereign for Double Jeopardy Purposes.¹⁴⁵ There is no single definition of constitutional sovereignty that we could simply import for Article III purposes.

It might also be tempting to describe these courts in terms of their popular sovereignty, or having just dispensed with the word “sovereignty,” in terms of their

¹⁴² See generally *Hilton v. Guyot*, 159 U.S. 113 (1895); see also 21 U.S.C. 4102 (limiting recognition of foreign defamation judgments).

¹⁴³ See Monaghan, *supra* note 123, at 860-62.

¹⁴⁴ *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1872 (2016).

¹⁴⁵ *Id.* at 1868.

democratic pedigree. State courts, tribal courts, and foreign courts, are all organized outside of the federal government, and thus represent the “authorization of a local legislative power that comes from below.”¹⁴⁶ But this cannot quite explain the longstanding acceptance of territorial courts. The first territorial statute at the founding, the Northwest Ordinance, “imposed and staffed a government almost entirely from above. ... Congress enacted it without any process for ratification or assent, and territorial citizens lacked voting representation in Congress.”¹⁴⁷ The power came from below only in the most metaphysical sense. Similar problems would afflict international courts created in part by U.S. agreement.

But if neither sovereignty nor local enactment are the touchstone, could there be a “judicial power of the U.S. Army,” vested outside of civilian courts, or a “judicial power of the Securities and Exchange Commission” vested entirely in an Article II administrative agency? What stops any proposed non-Article III court from simply being relabeled a “judicial” sub-branch of the relevant department?

As a matter of historical practice, it seems clear that this category has been more limited. Rather, the historical examples of such judicial power seem to have required a distinct government, meaning a body that had traditional hallmarks like territorial jurisdiction (even if shared) and some kind of citizenship or membership. Sovereignty aside, these hallmarks resonate with early modern political theory as well. That still leaves some hard cases, but it would rule out the “judicial power of the U.S. army” or “the judicial power of the Securities and Exchange Commission.”

The harder examples presented by history are some of the pseudo-territorial courts, distinct from the traditional territorial courts upheld in *Canter*. For instance, the Supreme Court eventually confronted a number of forms of adjudication that are arguably analogous to territorial courts, such as:

- courts in unincorporated territories¹⁴⁸
- the United States court in Indian territory¹⁴⁹
- court of private land claims in the western territories¹⁵⁰
- consular courts¹⁵¹
- the District of Columbia courts¹⁵²

¹⁴⁶ Philip Hamburger, *Is Administrative Law Unlawful?* 389-90 (2014).

¹⁴⁷ Gregory Ablavsky, *Administrative Constitutionalism in the Northwest Territory* (Jan. 21, 2019) at 3.

¹⁴⁸ *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922).

¹⁴⁹ *Stephens v. Cherokee Nation*, 174 U.S. 445 (1899); see also Von Creel, *A Court of its Own: The Establishment of the United States Court for the Indian Territory*, 27 *Okla City U. L. Rev.* 231 (2002).

¹⁵⁰ *United States v. Coe*, 155 U.S. 76 (1894).

¹⁵¹ *In re Ross*, 140 U.S. 453 (1891); see also *Forbes v. Scannell*, 13 Cal. 242, 267 (1859) (argument of counsel). The “American consular court in Morocco, the final outpost of American consular jurisdiction,” ceased operation in 1956 after Moroccan independence. Kal Raustiala, *Does the Constitution Follow the Flag?: The Evolution of Territoriality in American Law* 72 (2009).

¹⁵² *Palmore v. United States*, 411 U.S. 389, 410 (1973). But see Durling, *supra* note 78. Cf. *District of Columbia Court Reform and Criminal Procedure Act of 1970*, Sec. 111, Pub. L. No. 91-358, 84 Stat

And though they did not reach the Court, other examples have included:

- The “United States District Court for China” (a non-Article III sequel to the consular court system)¹⁵³
- federal enclaves¹⁵⁴

Reasonable minds can disagree about where to draw the line among these pseudo-territorial courts. But correctly locating non-Article III courts tells us that the question is whether each of these entities possessed the judicial power of a government, analogous to states, territories, and tribes.

B. Executive Power

What of the many tribunals that do not exercise the judicial power of the United States or of some other government entity? If they exercise any government power, it is likely executive. But executive adjudication may still be permissible under the Constitution depending on its consequences and its context. Such tribunals may not be courts, but not every application of law to fact requires a court. Indeed, fact-finding, and the application of law to fact, is a ubiquitous part of executive action. So what separates it from the things that only judges can do?

One longstanding principle of Anglo-American law holds that a court is needed only when the government seeks to deprive a person of their private rights to life, liberty, or property.¹⁵⁵ If, by contrast, the government is simply deciding whether to bestow a benefit or privilege, or if the government is grappling only with the scope of a public right, no court is needed.¹⁵⁶

Hence, St. George Tucker could write in his appendix to *Blackstone’s Commentaries*, that the “uncontrollable authority” of the courts “extend[ed] to every supposable case which can affect the life, liberty, or property of the citizens of America under the authority of the federal constitution, and laws, except in the case of an impeachment.”¹⁵⁷ The logical shadow of this requirement, masterfully catalogued by Caleb Nelson, produces the most important category of permissible executive adjudication: those that do not authorize the deprivation of life, liberty, or property.

473, 475. (ambiguously declaring “The judicial power *in* the District of Columbia is vested....” (emphasis added)).

¹⁵³ See Raustiala, *supra* note 151, at 68-72; see also Tahirih V. Lee, *The United States Court for China: A Triumph of Local Law*, 52 *Buff. L. Rev.* 923, 939 (2004) (“The haste with which the statute was enacted that established the court left important questions about the court’s status unaddressed. Neither this committee, nor any of the congressional bodies that subsequently dealt with the subject identified any constitutional authority under which Congress was acting.”)

¹⁵⁴ See *United States v. Hollingsworth*, 783 F.3d 556, 560 n.10 (5th Cir. 2015) (collecting many examples of misdemeanors on federal land given to the federal magistracy from 1894-1948).

¹⁵⁵ Nelson, *supra* note 29, at 568–569.

¹⁵⁶ Harrison, *supra* note 31, at 9-27.

¹⁵⁷ Tucker, *supra* note 6, at 354; cf. Baude, *supra* note 33, at 1816 n.42. As we will see *infra* II.C, Tucker arguably should have added a second exception, for courts martial.

But even longstanding principles have their longstanding exceptions. In at least two narrow circumstances, the executive branch can authorize deprivations of life, liberty, or property consistent with due process: military adjudication presupposed by the Constitution, and very temporary adjudications incident to judicial process. These circumstances were both recognized in prominent nineteenth century authority, and they are also properly located as forms of executive power.

1. No Deprivation of Life, Liberty, or Property

The predominant principle of executive action is that it cannot deprive people of life, liberty, and property without judicial process. This principle can be located in two different places in the constitutional text. One, and perhaps the most obvious to modern eyes, is in the Due Process Clause, which provides that nobody “shall ... be deprived of life, liberty, or property, without due process of law.”¹⁵⁸ There are well-known debates, and a great deal of constitutional precedent, about what kind of process the Clause requires to the extent that it goes beyond process to substance. But one of the most fundamental and oldest requirements of the Clause is one of form and legality – as a limit on the legislature’s ability to dispense with the courts.¹⁵⁹ Hence it has aptly been said that the Due Process Clause is an “instantiation of separation of powers”¹⁶⁰ and that “Due Process and Article III in this sense are fused at the hip.”¹⁶¹ And hence, as well, justices have sometimes correctly recognized this overlap between questions of non-Article-III adjudication and questions of due process.¹⁶²

The principle may also have a slightly older and more fundamental home, in Article I and Article III themselves. Many believed that by separating and vesting “legislative powers” and “the judicial power” in two different branches, the structural Constitution itself required a court before somebody could be deprived of a vested

¹⁵⁸ U.S. Const. amdt. V.

¹⁵⁹ See generally Nathan S. Chapman, Michael W. McConnell, Due Process As Separation of Powers, 121 Yale L.J. 1672 (2012); see also Ryan C. Williams, The One and Only Substantive Due Process Clause, 120 Yale L.J. 408, 454-457 (2010) (“contemporaneous usage indicates that ‘due process of law’ was commonly used as a reference to judicial process”); Gary Lawson, Take the Fifth ... Please!: The Original Insignificance of the Fifth Amendment’s Due Process of Law Clause, 2017 B.Y.U. L. Rev. 611, 630 (2017) (“a mass of materials in the early years of the republic equated due process of law with judicial process”); Harrison, *supra* note 31, at 39-40; Norman W. Spaulding, Due Process Without Judicial Process?: Antiadversarialism in American Legal Culture, 85 Fordham L. Rev. 2249, 2261-2266 (2017) (discussing the more modern disaggregation of due process and judicial process).

¹⁶⁰ Chapman & McConnell, *supra* note 159, at 1672.

¹⁶¹ Douglas G. Baird, Blue Collar Constitutional Law, 86 Am. Bankr. L.J. 3, 8 (2012).

¹⁶² *Murray’s Lessee v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 275 (1855) (“The question, whether these acts were an exercise of the judicial power of the United States, can best be considered under another inquiry . . . that the effect of the proceedings authorized by the act in question is to deprive the party, against whom the warrant issues, of his liberty and property, ‘without due process of law’”); *Crowell v. Benson*, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting) (“[U]nder certain circumstances, the constitutional requirement of due process is a requirement of judicial process.”).

right.¹⁶³ Hence it has also been argued that “There was no need for the Fifth Amendment in 1791 to tell courts that they could not deprive people of life, liberty, or property without due process of law. Due process of law just was, in an existential sense, what courts did when they were doing their jobs properly.”¹⁶⁴

Whether this principle is located in the Due Process Clause or in the separation of powers, it explains the most important category of executive adjudication. The deprivation of life, liberty, and property, generally require judicial process and therefore judicial power. But there is no constitutional prohibition on an executive official finding facts, or applying law to those facts, so long as he does not authorize the deprivation of life, liberty, or property.

This category encompasses most of what were classically known as “public rights” cases. While the phrase “public rights” has been much confused in modern case law, in the Nineteenth Century it generally referred to forms of adjudication that did not deprive any person of their private rights to life, liberty, or property.

A paradigmatic example was the grant of the public lands.¹⁶⁵ According to Jerry Mashaw, “[s]urveying and selling the public lands were the largest and most difficult tasks of the Republican era.”¹⁶⁶ The difficulties included the need to incorporate separate standards under British, Spanish, and French law; a sales credit system that had led to widespread defaults; a series of legislative dispensations for sympathetic cases; and the sheer volume of land and claims.¹⁶⁷ Congress thought that courts would be unable to handle the morass, and entrusted the job to executive land commissioners who would dispense “mass administrative justice.”¹⁶⁸

These commissioners were not Article III judges.¹⁶⁹ And according to Mashaw, their proceedings “may not have satisfied the formal procedural and evidentiary criteria for trials in the courts of law.”¹⁷⁰ Yet because most of the claims involved questions of federal law (and for that matter, involved the United States as a party), they

¹⁶³ John Harrison, *Legislative Power and Judicial Power*, 31 *Const. Comment.* 295, 304 (2016) (“For many decades, the basic doctrine of American constitutional law was that the government could not deprive people of vested rights. It could not take the property of *A* and give it to *B*. That principle was often attributed to the difference between legislative and judicial power. Only the latter could work deprivations of vested rights.”).

¹⁶⁴ Lawson, *supra* note 10, at 631.

¹⁶⁵ Nelson, *supra* note 29, at 577 (“For much of the nineteenth century, the most important field of federal administrative law concerned the disposition of public lands.”); Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 *Colum. L. Rev.* 939, 948 (2011) (“Public land disputes were probably the largest class of federal administrative action in the nineteenth century”). *Murray’s Lessee v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 284 (1855) (“Equitable claims to land by the inhabitants of ceded territories form a striking instance of such a class of cases”).

¹⁶⁶ Jerry L. Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* 119 (2012).

¹⁶⁷ *Id.* at 122-123.

¹⁶⁸ *Id.* at 123, 131.

¹⁶⁹ See, e.g., Act of Mar. 3, 1803, sec. 6, 2 Stat 229, 230 (providing for “commissioners, for the purposes of ascertaining the rights of persons” who would be appointed by the President alone).

¹⁷⁰ Mashaw, *supra* note 166, at 131.

would have fallen within the constitutional power of an Article III court.¹⁷¹ But the mass adjudications were not thought to run afoul of Article III's vesting of the judicial power.

Why not? Simply put, the commissioners did not do anything that *necessitated* a court because they did not *deprive* any person of life, liberty, or property. Rather, all the commissioners could do was grant or confirm the *award* of public property to putative claimants. Indeed this is something that Congress could do on its own, and so it is something that it could authorize the executive branch to do through a properly drawn statute. Land commissioners were not courts, they were executive officials, but they did not need to be courts.

Indeed, this justification for the non-Article III public land adjudication system was further demonstrated by the scope of that adjudication. The commissioners lacked any authority to bind private parties, and could dispose only of the public right. As Mashaw emphasizes, “The statutes providing for land commission adjudication of private claims made commission determinations final against the United States, but not against third party claimants. These latter claims would have to be fought out in the courts.”¹⁷²

Another historical example of such “public rights” were claims against the United States.¹⁷³ At the founding, claims for damages against the United States were thought barred by sovereign immunity, so all claimants were forced to petition Congress for individualized redress. Such redress was dispensed as a matter of grace, but Congress's good graces were sufficiently plentiful that it indeed passed many private bills over the early years paying such claims.¹⁷⁴

Eventually, later in the 19th century, these claims were instead funneled to a non-Article III tribunal, the so-called court of claims. And while the court of claims has gone through several important iterations and revisions, its successor today is a non-Article III tribunal.¹⁷⁵ And because it has not been vested with the judicial power of any government entity, it is not a court, in the constitutional sense.

These claims courts are nonetheless another classic example of permissible non-Article III adjudication. At first blush, one might see such claims as involving deprivations of property because the plaintiffs against the United States frequently claim exactly that: that the United States has damaged their property or owes them money for its misdeeds. But the background principle of sovereign immunity means that such claims are a judicial nullity unless and until the United States decides to waive its immunity. That has long been thought to render such claims public rights,

¹⁷¹ U.S. Const. Art III (“The judicial power shall extend to all cases ... arising under ... the Laws of the United States, and ... to Controversies to which the United States shall be a Party.”).

¹⁷² Mashaw, *supra* note 166, at 130.

¹⁷³ See Fallon, *supra* note 13, at 919 (describing “the ‘public rights’ doctrine” as “mostly, although not invariably, associated with the doctrine of sovereign immunity”).

¹⁷⁴ Indeed, there is a whole volume of the Statutes at Large collecting these private bills, many of which are claims-related. See generally 6 Stat. iii et seq. (collecting “The Private Acts of Congress” from 1789-1845).

¹⁷⁵ For some analysis of this successor, see *infra* Part III.A.3.b.

or discretionary benefits, rather than private rights of property.¹⁷⁶ Indeed, that is why Congress for so long dealt with such claims by private bill, until various mishaps and the need for procedural regularity prompted it to create the claims court.¹⁷⁷

As administrative adjudication grew around the start of the Twentieth Century, this original logic was sometimes expanded beyond its original constitutional roots. Still, many instances of federal administrative adjudication bore the hallmarks of this principle. By the time of its more controversial 1932 decision in *Crowell v. Benson*, the Court remarked that “Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions, and payments to veterans.”¹⁷⁸ In various ways, even these forms of adjudication mostly reflected the influence of the non-deprivation category. The interstate commerce commission’s adjudications had conclusive effect only when directing future conduct, not ordering money damages.¹⁷⁹ The Secretary of Agriculture’s powers under the Meat Inspection Act (upheld in the “public health” case *Crowell* mentioned)¹⁸⁰ were in fact powers of prospective regulation.¹⁸¹ Immigrants were generally thought to lack a vested right to enter or remain in the United States.¹⁸² Obligations to veterans were largely analogous to other claims against the United States, discussed above.

Access to the mails presented some trickier questions. In many respects, the traditional view was that access to the mail was a “privilege[],”¹⁸³ and thus that “[t]he legislative body, in thus establishing a postal service, may annex such conditions to

¹⁷⁶ Nelson, *supra* note 29, at 582-84. But cf. Harrison, *supra* note 31, at 18 (“Congress’s control over the availability of judicial review thus depended not only on its power to waive sovereign immunity, but more fundamentally on its power to create primary private rights and remedies to enforce them, when the executive was exercising public rights.”)

¹⁷⁷ See 2 Wilson Cowen, Philip Nichols, Jr., & Marion T. Bennett, *The United States Court of Claims: A History* 12-13 (1978)

¹⁷⁸ *Crowell v. Benson*, 285 U.S. 22, 51. *Crowell* itself authorized a deprivation of the employer’s money. But the great Henry Hart “regarded it as crucial that *Crowell* involved an enforcement action, in which the employer had been ordered by an administrative agency ‘to do something to his disadvantage’” and crucial that even *Crowell* thought such an action subject to important Article III constraints. Fallon, *supra* note 13, at 924 n. 36 (quoting Henry M. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 *Harv. L. Rev.* 1362, 1384 (1953)). By contrast, “In Hart’s view ... judicial involvement is not required in a private rights dispute in which an administrative agency refuses to give a plaintiff “a hoped-for advantage.” *Id.*

¹⁷⁹ Nelson, *supra* note 29, at 598 & n.150. Cf. Herbert J. Friedman, *A Word About Commissions*, 25 *Harv. L. Rev.* 704, 711 (1912) (“It should be noted that commissions only in a limited sense pass upon property rights.”).

¹⁸⁰ *Houston v. St. Louis Indep. Packing Co.*, 249 U.S. 479, 486 (1919).

¹⁸¹ 34 Stat. 669, 676 (“and no such meat or meat food products shall be sold or offered for sale by any person, firm, or corporation in interstate or foreign commerce under any false or deceptive name”); *id.* at 678 (“and said Secretary of Agriculture shall, from time to time, make such rules and regulations as are necessary for the efficient execution of the provisions of this Act”).

¹⁸² Nelson, *supra* note 29, at 580-81.

¹⁸³ *Ex parte Jackson*, 96 U.S. 727, 732 (1877).

it as it chooses.”¹⁸⁴ This was even more obvious for access to subsidized second-class mail,¹⁸⁵ though there might be some property rights once a document had *entered* the mail.¹⁸⁶

But this notion of post access as a privilege became complicated over time, as practice and precedent did point to some constitutional limitations on federal power over the mail,¹⁸⁷ and so by the mid-Twentieth Century, an observer could conclude: “That the use of the mails is not a legislatively granted privilege has been observed, but that it is a constitutionally protected right has not been definitively established.”¹⁸⁸ Similarly, there was change in the force of law given to the postmaster’s adjudications. Judicial review was initially very searching,¹⁸⁹ and grew more deferential only in the subsequent, and controversial, case of *Bates & Guild v. Payne*.¹⁹⁰ More generally, as Caleb Nelson has detailed, many of the individual examples that properly supported the early “public rights” doctrine belong in this category. (Oddly, the first Supreme Court “public rights” case, *Murray’s Lessee v. Hoboken Improvement*, may be an exception that belongs in a different category¹⁹¹ – though more modern cases have concluded that “[t]he point of *Murray’s Lessee* was simply that Congress may set the terms of adjudicating a suit when the suit could not otherwise proceed at all,”¹⁹² which would fit comfortably in this category.)

Much of modern doctrine about non-Article III courts discusses the “public rights” exception, with a series of different formulations many of which conflict both with each other and with this tradition. For example, the cases have variously looked to whether the government was a party to the controversy,¹⁹³ whether the matter “historically could have been determined exclusively” by the political branches,¹⁹⁴ and

¹⁸⁴ Pub. Clearing House v. Coyne, 194 U.S. 497, 506 (1904); see also *id.* (“The postal service ... is not, however, a necessary part of the civil government in the same sense in which the protection of life, liberty, and property ... are”).

¹⁸⁵ Lewis Pub. Co. v. Morgan, 229 U.S. 288, 316 (1913) (“[W]e are concerned solely and exclusively with the right on behalf of the publishers to continue to enjoy great privileges and advantages at the public expense, a right given to them by Congress upon condition of compliance with regulations deemed by that body incidental and necessary to the complete fruition of the public policy lying at the foundation of the privileges accorded.”); See also James C. N. Paul & Murray L. Schwartz, *Federal Censorship: Obscenity in the Mail* 34-35 (1961) (discussing the “so-called ‘privilege’ to go at special low rates” for “mass produced magazines or newspapers”).

¹⁸⁶ *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902) (“letters contained checks, drafts, money orders, and money itself, all of which were their property as soon as they were deposited in the various postoffices for transmission by mail”).

¹⁸⁷ *Ex parte Jackson*, 96 U.S. 727 (1877).

¹⁸⁸ Jay A. Sigler, *Freedom of the Mails: A Developing Right*, 54 *Geo L.J.* 30, 54 (1965).

¹⁸⁹ *McAnnulty*, 187 U.S. 94, *supra*.

¹⁹⁰ *Bates & Guild Co. v. Payne*, 194 U.S. 106, 109-10 (1904). See generally Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 *Yale L.J.* 908, 966-69 (2017) (“Precisely what motivated the Court to retreat to a deferential standard in *Bates* after reviewing the Postmaster General’s decision *de novo* in *McAnnulty* is hard to untangle.”).

¹⁹¹ *Dem ex dem. Murray v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 275 (1855); see *Infra* B.2.

¹⁹² *Stern v. Marshall*, 564 U.S. 462, 489 (2011).

¹⁹³ *Crowell v. Benson*, 285 U.S. 22, 50 (1932).

¹⁹⁴ *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 68 (1982) (plurality) (citing *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929)).

whether the rights at issue came from federal statutory law.¹⁹⁵ It has also said that “the public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that ‘could be conclusively determined by the Executive and Legislative Branches,’ the danger of encroaching on the judicial powers” is less than when private rights, which are normally within the purview of the judiciary, are relegated as an initial matter to administrative adjudication.”¹⁹⁶

More recently, in *Stern v. Marshall* the Court concluded that a Bankruptcy Court’s adjudication of a state law counterclaim fell outside of the public-rights exception, but the Court declined to choose among several possible definitions of public rights because the case did “not fall within any of the various formulations of the concept that appear in this Court’s opinions.”¹⁹⁷ In last term’s decision in *Oil States v. Greene’s Energy Group*, upholding executive review of a patent grant, the Court continued to apply these “various formulations.”¹⁹⁸

These cases present an important opportunity for clarification. One of the candidate definitions, taken from the plurality opinions in *Northern Pipeline* was of “‘matters arising between’ individuals and the Government ‘in connection with the performance of the constitutional functions of the executive or legislative departments ... that historically could have been determined exclusively by those’ branches.”¹⁹⁹ Another, attributed to *Murray’s Lessee*, was “a matter that can be pursued only by the grace of the other branches.”²⁰⁰ These two definitions come closest to the historical category, though they beg for a bit more explanation.²⁰¹ The reason that classic public rights cases could traditionally be adjudicated in the political branches is that they did not involve the deprivation of life, liberty, or property and so they did not require judicial process.

2. Deprivations That Nonetheless Satisfy Due Process

The same longstanding practice that confirms that executive adjudication cannot deprive private persons of life, liberty, or property marks two apparent exceptions. The power of military officials to adjudicate and punish military offenses, and the temporary, pre-judicial deprivation of property authorized in the Supreme Court’s decision of *Murray’s Lessee v. Hoboken*. In both cases, we might fairly say that the subject had diminished interests in their life, liberty, or property. That’s part of what

¹⁹⁵ *Thomas v. Union Carbide Agr. Prod. Co.*, 473 U.S. 568, 584 (1985).

¹⁹⁶ *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 853–54 (1986) (quoting *Thomas*, 473 U.S. at 589).

¹⁹⁷ *Stern*, 564 U.S. at 489.

¹⁹⁸ *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1373 (2018).

¹⁹⁹ *Stern*, 564 U.S. at 485 (quoting *Northern Pipeline*, 458 U.S. at 67–68 (1982) (plurality)).

²⁰⁰ *Stern*, 564 U.S. at 493 (citing *Murray’s Lessee*, 18 How. at 284).

²⁰¹ How much this category is limited to cases “between individuals and the Government,” as in the first formulation, depends on the scope of the right/privilege distinction. See *infra* III.B.4;

one sacrifices by joining the army,²⁰² and that's part of why government officials had to post bond against their own misdeeds.²⁰³ Nonetheless, it is hard to describe either case as one where there is no deprivation of all. Still, each of these forms of adjudication is permissible precisely because it is a traditional exception to the traditional rule that due process is judicial process.

a. Military Tribunals

The military justice system is a form of executive adjudication. Neither courts martial nor the “civilianized” courts of military appeals exercise the “judicial power of the united states,” because they are not staffed by judges with good behavior tenure or salary protections. And yet they authorize deprivations of liberty, and sometimes even life, in meting out military punishments. This would ordinarily put them in grave tension with both due process and the separation of powers, but courts martial have both a deep-seated historical pedigree and explicit recognition in the Constitution.

Article I gives Congress the power to “make rules for the government and regulation of the land and naval forces.”²⁰⁴ Article II exempts military officers from impeachment,²⁰⁵ presumably on the assumption that they will be subject to military discipline instead, and the Fifth Amendment’s grand jury requirement expressly exempts “cases arising in the land or naval forces.”²⁰⁶ These textual provisions have been taken as evidence of a broader principle, consistent with historical practice, that permits punishment by military court.²⁰⁷ Non-Article-III military courts have been convened since before the founding, and expressly upheld as constitutional by the Supreme Court by the mid-Nineteenth Century.²⁰⁸

These so-called military courts are not really courts in the constitutional sense. They are executive. When the Supreme Court first blessed the military justice system in 1857, it emphasized its separateness from the federal judicial power. It pointed to provisions of Article I that “show that Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practiced

²⁰² See Harrison, *supra* note 31, at 40 n. 142 (“Although the government does not have and probably cannot have control of the bodily integrity and natural liberty of private people, matters are different with respect to members of the armed forces. They have a general obligation to go where they are told to go and to risk their lives if necessary. A group of 300 soldiers, for example, might be ordered to hold a pass at all costs.”).

²⁰³ On bond requirements for government officials, see Andrew Kent, Ethan J. Leib, and Jed Shugerman, *Faithful Execution and Article II*, 132 *Harv. L. Rev.* (forthcoming 2019) at 54-56, 64-65, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3260593; Jennifer Mascott, *The Ratifiers’ Theory of Officer Accountability*, at 25-27.

²⁰⁴ U.S. Const. art I, sec. 8, cl. 14.

²⁰⁵ *Id.* art II, sec. 4.

²⁰⁶ *Id.* amdt. V.

²⁰⁷ Vladeck, *supra* note 28, at 951-61.

²⁰⁸ Fallon, *supra* note 13, at 919-20; *Dynes v. Hoover*, 61 U.S. 65, 79 (1857).

by civilized nations; and that the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States.”²⁰⁹

So military justice is not an exercise of judicial power, and not an offense to Article III. And even though the Due Process Clause ordinarily required a court to adjudicate the deprivation of private rights, the historical and textual pedigree of military courts rendered them an exception to this requirement, just as they have been held to be excepted from the Sixth Amendment’s jury-trial requirement and other ordinary constitutional principles.²¹⁰ They are a form of executive adjudication of life, liberty, or property that nonetheless satisfies due process. As the Court put it in 1911, “to those in the military or naval service of the United States, the military law is due process.”²¹¹

Caleb Nelson provides an alternative explanation for military courts, suggesting that they *do* exercise the judicial power, just not the “*civilian* judicial power.”²¹² Rather, he suggests, they exercise the military judicial power of the United States, an unwritten exception to Article III.²¹³ Similarly, in recent separate opinions Justice Thomas has argued that “Article III extends only to *civilian* judicial power”²¹⁴ and therefore that “military courts are better thought of as an ‘exception’ or ‘carve-out’ from the Vesting Clause of Article III, rather than an entity that does not implicate the Vesting Clause because it does not exercise judicial power in the first place.”²¹⁵

To be sure, Thomas and Nelson can point to some sources that describe military tribunals as exercising “judicial power.”²¹⁶ But there are plenty of sources pointing the other way too. As Justice Alito has explained in response, military tribunals originated as “an arm of military command exercising executive power” and were described as such by Blackstone.²¹⁷ And the subsequent “overwhelming historical consensus” was “that courts-martial permissibly carry out their functions by exercising executive rather than judicial power.”²¹⁸ William Whiting’s Civil-War military law treatise maintained that “the judicial power and the military power of courts-martial

²⁰⁹ *Dynes v. Hoover*, 61 U.S. 65, 79 (1857).

²¹⁰ Just as with territorial courts and public rights, the text, history, and structure that justify military courts may also help mark the limits of the powers of those courts. See generally Vladeck, *supra* note 28, at 984–85.

²¹¹ *Reaves v. Ainsworth*, 219 U.S. 296, 304, 31 S.Ct. 230, 55 L.Ed. 225 (1911)

²¹² Nelson, *supra* note 13, at 576.

²¹³ *Id.* at 576 & n. 67.

²¹⁴ *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1964 (2015).

²¹⁵ *Ortiz v. United States*, 138 S. Ct. 2165, 2186 (2018) (Thomas, J., concurring).

²¹⁶ *Id.* at 2186-88 (citing W. De Hart, *Observations on Military Law* 14 (1859); 11 *Op. Atty. Gen.* 19, 21 (1864); Captain John T. Willis, *The Constitution, the United States Court of Military Appeals and the Future*, 57 *Mil. L. Rev.* 27, 84 (1972); Brigadier General S.T. Ansell’s Brief Filed in Support of His Office Opinion (Dec. 11, 1917), reprinted in *Hearings on S. 64 before the Subcommittee of the Senate Committee on Military Affairs*, 66th Cong., 1st Sess., 71, 76 (1919)).

²¹⁷ *Ortiz*, 138 S. Ct. at 2198-99 (Alito, J., dissenting).

²¹⁸ *Id.* at 2203.

are independent of each other,”²¹⁹ and as William Winthrop put it in his more famous treatise, military courts are “simply *instrumentalities of the executive power*.”²²⁰

Similarly, supporters of the civilian judicial power view might be able to point to the fact that the judgments of military courts have been held to trigger the Double Jeopardy Clause.²²¹ But supporters of the executive power view can point to the fact that the President has the constitutional power to overrule courts martial, even in order to impose a harsher punishment.²²²

This is one of the harder characterization problems presented by non-Article III adjudication. But the executive power view seems more straightforward as a matter of constitutional structure and logic. Describing military courts as exercising “the military judicial power of the United States” – Article III notwithstanding – requires us to impose a surprising defeasibility on the judicial vesting clause. And it seems to require us to make other surprising claims about the separation of powers as well. For instance, when the executive branch makes rules to govern a military base, or broad decisions about military policy, ought we now describe that as the exercise of military “legislative power,” to match the military “judicial power”? And as Justice Thomas recognized, his view also led him to deny that administrative agencies exercise executive power in adjudication, even though that is the only kind of power they can permissibly exercise.²²³ At the same time, he was unwilling to conclude that tribunals such as “law-of-war military commissions” necessarily exercised judicial power.²²⁴

“All else being equal,”²²⁵ these surprising claims are a mark against seeing military courts as exercising a non-textual military judicial power. It is far more straightforward to describe all of the executive’s military power – rulemaking, law execution, and adjudication – as simply executive power.²²⁶

b. Temporary Pre-Adjudication Deprivations

²¹⁹ William Whiting, *The Government’s War Powers under the Constitution of the United States* 179 (1864).

²²⁰ 2 William Winthrop, *Military Law* 53 (1886) (emphasis added).

²²¹ *Ortiz*, 138 S. Ct. at 2174 (citing *Grafton v. United States*, 206 U.S. 333, 345 (1907)).

²²² *Id.* at 2201 (Alito, J., dissenting) (citing *Swaim v. United States*, 165 U.S. 553, 564-566 (1897); *Ex Parte Reed*, 100 U.S. 13, 20 (1879)).

²²³ *Ortiz*, 138 S. Ct. at 2188-2189 (Thomas, J., concurring).

²²⁴ *Id.* at 2188 n. 4 (Thomas, J. concurring) (“expressing no view” on an argument made by Jesse Choper & John Yoo, *Wartime Process: A Dialogue on Congressional Power to Remove Issues from the Federal Courts*, 95 *Cal. L. Rev.* 1243, 1283 (2007) that such commissions “might better be understood as exercising the President’s power to conduct war, not judicial power.”).

²²⁵ Cf. William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 *Nw. U. L. Rev.* at 8-9 (forthcoming 2019) <https://ssrn.com/abstract=3324308>.

²²⁶ The same would also be true under arguments made by Sai Prakash, that military courts must be authorized by Congress rather than by the executive. Sai Prakash, *The Imbecilic Executive*, 99 *Va. L. Rev.* 1361, 1388-89 (2013); Sai Prakash, *The Separation and Overlap of War and Military Powers*, 87 *Tex. L. Rev.* 299, 328-30 (2008). It is simpler to see the executive as executing military statutes by Congress, rather than seeing Congress as vesting a form of judicial power not mentioned in Article III (and therefore not even clearly within Congress’s enumerated powers).

Two other oddities of tradition suggest one other possible entrant into this category: very brief deprivations of liberty or property antecedent to an actual adjudication. It is possible that one could say that such deprivations are so brief that one could resist considering them deprivations at all; but it may be more transparent, if less tidy, to unite them here.

The first oddity is the procedure underlying the Supreme Court's decision of *Murray's Lessee v. Hoboken Improvement Company*.²²⁷ In *Murray's Lessee* the Court confronted the legality of the seizure of property by a "distress warrant."²²⁸ In short, the warrant allowed the government to seize a person's property to cover unpaid tax revenue (here, a corrupt tax collector who absconded with over \$1,000,000 in government funds).²²⁹ The federal law authorizing the warrant also gave the property owner to challenge it in front of an Article III court, but the government could take the property first and did not have to wait for an adjudication unless the court issued an injunction.²³⁰ This might seem to allow a deprivation of property without judicial power, and hence without due process of law.²³¹

The Court upheld the seizure nonetheless, in a somewhat long opinion that united the Article III and Due Process challenges,²³² and that made famous the phrase "public rights" in this context.²³³ Unlike most other public rights cases, the seizure was seemingly a deprivation of property, in which case it cannot be upheld as a non-deprivation. It would instead reflect some reason that the non-judicial deprivation nonetheless satisfied due process;²³⁴ but what?

²²⁷ 59 U.S. 272 (1855).

²²⁸ *Id.* at 274.

²²⁹ Nelson, *supra* note 13, at 587; Gordon G. Young, Public Rights and the Federal Judicial Power: From *Murray's Lessee* Through *Crowell* to *Schor*, 35 *Buff. L. Rev.* 765, 791 (1986).

²³⁰ An Act providing for the better organization of the Treasury Department, Section 4, 3 Stat. 592, 595 (May 15, 1820) ("if any person should consider himself aggrieved by any warrant issues under this act, he may prefer a bill of complaint to any district judge of the United States . . .").

²³¹ If one took the view that due process/judicial process requirements were limited to *de jure* changes in legal rights, and not *de facto* deprivations through physical seizures, then one might be able to say that *Murray's Lessee* did not involve a deprivation. If Swartout owed money to the government, the government was simply using the same kind of statutory powers that any creditor might have. Thanks to Harrison, *supra* note 31, at 11-12, and a conversation with John Harrison for this point. See also *id.* at 12. ("In *Murray's Lessee*, the government as creditor could take an act adverse to Swartout's interest but not violating his rights"). One might also say the same about arrests, discussed in this section.

²³² *Murray's Lessee*, 59 U.S. at 275 ("The question, whether these acts were an exercise of the judicial power of the United States, can best be considered under another inquiry, raised by the further objection of the plaintiff, that the effect of the proceedings authorized by the act in question is to deprive the party, against whom the warrant issues, of his liberty and property, 'without due process of law;' and, therefore, is in conflict with the fifth article of the amendments of the constitution").

²³³ *Id.* at 284 ("there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.").

²³⁴ *Id.* at 280 ("though 'due process of law' generally implies and includes . . . a trial according to some settled course of judicial proceedings, yet, this is not universally true").

One possibility is that it is simply a holding that tax collection, like the military, is an exception to the normal due process requirements, for reasons of widely-accepted historical practice. The Court pointed out at length that the distress procedures “do not differ in principle from those employed in England from remote antiquity—and in many of the States, so far as we know without objection—for this purpose, at the time the constitution was formed,”²³⁵ and that the tax procedures had long “varied widely from the usual course of the common law on other subjects.”²³⁶ It wrote: “probably there are few governments which do or can permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others . . .”²³⁷ The opinion therefore could support a form of tax procedure exceptionalism, on historical grounds.

But there is another possibility. As noted above, the procedures in *Murray’s Lessee* did permit judicial review, just as quickly as the property owner wished to file for it. And while it is not evident from the Court’s opinion,²³⁸ it has been suggested that some kind of judicial remedy was indispensable to the constitutionality of the seizure, either because otherwise the warrant would not be “lawful” and would not provide official immunity from tort,²³⁹ or because otherwise the owner would have an ejectment suit against subsequent purchasers.²⁴⁰ If so, then there might be a different way to understand the category of deprivation authorized by *Murray’s Lessee* – as a temporary deprivation antecedent to judicial review.

This understanding would also make sense of a related phenomenon that has been well-established in the law since the founding: the ability of police officers and others to make warrantless arrests.²⁴¹ An arrest is also a deprivation of liberty, and a warrantless arrest is one that occurs without judicial process. At the same time, precedent and longstanding practice have provided an important constraint on arrests -- the requirement that the arrestee be brought promptly before a judge who can adjudicate his prospective detention.²⁴² And in the federal system today, the initial

²³⁵ Id. at 282.

²³⁶ Id. at 278.

²³⁷ Id.

²³⁸ Indeed, the Court opined that the availability of judicial review was *not* constitutionally required and “simply waives a privilege which belongs to the government.” Id. at 284. Accord Harrison, *supra* note 31, at 18 n. 94 (“The privilege of suing the government includes but is not limited to a waiver of sovereign immunity”).

²³⁹ Pfander, *supra* note 27, at 736 n. 433.

²⁴⁰ Nelson, *supra* note 13, at 588 n.109 (citing *Rhinehart v. Schuyler*, 7 Ill. (2 Gilm.) 473, 527 (1845) & *Baker v. Kelley*, 11 Minn. 480, 499 (1866)).

²⁴¹ Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 576-583 (1999); Laura K. Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181, 1223-1231 (2016); Telford Taylor, *Two Studies in Constitutional Interpretation*, 27-29, 46-50 (1969).

²⁴² *Gerstein v. Pugh*, 420 U.S. 103, 112-116 (1975); see also *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

determination is often provided by a non-Article III magistrate judge, but there is a right of “prompt[]” review by an Article III judge as well.²⁴³

So perhaps *Murray’s Lessee* and the history of arrests are best seen as two traditional instances of another principle: that an immediate but brief deprivation of liberty or property is permissible when judicial adjudication is soon to follow.²⁴⁴

c. A Note on Jural Rights

There is one alternative way to conceive of these deprivations that may be theoretically tidier and more satisfying, even if it is doctrinally more radical. That would be to distinguish between *physical* deprivations and *legal* ones. One could see the Due Process Clause as technically applying only to legal deprivations. The executive cannot – or in Hohfeldian terms, the executive has a disability, or a lack of power – to change people’s legal rights to life, liberty, or property. When the executive kills or imprisons or seizes, those are physical acts over which the Due Process Clause does not reign. But those acts may turn out to violate the underlying positive law, which (again) is protected by the Clause.²⁴⁵

Again, this view is doctrinally radical,²⁴⁶ but if it were accepted it might be the tidiest way to explain the above deprivations. In each case, the executive can lawfully kill or seize to the extent actually authorized by positive law. The due process clause does not require any judicial process of any kind before those physical acts happen. The physical acts are either lawful, or not, depending on the positive law and its application of the facts – the law of war (and whether the military action was consistent with it), the law of distraint (and whether Swartout had embezzled the money), the law of arrest (and whether the suspect had committed a felony). What the Due Process Clause would protect would be the jural rights that make those seizures lawful or not. And if they were not, it would likely be possible to vindicate those jural rights in the courts. But this would explain why due process did not require judicial involvement before the physical acts.

In any event, whether to rethink executive power and due process more broadly is beyond this article’s scope. Whether one finds this account helpful, one does not need to go down this road to make sense of non-Article-III adjudication more generally.

C. No Power

²⁴³ 18 U.S.C. 3145. Moreover, district courts “may, at their own discretion, independently review the magistrate’s order and conduct any necessary evidentiary hearings or receive additional affidavits.” Michael O’Neill, A Two-Pronged Standard of Appellate Review for Pretrial Bail Determinations, Yale L.J. 885, 891 (1990).

²⁴⁴ As discussed later, twentieth century case law has further complicated this historical category by requiring non-judicial adjudicative procedures before some, but not all, deprivations of some new forms of property. See *infra* notes 412-417 and accompanying text.

²⁴⁵ I am indebted to John Harrison for this suggesting some of these ideas, but he is blameless for any erroneous implications of them.

²⁴⁶ See, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 84 (1972).

While the foregoing categories exhaust the most widely-cited traditional “exceptions” to Article III, there is one other category left. These are tribunals that do not exercise any power at all. They need not be vested with judicial power or executive power by any government, instead deriving their authority from another government official to which they serve as an “adjunct,” or from the consent of the litigants.

1. Adjuncts

Not everybody who works in a federal courthouse has an Article III commission. A federal law clerk presents no Article III problem even if he or she exercises their own judgment about who should win a case and drafts an opinion accordingly, because that opinion can only see the light of the day if it is approved by an Article III judge. More consequentially, on many legal matters non-life-tenured magistrate judges can issue “proposed findings and recommendations” subject to review by an Article III judge.²⁴⁷

The same principle was present historically in the work of the federal “commissioners” authorized in the early Nineteenth century, the forerunners of today’s magistrate judges. Commissioners were permitted to take on various tasks of the local federal court, such as accepting bail and affidavits, but it has been stressed that they “had *no* arrest or imprisonment powers,” and therefore did not amount to a “minor federal judiciary.”²⁴⁸ Indeed, in 1850, when the commissioners were given the power to render allegedly fugitive slaves under controversial federal legislation, there were serious objections based on Article III, which turned on whether the new rendition proceedings were still sufficiently ministerial and preliminary as to be analogous to traditional criminal extradition.²⁴⁹

These participants in the adjudication process need not hold life-tenured judgeships because they do not themselves exercise any judicial power; nor do they exercise executive power. Rather, they help the life-tenured judges who staff the Article III courts exercise their judicial power. They are “adjuncts” to the real subjects of Article III.

This principle of judicial “adjuncts” was later discussed and likely stretched by various cases, such as *Crowell v. Benson*, which upheld the power of administrative commissioners to conclusively adjudicate facts relevant to federal workers compensa-

²⁴⁷ 28 U.S.C. 636 (b)(1).

²⁴⁸ Charles A. Lindquist, *The Origin and Development of the United States Commissioner System*, 14 *Am. J. Legal Hist.* 1, 6 (1970).

²⁴⁹ See generally Jeffrey M. Schmitt, *The Antislavery Judge Reconsidered*, 29 *Law & Hist. Rev.* 797, 806-09 (2011) (recounting arguments on both sides). In *Ableman v. Booth*, 62 U.S. 506, 526 (1858), the Taney Court expressed its opinion that “the act of Congress commonly called the fugitive slave law is, in all of its provisions, fully authorized by the Constitution of the United States.”

tion claims by analogy to the use of special masters, commissioners, and other adjuncts.²⁵⁰ Locating the permissibility of adjuncts in this category will help us see what its scope should be: adjuncts are constitutionally permissible only to the extent that they are not the ones responsible for the exercise of judicial or executive power.

2. Consent

Judicial “adjuncts” such as magistrate judges sometimes also adjudicate by consent. Federal statutes permit magistrate judges to adjudicate civil cases and criminal misdemeanors based on party consent.²⁵¹ And the Supreme Court has specifically held that magistrate judges may select the criminal jury for a felony trial if the parties consent to it,²⁵² but cannot do so if the parties object.²⁵³

Consent also underlies various forms of private adjudication that substitutes for federal courts. Private commercial agreements allow arbitrators to adjudicate disputes about federal law or other controversies within federal jurisdiction. This adjudication generally derives from the parties’ agreement to arbitrate.²⁵⁴ Under federal arbitration law, these verdicts are enforced by federal courts, but cannot be re-adjudicated by them.²⁵⁵

So too, religious courts can hear disputes between those who choose to follow the principles of a given faith.²⁵⁶ As Michael Helfand has written, “the decisions of both religious arbitration tribunals and constitutionally protected religious courts are insulated from civil court review because the parties have explicitly or implicitly consented to the alternative dispute resolution process.”²⁵⁷

Supreme Court precedent on non Article III courts has placed some weight on consent. It was deemed to be “relevan[t]” but not always “dispositive” in upholding the adjudication in *CFTC v. Schor*.²⁵⁸ And it proved decisive in *Wellness International*

²⁵⁰ *Crowell v. Benson*, 285 U.S. 22, 51-52 (1932). See Nelson, *supra* note 29, at 599-602 for discussion; see also Fallon, *supra* note 13, at 926 (“Crowell had scarcely been decided before the lines that it drew to protect the role of article III courts .. began to erode.”).

²⁵¹ 18 U.S.C. 3401 (b); 28 U.S.C. 636(c). The statutes also permit magistrate judges to adjudicate so-called “petty offenses” without consent, a practice that is likely unconstitutional. See *infra* Part III.B.3.

²⁵² *Peretz v. United States*, 501 U.S. 923 (1991)

²⁵³ *Gomez v. United States*, 490 U.S. 858 (1989). This is a statutory violation. It is unclear whether the Supreme Court would think it unconstitutional if the statute permitted it. *Peretz*, 501 U.S. at 936.

²⁵⁴ See, e.g., *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (“Arbitration under the [Federal Arbitration] Act is a matter of consent, not coercion”). I am not referring to mandatory arbitration required by federal statute, such as that upheld in *Thomas v. Union Carbide Agr. Prod. Co.*, 473 U.S. 568, 571 (1985).

²⁵⁵ 9 U.S.C. 2.

²⁵⁶ There are also foreign courts in some nations that apply principles of religious law, see, e.g., David J. Karl, *Islamic Law in Saudi Arabia: What Foreign Attorneys Should Know*, 25 *Geo. Wash. J. Int'l L. & Econ.* 131, 151-64 (1992); those courts would instead exercise the judicial power of another government. See *supra* part II.A.4.

²⁵⁷ Michael A. Helfand, *Litigating Religion*, 93 *B.U. L. Rev.* 493, 525 (2013).

²⁵⁸ *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 849, 852 (1986).

v. Sharif, where a 6-3 majority of the Court upheld bankruptcy adjudication by consent,²⁵⁹ even though a 5-4 majority of the same Court had recently held the same kind of adjudication unconstitutional when there was an objection.²⁶⁰

Others have expressed doubt. As the dissent in *Wellness* pointed out, consent cannot usually cure a separation of powers problem.²⁶¹ Many scholars have similarly questioned the ability of consent to legitimate non-Article III adjudication.²⁶²

Locating non-Article III adjudication helps us see the power reflected by consent. Arbitrators and magistrates do not exercise judicial power, whether of the United States or any other government.²⁶³ But their adjudication of federal claims is nonetheless permissible.

It is true, as the skeptics argue, that consent cannot confer judicial power.²⁶⁴ But it can make judicial power unnecessary. Judicial power is necessary because the due process clause gives one a right to it. But if one waives that right, then judicial power is no longer necessary. Indeed, no power is necessary, other than the ordinary powers of contract that can be bestowed upon anybody.

III: Implications

All of this is to say that the supposed conflict between constitutional text and historical practice is not a deep one at all. That is not to say that *every* current form of non-Article III adjudication is lawful; but we are not put to a choice between the constitution's text and the broad sweep of history. Once we have closer attention to the separation of powers, it is quite plausible that Article III's meaning has been properly "liquidated"²⁶⁵ through such examples as territorial courts, public rights, and military courts. All of them cohere with the text and structure of the Constitution.

There are further implications. Once we understand the powers behind various forms of non-Article III adjudication, we can do more than simply muddle through with our current mix of text and practice. We can better understand the structure of non-Article III adjudication – its implications for appeals, removal, and the like – and we can better understand its lawful substance – what other forms of non-Article III adjudication might be permissible by analogy to the traditional practices.

²⁵⁹ *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1938 (2015).

²⁶⁰ *Stern v. Marshall*, 564 U.S. 462, 131 S. Ct. 2594, 2595 (2011). Justices Alito and Kennedy voted with the majority in both cases.

²⁶¹ So too the dissent in *Schor*. 478 U.S. 866-67 (Brennan, J., dissenting).

²⁶² See, e.g., F. Andrew Hessick, *Consenting to Adjudication Outside the Article III Courts*, 71 *Vand. L. Rev.* 715 (2018); Peter B. Rutledge, *Arbitration and Article III*, 61 *Vand. L. Rev.* 1189, 1197 (2008).

²⁶³ But see Roger J. Perlstadt, *Article III Judicial Power and the Federal Arbitration Act*, 62 *Am. U. L. Rev.* 201, 226 (2012) (“[T]hough arbitrators, like state court judges, are not United States officers, they are nonetheless exercising the judicial power of the United States when they adjudicate Article III disputes”).

²⁶⁴ Hessick, *supra* note 262, at 718.

²⁶⁵ See generally Baude, *Liquidation*, *supra* note 12.

In particular, several features of existing non-Article-III adjudication are unconstitutional – the independent exercise of power by bankruptcy judges, the adjudication of petty offenses by magistrate judges, and the current removal restrictions for the U.S. Court of Claims. Additionally, at least one recent Supreme Case (*Ortiz v. United States*) rests on a mistaken theory of non-Article-III adjudication. And future litigation can hopefully proceed with a better roadmap back to the Constitution.

A. The Structure of Non-Article III Adjudication

1. Legislative Courts or Executive Power?

Terminology is destiny. Cases and commentary frequently differentiate between so-called legislative courts and administrative agencies, but is there really a difference between them? And are legislative courts truly “courts,” in the constitutional sense? One article confidently asserts: “no one could reasonably believe that legislative courts are not properly deemed ‘courts.’”²⁶⁶ Another article, written a few years earlier, counters that “strictly speaking, ‘legislative courts’ are neither legislative nor courts; rather, they are executive agencies.”²⁶⁷ The latest edition of Hart and Wechsler posits some possible distinctions between the two.

Locating non-Article III adjudication within the Constitution answers these questions, with important implications for the powers and place of these tribunals. Territorial courts, state courts, tribal courts, and foreign courts all exercise judicial power and so they are – in the constitutional sense – genuinely courts. By contrast, tribunals that are justified because they deal with public rights or the military must be part of the executive branch, so while we might colloquially call some of them “legislative courts,” in the constitutional sense they are not.

In sum, so-called legislative “courts” do exist, but the only traditional example that is not a misnomer are territorial courts. Bankruptcy courts, military courts, the tax court, and the court of claims are not courts, in the constitutional sense. This conclusion has at least two further implications.

2. Supreme Court Appellate Jurisdiction

First, understanding which of these tribunals are courts helps to situate them more properly within the appellate system. Last term, the Supreme Court confronted one aspect of this question in *Ortiz v. United States*, where Professor Aditya Bamzai made an unusual and impressive intervention as amicus curiae to challenge the Court’s jurisdiction. *Ortiz* was an appeal of a conviction to the U.S. Supreme Court

²⁶⁶ Martin H. Redish & Daniel J. La Fave, Seventh Amendment Right to Jury Trial in Non-Article III Proceedings: A Study in Dysfunctional Constitutional Theory, 4 Wm. & Mary Bill Rts. J. 407, 433 (1995).

²⁶⁷ Akhil Reed Amar, Marbury, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U. Chi. L. Rev. 443, 499 (1989). Amar does concede that “Nonetheless they may function somewhat like courts.” Id.

from the Court of Appeals for the Armed Forces. Or was it? For on closer examination, it is doubtful that the Court of Appeals for the Armed Forces is truly a “court,” in the constitutional sense, or that Ortiz’s action was really an appeal.

The Supreme Court, in an opinion written by Justice Kagan, concluded that appellate jurisdiction was fine.²⁶⁸ A federal statute enacted in 1983 authorizes the U.S. Supreme Court to review “[d]ecisions of the United States Court of Appeals for the Armed Forces . . . by writ of certiorari.”²⁶⁹ And as the Court noted, it had “previously reviewed nine CAAF decisions without anyone objecting that we lacked the power to do so.”²⁷⁰

The sticking point comes from Article III’s description of the Supreme Court’s jurisdiction. The Court’s “original” jurisdiction is limited to cases “affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a party.”²⁷¹ All other cases, such as the federal law criminal proceedings that come out of the CAAF, are only within the Supreme Court’s appellate jurisdiction. And according to no less an authority than *Marbury v. Madison*, Congress cannot move any cases from the Court’s appellate jurisdiction to the original jurisdiction.²⁷²

This question of appellate jurisdiction turned on whether CAAF was a court. As the majority acknowledged, “our appellate jurisdiction permits us to review only prior judicial decisions, rendered by courts.”²⁷³ In *Marbury*, the Court had rejected jurisdiction to review the actions of an executive branch official, James Madison.²⁷⁴ In the Civil War case of *Ex parte Vallindigham*, the Court had rejected jurisdiction to review the actions of a military commission.²⁷⁵ If CAAF is like those executive bodies, appellate jurisdiction is improper.

The majority rejected these analogies, however, emphasizing the “military justice system’s essential character – in a word, judicial.”²⁷⁶ This “judicial character” was marked by extensive procedural protections, preclusive judgments, and a jurisdiction and structure similar to civilian courts.²⁷⁷ But locating non-Article III adjudication helps us to see why the Court was wrong and Professor Bamzai was right. Military tribunals may have judicial *character*, but they do not have judicial *power*.

²⁶⁸ Ortiz v. United States, 138 S. Ct. 2165 (2018)

²⁶⁹ 28 U.S.C. 1259.

²⁷⁰ 138 S. Ct. at 2173.

²⁷¹ U.S. Const. art. III, § 2, cl. 2.

²⁷² *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 174-75 (1803) (“If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. . . . To enable this court then to issue a mandamus, it must be shewn to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.”).

²⁷³ 138 S. Ct. at 2174 n.4 (citing *Ex parte Yerger*, 8 Wall. 85, 97 (1869); *The Alicia*, 7 Wall. 571, 573 (1869); *Cohens v. Virginia*, 6 Wheat. 264, 396 (1821); *Ex parte Bollman*, 4 Cranch 75, 101 (1807); *Marbury*, 1 Cranch at 175).

²⁷⁴ 1 Cranch (5 U.S.) 137 (1803).

²⁷⁵ 1 Wall. 243 (1864).

²⁷⁶ 138 S. Ct. at 2174.

²⁷⁷ *Id.* at 2174-75.

The majority also relied on a different analogy, pointing to the cases that had recognized the Supreme Court’s appellate jurisdiction over state courts²⁷⁸ and territorial courts²⁷⁹ (as well as the widespread assumption that it could exercise appellate jurisdiction over the DC courts).²⁸⁰ But once again, locating non-Article III adjudication lets us see this as a non-sequitur. In *Marbury* and *Vallandigham*, where jurisdiction was forbidden, the proceeding was executive power. In the states and territories, where appellate jurisdiction was permitted, the lower courts exercised judicial power, so appellate review made perfect sense.²⁸¹ But CAAF exercises executive power, so it belongs with the former group. In saying that “The non-Article III court-martial system stands on much the same footing as territorial and D.C. courts,”²⁸² the majority made exactly the mistake that this Article hopes to correct.

Justice Thomas’s concurring opinion confronted the question of judicial power much more directly, concluding that the appeal was proper because “CAAF exercises a judicial power.”²⁸³ Following Caleb Nelson’s suggestion discussed in Part II, he concluded that Article III’s vesting clause “must be read against ‘commonly accepted background understandings and interpretive principles in place when the Constitution was written, including the principle that general constitutional rules could apply ‘differently to civil than to military entities.’”²⁸⁴ In other words, he endorsed Nelson’s conclusion that Article III does not in fact vest the entire “judicial power of the United States” but only the “[civil] judicial power of the United States” leaving the “[military] judicial power” somewhere else.

For the reasons discussed above, I do not think this is the most fitting reading of Articles II and III, though it is not without some support. And even Justice Thomas acknowledged that he might reach a different conclusion for “other military courts, such as courts-martial or military commissions,” which might be non-judicial because “their proceedings are ‘summary’ and create no record to support writ of error review”²⁸⁵ or because they “might be better understood as exercising the President’s power to conduct war, not judicial power.”²⁸⁶ Justice Thomas was asking exactly the right question, even if his answer to it was debatable.

Alas, it was only the dissenting opinion by Justice Alito (joined by Justice Gorsuch) that got it exactly right:

²⁷⁸ Id. at 2176 (citing *Martin v. Hunter’s Lessee*, 1 Wheat. 304 (1816)).

²⁷⁹ Id. at 2176-2177 (citing *United States v. Coe*, 155 U.S. 76 (1894)).

²⁸⁰ Id. at 2177-2178.

²⁸¹ But see Charles Wright, *The Law of Federal Courts* 41-42 (4th ed. 1983) (arguing that it does not).

²⁸² Id. at 2178.

²⁸³ Id. at 2186 (Thomas, J., concurring)

²⁸⁴ Id. (citing Mascott, *Who Are “Officers of the United States”?* 70 *Stan. L. Rev.* 443, 480–483 (2018).

²⁸⁵ Id. at 2188 n.4 (Thomas, J., concurring) (summarizing Pfander, *supra* note 27, at 723 n.358).

²⁸⁶ Id. at 2188 n. 4 (Thomas, J. concurring) (summarizing Jesse Choper & John Yoo, *Wartime Process: A Dialogue on Congressional Power to Remove Issues from the Federal Courts*, 95 *Cal. L. Rev.* 1243, 1283 (2007)).

Our appellate jurisdiction permits us to review one thing: the lawful exercise of *judicial* power. Lower federal courts exercise the judicial power of the United States. State courts exercise the judicial power of sovereign state governments. Even territorial courts, we have held, exercise the judicial power of the territorial governments set up by Congress. Executive Branch officers, on the other hand, cannot lawfully exercise the judicial power of *any* sovereign, no matter how court-like their decisionmaking process might appear. That means their decisions cannot be appealed directly to our Court.²⁸⁷

I couldn't have said it better myself.

Justice Alito was also likely right in a later observation about the Supreme Court's decisions in *Hirota v. McArthur* and other cases arising out of the post-World-War-II military tribunals. Alito quoted Hart & Wechsler to observe that "after World War II we received 'more than a hundred' habeas petitions from individuals in the custody of 'various American or international military tribunals abroad,' almost none of whom had 'first sought [relief] in a lower federal court.' Consistent with *Marbury*, we denied review in every one."²⁸⁸

The central example, *Hirota*, resulted in a short per curiam opinion in which the Supreme Court held that it lacked power to review judgments imposed by "a military tribunal in Japan."²⁸⁹ According to the Court, it lacked jurisdiction because "the tribunal sentencing these petitioners is not a tribunal of the United States."²⁹⁰ This rationale is susceptible to at least three interpretations:²⁹¹ (1) that the tribunal was foreign, and that was a constitutional problem; (2) that the tribunal was foreign and that was a non-constitutional problem; (3) that the tribunal was not a court. The third rationale, apparently invoked by Justice Alito, is correct.²⁹²

The second rationale, that as a non-constitutional matter, the Supreme Court lacked jurisdiction over foreign tribunals, is at least plausible. But it would be wrong to endorse the first rationale, that the Supreme Court could *never* constitutionally exercise appellate jurisdiction over any foreign tribunal, if affirmatively granted by statute. Unfortunately, the D.C. Circuit did subsequently make that claim in *Ex Parte Flick*, seemingly interpreting *Hirota* to erect a *constitutional* bar to any federal jurisdiction over foreign judicial tribunals.²⁹³ *Flick* is mistaken in this respect, and the

²⁸⁷ Id. at 2190.

²⁸⁸ Id. at 2195 (quoting R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 292-93 (7th ed. 2015)).

²⁸⁹ *Koki Hirota v. Gen. of the Army MacArthur*, 338 U.S. 197, 198 (1948).

²⁹⁰ Id.

²⁹¹ See Stephen I. Vladeck, *Deconstructing Hirota: Habeas Corpus, Citizenship, and Article III*, 95 *Geo. L. J.* 1497, 1518-22 (2007), for at least two possible readings of the decision.

²⁹² It also appears consistent with *In re Yamashita*, 327 U.S. 1, 8 (1946) ("In the present cases it must be recognized throughout that the military tribunals which Congress has sanctioned by the Articles of War are not courts whose rulings and judgments are made subject to review by this Court").

²⁹³ *Flick v. Johnson*, 174 F.2d 983 (D.C. Cir. 1949). The D.C. Circuit's opinion does not explicitly say whether the bar is constitutional or non-constitutional, but in the context of then-extant D.C. Circuit

opinion in *Hirota* is unfortunate in its ambiguity. So long as such a tribunal exercises foreign judicial power,²⁹⁴ it is as much a candidate for appellate review as a state or territorial court.

In any event, military tribunals aside, the question of appellate jurisdiction remains a more general one. As the most recent edition of Hart & Wechsler notes, apart from CAAF:

Could Congress provide for direct Supreme Court review of an NLRB decision in an unfair labor practice proceeding? If not, what distinguishes the NLRB from the Court of Appeals for the Armed Services? The label “court”? The fact that the court, unlike the NLRB, engages exclusively in adjudication?

Finally, consider the trend toward the greater use of multinational tribunals, in which American officials participate, to adjudicate disputes arising under international agreements to which the United States is a party. Could the Supreme Court review a decision rendered by such a tribunal?²⁹⁵

Locating non-Article-III tribunals helps us to answer. No, the Constitution does not permit the Supreme Court to directly review decisions by the National Labor Relations Board, because it lacks any judicial power – even if one accepts the arguments about the special judicial powers of courts martial.²⁹⁶ On the other hand, the Supreme Court could potentially review the decision of a multinational tribunal, assuming it was properly vested with the judicial power of a foreign sovereign or international law.²⁹⁷

3. Removal

Non-Article III adjudication also raises questions of independence; can non-Article III “judges” be given some form of “judicial” independence? Article III judges, of course, hold their offices during good behavior. Members of the executive branch are subject to (some degree of) executive control. So-called “legislative” courts appear to fall into a confusing middle zone.

opinion in *Eisentrager v. Forrestal*, 174 F.2d 961 (D.C. Cir. 1949), rev’d 339 U.S. 763 (1950), Vladeck argues that it must have been a holding on “*constitutional* jurisdiction. . . ; a statutory holding to the contrary would have been inconsistent with *Eisentrager*.” Vladeck, *supra* note 291, at 1527.

²⁹⁴ Cf. *Flick*, 174 F.2d at 986 (describing Military Tribunal IV as “a court of international character” and an “appropriate instrument[] of judicial power for the trial of war criminals).

²⁹⁵ R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 292-93 (7th ed. 2015).

²⁹⁶ But cf. Fallon, *supra* note 14, at 963 n. 262 (“When an administrative decision has occurred in a context that bears all the hallmarks of an adjudicating, the dispute has already been treated as a ‘case.’”).

²⁹⁷ *Id.*; see *supra* Part II.A.4.

Locating non-Article-III adjudication helps us navigate that middle zone. Those adjudicators who wield executive power are in the executive branch and so subject to the ordinary executive removal power. Those who wield judicial power or no power lie elsewhere, and so a removal power is not required, though it may be permitted.

a. The Permissibility of Executive Removal: The Tax Court

Recent litigation about removal has confronted the United States Tax Court. Understanding this litigation requires a brief detour into the tax court’s history and structure: it has gone through several iterations, originally established in 1924 as the Board of Tax Appeals, renamed in 1942 as the Tax Court of the United States, and reconstituted in 1969 as the United States Tax Court.²⁹⁸ In providing a forum for pre-collection tax disputes with the federal government, it exercises executive power. Its legal structure and constitutional status, however, has frequently caused confusion, as Congress has repeatedly tried to assign it places in the constitutional structure that may not exist: first as “an independent agency in the executive branch of the Government;”²⁹⁹ then as an executive branch agency nonetheless called a “Court;”³⁰⁰ and then as a so-called “Article I” court, “established, under article I of the Constitution of the United States” as “a court of record.”³⁰¹

The Supreme Court first split about the status of the Tax Court in *Freytag v. Commissioner*, which considered the constitutional question of whether the Chief Judge of the Tax Court could appoint special trial judges for the court.³⁰² Such trial judges, the Court held, were constitutionally “inferior officers” whose appointments could be vested “in the President alone, in the Courts of Law, or in the Heads of Departments.”³⁰³

The majority opinion by Justice Blackmun concluded, quite plausibly, that the appointments clause’s reference to “courts of law” referred to courts that exercised “the judicial power.”³⁰⁴ As discussed above, it is exercising judicial power that makes a court, in the constitutional sense.³⁰⁵ But it then concluded, much less plausibly, that

²⁹⁸ Harold Dubroff & Brant J. Hellwig, *The United States Tax Court: An Historical Analysis* 175 (2d ed. 2014).

²⁹⁹ Revenue Act of 1924, ch. 234, §§ 900(a), (k), 43 Stat. 336, 338; on the possible non-existence of independent agencies, see Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 *Cornell L. Rev.* 769 (2013); Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush 4* (2008).

³⁰⁰ Revenue Act of 1942, ch. 619, § 504, 56 Stat. 957; on the non-existence of executive branch “courts,” see *supra* Part III.A. Dubroff describes the name change as “innocuous” and expresses puzzlement at the “substantial opposition” it drew. Dubroff & Hellwig, *supra* note 298, at 190.

³⁰¹ Tax Reform Act of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 730; on the misunderstanding of “article I” courts, see *supra* nn. **Error! Bookmark not defined.**-64 and accompanying text.

³⁰² *Freytag v. Commissioner*, 501 U.S. 868 (1991).

³⁰³ U.S. Const. art. II, sec. 2.

³⁰⁴ *Freytag*, 501 U.S. at 889-92.

³⁰⁵ See *supra* Part III.A.2.

the tax court exercised the judicial power – and not just any judicial power, but the judicial power of the United States. It stated: “Our cases involving non-Article III tribunals have held that these courts exercise the judicial power of the United States,”³⁰⁶ a conclusion it derived from *American Insurance v. Canter* and *United States v. Williams*.³⁰⁷ It also argued that a contrary conclusion about the tax court “would undermine longstanding practice” permitting legislative courts,³⁰⁸ and pointed to an 1839 precedent seeming to bless its position: “since the early 1800’s, Congress regularly granted non-Article III territorial courts the authority to appoint their own clerks of court, who, as of at least 1839, were ‘inferior Officers’ within the meaning of the Appointments Clause.”³⁰⁹

We can now see how the majority’s reasoning was confused. No non-Article III tribunal can exercise the judicial power of the United States. Some of those tribunals exercise other governments’ judicial power, and some exercise no judicial power. Hence it is no surprise that the non-Article III tribunals given the appointment power in the early 1800s were territorial courts. Territorial courts are one of the few such tribunals that are actual courts, exercising a form of the judicial power. But the tax court does not have any valid source of judicial power. It was a mistake to extend the logic of territorial courts to it, and it is not a court in the constitutional sense.³¹⁰

Justice Scalia wrote a concurrence for four justices that came much closer to the mark. He agreed that the chief judge could make the appointments, but for the very different reason that the tax court was a department in the executive branch.³¹¹ Whatever the definition of “department,” Scalia’s account of the tax court’s location is more plausible. He correctly generalized that apart from entities like territorial courts, so-called Article I courts and administrative agencies were structurally identical.³¹² Scalia also correctly noted that “the powers exercised by territorial courts tell us nothing about the nature of an entity, like the Tax Court, which administers the general laws of the Nation,”³¹³ and that the territorial courts did not “exercise any national judicial power.”³¹⁴

Freytag’s confusion about appointments has created confusion about removal. Consider the problem confronted by the D.C. Circuit in *Kuretski v. Commissioner*.³¹⁵ The Kuretskis were non-taxpayers who challenged the adjudication of the Tax Court because federal law authorizes the President to remove its members for “inefficiency,

³⁰⁶ Freytag, 501 U.S. at 889.

³⁰⁷ See supra nn. 55-67 for *Canter*. *Williams* was a case dating back to the period of confusion about the Court of Claims, see infra n. 332, which specifically and wrongly insisted that the Court of Claims exercised “judicial power.” *Williams v. United States*, 289 U.S. 553, 565 (1933).

³⁰⁸ Freytag, 501 U.S. at 890.

³⁰⁹ *Id.* at 892 (citing *In re Hennen*, 13 Pet., at 258.).

³¹⁰ *Williams* was more relevant, but also, as we have seen, confused and wrong.

³¹¹ Freytag, 501 U.S. at 901 (Scalia, J., concurring).

³¹² *Id.* at 912.

³¹³ *Id.* at 914.

³¹⁴ *Id.* at 913 (emphasis added).

³¹⁵ 755 F.3d 929 (2014).

neglect of duty, or malfeasance in office.”³¹⁶ If the Tax Court is really a court, exercising “judicial power,” reasoned the Kuretskis, then what business does the President have supervising and removing its judges?

The D.C. Circuit rejected the challenge, in an insightful opinion by Judge Srinivasan. Judge Srinivasan concluded that the Tax Court was in constitutional reality a part of the executive branch, so that the removal provisions posed no problem. Despite Congress’s declaration that the Tax Court was “established, under article I of the Constitution of the United States, [as] a court of record,”³¹⁷ and despite previous references to it as a “legislative court,” the D.C. Circuit relied on the statutory predecessors of the Tax Court and the longstanding tradition of executive assessment of taxation.³¹⁸ The Tax Court was an “Executive Branch entity” and “its judges are ‘Executive officers.’”³¹⁹

The decision has been criticized,³²⁰ but as a constitutional matter, all of this seems quite right. To be sure, this required the D.C. Circuit to wriggle out from under some dicta in *Freytag*, such as Justice Blackman’s statement that the Tax Court “exercises a portion of the judicial power of the United States.”³²¹ But whether it had the best reading of *Freytag* or not, *Kuretski*’s reading was the most consistent with the Constitution.³²²

One final wrinkle: After *Kuretski*, Congress was not content to leave well enough alone, and enacted a “clarification” of the Tax Court’s status. In 2015, Congress amended the tax code to state: “The Tax Court is not an agency of, and shall be independent of, the executive branch of the Government.”³²³ If this declaration were given legal effect, it would not leave any constitutional place for the Tax Court, which cannot exercise legislative or judicial power and does not belong in either of those

³¹⁶ 26 U.S.C. § 7443(f).

³¹⁷ Tax Reform Act of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 487, 730 (codified at 26 U.S.C. § 7441).

³¹⁸ *Kuretski*, 755 F.3d, at 939-40

³¹⁹ *Kuretski*, 755 F.3d, at 944-45 (quoting *Edmond v. United States*, 520 U.S. 651, 664-65 (1997) (which was describing the Court of Appeals for the Armed Forces)).

³²⁰ See, e.g., Brant J. Hellwig, *The Constitutional Nature of the United States Tax Court*, 35 *Va. Tax Rev.* 269 (2016); and Spencer P. Williams, *Kuretski v. Commissioner: The Tax Court's Identity Crisis*, 70 *Tax Law.* 819 (2017).

³²¹ *Kuretski*, 755 F.3d, at 941 (distinguishing *Freytag*, 501 U.S. at 891).

³²² Cf. Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 *Geo. L.J.* 921, 925-26 (2016).

³²³ Consolidated Appropriations Act, 2016, Pub. L. No. 114–113, sec. 441, 129 Stat. at 3126 (2015) codified at 26 U.S.C. 7441.

branches.³²⁴ That means that the declaration is a nullity for constitutional purposes, consistent with precedents about similar statutory pronouncements.³²⁵

To be sure, the resolution of this wrinkle requires what is effectively a determination about severability. The tax court's appointment structure, removal structure, and adjudication subject matter are all consistent with its being in the executive branch. Only the declaration about its constitutional status is not. Other legislative "courts," like bankruptcy courts and the court of claims will present a slightly more complicated case.

b. The Necessity of Executive Removal: The Court of Claims

A more serious constitutional problem confronts a different "legislative court," the non-Article III court of claims. The court hears claims for money against the United States, and its members are appointed outside of Article III, holding office for fifteen year terms,³²⁶ and removable for good cause.³²⁷ In many ways they are like the tax court. But unlike tax court judges, court of claims judges are removed by "the United States Court of Appeals for the Federal Circuit" (a real, Article III, court) not the President.³²⁸

As James Flynn recognized in an insightful student comment, this creates a problem. Under the same logic as *Kuretski*, the court of claims "is an executive branch entity."³²⁹ And this executive branch status means "that the interbranch removal of [court of claims] judges by the Federal Circuit violates separation-of-powers principles."³³⁰

The Court of Federal Claims is responsible for hearing monetary claims against the United States. Because these claims were not against the individual officers, and were barred by sovereign immunity except where the government had waived it, they were classically seen as "public rights" that could be disposed of by

³²⁴ See Daniel J. Hemel, *Tinkering with the Tax Court*, UChicago Faculty Blog (Dec. 18, 2015) at <http://uchicagolaw.typepad.com/faculty/2015/12/tinkering-with-the-tax-court.html>. But see *Battat v. Comm'r of Internal Revenue*, No. 17784-12, 2017 WL 449951, at *16 (T.C. Feb. 2, 2017) (problematically concluding that "even though Congress has assigned to the Tax Court a portion of the judicial power of the United States, the portion of that power assigned to the Tax Court includes only public law disputes and does not include matters which are reserved by the Constitution to Article III courts") (citation omitted).

³²⁵ See *Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1231 (2015); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 485-86 (2010).

³²⁶ 28 U.S.C. 172(a).

³²⁷ 28 U.S.C. 176(a) ("Removal ... only for incompetency, misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability").

³²⁸ *Id.*

³²⁹ James Anglin Flynn, *Interbranch Removal and the Court of Federal Claims: "Agencies in Drag,"* 125 *Yale L.J.* 313, 313 (2015).

³³⁰ *Id.*

executive action outside of Article III.³³¹ Thus, the court of claims exercises the executive power to dispose of public rights, not judicial power.³³² “Every debtor must decide what claims to pay. Doing so is not an exercise of judicial power, even when the debtor takes account of the law and applies it to the claim.”³³³

This executive-branch status creates big problems for the Federal Circuit’s removal power. Functionally, it seems quite plausible that it results in undue judicial influence over the executive behavior of the claims judges.³³⁴ And formally, it is hard to justify the assignment of this removal power to an Article III court. In *Mistretta* the Supreme Court upheld a different kind of interbranch removal: the President’s statutory power to remove members of the supposedly Article III sentencing commission. But removal is an executive power, and so is executing a federal statute, so this statutory power fit naturally within Article II. The reverse – *Article III* removal of *Article II* officials – does not follow.

The other argument for interbranch removal also fails here. The Appointments Clause has been held to allow Congress to vest some executive appointments in the courts.³³⁵ And because the power to remove has traditionally followed the power to appoint, it is possible that an Article III court can remove those officials that it has appointed.³³⁶ But the Federal Circuit does not appoint claims court judges; it only removes them. So this logic runs out too.

Not only is judicial removal of executive branch officials a problem, but the court of claims statute creates a second problem by eclipsing the President’s own power to remove. The Supreme Court’s decision in *Humphrey’s Executor v. FTC* did uphold limits on the President’s ability to remove executive branch officials who engage in the “quasi-judicial” activity of adjudication.³³⁷ But more recent decisions have questioned the reasoning of that case,³³⁸ and *Humphrey’s Executor* now stands for the

³³¹ Nelson, *supra* note 29, at 582-85.

³³² As Nelson has explained, between 1863 and 1982, the court of claims was staffed by life-tenured judges and thus, despite a great deal of confusion on this point, could also have been an Article III court exercising judicial power. *Id.* at 582 n.89; see also 2 Cowen et al, *supra* note 177, at 104-06.

³³³ Flynn, *supra* note 329, at 317-318 (quoting Craig A. Stern, *Article III and Expanding the Power of the United States Court of Federal Claims*, 71 *Geo. Wash. L. Rev.* 818, 819 (2003)).

³³⁴ Flynn, *supra* note 329, at 318-324.

³³⁵ U.S. Const. art. II, sec. 2, cl. 2. *Morrison v. Olson*, 487 U.S. 654, 673-77 (1988). For the counterargument that courts can appoint only those who they can supervise, see Akhil Reed Amar, *Intratextualism*, 112 *Harv. L. Rev.* 747, 805-06 (1999).

³³⁶ *In re Hennen*, 38 U.S. 230, 258-60 (1839); *Myers v. United States*, 272 U.S. 52, 119, 122 (1926). In *Morrison*, for instance, the Special Division which had the power to appoint the Independent Counsel also had the power to “terminate” the counsel’s office. 487 U.S. at 664.

³³⁷ *Humphrey’s Executor v. United States*, 295 U.S. 602, 629 (1935). The Court and the Solicitor General in *Humphrey’s Executor* expressly recognized that “the removability of members of the Federal Trade Commission necessitated a like view in respect of . . . the Court of Claims.” *Id.* Of course, at the time this was wrong. See note 332 *supra*.

³³⁸ *Morrison v. Olson*, 487 U.S. 654, 689 (1988) (“We undoubtedly did rely on the terms ‘quasi-legislative’ and ‘quasi-judicial’ to distinguish the officials involved in *Humphrey’s Executor* and *Wiener* from those in *Myers*, but our present considered view is that the determination of whether the Constitution allows Congress to impose a ‘good cause’-type restriction on the President’s power to remove an official cannot be made to turn on whether or not that official is classified as ‘purely executive.’”)

proposition that the President’s power can be limited to cases of “cause,” not that it can be eliminated entirely by being given to another branch of government.³³⁹

c. The Permissibility of Interbranch Executive Removal: Territorial courts.

The removal problems are in fact the trickiest as a theoretical matter, though long settled as a matter of practice, in the case of territorial courts. Territorial courts, as we have seen, do exercise judicial power rather than executive power. But many Nineteenth-Century statutes provided for them to be removable by the President, the President indeed removed a dozen or two,³⁴⁰ and the Supreme Court upheld this power in *McAllister v. United States*.³⁴¹ What is going on, and is it constitutional?

In fact, the practice of territorial tenure and removal fits the separation of powers perfectly well. Because territorial judges do not exercise executive power, removal is not constitutionally required. The President’s constitutional prerogative of removal is justified on the ground that he has a responsibility to supervise the exercise of executive power by members of the executive branch,³⁴² and the ground that he is vested with “the executive power.”³⁴³ But neither of these justifications necessitate any control over those who exercise the judicial power of another government.³⁴⁴

And indeed, both practice and precedent support this view, and have given the President little *constitutional* prerogative over territorial judges. The first statutes gave territorial judges good behavior tenure, which restricts the President’s removal power;³⁴⁵ subsequent statutes sometimes provided explicitly for removal, but not always.³⁴⁶ In *Myers v. United States*, the Court noted these restrictions and concluded that they were consistent with the Court’s view that the President had “the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate.”³⁴⁷ It noted that Justice McLean had distinguished the practice of executive removal as “based on the necessity for presidential removals in the discharge by the President of his executive duties and his taking care that the laws be faithfully executed, and that such an argument could not

³³⁹ *Humphrey’s Executor*, 295 U.S. at 629, 631; *Morrison*, 487 U.S. at 689; *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 493-495 (2010).

³⁴⁰ *Myers v. United States*, 272 U.S. 52, 155-156 (1926).

³⁴¹ 141 U.S. 174 (1891).

³⁴² 11 *Documentary History of the First Federal Congress* 880, 979 (Charlene Bangs Bickford & Helen E. Veit, eds. 1992) (statements of Richard Ames). See also David P. Currie, *The Distribution of Powers after Bowsher*, 1986 *Sup. Ct. Rev.* 19, 34-36.

³⁴³ 11 *Documentary History of the First Federal Congress*, *supra* note 342, at 868-869 (statements of James Madison).

³⁴⁴ But see *Executive Authority to Remove the Chief Justice of Minnesota*, 5 *Op. Atty Gen* 288 (1851) (arguing that the removal power extends to territorial judges).

³⁴⁵ *Supra* notes 69-72 and sources cited there.

³⁴⁶ *Supra* notes 78-92 and sources cited there.

³⁴⁷ 272 U.S. 52, 106 (1926).

apply to [territorial] judges.”³⁴⁸ And the Court concluded that the removal of territorial judges “present[ed] considerations different from those which apply in the removal of executive officers.”³⁴⁹ All of this is quite right.

On the other hand, the grant of a removal power over territorial judges is still constitutionally permissible. The President’s executive power includes the power to execute the laws. This includes a law creating conditional tenure passed by Congress pursuant to its Article IV power over the territories. To be sure, the dissenting opinion in *McAllister* claimed that *all* judicial power – even outside of Article III! – must necessarily be held under good behavior tenure because of “the settled public law of England” that became “part of the public or common law of this country.”³⁵⁰ This is an argument for what we now might call a “constitutional backdrop.”³⁵¹ But our practice has long been to the contrary: state positive law can give lesser tenure to those who exercise the “judicial power” of a state,³⁵² and if that is right, the same goes for federal positive law enacted for the territories. That is why most Nineteenth-Century legislation (after 1804) granted the President such a power, and he repeatedly exercised it.

4. The General Irrelevance of the Seventh Amendment

The Seventh Amendment provides that “In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.” Some commentators have suggested that the amendment imposes useful limits on Congress’s ability to vest matters in non-Article III courts, precisely because legislative courts and administrative agencies will often lack a civil jury.³⁵³ Others have suggested that Non-Article III courts should still be required to provide juries under the Seventh Amendment.³⁵⁴

But in its very recent decision in *Oil States v. Greene Energy Group*, the Court more flatly rejected the relevance of the Seventh Amendment: “When Congress properly assigns a matter to adjudication in a non-Article III tribunal, the Seventh

³⁴⁸ *Id.* at 156-57 U.S. ex rel. *Goodrich v. Guthrie*, 58 U.S. 284, 308-11 (McLean, J., dissenting) (1854)).

³⁴⁹ 272 U.S. at 158.

³⁵⁰ *McAllister v. United States*, 141 U.S. 174, 194-95 (1891) (Field, J., dissenting).

³⁵¹ Stephen E. Sachs, *Constitutional Backdrops*, 80 *Geo. Wash. L. Rev.* 1813 (2012).

³⁵² See Fitzpatrick, *supra* note 41, at 858-61 (describing this practice, though not necessarily endorsing it).

³⁵³ See, e.g., Suja A. Thomas, *A Limitation on Congress: "In Suits at Common Law"*, 71 *Ohio St. L.J.* 1071, 1101-08 (2010); Ilan Wurman, *The Untold Story of Lucia v. SEC: The Constitutionality of Agency Adjudications*, Notice & Comment (Apr. 6, 2018), <http://yalejreg.com/nc/the-untold-story-of-lucia-v-sec-the-constitutionality-of-agency-adjudications-by-ilan-wurman/>. See also Martin Redish and Daniel La Fave call this “The Historical/Forum Model.” *Seventh Amendment Right to Jury Trial in Non- Article III Proceedings: A Study in Dysfunctional Constitutional Theory*, 4 *Wm. & Mary Bill Rts. J.* 407 (1995); Ellen E. Sward, *Legislative Courts, Article III, and the Seventh Amendment*, 77 *N.C. L. Rev.* 1037, 1095-96 (1999);

³⁵⁴ See, e.g., Brief for Amicus Curiae The Civil Jury Project at NYU School of Law in Support of Neither Side, *Oil States v. Greene’s Energy Group*, No. 16-712, 2017 WL 3822695.

Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder. . . . Thus, our rejection of Oil States’ Article III challenge also resolves its Seventh Amendment challenge.”³⁵⁵

The foregoing analysis suggests that the *Oil States* approach is basically right. The Article III analysis should be conducted first, on its own. And then (with the exception of territorial courts) if the non-Article III adjudication is permissible, the Seventh Amendment should be ignored.³⁵⁶

As we have seen, administrative agencies and most so-called legislative courts – bankruptcy courts, the tax court, military courts, etc. – are not courts in the constitutional sense because they do not exercise judicial power. They are instead executive branch agencies arguably permitted under the public rights doctrine or principles of military authority. It is therefore not natural to refer to matters in those so-called courts as “suits at common law” to which the Seventh Amendment applies.³⁵⁷ *If* it is permissible to give such a matter to an executive branch agency in the first place -- because such a matter need not be determined by law suit, common law or otherwise -- then the Seventh Amendment provides no further restriction.

One partial exception lies in territorial courts. Because those courts do exercise judicial power, it is proper to say that they hear lawsuits, including “suits at common law.” So even if a matter is properly allocated to a territorial court, it is still possible for the Seventh Amendment to apply and require a jury trial. And indeed, this somewhat matches the doctrine: Supreme Court has held the Seventh Amendment to apply in some territorial courts, even as it has been ignored in other legislative courts.³⁵⁸

B. The Substance of Non-Article III Adjudication

In addition to helping us understand the structure of non-Article III adjudication, regrounding it in the Constitution’s separation of powers can also help us delimit its substance.

³⁵⁵ *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, No. 16-712, 2018 WL 1914662, at *11 (U.S. Apr. 24, 2018).

³⁵⁶ Martin Redish and Daniel La Fave call this “The Historical/Forum Model.” Redish & LaFave, *supra* note 353, at 430.

³⁵⁷ Redish and LaFave argue that “The text of the Seventh Amendment, however, makes no reference to ‘courts.’ Rather it refers solely to ‘suits.’” *Id.* at 433. But even they immediately go on to rely on a “classic illustration” that does refer to “courts.” *Id.* at 433 n.137 (quoting *In re Pacific Ry. Comm’n*, 32 F. 241, 255 (C.C.N.D. Cal. 1887) (“The term (cases or controversies) implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication.”))

³⁵⁸ See, e.g., *Black v. Jackson*, 177 U.S. 349, 363 (1900); *Capital Traction Co. v. Hof*, 174 U.S. 1, 5 (1899). To be sure, in the infamous “insular cases,” the Court also held that the Seventh Amendment did not extend to unincorporated territories. *Balzac v. Porto Rico*, 258 U.S. 298, 305 (1922). It therefore appears to be the case that the only “territorial” court where the Seventh Amendment applies under current doctrine is in the District of Columbia. Sward, *supra* note 353, at 1135-36. The correctness or legal status of the insular cases is beyond the scope of this paper, but it is separate from the issues of judicial power discussed above.

1. The Limits of Territorial Adjudication

As we have seen, the foregoing analysis provides a way to quiet formalist qualms about the tradition of territorial courts. But it also points to at least some limits on the scope of that jurisdiction, limits whose need is shown by the recent Fifth Circuit case of *United States v. Hollingsworth*.³⁵⁹

David Hollingsworth was charged with committing assault at the Belle Chasse military base in Louisiana, which is a federal crime under Congress's power to regulate federal enclaves.³⁶⁰ His crime was adjudicated by a federal magistrate judge, who is of course a non-Article III appointee appointed by the courts of law and holding an eight-year term. On appeal, Hollingsworth argued that the non-Article III adjudication was unconstitutional, but the Fifth Circuit rejected his claim.

Much of the docket of a federal magistrate is constitutionally justified either on the consent of the parties or the magistrate's role as an adjunct.³⁶¹ But neither was true of Hollingsworth's trial. Instead, the Fifth Circuit relied heavily on the fact that the crime was committed in a federal enclave, arguably analogous to a territory.

Pointing to the Supreme Court's blessing of non-Article III courts in the District of Columbia, the Fifth Circuit held that "Hollingsworth has no constitutional right to trial before an Art. III court."³⁶² It then addressed a second argument, "that, even if Congress could refer his trial to an Article I court under Clause 17, the magistrate judge who heard his case is not a member of such a court."³⁶³ It rejected this argument on the grounds that within an enclave, Congress "may vest and distribute the judicial authority in and among courts and magistrates, and regulate judicial proceedings before them, as it may think fit, so long as it does not contravene any provision of the constitution of the United States."³⁶⁴ It also pointed to the history of trials by magistrates in enclaves.³⁶⁵

The Fifth Circuit's opinions contained many truths, but it nonetheless ended up in error. First, it is technically true that no litigant has "a constitutional right to trial before an Art. III court."³⁶⁶ But a litigant whose liberty is at issue *does* generally have a right to a trial before *some* kind of court, i.e. a tribunal that exercises judicial power. If it is not a federal court, it must be a state court, a territorial court, or the like.

Second, even if we grant that federal enclaves may have courts analogous to federal territories, the magistrate in Louisiana was not part of such a court. This is where Hollingsworth's second argument comes in. It may well be that Congress can

³⁵⁹ *United States v. Hollingsworth*, 783 F.3d 556 (5th Cir. 2015).

³⁶⁰ 18 U.S.C. 113(a)(5); U.S. Const. art I, cl. 8, sec. 17.

³⁶¹ See generally Prepared by the Magistrate Judges Division of the Administrative Office of the U.S. Courts, *A Constitutional Analysis of Magistrate Judge Authority*, 150 F.R.D. 247 (1993) (summarizing powers and duties of magistrates).

³⁶² *Hollingsworth*, 783 F.3d at 559.

³⁶³ *Id.*

³⁶⁴ *Id.* quoting *Palmore*, 411 U.S. at 397.

³⁶⁵ *Id.* at 560 n. 10 (collecting statutes dating back to 1894).

³⁶⁶ *Id.* at 559.

vest the judicial power of the Belle Chasse enclave³⁶⁷ in a non-Article I tribunal, but it never specifically did so. No statute gave the federal magistrate that form of non-U.S. judicial power. Rather the magistrate’s statutory authority was simply a broad-based power to conduct trials over petty offenses³⁶⁸ – a statute that makes no reference to enclaves, and is instead based on a dubious exemption for petty offenses.³⁶⁹

Similarly, the Fifth Circuit’s long list of magistrates historically authorized to try crimes in national parks and federal enclaves featured statutes that specifically vested jurisdiction from one park or enclave in a particular official. Perhaps that regime resulted in the vesting of non-U.S. judicial power in those particular officials.³⁷⁰ But it is different from a federal magistrate who has never been attached or vested with the judicial power of any particular place.³⁷¹

The larger lessons here are: first the danger of assuming or extrapolating too much from the lawfulness of territorial adjudication; and second, the danger of confusing multiple distinct categories of non-Article III adjudication.

2. Bankruptcy Courts

This same confusion is important to framing disputes about the constitutionality of bankruptcy courts, which have been the subject of much of the recent Supreme Court litigation over non-Article-III adjudication.

Non-Article III officials have had primary authority over bankruptcy under various statutory regimes, starting most extensively in 1898, and then under the modern regime created in 1978.³⁷² Until the 1978 Bankruptcy Reform Act, there were virtually no Article III challenges to this adjudication,³⁷³ but as bankruptcy courts

³⁶⁷ If federal enclaves have their own form of judicial power, perhaps they derive from the state in which the enclave sits, since the enclave can be constitutionally created only with the host state’s consent. U.S. Const. art. I, sec. 8, cl. 17.

³⁶⁸ 18 U.S.C. 3401(b); 28 U.S.C. 636(a).

³⁶⁹ See *infra* Part III.B.3.

³⁷⁰ But see Federal Magistrates Act, Hearings Before the Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee, HRG-1966-SJS-0050, 90th Cong., 1st Sess. (1967) 250 (Memorandum of Subcommittee Staff) (“Congress appears to have restricted the Commissioner’s power to the enclaves for practical reasons--not because of a special constitutional basis that applied only to the enclaves.”) (quoted in Vladeck, *supra* note 387, at 79). Interestingly, that same report reported that at the time, trial by a commissioner required the defendant’s consent, and “[a]pparently no one believed the constitutional question would ever arise since a defendant was required to consent to trial by the Commissioner. During the debate one Senator did suggest that the waiver provision made the bill constitutional.” *Id.* at 249. So perhaps that was the historical basis. Cf. *supra* Part II.C.1.

³⁷¹ Accord Vladeck, *supra* note 387, at 68, 70-71 (arguing that one of Hollingsworth’s “shortcomings” is that “it fails to engage the actual text of the Federal Magistrates Act, which turns on the status, and not the location, of the offense.”).

³⁷² See Anthony J. Casey & Aziz Z. Huq, *The Article III Problem in Bankruptcy*, 82 U. Chi. L. Rev. 1155, 1167-76 (2015) (summarizing these regimes).

³⁷³ Casey & Huq report that “For eighty years, no dispute under the 1898 Act produced Article III challenges to referees’ (or later, bankruptcy judges’) adjudicatory authority.” *Id.* at 1173. Instead, there were various challenges under Article I, see Thomas E. Plank, *The Constitutional Limits of*

powers expanded substantially under the 1978 Act, the Supreme Court has since heard four such challenges, with plenty more in the lower courts.³⁷⁴

Several of these challenges have focused on the “public rights” doctrine, which was discussed extensively in *Northern Pipeline and Stern v. Marshall*. Those cases imposed important limits on bankruptcy adjudication, but now that we have located non-Article III adjudication we can see that they may not have gone far enough. The public rights doctrine is a principle of executive power. But today’s bankruptcy courts have not been vested with executive power.³⁷⁵ They are appointed by Article III courts,³⁷⁶ supervised by Article III courts, “constitute[d]” as “a unit of the district court.”³⁷⁷ If one were to try to reconstitute bankruptcy courts as exercising executive power, one would need to rewrite their structure almost entirely.³⁷⁸

For the same reason, today’s bankruptcy courts cannot be justified on the textual and historical grounds that have been used to sustain military tribunals. Aziz Huq and Tony Casey have argued that “[t]he use of nonjudicial commissioners in bankruptcy, however, has at least as long and as deeply rooted a history and pedigree as the use of territorial courts or military commissions.”³⁷⁹ And while this history is complicated by the instability in American practice³⁸⁰ and the limited powers exercised by historical commissioners,³⁸¹ it is beside the point for another reason. The historical pedigree of military courts substantiates them as a permissible form of executive power. (And territorial courts, as we have seen, are a permissible form of non-U.S. judicial power.) Bankruptcy courts are not vested with either kind of power, and so any argument in their favor must be of a different sort.

Instead, bankruptcy courts must be sustained – if at all – as a tribunal that exercises no independent power. This is not inconceivable, given the extensive powers of review that Article III courts exercise over the work of bankruptcy courts. Indeed,

Bankruptcy, 63 *Tenn. L. Rev.* 487, 533–40 (1996), and at least one claim that the pre-1978 regime called for district courts to make a finding that was “legislative rather than judicial.” *In re Penn Cent. Transp. Co.*, 384 *F. Supp.* 895, 912 (Reg’l Rail Reorg. Ct. 1974) (Friendly, J.).

³⁷⁴ *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality); *Stern v. Marshall*, 564 U.S. 462 (2011); *Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165 (2014); *Wellness Int’l Network, Ltd. v. Sharif* (2015).

³⁷⁵ See Harrison, *supra* note 31, at 6.

³⁷⁶ 28 U.S.C. 152

³⁷⁷ 28 U.S.C. 151.

³⁷⁸ To be sure, the difference between bankruptcy courts and the court of claims and the tax court in this respect is one of degree, not kind – each of them has some statutory features that are inconsistent with placement in the executive branch. But it is much more plausible to treat as severable the declaration that the Tax Court is an “Article I court” or the removal restrictions on the court of claims than it would be to sever nearly everything about bankruptcy courts. See *supra* III.A.3.a-b.

³⁷⁹ Casey & Huq, *supra* note 372, at 1192; cf. Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 *Yale L.J.* 346, 368 (2016) (referring to bankruptcy courts’ “long historical pedigree”).

³⁸⁰ *Id.* at 1169.

³⁸¹ Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 *Am. Bankr. Inst. L. Rev.* 5, 8-12, 14-23 (1995).

this was apparently Congress’s theory of bankruptcy courts when it enacted the statute.³⁸² The misplaced injection of “public rights” theory occurred only due to the creativity of the Solicitor General’s office in trying to defend the bankruptcy system.³⁸³ Nonetheless, the Court considered and rejected the treatment of bankruptcy courts as “adjuncts” in both *Northern Pipeline* and *Stern v. Marshall*.³⁸⁴ Whether or not this conclusion was right or wrong,³⁸⁵ the location of bankruptcy courts in the judiciary suggests that this is where the real action is.

3. Petty Offenses

A similar historical puzzle is raised by the adjudication of “petty offenses.” A federal statute purports to allow such crimes to be tried by a non-Article III magistrate judge³⁸⁶ and some scholarship has suggested that this is constitutionally permissible.³⁸⁷

There are two main textual or formal points made in favor of the petty offense exception, other than the practical argument that such offenses are too, well, petty for Article III judges to be bothered with.³⁸⁸ One is that precedent already recognizes that such crimes do not need to be tried to a jury, reading them out of both the Sixth Amendment’s jury trial right and the separate federal jury requirement of Article III.³⁸⁹ If we can dispense with the jury, why not dispense with the judge too?³⁹⁰ But the textual argument for the jury exception is that petty offenses did not rise to the level of “crime” within the meaning of the textual provisions.³⁹¹ Petty offenses are

³⁸² *Northern Pipeline*, 458 U.S. at 63.

³⁸³ *Id.*; Fallon, *supra* note 13, at 928.

³⁸⁴ *Northern Pipeline*, 458 U.S., at 84–86 (plurality opinion); *id.*, at 91 (Rehnquist, J., concurring in judgment); *Stern v. Marshall*, 564 U.S. 462, 500–501 (2011).

³⁸⁵ See, e.g., Martin H. Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 *Duke L.J.* 197, 226–27 (1983) (arguing that the *Northern Pipeline* plurality rejected this argument “without satisfactory explanation”).

³⁸⁶ 18 U.S.C. 3401; 28 U.S.C. § 636(a).

³⁸⁷ George Cochran Doub & Lionel Kestenbaum, *Federal Magistrates for the Trial of Petty Offenses: Need and Constitutionality*, 107 *U. Pa. L. Rev.* 443 (1959); Stephen I. Vladeck, *Petty Offenses and Article III*, 19 *Green Bag 2d* 67 (2015). But see Nelson, *supra* note 13, at 610 n. 214 (expressing skepticism).

³⁸⁸ Cf. Martin S. Lederman, *Of Spies, Saboteurs, and Enemy Accomplices: History's Lessons for the Constitutionality of Wartime Military Tribunals*, 105 *Geo. L.J.* 1529, 1557 (2017) (arguing that “the modern Court predicates the “petty offense” exception to the jury right upon normative considerations”).

³⁸⁹ *Bloom v. Illinois*, 391 U.S. 194, 210 (1968) (“It is old law that the guarantees of jury trial found in Article III and the Sixth Amendment do not apply to petty offenses.”); *Schick v. United States*, 195 U.S. 65 (1904); *Callan v. Wilson*, 127 U.S. 540 (1888).

³⁹⁰ Vladeck, *supra* note 387, at 74–79; Doub & Kestenaum, *supra* note 387, at 459–56.

³⁹¹ *District of Columbia v. Colts*, 282 U.S. 63, 72–73 (1930); *Schick*, 195 U.S. at 67–69; *Callan*, 127 U.S. at 549, 555–57; but see Stephen A. Siegel, *Textualism on Trial: Article III's Jury Trial Provision, the "Petty Offense" Exception, and Other Departures from Clear Constitutional Text*, 51 *Hous. L. Rev.* 89 (2013) (criticizing this analysis); Hamburger, *supra* note 146, at 244–46 (also criticizing this analysis).

said not to rise to “the dignity of a crime,”³⁹² and a drafting change in the Constitution’s text from “criminal offenses” to “crimes” is said to have invoked Blackstonian principles reserving the term “crime” only for more serious offenses.³⁹³ No analogous argument obtains against the more general Article III provisions, which apply to all deprivations of liberty.³⁹⁴

The other argument is a more historical claim that such non-Article-III adjudication is sanctioned by longstanding practice. But this claim involves another confusion of categories. First consider federal petty offenses. There has been a historical practice of trying federal petty offenses to non-Article-III commissioners, but for much of the country’s history it was predominantly limited to federal territories and federal enclaves.³⁹⁵ Federal territories, as we’ve seen, are a special case where the judicial power is not the judicial power of the United States. While federal enclaves are more of a stretch, they are at least arguably within the same exception.³⁹⁶ The federal practice also frequently required the defendant’s consent, which would validly put them in the “no power” category.³⁹⁷

It has also been argued that apart from federal practice, British and state practice allowed such offenses to be tried by a “justice of the peace” rather than a “judge.”³⁹⁸ Therefore, the argument goes, the trial was understood not to require “judicial power.”³⁹⁹ As a historical matter, this argument is much shakier than the claim for military courts.⁴⁰⁰ But even if it were true, it does not establish the validity of the federal practice of trial by magistrate judge. Under the federal separation of powers, if this power is not judicial then it either must be executive or it must be one that requires no power at all. Magistrate judges are not vested with executive power any more than bankruptcy judges are.⁴⁰¹ And the magistrate judges’ decision in such a trial is subject only to limited review by the Article III district court, rendering it implausible to say that he is an adjunct who exercises no power of his own.⁴⁰² These convictions are therefore unconstitutional.

4. The Limits of Agency Adjudication

³⁹² Schick, 195 U.S. at 67-68

³⁹³ Id. at 68-69 (discussing 4 W. Blackstone, Commentaries on the Laws of England 5).

³⁹⁴ Petty offenses can include up to six months incarceration and \$5000 in fines. 18 U.S.C. §§ 19, 3559, 3571.

³⁹⁵ Doub & Kestenaum, *supra* note 387, at 444, 449. Of course, this is now subject to the vesting issue discussed *supra* Part III.B.1.

³⁹⁶ See *supra* n. 154 & accompanying text.

³⁹⁷ Doub & Kestenaum, *supra* note 387, at 449. See *infra* n. 370.

³⁹⁸ Doub & Kestenbaum, *supra* note 387, at 456-58, 464.

³⁹⁹ Id. at 458.

⁴⁰⁰ See Nelson, *supra* note 13, at 610 n. 214 (arguing that *Shafer v. Mumma*, 17 Md. 331 (1861), a leading case in this argument, “did not necessarily rest on the idea that the trial of such cases does not require ‘judicial’ power”).

⁴⁰¹ See 28 U.S.C. 631 (appointment and supervision by courts); 28 U.S.C. 632 (“judicial officers”).

⁴⁰² See Fed. R. Crim. P. 58 (g)(2)(D) (“The defendant is not entitled to a trial *de novo* by a district judge. The scope of the appeal is the same as in an appeal to the court of appeals from a judgment entered by a district judge”).

Many other instances of non-Article-III adjudication occur in true members of the executive branch – administrative agencies. So-called administrative law judges adjudicate claims for Social Security and veterans’ benefits, violations of the securities laws and much more. Other agency officials also adjudicate important questions of labor law, immigration law, and more. Many of these forms of adjudication are likely constitutional. But analyzing each one is complicated because existing doctrine has collapsed and eclipsed the traditional hallmarks of permissible adjudication.

Agency administration is permissible in three possible classes of cases:

- Those where there is no deprivation of life, liberty, or property;⁴⁰³
- those deprivations that nonetheless satisfy Due Process such as in *Murray’s Lessee*; and⁴⁰⁴
- those where the agency exercises no power at all, because it serves as a judicial adjunct.⁴⁰⁵

However, the current structure and claims about agency adjudication frequently blends these categories together in a way that is confusing. The standard case of agency adjudication is one where the agency adjudicates a dispute on some topic in public law or public regulation; applies some procedures now associated with due process; and receives review, but not de novo review, from an Article III court. And for instance, the Court’s decision in *Thomas v. Union Carbide* upheld an agency adjudication because of a combination of factors: it involved a public regulation of a public problem, it permitted limited Article III review, and the parties had “abandon[ed] any due process claims.”⁴⁰⁶ This is a little from column A, a little from column B, a little from column C but does not necessarily comply with any of the traditional categories.

To be permissible under the first category, the agency must traffic in a privilege to which no due process right attaches. Historically, public benefits like social security payments would have qualified, or even the ability of non-citizens to lawfully enter the United States. But modern case law has subjected these deprivations to due process, thus shrinking this category.⁴⁰⁷

To be permissible under the second category, the agency action would have to fall into a very narrow historical category. Indeed, for functional purposes, this one might be an empty set. But modern case law has watered down the requirement of due process to focus more on fair procedures than judicial process, thus expanding this category.

To be permissible under the third category, the agency action would have to be one that did not really involve the exercise of power at all, because no government

⁴⁰³ Executive power, see supra II.B.1.

⁴⁰⁴ Executive power, see supra II.B.2.

⁴⁰⁵ No power, see supra II.C.1.

⁴⁰⁶ *Thomas v. Union Carbide Agricultural Products*, 473 U.S. 568, 589-93 (1985).

⁴⁰⁷ See Fallon, supra note 13, at 963, 966 n. 278.

action occurred until after judicial involvement. But *Crowell v. Benson* and subsequent cases have held treated agencies as adjuncts even when they engaged in adjudication that had legal effect.

Thus, relocating administrative adjudication within the Constitution ought to require a renewed focus on each of these categories, sorting agencies into those that deal only in public privileges, those that engage in deprivations consistent with due process, and those whose adjudications are not really the exercise of power at all. The rationale for adjudication by the Social Security Administration, the Securities and Exchange Commission, and the National Labor Relations Board might each be very different.

A comprehensive application of these principles to all administrative agencies today would also require one to take a position on three related doctrines:

First, a whole lot depends on the extent to which modern statutory rights, or exceptions to statutory prohibitions, are regarded as privileges, or instead as forms of liberty or property protected by due process. On one view, which would have radical implications for the administrative state, the right to engage in a regulated trade, or even the right to receive a promised stream of public money, could be protected and require a judicial hearing before deprivation. On another view, much of what agencies do is traffic in legal privilege.⁴⁰⁸ On this second view, the denial of benefits such as social security is not the deprivation of property or liberty. Indeed, even an order from the SEC to stop trading in securities might not be such a deprivation; if Congress has the enumerated power to ban all trading in securities, then on this view an exemption from that ban is a privilege, not a private right. The specific dispute between the Justices about the status of patents in *Oil States v. Greene's Energy Group* is an example of this kind of disagreement.⁴⁰⁹

Second, a whole lot also depends on the extent to which the federal government may condition privileges on one's waiver of legal rights, especially constitutional rights. If the scope of waiver is broad, then even administrative agencies that authorize fines might be constitutional, if one has consented to the administrative agency's power by engaging in a regulated activity.⁴¹⁰ If it is narrower, then there are limits on the agency's ability to leverage government regulatory power as consent for other deprivations. This question is known as the unconstitutional conditions doctrine.⁴¹¹

Third, depending on the answers to these first two questions, precedent might also be important. If one takes a more radical view of these doctrines, one would have

⁴⁰⁸ See generally Harrison, *supra* note 31, at 21-35, 43-44.

⁴⁰⁹ 138 S.Ct. 1365 (2018); see also Harrison, *supra* note 31, at 28-31; Gary Lawson, Appointments and Illegal Adjudication: The America Invents Act Through a Constitutional Lens, 26 *Geo. Mason L. Rev.* 26, 51-53 (2018).

⁴¹⁰ Harrison, *supra* note 31, at 21-27.

⁴¹¹ For important attempts to answer this question, see Richard A. Epstein, *Bargaining with the State* (1993); Einer Elhauge, *Contrived Threats v. Uncontrived Warnings: A General Solution to the Puzzles of Contractual Duress, Unconstitutional Conditions, and Blackmail*, 83 *U. Chi. L. Rev.* 503 (2016); Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 *Harv. L. Rev.* 989 (1991); and Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 *Harv. L. Rev.* 1413 (1989).

to confront the extensive 20th-Century practices and precedents of agency adjudication. When such cases should be overruled is a question about the scope of stare decisis and related doctrines.⁴¹²

Even if one believes that these doctrines permit much modern agency adjudication, sometimes the case law has gotten there by combining two category changes. For instance, in *Goldberg v. Kelly*, the Supreme Court held that the Due Process Clause required governments to afford certain procedures to welfare recipients before terminating their benefits. A basic premise of this ruling was that the benefits should be treated “as more like ‘property,’ than a ‘gratuity,’”⁴¹³ thus removing these proceedings from the “no deprivation” category of executive power. But the Court was not about to start requiring that every such proceeding occur before an Article III judge, or a state judge of similar judicial power.⁴¹⁴ So the Court then watered down the due process clause to require not “a judicial or quasi-judicial trial” but only certain procedural rights in an executive forum, such as notice, confrontation, and the presentation of evidence.⁴¹⁵ Having withdrawn administrative adjudications from one permissible category of executive power, the Court still needed to squeeze them into another.

It may well be fair enough to leave these changes in place. But clarity about the location and premises of non-Article-III adjudication is important for understanding what has happened to the doctrine so we can understand how far to extend it.

For instance, when the Court watered down due process, one might have maintained that the classical requirements should continue to apply to classical “liberty” and “property,” while the new watered down ones applied to the “new” property. (It is around this time that the Court began to talk of so-called liberty and property “interests” under the Due Process Clause;⁴¹⁶ perhaps that term could have been used to signal the new property and the new due process.)

But that did not happen. Instead, *Eldridge* became the generic requirement of due process, even when real liberty or property are at issue. The result, as some have decried, is that even such weighty government deprivations as drone strikes and the detention of U.S. Citizens are governed by “a case involving ... *the withdrawal of disability benefits!*”⁴¹⁷ Understanding the relationship of due process and executive adjudication helps us decide whether to accept this extension.

⁴¹² See generally Baude, Liquidation, *supra* note 12; Caleb Nelson, Stare Decisis and Demonstrably Erroneous Precedents, 87 Va. L. Rev. 1 (2001).

⁴¹³ *Goldberg v. Kelly*, 397 U.S. 254, 261-262 n.8 (1970) (citing, *inter alia*, Charles Reich, The New Property, 73 Yale L.J. 733 (1964)).

⁴¹⁴ *Id.* at 266.

⁴¹⁵ *Id.* at 266-67; see also *Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976) for the further and more canonical watering-down.

⁴¹⁶ See, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 90 n.21 (1972); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571-72 (1972); *Perry v. Sindermann*, 408 U.S. 593, 601 (1972).

⁴¹⁷ *Hamdi v. Rumsfeld*, 542 U.S. 507, 575-76, 124 S. Ct. 2633, 2672 (2004) (Scalia, J., dissenting) (emphasis and exclamation mark in original). See also Chapman & McConnell, *supra* note 159, at 1791-92; William Funk, Deadly Drones, Due Process, and the Fourth Amendment, 22 Wm. & Mary Bill Rts. J. 311, 320 (2013); Martin S. Flaherty, The Constitution Follows the Drone: Targeted Killings, Legal Constraints, and Judicial Safeguards, 38 Harv. J.L. & Pub. Pol’y 21, 38 (2015); Joseph Landau, Due Process and the Non-Citizen: A Revolution Reconsidered, 47 Conn. L. Rev. 879, 929

Or to speak more generally about the administrative state, defenders of modern principles of administrative law sometimes invoke traditional phrases such as “public rights” to justify those modern principles. Understanding just what those traditional principles were and what they would have justified allows us to see which elements of the administrative state comply with more classical separation of powers requirements and which do not. We can make a more considered decision about whether to retain the modern principles of the administrative state once we understand what the traditional principles are that they have replaced. Locating non-Article-III adjudication helps us dispatch the false binaries that have plagued this area for too long.

Conclusion

Some of the greatest scholars of constitutional law and federal courts, from David Currie and Gary Lawson on the one hand to Paul Bator and Richard Fallon other, have debated whether we should take Article III literally, or whether the disruption to our practice would be too serious to tolerate. In fact, Article III can be taken literally while our practice is taken seriously.

The traditional forms of adjudication outside Article III all involve something other than “the judicial power of the United States,” which is the power that Article III exclusively vests. To uphold and understand those exercises of power requires careful attention to the judicial and executive powers they are vested with, but all of them fall outside Article III.

(2015); Steve Vladeck, *The Holder Speech and the Mathews Test*, *Lawfare* (Mar. 6, 2012), <https://www.lawfareblog.com/holder-speech-and-mathews-test>