THE CONSTITUTIONAL CONUNDRUM OF MAGISTRATES' AUTHORITY TO ACT INDEPENDENTLY

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Over the last fifty years, trial courts have increasingly appointed magistrates to assist in the performance of judicial functions. The numbers are now significant. In federal courts, for example, the number of magistrates nearly equals the number of active, presidentially appointed district court judges. In Ohio, the number of magistrates who are now registered to serve in Ohio courts exceeds the total number of elected judges.

The roles that magistrates perform in assisting trial court judges differ from jurisdiction to jurisdiction. Historically, magistrates have functioned under the direct supervision of judges who have referred matters for assistance, and the magistrates report their actions and recommendations to the referring judge. After reviewing the magistrate's work, the judge adopts, rejects, or modifies the magistrate's actions and recommendations. The judge then issues an enforceable order, decree, or judgment. That structure still prevails.

But in some jurisdictions, magistrates can exercise greater independence. In fact, they can even serve as substitute judges, independently exercising judicial power without any supervision or review of a trial court judge. Congress, for example, has authorized federal magistrate judges to exercise — if all parties consent — authority to adjudicate in every kind of civil case that the Constitution gives a federal district court jurisdiction to hear. By contrast, the Supreme Court of Ohio allows magistrates to act independently when the parties consent but only in civil cases that involve jury trials.

When parties consent, however, magistrates in both court systems displace the trial court judges. Once consent is given, the magistrates preside over the cases,

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and the trial court judges to whom the civil cases were originally assigned no longer supervise or review the magistrates' actions.

Even though Congress authorized federal magistrate judges to exercise independent authority in 1979, the Supreme Court of the United States has not yet decided whether Congress has authority under the United States Constitution to authorize magistrate judges to act as substitutes for the district court judges with life-time tenure. The Ohio Supreme Court has not had an opportunity to answer that same question about Ohio magistrates and the Ohio Constitution: Does the state constitution allow courts to hire subordinate judicial officers and direct them to exercise power that the Constitution requires the elected judges to exercise? Magistrates in Ohio have only recently been allowed to independently preside over civil jury trials. They obtained that authority on July 1, 2020, when the Supreme Court of Ohio amended Civil Rule 53(C)(2) specifically to grant the authority to preside over civil jury trials without the supervision or review by trial court judges.

The 2020 amendment expands the authority of magistrates when presiding over jury trials in civil cases.[1] The supreme court originally promulgated Rule 53 in 1970. The original rule allowed trial courts to appoint referees "to hear an issue or issues . . . in any case in which the parties consent in writing."[2] In 1993, the Supreme Court of Ohio held in *Hartt v. Munobe*[3] that this language was broad enough to allow referees to preside at jury trials if all parties consent in writing. Two years later, the court exercised its rulemaking power and amended Rule 53 to square it with the ruling that jury trials are among the judicial acts that referees may, with the parties' consent, perform for trial court judges.[4]

The consent portions of the 1995 amendment were modeled on the Federal Magistrate Act of 1979 in which Congress authorized federal magistrate judges to

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1. OHIO CIV. R. 53(C)(2) now states:

> (2) *Jury trials before magistrates*. Notwithstanding any other provision of these rules, in jury trials presided over by magistrates, the factual findings of the jury shall be conclusive as in any trial before a judge. All motions presented following the unanimous written consent of the parties, including those under Civ.R. 26, 37, 50, 51, 56, 59, 60, and 62, shall be heard and decided by the magistrate. No objections shall be entertained to the factual findings of a jury, or made to the motion or legal rulings made by the magistrate except on appeal to the appropriate appellate court after entry of a final judgment or final appealable order. The trial judge to whom the matter was originally assigned before the parties consented to trial before a magistrate shall enter judgment consistent with the magistrate's journalized entry pursuant to Civ. R. 58, but shall not otherwise review the magistrate's rulings or a jury's factual findings in a jury trial before a magistrate.

2. Rule 53(A), Ohio Rules of Civil Procedure, 22 Ohio Off. Rep. 2d 1, 63, 43 Ohio St. Bar Ass'n Rpt. 1, 63 (June 22, 1970).

3. Hartt v. Munobe, 67 Ohio St. 3d 3, 5, 1993-Ohio-177, 615 N.E.2d 617, 620 (Ohio 1993) ("Although Civ.R. 53 does not explicitly authorize a referee to preside over a 'trial,' it authorizes a referee to hear 'an issue or issues.' There is no limitation as to how many issues he or she may hear; it logically follows that he or she may hear all of them."). In 1995, Ohio Civ.R. 53(C)(1)(c) was amended to provide: "Upon unanimous written consent of the parties, preside over the trial of any case that will be tried to a jury."

4. Amendments to Rules of Civil Procedure, 73 Ohio St. 3d LXXVIII; Ohio Supreme Court website, Rules of Court, http://www.supremecourt.ohio.gov/LegalResources/Rules/civil/ Civil-Procedure.pdf *180-81. *See also* Miele v. Ribovich, 90 Ohio St. 3d 439, 2000-Ohio-193, 739 N.E.2d 333 (Ohio 2000).

preside in any civil case, whether jury or nonjury, if all parties in the case consent.[5] The 1995 amendment made other changes to Rule 53 as well. It changed, for example, the title *referee* to *magistrate*,[6] and it altered how the newly renamed magistrates are compensated. Instead of their fees being taxed as costs, magistrates, like judges, were to be carried on the courts' payrolls so that their compensation would be "borne by the taxpayers generally."[7]

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5. *See* OHIO CIV. R. 53, Staff Note, 2020 https://1.next.westlaw.com/Document/N963F1140A94311EA8981875C7C0D3914/View/FullText.html?originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default).

> A major improvement to federal practice in the last half century was the authorization given magistrate judges to conduct civil jury trials. F.R.C.P. 73. Following the lead of the federal courts, Ohio magistrates also now conduct civil jury trials with written consent of all parties as authorized by Civ.R. 53(C)(1)(c).). . . .
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> The amendment . . . streamlines the procedure following jury trials conducted by magistrates upon unanimous consent of the parties, although still requiring the entry of judgment by the trial court. Factual findings of the jury and the magistrate's interlocutory rulings preceding the entry of judgment, are no longer required to undergo a cumbersome and expensive procedure for which essentially the first line of appeal has been to the trial court, rather than directly to a court of appeals.

Fed. R. Civ. P. 73 tracks language the Federal Magistrate Act pertaining to consent. *See* 28 U.S.C. § 636(c)(1), which provides:

> (c) Notwithstanding any provision of law to the contrary—
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> (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, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate judge may exercise such jurisdiction, if such magistrate judge meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate judge is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

6. In changing the name *referee*, the Ohio Supreme Court elected not to carry over the phrase *magistrate judge* from Federal Magistrate Act. Congress had adopted that name in 1990. That change was intended to reflect the enhanced stature of the office that followed enactment of the Federal Magistrate Act of 1979, particularly the expanded authority conveyed in 28 U.S.C. § 636(c) to act as alternate judicial officers to Article III judges. *See* Part A, 1, *infra.*

The difference between the Ohio name and the federal was inconsequential when the supreme court made the change in 1995. But it has become meaningful after the most recent expansion of magistrates' authority. Under the newly revised rule, once consent is given, Ohio magistrates take over all of the trial court judges' power to adjudicate the case. Continuation of the present title "magistrate," therefore, masks that significant enhancement of magistrates' power, just as it had done for federal magistrates before Congress changed their name.

Simply changing the title of Ohio magistrates to make the equivalence with judges apparent is not, however, an option in Ohio because, if the equivalence were to be made clear, an intractable problem becomes immediately obvious. OHIO CONST. art. IV, § 6 (A)(4) requires all judges to be elected.

7. OHIO CIV. R. 53, Staff Note, 1995.

Despite the several changes, however, the 1995 amendment preserved the principal/subordinate relationship that Chief Justice Thomas Moyer reaffirmed in *Hartt*. He wrote:

> Civ. R. 53 places upon the court the ultimate authority and responsibility over the referee's findings and rulings. The court must undertake an independent review of the referee's report to determine any errors. . . . [A] referee's oversight of an issue or issues, even an entire trial, is not a substitute for the judicial functions but only an aid to them.[8]

Even after the 1995 amendment, therefore, Civil Rule 53 continued to provide that magistrates' decisions — including their conduct of nonjury trials — did not become final until the trial judge, after an opportunity to review, adopted them and entered a judgment based upon them.[9] The 2020 amendment expands magistrates' authority, but only with respect to cases that are to be tried to a jury.

The supreme court's purpose in promulgating the most recent amendment was to eliminate the delays related to trial judges' review of magistrates' rulings and actions in jury cases, even though Rule 53 continues to require that review in nonjury cases. The Staff Note, which accompanied the proposed amendment when the court published the rule for public comment, characterized the review by trial judges as "unnecessarily time consuming and costly."[10]

To hasten the review process, the court extracted still more from the consent provisions in the Federal Magistrate Act of 1979.[11] Even with the most recent amendment, however, the court has adopted only a portion of the federal statute that governs the authority of magistrate judges to conduct jury trials without any oversight or review by the Article III judge who referred the case.[12]

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8. Hartt v. Munobe, 67 Ohio St.3d at 5-6 ("A trial judge who fails to undertake a thorough independent review of the referee's report violates the letter and spirit of Civ. R. 53, and we caution against the practice of adopting referee's reports as a matter of course, especially where a referee has presided over an entire trial.").

9. OHIO CIV. R. 53(D)(4)(a) still provides: "Action of court required. A magistrate's decision is not effective unless adopted by the court." As a matter of law, therefore, the magistrate's rulings became reviewable on appeal only after the trial judge took or had to opportunity to take that deliberative action.

10. OHIO CIV. R. 53, Staff Note, 2020.

11. 28 U.S.C. § 636(c) (2009) provides:

> (c) Notwithstanding any provision of law to the contrary—
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> . . .
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> (3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate judge in the same manner as an appeal from any other judgment of a district court. The consent of the parties allows a magistrate judge designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States. . . .

12. The most significant difference that remains between the consent provisions of 28 U.S.C. § 636(c) and Ohio Civ. R. 53(C)(2) is Ohio's failure to adopt precautions that Congress created against the danger of undue influence on parties in making their election about consenting to a magistrate-

The new Rule 53(C)(2) changes Ohio law governing consent-to-magistrate cases in four ways:

> 1) It prohibits all parties to the civil case from asking trial judges to review any of a magistrate's rulings in cases heard with the parties' consent;
> 2) It prohibits trial judges from reviewing any of those rulings on their own initiative;
> 3) It requires trial judges to sign the journal entry as prepared by magistrates, prohibiting any amendment or review, and
> 4) It transfers all review of the magistrate's rulings away from trial judges and to appellate courts.

The first three of the changes address proceedings in the trial court. The fourth prescribes where the authority for appellate review resides.

The effect of these changes is to give state-court magistrates, after consent and referral, full and exclusive authority over all pretrial proceedings in jury cases. This dramatic enhancement of authority extends to all dispositive motions, the conduct of trial, determination of liability, fashioning remedies, and the preparation of the court's final judgment. Magistrates exercise this authority without review by trial court judges. While only judges may perform the physical act of signing the final judgment, the rule prohibits judges from reviewing magistrates' actions and decisions or altering the disposition that the magistrates decided on.

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conducted trial. Congress has included detailed precautions in 28 U.S.C. § 636(c) ever since it was enacted.

Congress recognized that litigants could face coercion and retaliation if trial judges and magistrate judges were able to discover how parties exercise their right to give or withhold consent. Congress found that consent can be easily — and even unconsciously — compromised during the election process depending on who asks whether the parties' consent and how the question is presented. As a prophylactic, Congress established procedures to prevent judges and magistrates from participating in the election process or even knowing how parties voted on the reference to a magistrate. *See* 12 CHARLES ALLEN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 3071.2 (3d ed. 2014). The procedures are designed to keep the entire process leading up to the "initial consent or refusal of consent from the purview of the judge." *Id.* The process for ensuring that consent is given freely and voluntarily is prescribed for civil cases in 28 U.S.C. § 636(c)(3) and Fed. R. Civ. P. 73(b). *See generally* WRIGHT & MILLER, 12 FED. PRAC. & PROC. CIV. § 3071.2 (3d ed. 2014).

Congress also assured that parties have the opportunity to ask the Article III trial judge to rescind the order of reference despite their prior consent. 28 USC 636(c)(4) ("The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate judges under this subsection."). But that opportunity may not be available under Ohio Cir.R. 53(C)(2). The categorical sweep of its prefatory language establishing the primacy of that paragraph's language over all "other provisions of these [Civil] rules" seems to insulate magistrates from the trial judge's discretionary authority under Rule 53(D)(6) to disqualify "a magistrate for bias or other cause."

The Ohio Rule entirely ignores not just Congress's preventive measures but also the underlying potential for coercion and retaliation. The Staff Note accompanying the proposed rule offers no explanation why the risks that Congress thought so obviously in need of prevention can be safely ignored in Ohio.

The supreme court's goal was to emulate the efficient federal system for utilizing substitute or alternate judges to supplant constitutionally ordained trial judges in exercising judicial power. Although the term *substitute* or *alternate judicial officers* do not appear in either the Federal Magistrate Act or Ohio Civil Rule 53, the characterization is apt in both systems. The terms accurately denotes officers who have the capacity to exercise the judicial power of federal or state judicial power without the supervision by a constitutionally ordained judge but with equal authority to adjudicate claims and to render final judgment.

But a significant constitutional question arises out of the supreme court's decision to model the Ohio Rule after the federal statute. The Ohio Supreme Court's unspoken assumption has been that the Ohio Constitution is sufficiently similar to the federal constitution to allow a limited, surgical transplanting of the federal mechanism for reallocating judicial power.

There is, obviously, some facial plausibility in assuming that the mechanisms Congress might create for the operations of the federal judiciary would be easily transferrable into Ohio courts. The federal and Ohio constitutions are somewhat similar in not merely vesting judicial power of the respective sovereigns in courts but also in identifying at least some of the courts in which the power resides. The constitutions are similar also in specifying a method — albeit not the same method — by which the judges of those courts must be chosen. The two judicial systems seem to have become even more similar since Ohio adopted the Modern Courts Amendment,[13] which gave the Ohio Supreme Court something like the rulemaking authority that Congress delegated to the United States Supreme Court in Rule Enabling Act of 1934.[14] The similarity between the court systems seems even more apparent since Ohio adopted various sets of rules of practice and procedure that are modeled on federal counterparts.

Despite these similarities, however, the court's assumption about transferability of legislation regarding the function of magistrates in federal courts is unfounded. The Ohio Constitution differs markedly from the United States Constitution in ways that prevent various adjustments to Ohio's judicial system that might be otherwise feasible in the federal system. The effect of those constraints is to render the newly amended Rule 53(c) unconstitutional.

This article will first survey decisions by the United States Supreme Court that have accepted litigants' consent as an adequate foundation for various kinds of non-Article III judges and judicial officers to exercise the judicial power of the United States. Next, it will demonstrate the Court's current test for separation of powers fails to take full account of structural considerations that would arise in assessing the constitutional effect of litigants' consent under the Federal Magistrate Act.

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13. OHIO CONST. art. IV, § 5(B).

14. *See* Richard S. Walinski & Mark D. Wagoner, Jr., *Ohio's Modern Courts Amendment Must Be Amended: Why and How*, 66 CLEVE. ST. L. REV. 69, 75–81 (2017). One principal difference is that Ohio created rulemaking authority in the Ohio Supreme Court through constitutional allocation while Congress delegated rulemaking authority to the Supreme Court of the United States by legislation. The consequences of that difference are intractable.

This article will then lay out the key differences between the federal and Ohio constitutions in how they allocate judicial power and will explain why the differences render the new Civil Rule 53(C)(2) constitutionally defective. Finally, the article will demonstrate that because the Ohio Constitution itself vests the state's judicial power directly in common pleas courts and ordains[15] the judges of those courts with the authority and affirmative duty to exercise that power, neither the Ohio Supreme Court nor the General Assembly has constitutional authority to bar common pleas court judges from exercising that power.

A. THE FEDERAL SYSTEM OF MAGISTRATE JUDGES

1. The authority of magistrate judges and its evolution

The current position of federal magistrate judge was established in the Federal Magistrates Act of 1968.[16] Its ancestry goes back to the office of United States Commissioner, a ministerial position that the Second Congress created in 1793.[17] The commissioner's role initially was merely to "take bail"[18] in criminal cases, and it changed only slightly over the ensuing 150 years**.** In 1940, however, Congress expanded the duties of commissioners by permitting district courts to designate them to try petty criminal offenses committed on federal lands, but only if the defendant consented.[19]

In 1968, Congress enacted the Federal Magistrate Act. The transformation that the Act initiated has been dramatic. Congress abolished the entire system of commissioners and enacted a system of full- and part-time magistrates for United States district courts.[20] A principal consideration in devising the new system was

15. This verb is used in U.S. CONST. art. III, § 1, which is parallel to, although materially different from, OHIO CONST. art. IV, §§ 1, 4, and 18.

16. Peter G. McCabe, *The Federal Magistrate Act of 1979*, 16 HARV. J. ON LEGIS. 343, 383 (1979) ("The availability of sufficient judicial resources — judges and magistrates — to handle the caseload within a given district court is the primary factor that must be considered by a court in determining whether its magistrates should be empowered to try cases upon the consent of the parties.").

17. Act of March 2, 1793, ch. XXII, § 4, 1 Stat. 334 ("bail for appearance in any court of the United States, in any criminal cause in which bail is by law allowed, may be . . . by any person having authority from a circuit court, or the district courts of Maine or Kentucky to take bail; which authority, revocable at the discretion of such court, any circuit court or either of the district courts of Maine or Kentucky, may give to one or more discreet persons learned in the law in any district for which such court is holden . . . ."). *See* H.R. Rep. No. 1629, 90th Cong., 2d Sess. 11 (1968) reprinted in 1968 U.S. Code Cong. & Ad. News 4252. *See also* McCabe, *supra* note 18, at 345–46.

18. Act of March 2, 1793, ch. XXII, § 4, 1 Stat. 334.

19. 782 P.L. 785, 54 Stat 1058-59 § 1, ch. 785 (October 9, 1940) ("[A]ny United States commissioner specially designated for that purpose by the court by which he was appointed shall have jurisdiction to try and, if found guilty, to sentence persons charged with petty offenses against the law . . . committed in any place over which the Congress has exclusive power to legislate or over which the United States has concurrent jurisdiction, and within the judicial district for which such commissioner was appointed. . . . The commissioner before whom the defendant is arraigned shall apprise the defendant of his right to make such election and shall not proceed to try the case unless the defendant . . . signs a written consent to be tried before the commissioner.").

20. 90 P.L. 578, 82 Stat. 1107.

the need that Congress perceived to provide relief from the pressures that heavy caseloads had generated in district courts.

High volume, however, was not a problem that confronted all district courts uniformly; the demand on courts nationwide was uneven and dynamic. But Congress wanted to do more than merely help judges by giving them adjuncts to perform minor, delegable duties. Congress's principal motivation was "to provide flexibility, rather than to meet a pending emergency."[21] It intended to establish an alternative judicial officer who could make case-dispositive decisions and, thus, supplant Article III judges in certain cases.[22] Congress preferred a mechanism that would expand judicial capacity and also would be both versatile and less politically complex than increasing the number of life-tenured Article III judgeships.[23]

The Federal Magistrate Act created magistrate judges as judicial officers of the United States.[24] The new officers were to perform new duties in addition to the functions that had, over time, accrued to commissioners. Some of the new duties were listed in the statute.[25] Congress also gave judges the discretion to assign magistrate judges such "duties as are not inconsistent with the Constitution and laws of the United States."[26] The breadth of that authorization reflected Congress's hope that district court judges would be innovative in fashioning assignments for the new judicial officers. But for all that, the Act did not grant any additional authority for magistrate judges to conduct trials, whether jury or nonjury, beyond the authority that — with some expansion — commissioners had previously been granted to try petty criminal offenses.[27]

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21. McCabe, *supra* note 16, at 380.

22. *Id.* at note 196 (quoting H.R. Rep. No. 95-1364, 95th Cong., 2d Sess. at 22 (1978)) ("By redefining and by increasing the case-dispositive jurisdiction of an existing judicial officer — the U.S. Magistrate — the legislation provides the district court with a tool to meet the varying demands on its docket. Because of magistrates' limited tenure and the method of their appointment, magistrate supply and expertise can be designed to complement a particular Article III bench. Because of the consent requirement, magistrates will be used only as the bench, bar and litigants desire, only in cases where they are felt by all participants to be competent. The committee rejects the contention that litigants will be forced to have their cases tried by magistrates.").

23. This article uses the term *life-tenure* to mean judicial tenures having the attributes of continuation during "good Behavior" and of undiminishable compensation. *See infra* note 75.

24. Federal Magistrate Act Pub. L. No. 90-578, § 634(b), 82 Stat. 1107, 1112 (1968) ("All United States magistrates . . . shall be deemed to be officers and employees in the judicial of the United States Government . . . ."). Section 631 provided that the initial number and location of the newly authorized magistrates were to be determined through a coordinated effort among the Administrative Office of the United States Courts, the Judicial Conference of the United States, and the Judicial Councils of the various circuits. *Id.* at § 633(b).

25. *Id*. at § 636(b):

The additional duties authorized by rule may include, but are not restricted to —

(1) service as a special master in an appropriate civil action . . . ;

(2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions; and

(3) preliminary review of applications for post trial relief made by individuals convicted of criminal offenses . . . .

26. *Id*.

27. Section 636(a) of the Act provided that magistrates shall have:

Even with the additional, unspecified powers authorized in the Federal Magistrate Act of 1968, magistrate judges continued to serve only as adjuncts in Article III courts.[28] They did not themselves possess nor have authority to exercise the judicial power independently of an Article III judge.

Despite Congress's efforts, a backlog of cases continued in federal courts during in the 1970s.[29] Responding to the build-up, Congress in 1976 amended the 1968 Act to add specific functions that magistrate judges could perform to assist Article III judges in civil proceedings.[30] Still, authority for magistrate judges to conduct jury trials in civil cases was not explicitly approved in the Act.[31]

Explicit authority to preside at jury trials was a central feature of Congress's 1979 amendments.[32] In those amendments to 28 U.S.C. § 631 *et seq.*, which have become part of the statute, Congress authorized magistrate judges "to conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment."[33] The authorization[34] is broad and novel. Under it, magistrate judges

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(1) all powers and duties conferred or imposed upon United States commissioners by law and by the Rules of Criminal Procedure of the United States District Courts;

. . .

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations.

28. Circuit courts of appeals commonly refer to magistrates as "adjuncts." *See, e.g.,* Collins v. Foreman, 729 F.2d 108, 118 (2d Cir. 1984) ("We find more instructive the analogy to special masters, who, like magistrates, are properly seen as adjuncts to the district court."); Archie v. Christian, 808 F.2d 1132, 1138 (5th Cir. 1987) ("Magistrates are a valuable adjunct to article III judges."); Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037,(7th Cir. 1984) ("magistrates continue to function as adjuncts of the district courts); Lehman Bros. Kuhn Loeb Inc. v. Clark Oil & Ref. Corp., 739 F.2d 1313, 1316 (8th Cir. 1984) ("In our opinion these mechanisms limit the magistrate's role to that of adjunct, safeguard the integrity of the Article III judiciary, and keep section 636(c) within the bounds set by Article III of the Constitution.").

29. McCabe, *supra* note 18, at 353–54 ("The increasing caseload backlog in the district courts and the implementation of the Speedy Trial Act also played a part in leading to subcommittee hearings and congressional approval in 1976 of a measure expanding the pretrial jurisdiction of magistrates.").

30. Act of Oct. 1, 1976, Pub. L. No. 94-577, 94th Cong.; 28 U.S.C. §§ 631-639, 3401-3402 (1976).

31. McCabe, *supra* note 16, at 360 ("The 1976 amendments to the Magistrates Act clarified the pretrial role of magistrates . . . . They did not, however, deal with the trial of civil cases by magistrates or their case-dispositive authority.").

32. Federal Magistrate Act Pub. L. 96–82, 93 Stat. 643. (1979). *See generally* McCabe, *supra* note 16 at 365.

33. 28 U.S.C. § 631(C)(1).

34. In discussing the judicial power statutorily placed in magistrate judges, this article refers to their *authorization* to hear a matter, not their *jurisdiction* to do so. *See* United States v. Wey, 895 F.2d 429, 431, 1990 WL 12173 (7th Cir.1990) (Easterbrook, J.) ("As for 'jurisdiction': the word is a many-hued term. . . . Courts may have jurisdiction for some purposes but not others. . . . Subject-matter jurisdiction is absent when a federal court may not issue a binding decree on a subject . . . . Which judicial officer presides . . . does not affect the court's subject-matter jurisdiction, for it has nothing to do with whether the tribunal may enter a judgment conclusively resolving [a] dispute. . . . [When the question is whether a magistrate may lawfully act, the issue involves] interpretation of a law designating which judicial officer shall preside over which proceedings."). *But see* 28 U.S.C. § 636(c)(2) ("If a magistrate judge is designated to exercise civil jurisdiction under paragraph (1) of

have the capacity to preside fully over all actions that are within the subject-matter jurisdiction of district courts. Article III, § 2 defines that authority to include "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, . . ." and more.[35] The 1979 amendment thus effected a fundamental change in the nature of magistrate judges' authority,[36] authorizing them nothing less than "to assume the role of a district judge."[37] The new statute dictated that the availability of a magistrate judge to stand in for the district court judge must be announced to the parties in civil cases upon the filing of the complaint.[38]

But Congress required two conditions before magistrate judges could exercise any portion of that expanded authority. The magistrate judge must be "specifically designated to exercise such jurisdiction by the district court," and all parties to the action must consent.[39]

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this subsection, the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate judge to exercise such jurisdiction.").

35. 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 all Cases of admiralty and maritime Jurisdiction;—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 the Citizens thereof, and foreign States, Citizens or Subjects.").

36. *See* Brown v. United States, 748 F.3d 1045, 1057–58 (11th Cir. 2014) ("Although Congress considered magistrate judges to be 'adjunct[s] of the United States District Court, appointed by the court and subject to the court's direction and control,' . . . the fact is that when magistrate judges exercise their authority . . . to enter final judgment in civil cases, they are exercising the essential attributes of 'judicial Power.' . . . They do not function as mere adjuncts . . . .") (internal citations omitted.).

37. Brook & Weinberg v. Coreq, Inc., 53 F.3d 851, 852 (7th Cir. 1995) (per Easterbrook, J.) ("Section 636(c)(1) permits a magistrate judge to assume the role of a district judge with the parties' consent. Because this step entails the surrender of the judicial-independence protections in Article III of the Constitution, the consent must be voluntary."). *Cf.* Branch v. Umphenour, 936 F.3d 994, 1001 (9th Cir. 2019) ("[A]lthough it is clear that Branch was entitled to seek district court review of the magistrate judge's decision before all parties accepted the magistrate judge's jurisdiction, it is equally clear that, after all parties consented, Branch had no right to return to the district court for further review. . . . Branch argues that only a district judge is empowered to decide a motion made pursuant to Rule 72(a). See Fed. R. Civ. P. 72(a) ('The district judge must consider timely objections. . . .') (emphasis added). Perhaps so, but that misses the point. By consenting to the magistrate judge's plenary jurisdiction, Branch gave up the right to have the magistrate judge's decisions reviewed by the district judge. Thus, once the magistrate acquired full jurisdiction over the case, Branch had no right to have any Rule 72(a) motion decided at all, much less by the district judge.").

38. 28 U.S.C. § 636(c)(2) ("If a magistrate judge is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate judge to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate judge may again advise the parties of the availability of the magistrate judge, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. Rules of court for the reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent.").

39. *Id.* at § 636(c)(1) ("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, when specially designated to

In the same 1979 amendments, Congress established subject-matter jurisdiction in circuit courts of appeals to review de novo magistrate judges' decisions in consent cases.[40] Courts of appeal were thereby authorized to review magistrates' rulings on the same footing as they do the rulings of Article III judges.

2. The Magistrate Act and the U.S. Constitution

This system of substitute judges is possible under federal law only because of how Article III, § 1 allocates the judicial power of the federal government: to the Supreme Court and to any trial and appellate courts that Congress might choose to create.[41] The generality of this allocation to unspecified courts gives Congress great latitude in deciding both whether to create courts inferior to the Supreme Court and in how to structure them.[42] The Constitution empowers Congress to determine the structure and jurisdiction of courts it creates below the Supreme Court. For example, although the U.S. Constitution mandates that all judges sitting on an Article III court must be appointed for life,[43] it is silent on whether someone in addition to an Article III judge might exercise the judicial power of the United

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exercise such jurisdiction by the district court or courts he serves." Second, all parties in a particular case must consent.).

40. 28 USC 636(c)(3) ("Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate judge in the same manner as an appeal from any other judgment of a district court. The consent of the parties allows a magistrate judge designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. . . .").

41. U.S. CONST. art. 3 § 1 provides:

> 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. 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.

This section uses the permissive "may" in establishing Congress's authority to establish courts inferior to the Supreme Court. *See* Charles Warren, *New Light on the History of the Fed. Judiciary Act of 1789*, 37 HARV. L. REV. 49, 66-70 (1923). But with respect to the logically subsequent but equally material question about how much latitude the Constitution gives Congress in establishing the subject-matter jurisdiction of the federal courts, there are at least four views.

> (1) the constitutional grant is self-executing, which would mean that if there is some part of the judicial power not vested by Congress, the federal courts can hear those cases on the basis of the Constitution alone; (2) the constitutional language is mandatory, but even though Congress should vest the whole of the judicial power the duty to do so is not enforceable if Congress should fail to act; (3) Congress has discretion in deciding whether to give to the federal courts any part of the constitutional power, except that the grant of original jurisdiction to the Supreme Court is self-executing; and (4) although Congress has a wide discretion in granting or refusing jurisdiction, there are due process limitations on the exercise of this discretion. There is some judicial and scholarly support for each of these views.

WRIGHT & MILLER § 3526.

42. *See* Freytag v. C.I.R., 501 U.S. 868, 869 (1991) ("Congress has wide discretion to assign the task of adjudication to legislative tribunals").

43. U.S. CONST. art. III, § 1, cl. 1.

States. Nothing expressly prohibits it, and nothing expressly mandates that Article III judges be the exclusive jurists who may exercise federal judicial power in the federal courts that Congress might create. This silence opened the opportunity for Congress to empower federal magistrate judges to perform functions equivalent to Article III judges' — so long as the parties consent. Congress seized on this possibility to establish "a supplementary judicial power designed to meet the ebb and flow of the demands made on the Federal judiciary."[44]

At least four sections of the United States Constitution are implicated by federal legislation that authorizes agents other than Article III judges either to assist those judges or to supplant them in the exercise of judicial power. Article I, § 8[45] leaves it to Congress to decide whether to establish courts inferior to the Supreme Court and how to structure them. Article III, §1[46] of the United States Constitution vests the Supreme Court and the courts Congress might create with the "judicial power" of the United States, and § 2 prescribes specific protections for the independence of judges appointed to these courts.[47] The fourth is Article II, § 2, the Appointments Clause. It mandates that the President must "nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court."[48]

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44. Roell v. Withrow, 538 U.S. 580, 588 (2003) quoting H.R.Rep. No. 96–287, p. 2 (1979).

45. U.S. CONST. art. I, § 8, cl. 9 ("The Congress shall have Power . . . To constitute Tribunals inferior to the supreme Court; . . ."). The Supreme Court's opinion about how much authority this express power conveys has changed significantly over time. *Compare* Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511, 546 (1828) (Not all courts that Congress creates under this constitutional grant are constitutional courts, that is "courts in which the judicial power conferred by the Constitution on the general government, can be deposited. [Some courts that Congress may create] are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States.") *with* Wellness Internal Network, Ltd. V. Sharif, 575 U.S. 665, 135 S.Ct. 1932 (2015) (no violation for Art. I bankruptcy courts to adjudicate common claims if consent the court doing so).

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

47. U.S. CONST. art. III, § 1, cl. 1.

48. U.S. CONST. art. II, § 2, cl. 2 ("The President shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.").

The only judges explicitly mentioned in the Appointments Clause are "Judges of the supreme court." District court judges have, nevertheless, been treated as principal officers since the republic was founded.

The Judiciary Act of 1789, § 2 established a district court in each of the 13 states and allocated one judges to each court. The Act did not, however, establish any appointment process for those judges. Rather, President Washington nominated and the Senate confirmed the judge for each district

a. Separation of Powers

The Supreme Court of the United States has not yet ruled squarely on whether Congress may allow magistrate judges, with the consent of the parties, to exercise the adjudicatory powers that 28 U.S.C. § 636(c) authorizes.[49] What confidence proponents and opponents may have in Congress's ability to employ litigants' consent as a vehicle to elevate magistrate judges' authority wavered in recent decades as the Court ruled in a series of cases beginning in 1984.[50] The cases involved questions about Congress's authority under Article I to create "tribunals" and how that authority relates to the judicial power that Article III allocates to "inferior Courts." The cases involved the judicial power of bankruptcy-court judges,[51] magistrate judges' empaneling criminal juries,[52] the authority of judges sitting on Article I courts,[53] and similar matters.[54] The issues addressed in those

court. *See, e.g.*, *History of Federal Judiciary*, FED. JUDICIAL CENT., https://www.fjc.gov/history/judges/paca-william (Judge William Paca, U.S.D.Ct. MD). Presumably, both Congress and President Washington believed that the judicial officers who have authority to exercise Article III judicial power while sitting on inferior federal courts were more than "inferior Officers." *Compare Id.* §§ 3, 27, 35 (similarly establishing positions of judge, Marshal, United States Attorney and Attorney General but omitting an appointment process) *with* § 7 (establishing position of clerk of court and designating appointment authority in the judges of the respective courts); Ex parte Hennen, 38 U.S. (13 Pet.) 225, 229 (1839).

49. See OHIO CIV. R. 53, *supra* note 5.

50. *Compare* Leslie K. McMullin, Comment, *Is the Federal Magistrate Act Constitutional After Northern Pipeline?,* 1985 ARIZ. L. REV. 189 (1985); *with* Claudia L. Psome, *Magistrates and Consent*, 36 N. Y. L. SCH. L. REV. 675 (1991). *See also* Lori Yount, *Litigant Consent as a Constitutional Threat: Reconsidering the Jurisdiction of Magistrate Courts After Stern v. Marshall*, 55 S. TEX. L. REV. 197 (2013); George D. Brown, *Article III as a Fundamental Value—The Demise of* Northern Pipeline *and Its Implications for Congressional Power,* 49 Ohio St. L.J. 55 (1988); Douglas A. Lee and Thomas E. Davis, *"Nothing Less Than Indispensable": The Expansion of Federal Magistrate Judge Authority and Utilization In the Past Quarter Century*, 16 NEV. L.J. 845 (2016).

51. Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 (1982) (broad grant of jurisdiction to bankruptcy judges over all civil bankruptcy proceedings arising in or related to cases under Title 11 of the Bankruptcy Act violates Art. III of the Constitution); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 77-78 (1989) (Congress does not have the authority under U.S. Const, art. I, § 8 to establish a tribunal to adjudicate purely state-law claims); Stern v. Marshall, 564 U.S. 462, 482 (2011) (although the bankruptcy court had statutory authority to enter judgment against a defendant in a non-core proceeding, Art. III prevents bankruptcy courts from entering final judgment on claims that seek only to enlarge the bankrupt's estate and that would otherwise exist without regard to any bankruptcy proceeding) (emphasis in original); Wellness Internal Network, Ltd. v. Sharif, 575 U.S. 665 (2015) (no violation of Art. III for bankruptcy courts to adjudicate claims that, although lacked jurisdiction *per Stern v. Marshall*, if the parties' knowingly and voluntarily consent the court doing so).

52. Gomez v. United States 490 U.S. 858 (1989) (presiding at the selection of a jury in a felony trial is not one of the "additional duties" that a magistrate may be assigned under the Federal Magistrates Act); Peretz v. United States, 501 U.S. 923, 111 (1991) (supervision of voir dire in felony proceeding is additional duty that may be delegated to magistrate if litigants consent).

53. Commodity Futures Trading Commission v. Schor, 478 U.S. 833 (1986) (Article I court established to hear claims that commodities brokers violated a federal act; no violation of Art. III for court to adjudicate counterclaim to recover debit balance owed on account).

54. McCarthy v. Bronson 500 U.S. 136 (1991) (referral to magistrate judge for report and recommendation on conditions-of-confinement cases); Thomas v. Union Carbide Agricultural

cases have, to some degree, been similar to questions pertaining to magistrate judges' authority under § 636(c). The Court consistently analyzed the constitutional question in these cases as a separation-of-powers issue.

It is unnecessary for the purpose of this article to struggle through each of the cases. The opinions reveal that, despite a complete turnover among Justices, a persistent divide exists, not just about how the separation-of-powers question is to be answered, but even about how the question is to be framed.

Separation of powers, of course, is not a term that appears anywhere in the Constitution; it is a doctrine. At its core, the phrase expresses the belief that several framers shared in a political theory that Montesquieu devised decades before the Constitutional Convention of 1787.[55] As a constitutional doctrine, the phrase is an extrapolation from various sections and clauses in the Constitution, and it serves as an axiom that purports both to describe the operation of those provisions and their interrelations.

The differing separation-of-powers analyses that have competed over the past 30 years are essentially of two kinds, both easily recognizable in the dyadic jurisprudence of the last 100 years of American law. Predictably, one has at least the appearance of a formalistic analysis,[56] looking to the Constitution's language and history to construct rules of decision that then provide a tentative structure for construing unclear or competing portions of the Constitution. The other refers to the same constitutional language and history, but it uses them first to discern the interests that animated the relevant portions of the Constitution or that can be inferred from them and, then, to find a balance among those interests on a case-by-case basis.

Products Co., 473 U.S. 568, 600 (1985) (statutory mandate that contract disputes over interpretation of a specific federal statute be resolved by binding arbitration); Roell v. Withrow, 538 U.S. 580, 581 (2003) (consent to dispositive proceedings before a magistrate judge can be inferred from conduct, not just from expressions of consent).

55. Charles-Louis de Secondat, Baron de La Brède et de Montesquieu, XI SPIRIT OF LAWS chap. ~~66-67~~ (1748). The phrase *separation of powers* is an English rendering of Montesquieu's *pouvoirs distribués*. Montesquieu was frequently cited among the framers. *See* Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189. They generally agreed that Montesquieu's formula for trifurcation of sovereign power would be essential to the survival of a national government that is vested with only limited, constitutionally recognized powers because the necessity of cooperation among the established divisions of a unified government would effectively restrain the exercise of power to the limits prescribed in the Constitution.

The phrase describes the division of sovereign powers among legislative, executive, and judicial divisions and the establishing them with specified attributes, powers, and limitations. *Cf* Montesquieu at 174 ("[T]here is no liberty, if the power of judging be not separated from the legislative and executive powers.").

56. BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 794 (2016). *Formalism* as used here means:

> An approach to law, and esp[ecially] to constitutional and statutory interpretation, holding that (1) when an authoritative text governs, meaning is to be derived from its words, (2) the meaning so derived can be applied to particular facts, (3) some situations are governed by that meaning, and some are not, and (4) the standards for deciding what constitutes following the rules are objectively ascertainable.

These antipodal methods of analysis are reflected in the following excerpts from two of the principal cases. They display the Court's competing methods for maintaining the separation of the judicial powers that Article III allocates to the courts from the legislative powers that Article I vested in Congress, to create courts inferior to the Supreme Court.[57]

In 1982, Justice William J. Brennan insisted that analysis of congressional legislation affecting who may exercise "the judicial power of the United States" rests on the Constitution's language and history. For the majority in *Northern Pipeline*, he wrote:

> The Federal Judiciary was . . . designed by the Framers to stand independent of the Executive and Legislature—to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remained impartial. . . . As an inseparable element of the constitutional system of checks and balances, and as a guarantee of judicial impartiality, Art. III both defines the power and protects the independence of the Judicial Branch. . . . The inexorable command of this provision is clear and definite: The judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III.[58]

This view or one similar was the premise of the majority's analysis in *Granfinanciera v. Nordberg, Gomez v. United States,* and *Stern v. Maxwell*.[59]

Four years later in *Commodity Futures Trading Commission v. Schor*, a case that the Court has since described as "the foundational case" for separation-of-powers analysis "in the modern era,"[60] Justice O'Connor scrapped the rule of decision announced in *Northern Pipeline.* Despite acknowledging that rules of decision like those announced in *Northern Pipeline* could produce a rational and workable integration of Article I and Article III,[61] the majority in *Schor* adopted what it believed to be a more compelling analysis. The process involved extrapolating from the same constitutional language and history what interests the Framers intended either to enshrine or to protect against and then to weigh them against the circumstances that prompted Congress to act in the way that the Court had under review. The Court found that this method of analysis, rather than "formalistic and unbending rules," provided a better way to allow Congress to be innovative in exercising its power to establish tribunals.[62] Justice O'Connor wrote:

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57. *See generally* Magistrate Judges Division, Administrative Office of the U.S. Courts, *A Constitutional Analysis of Magistrate Judge Authority*, 150 F.R.D. 247 (1993).

58. *Northern Pipeline*, 458 U.S. at 58–59.

59. *See also* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 232 (1995) ("We held in *Schor* that, although a litigant had consented to bring a state-law counterclaim before an Article I tribunal, 478 U.S., at 849, we would nonetheless choose to consider his Article III challenge, because "when these Article III limitations are at issue, notions of consent and waiver cannot be *dispositive.*" Schor, 478 U.S. 851 (emphasis in the original).

60. *Schor*, 478 U.S. 833.

61. *Schor*, 478 U.S. at 851.

62. *Id*.

> 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. . . . Although such rules might lend a greater degree of coherence to this area of the law, they might also unduly constrict Congress' ability to take needed and innovative action pursuant to its Article I powers. Thus, in reviewing Article III challenges, 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 on the constitutionally assigned role of the federal judiciary.[63]

In performing its separation-of-powers analysis, the Court in *Schor* looked exclusively to Article III as the source of the competing interests that must be weighed against Congress's Article I powers to establish tribunals.[64]

The Court found that Article III serves two distinct interests. First, it serves to establish the judiciary as a distinct branch of government and, by doing so, to keep Congress─and, presumably, the Executive─from encroaching on Article III courts in order to aggrandize their own powers. Second, the provision creating tenure and salary-security provides a foundation for the judiciary's independence and impartiality.[65]

This method of analysis, in a more or less developed form, was the test the majority applied for the separation-of-powers analysis in *Thomas v. Union Carbide*, *Roell v. Withrow*, and *Wellness Internal Network, Ltd. v. Sharif*.[66]

The Court's shifting majorities have talked past each other on this separation-of-powers question for decades, but not entirely along an ideological divide. For example, Justices Brennan and Thurgood Marshall, who are widely remembered

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63. Commodity Futures Trading Commission v. Schor, 478 U.S. 833, 851 (1986) (quoting *Thomas*, 473 U.S., at 587−90). See *generally* Richard B. Saphire & Michael E. Solimine, *Shoring Up Article III: Legislative Court Doctrine in the Post* CFTC v. Schor *Era*, 68 B.U. L. REV. 85, 109–11 (1988).

64. *Schor*, 478 U.S. at 851.

65. In upholding Congress's constitutional power to establish the judicial tribunal at issue, the Court held Article III's guarantee of judicial independence and impartiality is merely a personal right of the litigants to have their cases decided by a judge who enjoyed those guarantees, but Congress may offer them an option to waive that right. *Id.* at 848-49.

The second interest that Article III protects is structure, not personal. It permanently safeguards the role of the judiciary by barring Congress from transferring Article III jurisdiction to non-Article III tribunals for the purpose of emasculating constitutional courts and aggrandizing "one branch at the expense of the other." Because this interest is structural, Congress cannot create an opportunity for litigants to waive it. *Id.*

66. *See generally* Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568 (1985); Roell v. Withrow, 538 U.S. 580 (2003); Wellness Internal Network, Ltd. V. Sharif, 575 U.S. 665 (2015).

as icons of Warren-Court liberalism and modernity, stood solidly with Justice Scalia[67] for doctrinal analysis, not interest analysis and balancing.[68]

As if to highlight the power of the competing methodologies to draw judicial attention from time to time, each has commanded a majority in one of the Court's two most recent cases, *Stern v. Marshall*[69] and *Wellness Internal Network, Ltd. v. Sharif*. Both were bankruptcy cases.[70] A comparison of these cases is informative because the same set of justices participated in both cases, and both were 5-4 decisions. Justice Kennedy was the swing vote.

Each case involved the same kind of claim: they arose entirely from state law and, if successful, would result only in augmenting the property of the bankrupt's estate.[71] According to the Bankruptcy Act, these were "noncore" claims.[72] As such, bankruptcy court judges had no power to render final judgment.[73] The judges were authorized under 11 U.S.C. § 157(c)(1) to hear the case but only to propose "findings of fact and conclusions of law to the district court."[74] If the parties consented,[75] however, the Act authorized the bankruptcy judge to adjudicate the claim with the same independence and finality as if it were a core claim.

In both cases, the parties either consented[76] or were deemed to have consented[77] to the bankruptcy judges' hearing the claim. The question in each case

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67. *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. at 65 (Scalia, J., concurring in part) ("I join all but Part IV of the Court's, opinion [per Brennan, J]. I make that exception because I do not agree with the premise of its discussion: that 'the Federal Government need not be a party for a case to revolve around "public rights.'"); Peretz v. United States, 501 U.S. at 955 (Scalia, J., dissenting) ("Turning to the merits of the statutory claim, I am in general agreement with Justice Marshall [dissenting].").

68. See Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); Thomas v. Union Carbide, 473 U.S. 568, 594 (Brennan and Marshall, JJ., concurring); *Schor*, 478 U.S 833, 859 (Brennan and Marshall, JJ., dissenting).

69. Stern v. Marshall*,* 564 U.S. 462, 482 (2011) ("The Court agrees . . . [that] Pierce consented to the Bankruptcy Court's resolution of the defamation claim.").

70. *See Stern*, 564 U.S. 462 (2011); *Sharif*, 575 U.S. 665 (2015).

71. *Id*.

72. *See Sharif*, 575 U.S. 665 (2015).

73. Bankruptcy courts may enter final judgments in "all core proceedings arising under title 11, or arising in a case under title 11." 11 U.S.C. §§ 157(a), (b)(1). . . . Section 157(b)(2) lists various categories of core proceedings, including "counterclaims by the estate against persons filing claims against the estate." § 157(b)(2)(C).

74. 28 U.S.C. § 157(c)(1) provides that:

> A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

75. 28 U.S.C. § 157(c)(2) (2020) provides that:

> Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

76. *Stern*, 564 U.S. at 479.

77. Wellness Internal Network, Ltd. V. Sharif, 575 U.S. 665 (2015).

was, therefore, whether the parties' consent could constitutionally create authority for the bankruptcy judge to adjudicate the claim, as the Bankruptcy Act purported to allow.

In *Stern v. Marshall,* the Court held that, although the Bankruptcy Act authorized bankruptcy judges to adjudicate a noncore claim if the parties consented, the statute authorizing it was unconstitutional. It ruled that only an Article III judge has the judicial power to decide and enter final judgment on a state common-law claim that is independent of the federal bankruptcy law and that is not resolvable by a ruling on the creditor's proof of claim in bankruptcy.[78] Accepting the rule announced in *Northern Pipeline*, the majority held that bankruptcy judges, who "lacked the tenure and salary guarantees of Article III," could not "constitutionally be vested with jurisdiction to decide [a] state-law" claim that "was not otherwise part of the bankruptcy proceedings."[79]

In the second case, however, the Court held the opposite. In *Sharif*, it upheld a bankruptcy judge's exercise of judicial power in deciding a state-law claim even though the claim was not otherwise a part of the bankruptcy proceeding. The Court did so without overruling *Stern*. And it did so even though it accepted the lower court's determination that, in light of *Stern*, the Congress had no constitutional authority to empower bankruptcy judges to adjudicate the noncore claim.[80]

The majority in *Sharif* upheld the bankruptcy judge's exercise of judicial power because they found that the parties had consented to the bankruptcy judge's deciding the claim. It then ruled that consent by the parties was adequate to cure Congress's lack of authority to such action. Even though the Court had specifically held in *Stern* that "parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III,"[81] the majority in *Sharif* ruled that litigants, by their act of consenting, can allow non-Article III judges to exercise judicial power. Despite the Constitution's plain language giving authority to exercise that power to only Article III judges, the Court's rationale was that "the entitlement to an Article III adjudicator is a 'personal right' and thus ordinarily 'subject to waiver.'"[82]

Sharif stands for the proposition that the Constitution creates merely a presumption that an Article III will preside in cases that fall within the judicial power of the United States. That presumption controls unless and until the litigants

78. *Stern*, 564 U.S. at 487 (internal quotations and citations omitted).

79. *Id*. at 462 (internal quotations and citations omitted).

80. *Id.*

81. *See* Commodity Futures Trading Commission v. Schor, 478 U.S. 833, 850-51 (1986) ("To the extent that [a] structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III, § 2. See, *e.g.,* United States v. Griffin*,* 303 U.S. 226, 229 (1938). 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."); Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 57-58 (1982) ("'The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'") (quoting Buckley v. Valeo, 424 U.S. 1, 122 (1976) (*per curiam*)).

82. *Sharif,* 135 S. Ct. 1932, 1944 (quoting *Schor*, 478 U.S. at 851).

prefer otherwise.[83] But the right of litigants to make that choice can arise only when Congress has created a substitute judicial officer who sits on a tribunal that Congress has created with authority to exercise judicial power.[84] And Congress may create the opportunity for litigants to consent to a non-Article III judge's exercise of judicial power only if, in doing so, it neither emasculates constitutional courts nor encroaches on or aggrandizes the appointment power of "one branch at the expense of the other."[85]

In short, "consent is the linchpin for the constitutionality of" the provisions allowing substitute judges like bankruptcy judges and, perhaps magistrate judges,[86] to act in the place of Article III judges,[87] at least for purposes of separation-of-powers analysis. Consent is constitutionally significant because, under federal law, a party's right to choose between alternative judges whom Congress chooses to offer is deemed to be a personal right,[88] not a structural feature of the Constitution. A party's decision to consent to an alternate adjudicator is, therefore, adequate to constitutionally empower the alternate judge to fully perform judicial functions─ even though the alternate otherwise lacks the authority to perform the functions─

83. *Sharif*, 135 S. Ct. 1932.

84. *But see id. at* 1944, 1957 ("[A]llowing Article I adjudicators to decide claims submitted to them by consent does not offend the separation of powers so long as Article III courts retain supervisory authority over the process…"; "allowing bankruptcy courts to decide *Stern* claims… would 'impermissibly threate[n] the institutional integrity of the Judicial Branch") (quoting *Schor*, 478 U.S. at 851) (grammatical correction in original).

85. *Sharif*, 135 S. Ct. at 1944, 1956 (Article III, § 1 "safeguards the role of the Judicial Branch in our tripartite system…" by "barring 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.") (quoting *Schor*, 478 U.S. at 851) (internal citations omitted).

86. Although *Sharif* was a bankruptcy case, it appears to offer support for the general proposition that consent validates substitute judges as constitutional alternatives to Article III judges. But the analogy between magistrate judges and the judicial officers involved in *Northern Pipeline*, *Schor*, *Stern*, and *Sharif* is hardly perfect. Despite the fact that all of the judicial officers in those cases were creatures of Congress's Article I power to constitute tribunals inferior to the Supreme Court, a difference exists between magistrate judges and some, if not all, other Article I judges. While the judicial officers at issue in those cases were all appointed to sit on Article I courts, magistrate judges are appointed to sit on Article III courts, and Article III prescribes attributes for those who exercise the judicial power allocated in Article III. They must be appointed by the President with the advice and consent of the Senate, they must have tenure during their good behavior, and their salaries may not be diminished. For a discussion of the relationship between magistrate judges and the attributes of Article III judges, *see* J. Anthony Downs, Comment, *The Boundaries of Article III: Delegation of Final Decisionmaking Authority to Magistrates*, 52 CHI. L. REV. 1032 (1985). For a discussion of the consequences of magistrate judges' exercising authority equivalent to Article III judges when they preside with consent, see subsection B. Appointments Clause, *infra.*

87. Adams v. Heckler, 794 F.2d 303, 307 (7th Cir. 1986). *See generally* 12 WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE: CIVIL §§ 3071.1, 3528 (2020) ("This statutory structure was designed by members of Congress who explicitly considered voluntary consent imperative… The voluntary consent requirement was designed to assuage constitutional concerns, as Congress did not want to erode the litigant's right to insist on a trial before an Article III judge.").

88. Roell v. Withrow, 538 U.S. 580, 588 (2003) ("Congress meant to preserve a litigant's right to insist on trial before an Article III district judge . . .") (citing Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848 (1986)).

so long as Congress, in creating the alternative adjudicator, does not impermissibly threaten the institutional integrity of the judicial branch.

To date, the Supreme Court—despite its decision in *Stern*—has balanced the effect of litigant's consent and the personal-right doctrine against only the interests embodied in Article III. The Court has not assessed how litigant's consent, when it triggers the sweeping judicial power that 28 U.S.C. § 636(c)(1) authorizes magistrate judges to exercise, may be affected by the limited nature of the magistrate judges' appointments as inferior officers under the Appointments Clause.

b. Appointments Clause

The Appointments Clause allocates the power to select and appoint all of the various officers who may be required to operate the federal government. It establishes a general rule for the appointment of all federal officers: Officers must be nominated by the President and confirmed by the Senate. Article II, § 2, clause 2 states:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: . . .

The Clause immediately continues by vesting in Congress the limited authority to establish different appointment processes for certain, unidentified "inferior Officers":

> but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

This limited exception, which the Supreme Court has referred to as the Excepting Clause,[89] was added to the Constitution of 1788 at the eleventh hour of the Constitutional Convention.[90] It applies to only "inferior Officers," a term that Article III does not define.[91] The Excepting Clause also limits Congress's authority to give appointment power to only three potential recipients: "the President alone," "the Courts of Law," and "the Heads of Departments." Unless Congress exercises

89. *See* Edmond v. United States, 520 U.S. 651, 660 (1997) (Scalia, J., joined by Rehnquist, C.J., and Stevens, O'Connor, Kennedy, Thomas, Ginsburg, and Breyer, JJ; Souter, J. joining in part and concurring in part).

90. *Id.* (citing 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 627–28 (1911 ed.)).

91. The Appointments Clause is silent on a number of other appointment-related issues as well. It is silent, for example, about the extent to which Congress may add duties to an existing office, whether appointed officers can take on different roles without reappointment, who has the authority to remove appointed officers, and on what grounds. *See, e.g., Separation of Powers-Appointments Clause-D.C. Circuit Furthers Uncertainty in Appointments Clause Test for Executive Branch Reassignments*, 129 HARV. L. REV. 1452 (2016).

the alternative appointment process, all "inferior Officers" must be nominated in precisely the same way as the principal, superior officers who are either listed or described in the first clause. The Supreme Court has recognized[92] that the Appointments Clause implies a third category of appointees ―employees ―who don't have the attributes of principal or inferior officers,[93] whatever those attributes might be.

i. Inferior officers and principal officers

When Congress created the office of magistrate judge in 1968, it invoked the Excepting Clause. Because it intended magistrate judges to serve subordinately as aides to the district courts, Congress designated the magistrate judges' eventual principals, the judges of the district courts, to be the appointing authorities for the newly created judicial officers.[94] Congress's decision to treat them as inferior officers of the United States was wise.[95] The United States Supreme Court has since ruled in at least three cases involving the status of judicial officers. All had been appointed to serve on Article 1 courts, which Congress had established under its Article I power to establish tribunals. In each case, the Court held that the judge appointed to the Article I court must be appointed in conformity with the Appointments Clause because the functions that Congress authorized that judgeship to perform amounted to attributes of inferior officers.[96]

Two of these cases stand for the broad proposition that what distinguishes an officer of the United States from an employee for purposes of the Appointments Clause are the duration of the appointment and the significance of the powers performed. In *Freytag v. Commission of Internal Revenue*, the Court considered the constitutionality of a statute that authorized the chief judge of the United States Tax Court to appoint special trial judges.[97] The statute authorized special trial judges to perform various duties. Some duties were limited to preparing proposed

92. United States v. Germaine, 99 U.S. 508, 509–10 (1879) ("The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate But foreseeing that when offices became numerous, and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments. That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt.").

93. *Id.* at 511–12.

94. 28 U.S.C. § 636(a) (2020).

95. Congress's wisdom perhaps had been formed in part by United States v. Eaton, 169 U.S. 331, 343 (1898) (holding a United States commissioner in district court proceedings is an inferior officer).

96. *See* Freytag v. Comm'r, 501 U.S. 868 (1991) ("special trial judge" of U.S. Tax Court) (internal quotations omitted); *Edmond*, 520 U.S. 651 (civil judge on the Coast Guard Court of Criminal Appeals); Lucia v. SEC, 138 S. Ct. 2044 (2018) (administrate law judge for Securities and Exchange Commission). *See also* Butz v. Economou, 438 U.S. 478, 513, (1978) (any "modern federal hearing examiner or administrative law judge within this framework is "functionally comparable" to that of a judge. His powers are often, if not generally, comparable to those of a trial judge . . . .").

97. *Freytag*, 501 U.S. at 870.

findings and drafting opinions that, after review, were issued by a Tax Court judge.[98] But the statute also empowered the special trial judges to exercise independent authority in certain cases and to decide them for the Tax Court.[99]

The statue allowing for the appointment of special trial judges was challenged as violating the Appointments Clause. The Court held that the Appointments Clause allows Congress to establish appointive authority in "Courts of law" and that the Tax Court is a court within the meaning of the Appointments Clause. It also ruled that the special trial judges were inferior officers of the United States because they were appointed to serve on a continuing basis and because they were authorized to exercise significant discretion and independent authority in the performance of at least some of their duties. As such, they were appointed in conformity with the Appointments Clause. The mere fact that the special trial judges exercised their most significant authority in only some cases and at other times performed as an employee did not diminish their status as officers.[100]

The Supreme Court reached the opposite conclusion about the appointment of administrative law judges within the Securities Exchange Commission. In *Lucia v. SEC*, the Court applied the same reasoning it had used in *Freytag* regarding the attributes of inferior officers who are appointed as judges on an Article I court.[101] Under the Administrative Procedure Act and the SEC's regulations, the agency's ALJs preside over administrative proceedings conducted as enforcement actions. The ALJ's duty in these cases is to render a decision that, subject to review by the Commission, includes factual findings, conclusions of law, and a remedy. The SEC then decides whether to review the decision. If it decides not to do so, the ALJ's decision "becomes final" and is "deemed the action of the Commission."[102]

The Court found that its ruling in *Freytag* controlled the Appointments Clause analysis of the ALJ's status because *Freytag* had established the rule for distinguishing an officer from an employee. The Court said: "In Freytag v. Commissioner . . . we applied the unadorned "significant authority" test to adjudicative officials who are near-carbon copies of the Commission's ALJs. . . . [O]ur analysis there . . . necessarily decides this case."[103]

The Court found that an ALJ exercised significant authority because, under the Administrative Procedure Act and the SEC's rules, the ALJ's decisions could become the final action of the Commission. That possibility was enough to elevate the status of ALJs, like the special trial judges in *Freytag,* to the status as an officer for purposes of the Appointments Clause. But what distinguished the ALJs from

98. *Id.* at 873.

99. *Id*. at 869.

100. *Id.* at 882 ("The fact that an inferior officer on occasion performs duties that may be performed by an employee not subject to the Appointments Clause does not transform his status under the Constitution. If a special trial judge is an inferior officer for purposes of subsections (b)(1), (2), and (3), he is an inferior officer within the meaning of the Appointments Clause and he must be properly appointed.").

101. Lucia v. S.E.C., 138 S. Ct. 2044, 2047-48 (2018).

102. *Id.* at 2048.

103. *Id.* at 2052. *But see* Morrison v. Olson, 108 487 U.S. 654, 669-72 (1988) (four attributes for an inferior officer: 1-removable by a higher officer; 2-only "certain, limited" duties; 3-the office is limited in jurisdiction; 4-tenure of the office is limited).

the special tax judges is that the ALJs were not appointed through a process that comported with the Clause. The ALJs were selected by the SEC staff. Because they had not been appointed by "the President, a court of law, or a head of department,"[104] they acted, therefore, without constitutional authority. The Court's remedy for the ALJ who "heard and decided [the] case without the kind of appointment the Clause requires" was firm.[105] It disqualified the ALJ from rehearing the case even if the Appointments Clause error were rectified.[106]

Neither *Freytag* nor *Lucia* turned on whether the officer should have been appointed as a principal officer, not as inferior officer. That question is, nevertheless, the one that may arise regarding magistrate judges because of their statutory capacity to occasionally act independently of, and with authority equivalent to, Article III judges. A form of this question arose in *Edmond v United States*, a case involving the Secretary of Transportation's appointment of military officers to serve as judges on the Coast Guard Court of Criminal Appeals, an intermediate Article I court within the Department of Transportation.[107] The Supreme Court had never before attempted to discern "an exclusive criterion for distinguishing principal and inferior officers for Appointments Clause purposes."[108]

The Court's analysis rested on this overarching observation about appointive authority. It observed that the manner that the Appointments Clause prescribes for appointment of principal officers is also "the default manner of appointment for inferior officers" under the Appointments Clause.[109] Officers who are not "inferior Officers" are necessarily principal officers and, as such, must be appointed by the President with the advice and consent of the Senate. The Court ruled that the hallmark of an inferior officer is the existence of someone in authority over the officer. "Whether one is an 'inferior' officer depends on whether he has a superior."[110] More precisely, it ruled that inferior officers are officers "whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."[111]

The Court reviewed the Department of Transportation's supervision of the judges' work,[112] the extent of superiors' authority to review the judges'

104. Lucia v. S.E.C., 138 S. Ct. 2044, 2051 (2018).

105. *Id.* at 2055.

106. *Id.*

107. Edmond v. United States, 520 U.S. 651 (1988).

108. *Id.* at 661.

109. *Id.* at 660.

110. *Id.* at 663.

111. *Id.*

112. *Id.* at 664 ("Supervision of the work of Court of Criminal Appeals judges is divided between the Judge Advocate General (who in the Coast Guard is subordinate to the Secretary of Transportation) and the Court of Appeals for the Armed Forces." The Judge Advocate General provides court with "administrative oversight" in various kinds that include prescribing rules of practice and procedure for the court and formulating "policies and procedures" governing the "review of court-martial cases.").

decisions,[113] the amount of independence the judge was afforded,[114] and where authority to discharge them lay.[115] But what really mattered, the Court said, was whether the judges had the "power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers."[116] Applying that measure, the Court concluded the judges of Coast Guard Court of Criminal Appeals were inferior officers because, due to the combined effect of the various forms of management, oversight, and review, the judges lacked the autonomy to render a final decision.[117] The military officers' performance of their adjudicative function on the court of appeals remained within a principal-subordinate relationship within Department of Transportation.

ii. The status of magistrate judges as officers

As was described in Part A, 1 above, the office of the federal magistrate judge has changed significantly since the process for appointing them was originally configured in 1968. The duties that Congress had initially prescribed when the new judicial office was conceived fit squarely within the definition of an "inferior officer," as that term is used in the Appointments Clause.

But the expanded authority of federal magistrate judges, which Congress enacted in 1976 and 1979, has elevated the office of magistrate judge to one that occasionally is, as a matter of law, the equal of an Article III judge. When the two conditions prescribed in 28 U.S.C. § 636 (c)(1) are met,[118] the judicial power that magistrate judges have the legal capacity to exercise becomes equal to the judicial power Article III district court judges exercise.

The broad power that § 636(c)(1) puts into the hands of magistrate judges is the very essence of federal judicial power. It is the power, not just to rule on cases and controversies that Article III describes, but also to decide them with the same independence and finality of every district court judge. Moreover, their judgments are subject to the same direct review and the same deference by superior courts in the Article III hierarchy.[119]

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113. *Id.* ("The Judge Advocate General's control over Court of Criminal Appeals judges is, to be sure, not complete. He may not attempt to influence (by threat of removal or otherwise) the outcome of individual proceedings . . . and has no power to reverse decisions of the court.").

114. *Id.* at 664-5 (Appellate review is in the Court of Appeals for the Armed Forces, itself an Article I court, which has specific, operational ties with the Executive Branch and whose judges the President may remove for cause.).

115. *Id.* at 664 1581(Judge Advocate General had authority to discharge judges without cause, a power "that is "a powerful tool for control.").

116. Edmond v. United States, 520 U.S. 651, 665 (1988).

117. *Id.*

118 See text, *supra* at note 39.

119. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 220 (1995) ("Article III establishes a 'judicial department' with the 'province and duty . . . to say what the law is' in particular cases and controversies. *Marbury v. Madison,* 1 Cranch 137, 177, 2 L.Ed. 60 (1803). The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy—with an understanding, in short, that 'a judgment conclusively resolves the case' because 'a "judicial Power"

The Supreme Court has itself recognized the equivalence of power that district judges and magistrate judges exercise when the two conditions have been met. In *Roell v Withrow*, the Court noted that they possess the same judicial authority, explaining that

> a § 636(c)(1) referral gives the magistrate judge full authority over dispositive motions, conduct of trial, and entry of final judgment, all without district court review. A judgment entered by "a magistrate judge [is] designated to exercise civil jurisdiction under [§ 636(c)(1)]" is to be treated as a final judgment of the district court, appealable "in the same manner as an appeal from any other judgment of a district court." § 636(c)(3).[120]

When acting within the scope of that authority § 636(c)(1), magistrate judges therefore are no longer in any sense acting as "inferior officers" who are subordinate to the authority of a superior, Article III judge. They are no longer acting within a principal-subordinate relationship. In light of *Edmond* and *Freytag*, Congress cannot — merely by invoking the Excepting Clause — give district court judges the authority under 28 U.S.C. § 636(c)(1)[121] to specially designate inferior judicial officers to act independently of a principal officer and with equivalent authority, even though those officers exercise their independence only on occasion and only in addition to other, lesser duties.

The Appointments Clause places a cap on the amount of additional judicial power that Congress may heap on non-Article III judges — without, that is, necessitating their reappointment as principal judicial officers in accordance with the Clause. Yet, by cloaking magistrate judges with judicial independence in the exercise of judicial power equivalent to that of district court judges, Congress has authorized them to act beyond the status to which they were appointed.

Despite Congress's wish to increase the number of judicial officers without the burdens that Congress associates with the tenure and compensation-security of Article III judges, the Appointments Clause prevents Congress from circumventing the President's and Senate's exclusive power to jointly appoint[122] principal officers to act independently in the exercise of sovereign power. Because the Appointments Clause exists to protect the public interest,[123] "[n]either Congress nor the Executive can agree to waive th[e] structural protection[s]" that

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is one to render dispositive judgments.'") (emphasis added) (quoting Hon. Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1990)).

The only differences that distinguish the power of magistrate judges after referral with consent are a narrowed power to punish criminal contempt, 28 U.S.C. § 636(e)(5) and (6), and the district court judges' power *sua sponte* or on a party's motion vacate the referral. 28 U.S.C. § 636(c)(4).

120. Roell v. Withrow, 538 U.S. 580, 585 (2003).

121. The statute provides in part that "(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, when specially designated to exercise such jurisdiction by the district court or courts he serves."

122. Edmond v. United States, 520 U.S. 651, 660 (1988).

123. *Id.* ("the Appointments Clause was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one.").

the [Appointments] Clause provides." [124] The Court has held that courts may hear questions arising under the Appointments Clause at nearly any stage of proceedings.[125] The Court has recognized the Appointments Clause's interests are "structural interests . . . of the entire Republic."[126] Because of that structural significance, the Supreme Court enforces the Appointments Clause in ways "designed not only to advance those purposes directly, but also to create '[]incentive[s] to raise Appointments Clause challenges.'"[127] Were Congress authorized to create subordinate officers, to empower courts under authority of the Excepting Clause to appoint them, and then, once appointed, to elevate the officer's authority to that of a principal, Congress would have arrogated to itself the authority to bypass the Appointments Clause and, thus, to allow appointment powers to accrue to "one branch at the expense of the other[s]."[128]

But Congress has done precisely that by enacting 28 U.S.C. § 631(a) and later amending 28 U.S.C. § 636(c)(1). With passage of § 631(a) in 1968, Congress gave district courts the power to appoint[129] magistrate judges to assist the Article III judges as subordinates in judges' exercise of the district courts' judicial power. Then, with passage of § 636(c)(1) in 1979, Congress gave the district courts the authority to "designate" certain of the inferior officers as having the capacity to act independently in exercising in any civil case the full judicial power of the district court case whenever all parties consent.[130] The combination of those two acts circumvents the default provision of the Appointments Clause: it allows for the creation of an officer who has authority to act independently in the exercise of Article III judicial power but who has not been appointed by the President and confirmed by the Senate. In short, when the Senate joined in passage of 636(c)(1) and when the President signed it into law, they abdicated their mandatory authority under the Appointments Clause to jointly appoint all principal officers of the United States. [131]

In summary, the narrow separation-of-powers reasoning that the Supreme Court used in *Sharif* cannot be transported to the Appointments Clause. Analysis

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124. *See* Weiss v. United States, 510 U.S. 163, 188-89 (1994) (Souter, J., concurring) ("no branch may abdicate its Appointments Clause duties. Congress, for example, may not authorize the appointment of a principal officer without Senate confirmation; nor may the President allow Congress or a lower level Executive Branch official to select a principal officer. . . . Neither Congress nor the Executive can agree to waive th[e] structural protection[s] the Clause provides.") (grammatical changes in the original). *See also* Glidden Co. Zdanok, 370 U.S. 530, 536 (1962) (Appointments Clause objections to judicial officers could be considered on appeal whether or not they were ruled upon below); Freytag, v. C.I.R., 501 U.S. 868 at 879 (1991).

125. *See generally,* Weiss v. United States, 510 U.S. 163 (1994). *See also* Glidden Co. v. Zdanok, 370 U.S. 530, 536 (1962).

126. Weiss v. United States, 510 U.S. 163, 189 (1994).

127. *Lucia v. S.E.C.*, 138 S.Ct. 2044, 2055 n.5 (2018) (quoting Ryder v. United States, 515 U.S. 177, 183 (1995)).

128. Commodity Futures Trading Commission v. Schor, 478 U.S. 833, 850 (1986) (internal quotations omitted) (quoting Buckley v. Valeo, 424 U.S. 1, 122 (1976) (*per curiam*)).

129. 28 U.S.C. § 631(a).

130. 28 U.S.C. § 631(c)(1) (1979).

131. *Id.*

of 28 U.S.C. § 636(c)'s consent provision under the Appointments Clause does not turn on the personal right of litigants to claim or waive an Article III judge.[132] Rather, the interests involved in the Appointments Clause are structural; they involve constitutionally mandated interactions of the President and Senate. Preservation of that interaction implicates broader public purposes than merely preserving fairness for litigants or even balancing one branch versus another.

* * *

The impact of party-consent on the make-up of the federal judiciary is not widely recognized. As of 2019, the total authorized number of Article III district court judges is 677.[133] The total number of Article I judges with the capacity to exercise in certain cases judicial power equivalent to Article III judges, on the other hand, now stands at 928.[134] The majority of that number─581[135]─are magistrate judges. Yet, they have arisen within the federal judiciary to fill the needs in a system that has grown since 1968. The docket of civil actions pending in district courts nationally, for example has increased from 93,207[136] cases in 1970 to 297,877[137] in 2019. That is an increase of 220%. The number of Article III district court judges that Congress authorized rose only 70% from 395 judges in 1970 to 677.[138] Representing nearly 60% of the district courts' judicial force, the 581 magistrate judges are a principle factor in the federal judiciary's ability to absorb the increase in pending cases.

As District Judge William G. Young has observed, "The evidence is all around us. It is the Article I, not the Article III, trial judiciary that is today expanding, vital, and taking on ever more judicial responsibilities."[139]

B. HOW THE OHIO CONSTITUTION COMPARES TO THE U.S. CONSTITUTION

The Supreme Court of the United States may eventually decide whether the U.S. Constitution gives Congress the authority to empower an inferior officer to supplant an Article III judge. Regardless of what the Court may decide, the outcome can have little bearing on whether the Ohio Constitution also permits a

132. *See supra* text accompanying notes 71-74.

133. Admin. Off. U.S. Cts., *Statistics & Reports: Judicial Business 2019—Status of Article III Judgeships*, U.S. CTS., https://www.uscourts.gov/statistics-reports/status-article-iii-judgeships-judicial-business-2019 (accessed 9/27/2020).

134. *Id*. The remaining 347 are bankruptcy judges.

135. *Id.*

136. Tim A. Baker, *The Expanding Role of Magistrate Judges in the Federal Courts*, 39 VAL. U. L. REV. 661, 684 Appendix B (2005).

137. Admin. Off. U.S. Cts., *Statistics & Reports: Judicial Business 2019—Judicial Business 2019 Tables*, U.S. CTS., https://www.uscourts.gov/judicial-business-2019-tables, Table C (last updated Sept. 30, 2019).

138. *Id*.

139. Hon. William G. Young, *An Open Letter to U.S. District Judges*, FED. LAW. 30, 34 (July 2003).

similar empowerment. The Ohio Constitution differs significantly from the federal Constitution with respect to the creation, allocation, and exercise of judicial power.

1. Judicial Power in the Ohio Constitution

The Ohio Constitution mentions judicial power in three Articles[140]; Article IV is devoted entirely to it. Although the term "judicial power" is not defined anywhere in the constitution, the essential characteristics of judicial power have been clear at common law: Judicial power is the "power to decide, and power to enforce the decision."[141] Chief Justice John Marshall recognized in 1803 that it is "emphatically the province and duty of the judicial department to say what the law is. . . . [and to] apply the rule to particular cases."[142]

Ohio has understood judicial power in the same way. The exercise of judicial power is "to decide and pronounce a judgment,"[143] Any law that authorizes the rendering of a judgment or decree necessarily confers judicial power.[144] The Ohio

140. OHIO CONST. art. II, §§ 32, 40; OHIO CONST. art. IV, § 1.

141. Cohens v. State of Virginia, 19 U.S. 264, 317 (1821). *See also* Watkins v. Holman's Lessee, 41 U.S. 25, 36, (1842) ("the right to decide between different parties; the power to declare what the law is between conflicting parties, and to carry judgments or decrees into effect."); Muskrat v. United States, 219 U.S. 346, 356 (1911) ("the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision.") (quoting JUSTICE SAMUEL FREEMAN MILLER, LECTURES ON THE CONSTITUTION 314 (1893)).

142. Marbury v. Madison, 5 U.S. 137, 177 (1803); Muskrat v. United States, 219 U.S. 346, 357 (1911) (the power to decide "the claims of litigants [who have been] brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs."). *See also* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218-19 (1995) ("The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy—with an understanding, in short, that 'a judgment conclusively resolves the case' because 'a "judicial Power" is one to render dispositive judgments.'").

143. State v. Cox, 101 N.E. 135, 139 (1913) (internal quotations omitted). *See also* State v. DeWitt, 2014-Ohio-162, ¶ 6 ("[J]udicial power is the power to decide and pronounce a judgment . . .") (quoting State v. Wilson, 657 N.E.2d 518 (1995)); State v. Wilson, 657 N.E.2d 518 (1995) ("The judicial power of the state of Ohio is vested in its constitutional courts, the Supreme Court, the courts of appeals, and the courts of common pleas, and such other courts as may be established by law. Section 1, Article IV, Ohio Constitution. . . . Exercise of that power in any manner which determines the individual rights of any person is reserved to the judge or judges of each of those courts, who holds office according to law and is commissioned to exercise the judicial power of his or her court. . . . [T]he judicial power is the power to decide and pronounce a judgment and carry it into effect in a controversy between two or more persons who by right bring that case before the court for its decision.").

For an eloquent discourse on the nature of judicial power, especially as distinguished from legislative power, see Chesnut v. Shane's Lessee, 16 Ohio 599, 623–26, 1847 WL 82, *11 (Ohio 1847) (Read, J., dissenting.).

144. *See* Geauga Lake Improvement Ass'n v. Lozier, 182 N.E. 489, 491–92 (1932) ("Judicial power . . . is authority to hear and determine where the rights of persons or property, or the propriety of doing an act, are the subject-matter of adjudication and the judicial act involves the exercise of judgment or discretion. . . . A law that confers upon a court the authority to render a judgment or decree which shall be a judicial settlement of the question in controversy, is a law conferring judicial power.") (internal quotations and citations omitted).

Supreme Court, describing what it means to exercise the judicial function, has stated that it requires the performance of "mental processes in the determination of law or fact, and at times [it] involves discretion as to how the [state's judicial] power should be used."[145]

2. The allocation of judicial power under the Ohio Constitution

Three sections of the Ohio Constitution, in combination or individually, prevent the injection of Congress's system of magistrate judges into Ohio law. Unlike the federal Constitution, these three sections specify not only the courts where judicial power lies but also — and more significantly — the officers who may exercise it. As a result, no gap exists in the Ohio Constitution that would allow for the creation of a "personal right" of litigants to choose whom they might want to exercise the state's judicial power in their cases. Nor is there room in the Ohio Constitution to allow the adoption of any law that bars the judges who sit on constitutionally created courts from exercising the judicial power that the constitution allocated to them. In fact, the Ohio Constitution positively eliminates that possibility.

a. The vesting of judicial power in specific courts

Article IV, §1: Judicial Power Vested in Court

> The **judicial power** of the state **is vested** in a supreme court, courts of appeals, courts of common and divisions thereof, and such other courts inferior to the Supreme Court as may from time to time be established by law.

Article IV, § 1 goes further than does Article III in the federal Constitution. Besides establishing a supreme court, it identifies two levels of inferior courts. The courts at all three levels are the repositories of the state's judicial power. By using the present passive verb "is vested," Article IV, § 1 directly vested the courts on all three levels with the judicial power of the state. The drafters' choice of verb may well have reflected the fact that the Ohio Supreme Court and the courts of common pleas had already come into existence when Ohio adopted its first constitution in 1802.[146] Nevertheless, the investiture of judicial power in the

145. Hocking Valley Ry. Co. v. Cluster Coal & Feed Co., 97 Ohio St. 140, 142 (1918) ("[The] entering these findings upon the journals of the court as a judgment can by no possibility be construed as a judicial function. The latter presupposes the use of mental processes in the determination of law or fact, and at times involves discretion as to how the power should be used. Under this statute the clerk is not vested with discretion, and his refusal to act would subject him to a writ of mandamus. It has been decided by this court that while the setting and allowance of a bill of exceptions, in determining the collection of a bill, may be judicial, the act of the judge in signing it is purely ministerial. The court determines and announces its conclusion. This function is judicial. After such announcement, the entry of his final decision is purely ministerial. If the statute in question required the determination by the clerk of any issue of fact or legal principle involved, this would have been an unwarranted exercise of judicial power.") (Emphasis added).

146. *See* OHIO CONST., 1802 art. III, § 2 (1803) (replaced 1851).

specifically identified courts was immediate and self-executing. It required no empowerment by the General Assembly.[147]

With judicial power vested directly, the constitution next addresses in separate sections the jurisdiction of each court level. The original and appellate jurisdiction of the supreme court and the courts of appeals has, since adoption of the Modern Courts Amendment in 1968, been largely defined in Article IV, §§ 2[148] and 3.[149] Article IV, § 4 addresses the extent of the common pleas courts'

147. The explicit vesting of judicial power in the courts does not mean, of course, that courts are necessarily the exclusive repository of all judicial power. *See, e.g.*, Fassig v. State, 116 N.E. 104, 107 (1917) ("What is judicial power cannot be brought within the ring-fence of a definition. It is undoubtedly power to hear and determine, but this is not peculiar to the judicial office. Many of the acts of administrative and executive officers involve the exercise of the same power. The court then shows that many boards hear and determine questions affecting private as well as public rights, and quotes with approval from State ex rel. v. Harmon, 31 Ohio St. 250: 'The authority to ascertain facts and apply the law to the facts when ascertained pertains as well to other departments of government as to the judiciary.'") (quoting State ex rel. v. Hawkins, 5 N. E. 228, 232 (1886)).

148. OHIO CONST., art. IV, § 2 Organization and jurisdiction of Supreme Court

. . . .

(B) (1) The Supreme Court shall have original jurisdiction in the following:

(a) Quo warranto;

(b)Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination;

(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

(2) The supreme court shall have appellate jurisdiction as follows:

(a) In appeals from the courts of appeals as a matter of right in the following:

(i) Cases originating in the courts of appeals;

(ii) Cases in which the death penalty has been affirmed;

(iii) Cases involving questions arising under the constitution of the United States or of this state.

(b) In appeals from the courts of appeals in cases of felony on leave first obtained,

(c) In direct appeals from the courts of common pleas or other courts of record inferior to the court of appeals as a matter of right in cases in which the death penalty has been imposed;

(d) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law;

(e) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;

(f) The Supreme Court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3(B)(4) of this article.

(3) No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.

(C) The decisions in all cases in the Supreme Court shall be reported, together with the reasons therefor.

149. OHIO CONST. art. IV, § 3 Organization and jurisdiction of Court of appeals

. . . .

(B)(1) The courts of appeals shall have original jurisdiction in the following:

(a) Quo warranto;

jurisdiction.[150] It gives the General Assembly authority to set the original and appellate jurisdiction of the common pleas courts. Usage of the future tense in this section signals that the breadth of the courts' subject-matter jurisdiction is for the legislation to adjust as it sees fit.[151]

Because the constitution mandates the existence of three court levels and has vested the courts with the judicial power of the state, neither the General Assembly nor the Ohio Supreme Court has any say in whether those courts will exist or whether they may exercise judicial power that Article III vests in them. This is in marked contrast to Congress's power to create and structure courts inferior to the Supreme Court.

The two constitutional provisions in Article IV that most constrain Ohio's allocation of judicial power, however, are § 6 and § 18.

b. The electorate, not governmental officers or legislators, select judges

Article IV, § 6 (A) Election of judges

> . . .
> (3) The **judges** of the courts of common pleas and the divisions thereof **shall be elected** . . . .
> (4) Terms of office of all judges shall begin on the days fixed by law, and laws shall be enacted to prescribe the times and mode of their election. . . .[152]

Article IV, § 6 is explicit in establishing that all judges must be popularly elected, not appointed.[153] Section 6 imposes the mandatory-election requirement for a specific group of judges: all judges who sit on the three specifically identified levels of court that Article IV, § 1 identifies as the repositories of the state's judicial power. The Ohio Supreme Court described the broad import of § 6 shortly after it

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(b) Mandamus;
(c) Habeas corpus;
(d) Prohibition;
(e) Procedendo;
(f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district, except that courts of appeals shall not have jurisdiction to review on direct appeal a judgment that imposes a sentence of death. Courts of appeals shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

150. OHIO CONST. art. IV, § 4(B) ("The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.").

151. Significantly, the legislature's authority to prescribe the jurisdiction of the supreme court and the courts of appeals was largely with adoption of the Modern Courts Amendment in 1968. Subject-matter jurisdiction of those courts is now prescribed eliminated in OHIO CONST. art. IV, §§ 2 and 3, respectively.

152. OHIO CONST. art. IV, § 6

153. *Id.*

was adopted, declaring that "it is not within the competency of the Legislature to cloth [sic]with judicial power any officer or person, not elected as a judge."[154]

Because Ohio has taken the selection of judges who sit on the supreme court, the courts of appeals, and common pleas court out of the hands of state officers and legislators, the separation-of-powers analysis—which has, so far, served as the bedrock for the consent doctrine in federal courts—has no bearing in Ohio.[155] The electorate alone has the power to select the judicial officers who exercise the state's judicial power.

The requirement that all judges be elected was part of the 1851 constitution, which remains in effect today. The mandate was adopted specifically to eliminate a provision in the 1802 Ohio Constitution by which judges were appointed.[156] Eliminating the appointment of judges was a central piece of the 1851 Ohio Constitution.[157] Although the constitution has been amended many, many times,[158] election of judges has been a durable feature of the Ohio Constitution for more than 170 years — despite attempts to change it in 1938, 1968, 1973, and 1987.[159]

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154. *Ex parte* Logan Branch, 1 Ohio St. 432, 434 (1853) ("Thus all the judicial power of the State is vested in the courts designated in the constitution, and in such courts as may be organized under the first section. But it is perfectly clear that, upon the creation of any additional court by the Legislature, the judicial officer must be elected, as such, by the electors of the district for which such court is created; and it is not within the competency of the Legislature to cloth [sic] with judicial power any officer or person, not elected as a judge.") *cited with app'l in* State ex rel. Whitehead v. Sandusky Cty. Bd. of Commrs., 979 N.E.2d 1193 (2012).

155. *See* OHIO CONST. art. IV, § 5; Havel v. Villa St. Joseph, 963 N.E.2d 1270, 1274 (2012) (If, somehow, the Ohio Constitution do lay a foundation for a personal right of litigants, as the Supreme Court has found in Article I and Article III, to waive adjudication by an constitutionally ordained judge, that right would be beyond the constitutional authority of the Ohio Supreme Court to "enlarge, abridge, or modify" by a court-promulgated rule of practice and procedure.).

156. Ohio Const. of 1802, art. III, § 8.

157. *See generally Symposium on Judicial Elections,* 30 CAP. U. L. REV. 437 (2002); *Selection of State Judges Symposium: Transcripts*, 33 U. TOL. L. REV. 287 (2002). *See also* Brian Cyril Salvagni, Comment, *Merit Selection: Does It Meet the Burden of Proof in Ohio*, 12 U. DAYTON L. REV. 381 (1986); Richard J.Ruebel, Note, *Judicial Selection and Tenure –The Merit Plan in Ohio*, 42 U. CIN. L. REV. 255 (1973); Kathleen L. Barber, *Ohio Judicial Elections–Nonpartisan Premises with Partisan Results*, 32 OHIO ST. L.J. 762 (1971) (For discussions on the comparative merits of judicial selection by appointment versus election).

158. *See* STEVEN H. STEINGLASS & GINO J. SCARSELLI, THE OHIO STATE CONSTITUTION 373 et seq, Appendix B (2011).

159. *Id.* The efforts in 1938, 1973, and 1987 all failed at the polls. The effort in 1968 was different. It was the Ohio State Bar Association's effort to have the General Assembly include in the proposed Modern Courts Amendment a restructuring of the courts in Ohio in a way similar to the Missouri Plan. The state bar's proposal would have called for a unified, statewide court that included a mixture of elected and appointed judges as well as authorization for the supreme court to control the number of judges who sit on each of the common pleas court in the state. The General Assembly declined to include the bar association's plan. *See* William W. Mulligan and James E. Pohlman, *1968 Modern Courts Amendment to the Ohio Constitution,* 29 OHIO ST. L.J. 811, 812–14 (1968). *See also* Leslie W. Jacobs, *The Supreme Court of Ohio, 1969 Term*, 30 OHIO ST. L.J., 626, 633 n. 49 (1969) (The Missouri plan provides for the "appointment of a judge from a list prepared by a select non-partisan committee and submission of his name at a later election in which he runs unopposed and the electorate approves or disapproves his 'record.' This system is not perfect, but it is a more workable attempt to provide insulation of a judge from politics while preserving the people's opportunity to

c. The ordination of judges with the right and duty to exercise judicial power

Article IV, § 18: The several **judges** . . . of the common pleas . . . courts . . . **shall . . . have and exercise** such power and jurisdiction . . . as may be directed by law.[160]

Article IV, § 18 is the most unusual provision in the Ohio Constitution relating to judicial power. Adopted in the Constitution of 1851 and never amended,[161] it ordains judges as the officers who "shall . . . have and exercise" the judicial power that the constitution vests in the various courts on which judges sit.[162] The semantic content is neither vague nor ambiguous. The plain language states explicitly that "judges" must "exercise" the state's judicial power.

There is no provision like § 18 in the U.S. Constitution. What is equally significant is that there is none like it in any state constitution either.[163] No other state constitution makes explicit that it is judges who possess and who must

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reject a man or his ideas which are offensive. The Ohio State Bar Association has repeatedly supported the introduction of this plan in Ohio.").

160. OHIO CONST. art. IV, § 18. Powers and Jurisdiction of Judges

> The several judges of the Supreme Court, of the common pleas, and of such other courts as may be created, shall, respectively, have and exercise such power and jurisdiction, at chambers, or otherwise, as may be directed by law.

(Emphasis added).

161. *See* STEVEN H. STEINGLASS & GINO J. SCARSELLI, *supra* note 158, at 203.

162. OHIO CONST. art. IV, § 18. This provision underscores the importance that the Ohio Constitution elsewhere places on the number of judges who may have the right and duty to exercise the judicial power of the state.

In Section 15, the constitution addresses the General Assembly's power both to create courts and to set the number of judges in each court who may exercise the court's judicial power. For common pleas courts, it sets one judge as the presumptive number for who may exercise the judicial power. The General Assembly may increase that number only by a bill passed with a two-thirds majority in each house. Section 15 requires that same super majority for setting the number of judges on the supreme and other courts, as well as for establishing the additional courts authorized in article IV, § 1.

Article IV, § 15 provides:

> Laws may be passed to increase or diminish the number of judges of the supreme court, to increase beyond one or diminish to one the number of judges of the court of common pleas in any county, and to establish other courts, whenever two-thirds of the members elected to each house shall concur therein; but no such change, addition or diminution shall vacate the office of any judge; and any existing court heretofore created by law shall continue in existence until otherwise provided.

By requiring legislative action to vary the number of judges who may exercise judicial authority, the process of altering that number necessitates gubernatorial approval, OHIO CONST. art. II, § 16, and amenability referendum, OHIO CONST. art. II, § 1.

163. *See* In re Ely's Tr. Estate, 194 N.E.2d 784, 786 (Ohio Ct. App. 1963), *rev'd*, 199 N.E.2d 746 (1964) (Article IV, § 18 is a unique provision, not found in any other of many state constitutions examined in our consideration of this case).

exercise the state's judicial power.[164] The provision is notably restrictive.[165] While many other states' constitutions directly vest their constitutionally created courts with judicial power, none explicitly states that the judges of those courts must exercise that power.

The fact that Art. IV, § 18 is specific in identifying only judges as the agents who may exercise the judicial power of the court on which they sit immediately suggests a cardinal canon of interpretation: *expressio unius est exclusio alterius,* which the Ohio Supreme Court has invoked for interpreting the constitution. According to the court, the expression of one thing necessarily implies the exclusion of other similar things not expressed.[166] The court has observed that

> [t]he rule has been variously applied. For example, where the means for exercise of a granted power are given in a constitution, no other or different means can be implied as being more effectual or convenient, for where a power is expressly given by the

164. *Compare* OHIO CONST. art. IV, § 18 *with* ALA. CONST. art. VI, §§ 139 et seq.; ALASKA CONST. art. IV, § 1; ARIZ. CONST. art. VI, § 1; ARK. CONST. amend. LXXX, § 1; CAL. CONST. art. VI, § 1, 18; COLO. CONST. art. VI, § 1; CONN. CONST. art. V, § 1; DEL. CONST., art. IV, § 1; FLA. CONST. rev. art. V § 1; GA. CONST. art. VI, § I, ¶ I; HAW. CONST. art. VI, §1; IDAHO CONST. art. V, § 2; Ill. CONST. art. VI, § 1; IND. CONST. art. VII, § 1; IOWA CONST. art. V, § 1; KAN. CONST. art. III, § 1; KY. CONST. § 109 et seq.; LA. CONST. of 1974 art. V, § 1; ME. CONST. art.VI, § 1; MD. CONST. art. IV, § 1; MICH. CONST. of 1963 art. VI, § 1; MINN. CONST. art. VI, § 1; MISS. CONST. art. VI, § 144; MO. CONST. art. V, § 1; MONT. CONST. art. VII, § 1; NEB. CONST. art. V, § 1; NEV. CONST. art. VI, § 1; N.H. CONST. pt. II, art. 72-a; N.J. CONST. art. VI, § 1, ¶ 1; N.M. CONST. art. VI, § 1; N.C. CONST. art. IV, § 1; N.D. CONST. art. VI, § 1; OKLA. CONST. art. VII, § 1; OR. CONST. art. VII, § 1; PA. CONST. art. V, §§ 1, 2; R.I. CONST. art. X, § 1; S.C. CONST. art. V, § 1; S.D. CONST. art. V, § 1; TENN. CONST. art.VI, § 1; TEX. CONST. art. V, § 1; UTAH CONST. art. VIII, § 1; VT. CONST. ch. II, § 4; VA. CONST. art. 6, § 1; WASH. CONST. art. IV, § 1; W.VA. CONST. art. VIII, § 1; WIS. CONST. art. VII, § 2; WYO. CONST. art. V, § 1. Massachusetts and New York have no constitution provision that expressly vests the sovereign's judicial power.

165. Although this Section of Article IV has not been cited in any reported case, Ohio's Constitutional Revision Commission in 1976 noticed § 18's restrictive nature. Formed in 1968, one year after Ohio's adoption of the Modern Courts Amendment, the commission performed a thorough review of the 1851 constitution, as amended. *See* H. STEINGLASS AND GINO J. SCARSELLI, *supra* note 160,at 66. Commenting in its final report on § 18, the commission stated without specification or explanation that § 18 is "in one sense unduly limiting and in another sense simply surplusage." *See id.* at 207.

"Enigmatic" might not be adequate to describe the commission's comment. That § 18 is "limiting," of course, is indisputably evident from the plain meaning of the text. But why "unduly" limiting? Where in any of the various sections of the Modern Courts Amendment or even in the remainder of the Ohio Constitution is there a proposition on which the plain meaning of § 18 impinges? On whose office or on which of the other branches of government do judges tread unduly when they are compelled to "have and exercise" judicial power? The commission's comment does not point to any. To the contrary, the commission's other observation —that § 18 is "simply surplusage" —suggests that § 18 does not cramp any other portion of the constitiution. It implies that § 18 is unneeded because the remainder of the constitution reinforces § 18's plain meaning.

Perhaps "Delphic" better describes the commission's comment.

166. State ex rel. Robertson Realty Co. v. Guilbert, 78 N.E. 931, 935 (1906) ("The familiar maxim of interpretation, '*Expressio unius est exclusio alterius*,' applies here; for logically the express grant of certain powers and silence as to others is necessarily a withholding of those not named.").

> constitution and the mode of its exercise is prescribed, such mode is exclusive of all others.[167]

Still, one must take care in applying this canon. The canon presumes, for example, that there exists a set of alternatives that, because they are not named, are therefore excluded.[168]

That set of alternatives, however, existed in abundance in 1851 when § 18 was adopted. A variety of quasi-judicial adjuncts were well known and commonly used at the time by federal and Ohio courts. They included arbitrators, referees, special masters, commissioners, etc.[169] The clarity and regularity of their usage brings light to the meaning and intended operation in preventing "exercise" by others than judges. Why Ohio, in 1851, should take this unique precaution of constitutionally prohibiting anyone except judges who sit on a constitutional court from exercising judicial power is immaterial. Perhaps § 18 was adopted only to establish a general rule, that to be judicially enforceable, a decision rendered by an alternative tribunal to which the parties had consented had to first be adopted by a judge exercising judicial power. Regardless, the language in § 28 and its context are clear: Judges are duty-bound to exercise the state's judicial power.

Section 18 places a qualifier on the duty it imposes on judges. It specifies that judges must exercise their authority "as may be directed by law." The qualification does not, however, create a condition — either precedent or subsequent — on judges' authority or duty; it merely establishes that the legislature, by enacting law, may manage or guide judges in exercising the power that § 1 vests in their courts. The qualifier in § 18 conveys merely that the General Assembly may legislate on matters regarding court procedures and practices. Depending on whether one reads

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167. *Id*. (internal quotations omitted.) *See generally* Karrick v. Bd. of Ed. of Findlay Sch. Dist., 186 N.E.2d 855, 858–59 (1962), *jdgmt vacated on reh'g* 190 N.E.2d 256 (1963) (quoting 11 AM. JUR. 667, *Constitutional Law* §57 ("In construing a constitution, resort may be had to the well-recognized rule of construction contained in the maxim '*expressio unius est exclusio alterius*,' and the expression of one thing in a constitution may necessarily involve the exclusion of other things not expressed. The rule has been variously applied . . . where the means for exercise of a granted power are given in a constitution, no other or different means can be implied as being more effectual or convenient, for where a power is expressly given by the constitution and the mode of its exercise is prescribed, such mode is exclusive of all others.").

168. *Karrick*, 186 N.E.2d.

169. *See* Heckers v. Fowler, 69 U.S. 123, 131 (1864) ("Practice of referring pending actions under a rule of court, by consent of parties, was well known at common law, and the report of the referees appointed, when regularly made to the court, pursuant to the rule of reference, and duly accepted, is now universally regarded in the State courts as the proper foundation of judgment."). *See, e.g.,* Thornton v. Carson, 7 U.S. 596, 597 (1813) (arbitrators); Williams v. Craig, 1 U.S. 313, 316 (1788) (referees); Oliver v. Piatt, 44 U.S. 333, 351 (1845) (special master); Newcomb v. Wood, 97 U.S. 581, 583 (1878) (recognizing "[t]he power of a court of justice, with the consent of the parties, to appoint arbitrators and refer a case pending before it"); Carey v. Commrs. of Montgomery Cty., 19 Ohio 245, 279 (1850) (arbitrators); Voorhees v. Jackson, ex dem. Bank of U.S., 35 U.S. 449, 457 (1836) (Ohio) (referee); In re Gregory, 19 Ohio 357, 358 (1850) (special master); Hunt's Lessee v. McMahan, 5 Ohio 132, 134 (1831) (commissioners).

Rockey v. 84 Lumber Co.[170] or *Havel v. Villa St. Joseph*,[171] that authority to "direct" matters of procedure either was transferred entirely and exclusively to the supreme court when the Modern Courts Amendment, Article IV, § 5(B) was adopted or is shared to some extent with the supreme court's rulemaking power.[172]

Section 18 bolsters the textual case for the independent existence of Ohio judges' right and duty to exercise of the state's judicial power. That support is evident, first, from use of *as* in its conjunctive sense.

There is no conjunction before *as*: § 18 does not say "*unless* as may be directed by law." Nor does it say "*except* as the law may otherwise direct." Either of those expressions would, of course, have signaled more than a mere limitation on the exercise of judicial power. They would signal the possibility that legislation could preempt the constitution's grant of authority. The conjunction *as*, when standing alone, connotes no more than "in the way or manner that."[173] The plain meaning of the phrase "as may be directed by law" is simply that judges are duty-bound to exercise what authority § 1 gives their courts but that they must follow what direction the General Assembly might choose to give.

Second, § 18 uses the modal auxiliary verb *may*. It doesn't say that judges shall exercise judicial power "as shall be directed by law."[174] The use of *may*─which expresses possibility or discretion, not necessity or a prerequisite─connotes that judges are not dependent on legislation for their authority to exercise the judicial power of their courts. Article IV, § 18 necessarily implies, therefore, that judges have the authority and duty to exercise the powers of their courts independently of whether the legislature acts. The grant of judicial power to judges

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170. Rockey v. 84 Lumber Co., 611 N.E.2d 789 (1993) (the Modern Courts Amendment transferred exclusive authority to prescribe rules of practice and procedure to Ohio Supreme Court).

171. Havel v. Villa St. Joseph, 963 N.E.2d 1270 (2012) (the General Assembly may in some instances override rules of practice and procedure promulgated by the Ohio Supreme Court).

172. OHIO CONST. art. IV, § 5(B).

> (B) The Supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the General Assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the General Assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.
>
> Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court. The supreme court may make rules to require uniform record keeping for all courts of the state, and shall make rules governing the admission to the practice of law and discipline of persons so admitted.

For a discussion of the phrase "rules of practice and procedure" as used in the Modern Courts Amendment, *see* Richard S. Walinski and Mark D. Wagoner, Jr., *Ohio's Modern Courts Amendment Must Be Amended: Why and How*, *supra* note 14.

173. *See, e.g.*, *As*, MERRIAM-WEBSTER.COM DICTIONARY, https://www.merriam-webster.com/dictionary/as (last visited Feb. 4, 2021).

174. *See, e.g.,* OHIO CONST. art. VIII, § 17 ("the General Assembly shall provide by law for . . . .").

in Article IV is self-executing.[175] The grant can be legislatively "directed," but it cannot be withdrawn or blocked. Ohio law has recognized that inviolability of judicial authority.[176] Section 18 does significantly more, therefore, than merely set up a presumption that common pleas judges must exercise the state's judicial power unless the "law" takes that authority away.

d. The instructive existence of Article IV, § 22

An odd amendment to the Ohio Constitution lends unusually pertinent support for the restrictions that are set out in the plain language of the Ohio Constitution, particularly § 18. Article IV, § 22 was first suggested in 1873 by Third Constitutional Convention, which was the bidecennial constitutional convention[177] that immediately followed adoption of the 1851 constitution and Article IV, §§ 1, 6, and 18. The amendment was prompted by the "tremendous backlog of cases" that were pending before the supreme court,"[178] a problem that persisted even after adoption of the 1851 constitution. Reportedly, it entailed four-year delays between filing of an appeal in the supreme court and the court's decision.[179] The General Assembly successfully proposed the amendment in 1875,[180] which stablished a mechanism to aid the court.

Adopted in 1875, § 22 authorizes the General Assembly, when requested by the supreme court, to form periodically a five-member commission to serve the supreme court temporarily as additional judicial officers with the power to decide and dispose of the backlogged cases. The amendment specified that the

175. While the language of the Ohio Constitution that directly and immediately vests judicial power in the various constitutionally created courts has existed in Article IV, § 1 since the current constitution was adopted in 1851, the constitution left the jurisdiction of those courts within the legislative power to control. OHIO CONST. art. IV, § 3 (1802) ("the court of common Pleas; which court shall have common law and chancery jurisdiction in all such cases as shall be directed by law"), § 4 ("The judges of the supreme court and courts of common Pleas, shall have complete criminal jurisdiction in such cases and in such manner, as may be pointed out by law"). *See* Stevens v. State, 3 Ohio St. 453, 455 (1854) ("The constitution itself confers no jurisdiction whatever upon that court, either in civil or criminal cases. It is given a capacity to receive jurisdiction in all such cases, but it can exercise none, until 'fixed by law.'"). Since adoption of the Modern Courts Amendment in 1968, however, the jurisdiction of the supreme court, courts of appeals, and common Pleas courts are established constitutionally.

176. *See* State v. Wilson, 657 N.E.2d 518, 520 (Ohio Ct. App. 1995) (" [T]he judicial power is the power to decide and pronounce a judgment and carry it into effect in a controversy between two or more persons who by right bring that case before the court for its decision. Such decisions usually, but do not always, involve an exercise of discretion by the judicial officer who makes them. . . . Those duties which do involve the exercise of judicial power are reserved to the judge and may not be delegated, by statute, order, or rule.").

177. The Ohio Constitution requires that the electorate be asked every 20 years to vote on whether to convene a constitutional convention. *See* OHIO CONST. art. XVI, § 3. (Conventions have been convened under this section only twice, in 1871 and 1912.). *See* Steinglass, *supra* note 160, at 39, 41.

178. *See* Steinglass, *supra* note 158, at 208.

179. J G Adel, OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE THIRD CONSTITUTIONAL CONVENTION OF OHIO 755 (1873) (comments of Mills Gardner).

180. *Id*.

commission would "have like jurisdiction and power . . . as are or may be vested in" the supreme court in order to "dispose of such part of the business then on the dockets of the Supreme Court."[181] The commission's "decision shall be certified, entered and enforced as the judgments of the Supreme Court . . . ."[182] The commissioners' decisions were final and not reviewable by the supreme court.[183] The commission would, therefore, serve as a parallel supreme court, would exercise the same appellate jurisdiction, and would, for the duration of its existence, function simultaneously with the court.[184] Section 22 authorized the General Assembly, if the supreme court requested, to recreate commissions periodically, although for slightly shorter periods.[185]

The relevance of this odd, rarely used, but still operative amendment is twofold. First, both the Constitutional Convention and the General Assembly recognized that the legislature had no authority to create judicial officers and give them full authority to exercise the state's judicial power, even temporarily. Second, they both recognized that, if the court ever were to have the help of additional judicial officers, the constitution would have to be amended yet again to give the General Assembly authority to create those judicial officers. In short, they

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181. OHIO CONST. art. IV, § 22.

182. OHIO CONST. art. IV, § 22. Supreme court commission:

> A commission, which shall consist of five members, shall be appointed by the Governor, with the advice and consent of the Senate, the members of which shall hold office for the term of three years from and after the first day of February, 1876, to dispose of such part of the business then on the dockets of the Supreme Court, as shall, by arrangement between said commission and said court, be transferred to such commission; and said commission shall have like jurisdiction and power in respect to such business as are or may be vested in said court; and the members of said commission shall receive a like compensation for the time being with the judges of said court. A majority of the members of said commission shall be necessary to form a quorum or pronounce a decision, and its decision shall be certified, entered and enforced as the judgments of the Supreme Court, and at the expiration of the term of said commission, all business undisposed of, shall by it be certified to the Supreme Court and disposed of as if said commission had never existed. The clerk and reporter of said court shall be the clerk and reporter of said commission, and the commission shall have such other attendants not exceeding in number those provided by law for said court, which attendants said commission may appoint and remove at its Pleasure. Any vacancy occurring in said commission, shall be filled by appointment of the Governor, with the advice and consent of the Senate, if the Senate be in session, and if the Senate be not in session, by the Governor, but in such last case, such appointments shall expire at the end of the next session of the General Assembly. The General Assembly may, on application of the supreme court duly entered on the journal of the court and certified, provide by law, whenever two-thirds of such[1] house shall concur therein, from time to time, for the appointment, in like manner, of a like commission with like powers, jurisdiction and duties; provided, that the term of any such commission shall not exceed two years, nor shall it be created oftener than once in ten years.

183. Maud v. Maud, 34 Ohio St. 540 (1878) (on motion for rehearing before the supreme court, the court held that it "has no power to rehear a cause decided by the commission, on the ground that the same was erroneously determined.").

184. *See* Steinglass, *supra* note 158, at 209.

185. The authority of the commission, the duration of its existence, and the manner of the commissioners' appointments all establish that this body and the commissioners who might serve on it are not to be confused with the Master Commissioner appointed by the Ohio Supreme Court for purposes defined in the duration of S. Ct. Prac. R. 14, 17.

recognized the impediment that Article IV, §§ 6 and 18 had created. Mills Gardner on behalf of the convention's Judicial Department,[186] explained during the floor debate on the amendment that the Constitution of 1851 contained "no provision whatsoever" that would allow the General Assembly to provide relief "if . . . the supreme court should become, as it is now, overrun with business."[187]

Section 22 was written and adopted to create a potential resource of substitute judges to relieve the workload of elected judges, but it created that potential resource to serve only the supreme court, not any other court. The restrictions that forced adoption of the amendment remain in the Ohio Constitution today.

e. Summary of the relevant amendments

The plain meaning of Article IV establishes a material difference between the Ohio constitution and the federal. Because of details that are set out in Article IV but that are absent from the U.S. Constitution, Ohio has constructed a more rigid allocation of judicial power than does the federal. Because of the detail in Article IV, judges must be elected. And it is those elected judges who must exercise the judicial power. Because those mandates are in the constitution, Ohio law may not abridge them.

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186. Adel, *supra* note 179 at 47.

Delegates to the 1875 Convention may well have seen evidence in another section of the 1851 Constitution that a constitutional amendment is necessary for trial courts and their judges to enter judgments in cases outside the structures prescribed in the revised Article IV for the exercise of judicial power. In addition to §18, the Constitution of 1851 contained § 19, which authorized the General Assembly to create Courts of Conciliation.

In the only reported discussion of § 19 during the 1851 convention, Delegate George B. Holt explained its purpose as establishing a venue for obtaining a binding, court-rendered judgment but one that would avoid the both the established venues and the mechanisms of routine litigation conducted in courts otherwise established in Article IV, §§ 6 and 18. To avoid the "strife and contention among neighbors, begetting and nursing discord and hatred in families, and in disturbing the harmony and peace of society," REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF OHIO 391 (1850-51), he proposed that the constitution authorize the General Assembly to establish courts with elected judges who would serve specifically as "judicious peace loving and peace making officer[s]," *Id*.

He proposed, therefore, a court that could exercise jurisdiction over disputes only when the parties to the dispute─as a constitutional prerequisite─consent to that exercise of jurisdiction. Section 19 was adopted as it is today:

Courts of conciliation

> The General Assembly may establish courts of conciliation, and prescribe their powers and duties; but such courts shall not render final judgment in any case, except upon submission, by the parties, of the matter in dispute, and their agreement to abide such judgment.

Delegates to the 1873 convention, in their consideration of § 22, might well have understood that a constitutional amendment was necessary to establish a mechanism for the conduct of litigation outside the mechanism established in §§ 6 and 18.

Although still authorized by the Ohio Constitution, the General Assembly has never created the courts of conciliation as separate tribunals.

187. ADEL, *supra* note 179 at 755 ("If you leave this section out of the Constitution, you leave no provision whatsoever, by which, if in the multiplicity of causes [i.e., cases], the supreme court should become, as it is now, overrun with business, you can relieve it.").

3. How the allocation and distribution of judicial power affects the 2020 amendment to Ohio Civil Rule 53(C)

The Ohio Supreme Court created the office of magistrate by including Rule 53 in the original version of the Ohio Rules of Civil Procedure, which the court promulgated on July 1, 1970.[188] Before that, referees had been creatures of statutes that authorized their appointment for a variety of purposes. The General Assembly repealed those statutes effective July 1, 1971[189] as presumptively conflicting with the court-promulgated Civil Rules.[190] Referees and, later, magistrates have been governed entirely by court rules ever since.[191]

Rule 53 has changed significantly since 1970. The most significant changes regarding magistrates' authority as judicial officers occurred with the 1995 and 2020 amendments.

Besides the provision inserted to make explicit magistrates' authority to try jury cases when all parties consent, the 1995 amendment included these enhancements:

- Authority of enter interim orders that have immediate, binding effect unless and until the trial judge grants relief from the order;[192]
- Authority to punish contempt committed in a magistrate's presence;[193]

188. OHIO CIV. R. 53(C)(2).

189. *See, e.g.*, OHIO REV. CODE §§ 2315.26–.43 (repealed *See* AM. H. B. 1201, § 3, 133 v H 3017 (eff. 7-1-71).

190. *See id.* ("[T]he taking effect of the Rules of Civil Procedure on July 1, 1970 is prima-facie evidence that the sections of the Revised Code . . . repealed by Section 1 are in conflict with such rules and shall have no further force and effect . . . .") The impetus for repealing was OHIO CONST. art. IV, § 5(B) ("The Supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. . . . All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.").

191. In addition to CIV. R. 53, magistrates are addressed in APP. R. 34, CRIM. R. 19, JUV. R. 40; TRAF. R. 14. Each of these sets of rules have been promulgated . . . under OHIO CONST. art. IV, § 5(B). Magistrates are also governed under the Ohio Supreme Court's Sup. R. 19 and 19.1. These rules are promulgated under OHIO CONST. art. IV, § 5(A)(1), which does not require that proposed rules be submitted to the General Assembly before taking effect. The court's rules of practice and procedure must, however, be submitted to both houses of the General Assembly before becoming law.

For a discussion of Article IV, § 5(B), its operations, its oddities, and its unanswerable conundrum, *see* Richard S. Walinski and Mark D. Wagoner, Jr., *supra* note 14. *See also* State v. Slatter, 423 N.E.2d 100, 102 (1981) ("The application of the substantive-procedural distinction to a statute or rule is not without difficulty, as the substantive and procedural laws are not always mutually exclusive"); Gregory v. Flowers, 290 N.E.2d 181, 187 (1972) ("Many courts have erred in proceeding upon an assumption that the supposed dividing line between the two categories has some kind of objective existence upon one side or the other of which a set of facts must always fall. Decisions, expressed in terms of locating a preexisting line instead of where the line ought to be drawn, have lent themselves immeasurably to the confusion which reigns in this whole area of law.").

192. OHIO CIV. R. 53(C)(3)(a) (1995).

193. OHIO CIV. R. 53(C)(3)(b) (1995).

> - Mandate that proceeding before magistrates be conducted under the same procedures as control other civil proceedings before the court;[194]
> - Elimination, unless otherwise specified in the order of reference, of the necessity for magistrates to prepare reports on matters referred to them, allowing magistrates instead to conduct all proceedings necessary for disposal of the case and prepare, sign, and serve a decision on the merits. The decision would become effective, however, only when adopted by the court.[195]

This broadened authority changed the original duties and authority so significantly that the court was impelled to mark that change. The original Rule 53 had vaguely tracked the parallel federal rule. Under the 1970 version of federal Rule 53, which addresses "masters," a special master had broad discretion to regulate the manner in which the assigned duties would be performed, and the rule only vaguely described the procedures that would apply to the masters' operations.[196] To mark the contrast with the former practices, the court made clear in the new Ohio Rule 53(D)(1) that procedures before Ohio magistrates moved away from vague prescriptions. It mandated that, thenceforth, judicial proceedings before magistrates be conducted on the record and would follow the same procedures employed in other civil proceedings. The Staff Note stated:

> Prior language largely [was] drawn from Federal Civil Rule 53 relative to special masters . . . . To prevent any implication that proceedings before magistrates are to follow any different procedure from other civil proceedings, division (D)(1) is added.[197]

As the authority of magistrates in Ohio has expanded, so too has the number of magistrates grown. In 2020, there are roughly 845 magistrates currently registered with the Ohio Supreme Court.[198] In 2019, the number of registered magistrates

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194. OHIO CIV. R. 53(D)(1) (1995).

195. OHIO CIV. R. 53(E).

196. *See, e.g.,* United States v. Clifford Matley Family Tr., 354 F.3d 1154, 1160 (9th Cir. 2004) ("The history of [Federal] Rule 53 supports a broad interpretation of a special master's authority to determine the appropriate procedures for completing his assigned duties. Rule 53 was derived from former Equity Rules 62 and 65. . . . The clear import of former Equity Rule 62 was that the special master had discretion to determine not only the kind of proof he required, but also the manner in which it would be presented.").

197. OHIO CIV. R. 53(D) (1995) (Staff Note).

198. This figure includes not only magistrates appointed by courts of common pleas under authority of CIV. R. 53, but also those appointed by municipal courts under authority of the same Civil Rule, those appointed by courts of appeals under authority of APP. R. 34(A), those appointed under OHIO REV. CODE § 2743.03(C)(2) to serve in the Court of Claims, and those appointed under authority of OHIO REV. CODE § 1905.05 by mayors of municipal corporation who conducts a mayor's court.

Although Rule 19 of Ohio Supreme Court's Rules of Superintendence requires magistrates to register annually with the court, the court does not publish the number of registered magistrates and maintains no public record of that number. *See* Letter from Edward Miller, Director of the Office of Public Information, Supreme Court of Ohio (Oct. 16, 2020) (on file with author Walinski). Because the court is able, however, to generate that number and has periodically done so for the Ohio Association of Magistrates, the Office of Attorney Services kindly provided the authors with the

exceeds the 715 elected judges[199] sitting on courts that are authorized by court-promulgated rule to appoint magistrates.

The other major enhancement of magistrates' authority, of course, was in 2020. It was the single largest enhancement because, despite being limited to only cases tried to jury, it goes the furthest in obliterating the principal subordinate relationship between magistrates and the judges who appoint them.

The Ohio Supreme Court has not ruled on whether magistrates may generally preside to conclusion over all civil cases that trial court judges might refer to them or, more narrowly, may preside with the parties' consent over civil cases that involve a jury trial. Nevertheless, Rule 53 mirrored─at least until the 2020 amendment─Chief Justice Moyer's opinion in *Hartt v. Munobe*, which insisted that referrals to magistrates do not relieve trial court judges of their duty to exercise their judicial functions.[200] How the court may eventually rule on the constitutionality of Rule 53 referrals will turn on whether the court finds, as lower courts in Ohio have found,[201] an inviolable foundation in the Ohio Constitution for the principal/subordinate relationship that the chief justice described between elected trial court judges and referees/magistrates.

When the 2020 amendment to Civ. R. 53(C)(2) is measured against the plain meaning of Article IV, one infirmity stands out: the prohibition that the amended rule imposes on the trial court judges. The rule requires the judge to "enter judgment consistent with the magistrate's journalized entry pursuant to Civ. R. 58, but shall not otherwise review the magistrate's rulings or a jury's factual findings in a jury trial before a magistrate."[202] The rule thus prohibits elected trial judges from exercising judicial power that the constitution has vested in the common pleas court on which that judges sit. That prohibition is unconstitutional because Article IV of the Ohio Constitution prohibits any law that would bar a judge who is elected according to § 6 from exercising under § 18 the judicial power that §§ 1 and 2 allocated, i.e., "the power to decide and pronounce" judgment.[203]

Perhaps the original drafters of 2020 amendment recognized the implications of this prohibition and sought to alleviate them by leaving a trace of responsibility for the trial judges to bear, the duty to sign blindly the magistrates' journal entries entering judgment. But the Ohio Supreme Court long ago considered whether the signing and journalizing of a judgment constitutes an exercise of judicial power. In *Hocking Valley Railway Co. v. Chester Coal & Feed Co.*,[204] the court held that it does not.

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numbers previously generated and reported to the Association. *See* Letter from Gina White Palmer, Director of the Office of Public Information, Supreme Court of Ohio (Nov. 11, 2020) (on file with author Walinski). The estimated number of magistrates currently registered in Ohio is derived from that letter.

199. SUP. CT. OHIO, 2019 OHIO COURTS STATISTICAL SUMMARY 5 (2020).

200. Hartt v. Munobe 615 N.E.2d 617 (Ohio 1993).

201. *See supra* text accompanying note 191.

202. Civ. R. 53(C)(2).

203. State v. Cox, 101 N.E. 135, 139 (1913).

204. Hocking Valley Ry. Co. v. Cluster Coal & Feed Co., 97 Ohio St. 140 (1918).

The case involved a liability claim against a railroad.[205] State law authorized the Public Utilities Commission to hear the facts on liability claims against railroads and, if warranted, to assess damages. The statute also provided that, if the commission's decision were certified to a court of common pleas, the clerk of court was authorized after a prescribed period to enter the commission's decision as a judgment of the court unless the defendant railroad filed a motion to docket the case for trial.[206]

The commission found for the claimant. The claimant certified the decision to the common pleas court and the clerk, in due time, entered judgment against the railroad in accordance with the statute. The railroad appealed, contending that the judgment was unenforceable. It argued that the statute, by authorizing the clerk to enter judgment, unconstitutionally granted judicial power to an officer other that the common pleas court judge.[207]

The Ohio Supreme Court affirmed the judgment, holding that the mere signing of a journal entry is a ministerial act, not the exercise of judicial power. The court ruled that

> the entering of findings upon the journals of the court as a judgment can by no possibility be construed as a judicial function. The latter presupposes the use of mental processes in the determination of law or fact, and at times involves discretion as to how the power should be used.
>
> . . .
>
> [W]here the statute has cast upon the clerk the duty of entering a judgment for a fixed, ascertained amount, it is a purely ministerial function . . . .[208]

The Supreme Court of Ohio has in various cases addressed the relationship between referees/magistrates and the trial court judges who refer matters to them,[209] but it has never considered whether Ohio's magistrate system — or, more probably, how much of it[210] — comports with the Ohio Constitution. Its failure to do so, however, was to be expected.

Before the 2020 amendment took effect, Civil Rule 53 required trial court judges who referred jury cases to magistrates to perform judicial functions, at least to some extent, in reviewing the magistrates' handling of the trials before adopting the verdict and judgment.[211] Therefore, in cases where the court considered

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205. *Id.*

206. *Cox*, 101 N.E. 135.

207. *Id*.

208. *Id*. at 142–43.

209. *See, e.g.,* Hartt v. Munobe, 67 Ohio St.3d 3 (1993); Shelly Materials, Inc. v. City of Streetsboro Planning & Zoning Commission, 145 N.E.3d 246 (2019), reconsideration denied sub nom, Shelly Materials, Inc. v. Streetsboro Planning & Zoning Comm., 137 N.E.3d 1191 (magistrate) (citing Normandy Place Assoc. v. Beyer, 443 N.E.2d 161 (1982) (referee)).

210. The history of Ohio courts using various kinds of adjuncts goes back not only to the earliest days of state's existence. The practice has its foundations in the common law.

211. OHIO CIV. R. 53(D)(1)(b).

allegations that a trial judge was alleged to have not performed an adequate review of a magistrate's actions, the court had to look no further than to the explicit language of the Rule 53, as it then existed, in affirming the legal obligation that the trial judge perform judicial responsibilities.

In *Hartt v. Munobe,* Chief Justice Moyer wrote:

> When a jury serves as the trier of fact, . . . its findings will not be subject to attack as are a referee's findings [might be]. Nevertheless, a party may still object to the referee's report or proposed entry on the basis of errors such as evidentiary rulings or jury instructions. If the court finds that such error occurred, it may reject or modify the report, return the report to the referee with instructions or hear the matter itself. Civ. R. 53(E)(2). Thus, even where a jury is factfinder, the trial court remains as the ultimate determiner of alleged error by a referee. . . .[212]

The chief justice concluded that oversight of a magistrate's handling "of an issue or issues, or even an entire trial, is not a substitute for the judicial functions but only an aid to them."[213] This was not a novel proclamation.

Even before *Hartt v. Munobe,* the supreme court had ruled in *Normandy Place Associates v. Beyer*,[214] that trial judges may not use referrals as a substitute for their own exercise of judicial power. The court said:

> [W]e reject any concept which would suggest that a trial court may in any way abdicate its function as judge over its own acts. We therefore hold that, even in the absence of an objection to a referee's report, the trial court has the responsibility to critically review and verify to its own satisfaction the correctness of such a report.[215]

In neither case did the court cite the Ohio Constitution as the legal foundation for the inviolability of the judicial duty to exercise judicial power.

Courts of appeals, however, have been more explicit in identifying the constitutional foundation on which the inviolability of judicial responsibilities rests. Most recently, the Court of Appeals for the Eighth District observed that the restriction on magistrates' authority to exercise judicial power is constitutionally based. In *Becher v. Becher*, the court ruled that

> Civ. R. 53(C)(1) . . . limits a magistrate's authority because the Ohio Constitution vests judicial power in 'a supreme court, courts of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the supreme court as may from time to time be established by law.' . . . 'Magistrates are neither constitutional nor statutory courts.'"[216]

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212. *Hartt*, 67 Ohio St.3d at 6.

213. *Id.*

214. Normandy Place Assocs. v. Beyer, 443 N.E.2d 161, 163-64 (1982).

215. *Id*.

216. Becher v. Becher, 2020-Ohio-669, ¶ 33 (8th Dist. Cuyahoga) (quoting Yantek v. Coach Builders Ltd., Inc., 2007-Ohio-5126 ¶ 9 (1st Dist. Hamilton)).

The Seventh District has said the same in *Dixon v. O'Brien*.[217]

Other courts of appeals have been even more specific. The Third District *In the Matter of Jones*[218] parsed the constitution issue more finely. There, the appellate court was asked to review a referee's order in a special, statutory proceeding where the referring trial court judge had not signed the order as a judgment of the court.[219] The court held that the referee's order was not a judgment of the common pleas court.[220] Its reason was that a referee cannot exercise the judicial power that is constitutionally vested in the common pleas court, and the court's power cannot be exercised by a judicial adjunct who is not elected. Citing Article IV, § 6, the court observed that the "constitution clearly requires that all judges shall be elected (or appointed to interim vacancies in office). The referee to whom reference is made under [the statute establishing the special proceeding] is not elected but 'designated by a judge of the court.'"[221] The court of appeals, therefore, reversed the judgment entered by the referee, and the parties did not ask the supreme court to review the decision. Other courts of appeals have, nevertheless, offered similar constitutional analyses.[222]

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217. Dixon v. O'Brien, 2011-Ohio-3399 ¶ 22 (7th Dist. Mahoning) (quoting Yantek v. Coach Builders Ltd., Inc., 2007-Ohio-5126, ¶ 13 (1st Dist. Hamilton)). All parties who consented to a magistrate's conducting a jury trial also stipulated to a waiver of all objections to any decisions by the magistrate. Holding the stipulation unenforceable, the court stated:

> [S]tipulations that purport to grant a magistrate full judicial powers circumvent the Ohio Constitution. A magistrate's power is specifically intended only "to assist courts of record." Civ.R. 53(C)(1). The rule limits a magistrate's authority because judicial power is vested in "a supreme court, courts of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the supreme court as may from time to time be established by law." Section 1, Article IV, Ohio Constitution. "'Magistrates are neither constitutional nor statutory courts. Magistrates and their powers are wholly creatures of rules of practice and procedure promulgated by the Supreme Court."

218. In the Matter of Jones, 1980 WL 351878 (3rd Dist. Allen).

219. *Id.* at *1 ("This order is not signed by a judge of the Probate Division of the Common Pleas Court but [the] Referee. Is an order of a referee in such a case of sufficient validity and authority to constitute an order of the court? The constitutional jurisdiction of this court is to review and affirm, modify, or review judgments or final orders of the courts of records inferior to the court of appeals within this district. Is this entry then a judgment or final order of the *court in the absence of an entry of judgment signed by the judge of that court*?") (emphasis in original).

220. *Id*.

221. *Id.* at *3.

222. *See*, *e.g.*, Spellman v. Kirchner, 2020-Ohio-3240, 2020 WL 3047752, ¶ 66 (11th Dist. Geauga) (Lynch, J, dissenting) ("The Ohio Constitution vests judicial power in 'a supreme court, courts of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the Supreme Court as may from time to time be established by law.' Ohio Constitution, Article IV, Section 1. The magistrate has limited authority 'to assist courts of record.' Civ. R. 53(C)(1). 'A magistrate's oversight of an issue or issues, even an entire trial, is not a substitute for the [trial court's] judicial functions but only an aid to them.' *Hartt v. Munobe*, 67 Ohio St.3d 3, 6, 615 N.E.2d 617 (1993)."); Quick v. Kwiatkowski, 18620, 2001-Ohio-1498 (2nd Dist. Montgomery) ("Magistrates are neither constitutional nor statutory courts. Magistrates and their powers are wholly creatures of rules of practice and procedure promulgated by the Supreme Court. Therefore, magistrates do not constitute a judicial tribunal independent of the court that appoints them. Instead, they are adjuncts of their appointing courts, which remain responsible to critically review and verify the work of the magistrates they appoint. . . ."); Reese v. Reese, Union No. 14-03-42, 2004-Ohio-1395, ¶ 12 (3rd Dist. Union) ("The magistrate is a subordinate officer of the trial court, not an independent officer

The Third District's holding in *Jones* regarding the referee's lack of authority was, of course, the same as the supreme court's holdings two years later in *Normandy Place Associates*[223] and again thirteen years later in *Hartt v. Munobe*,[224] although the supreme court's reasoning in those cases didn't reach constitutional grounds as the court in *Jones* did. The supreme court simply and appropriately cited its Civil Rule 53 as authority for the necessity that the trial judge — not the referee or magistrate — must be the "judicial officer" to exercise the "judicial function."[225] Nothing in either *Normandy Place Associates* or *Hartt v. Munobe*, however, undermines the constitutional rationale endorsed in *Becher, Dixon,* and *Jones*.

In summary, the Ohio Constitution expressly allocates the state's judicial power among three levels of courts of this state, including to the courts of common pleas, and it ordains the elected judges of those courts as the officers charged with exercising that power. Because the constitution itself vests the state's judicial power directly in common pleas court judges and places the responsibility for exercising that power on the elected judges, no law and no supreme court rule can bar those judges on any of the constitutional courts from exercising the judicial power vested in the respective courts on which they sit.

The court's new rule, however, purports to do precisely that. It purports to elevate the acts of a nonelected adjunct into the acts of the court itself, equivalent to acts of the elected trial court judge, for purposes of exercising the judicial power in the state.

CONCLUSION

The United States Constitution differs markedly from the Ohio Constitution. But, even though they differ in how they allocate judicial power and in the process each prescribes for how those who exercise that power are to be chosen, each bars magistrates from acting as substitute judges with judicial power equivalent to the judges who appointed them.

Magistrate judges are creatures of the Federal Magistrate Act. When Congress enacted 28 U.S.C. § 631(a) and authorized district court judges to appoint magistrate judges, it exercised its power to establish a process for appointing officers other than the default process that the Constitution prescribed in the

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performing a separate function. … It is the primary duty of the trial court, and not the magistrate, to act as judicial officer. … Moreover, the power to decide contested matters among parties before the court is the essence of the authority and responsibility allocated to the judicial branch of government. See Section 4, Article IV, Ohio Constitution. Under Ohio's constitutional and statutory system, the judicial power resides in a popularly elected judges and not in judicially appointed magistrates. See Section 6, 13, Article IV, Ohio Constitution; Section 2, Article XVII, Ohio Constitution; R.C.1901.08; R.C. 2301.02.").

223. *See* Normandy Place Assocs. v. Beyer, 443 N.E.2d 161 (1982).

224. *Hartt*, 615 N.E.2d at 620 ("a referee's oversight of an issue or issues, even an entire trial, is not a substitute for the judicial functions but only an aid to them. A trial judge who fails to undertake a thorough independent review of the referee's report violates the letter and spirit of Civ. R. 53, and we caution against the practice of adopting referee's reports as a matter of course, especially where a referee has presided over an entire trial.").

225. *Normandy*, 443 N.E.2d 161; *Hartt*, 615 N.E.2d at 620.

Appointments Clause, Article II, §2: presidential nomination and senatorial consent. The resulting constitutional classification of magistrate judges' as inferior officers requires that each of them be subordinate to and serve at the direction of a superior, principal officer who was appointed under the default provision of Article II, § 2. When Congress enacted 28 U.S.C. § 636(c)(1) and authorized the appointing judges to elevate magistrate judges' authority to that of a principal officer and to supplant the Article III judge, Congress acted unconstitutionally by raising appointment powers of district court at the expense of joint-appointment authority of the President and the Senate. When magistrate judges supplant district court judges, they exceed their authority as inferior Officers.

The constitutional issue in Ohio is different, but it nonetheless creates a barrier to magistrates' exercising judicial power independently. Article IV, § 1 of the Ohio Constitution expressly allocates the state's judicial power among three levels of courts, including to the courts of common pleas and, more specifically, to the elected judges of those courts. Because the constitution imposes on these elected judicial officers the affirmative duty to exercise the state's judicial power, neither the Ohio Supreme Court nor the General Assembly has constitutional authority to bar common pleas court judges from exercising that power.

The court's new rule, however, purports to do precisely that. It purports to elevate the acts of a nonelected adjunct to the common pleas court into the acts of the court itself, equivalent to the acts of the elected trial court judge for purposes of concluding the exercise of judicial power in the case. And for that reason, the 2020 amendment to Rule 53(C)(2) is beyond the constitutional authority of the Supreme Court to promulgate.