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The Relation Between Limitations on and Requirements of Article III Adjudication

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In endowing this Court with “judicial power” the Constitution presupposed an historic content for that phrase and relied on assumption by the judiciary of authority only over issues which are appropriate for disposition by judges.¹

All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.²

Our precedents in this area do not admit of easy synthesis.³

Obscurum per obscurius, explaining the obscure by means of the more obscure, does not sound like a very promising approach. That is especially so in a symposium based on the work of Paul Mishkin, whose scholarship in the field of federal jurisdiction casts so much light. Another metaphor, though, suggests that each individual piece of a jigsaw puzzle is hard to understand, some more than others, but that put together properly the pieces make a picture. Maybe something like that is true of the Supreme Court’s doctrines concerning the role of the federal courts in the constitutional system, and the extent of Congress’s power over that role. This essay is an attempt to find coherence in a notoriously difficult set of Supreme Court doctrines by looking at the bigger picture.

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1. *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Opinion of Frankfurter, J.).
2. *Allen v. Wright*, 468 U.S. 737, 750 (1984) (quoting *Vander Jagt v. O’Neill*, 699 F.2d 1166, 1178-1179 (D. C. Cir. 1983) (Bork, J., concurring)).
3. *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 847 (1986).

Some of those doctrines, principally those about standing and political questions, impose limits on the judiciary, keeping the courts from resolving some disputes that are at least partially governed by legal norms. Other doctrines, mainly those about procedural due process and the relationship between Article III and non-Article III adjudicators, make judicial involvement mandatory, requiring that the regular constitutional courts resolve certain disputes that are governed by legal norms. Together, those doctrines both limit the courts' turf and protect that turf from other decision makers.

Most of this essay is devoted to a description of the Article III and due process case law that is designed to show the picture they form when put together, a picture that is indeed about the role of the courts. With inevitable fuzziness and boundary problems, disputes that match the picture are to be decided ultimately by the courts and only by them, disputes that do not are to be decided elsewhere. The picture, I will suggest, is that of a lawsuit in which a court decides on the basis of legal and not political considerations, and does so with respect to the particularized interests of the parties—particularized in the sense that a judicial decree that affects the parties will not much affect anyone else.

Part I of this essay takes the first step toward providing a more fully developed description of that picture. It deals with the merely obscure—the standing, political question, and procedural due process cases—and seeks to show how they fit together. Standing doctrine, I will argue, is designed to limit the role of the courts when the effect of a judgment would not be particularized to private parties. By limiting the ability of private parties to sue in order to vindicate public rights, it sets up the executive, which can bring such suits, as a gatekeeper for judicial action when the interest at stake is one shared by all citizens: the interest in seeing that the law is complied with. The political question doctrine also keeps the courts from acting in a distinct class of cases: those that involve too little legal judgment and too much policy discretion.

Too little particularization or too much political discretion and the courts are off their turf. That implies that where the particularized interests of private parties are at stake and the decision is one of law and not discretion, the courts are to decide. That, I will suggest, is the lesson of the cases that determine whether there has been a deprivation of life, liberty, or property so that procedural due process is required. Due process doctrine makes judicial involvement mandatory in cases that are the mirror image of those in which standing and political question doctrine make judicial involvement impermissible.

Part II then turns to the yet more obscure, and discusses the cases governing congressional grants of adjudicatory authority to bodies other than Article III courts. I will argue that the tangled decisions beginning

with *Crowell v. Benson* make more sense in light of the understanding of the judicial role derived from the doctrines discussed in Part I, an understanding according to which the center of the judicial role is deciding questions of law and not policy and where the decision's effects are strongly focused on the parties before the court. Adjudication by non-Article III agencies is most easily justified, the cases indicate, when agency fact-finding is bound up with policy judgments in which the agency is considering the interests of the public, and not just the parties before it. That emphasis on matters of public concern makes it easier to understand the dominant role accorded to congressional control over legal rights that Congress creates as part of a regulatory system.

Part III then briefly sketches the understanding of the judicial role in the constitutional system that would help explain and justify these jurisdictional doctrines when taken as a whole. This Part suggests that the form those doctrines take, in which Congress's choices concerning the substance of the law are not dictated but are constrained by the constitutional structure, is itself in keeping with basic principles of the constitutional system.

I

PARTICULARIZATION, POLICY, AND THE JUDICIAL ROLE

A. *Jurisdiction-Limiting Doctrines*

1. *Standing and Particularization*

According to the Court's current doctrine, the Article III judicial power may be exercised only when the plaintiff has standing.⁴ Standing requires, first, an injury in fact, which must be concrete, particularized, and imminent, and, second, appropriate causation. Appropriate causation consists of a causal connection between the plaintiff's injury and the defendant's conduct, called traceability, and a likelihood that the requested relief will relieve the injury, called redressability.

Injury in fact does not include everything that is, in fact, an injury. Its restrictiveness is central to the doctrine. While the Court has not been quite clear as to the content of injury in fact, it has been clear on one central point: injury to the pure interest in having the law complied with is *not* injury in fact (at least when asserted by a private person). "This Court has repeatedly held that an asserted right to have the Government act in

4. As the Court formulates it, the requirement of standing applies to all plaintiffs. That is misleading, as Edward Hartnett has pointed out, because the government itself, when a plaintiff, need not have the kind of standing a private party needs. Edward Hartnett, *The Standing of the United States: How Criminal Prosecutions Show That Standing Doctrine is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239 (1999).

accordance with the law is not sufficient, standing alone, to confer jurisdiction on a federal court.”⁵

It is harder to describe fully the kind of interest, injury to which does give rise to standing. Some polar instances present easy cases; in particular injuries to person and property—the kind of injuries that give rise to entitlements to relief under the traditional private law—definitely can give rise to Article III standing. Thus when a detained prisoner seeks habeas corpus to remedy an injury to the interest in natural liberty, or when a property owner seeks an injunction against a genuine threat of physical damage to property, there is no standing problem.

The other components of the standing doctrine function as backstops to the fundamental rule that only injuries to certain kinds of interests will be recognized in the courts. One component seems to be built into the injury requirement itself: threatened injury must be imminent, and not just speculative, in order to count.⁶ Such a requirement may seem superfluous. If an injury to the interest in compliance with the law does not count, why should it matter whether the injury is imminent or far down the road? It matters because imminence functions to keep clever plaintiffs from getting around the primary rule about injury in fact. A plaintiff who is really concerned simply that the defendant is violating the law may well be able to come up with a story about a conceivably threatened harm to a more concrete interest of the plaintiff. A lack of imminent threat to the latter harm, though, may suggest strongly that the plaintiff is really concerned simply about the principle of the thing.

In quite similar fashion the two causation prongs of traceability and redressability serve to police the requirement that plaintiffs sue about something other than a violation of the law per se. Here one of the classic cases provides an excellent illustration. In *Frothingham v. Mellon*,⁷ Frothingham sued Secretary of the Treasury Mellon seeking an injunction against expenditures under the Maternity Act, which Frothingham argued was in excess of Congress’s spending power. She sued as a taxpayer, relying on her interest in keeping expenditures down so as to keep taxes down. Frothingham had injury in fact, and indeed claimed an injury to a classic common-law interest, her money. Of course taxpayers have standing to litigate the validity of their tax bills.

5. *Allen v. Wright*, 468 U.S. 737, 754 (1984) (citation omitted). As Professor Hartnett points out, *supra* note 4, the government itself does have standing to vindicate the pure interest that the law be followed.

6. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). The imminence requirement reflects in part the fact that standing problems almost always arise with respect to anticipatory remedies, mainly injunctions and declaratory judgments. Standing problems with respect to damages, although they do arise, are unusual.

7. 262 U.S. 447 (1923).

Yet Frothingham had what would now be called a causation problem. Given the size of federal revenues and Congress's tendency to spend them, she could not plausibly argue that her taxes were as high as they were because of the Maternity Act, or that enjoining expenditures under that statute would cause Congress to lower her taxes appreciably. Congress might well spend the money on something else, and even if it did not any reduction in Frothingham's taxes would be trivial or undetectable. Someone who was actually interested only in minimizing her taxes would not have bothered to bring that suit, and Frothingham brought it not because she was trying to save money, but because she believed the Maternity Act to be beyond Congress's enumerated powers. Causation analysis in *Frothingham* served its function of smoking out the plaintiff's real interest in the case, and revealed that interest to be impermissible.

If I am right, the standing doctrine is essentially negative. It is designed to keep private people from enforcing the duties that rest on others, including both the government itself and other private people, simply because those duties have been violated. The rationale for such a doctrine has been articulated most clearly by Justice Scalia in his commentary outside of judicial opinions, and by Edward Hartnett in his discussion of government standing.⁸ As they explain, standing doctrine operates in favor of the executive branch by restricting the ability of private parties to enforce duties that are owed to the public at large. It does so slightly indirectly by eliminating private lawsuits based on the rights that correlate with such duties. The right to have the law complied with per se is a right held by the public, not any one private person, and is to be vindicated by the political representatives of the public at large. This power of vindication lies with the executive, which can enforce compliance with duties owed to the public both in enforcement actions against private persons and in policing its own compliance with norms that regulate the government itself.

Allen v. Wright illustrates the separation of powers rationale for the standing doctrine. That case, and more generally lawsuits that offend the standing doctrine, typically share a feature that I think central to the doctrine's rationale: indivisible relief. The plaintiffs in *Allen* were parents of black children who were enrolled in public schools subject to desegregation decrees. They maintained that the Commissioner of Internal Revenue, by improperly giving tax-deductible status to discriminatory private schools, was in effect assisting white students to attend those schools and not the public schools, thereby making it more difficult for the plaintiffs' children to have a racially integrated education. The plaintiffs thus sought to change an Internal Revenue Service practice that affected a

8. Antonin Scalia, *The Doctrine of Standing as an Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 891 (1983); Hartnett, *supra* note 4.

large number of private schools, and in turn a very large number of actual and potential students at those schools, and after that a very large number of actual students at public schools, including the plaintiffs' children.⁹ The effect on all those public school children, those of the plaintiffs and all the others, would have been the same. The relief to the plaintiffs could not be separated from relief to many others. In a more standard private lawsuit, by contrast, the relief runs to, and affects, the plaintiff and the plaintiff alone. A private plaintiff who for some reason would prefer not to sue at all may decline to do so, and therefore will not have to live with a potentially unwanted remedial decree.

Considered as a separation of powers principle in favor of the executive, the standing doctrine increases the number of situations in which the non-judicial political process determines the mode and extent of enforcement of duties that operate in favor of the public generally. In the view of its supporters that is a good thing: When an interest is widely shared among a great many people, so that relief will affect all of them, it may not be desirable simply to allow anyone who shares that interest to seek judicial relief in effect on behalf of everyone. One of the primary purposes of political arrangements is to produce a mechanism for resolving disputes about widely shared interests. A main justification for the standing doctrine is that with respect to interests shared by the public, political actors should decide how to vindicate them.

Whether the Supreme Court, or indeed any federal court, applies the standing doctrine in a principled fashion, as opposed to using it to mask decisions based on substantive considerations, is of course a matter of dispute. I am concerned, however, not with the doctrine as it may work in practice, but as it is explained and justified by the Court. For the purposes of my argument, the important thing about the standing doctrine is that it distinguishes between lawsuits in which the application of the law to the facts will affect just one plaintiff or a small number of plaintiffs from lawsuits in which the relief to the plaintiff will also affect, in much the same way, a large number of other parties who are part of the public at large.

2. Policy Discretion, Law, and Political Questions

Besides standing, the other main limitation on the Article III judicial power comes from the political question doctrine. Underlying that doctrine is the familiar principle that some kinds of decisions are not to be made by courts, which is implemented by keeping courts away from such decisions in a fashion more vigorous than simply telling them to confine themselves to legal questions in deciding cases. The political question doctrine has two

9. *Allen*, 468 U.S. at 743-46 (describing plaintiffs' argument).

distinct but related manifestations. Sometimes it requires that when courts decide cases otherwise within their jurisdiction, they accept as final the resolution of legal questions made in other contexts by the political branches. Its other manifestation is as a limitation on remedies, in particular on the kind of political branch decisions that can be subject to judicial direction.¹⁰

a. Non-Judicial Finality and Policy Discretion on Legal Questions

An example of the first manifestation of the political question doctrine, non-judicial finality, is the recognition of governments—a topic that is central both historically and conceptually. That was the issue at stake in the headwaters case for the political question doctrine, *Luther v. Borden*.¹¹ *Luther* grew out of the disturbances in Rhode Island known as Dorr's Rebellion, during which a group of political reformers led by Thomas Dorr erected their own government for the State, ostensibly through an act of direct popular sovereignty, and sought to displace the established government. The latter declared martial law and Borden, deputized by the established government, broke into Luther's home to execute an arrest warrant. Luther sued Borden in the federal diversity jurisdiction, Borden defended on the grounds of official privilege, and Luther replied that the privilege was not available because Borden was not an officer, the government he claimed to work for having been replaced with another by the people.

Luther thus presented, in the context of an ordinary officer suit for tort damages, a momentous question of popular sovereignty and political legitimacy. In the lower court the plaintiffs had sought to prove that the Dorr government had lawfully replaced the earlier government. The Supreme Court, through Chief Justice Taney, found that the issue had been resolved by the President and Congress, who, the Court concluded, had continued to recognize the old government despite Dorr's pretensions. The Court held itself bound by those decisions without inquiring into their correctness.

Questions as to the identity of the legitimate government of a State of the Union rarely arise today.¹² Questions as to the identity of the legitimate

10. In earlier decades there was probably a third component, another kind of restriction that could be referred to as a political question. Often collective political rights, such as sovereignty, were not regarded as giving rise to entitlements to judicial relief. See *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1867). To the extent that it survives, this limitation would today be regarded as a question of standing. This may be the primary sense in which questions of districting were regarded as political prior to *Baker v. Carr*, although such cases also raise remedial problems resembling those that are still addressed under the political question rubric.

11. 48 U.S. (7 How.) 1 (1849).

12. The legitimacy of the governments of States of the Union arose pointedly and repeatedly during Reconstruction, when Congress by statute declared that most existing governments in the ex-Confederate States were "illegal, unrepresentative, and provisional only," and created a mechanism

government of foreign states, and questions of the legal existence of foreign states, do arise. They are archetypal political questions.¹³ If the political branches have made a judgment on recognition, the courts hold themselves absolutely bound by that judgment, regardless of its legal merits.¹⁴ While the recognition of foreign governments is heavily influenced by policy considerations, it is also a question governed by international law.¹⁵ In making those decisions, the political branches are applying law to fact, while at the same time resolving high questions of policy and exercising political discretion. Recognition is for that reason an example of the unusual category of legal questions that are best decided out of court.

The political question doctrine also accords absolute finality to some non-judicial decisions even more clearly based on law than is recognition of states, when those decisions are sufficiently freighted with political and policy discretion. For example, the Senate's decisions as a court of impeachment are binding on the judiciary, although those decisions rest on the application of law to fact and may include the resolution of questions of procedure governed by the Constitution.¹⁶ Whether a high crime or misdemeanor has been committed is a question of law and fact, but those questions can be inextricably intertwined with the question, for example, whether to remove the President of the United States from office. Sometimes the mix of the legal and the political is such that the courts do not exercise their customary function of finally resolving legal questions.

whereby they were to be replaced with new governments based on race-blind suffrage and other basic principles chosen by Congress. Act of Mar. 2, 1867, ch. cliii, 14 Stat. 428. Proponents of congressional reconstruction argued that Congress's determination of the illegitimacy of the self-reconstructed southern regimes was conclusive on the courts under *Luther*. That was the position, for example, of Senator Lyman Trumbull of Illinois, Chairman of the Senate Judiciary Committee and a principal Republican legal strategist during Reconstruction. See CONG. GLOBE, 40th Cong., 2d Sess. 3630-31 (1868).

13. *Baker v. Carr*, 369 U.S. 186, 211-12 (1962).

14. For many years the political branches recognized as the government of China the government based in Taipei, which controlled only a small fraction of the territory and population of China, and the courts accepted that decision as conclusive. "The status of the Republic of China in our courts is a matter for determination by the Executive and is outside the competence of this Court." *Nat'l City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 358 (1955).

15. "Particular decisions about whether to recognize a new regime as the government of another state are neither entirely governed by rules of international law nor left entirely to policy-makers' discretion." M.J. PETERSON, *RECOGNITION OF GOVERNMENTS* 28 (1997).

16. In the impeachment trial of Judge Walter Nixon, the Senate used a committee to assemble the factual record for use by Senators, and did not conduct all of its fact-finding before the full Senate. Judge Nixon objected that the Senate had failed to conduct a "trial" of his impeachment within the meaning of the Constitution, and the Supreme Court concluded that the question was political. *Nixon v. United States*, 506 U.S. 224 (1993).

b. Limitations on Judicial Interference with the Political Branches

Non-judicial finality, which underlies one application of the political question doctrine, means that a political actor's resolution of a legal question will be binding collaterally when that question arises in ordinary litigation. The problem of judicial involvement in decisions that mix legal and political considerations can come up more directly, in particular when a court is asked to grant affirmative relief that would direct the performance of a politically sensitive function of the government.

John Marshall promised that no political questions could be made in his court, and denied in *Marbury* that he had any interest in interfering in the political relations between the Secretary of State and the President.¹⁷ Today's courts may have standards different from his, and for example have become accustomed to directing the apportionment of legislatures despite having been warned away from that political thicket. Yet there are still contexts in which courts are hesitant to give affirmative relief that would directly interfere with political decisions, the most notable being the contexts of foreign and military affairs. Thus the Court in *Gilligan v. Morgan*¹⁸ expressed grave misgivings about judicial supervision of the training and tactics of the Ohio National Guard. Lower courts have almost always refused to give affirmative relief against United States military actions in foreign countries, and the Supreme Court has generally avoided those cases altogether.¹⁹

In both the direct and collateral contexts, the fear that drives judicial reticence in political question cases is about second-guessing highly sensitive and discretionary decisions, even when those decisions are about or substantially constrained by legal principles. Courts and law travel together usually, but not always.

B. Procedural Due Process and the Mandatory Judicial Role

While the doctrines of standing and political question operate to define the limits of federal court jurisdiction under Article III, procedural due process doctrine reflects the understanding that the judiciary must be involved in the decision of certain cases. Procedural due process may seem to be mainly about the executive and not the courts. Most of the cases are about the procedures that non-judicial agencies of the government must use when they take certain kinds of action adverse to the interests of private

17. *Marbury v. Madison*, 1 Cranch 137, 169-70 (1803).

18. 413 U.S. 1 (1973).

19. See, e.g., *Aktepe v. United States*, 105 F. 3d 1400 (11th Cir. 1997), cert. denied, 522 U.S. 1045 (1998), in which the court of appeals refused to exercise jurisdiction over damages claims by Turkish naval personnel injured in a NATO training accident, explaining that deciding such a suit would require the court to second-guess diplomatic and military decisions and so would violate the political question doctrine.

parties. Sometimes those procedures must closely resemble a judicial trial, while in other circumstances they may be substantially less elaborate. At the back end of that process, though, is almost always some kind of judicial review of the executive's decision. That review may be deferential as to fact and highly deferential as to policy choices, but it is almost always a component of due process. And when no process at all is due because no one has been deprived of life, liberty, or property, mandatory judicial involvement is nearly unheard of.

Following the language of the Fifth Amendment, the Court has formulated its tests for determining whether any process is due in terms of deprivation of life, liberty, or property. That question depends very strongly on whether the government decision involved was particularized and whether it involved the application of legal norms rather than the exercise of discretion.

1. Particularity and the Procedural Due Process Requirement of a Hearing

Two early twentieth-century cases remain central with respect to the question whether the Due Process Clause's requirement of individualized government decision making has been triggered. Decisions that affect a substantial number of people in the same way, decisions of the kind a legislature ordinarily would make, need not be made through an individualized hearing in order to comport with the Due Process Clause. On this side the standard citation is *Bi-Metallic Investment Co. v. State Board of Equalization of Colorado*,²⁰ one of two tax assessment cases decided within about a decade of one another. At issue was an order increasing the valuation for tax purposes of all the taxable property in Denver. The Court held that notice and a hearing, what we would call procedural due process, were not required. "Where a rule of conduct applies to more than a few people, it is impracticable that every one should have a direct voice in its adoption."²¹

Bi-Metallic distinguished the earlier case of *Londoner v. City and County of Denver*,²² which had required an actual live hearing with respect to a tax assessment decision. There the tax was being levied on a "small number of persons . . . who were exceptionally affected," as the Court explained in *Bi-Metallic*.²³ Together, those cases stand for the proposition that adjudicatory-type procedures are required for highly particularized decisions, while legislative-type procedures are appropriate for decisions that affect a large segment of the public. Due process as courts know it comes with particularity.

20. 239 U.S. 441 (1915).

21. *Id.* at 445.

22. 210 U.S. 373 (1908).

23. *Bi-Metallic Investment Co.*, 239 U.S. at 446.

2. Law, Discretion, and the Procedural Due Process Threshold

The requirement that an adverse government decision have focused effects is not enough to cause it to qualify as a deprivation of life, liberty, or property for purposes of procedural due process doctrine. A decision by the President not to grant a pardon, though narrowly focused on a single individual, would not constitute a deprivation for these purposes. The courts almost certainly would conclude that there is no property or liberty interest at stake.

They would so conclude, the cases suggest, because of the breadth of the President's discretion with respect to granting pardons. Property interests are understood to be those that are created by relatively determinate legal norms, and do not depend heavily on the exercise of official discretion. That is true of the core example of a constitutionally protected property interest, the kind of old property rights that govern relations between private parties. In extending the concept of property to the more problematic area of new property, which consists primarily of government benefits, the Court has routinely relied on the presence or absence of official discretion in determining whether an interest amounts to property. The less discretion officials possess, the more likely the interest involved is to constitute property for due process purposes.²⁴ When administrative officials are applying law rather than exercising their discretion, they must do so in a procedurally regularized fashion, usually with some form of judicial review of their decisions.

The marks of judicial involvement in resolving a dispute are particularized consequences for one or a few private people and the dominance of law over policy discretion. The more those features

24. Foundational cases for the current doctrine use the degree of discretion as a marker for the presence or absence of a property interest. In *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sinderman*, 408 U.S. 593 (1972), decided on the same day, the Court contrasted Roth's mere expectation of continued employment, which did not amount to property for due process purposes, with Sinderman's claim under a de facto or common law tenure system, which did. Roth served under a series of one year contracts with no provision for renewal. His employer had discretionary authority to rehire him, but that authority alone did not give Roth a property interest. Sinderman's employer, by contrast, was found to have created a common law of tenure that bound its discretion and created a property interest. A few years later in *Bishop v. Wood*, 426 U.S. 341 (1976), the Court found that a public employee whose employment was at-will had no property interest in his job.

The Court's so-called "entitlement" theory of property, which gives more protection as official discretion decreases, has been criticized for creating a perverse incentive.

Where agency power is wholly discretionary, where it is unconfined by standards, a person interested in a benefit distributed by that agency can have no expectations, no 'entitlement' that amounts to a property interest . . . Under entitlement theory, then, the government may avoid the costs to it of a due process hearing simply by making agency action entirely discretionary. Assuring objective and defined criteria and eliminating purely discretionary power was a driving force behind entitlement theory. Therefore, inasmuch as entitlement theory provides an incentive for action according to the "will and pleasure" of administrative officials, the theory is intrinsically contradictory.

ALFRED C. AMAN, JR., AND WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* 188-189 (2d ed. 2001) (footnote omitted).

predominate, the stronger the case for ultimate decision by a court. The more their contraries predominate, the stronger the case for excluding judicial decision. Those features of a dispute thus explain both the ceiling and the floor for judicial decision.

II

NON-ARTICLE III ADJUDICATORS

Procedural due process may mandate some judicial involvement, but how much? In particular, what is the role of the Article III courts when due process has so far been complied with elsewhere that a decision has been made by an adjudicator or adjudicatory body that is itself a great deal like, and may even be called, a court? Congress frequently makes such arrangements. For example, it has created the Tax Court and required that the Article III courts give substantial deference to its factual findings, and has given similar limited but substantial finality to administrative adjudication in agencies ranging from the Federal Communications Commission to the Social Security Administration to the Environmental Protection Administration. Those are the questions posed in a line of cases that has become a by-word for confusion and obscurity, the cases about non-Article III adjudicators.

The understanding sketched in Part I of several jurisdictional doctrines may provide improved explanations and justifications of the most obscure area of all, the cases about the difference between Article III and non-Article III adjudicators.

A. Procedural Due Process and the Judicialization of Non-judicial Decision Makers

First, the development of the procedural due process doctrine may help explain (and perhaps justify) the courts' willingness to accord substantial finality to adjudicatory bodies not staffed by jurors and life-tenured judges. The due process doctrine as I have described it is the mirror image of the standing and political question doctrines: due process requires that the courts play some important role in deciding the disputes that are most unlike the disputes that the political question and standing doctrines keep out of court. If I am right, the due process doctrine embodies the basic principles that govern the role of the courts. It is thus suited to play a central role in determining the scope of the judicial power, and in fact it does so when it requires some form of judicial review of non-judicial decision making. In addition to requiring some judicial involvement, the due process doctrine governs the procedures used by executive and other non-life-tenured adjudicators, and does so on the basis of the basic principle that Article III itself rests on: impartial adjudication. Giving non-Article III adjudicators a substantial role in deciding a dispute is thus not to

give away very much with respect to procedural protections, including protections for the impartiality of the adjudicator. And the actual contours of the due process requirement are themselves determined by the Article III judiciary and ultimately by the Supreme Court. In fact, the courts have more control of procedure under the due process doctrine than with respect to Article III, because the former is a standard and the latter is a rule. Due process limitations thus give the life-tenured judges both substantial review authority in particular cases and extensive systemic authority to oversee the rules that govern the proceedings that are subject to review. With all that in place, disputes about the requirements of Article III itself, as opposed to the Due Process Clause, may seem quite secondary, and the need to police the line between Article III and non-Article III adjudicators may seem quite limited.

B. Article III and Limitations on Non-Judicial Actors

Although the problem of non-Article III adjudicators may be secondary, it is very real, and has given rise to much confusion. I will try here to dispel some of that confusion by providing an explanation of an important but troubling aspect of the cases on this issue. Those cases involve and sometimes turn on a factor that may seem not to fit into my proposed image of the judicial power: Whether the law that is to be applied by a non-Article III tribunal was itself created by Congress. *Crowell v. Benson* involved a federal program of employee compensation for maritime workers in which workers' awards for injuries were adjudicated in an administrative tribunal staffed with decision makers who did not serve on good behavior. In *Crowell*, Chief Justice Hughes distinguished between administrative adjudication of issues arising under the federal statute, which was approved, and adjudication of constitutional questions concerning Congress's jurisdiction, which was reserved for the courts.²⁵ *Northern Pipeline* considered a challenge under Article III to the substantial finality given by the Bankruptcy Reform Act to the factual findings of the Bankruptcy Courts that statute created, courts staffed with judges who served for a term of years, not on good behavior. In *Northern Pipeline*, the Court disapproved of the Bankruptcy Courts' adjudication of claims arising under *state* law without concluding that non-life-tenured bankruptcy judges could have no substantial role in deciding cases under federal bankruptcy law.²⁶ And when the Court in *Schor* approved adjudication of a non-federal claim between a broker and an investor by a

25. *Crowell v. Benson*, 285 U.S. 22, 54-63 (1932). The distinction is often described as one between jurisdictional facts, which go to the scope of congressional power and are to be decided by Article III courts, and non-jurisdictional facts, which arise within the scope of that power and may be assigned to non-Article III adjudicators.

26. *N. Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). Six Justices joined in that conclusion, but there was no opinion for the Court.

Commodities Futures Trading Commission Administrative Law Judge, it relied on the practical connection that such claims bore to commodities transactions governed by acts of Congress.²⁷ Even *Schor* does not suggest that Congress can create an Article I court to adjudicate pure diversity cases that have no relationship to any federal statute.

1. Non-Article III Courts and the Adjudication of Public Rights

Why should it matter whether Congress made the law at issue, or the law that is importantly implicated, in a case? One possibility is that this is the ghost of the rights-privilege distinction, or of the principle that the greater power includes the lesser: because Congress could decide whether to create the entitlement in the first place, it can decide how adjudications regarding that entitlement are to proceed. That is very hard to swallow. In general, power over substance does not give power over structure. Congress's power to make law does not give it power to create its own executive branch to carry out that law, wholly disconnected from the President of the United States. Letting the power over substance turn into a power over structure would make separation of powers considerations drop out, leaving the non-Article III tribunals question to depend wholly on the scope of congressional power. That would to some extent preserve federalism, and would preserve the supremacy of the Constitution (as *Crowell* sought to do with the doctrine of jurisdictional facts), but it would jettison one fundamental feature of the constitutional scheme.

Justice Brennan, in his attempts to synthesize the cases about non-Article III adjudication, pointed the way toward a different rationale for thinking it relevant whether Congress had created the substantive law at issue. For the plurality in *Northern Pipeline*, and then for the Court in *Granfinanciera*, he sought to tame *Crowell* by reconceiving the category of public rights. Chief Justice Hughes had characterized the employer-employee dispute in *Crowell* as one involving private rights and not public rights; he limited the latter category, in which non-Article III adjudication had long been accepted, to cases between the government and others.²⁸ In *Granfinanciera*, Justice Brennan said that the Court had since rejected that narrow view of public rights, and of non-Article III adjudication, and instead had found the category to include seemingly private rights that are closely intertwined with a federal regulatory scheme.²⁹ Intertwinement with regulation, and not just the presence of the government as a party, could make a dispute one of public rights, and hence one in which adjudicators who are neither life-tenured judges nor jurors may play an important role in fact-finding. "If a statutory right is not closely intertwined with a federal

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

28. *Crowell*, 285 U.S. at 50-51.

29. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 54 (1989).

regulatory program Congress has the power to enact, and if that right neither belongs to or exists against the Federal Government, then it must be adjudicated by an Article III court.”³⁰

As Justice Brennan explained in a footnote to the passage just quoted, public-rights cases, with their permission for administrative adjudication, include regulatory enforcement actions such as that in *Atlas Roofing*, in which administrative adjudicators receive substantial deference as to facts when the government proceeds against a private party.³¹ The relevance of intertwinement with a federal regulatory scheme takes on added significance if we consider a central example of administrative adjudication that was available to Justice Brennan but not to Chief Justice Hughes when he wrote *Crowell*: adjudications by the National Labor Relations Board (NLRB). In a labor dispute within the Board’s jurisdiction, management and the union are the real parties in interest but do not have rights against one another that can be judicially enforced. Rather, the private parties must go to the NLRB, which will decide their dispute in a quite judicialized fashion, through a formal adjudication under the Administrative Procedure Act. If the Board finds in favor of the complaining party and issues an order, and the order is not complied with, only then are the Article III courts involved, when the Board brings an action to enforce its decision. In that action, the NLRB receives substantial deference on questions of fact.³²

Is the NLRB adjudication a case involving private rights? It has real parties in interest who are private. But it also involves the government, and a decision by the government that reflects the exercise of policy discretion with respect to particular facts. The NLRB’s understanding and implementation of the concept of an unfair labor practice is, and is meant to be, saturated with policy considerations. Moreover, the justification for the National Labor Relations Act was that labor disputes were not wholly private, but rather had major effects on the public at large. Indeed, the statute’s reach and the Board’s authority were tied to those effects on the public, because they were tied to disruptions of interstate commerce.³³

Viewed in this light, a proceeding before the NLRB is several steps away from the law-governed dispute involving effects only on particular parties that is the template for judicial resolution. Policy and discretion figure heavily in the NLRB’s decision-making process, and are supposed to do so because of the ramifications of those decisions for the public at large. When the Board’s decision comes before an Article III court, it is

30. *Id.* at 54-55 (footnote omitted).

31. *Atlas Roofing Co. v. Occupational Safety and Health Review Comm’n*, 430 U.S. 442 (1977).

32. A classic example of NLRB adjudication is *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), the canonical case on the deference given to the agency’s fact-finding.

33. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

entirely appropriate that the court defer to the agency on questions of policy, especially when the agency is supposed to be taking into account the interests of the public, not just the parties.³⁴ Indeed, in the deference given the agency on its policy decisions, and on factual determinations that are closely bound up with policy decisions, one sees the shadow of the political question doctrine. Whenever an agency adjudication is expected to turn in part on policy judgments and the consideration of effects on the public at large, that adjudication really has departed from the strict model of private rights that is the paradigm of a case proper to the Article III courts.

Justice Brennan's recasting of the category of public rights relies on the same aspects of a dispute that I have identified as central in this context: the extent to which it turns on policy and the extent to which its resolution affects the public at large, which is not adequately represented by any private party or by the courts. To be sure, Justice Brennan's version of the concept is less formalistic than was Chief Justice Hughes's, because it is easier to tell whether the government is a party to a case than whether the public is affected by a dispute. Justice Brennan seems to have seen the dangers of this deformatization, and writing for the majority in *Northern Pipeline* would have drawn a similarly formal line between cases governed by federal statutes and those governed by other sources of law. After losing that point in *Schor*, he wrote for the Court in *Granfinanciera* and did his best to limit the damage, stressing the need for a connection between a federal regulatory scheme and any disputes not governed by federal law if there was to be agency adjudication. Although the extended version of the concept of public rights that emerges from *Granfinanciera* probably stretches Justice Brennan's rationale past its limits, because in his view administrative adjudicators are not supposed to decide state-law questions on the basis of policy and effects on the public, it still invokes the basic principle that agency adjudication is justified by the presence of federal regulation in the public interest.³⁵

34. That agencies, and in particular the NLRB, adjudicate on the basis of policy concerns is basic to two of the most fundamental features of administrative law. As *Chenery II* recognizes, Congress may give agencies the choice of formulating policy in statute-like form through regulation or in common-law form through adjudication. *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). And agency interpretations of statutes formulated in formal adjudication receive deference under *Chevron* because the grant of formal adjudicatory authority is taken as a sign from Congress that the agency has been given the power to make policy and act with the force and effect of law. *United States v. Mead*, 533 U.S. 218 (2001).

35. Indeed, it may fairly be said that Justice Scalia, although he would draw the line in a different place and of course make it as bright as possible, is responding to the same underlying considerations. He would return to Chief Justice Hughes's definition of public rights cases: those involving the government.

It is clear that what we meant by public rights were not rights important to the public, or rights created by the public, but rights *of the public*—that is, rights pertaining to claims brought by or against the United States. For central to our reasoning was the device of waiver

With respect to rights created by state law and not connected to federal regulation, Congress has no authority to confer policy discretion on an agency and no claim to judge whether the supposedly private rights exist, in whole or in part, to serve the public interest. That is for the State to decide, at least outside the boundary set by *Schor*. Different rules for state-law rights, or at least for state-law rights that are not connected to federal regulation in the public interest, thus arise, not simply because of limitations on the extent of Congress's power, but more specifically because of the uses to which that power may be put: to authorize an agency to make policy in the public interest while at the same time adjudicating disputes.

As for constitutional rights, which were almost certainly on Justice Brennan's mind when he labored to rationalize this field in *Northern Pipeline*, their treatment too reflects the underlying theory of the judicial role. From *Crowell* onward, a majority of the Court seems to have assumed that the courts would not be bound by administrative adjudication of facts bearing on constitutional questions.³⁶ Contemporary judges generally assume that constitutional issues, or at least constitutional rights, are the special province of the judiciary. Either they regard constitutional questions as not involving any policy issues or, more realistically, they believe that any necessary policy-making on constitutional matters is to be done by the courts. In any event, they regard constitutional decision making as governed by law and not non-judicial discretion. And constitutional rights are preeminently individual rights, routinely characterized as protections for particular persons against the demands of the public at large.

2. Legislative Courts as Article III Adjuncts

This reasoning works best when adjudication is being done by executive agencies that also make policy and protect the public interest. It is less persuasive with respect to another class of non-Article III adjudicatory bodies, what may be called legislative courts narrowly speaking. Leading examples of the latter are the Tax Court and the United States Court of Federal Claims, each of which is a purely adjudicatory body that neither has, nor is part of an agency that has, policy-making responsibilities. The Tax Court decides disputes under a federal statute, but

of sovereign immunity, as a means of converting a subject which, though its resolution involved a "judicial act," could not be brought before the courts, into the stuff of an Article III "judicial controversy."

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 68 (Scalia, J., concurring in the judgment and concurring in part) (1989).

36. The "jurisdictional facts" exempted from administrative decision in *Crowell* itself were determinative of the extent of Congress's regulatory jurisdiction over admiralty matters, and hence bore on a constitutional question. 285 U.S. at 54-57.

it is a federal statute primarily concerned with raising revenue, not regulating conduct.³⁷ Most of the work of the Court of Federal Claims involves the application to the federal government of the ordinary law of contract and tort.³⁸ Those tribunals do not adjudicate in the service of regulation.

While legislative courts are not good candidates for the public rights rationale that applies to the NLRB, they are much more eligible for another justification discussed in *Crowell*: that they are subordinate parts of the Article III courts. As long as the Seventh Amendment does not require a jury trial, and it does not when the government is the defendant, Congress may have substantial authority to provide for subordinate fact-finders in Article III courts who are not Article III judges. This was one of the rationales offered by Chief Justice Hughes in *Crowell*. Although the compensation commission at issue in that case did not help decide disputes between the government and others, it did operate in cases under the admiralty jurisdiction, where no jury was needed. Chief Justice Hughes maintained that, in accordance with long-standing practice, granting limited finality on factual questions to the commission was permissible because life-tenured judges retained the “essential attributes of judicial power.”³⁹

Crowell does not rely on the point, but Article III vests the judicial power in courts, and not in judges directly. To be sure, the text immediately turns to the tenure of the judges, showing that they will in some measure make up the courts and strongly indicating that their role is very important; clerks of court are not mentioned at all, let alone given life tenure. Yet primacy by life-tenured judges, which Article III strongly implies, may leave some room for a lesser but non-trivial role for other judicial officers acting pursuant to congressional authorization. When non-life-tenured adjudicators can properly be treated as genuine judicial adjuncts assisting in the exercise of the constitutional judicial power, employing them does not raise any issues about the mandatory role of the Article III judiciary, for they are truly part of it.

37. The Tax Court, created by 26 U.S.C. § 7441 (2000), has jurisdiction over disputes under the revenue laws, 26 U.S.C. § 7442 (2000).

38. The United States Court of Federal Claims, created by 28 U.S.C. § 171 (2000), has jurisdiction over “any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort,” 28 U.S.C. § 1491(a) (2000).

39. *Crowell*, 285 U.S. at 51-53.

III

CONSTITUTIONAL STRUCTURE AND SUBSTANTIVE RIGHTS

Put the pieces together and a picture emerges. When a decision is being made that rests very much on law and not on discretion and that is highly particularized in its effect on individuals, the Constitution calls for judicial involvement. When a decision is being made that will affect a great many people all in the same way, judicial involvement is problematic, as it is when a decision rests very much on discretion and involves legal principles only to a limited extent. The constitutional doctrines that mandate judicial decision and those that limit judicial decision reflect a familiar understanding of the essence of what courts do. They decide concrete and particularized disputes involving the application of law.

This understanding of the judicial function reflects a common, if controversial, understanding of the institutional strengths and weaknesses of the courts. They are not politically representative organizations and so are not suited either to exercise policy discretion or to aggregate and reconcile the conflicting strands of interest that together make up the public interest. Because they are not representative, however, they should be able to stand firm in vindicating the legal rights of individuals, even when those rights conflict with other interests. Freed from the need to be selected as representatives of the public, judges can also be chosen for their technical expertise in the application of law to fact, a generalized expertise that does not necessarily qualify them to make important technical decisions in other areas.

It is also possible to offer a justification of the form the doctrines take, a justification based on fundamental features of the Constitution itself. The form of the doctrines concerns the way in which Article III principles, as the Court has developed them, handle the relationship between the Constitution and the ordinary law. Like other, more substantive, constitutional norms, those principles constrain but do not completely dictate the choices made by the sub-constitutional law-makers. Congress has substantial freedom in deciding what kind of legal entitlements and relations it will create, but some of its creations have mandatory structural consequences. Norms that produce very particularized, law-governed determinations by the government must be implemented to a substantial degree by the Article III courts. Whether to have such norms is optional, but how to adjudicate disputes under them is less so. And just as some legal rules, if established, are to be administered by the courts, so some legal rules, if established, must be administered by the executive. The standing doctrine means that while Congress may impose duties on the executive, it must to some extent leave the enforcement of those duties to the non-judicial political process.

A system in which constitutional rules constrain without dictating is especially useful with respect to government structure, because structural principles need to be sufficiently general to accommodate a wide variety of different substantive rules. Congress may adopt all kinds of different legal rules, and those rules must slot into the tripartite arrangement of the Constitution. Given substantial flexibility Congress can, for example, decide whether to create public benefit programs that differ from old property by creating entitlements between the government and private people, and then decide to have substantial judicial involvement in the administration of those programs. A more constraining Constitution might rule that out by making the principle of sovereign immunity non-optional, thereby precluding the creation of rights against the government and the forms of new property that rely on those rights.

This Constitution, as the Court today interprets it, gives the legislature more flexibility than that, but it does not give it complete flexibility in either direction. Sometimes Congress's substantive choices entail that the legal interests it creates be vindicated through the Article III courts, sometimes those choices may not be so vindicated. When it would prefer otherwise, and would wish to dispense with the courts with respect to private rights or recruit them with respect to public rights, Congress must take the bitter taste of constraint with the sweet of power.