FAIR AND IMPARTIAL ADJUDICATION

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INTRODUCTION

Any legal system that purports to respect the rule of law must ensure the fair and impartial adjudication of disputes under the law. Classic accounts of the rule of law assume that courts should resolve such disputes.[1] However, this is too narrow. All forms of adjudication, not just by courts, need to be fair and impartial. In any event, no one could claim that courts or entities by that name are always fair and impartial. All legal systems need a guarantee of fair and impartial adjudication that applies to all forms of dispute resolution under law.

A dispute arising under law is a claim by one individual or entity that another individual or entity has acted in a manner contrary to law. Most commonly, such disputes revolve around historical facts. For example, A claims B did something that, if true, means B acted contrary to law; and B denies that he did what A claims. Sometimes adjudicators must resolve conflicting claims about the applicable law. And sometimes they must resolve both the facts and the law. Disputes arising under law often pit one private person or entity against another. Other times they involve a dispute between the government and a private person or entity. The difficulty of ensuring fair and impartial adjudication is greatest in this latter context, when the government squares off against some nongovernmental person or entity.

The U.S. Constitution contains two strategies for securing fair and impartial adjudication. One is reflected in Article III; the other is found in the Due Process Clauses of the Fifth and Fourteenth Amendments. Part I of this Article describes these constitutional strategies and explains how each was originally envisioned as securing fair and impartial adjudication of disputes under law. Part II describes how each strategy, over time, has failed to provide a general guarantee of fair and impartial adjudication. Part III concludes with some tentative thoughts about restorative measures that might correct, at least to some degree, the deficiencies that have emerged in assuring fair and impartial adjudication over time.

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[1] *E.g.*, A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 114 (8th ed., Liberty Fund 1982) (1915).

I. TWO CONSTITUTIONAL STRATEGIES

The U.S. Constitution contains two strategies for securing fair and impartial adjudication of disputes under law. The first strategy, which this Article labels the "Independent Adjudicator" model, is reflected in Article III. The second strategy, which this Article calls the "Common Law Procedures" model, is embodied in the Due Process Clauses of the Fifth and Fourteenth Amendments.

A. *The Independent Adjudicator Model*

Article III vests the "judicial Power" of the federal government in a system of federal courts.[2] Repudiating colonial practice, in which judges served at the pleasure of the king,[3] Article III stipulates that all federal judges, once appointed, "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."[4] This has been understood, from the beginning, to mean that federal judges can serve for life, subject only to removal by impeachment, and as long as they serve, they cannot have their pay reduced.[5] What these protections were designed to accomplish, and what they largely have accomplished, is the creation of a system of adjudication that enjoys a very high degree of independence from the political branches—the Congress and the President.

How does the Independent Adjudicator model work to ensure fair and impartial adjudication? The answer rests on a combination of what Article III expressly provides and what it does *not* provide. It expressly provides that federal judges, once appointed, are immune from direct oversight or influence by the political branches in how they decide disputes that arise under law. What it does not provide is any authority for federal judges to enforce the judgments they reach in resolving those disputes. This silence about enforcement authority was understood, from the beginning, to mean that Article III judges would be dependent on the executive to enforce their judgments

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[2] U.S. CONST. art III, § 1.

[3] On the colonial background, see BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 105–07 (1967); Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. PA. L. REV. 1104, 1104–11 (1976).

[4] U.S. CONST. art III, § 1.

[5] *See* MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 83–86 (1996).

and thus, indirectly, on Congress to provide sufficient funding to the executive to enforce their judgments.[6]

The importance of insulating Article III judges from direct political influence is the more familiar half of the strategy. As Alexander Hamilton wrote in *The Federalist* No. 78, judicial independence is necessary in order "to guard the Constitution and the rights of individuals from . . . dangerous innovations in the government, and serious oppressions of the minor party in the community."[7] Yet if Article III did no more than create a body of judges unaccountable to the political process, this would raise something of the opposite concern—the prospect of appointing "a bevy of Platonic Guardians" that would rule society in the name of its own vision of the good.[8] Hamilton was anxious to assure his audience that this would not happen. He emphasized that the federal judiciary would be "beyond comparison the weakest of the three departments of power."[9] It would have "no influence over either the sword or the purse" and thus would exercise "neither FORCE nor WILL, but merely judgment."[10] Indeed, he specifically noted the less familiar point about what Article III does *not* provide: the judicial branch it created "must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."[11]

Extrapolating a bit, Hamilton was arguing that a body of judges which enjoys complete *independence* from the political branches in rendering judgments, but complete *dependence* on the political branches in enforcing its judgments, will necessarily exercise "judgment" as opposed to "will" in deciding disputes that come before it. In modern terminology, Article III judges would naturally gravitate to a strategy of resolving disputes in a manner that is regarded as fair and impartial.

Hamilton did not spell out why a combination of independence-in-judging with dependence-in-enforcing would produce fair and impartial adjudication. Perhaps the explanation would go something like this: if adjudicators

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6 *See* Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87 (current version at 28 U.S.C. § 566(c) (2012)) (creating an executive office of United States Marshal, with one marshal in every judicial district, and charging the marshal with enforcing judicial orders).

7 THE FEDERALIST NO. 78 (Alexander Hamilton).

8 *See* LEARNED HAND, THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES 73 (1958) ("For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not."). Judge Richard Posner once wrote that judicial independence encourages the exercise of political power by judges, both by insulating "judges from retribution by the overtly political branches and by influencing the selection process in favor of politically well connected lawyers, many of whom have tastes and skills for functioning as political judges." RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 19 (1985). The passage was omitted from the second edition of the book. *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM, at xiv (2d ed. 1996).

9 THE FEDERALIST NO. 78, *supra* note 7.

10 *Id.*

11 *Id.*

are insulated from direct political pressure in how they decide individual cases, they will eschew favoritism toward politically favored parties or hostility toward politically disfavored ones. One can say they will resolve factual questions in the disputes that come before them in a manner that is impartial. At the same time, if adjudicators know they are ultimately dependent on the political branches for enforcement of their judgments, they will not stray very far, certainly not on a consistent basis, from settled expectations about the decisional norms that they must use in assessing the conduct of the parties that come before them. They will adopt, one can say, legal principles that are generally understood to be fair.[12]

The framers of the Constitution did not invent the Independent Adjudicator strategy out of whole cloth. The model they had in mind was the British judiciary, as it emerged after the Glorious Revolution—a model that was widely regarded as having been denied to the American colonies in the years before the Revolution.[13] But they made the strategy more explicit, and Hamilton went a long way towards explaining why it would secure fair and impartial adjudication.

One interesting aspect of the Independent Adjudicator model, certainly as it is reflected in Article III, is that it says nothing about the *procedures* that will be applied in resolving the disputes that come before the independent adjudicators. The Constitution implicitly leaves procedures up to Congress to adopt by law, or in default of action by Congress, for the adjudicators to adopt on their own initiative.[14] The intuition here seems to be that as long as the adjudicator is truly independent, and is constrained by the lack of enforcement power to interpret the law in a manner that conforms to settled expectations, the exact mix of procedures used in resolving disputes under law is a detail that can be allowed to evolve over time in light of experience. For example, the manner in which parties receive notice of complaints or motions filed by opposing parties can change as the technology of distributing information changes.

The great strength of the Independent Adjudicator model is that it relies exclusively on two highly formal, constitutionally enshrined conditions: The adjudicator must have life tenure and secure compensation but no independent authority to enforce its judgments. These conditions are not something that will be open to dispute on an ongoing basis. The institutional arrangements for appointing and sustaining a body of adjudicators will either meet these conditions or not. Moreover, once these institutional conditions are met, successive legislatures and adjudicators can work out all other issues about the procedures that must be followed in adjudication, in the light of

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12 *Cf.* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 246–52 (1994) (interpreting Hamilton as arguing that the federal courts will exercise restraint in interpreting the law because of their dependence on the executive to enforce their judgments).

13 *See* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 157–59 (2008); Smith, *supra* note 3, at 1144.

14 *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 14 (1825) (reasoning that federal courts have authority to adopt rules for their own governance absent legislation on the subject by Congress).

experience. Thus, if the model works in producing fair and impartial adjudication, it will do so in a largely self-regulating manner that allows for considerable flexibility in adopting different procedural formats in different contexts, and for experimenting with procedural innovations.

B. *The Common Law Procedures Model*

The second model for assuring fair and impartial adjudication is contained in the Due Process Clause of the Fifth Amendment, later extended to the states by the Fourteenth Amendment. In contrast to the Independent Adjudicator model, which has always been understood to entail the twin conditions of independence in adjudicating and dependence in enforcing judgments, the exact mandate reflected in the Due Process Clauses has long been a matter of controversy. One controversy is whether the Clauses are addressed solely to procedures, as suggested by the words "due *process* of law," or whether they also secure a set of substantive entitlements.[15] Another point of contention is whether the Clauses apply only to executive and judicial actors, enjoining them to enforce the procedures laid down by the "law of the land," or whether they also constrain legislatures to adopt procedures consistent with some independent normative conception of what procedures are "due" in any particular context.[16]

This Article will not add to the already extensive literature on these debates. Instead, it will start with the original understanding of due process as it applies in the procedural context. Here, it is reasonably clear, "due process of law" meant the process followed by courts at common law.[17] The right of due process meant one had the right to a common-law trial, typically a trial by jury, before one's life, liberty, or property could be taken by the state.[18] This understanding prevailed at least until the end of the nineteenth century.[19] Indeed, the common-law trial continues to this day to provide the paradigm of the procedural package thought best to ensure a fair and impartial adjudication of a dispute arising under law.

A good illustration of the use of the Common Law Procedures model is the 1970 decision in *Goldberg v. Kelly*.[20] In delineating the procedures required by due process in the context of an administrative decision to

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15 *See* Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 86–90.

16 *See id.* at 95–100.

17 *See generally* Edward J. Eberle, *Procedural Due Process: The Original Understanding*, 4 CONST. COMMENT 339 (1987).

18 *Id.*

19 As stated in one influential nineteenth century decision, due process of law "mean[s] that no person shall be deprived, by any form of legislation or governmental action, of either life, liberty or property, except as the consequence of some judicial proceeding, appropriately and legally conducted." Wynehamer v. People, 13 N.Y. 378, 434 (1856).

20 397 U.S. 254 (1970).

terminate welfare benefits, the Court held that the beneficiary must be afforded the following list of procedures: (1) "timely and adequate notice detailing the reasons for a proposed termination;" (2) "an opportunity to confront and cross-examine adverse witnesses"; (3) an opportunity orally to present his or her own evidence and argument; (4) the right to retain a lawyer for representation; (5) the right to a statement of reasons for the decision limited to evidence adduced at the hearing; and (6) a decision by an impartial decision maker, in the sense of a person other than the employee who made the charging decision.[21] One can see from this list that the Court has abstracted from what it regards as the core or essential elements of a common-law bench trial. The proceeding must be adversarial, with claims and evidence provided by one party, and counterargument and evidence by the other; lawyers and lawyerly methods like cross-examination are key instruments for uncovering the truth; the adjudicator must base his or her decision on the record adduced at the hearing; and the adjudicator must provide a statement of supporting reasons for the decision.

The Common Law Procedures model seeks to ensure fair and impartial adjudication by starting with a historical model assumed to have achieved fair and impartial adjudication: the common-law trial, as it had evolved by late eighteenth century. It then reasons that one can abstract the core or essential features of this model, and impose them as a matter of constitutional law on contemporary forms of adjudication. The model assumes that if contemporary forms of adjudication comport with these essential procedural elements, one can be confident that they will provide fair and impartial adjudication.

In effect, the Common Law Procedures model adopts a strategy for assuring fair and impartial adjudication roughly the opposite of the Independent Adjudicator model. The Independent Adjudicator model mandates a particular institutional design for a body of adjudicators—a combination of independence in deciding and dependence in enforcing—and assumes that if these design conditions are met, there is no need to mandate any particular package of procedures that the adjudicator must follow. The Common Law Procedures model ignores the question of institutional design, at least along the dimensions of independence and dependence of the body of adjudicators, but insists that the adjudicator adhere to a particular package of procedures in rendering its decisions.

Note that to one limited extent, the Common Law Procedures model seems to overlap with the Independent Adjudicator model. At least as explicated in *Goldberg*, the Common Law Procedures model requires an "impartial" adjudicator.[22] But an impartial adjudicator, as required by the Common

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21 *Id.* at 267–71.

22 *Id.* at 271. *See generally* Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455 (1986) (examining what procedures are necessary to preserve judicial independence).

Law Procedures model, is not the same as an independent adjudicator, as mandated by the Independent Adjudicator model. An impartial adjudicator, as understood by the Common Law procedures model, is one who is free of bias toward one of the parties.[23] An independent adjudicator, under the Independent Adjudicator model, is one who is free of political control by the other branches of government.[24] Both elements are directed at aspects of the identity of the adjudicator, to the end of increasing the odds that the adjudicator will reach fair and impartial judgments. But the Independent Adjudicator model demands a permanent condition of insulation from political pressure. The Common Law Procedures model, in contrast, requires only absence of bias in individual cases.

The great strength of the Common Law Procedures model is its wide application. Unlike the Independent Adjudicator model, which applies only to adjudication by federal courts, the Common Law Procedures model applies to state courts, military tribunals, administrative agencies, and any other entity authorized to resolve disputes that arise under law. Its implicit premise is that by transplanting the model of the common-law trial to these diverse contexts, fair and impartial adjudication can be secured in contexts extending far beyond the limited domain of the Article III judiciary.

II. TWO MODELS OF FAILURE

Neither the Independent Adjudicator model nor the Common Law Procedures model has succeeded in providing a comprehensive guarantee of fair and impartial adjudication in the United States. This is partly because of the limitations in the constitutional provisions themselves and partly because of changes in the scope of government and in the practice of adjudication that have occurred since the respective provisions were adopted.

A. *The Limited Domain of the Independent Adjudicator Model*

The Independent Adjudicator model has always been confined to one institution: the federal courts. As such, it has failed to provide a comprehensive solution to the need to assure fair and impartial adjudication of disputes under the law. Unlike the Common Law Procedures model, the Independent Adjudicator model does not extend to state court judges. Nor does it extend to military tribunals, bankruptcy judges, magistrate judges, administrative law judges, prosecutors, caseworkers, arbitrators, or any other persons who perform functions that can be described as adjudication under law. To some extent this failure was built into Article III. But it has also been exacerbated

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23 Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 876–77 (2009).

24 *See supra* notes 2–12 and accompanying text.

by judicial rulings that have reduced the potential scope of Article III's application.

In one crucial respect, the failure to universalize the Independent Adjudicator model was inevitable. When the Constitution was adopted, it was impossible to imagine that the framers would dictate to the existing state governments how they would appoint and define the tenure of state court judges. It was difficult enough to secure agreement on the creation of a new federal judiciary.[25] Indeed, the compromise that was reached on this score in the Constitutional Convention of 1787 required the creation of only one federal court: the Supreme Court.[26] The framers left it up to Congress to decide whether any other federal courts would be created.[27] Thus, it was possible that only one adjudicative body—the Supreme Court—would be protected by the Independent Adjudicator model. All other adjudication might take place in state courts (or potentially before other kinds of adjudicators) enjoying variable but in nearly all cases lesser degrees of independence.

Congress of course did create lower federal courts, and in doing so had to abide by the protections of Article III with respect to the judges named to those courts. But the jurisdiction of the Article III courts has always been more limited than allowed by the Constitution's enumeration of the types of cases and controversies that comprise the federal judicial power.[28] For example, the legislature did not give federal courts the authority to exercise original jurisdiction over cases presenting a federal question until 1875.[29] Such limitations have necessarily reduced the potential scope of the Independent Adjudicator model.

Supreme Court decisions soon reduced the scope of the Independent Adjudicator model even further. As soon as it was organized, the federal government gained control of a vast amount of territory, most of which was held for eventual establishment of additional states.[30] Congress created territorial judges to serve in these territories, and these judges (because it was assumed they would eventually be replaced by state court judges) were not given the life tenure enjoyed by regular federal judges.[31] The Supreme Court upheld

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25 *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 6–9 (7th ed. 2015) (describing the Constitutional Convention's discussion about the court system).

26 *See* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

27 *Id.*

28 U.S. CONST. art. III, § 2.

29 Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470 (codified as amended at 28 U.S.C. §§ 1331–32 (2012)).

30 *See generally* PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (1968) (recounting the history of American territory and land development).

31 GARY LAWSON & GUY SEIDMAN, THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY 139–50 (2004).

this exception to Article III.[32] The federal armed forces were small up until the Civil War, but they adopted the English practice of using military courts marshal, composed of military officers who did not enjoy life tenure or secure compensation, to try offenses charged against uniformed personnel.[33] The Court upheld this as another exception to Article III.[34]

The Court planted the seeds of what became a more consequential carve-out from Article III in a decision called *Murray's Lessee v. Hoboken Land & Improvement Co.*[35] The case involved a corrupt federal tax collector who had fled to England.[36] In an effort to recover some of the lost funds, the Treasury Department imposed a lien against some of the tax collector's property. Other creditors challenged the use of an executive tax lien as both a violation of due process and Article III; but both claims were rejected. The Court stated that the lien was an example of matters that involve "public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper."[37] This statement gave birth to what commentators and courts have described as the "public rights" exception to Article III.[38]

The notion of a public rights exception to Article III does not make sense in terms of the rationale for the Independent Adjudicator model. If "public rights" refers to cases pitting the government against private actors, these seemingly are the ones *most* in need of an independent adjudicator. Alternatively, one could perhaps understand a public rights exception as being limited to cases involving government grants of land, franchises, or public-assistance benefits. But *Murray's Lessee* involved a government effort to take away property, not to confer it. Over time, largely in bankruptcy cases, the Court came to understand the public rights exception as covering virtually everything other than claims of private right grounded in state law, such as contract and tort claims.[39] This too makes little sense. State law claims are ordinarily adjudicated in state court, where the Independent Adjudicator model does not apply. The Court's privileging of private rights of contract

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32 Am. Ins. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828).

33 Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169, 169 (1953).

34 Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1858).

35 59 U.S. (18 How.) 272 (1856).

36 For the background of the case, see Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 587 (2007), and Gordon G. Young, *Public Rights and the Federal Judicial Power: From* Murray's Lessee *Through* Crowell *to* Schor, 35 BUFF. L. REV. 765, 791 (1986).

37 *Murray's Lessee*, 59 U.S. (18 How.) at 284.

38 *See generally* Young, *supra* note 36.

39 *See, e.g.*, Stern v. Marshall, 564 U.S. 462, 488–93 (2011) (tort claim); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 69–72 (1982) (plurality opinion) (contract claim).

and tort thus confined the Independent Adjudicator model to the area where its rationale was arguably weakest, and denied it where it was greatest.[40]

The most recent expansion of the public rights exception—and corresponding shrinkage of the right to an Article III tribunal—occurred in *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*.[41] The Court held that previously granted patents can be cancelled by the Patent and Trademark Office ("PTO"), a non–Article III tribunal, subject to deferential review by an Article III court. The Court acknowledged that it had never "definitively explained" the difference between a public right and a private right, and that its prior decisions had not been "entirely consistent."[42] But it held that patents are a "public franchise," analogous to a franchise to build a toll bridge over navigable waters.[43] As such, the Court concluded that patents fall in the public rights category and can be cancelled by a non–Article III tribunal. Read for all it is worth, *Oil States* would seem to justify the use of non–Article III tribunals to hear federal takings of land by eminent domain, since nearly all land in the United States derives either from colonial charters or federal land grants, and thus could also be characterized as a "public franchise."[44] Alternatively, the Court could easily decide, given the lack of any clear definition of public rights, that *Oil States* should be limited to the invention patent context.

The largest and most consequential exception to the Independent Adjudicator model concerns adjudications by administrative agencies. The history of adjudications by administrative agencies is long and complex.[45] When Congress first created agencies to adjudicate claims under federal law, the assumption was that such adjudications were subject to de novo review by an Article III court.[46] Congress grew impatient with the duplication of effort and delay this entailed, and signaled that it wanted the courts to back off.[47] Eventually, the Supreme Court agreed that Article III courts would give significant deference to fact finding by agency adjudicators, but would review conclusions of law de novo.[48] This, of course, ignored that accurate determinations of fact are often critical to fair and impartial adjudication. But the retreat of Article III courts to something akin to an appellate review model in

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40 Martin H. Redish, *Legislative Courts, Administrative Agencies, and the* Northern Pipeline *Decision*, 1983 DUKE L.J. 197, 210 (1983).

41 138 S. Ct. 1365 (2018).

42 *Id.* at 1373 (first quoting *N. Pipeline Constr. Co.*, 458 U.S. at 69; then quoting *Stern*, 564 U.S. at 488).

43 *Id.* at 1375.

44 Indeed, the grant of federal public domain land to private claimants was historically denominated a "patent." *See* Nelson, *supra* note 36, at 578.

45 This paragraph draws from Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939 (2011).

46 *See id.* at 953–55.

47 *See id.* at 955–59.

48 *See id.* at 959–65.

administrative cases was well established by 1932, when the Court in *Crowell v. Benson*[49] upheld this reduced role for Article III courts, even in cases involving private rights.[50]

Crowell and the emergence of the appellate review model raises the question of just what it means to say that a case must be heard by an Article III tribunal. Professor Richard Fallon, among others, has argued that the right to an Article III tribunal is simply the right to appellate review by an Article III tribunal.[51] This neatly eliminates any conflict between Article III and the emergence of widespread administrative adjudication—as long as Congress provides for some form of judicial review. This would appear to be the formula adopted in 1946 by the Administrative Procedure Act ("APA"): the agency can decide the facts subject to deferential review by an Article III court, but the court will decide all questions of law de novo.[52] This division of functions effectively mimics the division between trial courts and appellate courts in civil law more generally.

Several decades later, without mentioning the APA, the Court in the famous *Chevron* decision[53] instructed that deferential review is also called for when agencies resolve unclear questions of law.[54] This puts agencies in the driver's seat with respect to both questions of law and questions of fact, with Article III courts retreating to the function of monitoring agencies for extreme outcomes that can be characterized as unreasonable.[55]

One might think based on this survey that there is little left of the Independent Adjudicator model, but that is not the case. Article III judges still regularly hear federal criminal prosecutions and constitutional claims, to the extent they go to trial.[56] Still, the domain of the Independent Adjudicator model, which was never even close to complete, has continued to shrivel,

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49 285 U.S. 22 (1932).

50 *Id.* at 50–51, 54. The Court acknowledged that the case involved private rights, and thus the public rights exception did not apply. *Id.* at 51. The decision cautioned that "jurisdictional facts" and facts that undergird constitutional rights must be resolved by Article III courts. *Id.* at 54–63. This limitation fell by the wayside in *St. Joseph Stock Yards Co. v. United States*, where the Court held that facts supporting a claim of constitutional right could be resolved based on the record compiled by an administrative agency. 298 U.S. 38, 53–54 (1936).

51 Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 943–49 (1988). For other proponents of the appellate review solution, see Nelson, *supra* note 36, at 614–20.

52 *Compare* 5 U.S.C. § 706 (2012) (opening sentence) ("the reviewing court shall decide all relevant questions of law"), *with id.* § 706(2)(E) (saying that the reviewing court shall "set aside" agency decisions "unsupported by substantial evidence").

53 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

54 *See id.* at 842–43.

55 For a powerful argument that *Chevron* is incompatible with judicial independence by requiring Article III courts to defer to the views of one of the parties to a dispute, see Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187, 1189 (2016).

56 *See* Nelson, *supra* note 36, at 610.

reducing its potential to realize the general aspiration for fair and impartial adjudication.

B. *The Evisceration of the Common Law Procedures Model*

The failure of the Common Law Procedures model has roughly the opposite explanation: It has come about not because of the shrinking of the domain of the model, but because of its expansion.

The Common Law Procedures model worked well enough as long as government at both the federal and state levels adhered to the three-branch structure of government embodied in the Constitution—legislature, executive, and judiciary. The legislature was charged with enacting general laws of prospective application, but under the Due Process Clause it could not deprive a person of life, liberty, or property without a judicial trial that comported with the common-law model.[57] The executive was charged with bringing enforcement actions and executing judicial judgments, but under the Due Process Clause it could not seize persons or property without affording the affected person the right to challenge the action in court.[58] Lastly, the judiciary was charged with resolving disputes under law between adverse parties, but under the Due Process Clause it had to adhere to the Common Law Procedures model in both form and substance.[59] Exceptions from the model were permissible if it was possible to find some analogue in common-law practice. It was on this basis that the Court rejected due process challenges to executive tax liens,[60] allowed states to commence criminal prosecutions by information rather than indictment,[61] and permitted summary action to seize tainted foodstuffs that posed a potential danger to public health.[62]

As in the case of the Independent Adjudicator model, the rise of the administrative state put the Common Law Procedures model under stress. There was no decisive moment when the Court held that a hearing by an administrative agency, as opposed to a common-law court, could satisfy due process. Early challenges to administrative orders typically sounded in

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57 *See* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1679 (2012) (discussing this paradox).

58 *See id.* at 1782, 1789.

59 Thus, for example, sham trials, trials distorted by a mob atmosphere, and confessions obtained by coercion were all deemed to be inconsistent with the substance of the common-law trial and thus to violate due process. *See, e.g.*, Brown v. Mississippi, 297 U.S. 278, 285–86 (1936) (coerced confession); Powell v. Alabama, 287 U.S. 45, 59 (1932) (mob influence); Moore v. Dempsey, 261 U.S. 86, 91–92 (1923) (sham trial).

60 Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856).

61 Hurtado v. California, 110 U.S. 516, 538 (1884).

62 N. Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306, 320 (1908).

substantive rather than procedural due process.[63] Procedural due process objections were first raised in cases involving state occupational licensing, which could be characterized as a public right, or workers' compensation schemes, which could be characterized as voluntary.[64] Eventually, it became settled that courts would defer to administrative determinations of fact.[65] By the time administrative hearings were directly challenged as violating procedural due process, the claim was brushed aside on the ground that such hearings had become settled practice.[66] Congress subsequently ratified this inversion of the original understanding with the enactment of the APA.[67] Congress and the Court regarded administrative hearings mandated by the APA as comporting with due process because the hearings imitated the process that applied in a common-law court.[68] They politely ignored the obvious difference between a common-law trial and an adjudication conducted by a subordinate agency official that imitates a common-law trial.

Two transformative factors interacted to further eviscerate the Common Law Procedures model as a significant constitutional protection of fair and impartial adjudication. The first, and probably most important, was a vast expansion in the types of disputes to which due process applies. The expansion began gradually, in cases involving administrative adjudication of tax deficiencies, denials of admission to the bar by character and fitness commissions, and administrative terminations of government employment or security clearances.[69] But in 1970, the trickle suddenly became a flood. If there was a watershed moment when the scope of due process ballooned, it was the decision in *Goldberg v. Kelly.* As previously noted, *Goldberg* adhered to the Common Law Procedures model insofar as it took the common-law trial

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63 *E.g.*, Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 235 (1897) (involving the necessity of compensation for land taken by the state for public use); Chicago, Milwaukee & St. Paul Ry. v. Minnesota, 134 U.S. 418, 441 (1890) (discussing compensation rates for transportation of goods).

64 *See, e.g.*, Booth Fisheries Co. v. Indus. Comm'n of Wis., 271 U.S. 208, 211 (1926) (rejecting due process challenge to administrative commission given final authority to determine workers' compensation awards because the scheme was elective); Reetz v. Michigan, 188 U.S. 505, 507 (1903) (rejecting due process challenge to administrative board responsible for issuing physician licenses).

65 *See* Merrill, *supra* note 45, at 971.

66 *See, e.g.*, Crowell v. Benson, 285 U.S. 22, 45–48 (1932); Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 439–40 (1930).

67 *See supra* notes 52–55 and accompanying text.

68 *See* Wong Yang Sung v. McGrath, 339 U.S. 33, 49–51 (1950) (holding that the APA applies to immigration deportation hearings in order to cure due process objections to the procedures that otherwise would apply; thus, implicitly assuming that a hearing that comports with the APA satisfies due process).

69 *See, e.g.*, Willner v. Comm. on Character & Fitness, 373 U.S. 96, 102 (1963) (applying due process analysis to denials of admission to the bar by character and fitness commissions); Cafeteria & Rest. Workers Union Local 473 v. McElroy, 367 U.S. 886, 888–89 (1961) (applying due process analysis to administrative terminations of government employment or security clearances); Phillips v. Comm'r, 283 U.S. 589, 591–92, 597 (1931) (applying due process analysis to administrative adjudication of tax deficiencies).

as the model of what due process requires.[70] The transformative aspect of the decision was its vast expansion of the range of interests subject to the Due Process Clauses. *Goldberg* extended due process protection to welfare benefits, which had previously been regarded as a "privilege" the government was free to offer or withhold at its discretion.[71] The decision recharacterized welfare payments as "a matter of statutory entitlement."[72] A footnote, which was evidently an afterthought, cited to the scholarship of Professor Charles Reich, then a professor at Yale, who suggested that such benefits could be regarded as a type of "new property."[73]

The Court quickly followed the *Goldberg* precedent by extending due process to a wide range of interests previously assumed to be outside the realm of protection, including a horse trainer's license,[74] public utility services,[75] eligibility for parole,[76] and the accumulation of good time credits toward early release from prison.[77] Scholars soon labeled the extension of due process to various government benefits and public employment schemes the "new property," in homage to Professor Reich.[78] Similarly, scholars dubbed the extension to prison and parole regulations the "new liberty," since the primary liberty of the beneficiaries had been extinguished by their conviction and sentence.[79] The result was very much a revolution. In 1975, Judge Henry Friendly noted, "we have witnessed a greater expansion of procedural due process in the last five years than in the entire period since ratification of the Constitution."[80] Professor Jerry Mashaw calculated that complaints alleging procedural due process violations increased by 350% between the 1960s and the 1970s.[81]

The second factor that contributed to the demise of the Common Law Procedures model was a gradual transformation in the nature of the common-law trial itself. When the Due Process Clauses of the Fifth and Fourteenth

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70 *See* Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1267–68 (1975); *supra* notes 20–22 and accompanying text.

71 *E.g.*, Bailey v. Richardson, 182 F.2d 46, 58 (D.C. Cir. 1950), *aff'd by equally divided Court*, 341 U.S. 918, 918 (1951).

72 Goldberg v. Kelly, 397 U.S. 254, 262 (1970).

73 *Id.* at 262 n.8 (quoting Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965); and citing Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964)).

74 Barry v. Barchi, 443 U.S. 55, 64 (1979).

75 Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9, 11 (1978).

76 Greenholtz v. Inmates of the Neb. Penal & Corr. Complex, 442 U.S. 1, 15 (1979).

77 Wolff v. McDonnell, 418 U.S. 539, 557 (1974).

78 *See, e.g.*, Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 918 (2000) ("Reich's articles denounced the rights/privileges distinction and urged that 'government largesse' be recharacterized as constitutionally protected 'new property' . . . ." (quoting Reich, *The New Property*, *supra* note 73, at 734–39)).

79 *See id.* at 964 (quotations omitted).

80 Friendly, *supra* note 70, at 1273.

81 JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 9 (1985).

Amendments were adopted, the phrase "common-law trial" essentially meant trial by jury.[82] Certainly this was true in criminal cases. Civil cases were complicated by the existence of equity and a few other things like executive tax liens.[83] But controversies between the individual and the state were largely mediated by officer suits sounding in tort, and here too the jury trial reigned supreme.[84] Over time, the common-law trial has been extensively modified, often by changes designed to enhance the protection of individuals in the name of due process. Due process has come to mean something more like "fundamental fairness," and courts have applied this understanding to the requirements of the classic common-law trial in order to make alterations in the name of fairness.[85] These changes have made jury trials very expensive, which has resulted in the rise of plea bargains replacing trials in criminal cases.[86] The procedures of equity, including discovery and motions practice, were transposed onto civil cases more generally; as a result, civil trials also became more expensive.[87] Settlement negotiations and arbitration accordingly expanded to take their place.[88]

A moment's reflection will reveal that if the range of interests protected by due process is radically expanded, and the costs of a conventional common-law trial are dramatically increased, the Common Law Procedures model will no longer work. It has to be replaced by something else. And indeed, this is what happened.

The coup was administered in *Mathews v. Eldridge*,[89] in which the Court upheld the statutory scheme for terminating Social Security disability benefits as consistent with due process. The scheme provided for a paper hearing—essentially an exchange of medical reports—prior to termination, with the possibility of a full adjudicatory hearing imitating a common-law trial only after termination.[90] The case encapsulates the two factors this Article emphasizes as leading to the demise of the Common Law Procedures model. The number of disability recipients is huge, and the potential number of termination decisions runs into nearly one million annually.[91] The costs of

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82 *See* Chapman & McConnell, *supra* note 57, at 1679; Eberle, *supra* note 17, at 346–47.

83 *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 282 (1856).

84 *See generally* Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396 (1987) (outlining the history of an officer's breach of legal duty and the remedies available to the harmed).

85 *See, e.g.*, Taylor v. Kentucky, 436 U.S. 478, 485–86 (1978) (due process as fundamental fairness requires explicit instruction of presumption of innocence in criminal trial).

86 *See* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 7, 302 (2011).

87 *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 477 (2004).

88 *See id.* at 517.

89 424 U.S. 319 (1976).

90 *Id.* at 337–39.

91 The Social Security Administration receives over 2 million new disability claims each year and terminates nearly 900,000 existing claimants. Soc. Sec. Admin., *Disabled Worker Beneficiary Statistics by Calendar Year, Quarter, and Month*, SELECTED DATA FROM SOCIAL SECURITY'S DISABILITY PROGRAM, https://www.ssa.gov/oact/STATS/dibStat.html (last visited Jan. 18, 2019).

providing a full adjudicatory hearing before termination would likely swamp the administrative resources of the Social Security Administration, given the high percentage of recipients who would demand a hearing before termination, if only to delay the inevitable. The Court responded to this harsh reality by adopting a cost–benefit test for determining which features of a common-law trial are required by due process in any given context.[92] The test requires courts to select the package of procedures that would reduce the sum of error costs and the costs of administering the system.[93] Applying this test in a back-of-the-envelope fashion informed largely by the government's brief, the Court in *Eldridge* concluded that the combination of a medical review before termination and an option for a hearing imitating a common-law trial after termination was constitutional.[94]

The new cost–benefit approach to due process rationalized rulings such as *Goss v. Lopez*,[95] which held that due process required a public school principal, before suspending a student for misconduct for fewer than ten days, to orally inform the student of the reasons for the suspension and give the student a chance "to present his side of the story."[96] Whatever one thinks of the suggested procedure as a matter of educational policy, it bears only the faintest resemblance to a common-law trial. And inevitably so; it would be completely unworkable to hold a common-law trial before suspending a student for ten days or less.

Some commentators attacked the holding in *Eldridge* for treating the right to a hearing as a purely utilitarian matter and ignoring "dignitary" values.[97] But this criticism penetrates only partway into the sea change wrought by the decision. Before *Eldridge*, due process was regarded as an individual right. Every person was guaranteed that they would receive a common-law trial—or at least something imitating it—before being deprived of life, liberty, or property. *Eldridge* transformed this individual right into a requirement of social welfare maximization. The decision focused on the welfare of beneficiaries as a group, not the individual beneficiary before the Court.[98] But even this understates the extent of the transformation. The Court effectively recast due process as a requirement that hearing procedures advance the social welfare of organized society as a whole.

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92 *Eldridge*, 424 U.S. at 334–35.

93 *Id.* at 335.

94 *See id.* at 349.

95 419 U.S. 565 (1975).

96 *Id.* at 581.

97 *See, e.g.*, Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 885–86 (1981).

98 *Eldridge*, 424 U.S. at 342 (discussing financial interests of disability recipients in general); *id.* at 346–47 (discussing overall error rates in termination decisions); *id.* at 347–48 (discussing overall fiscal and administrative burden on the government likely to be caused by pre-termination hearings).

It did not take long for a more devastating critique of the *Eldridge* transformation to appear, delivered most effectively by Judge Frank Easterbrook, before he became a judge.[99] Easterbrook's point was simple: if the objective is to determine the package of procedures that maximizes social welfare, why is this a job for judges rather than the legislature? Easterbrook noted the paradox that the Court has given virtually dispositive deference to legislatures in deciding whether to create welfare schemes and how much to fund them.[100] These are regarded as matters of social policy, as to which the legislature is assumed to have superior competence and legitimacy. Why then should the package of procedures for implementing these systems—now assumed by *Eldridge* to be a matter of social welfare maximization—be assigned to judges? As Easterbrook wrote:

> Substance and process are intimately related. The procedures one uses determine how much substance is achieved, and by whom. Procedural rules usually are just a measure of how much the substantive entitlements are worth, of what we are willing to sacrifice to see a given goal attained. The body that creates a substantive rule is the logical judge of how much should be spent to avoid errors in the process of disposing of claims to that right.[101]

Although Easterbrook's critique was devastating, the Court (unsurprisingly) did not immediately confess error. The fact remains, however, that the Court over time has become decidedly more deferential to legislative judgments about appropriate packages of procedures in the context of administrative hearings, a retreat consistent with the Easterbrook critique.[102] For example, in *Walters v. National Ass'n of Radiation Survivors*,[103] the Court upheld a statute dating from the Civil War era that prohibited veterans from paying more than $10 for the services of a lawyer in challenging a decision by the Veterans Administration.[104] For decades the provision eluded any challenge based on due process, because veterans' benefits were regarded as privileges rather than property. But once *Goldberg* and its progeny expanded the domain of property to include government benefits, a due process challenge was inevitable. The ridiculously low cap on attorney fees would surely run afoul of the Common Law Procedures model, which included the right to hire a lawyer of one's choice for an agreed fee in order to do battle with the government. But it passed muster under the Court's application of the *Eldridge*

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99 Easterbrook, *supra* note 15, at 85, 88.

100 *See id.*

101 *Id.* at 112–13.

102 *See* Thomas W. Merrill, *Jerry L. Mashaw, The Due Process Revolution, and the Limits of Judicial Power*, *in* ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY L. MASHAW 39, 42–45 (Nicholas Parrillo ed. 2017) (documenting the decline in the Supreme Court's enforcement of procedural due process claims).

103 473 U.S. 305 (1985).

104 *Id.* at 307–08, 334.

cost–benefit test.[105] Indeed, to this Author's knowledge, the Court has never invalidated a procedural package adopted by Congress in a "new property" or "new liberty" type case. Decisions reviewing state administrative procedures have also become much more deferential, although a few decisions overturning state procedures, often on ambiguous grounds that mix up procedure with substantive disagreement with state policy, do exist.[106]

If a calculus designed to maximize social welfare determines the meaning of due process, and legislatures and agencies are better at making determinations of social welfare than courts, then courts should give something like *Chevron* deference to legislatures and agencies with respect to the meaning of due process in any given context. Indeed, Professor Adrian Vermeule has recently argued for just this conclusion.[107] However startling, the conclusion follows logically from the Court's premises. It is also a reasonably fair characterization of the reality of procedural due process on the ground. The Common Law Procedures model, if not dead, is surely greatly weakened.

III. POSSIBILITIES FOR RESTORATION

Is there anything to be done by way of restoring, or at least halting the decline in, the constitutional strategies for assuring fair and impartial adjudication? In general, there is little room for optimism here. Constitutional reform is supposed to occur through the process of formal amendment, as set forth in Article V.[108] This has always been difficult, and appears to be increasingly so, given growing political polarization mirrored by geographic polarization.[109] The de facto method of constitutional change today is revision in the Supreme Court's interpretation of the Constitution's text.[110] This does not work too well either, given the path-dependent nature of judicial precedent. There have been some spectacular course corrections in the past, such as *Erie Railroad Co. v. Tompkins*.[111] But the general pattern is that early interpretations chart a path, which congeals into a settled practice that the Court is unwilling to change for fear of undermining the notion that its interpretations are binding on everyone else. There are, however, some interpretative clarifications that are within the realm of the conceivable, and which might do something to shore up the constitutional protection of fair and impartial adjudication. If these interpretations were supplemented by a change in the

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105 *Id.* at 319–26.

106 *See, e.g.*, Logan v. Zimmerman Brush Co., 455 U.S. 422, 424, 437–38 (1982) (invalidating a state disability statute that had the effect of terminating claims if not processed in a timely fashion by a state agency).

107 *See* Adrian Vermeule, *Deference and Due Process*, 129 HARV. L. REV. 1890, 1930–31 (2016).

108 U.S. CONST. art. V.

109 Thomas W. Merrill, *Interpreting an Unamendable Text*, 71 VAND. L. REV. 547, 550–51 (2018).

110 *See id.* at 552.

111 304 U.S. 64 (1938). In *Erie Railroad*, the Court overturned the practice of applying general common law rather than state law in federal diversity jurisdiction cases. *Id.* at 80.

way in which administrative adjudication is conducted, an even more significant step could be taken toward restoring the assurance of fair and impartial adjudication.

A. *Clarifying the Public Rights Exception*

With respect to the Independent Adjudicator model, the most plausible interpretative clarification involves the nebulous public rights exception. The exception has never been clearly defined. In the foundational case, *Murray's Lessee*, "public rights" evidently referred to a right of public officials to act in a way detrimental to particular individuals.[112] But the more general understanding, reflected in a variety of contexts over time, is that public rights refer to benefits that the government, in its discretion, can either offer to its citizens or not.[113] Public rights in this sense are contrasted with private rights, which refer in this context to rights of the type that were recognized at common law before the adoption of the Constitution and which the Ninth Amendment says the Constitution does not deny or disparage.[114] These are, most prominently, the rights of life, liberty, and property mentioned expressly in the Due Process Clauses.[115]

In order to reinforce the Independent Adjudicator model, the Court should clarify that the public rights exception to Article III applies only to discretionary government benefits, such as entitlement programs, subsidy programs, immigration rights, and government employment. The public rights exception should not extend to government action intended to take away private rights of the type recognized prior to the adoption of the Constitution. This would mean that when the federal government seeks to coerce an individual to relinquish private rights of life, liberty, or property, an Article III court must hear the dispute.

To a large extent, this tracks existing practice. No one has suggested—yet—that an administrative agency can be created to try federal criminal cases or determine whether the federal government is authorized to take property by eminent domain. Notice, however, that these are coercive governmental actions that predate the rise of the administrative state. Administrative adjudication has been squared with Article III only by defining down the Article III right to mean something like appellate review.[116] Given the importance of accurate fact-finding in fair and impartial adjudication, this is not

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112 *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284–85 (1856).

113 *See* Nelson, *supra* note 36, at 566–72.

114 U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

115 *See* Nelson, *supra* note 36, at 566–67.

116 *See supra* notes 45–50 and accompanying text.

enough. Unfortunately, an interpretational correction is not possible here. The appellate review model of administrative review, which has been enshrined in the APA for more than seventy years, has too much gravitational force for judicial interpretation to reverse.[117] Restoring fair and impartial adjudication in the context of administrative adjudication requires a legislative fix, as discussed below.

The suggested clarification of the public rights exception is therefore relatively modest and intended largely as a firewall against further erosion of the Independent Adjudicator model found in Article III. Absent repudiation of the appellate review model in administrative law, this clarification would do nothing to cure growing concerns about fair and impartial adjudication in the context of administrative adjudication. And it would do nothing to staunch the rise of plea bargaining as an alternative to adjudication of criminal cases, nor the expansion of binding arbitration as an alternative to civil trials. These changes, as previously suggested, have been driven largely by the increasing costs of conventional trials.[118]

B. *Limiting the Cost–Benefit Test*

Turning to the Common Law Procedures model, the most plausible interpretive clarification involves the scope of the *Eldridge* cost–benefit test. Sometimes the Court has treated *Eldridge* as a universal test for the adequacy of hearing procedures; other times it has declined to apply it to proceedings that have been historically governed by distinct traditions.[119] This suggests that it is open to the Court to limit *Eldridge* to the context in which it was decided—an assessment of the adequacy of the procedures mandated by Congress for processing administrative benefit claims.

If *Eldridge* were cabined in this fashion, then two other moves would open up. With respect to claims governed by *Eldridge*—that is, review of the adequacy of administrative benefit procedures—courts could continue down the path of giving great deference to the package of procedures adopted by politically accountable bodies. This is a sensible trend. There is no reason why the multiplicity of issues processed by administrative agencies in the implementation of benefit schemes should be assessed against the benchmark of the common-law trial. For the reasons articulated by Judge Easterbrook, legislatures and agencies are better situated than courts to specify the packages of procedures that apply in these contexts.

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117 *See* Merrill, *supra* note 45, at 1003.

118 *See supra* notes 82–88 and accompanying text.

119 *Compare* Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004) (applying *Eldridge* to assess procedures followed in a habeas corpus proceeding), *with* Weiss v. United States, 510 U.S. 163, 177 (1994) (declining to apply *Eldridge* in assessing a due process challenge to military courts marshal procedures), *and* Medina v. California, 505 U.S. 437, 443 (1992) (rejecting *Eldridge* in the context of a due process challenge to criminal trial procedure).

For other types of due process claims, the test of adequacy should be based on tradition and settled practice. For criminal trials and ordinary civil proceedings, the benchmark would be the common-law trial, as it has evolved to the present day. For military courts marshal, the benchmark would be the traditions that govern courts marshal, as they have evolved to the present day. For habeas corpus petitions, the benchmark would be the traditions that govern habeas corpus as they have evolved to the present day, and so forth. In other words, a Burkean appeal to tradition would give content to due process of law, not judicial cost–benefit analysis or any other type of judicial policy-making.[120]

These interpretive clarifications would shore up the protection afforded by due process in conventional contexts where the government is acting as the aggressor seeking to deprive persons of life, liberty, or property. This is where individuals need fair and impartial adjudication the most, and it is also where the original understanding of the Due Process Clauses envisioned that the Common Law Procedures model would apply. It would also bring due process fully into play in the context of administrative adjudication where an agency is seeking to impose a civil fine, forfeiture, or obligation to pay reparations. But it would largely disarm due process from playing a significant role in administrative adjudication designed to determine eligibility for governmental benefits. Here, as elsewhere, tightening the range in which a constitutional right functions may strengthen the degree of protection it affords.[121]

C. *Reforming Agency Adjudication*

A third reform, which would require new legislation rather than interpretive clarification, concerns the pervasive problem of achieving fairness and impartiality in the context of administrative agency adjudication. The problem is often discussed in terms of the procedures for appointing and removing Administrative Law Judges ("ALJs"), who render initial decisions in administrative adjudication.[122] But the difficulty runs far deeper. American administrative agencies, in their original incarnation, were modeled after common-law courts and were expected to make policy through the process of case-by-case adjudication.[123] Some agencies, most notably the National Labor Relations Board ("NLRB"), still proceed in this manner.[124] Using

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120 On Burkean interpretation, see Merrill, *supra* note 109, at 590–99.

121 As Judge Stephen Williams has observed, expansion of the scope of a right, such as the right of procedural due process, often leads to dilution in protection of the right. Stephen F. Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. LEGAL STUD. 3, 13, 17 (1983).

122 *See, e.g.*, Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797, 832 (2013).

123 *See* Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANALYSIS 121, 124–25 (2016).

124 Barnett, *supra* note 122, at 816.

individual cases to make policy is fundamentally incompatible with resolving cases in a fair and impartial manner. Making policy through adjudication entails retroactive lawmaking; fair and impartial adjudication generally entails applying settled legal rules to disputed facts.

The assumption that agencies will make policy through adjudication is embedded in the APA.[125] Thus, the APA provides that adjudicatory decisions by ALJs are subject to plenary review by agency heads, and contemplates that agency heads, if they so desire, can decide contested disputes themselves, bypassing ALJs altogether.[126] Yet the prospect of review and reversal by agency heads is the principal reason why ALJ adjudication is not fair and impartial. Agency ALJs, like other adjudicators, are averse to having their decisions overturned.[127] Consequently, they trim their findings of fact and conclusions of law in ways that correspond to the preferences of the political heads of the agencies that employ them.[128] Tinkering with the method of appointing and removing ALJs cannot solve the ALJ bias problem. The only solution to this particular threat to fair and impartial adjudication is to get administrative agencies out of the business of resolving disputes under law altogether—including disputes under agency-made law.

In searching for an appropriate alternative to the current APA system of adjudication, one should keep several objectives in mind. One is the desirability of preserving the characteristics of agency adjudication that led the framers of the APA to endorse the use of ALJs for these purposes in the first place. These are, most importantly, the benefits of using an adjudicator who has expertise in a particular field, and relatedly, the ability to use more informal and expeditious procedures than those that characterize the modern civil trial. It is also important to satisfy the constitutional constraints imposed by the Appointments Clause and the limits on removal authority.[129] Finally, and most pertinently, it is imperative to devise a system that is more likely to generate fair and impartial outcomes that are not systematically biased in favor of the policy preferences of the incumbent political appointees who run the agencies.

Commentators have proposed various alternatives to the current system of ALJ adjudication. One obvious solution would be to expand the ranks of

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125 *Compare* 5 U.S.C. §§ 554–57 (2012) (prescribing elaborate provisions governing adjudication), *with id.* § 553 (prescribing bare-bones provisions governing rulemaking).

126 *See id.* § 556(b) (providing that the agency or one or more members of the body that comprises the agency may preside at the taking of evidence); *id.* § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.").

127 On the general aversion of adjudicators to being reversed, see Stephen J. Choi et al., *What Do Federal District Judges Want? An Analysis of Publications, Citations, and Reversals*, 28 J.L. ECON. & ORG. 518, 518–19 (2011).

128 *See* David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155, 1183 (2016) (concluding that SEC ALJs rule in favor of the agency a very high percentage of the time).

129 *See* Barnett, *supra* note 122, at 836–37.

the Article III courts sufficiently to permit all agency adjudication to be transferred to courts that are truly independent. However, this idea has been consistently opposed on the ground that it would dilute the prestige of the Article III courts and, perhaps more seriously, would create an enormous and unwieldy federal judiciary.[130]

A more promising solution would be to replace ALJs with independent adjudicators modeled on "Article I" courts like the Tax Court, the Bankruptcy Court, and the Court of Federal Claims. These Article I judges obviously specialize in a particular field, suggesting that additional specialized Article I courts could be created corresponding to particular federal agencies like the Securities and Exchange Commission ("SEC") and the PTO. In their current incarnations, Article I courts generally hew to the Federal Rules of Civil Procedure, but there is no reason why they could not be authorized to experiment with more informal or streamlined procedures, analogous to those followed by current ALJs. Article I judges are typically appointed for fixed terms of fourteen or fifteen years, in a manner consistent with the Appointments Clause, and are protected from dismissal except for good cause.[131] Different modes of appointment are possible, although having appointments made by federal courts of appeals, as in the case of bankruptcy judges, would likely result in high-quality judges. Having the courts of appeals make the appointments, and assigning these courts the responsibility of determining whether removal is warranted for causes, would also assure a very high degree of independence for these Article I adjudicators, approaching that associated with Article III judges. As in the case of the Tax Court, the Bankruptcy Court, and the Court of Federal Claims, Article III courts should review the decisions of these Article I judges under the appellate review model. The current practice of subjecting decisions by ALJs to review by the agency in which they work should be eliminated. This is the only way to provide assurance that the new Article I judges would resolve individual disputes in a fair and impartial manner.

This proposal has fairly significant implications for the structure of the administrative state. It would effectively end the practice of having agencies make policy through adjudication. Agencies would have to make policy by rulemaking and the issuance of policy statements, interpretive rules, and guidelines. There is of course a strong trend in this direction in any event, with more modern agencies, like the Environmental Protection Agency ("EPA"), relying almost exclusively on these sorts of regulatory tools rather than adjudication. But older agencies, like the NLRB and the Federal Trade

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130 *See, e.g.*, William H. Pryor, Jr., Opinion-Editorial, *Don't Expand the Federal Courts*, N.Y. TIMES, Nov. 29, 2017, at A31.

131 Tax Court judges are appointed by the President for terms of fifteen years and may be removed by the President only for good cause. 26 U.S.C. § 7443(e)–(f). Bankruptcy Judges are appointed by the U.S. Court of Appeals for the district in which they sit for a term of fourteen years and may be removed by the judicial council of the circuit only for good cause. 28 U.S.C. § 152(a)(1), (e).

Commission, would have to give up the practice of using adjudication to formulate policy. This proposal would also necessarily override the *Chenery* doctrine, which allows agencies to choose between rulemaking and adjudication in making policy.[132]

The costs of this proposal, in terms of diminished regulatory flexibility, would in this Author's opinion be more than outweighed by the benefits in terms of enhanced fairness and impartiality of this form of adjudication. Nevertheless, it would probably be prudent to phase in any such reform, perhaps by limiting it initially to agencies that use adjudication primarily to determine liability for civil fines, forfeitures, or reparations, such as the SEC, the PTO, and the EPA. For the time being, ALJs and administrative judges should continue making decisions about eligibility for federal benefits like Social Security disability, awaiting the results of experimentation with the new Article I court approach in select contexts.

D. *Mutually Reinforcing Changes*

Notice that the forgoing proposals have a mutually reinforcing effect. The proposed clarification of the public rights exception would mean that an Article III tribunal, protected by the Independent Adjudicator model, would hear challenges to federal actions that impinge on or abridge conventional rights of life, liberty, or property. The proposed limitation on the application of the *Eldridge* doctrine would mean that any form of adjudication, state or federal, that takes the form of an established type of judicial proceeding must conform to the Common Law Procedures model, as defined by the evolved traditions that govern such a form of action. Enacting the proposed statutory reform that would replace ALJs with Article I courts would mean that federal administrative adjudication would partake in a degree of independence analogous to that of Article III judges. This, however, would leave much uncovered—most prominently all federal and state administrative adjudication that involves benefit schemes.

Nevertheless, even if courts can shore up the Independent Adjudicator model and the Common Law Procedures model in the manner suggested, and even if ALJs are replaced by Article I judges, these reforms would still leave the dominant forms of adjudication that exist today—plea bargaining, settlement negotiations, informal adjudication, and arbitration—untouched. Whether the thousands of adjudications that take place in these contexts every day are fair and impartial depends entirely on the social norms that govern the individual adjudicators who operate in these contexts. Those individual adjudicators are typically lawyers, to be sure, but their behavior is not subject to the constraints associated with the Independent Adjudicator and Common Law Procedures models. Social norms, including lawyerly

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132 *See* SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) (stating that the choice whether to proceed by rulemaking or adjudication "lies primarily in the informed discretion of the administrative agency").

norms, are inherently fragile and can change rapidly. Perhaps the best that can be hoped for is a shoring up of constitutional understandings that apply in a shrinking set of circumstances, supplemented by some needed legislative reform. A more secure sense of the strategies for assuring fair and impartial adjudication may help strengthen, if only by example, the social norms on which society is now utterly dependent in an increasing portion of dispute resolution.

CONCLUSION

While the two constitutional strategies for assuring fair and impartial adjudication provided an auspicious beginning, over time each has failed to sustain this objective, which is central to the rule of law. The domain of the Independent Adjudicator model has shrunk significantly, as evidenced by territorial judges and military courts marshal, the public rights exception, and the emergence of agency adjudication subject only to deferential review by Article III courts. This has reduced the model's potential to realize the aspiration for fair and impartial adjudication. While this Article does not advocate a comprehensive fix, the proposed clarification of the public rights exception would at least restore some of the role of federal courts in providing fair and impartial adjudication.

The cost–benefit test that emerged in response to overextension of procedural due process has effectively recast the Common Law Procedures model as a requirement that hearing procedures advance general social welfare. This is not what the original constitutional strategy was designed to do. Limiting the cost–benefit test to due process challenges to administrative benefit schemes would restore some of the original purpose of the Due Process Clauses by ensuring that the government must use established judicial procedures when it seeks to take life, liberty, or property.

Perhaps the most important reform would be to change the job description of federal administrative agencies from adjudication to policymaking. If administrative adjudication is to be fair and impartial, it should be given to truly independent adjudicators, such as Article I courts, which are not subject to review and reversal by agency political appointees.