NON–ARTICLE III FEDERAL TRIBUNALS: AN ESSAY ON THE RELATION BETWEEN THEORY AND PRACTICE

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Since the 1980s, the Supreme Court's decisions involving the permissible uses of non–Article III federal tribunals have repeatedly invoked two competing theories. A "historical-exceptions" or "formalist" model would insist that only Article III judges can exercise federal adjudicative power except in three categories of cases that history marks as exceptional. A rival approach, often labeled "functionalism," would allow further deviations from the historical norm if they are supported by sound practical justifications and do not threaten the fundamental role of the Article III judiciary within the separation of powers. This Article explores the relationship between theory and practice in explaining why neither the historical-exceptions nor the functionalist paradigm has prevailed entirely over the other despite the vastly greater appeal of the former, when viewed in the abstract, to an increasingly originalist Court.

INTRODUCTION

Questions involving the permissible use of non–Article III tribunals have appeared frequently on the docket of the Supreme Court since the 1980s. Beyond possessing importance in their own right,[1] the Court's decisions addressing those questions provide a case study in the influence of legal theories on Supreme Court practice and of the impact of the Court's practice on legal theorizing, including by academics. The complex interaction between theory and practice in cases

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1 According to one tally, as of 2019 there were fewer than 900 authorized Article III judgeships in comparison with over 1,900 officially designated administrative law judges and more than 10,000 additional "agency adjudicators who conduct evidentiary hearings that are required by statute or regulation." Christopher J. Walker, *Charting the New Landscape of Administrative Adjudication*, 69 DUKE L.J. 1687, 1688, 1687–88 (2020).

involving non–Article III federal adjudication is my principal concern in this Article.

There are two leading theoretical accounts of how the courts should decide cases involving the permissible uses or functions of non–Article III tribunals.[2] One, which I shall term the "historical-exceptions" or "formalist" theory, begins with a literal reading of Article III, Section 1[3] as presumptively requiring that all federal officials vested with adjudicative responsibilities must be judges nominated by the President and confirmed by the Senate and endowed with life tenure.[4] Adherents of this approach, which has evolved over time into a form of applied originalism, acknowledge a series of historically recognized exceptions to the apparent requirements of Article III, Section 1, including for military tribunals, territorial courts, and entities, including administrative agencies, charged with resolving "public rights" disputes.[5] But they insist that no further exceptions should be

2 *See, e.g.*, Ortiz v. United States, 138 S. Ct. 2165, 2178 n.7 (2018) (noting the longstanding division between Justices with "functionalist and formalist" approaches to questions involving permissible uses of federal non–Article III adjudicative tribunals); RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 385–86 (7th ed. 2015) (distinguishing "formal" and "functional" approaches to separation-of-powers issues involving non–Article III tribunals); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489 (1987) (distinguishing formalist and functionalist approaches to separation-of-powers issues).

3 U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

4 This approach is exemplified by Justice William Brennan's plurality opinion in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58–59 (1982) (plurality opinion). For discussion, see *infra* notes 24–35 and accompanying text.

5 The category of public rights disputes is notoriously hard to define. *See infra* subsubsection III.B.1.a. FALLON ET AL., *supra* note 2, at 354, lists "three main classes of cases [that] have [historically] formed the doctrine's core": (1) claims against the United States for various opportunities and benefits; (2) "disputes arising from coercive governmental" enforcement of civil laws, including those imposing tax liability; and (3) immigration cases. The Supreme Court recently divided about the breadth of the second category in *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024), with the majority adopting a narrower and the dissenting Justices a more expansive specification. For discussion, see *infra* notes 156–69 and accompanying text. Professor Caleb Nelson offers a different account rooted in the nature of the public or private interests that are involved in particular cases. *See* Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 564 (2007) [hereinafter Nelson, *Adjudication in the Political Branches*]. According to him, public rights, as the term was used in the nineteenth century, arose from interests held by the public in an aggregate capacity. *See id.* at 566. By contrast, private rights involved the "vested" or fundamental interests of citizens in life, liberty, or property. *See id.* at 566–67. In light of this distinction, Nelson concludes that it is a mistake to refer to all cases involving public rights as "public rights

allowed. The labeling of this position as "formalist" reflects its commitment to enforcing constitutional rules as written or historically understood, without further exploration of whether their application to particular cases is necessary or desirable to promote whatever values the rules were designed to serve.[6]

A rival theoretical approach, often labeled as "functionalism," would permit more deviations from Article III literalism and Founding-era practices as long as two conditions are met.[7] First, any evolutionary expansions in the utilization of non–Article III tribunals, which may involve either legislative courts or administrative agencies,[8] must not threaten the fundamental role of the Article III judiciary within the constitutional separation of powers. Second, there must be sound practical justifications for any exceptions to the norm of adjudication by Article III judges that lack historical pedigrees.

Although the historical-exceptions and functionalist approaches to non–Article III tribunals appear to be incompatible with one another, they have endured as rivals since the 1980s. What is more, the Supreme Court's decisions have sometimes reflected the formalist, historical-exceptions theory and sometimes the functionalist analytical

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case[s]." Caleb Nelson, *Vested Rights, "Franchises," and the Separation of Powers*, 169 U. PA. L. REV. 1429, 1437 (2021) [hereinafter Nelson, *Vested Rights*] ("The problem with this way of talking is that the distinction between public and private rights is a way of classifying legal interests, not entire cases."). If a case involved a private right on either side, and if one party sought to resist the divestiture of a fundamental or vested right, then adjudication by an Article III court was required within the "traditional framework" applied by nineteenth-century jurists and lawyers, Nelson maintains. Nelson, *Adjudication in the Political Branches*, *supra*, at 565, 569. Although Professor Nelson's distinction between interests and cases is an analytically cogent one, it appears to result in the exclusion from the public rights category of a number of important cases to which the Supreme Court historically applied the public rights label, including ones involving the coercive collection of taxes. *See* FALLON ET AL., *supra* note 2, at 354 n.5.

6 *See* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988) (describing "the heart of the word 'formalism'" as "the concept of decisionmaking according to *rule*," where the decisionmaker is prevented from considering "factors that a sensitive decisionmaker would otherwise take into account"). *See generally* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 213 (1991).

7 This approach is exemplified by Justice Byron White's dissenting opinion in *Northern Pipeline*, 458 U.S. at 94 (1982) (White, J., dissenting). For discussion, see *infra* notes 37–41 and accompanying text.

8 *See generally* FALLON ET AL., *supra* note 2, at 379–80 (identifying characteristic distinctions between legislative courts and administrative agencies). *Cf.* William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1558, 1564 (2020) (asserting that "[b]ankruptcy courts, military courts, the U.S. Tax Court, and the U.S. Court of Federal Claims are not courts, in the constitutional sense," *id.* at 1558, because they do not exercise "the judicial power of the United States," *id.* at 1564 (emphasis omitted), and all but bankruptcy courts are located in the executive branch).

framework. As a result, the "doctrine" involving the permissible uses of non–Article III adjudicators has long been viewed as conflicted and unstable. This instability raises interesting questions, which I shall address, about why the Justices, even in the absence of changes of Supreme Court membership, sometimes appear to embrace the historical-exceptions or formalist and sometimes the functionalist theory.

A further complication in the relation between theory and practice arises from a transformation in the nature of constitutional debates from the 1980s to the present. When the Supreme Court began its modern struggles with non–Article III federal adjudication in the 1982 case of *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[9] the Court included no self-identified originalists. Since then, originalism has emerged as a frequently dominating influence in constitutional debates as the global rival to a collection of theories grouped under the rubric of "living constitutionalism" or "constitutional pluralism."[10] As originalism has risen as a theory, it has substantially subsumed and partly recast the still-identifiable historical-exceptions theory of the permissible uses of non–Article III adjudicative bodies.[11] A similar transformation has occurred as the functionalist approach of the 1980s has been assimilated into a more overarching theory of living constitutionalism.

Today, as we look to the future, the Supreme Court is widely viewed as dominated by originalist Justices.[12] As a result, the question whether the formalist, historical-exceptions approach will sweep the

9 458 U.S. 50 (1982). I trace the Court's "modern struggles" to *Northern Pipeline*—rather than, say, the Court's iconic decision in *Crowell v. Benson*, 285 U.S. 22 (1932), which is discussed at *infra* notes 22–36, 170–81 and accompanying text—because the plurality and dissenting opinions in *Northern Pipeline* exhibited the first clear opposition of the competing historical-exceptions and functionalist theories that have dominated debates about the permissible uses of non–Article III federal tribunals ever since. *N. Pipeline*, 458 U.S. at 70, 98 (White, J., dissenting).

10 For a conceptual introduction to that debate, see Lawrence B. Solum, Essay, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1244–50, 1271 (2019).

11 *See, e.g.*, Nelson, *Adjudication in the Political Branches*, *supra* note 5, at 564, 614 (rejecting the false allure of purportedly literalist interpretations of Article III and arguing that "early American lawyers had a particular understanding of the distinction between 'public rights' and 'private rights'" that "formed the basis for a framework that was used throughout the nineteenth century to separate matters that required 'judicial' involvement from matters that the political branches could conclusively adjudicate on their own," *id.* at 564).

12 *See, e.g.*, David Cole, *Egregiously Wrong: The Supreme Court's Unprecedented Turn*, N.Y. REV. BOOKS (Aug. 18, 2022), https://www.nybooks.com/articles/2022/08/18/egregiously-wrong-the-supreme-courts-unprecedented-turn-david-cole/ [https://perma.cc/SS5U-5N4J] ("[T]his past term, the new majority aggressively applied originalism . . . , and only they know how far they will go.").

field seems live and important, both in its own terms and as an aspect of the broader contest between originalism and living constitutionalism. Originalist Justices and scholars often express skepticism about a number of the functions that non–Article III tribunals perform in the modern administrative state.[13] In the past, proponents of the historical-exceptions theory, including originalist Justices, rarely demanded a large diminution in the scope of agency adjudication, even when they would not have approved it as an original matter. Originalists can and do give weight to stare decisis.[14] But stare decisis is a principle of policy, not an absolute command.[15] Accordingly, it remains to be seen how conservative, originalist Justices will respond to a variety of challenges to non–Article III adjudication as the surrounding doctrinal context changes, including through the increasing influence of originalist commitments in surrounding separation-of-powers doctrines.

A final aspect of the interrelationship between theory and practice in debates about the permissible uses of non–Article III tribunals involves the influence of legal scholars on the thinking of Supreme Court Justices and, reciprocally, the impact of Supreme Court practice on legal scholarship. My agenda for this Article thus includes consideration of the impact that scholarly theorizing about adjudication by non–Article III tribunals has had on the Court in the past and that it is likely to have in the future. I shall also be concerned, though more incidentally, with how the decisions and outlooks of the Justices have influenced, and how they are likely to continue to influence, the nature of the scholarship that law professors interested in non–Article III adjudication find worth pursuing.

Part I of this Article identifies the origins of modern debates about the permissible uses of non–Article III tribunals in cases in the Supreme Court during the early 1980s. It also explores those cases' relationship to other separation-of-powers issues that similarly elicited rival formalist and functionalist analytical approaches during the same

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13 *See, e.g.*, SEC v. Jarkesy, 144 S. Ct. 2117 (2024) (invalidating a provision authorizing the SEC to adjudicate an action for civil penalties); Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1380 (2018) (Gorsuch, J., dissenting) (rejecting the notion that "a political appointee and his administrative agents, instead of an independent judge" may cancel a previously issued patent).

14 *See, e.g.*, J. Joel Alicea, *The Originalist Jurisprudence of Justice Samuel Alito*, 46 HARV. J.L. & PUB. POL'Y 653, 657 (2023) ("It is widely accepted among originalist scholars and jurists alike that some version of *stare decisis* is compatible with originalism."); Michael W. McConnell, Lecture, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1763–76 (2015); *see also* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 42–44 (2019); William Baude, Essay, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2358–61 (2015).

15 *E.g.*, Payne v. Tennessee, 501 U.S. 808, 828 (1991) (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940)).

period. Part II describes the impact that the advent of originalism has had in partially transforming debates about non–Article III tribunals. Part III looks to the future and seeks to anticipate ways in which scholarly literature might influence the Justices' decisions on important issues that seem sure to arise in the years ahead.

By way of conclusion, Part IV reflects on the relationship between the historical-exceptions and functionalist approaches to issues involving non–Article III tribunals, as more recently refracted through originalist and living-constitutionalist interpretive theories, and Supreme Court practice. Even when the Court's guiding theoretical and normative visions are clear, Part IV emphasizes, it can be difficult to predict how far a majority of the Justices will ultimately be prepared to go in upsetting settled precedents and practices.

I. ORIGINS OF MODERN DEBATES ABOUT NON–ARTICLE III FEDERAL TRIBUNALS

This Part traces the origins of modern legal theories about the permissible uses of non–Article III tribunals to the Supreme Court's 1982 decision in *Northern Pipeline*. Justice Brennan's plurality opinion in that case marked the genesis of the historical-exceptions or formalist theory; Justice White's dissent helped to launch the alternative functionalist interpretive paradigm. After introducing the historical-exceptions and functionalist approaches, this Part briefly discusses the relationship between *Northern Pipeline* and other separation-of-powers disputes with which the Supreme Court struggled in the 1980s and early 1990s. It then charts the effect of originalist theory in partly subsuming and transforming debates about non–Article III adjudication.

A. *The* Northern Pipeline *Case*

Northern Pipeline arose from a statute purporting to specify the permissible responsibilities of non–Article III bankruptcy judges as including the adjudication of state-law claims by a debtor against a defendant who was not previously a party to the bankruptcy proceeding.[16] There was no doubt that the case came within "[t]he judicial Power of the United States"[17] and that Congress could have provided for its adjudication in an Article III court.[18] But the Bankruptcy Act of 1978[19] had

16 N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 54, 56 (1982) (plurality opinion).

17 U.S. CONST. art. III, § 1.

18 *See N. Pipeline*, 458 U.S. at 62 (plurality opinion).

19 Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.

authorized trial in the first instance in a non–Article III bankruptcy court.[20]

The issue of the power of a bankruptcy court to adjudicate a state-law claim such as that in *Northern Pipeline* (subject to appellate review in an Article III court) might have seemed narrow and technical except for the two-pronged theory that the government advanced in defense of the statutory scheme. The Solicitor General maintained first that Congress had broad discretion to employ specialized non–Article III tribunals to enforce nearly any kind of federal legislation enacted pursuant to Article I, at least where "particularized needs" existed.[21] Second, the government purported to draw support from a line of cases, tracing to the watershed decision in *Crowell v. Benson*[22] in 1932, in which the Supreme Court had permitted administrative agencies to resolve not only public rights cases but also "private rights" disputes involving the liability of one private citizen to another.[23] If agencies could adjudicate claims involving private rights, the government argued, then so could non–Article III bankruptcy judges, provided that any private rights issues that came before them (including those arising under state law) were somehow related to a bankruptcy case.

Mostly without questioning the validity of the precedents on which the government relied, Justice Brennan's plurality opinion in *Northern Pipeline* sought to characterize the cited cases as marking only three narrow, historically accepted exceptions—involving territorial courts, military tribunals, and entities set up to resolve public rights claims[24]—to an imagined norm that all adjudicators employed by the federal government must be Article III judges.[25] Having done so, the plurality proposed to extract a historically established and therefore controlling framework for decision: Article III requires that if Congress wishes to provide for original federal jurisdiction in any case within the scope of "the judicial Power," it must utilize an Article III

20 *N. Pipeline*, 458 U.S. at 54 (plurality opinion).

21 *See id.* at 62 ("[I]t is urged that 'pursuant to its enumerated Article I powers, Congress may establish legislative courts that have jurisdiction to decide cases to which the Article III judicial power of the United States extends.' Referring to our precedents upholding the validity of 'legislative courts,' appellants suggest that 'the plenary grants of power in Article I permit Congress to establish non-Article III tribunals in "specialized areas having particularized needs and warranting distinctive treatment,"' such as the area of bankruptcy law." (citation omitted) (quoting Brief for the United States at 9, *N. Pipeline*, 458 U.S. 50 (Nos. 81-150, 81-546))); *see also, e.g.*, Brief for the United States, *supra*, at 19–23; Reply Brief for the United States at 3, *N. Pipeline*, 458 U.S. 50 (Nos. 81-150, 81-546).

22 285 U.S. 22 (1932).

23 *See N. Pipeline*, 458 U.S. at 76–87 (plurality opinion).

24 *See id.* at 70–71.

25 *See id.* at 70 (asserting that the Court "has identified [only] three situations in which Art[icle] III does not bar the creation of legislative courts").

court unless the case falls within one of the three exceptions that the Court had identified.[26] Insofar as bankruptcy was concerned, Justice Brennan appeared to assume that core bankruptcy disputes about how to divide a debtor's assets under federal bankruptcy law could be assigned to bankruptcy judges.[27] But the same was not true, he insisted, of the state-law claim by a bankruptcy trustee seeking to collect the estate's assets from a noncreditor.[28]

Agency adjudication of private rights disputes under federal regulatory statutes, as ratified in *Crowell*,[29] poses a major challenge to the historical-exceptions approach. In *Northern Pipeline*, Justice Brennan responded by embracing a theory initially articulated in *Crowell* itself.[30] *Crowell* had upheld the authority of a federal agency to initially adjudicate private rights disputes under a federal statute on the theory that statutory provisions for enforcement of the agency's judgments or review of its decisions by Article III courts, which made de novo determinations of all questions of law, retained the "essential attributes of the judicial power"[31] in the Article III judiciary.[32]

Although accepting that *Crowell* was correctly decided based on the premise that the agency involved in that case functioned as an "adjunct" to the Article III courts, Justice Brennan held the adjunct theory inapplicable to the facts of *Northern Pipeline*.[33] When Congress creates a federal statutory right, he wrote, it "possesses substantial discretion to prescribe the manner in which that right may be adjudicated—including the assignment to an adjunct of some functions historically

26 *See id.* at 76.

27 *See id.* at 71.

28 *Id.*

29 Crowell v. Benson, 285 U.S. 22, 51–54 (1932).

30 *See N. Pipeline*, 458 U.S. at 78 (plurality opinion).

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

32 *Id.* at 53. The Court has subsequently referred to its acceptance of a fact-finding role for administrative agencies in private rights cases as based on the theory that the agencies function as "adjuncts" to the Article III courts. *See, e.g.*, Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 450 n.7 (1977) (stating that, in cases which involve only private rights, the "Court has accepted factfinding by an administrative agency, without intervention by a jury, only as an adjunct to an Art. III court, analogizing the agency to a jury or a special master and permitting it in admiralty cases to perform the function of the special master" (citing *Crowell*, 285 U.S. at 51–65)); *N. Pipeline*, 458 U.S. at 78 (plurality opinion) ("[T]his Court has sustained the use of adjunct factfinders even in the adjudication of constitutional rights . . . ."); *id.* at 84–87 (analyzing whether bankruptcy courts could reasonably be described as adjuncts to Article III courts, and concluding that they could not be); Stern v. Marshall, 564 U.S. 462, 487–88, 500–01 (2011) (same); Nelson, *Adjudication in the Political Branches*, *supra* note 5, at 605–09; James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 660–62 (2004).

33 *See N. Pipeline*, 458 U.S. at 77–78, 86 (plurality opinion).

performed by judges."[34] According to Justice Brennan, any such discretion was much narrower in the case of the state common-law right at issue in *Northern Pipeline*.[35] Justice Rehnquist, joined by Justice O'Connor, concurred in the judgment on the narrow ground that Article III prohibited Congress from conferring jurisdiction on a non–Article III federal tribunal to adjudicate state common-law actions.[36]

Writing in dissent, Justice White accused Justice Brennan of producing a list of permissible uses of non–Article III federal adjudicative tribunals but failing to adduce any rationalizing principles.[37] In place of Justice Brennan's historical-exceptions framework for analysis, Justice White offered a version of functionalism.[38] Although the details of the theory that Justice White advanced have not become canonical, the general outlines of his approach have echoed through subsequent cases and the surrounding scholarly literature.[39] As noted above, the functionalist paradigm requires consideration of whether Congress has an acceptable reason for wanting to utilize non–Article III federal adjudicators in the type of case at issue and whether a particular scheme threatens the core role of the judicial branch under the separation of powers.[40] In functionalist appraisals of threats to essential judicial functions, the availability of appellate review by an Article III court carries great weight.[41]

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34 *Id.* at 80.

35 *See id.* at 81–84. Justice Brennan also concluded that the delegation of power to the bankruptcy courts was "far greater" than that given to the agency in *Crowell*—including the adjudication of potentially more kinds of matters subject to what the plurality took to be a less searching standard of judicial review—and thus failed to pass constitutional muster under Article III. *Id.* at 86, 85–86.

36 *See id.* at 90–91 (Rehnquist, J., concurring in judgment).

37 *See id.* at 105 (White, J., dissenting).

38 *See id.* at 113 (defending an approach under which Article III "should be read as expressing one value that must be balanced against competing constitutional values and legislative responsibilities").

39 *See, e.g.*, Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 668–86 (2015); CFTC v. Schor, 478 U.S. 833, 835–59 (1986); *see also* FALLON ET AL., *supra* note 2, at 385–90.

40 *See, e.g.*, *Schor*, 478 U.S. at 851 (indicating that the Court should consider "the extent to which the 'essential attributes of [] judicial power' are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts," and "the origins and importance of . . . the concerns that drove Congress to depart from the requirements of Article III" (quoting Crowell v. Benson, 285 U.S. 22, 51 (1932)) (first citing Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 587, 589–93 (1985); and then citing *N. Pipeline*, 458 U.S. at 84–86 (plurality opinion))).

41 *See, e.g.*, *N. Pipeline*, 458 U.S. at 116 (White, J., dissenting) ("First, ample provision is made for appellate review by Art. III courts."); *Schor*, 478 U.S. at 853. For an emphasis on the importance of judicial review, see Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988). For arguments that a theory emphasizing appellate review as necessary to justify reliance on non–Article III federal

B. Context and Immediate Aftermath

Northern Pipeline was important, not simply as a decision about permissible adjudication by non–Article III tribunals, but as the first in a set of separation-of-powers cases decided by the Supreme Court during the 1980s that asked the Justices to choose between formalist and functionalist analytical frameworks. *Immigration & Naturalization Service v. Chadha*,[42] decided a year later, considered the constitutional validity of a statute authorizing one house of Congress, by majority vote, to "veto" proposed actions by the executive branch in the exercise of congressionally delegated authority.[43] As in *Northern Pipeline*, the lead opinion—though this time written for a majority of the Justices by Chief Justice Warren Burger—adopted a formalist approach. The Constitution, Burger reasoned, provides in clear terms that the role of Congress is to legislate and that legislation requires majority or supermajority votes by both the House and Senate followed by "presentment" to the President, to whom alone the Constitution assigns a veto power.[44] Legislative veto provisions, in the view of the Chief Justice, were incompatible with this design.[45] And the Court, according to the majority, had no authority to weigh policy arguments in defense of legislative vetoes. Instead, the Justices were bound by "[t]he choices . . . made in the Constitutional Convention."[46]

As in *Northern Pipeline*, Justice White authored a functionalist dissent. The underlying premise of Article I, he posited, was that federal lawmaking should reflect concurrent agreements among the House, the Senate, and the President.[47] In the modern world, he thought, Congress could no longer reasonably be expected to craft legislation in all of the detail needed to address complex problems; it therefore had little practical alternative but to delegate relatively open-ended authority to the executive branch to engage in rulemaking and otherwise craft policy.[48] But when the executive branch makes rules, Justice

tribunals lacks support in original constitutional history, 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, 1936–37 (2021). *See also* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 942 (2011) (arguing that the modern appellate review model, which emerged in the early twentieth century, replaced an earlier "bipolar" approach in which courts either employed prerogative writs such as mandamus to review agency action on a nondeferential basis on a court-made record or provided no judicial review at all).

42 462 U.S. 919 (1983).

43 *Id.* at 925, 923–25.

44 *See id.* at 945–51.

45 *See id.* at 951–58.

46 *Id.* at 959.

47 *See id.* at 994–95 (White, J., dissenting).

48 *See id.* at 967–68.

White continued, the risk arises that one or both houses of Congress might not approve of what it has done.[49] Under those circumstances, Justice White concluded, legislative veto provisions restore the original constitutional balance by ensuring that Congress concurs in, or at least does not object to, rules propounded by the executive branch that have the force of federal law.[50]

In the subsequent case of *Bowsher v. Synar*,[51] a majority of the Justices once again invalidated an important federal statute in an opinion characterized by formalist, quasi-literalist constitutional analysis. At issue in *Bowsher* was the Balanced Budget and Emergency Deficit Control Act of 1985,[52] which required cuts to federal spending if the federal budget deficit in any given year exceeded a specified ceiling.[53] Ultimate responsibility for calculating the size of budget deficits rested with the Comptroller General of the United States.[54] But a different statute purported to give Congress the power to remove the Comptroller General (for specified causes) by passing a joint resolution.[55] Chief Justice Burger's majority opinion invalidated the Act's budget-reduction mechanism on the ground that Congress's reservation of removal power over the Comptroller General violated the constitutional separation of powers. "Once the appointment [of a federal officer] has been made and confirmed . . . the Constitution explicitly provides for removal of Officers of the United States by Congress only upon impeachment by the House of Representatives and conviction by the Senate," he reasoned.[56]

Once more, Justice White dissented on functionalist grounds. He would have upheld the Comptroller's removability by Congress on the ground that it possessed "minimal practical significance" and presented "no substantial threat to the basic scheme of separation of powers."[57] Justice White situated his *Bowsher* dissent as the latest installment, after *Northern Pipeline* and *INS v. Chadha*, in a line of dissenting opinions rejecting what he called the Court's "distressingly formalistic

49 *See id.* at 994.

50 *Id.* at 994–95.

51 478 U.S. 714 (1986).

52 Pub. L. No. 99-177, 99 Stat. 1038.

53 *Bowsher*, 478 U.S. at 717–18.

54 *Id.* at 718.

55 *Id.* at 727–28.

56 *Id.* at 723. The majority also likened Congress's reservation of removal power over the Comptroller to the legislative veto invalidated in *Immigration & Naturalization Service v. Chadha*, reasoning that "[t]o permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto" over the executive's actions, since "Congress could simply remove, or threaten to remove, an officer for executing the laws" in an unsatisfactory manner. *Id.* at 726.

57 *Id.* at 759 (White, J., dissenting).

view of separation of powers as a bar to the attainment of governmental objectives."[58]

During the same period, however, other Supreme Court decisions relied on functionalist reasoning. *Thomas v. Union Carbide Agricultural Products Co.*[59] upheld a congressionally mandated scheme of binding arbitration, subject only to limited judicial review, to determine the entitlement of one private party to compensation by another private party for the use of its data in connection with a pesticide-registration scheme.[60] In an opinion by Justice O'Connor, the Court pronounced flatly that "[a]n absolute construction of Article III" was not tenable in light of the Court's precedents.[61] According to Justice O'Connor, "[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."[62] Based on that reasoning, the Court ruled that, even though the case involved a dispute between private parties, the right at issue was sufficiently integral to a legislative scheme so that it was "not a purely 'private' right, but [bore] many of the characteristics of a 'public' right."[63]

Justice Brennan, who had advanced a formalist, historically grounded analysis in *Northern Pipeline*, concurred in the judgment only.[64] As in *Northern Pipeline*, he thought the distinction between public and private rights crucial in determining the permissibility of non–Article III adjudication.[65] Even so, he concluded (with some hesitation) that the case lay within the public rights category.[66] Although the dispute "involve[d] . . . the duty owed one private party by another," Justice Brennan located it on the public rights side of the line, as defined by cases including *Northern Pipeline*, because it grew out of "the exercise of authority by a Federal Government arbitrator in the course of administration of [a] comprehensive [federal] regulatory scheme."[67]

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58 *See id.* (first citing N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 92–118 (1982) (White, J., dissenting); and then citing Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 967–1003 (1983) (White, J., dissenting)).

59 473 U.S. 568 (1985).

60 *Id.* at 571.

61 *Id.* at 583.

62 *Id.* at 587.

63 *Id.* at 589.

64 *Id.* at 594 (Brennan, J., concurring in judgment).

65 *See id.* at 598.

66 *See id.* at 600 ("Though the issue before us in this case is not free of doubt, in my judgment the . . . compensation scheme challenged in this case should be viewed as involving a matter of public rights as that term is understood in the line of cases culminating in *Northern Pipeline*.").

67 *Id.* at 600–01.

The Court's opinion in *CFTC v. Schor*,[68] again written by Justice O'Connor, was equally functionalist. In *Schor*, the Court permitted a federal administrative agency adjudicating a private rights dispute under a federal regulatory statute to rule on a state-law counterclaim.[69] The Court based its approval of the challenged scheme partly, though not exclusively, on the consent of the parties to administrative adjudication of the state-law claim.[70] Justice O'Connor expressly declined to adopt "formalistic and unbending rules" to assess the permissibility of adjudication by non–Article III federal tribunals.[71] Instead, the Court "weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary."[72]

Two years later, the Court's opinion in *Morrison v. Olson*,[73] which upheld statutory limits on the President's authority to fire independent counsel investigating wrongdoing by the executive branch,[74] also rested its conclusion on a functionalist analysis. Balancing competing factors, Chief Justice William Rehnquist's opinion for the Court determined that the challenged law served important purposes and neither "'impermissibly undermine[d]' the powers of the Executive Branch, [n]or 'disrupt[ed] the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions.'"[75]

Although the *Morrison* majority's reasoning was functionalist, the case is noteworthy, in retrospect, for Justice Scalia's solitary, formalist dissent. Relying on the text of Article II's Vesting Clause, Justice Scalia reasoned that because the conduct of a criminal prosecution is an exercise of executive power, statutory restrictions on the president's ability to remove independent counsels violated Article II's grant of "[t]he executive Power" to the president.[76]

In the final major separation-of-powers decision of the 1980s, *Granfinanciera, S.A. v. Nordberg*,[77] Justice Brennan's majority opinion

68 478 U.S. 833 (1986).

69 *Id.* at 847–59.

70 *See id.* at 850. The majority further analyzed whether the agency's adjudication would "impermissibly threaten[] the institutional integrity of the Judicial Branch," notwithstanding the parties' consent. *Id.* at 851 (citing *Thomas*, 473 U.S. at 587).

71 *Id.* at 851 (citing *Thomas*, 473 U.S. at 587).

72 *Id.* (citing *Thomas*, 473 U.S. at 590).

73 487 U.S. 654 (1988).

74 *Id.* at 659–60, 660 n.2.

75 *Id.* at 695 (fourth and fifth alterations in original) (first quoting *Schor*, 478 U.S. at 856; and then quoting Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977)).

76 *Id.* at 705 (Scalia, J., dissenting) (quoting U.S. CONST. art. II, § 1, cl. 1).

77 492 U.S. 33 (1989).

sought at one level to reaffirm the formalist, categorical approach that the *Northern Pipeline* plurality had adopted. At the same time, however, he muddied the waters by blurring the definition of the public rights category, just as he had in his concurring opinion in *Thomas v. Union Carbide*. According to the *Granfinanciera* majority, the definition of public rights subject to administrative adjudication could encompass "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."[78]

Even apart from that amalgamation, the majority opinion in *Granfinanciera* tested the limits of coherence. At issue was whether a bankruptcy court could adjudicate a bankruptcy trustee's claim to recover a fraudulent conveyance from a noncreditor who had not submitted a claim against the bankruptcy estate.[79] But the case also presented a second, related question of whether the defendant had a right to a jury trial under the Seventh Amendment. Early in the opinion, Justice Brennan suggested that the Article III and Seventh Amendment questions would track one another.[80] He began with the Seventh Amendment. The Seventh Amendment, he held, entitles the defendant in a fraudulent conveyance action to a jury trial.[81] That ruling required the Court to confront and distinguish *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*,[82] which had affirmed the existence of a public rights exception to the jury trial guarantee.[83] According to Justice Brennan, the fraudulent conveyance action in *Granfinanciera* involved a claim of private right to which *Atlas Roofing* did not apply.[84] In

78 *Id.* at 54 (quoting Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 594 (1985)).

79 *Id.* at 36. Congress had designated fraudulent conveyance actions as "core proceedings" that could be adjudicated in bankruptcy court; the issue was whether this designation, as applied to the facts at hand, was consistent with the Constitution. *Id.* (quoting 28 U.S.C. § 157(b)(2) (Supp. V 1988)).

80 *Id.* at 53–54.

81 *Id.* at 49; *see also* U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

82 430 U.S. 442 (1977).

83 *Granfinanciera*, 492 U.S. at 51 ("In *Atlas Roofing*, we noted that 'when Congress creates new statutory "public rights," it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be "preserved" in "suits at common law."'" (quoting *Atlas Roofing*, 430 U.S. at 455)).

84 *Id.* at 55 & n.10. The Court also clarified that, for actions at law within the meaning of the Seventh Amendment, the question of whether a jury trial is required overlaps entirely with the question of whether an Article III court is required to adjudicate the cause of action. *See id.* at 53 ("[I]f a statutory cause of action is legal in nature, the question whether

reaching that conclusion, Justice Brennan relied on his *Northern Pipeline* plurality opinion for the proposition that "state-law causes of action for breach of contract or warranty," like the one before the Court, "are paradigmatic private rights, even when asserted by an insolvent corporation" in the midst of bankruptcy proceedings.[85] Crucial to his analysis, however, was that the fraudulent conveyance defendants had not submitted a claim to recover money from the bankruptcy estate.[86] If they had, Justice Brennan suggested, then the action might have fallen within the public rights exception to both the Seventh Amendment and Article III.[87] In a final perplexing twist, the *Granfinanciera* Court remanded the case to the lower court to determine whether a bankruptcy court could conduct the jury trial that the Seventh Amendment required.[88]

C. *The Formalism vs. Functionalism Debate at the End of the Beginning*

As the juxtaposition of the Supreme Court's formalist and functionalist decisions from the 1980s suggests, the Court as then constituted had no stable compass in dealing with separation-of-powers issues, including but not limited to those involving the permissible uses of non–Article III adjudicative tribunals.[89] Critics viewed the Court's alternation between formalist and functionalist paradigms as chaotic.[90]

Some of the Justices, moreover, took positions that might seem surprising in light of their usual approaches to constitutional adjudication. Justice Brennan was a prime example. Although frequently labeled as a living constitutionalist, he pioneered the formalist or historical-exceptions approach to determining the permissible uses of non–Article III tribunals. His manifest goal in *Northern Pipeline*, whose framework he adhered to throughout his career, was to draw clear lines

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the Seventh Amendment permits Congress to assign [a cause of action's] adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal."). That is because the same public rights doctrine provides an exception to both the Seventh Amendment's jury trial requirement and Article III's requirement that federal adjudicators must enjoy tenure and salary protections. *Id.*

85 *Id.* at 56.

86 *Id.* at 58.

87 *See id.* at 58–59; *see also id.* at 57 (discussing Katchen v. Landy, 382 U.S. 323 (1966)); *id.* at 53 (explaining that "if a statutory cause of action . . . is not a 'public right' for Article III purposes, then Congress may not assign its adjudication to a specialized non-Article III court lacking 'the essential attributes of the judicial power'" (quoting Crowell v. Benson, 285 U.S. 22, 51 (1932))).

88 *Id.* at 64–65.

89 *See* Strauss, *supra* note 2, at 526 ("[T]he Court appears to be at sixes and sevens about the appropriate analytic technology for resolving separation-of-powers issues.").

90 *See id.*

to stop erosions of judicial power that might ultimately threaten the core functions of the Article III judiciary.[91]

As critics pointed out, however, Justice Brennan's methodological approach was ill-adapted to his purpose at least in part.[92] In adopting a formalist or historical-exceptions framework to appraise permissible uses of non–Article III federal tribunals, he appeared to accept that cases within the historically defined public rights category—which would minimally include disputes about entitlements to governmental benefits including Social Security and Medicare and most immigration cases—fell within an exception to the literal mandate of Article III and did not require any federal judicial involvement at all unless Congress chose to authorize it.[93] Assigning that significance to the public rights label would permit Congress to insulate even constitutional issues arising in public rights disputes from federal judicial review—a result that Justice Brennan would have found anathema.[94]

II. MORE RECENT DEVELOPMENTS IN THE DEBATE ABOUT NON–ARTICLE III TRIBUNALS AND ITS SURROUNDING CONTEXT

Since the 1980s, the two main paradigms for analyzing the permissible uses of non–Article III federal adjudicators have remained roughly the same: a formalist or historical-exceptions approach endures, as does a functionalist alternative.[95] Over time, Justice Antonin Scalia succeeded Justice Brennan as perhaps the leading champion of the historical-exceptions paradigm.[96] Chief Justice John Roberts has

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91 *See* Merrill, *supra* note 41, at 996 (describing "Justice Brennan's plurality opinion in *Northern Pipeline*" as "the ultimate manifestation of . . . anxiety" about transfer of adjudicative responsibilities to non–Article III tribunals as threats to core judicial functions); Strauss, *supra* note 2, at 513 (noting that Justice Brennan's "sense of the importance and vulnerability of the Court . . . may explain the strong interest in formalism by a Justice so often prone to insist on the Constitution's flexibility and adaptability").

92 *See* Martin H. Redish, *Legislative Courts, Administrative Agencies, and the* Northern Pipeline *Decision*, 1983 DUKE L.J. 197, 209–10 (criticizing the *Northern Pipeline* decision on this ground).

93 *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 68 (1982) (plurality opinion) (asserting that "[t]he understanding" of historical public rights cases was that "the Framers expected that Congress would be free to commit such matters completely to nonjudicial executive determination").

94 In cases not involving the permissibility of non–Article III adjudication, Justice Brennan joined opinions concluding that to interpret federal statutes as precluding all judicial review of constitutional questions, even in paradigmatic public rights cases, would raise a very serious constitutional question. *See, e.g.*, Webster v. Doe, 486 U.S. 592, 603 (1988); Bowen v. Mich. Acad. of Fam. Physicians, 476 U.S. 667, 681 n.12 (1986).

95 *See, e.g.*, FALLON ET AL., *supra* note 2, at 385–86.

96 *See, e.g.*, Stern v. Marshall, 564 U.S. 462, 504–05 (2011) (Scalia, J., concurring) ("Leaving aside certain adjudications by federal administrative agencies, which are governed (for better or worse) by our landmark decision in *Crowell v. Benson*, 285 U.S. 22

also embraced a historical-exceptions approach, apparently for the same reason as Justice Brennan had: he fears, and seeks to forestall, a case-by-case nibbling away of the central role of the Article III judiciary within the constitutional separation of powers.[97] On the other side of the divide, in cases subsequent to the 1980s, Justice Stephen Breyer stepped into the shoes of Justice White as a leading defender of functionalism.[98] Justice Sonia Sotomayor has also appeared committed to a functionalist approach.[99]

As the composition of the Supreme Court has changed, however, the competing historical-exceptions and functionalist analytical paradigms have been partly reformulated in light of a larger methodological debate about the comparative merits of originalism and living constitutionalism. This Part traces the partially transformative effects of the rise of constitutional originalism on debates about permissible uses of non–Article III tribunals. Section A briefly discusses the rise of originalism and the emergence of living constitutionalism as a general methodological rival. In order to provide a comparative perspective on the partly reshaped debates about non–Article III tribunals, Section B provides a thumbnail sketch of the apparent influence of formalist-originalist analytical frameworks in Supreme Court cases involving the President's appointment and removal powers. Section C then

(1932), in my view an Article III judge is required in *all* federal adjudications, unless there is a firmly established historical practice to the contrary."); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 70 (1989) (Scalia, J., concurring in part and concurring in judgment) (insisting that separation-of-powers principles must be protected by rules, not a "multifactored 'balancing test,'" and calling for a "return to the longstanding principle that the public rights doctrine requires, at a minimum, that the United States be a party to the adjudication").

97 *See Stern*, 564 U.S. at 503 ("Slight encroachments create new boundaries from which legions of power can seek new territory to capture." (quoting Reid v. Covert, 354 U.S. 1, 39 (1957) (plurality opinion))); Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 688 (2015) (Roberts, C.J., dissenting) (dissenting from a decision upholding bankruptcy court jurisdiction over a state-law claim and warning that "[t]he next time Congress takes judicial power from Article III courts, the encroachment may not be so modest—and we will no longer hold the high ground of principle").

98 *See, e.g.*, *Stern*, 564 U.S at 506, 512–13 (Breyer, J., dissenting) (rejecting a rigid historical-exceptions-based approach to determining the permissibility of non–Article III federal adjudication and concluding that the Court should "determine pragmatically whether a congressional delegation of adjudicatory authority to a non-Article III judge violates the separation-of-powers principles inherent in Article III," *id.* at 512–13).

99 See, for example, her opinion for the Court in *Wellness International*, 575 U.S. at 678–79, which permitted bankruptcy court jurisdiction over a state-law counterclaim based on the consent of the parties pursuant to a balancing analysis, as laid out by *CFTC v. Schor*, 478 U.S. 833, 851 (1986), and her dissent in *SEC v. Jarkesy*, 144 S. Ct. 2117, 2155, 2175 (2024) (Sotomayor J., dissenting), which would have allowed agency adjudication of government actions seeking civil penalties for violations of the securities laws based partly on the premise that "[t]here are good reasons for Congress" to set up such a scheme.

discusses recent patterns of decision in cases specifically involving the permissible uses of non–Article III adjudicators.

A. *The Partially Transformative Influence of Originalism and Living Constitutionalism*

In 1982, as noted above, the Supreme Court included no consistent champions of constitutional originalism. Since then, however, as originalism has gained an increasing foothold both in the Supreme Court and in legal academia, it has substantially subsumed and partly transformed the formalist or historical-exceptions approach to issues involving non–Article III federal adjudication. The presumption that Article III should be read literally with which Justice Brennan began in *Northern Pipeline* has yielded to specific historical research and text-based analysis concerning the original meaning of Article III.[100] Of perhaps greater significance, Justices who are drawn to originalism are now likely to see the historical-exceptions analytical paradigm—slightly reframed as reflecting purported original understandings of permissible categories of non–Article III adjudication—as supported or even entailed by originalist commitments. In a closely related development, critics of the functionalist model have increasingly attacked it by adopting the originalist complaint that living constitutionalism is untethered to law and affords judges undue discretion.[101]

Correspondingly, as the association of the historical-exceptions framework with originalism has strengthened, few if any judicial liberals have followed Justice Brennan in embracing a robust version of that methodology for gauging the limits that the Constitution places on non–Article III adjudication. Instead, proponents of functionalism have increasingly attacked the historical-exceptions approach for exhibiting what they take to be originalism's more general flaws. Among other complaints, functionalists have argued that it is difficult to identify original meanings with sufficient specificity to resolve a number of currently disputed cases[102] and that an originalist approach, if pursued

100 *See* Baude, *supra* note 8, at 1557 ("[W]e are not put to a choice between the Constitution's text and the broad sweep of history. Once we have closer attention to the separation of powers, it is quite plausible that Article III's meaning has been properly 'liquidated' through such examples as territorial courts, public rights, and military courts." (footnote omitted)).

101 *See, e.g.*, *Granfinanciera*, 492 U.S. at 70 (Scalia, J., concurring in part and concurring in judgment) (insisting that the separation-of-powers principles at stake when Congress assigns adjudicative responsibilities to non–Article III tribunals must be protected by rules, not a "multifactored 'balancing test'").

102 *See* Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421, 1427 (2021). Some originalists acknowledge that original meanings can be pertinently vague in some respects and argue that courts, in such cases, must adopt

without exceptions, could have potentially disastrous implications.[103] In a more affirmative vein, champions of the functionalist paradigm have endorsed the general, living-constitutionalist claim that vague, organic law should be interpreted in ways sensitive to practical desiderata and functional imperatives.

B. Patterns of Supreme Court Decisions

In separation-of-powers cases not involving non–Article III tribunals, the general trend of Supreme Court decisions subsequent to the 1980s has run in favor of originalist formalism. In the most general terms, this course reflects the much-noted ascendency of originalism as a constitutional interpretive methodology among the Justices of the Supreme Court. The pattern is especially notable in cases involving the President's appointment power under Article II, Section 2, Clause 2[104] and the President's removal power under the Article II Vesting Clause[105] and the Take Care Clause.[106]

The Appointments Clause distinguishes between principal officers, who must be appointed by the President and confirmed by the Senate, and inferior officers, whose appointments Congress may vest "in the President alone, in the Courts of Law, or in the Heads of

constructions that are consistent with the letter and the spirit of the uncertain language. *See, e.g.*, RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT 6–12 (2021). For arguments that courts have fared poorly in attempting to determine the permissible use of military tribunals based on a complex historical record, see Martin S. Lederman, *The Law(?) of the Lincoln Assassination*, 118 COLUM. L. REV. 323 (2018); Martin S. Lederman, *Of Spies, Saboteurs, and Enemy Accomplices: History's Lessons for the Constitutionality of Wartime Military Tribunals*, 105 GEO. L.J. 1529 (2017).

103 *See, e.g.*, *Stern*, 564 U.S. at 506, 519–21 (Breyer, J., dissenting). The majority, which invalidated the assignment of a private rights dispute to a non–Article III bankruptcy court, distinguished agency adjudication of private rights disputes but without affirming explicitly that agency adjudication in private rights cases stands on a sound constitutional footing. *See id.* at 490 n.6, 494 (majority opinion).

104 U.S. CONST. art. II, § 2, cl. 2 (providing that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments").

105 *Id.* § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

106 *Id.* § 3 (providing that the President "shall take Care that the Laws be faithfully executed").

Departments" without need for Senate confirmation.[107] Yet the text of the Appointments Clause does not explain how to differentiate between principal and inferior officers. To resolve challenges to exercises of power by officials who were not appointed by the President and confirmed by the Senate, the Supreme Court has adopted a formalist test that asks whether the officer has a supervisor (to whom the officer is thus "inferior") as distinguished from pursuing a more functionalist inquiry into the importance of the powers that an officer exercises.

Edmond v. United States,[108] which upheld the Secretary of Transportation's authority to appoint judges of the Coast Guard Court of Criminal Appeals on the ground that the judges were "inferior [o]fficers,"[109] illustrates the Court's method of analysis. Decided nine years after *Morrison v. Olson* had held that an independent counsel was an "inferior officer"[110] based on a multipart, functionalist inquiry,[111] *Edmond* characterized *Morrison* as not having "purport[ed] to set forth a definitive test" to differentiate between inferior and principal officers.[112] With *Morrison* thus distinguished, *Edmond* held that, "[g]enerally speaking, . . . [w]hether one is an 'inferior' officer depends on whether he has a superior."[113] Under that test, the method of appointment of Coast Guard Court of Criminal Appeals judges easily passed muster because other officers supervised them.[114]

United States v. Arthrex, Inc.[115] extended *Edmond*'s formalist approach. *Arthrex* considered the constitutional basis for the Patent Trial and Appeal Board's review of challenges to previously issued patents.[116] Because the Administrative Patent Judges who constituted the Board were appointed by the Secretary of Commerce—and not by the President with the advice and consent of the Senate—their exercises of power could be constitutionally valid, the Court reasoned, only if they

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107 *Id.* § 2, cl. 2; *see also* United States v. Arthrex, Inc., 141 S. Ct. 1970, 1979 (2021) (explaining that the Supreme Court has adopted the term "'principal' officers" as "shorthand" to describe officers who are not "inferior" within the meaning of the Appointments Clause (citing Edmond v. United States, 520 U.S. 651, 659 (1997))).

108 520 U.S. 651 (1997).

109 *Id.* at 666.

110 *See* Morrison v. Olson, 487 U.S. 654, 671 (1988).

111 *Id.* at 671–72.

112 *Edmond*, 520 U.S. at 661.

113 *Id.* at 662.

114 *Id.* at 664–65. Concurring in the judgment only, Justice Souter objected to this "single rule of sufficiency." *Id.* at 668 (Souter, J., concurring in part and concurring in judgment). He preferred a functionalist analysis that would prescribe "a detailed look at the powers and duties" of the officers "to see whether reasons favoring their inferior officer status within the constitutional scheme weigh more heavily than those to the contrary." *Id.*

115 141 S. Ct. 1970 (2021).

116 *Id.* at 1976.

were "inferior officers."[117] Given that premise, the Court invalidated the patent review scheme on the ground that no superior officials within the executive branch had statutory authority to reverse the Board's patentability judgments.[118] Dissenting from this portion of the Court's opinion, Justice Breyer would have preferred "a functional approach, which considers [the] purposes and consequences" underlying Congress's chosen scheme.[119]

Two relatively recent cases involving the President's removal powers similarly exemplify the Supreme Court's increasing commitment to formalism. In *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,[120] the Court considered the validity of the "double for-cause" removal protections that Congress had afforded to the members of the Public Company Accounting Oversight Board.[121] First, board members could be removed by the Commissioners of the Securities Exchange Commission (SEC), but only for cause;[122] and second, the Court assumed in light of the parties' agreement (without deciding) that the SEC Commissioners could be removed by the President only for cause.[123] Writing for the Court, Chief Justice Roberts invalidated the double for-cause protection as "contrary to Article II's vesting of the executive power in the President."[124] According to the Court, the scheme improperly restricted the President's ability to control the Board's exercises of power.[125] The majority also found that the limitations on the President's removal powers impaired the President's ability to "take Care that the Laws be faithfully executed."[126] The Chief Justice's opinion dismissed functionalist arguments that a challenged "law or procedure [might be] efficient, convenient, and useful in

117 *Id.* at 1979–80.

118 *Id.* at 1981.

119 *Id.* at 1996 (Breyer, J., concurring in judgment in part and dissenting in part). In a perhaps surprising twist, Justice Thomas also filed a dissenting opinion, joined in relevant part by Justices Breyer, Sotomayor, and Kagan. Notwithstanding his usual commitment to formalist constitutional interpretation, Justice Thomas here warned against creating "a rigid test" to distinguish principal officers from inferior ones, instead preferring a case-by-case analysis with an apparent presumption of deference to "Congress' choice of which constitutional appointment process works best." *Id.* at 1999 (Thomas, J., dissenting).

120 561 U.S. 477 (2010).

121 *Id.* at 483–84.

122 *Id.* at 486.

123 *Id.* at 487.

124 *Id.* at 496.

125 *Id.*

126 *Id.* at 484 (quoting U.S. CONST. art. II, § 3); *see also id.* at 493; *id.* at 496 (explaining that under a double for-cause removal scheme, the President cannot "ensure that the laws are faithfully executed").

facilitating functions of government" as irrelevant to proper constitutional analysis.[127]

Seila Law LLC v. Consumer Financial Protection Bureau[128] adopted a comparably formalist view of the President's removal power. *Seila Law* concerned the Consumer Financial Protection Bureau, an agency led by a single director who was removable by the President, but only for cause.[129] As in *Free Enterprise Fund*, Chief Justice Roberts's opinion for the Court invalidated the for-cause limitation as an impermissible restriction on the President's power to control executive branch personnel in contravention of both the Article II Vesting Clause and the Take Care Clause.[130] Once again, the Court rejected any role for functionalist considerations in the constitutional analysis.[131]

C. *Recent Developments Involving Non–Article III Federal Tribunals*

Despite the overall ascendency of formalism in separation-of-powers cases since the 1980s, the formalist historical-exceptions approach to the permissible uses of non–Article III federal tribunals has never achieved complete dominance. Continuing the pattern established in *Northern Pipeline* and *Granfinanciera*, two of the most testing cases have involved bankruptcy.

Stern v. Marshall[132] held that a bankruptcy court lacked the constitutional authority to adjudicate a debtor's state-law counterclaim against a creditor when a ruling on the creditor's proof of claim against the bankruptcy estate would not resolve the counterclaim.[133] Writing for the Court, Chief Justice Roberts began the majority's formalist, historical-exceptions analysis by holding that the state-law counterclaim did not fall within any of the "various formulations" of the "public rights exception" to Article III's requirements that had appeared in

127 *Id.* at 499 (quoting Bowsher v. Synar, 478 U.S. 714, 736 (1986)).

128 140 S. Ct. 2183 (2020).

129 *Id.* at 2191.

130 *See id.* at 2197.

131 *See id.* at 2207.

132 564 U.S. 462 (2011).

133 *Id.* at 487. Prior cases had suggested that a creditor's submission of a claim to the bankruptcy court might entitle the bankruptcy court to adjudicate state-law counterclaims filed against that creditor. *See id.* at 475, 487; Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 53, 58 (1989) (explaining that a creditor's right to a jury trial and, thus, to adjudication by an Article III court "depends upon whether the creditor has submitted a claim against the estate," *id.* at 58). But the majority distinguished those cases on the ground that in the case before it the resolution of the creditor's proof-of-claim was irrelevant to the underlying state-law counterclaim asserted against the creditor. *Stern*, 564 U.S. at 495–99.

the Court's previous opinions.[134] He then reaffirmed *Northern Pipeline*'s holding that the bankruptcy courts could not decide matters of private right, since the bankruptcy courts are not "adjuncts" of the district courts within the meaning of *Crowell v. Benson*.[135]

Justice Scalia filed a concurring opinion. For him, the Court's need to acknowledge that prior cases had articulated multiple competing conceptions of the public rights doctrine demonstrated that "something is seriously amiss with [the Court's] jurisprudence in this area."[136] As a corrective, he endorsed the formalist, historical-exceptions view that "an Article III judge is required in *all* federal adjudications, unless there is a firmly established historical practice to the contrary."[137] Justice Breyer dissented. Embracing the pragmatic, functionalist approach of *Thomas* and *Schor*,[138] he would have applied a five-factor test to hold that permitting bankruptcy courts to resolve debtors' state-law counterclaims would not intrude significantly on the federal judiciary's constitutional functions.[139]

Lurking in the background of *Stern*, though pointedly not addressed, was the fundamental question of whether Article III will permit bankruptcy courts even to perform their primary function of restructuring creditor-debtor relations. Although the Court acknowledged its prior acceptance that bankruptcy courts could play that role, *Stern* declined to provide a full-throated endorsement of that practice, which it had previously suggested—but never held—might be sustainable based on the premise that the restructuring of creditor-debtor relations involves matters of public right.[140] Looking back specifically at a dictum in *Granfinanciera*, the Court explained that *Granfinanciera* "did not mean to 'suggest that the restructuring of debtor-creditor relations is in fact a public right.'"[141] Although *Stern* thus seemed to put in question whether claims by creditors against debtors in bankruptcy proceedings can properly be classified as involving

134 *See Stern*, 564 U.S. at 488, 487–88. Instead of attempting to resolve inconsistencies in the Court's prior formulations, the Court concluded that none could encompass the state-law counterclaim in the case at hand. *See id.* at 488–95.

135 *Id.* at 500, 500–01 (citing N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 85, 91 (1982) (plurality opinion)).

136 *Id.* at 504 (Scalia, J., concurring).

137 *Id.* at 504–05. For Justice Scalia, one valid historical exception is "true" public rights cases, *id.* at 505, which, in his view, must at a minimum involve the United States as a party. *Id.* at 503 (citing *Granfinanciera*, 492 U.S. at 65 (Scalia, J., concurring in part and concurring in judgment)).

138 *Id.* at 510 (Breyer, J., dissenting).

139 *Id.* at 513–19.

140 *See N. Pipeline*, 458 U.S. at 71 (plurality opinion) (observing that "the restructuring of debtor-creditor relations . . . may well be a 'public right'").

141 *Stern*, 564 U.S. at 492 n.7 (quoting *Granfinanciera*, 492 U.S. at 56 n.11).

public rights—and to do so in an opinion in which it affirmed that bankruptcy courts could not adjudicate private rights disputes—the Court ultimately concluded that it need not consider the issue, since neither party had raised it.[142]

Against the backdrop of *Stern*, *Wellness International Network, Ltd. v. Sharif*[143] came as a surprise. Whereas *Stern* applied a version of the historical-exceptions test to invalidate a conferral of bankruptcy court jurisdiction to adjudicate a private rights claim under state law,[144] *Wellness International* invoked a functionalist rationale to allow a bankruptcy court's adjudication of a similar claim based on the consent of the parties.[145] Justice Sotomayor's majority opinion relied on *Schor* for the proposition that the right to an Article III court is a "personal right"[146] that is subject to "knowing and voluntary" waiver or forfeiture[147] as long as "the institutional integrity of the Judicial Branch" is not "impermissibly" threatened.[148] On that basis, the Court held that a bankruptcy debtor's failure to invoke *Stern* as a defense to a creditor's state-law claim in bankruptcy court was subject to the doctrine of forfeiture.[149]

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142 *Id.* Professor Baude argues that the public rights framework should have been inapplicable in *Northern Pipeline* and *Stern*: "The public rights doctrine is a principle of executive power. But today's bankruptcy courts have not been vested with executive power. Their judges are appointed by Article III courts, supervised by Article III courts, and 'constitute[d]' as 'a unit of the district court.'" Baude, *supra* note 8, at 1574 (alteration in original) (footnotes omitted) (quoting 28 U.S.C. § 151 (2018)). According to Baude, bankruptcy courts would need to be sustained on an "adjuncts" theory if they are to be sustained at all. *Id.* at 1575.

143 575 U.S. 665 (2015). The Court also dealt with issues involving the permissible jurisdiction of bankruptcy courts in *Executive Benefits Insurance Agency v. Arkison*, 573 U.S. 25 (2014).

144 *See Stern*, 564 U.S. at 487–88, 503 (invalidating a provision of the Bankruptcy Act insofar as it authorized adjudication of a state-law private rights claim by a non–Article III bankruptcy court that was not an "adjunct" to the federal district court).

145 *See Wellness Int'l*, 575 U.S. at 675–78, 685 (characterizing *Schor* as "[t]he foundational case in the modern era," *id.* at 675, in accepting "knowing and voluntary," *id.* at 685, consent as a basis for permitting non–Article III adjudication of private-rights disputes, at least "so long as Article III courts retain supervisory authority over the process," *id.* at 678, and the "institutional integrity of the Judicial Branch," *id.* (quoting CFTC v. Schor, 478 U.S. 833, 851 (1986)), was not impermissibly threatened).

146 *Id.* at 675 (quoting *Schor*, 478 U.S. at 848).

147 *Id.* at 685.

148 *Id.* at 678 (alteration in original) (quoting *Schor*, 478 U.S. at 851).

149 *Id.* at 671–74, 673 n.5, 686. The Court concluded that allowing waiver or forfeiture of the right to proceed on *Stern* claims before an Article III court did not impermissibly threaten the institutional integrity of the judicial branch, in light of the authority that district courts exercise over bankruptcy courts, the limited scope of bankruptcy court authority, and the apparent absence of any attempt by Congress to "aggrandize itself or humble the Judiciary." *Id.* at 679.

There were also important elements of functionalist reasoning in *Ortiz v. United States*,[150] which upheld the Supreme Court's appellate jurisdiction to review a decision of the non–Article III Court of Appeals for the Armed Forces.[151] Although Justice Kagan acknowledged that "our appellate jurisdiction permits us to review only prior judicial decisions, rendered by courts,"[152] she did not ultimately argue that the Court of Appeals for the Armed Forces was a "court" in the constitutional sense. It sufficed for purposes of permitting Supreme Court review, she concluded, that the Court of Appeals for the Armed Forces had a "judicial character"[153] or exhibited a "court-likeness."[154] Justice Kagan also relied heavily on precedent.[155]

SEC v. Jarkesy,[156] decided in 2024, then pivoted sharply back to formalism. In an opinion by Chief Justice Roberts, the Court held, by 6–3, that the Seventh Amendment barred Congress from assigning the adjudication of an action for civil penalties for violation of the federal securities laws to an administrative tribunal.[157] Hewing to a familiarly formalist line, the Chief Justice reasoned that federal adjudicative power must be vested exclusively in Article III tribunals, where the Seventh Amendment right to trial by jury applies, unless a historically established exception to that mandate applies.[158] According to the government, the *Jarkesy* case fell within the public rights exception to Article III and the Seventh Amendment, but the Chief Justice disagreed.[159] Although some actions by the government to enforce federal statutes in administrative tribunals qualify as public rights disputes, this one did not, he concluded.[160] In support of that determination, Chief Justice Roberts emphasized two considerations. First, the civil penalty at issue was punitive, not merely reparative.[161] Second, the provisions

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150 138 S. Ct. 2165 (2018).

151 *Id.* at 2173.

152 *Id.* at 2174 n.4.

153 *Id.* at 2179, 2179–80 (quoting *Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243, 253 (1864)).

154 *Id.* at 2179 (emphasis omitted).

155 *See id.* at 2176–79.

156 144 S. Ct. 2117 (2024).

157 *See id.* at 2130. Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett joined the Chief Justice's majority opinion.

158 *See id.* at 2131–32.

159 *See id.*

160 *See id.* 2132–34, 2136.

161 *See id.* 2130 (reasoning that because civil penalties are intended "to punish and deter, not to compensate," they are "a type of remedy at common law that could only be enforced in courts of law" (quoting Tull v. United States, 481 U.S. 412, 422 (1987))).

under which the government brought the action closely paralleled the traditional common law of fraud.[162]

Justice Sotomayor filed an angry dissent in which Justices Kagan and Jackson joined.[163] Her lengthy opinion relied heavily on precedent, especially *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*.[164] In an opinion by the ardently functionalist Justice Byron White, *Atlas Roofing* held that Congress could assign the task of adjudicating violations of the Federal Occupational Safety and Health Act and imposing fines payable to the United States to an administrative agency.[165] With regard to the Seventh Amendment issue of whether there was a right to trial by jury, Justice White wrote that

> [a]t least in cases in which "public rights" are being litigated—*e.g.*, cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact—the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.[166]

According to Chief Justice Roberts, *Atlas Roofing* was distinguishable because the Occupational Safety and Health Act created a novel statutory cause of action and *Jarkesy*, by contrast, involved prohibitions modeled on common law predecessors.[167] As if acknowledging the thinness of that distinction, Justice Roberts maintained that the historically exceptional category of public rights disputes should be defined narrowly, lest the exception "swallow the rule" that federal adjudication should normally occur in Article III courts in which the Seventh Amendment applies.[168] He further emphasized that mere considerations of efficiency or administrative convenience could not justify the assignment of a dispute that lay outside the public rights exception to an agency rather than a court.[169]

Also notable in charting the role of formalism and functionalism in the Supreme Court's decisions is a set of issues involving agency adjudication of private rights cases that the modern Court has so far deliberately chosen not to address. Largely as a result of its failure to grant certiorari in potentially revolutionary cases, the Court, to date,

162 *See id.* (noting "[t]he close relationship between the causes of action in this case and common law fraud").

163 *See id.* at 2155 (Sotomayor, J., dissenting).

164 430 U.S. 442 (1977).

165 *See id.* at 450.

166 *Id.*

167 *See Jarkesy*, 144 S. Ct. at 2136–39.

168 *Id.* at 2134.

169 *See id.*

has not questioned the precedent of *Crowell v. Benson*.[170] *Crowell* permitted the initial adjudication by administrative agencies of private rights disputes involving the agencies' organic statutes, but, as framed in 1932, also required the Article III courts—either in a suit to enforce an agency's judgment or an authorized appeal from it—to make independent judgments concerning any constitutional or legal issues that a case presented.[171] The Court's tacit acceptance of *Crowell* possesses major consequence. *Crowell*, which insisted that the requisite judicial oversight of agency decisionmaking retained all "essential attributes of the judicial power" in the Article III judiciary,[172] rested on a fiction even at the time of its decision.[173] Because factual findings frequently determine the outcome of litigation, permitting agencies to make factual rulings that are subject only to relaxed judicial review effects a major transfer of power from courts to agencies.[174] Moreover, *Crowell*'s demand for independent review of agencies' determinations of law weakened progressively over the remainder of the twentieth century, most notably under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[175] In a significant departure from *Crowell*, *Chevron* held that if a statute that Congress has committed to agency enforcement is relevantly vague or ambiguous, a reviewing court must defer to the agency's interpretation.[176] Under the *Chevron* regime, de novo judicial review remained for constitutional issues,[177] but not for many statutory questions. The Supreme Court recently overruled *Chevron* in *Loper Bright Enterprises v. Raimondo*.[178] But even with *Chevron* gone, agencies' fact-finding authority remains undiminished and will retain considerable practical importance unless *Crowell* is either overruled or severely limited, as well.

170 285 U.S. 22 (1932).

171 *Id.* at 54, 60–63.

172 *Id.* at 51.

173 *See* Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What* The Dialogue *(Still) Has to Teach Us*, 69 DUKE L.J. 1, 68 (2019); Strauss, *supra* note 2, at 509. *Crowell* itself recognized this fiction, at least to some extent. Chief Justice Hughes's opinion observed that legal rights often "depend[] upon the facts, and finality as to facts becomes in effect finality in law." *Crowell*, 285 U.S. at 57. The recognition that factual findings often determine the outcome of a lawsuit animated *Crowell*'s insistence that Article III courts exercise de novo review over facts that were "fundamental or 'jurisdictional.'" *Id.* at 54, 54–55.

174 *See* Merrill, *supra* note 41, at 980. Although the "standard narrative" attributes ratification of this transfer to *Crowell*, Professor Merrill argues that "courts abandoned de novo review of agency adjudication more than two decades" earlier. *Id.*

175 467 U.S. 837 (1984).

176 *Id.* at 842–45.

177 *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 923 (1995) (refusing to defer to agency interpretation that implicated a constitutional issue).

178 144 S. Ct. 2244 (2024).

Following *Jarkesy* and *Loper Bright*, the possibility of *Crowell*'s being overruled or sharply restricted cannot be lightly dismissed. I shall discuss that prospect later. But if we view the doctrinal landscape as it existed in freeze-frame prior to *Jarkesy* and *Loper Bright*, the Supreme Court was more prepared—as it still may be—to accept initial adjudication of private rights disputes by agencies than by bankruptcy courts.

If one asks why the Justices might exhibit more tolerance for private rights adjudication by administrative agencies than by bankruptcy courts, three reasons stand out. First, as I have suggested, all of the Justices appear to have viewed *Crowell*'s "agency model"[179] as beyond question, at least until recently. Rejecting *Crowell* could have major implications in requiring the invalidation of adjudicatory jurisdiction possessed by a number of well-established federal agencies[180]—a consequence that might give pause even to many constitutional originalists.

Second, if agency adjudication of private rights cases under the *Crowell* model is accepted, there may be good reasons, rooted in adjudicative efficiency, to permit agencies to exercise pendent jurisdiction over state-law claims that are closely related to federal statutory claims.[181] It seems wasteful to require the litigation of two claims arising out of the same set of facts in separate tribunals.

Third, if agency adjudication of private rights disputes is restricted to those arising under an agency's organic statute and state-law claims that are closely factually related, the threat that agencies pose to the central role of the Article III courts may seem small. By contrast, if Congress could assign private rights disputes to tribunals that it characterized as legislative courts, whose decisions have not always been subject to searching review by Article III courts, whenever it permissibly enacts substantive legislation under Article I, there might be no similarly clear constitutional cutoff point protecting the traditional role of the Article III judiciary.

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When one takes account of the overall pattern of cases involving permissible and impermissible assignments of adjudicative responsibilities to non–Article III tribunals, it is possible to offer two highly

179 CFTC v. Schor, 478 U.S. 833, 852 (1986) (observing that the challenged scheme of agency adjudication under the Commodity Exchange Act "hews closely to the agency model approved . . . in *Crowell*").

180 *See* Stern v. Marshall, 564 U.S. 462, 509 (2011) (Breyer, J., dissenting).

181 *But see* John M. Golden & Thomas H. Lee, *Federalism, Private Rights, and Article III Adjudication*, 108 VA. L. REV. 1547, 1549 (2022) (emphasizing that an important concern at the time of the drafting and ratification of Article III was "protecting the general primacy of state courts in deciding traditional categories of disputes between private parties outside the maritime context").

abstract generalizations concerning the import of the Supreme Court's leading decisions to date. First, if the employment of a non–Article III tribunal can be justified as falling within one of the recognized categories of "historical exceptions," the use is constitutionally permissible, at least to decide cases in the first instance. No Supreme Court decision holds otherwise. The qualifying reference to "at least in the first instance" is necessary in light of questions—which I shall discuss below—involving when, if ever, some form of appellate review by the Supreme Court or some other federal court might be necessary.[182] Second, even if the use of a non–Article III tribunal cannot be rationalized as falling within a recognized historical exception, it can sometimes be justified by appeal to the kinds of considerations on which functionalists have traditionally relied, notwithstanding some language in *Jarkesy* that might be read to suggest otherwise.[183] For now, at least, Justice Sotomayor's distinctively functionalist opinion for the Court in *Wellness International* exemplifies this latter possibility.[184] On its facts, *Wellness International* emphasized the importance of the parties' consent to non–Article III adjudication and could be read as so limited. But it could also be read more broadly in light of its extensive quotations from the functionalist reasoning of *CFTC v. Schor*.[185]

III. FROM THE PAST AND PRESENT TO THE FUTURE

This Part turns from the law as it has developed to date to issues that are likely to emerge in the future. Section A identifies potential sources of doctrinal flux. Section B then considers the likelihood that legal scholarship might guide the Justices' decisions about how to shape or reshape the law. As now constituted, the Supreme Court seems much more prone to influence by originalist scholarship, which

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182 *See infra* notes 266–79 and accompanying text.

183 *See* SEC v. Jarkesy, 144 S. Ct. 2117, 2134 (2024) (citing *Stern*, 564 U.S. at 501) ("We have never embraced the proposition that 'practical' considerations alone can justify extending the scope of the public rights exception . . . .").

184 *See* Ralph Brubaker, *Non-Article III Adjudication: Bankruptcy and Nonbankruptcy, with and Without Litigant Consent*, 33 EMORY BANKR. DEVS. J. 11, 14–15 (2016) (arguing that "*Wellness* fits a distinctive pattern . . . in which the Court uses formal categorical rules to determine the constitutionality of non-Article III adjudications without consent" but "uses a functional mode of analysis" when the parties have consented). For arguments questioning whether non–Article III adjudication can be justified on the basis of party consent, see Jaime Dodge, *Reconceptualizing Non-Article III Tribunals*, 99 MINN. L. REV. 905 (2015); F. Andrew Hessick, *Consenting to Adjudication Outside the Article III Courts*, 71 VAND. L. REV. 715 (2018). *But see* Daniel J. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291, 303 (1990) ("[C]onsent provides, if not complete, at least very considerable reason to doubt that the tribunal poses a serious threat to the ideal of federal adjudicatory independence.").

185 *See* Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 675–76, 678–80, 683 (2015).

generally supports a historical-exceptions approach to the permissible uses of non–Article III tribunals, than by writing that advances functionalist or living-constitutionalist arguments.

A. *Sources of Flux and Uncertainty*

At the present time, the principal source of doctrinal flux and uncertainty concerning the permissible use of non–Article III federal tribunals involves the composition of the Supreme Court. The Justices are increasingly originalist.[186] Justice Thomas is a longtime devotee of constitutional originalism and of the historical-exceptions framework for assessing non–Article III tribunals.[187] Justices Gorsuch[188] and Barrett[189] are both self-identified originalists. And Justice Alito, after joining a functionalist opinion in *Wellness International*, wrote a dissent in a recent case involving military courts on what appear to be originalist grounds.[190] Justice Alito has also, elsewhere, identified himself as a "practical originalist."[191] An additional, committed supporter of the historical-exceptions approach, as noted above, is Chief Justice Roberts,[192] as exhibited most recently in his opinion in *Jarkesy*. With Justice Kavanaugh also having joined the Chief Justice and Justices Thomas, Alito, Gorsuch, and Barrett in the *Jarkesy* majority, there is reason to

186 *See, e.g.*, Lee, *supra* note 41, at 1940 ("[O]riginalism as a mode of constitutional interpretation is ascendant both on the Supreme Court and in the academy.").

187 *See, e.g.*, *Rosenkranz Originalism Conference Features Justice Thomas '74*, YALE L. SCH. (Nov. 4, 2019), https://law.yale.edu/yls-today/news/rosenkranz-originalism-conference-features-justice-thomas-74 [https://perma.cc/3SKV-9LBQ] (quoting Justice Thomas as saying that modern-day originalists should "give the words and phrases used by [authors] natural meaning in context" and that doing otherwise "usurps power from the people").

188 *See, e.g.*, Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1381 (2018) (Gorsuch, J., dissenting) (contending that "[t]he Constitution's original public meaning supplies the key" to its interpretation); NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 116–27 (2019) (advancing defense of originalism).

189 *See, e.g.*, Amy Coney Barrett, Michael C. Dorf, Saikrishna B. Prakash & Richard H. Pildes, *Showcase Panel II: Why, or Why Not, Be an Originalist?*, 69 CATH. U. L. REV. 683, 686 (2020) (statement of Barrett, J.) ("At bottom, I think one ought to be an originalist because the Constitution, no less than a statute, is law."); Amy Coney Barrett, Remarks Accepting the Nomination to the Supreme Court (Sept. 26, 2020) (transcript and video available at https://www.nytimes.com/2020/09/26/us/politics/full-transcript-amy-coney-barrett.html [https://perma.cc/WNE5-YLEJ]) ("I clerked for Justice Scalia more than 20 years ago, but the lessons I learned still resonate. His judicial philosophy is mine, too.").

190 Ortiz v. United States, 138 S. Ct. 2165, 2189–90, 2199 (2018) (Alito, J., dissenting).

191 Matthew Walther, *Sam Alito: A Civil Man*, AM. SPECTATOR (Apr. 21, 2014, 12:00 AM), https://spectator.org/sam-alito-a-civil-man [https://perma.cc/XD92-CVGH] ("I think I would consider myself a practical originalist."); *see also* Steven G. Calabresi & Todd W. Shaw, *The Jurisprudence of Justice Samuel Alito*, 87 GEO. WASH. L. REV. 507, 512 (2019) (observing that a "theme of Justice Alito's jurisprudence is originalism, though not in the traditional sense of the word that one might associate with Justice Scalia").

192 *See supra* note 97 and accompanying text.

think that a majority of the Justices may now embrace a historical-exceptions framework for analyzing adjudication by legislative courts and administrative agencies, mostly (even if not in every case) as an application of their originalist philosophies.

It is far from certain, however, that the Justices' originalism and commitment to a historical-exceptions framework will necessarily determine their votes in all cases. Some of the originalist Justices may believe that considerations of judicial role counsel against the too-rapid upsetting of too many long-established institutions and practices, especially insofar as large practical dislocations might occur. If so, most versions of originalist theory include a place or exception for stare decisis.[193] In addition, the Justices can exercise their certiorari jurisdiction to exclude challenges to statutory schemes that might be difficult to justify in originalist-formalist terms from their docket.[194] At the same time, however, as I shall discuss below, there is reason to believe that some of the originalist Justices may not regard challenges to some iconic aspects of the modern administrative state as wholly out of the question. The recent overruling of *Chevron* testifies powerfully to that proposition.

Another issue that a majority of the Justices may view as unresolved concerns the necessary role of the Article III courts—if any—in public rights cases. An often-quoted dictum from the 1856 case of *Murray's Lessee v. Hoboken Land & Improvement Co.*[195] asserts that Congress, if it so chooses, can entirely withhold public rights cases from the jurisdiction of the Article III courts:

> [T]here 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.[196]

As I shall argue below, however, there are grounds for questioning whether that dictum should be taken at face value.

B. *Scholarship and Its Prospects for Influence*

With constitutional doctrine involving permissible uses of non–Article III tribunals in a state of partial uncertainty and potential flux,

193 *See supra* note 14 and accompanying text.

194 *See, e.g.*, Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1930 (2017) ("Even if a petitioner asked the Court to revisit, say, its 1937 conclusion that the Social Security Act is constitutional, there is no chance that the Court would grant certiorari.").

195 59 U.S. (18 How.) 272 (1856).

196 *Id.* at 284.

it becomes pertinent to ask what role, if any, scholarship is likely to play in affecting future Supreme Court decisionmaking. Scholars have an obvious capacity to shape the Justices' thinking. Yet it seems a fair inference that the Justices will be most open to influence by commentators whose methodological orientations and normative sympathies resemble their own. The receptivity of the Justices to scholarship that coheres with and reinforces their predispositions is especially pronounced in the case of the originalists, who often depend on scholarly writing as a guide to original constitutional meanings. In considering the impact that scholarship about non–Article III tribunals can achieve, I therefore distinguish between the prospects of originalist and nonoriginalist writing to influence the Supreme Court in the short-term future.

1. Originalist Scholarship

Many of the most impressive recent contributions to debates about the permissible uses of non–Article III tribunals have had a historical, often originalist, focus.[197] It also seems plain that the originalist Justices pay heed to originalist scholarship.

a. Historical Work on the Line Between Public and Private Rights

For Justices who are committed to a historical-exceptions limitation on the permissible uses of non–Article III tribunals, questions involving the outer boundaries of the public and private rights categories possess enormous significance.[198] Such questions have bedeviled the Supreme Court for some time and seem likely to continue to do so. In *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*,[199] for example, the majority and dissenting opinions divided over whether the Patent and Trademark Office's (PTO) reconsideration of the award of a patent on the petition of a patent challenger involved a matter of public or of private right.[200] If the former, all agreed that administrative adjudication was permissible; if the latter, the Constitution required a

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197 *See, e.g.*, Nelson, *Adjudication in the Political Branches*, *supra* note 5; Nelson, *Vested Rights*, *supra* note 5; Baude, *supra* note 8; James E. Pfander & Andrew G. Borrasso, *Public Rights and Article III: Judicial Oversight of Agency Action*, 82 OHIO ST. L.J. 493 (2021); Gregory Ablavsky, *Getting Public Rights Wrong: The Lost History of the Private Land Claims*, 74 STAN. L. REV. 277 (2022); *see also* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW (2012).

198 *See* FALLON ET AL., *supra* note 2, at 353–55, 384–85.

199 138 S. Ct. 1365 (2018).

200 *Id.* at 1373; *id.* at 1380 (Gorsuch, J., dissenting).

trial of the dispute in an Article III court. Finding that a public right was at stake, the majority upheld adjudication by the PTO.[201]

The Justices also disagreed about the outer boundaries of the public rights category in *SEC v. Jarkesy*. The three dissenting Justices thought that "what[ever] else, if anything, might qualify as a public right, . . . a statutory right belonging to the Government in its sovereign capacity" plainly does under longstanding judicial precedent.[202] The majority rejected that view, under which *Jarkesy* would have come out the other way. Instead, the majority conducted a relatively fact-specific analysis and narrowly distinguished the cases on which the dissenting opinion relied.[203] In support of that granular approach, Chief Justice Roberts emphasized that "[t]he public rights exception is, after all, an *exception*" the application of which requires justification on a case-by-case basis.[204]

In the face of uncertainty and even confusion among the Justices about how to differentiate public from private rights, a number of scholars have sought to render assistance. Notably, however, historical studies have often disagreed in their conclusions, including about matters on which future litigation may hinge. Justice Scalia insisted that whatever else might be true about public rights disputes, the government must be a party.[205] Other originalists, including leading scholars, believe that the key variable in historical references to private and public rights is the nature of the "interest" at stake. For example, Professor Caleb Nelson has equated private rights with "vested" rights and maintained that no one could be deprived of such rights through legislative, executive, or agency action—whether in a dispute with the government or with another private party—without an adjudication of his or her claim by an Article III court.[206] With rights Nelson has contrasted

201 *Id.* at 1373 (majority opinion). The majority found first that "the decision to *grant* a patent is a matter involving public rights—specifically, the grant of a public franchise." *Id.* It then found that "franchises" could be "qualified" in such a way as to permit their continued treatment as public rights in a subsequent reconsideration procedure before the Patent and Trademark Office. *See id.* at 1375.

202 SEC v. Jarkesy, 144 S. Ct. 2117, 2166 (2024) (Sotomayor, J., dissenting).

203 *See id.* at 2132–39 (majority opinion).

204 *Id.* at 2134.

205 Stern v. Marshall, 564 U.S. 462, 503 (2011) (Scalia, J., concurring) ("I adhere to my view, however, that—our contrary precedents notwithstanding—'a matter of public rights . . . must at a minimum arise between the government and others.'" (quoting Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 65 (1989) (Scalia, J., concurring in part and concurring in judgment))).

206 *See, e.g.*, Nelson, *Adjudication in the Political Branches*, *supra* note 5, at 583–84. But Professor Nelson, who asserted in his 2007 article that disputes about benefits and "franchises" were historically understood to involve "privileges" rather than "rights," *id.* at 566–68, has more recently concluded that some "franchises" conferred vested, private rights

"privileges" that, he maintains, lie outside the private rights category and could be removed or nullified via agency adjudication.[207]

A historically important example of the privilege category, Nelson insists, involved asserted statutory entitlements of noncitizens to enter or remain in the United States. Accordingly, he concludes, immigration disputes could permissibly be assigned to the public rights category and could be resolved by executive officials.[208] Professors Adam Cox and Emma Kaufman challenge any such blanket portrayal of immigration cases, many of which, they contend, involve deprivations of core private rights to bodily liberty.[209] In another disagreement with Professor Nelson's influential findings, Professor Gregory Ablavsky has contested Nelson's insistence on the central significance of vested rights in marking the permissible limits of adjudication outside of Article III.[210] According to Ablavsky, courts routinely held throughout the nineteenth century that Congress could refer land-claims disputes, including those involving "vested rights," to "Article I tribunals for final adjudication."[211] Even when vested rights were at stake, claims to public or once-public lands were a historically paradigmatic example of public rights disputes, Ablavsky maintains.[212] "To the extent that the Court is looking to the past to guide its jurisprudence . . . , the history of private land claims demonstrates that the administrative adjudication of rights, including to property, is on firmer historical footing than current critics argue," he concludes.[213]

Disagreements among scholars about the originally understood dividing line between public and private rights invite three comments.

First, in my judgment, it is a conceptual mistake to believe that uniquely correct original public meanings can always or even normally be derived from historical practice or usage, which is as likely as modern usage to reflect disagreement and uncertainty.[214] In cases of

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that could not be divested without judicial involvement, Nelson, *Vested Rights*, *supra* note 5, at 1432.

207 Nelson, *Adjudication in the Political Branches*, *supra* note 5, at 566–69.

208 *Id.* at 580–81.

209 *See* Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 YALE L.J. 1769, 1793, 1805–06 (2023).

210 Ablavsky, *supra* note 197, at 284.

211 *Id.*

212 *See id.* at 283–84.

213 *Id.* at 285; *see also* John M. Golden & Thomas H. Lee, *Congressional Power, Public Rights, and Non–Article III Adjudication*, 98 NOTRE DAME L. REV. 1113, 1120, 1165 (2023) (advancing an account of the public rights doctrine that "encompasses far more than a merely exceptional set of matters," *id.* at 1120, and tracks constitutional grants of power to Congress to regulate within "three distinctively federal spaces: physical, operational, and enforcement spaces," *id.* at 1165, and "normaliz[es] . . . non–Article III [federal] adjudication," *id.*).

214 *See* Fallon, *supra* note 102, at 1476.

historical disagreement, the most salient historical fact is frequently that people disagreed about the point in question or were inconsistent or confused in their linguistic usage or practice. In these circumstances, scholars can seek typical or consensus understandings. But recent scholarship involving administrative adjudication in the immediate aftermath of the Founding Era—some of it described above—paints a picture of ever-increasing complexity, not of agreement in identifying sharp-edged conceptual boundaries dividing public from private rights.

Second, even for a Supreme Court Justice who was confident that a clear historical line existed between public and private rights, practical and conceptual challenges could often remain involving those categories' proper application to modern circumstances. Professor Nelson's historical conclusions well illustrate the potential difficulties. According to Nelson, the private interests that historically could not be divested by an administrative adjudicator without the involvement of a court were, roughly, those protected by the Due Process Clause under the rubrics of life, liberty, and property.[215] Professors Cox and Kaufman agree: "Founding Era lawyers would have been shocked to learn that the government could take a person's recognized due-process rights without a trial before an Article III tribunal."[216] For Justices who were so persuaded, however, a question would arise about the proper modern treatment of liberty and property interests that today are recognized as coming within the protective ambit of the Due Process Clause—including those that Professor Charles Reich labeled as "the new property"[217]—but that had not been recognized as entitled to due-process protection at the time of the Founding.[218] In response, the Court could: (a) accept that vast numbers of adjudications involving alleged unlawful deprivations of statutory entitlements must be conducted by the Article III district courts, which then would be overwhelmed by a flood of new cases; (b) overrule *Goldberg v. Kelly*[219] and other "new property" cases and thereby undermine the settled expectations that have developed around a myriad of entrenched administrative schemes; or (c) adopt a distinction between "new property" and "old property" for purposes of gauging the permissibility of non–

215 *See* Nelson, *Adjudication in the Political Branches*, *supra* note 5, at 568–69; *see also* Baude, *supra* note 8, at 1542 ("While the phrase 'public rights' has been much confused in modern case law, in the nineteenth century it generally referred to forms of adjudication that did not deprive any people of their private rights to life, liberty, or property.").

216 Cox & Kaufman, *supra* note 209, at 1795.

217 *See generally* Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

218 Professors Cox and Kaufman frame this problem vividly in their recent article. *See* Cox & Kaufman, *supra* note 209, at 1804.

219 397 U.S. 254 (1970).

Article III adjudication, which would be deemed permissible in the case of the former but not the latter.

Professor Nelson favors the third of these possibilities.[220] By contrast, Professors Cox and Kaufman argue that this approach would be unprincipled because it relies on an "invent[ed] . . . distinction among due-process claims that exists nowhere in the Constitution."[221] However one judges that argument, it seems plain that attempting to anchor modern doctrine involving permissible uses of non–Article III tribunals in a conceptual distinction between public and private rights could easily generate complex legal and practical problems that purely historical inquiries could not resolve.

A vivid illustration comes from immigration disputes. Congress has provided for administrative adjudication of immigration-enforcement issues since the late nineteenth century.[222] Moreover, in cases including both *Northern Pipeline* and *Crowell v. Benson*, the Supreme Court has sometimes referred to immigration disputes as falling within the public rights category.[223] Professors Cox and Kaufman challenge that nearly categorical assignment based on what they portray as Founding-era understandings that deprivations of bodily liberty through detention and removal should require the involvement of an Article III court.[224] Even if Professors Cox and Kaufman were adjudged to have provided the more historically persuasive account, however, there would be serious practical obstacles to the conclusion that all immigration disputes require initial determination by an Article III tribunal. Today "there are more than 1.9 million immigration cases pending across the country."[225] Under these circumstances, I feel confident in predicting that an originalist argument for classifying all, most, or even many immigration disputes as involving private rights would not find a sympathetic audience in the Supreme Court.[226]

Further complicating the situation in the field of immigration are federal habeas corpus jurisdiction and the Suspension Clause.[227] In

220 In defense of that approach, he maintains that other constitutional law doctrines continue to recognize "distinctions between traditional forms of property and mere statutory entitlements." Nelson, *Adjudication in the Political Branches*, *supra* note 5, at 621.

221 Cox & Kaufman, *supra* note 209, at 1794.

222 *See id.* at 1800.

223 *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 69 n.22 (1982); Crowell v. Benson, 285 U.S. 22, 51 (1932).

224 Cox & Kaufman, *supra* note 209, at 1805–06.

225 *Id.* at 1799.

226 In a passing reference to immigration disputes, *SEC v. Jarkesy*, 144 S. Ct. 2117, 2132–33 (2024), observed that "Congress could . . . prohibit immigration by certain classes of persons and enforce those prohibitions with administrative penalties assessed without a jury."

227 U.S. CONST. art. I, § 9, cl. 2.

Immigration & Naturalization Service v. St. Cyr,[228] the Supreme Court relied on the canon of constitutional avoidance to hold that a noncitizen detained pending removal from the United States was entitled to invoke the statutory grant of federal habeas corpus jurisdiction to challenge an alleged error of law infecting the decision to remove him.[229] Whether limited review of agency decisions in an Article III court can generally satisfy the requirements of Article III, as it apparently does the demands of the Suspension Clause in some immigration cases,[230] is a question to which I shall return below.

Third, if the Supreme Court should hold that the line between public and private rights cases is fixed by history and has talismanic significance in determining the permissibility of adjudication by non–Article III tribunals, its stance would mark an important shift from the more functionalist approach that the Court adopted in *Thomas v. Union Carbide*, *CFTC v. Schor*, and *Wellness International* and that had prevailed in *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*. But *Jarkesy*, as described above, read *Atlas Roofing* so narrowly that it now may be limited nearly to its facts. Justice Sotomayor's dissenting opinion in *Jarkesy* characterized *Atlas Roofing* as effectively overruled.[231] Time will tell. For now, although *Jarkesy* appears to have resolved the important issue of whether actions by the government for civil penalties fall within the category of public rights disputes that can be assigned to administrative agencies, many other issues involving the metes and bounds of the public rights exception to Article III and the Seventh Amendment loom for future decision. As the *Jarkesy* majority acknowledged, the "Court 'has not "definitively explained" the distinction between public and private rights,' and we do not claim to do so today."[232]

Overall, although scholars are eager to render help to originalist Justices, and the originalist Justices seem eager to receive it, much about the historical distinction between private and public rights appears to be up in the air. Equally unclear is how much significance the originalist Justices would accord to that distinction in cases involving

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228 533 U.S. 289 (2001).

229 *Id.* at 300.

230 Subsequent to *Immigration & Naturalization Service v. St. Cyr*, Congress altered the statutory scheme to allow appellate "review of constitutional claims or questions of law." *See* 8 U.S.C. § 1252(a)(2)(D) (2018). This mode of review affords a "remedy for errors of law and, in some cases, errors of mixed law and fact and simple errors of fact." Peter Margulies, *The Boundaries of Habeas: Due Process, the Suspension Clause, and Judicial Review of Expedited Removal Under the Immigration and Nationality Act*, 34 GEO. IMMIGR. L.J. 405, 408 n.13 (2020).

231 *See* SEC v. Jarkesy, 144 S. Ct. 2117, 2172 (2024) (Sotomayor, J., dissenting) (arguing that "all avenues by which the majority attempts to distinguish *Atlas Roofing* fail").

232 *Id.* at 2133 (majority opinion) (quoting Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1373 (2018)).

long-settled practice and precedent believed to deviate from original constitutional understandings. Practical considerations, including the potentially crushing burden on Article III courts if large numbers of immigration cases were classed as involving private rights that require adjudication by the Article III judiciary, might seem impossible to ignore.

b. Rationalizing the Historical Exceptions

In *Northern Pipeline*, Justice White mocked Justice Brennan's historical-exceptions rationale for ascribing normative significance to a list of past utilizations of non–Article III tribunals for which Justice Brennan adduced no rationalizing principles.[233] In a recent article, Professor William Baude has sought to remedy that purported deficiency by arguing, primarily on originalist grounds, that military courts, territorial courts, and non–Article III entities resolving public rights disputes all exercise powers other than "the judicial power of the United States" under Article III.[234] According to Baude, military courts perform executive functions;[235] territorial courts exercise the adjudicative power of territorial governments, not the United States;[236] and the resolution of public rights disputes—as properly defined not to include liberty or property rights protected by the Due Process Clause—is not an inherently judicial function.[237]

Justices Alito and Gorsuch showed their receptivity to arguments along these lines in *Ortiz v. United States*, in which they voted to hold that the Supreme Court could not exercise appellate jurisdiction to review a decision of the non–Article III Court of Appeals for the Armed Forces.[238] Military courts, they reasoned, exercise executive rather than judicial power.[239] But a 7–2 majority, as discussed above, upheld

233 *See supra* note 37 and accompanying text.

234 Baude, *supra* note 8, at 1523–54.

235 *Id.* at 1548–51. *But see* Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L.J. 933, 934–38 (2015) (questioning the textual and historical bases for the Supreme Court's broad acceptance of the use of military tribunals and arguing that their employment should be permissible only insofar as "established norms of foreign and international practice" justify their use, *id.* at 938).

236 Baude, *supra* note 8, at 1525–33, 1548–51.

237 *See id.* at 1542–45; *see also* John Harrison, *Public Rights, Private Privileges, and Article III*, 54 GA. L. REV. 143, 148 (2019) (arguing that "when acting with respect to public rights and private privileges, executive officials were performing the characteristic executive function of exercising the government's own proprietary rights").

238 138 S. Ct. 2165, 2190–91 (2018) (Alito, J., joined by Gorsuch, J., dissenting).

239 *Id.* at 2190. The argument of Justices Alito and Gorsuch parallels, and may have been influenced by, Brief of Professor Aditya Bamzai as *Amicus Curiae* in Support of Neither Party at 2, *Ortiz*, 138 S. Ct. 2165 (No. 16-1423). *See Ortiz*, 138 S. Ct. at 2176 (majority

the Court's jurisdiction in a substantially functionalist opinion by Justice Kagan.[240] Despite its openly functionalist elements, Justice Kagan's opinion was joined by the self-described originalist Justice Clarence Thomas.[241] *Ortiz* thus serves as a reminder that the Justices cannot be counted on to be purist adherents of any rigid theory of permissible assignments of judicial power. As I suggested above in discussing the possible significance of precedent and long-settled practice, some of the Justices who count themselves as originalists or subscribers to a historical-exceptions theory may sometimes feel impelled to accommodate their ideals to competing practical desiderata, including adherence to precedent.

Another test of the originalist Justices' receptivity to Professor Baude's theory and of the purity of their commitment to originalist principles may involve the permissibility of non–Article III bankruptcy courts, around which so much litigation has swirled already. In *Northern Pipeline* and *Stern*, the Court assumed—albeit without expressly holding—that bankruptcy court jurisdiction to resolve claims by creditors against debtors' estates could be justified under the public rights doctrine.[242] Baude argues to the contrary: "The public rights doctrine is a principle of executive power. But today's bankruptcy courts have not been vested with executive power. Their judges are appointed by Article III courts, supervised by Article III courts, and 'constitute[d]' as 'a unit of the district court.'"[243] According to Baude, if the core functions of bankruptcy courts can be justified at all, it would need to be based on the theory that bankruptcy courts are "adjuncts" of the Article III judiciary.[244] Although classifying bankruptcy courts as "adjuncts" seems a good deal more plausible to me than applying that rubric to administrative agencies, the Court rejected calls to do so in both *Northern Pipeline*[245] and *Stern*.[246] Of equal potential significance,

opinion) (noting that, "[w]ith variations here and there, the dissent makes the same basic argument" as Bamzai).

240 *See supra* notes 150–55 and accompanying text.

241 138 S. Ct. at 2170.

242 *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 71 (1982) (plurality opinion); Stern v. Marshall, 564 U.S. 462, 492 n.7 (2011) (noting that although the Court had not previously held that "the restructuring of debtor-creditor relations is in fact a public right," it had decided prior cases on the basis of that assumption, and "[b]ecause neither party asks us to reconsider the public rights framework for bankruptcy, we follow the same approach here" (quoting Granfinanceria, S.A. v. Nordberg, 492 U.S. 33, 56 n.11 (1989))).

243 Baude, *supra* note 8, at 1574 (alteration in original) (footnotes omitted) (quoting 28 U.S.C. § 151 (2018)).

244 *See id.* at 1575.

245 *N. Pipeline*, 458 U.S. at 84–86 (plurality opinion); *id.* at 91 (Rehnquist, J., concurring in judgment).

246 *Stern*, 564 U.S. at 500–01.

accepting it might also suggest that, contrary to the Court's holding in *Stern*, the exercise of bankruptcy court jurisdiction over state-law claims related to core bankruptcy issues might be acceptable under Article III. It will be interesting to see whether some or all of the originalist Justices regard the implication of Baude's theory for bankruptcy courts as furnishing a welcome rationalization of existing doctrine or as constituting a bridge too far.

c. Agency Adjudication in Private Rights Cases

Insofar as I am aware, most originalist scholarship takes it for granted that, apart from historically recognized "exceptions," the Constitution was originally understood as forbidding congressional authorization of the final resolution of private rights disputes by non–Article III federal tribunals.[247] *Murray's Lessee v. Hoboken Land & Improvement Co.* offered the canonical statement: Congress cannot "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty."[248] As noted above, *Crowell* attempted to achieve consistency with that premise by insisting that the division of functions between agency and courts under the Longshoremen's and Harbor Workers' Compensation Act,[249] and presumably under other statutory schemes as well, retained "the essential attributes of the judicial power" in the Article III judiciary.[250] As also noted above, however, that description strained credulity even in 1932 and has grown even more difficult to take literally in the years since.[251] It is a patent fiction, even if often a benign one, to characterize agencies as "adjuncts" to Article III courts.[252]

Moreover, if the originalist Justices wanted to narrow *Crowell* severely, a possible ground for doing so might build on *Jarkesy*'s recent Seventh Amendment ruling. On its facts, Crowell was an admiralty case, to which the Seventh Amendment guarantee of jury trials "[i]n [s]uits at common law"[253] does not pertain. With *Jarkesy* having pared

247 *But cf.* Harrison, *supra* note 237, at 215 (observing that "today's understandings of the scope of congressional power support a broad scope of executive adjudication under the older system" because "[w]here Congress may forbid and then license an activity, it has the tools to create relations of public right and private privilege" rather than of traditional private right).

248 59 U.S. (18 How.) 272, 284 (1856).

249 Longshoremen's and Harbor Workers' Compensation Act, ch. 509, 44 Stat. 1424 (1927).

250 Crowell v. Benson, 285 U.S. 22, 51 (1932); *see also supra* notes 31–32 and accompanying text.

251 *See supra* note 173 and accompanying text.

252 *See* Monaghan, *supra* note 173, at 68; Strauss, *supra* note 2, at 509.

253 U.S. CONST. amend. VII.

down the category of public rights cases to which the Seventh Amendment does not apply, one could imagine the Court concluding that the right to a jury trial should have a more robust application in private rights cases not involving admiralty or equity, despite any congressional preference for agency adjudication.

Nevertheless, if the Supreme Court were to find *Crowell* vulnerable to an originalist challenge, or to confine its precedential authority to suits in admiralty and equity, much of the modern administrative state could be in trouble.[254] And up until now, the Court's proponents of an originalist or historical-exceptions limitation on permissible agency adjudication have seemed prepared to accept *Crowell* based on some combination of stare decisis and a role-based reluctance to invalidate practically important, long-accepted schemes of administrative adjudication. It remains to be seen whether the Court's current originalists will extend the pattern of leaving *Crowell* unquestioned into the future. Although I have emphasized that the originalist Justices are sometimes reluctant to upset longstanding precedents, their devotion to stare decisis is demonstrably selective.[255] The originalist Justices are also conservatives, and where issues of agency power are concerned, increasing numbers of them have manifested a willingness to reconsider decisions—including those involving *Chevron* deference[256] and the nondelegation doctrine[257]—that once seemed securely settled.

If the future of *Crowell* hangs in the balance, I can imagine two kinds of originalist scholarship that might affect the Justices' thinking.

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254 In his dissenting opinion in *Stern v. Marshall*, Justice Breyer worried that the Court's decision forbidding the adjudication of a private rights claim by a non–Article III bankruptcy court cast doubt on the permissibility of administrative agencies such as the NLRB, CFTC, and HUD. *See* 564 U.S. 462, 509 (2011) (Breyer, J., dissenting). The majority distinguished those tribunals from the bankruptcy court involved in *Stern* without affirming explicitly that they stand on a sound constitutional footing. *See id.* at 489 n.6, 493–94 (majority opinion).

255 *See* Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality*, 102 TEX. L. REV. 221, 223–25 (2023).

256 *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (overruling *Chevron*).

257 Recently, several of the Justices have called for the Court to revive the nondelegation doctrine based on arguments appealing to the Constitution's history and text. *See* Gundy v. United States, 139 S. Ct. 2116, 2131, 2133–37 (2019) (Gorsuch, J., dissenting); *see also id.* at 2131 (Alito, J., concurring in judgment) (noting that he would "support" efforts to "reconsider" the doctrine if a majority were willing to do so). The current Court has also developed and aggressively deployed a "major questions" doctrine, which requires an agency to point to "clear congressional authorization" in order to justify claims of authority to undertake "major" regulatory initiatives. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)). In a similar vein, *Kisor v. Wilkie* substantially cabined the degree of deference the Court will give to agencies' interpretations of their own rules. *See* 139 S. Ct. 2400, 2408 (2019).

The first and more obvious concerns stare decisis. For example, Justice Thomas has relied on originalist writing by Professor Nelson to endorse the view that all clearly erroneous precedents should be overturned when a party calls for their overruling.[258] For the most part, however, the votes of the originalist Justices have accorded with the premise that stare decisis is a "principle of policy"[259] the application of which is not governed by clear rules and requires the exercise of judicial judgment. Echoing that view, Professor Richard Re has argued that, contrary to conventional understandings, the doctrine of stare decisis rarely obligates the Justices to adhere to past erroneous decisions.[260] The doctrine's principal practical effect, on his account, is instead to endow the Justices with legal permission to adhere to erroneous precedent when they think it wise or prudent to do so. I agree.

Assuming that the originalist Justices would view themselves as legally permitted but not obligated to adhere to *Crowell*, I can readily imagine that a second line of originalist scholarship might influence their thought about whether to do so. Prominent originalist scholars have begun to theorize about how an originalist Supreme Court majority should manage a gradual transition from current law to a more pervasively originalist future. Professor Lawrence Solum has rejected demands for an originalist "big bang" as incompatible with underlying originalist commitments to "rule of law" values including predictability and stability.[261] Professors John McGinnis and Michael Rappaport have endorsed a technique of progressive overruling by which the Supreme Court would announce principles to apply in future cases without necessarily invalidating currently established institutional structures.[262]

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258 *See, e.g.*, Gamble v. United States, 139 S. Ct. 1960, 1986 (2019) (Thomas, J., concurring) (citing Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 62 (2001)).

259 *E.g.*, Payne v. Tennessee, 501 U.S. 808, 828 (1991) (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940)).

260 *See* Richard M. Re, *Precedent as Permission*, 99 TEX. L. REV. 907, 912–14 (2021); *see also* McConnell, *supra* note 14, at 1769–70 (taking a similar view).

261 Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 CONST. COMMENT. 451, 462 (2018).

262 *See* John O. McGinnis & Michael Rappaport, *An Originalist Approach to Prospective Overruling*, 99 NOTRE DAME L. REV. 425, 480 (2023) (acknowledging the need for a theory of originalism that makes the "transition from nonoriginalism back to the original meaning . . . less disruptive and more gradual when necessary" and arguing that prospective overruling of nonoriginalist statutes and prior decisions provides the right mechanism for doing this); *see also* Lawrence B. Solum & Max Crema, *Originalism and Personal Jurisdiction: Several Questions and a Few Answers*, 73 ALA. L. REV. 483, 535 (2022) (arguing that the Supreme Court could manage a transition toward originalism in personal jurisdiction by giving Congress ample notice about potential doctrinal overruling so that it could pass new laws preserving the doctrinal status quo).

The future will reveal whether originalist scholars' advocacy of gradual rather than immediate implementation of originalist ideals has any impact on the Justices' thinking about *Crowell.* It is interesting to recall that the Supreme Court stayed its decision in *Northern Pipeline* to give Congress a chance to respond before its invalidation of the then-prevailing scheme of bankruptcy courts took effect.[263]

d. Appellate Review in Public Rights Cases

Above I called attention to the question whether the Constitution might require judicial review of constitutional issues that arise from decisions by executive officials in public rights disputes. I shall return to that issue below.

2. Living Constitutionalism and Functionalist Scholarship

In recent years, I have encountered less functionalist scholarship about non–Article III tribunals than I have originalist or otherwise historically focused scholarship. If law professors have recently produced less functionalist writing, the relative dearth may be partly attributable to incentives. At least in the short term, there seems less likelihood that such scholarship would move the Supreme Court than that originalist scholarship might. Nonetheless, despite *Jarkesy*, it would be a mistake to speak categorically, especially in light of the Court's relatively recent, functionalist decisions in *Wellness International* in 2015 and *Ortiz* in 2018.

a. Functionalism, Living Constitutionalism, and Consilience

If functionalists or living constitutionalists hope to have an impact on Supreme Court decisionmaking, their best opportunities seem likely to come by highlighting consilience between their conclusions and those reached by originalist or otherwise historical scholarship. For a lawyer arguing to the Supreme Court today, it would be professional malpractice not to include some reasoning addressed to the originalist Justices. In normative constitutional scholarship, too, arguments are more likely to seem well-grounded in law insofar as they can be shown to be consistent with original constitutional meanings, purposes, or understandings at some level of generality.[264]

263 *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87–88 (1982).

264 *See* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1193 (1987) (describing the "desirability and plausibility" of achieving "constructivist coherence" among different kinds of constitutional arguments in light of overlap and interconnections among them).

I do not suggest that any scholar should embrace an interpretive philosophy of avowedly liberal originalism. To purport to practice originalism with a commitment to reaching liberal conclusions would be dishonest and likely self-defeating as well. Nevertheless, the implicit norms of our constitutional practice encourage a blending of high-level-of-generality historical arguments with other kinds of arguments that are familiar in functionalist frameworks for the assessment of non–Article III tribunals, including ones based on constitutional structure, precedent, and normative desirability.[265]

b. Necessary Roles for Article III Courts in Public Rights Cases

At least at one time, conventional wisdom, undoubtedly influenced by the famous dictum in *Murray's Lessee v. Hoboken Land & Improvement Co.* that I quoted above, held that the Constitution rarely if ever requires any role for the Article III courts in public rights cases.[266] In my view, however, the jury is still out on whether there are plausible historically grounded arguments—perhaps at a lofty level of generality—for maintaining that judicial review of constitutional questions that are integral to public rights disputes is necessary in some form.

In cases decided during the 1970s and 1980s, the Supreme Court affirmed that preclusion of all judicial review of constitutional issues arising in public rights cases would raise serious constitutional questions and, accordingly, adopted nonliteral interpretations of federal

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265 An example comes from Professor Amanda Tyler's scrupulous scholarship on the historical understanding of the Suspension Clause, which she concludes would forbid the use of military tribunals to try American citizens for offenses unrelated to military service and offers arguments that originalists could embrace without relying exclusively on originalist premises. *See generally* AMANDA L. TYLER, HABEAS CORPUS IN WARTIME: FROM THE TOWER OF LONDON TO GUANTANAMO BAY (2017). Much of Professor James Pfander's work begins by examining historical practices and meanings but issues in prescriptions—including about permissible uses of non–Article III tribunals—that are supported by a broader array of considerations. *See, e.g.*, Pfander, *supra* note 32, at 654–55 ("Methodologically, this Article relies on familiar styles of textual, structural, and historical argument; but it does not make an explicitly originalist claim that the Framers of the Inferior Tribunals Clause anticipated and made provision for controlling the modern administrative state. Instead, this Article seeks to offer a new account of the relationship between Article I tribunals and Article III courts that preserves judicial independence, fits tolerably well with the nation's institutional history, and provides a set of administrable limits on the power of Congress." (footnote omitted)).

266 *See, e.g.*, Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1386 (1953) ("It's perfectly obvious that final authority to determine even questions of law can be given to executive or administrative officials in many situations . . . falling in the third of Justice Curtis' three classes in *Murray's Lessee.*").

statutes to permit courts to address such questions.[267] In the last of those cases, *Webster v. Doe*,[268] Justice Scalia dissented on partly originalist grounds.[269] Especially in light of Justice Scalia's *Webster* dissent, the current Court might view that decision and its predecessors as the suspect residues of a now-faded, living-constitutionalist regime of judicially created rights of access to constitutional remedies.[270]

Throughout our history, however, courts have frequently devised mechanisms—often in the form of suits against individual government officials—to permit judicial remedies for violations of common law and then of constitutional liberty and property rights.[271] In prior writing, I have argued that the Constitution, read in light of its structure and history, requires effective judicial remedies for ongoing constitutional violations.[272] Professor Henry Monaghan posits that "giving *complete* finality to administrative deprivation of common law liberty and property rights (and other 'rights') would run sharply counter to our entire constitutional history" even, if I understand him correctly, in public rights cases.[273] Professor Baude also seems sympathetic to this argument. According to him, the outcome of the iconic case of *Murray's Lessee v. Hoboken Land & Improvement Co.* may be best explained on the premise that "an immediate but brief deprivation of liberty or property is permissible when judicial adjudication is soon to follow" or can be

267 *See, e.g.*, Bowen v. Mich. Acad. of Fam. Physicians, 476 U.S. 667, 681 n.12 (1986) (arguing that interpreting a Medicare statute to allow judicial review permitted the Court to "avoid[] the 'serious constitutional question' that would arise if" the Court "den[ied] a judicial forum for constitutional claims" (quoting Weinberger v. Salfi, 422 U.S. 749, 762 (1975))); Johnson v. Robison, 415 U.S. 361, 366 (1974) (reasoning that complete preclusion of judicial review of a First Amendment claim "would, of course, raise serious questions concerning . . . constitutionality"); *see also* Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1313–15 (2014).

268 486 U.S. 592 (1988).

269 *Id.* at 606, 616 (Scalia, J., dissenting).

270 *Cf.* DeVillier v. Texas, 144 S. Ct. 938, 943 (2024) ("Constitutional rights do not typically come with a built-in cause of action to allow for private enforcement in courts." (citing Egbert v. Boule, 142 S. Ct. 1793, 1802–03 (2022))); Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1379 (2018) (declining to rule on whether an opportunity for judicial review of an administrative decision revoking a patent was constitutionally required). Harrison, *supra* note 237, at 206–07, contemplates the possibility that "when the Constitution's substantive limitations operate on the government in its proprietary capacity, they create private legal interests that function as private rights," *id.* at 207, alleged deprivations of which would require judicial involvement. Although Professor Harrison stops short of embracing this conclusion, he describes it as having "considerable appeal." *Id.*

271 *See* Monaghan, *supra* note 173, at 47 ("[G]iving *complete* finality to administrative deprivation of common law liberty and property rights (and other 'rights') would run sharply counter to our entire constitutional history.").

272 *See* Richard H. Fallon, Jr., *Constitutional Remedies: In One Era and Out the Other*, 136 HARV. L. REV. 1300, 1344–47 (2023).

273 Monaghan, *supra* note 173, at 47.

initiated by the party who suffered the deprivation.[274] Professor Pfander advances a relevantly similar interpretation of *Murray's Lessee*.[275]

Earlier, I mentioned consilience. In summarizing originalist scholarship, Professors Cox and Kaufman cite a near consensus among originalist scholars that private rights were historically understood as associated with liberty and property rights protected by the Due Process Clause.[276] Insofar as it is now recognized that many "new" property and liberty rights enjoy due-process protection, perhaps it could be argued that their authoritative adjudication requires at least as much involvement by the Article III courts as must be afforded when other private rights are initially subject to administrative decisionmaking under *Crowell v. Benson*. As I have argued elsewhere, I believe the kind of protection that *Crowell* requires is most honestly described as involving judicial review by—rather than the retention of all "the essential attributes of the judicial power"[277] in—an Article III court.[278]

At the end of this brief discussion, I venture no hard conclusions about original constitutional meanings and no firm predictions about future Supreme Court decisionmaking. That said, I would like to think that the door is open to functionalist scholarship, drawing some support from original history but also relying on normatively inflected arguments and precedent, affirming that the Constitution sometimes mandates judicial review of constitutional issues arising from public rights disputes. To cite just one motivating example, I would think it intolerable if Congress, in the current day, could preclude all judicial review of legislative or executive action discriminating on the basis of

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274 Baude, *supra* note 8, at 1553. For an effort to reconstruct the conceptual assumptions underlying *Murray's Lessee* that would require no judicial review whatsoever, see Harrison, *supra* note 237, at 161–64. In historical scholarship that is at least consistent with the traditional view that Congress can exclude public rights disputes from judicial cognizance, Professors Merrill and Mashaw maintain that both Congress and the courts have sometimes disallowed any form of judicial review of administrative action. Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1415 (2010) (observing that by early in the twentieth century, federal "offices and bureaus . . . were deciding tens of thousands of cases every year, many of them with complete finality," and that "the Article III question that exercised the legal mind at the close of the nineteenth century was not whether administrative jurisdiction invaded judicial prerogatives, but whether the judiciary could, consistent with the Constitution, be given jurisdiction to hear appeals from adjudications statutorily allocated to the administrative process"); Merrill, *supra* note 41, at 987–92.

275 *See* Pfander & Borrasso, *supra* note 197, at 548–49 (arguing that *Murray's Lessee* contemplated "a post-hoc judicial role" in resolving legal issues involved in coercive collection of debts allegedly owed to the government).

276 *See* Cox & Kaufman, *supra* note 209, at 1792.

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

278 *See* Fallon, *supra* note 41, at 917–18.

race or religion in the distribution of benefits that would otherwise be subject to the public rights doctrine.[279]

IV. INTERPRETIVE THEORIES, LEGAL SCHOLARSHIP, AND SUPREME COURT PRACTICE

Among the several themes that I have developed thus far, but without highlighting, is one involving the relationship between normative constitutional theories and constitutional adjudication in the Supreme Court. This Part reflects on that relationship.

It is not the professional role of Supreme Court Justices to be legal theorists in the academic sense. The Justices are busy men and women with important practical agendas. Even so, they cannot help constructing legal theories. An illustration comes from the *Northern Pipeline* case, in which Justice Brennan formulated a historical-exceptions theory of the permissible uses of non–Article III tribunals, and Justice White championed a functionalist balancing theory.[280] Judicial theorizing need not be deep or broad.[281] It can be minimalist, linked to the facts of the case before the court.[282] Nevertheless, the Justices inescapably engage in theorizing about properly controlling considerations in order to explain and justify their decisions.

Once legal theories are constructed or embraced, moreover, they frequently exert a continuing influence on the Justices' decisionmaking. Willy-nilly, the Justices encounter new cases with a set of theoretical commitments—involving the considerations that properly controlled a prior case or cases—already in place. Under these circumstances, the Justices care not only about stare decisis but also about "personal precedent."[283] After having laid out their reasoning in one case, they would be hypocritical—and would be properly criticized on that basis—if they unexplainedly abandoned a previously embraced framework for a decision.[284]

The partial subsumption of issues involving permissible uses of non–Article III tribunals in broader debates about originalism and living constitutionalism adds a layer of complexity to the theorizing in which Supreme Court opinions almost necessarily engage. This is not

279 *See* Fallon, *supra* note 272, at 1345–47.

280 *See supra* notes 24–41 and accompanying text.

281 *See generally* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999) (distinguishing, *inter alia*, deep and shallow and minimalist and maximalist judicial reasoning).

282 *See id.*

283 *See* Richard M. Re, Essay, *Personal Precedent at the Supreme Court*, 136 HARV. L. REV. 824, 826–27 (2023) (arguing that personal precedent both does and should influence decisionmaking by Supreme Court Justices).

284 *See* RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 6 (2018).

the place for a deep examination of either the history or the theoretical merits of originalism. For purposes of the current inquiry into the relationship between legal theory and legal practice, however, it is vital to understand that originalism did not develop as, and as practiced in the Supreme Court has never been, a wholly freestanding view about proper norms of constitutional interpretation.[285] As originalists themselves acknowledge, the founders of the originalist movement were politically conservative lawyers who thought that constitutional law had been hijacked by political liberals and who wished to overturn a number of precedents that they believed to be both historically untenable and normatively unattractive.[286] Since then, originalism as practiced by judges and especially by the Justices of the Supreme Court has always stood in a complex but mutually supportive relationship with political conservatism.[287]

In noting associations between originalism as practiced in the Supreme Court and political conservatism, I do not suggest that the former is merely an aspect of the latter. In law, I have emphasized, rationales crafted to fit one case must be applied to future cases unless those future cases can be distinguished. I do, however, mean to suggest that general legal theories such as originalism and living constitutionalism—and even slightly lower-level theories such as the historical-exceptions and functionalist theories of the permissible uses of non–Article III tribunals—are not all that matter to constitutional adjudication in the Supreme Court. The Justices are rightly concerned to reach what they take to be prudent as well as normatively attractive resolutions of contested cases. Perhaps needless to say, their judgments of prudence and normative attractiveness partly reflect their political values.

285 I mean to distinguish here between originalism as an academic theory, on the one hand, and originalism as practiced by the self-identified originalist Justices of the Supreme Court and the members of the conservative political movement who have endorsed and supported their nomination and confirmation, on the other hand. I do not quarrel with the observation of Lawrence B. Solum, *Surprising Originalism: The Regula Lecture*, 9 CONLAWNOW 235, 251 (2018), that originalism can be framed as "a theory that is ideologically neutral at its core" and "commits us to the idea that we must follow the Constitution wherever it leads, whether the destination is conservative or libertarian, liberal or progressive." But the version of originalism that the Justices of the Supreme Court have been willing to practice has always been selective, *see* Fallon, *supra* note 255, and has most often aligned with conservative political values, *see id.* at 231–32.

286 *See, e.g.*, Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 601–02 (2004) ("[O]riginalism was a reactive theory motivated by substantive disagreement with the recent and then-current actions of the Warren and Burger Courts." *Id.* at 601.).

287 *See, e.g.*, Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 554–58 (2006) ("Since the 1980s, originalism has primarily served as an ideology that inspires political mobilization and engagement." *Id.* at 554.).

That the historical-exceptions theory of Article III tribunals would come to be associated with political conservatism, partly via the intervening influence of originalism, was not clearly visible at the time of the *Northern Pipeline* case. No more obviously foreseeable was the subsequent alignment of functionalism with political liberalism. In *Northern Pipeline*, the liberal Justice Brennan wrote the historical-exceptions-based plurality opinion, joined by Justice Thurgood Marshall, among others.[288] On the other side, Justice White's functionalist dissent attracted the votes of the very conservative Chief Justice Burger and the more moderate conservative Justice Powell.[289]

Nevertheless, as the linkage between originalism and political conservatism grew stronger over time, one might have expected to see conservative originalist Justices deploy the historical-exceptions theory as part of an agenda to restrict, cut back, or even kill off the administrative state.[290] The conservative originalist Justices have repeatedly displayed their skepticism of legal doctrines and precedents that abet the regulatory power of federal agencies in other contexts.[291] And to some extent, long-established structures of administrative adjudication—possibly including agency adjudication of private rights claims under the aegis of *Crowell v. Benson*—may now be under threat, as discussed in Part III.

But if we ask why more judicial restrictions of agency adjudication have not occurred, we encounter further complexities in the relationship between theory and practice. First, the Justices care about stare decisis and about their conceptions of the judicial role. As we saw in Part III, there are important areas with respect to which the Court's conservative Justices have hesitated so far and may continue to hesitate. I do not mean to overstate the power of stare decisis. As I acknowledged above,[292] stare decisis in the Supreme Court is a mostly a permissive doctrine, not a mandatory one, leaving even originalist Justices

288 *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 52 (1982) (plurality opinion).

289 *See id.* at 92 (White, J., dissenting).

290 *See* Cox & Kaufman, *supra* note 209, at 1771–72 (observing a tension in the jurisprudence of the Roberts Court, which is antibureaucracy in some important respects but fails to "follow[] through on [its] formalist theory of government functions," *id.* at 1772, which "would mean shifting the work of agency tribunals to Article III courts," *id.*, as the Roberts Court shows no disposition to do).

291 Examples include conservative originalist Justices' overruling of the *Chevron* doctrine, *see supra* note 256 and accompanying text; their apparent eagerness to revive the nondelegation doctrine, *see supra* note 257 and accompanying text; and their development and aggressive deployment of a "major questions" doctrine requiring Congress to employ exceptionally precise language when authorizing agencies to resolve important policy questions, *see supra* note 257 and accompanying text.

292 *See supra* text accompanying notes 258–60.

with considerable discretion about when to overturn nonoriginalist decisions and when to retain them. Nevertheless, as we have seen, conservative originalist Justices have chosen to adhere—at least thus far—to decisions including *Crowell v. Benson* that they would likely think initially mistaken on originalist grounds.

Second, there are aspects of the modern administrative state, including ones involving administrative adjudication that are not obviously justifiable under the historical distinction between public and private rights, that many political conservatives find congenial. Administrative mechanisms for the enforcement of immigration restrictions furnish one example. Agency adjudication of new property disputes may be another. In both cases, there are plausible originalist arguments—discussed in Part III—that at least some of the cases assigned to administrative adjudication might be classified as involving private rights or as otherwise requiring judicial determination under historical standards. Many immigration cases effect deprivations of historically recognized liberty rights.[293] Decades of modern precedent establish that disputes about entitlements to government benefits implicate "property" protected by the Due Process Clause, and deprivations of property rights protected by due process historically required judicial involvement.[294] But there also are plausible originalist arguments the other way, emphasizing that streams of statutory benefits were not historically regarded as constituting the kind of property that is the stuff of vested rights entitled to judicial protection, modern due process jurisprudence to the contrary notwithstanding.[295]

In thinking about the relationship between theory and practice in the Supreme Court, the Justices' normative values cannot be ignored. Those values seem likely to influence both the Justices' weighing of historical evidence bearing on original constitutional meanings and their judgments about how to interpret and when to reconsider the Court's constitutional precedents involving non–Article III adjudication. Rarely if ever do the Justices base their ultimate decisions on historical conclusions that they view as mandating dramatically imprudent outcomes in constitutional cases.

In noting the relevance of the Justices' substantive values to their decisions of reasonably disputable cases, I do not, I hasten to emphasize, mean to advance a cynically realist view. As I have suggested, it is easy to cite cases in which legal theories and methodological commitments matter. Conservative originalist Justices have consistently voted to reject schemes of non–Article III adjudication in cases in which

293 *See* Cox & Kaufman, *supra* note 209, at 1793, 1805–06.

294 *See id.* at 1793.

295 *See id.* at 1794–95.

there are few or even no obvious political stakes. The Court's confrontations over bankruptcy judges are one good example. Another may come from the recent dispute about patent revocations in which originalist Justices divided based on their evidently sincere commitment to getting the history right.[296]

Even so, my basic point about the influence of practical considerations and normative values on constitutional cases involving non–Article III tribunals holds. The Justices' decisions about when to rely on stare decisis and when to decide cases based on original constitutional meanings appear to be influenced, at least sometimes, by complex calculations that are partly orthogonal to the central, principled debate about the relative merits of originalist and living-constitutionalist interpretive theories. Various practical, prudential, and functional considerations matter—sometimes a lot. As Section II.C and subsection III.B.1 noted, at a time when nearly two million immigration cases are pending before non–Article III tribunals,[297] it is hard to imagine the Supreme Court as presently constituted mandating that large numbers of them require decision by Article III judges, virtually regardless of Founding-era understandings.

Where, then, are we left? Legal theories about the permissible uses of non–Article III tribunals exert a strong, sometimes determining influence on constitutional adjudication in the Supreme Court. Partly for that reason, some movements in an originalist, historical-exceptionalist direction seem likely in the short and medium term. At the same time, the large organizing concepts and theories that I have highlighted in this Article are only one aspect of the world of practice in which the Justices have made, and will continue to make, their decisions about permissible uses of non–Article III federal adjudicators.

The complexity in the relation of theory to practice makes it extremely hard to predict the future of some legislative courts and some grants of adjudicative authority to administrative agencies. The same complexity in the relation of theory to practice also makes judging hard for Justices who want to be principled but who also do not want to let abstract theories impel them to reach improvident results that are not clearly legally mandatory. At the end of the day, we misunderstand legal practice if we think that legal theories make no difference,

296 *Compare* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1376–78 (2018) (writing for the majority, Justice Thomas argues that the history does not support the notion that patent validity must be decided by an Article III court), *with id.* at 1381–95 (Gorsuch, J., dissenting) (disputing the majority's historical account and concluding "only courts could hear patent challenges in England at the time of the founding," *id.* at 1381).

297 *See* Cox & Kaufman, *supra* note 209, at 1799.

but we should not expect perfect theoretical consistency from the Justices, either.

I conclude with the complementary aphorisms of two sages. According to Immanuel Kant, "[o]ut of the crooked timber of humanity no straight thing was ever made."[298] According to Yogi Berra, "[i]t's tough to make predictions, especially about the future."[299]

298 ISAIAH BERLIN, THE CROOKED TIMBER OF HUMANITY: CHAPTERS IN THE HISTORY OF IDEAS, at xi (Henry Hardy ed., John Murray Ltd 1990) (1959) (attributing the phrase to Immanuel Kant).

299 *The Perils of Prediction*, ECONOMIST (May 31, 2007), https://www.economist.com/books-and-arts/2007/05/31/the-perils-of-prediction [https://perma.cc/FA9Z-EDKC] (attributing the phrase to Yogi Berra).