

## FEDERALISM, PRIVATE RIGHTS, AND ARTICLE III ADJUDICATION

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*This Article sheds new light on the private rights/public rights distinction used by the Supreme Court to assess the extent to which the United States Constitution permits adjudication by a non-Article III federal tribunal. State courts have traditionally been the primary deciders of lawsuits over private rights—historically defined as suits regarding “the liability of one individual to another under the law as defined.” If Congress could limitlessly assign adjudication of private rights cases to federal officials lacking the life tenure and salary protections of Article III judges, the political branches of the federal government would enjoy vastly expanded authority to encroach on state courts’ traditional authority to decide common law and equity cases between individuals. We argue that such vast congressional power is inconsistent with the limits on federal authority in a constitutional scheme in which state courts have traditionally dominated the adjudication of ordinary private disputes and in which Congress’s power of direct taxation and ability to create lower federal courts were hard-won concessions when the Constitution was adopted. Article III’s implicit constraints on congressional power to confer private rights cases on non-Article III federal tribunals effectively checks federal power to supplant state court adjudication by requiring that adjudicative power over such cases go substantially to Article III courts, bodies constitutionally insulated from congressional control. The private rights/public rights distinction thus operationalizes a principle of constitutional federalism through the mechanism of*

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*federal-level separation of powers. Article III’s federalism underlay explains the Supreme Court’s special concern with non-Article III adjudication of state law claims and of questions of “jurisdictional” fact—two doctrinal positions that have puzzled commentators focused on the threat that proliferation of non-Article III tribunals poses to the power of Article III courts, rather than to the power of state courts and local juries. By showing how federalism is an important part of the non-Article III adjudication puzzle, this Article complements prior accounts that focus solely on concerns with the separation of powers and individual liberty to explain constitutional constraints on congressional power to vest adjudicatory authority in federal officials lacking lifetime tenure and salary protections.*

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INTRODUCTION

Congress’s power to entrust adjudication to non-Article III judges or tribunals is an enduring enigma. Article III provides that: “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”<sup>1</sup> If this Vesting Clause and the Article III, Section 2 enumeration of nine “Cases” and “Controversies” to which the “judicial Power shall extend”<sup>2</sup> are to mean something, there must be some limit to

<sup>1</sup> U.S. Const. art. III, § 1.

<sup>2</sup> *Id.* § 2.

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Congress's power to assign final determinations in Article III-listed cases and controversies outside the judicial branch. But the nature of this limit remains one of the thorniest problems in modern constitutional and administrative law. The Supreme Court has developed a controversial "public rights doctrine" to define the constitutional scope of non-Article III adjudication: Congress has broad discretion to use non-Article III adjudicators in "public rights" cases and lacks similar discretion in "private rights" cases.

Concerns with individual liberty and federal-level separation of powers provide the two dominant themes in judicial opinions and scholarship relating to the public rights doctrine.<sup>3</sup> What has been overlooked in prior accounts is a third concern that was critical at the time of Article III's adoption: protecting the general primacy of state courts in deciding traditional categories of disputes between private parties outside the maritime context. In the wake of post-1930 federal legislation that has greatly expanded the scope of federally created rights and obligations, concern with the public rights doctrine has commonly focused on questions of separation of powers between the Article III courts and Congress's administrative creations. We highlight here, however, how the private rights side of the doctrine has operated to preserve pre-existing state judicial power by limiting federal tribunals for adjudicating cases and controversies between private parties.<sup>4</sup>

That state courts should handle ordinary private disputes outside the maritime context was axiomatic when the Constitution was adopted. This basic presumption of preserving state adjudicative power was strongly reflected in discussion and practice both at the Founding and in subsequent decades. It was, for example, the imperative of preserving state court decisional primacy over traditional private disputes that made Article III's provision for interstate diversity jurisdiction a point of peak controversy during ratification debates. At a time when interstate (and even long-distance intrastate) travel could be forbiddingly time-consuming and inconvenient, this constitutional federalism concern reflected very practical interests in ensuring that state citizens retained

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<sup>3</sup> See *infra* Part I.

<sup>4</sup> Cf. *Badgerow v. Walters*, 142 S. Ct. 1310, 1322 (2022) (declining to uphold federal jurisdiction under the Federal Arbitration Act over a suit to vacate an arbitration award because "[e]nforcement of the Act, we have understood, 'is left in large part to the state courts'" (citation omitted)).

access to relatively proximate, local courts and juries to resolve ordinary private disputes.<sup>5</sup>

Preserving state court decisional primacy in private rights cases could not only spare citizens the expense of travel to distant federal forums, but, more fundamentally, could also safeguard local governance and individual liberty by ensuring the centrality of local judges and juries in private dispute resolution.<sup>6</sup> Article III permitted some encroachment on such traditional work of state courts through its provisions for diversity jurisdiction, but the requirement of diversity itself ensured that this encroachment was limited, as was the mechanism—the Article III judiciary, through which such inroads could be made. If Congress could sidestep such limits by assigning adjudication of private rights cases to federal officials lacking the life tenure and salary protections of Article III judges, the political branches of the federal government would enjoy vastly expanded authority to encroach on state courts’ traditional authority to decide common law and equity cases among private parties.

The Judiciary Act of 1789 and relevant Supreme Court decisions from the nineteenth through the twentieth centuries, and even today, are consistent with recognition of the presumptive primacy of state court settlement of ordinary private disputes outside the admiralty and maritime contexts. Indeed, the provisions for federal court jurisdiction in the Judiciary Act of 1789 were notably parsimonious, prominently featuring, for example, a then-significant five-hundred-dollar amount-in-controversy requirement and only twice-a-year circuit courts for diversity jurisdiction—limitations that helped ensure that only a severely restricted subset of diversity cases would make their way to federal, rather than state, courts.<sup>7</sup> The substantially unchallenged status of state court primacy in resolving private disputes—partly a natural product of the limited resources and personnel of the federal government for much of United States history—helps explain the federalism dimension of Article III that was so prominent in ratification debates.

Appreciation of the federalism dimension of Article III casts the public rights doctrine into a different light. Some who have approached the doctrine strictly from a separation of powers perspective have dismissed

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<sup>5</sup> See *infra* text accompanying notes 143–45.

<sup>6</sup> See *infra* text accompanying notes 139–60.

<sup>7</sup> See *infra* text accompanying note 184.

its applications as incoherent or even mystifying.<sup>8</sup> In comparison to federal law matters, state law matters seem less likely to be subject to abusive allocation by a Congress presumptively more removed from specifically state concerns; yet Supreme Court Justices have repeatedly suggested that the state law status of a dispute between private parties makes its assignment to a non-Article III tribunal especially suspect.<sup>9</sup> Under a federalism perspective, this seeming anomaly dissolves: by restricting federal resolution of state law claims by non-Article III tribunals, the Court's decisions have been faithful to Article III's federalism underlay by helping ensure that state courts (with state judges and juries) remain the primary deciders of such matters. The federalism concern also helps explain the Supreme Court's evident caution, in the landmark case of *Crowell v. Benson*,<sup>10</sup> in assessing the proper allocation of decisional power between an administrative agency and the Article III courts—particularly as to so-called “jurisdictional facts”<sup>11</sup> prominent in that literally borderline maritime case.<sup>12</sup>

In short, we rehabilitate the private rights/public rights distinction in the face of critiques by explaining the doctrine's central role in

<sup>8</sup> See, e.g., Martin H. Redish, Legislative Courts, Administrative Agencies, and the *Northern Pipeline* Decision, 1983 Duke L.J. 197, 208 (“Use of the [public-versus-private rights] dichotomy to determine the proper article III-article I division contravenes the policies and language of article III.”).

<sup>9</sup> See, e.g., Kent Barnett, Due Process for Article III—Rethinking *Murray's Lessee*, 26 Geo. Mason L. Rev. 677, 691–92 (2019) (“[W]hen private parties have a dispute (usually concerning matters of state law), Article III offers its most robust protection. Of course, it is in these cases that the political branches would usually have the least interest.”); James E. Pfander & Andrew G. Borrasso, Public Rights and Article III: Judicial Oversight of Agency Action, 82 Ohio State L.J. 493, 496 (2021) (“Some think it odd that Article III operates more insistently to ensure review of private matters of state law than of claims based on federal statutes.”).

<sup>10</sup> 285 U.S. 22 (1932).

<sup>11</sup> *Id.* at 54–55, 63 (holding that findings of fact “as to the circumstances, nature, extent and consequences of the injuries” sustained by a maritime employee may be entrusted to a deputy commissioner subject to judicial review of law but that a “different question is presented where the determinations of fact are fundamental or ‘jurisdictional,’ in the sense that their existence is a condition precedent to the operation of the statutory scheme” and so must be determined by an Article III court). The *Crowell* Court's mandate that an Article III district court ought to “determine for itself the existence of these fundamental or jurisdictional facts,” *id.* at 63, has perplexed some commentators. See, e.g., Paul M. Bator, The Constitution as Architecture: Legislative and Administrative Courts Under Article III, 65 Ind. L.J. 233, 268–69 (1990) (“[I]f there is one thing plain about the structure of article III, it is that the question whether it is expedient and wise to have a case litigated in an article III federal *trial* court is not a matter of constitutional principle at all.”).

<sup>12</sup> See *infra* text accompanying notes 254–55.

safeguarding constitutional federalism. Article III's listing of nine forms of "Cases" and "Controversies" to which federal judicial power extended was, like the Constitution's earlier enumeration of legislative powers, a limiting measure as well as an enabling one. Specifically, Article III's limited enumeration acted to protect pre-existing state and local governance in the form of state courts and juries. Congress's constitutional obligation to vest federal power over private rights cases in Article III courts prevents the national government from undermining state court primacy in such cases simply by proliferating non-Article III tribunals to decide them. In this respect, horizontal separation of powers between the federal branches of government not only establishes a balance of powers at the federal level, but also helps protect traditional *state* prerogatives from *federal* government intrusion.<sup>13</sup> In contrast, this constitutional federalism concern is severely muted, if not entirely absent, in cases where displacement of state courts is not an issue—as in the territories or, because of longstanding consensus on the desirability of exclusively national adjudication, in admiralty and maritime cases. The concern is similarly muted or absent in public rights cases, which generally do not arise without the involvement, either as a party or as lawmaker, of the federal government. This Article concentrates on the private rights dimension of our account of the public rights doctrine and Article III; another article examines our account's implications for non-Article III adjudication in public rights cases.<sup>14</sup>

Our insight that federalism is an important factor on the private rights side of the public rights doctrine has significant consequences for modern constitutional and administrative law. While the federalism rationale for the private rights side of public rights doctrine supports the Supreme Court's special hesitancy with respect to the non-Article III adjudication

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<sup>13</sup> The protection is imperfect, of course: Congress can extend the reach of federal law—and, consequently, the Article III courts' federal question jurisdiction—through exercise of its Article I powers, which the Article III courts have recognized to be vast. Indeed, Diego Zambrano has argued that in the 1980s and 1990s, "the federal government began to aggressively appropriate state-court litigation[]...leading to negative distributional consequences for small-stakes litigants." Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. Chi. L. Rev. 2101, 2101 (2019). To remedy the situation, he advocates "federal funding for state judiciaries and a push for more state complex litigation courts." *Id.* at 2102. To the extent Congress seeks to deploy non-Article III adjudicators to displace traditional state court litigation, however, congressional efforts are cabined by the public rights doctrine. See *infra* text accompanying notes 112–34.

<sup>14</sup> John M. Golden & Thomas H. Lee, *Congressional Power, Public Rights, and Non-Article III Adjudication*, 98 *Notre Dame L. Rev.* (forthcoming 2023).

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of state law claims, the centrality of the state court displacement concern—and its established circumvention in the circumstances of territorial courts—also suggests that the private rights category is properly viewed as substantially bounded by history. There is a fair amount of sense in the indications from multiple Supreme Court Justices—as well as the precedentially established relationship between demands for Article III adjudication and Seventh Amendment jury rights—that, for purposes of the public rights doctrine, “private rights” are historically tied to rights recognized by common law, equity, or admiralty at the time of the Constitution’s ratification.<sup>15</sup> As a consequence, although the reference to constitutional text and ratification debates in our arguments may draw sympathy from originalists, our approach to understanding Article III and the Court’s public rights doctrine is compatible with an expansive domain for constitutionally permissible non-Article III adjudication, an aspect of our understanding that our companion article emphasizes.<sup>16</sup>

Ultimately, as with Seventh Amendment jury rights, much depends on how strictly one defines the category of relevant modern analogues for traditionally recognized private rights.<sup>17</sup> We do not assert that we have provided a definitive formulation of the private rights category. But we do believe that our account of federalism’s place within the understanding of public rights doctrine should help define the framework for future debates about when non-Article III adjudication is permissible under Article III. More immediately, our account illuminates current controversies regarding the role of Article III courts in our constitutional system. The Supreme Court has recently made the private rights/public rights distinction a centerpiece of decision making. In 2018, the Court, by a 7–2 vote, upheld Congress’s power to assign initial adjudication of patent validity challenges to administrative tribunals whose members lack the life tenure and salary protections of Article III judges because such challenges implicated “public rights.”<sup>18</sup> The two dissenters contended that patents had been historically treated like “other instruments creating

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<sup>15</sup> See *infra* text accompanying notes 38–40, 104, 230–43.

<sup>16</sup> See Golden & Lee, *supra* note 14.

<sup>17</sup> See Samuel L. Bray, *Equity, Law, and the Seventh Amendment*, 100 *Tex. L. Rev.* 467, 468–69 (2022) (discussing the Supreme Court’s historical approach to determining the scope of Seventh Amendment jury rights).

<sup>18</sup> *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1373 (2018) (holding that “reconsideration of the Government’s decision to grant a public franchise” is a matter of public right).

private property rights”<sup>19</sup> and thus that the role entrusted by Congress to non-Article III adjudicators was unconstitutional.<sup>20</sup>

This attention to the private rights/public rights distinction is part of a larger trend of re-emphasis on distinctions between private and public concerns in U.S. constitutional law. State actors have begun consciously exploiting the federalism dimension of the private rights/public rights distinction. In 2021, Texas enacted S.B. 8, a law specifically designed to evade injunction by Article III courts by packaging enforcement against abortion providers or assisters as a matter of private right<sup>21</sup> involving “the liability of one individual to another under the law as defined.”<sup>22</sup> More generally, scholars such as Gordon Wood have newly highlighted the extent to which distinctions between the public and the private have been critical in the development of U.S. constitutional law.<sup>23</sup> Wood in particular has shown how such distinctions have helped delineate the bounds of proper government action while also reinforcing the courts’ role as mediators between “the conflicting claims of public authority and [individuals’] private rights.”<sup>24</sup> Hence, understanding the proper scope of private/public classifications and their relation to structural concerns such as federalism and separation of powers, as well as to concerns of individual liberty, is a crucial problem in modern constitutional law. More specifically, understanding the application of the construct in the context of non-Article III adjudication provides a powerful lens to illuminate fundamental questions about the role of U.S. national courts in a constitutional democracy.

This Article proceeds as follows. Part I describes and distinguishes prior literature. Part II explains and supports our federalism-oriented approach to understanding Article III and the private rights/public rights

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<sup>19</sup> Id. at 1385 (Gorsuch, J., dissenting).

<sup>20</sup> Id. at 1386 (“Today’s decision may not represent a rout but it at least signals a retreat from Article III’s guarantees.”).

<sup>21</sup> See Georgina Yeomans, *Ordering Conduct Yet Evading Review: A Simple Step Toward Preserving Federal Supremacy*, 131 *Yale L.J.F.* 513, 513–14 (2021) (“[S.B. 8’s] delegation of enforcement [to private parties] was meant to prevent the law from being challenged in court before it was enforced.”).

<sup>22</sup> *Crowell v. Benson*, 285 U.S. 22, 50–52 (1932).

<sup>23</sup> See, e.g., Gordon S. Wood, *Power and Liberty: Constitutionalism in the American Revolution* 173 (2021); Louis Michael Seidman, *State Action and the Constitution’s Middle Band*, 117 *Mich. L. Rev.* 1, 10 (2018) (“Before the New Deal revolution, standard constitutional theory identified a public zone of police power and a private zone of individual freedom.”).

<sup>24</sup> Wood, *supra* note 23, at 173.

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distinction. It begins with an examination of pertinent constitutional text and continues with an account of the public rights doctrine. Part II then shows how the ratification debates and subsequent congressional practice support our federalism account of Article III and the private rights/public rights distinction. Part III details and analyzes the Supreme Court's treatment of questions of law, of questions of fact and jury rights, and of party consent to non-Article III adjudication. Part III contends that the outcomes in the Supreme Court's private rights cases have generally been correct, but that, in important respects, the Court's reasoning and doctrinal formulations can be improved. Significantly, Part III endorses the notion that, through consent to non-Article III adjudication, parties may waive otherwise applicable rights to Article III proceedings. After all, the structural protections themselves are designed, in substantial part, to protect individual liberty from tyrannical or otherwise excessive government interference. Consequently, individuals are generally free to give up their rights to adjudication in a government forum. Nonetheless, Part III emphasizes that such waivers are subject to backstopping checks to confirm that party consent does not substantially undermine state courts' traditional prerogatives or federal-level separation of powers—thereby illustrating the complicated ways in which the concerns of federalism, separation of powers, and individual liberty intertwine. The Conclusion summarizes main points and arguments, re-emphasizing how the federalism dimension of Article III helps bring greater clarity to the private rights/public rights picture.

## I. BACKGROUND

This Part locates the present Article relative to prior scholarship, much of which has focused on the relevance (or not) of the private rights/public rights distinction to the separation of powers—specifically, the extent to which Congress lacks power to assign to non-Article III adjudicators matters within the scope of the nine forms of cases and controversies listed in Section 2 of Article III. A basic contention of this Article is that, when applied to the constitutional question whether Article III of the U.S. Constitution requires adjudication by a judge appointed by the President with senatorial “Advice and Consent,”<sup>25</sup> tenure during “good

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<sup>25</sup> U.S. Const. art. II, § 2, cl. 2.

Behaviour,”<sup>26</sup> and protection from salary diminution,<sup>27</sup> the private rights/public rights distinction is grounded to a substantial degree in federalism and is not merely an outgrowth of federal-level separation of powers. Under our account, by generally requiring access to an Article III tribunal in federal adjudication of matters of private right, the public rights doctrine imposes an important constraint on Congress’s ability to expand federal adjudication into spheres traditionally dominated by state courts and juries.

By seeking to explain the public rights doctrine as a working and workable framework, this Article is perforce distinct from the work of scholars such as Martin Redish, who has dismissed the private rights/public rights distinction as “wholly unwarranted by constitutional language, history, policy or theory.”<sup>28</sup> This Article’s account also differs from a recent student note that focuses on federalism concerns in relation to “executive adjudication” but that turns for an enforceable principle to Article I’s Necessary and Proper Clause,<sup>29</sup> rather than retaining focus on Article III and associated case law.<sup>30</sup> In this respect, we are in accord with the conventional view that the non-Article III adjudication puzzle centers on the fences indicated or implicit within Article III itself, but with the key modification that the fences are understood to reflect a federalism concern, as well as concerns of individual liberty and federal-level separation of powers.

Our approach is in substantial conversation with—but still significantly distinct from—a classic 1965 assertion by leading administrative law scholar Louis Jaffe that “even a suit involving ‘private right’” may “be adjudicated by an agency provided that a court is empowered on appeal to determine the law, and provided that the matter is not one at ‘common law’ entitling the parties to a jury trial.”<sup>31</sup> The bare terms of Jaffe’s

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<sup>26</sup> Id. art. III, § 1.

<sup>27</sup> Id.

<sup>28</sup> Redish, *supra* note 8, at 204.

<sup>29</sup> U.S. Const. art. I, § 8, cl. 18.

<sup>30</sup> Note, Executive Adjudication of State Law, 133 Harv. L. Rev. 1404, 1439 (2020). The note’s prescriptions likewise differ. For example, the note does not embrace the role for consent that helped justify upholding non-Article III adjudication in *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 849–51 (1986). Compare *infra* Section III.C, with Note, *supra*, at 1439 (“The inevitable conclusion . . . is that *Schor* was wrongly decided.”).

<sup>31</sup> Louis L. Jaffe, *Judicial Control of Administrative Action* 91 (1965).

formulation differ in four significant particulars from our understanding of the public rights doctrine.

First, the requirement of some level of adjudication by an Article III court can extend to matters of *fact* as well as matters of law. As the Supreme Court clarified in *Crowell v. Benson*,<sup>32</sup> in private rights “cases of equity and admiralty, it is historic practice to call to the assistance of the courts, without the consent of the parties, masters and commissioners or assessors, to pass upon certain classes of questions, as, for example, . . . to find the amount of damages.”<sup>33</sup> Further, in common law cases, “the aid of juries is not only deemed appropriate but is required” by the Seventh Amendment.<sup>34</sup> But the Supreme Court in *Crowell* also determined that Article III courts should review *de novo* non-Article III adjudicators’ determinations of “fundamental or ‘jurisdictional’” facts,<sup>35</sup> and post-1965 Supreme Court decisions have highlighted the potential need for Article III adjudication of questions of fact in the bankruptcy context.<sup>36</sup> Indeed, even Jaffe recognized the need for some Article III court involvement on questions of fact through his characterization of review of agency decisions for substantial evidence as a form of review as a matter of law.<sup>37</sup>

Our second deviation from Jaffe’s provisos is our view that the private rights doctrine is not strictly limited to suits “at ‘common law’ entitling the parties to a jury trial.”<sup>38</sup> Private rights cases can also encompass traditional claims in equity or admiralty as well as modern analogues of traditional claims in equity or admiralty or at common law, such as claims under a workers’ compensation scheme that substitutes for traditional tort suits. A definition of a “private rights” claim that we believe to be supported well by the case law and relevant constitutional concerns holds

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<sup>32</sup> 285 U.S. 22 (1932).

<sup>33</sup> *Id.* at 51.

<sup>34</sup> *Id.* Although the Constitution is not explicit on the point, the Court has commonly appeared to assume that a right to a jury brings with it a right to proceedings before an Article III judge. This assumption makes sense as a corollary to a principle that Congress must substitute an Article III judge when providing for federal adjudication of private rights cases traditionally adjudicated by state court judges and juries.

<sup>35</sup> *Id.* at 54.

<sup>36</sup> See *infra* Subsection III.B.1.

<sup>37</sup> Jaffe elsewhere clarified that he viewed review of agency fact-finding for substantial evidence as part of a court’s assessment of what the law required and thus as encompassed in the requirements of his first proviso regarding reservation to the Article III courts of the power “on appeal to determine the law.” Jaffe, *supra* note 31, at 91, 595–96.

<sup>38</sup> *Supra* text accompanying note 31.

that a private rights claim is one (1) through which one or more private parties seek personalized relief from one or more other private parties; and (2) that was a sort of claim heard by state courts of law, equity, or admiralty in 1789<sup>39</sup> or is a modern analogue thereof.<sup>40</sup>

Our third and fourth deviations from Jaffe's provisos are perhaps best understood as elaborations on them. The third deviation, detailed in Section III.C below, is the proposition that party consent to non-Article III adjudication can waive otherwise existing rights to Article III adjudication when two conditions are met: (1) consent is sufficiently voluntary and well-informed; and (2) the resulting transfer of dispute resolution authority to a non-Article III arbitrator does not significantly undermine the federal separation of powers and a federalism principle that presumptively favors state court decisional primacy in private dispute resolution. Our fourth deviation adds something Jaffe may have viewed as implicit—namely, that even if congressional delegation of adjudicative authority to a non-Article III actor is permitted by Article III, it may still

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<sup>39</sup> Conceivably, there could be some slippage between this proffered definition's invocation of 1789 and Seventh Amendment precedent pointing to 1791. See Bray, *supra* note 17, at 468 ("Through the 1980s, the Court considered [in assessing whether Seventh Amendment jury rights applied] whether the claim was analogous to one that would have been brought at law or in equity in 1791."). But in reasonably disputed cases, the relevant historical analysis seems unlikely to turn very commonly on such a two-year difference; generally speaking, the course of legal development on such matters appears likely not to have been so immediately definitive or precise. Cf. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 379–80 (1996) (concluding that "the mere smattering of patent cases that we have from [the eighteenth century] shows no established jury practice sufficient to support an argument by analogy that today's construction of a [patent] claim should be a guaranteed jury issue"); *Tull v. United States*, 481 U.S. 412, 417 (1987) (describing the Seventh Amendment historical test as involving comparison "to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity"). If daylight develops between the 1789 test and the 1791 test, one could resolve the difference by concluding that the Seventh Amendment may have added (implicitly) to the set of cases for which non-Article III adjudication is improper but did not remove cases from that set.

<sup>40</sup> A paradigmatic private rights case involves a common law claim for relief by one private party against another private party—e.g., a suit for damages due to a breach of contract. The question of what constitutes an appropriate modern analogue came to a head in *Thomas v. Union Carbide Agricultural Products Co.*, which involved a challenge to a statutory "pesticide registration scheme" under which Congress "select[ed] binding arbitration with only limited judicial review as the mechanism for resolving disputes" between registrants over the first registrant's claim for compensation from the second registrant for the second's use of data submitted by the first. 473 U.S. 568, 571–75 (1985). Our companion article addresses this case in more detail. See Golden & Lee, *supra* note 14.

be impermissible because it violates another constitutional requirement, such as the Fifth Amendment requirement of due process.<sup>41</sup>

Our approach also differs significantly from those of more recent commentators, who have fractured over a variety of questions relating to the scope and justification for Article III adjudication of private rights. One view, grounded in an originalist outlook as well as precedent and tradition, is that the judicial role is necessary to protect individual liberty, with separation of powers being a device to advance this more fundamental end.<sup>42</sup> The cases that could be heard in English and American common law courts during the framing and ratification of the Constitution from 1787 to 1789 quite typically involved efforts to vindicate classic Lockean “private rights” to property, life, and liberty in society. Rights established by governmental license or favor—“public rights”—fell outside this enclave and could therefore be the subject of significant adjudicative action by government actors other than common law courts.

Under this individual liberty approach to understanding Article III, a federal court must decide private rights cases because it is the institution of national government that in its day-to-day operation (putting aside politically contentious appointment and confirmation processes) is most independent of politics and the political branches and therefore best positioned to provide fair arbiters of the liability of one individual to

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<sup>41</sup> See *Crowell v. Benson*, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting) (“[U]nder certain circumstances, the constitutional requirement of due process is a requirement of judicial process.”); see also Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What *The Dialogue* (Still) Has to Teach Us*, 69 *Duke L.J.* 1, 55 (2019) (noting with apparent approval Professor Jaffe’s “argu[ment] that due process requires a judicial determination of the ‘legality’ of any administrative deprivation with respect to common law liberty or property”). We should emphasize, however, that we agree with Daniel Meltzer that Article III can require an Article III court in situations where a requirement of due process by itself would not and that a requirement of due process does not invariably or woodenly equate to a requirement of judicial process. See Daniel J. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 *Ind. L.J.* 291, 299 (1990) (“In determining whether a state has provided due process, what matters is not abstract categorizing, but rather whether the tribunal provides a fair hearing.”).

<sup>42</sup> Cf. Richard A. Epstein, *Structural Protections for Individual Rights: The Indispensable Role of Article III—or Even Article I—Courts in the Administrative State*, 26 *Geo. Mason L. Rev.* 777, 778 (2019) (contending that “the separation of powers, and, to a lesser extent, the Appointments Clause, are prophylactic devices that are intended to protect both procedural and substantive rights—the two go hand in hand—without having to make detailed inquiries into individual cases under some vision of procedural due process to see whether these rights have been threatened”).

another under the law. Caleb Nelson is currently the most prominent academic advocate of this view.<sup>43</sup> John Harrison has similarly focused on what he terms “[t]he older system of executive adjudication, with its distinctions between private and public rights and private rights and privileges,”<sup>44</sup> but Harrison takes a comparatively expansive view of the scope of executive adjudication that this system permitted.<sup>45</sup> Nelson, we believe, is halfway right: the private rights/public rights distinction is indeed designed to preserve individual liberty. But apart from navigable waters, it is state courts and juries at the local level, not geographically distant federal courts, that are the constitutionally preferred institutions for the adjudication of private rights. And that basic distinction has important consequences for how the public rights doctrine should operate today.

William Baude has championed a more textualist approach focused on Article III’s vesting of “[t]he judicial Power of the United States”<sup>46</sup> in the Article III judiciary.<sup>47</sup> In this approach, the key separation of powers-focused insight is that, if what is being exercised is “judicial Power of the United States,” Article III judges have to do it.<sup>48</sup> For a definition of “judicial Power,” Baude offers that it is “the power to bind parties and to

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<sup>43</sup> See Caleb Nelson, *Adjudication in the Political Branches*, 107 *Colum. L. Rev.* 559, 562 (2007) [hereinafter Nelson, *Adjudication*] (“When government deals with rights held in common by the public at large, it makes sense for government to be responsive to the people as a whole. . . . But when government is dealing with core private rights, this political responsiveness has long struck Americans as undesirable.”); Caleb Nelson, *Vested Rights, “Franchises,” and the Separation of Powers*, 169 *U. Pa. L. Rev.* 1429, 1432 (2021) (clarifying that legislatures could grant “‘franchises’” that were “capable of vesting in private individuals or entities in such a way as to become full-fledged private rights” or “structure them in such a way as to avoid this result”).

<sup>44</sup> John Harrison, *Public Rights, Private Privileges, and Article III*, 54 *Ga. L. Rev.* 143, 214 (2019).

<sup>45</sup> *Id.* at 215. Among jurists, Justice Thomas is the leading champion of Nelson’s approach to the private rights/public rights distinction and its implications, although Justice Thomas has so far not embraced maximizing individual liberty as ultimate justification. See, e.g., *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 171 (2015) (Thomas, J., dissenting) (citing Nelson, *Adjudication*, *supra* note 43, at 561–74); *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 344 n.2 (2015) (Thomas, J., dissenting) (citing Nelson, *Adjudication*, *supra* note 43, at 566–67).

<sup>46</sup> U.S. Const. art. III, § 1, cl. 1.

<sup>47</sup> See William Baude, *Adjudication Outside Article III*, 133 *Harv. L. Rev.* 1511, 1513 (2020) (“The text of Article III seems to provide a simple account of who can exercise federal judicial power.”).

<sup>48</sup> See *id.* at 1520 (“Because Article III vests this [judicial] power [of the United States] in the federal courts, nobody else can have it.”).

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authorize the deprivation of private rights.”<sup>49</sup> Baude traces the second part of this definition to a “longstanding principle of Anglo-American law,” citing Nelson, thereby causing his facially text-centered approach to overlap in substantial respects with Nelson’s historical and individual freedom-motivated approach.<sup>50</sup>

Baude’s attention to Article III’s “of the United States” language<sup>51</sup> does point to a clever textual hook for justifying the permissibility of adjudication by non-Article III territorial courts, which, in his account, exercise the judicial power of a United States territory, rather than that of the United States.<sup>52</sup> Of course, our federalism explanation provides a different answer on this point, one that we believe better comports with history and common sense: territories do not require Article III courts because they feature no pre-existing state courts to be displaced. This explanation has the further advantage of not requiring response to a difficult question that Baude’s account must answer—namely, why one should *not* view a court created by the “Congress of the United States”<sup>53</sup> for a “Territory . . . belonging to the United States”<sup>54</sup> as exercising powers “of the United States.” Baude himself acknowledges that Congress “created an Article III district judge” for the Orleans Territory—even in 1804, Congress apparently could manage the feat of creating in a territory a court that exercised U.S. judicial power.<sup>55</sup>

A third approach takes a largely functionalist tack to understanding when and to what extent the Constitution requires Article III adjudication or, at least, the ability to seek review of non-Article III adjudication in Article III courts. Such a functionalist approach mixes concerns with individual liberty, separation of powers, and government efficacy—this last presumptively being a value under a Constitution purporting to advance ends such as “form[ing] a more perfect Union” and “promot[ing]

<sup>49</sup> *Id.* at 1513–14.

<sup>50</sup> *Id.* at 1541. In contrast with Nelson, however, Baude characterizes the adjudicative power of military courts as an established form of executive power. See *id.* at 1549 (“These so-called military courts are not really courts in the constitutional sense. They are executive.”). Nelson views this adjudicative power as a form of judicial power, albeit one that is implicitly excluded from the concern of an Article III that focuses instead on the scope of “*civilian* judicial power.” See Nelson, *Adjudication*, *supra* note 43, at 576.

<sup>51</sup> U.S. Const. art. III, § 1, cl. 1.

<sup>52</sup> See Baude, *supra* note 47, at 1525.

<sup>53</sup> U.S. Const. art. I, § 1.

<sup>54</sup> *Id.* art. IV, § 3, cl. 2.

<sup>55</sup> Baude, *supra* note 47, at 1529.

the general Welfare.”<sup>56</sup> This approach has strong pragmatic appeal but tends not to engage to the degree that we do with the details of Supreme Court decisions or of Article III’s text, historical context, and early implementation by Congress.

Jack Beermann has recently written along such functionalist lines, contending that “[i]t is vitally important to evaluate the role of non-Article III adjudicators pragmatically, with the primary considerations being the effectiveness of the regulatory schemes involved and the fairness of the adjudications performed.”<sup>57</sup> In Beermann’s view, “general principles of separation of powers, without clear evidence of abuse, should rarely, if ever, be employed to frustrate efforts by Congress and the Executive Branch to accomplish important federal policies.”<sup>58</sup> A focus on federal-level separation of powers leads Beermann to highlight “a somewhat puzzling aspect of this [current Supreme Court case law], namely that the law seems more concerned with Congress’s assignment of state law claims to non-Article III adjudicators than Congress’s assignment of federal claims to non-Article III adjudicators” even though the motivations for congressional abuse of such assignment power would seem “[i]ntuitively” to be greater with respect to disputes arising under federal law than those arising under state law.<sup>59</sup> Beermann’s puzzle dissolves on our view that constitutional restriction of the forms of federal adjudication available for private rights cases is designed to protect the traditional decisional primacy of state courts, which predominantly revolves around state law claims.

Related to functionalism are approaches that seek to explain Supreme Court precedents based on some version of an appellate review role for Article III courts. The basic idea is that “adequately searching appellate review of the judgments of legislative courts and administrative agencies is both necessary and sufficient to satisfy the requirements of article III.”<sup>60</sup>

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<sup>56</sup> U.S. Const. pmbl.

<sup>57</sup> Jack M. Beermann, *Administrative Adjudication and Adjudicators*, 26 *Geo. Mason L. Rev.* 861, 863 (2019).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 891–92.

<sup>60</sup> Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 *Harv. L. Rev.* 915, 918 (1988); see also Robert L. Glicksman & Richard E. Levy, *The New Separation of Powers Formalism and Administrative Adjudication*, 90 *Geo. Wash. L. Rev.* (forthcoming 2022), <https://ssrn.com/abstract=4006442> [<https://perma.cc/C7MB-UT6G>] (“The critical question from a separation of powers perspective [for administrative

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The most famous champion of appellate review theory, Richard Fallon, found it justified after considering an array of forms of constitutional reasoning:

[A]rguments about the plain, necessary, or permissible meaning of the constitutional text; arguments concerning the intent of the framers; arguments of theory that identify the values or purposes in light of which particular constitutional provisions or the constitutional text as a whole is most attractive or intelligible; arguments based on precedent; and arguments of policy or morality.<sup>61</sup>

James Pfander later developed an “inferior tribunals” variant of appellate review theory.<sup>62</sup> He interpreted Article I’s Inferior Tribunals Clause<sup>63</sup> to imply that Congress may create non-Article III federal tribunals so long as they are “inferior” to the Supreme Court in the sense that their decisions are subject to revision by writs, appeals, or collateral attack in the Article III courts.<sup>64</sup>

Appellate review theory matches up well with the standard appellate review model of modern administrative law, and *Crowell v. Benson* does offer a proto-Administrative Procedure Act version of that model in a private rights case.<sup>65</sup> However, *Crowell* also mandated *de novo* review of “jurisdictional” or “constitutional” facts, a prescription that sits uneasily with the appellate review model.<sup>66</sup> Furthermore, for all of its functional appeal, the Supreme Court has never fully endorsed appellate review theory and in fact has effectively rejected it in the context of bankruptcy

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adjudication describable as law execution] is whether the Article III courts retain the ability to ensure that the initial determination made by an executive agency or official complies with the law.”); cf. David Zaring, *Toward Separation of Powers Realism*, 37 *Yale J. on Reg.* 708, 723 (2020) (“[T]he judiciary does check the administrative state. However it does not do so by placing all cases and controversies as matters for federal judges alone to decide—a separation of powers remedy—but rather by letting courts review adjudications conducted at the agency level.”).

<sup>61</sup> Fallon, *supra* note 60, at 934.

<sup>62</sup> James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 *Harv. L. Rev.* 643, 651 (2004).

<sup>63</sup> U.S. Const. art. I, § 8, cl. 9 (authorizing Congress “[t]o constitute Tribunals inferior to the supreme Court”).

<sup>64</sup> See Pfander, *supra* note 62, at 651–52; see also Pfander & Borrasso, *supra* note 9, at 517–18 (discussing how writs of mandamus, prohibition, and certiorari and provisions for collateral attack acted as common law mechanisms for “administrative oversight” by Article III courts).

<sup>65</sup> See Thomas W. Merrill, *Fair and Impartial Adjudication*, 26 *Geo. Mason L. Rev.* 897, 906–07 (2019) (discussing “*Crowell* and the emergence of the appellate review model”).

<sup>66</sup> See *infra* Subsection III.B.2.

judges hearing supplemental state law claims subject to appellate-style review by Article III judges.<sup>67</sup> By focusing attention on how adjudication by a non-Article III federal tribunal can displace fact-finding by state courts and juries, our Article helps explain the Supreme Court's repeated expressions of concern with fact-finding as well as with the preservation of Article III courts' powers to expound on questions of law.

In sum, our Article's account of Article III and the public rights doctrine helps explain and reconcile the Court's decisions in ways that prior literature does not. Our approach improves on existing scholarship by combining sensitivity to the significance of litigant choice with a federalism perspective on Article III that not only suggests a normative justification for the private rights/public rights distinction, but also explains aspects of the case law—namely, solicitude for the assignment of state law claims and problems of fact-finding—with which other theories of Article III struggle.

## II. FEDERALISM AND THE PUBLIC RIGHTS DOCTRINE

This Part makes the basic argument for our understanding of the public rights doctrine. Section II.A makes the case that our federalism understanding comports with, and is at least arguably suggested by, constitutional text and concerns known to have informed its adoption. Section II.B examines fundamentals of the public rights doctrine, as well as what we argue to be its implicit private rights analogue. Section II.C shows how the federalism concern about preserving state court decisional primacy that we argue is implicit in Article III's text and the private rights/public rights distinction was explicit during the debates over ratification of the Constitution. Section II.D describes how practice in the early republic—in particular, congressional enactment of the Judiciary Act of 1789—respected the federalism concerns underlying the constitutional settlement. This respect was no mere fig leaf. Long after the Constitution's adoption, state courts remained the primary deciders of lawsuits over private rights, lawsuits in which courts determined “the liability of one individual to another under the law as defined.”<sup>68</sup> The private rights/public rights distinction has been both a reflection and a shaper of this reality.

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<sup>67</sup> See *infra* Subsection III.B.1.

<sup>68</sup> *Crowell v. Benson*, 285 U.S. 22, 50–52 (1932).

*A. Constitutional Text*

The delegates to the 1787 Constitutional Convention who adopted Article III recognized that a federal judiciary was a necessary complement to the new national government's legislative and executive branches but were also cautious about displacing state courts. Upon declaring independence in 1776, the states had sought to set up independent courts with robust jury trial rights to replace British colonial and admiralty courts subservient to a distant Crown and thus often viewed as instruments of repression. These state courts were potential models for the new federal judiciary, but, at the same time, their very existence posed a powerful argument against establishing a costly, redundant federal judicial system.<sup>69</sup> The words of Article III reflect the compromise ultimately achieved at the Convention—one balancing demands for a national judiciary branch with those for preservation of the traditional decisional powers of state courts and juries.

Article III's Vesting Clause makes the balancing act plain from the very start: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."<sup>70</sup> There was consensus that a Supreme Court was needed but disagreement at the Convention about the necessity of lower federal courts that would encroach upon state courts and juries. Furthermore, there was concern that the courts of a new general government might be as out of touch with the local needs and private rights of people as the colonial courts of the British Empire had been. The compromise decision adopted was to give Congress the option to establish lower federal courts "from time to time."<sup>71</sup>

The Article III Vesting Clause thus specified the institutions that were to wield the federal judicial power, but what was the substance of that judicial power? The Constitution elsewhere makes clear that this "judicial Power" does not encompass all instances of what modern eyes would

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<sup>69</sup> Cf. Peter Charles Hoffer, William James Hull Hoffer & N.E.H. Hull, *The Federal Courts: An Essential History* 16 (2016) (noting how limitations on a federal tribunal to hear appeals from state courts in prize cases under the Articles of Confederation "were necessary to satisfy a jealous state sovereignty [and] portended rivalry between state and national courts should the latter ever be established").

<sup>70</sup> U.S. Const. art. III, § 1.

<sup>71</sup> *Id.*

deem “adjudication” by federal government bodies.<sup>72</sup> For instance, Article I assigns “Judgment in Cases of Impeachment” to the Senate,<sup>73</sup> and assigns to each House of Congress the task of being “the Judge of the Elections, Returns and Qualifications of its own Members.”<sup>74</sup> But, by contrast to Articles I and II, Article III does not list forms of judicial power (e.g., Congress’s power “[t]o lay and collect Taxes”<sup>75</sup> or the President’s power “to make Treaties”<sup>76</sup>) but instead provides a list of three types of Cases and six types of Controversies to which “[t]he judicial Power shall extend.”<sup>77</sup>

The first of the nine categories makes clear that the federal judicial power generally encompasses federal subject matter: it includes “all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.”<sup>78</sup> The next two heads establish that the “judicial Power of the United States” extends to “all Cases affecting Ambassadors, other public Ministers and Consuls,” and “all Cases of admiralty and maritime Jurisdiction”<sup>79</sup>—cases especially likely to implicate essential foreign affairs and the commerce functions of the federal government. Arising-under cases and admiralty and maritime cases can implicate private rights, but of course, these categories do not touch on the great bulk of the traditional sorts of common law and equity cases that do not originate in federal law or in activities on the navigable waters or high seas.

The next three heads comprehend various “Controversies” in which the United States or a State is a party: “Controversies to which the United States shall be a Party,” “Controversies between two or more States,” and

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<sup>72</sup> *Black’s Law Dictionary* defines “adjudication” as “[t]he legal process of resolving a dispute.” Adjudication, *Black’s Law Dictionary* (6th ed. 1990). In the administrative agency context, the United States’ Administrative Procedure Act (“APA”) defines “adjudication” as an “agency process for the formulation of an order” and defines an “order” as “the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing.” 5 U.S.C. § 551(6)–(7). In the manner of the APA but without reference to an administrative agency, we define “adjudication” as the making of a final determination of obligations under the applicable law to pay damages or other monetary relief, act, or refrain from acting.

<sup>73</sup> U.S. Const. art. I, § 3, cls. 6–7.

<sup>74</sup> *Id.* art. I, § 5, cl. 1.

<sup>75</sup> *Id.* § 8, cl. 1.

<sup>76</sup> *Id.* art. II, § 2, cl. 2.

<sup>77</sup> *Id.* art. III, § 2, cl. 1.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* § 1; *id.* § 2, cl. 1.

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controversies “between a State and Citizens of another State.”<sup>80</sup> At least by traditional definitions of matters of private right, none of these heads would seem to implicate private rights because at least one of the parties is necessarily a State or the United States.<sup>81</sup> Finally, there are what might be called (at least roughly) three diversity-of-citizenship heads. These cover controversies “between Citizens of different States,” “between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.”<sup>82</sup> The Eleventh Amendment, ratified in 1795, narrows the interpretation of two of the heads by declaring that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”<sup>83</sup> As we shall see, it was the citizen-citizen and citizen-foreigner diversity heads that would provoke the greatest controversy during ratification because they plainly encroached upon state court adjudication of private rights.

Having laid out these nine heads, Section 2 of Article III further specifies:

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. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.<sup>84</sup>

In construing the jurisdictional language of Article III, it seems fair enough to presume that Congress does not enjoy absolute authority to vest adjudication of all these nine cases and controversies in federal officials who are not Article III judges. That would render Article III’s enumeration a dead letter. At the very least, Article III would appear to mandate creation of a Supreme Court which “shall have original

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<sup>80</sup> Id. § 2, cl. 1.

<sup>81</sup> As discussed in our companion article, however, there can be ambiguous situations in which the federal government pursues claims that might be viewed as substantially on behalf of private parties—for example, claims for reinstatement and back pay in the labor relations context. See Golden & Lee, *supra* note 14.

<sup>82</sup> U.S. Const. art. III, § 2, cl. 1.

<sup>83</sup> Id. amend. XI.

<sup>84</sup> Id. art. III, § 2, cl. 2.

Jurisdiction” in “all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party.”<sup>85</sup> Moreover, even if congressional assignment of a case or controversy to non-Article III adjudication is permitted under Article III, the assignment may yet violate the Fifth Amendment’s Due Process Clause.<sup>86</sup>

As an initial matter, however, it is not necessarily clear why Article III mandates any constraint on congressional power to choose a non-Article III adjudicator for anything other than cases and controversies within the Supreme Court’s original jurisdiction. Again, the Article III Vesting Clause locates judicial power “in one supreme Court, and in such inferior Courts as the Congress *may from time to time ordain and establish*.”<sup>87</sup> Moreover, the Supreme Court’s appellate jurisdiction is subject to “such Exceptions, and under such Regulations as the Congress shall make.”<sup>88</sup> The language of Article III thus seems to leave it up to Congress whether to create lower federal courts and whether to vest the Supreme Court with appellate jurisdiction.<sup>89</sup> Outside the Supreme Court’s original jurisdiction, does the greater power to create or withhold imply the arguably lesser power to transfer cases and controversies from the Article III list to non-Article III adjudicators?<sup>90</sup> If the answer is “no,” as most

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<sup>85</sup> *Id.*

<sup>86</sup> See *supra* note 41.

<sup>87</sup> U.S. Const. art. III, § 1 (emphasis added).

<sup>88</sup> *Id.* § 2, cl. 2.

<sup>89</sup> The extent of Congress’s power to control the Supreme Court’s appellate jurisdiction was an issue that divided the original authors of the most prominent federal courts casebook. Compare Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 *Harv. L. Rev.* 1362, 1364–65 (1953) (arguing that Congress’s exceptions to the Court’s appellate jurisdiction cannot go so far as to “destroy the essential role of the Supreme Court in the constitutional plan”), with Herbert Wechsler, *The Courts and the Constitution*, 65 *Colum. L. Rev.* 1001, 1005 (1965) (“I see no basis for [the] view [that Congress has limits to its exceptions power] and think it antithetical to the plan of the Constitution for the courts . . . .”); cf. Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 *Stan. L. Rev.* 895, 919–20 (1984) (defending plenary congressional power to control Supreme Court appellate jurisdiction to “express disaffection” with decisions by the Court); Lawrence Gene Sager, *Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 *Harv. L. Rev.* 17, 67 (1981) (arguing that “[t]he judicial independence requirements of article III” support a conclusion that “[s]ome effective form of federal judicial review under article III must be available for claims of constitutional right”).

<sup>90</sup> Cf. Martin H. Redish & William D. Gohl, *The Wandering Doctrine of Constitutional Fact*, 59 *Ariz. L. Rev.* 289, 319 (2017) (“[I]t is impossible to argue, on the basis of [Article III’s] text, that Article III dictates *de novo* federal court review of administrative findings of constitutional facts, when by its express terms it authorizes Congress to remove all jurisdiction from the lower federal courts.”).

commentators believe, then what is the greater, constitutional foul posed by congressional assignment of Article III cases and controversies to non-Article III adjudicators, as opposed to withholding federal jurisdiction altogether? There are three plausible answers that are not necessarily mutually exclusive. On the other hand, they are also not equal in weight.

First, there is the explanation on which we place primary emphasis in this Article. Because Article III enumeration of federal judicial power is, in important part, a promise of limited intervention in realms of pre-existing state judicial power, conferral of adjudicatory power on federal officials outside the judiciary branch could enable intervention on a greater scale and by more politically motivated federal actors who lack Article III judges' tenure and salary protections.<sup>91</sup> Consequently, from a federalism perspective, the parts of Article III's enumeration corresponding to judicial power that the states consented to share concurrently with the federal government (e.g., diversity cases) might only be given to Article III judges. Notably, however, this conservation of state power rationale has substantially weaker force in cases that only exist because of the federal government—for example, “Cases . . . arising under this Constitution, the Laws of the United States, and Treaties . . . which shall be made, under their Authority”<sup>92</sup> and “Controversies to which the United States shall be a Party.”<sup>93</sup>

Second, as a general matter, there is potential for encroachment into the independence of the federal judicial branch itself. No one doubts, for example, that it would be unconstitutional for Congress to create a non-Article III appellate court staffed by judges with one-year appointments to substitute for the Supreme Court in reviewing the constitutional judgments of Article III district judges.<sup>94</sup> Despite the permissive language

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<sup>91</sup> See Sager, *supra* note 89, at 61–67; 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.”).

<sup>92</sup> *Id.* § 2, cl. 1.

<sup>93</sup> *Id.* Likewise, in *The Federalist No. 82*, Alexander Hamilton observed that “this doctrine of concurrent jurisdiction is only clearly applicable to those descriptions of causes of which the State courts have previous cognizance. It is not equally evident in relation to cases which may grow out of, and be *peculiar* to, the Constitution to be established.” *The Federalist No. 82*, at 461 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

<sup>94</sup> Cf. *The Federalist No. 48*, at 276 (James Madison) (Clinton Rossiter ed., 1999) (describing as “evident” the notion that no branch “ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers”);

of the Appellate Jurisdiction Clause—“with such Exceptions . . . as the Congress shall make”—this hypothetical use of a non-Article III court undermines the independence that lifetime tenure and salary protection were designed to ensure for members of the judicial branch.

Third, from an individual liberty perspective, the consolidation of power threatened by such broad authority to constitute non-Article III tribunals seems facially antithetical to the U.S. constitutional order’s separate vesting of legislative, executive, and judicial powers.<sup>95</sup> If subordinates to the political branches that make laws also decide suits under those laws between private parties, the legal system might be especially susceptible—both in lawmaking and in application—to the use of the law to favor those with political influence and to disfavor those without such influence. A similar constitutional concern about a separation of powers abomination animates the Bill of Attainder Clause’s prohibition of the consolidation of prescriptive and adjudicative powers in Congress,<sup>96</sup> as well as the associated limitation of Congress to the power “to declare the Punishment of Treason” but not to enforce it.<sup>97</sup>

In summary, Article III vests “[t]he judicial Power of the United States”<sup>98</sup> in the Article III judiciary, but the Constitution makes clear that not all federal adjudication will occur there. On the other hand, even beyond formal reasons for rejecting a constitutional reading that renders the Article III Vesting Clause toothless, concerns of federalism, the separation of powers, and the protection of individual liberty support a conclusion that congressional ability to assign adjudication to non-Article III tribunals must be substantially limited. The next Section discusses the basics of how the courts—in particular, the Supreme Court—have so far

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Pfander, *supra* note 62, at 774 (expressing skepticism about the constitutionality of a hypothetical statute by which Congress creates “an Article I tribunal with nationwide jurisdiction over appeals from the decisions of federal district courts on specialized questions of tax or patent law”).

<sup>95</sup> See *The Federalist* No. 47, at 269 (James Madison) (Clinton Rossiter ed., 1999) (“No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty than [the principle of separation of powers].”); Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 *Nw. U. L. Rev.* 1, 60 (1990) (“It simply is difficult to believe that separation of powers is furthered, rather than diminished, by placing control over substantive rights—particularly constitutional rights—in the majoritarian body of government alone.”); cf. Brief for Petitioners at 20, *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020) (No. 19-715) (“Legislative subpoenas may not be used to engage in law enforcement . . .”).

<sup>96</sup> U.S. Const. art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.”).

<sup>97</sup> *Id.* art. III, § 3, cl. 2.

<sup>98</sup> *Id.* § 1.

delineated the limits. Sections II.C and II.D will discuss how the early history of the republic—from the ratification debates through the actions of Congress—provide support for our federalism understanding of the reasoning behind, and proper scope of, these limits.

### *B. The Private Rights/Public Rights Distinction*

As the prior Section shows, Article III is a limited grant of federal judicial power over nine enumerated categories of cases or controversies to be vested in one Supreme Court and lower courts that Congress “may from time to time ordain and establish”<sup>99</sup> consistent with the dictates of Article III. Nonetheless, the Supreme Court has long recognized that at least some cases within Article III’s enumerated heads of cases and controversies may be adjudicated by non-Article III tribunals. Of course, there is the aforementioned possibility of adjudication by a state court where state and federal courts have concurrent jurisdiction. But the Supreme Court has long held that there are also circumstances in which non-Article III, but still *federal*, adjudication is permissible. Cases falling within the traditional domains of territorial courts and courts martial are generally accepted historical examples.<sup>100</sup> A third, more controversial category of cases available for non-Article III adjudication, are those involving matters of “public right.” The Court has variably described the Constitution’s allowance of non-Article III adjudication of such matters as the “public-rights doctrine”<sup>101</sup> or the “public rights exception.”<sup>102</sup>

Delineation of the public rights category has long been more than a little woolly.<sup>103</sup> But the category is apparently quite broad, and for this reason we prefer the phraseology “public rights doctrine” over “public

<sup>99</sup> *Id.*

<sup>100</sup> See Pfander, *supra* note 62, at 743 (“Congress does enjoy broad power to constitute such tribunals to hear matters that fall outside of traditional conceptions of the judicial power of the United States—such as those heard before benefit agencies, courts-martial, and territorial courts.”).

<sup>101</sup> E.g., *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1373 (2018).

<sup>102</sup> E.g., *Stern v. Marshall*, 564 U.S. 462, 488 (2011).

<sup>103</sup> See *Oil States*, 138 S. Ct. at 1373 (“This Court has not definitively explained the distinction between public and private rights, and its precedents applying the public-rights doctrine have not been entirely consistent.” (citations and internal quotation marks omitted)); Judith Resnik, “Uncle Sam Modernizes His Justice”: Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation, 90 *Geo. L.J.* 607, 638 (2002) (describing public rights as “an ill-defined category that includes but is not limited to disputants’ claims against the United States government”).

rights exception.” The classic description appeared in the foundational case in Supreme Court jurisprudence on the public rights doctrine, *Murray’s Lessee v. Hoboken Land & Improvement Co.*:

To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper. Equitable claims to land by the inhabitants of ceded territories form a striking instance of such a class of cases; and as it depends upon the will of congress whether a remedy in the courts shall be allowed at all, in such cases, they may regulate it and prescribe such rules of determination as they may think just and needful. Thus it has been repeatedly decided in this class of cases, that upon their trial the acts of executive officers, done under the authority of congress, were conclusive, either upon particular facts involved in the inquiry or upon the whole title.<sup>104</sup>

The Supreme Court has now further characterized the public rights category as encompassing cases in which the federal government itself is a party, cases regarding the grant of a “public franchise” such as patent rights or the government’s reconsideration of such a grant,<sup>105</sup> and “cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert Government agency is deemed essential to a limited regulatory objective within the agency’s authority.”<sup>106</sup> Quite generally, disputes among private parties that turn on the validity of government-created rights such as patent rights may be public rights cases. Beyond the example of patent rights, an instructive

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<sup>104</sup> 59 U.S. (18 How.) 272, 284 (1856).

<sup>105</sup> *Oil States*, 138 S. Ct. at 1373 (“[T]he decision to *grant* a patent is a matter involving public rights—specifically, the grant of a public franchise. Inter partes review is simply a reconsideration of that grant, and Congress has permissibly reserved the PTO’s authority to conduct that reconsideration.”).

<sup>106</sup> *Stern v. Marshall*, 564 U.S. 462, 490 (2011).

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instance of such a case appeared in *Murray's Lessee* itself.<sup>107</sup> *Murray's Lessee* featured a dispute among private parties about title to property in which a central question was the validity of the Treasury Department's seizure and sale of the property without review by an Article III court.<sup>108</sup>

The scope of public rights cases involving only private parties has nonetheless generated great confusion in past decades.<sup>109</sup> The Court has acknowledged the muddle by speaking of some cases as involving “seemingly ‘private’ right[s].”<sup>110</sup> A 2011 opinion for the Court by Chief Justice Roberts confessed that “our discussion of the public rights exception since [1982] has not been entirely consistent.”<sup>111</sup> Further, some Justices have recently emphasized their view that a 2018 opinion for the Court invoking the public rights doctrine “should not be read to say that matters involving private rights may never be adjudicated other than by Article III courts, say, sometimes by agencies.”<sup>112</sup>

Nonetheless, it seems fair—albeit not logically necessary—to say that the public rights doctrine implies some version of its inverse—i.e., a “private rights doctrine” holding that the Constitution limits Congress’s power to assign the adjudication of private rights to a non-Article III entity. Even at the post-New Deal height of a sense of constitutional latitude regarding the assignment of federal adjudicators, there was fidelity to a core form of a private rights doctrine. A case in point comes

<sup>107</sup> 59 U.S. (18 How.) 272.

<sup>108</sup> See *id.* at 274–75.

<sup>109</sup> See Barnett, *supra* note 9, at 677–78 (describing the “‘public-rights’ exception” as “present[ing] ‘a most difficult area of constitutional law,’ where ‘precedents are horribly murky’ and ‘doctrinal confusion abounds’” (quoting Letter from Thomas G. Krattenmaker, Professor of L., Georgetown Univ. L. Ctr. (Jun. 30, 1976), in *Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civ. & Const. Rts.*, 94th Cong. 2689 (1976)); cf. Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, *Hart & Wechsler’s The Federal Courts and the Federal System* 354 (7th ed. 2015) (“Despite its historical lineage, the public rights category has never received a canonical formulation.”).

<sup>110</sup> *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 594 (1985); see also *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 54 (1989) (quoting *Union Carbide*, 473 U.S. at 593–94) (“The crucial question, in cases not involving the Federal Government, is whether ‘Congress, acting for a valid legislative purpose . . . , [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. . . .’” (alterations in original)).

<sup>111</sup> *Stern v. Marshall*, 564 U.S. 462, 488 (2011).

<sup>112</sup> *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1379 (2018) (Breyer, J., concurring).

in Jaffe's concession that access to Article III adjudication is necessary when constitutional jury rights apply.<sup>113</sup>

Our formulation of a private rights doctrine draws—but also builds—upon that articulated by the Supreme Court in its 1932 decision in *Crowell v. Benson*,<sup>114</sup> the decision most generally acknowledged as foundational for modern jurisprudence on the constitutionality of non-Article III adjudication. The *Crowell* Court distinguished “cases of private right and those which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.”<sup>115</sup> With respect to the latter category of “public rights” cases, “Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.”<sup>116</sup> But according to *Crowell*, in a case of “private right, that is, of the liability of one individual to another under the law as defined,” access to an Article III tribunal is constitutionally required.<sup>117</sup> What that Article III court must be empowered to decide is addressed at length in Part III. But for the moment, we can say that the upshot from the Court's case law—consistent with *Crowell*—is that Congress may assign substantial fact-finding responsibilities to non-Article III officials in a private rights case but cannot entirely displace the role of Article III federal judges in the adjudication of the relevant private rights, especially in relation to what are considered questions of law.

### C. Ratification Debates

Sections II.A and II.B have described the public rights doctrine as well as the foundations for our understanding in accordance with constitutional text. Neither conventional articulations of the doctrine nor Article III's text make explicit reference to the federalism principle that we argue underlie them, although federalism concerns seem discernible in their language and structure. To bolster our understanding of the doctrine and constitutional text, we turn now to the ratification debates, where the concerns about displacing state courts that we have highlighted were explicit. As this Subsection makes clear, concern about preservation of

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<sup>113</sup> See *supra* text accompanying note 31.

<sup>114</sup> 285 U.S. 22 (1932).

<sup>115</sup> *Id.* at 50.

<sup>116</sup> *Id.* (citation and internal quotation marks omitted).

<sup>117</sup> *Id.* at 51.

the powers of state courts and local juries was a major—arguably the most contentious— point of debate at state conventions to ratify the United States Constitution.<sup>118</sup> The original Constitution’s failure to provide for civil jury rights further stoked concerns about the potential overrunning of pre-existing, local mechanisms for governance. The need for defenders of the Constitution to allay such fears—to provide assurance that Article III comported with an expected, substantial continuation of traditional prerogatives of local courts and juries—is strong evidence for our federalism-informed understanding of Article III and its tributary public rights doctrine.

At the time of the Constitution’s framing and ratification, there was acute awareness that, in contrast to the Articles of Confederation, the new Constitution would give the national government considerable powers of direct action upon individuals. The most prominent instance was Congress’s Article I power to tax.<sup>119</sup> But Article III likewise loomed large in this regard. Article III authorized the establishment of federal courts that would have power to issue binding judgments and orders that could curtail individual liberty or take an individual’s property for, among other things, violation of federal revenue laws.<sup>120</sup> This was a great expansion from the more limited grants of centralized adjudicatory power under the Articles of Confederation, which encompassed prize cases, cases of alleged piracy or “felonies committed on the high seas,” and disputes over “the private right of soil claimed under different grants of two or more states.”<sup>121</sup> In taking on this vastly expanded realm of adjudicatory authority, the federal courts would assume roles of acting upon

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<sup>118</sup> See Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 *Harv. L. Rev.* 483, 487 (1928) (“On no section of the new Constitution was the assault more bitter than on the provisions for the federal judiciary.”).

<sup>119</sup> U.S. Const. art. I, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises.”); see also George Mason, *Remarks at the Virginia Convention* (June 4, 1788), in 9 *The Documentary History of the Ratification of the Constitution* 936, 936 (John P. Kaminski & Gaspare J. Saladino eds., 1990) [hereinafter 9 *DHRC*] (reporting that George Mason, an opponent of the Constitution at the Virginia ratifying convention, warned that “[t]he assumption of this power of laying direct taxes, does of itself, entirely change the confederation of the States into one consolidated Government”).

<sup>120</sup> See U.S. Const. art. III, § 2 (“The judicial Power [of the United States] shall extend to all Cases, in Law and Equity, arising under . . . the Laws of the United States.”).

<sup>121</sup> *Articles of Confederation of 1781*, art. IX; see also Thomas H. Lee, *Article IX, Article III, and the First Congress: The Original Constitutional Plan for the Federal Courts, 1787–1792*, 89 *Fordham L. Rev.* 1895, 1901–07 (2021) (identifying categories of subject matter in which the Articles of Confederation provided for adjudication at the national level).

individuals that had previously been reserved for state courts.<sup>122</sup> At the outer limits of such federal judicial power to act directly on individuals was the power to decide controversies among private parties outside the admiralty and maritime context and where no issues of federal law were implicated.

The newly envisioned federal courts' proposed encroachment on pre-existing state power predictably attracted criticism that champions of the new Constitution were anxious to rebut. They defended Article III in substantial part by emphasizing that the Constitution's provision for federal courts was not "intended to abolish" state courts.<sup>123</sup> Such concern about the future for state courts, as well as local juries, was a major tributary of the common Anti-Federalist worry that a "consolidation" of national power would degrade or even obliterate local governance.<sup>124</sup> The Anti-Federalist "Centinel" in Pennsylvania warned that a profusion of federal legislation would bring with it the "eclips[ing]" of state courts.<sup>125</sup> Brutus thundered that the federal judicial power itself would take a more active—even if "silent and imperceptible"—role in effecting "an entire subversion of the legislative, executive and judicial powers of the individual states."<sup>126</sup> George Mason, at the Virginia ratifying convention,

<sup>122</sup> See Brutus XI, N.Y. Journal (Jan. 31, 1788), *reprinted in* 20 The Documentary History of the Ratification of the Constitution 680, 681 (John P. Kaminski, Richard Leffler, Gaspare J. Saladino & Charles H. Schoenleber eds., 2004) [hereinafter 20 DHRC] ("The real effect of this system of government, will therefore be brought home to the feelings of the people, through the medium of the judicial power.").

<sup>123</sup> The Federalist No. 81, at 453 n.\* (Alexander Hamilton) (Clinton Rossiter ed., 1999) (rejecting the "absurd[]" notion that the Constitution's allowance for inferior federal courts was "intended to abolish all the county courts in the several States which are commonly called inferior courts").

<sup>124</sup> See Mason, *supra* note 119, at 936 ("The very idea of converting what was formerly a confederation, to a consolidated Government, is totally subversive of every principle which has hitherto governed us."); Michael J. Faber, *An Anti-Federalist Constitution: The Development of Dissent in the Ratification Debates* 31 (2019) (observing that "[t]he central concern of [the New York-based Anti-Federalist writer] Brutus is consolidation," which cuts against the principle that "republican government must remain close and responsive to the people").

<sup>125</sup> Reply to Wilson's Speech: "Centinel" [Samuel Bryan] II, Freeman's Journal (Philadelphia) (Oct. 24, 1787), *reprinted in* 1 The Debate on the Constitution: Federalist and Antifederalist Speeches, Articles, and Letters During the Struggle Over Ratification 77, 82 (Bernard Bailyn ed., 1993) [hereinafter 1 Debate on the Constitution] (predicting that, with the discovered "necess[ity] for the federal legislature to make laws upon every subject of legislation," "the state courts of justice . . . will be eclipsed and gradually fall into disuse").

<sup>126</sup> Brutus, *supra* note 122, at 683; see also Faber, *supra* note 124, at 34 (noting that, for Brutus, "[i]t is the courts, though, that will really hold this government together and consolidate power").

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reiterated the alarm he had earlier raised at the Constitutional Convention—that “[t]he judiciary of the United States is so constructed & extended, as to absorb & destroy the Judiciarys of the several States.”<sup>127</sup>

Defenders of the Constitution such as James Madison contended that fears about the displacement of state court adjudication were wildly overblown. Adverting to the fact that non-federal, non-diversity cases dominated state dockets, Madison suggested that the carefully delimited reach of Article III “judicial Power” meant that the federal courts would have relatively little impact on their state counterparts: “The great mass of suits in every State lie between Citizen & Citizen,” he observed, “and relate to matters not of federal cognizance.”<sup>128</sup> Noah Webster likewise stressed that, outside Article III’s limited heads of jurisdiction, “the powers and jurisdiction of the several judiciaries of each state, remain unimpaired.”<sup>129</sup> In *The Federalist No. 83*, Alexander Hamilton, addressing New Yorkers, struck a similar note in arguing that the Constitution’s failure to provide explicitly for trial by jury in civil cases “in no case abolished” the use of juries in such cases; instead, “in those controversies between individuals in which the great body of the people are likely to be interested, that institution will remain precisely in the same situation in which it is placed by the State constitutions,” fundamentally because “the national judiciary will have no cognizance of [those cases], and of course they will remain determinable as heretofore by the State courts only.”<sup>130</sup> As Section II.B emphasizes, these observations by Madison, Webster, and Hamilton were prescient.

Nonetheless, more specific arguments were necessary to address three key flashpoints: Article III’s provisions for (1) federal diversity jurisdiction; (2) congressional power to create an apparently unlimited

<sup>127</sup> George Mason, Objections to the Constitution (Oct. 7, 1787), in 8 *The Documentary History of the Ratification of the Constitution* 40, 44 (John P. Kaminski & Gaspare J. Saladino eds., 1988) [hereinafter 8 DHRC]; see also Mason, *supra* note 119, at 940 (“When we come to the Judiciary, we shall be more convinced, that this [National] Government will terminate in the annihilation of the State Governments . . .”).

<sup>128</sup> Letter from James Madison to George Washington (Oct. 18, 1787), in 8 DHRC, *supra* note 127, at 76, 76.

<sup>129</sup> “A Citizen of America” [Noah Webster], *reprinted in* 1 *Debate on the Constitution*, *supra* note 125, at 129, 152.

<sup>130</sup> *The Federalist No. 83*, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1999); cf. *The Federalist No. 82*, *supra* note 93, at 460 (Alexander Hamilton) (“I shall lay it down as a rule that the State courts will *retain* the jurisdiction they now have, unless it appears to be taken away in one of the enumerated modes.”).

number of inferior courts;<sup>131</sup> and (3) an appellate jurisdiction in the Supreme Court that extended to matters of fact as well as matters of law.<sup>132</sup> In contrast, admiralty and maritime actions were a key category of pre-existing private rights cases to which the Constitution extended federal judicial power<sup>133</sup> with relatively little controversy.<sup>134</sup>

Debates over federal diversity jurisdiction are arguably most to the point for our present purpose. As noted earlier, Article III provides that the federal “judicial Power shall extend . . . to Controversies . . . between a State and Citizens of another State;—between Citizens of different States, . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”<sup>135</sup> These provisions for diversity jurisdiction came under heavy fire, with Anti-Federalists contending that such cases “should be left . . . to the decision of the particular state courts.”<sup>136</sup> Diversity jurisdiction was a controversial category of federal judicial power because it plainly transgressed upon traditional adjudication of private rights by state courts and juries—federal courts were given jurisdiction to adjudicate the liability of individuals to other individuals from other states and foreign states.<sup>137</sup>

<sup>131</sup> U.S. Const. art. III, § 1, cl. 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”)

<sup>132</sup> Id. § 2, cl. 2 (providing that, “[i]n all the other Cases before mentioned [that do not lie within the Supreme Court’s ‘original Jurisdiction’], the supreme Court shall have appellate Jurisdiction, both as to Law and Fact”).

<sup>133</sup> Id. cl. 1 (“The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . .”).

<sup>134</sup> See, e.g., George Mason, Remarks at the Virginia Convention (June 19, 1788), in 10 *The Documentary History of the Ratification of the Constitution* 1401, 1403 (John P. Kaminski & Gaspare J. Saladino eds., 1993) [hereinafter 10 DHRC] (reporting that George Mason “admit[ted] that [the federal courts] ought to have Judicial cognizance in all cases affecting Ambassadors, foreign Ministers and Consuls, as well as in cases of maritime jurisdiction”); see also Faber, *supra* note 124, at 387–88 (indicating that, “for many Anti-Federalists,” “[c]ases involving federal laws, federal officers, and the Constitution clearly fell to the federal courts, as did maritime law cases and suits against the national government”).

<sup>135</sup> U.S. Const. art. III, § 2, cl. 1.

<sup>136</sup> Refutation of the “Federal Farmer”: Timothy Pickering to Charles Tillinghast, Philadelphia (Dec. 24, 1787), *reprinted in* 1 *Debate on the Constitution*, *supra* note 125, at 289, 302.

<sup>137</sup> See Pauline Maier, *Ratification: The People Debate the Constitution, 1787–1788*, at 287–88, 450 (2010); Lee, *supra* note 121, at 1911 (“These headings of judicial power had been designed to provide alternative forums for foreign and out-of-state litigants to protect against potentially biased judges and juries in state courts, and, to some extent, biased state laws as well.”); cf. Friendly, *supra* note 118, at 495–97 (surmising that the diversity jurisdiction was enacted in part to mitigate anti-business state legislation).

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Interstate diversity jurisdiction over suits “between Citizens of different States” was more controversial than international diversity jurisdiction, which could be justified to mitigate the risk of renewed war with Great Britain and tensions with the European powers.<sup>138</sup> Brutus contended that the interstate diversity provision would in practice swallow the jurisdictions of the state courts whole. In Brutus’s view, a party would readily gain entry to the federal courts by asserting diversity of citizenship—as a matter of fib or legal fiction—even when there was none as a matter of fact.<sup>139</sup> While Federalists such as Hamilton argued that federal diversity jurisdiction should be offered to give assurance of an impartial tribunal,<sup>140</sup> Anti-Federalists such as Mason viewed as “ridiculous” the notion that the state courts could not be trusted in such cases: “If I have a controversy with a man in Maryland—if a man in Maryland has my bond for 100 l. are not the State Courts competent to try it?”<sup>141</sup> John Marshall acknowledged that the federal courts’ jurisdiction over such cases “may not in general be absolutely necessary,” but contended that there could be diversity of citizenship cases in which access to a federal court would be critical to provide “justice to our citizens” and to avoid “disputes between the States.”<sup>142</sup> The vigor of the debate over interstate diversity jurisdiction highlights the extent to which

<sup>138</sup> See Wythe Holt, “To Establish Justice”: Politics, The Judiciary Act of 1789, and the Invention of the Federal Courts, 1989 *Duke L.J.* 1421, 1439 & n.56, 1452 (“The notoriety of the transgressions against the [Peace] Treaty [of 1783] made by legislatures and courts under the spell of debtors [during the time of the Articles of Confederation] was widespread among the creditor element.”).

<sup>139</sup> See Brutus XII, *N.Y. Journal* (Feb. 7 & 14, 1788), reprinted in 20 *DHRC*, supra note 122, at 756, 773–74 (“Nothing more is necessary than to set forth, in the process, that the party who brings the suit is a citizen of a different state from the one against whom the suit is brought . . . [.]”). The “assignee” clause of the Judiciary Act of 1789 was specifically enacted to preempt such litigation stratagems to manufacture diversity. See Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 79 (“[N]or shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favour of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange.”).

<sup>140</sup> See *The Federalist* No. 80, at 446 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (“The reasonableness of the agency of the national courts in cases in which the State tribunals cannot be supposed to be impartial speaks for itself.”).

<sup>141</sup> Mason, note 134, at 1405; see also Reply to Wilson’s Speech: “Centinel” [Samuel Bryan] II, *Freeman’s J.* (Philadelphia) (Oct. 24, 1787), reprinted in 1 *Debate on the Constitution*, supra note 125, at 77, 83 (“This last is a very invidious jurisdiction, implying an improper distrust of the impartiality and justice of the tribunals of the states.”).

<sup>142</sup> John Marshall, Remarks at the Virginia Convention (June 20, 1788), in 10 *DHRC*, supra note 134, at 1430, 1433–34.

respect for the traditional prerogatives of state courts was a matter of high concern in setting proper boundaries for federal court adjudication under Article III.

Debates over Congress's power to create courts inferior to the Supreme Court likewise highlighted worries about the potential displacement of state courts as well as the concern that federal courts would be comparatively remote forums for justice.<sup>143</sup> There was something of a catch-22 alleged by opponents in relation to Article III's provision regarding inferior courts.<sup>144</sup> If Congress failed to create enough inferior courts, "then an individual would have to travel far for the administration of justice, even further on appeal, and only the rich would truly be able to have a fair trial."<sup>145</sup> On the other hand, "[i]f the courts were many, they would necessarily be unacceptably expensive and encroach on the jurisdiction and prestige of the state courts."<sup>146</sup>

Of course, the Constitution was ratified despite such concerns. But a key point here is that, given that the limited provisions for adjudication by Article III courts were so hotly contested, the lack of comparable—or, insofar as we know, even reasonably prominent—argument over a possibility of non-Article III federal adjudicators displacing the work of

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<sup>143</sup> Cf. Joseph J. Ellis, *The Cause: The American Revolution and Its Discontents, 1773–1783*, at 324–25 (2021) (noting a prevalent view in the states during the 1780s that "[a]ny government beyond local or state borders was a foreign government, 'them' rather than 'us'"). That view prevailed well into the twentieth century. See, e.g., *Testa v. Katt*, 330 U.S. 386, 389 (1947) ("[W]e cannot accept the basic premise on which the Rhode Island Supreme Court held that it has no more obligation to enforce a valid penal law of the United States than it has to enforce a penal law of another state or a foreign country.").

<sup>144</sup> Cf. Marshall, *supra* note 134, at 1431 (stating that he had anticipated objections that, under the Constitution, Congress might provide "no Inferior Courts," but claiming that he "did not conceive, that the power of increasing the number of Courts could be objected to by any Gentleman, as it would remove the inconvenience of being dragged to the centre of the United States").

<sup>145</sup> Faber, *supra* note 124, at 387; see also Reply to Wilson's Speech: "Centinel" [Samuel Bryan] II, *Freeman's J. (Philadelphia)* (Oct. 24, 1787), *reprinted in* 1 *Debate on the Constitution*, *supra* note 125, at 77, 84–85 ("An inhabitant of Pennsylvania residing at Pittsburgh, finds the goods of his debtor, who resides in Virginia, within the reach of his attachment; but no writ can be had to authorise the marshal, sheriff, or other officer of Congress, to seize the property, about to be removed, nearer than 200 miles . . .").

<sup>146</sup> Faber, *supra* note 124, at 387; see also Reply to Wilson's Speech: "Centinel" [Samuel Bryan] II, *Freeman's J. (Philadelphia)* (Oct. 24, 1787), *reprinted in* 1 *Debate on the Constitution*, *supra* note 125, at 77, 85 ("Or if an inferior court, whose judges have ample salaries, be established in every county, would not the expence be enormous?").

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state courts is a significant dog that didn't bark.<sup>147</sup> From a federalism perspective, the possibility of non-Article III adjudicators taking on the work of state courts would presumably have been even more worrisome. Without the salary and life tenure protections of Article III judges, non-Article III officials would be easier for Congress to create, likely cheaper, and more desirable for members of the political branches who valued influence over the operation of their adjudicatory creations. The possibility does not seem entirely fanciful when one considers the forty-two justices of the peace that lame-duck President John Adams commissioned pursuant to the 1801 Act Concerning the District of Columbia,<sup>148</sup> made famous by *Marbury v. Madison*.<sup>149</sup> These justices of the peace had jurisdiction only in the District, but they personified the potential risk of encroachment—and of politicized and more likely biased encroachment<sup>150</sup>—by non-Article III adjudicators on the traditional powers of state courts in ordinary dispute resolution. Indeed, the fact that Adams and the Federalist Congress of 1801 did not even think to create justices of the peace in the states but rather attempted to create sixteen presumptive Article III circuit judges<sup>151</sup> comports precisely with our point that federalism lies at the heart of the constitutional commitment to Article III adjudication of private rights cases over which the states had concurrent jurisdiction. If the Anti-Federalists had even considered the

<sup>147</sup> Cf. *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) (“Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”).

<sup>148</sup> Act Concerning the District of Columbia, ch. 15, § 11, 2 Stat. 103, 107 (1801). The Act provided for “such number of discreet persons to be justices of the peace, as the President of the United States shall from time to time think expedient, to continue in office five years.” *Id.* The justices were to have:

[I]n all matters, civil and criminal, and in whatever relates to the conservation of the peace . . . all the powers vested in, and shall perform all the duties required of, justices of the peace, as individual magistrates, by the laws herein before continued in force in those parts of [the] district, for which they shall have been respectively appointed; and they shall have cognizance in personal demands to the value of twenty dollars, exclusive of costs . . . .

*Id.*

<sup>149</sup> 5 U.S. (1 Cranch) 137, 154 (1803) (“Has [Marbury] a right to the commission he demands? His right originates in an act of congress passed in February 1801, concerning the district of Columbia.”).

<sup>150</sup> Cf. Marshall, *supra* note 134, at 1430 (“What is it that makes us trust our Judges? Their independence in office, and manner of appointment. Are not the Judges of the Federal Court chosen with as much wisdom, as the Judges of the State Governments? Are they not equally, if not more independent?”).

<sup>151</sup> Judiciary Act of 1801, ch. 4, § 7, 2 Stat. 89, 90.

possibility of such non-Article III adjudicators exercising concurrent jurisdiction with the state courts, their opposition to the Constitution would presumably have been even more strident.<sup>152</sup>

Finally, there was substantial concern about the scope of the Supreme Court's appellate jurisdiction, particularly its extension to matters of fact as well as matters of law. For example, even Edmund Randolph, who supported the Constitution at Virginia's ratifying convention, condemned "the appellate jurisdiction as the greatest evil in it."<sup>153</sup> Opponents feared an abridgement of traditional rights to trial by a jury of locally resident peers.<sup>154</sup> Because "the term 'appellate' . . . [wa]s commonly used in reference to appeals in the course of the civil law," which then "prevail[ed] in our courts of admiralty, probate, and chancery," some feared that the Supreme Court's appellate jurisdiction was "an implied supersedure of the trial by jury" in the states that offered the jury right in those contexts.<sup>155</sup> And even if appeal to the Supreme Court did not entail re-examination of facts, the cost and expense it entailed was likely to favor the wealthy over the poor.<sup>156</sup> "Even suppose the poor man should be able to obtain judgment in the inferior Court," George Mason wondered, "what justice can he get on appeal? Can he go 400 or 500 miles

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<sup>152</sup> Cf. Pfander, *supra* note 62, at 739 (answering potential criticism of "an inferior tribunals account" for enabling "an end run around both the carefully circumscribed limits on the power of the federal courts and the jury trial guarantees of the Seventh Amendment" by indicating that a proper understanding of "the inferiority requirement" does not allow "Congress [to] simply shift state law matters to Article I tribunals").

<sup>153</sup> Edmund Randolph, Remarks at the Virginia Convention (June 10, 1788), in 9 DHRC, *supra* note 119, at 1092, 1101.

<sup>154</sup> See, e.g., Letter from Richard Henry Lee to Governor Edmund Randolph, Va. Gazette (Petersburg) (Dec. 6, 1787), reprinted in 1 Debate on the Constitution, *supra* note 125, at 465, 467 ("Judge Blackstone in his learned commentaries, art. jury trial, says, it is the most transcendant [sic] privilege which any subject can enjoy or wish for, that he cannot be affected either in his property, his liberty, his person, but by the unanimous consent of 12 of his neighbours and equals.").

<sup>155</sup> The Federalist No. 81, *supra* note 123, at 456–57 (Alexander Hamilton); see also Letter from Richard Henry Lee to Governor Edmund Randolph, Va. Gazette (Petersburg) (Dec. 6, 1787), reprinted in 1 Debate on the Constitution, *supra* note 125, at 465, 467 (describing jury trials as "more strongly discountenanced in civil cases by giving the supreme court in appeals, jurisdiction both as to law and fact").

<sup>156</sup> See Faber, *supra* note 124, at 35 (recounting how, per Brutus, "[o]nly the rich w[ould] be able to afford [Supreme Court] appeals, leaving 'the poor and middling class of people who in every government stand most in need of protection of the law' without a reasonable expectation of justice").

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[to the seat of the national government]? Can he stand the expence attending it?”<sup>157</sup>

Federalist defenders of Article III suggested that Congress could solve such problems by restricting rights to appeal. Hamilton, pointing to the power to make “[e]xceptions” to the Court’s appellate jurisdiction,<sup>158</sup> argued that Congress “would certainly have full power to provide that in appeals to the Supreme Court there should be no re-examination of facts where they had been tried in the original causes by juries.”<sup>159</sup> Edmund Pendleton similarly underscored that Congress’s power to make exceptions was a “great security” against encroachment on the jury trial right, particularly because Congress’s individual members could be expected to empathize with the hardships imposed by forcing citizens to travel “a great distance” to pursue appeals at the Supreme Court in the nation’s capital.<sup>160</sup> Webster counseled that, “in small actions, Congress will doubtless direct that a sentence in a subordinate court shall, to a certain amount, be definitive and final.”<sup>161</sup> Indeed, the First Congress severely cabined appeals from the state courts to the Supreme Court in Section 22 of the Judiciary Act of 1789, in part by enacting a two-thousand-dollar amount-in-controversy requirement.<sup>162</sup>

The concern about the Supreme Court’s appellate jurisdiction more generally highlighted the extent to which locating the trial process in a trustworthy forum was a focal point, even among those more inclined to be suspicious of the virtues of relying on state courts. Hamilton reasoned that Article III’s grant to Congress of “[t]he power of constituting inferior [federal] courts [wa]s evidently calculated to obviate the necessity of having recourse to the Supreme Court in every case of federal cognizance.”<sup>163</sup> If state courts were the only courts of first instance for federal cases, Hamilton expected that an inability to rely on the state courts to enforce federal law would lead to “a correspondent necessity for leaving the door of appeal as wide as possible.”<sup>164</sup> In Hamilton’s view,

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<sup>157</sup> Mason, *supra* note 134, at 1404.

<sup>158</sup> U.S. Const. art. III, § 2, cl. 2.

<sup>159</sup> The Federalist No. 81, *supra* note 123, at 458 (Alexander Hamilton).

<sup>160</sup> See Edmund Pendleton, Remarks at the Virginia Convention (June 19, 1788), *in* 10 DHRC, *supra* note 134, at 1398, 1399–401.

<sup>161</sup> “A Citizen of America” [Noah Webster], *reprinted in* 1 Debate on the Constitution, *supra* note 125, at 129, 153.

<sup>162</sup> See Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 84.

<sup>163</sup> The Federalist No. 81, *supra* note 123, at 453 (Alexander Hamilton).

<sup>164</sup> *Id.* at 454.

although he was “well satisfied . . . of the propriety of the appellate jurisdiction in the several classes of causes to which it is extended,” a resulting “*unrestrained course* to appeals” would be undesirable as “a source of public and private inconvenience.”<sup>165</sup> With proper congressional provision for lower federal courts of first instance, appeals could “be safely circumscribed within a narrow compass.”<sup>166</sup>

In sum, the ratification debates demonstrate substantial concern with the forums for trials and confirm that Article III is properly understood to embody a settlement under which federal courts have substantial but also substantially limited realms of jurisdiction, with the limitations generally acting to preserve the traditional prerogatives of state courts and local juries on matters of private right. The traditional role of state courts in resolving disputes between private individuals was generally to be respected and preserved. This sentiment coincides with the federalism-serving aspects of modern Supreme Court doctrine holding that non-Article III federal tribunals may adjudicate issues of public right but generally may not make final decisions regarding matters of private right.

#### *D. Practice in the Early Republic*

Practice in the early republic was consistent with ratification-period reassurances that the new national government would not obliterate, and would in fact respect, the traditional prerogatives of state courts in the realm of private rights. From the adoption of the U.S. Constitution to today, state court dominance in relation to adjudication of private rights has remained a prominent feature of United States governance, a feature that the early Congresses respected. As Henry Hart and Herbert Wechsler famously observed, federal law was substantially “interstitial” until well into the twentieth century.<sup>167</sup> State law, principally interpreted and

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<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> Fallon et al., *supra* note 109, at 488–89 (quoting Henry M. Hart, Jr. & Herbert Wechsler, *The Federal Courts and the Federal System* 435 (1953)). Federal question jurisdiction was parsimoniously deployed in the First Judiciary Act. There was no general arising-under statute, and specific slices of federal question jurisdiction were limited to the Alien Tort Statute (providing district courts with jurisdiction “of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States,” Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77) and to crimes and seizures under federal revenue and customs laws on land and in territorial waters. See Lee, *supra* note 121, at 1913–14, 1936.

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enforced through decisions of state courts and juries, had the lead role in governing the primary activity of private persons.<sup>168</sup>

The constitutional settlement of 1787 to 1789 left Congress with discretion whether to create “inferior [federal] Courts” subordinate to the constitutionally mandated Supreme Court,<sup>169</sup> and Congress notably did not rush to create a lower federal judiciary with the capacity to undermine the primary role of state courts in matters of private right. The Judiciary Act of 1789 made admiralty jurisdiction exclusive to the federal courts but established only concurrent federal jurisdiction over alien tort and diversity suits, while placing strict limitations on federal jurisdiction over the latter.<sup>170</sup> Meanwhile, outside the territories, military courts, and specialized areas such as patent and copyright law, federal question private rights cases—suits for liability from one private individual to another arising under federal law—were comparatively rare.<sup>171</sup> Even in an area such as patent law, full remedial power (e.g., equitable power to issue injunctions) was only haltingly entrusted to the federal courts.<sup>172</sup>

The Judiciary Act of 1789 is a critical case in point, not only because of its key role in establishing the initial contours of the Article III courts, but also because the actions of the First Congress are commonly taken as suggestive of the Constitution’s original public meaning.<sup>173</sup> The Act did create lower federal courts but implemented a highly constrained federal court system that was consistent with the assertions of Article III’s limited scope that defenders of the new Constitution had made in response to the

<sup>168</sup> See Lawrence M. Friedman, *A History of American Law* 139 (2d ed. 1985) (“In the late 18th century, and in the first half of the 19th, the federal courts clearly played second fiddle to the state courts. Where they were supreme, they were supreme; but the realm was a narrow one.”).

<sup>169</sup> U.S. Const. art. III, §§ 1–2 (vesting “[t]he judicial Power of the United States . . . in one supreme Court” but allowing Congress to “ordain and establish” “inferior Courts” and specifying the types of suits to which “[t]he judicial Power shall extend”).

<sup>170</sup> See Judiciary Act of 1789, ch. 20, §§ 9, 11, 1 Stat. 73, 77–78.

<sup>171</sup> Cf. Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 *Yale L.J.* 1288, 1301–02 (2021) (identifying an exception to an asserted general rule “that no early congressional grant of rulemaking power” involved “coercive regulation of [domestic] private rights and private conduct”).

<sup>172</sup> See *infra* text accompanying notes 188–91.

<sup>173</sup> Cf. *Myers v. United States*, 272 U.S. 52, 136 (1926) (“We have devoted much space to this discussion and decision of the question of the Presidential power of removal in the First Congress . . . [partly] because this was the decision of the First Congress, on a question of primary importance in the organization of the Government, made within two years after the Constitutional Convention and within a much shorter time after its ratification . . .”).

Anti-Federalists during the ratification debates. Thus, on top of the text of Article III and the record of debates over Article III provisions such as its diversity clauses, Congress's parsimonious specifications of lower federal court jurisdiction in the first Judiciary Act substantially corroborates that the Constitution was adopted on the understanding that state courts would, for the most part, preserve their franchises over the adjudication of private rights outside the maritime context.<sup>174</sup> Moreover, continued dedication to limiting the scope and reach of Article III adjudication—particularly in relation to questions previously resolved by state courts—reinforces the apparent reasonableness of inferring from ratification debate silence regarding non-Article III adjudication that the resolution of traditional state law claims by non-Article III federal adjudicators was understood to be substantially off the table.<sup>175</sup>

Contrary to the Anti-Federalist fears that a profusion of Article III judges would soon displace state courts, the 1789 Act created a compact judicial system of nineteen judges and inferior courts with carefully circumscribed jurisdiction. Moreover, the Supreme Court's appellate jurisdiction was cabined by a high amount in controversy, review by writ of error "on the face of the record" only where federal rights were denied,<sup>176</sup> and subsequent passage of the Seventh Amendment Re-Examination Clause.<sup>177</sup> The original jurisdiction of the lower federal courts did encompass cases arising under to-be-enacted national laws, including cases to enforce federal import duties and to define and punish federal crimes on the seas, but these did not involve adjudication of private rights of the sort that state courts had traditionally handled. Thus, as Senator William Maclay observed in early deliberations on the bill that would become the First Judiciary Act, "the Mass of Causes would remain with the State Judges, those only arising from federal laws, would come before the federal Judges[,] and these would comparatively be few indeed."<sup>178</sup>

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<sup>174</sup> See Holt, *supra* note 138, at 1484–86 ("The Judiciary Act [of 1789] . . . was much closer to the wishes of [the Constitution's] opponents than it was to the wishes of Ellsworth, James Wilson, and the other advocates of a strong, unfettered [federal] judiciary.").

<sup>175</sup> See *supra* text accompanying notes 147–53.

<sup>176</sup> Judiciary Act of 1789, ch. 20, §§ 22, 25, 1 Stat. 73, 84–87.

<sup>177</sup> U.S. Const. amend. VII ("[N]o fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

<sup>178</sup> Diary of William Maclay, in 9 *Documentary History of the First Federal Congress of the United States of America*, March 4, 1789–March 3, 1791, at 87 (Kenneth R. Bowling & Helen E. Veit eds., 1988) [hereinafter *Maclay's Diary*] (entry of June 23, 1789).

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When the First Congress did create original jurisdiction in the lower federal courts over private causes of action, it generally conferred jurisdiction concurrent with the state courts, with the exception of admiralty and maritime jurisdiction.<sup>179</sup> The exception for admiralty and maritime cases, for which the states had set up courts during the Revolutionary War, was understandable. Given the vital importance of seaborne commerce to the new country, even the most hardened opponents of a new federal court system tended to recognize the need for uniform, efficient, and neutral adjudication of shipping, cargo, collision, and other admiralty cases on a national scale.<sup>180</sup> The Judiciary Act otherwise vindicated Hamilton's earlier assurances that a "doctrine of concurrent jurisdiction" would commonly prevail, particularly with respect to "causes of which the State courts have previous cognizance."<sup>181</sup> The Act established only concurrent federal jurisdiction over alien tort and diversity suits, while placing strict limitations on federal jurisdiction over the latter.<sup>182</sup> Specifically, instead of assigning diversity cases to district courts staffed by local resident judges who could generally be available year-round, the Act assigned these cases to circuit courts scheduled to convene twice a year and prescribed to consist of a district judge and two Supreme Court Justices riding circuit, "any two of whom [would] constitute a quorum."<sup>183</sup> The Act also set a then-daunting five-

<sup>179</sup> Congress granted "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction" to the newly created federal district courts. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77. Section 9 did "sav[e] to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." *Id.*

<sup>180</sup> See, e.g., Maclay's Diary, *supra* note 178, at 85 (reporting that Richard Henry Lee "brought forward a Motion nearly in the Words of the Virginia amendment [among the twenty constitutional amendments proposed at the state ratification], Viz. that The Jurisdiction of the Federal Courts should be confined, to cases of admiralty and Maritime Jurisdiction").

<sup>181</sup> The Federalist No. 82, at 460–61 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

<sup>182</sup> Judiciary Act of 1789, ch. 20, §§ 9, 11, 1 Stat. at 77–79.

<sup>183</sup> *Id.* §§ 3–5, 1 Stat. at 73–75. A circuit court necessarily could only meet for a limited time in each individual district because it required the presence of at least one Supreme Court Justice, and this Justice had additional duties elsewhere—whether sitting as a circuit judge in another district, participating in a session of the Supreme Court itself, or engaging in the often non-trivial labor of traveling between such geographically distant sittings. See *id.* §§ 1, 4–5, 1 Stat. at 73–75; see also Hoffer et al., *supra* note 69, at 54 (describing the "three judicial hats"—circuit trial judge, circuit appellate judge, and judges on the Supreme Court itself—worn by Supreme Court Justices, who "spent more time traveling to and from the two sessions of the circuit court each year than they did sitting on the Supreme Court bench"); *id.* at 62 ("While the circuit courts were open for two days each term, the justices had good reason to complain that their travel to the distant Southern Circuit was largely a waste of time."). In

hundred-dollar amount-in-controversy threshold and specified that causes could not be brought on bills of exchange assigned to create diversity of citizenship, unless it was a foreign bill of exchange.<sup>184</sup>

Beyond maritime cases, federal judicial power even in private rights suits arising under *federal* law remained by far the exception and not the norm for decades—from the adoption of the Constitution until after the Civil War. During that time, federal law only relatively rarely prescribed liability between private parties. One exception within the 1789 Judiciary Act itself was the so-called Alien Tort Statute, which authorized an “alien” to sue “for a tort only in violation of the law of nations or a treaty of the United States” in federal district court, with concurrent jurisdiction existing in state courts and federal circuit courts.<sup>185</sup> Patent and copyright acts adopted in 1790 provided another set of early exceptions. These acts provided for actions at law for patent and copyright infringement.<sup>186</sup> But the jurisdiction of the lower federal courts over such cases was limited. Under the 1790 Copyright Act, “unless the controversy involved more than five hundred dollars, and was between citizens of different states, the suit was tried in state court.”<sup>187</sup> A revised version of the Patent Act in 1793 might have sought to correct a similar situation in patent law by explicitly providing something missing in the 1790 version—namely, that the “action on the case” for which it provided could proceed “in the circuit

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contrast, the district courts’ use of only locally based judges permitted them to be open essentially year-round. See Judiciary Act of 1789, ch. 20, § 3, 1 Stat. at 73 (providing for “a court called a District Court, in each of the afore mentioned districts, to consist of one judge, who shall reside in the district for which he is appointed”).

<sup>184</sup> See Judiciary Act of 1789, ch. 20, § 11, 1 Stat. at 78–79.

<sup>185</sup> Id. § 9, 1 Stat. at 76–77; see Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 Colum. L. Rev. 830, 848–58, 866–71 (2006) (explaining how state and circuit court concurrent jurisdiction tends to prove that the Alien Tort Statute was not about torts committed against foreign ambassadors (assigned to the Supreme Court’s original jurisdiction) or suits within admiralty and maritime jurisdiction exclusive to the district courts, including piracy).

<sup>186</sup> See 7 Donald S. Chisum, *Chisum on Patents* § 20.02 (2022) (“The 1790, 1793 and 1800 patent statutes provided a remedy for damages enforceable by an action at law ‘on the case’ but did not confer equitable jurisdiction on the federal courts.”); William Patry, *The Right to a Jury in Copyright Cases*, 29 J. Copyright Soc’y U.S.A. 139, 155–56 (1981) (describing the “common law causes of action” created by the Copyright Act of 1790).

<sup>187</sup> Patry, *supra* note 186, at 156.

court of the United States” as well as in “any other court having competent jurisdiction.”<sup>188</sup>

A dramatic omission from the early patent and copyright acts was their failure to include provisions for equity jurisdiction over suits for infringement. Under the Judiciary Act of 1789, federal courts could award injunctive relief in such infringement suits when the Act’s general provisions for diversity jurisdiction—in equity as well as law—applied.<sup>189</sup> But not until 1819 did Congress provide inferior federal courts with equity jurisdiction over patent and copyright suits between citizens of the same state.<sup>190</sup> Until then, a patent owner seeking an injunction against infringement by a citizen of the same state would need to obtain that relief from a state court.<sup>191</sup>

In sum, early congressional practice reinforces the sense that the extension of federal adjudication into the realm of private rights outside of admiralty and maritime cases was a serious matter. The Constitution’s allowances for direct action by the federal government on individuals—

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<sup>188</sup> Patent Act of 1793, ch. 11, § 5, 1 Stat. 318, 322; see also Patent Act of 1790, ch. 7, § 4, 1 Stat. 109, 111 (providing that recovery for patent infringement could be had “in an action on the case founded on this act” without specifying where such an action could proceed); cf. Copyright Act of 1790, ch. 15, § 6, 1 Stat. 124, 125–26 (providing for liability for damages “to be recovered by a special action on the case founded upon this act, in any court having cognizance thereof”). The 1790 Act’s lack of a specification of a court or courts in which patent infringement actions could proceed was apparently not an accident. A 1789 bill combining copyright and patent provisions had provided for recovery for patent infringement “in \_\_\_ court of record \_\_\_ having competent jurisdiction, by action of debt, bill, plaint or information.” H.R. 10, 1st Cong. ¶ 6 (1789), *reprinted in* Edward C. Walterscheid, *To Promote the Progress of Useful Arts: American Patent Law and Administration, 1798–1836*, at 433, 437–38 (1998). A later, patent-specific bill instead provided for recovery “in the district court of the district where the seat of government of the United States is or shall be, by action of debt, bill, plaint or information.” H.R. 41, 1st Cong. § 4 (Feb. 16, 1790), *reprinted in* Walterscheid, *supra*, at 445, 450. But this specification of venue was dropped before the House enacted the bill. See Walterscheid, *supra*, at 455 n.1, 459 (reprinting the final version of H.R. 41 and noting that “[t]his is the bill as passed by the House”).

<sup>189</sup> See *Livingston v. Van Ingen*, 15 F. Cas. 697, 698 (C.C.D.N.Y. 1811) (No. 8,420) (holding that the circuit court lacked equity jurisdiction over a patent infringement case between citizens of the same state but noting that the Judiciary Act provided circuit courts with equity jurisdiction of such cases when there was diversity of citizenship).

<sup>190</sup> See 7 Chisum, *supra* note 186, § 20.02 (“The 1790, 1793 and 1800 patent statutes provided a remedy for damages enforceable by an action at law ‘on the case’ but did not confer equitable jurisdiction on the federal courts.”); Patry, *supra* note 186, at 156 (“One of the most striking features of the [1790 copyright] act, however, is the complete absence of equity jurisdiction, which did not come for another twenty-nine years.”).

<sup>191</sup> See 7 Chisum, *supra* note 186, § 20.02 (stating that, prior to the 1819 act, “only state courts or federal courts sitting in diversity of citizenship jurisdiction could grant to a patent owner the important equitable remedy of an injunction”).

most prominently embodied by Congress's Article I power "[t]o lay and collect Taxes, Duties, Imposts and Excises,"<sup>192</sup> but also embodied by Article III's provisions for a federal court system—were significant but also limited. And as to the latter, the First Congress in 1789 was exceedingly parsimonious in availing itself of the judicial power for which Article III provided, although it did take the momentous step of creating lower federal courts. Given the hostility expressed during ratification toward the prospect of an extensive federal court system outside of admiralty and maritime cases, there was good reason for Congress to be wary as it haltingly extended federal court jurisdiction into the realm of private rights adjudication. Congress thereby showed continued respect for state courts' traditional dominance on land.

### III. APPLICATIONS

Part II has made the case that the public rights doctrine developed and deployed by the Supreme Court can be explained in important part as reflecting a principle of federalism implicit in Article III's text, proclaimed emphatically in the debates over that text's ratification, and corroborated strongly by subsequent congressional practice. Reference to the ratification debates and early congressional practice may make aspects of our account of particular interest to originalists. But our starting point is an effort to make better sense of puzzles associated with the public rights doctrine and an area of law that has long been viewed as ill-settled and problematic. As Cass Sunstein has highlighted, this is the sort of situation in which a turn to history and, in particular, to "the original understanding" can serve an important "coordinating function" in resolving disputes over constitutional law.<sup>193</sup> An originalist might take the evidence that we cite from the time of and around Article III's drafting and adoption as a necessarily axiomatic focal point.<sup>194</sup> Under our

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<sup>192</sup> U.S. Const. art. I, § 8, cl. 1.

<sup>193</sup> Cass R. Sunstein, *Originalism*, 93 *Notre Dame L. Rev.* 1671, 1687 (2018).

<sup>194</sup> Cf. Mitchell N. Berman, *Originalism Is Bunk*, 84 *N.Y.U. L. Rev.* 1, 22 (2009) ("Originalism proper is strong originalism—the thesis that original meaning either is the *only* proper target of judicial constitutional interpretation or that it has at least lexical priority over any other candidate meanings the text might bear (again, contrary judicial precedents possibly excepted)."). There is some relation between our approach and one of "[c]onstructive interpretation [that] aims at identifying a coherent set of principles that best explains and justifies all the decisions that have been taken in the name of the community." Jeffrey Goldsworthy, *Dworkin as an Originalist*, 17 *Const. Comment.* 49, 58–59 (2000) (explaining

approach, the unresolved questions raised by other legal materials play a crucial part in causing this evidence to emerge as a key factor in the effort to develop a “best” understanding of Article III for today.<sup>195</sup>

As with Jack Balkin’s account of the “‘thin’ theory of original meaning” that he associates with what he calls “[f]ramework originalism,”<sup>196</sup> recognition of the constitutional relevance of a federalism concern highlighted by the ratification debates leaves room for evolution of applications of the Constitution over time. Predictably, for example, presumptive state court dominance in the resolution of private disputes may erode as Congress enacts more and more federal law that supplements or even displaces state law in generating and regulating liabilities between private parties.

We believe that our descriptive contribution in highlighting Article III’s long under-recognized federalism underlay helps to make better sense of the public rights doctrine and, more generally speaking, of why and to what extent the Constitution requires an Article III judge to preside over the adjudication of particular forms of cases or controversies. We acknowledge, however, that this federalism concern does not appear to mandate all the details of the Court’s doctrinal results, even when it does help to explain them.<sup>197</sup> Likewise, adding attention to concerns of constitutional federalism to pre-existing attention to individual liberty and separation of powers seems unlikely to prescribe precisely how our

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ways in which “constructive interpretation is inhospitable to originalism”). But we cannot claim to be looking to shape or justify an understanding of Article III according to generalized notions of “the community’s conception of justice and fairness,” *id.* at 58, as opposed to specific constitutional principles such as federalism, separation of powers, and individual liberty that the materials before us suggest are in play.

<sup>195</sup> Cf. Berman, *supra* note 194, at 25 (“[E]ven those scholars most closely identified with non-originalism—Paul Brest, David Strauss, Laurence Tribe, for example—explicitly assign original meaning or intentions a significant role in the interpretive enterprise.”); Richard H. Fallon, Jr., A Constructivist Coherence Theory of Constitutional Interpretation, 100 *Harv. L. Rev.* 1189, 1240 (1987) (hypothesizing that “[t]he implicit norms of our practice of constitutional interpretation prescribe an effort to achieve plausible understandings of arguments from text, the framers’ intent, constitutional theory, precedent, and relevant values, all of which point to the same result”).

<sup>196</sup> Jack M. Balkin, The New Originalism and the Uses of History, 82 *Fordham L. Rev.* 641, 646 (2013).

<sup>197</sup> Cf. Richard H. Fallon, Jr., The Chimerical Concept of Original Public Meaning, 107 *Va. L. Rev.* 1421, 1497 (2021) (contending that “[c]ontested constitutional provisions rarely if ever have single original public meanings, ascertainable as a matter of historical and linguistic fact, that are capable of resolving reasonably disputable issues such as those in virtually all constitutional cases that come before the Supreme Court”).

constitutional case law should develop in the future. But such concerns can sensibly—and, some (e.g., originalists) would presumably argue, must—inform that development.

This Part shows how our account helps explain the Court's modern case law mandating Article III court involvement in private rights cases, which we take to include the Court's 1932 decision in *Crowell v. Benson*.<sup>198</sup> The Court has not articulated the justifications for the decisions in these cases particularly well, but we show how the Court's concern with the locus of adjudication for state law claims and jurisdictional facts resonates with a constitutional bargain that sought to preserve state courts' presumptive primacy in the resolution of traditional private rights disputes. Section III.A below discusses the relatively uncontroversial role of Article III courts in deciding questions of law in private rights cases. Section III.B addresses the more controversial position of the Supreme Court that Article III requires provision for *de novo* fact-finding by Article III courts for certain state law claims in bankruptcy cases and for certain matters of constitutional or jurisdictional fact. Section III.C discusses how our perspective conforms with the results in two consent cases involving the adjudication of matters of private right—*Commodity Futures Trading Commission v. Schor*<sup>199</sup> and *Wellness International Network, Ltd. v. Sharif*<sup>200</sup>—in which private parties were held to have waived otherwise applicable rights to Article III adjudication.<sup>201</sup>

#### A. Questions of Law

The Article III courts' fundamental "province and duty . . . to say what the law is"<sup>202</sup> suggests that the appellate review model broadly implemented in administrative law practice<sup>203</sup> is correct to demand that parties to private rights cases generally have the capacity to seek *de novo* determinations on questions of law by Article III judges. Supreme Court precedent seems uniformly to favor this proposition, although even the Supreme Court, as a federal court, lacks final authority to declare what the law is when state law provides the rule of decision, as is true of many

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<sup>198</sup> 285 U.S. 22, 63–65 (1932).

<sup>199</sup> 478 U.S. 833, 853–55 (1986).

<sup>200</sup> 575 U.S. 665, 682–86 (2015).

<sup>201</sup> See *infra* Section III.C.

<sup>202</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>203</sup> See *supra* text accompanying notes 65–67.

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ordinary private right cases. Further, a demand for *de novo* review on questions of law aligns well with a basic structural purpose of Article III courts as a check on the political branches and a guarantor of individual rights. Article III courts' power to expound freely on questions of law helps ensure that legal principles and their interpretation are not mere playthings for elected officials and their subordinate political appointees. This power retains substantial importance in situations involving competing claims of private right, where the government's interests might not be directly at stake but there might still be concerns about the motivations, if not the competence, of individual actors in the political branches in deciding questions of law. Review of legal questions by Article III judges enjoying life tenure and salary protection can help ensure that interpretation of the law is not improperly distorted by incentives in a particular case to curry favor, reward friends, or penalize enemies.

Moreover, consistent with the general embrace of an appellate review model for the work of the administrative state, review of administrative tribunals' decisions on questions of law can be crucial to ensuring that members of the executive branch properly act in accordance with their legislative mandates. In this way, *de novo* review on questions of law—with whatever deference the courts properly accord to administrative judgments where statutory language is ambiguous—enables the judicial branch to play a key role in both effecting and maintaining the checks and balances that the Constitution's scheme of separated powers contemplates.

Even with respect to determination of questions of law in private rights cases, however, the Article III courts' role is constrained by standard limits on federal judicial power such as the requirement of standing and the associated prohibition on advisory opinions, both of which are commonly traced to Article III's extension of the "judicial Power" only to "Cases" and "Controversies."<sup>204</sup> Related to these concerns is the basic point that the Article III courts can only hear a case that at least one party to it chooses to put before them. Thus, if a non-Article III federal adjudicator makes a decision in a private rights matter and no party makes

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<sup>204</sup> U.S. Const. art. III, § 2, cl. 1; see, e.g., Bradford C. Mank, *State Standing in United States v. Texas: Opening the Floodgates to States Challenging the Federal Government, or Proper Federalism?*, 2018 U. Ill. L. Rev. 211, 215 ("The standing doctrine incorporates the principle that federal courts should not hear or issue advisory opinions because such cases are not genuine cases or controversies.").

an effort to challenge that decision in an Article III court, there will generally be no Article III court review of any decisions of law, never mind findings of fact, in that matter. Of course, this point feeds into our assertion, in Section III.C below, of a general principle that the role of Article III courts in deciding private rights matters is subject to limits imposed by party consent.

### *B. Questions of Fact and Jury Rights*

Louis Jaffe's classic formulation of an appellate review model was qualified in that it required an Article III trial judge when the matter is "one at 'common law' entitling the parties to a jury trial."<sup>205</sup> This jury rights concession embodies a substantial intuition that is related to the federalism concern we have elaborated: the prospect that state citizens might lose pre-existing rights to local control of first stage adjudication, particularly through judgments of a jury of their peers, was a significant concern when the Constitution was adopted.<sup>206</sup> The failure of the original Constitution to specify a right to trial by jury in civil cases<sup>207</sup> and the perception that the Supreme Court might undo local jury verdicts on appeal were bitter points of contention during ratification debates.<sup>208</sup> In the face of such fire, Hamilton sought to argue that, in reality,

[t]he friends and adversaries of the plan of the [constitutional] convention . . . concur[red] at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.<sup>209</sup>

But as we indicated earlier, Jaffe's concession of a constitutional need for an Article III judge when common law jury rights apply does not go far enough.<sup>210</sup> As Article III's own language referencing equity as well as

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<sup>205</sup> Jaffe, *supra* note 31, at 91.

<sup>206</sup> See *supra* Section II.C.

<sup>207</sup> See Friendly, *supra* note 118, at 487 ("[T]he main attack [on Article III] was directed to the failure to make provision for trial by jury. . . ."); see also The Federalist No. 83, *supra* note 130, at 463 (Alexander Hamilton) ("The objection to the plan of the convention, which has met with most success in this State, and perhaps in several of the other States, is *that relative to the want of a constitutional provision for the trial by jury in civil cases.*").

<sup>208</sup> See *supra* text accompanying notes 151–55.

<sup>209</sup> The Federalist No. 83, *supra* note 130, at 467 (Alexander Hamilton).

<sup>210</sup> See *supra* text accompanying notes 37–40.

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law makes clear,<sup>211</sup> the Framers appreciated the traditional role of courts in deciding matters of equity for which jury rights generally do not apply. As the Supreme Court’s opinion in *Murray’s Lessee v. Hoboken Land & Improvement Co.* apparently takes for granted in rejecting the notion that Congress could “withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty,”<sup>212</sup> the constitutional settlement operated generally to secure the availability of gold-plated Article III process not only at the appellate level and not only for traditional matters of law in which jury rights apply, but also for traditional matters of equity and fact-finding pursuant to their resolution.

Indeed, an exclusion of equity cases from demands for Article III adjudication makes little sense from a functionalist perspective. The practical weakening of the role of the Article III judiciary—and the protections its insulation from the political branches provides—is arguably greater when Article III judges are deprived of power to act as the primary fact-finders in equity cases than when Article III judges are deprived of power to preside over trials in which juries are the primary fact-finders. Further, if the justification for depriving Article III judges of fact-finding power in equity is those judges’ lack of fact-finding expertise relative to, say, expert agency adjudicators, this justification does not adequately address the presumptive advantage that Article III judges’ constitutionally enshrined independence gives them as fact-finders—or, for that matter, the ability of a judge acting in equity to seek aid from a jury in resolving questions of fact.<sup>213</sup> Independence from the political branches is one of the perceived advantages of juries as fact-finders, and there is little reason for not also viewing it as a credibly decisive advantage of Article III judges as fact-finders in equity cases.

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<sup>211</sup> U.S. Const. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.”).

<sup>212</sup> 59 U.S. (18 How.) 272, 284 (1856).

<sup>213</sup> A modern judge may convene a jury for purposes of obtaining an advisory verdict. Fed. R. Civ. P. 39(c) (“In an action not triable of right by a jury, the court, on motion or its own: (1) may try any issue with an advisory jury . . .”). During the constitutional ratification debates, it was pointed out that judges in equity could sometimes refer factual questions to a court of law. See Reply to Wilson’s Speech: “Centinel” [Samuel Bryan] II, Freeman’s J. (Philadelphia) (Oct. 24, 1787), reprinted in 1 Debate on the Constitution, supra note 125, at 77, 82 (discussing how a chancellor could refer a question of fact “to the court of king’s bench for discussion according to the common law, and when the judge in equity should receive the verdict, the fact so established, could never be re-examined or controverted”).

Generally speaking, where federal adjudication threatened to supplant state court adjudication on non-statutory matters, the constitutional bargain struck in 1787 to 1789 provided that the states and citizens who had traditionally entrusted resolution of private matters to state courts would have the solace that federal adjudication of such matters would occur in Article III courts. The combination of tenure and salary protections, as well as the appointment process for Article III judges, was aimed at selecting judges whose primary facial allegiance would be to law and legal principle, in contrast to elected officials or subordinate political appointees presumptively more likely to favor personal or political interests of one or another state or one or another of its citizens.<sup>214</sup> In the last four decades, the Supreme Court has groped its way toward Article III's federalism principle in a series of bankruptcy cases that can otherwise seem puzzling and whose state law nexus has heretofore been ill-explained.

Allowance of the federal judiciary to play its intended role in the Constitution's scheme of checks and balances comports with a notion that Article III courts should be available for fact-finding in a second set of situations as well—fact-finding necessary to vindicate constitutional rights or to verify constitutional jurisdiction. This is the intuition behind a puzzling aspect of the Supreme Court's 1932 decision in *Crowell v. Benson*, in which the Court upheld a scheme that generally involved deferential Article III court review of fact-finding by an expert administrative agency, but in which the Court also emphasized that Article III courts must retain power to engage in *de novo* fact-finding on matters of constitutional or jurisdictional fact.<sup>215</sup>

### 1. *The Bankruptcy Cases*

Glimpses of the historical understanding that this Article emphasizes are found in two Supreme Court cases that found violations of Article III

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<sup>214</sup> See, e.g., The Federalist No. 78, at 433 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (describing “[t]he standard of good behavior for the continuance in office of the judicial magistracy” as “the best expedient . . . to secure a steady, upright, and impartial administration of the laws”). But see Faber, *supra* note 124, at 35 (observing that, in the view of Anti-Federalist “Brutus,” “The life terms, praised by the Federalists for making the judiciary independent of the executive and legislature, are a substantial part of the problem” because, “[i]n a republican government, judges serving for life will be ‘independent of the people, of the legislature, and of every power under heaven’”).

<sup>215</sup> See *infra* Subsection III.B.2.

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in the assignment of “judicial Power”<sup>216</sup> to bankruptcy courts, as well as a third bankruptcy case in which the Court ruled on the scope of public rights doctrine in finding a violation of Seventh Amendment jury rights. In each case of this trio, a majority of Justices concurred in the judgment, and members of these majorities agreed that the cases involved either classic common law claims under state law<sup>217</sup> or, in the case of a fraudulent conveyance action brought by a bankruptcy trustee, a “quintessential[] suit[] at common law that more nearly resemble[s] state-law contract claims brought by a bankrupt corporation . . . than . . . creditors’ hierarchically ordered claims to a pro rata share of the bankruptcy res.”<sup>218</sup> The Justices thus appeared to sense that there is something significant about the state law-like nature of a claim that requires an Article III adjudicator, particularly when the claim is, or substantially resembles, the sort of routine common law claim that state courts have traditionally decided.

This trio of bankruptcy cases began in the early 1980s with *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*<sup>219</sup> In *Northern Pipeline*, a mix of liberal and conservative Justices coalesced to declare a “broad grant of jurisdiction” to bankruptcy judges to be an

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<sup>216</sup> U.S. Const. art. III, § 1.

<sup>217</sup> See, e.g., *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982) (Brennan, J.) (plurality opinion) (“[T]he restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case.”); *id.* at 84 (“Indeed, the cases before us, which center upon appellant Northern’s claim for damages for breach of contract and misrepresentation, involve a right created by *state* law, a right independent of and antecedent to the reorganization petition that conferred jurisdiction upon the Bankruptcy Court.”); *id.* at 87 n.40 (“It is clear that, at the least, the new bankruptcy judges cannot constitutionally be vested with jurisdiction to decide this state-law contract claim against Marathon.”); *id.* at 90 (Rehnquist, J., concurring in the judgment) (“From the record before us, the lawsuit in which Marathon was named defendant seeks damages for breach of contract, misrepresentation, and other counts which are the stuff of the traditional actions at common law tried by the courts at Westminster in 1789. There is apparently no federal rule of decision provided for any of the issues in the lawsuit; the claims of Northern arise entirely under state law.”); *Stern v. Marshall*, 564 U.S. 462, 487 (2011) (“It is clear that the Bankruptcy Court in this case exercised the ‘judicial Power of the United States’ in purporting to resolve and enter final judgment on a state common law claim, just as the court did in *Northern Pipeline*.”).

<sup>218</sup> *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 56 (1989) (“They therefore appear matters of private rather than public right.” (citation omitted)).

<sup>219</sup> 458 U.S. 50.

unconstitutional violation of Article III.<sup>220</sup> The Court came to this conclusion even though bankruptcy court judgments were subject to review by Article III judges that was *de novo* on questions of law<sup>221</sup> and applied the “clearly erroneous” standard for review of fact-finding—the normal appellate standard of review for district judge fact finding.<sup>222</sup> The perceived problem of excessive bankruptcy judge jurisdiction arose from the all-encompassing nature of jurisdiction that Congress had provided to facilitate settlement of associated claims in a bankruptcy, including state common law claims.<sup>223</sup> To clear the debtor’s estate in a uniform proceeding may require extinguishing or diminishing property or liability rights under state law, and to do so requires the federal bankruptcy tribunal to make determinations of state law. It would be far more inefficient—and decrease the incentive to file for bankruptcy—if the federal tribunal did not have the power to clear such state law claims on a debtor’s estate. The particular claims at issue in *Northern Pipeline* were for “damages for alleged breaches of contract and warranty, as well as for alleged misrepresentation, coercion, and duress.”<sup>224</sup>

In isolation, the precise significance of the Court’s decision in *Northern Pipeline* is tricky to assess because there was no majority opinion—Justice Brennan authored a plurality opinion for four Justices, and Justice Rehnquist wrote an opinion, joined by Justice O’Connor, that concurred

<sup>220</sup> *Id.* at 87 (Brennan, J.) (plurality opinion); see *id.* at 91 (Rehnquist, J., concurring in the judgment) (“I agree with the plurality that th[e] grant of authority [to ‘decide Northern’s lawsuit over Marathon’s objection’] is not readily severable from the remaining grant of authority . . .”).

<sup>221</sup> See *id.* at 102 (White, J., dissenting) (observing that, whereas “courts are . . . admonished to give substantial deference to the agency’s interpretation of the statute it is enforcing,” “[n]o such deference is required with respect to decisions on the law made by bankruptcy judges”).

<sup>222</sup> See Caitlin E. Borgmann, Appellate Review of Social Facts in Constitutional Rights Cases, 101 Calif. L. Rev. 1185, 1188 (2013) (noting general applicability of the clear error standard to “federal trial judges’ findings of fact”). The clear error standard is commonly understood to be less deferential than the substantial evidence or arbitrary-or-capricious standards that generally apply to fact-finding by administrative agencies. See *N. Pipeline*, 458 U.S. at 102 (White, J., dissenting) (“[J]udicial review of the orders of bankruptcy judges is more stringent than that of many modern administrative agencies.”); see also *Dickinson v. Zurko*, 527 U.S. 150, 153 (1999) (“Traditionally, this court/court [clear-error] standard of review has been considered somewhat stricter (*i.e.*, allowing somewhat closer judicial review) than the APA’s court/agency standards.”).

<sup>223</sup> See *N. Pipeline*, 458 U.S. at 54–55 (Brennan, J.) (plurality opinion) (describing the breadth of the bankruptcy courts’ subject matter jurisdiction and powers under the new bankruptcy statute).

<sup>224</sup> *Id.* at 56.

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in the judgment.<sup>225</sup> Brennan’s opinion relied on the identification of a traditional and apparently exclusive class of “three situations in which Art. III does not bar the creation of legislative courts”: territorial courts, courts martial, and courts to decide “a matter of public rights.”<sup>226</sup> Hence, Brennan concluded that the bankruptcy courts were unconstitutionally exercising Article III judicial power because those courts did not “bear any resemblance to courts-martial,” did “not lie exclusively outside the States of the Federal Union,”<sup>227</sup> and were exercising “most, if not all, of the essential attributes of the judicial power”<sup>228</sup> in their “adjudication of state-created private rights, such as the right to recover contract damages . . . at issue in this case.”<sup>229</sup>

Brennan’s formal analysis somewhat obscures the concern of replacing state courts with federal tribunals not up to Article III’s gold standard. Nonetheless, glimmers of this concern shine through in Brennan’s distinction of territorial courts and his emphasis on the special need for Article III courts in the adjudication of state-created rights, as opposed to congressionally created federal rights.<sup>230</sup> Justice Rehnquist’s concurring opinion more bluntly pointed to the state law character of the claims as one of three key factors supporting the Court’s judgment of unconstitutionality: (1) the nature of the claims at issue—“breach of contract, misrepresentation, and other counts which are the stuff of the traditional actions at common law tried by the courts at Westminster in 1789” and here “aris[ing] entirely under state law”;<sup>231</sup> (2) the breadth of the bankruptcy court’s jurisdiction, which he described as encompassing “[a]ll matters of fact and law in whatever domains of the law to which the parties’ dispute may lead . . . , with only traditional appellate review by Art. III courts apparently contemplated”;<sup>232</sup> and (3) the lack of consent to non-Article III adjudication by at least one of the relevant parties.<sup>233</sup>

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<sup>225</sup> See *id.* at 52 (listing Justices joining Justice Brennan’s opinion); *id.* at 89 (introducing Justice Rehnquist’s opinion).

<sup>226</sup> *Id.* at 64–70 (Brennan, J.) (plurality opinion) (internal quotation marks omitted).

<sup>227</sup> *Id.* at 70–71.

<sup>228</sup> *Id.* at 87 (internal quotation marks omitted).

<sup>229</sup> *Id.* at 71.

<sup>230</sup> *Id.* at 80 (“[I]t is clear that when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated—including the assignment to an adjunct of some functions historically performed by judges.”).

<sup>231</sup> *Id.* at 90.

<sup>232</sup> *Id.* at 91.

<sup>233</sup> *Id.*

In short, through a combination of plurality and concurring opinions, *Northern Pipeline* made clear that appellate-style review by an Article III court is not necessarily enough to validate initial reliance on a non-Article III tribunal. Further, those same opinions at least suggested the nexus of concern with state interests that we contend was a key motivation—and remains a key purpose—of Article III’s dictates.

In 2011, the Court reaffirmed these points in the bankruptcy context; namely: (1) that, under certain circumstances, Article III requires either *de novo* review of fact-finding or that an Article III judge preside over relevant evidentiary hearings; and (2) that a legal claim’s location within the traditional jurisdiction of state courts weighs in favor of holding that this Article III requirement applies. In *Stern v. Marshall*,<sup>234</sup> a five-Justice majority held that a bankruptcy court’s decision on a state law tort counterclaim did not fit within “the public rights exception” to Article III adjudication and that, at least where the counterclaim was “not resolved in the process of ruling on a creditor’s proof of claim,”<sup>235</sup> the bankruptcy judge’s entry of final judgment on such a counterclaim was unconstitutional.<sup>236</sup> In explaining the Court’s holding, the Court emphasized that the counterclaim in question neither “flow[ed] from a federal statutory scheme” nor “completely depende[d] upon” adjudication of a claim created by federal law.<sup>237</sup> Notably, the Court repeatedly highlighted the “state law” nature of the counterclaim at issue,<sup>238</sup> as well as the “state law” nature of the claim at issue in *Northern Pipeline*.<sup>239</sup> Similarly, the Court distinguished a case in which the Court did not find a constitutional violation from non-Article III adjudication of a claim for compensation under federal law by highlighting that the claim

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<sup>234</sup> 564 U.S. 462 (2011).

<sup>235</sup> *Id.* at 488, 503.

<sup>236</sup> *Id.* at 503.

<sup>237</sup> *Id.* at 493.

<sup>238</sup> See, e.g., *id.* at 487 (“Here Vickie’s claim is a state law action independent of the federal bankruptcy law and not necessarily resolvable by a ruling on the creditor’s proof of claim in bankruptcy.”); *id.* at 503 (“The Bankruptcy Court below lacked the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor’s proof of claim.”).

<sup>239</sup> See, e.g., *id.* at 485 (“The Court concluded that assignment of such state law claims for resolution by those judges ‘violates Art. III of the Constitution.’”); *id.* (“A full majority of the Court, while not agreeing on the scope of the exception, concluded that the doctrine did not encompass adjudication of the state law claim at issue in that case.”); *id.* at 488 (“As explained above, in *Northern Pipeline* we rejected the argument that the public rights doctrine permitted a bankruptcy court to adjudicate a state law suit brought by a debtor against a company that had not filed a claim against the estate.”).

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for compensation was a creature of federal statute and did “not depend on or replace a right to such compensation under state law.”<sup>240</sup> The Court did not explain, however, why the state law nature of a claim was critical to the analysis—a gap that this Article fills.

Between *Northern Pipeline* and *Stern*, the Court decided another case, *Granfinanciera, S.A. v. Nordberg*,<sup>241</sup> in which a majority reaffirmed the connection between initial fact-finding and constitutional requirements for Article III judges. In *Granfinanciera*, a six-Justice majority held that, under the Seventh Amendment, “a person who has not submitted a claim against a bankruptcy estate has a right to a jury trial when sued by the trustee in bankruptcy to recover an allegedly fraudulent monetary transfer.”<sup>242</sup> More significantly for our purposes, five Justices joined a part of the Court’s opinion holding that, at least for non-criminal statutory claims that are “legal in nature,” the tests for the matter’s public rights status and for the inapplicability of Seventh Amendment jury rights are co-extensive: if the matter is one of public right, then there is no jury trial right, and vice versa.<sup>243</sup> Although the Court has commonly used this equation to determine the applicability of jury rights based on evaluation of the Article III question, our emphasis in this Article is on the possibility of using the equation in the other direction. In the adjudication of traditional state common law claims where jury rights clearly apply, a litigant has a constitutional right to proceedings presided over by an Article III judge.

The Court’s equation of the scopes of rights to a jury and Article III adjudication in non-criminal, legal contexts—an equation recently reaffirmed in *Oil States Energy Services, LLC v. Greene’s Energy Group*,

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<sup>240</sup> Id. at 491 (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 584 (1985)).

<sup>241</sup> 492 U.S. 33 (1989).

<sup>242</sup> Id. at 36.

<sup>243</sup> See id. at 53 (“[I]f a statutory cause of action is legal in nature, the question 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 whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal.”). Justice Scalia’s opinion concurring in part and in the judgment accepted that, if Congress may assign adjudication to a non-Article III tribunal, there need be no jury right in such adjudication; but he disagreed with the assertion in part of Justice Brennan’s opinion for the Court that the public rights doctrine may apply even when the United States is not “a party to the adjudication.” Id. at 70–71 (Scalia, J., concurring in part and in the judgment).

*LLC*<sup>244</sup>—has drawn criticism.<sup>245</sup> We contend, however, that this equation makes sense in light of our view of Article III adjudication as a mechanism for providing a tolerable substitute for state tribunals (and juries) and limiting federal encroachment on traditional state power. To the founding generation, influenced by Blackstone’s view of the jury as an optimal fact-finder that enabled “the surrounding community’s direct participation in the trial,”<sup>246</sup> the need for a jury undoubtedly highlighted the importance of properly conducted evidentiary hearings. Further, the criticality of procedure in trial-level proceedings must have almost ineluctably pointed to a need for an Article III judge to preside over those proceedings. In modern times, we have become overly entranced by Marshall’s articulation of Article III judges’ critical role in “say[ing] what the law is.”<sup>247</sup> But during the debates over ratification of the Constitution, focal points of concern with Article III were its failure to secure jury rights in civil cases<sup>248</sup> and the worry that the Supreme Court’s appellate jurisdiction would be more of a curse than a blessing.<sup>249</sup> At this earlier time, helping ensure that federal courts could properly vindicate individual rights based on particular facts appears to have been recognized as an at least equally key part of the judicial department’s “province and duty.”<sup>250</sup>

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<sup>244</sup> 138 S. Ct. 1365, 1379 (2018) (“This Court’s precedents establish that, when Congress properly assigns a matter to adjudication in a non-Article III tribunal, ‘the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.’” (quoting *Granfinanciera*, 492 U.S. at 53–54)).

<sup>245</sup> See Martin H. Redish & Daniel J. La Fave, Seventh Amendment Right to Jury Trial in Non-Article III Proceedings: A Study in Dysfunctional Constitutional Theory, 4 Wm. & Mary Bill Rts. J. 407, 409 (1995) (contending that “there is absolutely no legitimate, principled basis on which to conclude that a jury trial right is somehow inapplicable to [non-Article III] proceedings”).

<sup>246</sup> Laura I. Appleman, The Lost Meaning of the Jury Trial Right, 84 Ind. L.J. 397, 419 (2009).

<sup>247</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>248</sup> See *supra* text accompanying notes 206–07.

<sup>249</sup> See *supra* text accompanying notes 153–66.

<sup>250</sup> *Marbury*, 5 U.S. (1 Cranch) at 177.

2. *Crowell v. Benson and Jurisdictional Facts*

*Crowell v. Benson*,<sup>251</sup> the 1932 decision that is commonly seen as the font of modern case law on non-Article III adjudication,<sup>252</sup> is an odd case for this distinction. But this oddity enabled it to highlight another aspect of the Supreme Court’s case law that our federalism perspective helps elucidate: the Court sometimes demands that Article III courts have special say in the determination of so-called “jurisdictional” or “constitutional” facts.<sup>253</sup>

*Crowell* centered on a ship rigger’s claim for compensation for an injury suffered aboard a docked ship, and thus alleged to have occurred on navigable waters<sup>254</sup> and within the ambit of Article III “Cases of admiralty and maritime Jurisdiction.”<sup>255</sup> This worker’s compensation claim had a straightforward analogy to a claim for compensation that might, in principle, have been pursued under state law—and in a state court—but for the alleged location on navigable waters.<sup>256</sup> Indeed, before the establishment of the federal courts, such claims had been brought exclusively in state courts, and the savings-to-suitors clause in the Judiciary Act of 1789 helped to ensure that vesting new federal district courts with exclusive jurisdiction over admiralty claims would not erode the jury trial rights formerly available in state courts.<sup>257</sup> Accordingly, Chief Justice Hughes classified the suit as a case of “private right”—a

<sup>251</sup> 285 U.S. 22 (1932).

<sup>252</sup> By allowing “Congress to assign agencies to perform extensive factfinding, subject to only fairly narrow judicial review,” the Supreme Court’s 1932 decision in *Crowell* presaged a permissive half century in Article III case law, a permissiveness that facilitated “the birth of the modern administrative state.” 1 Laurence H. Tribe, *American Constitutional Law* 286 (3d ed. 2000).

<sup>253</sup> Cf. Henry P. Monaghan, *Constitutional Fact Review*, 85 *Colum. L. Rev.* 229, 238 (1985) (describing “[f]irmly embedded case law [as having] establishe[d]” the capacity, “absent limiting legislation, [of] federal appellate courts” to engage in “[c]onstitutional fact review”).

<sup>254</sup> See *Crowell v. Benson*, 45 F.2d 66, 66 (5th Cir. 1930) (“On July 4, 1927, J. B. Knudsen . . . sustained personal injuries while on a derrick barge which . . . was then moored in the Mobile river, a navigable stream, the claimant then being on the barge for the purpose of splicing a wire cable which was part of its equipment.”), *aff’d*, 285 U.S. 22.

<sup>255</sup> U.S. Const. art. III, § 2, cl. 1.

<sup>256</sup> *Crowell*, 285 U.S. at 37–38 (observing that the relevant federal act restricted recovery under it to situations where state law could not provide proceedings for workers’ compensation).

<sup>257</sup> Cf. David J. Bederman, *Admiralty and the Eleventh Amendment*, 72 *Notre Dame L. Rev.* 935, 1001 (1997) (noting that “the ‘savings to suitors’ clause of the Judiciary Act of 1789” recognized “a class of cases involving common law remedies where state and federal courts had concurrent jurisdiction”).

proceeding for determining “the liability of one individual to another under the law as defined.”<sup>258</sup> He distinguished “cases of private right and those which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.”<sup>259</sup> With respect to the latter category of “public rights” cases, “Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.”<sup>260</sup> But in a case of “private right,” the Court held that access to an Article III tribunal is constitutionally required for jurisdictional facts.<sup>261</sup>

The Court upheld agency adjudication of the “private rights” of the maritime worker against his employer nonetheless.<sup>262</sup> It reasoned that even in private rights cases, “there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges,” pointing out the role of juries in common law cases and masters and commissioners in equity and admiralty cases.<sup>263</sup> But the Court emphasized that a “different question is presented where the determinations of fact are fundamental or ‘jurisdictional,’ in the sense that their existence is a condition precedent to the operation of the statutory scheme.”<sup>264</sup> The specific requirements in *Crowell* were that “the injury occur upon the navigable waters of the United States and that the relation of master and servant exist” because “the power of the Congress to enact the legislation turns upon the existence of these conditions.”<sup>265</sup> The Court underscored that “Congress cannot reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction.”<sup>266</sup> In the Court’s view, “the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights requires that the Federal court should determine such an issue upon its own record and the facts elicited before it.”<sup>267</sup>

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<sup>258</sup> *Crowell*, 285 U.S. at 50–51.

<sup>259</sup> *Id.* at 50.

<sup>260</sup> *Id.* (citation and internal quotation marks omitted).

<sup>261</sup> *Id.* at 51, 54–55, 64.

<sup>262</sup> See *id.* at 62–65.

<sup>263</sup> *Id.* at 51.

<sup>264</sup> *Id.* at 54.

<sup>265</sup> *Id.* at 55.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 64.

Although the Court's ruling on the different status of constitutional or jurisdictional facts has met with some skepticism, we believe the Court's special solicitude on this point to be explained—even if not necessarily justified in complete detail—by the Court's awareness that the jurisdictional line in *Crowell* was crucial to taking this sort of private rights case out of the jurisdiction of the state courts. Because the case involved claims for injury suffered by a ship rigger while working on a ship in port, the case was arguably more than a reach for federal admiralty and maritime jurisdiction. Benson would presumably have been entitled to seek compensation in state proceedings if his accident had not happened on navigable waters. As the Court noted, “[i]n limiting the application of the Act to cases where recovery ‘through workmen’s compensation proceedings may not validly be provided by State law,’ the Congress evidently had in view the decisions of this Court with respect to the scope of the exclusive authority of the national legislature.”<sup>268</sup> Consistent with this Article’s contention that Article III should be read as incorporating substantial nods to federalism, the Court appears to have seen a need for an especially heavy role for Article III courts in jurisdictional fact-finding where proper fact-finding was crucial to ensuring proper respect for traditional prerogatives of the states in resolving disputes over private rights.

### *C. The Consent Cases*

Once a demand for Article III adjudication of certain questions of fact is recognized to result from structural principles such as federalism or separation of powers, the question arises why the Supreme Court has found this demand to be overridden in private rights cases where the parties have consented to non-Article III adjudication. How, one might ask, can an individual’s consent obviate a structural constitutional defect? The Supreme Court, nonetheless, has repeatedly upheld non-Article III adjudication of private rights when parties have consented to such process.

We believe the Court has reached the correct outcomes in these cases, although the Court’s reasoning has been incomplete. The consent cases do not contradict the public rights doctrine or any fundamental structural principle. They are instead distinguishable as highlighting private parties’ traditional capacity to resolve disputes without the aid of Article III

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<sup>268</sup> *Id.* at 39 (citation omitted).

courts—or, for that matter, any courts whatsoever. What can seem puzzling from a separation of powers perspective (How can a private party’s consent mitigate or authorize what is alleged to be a congressional encroachment on Article III judges’ power?) is not confounding when one views party consent from a federalism perspective—presuming that the party could waive a right to adjudication by a state court too.

John Harrison has similarly concluded that, in light of private parties’ broad capacity to consent to binding arbitration by other private actors, their capacity to consent to non-Article III adjudication by a federal bankruptcy judge or other federal actor should be relatively unremarkable.<sup>269</sup> By consent, parties can unquestionably dissolve, resolve, or narrow their disputes in many ways that take them entirely or substantially outside courts’ reach. Private parties have the power to resolve disputes without resort to courts or juries, including state courts and juries, and may choose not to pursue legal claims at all. Thus, we likewise think it substantially unremarkable that, to the extent consent occurs, a dispute otherwise qualifying for Article III adjudication may commonly be “settled” by parties through their submission to an alternative mode of resolution, whether that be a private arbitrator or an administrative tribunal.

The Supreme Court emphasized this point in its 2015 decision in *Wellness International Network, Ltd. v. Sharif*.<sup>270</sup> In *Wellness*, Justice Sotomayor wrote the opinion for the Court holding that, when litigants consent, a bankruptcy court may decide a so-called “*Stern* claim”—“a claim designated for final adjudication in the bankruptcy court as a statutory matter, but prohibited from proceeding in that way as a constitutional matter.”<sup>271</sup> The *Wellness* Court emphasized that it had “never done what Sharif and the principal dissent would have us do—hold that a litigant who has the right to an Article III court may not waive

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<sup>269</sup> Harrison, *supra* note 44, at 187 (“Once the government acquires a power like a private arbitrator’s [in exchange for a government benefit], the executive may exercise that power the way it exercises any other proprietary right of the government.”); cf. Troy A. McKenzie, Getting to the Core of *Stern v. Marshall*: History, Expertise, and the Separation of Powers, 86 Am. Bankr. L.J. 23, 49 (2012) (observing that, “[j]udged from the perspective of history,” the capacity of a private party to consent to non-Article III adjudication by a bankruptcy judge is “fairly straightforward”).

<sup>270</sup> 575 U.S. 665 (2015).

<sup>271</sup> See *id.* at 673–74, 686 (quoting *Exec. Benefits Ins. Agency v. Arkison*, 573 U.S. 25, 30–31 (2014), regarding the definition of a “*Stern* claim”).

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that right through his consent.”<sup>272</sup> The Court asserted that “allowing 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.”<sup>273</sup> Chief Justice Roberts retorted in dissent that the *Wellness* majority had “treat[ed] consent as ‘dispositive’ in curing the structural separation of powers violation—precisely what *Schor* said consent could not do”<sup>274</sup> in a 1986 decision on which the *Wellness* majority substantially drew,<sup>275</sup> *Commodity Futures Trading Commission v. Schor*.<sup>276</sup>

Despite the Chief Justice’s objection, we believe that *Wellness* got substantially right the role of consent in enabling non-Article III adjudication of a private rights matter. There are two major qualifications, however, that the *Wellness* Court’s stipulation of “supervisory authority” in the Article III courts arguably undersells. First, the consent in question should be properly voluntary. Second, party consent to non-Article III adjudication should not undermine the constitutionally ordained public interest in federalism as well as in federal-level separation of powers. This second caveat may require special caution where there is reason to believe that the state court that would presumably have heard the matter in the absence of federal intervention would have refused to accept the alleged consent as a mechanism for opting out of state court adjudication.<sup>277</sup>

The concern about whether there has been pertinent, “knowing and voluntary” consent<sup>278</sup> is not trivial.<sup>279</sup> A central government often has unique capacities to render consent illusory, and we think Richard Fallon

<sup>272</sup> *Id.* at 683.

<sup>273</sup> *Id.* at 678.

<sup>274</sup> *Id.* at 701 (Roberts, C.J., dissenting) (quoting *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851 (1986)).

<sup>275</sup> *Id.* at 675 (describing *Schor* as “[t]he foundational case [on consent] in the modern era”).

<sup>276</sup> 478 U.S. 833.

<sup>277</sup> Cf. *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 204 (1956) (“There would in our judgment be a resultant discrimination if the parties suing on a Vermont cause of action in the federal court were remitted to arbitration, while those suing in the Vermont court could not be.”).

<sup>278</sup> *Wellness*, 575 U.S. at 685.

<sup>279</sup> See Fallon, *supra* note 60, at 991–92 n.414 (“If article III values are to be protected, federal courts must shoulder the admittedly difficult line-drawing task of separating reasonable and valid from coerced and invalid ‘waivers’ of the right to an article III forum.”); Pfander, *supra* note 62, at 771–72 (“The problem with waiver will likely arise not from cases of relatively free choice, as in *Schor*, but from cases involving statutory provisions that seek to encourage litigants to surrender their right to an Article III court by making the right to recover in such a forum less attractive.”).

right to have questioned the Court's seeming suggestion in *Thomas v. Union Carbide Agricultural Products Co.* that there was meaningful consent to non-Article III adjudication through "'voluntary participat[ion]' in [a pesticide-registration] program"<sup>280</sup> when "the government's exclusive power to register pesticides frequently gave the would-be applicant no realistic alternative."<sup>281</sup> By contrast, in *Schor*, the party who ultimately challenged the constitutionality of non-Article III adjudication of a state law counterclaim for debt—namely, Schor himself—undoubtedly had eschewed a readily available option to proceed with the relevant dispute before an Article III court.<sup>282</sup> The conclusion that the upholding of non-Article III adjudication in *Schor* is correct even though *Schor* is properly viewed as a private rights case, whereas the approval of such adjudication in *Union Carbide* may only be justified if *Union Carbide* is viewed as a public rights case, neatly summarizes the importance of the role of consent relative to the private rights/public rights distinction.

*Schor* also helps to highlight the operation of our second major qualification—the need for courts to ensure that consent to non-Article III adjudication does not undermine the federalism and separation of powers principles that the Constitution ordains. In *Schor*, the Court enforced this principle through pragmatic, multifactor analysis of whether "a given congressional decision to authorize the adjudication of Article III business in a non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch."<sup>283</sup> *Wellness* enforced the principle through its somewhat more cryptic invocation of a requirement of "supervisory authority" vested in the Article III courts.<sup>284</sup>

This backstopping reference to constitutional principle in *Wellness* is analogous to the roles played in contract law by doctrines of unconscionability<sup>285</sup> and the unenforceability of agreements that are

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<sup>280</sup> 473 U.S. 568, 589–90 (1985).

<sup>281</sup> Fallon, *supra* note 60, at 991–92 n.414 (casting doubt on the propriety of *Union Carbide*'s description of registrants "as 'voluntary participants' in a [federal] program").

<sup>282</sup> *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 838 (1986). Schor had "expressly demanded that [the opposing party] proceed on its counterclaim in the [agency] reparations proceeding [that Schor initiated] rather than before the District Court." *Id.* at 849.

<sup>283</sup> *Id.* at 851.

<sup>284</sup> See *supra* text accompanying note 273.

<sup>285</sup> See E. Allan Farnsworth, *Contracts* § 4.28, at 298–308 (4th ed. 2004) (discussing "[t]he equitable concept of unconscionability").

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contrary to public policy.<sup>286</sup> Parties have broad power to contract as they wish, but courts reserve power not only to confirm the adequacy of consent, but also to ensure that individual choices do not undermine critical public interests. In the Article III context, those public interests include: (1) a proper respect for the traditional roles of state courts in resolving state law matters of private right; and (2) the maintenance of an independent judiciary adequately empowered to check the political branches and to protect individual rights. The Court's opinions in *Schor* and *Wellness* emphasized the latter, separation of powers concern in their reasoning.<sup>287</sup>

This Article's identification of a federalism principle underlying Article III suggests that the safeguarding of state courts' traditional prerogatives should play a more explicit role in future judicial consideration of consented-to non-Article III adjudication of private rights. The proper details of the tests for consistency with federalism and separation of powers principles are, we concede, not straightforwardly derived from the principles themselves, and such specification is beyond the scope of this Article. We can observe, however, that in relation to both concerns, the *Wellness* Court's invocation of Article III court "supervisory authority" seems either overly simplistic or, if a front for hidden complexity, overly oracular. Meanwhile, the specific details of *Schor*'s multifactor test have attracted criticism,<sup>288</sup> but *Schor*'s pointing to concerns of "the extent to which the 'essential attributes of judicial

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<sup>286</sup> See *id.* § 5.1, at 314 (discussing the possibility of a court's "refus[ing] to enforce an agreement on grounds of public policy"); cf. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985) (observing that, if an arbitration agreement's "choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy"). See generally Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 *Colum. L. Rev.* 203, 233 (2012) (discussing how equity has used "traditional, structured sets of presumptions and safety valves" to provide regulated, policy-informed backstops for judicial decision making).

<sup>287</sup> See *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 678 (2015) (highlighting "a structural purpose" for Article III in reinforcing the separation of powers without discussing federalism concerns); *Schor*, 478 U.S. at 850–56 ("[T]he state law character of a claim is significant for purposes of determining the effect that an initial adjudication of those claims by a non-Article III tribunal will have on the separation of powers for the simple reason that private, common law rights were historically the types of matters subject to resolution by Article III courts.").

<sup>288</sup> See, e.g., Fallon, *supra* note 60, at 932 (describing *Schor*'s doctrinal articulation as "lack[ing] definition").

power’ are reserved to Article III courts” and “the origins . . . of the right to be adjudicated”<sup>289</sup> are substantially in line with concerns highlighted in this Article. More generally, a key takeaway from this Section is that the Supreme Court’s consent cases are correct in recognizing that parties can waive rights to an Article III forum, just as they can waive jury rights or rights to state court adjudication. Nonetheless, the Court could have done better in explaining how federalism and separation of powers principles should provide backstopping checks to waivers that present a real threat to the intended constitutional balance.

#### CONCLUSION

This Article presents a new explanation of the origins and significance of the principle that the Constitution requires access to Article III courts for federal adjudication of matters of private right, one that goes beyond prior scholarship focusing exclusively on the separation of powers and individual liberty dimensions of the requirement. Our account points to a prime concern about Article III at the time of the Constitution’s adoption: the fear that the newly created federal government would encroach upon the established roles of state courts and juries in resolving most legal disputes among private parties. That concern is embodied in the so-called “Madisonian Compromise”<sup>290</sup>—the bargain reflected in Article III’s language by which Congress *must* create the Supreme Court and vest its original jurisdiction, but *may* create lower federal courts and vest the Supreme Court’s appellate jurisdiction “with such Exceptions, and under such Regulations as the Congress shall make.”<sup>291</sup> The compromise respected state courts’ traditional monopolies over private rights adjudication while securing the creation of a national judiciary that could help establish an effective national government.<sup>292</sup> Congress would have to take affirmative action to break these monopolies by, for example, creating lower federal tribunals that might hear state law tort cases as part

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<sup>289</sup> 478 U.S. at 851.

<sup>290</sup> See William Michael Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 120 Mich. L. Rev. 1, 35–36 (2021) (describing the Madisonian Compromise).

<sup>291</sup> U.S. Const. art. III, § 2, cl. 2.

<sup>292</sup> At the Constitutional Convention, the Committee unanimously defined the desired missions of the federal judicial branch in general terms: its “jurisdiction shall extend to all cases arising under the Nat[ional] laws[] [a]nd to such other questions as may involve the Nat[ional] peace [and] harmony.” 2 *The Records of the Federal Convention of 1787*, at 46 (Max Farrand ed., 1911).

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of their diversity jurisdiction. The general requirement that such tribunals be Article III courts was a stringent constraint on the means by which Congress could extend the reach of federal adjudication beyond the constitutional minimum. This constitutional federalism constraint was not just about preserving the power of state courts. As the ratification debates attest, many citizens firmly believed that individual liberty was best protected by committing adjudication of private rights to local judges and juries, not the potentially geographically remote tribunals of a centralized government.

The federalism-reinforcing nature of restrictions on non-Article III adjudication that we highlight has perhaps been intuited by Supreme Court Justices whose opinions have emphasized the state law nature of claims found to require access to an Article III adjudicator. But the federalism principle underlying this aspect of Article III, including its relation to questions of party consent, has been incompletely articulated and little theorized. This Article fills these critical gaps and, in so doing, helps bring greater coherence to—and support for—existing jurisprudence on congressional power to vest adjudicatory authority in federal officials who do not have lifetime tenure and salary protection. Moreover, our explanation of the private rights/public rights distinction is not just about reconciling and explaining the doctrine, nor even just about that plus “federalism” as a working concept. Rather, our account illuminates enduring aspects of our constitutional structure: the Constitution’s constraints on direct action on private persons by the branches of the national government and a corresponding default preference that adjudication of traditional disputes between private persons occur in the state courts.

Admittedly, neither our account nor the history, tradition, and text to which it points provide a decisive basis for embracing the Court’s current public rights doctrine in all its details. Moreover, our account suggests a definition for private rights but does not purport to be the final word on the category’s scope.<sup>293</sup> Nonetheless, this Article provides substantial support for a conclusion that federalism concerns should join concerns of individual liberty and separation of powers in assessing the extent to which the Constitution permits adjudication by non-Article III tribunals. In turn, the federalism rationale behind Article III’s limits not only places existing public rights doctrine in a more favorable light, but also suggests

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<sup>293</sup> See *supra* text accompanying notes 37–40.

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that federalism concerns should inform its further evaluation and development.