

# Public Rights and Article III: Judicial Oversight of Agency Action

JAMES E. PFANDER\* & ANDREW G. BORRASSO†

*As it works to define the relationship between the federal courts and the boards, commissions, and agencies that make up the administrative state, the Supreme Court has long distinguished between public and private rights. Dating from the decision in Murray’s Lessee, the public rights doctrine allows Congress to assign some matters either to the Article III judiciary or to non-Article III courts. Despite the doctrine’s pedigree, however, courts and commentators disagree about what triggers its application. Only three years ago, in Oil States v. Greene’s Energy, the Court upheld the patent board’s power to review patent validity as a matter of public right. But a spirited dissent argued that patent validity contests require an Article III court. Similar disagreements have peppered the Court’s analysis of other public rights questions.*

*This Article offers a new account of Murray’s Lessee and a new synthesis of the public rights doctrine. Murray’s Lessee did not turn on Congress’s power to manage the government’s immunity from suit or on the government’s appearance as a party to the litigation (as many have mistakenly assumed). Instead, the Court drew on a distinction between the creation or constitution of new rights and the adjudication of disputes over existing rights. Nineteenth century jurists insisted on judicial control of adjudicatory matters, but deferred when Congress conferred discretionary authority on a board or commission or court to fashion new rights through the issuance of a constitutive decree or order. The distinction between the adjudicative resolution of disputes over existing rights and the issuance of constitutive orders to create new rights does much to explain Murray’s Lessee and other controversial applications of the public rights doctrine. Applying this new understanding to Oil States, the Article concludes that although patents*

---

\* Owen L. Coon Professor of Law, Northwestern University Pritzker School of Law.

† J.D., Northwestern University Pritzker School of Law, 2020.

We owe thanks to Steve Calabresi, Michael Coenen, Charlotte Crane, Dick Fallon, Tara Grove, Andrew Hammond, Tonja Jacobi, John McGinnis, Michael Morley, Henry Monaghan, Nick Parrillo, Dave Schwartz, and Jim Speta for useful comments; to Tom Gaylord and the Pritzker Law Library for help with historical sources; to the Northwestern Pritzker School of Law faculty and research fund for generous financial support; and to our interlocutors at the faculty workshop at the University of Florida Levin School of Law, where we presented an early version of this paper.

*issue through a constitutive process, disputes over their validity present adjudicative issues that fall outside the public rights doctrine.*

#### TABLE OF CONTENTS

I.	INTRODUCTION .....	494
II.	THE COURSE OF COMMON LAW .....	505
	A. <i>Revenue and Accountability in the Common Law System</i> ....	505
	B. <i>The Importance of Priority</i> .....	510
III.	PRELUDE TO <i>MURRAY'S LESSEE</i> : THE COMMON LAW AND A MORE EFFICIENT TREASURY .....	512
	A. <i>Commonplace Distress</i> .....	512
	B. <i>Judicial Review of Distress</i> .....	515
	1. <i>Common Law Remedies and Discretion in            State Courts</i> .....	515
	2. <i>The Role of Article III Courts in Distress</i> .....	519
	C. <i>An Act Providing for the Better Organization of            the Treasury</i> .....	521
IV.	UNDERSTANDING <i>MURRAY'S LESSEE</i> .....	526
	A. <i>Incorporating the Distress Proceeding into the            Common Law Remedial System</i> .....	526
	B. <i>Murray's Lessee Cements Chief Justice            Marshall's Synthesis</i> .....	532
V.	DISTINGUISHING THE CONSTITUTIVE FROM THE ADJUDICATIVE .....	539
VI.	MAKING SENSE OF <i>MURRAY'S LESSEE</i> TODAY .....	549
	A. <i>The Role of the Government as a Party</i> .....	549
	B. <i>Scope of Review of Agency Decisions</i> .....	553
	C. <i>State Courts and Due Process Limits on            Agency Adjudication</i> .....	554
	D. <i>Oil States Revisited</i> .....	557
	E. <i>Formalism and the Separation of Powers</i> .....	562
VII.	CONCLUSION .....	564

#### I. INTRODUCTION

Disputes over the relationship between Article III courts and non-Article III tribunals have often turned on the supposed distinction between public and private rights. In only the most recent illustration, *Oil States v. Greene's Energy*,<sup>1</sup> the Supreme Court divided over whether the post-issuance review of

---

<sup>1</sup> *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1373 (2018).

patents was a matter of public right—and thus appropriate for disposition before a federal agency—or a matter of private right reserved to the federal judiciary. The majority opinion, by Justice Thomas, upheld the agency’s role in *inter partes* patent review based on a public conception of the rights in question.<sup>2</sup> The distinction between public and private right was thus central to the decision, as it has been in a series of cases stretching back to *Crowell v. Benson* and *Murray’s Lessee v. Hoboken Land & Improvement Co.*<sup>3</sup>

Despite its continuing importance, the public rights category has not proven self-defining. Dissenting Justices in *Oil States* sharply disputed the majority’s claim that matters of patent validity were proper subjects of agency adjudication. For the dissent, the agency’s role in issuing a patent did not extend to post-issuance disputes over patent validity.<sup>4</sup> Similar debates over the contours of the public rights doctrine have arisen in a host of different settings. Some have argued, as did Justice Scalia, that it arises only when the federal government appears as a party to litigation.<sup>5</sup> Some contend, in agreement with Chief Justice Roberts, that the doctrine describes the control Congress may lawfully exercise over sovereign immunity.<sup>6</sup> Some reason that Congress can foreclose all judicial review within the category,<sup>7</sup> while others believe that

---

<sup>2</sup> *Id.* at 1373, 1378. *Inter partes* review allows a non-owner of a patent to petition the Patent and Trademark Office to review a patent’s claims for invalidity on certain grounds. 35 U.S.C. § 311.

<sup>3</sup> *Crowell v. Benson*, 285 U.S. 22, 50 (1932); *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856). For other encounters with the public rights doctrine, see *Stern v. Marshall*, 564 U.S. 462, 484–95 (2011); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 52–56 (1989); *Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568, 583–93 (1985).

<sup>4</sup> *Oil States*, 138 S. Ct. at 1383–86 (Gorsuch, J., dissenting).

<sup>5</sup> *Granfinanciera*, 492 U.S. at 65 (Scalia, J., concurring in part and concurring in the judgment) (“I do not agree with the premise . . . that ‘the Federal Government need not be a party for a case to revolve around ‘public rights.’”).

<sup>6</sup> Chief Justice John Roberts explained that the point of the public rights doctrine was that “Congress may set the terms of adjudicating a suit when the suit could not otherwise proceed at all.” *Stern*, 564 U.S. at 489; see also Gordon G. Young, *Public Rights and the Federal Judicial Power: From Murray’s Lessee Through Crowell to Schor*, 35 BUFF. L. REV. 765, 792 (1986) (reasoning remedies against “the executive branch w[ere] accorded those claiming injury as a matter of legislative grace, by means of waiver of sovereign immunity”).

<sup>7</sup> See, e.g., Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 562 (2007) (“In a host of different ways, our constitutional system has therefore put the political branches in control of public rights. But when government is dealing with core private rights, this political responsiveness has long struck Americans as undesirable. When core private rights are at stake, the relationship among the branches shifts, and the judiciary assumes an indispensable role.”); see also William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1517–18 (2020) (discussing the public rights doctrine as the prominent attempt to reconcile the “text [of Article III] and longstanding practice” of non-Article III adjudication).

courts must still play a role.<sup>8</sup> Some think it odd that Article III operates more insistently to ensure review of private matters of state law than of claims based on federal statutes.<sup>9</sup>

Much of the confusion stems from varying interpretations of the leading case, the Supreme Court's 1856 decision in *Murray's Lessee*.<sup>10</sup> In language that many have quoted, the Court explained:

[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.<sup>11</sup>

Seizing on this language, and some surrounding dicta, jurists and scholars have proposed a host of competing conceptions of what we have come to know as the public rights doctrine. For some, it speaks to congressional power over the distribution of public largesse; for others, as we have seen, the key to the

---

<sup>8</sup> See Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 974 (1988) (“Examination of public rights tradition and the legislative courts doctrine thus demonstrates that a requirement of appellate review by an article III court in all cases decided by non-article III federal tribunals, although certainly not dictated by existing doctrine, would not entail the rejection of so much current law and settled practice as to be incapable of judicial implementation.”); see also Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 267 (1989) (“[T]he essence of the federal judicial power lies not in any question of trial jurisdiction but in the control that the court ultimately exercises in reviewing whether the law was correctly applied and whether the findings of fact had reasonable support in the evidence.”); cf. James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 731–40 (2004) [hereinafter Pfander, *Article I Tribunals*]; *id.* at 735 & n.428 (explaining that “whether particular matters come within the judicial power depends in part on the ‘will of Congress’” and that “Congress, in structuring the government’s affairs, enjoys some discretion in allocating business for first-instance determination between the executive and judicial branches. The role of Article III courts in the ultimate enforcement of federal rights nonetheless remains intact.”).

<sup>9</sup> See Martin H. Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 224–26, 229 (criticizing *Northern Pipeline*’s approach for focusing on state common law claims).

<sup>10</sup> *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856).

<sup>11</sup> *Id.* at 284. On the widespread invocation of this passage, see *Crowell v. Benson*, 285 U.S. 22, 49 (1932); *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*, 430 U.S. 442, 450–51, 451 n.8 (1977); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 63–64 (1982); *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 853–54 (1986); *Stern v. Marshall*, 564 U.S. 462, 489 (2011); and *Oil States Energy Services, LLC v. Greene’s Energy Group, LLC*, 138 S. Ct. 1365, 1373 (2018).

doctrine lies in the government's presence in the litigation.<sup>12</sup> Much administrative law litigation, needless to say, proceeds against the agency as a party and thus seemingly implicates retained congressional control over government suability.<sup>13</sup>

In this Article, we offer a close reading of the historical context that gave rise to *Murray's Lessee* and a new understanding of the public rights doctrine to which it gave voice. As for the history, we show that the distress warrants used in *Murray's Lessee* had proven quite controversial from an Article III perspective, both among the members of the 1820 Congress that authorized them and in the Supreme Court decisions that anticipated *Murray's Lessee*. Reviewing that history here, we focus on two overlooked encounters with the statute that led to opinions by Chief Justice Marshall. First in an opinion riding the Virginia circuit in *Ex parte Randolph*,<sup>14</sup> and next in an opinion for a unanimous Court in *United States v. Nourse*,<sup>15</sup> Marshall upheld the judicial role in resolving disputes over the amount any particular government employee might owe to the federal Treasury.<sup>16</sup> While he would grudgingly uphold executive power to pursue undisputed items of account,<sup>17</sup> Marshall suggested that the determination of a court was required in cases where the amounts were contested.<sup>18</sup>

---

<sup>12</sup> For emphasis on public lands as a good illustration of public rights matters, see John Harrison, *Public Rights, Private Privileges, and Article III*, 54 GA. L. REV. 143, 161–64 (2019) (discussing the distribution of property owned by the federal government as a matter of public rights). As for immunity, Chief Justice John Roberts described *Murray's Lessee* as upholding the power of Congress to set the terms of adjudicating a suit “when the suit could not otherwise proceed at all.” *Stern*, 564 U.S. at 489.

<sup>13</sup> Under the so-called agency model, individuals may litigate before the federal agency itself and then seek review before an Article III court. *See, e.g., Commodity Futures Trading Comm'n*, 478 U.S. at 852 (tracing the “traditional agency model” by which parties may seek review of agency adjudications in Article III courts to the decision in *Crowell v. Benson*). *See generally* Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043 (2010) (situating the agency model in a discussion of the role of Article III courts).

<sup>14</sup> *See Ex parte Randolph*, 20 F. Cas. 242, 253 (C.C.D. Va. 1833) (No. 11,558) (opinion of Marshall, Circuit Justice).

<sup>15</sup> *See United States v. Nourse*, 34 U.S. (9 Pet.) 8, 31–32 (1835).

<sup>16</sup> *Ex parte Randolph*, 20 F. Cas. at 253–57 (describing the challenge as the “first and most important” objection).

<sup>17</sup> *Id.* at 254. The undisputed nature of account played a key role in Chief Justice Marshall's reasoning, which referenced the ministerial-discretionary dichotomy. *See id.* (“They must be viewed as mere ministerial acts performed by mere ministerial agents. They cannot be otherwise sustained.”); *accord* 3 NATHAN DANE, GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW ch. 75 art. 2, § 4, at 61 (Boston, Cummings, Hilliard & Co. 1823) (explaining that sheriffs were vested with judicial and ministerial duties).

<sup>18</sup> *Ex parte Randolph*, 20 F. Cas. at 256. The second section of the Act requires that the account stated “shall exhibit *truly* the amount due to the United States.” *Id.* (emphasis added). The word “truly” was introduced to indicate that the distress “process was to be used only when the true amount was certainly known to the department; when the sum of money

Marshall's concerns allow us to see what was at stake in *Murray's Lessee*. True, the Court approved the use of a distress warrant to establish the government's priority in a dispute with other unsecured creditors as a matter of what it called "public rights."<sup>19</sup> But the Court did not embrace a wholesale shift in adjudicatory responsibilities from the judicial to the executive branch. The government debtor in the case, customs collector Samuel Swartwout, took flight after an audit revealed that he owed the government a substantial sum.<sup>20</sup> Swartwout's refusal to contest the debt claim eliminated any dispute as to the existence of the debt and reduced the case to a question of priority between creditors.<sup>21</sup> Instead of addressing obligatory post-distress judicial review in a disputed matter, the *Murray's Lessee* Court focused on and upheld the legal validity of the priority constituted by an executive act issuing the distress warrant.<sup>22</sup> Every indication suggests that the adjudicative role of the federal courts was preserved in disputed matters, in keeping with Marshall's view.

With the history clarified, we offer a new account of the public rights doctrine in *Murray's Lessee* and a new synthesis of the public rights cases. To explain the doctrine and ground the synthesis, we propose to distinguish among three forms of agency authority: (i) the agency's power to make rules within the scope of congressional delegation;<sup>23</sup> (ii) the agency's power, within frameworks created by Congress, to issue constitutive orders or decrees that confer new rights or establish a new status or relationship; and (iii) the agency's power to

---

debited to the officer appeared certain, and either no credits were claimed, or none about which a controversy existed." *Id.*; *accord id.* ("The amount due to the United States cannot be truly exhibited when the claim is shown by the account itself, to exceed what is really due.").

<sup>19</sup> See *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856).

<sup>20</sup> The precise amount was \$1,374,119.65. Transcript of Record at 15, *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856) (Nos. 54-55), DW108216483 (GALE, *The Making of Modern Law: U.S. Supreme Court Records and Briefs, 1832-1978*) [hereinafter *Record, Murray's Lessee*]; *accord Murray's Lessee*, 59 U.S. (18 How.) at 275. Subsequent histories have cast doubt on this figure. See, e.g., ARTHUR JAMES WEISE, *THE SWARTWOUT CHRONICLES: 1338-1899*, at 412-85 (New York, Trow Directory, Printing & Bookbinding Co. 1899) (providing a detailed account more sympathetic to Swartwout).

<sup>21</sup> See *Murray's Lessee*, 59 U.S. (18 How.) at 275-76.

<sup>22</sup> Focusing on priority, the Court stated the question presented as follows: whether the Treasury's uncontested warrant and "proceedings thereon . . . are sufficient . . . to pass and transfer the title . . . as against the lessors of the plaintiff." *Id.* at 274. The Court concluded by answering in the affirmative. *Id.* at 286.

<sup>23</sup> For modern restatements of the non-delegation doctrine, limiting delegations to contexts in which Congress has supplied the agency with an "intelligible principle" to apply in carrying congressional policy, see *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). For arguments to expand the permissible scope of delegation, see Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002).

adjudicate disputed claims within the judicial power of the United States.<sup>24</sup> While these agency functions shade into one another at the margins, the ideal types remain distinct both in terms of what the agency does and in terms of the nature of Congress's prerogative over the assignment of the function in question. Rulemaking falls squarely within agency competence, at least under modern formulations of the non-delegation doctrine. Courts oversee the rulemaking process to enforce limits and protect individual rights, but do not themselves engage in rulemaking. Adjudication remains a task for courts; agencies may be adjuncts to Article III courts by proposing a disposition but cannot exercise final control over the resolution of disputes within the judicial power.<sup>25</sup>

Matters of public right frequently arise from the second (and most unfamiliar) of our three categories—the power to issue constitutive decrees.<sup>26</sup>

---

<sup>24</sup> A large and growing literature debates the constitutional scope of Congress's power to delegate certain authority to executive branch actors, such as agencies. On the history of such delegations in the early republic period, see generally Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288 (2021); Kevin Arlyck, *Delegation, Administration, and Improvisation*, 97 NOTRE DAME L. REV. (forthcoming 2021), <https://ssrn.com/a=3802760> (on file with the *Ohio State Law Journal*). For contrasting views, see generally, for example, PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994). We mostly steer clear of this debate, although we recognize that the public-private distinction may inform some accounts of the bite of the non-delegation doctrine. See generally MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 68 fig.4.1 (2020) (suggesting stricter limits on delegation apply to Congress's power to regulate private individuals than to its powers over certain matters rooted in royal prerogative).

One can also understand the determination of money claims against the federal government as implicating matters of public right. In keeping with that understanding, the Court of Federal Claims has been constituted as a non-Article III tribunal, subject to review in the U.S. Court of Appeals for the Federal Circuit. The perception that matters of public right arise from congressional discretion over government suability owes much to the example of the court of claims. This Article focuses on agency adjudication and leaves to one side the Article III puzzles that arise from the court of claims, courts martial, and territorial courts. For a treatment of those subjects, see Pfander, *Article I Tribunals*, *supra* note 8, at 657–58.

<sup>25</sup> On the role of agency adjudication as an adjunct to the work of an Article III court, see *Crowell v. Benson*, 285 U.S. 22, 49 (1932). See generally Pfander, *Article I Tribunals*, *supra* note 8, at 731–40.

<sup>26</sup> See STEPHEN A. SMITH, RIGHTS, WRONGS, AND INJUSTICES: THE STRUCTURE OF REMEDIAL LAW 15 (2019) (“Private law constitutive rulings . . . are judicial pronouncements that, by their issuance, immediately alter, terminate, or create a new legal right, status, or relationship. Examples include . . . [the creation of a] trust[;] . . . [appointment of a] guardian[;] . . . [dissolution of a] marriage, partnership or other legal relationship . . . . Constitutive rulings are self-executing: they bring about a judicially desired result through their issuance. . . . [For some constitutive decrees,] it is arguable that the

One can find illustrations of such decrees across the landscape of nineteenth century administrative law. For example, when tax assessors fixed the assessed value of property, as they often did in the nineteenth century, they were exercising a form of assigned constitutive authority that established a new, prospectively binding legal obligation. Land office decisions were similar. Congress empowered executive officials to allocate rights to public property over which Congress exercised control. Both these forms of executive branch decision-making were familiar to the *Murray's Lessee* Court and both were subject to only such judicial review as Congress might specify, either by expressly so providing or by putting standards in place for the courts to enforce.<sup>27</sup>

Although tax assessment and land distribution were assigned to executive branch officials,<sup>28</sup> Congress also had authority (somewhat counter-intuitively)

---

responsibility for issuing such rulings should be shifted to administrative agencies.”); EDWIN BORCHARD, *DECLARATORY JUDGMENTS* 23 (2d ed. 1941) (describing as constitutive “judgments of forfeiture, partition, dissolution of partnership, divorce, annulment of a voidable marriage; or [those that] sanction a relation entirely new, such as the admission of a will to probate, the appointment of guardians and receivers . . . [B]ecause they effect a change of status and are primarily a source of new jural relations, [they] may be called constitutive, or, as they are sometimes called, ‘investitive.’”); F.H. LAWSON, *REMEDIES OF ENGLISH LAW* 12–13, 239 (2d ed. 1980) (explaining that constitutive judgments create a legal relationship between the parties, whereas coercive judgments “order . . . unsuccessful defendant[s] to conduct [themselves] in a certain way”). In upholding the power of federal courts to issue constitutive decrees in naturalization proceedings, the Supreme Court confirmed that the power to create new relationships was one that Congress could retain for itself, delegate to an agency, or assign to the federal courts. *See Tutun v. United States*, 270 U.S. 568, 576–77 (1926).

<sup>27</sup> “[W]hen power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter.” *Bartlett v. Kane*, 57 U.S. (16 How.) 263, 272 (1854); *see also Murray's Lessee*, 59 U.S. (18 How.) at 284 (first citing *Foley v. Harrison*, 56 U.S. (15 How.) 433, 445, 448 (1854); and then citing *Burgess v. Gray*, 57 U.S. (16 How.) 48, 63 (1854)).

<sup>28</sup> On the history of the private land claim category and its implications for the public rights doctrine, see Gregory Ablavsky, *Getting Public Rights Wrong: The Lost History of the Private Land Claims*, 73 *STAN. L. REV.* (forthcoming 2022) (on file with authors). Ablavsky finds that Congress empowered federal land officials to conduct a substantial measure of adjudication outside Article III in the course of resolving competing claims. *See id.* (manuscript at 21–24). He reports further that such adjudication was given a strong measure of finality and preclusive effect by the federal courts. *Id.* (manuscript at 24–28). Ablavsky traces this pattern of judicial deference to a conception that Congress enjoyed broad control over imperfect or inchoate titles to land, but far less authority over perfected titles to land. *Id.* (manuscript at 29–30). As a consequence, Congress used a variety of institutions, including land offices and, in some cases, Article I courts, to sort out competing claims. *Id.* (manuscript at 14). But, as Ablavsky concludes, viewing the matter as a problem in the separation of powers, the task of “perfect[ing] an imperfect title was not [necessarily or inherently] a judicial function.” *Id.* (manuscript at 43). Ablavsky offers the example of



to give the federal courts responsibility for the issuance of constitutive decrees. Consider the naturalization decree. From 1790 until the early years of the twentieth century, Congress assigned courts of law responsibility for evaluating claims to naturalized citizenship. Throughout this period, naturalization decrees were issued by Article III courts upon the submission of a petition and supporting evidence; if the court found that the submission met statutory requirements, it would administer the oath of office and enter a decree of naturalized citizenship.<sup>29</sup> Like other judicially issued constitutive decrees, such as those creating trusts, appointing guardians, evaluating prize claims in admiralty, and issuing search warrants, naturalization decrees conferred a new legal right or status. While judicial proceedings leading up to the entry of naturalization decrees were uncontested and do not fit easily into our conception of the adversary process, the Supreme Court confirmed that their issuance had been properly assigned to the federal courts in *Tutun v. United States*.<sup>30</sup>

Setting rulemaking to one side,<sup>31</sup> much of the confusion about the public rights doctrine stems from the fact that Congress can assign the power to issue constitutive decrees either to the executive or the judicial branch of the federal government. In other words, the allocation decision will reflect an exercise of legislative judgment rather than an essentialist assessment of the executive or judicial character of the decision-making process. This congressional discretion over the assignment of constitutive tasks, in turn, lies at the heart of the public rights doctrine. The *Murray's Lessee* Court explained as much, noting that public right matters were those which were “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” and listing public lands as a canonical example.<sup>32</sup> Speaking for a majority in *Tutun*, Justice Brandeis said much the same thing about the power to naturalize citizens, explaining that Congress was free to assign the determination to an agency, or

---

agency adjudication of land claims as a corrective to some formalist conceptions of the line between public and private rights. *Id.* (manuscript at 5–6) (citing work of John Harrison, William Baude, and Caleb Nelson).

<sup>29</sup> For an account of naturalization practice in the nineteenth century, see JAMES E. PFANDER, *CASES WITHOUT CONTROVERSIES: UNCONTESTED ADJUDICATION IN ARTICLE III COURTS* 5 (2021) [hereinafter PFANDER, *CASES*], describing naturalization proceedings and defending the power of the federal courts to entertain such matters as “cases” within the meaning of Article III.

<sup>30</sup> See *Tutun*, 270 U.S. at 576–77. For an account of *Tutun* and its decision to uphold naturalization proceedings as cases within the meaning of Article III, even though the petitioner was not engaged in an adversary proceeding and had not suffered any injury in fact, see PFANDER, *CASES*, *supra* note 29, at 13 n.1, 107–10.

<sup>31</sup> Scholars agree that Congress cannot delegate rulemaking power to federal courts. See Fallon, Jr., *supra* note 13, at 1127 (“Congress’s assignment of rulemaking responsibilities to agencies does not inherently threaten the courts’ necessary or traditional functions. Because Article III will permit federal courts only to decide cases or controversies, Congress could not vest the Article III courts with rulemaking authority even if it wished to do so.”).

<sup>32</sup> *Murray's Lessee*, 59 U.S. (18 How.) at 284.

to the courts, or to create a hybrid process in which both institutions play their part.<sup>33</sup> Confirmation appears in *Crowell v. Benson*, where the Court described the mode of determining matters of public right as a matter for congressional resolution.<sup>34</sup>

Affirmations of congressional discretion over which branch of government should enter constitutive decrees, however, do not imply similar discretion over the assignment of the adjudicative task of dispute resolution. As we have seen, the Article III judicial power invested in federal courts extends broadly enough to encompass both uncontested claims for the entry of constitutive decrees (like judgments of naturalized citizenship) and disputed matters between opposing parties. These two forms of judicial power have been sometimes described (following Roman law) as voluntary or non-contentious jurisdiction, on the one hand, and contentious jurisdiction on the other hand.<sup>35</sup> While Congress can create a non-contentious role for the federal judiciary, or assign constitutive work to an agency, Congress has no power either to take up itself or to transfer to an executive branch actor the core judicial role in dispute resolution.

We think this distinction between congressional control over the assignment of power to issue constitutive decrees and judicial control of the resolution of disputes and enforcement of rights helps clarify the place of the public rights doctrine in our scheme of separated powers. Congress can place the creation of new rights in the hands of agencies or courts as it thinks proper. When executive branch officials appraised property for taxing purposes, they fixed the amount due—solidifying a newly concrete legal relationship. And when a court decided

---

<sup>33</sup> Brandeis explained:

Whether a proceeding which results in a grant is a judicial one, does not depend upon the nature of the thing granted, but upon the nature of the proceeding which Congress has provided for securing the grant. The United States may create rights in individuals against itself and provide only an administrative remedy. It may provide a legal remedy, but make resort to the courts available only after all administrative remedies have been exhausted. It may give to the individual the option of either an administrative or a legal remedy. Or it may provide only a legal remedy. Whenever the law provides a remedy enforceable in the courts according to the regular course of legal procedure, and that remedy is pursued, there arises a case within the meaning of the Constitution, whether the subject of the litigation be property or status. A petition for naturalization is clearly a proceeding of that character.

*Tutun*, 270 U.S. at 576–77 (citations omitted). As to some constitutive acts, such as land grants, Congress might retain the determination for itself, acting in response to a legislative petition. *See id.* at 578 (likening naturalization to land grants and patents). But the constitutional requirement of a “uniform rule” of naturalization may have ruled out a legislative role in granting citizenship. *See* James E. Pfander & Theresa R. Wardon, *Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency*, 96 VA. L. REV. 359, 371, 413–41 (2010).

<sup>34</sup> *See* *Crowell v. Benson*, 285 U.S. 22, 50–51 (1932) (“Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals” (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929))).

<sup>35</sup> PFANDER, CASES, *supra* note 29, at 19–25.

the merits of a naturalization petition, its final judgment created a new legal relationship or status. In each case, the legal effect was constitutive. These constitutive decrees differ from the exercise of “adjudicative” power—which entails the retrospective settlement of disputed matters of right under the law as stated. The public rights doctrine can best be understood with this distinction in mind.<sup>36</sup>

The Court in *Murray’s Lessee* viewed the question of priority as a constitutive matter, distinct from the process of resolving a dispute between the government and its collector—and susceptible to executive branch determination. The Treasury Department’s distress warrant conferred a new right of priority on the federal government not unlike the constitutive decrees in *Tutun*. What’s more, the priority rights were strikingly similar to those that private creditors could secure by attaching property at the outset of litigation with a debtor in a court-centered process.<sup>37</sup> One can understand *Murray’s Lessee* as upholding Congress’s decision to transfer the constitutive act of establishing priority to executive officials, while preserving the judicial role in disputed matters in keeping with such cases as *Nourse* and *Randolph*.<sup>38</sup>

With this background in place, the Article considers what lessons *Murray’s Lessee* may offer modern courts attempting to navigate the boundary lines between agency action and Article III. One sees the Supreme Court’s special solicitude for the federal adjudicative role as a theme that animates much of its Article III jurisprudence since *Murray’s Lessee*. Judgments play a special role

---

<sup>36</sup> Thus, we focus on the legal effect of the government action rather than the specific procedures deployed. Accordingly, in this Article we consider the separation of powers problems associated with Congress’s decision to vest certain decisions among the three branches. This, however, is not the only context in which the public rights terminology is deployed. For example, Justice Thomas, joined by Justices Breyer, Kagan, and Sotomayor, recently used the same terminology to explain the scope of Article III standing. *See TransUnion LLC v. Ramirez*, No. 20-297, slip op. at 3–8 (U.S. June 25, 2021) (Thomas, J., dissenting). There, the dissenting Justices contended that the holder of the right—either the individual plaintiff or the community as a whole—determined whether legal injury sufficed, or whether legal injury plus personalized damages were required. *See id.* at 5–6. Cognizant of the terminology’s varying uses, we stick to the separation of powers problem and set others aside.

<sup>37</sup> As was the case under the statute upheld in *Murray’s Lessee*, if the private creditor succeeded in making out its claim on the merits in subsequent litigation, its priority dated from the moment property was brought within the custody of the court. For an account of practice on attachment in the nineteenth century, and a description of the priority that attachment conferred on the creditor, see James E. Pfander & Wade Formo, *The Past and Future of Equitable Remedies: An Essay for Frank Johnson*, 71 ALA. L. REV. 723, 729–42 (2020).

<sup>38</sup> *See United States v. Nourse*, 34 U.S. (9 Pet.) 8, 28–29 (1835) (describing the distress warrant as akin to execution based on a Treasury judgment but also explaining that “aggrieved [parties] may appeal from the decision of the treasury to the law, and prefer a bill of complaint”); *Ex parte Randolph*, 20 F. Cas. 242, 257 (C.C.D. Va. 1833) (No. 11,558) (opinion of Marshall, Circuit Justice) (holding the treasury agent “exceeded the authority given by law”).

in the common law system,<sup>39</sup> enabling federal officials to take away the life, liberty, and property of individual citizens.<sup>40</sup> The adjunct theory in *Crowell v. Benson*—limiting the authority of agency adjudicators—reflects a special concern with the loss of the federal courts’ distinctive adjudicative role. So too does the resistance to expanding the role of non-Article III bankruptcy adjudication in *Northern Pipeline* and *Stern*.<sup>41</sup> By contrast, the otherwise curious decision in *Thomas v. Union Carbide* may turn on the Court’s conclusion that the agency’s task was *constitutive*, rather than adjudicative.<sup>42</sup> The key to the cases thus lies in a careful evaluation of the nature of the authority assigned to the agency, rather than (as Justice Scalia and others have suggested) the government’s appearance as a party. After all, when the government brings an enforcement action against an individual (like the debt claims instituted against Nourse, Randolph, or Swartwout), the Marshall Court and the author of *Murray’s Lessee* both indicated that Article III’s guarantees apply.

We tell the story of *Murray’s Lessee* and consider its implications for the public rights doctrine in five parts. Part II provides an overview of the how common law remedies informed the collection of revenue. Part III details the scope of common law remedies for distress warrants, historical context essential for understanding the legislative and judicial choices that preceded the decision in *Murray’s Lessee*. Part IV examines the particulars of the *Murray’s Lessee* decision. After reviewing Marshall’s opinions in *Nourse* and *Ex parte Randolph* and the insights they offer into the era’s concerns with the separation of powers, Part IV concludes with a close reading of *Murray’s Lessee* itself.

Parts V and VI consider the implications for current law. Part V sketches public rights matters from *Murray’s Lessee* to *Crowell v. Benson*, listing several other examples of congressional control over the issuance of constitutive decrees. Part VI provides a new synthesis of the public rights cases for today’s

---

<sup>39</sup> Blackstone described the judgment as “the remedy prescribed by law for the redress of injuries; and the suit or action [as] the vehicle or means of administering it.” 4 WILLIAM BLACKSTONE, COMMENTARIES \*396 (St. George Tucker ed., Philadelphia, Birch & Small 1803) [hereinafter TUCKER’S BLACKSTONE].

<sup>40</sup> St. George Tucker gave voice in 1803 to the protective role of the judgment-entry power, explaining that the “judiciary, therefore, is that department of the government to whom the protection of the rights of the individual is by the constitution especially confided, interposing [the judicial] shield between [citizens] and the sword of usurped authority, the darts of oppression, and the shafts of faction and violence.” 1 TUCKER’S BLACKSTONE editor’s app. at 357.

<sup>41</sup> See *Crowell v. Benson*, 285 U.S. 22, 54 (1932) (emphasizing that the statutory scheme reserved “full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function”); cf. *N. Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 55 (1982) (describing the bankruptcy statute as vesting in bankruptcy judges—“all of the ‘powers of a court of equity, law, and admiralty,’” including “the power . . . to issue any order, process or judgment” (quoting 28 U.S.C. § 1481 (1976))); *Stern v. Marshall*, 564 U.S. 462, 494–95 (2011) (“[T]he most prototypical exercise of judicial power [is] the entry of a final, binding judgment . . .”).

<sup>42</sup> See *infra* Part IV.

jurists. The doctrine depends on what kind of role—constitutive or adjudicative—Congress has assigned to the agency. Such a focus on the nature of the agency’s task sheds light on a broad range of public rights decisions, including *Oil States* itself. The *Oil States* Court should have viewed the retrospective decision about patent validity as essentially adjudicative and the outcome should have turned on the adequacy of Article III review of the patent board’s resolution. In the end, the Court’s decision to uphold the agency’s role may have been right for the wrong reasons.

## II. THE COURSE OF COMMON LAW

Perhaps inevitably for an early republican institution, the early nineteenth century law of tax collection and government accountability relied heavily on suits brought at common law against government officials.<sup>43</sup> Centered on the entry of judgments by courts of record, what was sometimes called the course of the common law explains Congress’s reluctance to broaden the Treasury Department’s distress warrant authority in 1820. Preference for common law forms also explains why the Treasury’s distress authority received a narrow interpretation at the hands of Chief Justice Marshall and the Supreme Court. While the Court reached an accommodation with distress in *Murray’s Lessee*, its decision took account of and sought to preserve the judicial role.

### A. Revenue and Accountability in the Common Law System

To understand *Murray’s Lessee* in context, one must return to a common law world that sharply distinguished between judicial and extra-judicial government actions. Judicial actions proceeded according to the course of the common law. Defendants were brought before a superior court of record to answer the claims against them; they were given an opportunity to plead and to contest the factual and legal bases for the claim; they were entitled to a jury trial; and their property was often immune from process until a judgment was entered against them.<sup>44</sup> Once a judgment was entered, sheriffs were responsible for its execution, either by seizing the debtor’s property under writs of *feri facias*, or

---

<sup>43</sup>For an overview on administrative law and official accountability during these periods, see generally Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256 (2006); Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 YALE L.J. 1636 (2007) [hereinafter Mashaw, *Reluctant*]; Jerry L. Mashaw, *Administration and “The Democracy”: Administrative Law from Jackson to Lincoln, 1829–1861*, 117 YALE L.J. 1568 (2008) [hereinafter Mashaw, *Administration*]. On municipal tax collection, see generally Catherine S. Menand, *The Things That Were Caesar’s: Tax Collecting in Eighteenth-Century Boston*, 1 MASS. HIST. REV. 49 (1999).

<sup>44</sup>See Pfander & Formo, *supra* note 37, at 732–35.

by imprisoning the debtor until payment was made under writs of *capias ad satisfaciendum*.<sup>45</sup>

Matters were quite different when the government proceeded extra-judicially to enforce the obligations owed by local citizens. Local boards and commissions were often given power to carry out such government functions as tax collection,<sup>46</sup> road building,<sup>47</sup> and maintenance of a well-disciplined militia.<sup>48</sup> Citizens who failed to comply with the orders of these boards and commissions were subject to fines and penalties of various sorts. In some cases, the commission might pursue the collection of the tax or fine by initiating suit through the course of common law (judicially).<sup>49</sup> Alternatively, legislatures sometimes empowered the commission to collect fines and taxes through the use of distress (extra-judicially).<sup>50</sup> Under the distress alternative, the commission issued a warrant and the proper official (perhaps the local sheriff)

---

<sup>45</sup> Or “*fi. fa.*” and “*ca. sa.*” for short. For background on *fi. fa.*, see generally WILLIAM HENRY WATSON, A PRACTICAL TREATISE ON THE LAW RELATING TO THE OFFICE AND DUTY OF SHERIFF 123–47 (Philadelphia, J.S. Littell 1834). For background on *ca. sa.*, see generally *id.* at 96–108.

<sup>46</sup> See, e.g., Act of Feb. 16, 1786, § 4, in 1 LAWS OF THE COMMONWEALTH OF MASSACHUSETTS FROM NOVEMBER 28, 1780 TO FEBRUARY 28, 1807, at 265, 266 (Boston, J.T. Buckingham 1807).

<sup>47</sup> See, e.g., Act of July 31, 1760, No. 898, sched., in 4 THE STATUTES AT LARGE OF SOUTH CAROLINA: CONTAINING THE ACTS FROM 1752, EXCLUSIVE, TO 1786, INCLUSIVE 128, 138 (Thomas Cooper ed., Columbia, A.S. Johnston 1838). The 1760 revenue bill for South Carolina provided that collectors, in case of default, were to issue distress warrants to the local constables, who were empowered to jail defaulters for want of sufficient chattel. *Id.* para. XVIII, at 134–35. The revenue collected was apportioned, in part, to the “Commissioners for the Streets in Charlestown,” *id.* sched., at 138, and to keep “the road upon Charlestown Neck . . . in repair,” *id.* sched., at 143.

<sup>48</sup> See, e.g., *id.* sched., at 138–40 (making numerous provisions “for the forts,” “for the forces,” “for the scout boats,” “for lookouts,” and “for the public arms”). In 1792, Congress provided for the collection of fines owed the courts martial via distress. Act of May 2, 1792, ch. 28, § 7, 1 Stat. 264, 264–65. Fines issued by Courts Martial were levied by distress. *Id.* The exact procedures for distress were set by the state in which the fined party resided. *Id.* And non-commissioned officers could be imprisoned for nonpayment. *Id.* If deputies did not pay the fines they collected, the United States could bring action at debt for the amount due. *Id.* § 8, at 265. Congress took a similar approach again in 1795, when it passed a similar act which was the same with respect to distress. See Act of Feb. 28, 1795, ch. 36, §§ 7–8, 1 Stat. 424, 424–25.

<sup>49</sup> New Jersey is one of several states that provided for actions to collect taxes. See, e.g., Act of Dec. 20, 1781, ch. 291, §§ 2–3, in ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF NEW-JERSEY 231, 232 (Peter Wilson ed., Trenton, Isaac Collins 1784) (making sheriffs and county tax collectors subject to actions in debt brought by the Treasurer). Congress also provided for collection by an action in debt. See Whiskey Act, ch. 15, § 23, 1 Stat. 199, 204 (1791) (providing for either a suit to collect backed taxes or for the tax collectors’ district supervisor to levy distress and sale of goods).

<sup>50</sup> See *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 279 (1855) (listing Connecticut, Pennsylvania, South Carolina, New York, Virginia, Vermont, as colonial examples before explaining that, after “the formation of the [C]onstitution of the United States, other States have passed similar laws”).

carried out the seizure and sale of the debtor's property to secure payment of the fine.<sup>51</sup> Distress might also authorize the sheriff to imprison the debtor until the fine was paid.<sup>52</sup>

Common law courts took very different views of judicial and extra-judicial process. So long as the sheriff stayed within the metes and bounds of official authority conferred by a common law judgment and process of execution, the sheriff's actions were lawful.<sup>53</sup> Having had a day in court, the defendant could not recover against the judge who entered the judgment or the sheriff who carried it into execution. Distress warrants were a different matter altogether. The members of the board or commission, though empowered to issue the warrant, were subject to liability if they exceeded their authority, say by taxing property that was immune from tax or imposing militia duties on a person who was exempt from service.<sup>54</sup> Individuals on the receiving end of extra-judicial

---

<sup>51</sup> *E.g.*, *Shaw v. Dennis*, 10 Ill. (5 Gilm.) 405, 406 (1849) (syllabus) (trespass brought against a sheriff, who "set[] forth that the warrant was signed by three of the bridge commissioners" in defense).

<sup>52</sup> *E.g.*, An Act Providing for the Collection and Payment of Rates or Taxes (n.d.), § 4, in *ACTS AND LAWS OF THE STATE OF CONNECTICUT, IN AMERICA* 349, 350 (Hartford, Hudson & Goodwin 1796) (providing for the sheriff "to take his Body and him commit until the [tax] be paid, or he is otherwise released by due course of law").

<sup>53</sup>

An action does not lie against a mere ministerial officer for any thing done merely in pursuance of his duty. . . . [B]ut if he exceed his duty and is concerned in the wrong, and assists therein, he is liable as a party in the trespass or wrong. [And] [t]he officer must obey his precept, if the court has jurisdiction in the case, and he is required but to know the public law in the case.

3 DANE, *supra* note 17, ch. 75, art. 2, §§ 9–10, at 62 (emphasis omitted).

In all these cases in regard to the acts of officers, jurisdiction or no jurisdiction is material; generally the executive officer acts in virtue of some precept issued by some court or magistrate, and if that be valid or only erroneous, the executive officer must obey it and if he does not, and neglect his duty or to obey his precept, this action lies against him. But if the court or magistrate issuing the precept have no jurisdiction in the matter, it is void, and the officer is not liable for neglecting to execute it; but is liable to be sued, if he do proceed to execute it; hence it is often material to inquire if there be such lawful jurisdiction, issuing the precept the officer acts under, or not.

*Id.* art. 4, § 1, at 65. "If a court or magistrate issue process beyond their limits, it is void, and the officer obeys it at his peril." *Id.* § 2, at 65.

<sup>54</sup> Consider a tax case, *Wilson v. Mayor of New-York*, 1 Abb. Pr. 4, 23 (N.Y. Ct. C.P. 1854) ("The assessors themselves, . . . and . . . the parties by whom the original warrant for the collection of the tax is issued, may be liable. Their acts, so far as they exceed their jurisdiction, do not protect them from liability to make full reparation for any injury which results therefrom."); *accord id.* at 23–28 (collecting and discussing cases). As for the militia, consider *Wise v. Withers*, 7 U.S. (3 Cranch) 331, 337 (1806) (explaining personal liability lay against judges of a court martial who were "all trespassers" when they exceeded their jurisdiction).

government exactions or coercion thus had a right to test the legality of the exaction by suing officials in the courts of common law.

Life as a sheriff thus had its ups and downs. Sheriffs were often the face of government law enforcement at common law, serving process, selling property, executing search warrants, and sending debtors to jail. But they were also subject to suit for damages when they exceeded their authority or when they proceeded extra-judicially.<sup>55</sup> Similar forms of personal liability applied to other officials, such as the members of a board or commission that exceeded its authority in the issuance of a distress warrant. The common law thus served both as a vehicle for the enforcement of obligations to the government and as a limit on official power. On any given day, the sheriff might execute judicial process through a sheriff's sale and appear as a defendant in a suit brought by an individual challenging the exercise of extra-judicial authority. Personal liability encouraged sheriffs (and other government officers) to pay close attention to the limits of their official authority.

Sheriffs were paid a salary and fees for the various services they performed—so much to arrest a defendant, serve a subpoena, or execute a judgment.<sup>56</sup> Sheriffs also owed a strict duty to account for the money that passed through their hands. Public sale of properties in the satisfaction of judgments could produce substantial sums, all of which were held by the sheriff for payment to the creditor, less a percentage fee or “poundage” payable to the sheriff.<sup>57</sup> Similarly, sheriffs were responsible for the safe-keeping of property placed in the custody of the court, as with, say, an interpleader action.<sup>58</sup> Sheriffs did occasionally arrest and imprison defendants or debtors, but their work often savored more of the bookkeeper than of the gunslinger. It was crucial to the system that sheriffs honestly manage the public's funds. To that end, sheriffs were obliged to post bonds with good and sufficient sureties, to protect those whose money they handled.<sup>59</sup>

---

<sup>55</sup> See, e.g., William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 73 STAN. L. REV. ONLINE (forthcoming 2021) (manuscript at 4–5), [ssrn.com/a=3746068](https://ssrn.com/a=3746068) (on file with the *Ohio State Law Journal*) (collecting examples).

<sup>56</sup> E.g., Act of Mar. 17, 1780, ch. 193, § 2, in ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF NEW-JERSEY, *supra* note 49, at 122, 123. On the compensation of government officials in the eighteenth and nineteenth centuries, see generally NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940* (2013).

<sup>57</sup> Act of Dec. 20, 1781, ch. 291, § 2, in ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF NEW-JERSEY, *supra* note 49, at 231, 232 (providing that the sheriffs render accounts for all money collected from executions every year, the sum being recoverable through an action in debt by the Treasurer against the sheriff in any court of record).

<sup>58</sup> WATSON, *supra* note 45, at 135 (“After the sheriff has seized goods, it is his duty to remove them to a place of safe custody until they can be sold, for if they be rescued the sheriff is liable to the plaintiff for their value . . .”).

<sup>59</sup> The sheriffs in the several states had to post bond upon assumption of their office. See, e.g., Act of Oct. 5, 1781, ch. 279, § 1, in ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF NEW-JERSEY, *supra* note 49, at 215, 215.



When setting up shop in the 1790s, the new federal government borrowed the common law, the common law sheriff, and the system of bonded accounting for use with officers who handled federal money. One group of bonded accountants, federal tax collectors, operated in the nation's port cities to collect import duties.<sup>60</sup> *Murray's Lessee* arose from the Treasury Department's efforts to recover the money collected by one such collector, Samuel Swartwout.<sup>61</sup> A second group of bonded federal accountants, federal marshals, played the role of sheriff for the United States' district and circuit courts.<sup>62</sup> In addition to a salary, both collectors and marshals (like sheriffs) received poundage fees on the money they handled.<sup>63</sup> The fees could be significant and the bond amounts were impressive; the value of the \$20,000 bond required of federal marshals would exceed \$600,000 today;<sup>64</sup> Swartwout's bond as the collector of New York was nearly three times that amount.<sup>65</sup>

Disagreements naturally arose between the central government and the officers who handled federal money. The Judiciary Act of 1789 provided for federal courts to hear such disputes, authorizing the United States to sue as a plaintiff where the matter in controversy exceeded \$500.<sup>66</sup> One gets a sense of the complexity of such proceedings from litigation with the marshal of New York, Aguila Giles. To collect a hefty 1799 judgment in favor of the United States, Giles was called upon to levy execution on the property of John Lamb.<sup>67</sup> Giles did so, and duly forwarded the proceeds of the sale to the Treasury.<sup>68</sup> But Treasury officials contested the amounts Giles had deducted, including his fees and other items.<sup>69</sup> So the United States sued again, this time naming Giles as the

---

<sup>60</sup> The collectors at the ports posted bonds of up to \$60,000. Act of July 31, 1789, ch. 5, § 28, 1 Stat. 29, 44. Another example is the Secretary of the Treasury, who was required to post bond of \$150,000 and post "sufficient" sureties. An Act to Establish the Treasury Department, ch. 12, § 4, 1 Stat. 65, 66 (1789). The collectors were also paid through a fee system which provided compensation, in part based on the goods they seized. See PARRILLO, *supra* note 56, at 224–26.

<sup>61</sup> "Samuel Swartwout was collector of customs of the United States for the port of New York . . ." *Record, Murray's Lessee*, *supra* note 20, at 13.

<sup>62</sup> The first Judiciary Act required federal marshals to have two sureties and post bond of \$20,000. Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87.

<sup>63</sup> *E.g.*, Act of May 8, 1792, ch. 36, § 3, 1 Stat. 275, 276 (enumerating the various compensation rates for federal marshals).

<sup>64</sup> *Cf.* Judiciary Act of 1789 § 27, at 87. \$20,000 in 1789 is approximately \$620,000 in 2021. See CPI INFLATION CALCULATOR, <https://www.officialdata.org/us/inflation/1789?endYear=2021&amount=20000> [<https://perma.cc/2228-35LS>].

<sup>65</sup> Act of July 31, 1789, ch. 5, § 28, 1 Stat. at 44 (\$50,000).

<sup>66</sup> Judiciary Act of 1789 § 11, at 78.

<sup>67</sup> *United States v. Giles*, 13 U.S. (9 Cranch) 212, 213 (1815) (reporter's note) ("[T]he United States . . . recovered judgment in the district Court against one John Lamb for the sum of 127,952 dollars and 99 cents, debt, and 20 dollars damages . . .").

<sup>68</sup> *Id.* at 233 (explaining that Giles forwarded sums to the district attorney "by and with the approbation of the comptroller of the treasury").

<sup>69</sup> *Id.* (stating the special question of whether the amount withheld amounted to a legal conversion).

defendant and demanding \$20,000.<sup>70</sup> Eventually, the Supreme Court ruled in Giles's favor, but the litigation lingered until at least 1815.<sup>71</sup>

The *Giles* litigation reveals three factors that seem central to any evaluation of the role of the judiciary in hearing debt claims against federal government accountants. First, the nature of these disputes could be quite complex as claims for setoffs and fees demanded the careful attention of judge and jury. A brief perusal of the *Giles* opinion, which runs for several pages in the *U.S. Reports*, underscores this complexity.<sup>72</sup> Second, reliance on the course of the common law could make for lengthy delays in revenue collection. Third, the fact that government accountants were disabled from suing the United States gave them clear incentives to retain money in their own hands in doubtful cases and await the government's decision to initiate a lawsuit, possibly magnifying the chances of disagreement. The evident (though structural) self-interest of officials accounting for federal money doubtless helped to persuade Treasury officers to view the accountants' claims with some skepticism.

### B. *The Importance of Priority*

In a common law world without bankruptcy protection and the automatic stay, unsecured creditors scrambled to grab a debtor's dwindling assets. So priority rules were crucial in determining who got paid. A distant government was at a distinct disadvantage in such scrambles. Collectors in the customs houses were obliged to account to the government for the import duties they collected and were legally indebted for any missing funds.<sup>73</sup> But when collectors failed to pay and other creditors moved quickly, the government might find that its judgment for the amounts due had become effectively worthless through the passage of time.

The federal government, in the words of Justice Story, quickly tried to establish the "right of priority of payment of debts due to the government"—"a prerogative of the crown well known to the common law."<sup>74</sup> A series of statutes adopted during the early republic sought to operationalize the government's priority and paid particular attention to customs collectors. In 1790, Congress established that the United States would have priority in suits with customs collectors over dues.<sup>75</sup> Just two years later, Congress was compelled to extend the United States' priority in cases involving customs collectors' surety bonds.<sup>76</sup>

---

<sup>70</sup> *Id.* at 230.

<sup>71</sup> *Id.* at 240–43.

<sup>72</sup> *See id.* at 233–36 (listing out eight possible dispositions and ten certified questions).

<sup>73</sup> *See generally* Aaron T. Knapp, *From Empire to Law: Customs Collection in the American Founding*, 43 L. & SOC. INQUIRY 554, 565–68 (2018) (reviewing GAUTHAM RAO, NATIONAL DUTIES: CUSTOM HOUSES AND THE MAKING OF THE AMERICAN STATE (2016)) (providing an overview of the custom house statutory framework in the early republic).

<sup>74</sup> *United States v. State Bank of N.C.*, 31 U.S. (6 Pet.) 29, 35 (1832).

<sup>75</sup> Act of Aug. 4, 1790, ch. 35, § 45, 1 Stat. 145, 169.

<sup>76</sup> Act of May 2, 1792, ch. 27, § 18, 1 Stat. 259, 263.

Five years later, Congress extended the federal government's priority in any case where revenue officers were insolvent.<sup>77</sup> Yet another attempt focused on collecting customs revenue was adopted in 1799. This act required collectors to sue defaulting merchants as soon as the merchant's debt came due; provided for a summary process (unless the merchant objected in open court); and specified that, in cases of insolvency, the United States would have priority.<sup>78</sup>

Despite these efforts, the federal courts took a somewhat narrow view of the government's priority and consigned the government to a place back in the line of creditors. Though the Court upheld the constitutionality of priority legislation in 1805,<sup>79</sup> it also held that no lien was established until a suit was brought.<sup>80</sup> In 1814, the Court limited the scope of the 1797 insolvency statute to apply only when a legal insolvency had been declared.<sup>81</sup> Another technical fate befell the 1799 effort focusing on collecting debt from merchants: In 1819, the Court held that the 1799 act applied when a debtor assigned all his assets, not when only a portion had been assigned.<sup>82</sup>

Collecting missing revenue was thus a challenging feat in the early republic.<sup>83</sup> By the time Treasury officials in the remote federal city grew wise to a customs official's misdeeds, the government was already behind in the race to attach his property.<sup>84</sup> And by the time they could begin proceedings and attach the collector's property, they were unlikely to be first in line.<sup>85</sup> So the government found itself as one creditor among many, jockeying to claim a share of a debtor's property. It is little wonder, then, that Treasury asked Congress to revise the priority law "in order to render it effectual" in 1818, having "no doubt" in "the justice and propriety of securing this legal priority."<sup>86</sup>

---

<sup>77</sup> The statute describes:

[W]here any revenue officer . . . shall become insolvent . . . the debt due to the United States shall be first satisfied; and the priority hereby established shall be deemed to extend, as well to cases in which . . . the estate and effects of an absconding, concealed, or absent debtor, shall be attached by process of law . . . .

Act of Mar. 3, 1797, ch. 20, § 5, 1 Stat. 512, 515.

<sup>78</sup> Act of Mar. 2, 1799, ch. 22, § 65, 1 Stat. 627, 676–77.

<sup>79</sup> *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 396 (1805).

<sup>80</sup> *United States v. Hooe*, 7 U.S. (3 Cranch) 73, 91 (1805).

<sup>81</sup> *Prince v. Bartlett*, 12 U.S. (8 Cranch) 431, 434 (1814).

<sup>82</sup> *United States v. Howland*, 17 U.S. (4 Wheat.) 108, 116–17 (1819).

<sup>83</sup> It was not until well after the 1820 Act at issue in *Murray's Lessee* that Justice Story finally concluded that the United States' priority applied to cases in debt by bonds. *See United States v. State Bank of N.C.*, 31 U.S. (6 Pet.) 29, 40 (1832).

<sup>84</sup> The 1797 Act was "inadequate" in part because "the provisions of some of the State laws, by which liens are obtained, by taking out attachments, which are levied upon the property of their debtors, when upon the brink of insolvency, or immediately after such insolvency is known." Treasury Dept., Revision of the Revenue Laws (Jan. 20, 1818), reprinted in 3 American State Papers: Finance no. 515, at 234, 239 (Walter Lowrie & Walter S. Franklin eds., 1834).

<sup>85</sup> *See id.*

<sup>86</sup> *Id.*

### III. PRELUDE TO *MURRAY'S LESSEE*: THE COMMON LAW AND A MORE EFFICIENT TREASURY

Congress would respond to the Treasury's 1818 petition in 1820, simplifying collection and conferring priority by introducing the use of extra-judicial distress warrants. In this Part, we first sketch the use of distress as it developed in the states and the common law framework within which the targets of such proceedings could contest distress warrants. After laying this foundation, we explore the legislation at the heart of *Murray's Lessee* to show how it improved the government's priority without undercutting the collector's right to an adjudication in court of the debt claim.

As we will see, the legal framework Congress adopted bore some resemblance to a model in which creditors would first seize the debtor's property to establish priority and then litigate the debt claim. Familiar to modern students of *Pennoyer v. Neff* as a form of quasi-in-rem jurisdiction,<sup>87</sup> this form of attachment played an important role in the private law of debt collection.<sup>88</sup> By establishing the creditors' priority as of the date of attachment—not judgment<sup>89</sup>—the practice allowed pre-suit seizure of assets but preserved the defendant's right to an adjudication of contested debts. Congress adapted this procedure to the problem of enforcing collectors' dues by authorizing the Treasury to use distress as the foundation for the pre-suit seizure of assets (and the priority it conferred) and preserving the debtor's post-seizure right to an adjudication of disputed claims.

#### A. *Commonplace Distress*

We begin with an overview of distress, an extra-judicial form of summary process that allows government officials to seize a person's property "to secure

---

<sup>87</sup> For an account of *Pennoyer v. Neff*, 95 U.S. 714 (1878), and its approval of practice on foreign attachment of assets as a form of quasi-in-rem jurisdiction, see Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479, 480–90, 498 (1987).

<sup>88</sup> See Pfander & Formo, *supra* note 37, at 732–33. This practice traces back to the Mayor's Court of London. See *id.* at 732–33, 732 n.50 (citing Nathan Levy, Jr., *Attachment, Garnishment and Garnishment Execution: Some American Problems Considered in Light of the English Experience*, 5 CONN. L. REV. 399, 404 (1973)); see also *id.* at 732 n.49 (citing Joseph H. Beale, *The Exercise of Jurisdiction in Rem to Compel Payment of a Debt*, 27 HARV. L. REV. 107, 121–22 (1913)). Following the pre-suit seizure, the debtor could obtain release of the assets by posting bond and could, of course, contest the debt claim. See *id.* at 732 & n.52 (first citing ROBERT WYNESS MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* 482 (1952); and then citing *Tennent v. Battey*, 18 Kan. 324, 328 (1877)).

<sup>89</sup> *Id.* at 733 & n.54 (citing MILLAR, *supra* note 88, at 493). If the creditor was ultimately successful on the merits of the debt claim, the judgment was enforced against the attached assets, or the bond that stood in their place. *Id.* at 733 & n.53 (citing MILLAR, *supra* note 88, at 496).

the performance of a duty.”<sup>90</sup> Common law distress first allowed a landlord to seize a tenant’s personal property in payment of rent due.<sup>91</sup> Eventually, the Crown caught on and persuaded Parliament to authorize its use of distress to collect revenue from taxpayers.<sup>92</sup> Similar revenue collection tools were adopted by the colonial governments here, and several colonies adopted distress warrants as a means to collect taxes.<sup>93</sup> In Massachusetts, the Treasurer could issue a distress warrant to a local sheriff or constable to collect revenues due from delinquent tax collectors.<sup>94</sup> In New York, as early as 1739, distress was used to collect fines for being a “hawker” or “pedlar” without purchasing a license.<sup>95</sup> And Pennsylvania outlawed exercise of worldly business on Sunday, enforceable by a fine that was collected by distress.<sup>96</sup>

The federal government also used distress but did so initially to secure the collection of internal taxes and militia fines. Unlike external taxes collected from importers, internal taxes were payable in cash by citizens of the United

---

<sup>90</sup> *Distress*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“1. The seizure of another’s property to secure the performance of a duty, such as the payment of overdue rent. 2. The legal remedy authorizing such a seizure; the procedure by which the seizure is carried out.”). For a modern treatment of tax warrants in New York, see David Gray Carlson & Carlton M. Smith, *New York Tax Warrants: In the Strange World of Deemed Judgments*, 75 ALB. L. REV. 671, 671–73 (2012).

<sup>91</sup> Originally, distress was used to seize

cattle or goods for nonpayment of rent, or other duties; or . . . *damage-feasant*. . . . The former intended for the benefit of landlords, to prevent tenants from secreting or withdrawing their effects to his prejudice; the latter arising from the necessity of the thing itself, as it might otherwise be impossible at a future time to ascertain, whose cattle they were that committed the trespass or damage.

3 WILLIAM BLACKSTONE, COMMENTARIES \*6. Distress was also addressed in the Marlebridge Statute in 1267. 2 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 103 n.4 (London, E & R Brooke 1797) (explaining that distress for services, rents, damage feasant, or other lawful purposes is different than taking distress for revenge).

<sup>92</sup> The practice dates back at least to the beginning of the eighteenth century in England. See An Act for Rendering More Effectual the Laws Concerning Commissioners of Sewers, 7 Ann., c. 33 (1708) (Eng.), in 9 THE STATUTES OF THE REALM 141, 141–42 (1822) (empowering the commissioners to collect sewer fees by distress and sale of goods under their own authority, without the pre-approval of a court).

<sup>93</sup> *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 279 (1855) (listing several colonial examples, and explaining that, after “the formation of the [C]onstitution of the United States, other States have passed similar laws”).

<sup>94</sup> See, e.g., Act of Feb. 16, 1786, § 4, in LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, *supra* note 46, at 265, 266.

<sup>95</sup> Act of Nov. 17, 1739, ch. 691, § 6, in LAWS OF NEW-YORK 276, 277 (New York, James Parker 1752).

<sup>96</sup> An Act to Restrain People from Labor on the First Day of the Week (n.d.), ch. 119, § 1, in 2 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 175, 175–76 (n.p. 1896).

States.<sup>97</sup> Thus, in 1791, Hamilton's whiskey tax provided for collection by way of distress.<sup>98</sup> In 1792, and again in 1795, Congress exercised its power over the militia in providing for courts martial to impose fines, enforceable through distress, on those who failed to muster as required.<sup>99</sup> In 1798, Congress provided for a direct tax on the landed and slave property, as valued by government boards of tax assessment and collected by distress.<sup>100</sup> During and after the War of 1812, Congress again turned to direct taxes, enforceable through distress.<sup>101</sup>

---

<sup>97</sup> *E.g.*, Whiskey Act, ch. 15, § 3, 1 Stat. 199, 199 (1791) (providing for payment in cash or by bond, secured by sureties or by deposit of sufficient spirits).

<sup>98</sup> *Id.* § 23, at 204 (providing for either a suit to collect backed taxes or for the tax collectors' district supervisor to levy distress and sale of goods); see also WILLIAM HOGELAND, *THE WHISKEY REBELLION* 60–64 (2006) (describing Alexander Hamilton's role in the passage of the Whiskey Act).

<sup>99</sup> Act of May 2, 1792, ch. 28, § 7, 1 Stat. 264, 264–65. Fines issued by Courts Martial were levied by distress. *Id.* § 7, at 264–65. The exact procedures for distress were set by the state in which the fined party resided. *Id.* § 7, at 265. And non-commissioned officers could be imprisoned for nonpayment. *Id.* If deputies did not pay the fines they collected, the United States could bring action at debt of information for amount due. *Id.* § 8, at 265. The 1795 Act was the same with respect to distress. See Act of Feb. 28, 1795, ch. 36, §§ 7–8, 1 Stat. 424, 424–25.

<sup>100</sup> Act of July 14, 1798, ch. 75, § 8, 1 Stat. 597, 600. The First Congress laid a \$2 million tax apportioned among the states. *Id.* § 1, at 597–98. Under the Act, the Treasury Department appointed assessors who supervised collectors; these collectors were duty-bound to provide notice and make demand of individuals. *Id.* §§ 2–8, at 598–600. If the individuals refused to pay, the collectors could proceed by distress, provided they did not distress the family's means to make a living or other necessities such as dining utensils. *Id.* § 9, at 600.

<sup>101</sup> The first example is Duties on Carriages. Act of July 24, 1813, ch. 24, 3 Stat. 40. Under this statute, penalties existed for making false or evasive statements; these penalties are collected by distress. *Id.* § 5, at 41. There was a sixty-day grace period where the person could pay the duty to avoid the penalty. *Id.* Congress quickly followed on with a second example, the Excise Spirit Duties. Act of Dec. 21, 1814, ch. 15, 3 Stat. 152. Collection was enforceable by distress, with the familiar protection against distraining tools of trade and family necessities. *Id.* § 5, at 154–55. Two other examples bear mention. In 1815, Congress enacted the Direct and Property Tax. Act of Jan. 9, 1815, ch. 21, 3 Stat. 164. This was a six-million-dollar direct tax, apportioned among the states, and paid by property taxes. *Id.* §§ 1–5, at 164–66. Collectors could proceed by distress against delinquent debtors, *id.* § 26, at 173–74; the Treasury could proceed against delinquent collectors by distress, *id.* § 33, at 176–77. The collection of fines, however, occurred in a court of law with competent jurisdiction. *Id.* § 34, at 177. And in 1820, Congress incorporated Washington D.C. Act of May 15, 1820, ch. 104, 3 Stat. 583. Section 7 protects necessities from distress. *Id.* § 7, at 586–87. Section 12 empowers collection by distress and incorporates the Maryland replevin law, qualifying the right to replevy distrained personal property. *Id.* § 12, at 590.

## B. Judicial Review of Distress

### 1. Common Law Remedies and Discretion in State Courts

While distress warrants could provide legal authority for the coercive seizure and sale of property, they did not conclusively establish the legality of the process that led to the seizure. In other words, distress warrants were subject to at least two kinds of litigation in common law courts.<sup>102</sup> Some litigants asked the courts to block or otherwise control the warrant's issuance or execution.<sup>103</sup> These direct suits used administrative writs and asked the courts to review the executive's coercive processes prospectively—before any seizure occurred.<sup>104</sup> Other litigants might challenge the warrant by suing the sheriff or commissioners, post-seizure, seeking an award of damages or the return of seized property and arguing that the distress process suffered from a legal defect.<sup>105</sup> These collateral suits asked the court to fashion a retrospective remedy after the seizure had occurred.<sup>106</sup>

Reviewing distress warrants, common law courts applied varying degrees of scrutiny, depending on the nature of the taxpayer's challenge. On the one hand, the courts were remarkably strict in enforcing statutory and jurisdictional limitations on the taxing power.<sup>107</sup> Thus, if the tax collector failed to comply

---

<sup>102</sup> On direct and collateral review, see Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 946–53 (2011).

<sup>103</sup> On the reluctance of courts of equity to intervene, see *Van Cott v. Board of Supervisors of Milwaukee County*, 18 Wis. 247, 248–49 (1864) (explaining that equitable relief was unnecessary given the adequacy of “remedies by *certiorari*, *mandamus*, prohibition, etc., as heretofore applied in such cases”).

<sup>104</sup> On the traditional availability of forms of direct review, see *Wilson v. Mayor of New-York*, 1 Abb. Pr. 4, 14–17, 17 n.\* (N.Y. Ct. C.P. 1854) (discussing use of *certiorari* to review commissioners in New Jersey and New York). See generally James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of Ex parte Young*, 72 STAN. L. REV. 1269, 1311–18 (2020) (describing use of *mandamus* and *certiorari* in oversight of local administrative activity).

<sup>105</sup> E.g., sources cited *infra* notes 106–07.

<sup>106</sup> In these suits, it is important to recall “distress is not a judicial process. It is the private remedy of the party entitled to the rent, toll, service, tax, or other duty, for which the tenant or the debtor is liable.” *Ross v. Holtzman*, 20 F. Cas. 1239, 1240 (C.C.D.C. 1828) (No. 12,075). The court presumed the ability to challenge the distress: “When the party who has made the distress comes to answer for it, he may justify in different rights, by several avowries, and thus bring each right distinctly before the court.” *Id.* These actions typically involved ensuring that the collector was lawfully executing the warrant—you could not sue the collector because you disagreed with the amount you were being taxed. *Howard v. Proctor*, 73 Mass. (7 Gray) 128, 133 (1856).

<sup>107</sup> For examples of strict application of statutory rules, see *Farnsworth Co. v. Rand*, 65 Me. 19, 24–25 (1876) (invalidating distraint where collector held property one day beyond the four-day limit specified on the warrant); *Cressey v. Parks*, 76 Me. 532, 534

with the letter of the law, including the specific timing rules that governed tax collection, common law remedies were available.<sup>108</sup> Jurisdictional limits were also strictly enforced, as one court explained: “Their acts [as assessors], so far as they exceed their jurisdiction, do not protect them from liability to make full reparation for any injury which results therefrom.”<sup>109</sup> Thus, taxpayers might challenge a decision by the assessors to impose taxes on untaxable land just as they could challenge taxes imposed on property that was not within the government’s territorial authority.

In contrast to their strict, *de novo* review for statutory and jurisdictional transgressions, common law courts deferred to assessors’ exercise of lawful discretion. In many tax schemes, the amount of tax payable on any particular parcel of property was the product of a specific tax rate and an assessment of the property’s worth.<sup>110</sup> When tax statutes conferred discretion on assessors to conduct these valuations, courts deferred because the legislature had assigned legal responsibility for making the valuation to non-judicial actors.<sup>111</sup> Unless the legislature set some sort of legal standard as the measure of any particular property’s valuation, courts had no role to play in the valuation process.<sup>112</sup> To be sure, a modern realist might suspect that in at least some cases courts rigorously enforced statutory limits to express dissatisfaction with the exercise of the assessor’s valuation discretion. But as a formal matter, courts were expected to and largely did keep their hands off valuation decisions.

Consider the Supreme Court’s decision in *Bartlett v. Kane*,<sup>113</sup> a decision that appeared only a few years before *Murray’s Lessee* was decided. Under the terms of the applicable tariff laws, the amount of duty payable on imported goods was based in part on assessment of the value of the goods in question.<sup>114</sup> That valuation was initially determined by the collector, subject to review before

---

(1884) (same); *Pierce v. Benjamin*, 31 Mass. (13 Pick.) 356, 359–60 (1833) (same); *Wilson v. Shearer*, 50 Mass. (9 Met.) 504, 507–08 (1845) (distress invalidated where it interfered with estate administration); *Hoozer v. Buckner*, 50 Ky. (11 B. Mon.) 183, 183–85 (1850) (strictly applying notice rules); and *Rawbold v. Wilson*, 5 Ky. Op. 281, 281 (1870) (no receipt accompanied seizure of property).

<sup>108</sup> See sources cited *supra*, note 107.

<sup>109</sup> *Wilson v. Mayor of New-York*, 1 Abb. Pr. 4, 23 (N.Y. Ct. C.P. 1854).

<sup>110</sup> See, e.g., Tariff Act of Aug. 30, 1842, ch. 270, § 16, 5 Stat. 548, 563–64. For a comprehensive list of tariffs, see generally S. Doc. No. 54-219 (1896) (detailing the Tariff Acts passed by Congress from 1789 to 1895).

<sup>111</sup> “[W]hen power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter.” *Bartlett v. Kane*, 57 U.S. (16 How.) 263, 272 (1853).

<sup>112</sup> “The interference of the courts with the performance of the ordinary duties of the executive departments of the government would be productive of nothing but mischief; and we are satisfied that such a power was never intended to be given to them.” *Id.* (citing *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 516 (1840)).

<sup>113</sup> 57 U.S. (16 How.) at 269–70.

<sup>114</sup> See Act of July 30, 1846, ch. 74, §§ 1–4, 9 Stat. 42, 42–43.



a board of merchant appraisers.<sup>115</sup> After invoking that process of review, the importer withdrew the appeal, paid the tax under protest, and sought to attack the valuation through an action in the courts.<sup>116</sup> The government argued that the appraisal was final and conclusive in determining the dutiable value.<sup>117</sup> The Supreme Court agreed, explaining that

The appraisers are appointed “with powers, by all reasonable ways and means, to ascertain, estimate, and appraise the true and actual market value and wholesale price” of the importation. The exercise of these powers involve knowledge, judgment, and discretion. And in the event that the result should prove unsatisfactory, a mode of correction is provided by the act. It is a general principle, that when power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter.<sup>118</sup>

Thus, the Court recognized congressional power to place the valuation decision beyond the reach of judicial review. True, the Court reaffirmed that review was available when the officer exceeded her statutory authority or committed fraud. But if Congress made no provision for review, the valuation made by the designated official was conclusive, “whether executive, legislative, judicial, or special.”<sup>119</sup>

The distinction between strict review of jurisdictional and statutory limits and lax or non-existent review of the exercise of agency discretion regarding appraised valuation helps to explain much that seems puzzling about common law remedies. Three forms of direct administrative oversight were available at common law: writs of mandamus to compel ministerial action required by law;<sup>120</sup> writs of prohibition to bar an inferior court from taking up a dispute over which it lacked authority;<sup>121</sup> and writs of certiorari to correct legal mistakes and invalidate actions of a board or commission that exceeded its proper

---

<sup>115</sup> See Tariff Act of Aug. 30, 1842, ch. 270, §§ 16–17, 5 Stat. at 563–64.

<sup>116</sup> 57 U.S. (16 How.) at 269–70.

<sup>117</sup> *Id.* at 265, 270.

<sup>118</sup> *Id.* at 272 (citing *United States v. Arredondo*, 31 U.S. (6 Pet.) 691, 729 (1832)).

<sup>119</sup> *Id.* (citing *Arredondo*, 31 U.S. at 729–30).

<sup>120</sup> “[M]andamus is proper where a party has a legal right, and there is no other appropriate legal remedy, and where, in justice, there ought to be one . . . .” *Wilson v. Mayor of New-York*, 1 Abb. Pr. 4, 18 (N.Y. Ct. C.P. 1854) (emphasis omitted) (citations omitted); 6 DANE, *supra* note 17, ch. 186, art. 2, §§ 3, 19, at 320, 323; see 4 TUCKER’S BLACKSTONE, *supra* note 39, at \*110–11; see also Pfander & Wentzel, *supra* note 104, at 1315–17.

<sup>121</sup> *Wilson*, 1 Abb. Pr. at 21; 4 TUCKER’S BLACKSTONE, *supra* note 39, at \*112–14; see 6 DANE, *supra* note 17, ch. 186, art. 4, §§ 1–5, at 336–37; see also Pfander & Wentzel, *supra* note 104, at 1317–18.

jurisdictional boundaries.<sup>122</sup> Notably, each of these modes of review failed to trigger judicial oversight of the discretionary appraisals at the heart of the taxation scheme. Mandamus reached only ministerial matters when the legal duty was clear and thus left discretionary decisions immune from review.<sup>123</sup> Many courts refused to issue writs of prohibition to quasi-judicial boards and commissions on the theory that the work they were undertaking was not of a judicial character;<sup>124</sup> and certiorari provided for direct review of matters other than the lawful exercise of discretion.<sup>125</sup>

Apart from conducting direct review, common law courts entertained collateral suits that attacked the execution of distress warrants. Here, as with all common law proceedings, it was essential that the plaintiff select the proper form of action. Thus, if the sheriff had wrongfully taken property in execution of a tax obligation, the taxpayer might sue in replevin to recover the specific property out of the hands of the sheriff.<sup>126</sup> But if the sheriff no longer held the property or was not the party responsible for the legal violation, the plaintiff might sue instead in trover, seeking damages for the conversion of property.<sup>127</sup> Other plaintiffs might sue in trespass, challenging the extra-judicial taking of their property.<sup>128</sup> Still others might bring suit (such as an ejectment action) against the purchaser of their landed property, arguing that problems with the

---

122

[W]e ought not to allow [certiorari] where assessments of taxes are in question . . . . [I]f there be an excess of legal power by which any person's rights may be injuriously affected, an action lies, and it is much better that he should be put to this remedy, than that the whole proceeding should be arrested . . . .

*Wilson*, 1 Abb. Pr. at 16 (emphasis omitted) (quoting *In re Mount Morris Square*, 2 Hill 14 (N.Y. Sup. Ct. 1841)); see also Pfander & Wentzel, *supra* note 104, at 1311–15.

<sup>123</sup> Mandamus “may often be appropriately used when the assessment rolls are still within the control of the proper body, and they are exceeding their jurisdiction or violating the clear legal right of an individual, by imposing upon him an illegal tax, where they have no discretion to exercise.” *Wilson*, 1 Abb. Pr. at 20. But mandamus does not lie when “under the particular statute relied upon by the plaintiffs, there [is] a discretion given to the defendants.” *Id.* at 19 (citing *People ex rel. Comm. Ins. Co. of New-York v. Supervisors of New-York*, 18 Wend. 605 (N.Y. Sup. Ct. 1836)); see also Pfander & Wentzel, *supra* note 104, at 1315–16 & n.281.

<sup>124</sup> Prohibition “does not lie to a ministerial officer to stay the execution of process in his hands—[Prohibition] is directed to a *court* and to the *party* prosecuting an action or legal proceeding therein.” *Wilson*, 1 Abb. Pr. at 21; see also Pfander & Wentzel, *supra* note 104, at 1317–18 & n.310.

<sup>125</sup> See Pfander & Wentzel, *supra* note 104, at 1311–15 (“As an expansive tool of judicial review, certiorari evolved into ‘the chief means by which [state courts would] review administrative action’ throughout the nineteenth century.” (quoting Frank J. Goodnow, *The Writ of Certiorari*, 6 POL. SCI. Q. 493, 493 (1891))).

<sup>126</sup> See *Farnsworth Co. v. Rand*, 65 Me. 19, 21 (1876) (replevin); *Hoozer v. Buckner*, 50 Ky. (11 B. Mon.) 183, 183–84 (1850) (replevin and trespass).

<sup>127</sup> See *Wilson v. Shearer*, 50 Mass. (9 Met.) 504, 504 (1845) (trover); *Pierce v. Benjamin*, 31 Mass. (13 Pick.) 356, 361 (1833) (trover).

<sup>128</sup> See *Cressey v. Parks*, 76 Me. 532, 534 (1884) (trespass).

distress warrant invalidated the sheriff's sale.<sup>129</sup> Finally, some taxpayers would respond to the threat of distress by paying the tax due under protest and seeking to recover the amount of the tax back from the collector in an assumpsit suit for money had and received.<sup>130</sup>

Both the choice of remedy and the proper defendant were thought to depend on the nature of the legal challenge being mounted.<sup>131</sup> The taxpayer might proceed against the sheriff or collector of the tax, arguing that the execution was based on a distress warrant that was invalid on its face<sup>132</sup> or that the sheriff, in executing the warrant, exceeded the bounds of the authority it conferred.<sup>133</sup> Apart from attacking the warrant's validity, the taxpayer might challenge the legality of the tax assessment in a suit brought against the board of tax assessors.<sup>134</sup> Finally, the taxpayer could pursue an action against the ultimate receiver of illegal taxes.<sup>135</sup> Suing in assumpsit to reclaim illegal taxes,<sup>136</sup> the taxpayer invoked the theory that "money . . . obtained in such case by duress of the plaintiff's property [may] be recovered back."<sup>137</sup>

## 2. *The Role of Article III Courts in Distress*

The federal courts, including the Supreme Court, also followed the course of the common law in testing distress proceedings' legality. Those proceedings arrived on federal dockets in a good many ways: as suits initiated in federal

---

<sup>129</sup> See *Thatcher v. Powell*, 19 U.S. (6 Wheat.) 119, 119, 126–27 (1821) (ejectment to restore property where distress proceedings failed to comply with statute).

<sup>130</sup> See *Wilson v. Mayor of New-York*, 1 Abb. Pr. 4, 27 (N.Y. Ct. C.P. 1854) (citing, among others, *Amesbury Woollen & Cotton Mfg. Co. v. Inhabitants of Amesbury*, 17 Mass. (16 Tyng) 461 (1821); *Perry v. Inhabitants of Dover*, 29 Mass. (12 Pick.) 206 (1831); *Atwater v. Town of Woodbridge*, 6 Conn. 223 (1826); *Preston v. City of Bos.*, 29 Mass. (12 Pick.) 7 (1831); *Adam v. Town of Litchfield*, 10 Conn. 127 (1834); *Torrey v. Inhabitants of Millbury*, 38 Mass. (21 Pick.) 64 (1838); *Joyner v. Inhabitants of Sch. Dist. No. 3 in Egremont*, 57 Mass. (3 Cush.) 567 (1849)).

<sup>131</sup> *Wilson*, 1 Abb. Pr. at 22–23.

<sup>132</sup> E.g., *Howard v. Proctor*, 73 Mass. (7 Gray) 128, 133 (1856). In *Howard*, the plaintiffs objected to the assessment, which was without merit: "The warrants being good upon their face, sufficient in point of form, and coming from an authority having jurisdiction of the subject, the defendant cannot be liable for their regular execution. This rule, applicable to executive officers, includes collectors." *Id.* (citing *Hays v. Drake*, 72 Mass. (6 Gray) 387 (1856)).

<sup>133</sup> *Wilson*, 1 Abb. Pr. at 22–23 (collecting cases). Compare *Columbian Mfg. Co. v. Vanderpoel*, 4 Cow. 556, 558–59 (N.Y. Sup. Ct. 1825) (upholding warrant legal on its face), with *Bank of Utica v. City of Utica*, 4 Paige Ch. 399, 400 (N.Y. Ch. 1834) (indicating that challenges to a warrant should proceed by trespass).

<sup>134</sup> *Wilson*, 1 Abb. Pr. at 23–26 (IV.6). But see *Bishop v. Cone*, 3 N.H. 513, 516 (1826) (doubting use of trespass to test legality of assessments).

<sup>135</sup> *Wilson*, 1 Abb. Pr. at 26–28.

<sup>136</sup> *Id.* at 27.

<sup>137</sup> *Id.*; see also *id.* (collecting cases).

court to test federal distress enforcement;<sup>138</sup> as diversity suits challenging state distress proceedings;<sup>139</sup> and as actions that began as suits to challenge federal distress in state court and were carried on appeal to the Supreme Court by federal officers.<sup>140</sup> In all of these contexts, we find the federal courts responding in much the way their state counterparts did: with a relatively strict view of official accountability for statutory and jurisdictional errors and with deference to the discretionary decisions that lay at the heart of a finding of tax liability.

Decisions of the Marshall Court highlight the relatively strict modes of review applicable in federal courts. As Chief Justice Marshall explained, “[i]n summary proceedings . . . under a special statute prescribing its course, we think that course ought to be exactly observed, and [sufficient] facts . . . ought to appear, in order to show that its proceedings are” within the bounds of the statute.<sup>141</sup> Accordingly, the Court invalidated a distress sale of property owned by a non-resident after concluding that the warrant had not been lawfully executed.<sup>142</sup> Similarly, the Court invalidated the distress sale of property and restored the taxpayer to ownership after finding that the deed issued by the sheriff failed to set forth sufficient particulars to demonstrate compliance with the applicable statute.<sup>143</sup>

While they entertained collateral proceedings to test the legality of distress, the federal courts afforded litigants fewer opportunities for direct review of distress warrants. After *Marbury*, and *McClung v. Silliman*, neither the Supreme Court nor the lower federal courts nor the state courts had authority to issue mandamus or certiorari to review the legality of the actions of federal officers.<sup>144</sup> True, the Court would eventually conclude that the District of Columbia federal court had authority to issue mandamus to federal officials in the nation’s capital.<sup>145</sup> But that authority had little relevance outside the “ten miles square” that define the territorial boundaries of the D.C. court.<sup>146</sup>

---

<sup>138</sup> *Ex parte Randolph*, 20 F. Cas. 242, 250 (C.C.D. Va. 1833) (No. 11,558).

<sup>139</sup> See Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78–79 (establishing diversity jurisdiction).

<sup>140</sup> *Id.* § 25, at 85–87 (providing for appellate jurisdiction in the Supreme Court for cases where a state’s highest court’s decree or judgment presents a federal question).

<sup>141</sup> *Thatcher v. Powell*, 19 U.S. (6 Wheat.) 119, 127 (1821).

<sup>142</sup> *Parker v. Rule’s Lessee*, 13 U.S. (9 Cranch) 64, 70–71 (1815).

<sup>143</sup> *Williams v. Peyton’s Lessee*, 17 U.S. (4 Wheat.) 77, 77–79, 82–83 (1819); see also *Wise v. Withers*, 7 U.S. (3 Cranch) 331, 335–37 (1806); *Slade v. Minor*, 22 F. Cas. 317, 317–18 (C.C.D.C. 1817) (No. 12,937).

<sup>144</sup> *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598, 603–05 (1821).

<sup>145</sup> See *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 562 (1838).

<sup>146</sup> U.S. CONST. art. I, § 8, cl. 17 (“To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . .”).

Injunctive relief against wrongful government activity was much less common in this period than today. In one important exception, *Osborn v. Bank of United States*, Chief Justice Marshall affirmed an injunction that blocked the use of a distress-type proceedings to collect a state tax.<sup>147</sup> Marshall recognized that state officials had no discretion to impose and collect a tax on a federal instrumentality in violation of principles of federal supremacy.<sup>148</sup> But the injunction Marshall approved was predicated on jurisdiction conferred on federal courts in the Bank's own incorporation charter—jurisdiction that was not more widely available.<sup>149</sup> A handful of specific grants of jurisdiction empowered federal courts to enter injunctions, such as that adopted to ensure review of patent validity.<sup>150</sup> But lower federal courts had no general federal question jurisdiction during the period in question and no general authority to enjoin unconstitutional state and federal government actions.<sup>151</sup> (All that would change, of course, by the early twentieth century, helping to account for the appearance of *Ex parte Young*.<sup>152</sup>) The relative dearth of equitable relief makes the decision of Congress to rely on injunctive remedies for the distress proceedings at issue in *Murray's Lessee* all the more revealing, as the next Part explains.

### C. An Act Providing for the Better Organization of the Treasury

The statute at issue in *Murray's Lessee* made two important changes in the collection of debts due from government accountants. First, it supplemented the government's enforcement tools by adding the relatively quick distress-based enforcement to the more ponderous common law debt claim—the sort of claim that led to the protracted proceedings against Lamb and Giles.<sup>153</sup> Second, it allowed government accountants targeted in such distress proceedings to file for an injunction to block enforcement of the distress warrant pending a judicial test of the claims against them.<sup>154</sup> This Part reviews the history of that provision to highlight the controversial tradeoffs necessary to its enactment.

Congress very nearly refused to give the Treasury Department distress authority for use against government accountants. During debates over the legislation, members expressed concern with executive branch determination of

---

<sup>147</sup> *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 839–40 (1824). The Ohio tax provided for collection through a summary, distress-like procedure that involved entering the vault and extracting large amounts of deposits. *Id.* at 740 (reporter's note).

<sup>148</sup> *Id.* at 839–40.

<sup>149</sup> *Id.* at 846–47.

<sup>150</sup> *See, e.g.*, Act of July 4, 1836, ch. 357, § 16, 5 Stat. 117, 123–24.

<sup>151</sup> The first federal question jurisdiction came in 1875. *See* Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470. For a description of the limits of equity's jurisdiction over public law, see Pfander & Wentzel, *supra* note 104, at 1324–26.

<sup>152</sup> Pfander & Wentzel, *supra* note 104, at 1276, 1327, 1330.

<sup>153</sup> Act of May 15, 1820, ch. 107, §§ 2–3, 3 Stat. 592, 592–95.

<sup>154</sup> *Id.* § 4, at 595.

amounts due,<sup>155</sup> with the adequacy of remedies should the executive branch go too far,<sup>156</sup> and with the preservation of a right to trial by jury (as assured by traditional debt litigation).<sup>157</sup> The key turning point in the debates occurred in the Senate, with the introduction of a provision authorizing the target of the distress proceeding to seek injunctive relief against the enforcement of the distress warrant.<sup>158</sup> The provision for injunctive relief addressed nearly all concerns, except that with the erosion of trial by jury.

A brief summary of the provision as finally adopted reveals how carefully Congress calibrated the statute to accommodate the government's concerns with priority while protecting the rights of accountants to a judicial determination. For starters, the statute required the government to give its accountant notice of the issuance of a distress warrant.<sup>159</sup> That notice, coupled with the imposition of a statutory waiting period,<sup>160</sup> gave the accountant an opportunity to sue for injunctive relief.<sup>161</sup> The statute indicated that the suit was to be brought against the "United States,"<sup>162</sup> but the power of the district court to act did not depend on the formal appearance of the United States as a party.<sup>163</sup> Rather, the district court had authority to grant a stay immediately as it sorted out the accountant's challenge to the distress warrant and could, upon completing its assessment,

---

<sup>155</sup> See 36 ANNALS OF CONG. 2249 (1820) (statement of Rep. Edwards) (arguing that the bill violated the Fifth and Seventh Amendments).

<sup>156</sup> Compare 35 ANNALS OF CONG. 567–68 (1820) (amendment of Senator Barbour) (providing additional remedies in equity), with S. 15, 16th Cong. (1820), 35 ANNALS OF CONG. 70 (providing for collection by distress, but not specifying special remedies, thereby leaving remediation to the course of the common law).

<sup>157</sup> See 35 ANNALS OF CONG. 562 (statement of Senator Ruggles) (proposing to recommit the bill to the Judiciary Committee, instead of Finance, with "instructions to *substitute* in the place of the clause now contained in it such *provisions* as may *best facilitate* the adjustment of the accounts to which it relates, and the security and speedy *recovery of the debts, by the judgment or decree of the ordinary court of judicature*" (emphasis added)); cf. 36 ANNALS OF CONG. 2249 (statement of Rep. Edwards) (regarding the Seventh Amendment).

<sup>158</sup> See 35 ANNALS OF CONG. 563 (statement of Senator Barbour) (postponing debate after Senator Ruggles's motion to commit the collection to the courts narrowly failed); see also *id.* at 567–68 (amendment of Senator Barbour) (providing additional remedies in equity).

<sup>159</sup> Act of May 15, 1820, ch. 107, § 2, 3 Stat. 592, 592 (requiring the Treasury to state the account of the delinquent public accountant).

<sup>160</sup> *Id.* (providing for "ten days' previous notice" before collecting the amount owed by distress and sale).

<sup>161</sup> *Id.* §§ 4–5, at 595 (providing, in § 4, for "any district judge of the United States" to "grant an injunction to stay proceedings on such warrant" on "a bill of complaint" if the aggrieved may "prefer" a bill in equity, and providing, in § 5, that "such injunctions may be granted . . . either in or out of court").

<sup>162</sup> See *id.* § 4, at 595 (contemplating the United States as the party responsible for filing an answer).

<sup>163</sup> See *id.* (stating the suit may proceed even when the United States has not yet filed an answer).

grant full or partial relief against its enforcement.<sup>164</sup> In effect, then, the provision for injunctive relief established a kind of inverse bill for accounting: Instead of initiating such a bill, the government proceeded by distress and the accountant could demand judicial review by way of a full accounting in equity as of right.

As compared to the then-existing modes of review available to the targets of government distress proceedings, the statute was remarkably protective of the government accountants' interests. Consider, first, the nature and scope of judicial review. The statute authorized a kind of direct review of the legality of the distress warrant, rather than relying on the common law suit brought after the fact of execution.<sup>165</sup> Many state courts, as we have seen, viewed such direct review proceedings as available through petitions for mandamus relief.<sup>166</sup> But mandamus authorized narrow review of clear errors based on a potentially limited factual record.<sup>167</sup> The bill for injunctive relief, by contrast, authorized plenary review of the existence of the debts underlying the distress warrant and obviously permitted the accountant to participate in making the record on which the court would decide the question.<sup>168</sup>

Second, consider the relative convenience of the forum in which judicial review was to occur. At common law, the collector might seek direct or collateral review of a distress warrant.<sup>169</sup> Collateral attacks, as we have seen, would presumably target officials who exceeded the authority conferred by the face of the warrant. But collateral suits against executive branch officials to contest the amount due posed problems of geography: the suit would presumably proceed at the seat of government where the responsible official resided. Much the same was true of mandamus proceedings: they were available only in D.C. but not in the lower courts where the accountants lived and worked.<sup>170</sup> Reliance on common law modes would oblige local tax collectors to litigate many of their potential claims in the District. Breaking from these relatively inconvenient alternatives, the statute authorized the suit to be brought before "any district judge,"<sup>171</sup> allowing the accountant to sue in a convenient local forum. By allowing the suit to proceed against the United States, moreover, the statute eliminated the interests of defendant government officials from any calculus as to the forum in which litigation was to proceed.

Finally, the statute authorized suit in an Article III federal court, rather than consigning the debtor to challenges brought in state court.<sup>172</sup> Many forms of

---

<sup>164</sup> *Id.* §§ 4–6, at 595–96 (providing for proceedings in equity, with appellate review in appropriate cases).

<sup>165</sup> *See id.*

<sup>166</sup> *See supra* note 123 and accompanying text.

<sup>167</sup> 6 DANE, *supra* note 17, ch. 186 art. 2 §§ 3–4, 18–19, at 320–23.

<sup>168</sup> *E.g.*, *United States v. Nourse*, 34 U.S. (9 Pet.) 8, 26 (1835) (“[T]he same proceeding shall be had on such injunction as in other cases . . .”).

<sup>169</sup> *See Merrill, supra* note 102, at 946–53.

<sup>170</sup> *See Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 522, 562 (1838).

<sup>171</sup> Act of May 15, 1820, ch. 107, § 4, 3 Stat. 592, 595.

<sup>172</sup> *Id.*

judicial review named the government official as a defendant and were initiated in state court,<sup>173</sup> reflecting the limits of federal jurisdiction.<sup>174</sup> In the case of government enforcement proceedings, federal law authorized the United States to bring debt claims in the federal courts so long as the amount in controversy exceeded \$500.<sup>175</sup> Recognizing they were adding distress proceedings to this common law backdrop, Congress ensured a symmetric federal judicial forum for the litigation.<sup>176</sup>

While these provisions ensured full review in a convenient forum, the statute nonetheless included a number of provisions to protect the government's interests. First, it required the accountant to post a bond at the outset, in an amount sufficient to protect the government's financial interest.<sup>177</sup> That meant the government was assured of collection if its claim of indebtedness was upheld.<sup>178</sup> Second, the statute provided that the institution of a claim for injunctive relief did not affect the validity of the government's lien on the debtor's property.<sup>179</sup> This important provision guaranteed the government's priority ran from the date of the issuance of the distress warrant, rather than from the date the court rejected the debtor's application for injunctive relief.<sup>180</sup> Finally, the statute authorized a penalty if, in the court's judgment, the debtor sued only to delay enforcement.<sup>181</sup>

In the end, Congress balanced the government's interest in expeditious collection and the debtor's interest in judicial review of disputed matters of account. Distress would immediately constitute the government's priority but was made subject to a local suit by the debtor challenging the amount at issue. So long as the debtor had the financial wherewithal to post a bond, collection

---

<sup>173</sup> See *supra* Part III.B.1.

<sup>174</sup> *E.g.*, *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) ("Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute . . .").

<sup>175</sup> Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78.

<sup>176</sup> See Act of May 15, 1820, ch. 107, § 4, 3 Stat. 592, 595.

<sup>177</sup> *Id.* ("[N]o injunction shall issue till the party applying for the same shall give bond, and sufficient security, conditioned for the performance of such judgment as shall be awarded against the complainant, in such amount as the judge granting the injunction shall prescribe . . .").

<sup>178</sup> See Pfander & Formo, *supra* note 37, at 732–33 & nn.50–54 (describing the model of pre-judgment seizure along with the assignment of priority by attachment date—not the date of an eventual judgment).

<sup>179</sup> § 2, 3 Stat. at 593 ("And the amount due . . . is hereby declared to be, a lien upon the lands . . . of such officer and his sureties, from the date of a levy in pursuance of the warrant of distress issued against him or them . . ."); *id.* § 4, at 595 ("[N]or shall the issuing of such injunction in any manner impair the lien produced by the issuing of such warrant.").

<sup>180</sup> See *id.* § 4, at 595. Indeed, ensuring priority against revenue collectors was a common problem in the early years of federal government tax collection. See *supra* Part II.B.

<sup>181</sup> § 4, at 595 ("[I]f . . . the application for the injunction was merely for delay, . . . the said judge is hereby authorized to add such damages as that . . . shall not exceed the rate of ten per centum per annum on the principal sum.").



efforts against those who wished to contest the obligation would await an Article III court's judgment.

As suggested above, this compromise appears to have been central to the statute's passage. The bill to authorize the Treasury to proceed by way of summary distress emerged from the Senate Finance Committee in March 1820,<sup>182</sup> and it attracted substantial opposition.<sup>183</sup> On Friday, March 31, Senator Ruggles moved to recommit the bill to the Judiciary Committee.<sup>184</sup> Dissatisfied with the summary distress procedures, he proposed instructing the Judiciary Committee to return to the "recovery of the debts, by the judgment or decree of the ordinary courts of judicature."<sup>185</sup> The recommittal motion narrowly failed, 17-19.<sup>186</sup> This episode revealed substantial opposition to the proposed distress proceeding and strong support for continuing reliance on debt litigation or some suitable alternative, such as an equitable accounting.<sup>187</sup> Much of what happened after that vote was meant to mollify those concerned about the use of distress by bolstering the federal judicial role. Sensing mounting pressure against the bill, and perhaps sharing the concerns of the Ruggles minority, Senator Barbour requested an opportunity over the weekend to develop "an amendment which would require some time to prepare and digest."<sup>188</sup>

The following Monday, Barbour introduced his proposed amendment, setting forth the basic framework for the injunctive relief provisions that would ultimately appear in the statute.<sup>189</sup> The Barbour proposal authorized a bill in equity to enjoin execution pending a determination of the "true" amount due,<sup>190</sup> provided for issuance of the injunction in or out of court, thus assuring relief outside the formal terms of court;<sup>191</sup> and the amendment allowed appellate review as determined by a circuit-riding justice.<sup>192</sup> In the debate that followed, the Senate tweaked the amendment in various ways, most importantly by clarifying that the United States still could rely in doubtful cases on traditional actions at law.<sup>193</sup> A few days later, after "[c]onsiderable discussion," the

---

<sup>182</sup> 35 ANNALS OF CONG. 477 (1820).

<sup>183</sup> *See id.* at 562.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* Because the motion to commit the Bill to the Judiciary Committee failed, no vote was taken upon the instructions themselves. *Id.*

<sup>187</sup> Hence the "judgment or decree" language. *See* 35 ANNALS OF CONG. 562 (1820).

<sup>188</sup> *Id.* at 563.

<sup>189</sup> *Id.* at 567.

<sup>190</sup> *Id.* The full text of the amendment matches the final statute. *Compare id.*, with Act of May 15, 1820, ch. 107, §§ 4-6, 3 Stat. 592, 595-96.

<sup>191</sup> 35 ANNALS OF CONG. 567 (1820).

<sup>192</sup> *Id.*

<sup>193</sup> Senator Burrill's amendment noted that "nothing in the act should be construed 'to take away or impair any right or remedy which the United States now have by law for the recovery of taxes, debts, or demands.'" *Id.* at 568. Twenty-two ayes approved the amendment. *Id.* The amendment was part of the final statute. *See* § 9, 3 Stat. at 596 (matching Senator Burrill's amendment).

amendments were “finally agreed to” by a 28-8 vote,<sup>194</sup> setting the stage for ultimate passage of the bill a day later.<sup>195</sup>

The bill sparked some debate in the House of Representatives, by opponents who challenged its constitutionality.<sup>196</sup> In arguing against the bill, a congressman invoked due process guarantees and jury trial assurances of the Fifth and Seventh Amendments.<sup>197</sup> Representative Sergeant replied,

[T]here was nothing proposed but what was sanctioned by numerous precedents, such as sales for non-payment of taxes, &c. [Accountants ought to be subject to the Treasury’s] power, so far as to compel him to account for the money which he has received, and refuses or neglects to account for.<sup>198</sup>

In the end, the argument for distress, subject to equitable review, had carried the day.<sup>199</sup>

#### IV. UNDERSTANDING *MURRAY’S LESSEE*

After Congress completed its work on the distress statute, the federal courts would face questions about how to integrate the new proceeding into the common law framework for the collection of debts and protection of individual rights. Two questions would arise: could Congress lawfully transfer the judgment-entry power from the courts to a ministerial officer and, if it did so, what sort of remedies were available to debtors who faced a distress proceeding. These questions would recur, albeit in a less immediate form, in *Murray’s Lessee*. But they were first addressed in two important decisions of the Marshall Court, one the Chief Justice wrote for a unanimous Supreme Court, and one he issued as a circuit riding justice in Virginia.

##### *A. Incorporating the Distress Proceeding into the Common Law Remedial System*

Consider first Marshall’s decision for the Court in *United States v. Nourse*, refusing to allow the United States to relitigate a debt claim that a district court had rejected in proceedings to enjoin the enforcement of a distress warrant.<sup>200</sup>

---

<sup>194</sup> 35 ANNALS OF CONG. 576 (1820).

<sup>195</sup> *Id.* at 577.

<sup>196</sup> 36 ANNALS OF CONG. 2249 (1820).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 2249.

<sup>199</sup> *Id.*; accord 35 ANNALS OF CONG. 695 (1820). Senator Barbour’s brother Philip Pendleton Barbour was a Representative at the time. *Barbour, Philip Pendleton*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/barbour-philip-pendelton> [<https://perma.cc/3995-JEYD>]. Philip would later sit with Chief Justice Marshall in *Ex parte Randolph*. *Ex parte Randolph*, 20 F. Cas. 242, 250 (C.C.D. Va. 1833) (No. 11,558) (opinion of Barbour, District Judge).

<sup>200</sup> *United States v. Nourse*, 34 U.S. (9 Pet.) 8, 25–32 (1835).

The government's strategy can only be described as fairly aggressive. Joseph Nourse had served as the Register of the Treasury from 1789 (under Hamilton) until he was dismissed from office in 1829, following the election of Andrew Jackson.<sup>201</sup> On reviewing his accounts, the Treasury Department found he owed over \$11,000 and issued a corresponding distress warrant.<sup>202</sup> Nourse secured an injunction against enforcement, and that led to a full audit of the accounts.<sup>203</sup> Nourse claimed that he was entitled to payment for his official duties and to fees on the money he handled in connection with additional duties he assumed within the department.<sup>204</sup> The auditors and court agreed, so the court entered a permanent injunction against enforcement.<sup>205</sup>

Next, the government instituted a common law debt proceeding against Nourse, seeking to recover the same \$11,000 it had demanded by way of distress warrant.<sup>206</sup> Nourse asserted a claim preclusion defense.<sup>207</sup> The government argued that the district court had lacked jurisdiction to grant the injunction, inasmuch as the amounts in dispute related to chores Nourse had performed otherwise than as an officer of the United States subject to distress proceedings.<sup>208</sup> The Court rejected the argument, noting that the statute allowed any "person" aggrieved to seek injunctive relief against distress, rather than limiting the remedy to statutory officers.<sup>209</sup> The decision in *Nourse* thus

---

<sup>201</sup> Richard D. White Jr., *A Tale of Two Bureaucrats: Joseph Nourse, Oliver Wolcott Jr., and the Forerunners of American Public Administration*, 40 ADMIN. & SOC'Y 384, 386, 399 (2008). "Jackson promised during his campaign, . . . that he would 'soon clear out the Noursery,' a reference to Joseph's five decades in office as well as the number of Nourse family members employed in the treasury. To the Jacksonians, Nourse symbolized the entrenched, elitist, and superannuated Washington bureaucracy of the day." *Id.* at 399 (citations omitted); see also Albert Somit, *Andrew Jackson as Administrative Reformer*, 13 TENN. HIST. Q. 204, 205–06 (1954).

<sup>202</sup> White Jr., *supra* note 201, at 399–400 ("He was particularly vindictive with Nourse, whom he fired on June 2, 1829, for . . . misappropriation of government funds. Nourse, like other federal officials, charged the government for a wide range of expenditures, including reimbursements for his move from Philadelphia to Washington when the capital relocated 30 years before. The Jacksonians reprimanded Nourse for billing the government for his move, including being reimbursed for the brandy he provided to the men who packed his family's belongings.").

<sup>203</sup> *Nourse*, 34 U.S. (9 Pet.) at 28; accord White Jr., *supra* note 201, at 400.

<sup>204</sup> *Nourse*, 34 U.S. (9 Pet.) at 26–27 (detailing Nourse's complaint).

<sup>205</sup> *Id.* at 28.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 30 ("[The Attorney General] contends, that . . . Nourse was not an officer contemplated by the act providing for the better organization of the treasury department, that the warrant of distress could not legally be issued against him, and consequently, that this is not a case in which the district court can exercise jurisdiction.").

<sup>209</sup> *Id.* at 31–32 ("The character of the individual against whom the warrant may be issued is entirely disregarded by this part of the act. Be he whom he may, an officer or not an officer, a debtor or not a debtor; if the warrant be levied on his person or property, he is

confirms that the district court's exercise of judicial power overrides executive branch findings that underlay the distress warrant and that a final decision in the equitable suit bars any subsequent litigation on the same subject.

In the course of his decision, Marshall pinpointed the constitutional problems presented by the distress statute.

It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals, a ministerial officer might, at his discretion, issue this powerful process, and levy on the person, lands and chattels of the debtor, any sum he might believe to be due, leaving to that debtor no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust.<sup>210</sup>

Marshall thus saw judicial review as central to the validity of distress warrants, treating the statute as posing separation-of-powers problems under Article III. He denied that “ministerial” officials of the executive branch could take on the judicial department's role in deciding disputes between individuals and the government, expressing particular concern with the exercise of “discretion.” For Marshall, judicial review by suit for injunction cured an otherwise anomalous grant of authority to the Treasury.

Marshall had given voice to the same separation-of-powers concern two years earlier in *Ex parte Randolph*,<sup>211</sup> a circuit court decision. That case arose from a Treasury distress warrant issued to recover some \$25,000 from a naval officer.<sup>212</sup> Lieutenant Randolph, had served for a time as the purser of the frigate *Constitution*.<sup>213</sup> Randolph had become embroiled in a running dispute with President Jackson and Treasury officials over claims that he had acted dishonorably in the course of his naval service.<sup>214</sup> Feeling that he could not avenge his wounded pride by challenging the aged President to a duel, Randolph

---

permitted to appeal to the laws of his country, and to bring his case before the district judge, to be adjudicated by him. . . . The judgment is consequently a bar to any subsequent action for the same cause.”).

<sup>210</sup> *Nourse*, 34 U.S. (9 Pet.) at 28–29.

<sup>211</sup> See *Ex parte Randolph*, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (No. 11,558) (opinion of Marshall, Circuit Justice). The other Judge was Senator Barbour's brother, erstwhile-Representative, now-Judge Philip Pendleton Barbour. See *id.* at 250 (opinion of Barbour, District Judge). Judge Philip Barbour would later become an Associate Justice of the United States Supreme Court. See *Barbour, Philip Pendleton*, *supra* note 199.

<sup>212</sup> *Ex parte Randolph*, 20 F. Cas. at 253 (opinion of Marshall, Circuit Justice). Pursers are naval officers who are in charge of handling the money on board ships. *Purser*, BLACK'S LAW DICTIONARY (11th ed. 2019).

<sup>213</sup> *Ex parte Randolph*, 20 F. Cas. at 253. Randolph was merely the “acting” purser—the duly appointed purser had died while the crew was at sea, and Randolph was named to replace him ad hoc. *Id.* at 255.

<sup>214</sup> Lieutenant Randolph was the officer at issue. For a recounting of the whole affair, see John M. Belohlavek, *Assault on the President: The Jacksonian-Randolph Affair of 1833*, 12 PRESIDENTIAL STUD. Q. 361, 361–67 (1982).

contrived to tweak Jackson's nose at a public event.<sup>215</sup> Although he left the District of Columbia and evaded arrest on an assault charge, his arrest in Virginia on a distress warrant had potent political overtones.<sup>216</sup> Distress thus provided the Treasury with tools to address mundane matters of account and, as was arguably the case with Nourse and Randolph, to exact a kind of political retribution; the political overtones help to explain why the circuit court viewed the warrant with such dismay.

Chief Justice Marshall agreed with Randolph's petition for habeas corpus that the warrant was invalid.<sup>217</sup> Joining the district court judge in ordering Randolph's release from custody, Marshall articulated two controlling principles. First, and in keeping with the common law tradition of strictly interpreting the scope of extra-judicial remedies like distress, Marshall concluded that Randolph was not an "officer" within the meaning of the distress statute.<sup>218</sup> True, Randolph handled money for the navy, but his official role was too confined and too informal to trigger distress warrant authority.<sup>219</sup> Marshall read the statute to reach only officers regularly appointed to collect or dispense public funds—officers who were obliged to post an official bond with sureties.<sup>220</sup> As a temporary officer, filling in for one who died at sea, Randolph satisfied neither the appointment nor the bond requirement and was not a valid target for distress.<sup>221</sup>

Having invalidated the warrant on statutory grounds, Marshall went on to argue that the Constitution restricted executive power to issue distress warrants. Sounding themes that echoed through his later decision in *Nourse*, Marshall

---

<sup>215</sup> *Id.* at 362 ("[President Jackson] extended his hand in greeting, but instead of clasping it, [Randolph] grabbed Jackson by the nose and proceeded to turn it until blood flowed in a steady stream.").

<sup>216</sup> *Id.* at 362–66 (describing the battle in the papers over the assault and accounting dispute underlying it). "The Richmond *Whig* dubbed the arrest 'a harsh and unprecedented abuse of the power given the government under the act.'" *Id.* at 365–66. After the arrest, tensions only grew:

Governor Floyd had called out a troop of cavalry to protect the Lieutenant from being kidnapped by federal marshalls [sic] and taken to the District of Columbia. A mob was forming to free Randolph from jail. . . . Randolph, many Virginians agreed, was a persecuted man, not because of his debts, but because of his assault on the President.

*Id.* at 366.

<sup>217</sup> *Ex parte Randolph*, 20 F. Cas. at 257. The other Judge concurred—he was Senator Barbour's brother, erstwhile-Representative, now-Judge Philip Pendleton Barbour. *See id.* at 250–53 (opinion of Barbour, District Judge); Charles D. Lowery, *Barbour, Philip Pendleton (1783–1841)*, ENCYCLOPEDIA VA., <https://encyclopediavirginia.org/entries/barbour-philip-pendleton-1783-1841/> [<https://perma.cc/8QUL-G6SB>]. Judge Philip Barbour would later become an Associate Justice of the United States Supreme Court. *See Barbour, Philip Pendleton*, *supra* note 199.

<sup>218</sup> *Ex parte Randolph*, 20 F. Cas. at 255–56 (opinion of Marshall, Circuit Justice).

<sup>219</sup> *See id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

urged that distress could lawfully issue only as to ministerial decisions that did not involve the resolution of a legal or factual dispute between the government and its accountants.<sup>222</sup> Marshall based that conclusion both on the language of the statute, which limits distress to amounts “truly” due, and on a proper understanding of the necessary limits of executive power.<sup>223</sup> In case of a dispute over amounts due, or credits owed, courts must decide; it cannot be the determination of a “mere minister.”<sup>224</sup> In other words, Congress could not

have intended . . . that a treasury execution should issue for confessedly more than is due, by which the person of the debtor should be imprisoned, probably interminably, and his property sold. *Congress must have designed to leave such cases to the regular course of law.*<sup>225</sup>

The proper course, then, was for the United States to proceed by an action in debt against Randolph, thereby enabling the courts to resolve disputes over the amounts owed through the ordinary course of common law adjudication.<sup>226</sup>

Apart from outlining constitutional limits on the scope of the Treasury’s distress authority, *Randolph* provides an important lesson about the durability of common law forms of collateral attack on the levy and execution of distress warrants. One can readily imagine an argument that the statutory remedy by way of injunctive relief was exclusive, and thereby displaced other common law forms. On that view, having failed to avail himself of the right to seek injunctive relief against an invalid distress warrant, Randolph might be seen as barred from seeking alternative remedies. But no one involved in the litigation appears to have taken such an argument seriously. We find no mention of remedial

---

<sup>222</sup> *Id.* at 254 (“They must be viewed as mere ministerial acts performed by mere ministerial agents. They cannot be otherwise sustained.”); accord 3 DANE, *supra* note 17, ch. 75 art. 2, § 4, at 61 (explaining that sheriffs were vested with judicial and ministerial duties).

<sup>223</sup> See *Ex parte Randolph*, 20 F. Cas. at 254–57 (opinion of Marshall, Circuit Justice). The statute provided that the account stated “shall exhibit *truly* the amount due to the United States.” *Id.* at 256 (emphasis added). Marshall read the word “truly” to indicate that the distress “process was to be used only when the true amount was certainly known to the department; when the sum of money debited to the officer appeared certain, and either no credits were claimed, or none about which a controversy existed.” *Id.*; accord *id.* (“The amount due to the United States cannot be truly exhibited when the claim is shown by the account itself, to exceed what is really due.”).

<sup>224</sup> See *id.* at 254.

<sup>225</sup> *Id.* at 256 (emphasis added); accord *id.* at 257 (“[S]uch controverted question[s] ought to be decided in a court of justice . . .”).

<sup>226</sup> See *id.* at 256–57 (“Whether [the public accountant] is entitled to any, and to what credit, for [his expenses], is a proper inquiry for a court of justice. The treasury may refuse the credit, and refer the question to a court of justice, but cannot . . . issue execution for it, as the case now stands. . . . [S]uch controverted question ought to be decided in a court of justice; [otherwise the] warrant [would be] issued in a case which the law does not authorize . . . . [And] the agent of the treasury [would] exceed[] the authority given by law . . .”).

exclusivity either in the government's submission or in the decisions of the two judges.<sup>227</sup> Even under a statute that made no explicit provision for habeas, it was viewed as self-evidently available.

But one puzzle remains. Why did Marshall insist so strongly on the importance of preserving the role of the federal courts in resolving the factual and legal questions presented by distress warrants? After all, under the common law tradition as it developed in connection with distress warrants to collect taxes, the courts deferred to the assessors' discretionary determinations as to the value of the property and amount of tax due.<sup>228</sup> Representative Sergeant invoked this common law tradition in assuring members of the House that use of distress was supported by long tradition, including the sale of property for non-payment of taxes.<sup>229</sup> Marshall did not view this common law tradition as relevant to the assessment of the legality of issuing distress to collect debts from public accountants and expressed little willingness to defer to the executive branch's findings as to the amounts due.<sup>230</sup>

Marshall's position reflects the nature of the executive branch judgment made in the two kinds of cases. In the oversight of distress warrants to collect taxes, recall, the courts were only too willing to police the legal and jurisdictional limits on the exercise of tax authority.<sup>231</sup> But having confined the tax power within its legal boundaries, common law courts deferred to the assessors' discretionary valuation decisions. Such decisions were viewed as matters within the scope of the constitutive authority Congress assigned to the official and were free from judicial review. In calculating amounts due in disputes with public accountants, by contrast, the executive branch could invoke no similar body of properly delegated constitutive discretion.<sup>232</sup> Instead, the decisions about the amounts due to the government and the value of any setoffs were judicial questions to be resolved on legal principles.<sup>233</sup> That explains why, in both *Nourse* and *Randolph*, Marshall rejected the idea that "ministers" could exercise discretion in fixing the amounts due in disputes with public accountants. In Marshall's view, Treasury Department officials had no power to resolve disputed legal questions as they saw fit but were permitted at most to

---

<sup>227</sup> See *id.* at 244–47 (syllabus) (raising statutory and constitutional challenges including violations of Article III and the Fourth, Seventh, and Eighth Amendments); *id.* at 247–50 (stating the question presented for decision as simply whether the marshal's return was "sufficient cause for [Randolph's] detention in custody"); *id.* at 250–53 (opinion of Barbour, District Judge) (denying the auditor the power to issue distress upon resettled accounts and holding habeas corpus would issue for civil detentions); *id.* at 253–57 (opinion of Marshall, Circuit Justice).

<sup>228</sup> See *supra* notes 110–19 and accompanying text.

<sup>229</sup> See 36 ANNALS OF CONG. 2249 (1820) (remarks of Rep. Sergeant).

<sup>230</sup> *Ex parte Randolph*, 20 F. Cas. at 257 (opinion of Marshall, Circuit Justice).

<sup>231</sup> See *supra* notes 107–09 and accompanying text.

<sup>232</sup> See, e.g., *Ex parte Randolph*, 20 F. Cas. at 250–57; *United States v. Nourse*, 34 U.S. (9 Pet.) 8, 25–32 (1835).

<sup>233</sup> See, e.g., *Ex parte Randolph*, 20 F. Cas. at 254 (opinion of Marshall, Circuit Justice).

apply clear legal principles to undisputed facts.<sup>234</sup> Disputes between the government and individuals, as the Supreme Court explained in *Nourse*, were for the courts.<sup>235</sup>

### B. Murray's Lessee *Cements Chief Justice Marshall's Synthesis*

*Murray's Lessee*, importantly, did not involve a dispute between the government and an individual implicating Marshall's concern with the preservation of the judicial role in the adjudication of disputed debt claims.<sup>236</sup> Swartwout, the embattled tax collector, had absconded, and everyone seems to agree that he owed the federal government a large sum of money.<sup>237</sup> Instead, the case presented an issue of priority as between two unsecured creditors: the federal government (relying on the lien created by an uncontested distress warrant) and a private creditor (seeking to enforce a state court judgment)—both claiming the property of their common debtor.<sup>238</sup> In upholding the distress warrant, the Court held that Congress could lawfully empower the executive branch to issue a precept constituting priority over later judgments against the same debtor.<sup>239</sup>

In one sense, the Court merely confirmed what the market for title in property sold at auction had already concluded. Both the federal and state governments conducted sales of Swartwout's New Jersey property, and both did so at John Buck's hotel in Jersey City.<sup>240</sup> The federal auction, conducted in June sold the property in execution of the distress warrant for over \$24,000.<sup>241</sup> In the state auction, held six weeks later, the local sheriff's sale of the same property

---

<sup>234</sup> *See id.*

<sup>235</sup> *Nourse*, 34 U.S. (9. Pet.) at 28–29.

<sup>236</sup> *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 274–75 (1856) (“No objection has been taken to the warrant on account of any defect or irregularity in the proceedings which preceded its issue. It is not denied that they were in conformity with the requirements of the act of congress.”).

<sup>237</sup> The Treasurer's audit listed his debt as \$1,374,119.65. *Record, Murray's Lessee*, *supra* note 20, at 15; *accord Murray's Lessee*, 59 U.S. (18 How.) at 275. Historians assessing the record have suggested that this figure may have been inflated. *See WEISE, supra* note 20, at 479–80.

<sup>238</sup> *See Murray's Lessee*, 59 U.S. (18 How.) at 274 (noting “both parties claim title under Samuel Swartwout” and characterizing the dispute as one over priority).

<sup>239</sup> *Id.* at 274 (posing the question presented: “[W]hether the . . . warrant of distress . . . , and the proceedings thereon and anterior thereto, under which the defendants claim title, are sufficient, under the constitution of the United States and the law of the land, to pass and transfer the title and estate of the said Swartwout in and to the premises in question, *as against the lessors of the plaintiff.*” (emphasis added)); *id.* at 286 (answering the question presented “in the affirmative”).

<sup>240</sup> *Record, Murray's Lessee, supra* note 20, at 11 (sheriff's auction announcement); *id.* at 32 (marshal's).

<sup>241</sup> *Id.* at 32 (held June 1, 1839 and listing lots and sale prices).



in execution of a state court judgment fetched only \$101.<sup>242</sup> The purchaser at the state sale was, in effect, buying little more than a ticket to litigate the legal effect of the federal distress warrant on which the first sale was based. When that challenge was brought, in an action to eject the federal purchaser from the property several years later, it posed the issue of priority that the Court would ultimately decide.<sup>243</sup>

This context allows us to see the many elements of the *Murray's Lessee* decision with clearer eyes. The Court had no occasion to revisit its decision in *Nourse* or to address Chief Justice Marshall's concern with the preservation of the judicial role to decide a dispute between the government and its accountants.<sup>244</sup> Here, the uncontested distress warrant appears to have qualified as one within the scope of the ministerial authority that Marshall recognized as proper for transfer to the executive branch in *Ex parte Randolph*. Indeed, Justice Benjamin Curtis, writing for the majority, cited both *Nourse* and *Randolph* approvingly.<sup>245</sup> The *Murray's Lessee* Court had no occasion to consider whether the legislative scheme adequately protected the judicial role in disputed cases.

Yet the Court's opinion, responding to the state purchaser's claim that Article III required a prior judicial determination of the government's debt claims to validate the federal property sale, contains language that many have read to allow Congress to restrict the judicial role.<sup>246</sup> Two factors were said to support the plaintiff's claim that distress for a government debt lay beyond the power of executive branch officials. First, Article III made provision for the adjudication of such debt claims by extending the judicial power to controversies to which the United States was a party and thereby allowed Congress to assign debt adjudication and collection proceedings to the federal courts.<sup>247</sup> Second, Congress had recognized the propriety of a federal judicial role by creating a mechanism for review of the collector's indebtedness by suit

---

<sup>242</sup> *Id.* at 11 (sheriff's sale announcement). The specific plot at issue in *Murray's Lessee* was purchased on account for the federal government for \$1,700. *Id.* at 32 (listing the M.P. Green lot for sale of \$1,700). Murray's winning bid at the state sheriff's sale was \$10. *Id.* at 10–11 (listing the Mahlon P. Green lot third and noting its sale for \$10 at the sheriff's auction).

<sup>243</sup> This priority dispute was previewed at the federal distress auction: Murray's agent made a public announcement that any title purchased at the federal auction would be disputed. *Record, Murray's Lessee, supra* note 20, at 46–47.

<sup>244</sup> "No objection has been taken to the warrant on account of any defect or irregularity in the proceedings which preceded its issue." *Murray's Lessee*, 59 U.S. (18 How.) at 275.

<sup>245</sup> *Id.* at 279–80 (citing *United States v. Nourse*, 34 U.S. (9 Pet.) 8 (1835)); *Ex parte Randolph*, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (No. 11,558) (opinion of Marshall, Circuit Justice).

<sup>246</sup> *See Murray's Lessee*, 59 U.S. (18 How.) at 284–85.

<sup>247</sup> *Id.* at 275 ("[P]laintiff relies . . . on the second section of the same article, which declares that the judicial power shall extend to controversies to which the United States shall be a party.").

for injunctive relief against the United States.<sup>248</sup> “If it be such a controversy,” as the Court said in explaining the plaintiff’s claim, “then it is subject to the judicial power alone; and the fact that congress has enabled the district court to pass upon it, is conclusive evidence that it is a judicial controversy.”<sup>249</sup> If judicial judgment were required to confer priority in the debtor’s property, then the distress warrant was invalid.

Much of what modern scholars have found suggestive and confusing about *Murray’s Lessee* appears in the Court’s response to this claim that only an Article III court could issue a precept that would serve as the predicate for the sale of Swartwout’s property.<sup>250</sup> The Court explained that the government

---

<sup>248</sup> *Id.* at 282 (“[I]f [Swartwout’s debt] were not, in its nature, a judicial controversy, congress could not have conferred on the district court power to determine it upon a bill filed by the collector. If it be such a controversy, then it is subject to the judicial power alone; and the fact that congress has enabled the district court to pass upon it, is conclusive evidence that it is a judicial controversy.”).

<sup>249</sup> *Id.*

<sup>250</sup> For a diversity of interpretations of this portion of the opinion in the scholarship, see, for example, Pfander, *Article I Tribunals*, *supra* note 8, at 735 (“[I]n upholding congressional discretion over the first-instance determination of the debt, the *Murray’s Lessee* Court stopped well short of holding that Congress may place the issue of an individual’s indebtedness entirely beyond the reach of the federal courts.”); Nelson, *supra* note 7, at 588 (“The dicta in *Murray’s Lessee* arguably meant that Congress could provide for property to change hands on the strength of the Treasury Department’s distress warrants without ever permitting the property’s former owner to contest the government’s claims in court.”); Baude, *supra* note 7, at 1551–53 (“The Court upheld the seizure nonetheless in a somewhat long opinion that united the Article III and due process challenges and that made famous the phrase ‘public rights’ in this context.”); Harrison, *supra* note 12, at 161–62 (“The public right involved in *Murray’s Lessee* was a proprietary interest of the government: its claim as creditor against a government employee who had collected large amounts on the government’s behalf and had not remitted the money to the Treasury.”); Roger W. Kirst, *Administrative Penalties and the Civil Jury: The Supreme Court’s Assault on the Seventh Amendment*, 126 U. PA. L. REV. 1281, 1305 (1978) (“The entire opinion shows that the particular procedure in *Murray’s Lessee* was upheld against the constitutional challenge because there was a clear, definite, and limited history that a particular procedure had existed prior to the Constitution and had not been altered by the Constitution.”); Mashaw, *Administration*, *supra* note 43, at 1686–87 (“While the Court admitted that extrajudicial remedies authorized to be taken by private parties were always subject to de novo redetermination by a court of law, this was not true of ‘a public agent, who acts pursuant to the command of a legal precept, [and] can justify his act by the production of such precept.’ In this latter case Congress is free to make the question of whether the officer’s actions were justified the subject of judicial cognizance or not at its election.” (quoting *Murray’s Lessee*, 59 U.S. (18 How.) at 283)); Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 15 (1983) (“[T]he Court quickly concluded that some adjudication could take place outside of article III [sic] (or state) courts: ‘public rights’—claims by private individuals against the government and certain claims by the government against private parties for such matters as custom duties and, perhaps, taxes—*could*, if Congress so chose, be left entirely to final administrative determination.”).

enjoyed immunity from suit except on such terms as it might specify.<sup>251</sup> While Congress could control the terms on which the government itself must answer in a suit to challenge a distress warrant, proceedings to secure injunctive relief against the warrant were proper subjects of judicial cognizance.<sup>252</sup>

To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either 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; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.<sup>253</sup>

After that famous statement of what we now know as the public rights doctrine, the Court concluded by applying certain principles in denying the plaintiff's claim.<sup>254</sup> The distress warrant was legally effective and presumptively valid at the time execution was levied and, when Congress chose to allow a post-distress suit to proceed against the United States to determine the issue of indebtedness, the courts had full authority to hear such proceedings and grant any appropriate injunctive relief.<sup>255</sup>

Scholars and jurists have tended to view the Court's discussion as a strong reaffirmation of congressional discretion in defining the judicial role.<sup>256</sup> One

---

<sup>251</sup> *Murray's Lessee*, 59 U.S. (18 How.) at 283 ("It is competent for the United States to sue any of its debtors in a court of law. It is equally clear that the United States may consent to be sued, and may yield this consent upon such terms and under such restrictions as it may think just.")

<sup>252</sup> *Id.* at 283–84 ("[T]here can be no doubt that the mere question, whether a collector of the customs is indebted to the United States, may be one of judicial cognizance. . . . [C]ongress may provide by law, that [the marshal and the government], or either, shall, in a particular class of cases, and under such restrictions as they may think proper to impose, come into a court of law or equity and abide by its determination.")

<sup>253</sup> *Id.* at 284.

<sup>254</sup> *Id.* at 284–86.

<sup>255</sup> *Id.* at 285.

<sup>256</sup> See sources cited *supra* note 250; see also *Stern v. Marshall*, 564 U.S. 462, 489 (2011) ("The challenge in *Murray's Lessee* to the Treasury Department's sale of the collector's land likewise fell within the 'public rights' category of cases, because it could only be brought if the Federal Government chose to allow it by waiving sovereign immunity."); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 590–91 (1985) (noting that tax collection procedures in *Murray's Lessee* are among a class of "specialized areas" where Article III concerns must "give way" to Congressional preference for "prompt, continuous, expert and inexpensive . . . determination by an administrative agency" (internal quotation marks omitted) (quoting *Crowell v. Benson*, 285 U.S. 22, 46 (1932))); *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1373 (2018) ("When

can read the Court to suggest that matters within the scope of the public rights doctrine were subject to judicial review, or not, as Congress might deem appropriate. That, in turn, tends to encourage categorical thinking about the nature of public rights; so long as any particular matter falls into the public rights category, Congress might dispense with judicial review altogether.<sup>257</sup> But that fundamentally misunderstands the meaning of *Murray's Lessee*, which was announced at a time when judicial review of executive action depended almost entirely on suits against officers.<sup>258</sup> In the mind of the Justices who joined the opinion, Congress might well exercise control over sovereign immunity, but officer suits were nonetheless available at common law to constrain unlawful warrants.<sup>259</sup>

A careful look at the argument that triggered the Court's discussion of the government's immunity from suit in its own name helps to confirm that it was making no broad pronouncement as to Congress's power to foreclose review. In effect, the plaintiff argued Congress understood its duty, under Article III, to provide a federal forum for the initial adjudication of debt claims against the collector.<sup>260</sup> That's why Congress authorized post-distress injunctive relief in a suit against the United States and had given the federal courts full power to resolve any disputes over indebtedness.<sup>261</sup> By hypothesis, then, the adjudication of the debt claim required judicial say-so and the distress warrant—issued without such adjudication—was defective. Responding to that argument, the Court said that Congress could allow suit against the United States on any terms it chose or could withhold its consent altogether.<sup>262</sup> Congress was not *compelled* by Article III to limit the government's entitlement to the property of defalcating federal collectors to that initiated to execute on a formal judgment; the government could claim priority via distress to vindicate the public rights to which the Court referred. That, in turn, led the Court to reject the plaintiff's

---

determining whether a proceeding involves an exercise of Article III judicial power, this Court's precedents have distinguished between 'public rights' and 'private rights.' Those precedents have given Congress significant latitude to assign adjudication of public rights to entities other than Article III courts." (citations omitted)).

<sup>257</sup> See, e.g., *Oil States*, 138 S. Ct. at 1378 (“[A] matter involving public rights . . . from its nature does not require judicial determination.” (internal quotation marks and brackets omitted)); *Stern v. Marshall*, 564 U.S. 462, 488 (2011) (“[A] matter of ‘public right’ . . . can be decided outside the Judicial Branch.”); *Crowell v. Benson*, 285 U.S. 22, 50–51 (1932) (“[T]he mode of determining matters [within the public rights category] is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.” (internal quotation marks omitted) (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929))).

<sup>258</sup> See discussion *supra* Part III.B.1.

<sup>259</sup> See *infra* note 264 and accompanying text; see also *supra* Part III.B.1.

<sup>260</sup> See *Murray's Lessee*, 59 U.S. (18 How.) at 275.

<sup>261</sup> See *supra* notes 248–49 and accompanying text (discussing this all-or-nothing argument).

<sup>262</sup> *Murray's Lessee*, 59 U.S. (18 How.) at 284–85.

argument that congressional provision for injunctive relief against the United States confirmed the necessity of initial judicial resolution of debt claims.<sup>263</sup>

With its focus on the legality of the priority that followed from the executive audit and distress warrant, the Court stopped well short of suggesting that Congress was free to define the scope of remedies for distress warrants as it saw fit or to dispense with such remedies altogether. To the contrary, the Court reaffirmed the availability of remedies in suits brought at common law against the marshal who levied execution of the distress warrant.<sup>264</sup> Here again, some scholars<sup>265</sup> and jurists<sup>266</sup> have expressed doubt about the degree to which the Court confirmed the viability of common law remedies. They point to language in the opinion in which the Court explained that a “public agent, who acts pursuant to the command of a legal precept, can justify his act by the production of such precept. He cannot be made responsible in a judicial tribunal for obeying the lawful command of the government . . . .”<sup>267</sup> One might read this language, as some have,<sup>268</sup> to establish a rule of official immunity from suit, an immunity that might deprive individuals of any right to mount a common law collateral attack on the legality of the warrant. But that reading fails to persuade. As we have seen, the marshal’s common law immunity extended only to lawful execution of warrants valid on their face;<sup>269</sup> in restating the marshal’s immunity when serving “legal precepts,” the Court left open the possibility of a collateral suit to test *illegal* precepts.<sup>270</sup>

---

<sup>263</sup> *Id.* at 285.

<sup>264</sup> *Id.* at 284 (“[W]e do not consider congress can either 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 . . .”).

<sup>265</sup> Compare Nelson, *supra* note 7, at 589 n.109 (“[T]he accuracy of the underlying audit would not have been an open question in the context of a suit against the marshal.”), and Baude, *supra* note 7, at 1552 (“The opinion therefore could support a form of tax procedure exceptionalism on historical grounds.”), with Nelson, *supra* note 7, at 589 n.109 (“If Congress had provided no other avenue for the target of a distress warrant to get a court to examine the underlying audit, he might conceivably have been able to litigate this issue in an ejectment action against a subsequent occupant of the property.”), and Baude, *supra* note 7, at 1552–53 (“But there is another possibility. . . . [I]t has been suggested that some kind of judicial remedy was indispensable to the constitutionality of the seizure, either because otherwise the warrant would not be ‘lawful’ and would not provide official immunity from tort, or because otherwise the owner would have an ejectment suit against subsequent purchasers.”).

<sup>266</sup> *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 67–68 (1989) (Scalia, J., dissenting) (explaining the marshal was immune from liability when “obeying the lawful command of the government” (internal quotation marks omitted) (quoting *Murray’s Lessee*, 59 U.S. (18 How.) at 283)).

<sup>267</sup> *Murray’s Lessee*, 59 U.S. (18 How.) at 283.

<sup>268</sup> See sources cited *supra* note 250.

<sup>269</sup> See *supra* notes 107–09, 132–33 and accompanying text.

<sup>270</sup> See *Murray’s Lessee*, 59 U.S. (18 How.) at 283.

That reading was confirmed a few sentences later in an important section of the opinion. In specifying controlling principles, the Court explained

that, though a suit may be brought against the marshal for seizing property under such a warrant of distress, and he may be put to show his justification; yet the action of the executive power in issuing the warrant . . . is conclusive evidence of the facts recited in it, and of the authority to make the levy . . . .<sup>271</sup>

Federal marshals, in contrast to the government itself, were on this view ordinarily subject to suit in keeping with common law practice and could be required to justify their seizures. But the possibility of such a post-seizure suit did not alter the fact that the distress warrant was legally binding when issued. A suit, either for injunctive relief against the government or for trespass against the marshal or for habeas relief against the jailer might vitiate a distress warrant, but the warrant was valid until set aside. That meant the Swartwout warrant, uncontested upon issuance, was legally binding and gave the government a prior lien on Swartwout's property and "authority to make the levy."<sup>272</sup>

Focusing as it did on the legal effectiveness of an uncontested distress warrant, the *Murray's Lessee* Court had no occasion to specify the rules governing judicial review when a contest emerged. As we have seen, those were matters addressed in *United States v. Nourse* and *Ex parte Randolph*, decisions that viewed distress with some skepticism and worked to preserve the judicial role. The tone of *Murray's Lessee* suggests that the Taney Court may have been a bit more deferential to executive distress warrants than was the Marshall Court. (Chief Justice Taney was President Jackson's Attorney General and appeared for the government in its prior litigation with Joseph Nourse.<sup>273</sup>) In the end, the Court declined to categorically foreclose the issuance of all such warrants.<sup>274</sup> But nothing in *Murray's Lessee*, closely read, suggests that it meant to approve a statute that would purport to place the distress warrant beyond the reach of the courts. Such a scheme would produce precisely the "anomal[ies]" to which Chief Justice Marshall pointed in *Nourse*.<sup>275</sup>

Confirmation that *Murray's Lessee* did not undercut the review-preserving decisions in *Nourse* and *Randolph* or displace the common law tools of oversight can be found in lectures on federal jurisdiction by the opinion's author, Benjamin Curtis. Delivered in 1872 to the students at Harvard Law School, the Curtis lectures were later collected in an influential treatise on the subject that

---

<sup>271</sup> *Id.* at 285.

<sup>272</sup> *Id.*

<sup>273</sup> *United States v. Nourse*, 31 U.S. (6 Pet.) 470, 484 (1832). Taney was also the Secretary of Treasury who issued the distress warrant against Randolph. Belohlavek, *supra* note 214, at 365–66.

<sup>274</sup> *Murray's Lessee*, 59 U.S. (18 How.) at 285–86.

<sup>275</sup> *United States v. Nourse*, 34 U.S. (9 Pet.) 8, 28–29 (1835).

appeared in 1880.<sup>276</sup> Curtis described the *Murray's Lessee* distress provision in the following terms:

[when] a balance is found against one of those officers, it is not necessary for the United States to put a claim in suit against him; but on that balance being certified by the proper accounting officer, a warrant of distress issues at once against him . . . . That, as you perceive, is an executive act, and one which ought, in some way, to be brought under judicial review; and that has been done.<sup>277</sup>

That nicely summarizes *Murray's Lessee*: The executive distress warrant gives the government priority from its date of issuance as to amounts the statute describes as “truly” due, subject to some appropriate form of judicial review.

#### V. DISTINGUISHING THE CONSTITUTIVE FROM THE ADJUDICATIVE

The lesson of *Murray's Lessee* boils down to this: Congress has discretion in assigning to agencies or to courts the authority to create new (constitutive) rights, but must preserve courts' role in resolving disputes over individual indebtedness. The government's priority in its debtor's property could date from the Treasury's issuance of an uncontested distress warrant, provided that appropriate provision had been made for judicial review of the debt. The public right in question thus encompassed only the issue of priority; it did not extend to the final determination of any disputed amounts between the government and its debtor. Any particular proceeding may thus implicate both (i) matters as to which the agency can act conclusively—public rights, and (ii) matters that call for the decision of a court—private rights. The challenge lies in distinguishing the constitutive from the adjudicative role.

We explain the distinction between constitutive and adjudicative decisions by looking at a series of decisions that came down after *Murray's Lessee*. For expository purposes, we will emphasize the decisions to which the Court pointed in *Crowell v. Benson* as illustrations of the matters that make up the public rights category. In the public rights category, *Crowell* identified disputes over the appraisal of imported goods; title to land distributed by the land department; veterans' benefits; and the determination of postage rates.<sup>278</sup> We also briefly note other prototypical examples. In each of these cases, the agencies in question had been given authority to issue constitutive decisions

---

<sup>276</sup> BENJAMIN ROBBINS CURTIS, JURISDICTION, PRACTICE, AND PECULIAR JURISPRUDENCE OF THE COURTS OF THE UNITED STATES, at iii–iv (George Ticknor Curtis & Benjamin R. Curtis eds., Boston, Little, Brown, & Co. 1880).

<sup>277</sup> *Id.* at 164.

<sup>278</sup> The *Crowell* Court cited *Passavant v. United States*, 148 U.S. 214, 214–15 (1893) (appraisal); *Burfenning v. Chicago, St. Paul, Minneapolis & Omaha Railway Co.*, 163 U.S. 321, 321 (1896) (public land); *Silberschein v. United States*, 266 U.S. 221, 222 (1924) (veteran's benefits); and *Bates & Guild Co. v. Payne*, 194 U.S. 106, 107–08 (1904) (postal rates). *Crowell v. Benson*, 285 U.S. 22, 51 n.13 (1932).

within boundaries set by statute. The task for the federal courts was to enforce the boundaries without interfering with the exercise of agency discretion. It was these discretionary, constitutive decisions, and others like them, that the *Crowell* (and *Murray's Lessee*) Court(s) described as matters that Congress could assign to agencies or courts as it saw fit.<sup>279</sup> Federal court adjudication might ensue, to enforce statutory limits on agency discretion, but was not essential to the initial creation of the legal relationships in question.

*Import Appraisal.* Congress had long used boards of appraisers to assess the value of imports to determine the amount the importer must pay as customs duties. In *Bartlett v. Kane*, an importer sought to contest the valuation by a board of appraisers; the Court held, within the discretion Congress had assigned, such appraisals were conclusive.<sup>280</sup> The board was making an all-things considered valuation, based on commercial experience, rather than applying precise standards as specified by Congress.<sup>281</sup> Several years later, courts continued to defer to these appraisals. In *Passavant*, cited in *Crowell*, the Court reaffirmed the board's final authority over valuations.<sup>282</sup>

*Land Claims.* Land in the public domain was for Congress to distribute.<sup>283</sup> Like other public rights, Congress might allocate the public domain itself

---

<sup>279</sup> See *Crowell*, 285 U.S. at 50–51 (“Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.” (internal quotation marks omitted) (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929))).

<sup>280</sup> *Bartlett v. Kane*, 57 U.S. (16 How.) 263, 273 (1854).

<sup>281</sup> See *id.* at 271–72 (noting the “discreet and experienced” merchant appraisers exercise their “knowledge, judgment, and discretion”).

<sup>282</sup> See *Passavant*, 148 U.S. at 220 (declaring the appraiser’s valuation was conclusive in the absence of fraud).

<sup>283</sup> See *Bartlett*, 57 U.S. (16 How.) at 272 (citing *United States v. Arredondo*, 31 U.S. (6 Pet.) 691, 729–30 (1832)). *Arredondo* held that the superior courts in Florida territory had jurisdiction to decide petitions claiming public lands under Spanish grants, Congress having chosen that forum for assigning U.S. land patents in small claims and retaining for itself the final assignment of land patents in the case of large claims. *Arredondo*, 31 U.S. (6 Pet.) at 718–19, 729–30.

On the role of early republic’s land offices in the distribution of public lands, see JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION* 119–43 (2012) [hereinafter MASHAW, *CREATING*]. The first land distribution office was established in 1812. See *id.* at 123 (citing Act of Apr. 25, 1812, ch. 68, 2 Stat. 716). After establishing the General Land Office in 1812, *id.*, and deciding to honor British, Spanish, and French land claims in 1807, *id.* at 123 & n.25, Congress “created the nation’s first large-scale administrative adjudication process.” *Id.* at 123. The commissioners who resolved disputes under these acts often acted with several of the incidents we might associate with judicial proceedings: “The commissioners were given full authority to compel attendance at hearings, to administer oaths, to examine witnesses, and to decide the cases ‘according to justice and equity.’ . . . [And] Congress confirmed virtually all claims that were ruled upon favorably by the commissioners.” *Id.* at 129 (quoting An Act Making Provision for the Disposal of the Public Lands in the Indiana Territory, and for Other Purposes, ch. 35, § 4, 2 Stat. 277, 278–79 (1804)). On the power of non-Article III bodies to process land claims, see *Foley v.*



through specific legislative grants or assign responsibility for distribution to a land office.<sup>284</sup> Consider the petition of Abigail O’Flyng, submitted to the House of Representatives.<sup>285</sup> Abigail’s husband and three sons served in the War of 1812 under a land bounty program that entitled noncommissioned officers between the ages of eighteen and forty-five to parcels of land.<sup>286</sup> Ms. O’Flyng’s husband was too old, her youngest boy too young, and her two other sons were gallantly promoted but died before land was granted to them.<sup>287</sup> She petitioned Congress directly to obtain a land patent, appealing to their sense of fairness, and Congress passed a private law granting her petition.<sup>288</sup> “Thus, while [individuals’] claims were heard by commissioners, there was always the prospect that Congress would be the final arbiter.”<sup>289</sup>

In many cases involving private land claims, Congress followed the language of controlling treaties in confirming that federal title to land within

---

*Harrison*, 56 U.S. (15 How.) 433, 447–48 (1854) (upholding the executive “determin[ation], upon principles of equity and justice, as recognized in the courts of equity . . . [of] all cases of suspended entries now existing in . . . land offices” and treating those executive decisions as “final within the law” because they are “made by a special tribunal, with full powers to examine and decide [with] no provision for an appeal to any other jurisdiction” (quoting Act of Aug. 3, 1846, ch. 78, § 1, 9 Stat. 51, 51)).

<sup>284</sup> Because Congress retained power over the distribution of public lands,

[t]he only questions which can arise between an individual claiming a right under the acts done, and the public, or any person denying its validity, are, power in the officer, and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer; whether executive, legislative, judicial, or, special, unless an appeal is provided for, or other revision, by some appellate or supervisory tribunal, is prescribed by law.

*Arredondo*, 31 U.S. (6 Pet.) at 729–30 (emphasis omitted) (citations omitted); *accord* *Foley v. Harrison*, 56 U.S. (15 How.) 433, 447–48 (1854) (describing the 1846 system of land patent issuance, which empowered “the Commissioner of the General Land Office . . . to determine . . . all cases of suspended entries . . . and to adjudge in what cases patents shall issue upon the same” (internal quotation marks omitted) (quoting Act of Aug. 3, 1846, ch. 78, § 1, 9 Stat. 51, 51)); *Burgess v. Gray*, 57 U.S. (16 How.) 48, 63 (1854) (describing a system vesting commissioners with the power to hear and decide “claims to land under French or Spanish titles” and reserving to Congress review of commissioners’ decisions contrary to such petitioners). On the power of Congress to deploy non-Article III courts to hear land claims, subject to review in the Supreme Court, see *United States v. Coe*, 155 U.S. 76, 76–77, 85–86 (1894).

<sup>285</sup> 29 ANNALS OF CONG. 846 (1816). One scholar has made a compelling case linking the petition process to the creation of the modern administrative regime. See generally Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538 (2018) (highlighting the more inclusive, participatory features of this mode of constitutive legislative action).

<sup>286</sup> See Mashaw, *Reluctant*, *supra* note 43, at 1703–04.

<sup>287</sup> See *id.* at 1704.

<sup>288</sup> 29 ANNALS OF CONG. 337; An Act for the relief of Patrick O’Flyng, and Abigail O’Flyng and Edmund O’Flyng, ch. 72, Priv. L. No. 14-72, §§ 1–3, 6 Stat. 163, 163 (1816).

<sup>289</sup> MASHAW, *CREATING*, *supra* note 283, at 128.

ceded territory (Spanish Florida and Louisiana, for example) would continue to respect ownership rights under the prior regime.<sup>290</sup> Such private land claims thus triggered a process different from the issuance of land grants from the public domain and necessitated some evaluation of competing claims under prior law.<sup>291</sup> Congress would often assign the task of resolving such competing claims to commissioners, empowering them to act with finality or subject to the review of Congress or the courts.<sup>292</sup> The *Murray's Lessee* Court pointed to such proceedings in defining public rights<sup>293</sup> and *Crowell* echoed that conclusion, albeit in a case that arose from the distribution of public land.<sup>294</sup> There, the Court reaffirmed the finality of the land office's factual determinations as to the proper distribution of public lands. Yet the Court reiterated that the office cannot convey good title to land in disregard or defiance of the expressed will of Congress.<sup>295</sup> Courts were available to enforce statutory limits on the agency's constitutive role.<sup>296</sup>

*Veterans' Benefits.* From the earliest days of the republic, veterans petitioned Congress for the payment of pensions and other benefits.<sup>297</sup> Congress sometimes dealt with such petitions itself, appropriating funds to pay a

---

<sup>290</sup> For a careful evaluation of the history of the private land claim category and its implications for the public rights doctrine, see Ablavsky, *supra* note 28 (manuscript at 12–29). On the role of treaties in confirming rights in ceded territory, see *id.* (manuscript at 31, 38, 40, 43).

<sup>291</sup> See *id.* (manuscript at 41–42).

<sup>292</sup> See *id.* (manuscript at 14–17) (describing reliance on boards or commissions, subject to review by Congress or the courts).

<sup>293</sup> *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856) (first citing *Foley v. Harrison*, 56 U.S. (15 How.) 433 (1854); and then citing *Burgess v. Gray*, 57 U.S. (16 How.) 48 (1854)).

<sup>294</sup> *Crowell v. Benson*, 285 U.S. 22, 51 & n.13 (1932) (citing *Burfenning v. Chi., St. Paul, Minneapolis & Omaha Ry. Co.*, 163 U.S. 321, 323 (1896)). To be sure, *Burfenning* arose from the government's issuance of a homestead grant from the public domain, see *Burfenning*, 163 U.S. at 323, but Ablavsky notes similarities in the way courts had come to handle disputes over rights to public and private land. See Ablavsky, *supra* note 28, (manuscript at 42) (suggesting similarities in the resolution of disputes over preemption rights from the public domain and private land claims within ceded territory).

<sup>295</sup> *Burfenning*, 163 U.S. at 323.

<sup>296</sup> See, e.g., *Johnson v. Towsley*, 80 U.S. (13 Wall.) 72, 83–84, 88 (1871) (explaining that constitutive land office decisions awarding a patent “within the scope of its authority, is conclusive upon all others” but confirming that courts were available to correct mistakes and frauds and to enforce statutory rules governing the distribution of public land). Notably, the Court in *Johnson* offered a concise description of the nature of the land office process, explaining that the usual proceeding was “ex parte and peculiarly liable to the influence of frauds, false swearing, and mistakes.” *Id.* at 84.

<sup>297</sup> One prominent example underlies *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497 (1840). See Kristin A. Collins, “Petitions Without Number”: *Widows' Petitions and the Early Nineteenth-Century Origins of Public Marriage-Based Entitlements*, 31 L. & HIST. REV. 1, 15–20 (2013) (discussing *Decatur* as a suit brought to enforce pension entitlement conferred by a private law); see also *id.* at 13 (discussing a 1790 petition).

deserving veteran's family.<sup>298</sup> More often, Congress established a framework within which executive branch officials were responsible for the distribution of such benefits.<sup>299</sup> One early attempt to enlist the help of the federal courts ran afoul of the requirement of judicial finality; Congress made the federal courts' disability pension decisions subject to the oversight of War Department officials.<sup>300</sup> In refusing to hear claims in such a setting, the federal courts noted they could play a more active role in awarding pensions and other government benefits once Congress gave their decisions the requisite finality.<sup>301</sup> But so long as Congress chose to rely on agencies to constitute new rights to a pension, the federal courts deferred to benefit decisions within the bounds of the agency discretion. In *Silberschein v. United States*, cited in *Crowell*, the Court limited judicial review to an agency's veteran benefit decisions that were "wholly unsupported by the evidence," "wholly dependent on a question of law," or "clearly arbitrary and capricious."<sup>302</sup> With the shift over time from a benefit scheme that conferred relatively untrammelled discretion to one that specified a growing number of applicable legal standards, the oversight role of the federal courts would necessarily expand.

*Postal Rates.* Congress sets national postage fees and rates.<sup>303</sup> From relatively early in the nation's history, Congress assigned the postal service responsibility for deciding what rate applies to specified items of mail for purposes of fixing the price of a mailing.<sup>304</sup> In *Bates & Guild*, the plaintiffs sought second-class postage treatment for material that they viewed as a serial publication.<sup>305</sup> The postal service denied the application, deciding the material was a stand-alone item.<sup>306</sup> The Court upheld the agency's decision, explaining that where Congress has assigned the determination of questions of fact "to the

---

<sup>298</sup> See Collins, *supra* note 297, at 15–18; see also *id.* 18 n.56 (first citing A Resolution Granting a Pension to Susan Decatur, Widow of the Late Stephen Decatur, No. 2, 24th Cong., 2nd Sess. (Mar. 3, 1837); and then citing CONG. GLOBE, 34th Cong., 1st Sess. 1600 (1856)).

<sup>299</sup> On the handling of pension applications during the decades before the Civil War, see Mashaw, *Administration*, *supra* note 43, 1582 n.56, explaining the administrative reorganization for handling pension disputes, transferring the authority to hear them from the Treasury Department to the War Department, and appointing a Commissioner of Pensions. Amidst these reorganizations, Congress retained the ability to pass private laws granting pensions, as well. See generally Collins, *supra* note 297, at 13–20. Veterans Law Judges now review pensions. See Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, 131 Stat. 1105, 1107 (codified as amended at 38 U.S.C. § 101).

<sup>300</sup> Mashaw, *Administration*, *supra* note 43, at 1582 n.56.

<sup>301</sup> For an account of the congressional assignment of veteran benefit claims to the federal courts, and the Supreme Court's inconclusive decision in *Hayburn's Case*, see James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346, 1364, 1425–33, 1444–59 (2015).

<sup>302</sup> *Silberschein v. United States*, 266 U.S. 221, 225 (1924).

<sup>303</sup> On the organization of the early postal service, see generally RICHARD R. JOHN, SPREADING THE NEWS 30–37 (1998).

<sup>304</sup> *Id.*

<sup>305</sup> See *Bates & Guild Co. v. Payne*, 194 U.S. 106, 106–07 (1904).

<sup>306</sup> *Id.* at 107.

judgment and discretion of the head of a department,” courts will treat the decision as “conclusive.”<sup>307</sup> Even where issues of law arise, moreover, the Court expressed some willingness to defer to the agency’s legal interpretations in “doubt[ful]” cases.<sup>308</sup>

*Other constitutive examples.* Congress followed a similar pattern when assigning constitutive tasks to commissions and boards responsible for many forms of government largesse. As we have seen, two very early examples include pensions and public lands.<sup>309</sup> Patents for inventions are another early example: the First Congress established a petition-based system to issue patents.<sup>310</sup> And the federal frameworks for determining favorable immigration status<sup>311</sup> and naturalized citizenship<sup>312</sup> share analogous features.

---

<sup>307</sup> *Id.* at 109–10.

<sup>308</sup> *Id.* at 107; *cf.* *Chevron U.S.A. Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 844–45 (1984).

<sup>309</sup> *See supra* notes 283–302 and accompanying text.

<sup>310</sup> The First Congress also established a system to petition the executive for invention patents. *See* Act of Apr. 10, 1790, ch. 7, § 1, 1 Stat. 109, 109–10. Originally, any person could petition the Secretary of State, Secretary of the War, and the Attorney General, who would grant the patent if any two agreed to do so. *Id.* § 1, at 109–10. This process was quickly streamlined in 1793, restricting the right to petition to United States citizens and directing petitions to the Secretary of State, for determination by the Attorney General. *See* Act of Feb. 21, 1793, ch. 11, § 1, 1 Stat. 318, 318–21. Congress also delegated to other bodies. One example involved cases of interfering applications, where Congress delegated the final decision on the issuance of the patent to a board of arbiters. *See id.* § 9, at 322–23 (specifying, in two-application cases, one arbiter was chosen by each party and the final arbiter chosen by the Secretary of State). Congress assigned infringement and revocation proceedings to the federal courts under both acts. *See id.* §§ 5, 10, at 322, 23; Act of Apr. 10, 1790 § 1, at 111. Congress created the Patent Office within the State Department in 1836. Act of July 4, 1836, ch. 357, 5 Stat. 117, 117. Much like in the case of land patents, the establishment of the executive office did not preclude Congress from issuing private laws granting patents to individual parties. *See* Act of Feb. 2, 1838, ch. 90, § 1, 6 Stat. 717, 717.

<sup>311</sup> For example, the Immigration Act of 1903 provided for three-member “boards of special inquiry” that “determin[ed] whether an alien who has been duly held shall be allowed to land or be deported.” Immigration Act of 1903, ch. 1012, § 25, 32 Stat. 1213, 1220. Board hearings were not open to the public; appeals by either the party or a dissenting board member to the Secretary of the Treasury were allowed, but the Secretary’s decision was final. *Id.* Section 38 of the Act barred anarchists from entry into the United States. *Id.* § 38, at 1221. Clarence Darrow’s effort to void one board’s decision to deport an alleged anarchist fell short when the Supreme Court affirmed the denial of his client’s habeas petition. *See* *United States ex rel. Turner v. Williams*, 194 U.S. 279, 281, 285–86, 295 (1903), *aff’d* 126 F. 253 (C.C.S.D.N.Y. 1903). Darrow argued, *inter alia*, that the board’s power to decide admissibility violated Article III. *Id.* at 286 (argument for appellants). Because Congress had the power to expel aliens, *id.* at 289, and Article III did not prohibit assignment of that power to the executive “as part of the means necessary to give effect” to that Congressional power, *id.* at 291.

<sup>312</sup> The First Congress specified that any common law court of record could naturalize citizens. *See* Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, 103–04. Eventually, the naturalization process was reorganized under administrative proceedings. *See* Immigration

In each case, the public right in question emerged from the performance of a constitutive act pursuant to the administrative system Congress had put in place. Appraisal of property fixed the import duty; land officers distributed public land by conferring patent rights; boards conferred pension rights on veterans; postal officials imposed postage fee duties. Litigation can certainly arise from such agency determinations; indeed, the Court consistently reaffirmed the availability of judicial review to correct errors of law that occur during the constitutive process. But the agency's decisions to recognize new rights or impose new duties were immune from judicial challenge so long as the agency stayed within the zone of lawful discretion Congress had conferred. Over time, that discretion narrowed as Congress specified more rules to control the manner in which an agency performed its function.<sup>313</sup> Importantly, then, the decision to regard a matter as one involving a public right did not place the whole subject off the judicial table. Courts still enforced obligatory legal duties, even as they deferred to agency discretion in the constitution of new rights as conferred by Congress.

The blended quality of judicial review, combining deference to the agency's constitutive role with an insistence on agency compliance with law complicates the task of distinguishing matters of public and private right. Nineteenth century thinkers managed the distinction in part with a focus on the idea that, at some point in the constitutive process, rights vest and become private.<sup>314</sup> Once they do, invasions of the rights in question may trigger private litigation of the sort that courts handle. Thus, a land patent conferred through a constitutive process might ripen into clear title to the land in question. Similarly, once a court conferred naturalized citizenship on an individual applicant through a constitutive process, the judgment was viewed as conclusive and was not subject to collateral attack.<sup>315</sup> Such rights to land and citizenship were protected, both

---

Act of 1990, §§ 335–36, Pub. L. No. 101-649, 104 Stat. 4978, 5042–45 (codified as amended at 8 U.S.C. § 1447 (2018)) (providing an administrative procedure to decide naturalization applications); *see also* RICHARD D. STEEL, *STEEL ON IMMIGRATION LAW* § 15:23, at 749 (2019) (“Prior to the Immigration Act of 1990 INS only made recommendations on applications . . . and final authority was with the courts, either federal or state. Review was through normal appellate procedures.”).

<sup>313</sup> *See, e.g.*, Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 *YALE L.J.* 1487, 1495 (1983) (recognizing administrative discretion has been “restricted by legal rules, emanating from both Congress and the courts”).

<sup>314</sup> *See* Harrison, *supra* note 12, at 211 (“Article III gives private people a right to adjudication of their rights by courts. It does not determine what their rights are. As a result, Article III does not create any right to a judicial determination that is independent of the arrangement of rights established by the primary law. In the absence of a constitutional right, no problem of unconstitutionality arises.”); Nelson, *supra* note 7, at 561–62 (noting that judicial review is required for deprivations of private rights, but not for entitlements held by the public at large).

<sup>315</sup> PFANDER, *CASES*, *supra* note 29, at 5.

from the claims of other individuals and from takings by the government.<sup>316</sup> Congress had authority to alter the distribution system prospectively but could not reopen and redistribute privately held land or reopen and overturn citizenship decisions.

Both *Murray's Lessee* and *Crowell* illustrate the limits of legislative control. Congress can specify the rules that govern the obligations of its collectors to account for money owed to the Treasury. But it cannot legislatively impose a decision about that obligation in the case of the debts owed by an individual collector.<sup>317</sup> That retrospective decision has an inescapably adjudicatory character, as Chief Justice Marshall recognized in *Nourse* and *Randolph*.<sup>318</sup> Similarly, Congress can specify the rules that govern a maritime employer's duty to pay compensation to injured employees.<sup>319</sup> But it cannot depart from that scheme to specify the amount due in the particular case.<sup>320</sup> Those retrospective applications of legal rules to resolve a dispute over amounts owed do not constitute a new set of legal obligations, but specify instead the final legal consequences of an existing set of obligations. Both *Murray's Lessee* and *Crowell* accordingly recognized that resolving a dispute over amounts owed under the law as stated was a task for the courts, rather than the agency.

Admittedly, the line between the constitutive act of creating new public rights and the adjudicative act of assessing the legal implications of past assignments of private rights will not always be crystal clear. The blurriness of the line results from several factors. First, even where the agency has the authority to constitute new rights, it must do so within the bounds of the law. As the Court explained in *Towsley*, federal courts reviewed the *process* by which land officers made constitutive decisions, interposing to correct frauds, mistakes, and violations of legally binding rules.<sup>321</sup> Constitutive decisions might thus provide fodder for litigation, even where the courts defer to agency decisions reached within proper bounds. Second, some forms of adjudication doubtless have a constitutive quality. Consider *Spindel v. Spindel*, in which a perspicacious district court distinguished between a constitutive divorce

---

<sup>316</sup> *See id.* (describing the Marshall Court's treatment of naturalization decision as final and conclusive). For a modern example in the citizenship context, see *Trop v. Dulles*, 356 U.S. 86, 93 (1958) (plurality opinion), holding involuntary expatriation lies beyond the government's enumerated powers. There, two Justices expressed separation of powers concerns. *See id.* at 104 (Black, J., concurring) (contending that expatriation must be accomplished through Article III courts). And *Oil States* itself provides a recent property example. *See Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1379 (2018) ("[The majority decision] should not be misconstrued as suggesting that patents are not property for purposes of the Due Process Clause or the Takings Clause.").

<sup>317</sup> *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 222 (1995) (describing the Constitution's rejection of any legislative oversight of final judicial decisions); THE FEDERALIST NO. 48 (James Madison).

<sup>318</sup> *See supra* notes 207–11, 222–26 and accompanying text.

<sup>319</sup> *See Crowell v. Benson*, 285 U.S. 22, 39–42 (1932).

<sup>320</sup> *See id.* at 39–42, 55–56.

<sup>321</sup> *See Johnson v. Towsley*, 80 U.S. (13 Wall.) 72, 83–84 (1871).

decree—which federal courts lacked power to issue under the domestic relations exception to Article III—and the adjudication of a dispute over the validity of such a decree.<sup>322</sup> To be sure, a decision invalidating a Mexican divorce would have restored marital status to the parties, thus seeming constitutive. But the *Spindel* court rightly understood that the assessment of the legal relations of the parties was fundamentally adjudicative, focused as it was on sorting out the legal significance of prior acts, rather than the creation of new rights for the future.<sup>323</sup>

A final complication stems from the fact that Congress occasionally gives the federal courts authority to entertain applications for the recognition of constitutive rights (as with petitions for naturalized citizenship and occasional public land questions).<sup>324</sup> As Justice Brandeis explained in *Tutun*, Congress has broad discretion in structuring the assertion of claims for naturalized citizenship.<sup>325</sup> “The United States may create rights in individuals against itself and provide only an administrative remedy.”<sup>326</sup> Or it may provide a legal (i.e., judicial) remedy, but require that individuals first exhaust administrative remedies. Or it may create both administrative and legal remedies and let individuals choose which to pursue. Or it may provide only a remedy in federal court.<sup>327</sup> When Congress chooses the latter path by creating a regular mode of procedure, “there arises a case within the meaning of the Constitution” when someone invokes the procedure to pursue a claim of right.<sup>328</sup> Naturalization petitions, he concluded, are “clearly . . . proceeding[s] of that character.”<sup>329</sup> Unlike the adjudication of disputes over existing federal rights (a judicial task), the power to constitute new rights did not fall categorically within the power of agencies or courts; both were available as Congress might direct.<sup>330</sup>

---

<sup>322</sup> See *Spindel v. Spindel*, 283 F. Supp. 797, 806 (E.D.N.Y. 1968) (distinguishing between disputes over rights previously conferred and the constitutive process of conferring a new status, such as a divorce decree).

<sup>323</sup> See *id.* at 806–12.

<sup>324</sup> On the power of Congress to assign constitutive matters like naturalization claims to the federal courts for uncontested adjudication, see PFANDER, CASES, *supra* note 29, at 1–9. Another related example concerns patents: federal district courts can hear civil actions to obtain a patent if a PTAB decision reviewing the denial of a patent application is not appealed to the Federal Circuit. See 35 U.S.C. § 145.

<sup>325</sup> See *Tutun v. United States*, 270 U.S. 568, 576–77 (1926).

<sup>326</sup> *Id.* at 576.

<sup>327</sup> *Id.* at 577.

<sup>328</sup> *Id.*

<sup>329</sup> *Id.* at 576–77.

<sup>330</sup> See *id.* Due process may, of course, complicate matters, particularly where an agency imposes new constitutive legal obligations. Compare *Londoner v. City & County of Denver*, 210 U.S. 373, 385 (1908) (“[W]here the legislature of a State, instead of fixing the tax itself, commits to some subordinate body the duty of determining . . . [the tax] . . . , due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard . . . .”), with *Bi-Metallic Inv. Co. v. State Bd. of Equalization of Colo.*, 239 U.S. 441, 445 (1915) (“Where a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its

In contrast to those who emphasize legislative discretion over when to allow suits against the United States,<sup>331</sup> we think the discretion at the heart of the public rights doctrine inheres in the congressional choice of agencies or courts as the institution responsible for processing claims for the recognition of new constitutive rights.<sup>332</sup> In an early application of a principle of institutional settlement, Congress chose the body that was to decide the matter, and courts deferred to the resultant assignment of rights.<sup>333</sup> But while Congress can specify the institution responsible for constituting new rights, it cannot assign the adjudicative role to agencies except as allowed in *Crowell*. In *Murray's Lessee*, that meant that Congress could allow the Treasury to issue a warrant conferring priority on the government—but it could not give the Treasury the power to make a case-specific judgment in a dispute over how much a public accountant owes the Treasury under the governing rules. Such matters were governed by legal principles and necessarily entailed a right to judicial determination. Marshall thus questioned the legality of the delegation of such matters to the “ministers,” at least as to matters in dispute.<sup>334</sup> *Murray's Lessee* and its surrounding context confirmed that a post-hoc judicial role was essential as to

---

adoption. . . . General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. . . . There must be a limit to individual argument in such matters if government is to go on.”). See generally 1 KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 7.2, at 732 (6th ed. 2018) (“The principles announced in *Londoner* and *Bi-Metallic* lie at the core of administrative procedure. *Londoner* and *Bi-Metallic* form the basis for the modern relationship between agency rules and agency adjudications, and they remain crucial to legislative and judicial determinations of the types of procedural safeguards that should be provided in various decisionmaking contexts.”).

<sup>331</sup> E.g., *Stern v. Marshall*, 564 U.S. 462, 489 (2011) (“The challenge in *Murray's Lessee* to the Treasury Department’s sale of the collector’s land likewise fell within the ‘public rights’ category of cases, because it could only be brought if the Federal Government chose to allow it by waiving sovereign immunity.”); Young, *supra* note 6, at 799 (“In *Murray's Lessee*, the benefit involved was Congress’ consent to be sued.”).

<sup>332</sup> And in the early republic, Congress also retained the ability to make constitutive decisions itself through private laws. This practice has disappeared in the twentieth century. See McKinley, *supra* note 285, at 1593.

<sup>333</sup> See *Tutun*, 270 U.S. at 576–77. This aspect of *Tutun* also informed the definition of public rights in *Crowell v. Benson*:

But “the mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.” Familiar illustrations of . . . such matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans.

285 U.S. 22, 50–51 (1932) (citation omitted) (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929)).

<sup>334</sup> *Ex parte Randolph*, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (No. 11,558) (Opinion of Marshall, Circuit Justice).



matters in dispute, even as it upheld the Treasury's issuance of distress warrants to establish the government's right to priority.

## VI. MAKING SENSE OF *MURRAY'S LESSEE* TODAY

In this Part, we seek to distill lessons from *Murray's Lessee* and the decisions that echo its reliance on public rights to better define the doctrine's operation today. We begin by returning to the categories with which we began. Rulemaking falls to agencies and lies beyond the power of the courts (except of course when Congress assigns federal courts the power to fashion a body of federal common law).<sup>335</sup> Adjudication of disputes over existing rights falls to the federal courts, subject to the possibility as recognized in *Crowell* that Congress can assign agencies responsibility as adjuncts for first-instance decisions.<sup>336</sup> As for the issuance of constitutive decrees, Congress enjoys a measure of discretion and can assign the work to agencies or courts as it sees fit. Courts called upon to review such decrees must respect the agency's discretion within the boundaries Congress has prescribed.

With that framework in place, this Part evaluates the current debate over the public rights doctrine. We first consider and reject the claim that the government's role as a party to the litigation plays a central role in the doctrine's application. Instead, courts should focus on preserving the agency's role in recognition of new constitutive rights while continuing to enforce legal limits on the scope of that authority. We also examine the role of due process in assuring judicial oversight and reconsider many of the leading public rights decisions, including *Granfinanciera* and *Thomas v. Union Carbide*. We conclude with a reconsideration of the Court's decision in *Oil States*.

### A. *The Role of the Government as a Party*

The Court has given voice to the idea that matters of public right arise in disputes between individuals and the government. Inasmuch as some suits proceed against the government as a party, the Court has often viewed sovereign immunity as a key ingredient of the public rights analysis. Chief Justice Roberts adopted that view in *Stern*, placing the *Murray's Lessee* challenge to the sale of

---

<sup>335</sup> See *supra* note 333 and accompanying text. Some judicial lawmaking survives. In *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 450–51 (1957), the Court interpreted federal labor law as conferring power on the federal courts to fashion federal common law to govern the enforcement of labor contracts, including collective bargaining agreements. See James E. Pfander, *Judicial Purpose and the Scholarly Process: The Lincoln Mills Case*, 69 WASH. U. L.Q. 243, 243 (1991). Some scholars view the Sherman Anti-Trust Act as conferring a similar measure of judicial lawmaking authority. See, e.g., Alan J. Meese, *Justice Scalia and Sherman Act Textualism*, 92 NOTRE DAME L. REV. 2013, 2014 (2017) (“[T]he Chicago School in general”—“particularly Robert Bork and Frank Easterbrook”—“have read the Sherman Act [as] . . . delegating to courts authority to employ economic analysis to determine whether [something] . . . violates the [law].”).

<sup>336</sup> See *Crowell v. Benson*, 285 U.S. 22, 50, 56–58 (1932).

the collector's land within the "public rights" category of cases because "it could only be brought if the Federal Government chose to allow it by waiving sovereign immunity."<sup>337</sup> Justice Scalia expressed the same view in *Granfinanciera*,<sup>338</sup> a view he reiterated in *Stern*.<sup>339</sup> Describing *Murray's Lessee*, Justice Scalia viewed the "device of waiver of sovereign immunity" as "central to our reasoning"; it was the means of converting a subject which, though its resolution involved a "judicial act," could not be brought before the courts, into the stuff of an Article III "judicial controversy."<sup>340</sup> Confirming congressional power over the government's ability to sue and be sued, Justice Scalia defined public rights as rights pertaining "to claims brought by or against the United States."<sup>341</sup>

But *Murray's Lessee* did not turn on the government's role as a party or on a waiver of sovereign immunity,<sup>342</sup> although one had been adopted by the 1820 statute.<sup>343</sup> As we have seen, the government and its officers did not appear as a party in *Murray's Lessee*; the dispute arose between private individuals who purchased the land at auction.<sup>344</sup> By contrast, the government did appear as a party of sorts in *Crowell*; the employer brought suit against the federal commissioner to enjoin enforcement of the proposed compensation award.<sup>345</sup> Yet despite these party appearances, the Court viewed *Murray's Lessee* as presenting a question of public rights and *Crowell* as a matter of private rights.<sup>346</sup> In contrast to Justice Scalia's position in *Granfinanciera* and *Stern*, the appearance of the government offers an uncertain guide to the public rights category.

---

<sup>337</sup> *Stern v. Marshall*, 564 U.S. 462, 489 (2011).

<sup>338</sup> *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 65 (1989) (Scalia, J., dissenting) ("In my view a matter of 'public rights,' whose adjudication Congress may assign to tribunals lacking the essential characteristics of Article III courts, 'must at a minimum arise between the government and others.'" (quoting *N. Pipeline Construction Co. v. Marathon Pipe Line Co.*, 438 U.S. 50, 69 (1982))).

<sup>339</sup> *Stern*, 564 U.S. at 503 (Scalia, J., dissenting) ("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*, 492 U.S. at 65)).

<sup>340</sup> *Granfinanciera*, 492 U.S. at 68.

<sup>341</sup> *Id.*

<sup>342</sup> See *supra* Part IV.B.

<sup>343</sup> Act of May 15, 1820, ch. 107, § 4, 3 Stat. 592, 595 (allowing for a bill in equity against the United States).

<sup>344</sup> *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 274 (1856).

<sup>345</sup> *Crowell v. Benson*, 285 U.S. 22, 36 (1932) ("This suit was brought . . . to enjoin the enforcement of an award made by . . . [the] deputy commissioner of the United States Employees' Compensation Commission . . .").

<sup>346</sup> Compare *Murray's Lessee*, 59 U.S. (18 How.) at 285–86 (public rights), with *Crowell*, 285 U.S. at 51 ("The present case does not fall within the categories just described but is one of private right, that is, of the liability of one individual to another under the law as defined.").

Rather than looking at the parties to the litigation, *Murray's Lessee* focused on the nature of the relationship between the government and the individuals affected by the exercise of constitutive power. In the public lands cases, Congress was thought to control title to land; no prior rights existed aside from those that Congress chose to recognize, and no judicial role was required apart from one that Congress specified.<sup>347</sup> In *Murray's Lessee*, by contrast, the common law standards that governed the relationship between the Treasury and its accountants remained intact; the audit and distress warrant operated to assure the Treasury's priority—but it did not furnish a different legal standard for resolving disputes over the debts in question.<sup>348</sup> Hence, a judicial role remained. In *Crowell*, Congress exercised regulatory power over the commercial activities of maritime workers and their employers, and changed the legal standards.<sup>349</sup> But disputes over the application of those standards, resulting in a judgment, remained a subject of judicial cognizance.<sup>350</sup> In both cases, the government was an interested party and Congress had exercised a measure of legislative discretion. But the nature of that discretion differed, and the difference had important implications in determining whether Congress can dispense with the judicial role. Party status in the resulting litigation has less explanatory power.

The Court seems to have recognized as much in *Thomas v. Union Carbide*, rejecting the notion that, in all disputes between private parties, the public rights doctrine disappears.<sup>351</sup> *Thomas* was a variegated case, arising from a registration scheme in which the EPA invited chemical manufacturers to apply for licenses to sell various agricultural products.<sup>352</sup> As part of that process, manufacturers were to disclose the evidence of their products' safety and effectiveness and follow-on registrants were entitled to use that evidence, after some delay and some compensatory payment, in securing their own licenses.<sup>353</sup> Manufacturers challenged the scheme both as a taking of their (trade secret) property and as a violation of Article III.<sup>354</sup> The Court rejected both contentions—the first because the manufacturers could mount after-the-fact claims for takings under the Tucker Act assuming the compensation scheme failed<sup>355</sup> and the second because the Court viewed the amount of compensation due initial registrants as a matter that did not require full *Crowell*-like Article III participation.<sup>356</sup>

We think the key to the Court's decision lies in its characterization of the nature of the agency's decision as to the amount of compensation due from

---

<sup>347</sup> See *supra* notes 283–96 and accompanying text.

<sup>348</sup> See *supra* notes 250–61 and accompanying text.

<sup>349</sup> *Crowell*, 285 U.S. at 39–42 (analyzing Congress's power to change the substantive law).

<sup>350</sup> *Id.* at 44; *accord id.* at 63–64.

<sup>351</sup> *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 587 (1985).

<sup>352</sup> *Id.* at 571–75.

<sup>353</sup> *Id.* at 571–72.

<sup>354</sup> *Id.* at 576.

<sup>355</sup> *Id.* at 577.

<sup>356</sup> *Id.* at 589–93.

follow-on registrants.<sup>357</sup> Congress was free, the Court explained, to allow the EPA to collect fees from follow-on registrants and use those fees to compensate prior registrants.<sup>358</sup> Setting the level of such fees within the licensing process was, the Court explained, like a ratemaking decision.<sup>359</sup> The scheme in question transferred that ratemaking power, which the Court described as legislative, from the agency to the arbitrator.<sup>360</sup> One can thus understand the Court as having deferred, much as it did in the nineteenth century public lands cases, to the delegation of what it viewed as constitutive power to an executive official, here an arbitrator. Rather than making an adjudicative decision about the resolution of claims of right, which would then result in a judgment, the arbitrator was seen as making a discretionary, constitutive decision about fair compensation comparable to an agency decision about rates or appraisals.<sup>361</sup> That, indeed, was the nub of Justice Brennan's decision to concur in a decision upholding the arbitrator's role, which he characterized as a "case-by-case lawmaking function."<sup>362</sup>

The Court's decision was complicated by the possibility of limited Article III review of the arbitrator's decision, a factor that gave the scheme the appearance of an adjudication.<sup>363</sup> The Court downplayed the litigation-like character of the arbitral proceeding, noting that the awards were enforced through a system of internal agency sanctions that could restrict access to the licensure scheme rather than through the entry of a judgment enforceable against the parties in court.<sup>364</sup> Here, the Court faced the reality that an arbitral decision could be a candidate for judicial enforcement, under a standard of review that was too deferential to bring the arbitrator within the adjunct standard of

---

<sup>357</sup> See *Union Carbide*, 473 U.S. at 589 ("In essence, the public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that 'could be conclusively determined by the Executive and Legislative Branches,' the danger of encroaching on the judicial powers is reduced." (quoting *N. Pipeline Construction Co. v. Marathon Pipe Line Co.*, 438 U.S. 50, 68 (1982))).

<sup>358</sup> *Id.* at 590.

<sup>359</sup> *Id.*

<sup>360</sup> *Id.* One sees a reflection of the important distinction between an agency's adjudicatory and constitutive tasks in Justice Breyer's separate opinion in *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1388 (2015) (Breyer, J., concurring in part and concurring in the judgment). There, the Court found that the right to sue under *Ex parte Young* was unavailable to enforce a federal spending clause provision that cabined the exercise of state administrative discretion. *Id.* at 1387–88 (majority opinion). The majority emphasized the implied displacement of that remedy by other adequate remedies, including the threat of a loss of federal funds enforced through federal agency processes. *Id.* at 1385. Justice Breyer concurred, in part because he viewed the administrative authority in question as analogous to the exercise of ratemaking for which less stringent forms of judicial review would suffice. *Id.* at 1388 (Breyer, J., concurring in part and concurring in the judgment).

<sup>361</sup> *Union Carbide*, 473 U.S. at 590.

<sup>362</sup> See *id.* at 601–02 (Brennan, J., concurring) ("In essence, the FIFRA scheme delegates a significant case-by-case lawmaking function to the arbitrator in compensation disputes.").

<sup>363</sup> *Id.* at 592 (majority opinion).

<sup>364</sup> *Id.* at 591.

*Crowell*.<sup>365</sup> But the point of the scheme was less to transfer the judgment-entering power to an agency for enforcement against individuals than to assign the issue of compensation to a neutral for relatively quick resolution.<sup>366</sup> The resulting determination looks more like an appraisal than the resolution of a dispute over claims of right. Indeed, the Court reaffirmed that Article III primarily serves to protect the judgment-entering role when Congress contemplates the enforcement of agency decisions against unwilling individuals.<sup>367</sup>

### B. *Scope of Review of Agency Decisions*

Recognizing that the public rights category includes both *Murray's Lessee* and the public land cases, the timing and scope of judicial review may depend on the nature of the power Congress has delegated. Before the Civil War, the Court did not see the exercise of constitutive power by boards and commissions as calling for close oversight by the Article III judiciary.<sup>368</sup> That's the message of the approach to review of distress proceedings: common law courts conducted something like de novo review of statutory and jurisdictional restrictions on the taxing power but refused to review a commission's authority to appraise the property. *Murray's Lessee* leaves that distinction in place; it cited the public lands cases approvingly as examples of executive branch decisions binding on private parties,<sup>369</sup> but the Court had no occasion to specify the scope of review when Congress assigned judicial power outside Article III.<sup>370</sup>

We think Chief Justice Marshall's decisions in *Nourse* and *Randolph* have more to teach us about the scope of review. In *Nourse*, the petitioner secured plenary review of the audit and an injunction against any further enforcement of the distress warrant.<sup>371</sup> Marshall's opinion treats such review as essential.<sup>372</sup> In *Randolph*, Marshall suggested that habeas might serve less to secure plenary

---

<sup>365</sup> See *id.* at 592.

<sup>366</sup> See *id.* at 590.

<sup>367</sup> *Union Carbide*, 473 U.S. at 591; see also Louis L. Jaffe, *The Right to Judicial Review*, 71 HARV. L. REV. 401, 420 (1958) (“[I]n our system of remedies, an individual whose interest is acutely and immediately affected by an administrative action presumptively has a right to secure at some point a judicial determination of its validity.”).

<sup>368</sup> See MASHAW, CREATING, *supra* note 283, at 136–37.

<sup>369</sup> *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 274, 284 (1856).

<sup>370</sup> See *id.* at 275.

<sup>371</sup> See *United States v. Nourse*, 31 U.S. (6 Pet.) 470, 475–84 (1832) (syllabus) (describing the original injunction proceedings in the district court); *id.* at 493 (opinion of the Court) (“[T]he proceedings on this injunction, in regard to the merits of the case, are to be the same as in other cases of injunction . . . .”); see also *United States v. Nourse*, 34 U.S. (9 Pet.) 8, 28 (1835) (describing the same).

<sup>372</sup> See *Thryv, Inc. v. Click-to-Call Techs., LP*, 140 S. Ct. 1367, 1384 (2020) (Gorsuch, J., dissenting) (quoting *Nourse*, 34 U.S. (9 Pet.) at 28–29). For the quote, see *supra* text accompanying note 210.

review of the audit underlying the distress warrant than to invalidate the warrant.<sup>373</sup> Such invalidation would force the government to bring suit on a debt claim, establish the existence of an amount due in plenary proceedings, and then proceed to execute the judgment.<sup>374</sup> Either way, the federal courts would fully adjudicate all matters in dispute.

Today, the crisp scope-of-review line between the delegation of adjudicative and constitutive tasks has been blurred by the application of the Court's non-delegation doctrine. Since the 1930s, congressional delegations of legislative power must be accompanied by "intelligible" standards that guide the exercise of agency discretion.<sup>375</sup> Such standards allow courts to evaluate the legality of an agency's exercise of delegated authority and to enforce the boundaries within which the agency must operate.<sup>376</sup> Apart from their Article III claim, the manufacturers in *Union Carbide* argued that Congress had failed to supply the standards necessary to guide the arbitral decision.<sup>377</sup> The Court declined to reach this non-delegation issue and left it open on remand.<sup>378</sup> But the recognition that such a question arose helps us to see the difference between the quite modest scope of review applicable to executive decisions taken within the permissible scope of delegated power in nineteenth century America and the broader review available today.<sup>379</sup>

### C. State Courts and Due Process Limits on Agency Adjudication

While *Nourse* and *Randolph* both arose from initial litigation in federal court, state courts were available to hear collateral attacks on the execution of federal distress warrants. Given the option to pursue injunctive relief in district court, the targets of distress would be unlikely to invoke remedies available at

---

<sup>373</sup> *Ex parte Randolph*, 20 F. Cas. 242, 257 (C.C.D. Va. 1833) (No. 11,558) (opinion of Marshall, Circuit Justice).

<sup>374</sup> *Id.* at 256.

<sup>375</sup> See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541 (1935) (citing *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928)). For scholarly discussion of the non-delegation doctrine, see, for example, William K. Kelley, *Justice Scalia, the Nondelegation Doctrine, and Constitutional Argument*, 92 NOTRE DAME L. REV. 2107 (2017); Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379 (2017); and Ilan Wurman, *Constitutional Administration*, 69 STAN. L. REV. 359 (2017).

<sup>376</sup> See *Schechter Poultry*, 295 U.S. at 552–54 (Cardozo, J., concurring) (explaining the need for judicially cognizable boundaries). Of course, much remains uncertain about the role of deference, *Chevron*-inflected and otherwise, to an agency's exercise of interpretive discretion. See *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015) (treating extraordinary cases as exempt from *Chevron*-based deference to agency determinations).

<sup>377</sup> *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 593 (1985).

<sup>378</sup> *Id.*

<sup>379</sup> The type of delegation at issue in *Murray's Lessee*—Congress empowering the executive to establish priority before obtaining a judgment—might also raise modern due process concerns for third parties whose rights were impacted. One finds a modern analysis of related issues in *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1323–28 (2016).

common law. But as we have seen, those remedies would have included a suit against the marshal, requiring that officer to justify by demonstrating the facial legality of the warrant, and, depending on the scope of review in the marshal litigation, some sort of suit against those who conducted the audit.<sup>380</sup> In addition, the target might pay the amount due under duress and seek to recover in *assumpsit*.<sup>381</sup> *Replevin* and *ejectment* to recover personal and real property were also potential options.<sup>382</sup> Much of the nation's early administrative law developed in the context of suits against federal officers, many brought in state court.<sup>383</sup>

One can only speculate as to the scope of review available in such state court proceedings had Congress failed to make plenary review available in the federal district courts. Yet the scope of review, importantly, would have been a subject for ultimate determination by the Supreme Court. Section 25 of the Judiciary Act gave the Court appellate jurisdiction to review the decisions of state courts in any case involving an "authority exercised under the United States, and the decision is against their validity."<sup>384</sup> Using this power, the Court had fashioned a body of judicial review law to govern common law suits challenging the implementation of the Jeffersonian embargo.<sup>385</sup> Litigants challenging federal action in state court had a right to a state forum for the adjudication of their common law claims, and *as-of-right* review in the Supreme Court existed if the state court invalidated the federal action.<sup>386</sup> So suits contesting distress warrants would land on the Court's docket.

With *as-of-right* appellate jurisdiction, the Court would control the scope of review and decide which of the various common law forms was best suited to contest distress warrants. The Court had no obligation to defer to the common law rules of the state courts; *Swift v. Tyson* gave the federal courts freedom to develop their own body of general law to serve federal needs.<sup>387</sup> Nor would the Court have any obligation to rely on either Article III or the Due Process Clause to ensure such review. Having access to suits on a range of common law writs, the Court could ensure appropriate review as a matter of course. To the extent it

---

<sup>380</sup> See *supra* notes 132–34 and accompanying text.

<sup>381</sup> See *supra* notes 135–37 and accompanying text.

<sup>382</sup> See *supra* notes 126–29 and accompanying text.

<sup>383</sup> See James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1874–76 (2010).

<sup>384</sup> Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–87.

<sup>385</sup> Compare *Crowell v. M'Fadon*, 12 U.S. (8 Cranch) 94, 98 (1814) (rejecting suit for conversion of the cargo of a vessel detained under Jefferson's embargo), with *Slocum v. Mayberry*, 15 U.S. (2 Wheat.) 1, 12–13 (1817) (allowing owner to sue in *replevin* to recover cargo out of the hands of the officialdom). In thus tailoring relief, the Court did not view itself as fashioning rights to sue but as harmonizing common law remedies within the framework of federal law. On the willingness of state courts to entertain such claims, see, for example, *Blake v. Johnson*, 1 N.H. 91, 92–93 (1817).

<sup>386</sup> See § 25, 1 Stat. at 85–87.

<sup>387</sup> *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18–20 (1842).

saw anomalies in the remedial system, the Court could shape common law forms to provide the scope of review viewed as necessary. Constitutionalism would come into play only in response to legislation that sought to displace access to common law forms.

Given the availability of common law forms and the applicability of federal law in state court, legal thinkers in the early republic had little reason to distinguish between the role of due process and Article III in assuring judicial oversight. Obviously, Article III guarantees a federal judicial role in certain settings, but has less to say about the availability of review in the state court system. Today, we understand the Article III assurance of federal judicial review as quite different from the due process protections that govern proceedings in both state and federal courts.<sup>388</sup> But common lawyers may not have seen so sharp a division in the work being done by the two constitutional provisions.

Justice Brandeis was both right and wrong in his treatment of due process and Article III in *Crowell*.<sup>389</sup> He argued that Article III was orthogonal to the analysis of Congress's obligation to preserve judicial review of the commissioner's workers' comp determination; due process was the operative guarantee and the state courts could provide that process (as they had often done in the nineteenth century).<sup>390</sup> Brandeis built on this observation to argue that, like non-Article III state courts, non-Article III boards and tribunals could provide a proper forum for the adjudication of compensation claims.<sup>391</sup> Yet to the extent that Article III and due process both seek to ensure independent decisions, state courts and Article III courts both differed from the agency's commissioners charged with ensuring adequate compensation awards. Brandeis was right to suggest that state and federal courts were somewhat interchangeable in assuring a common law test of the legality of federal official conduct. But boards and commissions, acting extra-judicially, were not viewed as analogous to state courts. Today, the analogy seems even more strained as state courts have lost their power to oversee the legality of federal agency determinations.<sup>392</sup> The

---

<sup>388</sup> Compare HICKMAN & PIERCE, JR., *supra* note 330, § 7.2, at 730–32 (explaining that the *Londoner/Bi-Metallic* doctrine requires procedural due process protections for individualized decisions), with *Stern v. Marshall*, 564 U.S. 462, 482–87 (2011) (discussing which powers may be vested in different government officials).

<sup>389</sup> *Crowell v. Benson*, 285 U.S. 22, 65–95 (1932) (Brandeis, J., dissenting).

<sup>390</sup> *Id.* at 77–80, 84–87.

<sup>391</sup> *Id.* at 86–88.

<sup>392</sup> Most review proceeds under organic statutes in which parties name the United States or its agencies as parties, see Administrative Procedure Act, Pub. L. No. 79-404, § 10, 60 Stat. 237, 243–44 (1946); even suits against officers in their personal capacity now proceed in federal court by way of removal, 28 U.S.C. § 1442(a)(1) (2018). Meanwhile, the common law officer suit has been abrogated by statute. See Westfall Act, Pub. L. No. 100-694, § 5, 102 Stat. 4563, 4564 (1988) (codified as amended at 28 U.S.C. § 2679(b)). Brandeis's comments, delivered in the midst of that transition, make more sense as a description of the past than as a characterization of our present-day world.



historical state court option, invoked by Brandeis, thus has little relevance to the Article III role today.

#### D. Oil States *Revisited*

The dispute in *Oil States* arose from a competitor's challenge to an Oil States patent in fracking technology.<sup>393</sup> After conducting *inter partes* review, the Patent Trial and Appeal Board (PTAB) agreed with the competitor and invalidated Oil States's patent.<sup>394</sup> On appeal, the Federal Circuit upheld the invalidation against an argument that Congress violated Article III by assigning *inter partes* review to a non-Article III body.<sup>395</sup> The PTAB's role in adjudicating and ultimately rejecting the patent's validity was thrown into sharp relief by the pendency of parallel patent invalidation proceedings between the same parties in district court, the traditional forum for patent invalidity claims.<sup>396</sup>

In affirming the Federal Circuit, and upholding *inter partes* review at the PTAB, the Supreme Court relied almost entirely on its characterization of the dispute as a matter of public right.<sup>397</sup> Patents, the Court explained, had long been viewed as public franchises, distributed by Congress in connection with its power over intellectual property.<sup>398</sup> Congress thus enjoyed broad discretion in shaping the process by which such distribution occurred. Here, the patent office made an initial determination in issuing a patent, a matter that all regarded as implicating the public rights doctrine.<sup>399</sup> In the Court's view, Congress had qualified the initial issuance of the franchise by installing a mechanism to review the propriety of the initial grant.<sup>400</sup> While Congress was free to rely on federal courts for resolution of disputes over validity of the patent issuance decision, it was not obligated to do so.<sup>401</sup>

---

<sup>393</sup> *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1372 (2018).

<sup>394</sup> *Id.*

<sup>395</sup> *Id.*

<sup>396</sup> The PTAB's decision came down months after the District Court's claim construction order, which had foreclosed Oil State's competitor's arguments regarding invalidity. *Id.*

<sup>397</sup> *Id.* at 1373 ("Inter partes review falls squarely within the public-rights doctrine."); *accord id.* at 1372–79.

<sup>398</sup> *Id.* at 1373–75 (analogizing, in Section III.A, "that franchises can be qualified in this manner").

<sup>399</sup> *Oil States*, 138 S. Ct. at 1373–74 ("This Court has long recognized that the grant of a patent is a 'matte[r] involving public rights.'" (quoting *United States v. Duell*, 172 U.S. 576, 582–83 (1899))).

<sup>400</sup> *Id.* at 1374–75 ("Inter partes review involves the same basic matter as the grant of a patent. So it, too, falls on the public-rights side of the line.")

<sup>401</sup> *Id.* at 1378 ("[M]atters governed by the public-rights doctrine 'from their nature' can be resolved in multiple ways: Congress can 'reserve to itself the power to decide,' 'delegate

The Court was quick to add that patents retained their status as property for purposes of due process and takings law.<sup>402</sup> And the Court noted in passing that federal courts provided some review of *inter partes* cancellation decisions.<sup>403</sup> But the Court ascribed little significance to these factors, treating the public rights characterization of the matter as dispositive.<sup>404</sup> That same conclusion comes through in Justice Breyer's concurrence. Writing for three Justices, Breyer sought to ward off the implication that the Court's reliance on the public rights doctrine necessarily meant that all matters of private right called for Article III adjudication.<sup>405</sup> He set the stage for that assertion by agreeing with the majority's premise: "*inter partes* review is a matter involving public rights" and that suffices "to show that [the board's determination] violates neither Article III nor the Seventh Amendment."<sup>406</sup>

Dissenting along with Chief Justice Roberts, Justice Gorsuch took issue with the application of the public rights doctrine. For Gorsuch, the initial grant of a patent right conveyed a property interest that was subject to cancellation or invalidation only through judicial process.<sup>407</sup> Gorsuch relied on past practice in the courts of the United States, where patent invalidity disputes had long been viewed as matters for adjudication.<sup>408</sup> Decisions from the nineteenth century had proceeded on the assumption that the "only authority competent to set a patent aside, or to annul it, or to correct it for any reason whatever, is vested in the courts of the United States, and not in the department which issued the patent."<sup>409</sup> For Gorsuch, then, the character of the initial decision to grant a patent as a matter of public right or franchise did not control the government's right to revoke the patent. Revocations were different in kind and required

---

that power to executive officers,' or 'commit it to judicial tribunals.'" (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929))).

<sup>402</sup> *Id.* at 1379 ("[O]ur decision should not be misconstrued as suggesting that patents are not property for purposes of the Due Process Clause or the Takings Clause.").

<sup>403</sup> *Id.*

<sup>404</sup> *Id.*

<sup>405</sup> *Oil States*, 138 S. Ct. at 1379 (Breyer, J., concurring) ("[T]he Court's opinion should not be read to say that matters involving private rights may never be adjudicated other than by Article III courts . . . . Our precedent is to the contrary." (citations omitted)).

<sup>406</sup> *Id.* (italics added).

<sup>407</sup> *Id.* at 1380 (Gorsuch, J., dissenting) ("[M]ost everyone considered an issued patent a personal right—no less than a home or farm—that the federal government could revoke only with the concurrence of independent judges."). One could also critique the decision on contractual grounds. See N. Scott Pierce, *Double Jeopardy: Patents of Invention as Contracts, Invention Disclosure as Consideration, and Where Oil States Went Wrong*, 30 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 645, 715–16 (2020).

<sup>408</sup> *Oil States*, 138 S. Ct. at 1381 (Gorsuch, J., dissenting) ("'[W]hen a suit is made of the stuff of the traditional actions at common law tried by the courts at Westminster in 1789 . . . and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with' Article III . . ." (quoting *Stern v. Marshall*, 564 U.S. 462, 484 (2011))).

<sup>409</sup> *Id.* at 1384 (quoting *McCormick Harvesting Mach. Co. v. Aultman*, 169 U.S. 606, 609 (1898)).

recognition of a judicial role. Like the other opinions, Justice Gorsuch accorded no significance to the existence and adequacy of post-cancellation judicial review.<sup>410</sup>

Majority and dissent thus divided as to whether to characterize the *inter partes* decision as part of the agency's constitutive or adjudicative role.<sup>411</sup> But viewing that question through formalist eyes, the two opinions paid little attention to the surrounding legal context in determining what characterization made sense. Thus, the Court upheld the patent's invalidation as a public rights decision but had little to say about the downstream effects of that decision or about the relevance of post-invalidation judicial review.<sup>412</sup> The Court thus ignored the apparent purpose of the *inter partes* review system, the existence of post-cancellation review in Article III courts, and the likely impact of agency cancellation on any ongoing disputes in the federal courts over patent validity.<sup>413</sup>

We think all those factors deserved closer attention as the Court attempted to distinguish the constitutive and adjudicative roles of the PTAB. Rather than placing the matter in a one-size-fits-all public rights box, the Court should have closely evaluated the nature of discretion that Congress conferred on the PTAB. Viewed from that perspective, it appears to us that Congress acted to clean up a patent process that had come to be seen as too willing to issue poor quality patents. It sought to do so in part by improving and streamlining the process of disputing patent validity before an expert tribunal with the expectation that PTAB judgments would supplement and perhaps to some extent displace patent validity litigation in the federal courts.<sup>414</sup> Justice Gorsuch thus seems right to have regarded the matter as one of final dispute resolution, rather than one connected to the ongoing conferral of new constitutive rights.<sup>415</sup>

---

<sup>410</sup> *Id.* at 1385–86 (“The people’s historic rights to have independent judges decide their disputes with the government should not be a ‘constitutional Maginot Line, easily circumvented’ by such ‘simpl[e] maneuver[s].’” (quoting *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1335 (2016) (Roberts, C.J., dissenting))).

<sup>411</sup> Compare *id.* at 1374–75 (majority opinion) (characterizing the review as part of the grant), with *id.* at 1385–86 (Gorsuch, J., dissenting) (characterizing the review as disposition of the title in a disputed case).

<sup>412</sup> See *id.* at 1379 (majority opinion).

<sup>413</sup> For the purpose, see *id.* at 1371–72 (discussing the *inter partes* procedure but not Congress’s purpose in enacting it). For the Article III review, see *id.* at 1379 (reserving the question regarding the sufficiency of review). And for the impact of agency cancellation, see *id.* at 1372 (discussing the procedural history in *Oil States*—plainly featuring the impact of agency cancellation contrary to the determination of a court—but making no mention of the potential separation of powers issues stemming from such differing opinions from different branches).

<sup>414</sup> H.R. REP. NO. 112-98, at 45 (2011) (discussing *inter partes* review’s purpose: to be a cost-efficient alternative to determining patent validity in district courts).

<sup>415</sup> *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1385–86 (2018) (Gorsuch, J., dissenting).

We find further support for the Gorsuch view of the matter as predominantly adjudicative when we consider the preclusive effect of an *inter partes* decision on subsequent litigation of patent validity matters in federal court. The Supreme Court has held, in *B & B Hardware*, that a decision by the Trademark Trial and Appeal Board can have issue preclusive effects on federal court trademark litigation.<sup>416</sup> The Court pointed to prior cases establishing a presumption that, when Congress authorizes agencies to resolve disputes, “courts may take it as given that Congress has legislated with the expectation that . . . [issue preclusion] will apply except when a statutory purpose to the contrary is evident.”<sup>417</sup> Applying this presumption, the Court held the TTAB’s decisions about likely confusion in connection with a disputed trademark registration proceeding should, subject to the usual doctrinal qualifications, be given issue preclusive effect by federal courts in trademark infringement actions.<sup>418</sup>

One can certainly argue that the same presumption in favor of according preclusive effect applies to the PTAB’s *inter partes* review decisions. Sure enough, the Federal Circuit wasted little time in applying *B & B Hardware* to PTAB decisions, finding that the two appellate boards were “indistinguishable for preclusion purposes.”<sup>419</sup> Perhaps so. But the application of preclusive effect to PTAB decisions fits uneasily with the public rights predicate on which the *Oil States* majority based its decision upholding agency power.<sup>420</sup> As we have seen, the Court in *Oil States* did not view PTAB decision-making as the legitimate delegation of dispute-resolution authority subject to judicial review adequate to satisfy the strictures of Article III.<sup>421</sup> Instead, the Court’s public rights rationale linked the PTAB’s decision to review of the initial distribution of patents as public franchises.<sup>422</sup> As a result, the adequacy of post-

---

<sup>416</sup> *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1310 (2015) (“So long as the other ordinary elements of issue preclusion are met, when the usages adjudicated by the TTAB are materially the same as those before the district court, issue preclusion should apply.”).

<sup>417</sup> *Id.* at 1303 (brackets in original) (internal quotation marks omitted) (quoting *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991)).

<sup>418</sup> Dissenting, Justice Thomas found little support for the majority’s presumption. *Id.* at 1310 (Thomas, J., dissenting). Instead, he relied on the reluctance of older decisions and Restatements to accord preclusive effect to the decisions of any tribunals other than courts of competent jurisdiction. *Id.* at 1312. For Justice Thomas, such courts did not include administrative agencies. *Id.* To be sure, the dissent acknowledged that some effect had been given to agency decisions in the past. *Id.* at 1313. Citing the public land cases, Justice Thomas explained that decisions of the land office were accorded a measure of effect in subsequent judicial proceedings. *Id.* (citing *Smelting Co. v. Kemp*, 104 U.S. 636, 646 (1882)). But Justice Thomas characterized the effect as the result of the application of a form of equitable estoppel, rather than as a result of claim and issue preclusion. *Id.*

<sup>419</sup> *MaxLinear, Inc. v. CF CRESPE LLC*, 880 F.3d 1373, 1376 (Fed. Cir. 2018).

<sup>420</sup> On the inability of federal courts to oversee the agency’s acceptance of jurisdiction to conduct *inter partes* review, see *Thryv, Inc. v. Click-To-Call Techs., LP*, 140 S. Ct. 1367, 1370 (2020); *cf. id.* at 1387 (Gorsuch, J., dissenting).

<sup>421</sup> See *supra* notes 393–406 and accompanying text.

<sup>422</sup> See *supra* notes 393–406 and accompanying text.

determination judicial review played no obvious role in the Court's decision.<sup>423</sup> The legally conclusive quality of the PTAB decision depended, analytically, on agency decision-making through the assignment of a constitutive, rather than adjudicatory, power.<sup>424</sup>

Such constitutive decisions bind those they govern and determine outcomes in subsequent cases, but they do not represent adjudications to which claim and issue preclusive effect should attach. Consider the public land cases to which Justice Thomas pointed in dissenting from the extension of preclusive effect to agency adjudication in *B & B Hardware*.<sup>425</sup> Justice Thomas viewed those dispositions as controlling in later cases through equitable estoppel rather than through collateral estoppel.<sup>426</sup> Once one traces the public rights core of *Oil States* to constitutive discretion of the kind at issue in the public lands cases, then Justice Thomas's rationale in *Oil States* provides scant justification for the extension of claim and issue preclusive effect to PTAB decisions. Those decisions were not upheld as instances of permissible delegation of adjudication to the agency, subject to the sort of Article III review necessary to meet the *Crowell* standard.<sup>427</sup>

To the extent that the congressional design calls for the extension of claim and issue preclusive effect to the decisions of the PTAB, *Oil States* creates problems by obscuring the important role of judicial review. Whatever one might think about assigning preclusive effect to agency decisions that lack any Article III oversight—and the Court appears to have left that question open in *B & B Hardware*, in the trademark and patent context<sup>428</sup>—the existence of de

---

<sup>423</sup> See *supra* notes 393–406 and accompanying text.

<sup>424</sup> The *Oil States* Court, in characterizing *inter partes* review as a matter of public right, set the stage for the Court's recent decision in *United States v. Arthrex, Inc.*, No. 19-1434, slip op. at 6–19 (U.S. June 21, 2021), clarifying the role of the administrative patent judges or APJs who make up the patent review board. The *Arthrex* Court viewed *inter partes* review decisions as the final word of the agency on the issue of patent validity, *id.* at 4–5, and held that such finality was inconsistent with APJs' status as supervised officers within the Commerce Department, *id.* at 18–19. The *Arthrex* Court resolved the problem by invalidating provisions that insulated APJ decisions from further review by the director of the patent office. *Id.* at 21–22.

<sup>425</sup> *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1313–14 (2015) (Thomas, J., dissenting).

<sup>426</sup> *Id.*

<sup>427</sup> Compare *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1374–76 (2018) (holding that Congress could assign *inter partes* validity disputes to the PTAB without reference to the judicial role as an exercise of public rights), with *Crowell v. Benson*, 285 U.S. 22, 63–64 (1932) (holding that Congress made commissioner decisions regarding jurisdictional facts reviewable in equity under *de novo* review).

<sup>428</sup> *B & B Hardware*, 135 S. Ct. at 1305 & n.2. Ablavsky acknowledges as a “helpful framing” our suggested distinction between constitutive acts and adjudicative acts and embraces our suggestion that the line blurs at the margins, perhaps more than we allow. See Ablavsky, *supra* note 28 (manuscript at 44 & n.263). He goes on to suggest that broad preclusive effect was accorded private land decisions, which as a procedural matter tended

novo review of errors of law and substantial evidence review of factual determinations helps to ensure that parties have access to federal forums should they find themselves aggrieved by agency decisions. In such a world, preclusive effect would presumably attach to the judgment of the Federal Circuit, as to which the PTAB can be seen as having played a preliminary role as an adjunct within the meaning of *Crowell*.<sup>429</sup>

### E. Formalism and the Separation of Powers

In the end, the *Oil States* Court approached the twenty-first century problem of *inter partes* review from a perspective more formal than that with which nineteenth century jurists tackled distress warrants. Having placed *inter partes* review in the public rights box, the Court declared its work complete.<sup>430</sup> The dissent, equally committed to the use of formal rules in disputes over the separation of powers, responded in kind, taking issue with the majority's claim that *inter partes* review represented only a continuation of the process of initial patent distribution.<sup>431</sup> Both opinions echo Justice Scalia's desire, best expressed in *Granfinanciera*, to draw clear lines and escape from the pragmatic balancing of interests that he saw reflected in such decisions as *Union Carbide*.<sup>432</sup> Justice Scalia's emphasis on sovereign immunity and the government's role as a party attempt to articulate one such bright line rule.<sup>433</sup>

But the government's status as a party to the litigation, as we have seen, cannot determine the outcome of these cases. It did not control in *Murray's*

---

to resemble adjudications, even though they would have lacked the sort of Article III oversight that attends PTAB decisions today. *Id.* (manuscript at 44–45). We would add only that an agency may (as in *Union Carbide*) perform constitutive acts through trial-like forms of process regarded as final and conclusive within the zone of discretion Congress has conferred without necessarily conducting an adjudication that requires the oversight of the federal courts. We do not disagree that PTAB decisions may deserve claim and issue preclusive effect. But Justice Thomas's concern with expanding the preclusive effect of agency decisions in *B & B Hardware* suggests that any such effect should depend on the availability of Article III judicial review of the arguably preclusive agency determination.

<sup>429</sup> It could also apply with equal force to unreviewed agency decisions where the party had a right to seek judicial review.

<sup>430</sup> *Oil States*, 138 S. Ct. at 1378–79 (holding “narrow[ly]” that *inter partes* review did not violate Article III because it fell within the public rights doctrine).

<sup>431</sup> *Id.* at 1380–81 (Gorsuch, J., dissenting) (“[W]hen a suit is made of the stuff of traditional actions at common law tried by the courts at Westminster in 1789 . . . , the responsibility for deciding that suit rests with Article III judges . . . .” (quoting *Stern v. Marshall*, 564 U.S. 462, 484 (2011))).

<sup>432</sup> Compare *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 65–66 (1989) (Scalia, J., concurring in part and concurring in the judgment) (fashioning a categorical rule from the caselaw), with *Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568, 587 (1985) (emphasizing “practical attention to substance rather than doctrinaire reliance on formal categories”).

<sup>433</sup> *Granfinanciera*, 492 U.S. at 65–66 (Scalia, J., concurring in part and concurring in the judgment) (fashioning a categorical rule from the caselaw).

*Lessee*, in *Crowell*, or in *Oil States* itself. Instead, courts must determine the functional nature of the authority the agency has exercised and calibrate judicial involvement to take appropriate account of its adjudicative or constitutive quality. Nineteenth century courts applying the distress statute recognized the core judicial role at the heart of the indebtedness calculation and worked to defend that role from “ministerial” determination.<sup>434</sup> *Murray’s Lessee* gave legal effect to the priority conferred by the distress warrant, but confirmed that judicial review that would assure the protection of individuals’ rights.<sup>435</sup> While the Court described the government’s interest in establishing priority to amounts due from its accountants as a public right,<sup>436</sup> the exercise of adjudicative power at the center of that determination set the case apart from the exercise of constitutive power entailed in, say, the land office’s distribution of public rights.

Yet the problem of defining the scope of executive discretion—the focus of Marshall’s concern in *Randolph* and *Nourse*—remains. Marshall argued that “ministers” had no discretion to resolve disputes over indebtedness; the calculation of debts called for the exercise of judicial judgment and the application of rules of law.<sup>437</sup> Debt calculation thus differed from property assessments for tax purposes; when those decisions had been delegated to boards and commissions without any accompanying statutory standards, courts had no role to play. Marshall suggested that this difference might prevent the delegation of some judicial tasks to agencies of the executive branch.<sup>438</sup> *Murray’s Lessee* allowed the delegation because the judicial role was adequately protected in disputed cases.<sup>439</sup>

Distinguishing the adjudicative from the constitutive in agency decisions has grown more complex today. Congress has articulated more standards to guide the exercise of agency discretion over matters that once may have been considered constitutive in character and largely free from judicial control. Courts, as they did in the nineteenth century, bear responsibility for enforcing those standards and policing the boundaries of agency discretion. One can see the advantages of an appellate-review model as the best way to approach judicial review of agency action today.<sup>440</sup> Whether one sees the agency as having acted

---

<sup>434</sup> See *supra* notes 231–35 and accompanying text.

<sup>435</sup> See *supra* notes 236–39 and accompanying text.

<sup>436</sup> *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 274, 284 (1856).

<sup>437</sup> *Ex parte Randolph*, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (No. 11,558) (Opinion of Marshall, Circuit Justice).

<sup>438</sup> *Id.* at 256.

<sup>439</sup> *Murray’s Lessee*, 59 U.S. (18 How.) at 285 (“In substance, it is an extent authorizing a levy for the satisfaction of a debt . . . .”); *id.* at 284 (“The United States may thus place the government upon the same ground which is occupied by private persons who proceed to take extrajudicial remedies for their wrongs . . . . [E]very fact upon which the legality of the extrajudicial remedy depends may be drawn in question by a suit [after the fact] . . . .”).

<sup>440</sup> See Fallon, Jr., *supra* note 8, at 917–18 (describing the theory); *id.* at 961–63 (outlining its application in the public rights arena).

in an adjudicative or constitutive capacity, relatively searching review in an Article III court should suffice to justify enforcement of the agency's action.

## VII. CONCLUSION

We live today in a world shaped by misunderstandings of *Murray's Lessee*. The Court did not allow Congress to assign the adjudication of disputes to non-Article III "ministers," but rather confirmed the executive's power to take action to establish the federal government's priority in debt collection. In upholding the distress warrant, the Court did not rely on the power of Congress to define the government's immunity from suit; instead, the Court proceeded on the assumption that (whatever Congress chose to do about suits against the United States), common law claims based on trespass, habeas, and other familiar forms of action were available as of right against the responsible official. Nor did the Court intimate that the government's appearance as a party to the litigation played a controlling role in the outcome. It was, instead, the nature of power assigned to the agency officials that controlled the analysis. When the assignment involved a matter of adjudication, a retrospective determination of the rights of parties under the law as stated, the judicial power of the federal courts was implicated. But when Congress empowered the agency to create or distribute new rights or entitlements—in effect to exercise constitutive power—the judicial role was limited to make way for the exercise of agency discretion.

Reclaiming the distinction between the agency's exercise of constitutive and adjudicative functions helps to clarify the law of Article III. Some matters of public right, such as constitutive decisions that occur when government distributes some forms of government largesse, can be assigned to agencies, subject only to such legal standards as needed to inform the agency's discretion and enable judicial review. Agencies in such cases may enjoy both initial and final authority to make controlling constitutive determinations, subject to compliance with the standards Congress has specified. But in other cases, as in *Ex parte Randolph*, the agency can take only a provisional adjudicative step, one that becomes final only if interested parties accept the decision or fail to secure its invalidation in the course of judicial review. As *Murray's Lessee* teaches, federal courts were obliged to leave undisturbed lawful exertions of agency discretion in constitutive matters, such as the government's priority. But federal courts reviewing distress warrants in actions against government collectors owed no deference to the agency's calculations and were expected to conduct de novo review of the legal and factual basis of the debt claim. Final legal judgment was for the courts. Today, *Crowell* sets the parameters for a slightly less searching review of agency adjudication but continues to insist on a role for the federal courts. Courts conducting such review do not intrude on the scope of the agency's lawfully conferred discretion but instead exercise the judicial power assigned them in Article III. Properly understood, Article III has no exception for the adjudication of public rights. Instead, the nature of the government action, constitutive or adjudicative, determines how the judicial power comes into play.