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Article III, the Bill of Rights, and Administrative Adjudication

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ARTICLE III, THE BILL OF RIGHTS, AND ADMINISTRATIVE ADJUDICATION

John M. Golden & Thomas H. Lee*

Modern reconsideration of legal constraints on the federal administrative state has commonly focused on agency rulemaking but seems increasingly concerned with agency adjudication. In this Essay, we provide an overview of constitutional issues implicated by administrative adjudication. We specifically explain how and why the so-called public-rights doctrine generally allows federal administrative adjudication outside private-rights actions substantially linked to traditional actions in law, equity, or admiralty. We also discuss how constitutional provisions outside Article III—including Bill of Rights protections of individuals as against the federal government—may nonetheless require a role for Article III courts even in so-called public-rights cases, either as an alternative court of first instance or as an appellate court. This role for Article III courts might become more important with the increased political control of administrative adjudication that an Article II line of the U.S. Supreme Court’s separation-of-powers case law might ultimately demand.

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INTRODUCTION

There is a movement afoot in the United States to roll back the modern administrative state. Two interactive reasons appear to be at play. First, there is the continuation of a decades-old push for deregulation reflecting both business-based opposition to regulation and a more socially pervasive fear that a choking multiplicity of rules reduces the dynamism of American society and undermines fundamental commitments to personal liberty.¹ Second, there is a process point grounded in the constitutional separation of powers. The main objection here is not so centrally the scope or content of regulation, but rather that unelected bureaucrats make and enforce regulations.² Deregulation and the separation of powers are related aims: if Congress is the sole federal government organ entrusted with enacting rules that have significant social impact, then the federal government will have a diminished capacity to issue such rules. In this Essay, we explain (1) how these Article I–based challenges to the administrative state are largely orthogonal to the bulk of administrative *adjudication*; (2) how Article III concerns with such adjudication, in light of the vesting of the “judicial Power of the United States” in Article III courts,³ may be resolved under a proper

1. See Emily Berman & Jacob Carter, *Policy Analysis: Scientific Integrity in Federal Policymaking Under Past and Present Administrations*, J. SCI. POL’Y & GOVERNANCE, Sept. 2018 (describing how “[i]ndustry anger at [1960s and 1970s] regulations helped accelerate the rise of conservative think tanks . . . , which helped spread antiregulatory ideas”).

2. See Joshua C. Macey & Brian M. Richardson, *Checks, Not Balances*, 101 TEX. L. REV. 89, 90 (2022) (“The concern that the federal bureaucracy is an unaccountable fourth branch of government has given rise to renewed attacks on the constitutionality of the administrative state.”).

3. U.S. CONST. art. III, § 1.

understanding of the public-rights doctrine and of the checks that additional constitutional constraints place on that doctrine's effects; (3) how Article II, as highlighted by the U.S. Supreme Court's recent decision in *United States v. Arthrex*,⁴ has become a basis for challenge to administrative adjudication as insufficiently responsive to presidential control; and (4) how Article III and its concerns combine in a case currently before the Supreme Court.

I. ARTICLE I CHALLENGES AND ADMINISTRATIVE ADJUDICATION

A. *The Article I Challenge to Agency Rulemaking*

Much of the attack on the modern administrative state has focused on agency rulemaking. At least since the 1970s, the most prominent mode for lawmaking by federal administrative agencies has been the issuance of regulations fleshing out statutes enacted by Congress.⁵ Agency rulemaking mimics congressional lawmaking in terms of the basic nature of its products, which fill the Code of Federal Regulations (CFR) just as statutes fill the United States Code. But in issuing rules, agencies are bound in ways that Congress is not. An agency's regulations may fill gaps and supply necessary details, but the agency can neither rewrite a statute that empowers it nor regulate conduct beyond the statute's scope.⁶ Nor can Congress give an agency a broad swath of power to make policy without an "intelligible principle" to guide its policymaking discretion (and thereby also to provide a basis for judicial review).⁷ This is the current leading formulation for the nondelegation doctrine, which the Court declined to fortify in *Gundy v. United States*,⁸ but which a newly constituted Court might revisit.⁹

In the meantime, the Court has satisfied itself with clipping agencies' rulemaking wings through other means. For example, the Court has provided an elaborate list of necessary conditions that must be met in order for courts

4. 141 S. Ct. 1970 (2021).

5. See Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANALYSIS 121, 125–27 (2016) (discussing the rise of "the modern era of efficient, high-volume, high-impact regulation, where agencies, following public notice and comment, could issue rules with costs and benefits of scores of millions of dollars per year and more and did so in profusion").

6. See *City of Arlington v. Fed. Comm'n Comm'n*, 569 U.S. 290, 297–98 (2013) ("[T]he question—whether framed as an incorrect application of agency authority or an assertion of authority not conferred—is always whether the agency has gone beyond what Congress has permitted it to do . . .").

7. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001); see also William N. Eskridge Jr. & John Ferejohn, *The APA as a Super-Statute: Deep Compromise and Judicial Review of Notice-and-Comment Rulemaking*, 98 NOTRE DAME L. REV. 1893, 1949 (2023) (describing the Supreme Court's nondelegation doctrine as "allowed delegation of lawmaking authority so long as Congress accompanied the delegation with an 'intelligible principle' that could serve as the basis for judicial review").

8. 139 S. Ct. 2116, 2129 (2019) (Kagan, J.) (plurality opinion) (emphasizing that traditional nondelegation "standards, the Court has made clear, are not demanding"); *id.* at 2131 (Alito, J., concurring) ("Because I cannot say that the statute lacks a discernable standard that is adequate under the approach this Court has taken for many years, I vote to affirm.")

9. *Id.* at 2131 (Alito, J., concurring) ("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort.")

to give great deference to an agency's interpretation of its own regulations.¹⁰ Further, the Court has developed a "major questions doctrine" imposing a clear-statement requirement on statutory language alleged to support agency action that is considered "extraordinary" in light of history, the scope of the agency's alleged authority, and the "economic and political significance" of the action.¹¹ By providing a basis for striking down new regulatory initiatives in the name of keeping power in Congress's hands, the major questions doctrine manifests both separation-of-powers and deregulatory impulses.¹²

B. Adjudication as Rulemaking Substitute

Agencies also engage in lawmaking through adjudication that involves applying the law to particular facts to decide a dispute between the agency and a regulated party or even between private parties.¹³ As in Article III courts, such application of law to facts can involve a substantial amount of law interpretation, including the identification, clarification, and articulation of legal principles in ways that can resemble rulemaking in their prospective effects, particularly when administrative agencies designate the relevant opinions as precedential.¹⁴ In fact, as much as we have become used to the CFR as the embodiment of the modern regulatory state, adjudications or substantially adjudication-like processes have often been the primary mode by which federal administrative agencies have generated impactful rules governing society and affecting individual lives.¹⁵ For instance, in 1887, the Interstate Commerce Commission (ICC) was established as a federal agency to regulate the railroad industry.¹⁶ One of its most important regulatory

10. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415–18 (2019) (ticking through conditions for application of so-called "*Auer* deference").

11. *West Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2608–09 (2022) (quoting *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)).

12. Chief Justice Roberts's majority opinion in *West Virginia v. Environmental Protection Agency* is more in line with the separation of powers process view; Justice Gorsuch's concurring opinion shades toward the deregulation view. Compare *id.* at 2609 (grounding major questions doctrine in "both separation of powers principles and a practical understanding of legislative intent"), with *id.* at 2618 (Gorsuch, J., concurring) (contending that "[p]ermitt[ing] Congress to divest its legislative power to the Executive Branch" would generate a world in which "[i]ntrusions on liberty would not be difficult and rare, but easy and profuse").

13. We have defined adjudication more precisely as "the making of a final determination of obligations under the applicable law to pay damages or other monetary relief, act, or refrain from acting." John M. Golden & Thomas H. Lee, *Federalism, Private Rights, and Article III Adjudication*, 108 VA. L. REV. 1547, 1566 n.72 (2022).

14. Cf. Todd Phillips, *A Change of Policy: Promoting Agency Policymaking by Adjudication*, 73 ADMIN. L. REV. 495, 496 (2021) (noting that "the Administrative Procedure Act and Supreme Court precedents permit federal agencies to articulate new policy through both rules and adjudicative orders").

15. See DeMuth, *supra* note 5, at 124 (noting that New Deal and Progressive Era "programs proceeded almost entirely through case-by-case licensing and permitting and live evidentiary hearings and enforcement actions involving one or a few firms").

16. Interstate Commerce Act, ch. 104, § 11, 24 Stat. 379, 383 (1887) (codified as amended in scattered sections of 49 U.S.C.) (creating "the Inter-State Commerce Commission").

functions was the assessment of whether rates charged by industry players were “reasonable and just.”¹⁷ Determinations of whether a rate was reasonable could be made in response to backward-looking disputes over whether a proper rate had been charged.¹⁸ In 1906, the ICC acquired the power to set future maximum rates in substantially trial-like proceedings.¹⁹ The 1906 statute’s requirement of a “full hearing”²⁰ may be viewed as a precursor to later provisions for formal administrative proceedings under the Administrative Procedure Act²¹ (APA), although the APA would characterize rate-making proceedings as a form of rulemaking.²²

Some later-arising agencies have relied even more unambiguously on adjudication as a primary way to set policy. This practice has attracted criticism.²³ Controversially, for example, the National Labor Relations Board (NLRB) continues to rely very substantially on adjudication to develop and deploy its understanding of what the National Labor Relations

17. *Id.* §§ 1, 9; see also Daniel B. Rodriguez & Barry R. Weingast, *Engineering the Modern Administrative State: Political Accommodation and Legal Strategy in the New Deal Era*, 46 *BYU L. REV.* 147, 169 (2020) (discussing the “broad adjudicatory powers” of “[t]he Interstate Commerce Commission (ICC), the Federal Trade Commission (FTC), and other Progressive Era agencies”). Railroads predictably challenged various rate determinations made by the ICC as unjustified under the Interstate Commerce Act and as constituting an unconstitutional taking if the statute did support the ICC’s determination. See, e.g., *Dayton-Goose Creek Ry. Co. v. United States*, 263 U.S. 456, 484 (1924) (rejecting “the argument that the cutting down of income actually received by the carrier for its service to a so-called fair return is a plain appropriation of its property without any compensation”); *Interstate Com. Comm’n v. Louisville & Nashville R.R. Co.*, 227 U.S. 88, 100 (1913) (“The order of the Commission, restoring a local rate that had been in force for many years, and making a corresponding reduction in the through rate, was not arbitrary but sustained by substantial, though conflicting evidence.”).

18. See *Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 448 (1907) (holding “that a shipper seeking reparation predicated upon the unreasonableness of the established rate must . . . primarily invoke redress through the Interstate Commerce Commission”).

19. See ROBERT E. CUSHMAN, *THE INDEPENDENT REGULATORY COMMISSIONS* 70, 118 (1941) (reporting that 1906 legislation “gave the commission power to establish reasonable railroad rates for the future, but this power could be exercised only upon complaint by those affected by unreasonable rates,” a constraint that Congress replaced with an “affirmative duty” to set rates in 1920); Sidney Shapiro, Elizabeth Fisher & Wendy Wagner, *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 *WAKE FOREST L. REV.* 463, 471–72 (2012) (“The Interstate Commerce Commission (‘ICC’), for example, used trial-like adjudicatory procedures to set railroad rates, and the Federal Trade Commission (‘FTC’) used these procedures to determine if an unfair or deceptive trade practice had occurred.”).

20. Henry J. Friendly, “*Some Kind of Hearing*,” 123 *U. PA. L. REV.* 1267, 1271 (1975) (“It was only in 1906 . . . that section 15 was altered to require a ‘full hearing,’ apparently in line with what had become Commission practice.” (quoting Hepburn Act, ch. 3591, § 4, 34 Stat. 584, 589 (1906))).

21. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

22. 5 U.S.C. § 551(4) (defining “rule” as “includ[ing] the approval or prescription for the future of rates”).

23. See Alan M. Trammell, *Toil and Trouble: How the Erie Doctrine Became Structurally Incoherent (and How Congress Can Fix It)*, 82 *FORDHAM L. REV.* 3249, 3294 (2014) (reporting that a legal principle permitting agencies to “retain significant discretion to craft new substantive policies either through rulemaking or adjudication . . . has attracted significant scholarly criticism”).

Act²⁴ prohibits.²⁵ The complaint in such situations has, however, tended not to be that agencies are treading on congressional turf, i.e., potentially violating Article I.²⁶ It is instead a conglomeration of concerns that the failure to set agency policies in advance through rulemaking can (1) undermine the commitment to participatory administrative process signaled by the APA's provision for notice-and-comment rulemaking;²⁷ (2) lead to substantively inferior agency policymaking;²⁸ and (3) threaten general rule-of-law principles, such as advance notice of the law's content as well as stability and consistency in the law's interpretation and application.²⁹

Recently, however, there has been a shift toward lauding the benefits of the more ad hoc adjudicatory approach to developing agency policy, at least in contexts involving rapidly developing technologies. Moves by the Federal Trade Commission (FTC) toward engaging in more rulemaking on issues relating to such technologies have triggered significant advocacy for the comparative merits of case-by-case enforcement and adjudication.³⁰ The prospect of rulemaking has even invited charges of agency overreach that treads on the values embodied in Article I's assignment of legislative power

24. 29 U.S.C. §§ 151–169.

25. See Charlotte Garden, *Toward Politically Stable NLRB Lawmaking: Rulemaking vs. Adjudication*, 64 EMORY L.J. 1469, 1471 (2015) (“For decades now, academics and courts have been calling on the National Labor Relations Board (NLRB) to use its rulemaking authority, rather than relying nearly exclusively on announcing legal principles through adjudication.”).

26. *Id.*

27. See 5 U.S.C. § 553(b)–(d) (setting out procedural requirements for notice-and-comment rulemaking); Trammell, *supra* note 23, at 3295 (noting the critique that “notice-and-comment procedures allow greater public participation and debate about the choices that will govern federal adjudication”).

28. See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 541–42 (2003) (contending that “[n]otice-and-comment rulemaking, by its nature, facilitates the participation of affected parties [and] the submission of relevant information” and that, through an accompanying “reasoned-decisionmaking requirement,” it also “fosters logical and thorough consideration of policy”).

29. See *id.* at 542 (observing links between notice-and-comment rulemaking and “the prospective application of resulting policy” as well as potential increased predictability and notice to “affected parties”). See generally Cass R. Sunstein, *The Rule of Law 1* (Mar. 30, 2023) (unpublished manuscript), <https://ssrn.com/abstract=4405238> [<https://perma.cc/B8YH-JN6V>] (listing seven rule-of-law principles).

30. See James C. Cooper, *The Costs of Regulatory Redundancy: Consumer Protection Oversight of Online Travel Agents and the Advantages of Sole FTC Jurisdiction*, 17 N.C. J.L. & TECH. 179, 207 (2015) (“It is true that rules can change to adapt to changing circumstances, but this process is far less nimble than altering *ex post* enforcement posture.”); *id.* at 209 (“Had the FTC relied on rulemaking to mandate specific forms of disclosure on mobile platforms, or proscribe certain collection of data, these standards would have rapidly become obsolete and retard economic activity.”); cf. Craig C. Carpenter & Mark Bonin II, *To Win Friends and Influence People: Regulation and Enforcement of Influencer Marketing After Ten Years of the Endorsement Guides*, 23 VAND. J. ENT. & TECH. L. 253, 268–69 (2021) (criticizing the FTC’s possible development of more “formal rules” relating to the activities of online influencers by contending that the current combination of comparatively informal guidance, case-by-case enforcement, and relatively limited penalties adequately protects consumers while “allow[ing] brands and influencers to continue innovating influencer marketing and increase information and content available to consumers”).

to Congress, even if there is no threat to violate any specific nondelegation principle. Echoing rhetoric associated with the Supreme Court's major questions doctrine,³¹ an FTC commissioner recently objected to a proposal for rulemaking on data privacy on the ground that such rulemaking would have "vast economic significance" and was more properly the domain of Congress, not an administrative agency.³²

*C. Routine Administrative Adjudication Not Implicating
Rulemaking Concerns*

Much agency adjudication does not implicate the rulemaking-by-adjudication debate, however, because it is adjudication that does not involve general policymaking in any substantial sense. Such adjudication is comparatively routine and fact-bound.³³ It is the daily work of multitudes of federal officials whose adjudicatory responsibilities primarily entail determining the facts of individual cases and applying to those facts rules or standards from statutes or regulations, often in accordance with further agency guidance.³⁴ But assessing matters of fact and applying the law to the facts commonly demand the exercise of judgment, which is why Professor Frank Goodnow in 1905 recognized a common need to provide for judicial review of such "[a]dministrative acts of special application."³⁵

Nevertheless, the officials entrusted with such routine administrative adjudication generally lack authority to set policy for the agency, and their fact-specific decisions (e.g., whether a particular claimed invention lacks novelty and is therefore unpatentable, or whether a particular claimant has a disability that qualifies for federal benefits) usually make no pretension to do so.³⁶ Routine administrative adjudication typically applies only to the specific claimants and interested parties. Despite being much more prosaic than agency rulemaking on important matters of administrative policy and interpretation, routine, fact-bound adjudication is central to the operation of

31. *See supra* notes 12–13 and accompanying text.

32. FED. TRADE COMM'N, DISSENTING STATEMENT OF COMMISSIONER NOAH JOSHUA PHILLIPS 1 (2022) ("Congress—not the Federal Trade Commission ('FTC' or 'Commission')—is where national privacy law should be enacted."), https://www.ftc.gov/system/files/ftc_gov/pdf/Commissioner%20Phillips%20Dissent%20to%20Commercial%20Surveillance%20ANPR%2008112022.pdf [<https://perma.cc/6C6U-YRGN>].

33. We deliberately qualify our description of such comparatively routine and fact-bound adjudication because there may be cases in which precedential or other policymaking aspects of a decision might be inchoate or otherwise unappreciated upfront.

34. *See, e.g.*, Kent Barnett, *Codifying Chevron*, 90 N.Y.U. L. REV. 1, 63 (2015) (acknowledging the existence of "agency decisions that do not implicate ambiguous statutory provisions (such as numerous agency adjudications that apply fact to relatively settled law, including routine Social Security or immigration decisions)").

35. FRANK J. GOODNOW, THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES 50–51 (1905) (emphasis omitted).

36. *Cf.* Charles H. Koch, Jr., *Policymaking by the Administrative Judiciary*, 56 ALA. L. REV. 693, 701 (2005) (noting that "the hierarchical system [typical of administrative agencies] centralizes the policymaking authority in a superior review authority").

the modern federal administrative state, which features an immense landscape of federally granted benefits, including invention patents, Social Security benefits, veterans' benefits, Medicaid benefits, and immigration status.³⁷

Historically, Congress often granted government benefits to individuals by private bill.³⁸ But the delegation to administrative adjudicators of individualized decisions on such benefits has not been the focus of attacks alleging administrative agency encroachment on the “legislative Powers” that the Constitution assigns solely to Congress.³⁹ That makes sense to the extent that such administrative adjudication involves federal officials applying statutory rules or standards—or their regulatory offshoots—in ways that do not evoke any of the general policymaking authority commonly associated with Congress.

II. THE PERMISSIBILITY OF ADMINISTRATIVE ADJUDICATION UNDER ARTICLE III

Rather than treading on the domain of Congress under Article I, administrative adjudication is frequently seen as posing a different separation-of-powers challenge: encroachment of the political branches on the judicial branch. Indeed, for two reasons, the sense of encroachment on Article III judicial power might seem greater than the threat that agency lawmaking (typically through rulemaking but also through adjudication, as noted above, or the delegation to agencies of conferral of government benefits formerly done by private bills) seems to pose to Congress's Article I monopoly on legislative power.

First, even if one takes the view that the constitutional branches can delegate powers originally vested in them, “[t]he judicial Power of the United States” is not Congress's to give, except through the mechanism of creating “inferior [Article III] Courts.”⁴⁰ Article III vests the federal government's judicial power “in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish,” with the judges of all such courts required to “hold their Offices during good Behaviour” and to receive regular “Compensation which shall not be diminished during their Continuance in Office.”⁴¹

Second, typical alternative recipients of adjudicative authority are formally members of the executive branch, and this branch can, through further grants of enforcement authority and capacity for administrative rulemaking, have the power to make a rule, target an individual for enforcement of the rule,

37. See *supra* note 34 and accompanying text.

38. See Maggie Blackhawk, *Equity Outside the Courts*, 120 COLUM. L. REV. 2037, 2078 (2020) (“The petition process and the private bill system that supported it remained an active and intrinsic part of Congress for over one hundred years, until the legislative restructuring of the mid-1940s siphoned off its vestiges into the administrative state and the federal courts.”).

39. U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States . . .”).

40. U.S. CONST. art. III, § 1.

41. *Id.*

and adjudicate whether the rule has been broken. This three-in-one amalgamation can seem the worst kind of separation-of-powers foul. And by providing the final turn to this loop of combined powers, administrative adjudication—as opposed to prospective policymaking and classically executive exercises of investigatory and enforcement discretion—can seem like the sharpest insult.

The actual language of Article III, however, obscures why and when exactly congressional authorization of administrative adjudication constitutes an unconstitutional encroachment as against the judiciary. Article III lists nine categories of “Cases” and “Controversies” to which the judicial power of the United States “shall extend.”⁴² But Article III at the same time does not require Congress to create lower federal courts⁴³ and permits Congress to make exceptions to the Supreme Court’s appellate jurisdiction.⁴⁴ On the face of this constitutional language, Congress could by inaction opt to allow state courts to hear various disputes to which Article III provides that the judicial power of the United States “shall extend.” What Article III requires in terms of cases and controversies that *must* be heard in Article III courts thus poses an enigma that federal courts scholars have debated for generations.⁴⁵ More specific to this Essay’s purpose, there are difficult questions of why and how Congress may authorize non–Article III *federal* adjudicators to decide cases and controversies to which the judicial power of the United States extends.

A. The Private/Public-Rights Distinction

In response to these questions about the permissibility of non–Article III federal adjudication, the Supreme Court has articulated a distinction, under the rubric of the so-called public-rights doctrine, between private-rights matters (presumptively for Article III adjudication) and public-rights matters (eligible for adjudication by non–Article III federal officials).⁴⁶ Generations of scholars have puzzled over the distinction; some have dismissed it “as

42. *Id.* art. III, § 2, cl. 1 (beginning the list with “all Cases, in Law and Equity, arising under this Constitution” and ending it with “Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects”).

43. *See id.* art. III, § 1 (indicating that Congress “may from time to time ordain and establish . . . inferior Courts”).

44. *See id.* art. III, § 2, cl. 2 (“In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”).

45. Compare Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364–65 (1953) (contending that Congress cannot use its power to create exceptions to the Supreme Court’s appellate jurisdiction to “destroy the essential role of the Supreme Court in the constitutional plan”), with Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005 (1965) (“I see no basis for [the] view [that Congress has limits to its exceptions power] and think it antithetical to the plan of the Constitution for the courts.”). *See generally* Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What the Dialogue (Still) Has to Teach Us*, 69 DUKE L.J. 1 (2019).

46. Golden & Lee, *supra* note 13, at 1549 (describing the Supreme Court’s “controversial ‘public rights doctrine’”).

incoherent.”⁴⁷ Nonetheless, in the past decade, the Supreme Court repeatedly reemphasized the distinction’s significance.⁴⁸ In a pair of articles, we elaborated on how the private/public-rights distinction can be properly understood not only to legitimate but also to bound adjudication by non–Article III federal actors. Key points from these articles follow.

1. Private Rights

Like Article I, Article III provides an enumeration⁴⁹ that is both (1) an affirmative specification of categories of federal power—here judicial power over nine categories of “Cases” and “Controversies”; and (2) an implicit, defensive protection of preexisting state sovereign powers—here, the power to adjudicate most civil actions at law or equity among private parties, a large category of traditional matters of private right. We have indicated that a private-rights claim may be defined as a claim “(1) through which one or more private parties seek personalized relief from one or more other private parties and (2) that was a sort of claim heard by state courts of law, equity, or admiralty in 1789 or is a modern analog thereof.”⁵⁰ The private-rights category that helps maintain an intended federal-state balance is thus substantial, but it is also substantially bounded by its historical roots. Constraining non–Article III adjudication helps maintain continuity with the originally conceived balance between federal and state adjudicatory powers. “If Congress could limitlessly assign adjudication of private rights cases to federal officials lacking the life tenure and salary protections of Article III judges, . . . the federal government would enjoy vastly expanded authority” to poach private-rights cases from state courts.⁵¹ Further, preservation of state court decisional primacy over private-rights cases and controversies remained a prominent feature of the overall federal-and-state system of

47. *Id.* at 1550–51.

48. See *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1373 (2018) (noting that the Supreme Court’s “precedents have given Congress significant latitude to assign adjudication of public rights to entities other than Article III courts”); *Stern v. Marshall*, 564 U.S. 462, 487 (2011) (finding a constitutional violation where “[n]o ‘public right’ exception excuse[d] the failure to comply with Article III” evidenced by a bankruptcy court’s “purporting to resolve and enter final judgment on a state common law claim”).

49. See Gil Seinfeld, *Article I, Article III, and the Limits of Enumeration*, 108 MICH. L. REV. 1389 (2010) (comparing Article III enumeration of judicial power and Article I enumeration of legislative powers).

50. Golden & Lee, *supra* note 13, at 1558. The second prong acknowledges that even if an action is between or among private parties exclusively, it can still be a matter of “public right” for which non–Article III adjudication is permitted if the state courts did not enjoy traditional adjudicative primacy over the matter. See John M. Golden & Thomas H. Lee, *Congressional Power, Public Rights, and Non-Article III Adjudication*, 98 NOTRE DAME L. REV. 1113, 1157–64 (2023) (discussing “Matters of Public Right Contested by Private Parties”). Admiralty suits include private-rights actions committed to federal adjudication under the original constitutional bargain.

51. Golden & Lee, *supra* note 13, at 1547.

adjudication in the United States, long after the Civil War and Reconstruction Amendments otherwise rebalanced the federal system.⁵²

2. Public Rights

Whereas private-rights cases comprise the domain in which a tradition of state-court decisional primacy must be respected, *non-private-rights* (a.k.a. public-rights) cases and controversies are a domain in which Congress enjoys broad discretion to vest adjudication in non–Article III federal officials.⁵³ Such federal officials may be entrusted with the power to decide public-rights matters despite lacking the life tenure and salary protection of Article III judges and despite the fact that, if they are considered inferior officers, they may be appointed by someone other than the President acting with the Senate’s advice and consent.⁵⁴

We have identified three overlapping categories of cases and controversies for which non–Article III federal adjudication is permissible: (1) those that occur in “a physical space beyond the control of the states” (e.g., territorial courts); (2) those that fall “within the national government’s operational space,” whether to manage the federal government’s “internal affairs” (e.g., military courts) or “to administer statutorily granted rights or benefits” (e.g., invention patents); and (3) those involving noncriminal disputes between the government and a private party or disputes between private parties “within a properly bounded enforcement space of a federal regulatory regime” (e.g., NLRB adjudication of labor-management disputes).⁵⁵ Through this tripartite framework, we squared the public-rights doctrine with both the “modern ubiquity of non-Article III adjudication”⁵⁶ and the traditional categories of

52. *See id.* at 1550 (“[R]elevant Supreme Court decisions from the nineteenth through the twentieth centuries, and even today, are consistent with recognition of the presumptive primacy of state court settlement of ordinary private disputes outside the admiralty and maritime contexts.”); *cf.* Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. 1087, 1167 (2016) (“Reconstruction probably did not radically alter the basic architecture of federalism generally . . . but it did bring about a sea change in . . . the ability of the federal government to protect the fundamental rights of the people from state infringement.”).

53. *Oil States*, 138 S. Ct. at 1373 (“[The Supreme Court’s] precedents have given Congress significant latitude to assign adjudication of public rights to entities other than Article III courts.”).

54. *See* Golden & Lee, *supra* note 50, at 1165 (“[T]he breadth of the public-rights category is so substantial that one might more instructively call the relevant doctrine the ‘private-rights doctrine,’ rather than the public-rights doctrine.”).

55. *Id.* at 1113, 1117–19.

56. *Id.* at 1114; *cf.* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1804 (2012) (suggesting the rule that “[a]n Article III judge is required in *all* federal adjudications, unless the text and historical practice of the Constitution expressly or implicitly give Congress the power to authorize them.”); Laura K. Donohue & Jeremy McCabe, *Federal Courts: Article I, II, III, and IV Adjudication*, 71 CATH. U. L. REV. 543, 621 (2022) (calling for “a more robust understanding of the federal judicial system,” in which non–Article III courts are understood as grounded in “Constitutional text”).

territorial-court and military-court adjudication for which the Supreme Court has held that non–Article III tribunals are constitutionally permitted.⁵⁷

B. Checks on the Effects of Public-Rights Doctrine

Article III, through the private/public-rights distinction as we explain it, provides broad discretion for Congress to use non–Article III adjudicators in cases and controversies that do not challenge traditional state-court decisional primacy in matters of private rights. But we believe that other constitutional provisions provide independent constitutional constraints on Congress’s discretion, often requiring at least some provision for review of final agency action by an Article III court.

As we have previously noted, “[l]ong-established precedent, considerations of institutional competence, and a common desire for extra solicitude for constitutional rights strongly favor recognizing a infeasible role for Article III courts in policing constitutional constraints—even [or, one might add, just as] when the relevant action is taken by Congress directly.”⁵⁸ Hence, our framework is entirely consistent with the notion that Congress may not preclude Article III court review of allegations that a congressional delegation has violated structural constitutional constraints. In *Axon Enterprise, Inc. v. Federal Trade Commission*,⁵⁹ a unanimous Supreme Court showed sensitivity to such a notion in holding that allegations of the constitutional illegitimacy of proceedings before administrative law judges (ALJs) are within the jurisdiction of district courts in addition to being separately subject to appellate review in courts of appeals.⁶⁰

1. The Bill of Rights’s Capacity to Require an Article III Court in a Public-Rights Matter

Constitutional constraints in the Bill of Rights, which was ratified to protect individual rights against *federal* government action, can similarly provide a infeasible basis for Article III court review. For our purposes, the most prominent of these constraints is the Fifth Amendment Due Process Clause: no person shall “be deprived of life, liberty, or property, without due process of law.”⁶¹ Justice Louis Brandeis put it this way in his dissent in *Crowell v. Benson*⁶²: “under certain circumstances, the constitutional requirement of due process is a requirement of judicial process.”⁶³ But what exactly are those “circumstances”? And what are we to do with the reality

57. See Golden & Lee, *supra* note 50, at 1131–37 (discussing territorial and military courts).

58. *Id.* at 1177–78.

59. 143 S. Ct. 890 (2023).

60. *Id.* at 897; see also *id.* at 903 (discussing the separate availability of appellate review).

61. U.S. CONST. amend. V.

62. 285 U.S. 22 (1932).

63. *Id.* at 87 (Brandeis, J., dissenting); cf. Chapman & McConnell, *supra* note 56, at 1801 (“Due process in its original form insisted that traditional procedures be employed in cases affecting personal rights. Those traditional procedures were, in almost all cases, common law proceedings in court.”).

that even if the Due Process Clause is properly the source of a constitutional requirement of an Article III court in non-private-rights cases, the clause's open-textured language and associated precedents can make the clause seem a suspect and frail basis for the requirement?

Outside constitutional provisions relating to criminal procedure,⁶⁴ at least two other Bill of Rights provisions may help answer the question of when Fifth Amendment due process can require access to an Article III court—whether as an alternative first-instance forum or via appellate review. These are the Seventh Amendment's provision for jury rights in civil cases⁶⁵ and the Eighth Amendment's prohibitions of “excessive fines” and “cruel and unusual punishments.”⁶⁶

The Seventh Amendment provides that in “[s]uits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.”⁶⁷ There is nothing in this language that explicitly requires that the jury trial right must be exercised before an Article III judge. As we have explained with respect to matters of private right, however, Article III's enumeration of federal judicial power was importantly designed to preserve state-court decisional primacy over disputes between private parties at the time of the founding.⁶⁸ We think that the Seventh Amendment implicates the same principle: it is framed as a command to “preserve” a jury trial right in “[s]uits at common law.” Exemplifying this correspondence, constitutional ratification debates often presented in concert concerns about maintaining access to state courts *and* local juries.⁶⁹ Thus, we believe the Supreme Court has been essentially correct in holding that the answers to questions about the applicability of Seventh Amendment jury rights and the necessity of Article III adjudication commonly run together.⁷⁰

This conclusion is not inconsistent with the possibility that private parties can consent to a jury trial before a non-Article III judge, such as a magistrate judge. At least as long as party consent would have sufficed to opt out of state courts in an analogous case, this opt-out power of private parties aligns with our understanding that the public-rights doctrine's backward-looking constraint on non-Article III adjudication is not as directly motivated by a structural concern with the separation of powers as by an interest in

64. *See, e.g.*, U.S. CONST. art. III, § 2, cl. 3 (providing jury rights and imposing location restrictions for “[t]he trial of all Crimes, except in Cases of Impeachment”); *id.* amends. V–VI (providing procedural rights in relation to “criminal prosecutions”).

65. *Id.* amend. VII.

66. *Id.* amend. VIII.

67. *Id.* amend. VII.

68. *See supra* notes 49–51 and accompanying text.

69. *See Golden & Lee, supra* note 13, at 1576–77 (discussing ratification debates).

70. *See Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1379 (2018) (“This Court's precedents establish that, when Congress properly assigns a matter to adjudication in a non-Article III tribunal, ‘the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.’” (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53–54 (1989))).

preserving state courts' traditional decisional primacy with respect to traditional matters of private right.⁷¹

The Eighth Amendment can also demand an Article III court's involvement in certain types of cases. In particular, when a federal administrative agency seeks to impose punitive fines or career bans that impact an individual in significant, life-altering ways, agency action may implicate the Eighth Amendment bar against "excessive fines"⁷² and "cruel and unusual punishments"⁷³ and therefore warrant an Article III court as the final arbiter of the sentence. Similarly, there might be a carryover effect from comparison to presumptive requirements of constitutional process in criminal cases. It seems to be a substantially unchallenged axiom that—territorial and military courts (and impeachments) aside—a federal forum for trying a federal criminal case must generally be an Article III court, absent consent by the defendant as to indictments for minor crimes.⁷⁴ Correspondingly, criminal cases have been commonly characterized somewhat cryptically as "lying outside the public rights doctrine."⁷⁵ We believe a better characterization is that, for purposes of the public-rights doctrine, criminal cases are public-rights cases—cases falling within the government's enforcement space. But criminal cases are public-rights cases in which the gravity of private interests at stake provides a basis independent of the overarching private/public-rights rationale for demanding an Article III court's involvement.

Consistent with this reasoning, the Constitution provides many indicators of the special sensitivity of criminal matters, including not only Article III's explicit provisions for jury rights and state-of-commission venue in criminal cases,⁷⁶ but also multiple Bill of Rights provisions for procedural rights specific to criminal cases.⁷⁷ The need for Article III judges for adjudication

71. See Golden & Lee, *supra* note 13, at 1607.

72. U.S. CONST. amend. VIII; see also *Tyler v. Hennepin Cnty.*, 143 S. Ct. 1369, 1382 (2023) (Gorsuch, J., concurring) ("Economic penalties imposed to deter willful noncompliance with the law are fines by any other name. And the Constitution has something to say about them: [t]hey cannot be excessive.").

73. U.S. CONST. amend. VIII; cf. *United States v. Bajakjian*, 524 U.S. 321, 321–23 (1998) (holding that the Eighth Amendment barred forfeiture of the entire amount of undeclared cash transported by U.S. passenger on outbound international flight).

74. Cf. Martin S. Lederman, *Of Spies, Saboteurs, and Enemy Accomplices: History's Lessons for the Constitutionality of Wartime Military Tribunals*, 105 GEO. L.J. 1529, 1547 (2017) (noting that "the text of Article III does not guarantee that all trials of federal crimes be held in Article III courts with Article III judges" and positing that "perhaps Congress could opt to have federal offenses tried outside the federal government, in state courts").

75. Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 952 n.208 (1988).

76. U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed . . .").

77. See, e.g., *id.* amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . ; nor shall be compelled in any criminal case to be a witness against himself . . ."); *id.* amend. VI (specifying rights of the accused, "[i]n all criminal prosecutions," "to a speedy

of criminal matters may also be understood to be supported by the potential for a Fifth Amendment due process violation in the absence of such a judge.⁷⁸ Such due process logic could arguably extend to civil proceedings that are not formally criminal but effectively quasi-criminal because of the potential for severe adverse consequences for individual defendants.⁷⁹ Indeed, to avoid having significant procedural protections turn on questionable classification of a legal violation as civil, rather than criminal,⁸⁰ such extension may sometimes be necessary. The Supreme Court has already acknowledged this proposition with respect to civil deportation and the void-for-vagueness doctrine.⁸¹ We think that the principle that due process can mandate at least some criminal law–like protections for technically civil matters has more general applicability—a view with which Justice Gorsuch appears ready to run far indeed.⁸²

2. The Possibility of a Habeas Right to an Article III Court

Regardless of the extent to which Bill of Rights protections may sometimes mandate Article III process, there are other textually grounded constitutional concerns that may suggest a need for an Article III court despite the permissibility of non–Article III federal adjudication under the private/public-rights distinction. In relation to the Suspension Clause,⁸³ there is the right to petition for a writ of habeas corpus to an Article III court (or entitlement to an adequate substitute) vis-à-vis individuals held in federal

and public trial,” to “an impartial jury of the State and district wherein the crime shall have been committed,” to notice “of the nature and cause of the accusation,” to confront witnesses; “to have compulsory process for obtaining witnesses,” and “to have the Assistance of Counsel”).

78. U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law.”).

79. *Cf.* *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (listing “the private interest that will be affected by the official action” as the first of three generally applicable factors for determining “the specific dictates of due process”); Colin Miller, *Plea Agreements as Constitutional Contracts*, 97 N.C. L. REV. 31, 44 (2018) (“[T]he common question for courts is the extent to which they need to use the Due Process Clause to extend criminal safeguards to civil and quasi-criminal litigants.”).

80. *See, e.g.*, Elizabeth D. Katz, *Criminal Law in a Civil Guise: The Evolution of Family Courts and Support Laws*, 86 U. CHI. L. REV. 1241, 1245–46 (2019) (noting that, “[b]eginning in the 1930s, lawmakers strategically rebranded criminal [family] nonsupport prosecutions and the courts that heard them as ‘civil’” and that “the Supreme Court . . . allow[ed] the state’s label to limit procedural protections”).

81. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1212–13 (2018) (Kagan, J.) (plurality opinion) (rejecting argument that “a less searching form of the void-for-vagueness doctrine applies” to a civil statute providing for removal of noncitizens as opposed to a criminal statute).

82. *See id.* at 1229 (Gorsuch, J., concurring in part and in the judgment) (suggesting that void-for-vagueness doctrine should extend its reach to a variety of civil contexts given “that today’s civil laws regularly impose penalties far more severe than those found in many criminal statutes”); *cf. Axon Enter., Inc. v. Fed. Trade Comm’n*, 143 S. Ct. 890, 911 (2023) (Thomas, J., concurring) (“Naturally, merely labeling the deprivation of a core private right a ‘civil penalty’ cannot allow Congress and agencies to circumvent constitutional requirements.”).

83. U.S. CONST. art. I, § 9, cl. 2.

custody, a right that may require Article III court involvement in certain cases.⁸⁴

The federalism rationale informing our understanding of the private/public-rights distinction is less enlightening here. The Supreme Court has held that state courts cannot entertain petitions for writs of habeas corpus with respect to persons in federal custody.⁸⁵ Thus, there is ostensibly no concern about displacing state courts. But at that same time, with respect to U.S. persons in detention after convictions for federal crimes, it seems that some Article III court needs to be involved in adjudicating a petition for habeas corpus to challenge continued detention in violation of constitutional rights.

Boumediene v. Bush,⁸⁶ the most important recent case on this issue, involved captured enemy combatants, not federal criminal defendants in custody, but the Court did conclude there that the right to petition for the writ was a constitutional right implicit in the Suspension Clause.⁸⁷ At the same time, the Court recognized that “adequate substitute procedures for habeas corpus” might be acceptable even if no such substitute were found in that case.⁸⁸ If we accept that an Article III court is mandatory for the adjudication of the initial conviction in a federal court, then it does not seem to be much of a stretch to conclude that—given *Boumediene*’s holding that a right to petition for the writ is protected by the Constitution—an Article III court must be involved in the adjudication of constitutional challenges to continued detention in federal custody as a result of that conviction.

Whether the Suspension Clause or anything else in the Constitution can ground a constitutional right to an Article III court in the immigration context is a more difficult question. The field is still dominated by hoary Supreme Court precedents declaring Congress’s plenary power to control the entry of foreigners into the United States, a power understood to encompass the deportation of noncitizens.⁸⁹ Consequently, there can appear to be less basis for insisting on a general constitutional right of foreigners to access Article III courts for immigration or deportation claims via petitions for writs of

84. See generally *Boumediene v. Bush*, 553 U.S. 723 (2008). There was originally no right to resort to federal habeas corpus for prisoners in state custody. Because of the constitutional importance of limiting incursions on state-court decisional primacy, we believe that Article III courts, not a non-Article III federal adjudicator, must generally have the final say regarding petitions for habeas corpus under 28 U.S.C. § 2254 for prisoners in state custody. Congress could not delegate habeas petitions for state prisoners exclusively to non-Article III federal adjudicators.

85. *Tarble’s Case*, 80 U.S. (13 Wall.) 397 (1872).

86. 553 U.S. 723 (2008).

87. See *id.* at 745 (“The Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account.”).

88. *Id.* at 771. The key prior cases on this point both involved statutes in which habeas review in an Article III Court was available as a last resort. See generally *Swain v. Pressley*, 430 U.S. 372 (1977); *United States v. Hayman*, 342 U.S. 205 (1952).

89. See *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893) (“The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.”).

habeas corpus if Congress has chosen to commit all adjudications of such matters to administrative judges via the relevant statutes.⁹⁰ Nonetheless, the Supreme Court has sometimes indicated that an immigrant is “entitled to a writ of habeas corpus to ascertain whether the restraint is lawful.”⁹¹ The question of what level of process—such as some access to an Article III court—is required in adjudication of immigration claims remains controversial.⁹²

3. A Likely Required Role for Article III Courts in Certain Hybrid-Rights Cases

An Article III court might also be constitutionally required in certain cases involving “hybrid rights”—that is, cases involving a government-generated right whose grant by the government is a matter of public right but whose assignment to private individuals makes it a potential basis for a case between private parties in which Article III adjudication is required.⁹³ For example, the grant of invention patents is a matter of public right,⁹⁴ but a suit by one private party against another for patent infringement may be a matter of private right requiring an Article III adjudicator.⁹⁵ The line is not as arbitrary as it may seem at first glance. As between the government that grants a land patent, an invention patent, or another form of public franchise (such as the right to collect taxes) and the individual recipient, the relationship is one of

90. *See* *Nishimura Eiku v. United States*, 142 U.S. 651, 660 (1892) (“It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.”).

91. *Id.*; *see also* *Yamataya v. Fisher*, 189 U.S. 86, 102 (1903) (implicitly accepting a federal district court’s power to entertain a petition for a writ of habeas corpus from a nonresident foreigner, but holding that Congress’s provision for executive branch determination of her right to be in the United States comported with the Fifth Amendment’s requirement of due process).

92. *See, e.g.,* Nikolas Bowie & Norah Rast, *The Imaginary Immigration Clause*, 120 MICH. L. REV. 1419, 1426 (2022) (“Today, judges and legal academics continue to debate the significance and the merits of the Supreme Court’s ‘plenary power’ doctrine.”).

93. *See* Golden & Lee, *supra* note 50, at 1169–70.

94. *See* *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1373 (2018) (“This Court has recognized, and the parties do not dispute, that the decision to grant a patent is a matter involving public rights—specifically, the grant of a public franchise.” (emphasis in original)).

95. *See* Golden & Lee, *supra* note 50, at 1170–71 (“[I]n suits between private parties, questions of patent infringement and of patent infringement remedies are generally correctly classified as questions of private right.”). The foundational public-rights decision, *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1856), likewise illustrated how matters of public right can become mixed with matters of private right. *Murray’s Lessee* concerned a real property dispute between private parties in which the determinative question, answered in the affirmative, was whether federal enforcement of a distress warrant against a former federal tax collector accused of embezzlement had properly resulted in transference of title from the tax collector—without the intervention of an Article III judge—before he purportedly conveyed it to another. *See id.* at 284–85.

grantor to grantee, which is subject to conditions that the grantor might impose, including the possibility of later private enforcement of conditions of the grant.⁹⁶ But as between the grantee and others, the grantee's rights under the grant have solidified into rights that can be enforced like traditional property or contract rights.⁹⁷ A dispute between private parties over an alleged violation of such a right can involve a claim "of the liability of one individual to another under the law as defined," thus satisfying the classic definition of matters of private right that the Supreme Court articulated in *Crowell v. Benson*.⁹⁸

4. Congressional Preference for Article III Court Access as a Matter of Practice

Importantly, even when an Article III court might not be constitutionally required for adjudication, Congress commonly authorizes access to Article III courts, whether to steer well clear of due process or other constitutional concerns or otherwise to use Article III courts as a check on potentially wayward agency action.⁹⁹ Even if proceedings in a special tribunal such as the U.S. Court of Federal Claims satisfy the Due Process Clause and whatever additional constitutional constraints might be inferred from, say, the Takings Clause, Congress is likely to have a limited appetite for creating and maintaining non-Article III tribunals that are so substantially equipped and insulated from political control.¹⁰⁰ Just as Article III's restrictions can help ensure limited federal encroachment on traditional state-court prerogatives even when Congress can give federal adjudicatory power over private-rights matters to Article III courts, strong due process demands can mean that Congress will often assign the Article III courts more than the constitutional minimum of responsibility for public-rights adjudication when the cost of establishing alternative, constitutionally satisfactory institutions is perceived as too high.

96. See *Oil States*, 138 S. Ct. at 1375; cf. John Greil, *The Unfranchised Competitor Doctrine*, 66 VILL. L. REV. 357, 360–61 (2021) (noting that "a common way that [U.S.] state and local governments have promoted the creation and operation of ferries, toll bridges, railroads, and water and electric utilities" has been to grant a "special franchise [that] confers authority to engage in businesses (such as running a ferry or a toll bridge) that are not inherent rights, but privileges cities or states may refuse").

97. See Greil, *supra* note 96, at 360 (describing a public franchise in the hands of its recipient as "a vested private right" that could be enforced against competitors); *id.* at 379–80 (observing that, "just as nuisance could be actionable at law as well as equity," a franchisee could obtain "after-the-fact compensatory damages . . . for interference with a protected franchise" as well as an injunction against "the unfranchised competitor").

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

99. But cf. Gary Lawson, *Take the Fifth . . . Please! The Original Insignificance of the Fifth Amendment's Due Process of Law Clause*, 2017 BYU L. REV. 611, 631 (characterizing as "a fundamental mistake" the "assum[ption] that executive procedures determine, or are even relevant to, the lawfulness of an executive deprivation of life, liberty, or property").

100. Cf. Elizabeth I. Winston, *Differentiating the Federal Circuit*, 76 MO. L. REV. 813, 832–33 (2011) (noting that U.S. Court of Federal Claims judges' fifteen-year terms "are the longest in government, and upon the end of a judge's term, the judge may elect to take senior status, receive the same pay as regular judges, and continue to hear a full caseload").

III. ARTICLE III COURTS AND SUBORDINATION OF ADMINISTRATIVE
ADJUDICATION TO ARTICLE II

Under our view, the public-rights doctrine gives Congress substantial, albeit not unbounded, discretion to use non–Article III adjudicators for purposes of implementing its statutory regimes, whether those adjudicators are engaged in adjudication that substitutes in substantial ways for rulemaking or in the more routine, fact-bound adjudication that we distinguish. Other constitutional constraints limit congressional discretion. As we argue above, they can demand provision for Article III court review of an agency’s work or perhaps even provision for trial proceedings in an Article III court even when the public-rights doctrine does not.¹⁰¹ Moreover, where there is judicial review of agency action, the general presumption is that there is “law to apply”: agency actors were meaningfully charged with being faithful agents in implementing an expression of congressional will.¹⁰² Given the general acceptance that due process requirements apply to much adjudication by agency decision-makers, there is also a sense that such decision-makers are commonly charged with acting with meaningful impartiality in implementing that will: the Court has declared “a biased decisionmaker constitutionally unacceptable” when due process requirements apply.¹⁰³

But recent developments in the Supreme Court’s separation-of-powers decisions create tension with these general assumptions about how administrative adjudicators are to act. In *Seila Law LLC v. Consumer Financial Protection Bureau*,¹⁰⁴ the Court described Article II as mandating that the President have a substantially tight rein on essentially all “significant” decision-making¹⁰⁵ in a distinctively “unitary” executive branch.¹⁰⁶ In *United States v. Arthrex, Inc.*,¹⁰⁷ the Supreme Court extended its already evident concern with ensuring substantial political control of actors within the executive branch to officials whose responsibilities are principally and fundamentally adjudicatory: the administrative patent judges (APJs) of the Patent Trial and Appeal Board (PTAB) of the U.S. Patent and

101. *See supra* Part II.B.

102. *Cf.* *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410–13 (1971).

103. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

104. 140 S. Ct. 2183 (2020).

105. *Id.* at 2211 (“While we have previously upheld limits on the President’s removal authority in certain contexts, we decline to do so when it comes to principal officers who, acting alone, wield significant executive power.”); *cf.* *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 484 (2010) (“The President cannot ‘take Care that the Laws be faithfully executed’ if he cannot oversee the faithfulness of the officers who execute them.” (quoting U.S. CONST. art. II, § 3)).

106. *See Seila L.*, 140 S. Ct. at 2203 (“The Executive Branch is a stark departure from all [the Constitution’s] division [of power].”); *see also* Rebecca S. Eisenberg & Nina A. Mendelson, *The Not-So-Standard Model: Reconsidering Agency-Head Review of Administrative Adjudication Decisions*, 75 ADMIN. L. REV. 1, 9 (2023) (“[A] series of . . . opinions by Chief Justice Roberts have nonetheless given teeth to the unitary executive theory by declining to enforce legislative provisions that the Court thinks leave the President with too little authority over the administrative state.”).

107. 141 S. Ct. 1970 (2021).

Trademark Office (PTO).¹⁰⁸ Panels of three or more PTAB members, “typically three APJs,” preside over adversarial “inter partes review” proceedings.¹⁰⁹ In such a proceeding, a panel rules on whether issued patent claims should be canceled because of their failure to satisfy “novelty and nonobviousness requirements” for patentability.¹¹⁰ Under the Patent Act¹¹¹ as written, a decision by three APJs on such a matter was “the last stop for review within the Executive Branch”: “[a] party dissatisfied with the[ir] final decision may seek judicial review in the [Article III] Court of Appeals for the Federal Circuit” but had no avenue for recourse to a superior official in the executive branch.¹¹²

The Supreme Court found this arrangement intolerable in relation to adjudicatory officials who, like APJs, are appointed in a manner that the Constitution permits for “inferior,” but not principal, officers.¹¹³ APJs are “appointed by the Secretary of Commerce.”¹¹⁴ The Constitution requires that principal officers be appointed by the President with the advice and consent of the Senate.¹¹⁵ The Court held that “[o]nly an officer properly appointed to a principal office may issue a final decision binding the Executive Branch in [an inter partes review] proceeding.”¹¹⁶ The *Arthrex* Court proceeded to sever provisions of the Patent Act so that “the Director [of the PTO would] have the discretion to review decisions rendered by APJs,” thereby ensuring that “the President remains responsible for the exercise of executive power.”¹¹⁷

A cost of the Court’s insistence on political accountability for executive branch adjudicators such as APJs can be a compromising of the insulation of administrative adjudication from improper influence and conflicts of interest. With some justification, Professor Harold J. Krent has posited that “political control over adjudication seems anathema to rights of litigants asserting claims against the government itself.”¹¹⁸ Although agreeing with the centrality of this concern about adjudicator conflicts of interest,¹¹⁹ Professors Rebecca S. Eisenberg and Nina A. Mendelson have further emphasized “risks of unfairness, lawlessness, and corruption” that can be “especially pronounced for low-visibility decisions with high financial stakes for

108. *Id.* at 1988 (“[T]he exercise of executive power by inferior officers must at some level be subject to the direction and supervision of an officer nominated by the President and confirmed by the Senate.”).

109. *Id.* at 1977.

110. *Id.*

111. 35 U.S.C. §§ 1–390.

112. *Arthrex*, 141 S. Ct. at 1977.

113. U.S. CONST. art. II, § 2, cl. 2.

114. *Arthrex*, 141 S. Ct. at 1976.

115. U.S. CONST. art. II, § 2, cl. 2.

116. *Arthrex*, 141 S. Ct. at 1985.

117. *Id.* at 1988.

118. Harold J. Krent, *Presidential Control of Adjudication Within the Executive Branch*, 65 CASE W. RESV. L. REV. 1083, 1084 (2015).

119. See Eisenberg & Mendelson, *supra* note 106, at 65–66 (“One long-recognized risk is that political supervision may threaten adjudicator impartiality, especially when one of the parties to the adjudication is the agency itself.”).

well-funded and politically-connected interests”—such as many decisions on the patentability of individual patent claims.¹²⁰

For formal adjudicatory proceedings “required by statute to be determined on the record after opportunity for an agency hearing,”¹²¹ the APA protects against such concerns in a number of ways, including (1) generally restricting ex parte contacts between people outside the agency and agency officers or employees involved in or “reasonably . . . expected to be involved in the decisional process”¹²² and (2) requiring insulation of ALJs from agency officials “engaged in the performance of investigative or prosecuting functions.”¹²³ But agency members such as the Commissioners of the Securities and Exchange Commission (SEC), who may act as the final or even initial agency arbiters of questions of fact as well as law,¹²⁴ are explicitly exempted from the separation-of-functions requirement applicable to ALJs.¹²⁵ Moreover, vast swaths of federal administrative adjudication are not subject to the APA’s requirements for formal adjudication and may be performed within an agency (like the PTO) headed by an individual political appointee rather than a more politically insulated commission like the SEC.¹²⁶ The Attorney General’s power to act as the final decider of immigration cases is merely one of the most prominent examples of how an agency head’s review power can give rise to concerns of “procedural transparency, due process, and . . . independent decision-making.”¹²⁷

The Supreme Court’s emphasis on political accountability in administrative adjudication might predictably facilitate a future in which administrative adjudication is more politically inflected. If *Arthrex*’s emphasis on the need for direct-review authority by a political appointee is a harbinger of future developments, we could be headed to a future in which individualized agency decisions become more regularly interwoven with the concerns typical of fundamentally political actors. Such a result would stray substantially from the traditional “expert-agency ideal” of decision-making by expert and experienced adjudicators applying the law to facts as they find

120. *Id.* at 67–68.

121. 5 U.S.C. § 554(a).

122. 5 U.S.C. § 557(d)(1)(A)–(C).

123. *Id.* § 554(d).

124. *See id.* § 557(b).

125. *Id.* § 554(d) (stating the subsection’s requirements do “not apply . . . to the agency or a member or members of the body comprising the agency”); *cf.* Martin H. Redish & Kristin McCall, *Due Process, Free Expression, and the Administrative State*, 94 NOTRE DAME L. REV. 297, 312 (2018) (contending that “it is clear that the power of agency commissioners to participate in investigations, prosecutions, and adjudications creates an impermissible bias in contravention of the dictates of due process”).

126. *See* Richard J. Pierce, Jr., *Agency Adjudication: It Is Time to Hit the Reset Button*, 28 GEO. MASON L. REV. 643, 646–47 (2021) (noting historic growth in numbers of administrative judges (AJs) who lack protections for independence possessed by ALJs, with AJs “over five times as” numerous as ALJs by 2018); *id.* at 650 (“Currently, eighty percent of the members of the administrative judiciary are highly vulnerable to pressure from the politicians that head their agencies.”).

127. Bijal Shah, *The Attorney General’s Disruptive Immigration Power*, 102 IOWA L. REV. ONLINE 129, 136 (2017).

them.¹²⁸ Moreover, this outcome would generate tension even with Chief Justice William Howard Taft's generally very pro-presidential-control views in *Myers v. United States*.¹²⁹ Even while suggesting that the President should have authority to remove executive branch adjudicators because they had ruled in ways with which the President disagreed, Chief Justice Taft acknowledged that "there may be duties of a quasi-judicial character imposed on executive officers" that "affect interests of individuals" and "the discharge of which the President can not in a particular case properly influence or control."¹³⁰ The *Arthrex* Court seems to have been less concerned about crossing this quasi-judicial Rubicon.

A downstream effect of rulings like *Arthrex* could be more uncomfortable but also self-empowering work for the Article III courts. The Court-forced erosion of regimes of political insulation for agency adjudicators could lead to more administrative adjudication that is susceptible to charges of undue influence, bias, or the merely pretextual invocation of proper statutory or regulatory grounds for decision. Even if the Court's demand for a more generalized "political control of [administrative] adjudication" does not result in a "require[ment] that most administrative adjudication be moved to Article III courts,"¹³¹ the Article III courts might end up with much more work to do in supervising the operations of administrative agencies. Such work might be along the lines modeled, for example, by the Supreme Court's consideration of a due process challenge alleging the bias of an elected state supreme court justice in *Caperton v. A.T. Massey Coal Co.*¹³² or by the inquiry ordered by the U.S. Court of Appeals for the D.C. Circuit into possible violations of the APA's ex parte contact bans in *Professional Air Traffic Controllers Organization v. Federal Labor Relations Authority*.¹³³ In this sense, the Article III courts might end up having to address messes of their own making. But of course, this need will include a not-so-hidden upside for the Article III courts. Greater susceptibility of administrative adjudication to charges of undue political influence or bias will likely make substantial judicial review of administrative adjudication by politically insulated Article III courts seem all the more indispensable.¹³⁴

128. Cf. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2380 (2001) (describing hard-look review of agency action as "reflect[ing] an ideal vision of the administrative sphere as driven by experts").

129. 272 U.S. 52 (1926).

130. *Id.* at 135.

131. Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 YALE L.J. 1769, 1788 (2023) (contending that "[t]he Court's separation-of-powers formalism points toward [this] conclusion").

132. 556 U.S. 868, 872 (2009) (involving a situation in which "the justice had received campaign contributions in an extraordinary amount from, and through the efforts of, the board chairman and principal officer of [a] corporation found liable for [\$50 million in] damages").

133. 685 F.2d 547, 556–57 (D.C. Cir. 1982).

134. Cf. Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 113 (2022) (contending that recent Supreme Court decisions have a tendency to "centralize power in the Supreme Court" itself).

IV. *JARKESY V. SECURITIES & EXCHANGE COMMISSION*:
A BELLWETHER

Jarkesy v. Securities & Exchange Commission,¹³⁵ decided by the U.S. Court of Appeals for Fifth Circuit and currently pending before the Supreme Court, is an important case of administrative adjudication that exemplifies many of the concerns discussed in this Essay as well as how they might be addressed. In *Jarkesy*, a divided Fifth Circuit held that a securities fraud claim for a civil penalty that the SEC pursued in administrative proceedings was “akin to traditional actions at law to which the jury-trial right attaches”¹³⁶—namely, common-law fraud actions—and was “not the sort [of claim] that may be properly assigned to agency adjudication under the public-rights doctrine.”¹³⁷ Therefore, in the Fifth Circuit’s view, the SEC’s adjudication of such a claim in administrative proceedings without the benefit of a jury was unconstitutional.¹³⁸ The Fifth Circuit also held that statutory provision for an SEC ALJ to be removable only for cause is unconstitutional because, when combined with presumed restriction of the President’s ability to remove SEC Commissioners,¹³⁹ the result of the ALJ removal restriction is “that the President cannot take care that the laws are faithfully executed.”¹⁴⁰ The effective striking down of removal protection for ALJs raises questions about ALJ impartiality in ways resonant with the above discussion of potential fallout from *Arthrex*.¹⁴¹ But consistent with our primary focus on Article III, we concentrate on the private-rights portion of the Fifth Circuit’s opinion in what follows.

In our view,¹⁴² the Fifth Circuit erred by substantially ignoring the first part of the definition for private-rights matters introduced above: the prong specifying that a private-rights matter is one “through which one or more private parties seek personalized relief from one or more other private parties.”¹⁴³ This prong suggests that the SEC’s cease-and-desist order and the SEC’s order prohibiting *Jarkesy*’s future involvement in “various securities industry activities”¹⁴⁴ are properly understood as public-rights, rather than private-rights, matters—contrary to the Fifth Circuit’s apparent conclusion that its public-rights analysis justified vacating the entirety of the SEC’s decision.¹⁴⁵ One might similarly conclude that the SEC’s orders of “a civil penalty of \$300,000” and of disgorgement of “nearly \$685,000 in

135. 34 F.4th 446 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2688 (2023).

136. *Id.* at 451.

137. *Id.* at 455.

138. *Id.* at 465.

139. *See id.* at 463 (“[A] problem arises when [inferior-officer and principal-officer removal] protections act in concert.”).

140. *Id.* at 465.

141. *See supra* notes 127–35 and accompanying text.

142. *See Golden & Lee, supra* note 50, at 1172–77 (discussing the *Jarkesy* case).

143. Golden & Lee, *supra* note 13, at 1558; *see also supra* note 50 and accompanying text.

144. *Jarkesy*, 34 F.4th at 450.

145. *Id.* at 459 (“Thus, the agency proceedings below violated Petitioners’ Seventh Amendment rights, and the SEC’s decision must be vacated.”).

ill-gotten gains”¹⁴⁶ involved matters of public right. After all, these orders of monetary payment served the important public interest of deterrence.¹⁴⁷

Nonetheless, the SEC also made provision for ultimate payment of the monetary proceeds to other private individuals through a congressionally authorized “Fair Fund for the benefit of investors harmed by Respondents’ violations.”¹⁴⁸ There seems room for argument that the SEC’s provisions for imposing liabilities on one set of private parties and for using the proceeds to compensate other private parties mean that, to a certain degree, the SEC should be treated as resolving matters of private right—per *Crowell*’s classic definition, matters “of the liability of one individual to another under the law as defined.”¹⁴⁹ Under this view, the SEC’s monetary-penalty and disgorgement orders should be vacated, even though its other, more purely public-rights-oriented prohibitions should remain in effect.¹⁵⁰ Admittedly, we are skeptical of such argument in this context, in which, notably, Congress has merely authorized, rather than required, the SEC to redirect recovered funds to harmed investors.¹⁵¹ But our interest in maintaining an understanding of public and private rights that is sensitive to functional concerns means that we should acknowledge that justifying rejection of the Fair Fund argument is not trivial.¹⁵²

Regardless of how the Fair Fund wrinkle should be resolved, *Jarkesy* highlights how resolution of questions under the private/public-rights distinction should not always end inquiries into the constitutional validity of non–Article III adjudication. Although the SEC’s orders in *Jarkesy* might all be deemed public-rights matters for Article III purposes, they may still be viewed as imposing substantial deprivations of liberty as well as property

146. *Id.*

147. Golden & Lee, *supra* note 50, at 1174 (“[A] public interest in deterrence is commonly viewed as a central aim of both civil penalties and disgorgement.”). The power of government officials to impose civil penalties in non-jury “summary proceedings” was recognized by Sir William Blackstone right after he acknowledged the permissibility of such summary proceedings, à la *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1856), to protect the public revenue. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 278 (1769) (noting the capacity of justices of the peace “to inflict divers petty pecuniary mulcts, and corporal penalties, denounced by act of parliament for many disorderly offences”).

148. *In re John Thomas Cap. Mgmt. Grp. LLC*, Securities Act Release No. 10834, 2020 WL 5291417, at *20 (Sept. 4, 2020), *vacated*, *Jarkesy v. Sec. Exch. Comm’n*, 34 F.4th 446 (5th Cir. 2022).

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

150. See Golden & Lee, *supra* note 50, at 1176 (“The conclusion that the government’s pursuit of the cease-and-desist order and ban on industry activities are public remedies provides justification for administrative adjudication of securities fraud even if the SEC must sometimes separately petition a district court for an enforceable order of monetary relief in compliance with the requirements of Article III.”).

151. See *id.* at 1175.

152. See *id.* at 1175–76.

interests that an Article III court should have a role in finalizing when a party chooses to contest the administrative result.¹⁵³

Consider *Jarkesy*'s ban from industry activities. Even if the SEC properly has power to order such an indefinite ban as a matter of public-rights doctrine, the burden of this remedy on the defendant might support comparison to criminal penalties for which rights to Article III adjudication and trial by jury would ordinarily be understood to be constitutionally required.¹⁵⁴ Thus, due process concerns might be properly viewed as significant here.¹⁵⁵ Whether or not trial-level involvement of an Article III court is required to answer such concerns—as opposed to, for example, an alternative, non–Article III tribunal better insulated from political influence and the SEC's enforcement division than the SEC itself—a Congress motivated to take such concerns seriously would be very likely to consider using greater involvement of Article III courts as a fix. The APA's general provisions for access to Article III courts for appellate-style review of administrative action¹⁵⁶ is in line with this intuition.

CONCLUSION

It is worth underscoring *why* it matters how we frame the basis and extent of a constitutional requirement of Article III court involvement in cases and controversies to which the judicial power of the United States extends. The question of when access to an Article III court is required can seem largely academic when one considers that Congress very generally provides a path for some degree of Article III court access when a statute provides for agency adjudication, seemingly regardless of any felt constitutional requirement. Nonetheless, as cases like *Jarkesy* illustrate, Article III questions continue to arise and to threaten large domains of existing administrative adjudication. A better frame may provide sounder and more decisive answers to the questions raised by challenges to the administrative state.

More broadly, cogent explanation of constitutional doctrine constraining non–Article III adjudication helps us understand the fundamental constitutional values at stake. Historically, the central concerns in this area have been preserving the viability of state courts as primary forums for ordinary private dispute resolution and protecting individual rights against federal government direct action. The current tendency to postulate and seek to police strict lines of separation among the constitutional powers of the three branches (in particular, protecting Article III “judicial power” against encroachment by the political branches) and to seek limited regulation (or deregulation) as an end in itself are recent arrivals. A proper understanding

153. See Golden & Lee, *supra* note 13, at 1605–06 (noting “private parties’ traditional capacity to resolve disputes without the aid of Article III courts—or, for that matter, any courts whatsoever”).

154. See *supra* notes 74–77 and accompanying text.

155. See *supra* notes 79–82 and accompanying text.

156. See 5 U.S.C. §§ 702, 704, 706 (providing general rights to judicial review of “final agency action” and generally applicable appellate standards of review).

of constitutional authorizations and constraints validates a historically grounded, substantial, and infeasible role for the Article III judiciary in the modern administrative state. At the same time, such an understanding also validates a public-rights doctrine that gives Congress ample room to establish systems of administrative adjudication to aid in implementing of legislative mandates.¹⁵⁷

157. *Cf.* U.S. CONST. art. I, § 8, cl. 8.