

# CONGRESSIONAL POWER, PUBLIC RIGHTS, AND NON-ARTICLE III ADJUDICATION

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*When can Congress vest in administrative agencies or other non-Article III federal courts the power to adjudicate any of the nine types of “Cases” or “Controversies” listed in Article III of the United States Constitution? The core doctrine holds that Congress may employ non-Article III adjudicators in territorial courts, in military courts, and for decision of matters of public right. Scholars have criticized this so-called “public rights” doctrine as incoherent but have struggled to offer a more cogent answer.*

*This Article provides a new, overarching explanation of when and why Congress may use non-Article III federal officials to adjudicate matters of public right as well as matters in territorial and military courts. We reorganize the traditional categories into three overlapping spheres where such non-Article III adjudication may occur: (1) a case occurs in a physical space beyond the control of the states and therefore does not implicate preexisting state decisional primacy over matters of private right (e.g., territorial courts); (2) a case lies within the national government’s operational space, in which Congress and the executive cooperate to manage the government’s internal affairs (e.g., via courts martial) and to administer statutorily created rights or benefits (e.g., a grant of a land or invention patent); or (3) a case involves a claim against a private party brought by the government or another private party within a properly bounded enforcement space of a federal regulatory scheme (e.g., NLRB adjudication of labor-management disputes). Our account of the public-rights doctrine is functionally*

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*grounded but also deeply rooted in history. This account both explains the caselaw and squares the doctrine with the modern ubiquity of non–Article III adjudication.*

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## INTRODUCTION

Article III specifies that the federal “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,” as well as “to Controversies to which the United States

shall be a Party.”<sup>1</sup> Nonetheless, for adjudication of a host of questions in noncriminal cases arising under federal law or to which the United States is a party,<sup>2</sup> the federal government employs thousands of officials who were not appointed by the President with the Senate’s advice and consent and who do not enjoy the life tenure and salary protections of Article III judges.<sup>3</sup> A post–New Deal consensus generally tolerated such adjudicative delegations under an “appellate review” model in which the availability of appeal to an Article III court legitimized first-instance adjudications by non–Article III federal officials.<sup>4</sup> But that consensus has collapsed.<sup>5</sup> The constitutional basis of various forms of non–Article III adjudication is now questioned as part of a more general “attack on the national administrative state.”<sup>6</sup> Answering the question of when non–Article III adjudication is permissible is fraught but also critical at a time when the reach of the national government’s regulations, grants, and benefits is pervasive; administrative agencies’ power to “legislate” is challenged by the rise of the major questions doctrine;<sup>7</sup> and Article III judicial nominations seem more fiercely contested than ever.

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1 U.S. CONST. art. III, § 2, cl. 1.

2 As in a prior article, we define “adjudication” to be “the making of a final determination of obligations under the applicable law to pay damages or other monetary relief, act, or refrain from acting.” John M. Golden & Thomas H. Lee, *Federalism, Private Rights, and Article III Adjudication*, 108 VA. L. REV. 1547, 1566 n.72 (2022).

3 See Kent Barnett & Russell Wheeler, *Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal*, 53 GA. L. REV. 1, 5 (2018) (reporting “approximately 2,000 [federal] administrative law judges” and “more than 10,000” federal “non-ALJ adjudicators”); RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 351–63 (7th ed. 2015).

4 See *infra* text accompanying notes 244–49; cf. Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 992 (1988) (arguing for an “appellate review theory” for legitimizing non–Article III adjudication).

5 See Michael S. Greve, *Why We Need Federal Administrative Courts*, 28 GEO. MASON L. REV. 765, 767 (2021) (“Agency adjudication . . . has reemerged as a prominent topic of scholarly debate.”).

6 See, e.g., Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 3 (2017).

7 Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. (forthcoming 2023) (manuscript at 1), <https://ssrn.com/abstract=4165724/> [<https://perma.cc/ZA2N-PEKW>] (describing the major questions doctrine as “direct[ing] courts . . . to require explicit and specific congressional authorization for certain agency policies”).

Unfortunately, Supreme Court decisions provide no clear answer.<sup>8</sup> Indeed, the Court's precedents on this question have bedeviled courts and commentators at least since the 1932 decision in *Crowell v. Benson*.<sup>9</sup> Under the public-rights doctrine that *Crowell* reaffirmed, there must be substantial access to Article III courts in federal adjudication of matters of private right, matters described by *Crowell* as involving "the liability of one individual to another under the law as defined."<sup>10</sup> In contrast, Congress enjoys greater latitude to give non-Article III federal officials adjudicative authority in a trio of settings: military courts, territorial courts, and noncriminal cases involving "a matter of public rights."<sup>11</sup> But the Court has long provided uncertain and even inconsistent guidance on what constitutes a matter of public right. More fundamentally, the Court has never offered a coherent rationale for why it comports with the Constitution (and particularly with Article III) for Congress to use non-Article III federal adjudicators without mandatory recourse to Article III courts in the trio of settings where they are allowed.<sup>12</sup>

This Article's account of the public-rights doctrine reveals common themes among these three seemingly disparate settings. Although we use the well-established term "public rights" doctrine to describe the subject matter, our account of the doctrine encompasses and unites all the situations in which non-Article III federal adjudication is permissible without party consent and without the non-Article III tribunal's being considered a mere adjunct to an Article III court:<sup>13</sup> military and territorial courts as well as matters of public right. We provide not only a *descriptive* account of the doctrine that "fits" the

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8 See *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1373 (2018) (acknowledging that the Court's "precedents applying the public-rights doctrine have 'not been entirely consistent'" (quoting *Stern v. Marshall*, 564 U.S. 462, 488 (2011))).

9 285 U.S. 22 (1932).

10 *Id.* at 51.

11 *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64–70 (1982) (Brennan, J.) (plurality opinion). For this Article, we assume the common understanding that the public-rights doctrine does not apply in criminal cases. See *id.* at 70 n.24 ("Of course, the public-rights doctrine does not extend to any criminal matters, although the Government is a proper party."); see also Martin S. Lederman, *Of Spies, Saboteurs, and Enemy Accomplices: History's Lessons for the Constitutionality of Wartime Military Tribunals*, 105 GEO. L.J. 1529, 1553–54 (2017) (quoting *Northern Pipeline*, 458 U.S. at 70 n.24). There is support for this assumption in the Constitution's distinctive provisions relating to criminal cases, including Article III's provision that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." U.S. CONST. art. III, § 2, cl. 3.

12 See, e.g., Martin H. Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 205 (asserting that "the language and logic of article III do not justify the public-private right dichotomy").

13 See *infra* text accompanying note 211.

cases and is rooted in constitutional text, original understandings, and historical practice, but also a *normative* view of Article III as consistent with broad room for administrative adjudication to enable effective national government. For a well-functioning national government, non-Article III federal officials *must* in their day-to-day work—whether granting patents or benefits, allowing goods and persons into the country, collecting taxes, disciplining troops, or carrying out any of a multitude of other government operations—make final assessments of legal rights and obligations without compulsory resort to an Article III court.<sup>14</sup> Explicit assignments of congressional power in Article I, such as those to collect taxes, grant invention patents, and make rules and regulations for the armed forces, provide constitutional testimony to this practical reality.

Thus, the fundamental question is not whether the Constitution—and Article III in particular—permits Congress to assign adjudicatory authority to non-Article III federal officials. The Constitution must do this because adjudication is often a necessary incident of important missions the Constitution assigns to the political branches of the national government. On the other hand, there seem to be ways by which non-Article III federal adjudication could plainly encroach on Article III judicial power: for example, if Congress were to take away the Supreme Court’s appellate jurisdiction in constitutional cases and give it to non-Article III federal officials enjoying one-year appointments only.<sup>15</sup> The fundamental question is thus one of line drawing. How is room for non-Article III adjudication constitutionally confined?

The public/private-rights distinction purports to aid in the necessary line drawing. But how does one distinguish between matters of private right and those of public right? To facilitate answers, we reorganize the categories of permissible areas for non-Article III federal adjudication to clarify the relationships between the territorial courts, courts-martial, and public-rights categories. Specifically, we contend that Article III generally permits Congress to commit noncriminal Article III-listed “Cases” and “Controversies” to final adjudication by a non-Article III federal officer or tribunal in three overlapping spheres of activity:

1. The case or controversy occurs in a *physical space beyond the states’ control* and thus does not implicate concerns about eroding preexisting state decisional primacy over matters of private

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14 See Jack M. Beermann, *Administrative Adjudication and Adjudicators*, 26 GEO. MASON L. REV. 861, 863 (2019) (“[T]he success of important federal benefits and regulatory schemes depends on the availability of expert adjudicators who can resolve a high number of disputes efficiently.”).

15 See Golden & Lee, *supra* note 2, at 1569–70.

- right.<sup>16</sup> Key examples are territorial courts, the District of Columbia courts (and justices of the peace), military courts in foreign or occupied territories, and administrative bodies that adjudicate entry into the United States of foreign goods and persons.
2. The case or controversy occurs in the *operational space of the federal government*. A case within this space may feature a challenge to how the federal government manages its internal affairs or to how the government implements an Article I power to confer a right or benefit, such as a land grant or a monetary award.<sup>17</sup> Explicit constitutional grants of legislative or executive power that logically entail adjudication highlight core cases in the federal government's operational space. Key examples include courts-martial, the accounting of a customs collector's tariff receipts, and grants of patent rights.<sup>18</sup> The federal government's operational space also generally encompasses—and thereby explains—the jurisdiction of the Court of Federal Claims.<sup>19</sup> Some forms of non–Article III adjudication of immigration and revenue matters fall within both this operational space category and the beyond-state-control physical space category.
  3. The case or controversy involves a claim against one or more private parties within the *public-interest-focused enforcement space of a federal statutory scheme*, such as one regulating labor-management relations or requiring commercial pesticide registration. This third category is the most difficult to define and the most contested. It is adjacent to, and overlaps partly with, the operational space of internal affairs and direct government grants.<sup>20</sup> But the enforcement space category has a distinctly more outward-extending nature: this category includes claims

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16 Previously, we focused on the private rights side of the doctrine and explained how it reflects a principle of constitutional federalism that helps preserve the decisional primacy of state courts and juries in private disputes. *See generally id.*

17 The right/benefit conferring aspect of the federal operational space is similar to James Pfander and Andrew Borrasso's notion that Congress may commit to executive officials "the issuance of constitutive orders to create new rights," but their framing, in contrast to ours, tends to suggest that Article III itself requires resort to Article III courts with respect to the clawback of such rights. James E. Pfander & Andrew G. Borrasso, *Public Rights and Article III: Judicial Oversight of Agency Action*, 82 OHIO ST. L.J. 493, 493, 559 (2021).

18 *See infra* Part II.

19 Robert Meltz, *The Impact of Eastern Enterprises and Possible Legislation on the Jurisdiction and Remedies of the U.S. Court of Federal Claims*, 51 ALA. L. REV. 1161, 1161 (2000) ("Under the Tucker Act, the Court of Federal Claims ('CFC') has jurisdiction over most money claims against the United States . . .").

20 *See infra* subsection III.A.2.

of liability against individuals who are not government employees or who might not even be recipients of, or applicants for, relevant government grants. Noncriminal enforcement actions brought by the government commonly fall within this federal enforcement space, but we doubt that the government's appearance as a formal party should always suffice.<sup>21</sup> Conversely, as in *Thomas v. Union Carbide Agricultural Products Co.*,<sup>22</sup> a case between private parties over an alleged liability created wholly by a federal regulatory scheme may fall within the enforcement space even though the federal government is not involved as a party.<sup>23</sup> The less a matter seems a creature of federal statutory law and, separately, the more the matter's resolution generates personalized relief for a specific private party at another specific private party's expense, the greater the chance that non-Article III federal adjudication exceeds the proper bounds of this enforcement space.

To fully understand the contents and limits of the above three categories, it helps to consider a definition of matters of *private* right. In a prior article, we traced what might be called the “private-rights doctrine”—the private-rights side of the public-rights doctrine—to state courts' traditional role as the primary deciders of suits among private parties.<sup>24</sup> Article III was understood to honor this norm when the Constitution was adopted.<sup>25</sup> This federalism-inflected understanding of Article III informed our proposed definition of “a private rights claim [as] one (1) through which one or more private parties seek personalized relief from one or more other private parties; and (2) that was a sort of claim heard by state courts of law, equity, or admiralty in 1789 or is a modern analogue thereof.”<sup>26</sup> Straightforward attention to the constraints in this definition yields the first of our categories for a space in which non-Article III adjudication is permissible: matters occurring in physical space outside the states' control. The rationale for the second and third categories is similarly apparent in light of our federalism-oriented definition of matters of private right. The states have no inherent claim to adjudicatory authority over federal governmental operations or enforcement spaces anchored in constitutional grants of congressional or presidential authority: such matters could not be part of the state courts' authority prior to the start of the new federal government's work in 1789.

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21 See *infra* subsection III.A.1.

22 473 U.S. 568 (1985).

23 See *infra* subsection II.C.2.

24 See generally Golden & Lee, *supra* note 2.

25 See *id.* at 1574–84.

26 *Id.* at 1558.

Two additional points help clarify the distinctiveness and scope of our understanding of the non–Article III adjudication puzzle. First, we focus here on what *Article III* mandates in relation to non–Article III adjudication, but we also stress that other constitutional provisions may call for the involvement of Article III courts. Under our understanding, non–Article III decisionmaking on public-rights matters is generally permissible because it is fundamentally an exercise, in an adjudicative mode, of powers that the Constitution assigns to the political branches. It follows that Article III by itself does not require involvement of the Article III courts in such executive or legislative decisionmaking—except presumably to provide a check that a public-rights characterization is correct. Nonetheless, even in matters of public right, other constitutional constraints, such as the nondelegation doctrine<sup>27</sup> or the Fifth Amendment Due Process or Takings Clauses,<sup>28</sup> can require an Article III court to play a substantial role. Moreover, whether required by the Constitution or not, Congress certainly has the option—as well as practical incentives—to continue routinely providing for Article III appellate review under the Administrative Procedure Act (APA) and other statutes.

Second, recognition of our three categories of permissible non–Article III adjudication calls for rethinking conventional notions of congressional discretion in making assignments of federal adjudicatory authority. In combination with allowance for non–Article III military and territorial courts, the public-rights doctrine is often envisioned as *confining* non–Article III adjudication to a relatively narrow and static set of exceptional situations. Chief Justice Roberts has embraced this view in writing of the “public rights *exception*.”<sup>29</sup> Under our formulation, however, the realm of public-rights matters encompasses far more than a merely exceptional set of matters: it is an amalgam of three broad spaces abutting a private-rights core. Hence, we believe that the Court, in a recent opinion by Justice Thomas, more correctly spoke of the “public-rights doctrine.”<sup>30</sup> Recognizing the breadth of the doctrine may mollify the objections of those who favor a less facially formal and more freewheeling interest-balancing inquiry into allocations of adjudicatory authority. At the same time, the assurance of a nontrivial, tradition-based private-rights core might mollify the con-

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27 See *Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019) (“The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government.”).

28 U.S. CONST. amend. V.

29 *Stern v. Marshall*, 564 U.S. 462, 488 (2011) (Roberts, C.J.) (emphasis added).

30 *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1373 (2018) (Thomas, J.) (emphasis added).



cerns of those who find the current and potential future reach of federal authority a cause for alarm, rather than comfort. By combining robust realms for public rights with a private-rights core, our framework generally tracks the constitutional scheme for a national government with branches whose powers are meaningful and overlapping yet at the same time substantially limited and distinct.<sup>31</sup>

This Article proceeds as follows. Part I frames the Article III questions and locates this Article relative to prior scholarship. Part II shows how the history of how the Supreme Court has dealt with non-Article III adjudication supports our three-part framework for public rights. Part III emphasizes the expansiveness of our vision of public-rights matters but also stresses non-Article III adjudication's subjection to non-Article III constitutional constraints that may, as a practical matter, require access to Article III court review even when Article III does not. We conclude by elaborating upon the implications of our analytical framework for the past and future of administrative adjudication and its constitutionality.

## I. FRAMING THE ARTICLE III QUESTIONS

This Part frames issues regarding the legitimacy of non-Article III adjudication in their constitutional context and summarizes recent academic efforts in this area. Section I.A emphasizes how the Constitution's sparse text tends to drive judicial decisionmaking toward concerns of structure and function. Section I.B describes commentators' struggles to make sense of the Supreme Court's precedents.

### A. *Squaring Non-Article III Adjudication with Article III*

Article III, Section 2 provides that the federal "judicial Power shall extend" to nine enumerated "Cases" and "Controversies."<sup>32</sup> From the time of the first Judiciary Act, however, Congress has never fully vested adjudicatory authority over these matters in Article III courts.<sup>33</sup> There was no need to vest fully—and in fact reason not to—because there were functioning judicial systems in the states and federal courts would necessarily poach upon their business. Heated ratification debates about the scope of Article III judicial power made clear that the lan-

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31 Cf. Andrew Coan, *Implementing Enumeration*, 57 WM. & MARY L. REV. 1985, 1990 (2016) (describing a need "to balance the Constitution's commitment to internal limits with its equally apparent commitment to effective national government").

32 U.S. CONST. art. III, § 2, cl. 1.

33 See, e.g., Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 889 (2011) (noting the limited jurisdiction of the inferior courts created by the Judiciary Act).

guage of Article III should be viewed as reflecting a key feature of constitutional federalism: an understanding that state courts and local juries, not federal courts, should remain the primary adjudicators of disputes between private parties.<sup>34</sup> For more than two centuries, subsequent practice has substantially conformed to that understanding.<sup>35</sup> Further, this understanding has implications for Congress's power to delegate adjudication to non–Article III tribunals:

If Congress could limitlessly assign adjudication of private rights cases to federal officials lacking the life tenure and salary protections of Article III judges, the political branches of the federal government would enjoy vastly expanded authority to encroach on state courts' traditional authority to decide common law and equity cases between individuals.<sup>36</sup>

By reserving a distinctive role for the Article III courts, federal-level separation of powers served not only as a mechanism for checks and balances between Congress, the executive, and the Judiciary, but also as a means to protect an important interest in constitutional federalism.

The adopters of the Constitution recognized, however, that the lines separating the powers of the different federal branches are not sharp. In *Federalist No. 47*, James Madison responded to the charge that the Constitution “distributed and blended” “[t]he several departments of power” not by denying the charge, but rather by contending that the Constitution avoided both “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands” and “a mixture of powers, having a dangerous tendency to such an accumulation.”<sup>37</sup> For Madison, the fundamental concern was not that there be *no* mixture of powers but instead that there not be “too great a mixture.”<sup>38</sup> The powers of the three branches need to be distinct, but such distinction does not preclude overlaps. Moreover, alternative constitutional principles, such as those later embodied in the Fifth Amendment's Due Process Clause<sup>39</sup> and other provisions of the Bill of Rights, provide judicially enforceable checks that bolster individual interests and otherwise help ensure that the branches' exercises of power stay within constitutionally safe bounds.<sup>40</sup>

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34 See generally Golden & Lee, *supra* note 2.

35 See *id.*

36 *Id.* at 1547.

37 THE FEDERALIST NO. 47, at 307–08 (James Madison) (Modern Library ed., 2000).

38 *Id.* at 315.

39 U.S. CONST. amend. V.

40 See Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1807 (2012) (contending that, under the original understanding, due process imposed constraints on both executive and legislative action).

This context is the logical starting point for assessing Congress's power to deploy a non-Article III decisionmaker in resolving a case or controversy within the constitutional scope of Article III judicial power. Since the early republic, territorial courts, military courts, and non-criminal matters of "public right" have been accepted as instances where non-Article III tribunals or officers may exercise final decisional authority, in contrast to private-rights matters, where such officials may be used as adjuncts but Article III judges must have the final say on any matters that remain in dispute.<sup>41</sup> But determining the scope and precise significance of the public-rights category, including its relationship to the territorial and military courts categories, has been a challenge.

### B. Scholarly Commentary

In addressing issues about the permissible scope of non-Article III adjudication, scholars have struggled to define the content of the public-rights doctrine and have sometimes rebelled against it. As a practical matter, the modern dominance of an appellate review model for the judicial review of final administrative actions<sup>42</sup> generally ensures substantial access to Article III courts for review of administrative action and thus can call into question the need for a separate public/private-rights distinction to police constitutionality. The sparseness of pertinent constitutional text that nowhere mentions a public/private rights-distinction adds fuel to the fire, as does the Supreme Court's apparent dissatisfaction with such facially formal categories in the mid-1980s.<sup>43</sup> But there has also been a countermovement in favor of giving the public/private-rights distinction renewed force. Though sometimes praised,<sup>44</sup> the mid-1980s' balancing approach drew criticism for leaving Article III protections insufficiently certain and secure.<sup>45</sup> The Court's recently revived emphasis on the public/private-rights distinction, led by Justice Thomas, is in part a response to such concerns

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41 See *infra* text accompanying note 211.

42 See *infra* notes 244–49 and accompanying text.

43 See *infra* Section II.C.

44 See Gordon G. Young, *Public Rights and the Federal Judicial Power: From Murray's Lessee Through Crowell to Schor*, 35 *BUFF. L. REV.* 765, 865 (1986) ("The focus is now properly on balancing the need for non-Article III adjudication against the threat it poses to a variety of private interests and rights, and to the tenured judiciary.").

45 See ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 255–56 (3d ed. 1999) (describing the Court's balancing approach as "inherently unpredictable" and threatening "the jurisdiction of Article III courts"); Daniel J. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 *IND. L.J.* 291, 295 & n.24 (1990) (criticizing the Court's use of too many "ill-defined and often irrelevant variables").

about open-ended balancing<sup>46</sup> and has spurred a renewed round of academic writing.

The natural starting point for discussion remains the appellate review model that is dominant in federal administrative law. Given this dominance, it is unsurprising that many scholars have sought to reconcile Article III with widespread administrative adjudication through some version of what Richard Fallon calls an “appellate review theory.”<sup>47</sup> The theory posits that Congress may “employ non–Article III tribunals to adjudicate cases that the Article III courts otherwise could have decided if, but only if, [Congress] provide[s] for sufficiently searching review in an Article III court.”<sup>48</sup> “[L]ong . . . the leading answer to [the] conundrum” of how to reconcile administrative adjudication and Article III,<sup>49</sup> appellate review theory has run into roadblocks, including concerns that it is simultaneously over- and under-protective of interests in Article III adjudication,<sup>50</sup> as well as, more practically speaking, the Court’s now decades-long refusal to embrace this academic favorite.<sup>51</sup> Fallon himself has indicated the desirability of adding a threshold inquiry into Congress’s purpose in “employing a non–Article III tribunal.”<sup>52</sup>

But attempts to reticulate appellate review theory along such lines could make it less enticing to the courts. The past few decades have witnessed the rise of a new formalism that emphasizes reluctance to impute congressional motives as well as close reading of texts, respect for original understandings, and careful attention to old cases, tradition, and historical practice.<sup>53</sup> A number of scholars have taken approaches to construing Article III that better fit this neo-formalist world.

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46 Cf. *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1373, 1381 n.1 (Gorsuch, J., dissenting) (doubting “that the political branches may ‘depart from the requirements of Article III’ when the benefits outweigh the costs” (quoting *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851 (1986))).

47 Fallon, *supra* note 4, at 933; Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1117–18 (2010).

48 *Id.* at 1117.

49 Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 NW. U. L. REV. 1569, 1582 (2013).

50 See Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L.J. 933, 985 (2015) (asserting that “the elegant simplicity of the appellate review model also provides one of the central charges against it”).

51 See James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 647–48 (2004) (“Despite the theory’s support in the literature, however, the Supreme Court has yet to embrace appellate review as the measure of congressional obligation.”).

52 Fallon, *supra* note 47, at 1118.

53 See Robert L. Glicksman & Richard E. Levy, *The New Separation of Powers Formalism and Administrative Adjudication*, 90 GEO. WASH. L. REV. 1088, 1088 (2022) (acknowledging

In this vein, James Pfander has offered a textual justification for the use of non–Article III federal adjudicators. Specifically, Pfander has construed Congress’s Article I power “[t]o constitute Tribunals inferior to the supreme Court”<sup>54</sup> as a power to deploy non–Article III federal tribunals for adjudication so long as they are kept “inferior” to the Supreme Court.<sup>55</sup> Further, Pfander has explained the propriety of non–Article III adjudication for many cases by arguing that they have not exhibited the finality characteristic of “judicial power” because, in cases against the government, “Congress retained legislative discretion over payment” and because, as to court-martial proceedings, they were “subject to review that occurred inside the executive branch.”<sup>56</sup>

William Baude has more recently proposed an even more text-centered solution to the non–Article III adjudication puzzle. Baude focuses on Article III’s language regarding “the judicial power ‘of the United States.’”<sup>57</sup> According to Baude, territorial courts, like state or foreign courts that exercise the judicial power of *other* sovereigns, do not exercise the judicial power “of the United States”;<sup>58</sup> military courts and public-rights adjudicators exercise *executive* power, not “judicial” power;<sup>59</sup> and magistrates and bankruptcy judges are adjuncts who do not themselves wield judicial “power” and so may only do minor tasks or adjudicate with party consent.<sup>60</sup> Consequently, provision of these forms of non–Article III adjudicators comports with Article III because it does not encroach on “[t]he judicial Power of the United States.”<sup>61</sup>

Caleb Nelson has taken a different, more history-centered approach. Nelson has argued that, at least according to nineteenth-century understandings, an exercise of “judicial” power—i.e., a decision by one or more Article III judges—was required when government infringed upon “core private rights” like life, physical liberty, or traditional types of property.<sup>62</sup> But federal officials without Article III ten-

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“a new era of separation of powers formalism”); Ofer Raban, *Between Formalism and Conservatism: The Resurgent Legal Formalism of the Roberts Court*, 8 N.Y.U. J.L. & LIBERTY 343, 367 (2014) (discussing “formalism’s conservative revival”).

54 U.S. CONST. art. I, § 8, cl. 9.

55 See Pfander, *supra* note 51, at 648.

56 *Id.* at 652.

57 William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1513–14 (2020).

58 *Id.* at 1522–25.

59 *Id.* at 1544, 1548.

60 *Id.* at 1556–57; see *id.* at 1522–23 (describing “three kinds of permissible non–Article III tribunals”).

61 U.S. CONST. art. III, § 1.

62 Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 572 (2007).

ure and salary protection were permitted to make determinations regarding rights held “by the people at large, such as the public’s right to use navigable waterways,” and also “quasi-private ‘privileges’ that [a legislature] created for reasons of public policy.”<sup>63</sup> After the Supreme Court’s 2018 decision in *Oil States Energy Services, LLC v. Greene’s Energy Group, LLC*,<sup>64</sup> he clarified that legislatures could vest “franchises” in private parties “in such a way as to [make them] full-fledged private rights,” but legislatures could also “structure them in such a way as to avoid this result.”<sup>65</sup> Nelson thus embraces a view of the public/private-rights distinction resonant with lines suggested by liberal political theorists like John Locke.<sup>66</sup>

John Harrison has likewise “explore[d] the older system that Nelson has recovered.”<sup>67</sup> In contrast with Nelson, however, Harrison has contended for a capacious vision of the range of permissible executive adjudication under that system. In Harrison’s account, the legislature has substantial power to determine “[h]ow far private, as opposed to public, rights reach,” with the result that “the independent constraining effect of separation of powers on administrative government is less than some may think.”<sup>68</sup> Harrison thereby presages our own conclusion that the permissible domain of non–Article III federal adjudication is expansive. But Harrison, like Nelson, centers his account on a traditional understanding of the public/private-rights distinction<sup>69</sup> and acknowledges concern about his account’s tendency to suggest that Congress might be able to substantially “federalize the private law.”<sup>70</sup>

Though in many respects illuminating, these past scholarly efforts have failed to provide a conclusive resolution to the puzzle of non–Article III adjudication. Prior accounts commonly reject or disparage some subset of Supreme Court precedents: a favorite punching bag is

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63 *Id.* at 570–71.

64 138 S. Ct. 1365 (2018).

65 Caleb Nelson, *Vested Rights, “Franchises,” and the Separation of Powers*, 169 U. PA. L. REV. 1429, 1432 (2021).

66 Nelson, *supra* note 62, at 567 (“[Anglo-American lawyers] distinguished what I will call ‘core’ private rights . . . from mere ‘privileges’ or ‘franchises’ (which public authorities had created purely for reasons of public policy and which had no counterpart in the Lockean state of nature).”).

67 John Harrison, *Public Rights, Private Privileges, and Article III*, 54 GA. L. REV. 143, 148 (2019).

68 *Id.* at 215.

69 *See id.* at 172 (describing nineteenth-century justification for “allow[ing] absolute finality in the political branches with respect to public rights” and associated “private privileges”).

70 *See id.* at 203 (skeptically entertaining a proposition that Congress could “federalize the private law”).

the Court's upholding of non-Article III process in *Union Carbide*.<sup>71</sup> Meanwhile, the Court has hesitated to definitively embrace any of the major competing accounts. The Court has declined to endorse appellate review theory or its inferior-tribunal variant.<sup>72</sup> Despite the rhetorical power of Baude's approach, the Court seems unlikely to find persuasive evidence for it in either original sources or the Court's prior decisions.<sup>73</sup> Finally, the Court's by-now-well-entrenched description of public rights as ones "integrally related to particular Federal Government action"<sup>74</sup> defies Nelson's vision of a relatively crisp, historically well-rooted public/private-rights distinction while raising concerns of boundlessness that Harrison finds lurking in his own account.<sup>75</sup>

Our approach distinguishes itself by championing an expansive but nonetheless significantly bounded vision of the public-rights doctrine that comports with decades-long practice and reconciles at least the outcomes, if not the entirety of the reasoning, of the leading Supreme Court precedents. Although we believe that our account's greater consistency with Supreme Court caselaw and practice is a significant advantage,<sup>76</sup> we recognize that it is not necessarily decisive. Compared to competing accounts, ours benefits from additional structural and practical advantages. Consistent with our prior Article focused on matters of private right, we begin with a federalism-oriented view of Article III rooted in the Constitution's original understanding. This backward-looking, federalism-oriented view endows our framework with a substantial private-rights core that defies easy assimilation by appellate review theory and bounds Congress's capacity to transform matters traditionally resolved in state courts into federalized matters of private right. The combination of this private-rights core and our more dynamic, three-part functional framework for public rights enables our account not only to match longstanding precedent and

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71 See, e.g., Baude, *supra* note 57, at 1578 (calling *Union Carbide* into question); Fallon, *supra* note 4, at 991 (contending that *Union Carbide* and another decision "should [both] have come out the other way"); Pfander, *supra* note 51, at 772 ("[T]he inferior tribunals account would not support the Court's decision in [*Union Carbide*].").

72 See *supra* note 51 and accompanying text.

73 See, e.g., CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 50 (6th ed. 2002) (characterizing as a "conceptual problem[]" the question "[h]ow the same case can involve the judicial power of the United States when it reaches the Supreme Court, but not be within the judicial power when it is tried in the territorial court").

74 *Stern v. Marshall*, 564 U.S. 462, 490–91 (2011) (citing *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 174 (2011)).

75 See *supra* note 70 and accompanying text.

76 Cf. JAMES E. PFANDER, CASES WITHOUT CONTROVERSIES: UNCONTESTED ADJUDICATION IN ARTICLE III COURTS 227 (2021) ("Continuing practices, based on longstanding tradition, enjoy a claim of presumptive constitutionality and courts should hesitate to declare them invalid.").

practice better than the main competitors, but also supports a forward-looking appreciation of the political branches' power and discretion to adapt the organization and operation of the federal government to evolving national needs.

## II. HISTORICAL PRACTICE AND PRECEDENTS

This Part shows how our three-part framework for public rights aligns with historical practice and precedents. Our account begins with discussion of state, federal, and territorial courts in the early republic; sets out some early examples of non–Article III adjudication by military courts and the federal government's initial patent board and later patent examiners; chronicles the public-rights doctrine's nineteenth-century emergence; and then traces the course of Supreme Court decisions and rise of the administrative state through to the present. The account shows how practices of non–Article III adjudication for distinctively federal physical, operational, and enforcement spaces developed; won general sanction by the Supreme Court; but ultimately—particularly with respect to outward-directed enforcement space—raised thorny questions about the extent to which Congress may subject traditional, state-based private rights to federal adjudication by non–Article III tribunals.

### A. *Late Eighteenth- and Nineteenth-Century Foundations*

The federal government of the early republic was relatively spare<sup>77</sup> and often used—or sought to use—Article III judges for essentially administrative functions that were sometimes found not to lie within the Article III “judicial Power.”<sup>78</sup> On the other hand, early Congresses occasionally authorized adjudication—seemingly, exercises of the “judicial Power of the United States”—by non–Article III federal officers in “Cases” or “Controversies” that fell within the enumeration of Article III, Section 2 (e.g., by “arising under” federal laws), and the Supreme Court approved their use. These examples of non–Article III adjudication support our three-part framework for public rights and also

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77 Cf. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 582 (1984) (“The minimalist federal government outlined in Philadelphia in 1787 envisioned a handful of cabinet departments to conduct the scanty business of government, each . . . thinly peopled with political employees.”).

78 See *Hayburn’s Case*, 2 U.S. (2 Dall.) 409 (1792); 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 486–89 (Henry P. Johnston ed., New York, G.P. Putnam’s Sons 1891); see also JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 74 (2012) (“Congress in the early years of the Republic seemed to have little hesitation in using courts or judicial personnel as administrators.”).



show how the Constitution's specific grants of power to Congress commonly underlay acceptance of non-Article III federal adjudication, particularly in this early era.

## I. Non-Article III Courts and Pre-Public-Rights Doctrine

As noted in Section I.A, a key reason for the Founding generation to be wary of non-Article III federal tribunals was concern about the federal government's potential displacement of the traditional powers of state courts and local juries, a concern that tribunals not subject to Article III's restrictions would predictably exacerbate.<sup>79</sup> The concern was substantially diluted, however, in distinctively federal physical and operational spaces understood to be outside the states' control—e.g., the territories in which non-Article III federal courts adjudicated private and public disputes, the realm of military conduct subject to courts-martial, and the federal bureaucratic space for awarding direct grants such as invention and land patents. In relation to the territories and the military, Congress enjoyed specific grants of power that helped courts view them as realms especially subject to control by the federal government's political branches. Meanwhile, the ability of non-Article III adjudicators to decide on grants or denial of statutorily created rights or benefits seems generally to have been unquestioned—perhaps because Congress could presumably have made individual awards of such rights or benefits directly via private bill. This subsection discusses a series of antebellum cases indicating that Congress could use non-Article III tribunals to decide Article III-listed cases and controversies not only where, as in the territories, there were no state courts to displace, but also in other situations where Congress was exercising its constitutional powers in the service of vital national needs.

### a. State Courts and the Judiciary Act of 1789

The Judiciary Act of 1789 provided for nineteen federal judges—six Supreme Court Justices and thirteen district judges—a surprisingly compact judicial cohort given the size of the United States and its population of about four million.<sup>80</sup> The small scale of the Article III judiciary was in part financially driven, but in larger part resulted because the federal courts were superimposed upon the preexisting judicial systems of the various states, many of whose residents had been skeptical

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<sup>79</sup> See *supra* text accompanying notes 35–40.

<sup>80</sup> See Judiciary Act of 1789, ch. 20, § 2, 1 Stat. 73; Diana Gribbon Motz, *The Constitutionality and Advisability of Recess Appointments of Article III Judges*, 97 VA. L. REV. 1665, 1676 (2011) (observing that the 1789 Judiciary Act created a system “of only nineteen federal judges”).

about the need for geographically dispersed federal courts of first instance, at least outside the maritime context.<sup>81</sup> Indeed, the state courts, although technically non–Article III adjudicators, have long had unchallenged authority to decide certain cases and controversies among the nine heads of Article III judicial power. Controversies “between Citizens of different States”<sup>82</sup> involving matters of state law are the canonical example, but the state courts have also possessed—and retained—concurrent jurisdiction over noncriminal cases arising under federal law absent explicit congressional exclusion.<sup>83</sup> Congress seems to have been wary of overplaying its hand by displacing the more familiar state courts through overzealous offering of Article III alternatives.

It stands to reason that Congress should, at least from the standpoint of federalism, be even charier of diverting cases from the state courts to federal tribunals that lack the constitutional tenure, salary, and appointments requirements for Article III judges. Because of the Article III courts’ constitutionally-mandated insulation from the national government’s political branches, diversion to Article III courts instead of non–Article III tribunals could best serve to contain Founding-era concerns about a potentially limitless consolidation of power by the federal government that would usurp the traditional powers of state courts and local juries.<sup>84</sup>

On the flip side, state courts did not have a generally strong claim to preexisting jurisdiction over various public cases and controversies such as “Controversies to which the United States shall be a Party,”<sup>85</sup> especially as controversies in which the United States is the defendant are often subject to a federal sovereign immunity default.<sup>86</sup> Consequently, Congress has greater latitude in assigning the forum for adjudication of such cases and controversies—for example, to the Article I

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81 See Golden & Lee, *supra* note 2, at 1574–80.

82 U.S. CONST. art. III, § 2, cl. 1.

83 See *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507–08 (1962) (“Concurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule.”). Indeed, prior to the Constitution’s adoption, state courts necessarily had exclusive jurisdiction over an important subset of federal law claims—claims arising under the 1783 peace treaty with Great Britain. See Thomas H. Lee, *Article IX, Article III, and the First Congress: The Original Constitutional Plan for the Federal Courts, 1787–1792*, 89 *FORDHAM L. REV.* 1895, 1901–06 (2021) (describing limited provisions for federal adjudication under the Articles of Confederation).

84 See Golden & Lee, *supra* note 2, at 1590–92.

85 U.S. CONST. art. III, § 2, cl. 1.

86 See Kate Sablosky Elengold & Jonathan D. Glater, *The Sovereign Shield*, 73 *STAN. L. REV.* 969, 971 (2021) (“As a sovereign, the federal government has the power . . . to specify whether, where, and when it can be sued.”).

Court of Federal Claims, whose judges lack life tenure and instead serve for fifteen-year terms.<sup>87</sup> Hence, the traditional correspondence of public-rights cases to cases in which the United States is a party makes some sense as a reflection of a constitutional settlement of federalism concerns. Under this settlement, Article III courts provide a presumptively trustworthy federal forum for classes of cases that the state courts would previously have decided,<sup>88</sup> while Congress has substantial discretion to assign non-Article III adjudication for issues over which state courts lacked preexisting jurisdiction.

### b. Territorial Courts

The treatment of territorial courts—the paradigm case for courts operating in a distinctively federal physical space—has been informed by the Constitution’s explicit provision of Congress with broad “Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”<sup>89</sup> Nonetheless, the United States’ approach to adjudication in the territories provides clues about the more general nature of rights to Article III adjudication, including the role of the constitutional federalism concerns highlighted above.

The first Judiciary Act provided explicitly and separately for Article III district courts in what would become Kentucky and Maine, even though they were not states in September 1789.<sup>90</sup> By contrast, the Judiciary Act did not say anything about courts in the Northwest Territory, which included the future states of Ohio, Indiana, Michigan, Illinois, Wisconsin, and a portion of Minnesota.<sup>91</sup> Section 4 of the Northwest Ordinance of 1787 had provided that Congress appoint for the territory “a court to consist of three judges” whose “commissions shall

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87 See Jack Achiezer Guggenheim, *In Summary It Makes Sense: A Proposal to Substantially Expand the Role of Summary Judgment in Nonjury Cases*, 43 SAN DIEGO L. REV. 319, 338 (2006) (describing the present Court of Federal Claims); FALLON ET AL., *supra* note 3, at 89–91 (detailing the history of the Court of Claims).

88 See Golden & Lee, *supra* note 2, at 1574–84.

89 U.S. CONST. art. IV, § 3, cl. 2; see also Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 816 (2005) (“Congress exercised plenary power . . . over the territories of the United States throughout the nineteenth century.”).

90 Judiciary Act of 1789, ch. 20, § 2, 1 Stat. 73, 73 (specifying a “District of Kentucky” and a “Maine District” separate from Virginia and Massachusetts districts).

91 Stephen G. Calabresi, *Does Institutional Design Make a Difference?*, 109 NW. U. L. REV. 577, 590 (2015) (noting that the Northwest Territory “ultimately became the states of Ohio, Indiana, Illinois, Michigan, Wisconsin, and part of Minnesota”).

continue in force during good behaviour.”<sup>92</sup> After the Constitution was ratified, Congress passed a statute replacing congressional appointment of these judges (as well as governors and secretaries) with presidential appointment subject to senatorial advice and consent.<sup>93</sup> But despite this convergence on an appointments process tracking that for Article III judges, Congress appears to have viewed territorial judges as executive branch officials: not only were they unmentioned in the first Judiciary Act, section 4 of the Northwest Ordinance grouped them with the “secretary” who appears to have been the chief administrator, and the 1789 Salary Act classified them as “Executive Officers.”<sup>94</sup> Nor was there any appeal by writ of error from the Northwest Territory court to the Supreme Court until 1805.<sup>95</sup>

That Congress provided for Article III district courts in Kentucky and Maine, which were future states formed from existing states, but used non–Article III executive branch officials as judges in the Northwest Territory is a highly instructive juxtaposition that prior scholarship has neglected. It corroborates our view that, at the time of the Constitution’s adoption, issues relating to the Article III courts were substantially bound up with concerns of federalism. Because there were no state courts to displace in the Northwest Territory, Congress apparently did not feel a need to use Article III judges to decide cases and controversies there (even on appeal until 1805), including private-rights cases falling within Article III’s nine heads of federal “judicial Power.” The fact that the lame-duck Federalist Congress of 1801 created non–Article III adjudicators in the District of Columbia (the justices of the peace) but Article III circuit judges in the states is further proof of how Article III adjudication implicated constitutional federalism.<sup>96</sup>

Congress replicated the “good behavior” and presidential appointment formula for judges in the Southwest Territory in 1790 (future Tennessee),<sup>97</sup> the Mississippi Territory in 1798,<sup>98</sup> and the Indiana Territory carved out of the Northwest Territory in 1800.<sup>99</sup> But Congress adopted a new model for the “Orleans Territory” obtained as the

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92 Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51 & n.(a) (1789) (providing that the Northwest Ordinance adopted by the Articles of Confederation Congress on July 13, 1787 “may continue to have full effect”).

93 See § 1, 1 Stat. at 52–53.

94 See Gregory Ablavsky, *Administrative Constitutionalism and the Northwest Ordinance*, 167 U. PA. L. REV. 1631, 1633 n.12 (2019); Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1288 (2006).

95 See Act of Mar. 3, 1805, ch. 38, 2 Stat. 338, 338–39.

96 See Golden & Lee, *supra* note 2, at 1580–82.

97 See Act of May 26, 1790, ch. 14, § 2, 1 Stat. 123, 123.

98 See Act of Apr. 7, 1798, ch. 28, § 3, 1 Stat. 549, 550.

99 See Act of May 7, 1800, ch. 41, § 3, 2 Stat. 58, 59.

southern part of the Louisiana Purchase.<sup>100</sup> First, although the President still retained the power to nominate judges, Congress provided that the “judicial power shall be vested in a superior court, and in such inferior courts, and justices of the peace, as the legislature of the territory may from time to time establish.”<sup>101</sup> Second, rather than tenure during “good behavior,” Congress provided that the “judges of the superior court and the justices of the peace, shall hold their offices for the term of four years.”<sup>102</sup> Third, Congress provided for one Article III district judge for the city of New Orleans by incorporating by reference the First Judiciary Act’s specifications regarding the Kentucky District, presumably with an eye to customs revenue cases in that important commercial port.<sup>103</sup> This last action suggests that Congress believed that the “judicial Power of the United States” specified in Article III extended to the territories. Nonetheless, Congress chose generally to enact statutes to establish, or to charge territorial legislatures with establishing, territorial courts of general jurisdiction that were not staffed by Article III judges.<sup>104</sup>

The Supreme Court ultimately sanctioned the use of non–Article III territorial courts. In *American Insurance Co. v. Canter*,<sup>105</sup> the Supreme Court upheld the Florida territorial legislature’s discretion to vest jurisdiction over admiralty cases in a lower territorial court whose judges lacked tenure and salary protection and were appointed by the territorial legislature.<sup>106</sup> Writing for the Court, Chief Justice Marshall reasoned that although only Article III courts can exercise admiralty jurisdiction “in the states,” “the same limitation does not extend to the territories” because, “[i]n legislating for them, Congress exercises the combined powers of the general, and of a state government.”<sup>107</sup>

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100 See Act of Mar. 26, 1804, ch. 38, § 5, 2 Stat. 283, 284. For the northern part of the Purchase, Congress provided that the “governor and judges of the Indiana territory shall have power to establish . . . inferior courts, and prescribe their jurisdiction and duties, and to make all laws which they may deem conducive to the good government of the inhabitants thereof.” § 12, 2 Stat. at 287.

101 § 5, 2 Stat. at 284.

102 *Id.*

103 § 8, 2 Stat. at 285–86.

104 See Pfander, *supra* note 51, at 712 (“[T]he formal extension of Article III jurisdiction to local courts became a commonplace of territorial organization.”).

105 26 U.S. (1 Pet.) 511 (1828).

106 *Id.* at 546.

107 *Id.* The Supreme Court later used the same reasoning to uphold Congress’s use of non–Article III judges for the courts of general jurisdiction in the District of Columbia. See *Palmore v. United States*, 411 U.S. 389, 409–10 (1973). The issue there was somewhat trickier, however, because of the District’s creation by cession from states with preexisting courts. See James Durling, *The District of Columbia and Article III*, 107 GEO. L.J. 1205, 1226–28 (2019) (asserting that D.C. courts must be Article III courts in significant part because the District was formed by the cession of state lands).

*Canter* is worth examining closely because it is often misconstrued. The Supreme Court asserted that the “jurisdiction with which [the Florida territorial courts] 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.”<sup>108</sup> Baude reads this statement to mean that the power to hear admiralty cases in the Florida territory was not part of “the judicial power of the United States” and instead only part of the “judicial power of the Territory of Florida.”<sup>109</sup> That is a reasonable reading of the first part of Marshall’s statement, but we believe that the second point in Marshall’s statement is the key: the decisional power of the territorial courts derives from Congress’s exercise of its general power over the territories under Article IV. Congress’s power to create a court like that in *Canter* for a territory *outside* the bounds of the States contrasts with its more limited power *inside* the bounds of the States. As Chief Justice Marshall explicitly acknowledged in *Canter*, only Article III courts could decide admiralty and maritime cases “in the states.”<sup>110</sup>

In short, the key point is that the territories are subject to a broad, affirmative grant of power to Congress in constitutional text that includes the power to use non–Article III federal officials to decide admiralty cases in the territories. This understanding of *Canter* supports our sense that the scope of permissible non–Article III adjudication is substantially commensurate with—indeed sometimes a logical offshoot of—explicit grants of congressional power, usually in Article I but here in Article IV.

### c. Military Courts

Courts-martial offer the paradigm case of non–Article III adjudication within the federal government’s operational space. American use of courts-martial in which one or more military members administered justice within the ranks has been prevalent since the Revolutionary War.<sup>111</sup> Not only do courts-martial precede Article III and the existence of Article III courts, the Constitution grants power to Congress to “make Rules for the Government and Regulation of the land and naval Forces.”<sup>112</sup> Rules concerning the adjudication and punishment of soldiers in the field and sailors at sea who commit offenses or fail to

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108 *Canter*, 26 U.S. (1 Pet.) at 546.

109 Baude, *supra* note 57, at 1527.

110 *Canter*, 26 U.S. (1 Pet.) at 546; *see supra* text accompanying note 107.

111 WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 47 (2d. ed. rev. 1920).

112 U.S. CONST. art. I, § 8, cl. 14.

follow orders naturally fall within the ambit of this Article I power.<sup>113</sup> In relation to alleged violations of such rules, Congress has historically enjoyed greater latitude than in other contexts to vest final determinations in non-Article III tribunals—perhaps unsurprisingly given Congress’s expressly specified regulatory power, its extensive war powers,<sup>114</sup> foreseeable exigencies of military service, and the sense that the conduct of war is classically a matter for the political branches. Historically, non-Article III military tribunals have rendered results ranging from less severe “non-judicial punishment” to criminal determinations in courts-martial.<sup>115</sup>

The Supreme Court has long upheld the constitutionality of non-Article III courts-martial as to members of the armed forces. In 1858, the Court held in *Dynes v. Hoover*<sup>116</sup> that the use of courts-martial to enforce good order and discipline within the ranks is constitutional.<sup>117</sup> The Court explicitly referenced Congress’s Article I power and the President’s Article II Commander-in-Chief power,<sup>118</sup> as well as the fact that the Fifth Amendment Grand Jury Clause excepts “cases arising in the land or naval forces.”<sup>119</sup> In the Vietnam War era, the Court ruled that a military member could be tried by court-martial only for “service-connected” offenses,<sup>120</sup> but the Court overruled that decision in 1987.<sup>121</sup>

For a long time, the courts-martial have had their own internal appeals courts with ultimate resort by discretionary writ of certiorari to the U.S. Supreme Court.<sup>122</sup> In *Ortiz v. United States*,<sup>123</sup> the Court upheld this jurisdiction against a *Marbury*-inflected assertion<sup>124</sup> that such review of decisions of the Court of Appeals for the Armed Forces was not

113 Military courts are primarily concerned with criminal matters and matters of good order and discipline among service members. See JOINT SERV. COMM. ON MIL. JUST., MANUAL FOR COURTS-MARTIAL UNITED STATES, at II-9 (2016) (“The jurisdiction of courts-martial is entirely penal or disciplinary.”). They may be used, however, to adjudicate liability among private persons under special circumstances, such as during military occupation. *Id.*

114 See U.S. CONST. art. I, § 8 cls. 11–16 (granting Congress a series of powers relating to war-making and use and maintenance of militias); see also Ingrid Wuerth, *The Captures Clause*, 76 U. CHI. L. REV. 1683, 1743 (2009) (noting “a growing body of scholarship that emphasizes congressional supremacy in war and foreign affairs”).

115 WINTHROP, *supra* note 111, at 48–51.

116 61 U.S. (20 How.) 65 (1858).

117 See *id.* at 79.

118 *Id.* at 78–79 (first citing U.S. CONST. art. I, § 8; and then citing *id.* art. II, § 2, cl. 1).

119 *Id.* at 79 (quoting U.S. CONST. amend. V).

120 *O’Callahan v. Parker*, 395 U.S. 258, 274 (1969).

121 *Solorio v. United States*, 483 U.S. 435 (1987).

122 28 U.S.C. § 1259 (2018).

123 138 S. Ct. 2165 (2018).

124 *Id.* at 2173–74 (noting a party’s argument that, in the manner of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the Court should find that it lacked jurisdiction).

an exercise of appellate jurisdiction because the latter was not a “court.”<sup>125</sup> More generally, there is consensus that, at least under Article III alone, review by an Article III court such as the Supreme Court is not constitutionally *required* for courts-martial. Although the Court has consistently affirmed that the Fifth Amendment’s Due Process Clause applies to the military justice system,<sup>126</sup> the Supreme Court has specifically opined that “the power to provide for the trial and punishment of military and naval offences . . . is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States.”<sup>127</sup>

To be sure, this declaration of independence is not literally true: a case like *Dynes*, tried to a court-martial on an assertion of desertion, is surely a case “arising under . . . the Laws of the United States”<sup>128</sup>—namely, the congressional Act authorizing the court-martial and the prohibition of desertion made by the Navy pursuant to Congress’s enabling statute.<sup>129</sup> And “trial and punishment”<sup>130</sup> is surely a “judicial act,” to borrow language from the case that serves as the font of the Supreme Court’s public-rights doctrine, *Murray’s Lessee v. Hoboken Land and Improvement Co.*<sup>131</sup> The fundamental point, however, is that, given Congress’s explicit Article I power to make rules for the armed forces and the President’s Article II–prescribed role as Commander in Chief, Article III does not mandate a role for Article III courts in military cases despite those cases’ “arising under” status. It is the same point made earlier about the territorial court’s jurisdiction in admiralty cases in *Canter*.<sup>132</sup> This conclusion has carryover implications for matters of public right over which Congress or the President enjoys an explicit constitutional grant of power.

Military tribunals or commissions with jurisdiction to decide cases beyond the heartland of court-martials for military members pose a special challenge because they are harder to justify under Congress’s

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125 *Id.* at 2175 (characterizing courts-martial “as judicial bodies”).

126 *See Weiss v. United States*, 510 U.S. 163, 176 (1994) (“Congress, of course, is subject to the requirements of the Due Process Clause when legislating in the area of military affairs, and that Clause provides some measure of protection to defendants in military proceedings.”).

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

128 U.S. CONST. art. III, § 2, cl. 1.

129 *Dynes*, 61 U.S. (20 How.) at 77.

130 *Id.* at 79.

131 59 U.S. (18 How.) 272, 280 (1856); *see also* Baude, *supra* note 57, at 1550 (acknowledging that military courts are “one of the harder characterization problems presented by non–Article III adjudication”).

132 *See supra* notes 107–09 and accompanying text.



express Article I powers. Nonetheless, the Supreme Court has generally condoned their use subject to the requirement of due process,<sup>133</sup> as long as there is plausible claim of wartime exigency.<sup>134</sup> There seems some analogy here to situations in which the Court has engaged in functional analysis to conclude that “a seemingly ‘private’ right . . . is so closely integrated into a public regulatory scheme” as to have its adjudication properly assigned to a non-Article III tribunal.<sup>135</sup>

#### d. The First Patent Board and Later Patent Office

The First Congress provided a further instructive example of the use of non-Article III federal officials for adjudication within the federal government’s operational space. The U.S. Constitution explicitly gave Congress the power to provide for federal patents and copyrights—specifically, the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>136</sup> In exercising this power, Congress could have followed the example of a number of states by issuing patents through individual private bills.<sup>137</sup> Instead, the First Congress enacted the Patent Act of 1790, which delegated to a board of three executive branch officials—the Secretary of State, the Secretary of War, and the Attorney General—the power to decide whether to grant petitions for patent rights.<sup>138</sup> Although in 1793 Congress replaced the initial arrangement with a less burdensome registration system, even this registration system required the Attorney General to certify that draft “letters patent” were “conformable

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133 See *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (“[D]ue process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.”).

134 Compare *Ex parte Quirin*, 317 U.S. 1, 28–29 (1942) (“An important incident to the conduct of war is the adoption of measures by the military command . . . to seize and subject to disciplinary measures those enemies who . . . have violated the law of war.”), with *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121–122 (1866) (denying the constitutionality of trial of a “citizen in civil life, in nowise connected with the military service,” by a military commission in a state where “the Federal authority was always unopposed, and its courts always open”).

135 *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 594 (1985).

136 U.S. CONST. art. I, § 8, cl. 8.

137 See BRUCE W. BUGBEE, *GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW* 102–03, 132–136 (1967); Edward C. Walterscheid, *The Early Evolution of the U.S. Patent Law: Antecedents* (5, Part II), 78 J. PAT. & TRADEMARK OFF. SOC’Y 665, 668 (1996) (describing states use of “private bills and acts [for] busily spinning out patents”). Congress has occasionally passed statutes extending the terms of individual patents. See, e.g., *Evans v. Eaton*, 16 U.S. (3 Wheat.) 454, 506–07 (1818).

138 Patent Act of 1790, ch. 7, § 1, 1 Stat. 109, 109–10 (repealed 1793) (describing the board).

to th[e patent] act.”<sup>139</sup> Such provisions for executive branch adjudication of patent applications provide early illustrations of non–Article III adjudication within the direct-grant portion of the federal government’s operational space.

Decades later, the Patent Act of 1836 created a Patent Office that would use professional examiners to review applications for compliance with substantive patentability requirements such as inventive novelty.<sup>140</sup> Substantive patent examination raised new questions of whether and how applicants might appeal Office rejections. Significantly, Congress long avoided the solution—authorizing direct appeal to an Article III court—that dominates modern administrative law<sup>141</sup> but was then viewed as constitutionally suspect.<sup>142</sup> Under the Patent Acts of 1836 and 1839, the only rights to *appeal* Patent Office decisions (as opposed to rights to challenge those decisions in separately filed civil actions) were first to a board “of three disinterested persons . . . appointed . . . by the Secretary of State”<sup>143</sup> and later to the Chief Justice of the District Court for the District of Columbia,<sup>144</sup> who was understood to hear such appeals<sup>145</sup>—somewhat confusingly to modern sensibilities—only in a personal capacity, rather than as a member of an Article III court.<sup>146</sup>

## 2. *Murray’s Lessee* and the Birth of the Public-Rights Doctrine

Our next historical example, occurring at an intersection of the federal government’s operational and enforcement spaces, marks the official birth of the public-rights doctrine. *Murray’s Lessee v. Hoboken Land and Improvement Co.* was a dispute between private parties over real estate in New Jersey.<sup>147</sup> The key issue in the case, however, was the validity of a distress warrant under an 1820 statute that authorized Treasury Department officials to issue such a warrant for seizure of land owned by Samuel Swartwout, the U.S. Customs Collector for the

139 See Patent Act of 1793, ch. 11, 1 Stat. 318, 318–23 (describing the registration process, which still required a determination by the Attorney General that draft “letters patent” were “conformable to this act”).

140 See Patent Act of 1836, ch. 357, § 7, 5 Stat. 117, 119–20 (providing for substantive patent examination).

141 See *supra* text accompanying note 4.

142 See *United States v. Ferreira*, 54 U.S. (13 How.) 40, 47 (1851) (characterizing the notion of an appeal to the Supreme Court from “the award of a commissioner” as historically anomalous).

143 § 7, 5 Stat. at 120.

144 § 11, 5 Stat. at 354–55.

145 See § 16, 5 Stat. at 123–24; Patent Act of 1839, ch. 88, §§ 10–11, 5 Stat. 353, 354–55.

146 See P.J. Federico, *Evolution of Patent Office Appeals*, 22 J. PAT. OFF. SOC’Y 838, 843 (1940) (“The appeal was not to the court, but to the Chief Justice in person.”).

147 59 U.S. (18 How.) 272 (1856).

Port of New York from 1830 to 1838.<sup>148</sup> As a result of a \$1.37 million shortage disclosed by an audit, the Department issued the warrant, and a U.S. marshal accordingly sold the land to satisfy Swartwout's liability to the government.<sup>149</sup> All the proceedings, including the forced sale, were conducted without resort to Article III courts, although the 1820 statute had authorized challenge to the distress warrant in a federal district court upon filing of a surety, a route that Swartwout neglected to pursue.<sup>150</sup> Indeed, Swartwout appears to have instead chosen to flee the United States, and so the proceedings were likely conducted in absentia.<sup>151</sup> The defendants in *Murray's Lessee* traced their claim to the land to the federal government auction; the plaintiff's claim to title traced back to a later state government sale, which was without effect if the federal auction had already transferred title.<sup>152</sup> Thus, although the case involved a land dispute between two private parties, the critical issue was the validity of government action taken against a former federal customs officer without recourse to an Article III court.

The Court's upholding of the constitutionality of the Treasury Department's distress warrant effectively concluded the subsequent private-party litigation. As the Court then put it, "even in a suit between private persons to try a question of private right, the action of the executive power, upon a matter committed to its determination by the constitution and laws, is conclusive."<sup>153</sup>

Justice Curtis wrote for a unanimous court to explain its holding. His opinion for the Court conceded that "[i]t is true that in England, all these proceedings were had in what is denominated the court of exchequer," one of the three common-law courts of England.<sup>154</sup> The Court explained, however, that the Barons of the Exchequer wielded both judicial and executive powers: they decided "judicial controversies between the king and his subjects" and also had "charge of the revenues of the crown."<sup>155</sup> English practice thus yielded no ironclad norm that tax collectors were entitled to access common-law courts to challenge audits and resultant orders to disgorge public monies. As the Court pointed out, "[i]mperative necessity" had created a situation in which "there are few governments which do or can permit their claims for public taxes, either on the citizen or the officer employed

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148 *Id.* at 274–75.

149 *Id.*

150 *See* Nelson, *supra* note 62, at 587.

151 *See* Young, *supra* note 44, at 791.

152 *See* Nelson, *supra* note 62, at 587.

153 *Murray's Lessee*, 59 U.S. (18 How.) at 284–85.

154 *Id.* at 282.

155 *Id.*

for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land.”<sup>156</sup>

In relation to concerns of the public fisc, the Court thus embraced a muscular view of the federal government’s non–Article III *enforcement* authority, particularly in relation to the work-related conduct of government employees—i.e., to the federal government’s *operational* space. The Court concluded that Congress could, pursuant to its Article I Taxing Power, “provide summary means to compel these officers—and in case of their default, their sureties—to pay such balances of the public money as may be in their hands.”<sup>157</sup> And it held that summary “extrajudicial redress” in the case of “public defaulters,” in contrast to “ordinary debtors,” did not offend the U.S. Constitution: “the recovery of public dues by a summary process of distress, issued by some public officer authorized by law, is an instance of redress of a particular kind of public wrong, by the act of the public through its authorized agents.”<sup>158</sup> The Court reasoned that although *Swartwout* might have sued the federal “marshal for seizing property under such a warrant of distress . . . to show his justification; yet the action of the executive power in issuing the warrant, pursuant to the act of 1820, passed under [Congress’s Article I] powers to collect and disburse the revenue . . . , is conclusive evidence of the facts recited in [the warrant], and of the authority to make the levy.”<sup>159</sup>

The Court reinforced this robust understanding of Congress’s enforcement power by emphasizing that, in the absence of a waiver of sovereign immunity, *Swartwout* would not have been able to sue the government for issuing the warrant.<sup>160</sup> And so when “the act of 1820 enacts, that after the levy of the distress warrant has been begun, the collector [of public monies] may bring before a district court the question, whether he is indebted as recited in the warrant, it simply waives a privilege which belongs to the government.”<sup>161</sup> Neither Article III nor apparently any other constitutional provision (e.g., the Fifth Amendment Due Process Clause) required such access to an Article III court. In a critical passage, the Court asserted that this particular case was representative of a more general category, saying:

[W]e do not consider congress can . . . withdraw from judicial cognizance any matter which . . . is the subject of a suit at the common

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156 *Id.*

157 *Id.* at 281.

158 *Id.* at 278, 283.

159 *Id.* at 285.

160 *Id.* at 283 (“[A] public agent . . . cannot be made responsible in a judicial tribunal for obeying the lawful command of the government; and the government itself, which gave the command, cannot be sued without its own consent.”).

161 *Id.* at 284.

law, or in equity, or in admiralty . . . . At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper. Equitable claims to land by the inhabitants of ceded territories [such as under the Louisiana Purchase] form a striking instance of such a class of cases . . . .<sup>162</sup>

The meaning and modern implications of *Murray's Lessee* remain hotly contested. The Court plainly held that the Constitution did not require an Article III court in an administrative proceeding against a federal tax collector for disgorgement of customs revenues, and the Court justified this holding on the ground that the matter was one of public rights, citing equitable claims to privately owned land in “ceded territories” as another “striking instance of such a class of cases.”<sup>163</sup> Based on an exhaustive study of such equitable claims to private ownership of land, Gregory Ablavsky has concluded that Congress could freely “resolve these claims itself or, alternatively, refer these claims to Article I tribunals for final adjudication” with no felt need for Article III adjudication.<sup>164</sup> His conclusion that *Murray's Lessee* points to a capacious public-rights doctrine corresponds to our own.<sup>165</sup>

A further, commonly neglected aspect of *Murray's Lessee* is its illustration of how the nature of the public interest—here, one in the accounting for customs revenues at least temporarily held by tax collectors—can inform the public-rights analysis. The Court's emphasis on the criticality for the national government of the function of collecting taxes evokes a concern of practical necessity similar to that informing

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162 *Id.*

163 *Id.*

164 Gregory Ablavsky, *Getting Public Rights Wrong: The Lost History of the Private Land Claims*, 74 STAN. L. REV. 277, 284 (2022).

165 James Pfander and Andrew Borrasso have offered a more conservative reading under which Swartwout had a constitutional right to Article III court review of the warrant but effectively waived that right. See Pfander & Borrasso, *supra* note 17, at 498, 532–38. Pfander and Borrasso point to earlier opinions by Chief Justice John Marshall that they contend “suggested that the determination of a[n] [Article III] court was required in cases where the amounts [at issue in distress warrant cases] were contested.” *Id.* at 497. In contrast, we believe that Marshall's opinions fundamentally turned on statutory interpretation. See *United States v. Nourse*, 34 U.S. (9 Pet.) 8, 31 (1835) (rejecting the government's “strange” argument regarding Congress's provision for judicial review); *Ex parte Randolph*, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (No. 11,558) (indicating that courts should decide questions about “the constitutionality of a legislative act” only when “indispensably necessary”). Further, to our eyes, Pfander and Borrasso's interpretation contradicts the language in the Court's unanimous opinion in *Murray's Lessee* specifying that “congress may or may not bring [a matter of public right] within the cognizance of the courts of the United States.” *Murray's Lessee*, 59 U.S. (18 How.) at 284.

the allowance of non–Article III courts-martial. There seems a suggestion that, when special procedures like summary distress warrants are vital for the effective functioning of the national government (here, in the collection of critical tax revenues), they are particularly likely to be constitutionally permissible. In Swartwout’s particular case, the argument of public necessity was presumably at its apex: Swartwout’s alleged embezzlement of the largest source of federal revenue at the time (the customs receipts of the Port of New York City) posed a national fiscal crisis.<sup>166</sup>

### 3. The Freedmen’s Bureau

A punctuation mark to *Murray’s Lessee’s* embrace of non–Article III adjudication motivated by public necessity came in the closing days of the Civil War when Congress established a scheme for adjudicating private-rights cases involving freed Black persons in southern states subject to military occupation. On March 3, 1865, President Abraham Lincoln signed into law “[a]n Act to establish a Bureau for the Relief of Freedmen and Refugees.”<sup>167</sup> This Bureau, commonly referenced as the “Freedmen’s Bureau,” became a high water mark for nineteenth-century non–Article III adjudication. The Freedmen’s Bureau was located in the War Department and came with a broad mandate for “supervision and management of all abandoned lands, and the control of all subjects relating to refugees and freedmen from rebel states, or from any district of [the] country . . . embraced in the operations of the army.”<sup>168</sup> On May 30, 1865, General Oliver Howard, whom President Lincoln had appointed Bureau commissioner, issued an order directing his assistant commissioners to establish courts for freedmen as an alternative to state courts in “places where there is an interruption of civil law, or in which local courts . . . disregard the negro’s right to justice before the laws.”<sup>169</sup> No one challenged General Howard’s authority to issue this order, which provided for Bureau courts that would

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166 See DAVIS RICH DEWEY, *EARLY FINANCIAL HISTORY OF THE UNITED STATES* 246 (12th ed. 1934) (1903) (reporting that customs duties constituted over 60% of total federal receipts in 1838).

167 Act of Mar. 3, 1865, ch. 90, 13 Stat. 507.

168 *Id.* at 507–08.

169 O.O. HOWARD, *RULES AND REGULATIONS FOR ASSISTANT COMMISSIONERS*, H.R. EXEC. DOC. NO. 39-11, at 45 (1st Sess. 1865); see also Bernice B. Donald & Pablo J. Davis, “To This Tribunal the Freedmen Has Turned”: *The Freedmen’s Bureau’s Judicial Powers and the Origins of the Fourteenth Amendment*, 79 *LA. L. REV.* 1, 4 (2018) (“Of the Bureau’s many fields of action, however, none stirred up as much hostility as its judicial functions.”).

exercise powers of private-rights adjudication unprecedented for non-Article III federal tribunals operating within state boundaries.<sup>170</sup>

The makeup and procedures of the Freedmen's Bureau courts varied widely.<sup>171</sup> Judges could be military officers, civilian Bureau agents, or local lawyers.<sup>172</sup> There was commonly no provision for appeal—never mind provision for appeal to an Article III court.<sup>173</sup> The subject matter of the Bureau's adjudicatory decisions focused substantially on matters such as labor and employment contract disputes and minor crimes.<sup>174</sup> Serious crimes and large-stakes civil cases were typically referred to military courts, Article III courts as they were reopened, or state courts that were perceived as relatively fair.<sup>175</sup> Although the Freedman's Bureau Act provided initial authorization for only one year, Congress voted, over President Andrew Johnson's veto, to extend its authorization.<sup>176</sup> In a veto message to the Senate, Johnson expressed concerns with the Bureau courts—regarding the courts' capacity to adjudicate contract disputes, their potential employment of “stranger[s]” as judges, and the lack of juries<sup>177</sup>—that are predictable under our federalism-oriented view of Article III.<sup>178</sup>

The example of the Freedmen's Bureau courts powerfully validates the explanatory leverage of our three-category account of permissible non-Article III adjudication. The concern for preserving state

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170 See John M. Bickers, *The Power to Do What Manifestly Must Be Done: Congress, the Freedmen's Bureau, and Constitutional Imagination*, 12 ROGER WILLIAMS U. L. REV. 70, 74–75 (2006) (noting that, through the Bureau, “[f]or the first time, the federal government would operate directly in the personal lives of a large body of citizens: it would review private contracts, settle labor and property disputes, operate schools, and even serve as a licenser of marriages”).

171 See GEORGE R. BENTLEY, *A HISTORY OF THE FREEDMEN'S BUREAU* 154 (1955) (noting that the Bureau operated “a considerable variety of court systems”).

172 See *id.* at 152–54 (describing Bureau court staffing); Donald & Davis, *supra* note 169, at 16 (“[T]he tribunals were made up largely of Bureau officers or agents, but tribunals also incorporated civilians onto the courts.”).

173 See BENTLEY, *supra* note 171, at 154 (noting critiques of the Bureau); Donald & Davis, *supra* note 169, at 31 (same).

174 See DONALD G. NIEMAN, *TO SET THE LAW IN MOTION: THE FREEDMEN'S BUREAU AND THE LEGAL RIGHTS OF BLACKS, 1865–1868*, at 9 (1979); Donald & Davis, *supra* note 169, at 13 (“From the beginning, however, disputes over the labor contracts the Bureau oversaw demanded immediate attention.”); *id.* at 16 (describing Bureau tribunals in Virginia as “hear[ing] relatively minor matters, civil and criminal”).

175 See NIEMAN, *supra* note 174, at 9; Donald & Davis, *supra* note 169, at 16–17.

176 CONG. GLOBE, 39th Cong., 1st Sess. 3838–39 (1866) (Andrew Johnson's Veto Message for H.R. 613, extending the authorization for the Freedmen's Bureau); Act of July 16, 1866, ch. 200, 14 Stat. 173, 177 (Congress's override of President Johnson's veto).

177 See Andrew Johnson, *Veto Message*, AM. PRESIDENCY PROJECT (Feb. 19, 1866), <https://www.presidency.ucsb.edu/documents/veto-message-437> [<https://perma.cc/F7YW-CSXA>].

178 See *supra* note 34 and accompanying text.

court decisional primacy underpinning the private-rights doctrine was substantially suspended within the territory of the “rebel states”<sup>179</sup> under military occupation. The Bureau courts were thus akin to the territorial courts and military courts in our *physical space* category—i.e., outside the purview of functioning state governments, albeit temporarily.<sup>180</sup> The Bureau courts are also good examples of adjudication within the *operational space* of the national government. Reconstruction was a national military operation in which Congress delegated to the head of the Bureau, an army general, the power to make implementing “rules and regulations” subject to the President’s approval. Moreover, as noted above, the Bureau’s charter specifically encompassed power to adjudicate title to “abandoned” lands and “control of all subjects relating to refugees and freedmen from rebel states.”<sup>181</sup> Finally, much of the subject matter of the private-rights cases that the Freedmen’s Bureau courts decided involved employment and labor relations between the freedmen and southern Whites, in an effort to enforce emancipation and the civil rights of freed Black persons.<sup>182</sup> As such, the Bureau courts are a paradigmatic example of non–Article III tribunals statutorily authorized to act within what, under exigent circumstances, Congress perceived as a proper non–Article III *enforcement space* for congressionally recognized rights.<sup>183</sup>

One can debate, of course, the extent to which even the extreme circumstances of Reconstruction fully justified the Bureau courts’ powers or the manner of their exercise.<sup>184</sup> But the Bureau courts’ location at the intersection of all three of the traditional physical, operational, and enforcement spaces for non–Article III adjudication provides a powerful argument for their constitutional legitimacy. In turn, the relevance of these public-rights spaces to assessment of the Bureau’s constitutional legitimacy illustrates the utility of our framework.

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179 *Supra* note 163 and accompanying text.

180 *See* BENTLEY, *supra* note 171, at 167 (“[A]s the southern states complied with the terms of Military Reconstruction, and were ‘restored to the Union’ . . . the Bureau’s courts were withdrawn from them.”).

181 *Supra* note 168 and accompanying text.

182 *See* Donald & Davis, *supra* note 169, at 13 (describing such cases as “the core of the agency’s early judicial docket”).

183 *See id.* at 42 (“The Bureau was tightly interwoven with the Civil Rights Act [of 1866] as part of the enforcement machinery for the latter.”).

184 *See* Bickers, *supra* note 170, at 74 (observing that, before more recent rehabilitation, “[t]he Freedmen’s Bureau, like the rest of Reconstruction, was subjected to a withering historical criticism”).



### B. Crowell and the Apotheosis of the Appellate Review Model

After the end of Reconstruction, questions of the constitutionality of non–Article III adjudication under Article III took a different turn: the constitutional bases for non–Article III courts in the military and the territories were settled, the exigencies of Civil War and Reconstruction had passed, and in the late nineteenth century Congress substantially increased the number of Article III judges<sup>185</sup> and established intermediate appellate courts.<sup>186</sup> Congress abandoned the decades-old artifice of assigning appeals from Patent Office decisions to judges acting only in their personal capacities, rather than as members of a court,<sup>187</sup> and in 1899 the Court upheld this congressional action (and prefigured the twentieth-century rise of the appellate review model) by characterizing executive branch decisions on whether to grant patent applications as “essentially judicial” and thus properly subject to appeal to an Article III court.<sup>188</sup> For decades, however, this 1899 decision was viewed as exceptional.<sup>189</sup> On the ground, the more dramatic development was the outstripping of the enhanced institutional capacity of the judicial branch by the number and diversity of disputes that accompanied industrialization, tremendous economic and demographic growth, and political and social change. The Interstate Commerce Commission’s combination of ratemaking and regulatory powers expanded,<sup>190</sup> and additional bureaus and commissions proliferated—initially with characteristic tasks of setting rates and tariffs, but increasingly with mandates to regulate various aspects of a seemingly ever more complex society.<sup>191</sup>

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185 See Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial Service—and Disservice—1789–1992*, 142 U. PA. L. REV. 333, 342 (1993) (noting that between 1860 and 1900 the number of “U.S. judgeships” increased from 55 to 113).

186 See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 387 (2d ed. 1985) (noting that, in 1891, Congress enacted a law “set[ting] up a circuit court of appeals for each circuit”).

187 Compare text accompanying notes 143–46, with Patent Act of 1870, ch. 230, § 48, 16 Stat. 198, 205.

188 *United States v. Duell*, 172 U.S. 576, 587–89 (1899).

189 See, e.g., JOHN DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES* 48 n.30 (1927) (“The doctrine of the separation of powers stands squarely in the way of the constitutionality of a statute permitting an appeal to a court from the decision of an agency of the executive branch of government.” (citing *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1851))).

190 See James W. Ely, Jr., “*The Railroad System Has Burst Through State Limits*”: *Railroads and Interstate Commerce, 1830–1920*, 55 ARK. L. REV. 933, 966–67 (2003) (“Prodded by the Progressives, Congress enacted several statutes that strengthened the ICC and greatly enlarged national control of railroads.”).

191 See THOMAS K. MCCRAW, *PROPHETS OF REGULATION* 210 (1984) (noting that, “[b]y the end of the 1930s, a bewildering maze of new government organizations had sprung up” to join the early regulatory commissions).

The threat to Article III judicial power posed by a proliferation of non-Article III adjudication did not escape the Supreme Court's attention. Unlike the situation with Patent Office decisions, where the concern had been that direct judicial review encroached on executive branch operational space,<sup>192</sup> the rise of new regulatory bodies led to questions about the extent to which their encroachments on traditional spheres of private ordering should be viewed as impermissible encroachments on nondefeasible spheres of Article III adjudication. The Supreme Court addressed the issue in the New Deal Era case of *Crowell v. Benson*.<sup>193</sup>

*Crowell* featured a workers' compensation claim that arose from an injury to a ship rigger who was working on a derrick barge moored on the Mobile River.<sup>194</sup> Because the worker had filed for compensation from Charles Benson, the vessel owner, Chief Justice Hughes's opinion for the Court characterized the case as "one of private right, that is, of the liability of one individual to another under the law as defined."<sup>195</sup> Thus, even though the worker brought a claim under a federal statute, the Longshoremen's and Harbor Workers' Compensation Act,<sup>196</sup> the case was viewed as lying outside the federal government's public-rights enforcement space. The private-rights characterization gave momentum to Benson's challenge to the initial determination of a compensation award by a deputy commissioner of the U.S. Employees' Compensation Commission.<sup>197</sup>

A further point of weakness for the deputy commissioner's power to set the compensation award was that the facts of *Crowell* located it in a borderline physical space for federal administrative adjudication. If the injury was seen as occurring on land or state waters, the worker could have brought state-law claims in Alabama state court, presumably with a right to a jury. The Supreme Court held, however, that the injury on the docked barge occurred on navigable waters<sup>198</sup> and thus that the case fell "within the [federal] admiralty and maritime jurisdiction."<sup>199</sup> This further determination was not in itself enough to defeat Benson's challenge, however, because Congress's power to delegate

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192 *Cf. supra* text accompanying notes 140–46.

193 285 U.S. 22 (1932).

194 *Crowell v. Benson*, 45 F.2d 66, 66 (5th Cir. 1930), *aff'd*, 285 U.S. 22.

195 *Crowell*, 285 U.S. at 51.

196 Longshoremen's and Harbor Workers' Compensation Act, Pub. L. No. 69-803, 44 Stat. 1424 (1927).

197 *Crowell*, 285 U.S. at 36.

198 *See id.* at 37.

199 *Id.* at 39.

adjudication on the fringes of navigable waters to a non–Article III tribunal<sup>200</sup> is not as strong as it is in the territories, where Congress acts with its Article IV plenary power<sup>201</sup> and there are no state courts arguably displaced. In contrast, there is no specific constitutional grant of power for Congress to make admiralty and maritime laws, and the Court, eschewing reliance on the Commerce Clause,<sup>202</sup> reasoned backward from Article III’s grant of federal “judicial Power” in “all Cases of admiralty and maritime Jurisdiction”<sup>203</sup> to justify congruent congressional power.<sup>204</sup>

At the end of the day, the Court held that initial agency adjudication of the private-rights claim in *Crowell* did not violate Article III,<sup>205</sup> in substantial part because the Court construed the statute to afford de novo review in Article III courts of both questions of law<sup>206</sup> and questions of constitutional or “jurisdictional” fact<sup>207</sup> before an award would be enforced. The Court emphasized that the regulatory scheme provided access to Article III court review through two channels: a losing party such as Benson could challenge a compensation award in federal district court, and the government or a beneficiary could “apply for enforcement to the Federal district court.”<sup>208</sup> Further, deferential judicial review of agency determinations of ordinary facts was acceptable because an Article III court could still “deny effect to any administrative finding which is without evidence, or contrary to the indisputable character of the evidence.”<sup>209</sup> The Court pointed to the traditional

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200 See Robert W. Adler, *The Ancient Mariner of Constitutional Law: The Historical, yet Declining Role of Navigability*, 90 WASH. U. L. REV. 1643, 1647 (2013) (discussing “navigability tests”).

201 See *supra* sub-subsection II.A.1.b; see also *Crowell*, 285 U.S. at 50 (acknowledging congressional power to “establish legislative courts . . . to form part of the government of territories or of the District of Columbia” (internal quotations omitted)).

202 U.S. CONST. art. I, § 8, cl. 3; cf. *Crowell*, 285 U.S. at 55 n.18 (distinguishing Congress’s admiralty and maritime powers from its commerce power).

203 U.S. CONST. art. III, § 2, cl. 1.

204 See *Crowell*, 285 U.S. at 39–41.

205 See *id.* at 54 (“[W]e are unable to find any constitutional obstacle to the action of the Congress in availing itself of a method [of administrative adjudication] shown by experience to be essential in order to apply its standards to the thousands of cases involved . . .”).

206 See *id.* at 45 (“Rulings of the deputy commissioner upon questions of law are without finality.”); *id.* at 49 (concluding there was “no doubt of the intention to reserve to the Federal court full authority to pass upon all matters . . . held to [be questions of law]”).

207 See *id.* at 64. In contrast, “[a]part from cases involving constitutional rights . . . there [could] be no doubt that the Act contemplates that, as to questions of fact arising with respect to injuries to employees within the purview of the Act, the findings of the deputy commissioner, supported by evidence and within the scope of his authority, [would] be final.” *Id.* at 46.

208 *Id.* at 44–45.

209 *Id.* at 50 (quotation omitted).

fact-finding roles of juries, masters, and commissioners in reasoning that even in private-rights cases, “there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges.”<sup>210</sup> The Court’s emphasis on the Article III courts’ role in securing enforcement has led to a view that *Crowell* generally sanctioned use of an administrative agency as a fact-finding adjunct to the Article III courts.<sup>211</sup> Meanwhile, the Court’s acquiescence in deferential judicial review of ordinary facts made the case a key precedent for the appellate review model for Article III legitimation of agency adjudication.

Nonetheless, it is important to keep in mind that *Crowell* focused on the need for such legitimation in matters of *private* right. The Court distinguished “cases of private right” from “those which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.”<sup>212</sup> Echoing language from *Murray’s Lessee*,<sup>213</sup> the Court declared that in public-rights cases, “the mode of determining matters . . . is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.”<sup>214</sup> In Part III, we elaborate on this sentiment and show how constitutional constraints outside Article III can nonetheless require results substantially in accord with the standard appellate review model.

More immediately, however, the critical point is that *Crowell* ushered in a period of far-ranging triumph of an appellate review model for the Article III judiciary’s relationship with administrative adjudication.<sup>215</sup> Five years later, in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,<sup>216</sup> the Court attested to this development in rejecting a land-borne employer’s challenge to what the employer’s attorneys characterized as the National Labor Relations Board’s (NLRB)

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210 *Id.* at 51.

211 *See, e.g.,* *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 78 (1982) (Brennan, J.) (plurality opinion) (“The use of administrative agencies as adjuncts was first upheld in *Crowell v. Benson* . . .”).

212 *Crowell*, 285 U.S. at 50. This sentence was apparently not meant to indicate that government-as-a-party cases are the only form of public rights cases: the Court implied that the permissibility of non-Article III territorial courts is explained by the differential treatment of public rights cases. *See id.*

213 *See supra* text accompanying notes 157–59.

214 *Crowell*, 285 U.S. at 50 (quotation omitted).

215 *See, e.g.,* ADRIAN VERMEULE, *LAW’S ABNEGATION: FROM LAW’S EMPIRE TO THE ADMINISTRATIVE STATE* 26 (2016) (describing the APA as adopting an approach limned by *Crowell*).

216 301 U.S. 1 (1937).

unconstitutional exercise of “exclusive [original] jurisdiction over private quarrels between employees and their employer.”<sup>217</sup>

To the extent *Jones & Laughlin* was a public-rights case, it fell squarely in the federal government’s *enforcement* space. In *Jones & Laughlin*, labor union members had charged the Pennsylvania-based steel company with unfair labor practices designed to discourage employees’ “self-organization,” including “the discharge of certain employees.”<sup>218</sup> The NLRB responded by “issu[ing] its complaint against the respondent” and holding a hearing.<sup>219</sup> Concluding that the steel company had engaged in unfair labor practices, the NLRB

ordered the corporation to cease and desist from such discrimination and coercion, to offer reinstatement to ten of the employees named, to make good their losses in pay, and to post for thirty days notices that the corporation would not discharge or discriminate against [union] members, or those desiring to become members.”<sup>220</sup>

Pointing to the individualized relief afforded the fired employees, the employer’s attorneys asked the Supreme Court, “Can there be any doubt that the Labor Act has sought to vest the powers of a constitutional court, sitting in equity, in a quasi-judicial bureau which has no standing before the Constitution?”<sup>221</sup>

Chief Justice Hughes’s opinion for five Justices is most remembered as a landmark in Commerce Clause jurisprudence.<sup>222</sup> For present purposes, however, it is important for acknowledging<sup>223</sup> but rejecting the employer’s Article III challenge.<sup>224</sup> More accurately, the Court *implicitly* rejected the claim that Article III blocked Congress’s power to entrust adjudication to the NLRB because the Court upheld the act’s “procedural provisions” without *explicitly* engaging the Article III argument at all.<sup>225</sup> There seem at least three possibilities for why the

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217 Brief for Jones & Laughlin Steel Corp. at 99, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (No. 419), 1937 WL 34884.

218 *Jones & Laughlin*, 301 U.S. at 22.

219 *Id.* at 25.

220 *Id.* at 22.

221 Brief for Jones & Laughlin Steel Corp., *supra* note 217, at 102; *see also id.* at 103 (characterizing the case as one in which “private rights are sought to be protected and private remedies granted”).

222 *See, e.g.*, *United States v. Morrison*, 529 U.S. 598, 608 (2000) (describing the impact of *Jones & Laughlin* on Commerce Clause caselaw).

223 *Jones & Laughlin*, 301 U.S. at 25 (“[T]he respondent argues . . . (3) that the provisions of the Act violate § 2 of Article III . . .”).

224 *See id.* at 46–47 (stating that the act’s procedural “provisions, as we construe them, do not offend against the constitutional requirements governing the creation and action of administrative bodies”).

225 *Id.*

Court believed that the NLRB proceedings passed Article III muster: (1) *Jones & Laughlin* was a classic public-rights case because the United States was a party, with the NLRB suing for “the enforcement of valid legislation”;<sup>226</sup> (2) the case was a public-rights matter “unknown to the common law” because it was a “statutory proceeding” for equitable relief under federal labor law with damages as a mere “incident”—a point Hughes articulated to reject a Seventh Amendment civil jury challenge;<sup>227</sup> or (3) the act’s provisions for judicial review and the NLRB’s reliance on the Article III courts “to secure the enforcement of its orders”<sup>228</sup> sufficiently tracked the agency-as-adjunct framework sanctioned in *Crowell* even for matters of private right.<sup>229</sup>

How do these three rationales fit or illuminate the non–Article III adjudication puzzle? First, if the fact that the United States was a party alone sufficed, public-rights doctrine seems a trite formalism that pivots on whether the government is on one side of the “v.” When sovereign immunity is not at issue, it makes no constitutional sense that Congress can cherry-pick a favorable non–Article III forum in an employment dispute among private parties just because the government is technically the plaintiff.

A more sophisticated argument is that, at least in *Jones v. Laughlin*, the government’s presence on one side of the “v.” was not a mere formality. The NLRB’s orders to cease and desist and to provide notice of a policy of not discharging or discriminating against union members<sup>230</sup> were of substantially general benefit and thus can help make the matter seem at least partly one of public right—concerned with the public interest in protecting unnamed workers’ rights as well as those of any initial petitioners. The labor-union dimension of the case distinguished it from the single employee-versus-employer workers’ compensation dispute in *Crowell*, which the Court characterized as a matter of private right.<sup>231</sup> Further, NLRB cases like *Jones v. Laughlin* are shot through with policy concerns and discretionary judgments: the NLRB notoriously uses adjudication to set out policies of general applicability.<sup>232</sup> In defending NLRB adjudication from Article III attack, Harrison has made the point that “[t]he NLRB’s understanding and implementation of the concept of an unfair labor practice is, and is meant

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226 *Id.* at 47.

227 *Id.* at 48–49.

228 *Id.* at 24; *see also id.* at 47 (discussing the availability of judicial review).

229 Nonetheless, the majority’s analysis did not cite *Crowell v. Benson*. *See id.* at 43–49.

230 *Id.* at 22.

231 *See supra* text accompanying note 195.

232 *See* Charlotte Garden, *Toward Politically Stable NLRB Lawmaking: Rulemaking vs. Adjudication*, 64 EMORY L.J. 1469, 1471 (2015) (noting longstanding criticism of the NLRB for “relying nearly exclusively on announcing legal principles through adjudication”).

to be, saturated with policy considerations.”<sup>233</sup> Moreover, in deciding whether to proceed with a complaint, the NLRB acts in a relatively conventional executive mode, presumably weighing policy concerns or otherwise exercising prosecutorial discretion.<sup>234</sup>

But reasoning that non-Article III adjudication is beyond reproach because the NLRB is engaging in public policy under a federal statute seems less than airtight. Indeed, this reasoning, which dovetails with the second possible rationale for why the Court in *Jones & Laughlin* did not perceive an Article III problem, leads Harrison to worry about the possibility that Congress could “federalize . . . private law” and thereby subject it generally to non-Article III federal adjudication.<sup>235</sup> And the concern looms large given language in the Supreme Court’s unanimous 1977 decision in *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*.<sup>236</sup> In *Atlas Roofing*, the Court rejected a Seventh Amendment challenge to the jury-less administrative adjudication of civil monetary penalties sought by the government for violation of the Occupational Safety and Health Act of 1970.<sup>237</sup> In support of this result, the Court pointed not only to *Jones & Laughlin*, but also to a string of pre-*Crowell* opinions that the Court described as upholding “statutory schemes” in which Congress had “created new statutory obligations, provided for civil penalties for their violation, and committed exclusively to an administrative agency the function of deciding whether a violation has in fact occurred.”<sup>238</sup>

But it is perilous to use this broad language in *Atlas Roofing* to justify reading *Jones & Laughlin* as sanctioning the assignment to non-Article III tribunals of adjudication of any matters of statutorily created rights, including those that have significant common-law antecedents. *Atlas Roofing* involved a workplace safety enforcement action: the Department of Labor had determined that two employers had each violated “a mandatory occupational safety standard,” ordered abatement of the violations, and assessed fines of \$5,000 and \$600, respectively.<sup>239</sup> Thus, the Justices might not have seriously considered (or anticipated) the potential application of some of the opinion’s broad language to,

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233 See John Harrison, *The Relation Between Limitations on and Requirements of Article III Adjudication*, 95 CALIF. L. REV. 1367, 1381 (2007).

234 See Jonathan B. Rosenblum, *A New Look at the General Counsel’s Unreviewable Discretion Not to Issue a Complaint Under the NLRA*, 86 YALE L.J. 1349, 1356 (1977) (“Prior to 1947, courts construing [the Wagner Act’s] language [‘describing the Board’s power to issue complaints’] had emphasized that the Board’s . . . decision whether to issue a complaint depended on expert determinations of appropriate administrative policy.”).

235 See Harrison, *supra* note 67, at 203.

236 430 U.S. 442 (1977).

237 See *id.* at 444–45, 461.

238 *Id.* at 450.

239 *Id.* at 447–48.

say, disputes between private parties based on claims of statutorily created right that had common-law antecedents.

The practical implications of an overly broad reading of *Atlas Roofing* or of an associated rationale suggested by *Jones & Laughlin* are daunting. If the statutory creation of a new cause of action suffices to legitimate non–Article III adjudication, then Congress might circumvent any requirement of an Article III judge by passing a statute minting a new cause of action that permits equitable relief with “incidental” damages, even if the money damages are substantial and the nature of the “new” cause of action overlaps significantly with one under traditional common law. Like a contention that the government’s mere presence on one side of the “v.” is determinative, this smacks of empty-headed formalism that undermines the traditional understanding that there is a meaningful core of private-rights matters for whose adjudication Article III courts must have a prominent role.

Ultimately, the third explanation for *Jones & Laughlin*’s Article III result might be the most plausible. This explanation gains momentum from the Court’s discussion of how the statute’s “procedural provisions . . . afford[ed] adequate opportunity to secure judicial protection against arbitrary action in accordance with the well-settled rules applicable to administrative agencies set up by Congress.”<sup>240</sup> These “well-settled rules” might have been viewed as comporting with *Crowell*’s solution of viewing the agency as an adjunct to Article III courts that retained power to conduct *de novo* review of questions of law and jurisdictional facts.<sup>241</sup> If so, this view could also explain why the *Jones & Laughlin* Court saw no need to square its result with *Crowell*’s definition of matters of private right as matters “of the liability of one individual to another under the law as defined.”<sup>242</sup> The reinstatement and compensation orders in *Jones & Laughlin* seem facially to fit this definition, but *Crowell* itself had involved a matter of private right. Hence, *Jones & Laughlin* most likely represents a reaffirmation of the *Crowell* solution, here extended to a situation that lay outside admiralty and maritime contexts and in which Article III court review would generally come through a court of appeals, rather than a district court.<sup>243</sup>

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240 NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 47 (1937).

241 See *supra* text accompanying notes 205–08.

242 *Crowell v. Benson*, 285 U.S. 22, 51 (1932).

243 Unlike the statute in *Crowell*, the relevant act in *Jones & Laughlin* provided for enforcement of an agency order by the agency’s petition to a circuit court of appeals (when available), rather than to a district court. Compare National Labor Relations Act, Pub. L. No. 74-198, § 10(e), 49 Stat. 449, 454 (1935) (codified at 29 U.S.C. § 160(e) (2018)), with *Crowell*, 285 U.S. at 44. Given the limited range for fact-finding by the district court found permissible under the statute in *Crowell*, *id.* at 46 (“Apart from cases involving constitutional rights to be appropriately enforced by proceedings in court, there can be no doubt that the Act contemplates that, as to questions of fact arising with respect to injuries to employees



After World War II, the Administrative Procedure Act of 1946 (“APA”) explicitly adopted the appellate review model as federal administrative law’s default.<sup>244</sup> The APA generally provides for appellate-style judicial review of administrative action,<sup>245</sup> formally *de novo* on questions of law and typically limited (but not toothless) with respect to questions of fact.<sup>246</sup> Although courts have long struggled with the degree to which they should nonetheless afford deference to agency decisions on questions of law,<sup>247</sup> the federal courts have generally accepted that their Article III prerogatives on factual questions are sufficiently protected as long as they may reverse or vacate agency fact finding that lacks support by substantial evidence<sup>248</sup> or is arbitrary or capricious.<sup>249</sup>

### C. *The Modern Cases*

The most recent phase of Supreme Court caselaw emphasizes the need for more checks on non–Article III federal adjudication than appellate review theory seems naturally to suggest. In a series of bankruptcy cases, the Supreme Court has distanced itself from the notion

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within the purview of the Act, the findings of the deputy commissioner, supported by evidence and within the scope of his authority, shall be final.”), little would seem to turn on the different level of the federal judiciary through which the NLRB was generally to seek enforcement. *Cf.* § 10(e), 49 Stat. at 454–55 (permitting a party to “apply to the [circuit] court for leave to adduce additional evidence” that “the court may order . . . to be taken before the Board”).

244 See Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 942–43 (2011) (“The appellate review model . . . was later incorporated into the Administrative Procedure Act in 1946.”). Merrill asserts that, at least in the decades preceding *Crowell*, the appellate review model “succeeded in part” not because of a desire to check agency power, but rather to prevent “contamination” of the Article III courts by excessive intervention in matters of administration. *Id.* at 980. See generally DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940* (2014).

245 See 5 U.S.C. § 702 (2018) (“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”).

246 5 U.S.C. § 706(2) (2018) (specifying standards of review, including “substantial evidence” and arbitrary or capricious standards for review of agency fact finding except where “the facts are subject to trial *de novo* by the reviewing court”).

247 See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019) (upholding the federal courts’ practice of “deferr[ing] to agencies’ reasonable readings of genuinely ambiguous regulations”); *United States v. Mead Corp.*, 533 U.S. 218, 228–29 (2001) (describing deference regimes for agencies’ statutory interpretations).

248 See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (discussing the history of “the ‘substantial evidence’ formula” for fact-finding review (quoting *Wash., Va. & Md. Coach Co. v. NLRB*, 301 U.S. 142, 147 (1937))).

249 *Cf.* *Dickinson v. Zurko*, 527 U.S. 150, 152 (1999) (discussing standards of review for agency fact finding).

that appellate-style judicial review always suffices. Specifically, the Court has revitalized the significance of the distinction between public and private rights and rejected the notion that appellate-style judicial review is generally enough for matters of private right. At the same time, however, the Court has continued to view generously the scope of matters of public right, with its decisions in *Thomas v. Union Carbide Agricultural Products Co.*<sup>250</sup> and *Oil States*<sup>251</sup> reaffirming the strong implication in *Murray's Lessee* that a matter subject to adversarial litigation between private parties can still implicate a matter of public right. Despite some conflicting rhetoric, the Court's recent decisions thereby generally embody a duality that our framework reflects: a recognition of broad areas in which non–Article III federal adjudication is permissible along with an insistence on a nontrivial space in which substantial access to Article III courts, perhaps even at the level of *de novo* fact finding, is necessary.

### 1. Bankruptcy and Private Rights Rediscovered

In 1982, the Supreme Court sharply signaled that the appellate review model could not legitimate all instances of non–Article III adjudication. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,<sup>252</sup> the Court considered whether a “bankruptcy court” could properly adjudicate a state common-law claim.<sup>253</sup> What created an Article III problem was the “supplemental jurisdiction” that the Bankruptcy Reform Act of 1978 provided to facilitate settlement of all claims associated with a bankruptcy estate, including those grounded in state-based common law.<sup>254</sup> A majority of Justices agreed that “the broad grant of jurisdiction” to bankruptcy judges was unconstitutional under Article III<sup>255</sup> despite the fact that bankruptcy court judgments were subject to *de novo* review by Article III courts on questions of law<sup>256</sup> and,

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250 473 U.S. 568 (1985).

251 *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365 (2018).

252 458 U.S. 50 (1982).

253 *Id.* at 53–54; *see also* Anthony J. Casey & Aziz Z. Huq, *The Article III Problem in Bankruptcy*, 82 U. CHI. L. REV. 1155, 1173 (2015) (“[T]he Bankruptcy Reform Act of 1978[] . . . created a new non–Article III bankruptcy tribunal . . .”).

254 *See Northern Pipeline*, 458 U.S. at 54 (Brennan, J.) (plurality opinion) (“The jurisdiction of the bankruptcy courts created by the Act is much broader than that exercised under the former referee system.”).

255 *Id.* at 87; *see id.* at 91–92 (Rehnquist, J., concurring in the judgment) (expressing “agree[ment] with the plurality”).

256 *See id.* at 102 (White, J., dissenting) (noting a lack of a requirement of deference “to decisions on the law made by bankruptcy judges”).

apparently, less deferential review on questions of fact than applies for administrative-agency fact finding under the APA.<sup>257</sup>

There was no majority opinion in *Northern Pipeline*, but Justice Brennan's plurality opinion for four Justices<sup>258</sup> and Justice Rehnquist's opinion concurring in the judgment, which Justice O'Connor joined,<sup>259</sup> refocused attention on the traditional distinction between public and private rights. Brennan's opinion acknowledged *Crowell's* non-Article III adjunct workaround but concluded that the breadth of the bankruptcy judges' powers, including their enforcement authority and powers to rule on "right[s] created by state law,"<sup>260</sup> meant that they could not be viewed as mere "adjuncts" whose activities left Article III judges with "all essential attributes of the judicial power."<sup>261</sup> Justice Rehnquist's opinion agreed that the nature of the claims at issue was critical: in this case, these included "breach of contract, misrepresentation, and other counts which are the stuff of the traditional actions at common law tried by the courts at Westminster in 1789" and here "ar[ose] entirely under state law."<sup>262</sup> Rehnquist also highlighted the lack of one party's consent to the non-Article III adjudication<sup>263</sup> and the extent of bankruptcy court jurisdiction, "with only traditional appellate review by Art. III courts apparently contemplated."<sup>264</sup>

Later opinions of the Court in non-bankruptcy cases—*Thomas v. Union Carbide Agricultural Products Co.*,<sup>265</sup> and *Commodity Futures Trading Commission v. Schor*<sup>266</sup>—called into question the renewed focus on the distinction between public and private rights, but their more lasting legacy may be their endorsement of a broad vision of public rights. In both cases, Justice O'Connor's opinions for the Court emphasized that the relevant Article III analysis should be purposive and pragmatic<sup>267</sup>

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257 See *id.* (observing that the clear-error standard applied to judicial review of bankruptcy judge fact finding); see also *Dickinson v. Zurko*, 527 U.S. 150, 153 (1999) ("Traditionally, this court/court [clear-error] standard of review has been considered somewhat stricter (*i.e.*, allowing somewhat closer judicial review) than the APA's court/agency standards.").

258 See *Northern Pipeline*, 458 U.S. at 52 (listing Justices joining Justice Brennan's opinion).

259 See *id.* at 89 (introducing Justice Rehnquist's opinion).

260 *Id.* at 84 (holding that, because "the cases before us . . . involve a right created by state law," "Congress' authority to control the manner in which that right is adjudicated . . . plainly must be deemed at a minimum").

261 *Id.* at 84–85 (internal quotation marks omitted).

262 *Id.* at 90.

263 *Id.* at 91 (noting "Marathon's objection").

264 *Id.* at 91.

265 473 U.S. 568 (1985).

266 478 U.S. 833 (1986).

267 See *id.* at 847–48 (describing Article III analysis as requiring "reference to the purposes underlying" the relevant constitutional provision).

and that consent of the parties can play a significant role in legitimizing non–Article III adjudication.<sup>268</sup> In a final bankruptcy case to close out the 1980s, *Granfinanciera, S.A. v. Nordberg*,<sup>269</sup> Justice Brennan wrote an opinion for the Court that effectively enveloped O’Connor’s pragmatic approach in a reconstituted definition of matters of public right: according to *Granfinanciera*, a disputed matter is one of public right if the federal government is a party to the dispute or if “Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, [has] create[d] a seemingly ‘private’ right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.”<sup>270</sup>

Somewhat like Harrison’s vision of Congress’s power to expand the realm of public rights,<sup>271</sup> *Granfinanciera*’s formulation understandably raised concerns that it might permit Congress to legislate the public/private-rights distinction into insignificance. More than two decades later, a majority of the Court used another bankruptcy case, *Stern v. Marshall*,<sup>272</sup> to add starch to limits on what it termed “this ‘public rights’ exception.”<sup>273</sup> More specifically, the opinion for the Court by Chief Justice Roberts reemphasized that Article III courts’ constitutionally mandated roles extend under certain circumstances to fact finding as well as law declaration<sup>274</sup> and held that a bankruptcy court’s decision on a state-law tort claim was unconstitutional as the claim did not fit within “the public rights exception.”<sup>275</sup>

Nevertheless, even while using the language of exceptionality, Roberts’ majority opinion in *Stern* largely accepted the broad vision of public rights suggested by the majority opinions of Justices O’Connor and Brennan in the 1980s. Roberts’ opinion acknowledged that Congress may authorize non–Article III adjudication not only in “actions involving the Government as a party,” but also in “cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert Government agency is deemed essential to a limited regulatory objective within the agency’s authority.”<sup>276</sup> In yet another bankruptcy case, *Wellness International Network*,

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268 See *id.* at 848–49 (“[A]s a personal right, Article III’s guarantee of an impartial and independent federal adjudication is subject to waiver . . .”).

269 492 U.S. 33 (1989).

270 *Id.* at 54 (quoting *Union Carbide*, 473 U.S. at 593–94).

271 See *supra* text accompanying note 68.

272 564 U.S. 462 (2011).

273 *Id.* at 485.

274 *Id.* at 484 (quoting Justice Brennan’s plurality opinion in *Northern Pipeline*).

275 *Id.* at 499.

276 *Id.* at 490.

*Ltd. v. Sharif*,<sup>277</sup> Justice Sotomayor’s opinion for the Court reinforced this aspect of *Stern*, in part by declaring *Schor* to be the “[t]he foundational case in the modern era,”<sup>278</sup> and also by embracing “knowing and voluntary” consent as a general means for enabling non–Article III adjudication of private-rights matters,<sup>279</sup> at least “so long as Article III courts retain supervisory authority over the process.”<sup>280</sup>

The upshot of the modern bankruptcy and consent cases is that the public-rights doctrine is revitalized, the appellate review model is in question at least for traditional state-law private rights, and party consent is now a clearly established route for limiting the effects of classifying a matter as one of private, rather than public, right. But these cases did little to shed light on the validity of unconsented-to adjudication by administrative agencies across the breadth of the modern state. For that task, the cases discussed in the next subsection are critical.

## 2. Matters of Public Right Contested by Private Parties

In both *Oil States Energy Services, LLC v. Greene’s Energy Group, LLC*<sup>281</sup> and *Thomas v. Union Carbide Agricultural Products Co.*,<sup>282</sup> the Supreme Court made clear that the federal government does not need to follow the NLRB model of making itself a party to the dispute to have a matter classified as one of public right. Nor, in adjudicating a matter of public right, does the non–Article III adjudicator need to operate as a mere adjunct to the enforcement power residing in the Article III courts. In both *Oil States* and *Union Carbide*, the relevant agency had significant power to enforce a non–Article III adjudicatory scheme through direct action without need of a court order. In relation to the post-issuance review of patent validity at issue in *Oil States*, the Patent and Trademark Office (PTO) could effectuate its judgment by canceling patent rights that it had previously granted.<sup>283</sup> As part of the pesticide registration scheme at issue in *Union Carbide*, the Environmental Protection Agency (EPA) could determine that an earlier or later registrant had failed to comply with statutory provisions for arbitration, with the result that a prior registrant sacrificed an other-

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277 575 U.S. 665 (2015).

278 *Id.* at 675.

279 *Id.* at 685.

280 *Id.* at 678.

281 138 S. Ct. 1365 (2018).

282 473 U.S. 568 (1985).

283 *Oil States*, 138 S. Ct. at 1372 (describing potential results of PTO review).

wise applicable statutory “right to compensation” and a follow-on registrant would have its registration application denied or its issued registration canceled.<sup>284</sup>

In our view, the nature of the agencies’ enforcement powers provides a critical clue as to why these two cases were properly viewed as centering on matters of public right. In both cases, the potential targets of agency enforcement power—the patent owner in *Oil States* and the pesticide registrants in *Union Carbide*—were “voluntary participants in [a federal] program”<sup>285</sup> in which Congress gave an administrative agency power to grant, deny, or cancel statutorily created rights. Moreover, at least where, as in these cases, the rights in question are not substitutes for previously existing private rights, an agency’s exercise of such congressionally delegated power is likely to be acting within overlapping segments of the government’s operational and enforcement spaces that are, like the territories or “rebel states” during Reconstruction, distinct from the preexisting historical domains of the state courts and thus particularly suitable ground for constitutionally permissible non-Article III adjudication. We believe that the Court properly focused on such matters of substance in *Oil States* and *Union Carbide*, rather than obsessing over form (e.g., adversarial proceedings between private parties). But we also acknowledge that *Union Carbide* is the harder case because it features a right to monetary compensation (evocative of damages at common law) and extreme limitations on judicial review. Thus, we discuss these cases in reverse chronological order.

In *Oil States*, the Court upheld against Article III and Seventh Amendment attack a form of executive branch adjudication—“inter partes review” (IPR)—through which the PTO can cancel previously granted patent rights.<sup>286</sup> While the PTO and predecessor Patent Office had long adjudicated patentability questions in deciding whether to grant invention patents, questions of the validity of previously issued U.S. patent rights were for many years almost wholly the preserve of the Article III courts.<sup>287</sup> There was thus little question that Congress’s creation of post-issuance adversarial proceedings before the PTO

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284 *Union Carbide*, 473 U.S. at 574 n.1 (quoting Federal Insecticide, Fungicide, and Rodenticide Act, Pub. L. No. 95-396, § 3(c)(1)(D)(ii), 92 Stat. 819, 821 (1978) (codified at 7 U.S.C. § 136a(c)(1)(D)(ii) (2018))).

285 *Id.* at 589.

286 *Oil States*, 138 S. Ct. at 1370.

287 The Patent Act of 1952 gave the Patent Office the power to cancel previously issued patent claims in “interference proceedings” that “decide[d] which of competing claimants [of the same invention] ha[d] priority . . . as the first inventor[.]” Greg Reilly, *The Constitutionality of Administrative Patent Cancellation*, 23 B.U.J. SCI. & TECH. L. 377, 387 (2017). But previously, “the prevailing party [in a Patent Office interference proceeding] was required to file suit to obtain a wholesale cancellation of [an issued] patent.” *Id.*

shifted some adjudicatory work from the Article III courts to an administrative agency.

Nonetheless, Justice Thomas's opinion for a seven-Justice majority firmly grounded the Court's upholding of PTO post-issuance review in "the public-rights doctrine."<sup>288</sup> The Court's opinion made clear that the formal structuring of IPRs as adversarial proceedings between private parties did not determine the question of whether they involved matters of private right. To establish the public-rights nature of a matter, the federal government did not need to be a formal party to a dispute in which the validity of its own prior action—here, granting patent rights—was at issue. According to the Court's analysis, "the decision to *grant* a patent is a matter involving public rights—specifically, the grant of a public franchise,"<sup>289</sup> and, because "[i]nter partes review involves the same basic matter as the grant of a patent," "it, too, falls on the public-rights side of the line."<sup>290</sup>

In providing for inter partes review, Congress had exercised its power to make patent rights—statutory creations that Congress could have used private bills to directly grant and, at least under some circumstances, presumably also to directly repeal<sup>291</sup>—subject to later administrative cancellation.<sup>292</sup> For the *Oil States* majority's view, history, as well as logic and precedent, supported this conclusion. The Court cited a longstanding English tradition of providing for cancellation of patents by the Privy Council,<sup>293</sup> a body of advisors to the Crown that

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288 *Oil States*, 138 S. Ct. at 1373.

289 *Id.*

290 *Id.* at 1374.

291 See *supra* text accompanying note 137; see also BUGBEE, *supra* note 137, at 96–97, 100 (describing patents enacted by state legislatures that provided for their own repeal); P.J. Federico, *State Patents*, 13 J. PAT. OFF. SOC'Y 166, 172–73 (1931) (describing the repeal of a New York patent); cf. CHRISTINE MACLEOD, *INVENTING THE INDUSTRIAL REVOLUTION: THE ENGLISH PATENT SYSTEM, 1660–1800*, at 36 (1988) (describing a 1690 English Act "void[ing] any existing or future charters or patents" relating to "low wines and spirits"). Although Caleb Nelson questions the notion that Congress ever had a general power to repeal vested patent rights, he has also conceded that "Congress probably can authorize the government to convey title [to real property] to a private person while retaining a reversionary interest that allows the government to reclaim title at any time and for any reason." Nelson, *supra* note 65, at 1506, 1533. Under Nelson's account, therefore, a patent grant that explicitly allows for congressional repeal would presumably enable such a repeal, perhaps by preventing patent rights from truly vesting in the first place. See *id.* at 1532–33, 1538.

292 *Oil States*, 138 S. Ct. at 1375 (discussing a statutory "provision [that] qualifies any property rights that a patent owner has in an issued patent, subjecting them to the express provisions of the Patent Act"). Caleb Nelson, writing after *Oil States*, came to a similar conclusion. See *supra* note 63 and accompanying text.

293 *Oil States*, 138 S. Ct. at 1377 ("[I]t was well understood at the founding that a patent system could include a practice of granting patents subject to potential cancellation in the executive proceeding of the Privy Council.").

had retained general, albeit not exclusive,<sup>294</sup> jurisdiction over the patent system until 1753.<sup>295</sup> “Based on the practice of the Privy Council, it was well understood at the founding that a patent system could include a practice of granting patents subject to potential cancellation in the executive proceeding of the Privy Council.”<sup>296</sup> The fact that, for the task of reviewing post-issuance patent validity, “Congress chose the courts in the past d[id] not foreclose its choice of the PTO today.”<sup>297</sup>

Like *Oil States*, the Court’s mid-1980s case *Thomas v. Union Carbide Agricultural Products Co.*<sup>298</sup> involved a question about the constitutionality of subjecting a dispute between private parties to non–Article III adjudication. The relevant controversy involved not the validity of a right previously granted by the government but the amount of monetary compensation to be paid by one private party to another for the use of data the agency required for product approval.<sup>299</sup> Given this similarity to a cause of action at law for damages, *Union Carbide* presented a particularly hard case to characterize as a matter of public-right. After all, a claim for monetary compensation between private parties would seem to fit perfectly the definition of a matter of private right proffered in *Crowell*: a matter “of the liability of one individual to another under the law as defined.”<sup>300</sup> In *Union Carbide*, the Court nonetheless held that the right to compensation at issue was only “a seemingly ‘private’ right that [wa]s so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.”<sup>301</sup>

What was the regulatory scheme in *Union Carbide*? The statute in question, the Federal Insecticide, Fungicide, and Rodenticide Act

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294 See SEAN BOTTOMLEY, THE BRITISH PATENT SYSTEM DURING THE INDUSTRIAL REVOLUTION, 1700–1852: FROM PRIVILEGE TO PROPERTY 112–18 (2014) (discussing the role of the Courts of Chancery and Exchequer in patent-enforcement proceedings from 1660 to 1758); MACLEOD, *supra* note 291, at 59 (1988) (observing that, “[m]ore often [than not], the Council referred patent[infringement] cases to the civil jurisdiction of the common-law courts”).

295 See BOTTOMLEY, *supra* note 294, at 106 (“The Council offered remedies for both patentees seeking to enforce their rights against infringement and for those who sought to have these rights annulled.”); MACLEOD, *supra* note 291, at 19 (observing that the Statute of Monopolies of 1624 “in practice left jurisdiction over [the patent system] with the Privy Council, where it remained until 1753”).

296 *Oil States*, 138 S. Ct. at 1377.

297 *Id.* at 1378.

298 473 U.S. 568 (1985).

299 See *id.* at 576 (“[A]ppellees amended their complaint to allege that the statutory mechanism of binding arbitration for determining the amount of compensation due them violates Article III of the Constitution.”).

300 *Crowell v. Benson*, 285 U.S. 22, 51 (1932).

301 *Union Carbide*, 473 U.S. at 594.



(FIFRA), required a would-be registrant of a pesticide to “submit research data to the Environmental Protection Agency (EPA) concerning the product’s health, safety, and environmental effects.”<sup>302</sup> A data-sharing provision potentially limited the informational demands on later applicants for registration, however, by permitting the EPA to consider data submitted by one applicant in support of a later application and to do this without the permission of the earlier applicant.<sup>303</sup> If the repurposed data had been submitted within the last fifteen years, the later applicant would need to offer compensation to the earlier applicant. If the two private parties could not agree on the amount of compensation, either could “invoke binding arbitration” by an arbitrator from the Federal Mediation and Conciliation Service.<sup>304</sup> By the terms of the Act, “[t]he arbitrator’s decision [wa]s subject to judicial review only for ‘fraud, misrepresentation, or other misconduct.’”<sup>305</sup> The Court insisted that, despite the statutory language, “review of constitutional error [wa]s preserved”: FIFRA did “not obstruct whatever judicial review might be required by due process.”<sup>306</sup> Even with this caveat, however, FIFRA imposed a scheme of non–Article III federal adjudication with remarkably little allowance for judicial review.

Nonetheless, except for Justice Stevens, who would have disposed of the Article III challenge for lack of standing, the Court was unanimous in holding that FIFRA properly subjected monetary claims between private parties to binding arbitration.<sup>307</sup> As in *Oil States*, the Justices correctly looked beyond the formal parties to the suit and focused on matters of substance that properly determine on which side of the public/private-rights line a matter lies. Indeed, O’Connor’s opinion for the Court openly asserted that “[t]he enduring lesson of *Crowell* is that practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III.”<sup>308</sup> In our view, she wrongly presumed that such attention to substance could

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302 *Id.* at 571.

303 *See id.* at 573–74 & n.1 (quoting Federal Insecticide, Fungicide, and Rodenticide Act, Pub. L. No. 95-396, § 3(c)(1)(D)(ii), 92 Stat. 819, 820–22 (1978) (codified at 7 U.S.C. § 136a(c)(1)(F)(iii) (2018))) (describing the data-sharing provision).

304 *Id.* at 573.

305 *Id.* at 573–74 (quoting § 3(c)(1)(D)(ii), 92 Stat. at 821) (describing the data-sharing provision).

306 *Id.* at 592.

307 *See id.* at 594 (“[W]e hold that arbitration of the limited right created by FIFRA . . . does not contravene Article III.”); *id.* at 602 (Brennan, J., concurring in the judgment) (“I agree with the Court that the FIFRA arbitration scheme does not violate the mandates of Art. III.”); *id.* at 605 (Stevens, J., concurring in the judgment) (concluding that “appellees do not have standing to challenge the constitutionality of [the relevant statutory provision]”).

308 *Id.* at 587 (citing *Crowell v. Benson*, 285 U. S. 22, 54 (1932)).

not be accommodated by the public-rights doctrine.<sup>309</sup> With the benefit of Justice Brennan's later opinion for the Court in *Granfinanciera* which made that accommodation explicit,<sup>310</sup> we explain O'Connor's opinion for the Court as an enunciation of public-rights doctrine, rather than a deviation from it.

Consistent with our understanding of the public-rights doctrine, Justice O'Connor's opinion for the Court distinguished *Crowell* as involving a statute that "displaced a traditional cause of action" for injury suffered in the course of employment.<sup>311</sup> In *Crowell*, a federal workers' compensation scheme replaced state workers' compensation or common-law causes of action, a displacement justified by the Court through invocation of Article III admiralty and maritime jurisdiction via an expansive definition of "navigable waters."<sup>312</sup> In *Union Carbide*, there were no such traditional state rights being displaced. As demonstrated by other statutory regimes, Congress had *no* obligation to write FIFRA to compensate applicants for follow-on use of data they disclosed to the government for product approval. Under the food and drug laws, for example, no monetary compensation is provided to a first manufacturer of a drug when a second manufacturer submits an Abbreviated New Drug Application (ANDA) that relies on the data that the first manufacturer submitted.<sup>313</sup> Similarly, patent law has long required innovators to choose between keeping their inventions as trade secrets or subjecting their technical workings to public disclosure in exchange for issued—and, more recently, merely applied-for<sup>314</sup>—patent rights.<sup>315</sup> The PTO provides no monetary compensation for the required disclosure and instead charges multiple processing and maintenance fees.<sup>316</sup>

Consequently, the Court was justified in viewing the right to monetary compensation under FIFRA as a fully statutory creation lacking a

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309 *Id.* at 588 (asserting the "public-rights doctrine exalts form over substance" (quoting Joseph S. Sano, Comment, *A Literal Interpretation of Article III Ignores 150 Years of Article I Court History*: Northern Pipeline Co. v. Marathon Oil Pipeline Co., 19 NEW ENG. L. REV. 207, 231–32 (1983))).

310 *See supra* text accompanying note 270.

311 *Union Carbide*, 473 U.S. at 587.

312 *See supra* text accompanying notes 182–93.

313 *See* Colleen Kelly, *The Balance Between Innovation and Competition: The Hatch-Waxman Act, the 2003 Amendments, and Beyond*, 66 FOOD & DRUG L.J. 417, 422–23 (2011) (describing the "ANDA approval process for generic drugs").

314 *See* Lisa Larrimore Ouellette, *Do Patents Disclose Useful Information?*, 25 HARV. J.L. & TECH. 545, 596 (2012) (observing that a 1999 act "changed the default from publication only of issued patents to publication of applications eighteen months after filing").

315 *See* *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150–51 (1989) (describing patent law's "carefully crafted bargain").

316 *See* 37 C.F.R. § 1.16–18 (listing processing fees); *id.* § 1.20(e)–(g) (listing maintenance fees).

relevant analog in traditional common-law, equitable, or admiralty rights. As O'Connor remarked, the congressionally enacted scheme for binding arbitration was better understood as a substitute for a balkier approach to charging data users and rewarding data providers that Congress unquestionably could have adopted:

Congress, without implicating Article III, could have authorized EPA to charge follow-on registrants fees to cover the cost of data and could have directly subsidized FIFRA submitters for their contributions of needed data . . . . Instead, it selected a framework that collapses these two steps into one, and permits the parties to fix the amount of compensation, with binding arbitration to resolve intractable disputes.<sup>317</sup>

The nexus between the dispute at issue in *Union Carbide* and the generative power of registration that the United States sought to exercise is also illuminated by considering the forms of sanction that would result if one or another party failed to undertake the arbitration process or acquiesce in its result. If the first registrant were at fault, the EPA could recognize that the first registrant had forfeit “the right to compensation” that FIFRA created.<sup>318</sup> If the second applicant were at fault, the EPA could deny or cancel that applicant’s registration and issue an “appropriate” order “concerning the continued sale and use of existing [pesticide] stocks.”<sup>319</sup> To enforce the requirement of submission to binding arbitration, the EPA did not need to reach beyond the scope of its management of the registration process itself. Justice Brennan’s opinion concurring in the judgment arguably touched on this aspect of the case by connecting the public-rights nature of the matter at hand to the fact that “[t]he present case arises entirely within the regulatory confines of [FIFRA].”<sup>320</sup>

Hence, as in *Oil States*, the Court was right not to be distracted by the adversarial form of proceedings through which Congress chose to resolve a matter of public right—the availability or amount of government rights or benefits. In *Union Carbide* in particular, the Court recognized that Congress had exercised its discretion to “create a seemingly ‘private’ right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary”<sup>321</sup>—i.e., a matter of public

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317 *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 590 (1985) (internal citation omitted).

318 *See id.* at 574 n.1 (quoting Federal Insecticide, Fungicide, and Rodenticide Act, Pub. L. No. 95-396, § 3(c)(1)(D)(ii), 92 Stat. 819, 821 (1978) (codified at 7 U.S.C. § 136a(c)(1)(F)(iii) (2018))).

319 *Id.* (quoting § 3(c)(1)(D)(ii), 92 Stat. at 822).

320 *Id.* at 598 (Brennan, J., concurring in the judgment).

321 *Id.* at 594.

right. As with matters arising in the territories or in the course of military service, the fact that a matter arises within such a regulatory context and has its entire operation, including its enforcement, confined to that context can support a conclusion that even a claim “of the liability of one individual to another under the law as defined”<sup>322</sup> may be properly subject to non–Article III adjudication.

### III. THE BREADTH AND LIMITS OF PUBLIC RIGHTS

The winding path of the Supreme Court’s public-rights precedents can be frustrating. But substantial clarity can come from focusing on a bottom line from the caselaw: from *Murray’s Lessee* to the present, including during both the ostensibly pragmatist mid-1980s and more expressly in the more formalist 2010s, the Court has embraced a broad view of public rights that comports with the wide-ranging expanses of federal physical, operational, and enforcement spaces in which non–Article III adjudication has been consistently upheld. In Section III.A, we elaborate on the breadth of this vision, including the public-rights doctrine’s apparent allowance of public/private-rights hybrids—rights or individual cases that have both public- and private-rights aspects. In Section III.B, we highlight that, consistent with separation of powers, matters of public right—matters generally rooted in grants of legislative and/or executive power—are not as a matter of course subject to Article III court review through the force of Article III itself. Instead, the constitutional bases for the modern appellate review model of administrative adjudication are best understood to lie in constitutional constraints outside Article III: for example, the Fifth Amendment’s requirement of due process.

#### A. *The Robustness of Public Rights*

In the 1980s, the Supreme Court almost apologetically acknowledged the breadth of legitimate non–Article III adjudication by speaking of “seemingly ‘private’ right[s]” for which such adjudication was constitutionally permissible.<sup>323</sup> In contrast, the Court’s 2018 opinion in *Oil States* endorsed without apology an understanding of matters of public right that legitimizes swaths of rights- and benefits-generating adjudication within the federal administrative state.<sup>324</sup> Instead of speaking of “the public rights exception” as Chief Justice Roberts did in *Stern v. Marshall*,<sup>325</sup> Justice Thomas’s opinion for the Court therefore

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322 *Crowell v. Benson*, 285 U.S. 22, 51 (1932).

323 *Supra* note 306 and accompanying text.

324 *See supra* notes 277–80 and accompanying text.

325 564 U.S. 462, 489 (2011).

appropriately called it “the public-rights doctrine.”<sup>326</sup> Indeed, the breadth of the public-rights category is so substantial that one might more instructively call the relevant doctrine the “private-rights doctrine,” rather than the public-rights doctrine. By normalizing much non–Article III adjudication, such renaming would help highlight a separation of powers concern that federal administrative law’s dominant appellate review model can obscure: the need for Article III courts to justify their intervention in business that the Constitution predominantly assigns to the political branches. This Section emphasizes how the breadth of the public-rights doctrine relates to constitutional grants of power to the political branches, how the *Oil States* Court correctly refused to limit the scope of public rights by binding Congress to past assignments of public-rights matters to the Article III courts, and the possibility of hybrid statutory creations—having both public- and private-rights aspects—as exemplified by *Oil States* and a securities fraud case still currently pending in the courts.

### 1. Categories Commensurate with Congressional Power

This Article contends that the permissibility of non–Article III adjudication generally tracks the existence of three distinctively federal spaces: physical, operational, and enforcement spaces. We do not mean to say that our framework explains all aspects of the historical practice and cases. As we illustrate through the discussion of enforcement cases involving the NLRB above<sup>327</sup> and involving the SEC below,<sup>328</sup> in some situations our framework operates substantially to narrow and clarify the nature of “live” issues but still leaves at least some portion of the “right” outcome open to debate. Nonetheless, we believe that our account has more explanatory leverage than prior ones. The primary examples of early non–Article III adjudication discussed in Section II.A—the territorial courts (physical space), military courts (internal affairs aspect of operational space), various versions of a patent board (rights-generating aspect of operational space), and non–Article III determinations regarding the accounts of a tax collector (internal affairs aspect of operational space) having carryover effects to private land ownership and, ultimately, a dispute over that land between private parties (enforcement space)—exemplify the physical, operational, and enforcement spaces that we associate with the public-rights doctrine. Further, all these examples help demonstrate the

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326 *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1373 (2018).

327 *See supra* text accompanying notes 213–33.

328 *See infra* subsection III.A.4.

commonly strong ties between non–Article III adjudication and legitimate congressional power: all these examples have roots in specific powers that the Constitution explicitly grants to Congress: powers to regulate the territories and the military, to promote progress by issuing invention patents, and to tax.<sup>329</sup> In some instances, as with the issuing and cancellation of invention patents, the permissibility of non–Article III adjudication seems a straightforward extension of Congress’s powers to act by private bill.<sup>330</sup>

Where a non–Article III adjudicator acts either entirely within physical spaces beyond state control or within the federal government’s own operational space, non–Article III adjudication is especially likely to be found to be permissible. Within our framework, *Oil States* and *Union Carbide* thus become readily understandable, albeit not entirely easy. In *Oil States*, the government was reconsidering the correctness of its own prior rights-granting action, and, in *Union Carbide*, the government was regulating the availability of rights under a federal registration scheme in accordance with applicants’ compliance with the terms of that scheme.<sup>331</sup> In neither of these cases did the government need to step outside its internal-affairs or right-granting operational space in order to enforce a particular result.

Nevertheless, the significance of the public-rights determinations in *Oil States* and *Union Carbide* should not be understated. Much modern administrative adjudication, including a massive quantity of benefits adjudication by the Social Security Administration, occurs entirely within similar operational spaces. The scale of the federal government’s direct grants and benefits has expanded far beyond what was likely envisioned at the time that the Constitution was adopted. But by generally recognizing questions about the validity of a “public franchise” as a matter of public right,<sup>332</sup> the *Oil States* decision apparently—and, we believe, properly—extended its Article III blessing to a broad range of non–Article III adjudication in a manner that kept faith with the original meaning of Article III.

Although the *Oil States* Court did not lay out an express test or definition for a “public franchise,” the Court’s discussion of why patent rights have this character suggests the category’s expansiveness. The only requirement apparent from the Court’s opinion is that the right “not exist at common law”<sup>333</sup> and instead be a “creature of statute

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329 See *supra* Section II.A.

330 See *supra* text accompanying note 137.

331 See *supra* subsection II.C.2.

332 See *supra* text accompanying notes 288–90.

333 *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1374 (2018) (quoting *Gayler v. Wilder*, 51 U.S. (10 How.) 477, 494 (1850)).

law.”<sup>334</sup> In responding to Justice Gorsuch’s dissenting opinion, the Court seemed willing to assume another, related backward-looking requirement—namely, that, at the time of the Founding, the relevant matter was not “from its nature, . . . the subject of a suit at the common law, or in equity, or admiralty.”<sup>335</sup> Even with this additional constraint, the category of “public franchise” may encompass the many modern government benefits, licenses, grants, or registration regimes that have no evident and material common-law antecedents. Moreover, *Oil States* emphasizes that non-Article III adjudication of the conditions for a public franchise may be permissible not only at the time of the initial grant, but also on a continuing basis. Congress may give non-Article III adjudicators continuing capacity to assess the validity of such franchises so long as the government specifies up front the existence of this continuing authority.<sup>336</sup>

In contrast with more purely operational-space cases, enforcement cases such as *Murray’s Lessee* commonly have a substantial external component, a nontrivial interaction with the world of traditional private rights such as personal property or liberty interests. Although the property ownership question in *Murray’s Lessee* derived from the government’s response to the misconduct of a government tax collector (i.e., an act within the government’s operational space), that government response left the realm of the tax regime proper in order to assert a right of enforcement against the miscreant’s private property.<sup>337</sup> Likewise, in *Jones & Laughlin*, the government’s reinstatement and compensation orders entailed restrictions on traditional forms of privately held liberty and property interests.<sup>338</sup> As a result, enforcement cases such as these can present the most difficult cases to classify under the public-rights doctrine. It is perhaps no coincidence that the doctrine’s first explication came in such a case (*Murray’s Lessee*),<sup>339</sup> that the Court’s opinion in that case highlighted the critical public interest in collecting tax revenue to help establish the case’s public-rights character,<sup>340</sup> and that the details of the doctrine’s application (or nonapplication) were essentially ducked in *Jones & Laughlin*.<sup>341</sup> Nonetheless,

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334 *Id.* (quoting *Crown Die & Tool Co. v. Nye Tool & Mach. Works*, 261 U.S. 24, 40 (1923)).

335 *Id.* at 1376 (quoting *Stern v. Marshall*, 564 U.S. 462, 484 (2011)).

336 *See id.* at 1376 n.3 (distinguishing precedents regarding issued land patents because “[t]heir holdings do not apply when ‘the Government continues to possess some measure of control over’ the right in question” (quoting *Boesche v. Udall*, 373 U.S. 472, 477 (1963))).

337 *See supra* text accompanying notes 147–53.

338 *See supra* text accompanying notes 215–21.

339 *See supra* text accompanying notes 154–62.

340 *See supra* text accompanying note 156.

341 *See supra* text accompanying notes 222–29.

we believe that our framework helps advance analysis of the proper public/private-rights classification of such cases, particularly when one combines consideration of the characteristic contents of non–Article III enforcement space with attention to the definition of “private rights”—as subsection II.A.4 demonstrates.

In sum, the bounds of matters of public right are capacious, encompassing generative and enforcement activities that encompass much of the adjudicative work of the modern administrative state. This conclusion should dispel concern that application of Article III constraints—or, more specifically, revived focus on applying Article III’s public-rights doctrine—requires wholesale dismantling of ubiquitous agency adjudication.

## 2. Congressional Choice and the Conservative Use of History

A further key point is that the scope for non–Article III adjudication can grow not only because of the congressional creation of new public rights, but also because of a new congressional decision to provide for non–Article III adjudication of already existing public rights. This is the dynamic, forward-looking aspect of our normative argument that complements our backward-looking account of the private-rights core of the doctrine. As the Court pointed out in *Murray’s Lessee*, Congress has a choice of whether to assign adjudication of public-rights matters to an Article III court, to a non–Article III forum, or to both.<sup>342</sup> More than a century later, in *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*,<sup>343</sup> the Court likewise emphasized Congress’s power “to create new public rights and remedies by statute and commit their enforcement, *if it chose*, to a tribunal other than a court of law such as an administrative agency.”<sup>344</sup> In *Oil States*, the Court made clear that a longstanding congressional practice of committing such enforcement to Article III courts does not prevent Congress from later choosing to commit it to non–Article III tribunals.<sup>345</sup> The Court rejected “the dissent’s assumption that, because courts have traditionally adjudicated patent validity in this country, courts must forever continue to do so.”<sup>346</sup> This conservatism in using history can be crucial for the preservation of congressional discretion today because, given the relatively bare-bones nature of the national government in

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342 See *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856).

343 430 U.S. 442 (1977).

344 *Id.* at 460 (emphasis added).

345 See *supra* text accompanying note 297.

346 *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1378 (2018).



its early days, Congresses long relied substantially—and in many cases all but necessarily—on the Article III courts for the implementation of federal programs.<sup>347</sup>

The *Oil States* Court’s approach to using history was salutary in a second “conservative” respect worth highlighting. In *Oil States*, the majority and the dissent agreed that, historically, the British Crown had possessed powers to grant and to revoke patent rights.<sup>348</sup> The Privy Council had retained general jurisdiction over the patent system, including infringement proceedings, until 1753.<sup>349</sup> But the dissent correctly observed that historical practice and understandings were in a state of flux at the Founding.<sup>350</sup> The role of the Privy Council had been in decline since the Glorious Revolution of 1688,<sup>351</sup> and by the late eighteenth century, conceptions of patent rights as entitlements, rather than privileges, had surfaced but were far from dominant.<sup>352</sup> Significantly and, in our view, wisely, the Court based its classification of the nature of patent rights on longstanding understandings at the time of the Founding, rather than more revolutionary, not yet settled, late eighteenth-century trends. In a case of doubt about the historical record, the Court will often be wise to favor a reading that is “conservative” in the sense of adhering to the general rule that Congress commonly enjoys substantial discretion in choosing and structuring forums for the adjudication of rights and liabilities that its statutes create.<sup>353</sup>

### 3. The Possibility of Public/Private-Rights Hybrids

Our framework further supports a broad view of public rights through its allowance for the possibility of rights hybrids. As our discussion of the NLRB’s multiple forms of relief in *Jones & Laughlin* has

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347 See *supra* note 78 and accompanying text.

348 *Oil States*, 138 S. Ct. at 1382 (Gorsuch, J., dissenting) (“The crown both issued and revoked [patents].”).

349 See *supra* notes 295–97 and accompanying text.

350 See *Oil States*, 138 S. Ct. at 1382 (Gorsuch, J., dissenting) (“[B]y the 18th century, . . . invention patents came to be seen in a different light.”); OREN BRACHA, *OWNING IDEAS: THE INTELLECTUAL ORIGINS OF AMERICAN INTELLECTUAL PROPERTY, 1790–1909*, at 14 (2016) (“By the end of the eighteenth century, . . . some of the elements of the modern intellectual and institutional framework [for intellectual property] began to appear.”); Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550–1800*, 52 HASTINGS L.J. 1255, 1313 (2001) (describing a shift in patent law toward “the terminology and arguments of Locke’s natural rights philosophy”).

351 See BOTTOMLEY, *supra* note 294, at 111–12 (reporting a decreased patent caseload for the Privy Council after the Glorious Revolution).

352 See BRACHA, *supra* note 350, at 25 (concluding that, “[a]t the end of the eighteenth century,” “[t]he traditional ad hoc privilege structure had eroded . . . , but no firm and clear replacement took its place”).

353 See *supra* text accompanying note 344.

already suggested, individual enforcement cases may have both public- and private-rights aspects: in that case, the NLRB's orders to cease and desist and to provide notice of a policy of not discharging or discriminating against union members<sup>354</sup> seem of a generally beneficial nature quite consistent with paradigm notions of matters of public right, but the orders "to offer reinstatement," and to pay lost wages<sup>355</sup> seem very much in the nature of relief especially characteristic of private-rights cases.<sup>356</sup> Moreover, as our discussion of *Murray's Lessee* makes clear, adjudication of a matter of public right can effectively decide a matter of private right.<sup>357</sup> As with governmental separation of powers, bright-line distinctions are illusory.

The patent rights in *Oil States* furnish an illustrative example. The Court held that questions of patentability are matters of public right permissibly subject to adjudication by the PTO both before and after a patent's issuance.<sup>358</sup> In contrast, the Court declined to address "whether other patent matters, such as infringement actions, can be heard in a non-Article III forum."<sup>359</sup> The Court thereby suggested that the status of patent validity as a matter of public right is independent of whether questions of patent infringement or patent infringement remedies are matters of private right. Moreover, the Court made this suggestion despite the fact that questions of patent validity are closely intertwined with questions of whether a patent has been infringed as a practical matter. Many inter partes review proceedings result from challenges to patent validity brought by private parties whom other private parties have sued for patent infringement in district court.<sup>360</sup>

Despite the practical ties between questions of patent infringement and questions of patent validity, we believe that the Court correctly decoupled assessment of the public/private-rights character of validity from that for infringement. The criticality of this decoupling is highlighted by our further belief that, in suits between private par-

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354 *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 22 (1937).

355 *Id.*

356 *See id.* at 103 (McReynolds, J., dissenting) ("A private owner is deprived of power to manage his own property by freely selecting those to whom his manufacturing operations are to be entrusted.").

357 *See supra* text accompanying notes 152–53.

358 *See Oil States Energy, LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1373 (2018) ("Inter partes review is simply a reconsideration of that grant, and Congress has permissibly reserved the PTO's authority to conduct that reconsideration.").

359 *Id.* at 1379.

360 *See* Joshua C. Harrison, *A Recent Patent Class on the Scope of IPR Estoppel at the PTAB*, 14 J. BUS. & TECH. L. 35, 35 (2018) ("*Inter-partes review* (IPR) has become a popular alternative for defendants to challenge the validity of patents asserted in district court infringement proceedings.").

ties, questions of patent infringement and of patent infringement remedies are generally correctly classified as questions of private right.<sup>361</sup> They are questions of the liability of one private party to another that have historically been recognized to be closely analogous to matters of common-law tort.<sup>362</sup> Unlike the potential cancellation of patent rights in PTO inter partes review proceedings, the remedies typically at issue in a suit for patent infringement—monetary compensation for past infringement<sup>363</sup> and an injunction against future infringement<sup>364</sup>—directly reflect and impact activities external to the work of the PTO. The PTO could not award them simply by declining to grant—or canceling—a benefit or status made available only through the operation of federal statutory law.

Moreover, the individualized nature of typical patent infringement remedies—compensation for specifically adjudged acts of infringement or an injunction directed at specific products or processes of the adjudged infringer<sup>365</sup>—also contrasts with the refusal or cancellation of patent rights that can result from the PTO’s reconsideration of the validity of rights that it previously granted. If the PTO cancels patent rights, that cancellation might cause the dismissal of an individualized infringement proceeding in the district court. But such a dismissal is incidental to the more general effect of the PTO’s decision—release of the public at large from an obligation to avoid infringing the relevant patent rights.<sup>366</sup>

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361 In contrast, the federal government has provided for patent infringement suits against the United States in the non-Article III Court of Federal Claims. 28 U.S.C. § 1498(a) (2018). Moreover, when a private party alleges to the International Trade Commission that another party has violated its patent rights by importing infringing goods, the United States may turn that infringement charge into its own by launching an investigation into unfair trade practices that culminates in non-Article III adjudication before the ITC with the possibility of injunctive relief against the accused infringer. See Sarah R. Wasserman Rajec, *Patents Absent Adversaries*, 81 BROOK. L. REV. 1073, 1081 (2016) (discussing ITC procedure in patent infringement proceedings).

362 See Dmitry Karshedt, *Damages for Indirect Patent Infringement*, 91 WASH. U. L. REV. 911, 914 (2014) (noting that a patent infringement “cause of action . . . is often described as a species of . . . tort”). Before 1753, however, the Privy Council had authority to hear infringement cases, which were viewed as charging “contempt of the royal prerogative.” MACLEOD, *supra* note 291, at 58.

363 See 35 U.S.C. § 284 (2018) (providing for compensatory damages).

364 See *id.* § 283 (empowering courts to “grant injunctions . . . to prevent [patent-right] violation”).

365 See John M. Golden, *Injunctions as More (or Less) Than “Off Switches”*: *Patent-Infringement Injunctions’ Scope*, 90 TEX. L. REV. 1399, 1422–23 (2012) (discussing caselaw generally requiring that injunctions against future patent infringement be limited to specific products or processes adjudged to infringe and matter immaterially different from them).

366 Cf. *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 171 (2015) (Thomas, J., dissenting) (“Public rights are those belonging to the public as a whole.”).

In sum, the *Oil States* Court's implicit recognition of the possibility of public/private-rights hybrids was correct and further supports the sense that matters of public right are common, rather than exceptional. There can be matters of public right (e.g., patent validity) associated even with statutory creations (e.g., patents) that give rise to suits over matters of private right (e.g., patent infringement and patent infringement remedies). Further, non–Article III adjudication of a matter of public right can effectively determine the outcome of a private-liability proceeding. This last conclusion should not be a surprise. After all, in *Murray's Lessee*, the Court's determination that non–Article III action was valid effectively ended a classic private-rights dispute between private parties.<sup>367</sup>

#### 4. Sensitivity to Remedies

The potential for mixing of public-rights and private-rights matters in a single case is illustrated by the pending case of *Jarkesy v. Securities & Exchange Commission*.<sup>368</sup> In *Jarkesy*, a divided Fifth Circuit panel held that the SEC may not adjudicate a claim of securities fraud brought by the SEC against a hedge fund manager and an investment adviser<sup>369</sup> because it is “akin to traditional actions at law to which the jury-trial right attaches,” and “Congress, or an agency acting pursuant to congressional authorization, cannot assign the adjudication of such claims to an agency because such claims do not concern public rights alone.”<sup>370</sup> In so doing, the Fifth Circuit reduced the public-rights doctrine to a single-prong test: if the action to be tried before the administrative judge has a common-law analogue, then it “is not the sort that may be properly assigned to agency adjudication under the public-rights doctrine.”<sup>371</sup> For the Fifth Circuit, it was therefore decisive that “[c]ommon-law courts have heard fraud actions for centuries, even actions brought by the government for fines.”<sup>372</sup> The majority made no mention of *NLRB v. Jones & Laughlin* or *Crowell v. Benson* in its discussion of the public-rights doctrine.<sup>373</sup>

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367 See *supra* subsection II.A.2.

368 34 F.4th 446 (5th Cir. 2022).

369 *Id.* at 449–50 (“Petitioner Jarkesy established two hedge funds and selected Petitioner Patriot28 as the investment adviser.”).

370 *Id.* at 451; see also *id.* at 466 (Davis, J., dissenting) (“I respectfully disagree with each of [the majority’s] conclusions.”).

371 *Id.* at 455 (majority opinion).

372 *Id.*

373 The Fifth Circuit majority did cite *Crowell* (unconvincingly, in our view) to support a separate holding that the petitioners were right “that Congress unconstitutionally delegated legislative power to the SEC when it gave the SEC the unfettered authority to choose whether to bring enforcement actions in Article III courts or within the agency.” *Id.* at 459,

Although the fact that the government is a party does not automatically make a case a matter of public right, and disputes between private parties as in *Union Carbide* may yet be matters of public right, it does not follow that nature of the parties to a suit is wholly irrelevant to the determination of whether a matter is one of public right or of private right, particularly when those parties are the ones from whom relief is demanded and to whom it is awarded. Indeed, the remedial questions of *who must pay* and *to whom* are at the core of the Court's definition of matters of private right proffered in *Crowell*: "the liability of one individual to another under the law as defined."<sup>374</sup> In prior work, we proposed a more fulsome definition incorporating elaborations from *Crowell's* progeny: "a private rights claim is one (1) through which one or more private parties seek personalized relief from one or more other private parties; and (2) that was a sort of claim heard by state courts of law, equity, or admiralty in 1789 or is a modern analog thereof."<sup>375</sup> Methodologically speaking, the Fifth Circuit erred by focusing almost exclusively on the second prong of this proposed definition for private rights—analogs to common-law actions—without considering the first prong—whether the adjudication is of liability between private parties.

Ignoring the first prong can be a great mistake. If a claim of liability between private parties is not at issue, there is no need to entangle oneself in difficult questions of which similarities or differences between historical and present-day claims should predominate with respect to the second, historically oriented prong. Comparison of the private-rights matter in *Crowell* to the public-rights matter in *Oil States* further highlights how the first prong operates. *Crowell*, a private-rights case, focused on an individualized claim for worker's compensation. *Oil States*, a public-rights case, involved a claim for relief in the form of a wholly general—depersonalized—result: the cancellation of one or more patent claims "against the world."<sup>376</sup>

With these clarifications, we return to *Jarkesy's* particular facts. The Fifth Circuit described four forms of orders made by the SEC in *Jarkesy*: (1) an order that petitioners "cease and desist from committing

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459–61 (suggesting that *Crowell* supports this conclusion by declaring that Congress had complete control of "which cases are assigned to administrative tribunals").

374 *Crowell v. Benson*, 285 U.S. 22, 51 (1932); see also *supra* text accompanying notes 9–10.

375 *Golden & Lee, supra* note 2, at 1558. The second prong reflects an insight stressed by *Union Carbide*: even if a personalized claim of private liability is at issue, there can be a question whether that claim lies within the private sphere where state courts have enjoyed traditional adjudicative primacy. See *supra* text accompanying notes 301–22.

376 See Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 CALIF. L. REV. 241, 243 (1998) ("Copyright, patent, trademark, publicity rights, and various unfair competition torts all confer property rights against the world . . .").

further [Securities Act] violations”; (2) an order “barr[ing] Jarkesy from various securities industry activities”; (3) an order imposing “a civil penalty of \$300,000”; and (4) an order for disgorgement of “nearly \$685,000 in ill-gotten gains.”<sup>377</sup> Particularly when sought by the SEC’s enforcement division, the cease-and-desist order and prohibition against industry activities by defendants in the business of managing other people’s money seem reasonably understood to focus on securing interests of the general public, rather than on providing personalized relief. These aspects of the SEC’s decision might justifiably trigger calls for additional protective process because of their severity—calls that, as we explain in Section III.B, properly sound in concerns of due process.<sup>378</sup> But these aspects of the decision nonetheless appear comfortably to constitute matters of public right.

One can argue that the SEC’s orders of a civil penalty and disgorgement should be viewed similarly. As discussed earlier,<sup>379</sup> in *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*,<sup>380</sup> the Supreme Court unanimously recognized that it had repeatedly upheld “statutory schemes” in which Congress “created new statutory obligations, provided for civil penalties for their violation, and committed exclusively to an administrative agency the function of deciding whether a violation has in fact occurred.”<sup>381</sup> Further, a public interest in deterrence is commonly viewed as a central aim of both civil penalties and disgorgement.<sup>382</sup> Moreover, before imposing a civil penalty in an administrative proceeding, the SEC must determine that “such penalty is in the public interest.”<sup>383</sup>

However, in recent decades, the SEC, like some other administrative agencies, has sometimes used awards of disgorgement and civil penalties to provide compensation to individuals harmed by others’

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377 *Jarkesy*, 34 F.4th at 450. The SEC also ordered payment of prejudgment interest of about \$297,000 or more. In the Matter of John Thomas Cap. Mgmt. Grp. LLC, Securities Act Release No. 5572, 2020 WL 5291417, at \*29 (Sept. 4, 2020), *vacated*, *Jarkesy*, 34 F.4th 446.

378 See *infra* text accompanying notes 409–10.

379 See *supra* text accompanying notes 236–38.

380 430 U.S. 442 (1977).

381 *Id.* at 450.

382 See, e.g., Prentiss Cox & Christopher L. Peterson, *Public Compensation for Public Enforcement*, 39 YALE J. ON REGUL. 61, 65 (2022) (“Public compensation is rooted in the unique rights and obligations that accompany the executive branch’s duty to implement the law and preserve functioning commerce by deterring violations of market protection schemes.”).

383 15 U.S.C. § 77h-1(g)(1)(B) (2018).

legal violations.<sup>384</sup> This phenomenon of regulatory agencies' providing compensation to private parties is relatively new<sup>385</sup> and can raise questions about the extent to which administrative proceedings resulting in such compensation should be viewed as matters of public right.

In *Jarkesy*, however, details of the relevant statutory scheme, as well as the SEC's inconsistent practice in redirecting recovered funds to harmed investors, suggest that a public-rights conclusion is likely correct even for the SEC-ordered penalty and disgorgement. The statutory text that authorized these forms of relief does not explicitly require that monetary proceeds be used to compensate private parties.<sup>386</sup> The statute does "authorize[] [the SEC] to adopt rules, regulations, and orders concerning payments to investors, rates of interest, periods of accrual, and such other matters as it deems appropriate to implement th[e] subsection" providing for disgorgement.<sup>387</sup> But this language does not require that disgorged funds go to investors, and the federal government has often kept much of the money.<sup>388</sup>

One might still argue that, in cases where the SEC actually distributes funds from administratively ordered penalties and disgorgement to individual investors—or in cases where the SEC might reasonably be expected to do so—the SEC's orders of those penalties and disgorgement operate *in effect* to generate an award of personalized relief between private parties. Further, *Jarkesy* was a case in which the SEC ultimately planned such a distribution: the SEC's opinion in *Jarkesy* included an additional remedial order not mentioned in the Fifth Circuit's account: an order "that the disgorgement, prejudgment interest, and civil money penalty amounts [otherwise ordered] be used to create a Fair Fund for the benefit of investors harmed by Respondents'

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384 See Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500, 527 (2011) ("Over the past twenty years, the administrative law system has increasingly sought equitable remedies to make sure that wrongdoers fully compensate their victims."); cf. Prentiss Cox, *Public Enforcement Compensation and Private Rights*, 100 MINN. L. REV. 2313, 2315 (2016) (noting that "public compensation occurs under various statutory authorities in a multitude of enforcement areas").

385 See Zimmerman, *supra* note 384, at 518 ("[R]egulatory agencies have begun to compensate victims only recently . . .").

386 See 15 U.S.C. § 77h-1 (2018).

387 *Id.* § 77h-1(e).

388 The SEC's Division of Enforcement reported winning \$20.6 billion in monetary awards over fiscal years 2017 through 2021, \$5.9 billion in penalties and \$14.7 billion in disgorgement. Over the course of the same fiscal years, the Division of Enforcement reported disbursements of only \$4.2 billion—about one fifth of the total—to injured investors. SEC, ADDENDUM TO DIVISION OF ENFORCEMENT PRESS RELEASE: FISCAL YEAR 2021 (2021), <https://www.sec.gov/files/2021-238-addendum.pdf> [<https://perma.cc/K825-G9LN>].

violations.”<sup>389</sup> As we believe in the importance of considering matters of substance, as opposed to form only, in resolving private-versus-public rights questions, we are willing to concede that the private/public status of the SEC-ordered penalties and disgorgement awards might be argued in such circumstances.<sup>390</sup> Disgorgement of ill-gotten proceeds from a private fraudster to a harmed investor is very different from the recovery of stolen customs revenues from a federal tax collector for the benefit of the public fisc in the manner of *Murray’s Lessee*. Nonetheless, the apparent need for such argument to rely on how the SEC’s penalty and disgorgement remedies sometimes work “in effect” suggests that a holding that these awards are matters of private right is counter to substantial headwinds.<sup>391</sup>

Regardless of our success or failure in so prognosticating, a crucial point is that, however the penalty and disgorgement questions should be resolved, our formulation of public-rights doctrine upholds the SEC’s power to adjudicate important aspects of *Jarkesy*. The conclusion that the government’s pursuit of the cease-and-desist order and ban on industry activities are public remedies provides justification for administrative adjudication of securities fraud even if the SEC must sometimes separately petition a district court for an enforceable order of monetary relief in compliance with the requirements of Article III. The potential remedy-by-remedy dependence of the public/private rights-status of aspects of *Jarkesy* confirms the potential for public/private-rights hybrids previously discussed in subsection III.A.3. Meanwhile, the potentially weighty personal effects of even the most “public” of the remedies in *Jarkesy* point to the desirability of other constitutional checks on non-Article III adjudication such as the Fifth

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389 In the Matter of John Thomas Cap. Mgmt. Grp. LLC, Securities Act Release No. 5572, 2020 WL 5291417, at \*29 (Sept. 4, 2020), *vacated*, *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022).

390 Recent Supreme Court decisions have highlighted ambiguity regarding the public/private status of disgorgement awards. The Court has characterized district-court-ordered disgorgement for a Securities Act violation as (1) a “penalty” for statute of limitations purposes, *Kokesh v. SEC*, 137 S. Ct. 1635, 1643–44 (2017) (describing such disgorgement as a punishment for a violation of “public laws . . . committed against the United States”); and (2) an allowable form of equitable relief at least under certain circumstances, *Liu v. SEC*, 140 S. Ct. 1936, 1942 (2020). The equitable characterization is, however, arguably immaterial for SEC-ordered disgorgement as, without any reference to principles of equity, Congress has explicitly empowered the SEC to “enter an order requiring accounting and disgorgement, including reasonable interest.” 15 U.S.C. § 77h-1(e) (2018).

391 The “in effect” argument resembles a “conduit” argument known to administrative lawyers: the Court of Appeals for the D.C. Circuit has warned that communications between government entities might violate otherwise inapplicable ex parte contact bars if these communications “serve as mere conduits for private parties in order to get the latter’s off-the-record views into [an administrative] proceeding.” *Sierra Club v. Costle*, 657 F.2d 298, 405 n.520 (D.C. Cir. 1981).



Amendment's Due Process Clause. This closing concern is a perfect segue to the next Section.

### B. *Public Rights and Article III Court Review*

The reach of public-rights doctrine is not only broad. It is deep. By this we mean that classification of a matter as one of public right can call into question whether any Article III court review of non-Article III adjudication of that matter is required.<sup>392</sup> The Supreme Court has repeatedly indicated as much.<sup>393</sup> This seems particularly true when Congress could resolve the relevant matter of public right directly by public or private bill.

Correspondingly, for much of the United States' history, the primary constitutional question associated with executive actions exercising delegated legislative power was not whether they must be subjected to review by an Article III court, but instead to what extent an Article III court could review such executive actions at all.<sup>394</sup> In modern times, the Court has not gone so far: in *Oil States*, for example, the Court stated that given statutory provision for appellate-style review by Article III courts of PTO decisions, the Court did not need to decide the extent to which such provisions were constitutionally required.<sup>395</sup> But the logic of the *Oil States* Court's reference to, and reliance on, congressional power as a basis for upholding the PTO's cancellation proceedings suggests that a general need for appellate-style Article III court review of administrative agency action should not be assumed to follow from Article III alone.<sup>396</sup>

Nonetheless, we think there is ample basis in the Constitution for concluding that there must be a substantial role for Article III courts in supervising the work of non-Article III adjudicators. Long-established precedent, considerations of institutional competence, and a common desire for extra solicitude for constitutional rights strongly favor recognizing a nondefeasible role for Article III courts in policing

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392 See, e.g., *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856) (describing matters of public right as ones "which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper").

393 See, e.g., *supra* text accompanying notes 212–14.

394 See Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 YALE L.J. 1636, 1736 (2007) (describing early nineteenth-century judicial review as apparently "crystallizing into bipolar modalities" of *de novo* review "in suits for damages or through defenses in criminal prosecutions" and "more 'public law'-oriented review . . . limited to a search for 'jurisdiction' or 'authority'").

395 *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1379 (2018) (noting that "the Patent Act provides for judicial review by the Federal Circuit").

396 Cf. *id.* at 1377 n.4 (discussing "the unconstitutional-conditions doctrine" and congressional powers of direct action).

constitutional constraints—even when the relevant action is taken by Congress directly.<sup>397</sup> Article III courts should surely remain available to check whether the political branches have correctly classified a matter as one of public right and thus as appropriate for non–Article III adjudication. Further, other constitutional constraints such as the Fifth Amendment’s Due Process Clause or legislative nondelegation doctrine can require Article III court involvement (or, at least, access to Article III court involvement) even when Article III by itself does not. In *Oil States*, the Supreme Court specifically noted that, in ruling that the PTO’s inter partes review proceedings do not violate Article III’s allocation of judicial power, the Court did not reject the proposition that such proceedings could violate other constitutional constraints, such as those imposed by the Fifth Amendment’s Due Process and Takings Clauses.<sup>398</sup> The Court in *Crowell* was more decisive in indicating a general need for access to an Article III court for the resolution of a claim of constitutional violation.<sup>399</sup>

Even the relatively minimal modern nondelegation doctrine can provide an entrée for Article III court review of at least a traditional, ultra vires variety.<sup>400</sup> The nondelegation doctrine putatively ensures that Congress does not give away legislative power contrary to Article I’s command that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.”<sup>401</sup> The doctrine can seem

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397 See Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529, 1576, 1579–80 (2000) (discussing the value to individual rights of “an additional check on government action” and potential bases for ascribing to the judiciary a peculiar competence in enforcing constitutional constraints); Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1695 (2008) (“The best case [for judicial review of legislation] rests . . . on the . . . ground . . . that both [legislatures and courts] should have veto powers over legislation that might reasonably be thought to violate [fundamental] rights.”).

398 *Oil States*, 138 S. Ct. at 1379 (“[O]ur decision should not be misconstrued as suggesting that patents are not property for purposes of the Due Process Clause or the Takings Clause.”).

399 Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 76 n.183 (1981) (noting *Crowell*’s “suggest[ion] that a federal judicial forum must be available to hear all claims of constitutional right”).

400 See Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GA. L. REV. 117, 182 (2011) (“Even under the traditional nondelegation doctrine, judicial review is necessary to prevent wholly standardless delegations and ultra vires administrative action.”); cf. Douglas E. Edlin, *A Constitutional Right to Judicial Review: Access to Courts and Ouster Clauses in England and the United States*, 57 AM. J. COMPAR. L. 67, 68 (2009) (noting that ultra vires review empowers English courts to “ensur[e] that the agencies act only in accordance with the power Parliament intended them to have”).

401 U.S. CONST. art. I, § 1; see also Criddle, *supra* note 400, at 119.

toothless in light of the eight decades that have passed since the Supreme Court last deployed it to strike down a statute.<sup>402</sup> But by requiring that Congress constrain the executive decision-maker to act in accordance with a congressionally specified “intelligible principle,”<sup>403</sup> the nondelegation doctrine also ensures a basis for challenging agency action as *ultra vires*—beyond the bounds of what Congress has authorized. Helping ensure the integrity of constitutional allocations of power by setting aside *ultra vires* actions of agencies seems an appropriate task for the Article III courts.<sup>404</sup>

The nondelegation doctrine thus suggests that Article III court review of administrative adjudication is commonly necessary not because the Article III courts need to defend their prerogatives in relation to such administrative action, but because the Article III courts need to police congressional delegations to ensure that Congress has not unconstitutionally surrendered legislative power and that the executive branch has not encroached on Congress’s policymaking authority.<sup>405</sup> In other words, the nondelegation doctrine springing from the requirements of Article I gives Article III courts a vital role to play in checking the validity of administrative action, including administrative adjudication. Framing judicial review of administrative action as policing legislative-versus-executive boundaries, rather than policing executive-versus-judiciary boundaries, is appealing because it places courts in a more neutral refereeing role, rather than the conflicted

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402 Aditya Bamzai, Comment, *Delegation and Interpretive Discretion*: Gundy, Kisor, and the Formation and Future of Administrative Law, 133 HARV. L. REV. 164, 165 (2019) (noting that the Supreme Court “(save for two exceptions . . . in 1935) has not used the nondelegation doctrine to find a statute unconstitutional” (first citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); and then citing *Pan. Refin. Co. v. Ryan*, 293 U.S. 388 (1935))).

403 *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019).

404 See *Salinas v. U.S. R.R. Ret. Bd.*, 141 S. Ct. 691, 698 (2021) (noting the “strong presumption favoring judicial review of administrative action” (quoting *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015))). The mandate from *Crowell* might, however, only demand *ultra vires* review, not the appellate review model. See Merrill, *supra* note 244, at 1001 (suggesting the potential desirability of a nonappellate “model for judicial review, such as the *ultra vires* or jurisdictional model”); Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What The Dialogue (Still) Has to Teach Us*, 69 DUKE L.J. 1, 58 (2019) (“It may very well be that, habeas aside, *ultra vires* review of administrative lawmaking is all that is constitutionally necessary in the statutory context.”).

405 See *Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (D.C. Cir. 1976) (Leventhal, J., concurring) (“[C]ourts have upheld [broad] delegation—because there is court review to assure that the agency exercises the delegated power within statutory limits . . .”); cf. Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 376 (2019) (“Judicial review of the legality of agency action . . . allows courts to check agencies that exceed boundaries demarked by Congress.”).

role of an Article III court trying to decide when Congress has impermissibly “depart[ed] from the requirements of Article III” at the courts’ own expense.<sup>406</sup>

Another constitutional constraint worth discussing is the Fifth Amendment’s requirement of due process in situations involving a “depriv[ation] of life, liberty, or property.”<sup>407</sup> Under some circumstances, the Due Process Clause might effectively require Article III adjudication, either at trial or on appeal, in situations where Article III does not.<sup>408</sup> As Justice Brandeis observed in dissent in *Crowell*, “under certain circumstances, the constitutional requirement of due process is a requirement of judicial process.”<sup>409</sup> Particularly because of the centrality of impartiality to due process, the requirement of due process can be expected to occasionally require judicial review of non–Article III adjudication along the lines of the appellate review model. This conclusion seems to follow at least as long as Congress fails to make Herculean efforts to provide, across the breadth of the modern administrative state,<sup>410</sup> non–Article III tribunals that are as insulated from political and other outside influences as Article III courts.

Sensitivity to severity concerns in modern due process analysis also makes it a good candidate for the types of concerns that often motivate complaint about non–Article III adjudication. To the extent that one becomes more concerned about administrative orders the more severe their consequences—whether the orders are calls to cease and desist

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406 *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851 (1986).

407 U.S. CONST. amend. V.

408 To the extent one does not believe that Article I itself provides the basis for a personal claim that an agency has violated its congressional mandate, due process rights might serve that end. See Criddle, *supra* note 400, at 121–22 (arguing that due process requirements provide a mechanism for insisting on restriction of congressional delegations).

409 *Crowell v. Benson*, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting); see also Louise Weinberg, *The Article III Box: The Power of “Congress” to Attack the “Jurisdiction” of “Federal Courts,”* 78 TEX. L. REV. 1405, 1424 (2000) (concluding “that due process is likely to be at stake when access to federal courts for judicial review of federal government action is at stake”); cf. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1390 (1953) (describing how, in certain circumstances, habeas corpus jurisdiction plus due process requirements “implied a regime of law” with accompanying judicial responsibilities). The Supreme Court suggested the same in *Murray’s Lessee*, in which it reached the Article III question only after inquiring whether relevant proceedings comported with due process. *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 280 (1856).

410 Given the Supreme Court’s rejection of the notion of “tak[ing] the bitter with the sweet” in relation to deprivations of even statutorily created rights, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (quoting *Arnett v. Kennedy*, 416 U.S. 134, 154, 152–54 (1974)), Congress cannot generally condition a grant or “public franchise” on acceptance of a bar to later claims of a due process violation.

illegal activity, bars from involvement in regulated activities, civil penalties, or disgorgement—due process analysis is capable of providing an appropriately calibrated response.<sup>411</sup> Article III lacks this sensitivity.

The basic takeaway is that constitutional constraints external to Article III, such as the Due Process Clause and nondelegation doctrine, provide separate paths for requiring substantial roles for Article III courts in reviewing non-Article III adjudication. This section by no means provides an exhaustive exposition of these external constitutional constraints. For example, Article I's Suspension Clause and "[t]he Privilege of the Writ of Habeas Corpus" that it describes<sup>412</sup> easily merit similar acknowledgment and discussion.<sup>413</sup> Moreover, regardless of such external constitutional requirements, Congress's unanimous passage of the APA,<sup>414</sup> an act that makes an appellate review model for administrative action the federal system's general default,<sup>415</sup> suggests a likelihood that substantial provision for Article III court review of non-Article III decisionmaking is far from being entirely dependent on constitutional command.

## CONCLUSION

Supreme Court precedents on the constitutionality of non-Article III adjudication have long been perceived as incoherent. This Article presents a framework of physical, operational, and enforcement spaces for the public-rights doctrine that not only comports with text, precedents, and practice, but also reveals the interconnections between the traditional settings for permissible non-Article III adjudication—territorial courts, military courts, and cases involving matters of public right. In so doing, this Article shows how, in practice, the determination of whether a matter is one of public right is much more than a mere matter of form, although form is not entirely unimportant. As the Supreme Court held in *Oil States*, the question of whether a matter is one of public or private right is not determined simply by whether it is the subject of adversarial contention between private parties.<sup>416</sup> Key factors include the nature and the origin of any legal rights at stake—

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411 See Jason Parkin, *Dialogic Due Process*, 167 U. PA. L. REV. 1115, 1119 (2019) (discussing "balancing approach[es]" in due process analysis).

412 U.S. CONST. art. I, § 9, cl. 2.

413 See, e.g., *Rasul v. Bush*, 542 U.S. 466, 474 (2004) (noting that, "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention" (quoting *INS v. St. Cyr*, 533 U.S. 289, 301 (2001))).

414 Richard J. Pierce, Jr., *Agency Adjudication: It Is Time to Hit the Reset Button*, 28 GEO. MASON L. REV. 643, 644 (2021) ("After fifteen years of study and debate, Congress unanimously enacted the APA.").

415 See *supra* Section II.B.

416 See *supra* text accompanying notes 288–90.

in particular, whether they are rooted in state law; whether they are federally created substitutes or analogs for preexisting claims in law, equity, or admiralty; or whether they more distinctively owe their provenance to the national government's existence or creative action. The nature of the relief sought or ordered can also play a critical role. Generally speaking, a matter of private right involves a claim for personalized relief to be awarded from one private party to another.

A further important point is that statutorily created rights can have a hybrid character. Disputes relating to a single set of rights such as patent rights can implicate questions of both public and private right. A party sued for patent infringement may contend that asserted patent rights are invalid. The validity of patent rights is a matter of public right even though assertions of patent infringement may commonly be classified as matters of private right. Hence, a single federal case such as a patent infringement lawsuit can require resolution of both matters of private right (infringement) and matters of public right (validity).

These points about public and private rights reflect four elements of the analytical framework that we develop: our three spatial categories for matters of public right and our proposed definition for matters of private right. According to the latter definition, a matter of private right is one that involves a claim for personalized relief from one private party to another and that is at least a substantial analogue of legal, equitable, or admiralty claims heard by state courts at the time the U.S. Constitution went into effect. Correspondingly, public-rights matters occur within three overlapping spaces for permissible non-Article III adjudication: (1) physical space that is beyond state control and thus distinctively federal; (2) operational space for federal government activity directed to the management of internal affairs or the awarding of rights or benefits created by federal statute; and (3) enforcement space for the pursuit of public objectives under a federal statutory scheme. These spaces encompass the traditional categories of territorial and military adjudication as well as that of public-rights adjudication, but they reorganize those traditional categories in a way that suggests the territorial-court and military-court categories are really just special instances of a greater doctrine of public rights.

Functional and normative underpinnings for our framework are constitutionally sanctioned, commonly forward-looking demands for effective national governance and, as a counterweight, a federalism-oriented, backward-looking understanding of the private-rights core of Article III adjudication. Our framework's attention to the substance of what is at stake, rather than merely the form of a dispute, makes our approach to the public-rights doctrine consistent with Supreme Court

instruction that assessment of the propriety of non–Article III adjudication requires “practical attention to substance” instead of merely “doctrinaire reliance on formal categories.”<sup>417</sup> By binning matters in either public- or private-rights categories, public-rights doctrine necessarily has a somewhat formal flavor. But the formal façade fronts a deeper substantive core. Like formal modeling of photons or electrons alternately as particles or waves, the public/private-rights distinction seeks to use formally distinctive characterizations of phenomena for the effective pursuit of functional ends. For the public-rights doctrine, these ends include respecting a principle of federalism in relation to the adjudication of matters of private right and respecting the needs and appropriate discretionary power of the national government in relation to matters of public right.

Of course, there can be difficult-to-classify phenomena, and reasonable disagreements over the binary classification of such phenomena can lead to justifiable worry about disproportionate effects from settling on one classification or the other. But the hard edges of the effects of a public rights classification can be smoothed through the operation of other constraints, such as due process requirements or a demand for judicial enforcement of limits on delegated power. Likewise, the hard edges of a private-rights classification can be smoothed as well. Although the Supreme Court in *Crowell* recognized the liability claim there to be a matter of private right, the Court approved the use of non–Article III adjudicators in that case at least partly because of the Court’s judgment that the use of such adjudicators had been “shown by experience to be essential” for effective implementation of a congressional scheme for mass adjudication within the federal government’s “admiralty and maritime jurisdiction.”<sup>418</sup> It is not clear that a huge amount necessarily turns on whether a case such as *Jones & Laughlin* is characterized as a matter of public or private right when, as in *Crowell*, non–Article III adjudication even of matters of private right can be legitimized through reliance on the substantially nonreflexive action of Article III courts for the enforcement of administrative orders.<sup>419</sup> Acceptance of party consent as a means to enable dispute resolution outside the Article III courts can also ensure that the private-rights side of public-rights doctrine does not unduly thwart important national goals.<sup>420</sup>

Most fundamentally, the dynamic, forward-looking aspect of our vision of public rights supports a conclusion that Article III presents no bar to the bulk of modern agency adjudication, much of which falls

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417 *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 587 (1985).

418 *Crowell v. Benson*, 285 U.S. 22, 53–55 (1932).

419 *See supra* Section II.B.

420 *See supra* subsection II.C.1.

within what we have called the federal government's "operational space"—encompassing matters of internal affairs and the granting or denial of statutorily created rights or benefits. Moreover, our approach reflects a commonsense inference that some Article I, II, and IV specifications of congressional or executive power implicitly entail an authorization of non-Article III tribunals. At the same time, the backward-looking aspect of our approach enforces acceptance of a robust realm of matters of private right, in which a constitutional demand for access to Article III adjudication protects interests of federalism as well as federal-level separation of powers. Sensitivity to both structural constitutional concerns and the Constitution's mandates for governance permits our account to reconcile a tangled skein of Supreme Court decisions and to provide a balanced response to two of the most intractable and enduring questions in United States constitutional law: What is the "judicial Power of the United States," and how does the Constitution ensure its defense against historically expansive executive and legislative powers?