

AGENCY ADJUDICATION AND JUDICIAL NONDELEGATION: AN ARTICLE III CANON

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ABSTRACT—The rules governing judicial review of adjudication by federal agencies are insensitive to a critical separation of powers principle. Article III jurisprudence requires different treatment of agency adjudication depending on whether the agency is adjudicating a “private right” or a “public right.” When agencies adjudicate private rights, review of the agency adjudication must be available to an Article III court on a direct appellate basis. In contrast, Article III jurisprudence does not require review to an Article III court on a direct appellate basis of agency adjudications of purely public rights. That means that federal courts reviewing agency adjudications of private rights have a greater responsibility for vindicating Article III values than federal courts reviewing public rights adjudications. Administrative law’s deference doctrines do not reflect this distinction. The degree of deference courts owe to agencies does not vary depending on whether adjudication involves “public” or “private” rights, in the Article III sense of those terms. In either case, Article III courts review agency adjudication deferentially. This Article challenges that indifference. Courts should calibrate their degree of deference in accordance with the Article III line and apply more robust review to agency adjudication where private rights are at stake. This approach would vindicate separation of powers values, promote better administrative decisionmaking in private rights cases, and dovetail with entrenched doctrines of constitutional and administrative law. Interestingly, the logic of Article III elaborated here suggests one explanation for why some federal courts, in certain cases implicating quasi-private rights, are declining to defer to agency adjudications in a manner recognized to be inconsistent with the demands of ordinary administrative law.

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INTRODUCTION

Judicial review of agency action is highly attuned to structural constitutional principles.¹ The degree of deference courts owe to agencies varies according to whether federalism values are at stake,² whether matters of foreign affairs are involved,³ or whether the traditional segregation of functions between the branches would be threatened.⁴

In marked contrast, judicial review of agency action is *not* calibrated to reflect the possible impact of agency action upon individual rights. In

¹ A large scholarly literature addresses the interaction between structural constitutional principles and judicial deference to agencies. *See, e.g.*, Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 716 (2000) (arguing for eliminating *Chevron* deference for act of state doctrine and dormant foreign affairs doctrine); Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 489–90 (1996) (criticizing the conventional view that giving *Chevron* deference to the Department of Justice in its interpretation of criminal statutes would breach the traditional division between the criminal-lawmaking and criminal-enforcement functions); Catherine M. Sharkey, *Preemption as a Judicial End-Run Around the Administrative Process?*, 122 YALE L.J. ONLINE 1, 10 (2012), <http://yalelawjournal.org/2012/04/30/sharkey.html> (arguing for hard look “with teeth” review of preemption decisions); Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869 (2008) (arguing for limiting principles that would restrict administrative preemption more than under current law). *See generally* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000) (describing how various canons of construction applicable to administrative agencies constitute a modern incarnation of nondelegation doctrine).

² *See, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991).

³ *See, e.g.*, *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256–59 (1991) (rejecting deference to agency view that Title VII applied to discrimination outside United States).

⁴ *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in the judgment) (“[W]e have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference.”).

FCC v. Fox Television Stations, Inc.,⁵ the Supreme Court held that the fact that an agency rule potentially impinged on First Amendment speech did not trigger stricter “arbitrary-and-capricious” review.⁶ That the agency’s action implicated constitutional liberties, the Court held, did not alter the stringency of judicial review.⁷

This Article shows why attentiveness to structural constitutional principles requires attentiveness to individual rights. The reason is Article III. Though notoriously murky,⁸ the case law governing one’s entitlement to an Article III tribunal rests on a central distinction involving individual rights: much depends on whether a case involves traditional “private rights” to life, liberty, and property, on the one hand, or whether it involves “public rights,” such as statutory entitlements, on the other. Of course, Article III also enshrines a key structural constitutional principle—the principle of independent judicial review. This is surely as vital a structural principle as congressional control over foreign affairs, segregation between criminal lawmaking and criminal enforcement functions, or federalism.

Article III thus knits together individual rights with structural constitutional values in a manner that should be highly salient for administrative law. The Supreme Court recently admitted, however, that its Article III case law “fails to provide concrete guidance” on how the distinction between public and private rights affects the adjudicative powers of agencies.⁹ This Article takes up that implicit challenge by

⁵ 556 U.S. 502 (2009).

⁶ *Id.* at 516 (“If the Commission’s action here was not arbitrary or capricious in the ordinary sense, it satisfies the Administrative Procedure Act’s ‘arbitrary [or] capricious’ standard; its lawfulness under the Constitution is a separate question . . .”).

⁷ *Id.* (“The so-called canon of constitutional avoidance is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts. We know of no precedent for applying it to limit the scope of authorized executive action. In the same section authorizing courts to set aside ‘arbitrary [or] capricious’ agency action, the Administrative Procedure Act separately provides for setting aside agency action that is ‘unlawful,’ which of course includes unconstitutional action. We think that is the only context in which constitutionality bears upon judicial review of authorized agency action.” (citations omitted)).

⁸ *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 847 (1986) (“[O]ur precedents in this area do not admit of easy synthesis . . .”); Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 *IND. L.J.* 233, 239–40 (1990) (“The Supreme Court opinions devoted to the subject of the validity of legislative and administrative tribunals are as troubled, arcane, confused and confusing as could be imagined. It seems obvious that the Court has struggled with the subject, and the impression is strong that it is the subject, not the Court, that has won.”); John Harrison, *The Relation Between Limitations on and Requirements of Article III Adjudication*, 95 *CALIF. L. REV.* 1367, 1378 (2007) (describing the jurisprudence on non-Article III adjudicators as “a line of cases that has become a by-word for confusion and obscurity”).

⁹ *Stern v. Marshall*, 131 S. Ct. 2594, 2615 (2011) (“We recognize that there may be instances in which the distinction between public and private rights—at least as framed by some of our recent cases—fails to provide concrete guidance as to whether, for example, a particular agency can adjudicate legal issues under a substantive regulatory scheme.”). As the dissent in *Stern* recognized, the majority’s reasoning may call into question the validity of a variety of federal adjudicative schemes. *Id.* at 2622

explaining how the separation of powers principles underpinning Article III should shape judicial review of agency adjudication.

To understand this project, one must first understand the gross anatomy of Article III and the “judicial Power” it secures to federal courts.¹⁰ The Supreme Court has construed Article III to require that review of an agency’s adjudication be available to an Article III court on a direct appellate basis where the agency is adjudicating “private rights” to individual liberty and property under substantive federal laws—for example, where an agency is adjudicating a party’s liability to the government for a civil fine.¹¹ This judicial review can be deferential, but it cannot be entirely eliminated.¹² In contrast, an administrative agency can conclusively adjudicate public rights cases, such as those addressing federal benefits,¹³ without a federal court being available to review the correctness of the agency determination on a direct appellate basis.¹⁴ The core point is that the constitutional requirement that an Article III court be available to review an agency’s adjudication depends on whether the action involves private rights or public rights.

(Breyer, J., dissenting) (“At the same time, I fear the Court understates the importance of a watershed opinion widely thought to demonstrate the constitutional basis for the current authority of administrative agencies to adjudicate private disputes, namely, *Crowell v. Benson*.”).

¹⁰ U.S. CONST. art. III, § 1.

¹¹ As the discussion below explains, the distinction between public and private rights comes not from the text of Article III but rather from case law interpreting Article III—case law that has become increasingly important with the rise of widespread agency adjudication. Even though some scholars would prefer to inter the public–private distinction, *see, e.g.*, Martin H. Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 205 (criticizing the public–private rights distinction as “blind adherence to antiquated dicta”), Supreme Court cases of recent vintage heavily rely on it. *See, e.g.*, *Stern*, 131 S. Ct. at 2594 *passim*; *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2323 (2011) (citing the “well established” distinction between public and private rights).

¹² *See infra* Part II.B.

¹³ *See* Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 330 n.121 (1993) (“[C]laims of entitlement to welfare benefits, government jobs, and other forms of so-called ‘new property,’ clearly fall within the [public rights] category.” (citing Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964))).

¹⁴ It is important to distinguish (a) the availability of direct appellate review in a public rights case from (b) the availability of a subsequent and separate suit challenging administrative decisionmaking as unlawful. When I talk about the kind of “review” that need not be made available in public rights cases, I mean the former category—i.e., the ordinary sense of the term “review”—not the latter. Various constitutional rules may prohibit eliminating entirely the latter type of suit, but that topic lies beyond the scope of this Article. *See* Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 962 (1988) (“If Congress opts for administrative resolution of public rights disputes and the responsible administrative officer commits a coercive violation of legal rights, a constitutional ‘case’ will arise at the moment of the violation, and the full protections of article III will thereafter attach.”); *id.* at 965 (“Within the logic of public rights doctrine, it is true, no ‘case’ would have existed at common law until the actions of administrative decisionmakers were challenged in a proceeding against the relevant officials.”).

Ordinary administrative law's rules for judicial review of agency adjudication nowhere reflect this distinction. Federal agencies continually adjudicate cases—by assessing civil penalties, by awarding government benefits, and in myriad other contexts.¹⁵ The extent of deference courts owe to agencies does not vary if the underlying right being adjudicated is “public” or “private” in the Article III sense of those terms.¹⁶ But because of the massive number of public rights adjudications, the standards for judicial review of agency adjudication are calibrated to achieving “wholesale,” not “retail,” justice.¹⁷ The same rules of rough justice govern the far fewer private rights cases.¹⁸ Private rights cases are flotsam carried along by the flood of public rights cases into channels subject to loose judicial checks.

Article III jurisprudence should prompt us to question that uniformity of approach. Federal courts are discharging a nonoptional constitutional duty when they perform direct review of agency adjudications of disputes over private rights—disputes that “lie at the core of the historically recognized judicial power.”¹⁹ Judicial deference to agency adjudication should not be indifferent to this constitutionally mandated role.

This simple thesis—that courts should be guided by the Article III divide between public and private rights in determining the extent of their deference in adjudicative contexts—is novel. Whereas federal courts scholars have noted in general terms that deferential review of

¹⁵ Agencies “conduct adjudications . . . and have done so since the beginning of the Republic.” *City of Arlington, Tex. v. FCC*, No. 11-1545, slip op. at 13 n.4 (U.S. May 20, 2013), available at http://www.supremecourt.gov/opinions/12pdf/11-1545_1b7d.pdf; see also *id.* at 2 (Roberts, C.J., dissenting) (“[A]s a practical matter [agencies] exercise . . . judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules.”); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 574 (1984) (“The past century has witnessed the profuse growth of legislation assigning to special adjudicative tribunals—administrative agencies and other article I courts—the power to hold trial-type hearings that might otherwise have been placed in the article III courts.”).

¹⁶ As explained in further detail in Part I, the standards of review for agency action do not turn on whether the right at issue is public or private. See generally David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 143–53 (2010) (summarizing standards of review applicable to agency action).

¹⁷ See Fallon, *Some Confusions*, *supra* note 13, at 336–37 (“In the modern administrative state, it would not be workable to require careful judicial review of administrative fact-finding in every case. The burden on courts could prove overwhelming; the added costs and delays could not be justified. . . . While abjuring responsibility to guarantee individually correct decisions, the courts have generally acknowledged their obligation to identify and police, at wholesale if not at retail, the outer bounds of governmental lawfulness.” (footnotes omitted)).

¹⁸ See 5 U.S.C. §§ 701–06 (2006) (setting out standards for judicial review uniformly applicable to “agency action”).

¹⁹ See, e.g., *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70 (1982) (plurality opinion) (“Our precedents clearly establish that *only* controversies in the former [public rights] category may be removed from Art. III courts and delegated to legislative courts or administrative agencies for their determination. Private-rights disputes, on the other hand, lie at the core of the historically recognized judicial power.” (footnote omitted) (citations omitted)).

administrative adjudication may infringe Article III values, they have not broached the desirability of structuring judicial review of administrative adjudication around Article III's taxonomy of rights.²⁰ Administrative law scholarship has similarly overlooked this possibility. In leading treatises, Article III is treated as having no significance beyond the fact that some cases construing it have held agency adjudication constitutional.²¹ In several prominent discussions by administrative law scholars of the nature of judicial review of agency adjudication, Article III makes only a passing appearance.²²

This state of affairs is odd, given the longstanding preoccupation of scholars of all stripes with structural features of administrative law. One

²⁰ Thirty years ago, Martin Redish suggested that courts could satisfy an "absolute construction" of Article III by "reviewing with greater care than previously used an agency's primary factual findings," but he makes no differentiation between public and private rights; his goal was to inter that distinction, not implement it. See Redish, *supra* note 11, at 227–28. The same year, Henry Monaghan authored a canonical discussion of separation of powers and judicial review in administrative law; the article does not urge that courts discriminate between public and private rights adjudications. See Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983) (addressing deference to agency interpretations of law in light of *Marbury*). The most extensive recent discussion of Article III and agency adjudication is by Richard Fallon. See Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043 (2010). Professor Fallon's focus is on the minimal jurisdiction and remedial powers that must be available to federal courts to satisfy constitutional requirements, not on the relationship between administrative law's deference doctrines and Article III. See *id.* at 1115.

Several rich and nuanced discussions have traced the historical development of the relationship between agencies and federal courts. See, e.g., Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939 (2011) (explaining how the appellate review model came to be entrenched in American administrative law); Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559 (2007) (describing the historical origins and continuing salience of the distinction between public and private rights); Gordon G. Young, *Public Rights and the Federal Judicial Power: From Murray's Lessee Through Crowell to Schor*, 35 BUFF. L. REV. 765, 767 (1986) (explaining the development of the public-private rights distinction and how it affected the Court's approach to Article III problems). This impressive literature does not delve into the question of whether the line between public and private rights ought to shape judicial deference to agency adjudication in the modern day.

²¹ See, e.g., CHARLES H. KOCH, JR., 3 ADMINISTRATIVE LAW & PRACTICE (3d ed. 2010); RICHARD J. PIERCE, JR., 1 ADMINISTRATIVE LAW TREATISE § 2.8, at 132–45 (5th ed. 2010); PETER L. STRAUSS ET AL., GELLHORN & BYSE'S ADMINISTRATIVE LAW § 8.3, at 936 (10th ed. 2003). All discuss Article III in the context of establishing the baseline constitutionality of administrative adjudication, without discussion of how Article III's treatment of public and private rights might bear on deference to agency adjudication.

²² See, e.g., Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 315–17 (1989). John Dickinson's influential examination of judicial review and the administrative state "contained no discussion of Article III." See Merrill, *supra* note 20, at 979 (addressing JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES (1927)); *id.* at 972–79 (describing the impact of Dickinson's work on the early development of the appellate review model). A notable exception is an article by Richard Levy and Sidney Shapiro, which argues that rule of law values should be understood to prevent congressional foreclosure of Article III judicial review, regardless of whether the right at issue is "public" or "private" in the Article III sense. 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, 533 (2006).

explanation might be that building a theory on Article III jurisprudence is like trying to build on quicksand—the categories keep dissolving into each other as the Supreme Court tries to rationalize precedents obviously at war.²³ But a better explanation, I believe, has to do with the enormous shadow cast by *Chevron* over legal scholarship. Administrative law’s main obsession is the analysis of how *Chevron* and its companion doctrines affect rulemaking.²⁴ This is understandable; *Chevron* challenges to rulemaking pit courts and agencies against each other for the prize of interpretive primacy over statutory language, often where the stakes are high for regulated entities and the public.²⁵ In contrast, the allocation of authority between courts and agencies over *adjudication* is a matter that lacks comparable charisma, probably because such questions usually arise within the small-fry context of individual cases. Even an important case like *Overton Park*,²⁶ which is technically about judicial review of an informal adjudication,²⁷ has been evaluated mainly for its effects on rulemaking.²⁸ Whatever the reason, relatively little attention has been focused on how separation of powers principles should guide the judicial review of adjudication.²⁹

It is high time to change gears. The principle derivable from Article III jurisprudence is that in private rights cases the judicial review available to an Article III court must be meaningful. What, in concrete terms, would that mean? Specifically, federal courts should be more stringent in policing agency reasoning, agency fact-finding procedure, and the factual basis for the agency action in private rights contexts than in public rights contexts. On fact and mixed questions, the federal court’s review must be

²³ See, e.g., Redish, *supra* note 11, at 228 (calling Article III cases “confused and unprincipled”); sources cited *supra* note 8.

²⁴ See STRAUSS ET AL., *supra* note 21, at 1032–33 (collecting statistics and “[s]oundbites” on the enormous impact of *Chevron* upon legal scholarship and doctrine).

²⁵ See, e.g., *Massachusetts v. EPA*, 549 U.S. 497 (2007) (concerning the regulation of greenhouse gas emissions and its relation to global warming); *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607 (1980) (concerning the regulation of the carcinogen benzene in the workplace).

²⁶ *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

²⁷ See *id.* at 410–21.

²⁸ See, e.g., Peter L. Strauss, *Overseers or “The Deciders”—The Courts in Administrative Law*, 75 U. CHI. L. REV. 815, 821 (2008) (noting that *Overton Park* “planted the seeds that became ‘hard look’ and *State Farm*”); see also Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1410–14 (1992) (noting how courts fashioned the hard look doctrine from *Overton Park*’s “cryptic guidance” and tracing this doctrine’s profound consequences for rulemaking).

²⁹ One article has addressed the other side of the coin. Focusing on agencies rather than on courts, Joshua Schwartz has argued that Article III constraints on agency adjudication ought to be treated as precluding agencies from engaging in intracircuit nonacquiescence. Joshua I. Schwartz, *Nonacquiescence*, *Crowell v. Benson*, and *Administrative Adjudication*, 77 GEO. L.J. 1815, 1845 (1989).

functionally much closer to de novo review if courts are to honor Article III values when reviewing initial agency adjudication of private rights.

To secure the requisite review in private rights cases, Congress must either rewrite the statutes governing judicial review of adjudication or courts must radically reinterpret them. I advance the latter approach here. Courts should use existing tools already applicable to judicial review of adjudication, but with far more “bite” where private rights cases are concerned. In other words, federal courts reviewing agency adjudications should read narrowly statutes limiting the scope of judicial review to avoid the serious constitutional problems that would arise from the elimination of robust review of facts and law of agency adjudications of private rights.

This is a nondelegation canon,³⁰ but of an unusual sort. Whereas most recognized nondelegation canons check delegations of *legislative* power to agencies, this canon would check delegations of *judicial* power to agencies.³¹ This judicial nondelegation canon,³² just like its legislative analogs, would protect structural constitutional values. Exactly such a dynamic exists in judicial review of rulemaking, where a “presumption against preemption” applies.³³ Congress can, of course, preempt state law,³⁴ and Congress can delegate preemption to an agency, which can issue regulations that conflict with and thereby preempt contrary state law.³⁵ But the Court does not defer as readily to agencies on preemption issues

³⁰ See Sunstein, *Nondelegation Canons*, *supra* note 1, at 330.

³¹ See *id.* at 316–18. Professor Sunstein’s nondelegation canons all concern delegations of legislative power. See *id.* at 330–35. Even in the more general category of constitutionally inspired canons of statutory construction, canons protective of judicial power are rarities. Professors Eskridge and Frickey catalogue well over a dozen constitutionally inspired canons of construction, and only two have to do with courts: the presumption in favor of judicial review and the presumption against derogation of the judiciary’s traditional equity powers. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 601–02, 605 (1992). Another possible example of a judicial nondelegation canon is the rule that the Court will require a clear statement to construe a statute as conferring authority upon an agency to adjudicate private claims. See *Bank One Chi., N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 274 (1996) (“Our cases have not been quick to infer agency authority to adjudicate private claims.”).

³² At first blush, the idea of “judicial nondelegation” may cause some confusion. Congress cannot delegate what it does not have, i.e., judicial power, to agencies. Of course, it cannot delegate the power that it *does* have—legislative power—either. See *Mistretta v. United States*, 488 U.S. 361, 419 (1989) (Scalia, J., dissenting) (“Strictly speaking, there is *no* acceptable delegation of legislative power.”); *Bowsher v. Synar*, 478 U.S. 714, 755 (1986) (Stevens, J., concurring in the judgment). Correctly used—and as I use it here—the “nondelegation” locution is shorthand for the principle that Congress cannot “reassign powers” that the Constitution vests in a particular branch to another branch. *Mistretta*, 488 U.S. at 382 (majority opinion).

³³ See John F. Manning, *Lessons from a Nondelegation Canon*, 83 NOTRE DAME L. REV. 1541, 1545–47 (2008).

³⁴ U.S. CONST. art. VI, cl. 2.

³⁵ *Fid. Fed. Sav. & Loan Ass’n v. De la Cuesta*, 458 U.S. 141, 153–54 (1982).

because of the important structural principle—federalism—at stake.³⁶ Similarly, tailoring deference to administrative adjudication to Article III values would promote structural principles through administrative law doctrine.

The Article proceeds as follows. Part I sketches administrative law’s commitment to transsubstantive procedure, one aspect of which is that the administrative law doctrines governing judicial review are indifferent as to the right at issue in agency adjudication. Part II describes the continuing salience of the private right–public right line in Article III case law and how that division ties to the need for appellate review in Article III courts of private rights adjudications by agencies. Part III argues that the Article III line between public and private rights should guide judicial deference to agency adjudication. Part IV shows how calibrating deference in this fashion would dovetail with existing doctrines protective of Article III and illustrates the point with a recent Supreme Court case. Part V posits that courts of appeals in immigration cases are already applying less deferential judicial review to adjudications implicating quasi-private rights and points out some rewards of this species of “administrative common law.” A brief conclusion follows.

The primary purpose of this Article is conceptual; its goal is to demonstrate the existence of a truly surprising blind spot in the law of judicial review of administrative action and to provide a preliminary exploration of the virtues of attending to Article III values in structuring that review. Much of the following discussion proceeds at a somewhat high level of generality, in order to provide the context necessary to assess the unique sort of interbranch checking I am advancing. But all this theoretical soufflé will not, I hope, conceal the very meat-and-potatoes nature of this topic. In labor law, immigration, environmental law, securities law, and a host of other contexts, federal courts are routinely enlisted to review or enforce orders affecting private rights. Buried in federal dockets throughout

³⁶ *Solid Waste Agency v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 173 (2001) (noting that the need for a clear statement of congressional intent is “heightened where the administrative interpretation alters the federal–state framework by permitting federal encroachment upon a traditional state power”); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2027 (2008) (“Acting ostensibly through the rubric of standard administrative law doctrines, . . . the Court has ensured that the impact of challenged agency decisions on the states is considered. As a result, administrative law may be becoming the home of a new federalism.”). *But see* *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2579–80 (2011) (plurality opinion) (“[C]ourts should not strain to find ways to reconcile federal law with seemingly conflicting state law.”). Some commentators have pointed to the plurality portion of the opinion in *PLIVA* as a symptom of the presumption’s incipient erosion. *See, e.g.*, Simon Lazarus, *Stripping the Gears of National Government: Justice Stevens’s Stand Against Judicial Subversion of Progressive Laws and Lawmaking*, 106 NW. U. L. REV. 769, 808 (2012) (noting the Court’s recent inconsistent application of the presumption); Marcia Coyle & Tony Mauro, *From High Court Heavyweights, Highlights of the 2010 Term*, NAT’L L.J. (June 29, 2011), <http://www.law.com/jsp/nlj/PubArticlePrinterFriendlyNLJ.jsp?id=1202498926592> (describing *PLIVA* as evidence of “the disappearance of the historic ‘presumption against preemption’”).

the country are hundreds of motions, briefs, and opinions that turn upon no more and no less than the issue analyzed here: the question of how federal courts may reconcile deferential review of agency adjudication with the structural constitutional values they are entrusted with shielding. The concept of calibrating deference around Article III has very real litigation consequences in a wide swath of cases involving the legitimacy of administrative action.

I. RIGHTS NEUTRALITY IN ADMINISTRATIVE LAW

A core feature of administrative law, its “very essence,” is “the premise that legal principles concerning agency structure, administrative process, and judicial review cut across multiple agencies.”³⁷ One corollary of this essential premise is that critical doctrines governing judicial review of agency action are uniform across agencies and across substantive areas of law. “[P]art of the point of *Chevron* [was] to create a general, transsubstantive doctrine of administrative deference to replace the more ad hoc approach to deference that had previously characterized administrative law jurisprudence.”³⁸

Of course, *Chevron* is not the only form of deference. At last count, seven separate standards apply to judicial review of agency action.³⁹ Three of them—*Chevron*,⁴⁰ *Mead*,⁴¹ and *Skidmore*⁴²—concern agency interpretations of statutory law. One of them—*Auer* or *Seminole Rock*—applies to an agency’s interpretation of its own regulations.⁴³ Two are tethered to the formality of procedures that an agency uses to determine facts: substantial evidence review (*Universal Camera*) where the procedure used was formal,⁴⁴ and arbitrary or capricious review (*Overton Park*) where

³⁷ Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 499–500 (2011); see also Note, *Comparative Domestic Constitutionalism: Rethinking Criminal Procedure Using the Administrative Constitution*, 119 HARV. L. REV. 2530, 2530 (2006) (“The [Administrative Procedure] Act regulates agency procedure by creating a transsubstantive procedural floor applicable to virtually all agencies that may be, and often is, supplemented by substance-specific procedures that Congress and agencies establish. . . . To the geographically inclined, the APA is the floor of a broad procedural valley; across the valley lie scattered hills of substance-specific procedure piled up by agencies and legislatures . . .”).

³⁸ Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1682 (2007).

³⁹ For a pithy summary, see David Zaring, *supra* note 16, at 143–52.

⁴⁰ *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842–44 (1984).

⁴¹ *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

⁴² *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

⁴³ *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

⁴⁴ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

the procedure used was informal.⁴⁵ The last—*State Farm* or so-called “hard look” review—is a catchall applicable to all agency action.⁴⁶

These standards for judicial review are roughly tailored to the *form* of administrative decisionmaking on legal or factual questions.⁴⁷ More formal agency legal interpretations receive different treatment on review than less formal agency legal interpretations.⁴⁸ More formal agency factual determinations—those arrived at through formal rulemaking or adjudication—receive different treatment on review than factual determinations arrived at through informal rulemaking or adjudication.⁴⁹

What these standards of review are *not* tailored to is substance.⁵⁰ Whether the agency’s action affects collective bargaining, pollution, or import controls on notebooks, the standards for judicial review remain constant. As long as the agency is acting within its bailiwick, the subject

⁴⁵ *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414–15 (1971).

⁴⁶ *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–44 (1983); see Zaring, *supra* note 16, at 136–37 (citing *State Farm* for the rule that “courts must perform a general arbitrariness review in every case, under which, regardless of the factual conclusions or legal interpretations made by the agency, courts take a ‘hard look’ at the agency decision to see whether the agency has sufficiently explained its decision and whether the decision is basically rational, based on a review of the record as a whole”). Courts sometimes couch hard look review in the terminology of arbitrariness. See, e.g., *State Farm*, 463 U.S. at 43 (observing that an agency’s decisionmaking would be arbitrary and capricious if it had “entirely failed to consider an important aspect of the problem”).

⁴⁷ As various commentators have noted, this tailoring comes from the idea that procedural formality roughly tracks actual or constructive congressional intent to delegate. See Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 4 (1990) (“The threshold issue for the court is always one of congressional intent The touchstone in every case is whether Congress intended to delegate to the agency the power to interpret with the force of law in the particular format that was used.”); Note, “How Clear Is Clear” in *Chevron’s Step One?*, 118 HARV. L. REV. 1687, 1690 (2005) (“*Mead* thus set up a framework to determine congressional intent based in large part on levels of procedural formality.”).

⁴⁸ See *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001) (“It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.”); *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 157 (1991) (holding that “some weight” is due to agency informal interpretations albeit not “the same deference as norms that derive from the exercise of . . . delegated lawmaking powers”); *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944) (holding that an agency’s informally reached interpretation might merit some quantum of deference depending on its “power to persuade”). See generally Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833 (2001) (conditions for applying *Chevron*); Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock’s Domain*, 79 GEO. WASH. L. REV. 1449 (2011) (conditions for applying *Seminole Rock*).

⁴⁹ Compare 5 U.S.C. § 706(2)(E) (2006) (*Universal Camera* substantial evidence standard for review of facts found by formal proceedings), with *id.* § 706(2)(A) (*Overton Park* “arbitrary” or “capricious” review).

⁵⁰ Professor Cox makes a related point about institutional competence: “[T]he [*Chevron*] doctrine does not generally authorize courts to decide whether deference is appropriate by evaluating directly the competence of the administrative decisionmakers whose rulings are being reviewed.” See Cox, *supra* note 38, at 1682–83.

matter of the agency's action has no official place in the judicial review calculus.

The same is the case for constitutional rights. Structurally identical forms of judicial review apply, for example, to an agency's decision to block an organization's assets and to an agency's decision to rescind a permit to graze cattle on federal land.⁵¹ Ordinary judicial review doctrines make no formal provision for considering the impact of an agency's actions on particular constitutional rights.

This last point might come as something of a shock. After all, the extent of judicial review of government action often varies sharply depending upon whether and how that action affects constitutional rights.⁵² Many scholars regard protection of constitutional rights as the heart, if not the body and soul, of the case for having judicial review at all.⁵³

Within ordinary administrative law, however, asserted impact upon a constitutional right ostensibly does not matter for the level of judicial scrutiny the agency action will receive. It may be important to getting your case before a federal court in the first place that you are claiming an actual constitutional violation by the agency; the discussion will return to that point later on.⁵⁴ And constitutional rights clearly matter in the inquiry as to whether an agency's procedures for conducting administrative hearings comport with due process.⁵⁵ But these doctrines are extrinsic to the ordinary framework of judicial review of agency action. For an ordinary litigant bringing a run-of-the-mill petition for review of an agency's action on regular Administrative Procedure Act grounds,⁵⁶ the impact of the agency's

⁵¹ See § 706; *Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury*, 686 F.3d 965, 970, 976 (9th Cir. 2012) (applying substantial evidence standard); *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1127, 1132 (9th Cir. 2010) (same).

⁵² In First Amendment and substantive due process jurisprudence, for example, the stringency of judicial review is largely a function of whether and how a law affects a constitutionally protected right. See GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 1028–399 (6th ed. 2009) (discussing First Amendment doctrine); *id.* at 735–62 (discussing substantive due process doctrine); see also Michael Coenen, *Constitutional Privileging*, 99 VA. L. REV. 683, 685 (2013) (describing a variety of legal contexts in which courts “treat[] the constitutional status of a claim as a reason to give it a greater degree of judicial attention than it otherwise would receive”).

⁵³ See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980); LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 475 (1965) (making the “categorical[] and arbitrar[y] assert[ion] that the highest, the central, and the most realizable function of our courts is the protection and relief of the individual”); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV L. REV. 643, 746 n.489 (2004) (“Many accounts identify the protection of life, liberty, and property as the cornerstone of the constitutional right to judicial review.”). Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) (“The province of the court is, *solely*, to decide on the rights of individuals . . .” (emphasis added)).

⁵⁴ See *infra* Part IV.A.1 (discussing presumption of judicial review).

⁵⁵ See *infra* Part III.B.2 (discussing due process).

⁵⁶ See § 701(a)(1) (exempting from review actions for which judicial review is expressly precluded by statute); *id.* § 701(a)(2) (exempting from review agency action “committed to agency discretion by law”); *id.* § 702 (providing entitlement to judicial review for any “person suffering legal wrong because

action upon constitutional rights will not affect the type of judicial review the petition will receive. In this sense, judicial review in administrative law is *rights neutral*.

As recently as 2009, in the first petition for review in the *FCC v. Fox* case, the Court reaffirmed the rights neutrality of ordinary administrative law.⁵⁷ In considering an arbitrary and capricious challenge to an FCC rule with potential First Amendment implications, the Court “reject[ed] the invitation” “to apply a more stringent arbitrary-and-capricious review to agency actions that implicate constitutional liberties,” reasoning that a regulation’s lawfulness under the Constitution was a separate question from whether the action was “arbitrary or capricious in the ordinary sense.”⁵⁸ Even where First Amendment speech is involved, then, the rigor of judicial review of agency action does not ratchet up.⁵⁹

Profound reasons exist to doubt the wisdom of administrative law’s formal neutrality on rights.⁶⁰ The discussion below addresses some reasons that flow from Article III.

II. ARTICLE III AND ADMINISTRATIVE AGENCIES

“The typical federal administrative agency is given authority to ‘adjudicate’ individual claims either between private individuals or organizations, or between such private entities and the federal agency itself. The agency first holds hearings and finds facts. Ultimately, the agency applies the law to the facts in reaching its conclusion.”⁶¹

This is a familiar picture. Equally familiar is the customary arrangement of judicial review of agency adjudication.⁶² Generally

of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute”).

⁵⁷ See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

⁵⁸ *Id.*

⁵⁹ *Id.* (“The so-called canon of constitutional avoidance is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts. We know of no precedent for applying it to limit the scope of authorized executive action.” (citation omitted)). Outside of administrative law, the Court has been willing to take into account First Amendment considerations when construing language setting forth a generally applicable standard of appellate review. See *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 514 (1984) (“We hold that the clearly-erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure does not prescribe the standard of review to be applied in reviewing a determination of actual malice in a case governed by *New York Times Co. v. Sullivan*. Appellate judges in such a case must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity.” (footnote omitted)).

⁶⁰ See, e.g., Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 484 (2010) (arguing “that *Fox* is wrong in positing a strict separation between constitutional and ordinary administrative law”).

⁶¹ Redish, *supra* note 11, at 216 (footnotes omitted).

⁶² Because this customary arrangement is modeled on the relationship between trial and appellate courts in civil litigation, the allocation of institutional authority between agencies and reviewing courts is often referred to as the “appellate review model.” Professor Merrill has recently provided an

speaking, federal courts conduct de novo judicial review of agency determinations of constitutional issues, review of agency determinations of law subject to the constraints of *Chevron* and related cases, and highly deferential judicial review of agency determinations of fact.⁶³ Only in “rare circumstances” are agency findings of fact “specifically made subject to de novo review by an agency organic act.”⁶⁴

This typical picture, in nearly every particular, has generated a deep and persistent queasiness among scholars and judges. The text of Article III vests “judicial [p]ower” in life-tenured judges.⁶⁵ It never mentions administrative agencies.⁶⁶ Most scholars agree that taken literally, the text of Article III would bar even initial agency adjudication, a result that would ravage the operations of the administrative state.⁶⁷ How can the ubiquitous fact of administrative adjudication be reconciled with Article III?

The appellate review theory of Article III has long been the leading answer to this conundrum.⁶⁸ In this model, “sufficiently searching review of a legislative court’s or administrative agency’s decisions by a constitutional court will *always* satisfy the requirements of article III.”⁶⁹ Put differently, the appellate review model takes as a given that a non-Article III entity can always perform the *initial* adjudication, subject to appellate review in Article III courts.⁷⁰ “The most important questions” for the appellate review theory thus concern the scope of appellate review: “which issues must be

indispensable account of how the model came to occupy the crucial and constitutive position it currently holds in administrative law. See Merrill, *supra* note 20, *passim*. Merrill writes that the appellate review model for agency–court relations “first emerged in full blown form” around 1910, “in the context of judicial review of orders of the Interstate Commerce Commission,” that it thereafter spread to “review of orders of the Federal Trade Commission,” and that it was “fully entrenched before the onset of the New Deal and was later incorporated into the Administrative Procedure Act in 1946.” *Id.* at 942–43. As he further explains, the model’s early adoption into administrative law “allows us to understand why one of the most significant constitutional questions posed by the rise of the modern administrative state”—the question of how the use of administrative agencies to adjudicate cases could be squared with Article III—“was never seriously deliberated by the Supreme Court.” *Id.* at 943.

⁶³ Fallon, *Jurisdiction-Stripping*, *supra* note 20, at 1116–17.

⁶⁴ PIERCE, *supra* note 21, § 11.2, at 976.

⁶⁵ U.S. CONST. art. III, § 1.

⁶⁶ *Id.*

⁶⁷ See, e.g., Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 239 (1985) (“The rise of administrative adjudication is at variance with the original constitutional premise that most adjudication would take place in judicial, not administrative, tribunals.”); Pfander, *supra* note 53, at 646 n.2 (“A vast literature explores the scope of congressional power to substitute Article I tribunals for the inferior courts referred to in Article III, and virtually no one considers a literal interpretation possible.”); Craig A. Stern, *What’s a Constitution Among Friends?—Unbalancing Article III*, 146 U. PA. L. REV. 1043, 1043 (1998) (“Nine out of ten experts agree that a straightforward reading of the first section of the third article of the United States Constitution does not work.”); *id.* at 1043 n.1 (collecting sources that support the proposition that a literal reading of Article III is today unrealistic).

⁶⁸ See Fallon, *Of Legislative Courts*, *supra* note 14, at 933.

⁶⁹ *Id.* (emphasis added).

⁷⁰ *Id.*

reviewable in a constitutional court and how searching the appellate scrutiny must be” to be “sufficiently searching.”⁷¹

In certain respects, the Supreme Court has rejected the appellate review model as too lax a system for vindicating Article III values.⁷² *Northern Pipeline*, *Granfinanciera*, and *Stern* all rejected the premise that non-Article III courts (namely, bankruptcy courts) could adjudicate pure state law tort and contract claims.⁷³ It now seems settled that initial adjudication by Article I judges of state law causes of action unrelated to federal law abrogates Article III.⁷⁴

In other contexts, the appellate review model may be too demanding. A plethora of non-Article III courts exist, and the structures of review that govern them do not mesh particularly well with appellate review theory.⁷⁵ Territorial courts, courts martial, and military tribunals all mete out justice in ways that evade direct appellate review by Article III courts in the manner that a pure application of the appellate review model would demand.⁷⁶ It would be quite a surprise if the Court enforced direct appellate review on every determination of all of these courts. For these reasons, it seems the appellate review model is not the Grand Unified Theory of Article III that someday one hopes to find.⁷⁷

With respect to federal agency adjudication of federal law, however, the appellate review model has remarkable explanatory power. Administrative agencies applying federal law can adjudicate factual and legal issues in the first instance, subject to control by Article III courts.⁷⁸ This is the simple core of the appellate review model, though with an important wrinkle. The cases on agency adjudication and Article III reflect

⁷¹ *Id.*

⁷² See Pfander, *supra* note 53, at 648 (“[T]he appellate review theory does not fit particularly well with many of the accepted features of the Court’s Article I and Article III jurisprudence.”).

⁷³ See *Stern v. Marshall*, 131 S. Ct. 2594, 2601 (2011) (state law tort claim); *Granfinanciera*, S.A. v. Nordberg, 492 U.S. 33, 36 (1989) (state law fraudulent conveyance claim); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 56, 87 (1982) (plurality opinion) (state law contract claims); see also *Stern*, 131 S. Ct. at 2619 (treating *Northern Pipeline* as establishing that non-Article III courts cannot have the power to adjudicate, render final judgment, and issue binding orders in a traditional contract or tort action arising under state law, without consent of the litigants, and subject only to ordinary appellate review). A Seventh Amendment case, *Granfinanciera* held that the right to trial by jury attached to a state law fraudulent conveyance claim, so a bankruptcy judge could not decide it without a jury. *Granfinanciera*, 492 U.S. at 36.

⁷⁴ See *Stern*, 131 S. Ct. at 2619–20; *N. Pipeline Constr. Co.*, 458 U.S. at 70, 83–87.

⁷⁵ See Pfander, *supra* note 53, at 749–68 (arguing that an “inferior tribunals account” better explains the non-Article III courts jurisprudence than the appellate review model).

⁷⁶ *Id.*

⁷⁷ See Fallon, *Jurisdiction-Stripping*, *supra* note 20, at 1118 (noting “that if the Supreme Court were to embrace appellate review theory today, it would probably need both to invalidate more adjudicative structures (due to the absence of adequate appellate review) and apply more varied and lax standards for gauging adequacy (in order to avoid yet more invalidations) than I had once anticipated”).

⁷⁸ See *infra* Parts II.A and II.B.

a *particular incarnation* of the appellate review model that is tuned to the nature of the underlying right where federal administrative agencies are concerned.⁷⁹ As the discussion below will show, a key distinction exists for Article III purposes between agency adjudications of public rights and agency adjudications of private rights. Though the line between public and private rights is sometimes blurry,⁸⁰ the consequence of falling on one side or the other of that line is clear. An agency adjudication of private rights cannot be final; review must be available on a direct appellate basis to an Article III court of agency adjudications of private rights. In contrast, agency adjudications of public rights *can* be final—direct appellate review need not be available in individual cases to an Article III court (though it may be *made* available by statute).

Why does this difference matter to administrative law? The reason is just this: “[a] great deal of what modern federal agencies do can be characterized as resolution of disputes with respect to private rights.”⁸¹ Thus, a great deal of the time, federal courts reviewing agency adjudication will be playing a role that is *constitutionally mandated* and not *discretionary*. The remaining discussion in this Part explains this point, while the next Part will explore its appropriate ramifications for the stringency of judicial review of adjudication.

A. *Private Rights and Public Rights*

Supreme Court cases construing a litigant’s entitlement to an Article III tribunal have developed a basic distinction between private rights and public rights. Any candid discussion of this subject must acknowledge at the outset that the cases on Article III and the public–private line are a confusing morass. The Court’s jurisprudence reflects dramatically shifting tides on the Court—and indeed in the attitude of individual Justices—back

⁷⁹ In conventional portrayals, the appellate review model does not turn on the right at issue. See Nelson, *Adjudication in the Political Branches*, *supra* note 20, at 616–17 (“In academic circles, then, the appellate review theory of Article III is often perceived as a unitary approach that does not vary according to the type of legal interests being adjudicated.”). Professor Nelson argues that the “unitary” nature of the appellate review model may itself be an illusion. *Id.* at 617. In any event, the reality of the case law applicable to agency adjudication of federal law is that it implements a nonunitary version of the appellate review model. This fits with the overall pattern of the Court’s Article III jurisprudence. The Court seems to increasingly conceive of Article III as a plural, not a singular, requirement, with its meaning in each context dependent on historical practice and settled precedent—an approach that even Justice Scalia has obliquely endorsed. See *Stern*, 131 S. Ct. at 2621 (Scalia, J., concurring) (“Leaving aside certain adjudications by federal administrative agencies, which are governed (for better or worse) by our landmark decision in *Crowell v. Benson*, 285 U.S. 22 (1932), in my view an Article III judge is required in *all* federal adjudications, unless there is a firmly established historical practice to the contrary.”).

⁸⁰ See *infra* Part II.A for further elaboration of these two categories.

⁸¹ PIERCE, *supra* note 21, § 1.7, at 30.

and forth between formalism and pragmatism.⁸² Much confusion arises simply from the loaded terminology that the Court applies to rights. What sense is there in using the term “public” to refer to the interest of a government employee in retaining her job, or a welfare claimant his status as a welfare recipient? Conversely, what sense is there in calling one’s interest in receiving a worker’s compensation payment set by federal statute a “private” right? Not merely the substance of the doctrine but even the vocabulary in this area of law leaves much to be desired.⁸³ With that said, however, there nonetheless remains a nub to each concept that, once located, can be usefully built upon.

The “core” private rights are the rights to life, liberty, and property.⁸⁴ Private rights are “legal entitlements that belonged to discrete individuals (rather than the public as a whole)” as distinct from “mere ‘privileges’ that existed only at the sufferance of public authorities.”⁸⁵ A private right to property is at issue when the government is adjudicating a fine owed by an individual,⁸⁶ or when an agency is adjudicating liability of one private party

⁸² The formalist approach is displayed in *Stern, Northern Pipeline*, and *Crowell*. See *Stern*, 131 S. Ct. at 2598 (“This case involves the most prototypical exercise of judicial power: the entry of a final, binding judgment *by a court* with broad substantive jurisdiction, on a common law cause of action, when the action neither derives from nor depends upon any agency regulatory regime.”); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 (1982) (plurality opinion) (stating that the cases to which public rights doctrine applies “must at a minimum arise ‘between the government and others’” (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929))); *Crowell*, 285 U.S. at 51 (defining private rights cases as disputes involving “the liability of one individual to another under the law as defined”). A more pragmatic or flexible approach characterizes *Granfinanciera*, *Schor*, and *Thomas*. See *Granfinanciera*, *S.A. v. Nordberg*, 492 U.S. 33, 54–55 (1989) (“If a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court.”); *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 857 (1986) (adopting a multifactor balancing test because “due regard must be given in each case to the unique aspects of the congressional plan at issue and its practical consequences in light of the larger concerns that underlie Article III”); *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 594 (1985) (describing a public right as a right “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”).

⁸³ Thanks to David Shapiro for emphasizing the points in this paragraph.

⁸⁴ See Nelson, *supra* note 20, at 567 (noting Blackstone’s “three major groupings of core private rights: (1) the ‘right of personal security,’ which encompassed ‘a person’s legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation’; (2) the ‘right of personal liberty,’ which entailed freedom from ‘imprisonment or restraint, unless by due course of law’; and (3) the ‘right of private property,’ which involved ‘the free use, enjoyment, and disposal of all [one’s] acquisitions, without any control or diminution, save only by the laws of the land’” (alteration in original) (footnotes omitted) (quoting WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS 129, 134, 138 (Philadelphia, Robert Bell 1771))).

⁸⁵ *Id.* at 565.

⁸⁶ See, e.g., *Nat’l Indep. Coal Operators’ Ass’n v. Kleppe*, 423 U.S. 388, 392 (1976) (addressing statutory provision authorizing Secretary of the Interior to assess a civil penalty upon a coal mine operator after an administrative hearing). See generally Colin S. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 COLUM. L. REV. 1435, 1440 (1979) (“A few older statutes, and a number of more recent ones, contemplate a larger agency role. The agency

to another party under statutory or common law.⁸⁷ For the purposes of private rights doctrine, property encompasses the type of property that is treated as compensable under the Takings Clause of the Fifth Amendment if taken; it does not encompass any property the deprivation of which would trigger procedural due process protections.⁸⁸ So, for example, a government imposition of a fine would implicate private rights, whereas a government denial of Social Security benefits or a termination of a government employee for cause would not, even though the latter two actions would require the government to respect certain procedural safeguards.⁸⁹

“Public rights” are rights “that belong to the body politic.”⁹⁰ In Supreme Court jurisprudence, the category originated in 1855, when *Murray’s Lessee v. Hoboken Land and Improvement Co.*⁹¹ affirmed Congress’s authority to permit an executive branch agent to determine that an individual owed money to the federal government and to issue a “distress warrant” based on that determination.⁹² Rights to title to public land, to funds in the public treasury, to sail on public waters, or to access

may be directed to ‘assess’ the penalty, perhaps after affording the alleged violator notice and an opportunity to reply, prior to referring the case for prosecution. Some statutes authorize the agency to adjudicate the penalty claim itself, subject only to limited review of its action.”); Ezra Ross & Martin Pritikin, *The Collection Gap: Underenforcement of Corporate and White-Collar Fines and Penalties*, 29 YALE L. & POL’Y REV. 453, 459 (2011) (“Agencies enforce statutes, rules, and regulations through a variety of means, but imposition of monetary sanctions (including fixed or variable fines and penalties, and restitution) is the primary enforcement tool. Administrative fines may be imposed in both the civil and criminal contexts. Virtually every major administrative regulatory program contains some type of monetary sanction. Sometimes, fines are the only available sanction.” (footnotes omitted)).

⁸⁷ This can be seen in cases brought under the Black Lung Benefits Act, 30 U.S.C. §§ 901–51 (2006), a system of compensation for miners suffering from pneumoconiosis or “black lung.” See, e.g., *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1119 (6th Cir. 1984) (holding that black lung disputes were private rights adjudications under *Crowell* because they involve liability of one individual to another).

⁸⁸ Under *Goldberg v. Kelly*, 397 U.S. 254 (1970), and its progeny, “agencies may not withdraw or reduce certain individual statutory benefits, such as welfare payments, without providing procedures ranging from a statement of reasons to a trial-type hearing. A statute creates a constitutionally protected ‘property’ entitlement if it limits the discretion of administrative officials so as to mandate the provision of a benefit to those meeting specified terms.” Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1207 (1982).

⁸⁹ On the distinction between property for procedural due process purposes and property for purposes of the Takings Clause, see Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 954–90 (2000).

⁹⁰ Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 693 (2004).

⁹¹ 59 U.S. (18 How.) 272 (1856).

⁹² See *id.* at 284 (identifying “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”).

public roads are all public rights.⁹³ Why? The idea has historically been tied up with the role of courts:

In private disputes, courts entered judgments that were the predicates for the issuance of writs of execution that would transfer property rights from one party to another. . . . For individuals seeking benefits that the government might grant through the legislative process, by contrast, no judgment of a court was necessary to create an interest that Congress might choose to recognize as valid in the appropriations process.⁹⁴

Considerations of sovereign immunity are also relevant.⁹⁵ “[T]he traditional principle of sovereign immunity . . . recognizes that the Government may attach conditions to its consent to be sued,”⁹⁶ and the Court has suggested that this power subsumes the power to place conditions on which forum it may be sued in.⁹⁷

As with private rights, the precise contours of the public rights category remain in dispute. Historical evidence suggests that the collection of taxes and the exercise of eminent domain rights can be performed by the executive branch without judicial involvement.⁹⁸ Some scholars, however, have asserted that such functions cannot exclusively be adjudicated by non-Article III entities.⁹⁹

⁹³ Fallon, *Jurisdiction-Stripping*, *supra* note 20, at 1051 n.31 (“Whatever the underlying explanation, claims against the United States for money have long been understood to involve public rights.”); Nelson, *supra* note 20, at 566 (describing the public rights category as including “(1) proprietary rights held by government on behalf of the people, such as the title to public lands or the ownership of funds in the public treasury; (2) servitudes that every member of the body politic could use but that the law treated as being collectively held, such as rights to sail on public waters or to use public roads; and (3) less tangible rights to compliance with the laws established by public authority” (footnote omitted)); *see also Ex parte Bakelite Corp.*, 279 U.S. 438, 452 (1929) (describing public rights as including “claims against the United States . . . for money, lands or other things”).

⁹⁴ *See* Pfander, *supra* note 53.

⁹⁵ *See* Fallon, *Jurisdiction-Stripping*, *supra* note 20, at 1050 n.31 (noting that “[t]he notion that benefits disputes involve public rights and do not necessarily require judicial review appears to be rooted partly in the concept of sovereign immunity”).

⁹⁶ *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 67 (1982) (plurality opinion).

⁹⁷ *See id.*; *Ex parte Bakelite Corp.*, 279 U.S. at 452 (describing public rights as claims that “admit of legislative or executive determination, and yet from their nature are susceptible of determination by courts; but no court can have cognizance of them except as Congress makes specific provision therefor. Nor do claimants 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”).

⁹⁸ *See* Nelson, *supra* note 20, at 590 (“As one federal judge put it in 1876, ‘[e]xcept in cases where property is taxed, or otherwise taken for public purposes,’ the government could not deprive someone conclusively of core private rights without ‘suit in a court of justice.’” (quoting *Bowden v. Morris*, 3 F. Cas. 1030, 1032 (C.C.E.D. Va. 1876) (No. 1715))).

⁹⁹ *See, e.g.,* Monaghan, *Constitutional Fact Review*, *supra* note 67, at 247 n.102 (“The category of public rights has never been entirely stable. It has included some claims by the government against private parties for such matters as customs duties. But whether jurisdiction over government claims

Immigration is one important interstitial realm. In dictum, *Crowell* described immigration as among such matters as “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.”¹⁰⁰ Relying in part on this suggestion that immigration implicates public rights, as well as on the plenary power doctrine,¹⁰¹ Congress has allocated much immigration decisionmaking to administrative agencies free from judicial control.¹⁰²

Professor James Pfander and Theresa Wardon have recently shown that, contrary to the widespread misunderstanding of *Crowell*’s dictum, immigration does not fall squarely within the “public rights” category.¹⁰³ First, the Naturalization Clause contains a restriction—the requirement of a uniform rule—that bars Congress from making purely discretionary decisions about how to distribute the benefits of immigration, as it can with distributions of government revenues and public lands.¹⁰⁴ Second, the availability of habeas means that Article III courts must be available to review the legality of custody in individual cases.¹⁰⁵ Though the question has not been squarely presented, the Supreme Court has suggested that removal proceedings are not immune from habeas.¹⁰⁶ The Court’s opinion in *Boumediene v. Bush* provides additional support for the view that ostensibly public rights cases concerning bodily detention and removal in

against private parties for taxes can be conferred exclusively on a non-article III tribunal has not yet been resolved.” (citing *Ex parte Bakelite*, 279 U.S. 438); Pfander, *supra* note 53, at 760 (“*Murray’s Lessee* allowed the Treasury Department’s initial calculation of the delinquency to be determined by a non-Article III decisionmaker. Properly understood, the public rights doctrine permits executive agencies to play an initial role in calculating amounts due to the government, and secures the claimants’ right to an ultimate decision in Article III courts.” (footnote omitted)).

¹⁰⁰ *Crowell v. Benson*, 285 U.S. 22, 50 (1932) (quoting *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856)) (internal quotations marks omitted).

¹⁰¹ See generally Matthew J. Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HARV. C.R.-C.L. L. REV. 1 (2010) (describing the origins and influence of the plenary power doctrine).

¹⁰² See Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 380 (2006) (describing “several gaping exceptions to the availability of judicial review” in immigration cases including provisions that “bar judicial review of entire classes of removal orders, preclude judicial review of most discretionary decisions, specifically prohibit the use of particular judicial remedies and forms of action, and otherwise inhibit judicial review”).

¹⁰³ James E. Pfander & Theresa R. Wardon, *Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency*, 96 VA. L. REV. 359, 433–40 (2010).

¹⁰⁴ *Id.* at 438–39; see also *INS v. Chadha*, 462 U.S. 919, 960 (1983) (Powell, J., concurring in the judgment) (“When Congress finds that a particular person does not satisfy the statutory criteria for permanent residence in this country it has assumed a judicial function in violation of the principle of separation of powers.”).

¹⁰⁵ Pfander & Wardon, *supra* note 103, at 439.

¹⁰⁶ *INS v. St. Cyr*, 533 U.S. 289, 305 (2001) (“Moreover, to conclude that the writ is no longer available in this context would represent a departure from historical practice in immigration law. The writ of habeas corpus has always been available to review the legality of Executive detention.”).

fact implicate private rights; *Boumediene* made it clear that Congress was not entirely at liberty to assign to executive branch entities matters that might result in physical detention.¹⁰⁷ These constraints distinguish immigration from the category of classic public rights cases. For purposes of Article III, immigration is best treated as implicating what I will call a *quasi-private* right, not a public right.¹⁰⁸

B. *The Necessity of Appellate Review in Private Rights Cases*

With the distinction between public rights and core private rights somewhat in hand, the cases on Article III and agency adjudication show a pattern. When an agency adjudicates private rights under federal law, there must be review of that adjudication available on a direct appellate basis to an Article III court. An agency adjudication of public rights need not be so reviewable.

The watershed case is *Crowell v. Benson*,¹⁰⁹ which involved a federal workers' compensation scheme.¹¹⁰ Specifically, *Crowell* concerned a claim granted to an employee by the United States Employees' Compensation Commission.¹¹¹ The employer, Benson, brought suit in federal court against the administrative official charged with hearing the worker's compensation claim.¹¹² The suit challenged not only the award, but also the Commission's authority to make the award.¹¹³ Noting that the case involved a question of private rights,¹¹⁴ the Court held that there was nothing unconstitutional in Congress's decision to vest in the Commission the authority to review factual questions inherent in compensation claims, given that the courts were left with the "complete authority to insure the proper application of

¹⁰⁷ 553 U.S. 723 (2008). Cf. Thomas W. Merrill, *The Disposing Power of the Legislature*, 110 COLUM. L. REV. 452, 464 (2010) ("Whether as a matter of construction of Article III, or of due process, Congress is not completely free to delegate the defense of private rights to nonjudicial institutions. The Court's recent decision in *Boumediene* makes this clear with respect to rights of liberty and the suspension of habeas corpus." (footnote omitted)).

¹⁰⁸ Cf. Pfänder & Wardon, *supra* note 103, at 441 ("Congress can certainly assign immigration matters to non-Article III tribunals for initial adjudication, subject to the usual rules that govern judicial review. Congress surely has broad power to regulate and channel the exercise of judicial oversight. But neither the plenary power doctrine nor the nature of Congress's regulatory authority provides a foundation for curtailing the oversight role of the federal courts.").

¹⁰⁹ 285 U.S. 22 (1932).

¹¹⁰ *Id.* at 39–43.

¹¹¹ *Id.* at 36.

¹¹² *Id.*

¹¹³ *See id.* at 37.

¹¹⁴ *Id.* at 51 ("The present case does not fall within the categories just described but is one of private right, that is, of the liability of one individual to another under the law as defined.").

the law.”¹¹⁵ The Court relied heavily on the fact that the Commission’s decisions on factual issues were channeled to an Article III court.¹¹⁶

The New Deal era brought two decisions that likewise stressed the need for review of the administrative determination in an Article III court. In *NLRB v. Jones & Laughlin Steel Corp.*,¹¹⁷ the Court held that it did not violate the Seventh Amendment for the NLRB to adjudicate, subject to judicial review, whether an employer engaged in unfair labor practices and was thereby liable for monetary sanctions.¹¹⁸ In upholding the scheme, the Court relied on the fact that the NLRB’s decisions were enforceable only upon judicial order by an Article III court.¹¹⁹ Five years later, the Court in *Reconstruction Finance Corp. v. Bankers Trust Co.*¹²⁰ upheld initial adjudication by a federal agency of a state law claim where the claim was ancillary to a federal dispute and the agency’s determination was subject to deferential judicial review.¹²¹ The defendant, the Bankers Trust Company, had argued that “matters of private right may not be relegated to administrative bodies for trial.”¹²² The Court rejected that argument, again relying on the availability of review to an Article III court of legal and factual issues.¹²³

Decades later, *Atlas Roofing Co. v. Occupational Safety & Health Review Commission* addressed a challenge to agency adjudication of a civil fine—a private right—without a jury.¹²⁴ At issue was the Occupational Safety and Health Act of 1970, which empowered the federal government to use agency proceedings to require employers to address unsafe working conditions and to impose fines on employers for violations.¹²⁵ In response to a Seventh Amendment challenge, the Court relied on the availability of

¹¹⁵ *Id.* at 54.

¹¹⁶ *Id.* at 62–63 (“In the absence of any provision as to the finality of the determination by the deputy commissioner of the jurisdictional fact of employment, the statute is open to the construction that the court in determining whether a compensation order is in accordance with law may determine the fact of employment which underlies the operation of the statute. And, to remove the question as to validity, we think that the statute should be so construed.”). *Stern* treated *Crowell* as resting on the fact “that the administrative adjudicator had only limited authority to make specialized, narrowly confined factual determinations regarding a particularized area of law and to issue orders that could be enforced only by action of the District Court.” *Stern v. Marshall*, 131 S. Ct. 2594, 2612 n.6 (2011). “In other words,” *Stern* held, “the agency in *Crowell* functioned as a true ‘adjunct’ of the District Court.” *Id.*

¹¹⁷ 301 U.S. 1 (1937).

¹¹⁸ *Id.* at 48–49.

¹¹⁹ *Id.* at 47.

¹²⁰ 318 U.S. 163 (1943).

¹²¹ *Id.* at 166, 170.

¹²² *Id.* at 168.

¹²³ *Id.* at 170.

¹²⁴ 430 U.S. 442, 444 (1977).

¹²⁵ *Id.* at 445.

judicial review of such fines to a federal court of appeals,¹²⁶ and on that basis declared constitutional the agency's adjudication of a fine without a jury.¹²⁷

Commodity Futures Trading Commission v. Schor concerned federal agency adjudication of a state law counterclaim by one private party against another.¹²⁸ Schor alleged that a debit balance in his account was the result of ContiCommodity's violations of the Commodity Exchange Act; Conti counterclaimed, asserting that the debit was the result of Schor's trading losses and expenses.¹²⁹ The dispute was adjudicated before the Commodity Futures Trading Commission (CFTC).¹³⁰ Based on a lengthy set of considerations, including the fact that the CFTC's orders were enforceable only by a district court, the Court upheld the CFTC's authority to adjudicate the state law liability.¹³¹

The agency adjudications just described have all involved private rights. *Crowell*, *Schor*, and *Reconstruction Finance Corp.* involved one

¹²⁶ *Id.* at 455 n.13 (“We note that the decision of the administrative tribunal in these cases on the law is subject to review in the federal courts of appeals, and on the facts is subject to review by such courts of appeals under a substantial-evidence test. Thus, these cases do not present the question whether Congress may commit the adjudication . . . and the imposition of fines . . . to an administrative agency without any sort of intervention by a court at any stage of the proceedings.” (emphasis added)); see also *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70 n.23 (1982) (plurality opinion) (noting that in matters covered by *Atlas Roofing*, “[Congress] has generally provided, and we have suggested that it may be required to provide, for Art. III judicial review”).

¹²⁷ *Atlas Roofing* bears much of the blame for the confusion of Article III cases. The *Atlas Roofing* Court applied the label “purely private” to a case when a private party seeks to resist the federal government's authority to order it to pay money as required by a federal law, see *Atlas Roofing Co.*, 430 U.S. at 450 n.7 (describing *Crowell* as involving “purely ‘private rights’”), while simultaneously defining as a “public right” the case of a federal statute being used to collect civil penalties from private parties. See *id.* at 450 (misapplying the label “public rights” to the case when Congress authorizes agencies to collect civil penalties from private parties for violations of federal law). Fortunately, at least as it pertains to the structure of appellate review, the substance of the case is consistent with other holdings. Under *Crowell*, the liability of *A* to *B* under a federal statutory scheme can be adjudicated by an agency as an adjunct, a result that *Atlas Roofing* endorses. *Id.* at 450 & n.7. Under *Atlas Roofing* itself, liability under a federal statute of a private party to the federal government can be adjudicated in the first instance by an agency (with no jury), but the *Atlas Roofing* Court was careful to note that it was not holding that such adjudications could be exempted from review by an Article III court. See *id.* at 455 n.13. So, regardless of whether a federal statute displaces common law liability among private parties or whether it creates private liability to the government, agency adjudication has to be reviewable in an Article III court (with review that falls somewhere on the spectrum from *de novo* to deferential). See also *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 586 (1985) (noting the Court had refused to endorse the rule that “Article III has no force simply because a dispute is between the Government and an individual”).

¹²⁸ 478 U.S. 833, 835 (1986).

¹²⁹ *Id.* at 837–38.

¹³⁰ *Id.* at 838.

¹³¹ See *id.* at 847–57. *Stern* likewise read *Schor* as resting on litigant consent as well as on a tangle of six other factors—one of which was that the agency's “orders were enforceable only by order of the district court.” *Stern v. Marshall*, 131 S. Ct. 2594, 2613–14 (2011) (quoting *Schor*, 478 U.S. at 853) (internal quotation marks omitted).

party's liability to another. *Jones & Laughlin* and *Atlas Roofing* involved a private party's payment of a civil fine to the federal government. In all of them, the Court required that direct appellate review to an Article III court of the agency adjudication be available for the adjudicative scheme to be valid.

In contrast, the Court has held that agency adjudications of *public* rights can be conclusive. Several cases have reached this result.¹³² In modern times, the key case is *Thomas v. Union Carbide Agricultural Products Co.*¹³³ *Thomas* considered the validity under Article III of a scheme for mandatory binding arbitration created by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).¹³⁴ The FIFRA statutory compensation scheme at issue "[did] not depend on or replace a right to such compensation under state law."¹³⁵ In other words, the right to compensation from a follow-on applicant was dependent on the federal statutory entitlement.¹³⁶ It was a gratuity, not a statutory replacement of a preexisting common law right. Though the *Thomas* scheme did provide for review to an Article III court, "[t]he arbitrator's decision [was] subject to judicial review only for 'fraud, misrepresentation, or other misconduct.'"¹³⁷

¹³² See *Helvering v. Mitchell*, 303 U.S. 391, 399–400 (1938); *Lloyd Sabaudo Societa v. Elting*, 287 U.S. 329, 335 (1932); *Phillips v. Comm'r*, 283 U.S. 589, 599–600 (1931); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909) ("In accord with this settled judicial construction the legislation of Congress from the beginning, not only as to tariff but as to internal revenue, taxation and other subjects, has proceeded on the conception that it was within the competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power.").

¹³³ 473 U.S. 568 (1985).

¹³⁴ *Id.* at 571.

¹³⁵ *Id.* at 584.

¹³⁶ The previous year, the Court had confirmed that the right to compensation created by FIFRA was a gratuity when it held that the FIFRA scheme did not effectuate a taking. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1010, 1013 (1984) ("[W]ith respect to any data that Monsanto submitted to EPA prior to the effective date of the 1972 amendments to FIFRA, we hold that Monsanto could not have had a 'reasonable investment-backed expectation' that EPA would maintain those data in strictest confidence and would use them exclusively for the purpose of considering the Monsanto application in connection with which the data were submitted."). Before 1972, there was no guarantee that data would not be used to evaluate other applicants. After 1972 and before 1978, the federal statute was amended so that submitters of data had an expectation of compensation by the follow-on applicant. See *id.* at 992. After 1978, the scheme changed again to authorize EPA to disclose data submitted to it—but Monsanto was on notice of the change, and so there was no taking. See *id.* at 994–96, 1006. Thus, the Court treated FIFRA compensation *not* as a replacement of a state law right to compensation for trade secrets; rather, it viewed the compensation as purely the right to receive money that the federal government had promised through the statutory scheme in sufficiently definite terms—which is to say, a public right or a gratuity and not a private right. See *Thomas*, 473 U.S. at 584 (explaining that "[a]ny right to compensation . . . results from [the FIFRA statute] and does not depend on or replace a right to such compensation under state law").

¹³⁷ *Thomas*, 473 U.S. at 573–74 (quoting 7 U.S.C. § 136a(c)(1)(D)(ii) (1982)).

Consistent with the “rationale” of the public rights doctrine, the Court held that this extremely narrow standard of review did not offend Article III.¹³⁸

As these cases demonstrate, Article III is actually quite simple when it comes to agency adjudication. The cases where agency adjudication *cannot* be conclusive—where review to an Article III court must be available on a direct appellate basis—are private rights cases. In cases purely involving “public rights,” the agency adjudication can be conclusive; direct appellate review by Article III courts in public rights cases could be eliminated.¹³⁹ In short, where agencies administering federal law are concerned, the need for an Article III court’s availability to review the agency adjudication depends on whether or not a particular case involves traditional private rights.

It is also important to see what these cases do *not* hold. The cases addressing Article III and agency adjudication have not outright forbidden initial agency adjudication of private rights.¹⁴⁰ They have not prohibited initial adjudications of private rights by federal agencies from receiving

¹³⁸ An influential treatise treats *Thomas* as a case that classified the right at issue “as sufficiently bound up with an integrated regulatory scheme to come within the rationale, if not the historic scope, of the public rights doctrine.” RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 362 (6th ed. 2009). In my view, *Thomas* is better seen as classifying the right as within the public rights rationale because the only party involuntarily forced to adjudicate before a non-Article III tribunal was a claimant to government largesse—i.e., a claimant to a public right. *See id.* at 358 (“The follow-on registrant consented to arbitration, thereby perhaps waiving at least aspects of its rights to Article III review. And the original registrant, who did not consent, is not a defendant in an enforcement proceeding, where rights to Article III review are at their apex, but instead a claimant seeking affirmative relief.”); *see also Thomas*, 473 U.S. at 592 (“In any event, under FIFRA, the only potential object of judicial enforcement power is the follow-on registrant who explicitly consents to have his rights determined by arbitration.”).

¹³⁹ *See Nelson, supra* note 20, at 612 (“[A]lthough claimants [to public rights] might be able to get a true court to review the *systemic* adequacy of the administrative procedures that Congress has established, the Due Process Clause has not been understood to give each individual claimant the right to have a true court review the individualized adjudicative facts bearing on his or her particular claim.”); Schwartz, *supra* note 29, at 1882 (“The judicial review theory was invoked by the *Crowell* Court only to justify administrative adjudication of disputes between private entities. But in cases involving ‘public rights,’ the use of a non-article III tribunal was justified without any explicit reliance on the availability of judicial review.” (footnote omitted)).

¹⁴⁰ *Compare* *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833 (1986) (allowing non-Article III adjudication of a state law-based counterclaim in a hearing under the Commodity Exchange Act), *and* *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (rejecting the argument that the NLRB could not order back pay because it would violate the right to a jury trial under the Seventh Amendment), *and* *Crowell v. Benson*, 285 U.S. 22 (1932) (upholding the adjudication of worker compensation by the U.S. Employees’ Compensation Commission), *with* *Stern v. Marshall*, 131 S. Ct. 2594 (2011) (holding that Article III bars a bankruptcy court from adjudicating a state law-based counterclaim), *and* *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989) (holding that the Seventh Amendment guarantees a right to a jury trial for a bankruptcy court’s adjudication of a fraudulent conveyance claim), *and* *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982) (plurality opinion) (holding that the Bankruptcy Act of 1978 was unconstitutional because it impermissibly granted bankruptcy courts the power to adjudicate state law contract claims).

deferential review by Article III courts.¹⁴¹ They have not insisted on a strict division of executive and judicial power in the context of federal agencies administering federal law by adjudication.¹⁴² Rather, the cases emphasize that there must be direct appellate review available in run-of-the-mill cases to an Article III court where the agency adjudication involves traditional private rights.

If we take Article III as we find it explicated in the cases just discussed, what would it mean for judicial review of agency adjudication?¹⁴³ That is the topic to which the next Part turns.

III. CALIBRATING DEFERENCE TO ARTICLE III

This Part explains why courts should show less deference to the results of agency adjudication in cases where traditional private rights, in an

¹⁴¹ See, e.g., *Reconstruction Fin. Corp. v. Bankers Trust Co.*, 318 U.S. 163, 168–71 (1943) (sustaining scheme under which the federal agency performed the initial adjudication of a private rights claim subject to substantial evidence review by a reviewing court); *Jones & Laughlin Steel Corp.*, 301 U.S. at 47 (“The Board must receive evidence and make findings. The findings as to the facts are to be conclusive, but only if supported by evidence. The order of the Board is subject to review by the designated court, and only when sustained by the court may the order be enforced.”).

¹⁴² Cf. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1246–48 (1994) (advocating sharp executive–judicial division).

¹⁴³ My method in analyzing this area of law has rested on the modest premise that the Supreme Court will continue to adhere with some consistency to its prior cases, as well as on the prediction that one aspect of this consistency will be that the Court will continue to treat initial agency adjudication as acceptable as long as it is subject to appropriate controls by Article III courts. Whether this approach seems sound may largely depend on what one takes *Stern v. Marshall* to portend for the Court’s future stance on how Article III constrains adjudication by non-Article III adjudicators. In *Stern*, the Court considered an Article III challenge to a statutory scheme for bankruptcy adjudication that vested jurisdiction in a bankruptcy court to render a final judgment in a proceeding involving a debtor’s state law counterclaim for tortious interference. See *Stern*, 131 S. Ct. at 2601–03. The Court held that the bankruptcy court could not adjudicate the state law counterclaim because it involved a private right, not a public right. See *id.* at 2611–15. The *Stern* Court carefully stressed the differences between regulatory agencies and bankruptcy courts. See *id.* at 2614–15, 2619; Gillian E. Metzger, Foreword, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1338–39 (2012) (noting “*Stern*’s repeated carve-outs” for federal administrative agencies). Some scholars have read this language in *Stern* to indicate that the Court will afford agencies greater leeway in adjudicating private rights free from Article III oversight. See, e.g., Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384, 417–18, 452–60 (2012) (advancing a proposal, largely inspired by *Stern*’s hints, for a federal bankruptcy agency that would, in the authors’ view, avoid the Article III constraints applicable to bankruptcy courts).

But this is not the only possible reading of *Stern*. One might also see in *Stern* an indication that some members of the Supreme Court believe that the public rights exception has been too broadly drawn and that agency adjudication involving private rights is vulnerable to Article III challenge. See *Stern*, 131 S. Ct. at 2611–15 (narrowly reading *Crowell* and *Thomas*); *id.* at 2621 (Scalia, J., concurring) (“Article III judges are not required in the context of territorial courts, courts-martial, or true ‘public rights’ cases.” (emphasis added)); *id.* at 2621–30 (Breyer, J., dissenting) (noting that the *Stern* majority’s treatment of *Crowell* calls into question the validity of a variety of federal adjudicative schemes). In other words, there may be appetite on the Court for a rather more dramatic reworking of Article III constraints on agency adjudication than what I propose in Part III.

Article III sense, are at issue. It begins by discussing how calibrating deference to Article III would shield structural constitutional values and then defends this approach against certain objections.

At the outset, it is worth saying a word about the scope of the proposal. An armament of doctrines and remedies enable federal courts to address constitutional challenges to agency action.¹⁴⁴ My concern here is not to explain how reviewing courts might be sensitive to the full panoply of constitutional rights potentially implicated by agency adjudication, but rather to explore how a single structural value—the constitutional prerogatives of Article III courts—can be better implemented in administrative law. In other words, the project’s focus is on safeguarding the structural prerogatives of Article III courts, not on vindicating any and all constitutional rights of litigants—though achieving the former goal will sometimes further the latter.

A. *Judicial Nondelegation and Private Rights*

Article III doctrine distinguishing between public and private rights “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.”¹⁴⁵ The converse is also true: where Congress selects a quasi-judicial method of resolving matters that cannot be conclusively determined by the Executive and Legislative Branches, the danger of encroaching on the judicial powers is increased. Those “matters” are those that involve core private rights.

To guard against encroachments on judicial power, courts should read statutes that provide for deferential review more narrowly in cases where private rights are at issue than in cases where public rights are at issue. Courts should apply less deferential review in such cases so as to ensure that agencies are correctly adjudicating the facts and law involved in private rights cases.

This is a nondelegation canon for Article III courts reviewing agency adjudication of private rights.¹⁴⁶ Two justifications are conventionally used

¹⁴⁴ See FALLON ET AL., *supra* note 138, at 308–24. See generally Fallon, *Jurisdiction-Stripping*, *supra* note 20 (discussing limits on congressional power to strip judicial review).

¹⁴⁵ *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 589 (1985) (quoting *Northern Pipeline*, 458 U.S. at 68 (plurality opinion)).

¹⁴⁶ See *supra* note 32 (noting that the “nondelegation” locution is shorthand for the principle that Congress cannot “reassign powers” that the Constitution vests in a particular branch to another branch (quoting *Mistretta v. United States*, 488 U.S. 361, 382 (1989))). Rulemaking is not implicated. “[T]he only constitutionally authorized function of the Article III courts is to adjudicate cases . . .” Fallon, *Jurisdiction-Stripping*, *supra* note 20, at 1119. The deference that must be paid to agency fact finding in rulemaking, a quasi-legislative activity, does not implicate the adjudicative fact finding important to Article III. Fact finding in rulemaking might, of course, implicate other structural constitutional values.

to support nondelegation canons—constitutional avoidance considerations and institutional competence considerations. Both sets of reasons apply here.

1. Constitutional Avoidance.—Many, perhaps even all, nondelegation canons depend centrally on the principle of constitutional avoidance.¹⁴⁷ Is there a constitutional problem that needs avoiding here? If so, what exactly is it?

The answer has been alluded to already, but it is worth stating explicitly. As discussed above, the Court has held that conclusive agency adjudication of private rights is constitutionally prohibited.¹⁴⁸ So, totally deferential review is likewise prohibited. If, hypothetically, a judicial review statute just directed a reviewing court to adopt outright an agency’s factual or legal findings, the statute would be invalidated as violating Article III.¹⁴⁹ Existing statutes obviously do not go that far. But as they are written and construed, do they tilt too far in the direction of requiring deference?

Much existing scholarship concludes that the question is a close one but that they do not tilt too far. Professors Richard Saphire and Michael Solimine deem “the ‘substantial evidence’ or ‘weight of the evidence’ tests, or variants thereof” to “provide the appropriate and necessary guideline” for Article III review of agency adjudication, but they also argue that a narrower standard would gut Article III review of meaning.¹⁵⁰ Professor Martin Redish notes that “[w]hether there is ‘meaningful’ review under the

See generally Sharkey, *supra* note 1 (discussing federalism and agency fact finding in preemption decisions).

¹⁴⁷ *See* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 223 (“The nondelegation doctrine, in other words, now operates exclusively through the interpretive canon requiring avoidance of serious constitutional questions.”).

¹⁴⁸ *See supra* Part II.

¹⁴⁹ *See* Lawson, *supra* note 142, at 1247–48 (“Article III certainly would not be satisfied if Congress provided for judicial review but ordered the courts to affirm the agency no matter what. That would effectively vest the judicial power either in the agency or in Congress. There is no reason to think that it is any different if Congress instead simply orders courts to put a thumb (or perhaps two forearms) on the agency’s side of the scale.”); Gerald L. Neuman, *The Constitutional Requirement of “Some Evidence,”* 25 SAN DIEGO L. REV. 631, 731 (1988) (“[A]s Chief Justice Hughes trenchantly observed, if the judiciary were bound by administrative findings of fact regardless of the absence of evidentiary support, the agencies could circumvent the courts’ authority to declare the law by making fictional findings.”).

¹⁵⁰ *See* Richard B. Saphire & Michael E. Solimine, *Shoring Up Article III: Legislative Court Doctrine in the Post CFTC v. Schor Era*, 68 B.U. L. REV. 85, 144 (1988) (“Given the apparent narrowness of the ‘clearly erroneous’ standard, we think the ‘substantial evidence’ or ‘weight of the evidence’ tests, or variants thereof, provide the appropriate and necessary guideline. While the ‘clearly erroneous’ standard may be appropriate for appellate review of the factual findings of an article III trial judge, it seems entirely too deferential for other contexts, and would reduce article III review—the only time a litigant will have her case before an article III tribunal—to little more than a formality.” (footnote omitted)).

highly deferential ‘substantial evidence’ test is questionable.”¹⁵¹ Professor David Strauss notes that “it is by no means clear that the administrative state—with fact-finding that is responsive to political pressures and influenced by a prosecutor’s orientation—can be squared with article III.”¹⁵² Professor Richard Fallon notes that “any *further* circumscription of judicial review” over the already highly circumscribed type of review currently available “could be regarded as jurisdiction-stripping.”¹⁵³

These claims fall one crucial degree short of the mark. As they are conventionally read, the constraints on judicial review of agency adjudication *already* skew too far in favor of agencies where private rights are at issue.¹⁵⁴ Consider the substantial evidence standard. “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”¹⁵⁵ It may also only mean “more than a mere scintilla.”¹⁵⁶ The test “gives the agency the benefit of the doubt, since it requires not the degree of evidence which satisfies the *court* that the requisite fact exists, but merely the degree which *could* satisfy a reasonable factfinder.”¹⁵⁷ By way of comparison, a strict application of Article III to private rights cases implicating only state law requires an Article III court to find facts itself, with the non-Article III fact finder permitted to act at best as an adjunct.¹⁵⁸ It deviates too far from this paradigm to give “the benefit of the doubt” to an agency adjudicating private rights under federal law.¹⁵⁹

2. *Institutional Competence.*—An Article III judicial nondelegation canon can also be supported by reference to a second explanation for why nondelegation canons exist: institutional competence.

According to Professor Cass Sunstein, the nondelegation canons largely flow from concerns about institutional ability and incentives—basically, the idea that agencies are ill-suited to make important decisions

¹⁵¹ Redish, *supra* note 11, at 227.

¹⁵² See David A. Strauss, *Article III Courts and the Constitutional Structure*, 65 *IND. L.J.* 307, 310 (1990).

¹⁵³ Fallon, *Jurisdiction-Stripping*, *supra* note 20, at 1117 (emphasis added).

¹⁵⁴ Cf. Lawson, *supra* note 142, at 1247–48 (suggesting—though without “full confidence”—that substantial evidence review “arguably fails to satisfy Article III” and that “Article III requires de novo review, of both fact and law, of all agency adjudication that is properly classified as ‘judicial’ activity”).

¹⁵⁵ *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

¹⁵⁶ *Id.*

¹⁵⁷ *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 377 (1998).

¹⁵⁸ See *Stern v. Marshall*, 131 S. Ct. 2594, 2619 (2011); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 59 n.14 (1989); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 77–78 (1982) (plurality opinion).

¹⁵⁹ *Allentown Mack*, 522 U.S. at 377; see also Strauss, *supra* note 152, at 309 (“The most natural inference from the tenure and salary protections of article III is that the Framers wanted impartial decisions in particular cases. And of course making impartial decisions in individual cases requires control over fact-finding as well as law-declaring. In the run of the mill case, the facts are everything.”).

that Congress ought to make.¹⁶⁰ Because agencies are not designed to be sensitive to state interests,¹⁶¹ promote the welfare of Indian tribes,¹⁶² or consider certain foreign policy issues,¹⁶³ courts apply nondelegation canons in these areas rather than defer to agency interpretations.

An analogous justification applies here with respect to courts vis-à-vis agencies. Agencies may not be particularly well suited to the adjudication of private rights. First, agencies and agency adjudicators lack the features of independence that Article III courts possess. Some agency adjudications are done before administrative law judges (ALJs), who have important elements of independence from agencies, but more than half are done before “hearing” or “presiding” officers who lack the protections enjoyed by ALJs.¹⁶⁴ Second, even when ALJ adjudication does occur, its benefit is limited. The agency is not bound by the ALJ’s findings.¹⁶⁵ Third, and contrary to traditional assumptions about relative agency competence,¹⁶⁶ recent scholarship has emphasized that agencies may be “primarily

¹⁶⁰ Cass R. Sunstein, *Beyond Marbury: The Executive’s Power to Say What the Law Is*, 115 YALE L.J. 2580, 2608 (2006) (tracing nondelegation canons to the principle that “key decisions must be explicitly made by the national lawmaker”).

¹⁶¹ *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 908 (2000) (Stevens, J., dissenting) (“[A]gencies are clearly not designed to represent the interests of States . . .”).

¹⁶² Peter S. Heinecke, *Chevron and the Canon Favoring Indians*, 60 U. CHI. L. REV. 1015, 1039 (1993) (“The *Chevron* presumption is motivated by a belief that agencies are more competent, that they are more accountable, or that judicial monitoring is unnecessary. For Native Americans, however, political accountability is not helpful and agency competency may work against them.”).

¹⁶³ *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 258 (1991) (rejecting deference to the agency’s interpretation that Title VII applied to discrimination outside the United States). *But see* Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1204–07 (2007) (arguing that in the foreign policy realm “considerations of constitutional structure argue strongly in favor of deference to the executive—a point that makes the argument for deference stronger than in *Chevron* itself”).

¹⁶⁴ *See* Michael Asimow, *The Spreading Umbrella: Extending the APA’s Adjudication Provisions to All Evidentiary Hearings Required by Statute*, 56 ADMIN. L. REV. 1003, 1004 (2004) (“The APA’s adjudication provisions govern only a portion (probably half or less) of the evidentiary hearings called for by federal statutes.”); *id.* at 1008 (arguing that “schemes involving substantial stakes” should require APA formal adjudication); Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1145 (2006) (noting that many administrative adjudicators lack not only “resources, status, and visibility,” but also “structural protection that ensures their independence, because they can be subject to efforts by their superiors within agencies to affect their decisions” since they are “line employees of agencies, subject to reassignment or other influences”).

¹⁶⁵ *See* 5 U.S.C. § 557(b) (2006) (on appeal from the ALJ, “the agency has all the powers which it would have in making the initial decision”); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 492–93 (1951). Federal law differs in this respect from the law of some states, in which the ALJ’s findings are presumptively binding or may not even be appealable to the agency head. *See* MICHAEL ASIMOW & RONALD M. LEVIN, *STATE AND FEDERAL ADMINISTRATIVE LAW* 136–37, 512–13 (3d ed. 2009).

¹⁶⁶ *See, e.g., Moog Indus., Inc. v. FTC*, 355 U.S. 411, 413 (1958) (“[I]n the shaping of its remedies within the framework of regulatory legislation, an agency is called upon to exercise its specialized, experienced judgment.”).

interested in desert rather than deterrence” when meting out punishment.¹⁶⁷ But “[a]gencies are unlikely to be able to claim any particular expertise in the allocation of desert-based punishment.”¹⁶⁸ Indeed, they may affirmatively lack that expertise: “[b]ureaucrats . . . tend to resist or at least be indifferent to broad policy considerations or claims of abstract justice that do not fall squarely within their regulatory specialty.”¹⁶⁹ A judicial nondelegation canon would thus preserve judicial leeway in a realm where agency claims to deference are comparatively weaker—where agencies are applying penalties to regulated entities.

Reduced judicial deference to agency adjudications of private rights will also have an additional benefit: it will encourage better and more transparent agency decisionmaking. At the margins, the functional consequence of increased judicial scrutiny of private rights adjudications will be to incentivize an agency to ensure that the evidence, presumptions, and reasoning of its private rights adjudications can bear more searching scrutiny. One way an agency might achieve this result is by adopting evidentiary presumptions or rules to guide adjudication. An agency might also respond to the increased judicial scrutiny of adjudication by reducing its overall reliance on adjudication and by instead setting out explicit rules to govern classes of private rights cases—by, in effect, disposing of classes of routinely arising issues or cases by rule rather than by adjudication. Increased judicial scrutiny of private rights adjudications will thus either improve the quality of such adjudications or will instead encourage agencies to proceed by rules that can be openly assessed in advance of their application. Either outcome would be beneficial.¹⁷⁰

In sum, apart from concerns flowing from constitutional avoidance, considerations of institutional competence offer a separate justification to

¹⁶⁷ Max Minzner, *Why Agencies Punish*, 53 WM. & MARY L. REV. 853, 904 (2012); see also Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. REV. 577, 579, 581 (2012) (noting that “[r]egulatory agencies can and often do behave like retributive punishers,” and explaining that “[p]unishment . . . offers regulators substantially more slack at the same time it promises them access to increased resources”).

¹⁶⁸ Minzner, *supra* note 167, at 911.

¹⁶⁹ Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 15 (2007).

¹⁷⁰ Courts and scholars have noted the benefits of incentivizing agencies to apply openly stated rules to adjudications. See *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 375 (1998) (“The evil of a decision that applies a standard other than the one it enunciates spreads in both directions, preventing both consistent application of the law by subordinate agency personnel (notably ALJ’s), and effective review of the law by the courts.”); see also PIERCE, *supra* note 21, § 11.5, at 1035 (“An agency whose powers are not limited either by meaningful statutory standards or by legislative rules poses a serious potential threat to liberty and to democracy.”). As Pierce notes, the doctrine that an agency acts arbitrarily and capriciously when it makes an unexplained departure from precedent constrains this potential threat—but only as to those agencies that *have* a system of precedent; many agencies do not. *Id.* at 1035–36.

read the statutes governing judicial review so as to ensure robust review by Article III courts of private rights adjudications.¹⁷¹

B. *A Discussion of Objections*

The idea of calibrating deference to Article III faces some objections that deserve consideration. The first objection rests upon the undesirability of honoring distinctions between public rights and private rights. The second objection concerns the possibility that the Due Process Clause already ensures the requisite fairness of administrative procedures and that adding Article III-based protections for private rights would be overkill. The third objection rests on the unappetizing prospect that giving courts the latitude to ratchet up scrutiny of agencies in a selective subset of cases will invite untethered judicial lawmaking. Ultimately, none of these objections is persuasive.

1. *Baselines and Rights.*—Article III’s public rights–private rights distinction has few friends and many foes. Antipathy for the distinction takes a variety of forms. The public–private rights line reeks of pre-*Lochner* thinking about baseline entitlements,¹⁷² habits of thought widely believed to have been demolished by the advent of legal realism, the New Deal, and the procedural due process jurisprudence of the 1970s.¹⁷³ Public rights (namely, statutory entitlements, but also government jobs and government contracts) are critically important to people and to businesses,¹⁷⁴ and often may be more important to people or businesses

¹⁷¹ Cf. Levy & Shapiro, *supra* note 22, at 549 (explaining how the quality of public rights adjudication by the Veteran’s Administration shows that “the independence of Article III judges can be an important element in establishing meaningful and effective judicial review”).

¹⁷² “[O]ne of the great truisms bequeathed to us by legal realism” is the “nominalis[t]” conception of the meaning of property, which is the idea that “[p]roperty means whatever the nonconstitutional decisionmakers say it means, or whatever the nonconstitutional decisionmakers choose legally to protect as a ‘legitimate claim of entitlement.’” Merrill, *supra* note 89, at 949–50.

¹⁷³ See Richard J. Pierce, Jr., *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973, 1973 (1996) (“This revolution was accomplished in five opinions issued between 1970 and 1972, in which the Court expanded dramatically the scope of the interests that are protected by procedural due process and the procedural safeguards that apply to those interests.” (citing *Perry v. Sindermann*, 408 U.S. 593 (1972); *Bd. of Regents v. Roth*, 408 U.S. 564 (1972); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970))). The “revolution” was not destined to eradicate the line between rights and privileges: “[d]espite proclamations of its demise, the right/privilege distinction is not as moribund today [in 1986] as it appeared during the early 1970’s.” Fallon, *Of Legislative Courts*, *supra* note 14, at 966 n.278; see also Pierce, *supra*; Rodney A. Smolla, *The Reemergence of the Right–Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69, 70 (1982) (noting that the Burger Court’s jurisprudence had “substantially circumscrib[ed] the range of interests to which constitutional due process safeguards apply”).

¹⁷⁴ See Levy & Shapiro, *supra* note 22, at 500, 547–49; *May 2012 National Occupational Employment and Wage Estimates by Ownership: Federal, State, and Local Government, Including Government Owned Schools and Hospitals, and the US Postal Service*, U.S. BUREAU OF LAB. STAT.,

than the private rights they hold. Much public rights adjudication is dismal in quality and could greatly benefit from more robust judicial review,¹⁷⁵ an outcome that may be more difficult to achieve if finite judicial resources are expended on careful review of private rights adjudications. Whatever the reason, critics of the public rights–private rights divide may prefer not to see it propagate from the law of Article III into the law of judicial review of agency action.¹⁷⁶

This argument has quite a lot of force. But it is ultimately unconvincing. Ratcheting up judicial review over public rights may well be desirable, for reasons of basic decency and fairness, as well as to better protect rule of law values.¹⁷⁷ No constitutional obstacle exists to this path; the constraints appear to be mainly economic and political. But the infeasibility of stricter review for public rights adjudications should not straitjacket thinking about the constitutionally appropriate forms of judicial review for private rights.

More fundamentally, this objection greatly exaggerates the obsolescence of the line between public rights and private rights in American law.¹⁷⁸ To make the point more concrete, take the situation of a corporation holding a license to operate a business on federal land—a licensing case analogous to the *FCC v. Fox* situation, but without the

<http://www.bls.gov/oes/current/999001.htm#00-0000> (last updated Mar. 29, 2013) (reporting over 21,000,000 public-sector employees).

¹⁷⁵ See, e.g., Levy & Shapiro, *supra* note 22, at 547–49 (describing delays in Department of Veterans Affairs adjudications of veterans’ benefits: “[i]n light of the delays at the VA, it is not at all unusual for a veteran to die before his or her meritorious disability claim is resolved”).

¹⁷⁶ For an argument that the private rights–public rights divide should not “be categorically conclusive” for Article III purposes either, see Fallon, *Jurisdiction-Stripping*, *supra* note 20, at 1124 n.377 (citation omitted):

Although Nelson makes an impressive case that residues of nineteenth-century legal thought exert a continuing, often unrecognized influence on modern doctrine, I fail to understand why that influence should be categorically conclusive in some cases, such as those involving pendent agency jurisdiction over state law claims, but not in others.

Referring to the fact that nineteenth-century “residues” have not prevented the extension of procedural due process protections to determinations of public entitlements, Professor Fallon posits that Article III doctrine should likewise be liberated from “selective Article III originalism.” *Id.* at 1124. Other scholars have criticized the propagation of the public-private rights line into Seventh Amendment cases. See FALLON ET AL., *supra* note 138, at 361 n.6 (collecting sources).

¹⁷⁷ FALLON ET AL., *supra* note 138, at 361 n.6; Sidney A. Shapiro & Richard E. Levy, *Government Benefits and the Rule of Law: Toward a Standards-Based Theory of Due Process*, 57 ADMIN. L. REV. 106, 113 (2005) (“The rule of law is violated when the government fails to follow statutory or other legal standards in determining government benefits. While we believe that the differences between private property and government benefits are overstated, our more fundamental point is that, regardless of the character of the underlying interest, the injury to rule of law principles is the same when the government acts inconsistently with legal standards.” (footnote omitted)).

¹⁷⁸ Cf. Nelson, *supra* note 20, *passim* (arguing that the public–private and the right–privilege distinctions remain etched into the law of separation of powers that governs the modern administrative state today).

complicating First Amendment issues¹⁷⁹—and stipulate that the license qualifies as a protected interest for procedural due process purposes.¹⁸⁰ Now suppose the business litters. Under the judicial nondelegation view defended here, the decision of a federal agency to revoke the business's license for littering—a decision with enormous financial consequence—would receive ordinary review under the Administrative Procedure Act. In contrast, an agency decision to *fine* the same business for violating a federal law prohibiting littering on federal land, even if the fine were quite small, would receive more robust review.

Why does this make any sense? The same facts—whether or not littering occurred—are at issue in both situations. The same verbal formulation—substantial evidence—will apply to the agency adjudication of the license revocation and the agency adjudication of the fine. Certainly, the equities would seem to tilt in favor of more robust review of a bet-the-business revocation than a \$100 slap on the wrist.

The superficial similarity of the cases masks the fact that they are constitutionally quite distinct. The federal government does not have to license businesses at all on federal land; it could simply wind up the whole scheme without legal trouble. In contrast, an independent constitutional protection shields the business's funds—the Takings Clause.¹⁸¹ If two separate suits were to be brought—one that challenged the government's decision to shut down the licensing scheme, and another that challenged the government ordering the business to pay a \$100 fine—the two would receive very different treatment. Why? One sort of “property”—the license—involves a lesser interest because it receives only protection from “arbitrary deprivation by *executive* actors,” but the other sort of property—the money—is “protected against uncompensated ‘takings’ even by the legislature itself.”¹⁸²

¹⁷⁹ See *supra* text accompanying notes 57–59.

¹⁸⁰ Cf. *Bell v. Burson*, 402 U.S. 535, 539 (1971) (“Once licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.”).

¹⁸¹ U.S. CONST. amend. V.

¹⁸² Nelson, *supra* note 20, at 622; accord Merrill, *supra* note 89, at 958 & n.273 (noting that courts have rejected the idea that deprivations of new property are entitled to “substantive constitutional protection”); see *Richardson v. Belcher*, 404 U.S. 78, 80–81, 84 (1971) (rejecting the argument that changes in Social Security benefits were a violation of the Fifth Amendment); *Adams v. United States*, 391 F.3d 1212, 1220 n.4 (Fed. Cir. 2004) (“Generally, entitlements are considered to be government conferred benefits, safeguarded exclusively by procedural due process. In light of this, entitlements are often referred to as ‘property interests’ within the meaning of the Due Process Clause in cases decided under that clause, but such references have no relevance to whether they are ‘property’ under the Takings Clause.” (citation omitted)); see also Merrill, *supra* note 89, at 958 (“[W]hen the courts have been confronted with claims that ‘new property’ interests such as Social Security or welfare benefits are entitled to substantive constitutional protection [under the Takings Clause], those claims have been rejected out of hand.”); *id.* at 958 n.273 (collecting sources).

The New Deal and the procedural due process revolution may partially have eroded the distinction between public and private rights, but they far from erased it.¹⁸³ “*Lochner*-like themes are so deeply ingrained in the constitutional order . . . that it would be hopeless to attempt to abandon them even if it were desirable to do so.”¹⁸⁴ The public–private rights divide may be unfashionable, but it is part of the latent substructure upon which important constitutional commitments rest.

Of course, the fact that a constitutional distinction persists does not settle the question whether it is correctly drawn.¹⁸⁵ Both the money that will be fined and the permit are constitutional property (though of different flavors). Why should a reviewing court treat agency adjudication of the fine differently than agency adjudication of the permit? Some normative reason must exist to justify why it makes sense to accord greater judicial scrutiny only to agency adjudications of one subset of constitutional “property”—the category protected by the Takings Clause—rather than also to the broader set of all constitutional “property” shielded by procedural due process from arbitrary deprivations.

Other scholars have made normative arguments justifying the continued existence of a constitutional line between old and new property¹⁸⁶ and have explained the benefits of honoring this line when it comes to interpreting the demands of Article III.¹⁸⁷ It remains only to point out the logical consequence of this reasoning for the framework governing judicial review of agency adjudication. New property can be created or destroyed at the whim of the legislature.¹⁸⁸ So can the extent of appellate judicial review

¹⁸³ Professor Woolhandler notes two other areas of constitutional law that draw distinctions between old and new property—the law governing constitutional compulsion of monetary remedies and the law governing abrogation of state sovereign immunity. See Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L.J. 1015, 1060–61 (2006) (“Similarly, the possibility that the Constitution requires monetary remedies for certain wrongs is much more insistent for traditional common law interests than for claims for statutory benefits. And for purposes of when Congress can abrogate sovereign immunity under § 5 of the Fourteenth amendment, the Court has distinguished mere statutory claims (for example, for false advertising under the Lanham Act) from claims arising from systemic deprivations of traditional property interests.” (footnotes omitted)).

¹⁸⁴ Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 875 (1987).

¹⁸⁵ Woolhandler, *supra* note 183, at 1061 (“That we have in the past and continue to provide more protection for traditional common law interests does not fully respond to the issue of whether we ought to provide such protections.”).

¹⁸⁶ See Stephen F. Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. LEGAL STUD. 3, 11–13 (1983); Woolhandler, *supra* note 183, at 1061–62.

¹⁸⁷ See, e.g., Nelson, *supra* note 20, at 623–25 (defending Article III’s distinction between old and new property because greater protection for traditional forms of property acts as a counterweight to the growth of government and helps to promote private investments that will in turn spur wealth generation).

¹⁸⁸ See Shapiro & Levy, *supra* note 177, at 113–14 (noting that “[s]ince the Supreme Court has also made clear that the Constitution does not normally impose affirmative duties on the government, a legislature has the power to control the nature and extent of any benefit it creates, including whether

provided for adjudications of new property—that is the heart of the public rights doctrine.¹⁸⁹ Where the judiciary’s involvement exists only permissively, by legislative largesse, the judicial power cannot be at stake in as crucial a sense as it is in matters where the involvement of federal courts is a constitutional necessity.¹⁹⁰ Where judicial review is a constitutional necessity, it cannot be an empty one; it has to have some bite. The domain of judicial nondelegation thus must span the domain of cases to which Article III appellate review extends as a constitutional necessity—cases where agencies are adjudicating life, liberty, and traditional forms of property.

2. *Due Process Distinguished.*—The Due Process Clause places a floor on administrative procedures, including those involving adjudication of traditional private rights.¹⁹¹ Within administrative law, much of the judicial review of agency procedure has been subsumed by due process analysis.¹⁹² Indeed, for a doctrine supposedly protective of individual rights, “due process doctrine has acquired a managerial focus.”¹⁹³ Courts have “abjur[ed] responsibility to guarantee individually correct decisions.”¹⁹⁴ Instead, courts “generally acknowledge[] their obligation to identify and police, at wholesale if not at retail, the outer bounds of governmental lawfulness.”¹⁹⁵

there is an ‘entitlement’ to that benefit” sufficient to trigger the protections of procedural due process (footnote omitted)).

¹⁸⁹ See *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856) (noting that in cases involving public rights, “it depends upon the will of congress whether a remedy in the courts shall be allowed at all”); see also *supra* Part II.B (explaining Article III jurisprudence on the extent of direct appellate review necessary in public rights and private rights cases).

¹⁹⁰ Cf. *Nelson*, *supra* note 20, at 622 (“[N]oncontractual statutory entitlements plainly do not vest in individuals to the same extent that traditional forms of property can. It is not at all odd for our understanding of Article III to take account of this distinction, and to require less ‘judicial’ involvement in the adjudication of mere statutory entitlements than in the adjudication of traditional forms of property.”).

¹⁹¹ *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970) (“Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government’s case must be disclosed to the individual so that he has an opportunity to show that it is untrue. . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny.” (last two omissions in original) (quoting *Greene v. McElroy*, 360 U.S. 474, 496–97 (1959)) (internal quotation marks omitted)).

¹⁹² See Fallon, *Some Confusions*, *supra* note 13, at 330–37.

¹⁹³ *Id.* at 336.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* (footnote omitted); see also *id.* at 337 n.160 (“I have argued elsewhere that the underlying values might be [b]etter ascribed to Article III—the constitutional provision establishing a coequal judicial branch within a tripartite scheme of government—than to the Due Process Clause. In the case law, however, little has turned on the distinction, and the Due Process Clause has assumed an important structural role.” (citation omitted)).

The fact that due process already applies to agency adjudication may make the whole idea of a judicial nondelegation canon seem superfluous. One might take the view that due process and the Administrative Procedure Act (APA) already accomplish the task of ensuring fair agency procedure in private rights cases.¹⁹⁶ On this view, ratcheting up judicial review for private rights adjudications would duplicate the work already being done by procedural due process and the APA in ensuring fairness in administrative procedures.

One problem with this account is the scanty coverage of many of the procedural due process features of the APA. Sections 556 and 557 of the APA are simply inapplicable to much agency adjudication because it is informal.¹⁹⁷ And the category of informal adjudication is crowding out formal adjudication. When given the choice, agencies overwhelmingly prefer to use informal adjudication.¹⁹⁸ “They lobby for it with Congress, and they interpret ambiguous statutory provisions to allow for it.”¹⁹⁹ Moreover, agencies now have increased latitude to select informal adjudication. For a period of time, some federal courts of appeals applied the rule that any statutory requirements for a hearing meant a formal adjudication.²⁰⁰ Today, however, the predominant view is that agencies get *Chevron* deference as to whether the requirement for a hearing means a formal hearing or not.²⁰¹ These developments have stirred debate among

¹⁹⁶ PIERCE described an article written by Professor Verkuil as rebutting “any concern that administrative adjudication of disputes involving ‘private rights’ might jeopardize litigants’ rights to have adjudicative claims decided by tribunals that are free of domination by the political branches,” but the cited article barely touches on this question and cannot be read as intended to rebut comprehensively concerns about agency adjudications of private rights. Compare PIERCE, *supra* note 21, § 2.8, at 138, with Verkuil, *supra* note 22, at 316–17.

¹⁹⁷ 5 U.S.C. §§ 554, 556–57 (2006); see also PIERCE, *supra* note 21, § 2.8, at 138 (enumerating various characteristics, such as “the right to a hearing before an unbiased decisionmaker” that are inapplicable to informal agency adjudication). Informal adjudication is governed by sections 555 and 558. See 5 U.S.C. §§ 555, 558.

¹⁹⁸ William Funk, *The Rise and Purported Demise of Wong Yang Sung*, 58 ADMIN. L. REV. 881, 892 (2006) (agencies always reject formal adjudication); Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 165–80 (2000) (describing agencies’ increasing use of informal procedures).

¹⁹⁹ William Funk, *Close Enough for Government Work?—Using Informal Procedures for Imposing Administrative Penalties*, 24 SETON HALL L. REV. 1, 67 (1993). Funk explains that agencies’ motives for this preference are “equally clear. One motive is overt—the wish to avoid the perceived complexity, cost, and delay associated with formal, APA adjudications. The other motive is more covert—the desire to exercise more control both procedurally and substantively over the adjudication process—especially by avoiding the need to use independent ALJs.” *Id.*

²⁰⁰ See, e.g., *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 877 (1st Cir. 1978), *abrogated by* *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12, 16–17 (1st Cir. 2006).

²⁰¹ See *Dominion Energy*, 443 F.3d at 18–19; *Chem. Waste Mgmt., Inc. v. U.S. EPA*, 873 F.2d 1477, 1483 (D.C. Cir. 1989); Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 859 (2007); see also William S. Jordan, III, *Chevron and Hearing Rights: An Unintended Combination*, 61 ADMIN. L. REV. 249, 265–67 (2009); Richard J. Pierce, Jr., *Waiting for*

administrative law scholars, some of whom have argued that agencies are improperly evading the APA by using informal proceedings rather than formal ones.²⁰² Whether or not those arguments are correct, my point here is just that concerns about administrative adjudication of private rights cannot be answered by pointing to the provisions governing formal adjudication.

A broader problem with this account is that conflating due process and Article III commits a category error.²⁰³ The work done by Article III is different than the work done by due process. If an agency's procedures exactly mimicked those used by an Article III court, there could not possibly be a procedural due process problem with the agency's adjudications of private rights.²⁰⁴ An Article III problem would nonetheless exist if the agency's orders affected core private rights and were exempted from meaningful Article III review.²⁰⁵ Similarly, whether a right is public or private, one must be able to bring due process challenges to the adequacy of the procedures the government is using on a systematic basis.²⁰⁶ But Article III demands case-by-case availability of appellate review by a federal court of run-of-the-mill agency adjudications where private rights

Vermont Yankee II, 57 ADMIN. L. REV. 669, 673 (2005). The Ninth Circuit, however, has never overruled *Marathon Oil Co. v. EPA*, 564 F.2d 1253 (9th Cir. 1977).

²⁰² Cooley R. Howarth, Jr., *Restoring the Applicability of the APA's Adjudicatory Procedures*, 56 ADMIN. L. REV. 1043, 1044 (2004) (complaining of the "decades of unnecessary confusion about the applicability of the APA's adjudicatory provisions caused by court decisions that improperly narrowed the scope of those provisions and, in the process, erroneously excluded thousands of federal adjudications from the procedural protections of the [formal adjudication rules of the] APA" (footnote omitted)); Jordan, *supra* note 201, at 320–21 ("[T]he argument for deference is flatly contrary to the history of the APA and to the intent of Congress in enacting the APA.").

²⁰³ Courts often commit a similar category error when they conflate due process with habeas corpus. As Professor Garrett has recently argued, however, the habeas inquiry and the due process inquiry differ in critical ways. See Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 CORNELL L. REV. 47, 57 (2012) ("A judge asking whether the Due Process Clause was violated focuses on the minimal adequacy of general procedures, which may not necessarily require a judicial process. A judge asking whether the Suspension Clause was violated asks a different question: whether the process preserves an adequate and effective role for federal judges to independently review authorization of each individual detainee. The specific question for the judge is whether a person is in fact detained lawfully, which is a fundamental question of substance. Despite connections between habeas corpus and due process, the habeas judge's preoccupation with authorization instead of procedure suggests important reasons for the concepts to remain separate."); cf. Stephen I. Vladeck, *Boumediene's Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2112 (2009) (considering Justice Kennedy's suggestion in *Boumediene* "that the access to courts protected by the Suspension Clause is (at least largely) about protecting the courts as such" as opposed to protecting, merely or primarily, the rights of litigants).

²⁰⁴ See Nelson, *supra* note 20, at 612 n.222.

²⁰⁵ See *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1258–59 (11th Cir. 2003) (distinguishing between due process and Article III problems).

²⁰⁶ *Mathews v. Eldridge*, 424 U.S. 319, 332–33 (1976).

are at issue.²⁰⁷ Article III review must therefore mean more than just enforcing procedural due process requirements on agencies.²⁰⁸

Finally, Article III is a more durable protection than due process. An agency cannot cure a separation of powers violation by claiming “harmless error” the way it can cure procedural due process violations.²⁰⁹ Put differently, even if agency procedures are disregarded or erroneously applied, the result of the agency adjudication may yet be salvageable.²¹⁰ But if Article III constraints are disregarded or erroneously applied, the improper adjudication is invalid even if its result is substantively accurate because Article III goes to the agency’s authority to adjudicate the dispute—its jurisdiction.²¹¹ In short, Article III is made of tougher stuff than the Due Process Clause. The Due Process Clause can never fully substitute for Article III; the two constitutional provisions are not fungible.

3. “*Canon Fodder.*”—It is all very well and good to argue for a judicial nondelegation canon. But honest arguments about canons can only reach as far as the “canon fodder”—that is, the text upon which the canon will be brought to bear—will permit.

²⁰⁷ See *supra* Part II.

²⁰⁸ Wilber Griffith Katz, *Federal Legislative Courts*, 43 HARV. L. REV. 894, 917 (1930) (“While the cases deciding when judicial determination is required usually invoke the due process clause of the Fifth Amendment, the considerations relied on are considerations of the separation of powers, and it seems likely that the same conclusion would have been reached in these cases had the Fifth Amendment never been adopted. The Constitution not only affords, in its tripartite distribution of governmental powers, protection for the litigant’s claim for a judicial hearing in these cases, but also contains in Article III specific provisions apparently inserted to assure the independence of judges.”); Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2570 (1998) (“Trial before federal magistrate judges clearly provides due process. But wholesale assignment of federal judicial business to magistrate judges (at least without the parties’ consent) is not consistent with Article III. Thus, here too, Article III imposes limitations beyond those found in the Due Process Clause.” (footnote omitted)).

²⁰⁹ See, e.g., *Shinseki v. Sanders*, 556 U.S. 396, 407, 410–11 (2009) (explaining that a party seeking reversal of an agency order in a civil matter bears the burden of proving that an agency’s notice error caused harm to obtain reversal, and reversing Federal Circuit’s harmless-error framework, which presumed notice errors were harmful); cf. *Stone v. FDIC*, 179 F.3d 1368, 1377 (Fed. Cir. 1999) (“[W]hen a procedural due process violation has occurred because of *ex parte* communications, such a violation is not subject to the harmless error test.”).

²¹⁰ See, e.g., *Shinseki*, 556 U.S. at 409–10 (collecting cases in which courts of appeals determined that the appellant had failed to demonstrate agency error was harmful and so declined to reverse the agency determination).

²¹¹ See, e.g., *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985) (“[I]t is sufficient for purposes of a claim under Article III challenging a tribunal’s jurisdiction that the claimant demonstrate it has been or inevitably will be subjected to an exercise of such unconstitutional jurisdiction. . . . [A]ppellees’ Article III injury is not a function of whether the tribunal awards reasonable compensation but of the tribunal’s authority to adjudicate the dispute.”); *In re Marshall*, 600 F.3d 1037, 1069 (9th Cir. 2010) (Kleinfeld, J., concurring) (“Pierce’s constitutional rights to an Article III court and to jury trial as well as his statutory rights prevented jurisdiction in the bankruptcy court over Vickie’s claim against him. When the bankruptcy court decided otherwise, it was without jurisdiction to do so.”), *aff’d sub nom.* *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

Fortunately, the framework governing judicial review of adjudication allows room to avoid constitutionally troubling terrain by judicial interpretation of the applicable review statutes. The APA's formulations are highly elastic.²¹² The standards for judicial review in administrative law invite judicial gloss,²¹³ and courts oblige by providing that gloss.²¹⁴

Of course, this elasticity is not always regarded as a benefit. Scholars have criticized *Chevron* and so-called "*Chevron* trumps"²¹⁵ on the grounds that courts apply or do not apply them based on personal judicial preference or gerrymandered rules.²¹⁶ Similar complaints have been made concerning *State Farm's* "hard look" review and its creation of an unpredictably applied judicial gloss on the "arbitrary and capricious" standard.²¹⁷ The core critique of this sort of "administrative common law" is that it produces a lack of consistency and predictability in the actual standard for judicial review that will be applied in a particular case.²¹⁸ For two reasons, these concerns have weak application in this context.

²¹² For example, see 5 U.S.C. § 706 (2006), as well as its analogs in many organic statutes.

²¹³ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 489 (1951) (noting the difficulty of capturing judicial review standards in concrete phrases).

²¹⁴ See Metzger, *Embracing Administrative Common Law*, *supra* note 143, at 1295 ("To be sure, most administrative law is ostensibly linked to statutory provisions authorizing judicial review or imposing obligations on agencies, and these governing statutes exert some constraining force on judicial creativity. But the judge-fashioned doctrines that comprise modern administrative law venture too far afield from statutory text or discernible legislative purpose to count simply as statutory interpretation. Instead, their primary basis lies in judicial conceptions of appropriate institutional roles, along with pragmatic and normative concerns, that are frequently constitutionally infused and developed incrementally through precedent."); Strauss, *supra* note 28, at 820–23.

²¹⁵ "*Chevron* trumps" are statutory interpretations that receive preference over and above agency interpretations otherwise entitled to *Chevron* deference. The Supreme Court used this terminology in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005). See *id.* at 982 ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.").

²¹⁶ Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 783 (2010) ("*Chevron* is so pliable that courts applying it can still reach any desired result . . ."); see also Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 68 (2008) ("Judges applying normative canons independently to strike down agency interpretations face no constraint on their discretion to reach an authoritative construction of the statute, even when other permissible solutions exist."); *id.* at 105 ("To the extent that courts apply canons independently to fix a statute's meaning in their step-one analysis (or, all the more, to circumvent *Chevron's* framework altogether), the canon may provide a means for eluding deference and removing the policy issue from the agency's hands altogether. As such, it threatens the very sort of judicial aggrandizement at the expense of agency discretion that troubled the Supreme Court in its recent *Brand X* decision . . .").

²¹⁷ See, e.g., Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1066–68 (1995) (castigating the indeterminate application of *State Farm's* arbitrary and capricious criteria by district courts).

²¹⁸ For a thorough discussion of the pluses and minuses of administrative common law, see Metzger, *Embracing Administrative Common Law*, *supra* note 143.

First, while the suggestion that courts should reduce deference to agency adjudications of private rights does invite federal courts to make use of the play in the statutory joints, it does so only by reference to a methodology structured in a predictable manner around constitutional doctrine. The line between private and public rights may be obscure, but it does have determinate content—or at least, content that is determinable with some effort—unlike, for example, the line between major and minor policy changes²¹⁹ or between “reasoned analysis” and analysis that a court will deem to fall short of the mark.²²⁰

Second, concerns about the abuse of *Chevron* and *Chevron* trumps have been levied mostly at courts considering challenges to rulemaking.²²¹ In the rulemaking context, the systemic costs of error are relatively high because a denial of deference to an agency may fix a statute’s meaning and thus constrain policymaking.²²² In contrast, the stakes are lower when a court is reviewing an agency adjudication of a private right. Generally speaking, if a particular court gets it wrong on review of a particular private rights adjudication, the impact is almost certainly going to be on a small scale—a far cry from, say, derailing a years-long effort to promulgate a rule governing the marketing of tobacco.²²³ It is fitting that administrative common law seems to be a type of judicial reasoning best suited to the natural habitat of common law judicial decisionmaking: adjudication, not rulemaking.

IV. DOCTRINAL DOVETAILS

Dialing back deference in cases implicating Article III private rights will not be cheap. In a host of federal schemes, federal courts are routinely enlisted to review orders produced by administrative adjudication that implicate private or quasi-private rights.²²⁴ Just the class of cases involving agency adjudication of fines encompasses hundreds of statutes and dozens

²¹⁹ See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000) (asserting “confiden[ce] that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion”).

²²⁰ See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983).

²²¹ See *supra* note 216.

²²² See Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1446–47 (2005) (noting how failing to give *Chevron* deference or even avoiding the question of whether to give *Chevron* deference “sends a mixed message to the agency about who retains interpretive control” and “reduces [agencies’] ability to adapt new interpretations to changed circumstances”).

²²³ See, e.g., *Brown & Williamson*, 529 U.S. at 159–60 (deferring to Congress, rather than the FDA, on the regulation of the tobacco industry).

²²⁴ See sources cited *supra* note 86.

of agencies.²²⁵ Courts and agencies, we are told, are overburdened. What is the constitutional-values bang that justifies the extra-resources buck in private rights cases?

A. *Accounts of Article III*

Answering this question requires considering why we have Article III courts at all. Consider two intertwined justifications of the value of Article III courts. The first we might call positive—that it is an affirmative good to have certain decisions made by an “independent judiciary” with the characteristics specified by Article III that secure decisional independence.²²⁶ And the second we might call negative—that certain decisions should be fenced off from certain institutions—namely, Article I and Article II decisionmakers.²²⁷

The law governing judicial review of administrative adjudications already reflects these Article III values. Calibrating deference to the public–private rights line would dovetail with these existing features of law.

1. *The Positive Account.*—The positive justification, which has been well rehearsed in the literature, turns on the special features of Article III courts. Article III judges have no term limits and their salaries cannot be diminished.²²⁸ By imposing such limitations, “the Framers sought to ensure that each judicial decision would be rendered, not with an eye toward currying favor with Congress or the Executive, but rather with the ‘[c]lear heads . . . and honest hearts’ deemed ‘essential to good judges.’”²²⁹ In this way, insulation of Article III courts from political pressures is thought to preserve individual rights.²³⁰

²²⁵ See Ross & Pritikin, *supra* note 86 (“Virtually every major administrative regulatory program contains some type of monetary sanction. Sometimes, fines are the only available sanction.” (footnote omitted)).

²²⁶ See *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583 (1985) (one purpose of Article III is to secure “the role of the independent judiciary within the constitutional scheme”); Legomsky, *supra* note 102, at 386 (distinguishing institutional from decisional independence).

²²⁷ *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 848 (1986) (another purpose of Article III is to secure litigants’ “right to have claims decided before judges who are free from potential domination by other branches of government” (quoting *United States v. Will*, 449 U.S. 200, 218 (1980))).

²²⁸ U.S. CONST. art. III, § 1.

²²⁹ *Stern v. Marshall*, 131 S. Ct. 2594, 2609 (2011) (alteration in original) (quoting James Wilson, *Of Government*, in 1 *THE WORKS OF JAMES WILSON* 343, 363 (James DeWitt Andrews ed., Chicago, Callaghan & Co. 1896)).

²³⁰ See, e.g., *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011) (“The structural principles secured by the separation of powers protect the individual as well.”); Judith Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581, 588–89 (1985) (noting that “at a structural level, the Article III protections seem to have worked to imbue a group of individuals with a perceived freedom from courting popularity and to permit (for better or worse) specific individuals to make ‘brave’ or ‘foolhardy’ (depending upon one’s views) decisions on some occasions”).

Central fixtures of the law governing judicial review of administrative adjudication reflect the importance of review by an independent judiciary. One such doctrine is the presumption of availability of judicial review. This presumption is a rule of constitutional avoidance that courts apply to statutes limiting or precluding judicial review in order to preserve the role of Article III courts.²³¹ Courts go to extraordinary lengths to read statutory language that straightforwardly precludes review to permit review of constitutional claims (and sometimes nonconstitutional claims too),²³² even in the face of quite reasonable accusations that judicial insistence on securing review is thwarting evident legislative intent.²³³ The tenacity with which courts search for pathways to judicial review reflects the importance of that review.

Calibrating deference to the public–private rights line would naturally and appropriately extend this doctrinal commitment. It would ensure that judicial review of agency action—the judicial review that courts take such trouble to locate—is meaningful, over the domain of cases where Article III jurisprudence deems direct appellate review of agency adjudication to be indispensable.²³⁴ In this regard, the approach advanced here resonates with existing law reflective of the positive account of Article III.

2. *The Negative Account.*—The negative justification for Article III rests on the benefits of barring political branch actors from making decisions involving individual rights to property and liberty. Where criminal law is concerned, this notion has intuitive appeal. Scarcely ever is it doubted that justice requires entrusting criminal adjudication to courts, rather than to the political branches.²³⁵

²³¹ See *Webster v. Doe*, 486 U.S. 592, 603 (1988) (“[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. . . . We require this heightened showing in part to avoid the ‘serious constitutional question’ that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.”); *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 680–81 & n.12 (1986); *Weinberger v. Salfi*, 422 U.S. 749, 762 (1975); *Johnson v. Robison*, 415 U.S. 361, 373–74 (1974); *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 109–11 (1902).

²³² See Note, *Congressional Preclusion of Judicial Review of Federal Benefit Disbursement: Reasserting Separation of Powers*, 97 HARV. L. REV. 778, 779, 789–91 & nn.61–68 (1984) (collecting examples of “tortured statutory construction[s]” used by courts to “circumvent” statutory provisions precluding judicial review in veterans’ benefits and Medicare cases); cases cited *supra* note 231.

²³³ See, e.g., *Webster*, 486 U.S. at 618–19 (Scalia, J., dissenting) (accusing the majority of “writing [its] preference into a statute that makes no distinction between” constitutional and nonconstitutional claims in order to preserve review of a constitutional challenge).

²³⁴ FALLON ET AL., *supra* note 138, at 358 (noting that “rights to Article III review are at their apex” where the rights of a defendant in an enforcement proceeding are at issue).

²³⁵ See Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1030–31 (2006) (“The Constitution makes it difficult for the state to act in criminal cases against individuals and members of groups disfavored by the majority. All three branches must agree to allow a criminal conviction, and the judiciary plays a particularly significant role because of its relative insulation from the political imbalance described above [that biases the political system in favor of

This intuition does not translate easily to administrative adjudication. In the ordinary criminal context, the costs of excluding the political branches from adjudication of liability seem insignificant when weighed against the benefits of having an impartial determination of guilt or innocence.²³⁶ In administrative law, in contrast, adjudication by agencies has a tangible benefit—the application of agency expertise²³⁷—that would be sacrificed if that adjudication were replaced by either bottom-up adjudication or nondeferential review by generalist federal judges.

The discomfiture is apparent in the application of the constitutional fact doctrine to review of agency action. This *Marbury*-inspired doctrine charges Article III courts with performing de novo determinations of fact and law where constitutional claims are raised before agencies.²³⁸ The doctrine rests on the rationale that Article III courts cannot adequately exercise their responsibility to safeguard constitutional rights “if administrative bodies and state courts are free to specify the factual context in which the constitutional issue must be judged.”²³⁹ Courts have not been willing to take the constitutional fact doctrine to its logical extreme where agencies are concerned because the sacrifice of agency expertise would be too enormous. As a result, the constitutional fact doctrine has been “unevenly applied,”²⁴⁰ and its contours remain uncertain.

more severe punishments].” (footnote omitted)); Kahan, *supra* note 1, at 520 (noting that “[s]trict separation” of criminal lawmaking, criminal law interpretation, and criminal law enforcement “has traditionally been understood to be essential to fair notice, prosecutorial even-handedness, and democratic accountability”); Nelson, *supra* note 20, at 626 (“Judges and commentators of widely varying perspectives agree that Congress cannot require the courts to accept the executive branch’s determination of guilt, because authoritative deprivation of an individual’s natural rights to life or physical liberty requires fully ‘judicial’ determination of the individualized adjudicative facts.”). Kahan is one of the rare dissenters from this “orthodox” view. See Kahan, *supra* note 1, at 520 (“My goal . . . has been to defend an admittedly unorthodox claim: that the executive branch should make and interpret federal criminal laws and not just enforce them.”).

²³⁶ See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 537 (2004) (“Any process in which the Executive’s factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short. . . . [The ‘some evidence standard’] is ill suited to the situation in which a habeas petitioner has received no prior proceedings before any tribunal and had no prior opportunity to rebut the Executive’s factual assertions before a neutral decisionmaker.”); *Ward v. Vill. of Monroeville*, 409 U.S. 57, 61–62 (1972) (state statute authorizing trial before a town mayor with law enforcement responsibilities violated the Fourteenth Amendment, which requires a trial before “a neutral and detached judge in the first instance”).

²³⁷ See, e.g., *Dickinson v. Zurko*, 527 U.S. 150, 160–61 (1999) (discussing expertise).

²³⁸ See *Crowell v. Benson*, 285 U.S. 22, 60 (1932) (“In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function.”); Monaghan, *Constitutional Fact Review*, *supra* note 67, at 248–54 (tracing the historical development of the constitutional fact doctrine).

²³⁹ Neuman, *supra* note 149, at 735.

²⁴⁰ *Id.*

A lovely illustration is the Court's recent decision in *Elgin v. Department of the Treasury*.²⁴¹ Michael Elgin was fired from his job at the Treasury upon discovery that he had failed to register for the draft, which a federal law requires men of a certain age to do.²⁴² Elgin sued in a district court arguing that the registration law was unconstitutional because women are not required to register for the draft and thus cannot lose federal jobs for failing to register.²⁴³ The government urged dismissal, arguing that Elgin was required to bring his claims before the Merit Systems Protection Board (MSPB), the agency tasked with adjudicating employment disputes concerning federal employees.²⁴⁴ The Court held that Elgin had to first go to the MSPB despite the fact that the MSPB could not decide the constitutional challenge.²⁴⁵

The *Elgin* decision showed evident confusion about how best to reconcile the allure of application of agency expertise with the rule that Article III courts must have ultimate authority over constitutional claims. The Court, in an opinion joined by an intriguing combination of Justices,²⁴⁶ held that an agency could find facts *relevant* to the constitutional claim, even though the agency would then be gathering evidence on an issue it could not ultimately decide.²⁴⁷ An equally intriguing combination of Justices dissented,²⁴⁸ arguing in substance that district courts and not agencies have to lay the factual record for the adjudication of constitutional claims.²⁴⁹ Even for constitutional facts, then, the Court has been drawn to allow the exercise of agency expertise at the fact-finding stage, despite the fact that letting agencies find such facts results in a bizarre situation where an agency is performing a fact-finding function with respect to a constitutional claim that the agency has no authority to resolve.²⁵⁰

Elgin stands for one doctrinal pole—the facet that values the application of agency expertise almost no matter the context. But there is a

²⁴¹ 132 S. Ct. 2126 (2012).

²⁴² *Id.* at 2131.

²⁴³ *Id.*

²⁴⁴ *Id.* at 2134.

²⁴⁵ *Id.* at 2132.

²⁴⁶ The majority opinion, written by Justice Thomas, was joined by the Chief Justice and Justices Scalia, Kennedy, Breyer, and Sotomayor. *Id.* at 2129.

²⁴⁷ *Id.* at 2132–34.

²⁴⁸ The dissent, by Justice Alito, was joined by Justices Ginsburg and Kagan. *Id.* at 2140 (Alito, J., dissenting).

²⁴⁹ *Id.* at 2143 (“[N]either efficiency nor agency expertise can explain why Congress would want the Board to have exclusive jurisdiction over claims like these.”).

²⁵⁰ See *id.* *Elgin* affirmed that the federal courts of appeals could “take judicial notice of facts relevant to the constitutional question” but it also—without specifying the standard of review that would apply on appeal—held that “if resolution of a constitutional claim requires the development of facts beyond those that the Federal Circuit may judicially notice, the [Civil Service Reform Act] empowers the [Merit Systems Protection Board] to take evidence and find facts for Federal Circuit review.” *Id.* at 2138.

countervailing tendency in the law that recognizes the benefits of checking agency adjudicators, even when they are acting squarely within the ambit of their core areas of expertise.

Consider, for example, the conventional practice around the judicial enforcement of agency orders. Many agency orders are made ultimately *enforceable* only by civil actions brought in federal court.²⁵¹ Agencies seeking enforcement usually have to build a record before district courts, subject to ordinary rules of evidence and procedure.²⁵² The enforcement order that ultimately issues belongs to the court, not to the agency.²⁵³

Why make an agency go through an enforcement proceeding before a court to collect a penalty—a penalty predicated on an agency order for which the affected party may not even have sought review? The reason for this apparent redundancy is that Article III values are “at their apex”²⁵⁴ when a court is umpiring the collection of penalties from individuals. When the law is *finally* brought to bear upon an individual in a coercive fashion, a constitutional court must be in the loop to assuage concerns of illegality and unfairness.²⁵⁵ Even if it reduces overall efficiency, the interposition of an enforcement court is thought to secure fairer outcomes on a systemic basis.

The idea of judicial nondelegation described here would complement this conventional practice. Calibrating deference to the private–public line would ensure robust review over the domain of cases where direct appellate

²⁵¹ See Diver, *supra* note 86, at 1439 (“Except for penalties provided for in certain maritime statutes, civil penalties are, by express provision or by implication, subject to ultimate collection in a civil action to be brought in a United States district court. Such an action includes, of course, an opportunity for jury trial of contested factual issues not foreclosed by a previous binding judgment.” (footnotes omitted)).

²⁵² See Funk, *Close Enough*, *supra* note 199, at 1–3 (noting that administrative assessments of penalties “[t]raditionally” require a judicial proceeding).

²⁵³ 7 CHARLES H. KOCH, JR., WEST’S FEDERAL ADMINISTRATIVE PRACTICE § 8116, at 499 (3d ed. 2001) (“Once the court has determined to enforce the [agency] order, it issues its own enforcement order. A violation of that order then becomes a contempt of the court’s decision.”).

²⁵⁴ FALLON ET AL., *supra* note 138, at 358 (noting that “rights to Article III review are at their apex” where the rights of a defendant in an enforcement proceeding are at issue).

²⁵⁵ See *Sackett v. U.S. EPA*, 622 F.3d 1139, 1146–47 (9th Cir. 2010), *rev’d sub nom. Sackett v. EPA*, 132 S. Ct. 1367 (2012) (relying on the commitment of penalties to “judicial, not agency, discretion” to hold that EPA administrative compliance orders did not violate due process because “[a]ny penalty ultimately assessed against the Sacketts would therefore reflect a discretionary, judicially determined penalty, taking into account a wide range of case-specific equitable factors, and imposed only after the Sacketts have had a full and fair opportunity to present their case in a judicial forum”); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1371, 1375–76 (1953) (discussing the special obligations and powers of “enforcement courts”); Monaghan, *Marbury and the Administrative State*, *supra* note 20, at 18–19 (“Whether required by the Constitution or not, our system of administrative law typically provides for judicial review of the application of administrative power insofar as it directly affects specific individuals.”).

review by a federal court is required by Article III—private rights adjudications.

B. A Diorama of the Dovetails

The previous section described how existing law on the presumption of judicial review and on judicial enforcement of agency orders vindicates Article III values. It also argued that reduced deference by Article III courts to agency adjudications of private rights dovetails with these doctrines.

This section illustrates these concepts with *Sackett v. EPA*,²⁵⁶ a recent Supreme Court case involving judicial review and agency adjudication. On its face, the case involves a rather dry corner of environmental law about some rather wet land. In fact, the case is actually a sort of diorama of Article III-inspired doctrines. Much of what has happened in this case thus far can be explained by the interplay among the factors just discussed—the presumption of judicial review of administrative action and the importance of securing a robust role for enforcement courts when penalties may be imposed on private parties. On remand, however, the fate of this case (and the many others like it) should turn on the principle of judicial nondelegation outlined in this Article.

The Clean Water Act authorizes the EPA to issue administrative compliance orders (ACOs) if the EPA determines that a person is discharging a pollutant without a permit into “navigable waters.”²⁵⁷ The EPA issued an ACO to a couple, the Sacketts, who owned a residential lot in Idaho and had filled in part of their land with dirt and rocks in order to prepare to build a house there.²⁵⁸ The ACO stated that the Sacketts’ lot “contain[ed] wetlands” for purposes of federal law adjacent to a lake that qualified as a “navigable water” of the United States.²⁵⁹ The ACO further stated that by filling in their lot, the Sacketts had “discharge[d] . . . pollutants into waters of the United States.”²⁶⁰ The ACO ordered the Sacketts to restore the land to its previous condition, to give the EPA access to the site, and to provide access to documentation of the site’s conditions to EPA employees.²⁶¹

The EPA maintained that the ACO was not immediately challengeable because it was not a “final” agency action.²⁶² This left the Sacketts in a

²⁵⁶ 132 S. Ct. 1367.

²⁵⁷ 33 U.S.C. § 1311 (2006) (prohibiting “the discharge of any pollutant by any person”); *id.* § 1319 (authorizing issuance of a compliance order); *id.* § 1344 (authorizing issuance of permits for the discharge of dredged material into “navigable waters”).

²⁵⁸ *Sackett*, 132 S. Ct. at 1370.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 1371.

²⁶¹ *Id.*

²⁶² *Id.*

bind.²⁶³ If they did not obey the ACO, they would be in violation of it. Ultimately, if and when the EPA sought enforcement in a court of the ACO, the technical question before the court would be whether the Sacketts violated the ACO—not whether their land was wetlands or whether they had polluted wetlands by filling in the site.²⁶⁴ ACOs can be issued “on the basis of any information available,”²⁶⁵ a standard “which presumably includes ‘a staff report, newspaper clipping, anonymous phone tip, or anything else that would constitute any information.’”²⁶⁶ On top of that, potential penalties of \$75,000 per day would begin accruing from the day the ACO was issued if the ACO were ultimately found to have been validly issued.²⁶⁷ In other words, penalties would accumulate daily for violation of the ACO even though only the agency’s own decision to bring an enforcement action could trigger judicial review of the ACO.²⁶⁸ As Professor Araiza states, “the unavailability of judicial review trapped the Sacketts in a regulatory house of mirrors.”²⁶⁹

Appellate courts have not known what to make of this scheme. The most extreme response came from the Eleventh Circuit, which nullified a similar ACO on due process and separation of powers grounds in a Clean Air Act case, though it also held it lacked jurisdiction over the appeal.²⁷⁰ Other circuits had held that ACOs were not reviewable.²⁷¹

²⁶³ For an insightful discussion of *Sackett*, see William D. Araiza, *Apoplectic About Hyperlexis*, 80 FORDHAM L. REV. RES GESTAE 69 (2012), http://fordhamlawreview.org/assets/res-gestae/volume/80/69_Araiza.pdf.

²⁶⁴ Federal courts students will recognize in this pattern close echoes of Henry Hart’s *reductio ad terrorem* in the *Dialogue*:

Q. Doesn’t that pretty well destroy your notion that there has to be some kind of reasonable means for getting a judicial determination of questions of law affecting liability for criminal punishment? All Congress has to do is to authorize an administrative agency to issue an individualized order, make the violation of the order a crime in itself, and at the same time immunize the order from judicial review. On the question of the violation of the order, all the defendant’s rights are preserved in the criminal trial, except that they don’t mean anything.

Hart, *supra* note 255, at 1380. Change the frame from criminal liability to civil liability, and you have a fairly accurate description of what the ACO scheme accomplished and how it accomplished it.

²⁶⁵ 33 U.S.C. § 1319(a) (2006).

²⁶⁶ *Sackett v. U.S. EPA*, 622 F.3d 1139, 1145 (9th Cir. 2010) (quoting *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1241 (11th Cir. 2003)) (internal quotation marks omitted), *rev’d sub nom. Sackett*, 132 S. Ct. 1367.

²⁶⁷ *Sackett*, 132 S. Ct. at 1372.

²⁶⁸ See Araiza, *supra* note 263, at 71–72.

²⁶⁹ *Id.* at 71.

²⁷⁰ *Whitman*, 336 F.3d at 1239. *Cf.* *Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564, 565–66 (10th Cir. 1995) (declining to find due process violation with a similar Clean Water Act ACO); *S. Pines Assocs. v. United States*, 912 F.2d 713, 717 (4th Cir. 1990) (same).

²⁷¹ See, e.g., *Laguna Gatuna*, 58 F.3d at 566 (“Judicial review of every unenforced compliance order would undermine the EPA’s regulatory authority.”); *S. Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement*, 20 F.3d 1418, 1426–27 (6th Cir. 1994) (“[J]udicial review of pre-enforcement orders . . . is not available.”); *S. Pines Assocs.*, 912 F.2d at 716 (holding that “Congress meant to preclude judicial review of compliance orders under the CWA”); *Hoffman Grp., Inc. v. EPA*,

In *Sackett*, the Ninth Circuit declined to hold that the ACO issued to the Sacketts was a final agency action.²⁷² But with a statutory sleight of hand premised on due process avoidance, the Ninth Circuit also held that if and when the EPA chose to bring an enforcement proceeding, the propriety of the issuance of the ACO should be tried by the district court rather than merely assessed under an arbitrary and capricious standard.²⁷³ The Ninth Circuit held that in a subsequent civil enforcement proceeding, the legitimacy of the facts underpinning the ACO would have to be tested de novo by the district court using ordinary rules of evidence and procedure and with a preponderance of the evidence burden on the EPA.²⁷⁴ The Ninth Circuit, in other words, enlisted the enforcement court to act as a meaningful checkpoint on the ultimate enforcement of the law.

The Supreme Court disagreed, and it did so unanimously.²⁷⁵ The Court held that the ACO was subject to immediate judicial review because it was a final agency action for purposes of the APA.²⁷⁶ This was a result that none of the roughly one dozen appellate and district courts to consider the issue had been willing to reach.²⁷⁷ The Court's reasoning rested on the Article III-protective presumption of judicial review.²⁷⁸ The opinion is redolent with references to the Sacketts' private rights—in this case, the fact that the order effectively required the Sacketts to comply with the order under threat of large sanctions.²⁷⁹ A fair reading of the case is that the looming

902 F.2d 567, 569 (7th Cir. 1990) (“Congress has impliedly precluded judicial review of a compliance order except in an enforcement proceeding.”).

²⁷² *Sackett v. U.S. EPA*, 622 F.3d 1139, 1145 (9th Cir. 2010), *rev'd sub nom. Sackett*, 132 S. Ct. 1367.

²⁷³ *Id.* at 1147.

²⁷⁴ *Id.* at 1145 (“Although the term ‘any order’ in 33 U.S.C. § 1319(d) could be interpreted to refer to all compliance orders issued on the basis of ‘any information available,’ the term could also be interpreted to refer only to those compliance orders that are predicated on *actual*, not alleged, violations of the CWA, as found by a district court in an enforcement action according to traditional civil evidence rules and burdens of proof.”).

²⁷⁵ Justice Ginsburg concurred, on the understanding that only jurisdictional facts were challengeable pre-enforcement, not the terms and conditions of the order itself. *Sackett*, 132 S. Ct. at 1374 (Ginsburg, J., concurring). Justice Alito concurred, on the grounds that he would have liked to overturn *Rapanos* and that holding the ACO to be a final order was the best available alternative. *Id.* at 1375–76 (Alito, J., concurring) (“Allowing aggrieved property owners to sue under the Administrative Procedure Act is better than nothing, but only clarification of the reach of the Clean Water Act can rectify the underlying problem.”).

²⁷⁶ *Id.* at 1374 (majority opinion).

²⁷⁷ *See Sackett*, 622 F.3d at 1143 (“Every circuit that has confronted this issue has held that the CWA impliedly precludes judicial review of compliance orders until the EPA brings an enforcement action in federal district court. Many district courts have also so held. The reasoning of these courts is persuasive to us, as well as the broad uniformity of consensus on this issue.” (citations omitted)).

²⁷⁸ *See Sackett*, 132 S. Ct. at 1372–73.

²⁷⁹ *Id.* at 1372 (“[E]ach day they wait for the agency to drop the hammer, they accrue, by the Government’s telling, an additional \$75,000 in potential liability.”); *id.* at 1374 (“And there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated

threat to the Sacketts' private rights caused a unified Court to "turbocharge" the presumption of judicial review of agency action to ensure review by an Article III court—notwithstanding the absence of a circuit split on the issue and the years of judicial consensus on the proposition that such orders were *not* final.

The Supreme Court's treatment of agency expertise is also noteworthy. The EPA argued that allowing judicial review of ACOs would hamper its efforts to enforce pollution laws.²⁸⁰ But the Court was not swayed by the agency's contention that judicial review of ACOs would undercut the effective regulation of pollution, instead calling the APA's presumption of judicial review a "repudiation of the principle that efficiency of regulation conquers all."²⁸¹ Though obliquely, this statement endorses the point elaborated above—that the benefits of review by a neutral court outweigh the expertise and efficiency costs. Contrast this treatment of expertise in *Sackett*, which involves a private right, with *Elgin*, a case decided by the same Court mere weeks later, which involves federal employment—a public right. In *Elgin*, six Justices held that an agency's expertise could be usefully applied to a constitutional issue that the agency had no authority to adjudicate.²⁸² In contrast, in *Sackett*, a unanimous Court held that the sacrifice of efficiency of regulation was worthwhile given the desirability of judicial review—notwithstanding the fact that pollution is obviously the sort of problem the EPA is charged with addressing.²⁸³ The presence of a private right apparently exerted a persuasive pull on the Court in the *Sackett* case, leading it to accelerate the point at which a constitutional court would have a chance to examine the challenge to the agency's action.

Key questions remain unanswered for the Sacketts and for many others in the same shoes.²⁸⁴ The order, now a "final" order, is reviewable.²⁸⁵

parties into 'voluntary compliance' without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the EPA's jurisdiction."); *id.* at 1375 (Alito, J., concurring) ("The position taken in this case by the Federal Government—a position that the Court now squarely rejects—would have put the property rights of ordinary Americans entirely at the mercy of Environmental Protection Agency (EPA) employees.").

²⁸⁰ *See id.* at 1373–74 (majority opinion) (summarizing government arguments for why the Clean Water Act precluded judicial review of ACOs).

²⁸¹ *Id.* at 1374 ("The Government warns that the EPA is less likely to use the orders if they are subject to judicial review. That may be true—but it will be true for all agency actions subjected to judicial review. The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all.").

²⁸² *See Elgin v. Dep't of Treasury*, 132 S. Ct. 2126, 2139 (2012); *see also supra* notes 241–50 and accompanying text.

²⁸³ *Sackett*, 132 S. Ct. at 1374.

²⁸⁴ ACOs are used in a variety of other federal schemes, including the Clean Air Act, 42 U.S.C. § 7401 (2006) and the Comprehensive Environmental Response Compensation and Liability Act, *id.* § 9601.

²⁸⁵ *Sackett*, 132 S. Ct. at 1374.

On remand, the district court will have to decide whether the issuance of the ACO was arbitrary and capricious or otherwise not in accordance with law—a generic APA issue.²⁸⁶ The interesting question is how the district court will approach this matter. As noted above, the relevant statute authorizes the issuance of ACOs on “any available evidence.” What is “any available evidence” to mean? Can it include anything from “a staff report” to an “anonymous phone tip,” as the Eleventh Circuit believed and the Ninth Circuit agreed was the case?²⁸⁷ The factual and legal determination of the validity of the ACO could cause the Sacketts’ liability to balloon to millions of dollars.²⁸⁸

Looked at through the lens this Article recommends, these questions can be resolved easily. An ACO is the (final) result of informal agency adjudication in a private rights case. The district court reviewing the order is thus playing a nonoptional Article III role.²⁸⁹ The court should therefore lean, and lean hard, in the direction of securing robust judicial review. The district court must be able to ensure that the facts establishing that the Sacketts were building on wetlands were correctly determined. If it cannot do that based on review of the agency record, the district court should have a trial de novo using ordinary rules of trial court procedure and evidence. In short, the district court should read the applicable statutes down to the nub to ensure that the ACO was properly issued. And it should do so on Article III avoidance grounds, not on due process avoidance grounds.

Interestingly, the Ninth Circuit wanted the district court to reach exactly this result—only later, when the district court would be acting in its capacity as an enforcement court.²⁹⁰ But the appellate court’s holding was predicated on the statute’s enforcement provision,²⁹¹ which will be inapplicable on direct review of the ACO.²⁹² So the district court will thus have to cut its own path to this endpoint on remand. When it does, it should rely on Article III, not due process, as the source of its authority to demand robust review.

Before we leave the Sacketts, a final point is worth making about the EPA’s position in this case. One scholar has recently posited the existence

²⁸⁶ 5 U.S.C. § 706 (2006).

²⁸⁷ *Sackett v. U.S. EPA*, 622 F.3d 1139, 1145 (9th Cir. 2010) (quoting *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1241 (11th Cir. 2003)), *rev’d sub nom. Sackett*, 132 S. Ct. 1367.

²⁸⁸ *See Sackett*, 132 S. Ct. at 1372.

²⁸⁹ *See supra* Part II.

²⁹⁰ *See Sackett*, 622 F.3d at 1145–46 (holding that to enforce the ACO the EPA must show “by a preponderance of the evidence” and “according to traditional rules of evidence and standards of proof” in a district court a violation of the Clean Water Act).

²⁹¹ 33 U.S.C. § 1319(d) (2006).

²⁹² *See Sackett*, 622 F.3d at 1145 (reading the “commence a civil action” provision to authorize de novo review of ACOs (quoting § 1319(b))).

of Article II “safeguards” of federal jurisdiction.²⁹³ The argument relies on social science and political science literature, as well as historical narrative, to show that the executive branch has strong incentives to preserve federal court jurisdiction over cases.²⁹⁴ This thesis challenges the conventional assumption that Article III courts must safeguard their own terrain from encroachment by the other branches.

This is an important insight. It is worth noting, though, that those safeguards appear to attach only to the subset of cases that involve congressional attempts to strip jurisdiction over constitutional claims.²⁹⁵ This subset excludes the mine run of generic administrative law cases, in which statutory, not constitutional, issues are presented—and in which executive agencies appear not to be particularly interested in safeguarding federal courts’ capacity to conduct meaningful review.

The Executive Branch’s job is to defend the results of agency adjudication. As the EPA’s litigating position in the *Sackett* case vividly illustrates,²⁹⁶ the Executive discharges this function by contending that the myriad provisions applicable to agency action shield executive action from judicial oversight, not by urging that these provisions be read generously by courts to promote robust review. Over the massive terrain of agency action, Article III courts cannot count on Article II officials to secure a meaningful role for courts as checks on executive action;²⁹⁷ they must fend for themselves—as Madison foresaw.²⁹⁸

V. JUDICIAL NONDELEGATION IN IMMIGRATION CASES

The intensity with which a court will scrutinize a given agency action is a function of many variables.²⁹⁹ Administrative law cases reveal “a range of judicial characterizations of what it means to be ‘arbitrary [or]

²⁹³ Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 COLUM. L. REV. 250, 255 (2012).

²⁹⁴ *Id.* at 260–68.

²⁹⁵ *Id.* at 260, 318.

²⁹⁶ See Brief for the Respondents at 10–13, *Sackett v. EPA*, 132 S. Ct. 1367 (2012) (No. 10-1062), 2011 WL 5908950.

²⁹⁷ In this regard, Article III courts resemble states, which cannot count on executive agencies to give meaningful protection to the structural constitutional value of federalism. As a growing literature attests, agencies often lack the expertise, the statutory guidance, the institutional structure, or the incentives to effectively safeguard state autonomy and federalism values. See Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 698 (2008) (“Despite agencies’ expertise in implementing their own programs, no presumptive deference [to agency preemption determinations] should be due because agencies lack both institutional expertise on important issues of state autonomy and federalism and adequate statutory guidance regarding preemption questions.”); Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521, 570 (2012) (documenting the “spotty” compliance of federal agencies with executive orders regarding preemption).

²⁹⁸ See THE FEDERALIST NO. 51, at 348–49 (James Madison) (Jacob E. Cooke ed., 1961).

²⁹⁹ See Strauss, *supra* note 28, at 820–23 (noting that “variation-in-fact in the intensity of judicial review” is commonplace in administrative law).

capricious,’ responding to the nature of the action under review in ways the statutory formulation as such does not invite.”³⁰⁰ The term has:

one meaning for a court reviewing congressional judgments in enacting legislation, another for a court reviewing an agency’s decision to adopt a high-consequence regulation, another for a court reviewing an agency’s judgment to forego rulemaking it has been petitioned to undertake, and another for review of the products of informal adjudications in relatively low-consequence matters, such as the grant or refusal of permission to open a branch bank.³⁰¹

One of these “variation[s]-in-fact”³⁰² occurs in judicial review of agency adjudication. Many courts are already doing nondeferential review of agency adjudication that affects private rights or quasi-private rights in ways that coincide broadly with the approach proposed herein. These courts have insisted that agencies produce better facts and better reasoning in support of their adjudications. One possible way to understand these cases, I believe, is as a manifestation in the modern corpus of federal case law of the hidden logic of Article III sketched here—and as a demonstration of some concrete rewards of dialing back judicial deference to nonpublic rights adjudications.

Immigration law contains one noteworthy cluster of cases that may show the judicial nondelegation canon in action. For a variety of reasons, including the plenary power doctrine and long historical practice, immigration law is an area in which courts have historically treated executive agencies with an enormous amount of deference.³⁰³ But many immigration cases also implicate what I have called a quasi-private right to liberty—notably, those cases involving detention and asylum.³⁰⁴

Today, immigration law is recognized as a domain in which federal courts push back hard against agency adjudication. As Professor Cox noted in 2008 in an analysis of Judge Richard Posner’s immigration opinions, Judge Posner’s immigration cases “exhibit extremely searching review,” but his “lack of deference is far from idiosyncratic.”³⁰⁵ Plenty of other appellate courts do the same.³⁰⁶ “In fact,” he continued, “the trend is

³⁰⁰ *Id.* at 820–21 (alteration in original).

³⁰¹ *Id.* at 821 (footnotes omitted).

³⁰² *Id.* at 823.

³⁰³ See Lindsay, *supra* note 101, at 3 (“[E]xtraordinary judicial deference has been a cardinal feature of the federal immigration power since the Supreme Court first adopted the plenary power doctrine in the 1889 *Chinese Exclusion Case*.”).

³⁰⁴ See *supra* text accompanying notes 100–08.

³⁰⁵ Cox, *supra* note 38, at 1672; see also *id.* at 1679 n.25 (“[I]t is clear that one cannot fit this apparent lack of deference into standard administrative law doctrines.”).

³⁰⁶ See Stacy Caplow, *After the Flood: The Legacy of the “Surge” of Federal Immigration Appeals*, 7 NW. J.L. & SOC. POL’Y 1, 1 (2012) (“As a result of their increased exposure to immigration cases at the hearing stage—reading transcripts and immigration judge decisions—federal judges increasingly found fault with immigration adjudication, criticizing the quality of both the judging and

significant enough to count as an important—though often overlooked—thread of modern immigration jurisprudence.”³⁰⁷

The trend seems to have been instigated by the increased exposure of appellate court judges to immigration adjudication that commenced in 2002.³⁰⁸ By 2005, Judge Posner was able to collect myriad cases in which the courts of appeals had reversed the results of immigration adjudication.³⁰⁹ Federal appellate decisions in this area, as he noted, “have frequently been severe.”³¹⁰ The decisions have castigated a variety of adjudicative misdeeds by the agency, including immigration judges who have “riddled” their opinions “with inappropriate and extraneous comments,”³¹¹ cases in which the Board of Immigration Appeals seemed unaware of “the most basic facts” of the petitioner’s case,³¹² and cases in which “the elementary principles of administrative law, the rules of logic, and common sense seem to have eluded the Board.”³¹³ As Judge Posner put it, “adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice.”³¹⁴ Other circuits have been similarly harsh in their assessment of immigration adjudication.³¹⁵

The Supreme Court’s 2008 decision in *Boumediene v. Bush*³¹⁶ added fuel to the fire. *Boumediene*’s holding on the suspension of habeas corpus affirmed that Congress was not free to entirely eliminate judicial oversight from cases involving bodily detention, even where the case involved enemy

the lawyering.”); Cox, *supra* note 38, at 1672 (“Today a growing number of federal judges review decisions by the immigration courts with apparent skepticism.”).

³⁰⁷ Cox, *supra* note 38, at 1672.

³⁰⁸ See Caplow, *supra* note 306, at 2 (“Beginning in 2002, the United States Circuit Courts of Appeal found themselves in the midst of a ‘surge,’ a sudden and spectacular jump in the number of immigration appeals that quickly swamped and overwhelmed the federal appeals courts.”). According to Caplow, “[t]he nationwide explosion of immigration appeals required circuit court judges to peer through the looking glass into the previously largely-overlooked world of immigration courts and the immigration bar.” *Id.* at 26. This scrutiny, in turn, set off the waves of reproaches by appellate benches described in the text. “As the docket grew, so did judicial awareness and intolerance of the flaws of immigration adjudication. The forceful and attention-grabbing criticisms of immigration court decisions and immigration judges by now are well-known.” *Id.* at 27. For additional examples of such criticisms, see *id.* at 27 & nn.125–28.

³⁰⁹ *Benslimane v. Gonzales*, 430 F.3d 828 (7th Cir. 2005).

³¹⁰ *Id.* at 829.

³¹¹ *Id.* (quoting *Dawoud v. Gonzales*, 424 F.3d 608, 610 (7th Cir. 2005)).

³¹² *Id.* (quoting *Ssali v. Gonzales*, 424 F.3d 556, 563 (7th Cir. 2005)).

³¹³ *Id.* (quoting *Niam v. Ashcroft*, 354 F.3d 652, 654 (7th Cir. 2004)).

³¹⁴ *Id.* at 830.

³¹⁵ For a collection of cases from “[f]ederal judges across the country [who] have criticized the [immigration] agency’s decision making and aired their concerns over deferring to the agency,” see Shruti Rana, *Chevron Without the Courts?: The Supreme Court’s Recent Chevron Jurisprudence Through an Immigration Lens*, 26 GEO. IMMIGR. L.J. 313, 326 & nn.61–64 (2012).

³¹⁶ 553 U.S. 723 (2008).

aliens being held outside the territory of the United States.³¹⁷ Federal courts adjudicating immigration appeals have relied on *Boumediene* to emphasize that judicial review of immigrant detention and removal must be meaningful.³¹⁸

How should we understand these cases? The federal courts described above refused to defer in a context where one would very much expect them to have deferred. These rulings have shown heightened judicial vigilance and increased skepticism where judicial power was enlisted to support the results of agency adjudication in cases implicating quasi-private rights. By refusing to affirm the results of inadequate immigration adjudications, the federal courts of appeals have been performing the robust review that Article III demands.

Apart from illustrating judicial nondelegation in action, these cases have another interesting feature. They show the potential rewards of dialing back deference to agency adjudication. Federal courts' heightened scrutiny of agency adjudication of immigration cases has spurred some systemic changes. "The glaring attention [has] generated public reaction, forcing some reforms from the inside and continuing pressure from the outside."³¹⁹ Scholars and advocates have come to treat appellate review of immigration appeals as a place for analysis³²⁰ and advocacy,³²¹ instead of as just a processing point on a one-way conveyor belt out of the country. Judicial resistance to agency adjudication of quasi-private rights has had a percussive effect on the whole system.

In the discourse of administrative law scholarship, these cases are best viewed as another instance of "administrative law . . . as constitutional common law."³²² As Professor Metzger has pointed out, courts deploy

³¹⁷ A habeas court "must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain." *Id.* at 783.

³¹⁸ See, e.g., *Luna v. Holder*, 637 F.3d 85, 99–104 (2d Cir. 2011) (using *Boumediene*'s framework to analyze whether the Board of Immigration Appeals's system for letting aliens file motions to reopen was a constitutionally adequate substitute for habeas); *id.* at 102 ("We emphasize that because the writ of habeas corpus is 'designed to restrain' the Government's power, the Government must ensure that the motion to reopen process remains an adequate and effective substitute for habeas." (citing *Boumediene*, 553 U.S. at 765–66)). See generally MARTIN H. REDISH, SUZANNA SHERRY & JAMES E. PFANDER, *FEDERAL COURTS* 165–66 (7th ed. 2011) (describing the impact of *Boumediene* on immigration suits).

³¹⁹ Caplow, *supra* note 306.

³²⁰ See, e.g., Scott Rempell, *Judging the Judges: Appellate Review of Immigration Decisions*, 53 S. TEX. L. REV. 477, 481–82 (2012) ("Scholars regularly focus on the restrictions placed on appellate court review of immigration decisions. Seldom discussed, however, are the evaluative processes appellate courts employ that increase their oversight over the immigration agency's factual determinations." (footnote omitted)).

³²¹ See, e.g., Caplow, *supra* note 306, at 16 (noting various types of claims found on appeal).

³²² Metzger, *Ordinary Administrative Law*, *supra* note 60 ("[A] fair amount of ordinary administrative law qualifies as constitutional common law. Its doctrines and requirements are

administrative common law “as a central mechanism through which to ameliorate the constitutional tensions raised by the modern administrative state.”³²³ Rather than invalidate as unconstitutional the structure and mechanisms of modern administrative government, courts use administrative common law doctrines to address or alleviate constitutional concerns.³²⁴ Though the issue is not free from doubt, it seems correct that administrative common law of this kind is “ubiquitous and inevitable.”³²⁵ The bigger problem, as Professor Metzger notes, is that it is not candidly done.³²⁶

The immigration cases discussed here exemplify this quiet accommodation of constitutional values. Despite the difficulty of the task,³²⁷ federal courts are refusing to rubber-stamp agency adjudications where the consequences for individual liberty are so enormous. But even if I am correct to diagnose these courts as influenced by the underlying structure of Article III, the increased stringency of review applied by these courts seems to be the consequence of a sort of judicial reflex rather than the result of open and methodical deliberation on what Article III might or might not demand on review of agency adjudication affecting private or quasi-private rights. It would be better if courts frankly elaborated Article III’s nondelegation canon as a structural principle that should guide judicial review of agency adjudication. This is the sort of thing better done out in the open.³²⁸

CONCLUSION

Cass Sunstein has written that “pre-New Deal conceptions of legal rights permeate modern public law.”³²⁹ But some pre-New Deal conceptions of legal rights have attained only a partial permeation of public law. This is the case with Article III private rights. Although Article III

constitutionally informed but rarely constitutionally mandated, with Congress and agencies enjoying broad power to alter specific administrative mechanisms notwithstanding their constitutional aspect.”)

³²³ Metzger, *Embracing Administrative Common Law*, *supra* note 143, at 1296.

³²⁴ *Id.* at 1331.

³²⁵ *Id.* at 1370.

³²⁶ *Id.* at 1297.

³²⁷ Solomon Moore & Ann M. Simmons, *Immigrant Pleas Crushing Federal Appellate Courts*, L.A. TIMES, May 2, 2005, at A1 (reporting that “[j]urists, legal scholars and immigration lawyers interviewed argued that the BIA reforms have come at the expense of the nation’s circuit courts” and that “[t]he BIA’s reliance on one-sentence opinions has forced circuit courts to spend more time researching and deliberating the immigration cases that come to them”).

³²⁸ Metzger, *Embracing Administrative Common Law*, *supra* note 143, at 1356 (“[L]ack of transparency poses the real legitimacy challenge for administrative common law. Judicial development of administrative law is harder to square with the principle of democratic government if the fact that the courts play this lawmaking role is shielded from public acknowledgement and scrutiny.”).

³²⁹ Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 502 (1987). He does not mean it as a compliment. *See id.* at 504.

jurisprudence on the allocation of power between agencies and federal courts remains structured around this category, judicial review of administrative action is formally indifferent to it. Remedying that indifference would protect individual rights by serving structural constitutional values.

