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The Constitution as Architecture: Legislative and Administrative Courts Under Article III†

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I. INTRODUCTION: THE PROBLEM

My project in these lectures is to solve a constitutional puzzle. The puzzle is arresting and important, because it involves, at least at first glance, a substantial discrepancy between the scheme of the Constitution as designed and written by the Framers and the evolution and structure of our actual institutional architecture. History may have taken us on a tack that is discordant with the Constitution: what, then, should we make of this? If, on careful analysis, the discrepancy cannot be dissolved—if our existing institutional topography is in some sense truly unconstitutional—we appear to be faced with an uncomfortable dilemma. We must choose either to persist in our illegitimate and unconstitutional course, or engage in a massive invalidation and dismantling of a large array of highly successful and useful institutions.

Is it an answer to this that the dilemma is, by definition, a false one, because the mere fact of a deep, persistent and successful historical development (even if athwart the constitutional text and original plan) itself counts as a constitutional validation (or a kind of constitutional amendment)? Do we have here an example of the Constitution becoming what the "felt necessities of the time" demand? But is this not in turn an inadmissible assent to the neo-Darwinian concept that whatever wins is right? And does it not commit constitutional adjudication overtly to the stormy waters of expediency?

I will return to some of these methodological dilemmas later, but it should be emphasized that they arise only if the assumed discrepancy turns out to be a real one. My own ultimate purpose here is to propose a solution that dissolves the supposed discrepancy; I hope to show that our institutional

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development has been valid and that the constitutional doubts are based on a false understanding of the deep structure of the Framers' design.

I want now to describe what our problem is and tell the story of how we have dealt with it heretofore. The problem arises from the text of article III of the Constitution and from the animating concepts that lay behind its design. Article III states that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The next sentence of article III then lays down rules with respect to these (aforementioned) courts: their judges must hold office "during good Behaviour" and their salary may not be "diminished" during continuance in office. Finally, section 2 of article III says, in effect, that the exercise of the judicial power of the United States is restricted to the adjudication of nine specified classes of cases or controversies.

Now what does this text suggest? Let me first specify what it does not suggest. It would be manifestly wrong to read article III as providing that only courts constituted in accordance with the tenure, salary, and "case-or-controversy" rules of article III may undertake the task of adjudicating the nine classes of cases or controversies to which the federal judicial power extends. This would be wrong because it was explicitly contemplated in the design of the Constitution that some or all of these cases could and would continue to be adjudicated in the state courts; indeed, this possibility is entailed by the power of Congress to decide not to create any federal courts inferior to the Supreme Court. In other words, it is universally agreed that it is not the scheme of the Constitution that only article III courts may adjudicate article III cases. (This is an important aspect of our question, though its significance is disputed. I will return to it later.)

But the text of article III does powerfully support a somewhat narrower proposition: that if Congress determines to make inroads on the antecedent general jurisdiction of the state courts by assigning the adjudication of some or all of the cases enumerated in article III to a federal tribunal, that tribunal must be an "inferior Court[]" ordained and established pursuant to article III and constituted in accordance with the tenure, salary, and "case-or-controversy" restrictions of that article. The Constitution, in other words, seems to adopt a simple, majestic, and powerful model: Congress may leave the initial adjudication of some or all of article III's list of cases to the state courts, but if federal adjudication is felt to be needed, the requirements of article III automatically come into play and specify what sorts of courts Congress must employ for federal adjudication.

2. Id.
This conception of the design of article III—let us call it the Simple Model—has, further, the virtue that it directly subserves a central ideal of the Framers: the ideal of an Independent Judiciary. The proceedings of the Constitutional Convention and the Federalist Papers make it clear that it was the Framers' purpose to create a federal judiciary that, once appointed, was to be as free from political and financial pressures from the other branches as "the lot of humanity will admit." The notion that if a federal court is to exercise the federal judicial power by adjudicating some or all of the cases or controversies enumerated in article III, that court must be constituted so as to comply with the Constitution's rules guaranteeing independence for judges, is thus fully harmonious not only with the text but also with the conception of good government that that text was designed to bring to life.

II. THE DEVELOPMENT OF LEGISLATIVE AND ADMINISTRATIVE COURTS

In the face of all this, it is all the more remarkable that this Simple Model—so elegant, so powerful, with such claims to be the sole legitimate player in the field—has utterly failed to withstand the test of time. For some 200 years, Congress has consistently acted on the premise that it has the authority, in exercising its various substantive legislative powers, to reach the conclusion that it is necessary and proper to constitute special courts, tribunals and agencies which exercise—or at least seem to exercise—the federal judicial power (because they adjudicate cases and controversies arising under federal law) and yet which are not the inferior courts specified in article III, because their "Judges" do not enjoy article III's tenure and salary protections, and/or because they have been entrusted with tasks beyond the "judicial" Power of adjudicating article III cases and controversies. And during all this time, with virtually equal consistency, the exercise of that power has been sustained by the courts.

Why has this happened? How has it happened? Is it the case—as the Framers feared—that Congress has continuously acted on purpose to subvert the ideals of article III by creating a cadre of judges who would be subservient to political pressures from legislative or executive, and that it has somehow succeeded in persuading the article III courts to enter into this anti-constitutional conspiracy? The answer, plainly, is no. Rather,

6. See infra notes 25-36 and accompanying text.
departures from the Simple Model have developed in response to special institutional needs, under circumstances where it was the considered judgment of the legislature that it was inappropriate and inexpedient to have to choose between leaving a matter to the state courts on the one hand, or, on the other, to commit it to a regular federal tribunal. Time and again, circumstances have seemed insistently to demand that we create special and/or temporary and/or specialized tribunals for the performance of distinctive tasks for which the use of permanent courts manned by life-tenured judges performing an exclusively judicial task through the apparatus of conventional adjudication seemed awkward and ill-adapted.

The story of these developments is well known, and I will not recite it in detail here. An important impetus, from the beginning, came in connection with the felt need from time to time to establish tribunals for a transitory period. Thus, in the territories of the United States, subject to federal lawmaking power pursuant to article IV, section 3, federal courts had to be constituted to exercise a plenary local jurisdiction, as well as to exercise whatever "national" jurisdiction the ordinary federal courts (sitting in the states) were exercising at the time. This "local" business was to constitute "federal" business only temporarily, however, since state courts would take it over when the territory became a state. The response was to create territorial courts with judges of limited tenure, whose services could be dispensed with when no longer needed. In other contexts, too, the need has arisen from time to time to constitute temporary courts serving special transitory purposes, and it has seemed inapt and wasteful to staff them with judges appointed for life.

More generically, the use of full-blown "national" tribunals with judges enjoying life tenure and restricted to a "judiciary" power has seemed awkward and inappropriate in the context of meeting certain other special adjudicatory needs. Thus, from the beginning, soldiers and sailors have been tried by military tribunals administering a specialized military justice. And problems of specialized local governance (even if not necessarily temporary), as in the case of the government of the District of Columbia, or in the case of the possessions of the United States, were felt to call for a whole array of rather modest "local" (albeit "federal") tribunals; some of these were entrusted with quasi-administrative duties as well as the task of adjudicating cases and controversies.

A somewhat different story is that of the adjudicative institutions that slowly developed to manage the adjudication of claims against the United States and of other disputes between citizens and the United States, such as quarrels about customs, excises, and taxes. In the beginning, many of these institutions were not conceived of as "courts" at all: they started life as bureaucratic arms of the executive branch participating in the "execution" of the laws, or (sometimes) agencies of the legislature whose mission was
to make recommendations to the legislative branch.\textsuperscript{7} Over time, however, their role became more and more clearly identifiable with the adjudication of cases or controversies arising under the revenue or customs laws, or cases or controversies arising in connection with contract (or "takings") disputes with the national sovereign.\textsuperscript{8} Yet for many generations—perhaps because special "sovereign" prerogatives were felt to be involved—it continued to be thought appropriate and necessary that these specialized adjudicatory tasks should be managed by specialized tribunals rather than the ordinary national tribunals constituted in the ordinary way.\textsuperscript{9} Until relatively recently, therefore, it was traditional to constitute these tribunals without regard either to the independence guaranties or the "case-or-controversy" restrictions of article III: their judges typically continued to hold office for a term of years (and were removable for cause), and their tasks frequently included advisory and administrative functions of a sort that could not be delegated to an article III court.\textsuperscript{10}

An even more profuse and variegated flowering of special and specialized adjudicative tribunals and agencies is the product of the coming of, first, the industrial and, then, the administrative state. An important—and, it turns out, prototypical—foresaw a development at the level of state rather than federal government: workmen's compensation. The creation of workmen's compensation boards to supplant the jurisdiction of the common law courts to administer compensation to workers injured in industrial accidents was responsive to the felt need to create modest, high-volume, specialized tribunals, using informal and expeditious procedures to assure rapid and inexpensive justice to a class of litigants without meaningful access to the ordinary modes of litigation. When, later, workmen's compensation became a federal program (for admiralty workers), Congress readily followed the state law precedents by adopting a method of adjudication designed for the "prompt, continuous, expert and inexpensive" resolution of "the thousands of cases" involved:\textsuperscript{11} it created a specialized

\textsuperscript{7} Examples of these courts include the Tax Court, the Court of Claims and the Court of Customs and Patent Appeals.

\textsuperscript{8} See Williams v. United States, 289 U.S. 553, 561 (1933).

\textsuperscript{9} See, e.g., Ch. 488, 45 Stat. 1476 (1929) (changing jurisdiction over appeals from the Patent Office in patent and trademark cases from the Court of Appeals for the District of Columbia to the Court of Customs and Patent Appeals).


administrative compensation tribunal rather than resorting to the ordinary article III courts. 12

Even prior to the enactment of the federal Longshoremen's and Harbor Workers' Act, 13 Congress had already created the pathbreaking Interstate Commerce Commission (ICC). 14 This was the first of the "hydraheaded" agencies, involving the experiment of delegating adjudicative tasks to a multiform agency that is engaged in policy-making, rule-formulation and enforcement tasks as well as adjudication. And, as we know, the ICC was followed by numerous other administrative agencies—some "independent," some operating within the executive departments—that were assigned non-adjudicative as well as adjudicative tasks in connection with the general project of reforming and regulating special areas of the economy. And some of these assignments of jurisdiction were, as in the case of the National Labor Relations Board (NLRB), specifically designed to entrust a novel and reformist statutory mission to an agency that was politically and psychologically "committed" to the task and was free of the traditional (and "conservative") perspectives of the ordinary "generalist" courts. 15

Finally, the recent enactment of massive federal benefit, welfare and insurance schemes and the enactment by Congress of categorical regulatory enterprises (e.g., anti-discrimination legislation, 16 Occupational Safety and Health Administration (OSHA) 17), have given yet another impetus to the creation of specialized tribunals, boards and agencies devoted to the task of resolving the massive number of disputes arising under them. Further, the explosion of litigation in the regular article III courts has created an intense interest in "alternative methods of dispute resolution," whose very purpose is to provide a forum outside the normal article III process for the adjudication or arbitration of disputes.

In sum, then, what we have in fact experienced is a persistent assertion of the power to depart from the Simple Model in cases where this has seemed institutionally expedient and suitable. The result—valid or invalid—has been, without a doubt, an enriching source of important institutional flexibility and innovation: it has enabled Congress to set up—and eliminate—dozens of different sorts of adjudicative institutions, large or small, tem-
porary or permanent, important or modest, multi-faceted or narrowly focused, formal or informal, adjudicating private or governmental disputes, with power over a single industry or the entire economy, dealing with one or many subject matters and administering a huge variety of statutory schemes through a huge variety of processes.

Now it is of course the case that this history does not show that the creation of legislative and administrative courts was, in any strict sense, a necessity, that it would have been impossible—in theory—to adopt an article III solution to meet the institutional needs in question. We could have created variegated forms of article III tribunals—special, specialized, numerous, modestly paid, as the case may be; we could perhaps have solved even the problem of how to have temporary courts staffed by life-tenured judges. (In actuality, I think the point is, truly, theoretical only. In the context of the development of the “real” national courts as we know them, it would have been quite impossible, psychologically and politically, to create thousands upon thousands of life-tenured article III workmen’s compensation and social security and ICC and Security and Exchange Commission and NLRB and Equal Employment Opportunity Commission and OSHA “judges” sitting in article III administrative courts.) The only point established so far is that it has been a consistent feature of our institutional history that the creation of special tribunals and agencies, not cast in the rigid article III mold, was in fact perceived as necessary and proper and has answered a felt need for institutional innovation and experimentation. And I do think that the fact of this consistent judgment is impressive and ought to have weight.

What must also count as impressive is that, as I have said, the overwhelming weight of judicial authority has, over a century and a half, held virtually all of this institutional development to be constitutional, notwithstanding the seemingly inexorable demands of the Simple Model. Nevertheless, when we turn to the content of these constitutional justifications, we find ourselves in deep trouble. For the Supreme Court has been unable, in these 150 years, to find a coherent and satisfying theory for justifying the existence of legislative and administrative courts. The sense of discrepancy between our existing institutional architecture and our constitutional design persists, notwithstanding that the result has been the creation of a brilliantly successful space for institutional growth and innovation.

I now turn to the question of how our institutional development has been heretofore explained and justified under our Constitution.

III. The Validation of Legislative Courts: Introduction

The Supreme Court opinions devoted to the subject of the validity of legislative and administrative tribunals are as troubled, arcane, confused and confusing as could be imagined. It seems obvious that the Court has
struggled with the subject, and the impression is strong that it is the subject, not the Court, that has won. Many of the great cases in this area—National Mutual Insurance Co. v. Tidewater Transfer Co., Inc.,18 Glidden Co. v. Zdanok,19 Northern Pipeline Construction Co. v. Marathon Pipe Line Co.20—have, characteristically, been decided without an opinion commanding the majority of the Court. Some of the leading opinions (Ex parte Bakelite Corp.,21 Williams v. Standard Oil Co.22) have been overruled; some are famous for the absurdity of their metaphysics (e.g., O’Donoghue v. United States,23 holding that some hermaphroditic courts in the District of Columbia are both article I courts and article III courts) or the perversity of their twists and turns (Justice Jackson’s famous opinion in Tidewater,24 arguing that the ordinary article III courts may be given the task of adjudicating non-article III cases).

I do not plan to confuse you with a chronological account of the development of the doctrine in this field. Rather, I want to analyze the three important sorts of approaches that have been put forward to attempt to solve the puzzle of legislative courts. I will label these as, first, the Theological Approach, second, the Categorical Approach, and, third, the Instrumental Approach.

IV. THE THEOLOGICAL APPROACH

It is not surprising, given the majestic force of the Simple Model, that the Supreme Court struggled for a time to demonstrate that our actual institutional development is in fact entirely consistent with it, that it continues to be the case that the only federal courts that in fact exercise the federal judicial power are the article III courts, and that what legislative courts are doing does not count as an exercise of the federal judicial power. The notion derives from vivid language used by Chief Justice Marshall in American Insurance Co. v. Canter,25 the first great case dealing with the validity of a non-article III court. The question before the Court was whether it was constitutional to authorize territorial courts sitting in Florida—staffed by judges without life tenure—to adjudicate an admiralty case. The Court upheld the validity of the Florida adjudication.26 The Chief Justice enriched our terminology by inventing a phrase: he stated that the

18. 337 U.S. 582 (1949).
22. 278 U.S. 235 (1929) (overruled by Olsen v. Nebraska, 313 U.S. 236 (1941)).
23. 289 U.S. 516 (1933).
24. 337 U.S. at 582.
26. Id. at 546.
Florida courts did not have to be constituted in accordance with article III because they were "legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States." As such, said the Chief Justice, they "are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it."  

What does it mean, that the territorial courts are not exercising the judicial power of the United States when they adjudicate a case within the admiralty jurisdiction (the Chief Justice elsewhere specifies that the case was an admiralty case), or when they decide a case arising under federal law, because they are "incapable of receiving it"? And if they are not exercising that power, what are they doing? When a congressionally constituted tribunal enforces rules that obtain their force as law from the national government, whose judicial power is in play if not the judicial power of the United States? 

The assertion that federal tribunals, constituted without regard to article III but adjudicating cases arising under the laws of the United States, are not exercising the federal judicial power because they are "incapable of receiving it," seems to me to be a purely metaphysical assertion, akin to the Catholic doctrine that one who is not free of mortal sin is incapable of "receiving" the sacrament of the eucharist in any true sense. But, as such, it is not a satisfactory method of justifying the Constitutional validity of federal tribunals set up without regard to the guarantees and restrictions of article III. It is not satisfactory because it is perfectly circular: although verbally consistent with the Simple Model, it allows Congress to sweep it aside by the very fact of acting outside it. And it provides no coherent account of what these courts, not being "constitutional Courts" exercising the federal judicial power, are in fact doing. 

Indeed, there is a deeper problem. Any attempt to maintain the proposition that federal tribunals not constituted in accordance with the rules of article III do not exercise the federal judicial power suggests that the adjudicatory business assigned to such courts may not be assigned to article III courts, because the latter may not be asked to do anything other than to exercise the federal judicial power. The theological approach thus casts constitutional doubt on what has been a persistent feature of our system from the beginning: the fact that the article I courts and the article III
courts frequently exercise a concurrent jurisdiction or otherwise share portions of the judicial business. (Thus, the ordinary district courts adjudicate many contract claims and tax claims and tort claims against the United States; if the adjudication of these is not the exercise of the federal judicial function when performed by the Court of Claims or the Tax Court, how can it be that when performed by a United States District Court?) Even more important, the theological approach casts doubt on the validity of authorizing the “constitutional Courts”—including the Supreme Court—to review cases coming from legislative and administrative tribunals. And here we come to a point of critical importance. It has been an absolutely fundamental aspect of the institutional development I have recounted that, although many different sorts of tribunals have been assigned the task of initial adjudication of cases arising under federal law, judicial review in the regular article III courts and, in particular, a power of ultimate control in the United States Supreme Court, has been a persistent and fundamental feature of the scheme. Cases in the territorial courts, cases decided in the local courts of the District of Columbia and the possessions, cases in the Court of Claims and the Court of Customs Appeals—all have, from the beginning, been reviewable in the Supreme Court. And cases decided in the administrative agencies are characteristically subject to judicial review in the ordinary district courts or courts of appeals and then subject to review in the Supreme Court.

Any suggestion that the adjudication of cases in the article I courts and agencies is, by virtue of that fact, not an aspect of the federal judicial power thus undermines a fundamental and highly desirable aspect of our existing institutional architecture: the exercise of control over the entire federal court law-making enterprise by the United States Supreme Court. On the other hand, the alternative is yet another incoherent and unruly proposition: that when a federal article I court adjudicates a case or controversy arising under federal law, it is not exercising the judicial power of the United States, but when the Supreme Court decides that very same case on appeal, it is exercising the judicial power of the United States.

All of this demonstrates, surely, that the theological approach, with its assertion that the integrity of the Simple Model is inviolate, does not furnish us with an acceptable or adequate justification for the validity of legislative and administrative tribunals. No explanation that asserts that these tribunals are not in fact adjudicating cases arising under federal law within the meaning of article III has any hope of succeeding. Indeed, it should by now not surprise you that the Supreme Court opinions resting on this theological explanation are among the most painful in the annals of the Court.\textsuperscript{30} I am happy to report, therefore, that the theological approach—

\textsuperscript{30} Perhaps the most painful is the celebrated case of Williams v. United States, 289 U.S.
partly as a consequence of the ferocious attack mounted on it in the First Edition of Hart & Wechsler's The Federal Courts and the Federal System—appears to have been definitively repudiated in the more recent precedents. Beginning with Justice Harlan's plurality opinion in Glidden v. Zdanok and carrying forward in the recent cases in this area—Palmore v. United States, Northern Pipeline Construction Co. v. Marathon Pipe Line Co., Thomas v. Union Carbide Agricultural Products Co. and Commodity Futures Trading Commission v. Schor—although there is much disagreement and confusion, virtually all the Justices seem to be firmly agreed that it is impossible to distinguish constitutional from legislative courts on the ground that the former exercise the exclusive power to adjudicate the federal judicial business defined in article III, whereas the latter do something else. And that in turn means that our problem remains unsolved. How can article I courts and agencies be acting validly if they are sharing in the exercise of the federal judicial power and yet are constituted in contravention of the requirements and restrictions of article III?

V. THE CATEGORICAL APPROACH: HEREIN OF MARATHON

An alternative approach to the problem of justifying the existence of legislative and administrative tribunals, which I call the Categorical Approach, does not assert that the Simple Model must remain inviolate. Rather, it asserts that the Simple Model states a powerful general rule, and has simply been subjected to a few narrow, well-cabin'd and specially justified exceptions. The most aggressive recent proponent of this solution has been Justice Brennan. In his plurality opinion in the Marathon Pipe Line case, Justice Brennan argued that it is the law that federal tribunals not constituted

553, 578 (1933), where the Court held that the Court of Claims is not an article III court (and that the salaries of its judges were therefore subject to reduction under the Economy Act of 1933). Holding fast to the Simple Model and the theological approach, Justice Sutherland found it necessary to conclude that, when the Court of Claims adjudicates an action against the United States, it is not exercising the federal judicial power over “[c]ontroversies to which the United States shall be a Party,” because that phrase in section 2 of article III encompasses only cases where the United States is a “party plaintiff.” I could devote a whole lecture to the ways in which this reasoning is erroneous; among other things the opinion fails to explain how, on this premise, the article III courts (including the United States Supreme Court in both its original and appellate jurisdictions) feel free to adjudicate consented actions against the United States, and fails to explain (even accepting the premise) why cases in the Court of Claims are not cases “arising under” the laws of the United States.

34. 458 U.S. 50 (1982).
in accordance with the guarantees and restrictions of article III are invalid unless the tribunal comes within one of "three narrow situations not subject to th[е] command"\(^{38}\) of article III; Justice Brennan asserted that all of the legislative courts heretofore recognized and held valid fell within these three exceptions. The three exceptional categories, "each recognizing a circumstance in which the grant of power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of a power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers,"\(^{39}\) were asserted to be: (1) the military courts, (2) courts created within the territories, and (3) courts created in order to adjudicate cases involving "public rights."\(^{40}\) Concluding that the bankruptcy courts at issue in Marathon did not fall within any of these narrow categories, Justice Brennan, for a plurality of the Court, ruled that the statute creating them violated the Constitution.

A.

Does the notion of a powerful central rule subject to three narrow special exceptions provide a satisfactory account of legislative and administrative tribunals? Does it justify the validity of some or all of these tribunals? The answer to these questions must depend on some further inquiries. The approach provides a solution, first of all, only if the "exceptional" categories are narrow and well-cabined. If some or all of the exceptions lack a powerful holding principle that defines when they should or should not apply, then the exceptions are no longer consistent with maintaining the integrity of the Simple Model whether as a presumptive or an absolute principle. Further, even if these exceptions are well-cabined, the Categorical Approach solves our dilemma only if it provides a reasonably powerful description of the existing institutional terrain. If most of the legislative tribunals and agencies that in fact exist and that have been upheld as valid in the past do not fall within these exceptions, then we continue to face the very dilemma we are trying to solve: we must persist in an unconstitutional course or engage in wholesale invalidation.

Finally, Justice Brennan's account is satisfying only if these exceptions can themselves be constitutionally legitimated. Why are these exceptions, and no others, in fact to be allowed? If the justifications offered for these exceptions apply equally well to other categories, or are intrinsically inadequate, we are left exactly where we started.

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38. Id. at 64.
39. Id.
40. Id. at 67.
In my judgment, the Categorical Approach offered by Justice Brennan fails all of these tests. It solves nothing. It puts forward two "hard" categories, but completely fails to explain why the justification offered for them does not apply with equal strength to other administrative and legislative courts that Congress might wish to create. It then posits a third category of exception that—even in Justice Brennan's own formulations—is so "soft" that it has no meaningful content. Further, this third category is itself devoid of any powerful descriptive or justificatory power: it does not explain the existing terrain and rests on justifications that are neither more nor less legitimate than could be applied to any other exception you might think of.

I will make quick work of two of Justice Brennan's "exceptional" categories. The military courts and the territorial courts do, at least, constitute recognizable and special categories of institutions. But why should Congress be deemed to have power, in these two cases, to make exceptions to the central canon that if Congress wishes to constitute inferior courts to exercise the federal judicial power, it must do so in compliance with the rules of article III guaranteeing their independence? Justice Brennan asserts that, in these cases, Congress has been granted "exceptional" powers to regulate the subject. But in what respect is the grant of power to make "all needful Rules" regulating the territories more "exceptional" than the grant of power to make "uniform Laws on the subject of Bankruptcies" or any other substantive power enumerated in the Constitution? Of course, the substantive content of these powers is in each of these cases unique and therefore "exceptional"; but what tells us that one but not the other is so exceptional that it includes the power to constitute courts apart from the requirements of article III? Again, it is true that Congress has plenary legislative jurisdiction over the territories, and may make rules for them that in the states only the state legislatures may enact. But every grant of power to Congress is, in a sense, plenary with respect to the particular subject matter assigned, and it is therefore simply a play on words to assert that power over the territories is, somehow, exceptionally "plenary" in the relevant sense. What is missing is any explanation why Congress' exceptional power over the territories must be deemed to carry with it a power to trump the separation of powers requirements of article III. And if the answer is that the creation of legislative courts is justified in the territories because it is obviously sensible and appropriate to allow Congress to create temporary tribunals for the administration of local justice in the territories, then we have admitted precisely the sorts of justifications that will be relevant to many tribunals other than the territorial courts.

41. See id. at 70.
42. Id. at 65 (quoting American Insurance Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828)).
Indeed, it is my own sense that this is a field in which any exception destroys the underlying rule. If Congress is free to constitute legislative and administrative courts in connection with the exercise of some of its substantive powers on the ground that it is functionally necessary and proper to do so, then no reason in principle exists why other substantive congressional powers should not be candidates for the same treatment. The reason for this is not the philistine one, that the exception cannot be formulated so that its scope is absolutely determinate. The reason is that the justification for the exception has behind it no powerful core principle which attaches it to this exception and no other. It is, therefore, my own belief that the power of the Simple Model is entirely subverted as soon as we are prepared to acknowledge any exception whatever.

But even if I am wrong on this, Justice Brennan's approach fails because it does not stop here. That is, if Justice Brennan were prepared to say that only the military and territorial courts may survive, we would at least have a workable (if not a principled) system. The Simple Model would hold, subject to two arbitrary but well-cabined exceptions. This of course would jeopardize a vast array of institutions and would, perhaps, end the practice of administrative adjudication in the United States. Plainly, Justice Brennan himself was not prepared to go so far: he was obviously unwilling to cast serious doubts on the constitutional validity of administrative adjudication. That is why he added "Public Rights" cases to his list. I now turn to this category.

B.

What are cases involving the adjudication of "public rights"? Why should Congress have power to constitute courts without life-tenured judges to adjudicate them? The answer to both of these questions turns out to be profoundly unsatisfactory.

The provenance of the "public rights" category is the celebrated case of Murray's Lessee v. Hobokon Land & Improvement Co.,44 decided in 1855. The question in the case involved the validity of summary levy of execution by a federal officer on the property of a former United States collector of customs from whom amounts were allegedly due to the United States; a statute authorized such summary process, and was challenged on the ground that it allowed the executive to exercise judicial power. (The statute in question did permit the collector a subsequent court action to challenge the finding of indebtedness.) The Court upheld the validity of summary process, largely on historical grounds.

44. 59 U.S. (18 How.) 272 (1855).
Murray's Lessee in no way addressed the question whether, if Congress does determine that resort is to be to a court, that court may be constituted as a legislative or administrative court without regard to article III. Rather, the case dealt with the question whether summary executive enforcement, without resort to any court, violates article III or the due process clause. The case thus does not properly have any bearing on our question at all. But in the course of his opinion, Justice Curtis justified direct executive levy of execution on the basis of a distinction between public and private rights:

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. 45

And this language was subsequently transposed in the 1920's and 1930's to some cases discussing the validity of legislative courts 46 to suggest that even where Congress does use courts, it is free to disregard article III if the case in question involves "public" rather than private rights. The use of the category was, thereafter, in desuetude, until Justice Brennan revived it in his opinion in Marathon.

What are public rights cases? The question is not easily answered. The classical formulations (as in Murray's Lessee itself) attach the concept to those situations where Congress is free to dispose of the matter without any judicial review or intervention whatever. But was Murray's Lessee—involving a money claim by the United States against a citizen—itself such a case? Recall that the statute in that case did provide for subsequent judicial review; recall, too, that, ten years before Murray's Lessee, the Court in Carey v. Curtis 47 had been scrupulously careful to specify that, although it was affirming Congress' power to require that disputes over custom duties be, in the first instance, summarily settled without resort to judicial proceedings, it was not deciding whether all right of judicial review may be taken away from a protestant (going so far as to suggest several judicial remedies that might have been available). And has it not been crystal clear at least in the last fifty years, that the constitutional right to judicial review

45. Id. at 284.
47. 44 U.S. (3 How.) 236 (1845).
is clearest and strongest in precisely the Murray's Lessee kind of case, where the government seeks to collect a debt or tax, and is thus imposing a coercive requirement on the citizen enforceable by levy of execution on his body or property?

The point is simply that the attempt to attach the notion of legislative courts to the inchoate and evanescent category of cases where Congress is free to dispense entirely with any sort of access to judicial review is highly problematic, because the underpinnings of the latter category are themselves extremely unstable and have been subject to severe erosion. And surely Justice Brennan would not wish to reverse the ratchet and suggest that adjudication by a valid legislative court itself implies that Congress may dispose of the matter without any judicial involvement.48 On the other hand, to restrict the use of administrative adjudication to cases where, by modern standards, we would be willing to assert that Congress is free to dispose of the matter without any judicial intervention whatever, would mean that most administrative agencies would be quite unconstitutional. Justice Brennan obviously was not prepared to accept such a result; he revived the "public rights" concept precisely in order to avoid casting doubt on the validity of our hundreds of administrative agencies. That is why, in a subsequent case, Justice Brennan, acknowledging these difficulties, in effect detached the "public rights" concept from the "no right to judicial review" category:

In Ex parte Bakelite Corp., . . . public rights disputes were described as those "which may be . . . committed exclusively to executive officers." . . .

The underpinnings of the original theory, of course, have not survived intact. . . . The erosion of these underpinnings does not, however, mandate the conclusion that disputes arising in the administration of federal regulatory programs may not be resolved through Art. I adjudication. The term "public rights" as now understood encompasses those "matters arising between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments," . . . that need not be fully adjudicated in an Art. III forum or a properly constituted adjunct to such a forum.49

48. Forty-five years ago, Justice Brandeis, in his celebrated dissent in Crowell v. Benson, warned against just such a use of the "public right" concept: The suggestion that due process does not require judicial process in any controversy to which the government is a party would involve a revision of historic conceptions of the nature of the federal judicial system. That all questions arising in the administration of the Interstate Commerce Act, for example, or between a taxpayer and the government under the tax laws, could be committed by Congress exclusively to executive officers, in respect to issues of law as well as of fact, has never been supposed. Crowell, 285 U.S. at 87 n.23 (Brandeis, J., dissenting).

Notice, however, that this leaves us with a perfect circle: article I courts are valid if they adjudicate public rights cases; public rights cases are cases that need not be adjudicated in an article III forum.

What about the notion, also suggested in the formulations, that public rights cases are cases where the government is a party to the dispute? In *Marathon*, we are told that the category does refer to some—but not all—such cases:

The distinction between public rights and private rights has not been definitively explained in our precedents. Nor is it necessary to do so in the present cases, for it suffices to observe that a matter of public rights must at a minimum arise “between the government and others.” . . .\(^{50}\)

. . . It is thus clear that the presence of the United States as a proper party to the proceeding is a necessary but not sufficient means of distinguishing “private rights” from “public rights.” And it is also clear that even with respect to matters that arguably fall within the scope of the “public rights” doctrine, the presumption is in favor of Art. III courts. . . .

Of course, the public-rights doctrine does not extend to any criminal matters, although the Government is a proper party.\(^{51}\)

Having marched up this mountain in *Marathon*, however, we now march down it in the subsequent case of *Thomas v. Union Carbide Agricultural Products Co.*,\(^{52}\) where the Court upheld the validity of a statute requiring private parties to arbitrate (rather than litigate) disputes about cost-sharing in connection with the registration of pesticides under the statute known as the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).\(^{53}\) The majority of the Court expressly repudiated the use of the “public rights” category as a test for determining whether Congress may use an article I court, noting that the theory did not “command a majority” in *Marathon*.\(^{54}\) But what is particularly interesting is that Justice Brennan concurred:

I agree with the Court that the determinative factor with respect to the proper characterization of the nature of the dispute in this case should not be the presence or absence of the Government as a party. . . . Properly understood, the analysis elaborated by the plurality in *Northern Pipeline [Marathon]* does not place the Federal Government in an Art. III straitjacket whenever a dispute technically is one between private parties. . . . The [Marathon] plurality opinion’s reaffirmation of the constitutionality of the administrative scheme at issue in *Crowell v. Benson* . . . suggests that a proper interpretation of Art. III affords the Federal Government substantial flexibility to rely on administrative tribunals . . . . The plurality opinion should not be read to imply that reliance on administrative agencies for ratemaking or other forms of

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\(^{50}\) 458 U.S. at 69 (quoting *Ex parte Bakelite Corp.*, 279 U.S. at 451) (citations omitted).
\(^{51}\) *Id.* at 70 nn. 23-24 (citations omitted).
\(^{52}\) 473 U.S. at 568.
\(^{54}\) 473 U.S. at 586.
regulatory adjustments of private interests is necessarily suspect. . . .

. . . [T]he FIFRA compensation scheme challenged in this case should be viewed as involving a matter of public rights . . . . 55

Surely the moral of all of this is obvious. Justice Brennan's own confusing and contradictory formulations demonstrate that the "public rights" category has no holding power whatever. In the modern administrative state, suffused by statutory and administrative schemes that characteristically create complex interdependencies between public and private enforcement, it is unintelligible and futile to try to maintain rigid distinctions between questions of private and public rights. It may be that there was a time when pure common-law actions could be characterized as involving "only" private rights. But when an injured worker seeks statutory workmen's compensation, is the claim one of purely "private" right? (Does this depend on the formality of whether the insurance fund is administered by the state or the employer?) Is a reinstatement and back pay proceeding before the NLRB on account of an employer unfair labor practice a matter of public or private right? What about a bankruptcy trustee's action to set aside a preference? A citizen's suit to enjoin water pollution? A Title VII discrimination case?

The fact is that there is no intelligent way to answer these questions. And, in any event, the answer really has no bearing at all on the question whether it is or is not appropriate to dispense with the trappings of article III adjudication. For even if the "public rights" category were an intelligible and manageable category (which it is plainly not), we still have not been told why the category is congruent with cases where the use of an article I court or administrative agency is valid. Is it because these public rights cases usually involve statutory (rather than common law) claims and rights, and Congress' power not to create the claim or right at all includes the lesser power to assign its adjudication to an article I court? This analysis is supported in another part of Justice Brennan's Marathon opinion, where he states that,

[W]hen Congress creates a statutory right, it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies; it may also provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right. 56

(Notice how far we have come from a powerful and inviolate principle subject to only three "narrow" exceptions.) But why is this so? Why should substantive legislative power to make rules of decision to govern the case carry with it the structural power to decide that the adjudication of cases

55. Id. at 598-600.
56. Marathon Pipe Line, 458 U.S. at 83.
arising under these rules should proceed in a court that is not guaranteed independence? Indeed, from the viewpoint of the need for judicial independence, why is that need less acute in public rights cases than private rights cases?

I think I have said enough to explain why, in my judgment, the Categorical Approach fails. The exceptions it posits to the Simple Model have neither descriptive nor prescriptive power. In particular, the assertion that Congress has power to create legislative and administrative tribunals to adjudicate public rights, but not private rights, cases, is meaningless. By the time we finish with Justice Brennan's chaotic accounts of what are and what are not public rights cases, we discover that the concept is so manipulable that the formulation is functionally indistinguishable from the very counterformulations that Justice Brennan attacks on the ground that they do not in any meaningful way restrict Congress' power to ignore article III. Nor does the public rights category, however defined, justify the use of legislative and administrative courts, except by reference to functional and institutional needs that could be equally relevant in other contexts. At the end of the day, the Categorical Approach therefore dissolves, as Justice White saw in Marathon: "The plurality opinion has the appearance of limiting Art. I courts only because it fails to add together the sum of its parts. Rather than limiting each other, the principles relied upon complement each other; together they cover virtually the whole domain of possible areas of adjudication." 57

C.

Before turning to my third possible system of justification for legislative and administrative tribunals, I want to pause at this point to discuss two further aspects of the Court's decision in Marathon.

The first of these also arises from Justice Brennan's plurality opinion. For I have misled you so far. Justice Brennan did not hold in that opinion that article III adjudication is always required unless a case falls within one of his three "narrow" exceptions. He couldn't very well say that, because the result would have been to overrule the greatest of the cases validating administrative adjudication: Crowell v. Benson, 58 holding that Congress may delegate to an administrative agency the adjudication of workmen's compensation claims so long as adequate provision is made for judicial review. In Crowell, Chief Justice Hughes, referring to the public-rights private-rights distinction, explicitly stated that the validity of the workmen's compensation scheme at issue could not be disposed of on that basis because

57. Id. at 105.
the "present case... is one of private right, that is, of the liability of one individual to another..." Justice Brennan therefore had to admit still another category of valid administrative adjudication. He characterized this category as cases where:

Congress possesses the authority to assign certain fact finding functions to adjunct tribunals...

...[W]hen 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. ... [But] the functions of the adjunct must be limited in such a way that "the essential attributes" of judicial power are retained in the Art. III court.60

In Marathon itself, Justice Brennan concluded that the "adjunct" concept cannot save the bankruptcy courts, because they were authorized inter alia to adjudicate some ordinary state-law tort and contract claims which constituted the exercise of the "traditional judicial power." In any event, he said, after cataloguing their power, bankruptcy judges are not mere "adjuncts," in contrast to the agency in Crowell which had only very limited tasks.61

There is the kernel of a powerful and fruitful idea—one to which I will return—imbedded in this notion of "adjuncts," because it hints at the notion that the question of the appropriate exercise of the judicial power may turn on the extent of ultimate judicial control rather than on the question of who exercises original jurisdiction in a case. But as deployed in Justice Brennan's opinion in Marathon, this idea, too, is strikingly unsatisfactory. Methodologically, rather than inviting attention to the fundamental issue of what is sufficient judicial control, the "adjunct" notion posits a supposedly empirical (but actually only semantic) classification and then invites the judge to play the judicial game of listing facts that (supposedly) show that someone "is" or "is not" an adjunct. More deeply, the notion—perhaps useful in the context of the delegation of power to subordinate officials within the judiciary itself—has, again, neither descriptive nor prescriptive power as a test for validating legislative and administrative courts. Indeed, the notion that the institutional phenomenon of adjudication of disputes (public and private) by legislative courts and administrative agencies can be characterized as legitimate because these are "adjuncts" of the courts is ludicrously inapt—and exquisitely patronizing too. When the NLRB adjudicates an unfair labor practice case, or the ICC

59. Id. at 51.
61. See id. at 85-86.
adjudicates a massive rate reparations proceeding, or an administrative law judge sits to determine whether a social security disability case has been made out, the agencies neither do nor ought to conceive of themselves as “adjuncts” of some article III court. The whole point of creating these tribunals is to vest them with the power and responsibility to decide: to find the facts and determine and apply the relevant law. They neither do, nor should they, conceive of themselves as mere agents or delegees of some other institution. They are, for the moment, the deciding authority. Of course, their decisions are subject to review and frequently are reviewed—subject, in turn, to elaborate and variegated rules with respect to scope of review that are designed to cabin and guide the proper conduct of the reviewing authority. The point of judicial review is, however, not to displace the deciding authority, but to assure that his decision complies with law. The institution of judicial review is both misdescribed and misconceived if thought to render the reviewed agency an “adjunct” of the reviewer. Administrative agencies are no more “adjuncts” of the courts than district judges are “adjuncts” of the courts of appeals.

My opinion is, therefore, that analysis of the question whether adjudication by a legislative or administrative tribunal is valid in terms of whether the tribunal is an “adjunct” of the courts is neither a promising analytical tool nor a powerful way to describe the existing terrain. In my judgment it will be, and should be, abandoned.

Let me say, by way of aside, that you will have noticed that, in these lectures, I have been quite critical of the plurality opinion in Marathon. That impression is not misleading. Justice Brennan is a judge of the utmost distinction, but in this case he allowed himself—or, more likely, allowed his clerks—to unleash an opinion that is conceptually chaotic and institutionally reactionary. I deeply regret the intellectual disarray it threatened to create, and am relieved that the majority of the Court is rapidly abandoning it.62

VI. THE INSTRUMENTAL APPROACH

Heretofore we have been considering justifications for the phenomenon of legislative and administrative tribunals that purport to be in harmony with the fundamentals of the Simple Model. These justifications assert that

62. At this point in the text of his lectures Professor Bator indicates an intention in the written version to turn to the “somewhat abstruse issue” raised by “the swing Justices [in Marathon] (O’Connor and Rehnquist) that the bankruptcy courts were invalid because Congress is not free to delegate to non-article III courts the task of adjudicating ordinary state-law issues, such as ordinary common-law claims against the debtors of the bankrupt estate[,] . . . [and to] consider whether, in light of CFTC v. Schorr, it is still the law.” No text of this discussion has been found among Professor Bator’s papers.
these tribunals are consistent with the notion that the federal judicial power must always be, or at least almost always be, exercised by an article III court if it is to be exercised at all. These justifications are comforting, because they do not purport to challenge the constitutional ideology that lies at the heart of the Simple Model: they assent to, rather than deny the assertion that it is illegitimate to ask non-life-tenured judges to share in the federal judicial power. On the other hand, they are dramatically weak—even discordant—descriptively. They fail completely to explain the existing universe of federal adjudication, and thus have little or no legitimating power.

By contrast, what I call the Instrumental Approach is, at least, empirically accurate. It openly acknowledges that in fact Congress has persistently acted on the premise that it has general constitutional authority—not just in three narrow areas, and not just to create adjuncts—to reach the conclusion in connection with a specific substantive enterprise that resort to the initial jurisdiction of an article III court may be ill adapted to the achievement of some legitimate substantive end. In fact, the Instrumental Approach flatly asserts that legislative and administrative tribunals are valid because Congress has made a reasoned and conscientious judgment that it is necessary and proper, in connection with a valid statutory enterprise, to delegate an adjudicative function to a special or temporary tribunal that is constituted without regard to the restrictions and guarantees of article III.

The intellectual roots of this Instrumental Approach are various. The justification for the existence of territorial courts has always been essentially pragmatic. As Justice Harlan described it in *Glidden*:

It would have been doctrinaire in the extreme to deny the right of Congress to invest judges of its creation with authority to dispose of the judicial business of the territories. It would have been at least as dogmatic, having recognized the right, to fasten on those judges a guarantee of tenure that Congress could not put to use and that the exigencies of the territories did not require. . . . The same confluence of practical considerations . . . has governed the decision in later cases sanctioning the creation of other courts with judges of limited tenure. . . . Whether constitutional limitations on the exercise of judicial power have been held inapplicable has depended on the particular local setting, the practical necessities, and the possible alternatives. 63

Similarly, the opinion of Chief Justice Hughes in *Crowell* stressed Congress' practical wisdom in choosing a process that would achieve the "purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task." 64 But it was not until Justice White's

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opinion in *Palmore v. United States*, 65 upholding the validity of the statute constituting the local courts of the District of Columbia as legislative courts whose judges do not have life tenure, that this frankly pragmatic approach was formally adopted as the standard for measuring the validity of legislative and administrative tribunals:

It is apparent that neither this Court nor Congress has read the Constitution as requiring every federal question arising under the federal law, or even every criminal prosecution for violating an Act of Congress, to be tried in an Art. III court before a judge enjoying lifetime tenure and protection against salary reduction. Rather, both Congress and this Court have recognized that state courts are appropriate forums in which federal questions and federal crimes may at times be tried; and that the requirements of Art. III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment. 66

Note that this formulation is still both ambiguous and guarded. It is open to the interpretation that the reference to Congress' power to legislate "with respect to specialized areas having particularized needs and warranting distinctive treatment" 67 is merely a geographical reference; and it suggests a limiting principle by its somewhat delphic reference to "laws of national applicability and affairs of national concern." But in his dissenting opinion in *Marathon*, Justice White argued vigorously that the *Palmore* formulation did not rest on any theory of "geographical control," but rather "on an evaluation of the strength of the legislative interest in pursuing in this manner one of its constitutionally assigned responsibilities—a responsibility not different in kind from numerous other legislative responsibilities." 69 And, in this dissent, Justice White for the first time recast the Instrumental Approach in terms of a balancing test:

Article III is not to be read out of the Constitution; rather, it should be read as expressing one value that must be balanced against competing constitutional values and legislative responsibilities. . . .

. . . . [S]uch a balancing approach stands behind many of the decisions upholding Art. I courts . . .

. . . . The burden on Art. III values should . . . be measured against the values Congress hopes to serve through the use of Art. I courts. 70

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66. Id. at 407-08.
67. Id. at 408.
68. Id.
70. Id. at 113-15.
It is this “balancing” version of the Instrumental Approach that dominates the Court’s two most recent opinions in this troubled area. In the Thomas case the Court upheld a Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) provision requiring arbitration of disputes about the allocation of pesticide registration costs among private registrants. Justice O’Connor said that “an absolute construction of Article III is not possible” and that “the Court has long recognized that Congress is not barred from acting pursuant to its powers under Article I to vest decisionmaking authority in tribunals that lack the attributes of Article III courts.” The enduring lesson of Crowell is that practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III. A careful survey of the practical necessities that led Congress to adopt the arbitration scheme led Justice O’Connor to conclude that, “given the nature of the right at issue and the concerns motivating the Legislature, we do not think this [arbitration] system threatens the independent role of the Judiciary in our constitutional scheme.”

Finally, in Commodity Futures Trading Commission v. Schor, decided last Term [October Term 1985], the Court upheld the validity of a statutory scheme that allows the Commodity Futures Trading Commission to adjudicate reparations proceedings brought by customers against brokers who allegedly violated the Commodity Exchange Act (CEA) and also allows the Commission to adjudicate state-law counterclaims arising out of the same transaction and occurrence. Rejecting the application of “formalistic and unbending rules” that would “unduly constrict Congress’ ability to take needed and innovative action pursuant to its Article I powers,” Justice O’Connor stated that the question is one of the “practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary.”

An examination of the relative allocation of powers between the CFTC and Article III courts in light of the considerations given prominence in our precedents demonstrates that the congressional scheme does not impermissibly intrude on the province of the judiciary. The CFTC’s adjudicatory powers depart from the traditional agency model in just one respect: the CFTC’s jurisdiction over common law counterclaims.

72. Id. at 583.
73. Id.
74. Id. at 587.
75. Id. at 590.
76. 478 U.S. 833 (1986).
78. Schor, 478 U.S. at 851.
79. Id.
80. Id.
When Congress authorized the CFTC to adjudicate counterclaims, its primary focus was on making effective a specific and limited federal regulatory scheme, not on allocating jurisdiction among federal tribunals. Congress intended to create an inexpensive and expeditious alternative forum through which customers could enforce the provisions of the CEA against professional brokers. It was only to ensure the effectiveness of this scheme that Congress authorized the CFTC to assert jurisdiction over common law counterclaims. Indeed, as was explained above, absent the CFTC's exercise of that authority, the purposes of the reparations procedure would have been confounded.

... [O]ur Article III precedents ... counsel that bright-line rules cannot effectively be employed to yield broad principles applicable in all Article III inquiries. Rather, due regard must be given in each case to the unique aspects of the congressional plan at issue and its practical consequences in light of the larger concerns that underlie Article III. We conclude that the limited jurisdiction that the CFTC asserts over state law claims as a necessary incident to the adjudication of federal claims willingly submitted by the parties for initial agency adjudication does not contravene separation of powers principles or Article III.81

I must confess that I am uneasy about the reformulation of the Instrumental Approach in terms of "balancing." It seems to me that this suggests that the general question whether an article I solution is a wise and appropriate solution, given the countervailing values expressed by article III, is a question for the Court to decide; it leaves the Court with a large ad hoc discretion to validate or strike down, depending on its own sense of the competing institutional considerations. I do not understand why the Court should conclude that it has this open-ended and necessarily subjective balancing power. If article III, in accordance with the Simple Model, requires that cases arising under federal law be adjudicated by article III judges, then the Court has no right to "balance" that requirement away on grounds of expediency. If no such requirement exists, it must be because the Constitution is read to give Congress the power to constitute article I adjudicative agencies and courts in connection with its exercise of some substantive end. If Congress has such power, it may be invalidated only if its judgment—that a special tribunal is a necessary and proper way of effectuating a valid legislative purpose in connection with a valid substantive program—is arbitrary and irrational. It seems to me that the Instrumental Approach therefore posits what is, fundamentally, akin to a substantive due process test: a Congressional decision to constitute a legislative court is valid unless irrational or unreasonable. This seems to me to be a fair and accurate description of the actual legal terrain, and has the virtue of describing that terrain with intellectual honesty. "Balancing," on the other

81. Id. at 851-52, 855-57 (citation omitted).
hand, seems to me to paper over the realities; it serves to provide a rather illusory band-aid for the wounds inflicted on the Simple Model.

Does the Instrumental Approach—particularly in its Substantive Due Process form—obliterate article III? Is it susceptible to any limiting principle? Does it not tell us that Congress is entirely free to ignore the constraints of article III and make wholesale transfers of the federal judicial power to agencies and bureaucracies within the executive branch? How could the Framers have, at the same time, designed a system that was meant to insulate the independent judiciary from the power of the other branches, and also given the legislature carte blanche to displace that independent judiciary with judges who are, in effect, its creatures?

These objections to the Instrumental Approach are powerful and important; but they are not quite as powerful and important as appears at first glance. First of all, even in its Substantive Due Process version, the rule is not without limit. Congress may resort to a legislative or administrative tribunal only if it can be demonstrated that there is a reasoned basis for the judgment that dispensing with article III restrictions has an appropriate and valid purpose connected with the achievement of a valid legislative program. Wholesale transfers of jurisdiction, whose sole purpose is to destroy the protection of article III, are plainly invalid. The "rationality test" leaves the legislature with wide discretion; but it is a huge intellectual and political mistake to think of it as meaningless. It constitutes an important psychological and political constraint, ex ante, on the exercise of discretion.

Beyond this lie some more subtle considerations. Is it likely that Congress will seek to make anti-Constitutional inroads on the independence of the judiciary? For some 200 years Congress has in fact possessed and exercised the power that is now claimed to be so dangerous; I cannot think of a single case where the actual exercise of this power was abusive, was in fact designed to subvert the independence of the judge by making him a creature of the legislature or the executive. The fact is that the ideal of an independent judiciary is an immensely powerful political ideal. As we learned at the time of court-packing, and as we learn time and again when punitive proposals are pressed to deprive the federal courts of jurisdiction, many powers that Congress has—in theory—cannot and will not be exercised in practice because they are widely perceived to be anti-Constitutional in spirit. The prospect that Congress will make promiscuous punitive raids on the independence of the Federal Judiciary because it has wide powers to constitute legislative courts and administrative agencies strikes me as chimerical.

Indeed, the argument that it is a fatal objection to the affirmation of a power that no guarantee can be given against its abuse is methodologically flawed. The Constitution is full of provisions which can be abused (the very power of Judicial Review being not the least notable example). It is
even full of provisions which would allow an anti-Constitutional Congress and Executive jointly to end the independence of the judiciary. The Courts may be packed; more dramatically, their existence can be ended by the process of not making appointments. Obviously, all kinds of structural restraints guard against these abuses. An anti-Constitutional Congress and an anti-Constitutional President must both be in power to accomplish these ends. But that is true, too, of wholesale transfers of jurisdiction from article III to article I courts.

What about the objection, next, that article III gives litigants a personal constitutional right to an adjudication in a court whose independence is safeguarded by constitutional rules? If there is such a right, how can it be made subject to a legislative discretion to abrogate it?

I do not find this argument impressive. The ideals of separation of powers seem to me structural and political ideals; it is far from clear that they were designed to generate a system of private rights. I do not mean to question the by now established doctrine that private litigants do have standing to raise the question whether the court they are in is properly constituted in accordance with article III. And it must also be always remembered—as both Hughes and Brandeis stressed in *Crowell v. Benson*—that a litigant cannot be required to proceed in a tribunal whose structure and procedures violate the requirements of due process. The due process clause prevents administrative adjudication before a biased or suborned or mob-dominated judge. But if the Constitution and procedures of an article I court or agency do provide due process, the claim that “personal rights” have been violated because trial should have been in an article III court seems to me to be a second-order and attenuated claim. (It is, after all, common ground that that litigant could be required to proceed in a state court, where the conditions of independence may be far worse.)

My submission, then, is that the Instrumental Approach is not defeated by the argument that it allows Congress free reign to abrogate article III—it does not—or the argument that it destroys personal rights. Nevertheless, we are still in trouble. The real trouble with the Instrumental Approach is that it does not really solve the puzzle we started with. It asserts that Congress has power to create legislative courts in connection with its article I (and other) substantive powers, subject to a substantive due process-type constraint, but doesn’t explain why Congress has this power. What in the text or the structure justifies the rejection of the Simple Model that this approach entails? What can be said to show that the Constitution grants Congress the power to create administrative and legislative courts?

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82. 285 U.S. 22 (1932).
83. *Id.* at 87 (Brandeis, J., dissenting).
We return here to the methodological dilemmas I started with. There is a sense in which the strongest argument for the validity of legislative and administrative courts is history. For two hundred years our legislature has acted on the assumption that it has power to create these institutions. For two hundred years, it has been sustained in this by the very courts whose independence and integrity is supposedly subverted by its actions, and notwithstanding the seemingly inexorable force of the Simple Model. Virtually all of the great figures of the American judicial pantheon—Marshall and Hughes, Brandeis and Holmes, Frankfurter and Jackson—have participated in this process of validation. A large number of eminently useful and successful institutions have been created by virtue of this; and these are now deeply imbedded in the texture of our political and economic life. In a word, a huge body of precedent and experience validates our legislative and administrative tribunals.

But is this enough? I remain uncomfortable. The impulse to go back to article III, to see whether we cannot discover there some concept that could justify all of this, remains strong. Before I undertake to do this, however, we must take a more systematic and serious look at what the stakes are. What about the alternative of invalidation? Why should we not grit our teeth and decide to comply with the Constitution? Why not invalidate adjudication by legislative and administrative courts?

VII. THE ALTERNATIVE OF INVALIDATION

What would we lose if we conclude that our article I courts and administrative tribunals are invalid and must be reconstituted? Is this an alternative that can be, should be, seriously contemplated?

It is interesting, in this regard, that, as far as I know, no one—no judge, no professor—has in fact said that this is what we should do. There are many judicial opinions and even more learned articles that complain that we are in default, that we have disregarded the inexorable and commanding demands of the Constitution; but no one has actually said that we should simply eliminate all non-article III adjudication and either abolish all legislative and administrative tribunals or reconstitute them to comply with article III. Even the most fundamentalist scholar in this regard that I know—my colleague Professor David Currie, at the University of Chicago—hedges his bets. He makes it clear that he believes that the Simple Model represents the correct Constitutional view. He complains that the Court has been complaisant of violations. He applauds Justice Brennan's opinion

85. Id. at 37-38.
in *Marathon*, in *Thomas* and *Schor* the Court seems to be returning to loose and permissive ways. But he never says, flat out, that we should invalidate all administrative and legislative tribunals; and he never bothers to examine the universe that would be created if such an inexorable rule were adopted.

This shows, I think, that what we are contemplating here would in fact constitute a cataclysm in our institutional history. The problem is not, it seems to me, at the margins. To reconstitute the Tax Court, or the local courts of the District of Columbia, or even the Bankruptcy Courts, as article III courts would be perfectly manageable. The real problem lies with the inexorable presence of the administrative state. What seems to me quite unthinkable is the proposition that all federal administrative dispute-resolution proceedings should have to occur before a life-tenured article III judge in an article III court.

It might be said that we could have different sorts of article III (administrative) courts, with low visibility (and moderately paid?) judges—so long as they sit for life. But this seems to me only theoretically true, and, again, deeply inconsistent with our institutional traditions. Law professors, who possess tenure and think it natural, tend to forget that tenure is a problematic and anomalous institution. It would not be unmixedly wonderful to be blessed with thousands of bureaucrats who could not be fired or demoted, no matter how lazy or incompetent or cynical or abusive, without impeachment by the House of Representatives and trial in the Senate.

Further, the creation of thousands of new article III judges (even second- or third-tier ones) to manage the load of administrative adjudications could have fateful consequences on the institutional perspectives and psychology of the federal judiciary. It is important to remember that there exists an important reciprocal relationship between what we do not ask the article III courts to do and the kind of article III courts we have. It is because we have not created thousands of article III judges to manage all of the innumerable low-level and specialized and transitory tasks of administrative adjudication that we have developed the federal judiciary we possess in fact: a small group of revered, elite generalists, entrusted with enormous powers of constitutional governance over the other branches and the sovereign states.

In this context, it seems to me that it would create a grotesque mismatch of ends and means to require that every administrative adjudication—every social security disability case, every workmen’s compensation case, every

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87. Currie, supra note 84, at 38.
90. Currie, supra note 84, at 39.
rate proceeding—take place before a judge appointed for life sitting in a
court which may be entrusted with no functions other than the function of
adjudicating federal cases and controversies. I do not think it can happen,
and I do not think it should happen.

I want to give two more reasons why it is my opinion that it is irresponsible
and fruitless to suggest that we turn the clock back and adopt the "pure"
solution. The first is that such a step would, in my judgment, be unac-
ceptably regressive. Article III litigation is a rather grand and very expensive
affair. It is a game played almost entirely by an elite class. It is controlled
by an expensive (and, some would add, rapacious) cadre of lawyers. It
seems to me a step in the wrong direction to decree that this cumbersome
and expensive upper-class mechanism be given a monopoly over the reso-
lution of disputes under the national law. Professor Mashaw has argued
powerfully that even today our administrative adjudications are too judicial
in style, too formal, and too much oriented toward judicial review for apt
use in the context of administering mass schemes of welfare and other
government benefits.91 He demonstrates that the result is not just delay and
expense but unfair and unequal administration of justice.92 Insofar as he
seeks to curtail judicial review, Professor Mashaw's position is controversial
and much disputed. But his informative and insightful book should be
required reading for every judge and professor who is tempted casually to
propose that we should replace all of our administrative processes with
article III trials.

My second argument is closely related. The proposal that we should
invalidate our legislative and administrative courts does not simply undo
the past. It ties our hands for the future. I think it would be foolish and
irresponsible to cripple our ability to experiment with new sorts of specialized
tribunals and to invent new forms of administrative adjudication. What we
need is new alternatives to court litigation, not new rules that give courts
a monopoly over dispute resolution. A constitutional rule that would hobble
the power of the federal government to participate in the "alternative forms
of dispute resolution" movement would be tragic.

That is why I come down on the side that holds that wholesale invalidation
is not a possible solution. The massive weight of two hundred years of
legislative and judicial precedent cannot and should not be undone even if
it is ultimately demonstrated that our course has misapprehended the true
meaning of the Constitution from the beginning. In the end, history—if its
pressure is hard enough—does have and must have power to shape our
Constitution. It may be that, as a matter of original intent, the fourteenth

91. See J. Mashaw, Due Process in the Administrative State (1985); J. Mashaw,
92. J. Mashaw, supra note 91.
amendment did not intend to protect corporations, only natural persons, and that the establishment clause was not intended to bind the states. In my judgment, it would nevertheless be ludicrous today to undertake the project of revising our constitutional terrain so as to allow the states free reign to deprive corporations of property without due process of law, or to set up an official church. The content of the rules by which certain questions are treated as settled cannot be defined with a hard certainty, but there is no doubt that in every mature and efficient legal system, some such rules must exist and must be accorded a core of power. Nor should we give in to the philistine reductionist counter-argument, that if history is allowed to triumph over original intent here, then, in that event, everything in the Constitution is up for grabs. It is not the case that the assertion that the validity of legislative courts has been established by the force of history leads inexorably to the proposition that the courts are in all respects free to do as they please (or to the proposition that Roe v. Wade was legitimately decided). Unwillingness to repudiate two hundred years of consistent legislative and judicial precedent is not the equivalent of saying that the judges are free to interpret the Constitution in any manner that they think expedient. The beginning of wisdom in the law is the ability to make distinctions, to withstand the reductionist pressure to say that one thing must necessarily lead to another.

Nevertheless, the suggestion that we are in effect going to allow history to amend the Constitution is disturbing enough to warrant a renewed effort to see whether the dilemma we have posited is a genuine one. The effort is particularly appropriate because there is a remarkable arrogance in the proposition that both Congress and the Supreme Court have been wrong—indeed, obviously wrong—for two hundred years, that Marshall and Hughes and Brandeis were either muddle-headed or engaged in abetting a cynical triumph of expediency over constitutional principle. Before that conclusion is reached, we must be sure that article III must mean what that proposition presupposes.

VIII. CONCLUSION: THE MEANING OF ARTICLE III

I return, therefore, to where all of this started: the question of the meaning of article III. Is it true that the Simple Model—all federal adjudication must take place in an article III "inferior" court before a life-tenured judge—is inexorably true?

I start with the submission that it cannot be true. The claim that the judicial power is usurped if any agency or entity outside the article III system participates in it rests on a fundamental conceptual and epistemo-
logical mistake. Organizing categories such as "judicial power," "legislative power" and "executive power" cannot be defined so as to create rigid and impermeable walls between their exercise. There is no way to constitute a legislative power to assure that all "legislative" questions—that is, all policy choices with respect to the subject at hand—are completely and definitively answered when the statute leaves the hands of the legislature. Neither language nor our power of prediction is capable of determining in advance what should be the answer to every question that may arise with respect to the meaning or application of a statute. There is thus an inescapable and inevitable "legislative" component in the executive task of faithfully executing the laws; and there is an inescapable and inevitable "legislative" component when the courts interpret and apply the laws. We have sophisticated and flexible doctrines with respect to the delegation of legislative powers by the legislature precisely because some degree of delegation is an inevitable consequence of the nature of language itself. It is thus simply an element of the case that the executive and judicial branches will, in a sense, share in the exercise of the legislative power.

Similarly, it seems to me impossible to construct a logical definition of law enforcement by the executive that does not implicate the courts in the task of executing the laws. It is only history, not logic, that tells us that when the courts enter a judgment and authorize levy of execution, this counts not as a usurpation of the executive function but as a proper adjunct of "adjudication."

So with the judicial power. Every time an official of the executive branch, in determining how faithfully to execute the laws, goes through the process of finding facts and determining the meaning and application of the relevant law, he is doing something which functionally is akin to the exercise of judicial power. Every time the Commission of Internal Revenue makes a determination that, on X facts, the Tax Code requires the collection of Y tax, and issues a tax assessment on that basis, or the Immigration Service determines that Z is a deportable alien and issues an order to deport, an implicit adjudicatory process is going on. Of course, many such executive determinations are informal. But it is only a step—and one quite consistent with the ideal of "faithful" execution of the laws—from informal, implicit adjudication to the notion that in making these determinations the official should hear the parties, make a record of the evidence, and give explicit formulations to his interpretation of the law. Determinations by the executive to apply law and judicial adjudication have a symbiotic relationship and flow naturally from and into each other. There is no a priori wall between them. Thus there exists no way to define the judicial power to create a monopoly for the judges in the adjudicatory task of finding facts and determining the meaning and applicability of provisions of law. It is history and custom and expediency, rather than logic, that determine what needs to be the participation of the judges in this enterprise.
That is why, in general, I believe it is naïve—as well as undesirable—to think of separation of power rules as capable of creating sealed chambers each of which must contain all there is of the executive, the legislative and the judicial powers. Overlap is inevitable. And that, of course, is why the Framers complicated our constitutional structure by creating, in effect, a scheme not of rigidly separated but rather of divided and overlapping powers in which a highly sophisticated system of checks and balances assures that no branch has exclusive jurisdiction even within its own domain.

My first submission, and perhaps my most fundamental one, therefore, is that it is philosophically muddled and institutionally chimerical to try to create a rigid logical scheme which purports in some mechanical way to define what "is" the exercise of the federal judicial power and then insists that the article III courts retain a monopoly over whatever "it" is. Such an approach misunderstands what sort of thing article III creates. It rests on a conceptual mistake, like saying that this cow is one hour long. The judicial power is neither a Platonic essence nor a pre-existing empirical classification. It is a purposive institutional concept, whose content is a product of history and custom distilled in the light of experience and expediency. That is why, ultimately, it is not only wise but quite legitimate to see our separation of power canon as creating a principled but flexible system, an anatomy that has bones and sinews but is also capable of change and growth, an architecture that has structural integrity but can nevertheless adapt spaces and functions to meet changing needs.

It is in this spirit that I invite you to return with me to the language of article III. I ask again: is it true that the Simple Model—all federal adjudication must take place in an article III court—is inexorably true?

Article III provides that the judicial power of the United States shall be "vested" in the courts there specified,§4 and shall "extend" to nine enumerated classes of cases and controversies.§5 But it does not tell us in terms what counts as its exercise, nor what participation in its exercise is required in order to constitute the exercise of the judicial power by the courts vested with the power. More particularly, article III does not specify that the exercise of the federal "judicial power" by courts "vested" with it requires that those courts have a rigid monopoly over all aspects of the litigation from beginning to end. It leaves open the possibility that we have satisfied the concept of the exercise of the judicial power of the United States by the article III courts if there is sufficient participation in its exercise by those courts whether as a matter of original or appellate jurisdiction.

Is this suggestion undermined by the fact that article III provides that the judges of the "inferior Courts," as well as of the Supreme Court, shall

hold office during good behavior? I do not think so. Article III specifies that when the Congress acts to constitute inferior courts (as it is empowered to do by article I, § 8, cl. 9), it must do so in compliance with article III, section 1. But this is not the equivalent of saying that article III requires these courts themselves to perform all adjudicative tasks with respect to the determination of a case or controversy within the federal judicial power. It does not exclude the possibility that an administrative agency may be entrusted with the task of initial adjudication of a case even though it is not one of the "inferior Courts" whose judges are referred to in article III.

In fact the structure of article III strongly suggests that the Framers did not contemplate that the "exercise" of the federal judicial must include the exercise of initial jurisdiction by inferior federal courts. The Framers made it quite clear that the state courts were to remain free to adjudicate the cases and controversies numerated in article III, subject to the appellate control of the United States Supreme Court. It was, thus not the purpose of article III to give litigants a constitutional guarantee or right of original access to courts constituted in accordance with article III. The Constitution appears quite indifferent to the question whether the judicial power of the United States is exercised (by the courts "vested" with that power) as a matter of trial or appellate jurisdiction.

This was the key point made by Justice Brandeis in his celebrated dissent in Crowell v. Benson. Brandeis was arguing that article III in no way constrains the power of Congress to provide for the initial adjudication of federal workmen's compensation claims in a federal administrative tribunal. His point is encapsulated in a brilliant and justly famous sentence: "The 'judicial power' of Article III of the Constitution is the power of the federal government, and not of any inferior tribunal." Brandeis goes on:

There is in that Article nothing which requires any controversy to be determined as of first instance in the federal district courts. The jurisdiction of those courts is subject to the control of Congress. Matters which may be placed within their jurisdiction may instead be committed to the state courts. If there be any controversy to which the judicial power extends that may not be subjected to the conclusive determination of administrative bodies or federal legislative courts, it is not because of any prohibition against the diminution of the jurisdiction of the federal district courts as such, but because, under certain circumstances, the constitutional requirement of due process is a requirement of judicial process.

98. Id. at 86 (emphasis added).
99. Id. at 86-87 (citation omitted). Professor Bator suggests in his manuscript that Justice Brennan's quotation of this passage in Northern Pipeline Constr. Co. v. Marathon Pipe Line
Once we see that article III does not give specific content to the concept that the federal judicial power must be exercised by the courts specified therein, and in particular does not specify that the exercise of federal judicial power must involve the initiation of the case in an article III court, can we formulate a general principle that recognizes this and yet gives life to article III's central purposes? I believe we can, and that, indeed, it is this formulation that is to be found in the greatest and deepest of the cases discussing our problem: Crowell v. Benson.\textsuperscript{100} In Crowell, Chief Justice Hughes, in a brilliant stroke, reformulated the doctrine of "the judicial power of the United States," not in terms of rules relating to the article III courts' original or trial jurisdiction, but in terms of ultimate judicial control. He held that Congress may give adjudicatory power to administrative agencies if, and only if, the article III courts are given adequate power to control the legality of these agencies' exercise of these powers through judicial review of all questions of law (including the sufficiency of the evidence).\textsuperscript{101} Hughes drew the analogy with the use of juries and masters to illustrate that our traditions have long assumed that the "judicial power" can be properly exercised even if the adjudicatory task is distributed, so long as it is the judge who is in ultimate control.\textsuperscript{102} The leap from the relationship between a jury and judge on the one hand, and an administrative agency and reviewing court on the other, is perhaps contrived and even sophistical, but the idea that it stimulates is generative and powerful: what constitutes a proper "exercise" of judicial powers by institutions properly vested with such powers is not a self-defining category and is not specifically defined in article III either. It is our history and our customs, not an aggregation of Platonic essences, that tells us when the "judicial power" has been invaded or usurped. It was Chief Justice Hughes' surpassing intellectual achievement to see that the essence of the federal judicial power lies not in any question of trial jurisdiction but in the control that the court ultimately exercises in reviewing whether the law was correctly applied and whether the findings of fact had reasonable support in the evidence.

What follows from this? The rule I propose is that the federal "judicial power" has been adequately vested in courts constituted in accordance with article III if (i) the jurisdictional scheme, including its assignment of initial jurisdiction to the agency, is a reasonably necessary and proper way to

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\textsuperscript{100} 285 U.S. at 22.
\textsuperscript{101} Id. at 60.
\textsuperscript{102} Id. at 61.
achieve the ends of a valid federal program; (ii) the procedures and constitution of the agency comport with procedural due process; (iii) the scheme satisfies the requirements of due process with respect to judicial review; and (iv) the scheme gives an article III court ultimate power to control the legality and constitutionality of the powers asserted and exercised.

My submission is that this formulation, though not without problems, is in a deep sense, satisfying—that it meets the needs of the case. It rests on the notion that I advanced before, that “judicial power” is neither a self-defining nor empirical classification, but a purposive institutional concept. The purpose of vesting the federal judicial power in judges as independent “as the lot of humanity will admit” was not to create a rigid table of organization for the processing of litigation but to assure that, at the end of the day, judges free of congressional and executive control will be in a position to determine whether the assertion of power against the citizen is consistent with law (including the Constitution).

Is this too narrow, too grudging, a way to conceive of the design of article III? Justice Brennan so asserted in Marathon. He dismissed the suggestion that article III can be satisfied by provisions for judicial review:

> Appellants suggest that Crowell and Raddatz stand for the proposition that Art. III is satisfied so long as some degree of appellate review is provided. . . . [But] our precedents make it clear that the constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication, and not only on appeal, where the court is restricted to considerations of law, as well as the nature of the case as it has been shaped at the trial level.

But this seems to me without any power as a constitutional proposition. Of course it matters whether a case is tried before an administrative agency or a federal district court. It matters whether it is tried in a federal court or a state court. It matters whether it is tried to a judge or a jury. Judicial review neither does, nor should, create a universe which is the equivalent of a universe in which the court does everything, ab initio. But so what? Justice Brennan’s argument has bite only if, to satisfy the Constitution’s concept of the exercise of the federal judicial power, the federal district court must find all the facts and must “shape” the case at the trial level, must exercise plenary power to initially determine every question in the case for itself. But what Hughes and Brandeis demonstrate in Crowell is that this has never been our historic conception of the “judicial power.” And if 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

104. Id. at 86 n.39 (emphasis added).
all. The very core of Justice Livingston’s great compromise was his perception that the question of what institution should adjudicate initially is a question of expediency and practical wisdom, rather than a question of constitutional principle. Justice Brennan’s complaint, that judicial review leaves the administrative agency with real power to decide some things conclusively, that the court is restricted by the “shaping” of the case at trial, is true, but constitutionally irrelevant if Hughes and Brandeis are correct that the essence of the “judicial power” is not to assure that the federal court decide everything but to give it power to determine whether the agency’s decision complies with law and rests on sufficient evidence.

In fact, Chief Justice Hughes and Justice Brandeis themselves engaged in a celebrated debate in *Crowell* about the question whether the Constitution does include a requirement of *de novo* decisionmaking by the federal district court. The Chief Justice attempted to demonstrate that, with respect to certain issues of fact (“constitutional facts”) the Constitution requires trial *de novo* in an article III court. 105 This aspect of *Crowell* is thought to be a dead letter, although it has never been formally overruled. We need not pursue the matter here. The important—and triumphantly viable—aspect of *Crowell* is the point as to which Hughes and Brandeis agreed: the Constitution gives Congress wide discretion to assign the task of making the initial decision in a case arising under federal law to administrative agencies, but requires judicial review to assure the supremacy of law.

There was another issue that divided the two great jurists in *Crowell*. Justice Brandeis argued that the constitutional right to judicial review is entirely a matter of due process, and that article III has nothing to do with it. 106 The Chief Justice insisted that the question was one touching on the proper exercise of the judicial power of the United States under article III. What is the *significance* of the division?

I do not think that the distinction is substantive. As the Court made clear long ago in *Murray’s Lessee* itself, there is a fundamental congruence between the question whether the citizen has been afforded the judicial process that is “due” and the question whether sufficient scope has been given to the “judicial” power. 107 If Congress is free, under the due process clause, to remit a matter to the final determination of the executive departments, article III does not impose an independent requirement that it be adjudicated in a court. If the due process clause is satisfied by the scope of judicial review provided by a statute, I do not see the basis for the argument that that scope is inadequate for purposes of article III. I do not believe that Chief Justice Hughes was making a general claim (except with

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105. *Crowell*, 285 U.S. at 64.
106. *Id.* at 77 (Brandeis, J., dissenting).
respect to the "constitutional facts") that article III imposes larger require-
ments than the due process clause with respect either to the right to review
or the scope of review.

What Chief Justice Hughes was saying is that, to satisfy article III,
judicial review must at some point be vested in an article III court. This
concept is, itself, somewhat problematic. We can illumine the difficulty by
asking whether it would violate the Constitution to create a federal admin-
istrative agency and then provide that judicial review of that agency will be
in a federal legislative tribunal, that is, a court of administrative review
whose judges sit for terms of seven years and are removable for cause,
subject to review by certiorari in the United States Supreme Court. Does
the bare possibility of certiorari jurisdiction in the Supreme Court satisfy
the concept of article III "control" as posited in Crowell? I am, I admit,
not certain how to answer this question. The answer is complicated by the
textual power of Congress under article III to make exceptions to the
Supreme Court's appellate jurisdiction. And we have, for generations,
assumed that it is constitutional to make the state courts the final judges
of cases arising under federal law, subject only to the certiorari jurisdiction
of the Supreme Court.

In the federal context, the question is somewhat unreal and contrived.
No institutional necessity has ever been felt to transfer judicial review of
administrative agencies from the article III to an article I court; I don't
believe Congress is likely to do it; and I do not think such a gratuitous
transfer would or could satisfy my substantive due process test.

I have, with this, reached the end of my story. It is a complicated story.
Our English friends would say that it is an illustration of how, with our
written Constitution, we make heavy weather of matters that have a simple
and sensible solution. The saga of our legislative and administrative courts
does have a baroque and operatic quality. But in this case we can use Mark
Twain's famous remark, that the music of Wagner's operas is better than
it sounds, and turn it around. This is a case in which our constitutional
development is better than it sounds. The theories and justifications are
discordant; but the underlying development has been harmonious with our
constitutional ideals.
APPENDIX*

Professor Bator was the counsel of record and principal draftsman of the amicus curiae brief for the United States Sentencing Commission in Mistretta v. United States, which dealt with the constitutionality of the Sentencing Reform Act of 1984. The following passage, bearing the unmistakable characteristics of Professor Bator's prose style, may be taken as the last and the most comprehensive statement of Professor Bator's views on the separation of powers.

Charles Fried

The history and structure of the Constitution establish "the intent of the Framers that the powers of the three great branches of the National Government be largely separate from one another." Buckley v. Valeo, 424 U.S. 1, 120 (1976). The "purpose of separating and dividing the powers of government * * * was to 'diffus[e] power the better to secure liberty.'" Bowsher v. Synar, 106 S. Ct. 3181, 3186 (1986) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). Separation-of-powers principles guard against the tendency of government—and of each branch of government—to aggrandize itself at the expense of the people or the other branches. See INS v. Chadha, 462 U.S. 919, 951 (1983).

The Framers, however, "likewise saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively." Buckley, 424 U.S. at 121.

"While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." Youngstown, 343 U.S. at 635 (Jackson, J., concurring).

Indeed, the very "checks and balances" that are designed to protect liberties give the branches important roles in each other's fields of action. The President participates in law-making through his veto; the Senate influences the execution of the laws through its advice-and-consent power over officers nominated by the President, as well as through its participation in the congressional appropriations process; the President appoints, and the Senate must confirm, judges; but the judges have the power to invalidate statutes passed by Congress and signed by the President. Thus, "the provisions of the Constitution itself" show that "the Constitution by no means contem-

[* The Indiana Law Journal has reproduced a portion of the Amicus Curiae Brief of the United States Sentencing Commission as it was originally filed in Mistretta v. United States, 109 S. Ct. 647 (1989) (Nos. 87-1904, 87-7028).]
plates total separation” of the three branches. Buckley, 424 U.S. at 121; see also Morrison v. Olson, 108 S. Ct. 2597, 2620 (1988). And, as a consequence, this Court’s standards for enforcing separation-of-powers requirements have carefully distinguished those cases where there is a genuine (rather than a merely abstract or remote) threat to the constitutional scheme.

1. Where a separation-of-powers claim is based on the specific text of the Constitution, the Court has not hesitated to strike down Congress’ enactment. Buckley and Chadha are in point. The Appointments Clause, at issue in Buckley, specifies that Congress’ sole role in the appointments process is the Senate’s power of advice and consent. The Court consequently held that Congress may not give itself the power to appoint members of the Federal Election Commission. 424 U.S. at 124-137. The bicameral requirement and the Presentment Clauses, at issue in Chadha, specify “a single, finely wrought and exhaustively considered procedure” for exercising “the legislative power.” 462 U.S. at 951. The Court concluded that the legislative veto violated the separation of powers by bypassing these express constitutional requirements for lawmaking. Id. at 956-959.

2. The Court has also recognized that separation-of-powers principles are especially likely to be violated in cases involving “an attempt by Congress to increase its own powers at the expense” of another branch. Morrison, 108 S. Ct. at 2620; see also CFTC v. Schor, 106 S. Ct. 3245, 3261 (1986). Thus this Court’s decisions in Buckley, Chadha, and Bowsher gave great weight to the fact of congressional aggrandizement. In Buckley, Congress gave itself the power to appoint a majority of the members of the Federal Election Commission; in Chadha, Congress gave itself, through the legislative veto, control over the execution of a prior enactment; and in Bowsher, Congress retained a wide removal power over an officer whose functions “plainly entail[] execution of the law in constitutional terms.” 106 S. Ct. at 3192.

3. In contrast, where there is no violation of the constitutional text, and no aggrandizement by the acting branch, the Court has rejected the “archaic view of the separation of powers as requiring three airtight departments of government,” and has made plain that general separation-of-powers principles must be interpreted in a “pragmatic” and “flexible” manner (Nixon v. Adm’r of General Services, 433 U.S. 425, 443, 442 (1977)):

“True, it has been said that ‘each of the three general departments of government [must remain] entirely free from the control or coercive influence, direct or indirect, of either of the others . . . .’ Humphrey’s Executor v. United States, 295 U.S. 602, 629 (1935), * * *.

“But the more pragmatic, flexible approach of Madison in the Federalist Papers and later of Mr. Justice Story was expressly affirmed by this Court only three years ago in United States v. Nixon, [418 U.S. 683 (1974)]. * * * [T]he Court squarely rejected the argument that the Constitution contemplates a complete division of authority between the three branches.” Id. at 441-443.

8. In a footnote, the Court quoted Madison’s observation, in The Federalist No. 47, that
Under this "pragmatic, flexible" approach, the fundamental test for determining whether a congressional statute violates the separation of powers is "the extent to which [the challenged action] prevents the [affected] Branch from accomplishing its constitutionally assigned functions." Nixon, 433 U.S. at 443 (emphasis added). See also Morrison, 108 S. Ct. at 2621 (the test is whether Congress' scheme "'impermissibly undermine[s]' the powers of the Executive Branch, or 'disrupts the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions' "); Schor, 106 S. Ct. at 3258 (rejecting "formalistic and unbending rules" that might "unduly constrict Congress' ability to take needed and innovative action pursuant to its Article I powers"); Pacemaker Diagnostic Clinic v. Instromedix, Inc., 725 F.2d 537, 544 (9th Cir.) (en banc), cert. denied, 469 U.S. 824 (1984) ("The standard for determining whether there is an improper interference with or delegation of the independent power of a branch is whether the alteration prevents or substantially impairs performance by the branch of its essential role in the constitutional system").

In Morrison, the Court further specified that a threat to the "constitutionally assigned functions" of a branch may be created, and the "proper balance" between the branches therefore disrupted, if Congress assigns to a branch functions that "are more properly accomplished" by another branch. 108 S. Ct. at 2613. This theme echoes the Court's indication in Ex parte Siebold, 100 U.S. (10 Otto) 371, 398 (1880), that an "incongruity in the duty required" may lead the Court to invalidate an allocation of powers to one of the branches.

Finally, the Court has made it clear that even where there exists a "potential for disruption" of another branch, Congress' scheme will nevertheless pass muster if "that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." Nixon, 433 U.S. at 443. This is why the Court has insisted that a pragmatic evaluation be made of the circumstances that led Congress to adopt the statute and the seriousness of its impact on the "institutional integrity" of the affected branch. Schor, 106 S. Ct. at 3258; see also Morrison, 108 S. Ct. at 2621. "The idea of separation of powers is justified by eminently practical considerations. * * * It is faithful to the idea of separation of powers to examine the real consequences of the [challenged] statute." Pacemaker, 725 F.2d at 546-547.

4. This Court's "pragmatic, flexible" approach to separation-of-powers questions where no textual command of the Constitution is in play and the
danger-signal of congressional aggrandizement is absent has another virtue: it pays proper heed to the explicit constitutional authority of Congress to determine how all the branches of government should be organized to carry out their respective functions. The Necessary and Proper Clause empowers Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers of Congress, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. Art. I, § 8, cl. 18 (emphasis added). This specifically authorizes Congress to enact necessary and proper laws to effectuate not only its own enumerated powers, but all the powers of every branch of the federal government (including powers that Congress has validly delegated). See Kaiser Aetna v. United States, 444 U.S. 164, 172 n.7 (1979). The Constitution assigns to each branch its central mission and its enumerated powers. But the Constitution does not spell out a detailed table of organization; nor does it specify which branch is to perform the various subsidiary and incidental functions needed to round out the operations of the government as a whole. Rather, the Constitution leaves broad latitude to Congress to decide what institutions, and what allocation of subsidiary and interstitial responsibilities, will best carry out the constitutional plan for the other branches of government.

5. A flexible approach to separation-of-powers questions, giving proper heed to the pragmatic circumstances that animated Congress, is consistent with the historical evidence of the Framers' philosophy of separation of powers. As recent important research confirms, there did not exist, at the time of the framing of the Constitution, a determinate set of rules that defined when the ideals of separation of powers were or were not satisfied. See generally Casper, An Essay in Separation of Powers: Some Early Versions and Practices.—Wm. & Mary L. Rev.—(1988) (forthcoming). This is demonstrated, inter alia, by the fact that there was wide divergence with respect to constitutional allocations of power in the various state constitutions; and by the fact that many critical issues relating to separation of powers (e.g., power over appointments and the mode of selecting the

9. As this Court recognized in Siebold, 100 U.S. at 397, "it would be difficult in many cases to determine to which department an office properly belonged;" in the Court's example, the marshal is "an executive officer" who is also "pre-eminently the officer of the courts." See also Morrison, 108 S. Ct. at 2618 n.28 (discussing "[t]he difficulty of defining * * * categories of 'executive' or 'quasi-legislative' officials"). What is true of officers is true of the functions officers perform. As Justice Stevens observed in his concurring opinion in Bowsher, "[o]ne reason that the exercise of legislative, executive, and judicial powers cannot be categorically distributed among three mutually exclusive branches of government is that governmental power cannot always be readily characterized with only one of those three labels. On the contrary, as our cases demonstrate, a particular function, like a chameleon, will often take on the aspect of the office to which it is assigned." 106 S. Ct. at 3200.

10. Because this article is in press we have furnished copies to all counsel and lodged copies with the Court.
President) were hotly disputed in the Convention and often not settled until its closing sessions. In other words, there was no positive law of separation of powers at the time of the framing. Thus, when the Constitution's text does not itself determine how powers are to be divided, the Constitution should not be read by implication to create a rigid table of organization with respect to how the many interstitial and subsidiary functions of government should be organized. Rather, as this Court has perceived, the question is whether the scheme adopted by Congress substantially subverts the independence of one of the branches, or seriously disrupts its central constitutional mission. See Morrison, 108 S. Ct. at 2621-2622.

6. Obviously, neither the Necessary and Proper Clause, nor a "pragmatic, flexible" approach, authorizes Congress to override an explicit provision of the Constitution. But if there is one thing plain, it is that the text of the Constitution does not explicitly prohibit what Congress did in the Sentencing Reform Act. More particularly, it is critically important to remember that the Constitution does not itself assign the sentencing function to the exclusive jurisdiction of any branch. Indeed, deciding what punishment fits the crime is a paradigm example of a responsibility that has, historically, been shared among the three branches. See pp. 4-6, supra. Sentencing is thus preeminently a field where interbranch cooperation and sharing of responsibility are appropriate, and where rules must therefore "be fixed according to common sense and the inherent necessities of the governmental co-ordination." Hampton & Co. v. United States, 276 U.S. 394, 406 (1928). And it is precisely in such a field that Congress' discretion to allocate authority and fashion appropriate offices and institutions must be at its greatest.

11. Also relevant are the Convention's many decisions vesting in Congress (or in the executive branch) powers that were not self-defining and could readily have been assigned elsewhere (e.g., the power to declare war, which was a royal prerogative under the English system).

12. The point may be illustrated by the administration of probation and parole. Currently, the administration of probation is the responsibility of the judicial branch whereas the administration of parole is the responsibility of the executive branch. Yet, functionally, both probation and parole are forms of supervised release that serve as alternatives to incarceration. There is no reason to think that the current allocation of responsibility is constitutionally compelled. In fact there is considerable interplay between probation officers and the parole authorities. See, e.g., 18 U.S.C. § 3655 (requiring probation officers to "perform such duties with respect to persons on parole as the United States Parole Commission shall request").

Because probation officers are "peace officers" (Minnesota v. Murphy, 465 U.S. 420, 432 (1984)), and have "law enforcement" powers such as the power to arrest (Kimberlin v. United States Dep't of Justice, 788 F.2d 434, 437 (7th Cir.), cert. denied, 478 U.S. 1009 (1986)), the placement of the probation service in the judicial branch and the courts' powers to supervise (and remove) probation officers, see 18 U.S.C. § 3602, would become constitutionally suspect under Petitioner's rigid version of separation of powers.