

# Federalism Limits on Non-Article III Adjudication

F. Andrew Hessick\*

## *Abstract*

*Although Article III of the Constitution vests the federal judicial power in the Article III courts, the Supreme Court has created a patchwork of exceptions permitting non-Article III tribunals to adjudicate various disputes. In doing so, the Court has focused on the separation of powers, concluding that these non-Article III adjudications do not unduly infringe on the judicial power of the Article III courts. But separation of powers is not the only consideration relevant to the lawfulness of non-Article III adjudication. Article I adjudications also implicate federalism. Permitting Article I tribunals threatens the role of state courts by expanding federal judicial power without the constraints of Article III, and Article I tribunals are more likely than state or Article III courts to adjudicate disputes in ways that undermine state interests. This Essay argues that these federalism considerations provide a sounder basis than current doctrine for some of the exceptions to Article III and they suggest ways that the exceptions to Article III should be modified.*

---

\* Associate Dean and Professor of Law, University of North Carolina School of Law; J.D. Yale Law School; B.A. Dartmouth College. Thanks to Carissa Hessick, Derek Muller, John Yoo, and the participants at Pepperdine's symposium on *Federalism: Past, Present, and Future* for their helpful comments and questions.

TABLE OF CONTENTS

I.	INTRODUCTION .....	727
II.	ARTICLE III AND ITS EXCEPTIONS .....	729
III.	FEDERALISM INTERESTS IMPLICATED BY ARTICLE I ADJUDICATION..	732
	A. <i>Impairing State Court Power</i> .....	733
	1. Assumptions Underlying Article III .....	734
	2. Constraints on Article III .....	737
	a. <i>Structural Impediments</i> .....	737
	b. <i>Jurisdictional Limits</i> .....	739
	B. <i>Protecting State Interests</i> .....	740
IV.	APPLYING FEDERALISM CONSIDERATIONS TO EXISTING DOCTRINE...	743
	A. <i>Territorial Courts</i> .....	743
	B. <i>Military Exception</i> .....	746
	C. <i>The Public Rights Exception</i> .....	747
	1. Government Efforts to Vindicate Public Rights .....	747
	2. Suits Against the Government .....	749
	3. Private Suits .....	751
	D. <i>Consent</i> .....	752
	E. <i>Catch all</i> .....	753
	F. <i>Adjunct</i> .....	753
V.	CONCLUDING THOUGHTS ON RESTRUCTURING FEDERAL ADJUDICATION .....	754

## I. INTRODUCTION

Article III of the Constitution vests the federal judicial power in the Supreme Court and inferior courts that Congress creates.<sup>1</sup> Nevertheless, federal courts have upheld the power of various so-called “Article I tribunals”<sup>2</sup>—courts outside of Article III—to adjudicate disputes.<sup>3</sup> In doing so, courts have focused on the separation of powers, concluding that these Article I adjudications do not unduly infringe on the judicial power of the Article III courts.

But separation of powers is not the only consideration relevant to the lawfulness of non-Article III adjudication. Article I adjudications also implicate federalism by expanding the power of the federal government at the expense of the states. Under our constitutional system, state courts are the default tribunals to resolve disputes. They have general judicial power to resolve all lawsuits. By contrast, Article III confers limited judicial power on the federal courts. It extends the judicial power to only a small set of disputes,<sup>4</sup> and it constrains that power by limiting it to Article III judges who have been appointed by the President and confirmed by the Senate,<sup>5</sup> and who have life tenure and salary guarantees.<sup>6</sup> Article I adjudication expands the

---

1. U.S. CONST. art. III, § 1.

2. See generally James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 646 (2004) (“Congress has often assigned disputes that appear to fall within the scope of the federal judicial power to Article I tribunals whose judges lack salary and tenure protections. This practice encompasses a range of cases involving administrative agencies, legislative courts, courts-martial, and territorial courts.” (footnotes omitted)).

3. See, e.g., *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64–70 (1982) (plurality opinion) (describing various exceptions permitting non-Article III courts to adjudicate), *superseceded by statute*, 28 U.S.C.A. § 157 (2012), as recognized in *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015).

4. See U.S. CONST. art. III, § 2, cl. 1 (extending federal judicial power to nine types of disputes).

5. U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to . . . appoint . . . Judges of the [S]upreme Court . . .”). Although the text of the Constitution requires Senate confirmation only for the justices of the Supreme Court, the requirement has been understood to apply to inferior judges as well. See James E. Pfander, *Removing Federal Judges*, 74 U. CHI. L. REV. 1227, 1245 (2007). Although that conclusion is hardly obvious, see Burke Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 485, 523–29 (1930), I do not contest it here.

6. U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”). But see Pfander,

reach of federal judicial power. Article I tribunals exercise judicial power, but they do not face the jurisdictional constraints imposed by Article III.<sup>7</sup> Moreover, permitting Article I adjudication expands the pool of federal adjudicators to Article I judges, who do not have the salary and tenure guarantees of Article III and need not be confirmed by the Senate.<sup>8</sup>

Aside from impinging on the role of state courts, Article I tribunals threaten the states because those tribunals are more likely than state or Article III courts to adjudicate disputes in a way that undermines state interests. One reason for Article III's salary and tenure guarantees is to reduce the risk that Article III judges will be beholden to federal officials whose interests may diverge from those of state officials. Article I judges do not enjoy those same independence protections from federal officials. They accordingly are more likely than Article III judges to interpret both state and federal law in a way that benefits the federal government at the expense of the states.

This Essay argues that federalism should play a role in limiting Article I adjudications. Part II provides background information.<sup>9</sup> It describes the difference between Article III courts and Article I tribunals, as well as the exceptions to Article III that provide the basis for Article I adjudication. As it states, courts have focused on separation of powers in recognizing these exceptions. Part III discusses the federalism considerations implicated by Article I adjudication.<sup>10</sup> Part IV turns from concepts to doctrine.<sup>11</sup> It discusses how these federalism considerations relate to the current doctrinal exceptions to Article III. It argues that federalism helps explain some of the exceptions to Article III, and it suggests how some of the exceptions should be modified. Part V offers some preliminary thoughts on how we might restructure the law to avoid unlawful Article I adjudications.<sup>12</sup>

---

*supra* note 2, at 646.

7. See U.S. CONST. art. III, § 2, cl.1 (identifying the nine types of disputes that Article III courts may adjudicate).

8. Pfander, *supra* note 2, at 646; see *infra* note 18 and accompanying text.

9. See *infra* Part II.

10. See *infra* Part III.

11. See *infra* Part IV.

12. See *infra* Part V.

## II. ARTICLE III AND ITS EXCEPTIONS

Article III provides that “[t]he judicial Power of the United States, shall be vested in one [S]upreme Court, and in such inferior Courts” that Congress creates.<sup>13</sup> The Constitution requires that the judges of these courts be appointed by the president and confirmed by the Senate.<sup>14</sup> It also affords the judges of these courts with life tenure during good behavior and prohibits the reduction of their salary.<sup>15</sup> These guarantees insulate Article III judges from elected officials and popular opinion so that judicial decisions are the product of an impartial application of the law instead of a desire to appease majority sentiment.<sup>16</sup>

A literal reading of Article III establishes that only Article III courts may exercise the federal judicial power.<sup>17</sup> But courts have not adopted a literal view of Article III. They have recognized a handful of exceptions to Article III. Under these exceptions, Congress may assign various disputes to Article I tribunals that are staffed by judges who need not be appointed by the President and confirmed by the Senate, and who do not enjoy the salary and tenure guarantees of Article III.<sup>18</sup> The most prominent exceptions are these:

- *Territorial exception*—Article I tribunals may adjudicate disputes in the territories of the United States, the District of Columbia, and U.S. holdings in foreign countries.<sup>19</sup> The Court has

13. U.S. CONST. art. III, § 1.

14. U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to . . . appoint . . . Judges of the [S]upreme Court . . .”).

15. U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).

16. See John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 969–72 (2002).

17. See Pfander, *supra* note 2, at 668 (“Under the literal interpretation of Article III, Congress can create inferior tribunals only in accordance with the requirements of Article III.”).

18. *Id.* at 646. Although Congress may confer comparable statutory protections, *id.* at 721, it need not do so, and it often does not do so; if it does confer those protections, Congress can later revoke them at will. See *id.* at 686–87.

19. See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 65–66 & n.16 (1982) *superseded by statute*, 28 U.S.C.A. § 157 (2012), *as recognized in* *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015); see generally William Wirt Blume & Elizabeth Gaspar Brown, *Territorial Courts and Law: Unifying Factors in the Development of American Legal Institutions*, 61 MICH. L. REV. 467 (1963) (describing the territorial exception).

also relied on this exception to uphold Article I adjudications of disputes relating to Indian tribe membership.<sup>20</sup>

- *Military exception*—The Court has recognized two military exceptions to Article III. First, Article I courts martial can adjudicate charges against service members for offenses committed while on duty.<sup>21</sup> Second, Article I military commissions can adjudicate claims related to violations of laws of war.<sup>22</sup>
- *Public rights exception*—The public rights exception is an ill-defined exception that permits non-Article III adjudication of roughly three types of disputes: (1) suits brought by the United States in its sovereign capacity to enforce public rights—rights held by the government in its sovereign capacity, such as the right to collect taxes;<sup>23</sup> (2) suits by individuals to enforce their individual rights against the United States, such as individual claims against the government in the Court of Federal Claims;<sup>24</sup> and (3) suits between private parties seeking to enforce federally created rights related to a regulatory scheme.<sup>25</sup>
- *Consent*—A non-Article III tribunal may adjudicate a dispute if the parties consent to that tribunal’s jurisdiction, so long as the Article III judiciary maintains some degree of supervision over the Article I tribunal.<sup>26</sup>
- *Catch-all*—Even when one of the enumerated exceptions to Article III does not apply, a non-Article III tribunal may adjudicate a dispute if the reasons that Congress assigned the adjudication to the Article I tribunal outweigh the degree of intrusion

---

20. *Wallace v. Adams*, 204 U.S. 415, 425 (1907).

21. *See Solorio v. United States*, 483 U.S. 435, 436 (1987).

22. Martin S. Lederman, *Of Spies, Saboteurs, and Enemy Accomplices: History’s Lessons for the Constitutionality of Wartime Military Tribunals*, 105 GEO. L.J. 1529, 1564 (2017).

23. *See* Harry N. Scheiber, *Public Rights and the Rule of Law in American Legal History*, 72 CALIF. L. REV. 217, 217 n.4 (1984) (providing a brief overview of the meaning of “public rights”).

24. 28 U.S.C. § 1491 (2012).

25. *See* *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 570 (1985) (“Congress has the power, under Article I, to authorize an agency administering a complex regulatory scheme to allocate costs and benefits among voluntary participants in the program without providing an Article III adjudication.”); *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1951 (2015) (Roberts, C.J., dissenting) (describing the public rights exceptions).

26. *See Wellness Int’l Network*, 135 S. Ct. at 1940.

on the Article III courts.<sup>27</sup>

- *Adjuncts*—Article I tribunals may serve as adjuncts to Article III courts. Unlike the tribunals operating under the other exceptions to Article III, these adjuncts cannot render dispositive judgments.<sup>28</sup> Instead, they may make preliminary determinations of fact and law that form the basis for entry of judgment by the courts.<sup>29</sup> Still, as the Court has long recognized, these adjunct findings may constitute exercise of judicial power if they form the basis for Article III judgments.<sup>30</sup>

Together, these exceptions cover most types of disputes giving rise to litigation.<sup>31</sup> Consequently, Article III courts conduct relatively little federal adjudication.<sup>32</sup> The vast majority of federal adjudications occur before various Article I decisionmakers, such as federal magistrate judges, bankruptcy courts, tax courts, military tribunals, and administrative agencies.<sup>33</sup>

In justifying these exceptions, the Court has focused on whether Article I adjudication violates the separation of powers by infringing on the power of the Article III courts.<sup>34</sup> That argument comes in different forms. For some of the exceptions, the Court has argued that the determinations do not impinge on the power of the Article III courts because they do not involve the exercise of the judicial power at all.<sup>35</sup> For others, the Court has argued

27. *CFTC v. Schor*, 478 U.S. 833, 851 (1986) (balancing “[1] the extent to which the ‘essential attributes of judicial power’ are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the [judicial power,] . . . [2] the origins and importance of the right to be adjudicated, and [3] the concerns that drove Congress to depart from the requirements of Article III.”).

28. *See* *Crowell v. Benson*, 285 U.S. 22, 56–59 (1932).

29. *Id.*

30. *Id.*

31. F. Andrew Hessick, *Consenting to Adjudication Outside the Article III Courts*, 71 VAND. L. REV. 715, 725 (2018) (“[M]ost federal adjudication does not occur in Article III courts. Instead, the bulk of federal litigation occurs before federal magistrate and bankruptcy judges and in various other Article I tribunals . . .”).

32. *See id.*

33. *Id.*

34. *See, e.g., Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1951 (2015) (Roberts, C.J., dissenting); *see also* *CFTC v. Schor*, 478 U.S. 833, 857–58 (concluding that separation of powers, and not federalism, limit Article I adjudications).

35. *Wellness Int’l Network*, 135 S. Ct. at 1965 (Thomas, J., dissenting) (“[W]hile the legislative and executive branches may dispose of public rights at will—including through non-Article III adjudications—an exercise of the judicial power is required ‘when the government want[s] to act authoritatively upon core private rights that had vested in a particular individual.’”) (quoting Caleb Nelson,

that, although the non-Article III tribunal is indeed exercising judicial power, the exercise of that power is constitutional because the tribunal is exercising some sort of non-Article III judicial power.<sup>36</sup> A third justification is that, even when an Article I tribunal exercises judicial power assigned to the Article III courts, the exercise of that power is lawful if Congress's reasons for assigning the claim to the Article I tribunal outweigh the intrusion on the power of the Article III courts.<sup>37</sup>

### III. FEDERALISM INTERESTS IMPLICATED BY ARTICLE I ADJUDICATION

Although the courts have focused on separation of powers in determining the lawfulness of Article I adjudication,<sup>38</sup> it is not the only consideration relevant to that determination. Federalism is also important. Federalism describes the allocation of power between the state and national governments.<sup>39</sup> The Constitution delegates limited enumerated powers to the federal government; the residual lies with the states.<sup>40</sup> Although ordinarily discussed in terms of legislative power, federalism applies to the judicial power as well. State courts have general jurisdiction to hear all claims.<sup>41</sup>

---

*Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 569 (2007)). History supports other potential exceptions to Article III; for example, non-judicial bankruptcy tribunals historically could conduct “extrajudicial” proceedings to adjudicate claims against a bankruptcy estate. See 1 WILLIAM BLACKSTONE, COMMENTARIES \*477. Likewise, historically, justices of the peace could hear civil claims that did not exceed 40 shillings, *Capital Traction Co. v. Hof*, 174 U.S. 1, 16–17 (1899), and minor criminal cases, see J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 24 (2d ed. 1979). That practice may justify an exception to Article III. See *Stettinius v. United States*, 22 F. Cas. 1322, 1329 (C.C.D.C. 1839) (No. 13,387) (assuming constitutionality of adjudication by federal justices of the peace).

36. See, e.g., *Am. Ins. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 546 (1828) (justifying territorial exception on the ground that territorial courts exercise judicial power conferred by Congress under its Article IV power to regulate the territories).

37. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986) (stating that, otherwise, “Congress’ ability to take needed and innovative action pursuant to its Article I powers” might be unduly constricted).

38. See *Wellness Int’l Network*, 135 S. Ct. at 1941–45 (noting that separation of powers considerations exist with respect to Article I adjudications).

39. See *Alden v. Maine*, 527 U.S. 706, 748 (1999) (“[F]ederalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the [United States].”).

40. U.S. CONST. art. I, § 8; U.S. CONST. amend. X.

41. U.S. CONST. amend. X; see Charles W. Rhodes, *Clarifying General Jurisdiction*, 34 SETON HALL L. REV. 807, 818–19 (2004) (defining general jurisdiction as the “jurisdiction over all claims against the defendant based solely on the nature of the contacts between the defendant and the forum”).



Federal judicial power is more limited.<sup>42</sup>

Federalism bears on Article I adjudication in two ways. First, Article I adjudication impairs state judicial power. The Constitution creates a scheme under which state courts have the default power to adjudicate all claims, including claims arising under federal law.<sup>43</sup> States lose that exclusive prerogative only to the extent that Congress creates Article III courts to hear those claims.<sup>44</sup> Article I adjudication short circuits this arrangement.<sup>45</sup> Those tribunals provide an alternative means for federal adjudication.<sup>46</sup>

Second, Article I adjudication threatens the states' interests in their dealing with the federal government. One reason for the salary and tenure guarantees afforded to Article III judges is to reduce their dependence on federal officials who may have interests that diverge from those of the states.<sup>47</sup> Because Article I judges do not have those guarantees, they are more likely to favor federal interests at the expense of the states.<sup>48</sup>

#### A. *Impairing State Court Power*

Each state has its own judicial system that exercises state judicial power. This state judicial power extends to all types of disputes, including disputes arising under federal law, except to the extent that Congress creates Article III courts capable of hearing those claims.<sup>49</sup> These federal courts dilute the power of state courts because of their power to resolve disputes that would

42. *Introduction to the Federal Court System*, U.S. DEP'T OF JUST., <https://www.justice.gov/usao/justice-101/federal-courts> (last visited Oct. 26, 2018) ("Federal courts are courts of limited jurisdiction, meaning they can only hear cases authorized by the United States Constitution or federal statutes.").

43. See Hessick, *supra* note 31, at 744.

44. See U.S. DEP'T OF JUST., *supra* note 42.

45. See Hessick, *supra* note 31, at 745 ("[A]djudication in Article I tribunals . . . undermines the compromise of Article III because those tribunals constitute a second category of federal tribunals that may displace the state courts.").

46. *Id.*

47. See Edward Lazarus, *Life Tenure for Federal Judges: Should it be Abolished?*, CNN (Dec. 20, 2004, 4:08 PM), <http://www.cnn.com/2004/LAW/12/10/lazarus.federal.judges/> (explaining how life tenure "shields [federal] judges from the political pressure that comes with periodic accountability to an electorate.").

48. 28 U.S.C. § 152(a)(1), (e) (2012) (stating that US circuit courts appoint Article I bankruptcy judges, who serve fourteen-year terms, and may be removed for cause); see Lazarus, *supra* note 47.

49. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 508 (1962) (noting state courts have general jurisdiction, including concurrent jurisdiction with federal courts with respect to federal laws).

otherwise be resolved by state courts.<sup>50</sup> But various constraints on Article III judges, such as their cost, limit their displacement of state courts.<sup>51</sup> Article I adjudication undermines this scheme.<sup>52</sup>

### 1. Assumptions Underlying Article III

Article III rests on the premise that state courts would adjudicate most claims. The federal judicial power conferred by Article III extends to only nine types of disputes.<sup>53</sup> The assumption, which Madison explicitly articulated during the debates on Article III, was that state courts would resolve disputes falling outside these categories.<sup>54</sup> But the Constitution does not prohibit state courts from hearing suits falling outside these nine categories. To the contrary, as Alexander Hamilton observed in Federalist 82, Article III rests on the assumption that states presumptively have the power to resolve claims arising under federal law.<sup>55</sup>

Although the Framers agreed that a federal supreme court was necessary to ensure the uniform interpretation of federal law and to protect federal interests,<sup>56</sup> inferior federal courts were more controversial.<sup>57</sup> Those opposed to

50. See, e.g., Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1673 (2003) (“A federal court is frequently called upon to determine matters of state law.”).

51. *Judicial Compensation*, U.S. CTS., <http://www.uscourts.gov/judges-judgeships/judicial-compensation> (last visited Oct. 26, 2018) (noting salaries for federal judges and justices); *Survey of Judicial Salaries*, NAT’L CTR. FOR ST. CTS. 2–3 (Jan. 2016), <https://www.ncsc.org/FlashMicrosites/JudicialSalaryReview/2015/resources/CurrentJudicialSalaries.pdf> (listing salaries for state court judges and justices).

52. Hessick, *supra* note 31, at 746 (“[L]itigating in Article I tribunals is perceived as less expensive than litigating in state or federal courts because Article I tribunals need not adhere to the procedures, such as discovery rules, followed in those courts.” (footnote omitted)).

53. U.S. CONST. art. III, § 2, cl. 1 (identifying the nine types of disputes subject to federal judicial power).

54. Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 819 (1984) (recounting Madison’s response to objections about broad federal judicial power that “the far greater number of causes—ninety-nine out of a hundred—will remain with the state judiciaries”).

55. THE FEDERALIST No. 82, at 555 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe.”).

56. See RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 7 (5th ed. 2003).

57. See *id.* at 8.

inferior courts argued, among other things, that federal courts would reduce the power of the state courts.<sup>58</sup> They would do so not only by hearing cases that otherwise would go to state courts, but also by deciding those cases differently.<sup>59</sup> Because federal judges are federal employees, they might be inclined to interpret federal law more broadly, and to interpret state law more narrowly (or at least differently), than state judges.<sup>60</sup>

Article III aims to accommodate these objections. Although Article III vests the federal judicial power in the federal courts, it does not establish federal trial courts to exercise this federal judicial power.<sup>61</sup> Instead, Article III leaves to Congress the decision whether to establish federal trial courts.<sup>62</sup> To the extent Congress chooses not to create inferior federal courts, state courts are the default forums to resolve federal claims.<sup>63</sup>

This compromise, together with the statements in the debates surrounding the judiciary, reveals two important things. First, the Framers understood that state courts would adjudicate federal claims in the absence of an Article III court.<sup>64</sup> Second, the Framers assumed that Article III courts were the only federal tribunals that could exercise the federal judicial power.<sup>65</sup> Nowhere do the debates raise the possibility that other parts of the Constitution authorized Congress to create an Article I tribunal that also would com-

58. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 125 (Max Farrand ed., 1911) (noting Roger Sherman's argument that inferior federal courts would create an unnecessary expense); *id.* at 124 (statement of John Rutledge) (“[T]he State Tribunals might and ought to be left in all cases to decide in the first instance the right of appeal to the supreme national tribunal being sufficient to secure the national rights & uniformity of Judgmts: that it was making an unnecessary encroachment on the jurisdiction [of the States,] and creating unnecessary obstacles to their adoption of the new system.” (alteration in original)).

59. See FALLON, *supra* note 56, at 8.

60. See Benjamin C. Glassman, *Making State Law in Federal Court*, 41 GONZ. L. REV. 237, 238 (2005–2006) (discussing the uncertainty of federal courts interpreting state law).

61. See U.S. CONST. art. III, § 1 (refraining from explicitly establishing federal trial courts).

62. See U.S. CONST. art. III, § 1 (stating Congress may “ordain and establish” courts inferior to the Supreme Court). The only exceptions are cases affecting foreign officials and those in which a state is a party; for those disputes, Article III provides that the Supreme Court may sit as a trial court. U.S. CONST. art. III, § 2, cl. 2 (“In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction.”).

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

64. Redish & Muench, *supra* note 63, at 311 n.3.

65. See Pfander, *supra* note 2, at 668 (“Under the literal interpretation of Article III, Congress can create inferior tribunals only in accordance with the requirements of Article III.”).

pete with state courts.

Early practice also supports the central role of the state courts as adjudicators under the federal system. The Judiciary Act of 1789 granted to federal courts only a small portion of the allowable jurisdiction under Article III.<sup>66</sup> It did not confer general federal question jurisdiction on the federal courts, and it limited diversity jurisdiction to disputes exceeding \$500.<sup>67</sup> Those suits were left to the state courts.<sup>68</sup> Moreover, even where the Act did confer federal jurisdiction, it generally recognized concurrent state court jurisdiction.<sup>69</sup> For example, although the Act gave federal courts jurisdiction over civil actions for more than \$500 based on diversity jurisdiction and civil actions by aliens for violations of treaties, it gave state courts concurrent jurisdiction.<sup>70</sup> More remarkable, the Act gave concurrent jurisdiction to state and federal courts over civil suits by the United States involving at least \$100.<sup>71</sup> The only cases for which the Act gave exclusive jurisdiction to the federal courts were those involving federal crimes, admiralty, and seizures of property by the United States.<sup>72</sup> And even that exclusive jurisdiction soon saw inroads. By the early 1800s, Congress had recognized concurrent state jurisdiction over a variety of federal crimes.<sup>73</sup>

In short, the text and history of Article III indicate that, to the extent Article III courts did not hear a claim, state courts would have the power to adjudicate those cases, and Congress regularly relied on the state courts to ful-

66. 4 The Documentary History Of The Supreme Court Of The United States, 1789-1800: Organizing The Federal Judiciary: Legislation And Commentaries 59 (Maeva Marcus, et al eds., 1992) [hereinafter History of the Supreme Court].

67. *Id.*

68. *Justices v. Murray*, 76 U.S. (9 Wall.) 274, 280 (1869) (“This idea of calling to the aid of the Federal judiciary the State tribunals, by leaving to them concurrent jurisdiction in which Federal questions might be involved, with the right of appeal to the Supreme Court, will be found to be extensively acted upon in the distribution of the judicial powers of the United States in the act of 1789, known as the Judiciary Act.”).

69. See HISTORY OF THE SUPREME COURT, *supra* note 66, at 59 (“[T]he circuit Courts shall have original cognizance, concurrent with the Courts of the several States . . .”).

70. *Id.*

71. The Judiciary Act, Sec. 9, 1st Cong., 1 Stat. 73, 76–77 (1789).

72. *Id.*

73. William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1762–63 (2013) (discussing the use of state power as the mechanism for federal eminent domain in the first two decades of the federal government); Albert Levitt, *Jurisdiction over Crimes*, 16 J. AM. INST. CRIM. L. & CRIMINOLOGY 316, 319–24, 329–30 (1925) (discussing generally the development of concurrent jurisdiction over criminal offenses).

fill that role.<sup>74</sup> That structure alone indicates that non-Article III tribunals should not be permitted to exercise judicial power.<sup>75</sup> The only types of federal tribunals that can displace the state courts are Article III courts.<sup>76</sup>

## 2. Constraints on Article III

Given that state courts are the default forums for adjudication, constraints on the Article III judiciary increase the role of state courts. Article III imposes two types of limits on the federal judiciary.<sup>77</sup> First, it creates impediments to the establishment of Article III courts and to appointing judges to those courts.<sup>78</sup> Second, it limits the jurisdiction of the Article III courts.<sup>79</sup> Neither constraint applies to Article I tribunals.

### a. Structural Impediments

The Constitution imposes various obstacles to the creation of Article III courts and appointment of Article III judges. As noted, Article III does not create an inferior federal judiciary. Instead, it requires Congress to take affirmative steps to establish them.<sup>80</sup> Inertia, political resistance, economics, and the press of other matters all stand in the way to the creation of lower federal courts, tilting the odds in favor of maintaining a significant role for state courts.<sup>81</sup> Congress will create a lower federal court only if it deems that it is worth expending the resources to establish a federal system devoted to adjudication.

Those considerations apply differently to Article I tribunals. Unlike Article III courts, Article I tribunals need not be devoted solely to exercising

---

74. See Redish, *supra* note 63, at 311 n.3.

75. Jaime Dodge, *Reconceptualizing Non-Article III Tribunals*, 99 MINN. L. REV. 905, 905 (2015) (“Article III is so fundamental to our system of government that no body—not Congress or the Executive, nor even the judiciary itself—has the constitutional authority to consent to the removal of the judicial power to another branch.”).

76. *Id.*

77. U.S. CONST. art. III.

78. U.S. CONST. art. III, § 1.

79. U.S. CONST. art. III, § 1.

80. U.S. CONST. art. III, § 1.

81. See ANDREW NOLAN & RICHARD M. THOMPSON, CONG. RESEARCH SERV., R43746, CONGRESSIONAL POWER TO CREATE FEDERAL COURTS: A LEGAL OVERVIEW 9–11 (2014) (stating that Article III strictly limits Congress’s ability to create lower federal courts).

the judicial power.<sup>82</sup> Congress can also authorize them to promulgate rules, conduct investigations, and perform other tasks.<sup>83</sup> These synergies incentivize Congress to create Article I tribunals, rather than Article III tribunals.<sup>84</sup>

Filling Article III judgeships is also difficult.<sup>85</sup> The Constitution requires that each be appointed by the president and approved by the Senate. This two-branch procedure constrains the creation of Article III judges.<sup>86</sup> Moreover, Article III judges are expensive because of the tenure and salary guarantees.<sup>87</sup>

The same costs do not apply to non-Article III judges. The Constitution does not provide salary and tenure guarantees for Article I judges. Although some statutes provide substantial salaries for non-Article III judges, Congress may modify those laws if it determines that those judges are no longer worth the cost.<sup>88</sup> Nor do the same political constraints apply to Article I judges. The Constitution requires only that superior officers receive Senate confirmation.<sup>89</sup> Congress can create non-Article III judges who are not superior officers.<sup>90</sup> Indeed, most non-Article III judges do not require presi-

82. *Id.* at 13 (noting that unlike Article III courts which have a generalist nature, Article I tribunals can focus on a particular legal field with an adjudicator who is specialized in that area). Early practice established that federal courts cannot act “extrajudicially.” Letter from John Jay, Chief Justice, Supreme Court, to George Washington, President, U.S. (Aug. 8, 1793), *reprinted in* 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 1782–1793, at 488–89 (Henry P. Johnston ed., 1890).

83. Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts under Article III*, 65 IND. L.J. 233, 238 (1990) (discussing one of the first Article I tribunals that was “engaged in policy-making, rule-formulation and enforcement tasks as well as adjudication”).

84. *Crowell v. Benson*, 285 U.S. 22, 46 (1932) (stating that non-Article III tribunals may “furnish a prompt, continuous, expert, and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task”).

85. *See generally* Denis Steven Rutkus, Cong. Research Serv., R43762, *The Appointment Process for U.S. Circuit and District Court Nominations: An Overview 1* (2016) (discussing the appointment process for federal judges and how it has become increasingly scrutinized in recent years).

86. *Id.*

87. U.S. CONST. art. III, § 1. The salary for a federal district judge in 2018 is \$208,000. *See* U.S. CTS., *supra* note 51. That salary increases about 1% every year. *See id.* Without accounting for raises, a fifty-year-old judge appointed today can expect to draw at least a \$208,000 salary for at least fifteen years given that a fifty-year-old American male has a life expectancy of 79.8. ELIZABETH ARIAS, MELONIE HERON & JIAQUAN XU, UNITED STATES LIFE TABLES, 2014, 66 NAT’L VITAL STATISTICS REPORTS 1, 3 tbl.A (2017), [https://www.cdc.gov/nchs/data/nvsr/nvsr66/nvsr66\\_04.pdf](https://www.cdc.gov/nchs/data/nvsr/nvsr66/nvsr66_04.pdf).

88. *See supra* note 18 and accompanying text.

89. U.S. CONST. art. II, § 2, cl. 2 (stating the Appointments Clause requirements).

90. Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101

dential appointment and Senate confirmation. Some are appointed by the President, cabinet members, or the courts, and many others are simply employees who are hired based on a civil service examination. To be sure, some Article I tribunals do require presidential appointment and Senate confirmation. But Congress could reassign the adjudication to those who are not superior officers.

States have another interest in requiring Senate confirmation beyond simply slowing the appointments process. Senate confirmation increases state participation in Article III selection.<sup>91</sup> Senators are elected by the states.<sup>92</sup> Because they are elected, those senators have an interest in protecting their respective state's interests.<sup>93</sup> The Senate confirmation requirement thus gives states a larger say in Article III judicial appointments.<sup>94</sup>

#### *b. Jurisdictional Limits*

Article III courts cannot adjudicate all disputes. Article III extends the federal judicial power to nine categories of “cases” and “controversies.”<sup>95</sup> Various justiciability doctrines implement this case-or-controversy limitation.<sup>96</sup> These include the doctrines of standing, ripeness, and mootness.<sup>97</sup> Article III courts cannot hear a dispute that violates any of these requirements.<sup>98</sup>

HARV. L. REV. 915, 921–22 (1988) (discussing how Congress, under Article I, created “legislative courts” to which Article III guarantees do not apply).

91. See RUTKUS, *supra* note 85 (explaining that through the Senate, states play a large role in the judicial confirmation process and that “[a] consideration for Senators will be the views of their constituents, especially if many voters back home are thought to feel strongly about a nomination”).

92. U.S. CONST. amend. XVII (“The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof . . .”).

93. See, e.g., Catie Edmondson, *Joe Manchin’s Yes on Kavanaugh Finds Sympathy in West Virginia*, N.Y. TIMES (Oct. 8, 2018), <https://www.nytimes.com/2018/10/08/us/politics/joe-manchin-brett-kavanaugh-west-virginia.html> (discussing how a democratic Senator voted to confirm a conservative Supreme Court Justice because, otherwise, his constituents would not reelect him).

94. See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 547 (1954).

95. U.S. CONST. art III, § 2, cl. 1.

96. See generally *Allen v. Wright*, 468 U.S. 737, 750 (1984) (discussing the various justiciability doctrines that limit the case-or-controversy requirement, including standing, ripeness, mootness and political questions).

97. *Id.*; F. Andrew Hessick, *Cases, Controversies, and Diversity*, 109 NW. U. L. REV. 57, 62 (2015).

98. *Allen*, 468 U.S. at 750 (“The case-or-controversy doctrines state fundamental limits on feder-

These federal justiciability doctrines do not apply to state courts.<sup>99</sup> State law defines the power of state courts, and the scope of that power varies from state to state.<sup>100</sup> Although some states have adopted rules similar to the federal justiciability requirements, others have conferred greater power on their courts.<sup>101</sup> State courts accordingly can adjudicate disputes that the Article III courts cannot.

Although Article III courts cannot adjudicate these non-justiciable disputes, non-Article III tribunals can.<sup>102</sup> The case and controversy restriction does not apply to non-Article III tribunals.<sup>103</sup> They accordingly have the potential to hear claims that otherwise would be left to the state courts because they cannot be heard in the Article III courts.<sup>104</sup>

### B. *Protecting State Interests*

Aside from making Article III courts costly, the independence guarantees of Article III play an important role in protecting state interests.<sup>105</sup> State and federal interests often diverge.<sup>106</sup> State and federal officials may desire different policies and may have different views of appropriate allocations of power between the state and federal governments.<sup>107</sup>

Fears about these divergent interests led to the establishment of a federal judiciary.<sup>108</sup> The Framers were afraid that state courts, staffed with judges

al judicial power in our system of government.”).

99. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (“[T]he constraints of Article III do not apply to state courts . . .”).

100. Hessick, *supra* note 97, at 65–75, 94 (discussing variations in state justiciability doctrines).

101. *Id.*

102. *Envirocare of Utah, Inc. v. Nuclear Regulatory Comm’n*, 194 F.3d 72, 74 (D.C. Cir. 1999) (“Agencies, of course, are not constrained by Article III of the Constitution; nor are they governed by judicially-created standing doctrines restricting access to the federal courts.”).

103. *See id.*

104. *See id.*

105. *See* NOLAN & THOMPSON, *supra* note 81, at 10 (“Article III courts, which are insulated from political pressures through salary and tenure protections, provide a legal forum to help ensure compliance with federal interests, including those enshrined in the Constitution.”).

106. *See* Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 521 (2011) (discussing how state interests differ from federal interests in the context of criminal prosecution).

107. *See id.*; *see also* Diego A. Zambrano, *The States’ Interest in Federal Procedure*, 70 STAN. L. REV. 1805, 1805 (2018) (explaining the states’ strong interest in connection with recent federal procedure changes).

108. NOLAN & THOMPSON, *supra* note 81, at 10 (“[W]ithout an independent federal judiciary,



answerable to the people and politicians of the state, would discriminate against federal interests.<sup>109</sup> The same argument applies to federal judges. Federal judges may favor federal interests at the expense of the states.

Article III partially ameliorates this problem by guaranteeing the salary and tenure of Article III judges.<sup>110</sup> These guarantees aim to protect Article III judges from the influence of other federal officials, who may try to influence the courts to promote their interests.<sup>111</sup> Article I judges do not enjoy the same protections.<sup>112</sup> Accordingly, they are more susceptible to pressures from the President, Congress, and any other federal officials who exercise some control over the judges' salary and tenure.<sup>113</sup> Article I judges therefore pose a larger threat to state interests than Article III judges do.<sup>114</sup>

That threat to state interests is obvious in disputes in which the state or one of its officers is a party.<sup>115</sup> The Article I tribunal may rule against the state based on a shaky interpretation of the law simply out of a desire to please federal officials.<sup>116</sup> But those types of disputes are rare.<sup>117</sup> More

original litigation on federal claims would arise in *state* courts. The Framers, who had just witnessed the resulting chaos of decentralization during the Articles of Confederation, considered that having such power in the exclusive province of *state* courts 'presented a real threat to the enforcement of federal law against the states,' and consequently, the first Congress . . . established the system of lower federal courts.'" (footnote omitted).

109. See *supra* notes 57–60 and accompanying text.

110. U.S. CONST. art. III, § 1.

111. Pfander, *supra* note 2, at 646 & n.4 (discussing the importance of life tenure and salary guarantees for Article III judges in ensuring the separation of powers and judicial independence).

112. *Id.* (stating that despite these important Article III provisions, "Congress has often assigned disputes that appear to fall within the scope of the federal judicial power to Article I tribunals whose judges lack salary and tenure protections").

113. See Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 418–419 (1996) (explaining the importance of separation of powers).

114. In *Commodity Futures Trading Commission v. Schor*, the Supreme Court concluded that nothing in the historical record suggests that the founders viewed the independence of the Article III courts as essential to protecting state interests in federal adjudication. 478 U.S. 833, 858 (1986). While that may or may not be correct, it does not address the commonsense notion that independent federal judges are more likely to fairly adjudicate claims implicating state interests than judges who are incentivized to discriminate in favor of federal interests. See *supra* notes 110–11.

115. See Hessick, *supra* note 31, at 718 (discussing the importance of an impartial adjudicator in protecting the parties' respective interests).

116. See *id.* (explaining how Article I tribunals could threaten the societal interest of "living under a government that adjudicates based on the rule of law instead of political considerations").

117. See Anita R. Brown-Graham, *When You Can't Sue the State: State Sovereign Immunity*, POPULAR GOVERNMENT, Summer 2000, at 3, [https://www.sog.unc.edu/sites/www.sog.unc.edu/files/articles/article1\\_25.pdf](https://www.sog.unc.edu/sites/www.sog.unc.edu/files/articles/article1_25.pdf) (discussing the constitutional limitations on "both the federal government's

common suits involving state interests are those presenting questions of state law.<sup>118</sup> State laws embody decisions by the state regarding how to regulate themselves, and federal adjudications of those laws results in a non-state body determining their meaning.<sup>119</sup> States have an interest in having their laws interpreted by an independent Article III court instead of an Article I tribunal dependent on federal politicians.<sup>120</sup> The former is more likely than the latter to interpret the law objectively according to its terms.<sup>121</sup>

State interests are not limited to disputes directly involving states or their laws; they extend to many disputes that turn solely on federal law.<sup>122</sup> Because federal law preempts state law, any determination about the meaning of federal law affects to some degree the potential reach of state law.<sup>123</sup> A ruling that federal law controls a particular area prohibits state regulation of that same area.<sup>124</sup> Likewise, a determination by an Article I tribunal that federal law authorizes an agency to regulate in a particular area poses the potential for federal regulation to displace state law.<sup>125</sup> To be sure, some dis-

ability to provide remedies for wrongs committed by state governments and individual citizens' ability to use the courts to enforce remedies against state governments for violations of federally guaranteed statutory rights.”)

118. *See id.*

119. Mark R. Kramer, *The Role of Federal Courts in Changing State Law: The Employment at Will Doctrine in Pennsylvania*, 133 U. PA. L. REV. 227, 229 (1984) (The *Erie* Doctrine “requires that federal courts sitting in diversity jurisdiction apply state substantive law, decisional as well as statutory and constitutional”).

120. *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1052 (7th Cir. 1984) (Posner, J., dissenting) (“[I]t would not be inconsistent for a state to want the laws . . . to be interpreted by judges who are dependent on the electoral branches of its own government, while not wanting the laws to be interpreted by judges dependent on the electoral branches of another sovereign.”).

121. *See* Paul R. Verkuil, *Separation of Powers, the Rule of Law, and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 308 (1989).

122. *See* Michele E. Gilman, *Presidents, Preemption, and the States*, 26 CONST. COMMENT 339, 341–42 (2010) (addressing state interests in the context of the federal law preemption controversy).

123. BRUTUS XI (New York Journal, Jan. 31, 1788), reprinted in 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 512, 515 (John P. Kaminski & Gaspare J. Saladino eds., 1984) (“Every adjudication of the supreme court, on any question that may arise upon the nature and extent of the general government, will affect the limits of the state jurisdiction. In proportion as the former enlarge the exercise of their powers, will that of the latter be restricted.”).

124. *See* Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1141 (2007) (explaining that when Congress enacts a pervasive federal regulation in a particular field, its inferred that the states may not supplement it).

125. *See id.* Exacerbating the non-Article III intrusion on state sovereignty is that those tribunals have not recognized many of the doctrines that protect state interests in Article III courts. *See* Ellen E. Sward, *Legislative Courts, Article III, and the Seventh Amendment*, 77 N.C. L. REV. 1037, 1082–83 & n.230–31 (1999). For example, Article III courts have developed a variety of abstention doc-

putes pose greater threats to the states than others.<sup>126</sup> Disputes that call for routine application of law to fact pose little risk to the states.<sup>127</sup> But even those disputes may produce decisions that expand the federal government's power at the expense of the states.<sup>128</sup>

#### IV. APPLYING FEDERALISM CONSIDERATIONS TO EXISTING DOCTRINE

Shifting the approach for assessing the lawfulness of Article I adjudication from one focusing exclusively on separation of powers to one including federalism helps explain some exceptions that courts have recognized to Article III. It also suggests ways that the current exceptions to Article III should be modified.

##### A. Territorial Courts

The territorial exception permits Congress to create courts to adjudicate disputes in the territorial holdings of the United States.<sup>129</sup> The traditional justification for the exception is that Article IV grants Congress plenary power over the territories, and through this power, Congress can assign non-Article III judicial power to territorial courts.<sup>130</sup> This justification is unsound. Article III “vest[s]” the federal “judicial power” in the Article III

---

trines under which a federal court will not hear a case that raises issues that are better suited for state courts or that have already been raised in a pending state criminal case. *Id.* at 1083 n.231. Some agencies have not yet adopted these doctrines. *See, e.g.*, *W. Suburban Recycling & Energy Ctr., L.P.*, 6 E.A.D. 692, 712 (EAB Dec. 11, 1996) (declining to resolve whether EPA follows abstention doctrines). And some have exhibited hostility to them on the ground that that abstention is inappropriate because agencies have the “expertise” to administer statutes entrusted to them. *See Mo. Interstate Gas, L.L.C.*, 119 FERC ¶ 61074, ¶ 61462 (Apr. 20, 2007).

126. *See Fallon, supra* note 90, at 935–37 (explaining the values of non-Article III courts, including the delegation of disputes involving the delegation of disputes involving the application of law to fact).

127. *Id.*

128. *Id.* at 978 (explaining that Article I administrative agencies “may also have a bureaucratic tendency to expand their own power”).

129. *See Stanley K. Laughlin, Jr., The Constitutional Structure of the Courts of the United States Territories: The Case of American Samoa*, 13 U. HAW. L. REV. 379, 379–81 (1991) (describing the formation of territorial courts in the United States).

130. *See Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 619 (1838). The Court has relied on similar reasoning to justify Article I courts in the District of Columbia, U.S. holdings in foreign countries, and Indian reservations. *See N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 65 n.16 (1982), *superseded by statute*, 28 U.S.C.A. § 157 (2012), *as recognized in Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015).

courts,<sup>131</sup> and the judicial power conferred by Article IV is a type of federal judicial power.<sup>132</sup>

Federalism provides a better explanation.<sup>133</sup> In the nineteenth century when the territorial exception was first recognized, state courts did not presumptively have the power to resolve a suit that arose in the territories.<sup>134</sup> Restrictions on personal and territorial jurisdiction limited the states to adjudicating people or property found within their borders.<sup>135</sup> Territorial disputes were beyond the jurisdiction of the state courts.<sup>136</sup> States therefore did not have an interest in protecting their role in adjudicating disputes in the territories.<sup>137</sup> Nor did territorial courts present a real threat to the states. Territorial courts did not apply state or general federal law; instead, they applied local law that applied just to the territories.<sup>138</sup> Territorial courts thus did not usurp the power of state courts or otherwise imperil state interests.<sup>139</sup>

This federalism explanation finds support in *American Insurance Co. v.*

131. U.S. CONST. art. III, § 1.

132. See David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801–1835*, 49 U. CHI. L. REV. 646, 719 (1982) (calling the discussion in *Canter* “poorly explained” and “difficult to reconcile with the purposes of [A]rticle III”).

133. Federalism does not provide the only alternative explanation as Article III was designed to protect citizens living in the states, and individuals living in the territories did not qualify as full citizens warranting that protection, see Pfander, *supra* note 2, at 707—though this argument does not explain why territorial courts should be permitted to adjudicate suits over citizens of the state traveling in a territory. See *id.*

134. See *Pennoy v. Neff*, 95 U.S. 714, 733 (1877) (explaining the limits on state jurisdiction). If territorial courts had jurisdiction to hear claims arising in the states, Congress could circumvent Article III and state courts by directing that all claims subject to federal adjudication proceed to a non-Article III territorial court—for example, it could direct that all federal causes of action be tried in D.C. Superior Court. See Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L.J. 933, 982 (2015) (stating that the D.C. Superior Court is “a non-Article III federal territorial court” that is required to implement federal law and protect defendants’ constitutional rights).

135. *Pennoy*, 95 U.S. at 733.

136. See Pfander, *supra* note 2, at 707, 709–11 (stating that territorial citizens lacked access to state and federal courts outside of their respective territories).

137. PETER S. DU PONCEAU, A DISSERTATION ON THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES 30 (Philadelphia, Abraham Small 1824) (stating that the limitations in Article III “were expressly introduced for the purpose of guarding and protecting so much of the sovereignty of the States . . . ; but where the Constitution gives to the federal government an exclusive power over certain districts and territories, it could not mean to restrict their judiciary, where there was no sovereignty to protect but their own”).

138. See Pfander, *supra* note 2, at 709 (“[R]ights of territorial citizens were defined by reference to a unique set of local laws . . .”).

139. *Id.*

*356 Bales of Cotton*, which first recognized the territorial exception.<sup>140</sup> In upholding the adjudication, the Court stated that if the suit had arisen in one of the states instead of in a territory outside the states, only an Article III court could adjudicate the claim.<sup>141</sup> But this limitation did not apply to the territories because in the territories Congress exercises the “powers . . . of a state government.”<sup>142</sup>

Changes in the law since the nineteenth century, however, suggest that the territorial exception is now too broad. The power of the state courts has expanded. State courts now can hear disputes arising outside the state so long as the parties have sufficient contacts with the state.<sup>143</sup> States accordingly can adjudicate many disputes in the territories.<sup>144</sup> This expansion of state jurisdiction suggests that the territorial exception should be narrowed. If any state court has the power to hear a claim because of the parties’ contacts with a state, that state court should be the alternative forum to an Article III court. Permitting a territorial tribunal to hear those claims infringes on the states’ prerogative to adjudicate claims not subject to Article III jurisdiction.<sup>145</sup>

140. *Am. Ins. v. 365 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 546 (1828) (holding “that the Act of the territorial legislature[] erecting the Court . . . is not ‘inconsistent with the laws and Constitution of the United States,’ and is valid”).

141. *Id.* at 546 (“Although 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.”).

142. *Id.*

143. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

144. *Id.*; see, e.g., John J. Harte, *Validity of a State Court’s Exercise of Concurrent Jurisdiction Over Civil Actions Arising in Indian Country: Application of the Indian Abstention Doctrine in State Court*, 21 AM. INDIAN L. REV. 63, 65 (1997) (explaining that state courts may exercise jurisdiction over disputes arising in Indian territory).

145. Limiting the territorial exception in this way would potentially have the largest impact on disputes arising on Indian reservations located within a state. See, e.g., *Wallace v. Adams*, 204 U.S. 415, 423 (1907) (recognizing that Congress had the authority to establish courts responsible for issues regarding Indian territory property claims in relation to tribal membership discrepancies). Those reservations exist in state boundaries, and the Constitution permits state courts to exercise jurisdiction over claims arising on those reservations. See, e.g., *Oneida Indian Nation of N.Y. v. Burr*, 522 N.Y.S.2d 742, 742 (N.Y. App. Div. 1987) (recognizing broad state jurisdiction for claims arising on reservation); see also *In re Larch*, 872 F.2d 66, 69 (4th Cir. 1989) (noting that ICWA “discloses that Congress recognized that there can be concurrent jurisdiction in state and tribal courts”). Accordingly, states have the prerogative to adjudicate those claims except to the extent Congress assigns those claims to an Article III court. See Harte, *supra* note 144, at 65 and accompanying text.

### B. *Military Exception*

The military exception consists of two strands: courts-martial and military commissions. A federalism view of Article III does not provide much insight about the courts-martial exception.<sup>146</sup> That is because the states' interests in constraining the exercise of federal judicial power applies only when a federal body seeks to exercise judicial power,<sup>147</sup> and courts-martial do not exercise judicial power. Instead, they exercise executive power.<sup>148</sup> Their function is not to enforce rights through judgments, but to maintain discipline in the ranks.<sup>149</sup>

Military commissions raise larger federalism interests. Unlike courts-martial, commissions do exercise judicial power.<sup>150</sup> Their function is to enter judgments against individuals who are not members of the U.S. military.<sup>151</sup> Traditionally, these commissions heard charges against enemy combatants in foreign territory.<sup>152</sup> Those types of cases do not raise significant federalism interests because state jurisdiction does not extend to them, and they adjudicate non-state offenses.<sup>153</sup>

But efforts to expand the commissions into the states do raise federalism concerns. State courts would ordinarily have the power to hear those cas-

146. Of course, many military disputes likely fall outside the personal jurisdiction of any state. See David Vine, *The United States Probably Has More Foreign Military Bases Than Any Other People, Nation, or Empire in History*, THE NATION (Sept. 14, 2015), <https://www.thenation.com/article/the-united-states-probably-has-more-foreign-military-bases-than-any-other-people-nation-or-empire-in-history/> (discussing the United States' vast international military presence).

147. See U.S. CONST. art. III, § 2, cl. 1 (extending federal judicial power to nine types of disputes). Other federalism arguments apply when the federal government seeks to exercise power other than judicial power, but those arguments are beyond the scope of this paper.

148. See Jonathan Hafetz, *Policing the Line: International Law, Article III, and the Constitutional Limits of Military Jurisdiction*, 2014 WIS. L. REV. 681, 687; Fred L. Borch, *Defending Soldiers at Early Courts-Martial*, 2017 ARMY LAW, no. 5, at 1 (“[C]ourts-martial were courts of discipline, and not justice.”).

149. See Borch, *supra* note 148, at 1. The argument is not without faults, however, because courts-martial maintain discipline by adjudicating charges against service members and entering judgments imposing punishment on findings of guilt. See Hafetz, *supra* note 148, at 689 (noting that lay juries do not participate in courts-martial).

150. See Pfander, *supra* note 2, at 757 (discussing military commissions exercising judicial power).

151. *Id.* (explaining that the role of military commissions is to try cases “of illegal enemy combatants”).

152. *Id.*

153. *Cf.* *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877) (explaining the limitations of state court jurisdictions).

es.<sup>154</sup> While Congress could confer exclusive federal jurisdiction on federal courts, it should have to bear the cost of assigning those claims to Article III courts if it wishes to do so. That cost protects the states' interests in adjudicating the claims.<sup>155</sup>

### C. *The Public Rights Exception*

Under the public rights exception, Article I tribunals can adjudicate three types of disputes: (1) efforts by the government to vindicate its rights; (2) suits by individuals to enforce their rights against the government; and (3) suits between individuals turning on federal rights that are part of a broader administrative scheme. A federalism view of the judicial power provides insights into each of these strands.

#### 1. Government Efforts to Vindicate Public Rights

The oldest strand of the public rights exception involves government efforts to vindicate its public rights.<sup>156</sup> Public rights are rights held by the government, such as the right to collect taxes.<sup>157</sup> They are the government counterpart to private rights, which are the traditional rights held by individuals.

In its earliest form, this strand of the exception recognized that, just as the law can authorize individuals to enforce their rights extra-judicially—i.e., without the aid of the judicial power—so too the law can authorize the

---

154. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

155. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 131 (1866) (holding that military commissions could not hear claims against citizens who had been members of the confederacy). To be sure, *Milligan* focused on the Seventh Amendment right to a jury instead of on the limits of Article III. *Id.* at 123–24. But the Court has made clear that the test for whether the Seventh Amendment applies tracks the test for whether a claim may be assigned to a non-Article III tribunal, and prohibiting the commission from exercising jurisdiction also protected the states' interest in trying those claims. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989) (“[T]he question [for] whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question [for] whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal.”).

156. See *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1964–67 (2015) (Thomas, J., dissenting) (explaining the historical development of the federal government's enforcement of public rights).

157. See *id.* at 1965; F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 279–80 (2008) (discussing federal public rights).

government to enforce its public rights extra-judicially.<sup>158</sup> *Murray's Lessee v. Hoboken Land & Improvement Co.* provides an illustration.<sup>159</sup> There, a federal customs officer failed to give the United States duties that he collected for the United States.<sup>160</sup> After calculating the shortfall, the United States seized some of the official's property to satisfy the debt.<sup>161</sup> A subsequent suit challenged the seizure on the ground that only an Article III court could perform the calculation and seizure.<sup>162</sup>

The Supreme Court disagreed. The Court explained that the federal government had a right to be paid by the official, and although Congress could have required the government to go to an Article III court, it chose not to impose that requirement.<sup>163</sup> Instead, federal law authorized the government to seize property outside of court to offset the debt.<sup>164</sup> In other words, federal law established a standard extra-judicial remedy: just like the law has long authorized a private person to reclaim stolen property outside of court or to seize assets to compensate for unpaid rent,<sup>165</sup> the government could claim property to offset a debt owed by a collections officer.<sup>166</sup> *Murray* thus establishes that Congress may generally authorize extra-judicial means to enforce public rights.<sup>167</sup>

One way of extra-judicially enforcing public rights is to assign them to

---

158. *Wellness Int'l Network*, 135 S. Ct. at 1965 (noting that because "public rights were not thought to fall within the core of the judicial power, then that could explain why Congress would be able to perform or authorize non-Article III adjudications of public rights without transgressing Article III[]" (internal quotations omitted)).

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

160. *Id.* at 275.

161. *Id.*

162. *See id.* at 275, 282.

163. *Id.* at 283–84.

164. *Id.* at 285.

165. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES \*3–10 (detailing the types of redress for private injuries that may be "obtained by the mere act of the parties" outside of courts).

166. *See Murray*, 59 U.S. at 284. In stating that the government can choose to vindicate its public rights through government officials outside the judiciary, *Murray* stressed that Congress could not do the same for private rights. *Id.* As the Court put it, Congress cannot "withdraw from judicial cognizance" suits "at the common law, or in equity, or admiralty . . ." *Id.* Further, although the government can authorize a non-judicial government body to vindicate its public rights, it cannot authorize that body to vindicate private rights. *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1965 (Thomas, J., dissenting). If a person chooses to invoke the government's aid to enforce a private right, he must proceed through the judiciary. *See id.*

167. *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 450–51 (1977).



Article I tribunals. The provision of these non-judicial remedies by Article I tribunals does not implicate the states' interest in limiting the federal judicial power because those remedies do not involve the judicial power.<sup>168</sup>

But things are different when an Article I tribunal seeks to vindicate public rights in a way that does involve judicial power—for example, when an Article I tribunal seeks to enter a “dispositive judgment,” a hallmark of judicial power.<sup>169</sup> Only state courts and Article III courts can exercise judicial power. To be sure, the United States may have an interest in vindicating its rights in federal instead of state court.<sup>170</sup> But this suggests that Congress should confer Article III jurisdiction over those suits, not that the Constitution prohibits state jurisdiction over those suits.

## 2. Suits Against the Government

The second strand of the public rights exception covers suits by individuals *against* the government.<sup>171</sup> These suits do not seek to enforce public rights held by the government; instead, they seek to vindicate private rights against the government.<sup>172</sup>

The Court based this exception on sovereign immunity.<sup>173</sup> Sovereign immunity bars suit against the government unless it consents.<sup>174</sup> According

168. *See, e.g.,* *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909) (stating that “it was within the competency of Congress, when legislating as to matters exclusively within its control, to [give] . . . executive officers the power to enforce such penalties without the necessity of invoking the judicial power”).

169. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995) (“[A] judicial Power is one to render dispositive judgments.” (internal quotations omitted) (quoting Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1989–90))); *accord* SAMUEL FREEMAN MILLER, LECTURES ON THE CONSTITUTION OF THE UNITED STATES 314 (New York & Albany, Bank & Bros. 1891). Although the exact contours of judicial power are not well defined, it includes at the very least the power to enter dispositive judgments. *Plaut*, 514 U.S. at 219.

170. *See* FALLON, *supra* note 56, at 8.

171. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989) (“Congress may effectively supplant a common-law cause of action . . . if that statutory cause of action . . . lies against[] the Federal Government in its sovereign capacity.”).

172. *See id.* (discussing a private rights suit against the government based on a statutory cause of action that does not permit a jury trial).

173. *Ex parte Bakelite Corp.*, 279 U.S. 438, 451–52 (1929) (explaining that no court may adjudicate claims against the United States unless Congress explicitly permits it).

174. *Id.*; *see* *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67 (1982) (explaining “sovereign immunity, which recognizes that the Government may attach conditions to its consent to be sued”), *superseded by statute*, 28 U.S.C.A. § 157 (2012), *as recognized in* *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015).

to the Court, the government can attach conditions to that consent.<sup>175</sup> Thus, the reason that an Article I tribunal can hear suits against the government is that the government has consented to suit only before that tribunal.

This rationale is inconsistent with Article III. Article III confers the federal judicial power on the federal courts. The government cannot reassign this federal judicial power to Article I tribunals by conditioning its consent to suit.<sup>176</sup> Sovereign immunity provides the government with the power to *restrict* the power of courts to exercise their judicial power in suits against the government, not to confer the judicial power on non-Article III tribunals.<sup>177</sup>

If Article I tribunals hearing claims against the United States do exercise the judicial power, those adjudications undermine the federalism structure of Article III.<sup>178</sup> State courts have the power to adjudicate claims against the United States—indeed, they regularly did so in the nineteenth century.<sup>179</sup> Allowing Congress to dictate that it will waive sovereign immunity only in Article I tribunals allows it to avoid state courts without bearing the costs of establishing Article III courts.

175. *N. Pipeline Constr. Co.*, 458 U.S. at 67; see also *Juda v. United States*, 13 Cl. Ct. 667, 687 (1987) (“The doctrine of public rights is based, in part, on the traditional principle of sovereign immunity, which recognizes that the government may attach conditions to its consent to be sued.”).

176. See Hessick, *supra* note 31, at 731 (arguing that consent does not confer jurisdiction).

177. *N. Pipeline Constr. Co.*, 458 U.S. at 68. One could develop a theory for claiming that suits in which the United States waives its sovereign immunity do not involve the judicial power; for example, one could argue that sovereign immunity waivers are *not* decisions by Congress to permit suits against the United States, but instead, they are decisions to pay individuals through private legislation. *But see* Hessick, *supra* note 31, at 749 n.206 (“One might argue that . . . the ability of the government to waive sovereign immunity establishes that structural limitations are waivable.”). Under this theory, Article I adjudication is actually a determination of how to disburse funds through that legislation. *Cf.* Rebecca E. Zietlow, *Federalism’s Paradox: The Spending Power and Waiver Of Sovereign Immunity*, 37 WAKE FOREST L. REV. 141, 189–90 (2002) (explaining how the Spending Power in the sovereign immunity context can provide Congress a “‘back door’ through which to accomplish policy goals”). These Article I adjudications thus would not vindicate individual rights that have been violated, but would instead create new entitlements for the beneficiaries. *Dalehite v. United States*, 346 U.S. 15, 24 (1953) (noting that private bills create compensation entitlement). But the Court has not adopted this or any other theory that suggests sovereign immunity waiver does not involve the judicial power. See Hessick, *supra* note 31, at 749 n.206.

178. See Hessick, *supra* note 31, at 746.

179. See generally *Clark v. Barnard*, 108 U.S. 436, 445, 447–48 (1883) (holding that the Rhode Island state court’s denial of the defendant’s demurrer based on sovereign immunity was valid). One might argue that state courts simply lack the power to hear claims against the United States, but that is not so; during the nineteenth century, state courts regularly heard suits against the United States. *See id.*

### 3. Private Suits

The third strand of the public rights exception includes suits that are between private parties that allege federal statutorily created rights that are “so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution . . . .”<sup>180</sup> This “private” strand also does not involve the assertion of a public right belonging to the government. Nor does it require the government to be a party.<sup>181</sup> It extends to disputes between private parties alleging only individual rights, so long as those rights are related to a regulatory scheme.<sup>182</sup>

The Supreme Court has acknowledged that the resolution of these private suits is an exercise of the judicial power.<sup>183</sup> But it has justified the exercise of that power by an Article I tribunal by claiming that the disruption of the separation of powers is minimal because intrusion on the power of the Article III judiciary is insignificant.<sup>184</sup>

This argument overlooks the threat to federalism presented by Article I adjudication of these suits. Permitting Article I tribunals to resolve these disputes interferes with the states’ prerogative to resolve disputes through the judicial power unless Congress confers exclusive jurisdiction on the Article III courts.

To be sure, the suits falling within this strand of the exception necessarily involve federal, and not state, law.<sup>185</sup> But states have an interest in determining the scope of federal law because of federal law’s power to preempt state law.<sup>186</sup> Accordingly, Article I tribunals should not be permitted to adjudicate those claims.<sup>187</sup>

180. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 54 (1989) (The crucial question, in cases not involving the Federal Government, is whether “Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, [has] create[d] a seemingly ‘private’ right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary” (internal quotations omitted) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 593–94 (1985))).

181. See *Granfinanciera*, 492 U.S. at 54; *Thomas*, 473 U.S. at 569 (holding that one’s “right to an Article III forum is absolute unless the Federal Government is a party of record”).

182. *Granfinanciera*, 492 U.S. at 54; see *supra* note 2 and accompanying text.

183. See *Thomas*, 473 U.S. at 589.

184. *Id.* (stating that in these circumstances, the intrusion on the “judicial powers is reduced”).

185. *Granfinanciera*, 492 U.S. at 54 (discussing how this strand of the public rights exception is only implicated if Congress creates legislation).

186. See *Diller*, *supra* note 124, at 1141.

187. See *id.*; Garrick B. Pursley, *Avoiding Deference Questions*, 44 TULSA L. REV. 557, 577 (2009)

*D. Consent*

Under the consent exception, an Article I tribunal can hear any claim if the parties consent to the tribunal's jurisdiction, so long as the Article III courts maintain some supervisory authority over the Article I tribunal.<sup>188</sup> The theory underlying the exception is that the litigants' consent waives any individual right to an Article III adjudication<sup>189</sup> and that conditioning non-Article III adjudication on the litigants' consent minimizes any separation of power concerns because it prevents Congress from unilaterally removing cases from the Article III judiciary.<sup>190</sup>

This line of argument ignores the states' potential interests against permitting Article I adjudication based on the parties' consent.<sup>191</sup> First, under the consent exception, a "party no longer has the option of filing only in either a state court or an Article III court; instead, it can choose to proceed before an Article I tribunal."<sup>192</sup> Thus, Article I tribunals provide "more options for proceeding in federal court and consequently may result in fewer cases being filed in state court."<sup>193</sup> States accordingly have less control over the development of the law and resolution of disputes.<sup>194</sup>

Second, the consent exception permits non-Article III adjudication of disputes raising acute state interests. Under the exception, non-Article III judges can adjudicate any type of claim, including claims involving state law

(observing that "preemption, if not properly constrained, threatens to diminish state government authority below the constitutionally-required minimum threshold").

188. *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1944 (2015) ("[A]llowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers so long as Article III courts retain supervisory authority over the process.").

189. *Id.* at 1943 (reasoning that the party's consent to the adjudication weighed heavily on the adjudication's validity).

190. *See id.* at 1944 (stating that because Article III judges appoint and may remove Magistrate judges, Congress's use of a Magistrate judge via Article I tribunals is not a threat to Article III jurisdiction).

191. Hessick, *supra* note 31, at 745 (explaining that "[f]ederal adjudicators may discriminate against state interests, especially if the adjudicators are answerable to the public. For that reason, states have an interest in federal judges that are independent of the [P]resident and Congress").

192. *Id.* To be sure, the parties "proceed to Article I tribunals only if they choose to do so." *Id.* But that is irrelevant because the problem is that the law permits the parties to choose to go to the Article I tribunal instead of to an Article III or state court. *Id.* at 746 ("Allowing Article I tribunals to adjudicate claims thus makes it easier for Congress to encroach on state sovereignty.").

193. *Id.* at 745.

194. *Id.* at 745-46. The Court imposed some limit on this exception by stating that Congress does not rely on it to create a "a phalanx of non-Article III tribunals." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 855 (1986).

and claims involving the scope of federal law that may preempt state law.<sup>195</sup> These concerns are not alleviated just because the parties may proceed to an Article I tribunal only if they decide to do so.<sup>196</sup> Unless the state itself is a party, the interests of the state are unlikely to guide the parties' choice of forum; instead, the parties' will have their own interests in mind.<sup>197</sup> Indeed, non-state parties may choose to go to an Article I tribunal precisely because they perceive that Article I tribunal will interpret the law in a way that disfavors the states.<sup>198</sup>

#### E. *Catch all*

A federalism view of Article III should result in the eradication of the catch all exception.<sup>199</sup> That exception permits Article I tribunals to exercise judicial power to adjudicate claims that otherwise would be brought in a state or Article III court.<sup>200</sup>

#### F. *Adjunct*

The theory underlying the adjunct exception is that adjuncts do not exercise judicial power.<sup>201</sup> Instead, like law clerks, they merely advise Article III courts on how to rule in a particular case.<sup>202</sup> That justification is dubious

195. Hessick, *supra* note 31, at 745 n.182 (discussing how standing, mootness and ripeness doctrines do not apply to state courts or Article I tribunals, thus allowing both adjudication types to hear any claim).

196. *Id.* at 745.

197. *See generally*, Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79, 79–80 (1999) (discussing a party's strategy of selecting a forum in order to give that party the best chance at achieving its interest and win the suit).

198. *Id.* at 99 (“Litigants not only seek courts that will apply law favorable to their positions, but they also seek courts that are most likely to interpret and apply the law in a way that is favorable to their positions.”).

199. *See* Pushaw, *supra* note 113, at 451–52 (discussing the federalist view to judicial review, justiciability and separation of powers).

200. *CFTC v. Schor*, 478 U.S. 833, 851 (1986) (explaining when Congress may create an Article I tribunals to adjudicate Article III business).

201. *See* Daniel J. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291, 302–04 (1990) (discussing various views on the judicial power of an adjunct—i.e. non-Article III tribunal—versus an Article III court).

202. *Crowell v. Benson*, 285 U.S. 22, 58, 60 (1932) (stating that when Congress creates commissions and boards which help govern various transactions, such entities are still subject to the judicial power where constitutional rights are challenged); *see also* Pfander, *supra* note 2, at 742 (“Congress has established a range of adjudicatory agencies, relying upon the model of *Crowell* and structuring

because the determinations of adjuncts often are binding on courts and dictate the outcome in a case.<sup>203</sup> But if we accept it as true, a federalism view of judicial power does not prohibit adjuncts because they do not exercise judicial power.<sup>204</sup> Federalism does provide an additional reason, however, to closely scrutinize expansions of the adjunct exception. Any expansion would interfere not only with the Article III courts, but also with the state courts.<sup>205</sup>

## V. CONCLUDING THOUGHTS ON RESTRUCTURING FEDERAL ADJUDICATION

Reducing the scope of non-Article III jurisdiction leaves the question of who will decide those cases.<sup>206</sup> Non-Article III tribunals hear millions of cases each year.<sup>207</sup> A federalism view of non-Article III tribunals would not prohibit Article I adjudication of all these claims, but it would significantly limit non-Article III jurisdiction.<sup>208</sup>

One option is to increase the size of the Article III judiciary to handle the displaced non-Article III docket. But the expansion would have to be substantial for it to make a real difference in the ability of the courts to hear those cases. Currently, 380,000 new cases are filed each year in Article III courts,<sup>209</sup> and a significant portion of those cases are resolved by non-Article III magistrate judges.<sup>210</sup> The number of suits filed in non-Article III tribu-

---

the agencies to perform specialized work as assistants, or adjuncts, to federal courts that bear ultimate responsibility for resolution of the dispute.”).

203. See Meltzer, *supra* note 2, at 303 n.61 (doubting any important difference between adjuncts and judges).

204. See Bator, *supra* note 83, at 253 (stating Congress may assign adjudication to an adjunct, but the adjunct’s functions must be limited insofar as an Article III court still ultimately retains its judicial power over the adjudication).

205. See *id.* at 236–38 (discussing the pervasive expansion of adjunct courts).

206. See *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1938–39 (2015) (stating that without non-Article III tribunals, “the federal court system would grind nearly to a halt”).

207. See *Judicial Business 2017*, U.S. CTS., <http://www.uscourts.gov/statistics-reports/judicial-business-2017> (last visited Oct. 27, 2018) (stating that in 2017, over 790,000 bankruptcy petitions alone were filed, which is more than double the number of petitions filed in Article III courts).

208. See Hessick, *supra* note 31, at 753 (stating that non-Article III tribunals could still play an impactful role through hearing nondispositive motions, managing discovery, conducting trials and making recommendations to Article III courts).

209. See U.S. CTS., *supra* note 2 and accompanying text.

210. See *U.S. Magistrate Judges – Judicial Business 2017*, U.S. CTS., <http://www.uscourts.gov/statistics-reports/us-magistrate-judges-judicial-business-2017> (last visited Oct. 27, 2018) (stating that district court judges referred 348,629 civil matters to magistrate judges in 2017).

nals is far greater. Over 800,000 new social security claims are filed each year<sup>211</sup>—and that is only in one agency. The Article III judiciary would likely have to be more than doubled or even tripled to handle the extra cases in the non-Article III docket.

There are at least three downsides to this expansion. First, Article III judgeships are expensive. Judges have lifetime tenure and guaranteed salary. Second, greatly expanding Article III judgeships could generally result in worse judges. That is not simply because many more judges would need to be appointed; there is also the risk that qualified individuals would be less interested in joining the federal bench if the number of judgeships vastly increased because the increase would dilute the prestige of the job.<sup>212</sup> Third, because of lifetime tenure, altering the Article III judiciary is a clumsy way of handling the non-Article III docket.<sup>213</sup> Currently, non-Article III tribunals specialize in particular areas of the law.<sup>214</sup> This specialization allows those tribunals to handle cases more efficiently. Maintaining that efficiency would entail creating specialized Article III courts.<sup>215</sup> But that specialization could become outdated over time if the rates of particular claims change. For example, many immigration claims may be brought today, but in thirty years, there may be many fewer.<sup>216</sup> Because Article III's guarantees do not apply to non-Article III judges, Congress can more easily restructure non-Article III tribunals than Article III courts to meet these changes.<sup>217</sup>

---

211. *Adjudication Research: Joint project of ACUS and Stanford Law School*, STAN. U., <http://acus.law.stanford.edu/reports/caseload-statistics> (last visited Oct. 27, 2018) (reporting that 826,635 social security cases were filed with the Social Security Administration).

212. See Scott Baker, *Should We Pay Federal Circuit Judges More*, 88 B.U. L. REV. 63, 72 (2008) (explaining the prestige and benefits of being an Article III judge).

213. See Hessick, *supra* note 31, at 763 (stating that Article III judges with life tenure could not be fired even if there are too few cases to support that many judges in the future).

214. See Pfander, *supra* note 2, at 651 n.26 (discussing the need to for Article I tribunals to minimize litigation costs and provide expert adjudicators “to deal with specialized issue of law,” including bankruptcy and worker’s compensation).

215. See Bator, *supra* note 83, at 239 (discussing that while specialized Article III courts could have been created in theory, “it would have been quite impossible, psychologically and politically, to create thousands upon thousands of life-tenured [A]rticle III workmen’s compensation and social security and ICC and Security and Exchange Commission and NLRB and Equal Employment Opportunity Commission and OSHA ‘judges’ sitting in [A]rticle III administrative courts”).

216. See *Immigration Cases Pile up in Courts across the U.S.*, NPR, <https://www.npr.org/2018/06/26/623451409/immigration-cases-pile-up-in-courts-across-the-u-s> (last visited Oct. 27, 2018) (discussing how the backlog of immigration cases began in the Bush administration and accelerated during the Obama administration).

217. See Pfander, *supra* note 2, at 651 n.26.

Leaving more cases to the states also poses problems. States may be eager to have their courts decide some cases currently resolved by non-Article III tribunals. But they likely would have little interest in most cases heard by non-Article III tribunals, and they would not want to bear the cost of hearing those cases. The states would be able to absorb the costs much better than the Article III courts because the state judiciary is significantly bigger than the federal judiciary. “There are approximately 30,000 state [court] judges, compared to only 1,700 federal judges,”<sup>218</sup> and more than 100 million new cases are filed each year in the state courts compared with approximately 400,000 new cases each year in federal court.<sup>219</sup>

But the docket increase would still be non-trivial. And the costs would likely fall disproportionately on some states, most likely those with large urban areas and those near the borders—states that already have heavily burdened judiciaries. States accordingly may balk at hearing these new cases, especially since they derive from federal instead of state law.

To be sure, the Supreme Court has limited the ability of states to refuse to hear federal claims.<sup>220</sup> It has held that state courts cannot refuse to hear federal claims if they hear analogous state claims.<sup>221</sup> Thus, a state court cannot refuse to hear federal battery suits if it has jurisdiction over state battery suits. Nor can states limit their jurisdiction to hear only some federal claims of a particular sort—for example, a state cannot agree to hear all 1983 actions except those brought by prisoners against police officers.<sup>222</sup>

But these limitations rest on shaky ground. Many have criticized these decisions as unsupported by the Constitution and inconsistent with federalism.<sup>223</sup> States may be willing to challenge them, especially if the composi-

---

218. *FAQ: Judges in the United States*, INST. ADVANCEMENT AM. LEGAL SYS. 3, [https://iaals.du.edu/sites/default/files/documents/publications/judge\\_faq.pdf](https://iaals.du.edu/sites/default/files/documents/publications/judge_faq.pdf).

219. *Id.*

220. *Haywood v. Drown*, 556 U.S. 729, 740–41 (2009) (holding that New York may not deny a federal claim that goes against its own policy because “[a] State’s authority to organize its courts, while considerable, remains subject to the strictures of the Constitution”).

221. *Id.* at 740 (“[H]aving made the decision to create courts of general jurisdiction that regularly sit to entertain analogous suits, New York is not at liberty to shut the courthouse door to federal claims that it considers at odds with its local policy.”).

222. *Id.* at 741–42 (“Our holding addresses only the unique scheme adopted by the State of New York—a law designed to shield a particular class of defendants (correction officers) from a particular type of liability (damages) brought by a particular class of plaintiffs (prisoners).”).

223. *Id.* at 775 (Thomas, J., dissenting) (arguing that “whether two claims are ‘analogous’ is relevant only for purposes of determining whether a state jurisdictional statute discriminates against federal law”).



tion of the Supreme Court changes given that the most recent decisions on the matter were 5-4. And even if they remain good law, the increase in state court cases from reducing non-Article III jurisdiction may be significant enough to push some states to limit their courts' jurisdiction to hear state and federal claims in a way that complies with the Court's doctrines.<sup>224</sup>

If these scenarios seemed like real possibilities, Congress could respond by offering states money to expand their courts to hear the extra cases. The upshot would be that Congress would spend money on the states instead of on agencies to resolve cases that agencies should not have been resolving in the first place.<sup>225</sup>

A third option is to abrogate or modify federal claims that non-Article III tribunals currently hear. For example, if one concluded that the court of claims could no longer hear particular types of claims against the United States, Congress could refuse to waive sovereign immunity for those claims instead of pushing them into the Article III or state courts.<sup>226</sup>

Closely related, a fourth approach is to change the role of Article I tribunals by removing their ability to exercise judicial power. Doing so removes the federalism objection to the misuse of federal judicial power. To be sure, the judicial power has historically been not well defined,<sup>227</sup> and there continues to be disagreement among the justices.<sup>228</sup> But as noted above, it at least includes the power to enter "dispositive judgments" and to render binding constitutional interpretations. Article I tribunals could accordingly be prohibited from performing these tasks. Moreover, federalism considerations would provide an additional reason for courts to determine, finally, what constitutes the judicial power.

---

224. *Id.* at 776 (Thomas, J., dissenting) ("It cannot be that New York has forsaken the right to withdraw a particular class of claims from its courts' purview simply because it has created courts of general jurisdiction that would otherwise have the power to hear suits for damages against correction officers.").

225. *But see* Pfander, *supra* note 2, at 656 ("[A] literal interpretation of Article III will not do. Literalism promises clear guidelines, and it surely protects judicial independence; it holds that Congress may create lower federal adjudicatory bodies only in accordance with the requirements of Article III . . . . [T]his approach suffers from serious problems of institutional fit.").

226. *See* Hessick *supra* note 31, at 749 n.206 (explaining that Congress could waive sovereign immunity in the Article III context).

227. *See* Hessick, *supra* note 31, at 719–20.

228. *See* *Haywood*, 556 U.S. at 743–45 (Thomas, J., dissenting) (arguing for the correct interpretation of the Framers' intent in granting judicial power in Article III and discussing the history of judicial power as support).

\*\*\*

Courts have focused on separation of powers in determining the constitutionality of Article I adjudications. That focus assumes that the division of power in Article III exists only to protect the federal government. But the provisions of Article III also protect the states. Federalism helps to explain some doctrines that do not sit comfortable under a separation of powers view of Article I adjudication. Moreover, the failure to consider federalism more broadly has resulted in a skewed body of law that overly empowers Article I tribunals at the expense of the states.