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Implied Consent in Administrative Adjudication

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Abstract

Article III of the Constitution mandates that judges exercising the federal judicial power receive life tenure and that their pay not be diminished. Nonetheless, certain forms of adjudication have always taken place outside of Article III—in state courts, military tribunals, territorial courts, and administrative tribunals. Administrative law judges, employed by various federal administrative agencies, decide thousands of cases each year. A vast majority of the cases they decide deal with public rights, which generally include claims involving federal statutory rights or cases in which the federal government is a party. With litigant consent, however, the Supreme Court has upheld administrative adjudication of certain claims involving private rights. In the bankruptcy context, the Court has further determined that litigant consent may be implied.

This Note considers implied consent in the context of administrative adjudication. It examines various objections to it and argues that allowing parties to implicitly consent to administrative adjudication of claims involving private rights does not violate Article III. This Note offers a solution for how the consent exception to Article III should operate in the context of

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administrative adjudication by considering what constitutes implied consent and the weight of litigant consent in the determination of whether a claim involving private rights is proper for administrative adjudication.

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INTRODUCTION

Federal administrative agencies play a central role in administering and executing the law.[1] A majority of agencies are

1. *See* LEE MODJESKA, ADMINISTRATIVE LAW PRACTICE AND PROCEDURE § 1.3 (2022) ("[A]dministrative agencies today exercise substantial legislative and judicial power and authority.").

established by Congress[2] and are tasked with regulating a particular field, such as environmental protection, trade and business licenses, public health, and the list goes on.[3] They do this through both rulemaking and adjudication.[4] Administrative agencies adjudicate disputes involving the United States government as a party and disputes between private litigants,[5] the latter of which is the primary focus of this Note.

Currently, a majority of the discussion surrounding parties implicitly consenting to non-Article III adjudication takes place in the context of bankruptcy court adjudications.[6] This Note considers the role of implied consent in administrative adjudication of disputes between private parties, an area of scholarship that is largely unexplored. It concludes that in the wake of the Supreme Court's holding in *Wellness International Network, Ltd. v. Sharif*[7]—which held that parties may implicitly consent to having a bankruptcy judge adjudicate common law claims that were traditionally reserved to Article III courts[8]—it is likely that private parties may also implicitly consent to administrative adjudication of common law counterclaims. Expanding the conversation to include this issue is imperative,

2. *See* Allison Mather, Note, *Administrative Law: Whose Job Is It Anyway?*, 47 PEPP. L. REV. 143, 148 (2019) ("While administrative agencies derive authority from both the Legislative and Executive Branches, Congress creates most agencies.").

3. *See* Martin H. Redish, *Legislative Courts, Administrative Agencies, and the* Northern Pipeline *Decision*, 1983 DUKE L.J. 197, 217 (1983) (providing the "accepted principle that one purpose of administrative agencies is to have decisions made by those with the necessary expertise in the regulated subject matter").

4. *See* 32 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 8117 (2d ed. 2023).

5. *See* Michael Sant'Ambrogio, *Private Enforcement in Administrative Courts*, 72 VAND. L. REV. 425, 445 (2019) ("The majority of these cases [adjudicated by agencies] involve disputes between the government and beneficiaries of social welfare programs, federal employees, and government contractors.").

6. *See generally, e.g.*, Robert Miller, *Nothing New: Consent, Forfeiture, and Bankruptcy Court Final Judgments*, 65 DRAKE L. REV. 89, 96 (2016); Laura B. Bartell, *Stern Claims and Article III Adjudication—The Bankruptcy Judge Knows Best?*, 35 EMORY BANKR. DEVS. J. 13 (2019).

7. 575 U.S. 665 (2015).

8. *See id.* at 679 ("[W]e conclude that allowing bankruptcy litigants to waive the right to Article III adjudication . . . does not usurp the constitutional prerogatives of Article III courts.").

especially in light of the fact that many of the current Justices not only disagree with the consent exception to non-Article III adjudication,[9] but also support limiting administrative agencies' authority through any means necessary.[10]

Jarkesy v. Securities and Exchange Commission,[11] in which the Supreme Court recently heard oral argument,[12] is illustrative. The case stems from an administrative proceeding the SEC initiated against Jarkesy in which it determined he committed securities fraud.[13] On appeal to the Fifth Circuit, Jarkesy argued that administrative adjudication of the suit violated his Seventh Amendment right to a jury trial.[14] The court agreed.[15] It held that administrative adjudication of the securities fraud claim violated Jarkesy's Seventh Amendment right because it "is not the sort [of action] that may be properly assigned to agency adjudication under the public-rights doctrine."[16] In reaching this conclusion, the Fifth Circuit relied

9. *See id.* at 687–88 (Roberts, C.J., dissenting) ("Unfortunately, the Court . . . proceeds to the serious constitutional question whether private parties may consent to an Article III violation. In my view, they cannot."); *id.* at 707 (Thomas, J., dissenting) ("[B]ecause the only authorities capable of granting power are the Constitution itself, and the people acting through the amendment process, individual consent cannot authorize the Government to exceed constitutional boundaries.").

10. *See* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1018 (2023) (highlighting, in the context of nondelegation, that Justice Gorsuch, Justice Thomas, and Chief Justice Roberts have "indicated [they] would . . . place[] greater limits on Congress's ability to delegate issues to Agencies," and that "Justice Kavanaugh indicated an openness to reviving the nondelegation doctrine").

11. 34 F.4th 446 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2688 (2023).

12. SEC v. Jarkesy, No. 22-859 (U.S. argued Nov. 29, 2023).

13. *Jarkesy*, 34 F.4th at 449.

14. *See id.* at 451

> We agree with Petitioners that the proceedings suffered from three independent constitutional defects: (1) Petitioners were deprived of their constitutional right to a jury trial; (2) Congress unconstitutionally delegated legislative power to the SEC by failing to provide an intelligible principle by which to exercise the delegated power; and (3) statutory removal restrictions on SEC ALJs violate Article II.

15. *Id.*

16. *Id.* at 455. For a thorough discussion of the public rights doctrine, see *infra* Part I.B.1.

on *Granfinanciera, S.A. v. Nordberg*,[17] in which the Supreme Court held that, pursuant to the Seventh Amendment, the defendants had the right to a jury trial in the fraudulent conveyance action brought against them, even though Congress designated that type of claim for adjudication by bankruptcy courts.[18] The Court reached this conclusion despite recognizing the principle that "when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be 'preserved' in 'suits at common law.'"[19]

The Fifth Circuit's holding poses a threat to agency adjudication because of the way the Supreme Court's Seventh Amendment jurisprudence and non-Article III jurisprudence interact with each other. The two have long been intertwined because both rely, at least in part, on the public-rights doctrine.[20] The *Granfinanciera* Court even recognized as much, explaining that "the question of whether the Seventh Amendment permits Congress to assign . . . adjudication [of a cause of action] to a tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign [it] . . . to a non-Article III tribunal."[21]

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17. 492 U.S. 33 (1989).

18. *See id.* at 36 ("We hold that the Seventh Amendment entitles [petitioners] to a trial by jury, notwithstanding Congress' designation of fraudulent conveyance actions as 'core proceedings' in [the relevant statutory provision].").

19. *Id.* at 51 (quoting Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 455 (1977)); *see also* Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 455 (1977) ("Congress is not . . . prevented from committing some new types of litigation to administrative agencies . . . even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned instead to a federal court . . . . ").

20. *See Granfinanciera*, 492 U.S. at 53 ("Unless a legal cause of action involves 'public rights,' Congress may not deprive parties of litigating over such a right of the Seventh Amendment's guarantee to a jury trial."); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 284 (1855) ("[T]here are matters, involving public rights, . . . which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.").

21. *Granfinanciera*, 492 U.S. at 53.

Given the uncertainty surrounding the future of the administrative state and the high volume of cases decided by administrative law judges,[22] the impact of the Court's decision in *Wellness* on administrative agencies must be considered. This Note argues that, in most cases, an administrative agency adjudicating a case between two private parties involving public rights may also, with the parties' explicit or implicit consent, adjudicate private rights claims without violating Article III. There are, however, some circumstances in which Article III's structural and individual protections will be violated if a party who instituted a proceeding in front of an administrative agency is said to have implicitly consented to administrative adjudication of a common-law counterclaim brought against them.

I. ARTICLE III COURTS

Article III of the Constitution "both defines the power and protects the independence of the judicial branch."[23] Section one vests the judicial power of the United States "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[24] The "judicial Power of the United States"[25] is not further defined in the Constitution, and there is still no precise definition.[26] Nonetheless, it is generally accepted that the judicial power includes the authority to issue binding, final judgments.[27]

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22. *See* Judith Resnik, *"Uncle Sam Modernizes His Justice": Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607, 620 (2002) ("[A]dministrative law judges (ALJs) decide a volume of cases comparable to that of the life-tenured judiciary.").

23. Stern v. Marshall, 564 U.S. 462, 483 (2011).

24. U.S. CONST. art. III, § I.

25. *Id.*

26. *See* F. Andrew Hessick, *Consenting to Adjudication Outside the Article III Courts*, 71 VAND. L. REV. 715, 719–20 (2018) [hereinafter Hessick, *Consenting to Adjudication*] ("Neither Article III nor any other portion of the Constitution defines the 'judicial Power.' Moreover . . . any exact definition cannot be found in the old treatises, or any of the old English authorities.").

27. *See* William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1513–14 (2020) ("Article III's vesting of the judicial power . . . refers to the substance of judicial power (which is the power to bind parties and to

Section one of Article III also requires that Article III judges receive life tenure and that their pay not be diminished.[28] These protections are afforded to Article III judges "to ensure the independence of the Judiciary from the control of the Executive and Legislative Branches of government."[29] Article III, § 1 therefore "preserves to litigants their interest in an impartial and independent federal adjudication of claims within the judicial power of the United States, but also serves as 'an inseparable element of the constitutional system of checks and balances.'"[30]

The text of Article III, the separation of powers structure created by the Constitution, and early commentary on Article III all suggest that only Article III courts can exercise the federal judicial power.[31] Accordingly, "Congress may not withdraw from the Article III courts any matter which, from its nature, is the subject of a suit at the common law, or in equity, or in admiralty."[32] Despite this directive, state courts have always had concurrent authority to hear cases that could be brought in Article III federal courts, including those that arise under federal law.[33] Today, however, most federal adjudication

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authorize the deprivation of private rights) and more specifically to the judicial power 'of the United States' (rather than that of other governments).").

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

29. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 59 (1982).

30. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850 (1986) (quoting *N. Pipeline*, 458 U.S. at 58).

31. *See* Hessick, *Consenting to Adjudication*, *supra* note 26, at 722–24 (explaining that a "literal reading of Article III establishes that only Article III courts may exercise the federal judicial power" and that "parallel allocations of powers to Congress and the president," the "institutional design in the Constitution of the judicial branches," and "[e]arly commentary on Article III" confirm this).

32. Wellness Int'l Network Ltd. v. Sharif, 575 U.S. 665, 668 (2015) (internal quotations omitted).

33. *See* Baude, *supra* note 27, at 1515–16

> Article III leaves in place the systems of state courts . . . . These courts generally have concurrent authority to hear cases arising under federal law, to hear cases between citizens of different states, and so on—even though state court judges are nowhere to be found in Article III.

takes place not in Article III courts or in state courts but, rather, in non-Article III tribunals.[34]

II. NON-ARTICLE III TRIBUNALS

There are three basic types of non-Article III tribunals: Article I courts, administrative agencies, and Article III adjuncts, such as magistrate judges.[35] None of the judges sitting on these courts receive the salary and tenure protections necessary to qualify as Article III judges.[36] Nonetheless, for centuries, the Supreme Court has upheld adjudication of matters thought to be reserved to Article III courts by non-Article III federal tribunals.[37]

The three widely accepted exceptions are territorial courts, courts-martial, and cases involving "public rights."[38] Territorial courts are Article I tribunals established in United States

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Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 234 (1990) (clarifying that Article III does not prevent state courts from adjudicating "the nine classes of cases or controversies to which the federal judicial power extends").

34. *See* Resnik, *supra* note 22, at 620–21 ("Were one to count only Article I judges . . . the judges of the District of Columbia, bankruptcy and magistrate judges, and ALJs designated through the APA, the total is about 2350. That number overshadows the 834 life-tenured judgeships . . . ."); Hessick, *Consenting to Adjudication*, *supra* note 26, at 725 ("[M]ost federal adjudication does not occur in Article III courts. Instead, the bulk of federal litigation occurs before federal magistrate and bankruptcy judges and in various other Article I tribunals, such as the U.S. Tax Court, military tribunals, and administrative agencies.").

35. *See* Jack M. Beermann, *Administrative Adjudication and Adjudicators*, 26 GEO. MASON L. REV. 861, 864–65 (2019) ("There are two broad categories of non-Article III adjudicators in the federal government: those who function as adjuncts to the federal courts and those who work in federal agencies, both Executive Branch and independent.").

36. *See* Hessick, *Consenting to Adjudication*, *supra* note 26, at 717.

37. *See* Baude, *supra* note 27, at 1515

> [F]rom the beginning of the Constitution, it has been accepted that not every case that *can* be decided by the federal courts must be decided *only* by the federal courts . . . . [T]here are several forms of *federal* adjudication that seem to violate Article III's strict terms, and yet have been recognized and accepted for nearly two centuries or more.

38. *See* Beermann, *supra* note 35, at 878–79.

territories that are not part of any state.[39] Military Courts, or courts-martial, are Article I tribunals that adjudicate claims related to the military.[40] The public rights exception generally permits non-Article III adjudication of claims involving federal statutory rights or cases in which the government is a party.[41] Recently, however, the Court has recognized a fourth exception to Article III, which allows non-Article III tribunals to adjudicate cases involving private rights when the parties consent.[42]

A. *The Public vs. Private Rights Distinction*

To appreciate the significance of the consent exception, it is imperative to understand the distinction between public and private rights. Unfortunately, this is easier said than done. Even though Supreme Court jurisprudence surrounding public rights is relatively abundant, the Court has yet to provide a straightforward definition.[43]

The basic rule is that Congress may assign the adjudication of public rights, but not private rights, to non-Article III

39. *See id.* at 879 ("Territorial courts are non-Article III courts established in areas not part of any state where, after statehood, the need for federal judges would be greatly diminished.").

40. *See* Hessick, *Consenting to Adjudication*, *supra* note 26, at 754.

41. *See id.* ("[T]he public rights exception [is] an ill-defined category that roughly encompasses disputes involving federal statutory rights or in which the government is a party . . . .").

42. *See Wellness*, 575 U.S. at 668 (2015) ("Article III is not violated when the parties knowingly and voluntarily consent to adjudication by a bankruptcy judge."); *see also* Hessick, *Consenting to Adjudication*, *supra* note 26, at 726 ("A fourth exception depends on the consent of the parties. Under this exception, an Article I tribunal may adjudicate a dispute it otherwise could not if the parties consent to that adjudication.").

43. *See* Robert L. Glicksman & Richard E. Levy, *The New Separation of Powers Formalism and Administrative Adjudication*, 90 GEO. WASH. L. REV. 1088, 1130 (2022) ("The Court in Murray's Lessee did not clearly explain the distinction between public and private rights, leading to many different and conflicting perspectives on these concepts."). For examples of how the Supreme Court has avoided consistently defining public rights, see *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 (1982) and *Stern v. Marshall*, 564 U.S. 462, 488 (2011).

tribunals.[44] Claims to recover contract damages[45] and state law tort claims are examples of clearly established private rights disputes.[46]

The concept was first discussed in *Murray's Lessee v. Hoboken Land & Improvement Co.*,[47] a case in which the Supreme Court famously distinguished between public and private rights.[48] It explained that Congress cannot "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."[49] These are matters involving private rights. Alternatively, the Court explained, "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."[50]

Since its decision in *Murray's Lessee*, the Court has held that cases in which the federal government is a party,[51] cases involving the grant of a public franchise,[52] and "cases in which

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44. *See N. Pipeline*, 458 U.S. at 70 ("Our precedents clearly establish that *only* controversies in the former [public rights] category may be removed from Art. III courts and delegated to legislative courts or administrative agencies for their determination. Private-rights disputes, on the other hand, lie at the core of the historically recognized judicial power." (citations omitted)).

45. *See id.* at 71 ("[T]he restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case.").

46. *See Stern*, 564 U.S. at 493 (finding that a counterclaim for tortious interference "does not fall within any of the varied formulations of the public rights exception in this Court's cases" and "is instead one under state common law between two private parties").

47. 59 U.S. 272 (1855).

48. *See* Glicksman & Levy, *supra* note 43, at 1129 ("The court introduced this distinction in *Murray's Lessee v. Hoboken Land & Improvement Co.*, another pre-Civil War decision.").

49. *Murray's Lessee*, 59 U.S. at 284.

50. *Id.*

51. *See* Crowell v. Benson, 285 U.S. 22, 50 (1932) ("[T]he Congress, in exercising the powers confided to it, may establish legislative courts . . . to serve as special tribunals to examine and determine various matters, arising between the government and others . . . ." (internal quotations omitted)).

52. *See, e.g.*, Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 584 U.S. 325, 334–35 (2018) ("This Court has recognized . . . that the decision

the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert Government agency is deemed essential to a limited regulatory objective within the agency's authority,"[53] are all cases that may be adjudicated by non-Article III tribunals under the public rights exception. Conversely, cases in which one individual asserts a common-law claim against another individual are classified as private rights disputes and historically could not be adjudicated by non-Article III tribunals.[54]

III. EVOLUTION OF THE CONSENT EXCEPTION

The Supreme Court's modern jurisprudence justifying non-Article III adjudication is inconsistent.[55] It has generally alternated between applying a formal, categorical approach and a functional, balancing approach, but at times, has appeared to apply a combination of both.[56] The approach used determines whether consent is part of the constitutional analysis and, therefore, can be outcome-determinative. Given the Court's inability to consistently apply either approach and the fact that four of the current Justices were not on the bench the last time

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to *grant* a patent is a matter involving public rights—specifically, the grant of a public franchise. Inter partes review is simply a reconsideration of that grant, and Congress has permissibly reserved the PTO's authority to conduct that reconsideration.").

53. Stern v. Marshall, 564 U.S. 462, 490 (2011).

54. *See Crowell*, 285 U.S. at 51 ("The present case does not fall within the categories just described, but is one of private right, that is, of the liability of one individual to another under the law as defined."); Redish, *supra* note 3, at 203 ("'Inherently judicial' cases, on the other hand, are disputes between private litigants or private rights disputes. According to Justice Brennan, such cases 'lie at the core of the historically recognized judicial power,' and must, therefore, be heard by an Article III court." (quoting N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 70 (1982))).

55. *See* S. Todd Brown, *Consent, Coercion, and Bankruptcy Administration*, 11 J. BUS. & TECH. L. 25, 28 (2016) (describing the Supreme Court's jurisprudence considering the "various non-Article III bodies that appear to exercise judicial power" as a "body of law with 'frequently arcane distinctions and confusing precedents'" (citation omitted)); Glicksman & Levy, *supra* note 43, at 1124–25 ("[T]he current doctrine on 'non-Article III adjudication' . . . is convoluted and obscure . . . [and] many aspects of this doctrine are poorly explained and make little sense . . . .").

56. *See* Beermann, *supra* note 35, at 878–79 (describing the Court's two competing approaches to non-Article III adjudication).

the issue of non-Article III adjudication was considered, it is unclear which approach will be applied going forward.

This Part lays out, in broad brush strokes, the four major Supreme Court opinions considering the constitutionality of non-Article III adjudication. It is not an attempt to reconcile the two approaches the Court has alternated between, but merely an attempt to bestow order upon chaos.

A. *The Categorical Approach*

The categorical approach is so named because it proscribes that non-Article III adjudication is permissible for only three categories of disputes.[57] The exceptions to "the constitutional command that the judicial power of the United States must be vested in Art. III courts"[58] are territorial courts, courts-martial, and cases concerning public rights.[59] Non-Article III adjudication of a case violates the Constitution and is impermissible if it does not fall under one of the three categories.[60]

The Court justifies excluding these tribunals from Article III's command on the grounds that, in each circumstance, "the grant of power to the Legislative and Executive branches was historically and constitutionally so exceptional" that delegating adjudication of these cases to non-Article III tribunals was not threatening to "the constitutional mandate of separation of

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57. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 70 (1982) ("[T]his Court has identified three situations in which Art. III does not bar the creation of legislative courts.").

58. *Id.* at 63–64.

59. *See id.* at 64–67 (explaining that the Court has upheld "the creation by Congress of non-Art. III 'territorial courts,'" the power of Congress and the Executive "to establish and administer courts-martial," and "the constitutionality of legislative courts and administrative agencies created by Congress to adjudicate cases involving 'public rights'"); Anthony J. Casey & Aziz Z. Huq, *The Article III Problem in Bankruptcy*, 82 U. CHI. L. REV. 1155, 1173 (2015).

60. *See N. Pipeline*, 458 U.S. at 76

> Article III bars Congress from establishing legislative courts to exercise jurisdiction over all matters related to those arising under the bankruptcy laws. The establishment of such courts does not fall within any of the historically recognized situations in which the general principle of independent adjudication commanded by Art. III does not apply.

powers."[61] In *American Insurance Co. v. Canter*,[62] the Supreme Court upheld Congress's establishment of territorial courts on the ground that Article IV of the Constitution vests Congress with complete power over "territories not within the States that constituted the United States."[63] In *Dynes v. Hoover*,[64] the Court upheld Congress's establishment of military courts on the ground that the Constitution authorizes Congress to "provide and maintain a navy" and "to make rules for the government and regulation of the land and naval forces," names the President Commander in Chief, and exempts military offenses from the grand jury requirement.[65] The Court has explained that, because the constitutional provisions relied on in these cases give "the political Branches of Government extraordinary control over the precise subject matter at issue,"[66] Congress's establishment of the Article I tribunals is not a "broad departure from the constitutional command that the judicial power of the United States must be vested in Article III courts."[67] This rationale is somewhat troubling, however, because it is contrary to the long accepted principle that Congress may not exercise its Article I powers "in a way that violates other specific provisions of the Constitution."[68]

Justice Brennan applied the categorical approach in his plurality opinion in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[69]—the first case in the Supreme Court's jurisprudence concerning non-Article III tribunals.[70] The issue

61. *Id.* at 64.

62. 26 U.S. (1 Pet.) 511 (1828).

63. *N. Pipeline*, 458 U.S. at 65.

64. 61 U.S. (20 How.) 65 (1857).

65. *See id.* at 78–79 (explaining that Article 1, § 8, Article II, § 2, and the Eighth Amendment "show that Congress has the power to provide for the trial and punishment of military and naval offences" and that power "is given without any connection between it and the Third Article of the Constitution").

66. *N. Pipeline*, 458 U.S. at 66.

67. *Id.* at 63–64.

68. Saenz v. Roe, 526 U.S. 489, 508 (1999); *see also* Hessick, *Consenting to Adjudication*, *supra* note 26, at 756.

69. 458 U.S. 50 (1982).

70. *See* Note, *Executive Adjudication of State Law*, 133 HARV. L. REV. 1404, 1409 (2020) ("The formalist approach, best captured by Justice Brennan's plurality opinion in *Northern Pipeline Construction Co. v. Marathon*

presented was whether the Bankruptcy Act of 1978 violated Article III.[71] The Act established bankruptcy courts as a non-Article III tribunal with "jurisdiction over all civil proceedings arising under title 11 [the Bankruptcy title] or arising in or *related to* cases under title 11."[72]

Northern Pipeline filed suit against Marathon Pipe Line in bankruptcy court seeking damages for "alleged breaches of contract and warranty, as well as for alleged misrepresentation, coercion, and duress."[73] Marathon Pipe Line moved to dismiss the case, arguing that the Bankruptcy Act of 1978 "unconstitutionally conferred Art. III judicial power upon judges who lacked life tenure and protection against salary diminution."[74] The Court agreed.[75]

Justice Brennan's plurality opinion held that Congress's grant of jurisdiction to the bankruptcy courts was unconstitutional because none of the historically recognized exceptions to Article III applied.[76] This is because there is no "exceptional grant of power"[77] in the Constitution that would put the bankruptcy courts "beyond the reach of Article III."[78] Further, "the substantive legal rights at issue . . . cannot be deemed 'public rights'"[79] because the claims for damages for breach of warranty and misrepresentation came from state law and, accordingly, concerned private rights.[80]

Next, the Court considered whether Congress designed the bankruptcy courts to function as an adjunct to Article III courts

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Pipe Line Co., keeps intact the traditional bar on executive adjudication of state law claims.").

71. *See N. Pipeline*, 458 U.S. at 62 ("[W]e turn to the question presented for decision: whether the Bankruptcy Act of 1978 violates the command of Art. III that the judicial power of the United States must be vested in courts whose judges enjoy the protections and safeguards specified in that Article.").

72. *Id.* at 54 (internal quotations omitted).

73. *Id.* at 56.

74. *Id.* at 56–57.

75. *See id.* at 87.

76. *See id.* at 76.

77. *Id.* at 70.

78. *Id.* at 76.

79. *Id.* at 71.

80. *See id.* at 87 n.40 ("It is clear that, at the least, the new bankruptcy judges cannot constitutionally be vested with jurisdiction to decide this state-law contract claim against Marathon.").

rather than as a tribunal entirely outside of Article III.[81] The Court has upheld Congress's delegation of "historically judicial functions" to administrative agencies and magistrate judges as adjuncts to Article III courts.[82] In determining whether the bankruptcy courts were also an adjunct, the Court looked at "whether the Act has retained the essential attributes of the judicial power in Article III tribunals."[83]

The Court held that the bankruptcy court judges could not be considered adjuncts because "the Bankruptcy Act of 1978 ha[d] impermissibly removed most, if not all, of 'the essential attributes of the judicial power' from the Art. III district court."[84] Justice Brennan explained that administrative agencies and magistrates were proper adjuncts because, unlike the bankruptcy courts, they could not issue final judgments[85] and their findings were not subject to a deferential standard of review.[86] Accordingly, they "were subject to sufficient control by an Art. III district court."[87] In contrast, the bankruptcy courts at issue in *Northern Pipeline* had far more power.[88] Unlike the administrative agency and magistrate adjuncts, the bankruptcy

81. *See id.* at 77 ("The essential premise underlying appellants' argument is that even where the Constitution denies Congress the power to establish legislative courts, Congress possesses the authority to assign certain factfinding functions to adjunct tribunals.").

82. *See id.* ("As support for their argument, appellants rely principally upon *Crowell v. Benson*, 285 U.S. 22, 598 (1932), and *United States v. Raddatz*, 447 U.S. 667 (1980), cases in which we approved the use of administrative agencies and magistrates as adjuncts to Art. III courts.").

83. *Id.* (internal quotations omitted).

84. *Id.* at 87.

85. *See id.* at 85–86 ("[T]he agency in *Crowell* was required by law to seek enforcement of its compensation orders in the district court. In contrast, the bankruptcy courts issue final judgments, which are binding and enforceable even in the absence of an appeal.").

86. *See id.* at 85 ("[W]hile orders issued by the agency in *Crowell* were to be set aside if not supported by the evidence, the judgments of the bankruptcy courts are apparently subject to review only under the more deferential clearly erroneous standard." (internal quotations omitted)).

87. *Id.* at 79.

88. *See id.* at 86 ("[T]he 'adjunct' bankruptcy courts created by the Act . . . are exercising powers far greater than those lodged in the adjuncts approved in either *Crowell* or *Raddatz*.").

courts' jurisdiction under the Bankruptcy Act was akin to the jurisdiction exercised by Article III district courts.[89]

B. *The Balancing Approach*

The next time the court addressed the constitutionality of a non-Article III tribunal was in *Commodity Futures Trading Commission v. Schor*.[90] Writing for the majority, Justice O'Connor departed from the categorical approach Justice Brennan applied in *Northern Pipeline* and instead applied a functional, balancing approach.[91]

The facts of *Schor* are relatively straightforward. The Commodity Futures Trading Commission ("CFTC") is an administrative agency that adjudicates customers' reparations claims filed against commodity brokers for violations of the Commodity Exchange Act ("CEA").[92] The case turned on whether adjudication of common law counterclaims asserted in the reparations proceedings violated Article III.[93] The Court held that it did not.[94]

In contrast to Justice Brennan's articulation of the categorical approach in *Northern Pipeline*, the Court stated, "In determining the extent to which a given congressional decision to authorize the adjudication of Article III business in a non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch, the Court has declined to adopt formalistic and unbending rules."[95] Instead, Justice O'Connor explained, "we have weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have

89. *See id.* at 87.

90. 478 U.S. 833 (1986).

91. *See Executive Adjudication of State Law*, *supra* note 70, at 1410 ("The leading case for the functionalist view is *Schor*, authored by Justice O'Connor, which held that executive agencies could constitutionally adjudicate state law claims.").

92. 7 U.S.C. § 18; *see Schor*, 478 U.S. at 836.

93. *See Schor*, 478 U.S. at 835–36.

94. *See id.* at 851–52 ("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.").

95. *Id.* at 851.

on the constitutionally assigned role of the federal judiciary."[96] In light of precedent, it is difficult to understand the opinion as anything other than a rejection of the categorical approach Justice Brennan applied in *Northern Pipeline*, in favor of a "quintessentially functionalistic three-part test for administrative adjudication."[97] These factors include:

> [1] the extent to which the essential attributes of judicial power are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, [2] the origins and importance of the right to be adjudicated, and [3] the concerns that drove Congress to depart from the requirements of Article III.[98]

In considering the nature of the claim, Justice O'Connor recognized that the counterclaim asserted—a state law breach of contract claim—is a private right and "therefore a claim of the kind assumed to be at the core of matters normally reserved to Article III courts."[99] Under the categorical approach, this would be the end of the analysis—despite Justice O'Connor's claim that, in *Northern Pipeline*, "the absence of consent to an initial adjudication before a non-Article III tribunal was relied on as a significant factor in determining that Article III forbade such adjudication."[100] Under the balancing approach, however, this conclusion is not outcome determinative. Justice O'Connor explained,

> [T]he public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that could be conclusively determined by the Executive and Legislative Branches, the danger of encroaching on the judicial powers is less than when private rights, which are normally within the purview of the judiciary, are relegated . . . to administrative adjudication.[101]

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96. *Id.*
97. *See* Glicksman & Levy, *supra* note 43, at 1133–34.
98. *Schor*, 478 U.S. at 851 (internal quotations omitted).
99. *Id.* at 853 (internal quotations omitted).
100. *Id.* at 849.
101. *Id.* at 853–54 (internal quotations omitted).

Relying heavily on the parties' consent, the Court found that Congress's delegation of authority to the CFTC to adjudicate the counterclaim at issue "does not create a substantial threat to the separation of powers."[102] This is because "Congress gave the CFTC the authority to adjudicate such matters, but the decision to invoke this forum is left entirely to the parties."[103] Because the parties decided to have their claims adjudicated by an administrative agency instead of an Article III court, "the power of the federal judiciary to take jurisdiction of these matters is unaffected," and, "[i]n such circumstances, separation of powers concerns are diminished."[104]

C. *A Hybrid Approach*

The next case in the Supreme Court's jurisprudence on non-Article III adjudication is *Stern v. Marshall*.[105] This time, the Court seems to have applied a combination of the categorical and balancing approaches.[106]

In *Stern*, the Court considered whether a bankruptcy court could adjudicate a state common law counterclaim.[107] Vickie, also known as Anna Nicole Smith, was married to J. Howard, but he did not include her in his will.[108] After Howard passed, Vickie filed a petition for bankruptcy.[109] Pierce, Howard's son, filed a defamation complaint in the bankruptcy proceeding, alleging Vickie instructed her lawyers to tell the press that Pierce fraudulently gained control over his father's assets.[110] Vickie asserted a counterclaim for tortious interference against Pierce, alleging that he had tried to dissuade his father from

102. *Id.* at 854.

103. *Id.* at 855.

104. *Id.*

105. 564 U.S. 462 (2011).

106. *See* Casey & Huq, *supra* note 59, at 1175 ("*Stern*'s logic tracked *Northern Pipeline*'s formalist structure but elaborated on both the constitutional first principles at stake and the specific application of those rules to the bankruptcy context.").

107. *See Stern*, 564 U.S. at 487.

108. *Id.* at 469–70.

109. *Id.*

110. *Id.*

including her in his living trust.[111] After the bankruptcy court issued its judgment in favor of Vickie, Pierce appealed, arguing that the bankruptcy court did not have jurisdiction to enter final judgment on Vickie's counterclaim.[112]

The Supreme Court agreed with Pierce and held that the bankruptcy court's entry of final judgment on Vickie's counterclaim for tortious interference violated Article III because it was exercising "the judicial power of the United States in purporting to resolve and enter final judgment on a state common law claim."[113] In reaching this conclusion, the Court applied aspects of both the categorical and balancing approaches. The basis for its holding was that the claim was not one concerning public rights.[114] This is the correct conclusion under the categorical approach espoused by Justice Brennan in *Northern Pipeline* because it did not fall under one of the three historically recognized exceptions. In its analysis of whether Vickie's counterclaim was a public right, however, the Court employed the balancing approach. It articulated the factors considered by the Court in *Schor* and proceeded to distinguish the facts in *Stern* from those in *Schor*.[115] Most relevant to the discussion at hand, the Court noted that, "in contrast to the objecting party in *Schor*, Pierce did not truly consent to resolution of Vickie's claim in the bankruptcy court proceedings" because he "had nowhere else to go if he wished to recover from Vickie's estate."[116]

D. *A Return to the Balancing Approach*

Most recently, in *Wellness International Ltd. v. Sharif*, the Court considered "whether allowing bankruptcy courts to decide *Stern* claims by consent would impermissibly threaten the institutional integrity of the Judicial Branch."[117] In answering this question, the Court did not technically apply either

111. *Id.*

112. *See id.* at 470–71.

113. *Id.* at 487 (internal quotations omitted).

114. *See id.* at 493 ("Vickie's counterclaim . . . does not fall within any of the varied formulations of the public rights exception in this Court's cases.").

115. *See id.* at 491–94.

116. *Id.* at 493 (internal quotations omitted).

117. 575 U.S. 665, 678 (2015) (internal quotations omitted).

approach, as it ended up remanding the case to the Seventh Circuit, but it did provide the balancing approach as the appropriate analytical method.[118] It began by explaining that the "question must be decided not by formalistic and unbending rules, but with an eye to the practical effect that the practice will have on the constitutionally assigned role of the federal judiciary."[119] Next, it listed the factors considered by the Court in *Schor*[120] and held that Article III was not violated when litigants consented to bankruptcy court jurisdiction over claims that would otherwise be reserved to Article III courts.[121] The Court further held that party consent did not need to be express and, instead, may be implied.[122]

IV. THE CONSENT EXCEPTION DOES NOT VIOLATE ARTICLE III

While the Court appeared to signal a return to Justice Brennan's categorical approach in *Stern*,[123] *Wellness* indicates that this may not be the case.[124] This Part argues that the consent exception to non-Article III adjudication does not violate Article III. Subpart A explains the dual nature of Article III, § 1 and its different interpretations under the categorical and balancing approaches, and then it distinguishes Article III, § 1 from federal courts' subject matter jurisdiction. Subpart B explains why litigant consent to non-Article III adjudication does not violate the horizontal or vertical separation of powers principles. Finally, subpart C argues that both the categorical

118. *See* Casey & Huq, *supra* note 59, at 1181–82 ("Drawing on precedent from the administrative agency context, the *Wellness International* Court framed the issue in functionalist terms . . . .").

119. *Wellness*, 575 U.S. at 678 (internal quotations omitted).

120. *See id.* at 678–79.

121. *See id.* at 679 ("Applying these factors, we conclude that allowing bankruptcy litigants to waive the right to Article III adjudication of *Stern* claims does not usurp the constitutional prerogatives of Article III courts.").

122. *See id.* at 683 ("Sharif contends that to the extent litigants may validly consent to adjudication by a bankruptcy court, such consent must be express. We disagree.").

123. *See* Ralph Brubaker, *Non-Article III Adjudication: Bankruptcy and Nonbankruptcy, with and Without Litigant Consent*, 33 EMORY BANKR. DEVS. J. 11, 22–23 (2016) ("*Stern*, though, brought an abrupt and (for many) surprising resurrection of formalism in the jurisprudence of non-Article III adjudications.").

124. *See* Casey & Huq, *supra* note 59, at 1182.

and balancing approaches err in analogizing Article III to federal courts' subject matter jurisdiction because of the distinction between opting into and opting out of federal court.

A. *Article III's Structural and Individual Protections*

Article III, § 1 confers both an individual right and serves as a structural protection of "the constitutional system of checks and balances."[125] The individual right is to the "impartial and independent federal adjudication of claims within the judicial power of the United States."[126] The structural purpose of Article III is to bar "congressional attempts to transfer jurisdiction to non-Article III tribunals for the purpose of emasculating constitutional courts and thereby preventing the encroachment or aggrandizement of one branch at the expense of the other."[127]

Proponents of the categorical and balancing approaches disagree as to whether the individual protection can be waived. Those who subscribe to the balancing approach, like Justice O'Connor, believe that, although the structural protection is not subject to waiver, the individual right is.[128] Conversely, those who favor the categorical approach, like Justice Brennan, believe that the right to Article III adjudication can never be waived.[129] They reach different conclusions because they interpret the relationship between the structural and individual protections afforded by Article III differently.

In explaining why the individual protection can be waived, the *Wellness* Court compared it to other personal rights afforded by the Constitution, such as the right to a jury trial.[130] While

125. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850 (1986) (internal quotations omitted).

126. *Id.*

127. *Id.* (internal quotations omitted).

128. *See* Hessick, *Consenting to Adjudication*, *supra* note 26, at 726–27.

129. *See Schor*, 478 U.S. at 867 (Brennan, J., dissenting) ("I do not believe that a litigant may ever waive his right to an Article III tribunal where one is constitutionally required.").

130. *See* Wellness Int'l Network Ltd. v. Sharif, 575 U.S. 665, 675 (2015) ("As a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights—such as the right to a jury—that dictate the procedures by which civil and criminal matters must be tried." (internal quotations omitted)).

recognizing that a violation of the structural protection cannot be avoided altogether or completely resolved by party consent,[131] the majority explained that when "'the decision to invoke [a non-Article III] forum is left entirely to the parties and the power of the federal judiciary to take jurisdiction' remains in place," Article III's structural protection is not harmed.[132]

Unfortunately, the majority does not provide an adequate rationale for this conclusion.[133] In a footnote, the majority clarified that it was not relying on party consent to remedy a violation of Article III's structural protections.[134] Instead, it viewed party consent as evidence that a violation of Article III's structural protections never occurred in the first place.[135] Absent from this analysis is an explanation of *how* litigant consent carries out this function.

Dissenting in *Schor*, Justice Brennan explained that Article III's individual protections cannot be waived because "the structural and individual interests served by Article III are inseparable."[136] Under this view, any time an individual's rights are "harmed by the assignment of judicial power to non-Article III federal tribunals," the structural protection has already been violated because "the Legislative or Executive Branches have

131. *See id.* at 676 ("To the extent that this structural principle is implicated in a given case—but only to that extent—the parties cannot by consent cure the constitutional difficulty." (internal quotations omitted)).

132. *Id.* at 679 (quoting *Schor*, 478 U.S. at 855).

133. *See Article III—Separation of Powers—Bankruptcy Jurisdiction*—Wellness International Network, Ltd. v. Sharif, 129 HARV. L. REV. 201, 210 (2015) [hereinafter *Separation of Powers*] ("The majority's footnote-only analysis of the consent issue is unclear at best. It does not describe the degree to which litigant consent can influence the structural separation of powers analysis, nor does it provide a coherent theory of the connection between the structural and personal protections provided by Article III.").

134. *See Wellness*, 575 U.S. at 680 n.10 ("The principal dissent accuses us of making Sharif's consent dispositive in curing a structural separation of powers violation, contrary to the holding of *Schor*. That argument misapprehends both *Schor* and the nature of our analysis." (internal quotations omitted)).

135. *See id.*

136. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 867 (1986) (Brennan, J., dissenting).

encroached upon judicial authority and have thus threatened the separation of powers."[137]

The relevance of litigant consent under the balancing and categorical approaches is different because of the way each interprets the relationship between Article III's individual and structural protections. Under the balancing approach, parties may consent to non-Article III adjudication because it is a waiver of Article III's individual protection, which is separate from the structural protection.[138] Therefore, non-Article III adjudication of claims involving private rights may be constitutional even though none of the "historical exceptions" are applicable.[139] Under the categorical approach, party consent is completely irrelevant because the individual and structural protections cannot be separated.[140] Accordingly, non-Article III adjudication violates Article III's structural protections when a case does not fall under one of the three exceptions recognized in the *Northern Pipeline* plurality opinion.[141]

According to the Court, Article III's structural protection is akin to subject matter jurisdiction.[142] For an Article III court to adjudicate a case, both subject matter jurisdiction and personal jurisdiction are needed.[143] Subject matter jurisdiction is a

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137. *Id.*

138. *See id.* at 834 (majority opinion) ("As a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver.").

139. *See id.* at 857 ("[T]he limited jurisdiction that the CFTC asserts over state law claims . . . willingly submitted by the parties for initial agency adjudication does not contravene separation of powers principles or Article III.").

140. *See Schor*, 478 U.S. at 867 (Brennan, J., dissenting) ("Because the individual and structural interests served by Article III are coextensive, I do not believe that a litigant may ever waive his right to an Article III tribunal where one is constitutionally required. In other words, consent is irrelevant to Article III analysis.").

141. *See id.* at 859.

142. *See* Miller, *supra* note 6, at 104 ("The structural right to an Article III judge conferred by Article III, Section One of the Constitution is treated analogously to subject matter jurisdiction.").

143. *See* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701 (1982) ("The validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties. The concepts of subject-matter jurisdiction and personal jurisdiction, however, serve different purposes, and these different purposes affect the legal character of the two requirements." (citations omitted)).

non-waivable structural constraint on the courts, meaning that just because the parties to a dispute want their case adjudicated by an Article III court does not mean that it can be.[144] If the case is not one of the types enumerated in Article III, § 2[145] the federal court does not have jurisdiction to hear the case, and, regardless of the parties' wishes, it must be brought in state court.[146] Conversely, personal jurisdiction is an individual protection that is waivable, meaning, even if an Article III court cannot establish jurisdiction over a litigant, it can still adjudicate the case if the parties want it to.[147] Thus, when Article III courts have subject matter jurisdiction over a claim, the parties may bring it in federal court, thereby consenting to the court's jurisdiction. If they do not want to have the issue adjudicated by an Article III court, they can file in state court where it would remain, so long as the other party does not seek removal to federal court.

Proponents of the categorical and balancing approaches agree that when Article III's structural protection is implicated, "parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on

144. *See* United States v. Cotton, 535 U.S. 625, 630 (2002) ("This latter concept of subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived."); Miller, *supra* note 6, at 100 ("[T]he subject matter jurisdiction of a court is both unwaivable and unforfeitable.").

145. *See* U.S. CONST. art. III, § 2

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or Citizens thereof, and foreign States, Citizens or Subjects.

146. *See* Miller, *supra* note 6, at 100–01 ("[F]ederal courts are not courts of general jurisdiction. They possess only the jurisdiction and powers 'authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto.' . . . Parties cannot consensually confer federal courts with subject matter jurisdiction.").

147. *See Ins. Corp. of Ir.*, 456 U.S. at 703 ("Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived.").

federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, § 2."[148] Litigants cannot consent to a violation of either because they serve to promote the separation of powers among the three branches of the federal government.[149] Constitutional limitations on Article III courts' subject matter jurisdiction cannot be waived because "they serve interests the parties cannot be expected to protect, such as noninterference with matters reserved to the state courts."[150] Similarly, in the context of consenting to non-Article III adjudication, litigants "are unlikely to carefully weigh the long-term structural independence of the Article III judiciary against their own short-term priorities."[151] Both rationales are grounded in the idea that individual litigants generally make decisions based on what is most likely to lead to a favorable outcome for themselves.[152] If Article III's structural protection or a court's subject matter jurisdiction could be waived, even if waiver had the effect of violating the separation of powers among the branches of the federal government, it is highly likely that a litigant would waive it anyway if they believed doing so was in their best interest.[153]

The premise that litigants are unlikely to prioritize institutional interests over their individual interests makes sense. Litigants are unlikely to protect the states' interests promoted by limited federal court jurisdiction because it may be

148. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986); *id.* at 867 (Brennan, J., dissenting) (quoting the majority).

149. *See Miller*, *supra* note 6, at 100 ("The subject matter jurisdiction of federal courts is the most well-known of these structural principles. A lesser-known structural principle is federal courts' adjudicatory power under Article III, the principle analyzed by the majority in *Wellness* and another potential limitation to consent and forfeiture.").

150. David P. Currie, *Bankruptcy Judges and the Independent Judiciary*, 16 CREIGHTON L. REV. 441, 460 n.108 (1982).

151. Wellness Int'l Network Ltd. v. Sharif, 575 U.S. 665, 703–04 (2015) (Roberts, C.J., dissenting).

152. *Cf. Schor*, 478 U.S. at 851 ("When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.").

153. *See* Miller, *supra* note 6, at 105 ("To wit, an individual litigant will not protect the separation of powers among the governmental branches if doing so will not advance his or her case, even though such encroachments can undermine the fabric of the judicial process for all future litigants.").

at odds with their individual interests, or they may simply not care.[154] On the other hand, litigants' interests often align with the interests served by Article III's structural protections.[155] Article III's individual protections create judicial independence by insulating the judiciary from political pressure.[156] Consequently, in protecting their individual interests, litigants simultaneously protect the institutional interests served by Article III's structural protection. If an administrative tribunal was not functioning independently and was instead responding to political pressure from either the executive or legislative branches, it is unlikely that both parties would consent to administrative adjudication of the dispute.[157] Therefore, regardless of whether the individual or structural protections are inseparable, they are not violated when litigants consent to non-Article III adjudication.

B. *Separation of Powers Concerns*

1. Horizontal

The Court is more concerned about non-Article III adjudication of state law claims than it is about non-Article III adjudication of federal claims.[158] For example, in *Schor*, there was little to no discussion as to whether it was permissible for Congress to assign adjudication of the federal reparations claim

154. *See Executive Adjudication of State Law*, *supra* note 70, at 1441 n.312 ("States have a freestanding interest in how their citizens' rights and obligations are determined under their law (even if those citizens don't care) . . . .").

155. *See* Daniel J. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291, 304 (1990) ("In the present context, however, the strategic interests of litigants substantially coincide with institutional interests protected by article III.").

156. *See id.* at 302 ("Article III protects the rights of litigants precisely *through* its creation of judicial independence, just as more generally a system of separated powers is thought to promote individual liberty.").

157. *See id.* at 304 ("If there were a significant threat to a tribunal's adjudicatory independence, it is unlikely that *both* sides would consent to adjudication before it.").

158. *See* John M. Golden & Thomas H. Lee, *Federalism, Private Rights, and Article III Adjudication*, 108 VA. L. REV. 1547, 1551 (2022) ("Supreme Court justices have repeatedly suggested that the state law status of a dispute between private parties makes its assignment to a non-Article III tribunal especially suspect.").

to the agency.[159] The only issue was whether it was permissible for the agency to adjudicate the state common law counterclaim brought in response to the federal statutory claim.[160] Congress has the power to authorize non-Article III adjudication of federal statutory claims because it is "incidental to Congress' power to define the right that it has created" and therefore does not violate the separation of powers.[161] Conversely, state common law claims are not created by Congress and are "assumed to be at the 'core' of matters normally reserved to Article III courts."[162] Therefore, the "risk that Congress may improperly have encroached on the federal judiciary" [163] or attempted "to transfer jurisdiction to non-Article III tribunals for the purpose of emasculating constitutional courts"[164] is heightened when state common law claims are at issue. However, it is difficult to understand why this is the case.

In considering the assignment of adjudication of state law claims to non-Article III tribunals, it is unlikely that Congress would do so "for the purpose of emasculating constitutional courts."[165] Any reason for doing so would likely be benign, as there is little reason for Congress to be concerned with the substantive outcome of a claim arising under state law between two private parties.[166] Logically, Congress is likely to be more concerned with the substantive outcome of a claim arising under

159. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 855–56 (1986) ("[Congress's] decision to endow the CFTC with jurisdiction over such reparations claims is readily understandable given the perception the CFTC was relatively immune from political pressures and the obvious expertise that the Commission possesses . . . . This reparations scheme itself is of unquestioned constitutional validity." (internal quotations omitted)).

160. *See id.* at 854 ("[W]here private, common law rights are at stake, our examination of the congressional attempt to control the manner in which those rights are adjudicated has been searching.").

161. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 83 (1982).

162. *Schor*, 478 U.S. at 853.

163. *Id.* at 854.

164. *Id.* at 850 (internal quotations omitted).

165. *Id.* (internal quotations omitted).

166. *See* Beermann, *supra* note 35, at 891 ("Intuitively, it would seem that Congress would have little substantive concern over the outcome of private disputes arising under state law and that therefore the reasons it might assign some of those claims to non-Article III tribunals would be benign . . . .").

federal law.[167] For example, one scholar has raised the concern that Article I judges "beholden to the legislature" may decide cases in a way that promotes "the legislature's policy goals rather than what the law requires" by interpreting a statute to obtain a particular outcome.[168] Thus, it is puzzling how non-Article III adjudication of state law claims magnifies "[t]he risk that Congress may improperly have encroached on the federal judiciary."[169]

The assertion that disputes between two private parties over state-created common law rights are at the "core" of the judicial power and therefore cannot be assigned to non-Article III tribunals is equally troubling. States have always had, and always will have, an interest in determining what rights and obligations exist under their laws.[170] This is evidenced by the numerous debates during the drafting and ratification of the Constitution over the establishment of the lower federal courts and their ability to hear disputes involving state common law claims.[171]

The creation of the federal judiciary is the result of a compromise between the Federalists and Antifederalists.[172] The Federalists were in favor of establishing lower federal courts and opposed the creation of a federal judiciary comprised of only the Supreme Court.[173] The Antifederalists believed the creation

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167. *See id.* at 892.

168. Hessick, *Consenting to Adjudication*, *supra* note 26, at 736.

169. *Schor*, 478 U.S. at 854.

170. *See Executive Adjudication of State Law*, *supra* note 70, at 1405 ("States have a freestanding sovereign interest in which tribunals determine rights and obligations under their law, and the historical record demonstrates that they guarded this interest vigorously during the Constitution's drafting and ratification.").

171. *See* F. Andrew Hessick, *Federalism Limits on Non-Article III Adjudication*, 46 PEPP. L. REV. 725, 734 (2019) [hereinafter Hessick, *Federalism Limits*] ("Although the Framers agreed that a federal supreme court was necessary to ensure the uniform interpretation of federal law and to protect federal interests, inferior federal courts were more controversial.").

172. *See Executive Adjudication of State Law*, *supra* note 70, at 1422.

173. *See id.* at 1421 ("Federalists believed that both practical and principled reasons militated in favor of lower federal courts. First, a federal judiciary composed solely of a single supreme court would not be an effective counterweight to the other branches.").

of lower federal courts and a large federal judiciary were an unnecessary risk to state sovereignty.[174]

Article III expanded the authority of the federal judiciary beyond what previously existed under the Articles of Confederation.[175] During the Constitutional Convention, three states submitted plans for establishing the federal government.[176] The Virginia plan, which was the only one that required lower federal courts to be established, was adopted.[177] However, those against the creation of lower federal courts immediately passed a motion to eliminate them.[178] This back and forth led to the Madisonian Compromise.[179] Instead of requiring the establishment of lower federal courts, Congress was given the power to establish them later.[180] Antifederalists agreed to include the Madisonian Compromise in the final, ratified version of the Constitution on the condition that legislation would be passed that limited the power and scope of the lower federal courts.[181] The Judiciary Act of 1789 was this promised piece of legislation, and it did two important things.[182] First, the Federalists won the creation of lower federal courts and established the three-tier federal court system that operates

174. *See id.* at 1422 ("Antifederalists maintained, by contrast, that the risks posed by an expanded federal judiciary far outstripped any purported benefit offered by having lower federal courts. . . . [L]ower federal courts would conflict with state courts and invariably supplant them at the expense of state sovereignty.").

175. *See* Golden & Lee, *supra* note 158, at 1575.

176. *See Executive Adjudication of State Law*, *supra* note 70, at 1420.

177. *See id.* ("[T]he Virginia Plan won out . . . . Compared to the other options, the Virginia Plan had the broadest conception of a federal judiciary; it required the creation of lower federal courts where the other plans gave the national tribunal only appellate jurisdiction over state courts . . . .").

178. *See id.* at 1421.

179. *See id.*

180. *See id.*; *see also* James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 680–81 (2004).

181. *See Executive Adjudication of State Law*, *supra* note 70, at 1424.

182. *See id.* at 1423 ("To get a fair sense of the full original constitutional deal, it's important to read Article III and the Judiciary Act together . . . [because] Article III and the Judiciary Act were taken as a package item from the beginning.").

today.[183] Second, it left state courts as the default forum for adjudication of state law claims.[184]

Many of the concerns that motivated the Federalists to fight for the establishment of Article III district courts surrounded state court adjudication of federal issues. It is no secret that state and federal interests are not always aligned.[185] Recognizing this, the Federalists believed that state courts were not an appropriate tribunal for the adjudication of national issues because they were not accountable to the federal government and they were not capable of deciding federal issues impartially.[186] The fear was that state courts staffed by state judges would discriminate against federal interests when they diverged from the states' interests.[187]

The Federalists had little to no concern over state courts' competence to decide cases that only implicate state law. The Madisonian Compromise left state courts as the default forum for the adjudication of state law claims, and federal courts were given limited concurrent jurisdiction over the select category of cases that arise under federal question or diversity jurisdiction.[188] Diversity jurisdiction allows Article III courts to adjudicate disputes between citizens of different states when the claims arise solely under state law.[189] This was to ensure access to an impartial tribunal in suits between citizens of different states.[190]

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183. *See id.* at 1422.

184. *See id.* at 1425 ("[T]he bargain struck between Federalists and Antifederalists held that state courts would remain the default forum for state law claims and federal courts would have limited, concurrent jurisdiction over a defined band of cases.").

185. *See* Hessick, *Federalism Limits*, *supra* note 171, at 740 ("State and federal interests often diverge. State and federal officials may desire different policies and may have different views of appropriate allocations of power between the state and federal governments.").

186. *See Executive Adjudication of State Law*, *supra* note 70, at 1421–22.

187. *See* Hessick, *Federalism Limits*, *supra* note 171, at 740–41.

188. *See Executive Adjudication of State Law*, *supra* note 70, at 1425.

189. *See* Robert L. Jones, *Finishing a Friendly Argument: The Jury and the Historical Origins of Diversity Jurisdiction*, 82 N.Y.U. L. REV. 997, 999–1000 (2007) ("Diversity jurisdiction, which requires the federal courts to interpret and enforce state or foreign law in the adjudication of disputes between citizens of different states or nations, has been widely criticized as an unnecessary distraction from the federal courts' primary functions.").

190. *See* Golden & Lee, *supra* note 158, at 1579

Non-Article III adjudication of state common law claims remedies the Founder's concerns in the same way that Article III district courts do. The history of the federal court's establishment and limited jurisdiction over state common law claims demonstrate that Article III district courts were not established for the purpose of adjudicating state common law claims.[191] They were established so that state courts would not be deciding every federal or national issue, and federal agency adjudication still achieves this purpose. Moreover, administrative adjudication protects out of state parties from potentially biased state court judges in the same way as Article III courts because they are a federal tribunal.

2. Vertical

Although the Supreme Court primarily discusses the threat non-Article III adjudication poses to horizontal separation of powers,[192] scholars have also raised vertical separation of powers—or federalism—concerns.[193]

When an Article III court adjudicates a case involving state law, its authority to do so is usually based on diversity jurisdiction.[194] Unlike the history leading to the establishment

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> Federalists such as Hamilton argued that federal diversity jurisdiction should be offered to give assurance of an impartial tribunal . . . . [John Marshall] contended that there could be diversity of citizenship cases in which access to federal court would be critical to provide "justice to our citizens" and to avoid "disputes between the states."

191. *See id.* at 1610 ("The [Madisonian] [C]ompromise respected state courts' traditional monopolies over private rights adjudication while securing the creation of a national judiciary that could help establish an effective national government.").

192. *See Executive Adjudication of State Law*, *supra* note 77, at 1405 ("To date, in analyzing executive adjudication of state law, the Court has used a balancing test to figure out whether these executive tribunals encroach too much on the federal courts' territory and thus violate the horizontal separation of powers.").

193. *See* Golden & Lee, *supra* note 158, at 1549 ("Concerns with individual liberty and federal-level separation of powers provide the two dominant themes in judicial opinions and scholarship relating to the public rights doctrine."); *see also* Hessick, *Consenting to Adjudication*, *supra* note 26, at 745.

194. *See* Redish, *supra* note 3, at 208–09 ("[S]uits between private individuals involving state created common law rights . . . barely fall within

of lower federal courts, it is unclear why diversity jurisdiction ended up in the Constitution.[195] Antifederalists opposed its inclusion for two reasons. First, they worried it would reduce the role, prestige, and authority of state courts because the only cases left for them to adjudicate would be cases between citizens of the same state.[196] Second, they worried that federal courts hearing cases under diversity jurisdiction would apply federal law, which, after long enough, would end up displacing state law altogether.[197] Today, the primary federalism argument is that non-Article III adjudication of state common law claims with party consent reduces the number of cases being filed in state courts because litigants now have three options of where to proceed.[198]

Realistically, however, administrative adjudication of state common law claims is not a threat to the institution of state courts. For an administrative tribunal to hear a case, Congress must authorize it to adjudicate claims involving a specific, federal statutory right.[199] For example, Congress created the agency at issue in *Schor* as an "inexpensive and expeditious alternative forum through which customers could enforce the provisions of the CEA against professional brokers."[200] There are only fifteen administrative tribunals in which private parties may file a complaint against another private party

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the categories of cases to which the judicial power is extended in article III, section 2. Most of these cases fall only within the diversity jurisdiction . . . .").

195. *See Executive Adjudication of State Law*, *supra* note 70, at 1432 ("There isn't a settled explanation for why diversity jurisdiction is in the Constitution. Indeed, the records of the Constitutional Convention contain virtually zero debate on the matter.").

196. *See id.*

197. *See id.* at 1432–33.

198. *See* Hessick, *Consenting to Adjudication*, *supra* note 26, at 745 ("Permitting adjudication in Article I tribunals based on consent also undermines the compromise of Article III because those tribunals constitute a second category of federal tribunals that may displace the state courts.").

199. *See* Beermann, *supra* note 35, at 889–90 ("While Congress has assigned the adjudication of many federal statutory claims to Article III courts, such as antitrust claims and civil rights cases brought against state and local officials, Congress has provided for initial adjudication of some federal statutory cases in non-Article III tribunals.").

200. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 855 (1986).

without the agency's participation.[201] Moreover, any common law counterclaim filed in these administrative tribunals must be related to the federal statutory or regulatory scheme that permitted the initial complaint to be filed.[202] Thus, in the grand scheme of things, the limited situations in which administrative tribunals may adjudicate state common law claims are not a real threat to the jurisdiction and authority of state courts' power.

C. *Opting Out vs. Opting In to Federal Court*

Litigant consent to non-Article III adjudication does not violate Article III's structural protections and is distinct from federal court subject matter jurisdiction because of the difference between opting out of Article III jurisdiction and opting in to it. Article III courts have never been the baseline for constitutional adjudication, as litigants have always had the option to have their claims adjudicated in an alternative forum, namely, state courts.

As explained above, state courts were intended to be the primary tribunal for the adjudication of common law claims between private parties.[203] The requirement that Article III courts have subject matter jurisdiction over the parties' claims protects state courts' jurisdictional authority.[204] A party cannot consent to a violation of federal courts' subject matter jurisdiction because it functions as a restriction on the cases they can adjudicate.[205] However, a party has always had the

201. *See* Sant'Ambrogio, *supra* note 5, at 452 ("[F]ifteen administrative courts hear claims in which private parties may pursue enforcement actions with or without the agency's participation. Such cases most closely resemble private enforcement in federal court.").

202. *See, e.g.*, *Schor*, 478 U.S. at 856 (highlighting that the CFTC's authority to adjudicate counterclaims involving private rights was "limited to claims arising out of the same transaction or occurrence" as the reparations claim); *id.* at 852 (relying on *RFC v. Bankers Trust Co.*, 318 U.S. 163 (1943), in which there was "no constitutional difficulty in the initial adjudication of a state law claim by a federal agency, subject to judicial review, when that claim was ancillary to a federal law dispute"); *id.* (relying on *Katchen v. Landy*, 382 U.S. 322 (1966), in which the Court "upheld a bankruptcy referee's power to hear and decide state law counterclaims . . . when they arose out of the same transaction" as the initial bankruptcy claim).

203. *See supra* note 184 and accompanying text.

204. *See supra* note 188 and accompanying text.

205. *See supra* notes 144–146 and accompanying text.

option to proceed in state court even when federal courts have subject matter jurisdiction over the claims, and doing so has never been viewed as a violation of Article III.

That Article III courts were never the baseline for constitutional adjudication of cases involving common law claims is further demonstrated by the Supreme Court's history of upholding non-Article III adjudication based on party consent. As the Court in *Wellness* observed, "[a]djudication by consent is nothing new."[206]

One example of this is in the bankruptcy context. The Bankruptcy Act of 1800—the first United States bankruptcy law[207]—gave commissioners the power to adjudicate claim disputes.[208] If a party wanted the dispute to be adjudicated by an Article III court, they were required to opt out of the process established by the Act.[209] Similarly, the Bankruptcy Act of 1898 authorized referees to adjudicate bankruptcy claims so long as the litigants consented, either expressly or impliedly.[210] In his dissenting opinion in *Wellness*, Chief Justice Roberts attempted to distinguish the referees from the bankruptcy courts at issue in that case on the grounds that the referees did not have the authority to issue final judgments.[211] While this may be true, the distinction is only meaningful if the Article III judges were the ones with final decision-making authority.[212] They were not.[213] The referees' reports were essentially treated as binding

206. Wellness Int'l Network Ltd. v. Sharif, 575 U.S. 665, 674 (2015).

207. *See* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 6–7 (1995).

208. *See* Brown, *supra* note 55, at 52.

209. *See id.*

210. *See id.*

211. *See Wellness*, 575 U.S. at 702 (Roberts, C.J., dissenting).

212. *See id.* ("Article III courts do refer matters to non-Article III actors for assistance from time to time . . . . But under the Constitution, the ultimate responsibility for deciding the case must remain with the Article III court." (internal quotations omitted)).

213. *See* Brubaker, *supra* note 123, at 29–30

> *All* that was at stake, therefore, with the formal line Roberts was proposing was *who* performs the entirely formal act of entering the judgment in non-Article III consent adjudications—either a non-article III bankruptcy court . . . or an Article III district court (based upon a deferential appellate-like review of the non-Article III bankruptcy court's report).

on Article III district courts because they could only reverse the judgments under a deferential standard of review similar to appellate review.[214] Moreover, entering the judgment could be the extent of the Article III judge's involvement in the case.[215] Thus, the distinction does little to support the view that non-Article III adjudication of private rights disputes with litigant consent violates Article III.[216]

Magistrate judges also have the authority to adjudicate private rights disputes with party consent. Like administrative law judges and bankruptcy judges, they do not receive the tenure and salary protections afforded to Article III judges.[217] Magistrate judges are appointed by Article III judges for eight-year terms and are subject to removal only for cause.[218] Nevertheless, the Federal Magistrate Act[219] authorizes district court judges to refer a number of matters to magistrate judges for resolution.[220] Especially relevant to this discussion is magistrate judges' authority to enter final judgments in jury or nonjury civil matters as long as the parties consent.[221]

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214. *See id.* at 29.

215. *See id.* at 30

> The Article III judge need not have any involvement at all prior to the entry of judgment, as the Court in *Heckers v. Fowler*, 69 U.S. 123 (1864), approved a judgment entered under an order of reference that expressly provided "that on the filing of the report of said referee with the clerk of the court, judgment be entered in conformity therewith the same as if said cause had been heard before the court."

216. *See id.* ("Drawing such an extremely fine line, supposedly for the sake of protecting the institutional integrity of the Article III courts, seems a bit silly . . . . A majority of the Court in *Wellness*, therefore, was unwilling to extend *Stern's* formal prohibition to consent adjudications.").

217. *See* Hyungjoo Han, *Redefining Non-Article III Adjudicatory Authority Post* Stern v. Marshall, 18 U. PA. J. CONST. L. 725, 740 (2015).

218. *See* Hessick, *Consenting to Adjudication*, *supra* note 26, at 730.

219. 28 U.S.C. § 636.

220. *See* Han, *supra* note 217, at 739–40.

221. *See* 28 U.S.C. § 636(c)(1) ("Upon the consent of the parties, a full-time United States magistrate judge or a part-time United States magistrate judge who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case . . . .").

In *Peretz v. United States*,[222] the Supreme Court upheld magistrate judges' authority to preside over jury selection in criminal cases with party consent.[223] In doing so, the Court explained that individuals may waive their right to have an Article III judge preside over their jury selection.[224] As to the structural protections afforded by Article III, the court found none were implicated because the entire jury selection process "takes place under the district court's total control and jurisdiction."[225] Accordingly, "there is no danger that use of the magistrate involves a congressional attempt to transfer jurisdiction to non-Article III tribunals for the purpose of emasculating constitutional courts."[226]

Litigant consent to non-Article III adjudication of common law claims does not violate Article III's structural protections. A party cannot consent to adjudication by an Article III court without subject matter jurisdiction to hear a case because it is a limit on the court's power. Article III's structural protections, on the other hand, are not a limit on the power of other federal adjudicatory tribunals. As the history of state courts and non-Article III federal tribunals clearly demonstrate, parties have always had the option of proceeding in a forum other than the Article III courts, and such an option has never been considered a violation of the constitutional separation of powers.

V. OPERATION OF THE CONSENT EXCEPTION IN ADMINISTRATIVE ADJUDICATION

The Supreme Court has not addressed whether its holding in *Wellness*—that a party may implicitly consent to adjudication of common law claims by bankruptcy courts—extends to other

222. 501 U.S. 923 (1991).

223. *See id.* at 935 ("In sum, the structure and purpose of the Federal Magistrates Act convince us that supervision of *voir dire* in a felony proceeding is an additional duty that may be delegated to a magistrate under 28 U.S.C. § 636(b)(3) if the litigants consent.").

224. *See id.* at 937 ("Just as the Constitution affords no protection to a defendant who waives these fundamental rights, so it gives no assistance to a defendant who fails to demand the presence of an Article III judge at the selection of his jury.").

225. *Id.* (internal quotations omitted).

226. *Id.* (internal quotations omitted).

non-Article III tribunals.[227] When the issue is raised, however, it is likely the Court will reach the same conclusion in the context of administrative adjudication. This is especially likely considering that the first case in which the Court considered party consent in reviewing a challenge to a non-Article III tribunal's jurisdiction involved an administrative tribunal.[228]

This Part of the Note explores the questions left unanswered by the *Wellness* Court. Subpart A considers what constitutes implied consent by looking at examples of when the Court has found a party consented to non-Article III adjudication, examples of when it has found a party has not consented to non-Article III adjudication, and uses hypotheticals to determine where the line should be drawn. Subpart B considers the weight of litigant consent in the balancing approach applied by the Court in *Schor* and *Wellness*.

A. *What Constitutes Implied Consent*

The Court has not expressed whether it will always be the case that, by consenting to non-Article III adjudication of a particular claim, a party is consenting to non-Article III adjudication of any potential counterclaim that could be brought against them in the same proceeding. This Note argues that, in most cases, an individual who brings suit in an administrative proceeding and had the opportunity to file in state or federal court implicitly consents to agency adjudication of common law counterclaims brought against them if they appear to try the case and do not challenge the agency's authority.[229] In certain circumstances, however, the counterclaim will be so attenuated from the claim that initiated the agency proceeding that finding the litigant to have implicitly consented to non-Article III adjudication of the counterclaim will violate the individual

227. *See Separation of Powers*, *supra* note 133, at 207 ("But resisting the allure of bankruptcy exceptionalism, and categorical exceptions to Article III more generally, leaves more room for the application of *Wellness*'s pragmatism to future challenges to other non-Article III tribunals.").

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

229. *Cf.* Brown, *supra* note 55, at 52 ("[A] reviewing court will likely find knowing and voluntary consent where the litigant requests relief in bankruptcy court. This is consistent with *Schor* . . . and follows from invoking the court's jurisdiction to resolve a dispute.").

protections afforded by Article III. A claim is too attenuated when a party should not have reasonably anticipated the counterclaim in response to the type of claim they filed that instituted the agency proceeding. If the counterclaim is so attenuated that a party should not have reasonably anticipated it, the counterclaim is not a likely consequence of submitting the initial claim for administrative adjudication. In these situations, the party will not have "knowingly and voluntarily" consented to administrative adjudication of the counterclaim, as is required under the standard for consent articulated by the court in *Wellness*.[230]

The *Wellness* Court adopted the implied consent standard articulated in *Roell v. Withrow*.[231] The Court explained that "the key inquiry is whether 'the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case' before the non-Article III adjudicator."[232] Moreover, the Court emphasized that "a litigant's consent—whether express or implied—must still be knowing and voluntary."[233] In the context of a guilty plea, the Court in *Brady v. United States*[234] defined "knowingly" as "intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."[235]

While a party who physically appears before a tribunal has obviously appeared to try the case, subsequent filings in the litigation are also sufficient.[236] In *Wellness*, the Court directed the Seventh Circuit on remand to determine "whether Sharif's actions evinced the requisite knowing and voluntary consent, and also whether, as Wellness contends, Sharif forfeited his *Stern* argument below."[237] The Seventh Circuit concluded that Sharif forfeited his right to argue that he was entitled to an Article III adjudicator by waiting to raise the issue until his

230. Wellness Int'l Network Ltd. v. Sharif, 575 U.S. 665, 684 (2015).

231. 538 U.S. 580 (2003); *see Wellness*, 575 U.S. at 684–85.

232. *Wellness*, 575 U.S. at 685 (quoting *Roell*, 538 U.S. at 590).

233. *Id.* at 685.

234. 397 U.S. 742 (1970).

235. *Id.* at 748.

236. *See* Miller, *supra* note 6, at 91 n.4 ("Appearance should be construed broadly and could constitute a physical appearance or subsequent filings in the litigation." (citing *Roell*, 538 U.S. at 590)).

237. *Wellness*, 575 U.S. at 686.

reply brief.[238] Thus, Sharif's subsequent filings in the case constituted a voluntary appearance, and he consented to agency adjudication.

Consent is voluntary when it is "freely given, not subject to undue duress or coercion."[239] In the present context, consent requires that a party has the opportunity to proceed in a different forum, is aware of this opportunity, but chooses to file suit in an administrative tribunal.[240]

The facts in *Schor* set out the clearest example of when a party has consented to non-Article III adjudication of a counterclaim brought against them. Commodity Services ("Conti") initially filed its claim to recover Schor's debit balance in federal district court.[241] After invoking the CFTC's reparations jurisdiction by filing complaints against Conti, Schor also filed two motions in the Article III court proceeding asking the court to dismiss or stay the case on the grounds that "continuation of the federal action would be a waste of judicial resources and an undue burden on the litigants" because "[t]he reparations proceedings . . . will fully . . . resolve and adjudicate all the rights of the parties to this action with respect to the transactions which are the subject matter of this action."[242] The district court denied both requests, but Conti chose to dismiss the action and instead asserted a counterclaim for the debit balance in the reparations proceeding Schor had initiated before the CFTC.[243]

Here, the counterclaim is not too attenuated from Schor's claim that initiated the administrative proceeding such that he could not have reasonably anticipated it would be brought in said proceeding. Schor wanted the agency to adjudicate the counterclaim and knew that it would after Conti dismissed the

238. *See* Wellness Int'l Network Ltd. v. Sharif, 617 F. App'x 589, 591 (2015) ("By waiting until his reply brief to challenge the bankruptcy court's authority to decide the alter-ego claim, Sharif failed to preserve his challenge, and we will not address the issue.").

239. Brown, *supra* note 55, at 52.

240. *See* Miller, *supra* note 6, at 91 ("A litigant's consent to adjudication of an action means a litigant has a choice to proceed in an alternative forum, knows the options, and elects to proceed in the original forum.").

241. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 837 (1986).

242. *Id.* at 838 (internal quotations omitted).

243. *See id.*

claim it filed in federal court.[244] Moreover, because the counterclaim concerned the same debit balance Schor sought to recover in his complaint, the counterclaim arose "out of the same transaction or occurrence or series of transactions or occurrences set forth in the complaint"[245] Thus, his consent was "knowing and voluntary," and Article III's individual protections were not violated.

B. *The Weight of Litigant Consent*

The Court has not explained the role and weight of party consent in the balancing test it applied in *Schor* and *Wellness*. In holding that "litigants may validly consent to adjudication by bankruptcy courts,"[246] the *Wellness* Court emphasized that "the entire process takes place under the district court's total control and jurisdiction."[247] Bankruptcy court judges "are appointed and subject to removal by Article III judges," and "hear matters solely on a district court's reference, which the district court may withdraw."[248] Thus, the Court did not outright state that party consent alone authorized non-Article III adjudication.[249] Instead, it found that, "[s]o long as those judges are subject to control by the Article III courts, their work poses no threat to the separation of powers,"[250] and parties can consent to non-Article III adjudication of claims typically reserved to Article III courts.[251]

The Court has also emphasized the control of Article III courts over final judgments in the context of administrative adjudication. In *Schor*, the Court emphasized that the CFTC's

244. *See id.* at 849 ("Schor expressly demanded that Conti proceed on its counterclaim in the reparations proceeding rather than before the District Court, and was content to have the entire dispute settled in the forum he had selected until the ALJ ruled against him on all counts . . . ." (citation omitted)).

245. *Id.* at 850 (internal quotations omitted).

246. Wellness Int'l Network Ltd. v. Sharif, 575 U.S. 665, 674 (2015).

247. *Id.* at 679 (internal quotations omitted).

248. *Id.* (internal quotations omitted)

249. *See* Hessick, *Consenting to Adjudication*, *supra* note 26, at 728 ("To be sure, the Court did not go so far as to hold that the parties' consent alone authorized the bankruptcy court to adjudicate any claims.").

250. *Wellness*, 575 U.S. at 681.

251. *See id.* at 679.

orders "are enforceable only by order of the district court."[252] Similarly, in *Crowell v. Benson*[253]—the first case in which the Court upheld the use of administrative agencies as adjuncts[254]—the Act at issue provided that any worker's compensation order issued by the United States Employees' Compensation Commission was only enforceable by the federal district court in which the injury occurred.[255] Additionally, all compensation orders were appealable to the appropriate federal district court, which could then suspend the order or set it aside, in whole or in part.[256]

It is unlikely that the requirement that non-Article III adjudicators be subject to control by Article III courts will be difficult to satisfy in the context of administrative adjudication. Concerns regarding this factor are most likely to appear in challenges to adjudication by Article I courts. This is because, unlike orders issued by Article I courts, which are automatically enforceable, most orders issued by an administrative agency—though not all[257]—are not self-executing.[258] Instead, agencies usually have to seek enforcement of an order in federal court.[259] Current Justices on the bench in favor of restricting the authority of administrative agencies could be concerned that when Article III courts review agency orders, they defer to the

252. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 853 (1986).

253. 285 U.S. 22 (1932).

254. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 78 (1982) ("The use of administrative agencies as adjuncts was first upheld in *Crowell v. Benson*.").

255. *See Crowell*, 285 U.S. at 45.

256. *See id.* at 44 ("[A compensation order] may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order and instituted in the federal District Court for the judicial district in which the injury occurred." (internal quotations omitted)).

257. *See, e.g.*, 15 U.S.C. § 45(g) ("An order of the Commission to cease and desist shall become final [u]pon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time . . . .").

258. *See* Redish, *supra* note 3, at 216–17 ("The primary functional distinction between the work of administrative agencies and that of legislative courts is that unlike courts, agencies generally cannot issue automatically enforceable orders.").

259. *See id.* at 217.

agency's findings and conclusions.[260] Nonetheless, it is unlikely this factor will affect the weight of litigant consent in the balancing test.

Moreover, in both *Schor* and *Crowell*, the Court noted that the agencies only dealt with "a particularized area of law."[261] This is common across administrative agencies because they are often created, in part, "to have decisions made by those with necessary expertise in the regulated subject matter."[262] If a common-law counterclaim does not fall within an agency's specialization, this may be evidence that it is too attenuated from the claim that initiated the proceeding and administrative adjudication of the counterclaim may violate Article III.

For example, the claim Schor filed against Conti—which invoked the CFTC's reparations jurisdiction—was to recover a debit balance.[263] The state law counterclaim Conti filed in response was to recover the same debit balance.[264] Because the same debit balance was at issue in both claims and the CFTC had the responsibility of administering "a reparations procedure through which disgruntled customers of professional commodity brokers could seek redress for the brokers' violations of the Act or CFTC regulations,"[265] the counterclaim was within the "particularized area of law" that Congress intended the agency to have control over.[266]

On the other hand, had Conti's counterclaim been one similar to that asserted in *Stern*, the CFTC would no longer be dealing within the "particularized area of law" that Congress intended for the agency to operate in. Had Schor publicly alleged that Conti knowingly violated the CEA, and if Conti brought a counterclaim for defamation in response, the administrative law

260. *See id.* ("When an agency seeks enforcement of an order in federal court, the court is required both by statute and precedent to defer to the findings and conclusions of the agency.").

261. *Schor*, 478 U.S. at 853 (internal quotations omitted).

262. Redish, *supra* note 3, at 217.

263. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 837 (1986).

264. *See id.* at 838.

265. *Id.* at 836.

266. *See id.* at 856 ("The CFTC adjudication of common law counterclaims is incidental to, and completely dependent upon, adjudication of reparations claims created by federal law, and in actual fact is limited to claims arising out of the same transaction or occurrence as the reparations claim.").

judge would be presiding over a state common law claim that is entirely outside the "particularized area of law" that Congress intended for the agency to operate in, and the agency's adjudication of the counterclaim would violate Article III.

CONCLUSION

Implicit consent to administrative adjudication of common law counterclaims generally will not violate the Constitution. Consenting to administrative adjudication, or non-Article III adjudication generally, does not violate the individual or structural protections afforded by Article III. Litigants have always been free to have their cases adjudicated in a forum other than Article III courts, whether it be in state court or a different federal tribunal.

The Supreme Court's jurisprudence on non-Article III adjudication indicates that, as long as it adheres to the balancing approach, parties may implicitly consent to administrative adjudication of common law counterclaims. Such adjudication does not violate Article III's structural protections because Article III courts have never been the baseline for constitutional adjudication of common law claims. Under certain circumstances, however, a finding that a party implicitly consented to administrative adjudication of a common law counterclaim will violate the individual protections provided by Article III. If a claim is too attenuated from the initial claim that the administrative tribunal's adjudicatory authority is based on, the individual protections provided by Article III will be violated.