The New Separation of Powers Formalism and Administrative Adjudication

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Abstract

The Supreme Court has entered a new era of separation of powers formalism. Others have addressed many of the potentially profound consequences of this return to formalism for administrative law. This Article focuses on an aspect of the new formalism that has received less attention—its implications for the constitutionality of administrative adjudication. The Court has not engaged in an extensive discussion or reformulation of its separation of powers jurisprudence concerning administrative adjudication since its highly functionalist decision in Commodity Futures Trading Commission v. Schor *more than three decades ago, but recent opinions of individual Justices show signs that such a doctrinal restatement may be on the horizon.*

Despite the current lack of doctrinal clarity, administrative adjudication is generally valid under current law either because Congress may vest the determination of so-called "public rights" in non-Article III tribunals or because administrative agencies adjudicate cases as adjunct factfinders for the courts. The foundation for the emergent Article III formalism has been advanced most prominently by Justice Gorsuch in a pair of cases involving the legality of administrative adjudication of patent validity. His approach relies on a categorical rule that Article III requires an independent judiciary to have decisional authority in adjudications that affect private property and other protected rights, in much the same way that the unitary executive principle requires Presidential control over matters within the executive branch. Under this view, however, the judicial power is subject to a formalistic, historically defined exception for matters of public rights, which can be adjudicated without the involvement of the judiciary. This approach may be gaining traction as part of the broader resurgence of separation of powers formalism.

Justice Gorsuch's approach is flawed because it does not account for the structural role of the Article III judiciary. Although the cases have long recognized that Article III has both structural and individual rights components, separation of powers is ordinarily understood primarily in structural terms.

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Article III analysis therefore must account for the structural role of the courts and protect the structural interests of the federal judiciary. Focusing on structure highlights the importance of the status and character of the non-Article III tribunal for separation of powers analysis and the essential role of judicial review as a means to enforce the rule of law even when an adjudication does not implicate any individual right to an Article III court. This Article argues that most administrative adjudication is fully consistent with separation of powers formalism because the initial implementation of statutory provisions by agencies using quasi-judicial procedures is executive in character. It is the availability and scope of judicial review that determine the extent of any encroachment on the exercise of judicial power under Article III.

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Introduction

There can be little doubt that the United States Supreme Court has entered a new era of separation of powers formalism, even if the precise contours and implications of this formalistic approach are still unfolding. Prominent decisions invalidating statutory provisions governing appointment and removal of officers of federal administrative agencies reflect a strong formalistic flavor.[1] So do calls to reinvigorate the nondelegation doctrine[2] and to repudiate "*Chevron* deference" by federal courts to agency interpretations of ambiguous statutes.[3] If the resurgence of separation of powers formalism was unclear before, the appointment of Justices Gorsuch, Kavanaugh, and Barrett seals its current status as the dominant separation of powers approach on the Court.[4]

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1 *See*, *e.g.*, United States v. Arthrex, Inc., 141 S. Ct. 1970, 1985–87 (2021) (holding that administrative patent judges whose decisions were not subject to review by Director of the Patent and Trademark Office (PTO) were principal officers who must be appointed by the President with Senate consent, but allowing Director to make final decision on *inter partes* challenges to the validity of existing patents so that judges would qualify as inferior officers); Collins v. Yellen, 141 S. Ct. 1761, 1783 (2021) (holding that for-cause removal restrictions on single Director of the Federal Housing Finance Agency (FHFA) violated the President's inherent power to remove executive officers at will); Seila L. L.L.C. v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2188 (2020) (holding that for-cause restriction on removal of the Bureau's single Director violated the President's inherent power to remove executive officers at will); Lucia v. SEC, 138 S. Ct. 2044, 2055 (2018) (holding that the Commission's administrative law judges (ALJs) are "Officers of the United States" within the meaning of the Appointments Clause and therefore cannot be appointed by someone other than the President, the head of a department, or the courts of law); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 492 (2010) (holding that a statute that created two layers of for-cause removal protection for executive branch official interfered with the President's duty to "take care" that the laws are faithfully executed).

2 *See* Gundy v. United States, 139 S. Ct. 2116, 2130–31 (2019) (Alito, J., concurring in the judgment) (discussing willingness to reconsider nondelegation doctrine principles in place for more than eighty years); *id.* at 2131–48 (Gorsuch and Thomas, JJ., and Roberts, C.J., dissenting) (arguing for reinvigoration of the nondelegation doctrine); *see also* Paul v. United States, 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J., respecting the denial of certiorari).

3 *See* Michigan v. EPA, 576 U.S. 743, 760–64 (2015) (Thomas, J., concurring) (advancing separation of powers objections to *Chevron* deference); *cf.* SAS Inst. v. Iancu, 138 S. Ct. 1348, 1358 (2018) (Gorsuch, J.) (stating that "whether *Chevron* should remain is a question we may leave for another day").

4 Both Justices Gorsuch and Kavanaugh are staunch separation of powers formalists, as reflected in noteworthy opinions they wrote as judges of the United States Courts of Appeals. *See*, *e.g.*, PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 164–200 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting) (concerning the constitutionality of statutory restrictions on presidential power to remove the single head of an independent agency), *abrogated by* Seila L. L.L.C. v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring) (questioning the legality of judicial deference to agency statutory interpretations); De Niz Robles v. Lynch, 803 F.3d 1165, 1171 (10th Cir. 2015) (Gorsuch, J.) (same); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 537 F.3d 667, 685–715 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (concerning the constitutionality

These developments are a feature, not a bug, of the longstanding efforts to appoint "conservative" judges and justices to the federal bench.[5] Although the reinvigoration of separation of powers so as to constrain the modern administrative state may receive less attention than issues such as overturning *Roe v. Wade*,[6] it has always been one of the principal objectives of the effort over the last several decades to reshape the courts.[7] Separation of powers formalism is the logical ju-

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of restrictions on presidential removal of "Officers of the United States"), *aff'd in part, rev'd in part, and remanded*, 561 U.S. 477, 514 (2010).

Justice Barrett did not have occasion to address these issues as a judge on the United States Court of Appeals for the Seventh Circuit and has not yet authored any significant separation of powers opinions as a Supreme Court justice, so her views on separation of powers are less clear. But she joined the majority opinions in *Collins* and *Arthrex*. *See Collins,* 141 S. Ct. at 1761; *Arthrex*, 141 S. Ct. at 1970. Thus, it seems reasonably clear that she will embrace a more formalist view of separation of powers than her predecessor, Justice Ginsburg. It is too soon to tell, however, whether she will join with the strictest separation of powers formalists on the Court in a dramatic repudiation of the modern administrative state.

5 In this context, the authors use the term "conservative" as it is commonly used in reference to the judiciary and not in its partisan political sense. Although the meaning of the term varies with time and context, for purposes of this Article it means a judicial philosophy that favors "small government" and "traditional" rights. Conservative constitutional jurisprudence thus seeks to constrain the authority of government, especially the federal government, by reinvigorating the structural constraints of federalism and separation of powers. At the same time, conservative jurisprudence takes a predominantly historical approach to the recognition and protection of individual rights. Conservative judges and justices tend to favor formalistic approaches to constitutional law, such as textualist and originalist approaches to constitutional interpretation that produce categorical rules. Liberal or progressive judges and justices, by way of contrast, tend to take the opposite position on these matters, favoring a more evolutionary approach that empowers the government to improve social and economic conditions and to promote constitutional values by extending rights protections to marginalized communities. Of course, these generalizations oversimplify the reality that every judge or justice, regardless of ideological or political leaning, has a unique approach and perspective on constitutional issues.

6 410 U.S. 113 (1973). The Supreme Court overruled *Roe* in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

7 *See*, *e.g.*, PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014) (arguing that the modern administrative state violates separation of powers); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994) (same); Craig Green, *Deconstructing the Administrative State*: Chevron *Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. 619, 622 (2021) (discussing links between conservatives' shifting approach to *Chevron* and efforts to "deconstruct" the administrative state); *see generally* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2014); RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT 34, 39 (2014).

The Federalist Society has been instrumental in advancing doctrinal separation of powers arguments, such as the nondelegation doctrine and the unitary executive theory, to limit the authority of the administrative state. *See* Peter M. Shane, *Legislative Delegation, the Unitary Executive, and the Legitimacy of the Administrative State*, 33 HARV. J.L. & PUB. POL'Y 103, 103 (2010). For discussion of the Federalist Society's role in reshaping the judiciary to promote such libertarian conservative values, see MICHAEL AVERY & DANIELLE MCLAUGHLIN, THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS (2013); AMANDA risprudential tool to accomplish that objective because conservative justices generally favor a formalistic mode of analysis and because administrative agencies with broad regulatory authority and discretion are difficult to square with a formalistic reading of the separation of powers.[8] The Court's new separation of powers formalism therefore has already begun to reshape administrative law, with profound implications for the modern administrative state. [9] This Article will consider the implications of the new separation of powers formalism for administrative adjudication, which has been the focus of some of this Article's authors' recent scholarship.[10]

The distinction between formalism and functionalism as an approach to legal analysis in general, and separation of powers in particular, has been the subject of much attention.[11] For purposes of this Article, the authors understand *formalism* to be an approach to legal analysis that relies on categorical reasoning; i.e., bright-line rules that produce automatic outcomes (e.g., per se rules) attached to defined legal categories.[12] In the separation of powers context, this means that

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HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION (2015).

8 *See* Ilan Wurman, *Constitutional Administration*, 69 STAN. L. REV. 359, 361 (2017) (describing a "school of formalists" who take the position that "although the doctrine pretends that agencies are merely executing the law, agencies are in fact routinely exercising legislative and judicial power as well, undermining the constitutional separation of powers").

9 *See infra* Part III; Richard E. Levy & Robert L. Glicksman, *Restoring ALJ Independence*, 105 MINN. L. REV. 39 (2020) [hereinafter Levy & Glicksman, *ALJ Independence*] (arguing that the Supreme Court's recent decisions granting the President control over the appointment and removal of ALJs hampers ALJs' independence and advocating the creation of a federal central panel as a means to promote independence without violating the separation of powers).

10 *See generally* Levy & Glicksman, *ALJ Independence*, *supra* note 9 (exploring the implications of the Court's unitary executive precedents for the fairness and impartiality of ALJs).

11 *See*, *e.g.*, William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21 (1998); Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346 (2016); Ronald J. Krotoszynski, Jr., *Transcending Formalism and Functionalism in Separation-of-Powers Analysis: Reframing the Appointments Power After* Noel Canning, 64 DUKE L.J. 1513 (2015); Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 225–35 (1991) [hereinafter Merrill, *Principle*] (analyzing how the holding in *NLRB v. Noel Canning* on the recess-appointments power decreased the salience of traditional formalism and functionalism); Burt Neuborne, *Formalism, Functionalism, and the Separation of Powers*, 22 HARV. J.L. & PUB. POL'Y 45 (1998); Bijal Shah, *Judicial Administration*, 11 U.C. IRVINE L. REV. 1119 (2021); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987); David Zaring, *Toward Separation of Powers Realism*, 37 YALE J. ON REG. 708, 714–15 (2020) (advocating that current formalist and functionalist separation of powers doctrines should be replaced with a new modern understanding).

12 *See* M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L.

there are three distinct categories of governmental power—legislative, executive, and judicial—each of which is subject to bright-line rules concerning its scope and the manner in which it is exercised. By way of contrast, *functionalism* as we understand it eschews rigid categories and bright-line rules in favor of a flexible analysis that examines the circumstances of each case in relation to the values or purposes that underlie the law.[13] In the separation of powers context, a functional approach focuses on the purposes of separation of powers to allocate authority among three distinct branches that will check each other so as to prevent any faction from gaining control of the entire government and promote the rule of law.[14]

In practice, the rise of functionalist separation of powers analysis in the New Deal era was an essential prerequisite for the growth of the administrative state during the Twentieth Century. [15] Independent

REV. 1127, 1138 (2000) [hereinafter Magill, *Real Separation*] ("For the formalist, questions of horizontal governmental structure are to be resolved by reference to a fixed set of rules and not by reference to some purpose of those rules."); Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings*, 92 NW. U. L. REV. 591, 663 (1998) (linking formalism and categorical reasoning); Peter L. Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789, 804 (1983) (describing shift from formalism to functionalism in separation of powers analysis as a move away from "'air-tight' categories"); *see also* Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568, 587 (1985) (O'Connor, J.) (agreeing that "practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III").

13 *See, e.g.*, Eskridge, *supra* note 11, at 21–22 (noting that functionalist reasoning "promises adaptability and evolution" and "emphasiz[es] pragmatic values like adaptability, efficacy, and justice in law"); Joshua B. Fischman, *Politics and Authority in the U.S. Supreme Court*, 104 CORNELL L. REV. 1513, 1585 (2019) ("Authority formalists have sought clear, textually based boundaries on delegated authority, while authority functionalists have argued for flexible boundaries that better serve social purposes."); Elad D. Gil, *Totemic Functionalism in Foreign Affairs Law*, 10 HARV. NAT'L SEC. J. 316, 325 (2019) ("In general, functionalist reasoning provides greater room for balancing formulas and flexible standards . . . .").

14 *See* Mario Loyola, *The Concurrence of Powers: On the Proper Operation of the Structural Constitution*, 13 N.Y.U. J.L. & LIBERTY 220, 258 (2020) (stating that for functionalists, "as long as the three functions of government are carried out with some checks and balances, it shouldn't raise too many concerns when those functions get mixed within a single branch"); Magill, *Real Separation*, *supra* note 12, at 1142–43 (describing the "ultimate purpose" of functionalist analysis as being able "to achieve an appropriate balance of power among the three spheres of government"); Matthew James Tanielian, *Separation of Powers and the Supreme Court: One Doctrine, Two Visions*, 8 ADMIN. L.J. AM. U. 961, 967 (1995) (citing Merrill, *Principle*, *supra* note 11, at 232) (stating that for functionalists, "[t]he goal of the separation of powers should be to ensure that each branch retains enough power to continue to act as a check upon the power of the other branches").

15 *See* Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 398–400 (1987) (describing the Supreme Court's accommodation of agency authority through relaxation of separation of powers).

agencies with broad authority to issue binding rules, to investigate and prosecute violations, and to adjudicate cases[16] are nearly impossible to square with a formalistic view of separation of powers.[17] During the so-called "*Lochner* era," when the Supreme Court relied on various doctrines to invalidate government regulatory programs,[18] formalistic separation of powers analysis was one tool that the Court deployed to invalidate New Deal legislation.[19] Even before the Court's dramatic repudiation of its antiregulatory precedents in the aftermath of the "switch in time that saved nine,"[20] however, there were signs of a more functionalist analysis.[21] In the decades that followed the New Deal, functionalism became the dominant approach[22] and separation of powers seemed to impose few, if any, limits on the administrative

16 Many of these agencies were created during the New Deal. *See* Daniel J. Gifford, *The Emerging Outlines of a Revised* Chevron *Doctrine: Congressional Intent, Judicial Judgment, and Administrative Autonomy*, 59 ADMIN. L. REV. 783, 790–91 (2007) ("In the New Deal era when regulation proliferated, its administration was repeatedly entrusted to independent agencies.").

17 *See, e.g.*, Lawson, *supra* note 7.

18 Richard E. Levy, *Escaping* Lochner*'s Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 336 (1995).

19 *See id.* (observing that federalism and separation of powers "imposed significant barriers to federal economic regulation during the *Lochner* era, but the Court essentially abandoned them along with substantive due process in the late 1930s and early 1940s"). The most prominent example of this approach is *ALA Schechter Poultry Corp. v. United States*, in which the Court famously applied the nondelegation doctrine to invalidate the National Industrial Recovery Act. 295 U.S. 495 (1935).

20 *See* John Q. Barrett, *Attribution Time: Cal Tinney's 1937 Quip, "A Switch in Time'll Save Nine,"* 73 OKLA. L. REV. 229, 230 (2020) (describing "'the switch in time' that 'saved nine'" as "the quip that everyone learns in law school, if not earlier"); Daniel A. Crane & Adam Hester, *State-Action Immunity and Section 5 of the FTC Act*, 115 MICH. L. REV. 365, 371 (2016) (noting that after the "switch in time," the Supreme Court, having repudiated substantive due process, "was reluctant to permit anti-regulatory challenges under other legal theories"); Dina Mishra, *Child Labor as Involuntary Servitude: The Failure of Congress to Legislate Against Child Labor Pursuant to the Thirteenth Amendment in the Early Twentieth Century*, 63 RUTGERS L. REV. 59, 103 (2010) (discussing "the growing number of cases in which [the Court] had overruled its previous anti-regulatory precedents" after the "switch in time").

21 *See, e.g.*, Humphrey's Ex'r v. United States, 295 U.S. 602, 631–32 (1935) (upholding imposition of for-cause removal restrictions on members of the FTC); Crowell v. Benson, 285 U.S. 22, 50–65 (1932) (analyzing the degree to which Article III courts must retain the ability to review administrative adjudications of private rights). It is, perhaps, telling that *Humphrey's Executor* prevented President Roosevelt from removing a member of the FTC who opposed enforcement of the antitrust laws. *See* PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 170 (2018) (en banc) (Kavanaugh, J., dissenting) (describing *Humphrey's Executor* as "an unexpected decision that incensed President Roosevelt and helped trigger his ill-fated court reorganization proposal in 1937").

22 *See* Peter P. Swire, Note, *Incorporation of Independent Agencies into the Executive Branch*, 94 YALE L.J. 1766, 1767–68 (1985) (describing *Humphrey's Executor* as "part of a major shift to functionalism after 1935," which became the dominant mode of separation of powers analysis).

state, which experienced phenomenal growth during the Twentieth Century.[23]

Thus, the current resurgence of separation of powers formalism represents a serious challenge to administrative law as we know it. Some manifestations of this new separation of powers formalism have garnered significant attention. For example, the effort to rein in broad delegations to administrative agencies and the related attack on *Chevron* deference have been front and center in the administrative law and separation of powers literature.[24] Likewise, the Court's embrace of the strong unitary executive theory, as reflected in recent separation of powers cases that include *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,[25] *Lucia v. SEC*,[26] *Seila Law, L.L.C. v. Consumer Financial Protection Bureau (CFPB)*,[27] *United States v. Arthrex, Inc.*,[28] and *Collins v. Yellen*,[29] has garnered considerable scholarly attention.[30] Notwithstanding important pronouncements in *Stern v. Marshall*[31] and a pair of recent decisions involving administrative adjudication of challenges to patents,[32] however, the implications of

23 *Cf.* Ronald J. Krotoszynski, Jr., *Constitutional Flares: On Judges, Legislatures, and Dialogue*, 83 MINN. L. REV. 1, 9 (1998) (arguing that "the growth of the modern administrative state required the reconceptualization of the delegation doctrine and separation of powers doctrine" based on functionalist analysis, "largely in order to realize the benefits and efficiencies associated with agency expertise"). Nonetheless, unlike other aspects of its *Lochner* era antiregulatory jurisprudence, such as its narrow reading of federal legislative power and substantive economic due process, the Court did not overrule or repudiate *Schechter Poultry*. Instead, it consistently distinguished the case by finding very open-ended standards sufficient to meet the nondelegation doctrine's "intelligible principle" test. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474–75 (2001) (distinguishing *Schechter Poultry* and listing broad statutory standards that have been upheld as sufficient to satisfy the intelligible principle test).

24 *See*, *e.g.*, Gillian E. Metzger, *The Roberts Court and Administrative Law*, SUP. CT. REV. 1, 42–43 (2019); Gillian E. Metzger, *The Supreme Court 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 3–7 (2017) [hereinafter Metzger, *Redux*]; Magill, *Real Separation*, *supra* note 12, at 1141–42.

25 561 U.S. 477 (2010).

26 138 S. Ct. 2044 (2018).

27 140 S. Ct. 2183 (2020).

28 141 S. Ct. 1970 (2021).

29 141 S. Ct. 1761 (2021).

30 *See*, *e.g.*, Timothy G. Duncheon & Richard L. Revesz, Seila Law *as an Ex Post, Static Conception of Separation of Powers*, 2020 U. CHI. L. REV. ONLINE 97; Levy & Glicksman, *ALJ Independence*, *supra* note 9; Richard W. Murphy, *The DIY Unitary Executive*, 63 ARIZ. L. REV. 439 (2021); Cass R. Sunstein & Adrian Vermeule, *Presidential Review: The President's Statutory Authority over Independent Agencies*, 109 GEO. L.J. 637, 638 (2021).

31 564 U.S. 462, 482–503 (2011) (invalidating adjudication of traditional common law defamation claim by bankruptcy courts).

32 *See* Thryv, Inc. v. Click-to-Call Techs., L.P., 140 S. Ct. 1367 (2020); Oil States Energy Servs., L.L.C. v. Greene's Energy Grp., 138 S. Ct. 1365 (2018). For further discussion of these decisions, see *infra* notes 258–73 and accompanying text.

the new separation of powers formalism for administrative adjudication have received less attention in the commentary.[33]

This Article seeks to contribute to a more robust scholarly discussion of separation of powers and administrative adjudication. The Court has not engaged in an extensive discussion or reformulation of its separation of powers jurisprudence concerning administrative adjudication since its highly functionalist decision in *Commodity Futures Trading Commission v. Schor*[34] more than three decades ago. Recent opinions of individual Justices, however, show signs that such a doctrinal restatement may be on the horizon.[35] The authors wish to emphasize that this Article is not intended to endorse the new separation of powers formalism or advocate for its adoption. Instead, this Article takes the Court's embrace of this approach as a given and seeks to explore its implications for administrative adjudication.

The Article's core thesis is that, properly understood, most administrative adjudication is fully consistent with separation of powers formalism because it involves the execution of the law by officials within the executive branch. The Article develops this thesis in three steps. Part I of the Article provides our definition of formalism and

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33 *But cf.* William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511 (2020) (considering the justifications for non-Article III adjudication); Michael S. Greve, *Why We Need Federal Administrative Courts*, 28 GEO. MASON L. REV. 765, 775 (2021) (noting "enduring doubts" about the current model of administrative adjudication that "arise from separation-of-powers concerns"). Some of the Court's appointment and removal power cases have involved administrative adjudicators, and so have clear implications for administrative adjudication. *See infra* notes 302–06 and accompanying text. Although several of these decisions acknowledged that administrative adjudication presents distinctive issues, *e.g.*, Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 507 n.10 (2010), none offered any extended analysis of separation of powers or administrative adjudication. There has also been a spate of recent articles focusing on the historical understanding of "public rights." *See infra* note 292 (citing examples). These articles, however, do not offer a larger account of administrative adjudication.

34 478 U.S. 833, 847–48 (1986) (declaring that "the constitutionality of a given congressional delegation of adjudicative functions to a non-Article III body must be assessed by reference to the purposes underlying the requirements of Article III" and that "[t]his inquiry, in turn, is guided by the principle that 'practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III'" (quoting Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 587 (1985))). The Court's more recent forays into the field have acknowledged doctrinal uncertainty without attempting to revisit the doctrine. *See generally infra* Part II (discussing the Court's separation of powers jurisprudence concerning non-Article III adjudication). Justice Gorsuch, however, has signaled some dissatisfaction with the *Schor* test. *See Thryv*, 140 S. Ct. at 1388–89 (Gorsuch, J., dissenting) (arguing that foreclosure of judicial review of the decision by the Director of the PTO to initiate *inter partes* review of previously awarded patents impermissibly infringed upon the judicial power).

35 *See infra* notes 97–107 and accompanying text (discussing growing criticisms within the Court of various deference doctrines); *infra* Section III.A.1 (discussing Justice Gorsuch's emerging Article III formalism).

functionalism, discusses the reemergence of formalism as the predominant mode of separation of powers analysis, and describes the manifestations of the new separation of powers formalism in the Court's cases involving the parameters of legislative, executive, and judicial power. Part II explores the development of traditional doctrines governing adjudication by tribunals whose decisionmakers lack life tenure and salary protections, which we refer to as non-Article III adjudication. This discussion focuses on the Supreme Court's early cases upholding Article I courts and on the importance of the distinction between public and private rights. Part II concludes that although the current doctrine concerning administrative adjudication is confusing and poorly defined, administrative adjudication is generally valid under that doctrine either because Congress may vest the determination of so-called "public rights" in non-Article III tribunals or because administrative agencies adjudicate cases as adjunct factfinders for the courts.

Finally, Part III develops our approach to administrative adjudication. It begins with an examination of the emergent Article III formalism advanced by Justice Gorsuch, which focuses on an historical inquiry into the application of the public rights doctrine. This Article argues that this approach is flawed because it does not account for the structural role of the Article III judiciary. Building on a structural perspective, the Article offers an approach under which the initial implementation of statutory provisions by agencies using quasi-judicial procedures is executive in character and then relates this understanding to the public rights doctrine that has long governed the constitutionality of administrative adjudication. Finally, the Article emphasizes that the critical separation of powers question for administrative adjudication is the availability and scope of judicial review, rather than the propriety of initial administrative adjudication. That is the appropriate focus because the availability and scope of judicial review determine the extent of any encroachment on judicial power.

I. The New Separation of Powers Formalism

This Part of the Article identifies, defines, and describes the "new separation of powers formalism" reflected in the Supreme Court's recent separation of powers decisions. The purpose here is not merely to describe the leading cases, but also to connect the dots so as to clarify its core premises and their implications for the broader jurisprudence of separation of powers as it relates to administrative adjudication. The discussion begins with a general description of formalism and functionalism as modes of legal analysis, with particular reference to the separation of powers. It then examines the formalistic approach reflected in recent Supreme Court opinions, sketching out the core premises of that approach.

A. Formalism and Functionalism

Although the concepts of formalism and functionalism as styles of legal reasoning will be familiar to readers, this Part of the Article begins by explicitly stating the authors' understanding of formalism and functionalism and the implications of these approaches for separation of powers doctrine. Given that they are styles of legal reasoning,[36] formalism and functionalism can appear with respect to any type of law (e.g., statutory interpretation, common law, or constitutional law) and in any substantive field of law (e.g., torts, environmental regulation, or individual rights).[37] Regardless of the context, however, formalism and functionalism reflect certain key features, often captured by the distinction between "rules" and "standards" or "principles."[38]

1. Formalism

As a style of legal reasoning, formalism is focused on categorical analysis. Categorical analysis dictates relatively clear and specific outcomes based upon the assignment of a particular case to a particular category. Accordingly, formalism favors bright-line, per se rules based on mutually exclusive categories, even if the imperfection of language and the human aspects of the law make perfect attainment of these goals impossible.[39] The essential premise of formalism is that bright-

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36 *See* Thomas B. Nachbar, *Twenty-First Century Formalism*, 75 U. MIAMI L. REV. 113, 118 (2020) (emphasis omitted) (proposing an understanding of modern formalism as "a commitment to form in legal thinking").

37 *See* Daniel Farber, *The Ages of American Formalism*, 90 NW. U. L. REV. 89, 91 (1995) ("Formalists believe that certainty, stability, and logic are the primary values to be sought by judges, but admit that in practice these values cannot be attained completely. To implement these values, they embrace formalist methods, such as textualism as a system for interpreting statutes, adherence to established doctrine in common-law cases, and originalism as a method of constitutional interpretation.").

38 *See* Tanielian, *supra* note 14, at 967 ("The relationship between categorical separation and checks and balances, on one hand, and formalism and functionalism on the other, is strikingly congruent with the methodological contrast between rules and standards."); *see generally* Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985) (exploring and critiquing the conventional distinction between rules and standards); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992) (highlighting differences among the Justices as fueled in part by the choice between rules and standards and considering possible explanations for these divisions).

39 *See, e.g.*, Jeffrey M. Shaman, *On the 100th Anniversary of* Lochner v. New York, 72

line rules provide clear guidance to those who are subject to the law and limit the ability of judges or other officials to determine outcomes based on personal preferences, as opposed to the law.[40] In formalistic analysis, everything depends on assigning the case to the proper category, which necessarily dictates the outcome because strict rules attach as a result of that categorization.[41] Accordingly, characterizing the facts as placing the case in a particular category, as defined by text and precedent, is the key to formalistic analysis.[42] At least in the current era, formalism is generally associated with conservative judges, but it is not always or inevitably so.[43]

TENN. L. REV. 455, 468 (2005) (citing *Lochner* as an example of "a highly formalistic way of thinking that conceived of reality in terms of mutually exclusive black and white categories").

40 *See*, *e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989) (distinguishing between "a discretion-conferring approach" and "a general rule of law," as well as arguing that having clear rules as opposed to individual discretion provides guidance for lower courts, increases predictability, and promotes public confidence in the judiciary by producing consistent results).

41 *See* Magill, *Real Separation*, *supra* note 12, at 1139–40.

42 *See* Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CAL. L. REV. 853, 857–58 (1990) (explaining that "[f]ormalists treat the Constitution's three 'vesting' clauses as effecting a complete division of . . . federal governmental authority" and that "[a]ny exercise of governmental power, and any governmental institution exercising that power, must either fit within one of the three formal categories thus established or find explicit constitutional authorization for such deviation").

43 For example, textualist and originalist modes of interpretation, frequently championed by conservative Justices and scholars, are highly formalistic. *See, e.g.*, Nachbar, *supra* note 36, at 116–17 (footnotes omitted) (explaining that Justice Scalia's formalism "is commonly associated with textualism or originalism (or both)"); Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 349 (2005) (arguing that the central divide between textualists and intentionalists is the propensity of textualists to favor "rules" and of intentionalists to favor "standards"). Interestingly, however, Justice Scalia—a renowned formalist—championed *Chevron* deference, a functionalist doctrine that is now in the crosshairs of separation of powers formalists. *See* City of Arlington v. FCC, 569 U.S. 290 (2013) (rejecting an exception to *Chevron* deference for "jurisdictional" issues); *cf.* Gil, *supra* note 13, at 326 ("[U]nder a functionalist reading of *Chevron*, . . . judicial deference to executive agencies' statutory interpretations is appropriate because they have more expertise in ascertaining the meaning of laws they are charged with administering and are better situated to reflect democratic preferences."); Dawn Johnsen, *"The Essence of a Free Society": The Executive Powers Legacy of Justice Stevens and the Future of Foreign Affairs Deference*, 106 NW. U. L. REV. 467, 492 (2012) (footnote omitted) ("The *Chevron* Court explained the justifications for deference in terms of functionalism and democratic theory: 'Judges are not experts in the field, and are not part of either political branch of the Government,' while the administering agencies possess superior expertise and political accountability by virtue of serving an elected President."); Kimberly L. Wehle, *Defining Lawmaking Power*, 51 WAKE FOREST L. REV. 881, 903 (2016) ("*Chevron* step one requires courts to give effect to clear congressional directives and, for functionalists, to scour legislative history and purpose to identify Congress's intent.").

An excellent example of formalistic reasoning in a separation of powers context is *INS v. Chadha*,[44] which invalidated a statutory "legislative veto" provision authorizing either the House of Representatives or the Senate to nullify agency action by simple resolution.[45] The analysis began with the premise that legislative power must be exercised in accordance with the requirements of bicameralism and presentment.[46] Thus, the key question was whether the legislative veto was a legislative act—i.e., whether it fit within the category to which bicameralism and presentment requirements attach. The Court offered three reasons for concluding that the legislative veto was a legislative act: (1) because a part of the legislature, the House of Representatives, exercised the veto; (2) because the veto altered legal rights by revoking a deportable alien's asylum; and (3) because the veto effectively reclaimed authority Congress had delegated to the Attorney General by statute.[47] Once the Court concluded that the veto was a legislative act, it was necessarily invalid because it was not adopted in compliance with bicameralism and presentment procedures.[48]

44 462 U.S. 919 (1983).

45 *See id.* at 951 ("The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility."); *id.* at 946 ("The very structure of the Articles delegating and separating powers under Arts. I, II, and III exemplifies the concept of separation of powers . . . .").

46 *Id.* at 951 ("It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.").

47 *See id.* at 952–55. In the authors' view, none of these explanations are entirely convincing. First, the fact that the veto was exercised by the House of Representatives is a starting point, but cannot be sufficient, as the Court in *Chadha* acknowledged. *Id.* at 952. That the action altered Chadha's legal status cannot explain why the act was legislative as opposed to executive or judicial, insofar as both the executive action of the Attorney General and the judicial decision of the Supreme Court also altered Chadha's legal status. Finally, it is simply incorrect to suggest that the legislative veto reversed the statutory delegation of authority to the Attorney General. That delegation of authority was always subject to and limited by the House of Representatives' exercise of the veto, which did not alter or amend the underlying statute in any way. *See* E. Donald Elliot, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506, 514–15 (1989) (advancing similar criticisms). These points do not mean that *Chadha* was wrongly decided—there are alternative rationales for the outcome. Indeed, from a formalist perspective it does not matter what category of power the veto falls into—if it is legislative, it violates bicameralism and presentment; if it is executive, it violates Article II; and if it is judicial, it violates Article III. *See* Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 274–76 (1991) (reasoning that agency controlled by Congress violated separation of powers if its actions were executive because Congress cannot control the exercise of executive power and if its actions were legislative because it violated bicameralism and presentment).

48 *See Chadha*, 462 U.S. at 958 ("To accomplish what has been attempted by one House of

As a mode of analysis, formalism may be attractive because bright-line rules lead to clear and objective outcomes.[49] This virtue, however, may also be its vice. To the extent that formalism dictates outcomes, it may produce results that seem wrong—whether as a matter of justice, the purposes of a rule, or the ideological preferences of a judge.[50] When confronted with such an outcome, courts may be inclined to adapt the rule through devices such as the alteration or manipulation of categories, the recognition of categorical exceptions, and the use of legal fictions.[51] To the extent that the categorization of a case can be manipulated by this sort of judicial reasoning, however, the outcome is neither clear nor objective.[52] Manipulation of catego-

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Congress in this case requires action in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President."). The line-item veto case is another example of formalistic separation of powers reasoning. *See* Clinton v. City of New York, 524 U.S. 417, 438 (1998) (invalidating statute that authorized President to "cancel" budgetary items after signing an appropriation statute into law because the President "[i]n both legal and practical effect . . . has amended two Acts of Congress by repealing a portion of each" without following bicameralism and presentment). Professor Bradford Clark suggested that the Court has taken a more formalistic approach to separation of powers when legislative action is involved because the legislative process was tightly constrained to promote principles of federalism. *See* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1391–93 (2001). Although this observation may have been true at the time, the Court's subsequent cases involving executive power indicate that the new separation of powers formalism is not confined to the legislative power. *See infra* Section I.B.2 (discussing the Court's recent cases involving executive power).

49 *See* Ofer Raban, *The Fallacy of Legal Certainty: Why Vague Legal Standards May Be Better for Capitalism and Liberalism*, 19 B.U. PUB. INT. L.J. 175, 175–77 (2010) (gathering and quoting sources that claim "that bright-line rules allow people to better predict the consequences of their actions as compared to vague legal standards" and advancing a thesis that this common assumption is a fallacy).

50 *Cf.* Pierre Schlag, *Formalism and Realism in Ruins (Mapping the Logics of Collapse)*, 95 IOWA L. REV. 195, 205–07 (2009) (describing critiques of formalism as arbitrary, inefficacious, dogmatic, and incoherent, and noting that "[t]o its critics, formalism seems to be detached from both normative and political values as well as the ostensible realities in the social and economic sphere. Accordingly, formalism is routinely described as mechanical, wooden, rigid, authoritarian, and generally out of touch.").

51 *See, e.g.*, Aviam Soifer, *Reviewing Legal Fictions*, 20 GA. L. REV. 871, 892 (1986) (describing a host of Supreme Court holdings that "eviscerat[ed] civil rights protections" and extensions of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), and contract law principles as examples "of the triumph of fictions over facts, formalism over realism"); Wurman, *supra* note 8, at 366 (describing "the two formalist fictions that mask the administrative state's unconstitutional foundations"); *see also* Robert E. Scott, *Chaos Theory and the Justice Paradox*, 35 WM. & MARY L. REV. 329, 337 (1993) ("The formalist creation of fictions and artificial categories ultimately led to the rejection of formalism and the emergence of Legal Realism.").

52 *See* Scott, *supra* note 51, at 337 (attributing the decline of formalism to "the creative use of legal fictions," which masked a failure to address specific contexts); Schlag, *supra* note 50, at 205–07 (discussing criticisms of formalism as arbitrary, inefficacious, dogmatic, and incoherent).

ries, moreover, tends to mask the true reasons for a result, leading to decisions that are often disingenuous and lacking in transparency.[53]

2. *Functionalism*

As a style of reasoning, functionalism is focused on producing decisions that further the underlying interests, purposes, or values served by the law.[54] Accordingly, the functionalist approach favors open-ended rules that allow the courts to consider the circumstances of each case in light of those interests, purposes, and values.[55] In place of bright-line rules, functionalists favor standards or principles, balancing tests, ends-means scrutiny, and multifactored "all-the-circumstances" frameworks.[56] Thus, the essential premise of functionalism is that the law is a system of social ordering that serves a purpose and should be applied accordingly.

In the separation of powers context, functionalism contemplates that legislative, executive, and judicial powers will overlap and intermingle, and is therefore relatively unconcerned with the characterization of an action as legislative, executive, or judicial in character.[57] Functionalist separation of powers analysis focuses instead on the extent to which a particular institutional arrangement preserves the essential functions of each branch and a balance of control among the

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53 *See, e.g.*, Cass R. Sunstein, *What Judge Bork Should Have Said*, 23 CONN. L. REV. 205, 215–16 (1991) (arguing that originalism "is merely the latest version of formalism in the law," and that it reflects "the pretense that one can decide hard cases in law by reference to value judgments made by someone else. Those who indulge in that pretense usually end up not by abandoning value judgments but by making them covertly.").

54 *See*, *e.g.*, Allison H. Eid, *Federalism and Formalism*, 11 WM. & MARY BILL RTS. J. 1191, 1197 (2003) (stating that "a formalist is more likely to follow a rule without regard to the values that underlie it; a functionalist is more likely to look just at the values at stake").

55 *See* Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. PA. L. REV. 209, 214 (1993) (arguing that "functionalist debates over government structure are often notably open-ended").

56 *See*, *e.g.*, Eid, *supra* note 54, at 1197. The intelligible principle test for the nondelegation doctrine is an example of a functionalist approach to separation of powers. Under that test, when Congress delegates decision-making authority to agencies, it must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928). The test is designed to ensure that core legislative functions are performed by Congress, pursuant to the bicameralism and presentment requirements, but it is open-ended and flexible. *See* ROBERT L. GLICKSMAN & RICHARD E. LEVY, ADMINISTRATIVE LAW: AGENCY ACTION IN LEGAL CONTEXT 111–12 (3d ed. 2020) (describing the function of the intelligible principle test and identifying "a number of factors that may affect the specificity of the statutory standards needed to satisfy" the test).

57 *See* Linda D. Jellum, *"Which Is to Be Master," the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 861 (2009) (footnote omitted) ("[T]he functionalist approach posits that overlap beyond the core functions is practically necessary and even desirable.").

branches.[58] At least in the current era, functionalism is generally associated with liberal or progressive judges, but is not always or inevitably so.[59]

Morrison v. Olson,[60] in which the Court upheld a good-cause restriction on the removal of an independent counsel appointed under the Ethics in Government Act,[61] provides an excellent example of functionalistic separation of powers reasoning. The Court rejected the formalistic argument that, because the independent counsel was an executive officer engaged in quintessentially executive actions of investigation and prosecution, the President, as head of a unitary executive branch, must be able to remove the independent counsel "at will."[62] Instead, the Court inquired whether the independence afforded the independent counsel by good-cause removal protections would interfere with the essential functions of the President.[63] Because the independent counsel was a temporary appointee tasked with a single investigation and lacked any policy authority, the Court con-

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58 *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 689–90 (1988); M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 611 (2001) (noting that functionalists "tolerat[e] the exercise of 'judicial' or 'legislative' power by an administrative agency—as long as a 'core' function of the department in question was not jeopardized"). This approach requires the Court to determine what the essential functions of each branch are, a matter that is hard to specify and subject to potential manipulation. *See id.* at 613 n.24 (citing E. Donald Elliot, INS v. Chadha: *The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 134–35 (1983)).

59 *See, e.g.*, Victoria F. Nourse & John P. Figura, *Toward a Representational Theory of the Executive*, 91 B.U. L. REV. 273, 291 (2011) (reviewing STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008)) ("Functionalism has been considered a liberal version of the separation of powers on the theory that it presumes that Congress may alter the balance of power as long as it does not offend major textual provisions."); Justin Desautels-Stein, *Pragmatic Liberalism: The Outlook of the Dead*, 55 B.C. L. REV. 1041, 1059 (2014) (associating "legal functionalism with the modern liberal tendency to emphasize foreground rules over background rules" that focus on the purposes of government action and the nature of the social problem being addressed). Indeed, as noted above, *Humphrey's Executor*—a quintessentially functionalist decision permitting independent agencies—was handed down by a conservative court as a means of insulating agencies from the control of a liberal President. *See supra* note 21 and accompanying text.

60 487 U.S. 654 (1988).

61 *Id.* at 691–93. The Act expired pursuant to its "sunset" provision in 1999 and was not renewed. *See*, *e.g.*, Michael B. Rappaport, *Replacing Independent Counsels With Congressional Investigations*, 148 U. PA. L. REV. 1595, 1595 (2000).

62 *Morrison*, 487 U.S. at 689–90 (footnote omitted) ("The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II.").

63 *See id.* at 691 ("[W]e cannot say that the imposition of a 'good cause' standard for removal by itself unduly trammels on executive authority.").

cluded that the good-cause limitation did not interfere with the President's essential functions.[64] Therefore, the good-cause limitation did not violate separation of powers.[65]

As a mode of analysis, functionalism may be attractive because it offers the flexibility to achieve just outcomes in each case.[66] This virtue, however, may also be its vice. To the extent that functionalism uses open-ended tests that weigh competing considerations in light of all the circumstances, there is no objectively correct outcome.[67] Functionalism invites judges to make subjective judgments based on their personal values and ideological preferences. Because judges attach different weights to such factors, just outcomes are in the eye of the beholder and functionalism offers little certainty or predictability for parties who seek to adapt their behavior to the law.[68] As a result, functionalistic regimes may be less likely to produce just outcomes than they appear to be at first glance.[69]

Of course, formalism and functionalism are not absolutes, but rather represent the opposite ends of a spectrum of reasoning styles.[70] No court or judge is entirely formalist or entirely functionalist, and courts and judges may take more or less formalistic or functionalistic approaches in different cases.[71] Nonetheless, the choice between a more formalistic or more functionalistic separation of powers jurisprudence matters for administrative law.[72] Indeed, as described in the fol-

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64 *See id.* at 691–93.

65 *Id.* at 693.

66 *See supra* note 13 and accompanying text.

67 *See* Keith Werhan, *Normalizing the Separation of Powers*, 70 TUL. L. REV. 2681, 2685–86 (1996) ("The open-ended interest balancing that separation-of-powers functionalists typically favor risks incoherency where there is no agreed-upon scale of values by which to measure the risk and reward of a government practice.").

68 *See* Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 712 (1995) ("Because of the inherently subjective and unpredictable nature of all variants of the functionalist model, it is simply impossible to predict a decision on the constitutionality of particular legislative or executive invasions of the judicial province when employing a functionalist standard.").

69 *See id.*

70 *See* Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 486 (1987) (referring to "the methodological continuum running from legal formalism to functionalism").

71 Indeed, *INS v. Chadha* (1983) and *Morrison v. Olson* (1988), discussed above as paradigmatic examples of formalistic and functionalist reasoning, respectively, were decided by the Supreme Court within five years of each other. Perhaps paradoxically, the Court's composition had, if anything, become more conservative between *Chadha*, the formalistic case, and *Morrison*, the functionalistic case, with the appointment of Justices Scalia and Kennedy. *See* Morrison v. Olson, 487 U.S. 654 (1988); INS v. Chadha, 462 U.S. 919 (1983).

72 *See, e.g.*, Ronald J. Krotoszynski, Jr., *Cooperative Federalism, the New Formalism, and*

lowing Section, the adoption of a more formalistic approach to separation of powers threatens many doctrines that accommodate the modern administrative state.

B. The Return of Formalism

In recent cases, the Court's conservative justices have embraced a formalistic approach to separation of powers under which there are three distinct categories of governmental power exercised by three distinct branches of government in accordance with three distinct sets of constitutional requirements.[73] As developed in this Section, this approach has implications for the legislative, executive, and judicial powers as they relate to administrative agencies. First, the legislative power to "make the law" must be exercised by Congress pursuant to bicameralism and presentment, which supports reinvigoration of the nondelegation doctrine and undercuts a core rationale for *Chevron* deference.[74] Second, administrative agencies are necessarily engaged in (and limited to) the execution of the laws, which means that the President must be able to control them under a strong unitary executive principle.[75] Third, only the Article III judiciary has the authority to "say what the law is"[76] and resolve cases and controversies, which further undermines *Chevron* deference and has unresolved implications for administrative adjudication.[77]

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the Separation of Powers Revisited: Free Enterprise Fund *and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law*, 61 DUKE L.J. 1599 (2012) (documenting the rise of formalist separation of powers analysis in the Supreme Court's decisions and suggesting that these decisions raise constitutional concerns about "cooperative federalism" programs in which states implement federal programs).

73 The first of these cases, *Free Enterprise Fund*, emphatically proclaimed this approach in its very first sentence: "Our Constitution divided the 'powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial.'" 561 U.S. 477, 483 (2010) (quoting *Chadha*, 462 U.S. at 951).

74 These views have been espoused by individual Justices in concurring and dissenting opinions, but the chorus is growing, and it appears that major changes in these doctrines may be in the offing. *See infra* notes 84–107 and accompanying text.

75 Like *Free Enterprise Fund*, most of the recent decisions embracing formalism to invalidate provisions of agency statutes on separation of powers grounds concern the appointment, removal, and oversight of officers in the executive branch. *See infra* notes 108–19 and accompanying text.

76 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

77 This principle is less prominent in the cases but appears to be gaining momentum. *See infra* notes 131–40 and accompanying text.

1. Legislative Power

The formalist conception of the *legislative* power to "make the law" insists that important public policy decisions must be made by Congress through the enactment of statutes in conformity with bicameralism and presentment requirements.[78] Formalist critics charge that current administrative law doctrine permits Congress to delegate essential policy decisions, and hence the legislative power, to the executive branch. The exercise of legislative power by the executive branch is, of course, incompatible with separation of powers in general and the requirements of bicameralism and presentment in particular.[79] The essential premise of this critique is the characterization of particular executive actions as falling within the legislative power.[80] Although this sort of argument depends on some clear understanding of what makes a particular government action legislative in character, advocates of this critique have not to this point advanced such an understanding.

In general terms, the nondelegation doctrine reflects a formalistic premise that the legislative power itself, having been vested in Congress, cannot be delegated. The intelligible principle test is a means of determining whether a particular delegation of authority violates this rule, on the theory that the lack of standards means that Congress has vested legislative power in the executive branch.[81] Conversely, the incorporation of meaningful statutory standards indicates that Congress made the antecedent legislative policy choice and that subsidiary policy choices pursuant to those standards are executive actions to implement the statute.[82] Notwithstanding its formalist premise, because the

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78 *See generally supra* notes 44–48 and accompanying text (discussing *Chadha* and *Clinton v. City of New York*).

79 *See* Clinton v. City of New York, 524 U.S. 417, 438 (1998) (concluding that power to amend statutes could not be vested in the President, even pursuant to standards that might satisfy the nondelegation doctrine).

80 *See, e.g.*, NFIB v. Dep't of Labor, 142 S. Ct. 661, 669 (2022) (per curiam) (Gorsuch, J., concurring) (explaining that "if the statutory subsection the agency cites really did endow OSHA with the power [to impose a vaccine mandate on employers], that law would likely constitute an unconstitutional delegation of legislative authority").

81 *See, e.g.*, United States v. Chi., Milwaukee, St. Paul, & Pac. R.R. Co., 282 U.S. 311, 324 (1931) ("Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard."); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

82 *See* INS v. Chadha, 462 U.S. 919, 953 n.16 (1983) ("Executive action under legislatively delegated authority that might resemble 'legislative' action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does

intelligible principle test is quite open-ended and accommodates broad administrative discretion, it operates as a functional accommodation for the delegation of substantial policy discretion and authority to agencies.[83]

Justice Thomas has long argued that the Court has abdicated its duty to enforce the prohibition against delegation of the legislative power and failed to "adequately reinforce the Constitution's allocation of legislative power."[84] More recently, in *Gundy v. United States*,[85] other Justices seemed to endorse this critique. Justice Gorsuch, in a dissenting opinion joined by the Chief Justice and Justice Thomas, criticized "the intelligible principle misadventure" that had allowed "delegations of legislative power that on any other conceivable account should be held unconstitutional."[86] He characterized the Court's application of the intelligible principle doctrine as inconsistent with the Framers' delegation to the courts of "the job of keeping the legislative power confined to the legislative branch."[87] Indeed, Justice Gorsuch has even questioned the legitimacy of the Court's precedents "allowing executive agencies to issue legally binding regulations to govern private conduct."[88]

A majority of the justices may be prepared to reinvigorate the nondelegation doctrine. Chief Justice Roberts and Justice Thomas joined Justice Gorsuch's dissent in *Gundy*.[89] Justice Alito, who authored a brief concurring opinion in *Gundy*, also signaled a willingness

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not so require. That kind of Executive action is always subject to check by the terms of the legislation that authorized it. . . ."); Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 685–86 (1980) (Rehnquist, J., concurring in the judgment) (explaining that the nondelegation doctrine ensures that Congress makes "important choices of social policy," that Congress provides an "'intelligible principle' to guide the exercise of the delegated discretion," and "that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards").

83 *See, e.g.*, Caring Hearts Pers. Home Servs. v. Burwell, 824 F.3d 968, 969 (10th Cir. 2016) ("Executive agencies today are permitted not only to enforce legislation but to revise and reshape it through the exercise of so-called 'delegated' legislative authority.").

84 Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 77 (2015) (Thomas, J., concurring in the judgment). Justice Thomas argued that the grants of different types of power to the three branches of government "are exclusive." *Id.* at 67.

85 139 S. Ct. 2116 (2019).

86 *Id.* at 2140–41 (Gorsuch, J., dissenting).

87 *Id.* at 2135; *see also* West Virginia v. EPA, 142 S. Ct. 2587, 2618 (2022) (Gorsuch, J., concurring) (noting that "many States have robust nondelegation doctrines designed to ensure democratic accountability in their state lawmaking processes").

88 Kisor v. Wilkie, 139 S. Ct. 2400, 2438 n.84 (2019) (Gorsuch, J., concurring in the judgment).

89 *Gundy*, 139 S. Ct. at 2131 (Gorsuch, J., dissenting).

to reconsider the Court's approach to the nondelegation doctrine.[90] Justice Kavanaugh did not participate in the *Gundy* case, but he has signaled his support for Justice Gorsuch's critique.[91] Justice Barrett's position on the nondelegation doctrine is unclear,[92] but her conservative leanings may indicate that she would support the reinvigoration.[93] In the meantime, however, lower courts for the most part continue to reject nondelegation challenges to federal statutes.[94]

Likewise, the new formalist objections to *Chevron* deference rest in part on the argument that *Chevron* countenances the exercise of legislative power by executive branch agencies.[95] A central premise of

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90 *See id.* (Alito, J., concurring in the judgment) ("If a majority of this Court were willing to reconsider the approach [to the nondelegation doctrine] we have taken for the past 84 years, I would support that effort.").

91 *See* Paul v. United States, 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J., respecting the denial of certiorari) (writing separately "because Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases"). Before joining the Court, Justice Kavanaugh signaled his discomfort with broad delegations of rulemaking authority. *See* U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 417–26 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc) (relying on separation of powers to argue that *Chevron* did not apply in determining the legality of the net neutrality rule and that the delegation of authority to promulgate major rules must be explicit).

92 As noted previously, Justice Barrett did not author any opinions on these issues while on the United States Court of Appeals for the Seventh Circuit. *See supra* note 4.

93 *See* Adam Liptak, *Barrett's Record: A Conservative Who Would Push the Supreme Court to the Right*, N.Y. Times (Nov. 2, 2020), https://www.nytimes.com/article/amy-barrett-views-issues.html [https://perma.cc/W9EM-95H3] (reporting Justice Barrett as having similar conservative political and judicial leanings as Justice Scalia); Jason Windett, Jeffrey J. Harden, Morgan L.W. Hazelton, & Matthew E.K. Hall, *Amy Coney Barrett Is Conservative. New Data Shows Us How Conservative*, Wash. Post (Oct. 22, 2020), https://www.washingtonpost.com/politics/2020/10/22/amy-coney-barrett-is-one-most-conservative-appeals-court-justices-40-years-our-new-study-finds/ [https://perma.cc/Z8FC-W3BS] (same).

94 For recent lower court decisions rejecting nondelegation challenges, see Doe #1 v. Trump, 984 F.3d 848, 855 (9th Cir. 2020) (holding that statute authorizing the President to suspend immigration or impose on aliens "any restrictions he may deem appropriate" upon finding that the entry of aliens "would be detrimental to the interests of the United States," contains a sufficient intelligible principle), *vacated sub nom.* Doe #1 v. Biden, 2 F.4th 1284 (9th Cir. 2021); Big Time Vapes, Inc. v. FDA, 963 F.3d 436 (5th Cir. 2020) (rejecting claim that statute authorizing regulation of listed tobacco products and of "any other tobacco products that the Secretary of [Health and Human Services] by regulation deems to be subject to [the statute]" violates the nondelegation doctrine) (alterations in original) (footnote omitted), *cert. denied*, 141 S. Ct. 2746 (2021). *But see* Jarkesy v. Sec. & Exch. Comm'n, 34 F.4th 446, 461–62 (5th Cir. 2022) (holding that a statutory delegation to the SEC of authority to choose between administrative and judicial enforcement of alleged violations of the securities laws lacked an intelligible principle and therefore violated the nondelegation doctrine).

95 As discussed *infra* notes 136–40 and accompanying text, the primary argument against *Chevron* is that judicial deference to agency interpretations is inconsistent with the vesting of the judicial power in the federal courts.

Chevron is that statutory ambiguity constitutes an implicit delegation of authority to the agency to resolve that ambiguity.[96] Justice Thomas has charged that this sort of naked policy authority is, in effect, legislative in character.[97] This point is quite similar to the argument for reinvigorating the nondelegation doctrine insofar as it argues that Congress must be the body to make fundamental policy choices and delegation of those choices to executive branch officials is improper.[98] Indeed, as described more fully below,[99] the Court's conservative justices drew an explicit connection between judicial review of the scope of an agency's statutory authority and the nondelegation doctrine in the decision blocking an Occupational Safety and Health Administration ("OSHA") standard designed to combat the spread of COVID-19 in the workplace.[100] As a practical matter, moreover, repudiation of *Chevron* deference, or the adoption of other means to override agency interpretations of their organic statutes, would further empower the judiciary to narrow the scope of delegated agency authority.[101]

The new formalist critique of legislative delegation seeks a more restrictive and bright-line rule to ensure that only Congress exercises

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96 *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

97 *See*, *e.g.*, Michigan v. EPA, 576 U.S. 743, 762 (2015) (Thomas, J., concurring) (citation omitted) ("[I]f we give the force of law to agency pronouncements on matters of private conduct as to which Congress did not actually have an intent, we permit a body other than Congress to perform a function that requires an exercise of the legislative power.").

98 *Compare id.* at 761–62 (arguing that *Chevron* is inconsistent with separation of powers) *with* Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 77–87 (2015) (Thomas, J., concurring in the judgment) (arguing that the intelligible principle test as applied by the Court is inadequate to prevent improper delegations of legislative power).

99 *See infra* notes 147–62 and accompanying text.

100 NFIB v. Dep't of Labor, 142 S. Ct. 661 (2022) (per curiam).

101 The need for the judiciary to police agency authority was central to Chief Justice Roberts' dissent in *City of Arlington v. FCC*, 569 U.S. 290, 312–28 (2013) (Roberts, C.J., dissenting), in which he argued for an exception to *Chevron* deference when an agency is construing the scope of its own authority. *See id.* at 317 ("But before a court may grant [*Chevron*] deference, it must on its own decide whether Congress . . . has in fact delegated to the agency lawmaking power over the ambiguity at issue."). Paradoxically, perhaps, this position was forcefully rejected by Justice Scalia, a separation of powers formalist, who authored the majority opinion in *Arlington*. *See id.* at 297–98 (arguing that because agency authority is prescribed by Congress, "when [agencies] act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires"). Chief Justice Roberts apparently got the last laugh, however, as his opinion in *King v. Burwell*, 576 U.S. 473 (2015), carved out an exception to *Chevron* deference for major questions of statutory construction. *See id.* at 485–86 (2015); *see also* West Virginia v. EPA, 142 S. Ct. 2587, 2619–20 (2022) (Gorsuch, J., concurring) (linking the nondelegation doctrine and the major questions doctrine); *infra* notes 141–46 and accompanying text.

the legislative power.[102] The precise nature of that approach, however, is elusive. Both Justice Thomas and Justice Gorsuch have focused on historical practices at the founding to identify categories of permissible delegation, including limited authority to fill in the details of a statute, conditioning the application of a statutory rule on executive factfinding, and areas of shared legislative and executive authority.[103] Thus, one might imagine a formalistic doctrine in which the Court sought to determine the original public meaning of the "legislative power" that cannot be delegated.[104] Other possible outcomes might include a doctrine that focuses on particular types of policy decisions that must be made by Congress,[105] that identifies nondelegable enu-

102 *See*, *e.g.*, Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 77 (2015) (Thomas, J., concurring in the judgment) ("Although the Court may never have intended the boundless standard the 'intelligible principle' test has become, it is evident that it does not adequately reinforce the Constitution's allocation of legislative power.").

103 *See, e.g.*, *Gundy*, 139 S. Ct. 2136–37 (Gorsuch, J., dissenting) (describing these three historical categories of permissible delegation); *Ass'n of Am. RRs.*, 575 U.S. at 77–81 (Thomas, J., concurring in the judgment) (offering a similar historical account of the nondelegation doctrine).

104 Justice Thomas, Justice Gorsuch, and the Chief Justice appear to favor this approach, insofar as all three joined Justice Gorsuch's *Gundy* dissent. *Gundy*, 139 S. Ct. at 2131 (Gorsuch, J., dissenting). On the other hand, a balanced historical analysis might suggest that the original public meaning of Article I does not support the nondelegation doctrine. *See* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 Colum. L. Rev. 277, 280 (2021) ("In fact, the Constitution at the Founding contained no discernable, legalized prohibition on delegations of legislative power, at least so long as the exercise of that power remained subject to congressional oversight and control.").

105 *Cf.* Indus. Union Dep't, AFL–CIO v. Am. Petroleum Inst., 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring in the judgment) ("As formulated and enforced by this Court, the nondelegation doctrine . . . ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will.").

merated powers,[106] or that rejects or limits agency authority to issue binding legislative rules.[107]

Ultimately, the key point is that a new formalist reinvigoration of the nondelegation doctrine would be focused on defining the legislative power more clearly. Such a clear definition is necessary to support a categorical rejection of particular delegations. Depending on the final form of this doctrine, it could be used to reject or limit countless statutory delegations of rulemaking authority.

2. *Executive Power*

The new formalist perspective on the executive power is the most firmly ensconced component of the Supreme Court's separation of powers jurisprudence. In a series of five decisions handed down between 2010 and 2021, the Court has embraced a formalistic conception

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106 To this point, however, there is little support for such a rule. In *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212 (1989), the Court rejected the suggestion that the power to tax was subject to stricter rules against delegation. *See id.* at 220–21 ("We discern nothing in this placement of the Taxing Clause [as the first among the enumerated powers] that would distinguish Congress' power to tax from its other enumerated powers . . . in terms of the scope and degree of discretionary authority that Congress may delegate to the Executive in order that the President may 'take Care that the Laws be faithfully executed.' "). Some cases have suggested that delegation of the power to define criminal offenses violates the nondelegation doctrine, but the status of this idea is unclear. *See* Touby v. United States, 500 U.S. 160, 165–66 (1991) (citing Fahey v. Mallonee, 332 U.S. 245, 249–50 (1947); Yakus v. United States, 321 U.S. 414, 423–27 (1944); and United States v. Grimaud, 220 U.S. 506, 518, 521 (1911)) (acknowledging that "[o]ur cases are not entirely clear as to whether more specific guidance" is required "when Congress authorizes another Branch to promulgate regulations that contemplate criminal sanctions," but concluding that it was unnecessary to resolve that issue because the statutes in question would meet even this heightened requirement); *cf.* United States v. Melgar-Diaz, 2 F.4th 1263, 1266 (9th Cir. 2021) (relying on *Touby* in holding that statute criminalizing an alien's entry into the United States "at any time or place other than as designated by immigration officers," 8 U.S.C. § 1325(a)(1), did not violate the nondelegation doctrine).

107 Justice Gorsuch suggested that he might support this view in *Kisor v. Wilkie*, 139 S. Ct. 2400, 2438 n.84 (2019) (Gorsuch, J., concurring in the judgment) ("To be sure, our precedent allowing executive agencies to issue legally binding regulations to govern private conduct may raise constitutional questions of its own." (citing Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 66 (2015) (Thomas, J., concurring in judgment))). Before joining the Court, Justice Kavanaugh also suggested that any delegation of authority to promulgate "major rules" must be explicit. *See* U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 417–26 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc); *see generally* Michael Sebring, Note, *The Major Rules Doctrine: How Justice Brett Kavanaugh's Novel Doctrine Can Bridge the Gap Between the* Chevron *and Nondelegation Doctrines*, 12 N.Y.U. J.L. & LIBERTY 189 (2019) (arguing that this doctrine is an appropriate response to the separation of powers concerns presented by the delegation of authority to promulgate binding legislative rules). The Court's decision in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), which adopted the "major question doctrine" as a strong clear statement rule that limits agencies' authority to promulgate regulations, appears to be a significant step in this direction. *See infra* note 155.

of the executive power derived from the unitary executive theory.[108] Under this doctrine, the President must be able to control the exercise of executive power by all officers within the executive branch, including administrative agencies:

- In *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,[109] the Court invalidated the good-cause removal limitation on the members of the Public Company Accounting Oversight Board, located within the SEC, on the ground that two layers of good-cause removal protections interfered with the President's duty to take care that the laws are faithfully executed.[110]
- In *Lucia v. SEC*,[111] the Court held that ALJs of the SEC qualify as "Officers of the United States" whose appoint-

108 The strong unitary executive theory is not the only possible formalistic view of the executive power. Aside from the President's independent constitutional authority, executive power is derived from statutes. In the absence of a textual basis in the Constitution for the President's removal power, a formalist view of the executive power might emphasize legislative supremacy and postulate that the President's removal power is defined by statute. *See*, *e.g.*, Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 612–13 (1838) (rejecting the suggestion that the President may direct officers to violate duties imposed by law). This kind of approach appears to apply in relation to congressional control over the jurisdiction of the federal courts, which permits Congress to alter the law or strip the courts of jurisdiction, provided that it does not dictate the outcome in a particular case. *See* Patchak v. Zinke, 138 S. Ct. 897, 905 (2018) (citation omitted) ("The simplest example [of an encroachment on the judicial power] would be a statute that says, 'In *Smith v. Jones*, Smith wins.' At the same time, the legislative power is the power to make law, and Congress can make laws that apply retroactively to pending lawsuits, even when it effectively ensures that one side wins."); Bank Markazi v. Peterson, 578 U.S. 212, 226–32 (2016) (concluding that although Congress may not direct the courts to achieve a particular result under old law, it may alter the law in such a manner that it effectively compels that result).

109 561 U.S. 477 (2010).

110 *See id.* at 484; *see also id.* at 495 (stating that the Sarbanes-Oxley Act "not only protects Board members from removal except for good cause, but withdraws from the President any decision on whether that good cause exists. That decision is vested instead in other tenured officers—the Commissioners—none of whom is subject to the President's direct control. The result is a Board that is not accountable to the President, and a President who is not responsible for the Board."). *Free Enterprise Fund* suggested in a footnote that the prohibition against two layers of good cause restrictions might not apply to ALJs working for independent agencies. *See id.* at 507 n.10. In *Jarkesy v. Sec. & Exch. Comm'n*, 34 F.4th 446 (5th Cir. 2022), however, the court held that the statutory removal restrictions for SEC ALJs were unconstitutional under *Free Enterprise Fund* because they involve at least two layers of protection against removal. *Id.* at 464. The court interpreted *Free Enterprise Fund* as "merely [having] identified that its decision does not resolve the issue presented here." *Id.* at 465. It concluded that the insulation stemming from protection of ALJs through multiple for-cause removal restrictions improperly impedes the President's power to remove ALJs based on their exercise of delegated discretionary adjudicatory authority. *Id.*

111 138 S. Ct. 2044 (2018).

ment by subordinate officers within the SEC violated the Appointments Clause.[112]

- In *Seila Law, L.L.C. v. Consumer Financial Protection Bureau*,[113] the Court relied on a strong unitary executive theory to hold that the imposition of good-cause restrictions on the President's removal of the single Director of the Consumer Financial Protection Bureau ("CFPB") violated Article II.[114]
- In *United States v. Arthrex, Inc.*,[115] the Court held that Administrative Patent Judges ("APJs") could not be responsible for final decisions concerning patent validity unless they were principal officers appointed by the President with the consent of the Senate.[116]
- In *Collins v. Yellen*,[117] the Court followed *Seila Law* and held that good-cause restrictions on the President's authority to remove the Director of the Federal Housing

112 *Id.* at 2049, 2055. Not surprisingly, Justice Kagan's *Lucia* opinion was less formalistic than the other decisions discussed here. Instead of relying on the unitary executive theory, the Court relied on *Freytag v. Comm'r*, 501 U.S. 868 (1991), in which it had held that special trial judges who had been appointed by the Chief Judge of the Tax Court were inferior officers whose appointment had to conform to the Appointments Clause. *See Lucia*, 138 S. Ct. at 2052–53 ("*Freytag* says everything necessary to decide this case."). Nonetheless, *Lucia* is certainly consistent with the strong unitary executive theory and does not Challenge the formalistic approach taken in the other cases.

113 140 S. Ct. 2183 (2020).

114 *Id*. at 2197 ("We hold that the CFPB's leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the separation of powers."); *see* Duncheon & Revesz, *supra* note 30, at 98 ("In his majority opinion in *Seila Law*, Chief Justice John Roberts embraces formalism, arriving at an apparently bright-line rule that a for-cause removal restriction on a single-headed agency with executive power violates Article II."); Howard Schweber, *The Roberts Court's Theory of Agency Accountability: A Step in the Wrong Direction*, 8 BELMONT L. REV. 460, 461 (2021) ("[Chief Justice Roberts'] majority opinion in *Seila Law* . . . uncritically adopts an 18th century understanding of political accountability and applies that understanding in a formalistic and ultimately self-defeating way to the conditions of modern politics.").

115 141 S. Ct. 1970 (2021).

116 *Id.* at 1985. The patent holder argued that the appointment of APJs by the Secretary of Commerce violated the Appointments Clause because APJs were principal officers, and the Court agreed. *Id.* at 1973. Rather than invalidate the appointment, however, the Court's remedy was to convert APJs into inferior officers, so that their appointment was valid, by permitting the Director of the PTO—an Officer appointed by the President with Senate consent—to review APJ decisions. *See id.* at 1987 ("In sum, we hold that 35 U.S.C. § 6(c) is unenforceable as applied to the Director insofar as it prevents the Director from reviewing the decisions of the PTAB on his own. The Director may engage in such review and reach his own decision. When reviewing such a decision by the Director, a court must decide the case 'conformably to the constitution, disregarding the law' placing restrictions on his review authority in violation of Article II." (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803))).

117 141 S. Ct. 1761 (2021).

Finance Agency ("FHFA") violated the separation of powers.[118]

At the core of these decisions is a formalistic theory of the unitary executive under which the power of administrative agencies must be controlled through the accountability of agency officials to the President and the President's accountability to the people.[119]

It follows from this theory that any action by administrative agencies to implement statutory requirements—whether to enforce the law, promulgate regulations, or adjudicate cases—is executive in character. Under a formalistic view of separation of powers, agencies must be part of the executive branch because they are neither Congress nor courts and the existence of governmental entities that are not part of any of the three branches is unacceptable.[120] As part of the executive

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118 *Id.* at 1784. Although *Seila Law* had distinguished the FHFA when rejecting it as an historical precedent for the CFPB, *Collins* concluded that those distinctions were immaterial. *See id.* at 1784–87 (rejecting various possible grounds for distinguishing the FHFA from the CFPB). This extension of *Seila Law* prompted objections from Justices Kagan and Sotomayor. *See id.* at 1800–01 (Kagan, J., concurring in part and concurring in the judgment in part) ("My second objection is to the majority's extension of *Seila Law*'s holding . . . . Any 'agency led by a single Director,' no matter how much executive power it wields, now becomes subject to the requirement of at-will removal."); *id.* at 1804 (Sotomayor, J., concurring in part and dissenting in part) ("Never before, however, has the Court forbidden simple for-cause tenure protection for an Executive Branch officer who neither exercises significant executive power nor regulates the affairs of private parties.").

119 This theory does not appear in *Lucia*. *See* Lucia v. SEC, 138 S. Ct. 2044, 2051–55 (focusing narrowly on the question whether ALJs are "Officers of the United States," as opposed to mere employees, for purposes of the Appointments Clause). But it features prominently in *Free Enterprise Fund*, *Seila Law*, *Arthrex*, and *Collins*. *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 496 (invalidating dual good-cause removal provisions because the President "can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member's breach of faith"); *Arthrex*, 141 S. Ct. at 1979 (alteration in original) ("James Madison extolled this 'great principle of unity and responsibility in the Executive department,' which ensures that 'the chain of dependence [will] be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.'" (quoting 1 ANNALS OF CONG. 499, 499 (1789) (Joseph Gales ed., 1834))); Seila L. L.L.C. v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2197 (2020) (emphasizing that "lesser officers must remain accountable to the President, whose authority they wield"); *Arthrex*, 141 S. Ct. at 1979 (reasoning that the power exercised by executive officers "acquires its legitimacy and accountability to the public through 'a clear and effective chain of command' down from the President, on whom all the people vote" (quoting *Free Enter. Fund*, 561 U.S. at 498)); *Collins*, 141 S. Ct. at 1784 (reasoning that the President's removal power "is essential to subject Executive Branch actions to a degree of electoral accountability" (quoting *Free Enter. Fund*, 561 U.S. at 497–98)).

120 *See Seila Law*, 140 S. Ct. at 2197 ("The entire 'executive Power' belongs to the President alone. But because it would be 'impossib[le]' for 'one man' to 'perform all the great business of the State,' the Constitution assumes that lesser executive officers will 'assist the supreme Magistrate in discharging the duties of his trust.' 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939)").

branch, agencies must exercise executive power and cannot exercise legislative or judicial power.[121] Thus, for example, *Seila Law* cast doubt on *Humphrey's Executor's* functionalist analysis, under which the FTC was deemed to act "as a legislative or as a judicial aid" that "occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President."[122]

Under the strong unitary executive principle reflected in the cases, three conclusions inevitably follow from the premise that agencies wield executive power. First, as officers of the United States, agency officials are subject to the Appointments Clause, which contemplates an essential role for the President in the appointment of officers.[123] Second, the President's role as the head of the executive

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121 *See Arthrex*, 141 S. Ct. at 1982 ("While the duties of APJs 'partake of a Judiciary quality as well as Executive,' APJs are still exercising executive power and must remain 'dependent upon the President.'" (quoting 1 ANNALS OF CONG. 611–612 (1789) (Joseph Gales ed., 1834))); *Collins*, 141 S. Ct. at 1785 ("In deciding what it must do, what it cannot do, and the standards that govern its work, the FHFA must interpret the Recovery Act, and '[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law.'" (quoting Bowsher v. Synar, 478 U.S. 714, 733 (1986))).

122 *See Seila Law*, 140 S. Ct. at 2198 ("Rightly or wrongly, the Court [in *Humphrey's Executor*] viewed the FTC (as it existed in 1935) as exercising 'no part of the executive power.'"); *id.* at 2199 (characterizing the Court in *Morrison v. Olson* as "[b]acking away from the reliance in *Humphrey's Executor* on the concepts of 'quasi-legislative' and 'quasi-judicial' power"); *see also id.* (emphasis added) ("In short, *Humphrey's Executor* permitted Congress to give for-cause removal protections to a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was *said* not to exercise any executive power."). To be sure, there are formalistic elements to the analysis in *Humphrey's Executor*, insofar as the Court focused on characterizing the nature of the power being exercised to determine whether the President's removal power attached. *See Humphrey's Ex'r*, 295 U.S. 602, 628 (1934). Nonetheless, the notion that the FTC could exercise "quasi-legislative" or "quasi-judicial" powers as a legislative or judicial aid that is not squarely within the executive branch is distinctively functionalist. *See supra* notes 57–58 and accompanying text.

123 *See Lucia*, 138 S. Ct. at 2051 (citing U.S. CONST. art. II, § 2, cl. 2) ("The Appointments Clause prescribes the exclusive means of appointing 'Officers.' Only the President, a court of law, or a head of department can do so."). The Appointments Clause permits the appointment of inferior officers without presidential involvement. *See* U.S. CONST. art. II, § 2, cl. 2; *Lucia*, 138 S. Ct. at 2051 n.3 (acknowledging the distinction between principal and inferior officers). Most clearly, vesting appointment in the courts eliminates any presidential role in appointments, which is not entirely consistent with the strong unitary executive principle reflected in the recent cases.

In *Morrison v. Olson*, 487 U.S. 654 (1988), the Court rejected the suggestion that it would violate the separation of powers to vest the appointment of executive officers in the courts of law. *See id.* at 673 ("On its face, the language of this 'excepting clause' [for inferior officers] admits of no limitation on interbranch appointments. Indeed, the inclusion of 'as they think proper' seems clearly to give Congress significant discretion to determine whether it is 'proper' to vest the appointment of, for example, executive officials in the 'courts of Law.'"). *Morrison* is a highly functionalist decision. *See supra* notes 60–65 and accompanying text. As a result, the branch with the duty to take care that the laws be faithfully executed means that the President generally must be able to remove executive branch officials at will.[124] Third, *Arthrex* indicates that any final decision by an executive branch agency must be controlled by the principal officer in charge of that department, who in turn would be subject to appointment and (likely) removal at will by the President.[125]

In this manner, the Court's recent executive power precedents contemplate that the President must directly control any final decision made by executive officers.[126] Ultimately, these principles are simply incompatible with independent agencies, whose continued viability is in serious doubt.[127] Indeed, *Arthrex's* pronouncement that any final executive action must be under the control of a principal officer appointed by the President with Senate consent, taken together with the recent removal power cases, would seem to lead to the inevitable con-

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current Court might reject this broad language and require presidential control over the appointment of executive officers. For the time being at least, it is also possible for Congress to limit presidential involvement in the appointment of inferior officers by vesting their appointment in an independent agency, as the head of a department, as in *Lucia*. Nonetheless, independent agencies may soon be on the chopping block. In any event, President Trump relied on *Lucia* to insist that agency heads must be given free rein when appointing ALJs by exempting them from civil service merit hiring protocols. *See* Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (July 13, 2018) ("As evident from recent litigation, *Lucia* may also raise questions about the method of appointing ALJs, including whether competitive examination and competitive service selection procedures are compatible with the discretion an agency head must possess under the Appointments Clause in selecting ALJs.").

124 *See*, *e.g.*, *Seila Law*, 140 S. Ct. at 2192 (emphasis added) ("Our precedents have recognized only two exceptions to the President's *unrestricted* removal power.").

125 *See Arthrex*, 141 S. Ct. at 1985 ("Only an officer properly appointed to a principal office may issue a final decision binding the Executive Branch in the proceeding before us.").

126 *See supra* notes 109–19 and accompanying text. Under current doctrine, the President is still unable to control the final decisions of independent agencies, which highlights their incompatibility with the new separation of powers formalism. *See supra* note 121 (collecting language in recent cases indicating that the President must have at will removal power to ensure the political accountability of agency officials).

127 Indeed, it is possible that the Court will invalidate any good-cause limitations on officers who wield executive power, including inferior officers, which is the logical endpoint of its broad pronouncements on the removal power. *See* Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 STAN. L. REV. 175, 193 (2021) ("Unitarians come in many flavors, but most assert that the Constitution requires the President to have the ability to remove all executive officers—principal or inferior—at will."). The recent cases, however, seem less critical of the "exception" to at will removal for inferior officers. *Seila Law*, for example, omitted the sort of veiled criticism of this exception that the Court directed toward *Humphrey's Executor*. *See Seila Law*, 140 S. Ct. at 2199 (discussing exception to at-will removal for inferior officers). Indeed, *Arthrex* implicitly approved good-cause removal provisions for inferior officers as it left good-cause restrictions on removal of APJs intact after it converted them into inferior officers by allowing the Director of the PTO to make the final decision in *inter partes* review cases. *See Arthrex*, 141 S. Ct. at 1986–87; *supra* note 116.

clusion that the President must be able to control the actions of all principal officers by removing them at will.[128] This would seem to include multimember independent agencies, who qualify as heads of departments under *Lucia* and who have no superior other than the President. As discussed more fully below, the Court's recent executive power decisions therefore have important implications for administrative adjudication.[129]

3. *Judicial Power*

Under the formalist conception of separation of powers, the *judicial* power is the power of the courts to resolve cases and controversies within their jurisdiction, including the power to "say what the law is."[130] This power includes the authority, in a proper case or controversy, to review the actions of the legislative and executive branches for compliance with the law.[131] Insofar as administrative agencies are part of the executive branch and act pursuant to law, the judicial power includes the power to review their actions—in a proper case or controversy.

These principles are at the core of formalist critiques of doctrines that require courts to defer to agencies on legal issues, including *Chevron* deference to agency interpretations of the statutes they administer[132] and "*Auer* deference" to agency interpretations of their own regulations.[133] Although these critiques have yet to ripen into a majority decision repudiating deference to agencies on these matters, there has already been substantial erosion of both doctrines and their for-

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128 *See supra* note 119.

129 *See infra* notes 303–06 and accompanying text (discussing presidential oversight of administrative adjudication).

130 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

131 *See id.* (asserting judicial authority to review the actions of the Secretary of State for compliance with the law and of Congress for compliance with the Constitution).

132 The Court in *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), held that courts are required to defer to any permissible interpretation of an ambiguous statute by the agency with authority to implement that statute. Insofar as *Chevron* rests on the concept of implicit delegation of policy choices to administrative agencies, it is vulnerable to the argument that it represents an improper delegation of legislative power. *See supra* notes 95–101 and accompanying text. Here the focus is on the contention that deference to agencies on matters of law is an abdication of the judicial power.

133 Auer v. Robbins, 519 U.S. 452 (1997); *see* Kisor v. Wilkie, 139 S. Ct. 2400, 2437 (2019) (Gorsuch, J., concurring in the judgment) (arguing that *Auer* deference compromises judicial independence in violation of Article III by allowing the executive branch to "say what the law is"). For further discussion of *Kisor*, see *infra* notes 163–71 and accompanying text (discussing *Kisor* and criticism of *Auer* deference).

mal repudiation may only be a matter of time.[134] In addition, there are some recent decisions that reflect a formalistic approach to the adjudication of cases by tribunals that are not Article III courts.[135]

In recent years, separation of powers formalists have criticized *Chevron* as inconsistent with separation of powers.[136] One of the Court's earliest and most vocal *Chevron* critics has been Justice Thomas. He has argued that deference to an agency's interpretive authority infringes on the judicial power, which "as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws."[137] According to Justice Thomas, by precluding judges from exercising that judgment, *Chevron* "wrests from Courts the ultimate interpretative authority to 'say what the law is' and hands it over to the Executive."[138] In one of his last opinions before retiring, Justice Kennedy likewise deemed it "necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron*" because "[t]he proper rules for interpreting statutes and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary."[139]

134 The Justices have not had occasion to address comprehensively the implications of this vision of judicial power for other issues, such as the validity of non-Article III adjudication. *See infra* notes 241–54 (discussing the Court's recent decisions applying the public/private rights distinction without comprehensively addressing non-Article III adjudication). Justice Gorsuch, in particular, has expressed his dissatisfaction with the Court's current approach to this issue. *See infra* notes 258–73 (discussing Justice Gorsuch's dissenting opinions in *Oil States Energy Servs., L.L.C. v. Greene's Energy Grp.*, 138 S. Ct. 1365 (2018), and *Thryv, Inc. v. Click-To-Call Techs., L.P.*, 140 S. Ct. 1367 (2020)).

135 *See Oil States*, 138 S. Ct. at 1373, 1378 (relying on the public rights doctrine to uphold administrative determination of patent claims); Stern v. Marshall, 564 U.S. 462 (2011) (invalidating adjudication of traditional common law defamation claim by bankruptcy courts).

136 *See, e.g.*, Marla D. Tortorice, *Nondelegation and the Major Questions Doctrine: Displacing Interpretive Power*, 67 BUFF. L. REV. 1075, 1076 (2019) ("Justice Gorsuch, among others, argues that the current administrative state—specifically post-*Chevron*—violates the separation of powers as the Framers intended."); *see also supra* notes 95–101 and accompanying text (discussing formalist critique of *Chevron* as improperly delegating legislative power to agencies). Paradoxically, perhaps, Justice Scalia, a noted conservative separation of powers formalist, was one of *Chevron's* staunchest defenders. He consistently objected to efforts to limit its scope, most recently in *City of Arlington v. FCC*, 569 U.S. 290, 296–305 (2013) (rejecting exception to *Chevron* deference for agency interpretations of their own authority or jurisdiction). *See supra* note 101*; see also* INS v. Cardoza-Fonseca, 480 U.S. 421, 453–55 (1987) (Scalia, J., concurring in the judgment) (objecting to the Court's refusal to apply *Chevron* deference to an agency's statutory interpretation on a pure question of law).

137 Michigan v. EPA, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) (quoting Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 119 (2015) (Thomas, J., concurring in the judgment)).

138 *Id.* (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

139 Pereira v. Sessions, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring). The Court

Citing Justice Kennedy's plea, Justice Gorsuch has agreed that "there are serious questions" about whether *Chevron* "comports with the . . . Constitution."[140]

Although the Court has not yet repudiated *Chevron* altogether, recent decisions have greatly narrowed its scope.[141] Of particular significance in this regard is the so-called "major questions" doctrine advanced by Chief Justice Roberts in *King v. Burwell*.[142] As enunciated in that case, the doctrine precludes application of *Chevron* deference to an agency on a statutory interpretation issue that involves "a question of deep economic and political significance that is central to [the] statutory scheme [such that] had Congress wished to assign that question to an agency, it surely would have done so expressly."[143] Formulated in that way, the major questions doctrine gives courts discretion to decline deference and resort to de novo review of a statute's meaning by characterizing statutory issues as sufficiently "major," thus negating *Chevron*'s assumption that statutory ambiguity reflects an implicit delegation of gap-filling authority to the agency charged with administering the statute.[144] All of this casts considerable doubt about

did not apply *Chevron* deference in *Pereira* because it concluded that the statute was clear and unambiguous. *See id.* at 2113. In the same case, Justice Alito called *Chevron* an "increasingly maligned precedent." *Id.* at 2121 (Alito, J., dissenting).

140 Kisor v. Wilkie, 139 S. Ct. 2400, 2446 n.114 (2019) (Gorsuch, J., concurring in the judgment). As an appellate court judge, Gorsuch went further, opining that *Chevron* "appears . . . to qualify as a violation of the separation of powers." Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1154 (10th Cir. 2016).

141 *See generally* GLICKSMAN & LEVY, *supra* note 56, at 318–25 (discussing the emergence of various "non-*Chevron*" issues of statutory interpretation). Notably, in some recent decisions involving judicial review of agency statutory interpretations, the Court has engaged in de novo review without citing either *Chevron* or any other deference doctrine. *See, e.g.*, Babcock v. Kijakazi, 142 S. Ct. 641, 645–47 (2022) (holding that, based on statutory plain meaning, those employed as "dual-status military technicians" do not qualify for exception under the Social Security Act, 42 U.S.C. § 415(a)(7)(A)(III), from the general requirement that benefits be reduced for retirees who receive payments from separate pensions based on employment not subject to Social Security taxes). For a critical assessment of these developments, see Tortorice, *supra* note 136, at 1076 (arguing that efforts by separation of powers formalists such as Justice Gorsuch to eliminate *Chevron* deference reflects the judges' "own policy orientation and goals" and "it serves to reject the growth of the administrative state").

142 576 U.S. 473 (2015).

143 *Id.* at 485–86 (quoting Utility Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)); *see generally* Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 68 ADMIN L. REV. 445 (2016) (discussing implications of the doctrine).

144 *See*, *e.g.*, Catherine M. Sharkey, *Cutting in on the* Chevron *Two-Step*, 86 FORDHAM L. REV. 2359, 2413 (2018) (claiming that the major questions exception "represents a distinct form of a retreat from *Chevron*, one that could readily be deployed in service of a broader project to tighten the bounds on the ever-inflating administrative state"); Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to* Chevron *Deference as a Doctrine of Noninterference (or*

the continuing viability of *Chevron*,[145] which is significant given that "*Chevron* is the most-cited administrative law case of all time."[146]

More recently, the Court's decision in *National Federation of Independent Business v. Department of Labor* ("*NFIB*")[147] transformed the major questions doctrine into a clear statement rule that affirmatively limits agency regulatory authority. Under this approach, an agency's delegated regulatory authority does not include the authority to resolve major questions unless there is an explicit statutory grant of authority to do so.[148] In *NFIB*, the Court upheld a stay blocking an emergency temporary standard issued by OSHA in response to the COVID-19 pandemic.[149] The standard required businesses that employed at least 100 workers to require their employees to either be vaccinated against COVID-19 or take a weekly COVID-19 test and wear a mask at work.[150]

Why Massachusetts v. EPA *Got It Wrong)*, 60 ADMIN. L. REV. 593, 596–98 (2008) (describing the major questions doctrine as a *Chevron* step zero inquiry concerning whether an agency's interpretation "deserves any deference at all").

145 Kristin E. Hickman & Aaron L. Nielson, *The Future of* Chevron *Deference*, 70 DUKE L.J. 1015, 1015–17 (2021) (concluding that the future of *Chevron* "may be the most significant question right now in all of administrative law").

146 Jonathan H. Choi, *Legal Analysis, Policy Analysis, and the Price of Deference: An Empirical Study of* Mayo *and* Chevron, 38 YALE J. ON REG. 818, 820 (2021) (citing Peter M. Shane & Christopher J. Walker, *Foreword:* Chevron *at 30: Looking Back and Looking Forward*, 83 FORDHAM L. REV. 475, 475 (2014)). For a defense of *Chevron*'s constitutionality, see Craig Green, Chevron *Debates and the Constitutional Transformation of Administrative Law*, 88 GEO. WASH. L. REV. 654 (2020).

147 142 S. Ct. 661 (2022) (per curiam). On the same day it issued its decision in *NFIB*, in another per curiam opinion, the Court, by a 5–4 vote, refused to grant a stay sought by litigants claiming that an interim final rule issued by the Department of Health and Human Services that required health care facilities participating in Medicare or Medicaid to ensure that their covered staff are vaccinated against COVID-19 was beyond the Department's statutory authority. *See* Biden v. Missouri, 142 S. Ct. 647, 652–54 (2022) (per curiam). More recently, the Court confirmed that the major questions doctrine is a strong clear statement rule that limits statutory delegations of regulatory authority. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2614 (2022); for further discussion of *West Virginia*, see *infra* notes 155, 159.

148 *See, e.g.*, Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 477 (2021) (footnotes omitted) (describing a "strong version" of the doctrine that "operates as a clear statement principle, in the form of a firm barrier to certain agency interpretations"); Cass R. Sunstein, *The American Nondelegation Doctrine*, 86 GEO. WASH. L. REV. 1181, 1203 (2018) ("[T]he major questions doctrine, understood as a nondelegation canon, has fully arrived."). Justice Kavanaugh was a proponent of this strong version of the doctrine when he sat on the D.C. Circuit. *See* U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 421–22 (D.C. Cir. 2017) (en banc) (Kavanaugh, J., dissenting from the denial of reh'g en banc).

149 *See NFIB*, 142 S. Ct. at 670.

150 COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402, 61552 (2021) (codified at 29 C.F.R. § 1910.501(d)) (providing that an "employer must establish, implement, and enforce a written mandatory vaccine policy," but exempting employers from this requirement "if the employer establishes, implements, and enforces a written policy

In a per curiam opinion, the Court in *NFIB* reversed the Sixth Circuit's refusal to stay the standard, concluding that the parties challenging the standard were likely to prevail on their claim that OSHA lacked the authority to issue it.[151] In particular, because OSHA sought "to exercise powers of vast economic and political significance,"[152] it lacked authority unless the statute "plainly authorizes" the mandate.[153] Although this Article will not delve into the details of the interpretive question, because OSHA's standard would seem to fall comfortably within the statutory text,[154] the majority's conclusion that it did not highlights just how powerful this clear statement rule is.[155]

The implications of the strong version of the major questions doctrine for separation of powers jurisprudence are spelled out at greater length in Justice Gorsuch's concurring opinion, joined by Justices Thomas and Alito. Justice Gorsuch explained that the federal govern-

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allowing any employee not subject to a mandatory vaccination policy to choose either to . . . be fully vaccinated . . . or provide proof of regular testing . . . and wear a face covering"); *see also NFIB*, 142 S. Ct. at 671 (Breyer, J., dissenting) (charging that the majority "obscured" the option the standard gave employers of insisting that all employees either be vaccinated or test regularly and wear masks "by insistently calling the policy 'a vaccine mandate'").

151 *NFIB*, 142 S. Ct. at 663.

152 *Id.* at 665 (quoting Ala. Ass'n of Realtors v. Dep't of Health and Hum. Servs., 141 S. Ct. 2485, 2489 (2021)); *see also id.* (stating that "[t]his is no 'everyday exercise of federal power.' It is instead a significant encroachment into the lives—and health—of a vast number of employees" (quoting *In re* MCP No. 165, 20 F.4th 264, 272 (6th Cir. 2021) (Sutton, C. J., dissenting))).

153 *Id.*

154 Under 29 U.S.C. § 655(c)(1), OSHA may issue temporary emergency standards if "employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards," and the "emergency standard is necessary to protect employees from such danger." The majority did not attempt to deny that these conditions were met.

155 *See NFIB*, 142 S. Ct. at 665. The majority's principal interpretive argument was that the OSHA Act authorizes workplace health and safety standards, not standards to address "the hazards of daily life." *Id.* The standard was "strikingly" different from "the workplace regulations that OSHA has typically imposed" because it "cannot be undone at the end of the workday." *Id*.

The Court removed any doubts about the status and operation of the major questions doctrine in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), which the Court decided shortly before this Article went to press. In *West Virginia*, the Court invoked the doctrine to reject an attempted exercise of EPA's authority under the Clean Air Act to regulate greenhouse gas emissions from existing electric power plants. *Id.* at 2616. The Court made it clear that the doctrine does not simply negate the applicability of *Chevron*. Instead, it requires a reviewing court to begin its statutory interpretation analysis by applying a strong presumption that Congress did not want the agency to have the authority it claims. The agency may not rebut that presumption simply by providing a "plausible textual basis" for its assertion of authority. *Id.* at 2609. Rather, "both separation of powers principles and a practical understanding of legislative intent" require that the agency "point to 'clear congressional authorization' for the power it claims." *Id*. (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

ment must exercise its limited powers in a manner consistent with the Constitution's separation of powers.[156] He identified "at least one firm rule" that ensures that it does so—the major questions doctrine, which requires Congress to "speak clearly" if it wishes to assign to an executive agency decisions "of vast economic and political significance."[157] Justice Gorsuch explicitly linked the major questions doctrine to the nondelegation doctrine, emphasizing that "[i]t ensures that the national government's power to make the laws that govern us remains where Article I of the Constitution says it belongs—with the people's elected representatives."[158] "In this respect," he explained, "the major questions doctrine is closely related to what is sometimes called the nondelegation doctrine."[159] Justice Gorsuch reasoned that the major questions doctrine "guard[s] against unintentional, oblique, or otherwise unlikely delegations of the legislative power," provides "'a vital check on expansive and aggressive assertions of executive authority,'"[160] and blocks agencies from seeking to "exploit" statutory gaps or ambiguities to assume responsibilities not intended by Congress.[161] This concern with administrative agencies run amok is also evident in Justice Gorsuch's opinions on the separation of powers implications of agency adjudication, as we describe below.[162]

The Supreme Court's reliance on separation of powers principles to prevent agencies from interpreting their regulatory powers broadly has not been limited to the major questions doctrine. A number of

156 *Id.* at 667 (Gorsuch, J., concurring).

157 *Id.* (quoting *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489).

158 *Id.* at 668.

159 *Id.*; *see also id.* at 668–69 ("Both [the major questions doctrine and the nondelegation doctrine] are designed to protect the separation of powers and ensure that any new laws governing the lives of Americans are subject to the robust democratic processes that the Constitution demands."); *id.* at 669 ("The nondelegation doctrine ensures democratic accountability."). Justice Gorsuch relied even more heavily on the nondelegation doctrine in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), in which he argued that employment of the nondelegation doctrine is necessary "to vindicate the Constitution," and explained that "while we all agree that administrative agencies have important roles to play in a modern nation, surely none of us wishes to abandon our Republic's promise that the people and their representatives should have a meaningful say in the laws that govern them." *Id.* at 2624 (Gorsuch, J., concurring).

160 *NFIB*, 142 S. Ct. at 669 (quoting U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of reh'g en banc)).

161 *Id.* Quoting the late Justice Scalia, Justice Gorsuch described both the major questions and nondelegation doctrines as serving "to prevent 'government by bureaucracy supplanting government by the people.'" *Id.* (quoting Antonin Scalia, *A Note on the* Benzene *Case*, AM. ENTER. INST. J. ON GOV'T & SOC'Y 25, 27 (1980)).

162 *See* Thryv, Inc. v. Click-To-Call Techs., L.P., 140 S. Ct. 1367, 1387 (2020) (expressing concern over "unfettered executive power over individuals, their liberty, and their property"); *infra* Section III.A.1.

Justices have criticized deference to agency interpretations of their own regulations under *Auer v. Robbins*.[163] In *Kisor v. Wilkie*,[164] a narrow majority of the Court declined to overturn *Auer*, rejecting the litigants' argument that *Auer* deference violates separation of powers by "usurping the interpretive role of courts."[165] Justice Kagan's plurality opinion, which reflected her functionalist approach to separation of powers, rejected concerns about a "supposed commingling of functions" and concluded that there was no separation of powers violation because "courts retain a firm grip on the interpretive function."[166]

Nonetheless, the plurality set forth a number of limitations that greatly limit the scope of *Auer* deference,[167] a point that Chief Justice Roberts emphasized in his separate concurrence.[168] After *Kisor*, *Auer* deference applies only if (1) the regulation is "genuinely ambiguous" after exhausting "all the 'traditional tools' of construction"; (2) the agency construction is "reasonable" and "within the zone of ambiguity"; and (3) "the character and context of the agency interpretation entitles it to controlling weight," because (a) it is "the agency's 'authoritative' or 'official position'"; (b) it implicates the agency's "substantive expertise"; and (c) it "reflect[s] 'fair and considered judgment.'"[169] Like the major questions doctrine and other emerging limits on *Chevron* deference, these restrictions limit the scope of *Auer* deference and provide an easy way for courts to refuse to apply it.

Justice Gorsuch authored a lengthy concurrence in *Kisor*, joined by Justice Thomas and in part by Justices Kavanaugh and Alito, argu-

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163 519 U.S. 452 (1997). Although it is often referred to as *Auer* deference, that decision actually confirmed the approach to judicial review of regulatory interpretations taken previously in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). *Id.* at 461.

164 139 S. Ct. 2400 (2019).

165 *Id.* at 2421. Justice Kagan's opinion was joined by Justices Breyer, Ginsburg, and Sotomayor in its entirety and in part by Chief Justice Roberts. Four Justices—Gorsuch, Thomas, Kavanaugh, and Alito—indicated their support for overruling *Auer*. *Id.* at 2425 (Gorsuch, Thomas, Kavanaugh, and Alito JJ., concurring in the judgment). Given Justice Barrett's replacement of Justice Ginsburg, there may now be five votes for overturning *Auer*.

166 *Id.* at 2421–22; *see also id.* at 2422 (quoting City of Arlington v. FCC, 569 U.S. 290, 304–05 (2013)) ("That sort of mixing is endemic in agencies, and has been 'since the beginning of the Republic.'"). Because these statements were included in a portion of the opinion that Chief Justice Roberts declined to join, only a plurality of the Justices signed onto them.

167 *Id.* at 2414–18.

168 *See id.* at 2424 (Roberts, C.J., concurring in part) ("The majority catalogs the prerequisites for, and limitations on, *Auer* deference: The underlying regulation must be genuinely ambiguous; the agency's interpretation must be reasonable and must reflect its authoritative, expertise-based, and fair and considered judgment; and the agency must take account of reliance interests and avoid unfair surprise.").

169 *Id.* at 2415–17.

ing that *Auer* should be overruled.[170] Of particular relevance here, Justice Gorsuch took the view that *Auer* deference compromises judicial independence in violation of Article III by allowing the executive branch to "say what the law is," thereby improperly "denying the people their right to an independent judicial determination of the law's meaning."[171] The current status of *Auer* deference thus closely parallels that of *Chevron* deference. Both have been attacked as incompatible with Article III. Although neither has been overruled, both have been greatly eroded and may not long survive.

These developments, taken together with the other manifestations of a new separation of powers formalism, suggest that the time is ripe for a more formalist analysis of another separation of powers issue—that is, the extent to which administrative agencies may engage in adjudication. Before considering the contours of what such a new Article III formalism might look like, in the following Section we examine the evolution and status of the current doctrine on agency adjudication.

II. Non-Article III Adjudication

The focus of this Part is on how separation of powers formalism may affect agency authority to adjudicate cases, which the Court's recent decisions have not yet addressed in any comprehensive fashion.[172] To lay the foundations for the analysis of this question, this Part begins with a review of the current doctrine on "non-Article III adjudication."[173] Article III vests the judicial power in an independent

170 *See id.* at 2425–48 (Gorsuch, J., concurring in the judgment). Justice Gorsuch argued first that *Auer* is inconsistent with the Administrative Procedure Act, which directs the reviewing court to "decide all relevant questions of law" and "determine the meaning or applicability of the terms of an agency action," 5 U.S.C. § 706, and requires agencies to follow notice and comment procedures when they want to change a regulation. *See id.* at 2432–35. He then contended that *Auer* deference violates Article III, which is the part of the opinion relevant here. *See id.* at 2437–41. In addition, Justice Gorsuch challenged the plurality's policy justifications for *Auer* and its reliance on *stare decisis*. *See id.* at 2441–47.

171 *Id*. at 2441; *accord id.* at 2440. This view, which this Article explores further *infra* notes 266–68 and accompanying text, is central to Justice Gorsuch's formalist approach to non-Article III adjudication, which we discuss in Part III of the article. *See infra* Section III.A.1.

172 Nonetheless, there are some signs of dissatisfaction, such as Justice Gorsuch's dissent in *Thryv, Inc. v. Click-To-Call Techs., L.P.*, 140 S. Ct. 1367, 1388–89 (2020) (Gorsuch, J., dissenting). Likewise, the appointment and removal power cases, such as *Free Enterprise Fund*, *Lucia*, *Arthrex*, and *Collins*, have enhanced at least to some degree presidential power over the appointment and removal of agency adjudicators. *See supra* Section I.B.2.

173 This Article uses this term generically to refer to adjudication by tribunals whose adjudicatory officials lack life tenure and salary protections, including administrative adjudication, adjudication by Article I—or legislative—courts, and adjudication by adjuncts to the federal

judiciary, as reflected in its structural separation from the legislative and executive branches[174] and Article III's provisions giving judges life tenure and salary protection.[175] Notwithstanding these structural safeguards, current doctrine permits adjudication by various tribunals whose members lack life tenure and salary protections.[176] This doctrine is convoluted and obscure, but ultimately reflects a functional accommodation that broadly permits non-Article III adjudication, provided that Article III courts retain the essential attributes of judicial power. Nonetheless, many aspects of this doctrine are poorly explained and make little sense, which suggests that it may be ripe for a formalist reassessment.

A. The Early Cases

Like much of the law, the law of non-Article III adjudications has been path-dependent in the sense that early decisions and doctrinal choices have shaped its subsequent development. Of particular importance here are two concepts that continue to shape the analysis: (1) the concept of Article I or legislative courts that may exercise some judicial power outside the confines of Article III; and (2) a distinction between public rights that may be freely assigned to non-Article III tribunals and private rights for which non-Article III tribunals may only act as adjuncts to the Article III courts. Both of these doctrines are poorly explained and frequently misunderstood. To lay the foundations for an alternative account of non-Article III adjudication, the Article begins with an overview of the origins and evolution of both doctrines.

1. Article I (Legislative) Courts

In two important pre-Civil War decisions, *American Insurance Co. v. Canter*[177] and *Dynes v. Hoover*,[178] the Supreme Court upheld

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courts—such as magistrates and bankruptcy courts. In using this term, the authors do not mean to imply that adjudication by all these tribunals necessarily takes place outside of Article III.

174 *See generally* U.S. Const. art. I; U.S. Const. art. II.

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

176 These tribunals include not only administrative agencies, but also Article I courts of various kinds and other judicial adjuncts, such as magistrates and special masters. *See infra* Section II.A.1.

177 26 U.S. (1 Pet.) 511, 546 (1828) (upholding territorial courts staffed by judges without life tenure or salary protections).

adjudication by territorial courts and military tribunals. These cases introduced the concept of Article I or legislative courts exercising judicial power that was created by Congress rather than Article III itself, and therefore did not have to be exercised by the Article III judiciary.[179] Whatever the merits of this concept in relation to territorial or military courts, however, its extension to other kinds of Article I courts is problematic and largely unexplained.[180]

In *Canter*, the Court upheld the adjudication of cases by territorial courts whose judges lacked life tenure or salary protections.[181] This arrangement did not violate Article III even though the territorial courts exercised jurisdiction over matters, such as common law civil actions and criminal prosecutions, that qualified as judicial in nature. Chief Justice Marshall explained:

> [The territorial courts] are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States.[182]

The core idea appears to be that Congress exercises the general authority to govern the territories that would otherwise be exercised by states, including the power to provide for the adjudication of cases and controversies outside of Article III.[183] The Court followed a simi-

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178 61 U.S. (20 How.) 65, 79 (1857) (upholding military courts staffed by judges without life tenure or salary protections).

179 *See Canter*, 26 U.S. (1 Pet.) at 534; *Dynes*, 61 U.S. (20 How.) at 79. The designation of such tribunals as "Article I courts" or "legislative courts" is unfortunate because it is inaccurate and misleading. Article I courts are clearly not part of the legislative branch and are not congressional agencies. Nonetheless, we will continue to use the conventional terminology.

180 As the Article discusses more fully below, the authors think that a better explanation for these cases might be that these judicial functions are properly considered part of the executive power to administer territories in the possession of the United States and to command the military. *See infra* note 188 and accompanying text.

181 *See Canter*, 26 U.S. (1 Pet.) at 534.

182 *Id.* at 546.

183 *See id.* ("Although admiralty jurisdiction can be exercised in the states in those Courts, only, which are established in pursuance of the 3d article of the Constitution; the same limitation does not extend to the territories. In legislating for them, Congress exercises the combined powers of the general, and of a state government."). The same reasoning supports the constitutionality of local courts for the District of Columbia staffed by non-Article III judges. *See* Palmore v.

lar rationale in *Dynes* to uphold the creation of military courts that operate outside of Article III.[184]

Although these early decisions establish historical precedents for non-Article III tribunals, their reasoning is problematic in several respects. Legislative or Article I courts are created by Congress to adjudicate disputes arising under federal laws,[185] but that does not distinguish them from any other lower federal courts. More fundamentally, these courts cannot be part of the legislative branch or derive their authority from Article I because Congress cannot exercise judicial powers under any approach to the separation of powers.[186] Conversely, these courts cannot be exercising legislative power because they are not Congress and do not follow bicameralism and presentment procedures.

Nor does it make sense to say that a part of the judicial power operates outside of Article III, which vests the federal judicial power in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[187] If what these courts exercise is judicial power, then separation of powers would seem to require that they must be part of the judicial branch.[188] Nonetheless,

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United States, 411 U.S. 389, 400–04 (1973) (analogizing local courts in the District of Columbia to other non-Article III tribunals, including territorial courts and courts martial).

184 *See Dynes*, 61 U.S. (20 How.) at 79 ("Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations; and . . . the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other."); *see also* O'Callahan v. Parker, 395 U.S. 258, 261 (1969) ("[T]he exigencies of military discipline require the existence of a special system of military courts in which not all of the specific procedural protections deemed essential in Art. III trials need apply."); U.S. *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955) ("[T]he Constitution does not provide life tenure for those performing judicial functions in military trials."). The War Powers Clauses, U.S. Const., art. I, § 8, "supply Congress with ample authority to establish military commissions and make offenses triable by military commission." Bahlul v. United States, 840 F.3d 757, 761 (D.C. Cir. 2016) (Kavanaugh, J., concurring).

185 *See supra* notes 177–84 and accompanying text.

186 *See supra* Section I.A.

187 U.S. Const. art. III, § 1. That some cases and controversies within the federal judicial power might be resolved by state courts represents a fundamentally different question than the adjudication of cases and controversies by federal courts that lack life tenure and salary protections.

188 *See*, *e.g.*, Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 67 (2015) (Thomas, J., concurring in the judgment) ("[T]he Constitution identifies three types of governmental power and, in the Vesting Clauses, commits them to three branches of Government . . . . These grants are exclusive."). An alternative theory that might validate territorial and military courts would be that even the resolution of common law cases or criminal disputes can be considered executive in character when it is integral to the administration of the territories and the military. *See* Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 Yale L.J. 341, 388 (1989); *see also*

this sort of reasoning and the designation of such tribunals as Article I or legislative courts stuck and it continues to shape current doctrine in unfortunate ways. The characterization of territorial and military courts within the separation of powers context is not material to this Article's analysis of administrative adjudication, but the reliance on these cases to create and approve of other kinds of "Article I courts" is.[189]

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infra note 321 and accompanying text (suggesting that criminal prosecutions in general represent the vindication of public rights). *But see* Baude, *supra* note 33, at 1569 ("Territorial courts . . . do exercise judicial power rather than executive power.").

Justice Scalia regarded territorial courts as exercising neither federal judicial nor executive power. *See* Freytag v. Comm'r, 501 U.S. 868, 913 (1991) (Scalia, J., concurring in part and concurring in the judgment) (emphases omitted) (stating that territorial courts "do not exercise the national executive power—but neither do they exercise any national judicial power. They are neither Article III courts nor Article I courts, but Article IV courts—just as territorial governors are not Article I executives but Article IV executives."). To support that characterization, he relied on Chief Justice Marshall's opinion in *American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828), in which Marshall stated that territorial courts are not "constitutional Courts," but instead are "legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of [the Property Clause, U.S. CONST. art. IV, § 3, cl. 2,] which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States." *Freytag*, 501 U.S. at 913 (Scalia, J., concurring in part and concurring in the judgment); *see also* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 64 (1982) (recognizing the "exceptional" nature of territorial courts in that "the congressional assertion of a power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers"); Mark D. Rosen, *The Radical Possibility of Limited Community-Based Interpretation of the Constitution*, 43 WM. & MARY L. REV. 927, 944 (2002) ("Congress has utilized the Property Clause to create 'territorial courts' (also known as Article IV courts) in the U.S. territories."). In other contexts, congressional reliance on the Property Clause may excuse noncompliance with obligations normally attached to the exercise of a given form of governmental power. *See, e.g.*, Robert L. Glicksman, *Severability and the Realignment of the Balance of Power Over the Public Lands: The Federal Land Policy and Management Act of 1976 After the Legislative Veto Decisions*, 36 HASTINGS L.J. 1, 51–64 (1984) (considering whether reliance on the Property Clause to enact legislation governing the public lands eliminates the need to comply with bicameralism and presentment requirements but concluding that it probably does not). Nevertheless, some proponents of the unitary executive have argued that even though territorial courts are created pursuant to powers vested in Congress under the Property Clause, "those courts must conform to the dictates of Article III" in that they are "inferior Courts" whose judges must "have tenure during good behavior and guarantees against diminishment in salary while in office." Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the* Hamdan *Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1035 (2007) (emphasis omitted). This Article does not take a position on whether territorial courts exercise power that is not judicial in the Article III sense.

189 *See* Williams v. United States, 289 U.S. 553, 566 (1933) (upholding the Article I Court of Claims because "legislative courts possess and exercise judicial power—as distinguished from legislative, executive, or administrative power—although not conferred in virtue of the third article of the Constitution"). Whatever the merits of the Court's analysis of territorial and military courts, the reasoning of *Williams* is difficult to square with Article III.

2. *Public and Private Rights*

A second concept that shapes current doctrine is the distinction between public and private rights. Under this distinction, although public rights are the proper subjects of a case or controversy, Congress may freely assign their adjudication to Article I courts or administrative agencies.[190] In contrast, private rights are at the core of the judicial power and Congress may not assign their adjudication to non-Article III tribunals unless the Article III courts retain the essential attributes of judicial power.[191]

The court introduced this distinction in *Murray's Lessee v. Hoboken Land & Improvement Co.*,[192] another pre-Civil War decision. The case involved a tax collector who had absconded with his collected taxes rather than hand them over to the government. Under the applicable statutes, an administrative official audited the accounts and, upon the determination of a deficiency, the Secretary of the Treasury issued a distress warrant authorizing the seizure and sale of the tax collector's property.[193] The case involved a suit by the collector's creditors against the party who had purchased the collector's property at the distress sale. The creditors argued that the seizure and sale—which involved a determination by officials in the executive branch, rather than by an Article III court—violated due process and Article III.[194]

In a lengthy, confusing, and poorly understood opinion that established certain key principles,[195] the Court rejected these claims.[196] First, it acknowledged that there is an overlap between executive and judicial power, observing that the auditing of a receiver of public funds "may be, in an enlarged sense, a judicial act," but so, too, were many administrative actions that "involve[] an inquiry into the existence of facts and the application to them of rules of law."[197] Thus, "it is not sufficient to bring such matters under the judicial power, that

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190 James F. Pfander & Andrew G. Borrasso, *Public Rights and Article III: Judicial Oversight of Agency Action*, 82 Ohio St. L.J. 493, 501–02 (2021).

191 *Id.* at 545.

192 59 U.S. (18 How.) 272 (1855) (upholding administrative determination of tax collector liability for deficiencies).

193 *See id.* at 274–75.

194 *See id.* at 275–76.

195 *See* Charles Jordan Tabb, *The Bankruptcy Reform Act in the Supreme Court*, 49 U. Pitt. L. Rev. 477, 489 n.61 (1988) (listing *Murray's Lessee* as one of a number of "confusing" and hard to reconcile decisions); Pfander & Borrasso, *supra* note 190, at 496–97 (referring to the confusion stemming from varying interpretations of *Murray's Lessee*).

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

197 *Id.* at 280.

they involve the exercise of judgment upon law and fact."[198] Second, in a famous and oft-quoted passage, the Court further distinguished between public and private rights:

> 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.[199]

In subsequent cases, the Court relied on the public rights doctrine to uphold non-Article III adjudication of public rights by both Article I courts and administrative agencies.[200]

The Court in *Murray's Lessee* did not clearly explain the distinction between public and private rights, leading to many different and conflicting perspectives on these concepts. [201] Because the opinion stated broadly 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,"[202] subsequent decisions often linked the concept of public rights to sovereign immunity.[203] Other decisions, however, have

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198 *Id.*

199 *Id.* at 284.

200 Thus, for example, although *Murray's Lessee* involved an administrative determination, the Court relied on the public rights doctrine to uphold the adjudication of a tariff dispute by an Article I court in *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929) (reasoning that legislative courts may be used "to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it," and stating broadly that "[t]he mode of determining matters of this class is completely within congressional control").

201 For further discussion of the meaning of public rights, see *infra* notes 308–21 and accompanying text (concluding that public rights are rights belonging to the public whose assertion is a proper executive function).

202 *Murray's Lessee*, 59 U.S. (18 How.) at 283.

203 *See*, *e.g.*, *Ex parte* Bakelite, 279 U.S. at 452 (describing claims against the United States as "[c]onspicuous" examples of public rights and explaining that claimants do not "have any right to sue on them unless Congress consents; and Congress may attach to its consent such conditions as it deems proper, even to requiring that the suits be brought in a legislative court specially created to consider them"); *see also* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 67–68 (1989) (Scalia, J., concurring) (describing "the device of waiver of sovereign immunity" as

drawn the sovereign immunity rationale for public rights into question by extending the public rights doctrine to cases in which the government is not a party.[204] The Court's most recent decisions have generally relied on the public rights doctrine, defined historically, to resolve cases involving non-Article III adjudication.[205]

A final piece of the historical puzzle was added decades after *Murray's Lessee* in *Crowell v. Benson*,[206] which upheld the administrative determination of compensation for injured maritime workers. Because the claim arose between private parties, the Court concluded that its public rights precedents did not apply.[207] Nonetheless, Congress could vest the initial factual determinations of compensation claims in an administrative agency, whose function was similar to special masters and other "adjunct factfinders" who may assist the courts without violating Article III.[208] Critically, however, *Crowell* indicated that when non-Article III tribunals decide matters of private rights under this adjunct theory, Article III courts must retain the "essential attributes of the judicial power."[209] In particular, the Court indicated that courts must conduct de novo review of questions of law and of determinations of jurisdictional and constitutional facts.[210]

After *Crowell v. Benson*, the doctrine of non-Article III adjudication included both formal and functional elements. The distinction be-

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"central" to the reasoning of *Murray's Lessee*). As will be developed more fully below, the authors think this view misinterprets *Murray's Lessee* and the public rights doctrine, which is better understood as reflecting the view that the enforcement of rights on behalf of the public is an executive act. *See infra* notes 314–31 and accompanying text; *see also* Richard E. Levy & Sidney A. Shapiro, *Government Benefits and the Rule of Law: Toward a Standards-Based Theory of Judicial Review*, 58 ADMIN. L. REV. 499 (2006) [hereinafter Levy & Shapiro, *Standards-Based Theory*] (advancing similar view); Pfander & Borrasso, *supra* note 190 at 550 (rejecting claim that *Murray's Lessee* turned on a waiver of sovereign immunity).

204 *See infra* notes 239–40 (discussing the expansion of public rights in *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985), and *Granfinanciera*, 492 U.S. 33 (1989)).

205 *See infra* Section II.C. (discussing re-emergence of the public rights doctrine); *infra* Section III.A.1. (discussing Justice Gorsuch's approach to non-Article III adjudication).

206 285 U.S. 22 (1932).

207 *Id.* at 51 ("The present case does not fall within the categories [of public rights] just described but is one of private right, that is, of the liability of one individual to another under the law as defined.").

208 *Id.* (reasoning that in private rights cases "there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges").

209 *Id.*

210 *See id.* at 54 ("[T]he reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases."); *id.* at 63 (construing the statute to allow a federal court to "determine for itself the existence of . . . fundamental or jurisdictional facts").

tween public and private rights was a bright-line rule that permitted non-Article III adjudication of certain categories of public rights. When the categorical allowance for non-Article III adjudication of public rights did not apply because a claim involved private parties, the adjunct theory provided for a functional inquiry into whether Article III courts retained the essential attributes of judicial power. In practice, the combination of these two doctrines permitted most forms of non-Article III adjudication.

B. The Functionalist Transformation

After *Crowell v. Benson*, the doctrine remained relatively stable until the 1980s, when a series of decisions reframed the doctrine in functionalist terms. This functionalist approach involved an open-ended balancing of multiple factors, such as the non-Article III tribunal's jurisdiction and powers, the scope of review by Article III courts, and the nature of the rights involved. It also merged the public rights doctrine and the adjunct theory as part of a broader inquiry into whether adjudication outside of Article III impermissibly encroached upon the judicial power.

The transformation of the doctrine began with *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[211] which held that the bankruptcy courts' broad jurisdiction to resolve private claims in bankruptcy proceedings violated Article III. First, the plurality concluded that the adjudicatory authority of the bankruptcy courts could not be sustained under cases upholding territorial courts, courts martial, or adjudication of public rights by legislative courts and administrative agencies.[212] The plurality began by observing that although "[t]he distinction between public rights and private rights has not been definitively explained[,][213] . . . a matter of public rights must at a minimum arise 'between the government and others.'. . . .' "[214] On the other hand, the plurality continued, " 'the liability of one individual to another under the law as defined' is a matter of private rights."[215] The plurality reasoned further that "*only* controversies [involving public rights] may be removed from Art. III courts and delegated to legislative courts or administrative agencies for their determination."[216]

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211 458 U.S. 50 (1982).

212 *Id.* at 65–70.

213 *Id.* at 69 (citing Crowell v. Benson, 285 U.S. 22, 51 (1932)).

214 *Id.* (quoting *Ex parte* Bakelite Corp., 279 U.S. 438, 451 (1929)).

215 *Id.* at 69–70 (citation omitted) (quoting *Crowell*, 285 U.S. at 51).

216 *Id.* at 70.

Second, the plurality also declined to uphold bankruptcy courts as "adjuncts" to the federal district courts, distinguishing *Crowell v. Benson*.[217] In particular, unlike *Crowell*, the bankruptcy courts' jurisdiction was not limited to legislatively created rights but rather extended to traditional common law rights.[218] More fundamentally, to pass muster under the adjunct theory, "the functions of the adjunct must be limited in such a way that 'the essential attributes' of judicial power are retained in the Art. III court."[219] After reviewing the statutory provisions concerning the jurisdiction, authority, and district court review of bankruptcy courts, the Court concluded that the statute "impermissibly removed most, if not all, of 'the essential attributes of the judicial power' from the Art. III district court, and . . . vested those attributes in a non-Art. III adjunct."[220]

The decision in *Northern Pipeline* cast doubt on other adjudications by Article I courts and administrative agencies, but the Court acted quickly to remove those doubts. In *Thomas v. Union Carbide Agricultural Products Co.*,[221] the Court rejected the premise that the "public rights/private rights dichotomy of *Crowell* and *Murray's Lessee* . . . provides a bright-line test for determining the requirements of Article III."[222] The Court in *Thomas* also stated that the right of a pesticide registrant to receive compensation from follow on registrants who used its data to support their request for registration under the federal pesticide regulatory statute "is not a purely 'private' right, but bears many of the characteristics of a 'public' right."[223] Accordingly, the narrow grant of jurisdiction over such claims to an arbitral panel did not deprive the Article III courts of the essential attributes of judicial power even though they retained only a very narrow scope of review.[224]

Subsequently, in *Commodity Futures Trading Commission v. Schor*,[225] the Court upheld the adjudication of common law contract counterclaims by an administrative agency. In so doing, the Court adopted a quintessentially functionalistic three-part test for adminis-

217 *Id.* at 81.

218 *See id.* at 84–85.

219 *Id.* at 81.

220 *Id.* at 87.

221 473 U.S. 568 (1985).

222 *Id.* at 585–86.

223 *Id.* at 589.

224 *Id.* at 592–93.

225 478 U.S. 833 (1986).

trative adjudication,[226] observing that prior cases "weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary."[227] These factors included:

> [(1)] the extent to which the 'essential attributes of judicial power' are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, [(2)] the origins and importance of the right to be adjudicated, and [(3)] the concerns that drove Congress to depart from the requirements of Article III.[228]

Applying these factors in *Schor*, the Court elaborated further on each. First, the CFTC did not exercise the "essential attributes of judicial power."[229] In discussing this factor, the Court emphasized that the CFTC's jurisdiction was limited and that courts retained the power to review the CFTC's decisions under conventional administrative law standards of review.[230] It also noted that the CFTC did not exercise other incidental powers, such as conducting jury trials or enforcing its own subpoenas.[231] Second, the "nature of the claim" included consideration of whether a public or private right was involved, but this factor was not determinative.[232] Indeed, even though the particular claim at issue was a state common law claim "assumed to be at the 'core' of matters normally reserved to Article III courts,"[233] the Court upheld its adjudication by the CFTC.[234] Finally, the Court indicated that Congress's reason for giving the CFTC jurisdiction—to make "effective a specific and limited federal regulatory scheme"—also favored the con-

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226 Indeed, the Court began with the observation that "[i]n determining the extent to which a given congressional decision to authorize the adjudication of Article III business in a non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch, the Court has declined to adopt formalistic and unbending rules." *Id.* at 851. Justice Gorsuch expressed his concerns about this approach in his dissenting opinion in *Thryv, Inc. v. Click-To-Call Techs., L.P.*, 140 S. Ct. 1367, 1388–89 (2020) (Gorsuch, J., dissenting).

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

228 *Id.* (enumeration added).

229 *See id.* at 851.

230 *See id.* at 852–53.

231 *See id.* at 853.

232 *Id.*

233 *Id.*

234 *Id.* at 857 ("We conclude that the limited jurisdiction that the CFTC asserts over state law claims as a necessary incident to the adjudication of federal claims willingly submitted by the parties for initial agency adjudication does not contravene separation of powers principles or Article III.").

stitutionality of the CFTC's adjudication of the claim.[235] *Schor* itself seemed to treat this three-part test as authoritative and overarching, but subsequent cases have returned to a more formalist distinction between public and private rights.

C. The Re-emergence of Public Rights

Not long after *Schor* appeared to adopt a functionalistic three-part test for non-Article III adjudication, the Court began to reintroduce the distinction between public and private rights as a formalistic bright-line rule. Even as it did so, however, the Court also appeared to expand the definition of public rights to encompass many seemingly private rights. In addition, it continued to suggest that non-Article III adjudicators may be able to decide some private rights cases, including possibly common law claims, if the Article III courts retain the essential attributes of judicial power. As a result, there are few limits, outside the bankruptcy courts, on non-Article III adjudication.

In *Granfinanciera, S.A. v. Nordberg*,[236] the Court held that adjudication of fraudulent conveyance claims by bankruptcy courts without a jury violated the Seventh Amendment. Relying on past decisions holding that adjudication of public rights without a jury did not violate the Seventh Amendment,[237] *Granfinanciera* expressly equated the concept of public rights for purposes of Article III and the Seventh Amendment.[238] At the same time, however, the Court sowed confusion concerning the definition of public rights. Stating that *Thomas v. Union Carbide* had "rejected the view that a matter of public rights must at a minimum arise between the government and others,"[239] the

235 *Id.* at 855. The Court, however, did not indicate whether some reasons might be improper (and, if so, which ones) or otherwise weigh against the validity of non-Article III adjudication.

236 492 U.S. 33 (1989).

237 *See*, *e.g.*, Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442 (1977) (upholding adjudication of OSHA violations by the Occupational Safety and Health Review Commission against a Seventh Amendment challenge).

238 *See Granfinanciera*, 492 U.S. at 53 (stating that "if a statutory cause of action . . . is not a 'public right' for Article III purposes, then Congress may not assign its adjudication to a specialized non-Article III court . . . [a]nd if the action must be tried under the auspices of an Article III court, then the Seventh Amendment affords the parties a right to a jury trial").

239 *Id*. at 54 (citation omitted). With all due respect, however, the *Granfinanciera* Court overstated the reasoning of *Thomas*. The Court in *Thomas* rejected an absolute rule against adjudication of private rights by non-Article III tribunals. *See* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 585–86 (1985) ("This theory that the public rights/private rights dichotomy of *Crowell* and *Murray's Lessee* . . . provides a bright-line test for determining the requirements of Article III did not command a majority of the Court in *Northern Pipeline*. Insofar as appellees interpret that case and *Crowell* as establishing that the right to an Article III forum is

Court declared that rights between private parties qualify as public rights when "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, has created a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary."[240] Because *Granfinanciera* involved a Seventh Amendment challenge, however, it was unclear whether the Court's treatment of public rights adjudications as per se valid would extend to Article III challenges.

In *Stern v. Marshall*,[241] the Court invalidated the adjudication of a common law defamation counterclaim by a bankruptcy court as a violation of Article III. In doing so, it apparently confirmed that *Granfinanciera's* categorical treatment of public rights applies in the context of both Article III and Seventh Amendment challenges.[242] The adjudication of a common law defamation claim violated Article III because that claim "does not fall within any of the varied formulations of the public rights exception in this Court's cases."[243] The Court also rejected the application of the adjunct theory relied on in *Crowell v. Benson*, citing *Northern Pipeline* in concluding that "it is

absolute unless the Federal Government is a party of record, we cannot agree."). But it did not purport to redefine public rights. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 69 (1982) (footnote omitted) ("The distinction between public rights and private rights has not been definitively explained in our precedents. Nor is it necessary to do so in the present cases . . . ."). Instead, *Thomas* explained that "the right created by [the Federal Insecticide, Fungicide, and Rodenticide Act] is not a purely 'private' right, but bears many of the characteristics of a 'public' right." *Thomas*, 473 U.S. at 589. Thus, although *Thomas* may represent the first step along the path toward redefining public rights, it was *Granfinanciera* that completed the journey.

Conversely, although it is often assumed that the government's status as a party is sufficient to establish that a public right is involved, *Jarkesy v. Sec. & Exch. Comm'n*, 34 F.4th 446 (5th Cir. 2022), casts doubt on that assumption. The court held that an administrative enforcement action for securities fraud initiated by the SEC violated the Seventh Amendment because it deprived the defendant of a jury trial. *Id.* at 451. Although the government was a party to the adjudication, the court regarded that fact as a necessary but not sufficient basis for characterizing the rights at issue as public rights. The rights were private rights because fraud prosecutions were regularly brought in English courts at common law, and actions seeking civil penalties are akin to special types of action in debt that sought remedies that could only be enforced at common law. *See id.* at 453–57. The court's reasoning implies that if a statutory public right overlaps with a private common law right, the Seventh Amendment requires a jury trial.

240 *Granfinanciera*, 492 U.S. at 54 (internal brackets omitted). Justice Scalia, who concurred in the judgment, rejected the majority's definition of public rights because it was incompatible with the sovereign immunity rationale for public rights. *See id.* at 67–68 (describing "the device of waiver of sovereign immunity" as "central" to the reasoning of *Murray's Lessee*).

241 564 U.S. 462 (2011).

242 *Id.* at 492–95.

243 *Id.* at 493.

still the bankruptcy court itself that exercises the essential attributes of judicial power" over the defamation claim.[244] Thus, *Stern* left open the possibility that adjudication of private rights, including common law rights, by non-Article III tribunals is valid if their jurisdiction and powers are limited so that Article III courts retain the essential attributes of judicial power. Further, the Court also suggested that the doctrine might apply differently in the context of administrative adjudications.[245]

More recently, in *Oil States Energy Services v. Greene's Energy Group*,[246] the Court relied on the public rights doctrine to uphold the administrative *inter partes* review process through which the Patent and Trademark Office ("PTO") can reconsider and cancel previously issued patents under specified circumstances. Justice Thomas's opinion for the Court acknowledged that the Court had not definitively explained the doctrine and that its precedents had not been entirely consistent, but found it unnecessary to address these problems because "[i]nter partes review falls squarely within the public-rights doctrine."[247] In particular, it was well established that the *grant* of a patent was a matter of public rights arising between the government and the patentee, and "[p]atent claims are granted subject to the qualification that the PTO has 'the authority to reexamine—and perhaps cancel—a patent claim in an inter partes review.'"[248] Thus, the majority rejected the contention that a patent, once granted, becomes a matter of private right,[249] as well as the argument that patent validity could not be withdrawn from the Article III courts because it was historically the subject of suits at common law.[250]

Justice Breyer, joined by Justices Ginsburg and Sotomayor, offered a brief concurrence for the sole purpose of emphasizing that "the Court's opinion should not be read to say that matters involving private rights may never be adjudicated other than by Article III courts, say, sometimes by agencies."[251] Justice Gorsuch, joined by Chief Justice Roberts, argued in dissent that once patents are granted,

244 *Id.* at 500.

245 *See id.* at 494 ("Given the extent to which this case is so markedly distinct from the agency cases discussing the public rights exception in the context of such a regime, however, we do not in this opinion express any view on how the doctrine might apply in that different context.").

246 138 S. Ct. 1365 (2018).

247 *Id.* at 1373.

248 *Id.* at 1374 (citation omitted).

249 *See id.* at 1375–76.

250 *See id.* at 1376–78.

251 *See id.* at 1379 (Breyer, J., concurring).

they become matters of private right and that the history of common law adjudication of patents precludes their assignment to non-Article III tribunals.[252]

In sum, the current doctrine concerning administrative adjudication is confusing and poorly defined. Nonetheless, administrative adjudication is generally valid under one of two theories. Under the first theory, administrative adjudication is broadly permissible because Congress may vest the determination of so-called "public rights" in either the Article III courts or non-Article III tribunals. The Court has not clearly explained, however, why this should be so.[253] Under the second theory, administrative agencies adjudicate cases as adjunct factfinders for the courts, by analogy to magistrates and special masters. This theory allows Congress to vest limited jurisdiction in non-Article III tribunals over specifically defined claims that may not qualify as public rights. It does not, however, save the broad jurisdiction of the bankruptcy courts, which therefore may not adjudicate private common law claims.[254]

Ultimately, notwithstanding some formalistic elements, the analysis of adjudication by non-Article III tribunals is very functionalistic in character; it tolerates Article I courts that do not clearly belong in any branch, acknowledges the mixed functions of non-Article III tribunals, and focuses primarily, as in *Schor*, on whether a particular institutional structure upsets the balance among the three branches by divesting the courts of the essential attributes of judicial power. Nonetheless, there are signs of an emerging Article III formalism. In particular, Justice Gorsuch's dissent in *Oil States*, together with his dissent in

252 *See id.* at 1380–86 (Gorsuch, J., dissenting).

253 At one point in time, the sovereign immunity theory might have provided an explanation, but that explanation was also problematic for several reasons. First, sovereign immunity did not bar all remedies against the government; suits for injunctive relief against executive officers were permitted under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). Second, the ability to withhold consent does not in fact mean that Congress can grant sovereign immunity on whatever terms and conditions it might wish. *See*, *e.g.*, Republican Party of Minnesota v. White, 536 U.S. 765, 788 (2002) (observing that the "greater power to dispense with [judicial] elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance" in violation of the First Amendment) (alteration omitted). For example, Congress could not employ consent to suit by members of one race and deny that consent to members of other races without violating the Equal Protection Clause. Finally, even if sovereign immunity did at one time explain the doctrine, once the Court extended the definition of public rights to include rights that arise between private parties, sovereign immunity could no longer provide a justification for the doctrine. *See generally infra* notes 308–13 and accompanying text (discussing these objections).

254 *See supra* notes 236–45 and accompanying text (discussing *Granfinanciera* and *Stern v. Marshall*).

a subsequent case involving *inter partes* patent review,[255] reflects a dissatisfaction with this functionalist doctrine and sketches out his vision for a new Article III formalism that could gain traction as part of the broader resurgence of separation of powers formalism.

III. A Formalistic Reassessment of Administrative Adjudications

Given the emergence of the Court's new separation of powers formalism, it seems likely that the Court will also reassess its doctrine on non-Article III adjudication. This Part of the Article considers what such a formalistic reassessment might look like. It begins by piecing together the elements of a new Article III formalism that are reflected in the Court's recent decisions and concludes that this approach would embrace the distinction between private and public rights. Relying on that distinction, the emerging formalism would require Article III courts to determine any matter involving private rights but permit determination of public rights—historically defined—by non-Article III tribunals. After identifying the problems with this approach, this Article offers an alternative analysis focused on the availability and scope of judicial review that is consistent with separation of powers formalism and would be much more workable.

A. Article III and Separation of Powers

Although it is not yet fully formed, there are clear signs of a new formalist conception of Article III. Aspects of this conception are reflected in emerging critiques of *Chevron* and *Auer* deference[256] and in a pair of recent decisions concerning *inter partes* review of patents. This conception begins with the premise that the government cannot take away a person's rights without the involvement of the independent Article III judiciary, especially concerning the interpretation of applicable law.[257] This premise, however, is qualified by the public rights doctrine, which permits executive action to determine public rights without any judicial involvement. For other rights, this Article III formalism would appear to demand that the Article III judiciary

255 Thryv, Inc. v. Click-To-Call Techs., L.P., 140 S. Ct. 1367, 1378–89 (2020) (Gorsuch, J., dissenting); *see infra* notes 265–73 (discussing Justice Gorsuch's dissents in *Oil States* and *Thryv*).

256 *See supra* notes 136–40 and accompanying text (discussing formalist critique of *Chevron* deference); *supra* notes 163–71 and accompanying text (discussing formalist critique of *Auer* deference).

257 This principle was the starting point for Justice Gorsuch's dissents in *Oil States* and *Thryv*, discussed more below. *See infra* Section III.A.1.

must play a role, including de novo authority to interpret statutes and regulations, and to resolve other legal questions.

1. Justice Gorsuch's Private Rights Formalism

Justice Gorsuch has been the most forceful advocate of a new Article III formalism. Although elements of this view are reflected in his critiques of *Chevron* and *Auer* deference, the focus here is on a pair of dissenting opinions in two recent cases involving *inter partes* patent review: *Oil States Energy Services, L.L.C. v. Greene's Energy Group*,[258] and *Thryv, Inc. v. Click-to-Call Technologies, L.P.*[259] *Inter partes* review is a process through which parties may petition the PTO to cancel previously granted patents on specified grounds related to patentability.[260] Under current statutes, *inter partes* review is conducted by APJs within the PTO who are subject to good-cause removal protections.[261] As discussed above,[262] *Oil States* relied on the public rights doctrine to reject a patent holder's argument that "actions to revoke a patent must be tried in an Article III court before a jury."[263] In *Thryv*, the Court interpreted a provision foreclosing judicial review of the PTO's decision to institute *inter partes* review broadly so that the provision precludes judicial review of the PTO's decision to institute review based on an untimely petition.[264] The

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258 138 S. Ct. 1365 (2018).

259 140 S. Ct. 1367 (2020). Justice Gorsuch also relied on this approach in his concurring opinion in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). *See supra* notes 170–71 and accompanying text (discussing Justice Gorsuch's separation of powers critique of deference to an agency's interpretation of its own regulations).

260 *See* 35 U.S.C. § 311(a)–(b) ("[A] person who is not the owner of a patent may file with the Office a petition to institute an inter partes review of the patent [and] request to cancel as unpatentable 1 or more claims of a patent only on a ground that could be raised under section 102 or 103 and only on the basis of prior art consisting of patents or printed publications.").

261 *See generally* United States v. Arthrex, 141 S. Ct. 1970, 1977 (2021) (describing the Patent Trial and Appeal Board); *id.* at 1979–80 (describing the appointment of Administrative Patent Judges who adjudicate cases for the Board); *id.* at 1987 (describing the applicability of good cause removal requirements). The appointment and status of APJs was the issue in *Arthrex*, which permitted the Director of the PTO to review their decisions de novo so as to convert them into inferior officers. *See supra* note 115 and accompanying text.

262 *See supra* notes 246–52 and accompanying text.

263 *Oil States*, 138 S. Ct. at 1372; *cf. Thryv*, 140 S. Ct. at 1378 (Gorsuch, J., dissenting) ("Today the Court takes a flawed premise—that the Constitution permits a politically guided agency to revoke an inventor's property right in an issued patent—and bends it further, allowing the agency's decision to stand immune from judicial review.").

264 Under 35 U.S.C. § 314(d), the director's determination whether to institute an *inter partes* review is "final and nonappealable." Under 35 U.S.C. § 315(b), *inter partes* review is barred if the petition requesting it is filed more than one year after the petitioner is served with a complaint alleging infringement. *Thryv* held that § 314(d) foreclosed judicial review of a patent holder's claim that the PTO instituted *inter partes* review in violation of § 315(b). *Thryv*, 140 S.

Thryv majority did not discuss Article III or the constitutionality of foreclosing review, but rather focused solely on the interpretation of the statute that precluded review.

Justice Gorsuch dissented in both cases, articulating a broad principle that Article III courts must resolve cases and controversies involving "personal rights."[265] In Justice Gorsuch's view, moreover, once a patent has been granted, it becomes the private property of the patent holder that cannot be canceled or withdrawn without involvement of the Article III judiciary.[266] The central premise of Justice Gorsuch's objection in both *Oil States* and *Thryv* is that Article III operates as a check on executive action that interferes with life, liberty, or property:

> As the majority [in *Oil States*] saw it, patents are merely another public franchise that can be withdrawn more or less by executive grace. So what if patents were, for centuries, regarded as a form of personal property that, like any other,

Ct. at 1385. In an earlier case, the Court interpreted § 314(d) to preclude review when a challenge to institution of *inter partes* review is based on "questions that are closely tied to the application and interpretation of statutes related to the Patent Office's decision to initiate inter partes review." Cuozzo Speed Techs., L.L.C. v. Lee, 579 U.S. 261, 275–76 (2016). *Thryv* therefore represented an extension of the preclusion of review to matters unrelated to the statutory grounds for initiating *inter partes* review.

265 *Oil States*, 138 S. Ct. at 1380 (Gorsuch, J., dissenting) ("Until recently, most 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."). Justice Gorsuch was joined in his *Oil States* dissent by Chief Justice Roberts. *Id.* He was also joined in his *Thryv* dissent by Justice Sotomayor, although she did not join his harshest denunciations of the Court's functional Article III analysis. *Thryv*, 140 S. C.t at 1387 (Gorsuch, J. dissenting).

266 In both dissents, Justice Gorsuch analogized the grant of a patent to the acquisition of a homestead, emphasizing that once a homesteader had satisfied the conditions for a patent in land, the homestead became private property subject to the full measure of constitutional protection. *See Oil States*, 138 S. Ct. at 1385 (internal citations omitted) ("[W]hile the Executive has always dispensed public lands to homesteaders and other private persons, it has never been constitutionally empowered to withdraw land patents from their recipients (or their successors-in-interest) except through a judgment of a court."); *see also Thryv*, 140 S. Ct. at 1387 (Gorsuch, J., dissenting) ("Much like an inventor seeking a patent for his invention, settlers seeking these governmental grants had to satisfy a number of conditions. But once a patent issued, the granted lands became the recipient's private property, a vested right that could be withdrawn only in a court of law."). The majority, however, emphasized that the grant of a patent, unlike the grant of a homestead, is conditioned on the possibility that it may be withdrawn using *inter partes* review. *See Oil States*, 138 S. Ct. at 1374 (concluding that the distinction between the initial grant of a patent and *inter partes* review after it has been granted "does not make a difference" because "[p]atent claims are granted subject to the qualification that the PTO has 'the authority to reexamine—and perhaps cancel—a patent claim' in an inter partes review") (quoting *Cuozzo*, 579 U.S. at 267); *see also* Assiniboine & Sioux Tribes v. Nordwick, 378 F.2d 426, 429 (9th Cir. 1967) (noting that in public land law, a "disposal" of land by the United States pursuant to a statute such as the Homestead Act refers to a "final and irrevocable act").

> could be taken only by a judgment of a court of law. So what if our separation of powers and history frown on unfettered executive power over individuals, their liberty, and their property. What the government gives, the government may take away—with or without the involvement of the independent Judiciary.[267]

In effect, Justice Gorsuch advocated a categorical rule that Article III requires an independent judiciary to review agency decisions that affect private property, and other protected rights, in much the same way that the unitary executive principle requires Presidential control over matters within the executive branch.[268]

This formalistic rule, however, is subject to a formalistic exception for matters of public rights, which can be decided without the involvement of the judiciary.[269] Thus, neither of Justice Gorsuch's dissents challenged the public rights doctrine itself, but rather disputed the conclusion in *Oil States* that patents remain public rights after they have been granted. Both the majority and the dissent in *Oil States*, moreover, focused on the historical treatment of patents to determine whether they are public rights.[270] In *Thryv*, Justice Gorsuch also expressed his disdain for the more functionalistic aspects of the Court's Article III jurisprudence, particularly the *Schor* test, disparaging Justice Breyer's view "that agencies should be allowed to withdraw even private rights if 'a number of factors'—taken together, of course—suggest it's a good idea."[271] Justice Gorsuch's view of administrative

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267 *Thryv*, 140 S. Ct. at 1387.

268 Justice Gorsuch's concurrence in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), relied on a similar premise. *See id.* at 2440 ("The judicial power has always been understood to provide the people with a neutral arbiter who bears the responsibility and duty to 'expound and interpret' the governing law, not just the power to say whether *someone else's* interpretation, let alone the interpretation of a self-interested political actor, is 'reasonable.'"); *id.* at 2441 (arguing that *Auer* "den[ies] the people their right to an independent judicial determination of the law's meaning").

269 This exception apparently reflects the view that "public rights" are not rights at all, but rather may be allocated in the discretion of government. *See* Kent Barnett, *Due Process for Article III—Rethinking* Murray's Lessee, 26 Geo. Mason L. Rev. 677, 678 (2019) (arguing that "extending the public-rights exception, in general, only to matters concerning privileges or benefits . . . is best"); Thomas W. Merrill, *Fair and Impartial Adjudication*, 26 Geo. Mason L. Rev. 897, 906, 914–15 (2019) [hereinafter Merrill, *Impartial*] (calling the public rights exception "nebulous" and arguing that the exception should apply "only to discretionary government benefits, such as entitlement programs, subsidy programs, immigration rights, and government employment"). This approach would reinstitute the rights-privilege distinction and subject many critically important governmentally created interests to, in Justice Gorsuch's terms, "unfettered executive power." *See infra* notes 281–83 and accompanying text.

270 *See Oil States*, 138 S. Ct. at 1375–78 (majority opinion); *id.* at 1381–85 (Gorsuch, J., dissenting).

271 *Thryv*, 140 S. Ct. at 1389 (Gorsuch, J., dissenting) (referencing *Schor* and Justice

adjudication in *inter partes* review cases resonates with his recent Article III criticism of *Chevron* and *Auer* deference.[272] Both rest on the core premise that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[273]

2. Analytical Concerns Associated with Article III Formalism

Although the authors agree with the core premise that Article III requires the involvement of the independent judiciary in the resolution of cases or controversies, they believe that it would be a mistake for the Court as a whole to adopt Justice Gorsuch's approach to determining the limits of administrative adjudicatory authority. This Part of the Article considers that approach, highlighting its focus on an individual right to Article III adjudication. This approach, the authors conclude, does not adequately account for the structural component of Article III within the larger separation of powers framework. As a result, it would permit Congress to transfer all but a narrow band of traditional common law private rights claims to the unreviewable discretion of administrative agencies. Conversely, it would also commit the courts to an extensive historical inquiry in determining the validity of many administrative adjudications. Ultimately, as is developed in Sections III.B and III.C, there is an alternative understanding of administrative adjudication that is consistent with Article III formalism, protects the role of an independent Article III judiciary in the structure of government, and is workable in practice.

One striking feature of Justice Gorsuch's analysis is his characterization of Article III adjudication as involving "personal rights."[274] Although the cases have long recognized that Article III has both structural and individual rights components, separation of powers is ordinarily understood primarily in structural terms.[275] To be sure, sep-

Breyer's concurring opinion in *Oil States*); *see also id.* (emphasis omitted) (citations omitted) ("These 'factors' turn out to include such definitive and easily balanced considerations as the 'nature of the claim,' the 'nature of the non-Article III tribunal,' and the 'nature and importance of the legislative purpose served by the grant of adjudicatory authority to a tribunal with judges who lack Article III's tenure and compensation protections.' In other words, Article III promises that a person's private rights may be taken only in proceedings before an independent judge, unless the government's goals would be better served by a judge who isn't so independent.").

272 *See supra* notes 136–40 and accompanying text (discussing formalist critique of *Chevron* deference); *supra* notes 163–71 and accompanying text (discussing formalist critique of *Auer* deference).

273 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

274 *See supra* note 265 and accompanying text.

275 Thus, for example, the Court in *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986) described its task as "determining the extent to which a given congressional decision

aration of powers is a structural arrangement that protects individual rights and liberties,[276] but it does so indirectly by preventing the concentration of power and promoting the rule of law.[277] Even if individual private parties have standing to raise separation of powers challenges when government action in violation of separation of powers requirements causes them an injury, the doctrine does not ordinarily characterize these claims in terms of individual rights, such as an individual right to bicameralism and presentment or to presidential oversight.[278]

Of course, Article III may be different insofar as the jurisdiction of the Article III judiciary to decide cases and controversies is necessarily attached to the interests of individual litigants. Nonetheless, any individual right to an Article III court also sounds in due process, and might be better understood in those terms.[279] When the federal government deprives people of protected interests in life, liberty, or property, the process due in at least some cases arguably includes the involvement of the Article III judiciary. There is a clear overlap between Article III and due process, especially in the context of the pub-

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to authorize the adjudication of Article III business in a non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch." *Id.* at 851. In addition, the Court addressed this question even though the party challenging adjudication by an administrative agency had waived any personal right to an Article III court. *See id.* at 849 ("In the instant cases, Schor indisputably waived any right he may have possessed to the full trial of Conti's counterclaim before an Article III court.").

276 *Cf.* Clinton v. City of New York, 524 U.S. 417, 497 (1998) (Breyer, J., dissenting) (arguing that because statutory provisions creating a line-item veto "compl[ied] with separation-of-powers principles," they did not "threaten the liberties of individual citizens").

277 *See id.* at 450 (Kennedy. J., concurring) ("Separation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty.").

278 Parties may, of course, raise separation of powers challenges to government actions that injure them, such as claims that officers of the United States were improperly appointed. Although some of the cases in which the Court has agreed to resolve such challenges, such as *Lucia*, suggest that parties have the right to the determination of their claims by properly appointed officers, the primary focus of the unitary executive theory is structural. *See supra* notes 108–09 and accompanying text. By the same token, the Court's legislative power cases focus primarily on structure. *See, e.g.*, *Clinton*, 524 U.S. at 450 (Kennedy, J., concurring) ("So convinced were the Framers that liberty of the person inheres in structure that at first they did not consider a Bill of Rights necessary."); *see* INS v. Chadha, 462 U.S. 919, 946 (1983) ("The very structure of the Articles delegating and separating powers under Arts. I, II, and III exemplify the concept of separation of powers . . . .").

279 The same could be said for the Seventh Amendment, which is an explicit specification of one core element of fair procedures. *See* U.S. Const. amend. VII.

lic rights doctrine, insofar as *Murray's Lessee* dealt with both due process and Article III claims.[280]

Understanding Justice Gorsuch's analysis in due process terms highlights its correlation with the traditional right-privilege distinction that the Court repudiated for purposes of due process in *Goldberg v. Kelly*.[281] In particular, Justice Gorsuch accepted the premise that the initial award of a patent was a matter of executive discretion (a mere privilege), but argued that once awarded, a patent becomes private property that is therefore protected by Article III (a right).[282] Insofar as the Court's due process jurisprudence is designed to protect individual rights, any individual right to an Article III tribunal might be addressed more coherently under the Due Process Clause.[283]

The more important point for present purposes, however, is that Article III analysis must account for the structural role of the Article III courts and protect the structural interests of the federal judiciary. Focusing on the structural issues raised by non-Article III adjudication highlights the importance of a critically important factor that is often ignored in the cases: the status and character of the non-Article III tribunal.[284] When Congress allocates jurisdiction to the bankruptcy courts, which were the focus of *Marathon*, *Granfinanciera*, and *Stern v. Marshall*, the structural interests of the judiciary are only minimally implicated because bankruptcy courts are adjuncts of the district court and bankruptcy judges are removable by the courts for good cause.[285]

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280 Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 275–80, 283–86 (1855).

281 397 U.S. 254 (1970).

282 *See* Thryv, Inc. v. Click-to-Call Techs., L.P., 140 S. Ct. 1367, 1387 (2020) (Gorsuch, J., dissenting) (criticizing the Court's decision as treating patents as "merely another public franchise that can be withdrawn more or less by executive grace"); Oil States Energy Servs., L.L.C. v. Greene's Energy Grp., 138 S. Ct. 1365, 1385 (2018) (Gorsuch, J., dissenting) ("Just because you give a gift doesn't mean you forever enjoy the right to reclaim it. And, as we've seen, just because the Executive could *issue* an invention (or land) patent did not mean the Executive could *revoke* it.").

283 It should not be surprising that the Court's conservative majority might seek to reinstitute the right-privilege distinction. This Article does not take a position on that issue, other than to suggest that such a course of action should be undertaken directly and explicitly, rather than through the "back door" of the public rights doctrine.

284 Although the Court has occasionally adverted to the potential differences between adjudication by the bankruptcy courts and adjudication by administrative agencies, *see, e.g.*, Stern v. Marshall, 564 U.S. 462, 487 (2011), the cases tend to treat adjudication by Article I courts and administrative agencies indiscriminately. *See supra* Sections II.B–C.

285 *See* 28 U.S.C. § 151 ("In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district."); *See* 28 U.S.C. § 152(e) ("A bankruptcy judge may be removed during the term for which such bankruptcy judge is appointed, only for incompetence, misconduct, neglect of duty,

Granting jurisdiction to the bankruptcy courts may dilute the power of the Article III judiciary, but it does not give away any judicial power to another branch of government.[286] By way of contrast, administrative agencies are squarely part of the executive branch,[287] so legislation that takes part of the judicial power and gives it to administrative agencies raises much more serious structural concerns.[288]

Equally important, as the Court underscored in *Schor*, the structural interests of the federal courts may be implicated even when the adjudication of a matter does not implicate any individual right to an Article III court.[289] This is particularly true regarding the courts' role in protecting the rule of law—which applies even when executive action does not deprive anyone of a private right.[290] By focusing solely on the individual rights perspective and the public rights doctrine, Justice Gorsuch's approach would permit Congress to bar judicial review of a broad array of executive actions on the theory that Congress may remove matters involving public rights entirely from the purview of the courts. This outcome would be incompatible with Article III and the rule of law.

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or physical or mental disability and only by the judicial council of the circuit in which the judge's official duty station is located.").

286 In addition, given these provisions, it is appropriate to consider the bankruptcy courts, like magistrate judges and special masters, as adjuncts of the Article III judiciary. Similarly, because bankruptcy adjudications do not raise serious structural issues, it makes sense to permit private parties to consent to the jurisdiction of the bankruptcy courts.

287 *See supra* Section I.B.3. Leaving bankruptcy courts aside, it is not entirely clear whether Article I courts are part of the legislative, executive, or judicial branch, or perhaps belong somewhere else in the structure of government. *See supra* notes 177–89 and accompanying text (discussing precedents dealing with Article I courts). Thus, for example, the Supreme Court treated the Tax Court as a "court" for purposes of the Appointments Clause in *Freytag v. Comm'r*, 501 U.S. 868, 888–90 (1991), while the Court of Appeals for the District of Columbia Circuit rejected a challenge to the President's authority to remove Tax Court judges on the ground that the Tax Court was part of the executive branch and thus, in effect, an administrative agency in *Kuretski v. Comm'r*, 755 F.3d 929, 939 (D.C. Cir. 2014) (concluding that it was unnecessary to address the validity of interbranch removal of Tax Court judges by the President because "the Kuretskis have failed to persuade us that Tax Court judges exercise their authority as part of any branch other than the Executive").

288 For this reason, this Article questions the applicability of the "adjunct" theory to administrative adjudication. It is one thing to permit adjuncts that are attached to, and controlled by, the Article III judiciary to adjudicate as adjuncts to the courts; it is another thing entirely to treat executive branch officials controlled by the President as adjuncts to the courts.

289 *See supra* note 275 and accompanying text (discussing the waiver of any Article III objection to CFTC adjudication of common law breach of contract counterclaims).

290 *See generally* Levy & Shapiro, *Standards-Based Theory*, *supra* note 203 (arguing that judicial review of executive action must be available whenever legal standards govern executive action).

Focusing on structure also underscores another important point. From a structural perspective, what matters is the availability and scope of judicial review—not whether an initial decision has been made using a process that resembles adjudication.[291] As this Article develops more fully in the following Section, this sort of initial determination ordinarily fits comfortably within the concept of executive power and does not threaten the Article III judiciary. By focusing on the public rights doctrine in connection with the initial determination of a matter by the executive branch, then, the new Article III formalism threatens to embroil the courts in a largely unnecessary historical excavation concerning the proper characterization of any matter determined by means of administrative adjudication. The historical understanding of public rights is elusive and contested.[292] In *Oil States*, for example, both Justice Thomas's majority opinion and Justice Gorsuch's dissent engaged in an extensive historical analysis of whether patents, once granted, became private rights, but reached fundamentally different conclusions.[293]

Following the path of public rights formalism to evaluate initial executive branch decisions that use quasi-adjudicatory procedures would therefore commit the courts to a complex and inconclusive historical analysis of the nature of rights adjudicated by each agency.

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291 We elaborate more fully on this point below. *See infra* Section III.C.

292 *See*, *e.g.*, Gregory Ablavsky, *Getting Public Rights Wrong: The Lost History of the Private Land Claims*, 74 STAN. L. REV. 277, 285 (2022) ("To the extent that the Court is looking to the past to guide its jurisprudence, . . . the history of private land claims demonstrates that the administrative adjudication of rights, including to property, is on firmer historical footing than current critics argue."); Jack M. Beermann, *Administrative Adjudication and Adjudicators*, 26 GEO. MASON L. REV. 861, 881, 889 (2019) (arguing that "[t]here are six categories of public rights cases, each of which present slightly different issues concerning the propriety of this assignment" and that "[t]here are three categories of private rights, each of which presents different considerations concerning the propriety of allocating them to a non-Article III tribunal"); John Harrison, *Public Rights, Private Privileges, and Article III, 54* GA. L. REV. 143, 149 (2019) (arguing that public rights represent "the proprietary interests of the government"); Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 565 (2007) [hereinafter Nelson, *Political Branches*] (defining "core private rights" as "legal entitlements that belonged to discrete individuals (rather than the public as a whole)" and concluding that as a matter of historical practice "[t]he political branches could conclusively determine various 'public matters,' but the judiciary had to be able to resolve other kinds of factual issues for itself"); Pfander & Borrasso, *supra* note 190, at 539 ("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.").

293 *See supra* notes 246–50 and accompanying text (discussing *Oil States*). This inquiry will become even more fraught and difficult if courts follow the Fifth Circuit's approach in *Jarkesy v. Sec. & Exch. Comm'n*, 34 F.4th 446 (5th Cir. 2022). *See supra* note 239 (describing *Jarkesy*'s conclusion that the administrative adjudication involved a private right even though the government was a party because fraud claims were adjudicated by courts at common law).

Even if it is ultimately the case that the vast majority of administrative adjudications would qualify under the public rights exception, this sort of historical analysis would unnecessarily consume the resources of the judiciary and private litigants without producing satisfactory answers to core questions.[294]

In addition, Justice Gorsuch's public-private rights dichotomy appears to assume that administrative adjudication involves a bilateral dispute between the government and some private entity. Administrative adjudication is not always so simple, however. Often it involves contesting private interests in the resolution of a dispute that involves government action. In ruling on an application for a permit to discharge pollutants under the Clean Water Act, for example,[295] the Environmental Protection Agency ("EPA") determines not only the interests of the permit applicant, but also the interests of downstream property owners whose lands abutting the receiving water body may be adversely affected by the discharge. The concerns of downstream landowners, moreover, may overlap with the public interests that the Clean Water Act vindicates.[296] In such cases, the same adjudication may implicate both public and private rights, and the proper characterization of some interests as public or private rights may be especially difficult.

Because of the structural and practical issues raised by Justice Gorsuch's version of Article III formalism, the Court should not venture down that road unless it is necessary to do so. Fortunately, as this Article describes in the following Section, there is an alternative approach, fully consistent with separation of powers formalism, that offers a better way to resolve these issues.

B. Administrative Adjudication, Executive Action, and Public Rights

This Article's approach rests on the recognition that there is an essential difference between the issues raised by an initial administra-

294 *Cf.* Ablavsky, *supra* note 292, at 347–48 (quoting ROBERT W. GORDON, TAMING THE PAST: ESSAYS ON LAW IN HISTORY AND HISTORY IN LAW 7 (2017)) (referring to "the 'subversive tendencies of historicism'" in distinguishing between public and private rights). Professor Ablavsky favors "an anti-formalist line of reasoning about public rights . . . that focuses more on congressional intent and entanglement with a 'public regulatory scheme' than on strict categorization." *See id.* at 348 (footnote omitted).

295 *See* 33 U.S.C. §§ 1311(a), 1342(a) (prohibiting the discharge of pollutants but providing an exception for discharges authorized by a permit issued by the EPA or a state authorized by EPA to administer the permit program).

296 *See id.* § 1251(a) (setting forth the statutory goals, including elimination of pollutant discharges and, in the interim, achievement of fishable-swimmable waters).

tive determination that uses quasi-judicial procedures and those raised by limitations on the availability and scope of judicial review.[297] Both the current doctrine and Justice Gorsuch's Article III formalism ignore this difference, which creates unnecessary confusion. In the authors' view, initial determinations are, in most cases, a permissible executive function that can be performed by administrative agencies.[298] The real Article III issue is the extent to which judicial review can be limited or foreclosed altogether. This approach is fully consistent with separation of powers formalism and would bring much needed coherence to the analysis.

1. *Initial Administrative Adjudication as Execution*

To illustrate the differing issues raised by initial agency adjudication and limits on judicial review, consider a simple example. Suppose a statute provides for administrative adjudication in a case involving traditional private rights, such as property rights. It also provides that an adversely affected party who is dissatisfied with that administrative adjudication can obtain a de novo trial in an Article III court. It is hard to see how such an arrangement would implicate the structural concerns that animate Article III, even though an agency makes the initial determination. This sort of arrangement is not unprecedented. The FCC, for example, uses a similar process when imposing civil asset forfeiture, in which it issues a notice of apparent liability, followed by a de novo judicial determination if the party contests liability.[299]

To be sure, the individual right to an Article III tribunal might be compromised if the administrative decision results in an immediate deprivation of rights and there is an excessive delay prior to the de novo trial before an Article III tribunal. This problem, however, is

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297 This Article's coauthor, Professor Levy, has previously advanced many of the points in the following discussion in an article he coauthored with the authors' friend and colleague, Sid Shapiro. *See* Levy & Shapiro, *Standards-Based Theory*, *supra* note 203, at 519–25.

298 From this perspective, the public rights doctrine can explain why initial adjudication by administrative agencies is constitutionally permissible, but it also highlights some potential issues for Article I courts, whose location within the branches of government is unclear. To the extent that Article I courts are considered to be part of the executive branch, they are the functional equivalent of administrative agencies. *See* Kuretski v. Comm'r, 755 F.3d 929, 939 (D.C. Cir. 2014) (concluding that Tax Court judges exercise their authority as part of the executive branch). Article I courts that are part of the judiciary, such as the bankruptcy courts, present distinctive separation of powers issues that are beyond the scope of this Article, as is the unique status of the territorial courts.

299 *See generally* GLICKSMAN & LEVY, *supra* note 56, at 989 (describing process). Similarly, in Kansas, where Professor Levy lives, statutes provide for an administrative revocation or suspension of a driver's license for specified grounds, followed by a de novo trial. *See* KAN. STAT. ANN. 8-259.

primarily an issue of due process, as reflected in numerous decisions addressing the extent to which due process requires a pre- or post-deprivation hearing.[300] In some cases, due process may require an Article III remedy before the administrative action can affect a deprivation of protected rights.[301] But the initial administrative determination of most matters relating to the implementation of a statute is no different than the decision to initiate a prosecution or bring a civil action on behalf of the government. Thus, the initial determination of such matters would not encroach on the independent judiciary's Article III power.

Put simply, the initial determination by an administrative agency implementing a federal statute does not violate separation of powers or Article III because such a determination is an executive function properly vested in administrative agencies that are part of the executive branch.[302] This premise is reflected in the Court's recent appointment and removal cases, which treat administrative adjudicators as officers of the United States who must be accountable to the President.[303] *United States v. Arthrex, Inc.*,[304] is particularly instructive, insofar as it is another case, like *Oil States* and *Thryv*, involving *inter partes* review. *Arthrex* emphasized that "[o]nly an officer properly appointed to a principal office may issue a final decision binding the Executive

300 This process might implicate individual rights, to the extent that a judicial determination of the underlying individual interests is delayed. Here again, understanding the individual rights implications of administrative adjudication in due process terms is instructive in that the question of pre- or post-deprivation remedies is a recurrent one in procedural due process challenges. *See*, *e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546–47 (1985) (concluding that due process required only minimal pretermination process for tenured teacher in large part because teacher would receive a full hearing after the termination); Mathews v. Eldridge, 424 U.S. 319, 349 (1976) (concluding that Social Security disability insurance recipient was not entitled to full hearing prior to the termination of benefits); Goldberg v. Kelly, 397 U.S. 254, 270 (1970) (holding that welfare recipients were entitled to a full hearing before the termination of their benefits); *see also* Parratt v. Taylor, 451 U.S. 527, 544 (1981) (concluding that the negligent destruction of a prisoner's private property did not violate due process because the prisoner had an adequate tort remedy under state law).

301 *Cf.* Sackett v. EPA, 566 U.S. 120, 125–28 (2012) (concluding that EPA administrative compliance orders are subject to pre-enforcement review because of their significant and immediate impact on the private property rights of landowners).

302 *See* City of Arlington v. FCC, 569 U.S. 290, 304 n.4 (2013) (citing U.S. CONST. art. II, § 1, cl. 1) ("[Agency actions] take 'legislative' and 'judicial' forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power.'").

303 *See supra* notes 109–18 and accompanying text (discussing *Free Enterprise Fund*, *Lucia*, *Seila Law*, *Arthrex,* and *Collins*).

304 141 S. Ct. 1970 (2021) (holding that APJs whose decisions were not subject to review by Director of the PTO were principal officers who must be appointed by the President with Senate consent but allowing the Director to make final decisions so that judges would qualify as inferior officers). *See supra* notes 115–16, 125 and accompanying text.

Branch," thus applying the unitary executive theory to administrative adjudication.[305] The extent to which the quasi-adjudicatory and due process implications of administrative adjudications would support a good-cause limitation on the removal of adjudicators in the executive branch, at least those who qualify as inferior officers, remains unresolved.[306]

2. *Executive Power to Vindicate Public Rights*

This understanding dovetails nicely with the public rights doctrine and offers a superior approach to the alternative explanations of *Murray's Lessee* conventionally advanced by courts and commentators. Those alternatives generally rely on the premise that, because Congress holds the greater power to foreclose all remedies, it has the lesser power to create remedies that do not involve the Article III judiciary.[307] This sort of rationale, however, does not stand up to careful examination, especially from a structural perspective. This Article offers an alternative, structural understanding of public rights under which initial determinations concerning public rights are executive in character.

As previously discussed, the Court traditionally linked the public rights doctrine to sovereign immunity, on the theory that when the government is a party, it cannot be sued without its consent.[308] Because Congress could prevent any remedy whatsoever by withholding consent, the theory continues, it may consent to more limited remedies before administrative agencies or Article I courts.[309] Justice Gorsuch's approach is similar, but relies on the premise that public rights are interests that do not qualify as rights and that may therefore be doled out as a matter of executive discretion without any judicial involvement. These theories, however, cannot explain the public rights doctrine because—even if Congress need not provide a remedy—any

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

306 *See generally* Levy & Glicksman, *ALJ Independence*, *supra* note 9, at 68–80 (discussing separation of powers issues surrounding good cause limits on ALJ removal); *see also supra* note 110 (discussing application of *Free Enterprise Fund's* rule against dual good cause removal provisions to ALJs in Jarkesy v. Sec. & Exch. Comm'n, 34 F.4th 446 (5th Cir. 2022)).

307 *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 67 (1982) (plurality opinion) (stating that "the public-rights doctrine also draws upon the principle of separation of powers, and a historical understanding that certain prerogatives were reserved to the political Branches of Government").

308 *See supra* notes 203–04 and accompanying text.

309 This premise is questionable because sovereign immunity would not bar all remedies against the government. *See supra* note 253; *infra* notes 348–51 and accompanying text.

remedy Congress does provide cannot ignore other constitutional requirements, including separation of powers requirements.

In this regard, the early constitutional decision in *Hayburn's Case*[310] is directly on point. The case involved the determination of veterans' benefits, a quintessential public right and one for which a remedy against the government would seem to implicate sovereign immunity.[311] Under the statute, federal judges would make an initial eligibility determination, which would be reviewed by the Secretary of War, who could confirm it or set it aside.[312] Several Justices, while riding circuit, concluded that this arrangement violated the separation of powers because it subjected a judicial determination to review and correction by officials within the executive branch.[313] If sovereign immunity or the allocation of mere privileges allows Congress to provide remedies that would otherwise infringe on the judicial power in violation of Article III, then *Hayburn's Case* was wrongly decided.

Once the idea that the greater power to deny remedies includes the lesser power to limit those remedies to non-Article III tribunals is discounted, the public rights doctrine rests on vague and largely unexplained statements that public rights determinations involve the exercise of executive power.[314] Although the Court has not fully explained it, the authors think this understanding of public rights adjudications as executive in nature makes perfect sense upon a close examination of *Murray's Lessee*, which suggests that "public rights" are best understood as rights belonging to the public.[315] The enforcement of such rights on behalf of the public is a quintessential executive function.

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310 2 U.S. (2 Dall.) 409 (1792).

311 *See id.* at 409.

312 *See id.* at 410.

313 *See* Plaut v. Spendthrift Farm, 514 U.S. 211, 218 (1995) (stating that *Hayburn's Case* "stands for the principle that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch").

314 *See, e.g.*, Oil States Energy Servs., L.L.C. v. Greene's Energy Grp., L.L.C., 138 S. Ct. 1365, 1373 (2018) ("Our precedents have recognized that the [public rights] doctrine covers matters 'which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.'"); N. Pipeline Constr. Co. v. Marathon Pipe line Co., 458 U.S. 50, 68 (1982) (quoting *Ex parte* Bakelite Corp., 279 U.S. 438, 458 (1929)) ("The public-rights doctrine is grounded in a historically recognized distinction between matters that could be conclusively determined by the Executive and Legislative Branches and matters that are 'inherently . . . judicial.'").

315 Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 283 (1855) (describing "the recovery of public dues by a summary process of distress, issued by some public officer authorized by law" as "an instance of redress of a particular kind of public wrong, by the act of the public through its authorized agents").

In an often-overlooked passage, the Court in *Murray's Lessee* stated that although "both public and private wrongs are redressed through judicial action, there are more summary extrajudicial remedies for both."[316] The Court then gave three examples: (1) "[T]he recapture of goods by their lawful owner" is an example of "extra-judicial redress of a private wrong"; (2) "the abatement of a public nuisance" is an example of extra-judicial redress "of a public wrong, by a private person"; and (3) "the recovery of public dues by a summary process of distress, issued by some public officer authorized by law, is an instance of redress of a particular kind of public wrong, by the act of the public through its authorized agents."[317]

This discussion reflects three important points. First, the distinction between public and private rights refers to whether the right belongs to a private person or to the general public.[318] Private rights are held and vindicated by private parties. Public rights are rights held by the public as a whole.[319] Second, although public rights may sometimes be vindicated by private parties, as in the abatement of a public nuisance or a *qui tam* action,[320] they are most often vindicated through government action. Third, when the government does assert public rights, it is exercising an executive function. Indeed, the ordinary process of criminal prosecution accords with this analysis: the commission of a criminal offense is not only a violation of the rights of particular victims (who may be entitled to private remedies), but also a violation of the public order.[321]

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316 *Id.*

317 *Id.*

318 *See* Nelson, *Political Branches*, *supra* note 292, at 565 (defining "core private rights" as "legal entitlements that belonged to discrete individuals (rather than the public as a whole)").

319 *See id.* at 562–63 (referring to "rights held in common by the public at large" as distinct from "an individual's core 'private rights' to life, liberty, or property"). This understanding of public rights is similar to but broader than the definition advanced by Professor Harrison, who has argued that public rights reflect a more limited set of rights that accrue to the public through "the proprietary interests of the government." *See* Harrison, *supra* note 292, at 149.

320 *See* Evan Caminker, *The Constitutionality of* Qui Tam *Actions*, 99 YALE L.J. 341, 388 (1989) (quoting Abraham Lincoln, Acceptance Speech to the Republican Convention (June 16, 1858), in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 372 (R. Basler ed. 1946)) ("Authorizing private citizens to enforce the United States' legal interests through *qui tam* actions, no less than authorizing citizens to enforce their own legislatively created interests as an indirect means of implementing public policy objectives, is within Congress' power to 'judge *what* to do, and *how* to do it.'").

321 *See* Donald H.J. Hermann, *Restorative Justice and Retributive Justice: An Opportunity for Cooperation or an Occasion for Conflict in the Search for Justice*, 16 SEATTLE J. FOR SOC. JUST. 71, 89 (2017) (stating that "the penal law has moral significance because it contributes to the maintenance of public order, which is conducive to the common good"). The vindication of this public interest is the responsibility of the executive branch, which investigates the facts and

Viewed from this perspective, it is clear that most administrative adjudications fall squarely within the executive power in the sense that they involve the vindication of the public interest in implementing federal regulatory and benefit programs.[322] This sort of action is executive in character even if it involves the determination of facts and the application of the law and even if Congress chooses to require agencies to follow quasi-judicial processes in order to act.[323] Accordingly, the proper inquiry in any case of initial administrative adjudication is whether the agency is exercising executive power by implementing a public regulatory or benefit regime. This conclusion is fully consistent with a strict and formalist view of separation of powers.

In some contexts, moreover, when it implicates the vindication of a public interest arising in the context of a regulatory or benefit regime, the determination of rights that arise between private parties could properly be characterized as executive in nature.[324] This point is most evident in the context of statutory rights created as part of a comprehensive legislative regime, which explains *Granfinanciera's* expanded definition of public rights.[325] That kind of adjudication would include the right of pesticide registrants to compensation from follow-on registrants, which was at issue in *Thomas v. Union Carbide*,[326] as well as some additional agency adjudications.[327]

applies the law to determine whether a crime has been committed and by whom before prosecuting the offense. As this example further illustrates, the executive determination of public rights is not ordinarily final, but rather is subject to further judicial proceedings by Article III courts. The extent to which public rights determinations may be made without further judicial involvements is a separate question that we discuss below. *See infra* notes 340–54 and accompanying text.

322 Sovereign immunity is not relevant to this inquiry because such implementation does not involve suits against the government, although it may be relevant to the availability and scope of judicial review of administrative adjudications. *See infra* notes 348–51 and accompanying text.

323 *See* Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924, 1961 (2018) ("[A]ll administrative adjudication is, from the standpoint of constitutional law, an exercise of executive power, not of judicial power. Instead, administrative adjudication can be seen as the (preliminary) application of statutes to facts, a core executive task.").

324 *See supra* note 188 (suggesting that the power of territorial courts and the local courts in the District of Columbia might be characterized as executive in character because the resolution of private disputes is part of the administration of federal territories).

325 *See supra* notes 236–40 and accompanying text (discussing *Granfinanciera's* expansion of public rights to include congressionally created rights between private parties). Thus, contrary to Justice Scalia's objections in *Granfinanciera*, the expanded definition of public rights announced in that case is fully consistent with a proper understanding of those rights.

326 473 U.S. 568 (1985); *see supra* notes 221–24 and accompanying text.

327 Another example might be the certification of unions as representatives of workers

Even the determination of traditional common law rights might be considered executive in character if it is necessary to the vindication of the public interest in a comprehensive legislative regime, as in *Schor*.[328] Nonetheless, administrative adjudication of rights arising between private parties, especially traditional common law rights, would appear to be vulnerable to a separation of powers challenge.[329] If such rights are not public rights and their determination is therefore not executive in character, then adjudication by administrative agencies in the executive branch would run afoul of formalistic separation of powers principles. From a formalistic perspective, moreover, it would appear to violate separation of powers for executive branch agencies to function as adjuncts to the courts.[330]

In sum, although the new separation of powers formalism requires a rethinking of the current doctrine concerning administrative adjudication, it does not follow that most such adjudications are constitutionally impermissible or that an historical inquiry into the character of the underlying right is required. To the contrary, most administrative adjudication involves the exercise of executive power to vindicate public rights through the implementation of a legislative regime and is therefore fully consistent with the separation of powers.[331] This conclusion has important implications for statutes that limit judicial review, which we explore in the following Sections.

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under the National Labor Relations Act. *See* 29 U.S.C. § 159 (providing for certification of bargaining units, elections, and union representatives by the National Labor Relations Board).

328 Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986); *see supra* note 235 and accompanying text. This sort of reasoning would also apply to adjudication of common law rights and criminal prosecutions by territorial courts and local courts in the District of Columbia. *See supra* note 321 and accompanying text.

329 *Cf.* Craig A. Stern, *What's a Constitution Among Friends?—Unbalancing Article III*, 146 U. Pa. L. Rev. 1043, 1072 (1998) (footnote omitted) ("All of the judicial power must vest in the court. What is at issue is which duties render a decisionmaker a 'judge' for purposes of Article III, thereby requiring that individual to possess [Article III,] Section 1 security.").

330 *See* Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 Ind. L.J. 233, 252 (1990) ("[T]he notion that the institutional phenomenon of adjudication of disputes (public and private) by legislative courts and administrative agencies can be characterized as legitimate because these are 'adjuncts' of the courts is ludicrously inapt . . . ."). Under the unitary executive theory favored by many formalists, if agencies exercise executive power, they must be subject to the control and supervision of the president, rather than the courts, even if courts can retain the ordinary judicial review functions. *See supra* Section I.B.2. Conversely, if they exercise judicial power, they cannot be subject to the control and supervision of the president. This arrangement would not trouble a functionalist, however, because the functionalist perspective tolerates the intermingling of powers and functions provided that the balance of power among the three branches is not disturbed. *See supra* Section I.A.

331 Given the overlap between the executive and judicial powers in matters involving public

C. *Judicial Review and Judicial Power*

The structural recognition that administrative agencies that make initial decisions using adjudicatory procedures are executing the law has important implications for the availability and scope of judicial review.[332] Insofar as administrative adjudication involves the execution of the law, it does not and cannot constitute the final decision in a case or controversy that is within the jurisdiction of the Article III courts.[333] This is the central premise of Justice Gorsuch's Article III formalism.[334] Just as the executive decision to prosecute a crime is subject to a subsequent trial, so too are administrative adjudications subject to subsequent judicial proceedings as required by separation of powers—and due process.[335] Any statute foreclosing judicial review is valid, if at all, only if it is consistent with Article III.

At least since *Marbury v. Madison*,[336] it has been understood that the judicial power includes, in a proper case or controversy, the authority to determine whether executive officials have acted in accordance with the law.[337] Similarly, whatever power the President has to

rights, however, these same determinations may also be made by courts wielding the judicial power. Whether those courts must be staffed by judges with life tenure and salary protections is a separate question that must be addressed in light of the adjunct theory and the relationship between so-called "Article I courts" staffed by judges lacking these protections and the Article III judiciary. As suggested by our earlier discussion, this issue is a fascinating one. *See supra* notes 284–88 and accompanying text. But it is beyond the scope of this Article, and we will resist the temptation to go down that rabbit hole.

332 Although the availability and scope of judicial review are relevant for both administrative adjudication involving the exercise of executive power and adjudication by adjudicators acting as adjuncts to Article III courts, the two situations raise different questions that should be analyzed separately. Judicial review of administrative adjudication is a question of the proper relationship between the executive and judicial branches. Judicial review of the decisions of Article I courts is relevant to the question whether Article I courts qualify as adjuncts to Article III courts.

333 *See* Sunstein & Vermeule, *supra* note 323, at 1961 (characterizing administrative adjudication as an executive function that involves the "preliminary" application of law to facts); *see generally supra* notes 322–23 and accompanying text (discussing executive character of administrative adjudication of public rights).

334 *See supra* notes 265–68 and accompanying text.

335 *See* Greve, *supra* note 33, at 778, (supporting "a judicial system that subjects government action, so far as it interferes with a sphere of ordinary private conduct, to comprehensive, genuinely legal, and independent judicial control"); *id.* at 779 (supporting a "re-constitutionalizing [of] judicial control over executive adjudication by means of entrusting that task to independent courts").

336 5 U.S. (1 Cranch) 137 (1803).

337 *See id.* at 149. To be sure, the courts have not always adhered to this premise. For example, many agency actions are not subject to judicial review. *See* GLICKSMAN & LEVY, *supra* note 56, at 1116–71 (discussing circumstances under which statutes may preclude judicial review of agency action and where action is committed by law to an agency's unreviewable discretion).

control the execution of the laws, it does not include the power to order violations of the law.[338] Nonetheless, Congress has significant discretion when it comes to the creation and determination of the jurisdictional scope of the lower federal courts, and it may prescribe some limits on both the availability and conduct of judicial review.[339] The critical separation of powers question is when, if ever, congressional limits on the availability and scope of review violate separation of powers by encroaching on the Article III judicial power.

The analysis of this question should begin with the recognition that it is a different question than whether an initial administrative adjudication is constitutional. Whether administrative adjudication is consistent with separation of powers depends on whether it involves the exercise of executive power; the extent to which Congress may limit the availability and scope of judicial review depends on whether those limits impermissibly encroach on the powers of the judicial branch.[340] To be sure, the availability of judicial review may support the understanding that administrative adjudication is executive in nature, but the availability of such review is not essential to characterizing initial adjudications as executive because some executive actions may be exempt from judicial review as a matter of separation of powers.[341]

The availability of judicial review is a critical structural question because courts cannot ensure that administrative adjudication complies with the law if they have no jurisdiction to conduct review.[342] Nonetheless, the Supreme Court has offered little clear guidance on the extent to which Congress may foreclose judicial review of agency adjudications. It has famously gone to great lengths to construe provisions apparently foreclosing review in a manner that permits judicial review of at least some issues.[343] It has also erected a general presump-

338 Kendall v. U.S. *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 599–600 (1838) (requiring postmaster to obey judicial writ of mandamus rather than unlawful presidential directive).

339 Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1892 (2008) (acknowledging that the traditional view, "grounded in constitutional text, history, and structure," "is that Congress's power to limit the jurisdiction of the lower federal courts is plenary").

340 *See supra* Section II.B. There is also a due process element to this inquiry. *See supra* notes 279–83 and accompanying text. But our focus here is on separation of powers issues.

341 Such is the case, for example, for "political questions" that fall within the exclusive prerogatives of the President and executive branch. *See infra* note 353 and accompanying text.

342 *See*, *e.g.*, Thryv, Inc. v. Click-To-Call Techs., L.P., 140 S. Ct. 1367, 1387–89 (2020) (Gorsuch, J., dissenting) (arguing that the majority's decision upholding foreclosure of judicial review of decision to initiate *inter partes* patent review improperly abdicated judicial power).

343 *See, e.g.*, Webster v. Doe, 486 U.S. 592, 603–05 (1988); Leedom v. Kyne, 358 U.S. 184, 188–91 (1958); Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94, 107–08 (1902).

tion in favor of review that is especially powerful concerning constitutional claims.[344] Likewise, the Court's decisions on jurisdiction stripping send notoriously mixed messages.[345] Although this Article will not attempt to resolve these intractable debates here, the executive power understanding of administrative adjudication offers some insights concerning the availability and scope of judicial review.

First, Justice Gorsuch's analysis may suggest that administrative determinations that result in the deprivation of core private rights, particularly traditional common law claims, must be subject to de novo determination by an Article III court. This sort of rule would seem to apply to claims like the breach of contract counterclaim in *Schor*. If the focus is on the private right, however, it would also seem that the consent of the parties could resolve this issue, as it does when parties consent to the arbitration of common law claims with only limited judicial review.[346] Thus, for example, the authority of magistrates to resolve cases depends on consent.[347]

Second, although courts often state that matters of public rights may be resolved without any judicial involvement because sovereign

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344 *See, e.g.*, Johnson v. Robison, 415 U.S. 361, 366–374 (1974) (construing statutory provision precluding judicial review of cases arising under veterans' benefit statutes so as to permit review of constitutional challenge to denial of benefits to conscientious objectors performing alternate service but rejecting challenge on the merits).

345 *Compare Ex parte* McCardle, 74 U.S. 506 (1968) (upholding statute stripping court of jurisdiction in pending case), *with* United States v. Klein, 80 U.S. 128 (1971) (invalidating statute purporting to strip courts of jurisdiction to give effect to presidential pardon). In recent cases, the Court has struggled to determine when, if ever, a congressional statute that effectively determines the outcome in a particular case violates the judicial power. *See* Patchak v. Zinke, 138 S. Ct. 897 (2018) (upholding statute that determined outcome in land dispute with the Department of the Interior); Bank Markazi v. Peterson, 578 U.S. 212 (2016) (upholding statute that effectively determined the availability of assets for attachment); *see also* Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1045 (2010) [hereinafter Fallon, *Jurisdiction-Stripping*] ("[T]he Court has decided few cases squarely addressing the constitutionality of selective withdrawals of federal jurisdiction."); Ronald J. Krotoszynski & Atticus DeProspo, *Against Congressional Case Snatching*, 62 WM. & MARY L. REV. 791, 796–97 (2021) (criticizing the "functionalist turn" taken by the Court after *Free Enterprise Fund* and in *Patchak*, *Bank Markazi*, and *Oil States*, as a mistaken endorsement of "congressional case snatching").

346 In *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850–51 (1986), the Court concluded that a private party could not waive the structural interests of the judiciary, but Justice Gorsuch seems to regard the judiciary's role as one of protecting the personal rights of parties against the government, and those interests would seem to be waivable by consent.

347 *Compare* Gomez v. United States, 490 U.S. 858 (1989) (holding that supervision of voir dire by magistrates without the parties' consent violated Article III), *with* Peretz v. United States, 501 U.S. 923 (1991) (holding that supervision of voir dire by magistrates with the parties' consent did not violate Article III).

immunity would bar suit against the government,[348] that reading is, quite simply, wrong. It is true that sovereign immunity might prevent some remedies against the government if those remedies seek damages or their equivalent. But sovereign immunity does not preclude other remedies, such as injunctive or declaratory relief to prevent executive officers from violating the law.[349] Judicial orders setting aside or precluding enforcement of administrative adjudications do not implicate sovereign immunity unless they require the payment of damages or its equivalent.[350] At a minimum, the application of sovereign immunity as a justification for precluding any judicial involvement would have to involve a case-specific inquiry into whether sovereign immunity applies.[351]

Third, limits on the availability of judicial review for adjudication of public rights present the same sorts of separation of powers issues that limitations on review of any executive action would present. Under the rule of law, we would ordinarily expect that judicial review of executive action for compliance with the law is available in a proper case or controversy, even when the action is taken by high level officials up to and including the President.[352] To be sure, some executive actions might be exempt from review under the political question doctrine, which may explain why some public rights determinations are exempt from review.[353] Whether and to what extent Congress may divest the courts of jurisdiction, including jurisdiction to review agency adjudications, is a difficult and still unresolved constitutional question.[354] The key point for present purposes is that the answer to that

348 *See*, *e.g.*, Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568, 589 (1985) (emphasis added) (quoting N. Pipeline Constr. Co. v. Marathon Pipe line Co., 458 U.S. 50, 68 (1982)) (stating that "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").

349 *See Ex parte* Young, 209 U.S. 123 (1908).

350 *See* Edelman v. Jordan, 415 U.S. 651 (1974).

351 Thus, for example, sovereign immunity might be implicated by actions challenging the attachment of the assets of a defalcating tax collector, as in *Murray's Lessee*. *See supra* notes 192–204 and accompanying text.

352 *See* Biden v. Missouri, 142 S. Ct. 647 (2022) (upholding rule conditioning continued receipt of Medicare and Medicaid funding on compliance with mandate that non-exempt staff be vaccinated against COVID-19); GLICKSMAN & LEVY, *supra* note 56, at 114 (citing cases involving contested statutory delegations to the President).

353 *See* Levy & Shapiro, *Standards-Based Theory*, *supra* note 203, at 540–41 (suggesting that foreclosure of review would be permissible for government benefit decisions if those decisions involve standardless political discretion).

354 *See* Fallon, *Jurisdiction-Stripping*, *supra* note 345, at 1133 ("Questions involving Con-

question concerning administrative adjudication does not depend on whether public rights are involved, but rather on whether the determination constitutes a political question.

Related considerations apply to the question of the proper scope of judicial review, as reflected in the emerging separation of powers critique of *Chevron* deference.[355] Because "[i]t is emphatically the province and duty of the judicial department to say what the law is,"[356] courts must retain the final say on the interpretation of the law. That premise, however, does not necessarily preclude any deference to agencies on interpretive issues, provided that courts can enforce clear and unambiguous provisions and set aside agency decisions that are contrary to any permissible interpretation of the statute.[357] To the extent that statutory delegations pursuant to open-ended standards vest executive discretion in agencies, deference to the exercise of that discretion would be consistent with the proper judicial role.[358] Nonetheless, given current trends and the composition of the Court, we may expect the continued erosion of *Chevron* deference.[359]

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gress's power to strip jurisdiction from the federal and state courts are multifarious, multidimensional, and frequently complex.").

355 *See supra* notes 97–101, 136–40 and accompanying text.

356 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

357 *See, e.g.*, Akram Faizer & Stewart Harris, *Administrative Law Symposium Debate: A Conversation Between Akram Faizer and Stewart Harris of the Lincoln Memorial University's Duncan School of Law for the Belmont Law Review Symposium*, 8 BELMONT L. REV. 427, 442 (2021); Jonathan R. Siegel, *The Constitutional Case for* Chevron *Deference*, 71 VAND L. REV. 937, 942 (2018); Lawrence B. Solum & Cass R. Sunstein, Chevron *as Construction*, 105 CORNELL L. REV. 1465, 1471–72 (2020).

358 Justice Thomas has argued that such agency decisions either involve interpretation of the law, which falls within the judicial power, or legislative policy choices that must be made by Congress. *See supra* note 97 and accompanying text (referencing improper delegation of legislative power); *supra* notes 137–38 (referencing interference with judicial power). Whatever the limits on the delegation of legislative power may be, separation of powers formalism does not require the elimination of any and all executive discretion, which is quite simply impossible. Thus, even if the Court were to reinvigorate the nondelegation doctrine, some executive discretion would remain and deference to the exercise of that discretion would not violate the separation of powers. Indeed, judicial interference with the exercise of executive discretion would itself arguably violate separation of powers principles.

359 *See* GLICKSMAN & LEVY, *supra* note 56, at 325–28 (discussing potential narrowing of *Chevron* deference in the future). The present opposition to *Chevron* deference may have as much to do with opposition to regulation as it does to separation of powers functionalism. *See, e.g.*, Metzger, *Redux*, *supra* note 24, at 69–70 (discussing "contemporary judicial anti-administrativism" and opposition to *Chevron*); Daniel E. Walters, *Symmetry's Mandate: Constraining the Politicization of American Administrative Law*, 119 MICH. L. REV. 455 (2020) (arguing that courts have applied more rigorous scrutiny to allegations of agency "overreach" than "underreach"); Daniel Hornung, Note, *Agency Lawyers' Answers to the Major Questions Doctrine*, 37 YALE J. ON REG. 759, 780 (2020) (linking support for the "major questions" exception to *Chevron* deference to antiregulatory policy arguments). No less a separation of powers formalist than

For similar reasons, courts arguably must retain at least some authority to review factual determinations. The Court long ago recognized that review of legal determinations is not meaningful without some authority to review the facts.[360] At the same time, however, deferential review of agency factual findings is not necessarily inconsistent with the judicial power, provided the scope of review is sufficient to prevent pretextual factual determinations that purport to justify agency actions that are inconsistent with the agency's legal duties.[361] Nonetheless, we might expect a Court devoted to formalism in separation of powers jurisprudence to pay greater attention to these questions and perhaps reinstitute de novo review of some facts deemed essential to the proper exercise of judicial power.[362]

Ultimately, Article III formalism would not necessarily require de novo judicial determinations of legal or factual questions.[363] The executive branch, as a politically accountable and coequal branch of government, is entitled to a measure of deference when acting within the scope of its authority. The critical structural question, which this Article will not attempt to answer fully here, is when limits on judicial review interfere with judicial authority in violation of Article III. The important point is that this is the right question to ask when deciding whether administrative adjudication violates separation of powers.

Justice Scalia once championed *Chevron*, and current opposition to *Chevron* by conservative Justices largely emerged in response to increased regulation under Democratic presidents. *See* Green, *supra* note 7, at 657 ("chart[ing] the sudden transition from conservative support for *Chevron* to constitutional opposition" and finding that "resistance to *Chevron* entered mainstream politics only after Obama's reelection in 2012").

360 *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 357 (1816) (reasoning that authority to review state court judgments would be ineffective if limited to state court interpretations of federal law because federal law "may be evaded at pleasure" through appropriate findings of fact); *cf.* Merrill, *Impartial*, *supra* note 269, at 906 (arguing that "accurate determinations of fact are often critical to fair and impartial adjudication").

361 *See* Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94, 109–10 (1902) (concluding that the admitted facts could not "by any construction" support the application of statutes under which the Postmaster General could withhold delivery of the mail); *cf.* Dep't of Com. v. New York, 139 S. Ct. 2551, 2573–76 (2019) (sustaining district court's conclusion that Department of Commerce gave pretextual reasons for its decision to include a citizenship question on the census).

362 *See supra* note 210 and accompanying text (discussing de novo review of jurisdictional and constitutional facts).

363 *See, e.g.*, Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 989 (1988) (footnote omitted) ("*Crowell* placed heavy weight on a distinction between ordinary facts, concerning which limited review on the administrative record would suffice, and jurisdictional facts, which required de novo judicial fact-finding. Insofar as article III requires appellate review of ordinary facts, *Crowell's* approach seems generally appropriate. A judicial record is not necessary for the exercise of reasonably effective judicial oversight; review on an administrative record ought to suffice.").

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In sum, the new separation of powers formalism is likely to extend to Article III. As things now stand, this new formalism appears to mandate that Article III courts decide matters implicating personal rights to life, liberty, and property (i.e., "private rights"), with a historically defined exception for public rights. This approach is problematic because it does not account for the structural aspects of Article III and because it focuses on initial adjudications rather than the availability and scope of judicial. There is, however, an alternative approach that offers a more workable solution. Under this account, initial determinations by administrative agencies that implement statutory provisions is an executive function, even if it takes on the trappings of adjudication. From a formalist perspective, it follows that the agencies responsible for this sort of adjudication must be subject to constitutionally required means of presidential control and subject to judicial review to ensure that the executive action has a proper basis in the law and in the facts. For some private rights, agency adjudicatory decisions may require a de novo determination by Article III courts, but in most cases review can be deferential. The foreclosure of review altogether, however, should be limited to determinations that may be constitutionally vested in the exclusive discretion of the executive branch under the political question doctrine.

Conclusion

Gillian Metzger has recently referred to "a resurgence of the antiregulatory and antigovernment forces that lost the battle of the New Deal."[364] This "attack on the national administrative state is also evident at the Supreme Court," where "anti-administrative voices" among the Justices have become "increasingly prominent."[365] Whether it is being driven by this antiregulatory animus or merely coincides with it, the Court's separation of powers jurisprudence has shifted from a largely functionalist approach to one that relies more heavily on formalistic reasoning. Formalism in separation of powers cases is not a novel invention,[366] but the reinvigoration of formalism has already resulted in significant and potentially disruptive changes in the operation of the administrative state.[367]

364 Metzger, *Redux*, *supra* note 24, at 2.

365 *Id.* at 2–3.

366 *See supra* notes 44–48 and accompanying text.

367 The most prominent example is the Court's increasingly pronounced application of the unitary executive theory to invalidate good-cause limitations on the President's removal power.

The implications of this shift for the constitutionality of administrative adjudication is an open and, to date, underexplored question. More attention has been paid to the possibility, as an outgrowth of separation of powers formalism, of the Court's abandonment of *Chevron* deference[368] or of an overhaul of the nondelegation doctrine that constrains congressional authority to delegate to agencies the authority to implement regulatory and public benefit problems.[369] Either of these developments would reshape the relationships among Congress, the executive branch, and the federal courts, perhaps radically.

Application of a formalistic approach to non-Article III adjudication would be equally dramatic if, for example, it required federal courts to resolve in the first instance all of the disputes currently being addressed by the nearly 2000 ALJs and more than 10,000 administrative judges who work for federal administrative agencies.[370] Such an outcome is not inevitable, however, because administrative adjudication is not inherently incompatible with separation of powers. Nonetheless, the advent of separation of powers formalism indicates that the Court may be prepared to reconceptualize current doctrine, which is acutely in need of review and clarification.

Unfortunately, the early indications are that the formalistic approach to administrative adjudication is likely to make many of the same mistakes that plague current doctrine. To this point, at least, neither current doctrine nor Justice Gorsuch's formalistic approach to Article III has acknowledged the structural importance of the status and character of a non-Article III tribunal or the difference between an initial determination by an administrative agency and limitations on the availability and scope of review. Likewise, neither current doctrine nor the new Article III formalism has offered a coherent account of the public rights doctrine, even though that doctrine is increasingly central to the analysis.

It does not have to be that way. There is a much clearer and more coherent way to analyze administrative adjudication. The initial determination by an agency under a federal statute is, quite simply, an ex-

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See supra notes 108–29 and accompanying text (discussing *Free Enterprise Fund*, *Lucia*, *Seila Law*, *Arthrex*, and *Collins v. Yellen*).

368 *See supra* notes 95–101 and accompanying text.

369 *See supra* notes 84–94 and accompanying text.

370 Richard J. Pierce, Jr., *It's Time to Hit the Reset Button*, 28 GEO. MASON L. REV. 643, 647 n.29 (2021) (internal citations omitted) ("In contrast to the 1,931 ALJs in the federal government, agencies reported at least 10,831 non-ALJs."). Administrative judges, who lack statutory safeguards against removal or other adverse personnel actions, are highly vulnerable "to pressure from the politicians that head their agencies." *Id.* at 650.

ecutive action even if the process resembles judicial decisionmaking. Administrative adjudication is consistent with separation of powers in general and does not violate Article III in particular unless it cannot be characterized as the execution of the law. The critical question from a separation of powers perspective is whether the Article III courts retain the ability to ensure that the initial determination made by an executive agency or official complies with the law. Whether or not one finds formalism to be a more attractive approach than functionalism, it does provide an opportunity to shed light on some aspects of Article III's structural role that have confused courts and commentators and to clarify aspects of the doctrine that simply never made sense.